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Towards a Unified Theory of Transitional Justice

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Abstract

This article argues in favour of theorizing transitional justice in established democracies. Using a New Zealand example, the article employs liberal theory to develop a legitimating account of transitional justice. This account not only offers ways of replying to those who critique the transitional justice aspirations of established democracies but also constitutes a response to those who argue against the coherence of transitional justice as a theory. Although transregime legitimation is certainly not transitional justice's only role, it is an important function and provides resources for a unified political theory of transitional justice.

Keywords: transitional justice, legitimacy, transition, indigenous peoples, liberalism

Introduction

Official responses to legacies of grievous rights abuse, what are sometimes called problems of 'historical justice,' are often divided into two distinct species. On one hand are the practices of polities emerging from war or authoritarianism – the paradigmatic transitional justice contexts. On the other hand sit the redress practices of established democracies. Recent exemplars of established state redress include the programme for wartime Japanese American internees, the 'Apology to Australia's Indigenous Peoples,' and New Zealand's Treaty of Waitangi process. Both species of historical injustice share distinctive institutions and practices, including official apologies, reparations, truth commissions and public memorialization. Prompted by these commonalities, authors have begun to use the conceptual tools of transitional justice to describe the redress politics of established democracies.[1]

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[1] For example, Anne Orford, 'Commissioning the Truth,' *Columbia Journal of Gender and Law* 15(3) (2006): 851–883; Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies,' *Human Rights Quarterly* 27(1) (2005): 172–213; Will Kymlicka, 'Transitional Justice, Federalism and the Accommodation of Minority Nationalism,' in *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, ed. Paige Arthur (Cambridge: Cambridge University Press, 2011); Rosemary Nagy, 'The Scope and Bounds of

But the project of theorizing transitional justice within established democracies confronts two forms of resistance. First, there are those who argue that the presence of transitional justice practices within established democracies is evidence debunking transitional justice as a concept. If established democracies practice what is called transitional justice, and these states are nontransitional, there is nothing conceptually distinctive about *transitional* justice. A mere concatenation of 'ordinary' forms of justice, transitional justice need not attract a coherent and distinct theoretical apparatus.[2] Transitional justice's defenders respond by arguing that while established democracies might claim to practice transitional justice, since established democracies are neither emerging from war nor by definition *becoming* democracies, they do not practice transitional justice simply because the relevant institutions are 'not established as part of a political transition.'[3] These critiques are supported by arguments that the structural injustices embedded in established democracies require more prolonged and substantive efforts than the time-limited models borrowed from paradigmatic cases.[4] 'Nontransitional' transitional justice risks deceiving claimants with a superficial quick fix transitional rhetoric.[5]

Both lines of resistance agree that the established democracy 'remains a site of non-transition' where the democratic 'idealized endpoint' already exists.[6] This article disputes that claim. Established democracies can and do undergo transitional processes in the form of radical change to their legitimating regimes. The first section of the article describes an example of transitional politics in an established state, the New Zealand Treaty of Waitangi settlement with the *hapū*

Transitional Justice and the Canadian Truth and Reconciliation Commission,' *International Journal of Transitional Justice* 7(1) (2013): 52–73.

[2] Eric A. Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice,' *Harvard Law Review* 117(3) (2004): 761–825; Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field,"' *International Journal of Transitional Justice* 3(1) (2009): 5–27.

[3] Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2002), 17. See, also, Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections,' *Third World Quarterly* 29(2) (2008): 275–289.

[4] Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* 31(2) (2009): 321–367.

[5] Andrew Woolford, 'Transition and Transposition: Genocide, Land and the British Columbia Treaty Process,' *New Proposals: Journal of Marxism and Interdisciplinary Inquiry* 4(2) (2011): 67–76; Elizabeth Povinelli, 'Cunning of Recognition: Real Being and Aboriginal Recognition in Settler Australia,' *Australian Feminist Law Journal* 11(3) (1998): 3–27; Damien Short, 'Australian "Aboriginal" Reconciliation: The Latest Phase in the Colonial Project,' *Citizenship Studies* 7(3) (2009): 291–312; Andrew Schaap, 'Reconciliation as Ideology and Politics,' *Constellations* 15(2) (2008): 249–264; Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Non-Transitional Society,' in Arthur, supra n 1; Robert Sparrow, 'History and Collective Responsibility,' *Australasian Journal of Philosophy* 78(3) (2000): 346–359; James Tully, 'The Struggles of Indigenous Peoples for and of Freedom,' in *Political Theory and the Rights of Indigenous Peoples*, ed. Duncan Ivison, Paul Patton and Will Sanders (Cambridge: Cambridge University Press, 2000).

[6] Robyn Green, 'Unsettling Cures: Exploring the Limits of the Indian Residential School Settlement Agreement,' *Canadian Journal of Law and Society* 27(1) (2012): 129.

Ngāti Tuwharetoa (Bay of Plenty).[7] The second section uses liberal theory to develop a legitimating account of transitional justice. Legitimacy theory is under-explored as an independent account of transitional justice, and, thus, the third section demonstrates how the Waitangi process enacts transitional legitimation.

The article has two interrelated purposes. One is taxonomic, arguing that redress in established democracies can be a form of transitional justice. The demonstration of common institutional forms, transitional contexts and legitimating functions and the exposure to paradigmatic critiques constitute an argument that the redress practices of established democracies are a form of transitional justice. However, the more substantive work concerns the basis of their commonality – what makes justice transitional. The article explores the following claims about the theory of transitional justice: that transformations in legitimating regimes constitute transitional politics, that grievous wrongdoing by a state burdens its legitimacy and that transitional justice works to resolve that burden.

It may help to clarify the article as a theoretical undertaking to note that its usage of the term 'legitimate' and its variants refer to a certain class of political reasons, the reasons that support political authority (discussed in more detail below). This usage differs sharply from Weberian accounts describing legitimacy in terms of a population's state-supportive habits, opinions and beliefs.[8] That sociological approach is very influential and underpins those 'expressive' theories of transitional justice that represent it as a form of communication between the state and its citizens. The article shows how understanding redress as 'reason enactment' provides a resource for replying to those who critique the transitional aspirations of established democracies as rhetorical deception. Finally, legitimacy theory offers a way to unify the two species of historical injustice both with one another and with the broader liberal political theory of the state. This theoretical coherence provides a response to those who argue transitional justice is 'merely a

