

3

Historical-Structural Injustice

3.1 INTRODUCTION

Chapter 2 outlined patterns of historical abuses involving states and churches from antiquity to lived memory. These wrongs not only are historically distant violence or non-recent violence within living memory but also contribute to producing present-day structural injustices. In addition to addressing the concerns of living victim-survivors, what should these states and churches do with the inheritance and burden of their prior wrongdoing that persists in present day? This chapter argues that addressing historical-structural injustice should be understood as a necessary part of dealing with the past through transitional justice. This chapter first examines the documented and ongoing lived experiences and impact of abuses on victim-survivors. It then explores competing conceptions of structural injustice and argues that an integrated approach linking both liability and social connection should form the basis of responsibility for historical-structural injustice. It then examines the reproduction of historical-structural injustices in modern societies, before articulating the potential contribution of transitional justice to addressing these harms. The final two sections preview the hypothesis of Chapters 4 and 5: that structures of power, emotions, and national and religious myths inhibit society and churches from fully addressing historical-structural injustice.

3.2 LIVED EXPERIENCES OF VICTIM-SURVIVORS OF HISTORICAL ABUSE

It is impossible to offer a comprehensive picture of the damage caused by the historical abuses detailed in Chapter 2. The first-hand accounts of many are lost to time. Of those accounts recorded or documented, individuals,

communities, and peoples often experienced the same form of abuse in different ways.¹ A minority of accounts and narratives demonstrate either positive accounts of institutionalisation,² or positive elements to an overall experience.³ The vast majority of testimony provided and recorded in official investigations, personal autobiographies, oral histories, and other recorded accounts of historical abuse are overwhelmingly negative and recount, in harrowing detail and remarkable similarity across diverse contexts, the profound suffering and impact of these wrongs. The impact of genocide on Indigenous peoples and transatlantic slavery has altered the face of continents irrevocably, with widespread inter-generational loss of life to Indigenous communities, as well as loss of ownership of land, identity, and statehood, leading to inter-generational traumas.⁴ The legacy of slavery, Jim Crow, and successive generations of racial discrimination and violence have had a profound effect leading to inter-generational traumas on African Americans.⁵

In addition, trauma and related harms to life and health are a pervasive feature of those directly affected by historical abuse. Victims-survivors of child sexual abuse can suffer profound psychological damage, including post-traumatic stress disorder, substance abuse, or depression.⁶ Similar psychological harms can be evidenced among those subjected to institutional, non-sexual forms of historical abuse⁷ and those affected by forced adoption and

¹ Marinus H van IJzendoorn and others, 'Children in Institutional Care: Delayed Development and Resilience' (2011) 76 *Monographs of the Society for Research in Child Development* 8, 15.

² Truth and Reconciliation Commission of Canada, *They Came for the Children: Canada, Aboriginal Peoples, and Residential Schools* (Truth and Reconciliation Commission of Canada 2012) 45–9.

³ Gail H Corbett, *Nation Builders: Barnardo Children in Canada* (Dundurn Press 2002) 99–105.

⁴ Karen Menzies, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62 *International Social Work* 1522; William Aguiar and Regine Halseth, *Aboriginal Peoples and Historical Trauma: The Processes of Intergenerational Transmission* (National Collaborating Centre for Aboriginal Health 2015) <<https://www.ccnas-nccah.ca/docs/context/RPT-HistoricTrauma-IntergenTransmission-Aguiar-Halseth-EN.pdf>>.

⁵ Joy Degruy, *Post Traumatic Slave Syndrome: America's Legacy of Enduring Injury and Healing* (Joy deGruy Publications 2017); Bridget J Goosby and Chelsea Heidbrink, 'The Transgenerational Consequences of Discrimination on African-American Health Outcomes: Discrimination and Health' (2013) 7 *Sociology Compass* 630; Michael J Halloran, 'African American Health and Posttraumatic Slave Syndrome: A Terror Management Theory Account' (2019) 50 *Journal of Black Studies* 45.

⁶ Mark Fitzpatrick and others, 'Profiles of Adult Survivors of Severe Sexual, Physical and Emotional Institutional Abuse in Ireland' (2010) 19 *Child Abuse Review* 387.

⁷ MA Lieberman, VN Prock and SS Tobin, 'Psychological Effects of Institutionalization' (1968) 23 *Journal of Gerontology* 343; Rosemary Barnes, Nina Josefowitz and Ester Cole, 'Residential Schools: Impact on Aboriginal Students' Academic and Cognitive Development' (2006) 21 *Canadian Journal of School Psychology* 18; van IJzendoorn and others (n 1).

other forced child transfer practices.⁸ A common experience of institutionalisation is isolation and separation from one's family and community, and the destruction or damage of experiences of Indigenous languages, culture, and practices.⁹ Finally, the religious nature of the staff of the institutions had the capacity to create distinctive forms of spiritual abuse,¹⁰ creating significant anxiety and distress in areas such as theological belief, crisis of faith, and fears surrounding the participant's own mortality.¹¹

A victim-survivor-centred approach to addressing these harms may seek to respond to these lived experiences.¹² Such an approach may extend to address the socio-economic dimensions of human rights abuses. However, transitional justice practices, focusing primarily on individual lived experiences of harm, neglect the ways in which historical abuses may create and relate to systemic and widespread structures of harm, inequality, and discrimination that persist and are reproduced today. The broader legacies of colonisation, slavery, and inter-generational harms would likely form the context or backdrop to an approach that centres survivors of abuse within living memory. To examine the broader and enduring impact of historical abuses requires addressing the concept of structural injustice.

3.3 STRUCTURAL INJUSTICE

Diverse definitions of structural injustice persist.¹³ Johan Galtung contrasted direct violence, such as human rights violations against individuals and peoples, with structural violence that is not 'personal', 'direct', and 'intentional'.¹⁴ On this account, structural injustice and violence may become

⁸ Daryl Higgins, 'Impact of Past Adoption Practices: Summary of Key Issues from Australian Research' (A report to the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs 2010).

⁹ Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan UK 2014) 60–1.

¹⁰ Lisa Oakley and Kathryn Kinmond, *Breaking the Silence on Spiritual Abuse* (Palgrave Macmillan 2013) 21.

¹¹ Derek P Farrell, 'Sexual Abuse Perpetrated by Roman Catholic Priests and Religious' (2009) 12 *Mental Health, Religion & Culture* 39, 39.

¹² Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 *Journal of Law and Society* 265; Kieran McEvoy, 'Letting Go of Legalism: Developing a Thicker Version of Transitional Justice' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below* (Hart 2008).

¹³ Madison Powers and Ruth Faden, *Structural Injustice: Power, Advantage, and Human Rights* (Oxford University Press 2019) 87.

