

Introduction

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, Rwanda post-1994 genocide, and Egypt following the end of the Mubarak era are examples of such 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* is generally taken to refer to formal attempts by postrepressive or postconflict societies to address past wrongdoing in their efforts to democratize.¹ Societies in transition have enacted a range of measures to confront these legacies of violence, such as amnesty, criminal trials, truth commissions, and reparations. However, there is little consensus about which responses are appropriate and morally justified.² 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

¹ This definition is reflected not only in academic discussions but also in international documents on the subject. See, for instance, the UN Secretary General's Report, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies," which defines *transitional justice* as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"; see de Greiff, Pablo, "Theorizing Transitional Justice," in *NOMOS LI: Transitional Justice*, ed. Melissa S. Williams, Rosemary Nagy, and Jon Elster (New York: New York University Press, 2012), 31. As I note later in this chapter, the necessity of including a democratic aspiration is the subject of debate; I ultimately defend the inclusion of democracy in our understanding of transitional justice in Chapter 4.

² See, for example, Leebaw, Bronwyn Anne, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30, no. 1 (2008): 95–118; Fletcher, Laurel E. and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," *Human Rights Quarterly* 24, no. 3 (2002): 573–639.

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of a truth commission has an impact on the rule of law.³ For example, Jack Snyder and Leslie Vinjamuri examine thirty-two postconflict countries and find that truth commissions were either irrelevant or harmful except when established in countries that had already made significant progress in democratization.⁴ Such studies also consider the factors that explain the particular choices specific communities make and the constraints that influence decision making. These examinations enrich our understanding of what does or does not happen within various transitional communities and why.

My focus in this book, 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. These judgments are expressed in reactions such as, “It is unjust to grant amnesty 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 in such contexts.

To illustrate, consider South Africa and reactions to the Truth and Reconciliation Commission (TRC) established as part of the transition from apartheid to democracy. In 1994, South Africa began to transition from a forty-year period of institutionalized racism to democracy. All South Africans were placed into one of four racial groups: white, Indian, colored, or African.⁵ During the apartheid era, the African, colored, and Indian

³ See, e.g., Fletcher, Laurel, Harvey Weinstein, and Jamie Rowen, “Context, Timing, and the Dynamics of Transitional Justice: A Historical Perspective,” *Human Rights Quarterly* 31 (2009): 163–220; Van der Merwe, Hugo, Victoria Baxter, and Audrey Chapman, *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (Washington, DC: United States Institute of Peace Press, 2009); Olsen, Tricia D., Leigh A. Payne, and Andrew G. Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (Washington, DC: United States Institute of Peace, 2010); Shaw, Rosalind and Lars Waldorf, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford, CA: Stanford University Press, 2010).

⁴ Snyder, Jack and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28, no. 3 (2003–2004): 5–44. For a critique of the analysis used to generate these findings, see Thoms, Oskar N. T., James Ron, and Roland Paris, “State-Level Effects of Transitional Justice: What Do We Know?” *International Journal of Transitional Justice* 4, no. 3 (2010): 344.

⁵ I follow the racial categories used by the South African Truth and Reconciliation Commission in its final report. “Generally in this report, black Africans are referred to as Africans. Coloured people, people of Indian or Asian origin and white people are referred to as such.” (www.justice.gov.za/trc/report/finalreport/Volume%201.pdf at paragraph 13).

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South African populations were subjected to systematically unequal treatment, and racial segregation governed every aspect of daily life. The white South African minority constituted approximately 20 percent of the overall population. The government, run by the ruling National Party (NP), maintained apartheid by relying on a brutal system of repression carried out legally and extralegally by state security forces. Black South African resistance, largely led by the African National Congress (ANC), was initially nonviolent. However, after the 1960s, the ANC increasingly relied on violence as a form of resistance. After decades of protracted conflict, negotiations between the ANC and NP paved the way for the first democratic elections in 1994, when Nelson Mandela became the first black president of South Africa.

Many observers and citizens worried that civil war would follow the end of apartheid. A product of the negotiations to end apartheid, the Interim Constitution of 1993 contained a commitment to amnesty for parties responsible for offenses during the preceding conflict.⁶ Recognizing the high stakes of this transition to democracy and respecting the commitment to amnesty, the South African Parliament subsequently passed the Promotion of National Unity and Reconciliation Act, No. 34 of 1995, which created the TRC.