[7] A *hapū* is (roughly) a Māori political entity defined by genealogical descent. Ngāti Tuwharetoa (Bay of Plenty), sometimes called Ngāti Tuwharetoa ki Kawerau, is a *hapū* grouping within the much larger (more than 30,000 members) Ngāti Tuwharetoa *iwi* conglomeration. As its name suggests, Ngāti Tuwharetoa (Bay of Plenty) is centred on the coast, while the larger *iwi* encompasses the lakes and mountains of the central North Island. In the 2006 census, 5,151 individuals in the Bay of Plenty area reported Ngāti Tuwharetoa ancestry; however, the settlement legislation indicated a *hapū* membership closer to 3,000. The *hapū* is not a discrete subset of that larger *iwi*; Ngāti Tuwharetoa (Bay of Plenty) has substantial genealogical and political links with its neighbours on the Bay of Plenty coast, Ngati Awa. Both Ngati Awa and Ngāti Tuwharetoa are party to other settlements not discussed herein. For works treating New Zealand's Waitangi process as nontransitional, see, Richard S. Hill and Brigitte Bönisch-Brednich, 'Politicizing the Past: Indigenous Scholarship and Crown – Maori Reparations Processes in New Zealand,' *Social and Legal Studies* 16(2) (2007): 163–181; Richard Boast, 'The Waitangi Tribunal and Transitional Justice,' *Human Rights Research Journal* 4 (2006): 1–13. For the contrary position, see, Meredith Gibbs, 'Apology and Reconcilation in New Zealand's Treaty of Waitangi Settlement Process,' in *The Age of Apology: Facing Up to the Past*, ed. Mark Gibney, Rhoda E. Howard-Hassman, Jean-Marc Coicaud and Niklaus Steiner (Philadelphia, PA: University of Pennsylvania Press, 2008).

[8] For example, Richard A. Wilson, 'Justice and Legitimacy in the South African Transition,' in *The Politics of Memory and Democratization*, ed. Alexandra Barahona De Brito, Carmen González Enriquez and Paloma Aguilar (New York: Oxford University Press, 2001); Carole Blackburn, 'Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada,' *Journal of the Royal Anthropological Institute* 13(3) (2007): 621–638.

label' for an undistinguished set of practices.[9] Although transregime legitimation is certainly not transitional justice's only role, it is an important function and may provide the resources for a unified political theory of transitional justice.

The Concept of Transition

The concept of transition has 'always been slippery in transitional justice debates.'[10] In part this is due to the presence of two paradigmatic forms – namely, transitions from war to peace and transitions from authoritarianism to democracy. In recent years, it has become increasingly common to define the transition in terms of a comprehensive transformation in social and political life. This development is associated with the rise of 'restorative justice' theory in transitional scholarship and concurrent interest in social reconciliation and post-traumatic healing. A comprehensive standpoint puts the day-to-day experience of survivors at the centre of its theory.[11] From that standpoint, if the practice of justice is to be transitional, it needs to transform the daily life of survivors. A comprehensive perspective provides an experiential ground for critiquing the historical justice provided by established democracies. These programmes rarely have profound effects on popular opinion or behaviour, and survivors of authorized wrongdoing often remain economically and politically marginalized. If we accept that transitional justice must involve radical and comprehensive societal change, it would appear established democracies do not engage in transitional justice.

But a comprehensive conception of the political transition is at odds with the general agreement that significant democratization can constitute a transition. It is unclear that paradigmatic cases, such as that of Argentina, are transitional because they involve radical societal transformation. Argentina's transition from authoritarianism to democratic government left large-scale political and social inequalities intact. From this more minimalist perspective, instead of negating the transitional description, the failure to effect comprehensive social transformation simply reminds us that transitional justice is not an end in itself. There are few posttransitional utopias. If we want a concept of transition that describes actual political processes, we need a more restrictive account.

Representing the minimalist tradition in transitional scholarship, for Ruti Teitel, a transition's defining feature is 'a normative shift in the principles underlying and legitimating the exercise of state power.'[12] Following Teitel's strictures, our political theory of transitional justice focuses upon changes to the reasons

[9] Bell, supra n 2 at 13.

[10] Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice,' *Human Rights Quarterly* 30(1) (2008): 101.

[11] Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (New York: Cambridge University Press, 2006).

[12] Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 213.

justifying the exercise of political authority – the state's legitimating regime.[13] This conception offers two advantages. First, a theoretical focus on changes to public legitimating regimes captures the association of transitional justice with a shift from nondemocratic to democratic political forms, but it is capacious enough so that the values of liberal democracy do not themselves define the concept of transition. Second, a focus on legitimating reasons does not implicate the concept with the personal, often emotional or behavioural, conditions associated with comprehensive accounts. Liberal political theory is suspicious of such connections. Accepting that people naturally respond differently to redress practices, liberalism limits its concern to the public realm.

The New Zealand example helps develop the conceptual argument. During the past 50 years, relations between Māori and the New Zealand state have undergone radical change. Of these changes, the recovery of the Treaty of Waitangi as New Zealand's founding document is perhaps the most prominent. The 1840 treaty contains four provisions: Māori would recognize British governance of New Zealand, the Crown would have the sole right to acquire Māori land, Māori would be treated as British subjects and the British would recognize Māori political and property rights.[14] Described at the time as New Zealand's 'Magna Carta,' the treaty was the primary legitimating basis of British sovereignty in the islands.[15]

In the later 19th century, the New Zealand state's representation of its legitimacy rested progressively less on the treaty and rather more on the progressive superiority of its European-derived civilization.[16] In 1877, the New Zealand High Court described Māori as inferior 'primitive barbarians' whose Treaty of Waitangi should be 'regarded as a simple nullity.'[17] And it remained little more than that for a century.[18] The treaty's exclusion from New Zealand's constitutional imagination mapped that of Māori (*qua* Māori) politics generally. That misrecognition facilitated a series of grievous wrongdoings, including those suffered by Ngāti Tuwharetoa (Bay of Plenty).

No Ngāti Tuwharetoa (Bay of Plenty) *rangatira* (chief) signed the Treaty of Waitangi, and for several decades, British law had only nominal application in

[13] Cf. Stephen D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables,' *International Organization* 36(2) (1982): 185–205.

[14] These provisions are subject to interpretative disagreements that need not delay us.

[15] Paul McHugh, 'The Lawyer's Concept of Sovereignty, the Treaty of Waitangi, and a Legal History of New Zealand,' in *Sovereignty and Indigenous Rights: The Treaty of Waitangi in International Contexts*, ed. William Renwick (Wellington, New Zealand: Victoria University Press, 1991); Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (New York: Oxford University Press, 1992).

[16] James Belich, *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Auckland: Allen Lane, Penguin Press, 1996).

[17] *Wi Parata v. Bishop of Wellington* [1877] 3 NZ Jur (NS) 72.

[18] For discussion, see, Michael Belgrave, *Historical Frictions: Maori Claims and Reinvented Histories* (Auckland: Auckland University Press, 2005); Andrew Sharp, 'The Treaty in the Real Life of the Constitution,' in *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, ed. Michael Belgrave, Merata Kawharu and David Williams (Melbourne: Oxford University Press, 2005).

their lands.[19] In the 1860s, as European settlement pushed into new areas, Ngāti Tuwharetoa joined other Māori in a coalition restricting land sales. The resultant tensions erupted in a series of military conflicts.[20] The particular engagement relevant to this discussion occurred in 1865 when a Crown expedition comprising approximately 500 armed men entered Ngāti Tuwharetoa (Bay of Plenty) territory. When the Ngāti Tuwharetoa (Bay of Plenty) resisted, the Crown charged the *hapū* with rebellion and confiscated their land. In the following decades, the Crown returned less than a quarter of the confiscated land as private property vested in a small number of individuals (and not as *hapū* property). These individual titles were then sold to the Crown in the late 19th century.

