

TECHNOLOGY AND TRANSITIONAL JUSTICE

BY COLLEEN MURPHY*

Abstract: Transitional justice refers to the process of dealing with widespread wrongdoing characteristically committed during the course of conflict and/or repression. Examples of such processes include criminal trials, truth commissions, reparations, and memorials. Technology is altering the forms that widespread wrongdoing takes. Technology is also altering the form of processes of transitional justice themselves. This essay provides a map of these changes and their normative implications.

KEY WORDS: transitional justice, human rights, punishment, ethics of technology

This essay focuses on technology and transitional justice. I understand technology to refer to artifacts or practical instruments used for certain purposes.¹ Transitional justice is the process of dealing with widespread wrongdoing characteristically committed during the course of periods of conflict and/or repression. The first section of this essay explains transitional justice in greater detail. I focus on what is distinctive about the kind of wrongdoing processes of transitional justice address, the context in which wrongdoing occurs, and the context in which responses are adopted. The second section provides an overview of how technology is changing both the character of wrongdoing and the shape of processes of transitional justice. I end with a discussion of the theoretical questions generated by these changes and of the justice-based concerns these alterations raise.

I. TRANSITIONAL JUSTICE

In this section, after situating the development of the idea of transitional justice in the political contexts out of which it emerged, I highlight the

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¹ For an overview of this conception of technology see Maarten Franssen, Gert-Jan Lokhorst, and Ibo van de Poel, "Philosophy of Technology," *The Stanford Encyclopedia of Philosophy*, Edward N. Zalta, ed. (Fall 2018), URL = <https://plato.stanford.edu/archives/fall2018/entries/technology/>.

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specific features of wrongdoing that transitional justice processes are designed to address and specific features of the context in which such processes are implemented.²

In recent decades, a range of societies have established processes for dealing with wrongs committed during the course of conflict and/or repression as part of a broader process of transitioning away from these conditions and toward a better state, where one element of this better state is democracy. Two prominent examples of such societies are South Africa during its transition from apartheid to multiracial democracy in 1994 and Colombia at the present moment as it strives to implement the Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace (hereafter Final Agreement) ending more than fifty years of conflict between the Colombian government and the The Revolutionary Armed Forces of Colombia (FARC). The precise period in which transitional justice began remains a source of ongoing discussion. One common starting point is the aftermath of World War II with the Allied-run Nuremberg Trials.³ After Nuremberg, a major resurgence of interest in and pursuit of transitional justice began in the period of transitions from authoritarian regimes in South America in the late 1980s.⁴

Societies pursuing transitional justice often establish combinations of amnesty provisions, truth commissions, criminal trials, lustration, and/or reparations. Amnesty provisions remove the prospects for criminal or civil liability and are a commonly used type of transitional justice process.⁵ Amnesties vary in whether they apply to individuals or classes of persons; whether, and if so, which, conditions must be satisfied to be eligible for amnesty; whether, and if so, which, conditions must be satisfied to maintain amnesty; and which classes of action amnesty covers.⁶ In South Africa, perpetrators could receive amnesty provided they made a full disclosure of the wrongs that fell within the scope of the Truth and Reconciliation Commission (TRC) in which they were implicated and could demonstrate

² As Allen Buchanan noted in feedback on the essay, transitional justice is an example of a moral concept that has been introduced into our vocabulary and practice. Indeed, the central premise of my book, Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (New York: Cambridge University Press, 2017), is that transitional justice is a distinctive kind of justice, not reducible to other more familiar forms of justice, such as retributive, corrective, or distributive justice.

³ For an informative and comprehensive genealogy of transitional justice, see Ruti Teitel, "Transitional Justice Genealogy," *Harvard Human Rights Journal* 16 (2003): 69–94. For a contrasting view on when the idea of transitional justice originated, see Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (New York: Cambridge University Press, 2004).

⁴ Teitel, "Transitional Justice Genealogy."

⁵ For empirical data on amnesty provisions adopted, see Louise Mallinder, *Amnesties and Inclusive Political Settlements* (Edinburgh: Transitional Justice Institute for the Political Settlements Research Program, 2018). Full report available at: https://www.politicalsettlements.org/wp-content/uploads/2018/12/2018_Mallinder_Amnesties-Report.pdf (accessed June 12, 2020).

⁶ Kent Greenawalt, "Amnesty's Justice," in Robert Rothenberg and Dennis Thompson, eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000), 189–210; Mark Freeman, *Necessary Evils: Amnesties and the Search for Justice* (New York: Cambridge University Press, 2011).

that wrongs were committed for political reasons. Truth commissions are officially established bodies charged with documenting specified kinds of human rights violations over a delimited period of time.⁷ Many commissions produce a final report that documents findings and produces a set of recommendations to avoid recurrence of similar rights violations in the future. Commissions vary in the powers they enjoy (whether, for example, they have subpoena powers or power to grant amnesty.)

Criminal trials occur as domestic trials; at the permanent International Criminal Court; in ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR); and in hybrid tribunals, which are “courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred.”⁸ Lustration is the process of barring or restricting former government officials from serving in certain public capacities, and was used extensively in transitions from communism in Eastern Europe.⁹ Reparations offer some form of compensation aimed at repairing harm suffered by victims of wrongdoing. Reparations can be material or symbolic.¹⁰

Many of the processes used to pursue transitional justice, and in particular criminal trials and reparations, are not only used to pursue transitional justice. What is distinctive in transitional justice is the wrongs such processes are used to address, the context in which those wrongs are committed and in which responses to wrong are established, and the aims that processes like criminal trials have.

The kind of wrongdoing that processes of transitional justice focus on has certain features.¹¹ The wrongdoing of interest is not rare or exceptional, but rather *normalized*. Normalized wrongdoing becomes a basic fact of life for members of whatever group is targeted; members need to orient their conduct around the possibility of being victims of such wrongdoing. In the context of the United States at the time of writing, the police killing of George Floyd in Minnesota sparked nationwide protests around police brutality disproportionately affecting Black men and women. One of the

⁷ For a comprehensive overview of truth commissions see Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002).

⁸ Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflicts States: Maximizing the Legacy of Hybrid Courts* (New York: United Nations, 2008) <https://www.ohchr.org/Documents/Publications/HybridCourts.pdf> (accessed June 12, 2020). For an example of such a tribunal, see the Extraordinary Chambers in the Courts of Cambodia (official website: <https://www.eccc.gov.kh/en/node/39457>.)

⁹ Nir Eiskovits, “Transitional Justice,” *The Stanford Encyclopedia of Philosophy*, ed., Edward N. Zalta (Fall 2017) <https://plato.stanford.edu/archives/fall2017/entries/justice-transitional/>.

