

Traumatic Loss and Responsibility: The Requirements of Redress in the Aftermath of Murder

By

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Dissertation

Submitted to the Faculty of the
Graduate School of Vanderbilt University
in partial fulfillment of the requirements

for the degree of

DOCTOR OF PHILOSOPHY

in

Philosophy

August, 2016

Nashville, Tennessee

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To my grandmothers and great aunts,
Marilyn Novin, Gertrude Adelsberg,
Lucille Isaacs, and Estelle Krakaur

ACKNOWLEDGEMENTS

I am grateful to all who have contributed their knowledge, love, and support towards the creation and completion of this dissertation project. Thanks first to the Vanderbilt University Department of Philosophy for their years of support for my learning, research, and writing. Elizabeth Fiss' brilliance and incredible attention to detail supported and encouraged me as I took the final steps towards the completion of this project.

I am grateful to my mentors and teachers at Vanderbilt, especially the members of my dissertation committee: Professors Lucius T. Outlaw (Jr.), Lisa Guenther, and Kelly Oliver. Lucius Outlaw was my dissertation committee chair. My project was shaped by his insistence that philosophy can be soul work: That philosophical confrontation with lived problems can be a catalyst for the growth and healing required for the realization of justice. This notion of soul work sustained me throughout this project, and I am a proud and grateful inheritor of this commitment and the methodologies that follow from it. Lisa Guenther was a collaborator and mentor in some of the most formative work of this dissertation project, especially the REACH Coalition reciprocal education group at Riverbend Maximum Security prison in Nashville, Tennessee. In our conversations and collaborations, I had the opportunity to explore what it means to be an intellectual and teacher committed to the practices of social justice. Her feedback on this dissertation returned me to those questions in important and helpful ways. Kelly Oliver was my earliest mentor at Vanderbilt. I am grateful for her mentorship, research, and teaching, which provided me with courageous examples of how to bring an ethic of love and nonviolence to my own work.

I send thanks to my teachers at Riverbend Maximum Security prison: Abu Ali Abdur'Rahman, Wayne Nichols, Donald Middlebrooks, Kenneth Artez Henderson, Ron Cauthern, Akil Jahi, Gary Cone, and Derrick Quintero. Their commitment to resisting cycles of violence and imagining virtuous cycles inspired this dissertation.

I send thanks to my friends who have shared their brilliance with me and provided assistance at critical times in this process: Darla Migan, Sarah Tyson, Sasha Alekseyeva, Adam Burgos, Joseph Jordan, Alejandro Arango, Amy McKiernan, David Lewis, Andrea Pitts, Lis Paquette, Sarah Tyson, Natalie Cisneros, Carolyn Cusick, and Carmela Hill-Burke. I am grateful to professors who have provided encouragement and formative feedback: Colin Dayan, Lenn Goodman, Marilyn Friedman, Larry May, and José Medina.

I am grateful for the incredible love and support that I have received throughout this process from my family, especially my parents, sister, grandmother, and my aunts and uncle. I am especially thankful for their patience as I have worked to complete this project.

Sandy Skene-Björkman has been my closest friend throughout my graduate education. From the first day until the last, my conversations with Sandy have been a source of joy and a catalyst to growth, knowledge, and further thinking. Many of the sections of this dissertation project that I like best have their basis in my conversations with Sandy. Faith Newton has been my partner, friend, teacher, and primary support person throughout this project. She saw the promise of this project before I was able to. She helped me through the most challenging sections. Faith's encouragement and love were indispensable to my work. Her extraordinary thinking on the meaning of trauma and recovery enriched it. I am forever grateful.

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Introduction

In the past forty years, the victims' rights movement has had an outsize effect on the proceedings of the criminal justice system in the United States. Beginning in the 1970s, advocates of victims' rights sought to transform juridical notions of the principal stakeholders in criminal proceedings. In the common law view of criminal justice, the state stands in for the victim against the defendant.¹ In this, victims' rights advocates saw neglect of the victim(s) of the defendant's crimes. They argued that victims of crime and those aggrieved by the loss of murdered loved ones should have a more prominent role in the criminal justice system. To this end, they sought a wide-variety of reforms: They called for monetary reparations for persons who suffered financial losses due to crime; courtroom proceedings more sensitive to the epidemic of victim blaming, especially for those who suffered sexual assault; notice given to victims of crime and relatives of deceased victims at every stage of the juridical proceedings; closer ties between prosecutors and persons victimized by crime; the opportunity for victims and aggrieved persons to testify during courtroom proceedings and parole hearings; and, in many cases, longer, harsher sentences for persons convicted of crime. Although there is still much work to be done to avoid victim-blaming in the court proceedings, most jurisdictions have codified the other demands of victims' advocates through state and federal legislation, the establishment of a federal Office for Victims of Crime, and Supreme Court decisions.²

I share much of the motivation behind victim rights' advocacy. The work towards acknowledgement and response to the needs of victimized and aggrieved persons in institutions of criminal justice serves ethical duties to provide support for those who have suffered unjustified physical and psychic harms as well as unanticipated grief. Insofar as this is a movement that calls for reform in social, political, and legal spheres, advocates speak to the social and political stakes of serving persons victimized and aggrieved by crime. Being victimized or aggrieved by crime often damages trust and the ability to take part in the pleasures, challenges, and norms of communal life. At its best, support for victimized and aggrieved persons acknowledges the irreparable nature of the harm suffered and seeks to reconstruct communal life in memorial to what was lost and what was learned in the experience of harm.

¹ Lynne N. Henderson, "The Wrongs of Victim's Rights," *Stanford Law Review* 37, no. 4 (1985): 938–42, doi:10.2307/1228587.

² Marlene Young and John Stein, "The History of the Crime Victims' Movement in the United States" (Washington, D.C.: U.S. Department of Justice, 12/04), https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pdf/historyofcrime.pdf.

I diverge with victim rights advocates on the means by which they conceive of support for victimized and aggrieved persons. Although I affirm the importance of providing material reparations, considering the means by which courts can resist victim-blaming, and notifying aggrieved persons of the proceedings of the criminal justice system, I reject the call for closer relationships of victims with the prosecution and longer, harsher sentences for perpetrators. These demands identify the satisfaction of victims and aggrieved persons with the harsh punishment that prosecutors seek. Throughout this dissertation, I argue that this notion of satisfaction is inadequate to the needs of victimized and aggrieved persons in the aftermath of traumatic violence. Further, I argue that it undermines opportunities for victimized and aggrieved persons to develop memorialization and share the meaning of their experience of loss.

My rejection of the notion that harsh punishment serves victimized and aggrieved persons puts me at odds with the most influential demand of the victims' rights movements. This demand has buttressed the anticrime reforms of the 1980s and 1990s that codified "habitual criminal statutes" like California's Three Strikes Law³ and New York's widely emulated Rockefeller Drug Laws.⁴ Satisfaction of victims was the basis of prolonged life sentences⁵ and a renewed justification for capital punishment.⁶ Combined, these measures have contributed to the extraordinary increase in U.S. incarceration rates.⁷ The *doxa* of serving aggrieved persons via punitive treatment is enshrined in state constitutions through victims' rights amendments.⁸ Advocacy for these

³ Markus Dirk Dubber, *Victims in the War on Crime: The Use and Abuse of Victims' Rights* (New York: NYU Press, 2006), 1.

⁴ Governor Nelson Rockefeller said, "I have one goal and one objective and that is to stop the pushing of drugs and to protect the innocent victim." Brian Mann, "How the Rockefeller Drug Laws Changed America," *North Country Public Radio* (Saranac Lake, NY, January 24, 2013), <http://www.northcountrypublicradio.org/news/21316/20130124/how-the-rockefeller-drug-laws-changed-america>.

⁵ Marie Gottschalk, "Days Without End: Life Sentences and Penal Reform," *Prison Legal News*, January 15, 2012, <https://www.prisonlegalnews.org/news/2012/jan/15/days-without-end-life-sentences-and-penal-reform/>.

⁶ Marie Gottschalk writes, "...the judicial decisions and legal arguments involving capital punishment over the past three decades or so helped transform the death penalty into 'the ultimate form of victim recognition,' something it had never been before in U.S. history." Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006), 217.

⁷ "From 1978 to 2014, our prison population has risen 408%" ACLU, "The Prison Crisis," *American Civil Liberties Union*, 2016, <https://www.aclu.org/prison-crisis>.

⁸ Thirty-two states have passed victims' rights amendments. Many include language like Alaska's, which offers juridical authorities more reasons to reject parole for defendants: "the right [of victims] to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court." Some include California's call for harsher sentences in light of previous convictions, "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." Most all of the states include the provision of the victims' right to be heard in court. As I will argue in the third chapter, this testimony is often on behalf of prosecutors in support of harsher sentences. National Center for Victims of Crime, "Constitutional Amendments," *National Center for Victims of Crime*, 2016, <http://www.victimsofcrime.org/our-programs/public-policy/amendments>.

amendments and harsher sentences for defendants have come from national advocacy groups like Parents for Murdered Children, Citizens Against Homicide, and Justice for All.⁹ One does not need to look far into the testimony of aggrieved persons to find such sentiment.¹⁰

In this dissertation project, I argue that the institutional acknowledgement and inclusion of the needs of persons victimized and aggrieved by crime can and should leave a richer legacy than an extraordinarily punitive criminal justice system. I offer a reorientation of victims' rights advocacy towards institutional support for memorialization and testimony on the meaning of their experience of victimization. In this effort, I focus my attention on those who are aggrieved by the murder of loved ones. I do so for historical, instrumental, and personal reasons. Many of the earliest victims' rights advocacy groups were formed by persons aggrieved by murder.¹¹ My intervention thus speaks to the experiences at the source of the victims' rights movement. It seeks to reframe the demands that the movement has derived from those experiences. I also have reasons of efficacy: If we are able to rethink what aggrieved persons deserve in the aftermath of what is supposedly the "worst of the worst" crime, then there are possibilities of applying this thought throughout the criminal justice system. Finally, as a Jewish philosopher who has grown up among family aggrieved by the murder of loved ones in the Holocaust, I have seen the great and prolonged struggle of grandparents to live with great loss. The question of what aggrieved persons deserve and require for recovery and meaning-making in the aftermath of murder thus arises from lived experience.

Throughout my dissertation, I explicate and respond to arguments for the good of harsh punishment for persons aggrieved by murder. I look to contentions that harsh punishment delivers "closure" for aggrieved persons. In the most compelling discourses of closure, harsh punishment creates separation and safety from potentially triggering reminders. Insofar as the perpetrator is permanently incarcerated or executed, the aggrieved persons can move from a state of debilitating

⁹ Parents of Murdered Children assist aggrieved persons secure harsher sentences for defendants through their "Parole Block Program." Justice for All and Citizens Against Homicide advocate for aggrieved persons with a decidedly pro-punishment approach. All these organizations are involved in writing amici briefs in support of judicial decisions in the interest of harsher penalties for persons convicted of murder. See "Justice For All - A Criminal Justice Reform Organization," 2011, <http://www.jfa.net/deathpenalty.html>; "Citizens Against Homicide," 2016, <http://www.citizensagainsthomicide.org/>; Parents of Murdered Children, "Parole Block Program," *National Organization of Parents of Murdered Children*, 2016, <http://www.pomc.com/pbp.html>.

¹⁰ See Gregory Kane, "To Murder Victims' Families, Executing Killers Is Justice," *Baltimore Sun*, February 5, 2003, <http://www.baltimoresun.com/news/maryland/bal-md.kane05feb05-column.html>; Peter Bronson, "A Cruel Penalty for Victims," *Cincinnati Enquirer*, February 3, 2003, http://enquirer.com/editions/2003/02/03/loc_bronson03.html. An academic surveys of the testimony of the aggrieved makes this brutally plain: Marilyn Peterson Armour and Mark S. Umbreit, "Assessing the Ultimate Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison," *Marquette Law Review* 96, no. 1 (2012), <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5144&context=mulr>.

¹¹ Young and Stein, "The History of the Crime Victims' Movement in the United States," 4.

grief to grief that is more conducive to living, loving, and other future-oriented projects. I look to arguments that harsh punishment is an essential means of affirming the value of the lost victim. I look to arguments that punishment satisfies moral demands for accountability among those aggrieved by murder, which are the condition for moral recovery in the aftermath of traumatic experience.

I respond to each of these arguments by suggesting that the ends they seek—support for recovery from traumatic grief, affirmation of the value of the victim, and accountability for crimes—can be meaningfully sought and delivered by communities organized in support of aggrieved persons and the memorialization of the victim of crime. I envision a forum for support for grief and redress separate from the traditional guilt and sentencing functions of the criminal justice system. Such a measure provides sustained community support for grief that is better suited for the ongoing effects of traumatic loss. I argue the support for grief that comes through punishment fails to meet those ongoing needs. I envision this forum creating artifacts of memorialization for the persons lost to murder that not only affirm their value, but also share their teachings with the community and polity that remains. I suggest that this forum can include opportunities for testimonial responsibility-taking from perpetrators of crime that would satisfy moral demands for accountability while opening the possibility of redress and shared reconstructive projects between aggrieved persons and perpetrators. The traditional criminal proceedings would remain, but the responsibility for serving aggrieved persons would be shifted from those proceedings to the proceedings of the forum.

When the criminal justice system serves victims solely by the punitive treatment of perpetrators, they deprive aggrieved persons, their communities, and the polity in which they live of lessons with the potential to transform understandings of violence and grief. Such understandings could be the catalyst for richer means of recovery, resisting repetitions of violence, and constituting communities in support of grief. My aim in this dissertation project is to offer reasons in support of an alternative institutional response for those aggrieved by murder that would prioritize support for the teaching of aggrieved persons.

This notion of teaching is derived from W.E.B. Du Bois's notion of "contribution." He contends that a life worth living is one where humans are engaged in the free creation, study and/or enjoyment of beautiful, truthful, or moral artifacts. For Du Bois, the lineage of Black peoples' struggle in the U.S. has two aspects. The restrictions that create the need for struggle have severely limited opportunities for flourishing while also opening richer avenues for flourishing. For Du Bois, living under white supremacy's restriction reveals the insufficiency of the ideals of life of the white

majority. Without access to fulfilments that are unjustly limited to white U.S. citizens, Black people needed to create alternative life-sustaining ideals. Despite the pain of white supremacist restriction, Black traditions of thought have articulated these ideals and many Black communities have enacted those ideals to the ends of the healing and flourishing of their members. The flourishing that these ideals offer is richer because they speak to needs that are neglected in mass culture. To work on behalf of these ideals is to memorialize and develop a tradition of struggle rather than a tradition that is upheld with invidious hierarchical racial valuations.

Although there are distinctions in the harms of losing loved ones to murder and suffering the harms of white supremacy, both share the dynamic of oppressive restriction and the promise for richer flourishing. In murder, the commonplace expectation that one's loved one will be present is violently undermined. Trust in the safety and shared moral norms of communal life are also undermined. In my dissertation project, I am centrally concerned with two popular forms of response to these tremendous wrongs: First, the attempt to approximate *status quo ante* as in discourses of closure. Second, the call for punishment such that the perpetrator is adequately condemned by political and legal institutions. In the first response, there is an understandable desire to get out from under the challenges of traumatic grief. In the second response, there is an understandable desire for acknowledgement and thus memorial of the gravity of one's loss. Neither of these responses, however, are adequate to supporting tremendous task of reconstructing lives in the aftermath of traumatic loss. Without the presence of the lost loved one, there is a need for memorializing ritual and narrative. In the effort to rebuild trust in the world, there is the need to convene community to affirm norms that once seemed in no need of examination. There is an ability to connect with others whose trust has also been undermined and imagine relationships that could rebuild trust. There may be commitment to understanding violence and resisting its future iterations.

In the effort to serve persons aggrieved by murder, I argue that institutions of criminal justice should constitute communities that cultivate the potential for aggrieved persons' action and insight. This requires time and care, but the outcomes have the potential for much richness. Rather than serve aggrieved persons through the removal of the restriction that comes with traumatic grief or the punitive acknowledgement that a great wrong has occurred, I argue for an alternative response that honors the impossibility of return to the time before loss and the need for communities and the polity to transform to accommodate those who are inexorably changed by their experience of loss.

Chapter Review

In my first chapter, I foreground my dissertation's argument through a case study drawn from my grandparents' experience as persons aggrieved by the murder of family members in the European Jewish holocaust. I argue that their experience called for support to speak of the wrongs they suffered and resist the repetition of those wrongs. I argue that such support goes beyond safety and protection from those who perpetrated wrongs against them. This insight motivates me to envision what this support for aggrieved persons might look like in the U.S. criminal justice system. I look to Du Bois' notion of imaginative reconstruction beyond white supremacy to justify my methodological choice to do this imaginative work rather than engage directly with the contemporary crises of racism, sexism, violence, and inequality in the U.S. criminal justice system.

In my second chapter, I challenge the popular conception—put forth in discourses of “closure”—that harsh punishment should function as a form of support for those aggrieved by murder. I look to psychosocial research on the long-term consequences of traumatic experience, which suggests that traumatic memory and symptoms do not cease with the distance from perpetrators and trials that closure promises. I look to my familial case study to broaden our notion of possible harms in the aftermath of trauma. I point to the psychosocial phenomenon of the repetition of trauma, where the aggrieved person repeats aspects of the harms they suffered upon themselves and non-responsible others. I suggest that discourses of closure fail to address the vicious cycle wherein an initial trauma produces further harms. I look to Du Bois' notion of “contribution” to guide a notion of supporting recovery among aggrieved persons that opens the possibility for a virtuous cycle in the aftermath of traumatic loss.

In my third chapter, I respond to the contention that victim impact statements in the sentencing phase of trials offers sufficient opportunity for the testimony and contribution of aggrieved persons. I locate deficiencies in the testimony allowed in victim impact statements insofar as their content is limited by juridical principles like equal protection under the law and consistency of sentencing. I also point to limits around the court's framing and possibilities of response to the testimony of the aggrieved. I argue that there is a fundamental conflict between the aims of serving the aggrieved and the aims of deciding appropriate punishment. I argue that this should motivate an alternative forum for the testimony of aggrieved persons. I contend that such a forum can more adequately carry the burden of supporting traumatic grief and meeting the criteria of contribution that I offered in my second chapter.

In my fourth chapter, I respond to a contention from Jean Améry that the experience of being victimized by crime creates a moral demand for accountability of the perpetrator. For Améry, this accountability is the condition for the forward-looking goods, like contribution, which I seek throughout my dissertation. Indeed, throughout I argue that demands for redress can be satisfied by non-judicial means—by means of proceedings separate from that of holding perpetrators accountable. I recognize Améry’s commitment to perpetrator accountability as one that the forum I have proposed must take seriously. I integrate this demand for accountability by offering a place for perpetrator testimony in a separate meeting of the forum. Through testimony that takes responsibility for crimes committed and offers a plan for redress, the proceedings of the forum can satisfy demands for accountability without collapsing support for aggrieved persons with the punishment of the perpetrator.

Definition of terms

When I speak of “murder,” I include any instance of unjustified killing under the jurisdiction of U.S. state and federal courts. When I speak of “persons aggrieved by murder” I mean to point to those who relied upon the victim and shared intimate relationships with them. This includes family members, partners, and close friends. But there is no principled reason that others could not fall into this category. When I speak of “communities of the aggrieved” I refer to persons who make the choice to stand in support of aggrieved persons as they navigate grief and envision the reconstruction of their lives in the aftermath of traumatic loss. I understand “redress” as the collective effort of communities and social, political, and legal institutions to reconstitute the well-being of victims of and persons aggrieved by violence in the context of justice. A context of justice is one in which the claims for the well-being of victims do not restrict claims for fair treatment of defendants and persons convicted of crimes. It is one where the experiences and testimony of aggrieved persons are taken up for the purposes of resisting repetition of harms and better supporting those aggrieved by violence in the future. I use “recovery” to refer to the attainment of various aspects of well-being. Throughout the dissertation, I describe the elements of this well-being as the reconstruction of trust, the ability to imagine a future resistance to the repetition of the violence they suffered, and the ability to organize efforts in the interest of memorial for the one who was lost.

When I speak of the “perpetrator” I am referring to the person responsible for murder. In many instances, I assume that the perpetrator and convicted person are the same, despite the fact that this equivalence is not guaranteed in the context of any criminal justice system. In my third chapter on victim impact statements, I use the language of “defendant” instead of convicted person or perpetrator to recognize the mediating context of the juridical procedures. When I use the term “juridical,” I refer to processes and procedures that are a part of the traditional adversarial criminal justice system.

My conception of the polity refers to all persons who live under the coercive juridical authority of the nation-state (in the case of this project, the U.S. is my nation-state of interest). The responsibility of the polity is not only to prevent harm among members, but to cultivate and strengthen communal bonds among its members. As I will argue in my first and second chapters, such a nation-state calls for amplification of the intellectual and aesthetic contributions of groups that its members identify with.

Chapter I

Responding to Trauma in Aftermath of Murder: The Methodology of Criminal Justice in the Interest of Recovery from Trauma

In this chapter, I develop an argument for re-envisioning institutions of criminal justice so that they can properly address experiences of traumatic loss due to murder. My argument proceeds through the analysis of a case study. In this case study, I outline the methodological strategies that ground my attempt to take learning and reflection from my family's experience of loss and grief in the Holocaust. I contend that reflection on the resources that could have helped them in their search for recovery can be meaningful to the task of rethinking the relationship of institutions of criminal justice to aggrieved people. Insofar as this case study stands as an instance of the social-psychological phenomenon of trauma, the forms of recovery that could have been helpful there can serve as guideposts for the recovery of persons who experience traumatic experience in distinct contexts. In the context of institutions of criminal justice, I bring these insights to the traumatic experience of those who have lost loved ones to murder.

Through the case study—backed by empirical studies—I suggest that there is a threefold distinction in the meaning of the “aftermath of trauma.” One can experience aftermath as a having experienced trauma, but still exposed and threatened by further trauma. I call this “aftermath under conditions of ongoing violence.” It can also be experienced as having experienced trauma, but no longer threatened by it. This space provides survivors with a reasonable expectation of safety from re-traumatization. I call this “aftermath in spaces of protection.” Finally, it can be experienced as aftermath in a context where trauma is confronted and recovery is sought. I call this “aftermath under conditions of transformative recovery.” My contention—both within the case study and in reference to the criminal justice system—is that although “aftermath in spaces of protection” is the goal of many institutions, there are ethical and political reasons to encourage aftermath that offers more support for the recovery of the aggrieved.

In this essay, I outline this threefold distinction and its normative implications. I take up the methodological challenges of applying this insight to the U.S. criminal justice system. In the case of the U.S. criminal justice system, the problems of injustice and inequality muddy the question of “aftermath.” Such inequalities make it such that some aggrieved people do even not have the

opportunity to experience “aftermath in a space of protection.”¹ Thus, there is dissonance between my attempt to offer a critique of the criminal justice via the elaboration of the “aftermath in a space of recovery” and the conditions within the criminal justice system that call for critique. In light of this dissonance, I look to W.E.B. Du Bois for a theoretical frame to justify the counterfactual aspects of my critique of the criminal justice system. For Du Bois, the counterfactual framing of “aftermath” should be upheld for its aesthetic and social contributions to ongoing struggles against unjust institutions.

Section I: The Aftermath of Murder in the Context of My Family Ties to Victims of the European Holocaust

In this section, I will look to my family’s experience in the Holocaust as a case study to ground the threefold distinction in my notion of the “aftermath of trauma.” In addition to grounding the descriptive claim—that there is a threefold distinction in notions of the “aftermath of trauma”—this case study also motivates my normative claim: Institutions of criminal justice should offer those aggrieved by murder the resources to take up the third formation.

I am a Jewish philosopher with intergenerational ties to victims of the European holocaust: My grandparents and great aunts and uncles lived their lives aggrieved by the violence done to their fathers, mothers, aunts, uncles, cousins, friends, and lovers. I am three generations removed from the European holocaust, yet I count myself as one who is aggrieved by the murderous violence that killed and subjected my family to sexual violence and exile. Like many members of the third generation, I have grown up with experience of the ways that the grief and sadness are lifelong struggles for those who are living in the aftermath of murder, even those who are two generations removed from it.²

Like many members of the second and third generation, I’ve seen grandparents who lost many in the Holocaust struggle and fail to avoid inflicting their anger on themselves, their partners, and their children.³ I’ve grown up loved and shaped by people living in the aftermath of murder. I

¹ For instance, in cases of police-involved shooting deaths of unarmed Black men, women and children police officers are rarely held accountability for their actions. Zusha Elinson, “More Police Go to Trial in Killings, but Convictions Remain Rare,” *Wall Street Journal*, September 23, 2015, sec. US, <http://www.wsj.com/articles/more-police-go-to-trial-in-killings-but-convictions-remain-rare-1443044871>.

² Eli Somer and Moshe Nizri, “Ripples of Trauma and Resilience: Partner Relationships among Second-Generation Survivors of the Holocaust,” *Kavod: A Journal for Caregivers and Family*, no. 4 (Spring 2014), <http://kavod.claimscon.org/2014/06/ripples-of-trauma-and-resilience-partner-relationships-among-second-generation-survivors-of-the-holocaust/>.

³ Dov Shmotkin et al., “Resilience and Vulnerability Among Aging Holocaust Survivors and Their Families: An Intergenerational Overview,” *Journal of Intergenerational Relationships* 9, no. 1 (January 2011): 7–21, doi:10.1080/15350770.2011.544202.

want to reflect on the senses and meanings of “aftermath” from my lineage to frame the perspective from which I am considering the issues of criminal justice. In the canonical philosophical, literary, and psychological treatments in trauma studies, “aftermath” has referred to living, reflecting, and struggling *after* the experience of trauma.⁴ It is conceived as an opportunity for recovery and reflection towards the reconstitution of the self as robustly relational, future-oriented, and even capable of contribution to political life. My lineage reveals that “the aftermath of murder” has distinct resonances that depend upon socio-political conditions. I will position my project in light of those resonances.

First, I make a distinction between “aftermath under conditions of ongoing violence” and “aftermath in protected spaces.” The massacre my family suffered outside their homes in Romania in July 1941 happened under conditions where there was no defense force that conceived of them as persons worthy of protection.⁵ Those who survived and were transferred to ghettos were “living in the aftermath of murder”: guns were no longer trained on them as in the massacre. I imagine the expressions of grief there to be powerful and rich; however, possibilities for this “aftermath” in circumstances where the aggrieved’s life is as vulnerable to violence as the one who is grieved are

⁴ The tendency of writers to address trauma from the point of view of aftermath, of *post*-trauma follows from the paradigmatic case studies in the academic literature. Psychologists working with Vietnam veterans were the first to translate what was formerly called “shell-shock” into a more nuanced diagnosis of “Post-Traumatic Stress Disorder.” See Robert Jay Lifton, *Home from the War* (New York: Simon & Schuster, 1973). In the 1990s, the canonical trauma studies texts in literary theory took up Lifton with a focus on the European Jewish Holocaust. See Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History* (New York: Routledge, 1992); Cathy Caruth, *Unclaimed Experience: Trauma, Narrative and History* (Baltimore, MD.: Johns Hopkins University Press, 1996); Marianne Hirsch, *The Generation of Postmemory: Writing and Visual Culture After the Holocaust* (New York: Columbia University Press, 2013). Such work laid the foundations for philosophical literature concerned with conceptions of self in the aftermath of sexual violence and institutional formations of post-conflict justice (post-apartheid South Africa or post-genocide Rwanda). See Susan J Brison, *Aftermath: Violence and the Remaking of a Self* (Princeton, N.J.: Princeton University Press, 2002); Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge: Cambridge University Press, 2006). Across disciplines, these authors share the methodological commitment to insight into trauma through reflection on past traumatic events. The focus is on the aftereffects, aftermemory, psychic fear of repetition, and compulsion to repeat trauma, but the veterans are outside the warzone, the victims of concentration camps and sexual violence are survivors. The traumatic events may be psychically feared, but they are not recurrent. There is more recent literature that conceives of trauma as continuous rather than past. The cases studies at stake here focus on young Black people living in urban neighborhoods where violence is an ongoing threat. Journalist Stephen A. Crockett, Jr. has suggested a shift to Continuous Traumatic Stress Disorder. See John A. Rich, *Wrong Place, Wrong Time: Trauma and Violence in the Lives of Young Black Men* (Baltimore, MD: Johns Hopkins University Press, 2011); Stephen A. Crockett, Jr, “PTSD in the Inner City Needs a Name That Respects Its Victims,” *The Root*, May 20, 2014, http://www.theroot.com/articles/culture/2014/05/let_s_rename_hood_disease_to_signify_what_it_really_means.html.

⁵ For a scholarly account of my family’s experience in the present-day Ukraine, see Vladimir Solonari, “Patterns of Violence: The Local Population and the Mass Murder of Jews in Bessarabia and Northern Bukovina, July-August 1941,” *Kritika: Explorations in Russian and Eurasian History* 8, no. 4 (Fall 2007): 749–87.

⁶ Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* (New Brunswick, N.J: Rutgers

⁵ For a scholarly account of my family’s experience in the present-day Ukraine, see Vladimir Solonari, “Patterns of Violence: The Local Population and the Mass Murder of Jews in Bessarabia and Northern Bukovina, July-August 1941,” *Kritika: Explorations in Russian and Eurasian History* 8, no. 4 (Fall 2007): 749–87.

substantively different than “aftermath in protected spaces” where reoccurrence of violence no longer threatens in the same way.

I’m thinking here of the post-genocidal lives that my family took up once they emigrated to the U.S. and Israel. Their whiteness in the racial ordering of the U.S. afforded them the socio-political protection they lacked in Europe.⁶ Israeli military prowess and the contribution of the U.S. and Europe toward the establishment of Israeli protection provided the sense of safety that my family desperately needed in the aftermath of shattered childhoods, livelihoods, language, culture, and kinship networks. Even with the benefit of this “aftermath in protected spaces,” I still cannot comprehend how family members who faced such abyssal cruelty could have maintained rituals of community and reconstituted kinship networks. Yet, I am here. I am the result of and beneficiary of that work.

It is that “aftermath in protected spaces” that I’ve grown up with, and it is from the position of one who has reaped much benefit from it that I identify its shortcomings. Beyond the astonishing maintenance of ritual and kinship in my Jewish family and community, I have also been troubled at the ways that many people in my community see the maintenance of this protection as the central claim of Jewish identity. Like the Prime Minister of Israel, they contend that the security of Israel trumps the needs and demands of all others, especially Palestinian people.⁷ As Karen Brodtkin argues in *How Jews Became White Folks and What that Says About Race in America*, many white Jewish people accepted their racial privilege in the U.S. without meaningful resistance to the ways that such privilege comes at the expense of living a just and ethical life.⁸ Identification of this state of protection with fulfillment of recovery in the aftermath of traumatic experience leaves unaddressed the interpersonal issues of persons who have suffered trauma as a result of their experience of persecution. Specifically, it leaves unaddressed the needs of those who have suffered to rebuild trust in the world. It leaves unaddressed the propensity of persons who have suffered trauma to visit aspects of that trauma on others.

The silence that characterized my grandfather and great grandparent’s relationship to the trauma they experienced in the Holocaust has been identified as a feature of the experience of many

⁶ Karen Brodtkin, *How Jews Became White Folks and What That Says About Race in America* (New Brunswick, N.J.: Rutgers University Press, 1998).

⁷ International Middle East Media Center, “Netanyahu: ‘We Will Forever Live by the Sword,’” *IMEMC News*, October 27, 2015, <http://imemc.org/article/73591/>.

⁸ Brodtkin contrasts the racial understandings of assimilating immigrants (specifically white Jewish people) to that of people who were born in the U.S. She writes, “But fluidity and assimilation have meant assimilation into the practices and meanings of whiteness, of the dominant culture and values, of creating oneself as worthy by contrast with blackness.” Brodtkin, *How Jews Became White Folks and What That Says About Race in America*, 178.

who survived the Holocaust and survived traumatic experiences more generally.⁹ Holocaust survivors, according to psychotherapist Yael Danieli, remained silent about their experiences, especially in two decades preceding the war, because they thought that their stories would not be believed, that they would be greeted with horror, that they would be shamed for not resisting more, or suspected that they committed immoral acts to secure their survival.¹⁰ The testimony cited by Danieli points to the enormous difficulty of testimony in the aftermath of trauma. To speak one's trauma requires *trust* that listeners will listen compassionately after one has experienced an event that has very likely undermined the traumatized person's capacity to trust others. In *Trauma and Recovery*, Judith Herman writes "The ordinary response to atrocities is to banish them from consciousness. Certain violations of the social compact are too terrible to utter aloud: this is the meaning of the word unspeakable."¹¹

Without putting words to the experience of victimization, it is difficult for persons living in the aftermath of trauma to identify the dynamics of violence that they might unconsciously repeat upon non-responsible others. It is difficult for family members or members of the community to assist the aggrieved or victimized person in the effort to resist this repetition. I will look back to my familial case study as well as psychosocial research to explicate the phenomenon of "repetition compulsion" in my second chapter. For now, I want to highlight the way "aftermath in the space of protection" is committed to resisting the repetition of the group violence that has past, but is insufficiently attentive to the ways in which that violence can live on in interpersonal relationships.