¹⁴ Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 *Journal of Peace Research* 167.

normalised, legitimated, and appear invisible in a particular social context. Galtung describes this as ‘cultural violence’.¹⁵

Similarly, Iris Young suggests that ‘structural injustice occurs when social processes put large groups of persons under systematic threat of domination or deprivation of the means to develop and exercise their capacities, at the same time that these processes enable others to dominate or to have a wide range of opportunities for developing and exercising their capacities available to them’.¹⁶ Young distinguishes between instances of intentional oppression and structural injustices that are the cumulative effect of multiple, uncoordinated decisions of diverse agents, where individuals may claim their individual interactions are morally just but still contribute to producing and reproducing structural injustice.¹⁷ Similarly for Catherine Lu, structural injustice refers ‘to the institutions, norms, practices, and material conditions that played a causal or conditioning role in producing or reproducing objectionable social positions, conduct, or outcomes’.¹⁸

In contrast, Madison Powers and Ruth Faden suggest the need for an approach that integrates both direct and structural violence: ‘human rights violations and structural unfairness are inseparably connected in ordinary contexts and belong in one theory of structural injustice’.¹⁹ They argue that it may not be easy to analytically separate the categories of intentional harms and structural injustice, and to do so may also minimise the role of those who knowingly benefit from structural injustices or fail in their duty to protect others.²⁰

These different conceptions of structural injustice pursue different approaches to a variety of features. The first feature is a typology of unjust social structures. For Young, structures can be analytically divided into two types: (1) environmental and (2) rules based.²¹ ‘Environmental’ structures include all those physical objects in society, such as the planning and construction of cities and housing that may be unjust on grounds of race, class, or claims to ownership.²² In contrast, ‘rule-based’ structures consist of not only formal and informal rules that shape social interaction, such as legal rules, institutions, and hierarchies, but also non-legal norms, social expectations,

¹⁵ Johan Galtung, ‘Cultural Violence’ (1990) 27 *Journal of Peace Research* 291.

¹⁶ Iris Marion Young, *Responsibility for Justice* (Oxford University Press 2011) 52.

¹⁷ *ibid* 73.

¹⁸ Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017) 19.

¹⁹ Powers and Faden (n 13) 3.

²⁰ *ibid* 114–15.

²¹ Young, *Responsibility for Justice* (n 16) 53–67.

²² *ibid* 54–5.

and practices.²³ Young emphasises that structures create different but interdependent social positions, typically of hierarchy and inferiority, for instance the distinction between civilised and uncivilised peoples.²⁴ Such relationships can reproduce unjust structures in an unreflective or subconscious manner. Powers and Faden define structures: 'to include both domestic and international institutions and social practices that are, in their totality, a systematic social framework within which regular, ongoing, highly consequential interactions among individuals, social groups, and various institutional (governmental and non-governmental) agents take place'.²⁵ The authors also limit the relevant institutions and social practices applicable to structural injustice as those that share the characteristics of being asymmetric, near-inescapable, profound, and pervasive.²⁶

In the context of the historical abuses of this book, settler colonialism is a paradigmatic structure. Patrick Wolfe states 'the colonizers had come to stay – invasion is a structure not an event'.²⁷ Settler colonialism operates with an 'intention to permanently displace the Indigenous populations within their acquired territories'.²⁸ Similarly, other forms of white supremacy and racism can operate as a form of structural injustice that 'produces and reproduces segregation of members of racialised groups, and renders deviant the comportments and habits of these segregated persons in relation to dominant norms of respectability'.²⁹ In addition, Nuti emphasises how women have been subjected to structural injustice through both past overt discrimination and contemporary, seemingly egalitarian categorisations that inform a current 'unjust set of constraints that those who are recognised as women are likely to encounter'.³⁰ Mantouvalou has recently argued that state structures of welfare may unintentionally reproduce structural forms of poverty, including 'in work' poverty.³¹ Joe Feagin and Kimberley Ducey argue that elite, white-

²³ Alasia Nuti, *Injustice and the Reproduction of History: Structural Inequalities, Gender and Redress* (Cambridge University Press 2019) 33; Young, *Responsibility for Justice* (n 16) 55–67.

²⁴ Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000) 95.

²⁵ Powers and Faden (n 13) 92.

²⁶ *ibid.*

²⁷ Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8 *Journal of Genocide Research* 387, 388.

²⁸ Sarah Maddison, 'Indigenous Identity, "Authenticity" and the Structural Violence of Settler Colonialism' (2013) 20 *Identities* 288, 288.

²⁹ Iris M Young, 'Structural Injustice and the Politics of Difference' in Thomas Christiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) 366

³⁰ Nuti (n 23) 103.

³¹ Virginia Mantouvalou, 'Welfare-to-Work, Structural Injustice and Human Rights' (2020) 83 *The Modern Law Review* 929.

male dominance represents a ‘complex and oppressive system central to most western societies that now affects much of the planet’. As a result, they argue that systemic sexism, classism, and racism all appear together in society and ‘are regularly interlocking, codetermining and co-producing in a helix-like fashion’.³² Specific empirical evidence of current injustices in some of these structures is outlined below.

Third, these theories differ in the nature of responsibility for structural injustice. For Young, conventional forms of legal justice represent a liability model, where responsibility is conceived of as a wrongful deviation from a normal and acceptable set of background conditions. In contrast, if responsibility for structural injustice is framed in terms of social connection,³³ the background conditions themselves are put into question from a moral point of view.³⁴ On Young’s account of social connection, we can be held responsible for contributing to structural injustice even if we cannot be blamed for our individual conduct,³⁵ because of our participation in and contribution to the systems that reproduce patterns of injustice.³⁶ For Young, blameworthy conduct is not a central feature of structural injustice. Her contention is that a focus on fault ‘obscures the structural and institutional framework of oppression’. Young emphasises that this social connection model of responsibility should not fully replace other concepts of responsibility but rather complement them.³⁷ Maeve McKeown reads Young’s social connection model as ‘the most appropriate and consistent way to understand connection to structural injustice is that individuals reproduce the background conditions in which they act’.³⁸ As Sarah Maddison notes, ‘in as much as later generations continue to benefit from the resources and gains produced by historical injustices, and in as much as we continue to deny that the current circumstances . . . have causal links to these past injustices, then our response makes us guilty as a new collective’.³⁹

In assessing Young’s approach to responsibility for structural injustices, Neuhäuser notes: ‘what remains rather underdetermined in her approach is

³² Joe Feagin and Kimberley Ducey, *Elite White Men Ruling: Who, What, When, Where, and How* (Routledge 2017) 3.

³³ Young, *Responsibility for Justice* (n 16) 180.

³⁴ Lu (n 18) 101.

³⁵ Young, *Responsibility for Justice* (n 16) 104.

³⁶ *ibid* 180.

³⁷ *ibid* 100.

³⁸ Maeve McKeown, ‘Iris Marion Young’s “Social Connection Model” of Responsibility: Clarifying the Meaning of Connection’ (2018) 49 *Journal of Social Philosophy* 484, 484.

³⁹ Sarah Maddison, *Beyond White Guilt: The Real Challenge for Black–White Relations in Australia* (Allen & Unwin 2011) 29.

how exactly she envisions the collective elimination of structural injustice. It remains unclear, in other words, who has to do what'.⁴⁰ Organisation of collective action needs to be both effective and just in the context of existing liabilities for individual, institutional, and structural injustices, which is neglected in Young's account.⁴¹ Young's account: 'gives no advice as to how responsibility can be distributed along the criteria of power, privilege, interest, and collective capacity'.⁴² To provide this type of guidance in addressing structural injustice, Neuhäuser suggests the need for public discourse and institutions that can structure and organise the distribution of responsibility.⁴³ As a result, individual and institutional actors may share responsibility for addressing both their liabilities and structural injustice, which can be ascertained through the use of existing and new institutional mechanisms.⁴⁴ This suggests the mechanisms of transitional justice could potentially contribute to identify and foster accountability and responsibility for structural injustices.

