TRANSITIONAL JUSTICE AS ORDINARY JUSTICE

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The study of "transitional justice" is a rapidly expanding field at the intersection of jurisprudence, comparative politics, and political theory.[1] In the wake of the revolutions in Eastern Europe,[2] the democratization of South Africa, and the ever-increasing popularity of international human rights talk, an academic literature has arisen (or at least greatly expanded) that examines regime transitions in developing nations. Typically, this literature aims to identify distinctive jurisprudential, moral, and institutional problems of transitional justice. For example, should the new regime use retroactive criminal and civil law to punish officials or collaborators of the old regime? Should it undertake a campaign of lustration — the attempt to impose disenfranchisement, ineligibility for office, or other legal disabilities on the old regime's adherents? What should be the role of reparation and restitution in redressing violations of civil rights or property rights that occurred before transition?

In opposition to this work, we make two related claims. First, theorists of transitional justice commonly err by treating regime transi-

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[1] For examples of recent works in the field, see MEGAN KOREMAN, THE EXPECTATION OF JUSTICE: FRANCE 1944–1946 (1999); JUAN J. LINZ & ALFRED STEPAN, PROBLEMS OF DEMOCRATIC TRANSITION AND CONSOLIDATION: SOUTHERN EUROPE, SOUTH AMERICA, AND POST-COMMUNIST EUROPE (1996); CLAUS OFFE, VARIETIES OF TRANSITION: THE EAST EUROPEAN AND EAST GERMAN EXPERIENCE (1997); ISTVAN POGANY, RIGHTING WRONGS IN EASTERN EUROPE (1997); THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES (Alexandra Barahona de Brito et al. eds., 2001); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) (three volumes) [hereinafter TRANSITIONAL JUSTICE]; TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997); Jon Elster, Moral Dilemmas of Transitional Justice (2002) (unpublished manuscript, on file with the Harvard Law School Library) [hereinafter Elster, Moral Dilemmas]; and Jon Elster, Preference Formation in Transitional Justice (2002) (unpublished manuscript, on file with the Harvard Law School Library).

[2] Although we focus on the Eastern European transitions after 1989, we also draw on material from the Southern European transitions of the mid-1970s and the Latin American transitions of the 1980s. For overviews of the latter two cases, see LINZ & STEPAN, *supra* note 1.

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tions as a self-contained subject, thereby denying the relevance or utility of comparisons and analogies between regime transitions, on the one hand, and the wide variety of transitions that occur in consolidated democracies, on the other.[3] Sometimes this error appears as an explicit claim, as when Judith Shklar writes of Nuremberg and other transitional trials that "all analogies drawn from municipal law . . . are unconvincing."[4] Sometimes it takes the form of an implicit but necessary assumption in an argument, as when Jon Elster examines the "moral dilemmas" of transitional justice without reference to obvious analogies from domestic law.[5] Against this view, we claim that legal and political transitions lie on a continuum, of which regime transitions are merely an endpoint.

To take only the example of American domestic law, consider the transitions marked by a spate of constitutional amendments, such as the aftermath of the Civil War; difficult transitions from one government to another, such as those marked by the contested elections of 1800, 1876, and 2000; transitions created by changes in criminal and civil law or procedure, such as the judicial identification of new constitutional rights; and quotidian changes in economic and social regulation and taxation or in common law entitlements.[6] All of these transitions could — and many did — pose questions of retroactivity, personnel management, and compensation usefully analogous to those questions arising after regime transitions. The problem of compensation for the pretransition deprivation of property, for example, is common to both takings law and regime transitions. Although there are

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[3] Sanford Levinson makes a similar point about criticisms of truth commissions, which he fruitfully analyzes in light of the U.S. Supreme Court's due process jurisprudence. *See* Sanford Levinson, *Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 211, 211–12 (Robert I. Rotberg & Dennis Thompson eds., 2000).

[4] JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 167 (1986). Shklar's reference to "municipal law" might suggest that her statement applies only to the distinction between international and domestic law. The context makes clear, however, that her claim intends to encompass both the international-domestic distinction and the distinction between transitional regimes and consolidated legal systems. In general, Shklar runs the two distinctions together, perhaps because Nuremberg, her principal focus, was both an international and a transitional trial. Note the tension between Shklar's claim that municipal analogies are not useful and her central thesis that the rule of law, or legalism, is "entirely a matter of degree." *Id.* at 220. If legalism is a continuous variable, then there should be no conceptual gulf between transitional justice and ordinary justice. We agree with Shklar that legalism is a continuous variable; we add that transitions are as well.

[5] *See* Elster, Moral Dilemmas, *supra* note 1.

[6] There is a large body of literature on this last group of transitions. *See, e.g.*, Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 515 (1986) (characterizing conventional transition issues as a general problem generated by uncertainty about future state policy). The literature assumes that a government's transition policies are stable and predictable and thus focuses on the effects of those policies on the incentives of parties to invest and to purchase insurance.

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differences of degree between regime transitions and intrasystem transitions, there are also differences of degree between large-scale intrasystem transitions, such as constitutional amendments, and small-scale ones, such as changes in the tax code. It is by no means clear that the differences between regime and intrasystem transitions are more consequential or more fundamental than the differences between large-scale and small-scale intrasystem transitions.

In general, the analysts of transitional justice, who are typically steeped in moral theory, political theory and science, or highly theorized international law, have gone wrong by virtue of an insufficient appreciation of the ordinary law of consolidated democracies. They have erred, not by engaging in inadequate moral or political analysis, but by holding a stereotyped view of ordinary justice in consolidated democracies — one in which laws are always prospective, individuals always costlessly obtain compensation for harms to person or property inflicted by others, and transitions essentially never occur because the legal system runs smoothly in settled equilibrium. By contrast, in our view, ordinary lawmaking must routinely cope with policy shifts caused by economic and technological shocks and by changes in the value judgments of citizens and legal elites. These jarring discontinuities predictably create transition problems. The law has developed a range of pragmatic tools for managing these problems while maintaining social order, ensuring some stability of expectations, and aspiring to see justice done. None of this commits us to defending all of the law's pragmatic tools of transition management, some of which are excessively crude, inadequately theorized, or defended on specious grounds. It should, however, explode the assumption that transitional justice is a distinctive topic presenting a distinctive set of moral and jurisprudential dilemmas.

Our second claim follows from the first. If transitional justice is continuous with ordinary justice, then there is no reason to treat transitional justice measures as presumptively suspect on either moral or institutional grounds, unless we are to treat the justice systems of consolidated liberal democracies as suspect as well. Transitional justice measures typically include trials and other processes designed to punish or remove officials and collaborators of the old regime, and transfers of property or money to the victims of the old regime through restitution or reparations. The dominant instinct among academic commentators on transitional justice is to condemn transitional justice measures wholesale, either on the ground that transitional measures are retroactive and thus inherently illiberal, or on the closely associated ground that new regimes should reserve their energies exclusively for forward-looking measures that contribute to state building, eco-

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nomic growth, and political cohesion.[7] These commentators either reject transitional justice measures or relegate them to a minor or symbolic role. But this posture is no more coherent than would be a parallel condemnation of all the measures that legal systems ordinarily use to manage change. We argue that in any legal system, transition problems are inevitable; retrospective measures themselves have important forward-looking justifications; and the wholesale rejection of retrospective measures is an implausibly extreme solution to the transition problem that very few new regimes have adopted. The attempt to eschew transitional measures is itself a transitional measure, and usually a poor one. There are, of course, strong, pragmatic reasons to object to particular transitional schemes, programs, and measures, and we provide pragmatic evaluations as the discussion proceeds. There is no global reason, however, to treat all transitional justice as suspect.

Part I provides an overview of the transitional justice literature, defines the problems addressed in that literature, and introduces the institutional tools of transitional justice, including criminal and civil trials, truth commissions, lustration, and reparations. Part II examines a series of issues that arise in transitional justice situations and that are said, or assumed, to represent distinctive dilemmas of transitional justice. In each case, we show that the problems are at most overblown versions of ordinary legal problems. In the most striking cases, transitional justice theorists have reinvented the wheel, identifying transitional justice conundrums without reference to identical problems in domestic legal settings. We also examine the consequences of the relevant transitional justice measures and find little evidence that such measures result in illiberal repression and much evidence that they achieve pragmatic success. A brief conclusion follows.

I. OVERVIEW

A. Conceptual Framework

Every transition creates a divide between the old regime and the new regime. Victims of the old regime frequently demand justice against those whom they regard as perpetrators. The perpetrators include officials of the old regime (such as dictators, party leaders, judges, bureaucrats, and soldiers) and collaborators among the civilian population (including business and religious leaders, union officials, and ordinary citizens who betray their friends and neighbors). The victims argue that they were unjustly deprived of jobs, educational

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[7] *See, e.g.*, OFFE, *supra* note 1, at 84 ("[A]fter the demise of the old regime, and confronted with the chaos it has left behind, we have more important things to care about than retroactive justice."); Jon Elster, *On Doing What One Can*, E. EUR. CONST. REV., Spring 1992, at 15.

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opportunities, and property. Officials of the new regime — themselves often victims of the old regime — must decide how to answer these calls for transitional justice.

The tools of transitional justice include trials, truth commissions, reparations, apologies, and purges. These tools are part of a transition policy comprising economic, political, and legal reform. Often, but not always, the tools of transitional justice conflict with other policy goals. Purges, for example, can further political reform by eliminating the influence of officials of the prior regime, but they can also interfere with political reform by depriving the new state of skilled administrators. Even when a tool of transitional justice is consistent with political reform, it may still conflict with other goals like economic reform. Reparations, for example, serve justice by compensating victims of the old regime and serve political reform by taking resources away from people who threaten the new regime, but they might also unsettle property rights and interfere with economic reform by creating new claims against existing property holders.

Whether tools of transitional justice conflict with policy goals depends in part on how transitional justice is understood. In the literature, writers generally understand transitional justice as backward-looking: punishing wrongdoers, compensating victims for their losses, forcing individuals to disgorge property that was wrongfully acquired, and revealing the truth about past events.[8] But transitional justice can also be understood in forward-looking terms: providing a method for the public to recapture lost traditions and institutions; depriving former officials of political and economic influence that they could use to frustrate reform; signaling a commitment to property rights, the market, and democratic institutions; and establishing constitutional precedents that may deter future leaders from repeating the abuses of the old regime. Thus, whereas adherents to backward-looking conceptions of justice see transitional justice measures as desirable except when they undermine reform, adherents to forward-looking conceptions of justice see transitional justice measures and policy considerations as identical or mutually reinforcing.

The tools of transitional justice take many forms. One is the public trial, in which perpetrators from the old regime are charged with crimes and then provided with lawyers, the chance to defend themselves, the opportunity to cross-examine witnesses, and other procedural protections. On a spectrum with the show trial on one end and the conventional domestic criminal or civil trial on the other, trials conducted for the purpose of achieving transitional justice usually lie

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[8] *See, e.g.*, OFFE, *supra* note 1, at 82 (characterizing transitional justice as "retroactive justice").

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somewhere in between. Another tool of transitional justice is the truth commission, the purpose of which is to reveal the identities of perpetrators or collaborators and the nature of their activities, but not to punish those individuals except by exposing them to public outrage; those who cooperate are often granted amnesty.

The law applied against the defendant in these trials varies considerably. It can be new law that applies retroactively; old law that was on the books of the old regime but never enforced; international law that was nominally respected in the old regime but not incorporated into the legal system; or old law that was enforced, but not against the perpetrators from the old regime. Some post-transitional governments employ the intermediate device of retroactively extending expired statutes of limitations.

Typical criminal punishments are imposed against perpetrators, but of special importance for transitional justice is the purge or lustration. Purges occur when the perpetrators are thrown out of office with or without a trial. Lustration, as it occurred in Czechoslovakia[9] after the 1989 revolution, involves the public exposure of collaborators who were otherwise not known as such, along with a prohibition of their serving in office for a period of time.[10] Related to purges and lustration is the formal admission of past crimes, required in some states like South Africa as a condition for amnesty after testimony before a truth commission.[11]

Every transition is different, and the requirements of transitional justice of one regime typically differ from those of another. When the old regime is extremely repressive — for example, South Africa during apartheid or the Soviet Union or Nazi Germany, but not imperial Britain in colonial America — the demands for justice are usually stronger. When the departing government of the old regime yields power willingly rather than after a violent revolution — for example, Hungary or Poland, but not old-regime France or czarist Russia — those who take power might feel compelled to treat perpetrators with leniency. When the old regime is highly secretive but does not excessively interfere with property rights, truth commissions and trials might be more important than reparations. In addition, resource constraints, the urgency of economic reform, the degree to which revanchist elements

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[9] Czechoslovakia split into the Czech Republic and Slovakia in 1993. When we refer to laws enacted in Czechoslovakia and carried over to the Czech Republic, we refer to either Czechoslovakia or the Czech Republic as the context requires.

[10] Jiri Pehe, *Parliament Passes Controversial Law on Vetting Officials*, REP. ON E. EUR., Oct. 25, 1991, at 4, 4–5, *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 544.

[11] *See* Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 194 (2002) (explaining that South Africa's tight link between confessions and amnesty presented the strongest case of "truth-enhancing amnesty").

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continue to pose a threat, the dangerousness of the international environment, and the extent of collaboration across the population also place practical constraints on the level of transitional justice that can be achieved.

B. Criteria for Evaluating Transitions

All transitions have multiple goals. Every transition seeks political reform, and the transition can be judged by the quality of the political reforms achieved. Many transitions also seek economic reform and can be judged by their success in creating a vibrant market economy. Thus, we can distinguish the primarily political transitions in Spain, Portugal, and Greece in the early 1970s from the combined political and economic transitions in Central and Eastern Europe and parts of Asia in 1989 and the 1990s. Spain, Portugal, and Greece are usually considered political successes. Among the latter group, Poland, Hungary, Estonia, and the Czech Republic are the main political and economic successes. Russia and the former republics of the Soviet Union, however, are not as successful. Post-1989 economic and political success appear to go hand in hand.[12]

What is transitional justice? It means something different from the successful accomplishment of a political or economic transition: it means a political and economic transition that is consistent with liberal and democratic commitments.[13] Such a regime change should respect rights and involve a minimum of violence and instability. People should either retain their property rights or be compensated for their losses. Officials and supporters of the old regime should not be punished for legal acts. They should not be mistreated, humiliated, or denied trials. Instead of being treated as scapegoats, they should be invited to participate as equal citizens in the new regime. Supporters of the new regime should not profit from the transition or manipulate it for personal ends.

However, these elements of transitional justice reflect ideals that remain unrealized even in a consolidated liberal democracy such as the United States. In judging whether a transition has been just, it is important not to hold it to unrealistic ideals. Yet the literature does just that — either condemning transitions for violating these ideals or dismissing any effort at transitional justice because it will necessarily fail to achieve one or more of these ideals. A more constructive approach

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[12] *See* NATIONS IN TRANSIT 2001, at 26 tbl.B (Adrian Karatnycky et al. eds., 2001). Political and economic "success" is defined as the development of political and economic institutions that resemble those of the major liberal democracies.

[13] We follow the bulk of the literature in focusing on transitions to liberal democracy; we do not express an opinion on whether transitional justice can be achieved for other kinds of transitions.

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is to judge transitions against the standards used in consolidated liberal democracies, which must deal with the problems of their own, albeit smaller-scale, transitions. These standards reflect liberal commitments leavened with prudential concern for good transition management, which involves, among other things, the maintenance of valuable political structures, the satisfaction of some illiberal popular demands, and the achievement of substantive justice that might violate liberal norms. The same considerations apply at the level of the regime. Transitional justice is not achieved when rigid adherence to liberal norms results in political collapse and a return to authoritarianism. Transitional justice requires a balance of liberal commitments and political precautions. It is achieved when liberal norms are respected to the extent necessary for, and consistent with, the consolidation of liberal democratic institutions.

C. Transition Processes

A useful analysis of political transitions distinguishes among transitions that are led by the elite of the old regime, those that are forced on the elite by the opposition, those that are bargains between the elite and the opposition, and those that are imposed by a foreign nation.[14] An example of elite-led regime change is the Spanish transition of the early 1970s. After the death of Francisco Franco, King Juan Carlos initiated democratic and liberal reforms. Chile (1989), Hungary (1989), Russia (1991), and Bulgaria (1992) also fit this model. An example of opposition-led regime change is the defeat of the Greek colonels in the 1970s by a coalition of civil and military groups, which reinstated Greece's earlier constitutional democracy. Portugal (1976) and Argentina (1983) also fit this model, as do — although more remotely — the United States (1776) and France (1789). An example of a bargain is the Polish transition that culminated in 1989: this bargain was the result of the Solidarity union's growth as a major but illegal political force. The threat of economic disruption through work stoppages strengthened reformers in the Communist Party and led to a negotiated transition to, initially, a quasi-democracy. Other examples of this model include Brazil (1985), Uruguay (1985), and Czechoslovakia (1989). Examples of transitions led by a foreign power include Germany, Japan, and Italy after World War II. The victorious Allies forcibly ended the old regime and returned sovereignty to those states only after elites demonstrated a commitment to liberal democracy. Foreign countries also sparked wartime transitions in France, Belgium,

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[14] *See* SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 113–14 (1991). Huntington uses the needlessly obscure terms "transformation," "replacement," "transplacement," and "intervention."

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Denmark, and other conquered countries, but because the quisling governments in those countries enjoyed little legitimacy, transitional justice was managed by returned governments in exile, former resistance groups, and the native population, rather than by the liberators.