Land confiscation was an authorized wrongdoing. The state justified its actions as securing the state from internal challenge, imposing the law upon a recalcitrant territory and extending European civilization.[21] Set in a broader context, the Ngāti Tuwharetoa (Bay of Plenty) experience was part of New Zealand's general assimilative regime.[22] The state sought to extinguish primitive Māori economic and legal structures. So in addition to disruptive confiscation, the new individual land tenure permitted a few individuals (chosen by the state) to dispose of *hapū* resources in ways that restricted common access to traditional food supplies, housing, medicine and sites of spiritual significance.[23] The new property regime facilitated new industrial activities, including swamp drainage and geothermal power generation, that degraded the local environment and economically marginalized most members of the *hapū*.[24] These were authorized abuses – wrongdoing denied as wrong by the state and apparently infused with the reason-making power of political authority.

Things began to change after the Second World War. What Michael Ignatieff calls the 'rights revolution' embroiled New Zealand, along with other established democracies, in radical transformation.[25] A new legitimating discourse of political equality required every citizen (who soon ceased to be British subjects) to have the same civil rights and employment opportunities, an equal political voice and equitable political recognition. Repudiating claims to civilizational superiority meant ending the civic inequalities the legitimating regime had justified. Of course, the relevant changes have been slow and incomplete, and the new regime has its own problems. It is uncertain how the state should respect and enable citizen equality, or whether it can do so adequately, and grave injustices persist. These are important complications. The point relevant to the argument is more basic. There has been radical and fundamental change.

[19] The signatories included two central island Ngāti Tuwharetoa *rangatira*, Iwikau Te Heuheu Tukino III and Te Koroiko.

[20] For discussion, see, Waitangi Tribunal, *The Ngati Awa Raupatu Report* (1999).

[21] Michael King, *The Penguin History of New Zealand Illustrated* (Auckland: Penguin Books, 2003).

[22] Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1995).

[23] Waitangi Tribunal, supra n 20.

[24] Ibid.

[25] Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000).

Michael King describes the latter part of the 20th century as 'a revolution' in Māori–state relations.[26] But just as in other transitional contexts, revolution was not enough. The repudiation of European superiority had removed part of the legitimating foundations of the New Zealand state. New Zealand's 'Magna Carta' offered material to help fill the gap. In 1974, New Zealand recognized Waitangi Day, replacing the now defunct Dominion and Empire Days as the national holiday celebrating the birth of the polity. The 1975 Treaty of Waitangi Act committed the state to the 'observance, and confirmation, of the principles of the Treaty of Waitangi.'[27] As a 'founding document'[28] the treaty was reimagined as a social contract in which 'the Crown sought legitimacy from the indigenous people for its acquisition of sovereignty and in return it gave certain guarantees.'[29] However, the transition confronted a problem. The new regime represents the treaty's guarantees regarding Māori as its political foundation, yet, for a century, the state had not met those obligations. In 1984, the Treaty of Waitangi Act was amended to permit claims against any treaty violations by the state since 1840, giving birth to the present Waitangi settlement process.

We can conclude the initial argument for the transitional characteristics of New Zealand politics by looking at the Ngāti Tuwharetoa (Bay of Plenty) settlement. Discussed in greater detail below, the document offers evidence of New Zealand's transition. The official parliamentary apology identifies the Crown's violation of New Zealand's now-fundamental norms: 'The Crown profoundly regrets and unreservedly apologises for the breaches of the Treaty of Waitangi' and repudiates prior justifications for land confiscation, which had been designed to 'establish and maintain the Queen's authority' through European settlement.[30] This acknowledgement corresponds with one (nonexpressive) reason why transitional justice processes emphasize the importance of publicly witnessing and recording accounts of state wrongdoing. The process of recounting and condemning prior justifications for state wrongdoing identifies the now repugnant regime as the start point of the relevant transitional process. It also sets up the problem of authorized wrongdoing to which, or so we argue below, transitional justice responds.

The claim is that New Zealand engages in transitional politics. New Zealand is experiencing Teitel's 'normative shift' and undergoing forms of 'transitional politics' with close affinities to paradigmatic transitions.[31] That the relevant changes

[26] King, supra n 21.

[27] Treaty of Waitangi Act (1975).

[28] Cabinet Office, 'On the Constitution of New Zealand: An Introduction to the Foundations of the Current Form of Government,' in *Cabinet Manual 2008*, http://www.cabinetmanual.cabinetoffice.govt.nz/node/68 (accessed 10 February 2013).

[29] *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, 673.

[30] Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act (2005), part 1, §§ 10, 15.

[31] There are particular affinities to the 'elite reform' model described in Ingrid Nifosi, 'A New Conceptual Framework for Political Transition: A Case Study on Rwanda,' in *L'afrique Des Grands Lacs: Annuaire 2004–2005*, ed. Stefaan Marysse and Filip Reyntjens (Paris: L'Harmattan, 2005), 72.

are gradual, cumulative, contested and perhaps incomplete does not bar the analysis. Transitional scholarship is comfortable with 'protracted transitions,' and as noted above, there are few posttransitional utopias.[32] Furthermore, the narrow focus upon legitimating regime exposes the transitional character of New Zealand's established democracy while simultaneously leaving space for important distinctions between this and other paradigmatic transitions.

Authority and the Problem of State Wrongdoing

Transitional justice is 'a response to systematic or widespread violations of human rights' in the context of regime change.[33] Paradigmatic contexts make it easier to distinguish transitional justice institutions: they are the institutions concerned with the systemic human rights violations associated with the political forms the transition aims to displace. The context of established democracies demands greater precision. What is it for human rights abuse to be systemic? One way wrongdoing is systemic is when it is embedded in state policy. This form of systemization will usually justify injurious policies by reference to the prevailing legitimating regime. These authorized wrongdoings create a distinctive and important political problem. As Charles Mills urges, authorized wrongdoing is not a form of *deviance*; rather, it adheres to and enacts fundamental associative norms.[34] State wrongdoing does not violate accepted and enforced moral standards. Instead, the regime of citizen–state relations is itself perverse.

Our analysis distinguishes between political authority and political legitimacy. Political *authority* is the power of the state to create practical reasons; it is what gives law its reason-generating status.[35] The characteristic form of political authority is the power to provide the decisive warrant for coercive force. Underpinning the laws and regulations that define political principles of association, political authority is claimed by all states, no matter how vicious. Political authority gives state wrongdoing its particular status. As we said above, political *legitimacy* involves the reasons justifying the exercise of political authority. A state has legitimacy when it is permissible for it to issue and enforce laws and regulations; legitimacy concerns the reasons citizens have for accepting political authority. Political legitimacy is historically determined, at least in part. State institutions, offices and acts have a history that is open to normative assessment. Every new Caesar promises to protect the Republic. But when that claim is first made it is a prediction, not a description, and legitimacy cannot be adequately pledged. States can gain or lose legitimacy over time. Virtuous actions improve

[32] Todd Eisenstadt, 'Eddies in the Third Wave: Protracted Transitions and Theories of Democratization,' *Democratization* 7(3) (2000): 4.

