
Transitional Justice, Interdisciplinarity and the State of the ‘Field’ or ‘Non-Field’

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Abstract¹

Transitional justice appears to be an established field of scholarship connected to a field of practice on how to deal with past human rights abuses in societies in transition. The original focus of transitional justice discourse was that human rights law requires accountability in transitions, rooted in the discipline of law. Over time, this focus has been expanded to include a much broader range of mechanisms, goals and inquiries across a range of disciplines. In order to probe the current state of the field, this article argues against the current conception of transitional justice as a praxis-based interdisciplinary field. It suggests that there is a hidden politics to how transitional justice has been constructed as an interdisciplinary field that obscures tensions between the range of practices and goals that it now incorporates.

Introduction

This article is a response to the opening editorial in the first issue of the *International Journal of Transitional Justice* (IJTJ), which justifies the need for a specialist interdisciplinary journal on three main grounds:

- Transitional justice is an ‘evolving field’ of study that originated around a set of legal inquiries and alternative justice mechanisms but is rapidly burgeoning to address a broader set of issues, and thus merits dedicated attention
- There is a need to integrate the perspectives of the mix of activists, policy makers and academics involved in the transitional justice field (which is linked to a problematic divide between developed and developing countries)
- An interdisciplinary journal could assist in developing a scholarly inquiry that previously was being done by a number of different disciplines with little dialogue between them²

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² ‘Editorial Note,’ *International Journal of Transitional Justice* 1(1) (2007): 1–5.

This article seeks to examine the contemporary nature of the ‘field’ of transitional justice by arguing three converse propositions:

- Transitional justice does not constitute a coherent ‘field’ but rather is a label or cloak that aims to rationalize a set of diverse bargains in relation to the past as an integrated endeavour, so as to obscure the quite different normative, moral and political implications of the bargains.
- Transitional justice does not comprise a field of practice and a field of inquiry that need to be brought together in pursuit of coherent development. Rather, it is only by bringing practice and interdisciplinary legal analysis together that transitional justice can be presented as a coherent field.
- The call for interdisciplinarity is not a romantic and neutral call to transcend disciplinary constraints, but rather is part of the legitimating discourse of transitional justice as a field and an attempt by nonlaw disciplines to colonize the field (or alternatively ‘decolonize’ it from law’s traditional hold).

I make these converse arguments not to undermine the journal’s rationale,³ but rather to engage in a Socratic interrogation of the extent to which transitional justice constitutes a coherent field. I also seek to examine the relationship between a field of practice and a field of scholarship, and why the field is seen as necessarily interdisciplinary. The time seems right for this inquiry because, as the journal reaches its second anniversary, a growing unease is detectable among practitioners and in scholarship over the future direction of transitional justice. This unease centres on what the field’s goals are and should be, and whether and when the practice is ‘good’ (an extension of human rights discourse, or necessary to democratization or peace), ‘bad’ (imperialist, hegemonic, impunity serving or promoting a dangerous legal exceptionalism) or a value-neutral tool with which both ‘good’ and ‘bad’ goals can be pursued.⁴

In conclusion, I argue that the antithesis to IJTJ’s opening editorial exposes a politics to contemporary struggles over whether and how to conceive of transitional justice as a field, and that this politics is that of the metaconflict over the nature, direction, goals and ownership of transition itself. Awareness of this metaconflict assists in responding to current unease about the direction and significance of transitional justice as a concept or field, and is essential to holding on to or even reclaiming a meaningful ‘justice’ agenda in transition.

Transitional Justice: The Incredibly Fast Field

The opening editorial of IJTJ captures the sense of a burgeoning interdisciplinary scholarship constituting unproblematically a distinct field of ‘transitional justice.’ ‘Field’ here is used to connote ‘a sphere of knowledge, interest and activity, held together by distinctive claims for legitimacy’ as distinct from ‘discipline,’ which implies a body of knowledge with its ‘own background of education,

³ The author is in fact a member of the editorial board of the IJTJ.

⁴ This tension is alluded to in IJTJ’s first editorial note (*supra* n 2), which points out that universal justice mechanisms for mass atrocity are perceived by some as a new form of imperialism.

training, procedures, methods and content areas.⁵ Transitional justice as a field is understood to comprise both a sphere of practice or activity and a sphere of academic knowledge, with a praxis relationship between the two. While definitions of transitional justice vary, all view transitional justice as the attempt to deal with past violence in societies undergoing or attempting some form of political transition.

Particularly striking about the rise of transitional justice as a field is the speed with which it has been accepted as a distinct field and subsequently grown and entered a phase of disquiet. The term 'transitional justice' only came to be used in the mid-1990s, and it can be argued that transitional justice was only consolidated as an apparent 'field' sometime after 2000. Yet by 2009, we have a broad, multidisciplinary field that subjects its own origins, assumptions and political significance to radical critique. Unlike other fields of study, which have taken decades to reach this point, transitional justice can be argued to have experienced a dramatically compressed trajectory of fieldhood. A few landmark dates drawn from both practice and scholarship are outlined below and illustrate the speed of the trajectory; however, a detailed sociology of the term is beyond the scope of this article.⁶

The term 'transitional justice' as we understand and use it today emerged with reference to the transitions from authoritarian rule in Eastern Europe and Central America in the late 1980s and early 1990s.⁷ The term – originally not used – came to summarize debates over how successor regimes should deal with the human rights abuses of their authoritarian predecessors. As Paige Arthur writes, the distinctiveness of these debates from straightforward human rights was the addition of the 'normative aim of facilitating a transition to democracy.'⁸ The first academic (legal) pieces to argue clearly the need for postconflict accountability emerged in the context of the ongoing fight against impunity in Central and South America in the 1990s.⁹ The term 'transitional justice' was used in 1995 by Neil Kritz, who published a three-volume study entitled *Transitional Justice: How Emerging*

⁵ On field/discipline distinction, see, for example, Kaarle Nordenstreng, 'Discipline or Field?: Soul-Searching in Communication Research,' *Nordicom Review* 28 (2007): 211–222. On the concept of discipline, see, Guy Berger, Asa Briggs and Guy Michaud, *Interdisciplinarity: Problems of Teaching and Research in Universities* (Paris: Organisation for Economic Co-operation and Development, 1972).

⁶ For such a sociology, see Paige Arthur's impressive account of the origins of the discourse. Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice,' *Human Rights Quarterly* (forthcoming). See also, Bronwyn Anne Leebaw, 'The Irreconcilable Goals of Transitional Justice,' *Human Rights Quarterly* 30(1) (2008): 95–118.

⁷ See, Fionnuala Ní Aoláin and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies,' *Human Rights Quarterly* 27(1) (2005): 172–213; Arthur, supra n 6; Leebaw, supra n 6. However, some authors have argued that the term has more historic roots. See, for example, Ruti G. Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Law Journal* 16 (2003): 69–94 (tracing the field's origins to Nuremberg); Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004) (taking a much longer historical view).

⁸ Arthur, supra n 6.

⁹ Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' *Yale Law Journal* 100(8) (1991): 2537–2615; Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,' *California Law Review* 78(2) (1990): 449–513. See also Orentlicher's retrospective article clarifying the context of her 1991 piece being the anti-impunity struggles in Latin America, in which she acknowledges a need for differentiated justice. Diane Orentlicher, "'Settling Accounts" Revisited: Reconciling Global Norms with Local Agency,' *International Journal of Transitional Justice* 1(1) (2007): 10–22.

Democracies Reckon with Former Regimes.¹⁰ This work mapped out a coherent area of study of mechanisms still considered central to transitional justice inquiries today, such as commissions of inquiry, trials, vetting and restitution or reparation.