These four models are ideal types but provide a useful starting point. An extensive body of literature discusses why one path, rather than another, occurs in a particular country, and it examines the political effects of the different paths.[15] For our purposes, what is most interesting is the possibility that the kind of transition affects the kind of transitional justice that will occur. A pattern of sorts emerges (see Table 1, below). Where the elites lead the transition, transitional justice is limited. Where the elite and the opposition enter a bargain, transitional justice is moderate. Where the opposition or a foreign nation leads the transition, transitional justice is significant. In short, transitional justice increases as the influence of the elites decreases. One possible explanation for this pattern is that when elites lead the transition, they try to shield themselves from post-transitional punishments, and when they bargain for the transition, they try to extract concessions from the opposition.

Patterns like this one have engaged the interest of political scientists, who have sought to discover the social, political, and economic factors that are associated with successful regime transitions.[16] But transitional justice mechanisms themselves have received little attention; they are treated as superstructure. Our approach, by contrast, takes them seriously both as causal factors that may contribute to or undermine the success of a transition, and as political phenomena that can be evaluated legally and morally.

D. Some History and Examples

The establishment and consolidation of democratic institutions at the level of the nation-state are, like the nation-state itself, phenomena of the nineteenth century. In earlier periods one could find democratic institutions in city-states or small republics, and partially democratic institutions in larger entities like England. The American and French Revolutions did not immediately create nationwide democracies: the United States failed to expand the franchise to all free men until the early nineteenth century, while the French Revolution degenerated into

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[15] *See, e.g.*, TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES (Guillermo O'Donnell et al. eds., 1986) [hereinafter TRANSITIONS FROM AUTHORITARIAN RULE] (analyzing the ways in which transitions from authoritarian rule are shaped by historical conditions).

[16] *See, e.g.*, John Sheahan, *Economic Policies and the Prospects for Successful Transition from Authoritarian Rule in Latin America*, *in* TRANSITIONS FROM AUTHORITARIAN RULE, *supra* note 15, at 154.

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the Reign of Terror and Napoleon's dictatorship. Still, both revolutions led to significant efforts at transitional justice. In the American states, British loyalists and collaborators were tried and punished in great numbers. There were also significant purges, though they varied by state.[17] In France, Louis XVI was tried, and he and thousands of lesser-known folk were executed.

By the end of the nineteenth century, France, Great Britain, and a few other smaller countries had become democracies — in the sense of having a relatively broad franchise and electoral competition.[18] In this "first wave" of democratization, as Samuel Huntington describes it, democratization in most countries occurred gradually, with some setbacks, such as the consolidation of authoritarian power after the revolutions of 1848.[19] Transitional justice, however, is not associated with gradualism, and there are few examples of transitional justice from the major nineteenth-century democratic transitions.

Huntington's second wave of democratization, from 1943 to 1962,[20] began with the spread of democracy to states defeated and occupied by the Western Allies during World War II, and continued with the decolonization of India and other states in Asia and Africa.[21] Two kinds of transitional justice occurred. First, the Allied governments tried and punished many of the leaders of Nazi Germany, Italy, and Japan; they also tried to force the post-transitional governments to continue this process with criminal prosecutions of lower-level officials. Second, the post-transitional governments of occupied Allies — France, Belgium, Denmark, Holland, and so forth — tried and punished collaborators and officials of the puppet governments during the war.

The third wave of democratization, which began in 1974 in Portugal, had three phases: Southern Europe during the 1970s, Latin America during the 1980s, and Eastern Europe beginning in 1989.[22] These transitions were, for our purposes, the purest. The sudden, rather than gradual, changes that typified this wave created a sharp divide between an old regime and a new regime, and gave the new regime opportunities to bring members of the old regime to justice. Because these transitions were not the direct result of foreign influence on a defeated regime or intervention against an aggressor, there is relatively little confusion about whether transitional justice reflected the needs of

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[17] *See, e.g.*, CLAUDE HALSTEAD VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION (Peter Smith 1959) (1902) (chronicling the treatment of old-regime Tories during and after the American Revolution).

[18] HUNTINGTON, *supra* note 14, at 16–17.

[19] *Id.*

[20] *Id.* at 16.

[21] *Id.* at 18–19.

[22] *Id.* at 21–24.

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the local population or the interests of a foreign occupier. And because, in most cases, the old regime had existed for many years and had sunk roots into society, the problems of transitional justice were particularly acute.

Table 1 displays a selection of transitions. The purpose is not to provide a complete account but to give the reader a sense of the variation. We have left out post-World War I transitions; some of the post-World War II transitions, such as those of Greece and Holland; many of the Latin American transitions (including Mexico's quasi-transition from an era of PRI hegemony to one of greater political competition), many of which were quite gradual and thus difficult to distinguish from normal politics; most transitions in Africa, which present their own set of distinct issues because of the prevalence of warfare and the shallowness of modern political institutions; the transitions of many of the countries formerly dominated by the Soviet Union; and the transitions of the states that emerged from the fragments of Yugoslavia. The second column provides the year the transition began, but not the entire period of transition, which in many cases is subject to debate. The next three columns contain information about the use of trials, purges, and reparations. The penultimate column characterizes the political origin of the transition: elite-led, opposition-led, bargain, or foreign-led. The last column indicates whether there was also an economic transition.

TABLE 1. SELECTED TRANSITIONS

State	Year	Trials	Lustration/ Purges	Reparations	Type of Transition	Economic Transition
Panel A. 18th Century						
United States[23]	1776	Yes	Yes	None	Opposition-led	None
France[24]	1789	Yes	Yes	None	Opposition-led	None
Panel B. Post-World War II						
Belgium[25]	1944	Military trials and executions of collaborators	Purges of collaborators	None	Foreign-led	None

[23] *See* VAN TYNE, *supra* note 17.

[24] *See* WILLIAM DOYLE, THE OXFORD HISTORY OF THE FRENCH REVOLUTION 194–96 (1989) (describing the trial of Louis XVI).

[25] *See* PETER NOVICK, THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE 186–87 (1968), *reprinted in part in* 2 TRANSITIONAL JUSTICE,

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France[26]	1944	Trials and executions of Vichy officials and collaborators	Purges of police, military, and media	None	Foreign-led	None
Italy[27]	1944	Trials of Fascist leaders	Limited and ineffective purges of Fascists, beneficiaries of the prior regime, and "corrupt persons"	None	Foreign-led	None
Denmark[28]	1945	Criminal trials of collaborators	Purges of collaborators	None	Foreign-led	None
Germany[29]	1945	Military trials, 1945–1949; criminal trials after 1955	Purges of high-ranking Nazi and government officials; screening of population	Significant payments to victims and Israel	Foreign-led	None
Japan[30]	1945	Military trials	Purges of government, military, and business leaders	Reparations to Korean "comfort women" in the 1990s	Foreign-led	None

supra note 1, at 100, 101; L. Huyse, *The Criminal Justice System as a Political Actor in Regime Transitions: The Case of Belgium (1944–1950)*, *in* LIVING LAW IN THE LOW COUNTRIES 87 (1991) (special issue of RECHT DER WERKELIJKHEID), *reprinted in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 141.

[26] *See* KOREMAN, *supra* note 1, at 92–147; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 71–125.

[27] *See* ROY PALMER DOMENICO, ITALIAN FASCISTS ON TRIAL, 1943–1948 (1991); 2 TRANSITIONAL JUSTICE, *supra* note 1, at 153–204; Guiseppe Di Palma, *Italy: Is There a Legacy and Is It Fascist*, *in* FROM DICTATORSHIP TO DEMOCRACY 107 (John H. Herz ed., 1982).

[28] *See* Carl Christian Givskov, *The Danish "Purge-Laws"*, 39 J. CRIM. L. & CRIMINOLOGY 447 (1948), *reprinted in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 127.

[29] *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 1–71; John H. Herz, *Denazification and Related Policies*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 15; Karlheinz Niclauss, *Political Deconstruction at Bonn*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 39.

[30] *See* TAKEMAE EIJI, INSIDE GHQ: THE ALLIED OCCUPATION OF JAPAN AND ITS LEGACY 243–60, 266–70 (Robert Ricketts & Sebastian Swann trans., 2002); Arthur E. Tiedmann, *Japan Sheds Dictatorship*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 179; Andrew Pollack, *Japan Pays Some Women from War Brothels, but Many Refuse*, N.Y. TIMES, Aug. 15, 1996, at A11.

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Panel C. Southern Europe, 1970s						
Greece[31]	1974	Trials of government, military, and police officials	Purges of military officers and some business leaders; dismissal of government officials and educators	Restoration of pensions	Opposition-led	None
Portugal[32]	1974	Trials of military officers	Purges of government, military, and union officials	None	Opposition-led	None
Spain[33]	1975	None	None	None	Elite-led	None
Panel D. Latin America, 1980s						
Argentina[34]	1983	Trials of military and police officers	None	Payments to victims	Opposition-led	None
Brazil[35]	1985	None	None	None	Bargain	None

[31] *See* LINZ & STEPAN, *supra* note 1, at 116–29; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 241–82; Harry J. Psomiades, *Greece: From the Colonels' Rule to Democracy*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 251.

[32] *See* LINZ & STEPAN, *supra* note 1, at 116–29; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 283–96; Kenneth Maxwell, *The Emergence of Portuguese Democracy*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 231; Antonio Costa Pinto, *Settling Accounts with the Past in a Troubled Transition to Democracy: The Portuguese Case*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 65.

[33] *See* LINZ & STEPAN, *supra* note 1, at 87–115; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 297–322; Paloma Aguilar, *Justice, Politics, and Memory in the Spanish Transition*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 92; Alexandra Barahona de Brito, *Truth, Justice, Memory, and Democratization in the Southern Cone*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 119, 121–31, 136–40; Edward Malefakis, *Spain and Its Francoist Heritage*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 215.

[34] *See* LINZ & STEPAN, *supra* note 1, at 190–204; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 323–82; Carlos H. Acuña & Catalina Smulovitz, *Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering the Courts*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 1, at 93, 101–11.

[35] *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 431–52; Fernando Cardoso, *Entrepreneurs and the Transition Process: The Brazilian Case*, *in* TRANSITIONS FROM AUTHORITARIAN RULE, *supra* note 15, at 137.

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Uruguay[36]	1985	Some unsuccessful lawsuits; trials of doctors involved in torture	None	Restoration of civil service positions and pensions	Bargain	None
Chile[37]	1989	Some trials for human rights violations; truth commission	None	Payments of pensions, financial aid, and medical care	Elite-led	None
Panel E. Eastern Europe, 1989–1991						
Czechoslovakia[38]	1989	Extension of statutes of limitations in trials of government officials	Lustration of Communist Party officials, secret police, military officers, collaborators, and some business leaders	Return of some confiscated property; payments to victims of political crimes	Bargain	Yes
East Germany[39]	1989	Trials of border guards and government leaders	Purges of judges, lawyers, academics, and bureaucrats	Return of expropriated property	Bargain	Yes

[36] *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 383–430.

[37] *See* LINZ & STEPAN, *supra* note 1, at 205–18; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 453–510; de Brito, *supra* note 33, at 131–36; Jorge Correa Sutil, *"No Victorious Army Has Ever Been Prosecuted . . .": The Unsettled Story of Transitional Justice in Chile*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 1, at 121, 131–49.

[38] *See* POGANY, *supra* note 1, at 150–54, 188–91; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 533–92; Milos Calda, *The Roundtable Talks in Czechoslovakia*, *in* THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM 135 (Jon Elster ed., 1996); Carmen González-Enríquez, *De-Communization and Political Justice in Central and Eastern Europe*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 218, 224–31.

[39] *See* TIMOTHY GARTEN ASH, HISTORY OF THE PRESENT: ESSAYS, SKETCHES, AND DISPATCHES FROM EUROPE IN THE 1990S (1999); PETER QUINT, THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION (1997); 2 TRANSITIONAL JUSTICE, *supra* note 1, at 593–722; A. James McAdams, *Communism on Trial: The East German Past and the German Future*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 1, at 239–55; Jan-Werner Müller, *East Germany: Incorporation, Tainted Truth, and the Double Division*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 248; Ulrich Preuss, *The Roundtable Talks in the German Democratic Republic*, *in* THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM, *supra* note 38, at 99.

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Hungary[40]	1989	Adoption of international conventions to extend expired statutes of limitations	Screening of politicians, government officials, police, educators, and journalists	Payments to political prisoners and owners of seized property; auctions of seized land	Elite-led	Yes
Poland[41]	1989	Some trials of security officials	Screening of all state officials	Return of seized church property	Bargain	Yes
Lithuania[42]	1991	Arrests and trials based on KGB files	KGB officials and collaborators barred from office for five years	Return of or compensation for seized property	Opposition-led	Yes
Russia[43]	1991	None	None	Payment to victims of political crimes	Elite-led	Yes
Albania[44]	1992	Trials of government officials and party members	Unofficial purges of Communists; purge legislation deemed unconstitutional	Return of or compensation for seized property	Bargain	Yes

[40] *See* POGANY, *supra* note 1, at 155–78, 191–97; 2 TRANSITIONAL JUSTICE, *supra* note 1, at 645–92; González-Enríquez, *supra* note 38, at 241–44; Gábor Halma & Kim Lane Scheppele, *Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 1, at 155; András Sajó, *The Roundtable Talks in Hungary*, *in* THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM, *supra* note 38, at 69.

[41] *See* LINZ & STEPAN, *supra* note 1, at 166–89; POGANY, *supra* note 1, at 189–91; Mark S. Ellis, *Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 LAW & CONTEMP. PROBS. 181, 192–94 (1997); González-Enríquez, *supra* note 38, at 237–41; Andrzej K. Kozminski, *Restitution of Private Property: Re-Privatization in Central and Eastern Europe*, 30 COMMUNIST & POST-COMMUNIST STUD. 95, 101 (1997); Wiktor Osiatnyski, *The Roundtable Talks in Poland*, *in* THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM, *supra* note 38, at 21; Andrzej S. Walicki, *Transitional Justice and the Political Struggles of Post-Communist Poland*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 1, at 185–229.

[42] *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 763–70.

[43] *See id.* at 735–62; Nanci Adler, *In Search of Identity: The Collapse of the Soviet Union and the Recreation of Russia*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 273, 287–302.

[44] *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 723–34.

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Bulgaria[45]	1992	Trials of government officials	Lustration of Communist leaders and candidates, military officers, and some educators	Amnesty and payment to victims and exiles; return of or compensation for seized land	Elite-led	Yes
Panel F. Other Recent Transitions						
Uganda[46]	1986	None	None	None	Opposition-led	None
South Korea[47]	1987	Trials of officials responsible for crimes before 1960; trials for economic crimes	Purges of police and military officers; exposure of corrupt officials	None	Bargain	None
South Africa[48]	1995	Truth commission	None	Trivial reparations expected	Bargain	None

II. ANALYSIS

A. Depleting the New Regime of Skilled Officials

A problem that commonly arises after regime change is how to staff the new regime. Prosecutions and lustration may clear the way for adherents of the new regime — both latecomers and former members of the resistance or democratic opposition — to assume offices previously held by apparatchiks or functionaries of the old regime. The new regime's populace will resent being governed by the same old bureaucrats with new titles. Yet the more deeply the old regime was entrenched, and the longer it persisted, the more likely it is that its functionaries hold a monopoly on administrative and technical expertise in the ordinary business of government, making them indispensable to

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[45] *See id.* at 693–721; González-Enríquez, *supra* note 38, at 231–35; Rumyana Kolatova & Dimitr Dimitrov, *The Roundtable Talks in the Bulgaria*, *in* THE ROUNDTABLE TALKS AND THE BREAKDOWN OF COMMUNISM, *supra* note 38, at 178.

[46] *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 511–32.

[47] *See id.* at 205–40.

[48] *See* KENNETH CHRISTIE, THE SOUTH AFRICAN TRUTH COMMISSION (2000); John Dugard, *Retrospective Justice: International Law and the South African Model*, *in* TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES, *supra* note 1, at 269, 269–79; Richard A. Wilson, *Justice and Legitimacy in the South African Transition*, *in* THE POLITICS OF MEMORY, *supra* note 1, at 190.

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the new regime. Former resisters or revolutionaries are often the very people who have been denied technical education or political office; indeed, they are often among those seeking compensation precisely on the ground that the old regime deprived them of educational and professional opportunities.

The personnel dilemma facing new regimes, then, is that popular demand for the replacement of the old regime's functionaries will be greatest when those functionaries' expertise is the most essential. Consider the Hobson's choice facing democratic West Germany in the period after World War II. The judiciary had been heavily complicit in the Nazi regime — so much so that the occupying powers considered "closing all German courts for ten years and replacing them with a 'colonial' system, so that a new generation of judges could be educated in the meantime."[49] Of course, this proposal was never adopted, and the subsequent failure to denazify the judiciary meant that plaintiffs seeking compensation or restitution for violations of their rights by Nazis were often outraged to find that the judges hearing their cases were the same judges who had permitted the original abuses.[50]

The severity of the staffing problem varies with the depth of the old regime's entrenchment and the circumstances of the new regime's accession. At one extreme lie cases in which the old regime was short-lived (perhaps because it was temporarily imposed as part of a foreign military intervention) and a large cadre of noncollaborators can quickly resume office and reinstate the previously existing institutions. In Belgium and the Netherlands after the overthrow of the Nazi occupation, for example, governments-in-exile quickly reassumed power and staffed their institutions with pre-occupation elites. At the same time, however, the socialist government in Belgium "interpreted" the penal code to exempt many economic collaborators from punishment, on the strictly pragmatic ground that the commercial and industrial classes were indispensable to economic recovery.[51] This compromise illustrates how a nation's personnel problem can reach beyond its formally designated bureaucracies.