¹⁰ For a comprehensive overview of normative arguments for reparations and case studies of reparations programs implemented, see Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2008).

¹¹ I argue at length for the features of wrongdoing that transitional justice processes concentrate on, as well as the features of the context in which transitional justice is pursued, in Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 1.

main complaints of Black men and women is that no matter how they act they are still at risk of being a victim of violence. Hashtags like #sleeping-whileblack underscore the various circumstances under which Black men and women have been targeted for violence by the police or by self-deputizing white men and women.¹² The normalization of wrongdoing is reflected in the numbers of victims of certain kinds of wrongs, numbering in various contexts in the thousands, tens of thousands, hundreds of thousands, and in some cases millions.

Wrongdoing of interest to transitional justice processes is also not individualized; it is *collective*. Individuals characteristically become vulnerable to wrongdoing because of a group-based affiliation and are targeted by perpetrators acting in a group, such as qua member of security forces or a rebel group. The identities that matter for victims vary across transitional contexts, but can include racial or ethnic identity, religious identity, gender identity, and/or ideological commitments.

Finally, wrongdoing is *political*. It is political in the sense that the perpetrators of wrongdoing typically include state actors, members of a government's police or security forces. State actors and institutions can become implicated not only through direct perpetration of wrongdoing. The failure of institutions to hold wrongdoers accountable can contribute to impunity for wrongdoing. Groups organized politically to contest the state are also perpetrators of such wrongs. Many processes of transitional justice focus specifically on the reasons for the sake of which wrongs of certain kinds were committed. A political motive must be demonstrated to be eligible for amnesty or reduced sentences.¹³

Not only is the type of wrongdoing of interest to transitional justice of a certain kind, the context in which wrongdoing occurs is distinctive. The wrongs transitional justice processes focus on occur against a background of what I have called *pervasive structural inequality*.¹⁴ "Structural" signals the emphasis on institutions, which may be economic, political, legal, cultural, and/or social. Such institutions define and structure relationships among citizens and between citizens and officials by defining rights and duties; norms for permissible conduct, prohibited conduct, required conduct; and the penalties for violating specified rules and norms. Penalties can be understood broadly to refer not just to formal sanctions but also to informal

¹² Emily Bazelon, "A Discussion about How to Reform Policing," *New York Times*, June 13, 2020, <https://www.nytimes.com/interactive/2020/06/13/magazine/police-reform.html?action=click&module=Top%20Stories&pgtype=Homepage>.

¹³ See, for example, the South African Truth and Reconciliation Commission (TRC), which restricted its focus to killing, abduction, torture, and severe ill treatment committed for the sake of defending the apartheid state or contesting the apartheid order. The mandate and findings of the South African TRC are available at <https://www.justice.gov.za/trc/>. In Colombia, the Special Jurisdiction for Peace (<https://www.jep.gov.co/Paginas/Inicio.aspx>), a set of judicial bodies established to deal with war crimes, crimes against humanity, and other crimes, limits its focus to wrongs committed for political motives, and excludes those committed for the sake of personal profit or enrichment.

¹⁴ See Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 1.

(yet widely known) penalties that are meted out to those who violate rules for conduct. Institutions are unequal (1) when the opportunities open to citizens to do and become things of value, such as being educated, being employed, or avoiding poverty, vary as a function of membership in various social groups.¹⁵ Institutions are also unequal (2) when the opportunities open to individuals to shape the institutional rules and norms themselves differ as a function of membership in particular social groups. The fault lines of structural inequality vary across societies. Race, ethnicity, gender, religion, and regional location influence the form inequality takes in different contexts. Whereas in South Africa during apartheid racial classification was explicitly and legally made the basis upon which opportunities for being educated, avoiding poverty, and participating politically depended, in other contexts the fault lines of inequality are less intentionally and explicitly structured but are just as present. In Colombia during the more than fifty-year conflict between the Colombian government and the FARC, structural inequality tracking rural versus urban areas as well as indigeneity and race was part of what the terms of the Final Agreement to end conflict tried to address and redress. Structural inequality interacts with normalized wrongdoing in mutually reinforcing ways. Structural inequality can make members of a marginalized community more vulnerable to the violations of human rights that normalized wrongdoing consists in by diminishing recognition of members of such groups as rights bearers. Normalized wrongdoing can be used to defend or contest structural inequality. The killing, abduction, torture, and severe ill treatment that was the subject of the South African TRC was employed by state agents acting to defend and maintain apartheid as well as by armed anti-apartheid groups seeking to dismantle apartheid. Normalized wrongdoing can also be a response to perceived violations of rules and norms defined by structurally unequal institutions. Lynching is a form of extrajudicial punishment and racial terror directed at African Americans by white Americans in the United States. Black men could be vulnerable to being lynched for perceived violations of social norms prohibiting their freedom to look at white women sexually. White Americans' informally endorsed, but not legally recognized, sanction for such violation during the period of Jim Crow racial segregation was lynching. Though not legally permissible, police and government officials

¹⁵ To speak of what citizens have a genuine opportunity to do or become is to draw on the idea of capabilities first proposed by Amartya Sen and Martha Nussbaum. A capability, or effective freedom or genuine opportunity, to do X is a function of what an individual has and what an individual can do with what she has. The absence of individual economic resources can impede opportunities for mobility just as the absence of a certain kind of built infrastructure, such as roads. To lack the effective freedom to be educated can be a function of the lack of quality schools in the area where one lives as well as the lack of family support for one's education. For an overview of the idea of capability see Ingrid Robeyns, "The Capability Approach," *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Winter 2016) <https://plato.stanford.edu/archives/win2016/entries/capability-approach/>

frequently participated in or were otherwise implicated in lynching.¹⁶ Legal norms during Jim Crow regarding the prohibition of interracial marriage and sexual relationships had legal sanctions attached, but those formally recognized sanctions did not include lynching.