I contrast the values of safety and security that guide living in "spaces of protection" with the dedication to building a legacy of recovery and justice through engagement with the past, which characterizes "aftermath in spaces of transformative recovery." This is a notion of recovery that asks not only whether the formerly victimized person is out of the state of danger and able to partake in a life free of the forces that previously constrained them, but whether they have the resources to

⁹ Hadas Wiseman et al., "Parental Communication of Holocaust Experiences and Interpersonal Patterns in Offspring of Holocaust Survivors," *International Journal of Behavioral Development* 26, no. 4 (July 1, 2002): 371–81, doi:10.1080/01650250143000346; Nina Thorup Dalgaard and Edith Montgomery, "Disclosure and Silencing: A Systematic Review of the Literature on Patterns of Trauma Communication in Refugee Families," *Transcultural Psychiatry* 52, no. 5 (October 1, 2015): 579–93, doi:10.1177/1363461514568442.

¹⁰ Yael Danieli and Union for Reform Judaism, "Conspiracy of Silence: A Conversation with Dr. Yael Danieli," *Reform Judaism*, Winter 2009, <http://rjmag.org/Articles/index.cfm?id=1530>. Hasia Diner has disputed claims about the silence of the Jewish community around memorialization of the Holocaust and pervasive victim-blaming in those decades. Hasia Diner, *We Remember with Reverence and Love: American Jews and the Myth of Silence After the Holocaust, 1945-1962* (New York: NYU Press, 2010). This the collective remembrance of the Holocaust on the part of the Jewish community, however, did not always translate into a support that people needed to testify to their experience.

¹¹ Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence, from Domestic Abuse to Political Terror* (New York: Basic Books, 2015), 1.

create a legacy of beauty, justice, and/or truth from their traumatic experience. From the point of view of “aftermath in spaces of transformative recovery,” the crimes suffered are detested, but traumatic experience is respected. The one who has survived trauma has the potential to bring forth insight, moral demands, and artifacts from that experience. Institutions dedicated to creating this form of aftermath for victimized persons would support the realization of that potential.

With regards to Jewish experience, and specifically that of white Ashkenazi people victimized and aggrieved by the Holocaust like my family, I see an opportunity for a wider, more incisive legacy that many Jewish scholars and activists have taken up: First, a broader sense of resisting repetition of the violence of the Holocaust. The memory of the Holocaust is not only a means to resist the repetition of the horrors of genocide, but to motivate resistance to the repetition of the dynamics of unjustified violence, racism, sexism, and homophobia that underlie Nazism. Second, lessons learned from the examination of the beauty and the missed opportunities in memorializing and recovering from loss in the seventy years since the Holocaust can support others who are victimized or aggrieved by traumatic violence. The creation of such a legacy requires support for the reconstruction of trust in the world and the future, which are undermined in the experience of trauma. Without this trust, it is difficult to see how the creation of this legacy can be meaningful to others. The preservation of such a legacy requires vigilance to the ways in which this legacy can be undermined by Jewish participation in invidious dynamics of unjustified violence, racism, sexism, homophobia, and cissexism. My contention is that the most robust form of recovery is that which grieves and recovers in concert with the disruption of cycles of violence and the effort to build legacies of learning.

Section II: Connecting my familial ties to the critique of the U.S. criminal justice system

In this dissertation, I’ll begin the work of developing this “space of transformative recovery” in the context of a schema of criminal justice in response to murder. I take up this notion of recovery by offering a schema of criminal justice that might be capable of responding to those aggrieved by violence in ways that would have met the often ignored or silenced needs of members of my family for recovery. These are needs that go beyond the call for the punishment of Nazi perpetrators and for lives protected from ongoing anti-Semitic violence.

This project is my attempt to contribute the lessons from my family experience as an instance traumatic experience and repetition toward the critique of the punitive U.S criminal legal system. I believe that this case study can motivate a challenge to the present day *doxa* regarding punitiveness: That the satisfaction of those aggrieved by violent crime is measured by the harsh

punishment of the perpetrator combined with the sense of protection and safety felt by those aggrieved.¹² In many ways, my family seemed to experience a form of redress that approximated this ideal. Those who survived took up lives in the U.S. and Israel where there was safety from anti-Semitic violence. In these locations there was widespread condemnation of the Nazi violence that took so many of their family members. The shortcomings of this seeming ideal of recovery motivate me to think through an alternative form of responding to those aggrieved by murder in civil and criminal contexts.

My claim is that the study of insufficient recovery from trauma in the aftermath of the Holocaust can motivate alternative responses to murder in the context of criminal justice. This relies upon the analogical relationship between those aggrieved by murder in interpersonal and genocidal contexts. I frame the relationship between these two aggrieved groups by reference to their shared experience of trauma. I characterize trauma that comes with the murder of a loved one as an experience of a death within life. This is an experience where constitutive needs (and assumption of the satisfaction of those needs) regarding integrity, safety, and trust in others are violently undermined.

This analogy of distinct experiences of loss interpreted through the lens of “trauma” opens the field of interlocutors quite widely. Through this analogy I connect my questions regarding the needs of recovery after the experience of murder to a community of thinkers who confront trauma in its other forms. Améry reflects upon his experiences of torture in Auschwitz; Brison reflects upon her experience of rape and assault; Du Bois reflects on the traumas caused by anti-Black racism. These diverse figures share projects of confronting grief (widely construed) and elaborating the possibilities of recovery in the wake of past and ongoing experiences of trauma. I will further elaborate the hermeneutic of trauma upon which this analogical relationship is based in my third chapter.

I situate my project within a tradition of political thought that I see most clearly in the work of Du Bois, but which is also addressed in the work of Améry and Brison: These are intellectuals

¹² The language of “enhanced sentencing” in the California Victims’ Rights Proposition (both approved by voters): The 1982 Victims’ Bill of Rights used language of “enhanced sentencing” to speak of longer sentences and the 2008 Marsy’s Law reduces the parole opportunities for convicted persons. On the 1982 proposition: Dan Morain, “Longer Sentences Upheld Under Victims’ Rights Bill,” *Los Angeles Times*, January 29, 1985, http://articles.latimes.com/1985-01-29/news/mn-13928_1_rulings; “California Proposition 8, Victims’ Bill of Rights (June 1982),” accessed October 16, 2015, [https://ballotpedia.org/California_Proposition_8,_Victims'_Bill_of_Rights_\(June_1982\)](https://ballotpedia.org/California_Proposition_8,_Victims'_Bill_of_Rights_(June_1982)); Vanessa Barker, *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders* (New York: Oxford University Press, 2009), 74; Marsy’s Law: California Secretary of State, “California Voter Information Guide: Text of Proposed Laws,” 2008, <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>.

who look to the traditions of teaching and learning developed from their group's experience of living outside the realm of state protection as a catalyst for the reconsideration of the ideals of redress for past, present, and future wrongs. Du Bois, Brison, Améry, and I all share a commitment to considering what I call "reconstructive ideals": the ideals that might guide living together in the aftermath of violence.

Section III: Justifying the role of imagination (and recognizing its limits) in my schema of criminal justice

I have so far offered an account of living in the "aftermath" of violence through a recounting of my family's history in the Holocaust. There I distinguished between "aftermath under conditions of ongoing violence" and "aftermath under conditions of protection." I located my concern as a scholar on the creation of regulative ideals of redress that would support the recovery and reconstitution of persons who were aggrieved by murder. Thus, I located my concerns with engaging with "aftermath under conditions of transformative recovery," which is a movement I am looking to effect from a distance of seventy years. This is seventy years my family spent with the privilege of "aftermath in protected spaces." If I were to maintain focus on familial trauma, my decision to center the movement from "aftermath in protected spaces" toward "aftermath in spaces of transformative recovery" would be easily justified. However, there is dissonance insofar as I am seeking to apply these ideals of recovery to considerations of present criminal justice system in the U.S. Objections arise here insofar as I am bringing the considerations that are removed from the experience of trauma to an institution that is structured by ongoing and continuous traumatic violence.

In the foregoing, I will to develop the claim that—when conditions of crisis adhere—philosophical analysis should begin with the attempt to understand and contribute to the amelioration of the conditions of that crisis. This is a compelling metaphilosophical claim regarding the responsibility of philosophers when they undertake reflection on institutions that are structured by systematic oppression: I am compelled by this claim and I will seek to develop it further. The transformative recovery I described above sought to not only leave a legacy that speaks to reconstructive ideals of memorialization and recovery in the aftermath of violence, but also to resist future iterations of invidious socio-political arrangements and the violence that follows from them. Resistance to the current criminal justice system in the U.S. is an important opportunity for such

work. I do not wish to irresponsibly flee from the demands of resistance to unjust social arrangements for the sake of imagining what a just response to traumatic experience looks like.¹³

I respond to this claim, which I will refer to hereafter as the “responsibility of resistance” counterargument via Du Bois’s methodological considerations. Throughout his career, Du Bois is engaged by dynamics of emancipatory requirements and the importance of reconstructive visions amidst ongoing violence. Following Du Bois, I wish to suggest that there is a place for reconstructive and imaginative thought when conditions of traumatic violence persist. I will look to Du Bois’ “Criteria of Negro Art” (1926)¹⁴ to defend my attention to an imaginative vision of “aftermath under conditions of transformative recovery” in the context of criminal justice. Emancipation from conditions of racism, classism, and cis/heterosexism that define the present functioning of the U.S. criminal legal system are necessary; but, I will argue that such a project should not necessarily take methodological priority above the development of alternative visions of criminal justice.

There is a distinction between philosophical writing in resistance to the current crisis of the criminal legal system in the U.S. and my work, which assumes the cessation of that crisis in order to imagine alternative forms of responding to criminal trespasses. For instance, when I speak of institutions of criminal justice serving those aggrieved by murder, this is premised on the notion that who is deserving of “victims’ rights” and services are no longer confined by racist notions that privilege white victims of crime in the present criminal justice system. The “responsibility of resistance” counterargument that I develop would suggest that the ideality of my schema of criminal justice is pernicious with regards to the kinds of responsibility demanded of theorists and citizens in view of the present crises of the U.S. criminal legal system. Advocates of this counterargument would call for the current crisis of the criminal legal system to orient my methodology.

¹³ This objection is a reflection of my own worries about theoretical negligence. The claims have been influenced by philosophers who advocate for non-ideal theory, especially Charles Mills, but I do not see my work here as a counterpoint to theirs. The ideal/non-ideal theory debate in political philosophy includes claims about the responsibility of philosophers to engage with socio-political injustices, but they do so against a Rawlsian tradition. The Rawlsian tradition does not only imagine an ideally equal polity, but derives monistic principles of justice from such an ideally equal polity. The stakes of non-ideal theory in the philosophical literature are set against a problematic that is distinct from the one that I pursue here: The attempt to imagine pluralistic ideals in the aftermath of experience of violence and oppression. See Charles W. Mills, “‘Ideal Theory’ as Ideology,” *Hypatia* 20, no. 3 (August 1, 2005); Lisa Tessman, “Idealizing Morality,” *Hypatia* 25, no. 4 (October 1, 2010): 797–824; Elizabeth Anderson, *The Imperative of Integration* (Princeton, NJ: Princeton University Press, 2010); Laura Valentini, “Ideal vs. Non-Ideal Theory: A Conceptual Map,” *Philosophy Compass* 7, no. 9 (September 1, 2012): 654–64.

¹⁴ W.E.B. Du Bois, “Criteria of Negro Art,” in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), 993–1002.

This skeptical reader will rightly ask: Why focus on building an *ideal schema of criminal justice in the aftermath of murder* when the ongoing violence of the present criminal legal system grows ever worse? When working on an idealized level, this reader claims, I will miss salient features of the criminal justice system that make it what it is. At present, the criminal legal system is defined by a crisis of accountability. One cannot discuss criminal acts of murder and accountability without accounting for hierarchies of accountability. It is, for instance, very clear that police or white men who murder Black men, women, and children and claim self-defense (no matter how flimsy their stories) will very rarely be held accountable for their crimes. Violence by cissexual people against gender non-conforming people is viewed as outside of the realm of accountability. The degree of accountability that perpetrators are subjected to is very often determined by their financial capacities to hire effective counsel.

According to this reader, by working on the level of developing ideals in response to murder rather than engaging in critique of present conditions, I will fail to identify and redress the material conditions of oppression that make criminal punishment and accountability what they are. This skeptical reader would rightly distinguish theorists like myself who presume whose reflections on the law take the legal institution's claim of impartiality, of the equality of all before the law for granted and those who adhere the "responsibility of resistance," who seek to dismantle the claims of equality before the law, describe the ideological function of those claims, and attempt to remake or redress those inequalities. From the point of view of my interlocutor, it makes no difference if I acknowledge that the institutions are non-egalitarian *at present*; it matters that I am developing legal philosophical reflection as if they were.

This challenges the efficacy of my methodological tack. There are compelling reasons for this: The adherent of the "responsibility of resistance" is correct that operating on a level of assumed equality will conceive of murder and the criminal justice system in ways that are more congenial to present ordering of the criminal legal system. The present U.S. criminal legal system claims to treat all cases of murder alike. Any observer of the criminal legal system knows this to be false in the vast majority of cases. Many critics, like Michelle Alexander does in her *The New Jim Crow: Mass Incarceration in the Age of Color Blindness*, respond by denying narratives of legal "colorblindness," "class blindness," and "gender and sexuality blindness."¹⁵ They address and

¹⁵ See Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press, 2010).

redress the ways in which group identities track invidious distinctions in who is punished and how harshly.

Compelling methodological commitments follow for the adherent of the “responsibility of resistance.” They give methodological priority to the signification, description, and normative principles that are the non-egalitarian underside of the ideal of equality before the law which the criminal legal system claims to observe. They are devoted to the historical, philosophical, socio-economic, and socio-political labor that is required to understand the genesis of an ideal of equality that is so consistently undermined. This analysis may be a foundation for work of reconstructing equality such that it would be substantial, meaningful, and delivered on a consistent basis. It can also be the ground for alternatives to equality: Is there another kind of legal ideal beyond equality that would be adequate to the diverse political, social, economic, and gender experiences of members of a polity?

A principled resistance to my methodological commitment to reconstructive ideals of criminal justice despite ongoing conditions of violence can also follow. For the adherent of the “responsibility of resistance,” the theoretical basis of assumed equality before the law (and dealing with harms among members of the polity through such a lens) fails to recognize that there are philosophical, political, and legal questions of enfranchisement that must be acknowledged and wrestled with *before* there can be meaningful consideration of how an ideally equal criminal justice system would respond to murder. Without the priority of criminal injustice and disenfranchisement, the I am engaging in a practice of imagination that continues to accept the present-day institutional goals of equality before the law as a stipulated premise. As such, I ignore that this premise that is deserving of a detailed exposition. Examination of the ways it might be achieved, how the failures of its achievement might be redressed, and perhaps more fundamentally, whether it is a worthy ideal in the first place are required.

The challenge of this counterargument can be summarized: My notion of criminal justice is built on a pernicious assumption of equality of all before the law. Despite your acknowledgement that this ideal is far from realized, the crisis of the inequality before the law ought to draw you to contend with the material conditions of disenfranchisement and offer philosophical resources to engage with its redress. Without such a component, you contribute to ongoing legal philosophical dereliction of this problem. Your notion of redress will be too many steps removed from the present crisis to be relevant to living together and teaching and learning in the world that we currently share.

Section IV: Du Bois on the interdependence of reconstruction and emancipation

I diffuse the criticism of the adherent of the “responsibility to resist” by looking to the methodological considerations of W.E.B. Du Bois. Du Bois offers an alternative to the competing notions of priority that I’ve outlined above. For Du Bois, resistance to the injustice and oppression of white supremacy calls for a response that works on both ideal and non-ideal levels. Under conditions of ongoing violence, Du Bois argues for the interdependence of articulating reconstructive imaginative ideals (including those that stipulate counterfactual equality) and the work of resistance to concrete instances and formations of oppression. This interdependence, however, does not make the non-ideal and the ideal collapse into one another. They are distinct and mutually supportive forms of struggle. At the conclusion of this section, I will apply these insights to the project of creating a reconstructive vision for the U.S. criminal justice system.

In “Criteria of Negro Art,” Du Bois contends that Black resistance to white supremacy makes two inseparable demands on the U.S. polity and its members. First, there is a demand for Black people to live and love without the ongoing threat of violence and subordination. Second, there is the demand for material support and aesthetic and intellectual labor devoted to developing modes of living oriented by Black historical knowledge, intellectual lineages, cultural patterns, and the preservation of Black group identity. There is a relationship of mutual support between two sides of the struggle: life and love without violent subordination and intergenerational conservation and building of Black culture and politics. The former demand is that Black people in the U.S. be treated with the respect, dignity, and protection equal to that of privileged white citizens. The latter demand regards the aims those lives under conditions where white supremacy no longer persists. This is a call to preserve and contribute to contribute to the Black traditions of creativity and sustenance.

Du Bois argues for the inseparability of these demands: Reliable safety from white supremacy at the price of social, cultural, and political assimilation is insufficient. Too much attention to the work of the emancipation from violence risks inattention to the imaginative work that is necessary to challenge the aims and organization of life that white U.S. citizens have taken to be valuable. The shortcomings of the aims and organization of living held dear by white people in the U.S. have already been identified by Black traditions of thought and creativity. The work of building reconstructive visions of the polity conserves and develops those critiques into guiding principles of a reconstructed polity. In Du Bois’ 1960 “Whither Now or Why?” he underlines the critical importance of this cultural, reconstructive work: He contends that white supremacy will have

won if the opportunity to learn from Black history and develop traditions of thought and creativity is lost in the struggle for equality within the U.S.¹⁶

Du Bois motivates his argument for this interdependence by taking up a hypothetical rejoinder among his NAACP audience regarding the title of his speech. This interlocutor, like my non-ideal theorist, seeks to prioritize resistance to “conditions of ongoing violence” before the aesthetic/cultural focus of the speech. Du Bois imagines this skeptical retort:

Such people are thinking something like this: “How is it that an organization like this, a group of radicals trying to bring new things into the world, a fighting organization which has come up out of the blood and dust of battle, struggling for the right of black men to be ordinary human beings—how is it that an organization of this kind can turn aside to talk about Art? After all, what have we who are slaves and black to do with Art?”¹⁷

Before I explicate the challenge of Du Bois’s imagined NAACP interlocutor, I want to offer a broad working definition of “Art.” “Art” is the expression of creative capacities toward the end of “Beauty.” “Beauty,” for Du Bois, is the aesthetic experience of aesthetic creation or consumption that breaks the routinized temporalities of work and habit. It instantiates a temporality of curiosity, aesthetic pleasures and pains, imagination and vision, and in some instances, a “yes-saying” to life. The experiences of creation or consumption of “art” or “beauty” are not in themselves political acts. Of course, some artists explicitly express their protest, but there is no essential tie between the creation and consumption of artefacts of “art” and “beauty” and the political ends that the NAACP and other “fighting organizations” seek.

The tensions that drive the imagined NAACP challenge to Du Bois’ choice of topic, however, go beyond the mismatch of the political purpose of protest and the aesthetic indeterminacy of “Art.” For the non-ideal theorist, as for Du Bois’ challenger, there are competing projects and priorities between those who strive to do imaginative work under the heading of “Art” and those who are doing the work of political resistance. There are competing visions of novelty and of the resources that would support the flourishing of Black people. Du Bois’ NAACP challenger identifies with the lineage of Black resistance: From slave rebellions, to the work towards franchise, education, and more during Black Reconstruction, to those resisting lynching in their contemporary mid 1920s context. For the NAACP challenger, the ends of such resistance is “struggling for the right of black men to be ordinary human beings.” To strive for “ordinary” human being-ness is to

¹⁶ W.E.B. Du Bois, “Whither Now and Why,” in *The Education of Black People: Ten Critiques 1906-1960*, ed. Herbert Aptheker (New York: Monthly Review Press, 2001), 193–204.

¹⁷ Du Bois, “Criteria of Negro Art,” 993.

strive for a life that is economically and socially stable, politically enfranchised, supported, safe, and protected from harm. It is a life whose boundaries are unmarked by white supremacy.

Du Bois offers a metaphor of climbing to frame the striving that characterizes the work that his NAACP challenger prioritizes. He writes: “You and I have been breasting hills; we have been climbing upward; there has been progress and we can see it day by day looking back along blood-filled paths. But as you go through the valleys and over the foothills, so long as you are climbing, the direction—north, south, east or west—is of less importance.”¹⁸ The progress is directed by saying “no” to present conditions of oppression and abuse. What is sought is freedom from violence, second class citizenship, and abusive white supremacist conceptions of beauty and sexuality. The direction of this striving is “of less importance” insofar as such resistance to white supremacy is by its nature reactionary and opportunistic. Those who engage in this work confront terrors and seek to move themselves and others to safety. For good reasons, the success of such work is measured by the harms that were avoided rather than unity of purpose.

Du Bois identifies with this work of resistance: His language is “*You and I* have been breasting hills. *We* have been climbing upward...” Yet, his analysis also speaks to the ways in which those successes bring about new questions. These are questions that point to the richness and the limitations of the action and thought that develop in resistance to oppression. Immediately following his remarks on his and his NAACP audience’s upward movement he writes: “But when gradually the vista widens and you begin to see the world at your feet and the far horizon, then it is time to know more precisely whither you are going and what you really want.”¹⁹ He is speaking of the moments of relief from the constancy of the struggle to simply live without fear and violence. These are the moments when those who are resisting can ask themselves: “What would make living the livable life we’re striving for meaningful?” “How would we orient our lives to make them rich and valuable in the future that we’re striving for?”

Du Bois fears that those who are so dedicated to creating protection, safety and survival will lack the resources to respond to those questions with the richness they demand. As an example, he refers to the talk of an NAACP convention speaker the night before. He writes, “As it was phrased last night it had a certain truth: We want to be Americans, full-fledged Americans, with all the rights of other American citizens.”²⁰ The truth is that if the rights and protections that are constitutionally

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

promised to Black citizens—but are in fact circumscribed by white supremacy—were made meaningful and real, many of the burdens of Black life in the U.S. would be lifted.

Despite this truth, Du Bois articulates the limits of the vision of full US citizenship as a vision for a meaningful future. He asks: “But is that all? Do we want simply to be Americans? Once in a while through all of us there flashes some clairvoyance, some clear idea, of what America really is. We who are dark can see America in a way that white Americans cannot. And seeing our country thus, are we satisfied with its present goals and ideals?”²¹ Du Bois contends that the traditions of teaching and learning among the Black U.S. community call for more than inclusion in the political and legal rights granted to white citizens of the USA. Political inclusion cannot be an end in itself. This inclusion would be inadequate to the legacy of Black creativity and thought that sustained and enriched Black life under conditions of political and social oppression. It would risk failing to sustain that legacy for the future of the Black people in the U.S. and human civilization writ large.

Du Bois reworks the “present goals and ideals” of the U.S. by reference to the Black aesthetic tradition. He is concerned with “Beauty.” Specifically, the way in which the experience of creativity violently circumscribed—in slavery and in the aftermath of white supremacist responses to Black efforts at Reconstruction—teaches of the necessity of aesthetic experience for life. Du Bois frames the critical importance of aesthetic creativity and appreciation by asking his audience to imagine a time when white supremacy no longer persists. Here he asks his audience to imagine a time where Blackness is no longer a cause for threat or second class citizenship. He asks them to imagine the realization of equal political and legal protection and the attainment of economic affluence. He asks his audience if they would be satisfied to assimilate into a culture that equates flourishing with material accumulation and the status that such material accumulation can bring. Du Bois insists that expensive cars, expensive clothes and large notices in the newspaper announcing their social comings and goings cannot be a satisfactory end to the work of Black people who are fighting for meaningful equality.

It may seem that Du Bois has created a strawman of his NAACP opponent insofar as he links the single-minded struggle for political equality to the conspicuous consumption of affluent white Chicagoans in the mid-1920s. However, his contention is not that conspicuous consumption is an inevitable outcome of the NAACP’s fight for equality; rather, he guides his audience to an imaginary space in the aftermath of white supremacy, to a time when the NAACP’s ends are

²¹ Ibid.

achieved. This imaginative space affords his audience the space to ask those questions of “whither they are going,” which are questions of the meaning and values that they would want to orient their lives under ideal conditions. Although this orientation can be indebted to the values of resistance to white supremacy, their scope goes beyond the necessities of the present struggle. This is an elaboration of a vision of living together that is catalyzed by experiential, intellectual, and aesthetic insight into the failures of the dominant conceptions of success, meaningful living, and flourishing.

From such an imaginative space, Du Bois offers his vision of future living together. This is a vision of creativity and appreciation of aesthetic experience indebted to a tradition of Black experience, teaching, and learning in the U.S. He writes:

You realize this sooner than the average white American because, pushed aside as we have been in America, there has come to us not only a certain distaste for the tawdry and the flamboyant but a vision of what the world could be if it were a really beautiful world; if we had the true spirit; if we had the Seeing Eye, the Cunning Hand, the Feeling Heart... lived in a world where men know, where men create, where they realize themselves and where they enjoy life. It is that sort of a world we want to create for ourselves and for America.²²

Being “pushed aside in America” has given black Americans first-hand experience of the wrong that comes from proscribed perceptual (“Seeing Eye”), creative (“Cunning Hand”), and empathetic (“Feeling Heart”) capacities. Given the memory of the ways in which slavery and poverty affected those capacities, Black people know the injury that comes with the inability to freely use and build these capacities. They know that money-making and property-accumulation cannot alone make for lives worth living. The unique vision of Black people for the future of the U.S., according to Du Bois, is a polity that cultivates perceptual, aesthetic, and ethical capacities. Hence it creates the “really beautiful world.” For Du Bois, these capacities are built through the aesthetic experiences of “beauty.”

Du Bois defines “Beauty” by reference to his own diverse aesthetic experiences. He recalls “the Cathedral at Cologne”... “a village of the Veys in West Africa,”... “the Venus de Milo”... “a single phrase of music in the Southern South”²³ The cultivation of moments of being aesthetically struck are critical to Du Bois’s vision of a political future oriented around “Beauty.” Du Bois’s experiences of “beauty” point to more than pleasure, they point to his diverse intellectual heritage: The Cathedral in Cologne points to his indebtedness to Kant, Hegel, Marx, and Weber; the West African village speaks to his abiding commitment to give voice to Africa whether it be the

²² Ibid., 994-5.

²³ Ibid., 995.

reclamation of ancient Ethiopian and Egyptian civilizations or the traditions of common land ownership; the Venus de Milo speaks to his commitment to the ideals of golden age Greek philosophy and his insistence on classical education against Booker T. Washington²⁴; and of course, the music of the South speaks to his most profound influence: the black U.S. American cultural and intellectual tradition.

The experiences of architecture in Germany, village design in West Africa, Greek statue, and music in the U.S. South are aesthetic experiences that cultivate what Du Bois calls “true spirit”: perceptual, creative, and empathetic capacities. Those experiences have sharpened Du Bois’s own perceptual capacities insofar as he is able to perceive beauty in distinct idioms. This ability to perceive beauty translates into a pluralistic creativity: the capacity to take up and transform those conceptions of “beauty” via combination, comparison, and contrast. Conceived as the capacity to recognize another as distinct but nonetheless intelligible, empathy recognizes that while “beauty” arises from distinct social, political, geographic, racial, gendered contexts, it contributes to the meaningfulness of one’s own life. As such, “beauty” calls forth responsibility to the source of that beauty: the creator and the context out of which they create alike.

For Du Bois, this orientation towards “Beauty” is essential to living a meaningful life. However, the consumptive capitalist orientation of life in the mid-1920s through the present in U.S. blocks off these possibilities. Of “Beauty,” he writes: “In normal life all may have it and have it yet again. The world is full of it; and yet today the mass of human beings are choked away from it, and their lives distorted and made ugly. This is not only wrong, it is silly.”²⁵ Du Bois’s incredulity (“not only wrong, but silly”) is his sense that a denial of the capacity to live a life that allows for the pursuit of “Beauty” is not just a moral wrong: there is something wanton and cruel about a society that calls on a mass of people to work and struggle with such gritted teeth that there is not a moment to be awestruck. Without such moments, possibilities for richer ethical, creative, and perceptive life are blocked off.

The vision that Du Bois derives from the history of Black living, loving, teaching, and learning is one where there is a political, social, and economic imperative for the support for aesthetic experience, creativity, and interpretation. Such a polity relies on the creation of conditions of citizenship and equality that the NAACP seeks, but it doesn’t take that as a sufficient condition

²⁴ W.E.B. Du Bois, “Souls of Black Folk,” in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), 424-438.

²⁵ Du Bois, “Criteria of Negro Art,” 995.

for a meaningful overcoming of white supremacy. A meaningful overcoming of white supremacy will make demands that call for the reorientation of the values by which members of a polity live and socio-political institutions are organized. Towards this meaningful overcoming of white supremacy, working for equality runs in concert with the work of developing and thinking through those reorienting and reconstructive demands.

To follow Du Bois' call to consider the transformations that would arise in the aftermath of white supremacy is a commitment to attending to the articulations of Black people envisioning justice and meaningful lives amidst oppression. At age 92, in his April 1960 address "Whither Now or Why?" at the Conference of the Association for Black Social Science Teachers, Du Bois forcefully articulates the imperative of maintaining Black culture whether or not white supremacy persists. He speaks to his audience in the wake of *Brown v. Board of Education*—at the doorstep of generations of Black children who will be integrated into mixed public schools where many of their teachers will be white. He writes:

As I have said before and I repeat I am not fighting to settle the question of racial equality in America by the process of getting rid of the Negro race; getting rid of black folk, not producing black children, forgetting the slave trade and slavery, and the struggle for emancipation; of forgetting abolition and especially ignoring the whole cultural history of Africans in the world.

No! What I have been fighting for and am still fighting for is the possibility of black folk and their cultural patterns existing in America without discrimination; and on terms of equality.²⁶

Without the history, traditions of thought, struggle, and love taught in all Black primary and secondary schools, the legacies of Black life in the U.S. are threatened. If those legacies are threatened, the notions of racial equality that will be articulated by the coming generations will lose their experiential cultural and historical soil. From that background come the resources to enrich the demands of the struggle for racial equality.

To envision a world that is based upon (and thus dedicated to the development of) Black "cultural patterns," which Du Bois earlier defined as aesthetic production and appreciation, is to resist the compromise where racial equality means the assimilation of Black people. To do the work of preserving the history and ideals for the future, Du Bois conceives of a simultaneous demand: To live and love on terms of equality and to continually create and gain inspiration from the legacy of Black people thinking, resisting, working, speaking, and loving.

²⁶ Du Bois, "Whither Now and Why," 195.

I share Du Bois's methodological commitment to imagining the counterfactual end of white supremacy. This imaginative aspect of Du Boisian resistance to the crisis of white supremacy guides and situates my development of alternative ideals of responding to murder in the criminal justice system. As described above, the crisis of accountability in the U.S. criminal legal system is clear: White supremacy, classism, sexism, and cis/heterosexism structure the system such that people who are the most socially marginalized are punished severely for minor crimes or crimes they did not commit whereas the most socially privileged members are rarely punished for the more serious crimes they commit. My dissertation does not directly contribute to the transformation of the criminal justice system towards equality with regards to accountability for inequality. I am engaged in thinking and developing the ideals that might structure a future where this crisis no longer persists. I understand this work as a way to develop the knowledge—held by many who are engaged in resistance to inequitable accountability within the criminal justice system—that even if this crisis no longer persisted, the ideals of harsh punishment that guide the U.S. criminal legal system would still be insufficient. I am interested particularly in the ways that those ideals of harsh punishment are insufficient to the grief of the aggrieved. Those who have experienced the trauma of loss and sought to reimagine the criminal justice system's response to their loss otherwise are my allies.

I follow Du Bois in contending that imaginative work is a dimension of the resistance to the injustice of the present criminal legal system. The creation of equal justice remains of critical concern. For instance, the crisis of accountability that I mention above makes doubtful an affirmative answer to the question “Will the corrections officer who choked an inmate to death be convicted of their crime?” These are meaningful struggles for accountability and criminal justice within the present criminal legal system. Guilty and innocent sentences that go against the grain of established hierarchies of accountability—where, for instance, a corrections officer is convicted for their crimes against inmates—would mark meaningful progress. This instance of equal accountability, though, would not exhaust the demands of those who are living under conditions that made the accountability of correction officers so doubtful. Here, I would point to calls for guilty sentence to be supplemented with an attempt to ameliorate the antagonistic relationships between officers and inmates that are produced and exacerbated by the carceral system at large.

It is the articulation of demands above and beyond equality of accountability in the criminal justice system that I seek in this dissertation. I take up the articulations when those who are victimized by violence speak to the remainder between what the justice system can provide and their needs and demands for more robust protection and recovery. These are reconstructive visions that

are attempts to expound the knowledge that is developed by people who are experiencing violence. Of course, there are quite diverse ways of framing the remainder of that's left between present instantiations of criminal justice and the conceptions of those victimized. In this subsection, I've offered reasons for my focus on articulating alternative visions of the aftermath of the inequality of the criminal justice system. I've contended that this imaginative space of reconstruction has an important place alongside the work of resisting present injustice. I've denied my interlocutors contentions for the priority of intellectual work that contributes to the amelioration of that inequality on Du Boisian grounds. I've argued that demands for equality require supplement from imaginative reconstructive visions that take up the teaching and learning of groups who have suffered legal, social, and political exclusion.