Similarly, responsibility for structural injustice differs from what Catherine Lu calls interactional justice, that is, 'the settling of accounts between agents for wrongful conduct or unjust interactions and for undeserved harms and losses or injuries'.⁴⁵ Interactional justice seems to capture the majority of transitional justice practices, such as accountability and redress. In contrast, for Lu, pursuing justice that responds to structural injustice seeks to correct 'the conditions in which agents interact and relate to themselves, each other and the world'.⁴⁶ On her approach, agents responsible for structural injustice must repudiate and transform the structural factors that enabled the wrongdoing to occur and seek to establish conditions in which those who were victimised can regain effective moral and political agency in the relevant social/political orders.⁴⁷ In agreement, Robin Zheng suggests that responsibility for structural injustice is differentiated and that 'individuals bear responsibility for collectively transforming social structures because of the social roles we occupy'.⁴⁸

⁴⁰ Christian Neuhäuser, 'Structural Injustice and the Distribution of Forward-Looking Responsibility' (2014) 38 *Midwest Studies in Philosophy* 232, 242.

⁴¹ *ibid* 243, 247.

⁴² *ibid* 248.

⁴³ *ibid*.

⁴⁴ *ibid* 249.

⁴⁵ Lu (n 18) 19.

⁴⁶ *ibid* 35.

⁴⁷ *ibid* 259.

⁴⁸ Robin Zheng, 'What Is My Role in Changing the System? A New Model of Responsibility for Structural Injustice' (2018) 21 *Ethical Theory and Moral Practice* 869, 870.

Finally, theories of structural injustice take different accounts of the role of historical injustice specifically. For Young, in cases where the perpetrators and victims are still alive, a liability model of responsibility remains appropriate but may need to be supplemented with the social connection model. In contrast, ‘cases of historic injustice whose original perpetrators and victims lived generations ago present particular ontological and conceptual problems when we try to apply the liability model to them’.⁴⁹ This will be explored further in the context of transitional justice institutions in Part II of the book.

Young notes the potential for the liability model to operate for historical injustice where there may be evidence to demonstrate the responsibility of an agent, such as a business or church, that is the same institution as in the period of historical abuse.⁵⁰ While she gives examples of US cities or corporations that profit from slavery, she refuses to extend this to the state of the United States itself, as ‘the U.S. government has both aided slavery and the subsequent oppression of African Americans and made explicit reforms aimed at providing some remedy’.⁵¹ For Young, the responsibility for historical injustices falls on the people of the United States, or at least to some of them.⁵² For Young, the purpose of engaging in an assessment of historical injustice is to understand the production and reproduction of structural injustices, not to praise or blame but to see the relationship between actions, practices, and structural outcomes and to add moral weight and priority to reforms in that area.⁵³

In contrast, for Alasia Nuti, historical abuses play a specific role in structuring present-day forms and patterns of structural injustice: ‘the unjust past cannot be superseded by present-based considerations of injustice because the former structures the latter’.⁵⁴ For Nuti, it is important to emphasise ‘how many (although not all) environmental and rules-based structural processes do not simply stem from the sedimentation of past deeds and decisions but are also significantly connected with past unjust actions – that is, with historical injustices’.⁵⁵ Rather than being conceived as merely enduring, historical injustices should be regarded as historical-structural injustices that are reproduced over time, even if the original injustice, for instance slavery, has ended.⁵⁶

⁴⁹ Young, *Responsibility for Justice* (n 16) 172.

⁵⁰ *ibid* 175.

⁵¹ *ibid* 177.

⁵² *ibid* 178.

⁵³ *ibid* 186.

⁵⁴ Nuti (n 23) 31.

⁵⁵ *ibid* 35.

⁵⁶ *ibid* 44.

For Nuti, historical-structural injustices should be understood in terms of ‘unjust long-term structures that endure over time and through institutional transformations by means of changes in how they operate. Changes over time in the workings of an injustice are necessary for that injustice to be reproduced, especially in contexts where a past has been repudiated as unjust formally and by many societal members’.⁵⁷ For instance, Michelle Alexander similarly argues that those invested in racial hierarchies adapt new systems of control as each one seems to fail: ‘Following the collapse of each system of control, there has been a period of confusion – transition – in which those who are most committed to racial hierarchy search for new means to achieve their goals within the rules of the game as currently defined. It is during this period of uncertainty that the backlash intensifies and a new form of racialised social control begins to take hold. The adoption of the new system of control is never inevitable, but to date it has never been avoided’.⁵⁸

Historical abuses detailed in Chapter 2 involve the state, individuals, and institutions as they are directly liable and socially responsible for abuses within lived memory and those that are repeated and reproduced across generations in related but different contexts. Although the accounts above disagree on several issues, the integrated approaches adopted by Powers and Faden and Neuhäuser suggest the potential to consider both liability-based responsibility for historical abuses, based on existing and continuous legal obligations, and broader forms of responsibility for structural injustice, based on social connection. Nuti’s account clarifies that the latter form of responsibility can and should be informed by the former. Those individuals, institutions, and actors bearing legal and political responsibility for historical abuse directly should play a particular role regarding responsibility for structural injustice. In particular, the role of the state and Christian churches as a continuous legal and political actors and Christian churches suggests the potential for responsibility in terms of both liability and social connection.

If an integrated approach involving both liability and social responsibility for historical-structural injustice is possible, law is likely to play a significant role in determining whether liability or social responsibility is the primary way to understand responsibility for past harms. Law can play a mediating function in determining whether and when a particular set of harms constitute a form of liability or a form of structural injustice. In doing so, the legal system itself may constitute a site where structural injustice is reproduced, by unduly

⁵⁷ *ibid* 45.

⁵⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2012) 21–2.

narrowing or restricting the basis for liability or by denying the systemic or widespread nature of harms that are/should be subject to legal liability. However, the capacity of a legal system to be employed for its mediating role may also be limited by political and social scepticism or rejection of the burden of historical-structural injustices, for reasons explored below and in subsequent chapters.

3.4 ADDRESSING AND RESISTING THE IMPACT OF HISTORICAL-STRUCTURAL INJUSTICES ON CONTEMPORARY SOCIETIES

The claim that historical abuses are the basis of disadvantage or harm to individuals and groups today remains politically divisive across the jurisdictions studied. Emily Beausoleil notes that ‘it remains difficult to discern the indirect and elaborate networks and systems that connect the rich to the poor’.⁵⁹ For Jeremy Waldron, the effects of historical injustices may be superseded by circumstances, and social conditions may change to render just what was previously an injustice.⁶⁰ Such scepticism is also expressed among contemporary national religious and political leadership. In response to renewed claims for the need for reparations for slavery, Jim Crow, and the patterns of violence against African Americans, US Senator Mitch McConnell declared: ‘I don’t think reparations for something that happened 150 years ago, when none of us currently living are responsible, is a good idea’.⁶¹ In its recommendations, the Irish Commission of Investigation into Mother and Baby Homes stated: ‘Financial redress for past wrongs involves the present generation paying for the wrongs of earlier generations and it could be argued that this is unfair’.⁶² Zinaida Miller notes such positions are not ‘solely or even primarily about the preservation or memory of the past. Rather, they are assertions about how that past should inform the ways in which resources, power, and rights are distributed today’.⁶³ On her account, ‘The fulcrum of

⁵⁹ Emily Beausoleil, ‘Listening to Claims of Structural Injustice’ (2019) 24 *Angelaki* 120, 124.

