JUDGING STATE-SPONSORED VIOLENCE, IMAGINING POLITICAL CHANGE

BRONWYN LEEBAW
University of California, Riverside

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1

Introduction: Transitional Justice and the "Gray Zone"

A torturer informs a prisoner that no matter how loud she screams no one will ever hear her cries. Perceived enemies of the state are "disappeared," buried in mass graves, and forgotten. Episodes of repression, atrocity, and political violence are customarily downplayed or avoided in the history lessons that are taught to schoolchildren. Hannah Arendt characterized such strategies as efforts to establish "holes of oblivion into which all deeds, good and evil, would disappear."[1] She added that these efforts would never be entirely successful because "one person will always be left alive to tell the story."

In recent decades, institutions designed to recover such stories, and to challenge efforts to consign evidence of past atrocities to "holes of oblivion," have proliferated to numerous countries around the world. International war crimes tribunals have hired forensic scientists to reconstruct the stories that are told by the bones found in the mass graves of Bosnia-Herzegovina and Rwanda. An International Criminal Court has been developed to hold individuals accountable for egregious violations of human rights and humanitarian law. Truth commissions have been created in more than thirty-five countries to investigate patterns of political violence and abuses. These institutions have sent teams of investigators to the remote regions of Peru, the townships of South Africa, and the villages of East Timor and Sierra Leone to take testimony from survivors of political violence. They have compelled people who are responsible for torture, mass rape, "ethnic cleansing," and genocide to come forward with evidence and confessions. A growing number of leaders are facing pressure to address past wrongs through apologies, reparations, and reform.

In contemporary theoretical and policy debates, efforts to reckon with past political violence as part of a process of political change are now widely referred

[1] Hannah Arendt, *Eichmann in Jerusalem* (New York: Penguin, 1965), 232.

to as forms of "transitional justice."[2] This term was first used by Ruti Teitel as a way to characterize legal mechanisms for addressing wrongs committed under a prior regime in the context of liberalizing regime change. In the early 1990s, the term was generally associated with strategies adopted by successor regimes in Latin America, Eastern Europe, and Africa to address past human rights abuses while advancing democratization. Over time, transitional justice scholarship and policy have come to encompass extralegal responses to past abuses, along with an expansive conception of "transition" that includes many forms of political change and conflict resolution.

Following the end of the Cold War, international organizations became increasingly involved in developing transitional justice institutions in the context of ongoing conflicts or as part of negotiated settlements. At the same time, transitional justice became increasingly identified with the aspirations of the human rights movement and with the development of human rights institutions, especially war crimes tribunals and truth commissions. Transitional justice is championed as a critical and transformative response to political violence, which aims to expose previously hidden abuses, challenge denial, establish accountability, and advance political reform. The expansion of transitional justice institutions and practices is widely viewed as a victory in the struggle for justice and memory as against the powerful forces of denial and forgetting.

Yet the expansion of transitional justice has also been fraught with ambiguities and perplexities. What sets transitional justice apart from "ordinary" justice has less to do with the context of *transition* than with the political nature of the wrongs that these institutions seek to address. Transitional justice is often referred to as a response to "atrocities" or "past abuses," yet the meaning of these terms is contested and varies tremendously in different contexts. The atrocity of the Rwandan genocide, for example, is something quite different than the institutionalized racism, political exclusion, and entrenched

[2] Ruti Teitel, *Transitional Justice* (Oxford and New York: Oxford University Press, 2000); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004); James A. McAdams, ed., *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, IN: University of Notre Dame Press, 1997); Naomi Roht-Arriaza and Javier Mariecruzana, eds., *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (New York: Cambridge University Press, 2006); Chandra Sriram, *Confronting Past Human Rights Violations* (London and New York: Frank Cass, 2004); Chandra Sriram, "Transitional Justice Comes of Age: Enduring Lessons and Challenges," *Berkeley Journal of International Law* 23, no. 2 (2005): 101–18; Jonathan Van Antwerpen, "Moral Globalization and Discursive Struggle: Reconciliation, Transitional Justice, and Cosmopolitan Discourse," in *Globalization, Philanthropy, and Civil Society*, ed. David Hammack and Steven Heydemann (Bloomington, IN: Indiana University Press, 2009); Bronwyn Leebaw, "The Irreconcilable Goals of Transitional Justice." *Human Rights Quarterly* 30, no. 1 (2008): 95–118.

repression of South Africa's apartheid regime. What they have in common is their *systemic* character. Both cases involved injustices and killings that were authorized and ordered by political authorities, and both involved the widespread participation, complicity, and acquiescence of a large component of the population.

Mass complicity is a defining feature of systematic political violence and takes many forms. It may be the active, enthusiastic participation of the zealot or the quiet acquiescence of the timid bystander. Complicity may be secured by force or subtle coercion. Auschwitz survivor Primo Levi described the use of "Special Squads" comprised of Jewish concentration camp victims to participate in the gassing of other Jews as an attempt to shift the burden of guilt back onto victims, "so that they were deprived even of the solace of their innocence."[3] Children and teens have been forced to participate in atrocities against their own communities in a number of conflicts from Central America to Sierra Leone. The first defendant to face charges before the International Criminal Tribunal for the former Yugoslavia, Drazen Erdemovic, claimed that he too was a victim of forced complicity. In his testimony before the court, Erdemovic insisted that he had attempted to refuse his orders to shoot the unarmed men. "[A]t first I resisted," he stated, "and Brano Gojkovic told me if I was sorry for those people that I should line up with them; and I knew that this was not just a mere threat but that it could happen."[4] Complicity is not always coerced, however, and frequently takes the form of passive or unquestioning acceptance.

Levi referred to these various forms of complicity as "the gray zone," a space between victims and perpetrators, peopled with "gray, ambiguous persons" that exist in every society, but may become available as "vectors and instruments" for a criminal system.[5] The "gray zone" poses practical challenges to official efforts to judge and remember past abuse. Those who were complicit or acquiescent in past atrocities may still retain military or political power. They may continue to cherish the ideologies or mythologies that were invoked to justify past brutalities. They may be heavily invested in denying that such abuses ever occurred, or they may simultaneously justify and deny past abuses.[6]

The "gray zone" complicates and challenges basic assumptions about what judgment and remembrance ought to entail in the aftermath of politically

3 Primo Levi, *Survival in Auschwitz*, trans. Stuart Woolf (New York: Collier, 1993), 53.

4 *Prosecutor v. Drazen Erdemovic, Sentencing Judgment* (March 5, 1998).

5 Levi, *Survival in Auschwitz*, 49.

6 For an analysis of the various denials employed by those engaged in massive atrocity, see Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001).

authorized abuses and killings. Transitional justice institutions do not simply apply a set of commonly accepted legal standards to the task of judging past violence. Rather, they are engaged in a process of redefining what constitutes justice and injustice, one that challenges previously accepted or officially mandated views.[7] Transitional justice institutions cannot simply rely on a set of commonly accepted norms for guidance. Instead, they are engaged in a process of reimagining the very basis of political community. These dimensions of transitional justice raise a difficult set of questions that are relevant not only in the context of regime change or negotiated settlement, but that also apply more generally to various policies or programs designed to judge, investigate, and commemorate systematic political violence. Who is guilty when ordinary people commit extraordinary acts of brutality? What is the basis for judging atrocities that were authorized or compelled by political authorities? What is the relationship between the commitment to remember past abuses and the goal of advancing political reform to ensure their prevention in the future?

This book offers a new way to think about the legacies of two institutions that have profoundly influenced contemporary responses to these questions: the International Military Tribunal at Nuremberg and the South African Truth and Reconciliation Commission. Whereas the Nuremberg Trials inspired the development of legalistic responses to politically authorized atrocities, South Africa's Truth and Reconciliation Commission has served as a major influence for restorative approaches to transitional justice that aim to "heal the wounds of the past" through dialogue, testimony, or ritual. Human rights legalism and restorative justice present distinctive, even conflicting theoretical approaches to defining the terms of justice and memory in the aftermath of atrocities. However, the two frameworks share a common problem. Both are premised on the view that crime constitutes a discrete deviation from the shared norms or standards of a political community. Therefore, human rights legalism and restorative justice have judged and commemorated political violence in relation to the experiences of individual victims and perpetrators, while avoiding and obfuscating the "gray zone."