At the other extreme are the Iron Curtain nations. Although in a real sense subject to foreign military power, the Communist hegemony in those nations was far more durable and extensive than the Nazi hegemony in the Benelux countries. Mid-level officials were implicated in the repressive regime to a far greater degree, so that no obvious pool of politically clean candidates existed to fill the new regime's posts. An exception to this generalization is the German Democratic Repub-

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[49] INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 201 (1991).

[50] *See id.* at 215.

[51] Huyse, *supra* note 25, at 93–94, *reprinted in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 143, 149.

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lic (GDR), or East Germany, which represents an important special case. There, the unification with the Federal Republic of Germany (FRG), or West Germany, created a natural pool of highly efficient civil servants ready to assume the functions of the GDR bureaucracy. The major personnel problem concerning former GDR functionaries was how they could be productively employed at all.[52]

Some commentators appeal to the personnel dilemma as a pragmatic consideration that counsels against transitional measures, especially lustration schemes. As Claus Offe puts it, "[c]ountries which rely extensively on disqualification may deprive themselves of significant portions of the managerial and administrative manpower and talent that they depend upon in the process of economic reconstruction."[53] Indisputably that is so. The question is what follows. The least plausible solutions are the extreme ones: either a sweeping purge or total bureaucratic continuity.[54] Well-designed schemes can finesse the dilemma, maintaining a critical mass of useful old-regime personnel while excising the officials who present the greatest threat to the new regime or whose presence would create the greatest public offense.

Nontransitional analogies to the personnel dilemma illustrate the difficulty of achieving this balance. Personnel dilemmas also inevitably arise from changes in legal and public norms within a given constitutional regime. When such changes are relatively sudden and discrete, creating sharp discontinuities with past practices, the personnel problems within a regime may in many cases be as severe as, or more severe than, those in cases of regime change proper. Officials in power under the new regime, or candidates and nominees for office, often face scrutiny for any collaboration with the prior system of laws and norms. The debate tends to follow along the same lines as the debate that typically accompanies a regime change. Ideological adherents of the new equilibrium condemn the official for his previous, normatively objectionable behavior. Others respond that judging the official's past behavior by current norms is unfairly retroactive and will deprive the government of personnel who are technically qualified for office. Importantly, however, these debates rarely result in either wholesale purges or wholesale rehabilitation of the old system's adherents. The solutions that tend to prevail rehabilitate the rank-and-file bureaucrats, purge the leaders or conspicuous ideologues, and produce a legal and normative equilibrium that bars open praise of the discredited but discourages repeated witch-hunts for old collaborators.

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[52] *See* OFFE, *supra* note 1, at 94–95.

[53] *Id.* at 95.

[54] It is not clear whether Offe endorses the latter view, although he does state that the personnel problem undermines lustration "if applied to more than a trivial extent." *Id.*

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To make this discussion concrete, consider the following examples from American history of changes in laws and norms that produced personnel and appointments controversies:

1. Postbellum Lustration of Confederate Officials. — A major issue after the Civil War, until the enactment of the (mild) lustration provisions of the Fourteenth Amendment,[55] involved the power of federal and state legislators to bar from public office otherwise qualified experts and candidates who had fought for or served secessionist states. In many of those states, the cadre of personnel who had served secessionist governments was drawn from local elites who also provided most of the available pool of personnel for Reconstruction governments. Some Reconstruction governments undertook projects of lustration, but in two landmark cases the Supreme Court invalidated state and federal statutes that disqualified former Confederates from designated offices and occupations.[56] The arguments for invalidation blended a charge of unconstitutionally retroactive punishment with the claim that the statutes deprived the affected institutions of the services of highly qualified personnel. The eventual equilibrium that the political system reached involved the widespread civil rehabilitation of former Confederate officials, especially through presidential pardons, and the temporary exclusion from federal and state office of former federal officeholders who had subsequently joined the Confederacy — thus combining rebellion with violation of the federal official oath to support the Constitution.[57]

These compromises were controversial, and we take no position on whether they were appropriate. Our point here is that the personnel problem is not some intractable dilemma unique to transitional justice. Rather, the personnel problem is a managerial hurdle that is usually overcome through compromise and detailed policy design rather than through the taking of extreme positions in either direction. Note, too, that it is essentially irrelevant whether we categorize the changes in constitutional and public norms produced by the Civil War as intrasystem change or as regime change. Perhaps the war's fundamental alteration of domestic political dynamics counts as transitional in a strong sense, although the nominal constitutional framework remained unaltered during the period at issue in the lustration decisions, and

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[55] *See* KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865–1877, at 143–44 (1966).

[56] *See Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866) (invalidating, on bill of attainder and ex post facto grounds, a federal statute that excluded former rebels from the Supreme Court bar); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866) (invalidating a state disqualification and loyalty-oath provision as an ex post facto law).

[57] *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 185–97, 528–29 (1988).

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even the constitutional amendments that Congress eventually produced were in many respects unimpressive. The difficulty of categorizing the Civil War's effects as either regime change or intrasystem change merely emphasizes the uncertain boundaries of "transitional justice." The retroactive application of new legal and political norms creates personnel problems for post-transitional governments whether or not large-scale regime change has occurred.

2. The Development of the Civil Service. — Every election year creates a transition problem, writ small. New presidents want to reward supporters with governmental posts, punish enemies with the loss of office, and exert control over a sluggish and potentially recalcitrant bureaucracy. A natural constraint, however, is that career bureaucrats possess expertise and information, or at least familiarity with administrative routines, that political appointees cannot duplicate. The same basic constraint also affects the agencies' other masters, the standing congressional committees. The majority party in Congress wants executive appointees who share its views or (if the President is of the other party) who represent the other party's moderate wing. But committees also form ongoing relationships with high-level career bureaucrats who may have been appointed by a previous administration with a different ideological slant. Neither the President nor Congress, then, desires a wholesale bloodletting after every political transition, but each desires to exert a measure of political control over the agencies.

Congress and the executive branch have jointly created a humdrum but effective structure of statutes, regulations, and practices that accommodates these twin concerns. Most bureaucrats are civil servants with relatively stringent legal protections against political discharge, including review by an independent agency and protection from being pressed into service in political campaigns. Scattered across the top level of the bureaucracy, however, is a range of political positions that new administrations fill with their adherents. In the most optimistic account of the resulting equilibrium, career bureaucrats whose career investments are protected from sudden political expropriation develop technical expertise to serve politically accountable policymakers. In practice, political appointees may have difficulty establishing policy control and forcing bureaucrats to reveal information — but the large-scale problem of personnel transitions has been successfully muted.

3. The Canonization of Brown. — In 1954, when the Supreme Court held in *Brown v. Board of Education*[58] that racial segregation in public schools was unconstitutional, it was socially acceptable for experts in constitutional law to declare it wrongly decided, even lawless.

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[58] 347 U.S. 483 (1954).

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Massive popular resistance in the South encouraged reluctance on the part of Congress and the President to enforce *Brown*. Even well into the 1960s, the Court maintained a tentative remedial approach. By about the mid-1980s, however, *Brown* had become a canonical case in American constitutional law — a fixed point whose validity had to be presumed by any viable account of constitutional theory. Mainstream constitutional academics considered it an unanswerable charge against originalist revisionists, such as Robert Bork, that originalism had difficulty demonstrating that *Brown* was correctly decided.[59] (One might, of course, quibble with our categorization of *Brown*'s canonization as a change in norms; a tendentious textualist might argue that *Brown* represented a "judicial amendment" of the Constitution. But from the standpoint of constitutional politics, *Brown* is just a standard case, albeit a consequential one, of changing judicial interpretation of a capacious and ambiguous constitutional text.)

The important point is that the canonization of *Brown* predictably spilled over into personnel decisions. The most dramatic case involved William Rehnquist's nomination as Associate Justice in 1971 and as Chief Justice in 1986. In both cases, Rehnquist's attitude toward *Brown* became a major political controversy because Rehnquist had, when clerking for Justice Jackson in 1954, written a memo that argued for the constitutionality of racial segregation in public schools. Rehnquist was eventually confirmed to both posts, but in each confirmation fight he was forced to disavow the memo by claiming that it did not, even at the time, represent his personal views. A principal argument of Rehnquist's defenders was that imposing current norms on past behavior would deprive the public of the services of an official highly qualified for the post in other respects.[60]

4. The Triumph of the Civil Rights Movement. — The point about *Brown* resonates beyond constitutional law and judicial confirmations. Endorsement of white supremacy and racial segregation was the centerpiece of Dixiecrat presidential candidacies in 1948 and 1956. By 1964, with the enactment of the Civil Rights Act, no significant presidential candidate could openly defend those institutions. Yet many current officeholders have been, or could be, implicated as collaborators or supporters of Jim Crow. The resulting equilibrium of legal and political norms is complex. A ritualistic confession of error or a change of heart usually suffices to immunize former segregationists against public outcry. Consider Strom Thurmond, who was repeatedly reelected to the Senate despite having staged a pro-segregationist presi-

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[59] Though some originalists have tried. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

[60] For a fuller account of the controversy, see JOHN W. DEAN, THE REHNQUIST CHOICE 274–84 (2001).

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dential campaign in 1948: Thurmond could not have achieved this string of popular successes had he not publicly disavowed his former views.[61] By contrast, any public expression suggesting that the officeholder *currently* supports white supremacy is sure to create a political firestorm: compare Thurmond with Trent Lott, who lost his post as Senate Majority Leader for praising Thurmond's 1948 campaign in terms suggesting current racial animus.[62]

It is not hard to explain this equilibrium in straightforwardly functional terms. Barring from public life any person who once collaborated in Jim Crow would radically deplete the pool of available legislators, bureaucrats, and judges, and might create a backlash that would, perversely, increase racial tensions. This sort of explanation elides difficult questions about the mechanisms that give rise to complex norm equilibria. Yet it is undeniable that the current norms, whether or not morally justifiable in some ultimate sense, have a rough pragmatic logic about them: their effect is to reinforce a public consensus against white supremacy while avoiding the high social costs of a campaign against white supremacy's former adherents.[63] Similar equilibria obtain in transitional societies in which collaboration with the old regime was widespread, such as Germany after denazification or the post-communist regimes of Eastern Europe. In such societies, it is common knowledge that many, perhaps most, might be implicated in the old regime's wrongdoing, but large-scale campaigns of exposure and lustration either quickly lose steam or never get underway in the first place. Moderate, targeted lustration schemes eliminate a small but important layer of the old regime's critical officials, while legal and social norms constrain post-transitional public discourse by shunning any public expression of current support for the old regime's policies.[64]

B. Unsettling Property Rights

In many pretransitional states, governments take property from individuals and give it to others. Sometimes the property is given to political officials, cronies, or collaborators. Sometimes the property is given to poor people, displaced people, workers, or farmers. And sometimes — the usual case for Communist dictatorships — the property is kept by the government. If the confiscation occurred long be-

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[61] *See* Editorial, *Lott's Astounding Gaffe*, THE HERALD (Rock Hill, S.C.), Dec. 11, 2002, at A7.

[62] *See* Carl Hulse, *Lott Fails To Quell Furor and Quits Top Senate Post; Frist Emerges as Successor*, N.Y. TIMES, Dec. 21, 2002, at A1.

[63] Changing legal and social norms about sexual harassment might provide another example. Consider the controversy surrounding former Senator Robert Packwood, whose behavior fell dramatically out of step with postfeminist rules of sexual propriety.

[64] *See* Winfried Brugger, *Ban on or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 21–22 (2002).

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fore the transition, then the property holders at the time of the transition are usually not the original transferees. They are the children or grandchildren of the transferees, or they are purchasers of the property who may or may not have known about the original confiscation. They may also be employees or tenants of the government.

After transition occurs, the original property holders — or their relatives or descendants — often argue that the confiscated property should be returned to them or that they should be compensated for the loss of the property. In many states, these claims have fallen on receptive ears. States such as the Czech Republic and Hungary have created procedures for returning property to the original owners or their descendants, including institutions such as the Church.[65] Current property holders sometimes receive credits if they have improved the property; sometimes they are allowed to keep the property, in which case the original owners receive monetary compensation. Other states finance restitution from tax revenues and allow current holders of confiscated property to retain title.[66] But most transitional governments have either refused to create restitution programs or limited them to a small class of victims.

Critics of restitution programs argue that such programs unsettle property rights.[67] For a transition to succeed, these critics argue, the post-transitional economy must generate substantial wealth; otherwise, the public will blame democracy for economic failure, and antidemocratic elements surviving from the old regime will obtain power and prestige. An economy will generate substantial wealth, in turn, only if it is a market economy in which property rights are recognized and enforced. Thus, creating an atmosphere friendly to property rights is particularly important in the postcommunist states, which are undergoing economic as well as political transitions. But according to the critics, restitution programs that grant new claims to countless victims of the old regime have precisely the wrong effect: If, on the one hand, these claims are to be satisfied from general revenues, they will become a potentially unlimited burden on budgets for the indefinite future, when revenues are urgently needed to implement economic reform, support the elderly and others who lost out during the transition, clean up the environment, establish an honest bureaucracy, and deal with countless other exigencies next to which claims for reparative justice seem like a luxury. If, on the other hand, the claims are to be satisfied through disgorgement of real or personal property taken from the victims and now held by descendants of the wrongdoers, or inno-

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[65] *See* Kozminski, *supra* note 41, at 99.

[66] *See id.* at 105; Michael L. Neff, *Eastern Europe's Policy of Restitution of Property in the 1990s*, 10 DICK. J. INT'L L. 357, 374 (1992).

[67] *See, e.g.*, OFFE, *supra* note 1, at 119–30; Elster, Moral Dilemmas, *supra* note 1, at 13.

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cent third parties who received the property through grants or purchases, then the claims will create frictions in the market economy.

But from where will these frictions emerge? The creation of new claims by itself will not, under standard economic assumptions, injure the market. If all claims are immediately recognized and announced to the world, then both losers and winners will know the extent of their existing property rights, and they will invest and trade accordingly. To be sure, some existing property rights will be fragmented, but others will be combined and adjusted in other ways. There is no reason to think that the status quo distribution of property rights (real or implicit) in an inefficient communist or quasi-communist economy is stable. Regardless of how property rights are distributed during the transition, property holders will continue to divide and combine them in response to market forces. Thus, there is no reason to believe that the recognition of restitution claims will create the need for more trades.

A more convincing argument is that frictions will arise from uncertainties about the restitution rights, including what they are, who holds them, and how they will be enforced. When the government announces a restitution program, thousands or millions of claims spring into existence, and each one must be adjudicated. People will be reluctant to invest in or buy land or other property until they know whether it is burdened by valid claims.

As this description suggests, the amount of uncertainty is a decision variable. A state can reduce uncertainty by requiring that all claims be filed within six months, as Czechoslovakia did, and by using expedited procedures.[68] Moreover, domestic experience shows that a moderate level of uncertainty about property rights is a cost worth bearing.

In domestic law, property rights are always uncertain; their precise contours are unknown and cannot be determined at reasonable cost. An owner's title to personal property is vulnerable to a potential claim by a prior owner from whom the property was stolen. Title to real estate is vulnerable to adverse possession if the owner does not occupy the property. Title to land in many parts of the United States is vulnerable to a potential claim by an Indian tribe whose land was taken illegally by a state government or by the federal government. Title to personal property can be vulnerable to security interests that do not need to be recorded. Title — or, more accurately, the value of property under title — is vulnerable to uncompensated regulatory takings or ordinary takings that are inadequately compensated under the law. Indeed, nothing prevents the federal government and state governments from raising property taxes or any other general taxes to an ex-

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[68] *See* Neff, *supra* note 66, at 369.

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tent that would undermine the value of holding particular kinds of property. Title would be preserved, but as an empty form; the value of property ownership is qualified by the risk of changes in the tax law, as well as in regulatory laws. Although there is a strand of thought going back to the *Lochner* era that property rights should be immune from invasion by the government, even this body of thinking provides countless exceptions for public purposes and, in any event, has been repudiated. In every successful market economy, people hold their property subject to uncertainties created by the government's freedom to regulate that property at any time.

Indeed, restitution programs can be thought of as just another regulatory program — like the Endangered Species Act — or a transfer program that unsettles property rights in pursuit of some social goal. In both contexts, the unsettling of property rights is tolerated when it promotes a pressing social goal, the achievement of which will not significantly undermine the market. The Endangered Species Act reduces the value of investments in land by holding out the risk that the land cannot be developed, but it also promotes environmental protection. To keep the cost of environmental protection at a reasonable level, the Act's provisions are circumscribed in a variety of ways.[69]

Similarly, transitional governments typically limit restitution programs in a variety of ways to minimize uncertainty about property rights. Some transitional states, for example, finance restitution out of tax revenues so that property owners can expect a full return on their investment (minus taxes).[70] The choice here is whether the interference with property rights should take the form of a small tax on all property or a large confiscatory tax on only those pieces of property that are subject to valid restitution claims. In a small, undeveloped economy, risk-averse landowners might be reluctant to develop land that could be subject to a restitution claim. Thus, one might think of government financing of restitution as a state-funded insurance scheme where private insurance markets would otherwise fail.