⁶⁰ Jeremy Waldron, ‘Superseding Historical Injustice’ (1992) 103 *Ethics* 4; Jeremy Waldron, ‘Redressing Historic Injustice’ (2002) 52 *The University of Toronto Law Journal* 135.

⁶¹ Eli Rosenberg, ‘Mitch McConnell’s Ancestors Owned Slaves, According to a New Report. He Opposes Reparations’ *Washington Post* (Washington, DC, 8 July 2019) <www.washingtonpost.com/politics/2019/07/09/mitch-mcconnells-ancestors-owned-slaves-according-new-report-he-opposes-reparations/> accessed 19 March 2021.

⁶² ‘Commission of Investigation into Mother and Baby Homes: Recommendations’ (2021) para 14.

⁶³ Zinaida Miller, ‘The Injustices of Time: Rights, Race Redistribution and Responsibility’ (2021) 52 *Columbia Human Rights Law Review* 647, 651.

debate is not whether to discuss the past or not but rather how to define it and what it means in and for the present'.⁶⁴

In rejecting such concerns, Alasia Nuti draws on the work of Reinhart Koselleck to suggest that historical time is always embedded within social and political institutions, and thus the framing of history, the past and their importance to the present, is deeply political.⁶⁵ During modernity, according to Koselleck, the past starts being conceived as exceptional and separated from the present and the future.⁶⁶ As a result, critics of addressing historical injustice are able to separate the unjust past from the present injustices and relegate the current relevance and impact of historical abuses. In contrast, Koselleck argues that there are two different yet interdependent levels of temporality: 'events' and 'long-term structures'.⁶⁷ Events are specific, occur in a determinate moment, and are capable of being narrated as having a beginning and end. Long-term structures endure over time and may extend over inter-generational groups of persons. For Koselleck, long-term structures offer a necessary but insufficient basis to explain the occurrence of particular events, which remain the product of individual agency, under conditions created by the long-term structure.⁶⁸

To illustrate the relevance of this approach to historical-structural injustice, Nuti gives the example of slavery in the United States both as a historical phenomenon (an event) and 'also characterised by long-term structures that constituted its possibility of existence and that may have outlived the end of the 'event' of slavery'. In particular, Nuti suggests the structural dimension of slavery is reflected in

- (1) the long-term structures (e.g. economic, political, and ideological) that were in place before the beginning of slavery and under which the establishment of the institution of slavery was possible;
- (2) those long-term structures, such as the creation of racial hierarchies, that sustained the institution of slavery over time during its different phases; and
- (3) those long-term structures (e.g. of economic dependency, political disenfranchisement, institutional violence, cultural disempowerment,

⁶⁴ *ibid* 652.

⁶⁵ Nuti (n 23) 20.

⁶⁶ Reinhart Koselleck, Stefan-Ludwig Hoffmann and Sean Franzel, *Sediments of Time: On Possible Histories* (Stanford University Press 2018) 117–36.

⁶⁷ Reinhart Koselleck, *Futures Past: On the Semantics of Historical Time* (Columbia University Press 2004) 108.

⁶⁸ Nuti (n 23) 24.

and psychological oppression) established in the United States by slavery that not only may have outlasted the abolishment of the ‘peculiar institution’ but may also keep being reproduced nowadays and be the structural conditions under which other events can occur.⁶⁹

This account of history as both events and structure offers a valuable mechanism to recognise the political character of debates regarding the history of historical abuses including and beyond slavery, comprising those patterns of violence outlined in Chapter 2, and beyond. For Pablo de Greiff, the future of dealing with the past in transitional justice involves an examination of how ‘a problematic and unredressed past, continues to manifest itself both in the present and in the future’.⁷⁰ Emphasising and examining the relationships between historical abuses and contemporary structural injustices offer a means for contemporary living victim-survivors, advocates, and activists to argue and illustrate how the structure of particular historical injustices is reproduced in the present.⁷¹ This approach suggests that historical abuses are not merely or primarily a ‘legacy’ passively received by subsequent generations and in need of being addressed as an impediment to social progress.⁷² Instead, it enables a substantive account of structural injustice to address historical abuses within lived experience and memory, while not precluding individual, institutional, and state responsibility for specific events that occur in the context of long-term structures of historical abuses.⁷³

Though historical abuses cannot completely determine the shape and material outcomes of our present societies, the descendants of historically marginalised and harmed groups experience present-day forms of harm and discrimination. These outcomes suggest historical abuses have had an inter-generational impact on the nature, structure, and quality of life in the societies studied in this book. Abusive and discriminatory structures are being reproduced in the present. Life expectancy, health, and other quality of life indicators are routinely lower for Indigenous peoples in Canada, Australia, and the United States than for white settler populations.⁷⁴ Violence against Indigenous peoples remains disproportionate in the United States, Canada, and Australia, especially

⁶⁹ Nuti (n 23) 26.

⁷⁰ Pablo de Greiff, ‘The Future of the Past: Reflections on the Present State and Prospects of Transitional Justice’ (2020) 14 *International Journal of Transitional Justice* 251, 258.

⁷¹ Nuti (n 23) 26.

⁷² *ibid* 27.

⁷³ *ibid* 28.

⁷⁴ Martin Cooke and others, ‘Indigenous Well-Being in Four Countries: An Application of the UNDP’s Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand, and the United States’ (2007) 7 *BMC International Health and Human Rights* 9.

against women.⁷⁵ The number of missing and murdered American Indian and Alaskan Native women is over ten times the amount than the national average.⁷⁶ A Canadian police study states that Indigenous women constituted 16 per cent of all female homicides between 1980 and 2012, despite making up only 4 per cent of the female population.⁷⁷ At present, Indigenous women and girls make up 24 per cent of female homicide victims.⁷⁸

Life expectancy is also lower for African Americans compared to white Americans.⁷⁹ Edwards et al conclude that 1 in 1,000 black men and boys will be killed by police over their lifetime and between thirty-six and eighty-one American Indian/Alaska Native men and boys per 100,000 will be killed by police over the life course.⁸⁰ One in three black men will likely enter the criminal justice system at some point during their lifetime.⁸¹ Additionally, nearly one in five black Americans have experienced some form of voter suppression in their lifetimes.⁸² The sexual and reproductive rights of African American women have been infringed due to racist and discriminatory healthcare practices from slavery through the post-Civil Rights era, despite some recent improvements to ensure equitable healthcare.⁸³ Black

⁷⁵ Jillian Boyce, 'Victimization of Aboriginal People in Canada, 2014' (Canadian Centre for Justice Statistics 2014); Australian Institute of Health and Welfare, 'Family Domestic and Sexual Violence in Australia: Continuing the National Story 2019' <www.aihw.gov.au/reports/domestic-violence/family-domestic-sexual-violence-australia-2019/contents/table-of-contents> accessed 18 August 2021; National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (Executive Summary)* (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019).

⁷⁶ Indian Law Resource Center, *Ending Violence Against Native Women* (ILRC 2013).

⁷⁷ Royal Canadian Mounted Police, *Missing and Murdered Aboriginal Women: A National Operational Overview* (2014).

⁷⁸ Tina Hotton Mahony, Joanna Jacob and Heather Hobson, 'Women in Canada: A Gender-Based Statistical Report' (Statistics Canada 2017).