The individualistic focus of these frameworks has been a strategy for depoliticizing transitional justice in contexts characterized by persistent, volatile, conflict over the very terms of judgment and memory. Depoliticization is embraced as a way to establish the legitimacy of transitional justice institutions, the integrity of their investigations, and their contributions to political reconciliation. However, depoliticization has also undermined the critical role of transitional justice as a challenge to denial, as a basis for exposing the systemic dimension of past wrongs, and as a basis for advancing an ongoing process of change.

7 Teitel, *Transitional Justice*, 6.

Returning to theoretical debates on judgment and memory in the aftermath of Nazism and apartheid, this book locates and develops an alternative approach to transitional justice that moves beyond this victim-perpetrator framework to develop strategies for investigating complicity in, as well as *resistance to*, past injustices. In order to develop such strategies, I contend, it will be important to counter the prevailing logic of depoliticization associated with contemporary transitional justice by acknowledging, affirming, and critically evaluating the role of political judgment in our moral responses to political violence.

A GREAT LEGALISTIC ACT

In the aftermath of the Second World War, one of the problems confronted by the Allied countries was the question of what to do with surviving leaders of the Nazi regime. President Roosevelt's cabinet was divided over the issue. Secretary of the Treasury, Henry Morgenthau Jr., proposed summary execution for those listed as "archcriminals." Secretary of War, Henry Stimson, lobbied against this plan with a proposal for the United States to participate in an international tribunal for chief Nazi officials. Eventually, Stimson would prevail with a proposal to put leaders of the Nazi regime on trial in a court of law.[8]

The International Military Tribunal at Nuremberg would be the first international criminal court and the first to try leaders for "crimes against humanity." Of course, the Allied powers that occupied Germany were responsible for their own wartime atrocities. In filmed interviews with Erol Morris, former Defense Secretary Robert McNamara recites figures on the staggering loss of human life that resulted from the firebombing of Japanese cities, which he had helped plan while working under General Curtis LeMay. McNamara acknowledges that if the Allies had lost the war, he and his colleagues would justifiably have been tried as war criminals.[9] Nevertheless, the Nuremberg Trials were championed as a spectacle of restraint and evidence of the law's power to "stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law."[10] The trials were also seen as a basis for challenging denial regarding the extent of Nazi atrocities. Chief Prosecutor, Justice

[8] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), 32–4.

[9] *The Fog of War: Eleven Lessons from the Life of Robert S. McNamara*. Directed by Erol Morris (Sony Pictures Classics, 2004).

[10] Justice Robert Jackson, "Opening Statement to the International Military Tribunal," *Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945–11/30/1945* (Nuremberg: IMT, 1947), 98–102.

Robert Jackson, famously announced that the trials would provide "undeniable proofs of incredible events."[11]

While the historical importance of the Nuremberg Tribunal is unquestionable, it is reasonable to wonder whether Nuremberg remains relevant for contemporary transitional justice debates. The International Military Tribunal at Nuremberg was developed under conditions of total occupation and unconditional surrender. In contrast, contemporary transitional justice institutions are generally established in contexts where the outgoing regime retains a significant degree of power or control. Yet the Nuremberg Tribunal continues to inform contemporary *ideas* regarding the meaning and role of justice in the aftermath of political violence. As Judith Shklar put it, establishing the Nuremberg Tribunal was a "great legalistic act."[12] "For those who believe in human rights," adds Gary Jonathan Bass, "Nuremberg remains legalism's greatest moment of glory."[13] The International Military Tribunal at Nuremberg was established under conditions that were historically unique and unlikely to be repeated, yet it continues to inspire the prominent view that a *just* response to political violence is a *legalistic* one.

In her classic work on the theme, Judith Shklar characterized legalism as the "ethical attitude that holds moral conduct to be a matter of rule following and moral relationships to consist of duties and rights determined by rules."[14] Shklar saw legalism as an ethos, as well as an ideology. As an ethos, legalism holds that the court and the trial epitomize moral perfection, and that a bright line must be established between law and politics. From the vantage point of the legalist, the distinction between law and politics is a basis for constraining abuses of power by transcending ideology altogether. Shklar countered this view by arguing that legalism must also be understood as an ideology with distinct political preferences.

A particular variant of legalism, which I refer to as "human rights legalism," has been at the center of evolving debates on transitional and global justice. With Nuremberg as a major source of inspiration, human rights legalism not only insists upon the promotion of *law* and courts in general, but on the centrality of *criminal* law in the aftermath of atrocities and political violence.[15]

[11] Jackson, "Opening Statement."

[12] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 1.

[13] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2001), 203.

[14] Shklar, *Legalism*, 1.

[15] Mark Drumbl, *Atrocity, Punishment, and International Law* (New York: Cambridge University Press, 2007).

"Nuremberg stands for the proposition that the most appropriate form of judgment is the trial," writes Ruti Teitel, "and the most appropriate forum of judgment is the International Military Tribunal."[16] Human rights legalism holds that formal standards of international criminal law provide the basis for judging political violence, whether criminal trials occur at the domestic or international level. Criminal trials focus narrowly on the task of establishing individual guilt and must provide due process guarantees to defendants. In this view, international law provides a basis for transcending the conflicts and divisions associated with judging "the gray zone." By prosecuting individuals in accordance with due process guarantees, human rights legalism aspires to challenge the demonization of groups based on attributions of collective criminality and to channel the desire for revenge into support for measured punishment bounded by fair procedures.

This set of ideas has had a powerful influence on the development of contemporary transitional justice institutions. In the post–Cold War era, legalism has animated the development of ad hoc international criminal tribunals to oversee prosecution for atrocities committed in the former Yugoslavia and Rwanda, as well as the development of the International Criminal Court.[17] Hybrid courts, which combine international and domestic oversight, have been developed in Sierra Leone, East Timor, and Cambodia. International organizations and powerful states have tended to criticize or condemn transitional justice practices that are not compatible with legalism.[18] Human rights organizations have been critical of administrative purges and lustration processes, for example, because these responses to political violence generally involve significant punishment without due process guarantees. For the same reason, human rights groups have been concerned about Rwanda's decision to use quasi-traditional *gacaca* courts as a way to process complaints against some 100,000 alleged *genocidaires* that had been awaiting trial in detention for more than a decade.[19] Proponents of human rights legalism also tend to oppose the use of amnesties or political pardons as strategies for negotiating an end to civil wars. It is a specifically legalistic definition of justice that is at the center of ongoing debates that pit the pursuit of peace against the goal of justice. Less obviously, human rights legalism has narrowed the scope of

[16] Ruti Teitel, "Nuremberg and Its Legacy: 50 Years Later," in *War Crimes: The Legacy of Nuremberg*, ed. Belinda Cooper (New York: TV Books, 1999), 44.

[17] Bass, *Stay the Hand of Vengeance*; Drumbl, *Atrocity, Punishment, and International Law*.

[18] Drumbl, *Atrocity, Punishment, and International Law*.

[19] See for example, Amnesty International, *Rwanda: A Question of Justice* (London: Amnesty International Secretariat, 2002), or more recently, Kenneth Roth, "The Power of Horror in Rwanda," *Los Angeles Times*, April 9, 2009, Opinion Section.

inquiry associated with transitional justice policy and practice. These institutions have tended to focus on violations of civil and political rights, which are amenable to a legalistic response, while avoiding economic and social injustices, which are held to require broader political solutions.[20]

Critics of human rights legalism have argued that the demand for criminal trials clashes with pragmatic responses to conflict that might serve to minimize backlash from nationalists and apologists.[21] Others contend that legalism defines justice narrowly in accordance with an idealized Western approach to criminal prosecution, superseding social and economic justice, as well as alternative approaches to criminal justice.[22] Such scholars have opened an important debate about the limitations and problematic implications of human rights legalism. However, they have generally focused on legalistic institutions and policies, with less attention to the network of ideas associated with legalism. South Africa's Truth and Reconciliation Commission became significant in transitional justice debates because it developed a critique of human rights legalism and offered an alternative way to think about the basis of judgment and the role of official remembrance in the aftermath of political violence.

A DIFFERENT KIND OF JUSTICE

It is often observed that the UN's adoption of the 1948 *Universal Declaration of Human Rights* became possible only as a result of global outrage in response to Nazism.[23] Yet the human rights movement was also profoundly influenced by global outrage in response to the racism, dispossession, exploitation, and violent repression that was institutionalized by South Africa's apartheid system.

[20] Kenneth Roth, "Defending Economic, Social, and Cultural Rights: Practical Issues Faced by an International Human Rights Organization," *Human Rights Quarterly* 26, no. 1 (2004): 63–73; Zinaida Miller, "Effects of Invisibility: In Search of the Economic in Transitional Justice," *International Journal of Transitional Justice* 2, no. 3 (2008): 266–291. For a discussion of the way in which human rights activists are developing new strategies for addressing private harms and social injustices, see Alison Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (New York: Routledge, 2005).