In addition, most transitional states refuse to grant full compensation for confiscated property and instead provide only partial restitution. These limits on restitution are sometimes overt and sometimes hidden. The owner of property that was confiscated ten years ago but is now worth $10,000 might get substantially less than $10,000 in compensation for a number of reasons: because interest or inflation is disregarded, because the law places a ceiling on the value of the claim, because enforcing the claim entails costly or time-consuming proce-

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[69] *See, e.g.*, 16 U.S.C. § 1539(b) (2000) (creating a hardship exception to the Endangered Species Act).

[70] *See* Neff, *supra* note 66, at 369 (describing Czechoslovakia's restitution program).

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dures, or because the value of improvements is subtracted from the claim. In Hungary, for example, only claims worth less than $2700 fetched full compensation in nominal terms; higher claims fetched only a percentage of their value.[71] Likewise, in Germany, compensation was less than the full market value of confiscated land and took the form of promissory notes rather than cash.[72]

Transitional governments also limit the destabilizing impact of restitution by imposing procedural requirements. In Czechoslovakia, as mentioned earlier, claimants were given only six months to file their claims.[73] After this period, all claims were known and could be liquidated through private contracts. In Germany, the procedures for selling state-owned property that would be used for investment were initially too cumbersome. The government sped up the process by eliminating administrative review and by allowing the manager of the property to decide whether the buyer's investment plan was adequate.[74]

Another way that transitional states have limited restitution has been to make their restitution programs reflect nonreparative as well as reparative goals. Post-Nazi Germany, for example, placed a cap on reparations so that people with claims above the cap received only a fraction of their claims, but more people received at least some compensation.[75] Hungary similarly placed a cap on reparations.[76] These post-transitional governments enhanced the legitimacy of their restitution programs by increasing the number of beneficiaries and appealing to norms of distributive justice.

Finally, transitional states often reduce uncertainty created by restitution programs by protecting certain kinds of investments. Many countries, for example, protect those who invest in previously confiscated land by paying restitution claims out of tax revenues instead of forcing the investor to return the land to its original owner. Similarly, in post-Nazi Germany, the government encouraged investment by indemnifying purchasers of key parcels of land.[77]

Governments in consolidated democracies use these same techniques to limit the adverse economic impacts of domestic transition programs. In the United States, for example, the federal government settles Indian claims by paying cash rather than returning property

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[71] *See id.* at 374.

[72] *See* QUINT, *supra* note 39, at 141–42.

[73] *See* Neff, *supra* note 66, at 369.

[74] *See* QUINT, *supra* note 39, at 130.

[75] *See* Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U. L. REV. 489, 504–05 (1972).

[76] *See* Neff, *supra* note 66, at 374.

[77] *See* QUINT, *supra* note 39, at 131; David Southern, *Restitution or Compensation: The Property Question*, 2 GERMAN POL. 436, 442–44 (1993).

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that has been developed and settled for decades or more.[78] Like transitional reparations programs, domestic programs almost always pay claims at less than their full value and use procedural hurdles and other devices to limit them.[79] Domestic programs also often have a redistributive component. For example, the reparations to Japanese Americans interned during World War II were lump sums rather than functions of lost wages or other factors that could have resulted in a distribution favoring the wealthy.[80]

It can be argued that many of the domestic laws mentioned above strengthen the market rather than undermine it for the sake of other goals. For example, adverse possession and other ownership doctrines balance two values that are important for the market: confidence that one's property will not be expropriated, and the ability to find out quickly and cheaply whether title is clear. Adverse possession gives the owner an incentive to clarify a claim to property so that third parties who are eager to invest in a piece of property can learn whether or not someone else already has an interest in it.

A similar argument can be made about restitution programs. They have three market-promoting effects. First, they show a commitment to property rights that transcends the claims of the state. Rather than permitting the post-transitional state and its citizens to inherit property rights illegitimately expropriated by the prior government, the restitution program demands that the property go to its original owners. To the extent that the restitution program shows a strong public commitment to property rights, it discourages future governments from expropriating property and sends a signal to foreign investors that the new regime is committed to property rights.

Second, restitution programs limit the discretion of officials in the post-transitional government, who often have unsavory connections to the pretransitional government. Istvan Pogany misses this point when he argues that post-transitional governments should sell confiscated property to foreign companies that can invest in it.[81] A discretionary system creates opportunities for all kinds of abuses, including corruption and rent-seeking. And the individuals who obtain restitution can always resell their property to foreign investors and others who can put the property to more productive use.

Third, restitution programs are more likely to extinguish moral and political pressure against the existing allocation of property rights than

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[78] *See* Nell Jessup Newton, *Compensation, Reparation, and Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468–70 (1993).

[79] Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 692 & n.4 (2003).

[80] *Id.* at 695.

[81] *See* POGANY, *supra* note 1, at 150.

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allocation schemes that are apparently more rational. The restitution claims of American Indians, for example, created moral and political pressure even when they were not legally valid, and the states and the federal government translated these pressures into legal claims.[82] When historical property rights have more legitimacy than the distribution existing at the time of transition, restitution programs channel claims into the legal system that might otherwise destabilize the market by posing a political threat to the security of post-transitional property rights.

In sum, the appeal to the market cannot by itself resolve the question whether restitution programs should be used. While there are respectable theoretical arguments on both sides, it is an empirical question whether the use of restitution programs eases or interferes with the transition to a market economy.

One cannot answer the empirical question with much confidence, but the evidence tends to support the use of restitution. Compared to other transitional states after World War II, post-Nazi West Germany paid by far the most significant reparations, both in absolute and relative terms. And unlike the reparations paid by other post-transitional states, much of the West German reparations left the country — to Israel and to Holocaust victims who emigrated to other countries. Yet compared to other transitional states, West Germany surely experienced the most successful political transition in terms of the distance traversed from the Nazi era to the postwar era,[83] and there is no evidence that the massive reparations hindered West Germany's economic or political development.

Today's postcommunist Germany is burdened with a new restitution program arising from the collapse of the GDR and its absorption into a unified German nation:

> 1.1 million claims have been registered comprising over two million separate claims to over half the land area of the former GDR. In short, outside agricultural property, there is very little property in the new Länder which does not have a restitution claim registered against it, often multiple claims. . . . In the centre of Leipzig, 23,000 restitution claims have been registered.[84]

Meanwhile, eastern Germany has been mired in a depression, and Germany as a whole has had a stagnant economy. But it would be wrong to attribute these problems to the restitution program, the costs

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[82] *E.g.*, Indian Claims Commission Act, 25 U.S.C. §§ 70–70v (1946) (repealed 1978).

[83] For example, Germany had more extensive purges and trials than Italy, and a study shows that civil servants in 1970s Italy were more antidemocratic than those in West Germany. *See* ROY PALMER DOMENICO, ITALIAN FASCISTS ON TRIAL: 1943–1948, at 224 (1991) (citing study).

[84] Southern, *supra* note 77, at 444–45; *see also* QUINT, *supra* note 39, at 151–53.

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of which were dwarfed by those of the privatization scheme, the environmental problems left behind by the GDR, the wage equalization program, and the cultural and political tensions between East and West. Indeed, the claims have been processed steadily, and the Treuhand, a German government agency charged with privatizing the former GDR economy, has promoted investment by indemnifying real estate developers against restitution claims.[85]

Hungary and the Czech Republic also implemented restitution programs, and they represent two of the most successful transitions from the 1989 phase of the third wave. Both countries are considered economic and political success stories: they have functioning market economies and highly rated political institutions.[86] In the Czech Republic, where privatization projects and capital markets have been riddled with corruption,[87] "[r]estitution was by far the cleanest and most successful process. Families immediately started taking good care of their properties, and towns and cities, especially their older parts, became beautiful once again."[88] By reducing government discretion, restitution limited the opportunities for corruption. Although it is not clear that restitution is a necessary condition for transitional success — Poland had no significant restitution program and is also considered an economic and political success[89] — the evidence suggests that restitution as a form of transitional justice does not interfere with political and economic transition.

Critics of restitution programs might argue that Hungary and the Czech Republic have achieved political and economic reform only because their restitution programs were limited. Perhaps this is so, but that only shows that transitional justice does not open a Pandora's box. Like any domestic legal program, transitional justice can be circumscribed in light of other needs and concerns.

Istvan Pogany argues that restitution programs reinforce stereotypes "that certain national or ethnic groups tend to accumulate unfair or grossly disproportionate wealth."[90] He is talking mainly about Jews, but also about ethnic Germans in Hungary and the Czech Republic. Pogany's argument also has its domestic analogues: the claim that welfare programs should be avoided because they stigmatize blacks, and the argument that American Indians should not get their land back because such restitution would cause resentment among other Americans. Neither of these lines of argument is respectable:

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85 QUINT, *supra* note 39, at 129–30, 147–51.

86 *See* NATIONS IN TRANSIT 2001, *supra* note 12, at 26 tbl.B.

87 *Id.* at 166–67.

88 *Id.* at 167.

89 *See* Kozminski, *supra* note 41, at 105.

90 POGANY, *supra* note 1, at 217.

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each depends on a speculative causal mechanism, and each is rejected by most of the people who are supposedly the victims of the stereotypes.

C. *Retroactive Justice*

A dramatic feature of some regime transitions is the retroactive application of new legal and political norms to conduct that occurred under the old regime. In the case of lustration and purges, the retroactivity is civil in character, while in the most dramatic cases of retroactivity, such as the Danish, Dutch, and French laws after 1945 that punished collaborators of the Nazis or the Vichy regime,[91] criminal trials and sentences proceed under substantive standards that are openly retroactive. In other cases, such as the trials conducted by reunified Germany of former East German border guards for shooting attempted escapees, defendants claim that their conduct would be legal if not for the retroactivity of the new regime's law. The new regime must then either openly acknowledge retroactivity or else resort to a variety of legal techniques designed to sidestep or eliminate the retroactivity problem. The possible techniques and their domestic analogues are discussed below.

The basic tension that animates these debates is the so-called dilemma of retroactive justice. The positive law of the old regime often licensed abuses and injustice, including widespread violations of civil rights and property rights. In many cases, those abuses themselves included retroactive punishment, under the old regime's norms, of citizens and officials of the regime that the old regime replaced; consider, for example, the treatment of *ancien regime* aristocrats in Communist polities. Even where the actions of old-regime officials were crimes under the old regime's positive law, the relevant statutes of limitations have often expired. Should the new regime punish the old conduct, assuming that it has not pledged amnesty or immunity to old leaders during the transition? (Where such pledges have been made, a further question is whether the new regime has a moral or prudential obligation to adhere to them after the transition.)

The case for retroactive justice need not rest (solely) on a morally disreputable passion; the popular demand for punishment of officials and collaborators of the old regime may also rest on considerations that are normatively quite respectable. If retroactive punishment of old-regime leaders is illiberal, it also responds to standard retributivist

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[91] For the Danish law, see Givskov, *supra* note 28, at 457. For the Dutch law, see HENRY L. MASON, THE PURGE OF DUTCH QUISLINGS: EMERGENCY JUSTICE IN THE NETHERLANDS 61–63 (1952). For the French law, see Roy C. Macridis, *France: From Vichy to the Fourth Republic*, *in* FROM DICTATORSHIP TO DEMOCRACY, *supra* note 27, at 161.

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intuitions about appropriate punishment, given that old leaders often violated liberal rights (as by inflicting retroactive punishment on *their* predecessors). Punishment may also have important symbolic effects; paradoxically, illiberal or procedurally suspect retroactive punishment may dramatize the new regime's commitment to legality and liberal democracy, suggesting in an emphatic way that future violations of rights will be met with sanctions. Most pragmatically, when a popular passion for retribution is widespread, it is a social datum that the new regime's policymakers must take into account as they would other facts. Allowing former persecutors to roam free may effectively encourage unfocused private violence against innocent and guilty alike. Thus, retroactive justice fulfills the standard channeling function of legal punishment, which substitutes public and official process for vigilantism.

Against the demand for substantive justice, however, is the competing concern of procedural legality. In the standard case of transition from a communist or authoritarian regime to a democratic one, leaders of the new regime want to establish (and want to be seen to establish) a conventional liberal democracy that respects constitutional and international norms of legality. Prominent among those norms is the concept that retroactive punishment violates the rule of law: "no punishment without law" (*nulla poena sine lege*) is taken to bar "after the fact" (*ex post facto*) sanctions. Opposing the demand for substantive justice, then, is a desire both to afford procedural legality and to be seen to afford it, even to the old regime's offenders. Indeed, the refusal to violate procedural legality even to punish those who previously violated procedural legality may appear noble, as the highest possible affirmation of the new regime's liberal commitments.

All this is, in large part, a standard debate about means and ends. Advocates of retroactive punishment wish to use illiberal means to serve liberal ends, whereas opponents argue that liberal ends can be served only through liberal means.[92] In practice, however, this stark moral dilemma is usually not resolved, but finessed. Rather than adopt a principled and thoroughgoing account that either discards

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[92] The stakes of the debate between liberal procedural legalists, on the one hand, and advocates of backward-looking justice, on the other, may be higher in transitional settings than in analogous settings in consolidated democracies. Perhaps because regime transitions are always more vivid and visible to future generations than are moments of ordinary politics, regime transitions create more important social and constitutional precedents. But this consideration does no work in the debate between procedural legalists and advocates of transitional justice; both sides may claim that the heightened importance of the historical moment makes it all the more critical to adopt their preferred course of action. In any event, many have claimed that major constitutional transitions within consolidated democracies, such as Reconstruction or the New Deal, also enjoy this heightened significance. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

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substantive justice in favor of a "thick line" between past and present or discards procedural legality in favor of retroactive justice, leaders and institutions of the new regime, including the new regime's judges, typically follow a middle course that allows some punishment of old offenders but that adheres, at least nominally, to the norms of procedural legality. Consider the following legal techniques for dissolving or circumventing the dilemma.

1. The Appeal to Higher Preexisting Law. — In the most difficult cases, as we have seen, the old regime's positive law did not prohibit, or affirmatively authorized, the abuses at issue. An obvious way to dissolve the retroactivity problem is to claim that the old regime's positive law was itself subject to, or trumped by, some higher law that existed throughout the period. In general, three versions of the appeal to higher law are common: the appeal to preexisting constitutional law, international law, or "natural" law.

In the case of constitutional law, legalists of the new regime claim that the old regime never "validly" or "legally" came into existence, so that its positive law was void from the outset. In the border guards cases, some German constitutionalists advanced the theory that GDR law was void from the outset because the FRG alone had inherited sovereignty from the Third Reich (or from the Weimar Republic).[93] Under this theory, the GDR law with which the border guards justified their acts would have been invalid. The sticking point here, however, was that the Unification Treaty itself prohibited the unified government from punishing acts committed in the GDR unless those acts were punishable under GDR law.[94] And GDR law contained many provisions, doctrines, and informal norms that might be said to authorize border killings. Although the GDR code contained standard provisions on murder and manslaughter, the Border Law of 1982 made it a felony to cross the border without authorization and stated that use of a weapon to prevent felonies at the GDR border was justified.[95] More generally, the GDR constitution adverted to a doctrine of "socialist legality," under which party directives ordering, in the name of socialist revolution, the killing of attempted escapees might trump any other provisions of positive law.[96]

If the appeal to a preexisting constitution fails, the new regime may appeal to preexisting rules or norms of international law. In some cases, the old regime itself will have consented to or approved this higher law. Consider that the GDR was a signatory to various international human rights conventions, including the 1966 International

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[93] *See* QUINT, *supra* note 39, at 196.

[94] *See id.* at 197.

[95] *See id.* at 198.

[96] *Id.* at 197.

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Covenant on Civil and Political Rights.[97] Although the Covenant provides an individual with a right of exit from any country, including one's own, and prosecutors argued that this provision trumped the domestic laws that arguably authorized border killings, GDR law also held that a treaty had no domestic effect unless implemented by legislation — and the Covenant never was. In some cases, however, German courts used the Covenant in a less direct fashion to help construct an idealized version of GDR law[98] under which the border guards could be punished. Thus, the Federal Supreme Court upheld convictions in border guards cases on the theory that supralegal principles of justice and human rights were themselves implicit in GDR law and were evidenced by sources such as the Covenant, despite its lack of domestic legal force.[99]

In other cases, the relevant international norms will be customary or *jus cogens* norms, such as prohibitions on genocide or war crimes; these norms, of course, were prominent in the Nuremberg prosecutions. Where, however, neither treaty nor customary international law is available or applicable, the appeal to higher legal norms must be phrased as an appeal to natural law; and of course the conceptual and jurisprudential boundaries between customary *jus cogens* norms and natural law norms are notoriously vague. Apart from Nuremberg, in the most controversial judgment in the trials of the East German border guards, a German court convicted two guards for violating basic human rights, despite conceding that the killings were authorized under GDR law.[100] The broad trend since Nuremberg, however, has been to deemphasize the most direct forms of appeal to natural law in such situations, in part because of the development of an elaborate vocabulary of international legal norms that serve the same function, and in part because the inevitable comparison to the Nazi horrors detailed at Nuremberg tends to favor defendants charged with lesser abuses.

2. Taking Nominal Law Seriously. — In other cases, a variant of the appeal to higher law occurs when the new regime's courts enforce, or extrapolate law from, provisions in the old regime's code that were strictly nominal — rarely enforced and constantly belied by administrative practice. In one German border guard trial, the court eschewed the natural law approach and professed strict adherence to the positive law of the GDR.[101] But the court construed GDR law to not authorize the border killings — a startling conclusion, given that the GDR government commonly gave the border guards rewards and official deco-

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97 *See id.* at 200.

98 *See id.* at 199–201.

