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11 Political Reconciliation and International Criminal Trials[1]

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I. INTRODUCTION

My focus in this chapter is on the role of the international community, and of international criminal trials specifically,[2] in the promotion of political reconciliation within transitional societies. The concept of reconciliation refers to the process of repairing damaged relationships.[3] Political reconciliation focuses on the characteristically impersonal relations among members of a political society. Transitional societies are those aspiring to democratize or, more minimally, establish peace after a recent period of repressive rule or civil conflict, characterized by systematic human rights abuses. Examples of recent transitional societies include Iraq, Afghanistan, and Rwanda.

An inquiry into the role of international criminal trials in promoting political reconciliation may seem unpromising. The operations of some hybrid

[1] An earlier version of this chapter was presented at the International Association for Philosophy of Law and Social Philosophy (IVR) World Congress in Krakow, Poland, as part of a panel on "International Criminal Trials." I am very grateful to Larry May for inviting me to participate in that panel and for the helpful feedback I received. I would also like to thank Kathleen Murphy, Susanne Sreedhar, Nancy Lawrence, Cyndy Brown, and Paolo Gardoni for their valuable comments on previous drafts.

[2] In this chapter, international criminal trials are understood broadly to include ad hoc international tribunals, the permanent International Criminal Court (ICC), as well as hybrid tribunals operating in domestic contexts.

[3] This understanding of the concept can be found in the work of John Roth, "Useless Experience: Its Significance for Reconciliation after Auschwitz," in David Patterson and John K. Roth (eds), *After-Words: Post Holocaust Struggles with Forgiveness, Reconciliation, Justice* (Seattle: University of Washington Press, 2004), 86; Daniel Philpott, "Introduction," in Daniel Philpott (ed), *The Politics of Past Evil: Religion, Reconciliation, and the Dilemmas of Transitional Justice* (Notre Dame: University of Notre Dame Press, 2006), 14; and Trudy Govier and Wilhelm Verwoerd, "Trust and the Problem of National Reconciliation," 32(2) *Philosophy of the Social Sciences* (2002), 178–205. This is the second sense of reconciliation that Paul M. Hughes identifies in his "Moral Atrocity and Political Reconciliation: A Preliminary Analysis," 15(1) *International Journal of Applied Philosophy* (2001), 123–135.

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and international criminal tribunals are hampered by insufficient financial resources, lack of international personnel familiar with local cultures and languages, hostility to international personnel in certain transitional contexts, and rejection of the legitimacy of such tribunals. Such limitations call into question the ability of international trials to prosecute and successfully convict perpetrators and counter impunity. They also seemingly strengthen skepticism about the ability of such trials to promote reconciliation.

One objective of this chapter is to temper such skepticism. My thesis is that international criminal trials can contribute to political reconciliation by fostering the social conditions required for law's efficacy. This chapter builds on previous work in which I argue that the cultivation of mutual respect for the rule of law is a constitutive part of the process of political reconciliation.[4] The (re-)establishment of mutual respect for the rule of law is an important part of the process of repair because relationships structured by law realize three important moral values: agency, reciprocity, and justice. The absence or erosion of the rule of law damages relationships by undermining these values and by cultivating distrust, resentment, and a sense of betrayal among citizens.[5]

This chapter departs from prominent themes in contemporary discussions of international criminal trials and political reconciliation in two respects. First, I focus on the character of the international criminal trials process, rather than defending or challenging the contributions of international criminal trials to justice, deterrence, or ending the historic impunity enjoyed by perpetrators of human rights abuses.[6] Second, because my interest is in the

[4] See my "Reconciliation, the Rule of Law, and Genocide," *The European Legacy* (forthcoming); "Reconciliation, the Rule of Law, and Post-traumatic Stress Disorder," in Nancy Nyquist Potter (ed), *Trauma, Truth, and Reconciliation: Healing Damaged Relationships* (Oxford: Oxford University Press, 2006), 83–110; and "Lon Fuller and the Moral Value of the Rule of Law" 24 *Law and Philosophy* (2005), 239–62.

[5] My claim is not that establishment of mutual respect for the rule of law is sufficient for reconciliation, nor that undermining or the absence of a legal system is the only source of damage to political relationships during civil conflict or repressive rule.

[6] For a discussion of general justifications of international criminal trials, see Naomi Roht-Arriaza, *Impunity and Human Rights: International Law Practice* (New York: Oxford University Press, 1995); Jaime Malamud-Goti, "Transitional Governments in the Breach: Why Punish State Criminals?" 12(1) *Human Rights Quarterly* (1990), 1–16; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998); Neil Kritz, *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, DC: United States Institute of Peace Press, 1995); M. Cherif Bassiouni, "Searching for Peace and Achieving Justice," 59(4) *Law and Contemporary Problems* (1996), 9–28; and Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Crown Publishing Group, 1998). Nancy Combs questions whether international criminal trials, as currently structured, are effective in ending the legacy of impunity in her *Guilty Pleas in International Criminal Law* (Stanford, Stanford University Press, 2007).

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conduct of criminal trials rather than their outcome, I do not address the question of the compatibility between criminal trials, retributive justice, and reconciliation.[7] Instead, I emphasize what I take to be subtler, more easily overlooked contributions of international criminal tribunals to political reconciliation.[8]

The first of the four sections in this chapter explains the social conditions on which law's efficacy depends, drawing on the insights of legal philosopher Lon Fuller. The second highlights the absence of these conditions in societies in conflict or under repressive rule. The third shows how international criminal trials can promote reconciliation by cultivating the social conditions on which law depends. I also discuss the circumstances that must be in place for these contributions to be realized in practice. The fourth considers three objections to my analysis.

II. SOCIAL CONDITIONS OF LAW

My focus in this section is the social and moral conditions required for a system of legal rules to regulate the behavior of citizens and officials in practice. My aim is expository and constructive, namely, to articulate Fuller's argument for the necessity of four conditions.[9] These conditions are: ongoing cooperative interaction between citizens and officials, systematic congruence between law and informal social practices, legal decency and good judgment,

[7] For a discussion of this relationship, see Ruti Teitel, "Bringing the Messiah through Law," in Carla Hesse and Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), 177–93.

