When does a process of transitional justice qualify as just?[1]

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Transitional justice is the process of dealing with past wrongdoing, which was committed during extended periods of conflict or repression. Such processes take place characteristically as part of an effort to end conflict or repression. Processes of transitional justice vary, from criminal trials to truth commissions, and from reparations to amnesty. Transitional justice now constitutes a global practice. Dozens of countries across the globe explicitly are now or have been pursuing transitional justice. Prominent examples of places where transitional justice processes have been or are now being established include South Africa following the end of apartheid, Colombia at the present moment as it implements the Final Agreement between the government and the FARC, [2] and Iraq following the fall of Saddam Hussein. International organizations like the International Center for Transitional Justice focus specifically on tracking processes that exist and advise countries in designing and implementing their processes. Literature on transitional justice critically examines specific processes and the features of the overall practice.

Moral debates about transitional justice focus on the justifiability of processes like truth commissions and amnesty. Such debates arise and are deeply contested both theoretically and politically for a number of reasons. For one thing, impunity, that is, non-accountability for wrongdoing, is characteristically the *de facto* norm prior to the establishment of processes of transitional justice. One of the overarching aims of many transitional justice processes is to counter such impunity. Yet, at the same time it is not clear if impunity is in fact countered if mechanisms other than criminal punishment are adopted to deal with perpetrators of wrongdoing; if the standard for accountability is criminal trial and punishment then the absence of this process may signal an absence of accountability. Nor is it clear if impunity is countered if in fact many perpetrators of wrongdoing will not be subject to any transitional justice process at all. A core aim of transitional justice is to vindicate the rights of victims. Yet it is not clear if the rights of victims are recognized if reparations offered fall far short of what justice would seem to demand and if the limited scope of transitional justice processes means that many victims of wrongdoing will go unrecognized.

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[2] English translation of the Final Agreement is here: http://www.altocomisionadoparalapaz.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx.

Serious practical constraints in transitional contexts make the full satisfaction of principles of justice impossible in the near term where decisions about transitional justice processes are made.[3] In the face of these constraints, a common lens for conceptualizing the justifiability of transitional justice processes is from the perspective of compromise. Transitional justice processes, it is often claimed, are a product of compromise.

In previous work I have rejected the particular ways in which the compromise at the core of transitional justice has been represented in the literature.[4] My core objection to such conceptualizations is that they incorrectly stipulate what the values are which must be subject to a compromise in transitional justice processes. More specifically, I argue against presuming that insofar as justice is part of any compromise equation, the justice at issue is retributive or corrective justice. Instead, I claim, we ought to take seriously the idea that transitional justice represents its own type of justice, not reducible to the claims of retribution or correction.

But to argue against particular conceptualizations of compromise in connection with transitional justice is not to argue against a place for compromise in transitional justice. And it is on that place I want to focus here. My aim is to identify some of the criteria to use to distinguish justified from unjustified compromises, so that in that sense a transitional justice process may be judged (un)just. I begin with three cases of recurring concern in transitional justice, which I call *shaking hands with the devil, selling victims short,* and *entrenching the status quo*.[5] After explaining why I set aside the first, I focus on the second and third, both of which underscore the need for criteria to distinguish good compromises from bad. The second section looks at accounts of compromise in the literature in political philosophy and political theory, extracting from my discussion two general criteria which justified compromises must satisfy. The third and final section expands on the conditions that must be satisfied for a compromise to be justified. One issue that existing discussions omit is how to differentiate the incomplete fulfillment of a value from the failure to promote a given value at all. I argue that to make this differentiation we should adopt in the evaluation of processes of transitional justice the structure of evaluation that Lon Fuller proposed for the rule of law. Like with the rule of law, our evaluation of compromises of transitional justice should have two distinct parts, one shaped by the demands of what Fuller calls the morality of duty and the other shaped by the demands of the morality of aspiration.

I. **Compromising when Compromising?**

[3] The source of constraints and compromising pressure may not be just domestic, but also shaped by international actors too. For an illustration see Brian Grodsky, "International Prosecutions and Domestic Politics: The Use of Truth Commissions as Compromise Justice in Serbia and Croatia," *International Studies Review* 11 (4) (2009): 687-706.

[4] Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (New York: Cambridge University Press, 2017).

[5] The title "shaking hands with the devil" is taken from Romeo Dallaire's memoire following his experiences as UN Commander in Rwanda during the 1994 genocide. Romeo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, rep. ed. (De Capo Press: 2004).

In this section I articulate three cases in which appeal to compromise figure, which any adequate account of the morality of compromise must address. The first is what I call *shaking hands with the devil.* The second is what I call *selling victims short.* The third is *entrenching the status quo.* While one way of understanding the worry at stake in shaking hands with the devil fails to sufficiently acknowledge the circumstances of transition, I argue, another way of framing the worry can be incorporated into the way in which we address the worry of selling victims short. Thus, I focus for the remainder of my discussion on the second and third cases.