99 *See id.* at 202–03; Elster, Moral Dilemmas, *supra* note 1, at 7–8.

100 QUINT, *supra* note 39, at 202.

101 *Id.* at 198.

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rations for their actions. The court's technique was to ignore the "law in action" in favor of a straight-faced pretense that the nominal statutory law of the GDR applied impartially to the guards. To be sure, we have seen that the border guards had a colorable argument even on this fanciful premise, but the court held that GDR law "did not require the border guards to shoot-to-kill single, unarmed escapees. [The guards] did not have to shoot [those who] posed no risk to border security, thus failing to meet the criterion for use of deadly force under communist law."[102] In a similar vein, German legal theorists have argued that direct orders of party officials, such as orders directing repression and killing, were not technically law in the GDR and therefore must be ignored in favor of strict adherence to the surface meaning of GDR statutes and administrative provisions.[103] Whereas the appeal to higher law dissolves the retroactivity problem by trumping the positive authority on which old-regime defendants rely, this approach dissolves the problem by claiming that old-regime defendants never had positive authority in the first place unless that authority was specified in formal sources of law and in explicit terms.

3. Interpretive Statutes. — In the cases we have discussed so far, courts avoid the retroactivity problem by interpreting the law of the old regime or by identifying higher law. Legislatures, however, may also enact pragmatic measures that aim to smooth over the principle-ridden conflict between retroactive justice and procedural legality. One technique is the enactment of interpretive statutes, by which legislatures proclaim an understanding that the positive law of the old regime, despite appearances, either never authorized or affirmatively prohibited the relevant acts. In Belgium after World War II, the narrow scope of the provisions in the penal code concerning treason, limited essentially to military activities, was widened through interpretive statutes to encompass less direct forms of collaboration.[104]

4. Retroactive Extension of Statutes of Limitations. — Another means by which legislatures may institute retroactive justice is by extending statutes of limitations for the prosecution of old crimes. (This technique, of course, is available only where the old positive law barred, or can now be construed to bar, the substantive acts for which old-regime officials or collaborators will be prosecuted.) There are two standard cases. In the first, the statute of limitations has not yet expired, and defendants are reduced to arguing that the new regime is obligated to let the previously prescribed limitations period run if it

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[102] Kif Augustine Adams, *What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 STAN. J. INT'L L. 271, 297–98 (1993), *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 625, 633 (footnote omitted).

[103] QUINT, *supra* note 39, at 200.

[104] MASON, *supra* note 91, at 129–30.

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cannot initiate prosecution within that time. In the second case, which is legally and rhetorically stronger for defendants, the previously prescribed limitations period has already expired, and defendants argue that they have a vested immunity from prosecution. In either case, but most critically in the second, new governments counter that the running of the limitations period should be held to have been tolled by the old regime's lawless refusal to prosecute its own officials who violated nominal law on party orders.

Contrasting decisions from the constitutional courts of Czechoslovakia and Hungary illustrate the dynamics of limitations periods, as well as the interactions between domestic and international law. In both new regimes, the legislatures enacted retroactive extensions of statutes of limitations. The Czech court upheld the measure as a requirement of justice, while the Hungarian court invalidated it as a violation of procedural legality, even where the limitations period had not yet expired.[105] (In this respect, the Hungarian decision goes well beyond American constitutional law, which generally allows retroactive extension of unexpired limitations, although not of expired ones.)[106] The Hungarian court's ruling was softened, however, when the legislature enacted a new law based on international conventions that abrogate limitations periods for egregious offenses, such as war crimes and crimes against humanity.[107] The Hungarian court upheld the statute as applied to such offenses. In this type of case, the new regime in a sense uses international law, not directly to trump the old regime's positive law, but indirectly to trump the constitutional protection of procedural legality in its own newly enacted constitution.

How should we evaluate these techniques for accomplishing a measure of retroactive justice, especially in the limited case of retroactive criminal prosecution? Jon Elster states that "[e]ither of the two non-hypocritical positions" — openly avowed retroactive justice, as at Nuremberg, or thoroughgoing insistence on procedural legality — "seem[s] defensible."[108] Elster sees the techniques we have canvassed for ameliorating the moral dilemma, however, as morally indefensible "subterfuge."[109] This is a standard plea for candor and moral transparency, but it overlooks the fact that courts in consolidated democra-

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[105] *Compare* Constitutional Court (Czech Republic), Decision on the Act of the Illegality of the Communist Regime (Dec. 21, 1993), *reprinted in* 3 TRANSITIONAL JUSTICE, *supra* note 1, at 620, *with* Constitutional Court (Hungary), Decision on the Statute of Limitations, No. 2086/A/1991/14 (Mar. 5, 1992), *reprinted in* 3 TRANSITIONAL JUSTICE, *supra* note 1, at 629.

[106] *See* Stogner v. California, 123 S. Ct. 2446, 2453 (2003).

[107] Krisztina Morvai, *Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court*, E. EUR. CONST. REV., Fall 1993–Winter 1994, at 32, 33–34, *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 661.

[108] Elster, Moral Dilemmas, *supra* note 1, at 8.

[109] *Id.* at 7.

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cies are by no means always candid. Although candor is often praised in general,[110] it remains controversial in particular settings. As such, the candor argument is orthogonal to the transitional justice question: candor might or might not be desirable, but it cannot be assumed without argument that courts doing transitional justice should be more candid than courts doing ordinary justice. The conceptual mistake here is to hold courts doing transitional justice to moral standards that would be unrealistic even for courts in settled liberal democracies.

Moreover, the techniques we have discussed may, in a larger sense, promote candor. Communist and authoritarian regimes frequently try to conceal their abuses with elaborate lip service to liberal and international human rights norms — by subscribing to international conventions (as the GDR did),[111] by maintaining unimpeachably liberal codes of nominal law, and by professing strict adherence to universal moral codes. The old regime benefited from the existence of these propaganda materials and from the divorce between the nominal law of human rights and the brutal de facto law of party dominance. When the new regime's courts ignore law in action in favor of law in the books, or treat the old regime's international commitments as good-faith obligations, they are merely holding the old regime to its word. It is hardly clear that candor would be better served by treating de facto authoritarian power as law, while ignoring the professed standards for limiting such power that the old regime published, insincerely, to the world.[112]

Finally, Elster is too casual in dismissing as morally impermissible "subterfuge" a series of techniques that adjust and reconcile the competing claims of justice and legality.[113] Many of those techniques are not subterfuges at all. In some cases, they are best understood as attempts to identify circumstances that vitiate the moral rationale for the liberal ban on retroactive punishment. The appeal to international norms, for example, weakens the defendant's argument that the retroactive punishment comes as an unfair surprise; international condemnation should put wrongdoers on moral notice. A similar point holds for retroactive extensions of statutes of limitations, which only apply to those who have, after all, violated underlying substantive law in effect at the time of the violation; usually that substantive law has moral content, as opposed to being a strictly regulatory offense. In other

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110 *See* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

111 *See* OFFE, *supra* note 1, at 100–01.

112 *See* Levinson, *supra* note 3, at 219 ("[H]owever much [old-regime officials] might well have felt as a practical matter immune from punishment, [they] can scarcely be heard to say that it is 'unfair' to hold them to the formal law that had been trumpeted to the world in answer to the accusations of just such conduct as in fact was occurring.").

113 *See* Elster, Moral Dilemmas, *supra* note 1, at 8.

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cases, these techniques are best understood as attempts to strike a workable balance between competing moral intuitions and pragmatic needs. Taking nominal law seriously, for example, reduces the formidable decision costs of identifying the old regime's "real" unwritten law; retroactive extension of statutes of limitations gives new-regime officials, caught up in the transitional tumult, breathing space to sort out offenders and establish priorities among potential cases.

This sort of conflict management, as among competing moral and practical considerations, is hardly unique to transitional justice situations. Unsurprisingly, many legal systems have developed similar techniques to cope with the conflicts between retroactivity and justice that arise in smaller, routine transitions. Consider the parallels between the techniques we have discussed here and the techniques available in American law for dampening the effects of constitutional prohibitions on retroactivity, such as the Ex Post Facto Clause[114] (for penal laws) and the Due Process,[115] Contracts,[116] and Takings[117] Clauses (for civil laws and laws affecting property rights). In the civil context, courts accommodate the competing claims of justice and legality under the doctrine that retroactivity is permissible unless "unreasonable," where reasonableness takes into account the exigencies that call for retroactive lawmaking.[118] Legislatures have also used interpretive statutes to bolster retroactive application of laws, and courts have been receptive to such legislative practices.[119] Furthermore, there is a domestic parallel to the invocation of higher law to trump the old regime's positive law. In suits against federal and state officials for actions authorized by statutory or administrative law, plaintiffs commonly claim that the actions violated some capacious or ambiguous constitutional provision, such as the Due Process Clause. If the court finds that the action violated the constitutional provision, the defen-

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[114] U.S. CONST. art I, § 10, cl. 1.

[115] *Id.* amend. V.

[116] *Id.* art. I, § 10, cl. 1.

[117] *Id.* amend. V.

[118] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 438 (1934) ("The question is not whether the [retroactive] legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end."); Miller v. Schoene, 276 U.S. 272, 280 (1928) ("For where, as here, the choice [to destroy one property in order to protect another] is unavoidable, we cannot say that its exercise, controlled by considerations of social policy which are not unreasonable, involves any denial of due process."); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 694–95 (1960) ("Thus the Court has consistently held that not all retrospective statutes are unconstitutional, but only those which, upon a balancing of the considerations on both sides, are felt to be unreasonable.").

[119] *See, e.g.*, Stockdale v. Ins. Cos., 87 U.S. (20 Wall.) 323, 332–33 (1873) (upholding, against due process and separation of powers claims, a federal interpretive statute that retroactively extended the duration of a statutory tax).

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dant has no valid complaint about retroactivity, at least if the court can claim with a straight face that the right was "clearly established" when the defendant acted.[120]

Even in the criminal setting, legislatures and courts have ample leeway to adjust the ex post facto prohibition in pragmatic style. Legislatures may retroactively extend criminal statutes of limitations so long as the limitations period has not already run.[121] In all cases, strong governmental interests in attaining retroactive justice may be accommodated, in particular settings, either by declining to describe the prescribed sanctions as "penal,"[122] or by describing the new law as "procedural" rather than substantive.[123] Either technique allows courts effectively to circumvent the ex post facto prohibition.

The point, of course, is not necessarily to praise any of these doctrines or decisions. It is to note that these sorts of accommodations are widely used in American law and are successful in the minimal, pragmatic sense that they limit the worst abuses of retroactive justice while satisfying powerful social demands for post hoc adjustments of legal obligations. Any set of moral intuitions that condemns such pragmatic accommodations on a wholesale basis should be recalibrated. Any moral objections to these techniques should operate at retail and point to the unjust consequences of particular rules and decisions. Candor is not the relevant criticism, and the wholesale level of analysis is not the right level of generality at which to criticize retroactive justice.

Eschewing Elster's moral critique, Bruce Ackerman opposes retroactive justice squarely on pragmatic grounds.[124] Stipulating for argument's sake that retroactive criminal punishment is morally justifiable in transitional justice situations,[125] Ackerman advances formidable

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120 Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982).

121 *See* Stogner v. California, 123 S. Ct. 2446, 2453 (2003) (invalidating the retroactive extension of an expired statute of limitations, while approving the retroactive extension of unexpired statutes of limitations); United States *ex rel.* Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir. 1982) ("Extending a limitation period *before* a given prosecution is barred does not violate the *ex post facto* clause."); Falter v. United States, 23 F.2d 420, 425 (2d Cir. 1928) (distinguishing the act of reviving a prosecution already barred from the act of extending the window of prosecutorial opportunity).

122 *See, e.g.*, Smith v. Doe, 123 S. Ct. 1140, 1154 (2003) (holding that the retroactive application of a statute requiring sex offender registration does not violate the Ex Post Facto Clause because the registration requirement is regulatory, not punitive); Mahler v. Eby, 264 U.S. 32, 36 (1924) (holding that the retroactive application of a ground for deportation does not violate the Ex Post Facto Clause because deportation is not punishment); *cf.* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038–39 (1984) (holding that the exclusionary rule does not apply to deportation proceedings because deportation is not a form of punishment).

123 *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.").

124 BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 69–98 (1992).

125 *Id.* at 74.

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practical objections to retroactive justice.[126] The core problem, he argues, is that new regimes enjoy great moral credibility but possess low bureaucratic capacity. In many cases, the legal system of the new regime is staffed principally by officials selected under the old regime, and the system is often threatened with overload.[127] In light of the costs of prosecution, the new regime inevitably must select a limited number of targets, but any principle of selection will seem arbitrary and impractical. Prosecutions of high-ranking officials are difficult because their most culpable orders and policies are often left implicit, or simply unwritten. Prosecutions of low-ranking officials pose the difficult questions whether and when compliance with superior orders should be exculpatory, and the public will complain if it appears that the small fish have been punished while the big fish have slipped away.[128]

We take up a number of these pragmatic questions separately in other sections. Our general point is that Ackerman has the right premises, but his (apparent) conclusion that retroactive prosecution should never occur amounts to an implausibly extreme solution.[129] Despite the practical difficulties, the optimal number of prosecutions of old-regime officials is probably not zero. It is rare for new regimes to entirely eschew retroactive criminal justice, as did Spain after 1975 and Russia after 1991.[130] The indisputable need for selection among possible defendants, all of whom are morally culpable (albeit on varying grounds and to varying degrees), is no fatal objection. Prosecutors routinely face the same difficulties when they target a large and hierarchically organized conspiracy, such as a drug cartel, or when a large number of people commit the criminal act, such as in the case of tax evasion.[131] Like Elster, Ackerman exaggerates the moral and practical import of problems that are familiar in nontransitional settings and that have never proved crippling to nontransitional legal systems.[132] In the domestic, nontransitional setting, complete and perfect justice and enforcement cannot be obtained; so too the inevitable difficulties of transitional justice should not be taken as a conclusive objection.

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126 *Id.* at 72.

127 *Id.*

128 *See id.* at 75–77.

129 *See id.* at 73, 80.

130 *See supra* p. 772 tbl.1.

131 For more discussion of selective prosecution, see *infra* section II.G.1.

132 *See* ACKERMAN, *supra* note 124, at 69–92; *see also* Martin Krygier, *Transitional Questions About the Rule of Law: Why, What, and How?*, 28 E. CENT. EUR. — L'EUROPE DU CENTRE-EST 1 (2001) (discussing the rule of law in both transitional and nontransitional contexts).

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D. Court Congestion

One stock pragmatic argument against retroactive justice is that prosecutions, civil proceedings, or lustration of old-regime officials will tie up the new legal system with endless backward-looking litigation, thus preventing the courts from pursuing the task of building a new regime. As Claus Offe puts it, "after the demise of the old regime, and confronted with the chaos it has left behind, we have more important things to care about than retroactive justice. Formal court procedures are costly, and the professional manpower used in them is more urgently needed for other purposes."[133]

Although this objection is perhaps not the most prominent or important of the pragmatic arguments for the "thick line," we focus on it because it illustrates very clearly the impulse that animates opponents of retroactive justice. The impulse is to look forward rather than backward; opponents see retroactive justice, and transitional justice generally, as a waste of institutional resources compared to the tasks of regime building. It should by now be obvious that this view assumes away, rather than answers, the argument for retroactive justice, lustration, and compensation. Such measures can always be given, and always do receive, both a forward-looking and a backward-looking justification. Proponents of transitional measures rarely rest content with simply appealing to retributivism or the *lex talionis*. Rather, they also argue that retroactive justice legitimates the new regime and dampens private violence; that lustration ensures that the new regime will be staffed by supporters, not crypto-reactionaries; and that restitution or reparations level the playing field, providing victims with useable substitutes for their lost human capital and preventing old-regime collaborators from using their ill-gotten gains to achieve disproportionate success in the new order.

There is no way to cash out the court congestion argument without assuming away the forward-looking benefits of transitional justice measures. Once these benefits are recognized, the congestion "problem" simply becomes another (forward-looking) policy issue that the new regime must consider. If one assumes that the judicial system's capacity remains constant, the systemic effect of adding a new class of transitional justice proceedings will be to displace some set of ordinary legal disputes by shunting them to the back of the court queue. This effect is a loss only if the displaced proceedings would have made greater net contributions to the new regime's welfare than the transitional justice proceedings; otherwise, the effect is a straightforward benefit. If the judicial system's capacity does not remain constant, then the relevant tradeoff is simply the opportunity cost of the re-

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[133] OFFE, *supra* note 1, at 84.

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sources necessary to expand the system in order to accommodate the transitional proceedings. In either case, the regime's task is just to pick the forward-looking projects with the best social returns; the reference to court congestion does no independent work.

Here, too, there is an illuminating parallel to debates within nontransitional legal systems — in this case, to stock debates about the creation of new causes of action.[134] Opponents complain that new causes of action will open the floodgates of litigation, swamping courts; proponents point to the valuable compensatory and deterrent effects of the new suits. As in the transitional setting, the real question is just the relative contributions to social welfare of the new lawsuits and those they would displace. The parallelism of the two debates fails in one respect, however. No one in the nontransitional setting claims that the legal system should ignore all past wrongdoing and focus on "future business," perhaps because of the prominence of forward-looking considerations, such as deterrence, as a justification for ordinary tort liability. As we have explained, however, every type of transitional justice measure also has important forward-looking justifications. Once these forward-looking justifications are recognized, it becomes clear that the congestion objection is merely an institutional makeweight.