[8] Analyses that focus on other potential contributions of trials to reconciliation include Larry May, "Genocide, Criminal Trials, and Reconciliation" (forthcoming); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (Piscataway, NJ: Transaction Publishers, 1999); Michel Feher, "Terms of Reconciliation," in Carla Hesse and Robert Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York: Zone Books, 1999), 325–339; and Julie Mertus, "Only a War Crimes Tribunal: Triumph of the International Community, Pain of the Survivors," in Belinda Cooper (ed), *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999). Challenges to these accounts of the contributions of trials to political reconciliation include Teitel, "Bringing the Messiah through Law," and Laurel Fletcher and Harvey Weinstein, "Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation," *Human Rights Quarterly* 24 (2002): 573–639.

[9] Fuller never systematically argued for these general conditions, although references to them occur throughout his writings. My reconstruction of Fuller's argument draws on his work and on Gerald Postema's discussion of Fuller on implicit law. See Gerald Postema, "Implicit Law," 13 *Law and Philosophy* (1994), 361–87; Lon Fuller, *The Morality of Law* (rev. ed.) (New Haven, CT: Yale University Press, 1969); Lon Fuller, *Anatomy of the Law* (Westport: Greenwood Press Publishers, 1968); and Lon Fuller, "Human Interaction and the Law," in Kenneth Winston (ed), *The Principles of Social Order: Selected Essays of Lon F. Fuller* (rev. ed) (Portland: Hart Publishing, 2001), 231–66.

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and faith in law. The first condition, ongoing cooperative interaction, is the most fundamental. The second, third, and fourth conditions facilitate ongoing cooperative interaction and ensure that it is of the kind necessary for law to function as it should.

Typically, in stable social contexts the presence of each of these four social conditions is assumed or taken for granted. However, as I discuss in greater detail in the next section, these conditions are characteristically undermined or absent during periods of repressive rule or civil conflict. Appreciating the role of these social conditions in cultivating or maintaining a system of legal rules that regulate the behavior of citizens and officials in practice is thus critical for understanding what processes of reconciliation must address if political relationships in transitional societies are to be repaired.

Law refers to "the enterprise of subjecting human conduct to the governance of rules."[10] To understand the social conditions required for law to be effective, it is important first to discuss law's central task. Law's primary function is, in the words of Fuller, to maintain "a sound and stable framework (or baselines) for self-directed action and interaction."[11] There are three senses in which the action and interaction structured by law are self-directed.[12] First, law influences behavior by providing reasons for choosing specific courses of action, rather than psychologically manipulating or altering the social conditions for action. Agents choose whether to act on these reasons. Second, legal rules specify general norms, which agents follow by interpreting and applying to their situation. Action governed by law is self-directed because citizens discover in a general rule a reason for acting in a specific way. Finally, the framework of law enables citizens to pursue their goals and plans. Individuals pursue their goals in a social context where they interact with others. To pursue their goals successfully, individuals must be able to formulate reliable and stable mutual expectations of how others will behave. Such expectations enable individuals to anticipate how others will respond to different actions.

The ability of law to provide general and shared baselines for interaction depends on ongoing cooperative interaction among citizens and officials.[13] The norms of law must be common, public norms if they are to provide shared baselines. Cultivating shared, public understandings requires officials and citizens to consider how others are likely to interpret and determine the practical import of general norms. Citizens must consider how officials are likely to understand this practical import to be confident that their interpretation of

[10] On this point, see Fuller, *Morality of Law*, 130.
[11] Fuller, *The Morality of Law*, 210.
[12] See Postema, "Implicit Law," for a complete discussion of these first two conditions.
[13] See Fuller, "Human Interaction and the Law," 234–5 and *Morality of Law*, 206–20.

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which actions are prohibited or permitted coincides with the interpretation of officials and other citizens. Similarly, officials must consider how citizens are likely to understand legal rules when determining the practical import of general legal norms. The substantive aims of law are undermined if officials' interpretation of the law does not roughly coincide with the understanding of citizens. When citizens and officials can be confident that they share the same understanding, the ability of citizens to successfully pursue their goals and lead self-directed lives is enhanced; they are in a very real sense able to determine what kind of treatment their actions are likely to receive. When there is no congruence, officials dictate the meaning of law instead of facilitating self-directed interaction.

The required ongoing cooperative effort also entails willingness on the part of officials and citizens to comply with such rules and, as such, be governed by law. Citizens generally must fulfill the expectation of officials and fellow citizens that the law will influence their deliberations and determine which actions they choose. Officials must judge and respond to the conduct of citizens in accordance with declared rules.[14] Implicit in governance by law is the commitment of the government to the citizen that law in fact specifies the standard of conduct that citizens are expected to obey and to which they will be held.

If and when there is an absence of the willingness to comply with law, then the efforts of citizens and officials become futile. As Fuller writes, "A gross failure in the realization of either of these anticipations – of government toward citizen and of citizen toward government – can have the result that the most carefully drafted code will fail to become a functioning system of law."[15] Equally significant, the incentive or willingness of citizens and officials to comply with the law is responsive to the actions of others. To the extent that others refuse to restrict their actions, the corresponding willingness of others will decline. As Fuller writes, "If the citizen knew in advance that in dealing with him government would pay no attention to its own declared rules, he would have little incentive to abide by them. The publication of rules carries with it the 'social meaning' that the rulemaker will himself abide by his own rules."[16]

The second social condition is systematic congruence between informal practices and the law, which facilitates the ability of citizens and officials to understand how others will interpret and apply general rules. Individuals determine the practical import of a general legal norm, what it requires in

[14] Fuller, *Anatomy of Law*, 9.
[15] Fuller, "Human Interaction and the Law," 255.
[16] Fuller, *Morality of Law*, 217.