Before describing the cases, it is necessary to say more about the context of transitional societies. There are four what I call in my work circumstances of transitional justice which characterize transitional societies. The first is *pervasive structural inequality.* This condition focuses on the terms for interaction among citizens and between citizens and officials in a society during conflict and/or repression.[6] Such terms are institutionally defined. Legal institutions, political institutions, economic, social and cultural institutions all delimit through rules and norms what modes of conduct are permitted, prohibited, or required by whom (e.g., officials) with respect to whom (e.g., citizens). Institutions also include penalties, formal and informal, for violating rules and norms. Terms for interaction can be unequal in two ways. First, different groups can enjoy differential effective ability, or genuine opportunity, to shape rules and norms for interaction. Second, what different groups are able to effectively do and become given existing rules and norms can vary. Opportunities to be educated, employed, healthy, respected, recognized as a member of one's political community are some of the doings and beings that can vary as a function of institutional rules and norms. When inequality is *pervasive,* it is such that the legitimacy of the institutional order itself can be challenged. In apartheid South Africa, the white supremacy at the core of the apartheid institutional order was reflected in the fundamentally different opportunities that various racial groups enjoyed to participate in and shape the rules and norms of political, legal, and economic institutions, an inequality that was in turn rationalized by religious, educational, and cultural institutions. The systematic marginalization of and discrimination against black South Africans by white South Africans resulted in South Africa being one of the most unequal societies globally at apartheid's end. Indigeneity, geographical location (e.g., being located in more rural as opposed to urban areas), gender, ethnicity, nationality, and religion are just some of the fault lines that become salient as fault lines for inequality in transitional contexts.

A second circumstance is what I call *normalized collective and political wrongdoing.*[7] Wrongdoing refers to violations of human rights that become a basic fact of life around which individuals of targeted groups must orient their conduct and so in that sense normalized. Wrongdoing becomes a factor for members of targeted groups to take into account because it

[6] Murphy, *Conceptual Foundations,* chapter 1. You can also expand terms for interaction to focus on international and transnational relationships. I focus here on the simplest case of interaction within the context of a state for purposes of describing the kind of inequality I have in mind. What I call pervasive structural inequality is capturing similar concerns to what Catherine Lu calls structural injustice in *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017).

[7] Murphy, *Conceptual Foundations,* chapter 1.

is not isolated, but becomes a common occurrence; it is no longer exceptional but the de facto rule. The number of victims of wrongdoing reflects this normalization. Victims of particular forms of wrongdoing can number in the hundreds, thousands, tens or hundreds of thousands, and in some cases million(s). Such wrongdoing takes many forms, from disappearing, to limb amputation, torture, forms of sexual violence, or wrongful expropriation of land. The normalization of wrongdoing complicates responses to wrongdoing. Many individuals do not fall into distinct categories of victims and perpetrators. The categories of perpetrator and victim can become overlapping, both categories applying to the same person at once. The relevant moral categories to consider when responding to wrongdoing is broader than the categories salient in cases of discrete wrongs. Bystanders to, individuals complicit in, as well as beneficiaries of wrongdoing make possible or are impacted by the normalization of wrongdoing.

Wrongdoing is collective in the sense that groups are targeted, and groups (with various degrees of organization) commit wrongdoing. Wrongdoing is political in two senses. The first is in the sense of being committed for the sake of furthering political ends. Defending the state, implementing policy goals, contesting a government, and seeking control of land are all objectives which have been pursued via normalized wrongdoing. The second sense wrongdoing is political is in terms of the agents it implicates; in particular, state actors or private citizens acting with the permission of or in collaboration with state actors are responsible for the wrongdoing of interest. They are not the only perpetrators of wrongdoing. Members of groups organized politically and acting on behalf of a community contesting the state are political actors implicated in wrongdoing as well. The displacement of 7 million people in Colombia during the course of the conflict between the Colombian government and FARC was the product not only of armed rebel groups but also caused in part by paramilitaries acting in collaboration with or with the permission of members of the government.[8]

Pervasive structural inequality and normalized collective and political wrongdoing often interact in mutually reinforcing ways. Inequality can make certain groups more vulnerable to being targeted by wrongdoing. Wrongdoing can be used as a way of maintaining or defending inequality.

Many conflicts end without decisive winners, and in such cases transitions occur when the balance of power is not decisively shifted towards one party or in one direction. Attempts to end protracted conflict occur when conflict is protracted precisely because no single party can enforce its will on the other(s). This creates what I call *serious existential uncertainty*, that is, fundamental ambiguity in the trajectory of a political community.[9] In the context of aspirations for an end to conflict or repression, it remains profoundly unclear whether those aspirations will be realized. Uncertainty exists because failure is not a given; there is a credible chance for conflict to end, given the signing of a peace agreement for example. But whether violence will

[8] Stephanie Hanson, "Colombia's Right-Wing Paramilitaries and Splinter Groups," *Council on Foreign Affairs,* January 10, 2018, https://www.cfr.org/backgrounder/colombias-right-wing-paramilitaries-and-splinter-groups.
[9] Murphy, *Conceptual Foundations,* chapter 1.

cease in the short- or long-term is not obvious. Many attempted transitions to democracy following conflict and/or repression fail, and serious existential uncertainty highlights this fact. Serious existential uncertainty also impacts the subjective perspective of members and observers of transitional societies; in the midst of uncertainty, competing narratives of unfolding events can exist at once. While for some the signing of a peace agreement may represent a decisive shift in political relations, for others the signing may be seen as a repetition of previous attempts at peace, all of which failed.

