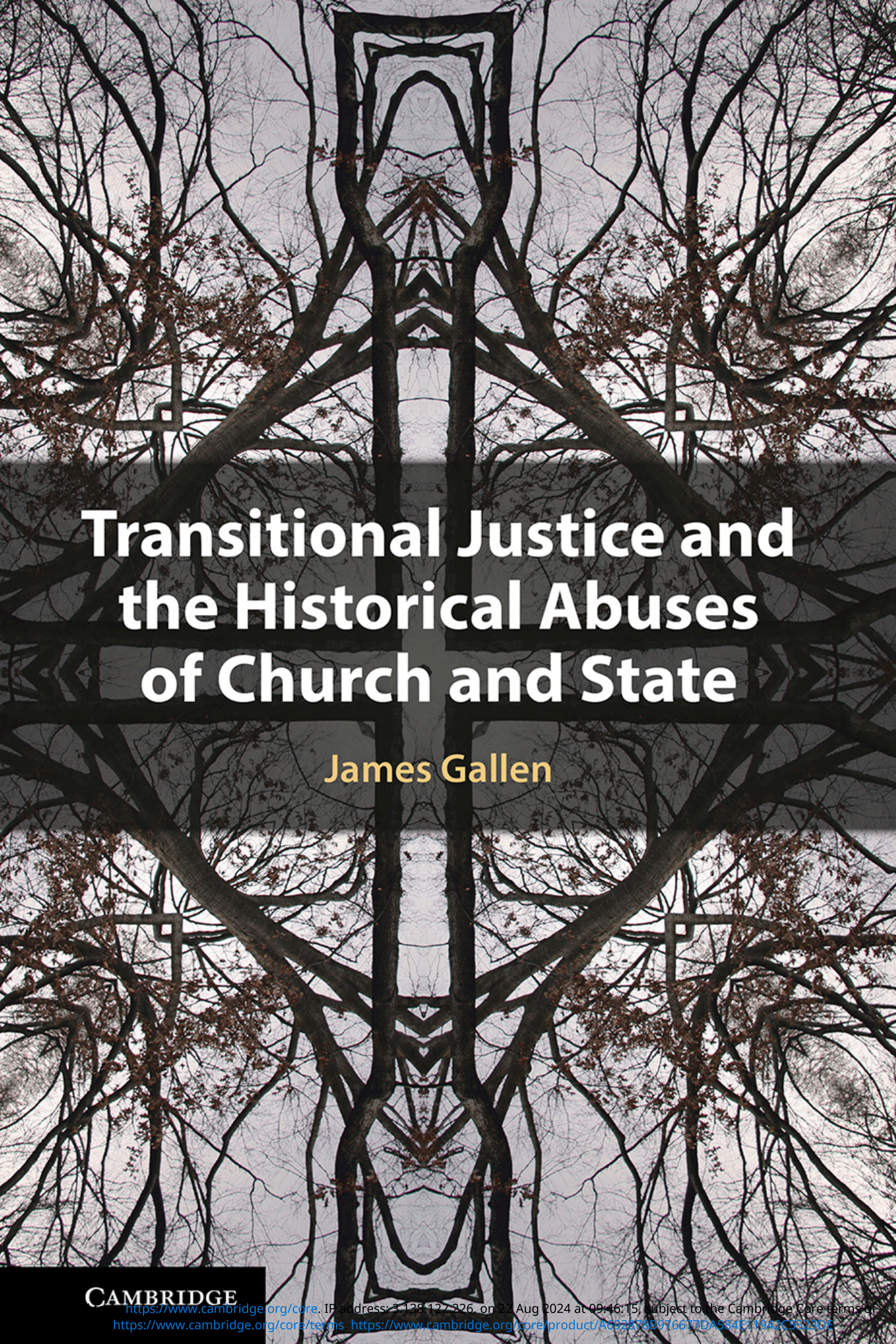

Transitional Justice and the Historical Abuses of Church and State

James Gallen

CAMBRIDGE

TRANSITIONAL JUSTICE AND THE HISTORICAL ABUSES OF CHURCH AND STATE

In this book, James Gallen provides an in-depth evaluation of the responses of Western states and churches to their historical abuses from a transitional justice perspective. Using a comparative lens, this book examines the application of transitional justice to address and redress the past in Ireland, Australia, Canada, the United States, and the United Kingdom. It evaluates the use of public inquiries and truth commissions, litigation, reparations, apologies, and reconciliation in each context to address these abuses. Significantly, this novel analysis considers how power and public emotions influence, and often impede, transitional justice's ability to address historical-structural injustices. In addressing historical abuses, power fails to be redistributed and national and religious myths are not reconsidered, leading Gallen to conclude that the existing transitional justice efforts of states and churches remain an unrepentant form of justice. This title is also available as Open Access on Cambridge Core.

James Gallen is an associate professor in the School of Law and Government at Dublin City University. His research focuses on transitional justice, with emphasis on its capacity to address institutional abuses and non-recent violence in Western states and churches.

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JAMES GALLEN
Dublin City University

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Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

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www.cambridge.org
Information on this title: www.cambridge.org/9781316515549

DOI: 10.1017/9781009025973

When citing this work, please include a reference to the DOI 10.1017/9781009025973

First published 2023

A catalogue record for this publication is available from the British Library.

A Cataloging-in-Publication data record for this book is available from the Library of Congress

ISBN 978-1-316-51554-9 Hardback

To my daughter Ivy and to all victim-survivors of the harms discussed in this book.

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Acknowledgements

This book was hard to write. It addresses distressing subject matter across several countries and centuries. I would not have been able to complete this project without the wisdom, care, and support of many people.

First, I am grateful for the support of the UK Arts and Humanities Research Council, without whom this book could not be published in a gold open access fashion as part of the 'Reparations, Responsibility and Victimhood in Transitional Societies' project (AH/P006965/1). This book also received financial support from the Faculty of Humanities and Social Sciences Book Publication Scheme at Dublin City University.

Second, I am grateful to all the staff at Cambridge University Press who supported the production of this book and to peer reviewers, who significantly stretched, supported, and improved this book.

Third, I am immensely grateful to a range of colleagues across the world, who have generously shared their wisdom, time, and encouragement to help bring this project to fruition. I am especially thankful to Anne-Marie McAlinden, who selflessly mentored this project at critical stages. In addition, I would like to thank colleagues and friends who read and provided feedback on chapters of this text and provided support and guidance in addressing the issues in the book. In particular, I would like to thank Sarah-Anne Buckley, Mark Coen, Vicky Conway, AnneMarie Crean, Luna Dolezal, Máiréad Enright, Fionna Fox, Gladys Ganiel, Kate Gleeson, Philip Hyland, David Kenny, Cheryl Lawther, Patricia Lundy, Gordon Lynch, Kieran McEvoy, Luke Moffett, Conall O'Fatharta, Maeve O'Rourke, Eoin O'Sullivan, Emilie Pine, Joanna McHugh Power, Kevin Power, Karen Quigley, Sinéad Ring, and Colin Smith. I am very grateful to the School of Law and Government at Dublin City University and Heads of School, Gary Murphy, Iain McMenamin, and Ken McDonagh for supporting this book and my work in this area.

I am profoundly grateful and indebted to victim-survivors on the island of Ireland and beyond who have shared their experiences with me, both those who are engaged in activism and advocacy and those who disclosed their harms and experiences to me in confidence. It is the privilege of my life to hear you, to learn from you, and to try and make some small contribution to pursuing justice with you.

I would not have been sustained in this work without the love and support of family, friends, and community. Thanks to the communities of faith at St Michael's Parish, Dun Laoghaire, and Holy Trinity Rathmines, with especial thanks to those involved in Rubicon, for being part of this journey for a time.

Thanks to all my friends for sustaining and lightening me these last few years and to my family for their endless love and support: Mum, Dad, Enda and Daria, thank you so much for everything. Above all, my greatest thanks are to my wife Sherry and our daughter Ivy. Thank you for believing in me, for championing me, and for putting up with me, especially in the final few months of writing. I love you so much.

With the exception of a few late amendments, I intend this book to be accurate as of its submission in December 2021. All errors and omissions naturally remain the fault of the author.

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PART I

Understanding Justice for Historical Abuses

1

Introduction

1.1 HISTORICAL ABUSES OF CHURCH AND STATE

Western states and Christian churches and organisations have marginalised, shamed, and harmed women, men, children, and entire peoples and nations, despite seeking to serve the least among them. These societies and Christian churches today claim to address this impact of widespread and systemic pain and suffering on victim-survivors and their descendants and on the legitimacy of societies and churches. This book argues that these states, churches, and religious organisations must repent, acknowledge, and materially address their roles in these historical abuses. If not, states and churches cannot credibly claim the authority to lead their citizens and congregations and, worse, the structure of these abuses will continue to be replicated and repeated, including in the very measures designed to address the past.

In this book, 'historical abuses' mean non-recent violence and human rights violations that occurred decades or generations before the time at which there were (additional) efforts to promote the national legal and political recognition of their wrongdoing. Although historical abuses are evident across all social contexts, this book argues that Western societies and churches co-created a violent Christian nationalism through their constructions of civilisation, empire, patriarchy, and the control of individual bodies and the social order. Across various states and churches, historical abuses include the genocide of Indigenous peoples; killing, violence against, and lynching of African Americans; the rape and sexual assault of women and children in institutions and beyond; the arbitrary detention, slavery, and forced, unpaid labour of African Americans; Indigenous peoples in the United States, Canada, and Australia and women in Magdalene Laundries and maternity homes; the theft and expropriation of Indigenous land; the forced medical experimentation

and procedures on vulnerable adults and children; and the forcible removal of children from families, including illegal adoptions.[1]

This book believes that a distinctive response is warranted to address the widespread and systemic harms understood as historical abuses. Several national investigations have confirmed that child sexual abuse and non-sexual forms of historical abuse, such as physical abuse, neglect, emotional abuse, and forced family separation, occurred against large numbers of individuals and were 'widespread', 'endemic', or 'systematic'.[2] Investigations of the global Catholic Church at United Nations human rights treaty body mechanisms confirm the widespread and systemic nature of child sexual abuse in that institution.[3] The nature of historical institutional abuse, involving entire classes of peoples, in the case of Indigenous peoples and African Americans, and particularly the marginalisation of women, especially women who became pregnant outside marriage, of the poor, and of children, are suggestive of a widespread and systematic practice, that constitutes a 'gross violation of human rights'.[4]

From the twentieth century until present, through the tireless efforts of victim-survivors,[5] of communities, and social movements, states and churches have been forced to address their responsibility for historical abuses across a range of jurisdictions.[6] This book will examine historical abuses in the United

[1] Regrettably, this book will not address the role of prisons, psychiatric institutions, or the medical profession as sites of historical abuses.

[2] The Commission to Inquire into Child Abuse, *Final Report* (Government Publications 2009; Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017); Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 2:* (McGill-Queen's University Press 2015) 399–452; Commission of Investigation, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Department of Justice, Equality and Law Reform 2009).

[3] United Nations Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of the Holy See' (2014) CRC/C/VAT/CO/2; James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 International Journal of Transitional Justice 332. United Nations Committee against Torture, 'Concluding Observations on the Initial Report of the Holy See' (2014) CAT/C/VAT/CO/1.

[4] Theo van Boven, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' (1996) 59 Law and Contemporary Problems 284.

[5] This book uses the term 'victim-survivor' to enable individuals who have experienced serious harm to self-identify in their own manner. Paul Rock, 'On Becoming a Victim' in Carolyn Hoyle and Richard Wilson (eds), *New Visions of Crime Victims* (Hart Publishing 2002).

[6] Shurlee Swain and Johanna Sköld, *Apologies and the Legacy of Abuse of Children in 'Care:' International Perspectives* (Palgrave Macmillan 2015).

Kingdom, Australia, Canada, the United States, Ireland, and the Holy See, the legal representation of the Roman Catholic Church. In each setting, similar responses to historical abuses have emerged, including the establishment of inquiries; litigation to hold individuals, non-state actors, and states accountable; reparation schemes and apologies on behalf of states and churches; and reconciliation discourses and processes.

This book argues that to adequately address historical abuses, the modern responses of Western states and Christian churches need to not only draw from the ideas, legal rules, and practices of transitional justice but also practise a new justice paradigm that addresses historical-structural injustice and, in particular, the dimensions of power and of emotions in responding to this longer form of injustice. A failure to expand the imagination and practices of what is necessary to respond to historical abuses may result in the very mechanisms of transitional justice being used to consolidate the power of states and churches and cause fresh and additional harm to victim-survivors.

This book is among the first to address these historical abuses from the perspective of transitional justice.[7] Transitional justice is defined by the United Nations as

> 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. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[8]

This book has four central claims regarding historical abuses and the potential for a transitional justice response from states and churches. First, perpetration of historical abuses forms part of a consistent and intergenerational pattern of violence in the name of Christian nations that continues to be reproduced in the present. Both church and state were interested in the construction of the 'ideal' human, enforced with norms of civilisation, shame, and control, with highly racialised, patriarchal, and class dimensions, and violent consequences for those who did not conform to the ideal. Over time, the use of power, law, and Christianity shifted from explicitly imperial in

[7] Brandon Hamber and Patricia Lundy, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) 15 Victims & Offenders 744.

[8] 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.

nature to a focus on the institutionalisation of the vulnerable. In increasingly secular or post-Christian societies, efforts to address individuals and groups that are perceived as social problems may have broadened the ideological justification for intervention in individual, family, and community lives, but the structure remains one of marginalising and 'othering' those perceived as non-ideal from society. This history poses the question of how transitional justice can address abusive enterprises and structures pursued and endorsed by a religious and moral belief in the goodness of churches and nations.

Second, this book demonstrates that both Christian churches and states in responding to historical abuse in modern times, despite extensive time, energy, and resources, have largely sought to retain and consolidate power and avoid the challenges to the foundational myths and narratives of nation states and Christian churches provoked by addressing historical abuses. In this way, the responses of states and churches constitute 'unrepentant justice', where the states and churches refuse to accept that their claims to legitimate state and religious authority, which formed the basis on which historical abuses have taken place and continue to be reproduced in the present, were wrong and are fundamentally incapable of being legitimated. Instead, states and churches frame their responses to historical abuses primarily as a matter of political benevolence. The book argues Western states and Christian churches must relinquish claims to absolute authority and instead attempt to build an alternative legitimacy in societies through new national myths, structures, and practices. These include explicit legal and political recognition of the fallibility and wrongdoing of states and churches and involve the empowerment of individuals and groups subjected to historical abuses at individual, structural, epistemic, and ontological levels.

Third, in applying the principles and frameworks of transitional justice to Western democracies and Christian churches, the book argues that its mechanisms of investigations, accountability, reparations, and apology are wholly necessary but also inherently inadequate to the task of addressing gross violations of human rights in any context. As presently designed and practised, such mechanisms may serve the needs of victim-survivors on an episodic basis. However, to adequately address inter-generational and systemic harms, states and churches must increase their acknowledgement of and directly address structural injustices that pervade modern societies and reproduce harms and attitudes that gave rise to such historical abuses. States and churches must end their attempts to maintain and reinforce their claims to power, legitimacy, and authority and instead pursue guarantees of non-repetition of harm that effectively empower victim-survivors and marginalised communities. Fundamentally, this approach must make real the slogan 'nothing for us without us'.

Finally, there is a necessarily tragic quality to addressing historical abuses that occurred decades or generations ago. Even if every wish of victim-survivors were met, justice cannot undo the harms done to those who have died nor to those who live and endure the suffering they have experienced and witnessed. The hunger to resolve and overcome pain is inevitable, universal, and impossible to satisfy. The transformation of power relationships and structures is not easy, inevitable, or quick, and this inherent inadequacy must inform any new conception or approach to justice. An appropriate justice response incarnates inter-generational commitments to remember and transform the meaning and material impact of historical abuses and includes a haunting sense of inadequacy, rather than justice as triumphalism.

Section 1.2 of this chapter outlines the existing and related conceptions of justice that may inform a response to historical abuses and positions transitional justice as the dominant but flawed approach to addressing the violent aspects of the past. Section 1.3 considers the application of these justice approaches to the context of historical abuses of Western states and Christian churches. Section 1.4 previews the remaining chapters of the book.

1.2 DIMENSIONS OF JUSTICE

How societies deal with the violent aspects of their past is a perennial problem.[9] At present, multiple conceptions and practices of justice inform responses to past violence, involving assessing individual, institutional, and social responsibility. This section assesses whether and how restorative justice, transitional justice, and transformative justice should operate to guide Western societies and churches in how to respond to their legacies of historical abuses. Restoration, transition, and transformation are different conceptions of social change that can accompany justice measures, each distinctive from mainstream legal justice in Western societies and churches. To offer an adequate response to the enormity of the nature and scale of historical abuses, it is necessary to draw from each conception.

1.2.1 *Restorative Justice*

Restorative justice can be understood as a set of diverse processes where 'all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the

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

future'.[10] Restorative justice emphasises crime primarily as a breakdown of private relationships between the victim, the offender, and the community.[11] The use of restorative justice to address criminality and prior wrongdoing gathers continued support and academic interest as an alternative to traditional punitive and carceral approaches to justice and aligns with alternative responses to crime from secular, Christian, and Indigenous perspectives.[12]

Restorative justice literature has begun to address historical abuses, such as institutional care of children, and in doing so, overlaps with transitional justice discourse.[13] However, the use of restorative justice in cases of sexual violence and other serious harms remains controversial and challenging.[14] Some argue that restorative justice may downplay violence against women or re-victimise or endanger victim-survivors.[15] In addition, restorative justice theory sometimes emphasises the Christian roots and spiritual dimensions of the practices, which may be problematic in cases where historical abuse was perpetrated by church institutions.[16] Julie Stubbs suggests the need for caution in applying restorative justice practices in Indigenous communities.[17] In addition, restorative justice, if focused on victim–perpetrator relations alone, struggles to conceptualise a response where the state perpetrates or condones this violence.[18] As a result, restorative justice principles and practices may only form a

[10] Tony Marshall, *Restorative Justice: An Overview* (Home Office 1999) 5.

[11] Jonathan Doak and David O'Mahony, 'In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland' (2011) 31 Legal Studies 305.

[12] Margarita Zernova, *Restorative Justice: Ideals and Realities* (Ashgate 2007) 7–31; John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press 2002) 3–28; Marie Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?* (University College Dublin and School of Applied Social Science 2014).

[13] Jennifer J Llewellyn, 'Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies' in Tristan Anne Borer (ed), *Telling The Truths: truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame Press 2006); Jennifer J Llewellyn and Robert Howse, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' (1999) 49 University of Toronto Law Journal 355; Kerry Clamp, *Restorative Justice in Transition* (Routledge 2015); Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016).

[14] Estelle Zinsstag and Marie Keenan (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge 2017).

[15] Liz Kelly, 'What's in a Name? Defining Child Sexual Abuse' (1988) 28 Feminist Review 65, 66.

[16] Kate Gleeson and Aleardo Zanghellini, 'Graceful Remedies: Understanding Grace in the Catholic Church's Treatment of Clerical Child Sexual Abuse' (2015) 41 Australian Feminist Law Journal 219, 224.

[17] Julie Stubbs, 'Restorative Justice, Gendered Violence, and Indigenous Women' in James Ptacek (ed), *Restorative Justice and Violence against Women* (Oxford University Press 2009) 103.

[18] Jonathan Doak, 'Stalking the State: The State as a Stakeholder in Post-Conflict Restorative Justice' in Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016).

particular component of an overall justice response to widespread or systemic historical abuses.[19] While the practices of restorative justice may offer victim-survivors therapeutic value in specific contexts, in the absence of addressing the broader systemic issues arising from historical abuses, restorative justice alone seems an inadequate response.

1.2.2 *Transitional Justice*

Since its emergence in the late 1980s and early 1990s, transitional justice has addressed how societies reckon with a legacy of gross violations of human rights,[20] principally in the contexts of post-conflict and post-authoritarian societies. In contrast to restorative justice, its primary focus is on system-wide justice responses. As a body of scholarship and practice, transitional justice covers several discrete elements: truth seeking, accountability, reparation, institutional reform, or guarantees of non-repetition and reconciliation.[21] These elements of transitional justice have claimed to operate with two dimensions: (1) responding to the violation of human rights of victim-survivors, drawing on restorative justice principles, and (2) contributing to or facilitating a 'transition' from widespread violence to democratic rule.[22] As a result, transitional justice operates on claims based on principled beliefs about what is the just response to past violence and on causal beliefs about how justice measures contribute to social change.[23] The early practice of transitional justice employed a thin conception of 'transition', focused on legal-institutional forms of politics at an elite level, rather than broader social transformation.[24] Influential early scholarship from Guillermo O'Donnell and Phillipe Schmitter reflected a belief in the causal power of elite decisions in transforming abusive state security actors and reinstalling democratic norms,[25] and narrowed 'perceptions of what justice entailed, or could become,

[19] Anne-Marie McAlinden, 'Are There Limits to Restorative Justice? The Case of Child Sexual Abuse' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice* (Routledge 2006) 307.

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

[21] United Nations Security Council (n 8).

[22] Arthur (n 20) 355.

[23] ibid 358.

[24] ibid 338.

[25] Guillermo O'Donnell and Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press 1986) 37–9.

during a time of transition'.[26] This preference for a narrow, legal-institutional approach to transition has proven largely inadequate for the task. In 2002, Thomas Carothers noted that the transition paradigm was not capturing reality in countries with the potential for democratic transition.[27] He concluded that it was no longer appropriate to assume that 'a country's chances for successfully democratizing depend primarily on the political intentions and actions of its political elites without significant influence from underlying economic, social, and institutional conditions and legacies'.[28]

Nonetheless, while the practice of transitional justice expanded to address post-conflict states, such as Rwanda, the idea of how justice mechanisms contribute to 'transition', now from armed conflict to peaceful democracy, remained under-theorised and unresponsive to this expansion.[29] Pablo de Greiff recently noted the contextual features in post-authoritarian countries, such as a functioning set of legal institutions, economic capacity to provide large-scale reparations, and a narrow and asymmetrical set of human rights violations, are absent in post-conflict situations.[30] Despite these challenges in both post-authoritarian and post-conflict societies, transitional justice has grown significantly since the 1980s and has become a dominant paradigm of international law, policy, and practice for addressing widespread or systemic human rights violations. Transitional justice forms part of the policy of the United Nations, the European Union, and a range of states in their foreign policy goals.[31] It is the framework employed in jurisdictions across the world, as not only a top-down and elite-driven form of policy making but also through bottom-up and victim-survivor-driven initiatives. As will be examined in its specific elements in subsequent chapters, transitional justice is at once a potential vehicle for elite-driven pacts framed as justice and human rights measures, and a potential means of social change and emancipation for victim-survivors.

In this context, there has been an expansion of transitional justice scholarship and practice to address widespread human rights abuses outside of its

[26] Arthur (n 20) 348, 349.
[27] Thomas Carothers, 'The End of the Transition Paradigm' (2002) 13 Journal of Democracy 5, 6.
[28] ibid 17.
[29] 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, 254.
[30] ibid.
[31] Annie R Bird, *US Foreign Policy on Transitional Justice* (Oxford University Press 2015); Laura Davis, *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice* (Routledge 2014); United Nations Security Council (n 8).

paradigms of armed conflict or post-authoritarian rule.[32] Arthur notes that it remains unclear whether the standard transitional justice measures, designed with the specific limitations of post-authoritarian societies in mind, would add value to addressing historical injustices in mature societies.[33] In contrast, Posner and Vermeule suggest that while transitional justice operates typically in post-conflict and post-authoritarian states, these are not exceptional circumstances, but instead should be understood as operating along a continuum to include questions of legal change in settled, peaceful consolidated democracies.[34] On their account, transitional justice does not present 'a distinct set of moral and jurisprudential dilemmas'. There is a considerable and growing practice of inquiries and truth commissions; accountability in criminal, civil, and canonical trials, and in international human rights law; redress and reparation programmes; and apologies and reconciliation addressing historical abuses in these contexts. Historical abuses have been addressed through a transitional justice literature in the context of Canada, Australia, and Ireland.[35] Scholarship addressing historical abuses in the United States is growing in employing transitional justice to address historical racial injustices.[36] While there may be potential for transitional justice to inform responses to historical abuses of states and churches, it is necessary to address below (i) the nature of transition involved in addressing historical abuses in Western democracies and Christian churches and (ii) how the mechanisms of transitional justice may contribute to this transition.

1.2.3 *Transformative Justice*

A third trend in justice literature and practice is growing discontent with transitional justice. For instance, transitional justice can be criticised as not

[32] Dustin N Sharp, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2015) 9 International Journal of Transitional Justice 150; Fionnuala Ni Aolain and Colm Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 Human Rights Quarterly 172.

[33] Arthur (n 20) 362.

[34] Eric A Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice' (2004) 117 Harvard Law Review 761.

[35] Rosemary Nagy, 'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2013) 7 International Journal of Transitional Justice 52; James Gallen and Kate Gleeson, 'Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians' (2018) 14 International Journal of Law in Context 43; Mark McMillan and Sophie Rigney, 'Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment' (2018) 41 Ethnic and Racial Studies 759; Elaine Loughlin, 'Katherine Zappone: "We Will Find the Truth and Achieve Reconciliation"' *Irish Examiner* (Cork, 10 March 2017).

[36] Andrew Valls, 'Racial Justice as Transitional Justice' (2003) 36 Polity 53.

engaging questions of socio-economic rights or socio-economic causes of violence meaningfully, thus replicating the privileging of civil and political rights in mainstream human rights discourse.[37] A related concern is that transitional justice is not meaningfully empirically evaluated to assess how successfully it achieves its stated goals.[38] Some critiques examine the risk that transitional justice practice typically disadvantages and de-prioritises women in the provision of testimony, accountability, and prosecution strategies, and in access to effective remedies and redress.[39] Others critique transitional justice as offering only a 'top-down' account of addressing the past, that minimises or ignores grassroots or 'bottom-up' participatory approaches that substantially privilege the views of victim-survivors.[40] As transitional justice has grown in popularity and prominence, it has been criticised as being indifferent to context, formulaic, and technocratic.[41] Further critiques challenge the value of the transitional justice paradigm and enterprise as a whole. Catherine Turner has asserted the inherently inadequate nature of transitional justice, if pursued through legal institutions alone, to overcome political conflicts and warns strongly that transitional justice may perpetuate division and create new sites of exclusion[42] and harm to victim-survivors. Balint et al highlight the conceptual constraints present in transitional justice that inhibit its ability to address structural harms, especially for historical, inter-generational injustice.[43] Transformative justice has built on these critiques

[37] Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third World Quarterly 275; Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339; Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017).

[38] Lauren Marie Balasco, 'The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice' (2013) 12 Journal of Human Rights 198, 211.

[39] Lia Kent, 'Transitional Justice in Law, History and Anthropology' (2016) 42 Australian Feminist Law Journal 1, 3.

[40] Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265; A Eriksson, 'A Bottom-Up Approach to Transformative Justice in Northern Ireland' (2009) 3 International Journal of Transitional Justice 301; Laurel E Fletcher, 'Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation' (2009) 72 Law and Contemporary Problems 51; Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008).

[41] de Greiff (n 29) 255.

[42] Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (1st ed, Routledge 2017).

[43] Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8 International Journal of Transitional Justice 194, 200–1.

to suggest fundamental reform of the goals and methods of transitional justice or alternatively a parallel practice and discourse, or most radically a replacement of transitional justice with a transformative justice framework. Simon Robins and Paul Gready define the concept of *transformative justice* 'as transformative change that emphasizes local agency and resources, the prioritization of process rather than preconceived outcomes and the challenging of unequal and intersecting power relationships and structures of exclusion at both the local and the global level'.[44] Although these criticisms are warranted, transformative justice remains largely critical rather than constructive in nature and without a substantial body of practice to date.

However, the expansion of transitional justice to transformative justice has been recently challenged as improbable or unfeasible.[45] Some authors suggest that while transitional justice mechanisms may contribute to social transformation, they are unable to restructure the future or achieve transformation on their own.[46] Pádraig McAuliffe argues transformative justice advocates fail to account for any political conditions that inhibit transformation and, instead, reflect 'great optimism that the social world within states can be changed – the main barriers to justice exist not in context, state capacity or the efficacy of transitional justice's mechanisms, but at the cognitive or ideational level'.[47] A transformative approach to justice may have broader ambitions of social change than securing or building the legitimacy of Western societies or churches. It may also make claims regarding an appropriate process to give meaning to transitional justice's claims to be bottom-up and victim-survivor centred. Nonetheless, it must address the political and social obstacles to transformation to offer a feasible account of justice as transformation, especially in the novel context of Western societies and churches. If the ambitious goals of transitional justice have been deemed to fail, in what context would the more ambitious goals of transformative justice succeed? Each of these dimensions of justice is deeply related and has the potential to add value to a justice response to historical abuses. Each in turn has limits and flaws and would be in new territory in its application to historical abuses by churches and Western states.

[44] Gready and Robins (n 37) 340.

[45] Dustin N Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13(3) International Journal of Transitional Justice 570.

[46] Margaret Urban Walker, 'Capturing Transitional Justice: Exploring Colleen Murphy's *The Conceptual Foundations of Transitional Justice*' (2018) 14 Journal of Global Ethics 137, 144; Colleen Murphy, 'On Theorizing Transitional Justice: Responses to Walker, Hull, Metz and Hellsten' (2018) 14 Journal of Global Ethics 181, 187.

[47] McAuliffe (n 37) 72.

1.3 TRANSITIONAL JUSTICE IN WESTERN DEMOCRACIES AND CHRISTIAN CHURCHES

Restoration, transition, and transformation offer different conceptions of social change that accompany justice measures. Both restorative justice and transitional justice espouse similar values, such as truth, accountability, reparation, and reconciliation, and criticise exclusively retributive and adversarial justice approaches.[48] Both seek to pursue processes involving the acknowledgement of wrongdoing and need for reparation by the perpetrator.[49] Both can be understood as evaluative concepts, requiring consistent clarification of the meaning of the concept and judgements as to whether a given practice constitutes effective justice.[50] Similarly, restorative and transformative justice may be understood as distinctive, or entirely overlapping, with perhaps the more profitable views suggesting that they operate along a spectrum and that restorative justice practices may have a transformative dimension, where they affect broader conflicts, communities, and social structures.[51] Transitional justice and transformative justice have a variety of potential relationships. Transformative justice may seek to reform or replace transitional justice concepts and practices. However, in the absence of momentum regarding such replacement, it may be best positioned 'at the radical end of a transitional justice continuum' and remain in need of a constructive dimension.[52]

It remains necessary to address what is the 'restoration', 'transition', or 'transformation' involved in addressing historical abuses of Western societies and Christian churches. 'Restoration' as a return to some prior state of right relationship may be inappropriate and inapplicable in the context of historical abuses. The colonisation and genocide of Indigenous peoples, the enslavement of African Americans, and the institutionalisation of women and

[48] David O'Mahony and Jonathan Doak, 'Transitional Justice and Restorative Justice' (2012) 12 International Criminal Law Review 305; Kerry Clamp and Jonathan Doak, 'More than Words: Restorative Justice Concepts in Transitional Justice Settings' (2012) 12 International Criminal Law Review 339.

[49] Howard Zehr, 'The Intersection of Restorative Justice with Trauma Healing, Conflict Transformation and Peacebuilding' (2009) 18 Journal for Peace and Justice Studies 20.

[50] Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 International Journal of Transitional Justice 199; Gerry Johnstone and Daniel W Van Ness, 'The Meaning of Restorative Justice' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007) 7.

[51] M Kay Harris, 'Transformative Justice: The Transformation of Restorative Justice' in Dennis Sullivan and Larry Tifft (eds), *The Handbook of Restorative Justice* (Routledge 2007) 556.

[52] Dáire McGill, '"Post-Conflict" Reconstruction, the Crimes of the Powerful and Transitional Justice' (2017) 6 State Crime Journal 79, 80.

children, all depended upon an initial view of these groups as 'other', which is an inadequate basis on which to restore just relationships. Christopher Cunneen suggests, 'One of the great dangers is that restorative justice may simply dissolve into a process of maintaining neo-colonial relations'.[53] Kathleen Daly notes that when discussing responses to sexual violence, restorative justice scholars and advocates often focus on an *individual* context of violence, which may overlook other contexts of violence, such as when individuals abuse positions of power, or when sexual victimisation occurs in closed institutions or communities.[54] To address these concerns, any feasible approach to restoration must address the need to reject the lie of otherness as inferiority and do so in both individual and structural terms.

How is it possible to think about transitional justice within Western liberal democracies and churches? Social change from conflict or dictatorship to a peaceful liberal democracy is the primary understanding of transition within transitional justice. In Ruti Teitel's account, state transition remains the key distinguishing feature between 'ordinary' and transitional justice.[55] Instead of a required feature of transitional justice, it may be profitable to consider that paradigms of armed conflict or dictatorships are not the only sites in which widespread or systemic violence or significant social change can take place and may be situated within a spectrum of social transition. A single paradigm of transitional justice 'ignores the problem that human rights abuses may continue to take place in circumstances where, in theory at least, the norms of liberal democratic accountability prevail'.[56] Limiting transitional justice to societies emerging from conflict or authoritarian rule 'implies a moral differentiation' where poor countries are seen as having endemic human rights problems while rich Western countries 'are implied to be free of such mess and only have a need to come to terms with practices that took place in a relatively distant past'.[57]

In Colleen Murphy's account, the circumstances of transitional justice, in which it makes sense to address questions of transitional justice goals and

[53] Chris Cunneen, 'Restorative Justice and the Politics of Decolonisation' in GM Elmar Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002) 46.

[54] Kathleen Daly, 'Sexual Violence and Justice: How and Why Context Matters' in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Realm of Law* (Palgrave Macmillan 2015).

[55] Ruti G Teitel, *Transitional Justice* (Oxford University Press 2000) 213.

[56] Lundy and McGovern (n 40) 273.

[57] Thomas Hansen, 'Transitional Justice: Toward a Differentiated Theory' (2011) 13 Oregon Review of International Law 1, 40.

institutions, continue to operate along a spectrum between transitional and more stable democracies.[58] For Murphy, there are four existence conditions which when present warrant consideration of transitional justice – pervasive structural inequality, normalised collective and political wrongdoing, conditions of serious existential uncertainty, and contested authority.[59] In Murphy's account, the assertion that democracies such as the United States and Canada exhibit her four existence conditions for the circumstances of transitional justice challenges the legitimacy of the democratic institutions and structures in those states and requires evidence that there is widespread systemic and profound injustice, which suggest they do not warrant the label 'democratic'.[60] As a result, the challenge in applying transitional justice to historical abuse in Western democracies and churches concerns establishing whether there are sufficiently unjust existence conditions to warrant consideration of questions of transitional justice, reflecting a harm-centric 'justice model'.[61] To what extent do the historical abuses and their consequences in Western states and churches challenge their legitimacy? This book argues that the nature and extent of historical abuses and their present-day reproduction present fundamental challenges to such legitimacy.

In the case of settler democracies, such as the United States, Australia, and Canada, Stephen Winter argues that while a 'settler polity already occupies the 'idealized endpoint' of transitional justice',[62] transitional politics are forms of politics in which agents seek fundamental changes to basic governing norms,[63] and, in doing so, may pose a potentially existential threat to settler societies.[64] To apply to settler democracies, both Augustine Park and Esme Murdock have argued that transitional justice must be radicalised to make a meaningful contribution to decolonisation, rather than affirm existing settler democratic orders.[65]

The original violence of settler democracies in conquest and colonisation does not exhaust the contexts where sufficient structural injustice exists. Anne-

[58] Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (1st pbk ed, Cambridge University Press 2017) 42.
[59] ibid 75.
[60] ibid 78.
[61] Balint, Evans and McMillan (n 43).
[62] Stephen Winter, *Transitional Justice in Established Democracies a Political Theory* (Palgrave Macmillan 2014) 43.
[63] ibid 54.
[64] ibid 15.
[65] Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14(2) International Journal of Transitional Justice 262–3; Esme G Murdock, 'Storied with Land: "Transitional Justice" on Indigenous Lands' (2018) 14 Journal of Global Ethics 232.

Marie McAlinden suggests the 'regime change' that has been thrown up by Irish inquiries into institutional abuse of children is a 'defining moment in Irish political and legal history' because it 'offers a unique opportunity to make a permanent break with the past' from an 'amorphous or undefined' relationship to one of greater state control of church authority.[66] Similar arguments could be made regarding historical abuse in the United Kingdom or other states where the state delegated care of vulnerable individuals or groups to church control or implementation. As the United Kingdom faces attempts from survivors of atrocities during the British Empire for inquiries, accountability, and redress, transitional justice could apply to post-imperial and post-colonial contexts.

Finally, the transition involved may also concern the nature and structure of religion in Western states more generally. The conditions giving rise to historical abuse, through the limited governance and oversight in Christian institutions, have been exported by Christian organisations from one country to another, as discussed later. For instance, the challenge caused by the abuse scandals to the Catholic Church's legitimacy and credibility across the Global North is immense.[67] The crisis may thus require the church to undergo a radical transformation of its governance and theology to the extent that they are relevant causes of historical abuse. As a result, the transition involved in historical abuse could be understood as an evaluative tool to assess the re-imagining and resetting of relationships between Christian churches and state institutions and the re-founding of the provision of state care to vulnerable individuals and groups.

These plural and related understandings of transition reflect McAuliffe's critique that 'the inherently imprecise term "transition" has proven susceptible to extreme conceptual stretching, encompassing any transformation in social, economic or political life'.[68] McAuliffe bemoans such an approach to transitional justice as a 'hopelessly capacious norm'. This book does not share this hopelessness. Rather than be a cause for despair, this book recognises the distinctive potential, political symbolism, and tactics involved in addressing the past in Western democracies and Christian churches as a 'transition', rather than the application of 'business as usual' standards to existing administrative and justice processes (inquiries, trials, redress, apologies).

[66] Anne-Marie McAlinden, 'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland' (2013) 33 Legal Studies 189.

[67] 'U.S. Catholics See Sex Abuse as the Church's Most Important Problem, Charity as Its Most Important Contribution' *Pew Research Center* (6 March 2013).

[68] McAuliffe (n 37) 75–6.

The task in responding to historical abuses may be profound: to restore a truth that there are no 'others' whom it is legitimate to control, denigrate, or destroy; to transition from a society built on national and religious myths of redemptive violence to one that incorporates acknowledgement of individual, social, and institutional responsibility for wrongdoing; and to transform processes from those that assume expertise and elite-led mechanisms are the primary ways to achieve social change and embrace a transformation where the nature and quality of change and progress are the transformation itself.

1.4 OUTLINE OF THE BOOK

1.4.1 *Part I Understanding Justice for Historical Abuses*

In Part I, the problem of historical abuses and the need for a distinctive justice response are examined. Chapter 2 addresses early Christian justifications for organised violence and demonstrates the inherent risk of links between religion, politics, and violence. It then examines early justifications for colonisation, where conceptions of non-Christian inferiority justified expansion and transatlantic slavery. In that context, the chapter assesses the emergence of closed institutions run by church and state actors as a key development in how social orders responded to those individuals and groups that were deemed a problem, based on religious and secular motivations. The chapter concludes by documenting the available evidence and estimates of historical abuses available for harms that can today be recognised, if controversially, as gross violations of human rights.

Chapter 3 argues that historical abuses concern longer-term historical violence but also resulted in structural injustice: broader patterns that result in everyday injustices and wider forms of discrimination and marginalisation against historically targeted social categories, conceived of as 'historical-structural injustice'.[69] The chapter argues to address historical-structural injustices involves responding not only to past harms experienced across generations and within lived memory but also to the ways in which these harms are reproduced in the present. The chapter hypothesises that two factors inhibit states and churches from addressing historical-structural injustices – a desire to maintain and consolidate power and the role of public emotions, particularly shame. These factors enable states and churches to maintain existing national and religious myths that avoid a fundamental challenge to state and church authority and legitimacy.

[69] Alasia Nuti, *Injustice and the Reproduction of History: Structural Inequalities, Gender and Redress* (Cambridge University Press 2019) 13–14.

Chapter 4 considers power as essential to understanding who is legally liable and who is socially and politically responsible for addressing historical-structural injustices. The chapter outlines competing conceptions of power, preferring and applying political scientist Mark Haugaard's four-dimensional conception of power to address the complexities of historical-structural injustices, namely power as agency, structure, epistemic, and ontological. The chapter then examines the role of national and religious myths as justification narratives that maintain existing distributions and structures of power and construct limitations in addressing the past in transitional justice. As a result, it argues that changes in the distribution of power are central to addressing historical-structural injustices, which have coalesced to form national and religious myths that support the existing distributions of power and modern national and religious identities.

Chapter 5 argues that emotions are a mechanism by which victim-survivors may exercise agency and provide the symbolic and public means by which the states and churches themselves seek to respond in kind in addressing their legacies of gross violations of human rights, through the construction and practice of symbolic public-facing emotions.[70] In doing so, the chapter argues that political and religious leaders and official practices can perform emotions as symbolic representations of their communities and can subject victim-survivors to engagements that affirm and acknowledge their emotional states and needs or engagements that deny and dismiss these positions and emotions. This chapter argues that emotions are deeply enmeshed with the four dimensions of power and in particular that shame remains a key and problematic emotion in the modern responses from states and churches to historical abuse and greatly impacts the lived experiences of victim-survivors and their descendants today.

1.4.2 *Part II Assessing Transitional Justice for Historical Abuses of Church and State*

Part II of the book applies this framework of historical-structural injustices comparatively. This book will examine Ireland, the United Kingdom, Australia, Canada, and the United States, while also examining the global role of the Holy See, the legal representation of the Roman Catholic Church, diocese and religious orders, and other Christian denominations,

[70] Jonathan G Heaney, 'Emotion as Power: Capital and Strategy in the Field of Politics' (2019) 12 Journal of Political Power 224, 225.

within the jurisdictions mentioned. These jurisdictions were chosen for the following reasons:

(i) Complex multi-actor histories of abuses involving states, churches, and national societies;
(ii) Shared common law heritage and British imperial background;
(iii) Shared and differentiated experience with settlement, colonisation, and postcolonial contexts;
(iv) Shared history and experience of institutionalisation;
(v) Varied experiences and approaches regarding addressing historical abuses as part of transitional justice; and
(vi) Varied engagements with international law, human rights law, and courts as a component of addressing their past.

The book does not propose a comprehensive comparison of transitional justice-like measures in these jurisdictions but instead adopts a focused and targeted comparison based on its evaluative and critical framework, looking at historical-structural injustices through the lenses of power and emotion.

Chapter 6 argues that inquiries, whether traditional public inquiries or more innovative and participatory forms of truth and reconciliation commissions, can enable episodic uses of power from victim-survivors and advocates, evidenced in the nature and extent of consultation and ownership of the process and the opportunity to engage with and influence the inquiry's operations. Inquiries may shape the nature and function of the articulated emotions of victim-survivors but also have a significant emotional and potentially re-traumatising effect for victim-survivors. The chapter argues that these episodic uses of power and experiences of emotional disclosure in well-designed inquiries or commissions will necessarily raise the expectations of victim-survivors for other elements of justice, including structural justice, to be addressed through and beyond other mechanisms of transitional justice.

Chapter 7 argues that law's framing of accountability results in an inevitably partial and fractured picture of wrongdoing for historical abuse. The chapter argues that despite a focus on accountability for historical child sexual abuse, non-sexual historical abuses, especially those authorised or ignored by law, struggle to achieve modern-day legal accountability against individuals, institutions, or states. Law's claim to sovereign authority is unable to comprehensively address historical-structural abuses, which may challenge the legitimacy of the legal order created by states and churches. The chapter considers these challenges in the context of accountability mechanisms, including criminal prosecutions, civil litigation, and the use of canon law.

Chapter 8 argues that despite significant munificence to the compensation and redress schemes for historical abuses, the approach taken across a range of states misses the opportunity to transform the relationship between victim-survivors of historical abuse and the states and churches responsible for their harm. If the monetary and material dimensions of reparations are necessarily inadequate to the harms experienced, then the symbolic and communicative dimensions form a critical part of reparations as a response to historical-structural injustice. Rather than act as a form of settlement and closure of claims regarding wrongs, reparations can also serve as examples, to communicate ongoing commitments from states and churches to other aspects of transitional justice, that reflect a desire for a renewed relationship with victim-survivors.

Chapter 9 argues that apologies offer the most direct and explicit mechanism for states and churches to reframe and narrate historical-structural abuse. It argues that although apologies may address institutional or state failure to prevent historical abuses or the illegitimacy of historical practices, few apologies take the further step of problematising the claim by states and churches to have the legitimate power and authority to structure lives and society using violent, coercive, or dominating values and means. In doing so, they limit the capacity of the apology to impact underlying structures of power and authority in society or challenge their fundamental self-identity or founding myth.

Chapter 10 argues the practices and discourses of reconciliation have tended to operate as a form of inappropriate and premature settlement or closure of the grievances of victim-survivors and their descendants. To encourage victim-survivors and a society to pursue reconciliation in the absence of addressing other elements of transitional justice may operate as a reaffirmation of the power structures of states and churches. While the experience of Canada and Australia contains an explicit reconciliation discourse and practice, in the absence of significant change in, and imagination regarding, power relationships in those societies, they join the United States, Ireland, and the United Kingdom in remaining deeply unreconciled societies. In addition, the reconciliation practice of the Catholic Church regarding historical abuse demonstrates its inability to effectively self-critique in its processes of reconciliation.

Chapter 11 concludes the book by arguing that if it fails to consider structural injustice, power, and emotions, transitional justice may be used to legitimate structures of power and emotional narratives that continue to subordinate and marginalise historically abused groups and individuals. It concludes that a different conception of progress and transition is required

to navigate the meaning of historical abuses for the legitimacy of Western liberal democracies and Christian churches. In this account, the book concludes, transition and transformation are matters of the character of progress itself, progress that lives in the tension between wrongs that 'can never be repaired and must never be forgotten'.[71]

The challenge of addressing historical abuses considered in this book arrives at a significant time. In light of the human rights violations during the Trump presidency and the attempted insurrection in the United States in 2021 and ongoing racial inequity and violence,[72] in light not only of the Rhodes Must Fall movement but also of Brexit in the United Kingdom, Western liberal democracies can no longer be understood as unproblematic end states for processes of democratisation or transitional justice but are themselves the sites of significant social change and conflict. We are at a time where there is deep and wide dissatisfaction with the way in which Western societies and human rights operate.[73] Institutional Christianity also faces its own crises. In addition to the decades of crisis in the Catholic Church caused by clerical abuse scandals, awareness of sexual abuse scandals, both recent and non-recent, grows in other Christian denominations.[74] The persistence and rise of Christian nationalism seeking to support the populist threat to Western liberal democratic values and institutions also deeply implicates the theology and pursuit of power from Christian leaders and institutions across denominations.

As a result, a new articulation and practice of transitional justice, human rights, and the values designed to serve the needs of victim-survivors is required. After thirty years or more of theorising and practice of transitional justice with deep imperfections, it should not come as a surprise that these commitments are often partially implemented or not at all. In offering a new approach, it is hoped this book will not make the perfect the enemy of the good but can also serve to advance discourse and practice in this especially challenging historical period for human rights and transitional justice. If this

[71] This draws from the mission statement of the Conference on Jewish Material Claims against Germany which states: 'We know the horrors of the Holocaust can never be repaired and must never be forgotten.'

[72] 'Towards Non-Recurrence: Accountability Options for Trump-Era Transgressions' (Protect Democracy 2020) <https://protectdemocracy.org/project/towards-non-recurrence-accountability/>.

[73] Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1; Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (Asser Press 2019).

[74] Katherine W Bogen and others, 'It Happens in #ChurchToo: Twitter Discourse Regarding Sexual Victimization within Religious Communities' (2022) 37(3–4) Journal of Interpersonal Violence 1338–1366.

challenge is not embraced and historical deaths, discriminations, and harms that human rights aim to prevent are forgotten, they will be repeated in present and future contexts. Mindful of these concerns and seeking to be vigilant in not reproducing an elite-driven, top-down transitional justice, this book offers a new conception of transitional justice to analyse and evaluate the responses of states and institutional churches to historical abuses.

2

Otherness and Violence in States, Christianity, and Institutions

2.1 INTRODUCTION

Organised violence is a central feature of the Christian tradition, the Roman Catholic Church, the British Empire, and nations such as the United States, Canada, Australia, the United Kingdom, and Ireland. Historical abuses within lived memory in these cases are the product of long-term, inter-generational attitudes and practices of empire – patriarchy, racism, classism, and violence – that were, in part, influenced by and justified through Christian theology and institutions. In turn, Christian churches, religious orders, and charitable organisations were among the perpetrators involved in historical abuses, achieved through the theological, moral, political, and legal condemnation of the 'other'. This chapter offers a genealogy that demonstrates repeated patterns of exclusion, violence, and justification involving Christianity and Western European states and their settler colonies. A genealogical approach reflects how regimes of power and knowledge are assembled and reproduced.[1] Section 2.2 examines the relationship between Christianity and historical justifications for violence, with a particular emphasis on colonisation and slavery. Section 2.3 identifies the emergence of closed institutions as a key tool of nation-building that consolidated this early relationship of Christianity and violence but also extends to within living memory. Section 2.4 examines the nature of the violent abuses committed in these contexts, and Section 2.5 concludes.

2.2 CHRISTIANITY AND HISTORICAL VIOLENCE

From early in its existence, the Christian tradition reflected both a theological world view of inclusion and practices of liberation, and an opposing

[1] Kevin Ryan, *Social Exclusion and the Politics of Order* (Manchester University Press 2007) 44.

manifestation that aligned with contemporary power structures and systems of violence.[2] Though early Christian communities were originally subjected to persecution as an emergent religion in the Roman Empire,[3] Christianity was made legal in 313 CE, and later became the official Roman imperial religion under the Emperor Constantine.[4] This imperial form of Christianity subverted the original message of Jesus Christ and of early Christian communities and offered the means to justify empire and warfare through Christian theology.[5] A succession of popes and papal Christianity, later the Roman Catholic Church, took explicitly imperial forms,[6] as the notion of Christendom, the union between Christianity and material power, was evident from the fourth century.[7]

Even in this early period, Christian communities were aware of the risk of sexual abuse within the church, prohibiting sex between adult men and boys in the Council of Elvira in the fourth century.[8] After the disintegration of the Western Roman Empire in the sixth century, conversion to Christianity continued to be used to provide a religious justification for organised political violence among the communities of Europe,[9] for example in the missionary armed conflict of King Charles the Great (Charlemagne) against neighbouring Saxon peoples.[10] In later centuries, violent Christianity found articulation in the nine Crusades into the modern Middle East by European armies.[11] In 1095, Pope Urban II launched the First Crusade and declared that war was not only just but holy and incentivised participation for Christians through the

[2] Rita Nakashima Brock and Rebecca Ann Parker, *Saving Paradise: How Christianity Traded Love of This World for Crucifixion and Empire* (Beacon Press 2008) 63.

[3] Candida R Moss, *The Myth of Persecution* (Harper Collins 2014); WHC Frend, *Martyrdom and Persecution in the Early Church* (James Clarke & Company 2008).

[4] Peter Brown, *The Rise of Western Christendom: Triumph and Diversity, A.D. 200–1000* (10th anniversary rev. edn, Wiley-Blackwell 2013) 74.

[5] Karen Armstrong, *Fields of Blood: Religion and the History of Violence* (Alfred Knopf 2015) 248–9.

[6] Rosamond McKitterick, 'The Popes as Rulers of Rome in the Aftermath of Empire, 476–769' (2018) 54 Studies in Church History 71.

[7] Diarmaid MacCulloch, *Christianity: The First Three Thousand Years* (Penguin Books 2014) 1024–30.

[8] Thomas P Doyle, AW Richard Sipe and Patrick J Wall, *Sex, Priests, and Secret Codes: The Catholic Church's 2000-Year Paper Trail of Sexual Abuse* (Volt Press 2006) 14.

[9] Randall Lesaffer, 'Between Faith and Empire' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire* (Oxford University Press 2017) 106.

[10] Brock and Parker (n 2) 224, 238; G Ronald Murphy, *Saxon Savior: Germanic Transformation of the Gospel in the Ninth Century 'Heliand'* (Oxford University Press 1995) 11.

[11] Brock and Parker (n 2) 275.

removal of penance for sin for those who joined the Crusade, earning forgiveness for all their sins and assurance of a place in paradise after death.[12]

A second link between Christianity and organised violence emerged in 1231, when Pope Gregory IX's Inquisition licensed the church to use torture and execution to discipline those who were deemed heretics.[13] Approximately 3,250 people were executed by inquisitions between 1231 and 1730,[14] with a significant anti-Semitic targeting of Jews.[15] During this medieval period, there is further evidence of clerical sexual abuse of children,[16] with church law specifically prohibiting child sexual abuse.[17] A third early form of Christian violence was against women in trials for heresy and witchcraft,[18] often targeting women independent of patriarchal authority.[19] Estimates of women killed for witchcraft vary between 35,000 and 100,000.[20]

The later fragmentation of European Christianity through the Protestant Reformation contributed to protracted religious and sectarian violence among European communities and kingdoms. The competition between successive popes, kings, and Holy Roman Emperors led to frequent conflict and violence and to the Thirty Years' War.[21] Stephane Beaulac notes that while originally based on religious antagonism, these conflicts were eventually dominated by the power politics of belligerents.[22] The Peace of Westphalia in 1648 marks the beginning of Eurocentric conceptions of sovereign statehood in international affairs and the demise of supreme transnational and transcendental Christian

[12] ibid 254–78.
[13] Karen Sullivan, *The Inner Lives of Medieval Inquisitors* (University of Chicago Press 2011).
[14] Henry Kamen, *The Spanish Inquisition: A Historical Revision* (4th edn, Yale University Press 2014) 266; E William Monter, *Frontiers of Heresy: The Spanish Inquisition from the Basque Lands to Sicily* (Cambridge University Press 1990) 53.
[15] William Nicholls, *Christian Antisemitism: A History of Hate* (Rowman & Littlefield Publishers 2004).
[16] Doyle, Sipe and Wall (n 8) 19–23.
[17] Thomas Doyle and Stephen Rubino, 'Catholic Clergy Sexual Abuse Meets the Civil Law' [2004] Fordham Urban Law Journal 549, 582–3.
[18] Alan Anderson and Raymond Gordon, 'Witchcraft and the Status of Women – The Case of England' (1978) 29 The British Journal of Sociology 171, 173.
[19] Anne Llewellyn Barstow, *Witchcraze: A New History of the European Witch Hunts* (Pandora 1994) 21.
[20] Bengt Ankarloo, Stuart Clark and E William Monter, *The Period of the Witch Trials* (University of Pennsylvania Press 2002); Barstow (n 19).
[21] Ronald G Asch, *The Thirty Years War: The Holy Roman Empire and Europe, 1618–1648* (Macmillan 1997); Geoffrey Parker and Simon Adams (eds), *The Thirty Years' War* (Routledge 1997).
[22] Stephane Beaulac, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 Australian Journal of Legal History 181.

institutions as the dominant force in Europe.[23] Despite the beginnings of the early Christian churches as sites of equality and care for the poor and needy, the relationship of Christianity with empire, monarchy, and power led to significant violence justified in the name of Christianity against those deemed 'other'.[24] This pattern would repeat itself in imperial colonisation and transatlantic slavery, justified in part by the salvation of the soul of the 'other' and possession of their lands and culture for Christ. These processes, in turn, provide the context and structure for historical abuses within lived memory.

2.2.1 *Empire and Colonialism*

Empire and colonialism were justified on several political, economic, and moral grounds, including Christian theologies linked to a view of the end of time, eschatology.[25] Brooke and Parker suggest that 'Columbus' expedition of 1492 sought . . . to plunder the riches of the environs of paradise, to bring about the conversion of the "Indians," and to precipitate a Crusade to Jerusalem, where history would culminate'.[26] In 1493, the papal bull *Inter Caetera* authorised and sanctified Columbus' expedition, with this 'doctrine of discovery' functioning as both a theological affirmation of conquest and a political and military mediation between colonial settler powers.[27]

The logic of inquisitions and Crusades framing the non-Christian as 'other' continued in colonisation. Across diverse processes of colonisation,[28] 'non-Europeans were conceptualised by Europeans in ways that dehumanised them and represented their cultures or civilisations as inferior'.[29] Several concepts of inferiority were used to justify this subjugation of the other, often designating the non-Christian as unequal or subhuman.[30]

[23] Bruce Bueno de Mesquita, 'Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty' (2000) 2 International Studies Review 93.
[24] Armstrong (n 5) 641.
[25] Kirsten T Edwards, 'Christianity as Anti-Colonial Resistance?: Womanist Theology, Black Liberation Theology, and the Black Church as Sites for Pedagogical Decolonization' (2013) 15 Souls 146, 151.
[26] Brock and Parker (n 2) 319.
[27] Mark Charles and Soong-Chan Rah, *Unsettling Truths: The Ongoing, Dehumanizing Legacy of the Doctrine of Discovery* (InterVarsity Press 2019) 35.
[28] Nicholas Thomas, *Colonialism's Culture: Anthropology, Travel, and Government* (Princeton University Press 1994) 20.
[29] Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press 2003) 83.
[30] Hayden White, 'The Forms of Wildness: Archaeology of an Idea' in Edward Dudley and Max Novak (eds), *The Wild Man Within: An Image in Western Thought from the Renaissance to Romanticism* (University of Pittsburgh Press 1972) 5.

These justifications for inferiority combined with existing patriarchal structures in European colonisers, suggesting particular inferiorities for non-Christian women.[31]

In designating non-Europeans and their societies as 'other', several religious justifications were used for colonisation, alongside commercial and political justifications.[32] The Roman Catholic papacy granted Catholic kingdoms the right to colonise lands they 'discovered'.[33] While English expansion took place by private actors such as the Virginia Company, it also included Christian motivations.[34] English claims to 'discovered lands' of now Australia, Canada, and the United States relied on whether the 'discoverer' was able to take possession of them.[35] This was despite the existence of systems of agriculture, housing, and 'productive' life among First Nations peoples.[36] Europeans claimed they were bringing salvation and civilisation to non-Christian peoples.[37] Martti Koskenniemi notes that while the majority of early Spanish theologians 'agreed that the conquest had originally taken place in an unlawful manner, this did not lead them to advocate a speedy end to the presence of Spain in the New World' but instead required them to 'remain as trustees to protect the innocent and to preach the gospel', with violence justified if the Indians persisted in human sacrifice or the harassment of priests.[38]

The colonisation of the United States, Australia, and Canada can be understood as settler colonialism, with an 'intention to permanently displace the Indigenous populations within their acquired territories'.[39] Patrick Wolfe

[31] Evelyn Nakano Glenn, 'Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation' (2015) 1 Sociology of Race and Ethnicity 52; Scott Lauria Morgensen, 'Theorising Gender, Sexuality and Settler Colonialism: An Introduction' (2012) 2 Settler Colonial Studies 2.

[32] Lauren Benton and Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice' (2010) 28 Law and History Review 1, 37; Stuart Banner, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23 Law and History Review 95.

[33] Martti Koskenniemi, 'Introduction' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire* (Oxford University Press 2017) 7.

[34] Carla Gardina Pestana, *Protestant Empire: Religion and the Making of the British Atlantic World* (University of Pennsylvania Press 2009).

[35] Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (Yale University Press 1995).

[36] Bruce Pascoe, *Dark Emu: Aboriginal Australia and the Birth of Agriculture* (Scribe 2018) 156.

[37] Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge University Press 1986) 39.

[38] Martti Koskenniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 University of Toronto Law Journal 1, 9.

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

notes that 'settler colonialism has both negative and positive dimensions. Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base … invasion is a structure not an event'.[40] The goals of settler colonialism to acquire land and gain control of resources were accomplished through direct acts of violence, the forced removal of Indigenous peoples from their lands, and biological and cultural forms of assimilation, such as inter-marriage and replacement of Indigenous culture with settler culture.[41] Settler colonialism also had deeply gendered consequences, seeing gender differentiation, and female domesticity and dependency, as marks of civilisation.[42] Across the national contexts affected by colonisation, a wide variety of harms are discussed below. Christianity was also used to justify the 'second wave' of nineteenth-century colonisation throughout sub-Saharan Africa and Asia through the use of 'the standard of civilisation'.[43] Marimba Ani notes that for such colonisers 'Christianity and civilization were inseparable'.[44] Regrettably, in-depth analysis of these forms of empire and colonisation is beyond the scope of this book. In considering the impact of colonialism, the Canadian Truth and Reconciliation Commission report concludes in terms that apply broadly:

> The justification offered for colonialism – the need to bring Christianity and civilization to the Indigenous peoples of the world – may have been a sincerely held belief, but as a justification for intervening in the lives of other peoples, it does not stand up to legal, moral, or even logical scrutiny. The papacy had no authority to give away lands that belonged to Indigenous people. The Doctrine of Discovery cannot serve as the basis for a legitimate claim to the lands that were colonised, if for no other reason than that the so-called discovered lands were already well known to the Indigenous peoples who had inhabited them for thousands of years. The wars of conquest that took place to strip Indigenous peoples of their lands around the globe were not morally just wars; Indigenous peoples were not, as colonists often claimed, subhuman, and neither were they living in violation of any universally agreed-upon set of values. There was no moral imperative to impose

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

[41] Glenn (n 31) 57.

[42] ibid 70.

[43] Keal (n 29) 29; Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984).

[44] Marimba Ani, *Yurugu: An African-Centered Critique of European Cultural Thought and Behavior* (Africa World Press 1994) 154.

> Christianity on the Indigenous peoples of the world. They did not need to be 'civilized'; indeed, there is no hierarchy of societies.[45]

The justifications offered for colonisation and empire merged theology, commerce, law, and politics to create and impose dominant and oppressive narratives and practices, based on the false 'othering' of non-Christian peoples. In addition, Christianity also merged with commercial and imperial interests to legitimate the practice of slavery.

2.2.2 *Slavery*

Slavery is one of the longest-standing forms of human violence, predating Christianity and found across a range of cultures and traditions.[46] The justification of the trade in slavery from Africa draws on the same logic and processes as the Crusades and colonisation processes,[47] through the perceived inferiority of enslaved peoples and through the perceived commission of sin by non-Christians.[48] Popes in the 1400s saw enslavement as an instrument for Christian conversion and endorsed the Portuguese shipment of African slaves back to Europe.[49] On 18 June 1452, Pope Nicholas V issued the papal bull *Dum Diversas*, which identified Saracens (Muslims) and pagans as targetable for 'perpetual slavery'.[50] The logic of settler colonialism, seeking to exploit land and resources and replace a native population, gave rise to the use of slavery as a means of achieving this.[51] Subsequently, the transatlantic slave trade populated colonies in the Americas. It is estimated that at least 12 million Africans were shipped across the Atlantic,[52] with more killed in transit. The majority of slaves went to Brazil or the Caribbean, with approximately 300,000 captives coming to the now United States.[53] In addition, slavery also affected

[45] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 1* (McGill-Queen's University Press 2015) 24.
[46] Keith Hopkins, *Conquerors and Slaves* (Cambridge University Press 1981).
[47] Brock and Parker (n 2) 324.
[48] David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford University Press 2006) 50.
[49] ibid 54.
[50] Charles F Irons, *The Origins of Proslavery Christianity: White and Black Evangelicals in Colonial and Antebellum Virginia* (University of North Carolina Press 2008) 1.
[51] Glenn (n 31) 67.
[52] Paul Lovejoy, 'The Impact of the Atlantic Slave Trade on Africa: A Review of the Literature' (1989) 30 Journal of African History 365, 368, 372.
[53] Daina Ramey Berry, *The Price for Their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Random House 2018).

Native Americans. Allan Gallay estimates that between 1670 and 1715, 24,000 to 51,000 Native Americans were exported to then Spanish Florida and to the West Indies to work in sugar cane plantations.[54]

Michelle Alexander notes that the concepts of race and white supremacy emerged in the American colonies 'as a means of reconciling chattel slavery – as well as the extermination of American Indians – with the ideals of freedom preached by whites in the new colonies'.[55] She suggests that the planter class granted poor whites access to lands and roles policing slaves, which 'effectively eliminated the risk of future alliances between black slaves and poor whites. Poor whites suddenly had a direct, personal stake in the existence of a race-based system of slavery'.[56] In addition, Alexander argues that Southern slave-holding colonies agreed to form a union, on the condition that the federal government would not interfere with their right to own slaves as property. As a result, the US Constitution constructed a federal government weak in its relationship to both private property and states' rights and deliberately colour-blind.[57]

While Christianity had been one of the bases for legitimating chattel slavery, the abolitionist role of non-institutional Christian churches and faith movements, such as Methodists and emergent evangelicalism, is notable, in contrast to more established state churches with greater links to the slave trade or slave ownership in the United Kingdom or the United States.[58] In ending the slave trade in England, reparations were provided to *slave owners* as compensation for loss of their property, to the cost of £20 million (the equivalent of £16,782 million in 2008).[59] In addition, Mark Noll views debates about slavery in the United States leading to the American Civil War as profoundly theological in nature,[60] with proponents on both sides of the war 'reassuring combatants on either side that each enjoyed a unique standing before God and each exercised a unique role as the true bearer of the nation's

[54] Alan Gallay, *The Indian Slave Trade: The Rise of the English Empire in the American South, 1670–1717* (Yale University Press 2002) 299.

[55] Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New Press 2012) 23.

[56] ibid 25.

[57] ibid 25–6.

[58] Jenny S Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012) 17; Leo D'Anjou, *Social Movements and Cultural Change: The First Abolition Campaign Revisited* (Aldine de Gruyter 1996) 198.

[59] Marika Sherwood, 'The Trade in Enslaved Africans and Slavery after 1807' in Fernne Brennan and John Packer (eds), *Colonialism, Slavery, Reparations and Trade: Remedying the 'Past'?* (Routledge 2012) 28.

[60] Mark A Noll, *The Civil War as a Theological Crisis* (University of North Carolina Press 2006).

Christian civilization'.[61] In the absence of theological resolution to the question of slavery in the United States, violent civil war sought to resolve the issue of slavery by force and by law.

In the post-Civil War period known as Reconstruction, as Alexander notes,

> federal civil rights legislation was passed, including the Thirteenth Amendment, abolishing slavery; the Civil Rights Act of 1866, bestowing full citizenship upon African Americans; the Fourteenth Amendment, prohibiting states from denying citizens due process and 'equal protection of the law'; the Fifteenth Amendment, providing that the right to vote should not be denied on account of race; and the Ku Klux Klan Acts, which declared interference with voting a federal offence and the violent infringement of civil rights a crime.[62]

However, a lack of meaningful enforcement of federal rights rendered some of these protections 'largely illusory – existing on paper but rarely to be found in real life'.[63] Instead, racism and discrimination were reproduced in forms beyond slavery. Southern states began a campaign to 'redeem' the South, weakening new legal protections in a context of renewed racial violence and a resurgent Ku Klux Klan,[64] resulting in the withdrawal of federal troops from the South and effective abandonment of African Americans. In this new system of racial social control, known as 'Jim Crow', Southern legislatures adopted 'black codes' designed to minimise the post-Civil War effect of emancipation by creating legal forms of racial segregation in transport and education.[65] These states adopted vagrancy laws, criminalising unemployment and targeted at blacks,[66] and eight of those states enacted convict laws, forcing prisoners to work for little or no pay for plantation owners and private companies.[67] Ira Katznelson notes that the Jim Crow South was indulged in early twentieth-century federal law making, such as the New Deal, which excluded farm workers and domestic servants from old age insurance, rendering 65 per cent of African Americans nationally and between 70 and 80 per cent in the South ineligible.[68] Alexander

[61] ibid 21.
[62] Alexander (n 55) 29.
[63] ibid 30.
[64] ibid.
[65] ibid 28.
[66] Kristin O'Brassill-Kulfan, *Vagrants and Vagabonds: Poverty and Mobility in the Early American Republic* (New York University Press 2019).
[67] Douglas A Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Anchor Books 2009).
[68] Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* (1st ed, Liveright Publishing Corporation 2013) 156–94.

concludes that by the twentieth century, Southern states had a broad range of laws enabling discrimination against African Americans in every sphere of life.[69]

Throughout these contexts of colonialism and slavery, we can find the use of Christianity in the name of violence, oppression, and domination and as a basis for resistance, emancipation, and liberation. As the secularisation of the Western world increased throughout the Enlightenment, scientific thinking and liberal politics grew in influence across the English-speaking world.[70] Nonetheless, closed and coercive institutions, involving a combination of states and churches, played a role in the construction and constitution of society and were key sites of more recent historical abuses within lived memory.

2.3 INSTITUTIONS AND ABUSES

Closed state- and church-run institutions emerged to address people and groups perceived as 'other' and as social problems,[71] beginning with the poor, then extending to specific cross-sections of society. To understand this period, David Nash suggests we concentrate on how religion is used to justify world views and the role of specific actors within that context.[72] Shurlee Swain notes that both Anglican and Catholic denominations, 'sanctioned a view that saw the poor as being responsible for their own fate'.[73]

In Britain and Ireland, the Poor Laws started the process of institutionalisation.[74] The first Poor Law in 1531 enabled local authorities to round up child vagrants and beggars and put them to work in apprenticeships.[75] A 1647 Poor Act began the process of workhouses for the poor, which later involved the training of children for industry and trades while compulsorily detained.[76]

[69] Alexander (n 55) 35.

[70] Callum G Brown, *The Death of Christian Britain: Understanding Secularisation, 1800–2000* (2nd ed, Routledge 2009); Sheridan Gilley, 'Christianity and Enlightenment: An Historical Survey 1' (1981) 1 History of European Ideas 103.

[71] Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Law Commission of Canada 2000) 3; Eoin O'Sullivan and Ian O'Donnell (eds), *Coercive Confinement in Ireland: Patients, Prisoners and Penitents* (Manchester University Press 2012) 258.

[72] David Nash, 'Reconnecting Religion with Social and Cultural History: Secularization's Failure as a Master Narrative' (2004) 1 Cultural and Social History 302, 318.

[73] Shurlee Swain, 'Do You Want Religion with That? Welfare History in a Secular Age' (2005) 2 History Australia 79.1, 79.4.

[74] Ryan (n 1) 51.

[75] Brian Corby, Alan Doig and Vicki Roberts, *Public Enquiries into Abuse of Children in Residential Care* (Jessica Kingsley 2001) 15.

[76] ibid 16.

The Poor Relief (Ireland) Act 1838 established a system of workhouses throughout the country.[77] Workhouses existed in the United Kingdom until 1948 when the National Assistance Act and the National Insurance Act 1946 ended the Poor Laws.

Ryan notes that at the end of the eighteenth century, the UK poor houses were criticised as too expensive, ineffective, and sites of disease and immorality.[78] Subsequent specialist institutions emerged for women and children.[79] Regarding children, the function of institutions such as industrial schools was to prevent the negative traits of the 'other' from passing into the next generation.[80] Regarding the institutionalisation of women, Carol Smart notes that while law had long sought to regulate women's sexuality and reproduction, the nineteenth century marks 'a specific moment of struggle over the use of law to regulate the feminine body'.[81] In addition to continuing religious justifications for problematising the 'other', De Groot suggests that in this period 'theories and practices related to "race" and "sex" drew on biological, anthropological, and medical scholarship'.[82] Rather than exclusively pursuing strategies of elimination, as had been dominant with colonial conquest, the rise of institutions reflects a change in state and religious thinking in the potential for incarceration, coercion, and punishment as a form of personal transformation of those deemed 'other'.[83]

2.3.1 *Residential Schools*

Industrial schools were proposed as a solution to poverty in Britain and Ireland, based on a model adopted in Germany, Switzerland, and Scandinavia. Reformatory schools were established in 1858 for children found guilty of criminal offences under the British Poor Law. Jane Barnes states that industrial schools had two objectives: to train children 'to be capable of

[77] 'The Commission to Inquire into Child Abuse Report' (Government Publications 2009) para 2.01.

[78] Ryan (n 1) 55.

[79] Robert Van Krieken, 'The "Stolen Generations" and Cultural Genocide: The Forced Removal of Australian Indigenous Children from Their Families and Its Implications for the Sociology of Childhood' (1999) 6 Childhood 297.

[80] Nancy Fraser and Linda Gordon, 'A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State' (1994) 19 Signs 309.

[81] Carol Smart, *Regulating Womanhood* (Routledge 1992) 13.

[82] Joanna De Groot, '"Sex" and "Race": The Construction of Language and Image in the Nineteenth Century' in Susan Mendus and Jane Rendall (eds), *Sexuality and Subordination: Interdisciplinary Studies of Gender in the Nineteenth Century* (Routledge 1989) 92–3.

[83] Linda Mahood, *Policing Gender, Class, and Family: Britain, 1850–1940* (UCL Press 1995) 78.

supporting themselves by honest labour' and to reform the child's character away from a family's bad influence.[84] The Children Act 1908 provided that each school was to be independently managed, though subject to state inspection and funding.[85] Brian Corby et al suggest that in the United Kingdom provision was made for 100,000 children in the nineteenth and twentieth centuries under this and related systems.[86] By 1911, there were 112 industrial schools operating in England and Wales, with a majority run by charitable and religious groups.[87] Industrial schools were abolished in the UK by 1933.[88] In the UK, inquiries in the 1940s emphasised the lack of coordination and monitoring between the numerous bodies which shared responsibility for the welfare of children in the care of the state,[89] but also a failure to respond to allegations of abuse and cruelty. Scotland was distinctive for its use of day industrial schools or 'ragged schools', which aimed at reforming children who had not already committed crimes.[90] By the early twentieth century, the forty-eight reformatories and industrial schools in Scotland were dealing with nearly 7,000 girls and boys.[91] After the creation of Northern Ireland in 1922 with the partition of Ireland, there were only five industrial or reformatory schools still operational.[92]

Industrial schools were established in Ireland under the Industrial Schools Act 1868.[93] Over the recorded period from 1936 to 1970, a total of 37,000 children and young persons entered Irish industrial schools.[94] The majority were operated by religious orders of the Catholic Church, with the state paying a stipend to the orders per child housed. A 1970 report recommended the closure of the residential school system, concluding that its rules and

[84] Jane Barnes, *Irish Industrial Schools, 1868–1908: Origins and Development* (Irish Academic Press 1989) 85–6.
[85] 'The Commission to Inquire into Child Abuse Report' (n 77) para 2.18.
[86] Corby, Doig and Roberts (n 75) 25.
[87] Peter Higginbotham, *Children's Homes: A History of Institutional Care for Britain's Young* (2017).
[88] Sinead Pembroke, 'The Role of Industrial Schools and Control over Child Welfare in Ireland in the Twentieth Century' (2013) 21 Irish Journal of Sociology 52, 52–3.
[89] Care of Children Committee, 'Report of the Care of Children Committee (Chairman: Myra Curtis),' (His Majesty's Stationery Office 1946); Committee on Homeless Children, Etc, 'Report of the Committee on Homeless Children, Etc. (Chairman, James L. Clyde) Cmd 6911 Edinburgh,' (His Majesty's Stationery Office 1946).
[90] Mahood (n 83) 3.
[91] ibid.
[92] Edward Fahy, 'Reformatory Schools in Ireland' (1942) 60 Hermathena 54.
[93] 'Hansard (UK Parliament) Vol 285 Cc1022–4 (1884).
[94] Eoin O'Sullivan, 'The Ryan Report: Reformatory and Industrial Schools and Twentieth-Century Ireland' in Rosie Meade and Fiona Dukelow (eds), *Defining Events: Power, Resistance and Identity in Twenty-First-Century Ireland* (Manchester University Press 2014) 202.

regulations did not conform to modern standards of childcare.[95] In Ireland, industrial and reformatory schools ensured 'the Irish Catholic's ability to morally herd the Irish people, while the state sought to protect itself from social unrest at poverty and the derision of foreigners, especially the formerly colonial power Britain'.[96] Buckley and McGregor note that the industrial and reformatory schools reflect the high degree of trust between the Irish state and Catholic Church. In 1939, the state removed the policy of inspecting children in industrial schools placed from statutory care 'on the basis that the job the religious were doing on behalf of the State was such that it did not require such supervision and inspection'.[97]

During the 1860s–1870s, Australia introduced industrial and reformatory schools[98] but met resistance, due to the perceived stigma of poverty.[99] Instead, local legislatures had to make alternative provision for the poor and especially for children.[100] The early shift from boarding schools to a 'boarding out' model of housing children with foster families differentiates Australia from other jurisdictions[101] but also resulted in significant abuse for Australian children in care. It is estimated that at least 500,000 children experienced life in this out-of-home 'care' system.[102]

In Canada, residential schools were first established by religious organisations as part of their missionary work to both 'civilize' and 'Christianize' Indigenous children.[103] From 1874 until 1969, residential schools were operated in Canada jointly by Christian organisations and government.[104] Roughly 150,000 children were taken from their families and placed in residential

[95] 'Reformatory and Industrial Schools System Report' (The Stationary Office 1970).
[96] Anthony Keating, 'Church, State, and Sexual Crime against Children in Ireland after 1922' (2004–6) 5 Radharc 155, 156.
[97] Sarah-Anne Buckley and Caroline McGregor, 'Interrogating Institutionalisation and Child Welfare: The Irish Case, 1939–1991' (2019) 22 European Journal of Social Work 1062, 1069.
[98] Shurlee Swain, 'Beyond Child Migration: Inquiries, Apologies and the Implications for the Writing of a Transnational Child Welfare History' (2016) 13 History Australia 139, 140.
[99] Brian Dickey, 'Why Were There No Poor Laws in Australia?' (1992) 4 Journal of Policy History 111; Tanya Evans, *Fractured Families: Life on the Margins in Colonial New South Wales* (UNSW Press 2015).
[100] Swain (n 98) 141.
[101] ibid 143; Shurlee Swain, 'Institutional Abuse: A Long History' (2018) 42 Journal of Australian Studies 153, 156.
[102] *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (Commonwealth of Australia 2004) xv.
[103] Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada' (2015) 50, 103; Canada, House of Commons Debates (22 May 1883), 1376.
[104] Truth and Reconciliation Commission of Canada (n 103) 55–6.

schools.[105] The residential school system operated with few regulations under the Indian Act from 1894, which were weakly enforced.[106] Canadian residential schools represented a colonial attempt to assimilate self-governing peoples and their national identity, by transforming their bodies, ways, and knowledge with those of the settler majority.[107] The Canadian government took direct control over all the schools in 1970 and began their closure.[108]

In the United States, residential schools emerged in the seventeenth century, separating Native children from their communities to receive 'Christian civilising instruction'.[109] Residential schools became formal federal policy in 1869, forcing more than 100,000 Native children to attend schools operated by Christian denominations and religious orders. The stated rationale of this policy, as in Canada, was to 'kill the Indian, save the man'.[110] The schools were intended to train Native boys for manual labour and girls for domestic work, reinforcing white patriarchal structures and resulting in a loss of female leadership in Native communities.[111] Across these jurisdictions, the desire to transform the character of children in residential schools was predicated on a belief in their inferior nature, as Ferguson describes their status as 'moral dirt'.[112] This form of othering is also evident in institutions designed to condemn and reform women.

2.3.2 *Magdalene Laundries*

A second closed institution operated by religious orders were Magdalene Laundries, the first was established in 1758 in England.[113] The claimed

[105] Matt James, 'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6 International Journal of Transitional Justice 182, 184.
[106] Truth and Reconciliation Commission of Canada (n 103) 61.
[107] Celia Haig-Brown, *Resistance and Renewal: Surviving the Indian Residential School* (Tillacum Library 1988); Margaret D Jacobs, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880–1940* (University of Nebraska Press 2009).
[108] Truth and Reconciliation Commission of Canada (n 103) 69.
[109] Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Duke University Press 2015) 35.
[110] ibid 36.
[111] ibid 37.
[112] Harry Ferguson, 'Abused and Looked After Children as "Moral Dirt": Child Abuse and Institutional Care in Historical Perspective' (2007) 36 Journal of Social Policy 123.
[113] 'Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries, Chapter 3: History of the Magdalene Laundries and Institutions within the Scope of the Report' (Department of Justice, Equality and Law Reform 2013) para 69.

purposes of the Laundries were to house 'fallen women' and oblige them to engage in unpaid labour as penance and in repayment for sanctuary.[114] According to contemporary accounts, in England by 1898 'there were more than 300 Magdalene institutions, collectively housing 6,000 inmates and employing at least 1,200 full time Rescue staff'.[115] Comprehensive historical figures are not yet gathered for Laundries in England. In Northern Ireland, Laundries operated from 1867 until 1984, housing approximately 3,000 inmates.[116] For Linda Mahood, in Scotland, the 'carceral regimes deployed by these Magdalene asylums were based on both class and gender ideology', targeting young working-class women.[117]

The Magdalen Laundries operated in Ireland between 1795 and 1996. Ten thousand and twelve women are known to have been detained in a Magdalen Laundries from 1922 until 1996, though victim-survivor groups contest these figures.[118] James Smith asserts, 'In a society where even the faintest whiff of scandal threatened the respectability of the normative Irish family, the Magdalen asylum existed as a place to contain and punish the threatening embodiment of instability'.[119] In Australia, James Franklin notes the operation of eight Magdalene Laundries between 1890 and the 1960s for 'fallen women' who were placed in the convent, 'voluntarily or involuntarily, for reasons such as being destitute, uncontrollable, picked up by the police, and similar'.[120] In the United States, Magdalene Laundries were established in the 1840s, with approximately thirty-five institutions established by 1900.[121] Magdalene Laundries also operated in Canada from 1820, where women were obliged to engage in unpaid labour,[122] but have not been significantly investigated.

[114] Michelle Jones and Lori Record, 'Magdalene Laundries: The First Prisons for Women in the United States' (2014) 17 Journal of Indiana Academy of Social Sciences 166, 170.
[115] Frances Finnegan, *Do Penance or Perish: Magdalen Asylums in Ireland* (1st Oxford University Press edn, Oxford University Press 2004) 7.
[116] Leanne McCormick and Sean O'Connell, 'Mother and Baby Homes and Magdalene Laundries in Northern Ireland, 1922–1990' (Ulster University/Queens University Belfast 2021) 33 <www.health-ni.gov.uk/sites/default/files/publications/health/doh-mbhl-final-report.pdf>.
[117] Mahood (n 83) 8.
[118] Maeve O'Rourke and James Smith, 'Ireland's Magdalene Laundries: Confronting a History Not yet in the Past' in Alan Hayes and Maire Meagher (eds), *A Century of Progress? Irish Women Reflect* (Arlen House 2016).
[119] James M Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Manchester University Press 2008) xiv.
[120] James Franklin, 'Convent Slave Laundries? Magdalen Asylums in Australia' (2013) 34 Journal of the Australian Catholic Historical Society 70, 71.
[121] Jones and Record (n 114) 172–4.
[122] Valerie J Andrews, *White Unwed Mother: The Adoption Mandate in Postwar Canada* (Demeter Press 2018); Jones and Record (n 114).

2.3.3 *Maternity Homes*

From the beginning of the Poor Laws, unmarried mothers and their children were considered to be a serious problem for both the management and finances of workhouses and similar institutions.[123] In response, specialist institutions for unmarried mothers developed in the nineteenth and early twentieth centuries from voluntary, mainly religious, organisations.[124] In 1871, Female Mission to the Fallen opened the first mother and baby home in the United Kingdom.[125] Contemporary accounts of these homes and adoption societies were critical in that they were profit making, while claiming to be philanthropic.[126] It is not until 1939 and high rates of births outside marriage during World War II that national lists of mother and baby homes were compiled. A 1949 directory contained 159 homes in England and Wales.[127] In Northern Ireland, it is estimated that between 1922 and 1990 over 10,500 women entered mother and baby homes, with an undocumented number of single mothers entering workhouses.[128]

In the United States, maternity homes stigmatised pregnant young women by removing them from their families, friends, and neighbours but predominantly affected middle-class white American women and girls, who were framed as psychologically neurotic for becoming pregnant outside marriage.[129] By 1972 there were 201 maternity homes in the United States, responding to a 177 per cent increase in recorded pregnancy outside marriage from 1940.[130] Rickie Solinger suggests there was greater acceptance of an unmarried mother in African American communities but also that maternity homes often had a white-only entrance policy.[131]

In Canada, from the 1880s maternity homes 'accepted money for the upkeep of an unwed mother's infant and promised to find adoptive homes

[123] Maria Luddy, 'Unmarried Mothers in Ireland, 1880–1973' (2011) 20 Women's History Review 109, 110–11.
[124] Gillian Clark, 'The Role of Mother and Baby Homes in the Adoption of Children Born Outside Marriage in Twentieth-Century England and Wales' (2008) 11 Family & Community History 45, 54.
[125] Renate Howe and Shurlee Swain, 'Saving the Child and Punishing the Mother: Single Mothers and the State 1912–1942' (1993) 17 Journal of Australian Studies 31, 34–5.
[126] Clark (n 124) 48.
[127] ibid 54.
[128] McCormick and O'Connell (n 116) 22.
[129] Rickie Solinger, *Wake Up Little Susie* (2nd Routledge pbk. edn, Routledge 2000) 4.
[130] Helen Wallace and others, 'The Maternity Home: Present Services and Future Roles' (1974) 64 American Journal of Public Health 568.
[131] Solinger (n 129) 5–6.

for such children.'[132] Advocacy organisations have documented that at least sixty-six maternity homes operated.[133] Murray notes the operators of such homes perceived themselves as building the Canadian nation by ensuring that future male leaders 'would not be "ruined" by fallen sisters "dragging" them "down to the damnable abyss"'.[134] In addition, religious orders also sought to maintain the homogeneity of their own faiths.[135] Approximately 300,000 unmarried mothers in Canada were systematically separated from their babies at birth for adoption.[136] In the 1960s, the 'sixties scoop' meant that Aboriginal children were 'apprehended in disproportionate numbers throughout Canada and adopted primarily into non-Aboriginal homes in Canada, the United States, and overseas'.[137] This process of disproportionate adoption reflects the closing of the residential schools in Canada but the continuance of attempts to shape Aboriginal child welfare.[138]

In Ireland, in the early 1920s, the state and religious orders established several mother and baby homes to address a perceived moral crisis involving unmarried mothers, who were framed as both sinners and damaging to the reputation of the newly independent state.[139] According to the 2021 Commission of Investigation into Mother and Baby Homes report, there were about 56,000 unmarried mothers and about 57,000 children in the mother and baby homes and county homes investigated by the Commission.[140] A total of about 9,000 (15 per cent of all) children died in the institutions under investigation. In Australia, diverse institutions for child welfare operated, including orphanages, asylums, and maternity homes, which have been documented as abusive by women formerly resident there.[141] A significant practice of 'boarding out' children to foster homes also persisted in Australia.[142] Swain and Howe argue: 'The objective of protecting the child while punishing the mother became the

[132] Karen Bridget Murray, 'Governing Unwed Mothers in Toronto at the Turn of the Twentieth Century' (2004) 85 The Canadian Historical Review 253, 256.
[133] <www.originscanada.org/adoption-practices/adoption-realities/homes-for-unwed-mothers/>
[134] Murray (n 132) 258.
[135] ibid 261.
[136] Andrews (n 122).
[137] Raven Sinclair, 'Identity Lost and Found: Lessons from the Sixties Scoop' (2007) 3 First Peoples Child and Family Review 65, 66.
[138] ibid 67.
[139] Finola Kennedy, *Cottage to Crèche: Family Change in Ireland* (Institute of Public Administration 2001) 145; Luddy (n 123) 110.
[140] Commission of Investigation into Mother and Baby Homes, *Final Report, Executive Summary* (Official Publications 2021) 2.
[141] *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Commonwealth of Australia 2012) 34–9.
[142] *Forgotten Australians* (n 102) 20–30.

central concern of public policy in relation to single mothers',[143] which led to a significant practice of forced adoptions, discussed below.

2.4 HISTORIES OF ABUSES

In addition to entire classes and nations of peoples, women and children were particularly marginalised by social attitudes and institutionalisation through intersectional forms of harm and discrimination, affecting especially poor, black, mixed race, or Indigenous women and children. In a context of prior inter-generational harms, such as colonisation and slavery, institutionalisation not only occurred with the support of governments, churches, and families, socialised by contemporary religious attitudes and teaching, but also formed part of criminal justice, health, and welfare systems. When combined with persistent criminal behaviour by religious actors outside of institutional contexts, especially clerical child sexual abuse, a picture of widespread and systemic harms against members of these societies from state and church officials emerges. Harm, especially sexual violence, is always under-reported and difficult to estimate. This is doubly true regarding historical abuses, where the passage of time and degradation of evidence make it difficult now to reach accurate estimates about the number of victims-survivors and perpetrators involved.[144] The harms listed below should be understood as provisional and likely under-reported.

2.4.1 *Genocide*

In international law, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group; and
(e) Forcibly transferring children of the group to another group.[145]

[143] Howe and Swain (n 125) 31.
[144] David Finkelhor and Richard K Ormrod, 'Factors in the Underreporting of Crimes Against Juveniles' (2001) 6 Child Maltreatment 219.
[145] Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277, entered into force Jan. 12, 1951.