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specific situations, by imagining acting on it. This imaginative exercise draws on knowledge of one's social context and practices.[17] To illustrate, consider Fuller's example of a statute that makes it a "misdemeanor to bring any 'vehicle' within the park area."[18] Determining which objects are permitted or prohibited by this statute, and thus the statute's practical import, depends on knowing the social function played by parks as an institution. This social function may differ in various social contexts, leading to corresponding different understandings of what constitutes a vehicle for purposes of the statute. What is permissible to bring to a park will differ if a park functions as a place of quiet versus as a place for social gathering and "enjoyment."

When a norm has no connection with social practices, it can become more difficult to determine its practical import and to be confident that one's interpretation will be congruent with the interpretation of other citizens and lawmaking and law-enforcing officials. A likely result is that individuals will become "dependent on what officials and formal institutions do," rather than on their own understanding.[19] In addition, laws disconnected from a given social context are more likely to seem unreasonable or arbitrary, which may lead to outright evasion of the law.[20]

Third, law's efficacy depends on legal decency and good judgment among lawmaking and law-enforcing officials. Maintaining law is a practical art[21] that "depends upon repeated acts of human judgment at every level of the system."[22] The required legal decency consists of an understanding of and appreciation for the distinctive way that officials govern when they govern by law.[23] When officials govern by law, they are responsible for providing and maintaining shared baselines for interaction. This is fundamentally different than using political power to eliminate enemies or rivals or viewing legal power as a tool to control citizens and other officials. Legal decency also includes a respect for the implicit limitations on official action that law entails. For law to successfully provide baselines for interaction that citizens have a genuine opportunity to follow, legal rules must take a specific form. The requirements of the rule of law specify the form that rules should take and must be systematically respected for legal rules to be able to govern the conduct of citizens

[17] It becomes clear from social context, Fuller writes, that, for example, a ten-ton truck is excluded but a baby carriage is not, although both fall under the dictionary definition of "that in or on which a person or thing is or may be carried." (*Anatomy of the Law*, 58).

[18] Fuller, *Anatomy of the Law*, 58.

[19] Postema, "Implicit Law," 265.

[20] Kenneth Winston makes this point when introducing Fuller's essay "Human Interaction and the Law." See p. 231 of his *The Principles of Social Order: Selected Essays of Lon F. Fuller* (rev. ed) (Portland: Hart Publishing, 2001).

[21] See Fuller, *Morality of Law*, 91.

[22] Fuller, *Anatomy of the Law*, 39.

[23] Ibid., 65.

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and officials in practice. The lawmaking and law-enforcing process should be constrained by these requirements.

In *The Morality of Law*, Fuller discusses at length the eight requirements of the rule of law, which include clarity, promulgation, prospectivity, and congruence between official action and the law. Each of these captures implicit expectations made within contexts where officials govern by law. Fuller writes, for example, "Every exercise of lawmaking function is accompanied by certain tacit assumptions, or implicit expectations, about the kind of product that will emerge from the legislator's efforts and the form he will give to the product . . . there is implicit in the very notion of a law the assumption that its contents will, in some manner or other, be made accessible to the citizen so that he will have some chance to know what it says and be able to obey it."[24] Law cannot provide shared baselines for interaction if the baselines themselves are kept secret and remain unknown to citizens.[25] The eighth desideratum requires that there be congruence between official action and the law. Fuller discusses various procedural mechanisms, such as the right to representation by counsel, the right to cross-examine witnesses, the right to appeal a decision, and the right to habeas corpus, that are designed to maintain such congruence. He also lists factors like "bribery, prejudice, indifference, stupidity, and the drive toward personal power," which can destroy or impair congruence by undermining legal decency.[26]

Good judgment, as well as decency, by officials is required because there is no simple formula that lawmakers can follow to maintain a system of rules that respect the requirements of the rule of law and that effectively govern the behavior of citizens and officials in practice.[27] For example, adherence to the requirements may at times undermine legality, and violations of requirements of the rule of law may promote the purpose of law. To illustrate the former point, Fuller writes: "Suppose the absurd situation of a government that has only one law in the books: 'Do right and avoid evil.' In this case a rule is general, but general in a way that thoroughly undermines legality." In contrast, in certain situations retrospective legislation may be appropriate and not inimical to the rule of law. Fuller illustrates this point by drawing on an example of a statute in New Hampshire that required the performer of a

[24] Ibid., 61.

[25] Similarly, declared rules that are systematically unclear or vague will not be able to provide the relevant guidance for citizens and officials. This problem with vagueness is why it makes sense, Fuller writes, to consider due process guarantees violated when a law is so vague that it is not clear what law it prohibits or permits. Fuller, *Morality of Law*, 102.

[26] Ibid., 81.

[27] Fuller's most extended discussion of this condition occurs in *Anatomy of the Law*, 13–39.

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marriage to fill out a form within five days of the marriage ceremony. The state printing press burned down after the legislature adjourned, leaving no legal way to repeal or postpone the date that the statute became effective. A retroactive statute provided a way of validating performed marriages until the legislature resumed session, which would otherwise have been invalid.

Recognition of the fact that certain instances may permit violation of the requirements of the rule of law opens the door to potential corruption and abuse. Decency and good judgment are required to understand when and why it is appropriate to violate the requirements of the rule of law. The use of retroactive legislation can be deeply problematic and inimical to the rule of law, as Hitler's use of retroactive legislation following the Roehm purge vividly demonstrates. In 1934, after deciding that certain "dissident" members of the Nazi Party posed a threat and needed to be eliminated, Hitler went to Munich where he and his followers shot and killed seventy individuals deemed threatening. Afterward, Hitler demanded that legislation be passed stating that "he had acted as 'the supreme judicial power of the German people.' The fact that he had not lawfully been appointed to any such office, and that no trial had ever been held of the condemned men – these 'irregularities of form' were promptly rectified by a statute retrospectively converting the shootings into lawful executions."[28]