[21] Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28 (2003/4): 5–44.

[22] Kieran McEvoy, "Beyond Legalism: Toward a Thicker Understanding of Transitional Justice," *Journal of Law and Society* 34, no. 4 (2007): 411–440; Drumbl, *Atrocity, Punishment and International Law*; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002); Brad Roth, "Peaceful Transition and Retrospective Justice: Some Reservations. A Response to Juan Méndez." *Ethics & International Affairs* 15 (2001): 45–50.

[23] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

Apartheid was legally entrenched with the victory of the National Party in 1948, shortly after the signing of the UDHR. South Africa was seen as a "test case" for those who sought to use human rights in the struggle against racism and colonialism.[24] The African National Congress incorporated human rights language into the text of the historic Freedom Charter in 1955. The transnational network that developed to oppose the South African regime is widely viewed as a model for contemporary human rights activism and evidence of its success.[25]

In 1994, the black majority of South Africa finally achieved full political equality. In South Africa's first democratic elections, the African National Congress was transformed from a guerilla movement into the ruling political party. South Africa's relatively peaceful transition to majority democratic rule was widely viewed as a "small miracle." Among the compromises that facilitated this transition was a decision to grant amnesties to those responsible for past human rights abuses on the grounds that they would agree to provide public confessions outlining the details of their acts. Inserted into South Africa's interim constitution was a statement intended to set the tone for the transition: "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* ["humaneness"] but not for victimization." In the immediate aftermath of the transition, South Africa's parliament passed legislation to establish a Truth and Reconciliation Commission (hereafter TRC) that would oversee the process of dealing with apartheid-era violence.

Truth commissions are temporary institutions designed to investigate patterns of political violence and abuse.[26] In contrast with commissions of inquiry, truth commissions are generally established in the immediate aftermath of a regime change or as part of a negotiated settlement to end a civil war. Truth commissions are usually defined as public institutions, established either by

[24] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998), 213.

[25] See Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, NY: Cornell University Press, 1995); William Korey, *NGOs and the Universal Declaration of Human Rights: "A Curious Grapevine"* (New York: St. Martin's Press, 1998); Lynn Graybill, *Truth and Reconciliation in South Africa: Miracle or Model?* (Boulder, CO: Lynne Rienner, 2002).

[26] Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York and London: Routledge, 2001). For a more recent comparative analysis of truth commission procedures, see Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006). See also Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (New York: Routledge, 2009); Ernesto Verdeja, *Unchopping a Tree: Reconciliation in the Aftermath of Political Violence* (Philadelphia: Temple University Press, 2009).

domestic authorities or by the United Nations. However, in Brazil, Guatemala, and other countries, private organizations have launched investigations similar to those undertaken by truth commissions.[27] Truth commission investigations encompass not only the causes, but also the consequences and legacies of political violence. Their approaches to investigation vary significantly, but they nearly always involve a process of taking statements and testimony from victims.[28] Truth commissions do not have the power to prosecute alleged perpetrators of abuse. However, many truth commissions, including South Africa's TRC, are designed to give information to prosecuting authorities.[29] Upon completing their investigations, truth commissions develop reports and issue recommendations for reparation, institutional reform, prosecution, or commemoration.

Human rights advocates once saw truth commissions as a pragmatic alternative in contexts where prosecuting those responsible for past injustices would be preferable, but limited, impractical, or unfeasible. South Africa's TRC challenged this view with the claim that it was not merely a next best alternative to trials, but rather a basis for advancing a "different kind of justice": *restorative justice*.[30] South African leaders associated with the TRC were not opposed to international criminal justice. In fact, many went on to become staunch supporters of the International Criminal Court.[31] However, they challenged the basic theoretical assumptions animating human rights legalism and offered restorative justice as an alternative.[32]

[27] On the *Nunca Mais* project in Brazil, see Lawrence Wechsler, *A Miracle, A Universe: Settling Accounts with Torturers* (Chicago: University of Chicago Press, 1990); On unofficial truth projects, see Louis Bickford, "Unofficial Truth Projects," *Human Rights Quarterly* 29, no. 4 (2007).

[28] See Audrey Chapman and Patrick Ball, "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala," *Human Rights Quarterly* 23 (2001).

[29] See Naomi Roht-Arriaza, "The New Landscape of Transitional Justice," in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Marriezcurrena (Cambridge: Cambridge University Press, 2006), 1–16.

[30] Charles Villa-Vicencio, "A Different Kind of Justice: The South African Truth and Reconciliation Commission," *Contemporary Justice Review* 1 (1999): 407–28.

[31] Statement by Civil Society Organizations and concerned individuals in South Africa on the decision made by the AU to refuse cooperation with the ICC (July 13, 2009).

[32] See Charles Villa-Vicencio, "Restorative Justice: Dealing with the Past Differently," in *The Provocations of Amnesty: Memory, Justice, and Impunity*, ed. Charles Villa-Vicencio and Erik Doxtader (Claremont: David Philip Publishers, 2003) and Johnny de Lange, "The Historical Context, Legal Origins and Philosophical Foundation of the South African Truth and Reconciliation Commission," in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, ed. Charles Villa-Vicencio and Wilhelm Verwoerd (Cape Town: University of Cape Town Press, 2000); Desmond Mpilo Tutu, *No Future without Forgiveness* (New York: Doubleday, 1999), 54–5; 155–7; Alex Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000), 278–99; 387–400.

Restorative justice theory emerged out of a range of informal alternative justice practices, encompassing juvenile justice, alternative dispute resolution, Native American talking circles, and other indigenous justice practices in New Zealand, Canada, and a number of African countries.[33] In contrast with the secular tradition of legalism, restorative justice has been influenced by theological approaches to reconciliation.[34] In contrast with the legalistic emphasis on enforcing rules, restorative justice aspires to repair injuries or damages caused by crime and violence. This not only requires a response to the harms experienced by victims of crime, but also strategies for rehabilitating or reintegrating those who are responsible for crime by outlining ways that they can make amends. This expansive set of goals has led commentators to refer to restorative justice as a morally ambitious theory.[35] Restorative justice does not exclude punishment, and may even require it, but rejects the view that punishment ought to be the goal of justice. Instead, punishment is part of the broader process of repair, which might also encompass expressions of apology, atonement, and forgiveness.[36] In contrast with the legalistic preference for formal rules, restorative justice calls for standards of judgment that are flexible and responsive to local contexts, practices, and values. Instead of using law to mediate the emotional response to crime, restorative justice calls for victims, perpetrators, and communities to participate directly in the process of justice.

South Africa's TRC has had a remarkable influence on the theory and practice of transitional justice worldwide. "[S]ince the advent of South Africa's TRC in the 1990s," writes one commentator, "it is difficult to conjure an example of a political or post-conflict transition in which the idea of establishing a

[33] See Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990); John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002).

[34] See Daniel Philpott, "What Religion Brings to the Politics of Transitional Justice," *Journal of International Affairs* 61, no. 1 (2007): 93–110; Michael L. Hadley, ed., *The Spiritual Roots of Restorative Justice* (Albany, NY: State University of New York Press, 2001); Leslie Vinjamuri and Aaron P. Boesenecker, "Religion, Secularism, and Nonstate Actors in Transitional Justice," in *The New Religious Pluralism*, ed. Thomas Banchoff (Oxford: Oxford University Press, 2008).

[35] Elizabeth Kiss, "Moral Ambition within and Beyond Political Constraints: Reflections on Restorative Justice," in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, NJ and Oxford: Princeton University Press, 2000).

