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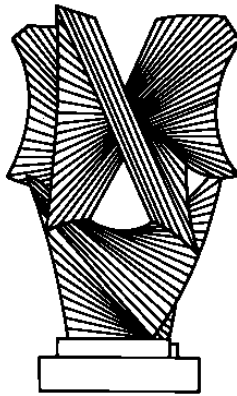
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TRANSITIONAL JUSTICE AS ORDINARY JUSTICE

Eric A. Posner and Adrian Vermeule

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Transitional Justice as Ordinary Justice

Eric A. Posner* & Adrian Vermeule**

The study of “transitional justice” is a rapidly expanding subfield at the intersection of jurisprudence, comparative politics, and political theory.¹ In the wake of the revolutions of 1989 in Eastern Europe, the democratization of South Africa, and the ever-increasing popularity of international human rights talk, an academic literature has arisen (or at least greatly expanded²) that examines regime transitions in developing nations. Typically, this literature aims to identify distinctive jurisprudential, moral and institutional dilemmas or problems of transitional justice. 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,” or the attempt to impose disenfranchisement, ineligibility for office, or other legal disabilities on the old regime’s adherents? What of reparation and restitution to redress pre-transition violations of civil rights or property rights?

In opposition to this work, we make two linked claims. First, the theorists of transitional justice commonly err by treating regime transitions 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 the legal systems of consolidated democracies, on the other.³ Sometimes this is an explicit claim, as when Shklar says of Nuremberg and other transitional trials that “all analogies

* Kirkland & Ellis Professor of Law, The University of Chicago.

** Professor of Law, The University of Chicago. Thanks to Bernard Harcourt, Jenia Iontcheva, Chris Kutz, Claus Offe, Lior Strahilevitz, David Strauss, and participants at a workshop at the University of Chicago for helpful comments, and to Eric Truett for excellent research assistance. Posner thanks the Sarah Scaife Foundation Fund and The Lynde and Harry Bradley Foundation Fund for financial support.

¹ Examples of recent work include Ruti Teitel, *Transitional Justice* (2000); *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Neil J. Kritz ed. (1995); *The Politics of Memory: Transitional Justice in Democratizing Societies*, Alexandra Barahona De Brito, Carmen Gonzalez-Enriquez and Paloma Aguilar eds. (2001); *Transitional Justice and the Rule of Law in New Democracies*, J.A. McAdams, ed. (1997); Jon Elster, *Preference Formation in Transitional Justice* (2002); Jon Elster, *Moral Dilemmas of Transitional Justice* (2002); Claus Offe, *Varieties of Transition: The East European and East German Experience* (1997); Megan Koreman, *The Expectation of Justice: France 1944-1946* (1999); Juan J. Linz and Alfred C. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and post-Communist Europe* (1996); Istvan S. Pogany, *Righting Wrongs in Eastern Europe* (1997).

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

³ Sanford Levinson makes a similar point about criticisms of truth commissions, which he fruitfully analyzes in light of the Supreme Court’s due process jurisprudence. See Sanford Levinson, “Trials, Commissions, and Investigating Committees: The Elusive Search for Norms of Due Process,” in *Truth vs. Justice: The Morality of Truth Commission*, Robert I Rotberg & Dennis Thompson eds. 211-34 (2000).

drawn from municipal law . . . are unconvincing”;⁴ sometimes it is an implicit but necessary assumption, as when Elster examines the “moral dilemmas” of transitional justice without reference to obvious intrasystem analogies.⁵ Against this view, we urge that legal and political transitions lie on a continuum, of which regime transitions are merely the endpoint.

To take only the example of American domestic law, consider the transitions produced by a spate of constitutional amendments, such as the aftermath of the Civil War; difficult transitions from one government to another, such as 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 might, and many did, pose questions of retroactivity, personnel management and compensation usefully analogous to those arising after regime transitions. The varieties of transition implicate similar considerations, even if those considerations have different weights at different points on the continuum; the problem of compensation for the deprivation of pre-transition property, for example, is analogous in both takings law and in regime transitions. There are differences of degree between regime transitions and intrasystem transitions. But 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 former set of differences is somehow larger or more consequential than the latter.

In general, the analysts of transitional justice, who are typically steeped in moral theory, political theory and science, or in highly theorized international law, have gone wrong through insufficient appreciation of the ordinary law of consolidated democracies. They have erred, not by virtue of inadequate moral or political analysis, but by holding a stereotyped picture of ordinary justice, one in which all laws are always prospective, individuals costlessly obtain compensation for all harms to person or property inflicted by others, and transitions essentially never occur because the legal system runs smoothly in settled equilibrium. In our picture, by contrast, 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

⁴ Judith Shklar, *Legalism: Law, Morals and Political Trials* 167 (1964). Although the reference to “*municipal*” law might suggest that Shklar is speaking solely of the distinction between international and domestic law, the context makes clear that she means to encompass both that distinction and the distinction between regime transitions 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 that there is a severe tension between the Shklar’s denial that municipal analogies are 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, it should follow that there is no unbridgeable 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 of Transitional Justice*, *supra* note ---.