Given the occurrence of atrocities and human rights violations during conflict or repression and given that it is rare for human rights violations to be committed only by one side, the parties in conflict in transitional contexts often come to regard their opponents as fundamentally evil. Because of the ways in which state agents and actors are implicated in wrongdoing, the state itself and state actors are viewed in this manner by at least a segment of a political community. The fourth and final circumstance of transitional justice is what I call *fundamental uncertainty about authority.*[10] Who has the authority to deal with past wrongs is unclear in such contexts, because standard arguments for why the state has the authority to punish do not apply. The state is not a neutral arbitrator of parties to wrongdoing, but is instead a party to the wrongs that are being addressed. In the context of pervasive structural inequality and state-sponsored wrongdoing against citizens, the state moreover does not represent values to be vindicated through responses to wrongdoing, but instead values in need of repudiation.[11] Unsurprisingly, given their role in wrongdoing, state agents can work actively to prevent the question of authority from ever being raised, by working to prevent responses to wrongdoing from being formulated.

Against the background of these four circumstances, the question arises as to whether one should *shake hands with the devil.* The decision to engage in negotiations that may lead to a transition becomes morally fraught, and worries of unjustified compromising levied. To shake hands with the devil, the worry is, would be to legitimate an illegitimate organization or government. Right now the United States government is divided over whether to include the Taliban in peace talks in Afghanistan.[12] The United Kingdom banned Gerry Adams, leader of Sinn Fein, the nationalist political party aligned with the Irish Republican Army, from the airwaves before recognizing him and the party in the peace negotiations that produced the Belfast Agreement/Good Friday Agreement of 1998, which formally ended The Troubles in Northern Ireland. To this day, elected members of Sinn Fein do not take their seats in Westminster, refusing to recognize the right of the British government to exercise sovereignty

[10] Murphy, *Conceptual Foundations,* Chapter 1.

[11] On the importance of state neutrality and the values the state is in a position to vindicate as grounds for the state's role in responses to wrongdoing see Jean Hampton, "Correcting Harms Versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review*, 39 (1992), 1659-1702.

[12] Karen DeYoung, "Collapse of Afghanistan peace talks spotlights internal Trump administration division," *Washington Post,* Sept. 8, 2019, https://www.washingtonpost.com/national-security/collapse-of-afghanistan-peace-talks-spotlights-internal-trump-administration-divisions/2019/09/08/c7d57412-d24b-11e9-86ac-0f250cc91758_story.html

over the island of Ireland.[13] The South African apartheid government imprisoned Nelson Mandela and other leaders of the African National Congress, before engaging in secret negotiations ultimately leading to the negotiated transition that ended apartheid. Nelson Mandela discusses the fraught nature of the decision to engage in talks with the South African apartheid government thus:

> "We had been fighting against white minority rule for three-quarters of a century. We had been engaged in the armed struggle for more than two decades…It was clear to me that a military victory was a distant if not impossible dream. It simply did not make sense for both sides to lose thousands if not millions of lives in a conflict that was not necessary. They must have known this as well. It was time to talk.
> This would be extremely sensitive. Both sides regarded discussions as a sign of weakness and betrayal. Neither would come to the table until the other made significant concessions. *The government asserted over and over that we were a terrorist organization of Communists, and that they would never talk to terrorists or Communists*. This was National Party dogma. *The ANC asserted over and over that the government was fascist and racist and that there was nothing to talk about until they unbanned the ANC, unconditionally released all political prisoners, and removed troops from the townships*."[14]

As these cases illustrate, shaking hands with the devil is often an ineliminable part of ending conflict or repression. To end conflict, you need to engage with the groups in conflict, including those considered pariahs. This point also applies when conflict or repression ends not with negotiated agreement but with decisive victory. In post-genocide Rwanda there was no option for the targeted Tutsi minority to live separate from or without the Hutu majority. The refusal to engage with implicated neighbors was for many an option that did not practically exist. The failed de-Baathification policy implemented by the United States in Iraq following the fall of Saddam Hussein serves as a cautionary tale for those tempted to expunge anyone tainted by a repressive regime from the new government.[15] In doing so you risk both failing to understand the roles played by members of government in a morally fair, sufficiently nuanced manner, and also risk depleting a regime of its skilled professionals.[16]

Refusal to engage may keep one's hands clean, but at the cost of more bloodshed; striving for moral purity and clean hands may thus itself be the subject of critique. Refusal to engage may

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[13] Paul Maskey, "I'm a Sinn Fein MP. This is why I won't go to Westminster, even over Brexit," *The Guarrdian,* March 6, 2018, https://www.theguardian.com/commentisfree/2018/mar/06/sinn-fein-mp-british-parliament-irish-republicans-brexit.

[14] Nelson Mandela, *The Long Road to Freedom: The Autobiography of Nelson Mandela* (Bay Back Books, 2013), p. 525.

[15] Miranda Sissons and Abdulrazzaq Al-Saiedi, "Iraq's de-Baathification still haunts the country," *Al Jazeera,* March 12, 2013, https://www.aljazeera.com/indepth/opinion/2013/03/201331055338463426.html; Miranda Sissons and Abdulrazzaq Al-Saiedi, "A Bitter Legacy: Lessons of De-Baathificationin Iraq," *International Center for Transitional Justice Report,* March 4, 2013, https://www.ictj.org/publication/bitter-legacy-lessons-de-baathification-iraq.