Throughout the 1990s, the discourse broadened to include a range of legal regimes and mechanisms. The *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993, and the International Criminal Tribunal for Rwanda (ICTR) was established in 1994. The landmark establishment of the South African Truth and Reconciliation Commission (TRC) in 1995 pushed to centre stage consideration of alternative legal mechanisms for dealing with the past.¹¹ Humanitarian law's requirements as regards postconflict accountability also began to be explored and developed. In 1995, for example, the International Committee of the Red Cross produced an explanatory interpretation of the amnesty provision of Article 6(5) of Protocol II to the 1949 Geneva Conventions, interpreting its broad wording as implicitly limited to the release of those detained for having participated in hostilities rather than those who violated international humanitarian law.¹² In 1998, the Rome Statute established the International Criminal Court (ICC), which, although originally conceived as a response to interstate conflict, was eventually established against the backdrop of widespread intrastate conflict and associated transitional justice developments. This came to bear on drafting debates, most overtly through consideration of whether political overrides to the Court's jurisdiction should be provided to deal with the dilemmas of societies transitioning from authoritarianism and conflict.

Despite these developments a self-conscious field of practice and study consistently termed 'transitional justice' only really came into being around 2000 and after. By this point, the term covered a much broader terrain than transitions to democracy, addressing transitions in a range of societies, most notably those attempting negotiated settlement in protracted social conflicts.¹³

In 2000, Ruti Teitel published *Transitional Justice*, which uses 'transitional justice' as a broader label to describe 'the conception of justice in periods of political transition.' This conception is characterized by legal responses to the wrongdoings of repressive predecessor regimes.¹⁴ Around the same time, 'transitional justice'

¹⁰ Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: United States Institute of Peace Press, 1995).

¹¹ See Mark Freeman, who talks about the South African TRC in terms of a paradigm-defining truth commission, with the history of truth commissions divided into 'before' and 'after' South Africa. Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006). An earlier article by Priscilla Hayner reveals a broader practice of truth commissions: Priscilla Hayner, 'Fifteen Truth Commissions—1974 to 1994: A Comparative Study,' *Human Rights Quarterly* 16(4) (1994): 597–655.

¹² See the letter from the International Committee of the Red Cross cited in Naomi Roht-Arriaza, 'Combating Impunity: Some Thoughts on the Way Forward,' *Law and Contemporary Problems* 59(4) (1996): 93–102.

¹³ Ní Aoláin and Campbell, *supra* n 7.

¹⁴ Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 3. See also, Teitel, *supra* n 7.

became a label under which nongovernmental organizations (NGOs) worked and university courses, centres and institutes were established.¹⁵ The founding meeting of the main transitional justice NGO, the International Center for Transitional Justice (ICTJ), took place in 2000. In part formed with the aim of disseminating the South African experience, the organization opened its doors in 2001.¹⁶ The year 2000 also saw the UN first pin its own flag to the normative mast, in particular through secret guidelines to its negotiators and through its dissent to the amnesty provision of the Lomé Peace Accord for Sierra Leone.¹⁷ By 2004, UN Secretary-General Kofi Annan publicly formalized the UN's normative commitment to transitional justice in his seminal report on the topic.¹⁸ He defined transitional justice as comprising

the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.¹⁹

The report reflects what was arguably a Kuhnian 'paradigm shift' with regard to transitional justice. Once assumed to stand at odds with negotiated transitions by undermining efforts to reach elite compromises that would 'stop the killing' by prioritizing accountability over reconciliation, transitional justice was now adopted enthusiastically by policy makers and viewed as necessary to sustaining ceasefires and achieving a successful transition from conflict.²⁰ The paradigm shift involved a more explicit recognition of transitional justice as a tool for a range of political and social goals beyond accountability.

The Broadening of the 'Field'

As the focus of transitional justice expanded from human rights accountability in democratic transitions to a broader conception of transition involving a range of legal regimes and mechanisms, as well as a complex set of goals beyond those of 'accountability' and 'democratization,' the field came increasingly to involve disciplines other than law. Today, transitional justice scholarship is an ever-increasing set of inquiries that take place across a range of disciplines, including anthropology, cultural studies, development studies, economics, education, ethics, history, philosophy, political science, psychology, sociology and theology.

This scholarship has retained a central focus on the mechanisms used by societies to deal with past human rights violations and abuses, comparative across

¹⁵ These include the Project for Justice in Times of Transition at Harvard University, the Transitional Justice Project at the Notre Dame School of Law and the Transitional Justice Institute at the University of Ulster.

¹⁶ For a history of the International Center for Transitional Justice, see, <http://www.ictj.org/en/about/mission/>.

¹⁷ For an account of the disclaimer, see, *Seventh Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone*, UN Doc. S/1999/836 (30 July 1999), para. 7.

¹⁸ *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (3 August 2004).

¹⁹ *Ibid.*, para. 8.

²⁰ Leebaw, supra n 6.

mechanism and across conflict type. Given this focus, legal scholarship has maintained a hold on examining doctrinal issues with reference to international criminal law, human rights law, humanitarian law and domestic challenges to amnesty.²¹ However, legal inquiries have themselves become somewhat more interdisciplinary, with sociolegal studies addressing: how the concept of transitional justice should be conceived with relation to the role of law during the conflict; the need for institutional reform and dealing with the past;²² when and how societies or negotiators choose particular mechanisms;²³ the respective benefits of 'top-down' and 'bottom-up' approaches to the design of transitional justice; and the respective merits of local versus national and international processes.²⁴

The field has also broadened and 'academicized' beyond these 'direct' transitional justice inquiries and beyond law in three main ways, all of which question to different degrees whether transitional justice is an unmitigated 'good.'

Does transitional justice work? A body of research is emerging on whether transitional justice works and whether it delivers on the political goals to which it lays claim. While this research draws heavily on the social sciences, it has incorporated a range of disciplines and thus has been central to the idea that transitional justice constitutes an interdisciplinary field.

The research has two main thrusts. The first is conceptual, involving the attempt to conceptualize the link between transitional justice and a range of other goals, such as the rule of law, transitional justice and democratization, transitional justice and power sharing, transitional justice and reconciliation, transitional justice and peace and transitional justice and disarmament, demobilization and reintegration.²⁵ Research in this area has drawn in disciplines closely associated with the asserted 'goal'; for example, theology or psychology in discussions of reconciliation, political science in discussions of democratization or power sharing and history in discussions of truth telling and historical inquiry.

²¹ A broad sampling of literature could be given, but for examples of innovative argumentation using diverse legal sources, see, for example, Freeman, *supra* n 11; Ronald C. Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' *Virginia Journal of International Law* 43 (2002): 173–247.

²² See, for example, Christine Bell, Colm Campbell and Fionnuala Ni Aoláin, 'Justice Discourses in Transition,' *Social and Legal Studies* 13(3) (2004): 305–328; Teitel, *supra* n 7.

²³ See, for example, Jack Synder and Leslie Vinjamuri, 'Trials and Errors: Principles and Pragmatism in Strategies of International Justice,' *International Security* 28(3) (2003): 5–44.

²⁴ See, for example, Kieran McEvoy and Laura McGregor, eds. *Transitional Justice from Below* (Oxford: Hart Publishing, 2008); Laura Arriaza and Naomi Roht-Arriaza, 'Social Reconstruction as a Local Process,' *International Journal of Transitional Justice* 2(2) (2008): 157–172.