⁶ There is a large literature on this latter group; see, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *Harv. L. Rev.* 509 (1986). The literature assumes that a government’s transition policies are stable and predictable, and thus focuses on their effects on incentives of parties to invest and purchase insurance. It is questionable whether this assumption can be applied to regime transitions, as we discuss below.

create transition problems. The law has developed a range of pragmatic tools for managing such problems while maintaining social order, ensuring some stability of expectations, and occasionally aspiring to see justice done. None of this commits us to defending all of the law's pragmatic tools of transition-management, which are in some cases excessively crude, inadequately theorized, or defended on specious grounds. But it should explode the assumption that transitional justice is a distinctive topic that presents a distinct set of moral and jurisprudential dilemmas.

Our second claim results from the first. Given that transitional justice is continuous with ordinary justice, 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 nontransitional liberal democracies as suspect as well. 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 of state-building, economic growth, and the development of political cohesion. 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. In any legal system, we will argue, transition problems are inevitable; retrospective measures themselves have important forward-looking justifications; and to forego any retrospective measures is an implausibly extreme solution to the transition problem, one that very few new regimes have adopted. The attempt to eschew transitional measures is itself a transitional measure, and usually a poor one. There will of course be good pragmatic reasons to object to particular transitional schemes, programs and measures, and we will provide pragmatic evaluations as the discussion proceeds. There is no global reason, however, to treat 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 turns to analysis. We examine serially a range of issues that arise in transitional-justice situations, issues 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 worst cases, transitional-justice theorists have reinvented the wheel, identifying transitional-justice conundrums without reference to identical problems in domestic legal settings. In each case, we also examine the consequences of the relevant programs or measures, finding that transitional measures rarely result in illiberal repression, and often 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 folk who inform on their friends and neighbors. The victims argue that they were unjustly deprived of jobs, positions, educations, and property. Officials in the new regime, who were 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 will be chosen as 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, further political reform by eliminating the influence of officials of the prior regime, but also interfere with political reform by depriving the new state of people with administrative skills. Even when transitional justice and political reform imply consistent policies, these might conflict with other goals like economic reform. Reparations, for example, serve justice by compensating victims of the old regime, and political reform by taking resources from people who threaten the new regime; but reparations might also unsettle property rights and interfere with economic reform.

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: compensating victims for their losses; punishing wrongdoers and forcing individuals to disgorge property that was wrongfully acquired; and revealing the truth about past events. 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, where 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 will see transitional justice measures and policy considerations as identical or mutually reinforcing.

The tools of transitional justice take many forms. Trials are usually public proceedings in which legal forms are used as much as possible. Perpetrators from the old regime are charged with crimes, are often given lawyers and a chance to defend themselves, might be allowed to cross-examine witness, and often enjoy other procedural protections. There is a spectrum with the show trial on the one end, and the regular domestic criminal or civil trial on the other; trials conducted for the purpose of achieving transitional justice usually lie in between. Other trials are conducted by truth commissions, whose purpose is to reveal the identities of collaborators or perpetrators, and the nature of their activities, but not to punish except by exposing participants to public outrage; those who participate are often given amnesties.

The law applied against the defendant in these trials varies considerably. It can be new law that applies *ex post facto*; 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 in fact enforced but not, for

improper reasons, against the perpetrators who are now on trial. Some posttransition governments employ the intermediate device of retroactively extending statutes of limitations that had expired.

Ordinary criminal punishments are imposed against perpetrators—jail, death—but of special importance for transitional justice is the purge or lustration. These terms have slightly different meanings: purges occur when the perpetrators are thrown out of office, with or without a trial. Lustration, as it occurred in Czechoslovakia⁷ after the 1989 revolution, involved the public exposure of collaborators who were otherwise not known as such, along with a prohibition against their serving in office for a period of time. Related 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.⁸

Every transition is different, and the requirements of transitional justice for one transition will typically differ from the requirements for another. When the old regime is extremely repressive—South Africa or the Soviet Union or Nazi Germany, not Imperial Britain in colonial America—then the demands for justice will be stronger. When the last government of the old regime yield power willingly rather than provoking a violent revolution—Hungary or Poland, not old regime France or czarist Russia—then those who take power might feel constrained to treat perpetrators with leniency. When the old regime was highly secretive but did not interfere too much with property rights, then truth commissions and trials might be more important than reparations. And resource constraints, the urgency of economic reform, the degree to which revanchist elements continue to pose a threat, the dangerousness of the international environment, and the extent of collaboration across the population will 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 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 mainly 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 counted as 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 are not as successful. Post-1989 economic and political success appears to go hand in hand.⁹

What is transitional justice? It means something different from the successful accomplishment of a political or economic transition: it means a political and economic

⁷ Czechoslovakia split into the Czech Republic and Slovakia in 1993. When we refer to laws enacted in Czechoslovakia and carried over into the Czech Republic, we will refer to Czechoslovakia and to the Czech Republic as the context requires.