Conclusion

Du Bois's methodology speaks to the work I am setting forth to do on Jewish identity. The distinct yet interrelated senses of emancipation and reconstruction are not only at stake in sacred Jewish tradition (the movement from slavery to the establishment of law in Exodus being the archetypal narrative), but in my family's lived experience. As with Du Bois, I believe that there is no meaningful Jewish emancipation from oppression without the dynamic attempt to take up Jewish experience and intellectual and aesthetic traditions to create a meaningful vision of the future. Du Bois demands that his audience remain vigilant to the threat of the belief that emancipation from inequality exhausts the ends of a tradition of thought and creativity that was developed before and in the midst of ongoing violence.

My aim is to interpret Black and Jewish thinkers together to offer a reconstructive vision of criminal justice for the U.S. Such work is an attempt to enact the vigilance that Du Bois calls for from a Jewish perspective. Jewish people have taken up a relatively privileged space within the U.S., and with such a position, there is the threat of becoming complacent to the ways that such privilege produces assimilation to the dominant "goals and ideals." Du Bois warns against identification with the political, social, and economic status quo. Such an identification does not adequately mine the experiences and traditions that sustained us when we lived outside of the status quo. It does not adequately take up the ways that those traditions sustained critique and called on future adherents to remain engaged in critique whether or not anti-Semitism persisted.

The criminal justice system in the U.S. is an institution that requires this richer critique. Its institutions are structured by racism, sexism, and classism, but its injustices do not often reach white Jewish citizens. Through our history, Jewish people have experienced both exclusion and inclusion

with regards to criminal justice systems. I contend that we are called to examine the meanings and experience of exclusion to critique more deeply the ways in which we are included in the protection of criminal justice systems. My contention is that such a system calls not only for resistance to the ways in which oppression occurs in the criminal legal system, but that it also calls for reconsideration of the ideals and goals of such punishments. In this dissertation, I challenge the ideals that link harsh punishment to victim satisfaction, which underlie the powerful victims' rights movement. I seek to transform our notions what support for aggrieved persons might look like.

Chapter II

Contesting “Closure”: Du Boisian “Contribution” as the Aim of Victims’ Advocacy in the Aftermath of Murder

In this chapter, I challenge the popular conception—put forth in discourses of “closure”—that harsh punishment functions as a form of support for those aggrieved by murder. Closure refers to a movement of grief on the part of one who is aggrieved by murder. The experience of closure is the progression from a state of intense grief to a state of manageable grief. It is a movement of grief whereby aggrieved people achieve a welcome distance from the pain of loss. Discourses of closure suggest that the needs of the aggrieved are served through state control of perpetrators, public condemnation of perpetrators, and a speedy trial. Together, these works of the criminal justice system are said to offer the aggrieved distance from criminal proceedings and distance from the perpetrator. According to proponents of these discourses, such distance supports those who are aggrieved: It allows them to grieve on their own terms rather than being constantly returned to trauma via trials and confrontation with the perpetrator.

I argue against seeking closure as a means to support those who are aggrieved by murder. I look to research on traumatic symptomology, which a majority of persons suffer in the aftermath of the murder of loved ones. The research suggests that support for those who are traumatized must go further than “closure” allows. Psychiatric research on the long-term consequences of traumatic experience suggests that traumatic recall does not cease with distance from perpetrators and trials. I interpret the research to call for ongoing measures of support for aggrieved persons. Such support contrasts with the achievement of freedom from reminders of the traumatic event that discourses of closure promise.

I look to a familial case study to suggest that the concern in the aftermath of trauma is not only about traumatic recall, but also about the repetition of trauma, where the aggrieved person repeats aspects of the harms they suffered by inflicting the harms on themselves and on non-responsible others. Traumatic recall and repetition creates a vicious cycle where the initial trauma create more harms. My aim is to offer institutional support for a *virtuous* cycle where the experience of trauma invokes ongoing community support for the aggrieved. In my schema of response, the aggrieved is supported in testifying on their experience and taking up that experience to articulate social and political demands that they develop out of their experience of trauma.

Given the too sanguine conception of recovery in the aftermath of trauma that underlies notions of closure through harsh punishment, I look to Du Bois' notion of "contribution" to guide an alternative notion of supporting recovery among aggrieved persons. By contribution, Du Bois refers to the processes by which human beings engage with the group traditions with which they identify to create aesthetic, intellectual, and epistemic artifacts. The confrontation with group trauma is part of that engagement with group traditions. Taking my guidance from Du Bois' notion of creating artifacts out of confrontation with group trauma, I argue for the importance of institutional support for aggrieved persons to create and share of artifacts of their own in the aftermath of trauma. These artifacts are the starting point for the virtuous cycle I seek in the aftermath of murder. Remembrance and the articulation of what aggrieved people need in the aftermath of trauma is a condition of possibility for invoking support for recovery from others. Such articulations also provide a legacy of support for those who those who have experienced or will experience similar harms. These stories also hold the potential for assisting in the construction of social and political institutions capable of responding to traumatic symptomology and resisting future iterations of trauma.

Section I: Closure as the Aim of Criminal Justice for the Aggrieved

In this section, I offer an elaboration of the claims of those who advocate for closure as the aim of supporting victims in institutions of criminal justice, and who argue that meting out harsh punishment a way to achieve the end of closure. To seek closure for the aggrieved is to offer them opportunities to be relieved of debilitating states of grief. It is an institutional orientation towards helping the aggrieved move into states of living where life proceeds without constant interruption from past trauma. Although the aim of "closure" is also sought by those who advocate for reparative or reconciliatory approaches to criminal justice, I am concerned with the contentions of advocates of harsh punishment who take up the language of closure because the connection of "closure" to harsh punishment is one of the central ways that the good of the aggrieved is attached to the intensity of punishment.¹

¹ We can find this sentiment in jurisprudential and political discourses. For instance, Justice Susan Huchinson in *People v. Robinson* (Ill. App. Ct. 1998) writes: "To wipe out the convictions of [the] defendants...on [a] legal technicality...would serve only to increase the misery of victims who have endured enough suffering. In our view, the law should serve as a salve to help heal those whose rights and dignity has been violated, not as a source of additional turmoil. To this end, we hold that victims of violent crime are entitled to retain whatever closure that may be brought by the finality of criminal conviction." qtd. in Dubber, *Victims in the War on Crime*, 171. In defense of the "Marsy's Law" victims' rights bill, which reduces parole opportunities for convicted persons, Illinois Senate President John Cullerton suggests Marsy's Law gives victims "more opportunities to secure a sense of justice and closure" Office of State Senator Heather Steans (D-Chicago 7th), "Crime Victims' Bill of Rights' to Appear on November Ballot," *Capitol Fax*, April 10, 2014,

The argument I examine here proceeds as a syllogism: Institutions of criminal justice should offer closure to those aggrieved by murder. Harsh punishment of perpetrators achieves the end of closure. Therefore, harsh punishment achieves a desirable end for criminal justice. The most compelling justifications of the major premise seek closure as a means to support the autonomy of the aggrieved. When people are aggrieved by murder, their loss is such that the everyday autonomy of their lives is disrupted by melancholy. Support is given by helping them recover a sense of self-directedness in the world. We clarify this dynamic by reference to temporality: The aggrieved person becomes moored in the past and recovery is about taking up a sense of futurity. The most compelling justifications for harsh punishment achieving the aim of closure point to harsh punishment as an effective means of lifting the burdens of seeking justice from aggrieved persons and memorializing the gravity of their loss. Lifting burdens from the shoulders of the aggrieved and memorializing their loss show that they belong to community. It shows that the polity is behind them in their grief and anger. This is an important aspect of the work of relieving the aggrieved from isolation that is often a part of the experience of the aftermath of trauma.²

As critics of the language of “closure” in response to life-altering events have noted, it is necessary to distinguish a notion of closure that is sensitive to the articulations of aggrieved people from mass media notions of closure. In *Killing McVeigh: The Death Penalty and the Myth of Closure*, Jody Madeira describes the mass media conception as one that prescribes “absolute finality” to the grieving process where one returns to their pre-traumatic state. Such a conception is rejected by persons who have experienced the murder of a loved one. For instance, Charlie Younger, a survivor of the Oklahoma City bombing, expresses a sentiment shared by many aggrieved people: “I think things get better and get worse, but as long as a person’s alive and they have the state of mind that they can remember things, there’s never closure.”³ The expectation of “return to normal life” communicated by mass media conceptions of closure fails to respect the importance of the grief of the aggrieved. It assumes that pre-traumatic “normal” life is both possible and desirable. Many of the aggrieved see their grief—even in its debilitating and revolting aspects—as a memorial to their

<http://capitolfax.com/2014/04/10/crime-victims-bill-of-rights-to-appear-on-november-ballot/>. (Office of State Senator Heather Steans 2014)

² See “Chapter 1: Surviving Sexual Violence” in Brison, *Aftermath*.

³ Jody Madeira, *Killing McVeigh: The Death Penalty and the Myth of Closure* (New York: NYU Press, 2013), 42.

loved one.⁴ To suggest that their grief can or should cease is not only impossible, but it can sound like an imperative to stop remembering the depth of their love for the one who is now lost.

In contrast to the mass media conception that conceives of closure as the end of grief, I offer an articulation that is more sensitive to the testimony of people aggrieved by murder. This more compelling version views “closure” as an end to the form of grief that Sigmund Freud calls “melancholia.”⁵ Closure would not be an end to grief as such, but the end of the particular aspect of grief that aggrieved people describe as being stuck and constantly disrupted by remembering. The symptoms are familiar from narratives of living with Post-Traumatic Stress Disorder (PTSD, hereafter). Social scientific surveys have suggested that a majority of family members and friends of those killed exhibit some symptoms of PTSD.⁶ Many aggrieved people describe the disruption of their lives by the compulsive need to visit grave sites, compulsive reliving of the moment when they found out that their loved one had died.⁷ “Closure” in its best articulation is framed as the end of the intensive aspect of repetitive and compulsive behaviors around grief.

It is uncontroversial to suggest that release from such painful experience is desirable. Those who are aggrieved often speak of this as the desire to “close a chapter” of their lives and move to a new form of grief that is more conducive to their living, memorializing, and loving in the aftermath of murder. Survivor testimony in Madeira’s study is instructive:

Dr. Paul Heath noted, ‘I don’t think there is such a thing as closure. There is such a thing as coming to live with the experience, the traumatic experience, in your own unique way.’ Survivor Lane Wharton explicitly rejected a definition of closure as absolute finality in favor of a more workable explanation as coping: “To me closure is just coming to grips I guess in my own mind with what has happened and being able to cope with what happened.” Vicki Hamm believed that people often used closure to refer to inner peace: “I think what they mean is they found a peacefulness about living with what happened to them. And I found that.”⁸

⁴ See the account of a Vietnam veteran suffering from traumatic nightmares who refuses to take medication. When asked why, he replied: “I realized that if I take the pills and the nightmares go away...I will have abandoned my friends, and their deaths will have been in vain. I need to be a living memorial for my friends who died in Vietnam.” Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (New York: Viking, 2014), 10.

⁵ Sigmund Freud, “Mourning and Melancholia,” in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. James Strachey, vol. 14 (1914–16): On the History of the Psycho-Analytic Movement. Papers on Metapsychology and Other Works, 24 vols. (London: Hogarth Press, 1953), 243–58.

⁶ Heidi M. Zinzow et al., “Examining Posttraumatic Stress Symptoms in a National Sample of Homicide Survivors: Prevalence and Comparison to Other Violence Victims,” *Journal of Traumatic Stress* 24, no. 6 (December 2011): 743–46, doi:10.1002/jts.20692.

⁷ Eric Schlosser, “A Grief Like No Other,” *The Atlantic*, September 1997, <http://www.theatlantic.com/magazine/archive/1997/09/a-grief-like-no-other/376944/>.

⁸ Madeira, *Killing McVeigh*, 43.

The testimony of “coming to live with the experience,” “coming to grips with,” and “found a peacefulness about living with what happened” points to the aggrieved gaining a sense of control over their mourning. Temporality is again a helpful hermeneutic: The aggrieved find a sense of living in a future-oriented way that is not determined entirely by the past. Rather than grief as present, disruptive, and unremitting, these testimonies put value in gaining a sense of distance from the experience of violence. With such distance, they gain a measure of autonomy over the process of memorializing.

Although harsh sentences for perpetrators do not in themselves bring about this state of “closure” where the aggrieved gain distance and a sense of control over the grief for their loved one, advocates of harsh punishment of life without parole and capital punishment compellingly suggest that such sentences remove obstacles in the grieving process. These advocates argue—and here I agree—that the criminal justice system has a role to play as a contributor to the cessation of debilitating grief towards the more livable sense of grief described by survivors and aggrieved people in the paragraph above.

Among her interviewees, Madeira finds a common sense of need for harsh punishment as a means to create a more livable sense of grief. The pain of McVeigh’s murders was not only about the loss of loved ones: there was an undesired relationship of fascination, anger, and concern with the perpetrator. Harsh sentences promise to put an end to that relationship: The state takes the role of permanent mediator of the relationship in favor of the aggrieved. For instance, never again does the aggrieved person have to worry about meeting the perpetrator outside the context of carceral control.

McVeigh’s defiance in the face of mass condemnation rubbed salt in the antagonism, and created an even stronger desire for harsh punishment among the aggrieved. Madeira writes:

Many described McVeigh’s continued existence as a barrier to reconstruction. Because McVeigh occupied one camp in the involuntary and adversarial relationship between family member/survivor and offender, he was linked to them and so became and remained a part of the collective, instead of being cast outside of it. Family members and survivors found his inclusion traumatizing because it delayed or diminished their control; at any time a message could issue from McVeigh and aggravate wounds just starting to heal.”⁹

The fact that McVeigh lived and had a platform to speak, meant that he had the power to throw the aggrieved back to states of anguish and hurt that they believed they had already left. Thus,

⁹ Ibid., 18

McVeigh's execution promised a greater sense of regulation around their grieving process. She writes: "The vast majority...felt relief after the execution, the event that terminated the involuntary relationship."¹⁰ Further, she finds that aggrieved people felt "'Satisfaction' that they no longer had to 'serve their own sentence,' and that, in the books of their lives, they had come to the 'last page' of the bombing volume."¹¹ Aggrieved people describe parole hearings as events that have the effect of throwing them back to the undesirable state of grief: "I would love to be able to put this in the past and go on, but the laws of our justice system don't allow me to do that. Regardless of how many years go by, I have to relive this every time he (the murderer) is up for parole."¹²

Harsh sentences—despite the protracted legal proceedings that often follow them—promise the aggrieved the possibility of grieving on their own terms. The testimonies in the above paragraph suggest that the adversarial legal system's proceedings place the aggrieved in the position of reliving trauma rather than contributing to movement towards understanding and healing. There is a shared sense that the perpetrator is a burden on the aggrieved as long as they are living, speaking, potentially free from carceral control. It follows that harsh sentences are desirable because they act to remove the burden of having to fight for the public recognition of their pain. Harsher sentences serve as a means for this recognition in an institutional context with limited support for aggrieved persons.

In this section, I have defined "closure" for aggrieved people in the aftermath of murder beyond the mass-media conception. The more compelling definition of "closure" refers to the end of a particularly difficult and compulsive state of grief; it is not the return to normality unencumbered by grief. Through harsh punishments, the criminal justice system is said to support this movement of grief. According to advocates of this notion of closure, these punishments remove traumatizing burdens from the aggrieved: The aggrieved no longer have to share a world with an executed person. They never have to attend a parole hearing when the perpetrator is sentenced to life without parole. The role of the criminal justice system—with regards to the aggrieved person—is to make them free to grieve on their own terms. Time and space that are uninterrupted by the demands of the criminal justice system are said to create feelings of control and intentionality that are conducive to more desirable experiences of mourning.

¹⁰ Ibid.

¹¹ Ibid., 38.

¹² Heidi M. Zinzow, Marti P. Thompson, and Alyssa A. Rheingold, "Homicide Survivors: A Summary of Research," in *Victims of Crime*, ed. Robert C. Davis, Arthur J. Lurigio, and Susan Herman, Fourth Edition (Los Angeles: SAGE Publications, Inc, 2007), 148.

Section II: The Criminal Justice System Beyond the Removal of Burdens

In this section, I argue that research on trauma reveals that the lifting of burdens that closure promises is insufficient to the challenge of supporting aggrieved people facing trauma. It is insufficient because of its too-hopeful conception of the temporality of trauma and healing in the aftermath of a traumatic event. Although we would hope for trauma victims to be able to step over a threshold such that debilitating effects would be things of the past, the psychiatric research I cite below—as well as the narrative of Jean Améry in chapter four—tell a different story. The temporality of trauma cannot be put neatly into the past; it disrupts the present with unexpected ferocity at unexpected times. Psychiatric research points to the ways in which traumatic experience affects the nervous system such that the benefits of “closure” discussed in the above section is undermined.

Psychiatric research on victims of traumatic stress reveal that victims do not escape from the intensity of traumatic grief by escaping the situations that bring back memories—the trials, confrontations with the perpetrators, the parole hearings. The tragic character of traumatic stress is that it causes the breakdown of the capacity to distinguish threatening stimuli from safe stimuli even in the most mundane contexts. Psychiatrist Bessel van der Kolk writes:

Dissociation is the essence of trauma. The overwhelming experience is split off and fragmented, so the emotions, sounds, images, thoughts, and physical sensations related to the trauma take on a life of their own. The sensory fragments of memory intrude into the present where they are literally relived. As long as the trauma is not resolved, the stress hormones that the body secretes to protect itself keeps circulating, and the defensive movements and emotional responses keep getting replayed... [M]any people may not be aware of the connection between their ‘crazy’ feelings and reactions and the traumatic events that are being replayed. They have no idea why they respond to some minor irritation as if they were about to be annihilated.¹³

I quote at length to highlight the way in which re-traumatization operates as an unexpected intrusion from within the body and psyche of aggrieved persons. The survivors and aggrieved people quoted in the above section sought freedom from the external stimuli that would remind them of past traumatic experience. Many of them connected that freedom to a sense of moving on to healthier, more productive forms of grief. Van der Kolk argues convincingly that traumatic experience (when experienced and relived in the context of traumatic stress disorder) imprints itself within the body and psyche such that everyday decisions can often trigger unwarranted fight, flight, or freeze

¹³ Bessel van der Kolk, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (New York: Viking, 2014), 66.

responses. The wound of traumatic stress becomes parasitic on situations that *prima facie* have no relation to the traumatic experience.

This is where psychiatric research has resonances with the familial experience of trauma that I described in my first chapter. In that first chapter, I connected my grandfather's escape from Nazi Vienna and his silent work of dealing with the pain that accompanied the murder of his family to the undermining of his ability to be a supportive parent. Van der Kolk speaks of the experience of traumatic flashbacks in ways that resonate with those family dynamics. He writes:

These reactions [traumatic responses to triggers that have only vague connection to the actual trauma] are largely irrational and largely outside people's control. Intense and barely controllable urges and emotions make people feel crazy—and makes them feel that they don't belong to the human race. Feeling numb during birthday parties for your kids or in response to the death of loved ones makes people feel like monsters. As a result, shame becomes the dominant emotion and hiding the truth the central preoccupation.¹⁴

Trauma makes participation in community and relationships challenging. The alienation from the ability to feel pleasure and the inability to mourn and grieve when one desires is painful. These are behaviors and attachments that make the pleasures and pains of communal, relational life what they are. Without the capacity to participate in sociality through rituals of pleasure and mourning, frustration makes way for the inability to connect meaningfully with even the closest loved ones. It makes responsibilities to broader communities similarly challenging.

The discourse of “closure” fails to meet the challenge that traumatic experience creates for the aggrieved, their families, and their communities. When advocates of “closure” seek to free the aggrieved from the burdens of their experience by relieving them of fears around the perpetrator and experiences of reliving trauma through proceedings in the criminal justice system, they seek to help the aggrieved into a state where they are free to grieve and memorialize in a more desirable, less disruptive way.

If trauma and grief were linear—where success is reached once the stage of desirable grief is achieved— then seeking “closure” would be a sensible aim for those aggrieved by murder. This implies that once the aggrieved reaches the more desirable state of grief, there is no going back. Van der Kolk's research suggests that the contrary is true. If trauma alters stress hormones such that ordinary life can become unnerving or terrifying, then the nature of trauma is to disrupt the feelings of safety, distance, and calm that are characteristic of that second, more desirable stage of grief.

¹⁴ Ibid., 67.

If the nature of trauma is the disruption of everyday experience and relationships, a criminal justice system sensitive to trauma would offer resources to assist the aggrieved person in reconstructing their sense of safety and trust in the mundane. In what follows I will suggest that rather than a progressive movement away from melancholia, ongoing efforts are required to address the traumatic experience as well as flashbacks, numbness, and shame. This work is not about releasing the aggrieved from traumatic experience, but instead taking up that traumatic experience as an occasion for teaching and learning. The aim is to make it possible for the aggrieved to safely and meaningfully return to traumatic experience in the context of a community of support.

To support these claims, I look to family experience as an instance of the inadequacy of the narratives of closure for healing: They gained distance from trauma, but they did not experience recovery such that they could avoid the intergenerational repetition of traumatic experience. In conversation with social psychological literature, I show how narration of traumatic experience and community support could serve as resources in the recovery from trauma. I then look to Du Bois's essay "On the Coming of John" for a model of using narrative and community support as a means of confronting traumatic experience. From Du Bois's reflections and his notion of "contribution," I outline forms of narration and community pedagogy that have the power to contribute to healing in the aftermath of the traumatic grief that accompanies the loss of loved ones to murder.

Section III: Familial Silence and Breaking the Repetition of Trauma Through Pedagogy

In this section, I'll return to my familial case study and take it up in the context of psychological research around the repetition of trauma. I'll first identify the dynamic of repetition in my familial case study. I will suggest that the repetition of trauma threatens aggrieved persons—even in circumstances akin to that of closure. I suggest that within storytelling and a trauma-sensitive community, there are resources to head off the intergenerational repetition of trauma.

Insofar as my family escaped the ravages of genocide in Europe, they came to a country where their whiteness produced the safety they needed to reestablish their lives and support new generations. They gained this protection in an environment where virulent anti-Semitism was traded for subtle and less violent forms. They were no longer threatened by the displacing violence that threatened in Europe. In the U.S., the Nazi violence that aggrieved them was subject to widespread condemnation. Their experience in the aftermath of violence met the central demand of advocates of closure: They gained distance from perpetrators that would allow them to exert control over their grief. Although this distance created a great deal of good in their lives, it was inadequate to prevent

the repetition of trauma. This repetition of trauma—like the flashbacks, numbness, and isolation described in the above section—was an intrusion of past traumatic experience in a present.

My great grandparents grew up in Bessarabia (present-day Ukraine). They fled before the worst of the Romanian nationalist and National Socialist violence. In exile, they joined family in the Bronx and lived in their apartment on Olinville Avenue for as long as anyone can remember. As the oldest of my generation, I am the only one of my generation with a distinct memory of my great grandparents. I took great pleasure in lighting my grandfather's pipe against the cries of my parents, aunts, and uncles: "Get the child away from the fire!" "You have LUNG CANCER!" The apartment shook with the 2 train and my great grandmother's cooking made the apartment savory with schmaltz. I remember how the anticipation of seeing and being seen by my great grandparents sent me into fits of joy. In me, my great grandparents must have seen the fulfillment of their struggle to reconstruct a family in the wake of the destruction of everything and nearly everyone they knew.

Although my experience of my great grandparents and their success at reconstructing kinship might seem to be a sign of closure around trauma, their silence around the pain and loss of their exile from Eastern Europe created lasting challenges to their flourishing and that of succeeding generations. When my grandmother was in her mid-40s, she was diagnosed with terminal cancer. As was the custom in the 1970s, the doctor told only her husband, my grandfather. My grandfather (who himself escaped from Vienna, Germany and left many behind) convened with my great grandparents and my great aunt and uncle. Together, they decided not to tell my father and aunt, who were ages 16 and 12. Nor did they tell my dying grandmother. The lost opportunity to say goodbye to their mother haunts my father and aunt to this day.

If my great grandparents had the emotional, linguistic, and embodied resources to not only speak of their pain, but teach others about the meaning of loss in Bessarabia and the means by which they found strength in exile, those skills could have translated to an ability to communicate about their daughter's illness. If they were able to communicate the pain of exile as something instructive, they could have understood that pain and loss are not to be avoided at all costs. They could have taken up the pain of grief as something that human beings need resources to face together. Without these resources, there was a tragic repetition: As the Nazis took away my grandfather's and great grandparents' ability to say goodbye to their family and friends, my father and aunt were denied the opportunity to say goodbye to their mother.

My contention is that my grandparents needed a form of pedagogy that would have allowed them to become teachers of pain and loss. Specifically, I am thinking of resources that would have

allowed them to say “You’re dying” to my grandmother and “Your mother is dying” to my father and aunt. With these words come the responsibilities of comforting the dying and addressing adolescent struggles with loss. These are among the most difficult human responsibilities. Rather than begin the work of grief in a familial context, my grandfather and great grandparents made a choice to let the work of grief follow from death. By my father’s account of events, his father and grandparents justified the decision through the language of “protection”: The idea that the knowledge of terminal illness would harm my grandmother and somehow make her give up her desire to live. I believe this paternalism masked their inability to take up the difficult responsibilities that would come with telling the truth.

Taking up the responsibility of caring for a dying mother and her teenage children required skills that my grandparents lacked. Fascist violence robbed them of the ability to experience movement, loss, and death in the ways that their communities and families were prepared for. They were unable to experience those tragic circumstances through the language and ritual that make them bearable. There was no ritual to deal with the murder of nearly all the people they left behind. They lacked the sense of community necessary to share the burden of loss. To make and share meaning in exile is extraordinarily challenging. My grandparents did enough of this work to live and support three generations of family, but they lacked the resources that would have made it possible for them to express and share the meaning of loss for themselves and for succeeding generations.

Murder also creates loss that is outside the socially expected and supported forms of grieving. As in the case of my grandparents, I contend that those who experience the murder of loved ones should have access to resources that help them to create shareable words, artifacts, and stories. The aim is not freedom from the stuckness of traumatic experience and flashbacks, repetitions, and isolation, but the possibility of re-experiencing trauma in a context that allows for richer possibilities of support.

I will elaborate this claim through scholarly engagements with the “compulsion to repeat trauma.” Within this field, I focus on attempts to understand the question “Why do those who experience trauma repeat it in new contexts and upon those who are not responsible for the initial trauma?” By addressing this question, I’ll seek a richer explanation of my grandparents’ behavior and for the therapeutic basis for my emphasis on storytelling in the aftermath of trauma.

Section IV: The Vicious Cycle of Traumatic Repetition

I will take up the psychiatric model of Bessel van der Kolk and the psychosocial conceptions of Robert Jay Lifton to offer two perspectives on the repetition of trauma. Lifton works from a

psychodynamic frame developed from a Freudian background. Freud suggests that the repetition of trauma is an attempt to master that which previously overwhelmed feelings of safety and control.¹⁵ For Freud, on an unconscious level we recreate traumatic situations in the hope that this time we can be the active subjects of the experience rather than the passive recipients of traumatic victimization. Lifton looks to the case of the My Lai massacre committed by U.S. soldiers during the Vietnam War.¹⁶ Days after suffering casualties of their own, Charlie Company went on a rampage of rape and murder that killed nearly all the civilian inhabitants of My Lai. The psychodynamic reading of this massacre contends that the traumatized soldiers took part in a dynamic of repetition insofar as they recreated the violence that they initially experienced as victims—this time on much larger and more terrible scale. Lifton writes, “...there is sexual innuendo throughout the descriptions of My Lai—the sense of men who had been inactivated and rendered impotent suddenly asserting a form of violent omnipotence.”¹⁷ Their enemy frustrated them with guerilla tactics. Lacking direct encounters with the enemy to release their desire for vengeance, they found civilians—due to a mixture of racism, sexism, paranoia, and military rhetoric—to be an adequate substitution.¹⁸ Lifton describes soldiers murdering civilians from a defensive crouch, as if simulating combat.¹⁹

A form of traumatic repetition emerges: There is a traumatic experience: Losing fellow soldiers in Vietnam and—in the case of my grandparents—the murder of faraway family and friends. These experiences left the soldiers and my grandparents victimized and grieving. To escape the pain that comes with passive victimization, traumatized persons recreate aspects of the violence they experienced as victims and impose it upon persons who act as substitutes for those responsible for the initial violence. As noted by Cathy Caruth, in the Freudian tradition traumatic victimization overwhelms consciousness.²⁰ Trauma overwhelms our capacity to order and edit perceptual experience, which maintains our sense of stability and security in the world. By repeating trauma upon substitute persons, we seek to impose stability out of previously overwhelming experiences by taking the position of an aggressor rather a victim.

¹⁵ Sigmund Freud, *Beyond the Pleasure Principle*, trans. James Strachey (New York: W. W. Norton & Company, 1990), 11.

¹⁶ Robert Jay Lifton, *Home from the War: Vietnam Veterans Neither Victims nor Executioners* (New York: Simon & Schuster, 1973), 33-72.

¹⁷ *Ibid*, 54.

¹⁸ Lifton suggests that without a sense of purpose in Vietnam, memorialization of others who were killed through violence became the singular means by which the U.S. soldiers made their mission meaningful. Lifton describes this as the “survivor mission” mentality. *Ibid*, 55.

¹⁹ *Ibid*, 50.

²⁰ Caruth, *Unclaimed Experience*, 61.

There is another line of thought by psychiatrists who look to neurobehavioral studies to understand the dynamic of repetition. Bessel van der Kolk cites studies that suggest that traumatic experience is strongly correlated with hyperarousal and an intense drive to the familiar, even if familiar circumstances are detrimental to the organism's well-being.²¹ Extreme adverse responses to novel stimuli offer a distinct, but still plausible hermeneutic by which to understand the repetition of traumatic experience. The unconscious desire to master is read now as a somatic need to remain in that which is known—circumstances in which the traumatized person has knowledge and feels the capacity to exercise a measure of control.

The massacre inflicted by the U.S. soldiers in My Lai is rendered as the desire to reduce the adverse stimuli (the enemy defined broadly enough to include Vietnamese civilians) to nothingness. Rather than respond to these persons with ethical discernment, they destroyed everyone in the village, leaving the soldiers “safe”: alone with themselves. The soldiers responded to adverse stimuli with intense violence—a brutal attempt to regain the control that was lost with the loss of their fellow soldiers. My great-grandparents and grandfather's repetition is rendered as avoidance of the adverse stimuli that would come with speaking truthfully about my grandmother's death. Their previous traumatic experience made the work of going into unfamiliar emotional space extraordinarily difficult.

Although there are differences between these two ways of interpreting the repetition of trauma, if viewed through the lens of vulnerability these accounts are more similar than they may seem. The Freudian account stresses *activity* in distinction to a state of passivity created by trauma. The neurobiological account stresses maladaptive *passivity* as the result of the fear created by trauma. In both accounts, there is a shared sense that vulnerability can be overcome. In the Freudian tradition, the *activity* of victimizing others overcomes the vulnerability that came with traumatic experience. In the psychiatric account, the avoidance behavior seeks to avoid the vulnerability that came with traumatic experience through the avoidance of novelty. Trauma creates discomfort with the vulnerability experienced in the past and the vulnerability that comes with living in the world in the present and future. The repetition of trauma—in the general sense that concerns me—can be understood as those actions which respond to possible vulnerable situations with actions that disperse traumatic experiences interpersonally and temporally.

Section V: Storytelling and Community in Recovery from Traumatic Experience

²¹ Bessel van der Kolk, “The Compulsion to Repeat the Trauma,” *Psychiatric Clinics of North America* 12, no. 2 (1989): 389–411.

The recovery from the compulsion to repeat trauma has been described as “working through” trauma as opposed to “acting out.” Freud’s essay “Remembering, Repeating, and Working Through” distinguishes between the terms.²² “Acting out” is Freud’s term for the behaviors that contribute to a vicious cycle of repetition. The traumatized person repeats aspects of their trauma in their behaviors towards themselves and others, but they have no conscious awareness that their present behaviors are linked to a past trauma. Freud writes: “the patient does not remember anything of what he has forgotten or repressed, but acts it out. He reproduces it not as a memory, but as an action; he repeats it, without, of course, knowing that he is repeating it.” In compulsively acting out trauma without knowing what we are doing, we become trauma’s object.

