

Transitional Justice for Historical Injustice

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I. Introduction

Historical injustice (political violence, for our purpose), is *temporally distant* and sometimes *temporally extended*. The transatlantic slave trade and colonialism are two prominent examples; violence in the past reverberates into the present. Descendants of enslaved Africans in the Americas are subjected to structural, state, and interpersonal violence and discrimination, and citizens of former European colonies still pay the consequences of land and labor exploitation, and experience the after-effects of being denied self-determination and self-governance.

This chapter explores possibilities for transitional justice for historical political violence, with an emphasis on racialized violence. Throughout, we address both slavery and colonialism. While some scholarly and public discussions often separate the two, discussing each in isolation, this separation is a mistake. Slavery was one of the engines of colonialism; the so-called “New World” was built through the labor of enslaved peoples on stolen Indigenous land. Part of our argument draws attention to the problems that arise when states try to divide history into discrete periods and pursue piecemeal transitional justice. We begin the chapter by discussing some of the reasons historical injustice should be included in transitional justice. We then turn to the challenges of doing so. Finally, we explore how transitional justice efforts might be re-imagined to better respond to historical injustice.

II. Arguments for Including Historical Injustice in Transitional Justice

Since its inception, transitional justice has characteristically focused on temporally discrete wrongs that occurred within the living memory of members of a political community. For example, the international criminal tribunals in Nuremberg, Germany and Tokyo, Japan addressed war crimes, crimes against humanity, and crimes against peace committed during the Second World War. The United States, one of the victors, four decades later awarded reparations to persons of Japanese ancestry who had been relocated and interned as part of the U.S. government response to the attack on Pearl Harbor and the then-still escalating global conflict. (Japan, by contrast, continues to resist redress claims for sexual slavery by its forces during the War.) In the Southern Hemisphere, the South African Truth and Reconciliation Commission (TRC), established in 1995, focused on killings, abduction, torture, and severe ill-treatment during apartheid, from 1960 to 1994. More recently, in 2021, Germany agreed to pay €1.1 billion to Namibia for the Herero-Nama genocide, which lasted from 1904 to 1908. Also in 2021, the University of Aberdeen in Scotland returned to Nigeria a Benin bronze statue that had been looted by imperial forces. Museums in Cambridge and Newcastle have also repatriated Benin Bronzes, as have museums outside of the United Kingdom – the Metropolitan Museum of Art in New York, for example, and all museums in Germany.

There are three widely recognized limitations to focusing on temporally discrete and temporally close wrongs. First, failing to engage with slavery and colonialism – and their legacies – risks neglecting the

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most egregious forms of wrongdoing in human history.² To the extent that transitional justice is concerned with redressing widespread violence and abuse for its own sake, it must be concerned with slavery and colonialism. While there are few living direct perpetrators and victims of colonialism and slavery, millions are affected by their unaddressed legacies,³ whether they benefit or suffer from deprivations causally connected to slavery and colonialism.

Second, the narrative of a particular time period that emerges from transitional justice is distorted; a full picture of the truth does not emerge when we consider only wrongs that are temporally discrete and temporally close.⁴ Take apartheid as an example. One prominent criticism emphasizes how the mandate of the TRC put apartheid, a crime against humanity itself, as background context rather than subject of scrutiny. The ordinary violence of apartheid was never addressed; only the extraordinary violence used to maintain and contest it was.⁵ In addition, more attention was paid to physical repression than to bureaucratic and economic repression – the consequences of which still make South Africa a racially stratified and unequal society, even with Black political power.⁶

Even this focus is too narrow from the perspective of historical injustice. Apartheid did not operate in a historical vacuum. It emerged from and was shaped by the settler-colonial period that preceded it.⁷ A longer temporal lens is needed to capture the historical roots of apartheid and the ‘truth’ about the wrongdoing that occurred during the discrete period of apartheid. The continuities of apartheid with the periods preceding it, and the ways unaddressed historical injustice compound contemporary injustice, were erased by the temporally limited nature of the TRC’s inquiry. South Africa is not unique in this redirect. Kenya, for example, missed the opportunity to interrogate British colonial rule and its after-effects post-Independence. The same can be said of countries in Central and South America. For

² Margaret Moore, “Justice and Colonialism,” *Philosophy Compass* 11, no. 8 (2016): 447-461; BH. V. N. Lakshmi, and Zainab Abdulaziz al Suhaibani, “A Glimpse at the System of Slavery,” *International Journal of Humanities and Social Sciences* 5, no. 1 (2016): 211-216; Vittorio Bufacchi “Colonialism, Injustice, and Arbitrariness,” *Journal of Social Philosophy* 48, no. 2 (2017): 197-211; Massimo Renzo, “Why Colonialism is Wrong,” *Current Legal Problems* 72, no. 1 (2019): 347-373.

³ William E. Cross, “Black Psychological Functioning and the Legacy of Slavery,” in Yael Danieli (ed.), *International Handbook Of Multigenerational Legacies of Trauma* (Springer, 1998), pp. 387-400; Gilbert Pwiti and Webber Ndoro, “The Legacy of Colonialism: Perceptions of the Cultural Heritage in Southern Africa, with Special Reference to Zimbabwe,” *The African Archaeological Review* 16, no. 3 (1999): 143-153; Mahmood Mamdani, “Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism,” *Comparative Studies in Society and History* 43, no. 4 (2001): 651-664; Arif Dirlik, “Rethinking Colonialism: Globalization, Postcolonialism, and the Nation,” *Interventions* 4, no. 3 (2002): 428-448; Julie Cassidy, “The legacy of colonialism,” *American Journal of Comparative Law* 51 (2003): 409-455; Graziella Bertocchi and Arcangelo Dimico, “Slavery, Education, and Inequality,” *European Economic Review* 70 (2014): 197-209.