[33] International Center for Transitional Justice, *What Is Transitional Justice?*, http://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf (accessed 10 February 2013).

[34] Charles W. Mills, *The Racial Contract* (Ithaca, NY: Cornell University Press, 1997).

[35] David M. Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008).

legitimacy, vicious actions burden it and grievous wrongdoings corrode the state's authority vis-à-vis those it has wronged. The antithesis between legitimacy and authorized wrongdoing is one reason state wrongdoing can make revolutions acceptable. But revolution may not resolve the burden.

Legitimacy and Transitional Justice

Transitional justice exists when, in the context of regime transition, the state seeks to redress authorized wrongdoing. But how does it work? Liberal political theory can help us reconstruct key functions. Of course, just as legitimation is not the only function of transitional justice, liberal discourse is not the only legitimating option. We discussed the civilizational regime of pre-war New Zealand above; others include theocratic, fascist, utilitarian or communist regimes. There is no need to dwell on the reasons for rejecting these; liberal theory has its own disgraceful histories. While unlike the historical legitimacy of states, the acceptability of a political theory is a question of truth and not history, it is appropriate to be suspicious of the 'imperialist ghost in the liberal-democratic machine.'[36] Ours is a 'chastened liberalism.'[37] It begins with the conviction that we each present each other with practical moral reasons and we are each responsible for respecting that equality. In that sense, it is a weak liberal theory (see below). Yet until we are provided good reasons why we should treat people otherwise, the initial premises of equality and responsibility offer a tentative basis for a 'postcolonial' liberalism.[38]

Elements of legitimacy theory are common within transitional justice theory, but these are often understood in sociological terms. As an example, a recent article by Pablo de Greiff outlines a theory of transitional justice with many parallels to our account.[39] De Greiff argues that transitional justice ultimately aims at a reconciled and democratic polity. Transitional justice works towards these goals by creating the institutional conditions for civic trust and civil recognition. Since civic trust and civil recognition are necessary conditions of reconciled and democratic polities, transitional justice's promotion of these mediate goals supports the ultimate aims. De Greiff addresses questions of economic development, administrative reform, rights respect, democratic participation, recognition and the rule of law – these are commonplaces of liberal theory. Our accounts diverge when de Greiff places norm affirmation at the centre of his theory: 'transitional justice measures work – to the extent that they do – only in virtue of their capacity for norm-affirmation.'[40] The emphasis is on expressive functions. This communicative role corresponds to de Greiff's concern for the

[36] Michael Freeman, 'Historical Injustice and Liberal Political Theory,' in Gibney et al., supra n 7 at 52.

[37] Jeff Spinner-Halev, *Enduring Injustice* (Cambridge: Cambridge University Press, 2012), 187.

[38] Cf. Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002).

[39] Pablo de Greiff, 'A Normative Conception of Transitional Justice,' *Politorbis* 50(3) (2010): 17–29.

[40] Ibid., 22.

'attitudinal dimension' of reconciliation.[41] Transitional justice communicates to the citizenry the 'trustworthiness' of the state; it exhibits improvements in state morality and thereby works to restore confidence in political institutions.[42]

Transitional justice scholars tend to describe legitimation as improving the stabilizing effects of a population's habits, opinions and beliefs. This focus is understandable. Certain habits and beliefs can help secure novel political forms.[43] A population that endorses a new government will be more likely to support it, and inculcating certain behaviours (e.g., paying taxes) can strengthen state institutions. Scholars such as de Greiff argue that transitional justice works to promote these forms of popular support through its expressive functions, condemning prior political forms and exhibiting the virtues of the new. But a communicative analysis encourages critical scholarship to treat transitional legitimation with suspicion. Opinion formation is often a means for recruiting endorsement from those who will be exploited. Or, perhaps less sinisterly, legitimation is equated to the development of hegemonic marginalizing discourses. Either way, the state may use transitional justice to 'fashion new forms or reinforce old forms of unjust social relations.'[44]

In contrast, this article argues that the account of political legitimacy does not rest upon belief and behaviour but upon justification. Insofar as beliefs and habits are sociological phenomena, they cannot be self-validating.[45] Therefore, legitimation does not mean convincing or persuading a population; expressive roles capture neither the problem created by authorized wrongdoing nor the way transitional justice works to resolve it. Our reasoned focus also contrasts with transitional justice theories that stress affective matters – usually concerns about offender sincerity and claimant response. Liberal political theory does not ask the state (which Nietzsche describes as the 'coldest of cold monsters') to emote reparative sincerity.[46] Nor does it require redress to be accepted by all redress claimants. Claimants will naturally disagree over the adequacy of redress measures, making even an idealized goal of actual unanimity an impossible (and apolitical) task. In any case, if the political order is to be justifiable, it cannot aim at changing affective or behavioural phenomena directly. Instead, our account looks at the reasons people have to feel certain ways or to engage in certain behaviours. The principled basis of the public realm is, fundamentally, one of

[41] Ibid., 26. De Greiff is unspecific as to the content of this attitude, but it has to do with trusting state institutions. Elsewhere he defines 'trusting an institution . . . [as] knowing that its constitutive rules, values and norms are shared by participants.' See, Pablo de Greiff, 'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted,' in Gibney et al., supra n 7 at 126.

[42] De Greiff, supra n 39 at 20.

[43] Jeff Spinner-Halev, 'Democracy, Solidarity and Post-Nationalism,' *Political Studies* 56(3) (2008): 604–628.

[44] Woolford, supra n 5 at 70.

[45] G. A. Cohen, 'Facts and Principles,' *Philosophy and Public Affairs* 31(3) (2003): 211–245.

[46] Friedrich Nietzsche, *Thus Spake Zarathustra*, trans. Thomas Common (Raleigh, NC: Alex Catalogue, 1999), 24.

reason. Therefore, the focus of liberal theory is the interplay between two further conceptions of legitimacy: first, the relations between authority and a prevailing discursive regime, and second, the traditional concern of political theory, its principled justification.

It is necessary to say something more about these two further conceptions of legitimacy. Beginning with the discursive, John Horton describes the justification of political authority as judgements about how well state institutions conform to a legitimation regime.[47] But the justifications supported by a discursive regime can be mistaken. The New Zealand example of a legitimating regime built around concepts of European superiority demonstrates how agreement in judgement is no more self-validating than concurrence in belief. One way of seeing the problem is to notice that on Horton's account, it would make no sense to say that state action congruent with a prevailing discursive regime was illegitimate. Yet that must be possible. In Aldous Huxley's *Brave New World*, the World State's policies are congruent with a pleasure-centric justificatory discourse, but that is no support for its authority.[48] There is something wrong with a theory in which soma provision could legitimate the state.