The fourth social condition is faith in the law among citizens. Fuller writes, "Normally, and by and large, the citizen must of necessity accept on faith that his government is playing the game of law fairly," by, for example, formulating clear, general rules that are actually respected and enforced in practice.[29] Fuller never explicitly explains why such faith is necessary. Presumably, faith is required in part because a chronic suspicion of government officials and continual checking up on government actions would lead to paralysis, instead of self-directed action and interaction, at the individual or at the societal level. Similarly, the willingness of citizens to follow the requirements, and thus the ability of law to provide an effective framework for interaction, depends on citizens having a certain degree of faith in legal procedures. Such faith is not inviolable, nor does Fuller claim that citizens should maintain their faith in the law, regardless of revelations of how government officials are acting in practice. As Fuller notes, "Precisely because this faith plays so important a role in the functioning of a legal system, a single dramatic disappointment of it, or a less conspicuous but persistent disregard for legality over a whole branch of law, can undermine the moral foundations of a legal order, both for

[28] Ibid., 64.
[29] Fuller, "Human Interaction and the Law," 255.

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those subject to it and for those who administer it." Indeed, the clear abuse of or indifference to the requirements can undermine the faith of citizens and lead to a subsequent erosion of the willingness among citizens or officials to maintain this kind of social order. The faith required is not identical to blind obedience or no oversight on the part of citizens. Thus, Fuller's recognition of the importance of faith does not imply that citizens are expected or required to disregard or be indifferent to what government officials are doing.

III. ABSENCE OF SOCIAL AND MORAL CONDITIONS IN TRANSITIONAL CONTEXTS

In societies in conflict or under repressive rule, declared legal rules frequently do not govern the behavior of officials and citizens in practice, and the social conditions required for law to be effective are absent or undermined.[30] In this section, I illustrate the absence of the four social conditions described in the previous section, using concrete, historical examples.[31] The absence of such conditions is significant because it negatively impacts the prospects for reconciliation, understood as the (re-)building of a mutual commitment among citizens and officials to respect the rule of law. It is in fostering the social conditions for law's efficacy, I suggest in the next section, that international criminal trials can contribute to reconciliation.

Let us first consider Argentina. Legal scholar and politician Carlos Nino, who was actively involved in the transition to democracy and the efforts to deal with the legacy of human rights abuses, eloquently captures the absence of the cooperative interaction at the heart of law in his native Argentina in his discussion of anomie, "a disregard for social norms, including the law."[32] In Nino's view, anomie contributed to the conduct of the military junta from 1976

[30] For a detailed description of the absence of these conditions prior to a transition away from conflict and repressive rule, see Paul van Zyl, "Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies," in *Looking Back Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, in Charles Villa-Vicencio and Wilhelm Verwoerd (eds), (Cape Town: University of Cape Town Press, 2000), 42–57; Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," 52(2) *Journal of Interational Affairs* (Spring 1999), 647–7; Naomi Roht-Arriaza, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," 78 *California Law Review* (1990), 451–13; and Truth and Reconciliation Commission of South Africa, *Volume 4: Truth and Reconciliation Commission of South Africa Repot* (London: MacMillan Reference Limited, 1999).

[31] These examples serve illustrative purposes. I recognize that the extent of the impairment of the functioning of the law, as well as the depth and pervasiveness of the erosion or absence of four social conditions, varies in different transitional contexts.

[32] Carlos Nino, *Radical Evil on Trial*, (New Haven: Yale University Press, 1996), 47–8.

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through 1983. Nino traces anomie to the colonial period "when local officials frequently proclaimed: 'Here the law is respected, but not obeyed.'"[33] Other examples of official anomie include the recurrent use of the coup d'état and the "unconstitutional mechanisms" to first acquire and then increase political power. Courts facilitated anomie by recognizing the legitimacy of coups d'état rather than checking the illegal and extralegal exercise of political power. In Nino's words, "Argentine judges have developed the doctrine of de facto laws to legitimate laws enacted by the military governments."[34] A robust black market, extensive tax evasion, smuggling, and bribery illustrate the systematic disregard for law by citizens. Consequently, "everyone would be better off if the laws were obeyed, but no single individual is motivated to do so."[35]

This absence of ongoing cooperative effort was coupled with an erosion of legal decency and judgment, vividly displayed in the systematic, unofficial disappearing of citizens.[36] Disappearing citizens are first abducted by agents of the state or those acting at the request of the state, and then often tortured and killed. They "disappear" in the sense that the state refuses to acknowledge that the abduction occurred or provide information on the abductees' whereabouts. In response to allegations of disappearances, governments typically deny that a crime has occurred at all, let alone a crime for which they are responsible. Sadly, the practice of disappearing, as well as the use of death squads, is not unique to Argentina. Uruguay, El Salvador, Guatemala, Sri Lanka, South Africa, Ethiopia, and Cambodia are just some of the countries that have disappeared citizens or operated death squads during periods of civil conflict or repressive rule.[37] Death squads kill individuals at the request of the state, which in turn denies responsibility. However, the location of the body does not remain unknown but is normally "deliberately left where it can be found."[38] Responsibility for such deaths is frequently laid at the door of individuals not associated with, or in conflict with, a regime.

In both substance and impact, the occurrence of disappearing citizens is incompatible with the overall purpose of law. First, it constitutes a rejection of the implicit commitment of a government that rules by law to hold citizens to the standards expressed by declared rules. Governments "render meaningless legal discourse" when they deny that any crime occurred or deny responsibility for crimes that are discovered. Cases of "disappearing individuals" enable a government to avoid responsibility for its actions and frustrate the ability

[33] Nino, *Radical Evil on Trial*, 47–8. [34] Ibid.
[35] Ibid.
[36] Disappearing also displays a lack of more general decency.
[37] Roht-Arriaza, "State Responsibility to Investigate," 451–5.
[38] These definitions draw on those provided in Roht-Arriaza, "State Responsibility to Investigate."