⁴ Rosemary Nagy, “Transitional Justice as Global Project: Critical Reflections,” *Third World Quarterly* 29, no. 2 (2008): 275-289; Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194-216; Zinaida Miller, “Temporal Governance: The Times of Transitional Justice,” *International Criminal Law Review* 21, no. 5 (2021): 848-877; Thomas Obel Hansen, “The Multiple Aspects of ‘Time’ Rendering Justice for War Crimes in Iraq,” *International Criminal Law Review* 21, no. 5 (2021): 878-904.

⁵ Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC),” *diacritics* 32, no. 3/4 (2002): 33-59.

⁶ Brandon Hamber, *Who Pays for Peace?: Implications of the Negotiated Settlement for Reconciliation, Transformation and Violence in a Post-Apartheid South Africa* (Catholic Institute for International Relations, 2002); Josh Bowsher, “The South African TRC as Neoliberal Reconciliation: Victim Subjectivities and the Synchronization of Affects,” *Social & Legal Studies* 29, no. 1 (2020): 41-64.

⁷ Robin D. G. Kelley, “The Rest of Us: Rethinking Settler and Native,” *American Quarterly* 69, no. 2 (2017): 267-276; Lorenzo Veracini and Rafael Verbuyst, “South Africa’s Settler-Colonial Present: Khoisan Revivalism and the Question of Indigeneity,” *Social Dynamics* 46, no. 2 (2020): 259-276.

instance, in Colombia, truth commissions have focused on the post-colonial period. Take, also, Timor-Leste in Southeast Asia, where the truth commission emphasized political violence during the Indonesian occupation, from 1974 to 1999. This is despite the fact that Portugal's departure in 1974 was the inciting incident for Indonesia to invade Timor-Leste.

Third, transitional justice will be self-defeating unless and until historical injustices like slavery and colonialism are confronted. The legacy of colonialism and slavery continues to be reflected in the national and international institutional order we inhabit.⁸ As Olúfẹmi O. Táíwò puts it, “The historical patterns and events that jointly constitute the history of colonialism and slavery involved hundreds of millions of people, scattered across all of the world’s inhabited continents, and have taken place over five centuries,”⁹ Transatlantic slavery and colonialism quite literally built the modern world, and the inequalities and injustices they left behind in their wake uphold this order.

Despite their differences, there are some widely accepted ways that legacies of colonialism and slavery shape the contemporary situation of peoples globally. Contemporary wealth gaps – both within national communities, along racial lines and, globally, between formerly colonized and formerly colonizing countries – are intergenerational consequences of resource and human capital extraction and exploitation, from the enslaved or colonized to slave-holding individuals and colonizing communities.¹⁰

Contemporary institutionalized repression and oppression often reflect similarity of function, even if the distinctive institutional forms of slavery and colonialism have formally ended.¹¹ Both passport regimes and police violence shape differential freedom of movement in the global order and within communities.¹² This mirrors the freedom of movement denied to colonial subjects during the colonial era and enslaved peoples during the transatlantic slave trade and subsequent chattel slavery. Centering knowledge traditions of descendants of colonized and slaveholding communities is also a subject of contention.¹³ Objections to the historical and contemporary devaluing of knowledge traditions of descendants of colonized and enslaved peoples – as well as of indigenous communities on whose stolen lands European

⁸ Avidit Acharya, Matthew Blackwell, and Maya Sen, “The Political Legacy of American Slavery,” *The Journal of Politics* 78, no. 3 (2016): 621-641; Graziella Bertocchi, “The Legacies of Slavery in and out of Africa,” *IZA Journal of Migration* 5, no. 1 (2016): 1-19; Táíwò, Olúfẹmi O. *Reconsidering Reparations* (Oxford University Press, 2022); Yuvraj Joshi, “Racial Transition,” *Washington University Law Review* 98 (2020): 1181-1256; Yuvraj Joshi, “Racial Transitional Justice in the United States,” in Matiangai Sirleaf (ed.), *Race and National Security* (forthcoming, 2023).

⁹ Olúfẹmi O. Táíwò, “Reconsidering Reparations: The Movement for Black Lives and Self-Determination,” in Brandon Hogan, Michael Cholbi, Alex Madva, and Benjamin S. Yost, eds. *The Movement for Black Lives: Philosophical Perspectives* (Oxford University Press, 2021), pp. 93-115.

¹⁰ Anne-Charlotte Martineau, “A Forgotten Chapter in the History of International Commercial Arbitration: The Slave Trade's Dispute Settlement System,” *Leiden Journal of International Law* 31, no. 2 (2018): 219-41; Kelebogile Zvobgo and Meredith Loken, “Why Race Matters in International Relations,” *Foreign Policy* 237 (2020): 11-13.

¹¹ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 10th ed. (New Press, 2020); Isabel Wilkerson, *Caste: The Origins of our Discontents* (Random House, 2020).

¹² On passports and freedom of movement see E. Tendayi Achiume, “Racial Borders,” *Georgetown Law Journal* 110 (2021): 445.

¹³ Robbie Shilliam, “Race and Racism in International Relations: Retrieving a Scholarly Inheritance,” *International Politics Reviews* 8, no. 2 (2020): 152-195; V Spike Peterson, “Critical Privilege Studies: Making Visible the Reproduction of Racism in the Everyday and International Relations,” *Security Dialogue* 52, no. 1_suppl (2021): 17-27; Ilaria Carrozza and Lina Benabdallah, “South-South Knowledge Production and Hegemony: Searching for Africa in Chinese Theories of IR,” *International Studies Review* 2022 (online first); Bianca Freeman, D. G. Kim, and David A. Lake, “Race in International Relations: Beyond the ‘Norm Against Noticing.’” *Annual Review of Political Science* 25 (2022): 175-196.

empires took root – ground calls to decolonize curricula and disciplines.¹⁴ There cannot be social transformation and recognition of the full dignity and equality of victims if the colonial roots of the current global and national orders are not addressed.¹⁵

III. Challenges of Transitional Justice for Historical Injustice

While the normative importance of including historical injustice within transitional justice is clear, how to do so is less straightforward. In this section, we discuss some of the core challenges in using transitional justice processes to deal with historical injustice.