⁷⁹ Atheendar S Venkataramani, Rourke O'Brien and Alexander C Tsai, 'Declining Life Expectancy in the United States: The Need for Social Policy as Health Policy' (2021) 325 *JAMA* 621; Laura Dwyer-Lindgren and others, 'Inequalities in Life Expectancy Among US Counties, 1980 to 2014: Temporal Trends and Key Drivers' (2017) 177 *JAMA Internal Medicine* 1003.

⁸⁰ Frank Edwards, Hedwig Lee and Michael Esposito, 'Risk of Being Killed by Police Use of Force in the United States by Age, Race–Ethnicity, and Sex' (2019) 116 *Proceedings of the National Academy of Sciences* 16793.

⁸¹ The Sentencing Project, 'Criminal Justice Facts,' available at <www.sentencingproject.org/criminal-justice-facts/> (last accessed July 2019)

⁸² 'Discrimination in America: Experiences and Views of African Americans' (Harvard TH Chan School of Public Health, Robert Wood Johnson Foundation, and NPR 2017).

⁸³ Cynthia Prather and others, 'Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity' (2018) 2 *Health Equity* 249.

women die in childbirth at three to four times the rate of white women.⁸⁴ In the twenty-three years prior to 2007, the wealth gap between African American and white households increased by \$75,000, from \$20,000 to \$95,000.⁸⁵ Bhashkar Mazumder finds that ‘more than 50 per cent of blacks who start in the bottom quintile in the parent generation remain there in the child generation, but only 26 per cent of whites remain in the bottom quintile in both generations’.⁸⁶ White Americans have ten times the wealth of black Americans.⁸⁷ The Pew Research Center estimates that white households are worth roughly twenty times as much as black households and that whereas only 15 per cent of whites have zero or negative wealth, more than a third of blacks do. Patrick Sharkey shows that black families making \$100,000 typically live in the kinds of neighbourhoods inhabited by white families making \$30,000. ‘Blacks and whites inhabit such different neighborhoods,’ Sharkey writes, ‘that it is not possible to compare the economic outcomes of black and white children’.⁸⁸ Similar forms of racism persist in the United Kingdom, where police are six times more likely to stop and search black people compared to whites.⁸⁹ In 2018, about 13.8 per cent of the UK population was from a minority ethnic background, but 27 per cent of the prison population were from the same background.⁹⁰ Social and economic inequalities experienced by ethnic minorities make a substantial contribution to ethnic inequalities in health.⁹¹

In the face of such empirical realities, how the past is understood to relate to the present is a key point of political contention across each of the contexts in this book. Some may deny the link between these contemporary realities and

⁸⁴ Jamila Taylor and others, ‘Eliminating Racial Disparities in Maternal and Infant Mortality: A Comprehensive Policy Blueprint’ (Center for American Progress 2019).

⁸⁵ Thomas Shapiro, Tatjana Meschede and Sam Osoro, ‘The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide’ (2013) Institute of Assets and Social Policy Research and Policy Brief <<http://drum.lib.umd.edu/handle/1903/24590>> (accessed 2 June 2021).

⁸⁶ Bhashkar Mazumder, ‘Black–White Differences in Intergenerational Economic Mobility in the United States’ 38 *Economic Perspectives* 1, 8.

⁸⁷ Angela Hanks, Danyelle Solomon and Christian Weller, ‘Systematic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap’ (Center for American Progress 2018) <<https://cdn.americanprogress.org/content/uploads/2018/02/20131806/RacialWealthGap-report.pdf>>.

⁸⁸ Patrick Sharkey, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* (The University of Chicago Press 2013).

⁸⁹ Michael Shiner and others, ‘The Colour of Injustice: “Race”, Drugs and Law Enforcement in England and Wales’ (Stop Watch 2018).

⁹⁰ ‘Her Majesty’s Prison and Probation Service Offender Equalities Annual Report 2019/20’ 5.

⁹¹ Karen Chouhan and James Nazroo, ‘Health Inequalities’ in Bridget Byrne and others (eds), *Ethnicity Race and Inequality in the UK: State of the Nation* (Policy Press 2020).

historical abuses, emphasising a lack of direct causation between the two phenomena.⁹² Such issues may be relevant for imposing responsibility for legal liability but are merely one of many factors when the ongoing relevance of historical abuses is considered in moral or political terms. Miller notes: ‘The narration of the past justifies different and often competing positions on economic, political, and legal arrangements in the present. In the United States, the debate hinges on whether the wrongs of slavery were resolved by constitutional and political processes or if they are a continuing factor in racial inequality today’.⁹³ In Canada, by contrast, the past has been simultaneously embraced and obscured. Miller notes: ‘The federal government has admitted responsibility not only for the past but for the present, legally and politically conceptualising historical continuity in a way that is largely absent elsewhere. Yet among Indigenous activists and allies, there is ongoing frustration with the failure to link that admission to meaningful redistribution of resources in the present – particularly when the distribution to Indigenous peoples might involve a different distribution of resources for non-Indigenous Canadians.’⁹⁴ Similarly, Máiréad Enright argues that the Irish state is engaged in effort ‘to establish and police the boundaries of “homogenous national time”. The politics of national time underpin and sustain discourses of responsibility for historical abuse. They enable the state to corral certain historicised abuses within a distinct regulatory space and accordingly to achieve “closure”; limiting the state’s responsibility to investigate those abuses or compensate those who suffered them’.⁹⁵ Balint et al note that in Australia: ‘Initiatives designed to address the past have been undertaken as discrete initiatives unconnected to a broader and substantive justice agenda through which Indigenous and non-Indigenous peoples in settler colonial states collectively seek to acknowledge and grapple with the devastating effects of colonialism and its ongoing impact and manifestations’.⁹⁶

Across these contexts, an approach to justice that addresses the present-day consequences of historical abuses challenges the idea of a liberal democratic

⁹² Janna Thompson, ‘Historical Injustice and Reparation: Justifying Claims of Descendants’ (2001) 112 *Ethics* 114.

⁹³ Miller (n 63) 653.

⁹⁴ *ibid* 735–6.

⁹⁵ Máiréad Enright, ‘No. I Won’t Go Back’: National Time, Trauma and Legacies of Symphysiotomy in Ireland’ in Emily Grabham and Siân M Beynon-Jones (eds), *Law and Time* (Routledge 2018) 47.

⁹⁶ Jennifer Balint and others, *Keeping Hold of Justice: Encounters between Law and Colonialism* (University of Michigan Press 2020) 89.

society as the paradigmatic end goal of transitional justice.⁹⁷ With this goal of (re)establishing liberal democracy, transitional justice is a set of practices aimed at a particular conception of society, which fails to address broader questions of historical-structural injustice.⁹⁸ A liberal conception of justice can be criticised as being inattentive to questions of structural injustice: ‘an approach that is blind to the circumstances of people is more likely to perpetuate rather than correct injustice’.⁹⁹ This failure is one of the key criticisms of transitional justice within transformative justice literature.¹⁰⁰ The social contract tradition aims at non-discrimination but is undermined by the cultural and historical abuses of societies and their institution, laws and practices.¹⁰¹ To address the present effects of historical abuses on victim-survivors and society as a whole requires a significant reimagining of how states, churches, and societies respond to the past. To do so may require more than the formulation of legal responses to perceived social problems, particularly where the legal system may itself be a site where structural injustices are reproduced.¹⁰²

3.5 ASSESSING HISTORICAL-STRUCTURAL INJUSTICE AND TRANSITIONAL JUSTICE

The above discussion of conceptions of structural injustice indicated that rather than focus on liabilities for past historical injustices alone, to adequately address the lived consequences of structural injustices today, accounts of structural injustice instead also emphasise that society is today *burdened* by historic abuses and as a result has a responsibility to address such harms and their consequences in continued patterns of alienation, domination, and harm.¹⁰³ On such an account, ‘The main way to understand the connection between historic injustice and present injustice lies in uncovering how patterns of historic injustice are reproduced in, or inform the subsequent

⁹⁷ United Nations Security Council. ‘Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (3 Aug 2004) S/2004/616, 4.