⁸ 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).

⁹ *Nations in Transit 2001*, at 27 tble. B (Adrian Karatnycky, Alexander J. Motyl, Amanda Schnetzer eds. 2001).

transition that is consistent with liberal and democratic commitments.¹⁰ A regime change should involve a minimum of violence and instability, and should respect rights. People should either retain their property rights, or be compensated for their loss. Officials and supporters of the old regime should not be punished for legal acts. They should not be mistreated and humiliated, or denied trials. They should not be scapegoated, and instead 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 are not met even in a consolidated liberal democracy such as that of the United States. In judging whether a transition has been just, it is important not to hold it to ideals that are unrealistic. And yet the literature does just that—either condemning transitions for violating these ideals or condemning any effort at transitional justice because it must fail one or more of these ideals. A more productive approach is to judge transitions against the standards used in consolidated liberal democracies, which must deal with their own transition problems, albeit not transitions at the level of regime. These standards reflect liberal commitments leavened with prudential concern for good transition management—which involves, among other things, maintaining valuable political structures, satisfying some illiberal popular demands, and doing 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 allows a balancing of liberal commitments and political precautions. It is achieved when those norms are respected to the extent necessary to, and consistent with, the consolidation of liberal democratic institutions.

C. Transition Processes

A useful analysis of political transitions distinguishes 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.¹¹ An example of elite leadership is the Spanish transition of the early 1970s. After the death of 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 leadership 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 at a remove—the great French and American progenitors. An example of a bargain is the Polish transition that culminated in 1989: this was the result of the growth of the Solidarity union 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. Brazil (1985), Uruguay (1985), and Czechoslovakia (1989) fit this model. An example of foreign leadership is the treatment of Germany, Japan, and Italy after World War II. The victorious allies forcibly ended the old regime and returned sovereignty to the states only after elites demonstrated a

¹⁰ 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.

¹¹ Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* 114 (1991); he uses the needlessly obscure terms transformation, replacement, transplacement, and intervention.

commitment to liberal democracy. Foreign countries also sparked wartime transitions in France, Belgium, 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 literature discusses why one path occurs rather than another in particular countries, and the political effects of the different paths,¹² but 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 opposition or a foreign nation leads the transition, transitional justice is significant. Where the elite and the opposition enter a bargain, transitional justice is moderate. In short, transitional justice declines as the influence of the elite increases. The explanation for this pattern is that elites try to shield themselves from post-transitional punishments when they lead the transition, and to extract concessions when the transition is the result of bargaining. Powerful opposition groups resist these efforts; weak opposition groups submit to them.

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.¹³ But transitional justice mechanisms 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 is, like the nation state itself, a phenomenon of the nineteenth century. In earlier periods one could find democratic institutions in city states or small republics, and one could find partially democratic institutions in larger entities like England. The American and French revolutions did not immediately create nationwide democracies. The United States had to wait for the expansion of the franchise in the early nineteenth century. The French revolution degenerated into terror and then the Napoleonic 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.¹⁴ France gave us the trial of Louis XVI as well as thousands of executions of lesser folk.

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. In this “first wave” of democratization, as Huntington describes it, democratization occurred in most countries gradually, with some

¹² See, for example, chapters in *Transitions From Authoritarian Rule: Comparative Perspectives*, Guillermo A. O’Donnell, Philippe C. Schmitter, Laurence Whitehead, eds. (1986).

¹³ See, e.g., O’Donnell et al, *supra* note 9.

¹⁴ See, e.g., Claud Van Tyne, *The Loyalists in the American Revolution* (1959).

setbacks such as the consolidation of authoritarian power after the revolutions of 1848.¹⁵ 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 is the period from 1943 to 1962. It begins with the spread of democracy to states defeated and occupied by the Western allies during World War II, and continues with the decolonization of India and other states in Asia and Africa.¹⁶ Two kinds of transitional justice occurred. The allied governments tried and punished many of the leaders of Nazi Germany, Italy, and Japan; they also tried to force the posttransition government to continue the process with criminal prosecutions of lower level officials. And the posttransition governments of defeated allies—France, Belgium, Denmark, Holland, and so forth—tried and punished collaborators and officials in 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 American during the 1980s, and Eastern Europe beginning in 1989. These transitions are, for our purposes, the purest. Because they were all sudden rather than gradual, they created a sharp divide between an old regime and a new regime, and gave the new regime opportunities for doing justice against members of the old regime. Because these transitions were not directly the result of foreign aid of a defeated regime or intervention against an aggressor, there is relatively little confusion about whether transitional justice reflects the needs of the local population or the interests of a foreign occupier. And because the old regime had in most cases existed for many years, and had sunk roots deep into society, the problems of transitional justice were posed with special acuteness.