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of citizens to determine the justifiability of government actions. Second, as Roht-Arriaza discusses, the function of such activities is to frighten citizens into impotence by terrorizing "broad sections of the population, who live with the uncertainty of not knowing whether their relatives, neighbors, or co-workers are dead or alive . . . The terror and uncertainty create a chilling effect on political activity in general."[39] The use of terror provides evidence of the lack of respect for what the requirements of the rule of law mandate. A government that resorts to terror creates a climate of instability and fear, where citizens cannot turn to declared rules or rely on their interpretation of them to develop stable expectations about what official treatment or response their actions is likely to be. The absence of due process, indeed *any* legal process, undermines conditions crucial for realizing congruence and constitutes a refusal by government officials to be constrained in their actions by what the law permits or prohibits. Disappearing is "clearly illegal under international law, as well as under the domestic law of every country prohibiting murder and kidnapping."[40] The lengths to which officials go to deny responsibility for such disappearances are evidence of their illegality.

Government officials in transitional societies also often lack the judgment and competence required to maintain a system of law. Legal scholar Paul van Zyl writes that newly established governments "inherit . . . criminal justice systems that are practically inoperative." Even when committed to the rule of law, officials may lack the knowledge of what respect for due process entails or may construct a legal system in which appropriate due process guarantees are not included. As van Zyl writes, "In certain countries, criminal justice systems were created in a climate of oppression and human rights abuses. Law enforcement personnel were trained and authorized to employ methods of evidence-gathering, prosecuting and adjudicating that would be impermissible in a constitutional democracy."[41] In South Africa during apartheid, the police regularly used torture to extract confessions, which consequently rendered them unprepared to deal with crime using more difficult but legitimate methods of gathering evidence.[42] This lack of preparation is confirmed by the "collapse in the capacity of the police to investigate and arrest, attorneys general to prosecute, judges to convict and correctional facilities to imprison . . . The South African police have an extremely small number of poorly trained detectives. In certain jurisdictions more than a third of prosecutorial posts are empty

[39] Roht-Arriaza, "State Responsibility to Investigate," 451–5.
[40] Roht-Arriaza, "State Responsibility to Investigate," 456.
[41] Paul van Zyl, "Justice Without Punishment," 44.
[42] Ibid.

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and cannot be filled."[43] The retraining of the police may thus be necessary in transitional contexts.

Given the absence of the cooperative effort required to maintain law, incongruence between informal practices and declared rules, and erosion of decency and judgment among officials, it is not surprising that citizens living in societies emerging from a period of repressive rule or civil conflict often have little faith in law. Even in contexts where the erosion of the social conditions required for law is not as dramatic or pervasive as in the contexts described, the faith in law of citizens can be undermined nonetheless. Consider Northern Ireland. Historically, there has been deep distrust among the predominantly Catholic nationalists of the Royal Ulster Constabulary (RUC), the police force in Northern Ireland from 1922 through 2001.[44] Reforming the police force was one of the primary commitments of the United Kingdom in the most recent peace agreement, and remains an important condition for the long-term success of that agreement. Evidence of the distrust includes the historically low level of participation by Catholics in the police force. At the time of the Northern Ireland Agreement, cultural Catholics composed 43% of the population, but only 7.5% of the RUC personnel.[45] Other indications include fear of the RUC, hostility toward their presence, and a refusal to cooperate in police investigations.[46]

Sources of the distrust of and lack of faith in the police among the largely Catholic, nationalist population include unlawful state-sanctioned killing by police and collusion between the police and paramilitary organizations.[47] Such events, but equally importantly the nonrepresentative composition of the police, contributed to the perception of partiality. In the words of political scientists John McGarry and Brendan O'Leary, experts on Northern Ireland, "A police service composed primarily of recruits from the dominant ethnic or national group will not be seen as impartial by members of excluded groups, irrespective of the behaviour of police officers. Such a service is also unlikely to be impartial in practice, as its officers are more likely to reflect the

[43] Paul van Zyl, "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission," 52(2) *Journal of International Affairs* (Spring 1999), 647–67.

[44] The RUC was assimilated in 2001 into the newly constituted Police Service of Northern Ireland.

[45] John McGarry and Brendan O'Leary, *Policing Northern Ireland: Proposals for a New Start* (Belfast: Blackstaff Press, 1999). Available at http://cain.ulst.ac.uk/issues/police/docs/mcgarry99.htm (accessed on September 11, 2007).

[46] McGarry and O'Leary, *Policing Northern Ireland*.

[47] John McGarry and Brendan O'Leary, "Stabilising Northern Ireland's Agreement," *The Political Quarterly* (2004), 213–25, on 217. See also Fionnuala Ni Aolain, *The Politics of Force: Conflict Management and State Violence in Northern Ireland* (Belfast: Blackstaff Press, 2000).

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values of their own community of origin, and not those of others."[48] Increasing a representative police force will "increase nationalist confidence that the police service(s) represent(s) everybody. It will erode the partisan unionist culture."

IV. THE CONTRIBUTION OF INTERNATIONAL CRIMINAL TRIALS

Transitional societies aspire to foster political reconciliation or to repair damaged political relationships. An important component of this process is (re-)building a system of shared legal rules to regulate the behavior of citizens and officials in practice. The general lesson from the Fullerian analysis in Section I is that the cultivation of law depends not simply on drafting and ratifying a constitution that specifies protected rights. In addition, the social conditions of law need to be cultivated. The characteristic absence of these conditions in transitional contexts constitutes an obstacle to the (re-)building and repairing of social relationships predicated on mutual respect for and shaped by the law in practice. Thus, processes of reconciliation should address, at least in part, and attempt to promote the cooperative interaction, decency, good judgment, and faith in the law that enable self-directed interaction to flourish.[49]

Understanding how to cultivate each of these social conditions of law requires both theoretical and empirical knowledge.[50] Theoretical analysis of the function and defining characteristics of social processes (e.g., criminal trials, truth commissions, reparations) can shed light on connections between such processes and the goals of and preconditions for reconciliation. Empirical studies can then provide important information about the circumstances that are conducive to or inimical for the achievement of the function of social processes like law. Such information can provide guidance in terms of whether, for example, international criminal trials are likely to realize their potential contribution to reconciliation in specific transitional contexts.