E. Destruction of Reputations

One reason for drawing a thick line between past and present is that the past is so thoroughly corrupt that it seems to implicate all but a few brave dissenters — and perhaps even them as well.[135] Nearly all people collaborate in their own enslavement, and if gradations of guilt exist, they are too difficult to distinguish after the transition, for the past seems like a bad dream and can no longer be understood.[136] Eager to keep the past at bay, critics of transitional justice emphasize the risks it poses to the reputations of those who are needed to move society forward.[137]

These critics focus on the Czech lustration law, which was the first of its kind in Eastern Europe and has been imitated in Hungary, Poland, and other countries.[138] A well-known article by Lawrence

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[134] *See, e.g.*, PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 33–44 (1988).

[135] *Cf.* Adam Michnik & Václav Havel, *Justice or Revenge?*, J. DEMOCRACY, Jan. 1993, at 20, 21–22 (noting that it is necessary to excise elements of the past in order to "remove an ulcer that [is] poisoning the whole system").

[136] *See* Lawrence Wechsler, *The Velvet Purge: The Trials of Jan Kavan*, NEW YORKER, Oct. 19, 1992, at 66, 78–79, *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 547.

[137] *See id.* at 68, *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 545.

[138] The GDR was a special case: after the German unification, hundreds of thousands of GDR state employees were simply fired and replaced by western Germans — an option not available to

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Wechsler, for example, documents the torments of Jan Kavan, a former Czech dissident whose life and political career were thrown into turmoil after he was accused of collaborating with the old regime.[139]

Claus Offe also makes a number of points about the reputational effects of lustration and related "disqualification laws."[140] First, "[g]overnments may become addicted to witch-hunting or scapegoating, and may resort to ever more indiscriminate use of such practices as a solution to all kinds of political problems."[141] Second, "[t]he practice of disqualification may . . . provide individuals with opportunities to exploit the sanctioning potential of the state as a private weapon or means of blackmail."[142] Third, the threat of lustration might give rise to "a thoughtless habit — or, alternatively, a consciously designed hidden agenda — of personalizing the nature of the regime itself, and by implication of whitewashing all those whose names are not listed in the official files on members, officeholders or informers — all of which might amount to an obstacle to coming to terms with the past in an adequate, fair and critical way."[143] Fourth, secret police records are never complete and often contain inaccuracies, some of which are created by departing officers intent on concealing their own trail and casting suspicion on their enemies.[144] Fifth, "[f]ormer informers will . . . have to face the indefinite uncertainty that some of their victims will find out about their activities and respond by private means of revenge and/or public denunciation, which in turn may motivate informers to form protective networks among themselves and to put their inside knowledge to some strategic use."[145] In short, what concerns Offe is the delicacy of reputation and its special susceptibility to abuse in transitional societies, where one's reputation as a collaborator or dissident has tremendous significance, and where nearly everyone is tainted.

A related criticism of lustration is that its injury to reputation is based on retroactive moral judgment. Lustration involves the administrative or judicial determination that a person collaborated with the old regime, and the punishment is exclusion from office and usually

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other transitional states, which had to draw on their own ranks. In eastern Germany, the opening of the Stasi files ended the careers of many prominent eastern Germans, including intellectuals and reformers, by revealing their collaboration with the old regime. *See* QUINT, *supra* note 39, at 231.

139 *See* Wechsler, *supra* note 136, at 68–72, 80–86, 92–94, *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 558.

140 OFFE, *supra* note 1, at 92–99.

141 *Id.* at 95.

142 *Id.*

143 *Id.* at 96.

144 *See id.* at 97; *see also* Jan Orbman, *The Parliament Approves Screening of Deputies*, REP. ON E. EUR., Feb. 1, 1991, at 4.

145 OFFE, *supra* note 1, at 99.

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public exposure. But because collaboration is never a crime under the old regime, lustration involves making a purely moral judgment about a person's conduct. In Germany, for example, GDR civil servants were dismissed if they "violated the principles of humanity or the rule of law," including rights and principles contained in international conventions.[146] It is such moral judgment, as well as the potential stigmatizing effect of lustration, that bothers critics.[147]

But retrospective moral judgment plays an important role in domestic law as well. Imagine that a person has done something shameful but not illegal. (As Trent Lott's downfall illustrates, the behavior may not be shameful at the time it was conducted, but it may become shameful after social norms change.) Disclosure of the shameful act would harm the person by alerting his employer, spouse, and friends to the misdeed. This person is in a position similar to that of the person who collaborated with a pretransitional regime. In both cases, the only thing that stands between the status quo and personal ruin is public ignorance about the past deed. In both cases, we might imagine, some people know about the past deed, and perhaps rumors about it circulate as well.

The law recognizes that the disclosure of this information produces benefits and harms. It harms the individual who committed the shameful deed, but it also benefits people who receive more accurate information about the person's character. If the past act involved dishonesty and betrayal, the person's employer, spouse, and friends might, by shunning the person, avoid being the victims of future bad acts. Although one might argue that more information is always better, the law takes a more complex view that recognizes that information is often misused. People overreact rather than engage in Bayesian updating; they herd; they stigmatize; they scapegoat; they use a person's humiliation as a means for setting off their own virtuous characters. To avoid shame and humiliation, people might prospectively avoid taking desirable risks or, having made a youthful mistake, avoid public positions in which they could be exposed. There is a kind of Mayor of Casterbridge effect: the incentive to take risks is reduced by the possibility that the reward for success will be nullified as the result of exposure of a past misdeed. Offe suggests more darkly that citizens vulnerable to lustration would also group together and pose a threat to

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146 QUINT, *supra* note 39, at 172 (quoting the German Unification Treaty).

147 Thus, it is puzzling that lustration has received more criticism from the international community than truth commissions have. Truth commissions depend mainly on reputational sanctions, which are often significant and sometimes provide the basis for legal proceedings. *See* David A. Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, *in* TRUTH V. JUSTICE, *supra* note 3, at 99, 103–05. On the virtues and vices of truth commissions, see MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 52–90 (1998).

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the new regime, just as those who were (literally) branded as outlaws in early modern England formed criminal gangs living outside the reach of law.[148]

And yet this problem is hardly unknown in domestic law. Individuals constantly run the risk that their past misdeeds will catch up with them. We see politicians hounded out of office when the press or rival politicians disclose to the public their earlier statements. A whole industry devotes itself to maintaining records of defaults on debts of ordinary people, and another industry offers to dig up the past of anyone for a fee. In trials, character evidence can be used in certain circumstances, leaving a person's legal guilt to be based in part on judgments about the person's lawful but morally improper behavior. And domestic truth commissions in consolidated democracies are tolerated despite the damage done to reputations.[149] None of this is meant to suggest that the law never views stigma as a problem. Privacy laws enable people to keep certain facts hidden from view; credit reporting laws restrict disclosure of defaults and bankruptcies; expungement laws erase criminal records or limit access to them; blackmail laws discourage disclosure of shameful information by limiting its value as a bargaining chip; defamation laws recognize the importance of a clean reputation; and all kinds of statutes and constitutional doctrines prevent discrimination on the basis of traditionally stigmatizing conditions such as illegitimacy. But these laws, by restricting only some uses of information about a person's past, show the extraordinary value of information when it is accurate and not abused.

These domestic laws, like lustration laws, are devices for clarifying the past. Privacy law permits one to conceal those parts of one's past that are not of great relevance to the present; lustration law forces one to reveal those parts of one's past that are of great relevance to the present. Privacy law does not generally enable individuals to conceal embarrassing but relevant portions of their past; lustration law does not force individuals to reveal embarrassing but irrelevant portions of their past. The main difference is that lustration laws ferret out hidden but significant information, while privacy laws conceal information that might otherwise be discovered — a difference that is easily explained by the difference in background legal regimes. Privacy laws exist in open societies in which people can find out anything about anybody; lustration laws exist in post-transitional societies in which, under the old regime, nobody (except the government) could find out anything about anybody. Some institutional bootstrapping is needed

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[148] *See* OFFE, *supra* note 1, at 95.

[149] *See* Levinson, *supra* note 3, at 212–16 (discussing the U.S. Commission on Civil Rights and congressional investigations).

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to convert the closed society into the open society. It is not enough to remove censorship restrictions if much of the information that would be freely available in an open society cannot be obtained through subpoena or other forms of legal coercion.

Seen in this light, the concern about lustration's damage to reputation seems overwrought. Lustration, like any civil or criminal trial, harms the reputation of a person who is found to have engaged in wrongful conduct. This particular reputational harm is generally seen as unobjectionable in the domestic law of consolidated democracies; if people are likely to overreact, however, domestic law provides devices such as expungement or antidiscrimination laws to limit the long-term harm. Lustration might also harm the reputation of a person who is found not to have engaged in wrongdoing. But again, the same is true about ordinary criminal and civil procedures: an arrest that does not lead to trial or conviction can nonetheless stigmatize.

Lustration does not always involve individualized determinations. In many cases, a broad class of people is prohibited from holding high office on the ground that anyone who belongs to that class poses a threat to the new regime. Individuals in this class either have no right to show that they do not pose a threat, or their rights are heavily circumscribed, with few procedural protections. The initial Czechoslovak lustration law, for example, barred all Communist officials and collaborators from holding posts in the government, the military, the courts, the universities, and businesses owned by the state.[150] Appeal was permitted, but there was effectively a presumption of guilt.[151] Indeed, the post-World War II denazification laws created by the Allies placed the burden of proof on the defendant to show misclassification.[152]

These lustration laws raise due process concerns similar to those related to retroactive justice,[153] but the important point here is that deliberately overbroad, prophylactic bans on officeholding do not damage reputations as much as individualized determinations do. The person who falls under the prophylactic ban can claim to be a special victim of the overinclusive rule. Indeed, if a person is already known to be a member of the proscribed class — former officials of the prior government, for example — the lustration does not injure reputation at all; it simply ratifies what is already known. As such, critics of lustration are inconsistent: they worry about harm to individual reputa-

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150 Pehe, *supra* note 10, at 4–6.

151 *Id.* at 7–8.

152 Herz, *supra* note 29, at 27. However, it was relatively easy to appeal or to pay a small fine as the price of denazification. *Id.*

153 *See supra* section II.C.

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tions, but they appeal to due process norms to bar more rule-based lustration schemes that would minimize reputational harm.[154]

Although there is anecdotal evidence about the reputational harm caused by lustration in transitional societies, we have found no systematic account of the actual damage done. On the contrary, observers confirm that lustration laws have not caused the kind of widespread disruption or injustice that was once predicted.[155] Jan Kavan was eventually cleared by a court, and he was subsequently elected to a seat in Parliament.[156] Although he had to endure many painful years of uncertainty, all defendants face similar uncertainty, and there seems to have been ample reason to be suspicious of him, even if ultimately not enough to justify purging him from government office.

Indeed, the harsh lustration laws that Czechoslovakia enacted in 1991 provide a good test case.[157] These laws were inherited by the Czech Republic but not Slovakia when the two nations split. According to Timothy Garton Ash, "there is no doubt that the [lustration] law did keep a number of highly compromised persons out of public life in Czech lands, while such persons remained to do much damage in Slovakia."[158] Indeed, these persons reestablished in Slovakia an authoritarian regime that has only recently begun to thaw, while in the Czech Republic the transition to a liberal democracy has been relatively smooth and steady.[159]

Poland, which ranks as the most successful of the Central and Eastern European transitional states,[160] initially had no lustration law, but after a series of scandals involving high officials who were believed to have been collaborators of the old regime — including one scandal that caused the fall of the government — a lustration law was created in 1998.[161] Although initially supported by the public, the optimistic view that a thick line could be drawn between past and pre-

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154 The view that lustration is necessarily stigmatizing is widely accepted without argument, even among those who are sympathetic to lustration. *See, e.g.*, Stephen L. Esquith, *Toward a Democratic Rule of Law: East and West*, 27 POL. THEORY 334, 351 (1999).

155 *See* Paulina Bren, *Lustration in the Czech and Slovak Republics*, RFE/RL RES. REP., July 16, 1993, at 22 ("[I]n some sense, the great surprise about lustration was the relatively temperate way in which it was applied. Considering the resentment and hostility that had built up toward the previous Communist regime . . . the issue of how Czechoslovakia should deal with its past could well have proved more incendiary."); NATIONS IN TRANSIT 2001, *supra* note 12, at 161.

156 Wechsler, *supra* note 136, at 558.

157 *See* Bren, *supra* note 155, at 16.

158 ASH, *supra* note 39, at 230.

159 *See* NATIONS IN TRANSIT 2001, *supra* note 12, at 161, 333. Over the last few years, the Czech Republic has experienced some political problems, but its scores for democracy and rule of law remain greatly superior to Slovakia's. *See id.* at 27 tbl.C (tracking trends in political reform in the Czech Republic, Slovakia, and other Central and Eastern European countries).

160 *See id.* at 26 tbl.B (ranking Poland as the top scorer in both political and economic reform).

161 ASH, *supra* note 39, at 231, 237.

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sent has since been repudiated, and the new lustration law enjoys popularity.[162]

The other success stories — the former GDR and Hungary — also enacted lustration laws, although only after much delay and in milder form than in the Czech Republic. By contrast, the failures and partial failures — Russia and its satellites — had no significant lustration laws. This pattern must have disappointed those who believed that Spain's smooth, purge-free transition would provide the model for successful transition after 1989. It only shows, however, that what works in one country might not work in another.

The early critics of lustration underestimated the importance of exposing collaborators and removing them from political life. They did not see that these people could do harm and that their presence in positions of power would demoralize the public, who would then, in turn, demand their removal. The critics did not see that, however unpopular the Communist parties were at the time of rupture, they or their successors could draw on sizeable resources and networks to make a comeback. All of this is now well known. What is less well understood is that the critics exaggerated the reputational consequences of lustration because they did not see the parallels between lustration and the treatment of reputation under domestic law.

F. Measurement Problems

A common complaint about transitional justice measures is that they draw morally arbitrary distinctions in deciding which groups to benefit. Critics of restitution programs, for example, point out that these programs always seem to exclude certain classes of claims that are just as strong as those that are included. Germany's post-Holocaust restitution program, for instance, included Jews but excluded gypsies[163] and homosexuals, even though members of the latter two groups were also murdered in large numbers. Likewise, the Czech restitution program focused on property confiscated after 1948, when the Communist dictatorship came into power, thus excluding the claims of ethnic German and Hungarian citizens whose property was confiscated between 1945 and 1948.[164] Jews who lost property during World War II were also initially excluded, but the program was later extended to include their claims. This extension, however, excluded

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[162] Barbara A. Misztal, *How Not To Deal with the Past: Lustration in Poland*, 40 ARCHIVES EUROPÉENNES DE SOCIOLOGIE 31, 53 (1999) (noting that "[w]hile only one third of Poles saw a need for lustration in 1993, by the end of 1998 almost 70 per cent described lustration as an important and necessary policy").

[163] *See* MÜLLER, *supra* note 49, at 263–64.

[164] *See* OFFE, *supra* note 1, at 120–21.

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other groups who lost property prior to 1948.[165] Similarly, the Hungarian restitution program favored ethnic Hungarians at the expense of ethnic Germans[166] and (initially) Jews.[167]

Critics also argue that restitution programs are unjust because they draw morally arbitrary distinctions in deciding what types of harm to compensate. Elster, for instance, argues that although the factory owner and the ordinary worker both suffer under communism — the first loses his factory, and the second loses his right to sell his labor — restitution programs typically compensate the factory owner but not the worker.[168] Likewise, Vojtech Cepl argues that reparations "cannot restore lost careers, opportunities, health and lives" and therefore should be discarded in favor of forward-looking reforms.[169] Offe argues similarly:

> [R]estitution does not correspond in any sense to criteria of need, past or future achievement, or to standards of equal citizenship rights. Instead it usually implies a redistribution at the expense of those members of the present generation who receive no compensation, and also at the expense of future generations who are deprived of either the privatization proceeds or access to restored pieces of private property.[170]

In sum, the argument is that because restitution leaves less wealth available for people who were never victims but who are likely to be poorer than those who lost valuable property, it violates principles of distributive justice.

These criticisms encompass two distinct ideas. The first is a technical idea about implementation. Suppose we agree that people who suffered under communism should receive special compensation. We might still object to restitution because measurement problems would result in a compensation system that is worse than no compensation system at all. It might be worse because the administrative costs are greater than the social benefits, or because the system amounts to a lottery — with those who happen to have lost a factory receiving more money than those who were deprived of an education.

The second idea is disguised as a concern about implementation but is in fact a critique of the goal of restitution. Offe, for example, argues that because restitution programs are designed to compensate for lost property, they cannot use need as the sole or main criterion for

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165 *See* POGANY, *supra* note 1, at 151–52.

166 *See id.* at 168–69.

167 *See id.* at 165–68.

168 *See* Elster, Moral Dilemmas, *supra* note 1, at 21; *see also* Christopher Kutz, Justice in Reparations: The Problem of Land and the Value of Cheap Talk (Apr. 4, 2003) (unpublished manuscript, on file with the Harvard Law School Library).

169 Vojtech Cepl, *A Note on the Restitution of Property in Post-Communist Czechoslovakia*, 7 J. COMMUNIST STUD. 367, 375 (1991).