[36] Jennifer Llewellyn and Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission," *University of Toronto Law Journal* 49 (1999): 355–88. Villa-Vicencio, "Restorative Justice: Ambiguities and Limitations of a Theory"; Lisa LaPlante and Kimberly Theidon, "Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru, *Human Rights Quarterly* 29, no. 1 (2007): 228–50.

truth commission has been overlooked."[37] The Deputy Chair of South Africa's TRC, Alex Boraine, went on to found the influential International Center for Transitional Justice, which plays an active role in consulting with leaders involved in establishing truth commissions and other transitional justice institutions. One influential edited volume on the morality of truth commissions is entirely dedicated to debates on South Africa's TRC.[38] The TRC has become a focal point for debates in political theory on the themes of forgiveness and reconciliation.[39]

South Africa's TRC has also influenced a particular way of adapting restorative justice to the context of political violence, which I refer to as "therapeutic justice." More specifically, the TRC has inspired the view that as a response to political violence, one of the most important goals associated with restorative justice is to establish a therapeutic process that aims to "heal the wounds of the past." This variant of restorative justice emphasizes the importance of addressing the trauma resulting from past abuses, which, if left unchecked, might fuel ongoing cycles of violence and mistrust. Truth commissions contribute to restorative justice, in this view, by providing new information that might foster psychological closure, opportunities for therapeutic testimony, or cathartic encounters between victims, perpetrators, and sympathetic observers. [40]

This "healing model" of transitional justice has its critics. Some reject the idea of restorative justice as intellectually incoherent and contend that a better moral defense of truth commissions rests on establishing their role in advancing deliberative democracy.[41] Others are concerned with the way

37 Freeman, *Truth Commissions and Procedural Fairness*, 11.

38 Rotberg and Thompson, eds., *Truth v. Justice*.

39 See for example, Jean Bethke Elshtain, "Politics and Forgiveness," in *Burying the Past: Making Peace and Doing Justice after Civil Conflict*, ed. Nigel Biggar (Washington DC: Georgetown University Press, 2003); Andrew Schaap, *Political Reconciliation* (London and New York: Routledge, 2005); Peter Digeser, *Political Forgiveness* (Ithaca, NY: Cornell University Press, 2001); Fuyuki Kurasawa, *The Work of Global Justice: Human Rights as Practices* (Cambridge: Cambridge University Press, 2007); Mark Amstutz, "Restorative Justice, Political Forgiveness, and the Possibility of Reconciliation," in *The Politics of Past Evil: Religion, Reconciliation, and Transitional Justice*, ed. Daniel Philpott (Notre Dame, IN: Notre Dame University Press, 2006). Aletta Norval, "Memory, Identity, and the (Im)possibility of Reconciliation: The Work of the South African Truth and Reconciliation Commission," *Constellations* 5, no. 2 (2002): 250–65.

40 Both Minow and Kiss associate restorative justice with therapeutic testimony. However, it is important to note that neither scholar *reduces* restorative justice to therapy. See Kiss, "Moral Ambition" and Minow, "The Hope for Healing: What Can Truth Commissions Do?" in *Truth v. Justice*, ed. Rotberg and Thompson.

41 Amy Gutmann and Dennis Thompson, "The Moral Foundations of Truth Commissions," in *Truth v. Justice*, ed. Rotberg and Thompson, 22–44.

that restorative justice identifies justice with healing and therapy. "A person plagued by cancer is not at fault," write Roth and Des Forges, "Murderers … are different." Treating them as victims of social psychosis or trauma is dangerous in their view, "because it signals to other would-be mass murderers that they risk not punishment but, at most, communal therapy sessions."[42] Even sympathetic observers, such as Minow, have noted that this therapeutic conception of justice is in tension with political responses to past abuses.[43]

Nevertheless, the therapeutic approach to transitional justice has been influential in shaping ideas about the role of truth commissions and the meaning of restorative justice as a response to political violence. Rwanda's *gacaca* courts ostensibly represent an alternative way to enact a restorative response to atrocity – one that does not center on investigating and narrating the past, but entails a participatory process of adjudication and punishment.[44] However, for a number of reasons, this approach to restorative justice has not been as influential as the therapeutic approach associated with South Africa's TRC.[45] Although the amnesty provisions associated with the TRC have not been replicated, truth commissions commonly (though not uniformly) follow South Africa's lead by framing their work in relation to therapeutic categories. Sierra Leone's Truth and Reconciliation Commission, for example, encouraged people to participate in the process with signs that read, "Revealing is Healing!"[46] Restorative justice principles were also incorporated into the design of the International Criminal Court, which provides space for victim testimony and a reparations fund.[47]

[42] Kenneth Roth and Alison Des Forges, "Justice or Therapy?" *Boston Review* (Summer 2002).

[43] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 63.

[44] See Drumbl, *Atrocity, Punishment, and International Law*; Timothy Longman, "Justice at the Grassroots? Gacaca Trials in Rwanda," in *Transitional Justice in the Twenty-First Century: Beyond Peace versus Justice*, 206–28.

[45] Mark Drumbl argues that Rwanda's *gacaca* process has moved away from its restorative and reconciliatory goals to become something more punitive and retributive (*Atrocity, Punishment, and International Law*, 94). See also, Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (New York: Cambridge University Press, 2010).

[46] Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone," *United States Institute of Peace Special Report* (Washington DC: USIP, 2005). See also, Tim Kelsall, "Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission of Sierra Leone," *Human Rights Quarterly* 27, no. 2 (2005).

[47] Among those who participated in the negotiations leading to the Rome Statute of the International Criminal Court, writes Christopher Muttukumaru, there was a "gradual realization" that victims "not only had an interest in the prosecution of offenders but also an interest in restorative justice." See Christopher Muttukumaru, "Reparation to Victims," in *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, ed. Roy S. Lee (The Hague: Kluwer Law International, 1999), 264.

Although legalism remains the dominant framework for promoting and evaluating transitional justice, restorative justice has emerged as a prominent alternative. The two frameworks offer distinctive ways of addressing political violence, yet they are not mutually exclusive. I refer to them as "frameworks" because they are not simply sets of policy preferences, but rather refer to a broader network of assumptions regarding the relationships among justice, politics, and memory in the aftermath of political violence. These theoretical frameworks have influenced the kinds of institutions and strategies that are promoted to judge and remember political violence. They have influenced the way that transitional justice strategies are critically evaluated. More generally, legalism and restorative justice have influenced the way that policymakers and scholars understand, analyze, and commemorate political violence.

Despite their differences, legalism and restorative justice share a basic problem: Both are derived from criminal justice models that define crime as *deviance* from common norms and practices. Yet as applied to the context of transitional justice, they are used as a basis for judging crimes of *obedience* – violent or abusive acts that have been authorized by political leaders and rationalized or justified in the name of political communities. Both frameworks are premised on the availability of consensus regarding the terms of debate on past abuses, yet are applied in contexts characterized by ongoing volatile conflict over the fundamental question of how past violence ought to be judged. Both frameworks analyze and investigate the experience of innocent victims and guilty perpetrators, yet apply this framework to the context of systematic atrocities characterized by "gray zones" of complicity and ambiguous involvement. These frameworks have been appealing as approaches to transitional justice not *in spite of* the way that they are in tension with political responses to past abuse, but precisely *because* they provide strategies for depoliticizing the process of judgment and remembrance. Addressing their limitations means taking a closer look at this logic of depoliticization.

REMEMBERING VICTIMS AND PERPETRATORS, FORGETTING POLITICS

Transitional justice institutions are commonly criticized on the grounds that they are, or that they risk becoming, politicized. Where transitional justice becomes too political, according to such critics, it amounts to little other than a "witch hunt." This was the charge that the National Party, which presided over apartheid, leveled at South Africa's TRC. This was also the message that Republican leaders in the United States broadcast in response to those who have called for an investigation of Bush Administration officials for torture and other human rights abuses. Such comments suggest that if any degree of

political judgment enters into the investigation of past abuses, then the entire process will be illegitimate and invite destructive backlash.

Criminal justice frameworks provide a way to respond to such charges by depoliticizing the terms of investigation. Depoliticizing the process of judgment is seen as a basis for establishing the legitimacy of transitional justice investigations in contexts characterized by volatile conflict over the very terms of debate. Focusing on discrete individual infractions and experiences is a way to demonstrate that transitional justice investigations are independent, rather than partisan, and concerned with reestablishing the integrity of the law or alleviating the suffering of individual victims. It is also a strategy for challenging political justifications for violence. Following the lead of major human rights organizations, transitional justice institutions analyze actions that may have been widely accepted as a matter of duty and recast them as "violations," "abuses," and "atrocities." Finally, in contexts where politics has become synonymous with violent exclusion, depoliticization has been a strategy for promoting reconciliation and a common sense of justice. Yet this has also been a problematic and contradictory strategy.

One problem is that depoliticization does not *transcend* the politics of transitional justice, but rather functions to obfuscate and naturalize the way that politics operate in the process of judging the past. Depoliticization masks the particular political and social values that frame the investigation and its judgments.[48] It also naturalizes the political compromises and asymmetries that define the scope of transitional justice mandates. Critics of the human rights movement have argued that depoliticization functions to foreclose debate on the terms of global justice, while presenting the values and traditions associated with western liberalism as universal.[49] Depoliticization has also obfuscated the ways in which international justice norms are gendered.[50] In the context of transitional justice, these are particularly troubling problems. Transitional justice institutions not only define the terms of justice

[48] Michael Barnett and Martha Finnemore. "The Politics, Power, and Pathologies of International Organizations," *International Organization* 53, no. 4 (1999): 699–732.