A. Establishing responsibility

Transitional justice typically establishes causal connections between past (and usually recent) injustice and present suffering. Particular emphasis is placed on connecting political or military leaders in wrongdoing and holding them accountable. Indeed, the premise of transitional justice is anchored in the hope that emblematic accountability for these leaders will contribute to political transformation and peace, or at least remove perpetrators from repeating such violations.

Criminal trials and civil lawsuits forge causal links between the particular actions of defendants and the subsequent harm and loss victims suffered. Underlying these practices is a particular picture of liability: an individual is responsible for their actions and the consequences of those actions. In other words, a defendant faces charges of engaging in certain criminal acts. In the case of acts that are collective in some respect (either by targeting a group with an intention to eliminate, as in the case of genocide, and/or by being committed by a collective group, such as a military unit), criminal law scholars and criminal lawyers seek to establish the right kind of link between an individual's actions and wrongdoing.

An ongoing debate among international criminal law scholars challenges the idea that existing legal doctrine provides an adequate basis for holding individuals to account for collective crimes.¹⁶ According to the doctrine of joint criminal liability, an individual may be liable for crimes if they are the physical perpetrator of the crime in question *or* participated in bringing to fruition a common design or purpose. Some scholars problematize the adequacy of joint criminal enterprise by questioning whether it has a sufficient threshold for distinguishing the kind of contribution an individual must make to be liable for crimes committed by others that the individual may not have intended, though were foreseeable. The broadness of scope is in tension with the ideal of individual culpability, according to which one is held account for what one, and not others, are responsible for doing.

¹⁴ Gurminder K. Bhambra, Yolande Bouka, Randolph B. Persaud, Olivia U. Rutazibwa, Vineet Thakur, Duncan Bell, Karen Smith, Toni Haastrup, and Seifudein Adem. “Why Is Mainstream International Relations Blind to Racism?” *Foreign Policy*, 3 July 2020, foreignpolicy.com/2020/07/03/why-is-mainstream-international-relations-blind-to-racism-colonialism (Accessed 15 November 2020); Zvobgo and Loken, “Why Race Matters in International Relations.”

¹⁵ Nigel C. Gibson, *Fanonian Practices in South Africa From Steve Biko to Abahlali base Mjondolo*. Palgrave Macmillan, 2011; Nigel C. Gibson, “What Happened to the ‘Promised Land’? A Fanonian Perspective on Post-Apartheid South Africa,” *Antipode* 44, no. 1 (2012): 51-73.

¹⁶ Jennifer Martinez and Allison Danner, “Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law,” *California Law Review* 93 (2005): 75-169; JD Ohlin, “Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,” *Journal of International Criminal Justice* 5 (2007): 69-90; Natalia Perova, “Stretching the Joint Criminal Enterprise Doctrine to the Extreme: When Culpability and Liability Do Not Match,” *International Criminal Law Review* 16, no. 5 (2016): 761-795; Pedro Caeiro and Joana Costa, “Joint Criminal Enterprise on the Decline: A Step Further in the ‘Self-Becoming’ of International Criminal Law?” *International Criminal Law Review* 19, no. 2 (2019): 214-233.

The link between individual culpability and wrongdoing also exists in other processes like truth commissions.¹⁷ While it is common for commissions to investigate the underlying conditions that enabled patterns of human rights violations to occur and establish patterns of harm and systems of responsibility over time, for many, a key focus remains on identifying perpetrators and victims. Implicit in this process is a similar picture of individual culpability as the one that underpins criminal justice processes. Identifying victims is also predicated on direct, rather than indirect, harm, usually to one's person.

While there is widespread acknowledgement, within academia at least, of how legacies of colonialism and slavery continue to shape the contemporary world, including historical injustices in the purview of transitional justice processes is a challenge. It creates tension with the picture of individual culpability discussed above. Establishing the precise causal connections between historical injustice and present suffering is significantly more complicated than establishing the connections between wrongdoing and suffering in the "recent past" that processes of transitional justice normally try to establish.¹⁸

For one thing, given the passage of time, the direct victims and perpetrators of colonialism and slavery, apart from a few cases, would not be the subjects of transitional justice. Consider, for example, reparations and efforts to calculate the legacies of slavery and colonialism. It is the descendants of the enslaved and enslavers and of colonial subjects and colonial leaders – as well as the members of political communities who are harmed by or benefit from the legacies of colonialism and slavery – that would undertake the process. They are connected to direct perpetrators and victims but are not themselves. Regarding slavery in the United States, what Michael Rothberg calls "implicated" subjects are temporally and often spatially separated from victims and perpetrators.¹⁹

In addition, transitional justice processes and scholarship increasingly include categories of actors beyond victims and perpetrators: bystanders, beneficiaries, corporations, religious bodies, collaborators, and individuals who are victims and perpetrators at once.²⁰ But the temporal and spatial dimension of implicated subjects in slavery differs from that of direct collaborators and bystanders of more recent wrongs.