Processes of transitional justice not only take up a particular kind of wrongdoing, they also are characteristically implemented in a specific type of political context. The political contexts in which such processes operate are fragile. They are contexts in which, for example, an end to war has technically been achieved through the signing of a peace agreement, but where the duration of that agreement and mutual respect for its term remains far from a given. Or a repressive regime has fallen, but many of the same personnel who operated state security forces continue to occupy official positions or continue to wield influence within a community. A circumstance of what I call in my work *serious existential uncertainty* refers to the fragility of the contexts in which transitional justice processes are often implemented. In fragile political contexts, it is not entirely clear where a community is heading. Peace is tangible in a way it was not prior to the signing of an agreement, but the permanence of peace is unclear. At the time of writing, the ongoing killing of human rights defenders in contemporary Colombia has raised questions about the durability of the Final Agreement between the Colombian Government and FARC.¹⁷ The euphoria that accompanied the toppling of Hosni Mubarak in Egypt in 2011, after his authoritarian regime had been in power for decades, has been replaced with the realization that the repression characteristic of his regime has continued despite his removal.¹⁸

Further exacerbating the fragility of political contexts are the profound challenges to authority that exist—what I call *fundamental uncertainty about authority*, the fourth circumstance of transitional justice. Transitional justice processes take up wrongs implicating state actors. This means that a standard explanation of why the state has standing to deal with wrongdoing cannot be offered.¹⁹ According to such explanations, it is appropriate for the state to punish because it is the representative of a community's values that

¹⁶ For a comprehensive overview of lynching in the United States, see Philip Dray, *At the Hands of Persons Unknown: the Lynching of Black America*, reprint edition (New York: Modern Library, 2003).

¹⁷ English translation of the Final Agreement is here: <http://www.altocomisionadoparalapaz.gov.co/Prensa/Paginas/2017/Mayo/El-Acuerdo-de-paz-en-ingles.aspx>. On the killing of human rights defenders since the signing of the Final Agreement, see Radina Gigova, "'Staggering Number' of Human Rights Defenders Killed in Colombia, the UN Says," *CNN*, January 14, 2020, <https://www.cnn.com/2020/01/14/americas/staggering-number-of-human-rights-defenders-killed-in-colombia-the-un-says/index.html> (accessed June 12, 2020).

¹⁸ On this point see, for example, Ashraf el-Sharif, "Egypt's Post-Mubarak Predicament," *Carnegie Endowment for International Peace*, January 29, 2014, <https://carnegieendowment.org/2014/01/29/egypt-s-post-mubarak-predicament-pub-54328> (accessed June 16, 2020).

¹⁹ For an example of a standard explanation of the kind I describe, see Jean Hampton, "Correcting Harms versus Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1991–1992): 1659–1702.

wrongdoing has challenged. The state is impartially situated and, so, able to judge well what proportional suffering is needed to vindicate the value of the victim that wrongdoing has denied. By contrast, in transitional contexts the state is not a neutral party to wrongdoing, whose impartiality can be the basis for confidence that impartial judgments of justice will be handed down. The state is not well positioned to represent victims in judicial proceedings, given that victims may have been victims at the hands of state actors. This raises the question of the basis on which the state has authority to deal with wrongdoing. Compounding this question of authority is the broader fragile context in which processes occur. A new regime's authority may not have been consolidated as it may continue to face, for example, challenges to its legitimacy from disgruntled factions in a divided community.

Before turning to discuss the normative aims of transitional justice, I want to clarify the role that the four circumstances of transitional justice I just described (normalized collective and political wrongdoing; pervasive structural inequality; serious existential uncertainty; fundamental uncertainty about authority) play in my analysis.²⁰ The focus of transitional justice scholarship and practice has expanded over the past few decades, from an initial focus on transitions from authoritarian regimes to democracy to a later focus on transitions from civil conflict, and most recently to the pursuit of transitional justice in settled democracies. This continual expansion raises the question: To what range of cases should transitional justice apply? The circumstances of transitional justice I outline above aim to provide resources for answering this question. More specifically, the presence of all four circumstances of transitional justice makes a society a transitional society.

As David Hume originally noted, principles of justice provide guidance for addressing a question of justice that becomes salient against a background set of circumstances of justice. Hume believed that the task of justice was to provide normative guidelines for stabilizing property claims, a goal that was necessary in the circumstance of scarcity of goods, among other circumstances. The circumstances of transitional justice matter for identifying and defending the normative goals of transitional justice. These four circumstances, as I discuss in a moment, provide the resources for identifying and understanding the central question of justice that transitional justice takes up.

Three further points about my use of the circumstances of justice are important to make.²¹ All three concern how we should understand the difference between transitional and non-transitional societies. First, the difference between transitional and non-transitional societies does not lie

²⁰ I am grateful to an anonymous reviewer for questioning my use of examples drawn from the United States, a settled democracy, in my discussion of the circumstances of justice, which led to the clarification in the paragraphs that follow.

²¹ On these points, see Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 1.

in the presence of certain features in the former not found in the latter. The difference is the degree to which a certain feature is present. For example, structural inequality is present in all societies. What distinguishes transitional societies is the presence of structural inequality that is *pervasive*. The pervasive character of inequality calls into question the legitimacy of the institutional order in ways that inequality present in a more *limited* manner does not. In cases of limited structural inequality, reform is required but revolution is not.

Second, non-transitional societies may exhibit some features present in transitional societies. For example, ongoing repressive regimes or contexts of war, like Syria at the present moment, can be characterized by normalized collective and political wrongdoing. The systematic torture of political dissidents by the Bashar al-Assad regime is one example. But in my view such cases are not cases of transitional justice if there is no prospect for robust change in the manner serious existential uncertainty requires but instead the future looks like one characterized by relatively stable continuing war. Processes of accountability may and are being pursued by countries outside of Syria. However, such processes cannot directly contribute to a core normative goal of processes of transitional justice—societal transformation—in a context where societal transformation is practically impossible given the continuance of war.

Third, there is nothing about the fact that a society is a “settled democracy” that makes it immune to becoming transitional or having the presence of some of the circumstances of transitional justice I lay out. By evaluating societies according to the presence or absence of the circumstances of transitional justice I have laid out, we can avoid a certain kind of blindness to injustice that labeling or considering a society as a settled democracy may otherwise lead to. The United States may be a settled democracy, but it is a democracy that has a long history of normalized wrongdoing targeting Black men and women, and it is a democracy whose inequality is the subject of ongoing concern.²² The fact that the United States has held democratic elections (though for long parts of our history not open to all adult citizens and not under fair conditions of participation for all) does not make it immune to experiencing the kind of fragility and uncertainty about lines of authority that is characteristic of post-conflict contexts. Indeed, we saw unprecedented uncertainty around the 2020 election, a product of statements by then-President Trump raising doubt as to whether he would voluntarily leave office if not elected,

²² Colleen Murphy, “Transitional Justice in the United States,” *Just Security*, July 16, 2000, <https://www.justsecurity.org/71236/transitional-justice-in-the-united-states/> (accessed September 1, 2020); Colleen Murphy, “The Movement for Black Lives and Transitional Justice,” in Brandon Hogan, Michael Cholbi, Alex Nadva, and Benjamin Yost, eds., *Philosophers on the Movement for Black Lives* (New York: Oxford University Press, 2021).