[16] This is the title of one of the sections in Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117(3) (2004): 765-825.

also reflect a failure of epistemic humility: in each of the cases cited above incommensurable narratives of the conflict led to contested narratives of who is a terrorist; one person's terrorist is another person's freedom fighter and one person's legitimate government is another's organ of terror.

The interesting question in my view is not whether to engage in these cases, but, rather, how to engage with integrity when engagement is non-optional. Principled compromise in transitional contexts cannot exclude unreasonable actors for the very nature of the conflict is such that unreasonable actors are one of the constituent elements to deal with for any transition to be possible and successful. In this way my focus on compromise in the context of transitional societies differs from discussions of compromise in the context of stable liberal politics, where the presumption that you can exclude citizens with unreasonable views may be pragmatically possible and normatively desirable. Integrity may require red lines, but too many red lines in the cases I am interested in may make negotiation impossible or severely circumscribe the possibilities of agreement of any kind being reached. The second and third cases implicitly raise the question of the conditions under which engagement occurs with integrity, and it is to these cases I now turn.

The second and third cases concern decisions about how the past will be treated. Specifically, they focus on processes of transitional justice, the tension that can arise among the goals such processes have, and the risk for processes to be self-defeating on their own terms. The first is what I will call *selling victims short.*[17] Transitional justice is deeply, and in some conceptualizations fundamentally and foremost, concerned with vindicating the rights of victims. The worry expressed in many transitional contexts is that victims do not receive enough to do justice to their experiences, even if you take into account other competing or pressing demands. The worry as expressed does not depend upon the expectation that the full demands of justice will be achieved; there is no prior expectation by or for victims of full compensation for harms suffered, assuming that such compensation could be determined. Rather, the worry is that what victims do receive is insufficient, even granting all of the balances to be struck. The claims of victims are unduly sidelined. What results is an empty gesture, rather than meaningful attempt to repair victims. This complaint is articulated in Colombia at the present moment, and was and is still articulated in South Africa in the context of the South African Truth and Reconciliation Commission (TRC).[18] The worry is summarized thus: "Victims have frequently raised the objection that both the TRC and the government have been much more interested in placating perpetrators than meeting the needs of victims. In this context, reparations have come to mean much more than a means of support or a kind of recognition of suffering. *They have become the unfulfilled answer to the question of whether or not justice has been done in the transition process*."[19] The selling victims short concern applies not only to the

[17] See, for example, Luke Moffett, "Reparations in Transitional Justice: Justice or Political Compromise?," *Queen's University Belfast School of Law: Research Paper 2019-07,* pp. 1-17. SSRN-id2997871.pdf; Warren Buford and Hugo van der Merwe, "Reparations in Southern Africa," *Cahiers d'etudes africaines* 44(1-2) (2004): 2-53.
[18] https://www.ictj.org/news/ignoring-cries-justice-south-africa-fails-victims-apartheid-era-crimes.
[19] C. Colvin, "Overview of the Reparations Programme in South Africa," CSVR Report Commissioned by ICTJ (2003), and quote published in Buford and van der Merwe at p. 4. Emphasis added.

form of justice done to those victims who are formally recognized in processes, but also more broadly to those victims who go unrecognized. Transitional justice processes aim to provide a platform for victims to share their stories, but at the same time circumscribe who can speak in ways that silence certain victims.[20]

The third worry about the compromises involved in the pursuit of transitional justice is that processes end up *entrenching the status quo* and are in this way ultimately self-defeating. Bending to the constraints of what is feasible to achieve, processes, far from enabling or contributing to fundamental societal change, reinforce patterns from before. The status quo could be conceptualized in terms of colonial patterns of interaction, where the settler colonial norms and conceptualizations of values being facilitated by processes of transitional justice govern, replicating patterns of erasure of colonial practices themselves. For example, rather than recognize the desire for sovereignty of indigenous peoples, the notion of a single political community being repaired through a process of reconciliation is adopted.[21] It can also refer to the failure to fundamentally alter the unequal and unjust norms and rules governing interaction; transitional justice processes leave those norms and rules untouched. As Dustin Sharp puts it in a recent paper, "critics have argued that transitional justice does too little to disturb the postconflict status quo, treating symptoms rather than causes; that it remains oblivious to multiple forms of economic, structural, cultural, and everyday and gender-based violence; that it marginalizes local or indigenous conceptions of peace and justice…The trouble is, while transformation may be a useful conceptual prism for thinking about the limitations of the mainstream goals and modalities of the field, taken literally it is an improbable outcome in most transitional justice scenarios, and perhaps especially in fragile postconflict states…"[22]

Given the enormity of the task of transformative transitional justice and the constraints under which processes of transitional justice are established, no process or set of processes can fundamentally alter the framework governing a community. But this raises the question of what progress towards changing patterns of interaction or achieving recognition should be seen as good enough from the perspective of justice? How do we manage expectations in ways that are normatively demanding, but not hopelessly utopian? On what basis should individuals and communities attempting to deal with legacies of wrongdoing make choices in the nonideal conditions under which they operate?