In this section, I first offer a theoretical argument to support the claim that international criminal trials contribute to reconciliation by cultivating legal decency and good judgment among officials and encouraging faith in law

[48] McGarry and O'Leary, *Policing Northern Ireland*. Other important studies of the police in Northern Ireland include John Brewer, Adrian Guelke, Ian Hume, et al., *The Police, Public Order, and the State: Policing in Great Britain, Northern Ireland, the Irish Republic, the United States, Israel, South Africa, China* (New York: St. Martin's Press, 1988), 12 and John Brewer, *Inside the RUC; Routine Policing in a Divided Society* (Oxford: Oxford University Press, 1991), 250.

[49] These conditions capture only part of the obstacles because the repair that reconciliation entails is broader than the restoration of mutual respect for the rule of law.

[50] I am grateful to Leslie Francis for helping to clarify this point for me.

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among citizens. I then explore some of the empirical conditions that can influence whether these contributions are, in fact, realized. My empirical discussion is largely speculative. Further empirical research is required to confirm or disconfirm the considerations that I advance or point to overlooked considerations that might be relevant. After considering and responding to a series of objections, I end this section by highlighting the limits of the contributions to reconciliation that international criminal trials can make.

The starting premise of my theoretical argument is an empirical observation: The international community is extensively involved in the legal processes of transitional societies, especially during their transitional period from conflict or repressive rule to peace and democracy. Ad hoc international criminal tribunals, like the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the permanent International Criminal Court (ICC) represent one dimension of this involvement. These tribunals cover serious violations of international humanitarian law, including violations of the Geneva Conventions, laws of war, genocide, and crimes against humanity in a specific area during a specific period of time.[51] Such tribunals are the product of international cooperation and interaction. Separate United Nations Security Council resolutions created the ICTY and ICTR, and the ICC is based on a treaty signed by 104 countries. Trial proceedings draw on both civil and common law systems, and the staff of such tribunals is drawn from around the globe.[52] The collection of evidence, detention of accused persons, and funding of such tribunals depends on cooperation and contributions from the international community.[53]

Hybrid tribunals also have been established in contexts including Sierra Leone, Timor–Leste, Kosovo, Bosnia, and Cambodia.[54] Such courts are hybrid in the sense that judges and prosecutors include both national and international representatives, and the rules regulating such courts include national and international regulations. They operate in the location where the crimes

[51] United Nations, "International Criminal Tribunal for Rwanda." Available at http://69.94.11.53/default.htm (accessed on September 9, 2007).

[52] As of February 2007, the staff of the ICTY had members representing eighty-one countries. The ICTR has eighty-five nationalities represented in its staff.

[53] United Nations, "ICTY at a Glance." Available at http://www.un.org/icty/glance-e/index.htm (accessed on September 9, 2007). The relationship between these international tribunals and national courts is defined differently. Although national courts and the ICTY have concurrent jurisdiction over such violations, the ICTY can "claim primacy" if in the interest of international justice. The ICC, in contrast, represents a "court of last resort" – that is, it only pursues cases if not investigated or prosecuted in a genuine way by a national court.

[54] International Center for Transitional Justice (ICTJ) Web site.

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occurred.[55] The operating budget for such hybrid tribunals is influenced by the scale of voluntary contributions from international donors.[56]

Complementing such formal involvement is the work of nongovernmental organizations (NGOs). William Schabas has documented the influential role of the United States Institute of Peace, Priscilla Hayner, and Paul van Zyl in determining the relationship between the court and the Truth and Reconciliation Commission in Sierra Leone.[57] The ICTJ advises countries on whether to confront the legacy of human rights abuses through criminal trials and/or truth commissions and the appropriate relationship to establish between different programs (i.e., the Truth and Reconciliation Commission and Special Court in Sierra Leone); trains and assists prosecution efforts in both domestic and hybrid tribunals; files *amicus curiae* briefs in domestic tribunals; monitors domestic criminal justice proceedings; publishes studies on the study of hybrid tribunals; and holds conferences on domestic prosecutions with international representatives involved in such efforts to create a network of advisors and offer a forum for exchanging investigation strategies.[58] It currently works in such capacities in more than twenty-five countries around the world, including Burundi, The Democratic Republic of the Congo, Ghana, Kenya, Liberia, Sierra Leone, South Africa, Uganda, Argentina, Colombia, Guatemala, Mexico, Nicaragua, Panama, Peru, Afghanistan, Cambodia, Sri Lanka, Algeria, and Iraq.

This intense level of involvement in the legal processes of transitional societies by the international community differs significantly from the role that the international community plays in the legal processes of nontransitional societies. This deep level of involvement suggests that the international community is positioned to affect the norms, practices, and patterns of interaction within transitional societies in a much more profound manner than nontransitional contexts. That is, the operations of the ICTY and newly formed ICC, for example, have more immediate and direct ramifications on the social and legal processes of the former Yugoslavia and Uganda than they do on those of France.

International criminal trials can influence prospects for reconciliation in transitional contexts, I want to suggest, by playing an educative role. International proceedings can thus offer a stark contrast to the practices and procedures

[55] ICTY Web site.

[56] William Schabas, "A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone," 15 *Criminal Law Forum* (2004), 3–54.

[57] Schabas, "A Synergistic Relationship," 25. Hayner and van Zyl both work at the ICTJ.

[58] ICTY Web Site. Available at http://www.ictj.org/en/tj/781.html (accessed on September 7, 2007).