In contrast, “working through” is the process by which this unconscious repetition becomes conscious. Trauma is taken up in language or action as a memory. Jean Laplanche and Jean-Bertrand Pontalis clarify the Freudian language: “working through is undoubtedly a repetition albeit one that’s modified by interpretation—for this reason—liable to facilitate the subject’s freeing himself from repetition mechanisms.”²³ When we interpret trauma in language or action, the trauma becomes our object. In acting out, we attempt to come to terms with trauma by dis-identification with the vulnerability that came with the trauma. Insofar as we put trauma into language or action, we have the possibility of creating a relationship to our traumatic vulnerability. Such a relationship to traumatic vulnerability is a condition of possibility for a virtuous cycle where facing traumatic vulnerability brings about a community of support for healing: When we put our pain into words or action, others can learn where we hurt. This knowing opens up the possibility of solidarity in our attempt to respond to and recover from those pains. Storytelling does not automatically bring about a community of support, but under good circumstances—which I will explicate below and in the next chapter—it can act as a catalyst for that community.

When we are consciously returning to traumatic memory, we make the traumatic experience shareable: We put it in terms or gestures that are intelligible to others. It means that we are telling stories that have the potential to break through the isolation that comes with the experience of trauma. These stories have the potential to invoke a community capable of ongoing support for the aggrieved.

²² Freud, “Remembering, Repeating and Working-Through.”

²³ Jean Laplanche and Jean-Bertrand Pontalis, *The Language of Psycho-Analysis*, trans. Donald Nicholson-Smith (New York: W. W. Norton & Company, 1973), 488–89.

As we saw in the above van der Kolk quote, trauma creates challenges to taking part in communal life. The constant fear of being triggered as well as the experience of triggers and flashbacks themselves are burdens upon aggrieved persons. Both make participation in communal life extraordinarily challenging. I work from a social and political institutional perspective, and given what we know about the nature of traumatic symptomology, institutions are not well situated to ameliorate traumatic symptomology. This is an everyday struggle to distinguish threatening stimuli from mundane stimuli; it is an everyday struggle to resist the compulsion to repeat aspects of one's trauma upon oneself or others. The problems here are too granular for effective intervention from an institutional organization like the criminal justice system. Where the criminal justice system can meaningfully contribute is in assisting communities to respond in better ways to aggrieved persons carrying the burden of trauma. In what follows, I ask: How can community best be constituted around the aggrieved? By what means can social and political institutions support the creation of such communities? Rather than promising relief from the burdens of trauma, my aim is to offer a schema of a community that could share the weight of traumatic burdens with the aggrieved.

The community of support would be trauma-sensitive to the extent that instances of traumatic symptomology would be an opportunity to support the aggrieved person. This, in itself, is an important step insofar as persons experiencing traumatic symptomology are often taken by others as disruptive of the normal functioning of communal life. The support I am looking for would create opportunities for belonging even when the aggrieved person cannot act in accordance with norms of communal life. Whereas trauma is often experienced as exploitation of vulnerability, a trauma-sensitive community responds to vulnerability with compassion and care. They offer aggrieved persons the opportunity to reclaim vulnerability in its positive sense: as a signal for the need of attention and care. This is a community organized in opposition to vulnerability in the vicious sense where it signals weakness in the face of exploitation. Such a community would promote trust in others where traumatic experience undermined it.

A community-based movement that seeks to transform traumatic vulnerability into vulnerability that summons communal support is one aspect of a larger response to trauma. In the schema of institutional response that I envision, the goal is a community of support whose direction and aims are in large part defined by the one that has experienced trauma. Here, there is not only compassionate responsiveness to traumatized persons, but there is a community that is built in dialogue with the harms aggrieved persons experienced and the ideals towards which they wish to

work.²⁴ The traumatized person is thus not only a wounded person to be supported, but also a teacher of their experience. The following chapter will go further into the dialogic relationship between community of support and the articulations of the aggrieved person, but for now I will highlight the way in which narratives that address traumatic experience are critical to this process.

The movement from story to community support offers an alternative path to satisfying the desire for community solidarity in the aftermath of crime. Harsh punishment delivers a version of this solidarity: When life without parole or death sentences are handed down by the institution of criminal justice, it represents a polity standing behind the aggrieved. There is an acknowledgement of the wrong the aggrieved suffered and a willingness on the part of social and political institutions to take on the burden of administering punishment. In vernacular terms, this institutional response is how a polity contributes to *making things right* in the aftermath of murder. The process of a polity supporting stories that invoke community support is also capable of acknowledging the serious wrong that the aggrieved suffered. The gesture of listening and sympathizing with a story does not hold the same gravity as a gesture of declaring a perpetrator guilty and sentencing them harshly. Yet, there are advantages to this movement away from the fanfare: The support that comes from hearing and responding to story will be separated from a particular juridical outcome.²⁵ But, this allows support for aggrieved persons that is more sustained than a singular action handed down by a judicial body. The criminal justice system I imagine takes a measure of responsibility for constructing a community around the aggrieved that can offer resources as they face ongoing repercussions of grieving for loved ones lost to murder.

Further, telling stories around traumatic experience invokes a community of support insofar as these stories point to the harms of the *specific* trauma experienced and point to the aspects of memorialization or recovery that are most meaningful. These stories can thus call forth a response to traumatic experience that brings solidarity in repairing the harms and bringing forth

²⁴ A critical reader will suggest that there is nothing in my argument that prevents aggrieved persons from constituting a community on the basis of seeking recovery through harsh punishment of the perpetrator. This is reader is correct, but this does not mean that we are back where we started. Rather than institutions of criminal justice conceiving of the satisfaction of the aggrieved to be a singular achievement of harsh punishment, we now have a plural conception of what means to satisfy aggrieved persons in the aftermath of murder. The primary support is in building community around the aggrieved person; although I have offered therapeutic reasons for constituting such a community in accordance with non-retributive responses to murder, I have not yet provided an argument that harsh punishment is politically or ethically impermissible. Thus, communities I advocate for cannot be definitely delimited in accordance with non-retributive responses to murder.

²⁵ This is not to say that activism for just juridical outcomes is in any way undesirable. I am arguing that the success of such activism should not determine whether or not the aggrieved are meaningfully supported in the aftermath of murder.

memorialization for loss. For such potential power to be realized, work is required on the side of the aggrieved and the community of hearers alike: For the aggrieved, the challenge is to name the harm experienced and the harms that continue to arise from it. The challenge is to articulate what they wish to be done for the sake of recovery. For the community of hearers, they must first choose to give their support to the aggrieved person. In choosing to give support, they are challenged to hold one another accountable to resist victim-blaming. They are challenged to support one another as they take on the emotional work of compassion. The community of support must be in dialogue with one another and with the aggrieved about how they want to fulfill the aggrieved's wish for recovery. This process of articulation, choosing, and dialogue will be explicated in greater detail in the third chapter.

When the harms of surviving loss of a loved one are articulated, whether they are feelings of responsibility or anger at the perpetrator, a picture is painted of what life is like for the aggrieved person. Such articulations tell the story of how the victim's grief brings challenges to their attempts to live and love. Members of the communities that hear these stories can provide resources that help aggrieved persons to resist the sense of having to face those challenges alone. They can have a sense of what the day-to-day support that aggrieved persons need in the aftermath of loss. For instance, community members can connect aggrieved people to others who can speak to them of their experience of similar losses. Out of such stories, a path towards recovery can be envisioned by those who are more recently aggrieved.

In this section, I have offered reasons that storytelling in the aftermath of murder is advantageous to the recovery of persons who are aggrieved by murder. In the next section, I will look to Du Bois for an instance of this storytelling in the aftermath of trauma and show how such storytelling invokes community.

Section VI: Tragic Pedagogy: Du Bois as Teacher in an Anti-Black World

In the following sections, I look to Du Bois's writings for a notion of pedagogical storytelling that could be the basis for an alternative to "closure" as the aim of victims' rights advocates. Du Bois's notion of contribution offers a vision of responding to traumatic experience towards the ends of recovery and the elaboration of transformative political demands. I'll begin by looking to "Of the Coming of John"²⁶ as a model for the kind of pedagogy I advocate in the aftermath of trauma. Although Du Bois is responding to conditions of ongoing violence whereas my

²⁶ W.E.B. Du Bois, "Souls of Black Folk," in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), 521-535.

grandparents are struggling with the grief related to past violence, I contend that there are shared benefits to storytelling in both cases. To tell the story of traumatic experience offers others a means to understand and empathize with the harm experienced. It opens up the possibility of those others choosing to create a community through which the burdens of tragic experience are shared.

These stories can also level a critique of a social arrangement or polity in which such traumas happen. The tragedies articulated can extend beyond the harms suffered by the aggrieved as an individual to the harms suffered by the aggrieved as a member of a larger social grouping. For instance, a Palestinian killed in an Israeli bombing raid is an affront to Palestinian people as such. It can extend to the ways in which that interpersonal violence is linked to social and political circumstances that affect all who live in a polity. For instance, one may link increased gun violence to “Stand-Your-Ground” laws on the books in many states. As such, the community of support is called upon not only to choose to support the aggrieved person in their recovery, but to memorialize the one who is lost through choosing to resist social, political, and legal arrangements which make the repetition of harms more likely.

Du Bois writes “Of the Coming of John” from the perspective of an educator of young Black college students. He captures the struggle of sending students off into a world where the ideals of justice and beauty that educators seek to instill in their students create dissonance with the white supremacist world in which they live. This is a dissonance pregnant with tragedy, and the tragedy plays out in the pages of the short story. I will highlight the ways in which his storytelling functions as a contribution to a community of educators and students who work in fear of this tragedy. It is likely that many of them have already experienced it.

John Jones is a well-loved Black college student from a small town in coastal South Georgia. In preparatory school, he plays the class clown until he is placed on academic suspension. He returns and completes his prep school and college degrees with fervor for learning. He finds inspiration in astronomy, history, and ethics. He returns to his small town in Georgia to open a school for Black children and “to settle the Negro problems there.” He knows the danger of such work. He quotes the biblical Queen Esther, “I will go in to the King, which is not according to the law; and if I perish, I perish.”²⁷ Upon his return, he alienates members of the Black community with his heavy sense of duty and his deprecation of religion in the contemporary world. Jennie, his sister, asks: “Does it make every one—unhappy when they study and learn lots of things?” Yes, John says,

²⁷ Ibid., 528.

and he hesitates before affirming that he is nonetheless glad to have studied. Jennie expresses the wish to study despite the consequences: “‘I wish I was unhappy,—and—and,’ putting both arms about his neck, ‘I think I am, a little, John.’”²⁸

John goes to the town’s white Judge and requests a position as a teacher at the Black school, and the judge agrees on the condition that he teach Black children to be the servants of the white townspeople. John says what he needs to get the job, but he is fired a month later when the judge hears that John taught his students about the French revolution. Walking home on the day he was fired, John sees Jennie fighting off the judge’s rapist son. He kills the Judge’s son in one blow. The story ends with John jumping to his death as a white lynch mob approaches.

John was the student that Du Bois and his colleagues sought to educate. He took his education as a means for his own empowerment, and he took up the burden of teaching in the community from which he came. John met and exceeded the standards of his educators, but one cannot meet and exceed those standards without also knowing and feeling the great injustice of white racism. The narrator describes John taking on the burden of this realization “He grew slowly to feel almost for the first time the Veil that lay between him and the white world; he first noticed now the oppression that had not seemed oppression before, differences that erstwhile seemed natural, restraints and slights that in his boyhood days had gone unnoticed or been greeted with a laugh.”²⁹ John could no longer take part in the strategy of survival that plays down, laughs off, or accepts the injustice of white supremacy as a necessary feature of the world.

The educator and students’ dilemma is that good education makes one liable for death in a white supremacist world. To be educated is to feel one’s oppression more sharply, and thus to feel committed to overturning white supremacist orderings of lives. To be committed to overturning white supremacy is to risk death. Although the story is fictional, it points to a real and justifiable fear on the part of the educators of Black students: That a wide-ranging education will put students at violent odds with the society that they live in and the people in the places that they come from. By telling the story of the tragedy that has already happened and will happen in the future, Du Bois invokes a community of teachers and students to face the death that lingers too near the lessons they are teaching and learning.

To give language and invoke community around the tragic dimensions of Black education is to point to a troubling aspect of the liberal education that Du Bois advocates in earlier chapters of

²⁸ Ibid., 531.

²⁹ Ibid., 527.

the *Souls of Black Folk*.³⁰ By telling this story, Du Bois resists a possible cycle of institutional failure. The Reconstruction-era Freedmen's Bureau (1865-1872) worked on behalf of the education and support of formerly enslaved people. Given the political shifts ushered in by the end of the Lincoln presidency (1861-1865) and the rise of the Ku Klux Klan, the support promised by the Bureau was in jeopardy almost as soon as it was established. After the Bureau was closed by an act of Congress, the work of the Bureau had to be taken up by other means. Black colleges and universities were one of many ways in which supporters of Reconstruction continued their work. But, to keep their doors open, these schools had to raise funds from private and public donors.

University and college fundraising then and now relies on idealized images of education and its outcomes for its students. Although potentially helpful in avoiding the repetition of a supportive institution whose doors closed too soon, this idealizing of college education opens up the possibility of another kind of institutional failure. This is the potential failure to openly address the risks of Black higher education in a white supremacist world. To face these risks is to offer a communal space to share strategies for living with this threat of tragedy. It is an opportunity to build a resistance to white supremacy that is particular to the experience of students and teachers: Knowing, feeling, expressing, and resisting the wrongs of white supremacist hierarchies should not bring about the threat of death.

"Of the Coming of John" stands as model for testimony in the aftermath of murder because it identifies the harm of the traumatic experience and through engagement with that harm, expresses a transformative political demand. The essay addresses personal, social, and political harm of white supremacist violence that murders those who gain knowledge from Black educational institutions and attempt to share that knowledge. The transformative political demand arises from the fact that John and Jennie should have been able to live without the fear of white-male supremacist violence encroaching upon their bodily integrity. John should have been able to live and work as an educated Black person in the U.S. Jennie should have been able to decide her path without the trauma of attempted rape and the grief that comes with the loss of her brother to murder. As such, Du Bois' narrative invokes potential community with those who are also threatened by the traumatic experience he describes. He also invokes it with those who are invested in the political demand of protecting the lives, knowledge, and hopes that Black men and women embody. Insofar as he calls upon particular people to be a part of the community, he is describing

³⁰ See "Of Booker T. Washington and Others," *Ibid.*, 372-391.

the particularities of the harm that could be addressed by that community: The possibility that the potential to teach and lead that educators cultivate in their students will be violently disrupted. The ways in which white supremacist violence shows up in what is constituted as a safe space for Black students.

Section VII: “Contribution” as an Alternative to “Closure”

Du Bois’s “Of the Coming of John” is an illustration of his notion “contribution.” In this section, I will explicate this notion and argue that it should orient the criminal justice system’s response to those aggrieved by murder. This is a conception of criminal justice guided by the Du Boisian ideal where all people live together in a polity that supports creativity, truth-telling, and the formulation of moral demands out of histories of violence and trauma.³¹ This is a polity in which groups, and the individuals that compose them, are defined by and esteemed in virtue of their ability to tell stories and make creative, epistemic, and moral contributions to social and political life.³² Du Bois envisions a polity where this esteem is demonstrated by learning from the cultures and histories of diverse groups and the individuals that compose them. It is a polity where respect for all is grounded in the potential of all to be teachers.

I interpret the contention of the potential of all to be teachers to connect a philosophical anthropological claim to a political claim. What I term the “right to pedagogy” arises from two central claims of Du Bois’s philosophical anthropology. In the “Conservation of the Races,” he claims that human beings by nature live among and are identified with racial groups.³³ They are thus connected to their own group’s aesthetic, historical, ethical, and epistemic traditions through myriad connections including kinship, belief, socio-economic position, and physio-biological similarities. All human beings can mine their own and other group traditions for insights of social, political, and aesthetic value, which I interpret as Du Bois’s notion of contribution. The potential for every human to do this work, and to put these contributions forward, is the potential for teaching. Human beings—by nature of living within and among groups with unique intellectual and aesthetic

³¹ This mirrors the regulative political ideals of Beauty, Truth and Right worked out in Du Bois, “Criteria of Negro Art.”

³² The concept of contribution is developed throughout Du Bois’s career: W. E. B. Du Bois, “The Conservation of Races,” in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), 815–826; Du Bois, *The Souls of Black Folk*. in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), 993–1002; Du Bois, “Criteria of Negro Art,” in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), 993–1002; W. E. B. Du Bois, *The Gift of Black Folk*, The Oxford W.E.B. Du Bois (New York, NY: Oxford University Press, 2007).

³³ W.E.B. Du Bois, “The Conservation of Races,” in *Writings*, ed. Nathan Irvin Huggins (New York, NY: Literary Classics of the United States, 1986), see p. 817 for anthropological claims and p. 820-825 for claims regarding contribution.

traditions—have the potential to teach. When I speak of the “right to pedagogy,” I interpret Du Bois’s long and varied *oeuvre* of pedagogical thinking as insisting upon the political normativity of the movement from potential contributor to teacher.³⁴

A criminal justice system that took the political normativity of movement from potential contributor to teacher as its aim would offer support to the aggrieved in the aftermath of murder such that they would be able to communicate about the experience of their loss and the meaning they wish to make out of it. This is a claim that I have argued for above, but grounded in Du Bois’s notion of contribution, it becomes richer: He locates our capability to communicate story and teach in our essence. Through the group traditions with which we identify, we inherit resources to form stories. We have a base of aesthetic judgments, knowledge claims, and moral experience that were motivated from triumphs and traumas alike. Thus, even when communicating about traumas that seem unspeakable, these traditions offer support. When I speak of institutional support for storytelling, I imagine institutional resources put forward to engage willing aggrieved persons in delving into those traditions to find the inspiration and language with which to speak of their experience. This language can be used to teach lessons from what they experienced.

“Of the Coming of John” illustrates the ways in which group traditions support us when we are challenged to communicate traumatic vulnerability. Charles I. Nero locates John’s citation of Esther within a long line of Black women poets and writers. Nero cites Mary Stewart (1803-1879) defending her right to speak on behalf of the abolition of slavery as a woman by analogy to Esther standing for her Jewish people.³⁵ He cites Sojourner Truth (1797-1883) who also likens her struggle as a Black woman demanding the rights of full citizenship in the U.S. to that of Esther.³⁶ Truth goes further in her New York City Convention speech and suggests that those who resist her message should remember the terrible fate of those who resisted Esther.³⁷ African American Baptist women described Ida B. Wells as “a queen Esther, a woman of high talent, that has sounded the bugle for a defenseless race.”³⁸

³⁴ W.E.B Du Bois, “The Hampton Idea,” in *The Education of Black People: Ten Critiques 1906-1960*, ed. Herbert Aptheker (New York: Monthly Review Press, 2001), 21–32; W.E.B. Du Bois, “The Revelation of Saint Orgne The Damned,” in *The Education of Black People: Ten Critiques 1906-1960*, ed. Herbert Aptheker (New York: Monthly Review Press, 2001), 135–62; W.E.B. Du Bois, “Whither Now and Why,” in *The Education of Black People: Ten Critiques 1906-1960*, ed. Herbert Aptheker (New York: Monthly Review Press, 2001), 193–204.

³⁵ Charles I. Nero, “Queering The Souls of Black Folk,” *Public Culture* 17, no. 2 (March 20, 2005): 266.

³⁶ *Ibid.*, 267.

³⁷ Sojourner Truth, “Speech at New York City Convention” (Fourth National Woman’s Rights Convention, New York, 1853), <http://www.lehigh.edu/~dek7/SSAWW/writTruthSpeech2.htm>.

³⁸ Nero, “Queering The Souls of Black Folk,” 267.

To give voice to the vulnerability that John faces in his decision to return to his hometown, Du Bois looks to a tradition of Black women who appropriate a Jewish figure facing genocide to speak about the injustices of slavery, patriarchy, and lynching at the intersection of sexism and racism. Du Bois, Stewart, Truth, and the African American Baptist women tap into a story that allows them to frame the complicated experience of knowing that the demand they level is unwelcome and knowing that the consequences of speaking it will likely be dire, but doing so anyway. It allows them, in the words of Nero, to engage in the practice of “voice merging,” which connects the sacredness of the duty of fighting racism and sexism to the sacred task of Esther saving the Jewish people from genocide.³⁹ Although Nero speaks of this as a practice of legitimation, it is also a means to support these activists to communicate their challenges and the aims of their work. Through Black feminist and Jewish storytelling around Queen Esther, Du Bois finds a structure and tradition to frame the conflict of John and all—including himself⁴⁰—who put their lives on the line for themselves and those they love and the racial group they identify with.

Du Bois’s notion of contribution speaks to our capacity to tell stories of traumatic vulnerability. In above sections, I have identified this capacity to tell stories with the invocation of a community of support that would provide support and accountability for aggrieved persons in their processes of recovery. Once these stories are told, they leave behind a legacy that contributes to others who may suffer similar harms. As mentioned above, they have the potential to break the sense of traumatic isolation for listeners or readers who have also lost loved ones to murder. Telling these stories also creates a legacy that can open up a virtuous cycle: The contribution of the story of the experience of trauma supports others in the articulation of their own experience of trauma. The citations of Esther demonstrate this: Jewish people tell a story about their experience on the brink of genocide in Persia, Black women take up this story as a means to understand the risk and promise of standing as a woman for the sake of Black people in a white-male supremacist culture. Du Bois uses these traditions to articulate the vulnerability that comes with using one’s education for the sake of Black uplift in a white supremacist culture. These stories told about trauma are flexible, and thus relevant to attempts to tell stories and invoke new communities around new traumas.

³⁹ Ibid., 266.

⁴⁰ Nero identifies Du Bois’s own citation of Esther in his personal journals, quoted in David Levering Lewis’ biography. After celebrations in Germany on the occasion of his 25th birthday, Du Bois writes: “These are my plans: to make a name in science, to make a name in literature and thus to raise my race. Or perhaps to raise a visible empire in Africa thro’ England, France or Germany. I wonder what will be the outcome? Who knows?” In closing, Du Bois foreshadowed “Of the Coming of John” when he quoted Esther 4:16: “I will go unto the king—which is not according to the law and if I perish—I PERISH.” Nero, “Queering The Souls of Black Folk,” 268.

Du Bois writes: “We believe that the Negro people, as a race, have a contribution to make to civilization and humanity which no other race can make.”⁴¹ This refers in part to the legacy which Black traditions of teaching and learning have left and will leave for humanity writ large. This encompasses the work of leaving a legacy of story and teaching that can be useful for others who face vulnerabilities that challenge their capacity for communication. It also encompasses the socio-political demands that arise out of the Black experience of group trauma. In the case of “Of the Coming of John,” it is the articulation of the wrong of white supremacist violence and the need for a community response to face this wrong. Although this wrong can be articulated by members of non-Black groups, there is an urgency and breadth of understanding of the harm and its repair that comes only with living with the threat of that violence on an everyday basis. There is an urgency that comes with seeing the work of institutions of Black higher learning undermined by that violence.

In “The Conservation of the Races,” Du Bois develops the notion of “contribution” as a groundwork for a multiracial democracy in the U.S. He writes, “We believe that, unless modern civilization is a failure, it is entirely feasible and practicable for two races in such essential political, economic and religious harmony as the white and colored people of America, to develop side by side in peace and mutual happiness, the peculiar contribution which each has to make to the culture of their common country.”⁴² Du Bois is advocating for the possibility of racial distinction without white supremacist subordination of the striving, creations, and lives of Black people. In the presence of equality and justice, there is the possibility for persons of all races to be engaged in the work of contribution: Working to bring their aesthetic, ethical and epistemic insight and story into the world.

My use of “contribution” as a means to guide an institutional response on behalf of persons who are aggrieved by murder diverges from the context in which Du Bois developed the term. Contribution, in the Du Boisian sense, is indexed to racial tradition and making that tradition meaningful for the purposes of democracy founded on respect for racial distinction. Within the framework of a multiracial democracy, there will be institutions like the criminal justice system that can take the principles of contribution as guiding principles without being strictly tied to supporting racial contribution. The notion of contribution I take as a guide for victim-oriented proceedings of the criminal justice system is supported by a racial tradition. It can uphold and project forward racial traditions, but it does not necessarily do this work. The group of interest in my dissertation is “persons aggrieved by murder.” They are united in grief over losing a loved one. Their contributions

⁴¹ Du Bois, “The Conservation of Races,” 825.

⁴² Ibid.

are for the sake of their own recovery and for creating a legacy of memorialization for the one that is lost. As with Du Boisian contribution, that work of recovery and memorialization is oriented towards creations of legacies that support the realization of flourishing for all members of the polity. Whereas Du Bois envisions a polity built out of the diverse teachings made possible by the support for the flourishing of diverse racial lineages, I envision a polity that supports the diverse teachings of those who are aggrieved by murder as an aspect of Du Bois's project. With a community choosing to learn and engage in these practices of recovery, a legacy of support is available for others who suffer similar harms or wish to create richer forms of community support for grief. The teachings at stake are united by delving into grief and recovery. Not all of this work will be explicitly guided by delving into racial traditions of teaching and learning.

The principles that I take from Du Bois to guide the transformation of the criminal justice system's response to aggrieved persons are: The importance of having intellectual, moral, epistemic, and aesthetic traditions from which to tell one's own stories; creating intellectual, moral, epistemic, and aesthetic artifacts are expressions of our human capacity to teach and learn; that those artifacts serve as a resource for those who seek to articulate their experience in the future; and the importance of building social and political demands out of the experience of injustice. When I recommend these principles to victim rights advocates, I offer resources to support storytelling and testimony such that the virtuous cycle that can result is made more likely. Such storytelling and testimony not only invokes community that can support recovery, but they also do important social and political work: Those stories and the work of those communities leave a legacy of testimony and response to trauma that can guide institutional transformation. This institutional transformation be oriented towards better communal support of the aggrieved. They can also be oriented towards preventing those harms from being repeated in the future.

Section VIII: Forms of Contribution Through Grief

An important aspect of the Du Boisian notion of contribution is the thought that we can return to traumatic experience and mine that experience for knowledge that builds community and enhances our own living and loving. In this final section, I will make the notion of contribution in the aftermath of murder concrete by providing four potential contributions through grieving that would constitute the testimony that victims' rights advocates should seek.

First, there is the form of contribution through grieving that looks to experiences of loss to ground ethical principles for living together. In one of the most moving passages of "The Sorrow

Songs” essay, Du Bois contends that Black people in the U.S. have responded to 300 years of traumatic violence—in important part—with the demand for justice.⁴³ He writes:

Around us the history of the land has centred for thrice a hundred years; out of the nation’s heart we have called for all that was best to throttle and subdue all that was worse; fire, blood, prayer and sacrifice, have billowed over this people, and they have found peace only at the alters of the God of Right.⁴⁴

In the context of the “Sorrow Songs” essay, Du Bois describes the “gift of Spirit” as a prophetic call to white U.S. Americans “to despise not Justice, Mercy, and Truth” lest the nation be smitten with a curse.”⁴⁵ In the midst of slavery, the “God of Right” knew the wrong that Black people were undergoing. Sorrow songs sung on behalf of the “God of Right” united people in the articulation of the wrongs of enslavement and the white supremacist ordering of human life.

An orientation towards “Right” seeks to rectify a particular wrong while also teaching the lessons of those particular wrongs in a categorical way. Out of the Sorrow Songs, one can teach: “The suffering of chattel slavery ought never to be repeated” and “Humans ought to be able to build community through choice.” It is the categorical lessons which I emphasize here: Where a specific instance of traumatic violence is examined and taken as an opportunity to develop a principle by which to orient present and future living together. For my own work, I look to my family’s experience of genocide and their struggle to resist visiting aspects of those wrongs upon those they love as the foundation for not only condemning genocide, but also asserting that “Those who suffer traumatic harms should have support to resist the psychological propensity to repeat aspects of those harms on others.”

Second, there is a form of contribution through grief that looks to the person who was lost—a trait or a message—and takes up that as an aspect of oneself. In “Of Alexander Crummell,” Du Bois memorializes Crummell through an accounting of his lifelong struggle to communicate and build community around his work.⁴⁶ Much of the essay is a tribute to the relentlessness of that struggle in the face of white supremacy. For Du Bois, white supremacy not only blocked paths to professional progress, but it brought out hatred and despair, which threatened to derail Crummell’s lifework. As Du Bois writes at an early stage of his career, he seeks guidance on how to face the inevitable obstacles that confront Black visionaries in a world structured by white supremacy. He

⁴³ Du Bois, “Souls of Black Folk,” 536–46.

⁴⁴ Ibid, 545.

⁴⁵ Ibid.

⁴⁶ Du Bois, “Souls of Black Folk,” 512–20.

holds up Crummell's example as one who labored honorably through obstacles: "He never faltered, he seldom complained; he simply worked, inspiring the young, rebuking the old, helping the weak, guiding the strong."⁴⁷ Insofar as Du Bois memorializes Crummell and takes on his example for himself, he makes loss meaningful through emulation. This is the work where aggrieved look to the one who is lost, interpret the lost one's life in the context of lived problems, and seeks to gain guidance from there.

Third, there is a form of contribution through grief that looks to the experience of loss and seeks to learn something from that experience. What was a form of support for grief that was required, but that was absent? How did this experience of loss reveal the complicated nature of our relationship to other people? How does the experience of mortality bring about a need to reorganize our priorities? How does confrontation with terrible injustice or cruelty point to a need to build new forms of understanding ourselves and others? Out of these questions there is the possibility of contributing to others who might suffer a similar loss in the future. There is the opportunity to speak truth about the nature of our relationships and our attachments.

Fourth, there is a form of grieving that works toward the transformation of the conditions that created the traumatic loss. This is one that takes up the political imperatives of resisting the institutional and social conditions that contributed to the occurrence of the trauma. This is the work of creating institutional space for the concerns that are raised in "Of the Coming of John" and in the work of all people who organize to take on a systematic issue. People from groups as diverse as AIDS Coalition to Unleash Power (ACT UP) to the Tay Sachs and Allied Diseases Association take on this imperative. As do people who identify as victims and take up the mantle of victims' rights as closure—despite being misguided in their calls for harsh punishment as a means to support victims—and those who take up their experience for the purposes of reconciliation or transformative justice.

Conclusion

In this chapter I have contested the underlying conception of grief at stake in discourses that link harsh punishment to closure for aggrieved persons. I showed that the conception of grief which assumes that harsh punishment establishes closure for aggrieved persons does not stand up to research on trauma. I have mapped a means of supporting aggrieved persons that does not rely upon the result of the sentencing phase of criminal trials. I contend that institutions of criminal

⁴⁷ Ibid., 521.

justice can lend support to aggrieved people by supporting their capacities to tell stories and teach in the aftermath of traumatic experience. Institutions can assist communities to not only be sensitive to the vicissitudes of traumatic experience, but to learn from aggrieved persons in light of their stories. I have looked to Du Bois for both an instance of this storytelling and a conceptual framework for it. Adapted for the purposes of supporting aggrieved persons in the aftermath of murder, I argue that Du Bois's notion of contribution should take the place of closure as the aim of victim-oriented measures taken by the criminal justice system. Instead of promising to suture the wound of traumatic loss, the storytelling and social and political demands promoted by contribution offer a basis of ongoing support for aggrieved persons. This is support for the aggrieved to become teachers of their trauma. As such, they take on the power to guide the healing of their own trauma as well as the traumas of others.

Chapter III

Testimony and Responsibility-Taking in the Aftermath of Murder: Beyond Victim Impact Statements

In my previous chapter, I suggested that the link between harsh punishment and victim satisfaction is undermined by the ongoing challenges of traumatic experience. For both therapeutic and socio-political reasons, I argued that more robust support for victims of traumatic experience begins with support for them to make testimonial contributions: Creative artifacts, stories, demands that are drawn from the experience of loss and grief. I suggested that such artifacts, in the context of a compassionate community, could invoke ongoing support that goes far beyond that which is offered by a sentence handed down by a judicial body.

In this chapter, I address the question: Does the victim advocacy I call for simply reiterate the demand for victim impact statements? A politico-legal achievement of the victims' rights movement, victim impact statements allow for testimony from an aggrieved person in a form that seems to meet and even exceed the standard of victim-advocacy that I outlined in my previous chapter under the heading of contribution. Amidst a strong push for victims' rights, *Payne v. Tennessee* opened the door for the testimony of the aggrieved in the sentencing phase of capital trials.¹ They are also a part of non-capital cases in all 50 U.S. states.² This chapter begins with a definition of victim impact statements and an outline of the jurisprudential debates that define the practice of testimony of the aggrieved in capital cases. Although there is variation among jurisdictions, at a bare minimum, victim impact statements allow aggrieved persons to testify to the emotional and financial harms that they suffered as a result of murder as well. They are also allowed to offer a glimpse into the life of the victim.³ This forum thus meets many of the criteria I spelled out in the preceding chapter: There is a public forum supported by institutions of criminal justice for testimony and an opportunity for aggrieved persons to articulate the pain of loss and briefly memorialize the person they lost.⁴ Beyond what I outlined in the previous chapter, participation in the sentencing phase of the trial allows aggrieved persons to participate in the proceedings of the criminal justice system.

¹ Vivian Berger, "Payne and Suffering - A Personal Reflection and a Victim-Centered Critique," *Florida State University Law Review* 20 (1992-1993): 21.