II. Principled Compromises

[20] Bronwyn Anne Leebaw, "The Irreconcilable Goals of Transitional Justice," *Human Rights Quarterly* 30 (2008): 95-118, at p. 113. This concern was at the heart of Mahmood Mamdani's critique of the TRC. See Mamdani, "Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa," *Diacritics* 32(3-4) (2002): 35-69.

[21] See, for example, Kirsten Anker, "Reconciliation in Translation: Indigenous Legal Traditions and Canada's Truth and Reconciliation Commission," *Windsor Yearbook of Access to Justice* 33 (2) (2016): 15-43; Catherine Lu, *Justice and Reconciliation in World Politics* (New York: Cambridge University Press, 2017).

[22] Dustin Sharp, "What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice," *International Journal of Transitional Justice, doi: 10.1093/ijtj/ijz018* (2019): 1-20, and pp. 1-2. For similar worries about the articulation of robust conceptions of transitional justice see Padraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Cheltenham: Edward Elgar, 2017).

Before turning to the criteria that could help us distinguish good and bad compromises and respond to worries that victims have been sold short and the status quo has been unjustifiably entrenched, I want to say a word about how the compromise at issue can be filled out in different ways depending on your conception of transitional justice. Jonathan Allen articulates a common way of thinking of the competing values at stake in his writings about truth commissions. There he says, "Truth commissions, in general, and the TRC, in particular, purport to be attempts to *balance* the independent forces of both justice and reconciliation… The first- and most emphatic- objection to the idea of a TRC is that this institution is the embodiment of an unprincipled, political compromise…"[23] It is in part because of recognition of the tension among various values, and in particular between reconciliation and justice, that the view of transitional justice as compromise first developed. As the latter part of Allen's quote also indicates, a central concern is explaining why a compromise is justified.

In my work I reject a way of framing the compromise present in processes of transitional justice in terms of a balance between justice and reconciliation. I argue that transitional justice is best understood as aiming at its own form of justice, namely, the just pursuit of societal transformation. Societal transformation captures the demands of political reconciliation in the sense that it refers to the necessity of repairing relationships in a manner that transforms what have been historically fundamentally unequal and unjust structures of interaction in political relationships.[24] It is this aim that transitional justice processes have as their overarching objective, I claim. But in pursuing this aim through processes dealing with past wrongdoing, transitional justice also requires, in my view, that the victims and perpetrators who are participants in these processes be treated fairly and appropriately. To do this, processes must respect the claims of victims of wrongdoing to reparation and acknowledgement and the moral demands on perpetrators to be held accountable for their actions.[25]

Though in my book I do not make explicit where compromises may arise in my account, this is only because I do not focus on the evaluation of specific processes of transitional justice; instead my focus is on articulating the ends such processes ideally pursue and constraints on the pursuit of those ends. However, in practice the full promotion of relational transformation in a manner that achieves full satisfaction of the claims of victims and demands on perpetrators will not normally be possible. There can be important synergy between the pursuit of relational transformation and the respect of victims and perpetrators; possibilities for acknowledging victims as rights bearers and as having been victims of wrongdoing may necessitate addressing background gender norms that shape perceptions of victimhood and eligibility for rights. But there can also be tension between these two general dimensions of transitional justice. Thus, compromises may need to be made between the pursuit of relational transformation and the satisfaction of the demands of victims and claims of perpetrators. Alternatively, compromises

[23] Allen, p. 321. On this point see also Leebaw, "Irreconcilable Goals," p. 101.
[24] The full articulation of what I take that transformation to entail is outlined in chapter 3 of *The Conceptual Foundations of Transitional Justice.*
[25] I do not equate the claims of victims with the claims of corrective justice, nor the demands on perpetrators with the demands of retributive justice.

among the relative priority of aspects of relational transformation to pursue or between the claims of victims and those of perpetrators may be necessary.

Differences in specific conceptualizations of the compromises entailed by processes of transitional justice do not alter the core challenge raised by the second and third cases. Answering the questions raised by these cases, that is, knowing whether we have sold victims short or unjustifiably entrenched the status quo, requires articulating the criteria that distinguish good from bad compromises as a general matter. Interestingly, compromise is not the subject of robust normative interest or political defense. Philosophers prioritize the articulation of principles of justice fully satisfied. Less time is spent discussing or evaluating compromises.[26] This is true despite the widely recognized view that compromise is at the core of democratic politics. Democratic politics is premised on a willingness of those with competing positions on policy questions to identify a ground on which they can agree; democratic politics fail absent a willingness to refrain from insisting on certain priorities under certain conditions. However, it is not enough simply to recognize that compromise is necessary for functioning democratic politics or given the constraints that transitional societies confront. This is not sufficient to distinguish good compromises from bad. Nor is it sufficient as a response to critiques which raise the worry that victims have been sold short or the status quo unjustifiably entrenched. The question of the basis on which to distinguish good compromises from bad needs to be articulated.

Jonathan Allen offers one answer in his defense of what he calls "principled compromises" specifically in the context of transitional justice.[27] Allen defines a principled compromise as occurring when "common or undisputed ground between values is sought, and the elements of both values that can be reconciled or that need not be in conflict are given emphasis. Precisely how the balance may be struck in particular cases cannot be legislated philosophically, but at a minimum, we need to find evidence of respect for central aspects of both values."[28] Principled compromises are distinguished from trade-offs in that they do not simply involve an utilitarian balancing.[29] Principled compromise allows that some values cannot be simply balanced against other goods and does not permit the sacrifice of values if not necessary. [30] Allen illustrates the idea of a principled compromise using the case of the South African TRC, in which aspects of the pursuit of different forms of justice and the pursuit of reconciliation were realized to some extent.