fascist tendencies on display in the United States, and indications of democratic backsliding.²³

So what are the normative aims of transitional justice? Transitional justice is distinctive in the aims that its processes are used to pursue and the subsequent criteria that must be satisfied in order to demonstrate that justice has been done in any particular case.²⁴

One set of aims of transitional justice concerns treating the direct participants in such processes—victims and perpetrators in particular—fairly and appropriately. However, the measure of justice, as I have argued elsewhere, is not whether perpetrators suffer punishment proportional to their culpable wrongdoing, as retributive justice demands.²⁵ Transitional justice severs retributive justice's necessary link between the intentional infliction of suffering and accountability. For perpetrators, fair and appropriate treatment means ensuring the conduct in which they engaged is condemned as wrongful, providing conditions in which responsibility for wrongful conduct can be acknowledged, and providing an opportunity for perpetrators to provide reparation to victims. But transitional justice allows for a much broader range of processes that can express condemnation and achieve accountability than criminal trial and punishment.

Nor is the measure of justice whether victims receive proportional compensation for losses incurred as a result of wrongdoing, bringing them back to the status quo ante, as corrective justice demands. Corrective justice takes as a given the status quo ante against which the standard of care for action is measured. But it is precisely that standard which is in need of change in many transitional contexts, given structural inequality and normalized wrongdoing. Part of what processes of transitional justice must do is redefine the baseline for interaction against which wrongful losses are judged.²⁶ Moreover, engaging in precise calculations of proportional losses of victims can be inappropriate in transitional justice contexts because this standard would result in morally troubling comparative judgments of victims.²⁷ For victims, the backward-looking demand of transitional justice means ensuring that it is acknowledged that they were victims of wrongdoing, affirming their status as bearers of human rights and as members of the political community, and providing some form of reparation for harms suffered.

Another reason transitional justice is distinctive is that the purpose of responding to wrongdoing is not limited to fair and appropriate treatment

²³ See, for example, Alexis Benveniste, "Media Shouldn't Normalize 'Fascist' Trumpism, Yale Professor Says," *CNN*, August 30, 2020, <https://www.cnn.com/2020/08/30/media/trump-fascism-reliable/index.html> (accessed Sept. 1, 2020); Aziz Huq and Tom Ginsburg, "How To Lose a Constitutional Democracy," *UCLA Law Review* 65 (2018): 78–169.

²⁴ I argue for this set of common objectives in chapters 3 and 4 of *The Conceptual Foundations of Transitional Justice*.

²⁵ Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 4.

²⁶ Margaret Urban Walker, "Restorative Justice and Reparations."

²⁷ See Pablo de Greiff, "Justice and Reparations," in Pablo de Greiff, ed., *The Handbook of Reparations* (New York: Oxford University Press, 2006), 451–77

of perpetrators and victims. A core, indeed overarching, purpose of responding to wrongdoing is to facilitate fundamental shifts in the manner in which citizens interact with each other and with government officials.²⁸ This transformative aim targets both the pervasive structural inequality that shapes interaction and the conditions that make normalized wrongdoing possible. Transitional justice is a transition to a better state, where that better state is one in which citizens interact with one another and with officials as equals.

The specific areas where transformation is needed will vary across political contexts, but at a certain level of abstraction there are common areas where reform is required.²⁹ Trust is an attitude of optimism about the lack of ill will and the competence of the trusted coupled with an expectation that the trusted individual will prove trust-responsive (will take seriously the fact that he or she is being relied upon by others when he or she deliberates about how to act).³⁰ In contexts where distrust is pervasive and distrust is reasonable, citizens put themselves at risk insofar as they presume competence or lack of ill will on the part of other citizens or officials. For example, the ongoing protests in the United States at the time of writing are a response to the reasonable distrust on the part of Black men and women toward the police; given the normalized killing of unarmed Black men and women by the police, the presumption of lack of ill will is not justified in this case. Transformation requires tending to the conditions that would make trust among citizens and between citizens and officials reasonable. In the case just given, police reform is necessary in order for a default presumption of trust to be reasonable. Part of what such reform requires is captured by the second condition for transformation: (re)building the rule of law. Following Lon Fuller, I understand the rule of law to capture a set of conditions that must be in place for legal rules to be able to govern conduct.³¹ Such conditions include requirements on the form legal rules must take; rules must be clear and promulgated, for example. Importantly, there must be congruence between what rules say and how officials act. Police brutality in many cases constitutes a violation of the congruence requirement insofar as the treatment that is brutal is not permitted according to declared rules.³²

The last area in which relationships are characteristically in need of repair is in terms of the effective freedom or genuine opportunities open to individuals to avoid poverty, participate in institutions, and be recognized as

²⁸ Murphy, *The Conceptual Foundations of Transitional Justice*, chap. 3.

²⁹ For the full argument for these features see Colleen Murphy, *A Moral Theory of Political Reconciliation* (New York: Cambridge University Press, 2010).

³⁰ This general definition is taken from Karen Jones, "Trust as an Affective Attitude," *Ethics* 107, no. 1 (1996): 4–25.

³¹ Lon Fuller, *The Morality of Law*, rev. ed. (New Haven, CT: Yale University Press, 1969); Colleen Murphy, "Lon Fuller and the Moral Value of the Rule of Law," *Law and Philosophy* 24 (2005): 239–62.

³² This is not always the case. In some areas of police reform the practices that are permitted are precisely what need to change.

members of a political community. Establishing threshold levels of genuine opportunities for all citizens to avoid poverty, be recognized as members of a political community, and participate in political and economic institutions are some key objectives. From a capability perspective, enhancing such freedom or opportunities requires looking at what individuals have and what they can do with what they have. Consider being educated. Systematic inequalities in educational attainment may arise as a function of inequality in individual economic resources, in contexts where money is needed to attend or for resources such as uniforms required for school. Or they may be a function of what individuals can do with what they have, because of variation in the availability of quality local educational institutions.