The TRC's directive was to "investigat[e] and document gross human rights violations committed within or outside South Africa in the period 1960–1994," specifically killing, abduction, torture, and severe ill treatment. The TRC investigated instances of direct violations as well as any "attempt, conspiracy, incitement, instigation, command or procurement" to commit such violations.⁷ The TRC comprised three committees: the Committee on Human Rights Violations, the Committee on Amnesty, and the Committee on Reparations and Rehabilitation.⁸ More than 20,000 individuals testified as victims (or as family members of deceased victims) over the course of its proceedings. The TRC also made recommendations regarding reparations for victims. The TRC was not empowered to punish perpetrators, although the TRC was given the legal authority to grant amnesty to perpetrators – on both sides – who testified

⁶ Dyzenhaus, David, "Survey Article: Justifying the Truth and Reconciliation Commission," *Journal of Political Philosophy* 8 (2000): 475.

⁷ *Ibid.*, 476.

⁸ The TRC also held institutional hearings to determine the role of the media, law, health sector, business, and religious communities during apartheid; these were designed to understand how the system was sustained. The radio, newspapers, and television media covered the public hearings of the TRC extensively (see *ibid.*, 479).

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fully to what they had done. The amnesty provision was such that a perpetrator could apply for and be granted amnesty if he or she fully disclosed the acts for which he or she was responsible and demonstrated that the acts were committed for political reasons. By individualizing amnesty, the TRC allowed for a measure of accountability for human rights abuses; this contrasted with previous commissions preceded by a blanket amnesty that allowed general impunity for human rights abuses. Nonetheless, perpetrators granted amnesty were immune from civil or criminal liability. More than 7,000 amnesty applications were submitted, and eventually amnesty was granted to approximately 850 individuals. Like other such commissions, the TRC was charged to produce a report that summarized the findings of their investigation. Following the conclusion of its work, the TRC produced a five-volume report detailing its findings and recommendations.

In a powerful account, Antjie Krog, one of the journalists who covered the TRC, recounts a range of judgments expressed about the commission.⁹ Here are a few examples:

According to a black South African journalist: For me, justice lies in the fact that everything is being laid out on the same table . . . The Truth that rules our fears, our deeds, and our dreams is coming to light. From now on, you don't only see a smiling black man in front of you, but you also know what I carry inside of me. I've always known it – now you also know.¹⁰

According to an international observer: It will sometimes be necessary to choose between truth and justice. We should choose truth, he says.¹¹

According to an applicant for amnesty: Where does culpability rest? I believe I cannot be held solely responsible for the death of Anton Fransch. And the role played by the security police must be exposed. [*cries out*] I wish! To be recognized! For who and what I am! So that the falsification of my history can be rectified.¹²

Krog recalls thinking that the imprisonment of the apartheid era prime minister, P. W. Botha, could only be an empty spectacle of justice – that his arrest could hardly compensate for the vast injustice of the regime over which he and his predecessors had presided. In her words, “A commission for truth? . . . What would be the effect of a manacled P. W. Botha,

⁹ Krog, Antjie, *Country of My Skull: Guilt, Sorrow and the Limits of Forgiveness in the New South Africa* (New York: Three Rivers Press, 1998).

¹⁰ *Ibid.*, 60.

¹¹ *Ibid.*, 32. These were the words of philosopher Jose Zalaquett at a conference Krog attended in early 1994.

¹² *Ibid.*, 73.

stripped of his little hat and forefinger, on his way to long-term imprisonment, other than astonishment that anyone could regard this as the final proof of justice? But immediately I'm ashamed."¹³

These perspectives represent a wide range of moral viewpoints. While for the black South African journalist exposing the truth is itself a form of justice, the international observer claims that transitional societies must choose between truth and justice. The amnesty applicant complains about unjustly being held liable for crimes in which others should also be implicated, while Krog reveals her own skepticism – which many others shared – about what is achieved by holding anyone, even leaders, responsible for collective crimes, liable through criminal punishment. Through these impassioned responses, we can begin to see how differently members of societies in transition respond to the legacy of wrongdoing and attempts to address that legacy. Confronted with decades of horrific and systematic violations of human rights, black and white South Africans had to decide how they would deal with the moral aftermath.