²⁵ See, for example, Mark Arenhovel, 'Democratization and Transitional Justice,' *Democratization* 15(3) (2008): 570–587; Jeremy I. Levitt, 'Illegal Peace? An Inquiry into the Legality of Power-Sharing with Warlords and Rebels in Africa,' *Michigan Journal of International Law* 27(2) (2006): 495–578; David Bloomfield, Teresa Barnes and Luc Huyse, *Reconciliation after Violent Conflict* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003); Centre for Humanitarian Dialogue, *Negotiating Peace* publications, available at <http://www.hdcentre.org/projects/justice-peacemaking>; Alexander Mayer-Riech and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council/International Center for Transitional Justice, 2007).

The second thrust of research is empirical: a rush to 'hard' data involving a range of social science research methodologies. This research aims to determine how we can 'measure' whether transitional justice delivers on the goals to which it lays claim.²⁶ Emerging empirical work attempts to study the phenomena of transitional justice through qualitative research methods while also increasingly trying to quantify the relationship between transitional justice and its asserted goals.²⁷ This empirical trend derives from two key sources, the first of which is donor pressure. A diverse range of transitional justice mechanisms has existed for some time and received extensive funding, which is producing pressure for evaluation.²⁸ A second pressure is that of to a more general disenchantment with transitions and the apparent failure of either peace or democracy to take hold despite elaborate settlements and extensive outside support.²⁹ 'Hard' data has high currency with policy makers and funders.

Gender dynamics of transitional justice. A growing body of research addresses the gender dynamics of transitional justice.³⁰ This research both questions and critiques law from a necessarily interdisciplinary perspective. Are particular transitional justice mechanisms capable of recognizing gender-based harms and do they include procedures adequate to protecting victims of sexual violence? Is the typical focus on civil and political violations capable of addressing the concerns of women? What would women-centred reparations look like? This research often has its own praxis dimension, rooted in feminist analysis generally and linked to

²⁶ See, for example, Phuong Pham and Patrick Vinck, 'Empirical Research and the Development and Assessment of Transitional Justice Mechanisms,' *International Journal of Transitional Justice* 1(2) (2007): 231–248; Oskar N.T. Thoms, James Ron and Roland Paris, *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners* (Ottawa: Centre for International Policy Studies, University of Ottawa, 2008).

²⁷ See, for example, the Transitional Justice Data Base project at the University of Wisconsin–Madison, <http://www.polisci.wisc.edu/tjdb/>, and the papers produced from it, including, Tricia Olsen, Leigh Payne and Andrew Reiter, 'Demand for Justice: Domestic Support for Transitional Justice Mechanisms' (paper presented at the International Studies Association's 49th Annual Convention, 'Bridging Multiple Divides,' San Francisco, CA, 26 March 2008). See also, Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America,' *Journal of Peace Research* 44(4) (2007): 427–445, and related data sets; Leslie Vinjamuri and Aaron Boesenecker, *Peace Agreements and Accountability since 1980* (Geneva: Centre for Humanitarian Dialogue, 2007).

²⁸ Thoms, Ron and Paris, supra n 26.

²⁹ This argument has been made with reference both to transitions to democracy and to peace processes. See, for example, Fareed Zakaria, 'The Rise of Illiberal Democracy,' *Foreign Affairs* 76(6) (1997): 22–43. See also, Paul Collier, V.L. Elliott, Håvard Hegre, Anke Hoefler, Marta Reynal-Querol and Nicholas Sambanis, *Breaking the Conflict Trap: Civil War and Development Policy* (Washington, DC: World Bank/Oxford University Press, 2003), suggesting that over 50 percent of civil wars reignite within a period of five years of their ostensible settlement, as well as subsequent UN documentation that recites this figure, including, *A More Secure World: Our Shared Responsibility, Report of the High Level Panel on Threats, Challenges and Change*, UN Doc. A/59/565 (2 December 2004). Compare these works to, Astri Suhrke and Ingrid Samset, 'What's in a Figure? Estimating Recurrence of Civil War,' *International Peacekeeping* 14(2) (2007): 195–203, arguing that Collier et al.'s figure is ambiguous and distorted.

³⁰ See articles from the 2004 ICTJ Bellagio Workshop on Gender and Transitional Justice in *Colombia Journal of Gender and Law* 15 (2006); the special issue on gender and transitional justice, *International Journal of Transitional Justice* 1(3) (2007); and Ruth Rubio-Marin, ed., *What Happened to the Women? Gender and Reparations for Human Rights Violations* (New York: Social Science Research Council, 2006).

campaigns for redefinition of harms or reparations and for better processes for the inclusion of women.³¹

In addition, a theoretical, critical strand to this research examines whether transitional justice as a concept is capable of accommodating the demands and visions of women as regards either justice or the nature and outcomes of transition.³² Research is also beginning to address other marginalized groups, such as children³³ and ‘non-conflict’ minorities, that is, minorities who were not protagonists in violent conflict and who may find that they lose out in institutions designed primarily to accommodate those groups that have waged war.³⁴

Critical examinations of transitional justice. The third strand of research similarly critiques the concept of transitional justice, questioning its end goals. This critical literature and the unease it exhibits are linked to unease about the imperial dimension of the rise of international criminal law and the ways in which high-level policy makers in international organizations and governments have adopted the discourse of transitional justice in interventions relating to goals such as addressing ‘failed statehood,’ and security sector reform.

Transitional justice is critiqued as ‘ordinary justice,’³⁵ as ‘steady state’ international justice enabling the war on terror,³⁶ as ‘exceptional justice’ with disturbing consequences for justice more generally³⁷ and as ‘liberalising’ justice with colonial dimensions.³⁸ ‘Critical’ here means critical of the concept, as opposed to merely critical of dimensions of the field’s operation. These criticisms are diverse and emanate from quite different ideologies and disciplines. Nevertheless, all share the idea that transitional justice is in some sense dangerous or duplicitous in claiming to be a distinct brand of justice that responds to a distinct set of dilemmas. Many

³¹ See, for example, Fionnuala Ní Aoláin and Eilish Rooney, ‘Underenforcement and Intersectionality: Gendered Aspects of Transition for Women,’ *International Journal of Transitional Justice* 1(3) (2007): 338–354; Sanam Naraghi Anderlini, Camille Pampell Conaway and Lisa Kays, ‘Transitional Justice and Reconciliation,’ in *Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action* (London: International Alert/Women Waging Peace, 2007).

³² See documentation of this discussion in Christine Bell and Catherine O’Rourke, ‘Does Feminism Need a Theory of Transitional Justice: An Introductory Essay,’ *International Journal of Transitional Justice* 1(1) (2007): 23–44.

³³ See the UN Children’s Fund (UNICEF) project and publications on transitional justice and children, http://www.unicef-irc.org/cgi-bin/unicef/research/main.sql?file=scheda_projects.sql&key=170.

³⁴ See the research of Minority Rights Group International on minorities and conflict, <http://www.minorityrights.org/6857/thematic-focus/conflict.html>.

³⁵ Eric A. Posner and Adrian Vermuele, ‘Transitional Justice as Ordinary Justice,’ *Harvard Law Review* 117 (2004): 761–825.

³⁶ Teitel, *supra* n 7.

³⁷ Christine Bell, Colm Campbell and Fionnuala Ní Aoláin, ‘The Battle for Transitional Justice: Hegemony, Iraq and International Law,’ in *Judges, Transition and Human Rights Cultures: Essays in Honour of Stephen Livingstone*, ed. Kieran McEvoy, John Morrison and Gordon Anthony (Oxford: Oxford University Press, 2007).