From a principled perspective, endorsement and discourse congruence are *evidence* of legitimacy but do not constitute it. One reason for maintaining the distinction between principles and regimes is the phenomenon of reasonable disagreement. Citizens who share a discourse can reasonably disagree whether a particular programme legitimates or delegitimates the state. A second reason is the difficulty of detangling the principled from the discursive. It is easier to find reasons to think other interpretations wrong than to establish the principled foundations of our preferred option. Our chastened liberalism is suspicious of even our most firmly grounded judgements. Finally, in the absence of discourse-independent principles, it is difficult to see how the critique of discourses can occur. A principled conception of legitimacy is not only indispensable to understanding how redress could, in the face of reasonable disagreement, be legitimating but also equally important for a critical theory that wishes to avoid collapsing into relativism. Principles provide criteria for critically evaluating the practice of transitional justice.[49]

We have identified three conceptions of legitimacy – the sociological concern with stabilizing beliefs and habits, the justifying potential of accepted discursive regimes and the principled validity of political authority. The degree to which a state enjoys each can vary independently. Implementing a more principled legitimacy may decrease levels of stabilizing beliefs or discursive congruence. For the moment, we need say only that the gaps between institutional facts and justifying

[47] John Horton, 'Political Legitimacy, Justice and Consent,' *Critical Review of International Social and Political Philosophy* 15(2) (2012): 129–148.

[48] Aldous Huxley, *Brave New World* (New York: Bantam Books, 1968). Cf. the speech by the Resident World Controller for Western Europe in chapter 16.

[49] I owe this formulation to an *IJTJ* reviewer.

discourse combine with our suspicions regarding further lacunae between discourse and principles to make it doubtful that any state is fully legitimate.

The Ecumenical Account

Transitional politics are constituted by radical changes in legitimating regimes; therefore, our theory focuses on changes to and within discourse. If we are to see how transitional justice legitimates the state, we need a substantive theory of legitimacy. However, prevailing liberal legitimacy discourse involves a plurality of values, and there is reasonable disagreement as to how these should be arranged.[50] Not only can reasonable argument prioritize these values differently but we can reasonably disagree about the nature of each value. That is why political legitimacy is deeply contested. Successful political orders institutionalize conflict over the basis of legitimate authority by providing space for multiple contrasting articulations. Our account does not describe such interplay. Our discussion offers ecumenical attention to four prominent discursive elements: 'rational preference,' 'justice,' 'self-government' and 'civic recognition.'[51] As this is an argument about transitional justice (and not the best legitimating theory), we need only set up a metric for assessing the delegitimating effects of state wrongdoing and the way transitional justice responds. This section briefly describes each of the four ecumenical values and then indicates how they appear in transitional justice theory.

A political order is rationally preferable if you would be better off within it than without. In the Hobbesian tradition, a legitimate political order appeals to the individual's interests by offering a superior opportunity set. The comparative baseline matters. Hobbes characterizes the chaotic alternative to any state as intolerable, thereby licensing any form of political order.[52] But there are other reasonable baselines, and the Hobbesian standard requires subtle development if it is not to have perverse implications. Political legitimacy depends on historically instantiated baselines. If state action encumbers people with radically worse life chances than they have reason to expect, then the state is less legitimate.

[50] For a recent 'state of the field' discussion, see, Emanuela Ceva and Enzo Rossi, 'Introduction: Justice, Legitimacy and Diversity,' *Critical Review of International Social and Political Philosophy* 15(2) (2012): 101–108.

[51] The most influential sources for the following discussion are Thomas Hobbes, *Leviathan Parts I and II* (New York: Macmillan, 1958); Robert A. Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000); John Rawls, *Political Liberalism: With a New Introduction and the 'Reply to Habermas'* (New York: Columbia University Press, 1996); Estlund, supra n 35; Bernard Williams, 'Realism and Moralism in Political Theory,' in *In the Beginning Was the Deed*, ed. Geoffrey Hawthorn (Princeton, NJ: Princeton University Press, 2005); Jeremy Waldron, 'Theoretical Foundations of Liberalism,' *Philosophical Quarterly* 37(147) (1987): 127–150; Allen Buchanan, 'Political Legitimacy and Democracy,' *Ethics* 112(4) (2002): 689–719; Jean-Jacques Rousseau, *On the Social Contract*, ed. Roger D. Masters, trans. Judith R. Masters (New York: St Martin's Press, 1978); Charles Taylor, 'The Politics of Recognition,' in *Multiculturalism: Examining the Politics of Recognition*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 1994).

[52] Hobbes, supra n 51.

As discussed above, land confiscation seriously damaged the life chances of Ngāti Tuwharetoa (Bay of Plenty). Changes to the property rights law and the marginalization of more traditional Māori economic practices harmed Ngāti Tuwharetoa (Bay of Plenty). Because the new regime damaged their life chances, the *hapū* had reason to prefer prior, non-European, political forms.

Some modes of transitional justice, such as reparations, improve the life chances of survivors directly. But the role of transitional justice in this area is much broader than direct material transfers. Transitional justice scholarship promotes state-institution building. Improving public administration helps lay the foundations for improving the citizenry's life chances.[53] Because the preconditions of low socioeconomic development often include legacies of injustice and civic institutional failure, transitional justice may facilitate economic integration and growth by removing corrupt officials, ending impunity and reforming bureaucratic practice.

Our second legitimating value is justice, in the narrow sense applicable to individual rights. The Lockean tradition represents the state as legitimate insofar as it defends a sufficient domain of civil rights defined by an independent standard of justice.[54] But what is a sufficient domain? One of the most difficult questions in the contemporary theory of legitimacy concerns its relation to distributive justice. It seems implausible the two are isomorphic.[55] A full theory of legitimacy would need to delineate the boundaries and connections between the relevant scope of individual interests, a general theory of justice and the sphere of rights at stake in political legitimacy. It would need to arbitrate disputes and specify the limits beyond which protection is irrelevant or even delegitimating. Our ecumenical account turns aside from that quest. Whatever the best account should be, it will include the equal protection of some minimally sufficient set of rights to a person's possessions, life, bodily integrity, agency and due process against both the state and others who would do them harm.

The connections between transitional justice and respect for rights are frequently straightforward. In addition to its punitive functions, transitional justice often directly concerns the rights of survivors, as when programmes of reparative justice respond to corrective rights. But the relation between rights respect and transitional justice can be more sophisticated than mere compensation. In the struggle to avoid collapsing into the power politics of victor's justice, transitional justice theory pays scrupulous regard to individual rights, even as it recognizes its ability to satisfy these in practice is sharply circumscribed. Institutions of transitional justice employ creative forms of due process, albeit often quite different

[53] Pablo de Greiff, 'Articulating the Links between Transitional Justice and Development: Justice and Social Integration,' in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009).

[54] Cf. John Locke, 'Two Treatises of Government,' in *Locke: Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1960).

[55] Enzo Rossi, 'Justice, Legitimacy and (Normative) Authority for Political Realists,' *Critical Review of International Social and Political Philosophy* 15(2) (2012): 149–164.

from those of nontransitional institutions.[56] Finally, transitional administrative reform helps secure individuals both from the arbitrary exercise of state power and from private wrongdoing.