² National Center for Victims of Crime, "Victim Impact Statements," *Victimsofcrime.org*, 2008, <https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements>.

³ Wayne A. Logan, "Victim Impact Evidence in Federal Capital Trials," *Federal Sentencing Reporter* 19, no. 1 (2006): 05-12, doi:10.1525/fsr.2006.19.1.05.

⁴ Edna Erez, "Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceeding," *Criminal Law Bulletin* 40 (October 2004): 483-500.

Given that we invest sentences of punishment with the power to memorialize and affirm the value of the one lost to murder, this participation often feels like a contribution to the legacy of the victim.

Although victim impact statements may seem to meet and exceed the victim support that I brought together under the heading of contribution, I suggest these apparent benefits are outweighed by what is lost due to the adversarial context of these victim impact statements. The ongoing community support, which is crucial to the recovery of the aggrieved, will be limited at best. The testimony of the aggrieved is limited from two directions: It is limited by the requirement that the aggrieved speak to a limited scope of the harms experienced. It is limited by the fact that the institutional response to their testimony comes only in the form of prosecutors (and sometimes defense attorneys) attempting to turn the testimony in the favor of those they represent.

My thesis is that the adversarial sentencing context is not the appropriate context in which to respond to the needs and demands of persons aggrieved by murder. I argue that the community formation which I sought in the previous chapter is best delivered through an institutionally supported forum outside the traditional proceedings of the criminal justice system. I will offer norms and guidelines for those fora and those who choose to participate in them. These are norms to guide the practices of implementing the virtuous cycle I outlined in my previous chapter.

Section I: Victim Impact Statements in the Aftermath of Murder in the U.S. Criminal Justice System

In cases of murder, victim impact statements refer to testimony given by aggrieved persons on the emotional, financial, and physical consequences of crime. These testimonies are offered during the sentencing phase of trials and at parole hearings. They are accounts of the consequences of crime that would not ordinarily be heard in the course of the criminal trial: They are meant to reveal aspects of the harm beyond the knowledge gained in the presentation of evidence, the testimony of witnesses, and the presentation of testimony mitigating the blameworthiness of the defendant. They provide testimony that guides the criminal court's decision to award financial restitution to victims. In cases of murder, victim impact statements are generally reserved for family members, but in many districts, friends, community members, and even emergency personnel are allowed to testify.

According to supporters, these impact statements offer victims a therapeutic opportunity to express themselves. For reasons similar to those I argued for in my last chapter, advocates see the act of testimony as a good in itself for aggrieved persons. Additionally, it gives aggrieved persons a forum where their status as persons victimized by crime is publically acknowledged. Victim impact

statements are also said to provide support for the determination of justice. According to advocates, the statements of aggrieved persons offer judge and jury a novel view of the harm, which assists in the determination of a sentence proportionate to the crime.⁵

Victim impact statements are admissible throughout all fifty states and in federal courts as well. Not only are they admissible nearly everywhere, but 36 out of 50 states have passed victim rights amendments,⁶ most of which guarantee victims the “right to be reasonably heard.” The federal government also guarantees this right to victims through its 2004 Victim Rights’ Act. At present, the phenomenon of victim impact statements has spread throughout European and European settler-colonial nations: England and Wales, Ireland, New Zealand, Canada, Australia, and the Netherlands allow victim/aggrieved people’s testimony at some stage in the criminal trial.⁷

In the U.S., controversies over victim impact statements as a practice are presently confined to scholarly legal debates. However, challenges to victim impact statements in cases of capital murder (where defendants are eligible for the death penalty) have gone to the U.S. supreme court in *Booth v. Maryland* (1987), *Gathers v. Virginia* (1989), and *Payne v. Tennessee* (1991). In *Booth* and *Gathers*, victim impact statements were ruled to be trespassing the Eight Amendment’s prohibition against cruel and unusual punishment, specifically with regards the proportionality doctrine. Justice Powell, writing for the *Booth* majority, wrote:

The admission of the family members’ emotionally charged opinions and characterizations of the crimes could serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. Such admission is therefore inconsistent with the reasoned decision making required in capital cases.⁸

The considerations regarding the character of the victim and the consequences for the aggrieved in the aftermath were ruled irrelevant to question of the defendant’s blameworthiness. The court argued that punishment should not follow from how pious or gracious the murdered victim was. Nor should it follow from how deeply missed the victim is. The principle behind the ruling is one of equal protection: Punishment should be consistent whether or not the victim’s memory garnered affecting testimony. Punishment should be consistent whether the victims’ loss is felt deeply by others willing to testify or not. In the *Gathers* decision, the court affirmed that considerations of the

⁵ Paul G. Cassell, “In Defense of Victim Impact Statements,” *Ohio State Journal of Criminal Law* 6, no. 2 (2009): 611–48.

⁶ National Victims’ Constitutional Amendment Passage, “State Victim Rights Amendments,” *Nvcap.org*, 2015, <http://nvcap.org/stvras.html>.

⁷ Vicky De Mesmaecker, “Antidotes to Injustice? Victim Statements’ Impact on Victims’ Sense of Security,” *International Review of Victimology* 18, no. 2 (May 1, 2012): 134, doi:10.1177/0269758011432954.

⁸ *Booth v. Maryland*, 482 U.S. 497 (U.S. Supreme Court 1987).

victim's good character and religiosity in victim impact testimony ran afoul of the Eighth Amendment.⁹ Given that the moral and religious character of the victim was—in this case at least—irrelevant to the defendant's decision to commit the crime, the court argued that it should not be a part of the decision as to how that crime should be punished.

There is a Kantian commitment in the majority decisions in *Booth* and *Gathers*: Punishment should not hinge on the unforeseen or unforeseeable consequences of criminal behavior, specifically the effects on the family and community of the one lost to murder.¹⁰ *Payne* overturned both decisions—in part—on the grounds that the proportionality considerations of the Eighth Amendment do not necessarily rule out aggrieved people's testimony. The *Payne* majority argued that the harms caused to family members in the aftermath of murder are not different in kind from the ways in which courts traditionally consider the consequences of criminal behavior to be relevant to punishment.¹¹ This picks up a line of thought explicated by Justice White in his dissent to *Booth*. He argued that we expect harsher punishment for a reckless driver who unintentionally kills someone than to a reckless driver who harms no one.¹² Punishment can thus follow from unintended consequences. The *Payne* decision suggests that the trauma of loss and the loss of the particular contribution that the victim made and/or was capable of making are unintended consequences of crime relevant to deciding punishment. Victim impact statements are admissible as a means to bring those unintended consequences into the view of the court.

The majority offered further defenses of victim impact statements in *Payne*: Given that the defendant has an extended opportunity to call forth witnesses for the purposes of testifying to their individual moral and social worth (for the purposes of mitigating blameworthiness), the majority in *Payne* argued that the victim should have the right to have witnesses testifying to their individual worth. In *Payne*, Pervis Payne's girlfriend and parents testified to his church-going ways, his kindness to children, the absence of previous run-ins with police, and the absence of a history of drug or alcohol abuse.¹³ In other contexts, mitigating evidence may speak to the defendant's work towards rehabilitative goals and their remorse for the crime. Mitigating evidence is offered in support of the contention that the defendant is worthy of a lighter sentence.

⁹ *South Carolina v. Gathers*, 490 U.S. 805 (U.S. Supreme Court 1989).

¹⁰ R.P. Peerenboom, "Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of *Payne v. Tennessee*," *Pepperdine Law Review* 20, no. 1 (December 15, 1992): 25–72.

¹¹ *Ibid.*, 27.

¹² *Booth v. Maryland*, 482 U.S. 497, 515 (U.S. Supreme Court 1987).

¹³ *Payne v. Tennessee*, 501 U.S. 808, 814 (U.S. Supreme Court 1991).

The *Payne* court argued that if the character of the defendant is presented before the court without presentation of the character of the victim, it “unfairly weigh[s] the scales in a criminal trial.” Writing in dissent from the *Booth* decision, Justice Scalia explains the notion of balance in the sentencing phase that won the day in *Payne*:

To require, as we have, that all mitigating factors which render capital punishment a harsh penalty in the particular case be placed before the sentencing authority, while simultaneously requiring, as we do today, that evidence of much of the human suffering the defendant has inflicted be suppressed, in effect to prescribe a debate on the appropriateness of the capital penalty with one side muted.¹⁴

Scalia frames the issue as one of procedural fairness to the prosecution. If the defense is allowed a wide scope in their attempt to show that their defendant is an individual deserving of a lighter sentence, then there should be a wide scope for the prosecution to show that the victim is an individual whose suffering justifies the harsher sentence. I will return later in this chapter to examine the presumption that the aggrieved person’s testimony is for the purposes of amplifying the prosecutor’s case.

The stakes of balancing testimony of the aggrieved with mitigation in the sentencing phase go beyond procedural concerns about fairness to the prosecution. The stakes are also therapeutic and symbolic. In a concurring opinion to *Payne*, Justice O’Connor writes:

“Murder is the ultimate act of depersonalization.” Brief for Justice For All Political Committee et al. as *Amici Curiae* 3. It transforms a living person with hopes, dreams, and fears into a corpse, thereby taking away all that is special and unique about the person. The Constitution does not preclude a State from deciding to give some of that back.¹⁵

O’Connor suggests that the victim impact statements can take on a memorializing function that does not necessarily trespass on the Eighth Amendment. For O’Connor, the testimony that the victims’ son misses his mother could not have been enough to prejudice the jury beyond the prejudice that came with hearing about the extreme violence of the murders and rape committed by the defendant.¹⁶ This is a nod to the *Booth* court’s worry that victim impact testimony would “inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant.” In instances where victim impact testimony has the prejudicial effect that the

¹⁴ *Booth v. Maryland*, 482 U.S. 497, 520 (U.S. Supreme Court 1987).

¹⁵ *Payne v. Tennessee*, 501 U.S. 808, 832 (U.S. Supreme Court 1991).

¹⁶ *Ibid.*

Booth court feared, O'Connor says that the defense can point to the Fourteenth amendment, which guarantees due process.¹⁷

Once constitutional worries are put aside, the aggrieved person's testimony can play the role of returning personality to the victim of murder that was stolen by the perpetrator. We can understand this notion of redress in the context of the rhetoric of victims' rights advocates, which O'Connor cites above. For many advocates of victim impact statements, the aggrieved are doubly wronged insofar as there they suffer the loss of loved one in murder and suffer a secondary harm that comes with being silenced in the proceedings of the criminal justice system.¹⁸ In effect: If deprived of the opportunity to speak to the traits, characteristics, and contributions of the victim, victims' advocacy groups frame the government as repeating an aspect of the harm that was inflicted by the perpetrator. Through victim impact statements, the criminal justice system can resist such repetition and serve the aggrieved by including the memory of the victim in the sentencing proceedings of the court.

In this review of the history of victim impact statements, particularly in cases of capital murder, I've addressed the procedural and victim-centered dimensions of their jurisprudential justification. The procedural considerations were highlighted in my explication of the Supreme Court's broadening of the harms relevant for punishment and the claim that fairness to the prosecution requires the ability to present victim impact statements to the court. The overarching claim is that better sentencing procedures require the inclusion of victim impact statements. The questions that arise from this justification are many: Does bringing the testimony of aggrieved into these proceedings create circumstances where they exercise too much control over the punishment of the defendant? Does this testimony constitute a rejection of the tradition by which we prosecute criminal trespasses as harms against the state rather than harms between two individuals (and their families)? Is the testimony relevant to the question of determination of the defendant's blameworthiness?

On the other hand, considerations of the welfare of the aggrieved are also a part of the justifications for victim impact testimony in the rhetoric of victim rights advocates and in decisions of the Supreme Court Justices. The overarching claim is that support for the aggrieved and memory of victims is served through victim impact testimony. There are also enduring questions that arise

¹⁷ Ibid.

¹⁸ Cassell, "In Defense of Victim Impact Statements," 464; Julian V. Roberts and Edna Erez, "Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements," *International Review of Victimology* 10, no. 3 (January 1, 2004): 225.

out of this claim: Does the testimony of the aggrieved create healing for aggrieved persons? Does it create a meaningful sense of participation for the aggrieved in the proceedings of criminal justice? Does it create a meaningful sense of memorialization for the victim?

Section II: Victim Impact Statements as Support for the Aggrieved

Both the procedural and welfare of the aggrieved justifications of victim impact statements are important for my argument in this chapter, despite the fact that my dissertation's guiding question is one of the welfare of the aggrieved. My overarching question is: What should institutions of criminal justice contribute to the redress of those who are aggrieved by murder? The procedural debates and regulations at stake within the U.S. criminal justice system might seem to be beyond the scope of my dissertation. However, they are important insofar as they create the boundaries around testimony as it is presented under the heading of victim impact statements. For instance, insofar as victim impact statements are understood by the Court as a procedural balance to defense mitigation, the testimony of the aggrieved during the sentencing phase will be framed as support for prosecutorial arguments for aggravation. Against the defense's attempt to put forward evidence that the defendant is capable of being a contributing member to society who deserves better than the court's harshest sentence, the aggrieved's testimony will be framed as an attempt to show that the character of the defendant is so blameworthy as to deserve the harshest sentence.

I will argue ultimately that the procedural goals of victim impact statements create an untenable conflict with the goals of redress and recovery for aggrieved and the memorialization of victims. Before building that argument, I will look to arguments by advocates of victim impact statements who, like Justice O'Connor in her concurring opinion cited above, suggest that that goals of welfare for the aggrieved can be achieved within the adversarial context of the sentencing proceedings. I focus on the overlap between the arguments of supporters of victim impact statements and my conception of contribution and community response to show the apparent sufficiency of victim impact statements as a form of redress. For that purpose, I'll break down the points of intersection between victim impact statements and my conception of contribution and response: First, I'll look to the ways in which victim impact statements encourage the testimony of the aggrieved. Second, I'll look to the ways in which victim impact statements allow for this testimony to be heard by a receptive community. Third, I'll look to how victim impact statements elicit support from those who hear them.

In the preceding chapter I argued for the cardinal importance of persons aggrieved by murder articulating the harm they have suffered. I suggested that stories are the grounds on which

communities can be constituted in support of recovery and resistance to vicious cycles of repetition. I contended that institutions of criminal justice should take responsibility for encouraging the aggrieved to craft testimony on the experience of murder. I suggested that these institutions should take a role in constituting communities such that this testimony opens a virtuous cycle where those articulations could be taken up by others in the interest of the recovery of the aggrieved and the community that has suffered the violence of murder. In victim impact testimony, the institution of criminal justice supports the aggrieved in making testimony by giving them a privileged place to speak in the proceedings of the criminal trial. This is a process that is supported mostly by prosecutors and—in some jurisdictions—victims’ advocates who guide the aggrieved person through the process of testifying. Jurisdictions often publicize guidelines for the structure of testimony.¹⁹

The expression of the dimensions of the harm experienced and the memorialization of the one lost to murder is encouraged by a criminal justice system that—at present—devotes the most socio-political attention and ritual to murder. It is not only the attention that trials give to the event of murder that makes them an important place for testimony, but it is also the ways in which trials have been given cultural meaning. We invest a memorializing function in trials, which contributes to the anguish that arises in miscarriages of justice and satisfaction when the guilty are sufficiently punished.²⁰ Miscarriages of justice express more than incompetence or bias among those who decided the case: They are expressions of political disregard for the victim of murder. In cases of murder where the social positionality of the perpetrator is privileged above that of the victim, miscarriages of justice signal an institutional affirmation of the hierarchical valuation of privileged groups over others. In cases where guilty verdicts and sufficiently harsh sentences are leveled against privileged persons who have committed crimes against those with less privilege, there is sometimes occasion for relief. Those cases express the worth and value of the life lost despite socio-political pressures to the contrary.

We invest criminal trials (and especially their verdicts) with the power to undermine and affirm the worth of the one who has been lost to murder. Advocates could argue that victim impact statements are meaningful because they give aggrieved people an opportunity to effect the sentence

¹⁹ Douglas Evan Beloof, “The Third Model of Criminal Process: The Victim Participation Model,” *Utah Law Review*, no. 2 (1999): 289–330.

²⁰ Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (Cambridge, Mass: Harvard University Press, 2002); George P. Fletcher, *With Justice For Some: Victims’ Rights In Criminal Trials* (Reading, Mass: Addison Wesley, 1995), 201–7.

handed down. In this context, their testimony does not only support their own grieving process and call forth the support of others—as I suggested in my previous chapter—but, it influences a socially and politically powerful means of memorializing. The aggrieved person has the opportunity to speak to those deliberating on the severity of punishment. They are thus speaking to people endowed with the power to affirm the socio-political worth and legacy of the dead through their decision.

In addition to playing a role in memorializing the one who has been murdered, court proceedings create an opportunity for acknowledgement of the aggrieved's status as one who is rightfully aggrieved by murder. In "Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceedings," Edna Erez argues for the importance of such acknowledgement of victim status. She cites an empirical study of the goals of crime victims in their participation in the criminal justice system, which "identified public recognition of victim status as the most significant [goal]." She continues, "The study confirmed that victims experience the refusal of victim status as secondary victimization, and that the VIS [Victim Impact Statement] can well serve victims by recognizing victim status."²¹ They speak to a group of persons who have extensive knowledge of the details of the murder and have already decided on the guilt of the defendant. In victim impact testimony, aggrieved people speak in a forum where they are introduced and given space to speak *as victims*. These circumstances free them from the everyday burdens that come with telling the story from start to finish so as to establish their victimization. Unlike the everyday experience of explaining what has transpired, speaking to the court in the midst of their deliberations endows the aggrieved with an opportunity to speak with little likelihood of their victim status being gainsaid. It is, for instance, rare that the aggrieved will be confronted with a cross-examination where the defense attorney raises questions about the character of the victim and whether the victim deserved their fate.²²

For advocates like Edna Erez, Julian Roberts and Paul Cassell, victim impact statements encourage testimony and create the opportunity for this testimony to be articulated to a receptive audience.²³ Testimony is meaningful for aggrieved persons for a variety of reasons: The power that comes with expressing one's affection for the lost loved one. An opportunity to express the value of one's loved one in proceedings that many see as an implicit form of memorialization. The

²¹ Erez, "Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceeding," 492.

²² Wayne A. Logan, "Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials," *Arizona Law Review* 41 (1999): 159–60.

²³ Cassell, "In Defense of Victim Impact Statements"; Paul G. Cassell, "Balancing the Scales of Justice: The Case for and the Effects of Utah," *Utah Law Review*, no. 4 (1994): 1373–1469; Roberts and Erez, "Communication in Sentencing."

affirmation of victimization that comes with being recognized by a group of people in a formal and institutional setting as one who has been harmed. This recognition and acknowledgement can sometimes be codified in the case law as judges will sometimes cite the victim impact testimony in their opinion. Erez cites empirical studies that suggest that such recognition makes victims feel included and seen in the proceedings.²⁴

Thus, victim impact statements offer those who have survived traumatic experience the opportunity to experience the positive transformation of the meaning of vulnerability that I spoke of in my second chapter. Murder exploits the vulnerability of the victims' body for the perpetrator's ends. Murder reveals the painful aspect of vulnerability in the relationship of the aggrieved to their lost loved one. The vulnerability that is constitutive of close relationship becomes an occasion for grief and pain. As we saw last chapter, victims of trauma—including those aggrieved by murder—struggle to regain trust and feelings of safety in the vulnerability of relationship. The opportunity to make a statement to the court offers aggrieved persons the opportunity to share vulnerability with others who are prepared to respect and listen to it. Sharing vulnerability brings about the possibility of influencing proceedings that are endowed with the power to memorialize and affirm the worth of the victim. Victim impact statements create the opportunity to make vulnerability into something positive: An opportunity to be heard in a respectful way and a means to memorialize and honor the lost loved one.

In this section, I have offered evidence in support of the claim of victim advocates that victim impact statements benefit redress and recovery for the aggrieved. I have suggested that there are points of important overlap between my Du Boisian notion of contribution and the redress rendered by victim impact statements. I have suggested that victim impact statements may even render a greater service than my conception of redress insofar as they allow aggrieved people to exert influence on the judicial sentencing of the court. I do not stand in strict opposition to their claims. Although I will critique victim impact statements on the grounds that the testimony of the aggrieved is too narrowly interpreted within the adversarial sentencing phase, from the perspective of the victim's welfare and recovery in the aftermath of murder, I see victim impact statements as rendering service.²⁵ For this reason, I do not believe there are grounds for prohibiting victim impact testimony from the perspective of victims' redress and recovery. My goal is to render aggrieved

²⁴ Roberts and Erez, "Communication in Sentencing," 231.

²⁵ I have serious reservations about victim impact statements on procedural jurisprudential grounds of fairness and equal protection. But, making such an argument would require focus on jurisprudential questions that go beyond my dissertation's focus on the serving the aggrieved.

persons a richer forum for redress and recovery such that victim impact statements would no longer be the primary space within the criminal justice system for aggrieved persons seeking acknowledgement and memorialization.

Section III: Shortcomings of Victim Impact Statements

In this section, I argue that the service that victim impact statements render to aggrieved persons is inadequate to their testimony. Advocates of victim impact statements rely on the notion that testimony articulated within sentencing proceedings offers satisfactory redress and recovery for the aggrieved. I contend that this overlooks the ways in which the testimony that aggrieved persons are allowed in this context is limited by procedural concerns and the aims of the prosecutors who have final say as to the content of the testimony. Advocates of victim impact statements may reasonably suggest that respectfully listening to testimony and acknowledging the aggrieved's status as a victim of crime supports recovery for the aggrieved. I argue that this acknowledgement of status is insufficient to support aggrieved persons. What is missing is the ongoing support for the aggrieved that I highlighted in my previous chapter. Advocates of victim impact statements suggest that testimony contributes to more severe sentences, which is a means to memorialize the victim of murder. I contend that such a view invests too much memorializing power in a judicial authority that is not designed for this purpose.

I will first look to the ways in which the procedural principles of the adversarial court limit the expression allowed by aggrieved people in their victim impact statements. Although the *Payne* majority allowed victim impact statements and overturned *Booth*, the *Payne* majority constrained their content in line with concerns raised by the *Booth* majority: Aggrieved persons could provide only a “quick glimpse of the life” of the victim.²⁶ They may not express opinions on the sentence deserved by the victim. They may not express opinions about the character of the defendant. They may not express “comparative worth” evaluation where they compare the worth of the victim to that of the defendant.²⁷

There are judicial principles at stake in these constraints. The brevity requirement limits the recollections of aggrieved persons to establish the individuality of the victim without risking a sentencing decision based on factors that were irrelevant or unforeseeable to the defendant's decision to murder. The prohibition against expression of opinions on the appropriate sentence speaks to the principle that the jury should determine the sentence as a result of weighing

²⁶ Logan, “Victim Impact Evidence in Federal Capital Trials,” 5.

²⁷ Logan, “Through the Past Darkly,” 157–58.

aggravating and mitigating evidence rather than the desire articulated by the aggrieved.²⁸ The constraints around claims about the defendant's character and "comparative worth" assessments are in service to the principle of equal protection, the requirement that the court view each life as equally valuable no matter the character or good deeds of the life in question.

Whether or not these constraints limit victim impact statements in present-day practice,²⁹ they reveal the ways in which the expressive ends of the testimony of the aggrieved are limited by the procedural principles of adversarial hearings. These are not constraints that make testimony impossible, but they show the friction between procedural principles oriented toward ends of fairness and the ends of recovery and memorialization for aggrieved persons. This means that what might be good for the ends desired by the victim must be balanced with ends of fairness and consistency of judicial procedures. These are not complementary aims. For instance, testimony restricted to provide only a "quick glimpse" to establish that one lost to murder was a person whose individuality is deserving of respect is not a robust form of memorialization. It does not allow the aggrieved to speak to the meaning of their relationship to the one lost to murder. The expression of anger at the defendant could conceivably be an important part of an aggrieved person's testimony, but such expressions are subject to defense attorney's objections. Further, the adversarial context means that victim impact statements are subject to cross-examination. This means that claims about the victim's character are subject to scrutiny by the defense.³⁰

Given that these constraints have not been widely enforced and defense attorneys have remained cautious in their challenges to aggrieved persons offering victim impact statements, it would be wrong to suggest that the court is unduly restrictive for the testimony of the aggrieved. Nonetheless, the courts' accommodations to victims and their survivors are in tension with foundational procedural principles. There is no principled reason that the procedural values could not be resurgent or that defense attorneys could not devise new ways of challenging the claims of aggrieved person's memorializing testimony. The sentencing proceedings are a forum that serves victims in the context of serving procedural ends, they are thus not a testimonial forum reliably devoted to the therapeutic and memorialization processes of the aggrieved.

²⁸ It seems to create problems of arbitrariness if two people who committed the same murder would have different sentences simply because one victim's family stood in favor of harsh punishment and another stood in favor of lighter punishment.

²⁹ Evidence suggests that these constraints have been considerably weakened since the *Payne* decision in 1991. Logan, "Victim Impact Evidence in Federal Capital Trials"; Logan, "Through the Past Darkly."

³⁰ Again, such impugning of the victims' character in the response to the victim impact statements are rare, but there is no prohibition against defense attorney's refining their methods and making the practice more widespread.

In her essay on the experience of the criminal justice system in the aftermath of her brother's murder, Charisse Coleman describes the parameters set out by the Louisiana judge that constrained her and her family's victim impact testimony. She writes:

Cameron [the victims' brother] could not testify about the income he lost when his depression in the wake of Russell's murder crippled his ability to function in his job. He wasn't allowed to mention his depression at all, in fact. Similarly, the judge ruled that Hugo [the prosecutor] could not elicit my testimony describing the months of insomnia.... Since sleeplessness could not be mentioned, the disruption to my work and general well-being that resulted from being awake all night and sleeping away the daylight hours would also go unremarked. My mother would not be telling the jury about the debilitation of a sorrowful fury that had no outlet, or of her often diminished ability to concentrate.... We were not permitted to tell of friendships that had evaporated overnight, or of friends who had drifted more gradually away, steered by the duration of our unassailable grief and their own queasiness and fear, as if the violence that had befallen us might somehow be contagious.³¹

In the absence of the more permissive guidelines approved a year later through the victims' rights amendment in Louisiana,³² the judge limited above testimony on grounds of precedent. The judge's decision reflects a procedural commitment to restricting testimony on the symptoms of traumatic loss unforeseeable by the defendant when he perpetrated the murder-robbery.

There are good reasons to side with the judge's restrictions: Admitting the testimony that one family member suffered from insomnia and another suffered from depression brings up problems of arbitrariness in sentencing: If some aggrieved persons experience their grief more or less intensely than others, it is not clear why that should affect aggravation in the sentencing decision. Although most experience trauma in the aftermath of the murder of a loved one, it is questionable whether a potentially harsher sentence should be handed down because some aggrieved people are more demonstrably traumatized than others. I will further reflect on Coleman's quote later in this chapter, but for now it is sufficient to note the ways in which the concerns about the criteria by which the jury decides blameworthiness conflict with the victims' expressive goals of speaking to the full dimensions of their experience.

³¹ James R. Acker and David R. Karp, eds., *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty* (Durham, N.C.: Carolina Academic Press, 2006), 22.

³² It is likely that a good deal of the above testimony would be admitted in light of the statute's guarantee that victims have the right to "Describe any change in the victim's personal welfare or familial relationships as a result of the offense." Louisiana State Legislature, "Louisiana Victims' Rights Laws," State Constitutional and Statutory Victims' Rights (Portland, OR: National Crime Victim Law Institute, 1998), <https://law.lclark.edu/live/files/4952-louisiana>. For timeline that includes Louisiana constitutional amendment, see Office for Victims of Crime, "Landmarks in Victims' Rights and Services," National Crime Victims' Rights Week-Resources (Washington, D.C., 2014), <http://ovc.ncjrs.gov/ncvrw2014/pdf/Landmarks.pdf>.

Beyond the procedural constraints on the testimony of the aggrieved, there are constraints that arise as a result of victim impact statements being framed as an extension of the prosecution's case. Victims are understood by the court to be working in support of the prosecution. This is an understanding that manifests in practice: The prosecution is in charge of notifying victims, organizing and reviewing the testimony of the aggrieved, and submitting it to the judge in the states that require it.³³ It also manifests in the ideological conception of victim impact statements as in support of the harshest sentence. Recall Justice Scalia's justification of *Payne* on the grounds of creating "balance" between mitigation and aggravation testimony. He argued that allowing only the mitigation testimony without the testimony of then aggrieved silences the pro-death penalty side, and thus leads to an unfair debate. Scalia's assumption is that the victim impact statements are necessarily an attempt to show aggravation as a counter to the defense's mitigation of blame.

The practical and ideological alignment of the prosecution and the aggrieved delimit the testimony of the aggrieved by creating circumstances where the testimony of the aggrieved is enlisted to show harm for the sake of demonstrating aggravation, and thus moving towards a harsher sentence.³⁴ This means that the aggrieved are confined to testifying to the harms they experienced as a result of the murder and the qualities that made the victim's life meaningful. This is important testimony, but it is nonetheless restrictive. The aggrieved has no opportunity to testify to what they need in terms of ongoing support for recovery. The focus on building a case against the defendant trumps the potential for building ongoing support for the aggrieved.

There is a mismatch between expansive testimony that speaks to the full extent of the harm the aggrieved person experienced as well as their conception of recovery in the aftermath of murder and the testimony allowed in victim impact statements. The problem with victim impact statements

³³ "Victims do not presently have party status at trial in any jurisdiction in the United States. In most state jurisdictions and in federal court, victims may hire attorneys. These privately funded prosecutors are under the control of the public prosecutor and participate at trial with the prosecutor's permission." Beloof, "Third Model of Criminal Process," 320.

³⁴ This leads to problematic exclusions of aggrieved people who do not meet the prosecutor's requirement for "good victims." There is research on the exclusion of people of color from the victim status in the criminal justice system. One can speculate that the reason that prosecutors are statistically more likely to comply with victim rights statutes in the cases of white victims is because of the racist orientation of the criminal justice system: The testimony of aggrieved people of color is less likely to call forth sympathy from sentencing authorities than that of aggrieved persons who are white. See Julie A. Beck, "Victims' Rights and Public Safety? Unmasking Racial Politics in Crime Discourses Surrounding Parole Revocation for 'Lifers' in California," *Western Criminology Review* 11, no. 1 (2010): 20–36; Norman S. Early, Jr., "Racial Minorities for Victim Justice," April 17, 2000, <http://www.nvcap.org/docs/letters/rmvj.htm>. There are also instances where the prosecutorial orientation of victim impact statements led to the exclusion of testimony from aggrieved persons with anti-death penalty commitments. See Murder Victims Family for Reconciliation, BRIEF OF AMICUS CURIA ON WRIT APPLICATION FROM THE DISTRICT COURT PARISH OF CALCASIEU, No. 10258-02, accessed April 14, 2016; Wayne A. Logan, "Confronting Evil: Victims' Rights in an Age of Terror," *Georgetown Law Journal* 96, no. 3 (2008 2007): 750–51.

has similarities with the problem I identified in discourses of closure in my previous chapter: There is a conception that the needs of the aggrieved are satisfied by a singular rather than ongoing form of support. In the case of closure, that satisfaction is said to come with the harsh punishment of the perpetrator. In the case of victim impact statements, the satisfaction is said to come with an opportunity to address the court. Advocates of closure and victim impact statements alike fail to extend institutional measures to ongoing reparation and memorialization beyond what the criminal trial offers given its focus on determining punishment for the perpetrator. The attempt to fit victim support within the framework of criminal trials undermines the potential richness that would come with proceedings focused on serving victims alone.

Advocates of victim impact statements might agree with my characterizations of the limitations of victim impact statements, but nonetheless suggest that those limitations are justifiable trade-offs for the ability to take part in the memorializing function that trials are endowed with. I disagree. I will distinguish and respond to two reasons that advocates might make this claim: First, there are those who are seeking acknowledgement of victim status in an institutional setting that is knowledgeable about the circumstances of the crime and prepared to confer that recognition upon the aggrieved. I take this conception of the good of victim impact statements to be a more general expression of the good of the testimony of the aggrieved in a forum that is friendly to it. Today, criminal trials are the central mode of bringing together a polity around murder, so it is no coincidence that this is where advocates focus their attention. However, I see no principled reason why these advocates would remain tied to victim impact statements if there were an alternative forum that could confer such acknowledgement on those aggrieved by murder with the possibility of more expansive testimony and response.