B. *Dealing with time*

Another challenge in establishing causal links between historical injustices and the present is the intervening periods of injustice that mediate between colonialism and slavery. There is thus a kind of institutional continuity that is maintained even amidst institutional change and disruption. Jim Crow, the period of racial apartheid in the U.S. South, between the American Civil War and landmark civil rights legislation and jurisprudence in the 1960s, is a helpful example. It is also recognized that unaddressed harms have compounding effects over time and intergenerationally.²¹ These factors make efforts to

¹⁷ Kelebogile Zvobgo, "Demanding Truth: The Global Transitional Justice Network and the Creation of Truth Commissions," *International Studies Quarterly* 64, no. 3 (2020): 609-625. Kelebogile Zvobgo, *Governing Truth: NGOs and the Politics of Transitional Justice* (Unpublished manuscript, 2022).

¹⁸ Claire Greenstein, "Patterned Payments: Explaining Victim Group Variation in West German Reparations Policy," *International Journal of Transitional Justice* 14, no. 2 (2020): 381-400.

¹⁹ Michael Rothberg, *Implicated Subjects: Beyond Victims and Perpetrators* (Stanford University Press, 2019).

²⁰ See, for example, Juan Espindola, *Transitional Justice After German Reunification: Exposing Unofficial Collaborators*. Cambridge University Press, 2015; Luke Moffett, "Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparations Mechanisms," *International Journal of Transitional Justice* 10, no. 1 (2016): 146-167; Juan Espindola and Leigh Payne (eds.), *Collaboration in Authoritarian and Armed Conflict Settings* (Oxford University Press, 2022); Táíwò, *Reconsidering Reparations*.

²¹ Táíwò, *Reconsidering Reparations*; Bernard Boxill, "A Lockean Argument for Black Reparations," *Journal of Ethics* 7 (2003): 63-91; Terry Mitchell, Courtney Arsen, and Darren Thomas, "Colonial Trauma: Complex,

disentangle the particular consequences of slavery and colonialism, or of subsequent periods like Jim Crow, exceptionally complicated.

Furthermore, some of the kinds of evidence typically brought to bear to prove wrongdoing and the identities of victims and perpetrators (e.g., forensic material, testimony of witnesses)²² may both be less available and less relevant for understanding the intergenerational consequences of historical injustices like slavery, even if the initial abuses are themselves well documented.

To illustrate these points concretely, life insurance companies offered enslavers coverage for killed and injured enslaved persons; historical injustice presses us to ask how that fact implicates insurance companies today. Beyond enslavers, people sold, traded, bought, and enjoyed products made partially or wholly by enslaved people, not only domestically but also internationally. Historical injustice requires us to ask what this fact means today for direct descendants of slaveholders, descendants of the non-slaveholding citizens who supported or failed to resist the legal infrastructure of slavery, and more recent immigrants to the United States racialized as white.²³ Spatially, the global economy connects textiles woven in South Asia using cotton grown in the Americas.²⁴ These patterns of interconnection are, moreover, products of the colonial era. Transitional justice challenges us to disentangle the causal threads linking consumption patterns in the Global North with production patterns and exploitation in the Global South. This has implications for the shape of transitional justice efforts. For instance, the plan to grant the formerly enslaved forty acres and a mule following the U.S. Civil War was a much different proposal than current ones to award their descendants restitution some one hundred and fifty years later.

C. Contending with existing models

Despite these complications, there have been attempts to untangle these threads, both theoretically and empirically, with significant emphasis on slavery in the United States.²⁵ Unlike many discussions of reparations in transitional justice contexts, discussions of reparations for slavery in the United States are grounded in an essentially corrective justice framework.²⁶ Wrongdoing that generates duties of

Continuous, Collective, Cumulative and Compounding Effects on the Health of Indigenous Peoples in Canada and Beyond,” *International Journal of Indigenous Health* 14 (2019): 74-94.

²² Kelebogile Zvobgo, “Designing Truth: Facilitating Perpetrator Testimony at Truth Commissions,” *Journal of Human Rights* 18, no. 1 (2019): 92-110.

²³ For a classic analysis, see Boxill, “A Lockean Argument for Black Reparations”; Vincene Verdun, “If the Shoe Fits, Wear it: An Analysis of Reparations for African Americans,” *Tulane Law Review* 67 (1993): 597-694. For a skeptical reaction to these arguments see Jeremy Waldron, “Superseding Historical Injustice,” *Ethics* 103 (1992): 4-28.

²⁴ John Francis Maxwell, “The Catholic Church and Slavery,” *Law & Justice: The Christian Law Review* 158 (2007): 23; Sven Beckert, *Empire of Cotton: A Global History* (Vintage, 2015); Janna Thompson, *Should Current Generations Make Reparation for Slavery?* (John Wiley & Sons, 2018); Catherine Hall, “Doing Reparatory History: Bringing ‘Race’ and Slavery Home,” *Race & Class* 60, no. 1 (2018): 3-21; Vincent Druliolle and Roddy Brett, “Introduction: Understanding the Construction of Victimhood and the Evolving Role of Victims in Transitional Justice and Peacebuilding,” in Vincent Druliolle and Roddy Brett (eds.), *The Politics of Victimhood in Post-Conflict Societies* (Palgrave Macmillan, 2018), pp. 1-22.

²⁵ William Darity and A. Kirsten Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (University of North Carolina Press, 2020).

²⁶ For an overview of corrective justice see Arthur Ripstein, “Theories of the Common Law of Torts,” *The Stanford Encyclopedia of Philosophy* (Summer 2022 edition); Edward N. Zalta (ed.), URL = plato.stanford.edu/archives/sum2022/entries/tort-theories. For critical views of corrective justice in transitional contexts see Margaret Urban Walker, “Restorative Justice and Reparations,” *Journal of Social Philosophy* 37 (2006): 377-395; Pablo de Greiff, “Justice and Reparations,” in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), pp. 451-77; Colleen Murphy, *The Conceptual Foundations of Transitional Justice* (Cambridge University Press, 2017).

compensation is normally defined with reference to a baseline standard of treatment that the victim was owed. The goal of compensation is to return individuals to the status quo ante, the situation they would have been in, had the wrongdoing not occurred. This baseline allows individuals to calculate what changed, and specifically what was lost, as a result of harm.