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of the past in transitional contexts. International criminal trials are structured to respect the constraints of due process and adhere to internationally recognized standards. In the words of the ICTY, "The Rules of Procedure and Evidence guarantee that ICTY proceedings adhere to internationally recognised principles of fair trial . . . important elements include the presumption of innocence, the right to be tried without undue delay, the right to examine adverse witnesses and the right of appeal. Procedural provisions for the protection of witnesses' identities and the actual assistance provided before, during and after the proceedings by the Victims and Witnesses Section within the Registry ensure that witnesses can testify freely and safely."[59] To the extent that such procedures are followed, international criminal trials provide a model for how criminal proceedings should be conducted. The procedures and safeguards characteristic of the structure of international criminal trials prioritize and take seriously the view of all persons, including criminals, as self-directed agents whose actions determine the official response to them. As discussed in the previous section, the lawmaking and law-enforcement officials within societies under repressive rule or emerging from civil conflict are characteristically corrupt, incompetent, and ineffective.

To illustrate some of the ways in which properly conducted international criminal trials can provide a sharply contrasting model for how the criminal justice process proceeds, consider first the presumption of innocence until proven guilty. Taking seriously this presumption implies the requirement that it be demonstrated, to a sufficiently justifiable degree, that the alleged perpetrator was indeed responsible for specific crimes. It implies the refusal to suspect or assume guilt simply because the perpetrator belongs to a suspect group or category. This is in contrast to practices in areas of conflict, where being Catholic in Northern Ireland or African in South Africa sometimes eroded the seriousness with which the presumption of innocence was maintained. The presumption of innocence is especially important to respect in transitional contexts. A shift in power often occurs in conjunction with a transition.[60] To the extent that previously powerful groups, which may have assumed the guilt of individuals who were members of a suspect group, are not themselves subject to the same practice by the international community or newly empowered groups working with the international community, this demonstrates in practice that the holding or losing of power should not and need not be responsible for or determine the outcomes of criminal trials.

[59] ICTY Web site.

[60] This is not to suggest that persons who previously held power no longer hold power after a transition. How dramatically the power dynamic shifts differs among societies.

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Another important component of international criminal trials is the treatment of alleged perpetrators during the period leading up to a trial and during the course of pretrial interrogation and evidence-gathering phases. In international criminal trials, suspects are not to be held in inhumane conditions, tortured into confessions, or made to suffer cruel and unusual punishment. Taking seriously these basic protections, even with respect to persons suspected or convicted of failing to show the same respect toward others in the past, sets an important precedent that contrasts sharply with practices of the past. Respecting constraints against torturing suspects into confession or holding suspects in inhuman conditions signals an acknowledgment of the dignity that stems in part from the agency of all individuals. The conduct of prosecutors and law enforcement officials throughout the legal process, specifically with respect to the gathering and sharing of evidence, is critical. In contrast to the practices described by van Zyl, official conduct should be performed in a forthright manner, not manipulated.

Finally, a legal system depends on the cooperation of citizens, who are often important sources of information and can serve as witnesses who play a critical role in the successful conviction of perpetrators of crimes. In situations of conflict, cooperating with law enforcement officials may be dangerous, leading to serious bodily harm and rarely resulting in the elimination of the original threat. Thus, it is critical that the witnesses who do cooperate in such trials be provided with adequate and serious protection, and this commitment is reflected in the provisions established by tribunals like the ICTY.

There are two primary respects in which the model provided by the process of international criminal trials can be educative in a way that is conducive toward reconciliation. First, such trials can cultivate decency and better judgment among lawmaking and law-enforcement officials in transitional contexts. They do so by highlighting the absence of legal decency and good judgment among government officials during conflict or repressive rule, when diminished significance is attached to proving the guilt of criminals and recognizing their humanity throughout the criminal process. In addition, by working with local officials, representatives of the international community can communicate training, knowledge, and understanding regarding how and in what way their practices must change for law to function as it should and for law to regulate conduct in practice.

The second way in which the educative role of international criminal tribunals can facilitate political reconciliation is by restoring confidence and faith in law among ordinary citizens. Seeing respect given to the constraints of due process and prohibitions against certain types of treatment can promote conditions conducive to faith in the legal system by reducing the risks involved

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in participation. Knowing that arrest does not entail torture, that conviction does not entail death, and that cooperation does not risk death reduces the incentive of individuals to opt out of cooperating with (or do everything to avoid contact with) the law enforcement system. Seeing norms of international law enforced, and seeing officials held accountable for failing to respect the constraints that law imposed, can restore confidence in the fact that law will be enforced and declared rules will provide an accurate picture of what the actual practice of law enforcement will be.

V. OBJECTIONS CONSIDERED

Persons acquainted with the actual operations of hybrid and international criminal tribunals like the ICTY may be skeptical about whether such trials can contribute to reconciliation in the way I suggest. They may point to the failure of such tribunals to respect the due process guarantees in practice, stemming, for example, from resource constraints both financially and in terms of personnel trained in the language of witnesses and alleged perpetrators.[61] In response, I would note that this objection does not call into question the validity of my analysis. The proposed contributions of criminal trials are based on the assumption that criminal proceedings with an international dimension operate as they should, where the specific normative understanding of how criminal trials should function is framed by the fundamental commitment of law to pursue justice and to respect the agency of perpetrators and victims alike. Highlighting the degree to which international criminal tribunals fail to operate the way they should draws attention to the importance of reforming international criminal trials and the necessity of the international community providing sufficient funding so that the contributions that I have discussed can be realized in practice.

This response may not alleviate the concerns about whether international criminal trials will contribute to reconciliation, even if trials are reformed to respect due process guarantees in practice. There are two potential sources of lingering doubt. International personnel are not always welcome in transitional contexts, nor are international or hybrid trials necessarily viewed as legitimate. One source of uncertainty about whether such trials will provide an educative moment stems from recognition of these conditions.

In response, I want to recognize the validity of this underlying concern. That the international community is deeply involved in transitional contexts does

[61] For a detailed examination of such failures, see Nancy Combs, *Factfinding in International Criminal Law: The Appearance, The Reality and The Future* (Cambridge: Cambridge University Press, forthcoming 2009).

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not guarantee that its involvement always will be beneficial. In practice, the international community may change norms or patterns of interaction within transitional societies for the worse rather than for the better.[62] Interaction with members of the international community may entrench rather than alleviate the perception of law's partiality.

