

**Transitional Justice: A Conceptual Map**  
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In recent decades, dozens of countries emerging from long periods of repressive rule and civil conflict have attempted the difficult transition to democracy. South Africa after apartheid, post-1994 genocide Rwanda, and present-day Egypt following the end of the Mubarak era are examples of transitional societies. Although the precise markers of a successful transition to democracy are a matter of ongoing dispute, scholars and policy experts alike agree that societies must explicitly address their legacies of violence, which typically include systematic and brutal human rights abuses.

The term “transitional justice” refers to formal attempts by postrepressive or postconflict societies to address past wrongdoing in their efforts to democratize. Societies in transition have enacted a range of measures to confront these legacies of violence, such as amnesty, criminal trials, truth commissions, and reparations. There is little consensus, however, about which response(s) are appropriate and morally justified. Many important studies on transitional justice concentrate on specific cases and employ social science methodologies to understand the social outcomes of different legal responses to wrongdoing, such as whether the establishment of a truth commission has an impact on the rule of law. Such studies also consider the factors that explain the particular choices specific communities make and the constraints that influence decision-making.

My focus in this chapter, however, is different. My interest is in the moral evaluation of the choices transitional communities make in dealing with wrongdoing. Both members and observers of transitional communities form moral judgments about the responses to wrongdoing that communities select. Such judgments are expressed in reactions such as, “It is unjust to grant

amnesties to perpetrators of human rights abuses” or “A truth commission achieved justice.”

There is great variation, and at times incompatibility, in the judgments individuals make.

Scholars, international organizations, victims, and citizens of transitional societies disagree on how we should morally judge measures adopted to deal with past wrongdoing.

At the heart of debates about how societies in transition should deal with wrongdoing is the following question: *what are the appropriate standards of justice to use when evaluating various legal responses to wrongdoing in transitional contexts?* This is a question about the general standards or principles that any response to wrongdoing must meet in order to qualify as *just*. In order to explain why responses other than criminal punishment do or do not meet the standards of justice, we must first understand what justice requires. I argue in this paper that to date there is no satisfactory answer to this question at the core of transitional justice.

In the next section I provide an overview of the pragmatic and moral challenges confronting transitional communities that explain why “ordinary” expectations of justice will not be satisfied. I then critically discuss two general ways of conceptualizing transitional justice: as a compromise and as restorative justice. In compromise views, transitional justice entails the balancing of specific (retributive/distributive/corrective) justice-based claims against competing moral and/or pragmatic considerations. At the core of the limitations with compromise and restorative justice views is a failure to acknowledge the context-sensitive nature of claims of justice. This failure matters because ignoring the background context presupposed by theories of justice, I argue, undermines distinctions between kinds of justice and, as a result, the normative point for making such distinctions in the first place is undermined. The most promising theoretical route to explore is the idea that transitional justice is a distinctive kind of justice.

However, this idea remains under-theorized and in need of greater conceptual clarification and articulation.

## **1. What is Controversial about Transitional Justice?**

Modern democracies generally hold that criminal punishment is the “first-best” moral response to wrongdoing, especially in the case of egregious wrongdoing such as rape and torture. Trials establish guilt and determine punishment, giving perpetrators “what they deserve.” Justice is achieved when wrongdoers are punished.<sup>1</sup> President Obama articulated the basic idea that perpetrators of wrongdoing must be punished in the aftermath of the killing of the U.S. ambassador to Libya in 2012: “Make no mistake, we will work with the Libyan government to bring to justice the killers who attacked our people” (Kirkpatrick and Myers 2012). More generally, the criminal justice system in the United States, as in many states around the world, is designed to mete out justice so conceived.

Criminal punishment is not entirely without its critics; some skeptics charge that punishment simply masks the brute desire for revenge that human beings harbor when wronged. However, such skeptics are in the minority among the general population and among academics; the consensus view is that is a legitimate response to wrongdoing and satisfies standards of justice. There is also consensus that at least part of the moral point of punishing criminals is to give them what they deserve. The core claim of retributive justice is that perpetrators deserve to suffer and it is intrinsically just to inflict such suffering. For retributivists the amount of suffering should be proportional to the wrong committed. Retributivists differ in the

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<sup>1</sup> For the purposes of this chapter I take “punishment” to refer specifically to “legal punishment” by the state.

explanations offered for why suffering is what is deserved. Some take this to be a bedrock moral intuition; others offer competing accounts of why suffering is deserved.<sup>2</sup> Many people believe that desert is not the only justification for punishment (deterrence counts as well); however, what is crucial for my purposes is that few are willing to say desert plays no part at all in the justification of criminal punishment. For purposes of articulating why justice is controversial in transitional contexts, I thus simply assume the claim that punishment can satisfy standards of justice.