⁹⁸ Vasuki Nesiah, ‘Transitional Justice Practice: Looking Back Moving Forward’ (Impunity Watch 2016) 38.

⁹⁹ Iris Marion Young, ‘Structural Injustice and the Politics of Difference’ in Anthony Laden and David Owen (eds), *Multiculturalism and Political Theory* (Cambridge University Press 2007) 68.

¹⁰⁰ Dustin N Sharp, ‘What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice’ (2019) 13(3) *International Journal of Transitional Justice* 570, 586.

¹⁰¹ Christopher Ryan Maboloc, ‘What Is Structural Injustice?’ (2019) 47 *Philosophia* 1185, 1185–6.

¹⁰² *ibid* 1192.

¹⁰³ Lu (n 18) 148.

development of, contemporary social structures'.¹⁰⁴ As members of the societies burdened by these inheritances of historical abuses and structural injustices, 'we are responsible in the present for how we narrate the past'.¹⁰⁵ It is open for states, societies, and churches to encompass a pluralistic, contrapuntal history, examining the perspective of both domination and resistance to it.¹⁰⁶ Young writes: 'A society aiming to transform present structures of injustice requires a reconstitution of its historical imaginary, and the process of such reconstitution involves political contest, debate, and the acknowledgment of diverse perspectives on the stories and the stakes'.¹⁰⁷ This approach aligns with Nuti's emphasis on counter-historical justifications: 'Counter-historical institutional justifications, which are developed in activist politics, critically examine whether and how our societies (and the transnational order) have been constructed to make an unjust history reproduce through changes'.¹⁰⁸

Responding to wrongdoing and assigning responsibility require re-imagining our baseline set of expectations and practices in society. Our national and religious myths must incorporate knowledge of and current and inter-generational responsibilities for past collective wrongdoing. For Young, taking our collective past of our political communities as given generates a present responsibility:

How individuals and groups in the society decide to tell the story of past injustice and its connection to or break with the present says much about how members of the society relate to one another now and whether and how they can fashion a more just future . . . A society aiming to transform present structures of injustice requires a reconstitution of its historical imaginary, and the process of such reconstitution involves political contest, debate, and the acknowledgment of diverse perspectives on the stories and the stakes.¹⁰⁹

Addressing historical-structural injustice is a necessary part of addressing transitional justice – a liberal democracy that does not address its own legacy of historical-structural injustice is an illegitimate and undesirable endpoint for any form of transitional justice. We are responsible today for reproducing systems of social control that are patriarchal, racist, and so on. We are not responsible evenly. These systems operate on (at least) ideational and material levels – those in power/privilege (who benefit from our collective burden) bear

¹⁰⁴ *ibid* 155.

¹⁰⁵ Young, *Responsibility for Justice* (n 16) 182.

¹⁰⁶ Edward W Said, *Culture and Imperialism* (Vintage Books 1994) 66.

¹⁰⁷ Young, *Responsibility for Justice* (n 16) 182.

¹⁰⁸ Nuti (n 23) 181.

¹⁰⁹ Young, *Responsibility for Justice* (n 16) 182.

a greater responsibility to address these systems of social control. We live in societies that continue to operate with structures of power and emotion that seek to control and shape the lives of historically discriminated and harmed groups. We live in societies that continue to see it legitimate to designate the 'other' as a scapegoat and a social problem. Law provides some of the tools to do this and facilitates amnesia about the continuity of these processes over time and limited tools of challenge.

Responsible institutions and actors, such as states and churches, have the opportunity to explicitly narrate and practice a new national social or religious identity that embraces their responsibility for past violence and embraces a non-dual self-identity (being capable of achieving the common good, contributing to decolonisation but also being capable of organised violence).

To attempt to expand responsibility for historical abuses in this manner is ambitious, particularly if it is to be part of transitional justice. Suggestions for transitional justice to attempt more than its existing institutional menu often run aground as unfeasible in the absence of political will and pre-existing power dynamics.¹¹⁰ Though existing critiques of transitional justice in transformative justice literature offer valid critical perspectives on the field, to date they do little to address how an already flawed enterprise, or its alternatives in transformative practice itself, would overcome existing structural limitations. Sharp suggests: 'Given the exquisite complexity involved, it is just too simple to attribute the inevitable persistence of some forms of violence, domination and inequality to a penchant for apolitical and technocratic engagement, insufficient participation, top-down approaches, and other critical studies boogeymen – even as these remain serious issues to grapple with.'¹¹¹

State and church officials could use the mechanisms of transitional justice (inquiries, accountability, redress, apologies, reconciliation) to be seen to serve victim-survivors but could equally use the same mechanisms to strengthen their authority, sovereignty, and control. There is no reason to suggest this could not equally be true of a transformative justice discourse or practice. In this context, discussions of structural injustice could form part of this pattern of serving the needs of victim-survivors, including those subjected to structural injustice, but could equally be captured. Transitional or transformative justice could thus be compatible with such institutions maintaining control over the extent to which a nation or church uses the violent aspects of its past as a means to address its present and future reforms. Transitional or transformative justice could instead reproduce

¹¹⁰ Sharp (n 100), 585.

¹¹¹ *ibid* 588.

historical-structural injustices – and be a new site of frustration, discrimination, and re-traumatisation for victim-survivors and those affected by older patterns of structural injustice.

Transitional justice is thus a mechanism that can be used to protect the systems of power that undergird Western states and institutional churches. As a result, the paradigmatic mechanisms of transitional justice could be assessed to see whether they make a meaningful contribution to addressing questions of structural injustice. Sharp concurs: ‘even a loose exploration of how mechanisms such as tribunals, truth commissions, vetting and reparations programs, and so on might go about attempting to address a form of violence that is impersonal, indirect and unintentional would go a long way in helping to assess whether this form of transitional justice should be rejected as an improbable or infeasible alternative in a particular context’.¹¹²

Addressing such significant harms even across diverse contexts and periods of history presents the opportunity for significant political and social rupture and change that may challenge dominant social systems and ideologies.¹¹³ In considering the potential contribution of transitional justice to these broader processes, Clara Sandoval distinguishes between three different types of social change: ordinary change, structural change, and fundamental change. Ordinary social change refers to ‘everyday changes that align with dominant ideologies and structures in society’, even where they are the result of significant political struggle or face resistance.¹¹⁴ For Sandoval, structural change may be necessary but insufficient to transform dominant ideologies and structures, giving the example of legal constitutional change.¹¹⁵ Finally,

Fundamental social change occurs when various structural changes provide foundations for new dominant ideologies inspired by radically different values to those evident during the repression or conflict to flourish. Furthermore, these values must be respected, endorsed, adopted, and articulated by different political sectors and ideologies of society and be given life through different norms, institutions, education, and culture, so that they are ultimately able to affect the economic, social, political, and other conditions that permitted the conflict or repression.¹¹⁶

¹¹² *ibid* 585.