[26] Exceptions include Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," *The University of Toronto Law Journal,* 49(3) (1999): 315-353; Avishai Margalit, *On Compromise and Rotten Compromises* (Princeton: Princeton University Press, 2010); Simon Cabulea May, "Principled Compromise and the Abortion Controversy," *Philosophy and Public Affairs,* 33(4) (2005): 317-348; Alin Fumurescu, *Compromise: A Political and Philosophical History* (New York: Cambridge University Press, 2013); Fabian Wendt (ed.), *Compromising on Justice* (Routledge: 2014).
[27] Allen, "Balancing Justice."
[28] Ibid., p. 338.
[29] Ibid., p. 325.
[30] Ibid., p. 325.

The sacrifice of values involved in the pursuit of a principled compromise raises the question as to what would make that sacrifice defensible. The picture that Allen presents of the integration of different positions is open to the challenge articulated by Simon Cabulea May, that while compromises are sometimes necessary and justified on pragmatic grounds, there can never be a principled justification for them. The kinds of constraints confronting transitional societies, in particular stemming from existing power imbalances, are precisely the pragmatic, but in May's view not principled, grounds that could justify the kind of sacrifice Allen posits. Pragmatic reasons to compromise in the face of disagreement appeal to the ways in which compromise will avoid a threat to the realization of one's goals.[31] Such reasons are instrumental and are as compelling as the good facilitated. Sometimes the good facilitated matters deeply. As May writes, "Pragmatic reasons for compromise are sometimes the weightiest moral reasons a politician has. We do not need to underscore this point by introducing the idea of a principled moral compromise."[32] By contrast, in principled compromises the reasons for compromise are not simply instrumental, a function of a goal that would otherwise be impeded. Rather, they are intrinsic, generating a reason to compromise even if it is not necessary to achieve one's goals. But such reasons May believes do not actually exist.

Daniel Weinstock disagrees with May's assessment of the possibility of principled compromise.[33] Weinstock is specifically interested in compromises that arise in the context of reasonable liberal democratic politics, not in the circumstances of transitional societies in which the aspiration is for a politics that is reasonable. However, some of the reasons he cites as grounds for a compromise to be principled have salience in transitional contexts too. Weinstock begins by distinguishing compromise from settling, cases in which the ultimate outcome is simply a function of the power differences among parties. Compromise, by contrast, is an outcome that is "between," in Weinstock's words, the advocated positions. In what he calls an *integrative* compromise "parties integrate aspects of the others' positions into the final settlement," echoing the picture of principled compromise Allen articulates.[34] Such integrative compromises can be principled not only in the sense that there is an attempt to respect the values in tension or conflict in the solution adopted (Allen's conception of principled), but also in the reasons for compromise in the first place.

Non-consequentialist or non-instrumental moral reasons to compromise exist in Weinstock's view. Incorporating many competing viewpoints in the way compromise positions can, Weinstock argues, overcomes the epistemic limitations of taking one perspective only into account. In transitional contexts, the epistemic reasons for compromise may reflect and instantiate the epistemic humility mentioned earlier. This is especially critical in the context of deeply divided societies such as Northern Ireland and Colombia, where incommensurable views of the history of a conflict and on the conditions required to deal with past wrongdoing in a just

[31] May, "Principled Compromise, p. 320.
[32] Ibid., p. 324.
[33] Daniel Weinstock, "On the possibility of principled compromise" in Fabian Wendt (ed), *Compromising on Justice* (Routledge (2014)): Pp.63-82.
[34] Weinstock, "Principled Compromise," p. 65. As he writes, "What distinguishes integrative compromises is that they use the ingredients of the initial positions as ingredients towards the fashioning of a compromise."

manner characteristically exist. Weinstock also argues that a commitment to democratic community can provide principled reasons for compromise, insofar as compromise signals a willingness to refuse to press to achieve one's maximal position, even when one could. Such restraint can "affirm a conception of community in which citizens attempt to build bridges toward reasonable others with whom they disagree, rather than maximizing the extent of their policy victories, at the cost of contributing to a 'winner-take-all' society."[35] An overarching aim of transitional justice processes is to contribute to the construction of democratic communities. Building bridges was the image used in the South African TRC. Such community and bridges may become practically possible when restraint is shown in the pursuit of certain objectives in the manner Weinstock suggests.

Finally, Weinstock claims that consequentialist reasons can support compromise on principled grounds, when the refusal to compromise has as a consequence the failure to promote a given value at all.[36] Such cases of 'principled consequentialism' are done for the sake of achieving a particular moral value, and so in that sense principled, while at the same time sensitive to the ways in which actual circumstances constrain the extent to which any particular value can be realized.[37] This principled reason for compromise is one of the most urgent in transitional contexts. The risk of refusal to compromise are illustrated by the actions of the current Colombian President Ivan Duque. Dissatisfied with the terms of the Colombian peace agreement, and in particular the terms of the transitional justice processes, Duque has levied a series of (ultimately unsuccessful) legal challenges to the Special Jurisdiction for Peace and has dramatically defunded institutional mechanisms that he finds objectionable. His concern that justice be fully done has created a serious risk that no justice, or peace, will be possible at all.