Table 1 displays a selection of transitions. The purpose is not to provide a complete accounting 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 Denmark, Greece, and Holland; many of the Latin American transitions (including the quasi-transition of Mexico with the destruction of the PRI's hegemony), which have often been quite gradual and 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 dominated by the former Soviet Union; and the transitions of the states that emerged from the fragments of Yugoslavia. The second column provides the year at which the transition begins 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 has the political origin of the transition: bargain, opposition led, elite led, or foreign led. The last column says whether there was an economic transition as well.

¹⁵ Huntington, *supra* note __ at 16-17.

¹⁶ *Id.* at 18-19.

Table 1: Selected Transitions¹⁷Panel A: 18th-19th Centuries

State	Year	Trials	Lustration/Purges	Reparations	type of transition	econ trans.
United States	1776	yes	yes	no	opposition-led	no
France	1789	yes			opposition-led	no

Panel B: Post-World War II

Germany	1945	Military trials 1945-49; criminal trials in Germany after 1955	High ranking Nazi, gov't officials; screening of population	Significant payments to victims, Israel	Foreign	no
Japan		yes	[probably]	not until 1990s, to Korean "comfort women"	Foreign	no
Denmark	1945	Criminal trials of collaborators	Collaborators	None	Foreign	no
France	1944	Trials of Vichy officials and collaborators; executions	stripped political, economic rights; police, military, media purged	None	Foreign	no
Belgium	1944	Military trial of collaborators; loss of political, civil rights possible; executions	Government agencies purged of collaborators	None	Foreign	no
Italy	1944	Trials of Fascist gov't officials; mostly leaders, some rank and file tried in different courts	purge of Fascists, beneficiaries of regime, "corrupt persons"; limited to major cities, not effective	None	Foreign	no

Panel C: Southern Europe—1970s

Portugal	1974	Military officers tried, often given light sentences	government, military, and union officials; in second wave widened purges	none	opposition-led	no
Greece	1974	officials, military police officers tried	Many military officers purged; national and local gov't officials, educators dismissed; minor officials transferred; some business figures purged	Reinstatement, some pensions restored	opposition-led	no
Spain	1975	none	none	none	elite-led	no

¹⁷ Sources: Peter E. Quint, *The Imperfect Union: Constitutional Structures of German Unification* (1997) (East Germany); O'Donnell et al., *supra* note 10 (Latin America); 2 *Transitional Justice*, *supra* note 1; *The Roundtable Talks and the Breakdown of Communism*, Jon Elster ed. (1996); Gerard Roland, *Transitions and Economics: Politics, Markets and Firms* (2000).

Panel D: Latin America—1980s

Argentina	1983	Some trials of military officers and police chiefs and officials	None	\$100's of millions paid to victims	opposition-led	no
Brazil	1985	None	None	None	Bargain	no
Uruguay	1985	some unsuccessful lawsuits by victims; doctors involved in torture tried by medical association	None	Civil servants fired by military allowed to return, regained pensions	Bargain	no
Chile	1989	some trials for human rights violation; truth commission	None	victims received pensions; student financial aid; medical care; \$10's of millions paid	elite-led	no

Panel E: Eastern Europe—1989-1991

Czecho-slovakia	1989	statutes of limitation adjusted to allow prosecution of gov't officials	Communist party officials, secret police, high military officers, collaborators, some businessmen	some confiscated property, in other cases property returned; victims of political crimes (or survivors) granted compensation; seized church property returned	Bargain	yes
Hungary	1989	International conventions adopted to aid trial where statutes of limitation had expired	Screening based on tribunals and gov't files of politicians, gov't officials, police, education and media employees	compensation for seized property; vouchers; seized land auctioned; compensation to political prisoners, survivors	elite-led	yes
Poland	1989		no law until 1999; screening of all state officials	church property	Bargain	yes
East Germany	1989	trials of border guards and some leaders	civil service, incl. judges, lawyers, academics, bureaucrats	property expropriated 1933-45 and after 1949	Bargain	yes
Russia	1991	None	None	compensation to victims of political crimes, pensions and other aid, preferential access to gov't services	elite-led	yes
Lithuania	1991	Arrests, trials based on KGB files; mostly related to independence movement	KGB officials, collaborators barred from office for 5 years	Owners, heirs could seek return of property or compensation		yes