³⁸ Catherine Turner, ‘Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law,’ *International Journal of Transitional Justice* 2(2) (2008): 126–151; Chandra Lekha Sriram, ‘Justice as Peace: Liberal Peacebuilding and Strategies of Transitional Justice,’ *Global Society* 21(4) (2007): 579–591.

strands of such critical thought suggest that this duplicity enables evil in the guise of 'doing good.'

The Field's Premature Midlife Crisis

Despite the breadth of transitional justice as a field, its incredibly fast trajectory from establishment to critique – arguably taking less than a decade – is startling for its almost nonexistent radical moment. Almost before it founded itself and defended its existence in the face of pragmatists who rejected any justice component to transition, it faced an onslaught of criticism from those who saw disturbing agendas being pursued under cover of a label associated with the 'good' of accountability. Yet, the current 'crisis' in the field can be understood as the coming of age of the field rather than as a result of its incoherence. This crisis constitutes what I will term 'the paradoxical moment of fieldhood,' whereby the symbolic capital of any new field leads to increased claims for inclusion in it, and pressure to reframe the field to include increasingly broad agendas and issues. Although apparently growing the field, this growth also appears to construct the field as 'all things to all people,' opening it up to a critique of the state of the field and questions about its future direction with respect to its original concerns.³⁹

However, the fast rise of transitional justice as a field and the speed with which it has reached its 'paradoxical moment of fieldhood' suggest that the notion of the 'field' of transitional justice is on a typical trajectory from establishment and acceptance to expansion to self-critique. It can be argued that the compression of the field's development reflects the fact that transitional justice is ambiguous in straddling three different conceptions: transitional justice as an ongoing battle against impunity rooted in human rights discourse; a set of conflict resolution techniques related to constitution making; and a tool for international statebuilding in the aftermath of mass atrocity. The ambiguous origins of transitional justice suggest an 'anti-thesis' to IJTJ's opening editorial.

Transitional Justice as 'Non-Field'

An alternative thesis to that of transitional justice as a field is that transitional justice is merely a label that gives apparent coherence to particularized practices of conflict resolution, emanating from diverse contexts and diverse actors with diverse goals, and moreover, a label that simultaneously obscures the quite different political and moral implications of these practices. This is a story of transitional justice as a 'cloak' rather than a 'field,' or of transitional justice as a 'non-field.'

Particularized Bargains on the Past

Transitional justice has developed as a label to describe a range of particularistic bargains aimed at increasing democratization and reducing violence. An

³⁹ Compare, for example, Ellen Messer-Davidow, *Disciplining Feminism: From Social Activism to Academic Discourse* (Durham, NC: Duke University Press, 2002), making this argument with reference to feminism's development as an academic discipline.

examination of these bargains in their particularistic detail illustrates the quite different mechanisms that have emerged in different contexts, and locates the common project of transitional justice not in a common pursuit of justice as accountability but in the common enterprise of finding a mechanism for 'dealing with the past' that will sustain political settlement. Sometimes this requires pursuing accountability, and sometimes it does not. Sometimes the bargain involves a genuine local negotiation, and sometimes it is internationally imposed.

In Central and South America, for example, where impunity was understood as one of the ways in which conflict had been embedded and recycled, combating impunity was viewed as necessary to ending the conflict, and provision for some form of accountability was made part of the negotiation of transition. The level and form of accountability agreed upon were shaped by the balance of power at the time of negotiation. In contrast, in Liberia (1993) and Sierra Leone (1996), broad amnesties were written into the peace settlements, which reflected local and, more pertinently, international acceptance that the conflicts revolved around issues of state failure, competition over resources and the privatization of public power by 'warlords.' Amnesty also implied acceptance that resolving the conflicts required 'public-ization' of power, as all the protagonists were drawn into something resembling a constitutional settlement. The enabling of constitutionalism meant recognizing constitutionally (at least for an initial period) the self-interest of warring factions. Paradoxically, therefore, the same connection between a 'constitutional deal' and the past that propelled measures to combat impunity in Central and South America pointed to a requirement of amnesty in Africa. The advent of the ICC has added a new dimension to this strategy by enabling a 'claw-back' on amnesty where amnestied individuals or groups have returned to fighting.⁴⁰ Partly as a result, the ICC increasingly appears in practice as a regional mechanism for Africa.

Another example is South Africa, where the establishment of the TRC, with its infamous trade-off of 'truth' for 'amnesty,' underwrote a constitutional settlement that was about a trade-off between the old and the new order. The TRC worked to provide a measure of justice sufficient to legitimate the new order, but which would not upset the military and economic status quo – a status quo understood to be vital to nonviolent transition. Justice and reconciliation were to be balanced as both necessary to the stability of any new political order. In Bosnia and Herzegovina, the ICTY, formed during the conflict, was written into the Dayton Peace Agreement in an attempt to give the international community one additional tool for literally 'prosecuting' the unitary state in the face of resistance from the ethnically divided entities also built into Dayton. Again, a particular transitional justice mechanism was produced as part and parcel of the constitutional 'fix' to the conflict more generally. Similarly, in Iraq, the use of 'transitional justice' reflected an attempt to legitimate ongoing prosecution of US war goals after the ceasefire.⁴¹

⁴⁰ Of course, nowhere in international law is this presented as a 'claw-back,' but I would argue that in effect international criminal justice has operated this way.

⁴¹ See, Bell, Campbell and Ní Aoláin, *supra* n 37.

More recent developments see transitional justice discourse used to press western liberal democracies into addressing historic wrongs against indigenous peoples, their former colonies or the descendants of their slaves. This application of transitional justice seems disconnected from either a settled notion of authoritarianism or accepted notions of violent conflict (although ongoing authoritarianism and antidemocratic practices in these contexts, as well as structural violence and conflict, are alleged to require 'transitional justice' solutions). These campaigns have been successful in forcing a modified or quasilegal mechanism drawn from the repertoire of transitional justice mechanisms when two criteria have been satisfied: political pressure requires that the wrong be addressed, and the legal system has had no capacity to respond to the wrong because it had no individual perpetrator, because the wrong done was historic and because the wrong was legal (both under international and domestic law) when perpetrated. Here, too, however, the state's resistance to or acceptance of a transitional justice mechanism is linked to state and popular understandings of how far the foundational constitutional settlement can be reopened in pursuit of greater inclusion.⁴²

These examples can be narrated as part of a field of practice of transitional justice involving a similar range of mechanisms and similar debates. However, the particularism of each constitutional bargain with respect to 'how to deal with the past' has given very different local meanings to what appear to be similar institutional provisions. Rather than constituting a developing and broadening field of activity, this practice can be understood as diverse and stochastic (that is, its development is both a product of predictable patterns and random development),⁴³ permitting different stories to be told about its origins and rationales.

The coexistence of the three stories – transitional justice as human rights, transitional justice as conflict resolution and transitional justice as international intervention – as equally credible accounts of the development of transitional justice, points to an understanding of the term as ambiguous almost from its inception. An alternative story of transitional justice can be told, therefore, in which transitional justice is not a field or practice but a cloak that covers a range of particularized bargains on the past. This cloak has been woven into a superficially coherent whole through processes of international diffusion, similarity in institutional provision and the common language of transitional justice fieldhood itself, but most notably because each particular bargain has needed to articulate a relationship to the accountability standards of international law, to which we now turn.

Practice and Scholarship

The second antithesis to the dominant notion of transitional justice is that it does not comprise a field of practice and a field of inquiry that need to be brought

⁴² See, Anne Orford, 'Commissioning the Truth,' *Columbia Journal of Gender and Law* 15 (2006): 851–882.