The label genocide remains highly controversial in its application to the United States, Canada, and Australia,[146] due in part to the retroactive application of this legal concept and the effect of alleging genocide in challenging national myths and identities.[147] Russell Thornton estimates the total Indigenous American population to be 5 million before 1492, falling to 250,000 towards the end of the nineteenth century,[148] though the nature and extent of genocidal killings, with the intention and not merely the consequence of destroying specific groups, remain highly contentious.[149] David Stannard suggests 'disease and genocide were interdependent forces, acting dynamically'.[150] Some examples exist of clear genocidal intent. In the nineteenth century, the discovery of gold in California led to a significant inward migration of settlers that devastated the Indigenous population, which at that time was estimated to have numbered approximately 150,000. Fewer than thirty years later, that population was reduced to fewer than 30,000.[151] A California state fund was created to pay per head or scalp of each Native American person exterminated.[152]

In addition to the military conquest of land, settler colonialism across the United States, Canada, and Australia demonstrates several practices that could be deemed genocidal in nature, or, at a minimum, have genocidal consequences, such as sexual violence. In addition, several forms of assimilation and the construction of citizenship and equality legislation can be seen to have destructive effects on the sovereign nature and identity of First Nations and Native peoples. In the United States, the Indian Citizenship Act 1924 declared all Indian peoples 'born within the territorial limits of the United States' to be US citizens and not primarily members of their tribal nation.

In Australia, two practices against Aboriginal peoples have been suggested as genocidal: killings in the process of land seizure and dispossession, and the twentieth-century policies of institutionalisation and child removal that 'developed

[146] Katherine Ellinghaus, 'Biological Absorption and Genocide: A Comparison of Indigenous Assimilation Policies in the United States and Australia' (2009) 4 Genocide Studies and Prevention 59, 59–60.

[147] Jeff Benvenuto, Andrew Woolford and Alexander Laban Hinton, 'Colonial Genocide in Indigenous North America' in Andrew Woolford, Alexander Laban Hinton and Jeff Benvenuto (eds), *Colonial Genocide in Indigenous North America* (Duke University Press 2014) 4.

[148] Russell Thornton, *American Indian Holocaust and Survival: A Population History Since 1492* (University of Oklahoma Press 1990) 30.

[149] David E Stannard, *American Holocaust: The Conquest of the New World* (Oxford University Press 1993).

[150] ibid xii.

[151] Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873* (Yale University Press 2016) 3.

[152] ibid 145–172.

as settler governments attempted to control surviving Indigenous populations'.[153] Colin Tatz maintains that the violent extermination of First Peoples in Australia reduced a population of at least 250,000 at first contact in 1788 to 30,000 by 1911.[154] The Australian *Bringing Them Home* report concluded that child removal from Indigenous families constituted genocide; that mixed motives did not abrogate the required intention for genocide; and that removal policies continued well after 1946 when genocide became a crime under international law. One in ten, possibly as many as one in three, Indigenous children were removed from their families and communities between 1910 and the 1970s.[155]

In Canada, over 150,000 First Nations, Métis, and Inuit children were placed in residential schools, which the Canadian Truth and Reconciliation Commission (TRC) termed 'cultural genocide'.[156] Bonita Lawrence describes assimilationist strategies which limited the status of Indigenous peoples to those who married within their own people, 'statistical genocide', with over 25,000 women having lost status between 1876 and 1985; anywhere from 1 to 2 million of their descendants are now incapable of asserting any legally recognised Indigenous identity in Canada.[157] A 2019 report concluded that contemporary violence being perpetrated against First Nations, Inuit, and Métis women and girls 'amounts to a race-based genocide of Indigenous peoples'.[158] Accusations of genocide have been resisted in the United States, Canada, and Australia and offer a challenging alternative to positive national histories, identities, and myths.[159] In the face of such resistance, Larissa Behrendt insists: 'the political posturing and semantic debates do nothing to dispel the feeling Indigenous people have that this is the word that adequately describes our experience as colonized people'.[160]

[153] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) 114.
[154] Colin Tatz, 'Genocide in Australia' (1999) 1 Journal of Genocide Research 315.
[155] Meredith Wilkie (ed), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission 1997) 30–32.
[156] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 2:* (McGill-Queen´s University Press 2015) vii.
[157] Bonita Lawrence, *'Real' Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (University of Nebraska Press 2004) 77.
[158] *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a* (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019) 50.
[159] Curthoys, Genovese and Reilly (n 153) 130.
[160] Larissa Behrendt, 'Genocide: The Distance between Law and Life' (2001) 25 Aboriginal History 132.

2.4.2 *Physical, Sexual, and Psychological Violence*

Physical and sexual violence are a central element of historical abuses considered in this book. Evidence of sexual abuse, including child sexual abuse, in Christian churches has a long history,[161] in both institutional and non-institutional settings. Doyle, Sipe and Wall conclude: 'sexual abuse of minors and adults by Catholic clergy has continued without interruption from the post-Apostolic period to present'.[162] Child sexual abuse perpetrated by priests has occurred in Ireland, Canada, the United States, the United Kingdom, and Australia in significant numbers, both in institutional settings and in the dioceses and parishes of the Catholic Church. When perpetrated against Indigenous peoples in the context of broader assimilationist strategies, such violence can assume a genocidal character.[163]

In the United States, within the Roman Catholic Church, initial reports disclosed a total of 17,259 reported cases with 4,392 priests accused of abuse between 1950 and 2002.[164] One estimate suggests that there may be 100,000 total victims of child sexual abuse arising in the Roman Catholic Church in the United States alone.[165] Andrea Smith also alleges rampant sexual abuse in Indian boarding schools,[166] though in the absence of nationwide inquiries it is difficult to ascertain the appropriate figure.

Sexual violence also forms part of the legacy of violence inherent in slavery and racism in the United States,[167] especially in a context where black women's bodies, and any children resulting from rape and sexual assault, were deemed property.[168] Patricia Hill Collins notes that perversely after

[161] Kim Stevenson, 'Unearthing the Realities of Rape: Utilising Victorian Newspaper Reportage to Fill in the Contextual Gaps' (2007) 28 Liverpool Law Review 405; Emily J Manktelow, *Gender, Power and Sexual Abuse in the Pacific; Rev. Simpson's Improper Liberties* (Bloomsbury Publishing PLC 2018).

[162] Doyle, Sipe and Wall (n 8) 53.

[163] Stannard (n 149) 121.

[164] John Jay College of Criminal Justice and Catholic Church (eds), *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002: A Research Study Conducted by the John Jay College of Criminal Justice, the City University of New York: For the United States Conference of Catholic Bishops* (United States Conference of Catholic Bishops 2004) 4.

[165] John Allen, 'Vatican Abuse Summit: $2.2 Billion and 100,000 Victims in U.S. Alone' *National Catholic Reporter* (8 February 2012) <http://ncronline.org/blogs/ncr-today/vatican-abuse-summit-22-billion-and-100000-victims-us-alone>.

[166] Smith (n 109) 38.

[167] Ruth Thompson-Miller and Leslie H Picca, '"There Were Rapes!": Sexual Assaults of African American Women and Children in Jim Crow' (2017) 23 Violence Against Women 934, 935.

[168] Thelma Jennings, '"Us Colored Women Had to Go Though A Plenty": Sexual Exploitation of African-American Slave Women' (1990) 1 Journal of Women's History 45; Leon F Litwack,

emancipation when enslaved women were no longer property, they were vulnerable to even more rapes: 'No longer the property of a few White men, African American women [and girls] became sexually available to all White men'.[169]

Sexual violence intersects with other forms of racist violence, especially lynching. Racist perceptions of the threat of sexual violence posed by black men to white women were often the basis for lynching of black men,[170] who were frequently sodomised or castrated as part of the lynching violence.[171] Lynching, being premeditated extrajudicial killing, emerged as a particular form of political and racial violence in the post-Reconstruction United States.[172] Lynchings were often public and mass events in which dozens or hundreds would participate,[173] often on the supposed basis of an allegation of murder or rape by the victim.[174] Estimates indicate at least 4,000 racially motivated lynchings between 1877 and 1950.[175] Sherrilyn Ifill notes the economic dimensions of lynching amid agriculture on large plantations 'lynching helped ensure the maintenance of a compliant and available workforce, without which the traditional agrarian southern economy could not function for the benefit of whites'.[176] James Cone sees the legacy of lynching as a key element of understanding the structural violence of racism in Christian terms: 'every time a white mob lynched a black person, they lynched Jesus. The lynching tree is the cross in America'.[177]

In Canada, at least 37,951 claims have been received for injuries resulting from physical and sexual abuse at residential schools,[178] likely only a portion of the full harms experienced. Although the Canadian Truth and Reconciliation

Been in the Storm So Long: The Aftermath of Slavery (1st Vintage Books edn, Vintage Books 1980).

[169] Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (Routledge 2006) 65.

[170] Thompson-Miller and Picca (n 167) 937.

[171] Philip Dray, *At the Hands of Persons Unknown: The Lynching of Black America* (Modern Library pbk edn, Modern Library 2003).

[172] Manfred Berg, *Popular Justice: A History of Lynching in America* (Rowman & Littlefield Publishers, Incorporated 2015).

[173] Barbara Holden-Smith, 'Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era' (1996) 8 Yale Journal of Law & Feminism 31, 36; Sherrilyn A Ifill, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century* (Beacon Press 2007) 16.

[174] Holden-Smith (n 173) 39.

[175] 'Lynching in America' (Equal Justice Initiative 2017) <https://lynchinginamerica.eji.org/report/>.

[176] Ifill (n 173) 65.

[177] James H Cone, *The Cross and the Lynching Tree* (Orbis Books 2011) 158.

[178] *Truth and Reconciliation Commission of Canada* (n 156) 106–7.

noted the widespread nature of sexual abuse in residential schools against Aboriginal children,[179] in the absence of a nationwide inquiry into clerical abuse it is impossible to estimate the scale of sexual violence both in and out of institutions. Physical abuse and sexual abuse often were intertwined.[180] In 2019, the Canadian Conference of Catholic Bishops (CCCB) was unable to provide comprehensive figures of the number of priests credibly accused of child sex abuse since 1950, noting that its conference did not gather nationwide statistics.[181]

In Australia, sexual violence has long been a pervasive form of harm, both in and beyond institutional contexts.[182] However, as in other jurisdictions, prosecutions for child abuse in the context of institutions remained challenging. A 2017 report heard from almost 8,000 survivors of abuse alleging abuse in over 3,400 institutions,[183] with over 1,800 alleged perpetrators in religious settings in claims of child sexual abuse,[184] and 7,382 survivors alleging abuse in religious settings.[185]

In Ireland, commissions of inquiry revealed that sexual abuse was 'endemic' in religious institutions throughout the country, with more than 1,000 former pupils testifying with allegations of physical and sexual abuse.[186] Between 1975 and 2014, there were 4,406 allegations of child sexual abuse by priests reported to church authorities and Gardai.[187] In the United Kingdom, at the

[179] Truth and Reconciliation Commission of Canada (n 45) 559–70.
[180] *Truth and Reconciliation Commission of Canada* (n 156) 108.
[181] Tavia Grant, 'The Walking Wounded: In Canada, Survivors of Catholic Church Sex Abuse Await a Reckoning' *The Globe and Mail* (22 September 2019) <www.theglobeandmail.com/canada/article-the-walking-wounded-in-canada-survivors-of-catholic-church-sex-abuse/>.
[182] Alana Piper (ed), *Gender Violence in Australia: Historical Perspectives* (Monash University Publishing 2019).
[183] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017).
[184] 'Proportion of Priests and Non-ordained Religious Subject to a Claim of Child Sexual Abuse 1950–2010' (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 5.
[185] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Royal Commission into Institutional Responses 2017) Vol. 16, 13.
[186] 'Report by Commission of Investigation into the Handling by Church and State Authorities of Allegations and Suspicions of Child Abuse against Clerics of the Catholic Archdiocese of Dublin' (Department of Justice, Equality and Law Reform 2009); Carol Holohane, 'In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports' (Amnesty International 2011).
[187] Figures compiled from annual reports available from the National Board for Safeguarding Children in the Catholic Church in Ireland, 'Publications,' 20 April 2020, <www.safeguarding.ie/publications>.

time of writing, the nature and extent of historical child abuse in England and Wales, and in Scotland, remain subject to ongoing inquiries. In Northern Ireland, the Historical Institutional Abuse Inquiry (HIAI) found systemic failings in the majority of residential institutions for children it investigated, with evidence of sexual, physical, and emotional abuse; neglect; and unacceptable practices across the institutions and homes examined.[188] Across these jurisdictions, it has also been shown that religious superiors knew about allegations of sexual abuse and made efforts to cover up the abuse or transfer abusers to avoid scandal.[189] While child sexual abuse crises have gathered significant national and international attention, it is important to position such abuse in the context of broader systems of violence and oppression of those deemed 'other', both in and beyond institutional contexts.

2.4.3 *Theft of Land and Property*

The conquest and occupation of Indigenous land is key to the structure of settler colonialism as an ongoing event, affecting the territories known as the United States, Canada, and Australia today. Settling forces removed Native peoples from lands they sought to occupy, through treaties, violence, and economic coercion. Western attitudes to sovereignty and early international law ignored the sovereignty and laws of Indigenous peoples and First Nations,[190] to expropriate and take land without effective consent. Walter Hixson notes that 'Euro-Americans employed the law as a means of disavowing the colonizing act. In some cases Indians legitimately sold land. Other times speculators and officials cheated them out of land, sometimes in collusion with their own "chiefs" or other tribes'.[191]

From the 1600s on, the territories of Indigenous tribes in North America were invaded by the English, Spanish, and French and, later, by the Americans. Kent McNeil notes that the loss of the lands of First Nations peoples was gradual and that it was not until 1870 to 1890 that 'the asserted

[188] AR Hart and others, *Report of the Historical Institutional Abuse Inquiry* (2017) Chapter 1, paras. 68–81.

[189] Truth and Reconciliation Commission of Canada (n 45) 559–70; Timothy Willem Jones, 'Sin, Silence and States of Denial: Canon Law and the "Discovery" of Child Sexual Abuse' (2015) 41 Australian Feminist Law Journal 237; Linda Hogan, 'Clerical and Religious Child Abuse: Ireland and Beyond' (2011) 72 Theological Studies 170.

[190] Kent McNeil, Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions,' in Julie Evans and others (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press 2013) 49.

[191] Walter L Hixson, *American Settler Colonialism: A History* (1st ed, Palgrave Macmillan 2013) 45.

territorial sovereignty of these states became a reality on the ground'.[192] In the United States, the Indigenous Reservation system began in 1763 with the Royal Proclamation set by Great Britain.[193] Between 1778 and 1871, the US Senate ratified 370 Indian treaties.[194] The 1830 Indian Removal Act systematised a federal policy forcibly moving Native peoples away from settler-populated areas.[195] Glenn notes: 'Through treaty, these tribes were prevailed upon to cede their traditional lands in Mississippi, Alabama, Georgia, and Florida in exchange for land west of the Mississippi'.[196] This led to the forced migration of five tribes from traditional lands in the Southern United States to Oklahoma, in what is known as 'the Trail of Tears',[197] leading to a forced march of the Cherokee peoples to the West and the death of at least 4,000 Cherokees from hunger, cold, and disease.[198]

In 1851, Congress passed the Indian Appropriations Act creating Indian reservations in Oklahoma.[199] The 1871 Indian Appropriation Act removed constitutional recognition of tribes as sovereign nations. In the 1880s, federal Indian policy adopted the goal of assimilation or 'Americanisation' to be achieved through education of Indian children in residential schools, as discussed above, and through land allotment, intended to break up tribal governments, abolish the reservations, and assimilate Indians into non-Indian society as farmers.[200] Charles Geisler suggests that 'Indians in America lost their land through coercion muted by market-like negotiations on some occasions and coercion without pretense on others'.[201] Glenn notes that 'before the start of allotment, Indians owned 138 million acres; that amount was reduced to 54 million acres by 1934 when the allotment program was terminated'.[202] The theft of land also affected African Americans, who

[192] McNeil (n 190) 39.
[193] Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford University Press 2007).
[194] ibid 93.
[195] Alfred Cave, 'Abuse of Power: Andrew Jackson and the Indian Removal Act 1830' (2003) 65 The Historian 1330.
[196] Glenn (n 31) 56.
[197] Dee Brown, *Bury My Heart at Wounded Knee: An Indian History of the American West* (Vintage 2006); John Ehle, *Trail of Tears: The Rise and Fall of the Cherokee Nation* (1st edn, Doubleday 1988).
[198] Glenn (n 31) 56.
[199] Joan Waugh, *U.S. Grant: American Hero, American Myth* (University of North Carolina Press 2009) 60–159.
[200] Glenn (n 31) 56–7.
[201] Charles Geisler, 'Disowned by the Ownership Society: How Native Americans Lost Their Land: Native American Enclosure' (2014) 79 Rural Sociology 56, 58–9.
[202] Glenn (n 31) 56–7.

were excluded from the Homestead acts.[203] A 2001 investigation into the theft of black-owned land stretching back to the pre-Civil War period documented some 406 victims and 24,000 acres of land valued at tens of millions of dollars. The land was taken through various means from legal pressure to violence.[204] Richard Rothstein has recently argued that racial segregation of land and housing has persisted throughout America through active policies of government at local, state, and federal levels.[205]

In Canada, jurisdiction over 'Indians and Lands reserved for the Indians' was assigned to the Parliament of Canada through the Constitution Act 1867. Canada promised Britain to honour the provisions of the 1763 Proclamation to 'negotiate with its Amerindians for the extinguishment of their title and the setting aside of reserves for their exclusive use'. This promise led to several numbered treaties.[206] Subsequent government practice under the 1876 Indian Act asserted further control over Indigenous people and their sovereignty. The Canadian TRC concluded that the Government of Canada's failure to honour the original intent of treaty relationships, as well as the 'destructive impacts of residential schools, [and] the 1876 *Indian Act*', have resulted in the broken trust among Indigenous people and Canadians.[207]

In Australia, in 1788, the First Nations possessed the entire continent. Then during a prolonged period of land grab from 1788 to the late 1960s Indigenous peoples were dispossessed.[208] Aileen Moreton-Robinson argues that settler states viewed dispossession as inherently legal based on the idea of *terra nullius*: 'Indigenous people did not have a concept of ownership, which means that we had no sovereignty to defend. Thus there was no theft, no war, and no need to have a treaty'.[209] The dispossession of land is central to the harms experienced and reproduced against Indigenous peoples in settler colonies. As we will see in subsequent chapters, although states are willing

[203] Samuel Bowles and Herbert Gintis, 'The Inheritance of Inequality' (2002) 16 Journal of Economic Perspectives 3.
[204] Todd Lewan and Dolores Barclay, 'When They Steal Your Land, They Steal Your Future' *The Los Angeles Times* (Los Angeles, California, 2 December 2001).
[205] Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (W W Norton & Company 2017).
[206] Derek Whitehouse, 'The Numbered Treaties: Similar Means to Dichotomous Ends' (1994) 3 Past Imperfect 25.
[207] Truth and Reconciliation Commission of Canada (n 103) 184.
[208] Robert Nichols, 'Theft Is Property! The Recursive Logic of Dispossession' (2018) 46 Political Theory 3.
[209] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015) 150.

to acknowledge and seek to remedy other more discrete harms, the return of lands to Indigenous peoples remains deeply challenging.

2.4.4 *Slavery and Unpaid Labour*

Slavery and subsequent practices of discrimination and mass incarceration of African Americans in the United States are discussed above. In Australia, unpaid labour was central to the establishment of Indigenous camps on land occupied by European conquest.[210] Domestic labour was promoted as a means by which to civilise and assimilate Indigenous girls into lower social classes.[211] State and church officials framed the exploitation of the labour of children to build religious buildings as training and education.[212] Unpaid labour was also a feature of life in workhouses in Ireland and the United Kingdom,[213] and latterly in industrial schools.[214] Unpaid labour was framed as penance for moral wrongdoing in Magdalene Laundries and maternity homes.[215] In Canada, in residential schools, parents and inspectors raised concerns about just how much work Indigenous students were being required to do.[216] The exploitation of labour across diverse national contexts demonstrates the links between historical abuses and the modern-day distribution of wealth and economic structures.

2.4.5 *Forced Child Removal*

Adoption and child migration were used to create a new family by seeking the destruction of another, an exchange that increased the number of 'respectable' citizens while cleansing the country of others. In the nineteenth century, child migration began to be seen in the United Kingdom as a means of reducing the financial demands of the poor, meeting 'labour needs of

[210] Anthony Thalia, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Case for Aboriginal Station Workers' [2007] Labour History 15.
[211] Ros Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press 2006).
[212] *Lost Innocents: Righting the Record: Report on Child Migration* (Senate Community Affairs References Committee Secretariat 2001).
[213] Simon Fowler, *The Workhouse: The People, the Places, the Life Behind Doors* (Grantham Book Services Ltd 2008) 111.
[214] 'The Commission to Inquire into Child Abuse Report' (n 77) Appendix, Review of Financial Matters relating to the system of the Reformatory and Industrial Schools, and a number of individual institutions 1939–69 (30 November 2007).
[215] Lindsey Earner-Byrne, *Mother and Child: Maternity and Child Welfare in Dublin, 1922–60* (Manchester University Press 2013) 189.
[216] Truth and Reconciliation Commission of Canada (n 45) 340.

underpopulated colonies', and benefitting child migrants themselves.[217] Gordon Lynch suggests that churches and charities cultivated a sense that child migration was a moral necessity to keep children within their own religious tradition.[218]

Several policies were enacted in the United States, Canada, and Australia to remove children of the poor and Indigenous children from their families and communities, to ensure they became '"civilized" and Christianised'.[219] In the United States, urban growth and immigration placed children in poor families at significant risk of hunger, disease, and poor housing in a context of a need to populate the American West and further assimilate migrants.[220] 'Orphan trains' organised placement of upwards of 200,000 urban poor children from the east of the United States within religious communities in the Western United States.[221] Starting in the 1880s, Indian child removal combined with placement in boarding schools to limit the influence of Indian mothers and to assimilate the child,[222] with as many as 25–35 per cent of all Indian children forcibly removed, mostly from extended family networks, and placed in predominately non-Indian homes, which had no relation to American Indian cultures.[223] Between 1900 and the 1970s, one-third of all Indigenous children born had been adopted into non-Indigenous families.[224] Rickie Solinger notes that it is especially post-World War II that US policymakers began to enact specific policies to separate mother and child where a mother was deemed morally problematic for being poor, pregnant, and unmarried.[225] Across the United States, it is estimated that a million and a half babies were adopted between 1945 and 1973.[226]

[217] Gordon Lynch, *Remembering Child Migration: Faith, Nation-Building, and the Wounds of Charity* (Bloomsbury Academic 2016) 11.
[218] ibid 14–15, 103.
[219] Gordon Lynch, 'Saving the Child for the Sake of the Nation: Moral Framing and the Civic, Moral and Religious Redemption of Children' (2014) 2 American Journal of Cultural Sociology 165, 167.
[220] Lynch (n 217) 14–15.
[221] Lynch (n 219) 166.
[222] Glenn (n 31) 57.
[223] Troy Johnson, 'The State and the American Indian: Who Gets the Indian Child?' (1999) 14 Wicazo SA Review 197, 204.
[224] Marian Bussey and Nancy M Lucero, 'Re-Examining Child Welfare's Response to ICWA: Collaborating with Community-Based Agencies to Reduce Disparities for American Indian/Alaska Native Children' (2013) 35 Children and Youth Services Review 394, 395.
[225] Rickie Solinger, 'Poor and Pregnant in the United States: 1950s, 1970s, 1990s' (1994) 21 Social Justice 22.
[226] Ann Fessler, *The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades before Roe v. Wade* (Penguin Press 2007) 31.

In Australia, the first child removal legislation introduced in the 1840s related to Indigenous children.[227] Missionaries believed that by direct instruction of Aboriginal children, the children would 'appreciate not only the benefits of civilisation, but the higher advantages of Christianity'.[228] Swain notes the progressive strengthening of the child removal powers can be understood within the context of growing concern about the racial composition of the nation.[229] The Aborigines Protection Act 1909 enabled the removal of children without their parents' consent if they were found by a magistrate to be 'neglected', which included children having 'no visible means of support or fixed place of abode'.[230] Adoption was a radical process enabling the erasure of a child's identity.[231] In this context, children were placed in church-affiliated institutions, where they were removed from and often had no further contact with their identity, families, and culture.[232] As noted above, the forced removal from Indigenous families, the Stolen Generations, affected between one in ten and one in three Indigenous children. Child migration of foreign white children became an explicit policy of the Australian government as part of its White Australia policy.[233] The 1922 Empire Settlement Act in the United Kingdom funded this child migration scheme. However, after their arrival in Australia, no authority monitored the children.[234] UK child migration schemes continued until 1970.[235] 6,500–7,000 unaccompanied child migrants were sent from the UK to Australia alone between 1912 and 1970.[236]

In Canada, approximately 90,000 unaccompanied children were transported from the United Kingdom from 1869 until the early twentieth century.[237] Lynch notes that throughout the nineteenth century 'the

[227] Shurlee Swain, 'Enshrined in Law: Legislative Justifications for the Removal of Indigenous and Non-Indigenous Children in Colonial and Post-Colonial Australia' (2016) 47 Australian Historical Studies 191, 196.
[228] ibid 197.
[229] ibid 206.
[230] Peter Read and New South Wales and Department of Aboriginal Affairs, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883–1969* (New South Wales Department of Aboriginal Affairs 2008) 7.
[231] Swain, 'Enshrined in Law' (n 227) 206.
[232] Russell MF Hawkins and Freda Briggs, 'The Institutionalised Abuse of Children in Australia: Past and Present' (1997) 133 Early Child Development and Care 41, 42.
[233] Ellen Boucher, *Empire's Children: Child Emigration, Welfare, and the Decline of the British World 1869–1967* (Cambridge University Press 2014) 92–125.
[234] Hawkins and Briggs (n 232) 43.
[235] Lynch (n 217) 2.
[236] ibid 52.
[237] ibid 31.

organisational structures through which child migration from Britain to Canada operated were diffuse, made up of competing and complementary relationships between state welfare providers, philanthropists, civic leaders, donors and churches'.[238] In addition, domestic adoptions in Canada were significant in the twentieth century. Some 600,000 Canadian babies were labelled 'illegitimate' between 1945 and 1971, and it is estimated that between 300,000 and 450,000 babies were given up for forced adoption during this period.[239]

In the United Kingdom, it is estimated that at least 500,000 women were affected by forced adoption practices in the twentieth century[240] but only recently did this become subject to official investigation.[241] Adoption was unregulated in Ireland, until the Adoption Act 1952. Natural mothers have strongly disputed the voluntary nature of the consent given to these arrangements even after 1952.[242] Mike Milotte argues that successive Irish governments were aware of a substantial, lucrative but entirely illegal trade in Irish children through illegal adoption and that both church and state supported the process in part as a mechanism to avoid the adoption of children into Protestant homes and to retain the Catholic faith of adopted children,[243] with allegations of up to 15,000 illegal adoptions nationally.[244] For many children, migration or adoption constituted a painful loss of relationships with family friends and community, compounded by neglect in new homes and institutions.[245] For some children, these forms of harm were compounded by experiences of physical and sexual violence and exploitation of their labour, as discussed above.

[238] ibid 41.
[239] Andrews (n 122) 152; 'The Shame Is Ours: Forced Adoptions of the Babies of Unmarried Mothers in Post-War Canada' (Standing Senate Committee on Social Affairs, Science and Technology 2018).
[240] Harriet Sherwood, 'MPs Urge Theresa May to Apologise for "Pain" of Forced Adoption Policy' *The Guardian* (London, 12 July 2018).
[241] Duncan Kennedy, 'Forced Adoption: Birth Parents Urged to Give Evidence to Inquiry' *BBC News* (London, 23 September 2021) <www.bbc.com/news/uk-58667268> accessed 1 December 2021.
[242] 'Clann Report: Principal Submissions to the Commission of Investigation into Mother and Baby Homes' (2018) <http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf>.
[243] Mike Milotte, *Banished Babies: The Secret History of Ireland's Baby Export Business* (New Island Books 2012) 23–25.
[244] Vivienne Clarke, 'There May Be 15,000 Illegal Adoptions, Barnardos Head Claims' *The Irish Times* (Dublin, 30 May 2018).
[245] Lynch (n 217) 88–90.

2.5 CONCLUSION

Amid other social, political, and economic forces, Christianity and churches were intimately involved in the social cultural and political development of Western Europe and the Global North but also in the justification of violence, conflict, and marginalisation of those deemed 'other', inferior, or morally problematic: non-Christians, non-whites, the poor, with a particular emphasis on women and children. Christianity framed and amplified historical abuses and their justifications to existential, eternal dimensions. It is in this context of inter-generational and widespread forms of violence that we can place closed institutions that operated until within living memory. The continuation of ideas that gave rise to historical abuses and the material aftermath of these harms continue to shape and inform the countries and churches examined in this book. If these cycles are not broken, justice for historical abuses will not be attained, and these countries and churches may reproduce fresh instances of exclusion, othering and violence, even as they attempt to do justice to the past.

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 intergenerational 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 abuse[7] 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.ccnsa-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 intergenerational 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-imaging 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 Nesiah 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] Nesiah (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.

4

Power

4.1 INTRODUCTION

Chapter 3 argued that inter-generational historical abuses are reproduced over time in present day, for victim-survivors, for historically marginalised groups, and for the descendants of those who suffered historical abuses. Chapter 3 suggested that more powerful actors, especially those whose power was developed through historical abuses, bear the greatest responsibility for addressing historical-structural injustices today and are most likely to resist addressing such injustices. This chapter considers power as essential to understanding who is legally liable and who is socially and politically responsible[1] for addressing historical-structural injustices and for evaluating whether and how unfair structures are reproduced in the practices of transitional justice designed to address these wrongs.

Section 4.2 will outline competing conceptions of power, preferring political scientist Mark Haugaard's four-dimensional conception of power. Section 4.3 applies these four dimensions of power to historical-structural injustices. Section 4.4 examines the role of national and religious myths as justification narratives that maintain existing distributions and structures of power. Section 4.5 examines power as a limitation in addressing the past in transitional justice. Section 4.6 concludes by identifying that assessing the role of power in addressing historical-structural injustices is necessary but insufficient in light of the challenges facing victim-survivors, states, and churches.

[1] Pamela Pansardi, 'Why We Do Need a Concept of Power' (2021) 14(2) Journal of Political Power 301, 310.

4.2 CONCEPTIONS OF POWER

Power has been subjected to a range of conceptualisations and evaluations in the last fifty years, across several disciplines.[2] Different explanations of power have proliferated,[3] with several notable traditions forming around different dimensions of power.[4] The first view is one of power over, which is capable of reflecting an oppressive use of power as domination. The second view of power is as power to, capable of reflecting empowerment of self and others, and is a view of power emphasised and contested within feminist scholarship.[5] A third approach adds power with,[6] which 'denotes wider collaboration between actors that facilitates joint power-to'.[7] Although some scholarship saw these as opposing approaches to power, a number of authors have combined these approaches in multi-dimensional conceptions of power.[8] Valeri Ledyaev notes that these approaches are 'searching for different forms (faces) of power and trying to incorporate them into their conceptual frameworks'.[9]

Since then, Mark Haugaard has argued there are four dimensions of power,[10] adding a re-conceptualised account of Foucault's work on power as a fourth dimension. Haugaard's four dimensions overlap but differ from power over, to and with, as explained below. For Haugaard, 'the four dimensions correspond to four aspects of social interaction. The first dimension refers to the agency-energy aspect of an interaction. The second concerns the structural components. The third concerns the epistemic element of the interaction.

[2] Robert A Dahl, 'The Concept of Power' (2007) 2 Behavioral Science 201; Steven Lukes, *Power: A Radical View* (Macmillan 1974); Amy Allen, *The Power of Feminist Theory: Domination, Resistance, Solidarity* (Westview Press 1999).

[3] Amy Allen, 'The Power Family Tree' (2014) 7 Journal of Political Power 443, 443.

[4] Peter Bachrach and Morton S Baratz, 'Two Faces of Power' (1962) 56 American Political Science Review 947; Valeri Ledyaev, 'Conceptual Analysis of Power: Basic Trends' (2021) 14(1) Journal of Political Power 72, 73.

[5] Amy Allen, 'Feminist Perspectives on Power' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2021) <https://plato.stanford.edu/archives/win2021/entries/feminist-power/>.

[6] Mark Haugaard, 'Editorial: Reflections upon *Power over*, *Power to*, *Power with*, and the Four Dimensions of Power' (2012) 5 Journal of Political Power 353.

[7] Mark Haugaard, 'The Four Dimensions of Power: Conflict and Democracy' (2021) 14(1) Journal of Political Power 153.

[8] Allen, *The Power of Feminist Theory* (n 2) 33–5; Pamela Pansardi, 'Power to and Power over: Two Distinct Concepts of Power?' (2012) 5 Journal of Political Power 73; Stewart Clegg, *Frameworks of Power* (Sage Publications 1989).

[9] Ledyaev (n 4) 74.

[10] Mark Haugaard, 'Rethinking the Four Dimensions of Power: Domination and Empowerment' (2012) 5 Journal of Political Power 33; Haugaard, 'The Four Dimensions of Power' (n 7); Haugaard, 'Editorial' (n 6).

The fourth relates to the social ontological elements of social subjects'.[11] In most social interactions, all four dimensions are present, but analytically it may be useful to separate them out. Each is discussed in depth below.

The use of power can often be exploitative, and references to power in the context of historical-structural injustices are often in this pejorative sense.[12] However, Haugaard and others maintain that uses of power have the potential to empirically be sites of either domination or emancipation.[13] Such a distinction operates where power is understood as a scalar concept, reflecting instances that are more or less dominating or emancipating.

The experience of power as either domination or emancipation across each dimension of power can be assessed through an intersectional lens, reflecting the potential for multiple forms of domination, such as patriarchy and racism, to overlap and intersect, causing distinct forms of harm to women of colour, for instance.[14] While Crenshaw's account of intersectionality can be taken to primarily analyse multiple forms of oppression in individual interactions and exercises of power, Patricia Hill Collins notes the need for an additional account of the structural features of interlocking systems of oppression.[15] Such accounts may also benefit from emphasis on the link of privilege and domination in relationships of power.[16] Chandra Talpade Mohanty argues that an intersectional account of power should refuse to homogenise the lived experiences of women under a variety of forms of oppression.[17] This concern reflects the need for epistemic injustice to be addressed, discussed in the third dimension below. Finally, the ontological dimensions of power, associated with the work of Michel Foucault, have also been adapted and critiqued to consider overlapping forms of oppression.[18] These dimensions of power and

[11] Haugaard, 'The Four Dimensions of Power' (n 7) 154.
[12] Madison Powers and Ruth Faden, *Structural Injustice: Power, Advantage, and Human Rights* (Oxford University Press 2019) 82.
[13] Haugaard, 'Rethinking the Four Dimensions of Power' (n 10) 34; Allen, *The Power of Feminist Theory* (n 2) 124–5; Steven Lukes, 'Power and Domination' (2021) 14(1) Journal of Political Power 97, 105.
[14] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] University of Chicago Law Forum 139.
[15] Patricia Hill Collins, 'Symposium: On West and Fenstermaker's "Doing Difference"' (1995) 9 Gender & Society 491.
[16] Ann Garry, 'Intersectionality, Metaphors, and the Multiplicity of Gender' (2011) 26 Hypatia 826, 827.
[17] Chandra Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61.
[18] Ladelle McWhorter, *Racism and Sexual Oppression in Anglo-America: A Genealogy* (Indiana University Press 2009).

their intersectional application offer a complex but thorough way of conceptualising power and evaluating its role in historical-structural injustices, and in modern-day responses through transitional justice.

4.3 DIMENSIONS OF POWER AND HISTORICAL-STRUCTURAL INJUSTICE

4.3.1 *First Dimension of Power: Agency*

The first dimension of power is its exercise by individuals. In this dimension of power, compliance with a legitimate exercise of 'power over' by one agent, may enable the other agent to exercise their 'power to', for instance, compliance with a road traffic police officer enables road users to exercise their power to use an ordered traffic system.[19] In contrast, where the individual exercise of power is not mutually empowering, it may constitute domination, where A gains at the expense of B.[20] In considering the individual's exercise of power, Haugaard notes that 'the three most significant power resources are violence-cum-coercion, authority and material-cum-economic resources'.[21] He distinguishes between acts of violence, from coercion, where the threat of violence is used to ensure compliance.[22]

As discussed in Chapter 2, historical-structural injustices constitute significant acts of violence. Feminist scholars have emphasised the role of power and domination in rape.[23] Several inquiry reports note that child sexual abuse constitutes an inherent and abhorrent abuse of power and act of violence, given the power imbalance between child victim and adult perpetrator.[24] The racist violence of slavery, Jim Crow, and modern-day racial violence in the

[19] Dahl (n 2) 202.
[20] Lukes (n 2) 27.
[21] Haugaard, 'The Four Dimensions of Power' (n 7) 154.
[22] Mark Haugaard, *The Four Dimensions of Power: Understanding Domination, Empowerment and Democracy* (Manchester University Press 2020) 172–85.
[23] Patricia Hill Collins, *Black Sexual Politics: African Americans, Gender, and the New Racism* (Routledge 2006).
[24] 'The Commission to Inquire into Child Abuse Report' (Government Publications 2009) vols 1, chapter 7, paras 111; chapter 8, 104; Australia and others, *Lost Innocents: Righting the Record : Report on Child Migration* (Senate Community Affairs References Committee Secretariat 2001) 112; *Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children* (Commonwealth of Australia 2004) 135; Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, The History Part 2* (McGill-Queen's University Press 2015) 415.

United States have been analysed as ongoing forms of domination.[25] Lynching as a communal and group form of violence depends on the power of numbers and public endorsement.[26] Settler colonial violence can be understood as not only biopower and an ontological form of power, discussed in the fourth dimension below, but also in power expressed in direct violence and coercion.[27]

A second form of agency relates to the role of authority. Law and religion play a particular role in creating and maintaining authority. Law purports to render conduct non-optional, which enables it to perform a function in guiding individual conduct.[28] Law's claim to authoritatively render conduct obligatory is one of a state's primary means of changing perceptions, behaviours, and attitudes.[29] Similarly, religion seeks to use charismatic authority, related to individual roles of priests, clerics, and other religious leaders, and the authority of scripture, such as the Bible.[30] Steve Ogden argues that in institutional Christianity, church leadership see themselves as divinely authorised through their own theological and epistemological interpretations of scripture and tradition.[31] Richard Sipe et al emphasise that Roman Catholic clerical culture operated out of blind obedience to the authority of superiors and led to a culture of malignant narcissism that facilitated and covered up abuse.[32] The role of religious authority is noted in existing inquiries into historical abuse, as leading to 'exaggerated levels of unregulated power and trust, which perpetrators of child sexual abuse were able to exploit'.[33]

[25] William J Wilson, *Power, Racism, and Privilege: Race Relations in Theoretical and Sociohistorical Perspectives* (Free Press 1976).

[26] Kathleen Belew, 'Lynching and Power in the United States: Southern, Western, and National Vigilante Violence (2014) 12 History Compass 84.

[27] Chelsea A Pardini and Ana Espinola-Arredondo, 'Violence, Coercion, and Settler Colonialism' (2021) 33 Journal of Theoretical Politics 236.

[28] Herbert Lionel Adolphus Hart, *The Concept of Law* (Clarendon Press 1998) 6.

[29] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press 2009) 28–37.

[30] Mark D Jordan, *Convulsing Bodies: Religion and Resistance in Foucault* (Stanford University Press 2015) 8.

[31] Steven G Ogden, *The Church, Authority, and Foucault: Imagining the Church as an Open Space of Freedom* (Routledge, Taylor & Francis Group 2017) 8.

[32] AW Richard Sipe, Thomas Doyle and Marianne Benkert, 'Clerical Spirituality and the Culture of Narcissism' (2013) <www.awrsipe.com/reports/2013/Spirituality-and-the-Culture-of-Narcissism.pdf>.

[33] Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 68–9; Truth and Reconciliation Commission of Canada (n 24) 550; 'The Commission to Inquire into Child Abuse Report' (n 24) Executive Summary, paras. 18–30.

Finally, agents exercise power through economic resources,[34] which can both be used coercively as a form of domination and also have a communicative component, reflecting a message regarding the legitimacy of the distribution of economic resources. Existing studies demonstrate significant political, economic, and social gain to empires, settler colonial states, and churches and religious orders involved in the expansion of empires, the process of transatlantic slavery, racial discrimination, and the institutionalisation of social groups in the eighteenth and nineteenth centuries.[35]

Power as a form of individual agency is important to establish individual liability and responsibility but may be challenging in the context of historical-structural injustices. Lukes notes that distributing responsibility between individual agents and social structures impacts how a society conceptualises 'the link between power and responsibility of both past and present actors' for prior wrongdoing.[36] Placing responsibility primarily or exclusively on either long-dead individuals or defunct authority, particularly historical authorities, also has the effect of relieving contemporary individuals and societies from more thoroughly examining their own responsibility to address injustice.

4.3.2 *Second Dimension of Power: Structure*

A second dimension of power is its role in the creation and maintenance of social, political, legal, and religious structures. Bachrach and Baratz define structural power as where: 'A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration only of those issues that are comparatively innocuous to A'.[37] Iris Young defines a structural dimension of power as where actors may suffer 'systematic threat of domination or deprivation of the means to develop and exercise their capacities' as result of multiple widespread social processes that are not controlled or directed by single agent.[38] For Clarissa Hayward, 'structural power' is 'institutionalized, objectified, internalized as motivational systems', and embodied in relatively enduring

[34] Haugaard, 'The Four Dimensions of Power' (n 7) 158–9.

[35] Daron Acemoglu, Simon Johnson and James Robinson, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 American Economic Review 1369; Eugene D Genovese, *The Political Economy of Slavery: Studies in the Economy & Society of the Slave South* (Wesleyan University Press 1989); Edward E Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (Basic Books 2016).

[36] Lukes (n 13) 101.

[37] Bachrach and Baratz (n 4) 948.

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

dispositions.[39] Hayward notes that structural power is particularly difficult to change due to its institutionalisation and reproduction over centuries.[40]

Haugaard distinguishes between 'structural conflict', which concerns conflict of the nature of this reproduction, and 'structural bias', which concerns the unfair possibilities created by a particular form of structure.[41] Structures have the function of organising issues into law, politics, or the private sphere, or excluding them from consideration completely. As a result, a conflict regarding historical-structural injustices is a fundamental conflict about the social order and concerns whether its structures and their reproduction are normatively legitimate and appropriate.[42] In a conflict about structure, 'the rules of interaction are contested because the social structures that underpin ordered interaction are in dispute'.[43] As a result, the interaction of agency and structures represents one of the key sites where power affects the potential for structural injustice to be addressed.

Resolving conflicts about the exercise of power as agency alone are conflicts *within* a structure, whereas conflicts regarding historical-structural injustice also involve conflict *about a structure*. In this regard, Stewart Clegg distinguishes between the 'episodic aspect of power, which focuses upon specific outcomes, and dispositional power, which constitutes the structured rules of the game, defining the dispositions of actors over time.[44] This distinction makes it possible to recognise that, for instance, within a male-dominated power structure, 'episodic power may, under certain conditions, be exerted by specific women whether through occasional access to power over or through power to', without affecting underlying patriarchal structures.'[45] In the contexts of historical abuses, individual acts of violence, coercion, and claims to authority existed and operated alongside structural constraints in legal political and religious systems over time. Foucault suggests that structures continue patterns of violence and domination by other means.[46] For instance, as discussed in Chapter 2, after the US Civil War, attempts to reintroduce new forms of discrimination and marginalisation of black Americans reflected

[39] Clarissa Rile Hayward, 'On Structural Power' (2018) 11 Journal of Political Power 56, 62.
[40] ibid 56.
[41] Haugaard, 'The Four Dimensions of Power' (n 7) 159–163.
[42] ibid.
[43] ibid 161.
[44] Haugaard (n 10) 37; Clegg (n 8) 83–5.
[45] Alix Tiernan and Pat O'Connor, 'Perspectives on Power over and Power to: How Women Experience Power in a Mining Community in Zimbabwe' (2020) 13 Journal of Political Power 86, 89–90.
[46] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Penguin Books 1991) 151.

attempts to exclude blacks from the structures of power.[47] Wolfe's account of the structure of settler colonialism is worth repeating: 'Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base … invasion is a structure not an event'.[48] In addition, structural dimensions of power will impact on how historical-structural injustices are addressed today. Specific elements of legal systems relevant to transitional justice, such as law's relationship to time, will be explored in Part II of this book for their capacity to confirm structure or offer the potential to de-structure existing power biases and structures.

4.3.3 *Third Dimension of Power: Epistemic Elements*

Steven Lukes is credited with the development of a third dimension of power, at an epistemic level.[49] Haugaard argues that there are five aspects of this third dimension of power: practical knowledge, natural attitude, reasonable versus unreasonable, reification, and truth versus Truth.[50] Conflicts regarding epistemology concern the idea that 'social reality is made, therefore it can be unmade'.[51]

Epistemic power is particularly relevant to historical-structural injustices in at least three ways. First, the process of reification, whereby the social constructedness of structures is denied,[52] is of particular relevance to historical-structural injustices, where there is often the combined denial of its occurrence and legitimation of a resultant legal, political, or religious order. Balint et al note: '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.'[53] Walter Benjamin observes that 'positive law demands of all violence a proof of its historical origin, which

[47] Angela Y Davis, 'Racialized Punishment and Prison Abolition' in Tommy L Lott and John P Pittman (eds), *A Companion to African-American Philosophy* (Blackwell Publishing 2007) 360; Corey Robin, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump* (2nd ed, Oxford University Press 2018) 6.

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

[49] Lukes (n 2); Lukes (n 13).

[50] Haugaard, 'The Four Dimensions of Power' (n 7) 163.

[51] ibid 165.

[52] ibid.

[53] Jennifer Balint and others, *Keeping Hold of Justice: Encounters between Law and Colonialism* (University of Michigan Press 2020) 14.

under certain conditions is declared legal and sanctioned'.[54] Costas Douzinas observes similarly that the sanctioning of historical violence through legal instruments allows past violence to be forgotten.[55] This role of law in structuring and portraying historical violence as legitimate, or failing to portray it and rendering it invisible in national legal or political consciousness, contributes to explaining why the abuses considered in this book are only being addressed in earnest in recent years, several decades after their commission. In particular, settler colonialism can also be understood to centrally involve a denial and disavowal of historical wrongdoing.[56] Lorenzo Veracini argues that 'settler colonialism obscures the conditions of its own production'[57] and instead constructs a mythical role for original violence: 'even when settler colonial narratives celebrate anti-indigenous violence, they do so by representing a defensive battle ensuring the continued survival of the settler community and never as a founding violence per se'.[58] In this context, law plays a key function. Peter Goodrich writes that a mythical legal history provokes 'an escape from memory'.[59]

Second, within Judeo-Christian traditions, religion often functioned as a form of reification, deriving from a foundational distinction between the sacred and profane.[60] Jeffrey Alexander argues that even modern secular social systems remain significantly structured along a sacred versus profane distinction.[61] Historical-structural injustice evidences persistent 'othering' across diverse time periods and contexts. Ogden defines 'othering' as a 'heuristic term used to describe the process of marginalization on the basis of difference'.[62] Powers and Faden note othering is a key dimension of structural injustice: 'structural injustice all too often arises out of and persists because of an explicit or implicit judgment that some lives matter less than others'.[63] Schwartz concurs that othering is an inherent violent act that also constitutes

[54] Walter Benjamin, *Reflections: Essays, Aphorisms, Autobiographical Writing* (Schocken Books 1986) 279.
[55] Costas Douzinas, 'Violence, Justice, Deconstruction' (2005) 6 German Law Journal 171, 175.
[56] Walter L Hixson, *American Settler Colonialism: A History* (1st ed, Palgrave Macmillan 2013) 12.
[57] Lorenzo Veracini, *Settler Colonialism* (Palgrave Macmillan UK 2010) 14.
[58] ibid 78.
[59] Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson 1990) 43–54.
[60] Emile Durkheim and Karen E Fields, *The Elementary Forms of Religious Life* (Free Press 1995).
[61] Jeffrey C Alexander, *Performance and Power* (Polity 2011) 98.
[62] Ogden (n 31) 19.
[63] Powers and Faden (n 12) 6.

identity: 'Violence is not only what we do to the Other. It is prior to that. Violence is the very construction of the Other.'[64] The non-white, non-male, non-adult, non-Christian person is described variously as other: as savage, as moral dirt, as in need of salvation, and so on.

A third form of power in this epistemic dimension is the capacity for testimonial and hermeneutical injustice, understood as the lack of concepts necessary for the articulation of experiences of the oppressed.[65] Gayatri Chakravorty Spivak described epistemic violence as when subaltern peoples are prevented from speaking about themselves or their own interests because others claim to know what those interests are.[66] Miranda Fricker situates such injustices within a conception of social power that may be exercised by individual agents or which may operate structurally.[67] She distinguishes between testimonial and hermeneutical injustice: 'testimonial injustice is caused by prejudice in the economy of credibility; and that hermeneutical injustice is caused by structural prejudice in the economy of collective hermeneutical resources'.[68] For Fricker, testimonial injustice occurs 'if prejudice on the hearer's part causes him to give the speaker less credibility than he would otherwise have given. Since prejudice can take different forms, there is more than one phenomenon that comes under the concept of testimonial injustice'.[69] In contrast, hermeneutical injustice arises where 'the social experiences of members of hermeneutically marginalized groups are left inadequately conceptualized and so ill-understood, perhaps even by the subjects themselves; and/or attempts at communication made by such groups, where they do have an adequate grip on the content of what they aim to convey, are not heard as rational owing to their expressive style being inadequately understood'.[70] Fricker notes: 'testimonial injustice, in which someone is wronged in their capacity as a giver of knowledge; and hermeneutical injustice, in which someone is wronged in their capacity as a subject of social understanding'.[71] Jugov and Ypi note that the distinctive nature of structural injustice, and how it is replicated over time, 'renders agents operating within such structure

[64] Regina M Schwartz, *The Curse of Cain: The Violent Legacy of Monotheism* (University of Chicago Press 2004) 5.
[65] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007).
[66] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois 1988).
[67] Fricker (n 65) 13.
[68] ibid 1.
[69] ibid 4.
[70] ibid 7–8.
[71] ibid 8.

vulnerable to epistemic opacity when it comes to observing the persistence of injustice', affecting both those who benefit from structural injustices and those harmed by them.[72] Epistemic injustice is deeply gendered in nature, with the distinct knowledge and experience of women ignored, marginalised, or misunderstood across diverse contexts.[73] Berenstain et al note:

> Colonization and land dispossession would not be possible without the violent disruption of Indigenous knowledge systems and ongoing organized attempts to disrupt their survival. Embodied ways of knowing, spiritual ways of knowing, and land-based ways of knowing – these are all forms of knowledge that are violently foreclosed in the name of settler futurity.[74]

For Charles Mills, epistemic injustice arises in the United States in a racial contract which regards white men as 'generic' knowers collectively and deems those it categorises as non-white as incapable of intellectual achievement and progress.[75] Mills describes an 'inverted epistemology' in which those who have created injustices remain largely ignorant of how they benefit from them.[76] Similarly, children have been historically subjected to a lack of testimonial credibility,[77] resulting in some instances in a lack of response when they disclosed abuse to adults. Epistemological power is a key site where knowledge, truth claims, and lived experiences can be heard and validated or ignored, denied, or suppressed. In this regard, it can form a key component of historical-structural injustices or be a site of opposition to such domination and harms. To address epistemic injustice at these structural and interpersonal levels will require not merely the practice of epistemic virtues aimed at counteracting these injustices[78] but also the practice of political, media, and educational institutions that can affect broader structures.[79]

[72] Tamara Jugov and Lea Ypi, 'Structural Injustice, Epistemic Opacity, and the Responsibilities of the Oppressed' (2019) 50 Journal of Social Philosophy 7, 9.

[73] Debra L Jackson, '"Me Too": Epistemic Injustice and the Struggle for Recognition' (2018) 4 (4) Feminist Philosophy Quarterly Article 7 1–20; Marjorie Johnstone and Eunjung Lee, 'Epistemic Injustice and Indigenous Women: Toward Centering Indigeneity in Social Work' (2021) 36 Affilia 376.

[74] Nora Berenstain and others, 'Epistemic Oppression, Resistance, and Resurgence' [2021] Contemporary Political Theory 2 <https://link.springer.com/10.1057/s41296–021-00483-z> accessed 19 August 2021.

[75] Charles W Mills, *The Racial Contract* (Cornell University Press 2011) 44–6.

[76] ibid 18.

[77] Michael D Baumtrog and Harmony Peach, 'They Can't Be Believed: Children, Intersectionality, and Epistemic Injustice' (2019) 15 Journal of Global Ethics 213.

[78] Fricker (n 65) 170.

[79] Elizabeth Anderson, 'Epistemic Justice as a Virtue of Social Institutions' (2012) 26 Social Epistemology 163; José Medina, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination* (Oxford University Press 2013) 90–118.

4.3.4 *Fourth Dimension of Power: Social Ontology*

The fourth dimension concerns the construction of individuals into social subjects.[80] Foucault argues that modernity involves a shift in the use of power from coercive domination alone to one where such power coexists with a constitutive or disciplinary power.[81] From an original Christianised form of public execution to the use of closed institutions as a form of punishment and discipline, Foucault argues that power controls and shapes individual bodies, and illustrates this through an examination of disciplinary institutions, such as prisons, and later through a society-wide concept of biopower.[82] For Foucault, the terms 'bio-politics' and 'governmentality' describe new forms of governing that arose in the mid-eighteenth century that were closely allied with the creation and growth of modern bureaucracies and institutions. In his later writings, Foucault employs the term 'bio-power' to describe how standards of normality are fostered in society as a means of social control, rather than through overt control through institutions.[83] Biopower is about normalisation,[84] the construction of what is 'normal' and the threat of punishment for what is deemed abnormal.

Similarly, in his account of nationalism, Ernest Gellner argues that key to the emergence of the modern state was not simply a monopoly upon violence and taxation, equally paradigmatic was the attempted monopoly upon socialisation, through control of education, particularly disciplinary education.[85] The modern state attempted to monopolise education and impose a common culture on all society.

Finally, Norbert Elias argues that modernity involves a change from obedience based upon coercion alone to compliance based upon self-restraint, understood as the 'civilizing process',[86] a term used to create authority and structures of power. For Elias, the civilising process emphasises the construction of social prestige and hierarchy through a focus on the appearance and compliance of bodies, and thus includes but extends beyond institutional

[80] Michel Foucault, 'The Subject and Power' in Hubert Dreyfus and Paul Rabinbow (eds), *Beyond Structuralism and Hermeneutics* (University of Chicago Press 1982) 208.
[81] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Pantheon Books 1980) 79–108.
[82] Foucault, *Discipline and Punish* (n 46) 53–70; Jordan (n 30) 44–7.
[83] Foucault, *Power/Knowledge* (n 81).
[84] Luna Dolezal, *The Body and Shame: Phenomenology, Feminism, and the Socially Shaped Body* (Lexington Books 2015) 63–4.
[85] Ernest Gellner, *Nations and Nationalism* (Blackwell 1990).
[86] Norbert Elias and others, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Rev edn, Blackwell Publishers 2000).

contexts.[87] The account given by Elias can be understood as an individual-focused, bottom-up approach to the internalisation of a socially constructed world, in addition to top-down and explicit processes of modernisation by nation states.

Historical abuses sit at the intersection of the use of power as domination in historical contexts and the normalisation of such power relations as a structure in the present. On these accounts, closed and coercive institutions seem to play a particular role in the construction of liberal freedom and modern society.[88] Haugaard notes: 'For those who do not internalize 4-D power willingly, coercive disciplinary institutions remain.'[89] Una Crowley and Rob Kitchin suggest that in post-independence Ireland power was used to 'mould and police the sexual practices of its citizens and create a sanitised moral landscape'.[90] Diarmuid Ferriter notes: 'Control of sex and sexual relations was central to the creation and maintenance of power and the social order, as recognised by both Freud and Foucault, and, in the Irish context, the attitudes adopted by the new class of farmers and the desire to control marriage, supported by the Catholic Church, was a reflection of such power.'[91] Scott Morgensen similarly notes that settler colonialism as a form of historical-structural injustice 'can be denaturalised by theorising its constitution as biopower, as well as how it in turn conditions all modern modes of colonialism and biopower'.[92] Ladelle McWhorter similarly asserts that both race and gender arise within the same 'normalizing disciplinary power/knowledge networks that arose in the early nineteenth century as means of managing individuals in large groups, and the biopower networks that arose from the nineteenth through the mid-twentieth centuries as large governmental systems augmented and intensified their control over populations'.[93]

Historical-structural injustices occurred in widespread and systemic fashions and are reproduced in present day in a manner that affects large sectors of society, including the descendants of historically abused groups. The four

[87] Dolezal (n 84) 66–8.

[88] Haugaard, 'Rethinking the Four Dimensions of Power' (n 10) 36; Kevin Ryan, *Social Exclusion and the Politics of Order* (Manchester University Press 2007).

[89] Haugaard, 'The Four Dimensions of Power' (n 7) 171.

[90] Una Crowley and Rob Kitchin, 'Producing "Decent Girls": Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922–1937)' (2008) 15 Gender, Place & Culture 355.

[91] Diarmaid Ferriter, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile 2012) 19.

[92] Scott Lauria Morgensen, 'The Biopolitics of Settler Colonialism: Right Here, Right Now' (2011) 1 Settler Colonial Studies 52, 53.

[93] Ladelle McWhorter, 'Sex, Race, and Biopower: A Foucauldian Genealogy' (2004) 19 Hypatia 38, 54.

dimensions of power provide a basis for analysing who benefits and who is harmed from these injustices, in a manner that enables a shared and integrated assessment of responsibility. Both individual uses of power by agents and the confirmation of power by existing structures of states and churches can be seen as sites of responsibility. In addition, the third and fourth dimensions of power demonstrate that historical-structural abuses can be evaluated not merely in interactive or structural terms but also in terms of individual and structural knowledge and the construction of social subjects in society.

Though helpful to separate analytically, a single interaction within the context of historical abuses can reflect multiple dimensions of power simultaneously. For instance, an individual instance of child abuse within a closed institution represents (i) the abuse of power at an individual level of the perpetrator; (ii) a structural abuse of power where the nature and environment of the closed institution placed the child in a position of risk and particular vulnerability to abuse; (iii) a situation where the child may be subject to epistemic injustice in the abuse being denied, justified, or rationalised; and (iv) in being conceptualised as 'moral dirt' or inferior based on their status and potentially contributing to the eradication of the child as a First Nations or Indigenous person and assimilating them into a settler society. These four dimensions thus thoroughly reflect the material and ideational dimensions of power and its capacity to cause harm in the context of historical-structural abuses. However, the four dimensions of power may also be involved in maintaining and legitimating existing distributions and structures of power that have their origin in historical violence. In particular, the role of power can be assessed in its contribution to fostering and maintaining national and religious myths as a source of justification and legitimating for the contemporary legal, national, and religious state of affairs.

4.4 POWER AND NATIONAL AND RELIGIOUS MYTHS

Part of the resistance of existing power structures and actors to addressing historical abuses may arise from the challenge that doing so poses to myths or self-images of states and church institutions and identities. Clarissa Hayward identifies the role of justification narratives as a force that maintains existing distributions and structures of power. For Hayward, when such justification narratives 'are institutionalized, they constrain and enable action by shaping incentive structures. When they are objectified in material form, they constrain and enable action through practical/corporeal experience'.[94] National

[94] Hayward (n 39) 65.

and religious myths seem to function as these narratives to justify (ignoring) the historical-structural abuses of the nation and churches and sustain and structure society in such a way that inhibits critique of the myth. Milan Kundera wrote, 'The struggle of man against power is the struggle of memory against forgetting.'[95]

Gérard Bouchard defines a myth as 'a collective representation that is hybrid, beneficial, or harmful, imbued with the sacred, governed by emotion more than by reason, and a vehicle of meanings, values, and ideals shaped in a given social and historical environment'.[96] He notes that myths are typically reified, taken for granted, and avoid being questioned.[97] For Roland Barthes, myths reify and present the particularities of history as natural, 'making contingency appear eternal'.[98] In doing so, myths complicate and distort our understandings by adding a further layer of meaning to the form where they are presented.[99] Walter Hixson notes that myths are central to the functioning of settler colonies in particular: 'for the settler colony to establish a collective usable past, legitimating stories must be created and persistently affirmed as a means of naturalizing a new historical narrative. A national mythology displaces the indigenous past … *Becoming the indigene* required not only cleansing of the land, either through killing or removing, but sanitizing the historical record as well'.[100] In these ways, myths function both as a form of epistemic injustice, silencing alternative narratives regarding the past, and as a form of social ontology, by constituting national identity and sentiment wrapped in myth and seeking to displace other identities.

National and religious myths have been used to justify violence on the basis of perceived differences between Europeans and Indigenous peoples, between races, and between men and women. Religion, Christianity, and the Bible are central to the national myths of Western societies, even after secularisation.[101] In particular, the myth of a chosen people or nation can be traced to the Hebrew Bible or Old Testament, originally for the people of Israel. Rosemary Ruether Radford notes: 'Early Christianity denationalized, universalized, spiritualized and eschatologized these ideas of an elect nation and its future

[95] Milan Kundera, *The Book of Laughter and Forgetting* (Aaron Asher tr, Harper Classics 2015) 4.
[96] Gérard Bouchard, *Social Myths and Collective Imaginaries* (University of Toronto Press 2017) 25.
[97] ibid 9.
[98] Roland Barthes, Annette Lavers and Sian Reynolds, *Mythologies* (Vintage Classics 2009) 155.
[99] ibid 131.
[100] Hixson (n 59) 11.
[101] Schwartz (n 67) 6.

hopes. God's chosen people were no longer the Jews but the Church',[102] giving rise to the pursuit of Christendom discussed in Chapter 2. Competing imperial and colonising powers later employed this myth, each claiming to be God's chosen people, converting the newly discovered 'pagans' to Christianity as mandated by the Bible, seeking to bring about the ultimate redemption of the earth.[103] Such national, imperial, and religious myths form part of the structure of settler colonialism: the settler leaves their land of origin, arrives in and 'settles' a new land, and transforms it from savagery to 'civilisation' in a process of irreversible 'progress'.[104] There are distinctive variations of national myths across the jurisdictions studied.

The English defined themselves 'for colonial purposes as an elect people over the Irish, considered as a "non-people"' and later extended this logic to enable the colonisation of territories worldwide, on the basis of control of non-white and non-Christian bodies'.[105] Krishan Kumar argues that across a wide variety of English cultural myths, the experience of the rise and fall of empire over a thousand years indelibly shapes English and British myths and national identity.[106] He notes: 'The imperial experience gave England a sense of itself as something more than a mere nation. It developed a "missionary" outlook, geared to purposes and causes – "Commerce, Christianity, and Civilization," ... that took it into the wider world beyond its borders'.[107] Kumar notes that the 'Whig myth of English history' in the seventeenth century advanced the 'stadial theory of progress, whereby societies advanced successively through stages of development, from "savagery" to "civilization", reflecting "England's rise to freedom and greatness" and its entitlement to impose these standards of civilization across the world'.[108] As the British Empire ended, myths emerged about the orderly 'transfer of power' from the imperial capital to national elites.[109] Robert Gildea suggests that 'the pain of the loss of empire has resulted in attempts to conjure up new fantasies of empire which in turn reinforce colonial divisions in contemporary society'.[110]

[102] Rosemary Radford Ruether, *America, Amerikkka: Elect Nation and Imperial Violence* (Equinox 2007) 7–8.
[103] ibid 9.
[104] Veracini (n 57) 22–33.
[105] Richard Kearney, *Strangers, Gods, and Monsters: Interpreting Otherness* (Routledge 2003) 72.
[106] Krishan Kumar, *The Making of English National Identity* (Cambridge University Press 2003).
[107] Krishan Kumar, '1066 and All That: Myths of the English' in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Routledge 2013) 101.
[108] ibid 107.
[109] Robert Gildea, *Empires of the Mind: The Colonial Past and the Politics of the Present* (Cambridge University Press 2019) 7.
[110] ibid 13.

Similarly, Paul Gilroy suggests that Britain struggles to reconcile its self-identity as victors over Nazi Germany, as being morally upright when facing murderous racism and fascism, with its own legacy of imperial violence.[111]

American myths have their origin in European myths of chosenness and colonisation, including English myths. Avihu Zakai has argued that there were two distinct models of the elect nation, one predicated on expansion from a base of divine election to a larger empire;[112] another, developed by the Puritans, where European nations had sinned and lost their election, and the true people of God were called to exodus in new territories.[113] For the Puritans and other settler colonialists, the notion of being a chosen nation carried the 'assumption of entitlement' to expand, to colonise, to bring Christianity to non-Christians, and to drive away competitors of other faiths and denominations.[114]

American myths continued in the US revolution and foundation of the federated state. The revolutionary United States is founded on a contradictory myth. It is first founded on a critique of Europe and England as corrupt, religiously intolerant, and unequal. In reaction, the new American nation would be egalitarian, democratic, a 'new Jerusalem', and reflective of a new stage of divine election in the eyes of Protestant clergy.[115] Bouchard notes: 'The consciousness of being founders, the feeling of creating a superior nation without historical precedent, gave substance to a veritable paradigm of new beginnings. Here, there was no cultural cringe but, rather, a providential mission, a "manifest destiny" (as John O'Sullivan of New York declared in 1845)'.[116] Ian Tyrell suggests the myth of American exceptionalism is built on a set of more specific myths and has adapted over time to add new features: 'In addition to a successful "revolution," there is the assumption of small government or laissez-faire as an American tradition; equality of opportunity; the "melting pot" for immigrants, a theme linked to material progress and abundance; the availability of "free" land in the "West" as the basis of abundance and opportunity; political and religious freedom; and anti-imperialism and anti-colonialism'.[117] However, the myth remains

[111] Paul Gilroy, *Postcolonial Melancholia* (Columbia University Press 2005) 87–120.
[112] Avihu Zakai, *Exile and Kingdom: History and Apocalypse in the Puritan Migration to America* (Cambridge University Press 1992).
[113] Perry Miller, *Errand into the Wilderness* (Belknap 1996).
[114] Ruether (n 102) 30–1.
[115] ibid 36.
[116] Gérard Bouchard, Michelle Weinroth and Paul Leduc Browne, *The Making of the Nations and Cultures of the New World: An Essay in Comparative History* (McGill-Queen's University Press 2008) 291.
[117] Ian Tyrell, 'The Myth(s) That Will Not Die: American National Exceptionalism' in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Routledge 2013) 52.

contradictory: despite claiming to be based on a universal 'rights of man', this meant only white Anglo-Saxon Protestant males and was never intended to include women, Native Americans, or African slaves,[118] and is blind to the violence and harms done in establishing the state and expanding the frontier. The failure to name and reconcile this contradiction continues to shape US national identity.[119]

Paulette Regan articulates the Canadian myth of the 'benevolent peacemaker', in which settlers used British law to peacefully transform the land and its inhabitants into a civilised society.[120] The peacemaker element of the myth distinguishes it from American myths of settlement by violent conquest of the frontier[121] and reenforces Canadian identity as compassionate, caring, and committed to diversity and multiculturalism.[122] Thobani argues that Canadians use the process of racial othering to construct an identity of 'exalted subjects' who are superior to First Nations peoples and non-white immigrants but do so through peaceful, legal, and multiculturalist means.[123] Eva Mackey describes the 'benevolent Mountie myth', which frames the expansion of Canada as peaceful, law-abiding, and well intentioned and reinforces a myth of 'national tolerance' as central to Canadian national identity.[124] Similarly, Gina Starblanket argues that Canadian treaties with First Nations peoples have been treated in mythic terms as transferring land to Crown control and by which First Nations peoples surrendered not merely land but their powers of governance.[125]

In Australia, a fictional myth of *terra nullius* viewed Australia as unowned, with First Nations peoples as unproductive and without possession of the land. This combined with a religiously motivated desire to pursue the 'civilisation' of the continent. Joanne Faulkner notes: 'Rather than admit the violence by which the British 'settled' the continent, Australians throughout their history

[118] Ruether (n 102) 41.
[119] ibid 211–2.
[120] Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010) 11.
[121] Scott W See, 'The Intellectual Construction of Canada's "Peaceable Kingdom" Ideal' (2018) 52 Journal of Canadian Studies 510.
[122] Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (University of Toronto Press 2007) 3–29.
[123] ibid 248.
[124] Eva Mackey, *The House of Difference: Cultural Politics and National Identity in Canada* (Repr, University of Toronto Press 2008) 24; Daniel Francis, *National Dreams: Myth, Memory, and Canadian History* (Arsenal Pulp Press 1997) 29–51.
[125] Gina Starblanket, 'The Numbered Treaties and the Politics of Incoherency' (2019) 52 Canadian Journal of Political Science 443, 446.

have repeated "terra nullius" as if it were a serenity mantra.'[126] These myths established and legitimated the settler colonial structure of Australia and the subsequent violence and abuses documented in Chapter 2. In addition, subsequent Australian myths emphasise the distinctive nature of Australia from Britain, such as myths of 'mateship'.[127] Russel Ward argued that the origins of Australia's national identity were to be found in the anti-authoritarian and egalitarian ethos of convict society, giving rise to a collectivist concept of mateship in a classless society.[128] In the twentieth century, Australian myths of national character emphasised and developed as a result of the ANZAC involvement in World War I.[129] The combination of myths of *terra nullius* and rugged individualism contribute to debates regarding modern national identity.

Independent Ireland presents a post-settler colonial context with a heightened role for the Roman Catholic Church and its religious orders. In this context, a nation and church once themselves subject to conquest and discrimination, on the establishment of the Irish Free State, chose to consolidate and expand the process of institutionalisation that had begun under British rule, continuing to condemn the poor, women, and children, owing to an increasingly assertive Catholic quasi-theocratic rule and the poverty and inexperience facing the new state. In Ireland, after the establishment of the Irish Free State in 1922, church and state authorities engaged in a process of nation-building in pursuit of an imagined nation: 'a nation of Irish Catholic virtues without the unnatural sexual vices that were seen by Free State ideologues, lay and clerical, as corrupting the rest of the world'.[130] This process enabled the continued use of institutions that predated the Free State and accelerated the identification of the Catholic Church and Catholic morality as synonymous with Irishness.[131] Enright writes: 'The new Irish state was built on an ideal of reconciliation of governmental power to

[126] Joanne Faulkner, 'Suffer Little Children": The Representation of Aboriginal Disadvantage through Images of Suffering Children, and the Wages of Spectacular Humanitarianism' (2019) 22 Theory & Event 595, 600.

[127] Nick Dyrenfurth, *Mateship: A Very Australian History* (Scribe 2015).

[128] Russel Braddock Ward, *The Australian Legend* (Repr, Oxford University Press 1993).

[129] Henry Reynolds, 'Are Nations Really Made in War?' in Henry Reynolds and others (eds), *What's Wrong with Anzac?* (UNSW Press 2010).

[130] Anthony Keating, 'Church, State, and Sexual Crime against Children in Ireland after 1922' (2004–2006) 5(7) Radharc 155–80, 157–8

[131] Máiréad Enright, "Involuntary Patriotism": Judgment, Women and the National Identity on the Island of Ireland' in Máiréad Enright, Julie McCandless and Aoife O'Donoghue (eds) *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (Bloomsbury 2017) 27–49, 31

religious precept, which promised to create a well-regulated, virtuous, prosperous and presumptively masculine nation. Its terrible failure was apparent throughout the twentieth century in a quotidian experience of physical violence, shame and sacrificial destruction of lives … Belief in the good faith of law and religion was duly undone'.[132]

Across these national contexts, the national and religious myths share a common feature: a belief in the value of redemptive violence,[133] where violence and social control are permissible because of the broader social value that the violence achieves. Walter Wink notes that this myth is pervasive in Western culture and is central to cultural depictions of the solutions to conflict.[134] Wink notes that Christianity plays a central role in maintaining this myth of redemptive violence, functioning as a shell that empties Christianity of its prophetic legitimacy to criticise the societies in which it operates and instead is 'manipulated to legitimate a power system intent on the preservation of privilege at all costs'.[135] The histories and origins of the states and churches in this book are deeply violent in nature. Failure to address the past and its impact on the present only serves to legitimate and sanctify this violence and continue the present deployment of the myth of redemptive violence.

4.5 POWER AS A LIMIT TO ADDRESSING THE PAST

Power plays a key role in the creation and reproduction of historical-structural injustice across the four dimensions examined above. Transitional justice necessarily engages with power and as a result creates risks that its practices can be used to create new forms of harm for victim-survivors[136] or reproduce historical-structural harms itself. Nagy writes: 'In the determination of who is accountable for what and when, transitional justice is a discourse and practice imbued with power.'[137] McAuliffe argues that 'the extent to which theories of transitional justice do not grapple with these profound complexities of elite

[132] 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) 58.
[133] Walter Wink, *Engaging the Powers: Discernment and Resistance in a World of Domination* (Fortress Press 1992).
[134] ibid 87.
[135] ibid 99–100.
[136] Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2017).
[137] Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third World Quarterly 275, 286.

power and wealth retention suggests the limits of the field's utility for catalysing emancipatory change'.[138]

A number of key features of transitional justice structure its relationship to power. First, the role of victim-survivors in transitional justice institutions can represent mere instances of episodic power through agency or, in more radical approaches, could lead to significant changes in the structural relationship between victim-survivors and the state. David Taylor constructs a typology of victim-survivor participation, reflecting both direct and indirect forms of participation.[139] The most direct, active form of participation in a transitional justice mechanism can be understood as full empowerment, where 'victims would participate at each stage of a transitional justice mechanism – from conception to design to implementation – as decision-makers, with real decision-making power. Powers are thus conferred on victims, with corresponding obligations on state and/or international implementing authorities to give form to these powers'.[140] According to Arnstein, anything other than full empowerment can result in token participation or empty ritual.[141] Lundy and McGovern argue that participation in transitional justice can be most successful when it involves 'co-generative dialogue' as a result of the 'transfer of power' in decision-making processes.[142] They recognise that participation has other challenges – 'who the locals are, who speaks for whom, and what exactly participation means', as well as the 'wholesale valorization of "insiders" to the exclusion of "outsiders"'.[143] Such an approach may not only involve survivors as agents experiencing empowerment in the context of particular institutions or practices but may also extend beyond that to affect broader structural features and lead to a more sustained engagement and empowerment of survivors or historically marginalised communities.

In contrast, survivor engagement may take the form of collaboration: 'Victims and affected communities must be consulted by the implementing authorities,

[138] Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017) 82.

[139] David Taylor, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?' (Impunity Watch 2014) Discussion Paper 22–27 <www.antoniocasella.eu/restorative/Taylor_2014.pdf> (accessed 13 September 2022); I Edwards, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967.

[140] Taylor (n 139) 24.

[141] Sherry R Arnstein, 'A Ladder of Citizen Participation' (1969)35 Journal of the American Institute of Planners 216.

[142] Patricia Lundy and Mark McGovern, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265, 280.

[143] ibid 292.

but are under no obligations themselves to participate. The process is in part extractive, with victims providing input, but the process preserves the decision-making power in the hands of the authorities.'[144] Third, participation can also take lesser forms such as the provision of information, including witnesses at TRCs or criminal trials.[145] Finally, Taylor extends the typology of participation to include indirect forms of participation, involving victim-survivor representation through advocacy or legal representation.[146] These forms of survivor engagement represent at best episodic and agency-based forms of power and would likely struggle to affect broader structural injustices and harms.

Hamber and Lundy critique the existing transitional justice practices on victim-survivor empowerment: 'Notwithstanding a general universal commitment to the principle of victimcentredness, in practice, full participation is often superficial. Victims are primarily still seen as "objects" in TJ with little power to influence outcomes . . . Victim participation in TJ therefore remains an aspiration rather than a reality'.[147] Robins and Gready similarly criticise limited existing roles for participation as nominal or instrumental, offering 'little or no agency in challenging power relations or in determining what mechanisms occur or how they are implemented. They have no transformative potential for victims'.[148] As a result, transitional justice processes may reflect an episodic and irregular exercise of power by victim-survivors[149] and would struggle to address the particular challenges of historical-structural injustices, where the structures are called into conflict.

Secondly, transitional justice mechanisms risk confirming the social structures in which they operate, where victim-survivors accept the terms of the debate set by the state. In transitional justice mechanisms, especially in the context of historical abuses considered in this book, there is a conflict about what type of conflict is taking place. State and religious institutions want to treat addressing the past as non-structural disputes, concerning interactions between individuals and perpetrators and, perhaps, institutional responsibility. This is explored more fully in Part II, across inquiries, litigation, and redress especially.

[144] Taylor (n 139) 24.
[145] ibid 25.
[146] ibid 26–7.
[147] Brandon Hamber and Patricia Lundy, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) 15 Victims & Offenders 744, 4.
[148] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339, 356.
[149] Clegg (n 8); Dennis H Wrong, *Power: Its Forms, Bases, and Uses* (Transaction Publishers 1995).

In contrast, some victim-survivors and advocates recognise the potential and need to address the conflict not only at individual but also at structural levels, particularly in the settler colonial context, or in examining institutional racism, misogyny, or other forms of structural violence. Transitional justice mechanisms have the potential to change or transform the ideas and beliefs of people regarding the institutions and structures that seek legitimation and claim authority. Dealing with the past and highlighting wrongdoing as intimately linked to the construction of the state and church may render their ongoing claims to authority unreasonable and illegitimate. Addressing historical-structural injustice may require that some forms of power and some claims to authority and legitimacy – such as being a legitimate settler colonial state – must be taken off the table. They cannot be legitimated, no matter how well intentioned or perfected with time and resources. Instead, to effectively respond to violence, coercion, and claims to authority over time, the structures need to change to redistribute and reimagine the nature of the institutions and their use of power.

Third, transitional justice may constitute a site of significant epistemic injustice that may exclude or marginalise the voices, knowledge, and preferences of survivors in the construction of the truth about the past and its implications for the present. For instance, Máiréad Enright and Sinéad Ring suggest that in Ireland 'the legal responses to victim-survivors enact a refusal to listen (testimonial injustice) or to alter the conditions under which victim-survivors can be heard (hermeneutical injustice)'.[150] They suggest the Irish state is 'benefitting from and continuing the prejudicial exclusion of victim-survivors from participation in the spread of knowledge about Ireland's history of abuse of marginalized women and children'.[151] Epistemic injustice is explored across Part II of the book.

Fourth, transitional justice performs an ontological function, by shaping the definition of who is a victim-survivor and the nature of the 'transition' involved for a society. The definition of victim and the creation of sub-categories of victim, such as 'innocent' and 'non-innocent', reflect deeply political forms of power. In addition, state-operated transitional justice institutions run the risk of constructing an 'imagined victim'[152] who does not challenge the state's

[150] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 70.

[151] ibid 86.

[152] Laurel Fletcher, 'Refracted Justice: The Imagined Victim and the International Criminal Court' in Sara Kendall, Carsten Stahn and Christian De Vos (eds), *Contested Justice: The Politics and Practice of International Criminal Court Intervention* (Cambridge University Press 2016); Adriana Rudling, '"I'm Not That Chained-Up Little Person": Four Paragons of Victimhood in Transitional Justice Discourse' (2019) 41 Human Rights Quarterly 421.

transitional justice responses. Balint et al note that failure to recognise victimhood is itself a form of othering and violence.[153]

Similarly, Ratna Kapur notes that the idea of transition may promote a linear and progressive conception of time and history that may operate as a means of exclusion: 'suggesting that the "post" in postcolonial does not merely mark the end of the colonial moment'.[154] Balint et al share this concern suggesting transitional justice is presentist in its concerns: 'Transitional justice assumes too a linear notion of time as progress, in which the past and the future are seen as separable and successive instead of intertwined and co-implicated. This makes it difficult for transitional justice to acknowledge and hence redress the enduring structural arrangements that may have resulted in past as well as present injustice and the ongoing effects of past inequities on present and future generations'.[155]

However, Winter suggests that viewing transitional justice as domination may result in a 'just so' account: 'the group in question is always occupying the "dominant" position (and indeed are identified as a class because they are dominant), it is always the case that any policy can be described as "functional" for the continuance of domination. Even when the state responds to a radical demand, such as the demand for apology and pecuniary redress, the state's response is always explicable as a way of maintaining an elite "power base"'.[156] In his view, such a critique is infallibly sceptical.

Instead, however, it should be possible to conceive of more or less oppressive uses of power in the name of transitional justice, rather than seeking some ideal or neutral use of power.[157] Rather than aiming at infallible scepticism, the hope in the following chapters of this book is to illustrate whether and how less oppressive forms of transitional justice may be pursued in addressing historical abuses.

4.5 CONCLUSION

The definition and role of power are politically significant as they enable us to ascertain whether and how individuals can exercise their own choices,[158] and

[153] Balint and others (n 53) 15.
[154] Ratna Kapur, 'Normalizing Violence: Transitional Justice and the Gujarat Riots' (2006) 15 Columbia Journal of Gender and Law 889.
[155] Balint and others (n 53) 95.
[156] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014) 34.
[157] Jeremy R Carrette, *Foucault and Religion: Spiritual Corporality and Political Spirituality* (Routledge 2000) 149.
[158] Pansardi (n 1) 11.

whether and how those choices are limited by broader structural, epistemic, or ontological forms of power. Changes in the distribution of power across these four dimensions are central to addressing historical-structural injustices, which have coalesced to form national and religious myths that support the existing distributions of power and modern national and religious identities. However, merely naming the dimensions of power and their role in reproducing historical-structural injustice and in inhibiting the work of transitional justice is foreseeably insufficient. The experiences of addressing the past in the countries and contexts of this book demonstrate that those in power and who benefit from power are, whether consciously or unconsciously, invested and attached to their present circumstances, privilege, and position. Social norms and reification present existing power dynamics as natural and inevitable.[159] To more fully unpack the reasons for resistance to addressing and redistributing the structures of power, it is necessary to examine the role of emotions in historical-structural injustices and in dealing with the past.

[159] Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press 2014) 12.

5

Emotions and Dealing with the Past

5.1 INTRODUCTION

Emotions are a central but under-appreciated element of historical-structural injustices and the potential and limits of modern-day responses such as transitional justice. Dealing with the past gives us the opportunity to address not only what we think but also what we feel about past violence. In this context, emotions function as a mechanism by which states and churches allow victim-survivors to exercise agency within the structure of legal and political institutions and within particular national emotional climates. Within these structures, emotions operate to provide the symbolic and public means by which the states and churches themselves seek to respond in kind in addressing their legacies of gross violations of human rights. In doing so, transitional justice can affirm or rework national and religious myths as sites of practical knowledge and felt experiences. An effective use of emotions in myths can challenge purely triumphalist conceptions of the nation or religion and replace them with more mature accounts that recognise the fallibility of state and churches. In doing so public emotions can articulate our shared responsibility for addressing the way in which our contemporary societies are structured by the reproduction of historical-structural injustices. This chapter will briefly frame existing debates in a growing literature on emotion and affect before identifying the relationship between emotions and transitional justice, historical-structural injustice, and power. The chapter will then argue that public emotions, including the emotional content of statements by political and religious leaders, are a key means by which these institutions construct responses to historical abuses. A final section problematises the role of shame as a public emotion and suggests the need for alternatives.

5.2 CONCEPTUALISING EMOTIONS AND AFFECT

Emotions have been historically neglected in the social sciences and overly contrasted with the study of rationality.[1] Such a distinction is not apolitical[2] but instead maps onto structures of patriarchy, whereby maleness was historically equated with rationality and women, femininity, and emotions were deemed irrational.[3] In addition, Susan Leigh Foster argues that early thinking on emotions must be situated 'within the context of Britain's discovery of the new world and subsequent colonial expansion'.[4] She criticises the work of Adam Smith and David Hume on sympathy and empathy, as depending on pernicious distinctions of nation and race, as well as those of gender and class.[5] Today, scholarship recognises that emotions are not additional to reason and rationality but that emotions are essential to rational thought.[6]

Within recent emotions literature, there is a distinction between emotions and affect. A variety of approaches have been taken to defining these terms across disciplines in the humanities and sciences, principally psychology.[7] For Paul Hoggett and Simon Thompson, for instance, 'Affect concerns the more embodied, unformed and less conscious dimension of human feeling, whereas emotion concerns the feelings which are more conscious since they are more anchored in language and meaning'.[8] Anne-Marie D'Aoust cautions that we need to be wary of drawing too sharp a distinction between emotions and affect, claiming that a focus on this distinction may have the unintended

[1] Jeff Goodwin, James Jasper and Francesca Polletta, 'Why Emotions Matter: Introduction to Passion Politics' in Jeff Goodwin, James Jasper and Francesca Polletta (eds), *Passionate Politics: Emotions and Social Movements* (University of Chicago Press 2001).

[2] Thomas Dixon, *From Passions to Emotions: The Creation of a Secular Psychological Category* (Cambridge University Press 2003).

[3] Simon J Williams and Gillian Bendelow, *The Lived Body: Sociological Themes, Embodied Issues* (Routledge 1998) 131.

[4] Susan Leigh Foster, *Choreographing Empathy: Kinesthesia in Performance* (Routledge 2011) 11.

[5] ibid 138, 142.

[6] Antonio R Damasio, *Descartes' Error: Emotion, Reason and the Human Brain* (Vintage 2006); Antonio R Damasio, *The Feeling of What Happens: Body, Emotion and the Making of Consciousness* (Vintage 2000).

[7] Monica Greco and Paul Stenner, 'Happiness and the Art of Life: Diagnosing the Psychopolitics of Wellbeing' (2013) 5 Health, Culture and Society 1, 11; Kristyn Gorton, 'Theorizing Emotion and Affect: Feminist Engagements' (2007) 8 Feminist Theory 333; James A Russell, 'Emotion, Core Affect, and Psychological Construction' (2009) 23 Cognition & Emotion 1259.

[8] Paul Hoggett and Simon Thompson (eds), *Politics and the Emotions: The Affective Turn in Contemporary Political Studies* (Continuum 2012) 2.

consequence of dividing examination of expression of emotions to social sciences, while leaving study of the body to neurosciences.[9]

A second point of contention is whether emotions and affect are universal in nature or whether they are socially conditioned and constructed. Literature within the critical and feminist traditions suggests that emotions are shaped by geo-political forces, such as power.[10] Monique Scheer emphasises that emotions are not universal traits of personality but rather depend upon culturally specific socialisation.[11] Goodwin et al concur that emotions are all politically, historically, and culturally constructed, with the emotions most relevant to politics more likely to be constructed, such as rage, shame, or indignation regarding identity and rights, and are all 'culturally and historically variable'.[12]

A third area of disagreement in the literature is whether and how emotions can be meaningfully ascribed to groups, such as institutions, states, and churches, as well as across members of social groups along racial, gender, or religious lines.[13] For instance, Brandon Hamber and Richard Wilson argue that nations are not like individuals, lack collective psyches, and that individual and collective processes of healing work on different timelines.[14] John Protevi distinguishes between 'emergentist and individualist perspectives on the subject. The emergentists posit a collective subject underlying collective emotions, while the individualists claim that collective emotions are simply the alignment or coordination of individual emotions'.[15]

Finally, there is growing recognition of the inherent relationship between law and emotion.[16] Terry Maroney notes that recent scholarship recognises 'law as a flexible, context-driven mechanism for reflecting, managing,

[9] Anne-Marie D'Aoust, 'Ties That Bind? Engaging Emotions, Governmentality and Neoliberalism: Introduction to the Special Issue' (2014) 28 Global Society 267, 269–70.

[10] Carolyn Pedwell, *Affective Relations: The Transnational Politics of Empathy* (Palgrave Macmillan 2014) 14; Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling* (20th Anniversary ed, University of California Press 2003).

[11] Monique Scheer, 'Are Emotions a Kind of Practice (and Is That What Makes Them Have a History?)' (2012) 51 History and Theory 193.

[12] Goodwin, Jasper and Polletta (n 1) 13.

[13] Christian von Scheve and Mikko Salmella (eds), *Collective Emotions: Perspectives from Psychology, Philosophy, and Sociology* (1st ed, Oxford University Press 2014).

[14] Brandon Hamber and Richard A Wilson, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35.

[15] John Protevi, 'Political Emotion' in Christian von Scheve and Mikko Salmela (eds), *Collective Emotions* (Oxford University Press 2014) 326.