Bulgaria	1992	Major figures in previous gov't tried	high level Communists and candidates, security and military officers, some educators banned from office	Amnesty and monetary compensation to political victims and exiled persons; nationalized land returned to former owners, or paid for	elite-led	yes
Albania	1992	Former gov't officials, party members tried for economic crimes and human rights violations	Unofficial purges removed former Communists from office; purge legislation deemed unconstitutional	Seized property returned or compensation was paid		yes

Panel F: Other Recent Transitions

South Korea	1987	Trials of officials responsible for crimes before 1960; trials for economic crimes	Police, military purged; corrupt officials exposed	None	Bargain	no
South Africa	1995	truth commission		anticipated but will be trivial	Bargain	no
Uganda	1986	None	None	None		no

II. ANALYSIS

A. Depleting Government of Skilled Officials

A recurring problem in cases of regime change is how the new regime is to be staffed. 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 approach a monopoly of administrative and technical expertise in the ordinary business of government, and are thus indispensable to the new regime. Former resisters or revolutionaries are disproportionately the very people who have been denied technical educations 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 replacement of old functionaries will be greatest when the old functionaries' expertise is 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."¹⁸ Of course this proposal was never adopted, and the later failure of denazification of the judiciary meant that plaintiffs seeking compensation

¹⁸ Ingo Muller, *Hitler's Justice: The Courts of the Third Reich* 201 (1991).

or restitution for Nazi rights-violations were often outraged to find that the judges hearing their suits were the same judges who had permitted the original abuses.¹⁹

As these points imply, 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 are cases in which the old regime was short-lived, perhaps because it represented a fleeting imposition by the external military force of a foreign nation, and in which a large cadre of noncollaborationist personnel can quickly resume office and reinstate the previously-existing institutions. The clear examples here are countries such as Belgium and the Netherlands after the overthrow of the Nazi occupation; governments-in-exile quickly reassumed power and staffed their institutions with pre-occupation elites. On the other hand, 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.²⁰ This emphasizes that the personnel problem can reach beyond 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, and mid-level officials were implicated in the repressive regime to a far greater degree, so that there is no obvious pool of politically clean candidates for the new regime's posts. An exception to this generalization is the GDR, which represents an important special case. There the unification with the FRG created a natural pool of highly efficient civil servants ready to assume the functions of the GDR bureaucracy, so that the major personnel problem concerning former GDR functionaries is how they may be productively employed at all.²¹

Some commentators appeal to the personnel dilemma as a pragmatic consideration that should block transitional measures, especially lustration schemes. As Clause Offe puts it, "[c]ountries which rely extensively on [lustration] may deprive themselves of significant portions of the managerial and administrative manpower and talent that they depend upon in the process of economic reconstruction."²² Indisputably that is so. The question is what follows, and whether doing so is worth the costs. The least plausible solutions are the extreme ones, either a sweeping purge or total bureaucratic continuity.²³ 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 point. Regime change is just one type of transition; personnel dilemmas also inevitably arise from changes in legal and public norms within a given constitutional regime. Where such

¹⁹ Kritz, *supra* note 1.

²⁰ Luc Huyse, "The Criminal Justice System as a Political Actor in Regime Transitions: The Case of Belgium (1944-1950), in Kritz, *supra* note 1 at 149.

²¹ Offe, *supra* note 1 at 94-95.

²² *Id.* at 95.

²³ It is not clear whether Offe endorses the latter view, although he does say that the personnel problem undermines lustration "if applied to more than a trivial extent."

changes are (in historical perspective) relatively sudden and discrete, creating sharp discontinuities with past practices, the personnel problems may in many cases be as severe, or more so, than in cases of regime change proper. Officials in power under the new regime, or candidates and nominees for office, will routinely face scrutiny for their collaboration with the preexisting system of laws and norms, and the debate will follow the same lines as in cases of regime change. Ideological adherents of the new equilibrium will condemn the official for his past, normatively objectionable behavior; others will 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 wholesale purges or wholesale rehabilitation of the old system's adherents. The solutions that tend to prevail rehabilitate the rank-and-file, purge leaders and conspicuous ideologues, and produce a legal and normative equilibrium that bars open praise for the discredited regime while discouraging repeated witch-hunts for old collaborators.

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

Postbellum lustration of Confederate officials: A major issue after the Civil War, until the enactment of the (mild) lustration provisions of the Fourteenth Amendment, involved the power of federal and state legislators to bar from public offices 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 were drawn from local elites who also provided most of the available pool of personnel for Reconstruction governments. In some states pro-secession elites made a relatively smooth transition into the new governments, especially after the North's abandonment of Reconstruction in 1876. Reconstruction governments in some places and at some periods undertook projects of lustration and disenfranchisement, but in two landmark cases the Supreme Court invalidated state and federal statutes that disqualified former Confederates from designated offices and occupations. 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 offices of former federal officeholders who had subsequently joined the Confederacy (thus combining rebellion with violation of the federal official oath to support the Constitution).