In transitional contexts both pragmatic and moral obstacles preclude the straightforward application of trial, conviction, and criminal punishment to many, indeed most, instances of wrongdoing. The sheer number of crimes can overwhelm even a mature criminal justice system created to deal with statistically infrequent wrongdoing. Numerous human rights abuses are characteristically committed during repression and conflict, and so criminal justice systems face the task of potentially prosecuting tens of thousands of cases. According to one estimate, between 170,000-210,000 individuals actively participated in the Rwandan genocide in 1994 (Straus 2004). In the words of South African lawyer Paul van Zyl, “Criminal justice systems are designed to maintain order in societies where violation of law is the exception. These systems simply cannot cope when, either as a result of state-sanctioned human rights abuses or internal conflict or war, violations become the rule” (van Zyl 2000, 46). There are additional obstacles to

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<sup>2</sup> See Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): 1659-1702; Herbert Morris, "Guilt and Suffering," *Philosophy East and West* 21 no. 4 (1971): 419-34.

Michael Moore, "Justifying Retributivism," *Israel Law Review* 24 (1993): 15-49. The views of both Hampton and Morris have been subject to extensive critique. For a critique of Morris see Hampton "Correcting Harms." For a critique of Hampton see Heather J. Gert, Linda Radzik, and Michael Hand, "Hampton on the Expressive Power of Punishment," *Journal of Social Philosophy*, 35 no. 1 (2004): 79-90.

the successful prosecution of even a portion of alleged perpetrators. It is not unusual for evidence to be systematically destroyed by government officials prior to a transition. Lack of trust in state agents may make the possibility of getting ordinary citizens to testify against wrongdoers practically impossible. Corruption as well as insufficiently trained and funded police and legal staff often undermine the ability of courts to effectively distinguish the guilty from the innocent.

Even when such pragmatic obstacles are not as severe in a given context, moral obstacles remain. During conflict and repression the state is often complicit in wrongdoing and the criminal justice system colludes in preventing agents of the state from being held accountable for wrongs committed. This collusion calls into question the authority of the state to prosecute such wrongs following a transition. The practical impossibility of charging all – or even most – who are guilty of wrongdoing has led to charges of arbitrariness and bias in the case of the few who are held to account. It is claimed that there is injustice in punishing a few while the many go free, especially when among the many going free are those responsible for issuing the orders that the punished followed. Finally, in some contexts, including South Africa, the possibility of a transition itself may have been conditioned on the granting of amnesty to those who participated in wrongdoing in the past. Amnesties preclude legal liability for a crime for either an individual or class of individuals and are granted prior to a criminal trial. Amnesty thus precludes punishment, and so pursuing punishment in a transition becomes morally controversial insofar as it violates a prior commitment.

Against this background, it is unsurprising that many communities in transition have sought out means other than criminal punishment to deal with the wrongs of the past. Legal scholars, international organizations, victims, and citizens of transitional societies disagree on whether any legal response other than criminal trial and punishment does in fact achieve justice.

Alternative responses do not hold perpetrators accountable in the same way as standard democratic justice systems. Amnesty in exchange for peace can grant rapists immunity from criminal and civil liability. Amnesty thus severs the link between accountability and hard treatment. Truth commissions document the actions of torturers, but do not punish them. Furthermore, truth commissions do not focus primarily on individual perpetrators and victims in isolation, but rather on patterns of interaction and structures of institutions that permit, sanction or promote such patterns. Reparations shift the emphasis away from the perpetrator to those who have suffered and been wronged, but reparations only offer material compensation for what in many cases is irreparable harm.

## **2. Transitional Justice as Compromise**

Many scholars view transitional justice as a compromise among familiar forms of justice (e.g., retributive justice) and competing moral considerations. In this section I critically evaluate a range of views of transitional justice as compromise in the literature. Scholars differ in how they characterize the compromise made and whether they take the compromise to be justified.

Despite these differences, there are two general features of compromise views. First, such views implicitly or explicitly define justice as “all-things-considered-justified.” Scholars may analyze what particular kinds of justice (e.g., retributive justice) demand in the course of their analysis, but what makes a response to wrongdoing justified is that it strikes the appropriate balance among competing values. The claims of commonly recognized types of justice, such as retributive justice, are one of multiple moral (or in some cases pragmatic) inputs that must be taken into account to determine whether a particular response to wrongdoing is “just.” Second,

compromise views also generally assume that moral demands are context-insensitive. That is, moral principles apply across all contexts. The same set of principles or standards needs to be satisfied for a response to wrongdoing to be justified in all contexts. I argue that many versions of compromise views are insufficiently nuanced in their understanding of the justice component of the compromise, failing to recognize that justice is a scalar concept and assuming rather than demonstrating what justice, as one moral value, demands. The most nuanced compromise views avoid this limitation, but in trying to identify how justice specifically is satisfied such approaches collapse important distinctions among kinds of justice and, as a consequence, the normative point for making such distinctions in the first place is undermined. A source of this problem is a failure to recognize the context-sensitive character of justice claims.