[16] Susan A Bandes (ed), *The Passions of Law* (New York University Press 1999); Julia JA Shaw, *Law and the Passions: Why Emotion Matters for Justice* (Routledge 2020); Brian H Bornstein and Richard L Wiener (eds), *Collective Emotions: Perspectives from Psychology, Philosophy, and Sociology* (1st edn, Oxford University Press 2014).

nurturing, or (dis)incentivizing specific emotions in specific situations for specific purposes'.[17] Scholarship in this area recognises a bi-directional relationship – that law and emotion may each shape and effect one another.[18] However, Bandes et al suggest that it remains the case that the structure of legal systems views emotions negatively, signalling prejudice, irrelevance or lack of reason and functions 'as a way to exclude evidence, discredit witnesses, and otherwise impose legal consequences', particularly in cases of individuals with traditionally marginalised status – women, people of colour, and individuals lacking social, economic, educational, or political capital.[19]

In the context of these ongoing debates, this chapter will examine the extent to which emotions are involved in transitional justice, power, and examine the social and public use of emotions in responding to historical abuses. The public use of emotion will examine the social construction of emotions, and subsequent chapters will consider both the emotional lived experiences of victim-survivors of transitional justice mechanisms and the explicit and political use of emotions by those mechanisms and the states and churches they concern.

5.3 EMOTIONS AND POWER

Understanding emotions and affect is a necessary but neglected part of addressing the role of power in historical-structural abuses. Luna Dolezal notes that 'Foucault offers little insight into how a subject feels and experiences power structures'.[20] Jonathan Heaney suggests that emotions and power are 'conceptual twins, both of which are essential to any understanding of social and political life'.[21] Heaney suggests limited consideration of emotion is particularly pronounced regarding theories of power, concluding 'emotion operated as an "epistemological other" and like other "others", was to be controlled, ignored or banished'.[22] He suggests instead that affect and power

[17] Terry A Maroney, 'A Field Evolves: Introduction to the Special Section on Law and Emotion' (2016) 8 Emotion Review 3, 4.

[18] Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions?' (2010) 94 Minnesota Law Review 1997, 2037.

[19] Susan A Bandes, Jody Lyneé Madeira, Kathryn D Temple and Emily Kidd White, 'Introduction', in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021) 4.

[20] Luna Dolezal, *The Body and Shame: Phenomenology, Feminism, and the Socially Shaped Body* (Lexington Books 2015) 63.

[21] Jonathan G Heaney, 'Emotions and Power: Reconciling Conceptual Twins' (2011) 4 Journal of Political Power 259, 259.

[22] ibid 264.

are intimately linked: 'Affect is the effect of relations of power'.[23] Lauren Guilmette argues, 'Networks of power sort, define, modify, and normalize the affective responses of their subjects through disciplinary institutions; yet affect also exceeds this range, opening space for resistance when one feels ill at ease with relational and/or institutional arrangements'.[24] D'Aoust concurs: 'Because bodies are always situated, sexualised and racialised, they do not feel the same way – to ourselves, but also to others … emotions cannot be uncoupled from relations of power that characterise and permeate the social field.'[25] As a result, a key challenge in considering the relationship between emotions and power is recognition of how power may shape the feeling rules across diverse intersectional forms of identity.[26]

This potential role of emotions can be assessed across the four faces/dimensions of power: agency, structure, epistemic, and ontological, each considered in detail below. Emotions will be experienced in the individual interactions in the agency dimension of power, between individual victim-survivor and perpetrator, or later between a survivor and the state or church seeking to address the past, in particular through transitional justice mechanisms examined in the next section. Second, emotions will be engaged by the experience of structural biases and structural injustices in the second dimension of power, whereby existing structural biases or injustices may minimise, exclude, or discriminate against women, children, Indigenous peoples, African Americans, or victim-survivors more broadly.

Third, epistemic injustice and the experience of not being heard or listened to can both silence the emotions as lived experience of survivors and prompt emotional responses, including trauma responses. Maroney is concerned about how law treats emotions in this dimension: 'Emotion-relevant legal questions often fall into an epistemological blank space. This is an unacceptable state of affairs. It is unacceptable, first, because it destabilizes law: when the bases upon which law is made are idiosyncratic, so too is the law itself. This state of affairs also is unacceptable because, in many instances, stable

[23] ibid 270.

[24] Lauren Guilmette, 'In What We Tend to Feel Is Without History: Foucault, Affect, and the Ethics of Curiosity' (2014) 28 The Journal of Speculative Philosophy 284, 286.

[25] D'Aoust (n 9) 271.

[26] Charlène Calderaro and Éléonore Lépinard, 'Intersectionality as a New Feeling Rule for Young Feminists: Race and Feminist Relations in France and Switzerland' (2021) 28 European Journal of Women's Studies 387; Kaitlin T McCormick and others, 'New Perspectives on Gender and Emotion' in Tomi-Ann Roberts and others (eds), *Feminist Perspectives on Building a Better Psychological Science of Gender* (Springer International Publishing 2016).

bases for emotional assessment exist. Finally, where no such bases exist, emotional assessment should be openly acknowledged as an expression of one's beliefs and values, not passed off as simple truth'.[27] Finally, emotions have an ontological dimension in their relationship to power where the expression of particular emotions may be state based, with a particular emphasis at the end of this chapter on the risks associated with public expressions of shame. For Ben Anderson, 'attending to the dynamics of affective life may become political when brought into contact with forms of biopower that, in different ways, normalise life'.[28]

5.3.1 *Emotions, Agency, and Transitional Justice*

Emotions play a significant role in the commission of human rights violations in a variety of ways, shaping not only individual acts of violence but also the very structures and ideologies of gross human rights violations.[29] First, historical abuses can be explained in part as having emotional dimensions to their causes. Existing literature on the concept and sociology of emotions argues that shame is the master emotion and is at the root of all acts of violence – in particular, the shame of being ashamed may lead to acts of rage, anger, and violence to deny this experience of shame.[30] When fear drives people to blame others who are not actually responsible, we can call it scapegoating.[31]

Second, historical abuses, such as genocide, crimes against humanity, physical and sexual violence, and the damage to families and culture all foreseeably generate a range of intense emotional responses.[32] Rage, grief, loss, shame, and disgust are among the predictable and documented responses to these events among victim-survivors, their families, and wider communities

[27] Terry A Maroney, 'Lay Conceptions of Emotion in Law' in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021) 16.

[28] Ben Anderson, 'Affect and Biopower: Towards a Politics of Life' (2012) 37 Transactions of the Institute of British Geographers 28, 29.

[29] Thomas Brudholm and Johannes Lang (eds), *Emotions and Mass Atrocity: Philosophical and Theoretical Explorations* (1st ed, Cambridge University Press 2018) 3.

[30] James Gilligan, *Violence: Reflections on a National Epidemic* (Vintage Books 1997) 10–11; L Ray, 'Shame, Rage and Racist Violence' (2004) 44 British Journal of Criminology 350; Thomas J Scheff and Suzanne M Retzinger, *Emotions and Violence: Shame and Rage in Destructive Conflicts* (iUniverse 2001); Thomas J Scheff, *Bloody Revenge: Emotions, Nationalism, and War* (Routledge 2020).

[31] Gordon W Allport, *The Nature of Prejudice* (Unabridged, 25th Anniversary ed, Addison-Wesley Pub Co 1979).

[32] Brian Martin, 'Managing Outrage over Genocide: Case Study Rwanda' (2009) 21 Global Change, Peace & Security 275.

who become aware of or acknowledge these events.[33] A victim-survivor-centred approach suggests a plurality of experiences and emotions should be anticipated and welcomed. Macalester Bell suggests: 'as victims of wrongdoing ... we should be careful to articulate to ourselves and to others precisely what attitudes and emotions we experience'.[34] McAlinden notes that cases of child abuse in particular often provoke significant public responses of anger, leading to the 'othering' of sex offenders.[35] She notes that where such emotional responses provide the basis for subsequent legislation or other responses to abuse, these responses may 'tend to inflate embedded levels of societal suspicion, mistrust and intolerance concerning potential sex offenders, and create indiscriminate strategies which "cast the net of suspicion on all"'.[36] Historical-structural injustices are often causes or contributing factors to survivors' experiences of trauma and post-traumatic stress disorder (PTSD), which in turn 'is often associated with a wide range of trauma-related aversive emotions such as fear, disgust, sadness, shame, guilt, and anger'.[37]

Third, emotions are a central feature of transitional justice measures in dealing with the past. Transitional justice can involve several emotions among victims and survivors directed at the leaders, perpetrators, and collaborators involved in the commission of harms.[38] Winter notes: 'affective questions of emotion and intent are central to personal redress ethics'.[39] Kamari Maxine Clarke argues that international human rights and transitional justice use law in a particular manner to encapsulate emotion: 'Law garners its authority through emotional affects that produce various forms of encapsulation, and

[33] Pumla Gobodo-Madikizela, 'Remorse, Forgiveness, and Rehumanization: Stories from South Africa' (2002) 42 Journal of Humanistic Psychology 7.

[34] Macalester Bell, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press 2013) 270.

[35] Anne-Marie McAlinden, 'Re-Emotionalising Regulatory Responses to Child Sex Offences' in Heather Conway and John Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart 2016) 140.

[36] ibid 141.

[37] Nora Görg and others, 'Trauma-Related Emotions and Radical Acceptance in Dialectical Behavior Therapy for Posttraumatic Stress Disorder after Childhood Sexual Abuse' (2017) 4 Borderline Personality Disorder and Emotion Dysregulation 15; Ananda B Amstadter and Laura L Vernon, 'Emotional Reactions During and After Trauma: A Comparison of Trauma Types' (2008) 16 Journal of Aggression, Maltreatment & Trauma 391; Lisa M Hathaway, Adriel Boals and Jonathan B Banks, 'PTSD Symptoms and Dominant Emotional Response to a Traumatic Event: An Examination of *DSM-IV* Criterion A2' (2010) 23 Anxiety, Stress & Coping 119.

[38] Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer 2009) 118–22.

[39] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014) 19.

through this process power is made real through various emotive appeals'.[40] Clarke suggests 'as feelings of political actors are projected onto sites of legal action, those actors jockey for power to establish the core assumptions that underlie beliefs about why something like violence erupts or how it should be mitigated'.[41]

Truth and reconciliation commissions are understood as being a central forum for the provision of testimony by victim-survivors. Such testimony can often involve intensely emotional accounts of the experiences of harm, grief, and suffering endured by victim-survivors. Since the South African Truth and Reconciliation Commission, there have been assessments of the claim that the disclosure of such experiences and testimony can have a healing and cathartic effect on survivors.[42] Studies call this claim into question and suggest that such commissions may have therapeutic value for only some survivors and in some contexts[43] or worse may be re-traumatising, or the value may dissipate over time.[44] Chapter 6 will explore the existing studies on the emotional impact of public inquiries like truth commissions on victim-survivors of historical-structural abuses.

Accountability mechanisms such as criminal and civil trials shape the role of emotions. The provision of testimony regarding past violence and suffering is subjected to rules of procedure and legal examination by professionals, in a manner which can formalise the experience of survivors and alienate them from their role within a trial process.[45] This will be explored further in Chapter 7. In addition, this formalisation of emotional experiences is shared with engagement with reparations mechanisms, explored in Chapter 8. Although in transitional justice theory reparations are designed to provide acknowledgement to victim-survivors of their suffering, this approach tends to focus on the status of survivors as rights holders, as civic agents, rather than as

[40] Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019) 38.

[41] ibid 11.

[42] David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 Human Rights Quarterly 592.

[43] Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 International Criminal Law Review 263.

[44] Bernard Rimé and others, 'The Impact of Gacaca Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after a Genocide' (2011) 41 European Journal of Social Psychology 695.

[45] Terry A Maroney and James J Gross, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective' (2014) 6 Emotion Review 142; Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005).

individuals with particular lived experiences, including emotional experiences. Finally, emotions play a significant role in the processes of apology and reconciliation, examined in Chapters 9 and 10.

Across these institutional settings, the emotions involved in historical abuses and transitional justice likely intersect with experiences of trauma and PTSD.[46] Susanne Karstedt notes that 'when listeners are confronted with such extreme trauma, atrocious events, or severe illness, they react with less empathy and even attempt to constrain the victim in the expression of emotions. Bystanders and nonvictims severely underestimate the victim's situation, react with anxiety, and respond with simplistic interventions that cannot do justice to the complex consequences of the negative emotional experience'.[47] As a result of these complexities and the shaping of emotion by particular institutional contexts, there is no way to assume that a 'single-shot expression of emotions' in transitional justice processes can contribute to the diminishing of emotional trauma.[48] As a result, emotions are relevant to transitional justice in addressing the past not only at an individual level for victim-survivors, perpetrators, and legal officials but also at a society-wide level through the emotional impacts of truth commissions processes and findings, the theatre and outcome of criminal and civil trials, and the performative effect and consequences of public state and church apologies.[49] Significant empirical work with survivors' experience in and around transitional justice mechanisms related to historical abuses is therefore warranted to validate claims that such processes offer healing, catharsis, or otherwise address emotions. Without it, at best we may conclude that at present transitional justice creates an ambivalent experience for the emotions of victim-survivors.

5.3.2 *Emotions and Historical-Structural Injustices*

In addition to this first, interactive dimension of power and emotion in transitional justice institutions, how emotions interact with these institutions

[46] Mendeloff (n 42).

[47] Susanne Karstedt, 'Emotions and Criminal Law: New Perspectives on an Enduring Presence' in Roger Patulny and others (eds), *Emotions in Late Modernity* (Routledge 2019) 101, 108; Bernard Rimé, 'Emotion Elicits the Social Sharing of Emotion: Theory and Empirical Review' (2009) 1 Emotion Review 60, 76.

[48] Kim ME Lens and others, 'Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?' (2015) 12 European Journal of Criminology 17, 30.

[49] Susanne Karstedt, 'Between Micro and Macro Justice: Emotions in Transitional Justice' in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021).

will be shaped by the second dimension of power involving structures and historical-structural injustice. As structures and practices of power seek to control bodies, they also seek to control and shape socially appropriate emotions.[50] Jon Elster writes, culture 'acts as a modifier – whether as amplifier or as brake – of the emotions'.[51] Emotional structures can influence normatively and socially desirable emotions. For William Reddy, an emotional regime is a 'set of normative emotions and the official rituals, practices, and emotions that express and inculcate them', and they are a 'necessary underpinning of any stable political regime'.[52] For Barbara Rosenwein and Riccardo Cristiani, an 'emotional community' is a group that adheres to the same valuations of emotions and how they should be expressed, and thus constitutes a community of emotional styles and norms.[53] Jonathan Heaney argues that the political and social use of emotions can construct an emotional state, referring to 'the various ways in which the nation-state has been directly and indirectly involved in the construction and deconstruction of the emotional life of the polity; the degree to which it reflects (and constructs) dominant emotional regime(s) and norms; and how these processes change through time'.[54] Deborah Gould has suggested the concept of 'emotional habitus', being the epistemic knowledge and dispositions of a group that, if only partially consciously, form how a group engages with emotions.[55] Flam suggests that the prevailing emotional regimes within societies, and their corresponding 'feeling rules' are both defined by power holders within those societies (asymmetrically, to their advantage) and are an expression and symbol of their power.[56]

The individual experience of emotion in transitional justice processes is thus inexorably linked to and mediated by the macro-context of normative emotional culture.[57] For Mihai, 'taking the past seriously and engaging publicly with citizens' politically relevant emotional responses represents a

[50] D'Aoust (n 9) 271.
[51] Jon Elster, *Alchemies of the Mind: Rationality and the Emotions* (Cambridge University Press 1999) 262.
[52] William M Reddy, *The Navigation of Feeling: A Framework for the History of Emotions* (Cambridge University Press 2001) 129.
[53] Barbara H Rosenwein and Riccardo Cristiani, *What Is the History of Emotions?* (Polity 2018) 39.
[54] Jonathan G Heaney, 'Emotion as Power: Capital and Strategy in the Field of Politics' (2019) 12 Journal of Political Power 224, 225.
[55] Deborah B Gould, *Moving Politics: Emotion and ACT UP's Fight against AIDS* (The University of Chicago Press 2009) 32.
[56] Helena Flam, 'The Transnational Movement for Truth, Justice and Reconciliation as an Emotional (Rule) Regime?' (2013) 6 Journal of Political Power 363, 365.
[57] Nikos Demertzis (ed), *Emotions in Politics: The Affect Dimension in Political Tension* (Palgrave Macmillan 2013) 9.

first opportunity for institutions to embark on a process of democratic emotional socialisation'.[58] As a result, she suggests institutions should strive for clear, exemplary decisions to 'stimulate reflection' on what democratically appropriate emotions should look like, through a justification and explanation of what commitment to constitutional democracy requires. Exemplary practices are those that 'reflect citizens' legitimate negative emotions and filter their expression through democratic values'.[59] Naomi Head has recently argued that the use of emotions in political rhetoric 'does not necessarily lead to the acknowledgement of political responsibility or to actions to address the historically-constituted roots of contemporary structural injustices'.[60] Head suggests: 'While a sentimental politics is likely to signal alignment with a certain set of moral values, thereby simulating a desire for justice, it nonetheless lacks a sustained political commitment and evades questions of political responsibility for suffering embedded in historically constituted global structural injustices'.[61] Head notes the role of emotion in political rhetoric as a potential vehicle to legitimise existing power structures and to include some and exclude others from the use of 'care, concern, and responsibility' in sentimental politics.[62]

In particular, emotions play a role in providing narrative and normative content for national myths. Emotions are a key part of myths.[63] Bouchard notes: 'a well-established myth is characterized (and conditioned) by being primarily emotion-driven, which helps us understand the liberties it can take with reality and the resilience it can show when it faces contradictions'.[64] Richard Rorty writes 'stories about what a nation has been and should try to be are not attempts at accurate representation, but rather attempts to forge a moral identity'.[65] Public emotions include those articulated by public figures, in this context including political and church leadership and representatives of victim-survivor communities. Martha Nussbaum argues, 'Good public emotions do embody general principles, but they clothe them in the garb of

[58] Mihaela Mihai, *Negative Emotions and Transitional Justice* (Columbia University Press 2016) 8.
[59] ibid 10.
[60] Naomi Head, 'Sentimental Politics or Structural Injustice? The Ambivalence of Emotions for Political Responsibility' (2020) 12 International Theory 337.
[61] ibid 339.
[62] ibid.
[63] Gérard Bouchard, *Social Myths and Collective Imaginaries* (University of Toronto Press 2017) 6.
[64] ibid 25.
[65] Richard Rorty, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (Harvard University Press 1999) 13.

concrete narrative history'.[66] National and religious myths depend less upon the mere act of incorporation of emotions relevant to historical abuses but rather seek to incorporate or exclude those emotions to the extent that they enable a constructive account of the state or church as a moral and political community. The honest reckoning with the emotions produced by historical abuses and reproduced in attempts to deal with the past is likely to produce a social ambivalence regarding an exclusively positive or unifying national or religious narrative or myth.[67] States and churches already employ emotions to advance their own nation-building and myth making, in their advancement of collective memory or the 'imagined communities' such as the nation,[68] in pursuit and production of 'profound emotional legitimacy' through political rituals like parades and public holidays.[69] For instance, in Ireland, Tom Inglis demonstrated, the main work of national habitus formation in the Irish context was 'outsourced' to the Catholic Church, which controlled the fields of education and health, who held a 'moral monopoly' over society.[70] Jonathan Heaney writes:

> in the early decades of the 20th century we see a concerted construction of national habitus via a unified nationalist and religious narrative, orchestrated by the two main power blocs in that society, church and state, and reinforced on the ground via powerful nationalist and religious networks. This relational setting was repressive and conservative, giving rise to an 'emotional climate' characterized by guilt, shame and fear; a repressive emotional and sexual code. Yet, it also produced high levels of solidarity and social cohesion, and a national habitus in which identification with, and 'love for' the nation was central to individual's conception of selfhood and personal 'identity'.[71]

A variety of factors may impact the nature and extent of the emotional dimensions within public accounts of addressing the past. Clarke notes that the feelings of individuals and groups may align or contrast with dominant

[66] Martha Craven Nussbaum, *Political Emotions: Why Love Matters for Justice* (Belknap Press 2015) 201.

[67] Javier Krauel, *Imperial Emotions: Cultural Responses to Myths of Empire in* Fin-de-Siècle *Spain* (Liverpool University Press 2013) 179.

[68] Maurice Halbwachs and Lewis A Coser, *On Collective Memory* (University of Chicago Press 1992); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised ed, Verso 2016).

[69] Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Sumach Press 2000) 4.

[70] Tom Inglis, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (2nd ed, University College Dublin Press 1998).

[71] Jonathan Heaney, 'Emotions and Nationalism: A Reappraisal' in Nicolas Demertzis (ed), *Emotions in Politics* (Palgrave Macmillan UK 2013) 260.

emotional regimes: 'Feelings operate through agencies that are embedded in particular historical inscriptions and are part of itinerant responses that are often collective but never fully predictable; they may or may not align with the emotional climate being produced by justice campaigns'.[72] Pennebaker et al suggest: 'The degree of social sharing within a country about a nations unwanted past can be related to a positive emotional climate if open discussions are encouraged or negative emotional climate if repressive governmental forces are at play.'[73] In creating or maintaining structures, Hoggett and Thompson note that states use emotions in the processes of governance and policy making through a variety of techniques: 'projection, where a government colludes with powerful anxieties by focusing them upon a particular target group which becomes construed as a social problem. Enactment occurs when a government, faced with a panic of some form, succumbs to the intense pressure to be seen to be doing something'.[74] Finally, they suggest states and their institutions may embody emotions through their existing rules, systems, structures, and procedures.[75]

For Naomi Head, state apologies and reconciliation may involve mere performances of empathy that evade political responsibility or may involve a more genuine process of testimonial empathy: 'the acknowledgement of injustice and its historical and structural dimensions, subjective shifts of understanding, and collective political action.'[76] On Head's account, the focus in assessing whether an apology is mere performance or not requires attending to the affective dynamics of the narrative created. She is concerned that such narratives may provide some actors nothing more than a 'vicarious sensory experience that does little to alter their own sense of privilege'.[77] For Head, a politics of pity is where the 'asymmetry between the spectator and the sufferer is maintained – often through the over-identification and imagined comprehension enabled through sentiment – ensuring that no radical reflexivity turns our gaze towards our entanglements in the creation and perpetuation of vulnerabilities and injustice'.[78] In contrast, compassion requires recognising the connection 'between the personal and the political and … entails the political recognition that while we are all vulnerable we are not so

[72] Clarke (n 40) 19.
[73] James W Pennebaker, Dario Paez and Bernard Rimé (eds), *Collective Memory of Political Events: Social Psychological Perspectives* (Lawrence Erlbaum Associates 1997) ix.
[74] Hoggett and Thompson (n 8) 6.
[75] ibid 7.
[76] Head (n 60) 355.
[77] ibid.
[78] ibid 346.

in the same way or to the same degree'.[79] The structure of public emotions thus forms a crucial platform for the reception and discourse regarding appropriate emotional responses to historical-structural injustices.

5.3.3 *Emotions and Epistemic Injustice*

The emotions of victim-survivors may be subjected to epistemic injustice,[80] that is, the state and church mechanisms for addressing the past may be unable or unwilling to meaningfully listen to or hear survivor emotions – or a specific subset of their emotions. In doing so, transitional justice mechanisms may construct 'ideal type' survivors, who speak and act in an emotional register that confirms existing structures of power. Those who express challenging emotions, such as rage,[81] or become emotional at issues that stretch beyond the endorsed paradigms of addressing the past, those who claim that Indigenous recognition is insufficient and decolonisation is required, for instance, may be excluded. More broadly, epistemic injustice regarding historical-structural injustices is likely to map on to existing forms of such injustice in the racialised and gendered recognition of emotion within legal processes.[82]

In contrast, where expressions of victimhood are repressed, this may have the unintended consequence of consolidating collective memories associated with the repressed event.[83] For Head, engagement with the emotional experiences of others can 'disrupt our epistemic comfort and render visible dynamics and hierarchies hitherto unaccounted for by the powerful and unaccountable to the oppressed'.[84] In this regard, Head emphasises the emotional dimension to the distinction between knowledge and acknowledgement, familiar to transitional justice:

[79] ibid.

[80] Miranda Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007).

[81] Sonali Chakravarti, *Sing the Rage: Listening to Anger after Mass Violence* (The University of Chicago Press 2014).

[82] Antuan Johnson, 'Sexual Assault and Gendered Hate: A Case of Epistemic Injustice' (2017) 11 Unbound 91; Dina Lupin Townsend and Leo Townsend, 'Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System' (2021) 35 Social Epistemology 147.

[83] James Pennebaker and Becky Banasik, 'On the Creation and Maintenance of Collective Memories: History as Social Psychology' in James Pennebaker, Dario Paez and Bernard Rimé (eds), *Collective Memory of Political Events: Social Psychological Perspectives* (Psychology Press 1997) 17.

[84] Head (n 60) 355.

> Knowledge, for testimonial empathy, requires listening without presuming a complete or full understanding of the other. It does not seek to master the narrative or knowledge of the other, to subsume it within a pre-established hierarchy of ideas, values, and beliefs, or to reduce the other to fit our own limited imaginations or perspectives. To do so would be to conflate empathy with a strategy of knowing intended to perpetuate, rather than disrupt, the existing structures of injustice.[85]

Finally, Head emphasises the risks of passive empathy, which could function as 'an "epistemology of ignorance" (of not knowing, or of not wanting to know)'.[86] Instead Head calls for "radical reflexivity and epistemic humility that is self-critical rather than self-referential in its interrogation of position, privilege, and power'.[87] The task of genuinely listening to and hearing the emotions of victim-survivors remains a key challenge for the staff of transitional justice mechanisms and representatives of state and church.

5.3.4 *Emotions and Constitutive Forms of Power*

Finally, emotions may play a role in the fourth constitutive form of power. The classification by society as 'black', 'Indigenous', 'poor', or 'victim' may result not only in significant disempowerment, discrimination, and harm but also with a set of social norms and messaging that it is shameful to belong to these categories of inferiority. For historically marginalised groups, group identity and experience may confirm the emotional dimensions of a particular social identity, that is, feelings of shame or inferiority in individuals who belong to groups that have been both historically and currently marginalised. For instance, William Reddy argues that in situations of conquest or colonisation, where a normative emotional management strategy is imposed on a population, 'emotional suffering becomes epidemic'.[88]

Second, emotions can play a key part in the constitution and politics of victimhood. Judith Shklar insists that victimhood 'has an irreducibly subjective component that the normal model of justice cannot easily absorb'.[89] Antti Malinen argues that for care leavers seeking justice for acts of historical abuses, being 'part of this emotional community opened up opportunities for

[85] ibid 348.
[86] ibid 353.
[87] ibid 355.
[88] Reddy (n 52) 126.
[89] Judith N Shklar, *The Faces of Injustice* (Yale University Press 1990) 37.

empowerment through sharing and the validation of experiences'.[90] For Mihai, 'until we understand the role played by affective investment in collective identification and mobilization, we will not be in a position to understand the emergence and resilience of non-democratic collective identities: racism, xenophobia, explosive nationalism and religious intolerance'.[91] Janine Natalya Clark argues that in transitional justice to date 'the neglect of emotional legacies represents a missed opportunity to explore how the meta emotions that people share – and which form part of "a social ontology of connection" – constitute potential new bases for building reconciliation in post-conflict societies'.[92] Subsequent chapters will examine how states employ and perform emotions through the specific institutions of transitional justice (investigations, trials, redress, and apologies) and enable the consolidation of their power and legitimacy. In particular, subsequent chapters will explore whether framing the past in terms of gross violations of human rights, institutional responses to such violations, and in terms of transitional justice 'inevitably distorts the historical "reality" of collective mass atrocities and the victims' remembered experiences of it'.[93]

5.4 HISTORICAL-STRUCTURAL INJUSTICES AND SHAME

Shame is an emotion which features both as a dimension of historical abuse and as an element of modern-day responses to such harms. There is a significant literature on shame across disciplines.[94] Kizuk notes: 'guilt is about a failure of doing whereas shame is about a failure of being. Unlike guilt, which focuses on failing to live up to a norm or breaking a rule, shame is often taken to be a response to a global failure of the self. This is because shame is, in structure, ontological rather than action-based – it is tied to our identity'.[95]

Nussbaum argues that shame 'is a painful emotion responding to a sense of failure to attain some ideal state' and involves not only the realisation but also the denial that one is 'weak and inadequate in some way in which one expects

[90] Antti Malinen, 'Eleven Old Boys Crying Out for Revenge: Emotional Dynamics in Care-Leavers' Efforts to Seek Justice: Case Study of the Palhoniemi Reform School 1945–1946' (2021) 18 No Foundations. An Interdisciplinary Journal of Law and Justice 40, 60.

[91] Mihaela Mihai, 'Theorizing Agonistic Emotions' (2014) 20 Parallax 31, 34.

[92] Janine Natalya Clark, 'Emotional Legacies, Transitional Justice and Alethic Truth: A Novel Basis for Exploring Reconciliation' (2020) 18 Journal of International Criminal Justice 141, 145.

[93] Chrisje Brants and Katrien Klep, 'Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness' (2013) 7 International Journal of Conflict and Violence 36, 48.

[94] Dolezal (n 20) 3.

[95] Sarah Kizuk, 'Settler Shame: A Critique of the Role of Shame in Settler–Indigenous Relationships in Canada' (2020) 35 Hypatia 161, 163.

oneself to be adequate.'[96] For Nussbaum, only shame of a specific and limited sort can be constructive. It is possible to invite others to feel shame in non-insulting, non-humiliating, and non-coercive ways,[97] but it seems necessary for such attempts at constructive shaming to be founded on mutual respect. In contrast, 'shame punishments, historically, are ways of marking a person, often for life, with a degraded identity.'[98] As a result, Nussbaum concludes that society's shaming behaviour is not to be easily trusted.[99]

Luna Dolezal concurs that 'shame is an emotion which is experienced by a subject when his or her perceived shortcomings or failings are observed by another'.[100] For Dolezal, shame is both embodied and social.[101] She notes the fact that shame is 'constitutive and necessary', particularly as a motivation of skill formation.[102] She usefully distinguishes between acute and *chronic* body shame, which 'arises because of more ongoing or permanent aspects of one's appearance or body, such as one's weight, height or skin colour. It can also arise because of some stigma or deformity, such as a scar or disability … Shame, in this case, is not experienced as an acute disruption to one's situation, but rather as a background of pain and self-consciousness, becoming more acute perhaps in moments of exposure or self-reference'.[103]

Shame is a feature of historical abuse that pervades several of the societies examined in this book. Relying on testimony in empirical work is 'particularly difficult' when dealing with shame and embarrassment as it is often bypassed or repressed.[104] Across the ninety inquiries discussed in Chapter 6, there are at least 1,090 references to shame. Persistent shame may explain failures to process child sexual abuse or PTSD.[105] For instance, Swain and Howe note the role of shame in Australian maternity homes, referencing a 1908 Charity Review article describing them as a place where, for mothers, 'their shame can be hidden and where they can live until their infants can do without their care'.[106] Similarly, in

[96] Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press 2004) 183.
[97] ibid 213–14.
[98] ibid 230.
[99] ibid 220.
[100] Dolezal (n 20) 4.
[101] ibid x.
[102] ibid 40.
[103] ibid 10.
[104] ibid 9.
[105] Candice Feiring and Lynn S Taska, 'The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery' (2005) 10 Child Maltreatment 337.
[106] Renate Howe and Shurlee Swain, 'Saving the Child and Punishing the Mother: Single Mothers and the State 1912–1942' (1993) 17 Journal of Australian Studies 31, 36.

twentieth-century Ireland, chronic shame was a persistent feature of the Catholic faith and reinforced in both religious rituals such as confession and through Irish families, schools, and communities, with particular emphasis on women and children.[107]

McAlinden notes that a politics of shame was integral to both Irish national and religious identity and that this identity was bolstered by bystanders in Irish families and institutions who failed to challenge the status quo, with the result that victim-survivors were silenced for decades.[108] Shame in Ireland attached in particularly gendered terms, targeting unmarried mothers and those who transgressed or were perceived to transgress other Catholic sexual norms.[109] In the context of the Magdalene Laundries, oral histories given by victim-survivors reveal 'women were conceptualised as mud and rubbish to be disposed of, as inexpensive goods for sale or as natural forces that were out of control. In that blinkered society they epitomised the worst side of illness and disability'.[110]

The religious nature of the institutions involved and the actors engaged in historical abuse raises the possibility of a particularly religious experience of shame, what some have dubbed sacramental shame: 'People often dispense this shame believing it will help their loved ones to conform to God's will and to spend eternity in heaven'.[111] As with the full range of emotions, shame can be analysed across the four forms of power developed in Chapter 4.

5.4.1 *Shame and Agency*

As seen above, survivor shame forms a pervasive reaction to the experience of historical-structural injustices. Shame retains the potential to form an element of responding to historical abuse. Shame is an emotion that can be deployed

[107] Anne-Marie McAlinden, 'Apologies as "Shame Management": the Politics of Remorse in the Aftermath of Historical Institutional Abuse' (2022) 42 Legal Studies 137, 140.

[108] ibid 141.

[109] Clara Fischer, 'Gender, Nation, and the Politics of Shame: Magdalen Laundries and the Institutionalization of Feminine Transgression in Modern Ireland' (2016) 41 Signs: Journal of Women in Culture and Society 821; Lindsey Earner-Byrne, 'The Boat to England: An Analysis of the Official Reactions to the Emigration of Single Expectant Irishwomen to Britain, 1922–1972' (2003) 30 Irish Economic and Social History 52.

[110] Miguel-Ángel Benítez-Castro and Encarnación Hidalgo-Tenorio, '"We Were Treated Very Badly, Treated Like Slaves": A Critical Metaphor Analysis of the Accounts of the Magdalene Laundries Victims' in Pilar Villar-Argáiz (ed), *Irishness on the Margins* (Springer International Publishing 2018) 120.

[111] Dawne Moon and Theresa W Tobin, 'Sunsets and Solidarity: Overcoming Sacramental Shame in Conservative Christian Churches to Forge a Queer Vision of Love and Justice' (2018) 33 Hypatia 451, 453.

in a single interaction between victim-survivor and perpetrator. On this approach, shaming is reintegrative when it reinforces an offender's membership in civil society.[112] Restorative justice literature suggests two elements to reintegrative shaming: (1) the explicit disapproval of the wrongful act (shaming) by respected others; and (2) the ongoing inclusion of the offender within a meaningful relationship (reintegration).[113] McAlinden notes the potential of reintegrative shaming to address child sexual abuse, by aiming 'to engage local communities in the management and reintegration of sex offenders and to directly address wider concerns about the presence of released sex offenders in the local community'.[114] As a result, if shame is to play constructive role in addressing historical-structural injustices, its potential is likely to be at the interpersonal level.

5.4.2 *Shame and Structure*

Second, shame is a key part of the emotional state or structure regarding social norms. John Elster concurs that shame is the most crucial emotion to the maintenance and enforcement of social norms.[115] Shame not only operates in individual experiences and social interactions but also 'plays a key normative and constitutive role in embodied, intersubjective and socio-political relations'.[116] Thomas Scheff and Suzanne Retzinger note that shame operates between individual emotional experience and the broader social structure of society.[117] In particular, they note that shame is closely linked to anger-rage, which often can lead to violence or aggression and serve as a destructive social force.

In this context, shame may form a central part of historical-structural injustices for historically marginalised groups. Luna Dolezal notes that 'the propensity to shame, and its consequences, is very much dependent on one's position within a social group'.[118] She notes: 'shame is deployed as a strategy of social exclusion, as a means to oppress a particular social group, this shame is often invisible, unacknowledged or individually and collectively bypassed'.[119]

[112] McAlinden (n 35) 145.
[113] John Braithwaite, *Restorative Justice & Responsive Regulation* (Oxford University Press 2002) 12–13.
[114] McAlinden (n 35) 144.
[115] Elster (n 51) 146.
[116] Dolezal (n 20) 12.
[117] Scheff and Retzinger (n 30) 45.
[118] Dolezal (n 20) 90.
[119] ibid 95.

Dolezal thus emphasises that the structure of shame may not align with the emotional experience of it (or lack thereof).[120] Instead, the structure of shame may manifest as a lack of self and/or social recognition of equal status and worth.[121] This form of shame does not attach merely to individuals but entire social groups and can be inherited and transmitted from one generation to the next, a permanent part of both individual and group identities.[122] Such structural forms of shame attach to historically marginalised groups and peoples, including Indigenous peoples, people of colour, women, and children, and form an inescapable form of shame that becomes part of social identity.[123] The results of such forms of shame are to reenforce a subjective experience of inferiority, which can lead to damaging emotional and cognitive outcomes and 'a state of profound disempowerment'.[124] Shame appears a particularly pernicious emotion when operating at the level of social, political and religious structures.

5.4.3 *Shame and Epistemic Injustice*

Third, shame can be deployed as a form of epistemic injustice. Cheshire Calhoun notes, 'the power to shame is likely to be concentrated in the hands of those whose interpretations are socially authoritative'.[125] Cecilia Mun suggests that 'standard accounts of shame, understood as espousing feeling rules for shame (including shaming, being shamed, and experiences of shame), are mechanisms for the practice of systemic testimonial injustices at the social-practical level of analysis'.[126] For example, Mun suggests practices of gaslighting or micro-aggressions reflect this use of shame.[127] To counter this, Enright and Ring suggest that epistemic justice requires 'the ashamed state to engage in a risky exposure to victim-survivors' testimony and to the possibility that doing so may transform the state and its law'.[128]

[120] ibid.
[121] ibid 95–7.
[122] ibid 93.
[123] Julien A Deonna, Raffaele Rodogno and Fabrice Teroni, *In Defense of Shame: The Faces of an Emotion* (Oxford University Press 2012) 227.
[124] Dolezal (n 20) 93.
[125] Cheshire Calhoun, 'An Apology for Moral Shame' (2004) 12 Journal of Political Philosophy 127.
[126] Cecilea Mun, 'Rationality through the Eyes of Shame: Oppression and Liberation via Emotion' (2019) 34 Hypatia 286, 298.
[127] ibid.
[128] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 88.

5.4.4 *Shame and Ontological Power*

Finally, shame can form part of the constitutive use of biopower. Nations can shame others and can bring shame upon themselves by recognising and acknowledging the way they have 'treated others who were in the past understood as the origin of shame'.[129]

Although body shame is fundamental to one's embodied subjectivity and social identity,[130] Dolezal emphasises that *chronic* body shame is also deeply involved in the constitutive use of power. This is particularly evident in Elias' account of the civilisation process. Dolezal argues, 'Although Foucault does not explicitly discuss shame in his analysis of discipline and embodiment, key to his theory are several features of the shame experience, such as objectification, alienation, internalization, and normalization'.[131] In contrast, Dolezal argues that for Norbert Elias: 'the civilizing process is driven by a deeper desire to avoid social exclusion and shame in order to secure and maintain social standing'.[132] Dolezal continues that for Elias: 'as bodies became the primary site of social worth and estimation, central to the social value system, fear of social degradation and the loss of social standing make it increasingly imperative for individuals to regulate and manage the body. Avoiding social exclusion and accruing body capital are central concerns for the subject, and these concerns are inextricably linked to the experience of body shame'.[133]

In contrast, Deigh suggests that shame may be productive where it reaffirms a commitment and failure to live up to the ideals of liberal democratic institutions.[134] Lisa Guenther distinguishes between shame as 'a feeling of collective ethical responsibility, and humiliation as an instrument of political domination'.[135] Sara Ahmed examines how apologies involving shame can function as nation-building, in which 'what is shameful about the past is covered over by the statement of shame itself'. On her account, shame may be restorative 'only when the shamed other can "show" that its failure to measure up to a social ideal is temporary'.[136]

[129] Sara Ahmed, *The Cultural Politics of Emotion* (2nd ed, Edinburgh University Press 2014) 108.
[130] Dolezal (n 20) 99.
[131] ibid 155.
[132] ibid 71.
[133] ibid 73.
[134] John Deigh, *Emotions, Values, and the Law* (Oxford University Press 2008) 109–11.
[135] Lisa Guenther, 'Resisting Agamben: The Biopolitics of Shame and Humiliation' (2012) 38 Philosophy & Social Criticism 59, 60.
[136] Ahmed (n 129) 107.

To date this constitutive use of shame has failed to achieve this restorative function in the context of addressing historical-structural injustices. Clara Fischer notes that 'Irish nationbuilding engages a politics of shame that operates both via the construction of shamed, deviant Others hidden away in Ireland's network of institutions and via the shame brought onto itself precisely through the maltreatment meted out to those deemed deviant Others. The Irish nation thus reproduces itself in this paradoxical, circular manner, as it draws on shame's capacity to bind people in the creation of national collectivities through the establishment of "insiders" and "outsiders" or through the assumption of collective or supra-individual failings that make us feel shame as (the) people of Ireland'.[137] Máiréad Enright and Sinéad Ring borrow from the work of Giorgio Agamben, and 'understand true shame as an experience of the collapse of the sovereign self. When speaking about historical institutional abuse, state actors have positioned the Irish state as ashamed of its past. On their view, state shame as performed in statements of this kind entails no loss of sovereignty. Rather, the post-authoritarian Irish state's identification with shame has run alongside new, intensely productive politics of nation-building reinforcing state sovereignty and inaugurating new techniques of government'.[138]

McKenzie et al note the application of shame to Australia at the level of a national myth: 'there has been extensive discussion of collective shame regarding, for example, Australia's violent history of colonisation; its present-day treatment of Indigenous people (e.g., the stigmatising and divisive Northern Territory Intervention) and the mandatory, prolonged detention of asylum seekers in harsh conditions. In these cases, shame is not being applied to a person by a community, although activists in these areas have often used the language of shame in their indictments of political leaders. Shame is primarily applied to the nation and its government by a section of its own citizenry. Shame is seen as evidence of both moral conscience and moral failure – the moral conscience of part of the nation directed at the government and the moral failings of other citizens in that same nation. These calls for communal shame are thus not only calls for accountability and reparatory action, but a contestation of the moral fabric of the nation'.[139] Sara Ahmed argues these performances separate shame from victim-survivors' experiences,

[137] Clara Fischer, 'Revealing Ireland's "Proper" Heart: Apology, Shame, Nation' (2017) 32 Hypatia 751, 757.
[138] Enright and Ring (n 128) 71.
[139] Jordan McKenzie and others, 'Social Emotions: A Multidisciplinary Approach' (2019) 3 Emotions: History, Culture, Society 187, 192.

shifting shame from a personal and individual matter to one of national identity that the state alone deems it is capable to address.[140]

In Canada, Sarah Kizuk argues that 'a politics of recognition informed by settler shame has done little to actually see or hear Indigenous peoples on their own terms. Since settler shame is a self-directed emotion that seeks to be discharged through reconciliatory processes that are dependent on liberal recognition, it remains a mere optics of justice wedded to settler ignorance'.[141] She defines settler shame: 'to be a personal experience related to the recognition of our identity as complicit in a racist and colonial world (being bad), as well as the concomitant realization that we might lose control over our identity and become defined solely as this bad self both by ourselves but also by our social world at large. Settler shame causes anxiety and is profoundly painful precisely because we do not want to jeopardize our social standing or lose the ability to self-define'.[142]

Denise Starkey notes the theological dimensions of shame, especially within the Roman Catholic tradition, cautioning: 'Theologies that do not address the different subject positions of perpetrators and victims, nor account for the dynamics of power and the absence of freedom of survivors cannot be said to ensure liberation. Shame must be "unmasked" in order to "derail" the shattering effects that lead to survivors being held accountable for the harm done to them while many perpetrators continue to evade responsibility'.[143] Thomas Scheff notes: 'Denial of shame goes hand in hand with denial of interdependence. An accurate and effective social science requires that shame and interdependence be brought into the light of day'.[144]

5.5 THE DANGER OF SHAME AND HISTORICAL-STRUCTURAL INJUSTICES

There is thus significant potential for shame to feature in the emotional and affective dimensions of addressing historical abuses. To the extent that it is turned to the purposes of nation-building and at the expense of the preferences of victim-survivors, such shame rhetoric and practices may risk further distress, re-traumatisation or alienation from society. Krista Thomason notes: 'When we shame, we attempt to define another person's identity in social life,

[140] Ahmed (n 129) 102.
[141] Kizuk (n 95).
[142] ibid 164.
[143] A Denise Starkey, *The Shame That Lingers: A Survivor-Centered Critique of Catholic Sin-Talk* (Peter Lang 2009) 4.
[144] Scheff (n 30) 54.

but this is an illegitimate exercise of power over another moral agent. In shaming, we take ourselves to be moral educators who are immune to the flaws that we point out in others.'[145] Ahmed notes: 'The politics of shame is contradictory. It exposes the nation, and what it has covered over and covered up in its pride in itself, but at the same time it involves a narrative of recovery as the re-covering of the nation'.[146] In their response to historical abuse, states and churches may continue to shame victim-survivors in their treatment in inquiries, prosecutions, or redress mechanisms. Fischer notes: 'Productive shame, and its potential for change, is thus subverted, as the continuous project of nationbuilding, in its desire for pride, renders productive shame impossible, as the performance of the gendered politics of shame continues to establish and then cover deviant Others as instances of national shame'.[147] Instead, Ahmed notes, 'The fear of being seen as "like them" structures this shame narrative'.[148] Kizuk concurs: 'Rather than operating as an affective transformative experience, settler shame leads to a collapse back into a remaking of settler identity. In other words, the responsibility becomes a responsibility to fix the image of the settler rather than repair the damaged relationship with Indigenous peoples. This is because we, as settlers, want to stop feeling bad so we take steps to discharge our shame in such a way that does not challenge the material conditions that have created and maintain racist and colonial injustice. Our individual (and national) efforts to resolve the experience of shame have taken place through the recognition of our shame experience: it is self-referential. To flee this shameful identity becomes, then, a project to restore our identity as superior'.[149]

Enright and Ring suggest that despite its misuse by states, shame retains radical potential because it is destabilising and can awaken a community to knowledge of past wrongdoing and prompts a duty to bear witness and make space for the wrongs done to others: 'Epistemic justice is incompatible with mere professions of shame unaccompanied by any radical change in the state's normal legal practices'. They suggest, 'Embracing shame as a mode of doing justice to the past in Ireland must mean decentering and reconfiguring established state attitudes to law, allowing new epistemic frames for the voicing and witnessing of traumatic experiences of historical institutional abuse to emerge. This is a process of anxious struggle, far removed from the

[145] Krista K Thomason, *Naked: The Dark Side of Shame and Moral Life* (Oxford University Press 2018) 13.
[146] Ahmed (n 129) 112.
[147] Fischer (n 137) 755.
[148] Ahmed (n 129) 111.
[149] Kizuk (n 95) 166.

comforts of the old sovereignty; the state must risk established practice and "act, *without guarantees*, for the good of all"'.[150] Dolezal suggests that structural forms of shame must be overcome collectively: 'socially inferior groups must invert chronic shame – a structural feature of their subjectivities – into pride in order to achieve collective and personal liberation'.[151]

Alternative emotions may be more suitable than shame at structural, epistemic and ontological levels. Brian Lickel et al note that the use of guilt rather than shame discourse may be more suitable for human rights violations: 'Insofar as shaming promotes anger, humiliation, and denial rather than empathy, guilt, and responsibility, shaming may harden rather than resolve the problem of human rights violations'.[152] One suggestion for how emotions may impact on responsibility for structural injustice is that greater awareness of historical abuses may prompt repentance. Linda Radzik notes, 'Repentant persons reject their former actions, habits, thoughts, or character traits in favor of a new set of values, commitments, dispositions, and intentions.'[153] She notes:

> Repentant persons acknowledge that their former actions were wrong and neither excused nor justified by some other consideration. In repenting, one sometimes acknowledges that one's past values – the moral views to which one had dedicated oneself – were wrongful. At other times, one continues to endorse the old set of values but criticizes oneself as having fallen short in one's pursuit of them. Repentance is sometimes described as both accepting a wrong as one's own and rejecting it. One commits or recommits oneself to the right and the good. This combination of a rejection of the past as wrongful and a commitment to better values makes the emotion of repentance a generally preferable response to wrongdoing than related emotions of self-assessment such as guilt, regret, remorse, or shame.[154]

Taiaiake Alfred suggests the need for restitution rather than shame, as a 'ritual of disclosure and confession in which there is an acknowledgement and acceptance of one's harmful actions and a genuine demonstration of sorrow and regret, constituted in reality by putting forward a promise to never again do harm and by redirecting one's actions to benefit the one who has been

[150] Enright and Ring (n 128) 90, emphasis in original.
[151] Dolezal (n 20) 97–8.
[152] Brian Lickel, Toni Schmader and Marchelle Barquissau, 'The Evocation of Moral Emotions in Intergroup Contexts: The Distinction between Collective Guilt and Collective Shame' in Nyla R Branscombe and Bertjan Doosje (eds), *Collective Guilt* (Cambridge University Press 2004) 52.
[153] Linda Radzik, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford University Press 2009) 67.
[154] ibid.

wronged. Even the act of proposing a shift to this kind of discussion is a radical challenge to the reconciling negotiations that try to fit us into the colonial legacy rather than to confront and defeat it'.[155] In its continued reliance on the legitimacy of 'othering' and its potential to be subverted to maintain existing structures of power and nationhood, shame remains a deeply challenging concept and emotion to be employed publicly and in an exemplary fashion, especially in the contexts of addressing historical-structural injustices.

5.6 CONCLUSION

In the context of historical abuses, the interactions of emotions and power in shaping past and re-enforcing present cultures and structural injustices remain underexplored. Transitional justice is an area of law and policy that has long laid claim to being able to provide healing and catharsis through its operations and institutions, but this claim lacks any widespread empirical validation to date. Emotions thus have the potential to interact with power as a key reason and cause for the nature and shape of a society or church's attempts to deal with the past. The role of emotions may offer a useful element of the framework to explain the opportunities and limitations within certain national and religious contexts. This book will not engage in a novel empirical evaluation of the emotions of individual victim-survivors beyond existing studies of the emotional dimensions of transitional justice practices in subsequent chapters. Instead, it will examine especially public expression of emotion and affect, with the potential for exemplary, norm-setting functions. Emotions can be evaluated as they emerge across the four dimensions of power discussed in Chapter 4: agency, structure, epistemology, and ontology. In the absence of comparative empirical analysis, reliance can be placed on both explicit references to the dimensions of power and emotion in existing processes and in a construction of these factors in the approaches taken by states and church. It is to these processes: inquiries, accountability, reparations, reform, apologies, and reconciliation – as elements of transitional justice – that the rest of the book is addressed.

Particular emphasis is placed on the emotion of shame. As an emotion that in its structure is a criticism of individual identity rather than individual conduct, it is an emotion that is pervasive in existing accounts of historical-structural injustices but also in attempts to respond to the past. The suggestion

[155] Taiaiake Alfred, 'Restitution Is the Real Pathway to Justice for Indigenous Peoples' in Gregory Younging, Jonathan Dewar and Mike DeGagne (eds), *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (Aboriginal Healing Foundation 2009) 182.

of this chapter is that while shame may play some beneficial role at an individual level, when deployed by powerful actors across existing structures, it is capable of re-enforcing the structure of society based on 'othering' and the creation of inferior social categories. As a result, public shaming is a technology of domination, assimilation, and civilisation and should play no part in a transitional justice that seeks to address historical-structural injustices themselves based on othering, inferiority, and the reproduction of violence over time.

PART II

Assessing Transitional Justice for Historical Abuses of Church and State

6

Investigating Historical-Structural Injustices

6.1 INTRODUCTION

The starting point for investigating historical abuses has tended to be denial from state and church authorities of wrongdoing or the need to investigate.[1] The cover-up of offences and high levels of trust in religious institutions and individuals also further delayed meaningful investigations.[2] As a result, inquiries into historical abuses have often only occurred several decades after the alleged harms took place.[3] A range of inquiry mechanisms have been used in response to campaigns to examine historical abuses. Scott Prasser defines a public inquiry as 'a non-permanent, discrete and independent organisational unit appointed by the executive government with clear publicly stated terms of reference'.[4] Public inquiries have a long heritage, across a variety of all legal traditions.[5] The British public inquiry practice remains particularly influential across common law legal systems,[6] where a royal commission or tribunal of inquiry remains the most significant, as it possesses legal powers of investigation and compulsion of evidence and testimony but prohibits evidence to be

[1] Anne-Marie McAlinden, 'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland' (2013) 33 Legal Studies 189, 192.

[2] Commission of Investigation, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Department of Justice, Equality and Law Reform 2009) para 1.24; 'Report of the Grand Jury, In Re County Investigating Grand Jury, MISC. NO. 03-00-239, (C. P. Philadelphia, 2003)' 2.

[3] Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan UK 2014) 105–6.

[4] Scott Prasser, *Royal Commissions and Public Inquiries in Australia* (LexisNexis Butterworths 2006) 22.

[5] Jason Beer and others (eds), *Public Inquiries* (Oxford University Press 2011) 1–31.

[6] Katie Wright, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 Child Abuse & Neglect 10, 11–12.

used in subsequent legal proceedings.[7] A tribunal of inquiry has been employed in the United Kingdom, a tribunal or commission of inquiry in the Republic of Ireland, and a royal commission in Australia and Canada. In the United States, grand jury investigations have functioned as inquiries regarding clerical sexual abuse in a number of US states.[8] In contrast, non-statutory or informal mechanisms of inquiry, whether run by state or church entities, 'depend on the cooperation of witnesses and the organisations under investigation', rather than relying on coercive legislative powers.[9] Beyond traditional public inquiry models, the Canadian Truth and Reconciliation Commission demonstrates the potential for a Truth and Reconciliation Commission (TRC) in the spectrum of potential inquiries for historical abuses. Regrettably, there remains no academic consensus on the definition of a truth (and reconciliation) commission.[10] The United Nations defines truth commissions as 'official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years'.[11] Kim Stanton suggests truth commissions are specialised public inquiries, with an emphasis on symbolic acknowledgement of wrongdoing and a function to educate the public about past injustices.[12] The terminology is not determinative. Ring and Gleeson describe the Irish Commission to Inquire into Child Abuse and the Australian Royal Commission into Institutional Responses to Child Abuse as truth commissions.[13] Non-recent abuse has been addressed across at least ninety inquiries in the jurisdictions considered in this book, outlined in Appendix 1. A selection of these will inform this chapter's analysis.

Inquiries can gather individual victim-survivor testimony, develop systematic and thematic data about the past, identify individuals and groups responsible,

[7] Scott Prasser, 'Royal Commissions in Australia: When Should Governments Appoint Them?' (2006) 65 Australian Journal of Public Administration 28, 32.

[8] Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008) 130–1.

[9] Shurlee Swain, Katie Wright and Johanna Sköld, 'Conceptualising and Categorising Child Abuse Inquiries: From Damage Control to Foregrounding Survivor Testimony' (2018) 31(3) Journal of Historical Sociology 282, 284.

[10] Jeremy Sarkin, 'Redesigning the Definition a Truth Commission, but Also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful' (2018) 19 Human Rights Review 349, 351.

[11] 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.

[12] Kim Stanton, 'Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada' (2013) 1 Transitional Justice Review 59, 62.

[13] Kate Gleeson and Sinéad Ring, 'Confronting the Past and Changing the Future? Public Inquiries into Institutional Child Abuse, Ireland and Australia' (2020) 29 Griffith Law Review 109, 111.

and offer recommendations.[14] This chapter argues that inquiries are best understood as raising expectations that the testimony of victim-survivors will be validated, acknowledged, and used to address historical abuses through other transitional justice mechanisms. If those expectations are not met, then inquiries represent a mere ritual contestation of power.[15] Section 6.2 considers the potential impact of inquiries across the four dimensions of power. Sections 6.3–6.5 consider the application of these dimensions across the inputs, processes, and outputs of an inquiry, reflecting its cycle as a non-permanent and episodic mechanism. Section 6.6 concludes by considering the potential for inquiries to affect unjust power relationships and national and religious myths.

6.2 ASSESSING INQUIRIES

This chapter will assess public inquiries into historical abuses across the four dimensions of power and emotion established in Part I of the book. First, survivors could anticipate several episodic exercises of power as agency with inquiries, such as having their statement taken in confidential and/or public hearings, and engagement in the design and practice of the inquiry. The provision of individual testimony and engagement with inquiries may also perform a therapeutic function for survivors.[16] However, existing studies of inquiries and truth commissions show survivor ambivalence about participation and the provision of testimony,[17] with some instances of short-lived benefit,[18] and others of harm to survivors from participation.[19] Strong claims about an emotional or psychological benefit to testifying remain unsustainable.[20]

[14] 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff, A/HRC/24/42' para 51.

[15] Georges Balandier, *Political Anthropology* (1st American ed, Pantheon Books 1970) 41.

[16] Brandon Hamber, Dineo Nageng and Gabriel O'Malley, '"Telling It Like It Is . . .": Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' (2000) 26 Psychology in Society (PINS) 18.

[17] Merryl Lawry-White, 'The Reparative Effect of Truth Seeking in Transitional Justice' (2015) 64 International and Comparative Law Quarterly 141, 166; Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer 2009); David Mendeloff, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 Human Rights Quarterly 592.

[18] Fiona C Ross, 'On Having Voice and Being Heard: Some After-Effects of Testifying Before the South African Truth and Reconciliation Commission' (2003) 3 Anthropological Theory 325.

[19] Karen Brounéus, 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) 39 Security Dialogue 55, 71.

[20] Susanne Karstedt, 'The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective' (2016) 8 Emotion Review 50, 53.

Second, the structure of inquiries can impact on the empowerment and emotional experience of victim-survivors. Inquiries are often 'characterised by formality, legality and a closed system of communication dominated by legal professionals'.[21] The legal scrutiny of evidence and testimony may cause frustration or distress for survivors seeking to have their lived experience believed and officially acknowledged, if it is challenged, misrepresented, or disbelieved. In addition, Greer and McLoughlin suggest that inquiries may represent an elaborate delaying tactic from governments, involving high costs and complex procedures and a timespan that may outlast the government that has established it, or give a sitting government several years to 'mitigate its own responsibility and accountability'.[22] Moreover, Swain, Wright, and Sköld note a common issue for public inquiries across these types is that they cannot implement their own proposals but instead merely make recommendations to government.[23] As a result, implementing inquiry recommendations is both a structural limitation on an inquiry's power and another opportunity for episodic and interactive use of power between victim-survivors and government and officials responsible for implementation. Without effective implementation of recommendations, it may be that the 'desire for truth is not matched by the willingness to live with its consequences in contemporary societies'.[24]

Third, inquiries may also be sites of epistemic justice or injustice. Inquiries may recognise survivors as knowers and experts in their own experience and acknowledge the truth and validity of their claims.[25] In contrast, inquiries may function to silence and not learn from victim-survivors' truth claims.[26] The power to classify individuals,[27] which was the basis of the othering inherent in historical abuses, remains present in inquiries, and may categorise some individuals as survivors, deny that status to others, or deem survivors and their testimony credible or choose not to believe it or disregard it. For Sonali

[21] Anne-Marie McAlinden and Bronwyn Naylor, 'Reframing Public Inquiries as "Procedural Justice" for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice' (2016) 38 Sydney Law Review 277, 282.

[22] Chris Greer and Eugene McLaughlin, 'Theorizing Institutional Scandal and the Regulatory State' (2017) 21 Theoretical Criminology 112, 126.

[23] Swain, Wright and Sköld (n 9) 286.

[24] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 224.

[25] Oz Frankel, 'Vulnerable Populations, Social Investigations, and Epistemic Justice in Early Victorian Britain' (2017) 7 Oñati Socio-Legal Series 261.

[26] Christine M Koggel, 'Epistemic Injustice in a Settler Nation: Canada's History of Erasing, Silencing, Marginalizing' (2018) 14 Journal of Global Ethics 240.

[27] Stanley Cohen, *Visions of Social Control: Crime, Punishment, and Classification* (Polity Press/Blackwell 1985) 195.

Chakravarti, inquiries can potentially listen to and act on survivors' anger and demands for justice, but such anger may also remain ignored, unheard, or marginalised.[28] Michael Ure concurs that TRCs operate not only to legitimate emotions coming from injustice but also to enable the overcoming of these emotions, with the result that survivors may be encouraged or compelled to banish emotions that disrupt or resist this.[29]

Fourth, inquiries may reach conclusions that shift a social ontology and challenge existing national and religious myths.[30] Onur Bakiner suggests that the historical context chapters in commissions' final reports can transform societal debate,[31] particularly by giving voice to survivors and by reframing previously unacknowledged abuses as human rights violations.[32] Others remain more sceptical. Adam Ashforth suggests that commissions of inquiry are 'theatre in which a central received "truth" of modern State power is ritually played out before a public audience'.[33] Balint et al suggest that while 'commissions of inquiry may indeed signify official acknowledgement of injustice … they also shut down the kind of conversations and fundamental reforms that would more adequately address the broader ideological, institutional, structural and governmental context in which they take place'.[34] Rolston and Scraton suggest that inquiries are intended 'to manage rather than resolve questions of governance'.[35] In doing so, inquiries may communicate the appropriate public emotion as a response to the inquiry findings, reflecting not only survivor emotional experiences but also the desired national, religious, or social emotional response.

Input, process, and output factors will be used to assess the extent to which historical abuse inquiries offered a meaningful and effective of investigation of

[28] Sonali Chakravarti, *Sing the Rage: Listening to Anger after Mass Violence* (The University of Chicago Press 2014) 19.

[29] Michael Ure, 'Post-Traumatic Societies: On Reconciliation, Justice and the Emotions' (2008) 11 European Journal of Social Theory 283, 285–7.

[30] Onur Bakiner, 'One Truth among Others? Truth Commissions' Struggle for Truth and Memory' (2015) 8 Memory Studies 345, 356.

[31] Bakiner (n 30).

[32] Onur Bakiner, *Truth Commissions: Memory, Power, and Legitimacy* (University of Pennsylvania Press 2016) 2.

[33] Adam Ashforth, 'Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms' (1990) 3 Journal of Historical Sociology 1, 9.

[34] Jennifer Balint, Julie Evans and Nesam McMillan, 'Justice Claims in Colonial Contexts: Commissions of Inquiry in Historical Perspective' (2016) 42 Australian Feminist Law Journal 75, 77.

[35] Bill Rolston and Phil Scraton, 'In the Full Glare of English Politics' (2005) 45 The British Journal of Criminology 547, 553.

the past for victim-survivors and for society. These factors have been chosen to reflect the episodic journey of a non-permanent institution like a public inquiry. Each reflects sites of potential empowerment or limitation of power for victim-survivors, as well as sites of emotional lived experience. Finally, public inquiries in their public processes, final reports, and implementation of recommendations can affirm or significantly challenge national and religious myths.

6.3 INPUT MEASURES

6.3.1 *Voice and Advocacy*

In recent decades, investigations into historical abuse have been established after the efforts of individual victim-survivor narratives, grassroots movements, media investigations, the scrutiny of international human rights organisations, and the work of activists and academics.[36] In Ireland, the Magdalene Laundries inquiry was established only after successful submission from advocacy organisation Justice for Magdalenes to the UN Committee against Torture.[37] Public pressure has typically led to the establishment of inquiries only where governments conclude that the issue constitutes a crisis 'too large, complex, or controversial to be handled through the usual political mechanisms'.[38] Nonetheless, state or church decisions to accede to such pressure can also be framed in their self-interest, with a desire to re-establish legitimacy.[39]

Upon establishment, inquiries may engage with significant episodic interaction with survivors and advocacy groups. In Ireland, several inquiries reference consultation processes in their establishment and operation.[40] Advocacy organisation Justice for Magdalenes engaged in an extensive and sophisticated campaign throughout the Magdalene Laundries inquiry to shape its foundation, processes, and outcomes.[41] Recently regarding the mother and baby

[36] Suellen Murray, *Supporting Adult Care-Leavers: International Good Practice* (Policy Press 2015) 195; Malin Arvidsson, 'Contextualising Reparation Politics' in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Abuse of Children in 'Care': International Perspectives* (Palgrave Macmillan 2015) 75; Brian Corby, Alan Doig and Vicky Roberts, 'Inquiries into Child Abuse' (1998) 20 Journal of Social Welfare and Family Law 377, 382.

[37] Claire McGettrick and others, *Ireland and the Magdalene Laundries: A Campaign for Justice* (I B Tauris & Company, Limited 2021) 72–5.

[38] Wright (n 6) 10.

[39] McAlinden (n 1) 213.

[40] 'Report of the Ferns Inquiry' (2005); 'The Commission to Inquire into Child Abuse Report' (Government Publications 2009).

[41] McGettrick and others (n 37) 50–67.

home inquiry, the Clann project developed a shadow report and lobbied the inquiry extensively.[42] In the United States, clerical abuse prosecutions and litigation, including grand jury investigations, resulted in the expansion of victim-survivor representative organisations such as Survivor Network of Those Abused by Priests (SNAP).[43] State and local level truth commissions sought to engage extensively with survivors.[44]

In Canada, negotiators establishing the TRC on residential schools emphasised the need to focus on victims,[45] and the Commission was informed in its work by a formal survivors committee.[46] In establishing the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG inquiry), the government engaged in pre-inquiry consultation with thousands of stakeholders for a year, to define the inquiry terms of reference and engaged in an ongoing process with an Elders and Grandmothers Circle.[47] As a result, there was increased emphasis on the root causes of violence against women and girls and cultural violence in the final terms of reference.[48] In Australia, both the Bringing Them Home inquiry and the Royal Commission into Institutional Responses to Child Sexual Abuse were mandated to consult widely.

In the UK, the Independent Inquiry into Child Sexual Abuse (IICSA) established both a Victim-Survivors Consultative Panel and Victim and Survivors' Forum, with the former intended to guide the inquiry conduct and the latter as a site for survivors to be consulted and updated regularly on inquiry processes. In the Hart inquiry in Northern Ireland, victims achieved an extension to the Historical Institutional Abuse Inquiry (HIAI) timeframe

[42] 'Clann Report: Principal Submissions to the Commission of Investigation into Mother and Baby Homes' (2018) <http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf>.

[43] Lytton (n 8) 124.

[44] 'Beyond the Mandate: Continuing the Conversation Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission' (Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission 2015) 13.

[45] Kim Stanton, 'Canada's Truth and Reconciliation Commission: Settling the Past?' (2011) 2 International Indigenous Policy Journal 1, 5.

[46] Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) 399.

[47] 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) 34–5.

[48] Colin Luoma, 'Closing the Cultural Rights Gap in Transitional Justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls' (2021) 39 Netherlands Quarterly of Human Rights 30, 34.

from 1945 to 1922.[49] Lundy and Hamber suggest such consultation served to legitimate the inquiry 'rather than fully address victim needs or shape the Inquiry in the way they wanted".[50] Extensive victim-survivor consultation guided the subsequent Truth Recovery Panel process to inform the design of any inquiry into Magdalene Laundries and mother and baby homes in Northern Ireland.[51] Consultation with survivors is likely to reflect the first dimension of power, as an interactive exercise of agency between state officials and survivors and advocates. A failure to consult survivor voices throughout an inquiry design, process, and outcomes is likely to serve as a site of epistemic injustice as survivors may feel unheard. However, even if repeated over time, without more profound changes it is unlikely to change the structure of state–survivor relationships.

6.3.2 *Commissioners*

Inquiries derive their legitimacy in part from their leaders' moral authority and competence.[52] The majority of historical abuse inquiries appointed experts, usually legal commissioners, and usually solely by executive government decision. This can have the effect of re-enforcing an inquiry as a site of perceived authority.[53] In Ireland, inquiry chairs and members have largely been judges, with no meaningful effort to include victim-survivor representatives or involve survivors in the selection of commissioners. The original Chair of the Commission to Inquire into Child Abuse (CICA), Justice Mary Laffoy, resigned in 2003, because of an alleged lack of government cooperation.[54]

In Australia, the Royal Commission retained its six commissioners and its lead counsel, including a former child migrant and an Aboriginal child psychiatrist, reflecting significant stability and continuity over its operations.[55]

[49] AR Hart and others, *Report of the Historical Institutional Abuse Inquiry* (2017) 4.

[50] Brandon Hamber and Patricia Lundy, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) 15 Victims & Offenders 744, 755.

[51] Maeve O'Rourke, Philip Scraton and Deirdre Mahon, 'Mother and Baby Institutions, Magdalene Laundries and Workhouses in Northern Ireland: Truth, Acknowledgement and Accountability' (Truth Recovery Design Panel 2021).

[52] Sarkin (n 10) 359.

[53] George Gilligan, 'Official Inquiry, Truth and Criminal Justice' in George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (Willan Publishing 2004) 18–19.

[54] Bruce Arnold, *The Irish Gulag: How the State Betrayed Its Innocent Children* (Gill & Macmillan 2009) 98–109; Gleeson and Ring (n 13) 117.

[55] Gleeson and Ring (n 13) 123.

The Bringing Them Home inquiry was led by human rights experts, with several Indigenous women appointed as co-commissioners and appointed an Indigenous Advisory Council with nationwide representation.[56] In the UK, IICSA saw three chairs and its lead counsel all resign by the end of 2016 amid much public criticism.[57] The Scottish Child Abuse inquiry faced similar challenges, including the resignation of its chair and inquiry panel.[58]

The Canadian TRC appointed its three commissioners after a process of nomination from government, victim-survivor representative organisations, churches and Aboriginal organisations, and in consultation with the Assembly of First Nations but had two resignations within its first year.[59] The MMIWG inquiry appointed five commissioners after a pre-inquiry consultation identified the need for a majority of Indigenous women commissioners, expert in law and research.[60] Zvobgo and Posthumus note that US truth commissions have largely struggled to recruit members from diverse backgrounds, despite examining racial violence and injustice. Commissions in Maine and California are exceptional, with open application processes for the role of commissioners.[61] The dominance of expert commissioners does not impugn the good faith of commissioners but rather reflects an unwillingness to cede power or authority from central state and expert structures to those historically marginalised. Efforts to involve victim-survivors in appointment processes could challenge existing power structures and pursue an emphasis on survivors' lived experience as a form of epistemic and ontological justice.

6.3.3 *Mandate*

Mandates can be assessed along a number of axes: temporal, geographical, and subject matter involved. Each axis can divide an inquiry from broader continuities of historical-structural injustices, but this is necessary to enable a feasible inquiry, especially if attempting a forensic style analysis. First, among

[56] Meredith Wilkie (ed), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission 1997) 16–17.

[57] Michael Salter, 'The Transitional Space of Public Inquiries: The Case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2020) 53 Australian & New Zealand Journal of Criminology 213, 224.

[58] Wright (n 6) 17.

[59] Truth and Reconciliation Commission of Canada (n 46) 399.

[60] Luoma (n 48) 35.

[61] Daniel Posthumus and Kelebogile Zvobgo, 'Democratizing Truth: An Analysis of Truth Commissions in the United States' (2021) 15(3) International Journal of Transitional Justice 510, 528.

the longest temporal scopes are the Canadian TRC (1883–1996) and the ongoing Scottish Child Abuse inquiry (from within living memory until 2015).

Other inquiries have incorporated assessment of both non-recent and contemporary forms of harm. This is especially valuable as it can demonstrate the continuities and reproductions of historical-structural injustices. The UK IICSA inquiry and Canadian MMIWG inquiry could examine both non-recent and contemporary abuse. In Australia, the Victoria Child Abuse inquiry, Bringing Them Home report, and the Royal Commission into Institutional Responses to Child Abuse examined both historical and contemporary abuse.[62] Gleeson and Ring suggest as the Royal Commission investigations were not constrained to the past, the process demonstrated 'institutional child sexual abuse is not a historical relic, thereby complicating the idea of transitioning from the past that "truth commissions" tend to uphold'.[63] Nonetheless, the focus of the Commission on sexual abuse was criticised for its exclusion of considering physical or emotional abuse in 'care' settings.[64]

Second, several inquiries were geographically limited at sub-national levels, with regional inquiries in Australia, Canada, and the United States. The significant partisan political division in the US Congress and Senate informs the lack of national-level inquiries in recent years.[65] Sherrilyn Ifill notes sub-national commissions could be valuable in interrogating local and community level responsibility for lynching as a collective offence.[66] In Ireland, inquiries into diocesan child sexual abuse did not have a national mandate. The Holy See has not engaged in any public inquiry process regarding the global phenomenon of clerical sexual abuse, but instead national- and state-run inquiries pre-dominate the assessment of church child sex abuse. Only investigations into child migration have considered transnational dimensions of historical abuse in both Australia and Northern Irish inquiries.

Third, the subject mandates tend to be limited to specific forms of abuse, such as child sexual abuse or by institution involved. Some inquiries have limited their investigations to a sample of potentially widespread or systemic harms over several decades. In Ireland, sampling of allegations by CICA was heavily criticised by survivor groups as providing only a partial picture

[62] Wilkie (n 56), Part 6 Contemporary Separations.
[63] Gleeson and Ring (n 13) 125.
[64] Frank Golding, 'Sexual Abuse as the Core Transgression of Childhood Innocence: Unintended Consequences for Care Leavers' (2018) 42 Journal of Australian Studies 191.
[65] Posthumus and Zvobgo (n 61) 528.
[66] Sherrilyn A Ifill, 'Creating a Truth and Reconciliation Commission for Lynching' (2003) 21 Law and Inequality 263.

of abuse.[67] The mandate of the McAleese inquiry was limited to the examination of state involvement in the operation of the laundries, excluding an assessment of individual behaviour or allegations.[68] Corby et al note that the majority of the contemporaneous investigations of child abuse in the United Kingdom addressed the physical abuse of children only, with a shift in focus since the 1990s to also address sexual abuse.[69] The Scottish Child Abuse, the Northern Irish HIAI, and IICSA for England and Wales have addressed abuse in both secular and religious institutions.

The Canadian TRC examined physical sexual abuse and neglect in residential schools but did not have a mandate to address other and ongoing forms of harms to Indigenous peoples arising from settler colonialism. Luoma suggests this limitation enabled Canada to position wrongdoing against Indigenous peoples as a limited historical mistake.[70] In contrast, the mandate of the MMIWG inquiry extended to assessing the causes of all forms of violence against Indigenous women and girls in Canada, including its underlying social, economic, cultural, institutional, and historical causes.[71] This enabled the inquiry to address ongoing, structural, and cultural harm in its settler colonial structure.[72] Several abuses have not been officially investigated, such as slavery, Jim Crowera racially motivated violence in the United States, the legacy of the British Empire, a nationwide study of child sexual abuse in the United States, or the role of Magdalene Laundries in jurisdictions outside Ireland.

6.3.4 *Powers*

Historical abuse inquiries have typically had limited, if any, powers to compel evidence, witnesses, and testimony. The powers that are assigned to investigations may also inhibit or preclude the use of gathered evidence in criminal or civil cases, with use immunity present in the approach of several jurisdictions. Inquiries are often prohibited from naming any individual accused of abuse unless the identity 'has already been established through legal proceedings, by admission or by public disclosure by that individual'.[73] In Ireland,

[67] Gleeson and Ring (n 13) 118.
[68] 'Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries' (Department of Justice 2013) chapter 2, para 4–14.
[69] Corby, Doig and Roberts (n 36) 383.
[70] Luoma (n 48) 45.
[71] ibid 44.
[72] ibid 45.
[73] Matt James, 'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6 International Journal of Transitional Justice 182, 190.

religious orders challenged the potential naming of offenders in CICA,[74] with the result that in its final report, even convicted abusers were given a pseudonym.[75] This outcome frustrated Irish victims, who viewed it as the continued protection of perpetrators.[76] The limitations on naming alleged perpetrators in truth commissions are usually in contexts where the threat of reversion to violence is plausible. Matt James notes that the Canadian context lacks any such comparable considerations that would make such a proscription justifiable.[77] In contrast, the Australian Royal Commission had a wide range of powers, including the power to compel the production of documents, and require witnesses to answer questions, even those that might incriminate them and to refer matters to the police and other authorities, even though its evidence is inadmissible in civil and criminal trials. Limited inquiry powers reflect their political nature, framed by law but limited by design in potential legal consequences.

6.4 PROCESSES

Most inquiries engage in independent research; in statement taking from victim-survivors and representatives of institutions, states, and churches; in public hearings to stimulate public debate and awareness of the topic of the inquiry; and in thematic analysis of cross-cutting and structural issues.

6.4.1 *Statement Taking*

Victim-survivor testimony is the defining feature of institutional abuse inquiries[78] and is a key opportunity for survivor agency in the inquiry. It is also a site where significant emotion may be experienced, with high risks of re-traumatisation.[79] Katie Wright has argued that the Bringing Them Home and Lost Innocents and Forgotten Australian inquiries treated survivor testimony and emotional experiences well, as survivors welcomed the opportunity to have

[74] *Michael Murray v Commission to Inquire into Child Abuse [2003] High Court of Ireland 2003 1998P (17 October 2003) (Abbott J)*.
[75] Gleeson and Ring (n 13) 118.
[76] Arnold (n 54) 296–312.
[77] James (n 73) 190.
[78] Wright (n 6) 16.
[79] Matthew Colton, 'Victimization, Care and Justice: Reflections on the Experiences of Victims/Survivors Involved in Large-Scale Historical Investigations of Child Sexual Abuse in Residential Institutions' (2002) 32 British Journal of Social Work 541.

their voices heard.[80] She notes: 'A psychologically infused therapeutic ethos legitimised the experience of trauma and provided a framework and a language for understanding and explaining the ongoing and often intergenerational legacies of childhood abuse and neglect'.[81] The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) approach to survivor testimony was informed by an 'empathetic trauma-informed approach that drew on contemporary understandings of psychological injury'.[82] In addition, its private hearings provided rich but confidential qualitative research from survivors enabling a more accurate account of abuse experienced by survivors and offering a basis for better future prevention.[83] This aligned with the stated wish of many survivors to tell the Commission about their ideas for policy and social change.[84] The RCIRCSA also curated a 'Message to Australia', asking survivors to describe what they wanted Australian society to know about their experience and the need for change. However, Gleeson and Ring note that multiple prior Australian inquiries had the result that limited numbers of Aboriginal people provided testimony in the belief that they had already provided testimony to the state and wanted to avoid the risk of re-traumatisation.[85]

The Canadian TRC dedicated a volume of its report, *Survivors Speak*, to testimony of former residents, including experiences of abuse.[86] Koggel affirms the value and potential of the approach taken by the TRC and its report: 'Sharing, remembering, and legitimizing Indigenous collective interpretative resources are steps in addressing ethical loneliness as moral and political abandonment. Another step is epistemological and political: understanding and addressing both testimonial and hermeneutical injustices that come from not being heard'.[87] In contrast, Ronald Niezen suggests that the TRC essentialised individual survivor experiences to create a master narrative that emphasised loss and suffering, but also a positive story of healing.[88]

[80] Katie Wright, 'Challenging Institutional Denial: Psychological Discourse, Therapeutic Culture and Public Inquiries' (2018) 42 Journal of Australian Studies 177.
[81] ibid 187.
[82] ibid 188.
[83] Salter (n 57) 222.
[84] ibid.
[85] Gleeson and Ring (n 13) 127.
[86] Truth and Reconciliation Commission of Canada, *The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada* (2015) 153–64.
[87] Koggel (n 26) 250–1.
[88] Ronald Niezen, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools* (University of Toronto Press 2017) 68.

In terms of emotions, Anne-Marie Reynaud concurs that the TRC discouraged survivor anger and emphasised survivor health and healing.[89]

In Ireland, Carol Brennan concludes that the Irish state harmed victim-survivors,[90] by disabling ownership of the process and compelling compliance with a purportedly therapeutic model.[91] Sinead Pembroke notes that the majority of survivors she interviewed felt CICA was non-transparent and 'triggered feelings of shame and stigma in relation to their time in the institution'.[92] Pembroke concludes that CICA should have integrated greater survivor participation into its investigations, especially recognising survivors' stated desire for accountability and prosecutions of abusers.[93] After initially resisting hearing survivor testimony at all, the McAleese committee ultimately did so but exacerbated the gendered forms of harm experienced by victim-survivors of the laundries by challenging the veracity of victim-survivor testimony.[94] Máiréad Enright and Sinéad Ring emphasise that the state's mistreatment of the victim-survivor as a source of knowledge amounts to a fresh form of epistemic injustice, reflecting both testimonial injustice in responding to historical abuse in manners that protect the state and hermeneutical injustice in 'privileging the state's sovereign ways of knowing and determining historical injustice'.[95]

The recent Mother and Baby Homes Commission operated with an Investigative and Confidential Committee. The Confidential Committee report itself undermines the credibility of victim-survivor testimony, suggesting it was in part contaminated by media coverage and some witnesses were 'clearly incorrect'.[96] A survivor who recorded their engagement with the Confidential Committee was able to evidence multiple instances where her statement had been inaccurately included in the report.[97] The Commission's final report

[89] Anne-Marie Reynaud, *Emotions, Remembering and Feeling Better: Dealing with the Indian Residential Schools Settlement Agreement in Canada* (Verlag 2017) 245.

[90] Carol Brennan, 'Trials and Contestations: Ireland's Ryan Commission' in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Children in 'Care': International Perspectives* (Palgrave Macmillan UK 2015) 56.

[91] ibid 64.

[92] Sinead Pembroke, 'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme' (2019) 22 Contemporary Justice Review 43, 51.

[93] ibid 56–7.

[94] McGettrick and others (n 37) 87.

[95] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 88.

[96] Commission of Investigation into Mother and Baby Homes, Final Report, Confidential Committee Report, (Official Publications 2021) 12.

[97] Catriona Crowe, 'The Commission and the Survivors' <https://thedublinreview.com/article/the-commission-and-the-survivors/>.

made several findings contrary to the stated lived experience of survivors. For instance, the Commission 'found very little evidence that children were forcibly taken from their mothers; it accepts that the mothers did not have much choice but that is not the same as "forced" adoption'.[98] As a result, the report was rejected with significant criticism in the national media, and by advocacy organisations and victim-survivors.[99] The Commission contrasted strongly with the civil society Clann report, which provides a constitutional and human rights analysis of the abuses documented by survivors in their written statements,[100] such as gender and socio-economic discrimination, stigma, racism, forced adoption, illegal adoptions, arbitrary detention, forced labour, physical and psychological abuse, punishments, neglect, and the deaths of infants in mother and baby homes and related institutions.[101]

Similarly, in the UK, Colton et al's survey of survivors who had given evidence before early inquiries found a high level of dissatisfaction, with participants perceiving the investigations as driven by 'the requirements of the criminal justice system, with the needs of victims/survivors and their families accorded second priority'.[102] Corby et al note the adversarial nature of traditional governmental inquiries as quasi-judicial in nature, with the cross-examination of witnesses despite their potential vulnerabilities or traumatisation.[103] Regarding the Hart inquiry, Patricia Lundy has noted the challenging and damaging experiences of survivors in giving testimony.[104] Hamber and Lundy note that more than half of the victims interviewed thought the private testimony given to that inquiry's Acknowledgment Forum was a positive experience where they were believed and acknowledged, though a sizeable number felt exposed or vulnerable after attending the forum.[105] It remains to be seen whether the ongoing IICSA and Scottish Child Abuse inquiries will provide a better experience in the eyes of survivors. It is expected survivors will be heard from and listened to in a modern inquiry. However, in providing testimony, victim-survivors may legitimate an inquiry

[98] Commission of Investigation into Mother and Baby Homes, Final Report, Recommendations (Official Publications 2021) 9

[99] Elaine Loughlin, 'Regina Doherty: "Cold" Mother and Baby Home Report Must Be Independently Reviewed' *Irish Examiner* (Cork, 17 January 2021).

[100] 'Clann Report: Principal Submissions to the Commission of Investigation into Mother and Baby Homes' (n 42).

[101] ibid 7–8; 108–17.

[102] Colton (n 79) 545.

[103] Corby, Doig and Roberts (n 36) 386.

[104] Patricia Lundy, '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' (2020) 55 Éire-Ireland 252.

[105] Hamber and Lundy (n 50) 753–4.

that nonetheless does not validate their testimony or provide any meaningful healing or therapeutic function for survivors. Although Australia and Canada demonstrate evidence of good practice, other jurisdictions reflect mixed or damaging results. Engagement with public inquiries thus presents a risky process for victim-survivors.

6.4.2 *Public Hearings*

Several inquiries hold public hearings as part of an investigative process. The Ryan Commission remains the only Irish inquiry to hold public hearings. In the United States, grand jury investigations have typically not provided for public hearings. The Australian Forde inquiry justified the exclusive use of private hearings due to the risk of prejudicing contemporary litigation and criminal proceedings.[106] The RCIRCSA held several public hearings, assessed on 'whether or not the hearing would advance an understanding of systemic issues and provide an opportunity to learn from previous mistakes'.[107] Individuals who could be adversely affected by evidence were entitled to respond. The Canadian TRC, MMIWG inquiry, and UK IICSA inquiry have held extensive public hearings. The TRC engaged in 7 national events and held 238 days of local hearings in 72 communities across Canada.[108] At the MMIWG inquiry, 468 family members and survivors of violence shared their experiences and recommendations at 15 community hearings.[109] To date, IICSA has held 325 days of public hearings. The Hart inquiry's public hearings were criticised by survivors as intimidating, victimising and creating the feeling they were on trial.[110] Public hearings represented a site of epistemic injustice, with survivors unable to exercise control over procedures and believing that they 'struggled to be heard'.[111] Public access to testimonies through these hearings was disempowering for the survivors involved.[112]

[106] Commission of Inquiry into Abuse of Children in Queensland Institutions, 'Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions' (Department of Families, Youth and Community Care, Brisbane 1999) iii.
[107] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) Vol. 16, 3.
[108] Truth and Reconciliation Commission of Canada (n 46) 25.
[109] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 47) 49.
[110] Hamber and Lundy (n 50) 755.
[111] ibid 757.
[112] ibid 758.

6.4.3 *Role of Alleged Perpetrators*

Although victim-centred, inquiries may also offer a space to hear from alleged perpetrators and responsible institutions, though this has been limited in practice. Hamber and Lundy note that some survivors were concerned and intimidated by the presence of alleged perpetrators, members of institutions, and religious orders at the HIA inquiry in Northern Ireland.[113] In the Greensboro Truth Commission in the United States, many felt that the failure of more perpetrators to participate or disclose details about law enforcement complicity in the attack hindered a broader reconciliation in the community.[114] In Canada, TRC Commissioner Marie Wilson noted that the absence of those who represented the institutions responsible for the crimes in the activities of the Commission was a source of a sense of injustice and incompletion for survivors.[115] Ronald Niezen contends perpetrators are abstracted and reified in inquiries: 'they are abstract (perceived as inhuman), represent the overall harm and, once labelled, are excluded from "truth telling" because their identification as perpetrators denies their legitimate speech'. In his view, this makes the origins of mass crimes more difficult to identify, excluding 'the institutional and policy driven sources of that suffering and the people who acted on them, sometimes in the belief that they were doing good'.[116]

6.5 OUTCOMES

6.5.1 *Findings*

An inquiry's final report will serve as its most enduring legacy. Sköld notes that despite diverse national contexts, informants have told similar stories regarding

[113] ibid 755.

[114] David Androff, '"To Not Hate": Reconciliation among Victims of Violence and Participants of the Greensboro Truth and Reconciliation Commission' (2010) 13 Contemporary Justice Review 269, 272.

[115] Marie Wilson, 'The Truth and Reconciliation Commission of Canada' in Wilton Littlechild and Elsa Stamatopoulou (eds), *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes* (Columbia University Press 2014) 135.

[116] Ronald Niezen, 'Human Rights As Therapy: The Healing Paradigms of Transitional Justice' in Danielle Celermajer and Alexandre Lefebvre (eds), *The Subject of Human Rights* (Stanford University Press 2020) 169–71.

physical violence, emotional violation, sexual abuse, exploitation, and neglect in the twentieth century.[117] Wright concurs that 'inquiry after inquiry has found that care did not meet either the legal or professional standards of the day, that physical and sexual abuse was common, and that neglect and psychological and emotional abuse were pervasive'.[118] Several inquiries recognise a widespread scale of abuse, particularly child sex abuse, but were unable to offer a comprehensive quantum of its scale.[119]

Multiple inquiries affirmed that complaints of wrongdoing were often ignored, accusers condemned, and perpetrators protected or moved between institutions or churches.[120] Numerous inquiries demonstrate that state and church authorities often knew or should have known about abuses but failed to create or implement any meaningful oversight of staff or protection of detained women and children.[121]

In Ireland, CICA found that physical, sexual, and emotional abuse was endemic and pervasive in industrial and reformatory schools, and found poverty as a driver for children's entry into the school system.[122] It recognised the significant and ongoing impact of abuse and institutionalisation on the lives of survivors.[123] However, Gleeson and Ring note the report did not

[117] Johanna Sköld, 'Historical Abuse – A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide' (2013) 14 Journal of Scandinavian Studies in Criminology and Crime Prevention 5, 7.

[118] Wright (n 6) 16.

[119] Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 6; 'The Commission to Inquire into Child Abuse Report' (n 40), Executive Summary, 21; Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 1, Part 1* (2015) 570; National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 47) 3.

[120] Royal Commission into Institutional Responses to Child Sexual Abuse (n 107) vol. 16, 26; Her Majesty's Inspectorate of Constabulary, '"Mistakes Were Made" HMIC's Review into Allegations and Intelligence Material Concerning Jimmy Savile between 1964 and 2012' (HMIC 2013) 18.