The aims of transitional justice are ambitious. They far exceed the capacity of what any single process (be it a truth commission, criminal trial, or reparations program) could feasibly achieve. What the above account assumes is that against the background of the enormous demands of justice to which normalized wrongdoing and pervasive structural inequality give rise, it is possible to achieve some measure of justice. Though the justice achieved in any specific case by any given process of transitional justice will be imperfect and incomplete, my claim is that when the aims of justice listed above are satisfied in some measure, then we can nonetheless speak of some justice being done. The failure to achieve perfect or complete justice is not the same as a failure to achieve any justice at all.³³

Given the limits of what any process—or even set of processes—of transitional justice are in a position to achieve, compromise becomes a necessity in most cases where transitional justice is pursued.³⁴ Compromise can arise in a number of places. While the pursuit of the two dimensions of transitional justice (altering the structure of interaction and treating perpetrators as well as victims fairly) can be mutually reinforcing, at times tensions may arise between these two general aims.³⁵ In order to achieve a broader understanding of how institutions are in need of reform and the conditions that facilitated normalized wrongdoing, the kind of work a truth commission undertakes may be appropriate. However, such commissions do not achieve the kind of accountability that criminal trials are in a position to

³³ I am grateful to Iskra Fileva for pressing me on whether it is possible to do justice in the cases of interest during discussion of my essay. It is in response to her question that this paragraph was added.

³⁴ On my particular conception of the places of compromise in transitional justice, see Colleen Murphy, "On Principled Compromise: When Does a Process of Transitional Justice Qualify as Just?" *Proceedings of the Aristotelian Society* CXX, no. 1 (2020): 47–70. For other accounts of compromise in transitional justice see Jonathan Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission," *University of Toronto Law Journal* 49, no. 3 (2003): 315–53; Eric Posner and Adrian Vermeule, "Transitional Justice as Ordinary Justice," *Harvard Law Review* 117, no. 3 (2004): 761–825.

³⁵ For examples of the ways in which they can be mutually reinforcing, see chapter 4 of *The Conceptual Foundations of Transitional Justice*. I am grateful to Christopher Freiman for pressing me on whether tension and conflict among the dimensions are possible.

mete out; perpetrators may be held to account by being named and being required to acknowledge and assume responsibility for the wrongs in which they are implicated, but they are not subject to criminal punishment. Compromises can also be necessary when prioritizing which dimension of the structure of interaction to alter. Tackling poverty, reforming security forces, or rebuilding trust may require different processes. Similarly, not all processes equally tend to the demands on perpetrators and moral claims of victims. Criminal trials are more oriented toward the moral demands on perpetrators, while reparations take as their primary subject the interests of victims.

In justifying the particular choices that are made about which wrongs will be the subject of transitional justice processes and which processes will be established, part of what must be established is that the justice achieved entails sacrifices that are principled. In demonstrating that a compromise is justified, various considerations are relevant.³⁶ When evaluating the justifiability of a compromise in any particular case, it is necessary to consider the balance of values reflected in a process, the reasons that are used to undergird the particular choices made, and whether there was indeed a threshold level of attainment in those values that are being balanced.

II. TECHNOLOGY

There are two general ways that technology is changing transitional justice. The first is by changing the character of normalized wrongdoing. The second is by changing the character of transitional justice processes. In this section I discuss each of these changes in turn. I end by articulating the new theoretical questions these changes raise and by considering some specific concerns of justice they generate.

Technology shapes the form that normalized wrongdoing takes in particular contexts. One way technology shapes wrongdoing is by affecting or altering who is vulnerable to being wronged. For example, social media provides a platform in which individuals can share information about their political views or the political events in their society. Repressive regimes follow the Twitter feeds of their citizens and use information gathered as a basis for identifying and then targeting those deemed problematically dissident.³⁷ One case that has received worldwide publicity is that of Saudi Arabian citizen Raif Badawi, who was arrested by the Saudi Arabian

³⁶ See Murphy, "On Principled Compromise."

³⁷ Ellen Nakashima and Greg Bensinger, "Former Twitter Employees Charged with Spying for Saudi Arabia by Digging into the Accounts of Kingdom Critics," *Washington Post*, November 6, 2019, https://www.washingtonpost.com/national-security/former-twitter-employees-charged-with-spying-for-saudi-arabia-by-digging-into-the-accounts-of-kingdom-critics/2019/11/06/2e9593da-00a0-11ea-8bab-0fc209e065a8_story.html (accessed June 16, 2020).

government for his blog activity, tried, and sentenced to ten years imprisonment and a thousand lashes.³⁸

Technology is also altering the form of wrongdoing, expanding possibilities for the violation of human rights.³⁹ Consider the use of AI technology in China's Xinjiang province, nearly half of the population of which are Muslim Uighurs. Through an extreme form of digital surveillance, the Chinese government is targeting citizens for detention in "re-education" camps; there are reports of deaths and torture inside such camps.⁴⁰ The monitoring focuses on identifying the language and religion of individuals, and so markers of ethnic identity. The Muslim Uighur minority is increasingly seen as being the target of a genocidal campaign on the part of the Chinese government, which the AI surveillance is facilitating.⁴¹

Technology also enhances possibilities for official denial of the existence of normalized wrongdoing or of a government's responsibility for wrongdoing that is acknowledged. The existence of state or official denial of wrongdoing is not a new phenomenon. Stanley Cohen in his work articulates three different forms denial of human rights violations may take.⁴² In cases of literal denial, the factual claim that a human rights violation occurred is contested. Government officials may deny the existence of political prisoners, or that a policy exists to target and exterminate dissidents. In interpretive denial, the characterization of behavior or actions is contested; torture is described as regrettable excesses. What some call a systematic policy is instead characterized as the actions of a few rogue agents. The "false positives" scandal in Colombia centered around the killing of civilians by Colombian state security agents, who then dressed civilians up in clothes of rebels to appear as guerillas killed. After initially flatly denying that any civilians were killed (literal denial), the Colombian government later claimed that such killings were never part of a policy but the actions of a few bad actors (interpretive denial), a claim that subsequent investigations disputed.⁴³ Finally, in implicative denial, the moral significance of what one acknowledges is reduced. One method is by displacing

³⁸ Ole Tangen, Jr., "From Badawi to Khashoggi: Freedom of Speech in Saudi Arabia," *DW. Com*, February 26, 2019, <https://www.dw.com/en/from-badawi-to-khashoggi-freedom-of-speech-in-saudi-arabia/a-47405223> (accessed June 16, 2020).

³⁹ I am grateful to an anonymous reviewer for drawing my attention to this particular example and so to the category of interest in this paragraph.

⁴⁰ Patrice Taddonio, "How China's Government is Using AI on its Uighur Muslim Population," *PBS News*, November 21, 2019, <https://www.pbs.org/wgbh/frontline/article/how-chinas-government-is-using-ai-on-its-uighur-muslim-population/> (accessed September 1, 2020).