To the extent that these attempts are grounded in a view that the aim of reparations is to bring descendants of the enslaved to the situation they would have been in had slavery not occurred, they face a fatal obstacle in defining the baseline.²⁷ In the case of the slavery, there does not exist a comparative class unaffected by this wrongdoing. There is no prior situation that exists untouched by slavery or colonialism. All contemporary individuals, descendants of the enslaved and of slave holders, of the colonized and colonizing, are products of the global order that slavery and colonialism produced. The opportunities and life chances of contemporary white and Black Americans, of Black Americans and Africans, are themselves a product of those histories.

To be sure, within the transitional justice literature, reparations are not generally conceptualized from within a corrective justice framework. Reparations are not understood to be returning victims to a status quo ante situation. Fundamentally, reparations are about redressing harm victims suffer *and* about helping to transform and solidify the baseline standards for conduct towards victims moving forward.²⁸ Beyond a different conception of what reparations are for, transitional justice scholarship recognizes that there are moral reasons to not be precise in calculating harms among victims because the comparative analysis it entails is morally repugnant.²⁹ Reparations take multiple forms, material and symbolic. They have as goals repairing the dignitary, psychosocial, political, and material harms victims of wrongdoing suffer.³⁰

The challenges, discussed above, to the inclusion of historical injustices like slavery and colonialism in transitional justice does not imply that the project should not be attempted. Rather, they invite a re-thinking of transitional justice. They suggest a reduced emphasis on criminal trials and the background of standards of proof they assume, a re-imagining of the kinds of narratives a truth commission should be tasked with establishing and the standards of proof against which they are evaluated, and a re-envisioning of what reparations should aim to do. We explore possible new directions next.

IV. New Models for Redress

A. Why historical injustice (still) should be addressed through transitional justice

The story of colonialism and of slavery is the story of structural injustice at the global scale. It is the story of, in the case of slavery, the denial of the of the enslaved and the corresponding of moral rights the enslaved. The enslaved lived lives predicated on the denial of any freedom to determine where they lived, worked, with whom they would be in relationships; subject to brute and often recurring forms of violence; enforced grueling labor without compensation; and the absence of any legal standing and so recourse for injuries and injustice. Colonialism, meanwhile, is the denial of self-determination over one's life and over ancestral and customary lands. Though slavery ended, the descendants of enslavers and their co-racials

²⁷ Táíwò, *Reconsidering Reparations*.

²⁸ On transformative reparations see Margaret Urban Walker, "Restorative Justice and Reparations," *Journal of Social Philosophy* 37, no. 3 (2006): 377-395; de Greiff, "Justice and Reparations."

²⁹ Claire Moon, "Who'll Pay Reparations on My Soul? Compensation, Social Control and Social Suffering," *Social & Legal Studies*, 21, no. 2 (2012): 187-199; Bertocchi Dimico, "Slavery, Education, and Inequality."

³⁰ Ruth Rubio-Marin and Pablo de Greiff, "Women and Reparations," *International Journal of Transitional Justice* 1, no. 3 (2007): 318-337; Margaret Urban Walker, "Truth Telling as Reparations," *Metaphilosophy* 41, no. 4 (2010): 525-545.

are still in an elevated position, relative to the descendants of the enslaved. And while colonialism ended, former colonial powers still exert outsized political economic power and control over their former colonial subjects.

With white supremacy as their foundation and animating logic, however, the legacies of colonialism and slavery (and what is required to redress them) are denied in order to buttress the existing , political, economic, and social order. The process by which this happens is both explicit and implicit, conscious and subconscious. Assumptions about Black criminality, Indigenous idleness, and Brown illegality, all of them devised through a white supremacist logic, allow, invite, and sustain the marginalization of and violence against communities of color in countries like the United States. More globally, assumptions that Global South countries are poorly run, politically and economically, because of tyrannical or incompetent leaders elides both the colonial roots of modern problems and permits primarily white-majority countries in the Global North to lay blame at the feet of countries in the Global South, and continue to exploit their lands and peoples.

The indefensible violence in the past (and present) structures myriad contemporary relationships and failing to address wrongdoing effectively normalizes it. Radical transformation is required: the basic structure of interaction must be changed so that inequality is not further entrenched and conditions that facilitate normalized wrongdoing are altered. Thus, descendants of the enslaved and of the colonized call for truth and justice. Their demands are no different than calls for acknowledgment and redress in the aftermath of internal armed conflicts, authoritarian governments, and other periods of repression.

To deny in principle and to say nothing in practice of these communities' demands, because of the non-transitional nature of transitional justice for historical injustice, transgresses fundamental norms about protecting and preserving human life, rights, and dignity. This is all the more problematic since, as we have described, the past is not really passed but, rather, influences the present. Moreover, colonialism and slavery are properly the focus of transitional justice because they exemplify two key features of the pursuit of transitional justice and, as a result, raise the same core question that transitional justice takes up. That question is: what constitutes the just pursuit of societal transformation?³¹ That question becomes necessary to pursue against a background of two core conditions: pervasive structural inequality and normalized wrongdoing.³²

Pervasive structural inequality is focused on the basic terms structuring interaction among political actors such as citizens and officials.³³ The subject of interest is not the discrete actions or interactions of particular individuals, but how interaction is structured, the underlying justifications for that structuring, and the material consequences of those structures.³⁴ Institutional rules and norms play a critical role in defining who is permitted, required, or prohibited from acting in certain ways with respect to a defined group (e.g., all human beings, fellow citizens, state officials). There are also formal and informal penalties for violating the rules and norms. For example, legally codified political rules specify who is eligible to serve in political office and the process by which political offices will be filled, such as by appointment or

³¹ For core cases of transitional justice see Murphy, *Conceptual Foundations of Transitional Justice*. For colonialism and slavery in particular see Táíwò, *Reconsidering Reparations*.