[121] Truth and Reconciliation Commission of Canada (n 46) 105–10; 'The Commission to Inquire into Child Abuse Report' (n 40), Executive Summary, 21; 'Report of the Grand Jury (Pennsylvania)' (Office of the Attorney General 2018) 1; John Jay College of Criminal Justice and Catholic Church (eds), *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002: A Research Study Conducted by the John Jay College of Criminal Justice, the City University of New York: For the United States Conference of Catholic Bishops* (United States Conference of Catholic Bishops 2004) 2, 6.

[122] 'The Commission to Inquire into Child Abuse Report' (n 40) vol, 2, 21; vol. 3, 107; Executive Summary, 21.

[123] ibid 5, chapter 3.

investigate the state's responsibility for its lack of effective regulation of industrial schools or its failure to protect children despite evidence of abuse.[124] Ring and Enright conclude: 'By subjecting victim-survivors to damaging processes, by substituting partial official histories for their testimony, and by censoring access to the archives of the bodies created to learn from the past, the state has co-opted victim-survivors' primary source of power: their unique knowledge of Ireland's recent history of institutional abuse of children and women'.[125] In Northern Ireland, the Hart inquiry found 'evidence of systemic failings' in homes and other residential institutions run by the state, local authorities, churches, and charities, with 'evidence of sexual, physical and emotional abuse, neglect and unacceptable practices'.[126] In general, victims welcomed the report and its findings.[127]

In settler democracies, the finding of whether abuses against Indigenous peoples constituted genocide remains highly controversial. The Maine Wabanaki TRC report concluded that cultural genocide was ongoing due to the disproportionate and unequal treatment of Native children in the welfare system in Maine since the 1960s, in a context of institutional racism in state systems, historical trauma among Native peoples, and ongoing contestation over Native sovereignty and jurisdiction.[128]

The Australian Bringing Them Home report concluded that '[t]he policy of forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled "genocidal" in breach of binding international law'.[129] However, the report is criticised for not including a broader finding of genocide.[130] It considered violations of native title rights as collective or individual property rights, or the right to inhabit traditional lands.[131] The Australian government criticised the validity and methodology of the report,

[124] Gleeson and Ring (n 13) 119.
[125] Enright and Ring (n 95) 87.
[126] Hart and others (n 49) 8–42.
[127] Hamber and Lundy (n 50) 752.
[128] 'Beyond the Mandate: Continuing the Conversation Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission' (n 44) 64.
[129] Wilkie (n 56) 239.
[130] Mark McMillan and Sophie Rigney, 'Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment' (2018) 41 Ethnic and Racial Studies 759, 767.
[131] Wilkie (n 56) 178.

claiming that it overestimated the number of Aboriginal children removed from their homes.[132] Conservative historians rejected its finding of genocide.[133]

The Canadian TRC found that the establishment and operation of residential schools were a central element of a policy of assimilation of Aboriginal peoples and was best described as 'cultural genocide', meaning the destruction of those structures and practices that allow the group to continue as a group.[134] This approach may have been designed to avoid a legal debate about the application of the UN Convention on Genocide, distracting from an emphasis on survivor experience.[135] Although scholars had been drawing links between residential schools and the broader project of settler colonialism as a form of genocide before this finding,[136] Woolford and Benvenuto suggest that in prior scholarly or popular understandings, genocide may have been reduced to group destruction as a form of mass murder.[137] They express concern that examining genocide on pre-existing and national terms will lose much of the nuance in the different regional and international forms of harm.[138]

In contrast, the MMIWG inquiry concluded that the systemic violence it documented amounts to an ongoing, race-based genocide against Indigenous peoples, especially against women, girls, and 2SLGBTQQIA individuals.[139] In addition, it documented a range of violations of Indigenous cultural rights, such as the seizure of traditional lands; expropriation of cultural property; forcible removal of Indigenous children from their families; and suppression of Indigenous histories, myths, and cultures.[140] Luoma values this approach rather than relegating cultural rights violations to an inquiry's historical context alone.[141] The supplemental legal report to the MMIWG

[132] Michael Tager, 'Apologies to Indigenous Peoples in Comparative Perspective' (2014) 5 International Indigenous Policy Journal 1, 6–7.
[133] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) 118.
[134] Truth and Reconciliation Commission of Canada (n 46) 1.
[135] David B MacDonald, 'Canada's History Wars: Indigenous Genocide and Public Memory in the United States, Australia and Canada' (2015) 17 Journal of Genocide Research 411.
[136] Andrew Woolford, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples' (2009) 4 Genocide Studies and Prevention 81; James W Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (2019).
[137] Andrew Woolford and Jeff Benvenuto, 'Canada and Colonial Genocide' (2015) 17 Journal of Genocide Research 373, 375.
[138] ibid.
[139] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada) (n 47) 50.
[140] ibid 333.
[141] Luoma (n 48) 47.

report understands genocide in Canada as both a direct act and a failure to prevent harms.[142] Özsu notes that this approach extends beyond the Genocide Convention and enables a framing of genocide as spanning decades through processes of cultural and colonial destruction, rather than a paradigm of a brief intense period of mass murder alone.[143] Such an approach is more contentious than a conservative interpretation of genocide but is one that recognises the multiple forms of systematic violence in human history and present that have been designed to destroy peoples deemed 'other'.

Several inquiries identify common causes of historical abuses. First, non-white races, Indigenous peoples, women, and children were deemed inferior and othered through discriminatory, racist, patriarchal attitudes.[144] The US Kerner Commission noted the trend in mid-twentieth-century United States towards reproducing white supremacy and structural inequality: 'Our nation is moving toward two societies, one black, one white – separate and unequal' and later 'What white Americans have never fully understood – but what the Negro can never forget – is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it, and white society condones it.'[145] These were significant findings in 1968 from a mainstream and establishment inquiry.[146]

Second, religious justifications amplified and framed historical abuses as salvation processes, for those deemed 'other'.[147] Third, members of religious organisations enjoyed significant authority, trust, and respect during the period of historical abuse, leading to significant deference and limited

[142] National Inquiry into Missing and Murdered Indigenous Women and Girls (Canada), *A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019).

[143] Umut Özsu, 'Genocide as Fact and Form' (2020) 22 Journal of Genocide Research 62, 67.

[144] Wilkie (n 56) 231–4; Australia and others, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (Commonwealth of Australia 2012) 24–8; The National Advisory Commission on Civil Disorders, *The Kerner Report* (2016 ed, Princeton University Press 2016) 112; Truth and Reconciliation Commission of Canada (n 46) 43–50; 'Mother and Baby Homes Commission of Investigation Final Report' (Government Publications 2021) Executive Summary, 1; Arnaud Winter, 'The Report of the Archdiocesan Commission of Enquiry into Sexual Abuse of Children by Members of the Clergy' (Archdiocese of St. John's 1990) 93.

[145] The National Advisory Commission on Civil Disorders (n 144) 1.

[146] Steven M Gillon, *Separate and Unequal: The Kerner Commission and the Unraveling of American Liberalism* (1st ed, Basic Books 2018) 14.

[147] 'Mother and Baby Homes Commission of Investigation Final Report' (n 144) Executive Summary, 16; Wilkie (n 56) 23, 103; Truth and Reconciliation Commission of Canada (n 46) 43; Australia and others, *Lost Innocents: Righting the Record: Report on Child Migration* (Senate Community Affairs References Committee Secretariat 2001) 33–5.

oversight and inspections.[148] Fourth, several inquiries consider a significant cause of abuse to be a lack of effective governance and oversight to prevent abuse, in both secular and religious contexts.[149] Paul Michael Garrett notes that the implication of this finding may be that 'problems could be rectified if a business model were adopted to promote better self-governance'.[150] Reoccurring findings that religious leadership relocated offenders and coerced victims into silence mean that it is impossible to maintain that abuse was exceptional but instead reflects the priority given to protecting the church's reputation, above the best interests of the child.[151] Several authors and inquiries suggest that these findings require interrogating the perception of clergy and religious as God's representatives on earth,[152] and the contribution of Christian theology to abuse,[153] particularly regarding sex, sexuality, and marriage.[154]

In contrast, the US Causes and Context report noted that the increase in clerical abuse until the late 1970s and the sharp decline by 1985 could be attributed to 'the rise in other types of "deviant" behavior, such as drug use and crime, as well as changes in social behavior, such as an increase in premarital sexual behavior and divorce', and noted, remarkably, that, as features of religious life such as a male and celibate priesthood were constant during this period, they could not be causes of abuse.[155]

[148] Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Law Commission of Canada 2000) 5; Commission of Inquiry into Abuse of Children in Queensland Institutions (n 106) 100.

[149] Royal Commission into Institutional Responses to Child Sexual Abuse (n 119) 13, 38, 41, 59; 'Report by Commission of Investigation into the Handling by Church and State Authorities of Allegations and Suspicions of Child Abuse against Clerics of the Catholic Archdiocese of Dublin' (n 2) 23; Truth and Reconciliation Commission of Canada (n 46) 4.

[150] Paul Michael Garrett, 'A "Catastrophic, Inept, Self-Serving" Church? Re-Examining Three Reports on Child Abuse in the Republic of Ireland' (2013) 24 Journal of Progressive Human Services 43, 46.

[151] Daly (n 3) 54–5; 'The Commission to Inquire into Child Abuse Report' (n 40) 22 (Executive Summary); 'Pennsylvania 40th Statewide Investigating Grand Jury, Final Report' (2019) 3 <www.bishop-accountability.org/PA_40th_GJ/2019_12_16_Final_Redacted_PA_GJ_Report_and_Responses_008307.pdf>; Commission of Investigation (n 2) 16.

[152] David Pilgrim, 'Child Abuse in Irish Catholic Settings: A Non-Reductionist Account: Child Abuse in Irish Catholic Settings' (2012) 21 Child Abuse Review 405, 408.

[153] Sheila Redmond, 'Fear and Denial at the Crossroads? Where Is the History of the "Child Abuse Scandal" within the Roman Catholic Church?' [2012] Historical Papers: Canadian Society of Church History 141, 146; 'Report of the Ferns Inquiry' (n 40) 36.

[154] Tracy J Trothen, *Shattering the Illusion: Child Sexual Abuse and Canadian Religious Institutions* (Wilfrid Laurier University Press 2012) 143.

[155] Karen J Terry, John Jay College of Criminal Justice and Catholic Church (eds), *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010: A Report Presented to the United States Conference of Catholic Bishops by the John Jay College Research Team* (USCCB Communications 2011) 3.

Finally, some inquiries directly address the impact of national myths as causes of historical-structural abuses. Despite its mandate on residential schools alone, the Canadian TRC expressly repudiates the myths of *terra nullius*, the Doctrine of Discovery, and civilising mission of imperial nations and Christian churches.[156] The Royal Commission on Aboriginal Peoples (RCAP) challenged the contradiction between benevolent Canadian peacemaker myths and the treatment of First Nations peoples: 'while we assume the role of defender of human rights in the international community, we retain, in our conception of Canada's origins and make-up, the remnants of colonial attitudes of cultural superiority that do violence to the Aboriginal peoples to whom they are directed'.[157]

In Australia, the Royal Commission into Aboriginal Deaths in Custody noted historical mistreatment of Aboriginal people was predicated on a racist sense of white superiority,[158] while the Bringing Them Home report noted that Australia's assimilation policies were based on the idea that there was nothing of value in Indigenous culture.[159] In the Lost Innocents reports on child migration, the desire to maintain links with Britain, to ensure a white Australia, and competition between Christian denominations to convert children inform the child migration and 'rescue' processes.[160] The Forced Adoption report notes the hostility of society to 'individuals and families who did not fit the idealised family unit and the 'right' of all legitimate couples to have children'.[161] The RCIRCSA noted the continuity and perennial nature of child sex abuse: 'it is a mistake to assume that sexual abuse in institutions will not continue to occur in the future'.[162]

In addressing these issues, an inquiry may hope to contribute to altering national identity and myths,[163] through changing public attitudes and aware-

[156] Truth and Reconciliation Commission of Canada (n 119) 24.
[157] 'Report of the Royal Commission on Aboriginal Peoples' (1996) 15.
[158] Elliott Johnston, 'Royal Commission into Aboriginal Deaths in Custody' (Commonwealth Government of Australia 1991) para 1.4.8-14, chapter 10 <www.austlii.edu.au/au/other/IndigLRes/rciadic/>.
[159] Wilkie (n 56) 27.
[160] Australia and others, *Lost Innocents* (n 147) paras 2.38; 2.50; 2.58; 2.117.
[161] Australia and others, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (n 144) para 2.21.
[162] Royal Commission into Institutional Responses to Child Sexual Abuse (n 119) 3.
[163] Sköld (n 117) 7.

ness.[164] However, Regan doubts the ability of a truth commission 'to act as a catalyst for social change and reconciliation' and may instead appropriate survivors' pain in voyeuristic and colonising ways.[165] Similarly, Chakravarti notes that although survivors may express intense emotions in engaging with inquiries, and may feel brief satisfaction when these emotions are validated, this remains 'a poor substitute for the change in material conditions necessary for justice'.[166] Instead the repudiation of ideas, no matter how damaging, is likely to need combining with material changes to the lives of victim-survivors and social structures to be an effective and legitimate form of social change.

6.5.2 *Recommendations*

If given a mandate to issue recommendations, inquiries have tended to recommend measures to address victim-survivor needs and to reform the relevant institutions or the state's regulation of an affected population. In Ireland, CICA issued ninety-nine recommendations, including a memorial for victim-survivors of residential school abuse[167] and the continuation of family tracing services for survivors of residential schools.[168] It recommended that religious orders consider how they debased their Christian ideals through tolerance of abuse and its cover-up.[169] Unique in Ireland in having explicit and independent recommendation, implementation, and monitoring powers, CICA confirmed in 2014 at its conclusion that ninety-four of ninety-nine recommendations had been implemented.[170] Other Irish inquiries into clerical sexual abuse (Ferns, Murphy, and Cloyne) did not issue recommendations due to mandate limitations. The McAleese inquiry into Magdalene Laundries led to a state apology and a redress scheme for victim-survivors, discussed in later chapters.

In England and Wales, both contemporary and historical abuse inquiries have made similar recommendations regarding safeguarding and pre-employment

[164] Wright (n 6) 19; Scott Prasser, 'Public Inquiries in Australia: An Overview' (1985) 44 Australian Journal of Public Administration 1, 7.
[165] Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010) 47.
[166] Chakravarti (n 28) 9.
[167] 'The Commission to Inquire into Child Abuse Report' (n 40) para 7.02.
[168] ibid 7.05.
[169] ibid 7.03.
[170] 'Ryan Report Implementation Plan: Fourth Progress Report' (Ryan Report Monitoring Group 2014).

vetting which have not always been implemented.[171] Corby et al note that often the delay in issuing recommendations caused by a long inquiry process after the initial outbreak of a scandal can inhibit pressure for their implementation and reform.[172] David Howe notes that public inquiries can often reflect a bureaucratic procedural response to a social crisis,[173] which can have a deadening effect on changing public attitudes and behaviour. In contrast, the Macpherson report examined the Metropolitan Police Service's (MPS) investigation of the 1993 racist murder of 18-year-old Stephen Lawrence by a group of five white men. The report concluded institutional racism was endemic in the MPS, and its seventy recommendations led to not only significant policy changes in British policing but also a major public debate about racism in Britain.[174] However, Lotem notes that the report confined its consideration of racism to the police, with the result that 'racism became a matter of communities and policing rather than historical continuities',[175] and missed the opportunity to frame these contemporary challenges as the reproduction of broader historical-structural issues. Given the single incident focus of the inquiry, this is perhaps not surprising.

In Australia, a review of the implementation of recommendations found that recommendations 'most likely to be implemented related to administrative systems, with those most likely to be fully or partially implemented pertaining to legislation'.[176] Four main factors emerged as barriers to implementation: 'practical constraints, organisational culture, structural constraints, and recommendations being too narrow or prescriptive'.[177] The recommendations of the Lost Innocents and Forgotten Australian reports were themselves subject to a separate report in 2009 assessing the progress of implementation,[178] noting at

[171] Nigel Parton, 'From Maria Colwell to Victoria Climbié: Reflections on Public Inquiries into Child Abuse a Generation Apart' (2004) 13 Child Abuse Review 80.

[172] Corby, Doig and Roberts (n 36) 387.

[173] David Howe, 'Child Abuse and the Bureaucratisation of Social Work' (1992) 40 The Sociological Review 491.

[174] Janet Foster, Tim Newburn and Anna Souhami, 'Assessing the Impact of the Stephen Lawrence Inquiry' (Home Office Research 2005) Home Office Research Study 294.

[175] Itay Lotem, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Palgrave Macmillan 2021) 255.

[176] Parenting Research Centre and others, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) <www.childabuseroyalcommission.gov.au/policy-and-research/published-research/implementation-of-recommendations>

[177] ibid.

[178] Australia and others, *Lost Innocents and Forgotten Australians Revisited: Report on the Progress with the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports* (Commonwealth of Australia 2009).

best a limited and variable implementation across the Australian states and territories. The Royal Commission into Aboriginal Deaths in Custody made over 400 recommendations, implementation of which was monitored for five years, but despite this, Aboriginal deaths in custody have subsequently almost tripled in likelihood.[179] The RCIRCSA made 409 recommendations to government and institutions, regarding child protection, information sharing and record keeping, and support and therapeutic services for survivors, including eighty-four recommendations on redress. These recommendations led to the National Redress Scheme discussed in Chapter 8. The national government response accepts, or accepts in principle, 104 of these 122 recommendations with the remaining 18 recommendations listed as being 'for further consideration' or 'noted'.[180]

In Canada, the government tried to ignore the RCAP report and did not endorse any of its 440 recommendations on increased spending on housing, education, and training for First Nations peoples and enhanced sovereign status.[181] The RCAP made several recommendations regarding investigation of treatment of Indigenous children in residential schools that have effectively if not directly been implemented through the Indian Residential Schools Settlement Agreement (IRSSA) and TRC processes. The TRC's final report calls to action under two high-level headings: 'legacy' and 'reconciliation'. Legacy addresses the consequences of colonialism, under the headings of child welfare, education, language and culture, health, and justice.[182] 'Reconciliation', by contrast, includes fifty-two calls to action, ranging from the obligations arising under specific legal instruments to considering reconciliation as applied to museums, media, sport, and business, among others.[183] These are discussed further in Chapter 10. In Canada, Matt James suggests the TRC may have functioned to emphasise the personal benefit to survivors in participating, while minimising the potential for

[179] Inga Ting, 'Policy Failure as Prisons Fill with Indigenous People' *Sydney Morning Herald* (Sydney, 27 May 2013).

[180] 'Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse' (Commonwealth Government of Australia 2018) v <www.childabuseroyalcommissionresponse.gov.au/sites/default/files/2019-05/Australian%20Government%20Response%20to%20the%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20full%20version.PDF>.

[181] Tager (n 132) 6–7.

[182] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5* (McGill-Queen's University Press 2015) 277–83.

[183] ibid 283–95.

the TRC to address ongoing systemic injustices affecting Indigenous peoples.[184] James asks whether a truth commission might amount to a 'politics of distraction', yet another exercise of 'affirmative repair' or 'settler magic' aimed at staving off demands for the restitution of stolen lands.[185] In contrast, Christine Koggel notes the potential of the Canadian TRC report to point beyond legal- and policy-specific recommendations: 'What is significant about the TRC final report is that it reveals layers of relationships and the conditions for societal transformation that are missed when the account is presented from the perspective of the state and its laws and institutions'.[186]

The MMIWG final report concludes with 231 'Calls for Justice', human-rights-based recommendations to end and resolve the genocidal violence against Indigenous women, girls, and 2SLGBTQQIA individuals. However, to date, little progress has been made. The commissioners recently marked the one-year anniversary of the final report by decrying 'deafening silence and unacceptable inaction from most governments'.[187]

In the United States, the Kerner Commission issued recommendations which remain relevant for black Americans today: (1) an end to de facto segregation in housing, (2) affordable housing, (3) jobs creation, including in police departments, and (4) the expansion of social assistance programmes.[188] However, President Johnson ignored the Commission's ambitious and costly recommendations,[189] in a context where he was seeking re-election and continuing to fight an expensive war in Vietnam.[190]

6.6 CONCLUSION

Inquiries into historical abuse share a range of ambitious and challenging goals, ranging from the discovery of forensic individual accounts of truth, to the gathering of systematic data on abuse and its nature and patterns, to providing a therapeutic experience for victim-survivors, potentially challenging national and religious myths that justified abuses, and offering recommendations to

[184] Matt James, 'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6 International Journal of Transitional Justice 182, 198.
[185] ibid 184.
[186] Koggel (n 26) 242.
[187] Ka'nhehsí:io Deer, '1 Year Later, Little Progress on Quebec Response to MMIWG Report, Say Families and Advocates' *Canadian Broadcasting Corporation* (Ottawa, 3 June 2020) <www.cbc.ca/news/indigenous/mmiwg-quebec-report-one-year-1.5595735>.
[188] The National Advisory Commission on Civil Disorders (n 144) 229–62.
[189] Posthumus and Zvobgo (n 61) 525.
[190] Gillon (n 146) 15.

materially change the lives of survivors and society. All of these goals are unevenly met in diverse national experiences, a product of not only the structure and implementation of their mandates but also the political will to pursue the fundamental changes recommended.

Most inquiries were capable of engaging with victim-survivors through testimony, consultation and through affirming and acknowledging, if only in part, survivor experiences of harm. However, the structure of inquiries limits their impacts in a number of respects. First, several inquiries have the effect of separating past harms from present forms of injustice affecting historically marginalised communities or descendants of victim-survivors. In contrast, the Australian Bringing Them Home and RCIRCSA inquiries, the Canadian TRC and MMIWG inquiries, and the UK IICSA inquiry all demonstrate the links between non-recent and contemporary harms. Second, most inquiries suffer from limited engagement from alleged perpetrators, both in person in the provision of testimony and in some instances through the refusal to cooperate in the provision of documentation. All inquiries are limited by design in being unable to implement their own recommendations. Ultimately the capacity for inquiries to impact public policy remains a question of political will and a key episodic contestation of power.

As sites for the construction of knowledge and potentially epistemic justice, some inquiries reflect the acknowledgement of survivors as experts in their own experiences and harm, most notably the Canadian TRC and MMIWG inquiries. In contrast, both the Magdalene Laundries and mother and baby home inquiries in Ireland challenge the veracity and weight to be given to survivor testimony and represent fresh epistemic injustices. Therapeutic claims remain unevenly tested empirically and are dependent on understanding the needs of victim-survivors across the range of mechanisms designed to address historical abuse.

Inquiries and their recommendations raise the expectations of victim-survivors for other elements of justice dealing with the past: including accountability, reparations, reform and apology, and acknowledgement. Any potential legitimation of the state and church that authorises an inquiry may dissipate if its recommendations are not implemented and power is re-consolidated by existing actors and structures.

Finally, some inquiries in turn challenge existing national myths and forms of identity directly, especially the Canadian TRC and MMIWG inquiries. Others, such as the Irish CICA and US grand jury investigations into clerical abuse, have represented significant symbols of national challenge to prior denials of abuse. However, the Irish inquiries especially make any gains in national transition at the expense of harming and re-traumatising survivors.

Inquiries thus inevitably raise expectations across a range of dimensions of power and emotions and risk causing distress to survivors where those expectations are not met. In setting an agenda for addressing the past, inquiries remain a key but risky vehicle for bringing together survivor experience, documentation, and the potential for state acknowledgement and action to transform the meaning and contemporary consequences of historical-structural injustices.

7

Litigation and Historical-Structural Injustices

7.1 INTRODUCTION

Litigation has proved a significant but limited tool in addressing historical-structural injustices. Litigation is a central site where the four dimensions of power are contested by parties to a case. Criminal law, civil litigation, canon law, and international human rights law have all played a role in addressing these abuses to date, but each has proven limited in its ability to provide a victim-survivor-centred process. Section 7.2 provides an overview of the intended functions of different forms of litigation; Section 7.3 assesses these forms across the four dimensions of power and emotion; Section 7.4 considers the different national experiences of employing litigation to address historical-structural injustices and in particular examines how high-profile victories for survivors are nonetheless circumscribed in their subsequent implementation by governments. Section 7.5 concludes by framing the appropriate expectations for the role of litigation in addressing historical-structural injustices.

7.2 LITIGATING HISTORICAL-STRUCTURAL INJUSTICES

Litigation can take a variety of forms relevant to historical-structural injustices, including individual criminal responsibility, institutional and state responsibility in civil litigation or international human rights law, and responsibility of individual Roman Catholic priests in canon law. In transitional justice, such litigation typically operates in a context of widespread or systemic harms, with the result that the vast majority of perpetrators will not be prosecuted,[1] due to the limitations of time, capacity, and resources. In a context of limited

[1] William Schabas, 'The Rwanda Case: Sometimes It's Impossible' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers 2002).

potential accountability through litigation, transitional justice scholarship has emphasised the symbolic power of pursuing a select number of perpetrators.[2] However, the evidence in support of the therapeutic role played by ordinary criminal or civil justice processes for victim-survivors remains extremely limited[3] and may be undermined by further trauma for victims who testify.[4]

In addition, civil liability is designed to hold individuals, institutions, and states accountable for the breach of appropriate standards of care. Several grounds of civil liability have been employed in addressing historical abuses.[5] Some of these, such as negligence, involve an assessment of fault of the individuals or institutions involved. Others, such as vicarious liability or non-delegable duties are non-fault-based forms of liability. Civil liability typically seeks to provide compensation to enable a plaintiff to be in the position akin to that before the harm took place. However, this goal is particularly challenging in the context of historical abuses,[6] which may concern irreparable harm or harm that took place in the non-recent past, rendering return to a prior state unfeasible.

Third, canon law forms the Roman Catholic Church's own internal accountability structure and has prohibited child sexual abuse by clergy from the earliest records of church governance.[7] In canon law, the most severe sanction for offending priests is their removal from office, known as defrocking or laicisation. However, other non-sexual forms of historical abuse are not prohibited. Before the United Nations Committee against Torture, the Holy See asserted that it had confirmed 3,420 credible allegations of sexual abuse by priests between 2004 and 2013, resulting in the removal of 848 priests and disciplining of 2,572 others.[8] More recent global figures are unavailable.

Finally, human rights law can be employed through national litigation or international individual complaints mechanisms and treaty-based monitoring mechanisms to address violations within a given state. The relevance and

[2] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 Politorbis 17; Ellen L Lutz and Caitlin Reiger (eds), *Prosecuting Heads of State* (Cambridge University Press 2009).

[3] Penney Lewis, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006) 23.

[4] Judith Lewis Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16 Journal of Traumatic Stress 159.

[5] James T O'Reilly and Margaret SP Chalmers, *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press 2014) 32.

[6] Paula Case, *Compensating Child Abuse in England and Wales* (Cambridge University Press 2007) 37.

[7] Faisal Rashid and Ian Barron, 'The Roman Catholic Church: A Centuries Old History of Awareness of Clerical Child Sexual Abuse (from the First to the 19th Century)' (2018) 27 Journal of Child Sexual Abuse 778.

[8] United Nations Committee against Torture, 'Concluding Observations on the Initial Report of the Holy See' CAT/C/VAT/CO/1, para 10.

impact of human rights will naturally vary depending on whether a state has a bill of rights, the number of international human rights treaties they have ratified, and their degree of cooperation with international courts and tribunals.[9] International human rights treaties may be limited temporally to their date of ratification, which may preclude their addressing historical-structural injustices.[10] In addition, Antony Anghie notes that 'the vocabulary of international law, far from being neutral, or abstract, is mired in this history of subordinating and extinguishing alien cultures'.[11] The design and extent of existing human rights may therefore inhibit their effective use by Indigenous peoples.[12] The capacity of victim-survivors to engage in legal litigation thus arises in a variety of contexts, each with its own inherent goals and limitations. Each area of litigation can be assessed along the four dimensions of power and emotion employed in this book.

7.3 ASSESSING LITIGATION

7.3.1 *Litigation and Agency*

Litigation represents a site for significant agency by survivors seeking to assert their rights or allege their experiences of harms. However, several features of litigating regarding non-recent harms will affect this agency. First, criminal trials of non-recent abuses take place in a context 'disconnected from the normal matrix of physical and circumstantial detail',[13] associated with an isolated criminal offence close to the period of investigation or trial. Fair trial concerns are thus especially prominent for historical abuses, which will be impacted by the availability of documentary evidence[14] and limited by the deaths and old age of alleged perpetrators.[15]

[9] Beth A Simmons, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press 2009).

[10] James Gallen, 'The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies' (2019) 19 Human Rights Law Review 675.

[11] Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 Social & Legal Studies 321.

[12] Noelle Higgins, 'Creating a Space for Indigenous Rights: The Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) 23 The International Journal of Human Rights 125.

[13] *R v DPP [2009] IEHC* 87.

[14] Elisabeth Baumgartner and others, 'Documentation, Human Rights and Transitional Justice' (2016) 8 Journal of Human Rights Practice 1.

[15] Kara Shead, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26 Current Issues in Criminal Justice 55.

Second, the distinctive legal personality of church dioceses and religious orders, which will often be unincorporated associations, or in the case of a bishop a corporate sole, or where the assets are held in a trust, may make it difficult for survivors to sue the correct defendant.[16] Canon law concentrates executive, legislative, and judicial power in diocesan bishops, until recently giving individual bishops discretion and authority to respond to allegations of sexual abuse.[17] However, recent developments in Canada, the United Kingdom, and Ireland have allowed for dioceses and religious orders to be sued,[18] with the most recent changes in Western Australia enabling survivors to sue current holders of religious institutions for historical abuse cases and access the assets of related trusts and corporations for the purposes of satisfying judgments.[19]

Third, attempts to litigate may be met with aggressive tactics employed by state or church institutions in resisting allegations of historical abuses, including delayed compliance with discovery and interrogations of plaintiffs' personal histories.[20] Jo Renee Formicola notes that across multiple dioceses, church leaders would offer significant financial settlements to survivors in exchange for confidentiality and secrecy, allegedly to protect not only the identity of victims but also the reputation of the church and alleged perpetrators.[21] This had the effect of precluding one survivor from knowing about other allegations in the diocese or against their perpetrator. Finally, across several jurisdictions, as discussed below, historically canon law was not an effective form of justice for survivors, in large part because its own standards were not even implemented regarding child abuse cases, with few if any canon trials taking place for contemporary allegations of non-recent child sex abuse.[22] This combination of factors suggests it has been challenging for

[16] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 58.

[17] Canon 381; Timothy A Byrnes, 'Catholic Bishops and Sexual Abuse: Power, Constraint, and Institutional Context' (2020) 62 Journal of Church and State 5, 9.

[18] *Re Residential Schools, 2002 ABQB 667*; *Re Residential Schools, 2001 ABCA 216*; *Hickey v McGowan [2017] IESC 6*; *[2017] ILRM 293*; *Various Claimants v The Catholic Child Welfare Society [2012] UKSC 56*.

[19] Western Australia, Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018, No. 3 of 2018.

[20] Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008) 69.

[21] Jo Renee Formicola, *Clerical Sexual Abuse: How the Crisis Changed US Catholic Church-State Relations* (Palgrave Macmillan 2016) 55.

[22] Commission of Investigation, *Report by Commission of Investigation into Catholic Archdiocese of Dublin* (Department of Justice, Equality and Law Reform 2009) para 4.6 and 4.87.

survivors to assert their rights and allege wrongdoing against state and church actors, even where the harm was criminal or illegal when it took place. In addition, structural factors compound these limitations to litigation.

7.3.2 *The Structure of Litigation*

The use of litigation for historical-structural injustices remains particularly challenging due to a number of structural features. First, to bring civil litigation regarding non-recent harms, victim-survivors must overcome the law of limitation, which allows a plaintiff a specific amount of time from a specified date within which to bring an action against a defendant. Ireland has the most restrictive limitation regime in the common law world.[23] The lack of a general discretionary judicial power in the Irish limitation regime contrasts with the approach in the United Kingdom[24] and extended approaches in Canada, and with the United States.[25] However, in Canada, limitation regimes have denied Indigenous peoples the capacity to litigate in several cases outside of the context of sexual abuse.[26] In Australia, the Royal Commission to Investigate Institutional Responses to Child Sexual Abuse concluded that 'current limitation periods are inappropriate given the length of time that many survivors of child sexual abuse take to disclose their abuse'.[27] The Australian States of Queensland and Western Australia recently retrospectively removed the limitation period for child sex abuse cases, enabling a case to be brought at any time in a person's life.[28]

Second, given the scale of historical abuses, there are a large number of potential litigants, which suggests a benefit to using class actions in civil litigation. In a class-action lawsuit, one party sues as a representative of a larger 'class' of people, reducing the cost to individual plaintiffs and the need for repetitive hearings. In jurisdictions with class-action mechanisms, this structure may operate as a form of survivor empowerment, enabling survivors to share the risks and costs of litigation. Third, unlike other forms of litigation,

[23] James Gallen, 'Historical Abuse and the Statute of Limitations' (2018) 39 Statute Law Review 103.

[24] See UK Limitation Act 1980, S33, as applied in *A v Hoare [2008] UKHL 6*.

[25] Marci Hamilton, 'The Time Has Come for a Restatement of Child Sex Abuse' (2013) 79 Brooklyn Law Review 397, 401.

[26] Craig Empson, 'Historical Infringements of Aboriginal Rights: *Sui Generis* as a Tool to Ignore the Past' (2019) 24 Appeal: Review of Current Law and Law Reform 101, 110–12.

[27] Royal Commission into Institutional Responses to Child Sexual Abuse (n 16) 52.

[28] Western Australia, Civil Liability Legislation Amendment (Child Sexual Abuse Actions) Act 2018, No. 3 of 2018; Queensland, Civil Liability and Other Legislation Amendment Act 2019 (Qld).

canon law largely operates in secret. It is only in early 2020 that Pope Francis ordered the removal of the 'pontifical secret', hiding the existence of canon law trials from national law enforcement.[29] Until then, no mandatory reporting or cooperation with civil laws was required under canon law, despite repeated national inquiries and United Nations Human Rights Committees recommending the abolition of such secrecy.[30] Formicola suggests that this structure emerged as successive popes were reluctant to accept the separation of church and state and instead emphasised the theological superiority of church teaching and law.[31] In their relationship to non-recent violence and to the widespread scale of abuse, the structure of civil litigation may both empower and constrain survivors' ability to address their experiences of harm.

7.3.3 *Accountability and Epistemic Injustice*

Litigation may also represent a site of fresh epistemic injustice for victim-survivors or their families, where their knowledge may not be believed or acknowledged as true,[32] especially in contexts of limited corroborating evidence.[33] Historically women and girls were often disproportionately disbelieved or blamed if they alleged sexual violence.[34] Any delay in bringing a criminal complaint regarding non-recent abuse may be heavily scrutinised by a court, which has tended to address such delay by establishing whether post-traumatic stress disorder (PTSD) or repressed memory inhibited an individual from bringing a complaint.[35] Such approaches frame survivor emotions as relevant only in medical terms and may neglect consideration of the broader political, cultural, and legal circumstances, where the alleged harm may have been authorised or condoned by the state. This approach creates an artificially receptive historical context that may deny victim-survivors access to courts for non-recent events and compound their experience of harm.

In contrast, civil liability could contribute to redistributing epistemic and ontological power, by reframing abuse that was once denied and not believed

[29] Marie Collins, 'Removal of "Pontifical Secret" in Clerical Sex Abuse Trials a Step Forward for Justice' *The Irish Times* (Dublin, 18 February 2020).
[30] Kieran Tapsell, 'Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities' (2019) 31 Journal for the Academic Study of Religion 143.
[31] Formicola (n 21) 11–13.
[32] Lewis (n 3) 7.
[33] *Stogner v California (2003) 539 US 607 (USSC)*.
[34] Laura Lammasniemi, '"Precocious Girls": Age of Consent, Class and Family in Late Nineteenth-Century England' (2020) 38 Law and History Review 241.
[35] Lewis (n 3) 9.

as injury and an abuse of power,[36] and telling victim-survivors' stories individually, publicly, and graphically.[37] Timothy Lytton concludes that tort litigation reframed clerical child abuse: 'Legal nesting fuelled public outrage, increasing impatience for real reform and making efforts to symbolically placate pro-reform constituencies harder. It also undermined the unquestioning trust and obedience of many Catholics that had been exploited by some to deflect allegations'.[38] Similarly, reframing an issue of historical abuse as a present-day violation of human rights could offer a significant form of epistemic justice where it results in belief of survivors and responsibility for wrongdoing.[39] However civil litigation can also remain a potential re-traumatising or marginalising process for victim-survivors.[40] Research disagrees on whether there are sufficient therapeutic benefits to victim-survivors to overcome the potentially harmful or re-traumatising effects of engaging in litigation and the legal process.[41] Finally, cases involving Indigenous peoples can provide several instances of epistemic injustice where Indigenous forms of knowledge and identity are denied equal value or recognition in settler colonial legal systems.[42]

7.3.4 *Accountability and Ontology*

Finally, whether law condemns, condones, or is silent regarding historical-structural injustices will make a significant contribution to either reproducing harms in the present or meaningfully addressing the past. Chapter 2 demonstrated how colonisation, the transatlantic slave trade, or more recently, the process of the institutionalisation of the poor or of women and children were framed as either morally, legally, and religiously justified, or formed part of constituting the nation states that today are challenged to address their legacies of historical abuses. Child sexual abuse by priests, in contrast, was long historically prohibited, albeit with a highly defective system of penalisation and enforcement.

[36] Martha Chamallas, *Introduction to Feminist Legal Theory* (3rd ed, Aspen 2012) 303–39.
[37] Helen Duffy, *Strategic Human Rights Litigation* (Hart Publishing 2018) 72.
[38] Lytton (n 20) 136.
[39] Ian Werkheiser, 'A Right to Understand Injustice: Epistemology and the "Right to the Truth" in International Human Rights Discourse' (2020) 58 The Southern Journal of Philosophy 186.
[40] Duffy (n 37) 78.
[41] Nathalie Des Rosiers, Bruce Feldthusen and Oleana AR Hankivsky, 'Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System' (1998) 4 Psychology, Public Policy, and Law 433; Case (n 6) 46.
[42] Dina Lupin Townsend and Leo Townsend, 'Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System' (2021) 35 Social Epistemology 147.

While prior investigations may hold historical legislation or governmental policy as morally or politically unacceptable in present day, separate legislative action would be required to criminalise such harms. Recognition of historical-structural injustice needs more than identifying individual perpetrators who violated pre-existing rules, it necessitates problematising historically accepted but now impugned standards. Several historical abuses were not aberrant violations of laws but instead were historically permitted or encouraged by law, reflecting an unjust baseline by contemporary standards.[43] Mamdani distinguishes between violence that preserves the law and legal system, such as criminal law offences, and violence that makes the law, such as settler colonial violence or violence otherwise constitutive of the state: 'A single-minded focus on identifying perpetrators leaves undisturbed the logic of institutions that make nation-building violence thinkable and possible'.[44] As a result, such violence represents an ontological dimension of power.

Canon law also communicates a distinct set of values and world view. Kieran Tapsell describes clericalism as arising out of a theology that priests are 'ontologically changed', that is marked out by God through ordination as special people whose very nature has been changed and who are divinely destined to change the world.[45] Byrnes suggests that the result is 'preserving that indispensable church from scandal was perceived as the central obligation of their positions'.[46] Nicholas Cafardi suggests that the Vatican remains pervasive in its use of a 'bella figura' (beautiful figure), that a good external appearance must be presented to the world.[47]

Specific forms of litigation also shape the presentation of historical abuses and contemporary responses to them. In civil liability, when the justifications for non-fault-based liability are interrogated, they create problematic narratives for legal responsibility and accountability regarding historical abuses: 'If liability attaches irrespective of fault, it is no longer necessary for lawyers to probe into how the Church handled abuse cases, and whether it was guilty of negligence or worse'.[48] For instance, Winter notes while vicarious liability

[43] Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017) 123.

[44] Mahmood Mamdani, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (Belknap Press 2020) 17.

[45] Kieran Tapsell, *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse* (ATF Press 2014) 51.

[46] Byrnes (n 17) 7.

[47] Geoffrey Robinson, *For Christ's Sake: End Sexual Abuse in the Catholic Church … for Good* (2013) 122.

[48] Richard Scorer, *Betrayed: The English Catholic Church and the Sex Abuse Crisis* (Biteback Publishing 2014) 299.

cases 'helped publicize the abuse endemic in Canada's residential schools system, it was not a trial of that system itself'.[49]

As already noted, rights discourses and practices may serve as important sites for reimaging historical abuses in terms of victims' rights and the duties of states to prevent and repair harms. However, early critical legal studies (CLS) scholarship suggested that rights litigation was part of a legal ideology that was compatible and the cause of the original oppression and injustice.[50] In turn, such concerns were rejected by critical race scholars such as Patricia Williams and Kimberley Crenshaw. Williams asserted that while a CLS critique of rights as empty may be true for white communities, for black Americans, rights represented a site of black empowerment.[51] Similarly, Crenshaw argued that rights rhetoric had been a significant force in inspiring black communities to pursue radical reform.[52] For Seán Eudaily, 'legal activism conceived as tactical resistance may lead to fundamental change in the epistemic, political, and subjective structures in which such practices are articulated'.[53] While in some instances, rights may be viewed as compatible with existing forms of oppression, there may also remain potential for litigation to disrupt existing ontological orders and provide the basis for resistance and alternative conceptions of the past. As a result, rights litigation may be a site where national and religious myths are challenged, affirmed, or ignored.

7.3.5 *Conclusion*

This range of factors impact how law will address the initial number of allegations and instances of harm significantly. The criminal law truncates the continuities of harm across different forms and generations of historical abuse discussed in earlier chapters, focuses on allegations of breaching existing law within lived memory, and selects from them, subject to the evidential requirements of a fair trial. Civil law litigation may provide a basis for action against state or church institutions but may do so in a manner limited by the form of liability, the limitation regime, and the availability of

[49] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014) 121.

[50] Mark Tushnet, 'An Essay on Rights' (1984) 62 Texas Law Review 1363, 1398–402.

[51] Patricia Williams, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401.

[52] Kimberlé Crenshaw, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1331.

[53] Seán Patrick Eudaily, *The Present Politics of the Past: Indigenous Legal Activism and Resistance to (Neo)Liberal Governmentality* (Routledge 2004) 49.

suitable defendants, class actions, or affordable costs to victims. Canon law remains nebulous in its capacity to offer a victim-survivor-centred approach to addressing child sex abuse cases. Human rights law may offer the basis for empowerment for survivors and affected communities but, as explored below, will also be likely resisted in its implementation by governments. No single basis for litigation is therefore a panacea to addressing historical-structural injustices. Instead, in employing a range of litigation mechanisms, victim-survivors have demonstrated considerable resilience across the jurisdictions examined in the book in demanding accountability through litigation. Where such demands are not met, the entire enterprise of transitional justice may be undermined in its ability to address the past.

7.4 NATIONAL EXPERIENCES

7.4.1 *Ireland*

Accountability for Irish historical abuses has focused almost exclusively on child sexual abuse. A 2002 documentary regarding clerical child sexual abuse in Dublin prompted a criminal investigation.[54] The 2011 Murphy report considered that this investigation was 'an effective, co-ordinated and comprehensive inquiry'.[55] Between 1975 and 2014, there were 4,406 allegations of child sexual abuse by priests reported to church authorities and Gardai from across Ireland in non-residential settings. It resulted in ninety-five criminal convictions, based on a church compilation of figures.[56] Only eleven criminal cases were forwarded to the Director of Public Prosecutions based on the Commission to Inquire into Child Abuse (CICA) report regarding abuse in child residential institutions.[57]

Several cases that proceeded to trial were ultimately unsuccessful on the grounds of a fair trial being impossible due to the delayed complaint.[58] Sinéad Ring notes the approach of the Irish courts fostered 'a simple narrative of the

[54] Commission of Investigation (n 22) para 5.28–31.
[55] ibid 5.43.
[56] Figures compiled from the annual reports from National Board for Safeguarding Children in the Catholic Church in Ireland, available at <www.safeguarding.ie>.
[57] United Nations Committee Against Torture, Concluding Observations CAT/C/IRL/CO/1, para. 20
[58] Sinéad Ring, 'The Victim of Historical Child Sexual Abuse in the Irish Courts 1999–2006' (2017) 26 Social & Legal Studies 562.

passive and traumatised victim paralysed by the domination of the abuser' and precludes examination of how society kept victims silent for decades after the abuse.[59] Support organisations for victim-survivors of child sexual abuse report that clients who engaged with criminal trials found the processes humiliating and re-traumatising.[60] In addition to individual acts of child sex abuse, the Gardai considered charges for the offence 'misprision of felony', where a person who knew that a felony had been committed and concealed it from the authorities,[61] but no prosecutions arose for this offence.[62] Finally, there have been no recent criminal prosecutions related to Magdalene Laundries, mother and baby homes, or illegal adoptions.[63]

Colin Smith and April Duff identify several difficulties for victim-survivors of historical abuse in Irish civil litigation.[64] As a smaller jurisdiction without the benefit of class actions, protective costs orders limiting potential financial cost to plaintiffs, or reform of Ireland's restrictive statute of limitations, litigating historical abuse cases has proven highly problematic. Smith and Duff note a practice from state and religious defendants of 'procedural delay in historic institutional-abuse cases [which] operates in favour of the defendants'.[65] Despite a strong constitutional bill of rights, Ireland's courts have not recognised violation of constitutional rights in the context of historical-structural abuses, likely owing to the procedural barriers restricting potential litigants. Enright and Ring conclude that the Irish state 'has failed to reimagine or supplement frameworks of civil and criminal liability, leaving victim-survivors without adequate conceptual means to give public legal expression to their experiences or to establish new legal discourses of unashamed authority and credibility that might enable them to speak to the state without fear of sanction'.[66]

However, Ireland is unique in making use of multiple forms of international law and human rights law to address historical abuse. In 2011, the

[59] ibid 565.
[60] July Brown, Damien McKenna and Edel O'Kennedy, 'Only a Witness: The Experience of Clients of One in Four in the Criminal Justice System' (One in Four 2018) 23, 60, 95.
[61] Commission of Investigation (n 22) para 5.35–6.
[62] ibid 5.39.
[63] Mike Milotte, 'Adoption Controversy: Only One Person Was Ever Charged over Bogus Birth Certificates' *The Irish Times* (Dublin, 1 June 2018).
[64] Colin Smith and April Duff, 'Access to Justice for Victims of Historic Institutional Abuse' (2020) 55 Éire-Ireland 100.
[65] ibid 112.
[66] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 86.

United Nations Committee against Torture criticised Ireland's failure to address the Magdalene Laundries,[67] leading to the establishment of an inquiry, discussed in Chapter 6. Similar efforts have been pursued regarding the issue of mother and baby homes in several United Nations human rights treaty body mechanisms.[68]

In addition, in *O'Keeffe v Ireland*, the European Court of Human Rights concluded that Ireland failed to protect Louise O'Keeffe from sexual abuse suffered as a child in an Irish National School and violated her rights under Article 3 (prohibition of inhuman and degrading treatment) and Article 13 (right to an effective remedy) of the European Convention on Human Rights.[69] The court considered that when relinquishing control of the education of children to non-state church actors, Ireland should have been aware, given its inherent obligation to protect children, of potential risks to their safety if there was no appropriate framework of protection.[70] The decision represents a site of epistemic justice, where the Strasbourg court accepts the reformulation of the case that was originally argued in tort law in Irish courts, as a violation of human rights. However, its impact in Ireland has been circumscribed significantly by the state's implementation of the judgment through an ex gratia redress scheme that interprets the judgment narrowly.[71]

In 1996, 2005, and 2009, the Irish Bishops' conference adopted a new set of canon law guidelines, which provided for all allegations of child abuse to be taken to the civil authorities.[72] However, these documents did not receive official recognition from the Vatican and remained without standing in canon law.[73] The Murphy report stated that historically the Archdiocese of Dublin 'did not implement its own canon law rules and did its best to avoid any

[67] United Nations Committee against Torture, 'Concluding Observations' CAT/C/IRL/CO/1

[68] United Nations Human Rights Committee, 'Concluding Observations on the Fourth Periodic Report of Ireland'; Addendum: Information received from Ireland on follow-up to the concluding observations, CCPR/C/IRL/CO/4/Add.1, paras 1–3.

[69] *O'Keeffe v Ireland [2014] ECHR 96.*

[70] ibid at para 162.

[71] Iarfhlaith O'Neill, 'Decision of the Independent Assessor Iarfhlaith O'Neill' (Department of Education 2019) <www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/independent-assessment-process/okeeffe-v-ireland-decision-of-the-independent-assessor.pdf>.

[72] 'Report into the Catholic Diocese of Cloyne' (Department of Justice and Law Reform 2011) para 4.21; Child Sex Abuse: Framework for a Church Response 1996 Our Children Our Church 2005; 2009 Safeguarding Children, Standards and Guidance Document for the Catholic Church in Ireland.

[73] Marie Keenan, *Child Sexual Abuse and the Catholic Church: Gender, Power, and Organizational Culture* (Oxford University Press 2012) 182.

application of the law of the State'.[74] Similarly, the 2011 Cloyne report concluded that the church had failed to carry out proper canonical investigations or to report all complaints to the Gardai or health authorities.[75] In response to the report, Taoiseach Enda Kenny emphasised in the Irish parliament that the Cloyne report demonstrated the attempts by the Catholic Church and the Holy See to frustrate a government inquiry in the recent past.[76]

7.4.2 *Australia*

Australian jurisdictions have long legislated against the sexual abuse of children.[77] The Royal Commission into Institutional Responses to Child Sexual Abuse (RCIRCSA) criminal justice report concluded that between 1950 and 2010, a total of 1,880 alleged perpetrators (diocesan and religious priests, religious brothers, religious sisters, lay employees, or volunteers) were identified in claims of child sexual abuse.[78] The RCIRCSA final report concluded that children were allegedly abused in over 4,000 institutions and made 2,562 referrals to the police,[79] leading to at least 127 prosecutions to date.[80] The RCIRCSA also criticised the criminal trial process as unfair and traumatic for victims of child sexual abuse.[81] The common law offence of misprision of felony has been abolished in all Australian jurisdictions, but it has been replaced with a series of offences regarding the concealment of or failure to prevent serious offences in several jurisdictions,[82] with one recent prosecution of an archbishop for failure to report abuse overturned on appeal.[83]

[74] 'Commission of Investigation (n 22) para 1.15.
[75] 'Report into the Catholic Diocese of Cloyne' (n 72) paras 1.31–1.37.
[76] 'Enda Kenny Speech on Cloyne Report' *RTE News* (Dublin, 20 July 2011).
[77] Lisa Featherstone, '"Children in a Terrible State": Understandings of Trauma and Child Sexual Assault in 1970s and 1980s Australia' (2018) 42 Journal of Australian Studies 164, 167.
[78] 'Proportion of Priests and Non-ordained Religious Subject to a Claim of Child Sexual Abuse 1950-2010' (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 5.
[79] <www.childabuseroyalcommission.gov.au/sites/default/files/final_information_update.pdf>
[80] Melissa Davey, 'Royal Commission Has Led to More than 100 Child Abuse Prosecutions, Says Head' *The Guardian* (London, 15 May 2017).
[81] Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 15.
[82] Section 316(1) of the Crimes Act 1900 (NSW); section 327 of the Crimes Act 1958 (Vic); section 49C of the Crimes Act 1958 (Vic)
[83] Tony Foley, 'Changing Institutional Culture in the Wake of Clerical Abuse – the Essentials of Restorative and Legal Regulation' (2019) 22 Contemporary Justice Review 171, 179.

The RCIRCSA noted that up to the 1990s, Catholic authorities did not engage with canon law processes or trials for allegations of child sexual abuse.[84] Although national responses (Towards Healing and the Melbourne Response) were established in the 1990s, the RCIRCSA concluded that processes 'to dismiss priests and religious appear to have been rarely used during the 1990s and early 2000s'.[85] The RCIRCSA concluded that the canon law system 'contributed to the failure of the Catholic Church to provide an effective and timely response to alleged perpetrators and perpetrators'.[86]

Several other areas of historical abuse have not resulted in any criminal accountability, such as the Stolen Generations, genocide against Indigenous peoples, the child migration process, or Aboriginal stolen wages, many of which operated under legislative authorisation or state complicity.

In Australia, civil liability has offered some limited success in addressing historical-structural injustices, particularly around the land rights of Aboriginal peoples. Early attempts to establish a right to traditional customary lands were unsuccessful.[87] However, in *Mabo & Ors v Queensland (No 2)*, the Australian High Court concluded that the Meriam people possessed native title over their traditional lands, defined as the rights and interests over land or waters that exist according to the traditional laws and customs of Indigenous inhabitants of land.[88] In rejecting the doctrine of *terra nullius*, the court concluded that native title exists when an Indigenous community could show there is a continuing association with the land in circumstances where no explicit act of the Crown has extinguished title.[89] Ann Curthoys et al note: 'The notion of *terra nullius* had always been deeply offensive to Indigenous people. The symbolic overturning of the doctrine was an important legal, political and psychological achievement. However, the *Mabo* case replaced the legal fiction of *terra nullius* with another legal fiction that Australia was 'settled', a legal narrative that also conflicts with the dominant Indigenous perspectives of Australian colonial history'.[90]

[84] Royal Commission into Institutional Responses to Child Sexual Abuse, *Preface and Executive Summary* (Royal Commission into Institutional Responses to Child Sexual Abuse 2017) 62.
[85] ibid 64–5.
[86] ibid 70.
[87] *Milirrpum v Nabalco Pty Ltd and the Commonwealth (1971) 17 FLR 141.*
[88] *Mabo & Ors v Queensland (No 2) [1992] HCA 23, (1992) 175 CLR 1.*
[89] ibid para 83.
[90] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) xi.

As in the US Supreme Court decision of *Brown*, the radical nature of the decision led to a political and popular backlash.[91] Short notes that the mining industry was particularly threatened by the case, and lobbied the government, concerned that some existing title could be invalid in the absence of compensation or that future purchases would involve greater control by Aboriginal peoples.[92] The campaign eventually led the government to legislate to provide 'certainty' for the commercial lobby by passing the Native Title Act 1993, which established a Native Title Tribunal for assessing native title claims.

Several subsequent decisions used historical documentation from British settlers to deny the claims of Indigenous peoples, which were based instead on oral testimony from Indigenous peoples corroborated with archaeological, anthropological, genealogical, and linguistic evidence,[93] creating a very high evidential threshold for First Nations peoples to assert land rights.[94] A people group had to show they formed a society, substantially the same as that which existed at sovereignty and had continued to observe a system of laws and customs which were, again, substantially unaltered from those observed by their ancestors at sovereignty.[95] As a result, native title litigation forms a further site of epistemic injustice for Indigenous peoples, with expansions of rights often counteracted. In *Wik*, the High Court held that native title could coexist with pastoral leases, which represented about 40 per cent of the total area of Australia.[96] In response, the Australian government passed the Native Title Amendment Act in 1998, which complicated the native title claims process for litigants. Native title remains deeply contested in Australia. Jon Altman concludes: 'If hypothetically all native title claims were successful, as much as 70 per cent of Australia could be under some form of Indigenous title and as much as 40 per cent of the Indigenous population could be resident on these lands'.[97]

In addition to cases involving native title, attempts to argue that Australia was responsible for genocide against First Nations peoples have also proven

[91] ibid 38.
[92] Damien Short, 'Reconciliation, Assimilation, and the Indigenous Peoples of Australia' (2003) 24 International Political Science Review 491, 498.
[93] *Members of the Yorta Yorta Aboriginal Community v Victoria [1998] FCA 1606*; *Western Australia v Ward [2000] FCA 191*.
[94] Curthoys, Genovese and Reilly (n 90) 67.
[95] *Yorta Yorta Aboriginal Community v Victoria [2002] 214 CLR 422*, para 50.
[96] *The Wik Peoples v State of Queensland & Ors [1996] HCA 40, (1996) 187 CLR 1*; Curthoys, Genovese and Reilly (n 90) 64.
[97] Jon Altman, 'The Political Ecology and Political Economy of the Indigenous Land Titling "Revolution" in Australia' [2014] Maori Law Review 1, 7.

unsuccessful,[98] particularly as Australia had not ratified the Genocide Convention retrospectively. These cases contrast with the findings of the Bringing Them Home report, which noted the potential for child removal to constitute genocide.[99] Curthoys et al note these cases demonstrate 'the challenges that Indigenous peoples face when using the law strategically to gain recognition of past wrongs'.[100] In subsequent cases,[101] Indigenous applicants were denied in their attempts to litigate regarding the Stolen Generations by an approach to the historical record that relied on 'the standards of the time' to judge the policy of child removal for the Stolen Generation. By adopting this approach, the court denied the applicants the ability to use oral evidence to reinterpret or reframe historical documentation in light of their lived experience,[102] confirming a narrow approach to epistemic justice. The result is law remains unable to 'escape its complicity in the colonial project, and its ability to write out, again and again, the experiences of Indigenous peoples'.[103] Buti writes that these decisions 'brought into relief the multiple legal and evidential obstacles involved in pursuing litigation to redress the alleged wrongs of past Aboriginal child separations or removals'.[104]

In *Trevorrow v South Australia [No 5]*, the applicant was fostered out without the consent of his parents by the Aborigines Protection Board despite their requests for the child's return.[105] Critically, the applicant's experiences were all documented in departmental medical records and could be interrogated by testimony from relevant doctors. Gray J concluded that the state was in breach of the limits of relevant legislation at the time, which did not give it the power to foster an Aboriginal child without parental consent,[106] a decision affirmed on appeal.[107] This finding has value for other members of the Stolen Generations interested in litigating their removals but would likely depend on the existence of similar documentary evidence. With these limited successes,

[98] *Wadjularbinna Nulyarimma & Ors v Phillip Thompson; Buzzacott & Ors v Minister for the Environment (1999) 96 FCR 153; (1999) 165 ALR 621; [1999] FCA 1192.*
[99] Curthoys, Genovese and Reilly (n 90) 134.
[100] ibid 132.
[101] *Cubillo v Commonwealth of Australia (includes summary dated 30 April 1999) [1999] FCA 518 (30 April 1999).*
[102] Curthoys, Genovese and Reilly (n 90) 136.
[103] ibid.
[104] Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32 Melbourne University Law Review 382, 386.
[105] *Trevorrow v State of South Australia (No 5) [2007] SASC 285 (1 August 2007)* para 152.
[106] ibid para 1229. Curthoys, Genovese and Reilly (n 90) 161–4.
[107] *Lampard-Trevorrow (2010) 106 SASR 331* 417.

Curthoys et al note: 'there has been considerable disillusionment among many litigants with the law as a form of redress'.[108]

Finally, no national bill of rights or regional human rights mechanisms are available in Australia, which impacts on victim-survivors' capacity to use human rights to examine historical abuse.[109] The absence of a strong human rights framework within Australian law has meant there is little to temper or fetter the exercise of power by the federal government in relation to policy on Indigenous people,[110] despite instances in which the state's treatment of Aboriginal peoples has been criticised.[111]

7.4.3 *Canada*

Despite the prosecution of child sex abuse being a historical legal possibility since 1892, the TRC report notes that contemporary reporting of abuse to government or church authorities arising from residential schools did not often lead to prosecution or conviction.[112] As in other jurisdictions, several other inquiries and issues of historical abuse have not led to significant or sustained prosecutions, such as illegal adoptions, or enforced disappearances of Aboriginal women.

Changes in Canadian law between 1991 and 2003 for class actions led to a situation where 18,000 outstanding civil lawsuits related to abuse in residential schools would take fifty-three years to conclude at a cost of $2.3 billion, not including the value of any compensation awarded to survivors.[113] The pressure of such litigation led to negotiations between Aboriginal organisations, religious organisations, and the federal government that would lead to the IRSSA. Regarding the Sixties Scoop process of transfer of Indigenous children into foster homes and adoption by white families, class-action litigation began in 2011, and in 2017 a $800 million settlement was announced based on a ruling

[108] Curthoys, Genovese and Reilly (n 90) 8.
[109] Hilary Charlesworth (ed), *No Country Is an Island: Australia and International Law* (University of New South Wales Press 2006) 64.
[110] Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans and others (eds), *Sovereignty* (University of Hawai'i Press 2012) 170.
[111] United Nations Committee against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' CAT/C/AUS/CO/4-5.
[112] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada Volume 1, Part 1* (2015) 560.
[113] 'Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools' (Assembly of First Nations 2004) 6.

that the Canadian government was liable for the harms caused by this process.[114] However, Bruce Feldthusen noted that the adversarial nature of civil litigation necessitated aggressive cross-examination of victim-survivors with the potential for re-traumatisation.[115] In addition, the length of proceedings, limited testimony from victim-survivors, and the complexity of potential liability of both church and/or state institutions created further difficulties for pursuing accountability.[116] In particular, 'a recognition of "power disparities and the special vulnerability of children" were mostly "absent from the judgments of most members of the High Court"'.[117]

In Canada, efforts to address clerical sex abuse began in 1987 in response to the Mount Cashel orphanage crisis.[118] Several subsequent reports were commissioned to address the issue[119] but have not produced national figures on the number of allegations or canon trials. A Committee for Responsible Ministry and the Protection of Minors and Vulnerable Adults was established in 2018 as a consultative body established within the Canadian Conference of Catholic Bishops (CCCB). Their 2018 report notes that each Canadian province now has mandatory reporting laws for child abuse.[120] However, the document suggests a preference for out-of-court settlements and mediation as a form of accountability.[121] As in other jurisdictions, such an approach may spare victim-survivors interrogating through the process of a court trial but also hides the scale and extent of the problem from public scrutiny and disables accountability for the systemic nature of the abuse.

There remains a significant practice of land disputes between Indigenous nations and Canada that reflects some of the epistemic and ontological injustices in Australia. In *Calder v British Columbia* in 1973, while the Nisga'a people were unsuccessful in seeking a declaration of their

[114] Ontario Sixties Scoop Steering Committee, 'Sixties Scoop Survivors' Decade-Long Journey for Justice Culminates in Historic Pan-Canadian Agreement' *Newswire.ca* (6 October 2017) <www.newswire.ca/news-releases/sixties-scoop-survivors-decade-long-journey-for-justice-culminates-in-historic-pan-canadian-agreement-649748633.html>.

[115] Bruce Feldthusen, 'Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It' (2007) 22 Canadian Journal of Law and Society 61, 68–9.

[116] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 2* (McGill-Queen's University Press 2015) 560–1.

[117] Jane Wangmann, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28 Melbourne University Law Review 169, 200.

[118] 'Protecting Minors from Sexual Abuse: A Call to the Catholic Faithful in Canada for Healing, Reconciliation, and Transformation' (Canadian Conference of Catholic Bishops 2018) 13.

[119] ibid 15.

[120] ibid 23–4.

[121] ibid 46.

Aboriginal title to ancestral lands in British Columbia,[122] the court recognised the existence of Aboriginal rights in Canadian law before the Royal Proclamation in 1763. The decision led to a change in government policy on native land claims and ultimately an amendment to the Canadian Constitution in 1982 to recognise and affirm 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada' under section 35(1). Borrows suggests: 'In the moment, the constitution appeared to present a path to genuine reform. Then the idea of originalist history re-emerged and became the touchstone for proving Aboriginal rights'.[123] In 1996, the Supreme Court ruled in *R. v Van der Peet* that Section 35(1) offered protection of Aboriginal rights but only for those practices, customs, and traditions that were 'integral to the distinctive culture' of particular groups prior to European contact.[124] Borrows notes the Supreme Court placed a search for 'original' understandings of Aboriginal rights as central, narrowing the scope of evolving knowledge, power, and epistemic justice.[125] In *Delgamuukw v British Columbia*, the Supreme Court stated the test to determine what constitutes a justified infringement on Aboriginal rights and title, and in doing so, placed the onus on Indigenous nations to prove occupation prior to sovereignty and subsequent continuous occupation,[126] as 'aboriginal title crystallized at the time sovereignty was asserted'.[127]

In *Tsilhqot'in Nation v British Columbia*, the Canadian Supreme Court found that the Tsilhqot'in Nation was entitled to a declaration of Aboriginal title in their traditional territories,[128] due to evidence of sufficient and exclusive historical occupation at the time of Canadian sovereignty. The Court in *Tsilhqot' in* stated that the doctrine of *terra nullius* never applied in Canada.[129] Borrows suggests that while a significant decision and victory for the Tsilhqot'in Nation, the case represents the continuation of a problematic treatment of Indigenous history in Canadian law: 'This test requires proof of what was integral to distinctive Aboriginal societies upon contact. If a practice developed after contact it cannot be protected as an Aboriginal right within

[122] *Calder v British Columbia (AG) [1973] SCR 313, [1973] 4 WWR 1.*
[123] John Borrows, 'Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism' (2017) 98 Canadian Historical Review 114, 120.
[124] *R v Van der Peet [1996] 2 SCR 507* [5, 73].
[125] Borrows (n 123) 115.
[126] *Delgamuukw v British Columbia [1997] 3 SCR 1010* [144].
[127] ibid 145.
[128] *Tsilhqot'in Nation v British Columbia 2014 SCC 44.*
[129] ibid 69.

Canada's Constitution."[130] Thus, courts' use of history is providing a significant structural constraint on Indigenous rights in Canada.[131]

Canada has also addressed historical-structural injustices through a human rights lens. In 2007, the First Nations child agency, the Assembly of First Nations, alleged that state-run child welfare services provided to First Nations children and families on reserve were flawed, inequitable, and discriminatory on an ongoing basis.[132] In 2016, the Canadian Human Rights Tribunal found that Canada was racially discriminating against First Nations children. The Canadian government is currently seeking judicial review of this decision, which may cost between $2 and 15 billion to implement. Rauna Kuokkanen argued that even if successful, the discriminatory treatment of First Nations peoples must be addressed through examining other relations of domination, including heteropatriarchal gender relations, 'which often displace Indigenous women, and consequently, their children from their communities'.[133]

In terms of employing international human rights, Kuokkanen notes: 'Traditionally, there has been no strong Indigenous engagement with international human rights instruments at the national level, although this has somewhat changed with the adoption of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).'[134] A notable exception is *Lovelace v Canada*, where the United Nations Human Rights Committee concluded that Canada had violated the International Covenant on Civil and Political Rights as the Indian Act violated the cultural and language rights of Indigenous woman Sandra Lovelace.[135] This led to an amendment of the Indian Act aimed at removing gender-based discrimination but denied Indigenous women the means to transfer their Indigenous status to their children. Subsequent cases have attempted to overcome this but have only removed 'the specific discrimination identified by each case, rather than addressing the foundational sex-based hierarchy in the status provisions'.[136]

In 2021, on National Indigenous People's Day, Canada formally adopted An Act respecting the UNDRIP. The Act provides that the Canadian government

[130] Borrows (n 123) 130.
[131] ibid 134.
[132] Cindy Blackstock, 'The Complainant: The Canadian Human Rights Case on First Nations Child Welfare' (2016) 62 McGill Law Journal 285.
[133] Rauna Johanna Kuokkanen, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press 2019) 37.
[134] ibid 29.
[135] *UNHRC, Sandra Lovelace v Canada, Communication no 24/1977, UN Doc CCPR/C/13/D/24/1977.*
[136] Kuokkanen (n 133) 72.

must 'in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration'. In particular, the Act provides that relevant government ministers must prepare and implement action plans to achieve the objectives of the Declaration. While this may offer the basis for advancing the potential of UNDRIP provisions, Section 2 of the Act nonetheless provides that '[t]his Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them'. It remains to be seen whether this Act will make a material difference to the Canadian government's treatment of First Nations peoples. Although the Canadian government rhetoric recognises the need for 'transformative change' with Indigenous peoples, Rosemary Nagy notes its practices continue to cause concern.[137] Rights have proven problematic and limited as a mechanism to achieve the empowerment of First Nations peoples, rights discourse and practice remains one element of addressing historical-structural injustices but one that risks framing First Nations interests, such as self-determination, as something to be granted by the state, affirming existing settler colonial structures.[138]

7.4.4 *United Kingdom*

English criminal law has long prohibited offences relevant to historical abuse, such as rape, child cruelty, or assault or neglect of a child in the care of another.[139] The UK demonstrates the potential and risks of criminal prosecution for historical sexual violence. Following a television documentary alleging abuse by English celebrity Jimmy Savile, Operation Yewtree was established as a police investigation into child sexual abuse led by the Metropolitan Police Services (MPS). A 2013 MPS report concluded that Saville, deceased, had committed at least 450 acts of child sexual abuse.[140] The operation led to nineteen arrests of other high-profile public figures and to seven convictions. More broadly, a 'Yewtree effect' was reflected in part in a 124 per cent increase in

[137] Rosemary Nagy, 'Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada' (2022) 26(2) The International Journal of Human Rights 191, 206.
[138] Kuokkanen (n 133) 39.
[139] Section 1 of the Children and Young Persons Act 1933.
[140] David Gray and Peter Watt, 'Giving Victims a Voice: Joint Report into Sexual Allegations Made against Jimmy Savile' (NSPCC/Metropolitan Police Service 2013).

the reporting of rape since 2012.[141] In response, MPS Operation Hydrant was established in 2014 to oversee and coordinate all 'non-recent' investigations concerning persons of public prominence and those historical institutional sexual offences. Figures in early 2020 indicate that '4,024 allegations led to guilty verdicts at court after police investigations since 2014 into decades-old child sex offences'.[142] Since Hydrant's launch, 7,000 suspects have been identified, with 11,346 allegations of attacks received from 9,343 victims, all concerning sexual abuse of children. Such figures relate to both institutional and non-institutional contexts of historical child sexual abuse. These figures have encouraged some victim-survivor representatives.[143] Other forms of historical abuse, such as institutionalisation per se, child migration, and illegal adoption, have not formed the object of criminal prosecutions but have been pursued through civil litigation.

The experience of victim-survivors in UK civil litigation continues to risk distress or re-traumatisation. The Independent Inquiry into Child Sexual Abuse (IICSA) report on accountability and reparations noted that for many victim-survivors 'the litigation process was emotionally challenging and that it compounded the trauma they had already suffered as children. They also felt dissatisfied with the outcome, either because their claims had failed or because they had succeeded, usually by accepting a settlement offer, but they had never received any explanation or apology for what had happened to them and did not feel that justice had been done'.[144]

The IICSA report on the safeguarding within the Roman Catholic Church confirms that in the church's historical responses to child sex abuse allegations, 'resistance to external intervention was widespread'.[145] The Nolan report in 2001 recommended the need for a single set of rules to address such allegations across the Catholic Church in England and Wales, leading to the eventual establishment of independent child commissions and child protection offices. The 2007 Cumberlege review of this process found the

[141] Peter Spindler, 'Operation Yewtree: A Watershed Moment' in Marcus Erooga (ed), *Protecting Children and Adults from Abuse After Savile: What Organisations and Institutions Need to Do* (Jessica Kingsley Publishers 2018) 212.

[142] Vikram Dodd, 'Police Uncovering "Epidemic of Child Abuse" in 1970s and 80s' *The Guardian* (London, 5 February 2020) <www.theguardian.com/uk-news/2020/feb/05/police-uncovering-epidemic-of-child-abuse-in-1970s-and-80s>.

[143] ibid.

[144] Alexis Jay and others, 'Accountability and Reparations' (IICSA 2019) CCS0719581022 09/19 26 <www.iicsa.org.uk/reports>.

[145] Alexis Jay and others, 'The Roman Catholic Church: Safeguarding in the Roman Catholic Church: in England and Wales' (Independent Inquiry into Child Sexual Abuse) vi <www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>.

church had made some progress regarding child protection, though noted the limited change for religious orders compared to dioceses.[146] The IICSA report concluded: 'The absence of published data about the number of priests laicised for child sexual abuse offences (whether in crimes in civil or canonical law) diminishes confidence in the Church's handling of such cases.'[147]

Beyond individual criminal and civil cases, the 2012 case of *Mutua & Ors v Foreign and Commonwealth Office* represented the first time that victims of colonialism were given the right to claim compensation from the British government. The claims arose from the systematic abuse and torture inflicted on the Kenyan people by British colonial officials and Kenyan 'home guards' under British command, including castration, systematic beatings, rape, and sexual assault with bottles; all of which were known about and sanctioned at the top levels of the British government.[148] Justice McCombe noted that a fair trial was possible due to the existence of extensive and meticulous colonial records that had been found in discovery.[149] The case extended principles of vicarious liability in tort law to the joint activities of British government and colonial administrations.[150] In 2013, the British government apologised and agreed to pay £19.9 million in compensation to over 5,000 claimants who had suffered abuse.[151] Balint notes that the settlement 'was couched in terms of being important for future economic and political relations, rather than as an important acknowledgement of British responsibility for these harms as integral to Empire'.[152] Balint suggested the case offered the potential for a new constitutive moment 'ushering in a new legal order in which colonial harms can be heard and redressed as well as changing the public and political landscape of how the British Empire is collectively remembered and discussed'.[153] However, she concludes that 'the absence of a broader public appreciation of the structural nature of these harms – as constitutive of Empire, not exceptional to it – means that the claims brought and heard in

[146] ibid 40.
[147] ibid 27.
[148] *Mutua & Ors v The Foreign and Commonwealth Office* [2012] EWHC 2678 (QB) (05 October 2012) para. 45.
[149] David M Anderson, 'Mau Mau in the High Court and the "Lost" British Empire Archives: Colonial Conspiracy or Bureaucratic Bungle?' (2011) 39 The Journal of Imperial and Commonwealth History 699.
[150] Jennifer Balint, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment' (2016) 3 Critical Analysis of Law 261, 277.
[151] William Hague MP, House of Commons Debates, vol. 563, col. 1692 (6 June 2013).
[152] Balint (n 150) 283.
[153] ibid 264–5.

their particularity will fail to have a more extensive constitutive impact'.[154] The potential impact of the case has been circumscribed by subsequent decisions and legislation.

In *Kimathi & Ors v The Foreign and Commonwealth Office*, in 2018, Stewart J dismissed similar group litigation, where over 40,000 Kenyans brought claims for damages against the UK Foreign & Commonwealth Office (FCO), alleging abuse in Kenya during the 1950s and early 1960s.[155] Stewart J held the claim was barred by the statute of limitations and that it would not be equitable to extend time in the claimant's favour due to the severe effects of the passage of time on the defendant's ability to defend the claim.[156] The judgment emphasised that civil litigation is distinct from a public inquiry and that 'the claims must stand or fall on established principles of civil litigation'.[157]

In *Keyu v Secretary of State for Foreign and Commonwealth Affairs*, the UK Supreme Court was asked whether the FCO should be required to hold a public inquiry into allegations of British soldiers shooting and killing twenty-four unarmed civilians in 1948 in Malaysia.[158] The UK government had rejected the claim for a public inquiry. The Court rejected the claim to compel the government to establish an inquiry, concluding that a historical claim that predates the European Convention on Human Rights needed a supervening event to create an obligation under the Convention to create an obligation to investigate.

Although these cases represent attempts to address the legacy of the British Empire through litigation, the future capacity of litigants to build on these approaches has been undermined by government legislation. Schedule 2 of the Overseas Operations (Service Personnel and Veterans) Act 2021 restricts a court's discretion, under the Limitation Act 1980, to disapply time limits for civil actions in respect of personal injuries or death which relate to overseas operations of the armed forces. The minister John Mercer in introducing the bill spoke of the need 'to lance the boil of lawfare and to protect our people from the relentless cycle of reinvestigations against our armed forces'.[159]

[154] ibid 265.
[155] *Kimathi & Ors v Foreign & Commonwealth Office [2018] EWHC 2066.*
[156] ibid 475.
[157] ibid 21.
[158] *Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355.*
[159] John Mercer MP, House of Common Debates, vol. 678, col. 1671 (16 July 2020).

7.4.5 *United States*

In the United States, there has been a significant focus on the criminal prosecution of clerical child sexual abuse but little systemic efforts to prosecute other forms of sexual abuse or non-sexual historical abuses. Attempts to hold priests accountable for child sex abuse began in 1984, in Louisiana,[160] but it would not be until 2002 and revelations of clerical abuse and its cover-up in Boston that the issue garnered national attention and forced the church to attempt to change its approach to dealing with abuse allegations. Formicola suggests that the successive investigations and litigation challenged the primacy of canon law and created expectations of legal cooperation from church institutions,[161] with secular governments less deferential to churches and as a result more powerful in how the past is addressed.[162] Most recent figures published by the United States Conference of Catholic Bishops (USCCB) indicate that 7,002 priests 'not implausibly' and 'credibly' were accused of sexually abusing minors in the period 1950 through 30 June 2018.[163] However, criminal convictions are not recorded in USCCB annual reports. Figures in the United States may continue to underestimate the extent of abuse as they rely on survey responses filled out by church officials without independent verification and are based on church personnel files, which may be incomplete or have removed incriminating material from personnel files to secret archives.[164] In addition, the US-based Survivors Network of those Abused by Priests (SNAP) unsuccessfully petitioned the International Criminal Court (ICC) alleging that Vatican officials had superior responsibility for consciously disregarding information that showed subordinates were committing or about to commit sexual violence. The request was rejected on the basis of lack of jurisdiction and because some of the allegations concerned events prior to the court's founding in 2002.[165] Similarly attempts to sue the Holy See in US court directly in tort law were also unsuccessful.[166]

[160] Jason Berry, *Lead Us Not into Temptation: Catholic Priests and the Sexual Abuse of Children* (LevelFiveMedia 2013).
[161] Formicola (n 21) 56.
[162] ibid 149.
[163] Annual reports available at <www.usccb.org/issues-and-action/child-and-youth-protection/reports-and-research.cfm> and <www.usccb.org/issues-and-action/child-and-youth-protection/archives.cfm>.
[164] Lytton (n 20) 44.
[165] James Gallen, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 International Journal of Transitional Justice 332, 345.
[166] *Doe v Holy See* 557 F3d 1066 (9th Cir 2009); *O'Bryan v Holy See* 556 F3d 361 (2009).

Criminal prosecutions in the United States largely fail to address other areas of historical abuse involving state apparatus, involving racially motivated violence against African Americans, systemic assessment of police brutality, or violence against Native Americans. According to Manfred Berg, of all lynchings committed after 1900, only 1 per cent resulted in a perpetrator being convicted of a criminal offence of any kind.[167] In contrast, litigation has formed a key part of seeking to address the legacy of slavery, Jim Crow laws, and racial discrimination. Early decisions of the US Supreme Court affirmed both the Doctrine of Discovery and white supremacy.[168] However, the litigation strategies addressing injustice against Native peoples and black Americans are significant in their differences. In *Brown v Board of Education* in 1954, the applicant successfully argued that the principle of 'separate but equal' was unconstitutional, thus prohibiting the racial segregation of public schools.[169] Brown remains the canonical example of how the US legal system addresses the nation's legacy of past racial violence[170] but perhaps remains of limited ontological value. Joshi notes that while significant for demonstrating that racially separate public schools are 'inherently unequal', the decision is also notable for its failure to mention white supremacy and the degrading treatment of black children.[171] Angela Onwuachi-Willig suggests that such an approach left intact and unchallenged pre-existing notions of white superiority and black inferiority pervasive in American society.[172]

The potentially radical nature of the decision was limited by the Court's own approach to its implementation. In *Brown II* the Supreme Court turned over the implementation of school desegregation to local judges, who were to act not immediately but with 'all deliberate speed'.[173] After *Brown*, segregation persisted significantly for ten further years and the Civil Rights mass movement was required to realise its potential.[174] This mass movement and legal

[167] Manfred Berg, *Popular Justice: A History of Lynching in America* (Rowman & Littlefield Publishers, Incorporated 2015) 153.
[168] *Plessy v Ferguson*, 163 US 537 (1896); *Dred Scott v Sandford*, 60 US (19 How) 393 (1857); *Johnson v M'Intosh*, 21 US 543 (1823); *Cherokee Nation v Georgia*, 30 US (5 Pet) 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).
[169] *Brown v Board of Education of Topeka*, 347 US 483 (1954).
[170] Jack Balkin and Sanford Levinson, 'The Canons of Constitutional Law' (1998) 111 Harvard Law Review 963, 994.
[171] Yuvraj Joshi, 'Racial Transition' (2021) 98 Washington University Law Review 1181, 1235.
[172] Angela Onwuachi-Willig, 'Reconceptualizing the Harms of Discrimination: How *Brown v. Board of Education* Helped to Further White Supremacy' (2019) 105 Virginia Law Review 343, 355.
[173] *Brown v Board of Education (Brown II)*, 349 US 294, 299 (1955) 138 301.
[174] Michelle Alexander *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Revised ed, New Press 2012) 38.

changes in turn led to retrenchment and resistance to racial integration,[175] ultimately finding expression in the Supreme Court with the successive appointment of conservative judges throughout the end of the twentieth century, who largely deny continuities of historical injustices to present inequalities.[176]

Other significant victories have been achieved through litigation, such as prohibiting voter discrimination,[177] but have equally been undermined by subsequent retrenchment in the Supreme Court.[178] Joshi suggests: 'In trying to disassociate the United States of today from its antebellum and Jim Crow histories, the Court denounced blatant forms of racism from the past while discounting the racism present today and denying continuities between past and present racism', and emphasises the Court's preoccupation with an end point to racial transition at which any exceptional measures would no longer be justified.[179] As a result, the most high-profile forms of litigation to address historical-structural injustices, such as *Brown*, are limited both by the structure of litigation requiring subsequent government action and by the relatively narrow framing adopted by the Courts in relation to the nature of the injustices addressed.

There have been several cases litigating the issue of reparations for slavery, but these have proven largely unsuccessful due to structural barriers in litigation, in particular the doctrine of sovereign immunity, that a political subject cannot sue the government without its consent, has barred two attempts.[180] In addition, descendants of slaves' claims for reparations have been rejected as courts concluded that the descendants had not been directly harmed themselves.[181] Emma Coleman Jordan notes the limited potential to achieve reparations for slavery: 'The litigation-for-reparations strategy suffers from the old problem of using the master's tools to tear down the master's house.'[182]

[175] Sumi Cho, 'From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from *Brown* to *Grutter*' (2005) 7 University of Pennsylvania Journal of Constitutional Law 809; Eduardo Bonilla-Silva, *White Supremacy and Racism in the Post-Civil Rights Era* (L Rienner 2001).

[176] Joshi (n 171) 1211.

[177] *Harper v Virginia State Board of Elections* 383 US 663, 663 (1966).

[178] *Shelby County v Holder*, 570 US 529 (2013).

[179] Joshi (n 171) 1185.

[180] *Johnson v McAdoo* 244 US 643 (1917); *Cato v United States*, 70 F3d 1103, III 1 (9th Cir 1995).

[181] *In re African-American Slave Descendants Litigation*, 375 F Supp 2d 721 (ND Ill 2005); *Cato v United States*, 70 F.3d 1103, III 1 (9th Cir. 1995) (n 181).

[182] Emma Coleman Jordan, 'A History Lesson: Reparations for What?' (2003) 58 NYU Annual Survey of American Law 557, 559.

The use of civil and constitutional rights has also been limited and risky for Native peoples. In the 1950s, Native claims were limited to those under the Indian Claims Commission, which allowed for the recovery of money but not return of Native lands,[183] and is discussed further as a limited form of reparation in Chapter 8. By the 1960s, Native tribes began to pursue the advancement of their interests through litigation through the development of the Native bar of attorneys.[184] This strategy led to a trend of the recognition of native rights to title in the 1970s and 1980s, recognising that federal Indian law was based on a government-to-government relationship between tribes and the United States.[185] Wilkinson notes that these successes became more limited in the 1980s and 1990s, similar to retrenchment against addressing racial injustice, with Justices Rehnquist, Scalia, and Thomas refusing to take seriously existing Native treaties.[186] Kirsten Matoy Carlson notes that at the US Supreme Court, Indian nations lose over 75 per cent of the cases litigated.[187] This rate suggests that efforts of Native tribes to assert their rights and power and address past injustices may be better pursued through Congressional legislation, through both general and tribal-specific legislation.[188]

The Court's approach to addressing Native sovereignty and jurisdiction has fluctuated in its effects as a form of epistemic injustice. In *Oliphant*, the Supreme Court declined to acknowledge criminal jurisdiction for Indian tribal courts over non-Indians.[189] In doing so, the Court concluded that the relevant treaty text was silent on this issue and as a result the Court could examine 'the common notions of the day' and 'the assumptions of those who drafted [the texts]' to resolve the issue.[190] Blackhawk is critical of this approach that remained rooted in a dominant ideology that sought to restrict the textual recognition and impact of Native sovereignty.[191] In contrast, in *Solem v Bartlett*, the Supreme Court concluded that three principles would evaluate the existence of any Congressional intent to diminish the borders of a Native

[183] Charles F Wilkinson, '"Peoples Distinct from Others": The Making of Modern Indian Law, 2006 Utah L. Rev. 379' (2006) 2006 Utah Law Review 379, 380.
[184] ibid 384.
[185] ibid 387–8.
[186] ibid 389; *Nevada v Hicks* 533 US 353 (2000).
[187] Kirsten Matoy Carlson, 'Congress and Indians' (2015) 86 University of Colorado Law Review 78, 81.
[188] ibid 156.
[189] *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978).
[190] ibid 207.
[191] Maggie Blackhawk, 'On Power and the Law: McGirt v Oklahoma' (2020) 2020 Supreme Court Review 1, 23.

reservation.[192] First, the Court affirmed that an explicit provision from Congress is required to diminish the boundary of a reservation. Second, the language must specifically state the intent to diminish a reservation or make a blatant statement from which the intent to diminish is presumed. Third, the Court made clear that historical evidence of intent to disestablish the reservation must be 'unequivocal' in order to be dispositive.[193] Such an approach raised the burden to displace existing reservations and Native borders. Maggie Blackhawk suggests that rights-based frameworks, such as that in *Brown*, have been used as a tool of settler colonialism against Native peoples. Instead, recognition of tribal sovereignty has benefited Native peoples as a recognition of power, not rights.[194] The potential of Native litigation in the United States thus remains predicated on recognition of Native sovereignty, not individual or collective rights granted by the state. Such litigation has the potential to redistribute ontological power, affirming the shared sovereignty and power on the territory of the United States/Turtle Island.

A recent Supreme Court decision illustrates the potential of an approach focused on power, rather than rights for Native peoples. In 2020 in *McGirt v Oklahoma*, the Supreme Court held that 'three million acres and most of the city of Tulsa, Oklahoma' was recognised by the United States as within reservation lands of the Muscogee (Creek) Nation, potentially leading to one-third to one-half of Oklahoma being part of a reservation.[195] In *McGirt*, the United States and the Muscogee (Creek) Nation had agreed on the borders of the reservation in a treaty that recognised Native sovereignty. The Supreme Court held that the text of the treaty would determine the outcome and that subsequent practices aiming to usurp sovereignty had not changed or made law. It notably stated: 'Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right'.[196] Such an approach affirms the potential for litigation to serve as a mechanism to address historical-structural injustice directly, providing measures of truth and reparation through the recognition of native title.

In contrast, Blackhawk suggests that the dissents by Justices Roberts, Alito, Kavanaugh, and Thomas are notable for their attempts to perpetuate national

[192] *Solem v Bartlett, 465 US 463 (1984).*
[193] ibid 471.
[194] Maggie Blackhawk, 'Federal Indian Law as Paradigm within Public Law' (2019) 132 Harvard Law Review 1787, 1798.
[195] *McGirt v Oklahoma, 140 S Ct 2452 (2020).*
[196] ibid 2482.

myths regarding American western frontier expansion, such as manifest destiny. The dissent's approach would shift the epistemic power away from a textual analysis that emphasised Native sovereignty and allow a contextual approach that would empower the court to find sufficient Congressional intent to diminish the borders of the reservation in the treaty.[197] In doing so, the dissent would have made legal an infringement of Native sovereignty that was non-consensual and violent.[198] The broader impact of the decision remains to be seen, with the Court noting that delay, laches, and other doctrines of civil litigation may bar Native nations from exercising power and jurisdiction.[199] Blackhawk argues that generations of Native advocacy have sought to emphasise the language of sovereignty, power, and conquest into law, 'thereby making the experience of Native people legible to formal lawmaking institutions'.[200] Such an approach can enable advocates 'to fracture the law in order to lower the barriers to reform' as a means of recognising and remedying historical-structural injustices.[201]

7.5 CONCLUSION

Each element of litigation has brought some element of justice for survivors but is also limited in significant ways. Criminal law responses to child sex abuse remain significant in undoing the self-created exceptionalism of Catholic priests and clericalism, and subject them to ordinary rules of criminal law.[202] However, the focus on clerical sexual abuse does not explain the limited number of prosecutions on sexual assaults against First Nations women and girls nor against African American women. The continuities of violence against women, especially women and girls of colour, should counter the idea that there was a historically exceptional period of sexual abuse. While prosecuting historical child sex abuse remains significant, this focus also obfuscates the absence of prosecution of non-sexual, state-sanctioned violence.