Many have criticized that equilibrium as insufficiently stringent, and it may have been. Our point here is just that the personnel problem is not some intractable dilemma of transitional justice. It is a managerial hurdle that in which compromise solutions and detailed policy design usually win out over the extreme positions in either direction. Note too that it is essentially irrelevant, in this regard, whether we categorize the changes in constitutional and public norms produced by the Civil War as intrasystem change or as effective 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

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

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 dynamic also affects the agencies' other master, the standing congressional committees. The majority party in Congress wants executive appointees that share its views, or (if the President is of the other party) that 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, and who have cross-cutting institutional agendas. 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 accommodate these twin concerns, by splitting differences and emphasizing mixed solutions. Most bureaucrats are civil servants with relatively stringent legal protections against political discharge, including review by an independent agency (the Merit Systems Protection Board); the Hatch Act protects them from being pressed into service in political campaigns. Scattered across the top level of the bureaucracy, however, are 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 investment is protected against sudden political expropriation, develop technical expertise to be put at the service of politically accountable policymakers. In practice things are not so rosy—political appointees have difficulty establishing policy control and forcing bureaucrats to reveal information -- but the large-scale problem of personnel transitions has been successfully muted.

The canonization of Brown. In 1954, when the Supreme Court's decision in *Brown v. Board of Education*²⁴ held public school segregation unconstitutional, leading experts in constitutional law could declare it wrongly decided, even lawless. Well into the 1960s the Court adopted a tentative remedial approach, and massive resistance in the South supported reluctance to enforce *Brown* on the part of Congress and the President. Strikingly, however, by about the mid-1980s *Brown* had become a canonical case in American constitutional law—a fixed point whose validity any viable account of constitutional theory had to assume. Mainstream constitutional academics considered it an unanswerable charge against originalist revisionists, such as Robert Bork, that

²⁴ 347 U.S. 483 (1954).

originalism had difficulty demonstrating *Brown* to be correct.²⁵ (We might of course quibble with the categorization of *Brown*'s transformation as norm change; a tendentious textualist claim might be 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. When confirmed as Associate Justice in 1971, Rehnquist's attitude towards *Brown* was a nonissue. When nominated for the Chief Justiceship in 1981, a major political controversy erupted when it was discovered that in 1954, serving as law clerk to Justice Jackson while *Brown* was being decided, Rehnquist had written a memo arguing for upholding public school segregation. Rehnquist was eventually confirmed, but only after in effect disavowing 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 to impose current norms on past behavior would deprive the public of the services of an official highly qualified for the post in other respects.

The triumph of the civil rights movement. The point about *Brown* generalizes, both beyond constitutional law and beyond judicial confirmations. Endorsement of white supremacy and 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 with 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 has been re-elected to the Senate continuously since 1950 despite having staged an important pro-segregationist presidential campaign in 1948—but only because Thurmond has publicly disavowed his former views.²⁶ 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.²⁷

It is not hard to explain this equilibrium in straightforwardly functional terms. To bar 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 effect that would, perversely, increase public statements of racial hostility. 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

²⁵ Though some originalists have tried. See Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947 (1995).

²⁶ "Lott's Astounding Gaffe," *The Herald* (Rock Hill, S.C.), Dec. 11, 2002, p. A7.

²⁷ Carl Hulse, "Lott Fails to Quell Furor and Quits Top Post," *New York Times*, Dec. 21, 2002, p. A1.

social costs of a campaign against white supremacy's former adherents.²⁸ Strikingly 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. But moderate, targeted lustration schemes succeed in eliminating a small but important layer of the old regime's critical officials, while law and public norms both constrain post-transition public discourse by stipulating that no public expression of current support for the old regime's policies is permitted.²⁹

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, and collaborators. Sometimes, the property is given to poor people, or displaced people, workers or farmers. Sometimes—the usual case for Communist dictatorships—the property is kept by the government. If the confiscation occurred a long time in the past, then the people who hold or use the property 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 know of the original confiscation. Or they are employees or tenants of the government.

When the transition occurs, the original victims—or their relatives or descendants—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. Current property holders sometimes receive credits if they have improved the property; and 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. But most transitional governments have not created restitution programs, or have limited them to a small class of victims.

Critics of restitution programs argue that they unsettle property rights.³⁰ For a transition to succeed, this argument holds, the posttransitional 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 only if it is a market economy in which property rights are recognized and enforced; and creating an atmosphere friendly to

²⁸ Changing legal and social norms about sexual harassment might provide another example. Consider the controversy surrounding officials such as Robert Packwood, whose behavior fell dramatically out of step with post-feminist rules of sexual propriety.