III Principled compromises revisited

I identified in the previous section two criteria for evaluating compromises and their principled character. One criterion looks to the values realized in the particular processes that are established. The extent to which a compromise is respectful to some degree of the values that are salient, but in conflict, matters. A second criterion concerns an examination of the reasons for the sake of which compromise is sought. Reasons for compromises that are principled include recognition that the possibility of (some degree of) justice is conditioned on compromise, when there is a real risk that absent compromise no justice at all will be achieved; a commitment to democratic community; and an expression of epistemic humility.

Still, with the criteria above we are not yet in the position to respond fully to critics who claim that victims are sold short and processes are self-defeating. For the worry is not just about the way that values may have been balanced, but more deeply about whether certain values were balanced at all.

[35] Ibid., p. 78.
[36] Ibid., p. 79.
[37] Ibid., p. 80.

A criterion for determining whether moral values have been promoted to any extent is needed. To rebut a complaint that justice has not been done to victims, we need first to settle upon what it would be to do justice (at all) to victims. Behind the complaint that victims have been sold short is not just the concern that not enough justice has been done, but also that no justice at all has been delivered. This worry arises specifically in transitional contexts because of the risks of moral failure that these contexts generate. The same process (e.g., criminal trials, reparations, and truth commissions) can be seen as a mechanism of justice in some contexts, but not in others. Rather than serving as a mechanism of retributive justice, trials can instead become a form of victor's justice. Rather than repairing victim's harm, reparations can become a tool to buy their silence.[38] One source of the serious risk of moral failure is the background context of impunity and injustice. The misrecognition of victims of wrongdoing during periods of conflict and repression, and the failure to hold accountable perpetrators of wrongdoing in the past shapes the interpretation of the meaning of transitional justice processes during transitions. Such processes operate in a context where the presumption is often one of moral failure, that trials will not achieve meaningful accountability or that reparations will not provide victims with meaningful repair. In this context, it is especially important to show that moral values were balanced and to some extent achieved by transitional justice processes.

How can one make the case that values were balanced, and not sacrificed completely? To answer this question, I want to suggest, we should adopt the structure that Lon Fuller proposed with respect to the rule of law. Lon Fuller in *The Morality of Law* draws on the idea of the morality of duty and the morality of aspiration to articulate two distinct ways of evaluating the rule of law in any particular context.[39] As Fuller conceptualizes the structure of evaluation of the realization of the rule of law, so too we should conceptualize the structure of the evaluation of the realization of the values involved in compromises in the case of transitional justice.

Fuller famously identified eight criteria the satisfaction of which was necessary for a legal order to properly be said to exist. These criteria reflect conditions that must be in place for law to fulfill its function, namely, the governance of conduct on the basis of rules. For example, law cannot govern conduct if legal rules are retroactive; only if legal subjects know in advance what legal rules require can they be in a position to take them into account when deliberating about how to act. When discussing these criteria, Fuller uses the distinction between the morality of duty and the morality of aspiration to separate two ways of viewing the demands of the rule of law. The morality of duty sets obligations the minimum satisfaction of which is necessary for moral behavior at all; failure to satisfy such requirements renders one guilty of wrongdoing. The morality of duty in the context of the rule of law means that absent a certain threshold level of satisfaction of the requirements of the rule of law, what results is not a system of law. One is guilty in this case of failure. In Fuller's words, "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void

[38] Pablo de Greiff, "Theorizing Transitional Justice," in Rosemary Nagy and Melissa Williams (eds.), *NOMOS LI: Transitional Justice* (New York: New York University Press, 2012), 31-77.
[39] Lon Fuller, *The Morality of Law,* rev. ed. (New Haven: Yale University Press, 1969).

contract can still be said to be one kind of contract."[40] A system of rules that are wholly retroactive cannot in meaningful sense govern conduct. A certain threshold level of success is necessary for law itself to be possible.

In Fuller's view, above that minimum threshold the perspective of the morality of aspiration is the appropriate one to adopt. From this perspective, the goal of action is excellence; not achieving excellence renders one guilty of shortcoming, but not failure. In Fuller's words, there "are eight kinds of legal excellence toward which a system of rules may strive. What appear at the lowest level as indispensable conditions for the existence of law at all, become, as we ascend the scale of achievement, increasingly demanding challenges to human capacity."[41] In the area where the morality of aspiration is salient, there is already present the achievement of some degree of law. A threshold level of prospectivity, for example, obtains. But once in the domain of legality, societies can do better or worse in respecting the rule of law and achieving excellence.