Civil litigation may bring 'some satisfaction and other therapeutic gains to victim-survivors and the community more generally, but law can never fully erase the injury or long-term impacts of violence'.[203] While civil litigation has

[197] Blackhawk (n 194) 19.
[198] ibid 20.
[199] *McGirt v Oklahoma*, *(n 195)* 2481.
[200] Blackhawk (n 194) 39–40.
[201] ibid.
[202] Thomas P Doyle, 'Clericalism: Enabler of Clergy Sexual Abuse' (2006) 54 Pastoral Psychology 189.
[203] Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice* (Palgrave Macmillan UK 2015) 5.

been used to gather institutional responsibility, the settlement of cases and the uneven nature of civil forms of responsibility across jurisdictions create arbitrary and invidious discriminations across victim-survivors.

There have been some significant achievements through litigation – the decisions in *Brown* in the United States or *Trevorrow* in Australia demonstrate that while historical legacies of state-authorised injustice can exceptionally be recognised by states, implementing remedies remains highly contested, challenging, and political. As a result, there are two competing tensions in the pursuit of accountability for historical abuse through litigation. Pablo de Greiff notes: 'Refraining from prosecuting mass violations is not an option since this omission in itself constitutes a new violation of international human rights obligations. The question is how to muster and organize available resources – institutional, political, human and material – to maximize the impact of criminal justice measures.'[204] On the other hand, in addressing the challenges facing the Stolen Generation, Pam O'Connor concludes '[l]itigation is a poor forum for judging the big picture of history'.[205] This insight appears true across the range of efforts for accountability for historical abuse across the countries examined.

Regarding canon law, to date it has been largely ineffective at providing justice for victims or punishment to perpetrator priests. In 2014, the Committee on the Rights of the Child expressed grave concern that the Holy See had neither acknowledged the extent of nor sufficiently addressed the crimes committed but had adopted policies and practices which have led to its continuation and to impunity for perpetrators.[206] Under Pope Francis, the Holy See has centralised the church's policies related to child abuse with mandatory reporting procedures from national bishops to the Holy See and the removal of the secrecy of canon trials. However, it remains to be seen whether this centralisation will result in more support for victims or be an instrument of impunity.[207]

The majority of international human rights mechanisms have been used, at best, to create domestic political pressure for states to engage in addressing historical abuse. The limits to this approach include a diminishing return to repeated engagement with international oversight bodies and a lack of

[204] 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff' A/HRC/27/56 para 37.
[205] Pam O'Connor, 'History on Trial: Cubillo and Gunner v The Commonwealth of Australia' (2001) 26 Alternative Law Journal 26, 30.
[206] United Nations Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of the Holy See' (2014) CRC/C/VAT/CO/2.
[207] Byrnes (n 17) 23.

effective emphasis on individual accountability. Each mechanism of litigation makes a partial contribution to addressing historical-structural injustices. The possibilities for doing so are limited by both the non-recent nature of the harms, the structure of litigation in the legal systems considered, and the willingness and capacity of courts to hear and acknowledge survivors as bearers of knowledge and truth, and to embrace the need for radical change prompted by the widespread or systemic harms they speak to.

8

Reparations

8.1 INTRODUCTION

Reparations represent an opportunity for those responsible for harm to redress victim-survivors in material and symbolic terms. Responsible actors providing reparations can acknowledge their responsibility for wrongdoing, and directly recognise victim-survivors as rights bearers. If successful, reparations can provide financial support, contribute to survivor healing, and rebuild trust between survivors and responsible actors. However, despite a significant amount of money in several national redress schemes for historical abuses, the approach taken fails to achieve these goals. Instead, redress often functions as a form of settlement and closure of claims regarding past wrongs and is limited in addressing inter-generational dimensions of historical-structural injustices. Section 8.2 considers the role of reparations as an element of transitional justice and previews the analysis of reparations across the four dimensions of power and emotions. Section 8.3 assesses the conceptual contribution of reparations to addressing historical-structural injustices, while Section 8.4 evaluates the contribution of existing redress schemes. Section 8.5 concludes by examining the potential and limits of reparations to address the mythical dimension of historical-structural injustices in material and symbolic terms.

8.2 REPARATIONS AS AN ELEMENT OF TRANSITIONAL JUSTICE

'Reparation' has been recognised as an umbrella term for different forms of redress, such as restitution, rehabilitation, compensation, apologies, or memorials.[1] Restitution, re-establishing the situation prior to the illegal act, constitutes a key

[1] United Nations Human Rights Committee, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add. 1326 May 2004, para 16.

objective of reparation in international law.[2] Where restitution is impossible or inappropriate given the gravity of the violation, compensation can be provided for the harm suffered, akin to tort law.[3] Originally, reparations were conceived of as a post-war remedy for inter-state conflict but have shifted to a more individual- and victim-focused approach in the post-World War II era,[4] with some significant and complex processes in contemporary post-conflict settings, such as in Colombia providing a range of measures to over 9 million victims.[5]

Reparations can be conceived of as mechanisms across the four dimensions of power and emotion examined in this book. First, reparations can operate as a material form of empowerment for individual victim-survivors, aiming to meet health needs, provide some financial acknowledgement of the harm suffered, and enable access to specialised services that may address a lack of empowerment or experiences of neglect or marginalisation during the time a victim was unredressed. By accessing reparations, victims may exercise individual agency and have their harm recognised and acknowledged by state authorities.[6] Reparations intend to serve a healing function for individual victim-survivors and communities,[7] addressing emotional distress or trauma. However, there is growing awareness of potential psychological damage or re-traumatisation caused by ill-designed processes, which may scrutinise the life choices and experiences of abuse by victim-survivors,[8] in a non-therapeutic way.

Second, reparations can affirm or challenge the distribution of power in existing structures. To date, reparations regarding historical-structural injustices have largely remained predicated on a corrective or interactional conception of justice, based on responding to harm of a victim-survivor by a

[2] *Factory at Chorzów Case (Germany v Poland) (Claim for Indemnity) (The Merits)* [1928] Permanent Court of International Justice Docket XIV: I. Judgment No. 13.

[3] Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer Berlin Heidelberg 2009).

[4] John Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (Rowman & Littlefield Publishers 2003) 4; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 17.

[5] Sanne Weber, 'Trapped between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39(1) Bulletin of Latin American Research 5.

[6] Pablo de Greiff, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006).

[7] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, Routledge 2011) 171; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 92.

[8] Stephen Winter, 'Two Models of Monetary Redress: A Structural Analysis' (2018) 13 Victims & Offenders 293, 303.

responsible individual, organisation, or state.[9] However, in recent years, a discourse of transformative reparations has emerged to respond to the perceived limitations of a purely corrective approach, by emphasising the need to address distributive justice, which takes into account the current needs of the population affected.[10] For Anna Reading, such a transformative justice approach to reparations 'is more usefully conceived as an assemblage of acts and processes across space and time that includes seeking transformations of material and nonmaterial reality that might be understood as emotional, spiritual, and affective capital along with transformations of material inequalities and economic capital'.[11] Such an approach suggests the potential for reparations to address structural injustices, within current distributions of wealth and resources and symbolic, non-material resources but remains to date without significant practice.

Third, reparations can serve or hinder epistemic justice. The process of acknowledging harm and the victim's status as rights holder may make a significant contribution to reparative epistemic justice.[12] Providing reparations may enable survivors to express their experiences of harm, how it affected their lives, and have that lived experience officially believed and acknowledged, vindicating their truth about what happened. However, a failure of acknowledgement and recognition, a lack of engagement with the voices and preferences of victim-survivors, or a lack of clearly communicated and agreed meaning regarding reparations may compound existing epistemic injustices.

Fourth, and relatedly, reparations can also be understood as an ontological form of power. Claire Moon suggests that reparations can 'regulate the range of political and historical meanings with which the crimes of the past are endowed and through which they are interpreted and acted upon'.[13] Reparations may contribute to the recognition of victim-survivors as rights holders, as those to whom duties to repair are owed by state and church

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

[10] Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625, 637.

[11] Anna Reading, 'The Restitutional Assemblage: The Art of Transformative Justice at Parramatta Girls Home, Australia' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (1st ed, Cambridge University Press 2019) 243.

[12] Ben Almassi and Philosophy Documentation Center, 'Epistemic Injustice and Its Amelioration: Toward Restorative Epistemic Justice' (2018) 34 Social Philosophy Today 95.

[13] Claire Moon, '"Who'll Pay Reparations on My Soul?" Compensation, Social Control and Social Suffering' (2012) 21 Social & Legal Studies 187, 188.

institutions and other non-state actors. However, such ontological power likely remains limited by the configuration of victim-survivors as rights holders within a liberal democratic framework, which is problematic in settler colonial contexts, as discussed below.

8.3 REPARATIONS AND HISTORICAL-STRUCTURAL INJUSTICES

In the case of gross violations of human rights, full healing, restitution, or compensation may be impossible: 'Nothing will restore a victim to the *status quo ante* after years of torture, sexual abuse, or illegal detention', or after the loss of a loved one.[14] In the absence of further meaning, compensation for human rights violations may function as 'hush money' or suggest a market value only for the experience of harm and loss.[15] In addition, addressing non-recent violence and/or violence beyond lived experience directly warrants a distinctive response, owing to the longer lapse of time between the harm experienced and attempts to redress it and the likelihood such reparations may extend to descendants of those originally harmed.

There are divergent views about the ability of reparations to achieve this. John Torpey finds that reparations are either commemorative: 'backward looking, not necessarily connected to current economic disadvantage'... or anti-systemic in nature: 'rooted in claims that a past system of domination (colonialism, apartheid, slavery, segregation) was unjust and is the cause of continuing economic disadvantage suffered by those who lived under these systems or their descendants'.[16] Torpey suggests that these two types of reparation should be regarded as the extremes on a spectrum.[17] Similarly, Janna Thompson distinguishes between synchronic and diachronic theories of reparations.[18] Synchronic theories refer to relationships between contemporaries, typically applicable to reparations in mainstream transitional justice, which concern relatively recent armed conflicts or authoritarian regimes. Reparations for historical-structural injustice are criticised when thought of

[14] United Nations, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (United Nations 2008) 10.

[15] Regula Ludi, *Reparations for Nazi Victims in Postwar Europe* (Cambridge University Press 2012) 8–9.

[16] John Torpey, '"Making Whole What Has Been Smashed": Reflections on Reparations' (2001) 73 The Journal of Modern History 333, 337.

[17] Torpey, *Politics and the Past* (n 4) 11.

[18] Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Polity 2002) 149.

in this way, where the original victim of injustice has perished.[19] Brophy notes that the highest profile argument against reparations in the United States is that 'the people currently asked to pay had nothing to do with the injustices of the past'.[20]

In contrast, diachronic theories refer to obligations incurred by past generations. For Thompson, as societies represent inter-generational communities, current members of these communities may claim reparations for past injustices, such as slavery and taking the lands of Indigenous peoples, committed against their ancestors.[21] On this account, reparations are not designed to primarily remedy the original wrongdoing per se but the loss of inheritance that acts negatively upon the link between generations. It remains a moral and political choice of current state and churches to accept the responsibility to provide reparations,[22] for harms where the original victims are now deceased, but their descendants are marginalised and harmed, based on the endurance and reproduction of historical-structural injustices.

8.3.1 *Reparation Schemes Considered*

Of the forty-one reparation schemes considered in this book in Appendix 2, the majority are commemorative and synchronic and fail to address the structural conditions that framed and created the context for specific abuses, or the structural conditions that have persisted or been reproduced after non-recent harms. A majority of the schemes provided to victim-survivors of historical abuse are *ex gratia*, arising as a gift, without admission of responsibility from the states or churches who administer the schemes. A second category of schemes represents the outcomes of the settlement of litigation. These range from private settlements with exclusively financial outcomes, to broad, complex, and public settlements, such as the Indian Residential Schools Settlement Agreement (IRSSA) in Canada.

In Ireland, the redress schemes have all been *ex gratia* and designed and administered by government. The Residential Institutions Redress Board

[19] Eric A Posner and Adrian Vermeule, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia Law Review 688.

[20] Alfred Brophy, 'The Cultural War over Reparations for Slavery' (2004) 53 De Paul Law Review 1181, 1202.

[21] Thompson (n 13) 149; Margaret Urban Walker, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014) 112.

[22] David C Gray, 'A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice' (2010) 87 Washington University Law Review 1043.

(RIRB) scheme was the result of survivor political and legal pressure and ran concurrently with the Commission to Inquire into Child Abuse (CICA) investigation, discussed in Chapter 6. It is the only scheme to have a financial contribution (of 11 per cent of the total cost) from churches, which were indemnified from any litigation for their contribution.[23] The Magdalene Restorative Justice Scheme arose as a response to the state's McAleese commission report.[24] A redress scheme for survivors of mother and baby homes has been proposed by government in 2022 and is progressing through parliament at the time of writing. There is no aggregated data on the settlement of claims against state or religious orders regarding historical abuses.

In Australia, redress schemes have been mandated by state or national governments, with varying levels of survivor advocacy and engagement. The 2018 National Redress Scheme, arising from a recommendation of the Royal Commission into Institutional Responses to Child Abuse, involved negotiations between state and federal governments and non-government institutions in all Australian jurisdictions to join the scheme, including the Catholic Church, Anglican Church, Salvation Army, Scouts Australia, YMCA Australia, the Uniting Church, and the Lutheran Church of Australia.[25] In 2021, the Australian government authorised national redress for the Stolen Generations, which will build on existing redress schemes from two Australian states. In addition, aggregated data gathered by the Royal Commission on Institutional Responses to Child Abuse reveals that over 3,000 claims of child sexual abuse against religious orders were resolved between 1995 and 2015. Catholic Church authorities made total payments of $268 million to settle claims of child sexual abuse between 1 January 1980 and 28 February 2015.[26] Daly and Davis note the rarity and value of this data to compare validation rates and monetary payments between civil litigation and redress schemes.[27] In addition, successive cases and legislation purported to enable Indigenous people to claim limited land rights where traditional ownership could be proven, discussed in Chapter 7.

[23] Patsy McGarry, 'Religious Congregations Indemnity Deal Was "A Blank Cheque," Says Michael McDowell' *The Irish Times* (Dublin, 5 April 2019).

[24] Claire McGettrick and others, *Ireland and the Magdalene Laundries: A Campaign for Justice* (I B Tauris & Company, Limited 2021) 127.

[25] Kathleen Daly and Juliette Davis, 'Unravelling Redress for Institutional Abuse of Children in Australia' (2019) 42 University of New South Wales Law Journal 1254, 1255–61.

[26] Royal Commission into Institutional Responses to Child Sexual Abuse, *Redress and Civil Litigation Report* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) 112.

[27] Kathleen Daly and Juliet Davis, 'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) 33(4) Current Issues in Criminal Justice 438, 458.

In contrast, Canada's reparations processes for historical abuse have been driven by litigation and facilitated by the ability of some groups of victim-survivors to leverage the class-action lawsuit mechanism. The highest profile and heavily used scheme relates to the IRSSA, established in 2006, as part of a settlement agreement of over 7,000 legal claims against the federal government and a number of churches. A second large settlement agreement in 2018 relates to the 'Sixties Scoop' of Indigenous children to foster care and adoption. Several other schemes result from class actions and concern abuse in closed institutions. In Canada, limited published data regarding the settlement of clerical abuse cases in non-residential settings makes a holistic evaluation challenging. In contrast to Australia, a Specific Claims Tribunal was established in 2008 to assess monetary damage claims made by a First Nation against the Crown regarding the administration of land and other First Nation assets. To date, CAN$ 8.8 billion has been paid out in 587 settlements.[28]

In the United Kingdom, a number of avenues of judicial reparation are available for victims of criminal harm. In England and Wales, victim-survivors can obtain reparation through awards of compensation by the criminal courts or by the Criminal Injuries Compensation Authority (CICA). However, the ongoing IICSA inquiry revealed that only around 0.02 per cent of criminal compensation orders relate to child sexual abuse.[29] In addition, a compilation of settlements against the English Catholic Church since 'records allow' to 2020 reveals that there have been 439 child sex abuse allegations against dioceses and forty-nine claims against religious orders.[30] On available data between 2003 and 2018, the Church of England addressed 217 claims for child abuse.[31] In addition, governments in Jersey, Northern Ireland, and Scotland have provided for reparations after and alongside public inquiries into institutional abuse. No aggregated settlement data is available in these jurisdictions.

[28] Government of Canada, 'Specific Claims Branch: Settlement Report on Specific Claims', Crown-Indigenous Relations and Northern Affairs Canada <https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx>.

[29] Alexis Jay and others, 'Accountability and Reparations' (IICSA 2019) CCS0719581022 09/19 64 <www.iicsa.org.uk/reports>.

[30] Alexis Jay and others, 'The Roman Catholic Church Safeguarding in the Roman Catholic Church in England and Wales' (Independent Inquiry into Child Sexual Abuse) 95 <www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>.

[31] Alexis Jay and others, 'The Anglican Church Safeguarding in the Church of England and the Church in Wales' (IICSA) 64 <www.iicsa.org.uk/document/anglican-church-safeguarding-church-england-and-church-wales-investigation-report>.

In the United States, there are no national reparation schemes regarding racial injustice and limited and unsatisfactory schemes for Native peoples. Aggregated data on the settlement of clerical sexual abuse cases against the Catholic Church reveal that 5,679 survivors received a total of approximately $2.5 billion, with an average settlement of $268,466.[32] The United States was the first to establish a formal process for the hearing of Native American land claims[33] but could only order monetary redress, not the return of Native lands.[34]

This universe of reparation schemes and settlement agreements demonstrates the significant cost of redress to date. However, both the experience of these schemes and their limitations have been a source of challenge and frustration for victim-survivors and inhibit their contribution to any transitional justice for historical-structural injustices.

8.4 ASSESSING REPARATION SCHEMES AND HISTORICAL-STRUCTURAL INJUSTICES

Assessing these reparation schemes is challenging in a context of limited publicly available reports on their processes and outcomes for survivors.[35] The full scope may be difficult to calculate, particularly in private settlements with church institutions, which do not disclose comprehensive figures.[36] In Ireland, a legal prohibition on applicants discussing engagement with the statutory RIRB has made assessment of its work highly challenging.[37] With these caveats in place, reparation schemes can be assessed across the four dimensions of power.

[32] Bishop Accountability, 'Sexual Abuse by U.S. Catholic Clergy Settlements and Monetary Awards in Civil Suits' <www.bishop-accountability.org/settlements/>; figures have not been validated by governmental inquiry or process.

[33] The Indian Claims Commission (1946) 60 Stat. 1050, 25 USC § 70 et seq.

[34] Nell Jessup Newton, 'Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System' in Roy Brooks (ed), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press 1999) 285.

[35] Kathleen Daly, *Redressing Institutional Abuse of Children* (Palgrave Macmillan UK 2014) 112.

[36] Timothy D Lytton, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008) 164.

[37] But see Sinead Pembroke, 'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme', Contemporary Justice Review (2019) 22 (January 2) 43.

8.4.1 *Dimension 1: Agency*

Reparations are a significant site of engagement between victim-survivors and states and churches, negotiating the establishment, cost, and procedure of any schemes. The record of such participation and ownership is mixed at best. Kathleen Daly notes that a majority of Canadian redress schemes and settlements involve negotiation with victim-survivors or, at least, their legal representatives, while four Canadian agreements only involved negotiations between legal representatives, with little or no victim participation.[38] In some instances, survivors were critical of the length of settlement proceedings that exhausted survivors and wasted funds of the defendants that could have helped survivors.[39] In the Jericho Hill, and Nova Scotia redress schemes, existing accounts from survivors were negative of the redress experience.[40] In contrast, the redress schemes for Grandview and St John's and St Joseph's were the product of significant participation from victim-survivor advocacy groups, leading to enhanced trust and reconciliation and a high validation and acceptance of claims by victim-survivors.[41] Both schemes allowed victims the opportunity to describe their own experiences and explain the consequences on their lives.[42] However, despite positive reviews from many victim-survivors, Daly noted that the language used for the Grandview redress scheme of 'healing' was misleading and premature.[43]

Within the Canadian cases, Daly notes the experiences of participation for victim-survivors, 'depend on the bargaining power of the advocacy group and the size and strength of the legal team'.[44] The most notable example was the IRSSA, which was the result of extensive engagement with victim-survivors,

[38] Daly (n 35) 146.
[39] 'Final Report: Review of the Needs of Victims of Institutional Abuse' (Law Commission of Canada 1998) 74.
[40] Lupin Battersby, Lorraine Greaves and Rodney Hunt, 'Legal Redress and Institutional Sexual Abuse: A Study of the Experiences of Deaf and Hard of Hearing Survivors' (2008) 10 Florida Coastal Law Review 67, 104–5; Fred Kaufman, 'Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse' (2002) 297 <https://novascotia.ca/just/kaufmanreport/fullreport.pdf>; 'Final Report: Review of the Needs of Victims of Institutional Abuse' (n 39) 84–5.
[41] Kaufman (n 40) 356.
[42] Daly (n 35) 172; Bruce Feldthusen, Oleana AR Hankivsky and Lorraine Greaves, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 Canadian Journal of Women and Law 66.
[43] Daly (n 35) 175.
[44] ibid 119–20.

advocates, and their legal representatives.[45] Reimer et al found that 31 per cent of survivors surveyed were positive about their experiences with the common experience payment component of IRSSA, with most saying reparations were pragmatically useful in providing financial assistance but went on to suggest that 'the satisfaction derived from the CEP money [Common Experience Payment] was for the most part temporary'.[46]

In contrast, a majority of Australian redress schemes are stipulated by government, with limited evidence of victim participation or consultation.[47] In contrast, the recent National Redress Scheme resulted from significant engagement by victim-survivors with the Royal Commission on child abuse that recommended a national approach and with subsequent government negotiations.[48] However, a recent review of this scheme found it fundamentally unsatisfactory despite this engagement, noting: 'The Scheme's enabling legislation states, "Redress under the Scheme should be survivor focussed." It currently is not … The feedback of survivors has been consistent about the need for change.'[49]

In the United Kingdom, a 2019 review of criminal compensation schemes by the UK Victims' Commission was highly critical of its operation, finding it 'extremely traumatic for victims who have to repeat details of the crime numerous times'.[50] In 2019, the UK IICSA reported that 'none of the avenues for redress which we have examined – civil justice, criminal compensation (CCOs and CICA awards) or support services – is always able to adequately provide the remedies which are sought as accountability and reparations for victims and survivors of sexual abuse'.[51] IICSA's analysis indicated a number of limitations to even bespoke reparation schemes: acknowledgement and apology may not be feasible where offending individuals or institutions no longer exist or do not want to engage with a redress process;[52] a redress scheme may

[45] ibid 120.
[46] Gwen Reimer and others, *The Indian Residential Schools Settlement Agreement's Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation 2010) xiv.
[47] Daly (n 35) 123.
[48] Royal Commission into Institutional Responses to Child Sexual Abuse (n 26).
[49] Robyn Kruk, 'Second Year Review of the National Redress Scheme' (Department of Social Services 2021) 11–13.
[50] 'Compensation without Re-Traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation' (Victims' Commissioner for England and Wales 2019) <https://victimscommissioner.org.uk/published-reviews/compensation-without-re-traumatisation-the-victims-commissioners-review-into-criminal-injuries-compensation/>.
[51] Jay and others, 'Accountability and Reparations' (n 29) vi.
[52] ibid 95.

not afford victim-survivors a 'day in court', which may be seen as beneficial; a common experience or tariff approach may seem limited or impersonal.[53] In addition, if the reparation scheme is not funded by the responsible institution, it bears little difference to existing statutory schemes and does not communicate any sense of accountability for the responsible institution.[54] The Northern Irish and Scottish redress schemes were the result of extensive lobbying and negotiation by victim-survivors.[55]

The RIRB and the Magdalene Laundries redress scheme in Ireland were the result of advocacy from victim-survivor organisations, but the implementation of the Magdalene scheme in legislation and policy resulted in the weakening of many of the benefits first proposed.[56] The Magdalene Scheme was subsequently found by the Ombudsman to have been maladministered.[57] In 2019 consultations with government, many survivors described their experiences of the RIRB process as adversarial, difficult, traumatic, and negative while Caranua was described as bureaucratic and unnecessarily unwieldy.[58] Sinead Pembroke found during her research on CICA and RIRB that, 'the majority of survivors that were interviewed, felt the inquiry and redress process triggered feelings of shame and stigma in relation to their time in the institution'.[59] In addition, many participants also felt that 'their solicitor had benefitted financially from their personal trauma'.[60] Fionna Fox and AnneMarie Crean note: 'Victims report that the Redress Board was

[53] ibid 96.

[54] ibid.

[55] Patricia Lundy and Kathleen Mahoney, 'What Survivors Want: Part Two A Compensation Framework for Historic Abuses in Residential Institutions' (Ulster University 2016) <https://pure.ulster.ac.uk/ws/portalfiles/portal/11546232/WSW+FINAL+APPROVED.pdf> (accessed 7 October 2022); Andrew Kendrick, Sharon McGregor and Estelle Carmichael, 'Consultation and Engagement on a Potential Financial Compensation/Redress Scheme for Victims/Survivors of Abuse in Care' (Centre for Excellence for Children's Care and Protection 2018) <https://strathprints.strath.ac.uk/70945/> (accessed 7 October 2022).

[56] McGettrick and others (n 24) 128–40.

[57] 'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (Office of the Ombudsman 2017).

[58] Barbara Walshe and Catherine O'Connell, 'Consultations with Survivors of Institutional Abuse on Themes and Issues to Be Addressed by a Survivor Led Consultation Group' (2019) 4 <www.education.ie/en/Publications/Education-Reports/consultations-with-survivors-of-institutional-abuse-on-themes-and-issues-to-be-addressed-by-a-survivor-led-consultation-group.pdf>.

[59] Sinead Pembroke, 'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme' (2019) 22 Contemporary Justice Review 43, 51.

[60] ibid 52.

adversarial, confrontational and often times antagonistic, particularly when their claims of abuse were denied by the respective Religious Order.'[61]

In the United States, while Congress hoped the Indian Claims Commission would be a means of avoiding litigation, it in fact adopted the culture and practices of the courts, and its hearings became long adversarial affairs.[62] Jennifer Balboni and Donna Bishop note that in Boston in the United States, clerical sexual abuse survivors 'detested' the sense that they were in competition with other survivors for a fixed pot of money, which was awarded based on a ranking of who was most 'damaged'.[63]

The majority of existing schemes consist of financial payments to victim-survivors. In a majority of cases, victim-survivors who engaged with a reparation scheme were obliged to waive rights to sue government or church entities for similar claims of abuse.[64] This requirement is typically intended to incentivise participation in the scheme and avoid double compensation. Disappointment with the amount received is a common finding across several schemes.[65] Survivors were unhappy when the Western Australian government reduced the maximum payment under its Redress WA scheme from $80,000 to $45,000, due to a larger than expected number of applicants.[66] In Ireland, Enright and Ring note that although the RIRB scheme was announced as being intended to provide compensation roughly equivalent to civil litigation, 'the average payment was roughly half that made in successful civil cases against religious orders'.[67]

In addition to financial payments, several schemes provided access to counselling or reclaiming medical, educational, or legal expenses.[68] Several schemes were also accompanied by apologies, addressed separately in Chapter 9. Several of the more ambitious schemes also contained elements of memorialisation and museums, regrettably beyond the scope of this book.

[61] Fionna Fox and AnnMarie Crean, 'Ryan Report Follow Up: Submission to the United Nations Committee against Torture Session 61' (Reclaiming Self 2017) 23.
[62] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008) 28–9.
[63] Jennifer M Balboni and Donna M Bishop, 'Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation' (2010) 13 Contemporary Justice Review 133, 152.
[64] Daly (n 35) 136.
[65] ibid 144; James Gallen and Kate Gleeson, 'Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians' (2018) 14 International Journal of Law in Context 43, 52.
[66] Royal Commission into Institutional Responses to Child Sexual Abuse (n 26) 96.
[67] Máiréad Enright and Sinéad Ring, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68, 75.
[68] Daly (n 35) 139.

Some schemes address reparations for cultural property, such as the 1990 US Native American Graves Protection and Repatriation Act (NAGPRA).[69] In Australia, some reparation packages do not have financial payments to survivors but instead focus on access to services and other benefits. For Forgotten Australians, one of the principal forms of redress in this period was the establishment of Find & Connect Support Services in 2010. It provides information on family tracing, personal records, counselling, and other support for all those placed in Australian orphanages, children's homes, and other institutions. The website was developed by 'a team of historians, archivists, and social workers'.[70] A 2014 evaluation of the service found it 'demonstrated considerable progress in meeting the needs of the Forgotten Australians and Former Child Migrants who are using their services', though noting some regional and institutional variation in access to records.[71]

Existing empirical and anecdotal evidence suggests that while victim-survivor empowerment may be experienced in advocating and applying for reparations, the experience of satisfaction or benefit from such interactions may be fleeting. Daly also notes that participation can be both a justice interest and an emotional burden to survivors: 'Participation itself can create emotional turmoil and dredge up bad memories. Complex processes and delays compound the problem.'[72] As a result, while survivor participation in advocacy design and implementation of reparation schemes may offer an episodic experience of empowerment, without more it is unlikely to change the structural distribution of power or the manner in which knowledge is shared across power in state or church institutions. In doing so, participation may also cause significant distress to survivors. Schemes, such as the RIRB and Magdalene schemes in Ireland, have proved largely unsatisfactory from survivor perspectives. Although several schemes combine financial payments with access to health services or information tracing, further research is needed to assess whether and how these schemes contributed to improving outcomes for survivors.

8.4.2 *Dimension 2: Structure of Reparations*

Existing reparation schemes largely operate within, rather than change existing legal and political structures of power. First, victim-survivor

[69] Stephen E Nash and Chip Colwell, 'NAGPRA at 30: The Effects of Repatriation' (2020) 49 Annual Review of Anthropology 225.
[70] Shurlee Swain, 'Stakeholders as Subjects' (2014) 36 The Public Historian 38.
[71] Australian Healthcare Associates, 'Evaluation of the Find and Connect Services Final Report' (Department of Social Services 2014) 2–3.
[72] Daly (n 35) 170.

participation with these schemes is likely to intersect with the structural feature of the expertise (or lack thereof) of state and church officials who will negotiate, design, and implement reparation schemes and who, as Stephen Winter notes, have the advantage of being 'repeat players', including 'the capacity to deploy long-term strategies that develop favourable precedents and rules. Whereas survivors usually participate in only one case (their own), the state employs experts who conduct hundreds of cases, enabling those officials to develop personal relationships with adjudicators, cultivate a reputation for credibility, and learn from experience.'[73]

Second, no national reparation scheme has attempted to be comprehensive, and instead many schemes are received with victim-survivor unhappiness at perceived limitations in the completeness, scope, and comprehensiveness of reparation schemes. Completeness refers to the 'ability of a programme to reach every victim, that is, turn every victim into a beneficiary'.[74] In some instances, the geographical scope is narrow, excluding some victims in the state. In the absence of nationwide reparation schemes in the United States regarding racial violence, several state- and city-level reparation initiatives have emerged.[75] Similarly, some states in Australia provided reparations for the Stolen Generations, with the national government only doing so in 2021. Narrow scope can occur even in schemes related to closed institutions nationwide. The Irish Magdalene Laundries scheme also initially failed to include all relevant institutions associated with Magdalene Laundries.[76] In making such determinations of scope, Claire McGettrick et al emphasise how the state and church sought to retain power and control of the process of survivor applications, with the relevant religious order 'verifying' a survivors' 'duration of stay'.[77] Other criticisms relate to the comprehensiveness of the schemes, which refers to the types of crime or harm that reparations seek to redress.[78] The majority of reparation schemes for historical abuse relate to child sexual abuse. This reflects the focus both of inquiries and of accountability mechanisms discussed in Chapters 6 and 7. This can be seen in the Australia National

[73] Stephen Winter, 'State Redress as Public Policy: A Two-Sided Coin' (2019) 31 Journal of Law and Social Policy 34, 38.
[74] United Nations (n 14) 15.
[75] Desmond S King and Jennifer M Page, 'Towards Transitional Justice? Black Reparations and the End of Mass Incarceration' (2018) 41 Ethnic and Racial Studies 739.
[76] 'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (n 57) 24–5; *MKL and DC v Minister for Justice and Equality* [2017] IEHC 389.
[77] McGettrick and others (n 24) 135.
[78] United Nations (n 14) 19.

Redress Scheme, limited to sexual abuse, or in the IRSSA, which excluded violations of Indigenous cultural rights. The Magdalene Laundries scheme only provided redress for the duration of stay in these institutions and not for forced labour or any other human rights violations.[79]

Even the broadest schemes do not claim to address the full scope of historical systems of harm and oppression, such as slavery, settler colonialism, or patriarchal power structures. Individualised schemes are important to recognise the lived experience of victim-survivors of particular harms. However, it is also significant to frame those individualised experiences as part of larger patterns of harm, particularly if reproduced over time as historical-structural injustices. Catherine Lu argues, 'In cases where structural injustice enables widespread, coordinated, legalized, and normalized individual, collective, or corporate wrongdoing … a narrow account of reparation that aims to settle accounts only between the particular agents involved is no longer appropriate for determining the field of responsible agents for victim reparations.'[80]

There is some evidence of the potential for reparations to contribute in this way. Anti-systemic schemes begin by providing compensation for detention within an institutional context that was legal at the time it took place, which may offer flat reparation per year institutionalised, and/or additional reparation for specific harms alleged, such as physical and sexual abuse or neglect.[81] Daly is in favour of this approach: 'by linking money to time spent in an institution, the amount may better symbolize claimants' realities of institutional life than a tort logic of "pain and suffering", which is tied to incidents of abuse.'[82] The provision of reparation for detention within an institutional setting that was legal at the time it took place demonstrates the ability of states and churches to revisit historical contexts and recognise moral and political wrongdoing, rather than rely merely on the settlement of legal claims alone. This opens up the potential for reparations to be provided for other historical contexts outside institutional settings, including to descendants.

Providing reparations for historical-structural injustices, such as the legacy of slavery and Jim Crow in the United States, will require extending eligibility for reparations to the descendants of those who suffered historical harm as well as those who suffer contemporary forms of harm. Descendants may claim eligibility by arguing either that the historical injustice has enduring effects in

[79] McGettrick and others (n 24) 128.
[80] Lu (n 9) 235.
[81] Winter (n 8) 293–4.
[82] Daly (n 35) 128.

the present or that as heirs to original victims they are entitled to remedy.[83] Evans and Wilkins note that these arguments remain challenging, 'because the exact influence of specific past wrongs upon specific present conditions is difficult to determine'.[84] However, of existing schemes, eligible relatives or estates of deceased victims/survivors were able to apply for and/or receive payment in four schemes in limited circumstances, including the Irish RIRB scheme and Canadian Residential Schools scheme. Other schemes in Western Australia and Jersey explicitly excluded descendants. Other schemes, such as the Scottish Redress Scheme, have recognised the need for priority groups within the pool of eligible applicants, typically those of advanced age or subject to life-threatening or terminal illnesses. As a result, it remains possible to construct a reparations scheme with an inter-generational scope, where there is sufficient political will to support this. The problem is political, not legal, and reflects the limits of law's ability to change culture and power structures alone. Interrogating the critiques of the structure and limits of existing schemes reveals their formal elements are capable of adaption to address historical-structural injustices in a more direct and comprehensive manner.

8.4.3 *Epistemic Justice and Reparations*

Reparations are often delivered through administrative, rather than litigation-based processes, claimed to be more efficient and less traumatic for survivors than litigation.[85] However, the existing cases studied here challenge that assumption. Limited survivor voice and epistemic justice in these schemes compound their direct and structural limitations. In the cases of private settlements, it is impossible to assess whether any epistemic justice is achieved for survivors or indeed the broader emotional experience for survivors. The lack of transparency in church settlements of clerical sexual abuse cases makes it difficult for survivors to compare settlements and share experiences of engaging with church authorities and lawyers and for such settlements to have any public communicative value, even if individual victim-survivors receive private apologies or appropriate processes.

[83] Janna Thompson, 'Historical Injustice and Reparation: Justifying Claims of Descendants' (2001) 112 Ethics 114, 116.
[84] Matthew Evans and David Wilkins, 'Transformative Justice, Reparations and Transatlantic Slavery' (2019) 28 Social & Legal Studies 137, 147.
[85] de Greiff (n 6) 459.

Of government-mandated schemes, only some provided the opportunity for oral hearings, with others relying on the submission of documents or application forms by survivors. Daly also notes that the larger the pool of potential claimants, the less likelihood of oral hearings or provision of benefits and services beyond financial compensation.[86] Regarding the Canadian IRSSA, there was both a flat CEP and an individualised Independent Assessment Process. In evaluating the CEP, Reimer et al noted that a third of those in their sample 'felt they were not believed in their first application'.[87] Fifteen per cent recognised reparations as symbolically important as a form of acknowledgement and recognition of wrongdoing.[88] However, Reimer et al also note engagement with this redress process was re-traumatising and distressing for some and was associated with a rise in 'accidental deaths, suicides, and homicides', which contributed to a 'general demoralisation' in some communities.[89] Other victim-survivors viewed the payments as inadequate or as hush money.[90] Participants generally agreed that the compensation process seemed 'inconsistent, leaving them at the mercy of an outside agency in control of yet another aspect of their lives'.[91] In Jennifer Matsunaga's empirical research, survivors criticised the CEP process as both faceless and requiring them to prove their presence in a residential school, despite a lack of ease in retrieving state and church records.[92] This research indicates the limits of reparations as a site of epistemic justice, with one government official stating: 'many application forms would come in covered in writing and sometimes there would be pictures and we just didn't know what to do with all that extra information'.[93] Negative victim-survivor experiences were reported regarding the redress scheme for the Nova Scotia Institutions, concluding claimants were 'presumed to be guilty of fraud and not treated with respect'.[94] Subsequent interviews of victim-survivors describe negative experiences of feeling disrespected and not believed.[95]

Regarding Irish redress schemes, Sinead Pembroke notes: 'the redress scheme application procedure itself (writing a detailed statement, and an

[86] Daly (n 35) 138.
[87] Reimer and others (n 46) 32.
[88] ibid 50.
[89] ibid 44.
[90] Daly (n 35) 181.
[91] Reimer and others (n 46) xiii.
[92] Jennifer Matsunaga, 'The Red Tape of Reparations: Settler Governmentalities of Truth Telling and Compensation for Indian Residential Schools' (2021) 11 Settler Colonial Studies 21, 29.
[93] ibid 30.
[94] Kaufman (n 40) 297.
[95] 'Final Report: Review of the Needs of Victims of Institutional Abuse' (n 39) 84–5.

assessment by a psychologist in order to verify their trauma), resulted in psychological wounds being opened up after years of consignment to the deepest reaches of the mind. This had a negative effect on some survivors' personal lives, and resulted in marital breakdowns.'[96] AnneMarie Crean and Fionna Fox write, 'The Redress Board in effect became another forum where once again the balance of power was unfairly tilted against the victim.'[97] In particular, they emphasise that 'victims report a lack of understanding of their individual circumstances coupled with a failure by the Board to understand and empathise with their past experiences of abuse and ongoing issues as a result'.[98] Máiréad Enright and Sinéad Ring frame such experiences as testimonial injustices, 'where victim-survivors are prevented from acknowledgement as a giver of knowledge and as an informant', noting it a particular injustice arising where it relates to the survivors' construction of their own childhood.[99] They note the state's broader responses to historical abuses constitute a form of epistemic injustice: 'Redress schemes have financialized the wrongs done to victim-survivors and eclipsed other dimensions of their claims. Victim-survivors feel that the injuries they suffered are not heard and recognized as wrongs.'[100] The Magdalene Laundries scheme was criticised by the state's own Ombudsman for denying the evidential value of women's own testimony: 'There was an overreliance on the records of the congregations and it is not apparent what weight if any was afforded to the testimony of the women and/or their relatives.'[101] These forms of epistemic injustice confirm that administering reparations through less complex means is no guarantee of avoiding distress to survivors. Instead, the limitations of the approaches adopted across jurisdictions demonstrate the real risk of re-traumatisation for survivors seeking reparations. The lack of capacity of those administering redress schemes to hear, accept, and acknowledge the experiences and voices of victim-survivors confirms reparations as a major site of epistemic injustice in dealing with the past. In attempting to simplify processes, whether through documentary applications or individualised assessments, many redress schemes demonstrate the inability to address the needs of victim-survivors and caution expectations for reparations for historical-structural abuses.

[96] Pembroke (n 59) 52.
[97] Fox and Crean (n 61) 22.
[98] ibid.
[99] Enright and Ring (n 67) 85.
[100] ibid.
[101] 'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (n 57) 8.

8.4.4 *Ontology and Reparations*

In some instances, particularly the settlement of class actions, reparations may represent the only mechanism for addressing the past and may by design fail to capture elements of truth seeking, accountability, or apology discussed in other chapters. As a result, reparations or settlements may be the sole contribution to the development of an ontological framing of victim-survivors. In the absence of an alternative narrative communicated around the redress, Daly concluded that survivors 'equated money with their injuries, suffering, and value as a person', which inevitably was re-traumatising.[102] Many survivors 'objected to the use of categories to define and rate their childhood abuse experiences', one saying 'it's like they were labelling beef'.[103] Negative experiences of Canadian redress schemes are united in the view that 'the payment was interpreted as monetary exchange for abuse or injuries suffered, and a survivor's "worth" was not recognized'.[104]

The absence of communicative messages may also be significant. For instance, the Irish government has failed to memorialise either context of the industrial schools or Magdalene Laundries, re-emphasising the financial dimensions of redress in both instances and rendering redress something provided to individual applicants alone. Instead, in the absence of any mention of rights or responsibility, the meaning of the scheme becomes nebulous. McGettrick et al write regarding the Magdalene scheme: 'The government's designation of the Scheme as "ex gratia" effectively functioned as a declaration that neither State departments not religious congregations were to be treated as wrongdoers who might be inclined to treat survivors with a lack of respect.'[105] The *ex gratia* approach excludes the possibility of recognising survivors as rights holders and the state and church as duty bearers.

Sunga argues that 'unless there is a clear articulation that a monetary award does not signify a market transaction, money will tend to indicate some form of exchange for abuse injuries.'[106] The consequences are that money payments may leave survivors to feel that 'their worth has not been understood or acknowledged by the party responsible for the abuse'.[107] For Sunga, an

[102] Daly (n 35) 179.
[103] 'Final Report: Review of the Needs of Victims of Institutional Abuse' (n 39) 83.
[104] Daly (n 35) 179.
[105] McGettrick and others (n 24) 135.
[106] Seetal Sunga, 'The Meaning of Compensation in Institutional Abuse Programs' (2002) 17 Journal of Law and Social Policy 39, 40.
[107] ibid 41.

alternative and explicit symbolism is necessary.[108] Sarah Pritchard suggests the potential for such money to communicate the vindication of survivor rights and the responsibility of offending actors.[109] Daly notes one common critique emerges that the opportunity for reparations to communicate a clear symbolic message was not taken: 'Most survivors did not see the payment as symbolic, as recognition for injury and solace for pain. Instead, they equated the amount received in an individualized scheme to the level of abuse and injury they had experienced and to their "worth". They did not understand why others received more money than they did.'[110] As a result, Daly concludes the word 'compensation' should be removed from redress schemes, which should avoid any link to a market value meaning and make explicit links to other non-monetary forms of redress or mechanisms to address the past.[111]

An emphasis on symbolism challenges the dominant *ex gratia* approach to reparations for historical abuses, based more on the benevolence of the provider of the scheme than as a matter of recognition of rights. As a result, the symbolism of reparations involves questions of the epistemic justice and ontological power involved in reparations – what are reparations understood to symbolise, who gets to be heard on this issue, and how does it relate to the broader meaning and knowledge in society? The role and participation of victim-survivors will be key in legitimating reparations in their content, processes, and potential symbolism. Lisa LaPlante argues that 'the "positionality" of victims will influence what they perceive to be necessary to feel repaired' and that a government should 'adopt a participatory approach while planning and implementing its reparation programs to accommodate better and manage the multiple justice aims and expectations of victims'.[112]

In the case of reparations in settler colonial contexts, existing schemes remain predicated on existing settler authority, structures, and social ontology, and involve 'inserting the Indigenous person into a reaffirmed colonial universe, where practices of economic, symbolic, and linguistic domination sit unchallenged'.[113] Rebecca Tsosie and others suggest that reparations for Indigenous peoples involve asserting claims for recognition of cultural and

[108] ibid 60.
[109] Sarah Pritchard, 'The Stolen Generation and Reparations' (1998) 4 University of New South Wales Law Journal 259, 264.
[110] Daly (n 35) 195.
[111] ibid 196.
[112] Lisa J Laplante, 'Just Repair' (2015) 48 Cornell International Law Journal 513, 514.
[113] Andrew Woolford, 'Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada' (2013) 3 Settler Colonial Studies 65, 77.

political rights as separate nations.[114] Regarding Indigenous land claims in Australia, Aileen Moreton-Robinson argues that 'Indigenous ontological relations to land are incommensurate with those developed through capitalism, and they continue to unsettle white Australia's sense of belonging, which is inextricably tied to white possession and power configured through the logic of capital and profound individual attachment'.[115] Recognition of these dimensions of Indigenous claims challenges a synchronic or commemorative account of reparations and requires reparations to be part of a broader dismantling of systems of assimilation, rather than part of them. To date, existing reparations processes neglect this dimension.

8.5 TRANSFORMING REPARATIONS FOR HISTORICAL-STRUCTURAL INJUSTICES: THE IMPACT ON NATIONAL MYTHS

The existing practice of reparations struggles to capture the distinctive circumstances of historical-structural injustices and continues a pattern of ambivalent success for reparation programmes familiar to mainstream transitional justice. Instead, the intention of reparations for historical-structural injustices should be not to undo or repair the harms done but to change the meaning of those harms by contributing to alleviating the material consequences of the harms today. In that way, reparations can contribute to either affirming or challenging the national and religious myths that undergird historical-structural injustices in each context explored in this book.

The design, process, and outcomes of reparations in Ireland miss the opportunity to communicate to victim-survivors and to society more broadly the acknowledgement of state and church responsibility, the status of victim-survivors as rights holders, and the admission of the inadequacy of the redress offered, despite significant expense. The processes of Irish redress schemes have been criticised by international human rights bodies and national civil society organisations.[116] Irish redress is inarticulate about its meaning and risks

[114] Rebecca Tsosie, 'Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations' in Jon Miller and Rahul Kumar (eds), *Reparations: Interdisciplinary Perspectives* (Oxford University Press 2006) 44.

[115] Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015) xxi; 3–19.

[116] United Nations Committee on the Rights of the Child, Concluding Observations on Ireland, CRC/C/IRL/CO/3-4; United Nations Committee on Economic Social and Cultural Rights, United Nations Concluding Observation on Ireland, E/C.12/IRL/CO/3; United Nations Human Rights Committee, Concluding Observations on Ireland, CCPR/C/IRL/CO/4; United Nations Committee against Torture (n 57).

forming a type of state shame that both acknowledges and recovers state authority and control over survivors' lives and interests.[117] In the absence of clearly communicated public narratives around these schemes, the Irish approach results in amplifying the risk that the money values and the distressing processes of reparations are all that are remembered from this attempt to address the past. To transform the Irish practice of reparations requires at a minimum changing survivor and public access to state and church archives regarding historical-structural abuses, currently highly restricted for survivors.[118]

The Australian experience shows growing appreciation of the need for redress as a response to historical abuses. The role of information and access to records is particularly prominent in Australia as an alternative to non-financial forms of reparation. However, even the most ambitious schemes, such as the National Redress Scheme for child sexual abuse, reflect a divergence between a willingness to offer reparation to those who have experienced definable and closed categories of harm and resistance to the idea of transformative approaches to reparations that would involve more profound and existential public debates about justice for colonisation and harms to First Nations peoples.

In Canada, the IRSSA represents the most ambitious and complex reparations scheme regarding historical abuses completed to date. While its approach has much to commend it, its scope reveals the enormity of the challenges facing reparations for entire systems of settler colonisation, of which residential schools and closed institutions form only a part. It is possible to suggest that, although reflecting a significant legal victory for survivors, and significant cost to state and church institutions, the redress scheme may not disrupt a settler colonial or assimilationist ontology. Its failure to incorporate Indigenous forms of knowledge suggests the potential continuation of the peaceful settler Canadian myth.

In addition to existing settlement of child abuse cases in the United States, calls for reparations regarding slavery in the United States have a long heritage. The fundamental challenge to such proposals is the implications of what reparations would mean for the national US political self-image and national myth.[119] There were historical, unsuccessful attempts to provide reparations

[117] Enright and Ring (n 67) 86–8.

[118] Maeve O'Rourke, 'Ireland's "Historical" Abuse Inquiries and the Secrecy of Records and Archives' in Lynsey Black, Louise Branigan and Deirdre Healy (eds), *Histories of Punishment and Social Control in Ireland: Perspectives from a Periphery* (Emerald Publishing 2022).

[119] Charles P Henry, 'The Politics of Racial Reparations' (2003) 34 Journal of Black Studies 131, 132.

for slavery, intending to provide each family of ex-slaves 'not more than forty acres of tillable land'.[120] Instead, Congress enacted the Southern Homestead Act in 1866, which provided eight-acre plots in five Southern states for former slaves to purchase, requiring capital for such purchases and not functioning effectively as reparation, and was in any event repealed by 1876.[121] Jeffrey Kerr-Ritchie notes the ongoing resonance of forty acres: 'By the 1930s, "forty acres" had become a collective memory among older generations of former slaves, an indication of the failure of the federal government to fulfill its promise to make emancipation mean something tangible, material, and longlasting.'[122] The idea of forty acres thus moved from a synchronic and diachronic conception of reparations over time.

Reparations continue to be advocated for regarding slavery, racism, and racial violence into the present day,[123] but with significant focus on reparations for slavery and a lessened focus on reparations for lynching and other acts of racial violence within living memory.[124] In 1969, the civil rights leader James Forman presented the Black Manifesto to American churches, demanding that they pay blacks $500 million in reparations.[125] Similar demands for reparations were made in the twentieth century by groups such as the National Coalition of Blacks for Reparations in America, the Black Radical Congress, Student Nonviolent Coordinating Committee, the Black Panthers, and the Black Economic Development Conference.[126] In 1989, Congressman John Conyers Jr. (D-MI) introduced the Commission to Study Reparations Proposals for African Americans Act and has consistently reintroduced the bill in subsequent

[120] Roy Brooks (ed), 'W. Tecumseh Sherman, Special Field Order No. 15: "Forty Acres and a Mule"' in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press 1999).

[121] Jeffrey Kerr-Ritchie, 'Forty Acres, or, an Act of Bad Faith' (2003) 5 Souls 8.

[122] ibid 21.

[123] Charles Ogletree, 'The Current Reparations Debate' (2003) 36 UC Davis Law Review 1051; Anthony Cook, 'King and the Beloved Community: A Communitarian Defense of Black Reparations' (2000) 68 George Washington University Law Review 959; Adjoa Aiyetoro, 'Formulating Reparations through the Eyes of the Movement' (2003) 58 NYU Annual Survey of American Law 457; Mari Matsuda, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323; Vincene Verdun, 'If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans' (1992) 67 Tulane Law Review 597; Alfred L Brophy, *Reparations: Pro & Con* (Oxford University Press 2006).

[124] Emma Coleman Jordan, 'A History Lesson: Reparations for What?' (2003) 58 NYU Annual Survey of American Law 557.

[125] Robert Fullinwider, 'The Case for Reparations' (2000) 20 Report from the Institute for Philosophy and Public Policy 1, 1.

[126] Robin DG Kelley, *Freedom Dreams: The Black Radical Imagination* (Beacon Press 2008) 118, 124–9.

years as House Resolution 40. In 2021, the resolution cleared the US House Committee on the Judiciary and at the time of writing was eligible for a full vote.

Thomas Craemer estimates the potential cost of slavery reparations by establishing 'the present value of U.S. slave labor in 2009 dollars to range from $5.9 to $14.2 trillion'.[127] In his view, the likelihood of such reparations depends less on legal process than on sufficient political will.[128] That political will, in turn, awaits a time when 'successors or descendants of the perpetrating side openly acknowledge the historical injustice'.[129] However, the debate about reparations has proven to be highly divisive.[130] A 2016 poll found that 81 per cent of whites were opposed to reparations.[131] It would seem implausible for the US federal government to shift from denial of the need to engage in truth telling or accountability mechanisms, but to move first towards a reparations model for historical abuses.[132] A gradual political process building national support for reparations may be necessary if highly challenging with an extremely partisan Congress and Senate.[133]

However, Native experience of reparations in the United States suggests a need for caution were any such reparations to be established. Regarding the Indian Claims Commission, Sandra Danforth notes: 'The idea that money could be substituted for land, not to consider the related grievances, did not accord with the meaning of the losses to the claimants ... Just redress would then have been viewed as an attempt to re-orient contemporary relations so as to change patterns which continue to produce grievances among Indians.'[134]

As in the United States, in the absence of meaningful national political investigation and public discourse regarding responsibility for historical abuses, it seems difficult to envisage circumstances where the British state and churches admit the need for reparations of historical-structural injustice caused by British imperialism. There is limited appetite for reparations in UK political discourse, particularly anti-systemic or diachronic reparations

[127] Thomas Craemer, 'Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies' (2015) 96 Social Science Quarterly 639.
[128] ibid 653.
[129] Thomas Craemer, 'International Reparations for Slavery and the Slave Trade' (2018) 49 Journal of Black Studies 694, 709.
[130] Evans and Wilkins (n 84).
[131] King and Page (n 75) 745.
[132] ibid 746.
[133] 'Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future' (2002) 115 Harvard Law Review 1689.
[134] Sandra Danforth, 'Repaying Historical Debts: The Indian Claims Commission' (1973) 49 North Dakota Law Review 359, 402.

regarding slavery or colonialism. In 2013, the fifteen countries that constitute the Caribbean Community (CARICOM) established the CARICOM Reparations Commission (CRC), to 'prepare the case for reparatory justice for the first peoples and African descended communities of the Caribbean whose ancestors suffered genocide, capture from Africa followed by enslavement in the Americas and racial apartheid'.[135] However, such proposals did not receive much media or political attention or support in the UK itself among politicians or church leadership.[136]

Early assessments of the Northern Ireland Historical Institutional Abuse Redress Board suggest it may replicate problems similar to the Irish RIRB and other redress schemes[137]. In 2018, the Scottish government accepted recommendations on the issue of financial redress/compensation for victims/survivors of abuse in care in Scotland, as a result of national consultation with victim-survivors. This redress scheme opened at the end of 2021. The scheme will operate a combined flat payment with individual experience payment.

8.6 CONCLUSION

Reparations can make a material and existential difference to the lives of victim-survivors and their descendants and contribute to redressing the past in a way that is symbolically and politically important for society at large. When designed to address historical abuses in specific institutional contexts, government-mandated reparation schemes can nonetheless grow to a considerable scale, as with the RIRB in Ireland or the IRSSA in Canada. Reparations seem to operate as a mechanism to enable states to respond to historical abuses, represent themselves as just and benevolent in doing so, while also serving the value of seeking to conclusively settle the financial and material dimensions of addressing past wrongdoing, thereby ultimately maintaining control and not fundamentally disrupting the social and political status quo.[138] In the settler colonial context, redress may function to reassert the dominance of the settler political and legal system over Indigenous peoples.[139] Other

[135] Gelien Matthews, 'The Caribbean Reparation Movement and British Slavery Apologies: An Appraisal' (2017) 51 Journal of Caribbean History 80, 80.
[136] Itay Lotem, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Palgrave Macmillan 2021) 296; Matthews (n 135) 89.
[137] Rebecca Black, 'Historic Abuse Survivor Launches Legal Challenge to Redress Board' *Belfast Telegraph* (Belfast, 19 March 2021).
[138] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Johns Hopkins University Press 2001) 343.
[139] Woolford (n 113) 77.

wrongs, notably British and American reparations for the legacy of transatlantic slavery, remain unaddressed and while expanding reparations to these contexts remains possible, existing practice cautions a thorough consideration of whether any reparations scheme would meet victim-survivors' and descendants' needs and expectations.

A range of approaches have been employed across the jurisdictions examined in this book. In seeking to achieve these goals of material difference and symbolic or existential difference, the process and messaging of reparations is likely to last longer than a financial award, which will be necessarily inadequate to the profound nature of the harm it seeks to remedy. At a minimum, the process of oral hearings, correspondence, and victim-survivor consultation must be respectful and take steps to credibly accept the accounts offered by victim-survivors. In particular, it seems perverse to require victim-survivors to produce information related to institutional abuse, when denial of access to archival information formed a significant basis of delaying initial investigations and transitional justice advocacy regarding historical abuse in the first instance.

In the absence of express messaging, it seems likely that victim-survivor experience with even the best designed and most expensive processes will be varied, with some finding the process and outcome inadequate or even distressing and re-traumatising. As a result, if reparations are to serve victim-survivors' and states' interest in settlement of claims, the process must communicate the necessary inadequacy of reparations alone.

Magdalena Zolkos argues that the desire for restitution and reparation may in fact also be a desire to suppress and overcome historical trauma, when in fact, this may be impossible in the case of 'unrectifiable' losses, which are not merely failures of implementation but instead mark 'a constitutive limit, or a threshold, for politics and for law in their encounter with situations of trauma, mourning, and dispossession.'[140] Similarly, Brandon Hamber suggests reparations can be a 'double-edged sword' as the promise of full remedy to international standards can never be achieved, no matter how inclusive or sensitive the justice or administrative reparation process.[141] Instead, governments and perpetrators must carry on 'continually, and perhaps endlessly, trying to make substantial, personalised and culturally relevant symbolic,

[140] Magdalena Zolkos, '"The Return of Things as They Were": New Humanitarianism, Restitutive Desire and the Politics of Unrectifiable Loss' (2017) 16 Contemporary Political Theory 321, 335–6.

[141] Brandon Hamber, 'Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past' (2000) 5 Ethnicity & Health 215.

material and collective reparations'.[142] On this account, transformation means not only material reparation but also an inherent and explicit communication through the reparations process and content, that nothing will ever be enough to undo the harms done – a recognition of inherent inadequacy. This approach would eschew the liberal conception of progress inherent in mainstream transitional justice and instead embrace the paradox of a moral duty to respond to an abusive past but a frank and explicit accounting for the limits in doing so. The mission statement of the Conference on Jewish Material Claims against Germany recognises this: 'We know the horrors of the Holocaust can never be repaired and must never be forgotten.' Both elements must be acknowledged. However, for this to be meaningful and to communicate a credible transformation of relationship between victim-survivors, society, and state and churches, the process of reparations must also offer meaningful signals of a transforming or transformed relationship through the disruption of existing power dynamics.

[142] ibid 225.

9

Apologies

9.1 INTRODUCTION

Apologies offer a distinctive way for states and churches to narrate their response to historical abuses and operate as a key site where power and emotions intersect. At their best, apologies can empower survivors, admit wrongdoing and responsibility, recognise the rights of victim-survivors, and make solemn commitments to address the past through other transitional justice mechanisms, as part of a redefined state or church. At their worst, apologies can be mere tactical ploys or cheap political theatre to minimise legal liability without any material consequences. Section 9.2 evaluates apologies in transitional justice through the four dimensions of power. Section 9.3 assesses apologies for historical-structural injustice regarding emotions before Section 9.4 examines the national practice of state and church apologies for historical abuses. While several official apologies admit wrongdoing and/or acknowledge the suffering of victim-survivors, most apologies tend to function as episodic forms of power, while retaining the broader structural, epistemic, and ontological forms of power intact. The dominant emotion expressed in such apologies is shame, which may preclude an examination of the root causes and ongoing social consequences of historical-structural abuses.

9.2 ASSESSING APOLOGIES IN TRANSITIONAL JUSTICE

There is growing consensus around the necessary elements of an effective apology.[1] Conceptually apologies can be distinguished from excuse, which

[1] 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence: Apologies for Gross Human Rights Violations and Serious Violations of International Humanitarian Law' (United Nations 2019) <https://apologies-abuses-past.org.uk/assets/uploads/UN_report_Apologies_in_Transitional_Justice-1.pdf>; Matt

implies a wrong was unintentional and from a justification, which points to factors that made wrongdoing necessary.[2] Blatz, Schuman, and Ross suggest that apologies can be assessed through the following elements:[3] '1 = Remorse; 2 = Acceptance of responsibility; 3 = Admission of injustice/wrongdoing; 4 = Acknowledgement of harm and/or victim suffering; 5 = Forbearance; 6 repair; 7 = Praise for minority group; 8 = Praise for majority group; 9 = Praise for present 10 = Dissociation of injustice from present'.[4] These thorough criteria are employed to categorise the apologies in this chapter in Appendix 3. As with each chapter in Part II, the nature and practice of apologies can be evaluated across the four dimensions of power and the contexts of emotions and national myths.

9.2.1 *Apologies and Agency*

Apologies can be individual, institutional, or communal in nature. Apologies tend to be theorised from the interpersonal to state or communal levels.[5] While individual apologies may therefore be complemented with other apologies, they should not be equated.[6] Aaron Lazare notes that apologies involve an exchange of power and shame between offender and offended that may rehabilitate the offender and empower the offended.[7] McAlinden argues that 'an apology may assist in: the displacement of internalised shame or self-blame by victims; the acknowledgement of blame and expression of shame and remorse by wrongdoers; and the acceptance of responsibility by institutions of Church and State and wider society for their involvement in sustaining abusive regimes'.[8] There is some practice of individualised and personal apologies from perpetrators and institutions responsible for historical-structural abuses.[9]

James, 'Wrestling with the Past: Apologies, Quasi-Apologies, and Non-Apologies in Canada' in Mark Gibney and others (eds), *The Age of Apology* (University of Pennsylvania Press 2008) 142.

2 Daniela Kramer-Moore and Michael Moore, 'Pardon Me for Breathing: Seven Types of Apology' (2003) 60 ETC: A Review of General Semantics 160.

3 Craig W Blatz, Karina Schumann and Michael Ross, 'Government Apologies for Historical Injustices' (2009) 30 Political Psychology 219, 221.

4 ibid 227.

5 Nick Smith, 'Political Apologies and Categorical Apologies' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014) 43–44.

6 Danielle Celermajer, *The Sins of the Nation and the Ritual of Apologies* (Cambridge University Press 2009) 6–7.

7 Aaron Lazare, 'Go Ahead, Say You're Sorry' *Psychology Today* (New York, 1 January 1995) 40, 42.

8 Anne-Marie McAlinden, 'Apologies as "Shame Management": The Politics of Remorse in the Aftermath of Historical Institutional Abuse' (2022) 42 Legal Studies 137, 148.

9 National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Australia) ss 54–56.

9.2.2 *Apologies and Structure*

In the absence of empirical data on individualised apologies, the primary focus of this chapter is on official apologies by those representing state or church institutions. For Stephen Winter, state apologies for historical abuse warrant special scrutiny, as they will likely involve people who had 'nothing to do with the injustices being apologised for'[10] but instead reflect the continuous claim to authority from state institutions.[11] State apologies may also seek to apologise on behalf of society as a whole, including societies long deceased. As a result, official apologies could be apt for addressing historical-structural injustices that involve both liabilities of specific actors and broader responsibility based on social connection.[12]

However, the structural power of the legal system has the potential to further support or undercut the impact of official apologies. Without more, an apology could be interpreted as an admission of legal liability and responsibility.[13] However, the United States, United Kingdom, Canada, and Australia have introduced legislation to protect apologies from implying legal liability.[14] Apologies could include or exclude the language of rights and responsibilities, or prefer a more ambiguous or moralistic discourse designed to avoid legal accountability. As a result, it remains critical that apologies are not seen as an alternative to truth, accountability, or material reparations but as a mechanism to accompany such reparations as a form of acknowledgement and recognition.[15] Patricia Lundy and Bill Rolston argue that in the absence of accountability and official acceptance of responsibility, official apologies can function to shield state institutions from scrutiny or responsibility and to deny effective redress and voice to victims.[16] For Martha Minow, unless accompanied by material acts such as redress reflecting responsibility for wrongdoing, an

[10] Janna Thompson, 'Is Political Apology a Sorry Affair?' (2012) 21 Social & Legal Studies 215, 218.
[11] Stephen Winter, 'Theorising the Political Apology' (2015) 23 Journal of Political Philosophy 261, 277.
[12] Thompson (n 10) 219.
[13] Susan Alter, 'Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations' (Law Commission of Canada 1999); Lee Taft, 'Apology Subverted: The Commodification of Apology' (2000) 109 The Yale Law Journal 1135.
[14] Anne-Marie McAlinden, 'Apologies and Institutional Child Abuse' (Queens University Belfast 2018) 14.
[15] Ruben Carranza, Cristian Correa and Elena Naughton, 'More Than Words: Apologies as a Form of Reparation' (International Center for Transitional Justice 2015) 8.
[16] Patricia Lundy and Bill Rolston, 'Redress for Past Harms? Official Apologies in Northern Ireland' (2016) 20 The International Journal of Human Rights 104, 104.

apology 'may seem superficial, insincere, or meaningless'.[17] Finally, the religious heritage of public apologies may complicate their use for historical abuses involving church institutions and actors.[18] Victim-survivors may feel unwilling or unable to engage with theologically motivated concepts or practices.

9.2.3 *Apologies and Epistemic Justice*

Apologies represent a potential site to address epistemic injustice. Victim-survivors can be involved in the drafting and presentation of an apology, and their voices and experiences can be included in the text of the apology itself. McAlinden notes that an unambiguous apology provides a form of epistemic justice for survivors and can validate victim experiences, providing 'recognition and the overt removal of blame from victims'.[19] The drafting, delivery, and timing of a political apology are thus critical.[20] Alice McLachlan notes that the value of an apology may lie in 'the process of constructing what ultimately gets said – who is involved, how equal and collaborative the process is, and who is chosen to speak – rather than the isolated act of speaking those words sincerely'.[21] Such engagement represents a site of episodic power for survivors, who may be given a role in shaping the narrative, timing, and material consequences of the apology. This interaction may briefly shift state-church and survivor power dynamics. However, MacLachlan notes that in contrast apologies can serve to reassert state control over the rhetorical space: 'asserting a particular narrative while demanding that the hearer now respond'.[22] An institutional or national leader can, through the act of apology, cast themselves as right-thinking and enhance their legitimacy. For Joram Tarusarira, a more ambitious, transformative apology 'incorporates the reparative and rehabilitative dimensions but adds an epistemic dimension by uprooting the logic behind the offence, thereby ensuring its non-repetition'.[23] In this regard, apologies may

[17] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998) 156.

[18] Michel-Rolph Trouillot, 'Abortive Rituals: Historical Apologies in the Global Era' (2000) 2 Interventions 171, 180.

[19] McAlinden (n 8) 146.

[20] 'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence: Apologies for Gross Human Rights Violations and Serious Violations of International Humanitarian Law' (n 1) 10–15.

[21] Alice MacLachlan, 'Gender and Public Apology' [2013] Transitional Justice Review 126, 142.

[22] ibid 137.

[23] Joram Tarusarira, 'The Anatomy of Apology and Forgiveness: Towards Transformative Apology and Forgiveness' (2019) 13(2) International Journal of Transitional Justice 206, 214.

function to address prior epistemic and ontological injustices, where survivor voices, experiences, and equal status are amplified and when apologies are combined with other transitional justice initiatives. Such an approach seems necessary in light of the context in which historical abuses have taken place and their replication as historical-structural injustices.

9.2.4 *Apologies and Ontology*

The continuous nature of some state and church institutions may also result in apologies engaging national identity and 'the emotional fabric of a nation'.[24] Linking an apology to broader national and religious myths involves calculations and sensitisation regarding whether and how to recast a new political vision for a state or church, or to reaffirm the claimed values of these institutions.[25] Celermajer describes this as an act of 're-covenanting' – acknowledging a collective failure to live up to normative ideals in the past and renewing a commitment to live up to those ideals in the future.[26] Janna Thompson suggests an apology 'signals the commitment of those who make it, sponsor it and support it to a national undertaking, and whether we can regard an apology as meaningful depends on our reasons for thinking that this undertaking has been initiated and will continue'.[27]

Several authors affirm the potential value of political apologies for their moral recognition of the status, rights, and harms suffered by victim-survivors.[28] Such moral recognition can reaffirm what was and should always have been true – that the wrongful conduct violated the rights, dignity, and status of victim-survivors and their families. In this regard, apologies may function to shift the ontological power dynamics by recognising the worth of those victim-survivors previously deemed 'moral dirt', 'savage', and so on.

In addressing national identity or myths, Cindy Holder notes that official apologies involve state officials repudiating one theory of the state and providing an alternative, which justifies an apology for past state action. In doing so, 'contemporary officials accept that prior officials believed that what was done followed from their positions but deny that prior officials were right

[24] Danielle Celermajer and Joanna Kidman, 'Embedding the Apology in the Nation's Identity' (2012) 121 Journal of the Polynesian Society 219.
[25] Mihaela Mihai, 'When the State Says "Sorry": State Apologies as Exemplary Political Judgments' (2013) 21 Journal of Political Philosophy 200, 218.
[26] Celermajer (n 6) 247.
[27] Thompson (n 10) 216.
[28] Trudy Govier and Wilhelm Verwoerd, 'The Promise and Pitfalls of Apology' (2002) 33 Journal of Social Philosophy 67.

about this'.[29] Similarly for Pablo de Greiff, an apology requires affirming a norm that the perpetrator and victims recognise as valid and binding.[30]

As a result, states and churches will only apologise for transgressing some norm they believe important. They may resist apologising for the commission of harms, on which their existence or authority continue to rely – yet this dimension of an apology may be critical to ensure the non-recurrence or reproduction of structures of harm. Cuthbert and Quartly note: 'it is not enough to say sorry without fully articulating the grounds on which the wrongs were done. It is only through a sustained and historically informed acknowledgment of the power structures that lead to such injustices that we can ensure that they are not repeated.'[31] For settler colonial states, it may be possible to apologise for specific sub-sets of harms, such as forced child migration or institutionalisation, but may remain impossible to apologise for the structure of settler colonisation itself. Churches and religious orders may apologise for harms committed in the conduct of their missional and salvific work but not for the claimed authority or idea behind the work as a whole. To do so would expose church and religious authority to the idea of theological error and fallibility. The willingness or capacity of a state or church to apologise for its very existence or authority structure may remain elusive.

Apologies for historical-structural abuses may thus operate at the limits of the potential for epistemic or ontological justice. Jacques Derrida suggests that the value of apology is at the highest when the challenge is at the highest,[32] when it is confronted with the impossible tasks of issuing or accepting an apology for an unforgivable wrong.[33] An apology that can explicitly state that it alone cannot fix unfixable harms and can point beyond itself to material and structural efforts addresses the causes of wrongdoing and offers a more comprehensive and honest narration of the problems faced when addressing historical abuses. An effective apology for historical-structural injustices thus needs not only acknowledgement of wrongdoing, responsibility, and victim suffering but also the national myth or claims of authority on which those

[29] Cindy Holder, 'Reasoning Like a State: Integration and the Limits of Official Regret' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014) 206.

[30] Pablo de Greiff, 'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted' in Mark Gibney and Rhoda Howard-Hassmann (eds), *The Age of Apology* (Pennsylvania State University Press 2008) 131.

[31] Denise Cuthbert and Marian Quartly, 'Forced Child Removal and the Politics of National Apologies in Australia' (2013) 37 American Indian Quarterly 178, 198.

[32] Jacques Derrida, *On Cosmopolitanism and Forgiveness* (Routledge 2001).

[33] Jean-Marc Coicaud, 'Apology: A Small Yet Important Part of Justice' (2009) 10 Japanese Journal of Political Science 93, 101.

harms were based, and finally a new vision for what the future of a state and/or church that can incorporate historical abuses into the narrative, myth, and self-image of the institution should look like. Such apologies offer the means to demonstrate continuities of historical violence with present injustices and to illustrate the national and religious understanding of responsibility for both of these forms of harm. Regrettably, these dimensions have proven the most elusive in the practice of apologies regarding historical abuses.

9.2.5 *Apologies for Historical Abuse and Emotion*

Based on existing examples, state and church apologies are likely to use emotive language and may claim to have an emotional effect on speakers, victim-survivors, members of institutions, and society at large, which may or may not be validated in the context of further material consequences flowing from an apology. Govier and Verwoerd suggest in an effective apology, the perpetrator's emotion, especially regret, may provide a reason for victims to move from resentment to acceptance.[34] An emotional apology may indicate an offender 'gets it' and takes responsibility.[35] MacLachlan notes that no one single emotion entirely captures what it is to be apologetic, which may include: 'sorrow, guilt, regret, shame, or anger'.[36] As outlined in Appendix 3, in the non-exhaustive list of ninety-five apologies, thirty-one make reference to regret and twenty-two contain reference to shame. Mihai suggests that 'shaming a community into acknowledging its violent past is a risky political strategy that can trigger a conservative backlash'.[37] Instead, she suggests an apology 'must engage all possible objections in a way that goes back to the community's pre-existing guiding principles and shows that, in spite of their plurivocality, these principles require that we firmly reject certain dangerous visions of the past'.[38]

McAlinden suggests reintegrative shaming may work especially well for individual apologies and fostering offender accountability, 'via the censure of wrongdoing rather than wrongdoers'.[39] However, as discussed in Chapter 5, the use of shame also risks reharming victim-survivors at structural and official levels. Sara Ahmed highlights shame's contradiction: 'It exposes the nation,

[34] Govier and Verwoerd (n 28) 69.
[35] McAlinden (n 8) 146–7.
[36] Alice MacLachlan, 'Fiduciary Duties and the Ethics of Public Apology' (2018) 35 Journal of Applied Philosophy 359, 362.
[37] Mihai (n 25) 208.
[38] ibid 215.
[39] McAlinden (n 8) 144.

and what it has covered over and covered up in its pride in itself, but at the same time it involves a narrative of recovery as the re-covering of the nation.'[40] As a result, apologies may serve to alleviate the interpersonal and lived experience of shame from victim-survivors but may be more problematic when expressing a state or institutional form of collective shame that results in a closure and limited engagement with the causes of historical-structural abuses by these actors. Others doubt whether institutions such as churches or states can effectively express emotions relevant to interpersonal apologies and instead should be judged exclusively by the policy 'consequences they trigger'.[41] Consequently, in the absence of other meaningful policy consequences, an apology, especially one framed in shame, may seek to settle historical abuses determinatively and in an exclusionary fashion. An apology is part of a national or institutional commitment to addressing injustice, not a substitute for such a commitment.

9.3 NATIONAL AND CHURCH EXPERIENCES WITH APOLOGIES

9.3.1 *United States*

Several states have provided for apologies regarding the treatment of Native Americans, slavery, and Jim Crow.[42] These limited US official apologies arose from the initiative of government officials and not as a response to activist pressure.[43] Speaking on behalf of the Bureau of Indian Affairs (BIA), Kevin Gover, also a citizen of the Pawnee Nation, issued an apology in 2000 for the historical treatment by the BIA of Native peoples.[44] The apology received mixed reactions, with some Native leaders appreciating it while others concluding that an apology without addressing 'intrusions on tribal sovereignty, under-funding of treaty-mandated Indian programs and the evasion of responsibility for fixing the trust management system' was not adequate.[45] Such an apology did not challenge the broader ontological or structural conditions

[40] Sara Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press 2014) 112.
[41] Mathias Thaler, 'Just Pretending: Political Apologies for Historical Injustice and Vice's Tribute to Virtue' (2012) 15 Critical Review of International Social and Political Philosophy 259, 267.
[42] Alexandra Minna Stern, 'Eugenics and Historical Memory in America' (2005) 3 History Compass 1, 5.
[43] Michael Tager, 'Apologies to Indigenous Peoples in Comparative Perspective' (2014) 5 International Indigenous Policy Journal 8.
[44] Christopher Buck, '"Never Again": Kevin Gover's Apology for the Bureau of Indian Affairs' (2006) 21 Wicazo SA Review 97.
[45] Tager (n 43) 9.

facing Native peoples. In 2009, President Barack Obama signed a further apology into law, which acknowledged responsibility for historical abuses to Native Americans but excluded any potential liability or reparations. Obama never read it aloud, leading some to question whether it constitutes a meaningful apology.[46]

Apologies regarding slavery are limited both structurally and in terms of challenging national myths and identity. Beginning with Virginia in 2007, several state-level apologies were issued regarding slavery and Jim Crow. Angelique Davis argues the text of these apologies

> allow for the legacy of slavery to continue and compound its present-day impacts in three ways: first, by minimizing the continuing legacy of the European Slave Trade; second, by thwarting concrete remedial measures including reparations claims; and third, by absolving White Americans, state governments, and the federal government for their role in these horrors and allowing them to continue to benefit from the continuing legacy of slavery in the United States.[47]

In addition, several of these apologies explicitly exclude the possibility of reparations, minimising the potential material impact of the apologies and undermining the symbolic or communicative dimensions.

In addition, in 2008, Congress passed a resolution offering the federal government's first formal apology to African Americans on behalf of the people of the United States.[48] The apology mentioned the wrongs committed against African Americans who suffered under segregation laws known as 'Jim Crow' laws. In 2009, the US Senate apologised for lynching campaigns against African Americans throughout much of the previous century.[49] However, in the absence of meaningful advancement of public inquiries or reparations regarding the treatment of African Americans, the acceptance and significance of the apology risk being hollowed over time. Tuğçe Kurtis et al suggest that the enduring beliefs in American exceptionalism and manifest destiny form part of collective identity in the United States and are formidable barriers

[46] Rob Capriccioso, 'A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It' *Indian Law Resource Center* (13 January 2010); Sheryl Lightfoot, 'Settler-State Apologies to Indigenous Peoples: A Normative Framework and Comparative Assessment' (2015) 2 Native American and Indigenous Studies 15, 27.

[47] Angelique M Davis, 'Apologies, Reparations, and the Continuing Legacy of the European Slave Trade in the United States' (2014) 45 Journal of Black Studies 271, 275.

[48] US House of Representatives. (2008). H. Res. 194: Apologizing for the enslavement and racial segregation of African-Americans <www.govtrack.us/congress/bill.xpd?bill=hr110-194>.

[49] US Senate. (2009). S. Con. Res. 26: A concurrent resolution apologizing for the enslavement and racial segregation of African Americans <www.govtrack.us/congress/bill.xpd?bill=sc111-26>.

to any serious reckoning with historical abuses.[50] Unless there is meaningful national pressure and commitment to reimagine national self-image and materially address the consequences of historical abuses, these federal- or state-level apologies are likely to be in vain.

9.3.2 *Canada*

The government and churches of Canada have offered several apologies to Indigenous peoples, particularly regarding residential schools. While they have increased in scope and recognition of wrongdoing, the apologies persist in maintaining the legitimacy of an integrationist approach to nation-building and avoid challenging settler ontology, thus limiting their transformative potential regarding Canada's relationship with Indigenous peoples. In 1998, the Minister for Aboriginal Affairs apologised for 'the tragedy of physical and sexual abuse' at residential schools[51] but did not admit state responsibility. James and Stranger-Ross note that this statement 'minimized Canadian wrongdoing by presenting as incidental sites of abuse what were in fact manifestations of a state-mandated policy of cultural destruction that was abusive in its very conception'.[52] By 2005, several Indigenous organisations were demanding 'a more narratively comprehensive and ceremonially robust residential schools apology',[53] amid growing political and financial pressure on the government to apologise due to the extensive litigation discussed in Chapter 7.[54]

In 2008, Canadian Prime Minister Stephen Harper apologised to Canada's Indigenous community for its residential school policy.[55] Harper recognised that the primary purpose of the schools had been to remove children from their families to assimilate them into the dominant culture, stating 'these objectives were based on the assumption Aboriginal cultures and spiritual

[50] Tuğçe Kurtis, Glenn Adams and Michael Yellow Bird, 'Generosity or Genocide? Identity Implications of Silence in American Thanksgiving Commemorations' (2010) 18 Memory 208, 222.

[51] Jane Stewart, 'Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the Occasion of the Unveiling of Gathering Strength – Canada's Aboriginal Action Plan' (7 January 1998) <www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>.

[52] The Landscapes of Injustice Research Collective, Matt James and Jordan Stanger-Ross, 'Impermanent Apologies: On the Dynamics of Timing and Public Knowledge in Political Apology' (2018) 19 Human Rights Review 289, 295.

[53] ibid 294.

[54] Rosemary Nagy, 'The Truth and Reconciliation Commission of Canada: Genesis and Design' (2014) 29 Canadian Journal of Law and Society/Revue Canadienne Droit et Société 199.

[55] 'Statement of Apology to Former Students of Indian Residential Schools' <www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>.

beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, "to kill the Indian in the child". Today, we recognise that this policy of assimilation was wrong, has caused great harm, and has no place in our country'. Significantly, after years of denial, this apology did not qualify state responsibility and explicitly used the word 'apologise'.[56]

The apology led to a range of responses from Indigenous leaders and communities. Phil Fontaine, then National Chief of the Assembly of First Nations, responded that the apology marked 'a new dawn' in the relationship between Aboriginal people and the rest of Canada.[57] In contrast, Clem Chartier, President of the Métis National Council, noted that many issues regarding the relationship between Métis people and residential schools were still unresolved.[58] The timing of the apology also prompted a range of responses. Holder suggests that an apology that wrestled with the TRC's findings might therefore have provided a more useful basis for promoting well-informed Canadian discussions about self-determination and political transition in Indigenous–settler relations.[59] However, James and Stranger-Ross note the irony that the government had originally insisted on awaiting the conclusions of the TRC, which had been rejected by Indigenous peoples and advocacy organisations as obfuscation, particularly given the elderly age of many residential school survivors.[60]

Neil Funk-Unrau concludes that while Harper's apology acknowledged past wrongdoings and committed to improved future relations, it does not fully address the contemporary disparities arising from this historical injustice.[61] Several scholars concur that the apology had the effect of bracketing off the schools' policy as an aberration and of absolving contemporary Canadians from responsibility for historical and contemporary injustices.[62] Although the

[56] Holder (n 29) 207.

[57] 'Indian Residential Schools Statement of Apology: Phil Fontaine, National Chief, Assembly of First Nations' <www.aadnc-aandc.gc.ca/eng/1100100015697/1100100015700>.

[58] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 2* (McGill-Queen's University Press 2015) 578.

[59] Holder (n 29).

[60] The Landscapes of Injustice Research Collective, James and Stanger-Ross (n 52) 296–7.

[61] Neil Funk-Unrau, 'The Canadian Apology to Indigenous Residential School Survivors: A Case Study of Renegotiation of Social Relations' in Mihaela Mihai and Mathias Thaler (eds), On the Uses and Abuses of Political Apologies (Palgrave Macmillan UK 2014) 138, 149.

[62] James (n 1) 204; Jennifer Henderson and Pauline Wakeham, 'Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada' (2009) 35 ESC: English Studies in Canada 1, 2; Eva Mackey, 'The Apologisers' Apology' in Jennifer Henderson and Pauline Wakeham (eds), *Reconciling Canada: Critical Perspectives on the Culture of Redress* (University of Toronto Press 2013) 50.

apology took responsibility for residential schools, 'it was silent about the policy's underlying, colonial goal: to weaken the ability of Indigenous communities to resist the settler colonialism'.[63] Holder attributes this omission to the influence of Canadian integrationist conceptions of citizenship and democracy, which preclude seeing the imposition of state structures on Indigenous communities as political or moral wrongs.[64] Jennifer Henderson and Pauline Wakeham emphasise that the limiting and isolation of the apology in this manner does not disturb Canada's national image as a 'progressive beacon', nor does it enable linkages between this apology and issues of Indigenous land restitution, sovereignty, or contemporary reproduction of historical-structural injustices.[65]

In 2017 and 2019, Justin Trudeau continued the use of official apologies with a further apology to Innu, Inuit, and Nunatu Kavut people of Newfoundland and Labrador residential school survivors for the federal government's treatment of Inuit with tuberculosis. The former group had been excluded from the Harper apology as the residential schools in those regions had not been run by the federal government. These apologies continue the structure of Harper's apology in offering genuine regret, responsibility, but by being limited in not repenting of the broader colonial and settler contexts. A national apology to the missing and murdered Indigenous women and girls recognised in 2019 as being subjected to genocide remains outstanding. The Canadian experience with apologies shows that apologies can result from significant political and activist pressure and represent significant national moments but still also form an incomplete narrative regarding dealing with the past that does not challenge the legitimacy of the Canadian state or its myths of the benevolent peacemaker.

9.3.3 *Australia*

Australia is among the most 'apology friendly' countries in the world. While again evidencing growth in the narrative sophistication of the apologies offered, Australia's apologies remain limited by the narration of national identity, which does not problematise the settler democracy conception of the state and society.

[63] The Landscapes of Injustice Research Collective, James and Stanger-Ross (n 52) 296; Holder (n 29) 203.
[64] Holder (n 29) 215.
[65] Henderson and Wakeham (n 62) 3–4.

The 1997 Bringing Them Home report called for those organisations responsible for forced removals to deliver apologies to Indigenous peoples.[66] Haydie Gooder and Jane Jacobs note that several state leaders and police forces had offered apologies on behalf of their governments and their constituents for their role in these laws, which 'amplified the absence of an official apology from the Prime Minister'.[67] In May 1997, Prime Minister John Howard admitted past injustices to Indigenous Australians but also stated that 'Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control'. Gooder and Jacobs noted that this received 'jeers from an increasingly dissatisfied audience' of Indigenous peoples, prompting Howard to go off script and 'with raised voice and clenched fist, he defended recent government policies that had significantly eroded the material and symbolic gains that had come with recognition of native title in the early 1990s'.[68]

In contrast, Prime Minister Kevin Rudd's two national apologies were products of prolonged agitation and public inquiry.[69] During the 2007 election campaign, Rudd promised a formal apology to Australia's Indigenous peoples, but as Michael Tager notes, to win parliamentary support for the apology, the new government rejected compensating the 'Stolen Generations', and Indigenous Affairs Minister Jennifer Macklin asserted, 'the apology will be made on behalf of the Australian government and does not attribute guilt to the current generation of Australian people'.[70] Such an approach expressly disavows the ongoing impact of historical-structural injustices in the present. Rudd delivered the apology in parliament in 2008 and it received live national television coverage with approximately a hundred members of the Stolen Generations in attendance.[71] Rudd admitted that the laws passed by former parliaments created the Stolen Generations and, therefore, those institutions should apologise. He received generally positive responses to his apology from

[66] Meredith Wilkie (ed), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission 1997) 652 Appendix 9, Recommendation 5a.

[67] Haydie Gooder and Jane M Jacobs, '"On the Border of the Unsayable": The Apology in Postcolonizing Australia' (2000) 2 Interventions 229, 237.

[68] ibid 230.

[69] Christine Fejo-King, 'The National Apology to the Stolen Generations: The Ripple Effect' (2011) 64 Australian Social Work 130; Denise Cuthbert and Marian Quartly, '"Forced Adoption" in the Australian Story of National Regret and Apology' (2012) 58 Australian Journal of Politics & History 82, 85.

[70] Tager (n 43) 5–6.

[71] ibid.

Aboriginal leaders.[72] Celermajer notes the inter-generational nature of wrong-doing challenged many Australians: 'An apology seemed to accuse them, when they could not see what they had done wrong.'[73] AD Moses surveys available Indigenous responses and concludes:

> reading of the apology and 'reconciliation' as nothing or little more than the continuation of colonial domination misses the point that most Indigenous people thought the terms of their national inclusion had changed significantly. The Indigenous sense of participating in the Australian national story as respected equals now seemed palpable, an experience that indicates Indigenous and non-Indigenous traditions could be commensurable rather than only inimical.[74]

However, the impact of the apology may have dissipated over time.[75] Damien Short suggests that while some Indigenous peoples may have accepted the apology without compensation, this remained an outstanding issue for others, which may have diminished the impact, quality, and sincerity of the apology.[76] In the absence of a recognition of Indigenous sovereignty, the apology failed to challenge the settler ontology in which Australia continues to operate.

In 2009, Rudd also made a formal apology on behalf of the nation to Australian-born children in care, often known as 'Forgotten Australians', and to former child migrants. Cuthbert and Quartly note that child removal was both the basis of apology to the Stolen Generations and also became the basis on which other non-Indigenous victim-survivors of historical abuse pursued their claims for an official apology.[77] The authors note, however, that such an approach risked reducing injustice to Indigenous peoples as relating to the Stolen Generation alone, and repositioned and de-indigenised historical abuse to mean only the suffering of children.[78] Cuthbert and Quartly argue 'by 2009 reconciliation was no longer an exclusively Indigenous issue; and innocence, ideally childhood innocence, appears to be a precondition for receiving a national apology in Australia'.[79]

[72] ibid.
[73] Celermajer (n 6) 170.
[74] A Dirk Moses, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15 Citizenship Studies 145, 155.
[75] Tager (n 43) 10.
[76] Damien Short, 'When Sorry Isn't Good Enough: Official Remembrance and Reconciliation in Australia' (2012) 5 Memory Studies 293, 302.
[77] Cuthbert and Quartly 'Forced Child Removal and the Politics of National Apologies in Australia' (n 31) 187.
[78] ibid 190.
[79] ibid 192.