Compromise views are most commonly found in the literature in political theory and philosophy, and one case study dominates such discussions: South Africa (Posner and Vermeule 2004). Some scholars focus exclusively on South Africa while others reference additional examples. Because South Africa has been so influential in philosophical discussions of transitional justice as moral compromise, I use it as the case study to illustrate competing versions of compromise positions. A central moral question debated in discussions in the literature of the South African Truth and Reconciliation Commission (TRC), established as part of the transition from apartheid to democracy, is whether, and for what reasons, the granting of amnesty to perpetrators of gross human rights abuses is morally justified. The amnesty provision in the TRC was such that a perpetrator could apply for and be granted amnesty if he fully disclosed the acts for which he was responsible and demonstrated that the acts were committed for political reasons. Individuals granted amnesty were immune from civil and criminal liability.

According to the *simple compromise* position, alternative responses to wrongdoing, such as the South African TRC, sacrifice justice. The realist version of the simple compromise view claims that justice is sacrificed out of expediency (Mendez 1997, 255) (Allen 1999). This position is realist in the sense of the tradition in international relations according to which morality does not extend to relations between states. All is fair in war—and the aftermath of war. Justice is defined by the powerful. Choices are a function of merely political compromise. “From the realist perspective, the question of why a given state response occurred is conflated with the question of what response was possible” (Teitel 1997, 2011). Pressing prudential considerations, such as a concern with a resumption of violence should alleged perpetrators be prosecuted, necessitate the choices particular communities make. At first glance, this characterization of the choices that transitional societies make seems apt. Indeed, transitional contexts can give rise to the same thought that realists articulate in the context of war or that underpins justifications for the suspension of ordinary rules by a government in a state of emergency. Justice is taken to be a luxury that communities cannot afford or that does not pertain to such contexts. All becomes fair in (the aftermath of) war.

However, the realist version of the simple compromise position is too sweeping in the permission it grants. Although many find it intuitively plausible to claim that actions not ordinarily sanctioned may be permissible in moments of crisis, few are willing to permit any action whatsoever. Killing may be justified in war, but massacre is not. Similarly, establishing a truth commission may be justified in a transitional context, but summary executions are not. Moreover, the realist version of the simple compromise view does not capture or recognize the moral salience of the various pressing considerations that transitional societies confront. A

concern for reducing or ending violence is not only of pragmatic interest for those potentially targeted, but reflects a moral concern with preventing unnecessary suffering.

The moral version of the simple compromise view acknowledges the moral weight that should be given to many of the countervailing considerations. In the moral version, when they establish a truth commission or grant amnesty transitional societies sacrifice justice for the sake of achieving competing moral values, such as peace or reconciliation (Moellendorf 1997) (Wilson 2001) (Lenta 2000). This version has the virtue of acknowledging the moral salience of many of the factors influencing decisions concerning how to deal with past wrongs. However, the moral version is too simplistic in its conceptualization of the various values at stake in these choices. This view implicitly assumes that values such as justice and reconciliation are completely distinct and incompatible. *Either* one promotes justice *or* one promotes reconciliation, so the thinking goes. Moreover, the moral version of the simple compromise view assumes that justice is achieved in an all-or-nothing manner. *Either* the demands of justice are satisfied, and satisfied completely, *or* justice is sacrificed. The possibility that justice may be satisfied to some degree is not considered.

*Nuanced compromise* views complicate the moral landscape. The basic strategy of such views is to demonstrate that alternative responses to wrongdoing are or can be sensitive to the moral concerns at the core of retributive justice. Similarly, the extent to which such responses respect the moral concerns at the core of other values, such as reconciliation, is considered. Nuanced compromise views demonstrate that choices to adopt responses other than punishment do not simply sacrifice justice for the sake of another value that is distinct from and unrelated to justice (e.g., something we could name reconciliation). Instead, alternative responses may serve both the value of justice and reconciliation to some degree. At the same time, nuanced

compromise views recognize that alternative responses to wrongdoing entail a moral cost and sacrifice. However, the moral cost and sacrifice is principled and one that can be justified (Allen 1999) (Posner and Vermeule 2004) (Cavulea May 2011) (Allais 2012).