²⁹ Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 *Tul. Eur. & Civ. L. F.* 1 (2002).

³⁰ See, e.g., Offe, *supra* note __; Elster, *supra* note __.

property rights is particularly important in the postcommunist states, which are undergoing economic transitions as well as political transitions. But restitution programs have precisely the wrong effect. They grant new claims to numberless victims of the old regime. If these claims are to be satisfied from general revenues, then they will become a potentially unlimited burden on budgets for the indefinite future, when revenues are urgently needed for economic reform, transfers to the elderly and others who lose out from the transition, cleanup of the environment, establishment of an honest bureaucracy, and countless other exigencies next to which claims for reparative justice seem like a luxury. If the claims are to be satisfied through disgorgement of real or personal property taken from the victims and now owned by descendants of the wrongdoers, or innocent third parties who received the property through grants or purchases, then the claims will create frictions in the market economy.

What are these frictions? The creation of new claims by themselves would not, under standard economic assumptions, injure the market. If all claims were immediately recognized and announced to the world, then both losers and winners would know the extent of their existing property interests, and invest and trade accordingly. To be sure, some existing property rights would be fragmented, but others would be combined and adjusted in other ways. There is no reason to think the status quo distribution of property rights (real or implicit) in an inefficient communist or quasi-communist economy are efficient. Regardless of how property rights are distributed during the transition, trade will be necessary in order to divide and combine them in response to market forces. There is no reason to think that more trades would be necessary if restitutionary claims were recognized.

The frictions arise from uncertainty about the restitutionary rights, including what they are, who holds them, 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 painstakingly adjudicated. People will be reluctant to invest in or buy land or other property until they know whether it is burdened by valid claims. But this makes it clear that 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. And uncertainty about property rights, if kept to a moderate level, is a cost that is often worth bearing, as domestic experience shows.

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 property is vulnerable to the claim of a prior owner from whom the property was stolen. Title in real estate is vulnerable to adverse possession if the owner does not occupy it. In the United States, title to land in many areas is vulnerable to claims of Indian tribes whose land was taken from them 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 U.S. government, and state governments, from raising property taxes or any other general tax to such an extent as to undermine the value of holding particular kinds of property. Title is 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 to invasion by the government, even this body of thinking provides countless exceptions for public purposes, and in any event has been repudiated. People hold their property subject to uncertainties created by the government's freedom to cause a regulatory transition in every successful market economy. Thus, the fear of unsettling property rights cannot be a sufficient objection to restitutionary schemes.

Indeed, restitution programs can be thought of as a just another regulatory program—like the Endangered Species Act—or transfer program that unsettles property rights in pursuit of some goal. In both contexts, unsettling of property rights is tolerated when it is the consequence of a pressing goal, and the goal is circumscribed so that its achievement will not undermine the market. The Endangered Species Act reduces the value of investments in land by holding out the risk that it cannot be developed, but it also promotes environmental protection. To keep its cost at a reasonable level, the protections created by the Act are circumscribed in a variety of ways. Similarly, transitional governments always limit restitution programs so that uncertainty about property rights is kept to a minimum.

These limits are diverse; to mention just a few: (1) some transitional states finance restitution out of tax revenues so that property owners can expect a full return on their investment (minus taxes). The choice here is just whether the interference in property rights should take the form of a small tax on all property or a large confiscatory tax just on those pieces that are subject to valid claims from earlier owners. 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.

(2) Most transitional states refuse to implement fully compensatory restitution and instead provide partial restitution. These limits on restitution are sometimes overt and sometimes hidden. A person who lost land now worth \$10,000 might get substantially less because (a) interest or inflation are disregarded, (b) the law places a ceiling on the value of the claim, (c) costly or time consuming procedures must be endured, or (d) the value of improvements is subtracted. In Hungary, for example, only claims worth less than \$2,700 fetched full (in nominal terms) compensation; higher claims fetched a percentage of their value.³¹ In East Germany, compensation was also less than the full market value of the land, and took the form of promissory notes rather than cash.³²

(3) States limit the destabilizing impact of restitution by imposing procedural requirements. In Czechoslovakia, as we mentioned, claimants were given only six months to file their claims.³³ After this period all claims would be known and could be liquidated through private contracts. In eastern Germany the procedures for selling state-owned property that would be used for investment were initially too cumbersome. The

³¹ Michael Neff, *Eastern Europe's Policy of Restitution of Property in the 1990s*, 10 *Dickinson J. Inter'l L* 357 (1992).

³² Quint, *supra* note __, at 142.