⁴³ For example, processes of norm development and diffusion were predictable, but the timing and transitional justice implications of an international court (the ICC) whose origins were independent of the discourse were less predictable.

together in pursuit of coherent development. Rather, it is only by bringing practice and interdisciplinary legal analysis together that transitional justice can be presented as a coherent field.

Fusion of Legal Norm and Narrative

The idea that transitional justice mechanisms constitute a field – both of practice and of intellectual inquiry – came not only from attempts to diffuse particularized bargains on the past and narrate them academically as having something in common but also from the need, increasing over time, to articulate a relationship between particularized practices of conflict resolution and international legal norms. This explains the dominance and continuing hold of law as central to transitional justice discourse. The concept of a ‘field’ of transitional justice only emerged because international legal norms were argued to be relevant to peace-making bargains. The narration of this diverse and particularized set of bargains as lawful or unlawful in terms of international legal standards can be argued to have sown diverse responses to ‘the past’ into a coherent field of transitional justice.

The attempt to find and articulate a common legal framework gave rise to a situation where particularized relationships between dealing with the past and constitutional settlement – the struggle against impunity in South and Central America, the requirements of political transition in Eastern Europe, the link between power sharing and amnesty in Africa and the South African truth-for-amnesty mechanism – were narrated as part of the one phenomenon of how to account for the past and satisfy international legal standards. The narrative of a distinctive ‘transitional’ justice required a common understanding that international legal norms that provide for accountability were relevant. As a range of legal regimes became involved in transitional justice debates, however, the particularized bargains could not easily or without controversy be fitted within any one legal regime. Therefore, narration of the relationship of these bargains to international law required an interdisciplinarity *within* legal discourse that revolved around the ongoing re-narration of which international legal regime applied and what exactly it required in the postconflict context. This narration, in turn, reconfigured the norms into ones capable of being harmonized and of operating to ‘crystallize’⁴⁴ certain broad, legally normative parameters.

What international law specifically permits or requires during transition remains unclear, but two pillars have been established: blanket amnesties covering serious international crimes are not permissible, and some level of (unspecified) amnesty is permissible and even required.⁴⁵ While these pillars cannot be found in any one legal regime, they can be argued to constitute the import of the regimes

⁴⁴ See, *Prosecutor v. Morris Kallon, Brima Bazzy Kamara*, case nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (13 March 2004), para. 72. See also, Diane Orentlicher, *Amicus Curiae Brief Concerning the Amnesty Provided by the Lomé Accord in the Case of the Prosecutor v. Morris Kallon*, SCSL-2003-07 (2003).

⁴⁵ See further, Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008).

when taken in combination.⁴⁶ New transitional justice mechanisms must locate themselves in relation to these pillars to articulate their normative validity. The debate over whether any new mechanism complies with both pillars continues to justify transitional justice as a distinctive field separate from human rights law, humanitarian law and international criminal law.

Transitional Justice as Interdisciplinary

The third antithesis is that the interdisciplinarity of transitional justice, while apparently 'necessary,' 'inevitable' and 'good,' signifies an attempt to legitimate transitional justice as a field and to attack the perceived dominance of the discipline of law.

Transitional Justice as 'Naturally' Interdisciplinary

The fusion of particularistic practice and universal legal norm has led to pressure for interdisciplinarity as 'necessary' or even 'inevitable.'⁴⁷ This pressure involves the argument that legal studies have to be approached from a position of *internal* interdisciplinarity, whereby law is open to insights from other disciplines through sociolegal and criminological approaches to law. It also involves the argument that more holistic *external* interdisciplinary inquiry is necessary to understanding transitional justice in all its infinite variety.

Interdisciplinarity as Field Legitimation and Colonization

Studies of interdisciplinarity often distinguish among 'multidisciplinarity,' where different disciplines are juxtaposed but with little integration between them; 'interdisciplinarity,' which captures the idea of interchange between disciplines, 'ranging from simple communication of ideas to the multiple integration of organizing concepts, methodology, procedures, epistemology, terminology, data and organization of research and education in a fairly large field'; and trans-, post- or anti-disciplinarity, which is the perhaps utopian goal of establishing a common system of axioms for a set of disciplines.⁴⁸ Three main justifications are given for interdisciplinary fields of study.⁴⁹ The first lies in the idea of a 'unity of knowledge' that attempts to connect disciplinary insight. The second lies in interdisciplinarity's appeal as a common sense response to the way phenomena arise in 'the real world' – as complex problems that require a range of responses. The third justification lies in the need to respond to professional requirements for interdisciplinary training.

⁴⁶ Orentlicher, *supra* n 44.

⁴⁷ See, Julie Thompson Klein, *Interdisciplinarity: History, Theory, and Practice* (Detroit, MI: Wayne State University Press, 1990), 44–45, noting that interdisciplinarity is usually presented as 'necessary' or 'inevitable.'

⁴⁸ Berger, Briggs and Michaud, *supra* n 5 at 25–26. See also, Klein, *supra* n 47 at 56–63 (and 63–73 for further discussion on the relationship between interdisciplinarity and transdisciplinarity).

⁴⁹ See, Klein, *supra* n 47.

All three justifications appear to apply to the field of transitional justice. A holistic interdisciplinary approach would seem important to studying a complex phenomenon. Transitional justice responds to real world dilemmas of how to reconcile legal norms that demand accountability with political goals such as conflict resolution, truth recovery, healing for victims and reconciliation. Finally, because practitioners are employed to deal with transitional justice issues and develop programmes, a range of skills are sought, so psychologists must know something of the legal framework, lawyers must know something of conflict resolution and all must know something of the limits of historical 'truth.'

Choices of discipline and interdisciplinarity, however, have also been alleged to have a deeper politics, and this theme is particularly dominant in discussions of interdisciplinarity in the field of law. The concept of a discipline, as its etymology suggests, stands as an attempt to order and to impose an authority and norms of thought as organizational devices through discrete methodologies and inquiries.⁵⁰ Disciplines, therefore, assume as much as deny a unity of knowledge that exists beyond the discipline, but view that unity as impenetrable if considered as a whole. As Jack Balkin asserts, 'The authority of discipline is not the enemy of reason. It is its fountainhead.'⁵¹

New fields that are considered interdisciplinary, transdisciplinary and even 'antidisciplinary' are claimed to use this interdisciplinary language in a similarly constructive project. Calls for these forms of interdisciplinarity are often part of the legitimating discourse of fieldhood, as the need to take on disciplinary divisions can often be a key justification for why a new field is necessary. For example, in the area of cultural studies, Karl Maton has argued that as regards the 'internal language of legitimation,' the breaking down of interdisciplinary boundaries is part of the field's substantive project, which is why 'blurring, crossing and transgressing established borders or boundaries (intellectual, social, physical, etc.) feature regularly within its legitimating discourse.'⁵² Moreover, the creation of an 'undisciplined' cultural studies enables the definition of culture and how it should be studied to be either 'explicitly eschewed or left open.'⁵³

A second challenge is made to calls for interdisciplinarity in the legal context. Legal scholarship on interdisciplinarity and the discipline of law has suggested that while interdisciplinarity appeals to the idea of a more complete and even transcendent discourse, in practice it often constitutes an attempt by one discipline to penetrate another.⁵⁴ Balkin goes as far as to argue that interdisciplinarity

is an attempt by disciplines to expand their empires, to colonize and take over other disciplines by extending their sphere of influence over them. If this colonization is successful it will not even be understood as colonization. It will be seen as part of the

⁵⁰ Berger, Briggs and Michaud, *supra* n 5 at 25; Jack M. Balkin, 'Interdisciplinarity as Colonization,' *Washington and Lee Law Review* 53 (1996): 949–970.