A similar challenge arises in extending an apology to women and to single mothers who were obliged to engage in forced adoption,[80] as in the subsequent apology from Prime Minister Gillard in 2013. The Gillard apology sought to acknowledge the pain, suffering, and coercion experienced by women, men, and children affected by forced adoptions. It pointed towards provision of access to counselling services and to adoption records as a commitment by the state of the need for material consequences. While the apology includes many beneficial components, it did not address the context of patriarchal dimensions to society, of the marginalisation and discrimination against women and single mothers that gave rise to such practices, or any social structures of gendered exclusion that may persist in Australia. Cuthbert and Quartly note:

> A more mature politics of apology and reconciliation would not elide race by installing a universalized figure of childhood suffering in the center of the reconciliation stage, just as it would not allow the specifics of gender-based power in the forced removal of children for adoption to be elided in favor of the figure of a suffering, gender neutralized parent whose installation occludes the specific sufferings of women at the heart of these practices.[81]

In 2018, Prime Minister Scott Morrison gave an apology to victim-survivors of child sexual abuse, which arose as a result of the publication of the report of the Royal Commission discussed in Chapter 6. Prior to the apology, the government appointed an independent, survivor-focused Reference Group to advise it on the form and content of the National Apology.[82] The apology received a positive if qualified reception, with media coverage marginalising the Indigenous experiences of child abuse and views of the apology,[83] with emphasis turning quickly to the need for reparations for victim-survivors, discussed in Chapter 8.

The normalisation of official apologies in Australia may have the effect of raising the minimum expectation of victim-survivors of historical abuse to include a meaningful apology, but also raises the expectation for the apology to point beyond itself to material provision of redress and other elements of transitional justice and attempts to redefine the Australian nation and its relationship to settler colonialism. Shame played a prominent role in Australian apologies, with some Australian commentators suggesting perpetrator shame

[80] Cuthbert and Quartly '"Forced Adoption" in the Australian Story of National Regret and Apology' (n 69) 96.

[81] Cuthbert and Quartly 'Forced Child Removal and the Politics of National Apologies in Australia' (n 31) 197.

[82] <www.childabuseroyalcommissionresponse.gov.au/national-apology/reference-group>

[83] Tanja Dreher and Lisa Waller, 'Enduring Silence: Racialized News Values, White Supremacy and a National Apology for Child Sexual Abuse' (2021) 45(9) Ethnic and Racial Studies 1671.

was a necessary component of individual or social healing.[84] However, Sara Ahmed suggests shame may function as a form of epistemic injustice if the mere expression of shame is seen as 'sufficient for a return to national pride'. Such references to shame may block 'the hearing of the other's testimony in turning back towards the "ideality" of the nation'.[85] By focusing largely on children to the exclusion of other forms of Indigenous harms and on the past as a different moral and political context, to the exclusion of continuities in the present, Australian apologies are inhibited in their potential to form the basis for significant transformation of Australian politics and law in light of historical abuses, whether through reparations, a treaty with Indigenous peoples, or more fundamental recognition of patterns of racism, misogyny, and class discrimination.

9.3.4 *United Kingdom*

In the absence of significant inquiries into the systemic nature of historical abuses in the United Kingdom, there is limited practice of official apologies.[86] Five British slavery apologies have been issued from 1999 to 2007. The City of Liverpool apologised in 1999. The other four British apologies for slavery arrived on the eve of the bicentenary of the Abolition of Slavery Act 1807. In 2006, Prime Minister Tony Blair expressed 'deep sorrow' over Britain's participation in the slave trade, which he described as a crime against humanity, in a statement deemed a personal reflection and not an official state apology. Mihaela Mihai notes contrasting reactions, with liberal critics noting limited expression of responsibility for atrocities committed by Britain against Africans and limited commitment to addressing the structural injustices caused by the legacy of slavery. Instead, Blair's account celebrated white abolitionists while 'effacing the memory of black resistance'.[87] This approach formed a means to talk about historical abuses in a way that 'limits the impact or influence of what was perceived as a potentially "damaging" event for Britain's self-image'.[88]

[84] Celermajer (n 6) 198.
[85] Ahmed (n 40) 119.
[86] Andrew McNeill, Evanthia Lyons and Samuel Pehrson, 'Reconstructing Apology: David Cameron's Bloody Sunday Apology in the Press' (2014) 53 British Journal of Social Psychology 656; Jason A Edwards and Amber Luckie, 'British Prime Minister Tony Blair's Irish Potato Famine Apology' (2014) 5 Journal of Conflictology 43.
[87] Mihai (n 25) 201.
[88] Emma Waterton and Ross Wilson, 'Talking the Talk: Policy, Popular and Media Responses to the Bicentenary of the Abolition of the Slave Trade Using the "Abolition Discourse"' (2009) 20 Discourse & Society 381, 395.

On Waterton and Wilson's account, this limited engagement with responsibility for the past is a form of epistemic injustice as it: 'skilfully worked to close down critical and dissenting voices from questioning Britain's responsibilities to contemporary communities. This was not simply a government implemented directive, but rather symptomatic of the manner in which issues of multiculturalism and diversity are talked about in Britain.'[89] In addition, media accounts of the apology suggest that the statement stops short of a formal apology due to fears of a subsequent need for reparations for slavery.[90] In response to these apologies, political and media backlash questioned how one generation could be responsible for wrongs perpetrated by another, particularly at a time when morals were different around the issue,[91] and suggested the apology constituted an attack on British history.[92]

In 2010, Prime Minister Gordon Brown made an apology regarding Britain's role in the Australian child migration scheme. Gordon Lynch notes that Brown inaccurately generalised from the experience of child migrants to Australia in the post-World War II period to the whole child migration process from the nineteenth century.[93] Lynch concludes that it is problematic if an apology functions to provide public sympathy for historical suffering alone and excludes criminal and civil justice or more nuanced understandings of the past.[94] In addition to these apologies, there was a recommendation in the 2017 Hart inquiry report in Northern Ireland for an apology to victim-survivors of residential institutions, which was delivered in 2022. The broader context of the UK's shifting and divided global self-image, in the context of Brexit and diminished global influence, may mask complex and underexplored impacts of practices of 'othering' and alienation within the territories of the United Kingdom and abroad. It may be the case that space for broader official apologies is especially narrow in this present context. In existing practice, the assumption that apologies can provide closure for historical-structural injustices fails to recognise how such injustices can be reproduced in the present.

[89] ibid 396.

[90] Gelien Matthews, 'The Caribbean Reparation Movement and British Slavery Apologies: An Appraisal' (2017) 51 Journal of Caribbean History 80, 89–90.

[91] Michael Cunningham, '"It Wasn't Us and We Didn't Benefit": The Discourse of Opposition to an Apology by Britain for Its Role in the Slave Trade' (2008) 79 The Political Quarterly 252.

[92] ibid.

[93] Gordon Lynch, *Remembering Child Migration: Faith, Nation-Building, and the Wounds of Charity* (Bloomsbury Academic 2016) 118.

[94] ibid.

9.3.5 *Ireland*

Ireland has had five official state historical abuse apologies and several from religious orders and churches but all were undermined by the treatment of victim-survivors in other aspects of transitional justice. In 1999, Taoiseach Bertie Ahern accepted the state's complicity in the abuse of children in residential schools due to the 'failure to intervene, to detect their pain, to come to their rescue'.[95] The apology announced the establishment of both the inquiry process and redress scheme for residential schools, support services, and limited legislative changes to enable civil action against individual perpetrators. The apology was repeated by Taoiseach Brian Cowen upon publication of the Ryan report in 2009. Emilie Pine notes that the apology lacks recognition of Ireland's failure to admit and acknowledge abuse in residential schools for decades, especially since the state was made aware of such abuse since the 1970s.[96] While the apology was coupled with an inquiry and redress, the experience of survivors in both of those processes, discussed in Chapters 6 and 8, respectively, is likely to have impacted negatively on perceptions of that apology.

On publication of the McAleese report into the Magdalene Laundries in 2013, Taoiseach Enda Kenny made two statements, including an apology. McAlinden's interviews with survivors indicate that many survivors valued Kenny's apology, emphasising its value in separating the Irish state from Catholic and religious influence. Others in turn emphasised that the apology was mere 'crocodile tears' in the absence of a meaningful material response from state and church.[97]

McAlinden notes that 'Kenny ends his seminal 2013 apology with reference to a radically transformed Ireland in the present and future based on a new shared normative identity',[98] emphasising compassion, empathy, and heart. However, such an approach may have been undermined by the apology's emphasis on shame. The Taoiseach uses the word 'shame' three times in his apology, referring to Ireland's present shameful knowledge of the past, second, a shameful recognition that historical Ireland rejected women institutionalised in Magdalene Laundries and, finally, in describing Ireland's forgetting of survivors and failing them as a 'national shame'.

[95] 'Bertie Ahern, Apology For Institutional Child Abuse' (1999) <www.rte.ie/archives/2019/0430/1046590-apology-to-victims-of-institutional-child-abuse/>.

[96] Emilie Pine, *Politics of Irish Memory: Performing Remembrance in Contemporary Irish Culture* (Palgrave Macmillan 2014) 22–3.

[97] McAlinden (n 8) 152.

[98] ibid 153.

Clara Fisher notes the central role of shame in the 2013 apology related to Ireland's treatment of survivors of Magdalene Laundries, not the ways in which the women were shamed themselves: 'Shame, once attached to and produced in Ireland's "fallen women," is displaced onto the Irish nation, precisely for its shaming of the women institutionalized in Magdalen Laundries. Interestingly, Kenny does not refer to the Church, to the religious orders, nor to the state as bearers of shame.'[99] In noting Kenny's attempts to distinguish an abusive past from a more compassionate present that is ashamed of prior wrongdoing,[100] Fischer concludes: 'By creating the distinction between a dark, less feeling, but more-or-less finished past of "Magdalen Ireland" and an enlightened, empathetic present, the Taoiseach's apology deflects from the contemporary shaming of populations who are similarly constructed as deviant and subjected to problematic state policies.'[101]

In 2021, Taoiseach Michael Martin issued a public apology to survivors of mother and baby homes. The apology frames the Commission report as the 'definitive account' of these institutions, which is problematic in light of the report's limitations. There was no involvement of survivors in drafting the apology. It is arguable that the apology, given the day after the publication of the Commission report, was delivered too soon, especially given that many elderly survivors were still struggling to obtain physical copies of the report. There is no mention of the word 'adoption' in the apology, no responsibility for any coercive or forced adoptions or forced labour abuse evident in the claims of survivors. As a result, it remains unclear what the Taoiseach apologises for. The event of the apology raises expectations that the state will react in a meaningful way. However, in light of the prior mistreatment of survivors documented in prior chapters, survivors would be wise to be cautious and suspicious of government processes.

Ireland's official apologies were well received by some victim-survivors and, in the case of Kenny's, aim at a new more compassionate Ireland. However, these apologies are arguably undermined over time by the state's treatment of survivors discussed in other chapters. In addition, the apologies largely exclude the roles of class, race, and gender as structural forms of injustices and minimise the extent to which historical-structural injustices persist in Irish society.

[99] Clara Fischer, 'Revealing Ireland's "Proper" Heart: Apology, Shame, Nation' (2017) 32 Hypatia 751, 756.
[100] ibid 760.
[101] ibid 761.

9.3.6 *Christian Churches and Religious Orders*

Christian churches have a long and problematic use of apologies for historical abuse. Luigi Accattoli has identified ninety-four instances where Pope John Paul II acknowledged wrongdoing committed by the church or asked forgiveness,[102] including apologies for violence during the Crusades and Reformation and for involvement in colonisation and slavery. In 2000, Pope John Paul II apologised for non-recent wrongs committed by the church against Jews, Indigenous peoples, women, and the poor.[103] However, Michael Marrus notes that in most cases Pope John Paul II apologised to God, not to victim-survivors or their descendants.[104] Such apologies fail to achieve an essential goal of the concept of apology as a dialogue between two parties or to serve the goal of restoring trust among a broken community or society. Pope Benedict XVI expressed his 'dismay', 'deep sorrow', and 'distress' at institutional and child sex abuse but did not denounce the cover-up of such abuse by the church or articulate concrete steps to hold to account bishops who failed to protect children.[105] In 2010, the Permanent Observer Mission of the Holy See (the UN representative from the Roman Catholic Vatican) issued a statement noting that the Doctrine of Discovery had been abrogated or annulled by subsequent church doctrine. However, such a statement did not amount to an apology and seems inherently inadequate in light of the pervasive impact of the doctrine in the nations studied in this book.[106]

In addition to papal apologies, several religious order and national, diocesan level apologies exist relevant to residential institutions in Canada, Ireland, Northern Ireland, and Scotland, with further apologies for clerical abuse in open settings. However, such apologies typically fall short across the accepted criteria – they rarely accept responsibility, offer repair, or speak to the values of the institution or church involved. Janet Bavales notes that in Canadian church apologies regarding residential schools: 'Most of the churches' references to their offenses avoided describing themselves as agents of wrongful

[102] Luigi Accattoli and Jordan Aumann, *When a Pope Asks Forgiveness: The Mea Culpa's of John Paul II* (Alba House 1998).

[103] Alessandra Stanley, 'Pope Asks Forgiveness for Errors of the Church over 2,000 Years' *New York Times* (New York, 13 March 2000).

[104] Michael R Marrus, 'Papal Apologies of Pope John Paul II' in Mark Gibney and others (eds), *The Age of Apology: Facing Up to the Past* (Pennsylvania State University Press 2008) 265.

[105] 'Pastoral Letter of the Holy Father Benedict XVI to the Catholics of Ireland' <www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html.>.

[106] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6* (McGill-Queen's University Press 2015) 30–1.

actions. In four of the six apologies (Anglican 1993, Catholic 1991, Oblate 1991, and United 1998), not one of the 18 clauses describing an offense was in active voice with the church (or "we") as agent.'[107] Several of the Canadian churches have since repudiated the Doctrine of Discovery and affirmed the need for Indigenous self-determination.[108]

In the United States, Anthea Butler White notes that while the Southern Baptist Convention's apology regarding slavery is commendable, 'it does not consider the theologies that were constructed around slaveholding or the perpetuation of those beliefs in the denomination. It does a great job at apologizing, but it does not address restitution for the structural racism within the denomination.'[109] In addition, both individual bishops and the US Conference of Catholic Bishops have apologised for successive state-level child abuse crises, but these apologies are undermined by ongoing resistance to implementing the church's own child abuse standards and an aggressive litigation strategy against survivors.[110]

In Australia, churches and religious orders made submissions of apology regarding the Stolen Generations to the Bringing Them Home inquiry.[111] Swain notes the changing character of Catholic apologies in Australia over the course of several inquiries:

> Catholic apologies before the Bringing Them Home inquiry positioned their sorrow as the product of hindsight, expressing regret for policies and practices considered beneficial at the time. They also sought to share the blame, arguing that it was government, not the church that was responsible for the removal of Indigenous children from their families, and that it was never critical, at the time, of the institutions in which they were placed. As the scandal around sexual abuse grew, the church became increasingly suspicious of the media coverage, arguing that it was intent on celebrating the fall from grace of a respected institution which had claimed to be the moral guardian of society.[112]

Both the Anglican and Catholic Churches in Australia apologised for their roles in child sexual abuse in response to Scott Morrison's 2018 apology.

[107] Janet Bavelas, 'An Analysis of Formal Apologies by Canadian Churches to First Nations' (University of Victoria 2004) Occasional Paper 1 12.
[108] Truth and Reconciliation Commission of Canada (n 106) 31–2.
[109] Anthea D Butler, *White Evangelical Racism: The Politics of Morality in America* (The University of North Carolina Press 2021) 93.
[110] Jo Formicola, 'The Politics of Clerical Sexual Abuse' (2016) 7 Religions 9, 7–10.
[111] Wilkie (n 66) chapter 14, 250–3.
[112] Shurlee Swain, 'A Long History of Faith-Based Welfare in Australia: Origins and Impact: A Long History of Faith-Based Welfare in Australia' (2017) 41 Journal of Religious History 81, 93–4.

Early apologies by the Catholic Church leadership in Ireland limited responsibility for harm, with a 2003 statement from Cardinal Seán Brady apologising for the 'hurt caused' and 'damage done' by abuse and framed responsibility in pastoral, rather than legal terms, and finally emphasised that most child abuse occurs in the context of a family.[113] In his apology in response to the Murphy Report, Archbishop Desmond Connell apologises in oblique terms, largely without naming child abuse, and by doing so, 'attempts to deflect personal responsibility for his own failures (i.e. mishandling of cases)'.[114] In contrast, Archbishop Diarmuid Martin's 2009 apology is more explicit in naming sexual abuse, acknowledging the inherent inadequacy of apologies, and admitting efforts to protect the reputation of the church.[115] McAlinden notes that the context in which some Irish religious apologies occur challenges their sincerity. For instance, while the Christian Brothers issued an apology on the publication of the Ryan report, their conduct during the Commission to Inquire into Child Abuse (CICA) inquiry had delayed the commission and resulted in a right to anonymity for their members. Until publication, the Brothers had denied wrongdoing. McAlinden concludes: 'Such a contradictory sentiment illustrates a context in which apologies are unlikely to be regarded as sincere.'[116]

While the 2004 apology of the Sisters of Mercy who also operated residential care institutions and industrial schools in Ireland more clearly acknowledges victim-survivor hurt and congregational responsibility, leading to support for the 'unambiguous' apology by victim-survivors,[117] this approach is likely facilitated by the existence of an indemnity for religious orders related to the industrial schools in Ireland. For instance, in 2013 in response to the McAleese report the four religious orders involved in Magdalene Laundries issued statements of apology. However, some of these are ambivalent and struggle to address the criteria of effective apologies laid out above. The Sisters of Mercy note that while conditions in the laundries had been harsh, 'some very supportive, lifelong friendships emerged and were sustained for several

[113] Seán Brady, 'Time To Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland' (4 December 2003) <www.armagharchdiocese.org/4-dec-launch-of-time-to-listen-confronting-child-sexual-abuse-by-catholic-clergy-in-ireland-report-of-royal-college-of-surgeons-in-ireland/>.

[114] '26/11/09 Personal Statement of Cardinal Desmond Connell' <www.dublindiocese.ie/261109-personal-statement-of-cardinal-desmond-connell/>; McAlinden (n 14) 7.

[115] Diarmuid Martin, '"I Am Aware That No Words of Apology Will Ever Be Sufficient" *Irish Independent* (Dublin, 27 November 2009) <www.independent.ie/irish-news/i-am-aware-that-no-words-of-apology-will-ever-be-sufficient-26585955.html>.

[116] McAlinden (n 14) 12–13.

[117] ibid 7–8.

decades', while the Good Shepherd Sisters stated that laundries were 'part of the system and the culture of the time'. In 2021, religious orders apologised after the publication of the report into mother and baby homes. Though some of these statements meet many of the criteria of effective apologies, many neglect any offer of amends or redress to survivors, and the statement of the Sisters of Mercy again redirects responsibility to Irish society.

McAlinden's research with survivors indicated that an apology should address not only the direct experience of physical or sexual abuse endured by survivors but also the longer-term impact on survivors of non-recent abuse, such as 'inter-generational transmission of shame via the life-long consequences of the denial of opportunities for education'.[118] McAlinden affirms that the failure of Irish church apologies related to their epistemic and ontological dimensions: these apologies lacked 'a common understanding of the injustice and … a narrative about the past which has been accepted by victims and perpetrators'.[119]

In the United Kingdom, the General Synod of the Church of England offered a slavery apology in 2006. The apology detailed the knowledge by church bishops of the cruel treatment of slaves, and the church's financial benefits from the slave trade and accepted direct responsibility. Itay Lotem notes the negative reaction to the apology both from African-heritage groups who criticised it as insincere and from the conservative press who thought it diverted attention from the 'celebrations of British past benevolence and moral rectitude'.[120] In response to the Northern Irish Institutional Abuse inquiry, a number of religious orders made limited apologies. The apologies of both the De La Salle Brothers and Sisters of Nazareth in 2014 express remorse and regret and acknowledge the suffering of residents in their institutions, if not institutional responsibility.[121] Apologies subsequent to the publication of the Hart report in 2017 continue this pattern, with further relevant religious orders apologising and a conditional acceptance that the standard of care offered by the orders may have been inadequate in some cases.[122] In the absence of religiously funded reparations, such statements are

[118] McAlinden (n 8) 147.
[119] ibid 148.
[120] Itay Lotem, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Routledge 2021) 280
[121] 'De La Salle Brothers Abuse Apology' *Belfast Telegraph* (Belfast, 14 January 2014) <www.belfasttelegraph.co.uk/news/northern-ireland/de-la-salle-brothers-abuse-apology-29915559.html>.
[122] 'Head of Catholic Church in Ireland Apologises to Child Abuse Victims' *Belfast Telegraph* (Belfast, 20 January 2017) <www.belfasttelegraph.co.uk/news/northern-ireland/head-of-catholic-church-in-ireland-apologises-to-child-abuse-victims-35384886.html>.

likely calibrated with legal liability in mind. There is no reference to the theological or cultural contexts in which these institutions operated or abuse took place.

Across jurisdictions, the limited nature of church apologies has not prevented extensive litigation and financial expense to church institutions, discussed in prior chapters. Limited ability or willingness to accept responsibility for historical abuses as related to the purpose and mission of churches or religious orders are therefore more likely to reflect ongoing denial or lack of theological competence to address institutional wrongdoing and repentance. A key limitation for the Catholic Church offering meaningful and effective apologies is the theological commitment to the church's own moral and spiritual perfection – those individuals who may commit moral wrongs may constitute the church, but the institution and idea itself remain beyond reproach.[123] David Novak suggests that changing this posture would be a fundamental shift for the Catholic Church: 'For if the Church at this level were to apologise, that would presuppose a criterion of truth and right higher than the revelation upon which the Church bases its authority, the revelation that the Church claims as her own.'[124] Danielle Celemajer argues that the Catholic Church could draw on 'its own historical forms of repentance to address this profoundly damaging aspect of its past'.[125] She notes: 'Church practices of repentance have been so thoroughly privatised, with the collective and corporate dimensions virtually erased from our understanding of what Catholic repentance could look like.'[126] She concludes that a meaningful church apology would situate the sources of wrongs in 'the practices, understandings and identities of the clergy and the Church on earth'. In particular, a meaningful apology would acknowledge and condemn 'the ways in which the Church has failed to take seriously the charges against it, the entrenched and unequal power relations that have been institutionalised through practice and doctrine',[127] contributing to the wrongdoing of individual priests. Though Christian churches may have the theological resources to address more meaningfully their past, there is little evidence in existing practice that they are committed to doing so.

[123] Marrus (n 104) 267.
[124] David Novak, 'Jews and Catholics: Beyond Apologies' (1999) 89 First Things 20.
[125] Danielle Celermajer, 'From Mea Culpa to Nostra Culpa: A Reparative Apology from the Catholic Church?' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014) 56.
[126] ibid 70.
[127] ibid 72.

9.4 CONCLUSION

However powerful or well calibrated to their potential audiences and political context public apologies may be, they alone are unlikely to meet victim-survivor justice needs.[128] Mark Gibney and Eric Roxstrom conclude that the West wants 'credit for recognizing and acknowledging a wrong against others, but it also wants the world to remain exactly as it had been before the apology was issued'.[129] Judged by this criterion, and extending the analysis to Christian churches, the apologies for historical abuses in this chapter remain limited or flawed.

Apologies tell us in the most explicit terms possible how the state perceives its role in national myth making. In the absence of meaningful investigation, accountability, or redress, apologies in the United States risk remaining empty rhetoric. Expansion of apologies in Canada and Australia masks the need to apologise more existentially for the broader impact of colonisation and genocide as ongoing historical-structural injustices.[130] By combining the Stolen Generation apology with that for the Forgotten Australians, the risk is that a focus on children is a prerequisite for an apology. The Gillard apology regarding forced adoption extends the suitable audience to adults but does not change the overall pattern.

The Irish and Northern Irish apologies reflect a carefully calibrated political discourse but one that must be understood in the context of obstructionist practices to inquiry, accountability, and redress in the Republic of Ireland, and similar limitations regarding these elements in Northern Ireland. Apologies in the United Kingdom in the context of slavery are limited by the absence of other transitional justice elements and by the limited textual engagement with either responsibility or with the structural continuities of slavery and postcolonial contexts. As a result, the narrative constructed by apologies for historical abuse is better in some jurisdictions than others but remains largely limited by its failure to acknowledge historical abuses, not as separate and past, but as continuous with and reproduced in the present.

[128] MacLachlan (n 21) 142.
[129] Mark Gibney and Erik Roxstrom, 'The Status of State Apologies' (2001) 23 Human Rights Quarterly 911, 936.
[130] Tony Barta, 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide' (2008) 10 Journal of Genocide Research 201.

10

Reconciliation

10.1 INTRODUCTION

As an element of transitional justice, reconciliation aims for the transformation of relationships between victim-survivors, perpetrators, and wider society. In the context of historical-structural abuses, however, the practices and discourses of reconciliation have tended to operate as a form of inappropriate and premature settlement or closure of the grievances of victim-survivors and their descendants. Encouraging victim-survivors and a society to pursue reconciliation in the absence of addressing other elements of transitional justice may operate as a reaffirmation of the power structures of states and churches. While the experience of Canada and Australia contains an explicit reconciliation discourse and practice, in the absence of significant change in and imagination regarding power relationships in those societies, they join the United States, Ireland, and the United Kingdom in remaining deeply unreconciled societies. In addition, the reconciliation practice of the Catholic Church regarding historical abuse demonstrates its inability to effectively self-critique in its processes of reconciliation.

10.2 THE CONCEPT OF RECONCILIATION

Reconciliation is a concept that defies straightforward description and definition.[1] Reconciliation theories view reconciliation as a 'scalar' concept,

[1] Lorna McGregor, 'Reconciliation: I Know It When I See It' (2006) 9 Contemporary Justice Review 155; David Bloomfield, *On Good Terms: Clarifying Reconciliation* (Berghof Research Center for Constructive Conflict Management 2006); Johan Galtung, 'After Violence, Reconstruction, Reconciliation, and Resolution: Coping with Visible and Invisible Effects of War and Violence' in Mohammed Abu-Nimer (ed), *Reconciliation, Justice, and Coexistence: Theory & Practice* (Lexington Books 2001); Jeremy Sarkin and Erin Daly, 'Too Many

which allows for minimal and maximal conceptions.[2] The contested nature of reconciliation creates risks that victim-survivors may interpret reconciliation as meaning they must unfairly relinquish some claims, accept imperfect justice, or be required to forgive perpetrators.[3] Ambiguity regarding reconciliation may also enable churches or governments to claim they pursue reconciliation but maintain an approach that fosters impunity, retains power, and ignores victims and the causes of conflict or violence.[4]

To mitigate these risks, we can first clarify the term. Reconciliation can be understood as not equivalent to impunity or a substitute for accountability.[5] Second, reconciliation should not be equated with forgiveness, expecting victim-survivors to personally forgive their perpetrators. Victim-survivors of gross violations of human rights would have good reasons to legitimately object to coerced or centrally organised forgiveness.[6] Third, we can distinguish between reconciliation and coexistence.[7] Crocker has suggested two levels of coexistence,[8] a thin conception of non-lethal coexistence and a thicker conception in which former perpetrators, victims, and bystanders respect each other as fellow citizens and participate in democratic decision-making. These conceptual caveats enable us to offer a negative definition of reconciliation that avoids the risks of equating it with other terms, suggesting it is more than mere non-violent coexistence but less than full interpersonal forgiveness and acceptance of past wrongdoings.

In the context of this book, it is helpful to examine reconciliation as a site of power across its role at interpersonal and societal levels.[9] First, reconciliation

Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 Columbia Human Rights Law Review 101.

[2] David A Crocker, 'Reckoning with Past Wrongs: A Normative Framework' (1999) 13 Ethics & International Affairs 43.

[3] Bloomfield (n 1) 7.

[4] McGregor (n 1) 158.

[5] Christine Bell, 'Dealing with the Past in Northern Ireland' (2003) 26 Fordham International Law Journal 1095, 1095.

[6] Rebecca Saunders, 'Questionable Associations: The Role of Forgiveness in Transitional Justice' (2011) 5 International Journal of Transitional Justice 119; David A Crocker, 'Truth Commissions, Transitional Justice, and Civil Society' in Robert I Rotberg and Dennis Thompson (eds), *Truth v Justice. The Morality of Truth Commissions* (Princeton University Press 2000) 108.

[7] Louis Kriesberg, 'Changing Forms of Coexistence' in Mohammed Abu-Nimer (ed), *Reconciliation, Justice, and Coexistence: Theory & Practice* (Lexington Books 2001).

[8] David Crocker, 'Punishment, Reconciliation, and Democratic Deliberation' (2002) 5 Buffalo Criminal Law Review 509.

[9] Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, Routledge 2011) 155; Ernesto Verdeja, *Unchopping a Tree: Reconciliation in the Aftermath of Political Violence* (Temple University Press 2009) 20.

can be understood at an interpersonal level, as interactional reconciliation.[10] Such interactions will be affected by the risks of the use of violence or coercion, authority, and economic power. Second, structural reconciliation seems a critical component of responding to historical-structural injustices, where state and society take on responsibility for addressing harms and their reproduction over time. For Catherine Lu, structural reconciliation is necessary for 'guiding genuine communication between agents about the terms of interactional reconciliation.'[11]

Bloomfield argues that national reconciliation extends beyond direct victims and perpetrators to incorporate a community- and society-wide dimension 'that demands a questioning of the attitudes, prejudices and negative stereotypes that we all develop about "the enemy"'.[12] However, significant risks arise in expanding the idea of reconciliation from the interactive to structural dimension. Top-down reconciliation may stretch elements of reconciliation designed for individuals to inappropriately apply to the state or nation, which do not have psyches or operate as the objects of therapy as an individual or group may.[13] A distinctive approach to addressing structural reconciliation must attend to both the objective and affective elements of the process.

Third, reconciliation can be assessed on how it addresses prior epistemic injustice. Susan Dwyer conceptualised reconciliation as 'bringing apparently incompatible descriptions of events into narrative equilibrium', a process involving the articulation of a range of interpretations of those events and the attempt by the parties 'to choose from this range of interpretations some subset that allows them each to accommodate the disruptive event into their ongoing narratives'.[14] Similarly, for Verdeja, political reconciliation should be rooted in mutual respect, 'the inter-subjective recognition of the moral worth of others, including indigenous peoples; an acknowledgment, in other words, of the equal moral status of other people'.[15] It may be the case, however, that reconciliation practices are imposed on victim-survivors in a manner that

[10] Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017) 25.

[11] ibid 20.

[12] David Bloomfield, 'Reconciliation: An Introduction' in David Bloomfield, Teresa Barnes and Luc Huyse (eds), *Reconciliation after Violent Conflict: A Handbook* (IDEA 2003) 13.

[13] Donna Pankhurst, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace' (1999) 20 Third World Quarterly 239; Verdeja *Unchopping a Tree* (n 9) 19.

[14] Susan Dwyer, 'Reconciliation for Realists' in Trudy Govier and Carol Prager (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Wilfred Laurier University Press 2003).

[15] Ernesto Verdeja, 'Political Reconciliation in Postcolonial Settler Societies' (2017) 38 International Political Science Review 227, 231.

silences their articulated needs, visions, and views of reconciliation. Such approaches may cause fresh harms to survivors.

Finally, reconciliation that addresses settler colonial injustice must also confront the challenge of *existential reconciliation*, or the 'disalienation of agents whose subjective freedom has been distorted by such injustice'.[16] Such a form of reconciliation relates to the ontological forms of power discussed in this book. In this context, the idea of reconciliation itself may prove problematic, particularly for settler colonial settings. Penelope Edmonds notes:

> Conciliation was frequently invoked on unstable and violent frontiers in the establishment of nascent settler formations in the often-expedient establishment of a settler compact and was diplomatically marked by handshake or treaty. (Re)conciliation is a feature of the internal colonialism of late liberal settler democracies, post-frontier societies, where the state seeks to incorporate Indigenes within the idea of one nation, and where Indigenous people are often legally configured as non-sovereign in their own territories.[17]

Similarly, Verdeja notes 'the term re-conciliation itself carries with it an idea of a return to a prior desirable state. Such narratives graft onto different societies a general moral story about harmony, rupture, and eventual reunion that risks ignoring important historical and political features'.[18] As a result, reconciliation discourses may merely be a modern adaption of historical interactions between settler forces and Indigenous peoples and nations and reflect a series of assumptions and preferences that will only ever benefit the processes of settlement.

10.3 RECONCILIATION AND EMOTIONS

In assessing reconciliation practices, it is also important to assess the emotional dimension for victim-survivors and society. For Pablo de Greiff, an 'unreconciled' society is one in which 'resentment characterises the relations between citizens and between citizens and their institutions. It is one in which people experience anger because their norm-based expectations have been threatened or defeated'.[19] De Greiff argues that if reconciliation is to have any substantial meaning, 'it must refer to something individuals either experience or not'.[20] He cautions that law and policy can only make a modest contribution to reconciliation: 'while transitional justice measures can

[16] Lu (n 10) 19–20.
[17] Penelope Edmonds, *Settler Colonialism and (Re)Conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Palgrave Macmillan 2016) 23.
[18] Verdeja *Unchopping a Tree* (n 9) 17.
[19] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 Politorbis 17, 25.
[20] ibid 26.

contribute to making institutions trustworthy, actually trusting institutions is something that requires an attitudinal transformation that the implementation of transitional justice measures can only ground but not produce'.[21]

In addition to the emotional dimension of interactive forms of reconciliation, there also remains a risk that elite-level practitioners focus on objective social conditions and neglect the subjective, emotional experience of individuals, and their attitudes towards one another regarding reconciliation.[22] Policy makers may overly privilege policy-driven initiatives and material and neglect the 'subjective' and lived experience of individuals subject to their policies. Michael Ure argues that 'the unfinished project of reconciliation hinges on transforming the way political and legal institutions respond to and incorporate emotional responses to injuries and loss'.[23]

Reconciliation at its epistemic and ontological or existential dimensions may also have a significant emotional impact. Edmonds notes the need to interrogate: 'the way statebased enactments may direct us towards a tidy politics of consensus, while others may unsettle us into a more creative, dissenting and unruly political place'.[24] Miranda Johnson argues reconciliation 'only re-entrenches settler belonging through an affective attachment to national renewal and has little to do with Indigenous conceptions of rights, reconciliation or sovereignties'.[25] She concludes: 'Having acknowledged and apologized for the injustices of the past, the settler state redefines postcolonial nationhood in terms of indigeneity appropriated from its former victims.'[26] By acknowledging the affective and emotional dimensions to reconciliation, it is possible to acknowledge the narration of reconciliation is not merely an exercise in state or institutional policy but also claims to address the national self-image and national self-founding.

10.4 RECONCILIATION AND HISTORICAL-STRUCTURAL INJUSTICES

Although reconciliation forms a significant part of transitional justice, it requires thorough adaption to the context of addressing historical-structural

[21] ibid.

[22] Pablo de Greiff, 'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted' in Mark Gibney and Rhoda Howard-Hassmann (eds), *The Age of Apology* (Pennsylvania State University Press 2008) 123.

[23] Michael Ure, 'Post-Traumatic Societies: On Reconciliation, Justice and the Emotions' (2008) 11 European Journal of Social Theory 283, 285.

[24] Edmonds (n 17) 25.

[25] Miranda Johnson, 'Reconciliation, Indigeneity, and Postcolonial Nationhood in Settler States' (2011) 14 Postcolonial Studies 187.

[26] ibid 199.

injustices. For de Greiff, unreconciled societies are characterised by widespread and systematic failures to recognise individuals as subjects of fundamental value and dignity. Reconciliation processes can be seen as the responses to these failures, where citizens can trust one another again and share a sufficient commitment to the norms and values of their state's institutions.[27] Reconciliation on de Greiff's account is epiphenomenal, that is, it results indirectly from pursuing law and policy rather than being a goal to seek directly.[28] As a result, there are very few things that can be done to promote reconciliation independently of other transitional justice practices.[29] Rather, as Bloomfield and Philpott agree, reconciliation is the whole relationship-oriented process within which the diverse elements of transitional justice are the constitutive parts.[30] However, a purely epiphenomenal approach may fail to account for contestation regarding instances where states or churches engage in explicit reconciliation activities. Verdeja notes such approaches may risk 'treating significant differences as threats to the social order and thus inimical to reconciliation. The rejection of political disagreements leaves us with few conceptual tools to distinguish between acceptable political contestation and domination. Indeed, the tendency to equate reconciliation with consensus, if not deep harmony, means that other key aspects of politics – such as argument and disagreement – are erased'.[31]

Instead, in the context of the cases studied in this book, accounts that embrace the reality of radical political disagreement about the nature and legitimacy of state and church authority are necessary after recognition of historical-structural injustices. Reconciliation accounts in mainstream transitional justice speak about the need for mutual trust among citizens and between citizens and the state.[32] The background assumption is a shared willingness to operate within the political community constructed by a state; this assumption cannot hold in settler colonial contexts, where Indigenous sovereign nations problematise the idea of mutual trust within a single democratic community. Damien Short suggests that although citizenship rights may seek to acknowledge the distinctive nature of Indigenous nations, they 'emanate from an illegitimate settler state that has subordinated indigenous laws, autonomy and forms of government. From an indigenous perspective

[27] de Greiff 'A Normative Conception of Transitional Justice' (n 19) 26.
[28] de Greiff 'The Role of Apologies in National Reconciliation Processes' (n 22) 122.
[29] ibid 123.
[30] Bloomfield (n 1) 11; Daniel Philpott, 'An Ethic of Political Reconciliation' (2009) 23 Ethics & International Affairs 389.
[31] Verdeja 'Political Reconciliation in Postcolonial Settler Societies' (n 15) 229.
[32] de Greiff 'A Normative Conception of Transitional Justice' (n 19).

they are regarded as little more than acts of absorption'.[33] Similarly, Esme Murdock suggests reconciliation processes 'largely do not consider, honor, or involve Indigenous geographies, histories, philosophies, or land-based epistemologies'.[34] She suggests the need to interrogate 'what precisely is being reconciled and what precisely we are transitioning to when the outcomes of reconciliatory processes are not transforming colonial socio-ecological systems and structures'.[35] Courtney Jung suggests this logic of closure informs settler colonial approaches to reconciliation and reflects a desire not to have to deal with the 'Indian problem' any more.[36] Others concur that reconciliation is inherently assimilative or colonising.[37]

In contrast, Verdeja suggests meaningful reconciliation is still possible and argues that reconciliation as mutual respect in settler contexts includes three elements: '(1) *critical reflection* on the past; (2) *symbolic and material recognition*; and (3) securing the means for *political participation*. These elements reflect the ethical issues that continue to arise in these societies, give greater conceptual coherence to reconciliation, and assist in assessing the ways in which contemporary reconciliation politics remain inadequate'.[38] For Verdeja, critical reflection includes public challenges to popular accounts of the past, including critique of basic social values and the kind of society citizens want.[39]

Indigenous scholars in turn emphasise the need for Indigenous resurgence. Jeff Corntassel and Taiaiake Alfred argue that reconciliation must be predicated on meaningful restitution of Indigenous lands and reparations,[40] which would reflect a significant structural change in settler societies. In addition, reconciliation must operate to address prior epistemic and ontological injustices. Both Alfred and Kyle Powys Whyte emphasise the need for reconciliation to abandon notions of settler superiority as the basis

[33] Damien Short, 'Reconciliation and the Problem of Internal Colonialism' (2005) 26 Journal of Intercultural Studies 267, 273.

[34] Esme G Murdock, 'Storied with Land: "Transitional Justice" on Indigenous Lands' (2018) 14 Journal of Global Ethics 232, 235.

[35] ibid 236.

[36] Courtney Jung, 'Reconciliation: Six Reasons to Worry' (2018) 14 Journal of Global Ethics 252, 260.

[37] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014); Audra Simpson, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Duke University Press 2014).

[38] Verdeja 'Political Reconciliation in Postcolonial Settler Societies' (n 15) 232.

[39] ibid 233.

[40] Jeff Corntassel, 'Cultural Restoration in International Law: Pathways to Indigenous Self-Determination' (2012) 1(1) Canadian Journal of Human Rights 93, 94; Taiaiake Alfred, *Wasá'se: Indigenous Pathways of Action and Freedom* (Broadview Press 2005) 152.

for any direct reconciliation activity or political action.[41] Murdock argues justice and reconciliation between Indigenous peoples and settler states should centre on 'Indigenous philosophies, collective capacities, and land-based epistemologies, and cannot temporalise injustice to the past as other frameworks of justice do', particularly transitional justice.[42] Maddison thus suggests competing goals for Indigenous peoples and settler states engaging in reconciliation. For Indigenous peoples, reconciliation may form an opportunity to highlight the ways in which contemporary policies reinforce historical-structural injustices. In contrast, settler governments may seek to use reconciliation as a means to settle and close the past as purely historical and not relevant to contemporary policy and politics – completing the colonial project once and for all.[43]

Beyond the settler context, reconciliation may be problematic for victim-survivors of harms perpetrated by religious actors or institutions. David Tombs suggests although there is extensive attention given to reconciliation in Christian doctrine, Christian churches and writers largely neglected the challenges of social reconciliation until the past few decades, due to the privatisation of religion in the public sphere and lack of churches' willingness to engage in political controversy.[44] Reconciliation from a religious foundation has featured in transitions and conflict resolution in recent decades. Processes of racial reconciliation are familiar to transitional justice, with significant emphasis on *ubuntu* and racial reconciliation in South Africa's approach to transitional justice,[45] and draw from the significant basis of reconciliation in religious and traditional thought.[46]

However, some traditional or religious approaches to reconciliation may marginalise the role of women or young people or be subject to political

[41] Kyle Powys Whyte, 'On Resilient Parasitisms, or Why I'm Skeptical of Indigenous/Settler Reconciliation' (2018) 14 Journal of Global Ethics 277, 288; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (2nd ed, Oxford University Press 2009) 274.

[42] Murdock (n 34) 237.

[43] Sarah Maddison, *The Colonial Fantasy: Why White Australia Can't Solve Black Problems* (Allen & Unwin 2019) 189.

[44] David Tombs, 'Public Theology and Reconciliation' in Sebastian Kim and Katie Day (eds), *A Companion to Public Theology* (Brill 2017) 123.

[45] Josh Bowsher, 'The South African TRC as Neoliberal Reconciliation: Victim Subjectivities and the Synchronization of Affects' (2020) 29(1) Social & Legal Studies 41–64; PGJ Meiring, 'Bonhoeffer and Costly Reconciliation in South Africa: Through the Lens of the South African Truth and Reconciliation Commission' (2017) 38 Verbum et Ecclesia 18.

[46] Karl Barth, Geoffrey William Bromiley and Thomas F Torrance, *The Doctrine of Reconciliation: Church Dogmatics* (Continuum 2004); Meiring (n 45); Desmond Tutu, *No Future without Forgiveness* (Rider 2000); Miroslav Volf, *Exclusion and Embrace: A Theological Exploration of Identity, Otherness, and Reconciliation* (Abingdon Press 1996).

manipulation.[47] For instance, Kate Gleeson and Aleardo Zanghellini argue that 'Catholic appeal to grace has the potential for turning into an extraordinary demand made of victims not only to rehabilitate offenders and the Church in the eyes of the community, but also to work towards the spiritual absolution of the abuser'.[48] On their account, such an approach creates risks of a gendered abuse of power within mediation processes for clerical child abuse and remains 'incompatible with orthodox restorative justice' theories.[49] Catherine Lu concludes that reconciliation strategies are problematic if they focus on an individual, de-politicised account that emphasises psychological healing and social unity at the expense of addressing structural sources of harm and injustice.[50]

As a result, existing accounts of reconciliation in transitional justice as settlement and as the restoration of civic trust and mutual respect within a liberal democratic paradigm may struggle in the contexts of settler colonialism, religious reconciliation, or racial reconciliation. Instead, it may be more profitable to think of reconciliation as a site of ongoing agonistic relationships. For Chantel Mouffe, it is necessary to transform antagonistic violence into agonistic relations, which enable a significant but shared contest between groups of different identities and values.[51] Verdeja notes that an agonistic approach centres on marginalised and excluded groups.[52] Paul Muldoon and Andrew Schaap argue that reconciliation politics 'tend to be' agonistic because they 'open up a space of contestation and disagreement in relation to the claims identity groups make as victims of injustice'.[53] Schaap suggests: 'reconciliation is not about settling accounts but remains as an unsettling experience since it seeks to enact a radical break with the social order that underpinned the violence of the past'.[54] Verdeja concludes based on these radical approaches that 'no agreement on a morally satisfactory account of reconciliation can be developed prior to political struggle; and, reconciliation will remain incomplete, for new forms of contestation and

[47] Susanne Alden, 'Internalising the Culture of Human Rights: Securing Women's Rights in Post-Conflict East Timor' (2007) 1 Asia-Pacific Journal of Human Rights and the Law 1–23.

[48] Kate Gleeson and Aleardo Zanghellini, 'Graceful Remedies: Understanding Grace in the Catholic Church's Treatment of Clerical Child Sexual Abuse' (2015) 41 Australian Feminist Law Journal 219, 220.

[49] ibid.

[50] Lu (n 10) 183.

[51] Chantal Mouffe, *The Democratic Paradox* (Repr, Verso 2009) 80–8.

[52] Verdeja 'Political Reconciliation in Postcolonial Settler Societies' (n 15) 229–30.

[53] Paul Muldoon and Andrew Schaap, 'Confounded by Recognition: The Apology, the High Court and the Aboriginal Embassy in Australia' in Alexander Hirsch (ed), *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair* (Routledge 2012) 182.

[54] Andrew Schaap, 'Agonism in Divided Societies' (2006) 32 Philosophy & Social Criticism 255, 272.

negotiation over collective identity will always emerge due to the intrinsically agonistic nature of political life'.[55]

One feature under-emphasised from detailed consideration in existing agonistic accounts of reconciliation is the application of reconciliation to intergenerational wrongs. How do present-day survivors engage in reconciliation where wrongdoing forms part of wrongs against them directly, and against their ancestors, possibly over several decades or centuries? Henderson and Wakeham suggest that premature attempts at closure and reconciliation reflect settler anxieties regarding reconciliation: 'The problem at the level of relations between Indigenous and non-Indigenous institutions in Canada is not one of inadequate closure, ... but one of repeated, pre-emptive attempts at reaching closure and "cure"'.[56] As a result, it may be more valuable to envisage reconciliation as an inter-generational process, one continued across different political contexts, rather than a process that can be concluded or settled once and for all. Former Canadian Truth Commissioner Murray Sinclair concurs: 'Residential schools were with us for 130 years, until 1996. Seven generations of children went to residential schools. It's going to take generations to fix things.'[57] Similarly, James Tully has argued that 'reconciliation is neither a form of recognition handed down to Indigenous peoples from the state nor a final settlement of some kind. It is an ongoing partnership negotiated by free peoples based on principles they can both endorse and open to modification *en passant*'.[58] Such an approach is regrettably contrary to many of the national experiences of the states examined in this book.

10.5 NATIONAL EXPERIENCES OF RECONCILIATION

10.5.1 *Canada*

In Canada, there have been both political and legal expressions of reconciliation.[59] Antonio Buti notes: 'The Canadian Supreme Court has essentially

[55] Verdeja 'Political Reconciliation in Postcolonial Settler Societies' (n 15) 230.

[56] Jennifer Henderson and Pauline Wakeham, 'Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada' (2009) 35 ESC: English Studies in Canada 1, 7.

[57] Dan Rubenstein, 'Murray Sinclair, from Truth to Reconciliation: Murray Sinclair at Carleton University' (5 October 2016) <https://newsroom.carleton.ca/story/truth-and-reconciliation-commission/>.

[58] James Tully, *Public Philosophy in a New Key* (Cambridge University Press 2008) 223.

[59] Kim Stanton, 'Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission' (2017) 26 Journal of Law and Social Policy 21.

sought to resolve the underlying contradiction posed by white settlement of Indigenous lands by imposing a restrictive definition of Indigenous rights that construes them as derived from practices and traditions specific to Indigenous cultures rather than as "general and universal" rights.'[60] This case law and its limits are discussed in Chapter 7.

In addition, reconciliation formed a considerable part of Canada's transitional justice processes, in particular its TRC. The TRC's mandate refers to reconciliation as 'an ongoing individual and collective process' emerging from 'the truth of our common experiences'. The TRC involved the provision of individual testimony and public hearings, which are often framed as having a reconciliatory function for individuals. It hosted seven national truth and reconciliation events and seventeen community or regional hearings, where survivors and their families shared their truths in public or through private statements. The TRC also held or participated in regional events, outreach activities, and hearings, visiting over seventy communities. This amounted to over 300 events, drawing upward of 150,000 people.[61] Although the TRC intended to give survivors the opportunity for healing through truth telling,[62] some were critical of TRC processes. Glen Coulthard notes that formalised truth-telling processes exclude, evade, or dismiss 'negative emotions' like anger and resentment from the possible range of emotions felt and expressed by survivors. Those who 'refuse to forgive and/or reconcile ... are typically cast as being saddled by the damaging psychological residue of [the] legacy [of residential schools], of which anger and resentment are frequently highlighted'.[63]

The TRC report suggests that while some may view reconciliation as the re-establishment of a conciliatory state, the Commission viewed reconciliation as 'about coming to terms with the events of the past in a manner which overcomes conflict and establishes a peaceful and healthy relationship among people going forward'.[64] The report emphasised reconciliation is not about 'closing a sad chapter of Canada's past' and that reconciliation will never

[60] Antonio Buti, '"Reconciliation": Its Relationship and Importance to Law' (2018) 43 University of Western Australia Law Review 107, 110.

[61] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6* (McGill-Queen's University Press 2015) 177.

[62] Matt James, 'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6 International Journal of Transitional Justice 182, 195.

[63] Coulthard (n 37) 109.

[64] Truth and Reconciliation Commission of Canada (n 61) 3.

occur unless we are also reconciled with the earth.[65] The report identified ten principles to guide reconciliation in Canada, including that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was the framework for reconciliation; that First Nations peoples have rights in treaties, constitutional, and human rights settings that must be recognised and respected; and that reconciliation 'requires constructive action on addressing the ongoing legacies of colonialism that have had destructive impacts on Aboriginal peoples' education, cultures and languages, health, child welfare, administration of justice, and economic opportunities and prosperity'.[66] Their approach also emphasised epistemic justice by arguing that the perspectives of Aboriginal Elders and Traditional Knowledge Keepers on 'the ethics, concepts, and practices of reconciliation are vital to long-term reconciliation' and that 'integrating Indigenous knowledge systems, oral histories, laws, protocols, and connections to the land into the reconciliation process are essential'.[67] This approach contrasts with the Canadian government's response that largely affirms the status quo, discussed below. The TRC itself highlighted the difference between reconciliation viewed by the state and by Indigenous peoples, as reflecting competing views of sovereignty: the state asserting the supremacy of Crown sovereignty and Indigenous peoples seeking recognition of their own sovereignty.[68]

In addition, broader structural reconciliation forms a significant part of the TRC's final report's calls to action under two high-level headings: 'Legacy' and 'Reconciliation'. 'Legacy' addresses the consequences of colonialism and 'Reconciliation' offers the principles for a shared future for Indigenous and settler peoples. The forty-two calls to action under 'Legacy' are divided into five subheadings: child welfare, education, language and culture, health, and justice.[69] 'Reconciliation', by contrast, includes fifty-two calls to action, ranging from the obligations arising under specific legal instruments to considering reconciliation as applied to museums, media, sport, and business, among others.[70] Under recommendation 45, the TRC calls on the government of Canada to '[r]enew or establish Treaty relationships based on

[65] ibid 7, 14.
[66] Truth and Reconciliation Commission of Canada, *What We Have Learned: Principles of Truth and Reconciliation* (Truth and Reconciliation Commission of Canada 2015) 3–4.
[67] Truth and Reconciliation Commission of Canada (n 61) 16.
[68] ibid 25.
[69] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5* (McGill-Queen's University Press 2015) 277–83.
[70] ibid 283–95.

principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future'. The same recommendation continues by asking Canada to '[r]epudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius'. The recommendations or calls also include healing relationships through 'public truth sharing, apology, and commemoration'; 'addressing the ongoing legacies of colonialism' and creating 'a more equitable and inclusive society by closing the gaps in social, health, and economic outcomes'; respecting and learning from the 'perspectives and understandings of Aboriginal Elders and Traditional Knowledge Keepers'; supporting cultural revitalisation, including 'integrating Indigenous knowledge systems, oral histories, laws, protocols, and connections to the land into the reconciliation process'; joint leadership, trust building, accountability, and resource investments; and 'sustained public education and dialogue . . . about the history and legacy of residential schools, treaties, and Aboriginal rights, as well as the historical and contemporary contributions of Aboriginal peoples to Canadian society'.[71]

Although highly ambitious, these calls have still been subjected to academic criticism. David MacDonald notes that the TRC's approach did not define self-determination or examine how it would affect Canadian sovereignty.[72] To date, of the ninety-four calls to action, nineteen remain un-started, thirty remain merely in proposal stages, thirty-two are underway and thirteen are complete.[73] Those completed include the inquiry into violence against Aboriginal women. Of those calls un-started, as of October 2022, most notably, the government of Canada has also not started a process of publishing its legal opinions regarding Aboriginal or treaty rights.

The selection of calls to action to pursue is inevitably a political choice reflecting cost and political will, among other factors. In 2018 the Canadian government published a 'Recognition and Implementation of Indigenous Rights Framework' and a set of ten principles aimed at 'transformative change' for a renewed relationship, which continues the supremacy of Canadian law and existing set of Indigenous rights, discussed in Chapter 7. Nagy suggests:

[71] Truth and Reconciliation Commission of Canada (n 66) 3–4.

[72] David MacDonald, 'Paved with Comfortable Intentions: Moving beyond Liberal Multiculturalism and Civil Rights Frames on the Road to Transformative Reconciliation' in Paulette Regan and Aimee Craft (eds), *Pathways of Reconciliation: Indigenous and Settler Approaches to Implementing the TRC's Calls to Action* (University of Manitoba Press 2020) 12.

[73] <https://newsinteractives.cbc.ca/longform-single/beyond-94?&cta=1>.

'The degree to which this agenda will destabilize the constitutional framework explained above remains tenuous at best.'[74]

Some Canadian Indigenous scholars have rejected this approach to reconciliation, advocating for more profound land restitution, greater Indigenous nationhood, and the production of alternatives to modern Western capitalist societies.[75] Courtney Jung suggests: 'Reconciliation may serve as a government project whose primary aim is to bolster state legitimacy. Reconciliation may reflect the desire, for settler-descendants, for expiation or a "move to innocence"'.[76] She concludes that reconciliation is a form of settler futurity: 'Settler futurity is essentially a settlement of accounts, a moment when settler descendants can finally turn to Indigenous people and say "Okay, now we're even"'. She continues:'[t]he "transition" is to an even playing field in which the government, and non-Indigenous Canadians, can no longer be held accountable for past wrongs'.[77]

Other scholars reject these criticisms. Paulette Regan argues that the commission's vision of reconciliation is resurgent: 'contingent on the land-based resurgence of Indigenous cultures, languages, knowledge systems, oral histories, laws, and governance structures . . . The commission's work lays the foundation for a decolonizing paradigm shift in how reconciliation is conceptualized, negotiated, and practiced in formal and informal settings.'[78] James Tully and John Burrows suggest resurgence thinking that promotes radical separation from settlers is not indigenous to Turtle Island (North America) but rather draws from the decolonisation contexts of the 1950s and 1960s. They express concern that applying such a radical critique to settler colonial settings may result in viewing 'the majority of Indigenous people as being co-opted'.[79] Sheryl Lightfoot equally emphasises that the pessimism traps developed by resurgence theorists 'are diametrically opposed to the work and vision of Indigenous organizations who have been working on the ground for decades to assert Indigenous nationhood both domestically and internationally, in ways that often assertively and creatively challenge and shift the existing system

[74] Rosemary Nagy, 'Settler Witnessing at the Truth and Reconciliation Commission of Canada' (2020) 21 Human Rights Review 219, 226.
[75] Alfred (n 41) 183.
[76] Jung (n 36).
[77] ibid 261.
[78] Paulette Regan, 'Reconciliation and Resurgence: Reflections on the TRC Final Report' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation* (University of Toronto Press 2018) 213.
[79] James Tully and John Borrows, 'Introduction' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation* (University of Toronto Press 2018) 6.

of sovereign states'.[80] Even on these less radical terms, such accounts of reconciliation in settler colonial contexts reflect a profound redistribution of both material and ideational power, rather than an affirmation of the existing social order by victim-survivors and their descendants.

10.5.2 *Australia*

As in Canada, reconciliation in Australia has both legal and political expressions. Matilda Keynes notes that since the 1980s Australia has pursued an official reconciliation agenda 'that has produced limited structural reforms for Aboriginal people, and which continues to neglect First Nations people's own proposals for reconciliation and reform'.[81] Mark McMillan and Sophie Rigney concur that the Australian government's approach to reconciliation 'does not adequately acknowledge the harms of the state, and does not allow the capacity for Indigenous peoples to seek justice through reconciliation'.[82]

The Royal Commission into Aboriginal Deaths in Custody began the use of official reconciliation by emphasising the need for reconciliation between Aboriginal and non-Aboriginal communities in Australia.[83] In 1991, the Council for Aboriginal Reconciliation was established, to 'promote reconciliation between Aborigines and Torres Strait Islanders and the wider Australian community and by means that include the fostering of an ongoing national commitment to cooperate to address Aboriginal and Torres Strait Islander disadvantage'.[84] The twenty-five person council included representatives of government, business and academia, and high-profile Aboriginal people. Its advisory role included guiding the Minister on processes to further reconciliation, including community education. On Short's account, the council failed to see Indigenous people as nations, capable of

[80] Sheryl Lightfoot, Tim Stevens and Nicholas Michelsen, 'The Pessimism Traps of Indigenous Resurgence', *Pessimism in International Relations: Provocations, Possibilities, Politics* (Palgrave Macmillan 2020) 156–8.

[81] Matilda Keynes, 'History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia' [2018] International Journal of Transitional Justice 114.

[82] Mark McMillan and Sophie Rigney, 'Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment' (2018) 41 Ethnic and Racial Studies 759, 769.

[83] James Muirhead, 'Royal Commission Into Aboriginal Deaths in Custody' (Commonwealth Government of Australia 1991) s 1.9.

[84] 'The Council for Aboriginal Reconciliation: Vision Statement' (The Council for Aboriginal Reconciliation) <www.austlii.edu.au/au/orgs/car/council/spl98_20/council.htm#:~:text=The%20Council%20for%20Aboriginal%20Reconciliation%20was%20established%20by%20the%20Commonwealth,Islander%20and%20wider%20Australian%20communities>.

negotiating a treaty with the state, and instead emphasised its role in promoting a single, united Australia.[85] The council emphasised eight issues as essential for reconciliation, with several identifying the need to educate non-Indigenous Australians regarding Australia's colonial history, the importance of Aboriginal and Torres Strait Islander relationships to land and sea, culture and heritage, and the current disadvantage and high levels of custody experienced by Indigenous peoples.[86]

The early efforts of the council contributed to a broader people's movement for reconciliation across different social groups.[87] The most significant grassroots reconciliation initiative was the National Sorry Day and the Sorry Book Campaign in 1998, in which over one thousand Sorry Books were signed by Australians throughout the country.[88] However, momentum for bottom-up reconciliation has since dissipated and been replaced with a focus on corporate initiatives to improve relationships between Aboriginal peoples and other Australians.[89] Maddison suggests that such strategies as community education and corporate-led reconciliation 'suggest that Australia has not pursued reconciliation as a path toward decolonising relationships between First Nations and the settler state'.[90] Short concludes: 'Both the Keating and Howard governments had the opportunity to give legislative effect to common law indigenous rights gains. Yet they bowed to the pressure of commercial interests, producing legislation that severely limited and reduced the gains'.[91]

These efforts at reconciliation were greatly influenced by legal and political developments regarding Aboriginal rights in the 1990s discussed in Chapter 7. The *Mabo* judgment, the Native Title Act 1993, and the Bringing Them Home report on the Stolen Generation 'marked the end of political bipartisanship over reconciliation and Indigenous policy more generally'.[92] As a result of the potentially profound impact of these processes and resistance to

[85] Damien Short, 'Reconciliation, Assimilation, and the Indigenous Peoples of Australia' (2003) 24 International Political Science Review 491, 496–7.

[86] Council for Aboriginal Reconciliation (Australia), *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Council for Aboriginal Reconciliation 2000) 13.

[87] ibid 65.

[88] Paulette Regan, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010) 59.

[89] Maddison (n 43) 192.

[90] ibid.

[91] Short (n 85) 506.

[92] Jon Altman, 'Reconciliation and the Quest for Economic Sameness' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016) 218.

implementing the decisions discussed in Chapter 7, from 1998 the Australian government focused on 'practical reconciliation', to reduce material disadvantage in the areas of health, housing, education, and employment, but without specified targets, timeframes, or monitoring. This approach framed reconciliation as disconnected from historical abuses and settler colonisation: 'The level of Indigenous disadvantage was deemed unacceptable, but was explained as a product of recent bad policy rather than a deeper history of colonial invasion and subsequent neglect.'[93] The practical reconciliation approach ignored Indigenous aspirations regarding land rights, cultural protection, and self-determination. Larissa Behrendt argues the clear agenda (of 'practical reconciliation') is one of assimilation and integration, reflecting the same logic as Welfare Boards and Aboriginal Protection Boards.[94]

In 1999, Prime Minister Howard made a Motion of Reconciliation to the federal parliament, which recognises 'the achievements of the Australian nation' and 'that the mistreatment of many indigenous Australians over a significant period represents the most blemished chapter in our national history'. While the motion went on to express regret for past unspecified injustices suffered by Indigenous Australians, it ended by stating, '[W]e, having achieved so much as a nation, can now move forward together for the benefit of all Australians'. McMillan and Rigney note that 'the emphasis of this motion on the nationhood of Australia and "the achievements of the Australian nation" explicitly uses reconciliation as a nation-building exercise for the Australian state, further denying Indigenous sovereignties'.[95] As a result, they conclude: 'Reconciliation has been conducted on "white" terms.'[96] Similarly, Damien Short suggests the reconciliation process is hence best understood as 'a stage in the colonial project rather than a genuine attempt at atonement'; especially by neglecting Indigenous claims to sovereignty, nationhood, or land and by focusing on modern-day assimilation and integration, it adopts the same agenda that motivated historical abuses such as child removal.[97] Henry suggests that, ultimately, the reconciliation policy has allowed a denial of the harms perpetrated by the state, and therefore has been used to 'bolster the legitimacy, authenticity and stability' of the

[93] ibid 219.
[94] Larissa Behrendt, 'The Link between Rights and a Treaty: "Practical Reconciliation"' (2002) 4 Balayi: Culture, Law and Colonialism 21.
[95] McMillan and Rigney (n 82) 770.
[96] ibid 769.
[97] Damien Short, *Reconciliation and Colonial Power: Indigenous Rights in Australia* (Ashgate 2008) 170–171.

Australian state.[98] Maddison concludes: 'reconciliation in Australia became a means of justifying colonial domination rather than transforming the relationship between Indigenous peoples and the settler state'.[99]

Short concludes: 'From the outset reconciliation in Australia placed a "colonial ceiling" on Indigenous aspirations by emphasising nation-building and national unity over sovereignty or the negotiation of a treaty.'[100] Indeed, the Australian reconciliation process remained 'extremely tightly controlled and managed within political boundaries acceptable to the settler colonial state'.[101]

Maddison and Nakata criticise Australian reconciliation for its focus on educating non-Indigenous people, 'at the expense of addressing historical injustice or the negotiation of contemporary treaties'.[102] Maddison suggests that while the formal reconciliation process in Australia introduced a new moral language to address historical-structural injustice, it did not resolve any of the issues raised, such as reparations, a treaty, or the profound inequality between settler and Indigenous peoples.[103] Maddison concludes: 'what settlers want from reconciliation, and what Indigenous peoples want in a transformed relationship with the settler, are profoundly, perhaps incommensurably different.'[104] Instead, she argues, '[W]hite Australia cannot solve black problems because white Australia is the problem'.[105] Palmer and Pocock suggest that 'the burden of reconciliation falls differentially on Aboriginal people and white settlers in Australia'.[106] They suggest that 'for settler Australia, a form of reparation – a reciprocal pain – might be found in a deep acknowledgement and acceptance of discomforting post-colonization history, through the affective force of Aboriginal postcontact heritage sites such as massacre sites and former fringe camps; this force could be a source of "reparative discomfort" … non-Indigenous people, by experiencing and holding strong

[98] Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 International Journal of Transitional Justice 199.
[99] Maddison (n 43) 193.
[100] Short (n 33) 274–5.
[101] Tom Clark, Ravi de Costa and Sarah Maddison, 'Non-Indigenous People and the Limits of Settler Colonial Reconciliation' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016) 4.
[102] Sana Nakata and Sarah Maddison, 'New Collaborations in Old Institutional Spaces: Setting a New Research Agenda to Transform Indigenous-Settler Relations' (2019) 54 Australian Journal of Political Science 407, 411.
[103] Maddison (n 43) 188.
[104] ibid 211.
[105] ibid 213.
[106] Jane Palmer and Celmara Pocock, 'Aboriginal Colonial History and the (Un)Happy Object of Reconciliation' (2020) 34 Cultural Studies 49, 53.

over time this new and potentially painful imaginary, might make some contribution to the process of makarrata or peace-making'.[107]

10.5.3 *United States*

Reconciliation does not form part of explicit government policy in the United States regarding either Native Americans or the slavery of African Americans. Modern efforts at reconciliation concerning race relations, slavery, and Jim Crow in the United States must reckon with the failure of one of the last nationwide attempts to address social division – Reconstruction.[108] After the Civil War, several constitutional amendments sought to ensure greater racial equality. The Thirteenth Amendment abolished slavery. The Fourteenth Amendment provided for the equal protection of all citizens. The Fifteenth Amendment barred racial discrimination in voting. Adam Serwer suggests, 'The Reconstruction amendments to the Constitution should have settled once and for all the question of whether America was a white man's country or a nation for all its citizens'.[109] However, as discussed in Chapter 2, by 1876, the withdrawal of federal troops in the South subjected African Americans in the South to a new reproduction of racial discrimination and violence in the Jim Crow era. Serwer concludes: 'In the aftermath of a terrible war, Americans ... purchased an illusion of reconciliation, peace, and civility through a restoration of white rule. They should never again make such a bargain.'[110]

Contemporary processes of racial reconciliation have proved challenging in the absence of national processes of truth telling and reparations. Eric Yamamoto asserts that interracial justice requires both 'material changes in the structure of the relationship (social, economic, political) to guard against "cheap reconciliation," [that is] just talk ... [and] the kind of recognition and redress of deep grievances that sparks a joint transformation in consciousness, diminishes enmities, and forges new relational bonds'.[111]

In 1997, President Clinton created the President's Initiative on Race by executive order 13050. Clinton appointed a seven-member advisory board with

[107] ibid 50.
[108] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (updated ed, HarperPerennial 2014).
[109] Adam Serwer, 'Civility is Overrated' (2019) *The Atlantic* <www.theatlantic.com/magazine/archive/2019/12/adam-serwer-civility/600784/>.
[110] ibid.
[111] Eric Yamamoto, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (New York University Press 1999) 11.

an initial mandate of educating Americans regarding racial issues, promoting racial dialogue, and recommending solutions to racial divides and problems. He also pledged to meet with citizens and listen to their views in several 'town-hall' meetings, a format he had used successfully in his presidential campaigns. However, this initiative did not make a significant impact on race relations. Renée Smith suggests several reasons for this failure, including a limited and divided public buy-in on the need for the process, a lack of focus, and inability to engage in open dialogue as the advisory board was obliged to meet in public. Finally, and most critically, the initiative coincided with revelations regarding Clinton's affair with Monica Lewinsky.[112] Smith suggests that the presidency is 'not well suited for eliciting general public debate on complex and sensitive issues such as race relations. Nor is it well suited for coalescing diverse opinions on policy alternatives'.[113]

The initiative issued a report which recommended strengthening civil rights enforcement, improving data collection on racial and ethnic discrimination, and strengthening the laws and enforcement against hate crimes.[114] Sherrilyn Ifill suggests:

> Imagining this kind of talk at a national level was, in retrospect, overly ambitious. The truth is that talking about race is challenge enough within families, within communities, and within cities. The idea of a conversation involving the entire nation, with communities from coast to coast grappling with the immensely complex and alienating topic of race (within one four-year presidential term, no less), was naively ambitious, although admirable.[115]

There are also religious dimensions to existing reconciliation processes in the United States. Anthea Butler notes that 'the racial reconciliation movements of the 1990s between white evangelicals and African Americans took several forms and met with varying degrees of success. Before the 1990s, attempts at racial reconciliation often took the form of joint church services or days of visitation between churches'.[116] Andrea Smith states that such efforts 'tended to focus on multicultural representation in congregations and denominations

[112] Renée Smith, 'The Public Presidency Hits the Wall: Clinton's Presidential Initiative on Race' (1998) 28 Presidential Studies Quarterly 780, 782–3.
[113] ibid 784.
[114] 'One America in the 21st Century: Forging a New Future' (The President's Initiative on Race 1998) 57–87 <https://clintonwhitehouse4.archives.gov/media/pdf/PIR.pdf>.
[115] Sherrilyn A Ifill, *On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century* (Beacon Press 2007) 132–3.
[116] Anthea D Butler, *White Evangelical Racism: The Politics of Morality in America* (The University of North Carolina Press 2021) 86.

rather than on structural forms of white supremacy'.[117] State-level inquiries, such as the Greensboro Truth and Reconciliation Commission, reveal the potential for such inquiries to contribute to reconciliation at 'cognitive-affective, behavioural, and social' levels.[118] Some victim-survivors described the experience of humanising perpetrators through witnessing perpetrator testimony and engagement; however, others were critical of the limits or absence of new disclosures from perpetrators as a basis for reconciliation.[119] The most dramatic though rare example of reconciliation involved survivors who forgave a perpetrator for killing their family member.[120] The Greensboro commission reflects the potential for further transitional justice processes in the United States that could contribute to racial reconciliation but only in a context of some perpetrator involvement and, even in that rare context, with ambivalent results.

In considering the hesitancy of the United States to begin the process of racial reconciliation, Ifill suggests some whites do not see the contemporary relevance of historical abuses; others worry that addressing the past will challenge 'white innocence' and require them to take responsibility for a past they may be ignorant about. Finally, for racial crimes within lived memory, some whites may fear the potential for criminal accountability.[121] In the American context, Verdeja suggests that greater use of reconciliation discourse could 'mean going beyond discussions over the use of indigenous symbols for sports teams or the purported benefits of indigenous-owned casinos that have dominated recent debates'.[122] By requiring some critical self-reflection, a process of reconciliation could also critique the 'country's founding principles of self-rule and democracy' to the extent that they are implicated in the systematic exclusion and destruction of Indigenous and black communities.[123]

10.5.4 *Ireland*

There is a lack of explicit reconciliation discourse in the context of Irish historical abuse. However, the discourse of reconciliation has played a

[117] Andrea Smith, *Unreconciled: From Racial Reconciliation to Racial Justice in Christian Evangelicalism* (Duke University Press 2019) 25.
[118] David Androff, '"To Not Hate": Reconciliation among Victims of Violence and Participants of the Greensboro Truth and Reconciliation Commission' (2010) 13 Contemporary Justice Review 269.
[119] ibid 277.
[120] ibid 281.
[121] Ifill (n 115) 134–5.
[122] Verdeja 'Political Reconciliation in Postcolonial Settler Societies' (n 15) 233.
[123] ibid.

significant role in Irish foreign policy regarding the Northern Irish peace process.[124] The combination of abuse by state and church authorities means that reconciliation could be differently experienced and conceived of by victim-survivors depending on whether they engage with state or church actors. In the absence of an explicit reconciliation policy towards survivors of various forms of historical abuses, it is possible to construct an epiphenomenal account of reconciliation across the other dimensions of transitional justice pursued by the Irish state, churches, and religious organisations.

While there is a rhetorical commitment to restoring the right relations with victim-survivors evident in the two-state apologies and several apologies from religious orders discussed in Chapter 9, these remain partial and piecemeal and are not predicated on the basis of recognition of citizens' status or rights or on recognition of the illegitimacy of institutionalisation as a process in twentieth-century Ireland. The lack of memorialisation in the Irish context also demonstrates a limited commitment to recasting the national self-image or national narrative to incorporate recognition of historical abuses. This suggests addressing historical abuses remains short term, exceptional, rather than constitutive of the Irish state and society. This framing of historical abuses' role in Irish society is also evident in the function of attempts to 'seal' access to survivor testimony and the archives of the Ryan Commission and the Residential Institutions Redress Board (RIRB) in late 2019.[125] At a process level, the lack of meaningful attempts to engage in reconciliation is also evident in the 'gag order' component of the Irish approach to inquiries and redress, prohibiting victim-survivors from speaking about their experiences with the state's transitional justice mechanisms as discussed in Chapter 8. These practices reflect attempts to 'settle' the past in a manner that causes epistemic and structural harm to survivors.

10.5.5 *United Kingdom*

As in the case of Ireland, reconciliation with victim-survivors of historical-structural abuse does not form part of the approach taken in the United Kingdom. Apologies to victim-survivors are considered separately in Chapter 9. Again, reconciliation has formed part of British foreign policy

[124] Duncan Morrow, 'Reconciliation and After in Northern Ireland: The Search for a Political Order in an Ethnically Divided Society' (2017) 23 Nationalism and Ethnic Politics 98.

[125] Conall O'Fahartha, 'Abuse Survivors Concern over Plan to Seal Records' *Irish Examiner* Cork, (16 August 2019).

regarding Northern Ireland[126] but has been kept separate from its response to institutional abuses. Reconciliation with victim-survivors of historical abuse in the United Kingdom will point to the broader processes of reconciliation in a state divided by lines of class, region, ethnicity, and religion. More broadly, there is a lack of the language of reconciliation in British engagement with former colonial states and societies. Instead, British engagement in post-colonial contexts can often be framed in terms of international trade or economic and human development, rather than in terms of reparations or responsibility for the past.[127] In the absence of other elements of addressing an abusive past, it seems grossly premature to consider reconciliation discourses and practices for a broader British involvement in historical-structural injustices.

10.5.6 *Reconciliation and the Catholic Church*

As a concept with a significant basis in religion and theology, reconciliation is significant in the thought if not practice of churches in addressing historical-structural injustices. In 'Memory and Reconciliation: The Church and the Faults of the Past', the Holy See distinguishes between the infallible character of the church and the potential for sin in its members.[128] Contrary to the theological history of sin and repentance in Christian churches outlined by Celemajer, the document asserts: 'Sin is therefore always personal, even though it wounds the entire Church.' Situations of 'social sin', which could be read as structural injustices, are always 'the result of the accumulation and concentration of many personal sins … the imputability of a fault cannot properly be extended beyond the group of persons who had consented to it voluntarily, by means of acts or omissions, or through negligence'.[129] However, the document notes that the Biblical tradition of social repentance involved a systemic admission of fault. The document calls for a particular historical interpretation, noting that in judging historical abuses it must be remembered that historical periods are different, that the sociological and cultural times within which the church acts are different, and so, the standards by which the

[126] Robbie McVeigh, 'Between Reconciliation and Pacification: The British State and Community Relations in the North of Ireland' (2002) 37 Community Development Journal 47.
[127] Itay Lotem, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Palgrave Macmillan 2021) 295–300.
[128] 'Memory and Reconciliation: The Church and the Faults of the Past' <www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20000307_memory-reconc-itc_en.html>.
[129] ibid.

church are judged should be different, recognising diversity in historical and geographical situations.

Without naming specific time periods or geographical locations, the document acknowledges the role of the church in 'forms of evangelization that employed improper means to announce the revealed truth or did not include an evangelical discernment suited to the cultural values of peoples or did not respect the consciences of the persons to whom the faith was presented, as well as all forms of force used in the repression and correction of errors'. It then acknowledges that 'attention should be paid to all the failures, for which the sons and daughters of the Church may have been responsible, to denounce injustice and violence in the great variety of historical situations', including express reference to situations of human rights violations and to the historical treatment of Jews by Christians. In addition, the document offers some limited potential acknowledgement of the need to end patterns of religious alienation: 'it is important to avoid perpetuating negative images of the other, as well as causing unwarranted self-recrimination, by emphasising that, for believers, taking responsibility for past wrongs is a kind of sharing in the mystery of Christ, crucified and risen, who took upon himself the sins of all'. The document notes that acts of addressing historical abuses 'can increase the credibility of the Christian message, since they stem from obedience to the truth and tend to produce fruits of reconciliation'. However, the practice of the church evidenced in other chapters tends to be lawyer-led, with an engagement with survivors that reflects the church's rights as a legal actor to safeguard its own assets, information and members. An exception to a legalistic approach is the church's use of restorative justice programmes. Gleeson and Zanghellini note that in the context of historical abuses, restorative justice programmes have been used for survivors and offenders in the United States, New Zealand, Australia, the Netherlands, and elsewhere,[130] despite the lack of evidence of the suitability of such approaches to address historical and sexual abuse. They note that due to the absence of sufficient publicly available data on the nature and processes of these initiatives, '[i]t is not apparent to what extent various church-led processes abide by restorative justice standards or provide a sense of justice for survivors and offenders'.[131] They conclude: 'The Catholic doctrine of grace entails that in the context of Catholic restorative justice the goal of restoring justice to victims who have not lapsed into unbelief would take second place to the goal of restoring justification to the offender.'[132]

[130] Gleeson and Zanghellini (n 48) 225.
[131] ibid 226.
[132] ibid 235.

While reconciliation may form a central part of Catholic theology, a practice that does not include corporate and institutional responsibility for past wrongdoing, particularly the cover-up or facilitation of such wrongdoing, as identified in Chapter 6, seems ill-suited to provide an effective form of engagement with victim-survivors and instead serves as another inappropriate form of settlement.

10.5 CONCLUSION

Across diverse contexts, a range of levels of interest from state and church leadership in reconciliation is evident. In addition, there persists ongoing scepticism about the nature and potential for reconciliation for historical abuses, especially for inter-generational abuses in the context of settler democracies. The persistence of this disagreement raises concerns about the very possibility of reconciliation. Strakosch notes: 'As a polity, we see ourselves formulating transformative strategies, but these remain our solutions to our problems. We see ourselves engaging in profound political debates about possible ways forward, but these "good colonist/bad colonist" debates remain circumscribed by liberal categories.'[133] To truly enter into that shared space is to 'attend to what is irreconcilable within settler colonial relations' rather than to force reconciliations.[134]

The reality for reconciliation regarding historical abuse is that a society will never be fully reconciled to itself. There are historical wrongs that cannot be undone, divisions and grievances that are generations deep. The challenge for societies addressing historical abuse is not to achieve a perfect and final form of reconciliation but instead to acknowledge and name the challenge of reconciliation in each successive government and for each successive generation. Reconciliation is the grammar of an ongoing conversation. It may be necessary to start the conversation or it may be necessary to refute the premises on which the conversation rests. As Tuck and Yang argue: 'to be part of this process of mutual imagination, we as settlers must first give up the fundamental desire to attach these futures to the project of legitimising our current privileges once and for all'.[135] This aligns with Edmonds who conceives of reconciliation as 'symbolic negotiations, forms of mythic exchange that reflect

[133] Elizabeth Strakosch, 'Beyond Colonial Completion: Arendt, Settler Colonialism and the End of Politics' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016) 17.

[134] Eve Tuck and K Wayne Yang, 'Decolonization Is Not a Metaphor' (2012) 1 Decolonization: Indigeneity, Education & Society 1, 4.

[135] ibid 28–36.

the struggle at the heart of the postcolonial condition itself'.[136] For Edmonds, 'Reconciliation narratives involve the invention of new postcolonial socialities and imagined futures, as well as the creative reinterpretation of past events'.[137] These accounts 'can be contrasted with the false ideals of reconciliation as an overcoming of negative sentiments or the creation of deep social harmony'.[138] In suggesting that reconciliation can offer an alternative to colonial modernities, Lu notes,

> Reconciled individuals may still hold resentment against perpetrators, and reconciled societies may still be marked by difference, disagreement and conflict ... progress toward reconciliation in any society involves addressing the alienation not only of those oppressed in various ways by contemporary structured and structural injustice, but also of those whose identities and beliefs about themselves, others, and the world are called into question in the process of decolonization.[139]

The state foregoes the path of seeking to control, dominate, or further realienate individuals to a new, post-historical abuse conception of state–citizen relationships but instead embraces a reality and set of lived experiences, where allegiance and support remain necessarily contested, challenged, and complex. These forms of relationship are sufficient, even if they do not comply with traditional liberal conceptions of citizenship. The same too can be said regarding reconciliation with churches and Christianity. Institutionally and theologically, both need to commit to the proposition that their role is not to constitute patterns of inclusion or membership of the 'saved' but instead to provide one among many possible mechanisms for individuals to pursue their own non-violent conception of their relationship to existence (and/or the divine).

The approaches of the states and churches studied in this book are either too small or seek to use reconciliation as a form of settlement, for what Indigenous peoples, African Americans, and victim-survivor groups may prefer to frame as an ongoing form of non-violent political contestation. Muldoon notes: 'Reconciliation – or the reconciled state – seems destined to remain an incomplete project; the always deferred "not yet" of the receding post-colonial horizon.'[140] Reconciliation depends upon recognition as equals – this is what

[136] Edmonds (n 17) 185.
[137] ibid 187.
[138] Lu (n 10) 212.
[139] ibid.
[140] Paul Muldoon, 'Indigenous Reconciliation Is Hard, It Re-opens Wounds to Heal Them' *The Conversation* (10 May 2016) <http://theconversation.com/indigenous-reconciliation-is-hard-it-re-opens-wounds-to-heal-them-55951> (accessed 20 September 2022).

states are not willing to do for Indigenous nations and what empires and churches are not willing to do with survivors – to admit they are not exceptional, but in fact we are all warranted an equal stake in dialogue that extends to challenge the foundations of state and church authority and the existing distributions of power and wealth. Without addressing these foundations, reconciliation will remain in the service of existing structures.

11

Conclusions

11.1 INTRODUCTION

This book assessed whether transitional justice can meaningfully respond to historical abuses of states and churches in Ireland, the United States, the United Kingdom, Canada, and Australia, and the broader global legacy of abuses in the Roman Catholic Church. It identified significant dissatisfaction at the approach taken, in existing critical literature and among survivor communities. This dissatisfaction stems from a failure by church and state to (i) change meaningfully the use and distribution of power, (ii) address the emotional and lived experience of survivors, and (iii) engage in the reimagination of national and religious myths and identity, required in taking responsibility for historical-structural injustices. In light of these failures, states, churches, and societies may employ the rhetoric and practices of transitional justice to legitimate existing structures of power and emotional narratives that continue to subordinate and marginalise historically abused groups and individuals and seek legitimation in existing national and religious myths. Such transitional justice is *unrepentant* justice: even as they claim to serve the needs of victim-survivors, states and churches retain the belief in their own legitimacy, authority, and capacity to control and shape the lives of those in their territories, denominations, and beyond. These states continue to assert the legitimacy of coercive confinement for asylum seekers, in prisons, and their capacity to morally and legally categorise and 'other' those deemed social problems. Churches continue to assert their capacity to 'other' those deemed morally and spiritually problematic, such as those who identify as LGBTQI+. The logic of historical-structural injustices continues today. This brief conclusion reflects on the potential of justice efforts in the face of this lack of repentance.

11.2 ASSESSING TRANSITIONAL JUSTICE FOR THE HISTORICAL ABUSES OF CHURCH AND STATE

This book concerned attempts in recent decades to address historical-structural injustices, reflecting both individual and institutional acts of violence within lived memory and inter-generational structures and patterns of violence, discrimination and harm. Part I considered both the nature and extent of longer and inter-generational forms of non-recent violence. Chapter 2 outlined organised violence among states and churches and demonstrated the consistent forms of 'othering' used to justify and legitimate these forms of harm over different historical and national contexts. Chapter 3 considered that if transitional justice focused only on addressing historical abuses within lived memory, it would not connect non-recent abuses to current harms experienced by the descendant members of historically marginalised groups. As a result, the chapter employed the concept of historical-structural injustice, to articulate how non-recent forms of violence can be more effectively understood as part of widespread and systemic patterns of socially reproduced violence, as well as the result of the direct commission or perpetration of violence by specific individuals, institutions, and states. In turn, the chapter argued that an evaluation of the role of power and emotion would reveal that resistance is the result of an unwillingness or inability of existing holders and beneficiaries of power structures to divest themselves of power and authority and to enable the articulation of new national and religious myths and forms of identity.

Chapter 4 considered power as a four-dimensional phenomenon, examining its role as a form of agency, as a structure, and at its epistemic and ontological levels. While the abuse of power was present across these dimensions in historical-structural injustices themselves, the chapter also suggested that these patterns and practices of power may be present in transitional justice mechanisms and processes, with the effect of limiting their ability to address historical-structural injustices directly. In particular, the chapter argued that existing practices and structures of power are sustained and reproduced by national and religious myths that legitimate and justify the status quo. Chapter 5 combined this analysis of power with assessing the parallel role of emotions in shaping both historical-structural abuses and attempts to address the past. Particular emphasis is placed on the emotion of shame. As an emotion that in its structure is a criticism of individual identity rather than individual conduct, it is an emotion that is pervasive in existing accounts of historical-structural injustices but also in attempts to respond to the past. The suggestion of this chapter is that while shame may play some beneficial role at

an individual level, when deployed by powerful actors across existing structures, it is capable of reinforcing the structure of society based on 'othering' and the creation of inferior social categories.

Part II evaluated existing transitional justice mechanisms through these lenses of power and emotion. Transitional justice provides several episodic experiences and contests of power for victim-survivors, state, and church institutions. In some instances, inquiries, apologies, and redress schemes have also affected national attitudes and awareness regarding abusive aspects of the past. However, current practices also reflect fundamental sites of resistance to addressing historical-structural injustice across each of the dimensions of power and emotion examined in the book, which are likely to remain and adapt in the future. Evaluating how states and churches address historical abuses across four dimensions of power reveals some of the limitations of current approaches.

Victim-survivor participation in inquiries and reparations is essential to legitimate these mechanisms. The experience of survivors in both instances is ambivalent – although some find inquiry processes helpful and empowering forms of recognition, as in some Australian inquiries, but others have frustrated, distressed, and re-traumatised survivors, especially Irish and some UK inquiries. Similarly, with redress schemes, while they can grow to some considerable scale such as the Irish RIRB or Canadian IRSSA schemes, even the best designed and most munificent schemes struggle to address the 'unrectifiable loss' of historical-structural injustices completely and may cause forms of distress and re-traumatisation. In addition, litigation processes considered in Chapter 7 offer limited and instrumental forms of survivor participation and empowerment and continue broader patterns of distress and re-traumatisation within victim engagement with the legal system. While apologies discussed in Chapter 9 can be crafted in a manner that involves survivor participation, their benefits to survivors are maximised when combined with other material measures designed to address survivor priorities directly. Finally, Chapter 10 highlighted the persistence of non-empowering forms of governance under the banner of reconciliation.

In contrast to these victim experiences, there are some actors who stand to lose in practical, economic, and authority-based terms by a shift towards a redistribution of power, even on the imperfect terms of current transitional justice practices. States and land-based economic actors, such as those involved in extractive industries such as oil or mineral wealth, all stand to lose power if land is redistributed to First Nations peoples. Churches may stand to lose financially if redress schemes continue to be developed that seek

contributions from responsible non-state actors. In addition to material and economic power, addressing the past may challenge the authority of individuals and institutions. Politicians who operate out of a political ideology that relies on division along racial, gendered, or religious lines have good reason to resist a more inclusive electorate that is not divided along identity lines. Churches whose theology continues to operate from a scapegoating posture and who assert their claims to spiritual authority are threatened by more inclusive redistributions of power. Attempts to change these distributions of power are likely to be resisted and fought. McAuliffe notes that where elites have guarded power to date, they remain unlikely to voluntarily concede it where they have the option not to do so.[1] John Borrows concurs that efforts to enable Indigenous self-determination and self-governance are likely to be met with substantial opposition from those who benefit from the prevailing allocation of power.[2]

Secondly, the structure of transitional justice mechanisms means that even the best practices are limited by design. Inquiries' inability to shape the implementation of their recommendations and the tendency to separate historical injustices from contemporary harms limit their potential to reorder fundamentally current social political and legal structures. The good practices of the Canadian TRC and MMIWG inquiries and the Australian RCIRCSA offer a better approach than traditional inquiry models but fundamentally remain contingent on external political will. Litigation mechanisms are typically designed to avoid addressing structural injustices and frame harms as deviations from structurally just baselines. In contrast, those landmark cases such as *Brown* in the United States or *Mabo* in Australia represent potential sites for significant change to existing structures. However, although these victories are profound and significant, there appears a persistent retrenchment and opposition to fully embracing the fundamental challenge posed by these decisions to the legal and political systems they seek to restructure. Similarly, while potentially broad or expensive in material terms, redress mechanisms nonetheless struggle to address the full scale and impact of settler colonial or imperial processes, with notable gaps in the provision of reparations for transatlantic slavery and limited return or restitution of Indigenous lands. Apologies are typically designed to exclude admission of legal liability or

[1] Pádraig McAuliffe, 'The Problem of Elites' in Matthew Evans (ed), *Transitional and Transformative Justice* (Routledge 2019) 93.