⁴¹ Rayshan Asat and Yonah Diamond, "The World's Most Technologically Sophisticated Genocide is Happening in Xinjiang," *Foreign Policy*, July 15, 2020, <https://foreignpolicy.com/2020/07/15/uighur-genocide-xinjiang-china-surveillance-sterilization/> (accessed September 1, 2020).

⁴² Stanley Cohen, *States of Denial: Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001).

⁴³ "Extrajudicial Executions," *Colombia Reports*, June 14, 2019, <https://colombiareports.com/false-positives/> (accessed June 16, 2020).

responsibility for wrongdoing that is acknowledged. For example, dissidents, rather than government officials, could be claimed responsible for deaths that are acknowledged. Other methods include minimizing significance of wrongdoing acknowledged by pointing to its routine or normalized character or justifying practices accurately described as all-things-considered justified in the face of a grave threat.

Technology enhances the possibility for these forms of denial. The manipulation of videos can alter the evidence of wrongdoing's occurrence. The possibility of such manipulation can in turn generate opportunities for denying evidence that is presented by challenging the authenticity of photos or videos produced. In an interview with Yahoo! News in 2017, in the midst of the ongoing and brutal civil war in Syria, Syrian President Bashar al-Assad dismissed photographs documenting the torture of political prisoners as "fake news."⁴⁴ Yet as of 2019, "According to the Syrian Network for Human Rights, nearly 128,000 people have disappeared. They are presumed to be either dead or still in custody. The group estimates almost 14,000 individuals have died under torture."⁴⁵ Bots on social media can be used to reinforce narratives of the responsibility of non-governmental actors for any wrongdoing that is recognized, one of many forms counter-protest measures by state actors can take.⁴⁶

At the same time, and precisely because of the power of social media, technology can provide recourse for targeted groups. Indeed, it is in part the effective and influential role of voices on social media that explains the incentives repressive governments have to target those voices in the ways described above. The use of social media can contribute to the organization of social movements and protests contesting repression and injustice. This can generate international awareness of rights violations, suffering, and repression.⁴⁷ It can also enhance internal forces of dissent and internal pressure on a government, leading in some cases to pressure on governments to mitigate repression. The pronounced role of social media during the Arab Spring has been the subject of numerous academic studies.⁴⁸ In the

⁴⁴ Democracy Now, "Inside Syria's Secret Prisons": A Harrowing Account of How Assad's Torture Machine Crushed Dissent," *Democracy Now*, May 16, 2019, https://www.democracynow.org/2019/5/16/inside_syria_s_secret_prisons_a (accessed June 16, 2020).

⁴⁵ *Ibid.*

⁴⁶ Daniel Trotter and Christian Fuchs, eds., *Social Media, Politics and the State: Protests, Revolutions, Riots, Crime and Policing in the Age of Facebook, Twitter and YouTube* (Oxfordshire: CRC Press, January 2015).

⁴⁷ For a general overview see Lucas Melgaço and Jeffrey Monaghan, eds., *Protests in the Information Age: Social Movements, Digital Practices and Surveillance* (Oxfordshire: Routledge, 2018). For an analysis of how this played out in the #MeToo movement see Lesley Wexler, Jennifer Robbennolt, and Colleen Murphy, "#MeToo, Time's Up, and Theories of Justice," *University of Illinois Law Review* 45 (2019): 45–111.

⁴⁸ For a summary of the role of social media in the Arab Spring, see Killian Clarke and Korhan Kocak, "Eight Years after Egypt's Revolution, Here's What We've Learned about Social Media and Protest," *Washington Post*, January 25, 2019, <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/25/eight-years-after-egypts-revolution-heres-what-weve-learned-about-social-media-and-protest/> (accessed June 12, 2020).

United States, videos documenting the killing of Black men and women at the hands of police have been used to generate and bolster support for Black Lives Matter. The specific killings of George Floyd ushered in nationwide protests against systemic racial injustice and demanding police reform.⁴⁹

The second general way technology is changing transitional justice is in how it is altering the character of processes of transitional justice. Technology is changing criminal trials by changing what counts as evidence in ways that overcome common obstacles to gathering sufficient evidence for accountability for mass atrocities via criminal trial and punishment. As scholars such as Nancy Combs have extensively documented, the evidentiary obstacles to successful prosecution of suspected perpetrators of international crimes in a manner that respects procedural requirements are steep.⁵⁰

Testimonial evidence is generally less reliable than other forms of evidence, but is the kind of evidence most available in many transitional contexts. The reliability of testimonial evidence is further reduced in cases of mass trauma, where memory can be less chronological. In many countries, especially in the Global South, the details of evidence needed in courts of law, including the specific date on which an event happened, the location, and the identity of the person of interest, may be recalled or may be difficult to determine if witnesses cannot read maps or estimate distances. In contexts where illiteracy is high and educational attainment minimal, citizens may simply never have learned units of measurement or how to read a map. This makes it difficult for a defendant to challenge the evidence presented against him or her. Moreover, the sorts of evidence that could be used to corroborate eyewitness accounts is less available as a general matter in many developing countries; videotapes, surveillance cameras, emails may all be unavailable in countries or areas of countries where Internet is unreliable or difficult to access or computers are less available and surveillance cameras are not present.

Governments may render investigation futile by destroying evidence so that it is impossible to gather. One example that Nancy Combs references is the order by the Japanese War Ministry to destroy evidence that could implicate troops otherwise subject to the Tokyo War Crimes Trials.⁵¹ Governments may also impede access to evidence that exists.⁵² They can

⁴⁹ Emily Bazelon, "A Discussion about How To Reform Policing," *New York Times*, June 13, 2020, <https://www.nytimes.com/interactive/2020/06/13/magazine/police-reform.html?action=click&module=Top%20Stories&pgtype=Homepage> (accessed June 16, 2020).

⁵⁰ Nancy Armoury Combs, "Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions," *Washington and Lee Law Review* 75, no. 1 (2018): 223–300; Nancy Combs, *Fact-Finding without Facts* (New York: Cambridge University Press, 2010).

⁵¹ Combs, "Deconstructing the Epistemic Challenges," citing Yuma Totani, "The Case Against the Accused," in Yuki Tanaka, Tim McCormack, and Gerry Simpson, eds., *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited*, International Humanitarian Law Series (Leiden, Netherlands: Brill, 2011).

⁵² On this, see Combs, "Deconstructing the Epistemic Challenges."

outright prevent investigation by refusing to grant visas or entry to investigators or by circumscribing where investigators may go.⁵³ Prosecution, but not defense counsel, may be able to gather data. Gathering of evidence may be thwarted in less obvious ways, by failing to guarantee the safety of witnesses, thereby contributing to the refusal of witnesses to testify out of concern for their safety; or by impeding access to certain witnesses altogether. Evidence-gathering can be further impeded by failures to protect or guarantee the security of investigators themselves.