Important empirical work needs to be done to refine our understanding of the conditions that are likely to facilitate the realization of the potential educative role of international criminal tribunals in practice. The objection draws attention to the critical importance of international criminal courts being viewed as legitimate. Viewing representatives of the international community as legitimate is more likely to encourage acknowledgment and understanding of the failures of past law-enforcement and lawmaking practices among domestic officials.

Whether trials are viewed as legitimate is likely to depend on whether specific conditions are in place. I want to suggest some circumstances that, in my view, are influential in this regard. How and which cases are selected for prosecution will affect the image of the impartiality of the international community. First, especially in deeply divided societies where atrocities were committed by members of both sides of a conflict, solely singling out representatives of one community for prosecution is likely to erode the perception of impartiality among the targeted community. Second, local law enforcement officials are more likely to view international representatives as legitimate if the practice of the international community is consistent with its rhetoric (and thus, e.g., impartial).[63] Partiality and corruption by international officials will only serve to entrench, and potentially legitimate, the practices too often found within transitional contexts.

A different source of skepticism about whether criminal trials will facilitate reconciliation stems from concern about the consequences of enhancing due process guarantees. Of particular concern may be the consequence that more guilty individuals go free. According to this objection, it is most important to see that criminals responsible for egregious wrongdoing are punished. Without punishment, victims will not have the opportunity to express their resentment and hatred and have the benefit of seeing justice done. Absent this opportunity, the willingness of victims to engage with the new society, or with the members

[62] I am grateful to Laurel Fletcher for drawing my attention to this point.

[63] For a discussion of the significance of perceptions of legitimacy, see Laurel E. Fletcher and Harvey M. Weinstein, "A World Unto Itself? The Application of International Justice in the Former Yugoslavia," in Eric Stover and Harvey Weinstein (eds), *The Former Yugoslavia, My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocities* (Cambridge: Cambridge University Press, 2004), 29–48.

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of the community from which perpetrators came in cases of divided conflict, will diminish. In addition, allowing guilty individuals to go free may represent a pattern disturbingly similar to the past. If the standards are too high, then it appears that the legacy of impunity, far from being successfully countered, will in fact be continued through international criminal trials.

In response, a note of caution is in order. Commitment to the rule of law entails that responsibility for specific wrongdoing be proven, and not merely assumed. If one eases the presumption of innocence that respect for the rule of law requires in cases where respecting this presumption might lead to acquittal, one risks replicating behavior characteristically displayed during civil conflict and by repressive regimes. Nor will appeal to the importance of countering the legacy of impunity be sufficient to justify a cavalier attitude toward this presumption. Repressive regimes normally disregard due process considerations not merely to instill terror, but also to counter an alleged or real threat to an important value or to the continued existence of their society.

At the same time, the objection raises an important point. If no alleged perpetrators are ever successfully prosecuted, then perpetrators have little reason to fear or anticipate punishment. Nor do members of transitional societies have reason to think that human rights will be respected, regardless of whether they are respected by law. Thus, if it turns out that few, if any, convictions can be achieved by adhering to stringent standards of due process, given, for example, current financial and personnel resource constraints, careful consideration may need to be given to whether it is possible to ease specific standards so as to make convictions possible but in a way that avoids the appearance or reality of replicating problematic patterns displayed during conflict or by repressive regimes.

There is one final objection to consider. Transitional societies often have extremely limited resources to devote to the pursuit of reconciliation, as well as more general societal reconstruction. Similarly, the international community has limited resources to devote to the various needs faced by societies emerging from a period of repressive rule or civil conflict. Societies and the international community may face the choice of investing in education and health care or investing to ensure that due process guarantees are more robustly protected. Given these tough choices, the objection goes, it is unjustifiable to demand that further resources be placed to protect due process more strongly when other ways of promoting reconciliation are more cost effective and needs other than reconciliation are equally pressing.

In response, I first want to recognize that this objection points to the limits of the contributions that international criminal tribunals can make to political reconciliation. It is critical to recognize the contributions, as well as the limits.

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First, respect for the rule of law constitutes one important, but not the only, dimension of repair that relationships in transitional contexts require. Second, international criminal trials address some but not all of the social conditions required for law to be effective and thus for the dimension of reconciliation on which I have focused in this chapter to be achieved. For example, international criminal trials do not address the broader reform of social practices required for congruence between laws protecting rights and social practices to be realized and the law to thus be effective. For example, in contexts like South Africa, racism is deep and pervades all social institutions. Such racism needs to be addressed if the laws specifying the equality of all citizens are to be viewed as reasonable and the concrete implications of such laws knowable by both citizens and officials. International criminal trials are ill suited to effect the change in information that social practices require to successfully combat racism.[64]

Given these limits, and the other pressing demands in transitional contexts that the objection rightly highlights, it may sometimes be unjustifiable to devote resources to strengthening due process guarantees. However, this needs to be demonstrated and cannot simply be assumed. In my view, much more careful analysis is required before we can conclude that this contribution is too costly. Such analysis requires, at a minimum, weighing the relative importance of the competing interests or values that might be pursued and assessing the likelihood that each competing value could be realized, should resources be devoted to its pursuit. How to determine and balance relative weights and likelihoods are complicated tasks, beyond the scope of this chapter to resolve,[65] but I hope that this chapter has succeeded in showing that this erosion or incomplete realization of due process guarantees will involve a significant cost, not only in terms of justice but also in terms of reconciliation. It is a cost that we should be extremely cautious about accepting.

[64] Although such trials may have some limited impact through expressing condemnation of specific crimes.

[65] For a discussion on these questions, see Colleen Murphy and Paolo Gardoni, "The Acceptability and the Tolerability of Societal Risks: A Capabilities-based Approach," 14(1) *Science and Engineering Ethics* (2008), 77–92 and "Determining Public Policy and Resource Allocation Priorities for Mitigating Natural Hazards: A Capabilities-based Approach," 13(4) *Science and Engineering Ethics* (2007), 489–504.