⁵¹ Balkin, *ibid.*, 955.

⁵² Karl Maton, 'Languages of Legitimation: The Structuring Significance for Intellectual Fields of Strategic Knowledge Claims,' *British Journal of Sociology of Education* 21(2) (2000): 153.

⁵³ *Ibid.*

⁵⁴ Balkin, *supra* n 50.

general methodology of the colonized discipline. Alternatively, the colonized discipline will simply disappear, absorbed into the conquering discipline or reconceptualised as a subspeciality.⁵⁵

For Balkin, interdisciplinarity has no romantic connotations but is merely the result of an unsuccessful attempt at colonization that has left behind a disciplinary mix.

Arguments that transitional justice is an interdisciplinary field can be considered to have both a legitimating and a decolonizing role with respect to the 'field.'

Interdisciplinarity as a Legitimizing Discourse

If we understand transitional justice more as a cloak than a field, and a cloak that at once seeks to cover and to rationalize a diverse set of practices with quite different justice and political implications, then assertions of interdisciplinarity are revealed to be part of the project of labeling transitional justice as a distinctive field. Transitional justice is legitimated as a field through the assertion that legal discourse must be more open to other disciplinary insights (termed here 'internal interdisciplinarity') and through arguments that law may not be the primary discipline in the field at all (termed here 'external interdisciplinarity').

Internal Interdisciplinarity: Regime Conflict and Legal Pluralism

Transitional justice is legitimated as a field through the recognition that transitions from authoritarianism and conflict do not fit easily within existing legal regimes. Four competing legal regimes appear to be relevant to the normative requirements of transitional justice: domestic criminal law, international human rights law, humanitarian law and international criminal law. Although often described as complementary, these regimes are distinct and have competing claims to governing transitional justice dilemmas. They can produce converse conclusions on the legality or illegality of certain measures because their standards and mechanisms of imposing accountability are not the same. Construction of a distinctive transitional justice requires an internal legal interdisciplinary debate on the appropriate framework of legal accountability. This internal interdisciplinarity is required for a bridge to be formed between what a blackletter application of any one of the legal regimes might require and the difficulty of 'fitting' each regime to transitional justice dilemmas.

Legal internal interdisciplinarity can be argued to permit and even require innovation in transitional justice mechanisms, as well as a mix of legal, quasilegal and political mechanisms for addressing the past. Increasingly, transitional justice is delivered not through one holistic mechanism but through a range of institutional vehicles that often operate simultaneously without a clear legal hierarchy. Forms of domestic criminal trial, varied truth commissions or commissions of inquiry, restorative justice mechanisms and international or hybrid criminal trials are often

⁵⁵ *Ibid.*, 960.

used simultaneously or sequentially in *ad hoc*, piecemeal and messy attempts to address a constantly evolving political situation.

This type of institutional provision can be understood in terms of ‘legal pluralism,’ which has been defined as ‘the idea that there can coexist distinct but genuinely normative legal orders.’⁵⁶ Legal pluralism exists where distinct legal orders have arisen over time (indigenous law and state law) or where a state-based legal order fails completely to replace the legal order that preceded it but must acknowledge it (a colonial legal order and traditional law). It can be ‘simple,’ as when legal orders are able to recognize each other and their application can be mutually reconciled (which is sometimes not viewed as proper legal pluralism), or it can be ‘radical,’ as when normative orders coexist that are capable of producing different answers to the same question and have no objective and incontestable way of adjudicating between the claims of each to priority.⁵⁷

While in some cases multiple transitional justice institutional provision can be contained within an account of simple or weak legal pluralism,⁵⁸ institutional provision increasingly is ‘radically legally pluralist,’ with no legal way of resolving competing institutional hierarchies or priorities of mandate.⁵⁹ This is the classic difficulty of radical legal pluralism: to paraphrase Neil Walker, it lacks a “‘master discourse,” whether state, state-counterfactual, suprastate or international’ to which past-focused institutions are prepared to defer.⁶⁰ Regime clash enables each institution to sustain its claim to trump the others. Each institution can assert its preeminence by asserting the preeminence of a particular legal regime: domestic criminal law for domestic truth commissions, international criminal law for international courts and tribunals and human rights law for human rights treaty implementation bodies.

A distinctive ‘field’ of transitional justice is legitimated by the asserted need to open up doctrinal debate beyond blackletter legal analysis to sociolegal or criminological inquiries capable of responding to a multiplicity of mechanisms with mixed political/legal and international/domestic dimensions, such as truth commissions or restorative justice processes, justified in terms of goals other than legal accountability alone.

⁵⁶ Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 102.

⁵⁷ John Griffiths, ‘What Is Legal Pluralism?’ *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1–55; Sally Engle Merry, ‘Legal Pluralism,’ *Law and Society Review* 22(5) (1988): 869–896.

⁵⁸ For example, the ICC sets up a clear relationship between itself and domestic courts – one of domestic priority and complementarity (Articles 13 and 17 of the Rome Statute). A truth commission, meanwhile, may be coupled with amnesty, which explicitly prevents domestic trials.

⁵⁹ See the multiple provisions for dealing with the past in the Arusha Peace and Reconciliation Agreement for Burundi of 28 August 2000. Note also that the multiplicity of international legal regimes now makes it much more difficult to align institutional provisions in a hierarchy because their legal orders clash and so continue to keep hold.

⁶⁰ Neil Walker, *Policing in a Changing Constitutional Order* (London: Sweet and Maxwell, 2000), 288.

External Interdisciplinarity: Transitional Justice beyond Law

The design of transitional justice institutions around a broader set of social and political goals creates both a pressure and an opportunity for a broader external interdisciplinarity that further legitimates transitional justice as a distinct field. This external interdisciplinarity suggests that the field can only exist by recognizing a phenomenon that is in some senses exceptional to the study of law or even the study of justice altogether. This phenomenon's exceptionality can only be understood as derived from the particular political goals of some type of political 'transition,' such as a transition from authoritarianism to democracy or from conflict to peace settlement (leaving it open, for now, what type of political transition is at issue).

If one only recognizes normative questions as relevant to a political transition, then transitional justice would be a matter of how to make sure that justice issues in transition are pursued within the best applicable legal framework. Thus, transitional justice would just constitute a specific, uncontroversial application of international criminal law, human rights law or even domestic criminal law, whichever is considered the relevant legal framework. Eric Posner and Adrian Vermuele's article 'Transitional Justice as Ordinary Justice' illustrates this point in reverse.⁶¹ To oversummarize, Posner and Vermuele argue that the so-called dilemmas of transitional justice (such as retroactivity or a measure of exceptional application of justice in service of the policy goals of political stability) are merely dramatic instances of dilemmas that exist in all criminal justice systems. The authors find that transitional justice as a distinct entity literally does not exist – it is all 'ordinary justice.'

The argument that transitional justice is something other than ordinary justice can only be justified by articulating the political needs of transition as in some sense peculiar and requiring that justice be mediated in terms of demands other than accountability. The assertion of goals other than accountability as central to transitional justice justifies and is reinforced by the interventions of the disciplines most closely associated with those goals.

Interdisciplinarity as Decolonization or Colonization of Law

The interdisciplinarity of transitional justice is also related to the political project of attempting to decolonize law's hold on the discourse, and even colonize transitional justice within other disciplines, for example, political science. The call for interdisciplinarity is in part a call for transitional justice to cut free from its roots in law and the legalization of its dilemmas.⁶²

⁶¹ Posner and Vermuele, *supra* n 35.