³² In Murphy four circumstances of transitional justice are laid out. For purposes of understanding why historical injustice can fit within the framework of transitional justice it is only necessary to discuss the first two such circumstances.

³³ Murphy, *Conceptual Foundations of Transitional Justice*.

³⁴ These aspects of pervasive structural inequality are relevant also in Iris Marion Young's discussion of structural injustice. See Iris Marion Young, *Responsibility for Injustice* (Oxford University Press, 2011); Iris Marion Young, "Responsibility and Global Justice: A Social Connection Model," *Social Philosophy and Policy* 23 (2006): 102-130. Young links structural injustice to a form of domination that is present in some, but not necessarily all, cases of interest to structural inequality.

by election. Political rules also outline who is eligible to participate in either route to appointment. Penalties for violating rules of eligibility can include an individual being disqualified for running for office because s/he fails to meet the eligibility criteria. Coexisting with legally codified political rules can also be informal social norms among political elites and political officials. For example, while civil service position might be a form of at will employment, existing norms might constrain officials from firing civil servants for partisan reasons.³⁵ Informal social norms may constrain possibilities within institutions. For example, although not formally barred from participating in elections or holding certain appointments, social norms may shape and, when pernicious undercut, perceptions of the members of certain gender(s), ethnicities, or race(s) as qualified candidates.

Unequal terms of interaction differentially constrain the genuine opportunities open to members of different social groups (1) to do and become things of value and (2) to shape the terms of interaction themselves. Constraints can consist in upfront obstacles to pursuing certain opportunities. Constraints can also stem from the negative consequences from pursuing opportunities. Threats of vigilante violence if someone contests unjust wages, the prospect of imprisonment if someone flouts legal demands, or social isolation and ostracism are some of the forms such consequences might take. What is critical for cases of structural inequality created by historical injustice is that the negative consequences do not fall equally on all members of a community; the same choice made by an individual is not subject to the same anticipation of negative consequences.

Structural inequality matters because of how it shapes life prospects, the range of things an individual can feasibly do or become throughout her lifetime. A fundamental way structural inequality shapes life consequences is through the material, distributional consequences of unequal rules and norms. Disproportionately high rates of poverty, hunger, and illness, as well as reduced life expectancy and lower rates of wealth accumulation are some of the material consequences of inequality. To take but one example, a cumulative consequence of apartheid was that at its end, South Africa became one of the most unequal countries globally along racialized lines in terms of wealth distribution, life expectancy, infant mortality rates.³⁶

Finally, underpinning structural inequality is always animating ideologies that implicitly justify the institutional order. As Catherine Lu writes in the context of colonialism, the theory of civilization used to justify colonial expansion was based on a racialized conception of who counted as civilized and who qualified as in need of civilization.³⁷ The equation of civilized with white and European rationalized the imposition of colonial rule upon the non-white and non-European peoples that colonizing countries violently controlled and ruled. A similar logic undergirded slavery and yes effects are tangibly felt today, both in places and in systems.³⁸

Locations where enslaved individuals lived in higher concentrations in 1860 correlate with modern-day racialized economic inequality and poverty.³⁹ In these places, there is evidence that racist attitudes persist too – contemporary hate crime rates are also positively correlated with the counties where slavery was

³⁵ Many of the criticisms of President Donald Trump during his term focused on his open flouting of long-standing norms that were not legally codified, for instance diplomatic communication and non-discrimination. On this point, see Diana Panke and Ulrich Petersohn, “President Donald J. Trump: An Agent of Norm Death?” *International Journal* 72, no. 4 (2017): 572-579.

³⁶ Leonard Thompson and Lynn Berat, *A History of South Africa, 4th ed.* (Yale University Press, 2014).

³⁷ Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge University Press, 2017).

³⁸ Ta-Nehisi Coates, *Between the World and Me* (One World, 2015).

³⁹ Heather A. O’Connell, “The Impact of Slavery on Racial Inequality in Poverty in the Contemporary US South,” *Social Forces* 90, no. 3 (2012): 713-734.

most prevalent in 1890.⁴⁰ Across the country, economic systems and discriminatory regulations developed in the 18th century and under Jim Crow laws have persisted – Black Americans have been traditionally denied housing and loans, making it more difficult to accumulate wealth in homeownership and easier to accrue debt.⁴¹ Slavery-era educational inaccessibility and Jim Crow era segregated school districts are also associated today with lower-quality public schools and white disinvestment from public schools, with many choosing to pay to send their children to expensive mostly-white private schools.⁴² The system of mass incarceration that disproportionately imprisons Black people also has its roots in slavery, a different system of exploitation and forced labor.⁴³ Historical exclusion from economic and employment opportunities paired with the criminalization of alternative networks of sustenance led more Black people to be imprisoned over time, many for nonviolent crimes like selling illegal drugs or stealing.⁴⁴

As indicated in the description of slavery above, structural inequality is maintained not only through animating ideologies but also characteristically through extraordinary, and not simply structural, violence.⁴⁵ Disappearing of citizens, torture, sexual violence, and murder are some forms such violence takes.⁴⁶ Other forms include forced displacement off land, intentional contamination of water sources, the deliberate destruction of infrastructure like schools and hospitals. Such violations of human rights are widespread in the cases of interest to transitional justice and become normalized in an empirical sense. They become a basic fact of life around which members of targeted groups must orient their conduct.