Technology can help overcome these obstacles. Technology can result in an investigation being less reliant upon testimonial evidence by increasing the proportion of non-testimonial evidence. Technology can do this by first enabling the real-time gathering of evidence, guarding against the risk of governmental destruction at a later date, and reducing the reliance of prosecutors on the willingness of governments to grant access to sites or witnesses. For example, apps for phones have been created for victims of sexual assault, who can both create a record of their assault and receive real-time medical advice.⁵⁴ Satellite images are used to map detention sites and areas where torture is conducted. Architectural modeling was used by Amnesty International to reconstruct the Saydnaya detention center in Syria, drawing on interviews with survivors of detention there.⁵⁵

Technology is also expanding the forms that evidence takes. The Office of the Prosecutor of the International Criminal Court in collaboration with Situ Research created a digital platform for the cases involving charges against Mr. Ahmad Al Faqi Al Mahdi for war crimes stemming from the intentional destruction of cultural heritage in Timbuktu, Mali. The platform was

designed to facilitate the organization, analysis, and presentation of evidence documenting the destruction of sites of cultural heritage in Timbuktu, Mali. Combining geospatial information, historic satellite imagery, photographs, open source videos, and other forms of site documentation ... this is the first time such a tool was used in the International Criminal Court and presents a visual and spatial

⁵³ The United States did precisely this when it revoked the visa granted to the Chief Prosecutor of the International Criminal Court, Fatou Bensouda, out of an objection to her investigating war crimes in Afghanistan, including crimes that could implicate American forces. See Marlise Simons and Megan Specia, "U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes," *New York Times*, April 5, 2019, <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html> (accessed June 16, 2020).

⁵⁴ UN Human Rights, "Apps Can Help Fight Impunity for Conflict-Related Sexual Violence," *Medium*, May 10, 2019, <https://medium.com/@UNHumanRights/apps-can-help-fight-impunity-for-sexual-violence-3bc85ef25ff> (accessed June 16, 2020).

⁵⁵ Amnesty International, "Saydnaya: Inside a Syrian Torture Prison," <https://saydnaya.amnesty.org> (accessed June 16, 2020); Amnesty International, "Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria," (London: Amnesty International Ltd, 2017), <https://www.amnesty.org/download/Documents/MDE2454152017ENGLISH.PDF> (accessed June 16, 2020).

evidentiary model in, inter alia, a case where sites of heritage were damaged or destroyed.⁵⁶

Not only is technology changing the functioning of processes like trials, it is expanding participation in and awareness of transitional justice processes. Technology is being used to increase the participation of citizens in these processes of transitional justice. In efforts to create a historical record of conflict and repression, technology is being used to enhance the participation among citizens and members of diaspora communities.⁵⁷ Verdad Abierta, a project of digital journalism in Colombia, aims to contribute to the documentation and production of the historical record of the more than fifty-year conflict in Colombia between the Colombian government and the FARC.⁵⁸ It is a project led by the Fundacion Ideas para la Paz (Foundation Ideas for Peace) think tank and Semana, a leading newspaper in Colombia. According to its statement of purpose, Verdad Abierta's goals are "contributing to the reconstruction, preservation and dissemination of the historical and judicial truth on the Colombian armed conflict and its current transformation."⁵⁹ The goal is to present information about the conflict in a simple, accessible manner to the public and to provide a platform for the collection of information about the conflict that can be used by government officials and lawyers. By increasing the public's knowledge of the conflict and of the project, the hope is to increase the number of citizens participating in the pursuit of transitional justice.

Technology also offers avenues for expanding public awareness, both domestically and internationally, of processes of transitional justice that are ongoing. The 1994 South African TRC became a touchstone for transitional justice discourse and a model for many transitional societies since. One reason why the South Africa TRC was so powerful was because it was the first truth commission to have its proceedings widely broadcast over an extended period of time. TRC hearings were held live on television, and updates on the daily hearings were included in nightly television newscasts. Iconic moments of the hearings (Archbishop Desmond Tutu weeping in response to hearings or mothers weeping as they learned about how their sons were killed by members of the Vlakplaas counterinsurgency unit)

⁵⁶ Situ Research, "ICC Digital Platform: Timbuktu, Mali," <http://www.situresearch.com/works/icc-digital-platform-timbuktu-mali> (accessed June 16, 2020); International Criminal Court, "Al Mahdi Case," <https://www.icc-cpi.int/mali/al-mahdi> (accessed June 16, 2020).

⁵⁷ Eric Wiebelhaus-Brahm, "Truth-Seeking at a Distance: Engaging Diaspora Populations in Transitional Justice Processes," in John Lannon and Edward F. Halprin, eds., *Human Rights and Information Communication Technologies: Trends and Consequences of Use* (Hershey, PA: IGI Global, 2013).

⁵⁸ Verdad Abierta, <https://verdadabierta.com> (accessed June 16, 2020); Jean-Marie Chenou, Lina P. Chaparro-Martinez and Ana Maria Mora Rubio, "Broadening Conceptualizations of Transitional Justice through Using Technology: ICTs in the Context of Justicia y Paz in Colombia," *International Journal of Transitional Justice* 13, no. 1 (2019): 92–104.

⁵⁹ Chenou et al., "Broadening Conceptualizations."

became iconic in part because they were so widely and publicly known and witnessed.

Social media provides avenues for ongoing updates on transitional justice processes occurring around the globe, disseminating information about when, for example, truth commission hearings that are ongoing will occur, as well as general updates on the status of other kinds of processes. For example, in Colombia the Commission for the Clarification of the Truth, Coexistence and Non-Repetition has its own dedicated Twitter account (<https://twitter.com/ComisionVerdadC>) and website (<https://comisiondelaverdad.co>). The Special Jurisdiction for Peace has a Twitter (https://twitter.com/JEP_Colombia), Facebook (<fb.me/ColombiaJEP>) and Instagram account (instagr.am/jep_colombia).