Nuanced compromise views take a more sophisticated view of justice than simple compromise views. They recognize that specific moral concerns underpin the basic principles of justice associated with different kinds of justice. They also draw attention to the basic rationale for specific injunctions of justice. Many such views also recognize that there are multiple kinds of justice about which we may speak and which may be fostered to varying degrees by alternative responses to wrongdoing in transitional contexts. For example, Lucy Allais discusses both restorative and retributive justice, while Jonathan Allen considers punitive justice, compensatory justice and “justice as ethos” (Allen 1999, 335). Finally, nuanced compromise views acknowledge the complex relationship between justice and other moral concerns such as reconciliation, noting that such values are not necessarily incompatible and may in fact be promoted by the same process.

An assumption underpinning nuanced compromise views is that extant theories of justice provide the requisite conceptual resources for understanding and evaluating the moral questions that transitional societies confront. Nuanced compromise approaches generally recognize that transitional contexts are not identical to ordinary contexts; rather, transitional societies are frequently characterized as exhibiting more-pronounced or acute versions of features found in other contexts (Posner and Vermeule 2004). Such differences do not alter the basic moral framework of justice that we should use to evaluate responses to wrongdoing in transitional contexts; the appropriate framework is the same one we use to evaluate responses to wrongdoing in other contexts. Moral demands are in this sense context-insensitive. However, as I argue

below, adapting a theory of retributive justice so that it can be used to evaluate the justifiability of truth commissions has a significant cost: the distinctions among kinds of justice collapse.

A recurring worry about *any* response to wrongdoing, including criminal trials, in transitional contexts is that it will fail to be - and to be viewed by members of the community in question as - an instrument of justice. As Pablo de Greiff nicely puts it, criminal trials risk being seen as mere “victor’s justice” or scapegoating; reparations risk being perceived as attempts to “buy off” victims and blood money; and truth commissions risk being seen as “a form of whitewash in which the truth emerges but no one pays any price” (de Greiff 2012, 38). The form skepticism takes in any particular society may vary in terms of breadth and depth in a given population. Skepticism may be wide (shared by the majority of a population) or narrow (shared only by a minority). The degree to which a given population is skeptical about such responses may also differ.<sup>3</sup> Skepticism about the justice of any response to wrongdoing seems intuitively plausible in such contexts, and may in particular cases be in fact justified.

Against this background, a central theoretical task is to explain how measures can in fact be measures *of justice* in a context in which they are not likely to be seen in this way and in which often these perceptions are justified. Such explanations stand to have significant practical consequences and affect the meaning that individuals within transitional communities attach to particular measures. By contrast, the same skepticism is not characteristically present among members of stable democratic societies or among scholars theorizing about responses to

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<sup>3</sup> In cases where skepticism is not widely shared, a minority population may be so deeply skeptical of a criminal justice system that the attempt to apply that system would lead to genuine political instability. That is, the minority population would simply give up any pretense that they would continue to abide by the authority of the state. If the minority population is small enough then skepticism may not be widespread, but still deep enough to be problematic. I thank Linda Radzik for drawing this point to my attention.

wrongdoing in such contexts. No criminal justice system is perfect, and many criticisms have been raised about criminal justice systems in stable democracies.<sup>4</sup> However, there is not a general presumption by scholars or by members of such communities that punishment involves the mere exercise of power by a stronger party over a weaker, or that civil damages amount to blood money. Nor consequently is there an assumption among scholars that there are tangible practical consequences that a theoretical justification of a response like punishment or truth commissions will have.

One source of these varying presumptions is the different moral needs present in each context. In transitional societies the basic importance of human rights and their efficacy in governing conduct often need to be established. The new political order that commits to such rights protections needs to be legitimized, and the previous political order that officially and publicly sanctioned violence rejected (de Greiff 2012) (Teitel 1997) (Gray 2010, 91-92). There is thus a need to draw a line between what communities sanctioned in the past and what will be sanctioned in the future. Yet these large tasks are pursued in the midst of a “justice gap”: “the radical disparity between justice needs and resources available to transitional regimes.