170 OFFE, *supra* note 1, at 126; *see also* POGANY, *supra* note 1, at 216–17.

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distributing benefits.[171] But a comparison to U.S. domestic law makes clear that this observation is hardly a serious objection. Because the American tort system is designed to deter accidents, provide compensation, and punish wrongful conduct, it too cannot use need as the main criterion for awarding damages. To the extent that deterrence and compensation are worthy goals, undesirable redistribution is simply something that must be tolerated — and then, only if it cannot be mitigated through the tax and transfer system. Similarly, if restitution is a sufficiently worthy goal, then its redistributive effects cannot be the exclusive concern. No one argued, for example, that reparations for the internment of Japanese Americans were unjustified because the money given to former internees would have provided greater value to the poor.

The features of the American tort system are relevant to the first idea about implementation as well. Under American tort law, victims of tortious acts usually have claims for compensation. Measurement error is a concern in some cases but not in others. Courts easily determine damages when property with a market value is damaged or destroyed; it is much more difficult to determine damages when property without a market value is damaged or destroyed, or when health or freedom is lost. In the long history of tort law, one finds different approaches to valuation problems. Sometimes courts refuse to recognize the harm, or they recognize the harm but award no damages (or only nominal damages): this was once true for death, pain and suffering, emotional distress, and some harms to reputation. More frequently in modern tort law, courts award damages with the candid recognition that the amounts are likely to be too high or too low, but better than nothing. No one argues that the entire tort system should be thrown out because torts against property are more likely to result in accurate damage awards than torts against health or reputation. Why, then, should a similar argument be made about post-transitional restitution programs?

Another, and more direct, domestic analogy to restitution is the taking. As we noted earlier, government takings are transitions, albeit of a humble kind, and takings jurisprudence reflects the same problem with measurement.[172] As a result of measurement problems, a homeowner whose house is taken by the government receives the house's market value, not its subjective value, which is the economically correct amount, given the goal of compensation. And because of measurement problems, the government must draw apparently morally arbitrary distinctions: one homeowner receives compensation for

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[171] *See* OFFE, *supra* note 1, at 128–29.

[172] *See supra* pp. 763–64.

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property taken by the government, but another homeowner receives no compensation when a nearby military base is shut down, even if the losses in property value are identical.

Moreover, courts and legislatures in both transitional and nontransitional settings encounter many difficult and often wrenching decisions about how to allocate rights and entitlements in the first place. The question whether the Czech restitution program should have covered claims beginning in 1948, or 1945, or 1939, or any other year is similar to the question whether the U.S. government should have compensated victims of the Oklahoma City bombing as well as the victims of the World Trade Center attack.[173] And Offe's concern that restitution favors wealthy people who lost significant assets mirrors the present-day concern that compensation of the survivors of 9/11 victims favors people whose spouses had generous salaries.[174] The responses to concerns like these are intricate and evolving, but no one takes the view that because morally arbitrary lines will be drawn, payments should never be made to victims of government policies or terrorist attacks.

Consider also the frequent domestic use of amnesties, pardons, and grants of clemency. These backward-looking devices unavoidably require difficult moral choices. They draw lines between groups of people who might have equally valid claims for relief, and they always penalize, in a comparative way, those who chose not to break the law in the first place. But amnesties and other acts of clemency serve important functions and are commonly used despite discomfort about arbitrary line drawing.

Our claim, then, is that measurement problems and similar concerns about arbitrariness in the distribution of benefits do not distinguish transitional justice from ordinary justice. The fact that transitional justice requires morally troublesome line drawing and crude circumventions of measurement problems that result in wealth redistribution, which might, in turn, conflict with norms of distributive justice or other ideals, does not distinguish post-transitional restitution programs from numerous popular and morally unobjectionable domestic laws.

G. The Difficulties of Judgment

Another common criticism of transitional justice is that judgment is too difficult, given the various arguments that excuse, or at least explain, the past conduct of former officials and collaborators of the old regime. Four arguments recur. First, some perpetrators did not insti-

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[173] *See* Lisa Belkin, *Just Money*, N.Y. TIMES, Dec. 8, 2002, § 6 (Magazine), at 92.
[174] *Id.*

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gate crimes; they only followed orders or were coerced into participation. Second, some collaborators were driven by genuine ideological conviction; or conversely, they were at worst opportunists who did not share the evil ideological motives of their leaders. Third, some officials did what they could to soften the regime's policies from time to time and did not resign because their replacements would have been even worse. And finally, the overwhelming number of morally compromised people under the old regime renders futile any effort to assign gradations of blame: "[t]he past is another country,"[175] and people's behavior under an authoritarian regime cannot be evaluated objectively by those living in a liberal state.[176]

Although each of these arguments might have more or less force in individual cases, taken together, they suggest to critics that transitional justice is futile. Because it is too difficult to make the proper moral distinctions necessary to do justice, the critics argue, the project of transitional justice should be abandoned. Václav Havel's argument that nearly everyone was implicated in the crimes of the Czechoslovakian Communist government is just one example.[177] But Havel's view seems too broad, and indeed, the Czech public rejected it: there are clear differences between ordinary people and those with power.[178] Among the latter group, people should have either worked for reform or quit and joined the ranks of the powerless. Elster similarly suggests that people with power — the perpetrators and chief beneficiaries of the old regime — can be judged differently.[179] Some bear greater guilt than others. This view is surely correct, but the conclusion that Elster draws from it — that the moral distinctions are too hard to make, and therefore punishment cannot be justified — does not follow. Below we analyze each of the four arguments that make judgment difficult for critics of transitional justice.

1. Relative Culpability and Prosecutorial Discretion. — One set of excuses typically offered by defendants in transitional justice trials involves pointing to another potential defendant whose culpability is greater. The defendant commonly claims that he was merely following the orders of a superior authority, that he was at most a passive participant who acquiesced in others' unjust actions. In the extreme case,

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175 L.P. HARTLEY, THE GO-BETWEEN 1 (1953).

176 *See* OFFE, *supra* note 1, at 102–03 (presenting arguments that complicate the evaluation of behavior under an authoritarian regime).

177 *See* Michnik & Havel, *supra* note 135, at 21.

178 *See* Michael Kraus, Settling Accounts: Postcommunist Czechoslovakia (Sept. 1992) (paper presented at the Annual Meeting of the American Political Science Association), *reprinted in part in* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 548, 549 (noting that the proponents of the Czech lustration law distinguished between "the ordinary citizen" and "party functionaries, former agents of the security, and their secret collaborators").

179 *See* Elster, Moral Dilemmas, *supra* note 1, at 27–28.

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the claim is that the superior authority would have killed or imprisoned the defendant for resisting or refusing to carry out the unjust command; in such a circumstance, the argument runs, there is no moral obligation to undertake heroic measures of resistance, even if such measures would have been morally praiseworthy. In each of its versions, the excuse of relative culpability is accompanied by a complaint about the arbitrariness of selective prosecution. Why should some be punished when others, perhaps because of a fortuitous dearth of evidence, go free — especially when those others are more culpable?

We need to disentangle these arguments. Taken separately, each is unimpressive, and it is not clear that their conjunction is any more successful. The complaint about selective prosecution is that "[d]isparities in chance survival of evidence will tie one individual [to a crime], while his comrade — with the same assignment, the same unit, and — probably — the same degree of guilt — will walk away free, because the evidence as to him happened to be insufficient."[180] But this observation is trivially true of any nontransitional criminal justice system. The requirement that punishment be based on evidence creates a risk of false negatives (cases in which the guilty go free for lack of proof); but it also minimizes false positives (cases in which the innocent are punished based on inadequate proof) and is presumably worth the costs. The possibility of moral luck is neither here nor there. One bank robber happens to face the hidden camera and gets twenty-five years; the other, who faces away from it, gets a hung jury or a favorable plea bargain. The first robber may curse the fates, but he has no moral or legal grievance that any justice system would recognize.

According to the defendant in the transitional justice trial, however, the new regime's prosecutors do not even prosecute all those against whom a case could be made, given the evidence; to make things worse, they often prosecute defendants who arguably are less culpable than those not prosecuted. The problem with the defendant's complaint, as well as with the parallel criticisms of transitional justice, is that the new regime's prosecutors are no more in the business of assessing moral desert than are the prosecutors of consolidated democracies. State officials use the criminal justice system as a tool of social control and must constantly compromise the moral merits of particular cases to achieve systemic aims.

To return to our example of a large, hierarchically organized drug cartel: who is more morally culpable, the kingpin who organizes distribution, or the mule who sells the product? The answer is not obvious, but neither is it particularly important, relative to the criminal justice

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[180] Fritz Weinschenk, *Nazis Before German Courts: The West German War Crimes Trials*, 10 INT'L LAW. 515, 528 (1976).

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system's other goals of deterrence and incapacitation. At the level of law enforcement policy, prosecutors may offer plea bargains to low-level conspirators to obtain evidence against the kingpins, or they may offer the kingpins a deal if they reveal all of the cartel's personnel and methods. Actual trials may focus on kingpins, but they may also, or instead, focus on the small fry, because the issues of proof are typically less complicated in low-level cases.

To get the kingpins, prosecutors may resort to indirection, charging them with lesser crimes, or satellite crimes, that are easier to prove. Erich Mielke, the GDR head of state security, was prosecuted on an alleged murder dating back to 1931; Harry Tisch, a trade unionist and GDR insider, was convicted of using union funds to finance the vacations of state officials.[181] These results outrage the critics of transitional justice,[182] for unclear reasons. Al Capone went to prison for tax evasion, not racketeering.[183] What utilitarian calculus, or what deontological constraint, suggests that it would have been better had he remained free? To be sure, the first-best outcome in any of these cases would be a prosecution on retributively appropriate charges. But when proof of those charges fails, the second-best choice is prosecution on the lesser charge.

At the level of American constitutional law, all this is perfectly acceptable. Courts — transitional or nontransitional — adopt a hands-off policy toward claims of selective prosecution, so long as the principle of selection is not independently invidious (racist or vindictive, using the latter term in the narrow legal sense of punishment for an earlier assertion of legal rights).[184] Subject to the ordinary requirements of proof and guilt, nontransitional courts do not set the guilty free merely because some third party, not (yet) prosecuted, was also guilty; nor do they allow defendants who are guilty of both a lesser charge and a greater charge to go free just because the government brought the lesser charge alone. Here, as elsewhere, the critics of transitional justice are guilty of moral perfectionism: they want the courts of transitional regimes to sift through moral imponderables in ways that courts of consolidated democracies never do.

The parallels between selective prosecution in transitional and nontransitional settings are striking, though obvious. The GDR regime could be seen as just a very large criminal conspiracy. As we discussed above, post-unification prosecutors and courts convicted some of the

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181 *See* QUINT, *supra* note 39, at 205.

182 *See, e.g.*, OFFE, *supra* note 1, at 101.

183 KENNETH ALLSOP, THE BOOTLEGGERS: THE STORY OF CHICAGO'S PROHIBITION ERA 328 (1968).

184 *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996) (dismissing a claim of selective prosecution); Teah R. Lupton, *Prosecutorial Discretion*, 90 GEO. L.J. 1279, 1283–84 (2002).

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border guards from the Berlin Wall;[185] the sentences were typically light, and they were carefully calibrated to factual assessments of culpability. The top echelon of GDR leaders was also prosecuted, although several, like Honecker himself, were subsequently excused on grounds of ill health. The large middle ranks of GDR officials — those who neither directed ultimate policies nor pulled the trigger — have largely gone unmolested, although most are unemployed and, in competition with highly skilled FRG administrators, unemployable. These outcomes of the reunified government's transition-management policies strike us as reasonable, or at least not clearly immoral or imprudent, given resource constraints and the competing costs and benefits of leniency and severity.

Ackerman offers Argentina as an example of a failed campaign of prosecution.[186] There, the leftist Alfonsin government's efforts to bring Peronist military officers to justice resulted in convictions of five members of the top echelon, but repeated rebellions by mid-level army officers forced Alfonsin to recognize a defense of "due obedience" to superior orders, sharply restricting the class of eligible defendants.[187] His Peronist successor, Carlos Menem, quashed the remaining cases, pardoned the convicted, and turned from punishment to reparations, leading to a sweeping compensation law for victims and their relatives.[188] *Pace* Ackerman, all this shows nothing about transitional prosecutions in particular, as opposed to either nontransitional prosecutions or other transitional measures. All it shows is that when new regimes are relatively weak, elements of the old regimes, such as the army, may retain enough political muscle to block attempted punishment, lustration, or any other measures that impose direct costs on them. The Argentinian reparations program, by contrast, succeeded because it did not encroach on the autonomy of the old regime's military. The political situation may constrain the new regime's choices, but this is not a normative argument for or against any particular transitional measure that is politically feasible.

If the defense of superior orders includes the claim that disobedience would have been punished harshly, it collapses into a claim of duress. This is the best claim for old-regime defendants precisely because it is universally recognized, in some form or another, by nontransitional courts in consolidated democracies. The remaining questions are largely empirical. Although transitional courts face difficult normative questions if a medium degree of duress is present, many easy cases will lie at one extreme or another. In the West German prosecu-

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185 *See supra* p. 793.

186 *See* ACKERMAN, *supra* note 124, at 78–80.

187 *Id.* at 79.

188 *See* 2 TRANSITIONAL JUSTICE, *supra* note 1, at 324.

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tions of Nazi officers, the duress claim was frequently made and just as frequently rejected on factual grounds: "despite intensive defense efforts not one instance could be conclusively established where any German was punished — even moderately — for refusing or circumventing participation in [Nazi] atrocities."[189]

Elster tries to complicate this picture in two ways. The first is to posit that old-regime officials might have had a subjective (albeit empirically ungrounded) belief that they would be punished for disobedience.[190] But this point has nothing to do with transitional justice; the issue of subjective versus objective standards of duress is equally important, or unimportant, in nontransitional trials.[191] The second complicating question is whether it makes a difference if the defendant's victims would have been harmed in any event, by someone else, had the defendant not harmed them.[192] Here the point seems to be that the added counterfactual deepens the moral problems, whatever the law's response. Doubtless that is so; ethical casuistry feeds off similar hypotheticals.[193] But the retreat to the safe ground of moral theory deprives the question of any importance for transitional justice. As far as the law is concerned, if *A* credibly threatens to injure *B* unless *B* injures *C*, *B* is excused for injuring *C* whether or not *A* would have injured *C* (as well as *B*) had *B* refused.[194] Nontransitional courts are not

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189 Weinschenk, *supra* note 180, at 526 (emphasis omitted). To be sure, the mere assertion of the duress defense imposes systemic costs, and the defense is more frequently invoked in transitional trials than in nontransitional ones. However, because other defenses commonly raised in nontransitional trials are less commonly raised in transitional ones, there is no reason to believe that the net costs of transitional trials are higher than those of an equivalent number of ordinary trials. For example, as demonstrated by the West German prosecutions of former Nazi officers, the complicity of the old regime's bureaucracy in the leadership's illiberal policies often means that documentary evidence of complicity is plentiful. Consequently, the cost of producing evidence to show that the defendant participated in the crime may be significantly lower in transitional trials than in nontransitional trials.

190 *See* Elster, Moral Dilemmas, *supra* note 1, at 27–28.

191 The general rule in American jurisdictions is that the defendant must "reasonably . . . believe" that the illegal conduct is "the only way to avoid imminent death or serious bodily injury to himself or to another." WAYNE R. LAFAVE, CRIMINAL LAW § 5.3 (3d ed. 2000).

192 *See* Elster, Moral Dilemmas, *supra* note 1, at 28.

193 *See, e.g.*, LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW, at ix–xiv (1996) (discussing how a number of crimes and legal rules do not coincide with a utilitarian justification); J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 98–99 (1973) (discussing the ethical dilemma posed by a hypothetical in which one could kill one hostage in order to save nineteen others); Judith Jarvis Thomson, *The Trolley Problem*, 94 YALE L.J. 1395 (1985) (discussing the ethical dilemma posed by a hypothetical in which the flip of a switch would save five people but cause the death of one person).

194 *See* LAFAVE, *supra* note 191, § 5.3. Note that in most American jurisdictions, the legal defense of duress is not available in homicide cases. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 23.04 (3d ed. 2001).

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in the business of moral casuistry; no more should be expected of transitional courts.

2. Determining Relative Culpability: Ideologues Versus Opportunists. — In criminal trials conducted by West German authorities after 1950, former Nazi judges successfully invoked ideology as an excuse.[195] The former judges, who imposed the death penalty on Jews, dissidents, and other "undesirables," argued that they acted not out of criminal motives, such as the desire for profit or advancement or bloodlust, but out of a sincere desire to serve the Nazi regime in which they believed wholeheartedly.[196] After 1989, efforts to prosecute officials of the former authoritarian states ran into similar problems. The spy chief of East Germany had the same mens rea as the never-punished spy chief of West Germany: an ideological commitment to serving the state. To obtain jail time for the East German spy chief, prosecutors sought to tie him to a murder that had occurred sixty years earlier.[197]

Ideology is not a defense in nontransitional criminal cases, though it is relevant to determining the degree of culpability and thus the severity of the punishment. Jonathan Pollard, for example, argued that his motive for spying on the United States was his belief that aiding Israel "would also benefit United States' security interests," not any real desire for pecuniary compensation from his handlers.[198] Although the courts rejected this argument without commenting on its legal implications, it is clear that Pollard's lawyers thought that ideological motivation would not be as severely punished as pecuniary motivation.[199] The legal significance of motivation is also reflected in the designation of pecuniary motive as an aggravating factor in capital sentencing.[200]

There are moral and practical reasons for punishing opportunists more severely than ideologues. The motive of opportunists is their own self-interest, which can never be an excuse for committing a moral wrong. The motive of ideologues is not self-interest, or not purely self-interest: it is usually a vision of a better society. When that vision is attractive, we condemn the means but not the ends. The opportunist, by contrast, can be blamed both for using illegal means and for having selfish ends.