The normalization of particular forms of human rights violations occurs against a background of impunity for wrongdoing.⁴⁷ Consider lynchings in the United States. Lynching is a form of extrajudicial punishment carried out in particular during the Jim Crow era by white Americans targeting Black men and women. Lynching occurred with the direct participation and facilitation, and implicit and explicit support, of government officials, including the police. The fact that it is still unknown how many Black men and women were lynched in the United States reflects the failure to investigate or keep historical records of lynchings when they occurred. Impunity can be a product of the failure of state institutions and officials to effectively prosecute criminal wrongdoing. It can also be a product of the fact that state officials are the perpetrators of such wrongdoing.

At the individual level, normalized wrongdoing may be viewed by members of a community in which it is occurring in a wide range of ways.⁴⁸ Some individuals may view wrongdoing as morally acceptable

⁴⁰ Christian Gunadi, “The Legacy of Slavery on Hate Crime in the United States,” *Research in Economics* 73, no. 4 (2019): 339-344.

⁴¹ Jonathan Kaplan and Andrew Valls, “Housing Discrimination as a Basis for Black Reparations,” *Public Affairs Quarterly* 21, no. 3 (2007): 255-273; Robert Reece, “Legacies Of Slavery: An Analysis of the Dimensions of Slavery’s Post-Emancipation Effects” (PhD dissertation, 2017).

⁴² Robert L. Reece and Heather A. O’Connell, “How the Legacy of Slavery and Racial Composition Shape Public School Enrollment in the American South,” *Sociology of Race and Ethnicity* 2, no. 1 (2016): 42-57.

⁴³ Aaron Gottlieb and Kalen Flynn, “The Legacy of Slavery and Mass Incarceration: Evidence from Felony Case Outcomes,” *Social Service Review* 95, no. 1 (2021): 3-35.

⁴⁴ Christopher Muller, “Exclusion and Exploitation: The Incarceration of Black Americans from Slavery to the Present,” *Science* 374, no. 6565 (2021): 282-286.

⁴⁵ Sally E. Hadden, *Slave Patrols: Law and Violence in Virginia and the Carolinas* (Harvard University Press, 2003); Charles L. Chavis, Jr. *The Silent Shore: The Lynching of Matthew Williams and the Politics of Racism in the Free State* (Johns Hopkins University Press, 2022).

⁴⁶ Pascha Bueno-Hansen, “Engendering Transitional Justice: Reflections on the Case Of Peru,” *Journal of Peacebuilding & Development* 5, no. 3 (2010): 61-74.

⁴⁷ Linda Green, *Fear as a Way of Life: Mayan Widows in Rural Guatemala* (Columbia University Press, 1999); Philip Dray, *At the Hands of Persons Unknown: The Lynching of Black America*, reprint ed. (Modern Library, 2003).

⁴⁸ Morrow Paul, *Unconscionable Crimes: How Norms Explain and Constrain Mass Atrocities* (MIT Press, 2003).

through processes of norm inversion or norm breakdown. Others may deny the full reality of what is occurring through processes of interpretive denial.⁴⁹ For some, wrongdoing may just become part of the way the world operates, and thus they avoid giving the moral acceptability of conduct much thought or think wrongdoing is too entrenched to be outraged over. Denial often continues long after wrongdoing ends, shaping norms about what can and cannot be publicly spoken. In the United States, it is only in 2022 that lynching was recognized as a distinctive federal crime.⁵⁰

Pervasive structural inequality and normalized wrongdoing can be mutually reinforcing. Normalized wrongdoing can have as its function terrorizing an oppressed population into submission, to accept the status quo institutional order rather than contesting it. The underlying ideologies and rationales used to defend structural inequality can impede and undermine recognition of the rights claims that members of a targeted group in fact enjoy. But normalized wrongdoing can also become a tool to contest oppression, utilized by liberation groups to topple a racist government or force radical change in the institutional structure.⁵¹

B. What it means to address historical injustice through transitional justice

In its more transformative vein, transitional justice is understood as the just pursuit of societal transformation.⁵² Put differently, wrongdoing is addressed not only for its own sake, to fulfill the moral demands of justice for victims and accountability for perpetrators. It is also intended to help change the underlying structural inequality that enabled – and perpetuates – wrongdoing.

Thus understood, pursuing colonialism and slavery as subjects of transitional justice could mean two different things. Transitional justice for historical injustice could refer to the process of addressing and redressing particular episodes of violence or violations of human rights that occurred during a given colonial era or in the course of slavery. Calls to address the Herero genocide in German-occupied South West Africa (present-day Namibia), to return the tooth of Belgian-murdered independence leader Patrice Lumumba to the Democratic Republic of the Congo, or to memorialize slave rebellions like the 1811 slave uprising in Louisiana, United States are just a few examples.⁵³ Such efforts fall more easily into the typical framework of transitional justice. Underpinning such processes is the thought that redressing particular episodes of wrongdoing contributes to the broader effort of transforming the larger structure of interaction. It is, simply, transitional justice by patchwork.

A different way of conceptualizing transitional justice, however, makes structural inequality itself the subject. Redressing historical injustices like slavery or colonialism requires addressing and redressing the particular institutionalized forms of interaction they constituted and the enduring legacies of material consequences for descendants. For instance, redressing slavery in the United States involves addressing the institutionalized theft entailed by the labor expended by the enslaved without compensation. Not only was such theft not addressed when slavery ended, but the conditions for the formerly enslaved to pursue economic and material success were institutionally stymied and undermined by Jim Crow era laws of segregation and discrimination, and housing policies like redlining.⁵⁴ If we conceptualize the subject of

⁴⁹ Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Polity Press, 2001).

⁵⁰ The Emmett Till Antilynching Act, <https://www.congress.gov/bill/117th-congress/house-bill/55/actions>.

⁵¹ Zvobgo, *Governing Truth*.

⁵² Murphy, *The Conceptual Foundations of Transitional Justice*.