The second reason that an advocate of victim impact statements might contend that limitations on the testimony of the aggrieved are justifiable trade-offs for participation in criminal trials is that they see sentences as expressions of the worth of victims. The aggrieved person wants to contribute to the prosecutorial effort to get the harshest sentence because that sentence is a declaration of the value of the life of the victim. I take up aspects of this claim in my fourth chapter, but for now I argue that such a claim is a symptom of circumstances where aggrieved persons lack diverse opportunities to see the enormity of their grief and outrage reflected in socio-political life. In the case of murder, which constitutes an extraordinary trespass on socio-political norms, it makes sense that aggrieved persons would seek solidarity with others in the acknowledgement of the wrong. The criminal trial stands as the central opportunity for this acknowledgement at present. But,

the criminal trial is not the best forum for such acknowledgement: The aim of the criminal trial is to deliberate on evidence and decide on questions of *the defendant's* guilt and punishment. Criminal trials are focused on alleged criminals, so the acknowledgement of the enormity of the aggrieved's grief and outrage is indirect. If we give sentences too much power to memorialize and affirm the value of those lost to murder, we give it over to an institutional forum that can—even in the best of circumstances—come to a decision on a punishment that reflects factors that have little to do with the seriousness of the crime.³⁵

I do not deny that court sentences are potent signals of socio-political valuations of the life of the victim. This is especially true when the sentences reflect the hierarchical ordering of persons present in socio-political arrangements at large. When the police officer who murdered Akai Gurley received a sentence of 800 hours of community service and five years of probation rather than a prison sentence,³⁶ such punishment stands as an affirmation of an already established pattern of courts unwilling to hold police officers accountable for taking the lives of Black men. Most who kill by recklessly shooting a gun, fail to render adequate aid, and justify such recklessness by reference to their fear of the dark and being surprised by the sound of a door closing would not receive such a lenient sentence.³⁷ Such a sentence gives the officer the opportunity to live where he pleases, remain with his family, and rebuild his life according to his own lights. This leniency is taken as an expression of the value of the life of the police officer and the devaluation of the life of Akai Gurley. For those aggrieved, the sentence suggests that Akai Gurley's life was not sufficiently valuable to warrant a harsher sentence.³⁸ It signals that the police officer's life is too valuable to impose a sentence that would have disrupted his autonomy.

In the case of those aggrieved by Gurley's death, it makes sense to suggest that victim impact statements would be desirable. Victim impact statements would allow them to affirm the value of his life by speaking to the gravity of their loss. This expression calls on the court to acknowledge the gravity of that loss by holding the police officer accountable. When the court's sentence does not

³⁵ Mitigating factors can involve issues from the convicted person's past while aggravating factors can be the defendant's criminal record, for instance.

³⁶ Alan Feuer, "Ex-New York Officer Gets 5 Years of Probation in Fatal Brooklyn Shooting," *The New York Times*, April 19, 2016, <http://www.nytimes.com/2016/04/20/nyregion/peter-liang-ex-new-york-police-officer-sentenced-akai-gurley-shooting-death-brooklyn.html>.

³⁷ Sarah Maslin Nir, "Officer Peter Liang, on Stand, Breaks Down as He Recalls Brooklyn Killing," *The New York Times*, February 8, 2016, <http://www.nytimes.com/2016/02/09/nyregion/officer-peter-liang-in-emotional-testimony-describes-the-night-of-a-fatal-shooting.html>.

³⁸ In response to the sentence, Mr. Gurley's aunt, Hertencia Peterson said, "There is no justice! Akai Gurley's life didn't matter!" Feuer, "Ex-New York Officer Gets 5 Years of Probation in Fatal Brooklyn Shooting."

reflect the gravity of that loss, it is troublesome that there are no alternative institutional fora for such grief to be reflected. Without such a forum, aggrieved persons are made to rely on the criminal trial alone to yield institutional recognition for their loss.

An alternative forum devoted to testimony and the ongoing support of aggrieved persons could provide direct acknowledgement and action on behalf of aggrieved persons in the aftermath of their loss. This is not to say that the outrage at the injustice of sentences that fail to hold defendants accountable for violence would be diminished by such a forum. Such a forum could take on support for resisting injustice in the criminal justice system. But more centrally, this forum would allow for separation of the function of memorializing the one who was lost to murder from the function of deciding on the guilt and punishment of the one convicted. If those functions are separated, and the forms of support available for aggrieved persons were to proliferate in that alternative forum, the weight of memorializing the gravity of loss would no longer belong to the criminal trial alone. I would hope that aggrieved persons would no longer feel so driven towards seeing harsh punishment as the central means of socio-political memorialization. I would hope that they would no longer be willing to trade-off meaningful support for living in the aftermath of violence for the possibility of influencing the defendant's sentence. It would offer a socio-political affirmation of the value of Gurley's life such that it would not be entirely indexed to whether or not the officer received a harsh enough sentence.

My contention that there is a need for alternative fora for testimony motivated by the shortcomings of victim impact statements as a response to those who are aggrieved by murder. If the testimony of the aggrieved is limited to victim impact statements as they are presently construed, the service that the criminal justice system can render to aggrieved persons is too limited. The testimony of aggrieved persons will be constrained by procedural principles of fairness. It is limited to serving the prosecution's aim of arguing for a harsher sentence. It is not taken up for the purposes of serving the needs and pain of the aggrieved. Finally, the memorialization of the victim that takes place within the criminal trial is limited to acknowledgement that they have suffered wrongs and that they are worthy of respect by virtue of the sentence handed down. Judicial decisions are unreliable markers of the worth of the victim of murder. There needs to be alternative opportunities to affirm the worth of victims of murder.

Section IV: Alternative Fora for The Testimony of the Aggrieved

Against the contentions of victims' rights advocates—such as Erez and Cassell—who suggest that the aims of reparative support of aggrieved people can be achieved within the confines

of the criminal proceedings, I have argued that the procedural and adversarial context of those proceedings undermines the provision of meaningful reparative support for aggrieved persons. An alternative forum for testimony of the aggrieved would allow for testimony, response, and memorialization of victims focused on their redress and recovery. In this section, I will put forward the normative requirements of a forum that would serve the ends of redress and recovery. In my previous chapter, I defined redress and recovery through the lens of Du Boisian contribution. I suggested that the criminal justice system can support contribution through the provision of resources with which the aggrieved can make testimony that shapes the ongoing support they receive in the aftermath of death of a loved one by murder. By normative guidelines, I mean the conditions which a good-enough forum must meet. They are also the conditions upon which the forum can be criticized.

Before I outline those normative guidelines, I will offer a clearer picture of how I envision this forum. I will set out to answer: Who will be present for these proceedings and what will the responsibilities be for the participants? These proceedings will be attended—first and foremost—by aggrieved persons. The requirements for who can participate as an aggrieved person will be widely interpreted—this can refer to family, friends, and community members. Those closest to the aggrieved will be eligible for the widest array of support services.

The proceedings will be attended by people who choose to act in support of the aggrieved: They may be persons who are related to the aggrieved but not as seriously impacted. They may be persons who have themselves suffered loss and feel compelled to support others in their experience of loss. They may be members of the community who are for any reasons compelled to support persons through their experience of grief. I could imagine a civil volunteer programs like Americorps or Senior Corps where volunteers could be called upon to gather, hear the testimony of the aggrieved, and devise plans for ongoing support, memorialization, and learning. Roles and responsibilities post-victims' forum will be shared according to factors such as availability and proximity to the aggrieved. An official trained to preside will be responsible for maintaining the order of the proceedings and upholding the norms of the forum. Grief counselors would assist the aggrieved in organizing their testimony, support the supporters, and assist in the organization of post-forum roles and responsibilities.

The first requirement is that these fora acknowledge the status of the aggrieved as harmed and requiring redress. Above, I suggested that this is possible in the court setting insofar as those in the courtroom have already deliberated on evidence of guilt and have established beyond a

reasonable doubt that a harm occurred. The court was thus ready to acknowledge the aggrieved in a way that is not possible in everyday life. This acknowledgement was underlined by the legal-political authority invested in the court. In the proceedings I envision, the acknowledgement of victim-status of the aggrieved comes by virtue of the founding intentions of the forum. These fora are established for the sake of organizing a community to come together for the sake of persons who have been victimized by murder. Thus, the aggrieved person walks into the room surrounded by persons present for the purposes of supporting them.

Against the background of a U.S. culture not adequately prepared to assist those aggrieved by murder through an arduous grieving process (as we saw in Coleman's testimony above), these fora would provide a place for people to come together to learn to create that support. Grief counselors would assist supporters in maintaining their well-being: Helping to create balance so that supporters can maintain compassion for the struggle of the aggrieved without being overcome by the grief they are there to support. When the expressions of grief take the form of intense anger towards the perpetrator or others. When that anger is directed at the supporters themselves, supporters may need help maintaining their commitment or reinterpreting their role. If this support is present, it makes it more likely that the support for the aggrieved will persist over time.

If there is persistent support for the aggrieved, there is the opportunity to create acknowledgement of grief through concerted action. In the court, there is acknowledgement insofar as one is listened to by a group of individuals versed in the details of the harm. In the forum, acknowledgement of testimony would be delivered via reliable communal action in response to it. This means that the aggrieved person would have greater responsibility. Given that there are no procedural questions of fairness to be faced by defendants, they would be free to address any harms they wish to. They are also free to memorialize the victim in any ways they wished to. But here, they would be responsible for testifying regarding the forms of support that they believe would help in creating recovery. Grief counselors can provide assistance in this work in accordance with group cultural, political, religious, or psychological traditions.

In sentencing proceedings, direct institutional acknowledgement of testimony is communicated through the possible (but not guaranteed) citation of judges in their decisions. Otherwise, acknowledgement comes by indirect modes, such as interpreting the defendant's sentence as a vindication of the testimony. The fora I propose would offer institutional acknowledgement of testimony by devoting resources to institutional reform developed out of the testimony in the fora. The testimonies given in these fora would offer a basis for recommendations

on topics of interest to the aggrieved: Prevention of future iterations of the violence their loved ones faced, recommendations on victim rights' procedures in criminal proceedings, recommendations for reform of the proceedings of fora for the aggrieved. Federal and state panels would be convened to investigate testimony and highlight the elements of testimony useful for institutional reform.

The second requirement is that these fora restore trust that has been undermined in the experience of traumatic violence. I first wish to define the notion of trust at stake as the assumption that the norms of respecting our bodily and emotional boundaries will be respected.³⁹ This is a norm that aims to allow us to pursue everyday endeavors without excessive fear. After her experience of rape and attempted murder, Susan Brison writes, "...I felt, for the first time in my life, like I had a perceptual deficit—not the blurred vision from the detached vitreous, but, rather, the more hazardous lack of eyes in the back of my head."⁴⁰ In the aftermath of the experience of trauma, Brison feels the loss of her sense of safety in the world. Before, there was a sense that those who were in the periphery could be expected to respect her person. Now, there is fear of whoever is in that periphery such that they must undergo some scrutiny before they can be considered safe.

Murder also undermines that norm of trust and general benevolence in a vicious way. Once this norm is undermined, questions arise for aggrieved persons about what people that surround them are capable of. The questions that aggrieved persons have around the risk posed by their fellow human beings mirror those of Brison in the aftermath the rape and attempted murder she experienced. In their study of a sample of persons aggrieved by murder, a majority of participants in Marilyn Peterson Armour and Mark S. Umbreit's *Assessing the Ultimate Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison*" identified issues trusting others in the aftermath of murder.⁴¹ One aggrieved person wrote:

I don't trust people. I'm very leery or wondering what it is they're after or what they're up to. It's like I know going down the street that you can look at people—and it's more men—and they can look normal, but they're not. How am I supposed to know this man is okay and this man isn't? I think it shatters a lot of your belief in the goodness of humanity. That some human could do this [murder] for nothing.⁴²

In the aftermath of traumatic violence, others who were assumed to be benign or benevolent are

³⁹ See Walker, *Moral Repair*, 23.

⁴⁰ Susan J. Brison, *Aftermath: Violence and the Remaking of a Self* (Princeton, N.J.: Princeton University Press, 2002), 14.

⁴¹ The study compared aggrieved persons in Minnesota with those in Texas. All aggrieved persons in Minnesota reported issues with trust over the 16-year span over which the study was conducted. Sixty percent of Texans reported trust issues over the 16-year span. Armour and Umbreit, "Assessing the Ultimate Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison," 113.

⁴² *Ibid.*, 77.

now assumed to be threats. According to the study, this general distrust persists whether or not the perpetrator is incarcerated. The threat that was embodied by the individual perpetrators of rape and murder become globalized in a way that affects the victim's/aggrieved's ability to live and interact with the world.

Although fora for the aggrieved cannot hope to restore trust to their pre-trauma levels, they can affirm respect for bodily and emotional boundaries. They can offer a place where vulnerability can be refigured through supportive response. Murder and rape are acts of exploiting bodily vulnerability. In the context of a forum for the aggrieved, the vulnerability conveyed through testimony is a means by which to build a supportive community. Vulnerability becomes an effective call for support. Fora thus enact the relationship to vulnerability that would obtain in the world as it should be. This follows Margaret Urban Walker's contention that reparation programs must be an "exemplification of the rectified relationship in the present and future that could, if sustained, become the basis for acceptable and stable moral, civil, and political relations."⁴³ Walker emphasizes the temporal aspects of this requirement: It is for the sake of assuring adequately respectful proceedings in the present and to assure that this relationship will obtain in the future. Although Walker is speaking specifically of reparations made by perpetrators for victims/aggrieved people, I see this temporal aspect as key. In the fora I propose, the responsive relationship to vulnerability is meant to guide the tenor of the proceedings and to show that this relationship to vulnerability is possible in the world outside of the forum. As opposed to what courts offer, the aggrieved are not only respectfully listened to. Their words are catalysts to action in response.

Towards this end, it is critical that the forum's facilitator take up strategies to build trust among members of the forum. This calls for clear expectations around the forum, particularly with regard to the responsibilities of supporters. The questions are: How do we define witnessing for the purposes of these fora? To what extent do supporters have a responsibility to act in light of the testimony of the aggrieved? This second question is especially relevant when the aggrieved person expresses the desire for vengeance against the perpetrator.

The third requirement of the forum is that witnessing serve as a means to facilitate recovery of the aggrieved. This means first assisting the aggrieved in dealing with the ways that grief interrupts everyday life. This work challenges the isolation that often comes with loss. It affirms that

⁴³ Margaret Urban Walker, "The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things," in *Justice, Responsibility and Reconciliation in the Wake of Conflict*, ed. Alice MacLachlan and Allen Speight (Dordrecht: Springer Netherlands, 2013), 217.

there is a community that is prepared to check-in and care for the aggrieved as they recover. Second, witnessing means memorializing the life of the victim and affirming their value. This is the creation of a lasting artifact from the pain of loss. It is an opportunity for the aggrieved to channel pain into something beautiful and have a community of people who are prepared to assist in the process of creation. Third, witnessing means advocating for socio-political knowledge that comes out of the testimony and the experience of participating in the forum. This is the work of contextualizing the violence experienced in a socio-political context where murder is a social phenomenon that is nearly guaranteed to reoccur. Such context opens connection to a community of aggrieved persons in the past, present, and future who have asked important questions regarding murder: What are the means by which we might resist repetition of violence as a community?⁴⁴ What are the means by which we might come together to provide greater support for aggrieved people in the aftermath of murder? This three-step process facilitates recovery by assisting the aggrieved with coming out of the isolation of grief and moving into community that shares the burden of creating artifacts and legacies that make healing meaning and teachings out of grief.

The fourth requirement is that there be a division of labor among supporters. This will make the support offered more sustainable as it limits individual burnout and brings about the sharing of heavy responsibilities. I envision supporters hearing testimony and then offering their assistance in the processes of grieving, memorialization, or socio-political advocacy. Although there should be considerations given to relatively equal distribution of responsibility, this decision of where to contribute would belong to supporters. The responsibility of supporters is to acknowledge and enact support for the testimony of the aggrieved; but they also would be present as teachers and learners. An aspect of this teaching and learning would be sharing or expanding their own experiences with grief and recovery. This forum calls forth the knowledge and curiosity of supporters for the purposes of recovery, rather than for simply taking supporters to be subject to whatever demands are articulated in testimony.

The fifth requirement is that the forum's participants not act on testimony calling for vengeance against perpetrators. The aggrieved would be assured that their anger and desire for vengeance have a place in the forum. The supporters would be there to create respectful space for such articulations. The supporters could express solidarity and understanding of those emotions. They could express that their conviction that those expressions are justified. But, the focus of the

⁴⁴ Shelley Neiderbach and Susan Iwansowski, *Invisible Wounds: Crime Victims Speak* (New York: Routledge, 1986); Acker and Karp, *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*.

action of the supporters would not be aimed at enacting anger and desire for vengeance.

There are multiple commitments that undergird this limitation on the actions of participants. First, acting on desires for vengeance undermines the third of the forum's requirement that the forum be dedicated to the recovery of the aggrieved. In my previous chapter, I argued that the relief that harsh punishment offers is undermined by the vicissitudes of traumatic experience. Second, the proceedings of the criminal court are already focused on the appropriate punishment of the defendant. The forum I propose should not duplicate the court's proceedings. Nor would it become a staging ground for advocating for a certain punishment for the perpetrator. Although, the perpetrator and their fate often looms large in the testimony of aggrieved persons, the aim of these proceedings are organized to directly support aggrieved persons rather than duplicate the indirect support where the perpetrator's treatment is said to create redress for the aggrieved. Finally, this quest for vengeance would undermine the sixth requirement, which I will explicate below, that the forum be committed to teaching and learning under the heading of "contribution." Taking up grief as a ground for contribution means working from grief towards richer modes of living together. Acting for vengeance and out of anger undermines contribution by bringing a community together for the sake of doing harm to another. This not only creates more victimization that will require more efforts of recovery, but it brings a community together for the sake of denying the potential contribution of another.

The highest aim of this proposed forum is the affirmation of the aggrieved as a teacher of their experience and of the knowledge they have gained living in the aftermath of traumatic loss. Each of the dimensions of the forum's responsibilities calls for a distinct form of learning such that teaching is possible. Resources would be offered to aggrieved persons in support of their testimony. In speaking to the dimensions of grief, as we saw in Charisse Coleman's testimony, there is the opportunity to express the full range of challenges. The experiences of insomnia, depression, inability to take joy in formerly pleasurable activities, and friendships and support networks unable to bear the burden of prolonged and complicated grief are common. A skill required on the part of the aggrieved is the ability to articulate somatic and emotional experiences in testimony. Beyond the ability to articulate the experience of grief, aggrieved persons would be called to articulate a pathway to recovery. This means offering a map of forms of support that would open possibilities for coping with stress; building a reliable support network; identifying sensitive days like holidays and birthdays and the kind of support that would be welcomed.

Towards the creation of memorials, I envision resources to support the aggrieved in creating

narratives around the person lost to murder: These resources could take the form of assistance in identifying a trait that the aggrieved person wishes to integrate into their own life and put forward as a trait for others to integrate into their own lives. These resources could take the form of supplies or funds to create a public artifact or public memorial event for the victim of murder. These resources could take the form of facilitating everyday rituals for remembrance, aspects of which could be shared and practiced by participants in the forum. These practices reinterpret the memorials that are normally limited to private religious contexts and bring them into a socio-political context. Thus, the audience and meanings of the memorializing expand beyond the community that would come together and mourn deaths under circumstances that human beings are more prepared for.

Towards the creation of socio-political contributions, I envision resources to support the aggrieved in orienting their resistance to the repetition of violence. These are resources of socio-political education that assist aggrieved persons in making connections among social, political, and economic factors and the murder that has touched their lives. This learning would reveal the general dynamics of violence of which the murder they experienced is an instance. For example, if the murder took place within a context of gender violence, relevant political education could take the form of connecting aggrieved persons to traditions of teaching and learning on this historical socio-political epidemic. The aggrieved person would be supported in becoming a teacher of the effects and meanings of the particular form of violence they experienced. Their advocacy in resisting the repetition of such violence would connect them to a larger community that shares their commitment.

Although these fora prohibit seeking a harsh sentence for the perpetrator, they allow socio-political critique which aims to resist repetition of certain forms of violence through, among other means, holding perpetrators accountable. In the case of Akai Gurley cited above, the forum would provide an opportunity for aggrieved persons and participants to come together and advocate against police violence against Black communities the police are supposed to serve. The work towards a harsher sentence for the officer who murdered Akai Gurley would be excluded from the forum. This is meant to distinguish the work of socio-political advocacy from advocacy for particular outcomes in individual cases. These fora would also allow for socio-political advocacy to be pursued on behalf of aggrieved persons as a group. This would be an instance of reflecting on one's treatment as an aggrieved person in the criminal justice system and seeking to develop the good and to transform that which was deficient.

These fora are an opportunity for members of a polity to be in dynamic relation to lineages

of memorializing the dead and supporting the bereaved. These are opportunities, in the most general sense, to affirm social bonds (shared grief over the one who is lost) and create new social bonds (out of the support rendered in a time of extraordinary vulnerability). For participants who are less intimately connected with the grief at stake, this forum is an opportunity to take part in the process of learning from the aggrieved such that the supporters would be able to bring their insights back into their own traditions of responding to grieving and murder. It is not only an opportunity for supporters and aggrieved persons to build on these traditions, but also an opportunity for them to make contributions from their traditions to the process of recovery for those aggrieved by murder. With the interactions of the demands of the aggrieved, the traditions of the aggrieved, and the traditions of supporters, there would be many opportunities within the fora for participants to make contributions to the community's provision of support for the aggrieved. I envision these fora as opportunities to come together around grief that open our imagination about support and recovery from murder beyond the limited means offered by the criminal justice system.

Conclusion

In this chapter, I have argued that victim impact statements offer a deficient form of support to aggrieved persons. I have located this deficiency in the context in which such testimony takes place. The procedural restraints of equal protection under the law and consistency of sentencing, among others, limit what the aggrieved can say in their testimony and how the testimony of aggrieved persons is interpreted and responded to. As the only socio-political forum that is deeply engaged with responsibility and redress in the aftermath of murder, I have argued that criminal proceedings are invested with a burden that they are not prepared to take on adequately: The affirmation of the worth of the life of the victim. I've presented an alternative forum for responding to the aggrieved that would allow for expansive testimony and ongoing community support for those aggrieved by murder. I contend that such a forum can more adequately carry the burden of affirming the value of the victim and creating meaningful memorials that meet the criteria of contribution that I offered in the previous chapter.

Chapter IV

The Retributive Demands of the Aggrieved: Jean Améry's Challenge to Forward-Looking Conceptions of Victim Reparation

In previous chapters, I have argued—contrary to many advocates of closure through punishment and victim impact statements—that we should separate the processes of supporting the aggrieved and punishing the defendant. I have argued that we can satisfy meaningful dimensions of redress for aggrieved persons without reference to the fate of the perpetrator. In this chapter, I explicate and respond to a counterargument from Jean Améry who argues in his essay “Resentments”¹ that we should not separate support for the aggrieved from treatment of the perpetrator. For him, traumatic experience should be interpreted as a moral experience, one that makes moral demands that perpetrators be held accountable for their crimes. Release from the stuck temporality of trauma comes only with the satisfaction of those moral demands. Accountability for crime, in Améry’s thought, is first and foremost delivered when perpetrators are subjected to punitive measures. Thus, punitive measures against perpetrators stand as the primary means of opening the possibility of moral recovery for persons aggrieved or victimized by crime.

Although I deny Améry’s claim that the perpetrator’s accountability is the only means by which to bring about moral recovery for persons who suffer traumatic loss, I take seriously his contention that moral demands for perpetrator accountability are of critical importance to many aggrieved persons. In contradistinction to other views I have considered throughout this project, Améry does not see punishment of perpetrators as a means by which to satisfy needs—such as support for grief or an affirmation of the value of the life of the victim—that could be satisfied through communities coming together in support of the aggrieved. Perpetrator accountability satisfies an essential demand of the experience of traumatic loss.

To meet the challenge of integrating this demand for perpetrator accountability without trespassing my commitment to separating support for aggrieved persons from punitive proceedings, I propose integrating perpetrator testimony into the fora I have proposed. In Améry’s conception of collective testimonial responsibility-taking for Germans in the aftermath of the Holocaust, I find a notion of perpetrator testimony that could satisfy demands for accountability without requiring punishment. I argue that this testimony should not be limited to collective crimes, but that

¹ Jean Améry, “Resentments,” in *At the Mind’s Limits: Contemplations by a Survivor on Auschwitz and Its Realities*, trans. Michel Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 62–81.

perpetrators taking responsibility for their crimes, no matter what they are guilty of, allows victimized and aggrieved persons to hear articulations of remorse, truth, and the circumstances around the crime. In addition to the satisfaction of moral demands delivered by such testimony, it also has the possibility to deliver distinct goods that go beyond moral demands for accountability. For instance, this testimony may allow victimized and aggrieved persons to settle lingering questions and gain perspective on the stakes of the violence they suffered. This knowledge can contribute to restoration of trust and a more nuanced perspective on why the violence was committed. I thus conclude with a call for institutions of criminal justice to pursue a hybrid approach whereby punitive accountability is balanced with encouragement of discursive accountability.

Section I: Linking Améry's Demands with those of Aggrieved Persons

Before delving into Améry's counterargument, I want to briefly elaborate and justify an assumption that guides my work in this chapter: That we can take Améry's articulations on resentment in the aftermath of the Holocaust and translate them as demands of those who are aggrieved by murder. It might seem as if there is a problematic gap between the experience and demands that someone would make in the aftermath of being tortured in the context of genocide and being aggrieved by murder. I will respond to two reasons that one might be skeptical of my translation of moral demands from Améry's context to that of this dissertation. I will also justify my terminological shift from "aggrieved person" in previous chapters to "victimized person" in this chapter to capture the continuities between Améry's experience and the experience of persons aggrieved by murder.

First, it might seem as if I am conflating the experience of being directly victimized by crime with the experience of being aggrieved by crime. Although there are many important distinctions to be made between being victimized by crime and being a survivor of one whose life is lost due to crime, the lens of traumatic experience provides a connection between these disparate experiences. Although Améry does not use the language of "trauma" to describe these experiences, the temporal experience that he describes of being stuck in the past is one that is mirrored in the experience of many who experience the symptomology of what is presently called post-traumatic stress syndrome. Insofar as a large majority of those who experience the murder of a loved one suffer such symptoms, there is a shared relationship to temporality that creates, for Améry, a shared moral experience of revolt against currents that orient non-traumatized persons to the present and future. The focus for Améry is not with the experience of being directly victimized by crime, but the

relationship to the event of the crime. This is a relationship that directly victimized persons and aggrieved persons share.

Second, one might worry about conflating the forms of redress proper to the circumstance of being a victim of a genocidal socio-political movement and to those proper to being the subject of a domestic crime. In the case of genocide, for instance, the institutional legal/socio-political responses to victims remain a work in progress. These programs were positively novel in 1966 when Améry published the essays that I focus on in this chapter. Cases of murder, on the other hand, are handled according to a well-established legal and socio-political precedents. Although Améry reckons with the problem of establishing justice and accountability for genocide, his focus remains on redressing the moral injury that he suffers during and in the aftermath of torture. As I have suggested above, the character of this moral injury is shared with all who suffer an irreparable injury or loss that they continually relive. This is an experience from which they cannot separate themselves by acts of will. Fortunately for my considerations, Améry distinguishes between what would be acceptable punishment for a harm that was limited to a singular criminal act and one that is done in a genocidal socio-political context. I engage with this distinction in the fourth section of this chapter.

In order to capture continuities between traumatic experiences of Améry being tortured in Auschwitz and the experience of being aggrieved by murder, I will use the term “victimized person” rather than “aggrieved person” or “victim.” Those aggrieved by murder experience victimization insofar as they are confronted with unexpected loss of a loved one as a result of a perpetrator’s crime. Aggrieved persons are not victims of crime as Améry and their loved ones are, but they share psychic wounds that come from unwarranted and unexpected traumatic experience. It is in this shared experience that I derive the relevant sense of victimization.

Section II: The Moral Demands of Traumatic Experience

I have so far interpreted traumatic experience in the aftermath of murder as an experience of vulnerability that calls for community support for the recovery of the aggrieved. By recovery, I have referred to the process by which aggrieved persons transform anger and grief into artifacts of testimony and memorialization. I have called on institutions of criminal justice to move beyond the proceedings on guilt and sentencing to create a forum that provides community support towards those ends of recovery. Throughout, I have claimed that it is possible to separate the support for the aggrieved living in the aftermath of murder from the punishment that a state levels upon perpetrators of crime. In this section, I will interpret Améry’s account of the moral demands of

resentment as a counterargument to my notion of recovery and the separation of the juridical and victim-support proceedings. I will explicate his argument that the only adequate response to traumatic experience is backwards-looking and thus focused on the treatment of the perpetrator.

Améry grounds the aggrieved persons' articulations of anger at the perpetrator and desire for vengeance, which I spoke of in my third chapter, in the experience of resentment. He connects resentment to the stuck temporality of trauma that I identified in my second chapter. Resentment is analogized to holding a grudge in opposition to the biological, social, and political sense of the future as the potentiality for healing and reparation.² As a survivor of torture in Auschwitz, he neither can nor desires to "[let] time heal his wounds." In the effort to define resentment, he writes:

In pondering this question, it did not escape me that resentment is not only an unnatural condition but also a logically inconsistent one. It nails every one of us onto the cross of his ruined past. Absurdly, it demands that the irreversible be turned around, that the event be undone. Resentment blocks the exit to the genuine human dimension, the future. I know that the time-sense of the person trapped in resentment is twisted around, disordered, if you wish, because it desires two impossible things: regression into the past and nullification of what happened. [...] In any event, for this reason the man of resentment cannot join in the unisonous peace chorus all around him, which cheerfully proposes: not backward, let us look but forward, to a better common future.³

When Améry describes the genuine human dimension of the future as impossible, I understand it as a claim about the restriction of imaginative possibilities available in the aftermath of traumatic experience. For Améry, the imagination that is required to ground reconstructive future-oriented thinking in the aftermath of traumatic experience is blocked. The traumatized person is left behind in their experience, repeatedly saying *this should not have been done, this must be undone*. For Améry, these are the central demands that follow from traumatic experience. This focus on the past opens up a gap between those who are traumatized and those who are less affected by that harm: Those who have been affected by traumatic experience are blocked from the possibility of accepting that this harm has happened and from imagining how to organize life in its aftermath. This is a notion of traumatic experience that resists my call for the integration of the lessons learned from that traumatic experience into a vision of the future. Améry suggests those aggrieved persons are likely incapable of taking up the imaginative capacities required for such testimony.

In his essay "Torture," Améry describes how traumatic experience breaks the distinction

² Améry sees the biological, social, and political realms as continuous insofar as their ends are the stable reproduction of life and community.

³ Améry, "Resentments," 68.

between past, present, and future. He writes:

It was over for a while. It still is not over. Twenty-two years later I am still dangling by dislocated arms, panting, and accusing myself. In such an instance, there is no “repression.” Does one repress an unsightly birthmark? One can have it removed by a plastic surgeon, but the skin that is transplanted in its place is not the skin with which one feels naturally at ease.⁴

The victimized person lives a painful contradiction. The harm the victimized person suffered is over yet it persists as an everyday reality. For Améry, loneliness and isolation in this non-normative, anti-social temporality is essential to traumatic experience. Against my conception of resisting isolation, this isolation is a dimension of traumatic experience that cannot be avoided through a community rallying around the aggrieved. No matter how much the community works at acknowledging the gravity of the harm and providing them support, there is a mismatch of temporal orientation that creates a serious obstacle for shared reparative projects between traumatized persons and those who I’ve called supporters. The aggrieved person remains fixed and returning to the moment of suffering the harm while the future-oriented time sense of a community seeks to integrate that harm and the experience of it into its present and future.

In response to isolation in the aftermath of trauma, I have sought to define the conditions for a trauma-sensitive community to come together around those who suffer the grief of murder. They would be aware of the vicissitudes of traumatic experience: Long periods of grieving, severe anger and desire for vengeance, the possibilities of repetition of trauma on non-responsible persons, and more. The community I’ve envisioned would be willing to acknowledge feelings of isolation by provisions of everyday support, witnessing the testimony of the aggrieved, and guiding them to non-punitive pathways to recovery. This is a trauma-sensitive version of the ways that communities traditionally gather around bereaved persons: There is intentional space made for those suffering grief separate from the normal responsibilities of communal life. The aim is to provide support such that bereaved persons can take the steps they need to take to return to communal life with its responsibilities and rituals. In the aftermath of traumatic loss, I have argued that this return to communal life is best sought in a transformative mode. The Du Boisian notion of “contribution” captures this. Those who suffer the trauma of murder would not be simply returned to the life they had before, but they would have the space to offer testimony as a contribution to reorienting communal life according to the lessons of that experience of loss.

⁴ Jean Améry, “Torture,” in *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities*, trans. Michel Rosenfeld and Stella P. Rosenfeld (Bloomington: Indiana University Press, 1980), 36.

I believe Améry would object to my notion of transformative reintegration of traumatized persons into communal life on grounds that the distinction in the time-sense of the aggrieved does not call for doubling down on measures to create integration and recovery, but a response to the moral demands that are held within the stuck time-sense. Even with my modification of the traditional processes of support for grief, there remains an assumption that aggrieved persons should take up a future-oriented temporality and could make effort towards it without reference to the fate of the perpetrator. On the contrary, Améry suggests the moral demands that are at stake in traumatic experience are only met in reference to the accountability of the perpetrator.