By bringing together insights from the philosophy of technology with the literature on transitional justice, we can generate new questions for research and inquiry. Consider memory. One of the overarching goals of processes of transitional justice is to create a historical record that can become the basis for a shared collective memory of conflict and repression. This is critical for preventing forms of denialism that enable wrongdoing to occur again in the future. But the form of record created, and therefore the kind of collective memory shared, can be shaped by the specific type of technology used to record events and present narratives. Philosophy of technology can help us think critically about the similarities and differences in the kind of shared record and subsequent memory generated by short video clips on social media as opposed to hours-long televised hearings of the kind the South African TRC established. We can then better understand which form(s) of technology are best suited to achieving the purpose(s) of creating and preserving a collective memory of wrongdoing, repression, and conflict. From the other direction, transitional justice scholarship can aid discussions of the moral and legal obligations of owners of social media platforms to regulate the content on their websites, by, for example, helping to identify what kind(s) of false content can facilitate ethnic cleansing or genocide, and so merit especially urgent attention.

In addition to new directions for scholarly inquiry, the changes to transitional justice by new technology raise justice-based concerns, which I end this section laying out. Before turning to the technology-specific concerns, it is important to first explain a general critique in the literature on transitional justice: processes of transitional justice duplicate patterns of marginalization that existed prior to a transition. This reproduction of marginalization is troubling for three reasons.⁶⁰ Epistemically, marginalization reduces understanding and knowledge of the conditions that contribute to wrongdoing and the consequences of wrongdoing. This worry is especially acute when members of marginalized communities are disproportionately represented

⁶⁰ Colleen Murphy, "The Ethics of Diversity in Transitional Justice," *Georgetown Journal of Law and Public Policy* 16 (2018): 821–36.

in the victims of wrongdoing. Morally, marginalization wrongs victims a second time. One of the main political functions of wrongdoing is to deny or reduce political agency of targeted groups; denying victims from members of marginalized communities opportunities for the exercise of political agency through participation in processes of transitional justice. Moreover, processes that lack diversity and marginalize members of certain communities fail to model the kind of political interaction among equals that the aim of societal transformation envisions. In response, there are increasing calls for attention to diversity of actors involved in negotiation of transition, choice of transitional processes, and functioning of processes. Diversity is understood to include women and LGBTQI individuals; members of historically marginalized groups, where which groups are historically marginalized is understood to be context-specific; and subnational actors.

The increasing use of technology in transitional justice risks contributing to the reproduction of the same patterns of marginalization characteristic of conflict and repression themselves in processes of transitional justice. How? Any tool or artifact requires certain conditions to be present before it can be used. A cell phone is a mode of communication only if one has knowledge of how to use it, has effective access to a specific cell phone to use, lives in an area where there is cell phone coverage, and can afford to pay whatever access fees cell phones require. The absence of any one of these conditions, and perhaps others, renders the tool useless for a particular potential user. Similarly, the technological changes being introduced to facilitate transitional justice processes all presuppose the presence of certain conditions within a given community. An app for reporting sexual violence and seeking medical help will be useless for individuals living in communities where Internet access is limited. Yet in many contexts of conflict, particularly in the Global South, Internet access is limited or unevenly present within communities. In 2014, 32 percent of the developing world used the Internet, compared to 78 percent in the developed world.⁶¹ An app for reporting is similarly disproportionately useless for female victims of sexual assault when there exists a gender digital divide. In Least Developed Countries the gender digital gap in 2016 was 31 percent; worldwide, the gap was 12.2 percent in 2016.⁶² Mobile broadband networks are also unevenly available depending on where one lives geographically. Only 67 percent of the rural population globally resides in an area with mobile-cellular networks, compared with 84 percent of the total global population.⁶³

The design of apps themselves can contribute to marginalization. Where multiple languages are spoken within a society, the language an app is

⁶¹ "The Global Digital Divide," <https://courses.lumenlearning.com/culturalanthropology/chapter/the-global-digital-divide/> (accessed June 16, 2020.)

⁶² ICT Data and Statistics Division, "ICT Facts and Figures," (International Telecommunication Union, 2016), <https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2016.pdf> (accessed June 17, 2020).

⁶³ *Ibid.*

designed in can have implications for who is able to effectively use it. The coding of events included in any database will impact who will qualify as a “perpetrator” and which experiences will count as assault. Insofar as coding reflects the views of who was or can be a victim, making it difficult to see or take seriously the harms targeting specific groups, coding and technology will simply reproduce invisibility.⁶⁴ Rape has been a recurrent feature of conflict, yet was not defined in international criminal law or recognized as a tool for genocide until the International Criminal Tribunal for Rwanda established in 1995.⁶⁵

When the documentation of wrongdoing and creation of a historical record of conflict relies upon technology to which not all have similar access and is designed in ways that make it difficult if not impossible for certain wrongs or victims to be recognized, the picture of wrongdoing and historical record of conflict that results will be distorted. It will not accurately reflect which individuals and communities were harmed or affected by conflict and what the scale of certain kinds of wrongdoing was. Not only will there be distortions, but the particular distortions on which I am focusing will be such that they reproduce the patterns of marginalization which were present during periods of conflict and repression and which transitional justice processes ideally contribute to helping to overcome. Consider Colombia. The more than fifty-year conflict disproportionately impacted populations in rural areas, and the Colombian peace process is predicated upon an explicit commitment to gender equity. Yet given the figures above about the rural and gender-based digital divides, we have reason to doubt the effective opportunity open to victims from rural areas and women to participate in the digital journalism project like *Verdad Abierta*. Not only does exclusion distort the historical record, it also denies victims from marginalized communities opportunities for the exercise of political agency and fails to model the kind of relationships transitional justice processes ideally help foster.

These potential sources of injustice underscore the need for a critical lens to understand both the potential benefits and potential risks when developing and implementing technology for the sake of transitional justice. Philosophy of technology can guide thinking about how to respond to the dual roles that technology plays in wrongdoing: enabling more hideous ways of committing wrongdoing, while at the same time reducing the capacity of a state to commit wrongdoing without detection or scrutiny by virtue of the monitoring it allows on the part of both citizens and international actors.⁶⁶ Technology has the potential to reduce the monopoly

⁶⁴ On this point see Robin West, “Jurisprudence and Gender,” *University of Chicago Law Review* 5, no. 1 (1988): 1–72.

⁶⁵ United Nations International Residual Mechanism for Criminal Tribunals, “Legacy Website of the International Criminal Tribunal for Rwanda,” <https://unictr.irmct.org/en/tribunal> (accessed June 17, 2020).

⁶⁶ Many thanks to Carmel Pavel for making this point during discussion of my essay.

a state might otherwise have over the production and dissemination of information at the same time that it can enhance the ability of the state to monitor its citizens. Frameworks in the philosophy of technology that make explicit the values implicated in a design can be critical in ensuring that the risks of marginalization and distortion are blunted.⁶⁷

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⁶⁷ For an overview of value-based design, see Franssen et al., "Philosophy of Technology."