[49] See Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights," *Harvard International Law Journal* 42 (2001): 201–45.

[50] See Helen Kinsella, "Gendering Grotius: Sex and Sex Difference in the Laws of War," *Political Theory* 34, no. 2 (2006): 161–91; Charli Carpenter, *Innocent Women and Children: Gender, Norms, and the Protection of Civilians* (Ashgate, 2006); Laura Sjoberg, *Gender, Justice, and the Wars in Iraq: A Feminist Reformulation of Just War Theory* (New York: Lexington, 2006); Katherine Franke, "Gendered Subjects of Transitional Justice," *Columbia Journal of Gender and Law* 15, no. 3 (2006); Fionnuala Ni Aoláin, "Political Violence and Gender During Times of Transition," *Columbia Journal of Gender and Law* 15, no. 3 (2006). See also, Christine Bell and Catherine O'Rourke, "Does Feminism Need a Theory of Transitional Justice? An Introductory Essay," *International Journal of Transitional Justice* 1, no. 1 (2007): 23–44.

for past abuses, but also frame the terms of an official process of remembrance. They function as a basis for "imagining community" in contexts characterized by violent division over the terms of debate.[51] By naturalizing the compromises, distortions, and asymmetries that frame their investigations, these institutions foreclose or limit ongoing debate regarding the terms of official memory in the process of political change.

A second, related objection is that depoliticizing transitional justice institutions has been at odds with their claim to challenge denial and learn from the past. To depoliticize is to analyze or address problems by removing them from their political and historical context.[52] Criminal trials *can* reveal a great deal about the workings of systemic injustice.[53] But this aspiration is in tension with the requirements of due process and the goal of individualizing guilt.[54]As David Kennedy observes, "speaking law to politics is not the same thing as speaking truth to power."[55] More generally, human rights legalism has analyzed and understood political violence primarily as a problem of "impunity," or the absence of judgment and punishment, regardless of the historical context and dynamics that shape abuses or atrocities. Restorative justice has been associated with a somewhat different view of the problem of political violence as fundamentally concerning the legacy of unresolved psychological injuries resulting from past abuses. In fact, both impunity and trauma *are* important problems associated with political violence, and it is not my intention to dismiss or belittle these problems. Rather, my concern is with the way that legalism and restorative justice have been employed as frameworks for analyzing and commemorating systematic political violence. By displacing attention to the political dynamics and contexts of the abuses under investigation, these frameworks undermine the critical role of transitional justice as a challenge to denial and as a basis for learning from the past.

[51] See Benedict Anderson, *Imagining Communities* (London: Verso, 1983); Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge: Cambridge University Press, 2001).

[52] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ and Oxford: Princeton University Press, 2006).

[53] See Bass, *Stay the Hand of Vengeance*; Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction Press, 1997); and Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT and London: Yale University Press, 2001).

[54] Drumbl, *Atrocity, Punishment and International Law*; Laurel Fletcher and Harvey M. Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, *Human Rights Quarterly* 23, no. 3 (August 2002): 573–639.

[55] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, NJ and Oxford: Princeton University Press, 2004).

Karl Jaspers, who remained in Germany throughout the Nazi era with his Jewish wife, Gertrude, rejected the view that all Germans should be held criminally responsible for the genocide. Yet he was frustrated with what he saw as a failure on the part of most German people to consider their responsibility for supporting the regime, or failing to effectively protest its actions. Jaspers argued that criminal guilt should be restricted to the worst offenders, but that all Germans should be pressed to examine their own moral and political guilt for the atrocities.[56] Contemporary transitional justice institutions abandon this goal to the extent that they use individual guilt in a manner that implicitly exonerates those who were actively involved or otherwise complicit in systematic abuses.[57] Although depoliticizing such investigations is usually justified as a prerequisite for justice and reconciliation, it has also functioned to limit the scope of accountability and to blunt official moral condemnations of past practices.

At the same time, relying on a victim-perpetrator framework to frame official investigations of past injustice plays into the fear that such investigations will become paralyzing and undermine the pursuit of political reconciliation or ongoing reform. By limiting official remembrance of past suffering to the experiences of those who might be characterized as passive or innocent victims, transitional justice institutions fail to acknowledge the complexities of suffering and agency, as well as the role of those who *did* take action to protest or resist oppression and political violence.[58] They put forth a morality based on obedience, deference, and internalization of shared norms, which elides the problem of their collapse or absence. At the same time, they exclude potentially powerful examples of agency, protest, refusal, and solidarity that might usefully inform a response to this problem.

A third objection is that the depoliticization of transitional justice assents to an exceedingly narrow and self-defeating vision of politics – one that is in tension with the goal of advancing democratic change. It suggests that we are incapable of making distinctions between good and bad in politics, that all forms of political judgment are equally pernicious and that the very act of taking sides in a political debate is an affront to the goal of reconciliation or to the integrity

[56] Karl Jaspers, *The Question of German Guilt*, trans. E.B. Ashton (New York: Dial Press, 1947). See also, Stephen L. Esquith, "Re-enacting Mass Violence." *Polity* 4 (2003): 513–34.

[57] See Fletcher and Weinstein, "Violence and Social Repair"; Drumbl, *Atrocity and Punishment in International Law*; Pablo De Greiff, "Trial and Punishment: Pardon and Oblivion: On Two Inadequate Policies for the Treatment of Former Human Rights Abusers," *Philosophy and Social Criticism* 22 (1996): 106.

[58] David Kennedy refers to this as "privileging the baby seal" in a human rights framework that sees the world as "uncivilized deviants, baby seals, and knights errant" (*The Dark Sides of Virtue*, 29).

of the judicial process. This premise is at odds with the view that democratic politics must remain open to an ongoing process of conflict and contestation.[59] As Wendy Brown observes, depoliticization tends to substitute "emotional and personal vocabularies for political ones."[60] It also sets transitional justice in tension with the pursuit of political mobilization on behalf of ongoing change to advance democratic reform or address the legacy of the past.

As strategies for depoliticizing the past, legalism and restorative justice have offered narrowly construed and largely symbolic accounts of justice. Although restorative justice theory requires measures to address and repair underlying social and political conflict, it is commonly identified with the goal of psychological adaptation and closure. And although proponents of human rights legalism are often uncompromising when it comes to opposing amnesties, they have acceded to a vision of justice that is narrowly defined as the accumulation of exemplary legal victories. In his account of Amnesty International, Stephen Hopgood reveals that in its effort to establish a stance of political impartiality, the organization moved away from grassroots organizing toward a dynamic of "largely white middle-class westerners working as experts on behalf of largely nonwhite non-Westerners."[61] Similarly, efforts to depoliticize transitional justice have been associated with the view that the process of dealing with the past is most successful, fair, and just when handled by professionals such as lawyers, psychologists, and social scientists, in accordance with evolving standards of "best practice."

This book argues that the use of legalistic and restorative frameworks to depoliticize public memory undermines the critical role of transitional justice in important ways. Transitional justice is premised on the importance of challenging denial regarding state-sponsored and other forms of political violence, yet legalism and restorative justice have both functioned as strategies for avoiding the ambiguities of the gray zone by shifting attention away from the themes of complicity in, and resistance to, political violence. The critical role of transitional justice institutions is associated with their claim to remember and learn from the past, yet legalism and restorative justice have also fostered new forms of organized forgetting and mythmaking. Both frameworks are championed as strategies for connecting the pursuit of justice with the

[59] On this theme, see Chantal Mouffe, "Democracy in a Multipolar World," *Millennium Journal of International Studies* 37, no. 3 (2009): 549–61; Schaap, *Political Reconciliation*; Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure* (Stanford, CT: Stanford University Press, 2003).

[60] Brown, *Regulating Aversion*, 16.

[61] Stephen Hopgood, *Keepers of the Flame: Understanding Amnesty International* (Ithaca, NY and London: Cornell University Press, 2006), 98.

goal of advancing political and democratic change, yet they have been framed in ways that denigrate political compromise, contestation, and agency.