⁶² See, Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,' *Journal of Law and Society* 34(4) (2007): 411–440. McEvoy does not advocate cutting free completely, but views legal issues as settled and a narrow legal disciplinary frame as an unhelpful 'legalization' of transitional justice mechanisms that serves to narrow possibilities for its development.

Those who advocate an interdisciplinarity beyond law tend to view themselves as decolonizers rather than colonizers. However, the project of interdisciplinarity can perhaps best be understood as a mutual project of (de)colonization and resistance. Any new discipline attempting to impact on another discipline may be successful in its (de)colonization project, or it may end up being colonized in the process. However, as Balkin argues, processes of disciplinary colonization and decolonization are often incomplete, with some aspects of a discipline susceptible to outside interdisciplinary influences and some resilient.⁶³

This mixed process of colonization and decolonization can be seen in transitional justice discourse with reference to its two central concerns, namely justice (implicating law in particular) and transition (implicating political science in particular). The difficulty of locating transitional justice as a subfield of either justice or transition is a product of the mutual projects of decolonization, resistance and colonization between law and other disciplines.

Transitional Justice as Subfield without a Field

What is justice? A range of disciplines contribute to the argument that transitional justice is a form of justice that is in service of a range of (often competing) goals, such as democratization or reconciliation, that mediate any notion of ‘accountability’ as the field’s only or even main objective. These disciplines increasingly attempt to decolonize transitional justice from straightforward accounts of law’s demands of accountability.

The decolonization of law’s hold on the discourse is central to constructing transitional justice practices as a coherent intellectual field of inquiry. From a legal perspective, transitional justice can be viewed as a subfield of human rights law, humanitarian law and/or international criminal law, and as an attempt to increase the reach of these regimes into transitional contexts. However, if the relationship between transition and justice is inverted so that the political goals of transition shape the justice that applies rather than the goals of justice shaping the project of transition, the relationship between field and subfield is also inverted. Human rights, humanitarian law and international law, from this view, appear to be subfields that collectively inform the development of transitional justice mechanisms rather than fields that require a particular application of justice.

The decolonization project is incomplete and cannot be completed, however. Law is resilient and even capable of ‘reverse’ colonization of would-be decolonizers. The word ‘justice’ in transitional justice and the term’s origins in an attempt to develop legal accountability during transitions to democracy, have made law’s predominance difficult to disrupt. Logically, transitional justice presents as a subfield of our understanding of justice, with some reference to legal norms. To claim its place as justice, transitional justice would seem to have to do more than offer itself as a set of techniques or as a ‘toolkit’ for dealing with the past and to be able to articulate a connection to a concept of justice as exceptional and requiring institutional

⁶³ Balkin, *supra* n 50.

innovation. Even if the exceptionalism of transitional justice only amounts to a capacity to innovate as regards appropriate legal or quasilegal mechanisms, the claim that this is a form of justice requires some threshold for when the exception is triggered. It would seem impossible to escape these questions by reducing transitional justice to a set of techniques and institutional innovations.

Therefore, legal norms and argumentation continue to be central to transitional justice as a field. Legal pluralism and institutional innovation have been a project of letting other disciplines impact on conceptions of law and legal institutions and of expanding or 'thickening' law rather than replacing it.⁶⁴ Moreover, the continuing relevance of legal norms leads to professional demands on lawyers and legal analysis that serve to perpetuate the institutional dominance of law and legal analysis in scholarship and practice. This is typical of law's capacity for resilience and even countercolonization. As Jack Balkin and Sanford Levinson note, 'It welcomes visiting disciplines to serve its own ends, and then cuts or stretches their work to fit law's template.'⁶⁵ The interdisciplinarity that results from the partial decolonization helps constitute transitional justice as a distinct field.

What is transition? Mutual processes of colonization and decolonization also explain the difficulty of a stronger interdisciplinary frame for the discourse as a whole. Logically, it would seem that transitional justice should be one subset of a set of issues to be explored in relation to 'transition.' Justice issues would seem to be only one of many transitional dilemmas that might include transitional economics or transitional governance. Transitional justice would seem to be a subset of the study of transitions from conflict; the justice component of a transition that will also present economic, political, social and psychological questions. An understanding of justice issues as merely one of a number of transition's dilemmas would sublimate them to a subfield of a nonlegal inquiry into processes of political transition.

What is interesting about the current state of transitional justice, however, is that scholars and practitioners show no clarity as to whether there is or needs to be a bounded concept of 'transition' during which transitional justice applies.⁶⁶ Little to no attempt has been made to define a concept of transition that would place limitations on when transitional justice can legitimately be applied. As we have seen, the field now includes transitions from conflict to peace, the nontransition transitions of western liberal democracies, post-interstate conflict-imposed justice and pretransition 'transitional justice' mechanisms in countries such as Colombia (often termed a case of 'transitional justice without transition'), where the problem

⁶⁴ See, McEvoy, *supra* n 62.

⁶⁵ Jack M. Balkin and Sanford Levinson, 'Law and the Humanities: An Uneasy Relationship,' *Yale Journal of Law and Humanities* 18 (2006): 178.

⁶⁶ See, Naomi Roht-Arriaza, 'The New Landscape of Transitional Justice,' in *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, ed. Naomi Roht-Arriaza and Javier Meriezcurrera (Cambridge: Cambridge University Press, 2006). Roht-Arriaza notes that the term 'transition' has always been unclear in transitional justice debates.

is not just the absence of transition but also that the transitional justice mechanism chosen seems aimed at impunity rather than accountability.⁶⁷

From one point of view, the lack of theorization of the type of transition that legitimately triggers transitional justice as a distinctive form of justice serves to weaken law's normative hold. Transitional justice is left as a set of techniques and mechanisms for 'dealing with the past' when traditional legal mechanisms prove difficult or undesirable politically (for whatever reason). Law's hold is thus decolonized. However, the lack of a clear definition of transition also creates difficulties for the disciplines engaged in studying particular types of transition (for example, political science or peace studies) in their attempts to dominate the discourse. The diversity of situations in which transitional justice mechanisms are asserted to be relevant defies any one disciplinary frame of analysis.

The interdisciplinarity that results from partial decolonization again plays a crucial role in constructing transitional justice as a distinctive field. Arguments that transitional justice requires an interdisciplinary approach function, as Maton suggests in relation to cultural studies, to deliberately leave the concept of transition undefined and undefinable. Paradoxically, the call for interdisciplinarity constructs transitional justice as the dominant field because a common project of transition can only be found in the acceptance of innovative forms of justice. Again, this inverts the relationship between subfield and field: transition is constituted as a subfield of transitional justice rather than vice versa.

Conclusion: The Politics of Transitional Justice as a Field

Thus far, I have argued that transitional justice is not a coherent field but rather a cloak that integrates diverse practices with quite different normative implications. I have argued that while this cloak covers the work of practitioners, policy makers and academics, it simultaneously disguises the different normative and political implications of transitional justice practices by narrating them into a coherent 'whole.' Finally, I have argued that narration of the field of transitional justice as interdisciplinary is not a romantic and innocent call to intellectual interchange. Rather, it performs two political functions: it assists in consolidating and legitimating transitional justice as a field, and it enables an attack on the perceived colonization of the field by law.

Of course, any new interdisciplinary field could be deconstructed in this way, particularly if 'fieldhood' is viewed as itself an artificial and flexible construct aimed at organizing activity and inquiry. This has been, after all, a Socratic exercise, and I would not seek to deny that characterizing transitional justice as a field of study operating across a number of disciplines can be a useful way of talking about a set of phenomena that appear to have some connection to each other and of creating a space for people involved in similar enterprises to talk to each other.