Nuanced compromise views adapt theories of particular kinds of justice to respond to the problems and moral needs characteristic of transitions. However, in moving to accommodate these needs, the link between a particular kind of justice and its widely recognized constitutive principles is severed. For example, a central principle of retributivism is “that those who commit

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<sup>4</sup> In the United States, for example, there are, moreover, advocates of restorative justice who argue that the system of criminal justice should be replaced and there are critics of particular features of specific criminal justice systems, such as the system of the United States, who advocate for their reform. There are recurring concerns about racial bias in the administration of criminal justice in the United States. There may be groups, especially immigrant and minority groups, which view punishment in democracies in this manner.

certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment.”<sup>5</sup> In explaining the justifiability of the South African TRC, however, Allais argues that “there are ways other than punishment of responding to the moral concerns underlying retributivism” (Allais 2012, 338). The case for the retributive character of a truth commission is made by appealing to the moral concerns that ground or are connected to the core retributive principles, such as respecting the value of human beings or upholding the law (Allais 2012, 342-43). Focusing on the moral concerns at this level of generality also allows her to demonstrate the ways in which other mechanisms satisfy the core concerns underpinning standard kinds of justice, despite fulfilling those concerns in a nonstandard way (e.g., without punishment).

However, separating retributive justice from its orienting problem and substantive normative principles undermines the basis for distinguishing it from other kinds of justice. Discussions of justice operate at many different levels and have different meanings at each level. Justice can be a virtue of individuals as well as a characteristic of laws. As philosophers since Aristotle have recognized, there are different kinds of justice (Aristotle 1999). Aristotle distinguished justice in distribution, rectification, exchange, and political justice. Contemporary philosophers examine retributive justice, corrective justice, distributive justice, international justice, procedural justice and justice in war. In Book 5 of the *Nicomachean Ethics*, Aristotle notes that the different ways something can be just must be distinguished, and in particular a description of different kinds of justice is needed (Aristotle 1999, 122).

Aristotle does not explain why it is important for justice to be divided, but here is one explanation for its importance. Justice is fundamentally normative, concerned with action. We

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<sup>5</sup> Walen, “Retributive Justice.”

theorize about justice so as to understand what we should do, as individuals and as communities. Communities confront a variety of problems that call for normative guidance. Kinds of justice focus on specific problems and offer normative guidance on how to deal with a particular issue. Retributive justice focuses on perpetrators of wrongdoing, and asks what should be done in response to their actions. Corrective justice focuses on the injuries individuals can suffer, and what should be done to repair wrongful injuries or losses. Theories of distributive justice answer the question: what principles must be satisfied by a set of social arrangements that assigns rights and duties, and determines the distribution of the benefits and burdens of social cooperation? As the descriptions of the problems indicate, kinds of justice differ in the basic subject of interest (e.g., perpetrators of wrongdoing, victims of wrongdoing, and/or the basic economic institutions of community). Principles of justice specify what counts as doing justice, and different kinds of justice propose different injunctions. Examples include the retributive principle that justice requires punishment of wrongdoers or Rawls's difference principle, according to which departures from strict equality in the distribution of primary goods is just so long as the inequalities are to the benefit of the least advantaged. Thinking of justice discretely in terms of particular kinds allows us to keep clear which problem we are dealing with, and to come up with specific principles for responding to a given problem that will be action guiding. I assume that the separation among kinds of justice is a valid one. In any given case, the separation among kinds of justice should be preserved unless there are overriding reasons not to in any given case.

All kinds of justice share features which count as aspects of justice, rather than another moral value. A basic concern with respect for human dignity is arguably one such feature. Respecting human dignity is thus a very general and basic moral concern of justice, which can be expressed in action in a range of ways. Distributing goods according to a specific set of

principles or inflicting suffering on perpetrators of wrongdoing may be two such ways. Demonstrating that responses such as truth commissions respect human dignity is also not sufficient to show that truth commissions respond to *retributive* justice. Thus the fact that responses like truth commissions respect human dignity may count in favor of them respecting justice in general, not retributive justice specifically.

### **3. A different kind of justice?**

A second kind of account of transitional justice focuses specifically on one moral value, justice, and explains why, and under what conditions, alternative responses fulfill the requirements of this particular value. Responses are “just” in such accounts insofar as they satisfy these requirements. Scholars who adopt this strategy focus on either *restorative justice* or *transitional justice*. Advocates of restorative justice generally view the requirements of justice as context-insensitive. Advocates of transitional justice generally view justice claims in a context-sensitive manner. According to context-sensitive views, the moral principles or standards that need to be satisfied for a response to wrongdoing to be justified vary across contexts. Here context influences which moral demands are salient in a given case. I discuss each of these kinds of justice in turn.

“Restorative justice” conceptualizes crime as a problem in the relationship among the offender, the victim, and the local community (Walker 2006, 383). In the view of advocates of restorative justice, justice is fundamentally about repairing damaged relationships. The core justice intuition at stake in addressing wrongdoing is “the notion that a social equality or equilibrium has been disrupted (or further disrupted) by the offense and that it must be restored

through social action” (Llewellyn and Howse 1999, 357). A chief goal of the criminal justice system, according to this framework, should be to reconcile the relationships among the criminal, the victim and/or the community in the aftermath of crime.