This book takes as its point of departure the range of such complex reactions, which exemplify the moral judgments we all make about justice. It is not obvious which – if any – of these judgments is correct. Each expresses a different, and yet plausibly legitimate, point of view. The justice of having the truth finally known and acknowledged seems compelling, as does the need to do more than just know what happened in order for justice to be achieved. It does seem intuitively unfair to hold one individual responsible for the actions of many, as well as intuitively futile to hold anyone accountable for wrongdoing that an entire society permitted. It simply is not clear what justice means “in the wake of massive abuses” when “‘ordinary’ expectations concerning what justice requires will not be satisfied.”¹⁴ Expectations in this context refer not to predictions about how justice will in fact be meted out in any given case; rather, expectations are normative in character and reflect the standards of behavior to which individuals and communities should appropriately be held. Equally unclear are the moral value and justifiability of *any* response to wrongdoing in such circumstances.

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 to qualify as *just*.

¹³ Ibid., 31–32. ¹⁴ De Greiff, “Theorizing Transitional Justice,” 58.

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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. The overarching objective of this book is articulating what transitional justice demands. My analysis aims to provide philosophers, lawyers, and other theorists engaged in scholarly debates about transitional justice, as well as policy makers and citizens of transitional communities, with the conceptual tools to morally evaluate options for dealing with and decisions about legacies of violence and wrongdoing.

All human beings care about whether justice is achieved. Individuals and communities react to injustice and failures of justice with various reactive attitudes, such as anger, resentment, and indignation. Such attitudes are one way that human beings hold others accountable for what they have done or failed to do in meeting our moral demands and expectations. Reactive attitudes are a form of communication, and implicit in such attitudes is an invitation for individuals or communities to respond to the judgments being expressed.¹⁵ Critically engaging the moral judgments underpinning such attitudes is a way of acknowledging the humanity and moral agency of the victims and communities expressing them.

Before developing a new positive theory of transitional justice, it is important to establish why such an account is needed. This is the primary task of this introductory chapter. In Section 1, I provide an overview of the pragmatic and moral challenges confronting transitional communities that explain why “ordinary” expectations of justice will not be satisfied. In Section 2, I explain why it is erroneous to think of justice in transitional circumstances as involving a moral compromise between truth and justice, in the way that the international observer, quoted in the preceding, suggests. In compromise views, transitional justice entails the balancing of specific (retributive/distributive/corrective) justice-based claims against competing moral and/or pragmatic considerations. Finally, I discuss limitations of equating transitional justice with restorative justice. 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, I argue, because ignoring the background context presupposed by theories of justice undermines distinctions between kinds of justice. As a result, the normative point for making such distinctions is undercut.

¹⁵ On reactive attitudes, see Strawson, P. F., *Freedom and Resentment and Other Essays* (New York: Routledge, 2008); David Shoemaker, “Moral Address, Moral Responsibility, and the Boundaries of the Moral Community,” *Ethics* 118 (2007): 71–75. On the second-person standpoint more generally, see Darwall, Stephen, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2009).

After discussing limitations with conceptualizing transitional justice as a moral compromise or as restorative justice, I argue that the most promising theoretical route to explore is the idea that transitional justice is a distinctive form of justice. Yet, as I discuss in Section 3, this idea remains undertheorized and in need of greater conceptual clarification and articulation. Section 4 provides an overview of the positive account of transitional justice developed in the succeeding chapters. The problem with justice in transitional contexts, I claim, is not the same as the problem of justice with which theories of retributive justice, corrective justice, or distributive justice are fundamentally concerned, nor, consequently, are the demands of justice that must be satisfied in transitions reducible to the principles of such theories. Transitional justice is ultimately concerned with the just pursuit of societal transformation, and that objective becomes salient in a specific set of circumstances of transitional justice. The rest of the chapters in this book articulate the circumstances of justice and flesh out the moral requirements for pursuing societal transformation justly.

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.¹⁶ Then President Barack 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.”¹⁷ 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.

For the purposes of articulating why justice is controversial in transitional contexts, I assume the claim that punishment can satisfy standards of justice.¹⁸ Criminal punishment is not entirely without its critics; some

¹⁶ For the purposes of this chapter, I take *punishment* to refer specifically to “legal punishment” by the state.

¹⁷ Kirkpatrick, David and Steven Lee Myers, “Libya Attack Brings Challenges for the U.S.,” *New York Times*, September 12, 2012.

¹⁸ I am using this example for purposes of illustration to set up why there is a question about which standards of justice are salient in transitional contexts. In doing so, I recognize that there are a range

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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 punishment can be a legitimate response to wrongdoing and can satisfy standards of justice.