Yet ideology is not always a mitigating factor. When the vision is abhorrent, then the ideologue is considered worse than the opportunist.

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195 MÜLLER, *supra* note 49, at 283–85.

196 *Id.* at 275–76.

197 ACKERMAN, *supra* note 124, at 76.

198 United States v. Pollard, 959 F.2d 1011, 1017 (D.C. Cir. 1992).

199 *See id.* at 1026–28.

200 *See* MODEL PENAL CODE § 210.6(3)(g) (1985).

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Hitler was worse than the many opportunists who filled the Nazi Party. It is thus not surprising that an act motivated by ideology sometimes fetches a higher sanction than an opportunistic act, and sometimes a lower sanction. It is important only to point out that these moral distinctions and practical concerns are not generally difficult, even if they might be in unusual cases, and courts make them every day. For this reason, we disagree with critics of transitional justice who argue that because it is difficult to decide whether an opportunist or an ideologue deserves the greater punishment, officials and collaborators of the old regime should not be tried.

A related, but slightly different, exculpatory argument is that the milieu or culture of the old regime made the defendant ignorant of or morally insensitive to the oppressive effects of the regime's policies.[201] Domestic law confronts the same problem when defendants in criminal cases offer the excuse of cultural relativism. The defendant argues that it was excusable for him to carry an illegal knife, because he is a Sikh priest, and the knife is a symbol of religion;[202] or to kiss his son's genitals, because that is what is done in Afghanistan;[203] or to preemptively kill someone who had previously threatened his life, because in Vietnam everyone knows that the death threat would have been carried out.[204] Courts and prosecutors sometimes recognize the force of these arguments and reduce the charge or the punishment,[205] but no one thinks that cultural relativism is always or even usually exculpatory.[206] Individuals with different cultural backgrounds have a duty to familiarize themselves with the laws and norms of the country to which they immigrate. Skepticism about the claims of individuals who do not do so is similar to the skepticism we feel about the claims of perpetrators and collaborators of a past authoritarian regime. Most individuals in authoritarian societies are capable of looking at their regime critically. A gray area corresponds to the domestic cultural relativism cases in which the illegal act is not particularly harmful and the cultural distance is great. For sufficiently wrongful behavior, however, the claim that the defendant did not have a culpable mental state is not credible, whether in transitional or nontransitional circumstances.

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201 *See* OFFE, *supra* note 1, at 102–03.

202 *See* People v. Singh, 516 N.Y.S.2d 412, 413 (1987).

203 *See* State v. Kargar, 679 A.2d 81, 82–83 (Me. 1996).

204 *See* Ha v. State, 892 P.2d 184, 195 (Alaska Ct. App. 1995). For overviews of the cultural defense issue, see Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 WASH. & LEE L. REV. 3 (2002); and Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime:* Kargar *and the Existing Framework for a Cultural Defense*, 47 BUFF. L. REV. 829 (1999).

205 *See, e.g.*, *Singh*, 516 N.Y.S.2d at 416 (finding "no basis for dismissal as a matter of law," but exercising judicial discretion to dismiss the charges).

206 *See* sources cited *supra* note 204.

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3. The "Schindler's List" Defense.[207] — Another standard excuse offered by old-regime officials is that they worked within the system to ameliorate its worst injustices or even to covertly sabotage its operation. Resignation from office, the argument runs, might have salved the official's conscience, but it would have harmed the resistance or opposition. The official's replacement could have been a fanatic adherent of the old regime's evil ideology, whereas the reluctant official helped to soften the harsh edges of the old regime's unjust directives. Here is a typical example of the argument:

> In France during the German occupation, only one judge refused to take the oath to Pétain. Many argued that it should be taken "since the alternative was to see captured *résistants* come before a judiciary even more Pétainized than it already was. . . . Frequently it had been a question of passing an unjust sentence short of death lest the case — or future cases — be taken out of the judge's hands and put in those of a Vichy fanatic."[208]

The difficulties of assessing such an argument are seemingly formidable. Should the excuse be discounted for its self-serving purpose of avoiding prosecution or purgation by the new regime? Should it be discounted for the empirical uncertainties that it entails? For one thing, perhaps it is not clear that the meliorist official would have been replaced by a fanatic. For another, perhaps it would have been better for the cause of resistance in the long term, though worse for individual defendants in the short term, for fanatical judges to replace moderate ones; the increased injustice might have spurred greater international condemnation or increased domestic resistance. Finally, if the old regime is evil, perhaps resignation from office and participation in the resistance should be understood as deontological duties,[209] not to be violated even upon the most convincing showing that the consequences of overt resistance would have been worse.

The more we poke at these problems, however, the less formidable they appear. We have seen that one of the collaborator's stock excuses — "if I hadn't done it, I would have been punished" — is just the criminal law defense of duress transposed to the transitional justice

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[207] Oskar Schindler participated in the Nazi regime by manufacturing goods for the military. But when the Nazis informed Schindler in the autumn of 1944 that Jewish workers were about to be "relocated," Schindler bribed and cajoled the military into allowing him to move his plant. This new plant was deliberately designed to produce defective military material while Schindler funneled profits to the Resistance. *See* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers"*, 9 TEMP. INT'L & COMP. L.J. 173, 173–74 (1995). Thanks to Eric Truett for this comparison.

[208] Elster, Moral Dilemmas, *supra* note 1, at 25–26 (omission in original) (quoting NOVICK, *supra* note 25, at 84–85).

[209] For an overview of the relevant moral problems from a nonconsequentialist perspective, see F.M. Kamm, *Harming Some To Save Others From the Nazis*, *in* MORAL PHILOSOPHY AND THE HOLOCAUST 155 (Eve Garrand & Geoffrey Scarre eds., 2003).

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context. The philosophical conundrums surrounding duress are indeed formidable, but the legal system finesses or ignores the conundrums in fine pragmatic style.[210]

All this holds true as well of the Schindler's List defense. Here the nontransitional analogue is the defense (technically it is a justification, not an excuse) of necessity, or the choice of evils, under which the defendant argues that committing the crime was necessary to produce a greater good or to avoid a greater harm.[211] Consider the Schindler-esque claim at issue in *State v. Green*,[212] in which one of the participants in a multiparty criminal conspiracy claimed that he had elected to participate in order to prevent harm to his son, who was also a conspirator.[213] While the father was never tried, the appeals court reviewing the conviction of another conspirator acknowledged that a court trying the father would properly have instructed the jury on duress and necessity.[214]

Defenses of this sort are rare in nontransitional settings, in part because many jurisdictions require the defendant either to have had no legal alternatives to committing the crime or to have exhausted those alternatives; calling the police is usually a better option than meliorist participation in a conspiracy. This requirement might be viewed as a decisive distinction between the transitional justice version of the necessity defense and the domestic version. After all, because the old regime presumably dominated all legislative and judicial institutions, there were likely no legal alternatives to committing the crime, at least if we ignore the possible recourse to international law and institutions. But the point of asking about legal alternatives is not a positivist attempt to figure out whether the governing law prohibited or permitted the acts in question. Rather, the point is just to flesh out the cost-benefit calculus — to help judges and juries determine, from the law's rough-hewn utilitarian perspective, whether there were available courses of action, other than the crime charged, that would have avoided the threatened harm at a lower social cost. It is not enough, in other words, to show that the harmful crime avoided an even greater harm; it must also be true that there were no less harmful actions in the feasible set of alternatives.

Transitional courts face the identical question: was complicity in the old regime's wrongdoing the lowest-cost alternative? For example, in the Nuremberg trial of German jurists that followed the major war crimes trials, the principal defendant, a former high official in the

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210 *See supra* p. 816.

211 *See* MODEL PENAL CODE § 3.02(1) (1985).

212 915 S.W.2d 827 (Tenn. Crim. App. 1995).

213 *Id.* at 832.

214 *Id.*

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Reich Ministry of Justice, argued that "if he were to resign, a worse man would take his place."[215] Although the tribunal found "much truth" in this contention because the atrocities committed by Nazi police elements outside the Ministry's control were much worse, it nonetheless rejected the defense, holding that "[t]he prostitution of a judicial system for the accomplishment of criminal aims involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes."[216] Whether or not one agrees that the social costs of frank atrocity are lower than the costs of judicialized murder — this is candor with a vengeance! — the question about net social costs is unimpeachable, and it is precisely the question that nontransitional courts ask as well.

One might also think that the factual questions are more difficult in transitional justice settings, either because they are really counterfactuals — if *X* had resigned from the bench, would *Y*, a fanatic, have taken his place? — or because they require more facts (or counterfacts), and on a larger scale, than their nontransitional analogues. However, these arguments miss the fact that the duress and necessity defenses are always predicated on counterfactual assertions, and there is no reason why the scale of the relevant counterfactual questions is necessarily greater in the transitional setting. Consider some real-life examples in which courts have reached varying and fact-sensitive decisions: whether a radical group may obstruct the activities of the Internal Revenue Service to protest the government's financial aid to El Salvador (no);[217] whether a public health organization may operate an illegal needle exchange program to combat the spread of AIDS (yes in some jurisdictions, no in others);[218] whether a private posse may round up and deport striking miners who planned to destroy lives and property (yes);[219] and, most famously, whether seamen adrift in a lifeboat may cannibalize a sickly cabin boy to stay alive (no).[220]

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[215] MÜLLER, *supra* note 49, at 271 (quoting United States v. Altstoetter (The Justice Case), 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 983, 1086 (1951)).

[216] *Id.* (quoting *Altstoetter*, 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1086).

[217] *See* United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991) (holding that the necessity defense was unavailable to the defendants).

[218] *Compare* People v. Bordowitz, 588 N.Y.S.2d 507, 513 (N.Y. Crim. Ct. 1991) (holding that "defendant's conduct falls within the standards of the medical necessity defense"), *with* Commonwealth v. Leno, 616 N.E.2d 453, 456–57 (Mass. 1993) (holding that the illegal distribution of needles to combat the spread of AIDS was not covered by the necessity defense).

[219] *See* State v. Wooton, Crim. No. 2685 (Cochise City, Ariz., Sept. 13, 1919) (jury acquittal), *cited in* Comment, *The Law of Necessity as Applied to the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1963).

[220] *See* Regina v. Dudley & Stephens, 14 Q.B.D. 273, 287–88 (1884).

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Conversely, the factual inquiries needed to resolve the Schindler's List defense in transitional settings are often no more complex than in nontransitional settings. In both contexts, courts eschew high-level abstractions, render fact-bound decisions, and use sentencing adjustments and other techniques to avoid all-or-nothing pronouncements. Consider the trial of five Vichy judges who had, in 1941, "sentenced three Communists to death in reprisal for the shooting of a German officer. The Germans had originally demanded ten executions; after negotiations, the victims were finally reduced to three — all of whom had been in prison at the time of the shooting."[221] Moral theorists will recognize this as an old ethical chestnut.[222] Practical jurists will instead be inclined to keep their conclusions at a lower level of abstraction, assessing each defendant's culpability in light of his particular role in the events and adjusting punishment accordingly. This is what the Gaullist court did; it sentenced "[f]our of the five judges . . . to terms ranging from life at hard labor to two years in prison; one, who had opposed the sentence, was acquitted."[223]

The point here is not to take sides in the debate between moral theorists and pragmatists.[224] It is to emphasize that the debate cuts across the distinction between transitional and nontransitional justice. By (implicitly) faulting transitional courts for deciding cases without resolving all relevant moral conundrums, the critics hold transitional courts to a higher standard than nontransitional courts; the discrepancy suggests that the higher standard is unrealistic.

4. Everyone Did It. — The fourth excuse — that everyone is implicated — reflects two distinct ideas: that it is wrong to punish only some people when everyone is guilty, and that it is impossible to use ordinary notions of guilt and innocence to evaluate conduct that took place before the new regime took power.[225] Peter Quint argues that the West German officials who prosecuted and judged cases against former officials of the GDR did not really understand what happened in East Germany. In a case involving election fraud in 1989, the "court rejected defense counsel's claim that, since all elections in the GDR were fundamentally fraudulent, [the defendant's] acts could not

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221 NOVICK, *supra* note 25, at 85 n.18.

222 *See* SMART & WILLIAMS, *supra* note 193, at 98–100 (describing a similar ethical dilemma).

223 NOVICK, *supra* note 25, at 85 n.18.

224 For an example of this debate, compare Martha C. Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776 (1998), with Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

225 Alternatively, the excuse may reflect how it is not clear that standard ideas about criminality can be applied to a person whose motives are no different from those of any other bureaucrat, but for the monstrousness of the bureaucratic end. *See* HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 276 (revised and enlarged ed., Penguin Books 1994) (1963).

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really constitute election fraud."[226] Quint argues that the court's ruling reflects incomprehension of the nature of life in a totalitarian regime[227] rather than, what is more likely, a conventional legal subterfuge for performing substantive (albeit retroactive) justice. Moreover, even if the West Germans did not fully understand the East German past, the East Germans surely did, and many of them complained bitterly that justice was not more severe. But Quint's larger point — that normative transformations accompanying transitions make judgments about the past hazardous — is widely shared.

Once again, however, this hazard in transitional justice is also present in nontransitional societies; the skeptics seem to forget that normative transformations take place in consolidated democracies as well. In the United States, the clearest example of such a normative transition was the nationwide transformation of racial attitudes during the second half of the twentieth century. As we discussed earlier,[228] this transformation has continually embarrassed public officials who supported segregation in the 1950s and 1960s, as Trent Lott's downfall most recently indicates.[229] Changing racial attitudes also contributed to the decision to provide reparations to Indian tribes, and to Japanese Americans who were interned during World War II. The normative transition has also contributed to the widespread adoption of affirmative action programs, as well as proposals to award reparations to the descendants of slaves. There have been other transformations as well. The backlash against communism after World War II cast suspicion on many officials who sympathized with communism in the 1930s. The backlash against drug use in the 1980s and 1990s embarrassed public officials who used drugs as young adults in the 1960s and 1970s. Even though each of these normative transformations implicated large segments of American society, rather than just a few wrongdoers, the legal and political systems still pursued reparative (and sometimes retroactive) justice.

There is no doubt that many people find it hard to imagine themselves sharing attitudes that were once widespread but are now taboo. But the public as a whole does seem to take a more realistic view, as it generally does not demand from its officials a past life free of actions that are considered blameworthy by current standards. Instead, the public seems content when officials make clear repudiations of their past actions, perhaps because it is simply looking for evidence that the officials share the new attitudes or at least will not work against them. Consequently, while people at the vanguard of change — the dissent-

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226 QUINT, *supra* note 39, at 206.

227 *See id.* at 215.

228 *See supra* section II.A.4

229 *See* Hulse, *supra* note 62.

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ers and dissidents who are eventually vindicated by the normative transformation — take on heroic status, those who resisted change are not necessarily condemned.

This political forgiveness exists in consolidated democracies and transitional democracies alike. The people who judge the past during a transition are the same as the people who lived in the past. They are capable of distinguishing between those who passively collaborated and those who used force against change, or between those who repudiate their past actions and those who work to undermine reform. Certainly, as overemphasized in the literature, people will sometimes deceive themselves, invent myths, scapegoat, and forget. But people do these things in consolidated democracies as well. That people in post-transitional societies can make reasonable moral distinctions is proved by the survival of many of the communist parties in Eastern Europe, which refashioned themselves as leftist parties in the post-transition electoral system after shedding secret police chiefs, torturers, and others from the old regime whose behavior was reprehensible by any standard.

Quint brings together many of the criticisms of transitional justice in his discussion of the prosecution of former GDR officials. He argues that the cases criminalized the ordinary politics of the GDR rather than picking out moments of great injustice.[230] And because most of the penalties were mild, "this immense expenditure of effort seems to serve little more than the function of bringing facts before the public and of labeling the former functionaries of the GDR as criminals . . . rather than actually serving any of the more traditional goals of the criminal law."[231] One could say exactly the same thing about denazification, which involved the processing of millions of German citizens but, because of resource constraints, resulted in relatively few punishments, most of which were trivial.[232] But criminal law frequently serves an educational function: it stigmatizes forms of lawbreaking that are harmful but widely tolerated. The prosecutions of former GDR officials had a grander scope than ordinary prosecutions, but they could be justified — and were widely believed to be justified — by the criminality of the regime. The post-GDR prosecutions, like the denazification process, showed that the activities of the prior regime were wrongful, not just matters of political disagreement.

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230 *See* QUINT, *supra* note 39, at 206 (footnote omitted).

231 *Id.* at 215.

232 *See* Herz, *supra* note 29, at 26–27.

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III. CONCLUSION

The urge to wipe the slate clean and start at Year Zero is deep and understandable, but it has been resisted by most transitional states. Wiping the slate clean does not erase the memories of the victims or the continuing influence of the old regime's perpetrators and supporters. Nonetheless, the dominant view in the academic literature is that transitional justice is counterproductive because it interferes with the development of democratic institutions and market economies. The interference takes many forms: overburdening courts, undermining property rights, depriving the government of experienced personnel, draining the treasury, burdening officials with complex technical problems, and confronting the judicial system with insoluble moral dilemmas. All of these objections are, however, overblown. Transitional justice below the regime level is a feature of nontransitional states, and in these states the costs of transitional justice are always balanced pragmatically against the benefits, rather than assumed in every case to be decisive. While academics often overlook the many parallels between transitional and ordinary justice, many transitional institutions themselves have recognized and exploited these parallels — a tactic that no doubt has contributed to their success in achieving transitional justice.

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