Restorative justice theorists generally regard it as a mistake to equate justice with retributive justice. The proper aim of the state in the aftermath of crime is not to secure retribution, or deter crime, but to restore the proper relationships among citizens, and between the citizens and the state. Forgiveness is characteristically a key aim of restorative justice. Restorative justice processes focus on rebuilding or building bonds, rather than isolating or alienating the perpetrator, and turn to measures such as restitution payments and face-to-face dialogue in order to restore that relationship (Brathwaite 2002) (van Ness and Strong 2002) (Kiss 2000, 68-69). When used in criminal sentencing, victims play an important participatory role, shaping what the offender must do to make amends (Johnstone 2002). The role of offenders is characteristically active as well, which, advocates claim, enables offenders to regain their sense of self-worth (Zehr 1990) (Brathwaite 2002).

The insight at the core of restorative justice - that relationships and their repair is a central concern of justice - is important. Indeed, relational repair is at the core of the account of transitional justice I develop in later chapters. However, I do not think the justice that is salient in transitions is best understood as restorative justice for three reasons. First, the idea of restorative justice is still underdeveloped. The core commitments of restorative justice are still being clarified, and fundamental areas of disagreement remain. Importantly, restorative justice theorists disagree about whether punishment is compatible with restorative justice. For some, the idea that punishment is needed to restore equilibrium is “arbitrary and historically

contingent” (Llewellyn and Howse 1999, 357). Other theorists of restorative justice include punishment as a process of restorative justice (Philpott 2012).

One reaction might be to develop further an account of restorative justice. However, two further limitations suggest this is not the most fruitful course for understanding transitional justice. The second limitation stems from the key role forgiveness plays in most accounts of restorative justice (Philpott 2012).<sup>6</sup> Forgiveness is generally defined as the overcoming or forswearing of negative emotions such as resentment, anger and hatred (Richards 1988) (Hughes 1993) (Hieronymi 2001). Here relational repair depends fundamentally on a change of reactive attitude or emotion among those wronged. In my view, forgiveness should not be a requirement for relational repair in transitional contexts (Murphy 2010).<sup>7</sup>

The morally laudatory role of forgiveness in interpersonal relationships is most powerful when considering wrongdoing that is the exception, but not the rule. When exceptional, wrongdoing occurs in the context of a relationship otherwise predicated on, for example, mutual respect. A willingness to forgive in this context can reflect recognition by the forgiver of her imperfection and fallibility. Just as she hopes the other will forgive her for her transgressions, she is willing to now forgive. However, in transitions the background relational context is not one of a mutually respectful and reciprocal relationship in which wrongdoing is the exception and not the rule. In contexts where relationships are not mutually respectful and reciprocal, urging forgiveness risks maintaining oppression and injustice. For the focus of forgiveness is not on fundamentally altering the terms of interaction, but rather on overcoming obstacles to ongoing or continuing interaction. In addition, the imperative to forgive places the burden for relational

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<sup>6</sup> Ibid.

<sup>7</sup> See in particular chapter 1.

repair squarely on victims, which is in transitional contexts deeply morally problematic. Urging forgiveness can reflect a failure to fully acknowledge or take seriously the wrongdoing to which victims were subject. Placing the burden of relational repair on victims can reflect a failure to recognize that victims are justified in feeling resentment and anger in response. Emphasizing or calling for forgiveness can reflect denial among perpetrators and those complicit in wrongdoing of their responsibility for wrongs that occurred and the corresponding obligations they now have as a result.

The second limitation points to the third limitation of restorative justice: it is insufficiently context-sensitive. Restorative justice theories do not consider the context in which the wrongs being dealt with occurred. Inattention to contextual differences obscures the fact that the reasonableness and plausibility of placing forgiveness at the core of an account of relational repair depends on certain background conditions being in place. Altering the background conditions affects the reasonableness of the moral imperative to forgive; it can turn a reasonable demand into a presumptively morally troubling one.

Accounts of transitional justice generally take seriously the idea that transitional justice is not reducible to forms of justice with which we are already familiar. They also generally take seriously the idea that claims of justice are context-sensitive. Normative discussions of transitional justice generally concentrate on the moral evaluation of the various means of pursuing justice (e.g., reparations or criminal trials), and not on the idea of transitional justice itself. As Paige Arthur puts it, “So far, there is no single theory of transitional justice, and the term does not have a fixed meaning” (Arthur 2009, 359). Pablo de Greiff makes the same point even more forcefully when he writes, “the field remains tremendously undertheorized. It is not just that the consensus around any given understanding of transitional justice and its components

is far from complete; the consensus is, moreover thin” (de Greiff 2012, 32). Below I briefly survey the few conceptual accounts of transitional justice currently present in the literature, and discuss their strengths and limitations.