RECOVERING POLITICAL JUDGMENT

A number of scholars have developed proposals for broadening the scope of transitional justice investigations to better address systematic, politically authorized injustices. Jaspers made the case for differentiating moral, criminal, political, and what he termed "metaphysical" guilt for Nazi atrocities.[62] More recently, Mahmood Mamdani argued that South Africa's TRC ought to have examined the responsibility of *beneficiaries* – those who continue to reap benefits from the legacy of apartheid.[63] Mark Drumbl suggests that in the aftermath of atrocity, collective responsibility ought to be assessed through civil remedies, which have a broader reach than criminal guilt.[64] Audrey Chapman and Patrick Ball have argued that the problem is methodological. Instead of relying on the legal framework for analyzing individual guilt, truth commissions should make use of social science methodology to establish the causes and dynamics of systemic violence.[65] Such proposals offer creative ways to widen the scope of transitional justice investigations in order to provide a critical and political response to systematic injustice. However, they sidestep an important problem, which is the way that the victim-perpetrator framework has been defended as a basis for depoliticizing transitional justice investigations.

To move beyond the confines of this framework, I suggest, it will be important to recover, defend, and evaluate the role of political judgment in transitional justice. The theme of political judgment has received little sustained attention in contemporary debates on transitional justice. What is striking about this omission is that many of the thinkers that influenced contemporary human rights legalism and restorative justice, particularly those writing in response to the challenges of judging Nazism and apartheid, defended the role of political judgment in efforts to reckon with massive atrocities and systemic injustice. For example, Judith Shklar, who is considered perhaps the most important theorist of legalism, defended the Nuremberg tribunal on the

[62] Jaspers, *The Question of German Guilt*.

[63] Mahmood Mamdani, "Reconciliation without Justice," *Southern Review* 10, no. 6 (1996): 22–5.

[64] Drumbl, *Atrocity, Punishment, and International Law*, 196.

[65] Audrey Chapman and Patrick Ball, "Levels of Truth: Macro-Truth and the TRC," in *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, ed. Audrey R. Chapman and Hugo Van der Merwe (Philadelphia: University of Pennsylvania Press, 2008).

grounds that it had subordinated the imperatives of legalism to a creative and flexible process of political judgment.[66] Hannah Arendt, who is frequently cited as an inspiration for scholarship on international criminal justice and forgiveness, developed a thorough critique of depoliticization and argued that political judgment should be a central response to twentieth-century atrocities.[67] Kader Asmal, who is credited with originating the idea for a South African TRC, argued that the primary goal of the truth commission should be to develop a political judgment of apartheid.[68] Even South African thinkers who defended the narrow investigative framework of the TRC, such as Charles Villa-Vicencio and Desmond Tutu, nevertheless made the case for incorporating political judgment into the restorative justice framework.

These writings on political judgment have been neglected as a result of the individualistic focus of transitional justice theory and policy. This book examines them in order to recover a different set of lessons that might be drawn from the examples of Nuremberg and the South African TRC regarding the role of political judgment in the aftermath of political violence. It also seeks to recover the concept of political judgment from the prevailing conventional wisdom that characterizes it as intrinsically divisive or antithetical to the pursuit of justice.

In so doing, one goal of this book is to argue that political judgment is essential to the critical role of transitional justice and, more generally, to the process of developing moral responses to systematic injustice. First, transitional justice institutions must make judgments, whether implicit or explicit, about the political systems, institutions, or values that authorize systematic violence and abuse. Second, transitional justice institutions make judgments in the absence of agreed upon rules and standards. They may invoke international or local norms, yet they do so in a context of radical disagreement over the meaning and application of these standards. They do not simply render judgment on past events by invoking a set of standards or laws, but also aspire to make their judgments politically meaningful in contexts where such standards have been hollow, completely disregarded, or malevolent. Finally, transitional justice institutions seek to judge in dynamic contexts, where the goal is not to reinforce existing rules or even to affirm tentative pacts and negotiations, but rather to address past injustices as part of an ongoing

[66] Shklar, *Legalism*, 156–68.

[67] Hannah Arendt, *Lectures on Kant's Political Philosophy Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago: University of Chicago Press, 1982), 1–3.

[68] Kader Asmal, Louise Asmal, and Ronald Suresh Roberts. *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance* (Cape Town: David Philips Publishers, 1996).

process of change.[69] Political judgment is important, as Leslie Thiele writes, because "there are no rules to determine where, when, and how new rules should be invented and old rules bent or broken."[70] Understood in this way, political judgment is a crucial dimension of praxis, the process of connecting theory to action.

The book develops this argument by addressing the charge that the criteria commonly used for evaluating political judgment are essentially at odds with the goals associated with transitional justice. Many scholars of political judgment begin with the basic premise that politics is tragically and inescapably violent. This idea is on display in the logic employed by the Athenian delegation to Melos in Thucydides' *Peloponnesian War*: "the strong do what they have the power to do and the weak accept what they have to accept."[71] International relations realists have cited the grisly fate of the Melians, who refuse to "look the facts in the face" and submit to the superior power of the Athenian empire, as a failure of political judgment.[72] The idea that political judgment requires a tragic sensibility and a willingness to compromise moral principles runs through the classics of realist theory from Machiavelli's *The Prince* to Weber's "Politics as a Vocation" and Morgenthau's ethic of "political realism."[73] José Zalaquett, a Chilean truth commissioner widely cited in the literature on transitional justice, invoked this approach to political judgment by citing Weber's "ethic of responsibility" as a way to justify the narrow parameters of Chile's initial transitional justice program.[74] Others have argued that transitional justice requires strategies designed to appease potential "spoilers" who have an incentive to derail a democratic transition or negotiated settlement.[75] The trouble with this approach is that it tends to identify good political judgment with a posture of resignation and acceptance with regard to prevailing divisions and dynamics of power.

[69] Ruti Teitel has argued that in the context of political transition, law "is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective" (*Transitional Justice*, 6).

[70] Leslie Paul Thiele, *The Heart of Judgment: Practical Wisdom, Neuroscience, and Narrative* (New York: Cambridge University Press. 2006), 4

[71] Thucydides, *The History of the Peloponnesian War: Revised Edition*, ed. Rex Warner, trans. M.I. Finley (New York: Penguin Classics, 1954), 402.

[72] For an alternative interpretation of Thucydides, see Richard Ned Lebow, *The Tragic Vision of Politics: Ethics, Interests, and Orders* (New York: Cambridge University Press, 2003), 65–167.

[73] See Michael Joseph Smith, *Realist Thought from Weber to Kissinger* (Baton Rouge: Louisiana State University Press, 1986).

[74] José Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," *Hastings Law Journal* 43 (1992): 1425–38.

[75] Snyder and Vinjamuri, "Trials and Errors."

Another influential approach posits that political judgments ought to be guided by the shared traditions and experiences of political communities. For Aristotle, *phronesis*, or practical wisdom, was a central human virtue that enables people to make judgments in the dynamic realm of the polis. In contrast with theoretical wisdom, Aristotelian *phronesis* "is concerned with human affairs and with matters about which deliberation is possible."[76] Because it is concerned with action, *phronesis* deals with particulars rather than universals. Aristotle argued that this kind of judgment could not be attained through philosophical contemplation, but rather through experience and "good sense," which he characterized as "the quality which makes us say of a person that he has the sense to forgive others."[77] Thus, according to Ronald Beiner, Aristotelian judgment is connected to understanding and "fellow feeling" in a political community.[78] Similarly, in Roman humanism, *sensus communis* is the basis of political judgment.[79] This understanding of political judgment may be discerned in prominent accounts of restorative justice. For example, John Braithwaite has argued that restorative justice must be guided by the shared norms or traditions of a community.[80] From this perspective, it is a mistake to presume that political judgment is antithetical to collective moral aspirations. Yet a critical moral response to systematic, politically authorized injustice cannot rely on community tradition, past shared experience, or conventional wisdom and must instead examine how prevailing notions of "common sense" might have been implicated in the abuses under investigation.

I draw on Arendt's unfinished writings on this theme to pursue an alternative way to think critically about the role of political judgment in transitional justice. Arendt was influenced by Aristotelian thought but moved away from the view that political judgment ought to be guided by community traditions and practices. Instead, she developed a basis for critically evaluating political judgment by drawing on Kant's idea of a kind of impartiality based on "enlarged mentality," which is achieved through an effort to take diverse perspectives into account without presuming to transcend a partial, subjective position. One reason that Arendt's account of political judgment is useful for debates on transitional justice is that it outlines a basis for attempting to bridge seemingly intractable divisions, yet without appealing to prepolitical or apolitical criteria.

[76] Aristotle, *Nichomachean Ethics*, trans. Martin Ostwald (New York: MacMillan, 1962), 1141b 10–15.