Fuller further complicates the achievement of excellence and so the morality of aspiration as it applies to the rule of law in two ways. First, he denies that any presence of a single retroactive law is necessarily a flaw. Depending on its purpose, a retroactive rule can serve the purpose of governing conduct. Fuller discusses on this point a historical case of a printing press that is uniquely authorized to print marriage certificates and which breaks down for a period of time. Individuals have marriage ceremonies during this period of time, but fail to receive the legally required certificate because they cannot receive it. Retroactive legislation to validate these marriages would not, in Fuller's view, be a problem from the perspective of the rule of law, while some other instances of retroactivity would. Second, the achievement of excellence in the rule of law is not identical with the maximal achievement of any one criterion. The eight desiderata of law interact in complicated ways. As Fuller writes, "it is easy to demonstrate that the various desiderata which go to make up that morality [internal morality of law] may at times come into opposition with one another…Here again it may become necessary to pursue a middle course which involves some impairment of both desiderata."[42]

Fuller's key insight for my purposes is the distinction drawn between two types of question one might ask about any particular value involved in a compromise. The first concerns the threshold set of conditions that must be met for a process to qualify as promoting a particular value, for example, meeting the justice claims of victims to reparations or promoting (conditions for the possibility of) trust. The second concerns the degree to which a given value was achieved. It is only after we have asked and answered the first question that we can go on to ask the second. That is, only after a positive answer to the first threshold question has been given can we intelligibly talk about competing values being balanced in a principled compromise. While a transitional justice process may be a moral improvement from the ways wrongs were addressed during conflict and repression, that process still may constitute a failure

[40] Ibid., p. 39.
[41] Ibid., p. 41.
[42] Ibid., p. 45.

if it does not, for example, minimally acknowledge that victims of wrongdoing were rights bearers.[43] Better may still not be good enough if the threshold for respect of victims is not satisfied.

A core challenge facing transitional societies, then, is figuring out where the threshold between the failure to achieve a value at all versus a shortcoming in the full achievement of a value lies. Articulating the thresholds for the various components of my conception of transitional justice is beyond the scope of this paper. However, from Fuller's discussion of the rule of law we can glean some guidance on how to begin this process of articulation. First, in the case of the rule of law, the threshold level of satisfaction of each of the criteria is shaped by the overall function of the rule of law, namely, governing conduct on the basis of rules. When it becomes the case that rules cannot shape conduct because they are insufficiently public, for instance, then there is failure. Fuller also repeatedly emphasizes that judgment with respect to the rule of law is ineliminable; the impact of failure of any criterion on the rule of law is not automatic but a function of what is trying to be achieved through, for example, retroactive legislation. This is why legal decency on the part of officials is a condition for the rule of law to be possible in Fuller's view.[44] More broadly, context specific judgment as to the overall extent to which a system of rules is able to govern behavior is necessary. Extrapolating from Fuller's discussion, we can see lessons for the specification of thresholds in the case of transitional justice. Respecting victims or holding perpetrators accountable may be an overarching aim that specific criteria must satisfy to a threshold level; it is critical to keep in mind the purpose or function of a particular value in the articulation of any threshold criterion a process must meet. Fuller's discussion also suggests that context will be important in shaping whether or not a threshold has been met in specific cases.

Going beyond Fuller, the contexts of transition should shape thresholds in another respect. Conflict and repression affect various segments of society in different ways, and this means that the diagnosis of the problems with political relationships in need of repair will not be uniform. Consider the rule of law. When extralegal repression is directed at a particular group within a political community, that group's experience may be one of the arbitrary use of power by state agents in ways that systematically undermines congruence between declared rules and the actions of government officials. Torture, though officially proscribed, may be routinely used against political dissidents. The erosion of the rule of law in apartheid South Africa was most pronounced in the regulation of conduct for black South Africans.[45] White South Africans who were not involved in the anti-apartheid struggle enjoyed a life of predictability in their treatment by security forces. Against the background of very different experiences with security forces, judgments about the priority of security reform to ensure congruence between declared rules and their enforcement will likely vary, reflecting the different experiences of groups within a community in conflict or under repression. Similarly, what forms of official

[43] On this condition for processes of transitional justice to treat victims in a fitting and appropriate manner, see Murphy, *Conceptual Foundations,* Chapter 4.
[44] Lon Fuller, *Anatomy of the Law* (Westport: Greenwood Press Publishers, 1968).
[45] On this point see the Final Report of the South African Truth and Reconciliation Commission, http://www.justice.gov.za/trc/report/index.htm.

acknowledgement victims seek that will be satisfactory may be shaped by prior experiences of denial and disregard by government officials. In deciding the threshold for values, it is important to examine whose experiences and conceptualizations are represented and shaping the judgments made in particular contexts. Failure to do so can replicate patterns of marginalization from the past and in this way reinforce the status quo. It may also blind us to when departure from entrenched norms and practices to a sufficient degree is needed to realize a value like the rule of law if the absence of this value in structuring interaction was not experienced or known by all and in particular members of a dominant and more powerful group.

The above represents a very preliminary treatment of the considerations that should inform the articulation of the threshold for minimum satisfaction of the moral demands in tension and in need of compromise in particular cases of transitional justice. Full articulation of the thresholds needed to distinguish processes that, for example, sold victims out from processes that were minimally satisfactory in the justice victims realized will be complex. But the moral evaluation of actual transitional justice processes requires this articulation. In Fuller's words, written about the structure of the rule of law but applicable more broadly to transitional justice, "Deciding where duty ought to leave off is one of the most difficult tasks of social philosophy. Into its solution a large element of judgment must enter, and individual differences of opinion are inevitable. What is being argued here is that we should face the difficulties of this problem and not run away from them under the pretext that no answer is possible."[46]

[46] Ibid., p. 12.