The context of Améry's account of the morality of traumatic experience is Germany twenty years after the 1945 Nazi surrender. Immediately following the surrender, Améry took comfort in the worldwide calls for retribution against Nazi Germany's leadership and for Germany to become the disarmed potato farm of Europe.⁵ But, soon after, the Cold War set in. The capitalist productivity of Germany was the basis of a newfound alliance with North American and European powers. This created conditions in which the retributive demands of those formerly at war with Nazi Germany faded. In the years before the publication of the essays cited above, the Eichmann trial in Jerusalem (1961) and the Auschwitz trial in Frankfurt (1963-5) brought the question of German guilt and accountability to the fore. With that, came arguments that victims should forgive perpetrators and be satisfied with the justice delivered at Nuremberg and the reparations given to the state of Israel from Germany.⁶

Améry finds this push for reconciliatory attitudes in German political and public opinion and intellectual circles. According to Hannah Arendt's account of the context of the 1963-1965 Frankfurt trial, the German public and the great majority of its judiciary could be still counted on to provide safe haven for Nazi war criminals. She finds German public opinion reflected in the argument of the Nazis' defense attorneys that accusations against their clients reflected "not a German desire for justice but the world opinion influenced by the victims' desire for 'retribution' and 'vengeance.'⁷ The prosecution used the image of retributive and vengeful victims as a means to delegitimize demands for accountability of perpetrators. They sought to equate justice for Nazi perpetrators with the demands of a German public that by and large had no problem living among

⁵ Améry, "Resentments," 65.

⁶ See Thomas Brudholm, "Contextualizing 'Resentments,'" in *Resentment's Virtue: Jean Améry and the Refusal to Forgive* (Philadelphia: Temple University Press, 2008), 71–82. There, Brudholm offers historical expressions for the attitudes Améry responds to in his "Resentments" essay.

⁷ Hannah Arendt, "Auschwitz on Trial," in *Responsibility and Judgment*, Reprint edition (New York: Schocken, 2005), 228.

those perpetrators.⁸ Améry cites publisher Victor Gollancz and Jewish philosopher Martin Buber as two influential intellectuals “trembling with the pathos of forgiveness and reconciliation.”⁹ Others believed or sought to assure others that Germany’s generous reparations policy towards the state of Israel was sufficient atonement for the sins of National Socialism.¹⁰

Améry finds a common thread within these calls for reconciliation with perpetrators: That the anger that comes from facing the irreparable harms of the past should be overcome to meet the demands of the present and future. This line of thought adheres whether those who advocate for reconciliation do so from a desire to protect war criminals, a Nietzschean commitment to interpreting resentment as self-destructive, or a notion that a bombed, pacified, reparations-paying Germany has met its obligations to its victims. For Améry, the injunctions to reconcile moralize a biological conception of healing: As the wounds of the body heal to allow humans to return to the normal functions of life, the gravity of the harms of the past can be overcome for the sake of the present and future. Although my notion of reparation differs from the notions of reconciliation advocated by Améry’s interlocutors,¹¹ my notion of reparation is also subject to such a claim. I advocate for creating circumstances where anger of resentment can be expressed, but like Améry’s opponents, I seek that this resentment be transformed into a memorializing contribution for the sake of living with others in the present and future.

Améry contends that deriving morality from the biological process of healing is immoral. He writes:

Whoever submerges his individuality in society and is able to comprehend himself only as a function of the social, that is, the insensitive and indifferent person, really does forgive. He calmly allows what happened to remain what it was. As the popular saying goes, he lets time heal his wounds. His time-sense is dis-ordered, that is to say, it has not moved out of the biological and social sphere into the moral sphere.¹²

When a traumatic harm occurs, a person in the moral sphere is committed to their experience such that they demand to make the past right no matter the consequences for the present and future. Persons in the immature biological and social spheres are distinguished by their forward-looking concerns with the continued and stable existence of the group and/or the individual. Forgiving

⁸ Note also the National Socialist logic at work in the above quote, which suggests that Germans and victims of Auschwitz constitute two mutually exclusive groups.

⁹ Améry, “Resentments,” 65.

¹⁰ *Ibid.*, 67.

¹¹ My notion of repair is focused on reconciliation with the world (with the past, with community, with living in the future) in the aftermath of trauma. According to Améry’s reading of his interlocutors, they are focused on reconciliation with perpetrators.

¹² Améry, “Resentments,” 71.

perpetrators or otherwise reconciling with the past creates the possibility of letting go of disruptive feelings of anger and desires for vengeance. Without those disruptions, it is easier to take up an orientation towards the future and join in the stable personal and communal reproduction of life. Those whom Améry criticizes have suffered or witnessed harms that were met with inadequate accountability measures, yet they nonetheless chose to move on and live a less disrupted life. According to Améry, they sacrificed the moral sense of the gravity of the harm they experienced for the sake of getting on with life.

The moral person faces the damage that was done and holds perpetrators accountable for the harms they inflicted whether or not these accountability proceedings have any forward-looking benefits for the aggrieved or the society in which they live. Améry defends this moral response to the torture he experienced at Auschwitz and speaks to the accountability required in its aftermath:

Man has the right and the privilege to declare himself to be in disagreement with every natural occurrence, including the biological healing that time brings about. What happened, happened. This sentence is just as true as it is hostile to morals and intellect. The moral power to resist contains the protest, the revolt against reality, which is rational only as long as it is moral. The moral person demands the annulment of time—in the particular case under question, by nailing the criminal to his deed. Thereby, and through a moral turning back of the clock, the latter can join his victim as a fellow human being.¹³

Despite the pressures of living within a social sphere that privileges the future over the past, morality demands that the aggrieved and the victimized remain committed to the demands that the past be undone. It is the mark of the mature moral being to refuse to submit to the ease that comes with accepting the past as something that has happened and requires a movement towards the future. Although facing the past in this way might be arduous, holding fast to the gravity and need for accountability is the price of taking one's own moral experience seriously. For Améry, it is the price of being an autonomous moral agent rather than one subordinated to forward-looking social and biological currents. What have been called symptoms of traumatic stress are better described as a moral commitment to protest the failures of others to take the gravity of past harms seriously enough.

I will focus on Améry's notion of accountability and reconciliation for the rest of this section. I am specifically interested in explicating the claim that "nailing the criminal to his deed" meets the demands of Améry's protest and thus opens the possibility of reconciliation between

¹³ Ibid. 72.

perpetrator and victimized person as well as imaginative access to the future. First, I will look to Améry's account of his support for the execution of one of his torturers. An SS-man named Wajs repeatedly beat him on the head with a shovel handle and was "a repeated murderer and especially adroit torturer."¹⁴ He writes, "My resentments are there in order that the crime become a moral reality for the criminal, that he be swept into the truth of his atrocity."¹⁵ The moral reality of the crime is the experience of the revolt against reality: The intense reality of being victimized without recourse to assistance. To face this reality with the knowledge that what is happening should not be happening. To look back upon the harm and intensely wish and demand that it had not happened. To satisfy Améry's demands, the perpetrator must be brought to this experience. The language of "swept" (*hineinreißen*) implies that such experience is done to the perpetrator from without.¹⁶

In execution, Améry contends that this moral reality becomes shared between perpetrators and those who suffered crimes. He writes:

When SS-man Wajs stood before that firing squad, he experienced the moral truth of his crimes. At that moment, he was with *me*—and I was no longer alone with the shovel handle. I would like to believe that at the instant of his execution he wanted exactly as much as I to turn back time, to undo what had been done.¹⁷

The firing squad brings the perpetrator to the experience of being helpless in the face of violence. Améry supposes—he uses the language of "I would like to believe"—that in the face of such helplessness, the perpetrator will wish that they did not commit the crime that brought them before the firing squad. This supposition is sensible: In execution, the perpetrator's criminal deeds become the condition for whether they live or die. If he had chosen better possibilities than torture and murder, Wajs could have lived. But, he chose destruction, which led him to this execution. Execution makes the perpetrator's desire to live continuous with the wish that the past had been different.

But, why should such shared desire for the past to be different meet the demands of Améry's resentments and be a condition for reconciliation between perpetrator and victim? The key is his claim that "The experience of persecution is, at the very bottom, that of an extreme loneliness. At stake for me [in Wajs' punishment] is the release from the abandonment that has persisted from

¹⁴ Améry, "Resentments," 70.

¹⁵ Ibid.

¹⁶ Jean Améry, "Ressentiments," in *Jenseits von Schuld und Sühne: Bewältigungsversuche eines Überwältigten* (Stuttgart: Klett-Cotta, 2015), 127.

¹⁷ Améry, "Resentments," 70.

that time until today.”¹⁸ This is loneliness that comes with continuing to live despite living on a distinct temporal and moral track than the rest of the world. The protest of trauma is that which attempts to break the isolation that comes with an under-acknowledged sense of the gravity of the wrong that was committed. In the perpetrator’s execution, Améry finds another whose access to a meaningful future also depends on the crime never happening. What Améry seeks is a shared experience of the feeling that the ability to live is dependent on the past being different. This is a felt need for the past crime to not have happened.

Perpetrators experiencing the moral truth of their crime, for Améry, is beyond knowing that they have done wrong or knowing that that the community condemns what they have done. To experience the truth of harm that one has committed is to feel the painful needs and loneliness that define living in the aftermath of traumatic experience. Although there are echoes of the retributive *jus talionis*, the eye for an eye, death for a death justification of punishment, the punishment itself does not balance the scales of morality. Punishment, for Améry, is a means to create shared experience and desire between perpetrators and those victimized by their crimes. The moral satisfaction is in the shared moral experience of trauma.

The shared moral experience of trauma brings about the possibility of reconciliation by shifting the moral identity of the perpetrator. In an already quoted section, Améry writes that this shared experience makes it so the perpetrator “can join his victim as a fellow human being.” In the section on the SS-man, he writes that “When they led him to the place of execution, the antiman had once again become a fellow man.”¹⁹ Although Améry doesn’t explicate the language of “antiman” or “fellow man,” his claims about torture and Nazism offer an interpretive structure. He writes that “torture was the essence of National Socialism...it was precisely in torture that the Third Reich materialized in all density of its being.”²⁰ As the antiman, the perpetrator is entirely defined, like Nazi Germany, by the violence they/it wrought.²¹ There is no separation between the crimes they wrought and who they are. In terms of this dissertation project, they are incapable of making positive contributions because they are defined solely as the destroyers of the potential and actual contributions of others. They are not fit for sharing a moral world.

Insofar as the perpetrator is held accountable and thus brought to the moment of feeling the

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Améry, “Torture,” 30.

²¹ He describes National Socialism as the only political system that “not only practiced the rule of the antiman...but had expressly established it as a principle.” Ibid., 31.

existential demand that the past be different, the person who was once identified with their destruction becomes one who has wrought destruction, but feels the gravity of that destruction and wishes they had not. The shared moral experience of trauma between perpetrator and victimized person breaks the complete identification of the perpetrator with their crime. The perpetrator joins the victimized person not only in the experience of trauma, but in their judgment of that past event. The moral protest that defined the victimized person's experience of the crime is now shared by the person who offended those moral demands.

Even if it is only for a moment before execution, the fellowship that comes from these shared moral norms opens the possibility of reviving the trust in the world that was lost in the experience of trauma. Améry writes, "That one's fellow man was experienced as the antiman remains in the tortured person as accumulated horror. It blocks the view of the world in which the principle of hope rules. One who is martyred is a defenseless prisoner of fear. It is *fear* that henceforth reigns over him."²² Access to the imagination and its reconstructive possibilities has been blocked by the knowledge of having been defenseless in the face of traumatic experience and the fear of its repetition. This is fear that comes with having experienced a dystopic world ruled by norms of destruction. It entails distrust of voices of reconciliation that suggest such a dystopia will not return. Accountability is the condition of trust that the destructive dystopia relegated to the past. In execution, for Améry, both the polity and the perpetrator acknowledge the gravity of the wrong. They affirm that there is a moral community that is willing to meet the moral demands of the aggrieved. With such affirmation, there is the possibility of imagining reconstructive possibilities.

The overarching claim that runs through Améry's work is that holding perpetrators accountable for their crimes is the condition upon which the victimized person can morally reclaim futurity. The counterclaim to my argument is now more sophisticated than that of closure. The claim is not that punishment lifts the burdens of grief from the shoulders of the aggrieved, it is that punishment satisfies the moral demand that is integral to the traumatic experience of aggrieved persons. This is the demand that the perpetrator feels the gravity of the wrong they committed. Punishment is the means by which a polity assures aggrieved persons it is committed to the rightness of their moral judgment, that it is committed to a world that resists the repetition of the traumatic harm they experienced.

Throughout this section, I have pointed to the places that Améry's argument comes into

²² Ibid., 40.

conflict with my claims in this dissertation. I have pointed to the ways that my aim of providing support for aggrieved persons, for Améry, are undermined by my de-emphasis of perpetrator accountability. Without such accountability, I believe that Améry would contest my claim that it is desirable for aggrieved persons to have the orientation towards the future that is required for contribution: The imaginative testimony that speaks to transformative lessons in the aftermath of murder. I believe that he would see my notion of community support as insufficient to morally reconstruct the trust that is required for the testimony I sought in my previous chapter. I believe Améry would contest the morality of my notion of recovery and its commitment to transform anger and resentment into memorializing artifacts whether or not the perpetrator has been held adequately accountable. For Améry, such work undermines the seriousness of the demands held within the anger and resentment of traumatized persons.

Section III: Responding to Améry's Moral Resentment

In this section, I will contest Améry's claim that recovery and reconstructive imagination in the absence of full accountability is immoral. Although I find Améry's moral defense of his resentments compelling, I deny his claims that resentment is the only moral response to traumatic experience. Testimony that takes up future-oriented conceptions of reconciliation do not necessarily undermine the gravity of that experience. I argue that victims of traumatic experience can look forward with others while meaningfully memorializing their experience. Further, I identify a problematic corollary of Améry's argument: For him, the possibility of a moral recovery of victimized persons is dependent upon institutions holding perpetrators accountable. This leaves the vast majority of victimized persons, who will not see their perpetrators brought to justice, without a compass for moral recovery. I argue that there are alternative pathways to achieve the moral trust-building that Améry attributes to punishing perpetrators: Communities that come together in support of aggrieved persons can also affirm the victimized person's moral judgment.

Despite my denial of Améry's contention that his commitment to the time-sense of trauma is the only moral experience, Améry's response calls for reckoning. Although it is not *the* moral response in the aftermath of trauma, it is *a* moral response to traumatic experience. It is a response that challenges the principle of separation of punitive perpetrator accountability proceedings from the support for the aggrieved. I take this up as a challenge that calls me to integrate perpetrator accountability into the fora I have proposed.

To review Améry's position: Traumatized persons have a duty to hold onto the past and so

demand that the wrong be made right.²³ This duty only loses its binding force when adequate accountability has been carried out. The recovery of imaginative future-oriented life without full accountability for perpetrators is a betrayal of the gravity of the harm one has suffered and an acceptance of pressure to conform to the social and political time-sense that are derived from the biological temporality of the healing of wounds. Améry requires that victimized persons preserve their wounds. Above, I referred to this duty to the past as a requirement that victimized persons “take their experiences seriously.” By continually facing the gravity of the experience of harm, the victimized person maintains the moral demand that past crimes should never have happened. To forgive perpetrators or reconcile oneself to the future for the sake of healing the traumatic wound is to give into a social and political time-sense inclined towards forgetting and silence. Silence and forgetting of past wrongs and its attendant lack of accountability is a failure to disavow the morality that guided the commission of the crime.

Améry’s contention that the orientation towards healing and reconciliation cannot coexist with meaningful remembrance of the past relies on a flawed premise. It relies on the notion that the future-oriented time-sense of the social and political reproduction of life is impervious to the demands of the past. Although we can accept Améry’s contention that social and political arrangements are inclined towards the present and future, reconciliation with the past and even forgiveness for perpetrators are acts that may be for the sake of transforming the orientation of social and political institutions. Those acts have the power to transform the future through acknowledgement of the past. For instance, we can look at victimized persons who testified and even forgave perpetrators in the South African Truth and Reconciliation Commission as attempting to create a legacy of peace as a memorial to the violence they suffered.

Rather than suggesting the violence that was suffered was so horrific that it requires nailing perpetrators to their crime, the victimized person can say that the violence they suffered was so horrific that the cessation of the repetition of that violence requires a willingness to model

²³ It is important to note the way that Améry’s normative claims are derived from his description of his condition in the aftermath of trauma. He frames the concerns of his “Resentments” essay: “What matters to me is the description of the subjective state of the victim. What I can contribute is the analysis of the resentments, gained from introspection. My personal task is to justify a psychic condition that has been condemned by moralists and psychologists alike.” Améry, “Resentments,” 64. His work in the essay is to show that the limits of his ability to conceive of the future and his inability to reconcile with the past are moral responses to the harms he experienced in Auschwitz. Yet, he goes further than simply suggesting they are morally justified: He describes them as the only moral response to the harms he experienced. Reconciliation becomes the immoral counterpoint to the moral conviction of resentment.

reconciliation between two previously warring groups.²⁴ We can look at victimized persons who lose loved ones to murder and devote themselves to preventing future iterations of the violence they experienced.²⁵ In both of these instances, the victimized person dedicated themselves to socio-political transformation of their future as a result of their experience of harm, not despite it.

The healing of the traumatic wound that comes from forgiveness or forward-looking devotion to transforming socio-political conditions, do not necessarily contribute to silence or forgetting that fails to condemn the crime. We can agree that commitment to unflinching preservation of traumatic experience stands out in a world that is often more concerned with the present and future than the past. However, allowing a wound to heal does not mean that the cause of the wound is forgotten or otherwise silenced. Such a response is possible, but we can also imagine one who allows the wound to heal to nonetheless have a forthright relationship to the experience of trauma. Their demands will not be grounded in Améry's demand "This should not have happened," but rather "This happened, my life will never be the same, and I must learn to live in its aftermath." With this latter understanding of traumatic violence, the demand to disavow the moral values that guided the violence of the past can take many forms: It can come by testimony to the pain of the experience of violence. It can come by calling forth a community of persons committed to living together in the interest of preventing the repetition of violence. It can come by creating testimonial opportunities for perpetrators to take responsibility and express remorse. Whereas Améry calls for condemnation through punishment as the condition of reconstructive imagination, the condemnations that are discursively created out of testimony can create meaningful disavowal of the past without dependence on the achievement of punitive sentences for perpetrators.

However, the condemnation expressed by punitive sentences handed down by legal institutions is powerful insofar as it has meaning for a wider public: When a state punishes, its

²⁴ This is the view of Desmond Mpilo Tutu and others who created and advocated for the South African Truth and Reconciliation Commission. The TRC is formed—in part—to maintain peace during an unsteady transition from apartheid to democracy. Tutu grounds this work in the Nguni notion of *ubuntu*: "A person with *ubuntu* is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that she belongs in a greater whole and is diminished when others are humiliated and diminished, when others are tortured or oppressed, or treated like they are less than they are." If violence were to flare up between pro and anti-apartheid groups, the dehumanizing horrors of war would follow for both sides. Desmond Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999), 31.

²⁵ This is the work of Linda and Peter Biehl and others who engage in transformative justice projects. Their daughter was killed in an attack by anti-apartheid youth in the Gugulethu township. The perpetrators apologized in the Truth and Reconciliation Commission proceedings and Linda and Peter supported their amnesty application. Together, perpetrators and the aggrieved set up a foundation in the honor of the victim, which serves township youth in the interest of non-violence and flourishing. Angela Y. Davis, *Are Prisons Obsolete?*, Open Media Book (New York: Seven Stories Press, 2003), 115.

punishment is delivered on behalf of all its citizens. The censure of action represented by punishment is understood by a vast majority of those citizens. The discursive condemnations I have outlined above lack the gravity of condemnation that state punishment delivers. Améry demands this wider condemnation. He writes, “If I remember rightly, it was Hans Magnus Enzensberger who once wrote that Auschwitz is Germany’s past, present, and future. But unfortunately he is not what counts, for he and his moral peers are not the people.”²⁶ Meaningful accountability requires affirmation by the German masses. A small community of Germans taking responsibility for their National Socialist past is insufficient to satisfy Améry’s call for accountability.

In response to murder, state punishment is the means by which mass condemnation is expressed. When an institution endowed with the power of political authority affirms the moral judgment of the victimized, it delivers a distinct form of satisfaction for aggrieved people. For instance, the capacity to trust in the aftermath of traumatic experience is reinforced by the knowledge that all citizens were—even in a mediated sense—represented in that condemnation. The discursive forms of the condemnation that I have outlined above do not deliver the mass condemnation that is a dimension of state punishment.

I nonetheless reject Améry’s contention that only mass condemnation can satisfy the moral demands of traumatic experience. I reject this on grounds that it creates an exclusive disjunction that leaves too many victimized persons without moral recourse in the aftermath of trauma. Either victimized persons are affirmed in their judgment through mass condemnation and can morally proceed with reconciliation, or they are not affirmed and have no moral recourse to healing, trust, and the imagination of the future. This leaves a great majority of victimized persons morally limited to the preservation of their wound and the stuckness in the past this preservation requires.

There are many reasons that state condemnation of traumatic violence is not delivered. Many of them are the result of malevolent practices (racism and sexism among prosecuting authorities, for instance) though not all are. Some are the result of an inability to gather appropriate evidence, to apprehend the perpetrator, or a defendant with mental disabilities that make holding them responsible inappropriate. As I argued in my third chapter, there is a mismatch between the aims of state punishment and the aims of the satisfaction of aggrieved persons that makes overreliance on state punishment for the satisfaction of victimized persons undesirable. Améry’s argument leaves too many—himself included—in a moral bind that can only be released by an

²⁶ Améry, “Resentments,” 78.

unreliable mass condemnation of crime through state punishment.

Victimized persons who lack recourse to the mass condemnation deserve less stringent criteria of moral satisfaction. It is reasonable to suggest that aggrieved persons could experience meaningful satisfaction of the moral demands of traumatic experience through communities of likeminded people. Contrary to Améry, I see Enzensberger and other Germans serious about envisioning responsibility in the aftermath of National Socialism as morally significant. Although the mass of German people or the perpetrator and their community may be unwilling to take responsibility for their past, there is moral value in a small group coming together to envision living with responsibility to a traumatic past. Even if the perpetrators remain at large or even sheltered, this smaller group is capable of creating a moral community that models responsibility to the moral demands of the victimized person. When crime occurs, whether it is the Nazi torture of millions or the murder of one, responsibility lies most directly with the organizers and perpetrators of those crimes. But responsibility can be taken up by others who are related to perpetrators through family ties, through identity, through ideology, through spirituality, and through shared citizenship.²⁷ When those others come forward and affirm the moral judgment of the victimized, this opens up the possibility of a new moral future. For instance, members of the racial groups represented by the perpetrator and the aggrieved can come together in light of a murderous racist crime to not only disavow what had happened but create new norms for living with one another in light of past violence. This opens the possibility of envisioning and modeling a moral future without neglect of the moral demands of the past.

Despite my rejection of the claim that there is a moral duty to maintain resentments in the absence of full accountability for perpetrators, I take the maintenance of resentments in the interest of perpetrator accountability as one of many possible moral responses to the loss of a loved one to murder. Améry's contention that traumatic experience contains moral protest makes an appropriate demand on his interlocutors to acknowledge the gravity of the past. In light of my work above, we can reinterpret his notion of accountability and suggest that holding perpetrators responsible is the only way to satisfy *his* legitimate moral demands for acknowledgement of the past without also suggesting that his demands are the only legitimate moral demands in the aftermath of traumatic loss. His moral demands could conceivably be shared by aggrieved persons who would be eligible

²⁷ See for instance this account of the healing of the relationship between the brother of the perpetrator and one aggrieved by violence. David Kaczynski and Gary Wright, "Building a Bridge," in *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*, ed. James R. Acker and David R. Karp (Durham, N.C.: Carolina Academic Press, 2006), 85–102.

for participation in the fora I proposed. Although the principles of the forum would deny the demand to focus efforts solely on securing punitive accountability, it is nonetheless important to consider how the forum could be opened to accommodate aggrieved persons who share Améry's moral demands.

Section IV: Integrating Discursive Forms of Perpetrator Accountability in the Fora

In my previous chapter, I wrote that supporters would seek to acknowledge the articulations of anger, vengeance, and desire for harsh sentences for the perpetrator, but not guide their action by those articulations. With his conception of resentment, Améry gives such desires for anger and vengeance a moral dimension that creates a novel challenge to my notion of acknowledgement. If I were to follow Améry's articulations to the letter, it would be necessary for me to shift the focus of the fora from the testimony and support of recovery of aggrieved persons to advocacy for punitive accountability for perpetrators. This would mean collapsing support for aggrieved persons into support for their punitive demands in the criminal juridical proceedings, which would trespass the principles I outlined in my third chapter.

I will propose a solution to this apparent conflict by taking up Améry's notion of discursive responsibility-taking in the fora I outlined in my third chapter. Although Améry sees this accountability as limited to meeting the demands of collective responsibility-taking (Germans who supported Nazism without themselves torturing or murdering), I contend that this notion of responsibility should be available in cases of individual perpetrators. This testimony can not only satisfy moral demands of accountability, but also deliver food to victimized persons in cases of individual perpetrators beyond what is possible in punitive forms of accountability. I do not argue that punitive accountability should be replaced with discursive accountability; rather, I see both forms of accountability as delivering distinct goods to victimized persons. I call for a hybrid notion of accountability that maintains the punitive accountability that defines current penal arrangements in the U.S. while integrating (and encouraging) discursive accountability measures. The fora I have proposed could be the place where discursive accountability measures could be realized. With this opportunity for perpetrators' responsibility-taking testimony, the fora would offer the opportunity for aggrieved persons to satisfy moral demands of accountability without collapsing support for victimized persons into advocacy for punitive proceedings.

For Améry, holding the perpetrator accountable is the only way to satisfy the moral demands he articulates. Although he sees harsh punishment as the primary means to such accountability, he also conceives of discursive pathways to accountability for the thousands of ordinary Germans who

upheld Nazi destruction without participating in its torture and murder. From them, Améry demands testimony that renounces the moral, intellectual, and cultural productions of Nazism; reflects the gravity of the loss created by their support of the Nazi regime; and a reflexive account of the violence that speaks to the constructive ideals to which they had access but nonetheless disavowed in their support for Nazism. Through this testimony, Germans affirm that they share a moral world with Améry because they too desire the impossible overturning of the violence that was done.

Améry suggests that the widespread corruption in Nazi Germany made it so that his moral demands could not be satisfied by the punishment of individual perpetrators. He writes:

If everything had taken place only between the SS-man Wajs and me, and if the entire inverted pyramid of SS men, SS helpers, officials, Kapos, and medal-bedecked generals had not weighed on me, I would have died calmly and appeased along with my fellow man with the Death's Head Insignia [...]

But Wajs from Antwerp was only one of a multitude. The inverted triangle is still driving me with its point into the ground.”²⁸

Through the engagement with the question of moral satisfaction in light of the execution of SS-man Wajs, Améry distinguishes between appropriate punishment for a criminal act of victimization (like the murders at stake in this dissertation) and the genocidal victimizations by Nazi Germany. If it were merely a criminal act, the execution would satisfy; but there is an entire socio-political arrangement behind the Waj's torture and murders. Améry suggests that eye for an eye revenge—killing one German for every one killed in the Holocaust or even torturing torturers with their same implements—would be unthinkable brutal. He writes that the justice “cannot consist in revenge dealt out in proportion to what was suffered.”²⁹ In light of this, Améry looks to discursive forms of accountability that could satisfy his moral demands without nailing perpetrators to their horror of their crimes.

Améry's notion of discursive accountability aims to cultivate the victimized persons' moral desire that the past be overturned among perpetrators. This involves perpetrators articulating and reflecting on their identities as persons who have committed serious wrongs.³⁰ He calls them to face responsibility despite the ease with which they can flee from it in the capitalist, reparations-paying Germany of the 1960s. Améry describes this alternative conception of accountability:

²⁸ Améry, “Resentments,” 70–71.

²⁹ *Ibid.*, 77.

³⁰ Despite distinctions drawn in the secondary literature between Améry's conception of resentment and justifications behind the South African Truth and Reconciliation commission, Améry's notion of perpetrator responsibility-taking has resonances with the jurisprudence of the South African Truth and Reconciliation Commission.

But if, in the midst of the world's silence, our resentment holds its finger raised, then Germany, as a whole and also in its future generations, would retain the knowledge that it was not Germans who did away with the dominion of baseness. It would then, as I sometimes hope, learn to comprehend its past acquiesce in the Third Reich as the total negation not only of the world that it plagued with war and death but also of its better origins; it would no longer repress or hush up the twelve years that for us others were a thousand, but claim them as its realized negation of the world and its self, as its own negative possession. On the field of history there would occur what I hypothetically described earlier for the limited, individual circle: two groups of people, the overpowered and those who overpowered them would be joined in the desire that time be turned back and, with it, that history become moral... And in the end the Germans would achieve what the people once did not have the might or will to do...the eradication of the ignominy.³¹

Resentment makes a moral demand to remember the traumatic event and the perpetrators who bear responsibility for that trauma. Améry points to the fact that Germany's commitment to Nazism ended due to military defeat rather than the German moral commitment to doing right. Even if the German state dutifully pays reparations to Israel, there is a moral remainder. There is a necessity of taking responsibility not only by prosecuting those who have done wrong and contributing to reconstruction of the lives of those victimized, but by taking reflexive responsibility for how the moral commitment to destruction came about and remained in power.

Reflexive responsibility-taking is critical to Améry's notion of discursive responsibility. Perpetrators must take responsibility for the horror that is the stuck temporality of traumatic experience, which Améry describes as "the twelve years that for us others were a thousand." This responsibility is taken not only by acknowledging how horrific this experience must be for victimized persons, but through reflexive testimony. The movement signaled by the "not only...but also" is from the thought that the violence committed was harmful solely for the victimized to the thought that such violence has reflexive aspects. As a bourgeois, secular Jewish, Weimar intellectual, Améry believed in the potential of German traditions of literary and political thought to bring about a polity that did not see its authority dependent upon genocidal ideals. For Améry, National Socialism denied life to its victims in the same way that it suffocated traditions of circumspect German ethical, cultural, and political thought. I understand Améry to propose a form of learning for perpetrators that orients them temporally backward: to a time when ideals and possibilities of doing otherwise than violence were generated and available. When the perpetrator considers their violence as negation of those "better origins," they can attempt to reclaim those ideals. Such a

³¹ Améry, *At the Mind's Limits*.

reclamation project offers resources for perpetrators to generate meaningful critical perspectives on the place of violence in their lives.

The “eradication of the ignominy” among Germans requires sharing with victimized persons the impossible “desire that time be turned back and, with it, that history become moral.” This is the desire to remake the past according to what should have been the case. Améry seeks responsibility-taking beyond apology for an instance of wrongdoing. By calling for *history* to become moral, he speaks not only of the need for the criminal deed to be undone but the entire web of choices and context that created the conditions of possibility for the violence.³² The reflexive element of discursive accountability serves this wider purpose. It points to the choices and context that allowed the negation of alternative ideals. In condemning the choices and contexts that preceded and conditioned the harm to another as well as the act of violence and its reflexive elements, Améry sees the potential for reconciliation. The moral satisfaction delivered to victimized persons by discursive accountability-taking is not qualitatively different than the satisfaction delivered by practices of punitive accountability.

Despite this equality of moral satisfaction, for Améry, discursive accountability is an option to be pursued when punitive accountability would be unacceptable.³³ Although punitive and discursive accountability deliver the same moral satisfaction, punitive accountability has the pride of place in his account. He does not draw out the distinct elements of each form of accountability nor does he compare their relative goods. The reasons for such an ordering can be taken from historical context as well as Améry’s own reflection on discursive accountability. He describes his account as an “extravagant moral daydream.” While Nuremberg and the history of war reparations offers a historical example of punitive accountability, there is no precedent for collective discursive accountability. Beyond that, discursive accountability requires that perpetrators come forward of their own volition. In the 1960s Germany that Arendt describes, there is no reason to believe that former Nazis and their supporters would be contrite when confronted with the demand to take responsibility.

Practical difficulties of realizing discursive accountability aside, I do not believe there are moral or socio-political reasons to prioritize punitive accountability. If both forms of accountability

³² The catalyst for my interpretation is Améry’s call for “the spiritual reduction to pulp by the German people, not only of the books, but of everything that was carried out in those twelve would be the negation of the negation: a highly positive, a redeeming act.” Améry, “Resentments,” 79.

³³ The basis for such an interpretation is twofold: The absence of discursive responsibility-taking as an option for SS-man Wajs and the fact that his account of discursive accountability only arises after a consideration (and acknowledgement of the absurdity) of collective punitive measures.

can deliver the same moral satisfaction to victimized persons, I see no evidence or principled reason to believe that Améry would make the categorical claim that punitive accountability should trump discursive accountability. Although Améry limits discursive responsibility-taking to those collectively responsible for Nazism, and the examples he offers are of Germans taking responsibility for collective crimes, the path Améry prescribes to those taking discursive accountability for their actions are transferable to individuals taking responsibility for interpersonal crimes. They might not be speaking to alternative non-violent national ideals that they failed to take up, but they will be speaking to ideals they inherited from their experience, heritage, and religion. The origins of the ideals are less important than their capacity to be used as templates for the reflexive responsibility-taking that Améry calls for.