[77] Aristotle, *Nichomachean Ethics*, 1143a.20.

[78] Ronald Beiner, *Political Judgment* (London: Metheune & Co., 1983), 79.

[79] Beiner, *Political Judgment*, 21.

[80] John Braithwaite, *Crime, Shame, and Reintegration* (Cambridge: Cambridge University Press, 1989).

Arendt's discussion of political judgment is also useful because it exposes tensions between two distinctive stances or activities associated with good political judgment. Her writings on the theme of political judgment remained unfinished at the time of her death and scholars continue to disagree over the direction she would, or should, have taken with them had she lived. Arendt sometimes seems to suggest that political judgment entails active engagement in politics through dialogue and persuasion. In others, she identifies political judgment with the "spectator" or historian, whose capacity to imagine and account for alternative perspectives depends on the achievement of some kind of distance from the violent passions of past events. As efforts to reckon with systematic injustice, transitional justice projects require both forms of political judgment. They are mutually reinforcing, but they are also in tension with one another. That is, the parameters of their historical investigations are informed by political persuasion, deliberation, and compromise. However, if they are to serve as a critical response to systematic atrocities and injustices, transitional justice institutions must also strive for the critical distance of the historian, whose reflections on past events expose the limitations of political compromise and challenge the parameters of prevailing "common sense." Instead of regarding this as problem to be resolved (in debates on Arendt or in debates on transitional justice), I suggest that the tension between them is essential to the critical role of transitional justice.

This approach to political judgment does not accommodate avoidance or denial, but rather insists upon potentially unsettling historical investigation and reflection. Paradoxically, transitional justice institutions are championed as a basis for reckoning with historical wrongs, yet their investigations are treated as a kind of welcome by-product of their role in achieving partial remedies for systematic abuses. Proponents of legalism have argued that by prosecuting individuals, courts can persuasively establish historical records of past violence. Proponents of restorative justice have tended to frame the role of transitional justice investigations in relation to therapeutic categories. In these arguments, the role of historical reflection and remembrance is bound up in, and limited by, the pursuit of politically feasible remedies for past injustices. In contrast, I suggest that the critical role of transitional justice requires a process of historical reflection that is somewhat detached from the project of remedy – one that might thereby shed light on the *limitations* of transitional remedies and compromises.

Good political judgment, as Arendt characterized it, must be constructive and imaginative as well as critical. If transitional justice is to be a basis for imagining the possibility of political community or reconciliation after atrocity, it should not be limited to addressing the experiences of victims

and perpetrators, but should also investigate the experiences of those who engaged in acts of resistance against systematic atrocities. The primary threat that Arendt associated with "holes of oblivion" was in the effort to erase traces of struggle, to make protest and dissent appear futile in the face of overwhelming state-sponsored repression. Contemporary transitional justice institutions are championed as tools in what Milan Kundera referred to as the "struggle of memory against forgetting,"[81] yet these institutions have made no space for the memory of resistance.[82] A common fear is that stories of resistance are invariably conveyed in Manichean terms, as a struggle of good against evil, and that recalling them will undermine the pursuit of dialogue and persuasion across lines of division. Although investigations that examine the theme of resistance may be unsettling, I suggest that they also illuminate possibilities for solidarity and innovation that are neglected in the effort to depoliticize transitional justice investigations.

The argument developed here makes three primary contributions to the theoretical literature on transitional justice. First, the argument challenges prominent approaches to defining and evaluating what it means to "do justice" in debates on transitional justice and human rights. Scholars engaged in theoretical and empirical research on these themes generally characterize human rights advocacy as idealistic and legalistic. This book does not take issue with a basic aspiration of legalism, which is to establish law as a basis for constraining abuses of power. Nor does it aim to provide an exhaustive critique of legalism as an ideology.[83] Instead, the book exposes the contradictions and limitations inherent in a particularly influential variant of legalism – human rights legalism. It challenges the claim that legalistic strategies delineate the realm of law or justice from the biases, compromises, and conflicts of politics. And it argues that as a response to systematic political violence, legalistic strategies may be obfuscating or critical depending on the quality of political judgment that informs them. Recognizing this does not mean that we ought to reject war crimes tribunals or abandon the project of international criminal justice, but that we should acknowledge and critically evaluate the role of political

[81] Milan Kundera, *The Book of Laughter and Forgetting* (New York: Harper Perennial, 1999).

[82] Robert Meister addresses this theme in "Ways of Winning: The Costs of Moral Victory in Transitional Regimes," in *Modernity and the Problem of Evil*, ed. Alan D. Schrift (Bloomington, IN: Indiana University Press, 2005).

[83] For more general studies of legalism in other contexts, see Wendy Brown and Janet Halley, eds., *Left Legalism/Left Critique* (Durham, NC and London: Duke University Press, 2002); McEvoy, "Beyond Legalism"; Robert Kagan, *Adversarial Legalism: The American War of Law* (Cambridge, MA: Harvard University Press, 2003); Ruti Teitel, "Humanity's Law: A Rule of Law for a New Global Politics." *Cornell International Law Journal* 35 (2002): 355–87.

judgment in their operation. It also reveals the limitations of legalism as a basis for evaluating alternative approaches to justice, framing moral action, and guiding historical reflection beyond the confines of the criminal trial.

Restorative justice has been characterized as a kind of large-scale therapy session and associated with a return to local or traditional approaches to resolving conflict. As a result, it has been too easy for critics to dismiss restorative justice as a retreat from accountability and the framework has not been taken seriously as a theoretical alternative to legalism. The debate on restorative justice has oversimplified the contributions of thinkers who influenced South Africa's TRC, and neglected their efforts to reflect on the TRC's limitations and disappointments. This book takes the discourse of transitional justice seriously. However, in this work I consider how thinkers and leaders who influenced that discourse went on to reflect on it critically, as scholars and as theorists. Building on these reflections and on restorative justice theory, I develop an alternative approach to conceptualizing restorative justice as a response to political violence – one that requires political judgment and responsibility, rather than a therapeutic "talking cure." I suggest that this approach to restorative justice offers an important response to the limitations of legalism. In developing this argument, the book also addresses ongoing debates regarding the ways that local actors work with the human rights framework, as well as emerging research on the influence of religious activists in developing international approaches ethics and justice.[84] In the South African context, local human rights leaders and religious activists did not just adapt international norms to address local dilemmas and problems, but also developed an innovative theoretical critique of human rights legalism.

Second, the argument bridges a persistent divide in scholarship on transitional justice. Human rights advocates, along with many prominent human rights scholars, have seen transitional justice as an essentially critical response to abuses of power. Transitional justice investigations may be imperfectly designed or implemented, in this view, but their fundamental function is to challenge denial, to investigate and address the extent of past violence.[85]

[84] See, for example, Shareen Hertel, *Unexpected Power: Conflict and Change Among Transnational Activists* (Ithaca, NY: Cornell University Press, 2006); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Context* (Chicago: University of Chicago Press, 2006); Cecelia Lynch, "Acting on Belief: Christian Perspectives on Suffering and Violence," *Ethics and International Affairs* 14 (2000).

[85] See for example, Roht-Arriaza and Mariezcurrena, eds., *Transitional Justice in the Twenty-First Century*; Eric Stover and Harvey M. Weinstein, eds., *My Neighbor, My Enemy: Justice and Community in the Aftermath of Atrocity* (Cambridge: Cambridge University Press, 2004); Victor Peskin, *International Trials in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2009); Kathryn Sikkink and Carrie

Commentators from a range of backgrounds and theoretical orientations have contested this view by arguing that transitional justice discourse and institutions primarily function to manage prevailing dynamics of power, cultivate consent for compromise, or establish new legitimating mythologies.[86] This book demonstrates that both perspectives are, to some extent, valid. Depoliticization is a powerful legitimating strategy that often masks the extent to which transitional justice institutions and practices are influenced by dynamics of power and inequality. However, these institutions also open up new possibilities for advancing critical, transformative responses to systematic injustice and brutality. Efforts to pursue such an agenda cannot rely on the technical acumen of professional policy makers, but also require political judgment.

Third, the book addresses ongoing debates on the relationship between the politics of memory and change. Transitional justice institutions and practices have long been challenged on the grounds that to insist on investigating or commemorating past atrocities and injustices is a self-defeating or ultimately paralyzing activity. The German *Historikerstreit* centered on the claim made by some historians that collective identity should not be weighed down by an oppressive obligation to remember the shameful deeds of previous generations.[87] In this view, common among conservatives, countries should be free to selectively emphasize heroic episodes from their histories as a basis for establishing unity, patriotism, and pride, without facing continual pressure to integrate past atrocities into their collective identity. Former Argentine President Carlos Menem argued that too much attention to human rights abuses would damage the cause of reconciliation.[88] Fears regarding the burden of memory are not only expressed by apologists or conservatives, but also

Booth Walling, "The Impact of Human Rights Trials in Latin America," *Journal of Peace Research* 44, no. 4 (2007), 427–45.