¹¹³ Clara Sandoval-Villalba, ‘Reflections on the Transformative Potential of Transitional Justice and the Nature of Social Change in Times of Transition’ in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies* (International Center for Transitional Justice 2017) 178.

¹¹⁴ *ibid* 181.

¹¹⁵ *ibid* 180–1.

¹¹⁶ *ibid* 182.

Winter agrees that ‘transitional politics are forms of politics in which agents seek to implement fundamental changes to political norms’.¹¹⁷

Balint et al note the potential contribution of transitional justice to addressing structural injustice: ‘A transitional justice framework enhanced by the notion of structural justice may also provide the theoretical resources to rethink the relation between justice, injustice, and transition and to reconsider what it means to pursue just outcomes as a society. It may prompt consideration of how justice measures could themselves facilitate a process of transition rather than simply respond to it’.¹¹⁸ In evaluating the potential contribution of transitional justice, the authors ask: ‘Do such injustices simply endure manifesting as they did when inflicted; do such injustices become compounded over time, their effects exacerbated and inflamed; or, indeed, does the character of such injustices change with the passage of time, and are they altered by either their longevity or the societal failure to effectively acknowledge and address them?’.¹¹⁹ On their approach, paradigmatic institutional approaches may combine with longer-term approaches to address structural injustices and be informed by non-Western, Indigenous legal frameworks.

In addressing structural injustice through changing fundamental norms, states, churches, societies, and victim-survivors have the opportunity to contribute to the material consequences of any such new national or religious identity by, for instance, re-imagining the role of sovereign authority in light of its historical misuse. This approach challenges the idealised end state of transitional justice as the pre-existing liberal market democracy. There are some emergent examples of this, for instance, in the calls to action of the Canadian Truth and Reconciliation Commission, which calls on the government of Canada to ‘[r]enew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future’. In the same recommendation, Canada is asked specifically to ‘[r]epudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius’.¹²⁰

The pursuit of structural justice ‘requires more than acknowledgment of alienating past injustices, since the persistence of structural alienation in

¹¹⁷ Stephen Winter, *Transitional Justice in Established Democracies a Political Theory* (Palgrave Macmillan 2014) 54.

¹¹⁸ Balint and others (n 96) 101.

¹¹⁹ *ibid* 102.

¹²⁰ Truth and Reconciliation Commission of Canada, *Calls to Action*, available at <http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf> (last visited 30 June 2020)

contemporary contexts produces a need for measures that address contemporary forms of structural alienation'.¹²¹ Lu argues that this pursuit 'must open possibilities for (and engage the capacities of) the oppressed to participate in the overturning of structural injustices and the work of creating a mutually affirmed social/political order, rather than assign to them the passive role of waiting for beneficiaries of historic injustice to produce just distributions by disgorging their benefits'.¹²² However, Sharp is right to suggest that 'many critical theory ideals – such as participation and local ownership – have become ritualized mantras devoid of substance after adoption by large international institutions'.¹²³

The emphasis of transitional justice on state-building has been matched with an 'excessive individualism and false universalism, which may at times mask or obscure power relations within that discourse and which dominates the imaginative space of emancipation'.¹²⁴ Instead Catherine Turner suggests 'what we can and must do is find a way to live with that past in a way that keeps us moving forward. This is only possible through ongoing critique and recognition of the inherently political nature of the choices being made with respect to the contested past'.¹²⁵

The framework put forward in Chapters 4 and 5 is that two factors may impede states and churches in engaging in transitional justice that extends to questions of structural injustice. First, states and churches wish to retain power and authority over their constituent populations and, it is argued, engage in transitional justice largely as an episodic or performative contestation of power, which ultimately returns to state or church. This is particularly evidenced across four dimensions of power experienced by survivors engaging in transitional justice responses to historical abuses. Second, the public use of emotions by state and church leaders, particularly shame, discourages society from full examining and embracing the nature of the challenge to national or religious identity prompted by examination of and reckoning with historical abuses. Rather than embrace a reality that we are both good and abusive people simultaneously, the rhetoric of shame enables society to re-cover and settle historical abuses as an exception or aberration.

¹²¹ Rahel Jaeggi, Frederick Neuhouser and Alan E Smith, *Alienation* (Columbia University Press 2016) 277.

¹²² Lu (n 18) 172.

¹²³ Sharp (n 100) 589.

¹²⁴ Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 *International Journal of Transitional Justice* 199, 207.

¹²⁵ Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2017) 172.

As a result, the transitional justice practices examined in this book reflect *unrepentant* justice.

3.6 POWER AND STRUCTURAL INJUSTICE

Existing structures and practices of power are a key impediment to address historical-structural injustice. To meaningfully address such injustice may involve addressing how power is distributed, practised, and reproduced in states, societies, and churches. For Young, social change occurs through pressure on powerful agents. Efforts to address structural injustice are embedded in contemporary economic and ideological processes, which ‘carry the effects of past assumptions, decisions and interests with them’ inevitably supporting or constraining the actions and aspirations of individuals and groups ‘even as we try to transform them.’¹²⁶ Young argues that ‘[s]ocial change requires first taking special efforts to make a break in [structural] processes, by engaging in public discussions that reflect on their workings, publicizing the harms that come to persons who are disadvantaged by them, and criticizing powerful agents who encourage the injustices or at least allow them to happen’.¹²⁷ Young notes four typical techniques used to deny the need to address structural injustice: the first is *reification*, or the pretence that the processes that create injustice are inevitable and unchangeable, like natural forces that cannot be otherwise. A second strategy denies connection between the individual/corporation/church/state and the broader structural injustice. A third strategy denies capacity to respond to all global or structural problems and that immediate problems deserve primacy. A final strategy suggests rather than having no connection, the actor has no responsibility to address structural injustice.¹²⁸ For Zheng, by reflecting on the ‘the specific forms of power, capital, or demands to which one is entitled in the relationship through that role, one can carve out a range of potential boundary-pushing actions’.¹²⁹ Balint et al concur: ‘The nature and power of structural injustices is traceable to the way in which they become significantly naturalised over time so that populations commonly perceive their manifestations in entrenched inequalities persistently suffered by particular groups as taken for granted’.¹³⁰ Similarly, Powers and

¹²⁶ Zheng (n 48) 876; Young, *Responsibility for Justice* (n 16) 55.

¹²⁷ Young, *Responsibility for Justice* (n 16) 150.

¹²⁸ *ibid* 154–70.

¹²⁹ Zheng (n 48) 880.

¹³⁰ Balint and others (n 96) 14.