⁵³ Ludo de Witte, *The Assassination of Lumumba*, 2nd ed. (Verso, 2003); Joseph Cephas Carroll, *Slave Insurrections in the United States, 1800-1865* (Dover Publications, 2004); Allan Cooper, "Reparations for the Herero Genocide: Defining the Limits of International Litigation," *African Affairs* 106 (2007): 113-126.

⁵⁴ Jessica Trounstine, *Segregation by Design: Local Politics and Inequality in American Cities* (Cambridge University Press, 2018).

transitional justice processes in this capacious, structural way, the conceptual challenges in identifying individual responsibility in the normal mode of transitional justice are significant. We confront the task of disentangling the causal effects of slavery and the subsequent periods of injustice that followed for descendants of the enslaved, of enslavers, and of contemporary Americans who arrived in the United States long after slavery (in some cases a century after) slavery formally ended.

These conceptual and empirical challenges point to the need for a different model for accountability and repair. In her work on structural injustice, Iris Marion Young explicitly eschews an emphasis on individualized attributions of responsibility for structural injustice.⁵⁵ Frameworks of individual accountability are more appropriate and salient, she claims, when dealing with normalized wrongdoing like massacres and genocide, wrongs that she calls interactional wrongs. In the case of structural problems, the project is forward-looking and focused on how members of a community can discharge their shared responsibility to alter the structure of interaction itself.

Similarly, in writing about reparations for colonialism and transatlantic slavery, Táíwò argues that we should shift from thinking about questions of responsibility to questions of liability, where “to be liable is simply to be obligated (typically to pay a price or bear a burden).”⁵⁶ Táíwò references the use of strict liability standards in tort law, where a defendant is liable to repair losses or harms suffered regardless of whether the individual was responsible in the sense of intentionally and voluntarily acted. The fact that the individual’s action caused harm is sufficient. Causation is a part of strict liability analysis, which is part of what Young wants to avoid analyzing, but if we think of strict liability as moving away from a concern with blame and fault-finding then the impetus behind the analysis of both Young and Táíwò is similar.

This model of thinking departs from a dominant transitional justice emphasis on fault as critical to accountability. But the struggle to develop frameworks that adequately conceptualize the relationship between individual actions and collective harms, reflected in ongoing dissatisfaction with the doctrine of joint criminal enterprise, could indicate a more radical departure from the notion of individual accountability that underpins much transitional justice scholarship and practice.

Transitional justice may still be understood as the just pursuit of societal transformation. However, what makes the pursuit of transformation just is that those who bear the transition costs in changing our societal order, both nationally and internationally, are those who have benefited from the legacies of violence and abuse. Backward-looking considerations of who constitutes an aggrieved party and who is the party responsible for or benefiting from injustice shape the distribution of these costs in a manner that is sensitive to historical injustice and its causal role in shaping the present distribution of advantages and disadvantages.⁵⁷ What exactly this might look like in practice remains to be seen.

There are examples of truth commissions addressing temporally distant forms of injustice in former enslaving countries. In particular, the United States has implemented four commissions specifically addressing anti-Black violence in the 19th and 20th centuries,⁵⁸ one of them national in its remit (Kerner) and the other three subnational (Rosewood, Tulsa, and Wilmington). Three mentioned slavery (Kerner, Tulsa, and Wilmington) but only one linked slavery, if briefly, to contemporary issues (Kerner).⁵⁹

⁵⁵ Young, *Responsibility for Injustice*.

⁵⁶ Táíwò, 123.

⁵⁷ Táíwò, *Reconsidering Reparations*, pg. 74.

⁵⁸ Daniel Posthumus and Kelebogile Zvobgo, “Democratizing Truth: An Analysis of Truth Commissions in the United States,” *International Journal of Transitional Justice* 15, no. 3 (2021): 510-532.

⁵⁹ Note, the subnational commissions referenced addressed subnational violence, i.e., within their jurisdiction. North Carolina 1898 Wilmington Race Riot Commission, *1898 Wilmington Race Riot Report* (Research Branch, Office of

Ongoing and proposed U.S. commissions also seek to address racial violence, though it remains to be seen if they will combine the temporally distant with the temporally extended. The patterns of past violence that a truth commission could pick up can prevent further marginalization and victimization of certain groups and the place of collective reparations in benefiting groups.

As models of historical injustice continue to evolve and develop, it is important to note one final challenge. To date, transitional justice scholarship and practice has been overwhelming when pursued within the confines of states. But the historical injustices that require attention were fundamentally transnational. While we have discussed slavery in the context of the United States, slavery in the United States cannot fully be understood apart from the broader transatlantic trade practices of which it was a part and the broader colonial context in which it was developed. What it would mean to address slavery in a fundamentally transnational way remains to be seen.

V. Conclusion

This chapter has provided an overview of the reasons why historical injustice must be addressed in and through transitional justice, the challenges specific to addressing and redressing historical injustice like colonialism and slavery, and the paths through which reparations or truth commissions have and might be pursued. As part of our discussion, we highlighted two general ways of defining the historical injustice being addressed through processes: as specific episodes of normalized wrongdoing (e.g., Herero genocide) or as concerned with structural inequality itself. Transitional justice processes that take up structural inequality may do so in ways that vary in how they are temporally circumscribed; some processes may adopt a broad focus on the various forms that structural inequality takes over time or on particular periods of historically informed structural inequality. Contextual factors will likely shape what transitional justice for historical injustice looks like, both in the process adopted and the specific subject of inquiry.

Archives and History, NC Department of Cultural Resources, 2006); Oklahoma Commission to Study the Tulsa Race Riot of 1921, *Tulsa Race Riot: A Report* (Commission to Study the Tulsa Race Riot of 1921, 2001); United States National Advisory Commission on Civil Disorders, *The Kerner Report* (Pantheon Books, 1988).