⁶⁷ Rodrigo Uprimny and Maria Paula Saffon, *Uses and Abuses of Transitional Justice Discourse in Colombia* (Oslo: International Peace Research Institute, 2007).

Nevertheless, a cost attends the rise of transitional justice as a distinctive 'field.' Once we recognize transitional justice as an ambiguous term and the concept of transitional justice as a cloak that hides ambiguities, which nevertheless continue to poke out from under the cloak, we can begin to see a hidden politics to the discussion of what appropriately falls within the label or field and, indeed, to arguments for the field to be interdisciplinary.

Transitional Justice as a Battlefield

Two related battles for the power of transitional justice discourse fuel academic debates over the state of the field. The first battle is for transition at the level of each particular conflict. Transition is not the same as postconflict; it is the postsettlement phase of dealing with a conflict that at best will be less violent than before (although the move from violence is rarely linear). The negotiated nature of contemporary conflict resolution efforts sees settlements that attempt to translate violent conflict into a set of political and legal institutional structures that enable the same political struggles to take place less violently. The hope is that these settlements and their new structures work at least as a holding device for violent conflict, and at most as a tool that enables a new political consensus to emerge that leads to the transformation, rather than merely management, of the conflict. For the parties to the conflict, however, in the short term, the new institutions are merely vehicles for pursuing the same old conflict, because whoever can win the transition can win the peace, and whoever can win the peace can win the war.

Transitional justice mechanisms, with their capacity to adjudicate on the rights and wrongs of a conflict, not only as regards individual culpability but also in relation to institutional and social responsibility for the genesis and sustenance of the conflict, are a key site of ongoing struggles in the battle for the nature and direction of the transition. Control of the transitional justice mechanism can enable victory in the metaconflict – the conflict about what the conflict is about – and thereby enable the victor to tilt all transitional mechanisms towards an end point for transition that approximates to the victor's battlefield goals.

The second battle is the academic, policy and practice one for control of the field. This is the battle between those who seek to 'do good' in protracted social conflict but who have competing ideas of what doing good requires. The debate over the disciplinary location of the field is part of this battle. If one views the key goal of transitional justice as inserting normative requirements of accountability into complex political transitions, then the field is perhaps a mainly legal one. If, however, the goals of transitional justice include democratic statebuilding, justice sector reform or promotion of the rule of law or of reconciliation or 'peace,' then each goal points to a different disciplinary frame, or a different multidisciplinary constellation. The assertion of interdisciplinarity itself is therefore inevitably tied up with the notion of what we think the goal of transitional justice is or should be. While the wish to open up transitional justice beyond lawyers is justified, we should not be so naïve as to think that the move to interdisciplinarity is

purely about the decolonization of the field in order to render it broader than law. Considerable policy goods and influences are at stake in this project. Calls for particular disciplinary or interdisciplinary approaches also mask attempts to redefine the goals of transitional justice. This is a field in which discussion of what constitutes 'the field' and the disciplinary content of the field links to policy debates over what the goals of transitional justice mechanisms should be.

Transition therefore has several levels of battle ongoing: the internal battle between the parties to the conflict to 'finger' and own transition so as to control its outcomes; the policy battle between those who seek to 'do good' and who have competing ideas of what this properly involves; and the academic battle over how we should understand transition and transitional justice. All of these battles link to a much bigger global struggle over the appropriate parameters of international intervention with respect to the internal makeup of the state, a debate in which transitional justice mechanisms have become an increasingly controversial means of intervention.

Reclaiming a Meaningful Justice Agenda

For those concerned with preserving a meaningful justice agenda in transitional justice, three related dangers apply to 'building the field' without recognizing the complexities of the multidimensional battlefield. The first danger is that decolonization of law's hold over the field can facilitate a dilution of law's normative pull and the justice dimension of transitional justice. Failure to recognize that transitional justice mechanisms only exist because of the argument that legal standards require some form of accountability during transition risks undoing what in practice is still a fragile consensus. Letting go of transitional justice as a clear subfield of human rights law has a cost, in terms of local justice struggles. While goals such as democratization, justice sector reform, rule of law and reconciliation might seem valuable, the paradigm shift to viewing transitional justice as assisting rather than conflicting with these goals has required that the goals too be 'depoliticized' from local contexts and justice struggles that might give them a thicker conceptualization.⁶⁸

The second danger is that without understanding the politics of transitional justice as a field, we have few ways to talk about and understand the premature midlife crisis of transitional justice discourse and practice. The idea that transitional justice may have both good and bad aspects leaves those seeking to use the term to affect people's lives struggling for a modified tool with which to press their claims. In their discussion of Colombia, for example, Rodrigo Uprimny and Maria Paula Saffon attempt to distinguish between 'manipulative transitional justice,' which aims to secure impunity and elevate political considerations over 'transformation of relations of power,' and 'democratic' transitional justice, which aims to protect victims against impunity.⁶⁹ Yet, from the perspective of transitional justice as a battlefield, both forms of transitional

⁶⁸ Leebaw, *supra* n 6.

⁶⁹ Uprimny and Saffon, *supra* n 67.

justice are manipulative—they are just manipulative to different ends. Shorn of the simple relationship with accountability, transitional justice as a concept provides little guidance on when and how we might distinguish between legitimate and illegitimate ends in any normative way. In contrast, transitional justice as a battlefield warns that transitional justice solutions and mechanisms tend to be designed precisely to enable diametrically opposed positions on what justice requires. The permissible ends of transitional justice therefore require that they be constantly argued for and won throughout design and implementation.

A third related danger of talking about transitional justice as an unproblematic field is that it risks missing an opportunity to engage with its deepest and most exciting justice project. This project involves engaging in the battlefield as a way of negotiating a cosmopolitan conception of justice in an attempt to transform power relationships not just at the local level but also at the international level. Transitional justice 'goals' such as justice, democracy, rule of law and perhaps even reconciliation are themselves often 'essentially contested concepts,' that is, concepts 'the proper use of which inevitably involves endless disputes about their proper use on the part of their users.'⁷⁰ Essentially contested concepts are not concepts that are vague or indeterminate around their edges, but rather concepts that involve ongoing contestation over 'paradigm or core cases.'⁷¹ The attempt to design transitional justice mechanisms to 'implement' essentially contested concepts either is futile or involves ignoring the contestation and viewing the concepts as reducible to a 'toolkit' approach involving a set of technical choices: what type of elections when, what type of justice sector reform when and what type of reconciliation mechanism when. This concedes an opportunity for academics and practitioners and for local and international actors to engage in a larger project of ongoing negotiation and compromise over what these concepts entail.

This deeper justice project involves recognizing the incoherence rather than the coherence of transitional justice as a field. It involves a different set of assumptions than those set out in this journal's opening editorial, namely that there is no master discourse capable of commanding consensus on the appropriate goals of transitional justice; that there is and can be no agreement on the appropriate disciplinary, multidisciplinary or interdisciplinary frame for transitional justice inquiries; and that the practice of justice is not one served by a division between practitioners who practice and academics who comment because meaningful justice as an outcome can only be achieved through a combination of reason and passion in pursuit of changed power relationships.

The deep justice project is one in which all must participate jointly, with: awareness of the contingency of their own positions; a willingness to negotiate justice while adhering to a belief that justice has a normative core content capable of delivering meaningful change in people's lives; and a conscious sense of how much is at stake in the negotiation.

⁷⁰ Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida),' *Law and Philosophy* 21(2) (2002): 148, citing W.B. Gallie, 'Essentially Contested Concepts,' *Proceedings of the Aristotelian Society* 56 (1956): 167–198.

⁷¹ *Ibid.*, 149.