For many, at least part of the moral point of punishing criminals is to give them what they deserve. Many people also 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. Appeals to desert are characteristically appeals to retributive justice. The core claim of retributive justice is that perpetrators deserve to suffer and it is intrinsically just to inflict such suffering.¹⁹ For retributivists the amount of suffering should be proportional to the wrong committed. Retributivists differ in the 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. Michael Moore argues that the intrinsic goodness of punishing wrongdoers best accounts for our intuitive judgments in particular cases. Jean Hampton argues that by countering the false moral claim implicit in wrongdoing suffering restores the moral equality between perpetrator and victim that wrongdoing disrupts. By contrast, Herbert Morris argues that suffering restores the fair distribution of benefits and burdens that wrongdoing upsets, and in particular the burdens of self-restraint that abiding by rules requires. Punishment takes

of theories of the moral point of criminal law to which one might subscribe, not all of which link the purpose of criminal law to desert. For an overview of such approaches, see Duff, Antony, "Theories of Criminal Law," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/sum2013/entries/criminal-law/>. For a sophisticated account of a pluralist theory of punishment, see John Tasioulas, "Punishment and Repentance," *Philosophy* 81, no. 2 (2006): 279–322. I use retributive theories of the criminal law because I believe they best capture a core source of the dissatisfaction with responses other than punishment in transitional societies. When objecting to the justice of alternative responses to wrongdoing, one typical core concern is that perpetrators are not getting what they deserve because they do not suffer the infliction of punishment. For many, this means that victims consequently do not receive the recognition and entitlement they are owed.

¹⁹ All retributivists agree that it is morally wrong to inflict more suffering than is proportional to the crime or to intentionally punish the innocent. Some retributivists may view proportional suffering as setting the ceiling on the suffering that is permissible. Alternatively, retributivists may see an obligation to inflict suffering up to the point of proportionality such that it is morally wrong to inflict less than proportional suffering. Negative retributivists argue that desert is not a sufficient reason to punish; some other moral good (e.g., deterrence) must be achieved through punishment as well. Positive retributivists see desert as providing a reason or justification for punishment. See Walen, Alec, "Retributive Justice," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, <http://plato.stanford.edu/archives/sum2015/entries/justice-retributive/>.

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away a wrongdoer's unfair advantage.²⁰ The differences among these accounts do not matter for my purposes; what is important is the underlying thought that punishment is an intrinsically fitting and appropriate response to wrongdoers.

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 and 210,000 individuals actively participated in the Rwandan genocide in 1994.²¹ 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."²² There are furthermore obstacles to 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

²⁰ See Hampton, Jean, "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; Moore, Michael, "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 Gert, Heather J. Linda Radzik, and Michael Hand, "Hampton on the Expressive Power of Punishment," *Journal of Social Philosophy* 35, no. 1 (2004): 79–90.

²¹ Straus, Scott, "How Many Perpetrators Were There in the Rwandan Genocide? An Estimate," *Journal of Genocide Research* 6, no. 1 (2004): 85–98.

²² van Zyl, Paul, "Justice without Punishment: Guaranteeing Human Rights in Transitional Societies," in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd, 46–57 (Cape Town: University of Cape Town Press, 2000).

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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 punishing a few while the many go free is unjust, 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. Amnesty was granted following the Dirty War in Argentina, apartheid in South Africa, and the civil war in Guatemala. Truth commissions have been established in dozens of countries since the 1970s, including Ghana, Fiji, Sierra Leone, and El Salvador. Truth commissions are officially established committees directed to investigate and document patterns of human rights abuses during a specified period. Commissions produce a report that summarizes the findings of their investigation but do not punish perpetrators. Reparations, offered to victims in Chile, Cambodia, and Morocco, provide some form of compensation to victims of wrongdoing, including “financial compensation to individuals or groups; guarantees of non-repetition; social services such as healthcare or education; and symbolic measures such as formal apologies or public commemorations.”²³ Finally, the barring of individuals from holding certain offices via programs of lustration has been implemented in countries such as Czechoslovakia, Poland, and Bulgaria.

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. Such disagreements are unsurprising given that alternative responses do not hold perpetrators accountable in the same way as criminal punishment. Amnesty in exchange for peace can grant rapists immunity from criminal and civil

²³ See International Center for Transitional Justice, <http://ictj.org/our-work/transitional-justice-issues/reparations>.