The rational preference and justice arguments are instrumental grounds for state legitimacy. In contrast, intrinsic strategies attend to goods that politics itself realizes. A prominent example is self-government. It is a necessary condition of a legitimate political order that it enables those governed to play equal and meaningful roles in the process of government. As the size and complexity of modern polities make this difficult, our best systems only approximate conditions enabling 'the addressees of the law . . . to understand themselves at the same time as its authors.'[57] Nevertheless, a polity lacking in respect for the value of popular self-government would fail to satisfy a condition of legitimacy.

Transitional justice theorists often identify its practice with democratization. More concretely, they argue that practice of transitional justice encourages people to assume roles in civil society that are the preconditions of effective democracy. A 2006 report by Yasmin Sooka, a former truth and reconciliation commissioner in both South Africa and Sierra Leone, argues that transitional justice works to build a participatory citizenship through the work of electoral commissions and human rights bodies.[58] Looking beyond elections, the civil associations surrounding and carrying out transitional justice include a broad spectrum of groups whose operations promote civil engagement and build social capital. How well transitional justice succeeds in these challenging and complicated tasks raises strongly contextualized and difficult questions. The important point for us is simple: transitional justice is democratizing.

The fourth and final value of our ecumenical account is civic recognition. A political order is legitimated when it realizes appropriate recognition. For theorists such as Hegel and Arendt, a political order is a necessary vehicle for civic personhood; appropriate recognition requires, and is a product of, a political structure.[59] But personhood is recognizable in many ways. It remains uncertain whether and what forms of citizenship are compatible with deep ethnic, religious and gender differences.[60] One way in which recent scholarship addresses these problems is through the 'rule of law.' Rule of law is itself a complex concept. Here we need express only the minimal point that recognition as a legal person imposes

[56] Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

[57] Jürgen Habermas, 'Equal Treatment of Cultures and the Limits of Postmodern Liberalism,' *Journal of Political Philosophy* 13(1) (2005): 3.

[58] Yasmin Sooka, 'Dealing with the Past and Transitional Justice: Building Peace through Accountability,' *International Review of the Red Cross* 88(862) (2006): 311–325.

[59] Georg Wilhelm Friedrich Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford: Clarendon Press, 1942); Hannah Arendt, *The Origins of Totalitarianism* (San Diego, CA: Harcourt Brace Jovanovich, 1968).

[60] Cf. Taylor, supra n 51.

a bridle upon arbitrary power. To be a legal person is to have the claim to be dealt with according to the law.[61]

Much 'reconciliatory' transitional justice theory rests upon the political potential of public recognition. Transitional justice provides institutions within which survivors of state wrongdoing acquire recognition as valuable members of the polity. For example, considering the South African Truth and Reconciliation Commission (TRC), Jonathan Allen writes, 'The TRC embodies a commitment to the recognition of the equal dignity of all citizens.'[62] The rule of law is similarly well established in the literature.[63] Transitional justice not only works to improve accountability and security; by encoding redress claims in the law, it also recognizes survivors of injustice as free subjects of a legal regime with the right to call the state to account.[64]

The connections between legitimacy theory and transitional justice deserve much greater attention, but we cannot linger. The necessary point is that a broad spectrum of transitional justice practice embodies legitimating values. These connections are how transitional justice responds to the corrosion of political legitimacy by authorized wrongdoing. This section concludes by showing how the legitimating account provides a helpful perspective upon two often-made claims. First, because legitimacy is radically plural, this account explains why single-faceted measures of redress are often insufficient. The point frequently arises with reference to official apologies. Recipients describe official apologies as 'insincere' unless these are supported by other measures, such as material compensation.[65] Where expressive accounts explain this insufficiency in terms of some lack of intensity in the performance of redress, our account suggests that since different modes of justice enact distinct legitimating reasons, single-faceted measures simply fail to provide sufficient legitimation. Second, legitimation provides a bridging concept linking the apparently contradictory demands of past and future. Some critics argue that historical justice claims are merely instruments for pursuing present political agendas.[66] These programmes use past (and therefore safe) injustices to provide a frisson of rectitude for current political consumption. Related concerns charge historical justice with encouraging irresponsible victimhood or attributing guilt to nonparticipants. The legitimating account resists these criticisms. Legitimacy is burdened *by the historical fact* of authorized wrongdoing. That makes historical injuries intrinsically important.

[61] L. T. Hobhouse, *Liberalism* (London: Williams and Norgate, 1911).

[62] Jonathan Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission,' *University of Toronto Law Journal* 49(3) (1999): 331.

[63] *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2011/634 (2011).

[64] For discussion, see, David A. Crocker, 'Truth Commissions, Transitional Justice, and Civil Society,' in *Truth v. Justice: The Morality of Truth Commissions*, ed. Robert I. Rotberg and Dennis Thompson (Princeton, NJ: Princeton University Press, 2000).

[65] Nick Smith, *I Was Wrong: The Meanings of Apologies* (Cambridge: Cambridge University Press, 2008), 238.

[66] Povinelli, supra n 5.

But at the same time, the problem that demands attention is the present-day state's legitimacy. That problem of legitimacy concerns all citizens.

Transitional Justice in New Zealand

This section concludes the argument for transitional justice in established democracies by demonstrating how the Ngāti Tuwharetoa (Bay of Plenty) settlement partakes of the legitimating functions of paradigmatic transitional justice practice. This demonstration raises complications as the argument confronts four problems the redress practice of established democracies shares with paradigmatic transitional processes. These are concerns with transitional justice's divisive character, countervailing disquiet with its unifying aims, apprehension with the use of transitional justice to implement new forms of injustice and, finally, difficulties with political amnesties. Although we make some suggestions as to how our account could address these concerns, we do not pursue their resolution. Instead, the purpose of raising these questions is to demonstrate further commonalities between established democratic practice and paradigmatic transitional justice.

In 1988, Ngāti Tuwharetoa (Bay of Plenty) lodged a grievance for 35,508 hectares seized by the Crown in 1866. The settlement process had two main stages – the work of the Waitangi Tribunal followed by negotiation between the *hapū* and the Crown. Each stage contained a number of steps. These overlapped in practice; hence, our linear representation is somewhat artificial. The Tribunal commenced its investigation in 1994. Once the relevant parties had finished their initial research, the Tribunal led an 'all-party' deliberation into the status of their claims. It is normal for more than one Māori actor or agency to claim redress for a particular wrongdoing, and the prehearing deliberation can be highly contested. Ngāti Tuwharetoa (Bay of Plenty) contested their inclusion within the larger Ngati Awa grouping, and later a neighbouring group, Ngati Rangitihi, lodged a challenge arguing that any proposed settlement would have a prejudicial impact on their claims. The Tribunal rejected the challenge, raising doubts as to whether the individuals making the claim were legitimate Ngati Rangitihi authorities, and recommended that Ngāti Tuwharetoa (Bay of Plenty) could pursue an independent claim.