In her seminal book, *Transitional Justice*, Ruti Teitel articulated one of the first accounts of transitional justice. Teitel argues that justice is ultimately *instrumental*: a just response to wrongdoing is one that will promote the transformation of a community into a liberal democratic order (Teitel 1997, 2011). Transitional justice is also pragmatic in the sense that just responses to wrongdoing will offer a pragmatic resolution to the dilemmas inherent in transitional contexts. Importantly, for Teitel what is needed to transform a particular community will be contingent on the particular character of the injustice in the past, and so there is no general prescription of what a just response to wrongdoing must do. Indeed, Ruti Teitel explicitly eschews general standards of justice for transitional contexts, arguing that what counts as just in any particular case “is contingent and informed by prior injustice” (Teitel 1997, 2014).

However, defining what counts as justice on a strictly-case-by-case basis is at odds with a basic intuition about justice: that there is a general set of principles of justice applicable across a range of cases (de Greiff 2012, 60). Moreover, there is a pressing need for criteria by which responses to a legacy of wrongdoing in the midst of a transition can be judged (il)legitimate and (un)just. Defining justice on a case-by-case basis does not provide useful criteria for distinguishing among or critically evaluating the choices communities make.

A few scholars have attempted to articulate the core or orienting principles of transitional justice. Such analyses characteristically begin with an explanation of what is morally distinctive about transitions. There is no consensus on this issue, though there are recurring themes in the literature. One recurring motif is that *law* is different in transitional contexts, and this difference

has moral implications. Law, it is frequently claimed, has a “Janus-faced” character in transitions (Teitel 1997) (Gray 2010). For example, criminal law is concerned not just about backward-looking considerations of desert but also forward-looking transformation of a community (Teitel 1997) (Gray 2010). However, scholars have convincingly refuted the claim that law is uniquely Janus-faced in transitional contexts; backward- and forward-looking concerns govern law even in democratic contexts (de Greiff 2012) (Gray 2010, 58).

A second motif is that transitional contexts are distinctive because of the distinctive moral needs that past wrongdoing generates.<sup>8</sup> For example, Frank Haldemann argues that recognition is the key goal of transitional justice, “giving due recognition to the pain and humiliation experienced by victims of collective violence.” But, he argues, such recognition requires communities to overcome the characteristic institutional and broader societal denial regarding the occurrence of and responsibility for wrongs of the past (Haldemann 2008, 687). Haldemann correctly highlights the fact that the wrongs to which transitional communities must respond had concrete victims, and responding to such victims is a key component of what transitional justice demands. However, this recognition is necessary but not sufficient for justice. Dealing with structural factors that enabled violence in the past is also important, and not only or even primarily because necessary to give victims the recognition needed, though it is important for that reason. Dealing with structural and institutional reform itself is also intrinsically part of what justice demands in transitions.

Pablo de Greiff recognizes the structural dimensions of transitional justice, arguing that what is morally required in transitions is the rehabilitation of the force of basic norms prohibiting violence; mass wrongdoing is possible only when this normative erosion happens. De Greiff

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<sup>8</sup> See de Greiff, “Theorizing Transitional Justice”; Gray, “Extraordinary Justice,” p. 58.

identifies this breakdown as a constitutive feature of what he calls very imperfect worlds, defined by “huge and predictable costs associated with the very effort to enforce compliance. At the limit, in such a world, that effort puts at risk the very existence of the system that is trying to enforce its own norms” (de Greiff 2012, 35). For the force of norms prohibiting violence to become rehabilitated, an expanded range of goals must be facilitated by transitional justice measures. In addition to recognition of victims, another intermediate goal of such measures is the cultivation of civic trust (de Greiff 2012; Murphy 2010). The final ends of such measures are reconciliation and democracy.

De Greiff points to objectives commonly invoked in transitional contexts and within the literature on transitional justice, such as trust, reconciliation and democracy, and shows how they are related in transitional justice processes. However, the precise relationship between these objectives and justice is not clear. More specifically, it is not clear whether objectives such as trust and democracy should be viewed as important independent moral values to be promoted by transitional justice processes or as components demanded by the specific moral value of justice. One source of the ambiguity lies in the definition of justice de Greiff provides. Eschewing talk of a distinctive set of principles of justice, de Greiff argues that general principles of justice are applied in a distinctive manner in the context of a very imperfect world. He does not elaborate on what such general principles of justice are. Clarification on the relationship between the intermediate and final objectives of transitional processes and the demands of justice is needed, especially in light of conceptual challenges being raised to the necessity of democracy for transitional justice.