Faden highlight the role of power in maintaining and resisting change to structural injustice:

These injustices take the form of unfair patterns of advantage and unfair relations of power, including subordination, exploitation, and social exclusion, as well as human rights violations and deprivations in well-being that contribute to and grow out of unjust social structural conditions. In our theory, human rights violations, disadvantage, and unfair power relations interact and are mutually reinforcing. They are both cause and effect of each other. Together, they are the hallmark of serious structural injustices that typically implicate multiple institutions and agents having differing degrees of culpability for the wrong that results.¹³¹

In addressing structural injustice, transitional or transformative justice must go beyond legalistic or technocratic claims to 'solve' the problem but rather seek to contribute to changing national, religious, or social identity and consciousness, to incorporate awareness and acceptance of responsibility for historical abuses through reckoning with and engaging in the redistribution of power. Vasuki Nesiiah argues that there is a 'crisis of legitimacy and effectiveness' in transitional justice due to 'the failure to open up the hierarchies of power to accountability' and because transitional justice processes have too often 'left the structures of impunity intact'.¹³² However, others are sceptical about transitional justice's ability to address power structures or structural injustice: 'in all likelihood there will always be hierarchies of power and structures of domination left intact even following a robust, progressive and longer-term approach to transitional justice. This is especially true if one takes into account more subtle forms of violence such as structural violence, whose minimisation – one cannot speak of elimination even in comparatively peaceful consolidated democracies – is the work of generations. While unintentional, there is therefore a risk that the more critical voices emphasise a matrix of power and domination left untouched by transitional justice, the less legitimate the enterprise may appear. In finding transitional justice wanting, some may come to see it as worthless. This points to the need for humility and expectations management on the part of critical theorists'.¹³³ Addressing power structures may therefore call for not only strategies aimed directly at power distribution and practices but also setting longer-term expectations for such fundamental social change.

¹³¹ Powers and Faden (n 13) 1.

¹³² Nesiiah (n 98) 50.

¹³³ Sharp (n 100) 587.

3.7 EMOTIONS AND STRUCTURAL INJUSTICE

A second neglected feature of addressing structural injustice is the role of emotions. Current approaches to addressing historical abuses, as will be discussed in Part II of the book, rely on a set of institutional practices familiar to transitional justice: investigations, accountability, reparation, apology, reconciliation, and guarantees of non-repetition. Within these institutional contexts, victim-survivor testimony and participation form a key part of legitimating and constructing the processes of dealing with the past. In doing so, these institutional processes often engage the emotions of victim-survivors, perpetrators, and contemporary society, as well as engaging in legal fact-finding or political decision-making. To date, the role of emotions in transitional justice has been largely neglected, and not integrated with thinking on emotions, power, and injustice elsewhere. For instance, Judith Shklar insists that victimhood 'has an irreducibly subjective component that the normal model of justice cannot easily absorb'.¹³⁴ David Welch similarly notes an experience of injustice provokes a significant emotional response that amplifies and radicalises the demands for a response to a perceived injustice.¹³⁵ This focus on the lived, emotional experience of victim-survivors is critical. If not, Lu notes: 'the ideological instrumentalisation of victimhood may have little to do with acknowledging or meeting the needs and concerns of actual individuals who have suffered direct pain, injury, loss, or destruction from the violence'.¹³⁶

There is some limited consideration of emotion in structural injustice literature. Structural justice must have an emotional and affective dimension. Beausoleil notes: 'Listening to the issue of inequality is not simply a question of comprehension but one of connecting with and being moved by what one comes to see'.¹³⁷ For Young, examining structural injustice in a manner that addresses only material conditions of inequality in context is inadequate.¹³⁸ In contrast, Nicholas Smyth critiques existing accounts of structural injustice, particularly Iris Young's, because the 'social connection model is far less realistic and socially effective than it aims to be. This is because the model systematically neglects the key role played by the emotions in human moral

¹³⁴ Judith N Shklar, *The Faces of Injustice* (Yale University Press 1990) 37.

¹³⁵ Lu (n 18) 66; David A Welch, *Justice and the Genesis of War* (Cambridge University Press 1993) 19.

¹³⁶ Lu (n 18) 77.

¹³⁷ Beausoleil (n 59) 124.

¹³⁸ Maboloc (n 101) 1191.

life'.¹³⁹ Smyth notes: 'moral life in all known human cultures is pervasively regulated by backwards-looking emotional appraisals of behavior; for example, shame, guilt, pride and admiration'. Smyth notes Young's account of reasons given as to why individuals may resist responsibility for structural injustice and asks: 'why do agents typically perform these defensive maneuvers? The answer is clear enough: for the same reason that anyone performs any such maneuver, namely, to suppress negative emotional responses. To banish them, if not from the mind entirely, then at least from immediate consciousness. In other words, such responses are defense mechanisms against negative self-directed moral emotions such as shame or guilt'.¹⁴⁰ Smyth concludes: 'it is unrealistic to expect that the deployment of the social connection model will not provoke the very emotions it seeks to avoid or move past'. He notes: 'Our task, going forward, is to develop a theory of structural injustice that respects the critical role played by the moral emotions in human social life'.¹⁴¹ Chapter 5 will examine the role of emotions in addressing historical-structural injustices.

3.8 CONCLUSION

A state or church that does not address its own legacy of historical-structural injustice is an illegitimate and undesirable endpoint for any form of transitional justice. Young states: 'If we do not face the facts of historic injustice, we may be haunted by victims' ghosts and destined to repeat the perpetrators' wrongs'.¹⁴² To address historical-structural injustice requires both specific initiatives and an inter-generational commitment to address inter-generational legacies of harm that address both the ideas and material consequences that constitute historical-structural injustices. As Miller describes: 'Inescapably, pasts of settler-colonialism, slavery, apartheid, and genocide inform the present. What remains unsettled is whether those pasts constitute completed events, ongoing legacies, or continuous presents'.¹⁴³

This chapter has demonstrated how existing accounts of structural injustice, particularly historical-structural injustice, can be combined with existing, interactional conceptions of justice familiar to transitional justice institutions, such as investigations, accountability, reparations, and apology. This

¹³⁹ Nicholas Smyth, 'Structural Injustice and the Emotions' (2021) 27 *Res Publica* 577.

¹⁴⁰ *ibid* 584.

¹⁴¹ *ibid* 588.

¹⁴² Young, *Responsibility for Justice* (n 16) 172.

¹⁴³ Miller (n 63) 654.

combined conception of justice provides the basis for assessing how societies and churches address their responsibility for harms and wrongs done centuries ago, and reproduced in discrimination, wrongs, and harms in subsequent generations, to present day.

This chapter has highlighted the current material needs of victim-survivors alive today and those who are the descendants of groups that have been subjected to historical abuses. Across each of the contexts studied, historical-structural injustice produces material consequences and fresh injustices in contemporary societies. The emergence of the Black Lives Matter movement in the United States, and Rhodes Must Fall in the United Kingdom, illustrates how victim-survivors, advocates, and activists seek to demonstrate the connection between violent and unequal pasts and the present. Different explanations of history are used to justify or criticise present distributions of power, resources and political, moral, and religious legitimacy.

Part II of the book will explore the potential for transitional justice mechanisms to address structural injustice. In doing so, it will explore the extent to which these mechanisms engage with questions of power and emotion as key neglected elements of structural injustice and as key sites used for resisting the profound social change required to achieve fundamental change required for transformative and structural justice. Addressing structural injustice as part of a response to historical abuses risks over burdening already imperfect institutions and practices. Instead it should encourage humbler expectations of what can be achieved through short- or medium-term legal and bureaucratic processes. Responding to widespread or systemic violence of historical abuses should be understood as an inter-generational process, especially where the violence itself is of an inter-generational character. The profound nature of the historical abuses discussed in this book warrants an expectation that it will take an equally profound change to respond meaningfully to them.