Priscilla Hayner argues that a transitional truth commission has the following basic aims: publicly acknowledge wrongdoing, respond to the needs of victims, contribute to justice and accountability, recommend reforms and help settle conflict.[67] Sharing these aims, the Waitangi Tribunal's role in the Ngāti Tuwharetoa (Bay of Plenty) settlement would be familiar to students of truth commissions. After determining which claims to adjudicate, the Tribunal empanelled a commission to hold hearings. Commission hearings have a legal tenor, and there were concerns that this would raise barriers to widespread Māori participation. The Tribunal worked to mitigate these barriers by employing Māori staff (at least one member of the commission was required to be Māori) and working, as much as

[67] Hayner, supra n 3.

possible, according to Māori custom (*tikanga*). To encourage participation, the commission held a series of 12 hearings (9 locally) lasting 37 days.[68] The Tribunal's final report combines the evidence obtained in hearings with material derived from independent historical investigations in a narrative contextualizing the relevant grievances.[69] The report also assesses the grounds, extent and validity of the relevant claims and makes settlement recommendations.

In the second stage of the process, the state and claimants negotiated a settlement. The first step of this second stage was the 'mandating' procedure, wherein the Crown, guided by the Tribunal's recommendations, determined which claimants had authority to settle which claims. In our case, Ngāti Tuwharetoa (Bay of Plenty) obtained a mandate distinct from Ngati Awa. The process of negotiation proper involved three steps. First, representatives of the Crown and *hapū* negotiated an Agreement-in-Principle. Second, they developed a draft Deed of Settlement for cabinet approval. *Hapū* ratification followed. The Deed of Settlement was ratified by a ballot of 55 percent of eligible members returning 95.8 percent in favour. The settlement was then finalized by parliamentary legislation and ceremonial signing. While these matters proceeded, the claimants constituted the Ngāti Tuwharetoa Settlement Trust. The trust is governed by a board of seven elected representatives who manage the assets received in redress and represent *hapū* interests with local government and with regard to land use in their traditional tribal area. Through participatory practices of deliberation, negotiation and ratification, settlement processes determine what claims are redressed, who has the authority to make particular claims and what the final settlement will be.

The settlement enacts the ecumenical account's legitimating values. Beginning with recognition, parliamentary settlement legislation includes the *hapū*'s position that it was misrecognized as rebellious. The official apology reiterates that the Crown 'unreservedly apologises' for land confiscation but also adds recognition of Ngāti Tuwharetoa (Bay of Plenty) as a political entity, stating that 'the Crown profoundly regrets its failure to acknowledge the *mana* and *rangatiratanga* of Ngāti Tuwharetoa (Bay of Plenty).'[70] *Mana* and *rangatiratanga* refer to the prestige, powers and prerogatives of the *hapū* as a political agent.

Moving beyond recognition ritual, the ecumenical account's self-government element explains why redress includes the institutionalization of Ngāti Tuwharetoa (Bay of Plenty) political agency. The settlement process itself is designed to be participatory; in addition, the Crown vested the *hapū* with a 'statutory acknowledgement' that enables its input into the management (and a veto over development) regarding six land parcels and an 'overlay classification' regarding that portion of the Parimanhana conservation land the *hapū* does not own. Moreover, the *hapū* and Crown are joint members of an advisory committee

[68] Much of the evidence concerned matters addressed by the separate settlement with Ngati Awa.
[69] Waitangi Tribunal, supra n 20.
[70] Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act (2005), part 1, §§ 10–11.

for two other conservation areas. In essence, the settlement creates a series of consultation mechanisms to enable ongoing and distinctive Ngāti Tuwharetoa (Bay of Plenty) participation in the governing of local lands and resources.

The institutionalization of Māori political agency confronts a challenge with resonances in paradigmatic transitional justice scholarship. Rama Mani points out how transitional justice measures can divide populations into victims and perpetrators and exclude bystanders.[71] As a result, transitional justice can reinforce the divisions it seeks to overcome. Similar criticism applies to the Waitangi process. The distinctive recognition of *hapū*-based political agency confronts resistance from those concerned with its divisive potential. In New Zealand, this concern emerged in a 2004 speech by Don Brash, then leader of the Opposition, describing the treaty process as part of a 'divisive trend.'[72] Charitably reconstructed, Brash offers a reasonable challenge. The recognition of 'greater civil, political or democratic rights [for] *any* particular ethnic group' violates the principled basis of citizen equality at the foundation of liberal legitimacy theory.[73]

One way of responding to this concern is to ensure analysis is pitched at the right level. Transitional justice may divide populations, but if our concern is appropriate treatment by the state, then disagreement and resistance are not, in themselves, theoretically problematic. People may have false beliefs about redress programmes. And if, contrary to those beliefs, the redress programmes are enacting forms of equal treatment, then the problem does not lie with the programme. Of course, public opposition reduces the likely success of redress initiatives, no matter how well justified. Here the legitimacy account provides a supportive resource. A legitimacy theory of transitional justice asks for support from the polity as citizens; it attends to the quality of what they share, the *res publica*. The theory provides a way to see official responses to historical justice as a common concern.

The problem of division has, as its mirror, concerns with unity that are particularly challenging in an indigenous context. The colonial attack upon the self-determination of indigenous peoples was an authorized wrongdoing. While a certain amount of devolution is part of the settlement, New Zealand does not recognize the sovereignty of Ngāti Tuwharetoa (Bay of Plenty) and makes no pretence of restoring it. Difficult elsewhere, the problem is existential for settler states whose recent origins lie in colonial violence. But it is implausible to think that successful redress requires restoring the *status quo ante* and our account provides resources for an alternative standard. As a child of Europe's religious conflicts, liberal theory is no stranger to discord. Liberal legitimacy theory concerns acceptable bases for a common political life among people marked by

[71] Rama Mani, 'Rebuilding an Inclusive Political Community after War,' *Security Dialogue* 36(4) (2005): 511–526.

[72] Don Brash, 'An Address to the Orewa Rotary Club,' *New Zealand Herald*, 27 January 2004. See, also, essays in Roger Openshaw and Elizabeth Rata, eds., *The Politics of Conformity in New Zealand* (Auckland: Pearson, 2009).

[73] Brash, supra n 72.

profound differences. Furthermore, since legitimacy is scalar, the theory of state is not utopian; transitional processes can be legitimating without resulting in a fully legitimate state. And as one possible route to further development, its self-government provisions licence an alternative (but contestable) reading of the treaty settlement process as radically pluralizing New Zealand's sovereignty. The account provides space for legitimating redress to leave the state both marked by political pluralism and less than fully legitimate.

In financial terms, the settlement recognizes the impact of land confiscation in damaging the *hapū*'s 'welfare, economy, environment, and development.'[74] Ngāti Tuwharetoa (Bay of Plenty) received $10.5 million NZD to assist in 're-establishing an economic base as a platform for future development.'[75] The settlement also includes real property rights, vesting the *hapū* with 66 hectares, some of which remains conservation land, along with camping and food gathering rights in the Matatā Wildlife Refuge. Finally, the settlement includes the right to purchase a geothermal power plant. In 2005, the *hapū* exercised that right, buying the Kawerau Geothermal Power Station. This initial acquisition positioned the *hapū* to further develop geothermal resources of the area, and in 2010, Ngāti Tuwharetoa (Bay of Plenty) brought further geothermal capacity to market.