[2] John Borrows, '"Landed Citizenship": Narratives of Aboriginal Political Participation' in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford University Press 2000) 340.

recognition of the violation of rights. Reconciliation policies remain structurally predicated on the existence and legitimacy of states and churches that have constituted and constructed themselves in part through historical-structural abuses.

In contrast to mechanisms that may positively affect the structural harms experienced by victim-survivors, the structure of transitional justice itself may also enable resistance to meaningfully address the past. The capacity of transitional justice to address historical-structural injustice is hampered by its current focus on 'strengthening rather than challenging the state',[3] which will disable its role in addressing settler colonialism or other processes requiring changes to structural features of states and churches. Augustine Park has argued a 'radicalised transitional justice would abandon liberal teleology, recognising the deep interrelation between liberalism and settler colonialism'. Such a move would disrupt 'the settler's linear concept of time and the colonial ideology of progress.'[4] Similarly, Balint et al suggest that the relevant transition: 'is from unjust to just relations – transforming of the social political economic and legal frameworks that underlie settler colonialism'.[5] While such a radical model of transitional justice grows in academic popularity, it must address the foreseeable resistance and challenges that a model would face, to overcome potential scepticism about whether such transition or transformation is possible.[6]

Expecting the existing mechanisms of transitional justice to address structural injustices directly seems implausible in light of the current practices adopted by relevant states and churches. For de Greiff, the known inadequacy of transitional justice mechanisms is a central challenge.[7] He notes the profound challenge involved in transitional justice as an effective form of social change: 'Although our knowledge of institutional transformation processes is deficient, it still outstrips our ability to effect changes in culture or personality. Again, this is not the result of mere chance. Culture and

[3] Jennifer Balint, Julie Evans and Nesam McMillan, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach', (2014) 8 International Journal of Transitional Justice, 194, 201

[4] Augustine SJ Park, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) 14(2) International Journal of Transitional Justice 260, 277.

[5] Jennifer Balint and others, *Keeping Hold of Justice: Encounters between Law and Colonialism* (University of Michigan Press 2020) 100.

[6] Pádraig McAuliffe, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017) 296; Dustin N Sharp, 'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13(3) International Journal of Transitional Justice 570, 588.

[7] Pablo de Greiff, 'A Normative Conception of Transitional Justice' (2010) 50 Politorbis 17, 19.

personality structures, … are resistant to direct interventions.'[8] Transitional justice, with its commitment to an alternative future but one that involves a problematic state and limited means to address broader processes of structural and cultural change, may be necessarily inadequate to the task of addressing historical-structural injustices, at least in its current form.

Third, transitional justice in inquiries, litigation, and redress, especially, presents opportunities for the healing and validation of victim-survivor experiences but also significant risks of re-traumatisation, distress, or fresh forms of epistemic injustices. The experiences of survivors in Irish mechanisms routinely constitute new forms of epistemic injustice, ignoring or marginalising survivor experience and denying recognition of framing of historical abuse as the violation of rights, with the exception of the *O'Keeffe* case before the ECHR. Existing accounts also criticise the treatment of survivor experiences in the Northern Irish and English and Welsh inquiries. In contrast, inquiries in Canada, especially the TRC and MMIWG processes, emphasised the distinct value of First Nations knowledge and expertise and aligned with the well-received treatment of survivor testimony in the Australian Lost Innocents, Bringing Them Home, and Forgotten Australian inquiries, and the recent RCIRCSA. Redress schemes that aim to avoid the potentially re-traumatising experience of litigation can nonetheless form a fresh site of epistemic injustice where they preclude survivors from a further opportunity to express their experiences and have these validated and acknowledged. Chapter 9 concluded that while some states' and churches' practices of apologies were broader and more holistic, the narrative constructed by apologies for historical abuse remains largely limited by its failure to acknowledge historical abuses, not as separate and past, but as continuous with and reproduced in the present. Chapter 10 concluded that as currently practised, reconciliation seeks to operate as a form of settlement designed to close down ongoing and perhaps perennial forms of contestation about the legitimacy of state- and church-led efforts to address the past. Instead, an agonistic conception of reconciliation offers the potential to serve as a site of ongoing contestation and a mechanism to evaluate whether and how the voices, knowledge, and views of survivors and marginalised communities and peoples form part of states' and churches' response to the past and reformed structures and practices of power, emotion, and national or religious myths.

[8] Pablo de Greiff, 'Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes' in Clara Ramírez-Barat (ed), *Transitional Justice, Culture, and Society: Beyond Outreach* (Social Science Research Council 2014) 13.

Moreover, with all the testimony gathered, it remains unclear the extent to which it impacts the discourse and behaviour of institutions, churches, states, and societies that were involved in abuses. Those who retain power and privilege in these contexts today have the luxury to ignore, dismiss, or minimise the need for radical change that arises from addressing survivor experiences directly. As Carol Gilligan has observed, positions of power are distinguished precisely by their ability to 'opt not to listen. And [to] do so with impunity'.[9] The effect of transitional justice processes may thus be to require survivor testimony, disclosure, and potential re-traumatisation, in the hope of seeing harms officially acknowledged, but ultimately this process will not affect how survivors are treated or viewed in society. Viewing epistemic injustice as one dimension of power, acts of listening, or performances of emotion by state and church officials, such as in apologies, are necessary but insufficient – such processes should accompany material changes for individual survivors and for the structures that gave rise to and reproduce historical-structural injustices, and not be a substitute for such changes.

Finally, meaningfully addressing historical-structural injustices requires the reworking of national and religious myths and identities, seeking to engender change in social and institutional consciousness and attitudes to the past, to the nation and to victim-survivor populations and historically marginalised groups. Lu suggests 'contemporary agents must struggle to turn away from the images of themselves and each other produced through objectionable social and political structures and relations and effect a turning around or reorientation of their vision'.[10] The inability or unwillingness of states, churches, and societies to fully accept both legal or interactional responsibility and ongoing social responsibility for historical abuses today arises in part because these groups want to maintain social, cultural, and national identities and myths that tell ourselves that we are fundamentally good people – and accepting the full reality and cost of historical-structural injustices fundamentally and necessarily challenges that picture. We want to tell ourselves that we are not perfect, but criminal, violent, or abusive conduct remains exceptional, the purview of a 'few bad apples'. Cognitive psychologists tell us that typically people prefer to understand events as caused by the character or personality traits of individuals, rather than caused by forces such as the social and cultural environment

[9] Carol Gilligan, 'Feminist Discourse, Moral Values, and the Law: A Conversation' (1985) 34 Buffalo Law Review 11, 62.

[10] Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017) 280.

or institution in which the event takes place.[11] This preference comes from our desire to be comforted by the belief that we live in a 'just world', in which justice is imposed and predictable based on what people deserve.[12] In doing so, we may declare ourselves, our states, and our churches innocent of any complicity or responsibility for historical-structural injustices.

For instance, Alissa Macoun argues that

> We declare ourselves innocent when we assume that non-Indigenous people are basically benevolent bystanders to racism and colonialism, just requiring additional information or education in order to do good. We declare ourselves innocent when we assume that we educated white progressives are fundamentally different from other non-Indigenous people, the solution to a problem that lies in the hearts and minds of others rather than in our own institutions, knowledges, and practices. We declare ourselves innocent when we acknowledge a racist colonial past but assume a separation between this past and our racist colonial present. We declare ourselves innocent when we see ourselves as agents of progressive futurity and not also of colonial institutions and racial power.[13]

For Christians, such a severance of the past and present and harm and responsibility is especially pernicious. Former Archbishop of Canterbury Rowan Williams notes that the church, as the body of Christ, should be conceived of as extending over time and space and not merely over different geographical nations: 'The Body of Christ is not just a body that exists at any one time; it exists across history and we therefore share the shame and the sinfulness of our predecessors, and part of what we can do, with them and for them in the Body of Christ, in prayerful acknowledgement of the failure that is part of us, not just of some distant "them".' He continued:

> To speak here of repentance and apology is not words alone; it is part of our witness to the Gospel, to a world that needs to hear that the past must be faced and healed and cannot be ignored … by doing so we are actually discharging our responsibility to preach good news, not simply to look

[11] Jon Hanson and David Yosifon, 'The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture' (2003) 152 University of Pennsylvania Law Review 129, 147; Jon Hanson and David Yosifon, 'The Situational Character: A Critical Realist Perspective on the Human Animal' (2004) 93 Georgetown Law Journal 1, 102.

[12] Adrian Furnham, 'Belief in a Just World: Research Progress Over the Past Decade' (2003) 34 Personality & Individual Differences 795, 796.

[13] Alissa Macoun, 'Colonising White Innocence: Complicity and Critical Encounters' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016) 86.

> backwards in awkwardness and embarrassment, but to speak of the freedom we are given to face ourselves, including the unacceptable regions of . . . our history.[14]

Conceived of in this way, Christian churches and communities have specific spiritual and theological obligations to address the harmful aspects of the past, especially those that are perpetuated in the present.

Resistance to this challenge to national and religious identities and myths functions as a form of denial of social connection and historical connection. Western states and churches do not see the need to problematise their myths or conception of legitimate power. They see that they only stand to lose by doing so. The focus on power and national and religious identity reinforces the profound and fundamental nature of addressing historical-structural injustices. The scale of the challenge is vast and daunting, the work of multiple generations. The demands for reparations, decolonisation, and transfer of power and land, involved as alternatives to existing processes, would fundamentally and radically change the nature and structure of the societies and churches examined and be met with significant claims of ignorance, innocence, and protest. By seeking to apply transitional justice to historical-structural injustices, it is no longer possible to suggest that current liberal democracies are a suitable utopian end point for transitional justice processes and mechanisms. Instead, the only way to relegitimate the power and authority of states and churches responsible for historical-structural injustices is to give it away and to recognise what was always true: that claims to power, authority, and truth are shared with the most marginalised in these societies and churches. The power and authority within Indigenous peoples, African Americans, women, children, victim-survivors of historical-structural abuses considered in this book and those historically marginalised groups beyond the present scope, as experts in their own experiences, harms, and futures, form the basis for more legitimate and just societies and churches.

11.3 WHITHER TRANSITION

In the context of these critiques, it is worth considering whether transitional justice retains any value for addressing large-scale and non-recent violence in the settings considered in the book. The field and its institutional responses to violence are capable of capture, manipulation, and being consistent with the

[14] Stephen Bates, 'Church Apologises for Benefiting from Slave Trade' *The Guardian* (London, 9 February 2006) <www.theguardian.com/uk/2006/feb/09/religion.world#>.

existing distributions of power and authority in society. Equally, these state-led responses are capable of instrumentalising the participation of victim-survivors to relegitimate the state at the expense of survivor re-traumatisation and further marginalisation or disempowerment.

And yet, there remains something significant about framing mechanisms to address the past as a broader process of social change, that is, as transitional justice. First, transitional justice has been and continues to be employed by victim-survivors of historical-structural injustices as one framework to address their demands for justice measures. The case selection for this book concerns national and religious contexts where (i) living victim-survivors are advocating for state and church responses to accusations of non-recent violence on a large scale and (ii) where descendants of social groups, especially women, Indigenous peoples, and African Americans, can and do make claims that ongoing forms of discrimination and harm that they experience bear some relationship or continuity with similar forms of violence or prejudice against these same social forms of identity in prior generations. These factors offer the basis for distinguishing cases of historical-structural injustices with ongoing effects and agents in contemporary societies, from those that do not. For instance, Winter gives the example of the Viking invasion of Ireland not being a basis for state redress from Denmark to Ireland.[15] It is in the cases where justice issues remain live, contested, and lived by victim-survivors, families, and descendants that transitional justice remains of value.

Second, in employing transitional justice in this context, both Stephen Winter and Nicola Henry concur on the capacity of transitional justice to unify diverse issues, debates, institutions, and practices as part of a broader and more coherent evaluative framework.[16] However, in doing so, the unifying function of transitional justice may work in different directions. A concern with unity or coherence may be compatible with transitional justice as the (re) building of legitimacy alone. Stephen Winter suggests: 'state redress both improves the historical congruency of state actions with legitimating values and satisfies outstanding rectificatory demands. In doing so, it removes burdens from political legitimacy and thereby extends and strengthens political authority'.[17] For Winter, a focus on the need for political legitimacy

[15] Stephen Winter, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014), 220.

[16] Nicola Henry, 'From Reconciliation to Transitional Justice: The Contours of Redress Politics in Established Democracies' (2015) 9 *International Journal of Transitional Justice* 199, 206, 217.

[17] Winter (n 15) 214.

highlights that the inadequacy of transitional justice mechanisms remains 'to the task of political transformation. Only when we see how they are unified by the larger theory of political legitimacy does a modest transformative prospect emerge.'[18]

While Winter provides a good descriptive account of some of the existing functions of redress mechanisms in state redress, he also concedes 'still it is likely that there are other, more effective, ways to stop communal cycles of violence than by improving the legitimacy of state institutions'.[19] His account eschews consideration of the ongoing dimensions of historical-structural injustices, and the role of emotions and articulated national myths, such as national shame,[20] as sites of resistance to the potential legitimating work of transitional justice. Part of the work of this book in examining those further issues is to suggest that transitional justice mechanisms will be necessarily inadequate to their task of addressing victim needs and contributing to social change if they do not extend beyond the role of enhancing state legitimacy.

In contrast, for Nicola Henry, this unifying function of transitional justice 'in turn refocuses attention to the fundamental questions that need to be asked about redress in such democracies'.[21] For Henry, rather than necessarily resolving crises of state legitimacy, transitional justice may also 'productively assist to destabilize or challenge the power of the state, even through measures that are designed and implemented by the state'.[22] Transitional justice may thus play a useful agonistic role in 'bringing together competing ideas on, first, what kind of change has occurred, and second, what kind of change is desired in the future', extending to addressing the 'complex social, economic, cultural, interpersonal, and generational tragedies generated by historical injustices of the past'.[23]

Third, considering transitional justice in the context of historical-structural injustices and the case studies selected in this book prompts consideration, not just of what an adequate single justice initiative is but what the transition involved in these contexts is. Balint et al suggest this should concern:

> not solely transition to a democratic regime as initially understood in the transitional justice paradigm, but also as transition from unjust relations to

[18] ibid 225.
[19] ibid.
[20] ibid 219.
[21] Henry (n 16) 206.
[22] ibid 212.
[23] ibid 209, 218.

> just relations and the transformation of the social, political, economic and legal frameworks such as those that underlie settler colonialism. It is the structural injustice of settler colonialism, and colonialism generally, that continues as the core injustice into the present. This includes the ongoing denial of indigenous sovereignty and the potential to place indigenous peoples outside the rule of law in governance.[24]

More recently, Balint et al suggest, 'It is through a more committed recognition of the past and its enduring significance in the present that the beginning of just relations might be found.'[25] On their account, acknowledging the enduring impact of the past on the present may enable 'the present to be conceptualized as not only a place of injustice, but of possibility, responsibility, and relationality. It compels a recognition that there are possibilities to interact justly still'.[26] This book shares their commitment to persist with the need for justice and to remedy structural injustices explicitly and directly.

As a result, there remains distinctive value in employing a transitional justice framework to address past large-scale violence, particularly where the consequences of such violence retain impact in contemporary societies. Transitional justice can unify diverse discourses and practices, can engage questions of whether and how the state (or church) can be legitimated as those institutions address the past, and can prompt the question and fresh consideration of whether, from what, and to what, there is a transition in state, church, and society. However, unless and until transitional justice measures address explicitly the role of power, individual and social emotions, and national myths, progressing the task of addressing historical-structural injustices may remain elusive.

11.4 POWER, EMOTIONS, AND PROGRESS

On this account, there is no reason to suggest that historical-structural injustices can be undone by a single (set of) transitional justice mechanisms. There is no reason to suggest that a particular configuration of institutional designs could avoid co-option or the reconsolidation of power. It is foreseeable that actors who benefit from existing power structures will seek to reassert that distribution of power when challenged on an episodic or individualised basis.

[24] Jennifer Balint, Julie Evans and Nesam McMillan (n 3) 214.
[25] Jennifer Balint and others (n 5) 133.
[26] ibid 141.

Knowing this should challenge the suggestion that the mere pursuit of a bottom-up, survivor empowerment would be capable of overcoming these structural limitations. Instead, the longer time frame of violence to be addressed, the reproduction of violence in contemporary societies, and the deeply embedded structures of power and cultural identity all suggest the need to revise the sense of progress that such transitional justice could feasibly claim to achieve.

For Michael Walzer, moral progress is concerned not with the discovery or invention of new principles but with the inclusion under old principles of previously excluded men and women.[27] On this account, moral progress is a matter of correcting epistemic errors about who 'counts' as a person.[28] A second approach, associated with Axel Honneth, describes moral progress in terms of improved institutional implementation of existing moral principles.[29] Such accounts of progress would mirror attempts to 'recognise' Indigenous peoples within a liberal democracy or suggest the need for further implementation of existing transitional justice strategies.

For Rahel Jaeggi, progress is different from a particular outcome. It instead 'refers to the form of change, to the process of transformation towards the good or better as such. To assert that the abolition of slavery represents progress is not the same thing as to say it is right'.[30] On this account, '[p]rogress is not the ongoing mastering of a basic problem or a set of basic problems; instead it is a matter of ongoing and progressive problem solving in the course of which its ends and means can undergo transformation – without a definite end. An advantage of such a conception is that it can be conceived as plural'.[31] In this regard, Amy Allen suggests progress must be problematised if framed as a form of triumph, and that, with relevance to progress in the context of settler colonial states, instead: 'A genuinely open and open-ended dialogue with colonized or subaltern subjects requires a kind of humility or modesty about our normative commitments and ideals that is inconsistent with these vindicatory narratives.'[32] As a result, even if deemed 'successful' in addressing the

[27] Michael Walzer, *Interpretation and Social Criticism* (pbk ed, Harvard University Press 1993) 27.
[28] Rahel Jaeggi, 'Resistance to the Perpetual Danger of Relapse' in Amy Allen and Eduardo Mendieta (eds), *From Alienation to Forms of Life: The Critical Theory of Rahel Jaeggi* (University of Pennsylvania Press 2018) 20.
[29] Axel Honneth, 'Rejoinder' (2015) 16 Critical Horizons 204.
[30] Jaeggi (n 28) 19.
[31] ibid 28.
[32] Amy Allen, *End of Progress – Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2017) 209–10.

past, transitional justice must be problematised as a form of progress. Transitional justice in the service of progress as the expansion of a liberal democracy seems inappropriate for settler colonial contexts. Progress as the better implementation of pre-existing values also seems inappropriate in UK, US, and Irish contexts where those values were implicated in historical-structural abuses.

Instead, progress may be measured by the dismantling, transfer, and sharing of power across the four dimensions explored in the book: material victim empowerment; changing legal and structural conditions but also amplifying voice, belief, knowledge; and a shared rewriting of national and religious myths. At a basic, interactional level, those concerned to address historical-structural injustices in their communities can model change by divesting themselves of power and privilege. Alissa Macoun insists we cannot 'see ourselves as agents of progressive futurity and not also of colonial institutions'. We cannot 'make ourselves the subjects and heroes of our own stories'.[33] Instead, it is incumbent on those who benefit from a society or church that is built on historical-structural injustices to learn from those who have suffered and stand in solidarity with those activists seeking to engage in social change.

Second, existing legal and social structures must cease to be sites of discontinuity and division between past and present and instead explicitly acknowledge their origins in the claims of redemptive violence. Law can be the basis for telling our whole stories as societies and communities, both good and bad, and for amplifying voices of the marginalised, rather than narrowing and excluding them. A 'living' law offers the means of showing continuities between Indigenous laws and ways of knowing and challenging dominant laws and conceptions of justice.[34]

Third, the ongoing promotion of victim-survivors as the primary source of knowledge and experience on the abusive past remains key. Achieving epistemic justice may remain illusory, but exhaustive efforts to amplify survivors within existing national and religious narratives would be a significant contribution. Richard Kearney emphasises that:

> even where narrative testimony can never measure up to the complexities and alterities of the past, it is important – ethically and poetically – to continue to remember. Or at least to keep on trying. I would go so far as to say that it is precisely when one is right up against the limits of the immemorial that one most experiences the moral obligation to bear witness to

[33] Macoun (n 13) 95.

[34] John Borrows, *Drawing out Law: A Spirit's Guide* (University of Toronto Press 2010); Balint and others (n 5) 42.

> history, echoing the words of Beckett's unnameable narrator: 'I can't go on, I'll go on'. The alternative, as I see it, is the expansion of the postmodern malady of melancholy without reprieve or redress. And that is unacceptable.[35]

Finally, our national and religious myths must incorporate the negative and combine the ambitions of nationalisms and Christian theology for utopias and progress, with the lived experiences of suffering caused in the name of these lofty ideals. Gordon Lynch cautions us to remember: 'When the moral certainties of humanitarian action dull sensitivity to the experiences of those believed to be its beneficiaries, then humanitarianism is as capable of causing harm as any other sacred tradition.'[36] This truth can be applied to the supposed humanitarianism of institutionalisation, child migration, coercive adoptions, and theories of racial superiority all framed in part as humanitarian and as Christian – and indeed to contemporary efforts of transitional justice.

It is possible to suggest that everyone, in successive generations of states and churches, is a survivor of a political and theological order that has as a central feature these patterns structures and practices of violence. Mahmood Mamdani suggests that decolonisation would involve recognition of a shared identity as survivors of political modernity, which 'requires that we stop accepting that our differences should define who benefits from the state and who is marginalized by it'.[37] Instead, our imaginations are required to consider how to rework national and religious identities and myths in light of historical-structural injustices.

Imagine new national and religious myths that tell our whole story as peoples who share time and space with a violent past and present, who employ narratives and myths that describe the sincerely held but morally wrong beliefs of settlers and of Christian and white superiority; that incorporate the knowledge and experiences of suffering of individual victim-survivors, their families, of historically marginalised communities, of women, of African Americans, and Indigenous peoples; that incorporate the fallibility of state and church authority as a central feature and lesson of our collective memory and mythology; that revere the endurance and courage of those who have pursued

[35] Richard Kearney, *Strangers, Gods, and Monsters: Interpreting Otherness* (Routledge 2003) 189–90.

[36] Gordon Lynch, *Remembering Child Migration: Faith, Nation-Building, and the Wounds of Charity* (Bloomsbury Academic 2016) 112.

[37] Mahmood Mamdani, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (The Belknap Press of Harvard University Press 2020) 23.

justice for historical-structural harms over successive generations; and that emphasise our current collective responsibility to address the impact of our past on our present.

Finally, imagine national myths that are not triumphalist in nature but recognise the challenging reality that we live within a very imperfect and unjust world – and that is the context in which transitional justice efforts will always operate. Robert Meister suggests that 'transitional justice tends to assume that past victims never really win – their choice is whether to persist in struggle or to stop'.[38] Meister suggests that this inadequacy is rooted in a secularised Christian eschatology, that at some future point in time justice will be done – so time itself is sufficient: 'This is a secular shell of messianism to which redemption *never comes*.'[39] Such a view suggests transitional justice efforts despite extensive advocacy, time, money, and effort are doomed to failure in their imperfections and limits.

In contrast, Rosemary Radford Reuther suggests a better model comes from the Jubilee tradition in Hebrew Scripture,[40] which assumes that there needs to be periodic and increasing renewal, every seven days, every seven years, and every seven times seven years (fiftieth year), with most radical reform intended to 'undo the unjust accumulations of wealth for some and oppression for others that have accumulated over the last several generations, re-establishing the basis for a viable society of equitable sharing of the means of life'.[41] None of these alternatives are irreversible; those in power who seek to avoid responsibility for past injustice will no doubt continue to have the means and opportunity to do so. However, naming the roles of power, emotion, and national myths, and the need to rework and redistribute their practice can emphasise dealing with the past is deeply relational and can contribute to the undoing of otherness. An emphasis on our shared, and inter-generational, responsibility to address the violence of the past done in our communities, nations, churches, and identities may be the most appropriate expectation of transitional justice for historical-structural injustices, to make it harder to repeat the sins of our fathers.

[38] Robert Meister, *After Evil: A Politics of Human Rights* (pbk ed, Columbia University Press 2012) 10.
[39] ibid 307.
[40] Leviticus 25:8–17.
[41] Rosemary Radford Ruether, *America, Amerikkka: Elect Nation and Imperial Violence* (Equinox 2007) 266.

Appendix 1: Public Inquiries

Country	Name	Short Name	Period of operation	Temporal scope	Material scope
Ireland	Commission to Inquire into Child Abuse	CICA	2000–2009	Investigation Committee: 1936–1999; Confidential Committee: 1914–2000	Physical abuse, sexual abuse, and neglect of children
Ireland	The Dublin Archdiocese Commission of Investigation	Murphy Report	2006–2009	1975–2004	Child sex abuse
Ireland	Ferns Report	Ferns Report	2003–2005	1966–2005	Child sex abuse
Ireland	The Dublin Archdiocese Commission of Investigation	Cloyne Report	2009–2011	1996–2009	Child sex abuse
Ireland	McAleese Report (Magdalene Laundries)	McAleese Report	2011–2013	1922–1996	State involvement in operation of Magdalene Laundries
Ireland	Commission of Investigation (Mother and Baby Homes)	Mother and Baby Homes Report	2015–2020	1922–1998	Living conditions, mortality, and post-mortem practices; arrangements for entry and exit of children; any discriminatory treatment
Australia	Adoption Practices in New South Wales	NSW Adoption	1998–2000	1950–1998	Unlawful or unethical adoption practices
Australia	Children in State Care Commission of Inquiry	CSCI	2004–2008	1930–2004	Assessment of (i) sexual abuse and (ii) criminal conduct resulting in death of children in state care

Australia	Commission of Inquiry into Abuse of Children in Queensland Institutions	Forde Inquiry	1998–1999	1911–1999	Abuse of children in institutional care settings in Queensland, Australia
Australia	Commonwealth Contribution to Former Forced Adoption Policies and Practices	Forced Adoption Report	2010–2012	1950–1970	Contribution of policies and practices of the Commonwealth Government to forced adoptions
Australia	Inquiry into the Handling of Child Abuse by Religious and Other Nongovernment Organisations	Betrayal of Trust	2012–2013	1950–2010	Processes by which religious and other non-government organisations respond to the criminal abuse of children by personnel within their organisations
Australia	Inquiry into the Implementation of the Recommendations of Lost Innocents and Forgotten Australians	Lost Innocents and Forgotten Australians Revisited	2008–2009	2001–2008	Progress on the implementation of the recommendations of the Lost Innocents and Forgotten Australians Senate Inquiries
Australia	Joint Select Committee on Adoption and Related Services 1950–1988	Tasmania Adoption Report	1999	1950–1998	To investigate whether past adoption practices were unethical and/or unlawful and make recommendations for services needed for those harmed by such practices

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Country	Name	Short Name	Period of operation	Temporal scope	Material scope
Australia	National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families	Bringing Them Home	1995–1997	1900–1970	The separation of Aboriginal and Torres Strait Islander children from their families, examining laws, policies, and practices and principles for compensating those affected and appropriate support services
Australia	Royal Commission into Aboriginal Deaths in Custody	RCADIC	1987–1991	1980–1989	Assessment of disproportionately high number of deaths of Aboriginal people in custody
Australia	Royal Commission into Institutional Responses to Child Sexual Abuse	RCIRCSA	2013–2017	No temporal limitation	Assess what government and institutions should do to better protect children against sexual abuse in institutional contexts and address the impact of past child sex abuse
Australia	Royal Commission into the New South Wales Police Force	RCNSWPF	1994–1997	No temporal limitation	To investigate the existence and extent of police corruption in the state, including the protection of paedophiles by NSW Police

Australia	Royal Commission into the Protection and Detention of Children in the Northern Territory	RCPDCNT	2016–2017	2006–2017	To investigate the child protection and youth detention systems in the Northern Territory, to assess whether there were any breaches of the law or failures of policy
Australia	Select Committee into Child Migration	Child Migration	1996	1900–1967	Child migration schemes
Australia	Senate Inquiry into Child Migration	Lost Innocents	2001	1900–1960	Child migration schemes
Australia	Senate Inquiry into Children in Institutional Care	SICIC	2003–2004	1920–1990	Investigation of the historical abuse and neglect of children in out-of-home care in Australia
Australia	Inquiry into Unfinished Business: Indigenous Stolen Wages	Unfinished Business	2006	1800–1980	Indigenous workers whose paid labour was controlled by government
Australia	Special Commission of Inquiry into Matters Relating to the Police Investigation of Certain Child Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle	Maitland-Newcastle	2012–2014	1949–1996	Church–Police interaction regarding investigation of child sex abuse in church

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Country	Name	Short Name	Period of operation	Temporal scope	Material scope
Canada	Canadian Royal Commission on Aboriginal Peoples	RCAP	1991–1996	1400–1991	To explore the evolving relationship between the Aboriginal peoples of Canada, the Canadian government, and Canadian society
Canada	Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints	Mount Cashel	1989–1992	1762–1989	Child abuse
Canada	Report of the Ad Hoc Committee on Child Sex Abuse	From Pain to Hope	1990–1992	1987–1992	Child sex abuse
Canada	Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy	Winter Report	1989–1990	1970–1990	Child sex abuse
Canada	Novia Scotia	Stratton Report	1994–1995	1950–1970	Child sex abuse
Canada	Independent Review of Nova Scotia's Response to Reports of Institutional Abuse	Kaufman Report	1999–2002	1994–1999	Child sex abuse

Canada	Ombudsman of British Columbia Report, Abuse of Deaf Students at Jericho Hill	Jericho Hill	1991–1993	1982–1991	Child sex abuse
Canada	Report of the Special Counsel Regarding Claims Arising out of Sexual Abuse at Jericho Hill School	Berger Report	1993–1995	1950–1990	Child sex abuse
Canada	Report of the Special Taskforce for the Review of From Pain to Hope (2005)	Review of From Pain to Hope	2002–2005	1992–2005	Child abuse in Catholic Church
Canada	The Role of the Royal Canadian Mounted Police during the Indian Residential School System	RCMP Report	2005–2011	1880–1990	Police role in Indian residential school system
Canada	Truth and Reconciliation Commission of Canada	Canadian TRC	2007–2015	1883–1996	Examination of the legacy of the nation's church-run residential schools, seeking to begin the healing process towards reconciliation
Canada	Quebec Ombudsman, The 'Children of Duplessis'	Duplessis Orphans	1997	1930–1960	Child abuse
Canada	Inquiry into missing and murdered Indigenous women and girls	MMIWG	2015–2019	1960–2018	To educate the public about the issue, facilitate healing within affected communities, restore confidence in Canadian institutions, and make recommendations for policy change and other reforms

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Country	Name	Short Name	Period of operation	Temporal scope	Material scope
Canada	Cornwall Public Inquiry	Cornwall Public Inquiry	2005–2009	1986–2004	Child abuse
Canada	Nova Scotia Home for Coloured Children Restorative Inquiry	Restorative Inquiry	2014–2019	No temporal limitation	Child abuse
United States	National Advisory Commission on Civil Disorders	Kerner Commission	1967–1968	1967	To examine the circumstances and causes of the nationwide race riots
United States	The Cardinal's Commission on Clerical Sexual Misconduct with Minors	Bernardin Report	1991–1992	No temporal limitation	Child sex abuse
United States	Westchester County, NY Grand Jury	Westchester Grand Jury	2002	No temporal limitation	Child sex abuse
United States	Suffolk County NY Grand Jury	Suffolk County Grand Jury	2002–2003	1957–2002	Child sex abuse
United States	Report on the Investigation of the Diocese of Manchester, New Hampshire	Manchester Report	2002–2003	1960–2002	Child sex abuse
United States	Attorney General of the State of New Hampshire, January 2003; Office of the Attorney General, The Sexual Abuse of Children in the Roman Catholic Archdiocese of Boston	New Hampshire Report	2002–2003	1960–2002	Child sex abuse

United States	Report of the Philadelphia Grand Jury, In Re County Investigating Grand Jury, MISC. NO. 01-00-89444, Philadelphia, PA	Philadelphia Grand Jury Report 1	2001–2003	1960–2002	Child sex abuse
United States	Report of the Grand Jury, In Re County Investigating Grand Jury, MISC. NO. 03-00-239	Philadelphia Grand Jury Report 2	2002–2003	1960–2002	Child sex abuse
United States	Restoring Trust: A Pastoral Response to Sexual Abuse	Restoring Trust Report	1993–1994		Child sex abuse
United States	A Report on the Crisis in the Catholic Church in the United States. The National Review Board for the Protection of Children and Young People	NRBPCYP Crisis Report	2004	1950–2004	Child sex abuse
United States	The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002, First John Jay College of Criminal Justice Report, City University of New York	Nature and Scope Study	2002–2004	1950–2002	Child sex abuse

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Country	Name	Short Name	Period of operation	Temporal scope	Material scope
United States	The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States	Causes and Context Study	2005–2011	1950–2010	Child sex abuse
United States	Tulsa Race Riot Commission	Tulsa Commission	1997–2001		1921 racial violence
United States	Greensboro Truth and Reconciliation Commission	Greensboro TRC	2004–2006		1979 racial violence
United States	A Documented History of the Incident which Occurred at Rosewood, Florida, in January 1923	Rosewood Massacre	1993		1923 racial violence
United States	1898 Wilmington Race Riot Commission	Wilmington Commission	2000–2006		1898 racial violence
United States	Maryland Lynching Truth and Reconciliation Commission	Maryland Lynching TRC	2019–2022	1854–1933	Racial violence
United States	California Truth and Healing Council	California Truth and Healing Council	2019–2025	No temporal limitation	Racial violence
United States	Carlisle Truth and Reconciliation Commission, Pennsylvania	Carlisle Truth and Reconciliation Commission, Pennsylvania	2020–2022	No temporal limitation	Racial violence

United States	San Francisco (Pilot) Truth Justice and Reconciliation Commission	San Francisco (Pilot) Truth Justice and Reconciliation Commission	2020	TBC	Racial violence
United States	Philadelphia (Pilot) Truth Justice and Reconciliation Commission	Philadelphia (Pilot) Truth Justice and Reconciliation Commission	2020	TBC	Racial violence
United States	Boston MA (Pilot) Truth Justice and Reconciliation Commission	Boston MA (Pilot) Truth Justice and Reconciliation Commission	2020	TBC	Racial violence
United States	Ad Hoc Truth and Reconciliation Commission Iowa City	Iowa City TRC	2020–2022	No temporal limitation	Racial violence
United States	Clinton Advisory Group on Race	One America Initiative	1997–1998	No temporal limitation	Race relations
United States	Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission	MWTRC	2013–2015	1960–2013	Treatment of Native children by State of Maine
United Kingdom	Allitt Inquiry	Clothier Report	1993–1994	1991	To investigate deliberate deaths and injuries of 13 children caused by a nurse, Beverley Allitt

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Country	Name	Short Name	Period of operation	Temporal scope	Material scope
United Kingdom	Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974	Waterhouse Report	1996–1998	1974–1996	Child abuse
United Kingdom	Report of the Review on Child Protection in the Catholic Church in England and Wales: A Programme for Action	Nolan Report	2001	2000–2001	Child abuse in Catholic Church
United Kingdom	Cumberlege Commission Report	Cumberlege Commission Report	2006–2007	2000–2007	Child abuse
United Kingdom	Independent Inquiry into Child Sexual Abuse	IICSA	2015–	No temporal limitation	Child sex abuse
United Kingdom	Northern Ireland Historical Institutional Abuse Inquiry	Hart Inquiry	2012–2017	1922–1995	Child abuse
United Kingdom	The Welfare of Former British Child Migrants. Volume 1, Report and Proceedings of the Committee /Health Committee, Third Report	Health Committee Child Migrant Report	1997–1998	1947–1967	Child migration schemes

United Kingdom	Review of the Waterhouse Inquiry into the Abuse of Children in Care in the Former Gwynedd and Clwyd Council Areas of North Wales	Macur Report	2012–2016	1996–1998	To review the scope of Waterhouse Inquiry, and whether any specific allegations of child abuse falling within the terms of reference were not investigated by the Inquiry
United Kingdom	Scottish Inquiry into Historical Child Abuse	SIHCA	2014–ongoing	Living memory–2014	To investigate historical cases of child abuse by care institutions in Scotland
United Kingdom	Independent Jersey Care Inquiry	IJCI	2013–2017	1945–present	Abuse in institutional care
United Kingdom	Historical Abuse Systemic Review: Residential Schools and Children's Homes in Scotland 1950 to 1995	Shaw Report	1950–1995	2004–2007	Child abuse
United Kingdom	Stephen Lawrence Inquiry	Stephen Lawrence Inquiry	1997–1999	1993	To investigate the circumstances surrounding the death of Stephen Lawrence and the police response
United Kingdom	The Victoria Climbié Inquiry: Report of an Inquiry by Lord Laming	The Laming Inquiry	2001–2003	1999–2001	To investigate the circumstances that led to the death of Victoria Climbié and the context of failures by public services

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Country	Name	Short Name	Period of operation	Temporal scope	Material scope
United Kingdom	Soham Murders Inquiry	The Bichard Inquiry	2003–2004	1995–2004	To examine the effectiveness of child protection measures in Humberside Police and Cambridgeshire Constabulary
United Kingdom	The Report of the Staffordshire Child Care Inquiry	Pindown Inquiry	1990–1991	1983–1989	Child abuse in children's homes in Staffordshire
United Kingdom	Ty Mawr Community Home Inquiry	Ty Mawr Report	1989–1991	1991–1992	Child abuse
United Kingdom	Leicestershire Inquiry into Allegations of Sexual Abuse by Management and Staff in Children's Homes	Kirkwood Report	1973–1986	1992–1993	Child abuse
United Kingdom	Choosing with Care: Warner Report	Warner Report	1991–1992	1992	Child abuse
United Kingdom	People Like Us: The Report of the Review of the Safeguards for Children Living Away from Home	Utting Report	1989–1997	1997	Review of safeguarding introduced by Children Act 1989 for children away from home
United Kingdom	Edinburgh's Children: The Report of the Edinburgh Inquiry into Abuse and Protection of Children in Care	Edinburgh Inquiry	1997–1999	1999	Child abuse

United Kingdom	Fife Inquiry into Abuse of Children by Care Home Manager David Murphy	Fife Inquiry	1977–2002	2002	Child abuse
United Kingdom	Independent Inquiry into Abuse at Kerelaw Residential School and Secure Unit	Kerelaw Inquiry	1996–2006	2009	Child abuse
United Kingdom	Committee of Inquiry into Children's Homes and Hostels	Kincora (Northern Ireland)	1984–1986	1958–1980	Child abuse
United Kingdom	An Abuse of Trust: The Report of the Social Services Inspectorate Investigation into the Case of Martin Huston	Huston Inquiry	1993	1991–1992	Practices of statutory and voluntary bodies regarding child sex offender Martin Huston
United Kingdom	Commission on Race and Ethnic Disparities	CRED	2020–2021	No temporal limitation	Racial inequality

Appendix 2: Reparations and Redress Schemes

Country	Name	Years of operation	Context
Ireland	Residential Institutions Redress Board	2002–2011	*Ex gratia* scheme for 139 residential institutions subject to state inspection and regulation
Ireland	Magdalene Laundry Restorative Justice Scheme	2013	*Ex gratia* scheme for detention in Magdalene Laundries
Ireland	Residential Institutions Statutory Fund (Caranua)	2014–2020	Support services to survivors already in receipt of compensation, RIRB payment or settlement with state or church institution
Ireland	Ex Gratia Scheme arising from O'Keeffe v Ireland (ECHR)	2015–2019; 2021–	*Ex gratia* scheme for those abused in open primary schools; re-opened in 2021 after independent review in 2019
United Kingdom	Lambeth Children's Homes	2018–2022	Tiered payments for abuse in residential settings
United Kingdom	Scottish Redress Scheme	2021–	Payments for abuse in care settings
United Kingdom	State of Jersey Redress Scheme	2019–2020	Payments for abuse in residential children's homes
United Kingdom	Historical Institutional Abuse Redress Scheme	2019–2024	Payments for abuse in residential children's homes
United Kingdom	Child Migrant Scheme	2018–	Government-mandated redress scheme

Country	Name	Years of operation	Context
Canada	Indian Residential Schools Settlement Agreement	2007–2019	Litigation settlement
Canada	Mount Cashel	1995–2013	Litigation settlement
Canada	George Epoch	1992–1998	Litigation settlement
Canada	St John's and St Joseph's, Ontario	1992	Litigation settlement
Canada	Grandview, Ontario	1993–1994	Litigation settlement
Canada	Nova Scotia Institutions	1996–1999	Litigation settlement
Canada	Ontario School for the Deaf	1998–2000	Litigation settlement
Canada	Jericho Hill, British Columbia	1996–2001	Government-mandated redress scheme
Canada	New Brunswick Institutions	1995	Government-mandated redress scheme
Canada	Alberta Sterilisation	1998–1999	Litigation settlement
Canada	Duplessis Orphans	2001–2002	Litigation settlement
Canada	Sixties Scoop Settlement Agreement	2018–2019	Litigation settlement
Canada	Huronia Regional Centre	2013	Litigation settlement
Canada	Specific Claims Tribunal	1973–	Compensation for expropriated land
Australia	Queensland Institutions	2007–2010	Government-mandated redress scheme
Australia	Tasmanian Institutions	2003–2013	Government-mandated redress scheme
Australia	South Australian Institutions	2010–2013	Government-mandated redress settlement
Australia	Tasmanian Stolen Generations	2007	Government-mandated redress scheme

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Country	Name	Years of operation	Context
Australia	Redress Western Australia	2007–2012	Government-mandated redress scheme
Australia	Australian National Redress	2018–2028	Government-mandated redress scheme
Australia	South Australian Stolen Generation	2015–2016	Government-mandated redress scheme
Australia	NSW Stolen Generation	2017–2022	Government-mandated redress scheme
Australia	Child Migrants UK	1999–2002	Government-mandated redress scheme
Australia	Child Migrants Aus	2002–2005	Government-mandated redress scheme
Australia	Child Migrants UK	2010	Government-mandated redress scheme
Australia	Forgotten Australians (Find and Connect)	2011-present	Government-mandated redress scheme
Australia	Federal Stolen Generation	2021	Government-mandated redress scheme
United States	Indian Claims Commission	1946–1978	Compensation for expropriated land
United States	Alaska Native Claims Settlement Act (ANCSA)	1971	Litigation settlement
United States	Chicago Reparations Ordinance	2015	Government-mandated redress scheme
United States	Native American Graves Protection and Repatriation Act	1990	Return of Native grave remains and cultural property

Appendix 3: State and Church Apologies

Apologiser	Country/ Church	Year	Theme	Remorse	Responsibility	Admission of wrongdoing	Acknowledgement of victim suffering	Re-commitment	Offer of Repair	Praise for minority group	Praise for majority group	Praise for present system	Disassociation	Emotion
Mr Carr, Premier	New South Wales, Australia	1997	Stolen Generation	✓	✓		✓	✓						Regret, grief, loss
Mr Kennett, Premier	Victoria, Australia	1997	Stolen Generation	✓		✓	✓							Regret
K Lingard, Minister for Families, Youth and Community Care	Queensland, Australia	1997	Stolen Generation	✓		✓	✓							Regret
Hon. P. D. Beattie	Queensland, Australia	1999	Stolen Generation	✓		✓	✓							Sorrow, regret
Mr Court, Premier	Western Australia, Australia	1997	Stolen Generation											
Dr Gallop, Leader of Opposition	Western Australia, Australia	1997	Stolen Generation	✓			✓							Regret
Dean Brown, Minister for Aboriginal Affairs	South Australia, Australia	1997	Stolen Generation	✓				✓						Regret
Mr Rundle, Premier	Tasmania, Australia	1997	Stolen Generation	✓			✓	✓						Regret
Mrs Carnell, Chief Minister	Australian Capital Territory	1997	Stolen Generation	✓			✓	✓						Regret
Ms Martin, Chief Minister	Northern Territory, Australia	2001	Stolen Generation	✓			✓	✓						
	Catholic Church Australia	1996	Stolen Generation	✓										Regret

Prime Minister Kevin Rudd	Australia	2008	Stolen Generation	✓	✓	✓	✓	✓		✓			✓		Honour, grief, suffering, and loss (Aboriginal)
Prime Minister Kevin Rudd	Australia	2009	Forgotten Australians	✓			✓	✓		✓			✓		Shame (x4)
Prime Minister Julia Gillard	Australia	2013	Forced Adoptions	✓	✓	✓	✓	✓	✓	✓					Shame (x2): the loss, the grief, the disempowerment, the stigmatisation, and the guilt, (survivors); sadness and remorse
Prime Minister Scott Morrison	Australia	2018	Child Sex Abuse	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		Grief and loss, love, honour, shame, guilt, sadness, believing survivors
Anglican Church Sydney	Australia	2018	Child Sex Abuse	✓	✓	✓	✓								Shame, repentance
Catholic Religious Australia	Australia	2018	Child Sex Abuse	✓			✓								
Minister of Indian Affairs and Northern Development	Canada	1998	Residential Schools	✓											Regret
Prime Minister Stephen Harper	Canada	2008	Residential Schools	✓	✓	✓	✓	✓	✓	✓		✓	✓		Sadness, survivor courage
Prime Minister Justin Trudeau	Canada	2017	Residential Schools	✓	✓	✓	✓	✓	✓	✓		✓	✓		Shame (x2), survivor courage, sadness, honour
Prime Minister Justin Trudeau	Canada	2019	Tuberculosis Epidemic	✓	✓	✓	✓	✓	✓	✓		✓	✓		Shame

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Apologiser	Country/ Church	Year	Theme	Remorse	Responsibility	Admission of wrongdoing	Acknowledgement of victim suffering	Re-commitment	Offer of Repair	Praise for minority group	Praise for majority group	Praise for present system	Disassociation	Emotion
RCMP Commissioner	Canada	2004	Residential Schools	✓			✓	✓		✓			✓	
Archbishop Fred Hiltz	Anglican Church of Canada	1993	Residential Schools	✓	✓	✓	✓							Shame, humiliation
Pope Benedict XVI	Holy See	2009	Residential Schools	✓			✓						✓	Sorrow, anguish
Primate Michael Peers	Anglican Church of Canada	2019	Residential Schools	✓		✓	✓	✓						Arrogance, remorse, shame, ignorance, repentance, lament, humility
Reverend Doug Crosby OMI	Oblates Conference of Canada	1991	Residential Schools	✓	✓	✓	✓	✓		✓			✓	Regret, sympathy
Bob Smith, Bill Phillips	United Church of Canada	1986	Residential Schools											
Bob Smith, Bill Phillips	United Church of Canada	1998	Residential Schools	✓	✓	✓	✓	✓						
	Catholic Church Canada (National Meeting)	1991	Residential Schools	✓			✓							
	Presbyterian Church Canada	1994	Residential Schools	✓	✓	✓	✓				✓			
Prime Minister Bertie Ahern	Ireland	1999	Residential Schools	✓			✓							

President Mary McAleese	Ireland	2009	Residential Schools	✓			✓	✓		✓					Grief, survivor courage
Prime Minister Enda Kenny	Ireland	2011	Child Sex Abuse	✓			✓			✓		✓	✓		
Prime Minister Enda Kenny	Ireland	2013	Magdalene Laundries	✓	✓	✓	✓		✓	✓			✓		Shame x3
President Michael D Higgins	Ireland	2018	Magdalene Laundries	✓	✓	✓	✓			✓					Honour, shame, forgiveness
	Congregation of Religious Orders Ireland	2002	Residential Schools	✓		✓	✓		✓						Regret
	Rosminians (Ireland)	1999	Residential Schools	✓											Sadness, shame, regret, abhorrence, sorrow
	Sisters of Mercy (Ireland)	1996	Residential Schools	✓					✓		✓				Regret
	Sisters of Mercy (Ireland)	2004	Residential Schools	✓	✓	✓	✓								Sorrow, forgiveness, distress
	Religious Sisters of Charity (Ireland)	1994	Residential Schools	✓											Sadness
	Christian Brothers (Ireland)	1998	Residential Schools	✓											
	Christian Brothers (Ireland)	1998	Residential Schools	✓		✓	✓		✓						Regret
Archbishop Diarmuid Martin	Dublin Archdiocese (Ireland)	2009	Child Sex Abuse	✓		✓	✓			✓	✓				Sorrow, shame

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Apologiser	Country/ Church	Year	Theme	Remorse	Responsibility	Admission of wrongdoing	Acknowledgement of victim suffering	Re-commitment	Offer of Repair	Praise for minority group	Praise for majority group	Praise for present system	Disassociation	Emotion
	Oblates Conference of Ireland	1999	Residential Schools	✓							✓			Abhorrence, regret
	Sisters of Charity (Ireland)	2013	Magdalene Laundries	✓										Regret, sorrow, sadness
	Sisters of Mercy (Ireland)	2013	Magdalene Laundries	✓							✓			Regret
	Good Shepherd Sisters (Ireland)	2013	Magdalene Laundries	✓										Regret, sadness
	Religious Sisters of Charity (Ireland)	2013	Magdalene Laundries	✓										
	Congregation of Religious Orders Ireland	2013	Magdalene Laundries	✓							✓			Sadness
Pope John Paul II	Holy See	1985	Slavery											Sadness
Pope John Paul II	Holy See	1995	Past discrimination against women in Catholic Church											Regret
Pope Benedict XVI	Holy See	2010	Child Sex Abuse (Ireland)	✓										Disturbed, dismay, betrayal, shame, remorse, sorrow
Governor of Oregon John Kitzhaber	United States of America	2002	Sterilisations											

President Bill Clinton	United States of America	1997	Tuskgee Medical Study	✓	✓	✓	✓	✓	✓	✓		✓	Outrage
United States Senate	United States of America	2009	Apology to Native Peoples of the United States										Regret
BIA Bill Gover	United States of America	2000	Treatment of Native Americans										Shame, fear, anger, sorrow
United States Senate	United States of America	2009	Slavery	✓	✓		✓						Remorse
United States Congress	United States of America	2005	Lynching	✓	✓	✓	✓						Sympathies, regret
United States Congress	United States of America	2008	Slavery	✓			✓		✓				
Virginia	United States of America	2007	Slavery										
Alabama	United States of America	2007	Slavery										Sympathies, regret
Arkansas	United States of America	2007	Slavery										Sympathies, regret
Connecticut	United States of America	2009	Slavery										Regret, contrition
Florida	United States of America	2007	Slavery										Regret, shame
Maryland	United States of America	2007	Slavery										Regret
North Carolina	United States of America	2007	Slavery										Contrition
New Jersey	United States of America	2008	Slavery										Regret, sympathies
Bishop Wilton Gregory	United States Conference of Catholic Bishops	2002	Child Sex Abuse	✓	✓	✓	✓	✓		✓	✓		Contrition, hurt, embarrassment
Cardinal Daniel Dinardo	United States Conference of Catholic Bishops	2018	Child Sex Abuse	✓	✓		✓						

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Apologiser	Country/ Church	Year	Theme	Remorse	Responsibility	Admission of wrongdoing	Acknowledgement of victim suffering	Re-commitment	Offer of Repair	Praise for minority group	Praise for majority group	Praise for present system	Disassociation	Emotion
City of Liverpool	United Kingdom	1999	Slavery											Shame, remorse
General Synod of the Church of England	United Kingdom	2006	Slavery											
Ken Livingstone	United Kingdom	2007	Slavery											
Prime Minister Tony Blair	United Kingdom	2006	Slavery	✓			✓	✓	✓	✓	✓		✓	Shame, sorrow
First Minister Jack McConnell	United Kingdom (Scotland)	2004	Child Abuse	✓			✓	✓	✓				✓	
Prime Minister Gordon Brown	United Kingdom	2010	Child Migration	✓	✓	✓	✓	✓	✓	✓			✓	Shame
Archbishop Philip Tartaglia	Scottish Catholic Church	2015	Child Sex Abuse	✓			✓							
	De La Salle Brothers, United Kingdom	2017	Child Abuse	✓										Regret
Sr Cora McHale	Sisters of Nazareth, United Kingdom	2017	Child Abuse	✓			✓							
Archbishop Eamon Martin	Catholic Church Ireland	2017	Child Abuse	✓			✓		✓					Shame

	Irish Norbites	2017	Child Abuse	✓			✓								
	Sisters of St Louis, Ireland	2017	Child Abuse	✓			✓								
	Diocese of Down and Connor	2017	Child Abuse	✓			✓								
	Congregation of Our Lady of Charity of the Good Shepherd	2017	Child Abuse	✓											
Prime Minister Michael Martin	Ireland	2021	Mother and Baby Homes	✓	✓		✓	✓		✓	✓		✓		Shame
Archbishop Eamon Martin	Catholic Church Ireland	2021	Mother and Baby Homes	✓	✓	✓									
	Sisters of Bon Secours	2021	Mother and Baby Homes	✓	✓	✓	✓								Regret, hope
	Sisters of the Sacred Heart of Jesus and Mary	2021	Mother and Baby Homes	✓							✓		✓		Shame, sorrow
	Daughters of Charity	2021	Mother and Baby Homes	✓							✓				Regret, hope
	Sisters of Mercy (Ireland)	2021	Mother and Baby Homes				✓								
Archbishop Michael Neary, Bishop of Tuam	Tuam, Ireland	2021	Mother and Baby Homes	✓	✓	✓									Shame
Bishop Fintan Gavin	Bishop of Cork and Ross, Ireland	2021	Mother and Baby Homes		✓	✓					✓				Sadness, shame, embarrassment

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Apologiser	Country/ Church	Year	Theme	Remorse	Responsibility	Admission of wrongdoing	Acknowledgement of victim suffering	Re-commitment	Offer of Repair	Praise for minority group	Praise for majority group	Praise for present system	Disassociation	Emotion
Archbishop Dermot Farrell	Dublin Archdiocese (Ireland)	2021	Mother and Baby Homes	✓										Shame
	Episcopal Church (United States)	2008	Slavery	✓	✓	✓	✓							
	Southern Baptist Convention (United States)	1995	Slavery	✓	✓	✓	✓				✓		✓	

Bibliography

'26/11/09 Personal Statement of Cardinal Desmond Connell' <www.dublindiocese.ie/261109-personal-statement-of-cardinal-desmond-connell/>

Abrams K and Keren H, 'Who's Afraid of Law and the Emotions?' (2010) 94 Minnesota Law Review 1997

Accattoli L and Aumann J, *When a Pope Asks Forgiveness: The Mea Culpa's of John Paul II* (Alba House 1998)

Acemoglu D, Johnson S and Robinson J, 'The Colonial Origins of Comparative Development: An Empirical Investigation' (2001) 91 American Economic Review 1369

Aguiar W, *Aboriginal Peoples and Historic Trauma* (National Collaborating Centre for Aboriginal Health 2015) <http://deslibris.ca/ID/10066010>

Ahmed S, *The Cultural Politics of Emotion* (2nd ed, Edinburgh University Press 2014)

Aiyetoro A, 'Formulating Reparations through the Eyes of the Movement' (2003) 58 NYU Annual Survey of American Law 457

Alexander JC, *Performance and Power* (Polity 2011)

Alexander M, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (Revised ed, New Press 2012)

Alfred T, Wasáse: Indigenous Pathways of Action and Freedom (Broadview Press 2005) 152

Peace, Power, Righteousness: An Indigenous Manifesto (2nd ed, Oxford University Press 2009)

Alfred T, 'Restitution Is the Real Pathway to Justice for Indigenous Peoples' in Gregory Younging, Jonathan Dewar and Mike DeGagne (eds), *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey* (Aboriginal Healing Foundation 2009)

Allen A, *End of Progress – Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2017)

'Feminist Perspectives on Power' in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2021) <https://plato.stanford.edu/archives/win2021/entries/feminist-power/>

'The Power Family Tree' (2014) 7 Journal of Political Power 443
The Power of Feminist Theory: Domination, Resistance, Solidarity (Routledge 2000)
Allen J, 'Vatican Abuse Summit: $2.2 Billion and 100,000 Victims in U.S. Alone' *National Catholic Reporter* (8 February 2012) <http://ncronline.org/blogs/ncr-today/vaticanabuse-summit-22-billion-and-100000-victims-us-alone>
Allport GW, *The Nature of Prejudice* (Unabridged, 25th anniversary ed, Addison-Wesley Pub Co 1979)
Almassi B and Philosophy Documentation Center, 'Epistemic Injustice and Its Amelioration: Toward Restorative Epistemic Justice' (2018) 34 Social Philosophy Today 95
Alston P, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1
Alter S, 'Apologizing for Serious Wrongdoing: Social, Psychological and Legal Considerations' (Law Commission of Canada 1999)
Altman J, 'The Political Ecology and Political Economy of the Indigenous Land Titling "Revolution" in Australia' (2014) Maori Law Review 1
'Reconciliation and the Quest for Economic Sameness' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016)
Ambos K, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC' in Kai Ambos, Judith Large and Marieke Wierda (eds), *Building a Future on Peace and Justice* (Springer 2009)
Amstadter AB and Vernon LL, 'Emotional Reactions During and After Trauma: A Comparison of Trauma Types' (2008) 16 Journal of Aggression, Maltreatment & Trauma 391
Anderson A and Gordon R, 'Witchcraft and the Status of Women: The Case of England' (1978) 29 The British Journal of Sociology 171
Anderson B, 'Affect and Biopower: Towards a Politics of Life' (2012) 37 Transactions of the Institute of British Geographers 28
Anderson BRO, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Revised ed, Verso 2016)
Anderson DM, 'Mau Mau in the High Court and the "Lost" British Empire Archives: Colonial Conspiracy or Bureaucratic Bungle?' (2011) 39 The Journal of Imperial and Commonwealth History 699
Anderson E, 'Epistemic Justice as a Virtue of Social Institutions' (2012) 26 Social Epistemology 163
Anderson K, *A Recognition of Being: Reconstructing Native Womanhood* (Sumach Press 2000)
Andrews VJ, *White Unwed Mother: The Adoption Mandate in Postwar Canada* (Demeter Press 2018)
Androff D, '"To Not Hate": Reconciliation among Victims of Violence and Participants of the Greensboro Truth and Reconciliation Commission' (2010) 13 Contemporary Justice Review 269
Anghie A, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 Social & Legal Studies 321

Ani M, *Yurugu: An African-Centered Critique of European Cultural Thought and Behavior* (Africa World Press 1994)
Ankarloo B, Clark S and Monter EW, *The Period of the Witch Trials* (University of Pennsylvania Press 2002)
Armstrong K, *Fields of Blood: Religion and the History of Violence* (Alfred A Knopf 2015)
Arnold B, *The Irish Gulag: How the State Betrayed Its Innocent Children* (Gill & Macmillan 2009)
Arnstein SR, 'A Ladder of Citizen Participation' (1969) 35 Journal of the American Institute of Planners 216
Arthur P, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Human Rights Quarterly 321
Arvidsson M, 'Contextualising Reparation Politics' in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Abuse of Children in 'Care': International Perspectives* (Palgrave Macmillan 2015)
Asch RG, *The Thirty Years War: The Holy Roman Empire and Europe, 1618–1648* (Macmillan 1997)
Ashforth A, 'Reckoning Schemes of Legitimation: On Commissions of Inquiry as Power/Knowledge Forms' (1990) 3 Journal of Historical Sociology 1
'Assembly of First Nations Report on Canada's Dispute Resolution Plan to Compensate for Abuses in Indian Residential Schools' (Assembly of First Nations 2004)
Australian Senate Community Affairs References Committee, *Lost Innocents and Forgotten Australians Revisited: Report on the Progress with the Implementation of the Recommendations of the Lost Innocents and Forgotten Australians Reports* (Commonwealth of Australia 2009)
'Australian Government Response to the Royal Commission into Institutional Responses to Child Sexual Abuse' (Commonwealth Government of Australia 2018) <www.childabuseroyalcommissionresponse.gov.au/sites/default/files/2019-05/Australian%20Government%20Response%20to%20the%20Royal%20Commission%20into%20Institutional%20Responses%20to%20Child%20Sexual%20Abuse%20-%20full%20version.PDF>
Australian Healthcare Associates, 'Evaluation of the Find and Connect Services Final Report' (Department of Social Services 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>
Bachrach P and Baratz MS, 'Two Faces of Power' (1962) 56 American Political Science Review 947
Bakiner O, 'One Truth among Others? Truth Commissions' Struggle for Truth and Memory' (2015) 8 Memory Studies 345
Truth Commissions: Memory, Power, and Legitimacy (University of Pennsylvania Press 2016)
Balandier G, *Political Anthropology* (1st American ed, Pantheon Books 1970)
Balasco LM, 'The Transitions of Transitional Justice: Mapping the Waves from Promise to Practice' (2013) 12 Journal of Human Rights 198

Balboni JM and Bishop DM, 'Transformative Justice: Survivor Perspectives on Clergy Sexual Abuse Litigation' (2010) 13 Contemporary Justice Review 133

Balint J, 'The "Mau Mau" Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment' (2016) 3 Critical Analysis of Law 261

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

Balint J, Evans J and McMillan N, 'Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach' (2014) 8 International Journal of Transitional Justice 194

'Justice Claims in Colonial Contexts: Commissions of Inquiry in Historical Perspective' (2016) 42 Australian Feminist Law Journal 75

Balkin J and Levinson S, 'The Canons of Constitutional Law' (1998) 111 Harvard Law Review 963

Bandes SA (ed), *The Passions of Law* (New York University Press 1999)

Bandes SA and others, 'Introduction', in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021)

Banner S, 'Why Terra Nullius? Anthropology and Property Law in Early Australia' (2005) 23 Law and History Review 95

Baptist EE, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (pbk ed, Basic Books 2016)

Barkan E, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (Johns Hopkins University Press 2001)

Barnes J, *Irish Industrial Schools, 1868–1908: Origins and Development* (Irish Academic Press 1989)

Barnes R, Josefowitz N and Cole E, 'Residential Schools: Impact on Aboriginal Students' Academic and Cognitive Development' (2006) 21 Canadian Journal of School Psychology 18

Barstow AL, *Witchcraze: A New History of the European Witch Hunts* (1st ed, Pandora 1994)

Barta T, 'Sorry, and Not Sorry, in Australia: How the Apology to the Stolen Generations Buried a History of Genocide' (2008) 10 Journal of Genocide Research 201

Barth K, Bromiley GW and Torrance TF, *The Doctrine of Reconciliation: Church Dogmatics* (Continuum 2004)

Barthes R, Lavers A and Reynolds S, *Mythologies* (Rev Vintage ed, Vintage Classics 2009)

Bates S, 'Church Apologises for Benefiting from Slave Trade' *The Guardian* (London, 9 February 2006) <www.theguardian.com/uk/2006/feb/09/religion.world#>

Battersby L, Greaves L and Hunt R, 'Legal Redress and Institutional Sexual Abuse: A Study of the Experiences of Deaf and Hard of Hearing Survivors' (2008) 10 Florida Coastal Law Review 67

Baumgartner E and others, 'Documentation, Human Rights and Transitional Justice' (2016) 8 Journal of Human Rights Practice 1

Baumtrog MD and Peach H, 'They Can't Be Believed: Children, Intersectionality, and Epistemic Injustice' (2019) 15 Journal of Global Ethics 213

Bavelas J, 'An Analysis of Formal Apologies by Canadian Churches to First Nations' Occasional Paper 1 (University of Victoria 2004)
Beaulac S, 'The Westphalian Model in Defining International Law: Challenging the Myth' (2004) 8 Australian Journal of Legal History 181
Beausoleil E, 'Listening to Claims of Structural Injustice' (2019) 24 *Angelaki* 120
Beer J, Dingemans J and Lissack R (eds), *Public Inquiries* (Oxford University Press 2011)
Behrendt L, 'Genocide: The Distance between Law and Life' (2001) 25 Aboriginal History 132
'The Link between Rights and a Treaty "Practical Reconciliation"' (2002) 4 Balayi: Culture, Law and Colonialism 21
'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans and others (eds), *Sovereignty* (University of Hawai'i Press 2012)
Belew K, 'Lynching and Power in the United States: Southern, Western, and National Vigilante Violence' (2014) 12 History Compass 84
Bell C, 'Dealing with the Past in Northern Ireland' (2003) 26 Fordham International Law Journal 1095
Bell M, *Hard Feelings: The Moral Psychology of Contempt* (Oxford University Press 2013)
Benítez-Castro M-Á and Hidalgo-Tenorio E, '"We Were Treated Very Badly, Treated Like Slaves": A Critical Metaphor Analysis of the Accounts of the Magdalene Laundries Victims' in Pilar Villar-Argáiz (ed), *Irishness on the Margins* (Springer International Publishing 2018) <http://link.springer.com/10.1007/978-3-319-74567-1_6>
Benjamin W, *Reflections: Essays, Aphorisms, Autobiographical Writing* (Peter Demetz ed, Schocken Books 1986)
Benton L and Straumann B, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice' (2010) 28 Law and History Review 1
Benvenuto J, Woolford A and Hinton AL, 'Colonial Genocide in Indigenous North America' in Andrew Woolford, Alexander Laban Hinton and Jeff Benvenuto (eds), *Colonial Genocide in Indigenous North America* (Duke University Press 2014)
Berenstain N and others, 'Epistemic Oppression, Resistance, and Resurgence' (2021) Contemporary Political Theory <https://link.springer.com/10.1057/s41296-021-00483-z>
Berg M, *Popular Justice: A History of Lynching in America* (Rowman & Littlefield Publishers, Incorporated 2015)
Berry DR, *The Price for Their Pound of Flesh: The Value of the Enslaved, from Womb to Grave, in the Building of a Nation* (Random House Inc 2018)
Berry J, *Lead Us Not into Temptation: Catholic Priests and the Sexual Abuse of Children* (LevelFiveMedia 2013)
'Bertie Ahern, Apology for Institutional Child Abuse' (1999) <www.rte.ie/archives/2019/0430/1046590-apology-to-victims-of-institutional-child-abuse/>
'Beyond the Mandate: Continuing the Conversation Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission' (Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission 2015)
Bird AR, *US Foreign Policy on Transitional Justice* (Oxford University Press 2015)

Black R, 'Historic Abuse Survivor Launches Legal Challenge to Redress Board' *Belfast Telegraph* (Belfast, 19 March 2021)

Blackhawk M, 'Federal Indian Law as Paradigm within Public Law' (2019) 132 Harvard Law Review 1787

'On Power and the Law: McGirt v Oklahoma' (2020) 2020 Supreme Court Review 1

Blackmon DA, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (1st Anchor Books ed, Anchor Books 2009)

Blackstock C, 'The Complainant: The Canadian Human Rights Case on First Nations Child Welfare' (2016) 62 McGill Law Journal 285

Blatz CW, Schumann K and Ross M, 'Government Apologies for Historical Injustices' (2009) 30 Political Psychology 219

Bloomfield D, 'Reconciliation: An Introduction' in David Bloomfield, Teresa Barnes and Luc Huyse (eds), *Reconciliation after Violent Conflict: A Handbook* (IDEA 2003)

On Good Terms: Clarifying Reconciliation (Berghof Research Center for Constructive Conflict Management 2006)

Bogen KW and others, 'It Happens in #ChurchToo: Twitter Discourse Regarding Sexual Victimization Within Religious Communities' (2022) 37(3–4) Journal of Interpersonal Violence 1338

Bonilla-Silva E, *White Supremacy and Racism in the Post-Civil Rights Era* (L Rienner 2001)

Bornstein BH and Wiener RL (eds), *Emotion and the Law: Psychological Perspectives* (Springer 2010)

Borrows J, '"Landed Citizenship": Narratives of Aboriginal Political Participation' in Will Kymlicka and Wayne Norman (eds), *Citizenship in Diverse Societies* (Oxford University Press 2000)

Drawing Out Law: A Spirit's Guide (University of Toronto Press 2010)

'Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism' (2017) 98 Canadian Historical Review 114

Bouchard G, *Social Myths and Collective Imaginaries* (English-language ed, University of Toronto Press 2017)

Bouchard G, Weinroth M and Browne PL, *The Making of the Nations and Cultures of the New World: An Essay in Comparative History* (McGill-Queen's University Press 2008)

Boucher E, *Empire's Children: Child Emigration, Welfare, and the Decline of the British World 1869–1967* (Cambridge University Press 2014)

Bowles S and Gintis H, 'The Inheritance of Inequality' (2002) 16 Journal of Economic Perspectives 3

Bowsher J, 'The South African TRC as Neoliberal Reconciliation: Victim Subjectivities and the Synchronization of Affects' (2020) 29(1) Social & Legal Studies 41

Boyce J, 'Victimization of Aboriginal People in Canada, 2014' (Canadian Centre for Justice Statistics 2014)

Brady S, 'Time to Listen: Confronting Child Sexual Abuse by Catholic Clergy in Ireland' (4 December 2003) <www.armagharchdiocese.org/4-dec-launch-of-time-to-listen-confronting-child-sexual-abuse-by-catholic-clergy-in-ireland-report-of-royal-college-of-surgeons-in-ireland/>

Braithwaite J, *Restorative Justice & Responsive Regulation* (Oxford University Press 2002)
Brants C and Klep K, 'Transitional Justice: History-Telling, Collective Memory, and the Victim-Witness' (2013) 7 International Journal of Conflict and Violence 36
Brennan C, 'Trials and Contestations: Ireland's Ryan Commission' in Shurlee Swain and Johanna Sköld (eds), *Apologies and the Legacy of Children in 'Care': International Perspectives* (Palgrave Macmillan UK 2015)
'Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future' (2002) 115 Harvard Law Review 1689
Brock RN and Parker RA, *Saving Paradise: How Christianity Traded Love of This World for Crucifixion and Empire* (Beacon Press 2008)
Brophy A, 'The Cultural War over Reparations for Slavery' (2004) 53 De Paul Law Review 1181
Brophy AL, *Reparations: Pro & Con* (Oxford University Press 2006)
Brounéus K, 'Truth-Telling as Talking Cure? Insecurity and Retraumatization in the Rwandan Gacaca Courts' (2008) 39 Security Dialogue 55
Brown CG, *The Death of Christian Britain: Understanding Secularisation, 1800–2000* (2nd ed, Routledge 2009)
Brown D, *Bury My Heart at Wounded Knee: An Indian History of the American West* (Vintage 2006)
Brown J, McKenna D and O'Kennedy E, 'Only a Witness: The Experience of Clients of One in Four in the Criminal Justice System' (One in Four 2018)
Brown P, *The Rise of Western Christendom: Triumph and Diversity, A.D. 200–1000* (10th Anniversary rev. ed, Wiley-Blackwell 2013)
Brudholm T and Lang J (eds), *Emotions and Mass Atrocity: Philosophical and Theoretical Explorations* (1st ed, Cambridge University Press 2018) <www.cambridge.org/core/product/identifier/9781316563281/type/book>
Buck C, '"Never Again": Kevin Gover's Apology for the Bureau of Indian Affairs' (2006) 21 Wicazo SA Review 97
Buckley S-A and McGregor C, 'Interrogating Institutionalisation and Child Welfare: The Irish Case, 1939–1991' (2019) 22 European Journal of Social Work 1062
Bueno de Mesquita B, 'Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty' (2000) 2 International Studies Review 93
Bussey M and Lucero NM, 'Re-Examining Child Welfare's Response to ICWA: Collaborating with Community-Based Agencies to Reduce Disparities for American Indian/Alaska Native Children' (2013) 35 Children and Youth Services Review 394
Buti A, 'The Stolen Generations and Litigation Revisited' (2008) 32 Melbourne University Law Review 382
'"Reconciliation": Its Relationship and Importance to Law' (2018) 43 University of Western Australia Law Review 107
Butler AD, *White Evangelical Racism: The Politics of Morality in America* (The University of North Carolina Press 2021)
Byrnes TA, 'Catholic Bishops and Sexual Abuse: Power, Constraint, and Institutional Context' (2020) 62 Journal of Church and State 5

Calderaro C and Lépinard É, 'Intersectionality as a New Feeling Rule for Young Feminists: Race and Feminist Relations in France and Switzerland' (2021) 28 European Journal of Women's Studies 387

Calhoun C, 'An Apology for Moral Shame' (2004) 12 Journal of Political Philosophy 127

Calloway CG, *The Scratch of a Pen: 1763 and the Transformation of North America* (Oxford University Press 2007)

Canada, House of Commons Debates (22 May 1883), 1376

Capriccioso R, 'A Sorry Saga: Obama Signs Native American Apology Resolution; Fails to Draw Attention to It' *Indian Law Resource Center* (13 January 2010)

Care of Children Committee, *Report of the Care of Children Committee (Chairman: Myra Curtis)* Cmd. 6922 London (His Majesty's Stationery Office 1946)

Carlson KM, 'Congress and Indians' (2015) 86 University of Colorado Law Review 78

Carothers T, 'The End of the Transition Paradigm' (2002) 13 Journal of Democracy 5

Carranza R, Correa C and Naughton E, 'More Than Words: Apologies as a Form of Reparation' (International Center for Transitional Justice 2015)

Carrette JR, *Foucault and Religion: Spiritual Corporality and Political Spirituality* (Routledge 2000)

Case P, *Compensating Child Abuse in England and Wales* (Cambridge University Press 2007)

Cave A, 'Abuse of Power: Andrew Jackson and the Indian Removal Act 1830' (2003) 65 The Historian 1330

Celermajer D, *The Sins of the Nation and the Ritual of Apologies* (Cambridge University Press 2009)

'From Mea Culpa to Nostra Culpa: A Reparative Apology from the Catholic Church?' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014)

Celermajer D and Kidman J, 'Embedding the Apology in the Nation's Identity' (2012) 121 Journal of the Polynesian Society 219

Chakravarti S, *Sing the Rage: Listening to Anger after Mass Violence* (The University of Chicago Press 2014)

Chamallas M, *Introduction to Feminist Legal Theory* (3rd ed, Aspen 2012)

Charles M and Rah S-C, *Unsettling Truths: The Ongoing, Dehumanizing Legacy of the Doctrine of Discovery* (IVP, an imprint of InterVarsity Press 2019)

Charlesworth H (ed), *No Country Is an Island: Australia and International Law* (University of New South Wales Press 2006)

Cho S, 'From Massive Resistance, to Passive Resistance, to Righteous Resistance: Understanding the Culture Wars from *Brown* to *Grutter*' (2005) 7 University of Pennsylvania Journal of Constitutional Law 809

Chouhan K and Nazroo J, 'Health Inequalities' in Bridget Byrne and others (eds), *Ethnicity Race and Inequality in the UK: State of the Nation* (Policy Press 2020)

Clamp K, *Restorative Justice in Transition* (Routledge 2015)

(ed), *Restorative Justice in Transitional Settings* (Routledge, Taylor & Francis Group 2016)

Clamp K and Doak J, 'More than Words: Restorative Justice Concepts in Transitional Justice Settings' (2012) 12 International Criminal Law Review 339

'Clann Report: Principal Submissions to the Commission of Investigation into Mother and Baby Homes' (2018) <http://clannproject.org/wp-content/uploads/Clann-Submissions_Redacted-Public-Version-October-2018.pdf>
Clark G, 'The Role of Mother and Baby Homes in the Adoption of Children Born Outside Marriage in Twentieth-Century England and Wales' (2008) 11 Family & Community History 45
Clark JN, 'Emotional Legacies, Transitional Justice and Alethic Truth: A Novel Basis for Exploring Reconciliation' (2020) 18 Journal of International Criminal Justice 141
Clark T, de Costa R and Maddison S, 'Non-Indigenous People and the Limits of Settler Colonial Reconciliation' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016)
Clarke KM, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019)
Clarke V, 'There May Be 15,000 Illegal Adoptions, Barnardos Head Claims' The Irish Times (Dublin, 30 May 2018)
Clegg S, *Frameworks of Power* (Sage Publications 1989)
Cohen S, *Visions of Social Control: Crime, Punishment, and Classification* (Polity Press and Blackwell 1985)
Coicaud J-M, 'Apology: A Small Yet Important Part of Justice' (2009) 10 Japanese Journal of Political Science 93
Coleman Jordan E, 'A History Lesson: Reparations for What?' (2003) 58 NYU Annual Survey of American Law 557
Collins M, 'Removal of "Pontifical Secret" in Clerical Sex Abuse Trials a Step Forward for Justice' The Irish Times (Dublin, 18 February 2020)
Collins PH, 'Symposium: On West and Fenstermaker's "Doing Difference"' (1995) 9 Gender & Society 491
Colton M, 'Victimization, Care and Justice: Reflections on the Experiences of Victims/Survivors Involved in Large-Scale Historical Investigations of Child Sexual Abuse in Residential Institutions' (2002) 32 British Journal of Social Work 541
Commission of Inquiry into Abuse of Children in Queensland Institutions, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions* (Department of Families, Youth and Community Care, Brisbane 1999)
'The Commission to Inquire into Child Abuse Report' (Government Publications 2009)
Committee on Homeless Children, Etc., *Report of the Committee on Homeless Children, etc. (Chairman, James L. Clyde) Cmd 6911 Edinburgh* (His Majesty's Stationery Office 1946)
Cone JH, *The Cross and the Lynching Tree* (Orbis Books 2011)
Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277.
Cook A, 'King and the Beloved Community: A Communitarian Defense of Black Reparations' (2000) 68 George Washington University Law Review 959
Cooke M 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

Corbett GH, *Nation Builders: Barnardo Children in Canada* (Dundurn Press 2002)

Corby B, Doig A and Roberts V, 'Inquiries into Child Abuse' (1998) 20 Journal of Social Welfare and Family Law 377

Public Enquiries into Abuse of Children in Residential Care (Jessica Kingsley 2001)

Corntassel J, 'Toward Sustainable Self-Determination: Rethinking the Contemporary Indigenous-Rights Discourse' (2008) 33 Alternatives: Global, Local, Political 105

Coulthard GS, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press 2014)

Council for Aboriginal Reconciliation (Australia), *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Council for Aboriginal Reconciliation 2000)

'The Council for Aboriginal Reconciliation: Vision Statement' (The Council for Aboriginal Reconciliation) <www.austlii.edu.au/au/orgs/car/council/spl98_20/council.htm#:~:text=The%20Council%20for%20Aboriginal%20Reconciliation%20was%20established%20by%20the%20Commonwealth,Islander%20and%20wider%20Australian%20communities>

Craemer T, 'Estimating Slavery Reparations: Present Value Comparisons of Historical Multigenerational Reparations Policies' (2015) 96 Social Science Quarterly 639

'International Reparations for Slavery and the Slave Trade' (2018) 49 Journal of Black Studies 694

Crenshaw K, 'Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1331

'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) University of Chicago Law Forum 139

Crocker DA, 'Punishment, Reconciliation, and Democratic Deliberation' (2002) 5 Buffalo Criminal Law Review 509

'Reckoning with Past Wrongs: A Normative Framework' (1999) 13 Ethics & International Affairs 43

'Truth Commissions, Transitional Justice, and Civil Society' in Robert I Rotberg and Dennis Thompson (eds), *Truth v Justice. The Morality of Truth Commissions* (Princeton University Press 2000)

Crowley U and Kitchin R, 'Producing "Decent Girls": Governmentality and the Moral Geographies of Sexual Conduct in Ireland (1922–1937)' (2008) 15 Gender, Place & Culture 355

Cunneen C, 'Restorative Justice and the Politics of Decolonisation' in Elmar GM Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing 2002)

Cunningham M, '"It Wasn't Us and We Didn't Benefit": The Discourse of Opposition to an Apology by Britain for Its Role in the Slave Trade' (2008) 79 The Political Quarterly 252

Curthoys A, Genovese A and Reilly A, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press 2008)

Cuthbert D and Quartly M, '"Forced Adoption" in the Australian Story of National Regret and Apology' (2012) 58 Australian Journal of Politics & History 82

'Forced Child Removal and the Politics of National Apologies in Australia' (2013) 37 American Indian Quarterly 178

Dahl RA, 'The Concept of Power' (2007) 2 Behavioral Science 201

Daly K, *Redressing Institutional Abuse of Children* (Palgrave Macmillan UK 2014)

'Sexual Violence and Justice: How and Why Context Matters' in Anastasia Powell, Nicola Henry and Asher Flynn (eds), *Rape Justice: Beyond the Realm of Law* (Palgrave Macmillan 2015)

Daly K and Davis J, 'Unravelling Redress for Institutional Abuse of Children in Australia' (2019) 42 University of New South Wales Law Journal 1254

'Civil Justice and Redress Scheme Outcomes for Child Sexual Abuse by the Catholic Church' (2021) (33)(4) Current Issues in Criminal Justice 438

Damasio AR, *The Feeling of What Happens: Body, Emotion and the Making of Consciousness* (Vintage 2000)

Descartes' Error: Emotion, Reason and the Human Brain (rev ed with a new preface, Vintage 2006)

Danforth S, 'Repaying Historical Debts: The Indian Claims Commission' (1973) 49 North Dakota Law Review 359

D'Anjou L, *Social Movements and Cultural Change: The First Abolition Campaign Revisited* (Aldine de Gruyter 1996)

D'Aoust A-M, 'Ties That Bind? Engaging Emotions, Governmentality and Neoliberalism: Introduction to the Special Issue' (2014) 28 Global Society 267

Daschuk JW, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (University of Regina Press 2019)

Davey M, 'Royal Commission Has Led to More than 100 Child Abuse Prosecutions, Says Head' *The Guardian* (London, 15 May 2017)

Davis AM, 'Apologies, Reparations, and the Continuing Legacy of the European Slave Trade in the United States' (2014) 45 Journal of Black Studies 271

Davis AY, 'Racialized Punishment and Prison Abolition' in Tommy L Lott and John P Pittman (eds), *A Companion to African-American Philosophy* (Blackwell Publishing 2007)

Davis DB, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (Oxford University Press 2006)

Davis L, *EU Foreign Policy, Transitional Justice and Mediation: Principle, Policy and Practice* (Routledge 2014)

de Greiff P, 'Justice and Reparations' in Pablo de Greiff (ed), *The Handbook of Reparations* (Oxford University Press 2006)

'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted' in Mark Gibney and Rhoda Howard-Hassmann (eds), *The Age of Apology* (Pennsylvania State University Press 2008)

'A Normative Conception of Transitional Justice' (2010) 50 Politorbis 17

'Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes' in Clara Ramírez-Barat (ed), *Transitional Justice, Culture, and Society: Beyond Outreach* (Social Science Research Council 2014)

'The Future of the Past: Reflections on the Present State and Prospects of Transitional Justice' (2020) 14 International Journal of Transitional Justice 251

De Groot J, '"Sex" and "Race": The Construction of Language and Image in the Nineteenth Century' in Susan Mendus and Jane Rendall (eds), *Sexuality and Subordination: Interdisciplinary Studies of Gender in the Nineteenth Century* (Routledge 1989)

'De La Salle Brothers Abuse Apology' *Belfast Telegraph* (Belfast, 14 January 2014) <www.belfasttelegraph.co.uk/news/northern-ireland/de-la-salle-brothers-abuse-apology-29915559.html>

Deer K, '1 Year Later, Little Progress on Quebec Response to MMIWG Report, Say Families and Advocates' *Canadian Broadcasting Corporation* (Ottawa, 3 June 2020) <www.cbc.ca/news/indigenous/mmiwg-quebec-report-one-year-1.5595735>

Degruy J, *Post Traumatic Slave Syndrome: America's Legacy of Enduring Injury and Healing* (Joy deGruy Publications 2017)

Deigh J, *Emotions, Values, and the Law* (Oxford University Press 2008)

Demertzis N (ed), *Emotions in Politics: The Affect Dimension in Political Tension* (Palgrave Macmillan 2013)

Deonna JA, Rodogno R and Teroni F, *In Defense of Shame: The Faces of an Emotion* (Oxford University Press 2012)

Derrida J, *On Cosmopolitanism and Forgiveness* (Routledge 2001)

Des Rosiers N, Feldthusen B and Hankivsky OAR, 'Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Judicial System' (1998) 4 Psychology, Public Policy, and Law 433

Dickey B, 'Why Were There No Poor Laws in Australia?' (1992) 4 Journal of Policy History 111

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

Dixon T, *From Passions to Emotions: The Creation of a Secular Psychological Category* (Cambridge University Press 2003)

Doak J, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 International Criminal Law Review 263

'Stalking the State: The State as a Stakeholder in Post-Conflict Restorative Justice' in Kerry Clamp (ed), *Restorative Justice in Transitional Settings* (Routledge 2016)

Doak J and O'Mahony D, 'In Search of Legitimacy: Restorative Youth Conferencing in Northern Ireland' (2011) 31 Legal Studies 305

Dodd V, 'Police Uncovering "epidemic of Child Abuse" in 1970s and 80s' *The Guardian* (London, 5 February 2020) <www.theguardian.com/uk-news/2020/feb/05/police-uncovering-epidemic-of-child-abuse-in-1970s-and-80s>

Dolezal L, *The Body and Shame: Phenomenology, Feminism, and the Socially Shaped Body* (Lexington Books 2015)

Douzinas C, 'Violence, Justice, Deconstruction' (2005) 6 German Law Journal 171

Doyle T and Rubino S, 'Catholic Clergy Sexual Abuse Meets the Civil Law' (2004) 31 Fordham Urban Law Journal 549
Doyle TP, 'Clericalism: Enabler of Clergy Sexual Abuse' (2006) 54 Pastoral Psychology 189
Doyle TP, Sipe AWR and Wall PJ, *Sex, Priests, and Secret Codes: The Catholic Church's 2000-Year Paper Trail of Sexual Abuse* (Volt Press 2006)
Dray P, *At the Hands of Persons Unknown: The Lynching of Black America* (pbk ed, Modern Library 2003)
Dreher T and Waller L, 'Enduring Silence: Racialized News Values, White Supremacy and a National Apology for Child Sexual Abuse' (2021) Ethnic and Racial Studies 1
Duffy H, *Strategic Human Rights Litigation* (Hart Publishing 2018)
Durkheim E and Fields KE, *The Elementary Forms of Religious Life* (Free Press 1995)
Dwyer S, 'Reconciliation for Realists' in Trudy Govier and Carol Prager (eds), *Dilemmas of Reconciliation: Cases and Concepts* (Wilfred Laurier University Press 2003)
Dwyer-Lindgren L and others, 'Inequalities in Life Expectancy Among US Counties, 1980 to 2014: Temporal Trends and Key Drivers' (2017) 177 JAMA Internal Medicine 1003
Dyrenfurth N, *Mateship: A Very Australian History* (Scribe 2015)
Earner-Byrne L, 'The Boat to England: An Analysis of the Official Reactions to the Emigration of Single Expectant Irishwomen to Britain, 1922–1972' (2003) 30 Irish Economic and Social History 52
Mother and Child: Maternity and Child Welfare in Dublin, 1922–60 (Manchester University Press 2013)
Edmonds P, *Settler Colonialism and (Re)Conciliation: Frontier Violence, Affective Performances, and Imaginative Refoundings* (Palgrave Macmillan 2016)
Edwards F, Lee H and Esposito M, '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
Edwards I, 'An Ambiguous Participant: The Crime Victim and Criminal Justice Decision-Making' (2004) 44 British Journal of Criminology 967
Edwards JA and Luckie A, 'British Prime Minister Tony Blair's Irish Potato Famine Apology' (2014) 5 Journal of Conflictology 43–51 <http://journal-of-conflictology.uoc.edu/joc/ca/index.php/journal-of-conflictology/article/view/vol5iss1-edwards-luckie.html>
Edwards KT, 'Christianity as Anti-Colonial Resistance?: Womanist Theology, Black Liberation Theology, and The Black Church as Sites for Pedagogical Decolonization' (2013) 15 Souls 146
Ehle J, *Trail of Tears: The Rise and Fall of the Cherokee Nation* (1st ed, Doubleday 1988)
Elias N and others, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations* (Rev ed, Blackwell Publishers 2000)
Ellinghaus K, 'Biological Absorption and Genocide: A Comparison of Indigenous Assimilation Policies in the United States and Australia' (2009) 4 Genocide Studies and Prevention 59

Elster J, *Alchemies of the Mind: Rationality and the Emotions* (Cambridge University Press 1999)

Closing the Books: Transitional Justice in Historical Perspective (Cambridge University Press 2004)

Empson C, 'Historical Infringements of Aboriginal Rights: Sui Generis as a Tool to Ignore the Past' (2019) 24 Appeal: Review of Current Law and Law Reform 101

'Enda Kenny Speech on Cloyne Report' *RTE News* (Dublin 20 July 2011)

Enright M, "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)