[86] Samuel Huntington, *The Third Wave: Democratization in the Late 20th Century* (Norman, OK: University of Oklahoma Press, 1991); Snyder and Vinjamuri, "Trials and Errors"; Wilson, *The Politics of Truth and Reconciliation in South Africa*; Robert Meister, "Human Rights and the Politics of Victimhood," *Ethics and International Affairs* 16, no. 2 (2002): 91–108. Ruti Teitel has argued that transitional justice entails a process of negotiation between critical and conservative responses to past wrongs. See, *Transitional Justice*, 213–28; "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69–94.

[87] See Charles Maier, *The Unmasterable Past: History, Holocaust, and German National Identity* (Cambridge, MA: Harvard University Press, 1988); Jurgen Habermas, *A Berlin Republic: Writings on Germany* (Lincoln, NE: University of Nebraska Press, 1997).

[88] See, Luis Roniger and Mario Sznajder, *The Legacy of Human Rights Violations in the Southern Cone: Argentina, Chile, and Uruguay* (Oxford: Oxford University Press, 1999), 78, 163.

by liberals, who observe that the idea of a community that bears an obligation or debt to the past is in tension with the idea of a rights-based political community with porous boundaries and the capacity to alter its identity over time.[89] Others have expressed the fear that an obsessive focus on past injury is symptomatic of, and functions to reinforce, a declining faith in the possibility of collective action for a better future.[90]

This book rejects the idea that transitional justice insists upon *too much* memory, too much attention to past wrongs, along with the view that an obligation to remember past wrongs will undermine the goal of political change. At the same time, the book suggests that the *frameworks* that animate transitional justice institutions and practices *have* undermined this goal. By limiting the process of reckoning with past wrongs to the experiences of victims and perpetrators, they frame official remembrance in ways that illuminate helpless suffering and criminal guilt, while relegating stories of complicity, resistance, and refusal to the shadows. The distinction between victims and perpetrators is fundamental to our sense of justice. Yet to limit our practices of remembrance and remedy to these categories is to radically curtail our commitment to acknowledge and learn from past injustices.

PLAN OF THE BOOK

The second and third chapters of the book examine influential theoretical articulations of human rights legalism and restorative justice in historical context against the backdrop of events that have defined the contours of contemporary theory and practice. Specifically, these chapters examine how human rights legalism and restorative justice have functioned to depoliticize transitional justice in response to volatile conflict over the terms of investigations.

Chapter 2 examines variation and change in legalistic approaches to transitional justice from Nuremberg to the present. The analysis builds on a neglected distinction at the center of Shklar's seminal book, *Legalism*. Shklar was deeply critical of what she viewed as academic, or ideological, legalism, which advanced a messianic view that law could transcend and overcome politics. However, Nuremberg represented to her an alternative approach to legalism that was creative, flexible, and explicitly political. The chapter argues

[89] See William James Booth, "Communities of Memory: On Identity, Memory and Debt," *American Political Science Review* 93 (1999).

[90] John Torpey, "Introduction: Politics and the Past," in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey (Lanham, MD: Rowman and Littlefield, 2003).

that the contemporary human rights movement has incorporated *both* forms of legalism, the creative and the messianic, yet the two are starkly at odds with one another. As a result, human rights legalism is increasingly cited as a basis for political intervention and change, yet also functions to obfuscate the politics driving systematic abuse and atrocity.

Chapter 3 examines how South Africa's restorative approach to justice took shape against the backdrop of the transitional period, from the negotiations to end apartheid through the writing of the TRC's final report. It argues that the TRC's restorative approach to justice was influenced by two distinctive challenges to human rights legalism. One challenge was articulated by human rights lawyers associated with the African National Congress (ANC), who rejected human rights legalism as an inadequate response to systemic injustices and saw the TRC as a potential basis for political judgment and ongoing reform. The TRC's theoretical framework was also informed by South African leaders from various "healing" professions, including religious leaders, medical doctors, psychologists, and therapists, who developed the case for an alternative approach to justice centered on "healing the wounds of the past." In the text of the *TRC Report*, this "healing" framework became a basis for depoliticizing the TRC's assessment of apartheid-era violence. This undermined the TRC's critical response to apartheid and has led proponents and critics alike to overlook the significance of South Africa's theoretical challenges to human rights legalism.

Together, these chapters demonstrate how the logic of depoliticization undermines the role of transitional justice as a response to systemic political violence. They demonstrate that this logic of depoliticization is not a *legacy* of, but rather a *departure* from the ideas that animated the Nuremberg Trials and the South African TRC. These chapters also locate an alternative theoretical tradition that has defended the role of political judgment in transitional justice and examines how such thinkers have faced persistent criticism from those that identify political judgment with resignation, moral compromise, or the uncritical adoption of community values.

Chapter 4 develops the argument that Hannah Arendt's writings on the theme of political judgment as "enlarged mentality" provide a way to move beyond this impasse. Although Arendt has influenced contemporary legalism and restorative justice, she was deeply critical of depoliticization in the human rights movement. The first section of the chapter examines this critique, which traces depoliticization to a pervasive sense of despair in the possibility of meaningful political engagement. The chapter then considers how Arendt's writings on political judgment address this problem. It examines two prominent ways of interpreting Arendt's theory of political judgment: one that

identifies political judgment with action and deliberation, and another that identifies political judgment with critical distance and detached reflection. The chapter demonstrates how these distinct approaches illuminate claims regarding the role of political judgment that have been implicit, yet underdeveloped, in debates on transitional justice. It argues that the two are mutually reinforcing, but in tension with one another and that both are vital to the critical role of transitional justice. A concluding section develops this argument and its implications by reconsidering Aeschylus's *Oresteian Trilogy* as a drama of transitional justice.

Chapter 5 builds on this argument by developing a conceptual distinction between restorative justice and therapeutic justice as responses to political violence. In contrast with therapeutic justice, restorative justice requires political judgment and political responsibility for addressing the consequences of crime and violence. The problem is that restorative justice is based on the premise that community practices and values ought to guide the process of political judgment. Yet judging political violence requires a critical response to the ways that communities are implicated in, and constructed by, political violence. I locate three distinctive responses to this problem in the reflections of Desmond Tutu, Charles Villa-Vicencio, and Mahmood Mamdani, as they considered the limitations and disappointments associated with the TRC. Tutu and Villa-Vicencio offer distinctive theoretical approaches to restorative justice, yet both associate the framework with an approach to political judgment that is grounded in active persuasion, compromise, and transformative dialogue. In contrast, Mamdani argues that restorative justice requires a critical and historical approach to political judgment – one that exposes denial and examines the legacy of the past in the present. Building on the argument developed in Chapter 4, I suggest that restorative justice requires both forms of political judgment and consider how truth commissions might better mediate the tensions between them.

Chapter 6 considers how transitional justice institutions might move beyond the victim-perpetrator framework to investigate the theme of resistance. The chapter examines three ways of investigating resistance and the unique concerns that are raised by each approach. One possibility, which Arendt proposed in her analysis of the Eichmann trial, is to examine the failure to resist, or to refuse compliance with, systems and institutions that are responsible for committing atrocities. A second possibility, articulated by Kader Asmal, is that truth commissions could investigate and commemorate political resistance, rather than restricting their investigations to experiences of passive suffering and guilt. A third approach, found in the arguments presented by both Arendt and Asmal, is to investigate examples of what might be referred to as *privileged*

resistance – acts of resistance by individuals who broke ranks with their own communities to protest atrocities that were committed in their name. Each of these approaches to examining resistance is revealing and unsettling in ways that are potentially at odds with the project of political reconciliation. Yet investigating resistance also illuminates possibilities for political community, agency, and solidarity that are obscured by the victim-perpetrator framework of contemporary transitional justice and human rights institutions. Returning to Primo Levi's essay, "The Gray Zone," I argue that transitional justice investigations might contribute to these goals by acknowledging the shades of gray that emerge in stories of resistance as well as the failure to resist systematic political violence and atrocity.

Chapter 7 concludes the volume by integrating the analysis and discussing its implications for recent debates on the dilemmas of judging systematic, politically authorized forms of violence.