In the absence of the strict priority of punitive over discursive forms of accountability, we can offer a hybrid approach to punishment that combines both without trespassing the moral demands of traumatic experience. In my attempt to envision institutions of criminal justice in service to persons aggrieved by murder, I see both forms of accountability as delivering distinct goods to victimized persons. When I speak of “goods,” I refer to resources that meet stated needs of aggrieved persons that are beyond the scope of moral accountability in both punitive and discursive forms. My contention is that—as long as delivering these goods do not interfere with moral satisfaction on matters of accountability—the desirability of delivering those goods stand as reasons to motivate institutions of criminal justice to offer this hybrid of punitive and discursive accountability. I see the for a I have proposed as an opportunity for discursive accountability where the traditional juridical guilt and sentencing proceedings will enforce punitive accountability.

Punitive accountability holds perpetrators responsible. The violence of the state deprives perpetrators of liberties that they would otherwise enjoy. From the perspective of those victimized, this is a form of accountability that creates boundaries between themselves and perpetrators and between perpetrators and the society of non-incarcerated persons. This separation honors victimized persons’ well-founded distrust of perpetrators of the violence. It offers aggrieved persons the space to mourn without the anxiety of having to avoid the perpetrator or even encounter them. For Améry, the perpetrator facing punishment is brought to share the moral demand that the past be different. As I have also noted above, punitive accountability stands as public acknowledgement of the depth of the harm suffered. It stands as a mass affirmation of the judgment of the victimized. Punitive accountability delivers a measure of control to victimized persons insofar as they know that the perpetrator is under the control of the state. Its deprivations may create a wish within the

perpetrator that the past be different. Mass acknowledgement of harm can indeed be an important dimension of trust-building in the aftermath of violence.

Discursive accountability calls for perpetrators to take responsibility for their crimes. Through moral commitment or incentive, perpetrators offer testimony that speaks to the truth of what they did, their reasons for committing their crime, and their remorse for what they have done. In an adversarial justice system that punishes harshly, the possibility of living a day outside of carceral control often requires that those accused of murder maintain a relationship to responsibility of denial, silence, or mitigation. Although criminal courts can establish a convincing narrative of who did what to whom, perpetrators admitting wrongdoing and seeking redress satisfy demands of the aggrieved in a way those narratives cannot. Perpetrators have epistemic access to details of the crime in a way no others do. In taking responsibility rather than mitigating responsibility, they are challenged to provide information about the circumstances of murder and victim in a way that resists victim blaming. This can satisfy the demand of aggrieved persons for motives of murder and the victim's last words.³⁴ An account of the motives has the possibility of resisting the distrust, described in my third chapter, that comes with murder seeming to come from nowhere and for no reason. The account of the victims last words can contribute to memorializing.

Rather than imagine that perpetrators share the wish for the past to be different upon receiving punishment (as Améry does) or remain fixed to questions of whether or not perpetrators experience remorse (as many aggrieved persons do), expressions of remorse allow aggrieved persons to hear this remorse. It opens the possibility of victimized persons and/or their representatives asking questions of perpetrators to better understand this remorse. This satisfies the demand of aggrieved persons to hear perpetrators take meaningful responsibility for their crimes and express how those crimes have affected them.³⁵ If aggrieved persons are satisfied by the testimony, such accountability provides a moral baseline for the possibility of jointly envisioning practices of moral reconstruction. These are practices that could support the proliferation of responsibility among perpetrators of crimes, memorialize the past, and prevent the repetition of the past harm. In discursive accountability, the knowledge of the crime is more robust than punitive accountability allows; remorse can be articulated and become the basis for shared moral reconstruction.

³⁴ Armour and Umbreit refer to these questions of truth of the crime and perpetrators' motives remorse as "remaining questions." More than sixty percent of those surveyed possessed questions along these lines. Armour and Umbreit, "Assessing the Ultimate Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison," 66.

³⁵ *Ibid.*, 59–60.

There should be a balance between punitive and discursive accountability. A competition for pride of place leads to bad outcomes no matter which form of accountability comes out on top. If punitive accountability is too privileged, there is discouragement of responsibility-taking that can deliver truth and the possibility of meaningful reconstructive projects between perpetrators and aggrieved persons. If discursive accountability is too privileged, the polity neglects the importance of mass censure and respecting victimized persons' desire for separation from perpetrators. When I call for a balance between the two forms of accountability, I call for a criminal justice system that attempts, as far as possible, to deliver these distinct goods in light of the conflicts that arise between them.

Punitive and discursive forms of accountability fundamentally diverge on the conception of the trustworthiness of perpetrators. In punitive accountability, perpetrators are treated as untrustworthy. They have undermined communal trust and are thus untrustworthy enough to require the violence of the state to enforce separation between them and non-incarcerated members of the polity. In discursive accountability, trust in perpetrators is a requirement. Aggrieved persons must believe that the words expressed represent a genuine *feeling* of remorse.³⁶ They must trust that the plan of redress perpetrators propose will be carried out as stated in testimony.

This divergence between attitudes towards the perpetrator does not require that we choose one form of accountability or the other. Rather, we can say that each is appropriate at different times. The distrust communicated by punitive accountability is appropriate closer to the event of traumatic loss. Trust required by discursive accountability must be cultivated over a longer period of time. Building this trust requires ongoing commitment to taking-responsibility on the part of perpetrators, which could take diverse forms. It may, for instance, entail their reaching out to the victims' loved ones to express remorse or a program of community-based work in which perpetrators serve others in the attempt to resist future iterations of the violence they committed. This process of perpetrators taking responsibility and memorializing loss requires learning to understand themselves as persons who have committed an irreparable crime, but who have often experienced victimization themselves.³⁷ To explain why the murder happened, it is often necessary

³⁶ Trudy Govier and Wilhelm Verwoerd, "The Promise and Pitfalls of Apology," *Journal of Social Philosophy* 33, no. 1 (January 1, 2002): 69, doi:10.1111/1467-9833.00124.

³⁷ James Garbarino is a forensic psychologist who contends that "Gross violations of the human rights of children ultimately lead to the most violent, inhumane actions by adults." By gross violations, he refers to continuous experiences of violence and abuse in early childhood. Bronfenbrenner Center, *James Garbarino: "Listening to Killers: Bringing Developmental Psychology into the Courtroom in Murder Cases"* (Ithaca, NY: Beebe Hall, Cornell University, 2015), <https://www.youtube.com/watch?v=5OrTbL5G9RQ>. In his book, he points to the moral damage of racism, domestic

to refer to prior experiences of victimization. The challenge for perpetrators is to speak to these experiences without using those experiences as an excuse for their crime. This calls for support in learning how to connect previous experiences of victimization to the murder they committed.

Finally, there are practical concerns regarding how responsibility-taking can be encouraged in a context of a criminal justice system (like that of U.S.) where the possibility of living outside carceral control requires that aggrieved persons maintain their appeals and thus avoid the self-incriminating testimony that is a dimension of discursive responsibility-taking. An account of an incentive structure that could convince perpetrators of the value of giving up appeals for the sake of taking responsibility for crimes is beyond the scope of this dissertation.

However, in light of the stakes of such a decision to effectively give up appeals, discursive responsibility-taking proceedings must offer substantial benefits to perpetrators. Preliminarily, I recommend meaningful reductions in sentences with additional support provided for perpetrators to achieve the ends of redress they outlined in their testimony. The higher stakes of such testimony require institutional criteria to judge its adequacy. The jurisprudence of the South African Truth and Reconciliation Commission, for instance, offers an example of how to judge whether perpetrators adequately takes responsibility for their crimes.³⁸ We can look to Améry's requirements for reflexive testimony and sharing of the demands of the aggrieved to ground requirements for adequate expression of remorse. If the perpetrator is for any reason unwilling to engage in discursive accountability, this forum can create an opportunity for those related to the perpetrator through a wide variety of familial or community relationship to take a measure of responsibility and to pledge to come together to create healing and possibility of redress.

Conclusion

In this chapter I have engaged with one of the most compelling and challenging counterargument so far. Through an explication of Améry's argument in "Resentments," I have presented reasons why one might take the foundational claims of this dissertation to be immoral. Throughout this dissertation, I have argued that the demands of redress for persons aggrieved by traumatic loss could be satisfied without reference to the fate of the perpetrator. I have contended

violence, sexual abuse, gender violence, and poverty as critical to understanding why people murder: Garbarino, *Listening to Killers: Lessons Learned from My Twenty Years as a Psychological Expert Witness in Murder Cases* (Oakland, California: University of California Press, 2015).

³⁸ See, for instance, South African Truth and Reconciliation Commission, "Amnesty Decision on Death of Steve Biko," February 16, 1999, <http://www.justice.gov.za/trc/media/pr/1999/p990216a.htm>; Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, vol. 1 (Cape Town : New York, NY: Palgrave Macmillan, 2001), 110–35.

that institutions of criminal justice could structure community support for aggrieved persons to deliver the goods that advocates of victims' rights supposed to follow from punishment. The forward-looking goods of the Du Bosian notion "contribution" that I have sought in the aftermath of trauma are—for Améry—morally conditioned by perpetrator accountability. For Améry, holding perpetrators accountable for their crimes satisfies a moral demand of people victimized by traumatic experience that can be satisfied by no other means. I have recognized Améry's commitment to perpetrator accountability as one that the fora I have proposed must take seriously. I integrate this moral demand by offering a place for perpetrator testimony as a separate meeting of the fora. Through testimony that takes responsibility for crimes committed and offers a plan for redress going forward, the proceedings of the fora satisfy demands for accountability without collapsing support for aggrieved persons with the punishment of the perpetrator. Through this testimony, the fora offer the possibility of perpetrators and aggrieved persons coming together for the purposes of "contribution."

Conclusion

In this dissertation project, I have identified the shortcomings of efforts to support persons aggrieved by murder within the context of the present U.S. criminal justice system. I have shown the ways that discourses that promise “closure” for aggrieved persons through the harsh punishment of perpetrators fail to address the ongoing effects of traumatic experience. Instead of seeking closure, I advocate for cultivating capacities to live with the ongoing effects of traumatic experience. To this end, I argue that institutions of criminal justice should promote testimonial contribution in the context of community support capable of addressing prolonged struggles with grief. I have shown the ways that the sentencing phase of trials is not the appropriate context in which to hear and respond to the needs and demands of persons aggrieved by murder. Instead of limiting the formal testimony of aggrieved persons to victim impact statements in the sentencing phase of trials, I advocate for an opportunity to testify in separate fora convened for the purpose of supporting expansive testimony and providing ongoing community support as they reconstruct their lives.

I have motivated this work by reference to the importance of envisioning institutional support for recovery of persons aggrieved by traumatic loss beyond punishment. In the U.S., we have invested punishment with the power to heal aggrieved persons and affirm the value of the lives of those lost to murder. At best, the punishment of perpetrators is an acknowledgement of the gravity of traumatic loss on behalf of a polity. This is a meaningful act of acknowledgement; however, when support for the aggrieved is narrowly focused on punishment, the potential for assisting in the reconstruction of life and learning from traumatic loss is undermined. In my dissertation project, I have envisioned fora that could cultivate these reconstructive and pedagogical potentials in the aggrieved and their communities. If realized, this reconstruction and pedagogy could be the grounds for resisting repetitions of violence, insight into how communities can come together to support aggrieved persons in the aftermath of traumatic loss, and creating meaningful memorial for those who are lost.

I have acknowledged the importance of the accountability of perpetrators in the moral demands of aggrieved persons. I sought to integrate this accountability into my vision of criminal justice by offering an opportunity for perpetrators to offer responsibility-taking testimony. This testimony has the potential to satisfy demands of accountability while opening shared reconstruction among perpetrators, those aggrieved by their crimes, and the community of the aggrieved. I have pointed to complications that arise in the creation of this hybrid system of criminal justice where the

goods of pursuing a punitive response to crime are balanced with creating the conditions where perpetrators can testify to their wrongdoing.

I plan on taking up these complications in a future project. There, I will look to the jurisprudence of the Truth and Reconciliation Commission of South Africa for criteria to judge the adequacy of perpetrator testimony and plans redress. I will offer more detail as to the pedagogy (and prison reforms) necessary for such testimony. I will reflect upon the sentence-reducing incentives that would be available for perpetrators whose testimony meets the criteria for adequate responsibility-taking and redress. It is worthwhile to incentivize discursive responsibility-taking by perpetrators because it has the potential to create good outcomes for aggrieved persons and create rich pedagogical opportunities for the perpetrator. It creates an opportunity for their contribution.

There are compelling models for imagining the contribution of perpetrators. Former perpetrators working with youth to promote peace and non-violent community are my models for this work: In Chicago, Ceasefire community activists bring youth together to reflect upon violence and consider non-violent alternatives in circumstances that would ordinarily call for violent response.¹ In these spaces, responsibility-taking and articulation of remorse are enacted in ways that have the potential to prevent the reoccurrence of violence. To build trust among youth trying to survive in violent circumstances, it is necessary for perpetrators-turned-activists to articulate the way they felt and thought at the time when they committed their violence, the circumstances of the violence they committed, and the struggles of living in the aftermath of this violence. I believe this attempt to resist the repetition of violence is a form of ongoing community redress and a compelling form of memorialization for the one lost to murder.

¹ Wesley Skogan, Natalie Bump, and Jill Dubois, "Evaluation of Ceasefire-Chicago," March 19, 2009, <http://cureviolence.org>. I believe that the epidemiological anti-violence principles of *Cure Violence*, especially in its promotional literature, are problematically insensitive to the ways in which poor communities of color are subject to violence beyond interpersonal violence. See Beth Richie for a much richer account of gender violence, the violence of economic divestment, and state violence within these communities: Beth Richie, *Arrested Justice: Black Women, Violence, and America's Prison Nation* (New York: New York University Press, 2012). Despite Ceasefire's simplistic rendering of violence, I want to uphold their claim that anti-violence work is best guided by those who have experienced and even committed acts of violence within that community.

REFERENCES

- Acker, James R., and David R. Karp, eds. *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*. Durham, N.C: Carolina Academic Press, 2006.
- ACLU. "The Prison Crisis." *American Civil Liberties Union*, 2016. <https://www.aclu.org/prison-crisis>.
- Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New Press, 2010.
- Améry, Jean. *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities*. Translated by Sidney Rosenfeld and Stella P. Rosenfeld. Bloomington: Indiana University Press, 1980.
- . "Resentments." In *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities*, translated by Michel Rosenfeld and Stella P. Rosenfeld, 62–81. Bloomington: Indiana University Press, 1980.
- . "Ressentiments." In *Jenseits von Schuld und Sühne: Bewältigungsversuche eines Überwältigten*, 114–44. Stuttgart: Klett-Cotta, 2015.
- . "Torture." In *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities*, translated by Michel Rosenfeld and Stella P. Rosenfeld, 21–40. Bloomington: Indiana University Press, 1980.
- Anderson, Elizabeth. *The Imperative of Integration*. Princeton, NJ: Princeton University Press, 2010.
- Arendt, Hannah. "Auschwitz on Trial." In *Responsibility and Judgment*, Reprint edition., 227–56. New York: Schocken, 2005.
- Armour, Marilyn Peterson, and Mark S. Umbreit. "Assessing the Ultimate Impact of the Ultimate Penal Sanction on Homicide Survivors: A Two State Comparison." *Marquette Law Review* 96, no. 1 (2012).
<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5144&context=mulr>.
- Barker, Vanessa. *The Politics of Imprisonment: How the Democratic Process Shapes the Way America Punishes Offenders*. New York: Oxford University Press, 2009.
- Beck, Julie A. "Victims' Rights and Public Safety? Unmasking Racial Politics in Crime Discourses Surrounding Parole Revocation for 'Lifers' in California." *Western Criminology Review* 11, no. 1 (2010): 20–36.
- Beloof, Douglas Evan. "The Third Model of Criminal Process: The Victim Participation Model." *Utah Law Review*, no. 2 (1999): 289–330.
- Berger, Vivian. "Payne and Suffering - A Personal Reflection and a Victim-Centered Critique." *Florida State University Law Review* 20 (1993 1992): 21.

- Booth v. Maryland, 482 U.S. 497 (U.S. Supreme Court 1987).
- Brisson, Susan J. *Aftermath: Violence and the Remaking of a Self*. Princeton, N.J.: Princeton University Press, 2002.
- Brodkin, Karen. *How Jews Became White Folks and What That Says About Race in America*. New Brunswick, N.J.: Rutgers University Press, 1998.
- Bronfenbrenner Center. *James Garbarino: "Listening to Killers: Bringing Developmental Psychology into the Courtroom in Murder Cases."* Ithaca, NY: Beebe Hall, Cornell University, 2015.
<https://www.youtube.com/watch?v=5OrTbL5G9RQ>.
- Bronson, Peter. "A Cruel Penalty for Victims." *Cincinnati Enquirer*, February 3, 2003.
http://enquirer.com/editions/2003/02/03/loc_bronson03.html.
- Brudholm, Thomas. "Contextualizing 'Ressentiments.'" In *Resentment's Virtue: Jean Amery and the Refusal to Forgive*, 71–82. Philadelphia: Temple University Press, 2008.
- "California Proposition 8, Victims' Bill of Rights (June 1982)." Accessed October 16, 2015.
[https://ballotpedia.org/California_Proposition_8,_Victims'_Bill_of_Rights_\(June_1982\)](https://ballotpedia.org/California_Proposition_8,_Victims'_Bill_of_Rights_(June_1982)).
- California Secretary of State. "California Voter Information Guide: Text of Proposed Laws," 2008.
<http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop9>.
- Caruth, Cathy. *Unclaimed Experience: Trauma, Narrative and History*. Baltimore, Md.: Johns Hopkins University Press, 1996.
- Cassell, Paul G. "Balancing the Scales of Justice: The Case for and the Effects of Utah." *Utah Law Review*, no. 4 (1994): 1373–1469.
- . "In Defense of Victim Impact Statements." *Ohio State Journal of Criminal Law* 6, no. 2 (2009): 611–48.
- "Citizens Against Homicide," 2016. <http://www.citizensagainsthomicide.org/>.
- Crockett, Jr, Stephen A. "PTSD in the Inner City Needs a Name That Respects Its Victims." *The Root*, May 20, 2014.
http://www.theroot.com/articles/culture/2014/05/let_s_rename_hood_disease_to_signify_what_it_really_means.html.
- Dalgaard, Nina Thorup, and Edith Montgomery. "Disclosure and Silencing: A Systematic Review of the Literature on Patterns of Trauma Communication in Refugee Families." *Transcultural Psychiatry* 52, no. 5 (October 1, 2015): 579–93. doi:10.1177/1363461514568442.

- Danieli, Yael, and Union for Reform Judaism. "Conspiracy of Silence: A Conversation with Dr. Yael Danieli." *Reform Judaism*, Winter 2009. <http://rjmag.org/Articles/index.cfm?id=1530>.
- Davis, Angela Y. *Are Prisons Obsolete?* Open Media Book. New York: Seven Stories Press, 2003.
- Diner, Hasia. *We Remember with Reverence and Love: American Jews and the Myth of Silence After the Holocaust, 1945-1962*. New York: NYU Press, 2010.
- Du Bois, W.E.B. "Criteria of Negro Art." In *Writings*, edited by Nathan Irvin Huggins, 993–1002. New York, NY: Literary Classics of the United States, 1986.
- . "Souls of Black Folk." In *Writings*, edited by Nathan Irvin Huggins, 357–548. New York, NY: Literary Classics of the United States, 1986.
- . "The Conservation of Races." In *Writings*, edited by Nathan Irvin Huggins, 815–26. New York, NY: Literary Classics of the United States, 1986.
- . "The Hampton Idea." In *The Education of Black People: Ten Critiques 1906-1960*, edited by Herbert Aptheker, 21–32. New York: Monthly Review Press, 2001.
- . "The Revelation of Saint Orgne The Damned." In *The Education of Black People: Ten Critiques 1906-1960*, edited by Herbert Aptheker, 135–62. New York: Monthly Review Press, 2001.
- . "Whither Now and Why." In *The Education of Black People: Ten Critiques 1906-1960*, edited by Herbert Aptheker, 193–204. New York: Monthly Review Press, 2001.
- Dubber, Markus Dirk. *Victims in the War on Crime: The Use and Abuse of Victims' Rights*. New York: NYU Press, 2006.
- Early, Jr., Norman S. "Racial Minorities for Victim Justice," April 17, 2000. <http://www.nvcap.org/docs/letters/rmvj.htm>.
- Elinson, Zusha. "More Police Go to Trial in Killings, but Convictions Remain Rare." *Wall Street Journal*, September 23, 2015, sec. US. <http://www.wsj.com/articles/more-police-go-to-trial-in-killings-but-convictions-remain-rare-1443044871>.
- Erez, Edna. "Victim Voice, Impact Statements and Sentencing: Integrating Restorative Justice and Therapeutic Jurisprudence Principles in Adversarial Proceeding." *Criminal Law Bulletin* 40 (October 2004): 483–500.
- Felman, Shoshana. *The Juridical Unconscious: Trials and Traumas in the Twentieth Century*. Cambridge, Mass: Harvard University Press, 2002.
- Felman, Shoshana, and Dori Laub. *Testimony: Crises of Witnessing in Literature, Psychoanalysis and History*. New York: Routledge, 1992.

- Feuer, Alan. "Ex-New York Officer Gets 5 Years of Probation in Fatal Brooklyn Shooting." *The New York Times*, April 19, 2016. <http://www.nytimes.com/2016/04/20/nyregion/peter-liang-ex-new-york-police-officer-sentenced-akai-gurley-shooting-death-brooklyn.html>.
- Fletcher, George P. *With Justice For Some: Victims' Rights In Criminal Trials*. Reading, Mass: Addison Wesley, 1995.
- Freud, Sigmund. *Beyond the Pleasure Principle*. Translated by James Strachey. New York: W. W. Norton & Company, 1990.
- . "Remembering, Repeating and Working-Through." In *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, edited by James Strachey, 12:145–56. London: Hogarth Press, 1964.
- Gottschalk, Marie. "Days Without End: Life Sentences and Penal Reform." *Prison Legal News*, January 15, 2012. <https://www.prisonlegalnews.org/news/2012/jan/15/days-without-end-life-sentences-and-penal-reform/>.
- . *The Prison and the Gallows: The Politics of Mass Incarceration in America*. New York: Cambridge University Press, 2006.
- Henderson, Lynne N. "The Wrongs of Victim's Rights." *Stanford Law Review* 37, no. 4 (1985): 937–1021. doi:10.2307/1228587.
- Herman, Judith Lewis. *Trauma and Recovery: The Aftermath of Violence, from Domestic Abuse to Political Terror*. New York: Basic Books, 2015.
- Hirsch, Marianne. *The Generation of Postmemory: Writing and Visual Culture After the Holocaust*. New York: Columbia University Press, 2013.
- International Middle East Media Center. "Netanyahu: 'We Will Forever Live by the Sword.'" *IMEMC News*, October 27, 2015. <http://imemc.org/article/73591/>.
- "Justice For All - A Criminal Justice Reform Organization," 2011. <http://www.jfa.net/deathpenalty.html>.
- Kaczynski, David, and Gary Wright. "Building a Bridge." In *Wounds That Do Not Bind: Victim-Based Perspectives on the Death Penalty*, edited by James R. Acker and David R. Karp, 85–102. Durham, N.C: Carolina Academic Press, 2006.
- Kane, Gregory. "To Murder Victims' Families, Executing Killers Is Justice." *Baltimore Sun*, February 5, 2003. <http://www.baltimoresun.com/news/maryland/bal-md.kane05feb05-column.html>.
- Laplanche, Jean, and Jean-Bertrand Pontalis. *The Language of Psycho-Analysis*. Translated by Donald Nicholson-Smith. New York: W. W. Norton & Company, 1973.

- Lifton, Robert Jay. *Home from the War*. New York: Simon & Schuster, 1973.
- Logan, Wayne A. "Confronting Evil: Victims' Rights in an Age of Terror." *Georgetown Law Journal* 96, no. 3 (2008 2007): 721–76.
- . "Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials." *Arizona Law Review* 41 (1999): 143–92.
- . "Victim Impact Evidence in Federal Capital Trials." *Federal Sentencing Reporter* 19, no. 1 (2006): 05–12. doi:10.1525/fsr.2006.19.1.05.
- Louisiana State Legislature. "Louisiana Victims' Rights Laws." State Constitutional and Statutory Victims' Rights. Portland, OR: National Crime Victim Law Institute, 1998.
<https://law.lclark.edu/live/files/4952-louisiana>.
- Madeira, Jody. *Killing McVeigh: The Death Penalty and the Myth of Closure*. New York: NYU Press, 2013.
- Mann, Brian. "How the Rockefeller Drug Laws Changed America." *North Country Public Radio*. Saranac Lake, NY, January 24, 2013.
<http://www.northcountrypublicradio.org/news/story/21316/20130124/how-the-rockefeller-drug-laws-changed-america>.
- Mesmaecker, Vicky De. "Antidotes to Injustice? Victim Statements' Impact on Victims' Sense of Security." *International Review of Victimology* 18, no. 2 (May 1, 2012): 133–53.
 doi:10.1177/0269758011432954.
- Mills, Charles W. "'Ideal Theory' as Ideology." *Hypatia* 20, no. 3 (August 1, 2005): 165–83.
 doi:10.1111/j.1527-2001.2005.tb00493.x.
- Morain, Dan. "Longer Sentences Upheld Under Victims' Rights Bill." *Los Angeles Times*, January 29, 1985. http://articles.latimes.com/1985-01-29/news/mn-13928_1_rulings.
- Murder Victims Family for Reconciliation. BRIEF OF AMICUS CURIA ON WRIT APPLICATION FROM THE DISTRICT COURT PARISH OF CALCASIEU, No. 10258-02. Accessed April 14, 2016.
- National Center for Victims of Crime. "Constitutional Amendments." *National Center for Victims of Crime*, 2016. <http://www.victimsofcrime.org/our-programs/public-policy/amendments>.
- . "Victim Impact Statements." *Victimsofcrime.org*, 2008.
<https://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements>.
- National Victims' Constitutional Amendment Passage. "State Victim Rights Amendments." *Nvcap.org*, 2015. <http://nvcap.org/stvr.html>.

- Neiderbach, Shelley, and Susan Iwansowski. *Invisible Wounds: Crime Victims Speak*. New York: Routledge, 1986.
- Nero, Charles I. "Queering The Souls of Black Folk." *Public Culture* 17, no. 2 (March 20, 2005): 255–76. doi:10.1215/08992363-17-2-255.
- Nir, Sarah Maslin. "Officer Peter Liang, on Stand, Breaks Down as He Recalls Brooklyn Killing." *The New York Times*, February 8, 2016.
<http://www.nytimes.com/2016/02/09/nyregion/officer-peter-liang-in-emotional-testimony-describes-the-night-of-a-fatal-shooting.html>.
- Office for Victims of Crime. "Landmarks in Victims' Rights and Services." National Crime Victims Rights Week-Resources. Washington, D.C, 2014.
<http://ovc.ncjrs.gov/ncvrw2014/pdf/Landmarks.pdf>.
- Office of State Senator Heather Steans (D-Chicago 7th). "'Crime Victims' Bill of Rights' to Appear on November Ballot." *Capitol Fax*, April 10, 2014.
<http://capitolfax.com/2014/04/10/crime-victims-bill-of-rights-to-appear-on-november-ballot/>.
- Parents of Murdered Children. "Parole Block Program." *National Organization of Parents of Murdered Children*, 2016. <http://www.pomc.com/pbp.html>.
- Payne v. Tennessee, 501 U.S. 808 (U.S. Supreme Court 1991).
- Peerenboom, R.P. "Victim Harm, Retributivism and Capital Punishment: A Philosophical Critique of Payne v. Tennessee." *Pepperdine Law Review* 20, no. 1 (December 15, 1992): 25–72.
- Rich, John A. *Wrong Place, Wrong Time: Trauma and Violence in the Lives of Young Black Men*. Baltimore, MD: Johns Hopkins University Press, 2011.
- Richie, Beth. *Arrested Justice Black Women, Violence, and America's Prison Nation*. New York: New York University Press, 2012.
- Roberts, Julian V., and Edna Erez. "Communication in Sentencing: Exploring the Expressive Function of Victim Impact Statements." *International Review of Victimology* 10, no. 3 (January 1, 2004): 223–44.
- Schlosser, Eric. "A Grief Like No Other." *The Atlantic*, September 1997.
<http://www.theatlantic.com/magazine/archive/1997/09/a-grief-like-no-other/376944/>.
- Shmotkin, Dov, Amit Shrir, Shira Goldberg, and Yuval Palgi. "Resilience and Vulnerability Among Aging Holocaust Survivors and Their Families: An Intergenerational Overview." *Journal of*

- Intergenerational Relationships* 9, no. 1 (January 2011): 7–21.
doi:10.1080/15350770.2011.544202.
- Skogan, Wesley, Natalie Bump, and Jill Dubois. “Evaluation of Ceasefire-Chicago,” March 19, 2009.
<http://cureviolence.org>.
- Solonari, Vladimir. “Patterns of Violence: The Local Population and the Mass Murder of Jews in Bessarabia and Northern Bukovina, July-August 1941.” *Kritika: Explorations in Russian and Eurasian History* 8, no. 4 (Fall 2007): 749–87.
- Somer, Eli, and Moshe Nizri. “Ripples of Trauma and Resilience: Partner Relationships among Second-Generation Survivors of the Holocaust.” *Kavod: A Journal for Caregivers and Family*, no. 4 (Spring 2014). <http://kavod.claimscon.org/2014/06/ripples-of-trauma-and-resilience-partner-relationships-among-second-generation-survivors-of-the-holocaust/>.
- South African Truth and Reconciliation Commission. “Amnesty Decision on Death of Steve Biko,” February 16, 1999. <http://www.justice.gov.za/trc/media/pr/1999/p990216a.htm>.
- South Carolina v. Gathers, 490 U.S. 805 (U.S. Supreme Court 1989).
- Tessman, Lisa. “Idealizing Morality.” *Hypatia* 25, no. 4 (October 1, 2010): 797–824.
doi:10.1111/j.1527-2001.2010.01125.x.
- Truth, Sojourner. “Speech at New York City Convention.” presented at the Fourth National Woman’s Rights Convention, New York, 1853.
<http://www.lehigh.edu/~dek7/SSAWW/writTruthSpeech2.htm>.
- Truth and Reconciliation Commission of South Africa. *Truth and Reconciliation Commission of South Africa Report*. Vol. 1. 5 vols. Cape Town : New York, NY: Palgrave Macmillan, 2001.
- Tutu, Desmond. *No Future without Forgiveness*. New York: Doubleday, 1999.
- Valentini, Laura. “Ideal vs. Non-Ideal Theory: A Conceptual Map.” *Philosophy Compass* 7, no. 9 (September 1, 2012): 654–64. doi:10.1111/j.1747-9991.2012.00500.x.
- van der Kolk, Bessel. *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma*. New York: Viking, 2014.
- . “The Compulsion to Repeat the Trauma.” *Psychiatric Clinics of North America* 12, no. 2 (1989): 389–411.
- Walker, Margaret Urban. *Moral Repair: Reconstructing Moral Relations after Wrongdoing*. Cambridge: Cambridge University Press, 2006.

- . “The Expressive Burden of Reparations: Putting Meaning into Money, Words, and Things.” In *Justice, Responsibility and Reconciliation in the Wake of Conflict*, edited by Alice MacLachlan and Allen Speight, 205–25. Dordrecht: Springer Netherlands, 2013. ny.
- Wiseman, Hadas, Jacques P. Barber, Alon Raz, Idit Yam, Carol Foltz, and Sharon Livne-Snir. “Parental Communication of Holocaust Experiences and Interpersonal Patterns in Offspring of Holocaust Survivors.” *International Journal of Behavioral Development* 26, no. 4 (July 1, 2002): 371–81. doi:10.1080/01650250143000346.
- Young, Marlene, and John Stein. “The History of the Crime Victims’ Movement in the United States.” Washington, D.C.: U.S. Department of Justice, 12/04.
https://www.ncjrs.gov/ovc_archives/ncvrv/2005/pdf/historyofcrime.pdf.
- Zinzow, Heidi M., Alyssa A. Rheingold, Michelle Byczkiewicz, Benjamin E. Saunders, and Dean G. Kilpatrick. “Examining Posttraumatic Stress Symptoms in a National Sample of Homicide Survivors: Prevalence and Comparison to Other Violence Victims.” *Journal of Traumatic Stress* 24, no. 6 (December 2011): 743–46. doi:10.1002/jts.20692.
- Zinzow, Heidi M., Marti P. Thompson, and Alyssa A. Rheingold. “Homicide Survivors: A Summary of Research.” In *Victims of Crime*, edited by Robert C. Davis, Arthur J. Lurigio, and Susan Herman, Fourth Edition., 133–60. Los Angeles: SAGE Publications, Inc, 2007.