Enright M and Ring S, 'State Legal Responses to Historical Institutional Abuse: Shame, Sovereignty, and Epistemic Injustice' (2020) 55 Éire-Ireland 68

Eriksson A, 'A Bottom-Up Approach to Transformative Justice in Northern Ireland' (2009) 3 International Journal of Transitional Justice 301

Eudaily SP, *The Present Politics of the Past: Indigenous Legal Activism and Resistance to (Neo)Liberal Governmentality* (Routledge 2004)

Evans C, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012)

Evans M and Wilkins D, 'Transformative Justice, Reparations and Transatlantic Slavery' (2019) 28 Social & Legal Studies 137

Evans T, *Fractured Families: Life on the Margins in Colonial New South Wales* (UNSW Press 2015)

Fahy E, 'Reformatory Schools in Ireland' (1942) 60 *Hermathena* 54

Farrell DP, 'Sexual Abuse Perpetrated by Roman Catholic Priests and Religious' (2009) 12 Mental Health, Religion & Culture 39

Faulkner J, 'Suffer Little Children": The Representation of Aboriginal Disadvantage through Images of Suffering Children, and the Wages of Spectacular Humanitarianism' (2019) 22 Theory & Event 595

Feagin J and Ducey K, *Elite White Men Ruling: Who, What, When, Where, and How* (Routledge 2017)

Featherstone L, '"Children in a Terrible State": Understandings of Trauma and Child Sexual Assault in 1970s and 1980s Australia' (2018) 42 Journal of Australian Studies 164

Feiring C and Taska LS, 'The Persistence of Shame Following Sexual Abuse: A Longitudinal Look at Risk and Recovery' (2005) 10 Child Maltreatment 337

Fejo-King C, 'The National Apology to the Stolen Generations: The Ripple Effect' (2011) 64 Australian Social Work 130

Feldthusen B, 'Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It.' (2007) 22 Canadian Journal of Law and Society 61

Feldthusen B, Hankivsky OAR and Greaves L, 'Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse' (2000) 12 Canadian Journal of Women and Law 66

Ferguson H, 'Abused and Looked After Children as "Moral Dirt": Child Abuse and Institutional Care in Historical Perspective' (2007) 36 Journal of Social Policy 123

Ferriter D, *Occasions of Sin: Sex and Society in Modern Ireland* (Profile 2012)

Fessler A, *The Girls Who Went Away: The Hidden History of Women Who Surrendered Children for Adoption in the Decades before Roe v. Wade* (Penguin Press 2007)

'Final Report: Review of the Needs of Victims of Institutional Abuse' (Law Commission of Canada 1998)
Finkelhor D and Ormrod RK, 'Factors in the Underreporting of Crimes against Juveniles' (2001) 6 Child Maltreatment 219
Finnegan F, *Do Penance or Perish: Magdalen Asylums in Ireland* (1st Oxford University Press ed, Oxford University Press 2004)
Fischer C, 'Gender, Nation, and the Politics of Shame: Magdalen Laundries and the Institutionalization of Feminine Transgression in Modern Ireland' (2016) 41 Signs: Journal of Women in Culture and Society 821
'Revealing Ireland's "Proper" Heart: Apology, Shame, Nation' (2017) 32 Hypatia 751
Fitzpatrick M and others, 'Profiles of Adult Survivors of Severe Sexual, Physical and Emotional Institutional Abuse in Ireland' (2010) 19 Child Abuse Review 387
Flam H, 'The Transnational Movement for Truth, Justice and Reconciliation as an Emotional (Rule) Regime?' (2013) 6 Journal of Political Power 363
Fletcher L, 'Refracted Justice: The Imagined Victim and the International Criminal Court' in Sara Kendall, Carsten Stahn and Christian De Vos (eds), *Contested Justice: The Politics and Practice of International Criminal Court Intervention* (Cambridge University Press 2016)
Fletcher LE, 'Institutions from Above and Voices from Below: A Comment on Challenges to Group-Conflict Resolution and Reconciliation' (2009) 72 Law and Contemporary Problems 51
Foley T, 'Changing Institutional Culture in the Wake of Clerical Abuse – The Essentials of Restorative and Legal Regulation' (2019) 22 Contemporary Justice Review 171
Foner E, *Reconstruction: America's Unfinished Revolution, 1863–1877* (Updated ed, HarperPerennial 2014)
Formicola J, 'The Politics of Clerical Sexual Abuse' (2016) 7 Religions 9
Formicola JR, *Clerical Sexual Abuse: How the Crisis Changed US Catholic Church-State Relations* (Palgrave Macmillan 2016)
Foster J, Newburn T and Souhami A, 'Assessing the Impact of the Stephen Lawrence Inquiry' (Home Office Research 2005) Home Office Research Study 294
Foster SL, *Choreographing Empathy: Kinesthesia in Performance* (Routledge 2011)
Foucault M, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977* (Colin Gordon ed, 1st American ed, Pantheon Books 1980)
'The Subject and Power' in Hubert Dreyfus and Paul Rabinbow (eds), *Beyond Structuralism and Hermeneutics* (University of Chicago Press 1982)
Discipline and Punish: The Birth of the Prison (Reprint, Penguin Books 1991)
Fowler S, *The Workhouse: The People, the Places, the Life behind Doors* (The National Archives: [distributor] Grantham Book Services Ltd 2008)
Fox F and Crean A, 'Ryan Report Follow Up: Submission to the United Nations Committee against Torture Session 61' (Reclaiming Self 2017)
Francis D, *National Dreams: Myth, Memory, and Canadian History* (Arsenal Pulp Press 1997)
Frankel O, 'Vulnerable Populations, Social Investigations, and Epistemic Justice in Early Victorian Britain' (2017) 7 Oñati Socio-legal Series 261
Franklin J, 'Convent Slave Laundries? Magdalen Asylums in Australia' (2013) 34 Journal of the Australian Catholic Historical Society 70

Fraser N and Gordon L, 'A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State' (1994) 19 Signs 309
Freeman M, *Truth Commissions and Procedural Fairness* (1st ed, Cambridge University Press 2006)
Frend WHC, *Martyrdom and Persecution in the Early Church* (James Clarke & Company 2008)
Fricker M, *Epistemic Injustice: Power and the Ethics of Knowing* (Oxford University Press 2007)
Fullinwider R, 'The Case for Reparations' (2000) 20 Report from the Institute for Philosophy and Public Policy 1
Funk-Unrau N, 'The Canadian Apology to Indigenous Residential School Survivors: A Case Study of Renegotiation of Social Relations' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014)
Gallay A, *The Indian Slave Trade: The Rise of the English Empire in the American South, 1670–1717* (Yale University Press 2002)
Gallen J, 'Jesus Wept: The Roman Catholic Church, Child Sexual Abuse and Transitional Justice' (2016) 10 International Journal of Transitional Justice 332
'Historical Abuse and the Statute of Limitations' (2018) 39 Statute Law Review 103
'The European Court of Human Rights, Transitional Justice and Historical Abuse in Consolidated Democracies' (2019) 19 Human Rights Law Review 675
Gallen J and Gleeson K, 'Unpaid Wages: The Experiences of Irish Magdalene Laundries and Indigenous Australians' (2018) 14 International Journal of Law in Context 43
Galtung J, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167
'Cultural Violence' (1990) 27 Journal of Peace Research 291
'After Violence, Reconstruction, Reconciliation, and Resolution: Coping with Visible and Invisible Effects of War and Violence' in Mohammed Abu-Nimer (ed), *Reconciliation, Justice, and Coexistence: Theory & Practic* (Lexington Books 2001)
Garrett PM, 'A "Catastrophic, Inept, Self-Serving" Church? Re-Examining Three Reports on Child Abuse in the Republic of Ireland' (2013) 24 Journal of Progressive Human Services 43
Garry A, 'Intersectionality, Metaphors, and the Multiplicity of Gender' (2011) 26 Hypatia 826
Geisler C, 'Disowned by the Ownership Society: How Native Americans Lost Their Land: Native American Enclosure' (2014) 79 Rural Sociology 56
Gellner E, *Plough, Sword, and Book: The Structure of Human History* (University of Chicago Press 1989)
Nations and Nationalism (Repr, Blackwell 1990)
Genovese ED, *The Political Economy of Slavery: Studies in the Economy & Society of the Slave South* (2nd ed, 1st Wesleyan ed, Wesleyan University Press 1989)
Gibney M and Roxstrom E, 'The Status of State Apologies' (2001) 23 Human Rights Quarterly 911

Gildea R, *Empires of the Mind: The Colonial Past and the Politics of the Present* (Cambridge University Press 2019)
Gilley S, 'Christianity and Enlightenment: An Historical Survey' (1981) 1 History of European Ideas 103
Gilligan C, 'Feminist Discourse, Moral Values, and the Law – a Conversation' (1985) 34 Buffalo Law Review 11
Gilligan G, 'Official Inquiry, Truth and Criminal Justice' in George Gilligan and John Pratt (eds), *Crime, Truth and Justice: Official Inquiry, Discourse, Knowledge* (Willan Publishing 2004)
Gilligan J, *Violence: Reflections on a National Epidemic* (Vintage Books 1997)
Gillon SM, *Separate and Unequal: The Kerner Commission and the Unraveling of American Liberalism* (1st ed, Basic Books 2018)
Gilroy P, *Postcolonial Melancholia* (Columbia University Press 2005)
Gleeson K and Ring S, 'Confronting the Past and Changing the Future? Public Inquiries into Institutional Child Abuse, Ireland and Australia' (2020) 29 Griffith Law Review 109
Gleeson K and Zanghellini A, 'Graceful Remedies: Understanding Grace in the Catholic Church's Treatment of Clerical Child Sexual Abuse' (2015) 41 Australian Feminist Law Journal 219
Glenn EN, 'Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation' (2015) 1 Sociology of Race and Ethnicity 52
Gobodo-Madikizela P, 'Remorse, Forgiveness, and Rehumanization: Stories from South Africa' (2002) 42 Journal of Humanistic Psychology 7
Golding F, 'Sexual Abuse as the Core Transgression of Childhood Innocence: Unintended Consequences for Care Leavers' (2018) 42 Journal of Australian Studies 191
Gong GW, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984)
Gooder H and Jacobs JM, '"On The Border Of The Unsayable": The Apology in Postcolonizing Australia' (2000) 2 Interventions 229
Goodrich P, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson 1990)
Goodwin J, Jasper J and Polletta F, 'Why Emotions Matter: Introduction to Passion Politics' in Jeff Goodwin, James Jasper and Francesca Polletta (eds), *Passionate Politics: Emotions and Social Movements* (University of Chicago Press 2001)
Goosby BJ and Heidbrink C, 'The Transgenerational Consequences of Discrimination on African-American Health Outcomes: Discrimination and Health' (2013) 7 Sociology Compass 630
Görg N and others, 'Trauma-Related Emotions and Radical Acceptance in Dialectical Behavior Therapy for Posttraumatic Stress Disorder after Childhood Sexual Abuse' (2017) 4 Borderline Personality Disorder and Emotion Dysregulation 15
Gorton K, 'Theorizing Emotion and Affect: Feminist Engagements' (2007) 8 Feminist Theory 333
Gould DB, *Moving Politics: Emotion and ACT UP's Fight against AIDS* (The University of Chicago Press 2009)

Govier T and Verwoerd W, 'The Promise and Pitfalls of Apology' (2002) 33 Journal of Social Philosophy 67
Grant T, 'The Walking Wounded: In Canada, Survivors of Catholic Church Sex Abuse Await a Reckoning' *The Globe and Mail* (22 September 2019) <www.theglobeandmail.com/canada/article-the-walking-wounded-in-canada-survivors-of-catholic-church-sex-abuse/>
Gray D and Watt P, 'Giving Victims a Voice: Joint Report into Sexual Allegations Made against Jimmy Savile' (NSPCC/Metropolitan Police Service 2013)
Gray DC, 'A No-Excuse Approach to Transitional Justice: Reparations As Tools of Extraordinary Justice' (2010) 87 Washington University Law Review 1043
Gready P and Robins S, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339
'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339
Greco M and Stenner P, 'Happiness and the Art of Life: Diagnosing the Psychopolitics of Wellbeing' (2013) 5 Health, Culture and Society 1
Greer C and McLaughlin E, 'Theorizing Institutional Scandal and the Regulatory State' (2017) 21 Theoretical Criminology 112
Guenther L, 'Resisting Agamben: The Biopolitics of Shame and Humiliation' (2012) 38 Philosophy & Social Criticism 59
Guilmette, 'In What We Tend to Feel Is without History: Foucault, Affect, and the Ethics of Curiosity' (2014) 28 The Journal of Speculative Philosophy 284
Haig-Brown C, *Resistance and Renewal: Surviving the Indian Residential School* (Tillacum Library 1988)
Halbwachs M and Coser LA, *On Collective Memory* (University of Chicago Press 1992)
Halloran MJ, 'African American Health and Posttraumatic Slave Syndrome: A Terror Management Theory Account' (2019) 50 Journal of Black Studies 45
Hamber B, 'Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past' (2000) 5 Ethnicity & Health 215
Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health (Springer 2009)
Hamber B and Lundy P, 'Lessons from Transitional Justice? Toward a New Framing of a Victim-Centered Approach in the Case of Historical Institutional Abuse' (2020) 15 Victims & Offenders 744
Hamber B, Nageng D and O'Malley G, 'Telling It Like It Is. . .": Understanding the Truth and Reconciliation Commission from the Perspective of Survivors' (2000) 26 Psychology in Society (PINS) 18
Hamber B and Wilson RA, 'Symbolic Closure through Memory, Reparation and Revenge in Post-Conflict Societies' (2002) 1 Journal of Human Rights 35
Hamilton M, 'The Time Has Come for a Restatement of Child Sex Abuse' (2013) 79 Brooklyn Law Review 397
Hanks A, Solomon D and Weller C, '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>
Hansard (UK Parliament) Vol 285 Cc1022–4 (1884)

Hansen T, 'Transitional Justice: Toward a Differentiated Theory' (2011) 13 Oregon Review of International Law 1

Harris MK, 'Transformative Justice: The Transformation of Restorative Justice in D Sullivan (Ed) The Handbook of Restorative Justice 555' in Dennis Sullivan and Larry Tifft (eds), *The Handbook of Restorative Justice* (Routledge 2007)

Hart AR and others, *Report of the Historical Institutional Abuse Inquiry* (The Inquiry into Historical Institutional Abuse 2017)

Hart HLA, *The Concept of Law* (2nd ed, repr, Clarendon Press 1998)

Hathaway LM, Boals A and Banks JB, 'PTSD Symptoms and Dominant Emotional Response to a Traumatic Event: An Examination of *DSM-IV* Criterion A2' (2010) 23 Anxiety, Stress & Coping 119

Haugaard M, 'Rethinking the Four Dimensions of Power: Domination and Empowerment' (2012) 5 Journal of Political Power 33

'Editorial: Reflections upon *Power over*, *Power to*, *Power with* , and the Four Dimensions of Power' (2012) 5 Journal of Political Power 353

The Four Dimensions of Power: Understanding Domination, Empowerment and Democracy (Manchester University Press 2020)

'The Four Dimensions of Power: Conflict and Democracy' (2021) Journal of Political Power 1

Hawkins RMF and Briggs F, 'The Institutionalised Abuse of Children in Australia: Past and Present' (1997) 133 Early Child Development and Care 41

Hayner PB, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed, Routledge 2011)

Hayward CR, 'On Structural Power' (2018) 11 Journal of Political Power 56

Head N, 'Sentimental Politics or Structural Injustice? The Ambivalence of Emotions for Political Responsibility' (2020) 12 International Theory 337

'Head of Catholic Church in Ireland Apologises to Child Abuse Victims' *Belfast Telegraph* (Belfast, 20 January 2017) <www.belfasttelegraph.co.uk/news/northern-ireland/head-of-catholic-church-in-ireland-apologises-to-child-abuse-victims-35384886.html>

Heaney J, 'Emotions and Nationalism: A Reappraisal' in Nicolas Demertzis (ed), *Emotions in Politics* (Palgrave Macmillan UK 2013) <http://link.springer.com/10.1057/9781137025661_13>

Heaney JG, 'Emotions and Power: Reconciling Conceptual Twins' (2011) 4 Journal of Political Power 259

'Emotion as Power: Capital and Strategy in the Field of Politics' (2019) 12 Journal of Political Power 224

Henry CP, 'The Politics of Racial Reparations' (2003) 34 Journal of Black Studies 131

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

Her Majesty's Inspectorate of Constabulary, '"Mistakes Were Made" HMIC's Review into Allegations and Intelligence Material Concerning Jimmy Savile between 1964 and 2012' (HMIC 2013)

'Her Majesty's Prison and Probation Service Offender Equalities Annual Report 2019/20'

Herman JL, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16 Journal of Traumatic Stress 159
Higginbotham P, *Children's Homes: A History of Institutional Care for Britain's Young* (2017)
Higgins D, '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)
Higgins N, 'Creating a Space for Indigenous Rights: The Universal Periodic Review as a Mechanism for Promoting the Rights of Indigenous Peoples' (2019) 23 The International Journal of Human Rights 125
Hill Collins P, *Black Sexual Politics: African Americans, Gender, and the New Racism* (Routledge 2006)
Hixson WL, *American Settler Colonialism: A History* (1st ed, Palgrave Macmillan 2013)
Hochschild AR, *The Managed Heart: Commercialization of Human Feeling* (20th anniversary ed, University of California Press 2003)
Hogan L, 'Clerical and Religious Child Abuse: Ireland and Beyond' (2011) 72 Theological Studies 170
Hoggett P and Thompson S (eds), *Politics and the Emotions: The Affective Turn in Contemporary Political Studies* (Continuum 2012)
Holden-Smith B, 'Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era' (1996) 8 *Yale Journal of Law & Feminism* 31
Holder C, 'Reasoning Like a State: Integration and the Limits of Official Regret' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014)
Holohane C, 'In Plain Sight: Responding to the Ferns, Ryan, Murphy and Cloyne Reports' (Amnesty International 2011)
Honneth A, 'Rejoinder' (2015) 16 Critical Horizons 204
Hopkins K, *Conquerors and Slaves* (Cambridge University Press 1981)
Howe D, 'Child Abuse and the Bureaucratisation of Social Work' (1992) 40 The Sociological Review 491
Howe R and Swain S, 'Saving the Child and Punishing the Mother: Single Mothers and the State 1912–1942' (1993) 17 Journal of Australian Studies 31
'"I Am Aware That No Words of Apology Will Ever Be Sufficient" Diarmuid Martin' *Irish Independent* (Dublin, 27 November 2009) <www.independent.ie/irish-news/i-am-aware-that-no-words-of-apology-will-ever-be-sufficient-26585955.html>
Ifill SA, 'Creating a Truth and Reconciliation Commission for Lynching' (2003) 21 *Law and Inequality* 263
On the Courthouse Lawn: Confronting the Legacy of Lynching in the Twenty-First Century (Beacon Press 2007)
'Indian Residential Schools Statement of Apology – Phil Fontaine, National Chief, Assembly of First Nations' <www.aadnc-aandc.gc.ca/eng/1100100015697/1100100015700>
Inglis T, *Moral Monopoly: The Rise and Fall of the Catholic Church in Modern Ireland* (2nd ed, University College Dublin Press 1998)
Irons CF, *The Origins of Proslavery Christianity: White and Black Evangelicals in Colonial and Antebellum Virginia* (University of North Carolina Press 2008)

Jackson DL, '"Me Too": Epistemic Injustice and the Struggle for Recognition' (2018) 4 Feminist Philosophy Quarterly Article 7, 1–19

Jacobs MD, *White Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880–1940* (University of Nebraska Press 2009)

Jaeggi R, Allen A and Mendieta E, 'Resistance to the Perpetual Danger of Relapse', *From Alienation to Forms of Life: The Critical Theory of Rahel Jaeggi* (University of Pennsylvania Press 2018)

Jaeggi R, Neuhouser F and Smith AE, *Alienation* (Columbia University Press 2016)

James M, 'Wrestling with the Past: Apologies, Quasi-Apologies, and Non-Apologies in Canada' in Mark Gibney and others (eds), *The Age of Apology* (University of Pennsylvania Press 2008)

'Uncomfortable Comparisons: The Canadian Truth and Reconciliation Commission in International Context' (2010) 5 Les ateliers de l'éthique 23

'A Carnival of Truth? Knowledge, Ignorance and the Canadian Truth and Reconciliation Commission' (2012) 6 International Journal of Transitional Justice 182

Jay A and others, 'Accountability and Reparations' (IICSA 2019) CCS0719581022 09/19 <www.iicsa.org.uk/reports>

'The Anglican Church Safeguarding in the Church of England and the Church in Wales' (IICSA) <www.iicsa.org.uk/document/anglican-church-safeguarding church-england-and-church-wales-investigation-report>

'The Roman Catholic Church Safeguarding in the Roman Catholic Church in England and Wales' (Independent Inquiry into Child Sexual Abuse) <www.iicsa.org.uk/key-documents/23357/view/catholic-church-investigation-report-4-december-2020.pdf>

Jennifer Henderson and Pauline Wakeham, 'Colonial Reckoning, National Reconciliation?: Aboriginal Peoples and the Culture of Redress in Canada' (2009) 35 ESC: English Studies in Canada 1

Jennings T, '"Us Colored Women Had to Go Though A Plenty": Sexual Exploitation of African-American Slave Women' (1990) 1 Journal of Women's History 45

John Jay College Research Team, *The Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States, 1950–2002: A Research Study Conducted by the John Jay College of Criminal Justice, the City University of New York: For the United States Conference of Catholic Bishops* (United States Conference of Catholic Bishops 2004)

Johnson A, 'Sexual Assault and Gendered Hate: A Case of Epistemic Injustice' (2017) 11 Unbound 91

Johnson M, 'Reconciliation, Indigeneity, and Postcolonial Nationhood in Settler States' (2011) 14 Postcolonial Studies 187

Johnson T, 'The State and the American Indian: Who Gets the Indian Child?' (1999) 14 Wicazo SA Review 197

Johnston E, 'Royal Commission into Aboriginal Deaths in Custody' (Commonwealth Government of Australia 1991) <www.austlii.edu.au/au/other/IndigLRes/rciadic/>

Johnstone G and Van Ness DW, 'The Meaning of Restorative Justice' in Gerry Johnstone and Daniel W Van Ness (eds), *Handbook of Restorative Justice* (Willan Publishing 2007)

Johnstone M and Lee E, 'Epistemic Injustice and Indigenous Women: Toward Centering Indigeneity in Social Work' (2021) 36 Affilia 376
Jones M and Record L, 'Magdalene Laundries: The First Prisons for Women in the United States' (2014) 17 Journal of Indiana Academy of Social Sciences 166
Jones TW, 'Sin, Silence and States of Denial: Canon Law and the "Discovery" of Child Sexual Abuse' (2015) 41 Australian Feminist Law Journal 237
Jordan MD, *Convulsing Bodies: Religion and Resistance in Foucault* (Stanford University Press 2015)
Joshi Y, 'Racial Transition' (2021) 98 Washington University Law Review 1181
Jugov T and Ypi L, 'Structural Injustice, Epistemic Opacity, and the Responsibilities of the Oppressed' (2019) 50 Journal of Social Philosophy 7
Jung C, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society' in Paige Arthur (ed), *Identities in Transition* (Cambridge University Press 2010)
'Reconciliation: Six Reasons to Worry' (2018) 14 Journal of Global Ethics 252
Kamen H, *The Spanish Inquisition: A Historical Revision* (4th ed, Yale University Press 2014)
Kapur R, 'Normalizing Violence: Transitional Justice and the Gujarat Riots' (2006) 15 Columbia Journal of Gender and Law 889
Karstedt S, 'The Emotion Dynamics of Transitional Justice: An Emotion Sharing Perspective' (2016) 8 Emotion Review 50
'Between Micro and Macro Justice: Emotions in Transitional Justice' in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021)
Katznelson I, *Fear Itself: The New Deal and the Origins of Our Time* (1st ed, Liveright Publishing Corporation 2013)
Kaufman F, 'Searching for Justice: An Independent Review of Nova Scotia's Response to Reports of Institutional Abuse' (2002) <https://novascotia.ca/just/kaufmanreport/fullreport.pdf>
Keal P, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge University Press 2003)
Kearney R, *Strangers, Gods, and Monsters: Interpreting Otherness* (Routledge 2003)
Keating A, 'Church, State, and Sexual Crime against Children in Ireland after 1922' (2004) 5 Radharc 155
Keenan M, *Child Sexual Abuse and the Catholic Church: Gender, Power, and Organizational Culture* (Oxford University Press 2012)
University College D and School of Applied Social Science, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?* (2014)
Kelley RDG, *Freedom Dreams: The Black Radical Imagination* (Beacon Press 2008)
Kelly L, 'What's in a Name? Defining Child Sexual Abuse' (1988) 28 Feminist Review 65
Kendrick A, McGregor S and Carmichael E, 'Consultation and Engagement on a Potential Financial Compensation/Redress Scheme for Victims/Survivors of Abuse in Care' (Centre for Excellence for Children's Care and Protection 2018)
Kennedy D, 'Forced Adoption: Birth Parents Urged to Give Evidence to Inquiry' *BBC News* (London 23 September 2021) <www.bbc.com/news/uk-58667268>

Kennedy F, *Cottage to Crèche: Family Change in Ireland* (Institute of Public Administration 2001)
Kent L, 'Transitional Justice in Law, History and Anthropology' (2016) 42 Australian Feminist Law Journal 1
Kerr-Ritchie J, 'Forty Acres, or, An Act of Bad Faith' (2003) 5 Souls 8
Keynes M, 'History Education for Transitional Justice? Challenges, Limitations and Possibilities for Settler Colonial Australia' (2018) International Journal of Transitional Justice
Kidd R, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press 2006)
King DS and Page JM, 'Towards Transitional Justice? Black Reparations and the End of Mass Incarceration' (2018) 41 Ethnic and Racial Studies 739
Kizuk S, 'Settler Shame: A Critique of the Role of Shame in Settler–Indigenous Relationships in Canada' (2020) 35 Hypatia 161
Koggel CM, 'Epistemic Injustice in a Settler Nation: Canada's History of Erasing, Silencing, Marginalizing' (2018) 14 Journal of Global Ethics 240
Koselleck R, *Futures Past: On the Semantics of Historical Time* (Columbia University Press 2004)
Koselleck R, Hoffmann S-L and Franzel S, *Sediments of Time: On Possible Histories* (Stanford University Press 2018)
Koskenniemi M, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 University of Toronto Law Journal 1
'Introduction' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire* (Oxford University Press 2017)
International Law and the Far Right: Reflections on Law and Cynicism (Asser Press 2019)
Kramer-Moore D and Moore M, 'Pardon Me for Breathing: Seven Types of Apology' (2003) 60 ETC: A Review of General Semantics 160/169
Krauel J, *Imperial Emotions: Cultural Responses to Myths of Empire in* Fin-de-Siècle Spain (Liverpool University Press 2013)
Krieken RV, 'The Stolen Generations' and Cultural Genocide: The Forced Removal of Australian Indigenous Children from Their Families and Its Implications for the Sociology of Childhood' (1999) 6 *Childhood* 297
Kriesberg L, Changing Forms of Coexistence in Mohammed Abu-Nimer (ed), *Reconciliation, Justice, and Coexistence: Theory & Practice* (Lexington Books 2001)
Kruk R, 'Second Year Review of the National Redress Scheme' (Department of Social Services 2021)
Kumar K, *The Making of English National Identity* (Cambridge University Press 2003)
'1066 and All That: Myths of the English' in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Routledge 2013)
Kundera M, *The Book of Laughter and Forgetting* (Aaron Asher tr, 2015)
Kuokkanen RJ, *Restructuring Relations: Indigenous Self-Determination, Governance, and Gender* (Oxford University Press 2019)
Kurtis T, Adams G and Yellow Bird M, 'Generosity or Genocide? Identity Implications of Silence in American Thanksgiving Commemorations' (2010) 18 Memory 208

Lammasniemi L, '"Precocious Girls": Age of Consent, Class and Family in Late Nineteenth-Century England' (2020) Law and History Review 1

The Landscapes of Injustice Research Collective, James M and Stanger-Ross J, 'Impermanent Apologies: On the Dynamics of Timing and Public Knowledge in Political Apology' (2018) 19 Human Rights Review 289

Laplante LJ, 'Just Repair' (2015) 48 Cornell International Law Journal 513

Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Law Commission of Canada 2000)

Lawrence B, *'Real' Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (University of Nebraska Press 2004)

Lawry-White M, 'The Reparative Effect of Truth Seeking in Transitional Justice' (2015) 64 International and Comparative Law Quarterly 141

Lazare A, 'Go Ahead, Say You're Sorry' *Psychology Today* (New York, 1 January 1995) 40

Ledyaev V, 'Conceptual Analysis of Power: Basic Trends' (2021) 14(1) Journal of Political Power 72

Lens KM and others, 'Delivering a Victim Impact Statement: Emotionally Effective or Counter-Productive?' (2015) 12 European Journal of Criminology 17

Lesaffer R, 'Between Faith and Empire' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire* (Oxford University Press 2017)

Lewan T and Barclay D, 'When They Steal Your Land, They Steal Your Future' The Los Angeles Times (Los Angeles, California, 2 December 2001)

Lewis P, *Delayed Prosecution for Childhood Sexual Abuse* (Oxford University Press 2006)

Lickel B, Schmader T and Barquissau M, 'The Evocation of Moral Emotions in Intergroup Contexts: The Distinction Between Collective Guilt and Collective Shame' in Nyla R Branscombe and Bertjan Doosje (eds), *Collective Guilt* (Cambridge University Press 2004) <www.cambridge.org/core/product/identifier/CBO9781139106931A012/type/book_part>

Lieberman MA, Prock VN and Tobin SS, 'Psychological Effects of Institutionalization' (1968) 23 Journal of Gerontology 343

Lightfoot S, 'Settler-State Apologies to Indigenous Peoples: A Normative Framework and Comparative Assessment' (2015) 2 Native American and Indigenous Studies 15

Lightfoot S, Stevens T and Michelsen N, 'The Pessimism Traps of Indigenous Resurgence', in Stevens T and Michelsen N (eds), *Pessimism in International Relations: Provocations, Possibilities, Politics* (Palgrave Macmillan 2020)

Litwack LF, *Been in the Storm So Long: The Aftermath of Slavery* (1st Vintage Books ed, Vintage Books 1980)

Llewellyn JJ, 'Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies' in Tristan Anne Borer (ed), *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame Press 2006)

Llewellyn JJ and Howse R, 'Institutions for Restorative Justice: The South African Truth and Reconciliation Commission' (1999) 49 University of Toronto Law Journal 355

Lotem I, *The Memory of Colonialism in Britain and France: The Sins of Silence* (Palgrave Macmillan 2021)
Loughlin E, 'Katherine Zappone: "We Will Find the Truth and Achieve Reconciliation"' *Irish Examiner* (Cork, 10 March 2017)
Loughlin E, 'Regina Doherty: "Cold" Mother and Baby Home Report Must Be Independently Reviewed' *Irish Examiner* (Cork, 17 January 2021)
Lovejoy P, 'The Impact of the Atlantic Slave Trade on Africa: A Review of the Literature' (1989) 30 Journal of African History 365
Lu C, *Justice and Reconciliation in World Politics* (Cambridge University Press 2017)
Luddy M, 'Unmarried Mothers in Ireland, 1880–1973' (2011) 20 Women's History Review 109
Ludi R, *Reparations for Nazi Victims in Postwar Europe* (Cambridge University Press 2012)
Lukes S, *Power: A Radical View* (Macmillan 1974)
'Power and Domination' (2021) Journal of Political Power 1
Lundy P, '"I Just Want Justice": The Impact of Historical Institutional Child-Abuse Inquiries from the Survivor's Perspective' (2020) 55 Éire-Ireland 252
Lundy P and Mahoney K, 'What Survivors Want: Part Two A Compensation Framework for Historic Abuses in Residential Institutions' (2016)
Lundy P and McGovern M, 'Whose Justice? Rethinking Transitional Justice from the Bottom Up' (2008) 35 Journal of Law and Society 265
Lundy P and Rolston B, 'Redress for Past Harms? Official Apologies in Northern Ireland' (2016) 20 The International Journal of Human Rights 104
Luoma C, 'Closing the Cultural Rights Gap in Transitional Justice: Developments from Canada's National Inquiry into Missing and Murdered Indigenous Women and Girls' (2021) 39 Netherlands Quarterly of Human Rights 30
Lutz EL and Reiger C (eds), *Prosecuting Heads of State* (Cambridge University Press 2009)
Lynch G, 'Saving the Child for the Sake of the Nation: Moral Framing and the Civic, Moral and Religious Redemption of Children' (2014) 2 American Journal of Cultural Sociology 165
Remembering Child Migration: Faith, Nation-Building, and the Wounds of Charity (Bloomsbury Academic 2016)
'Lynching in America' (Equal Justice Initiative 2017) <https://lynchinginamerica.eji.org/report/>
Lytton TD, *Holding Bishops Accountable: How Lawsuits Helped the Catholic Church Confront Clergy Sexual Abuse* (Harvard University Press 2008)
Maboloc CR, 'What Is Structural Injustice?' (2019) 47 Philosophia 1185
MacCulloch D, *Christianity: The First Three Thousand Years* (Penguin Books 2014)
MacDonald D, 'Paved with Comfortable Intentions: Moving beyond Liberal Multiculturalism and Civil Rights Frames on the Road to Transformative Reconciliation' in Paulette Regan and Aimee Craft (eds), *Pathways of Reconciliation: Indigenous and Settler Approaches to Implementing the TRC's Calls to Action* (University of Manitoba Press 2020)
MacDonald DB, 'Canada's History Wars: Indigenous Genocide and Public Memory in the United States, Australia and Canada' (2015) 17 Journal of Genocide Research 411

Mackey E, *The House of Difference: Cultural Politics and National Identity in Canada* (Repr, University of Toronto Press 2008)
'The Apologisers' Apology' in Jennifer Henderson and Pauline Wakeham (eds), *Reconciling Canada: Critical Perspectives on the Culture of Redress* (University of Toronto Press 2013)
MacLachlan A, 'Gender and Public Apology' (2013) Transitional Justice Review 126
'Fiduciary Duties and the Ethics of Public Apology' (2018) 35 Journal of Applied Philosophy 359
Macoun A, 'Colonising White Innocence: Complicity and Critical Encounters' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016)
Maddison S, *Beyond White Guilt: The Real Challenge for Black–White Relations in Australia* (Allen & Unwin 2011)
'Indigenous Identity, "Authenticity" and the Structural Violence of Settler Colonialism' (2013) 20 Identities 288
The Colonial Fantasy: Why White Australia Can't Solve Black Problems (Allen & Unwin 2019)
Madley B, *An American Genocide: The United States and the California Indian Catastrophe, 1846–1873* (Yale University Press 2016)
Mahony DO and Doak J, 'Transitional Justice and Restorative Justice' (2012) 12 International Criminal Law Review 305
Mahony TH, Jacob J and Hobson H, 'Women in Canada: A Gender-Based Statistical Report' (Statistics Canada 2017)
Mahood L, *Policing Gender, Class, and Family: Britain, 1850–1940* (UCL Press 1995)
Malinen A, 'Eleven Old Boys Crying Out for Revenge: Emotional Dynamics in Care-Leavers' Efforts to Seek Justice: Case Study of the Palhoniemi Reform School 1945–1946' (2021) 18 No Foundations. An Interdisciplinary Journal of Law and Justice 40
Mamdani M, *Neither Settler nor Native: The Making and Unmaking of Permanent Minorities* (The Belknap Press of Harvard University Press 2020)
Manktelow EJ, *Gender, Power and Sexual Abuse in the Pacific: Rev. Simpson's Improper Liberties* (Bloomsbury Publishing PLC 2018)
Mantouvalou V, 'Welfare-to-Work, Structural Injustice and Human Rights' (2020) 83 The Modern Law Review 929
Marietta College and Tager M, 'Apologies to Indigenous Peoples in Comparative Perspective' (2014) 5 International Indigenous Policy Journal 1
Maroney TA, 'A Field Evolves: Introduction to the Special Section on Law and Emotion' (2016) 8 Emotion Review 3
Maroney TA, 'Lay Conceptions of Emotion in Law' in Susan Bandes and others, *Research Handbook on Law and Emotion* (Edward Elgar Publishing 2021)
Maroney TA and Gross JJ, 'The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective' (2014) 6 Emotion Review 142
Marrus MR, 'Papal Apologies of Pope John Paul II' in Mark Gibney and others (eds), *The Age of Apology: Facing Up to the Past* (Pennsylvania State University Press 2008)
Marshall T, 'Restorative Justice: An Overview' (Home Office 1999)

Martin B, 'Managing Outrage over Genocide: Case Study Rwanda' (2009) 21 Global Change, Peace & Security 275
Martinez JS, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press 2012)
Matsuda M, 'Looking to the Bottom: Critical Legal Studies and Reparations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 323
Matsunaga J, 'The Red Tape of Reparations: Settler Governmentalities of Truth Telling and Compensation for Indian Residential Schools' (2021) 11 Settler Colonial Studies 21
Matthews G, 'The Caribbean Reparation Movement and British Slavery Apologies: An Appraisal' (2017) 51 Journal of Caribbean History 80
Mazumder B, 'Black–White Differences in Intergenerational Economic Mobility in the United States' (2014) 38 Economic Perspectives 1
McAlinden A-M, 'Are There Limits to Restorative Justice: The Case of Child Sexual Abuse' in Dennis Sullivan and Larry Tifft (eds), *Handbook of Restorative Justice* (Routledge 2006)
'An Inconvenient Truth: Barriers to Truth Recovery in the Aftermath of Institutional Child Abuse in Ireland' (2013) 33 Legal Studies 189
'Re-Emotionalising Regulatory Responses to Child Sex Offences' in Heather Conway and John Stannard (eds), *The Emotional Dynamics of Law and Legal Discourse* (Hart 2016)
'Apologies and Institutional Child Abuse' (Queens University Belfast 2018)
'Apologies as "Shame Management": The Politics of Remorse in the Aftermath of Historical Institutional Abuse' (2021) Legal Studies 1
McAlinden A-M and Naylor B, 'Reframing Public Inquiries as "Procedural Justice" for Victims of Institutional Child Abuse: Towards a Hybrid Model of Justice' (2016) 38 Sydney Law Review 277
McAuliffe P, *Transformative Transitional Justice and the Malleability of Post-Conflict States* (Edward Elgar Publishing 2017)
'The Problem of Elites' in Matthew Evans (ed), *Transitional and Transformative Justice* (Routledge 2019)
McCormick KT and others, 'New Perspectives on Gender and Emotion' in Tomi-Ann Roberts and others (eds), *Feminist Perspectives on Building a Better Psychological Science of Gender* (Springer International Publishing 2016)
McCormick L and O'Connell S, 'Mother and Baby Homes and Magdalene Laundries in Northern Ireland, 1922–1990' (2021) <www.health-ni.gov.uk/sites/default/files/publications/health/doh-mbhl-final-report.pdf>
McEvoy K, 'Letting Go of Legalism : Developing a Thicker Version of Transitional Justice' in Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below* (Hart 2008)
McEvoy K and McGregor L (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publications 2008)
McGarry P, 'Religious Congregations Indemnity Deal Was "A Blank Cheque," Says Michael McDowell' *The Irish Times* (Dublin, 5 April 2019)
McGettrick C and others, *Ireland and the Magdalene Laundries: A Campaign for Justice* (I B Tauris & Company, Limited 2021)

McGill D, '"Post-Conflict" Reconstruction, the Crimes of the Powerful and Transitional Justice' (2017) 6 State Crime Journal 79
McGregor L, 'Reconciliation: I Know It When I See It' (2006) 9 Contemporary Justice Review 155
McKenzie J and others, 'Social Emotions: A Multidisciplinary Approach' (2019) 3 Emotions: History, Culture, Society 187
McKeown M, 'Iris Marion Young's "Social Connection Model" of Responsibility: Clarifying the Meaning of Connection' (2018) 49 Journal of Social Philosophy 484
McKitterick R, 'The Popes as Rulers of Rome in the Aftermath of Empire, 476–769' (2018) 54 Studies in Church History 71
McMillan M and Rigney S, 'Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment' (2018) 41 Ethnic and Racial Studies 759
McNeill A, Lyons E and Pehrson S, 'Reconstructing Apology: David Cameron's Bloody Sunday Apology in the Press' (2014) 53 British Journal of Social Psychology 656
McNeil K, 'Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions' in Julie Evans and others (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press 2013)
McVeigh R, 'Between Reconciliation and Pacification: The British State and Community Relations in the North of Ireland' (2002) 37 Community Development Journal 47
McWhorter L, 'Sex, Race, and Biopower: A Foucauldian Genealogy' (2004) 19 Hypatia 38
Racism and Sexual Oppression in Anglo-America: A Genealogy (Indiana University Press 2009)
Medina J, *The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and the Social Imagination* (Oxford University Press 2013)
Meiring PGJ, 'Bonhoeffer and Costly Reconciliation in South Africa – through the Lens of the South African Truth and Reconciliation Commission' (2017) 38 *Verbum et Ecclesia* 18
Meister R, *After Evil: A Politics of Human Rights* (pbk edn, Columbia University Press 2012)
'Memory and Reconciliation: The Church and the Faults of the Past' <www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20000307_memory-reconc-itc_en.html>
Mendeloff D, 'Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice' (2009) 31 Human Rights Quarterly 592
Menzies K, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62 International Social Work 1522
Mihai M, 'When the State Says "Sorry": State Apologies as Exemplary Political Judgments' (2013) 21 Journal of Political Philosophy 200
'Theorizing Agonistic Emotions' (2014) 20 Parallax 31
Negative Emotions and Transitional Justice (Columbia University Press 2016)
Miller P, *Errand into the Wilderness* (11th print, Belknap Pr of Harvard Univ Pr 1996)
Miller Z, 'The Injustices of Time: Rights, Race Redistribution and Responsibility' (2021) 52 Columbia Human Rights Law Review 647
Mills CW, *The Racial Contract* (Nachdr, Cornell University Press 2011)

Milotte M, *Banished Babies: The Secret History of Ireland's Baby Export Business* (Updated and expanded ed, New Island Books 2012)
'Adoption Controversy: Only One Person Was Ever Charged over Bogus Birth Certificates' *The Irish Times* (Dublin, 1 June 2018)
Minow M, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press 1998)
Mohanty C, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' (1988) 30 Feminist Review 61
Monter EW, *Frontiers of Heresy: The Spanish Inquisition from the Basque Lands to Sicily* (Cambridge University Press 1990)
Moon C, '"Who'Ll Pay Reparations on My Soul?" Compensation, Social Control and Social Suffering' (2012) 21 Social & Legal Studies 187
Moon D and Tobin TW, 'Sunsets and Solidarity: Overcoming Sacramental Shame in Conservative Christian Churches to Forge a Queer Vision of Love and Justice' (2018) 33 Hypatia 451
Moreton-Robinson A, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press 2015)
Morgensen SL, 'The Biopolitics of Settler Colonialism: Right Here, Right Now' (2011) 1 Settler Colonial Studies 52
'Theorising Gender, Sexuality and Settler Colonialism: An Introduction' (2012) 2 Settler Colonial Studies 2
Morrow D, 'Reconciliation and After in Northern Ireland: The Search for a Political Order in an Ethnically Divided Society' (2017) 23 Nationalism and Ethnic Politics 98
Moses AD, 'Official Apologies, Reconciliation, and Settler Colonialism: Australian Indigenous Alterity and Political Agency' (2011) 15 Citizenship Studies 145
Moss CR, *The Myth of Persecution* (Harper Collins 2014)
'Mother and Baby Homes Commission of Investigation Final Report' (Government Publications 2021)
Mouffe C, *The Democratic Paradox* (Repr, Verso 2009)
Muirhead J, 'Royal Commission into Aboriginal Deaths in Custody' (Commonwealth Government of Australia 1991)
Muldoon P 'Indigenous Reconciliation Is Hard, It Re-opens Wounds to Heal Them' *The Conversation* (10 May 2016) <http://theconversation.com/indigenous-reconciliation-is-hard-it-reopens-wounds-to-heal-them-55951> (accessed 20 September 2022)
Muldoon P and Schaap A, 'Confounded by Recognition: The Apology, the High Court and the Aboriginal Embassy in Australia.' in Alexander Hirsch (ed), *Theorizing Post-Conflict Reconciliation: Agonism, Restitution and Repair* (Routledge 2012)
Mun C, 'Rationality through the Eyes of Shame: Oppression and Liberation via Emotion' (2019) 34 Hypatia 286
Murdock EG, 'Storied with Land: "Transitional Justice" on Indigenous Lands' (2018) 14 Journal of Global Ethics 232
Murphy C, *The Conceptual Foundations of Transitional Justice* (1st pbk ed, Cambridge University Press 2017)
'On Theorizing Transitional Justice: Responses to Walker, Hull, Metz and Hellsten' (2018) 14 Journal of Global Ethics 181

Murphy GR, *Saxon Savior: Germanic Transformation of the Gospel in the Ninth Century 'Heliand'* (Oxford University Press 1995)
Murray KB, 'Governing Unwed Mothers in Toronto at the Turn of the Twentieth Century' (2004) 85 The Canadian Historical Review 253
Murray S, *Supporting Adult Care-Leavers: International Good Practice* (Policy Press 2015)
Nagy R, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third World Quarterly 275
'The Truth and Reconciliation Commission of Canada: Genesis and Design1' (2014) 29 Canadian Journal of Law and Society / Revue Canadienne Droit et Société 199
'Settler Witnessing at the Truth and Reconciliation Commission of Canada' (2020) 21 Human Rights Review 219
'Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada' (2021) The International Journal of Human Rights 1
'The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission' (2013) 7 International Journal of Transitional Justice 52
Nakata S and Maddison S, 'New Collaborations in Old Institutional Spaces: Setting a New Research Agenda to Transform Indigenous-Settler Relations' (2019) 54 Australian Journal of Political Science 407
Nash D, 'Reconnecting Religion with Social and Cultural History: Secularization's Failure as a Master Narrative' (2004) 1 Cultural and Social History 302
Nash SE and Colwell C, 'NAGPRA at 30: The Effects of Repatriation' (2020) 49 Annual Review of Anthropology 225
The National Advisory Commission on Civil Disorders, The Kerner Report (2016 ed, Princeton University Press 2019)
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)
Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Volume 1a (National Inquiry into Missing and Murdered Indigenous Women and Girls 2019)
A Legal Analysis of Genocide: Supplementary Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls (National Inquiry into Missing and Murdered Indigenous Women and 2019)
National Redress Scheme for Institutional Child Sexual Abuse Act 2018 (Australia)
Nesiah V, 'Transitional Justice Practice: Looking Back Moving Forward' (Impunity Watch 2016)
Neuhäuser C, 'Structural Injustice and the Distribution of Forward-Looking Responsibility' (2014) 38 Midwest Studies In Philosophy 232
Newton NJ, 'Indian Claims for Reparations, Compensation, and Restitution in the United States Legal System' in Roy Brooks (ed), *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice* (New York University Press 1999)

Ni Aolain F and Campbell C, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 Human Rights Quarterly 172
Nicholls W, *Christian Antisemitism: A History of Hate* (Rowman & Littlefield Publishers 2004)
Nichols R, 'Theft Is Property! The Recursive Logic of Dispossession' (2018) 46 Political Theory 3
Niezen R, *Truth and Indignation: Canada's Truth and Reconciliation Commission on Indian Residential Schools* (2nd ed, University of Toronto Press 2017)
'Human Rights As Therapy: The Healing Paradigms of Transitional Justice' in Danielle Celermajer and Alexandre Lefebvre (eds), *The Subject of Human Rights* (Stanford University Press 2020)
Noll MA, *The Civil War as a Theological Crisis* (University of North Carolina Press 2006)
Novak D, 'Jews and Catholics: Beyond Apologies' (1999) 89 First Things 20
Nussbaum M, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton University Press 2004)
Political Emotions: Why Love Matters for Justice (First Harvard University Press pbk edn, The Belknap Press of Harvard University Press 2015)
Nuti A, *Injustice and the Reproduction of History: Structural Inequalities, Gender and Redress* (Cambridge University Press 2019)
Oakley L and Kinmond K, *Breaking the Silence on Spiritual Abuse* (Palgrave Macmillan 2013)
O'Brassill-Kulfan K, *Vagrants and Vagabonds: Poverty and Mobility in the Early American Republic* (New York University Press 2019)
O'Connor P, 'History on Trial: Cubillo and Gunner v The Commonwealth of Australia' (2001) 26 Alternative Law Journal 26
O'Donnell G and Schmitter P, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Johns Hopkins University Press 1986)
O'Fahartha C, 'Abuse Survivors Concern over Plan to Seal Records' *Irish Examiner* (Cork, 16 August 2019)
Ogden SG, *The Church, Authority, and Foucault: Imagining the Church as an Open Space of Freedom* (Routledge, Taylor & Francis Group 2017)
Ogletree C, 'The Current Reparations Debate' (2003) 36 UC Davis Law Review 1051
'One America in the 21st Century: Forging a New Future' (The President's Initiative on Race 1998) <https://clintonwhitehouse2.archives.gov/Initiatives/OneAmerica/PIR.pdf>
O'Neill I, 'Decision of the Independent Assessor Iarfhlaith O'Neill' (Department of Education 2019) <www.education.ie/en/Learners/Information/Former-Residents-of-Industrial-Schools/ECHR-OKeeffe-v-Ireland/independent-assessment-process/okeeffe-v-ireland-decision-of-the-independent-assessor.pdf>
Ontario sixties scoop steering committee, 'Sixties Scoop Survivors' Decade-Long Journey for Justice Culminates in Historic Pan-Canadian Agreement' *Newswire.ca* (6 October 2017) <www.newswire.ca/news-releases/sixties-scoop-survivors-decade-long-journey-for-justice-culminates-in-historic-pan-canadian-agreement-649748633.html>
Onwuachi-Willig A, 'Reconceptualizing the Harms of Discrimination: How *Brown v. Board of Education* Helped to Further White Supremacy' (2019) 105 Virginia Law Review 343

'Opportunity Lost: An Investigation by the Ombudsman into the Administration of the Magdalene Restorative Justice Scheme' (Office of the Ombudsman 2017)
O'Reilly JT and Chalmers MSP, *The Clergy Sex Abuse Crisis and the Legal Responses* (Oxford University Press 2014)
O'Rourke M, 'Ireland's "Historical" Abuse Inquiries and the Secrecy of Records and Archives' in Lynsey Black, Louise Branigan and Deirdre Healy (eds), *Histories of Punishment and Social Control in Ireland: Perspectives from a Periphery* (Emerald Publishing 2022)
O'Rourke M, Scraton, P and Mahon D, 'Mother and Baby Institutions, Magdalene Laundries and Workhouses in Northern Ireland:Truth, Acknowledgement and Accountability' (Truth Recovery Design Panel 2021)
O'Rourke M and Smith J, 'Ireland's Magdalene Laundries: Confronting a History Not yet in the Past' in Alan Hayes and Maire Meagher (eds), *A Century of Progress? Irish Women Reflect* (Arlen House 2016)
O'Sullivan E, 'The Ryan Report: Reformatory and Industrial Schools and Twentieth-Century Ireland' in Rosie Meade and Fiona Dukelow (eds), *Defining Events: Power, Resistance and Identity in Twenty-first-century Ireland* (Manchester University Press 2014)
O'Sullivan E and O'Donnell I (eds), *Coercive Confinement in Ireland: Patients, Prisoners and Penitents* (Manchester University Press 2012)
Özsu U, 'Genocide as Fact and Form' (2020) 22 Journal of Genocide Research 62
Pagden A, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (1st pbk ed, repr with corrections and additions, Cambridge University Press 1986)
Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800 (2. Dr., Yale University Press 1995)
Palmer J and Pocock C, 'Aboriginal Colonial History and the (Un)Happy Object of Reconciliation' (2020) 34 Cultural Studies 49
Pankhurst D, 'Issues of Justice and Reconciliation in Complex Political Emergencies: Conceptualising Reconciliation, Justice and Peace' (1999) 20 Third World Quarterly 239
Pansardi P, 'Power to and Power over : Two Distinct Concepts of Power?' (2012) 5 Journal of Political Power 73
'Why We Do Need a Concept of Power' (2021) Journal of Political Power 1
Pardini CA and Espinola-Arredondo A, 'Violence, Coercion, and Settler Colonialism' (2021) 33 Journal of Theoretical Politics 236
Parenting Research Centre and others, *Implementation of Recommendations Arising from Previous Inquiries of Relevance to the Royal Commission into Institutional Responses to Child Sexual Abuse* (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) <www.childabuseroyalcommission.gov.au/policy-and-research/published-research/implementation-of-recommendations.aspx>
Park ASJ, 'Settler Colonialism, Decolonization and Radicalizing Transitional Justice' (2020) International Journal of Transitional Justice ijaa006
Park CJ, 'Chronic Shame: A Perspective Integrating Religion and Spirituality' (2016) 35 Journal of Religion & Spirituality in Social Work: Social Thought 354
Parker G and Adams S (eds), *The Thirty Years' War* (2nd [rev.] ed, Routledge 1997)
Parton N, 'From Maria Colwell to Victoria Climbié: Reflections on Public Inquiries into Child Abuse a Generation Apart' (2004) 13 Child Abuse Review 80

Pascoe B, *Dark Emu: Aboriginal Australia and the Birth of Agriculture* (Scribe 2018)
'Pastoral Letter of the Holy Father Benedict XVI to the Catholics of Ireland' <www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html>
Pedwell C, *Affective Relations: The Transnational Politics of Empathy* (Palgrave Macmillan 2014)
Pembroke S, 'The Role of Industrial Schools and Control over Child Welfare in Ireland in the Twentieth Century' (2013) 21 Irish Journal of Sociology 52
'Historical Institutional Child Abuse in Ireland: Survivor Perspectives on Taking Part in the Commission to Inquire into Child Abuse (CICA) and the Redress Scheme' (2019) 22 Contemporary Justice Review 43
Pennebaker J and Banasik B, 'On the Creation and Maintenance of Collective Memories: History as Social Psychology' in James Pennebaker, Dario Paez and Bernard Rimé (eds), *Collective Memory of Political Events: Social Psychological Perspectives* (Psychology Press 1997)
Pennebaker JW, Páez D and Rimé B (eds), *Collective Memory of Political Events: Social Psychological Perspectives* (Lawrence Erlbaum Associates 1997)
'Pennsylvania 40th Statewide Investigating Grand Jury, Final Report' (2019) <www.bishop-accountability.org/PA_40th_GJ/2019_12_16_Final_Redacted_PA_GJ_Report_and_Responses_008307.pdf>
Pestana CG, *Protestant Empire: Religion and the Making of the British Atlantic World* (University of Pennsylvania Press 2009)
Philpott D, 'An Ethic of Political Reconciliation' (2009) 23 Ethics & International Affairs 389
Pilgrim D, 'Child Abuse in Irish Catholic Settings: A Non-Reductionist Account: Child Abuse in Irish Catholic Settings' (2012) 21 Child Abuse Review 405
Pine E, *Politics of Irish Memory: Performing Remembrance in Contemporary Irish Culture* (Palgrave Macmillan 2014)
Piper A (ed), *Gender Violence in Australia: Historical Perspectives* (Monash University Publishing 2019)
Posner EA and Vermeule A, 'Reparations for Slavery and Other Historical Injustices' (2003) 103 Columbia Law Review 688
'Transitional Justice as Ordinary Justice' (2004) 117 Harvard Law Review 761
Posthumus D and Zvobgo K, 'Democratizing Truth: An Analysis of Truth Commissions in the United States' (2021) 15(3) International Journal of Transitional Justice 510
Powell A, Henry N and Flynn A (eds), *Rape Justice* (Palgrave Macmillan UK 2015)
Powers M and Faden R, *Structural Injustice: Power, Advantage, and Human Rights* (Oxford University Press 2019)
Prasser S, 'Public Inquiries in Australia: An Overview' (1985) 44 Australian Journal of Public Administration 1
Royal Commissions and Public Inquiries in Australia (LexisNexis Butterworths 2006)
'Royal Commissions in Australia: When Should Governments Appoint Them?' (2006) 65 Australian Journal of Public Administration 28
Prather C 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

Pritchard S, 'The Stolen Generation and Reparations' (1998) 4 University of New South Wales Law Journal 259

'Proportion of Priests and Non-ordained Religious Subject to a Claim of Child Sexual Abuse 1950–2010' (Royal Commission into Institutional Responses to Child Sexual Abuse 2017)

'Protecting Minors from Sexual Abuse: A Call to the Catholic Faithful in Canada for Healing, Reconciliation, and Transformation' (Canadian Conference of Catholic Bishops 2018)

Protevi J, 'Political Emotion' in Christian von Scheve and Mikko Salmella (eds), *Collective Emotions: Perspectives from Psychology, Philosophy, and Sociology* (1st edn, Oxford University Press 2014)

Radzik L, *Making Amends: Atonement in Morality, Law, and Politics* (Oxford University Press 2009)

Rashid F and Barron I, 'The Roman Catholic Church: A Centuries Old History of Awareness of Clerical Child Sexual Abuse (from the First to the 19th Century)' (2018) 27 Journal of Child Sexual Abuse 778

Ray L, 'Shame, Rage and Racist Violence' (2004) 44 British Journal of Criminology 350

Raz J, *The Authority of Law: Essays on Law and Morality* (2nd ed, Oxford University Press 2009)

Read P and New South Wales and Department of Aboriginal Affairs, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883–1969* (New South Wales Department of Aboriginal Affairs 2008)

Reading A, 'The Restitutional Assemblage: The Art of Transformative Justice at Parramatta Girls Home, Australia' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (1st ed, Cambridge University Press 2019)

Reddy WM, *The Navigation of Feeling: A Framework for the History of Emotions* (Cambridge University Press 2001)

Redmond S, 'Fear and Denial at the Crossroads? Where Is the History of the "Child Abuse Scandal" within the Roman Catholic Church?' (2012) Historical Papers: Canadian Society of Church History 141

'Reformatory and Industrial Schools System Report' (The Stationary Office 1970)

Regan P, *Unsettling the Settler Within: Indian Residential Schools, Truth Telling, and Reconciliation in Canada* (UBC Press 2010)

'Reconciliation and Resurgence: Reflections on the TRC Final Report' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation* (University of Toronto Press 2018)

Reimer G and others, *The Indian Residential Schools Settlement Agreement's Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation 2010)

'Report by Commission of Investigation into the Handling by Church and State Authorities of Allegations and Suspicions of Child Abuse against Clerics of the Catholic Archdiocese of Dublin' (Department of Justice, Equality and Law Reform 2009)

'Report into the Catholic Diocese of Cloyne' (Department of Justice and Law Reform 2011)

'Report of the Ferns Inquiry' (2005)

'Report of the Grand Jury, In Re County Investigating Grand Jury, MISC. NO. 03-00-239, (C. P. Philadelphia, 2003)'
'Report of the Grand Jury (Pennsylvania)' (Office of the Attorney General 2018)
'Report of the Inter-Departmental Committee to Establish the Facts of State Involvement with the Magdalen Laundries' (Department of Justice, Equality and Law Reform 2013)
'Report of the Royal Commission on Aboriginal Peoples' (1996)
'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence: Apologies for Gross Human Rights Violations and Serious Violations of International Humanitarian Law' (United Nations 2019) <https://apologies-abuses-past.org.uk/assets/uploads/UN_report_Apologies_in_Transitional_Justice-1.pdf>
'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff' A/HRC/27/56
'Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff' A/HRC/24/42
Reynaud A-M, *Emotions, Remembering and Feeling Better: Dealing with the Indian Residential Schools Settlement Agreement in Canada* (transcript Verlag 2017)
Reynolds H, 'Are Nations Really Made in War?' in Henry Reynolds and others (eds), *What's Wrong with Anzac?* (UNSW Press 2010)
Rimé B, 'Emotion Elicits the Social Sharing of Emotion: Theory and Empirical Review' (2009) 1 Emotion Review 60
'The Impact of Gacaca Tribunals in Rwanda: Psychosocial Effects of Participation in a Truth and Reconciliation Process after a Genocide' (2011) 41 European Journal of Social Psychology 695
Ring S, 'The Victim of Historical Child Sexual Abuse in the Irish Courts 1999–2006' (2017) 26 Social & Legal Studies 562
Robin C, *The Reactionary Mind: Conservatism from Edmund Burke to Donald Trump* (2nd ed, Oxford University Press 2018)
Robinson G, *For Christ's Sake: End Sexual Abuse in the Catholic Church . . . for Good* (2013)
Rock P, 'On Becoming a Victim', Carolyn Hoyle and Richard Wilson (eds.), *New Visions of Crime Victims* (Hart Publishing 2002)
Rolston B and Scraton P, 'In the Full Glare of English Politics' (2005) 45 The British Journal of Criminology 547
Rorty R, *Achieving Our Country: Leftist Thought in Twentieth-Century America* (1st Harvard University Press pbk ed, Harvard University Press 1999)
Rosenberg E, '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-ancestor sowned-slaves-according-new-report-he-opposes-reparations/>
Rosenwein BH and Cristiani R, *What Is the History of Emotions?* (Polity 2018)
Ross FC, 'On Having Voice and Being Heard: Some After-Effects of Testifying Before the South African Truth and Reconciliation Commission' (2003) 3 Anthropological Theory 325
Rossetti SJ, 'The Impact of Child Sexual Abuse on Attitudes toward God and the Catholic Church' (1995) 19 Child Abuse & Neglect 1469

Rothstein R, *The Color of Law: A Forgotten History of How Our Government Segregated America* (1st ed, Liveright Publishing Corporation, a division of W W Norton & Company 2017)

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

Royal Commission into Institutional Responses to Child Sexual Abuse, *Lost Innocents: Righting the Record : Report on Child Migration* (Senate Community Affairs References Committee Secretariat 2001)

Forgotten Australians: A Report on Australians Who Experienced Institutional or Out-of-Home Care as Children (Commonwealth of Australia 2004)

Commonwealth Contribution to Former Forced Adoption Policies and Practices (Commonwealth of Australia 2012)

Redress and Civil Litigation Report (Royal Commission into Institutional Responses to Child Sexual Abuse 2015) <www.childabuseroyalcommission.gov.au/policy-and-research/redress/final-report-redress-and-civil-litigation>

Criminal Justice Report (Royal Commission into Institutional Responses to Child Sexual Abuse 2017)

Final Report (Royal Commission into Institutional Responses to Child Sexual Abuse 2017)

Preface and Executive Summary (Royal Commission into Institutional Responses to Child Sexual Abuse 2017)

Rubenstein D, 'Murray Sinclair, From Truth to Reconciliation: Murray Sinclair at Carleton University' (5 October 2016) <https://newsroom.carleton.ca/story/truth-and-reconciliation-commission/>

Rudling A, '"I'm Not That Chained-Up Little Person": Four Paragons of Victimhood in Transitional Justice Discourse' (2019) 41 Human Rights Quarterly 421

Ruether RR, *America, Amerikkka: Elect Nation and Imperial Violence* (Equinox 2007)

Russell JA, 'Emotion, Core Affect, and Psychological Construction' (2009) 23 Cognition & Emotion 1259

Ryan K, *Social Exclusion and the Politics of Order* (Manchester University Press 2007)

'Ryan Report Implementation Plan: Fourth Progress Report' (Ryan Report Monitoring Group 2014)

Said EW, *Culture and Imperialism* (1st Vintage Books ed, Vintage Books 1994)

Salter M, 'The Transitional Space of Public Inquiries: The Case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse' (2020) 53 Australian & New Zealand Journal of Criminology 213

Sandoval-Villalba C, '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)

Sarkin J, 'Redesigning the Definition a Truth Commission, but also Designing a Forward-Looking Non-Prescriptive Definition to Make Them Potentially More Successful' (2018) Human Rights Review

Sarkin J and Daly E, 'Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies' (2004) 35 Columbia Human Rights Law Review 101

Saunders R, 'Questionable Associations: The Role of Forgiveness in Transitional Justice' (2011) 5 International Journal of Transitional Justice 119

Schaap A, 'Agonism in Divided Societies' (2006) 32 Philosophy & Social Criticism 255

Schabas W, 'The Rwanda Case: Sometimes It's Impossible' in M Cherif Bassiouni (ed), *Post-Conflict Justice* (Transnational Publishers 2002)
Scheer M, 'Are Emotions a Kind of Practice (and Is That What Makes Them Have a History?)' (2012) 51 History and Theory 193
Scheff TJ, *Bloody Revenge: Emotions, Nationalism, and War* (Routledge 2020)
Scheff TJ and Retzinger SM, *Emotions and Violence: Shame and Rage in Destructive Conflicts* (iUniverse 2001)
Scheve C von and Salmella M (eds), *Collective Emotions: Perspectives from Psychology, Philosophy, and Sociology* (1st ed, Oxford University Press 2014)
Schwartz RM, *The Curse of Cain: The Violent Legacy of Monotheism* (University of Chicago Press 2004)
Scorer R, *Betrayed: The English Catholic Church and the Sex Abuse Crisis* (Biteback Publishing 2014)
See SW, 'The Intellectual Construction of Canada's "Peaceable Kingdom" Ideal' (2018) 52 Journal of Canadian Studies 510
Serwer A, 'Against Reconciliation' (2019) *The Atlantic* <www.theatlantic.com/magazine/archive/2019/12/adam-serwer-civility/600784/>
'The Shame Is Ours: Forced Adoptions of the Babies of Unmarried Mothers in Post-War Canada' (Standing Senate Committee on Social Affairs, Science and Technology 2018)
Serwer A, 'The Shame Is Ours: Forced Adoptions of the Babies of Unmarried Mothers in Post-War Canada' (Standing Senate Committee on Social Affairs, Science and Technology 2018)
Shapiro T, Meschede T and Osoro S, '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>
Sharkey P, *Stuck in Place: Urban Neighborhoods and the End of Progress toward Racial Equality* (The University of Chicago Press 2013)
Sharp DN, 'Emancipating Transitional Justice from the Bonds of the Paradigmatic Transition' (2015) 9 International Journal of Transitional Justice 150
'What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice' (2019) 13 *International Journal of Transitional Justice* 570
Shaw JJA, *Law and the Passions: Why Emotion Matters for Justice* (Routledge 2020)
Shead K, 'Responding to Historical Child Sexual Abuse: A Prosecution Perspective on Current Challenges and Future Directions' (2014) 26 Current Issues in Criminal Justice 55
Sherman WT, 'Special Field Order No. 15: "Forty Acres and a Mule"' in Brooks R (ed), When Sorry Isn't Enough: The Controversy over Apologies and Separations for Human Injustice (New York University Press 1999)
Sherwood H, 'MPs Urge Theresa May to Apologise for "Pain" of Forced Adoption Policy' The Guardian (London, London, 12 July 2018)
Sherwood M, 'The Trade in Enslaved Africans and Slavery after 1807' in Fernne Brennan and John Packer (eds), *Colonialism, Slavery, Reparations and Trade: Remedying the 'Past'*? (Routledge 2012)
Shiner M and others, 'The Colour of Injustice: "Race", Drugs and Law Enforcement in England and Wales' (Stop Watch 2018)
Shklar JN, *The Faces of Injustice* (Yale University Press 1990)

Short D, 'Reconciliation, Assimilation, and the Indigenous Peoples of Australia' (2003) 24 International Political Science Review 491

'Reconciliation and the Problem of Internal Colonialism' (2005) 26 Journal of Intercultural Studies 267

Reconciliation and Colonial Power: Indigenous Rights in Australia (Ashgate 2008)

'When Sorry Isn't Good Enough: Official Remembrance and Reconciliation in Australia' (2012) 5 Memory Studies 293

Simmons BA, *Mobilizing for Human Rights. International Law in Domestic Politics* (Cambridge University Press 2009)

Simpson A, *Mohawk Interruptus: Political Life across the Borders of Settler States* (Duke University Press 2014)

Sinclair R, 'Identity Lost and Found: Lessons from the Sixties Scoop' (2007) 3 First Peoples Child and Family Review 65

Sipe AWR, Doyle T and Benkert M, 'Clerical Spirituality and the Culture of Narcissim' (2013) <www.awrsipe.com/reports/2013/Spirituality-and-the-Culture-of-Narcissism.pdf>

Sköld J, 'Historical Abuse – A Contemporary Issue: Compiling Inquiries into Abuse and Neglect of Children in Out-of-Home Care Worldwide' (2013) 14 Journal of Scandinavian Studies in Criminology and Crime Prevention 5

Smart C, *Regulating Womanhood* (Routledge 1992)

Smith A, *Conquest: Sexual Violence and American Indian Genocide* (Duke University Press 2015)

Unreconciled: From Racial Reconciliation to Racial Justice in Christian Evangelicalism (Duke University Press 2019)

Smith C and Duff A, 'Access to Justice for Victims of Historic Institutional Abuse' (2020) 55 Éire-Ireland 100

Smith JM, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Manchester University Press 2008)

Smith N, 'Political Apologies and Categorical Apologies' in Mihaela Mihai and Mathias Thaler (eds), *On the Uses and Abuses of Political Apologies* (Palgrave Macmillan UK 2014)

Smith R, 'The Public Presidency Hits the Wall: Clinton's Presidential Initiative on Race' (1998) 28 Presidential Studies Quarterly 780

Smith RM, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge University Press 2003)

Smyth N, 'Structural Injustice and the Emotions' (2021) Res Publica 27 Res Publica 577–592

Solinger R, *Wake Up Little Susie* (2nd Routledge pbk ed, Routledge 2000)

Solinger S Rickie, 'Poor and Pregnant in the United States: 1950s, 1970s, 1990s' (1994) 21 Social Justice 22

Spindler P, 'Operation Yewtree: A Watershed Moment' in Marcus Erooga (ed), *Protecting Children and Adults from Abuse After Savile: What Organisations and Institutions Need to Do* (Jessica Kingsley Publishers 2018)

Spivak GC, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (University of Illinois 1988)

Stanley A, 'Pope Asks Forgiveness for Errors of the Church over 2,000 Years' *New York Times* (New York 13 March 2000)

Stannard DE, *American Holocaust: The Conquest of the New World* (Oxford University Press 1993)
Stanton K, 'Canada's Truth and Reconciliation Commission: Settling the Past?' (2011) 2 International Indigenous Policy Journal 1
'Intransigent Injustice: Truth, Reconciliation and the Missing Women Inquiry in Canada', (2013) 1 Transitional Justice Review 59
'Reconciling Reconciliation: Differing Conceptions of the Supreme Court of Canada and the Canadian Truth and Reconciliation Commission' (2017) 26 Journal of Law and Social Policy 21
Starblanket G, 'The Numbered Treaties and the Politics of Incoherency' (2019) 52 Canadian Journal of Political Science 443
Starkey AD, *The Shame That Lingers: A Survivor-Centered Critique of Catholic Sin-Talk* (Peter Lang 2009)
'Statement of Apology to Former Students of Indian Residential Schools' <www.aadnc-aandc.gc.ca/eng/1100100015644/1100100015649>
Stern AM, 'Eugenics and Historical Memory in America: Eugenics and Historical Memory in America' (2005) 3 History Compass 1–11
Stevenson K, 'Unearthing the Realities of Rape: Utilising Victorian Newspaper Reportage to Fill in the Contextual Gaps' (2007) 28 Liverpool Law Review 405
Stewart J, 'Address by the Honourable Jane Stewart Minister of Indian Affairs and Northern Development on the Occasion of the Unveiling of Gathering Strength – Canada's Aboriginal Action Plan' (7 January 1998) <www.aadnc-aandc.gc.ca/eng/1100100015725/1100100015726>
Stover E, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press 2005)
Strakosch E, 'Beyond Colonial Completion: Arendt, Settler Colonialism and the End of Politics' in Sarah Maddison, Tom Clark and Ravi de Costa (eds), *The Limits of Settler Colonial Reconciliation* (Springer Singapore 2016)
Stubbs J, 'Restorative Justice, Gendered Violence, and Indigenous Women' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press 2009)
Sullivan K, *The Inner Lives of Medieval Inquisitors* (University of Chicago Press 2011)
Sunga S, 'The Meaning of Compensation in Institutional Abuse Programs' (2002) 17 Journal of Law and Social Policy 39
Swain S, 'Do You Want Religion with That? Welfare History in a Secular Age' (2005) 2 History Australia 79.1
'Stakeholders as Subjects' (2014) 36 The Public Historian 38
'Beyond Child Migration: Inquiries, Apologies and the Implications for the Writing of a Transnational Child Welfare History' (2016) 13 History Australia 139
'Enshrined in Law: Legislative Justifications for the Removal of Indigenous and Non-Indigenous Children in Colonial and Post-Colonial Australia' (2016) 47 Australian Historical Studies 191
'A Long History of Faith-Based Welfare in Australia: Origins and Impact: A Long History of Faith-Based Welfare in Australia' (2017) 41 Journal of Religious History 81
'Institutional Abuse: A Long History' (2018) 42 Journal of Australian Studies 153
Swain S and Sköld J, *Apologies and the Legacy of Abuse of Children in 'Care:' International Perspectives* (Palgrave Macmillan 2015)

Swain S, Wright K and Sköld J, 'Conceptualising and Categorising Child Abuse Inquiries: From Damage Control to Foregrounding Survivor Testimony' (2017) Journal of Historical Sociology (2018) 31(3) Journal of Historical Sociology 282

Taft L, 'Apology Subverted: The Commodification of Apology' (2000) 109 The Yale Law Journal 1135

Tager M, 'Apologies to Indigenous Peoples in Comparative Perspective' (2014) 5 International Indigenous Policy Journal 1–18 <https://ojs.lib.uwo.ca/index.php/iipj/article/view/7446>

Tapsell K, *Potiphar's Wife: The Vatican's Secret and Child Sexual Abuse* (ATF Press 2014)

'Civil and Canon Law on Reporting Child Sexual Abuse to the Civil Authorities' (2019) 31 Journal for the Academic Study of Religion 143

Tarusarira J, 'The Anatomy of Apology and Forgiveness: Towards Transformative Apology and Forgiveness' (2019) International Journal of Transitional Justice ijz006

Tatz C, 'Genocide in Australia' (1999) 1 Journal of Genocide Research 315

Taylor D, 'Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual?' (Impunity Watch 2014) Discussion Paper <www.impunitywatch.org/docs/IW_Discussion_Paper_Victim_Participation1.pdf>

Taylor J and others, 'Eliminating Racial Disparities in Maternal and Infant Mortality: A Comprehensive Policy Blueprint' (Center for American Progress 2019)

Teitel RG, *Transitional Justice* (Oxford University Press 2000)

Terry KJ, John Jay College of Criminal Justice and Catholic Church (eds), *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950–2010: A Report Presented to the United States Conference of Catholic Bishops by the John Jay College Research Team* (USCCB Communications 2011)

Thaler M, 'Just Pretending: Political Apologies for Historical Injustice and Vice's Tribute to Virtue' (2012) 15 Critical Review of International Social and Political Philosophy 259

Thalia A, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Case for Aboriginal Station Workers' (2007) Labour History 15

Thobani S, *Exalted Subjects: Studies in the Making of Race and Nation in Canada* (University of Toronto Press 2007)

Thomas N, *Colonialism's Culture: Anthropology, Travel, and Government* (Princeton University Press 1994)

Thomason KK, *Naked: The Dark Side of Shame and Moral Life* (Oxford University Press 2018)

Thompson J, 'Historical Injustice and Reparation: Justifying Claims of Descendants' (2001) 112 Ethics 114

Taking Responsibility for the Past: Reparation and Historical Injustice (Polity 2002)

'Is Political Apology a Sorry Affair?' (2012) 21 Social & Legal Studies 215

Thompson-Miller R and Picca LH, '"There Were Rapes!": Sexual Assaults of African American Women and Children in Jim Crow' (2017) 23 Violence against Women 934

Thornton R, *American Indian Holocaust and Survival: A Population History Since 1492* (University of Oklahoma Press 1990)

Tiernan A and O'Connor P, 'Perspectives on Power over and Power to: How Women Experience Power in a Mining Community in Zimbabwe' (2020) 13 Journal of Political Power 86

Ting I, 'Policy Failure as Prisons Fill with Indigenous People' *Sydney Morning Herald* (Sydney, 27 May 2013)

Tombs D, 'Public Theology and Reconciliation' in Sebastian Kim and Katie Day (eds), *A Companion to Public Theology* (Brill 2017)

Torpey J, '"Making Whole What Has Been Smashed": Reflections on Reparations' (2001) 73 The Journal of Modern History 333

(ed), *Politics and the Past: On Repairing Historical Injustices* (Rowman & Littlefield Publishers 2003)

'Towards Non-Recurrence: Accountability Options for Trump-Era Transgressions' (Protect Democracy 2020) <https://protectdemocracy.org/project/towards-non-recurrence-accountability/>

Townsend DL and Townsend L, 'Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System' (2021) 35 Social Epistemology 147

Trothen TJ, *Shattering the Illusion: Child Sexual Abuse and Canadian Religious Institutions* (Wilfrid Laurier University Press 2012)

Trouillot M-R, 'Abortive Rituals: Historical Apologies in the Global Era' (2000) 2 Interventions 171

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

Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 2 (McGill-Queen's University Press 2015)

Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 5 (McGill-Queen's University Press 2015)

Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6 (McGill-Queen's University Press 2015)

Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 1, Part 1 (McGill-Queen's University Press 2015)

The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada (2015)

Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015)

What We Have Learned: Principles of Truth and Reconciliation, (Truth and Reconciliation Commission of Canada 2015) 3–4

Tsosie R, 'Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations' in Jon Miller and Rahul Kumar (eds), *Reparations: Interdisciplinary Perspectives* (Oxford University Press 2006)

Tuck E and Yang KW, 'Decolonization Is Not a Metaphor' (2012) 1 Decolonization: Indigeneity, Education & Society 1

Tully J, *Public Philosophy in a New Key* (Cambridge University Press 2008)

Tully J and Borrows J, 'Introduction' in Michael Asch, John Borrows and James Tully (eds), *Resurgence and Reconciliation* (University of Toronto Press 2018)

Turner C, *Violence, Law and the Impossibility of Transitional Justice* (1st ed, Routledge 2017)
Tushnet M, 'An Essay on Rights' (1984) 62 Texas Law Review 1363
Tutu D, *No Future without Forgiveness* (Rider 2000)
Tyrell I, 'The Myth(s) That Will Not Die: American National Exceptionalism' in Gérard Bouchard (ed), *National Myths: Constructed Pasts, Contested Presents* (Routledge 2013)
United Nations, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (United Nations 2008)
United Nations Committee against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' CAT/C/AUS/CO/4-5. Concluding Observations on the Initial Report of the Holy See (2014) CAT/C/VAT/CO/1'
United Nations Committee on the Rights of the Child, 'Concluding Observations on the Second Periodic Report of the Holy See' (2014) CRC/C/VAT/CO/2
United Nations Human Rights Committee, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/21/Rev.1/Add. 1326 May 2004
United Nations Security Council. Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (S/2004/616). August, 3 2004.
Uprimny Yepes R, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice' (2009) 27 Netherlands Quarterly of Human Rights 625
Ure M, 'Post-Traumatic Societies: On Reconciliation, Justice and the Emotions' (2008) 11 European Journal of Social Theory 283
'U.S. Catholics See Sex Abuse as the Church's Most Important Problem, Charity as Its Most Important Contribution' *Pew Research Center* (6 March 2013)
U.S. House of Representatives. (2008). H. Res. 194: Apologizing for the enslavement and racial segregation of African-Americans. Retrieved from <www.govtrack.us/congress/bill.xpd?bill=hr110-194>
U.S. Senate. (2009). S. Con. Res. 26: A concurrent resolution apologizing for the enslavement and racial segregation of African Americans. Retrieved from <www.govtrack.us/congress/bill.xpd?bill=sc111-26>
Valls A, 'Racial Justice as Transitional Justice' (2003) 36 Polity 53
van Boven T, 'Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms' (1996) 59 Law and Contemporary Problems 284
van IJzendoorn MH and others, 'Children in Institutional Care: Delayed Development and Resilience' (2011) 76 Monographs of the Society for Research in Child Development 8
Venkataramani AS, O'Brien R and Tsai AC, 'Declining Life Expectancy in the United States: The Need for Social Policy as Health Policy' (2021) 325 JAMA 621
Veracini L, *Settler Colonialism* (Palgrave Macmillan UK 2010) <http://link.springer.com/10.1057/9780230299191>
Verdeja E, *Unchopping a Tree: Reconciliation in the Aftermath of Political Violence* (Temple University Press 2009)

'Political Reconciliation in Postcolonial Settler Societies' (2017) 38 International Political Science Review 227
Verdun V, 'If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans' (1992) 67 Tulane Law Review 597
Victims' Commissioner for England and Wales, 'Compensation without Re-Traumatisation: The Victims' Commissioner's Review into Criminal Injuries Compensation' (2019) <https://victimscommissioner.org.uk/published-reviews/compensation-without-re-traumatisation-the-victims-commissioners-review-into-criminal-injuries-compensation/>
Volf M, *Exclusion and Embrace: A Theological Exploration of Identity, Otherness, and Reconciliation* (Abingdon Press 1996)
Waldron J, 'Superseding Historical Injustice' (1992) 103 Ethics 4
'Redressing Historic Injustice' (2002) 52 The University of Toronto Law Journal 135
Walker MU, 'Moral Vulnerability and the Task of Reparations' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014)
'Capturing Transitional Justice: Exploring Colleen Murphy's *The Conceptual Foundations of Transitional Justice*' (2018) 14 Journal of Global Ethics 137
Wallace H and others, 'The Maternity Home: Present Services and Future Roles' (1974) 64 American Journal of Public Health 568
Walshe B and O'Connell C, 'Consultations with Survivors of Institutional Abuse on Themes and Issues to Be Addressed by a Survivor Led Consultation Group' (2019) <www.education.ie/en/Publications/Education-Reports/consultations-with-survivors-of-institutional-abuse-on-themes-and-issues-to-be-addressed-by-a-survivor-led-consultation-group.pdf>
Walzer M, *Interpretation and Social Criticism* (1st pbk ed, Harvard University Press 1993)
Wangmann J, 'Liability for Institutional Child Sexual Assault: Where Does Lepore Leave Australia?' (2004) 28 Melbourne University Law Review 169
Ward RB, *The Australian Legend* (Repr, Oxford University Press 1993)
Waterton E and Wilson R, 'Talking the Talk: Policy, Popular and Media Responses to the Bicentenary of the Abolition of the Slave Trade Using the "Abolition Discourse"' (2009) 20 Discourse & Society 381
Waugh J, *U.S. Grant: American Hero, American Myth* (University of North Carolina Press 2009)
Weber S, 'Trapped between Promise and Reality in Colombia's Victims' Law: Reflections on Reparations, Development and Social Justice' (2020) 39(1) Bulletin of Latin American Research 5
Welch DA, *Justice and the Genesis of War* (Cambridge University Press 1993)
Werkheiser I, 'A Right to Understand Injustice: Epistemology and the "Right to the Truth" in International Human Rights Discourse' (2020) 58 The Southern Journal of Philosophy 186
White H, 'The Forms of Wildness: Archaeology of an Idea' in Edward Dudley and Max Novak (eds), *The Wild Man Within: An Image in Western Thought from the Renaissance to Romanticism* (University of Pittsburgh Press 1972)

Whitehouse D, 'The Numbered Treaties: Similar Means to Dichotomous Ends' (1994) 3 Past Imperfect 25
Whyte KP, 'On Resilient Parasitisms, or Why I'm Skeptical of Indigenous/Settler Reconciliation' (2018) 14 Journal of Global Ethics 277
Wilkie M (ed), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission 1997)
Wilkinson CF, '"Peoples Distinct from Others": The Making of Modern Indian Law' (2006) Utah Law Review 379
Williams P, 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401
Williams SJ and Bendelow G, *The Lived Body: Sociological Themes, Embodied Issues* (Routledge 1998)
Wilson M, 'The Truth and Reconciliation Commission of Canada' in Wilton Littlechild and Elsa Stamatopoulou (eds), *Indigenous Peoples' Access to Justice, Including Truth and Reconciliation Processes* (Columbia University Press 2014)
Wilson WJ, *Power, Racism, and Privilege: Race Relations in Theoretical and Sociohistorical Perspectives* (Free Press 1976)
Wink W and Wink W, *Engaging the Powers: Discernment and Resistance in a World of Domination* (Fortress Press 1992)
Winter A, 'The Report of the Archdiocesan Commission of Enquiry into Sexual Abuse of Children by Members of the Clergy' (Archdiocese of St. John's 1990)
Winter S, *Transitional Justice in Established Democracies: A Political Theory* (Palgrave Macmillan 2014)
'Theorising the Political Apology: Theorising the Political Apology' (2015) 23 Journal of Political Philosophy 261
'Two Models of Monetary Redress: A Structural Analysis' (2018) 13 Victims & Offenders 293
'State Redress as Public Policy: A Two-Sided Coin' (2019) 31 Journal of Law and Social Policy 34
Wolfe P, 'Settler Colonialism and the Elimination of the Native' (2006) 8 Journal of Genocide Research 387
Woolford A, 'Ontological Destruction: Genocide and Canadian Aboriginal Peoples' (2009) 4 Genocide Studies and Prevention 81
'Nodal Repair and Networks of Destruction: Residential Schools, Colonial Genocide, and Redress in Canada' (2013) 3 Settler Colonial Studies 65
Woolford A and Benvenuto J, 'Canada and Colonial Genocide' (2015) 17 Journal of Genocide Research 373
Wright K, 'Remaking Collective Knowledge: An Analysis of the Complex and Multiple Effects of Inquiries into Historical Institutional Child Abuse' (2017) 74 Child Abuse & Neglect 10
'Challenging Institutional Denial: Psychological Discourse, Therapeutic Culture and Public Inquiries' (2018) 42 Journal of Australian Studies 177
Wrong DH, *Power: Its Forms, Bases, and Uses* (Transaction Publishers 1995)
Yamamoto E, *Interracial Justice: Conflict and Reconciliation in Post-Civil Rights America* (New York University Press 1999)
Young IM, *Inclusion and Democracy* (Oxford University Press 2000)

'Structural Injustice and the Politics of Difference' in Anthony Laden and David Owen (eds), *Multiculturalism and Political Theory* (Cambridge University Press 2007)

'Structural Injustice and the Politics of Difference' in Thomas Christiano and John Christman (eds), *Contemporary Debates in Political Philosophy* (Wiley-Blackwell 2009) <https://onlinelibrary.wiley.com/doi/10.1002/9781444310399.ch20>

Responsibility for Justice (Oxford University Press 2011)

Zakai A, *Exile and Kingdom: History and Apocalypse in the Puritan Migration to America* (Cambridge University Press 1992)

Zehr H, 'The Intersection of Restorative Justice with Trauma Healing, Conflict Transformation and Peacebuilding' (2009) 18 Journal for Peace and Justice Studies 20

Zernova M, *Restorative Justice: Ideals and Realities* (Ashgate 2007)

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

Zinsstag E and Keenan M (eds), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions* (Routledge 2017)

Zolkos M, '"The Return of Things as They Were": New Humanitarianism, Restitutive Desire and the Politics of Unrectifiable Loss' (2017) 16 *Contemporary Political Theory* 321

A v Hoare [2008] UKHL 6

In re African-American Slave Descendants Litigation, 375 F Supp 2d 721 (ND Ill 2005)

Johnson v McAdoo 244 US 643 (1917)

Johnson v M'Intosh, 21 US 543 (1823)

Keyu v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69; [2016] AC 1355

Kimathi & Ors v Foreign & Commonwealth Office [2018] EWHC 2066

McGirt v Oklahoma, 140 S Ct 2452 (2020)

Michael Murray v Commission to Inquire into Child Abuse [2003] High Court of Ireland 2003 1998P (17 October 2003) (Abbott J)

Milirrpum v Nabalco Pty Ltd and the Commonwealth(1971) 17 FLR 141

MKL and DC v Minister for Justice and Equality [2017] IEHC 389

Mutua & Ors v The Foreign And Commonwealth Office [2012] EWHC 2678 (QB) (05 October 2012)

Nevada v Hicks 533 US 353 (2000)

O'Bryan v Holy See, 556 F3d 361 (2009)

O'Keeffe v Ireland [2014] ECHR 96

Oliphant v Suquamish Indian Tribe, 435 US 191 (1978)

Plessy v Ferguson, 163 US 537 (1896)

R v DPP [2009] IEHC 87

R v Van der Peet [1996] 2 SCR 507

Re Residential Schools, 2001 ABCA 216

Re Residential Schools, 2002 ABQB 667

Shelby County v Holder, 570 US 529 (2013)

Solem v Bartlett, 465 US 463 (1984)

Stogner v California (2003) 539 US 607 (USSC)

UNHRC, Sandra Lovelace v Canada, Comm. 24/1977, UN Doc. CCPR/C/13/D/24/1977
Various Claimants v The Catholic Child Welfare Society [2012] UKSC 56
Worcester v Georgia, 31 US (6 Pet) 515 (1832)

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