Whether democracy as an aspiration is in fact necessary to transitional justice is one of a number of increasingly pronounced conceptual questions that arise in discussions of the range of

cases that should properly fall under the scope of transitional justice. The last part of this section provides an overview of these conceptual questions, and then explains the significance of these debates for theorizing about transitional justice.

Paige Arthur in her intellectual history of transitional justice articulates the paradigm transition case informing early discussions of transitional justice exemplified by Argentina in its transition from rule by a military junta and the Dirty War in the 1980s (Arthur 2009). In this paradigm, past abuses were defined as violations of civil and political rights, such as rape, execution, kidnapping, and torture. Two general features characterized the political context within which wrongs were being addressed on which I want to focus. First, the society was in transition from one political regime to another. Second, the transition was to democracy, where democracy entailed changes in law and of political institutions.

Each feature of this paradigm has been called into question as necessary for cases that fall under the scope of transitional justice. In terms of wrongdoing, scholars problematize the exclusive emphasis on violations of civil and political liberties, and transitional justice responses take up a broader range of wrongs. For example, Louise Arbour argues that an emphasis on civil and political rights is self-defeating. The long-term prospects for peace and democracy depend on addressing grievances that could fuel future conflict, and such grievances include violations of economic rights. Examples of violations of economic and social include unequal or discriminatory access to land, to work, and to housing or resources. Other scholars question the extent to which a focus on civil and political liberties adequately addresses gender-based harms (Aoláin and Rooney 2007).

The relationship between democracy and transitional justice is the subject of ongoing debate. One challenge is to the necessity of including democracy as a constitutive normative aim

in transitional justice. Scholars point to the fact that societies considered to be transitional do not all share the normative aim of democracy. Transitional justice scholarship includes countries in transition but not moving in a liberal political direction such as Chad and Uganda. Countries that have not had a political transition though there has been a reduction in conflict are also studied. Another challenge is to the practical impact of having an aspiration to democratize. Here the point is that it is a mistake to assume that a democratic aim or aspiration will translate into the achievement of democracy (Carothers and Samer-Marram 2015).

Finally, skepticism about the necessity of “transition” in transitional justice exists. The countries dealing with past wrongs that have been the focus of transitional justice scholarship and practice include a broader set of cases, including, importantly, consolidated democracies that are not “in transition” to democracy but are already democratic. Australia, Canada and the United States fall into this category. Scholars also argue that even if transition is necessary, it is inadequately conceptualized. It is a mistake to assume that transition refers to a process that will succeed in reaching a predetermined end and to think the process is a temporary or short-lived one. Assuming that a transition follows a predetermined trajectory blinds theorists to the complex power dynamics that shape what happens in a given case (Hansen 2011). In addition, “transitions” never actually involve a sharp break between a past in which repressive policies and practices took place and a future predicated on consolidated democracy (Dyzenhaus 2003). Many countries remain for extended periods of time in a situation between democratic and repressive rule. Thomas Carothers argues that political analysis should “start by assuming that what is often thought of as an uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is actually the most common political condition today of the countries

in the developing world and the post-communist world. It is not an exceptional category ... it is a state of normality for many societies” (Carothers 2002, 17-18).

## **Conclusion**

Though theoretically underdeveloped, taking seriously the idea that transitional justice is a distinctive kind of justice is in my view the most promising theoretical avenue to pursue. By way of conclusion, I want to articulate what I take to be the desiderata for an adequate account of transitional justice that have emerged from the discussion in the previous sections. An adequate account must clarify why it is reasonable to think that justice is different in transitional contexts and must answer the conceptual questions about the scope of cases that properly fall under transitional justice. In this articulation, the relationship between transitional justice and other subjects/types of justice (retributive justice, restorative justice, distributive justice) should be clarified. The scalar character of the demands of justice should also be recognized so that we see how it is possible to judge that a given response to wrongdoing is more or less just, or just or unjust, to different extents. The principles should also be such that they satisfy the pressing practical need for a normative theory of transitional justice. That is, principles of transitional justice should be such that they can be action guiding. An account should also be context-sensitive in the sense of explaining why a given set of principles is salient in the specific context of transition. Finally, an account must clarify the context of transition in part by answering the conceptual questions raised about, for example, the necessity of democracy.

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