Some critics argue that paradigmatic transitional justice practices have significant affinities with neoliberal reform.[76] For example, transitional administrative reforms often involve marketizing both economic production and public service provision. Transitional justice 'reflect[s] the impulses of a neo-liberal world order' while its moralizing content (transitional justice claims to be *just*) works to 'silence discussion of other alternatives.'[77] Treaty settlement processes confront a similar twofold criticism. Annette Sykes argues that a 'neo liberal agenda' is using historical justice claims to privatize publicly owned assets.[78] Driven in part by the demands of the settlement process itself, *iwi* and *hapū* have become strange corporate and political multiplicities whose increasing public service delivery responsibilities represent their partial privatization. Developing the moralizing side of the critique, Sykes argues that a corporate elite is using the language of indigenous rights to shield entrenching class divisions. Sykes's claims are not refuted by our example. Despite the financial benefits of the settlement, the *hapū*'s income and workforce participation rates are well below the national average.[79] Perhaps redress induces Māori to affirm an indirect form of

[74] Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act (2005), part 1, § 10.

[75] Paul Goldstone, *Treaty of Waitangi Settlements Process* (Wellington, New Zealand: Parliamentary Library, 2006), 16.

[76] See, discussion in Michael Humphrey and Estela Valverde, 'Human Rights Politics and Injustice: Transitional Justice in Argentina and South Africa,' *International Journal of Transitional Justice* 2(1) (2008): 83–105.

[77] Ian Taylor, 'What Fit for the Liberal Peace in Africa?' *Global Society* 21(4) (2007): 555–556.

[78] Annette Sykes, 'The Politics of the Brown Tables, the 2010 Bruce Jesson Lecture,' http://img.scoop.co.nz/media/pdfs/1011/Annette_Sykes_Lecture_2010.pdf (accessed 10 February 2013).

[79] Using 2006 census data available from Statistics New Zealand, http://www.stats.govt.nz/ (accessed 29 September 2012).

neocolonization in which political dominance is reframed as market imperatives. But that result is not entailed by the legitimating theory. Neoliberalism is not identical to liberalism. In many respects, neoliberalism stands opposed to traditional liberal theory, and the ecumenical account may itself provide resources to contest inequitable structures both within and resulting from the treaty process.

Our last point of discussion concerns the legitimating value of rights. Critical scholarship attends to the way that framing issues as matters of rights shapes redress politics.[80] This criticism is protean, and we conclude our discussion of how the settlement incorporates legitimating values by looking at one way questions of rights constrain redress practice. The Deed of Settlement describes its provisions as a practice of rights respect – a fair and final settlement of all the *hapū*'s historical claims.[81] But like most transitional justice programmes, the settlement does not provide full compensation. The settlement is limited in two ways. First, all parties recognize the settlement as a partial compensation; the Deed of Settlement states the claimants forego 'full redress [so as to] contribute to the development of New Zealand.'[82] The second limit is the prior restriction upon transferable property. Only public land is available. Unjustly acquired private land is protected against restitution.

It may be attractive to see the amnesty extended to private property as analogous to the criminal amnesties extended in paradigmatic contexts. Many authors see criminal amnesty as a necessary evil forced upon the transitional polity by the threat posed by those protected. Amnesty is a bargain with iniquity, trading off justice for the sake of peace.[83] However, alternative accounts seek a moral justification for amnesties. These confront the argument that amnesty is falling away from justice by claiming that amnesty itself can reflect principled grounds.[84] That discussion is one of the most persistent debates in the transitional justice literature, and it is equally applicable to the practice of established democracies.

It is easy to view New Zealand's policy pragmatically. The amnesty protects the powerful propertied interests whose benign neglect of the Waitangi process is conditional upon it remaining nonthreatening to their holdings. Yet the amnesty is amenable to a principled reading as well. Property rights represent important values around which individuals construct their expectations, interests and life goals. Not only do rights constitute an independent legitimating good but our rights holdings also ramify across the other three values of the ecumenical account. And, finally,

[80] Richard A. Wilson, 'Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights,' *Current Anthropology* 41(1) (2000): 75–98.

[81] Ngāti Tuwharetoa (Bay of Plenty) and Her Majesty the Queen in Right of New Zealand, 'Deed of Settlement of the Historical Claims of Ngāti Tuwharetoa (Bay of Plenty)' (6 June 2003), sec. 1.9, http://nz01.terabyte.co.nz/ots/DocumentLibrary/NgatiTuwharetoa%28BayofPlenty%29DeedofSettlement.pdf (accessed 10 February 2013).

[82] Ibid., sec. 1.8(c)–(d).

[83] Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (Cambridge: Cambridge University Press, 2009).

[84] Amy Gutmann and Dennis Thompson, 'The Moral Foundations of Truth Commissions,' in Rotberg and Thompson, supra n 64.

even if injustice is rarely superseded, rights are not imprescriptible, and many of the same reasons that made the dispossession of indigenous peoples wrongful now apply to the current holders of wrongfully derived property.[85] Restitution of private property might simply enact new forms of injustice. But that argument has little power when applied to state property. The state does not have the expectations, goals and interests that characterize individual agents. In the last analysis, public property garners a mere fiduciary justification; it is held by the state for the benefit of its citizenry. If the justification for excluding private property rests upon principled grounds, current practice might not trade off principles for peace but instead balance respect for conflicting legitimating values.

This final section of the article identified some of the ways Treaty of Waitangi settlement procedures enact legitimating values of the ecumenical account through processes that respond to state wrongdoing, offering a glimpse into its workings with regard to appropriate recognition, self-government, rational preference and justice (rights). At the same time, it raised potential criticisms of these responses, including concerns that redress creates disunity, requires unity, enacts new forms of misrecognition and injustice and is complicit with a less-than-equitable respect for rights. These lines of critique are drawn from paradigmatic transitional justice literature. That they apply to redress in established states strengthens the taxonomic argument, while at the same time indicating how a legitimating theory provides resources for potential responses.

Conclusion

This article prosecutes two mutually supporting claims. Its taxonomic contention is that similarities of practice, its transregime context, legitimating function and shared critique indicate that redress undertaken by established states can be a form of transitional justice. Although that classifying claim has independent interest, the weight of the argument is theoretical, using the taxonomic claim to illuminate how transitional justice is characterized by its legitimating function. Having first situated the Waitangi process within New Zealand's regime transition, the article examines how transitional justice works on the problem of delegitimation created by authorized wrongdoing. Authorized wrongdoings damage the legitimating foundations of political authority. Transitional justice responds to that problem through mechanisms that enact legitimating values. Simple in the abstract, the argument involves significant internal complexity, and our too-brief sketch underscores the need for further research. As yet, the literature has been occupied by sociological rather than reasoned accounts of legitimacy. Although the transregime repair of political legitimacy is certainly not transitional justice's only role, that function holds out the prospect of unifying the field by providing a firm reasoned standpoint upon which to ground transitional justice theory.

[85] Jeremy Waldron, 'Superseding Historic Injustice,' *Ethics* 103(1) (1992): 4–28.