³³ Neff, *supra* note __ at 369.

government sped up the process by eliminating administrative review and allowing the manager of the property to decide whether the buyer's investment plan was adequate.³⁴

(4) States also limit restitution by making their restitution programs reflect non-reparative goals as well as reparative goals. Nazi era reparations had a significant redistributive component: people who lost more received a decreasing fraction of their loss.³⁵ The Hungarian system provides another example: the fraction of the claim that is compensated decreases with its size. The government enhances the legitimacy of the program by increasing the number of its constituents or appealing to norms of distributive justice.

(5) States reduce uncertainty created by restitution programs by protecting certain kinds of investments. In many countries, a person who invests in land that is subject to a restitutionary claim will be able to keep the land; the claimant will be paid out of tax revenues. In eastern Germany, the government encouraged investment by indemnifying purchasers of key parcels of land.

Governments in consolidated democracies use these same techniques in order to limit the adverse impact of domestic transition programs on the market economy. In the United States, the federal government settles Indian claims by paying cash rather than allowing tribes to take property that has been developed and settled for decades or more. Domestic reparations programs almost always pay claims at less than their full value, and use procedural hurdles and other devices to limit them.³⁶ And there is often a redistributive component to reparations programs: for example, reparations to Japanese-Americans interned during World War II was not a function of lost wages or other factors that could have resulted in a distribution in favor of the wealthy.³⁷

It can be argued that many of the domestic laws mentioned above—adverse possession, for example—strengthen the market rather than undermining it for the sake of other goals. Adverse possession and other ownership doctrines trade off two values that are important for the market: the ability to rely on one's property not being 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.

But 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 posttransition 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 will discourage future governments from expropriating property, for the title held by future

³⁴ Quint, *supra* note __, at 130.

³⁵ Schwerin, *supra* note __, at

³⁶ Eric A. Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 *Colum. L. Rev.* (forthcoming 2003).

³⁷ *Id.*

governments will be vulnerable to subsequent restitution programs. It will also send a signal to foreign investors of the new regime's commitment to property rights.

Second, restitution programs limit the discretion of officials in the posttransitional government, officials who often have an unsavory connection to the pretransitional government. Pogany misses this point when he argues that posttransitional governments should sell property to foreign companies that can invest in it.³⁸ 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 allocation schemes that are apparently more rational. The claims of American Indians create moral and political pressure even when they are not legally valid, and the states and the federal government have translated these pressures into legal claims.³⁹ When historical property rights have more legitimacy than the distribution that exists at the time of transition, restitution programs channel into the legal system claims that might otherwise destabilize the market by posing a political threat to the security of posttransitional property rights.

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

One cannot answer the empirical question with much confidence but the evidence tends to support the use of restitution. Post-Nazi West Germany has paid by far the most significant reparations, both in absolute and relative terms. And unlike other posttransition states, much of the money left the country—to Israel, and to Holocaust victims who emigrated to other countries. Yet West Germany is surely the most successful political transition in terms of the distance traversed from the Nazi era to the postwar era.⁴⁰ There is no evidence that the massive reparations hindered West Germany's economic or political development, and indeed they probably helped West Germany achieve political normalcy.

The postcommunist Germany of today is burdened with a new restitution system stemming 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.⁴¹

³⁸ Pogany, p. 150.

³⁹ E.g., The Indian Claims Act, 25 U.S.C. 70 (1946) (repealed 1978).

⁴⁰ For example, Germany had more extensive purges and trials than Italy did; and a study shows that in the 1970s civil servants in Italy were more antidemocratic than those in West Germany. See Roy Palmer Domenico, *Italian Fascists on Trial: 1943-1948* 224 (1991) (citing study).

⁴¹ David Southern, *Restitution or Compensation: The Property Question*, 2 *German Politics* 436. See also Quint, *supra* note __, at 151-53.

Eastern Germany is mired in a depression, and Germany as a whole has a stagnant economy. But it would be wrong to attribute these problems to the restitution program, which is dwarfed by the privatization scheme, by the environmental problems left behind by the GDR, by the wage equalization program, and by the cultural and political tensions between East and West. Indeed, the claims are being processed steadily, and investment is where necessary promoted by the Treuhand, a German government agency charged with privatizing the former GDR economy, which indemnifies developers of lands against restitution claims.⁴²

Hungary and the Czech Republic also implemented restitution programs, and they are two of the most successful transitions from the 1989 phase of the third wave. Both countries are counted among the economic and political success stories: they have functioning market economies and have highly rated political institutions.⁴³ In the Czech Republic, where corruption is rife, “[r]estitution was by far the cleanest and most successful process [among other forms of privatization]. Families immediately started taking good care of their properties, and towns and cities, especially their older parts, became beautiful once again.”⁴⁴ By contrast, fraud and corruption have marred the voucher program.⁴⁵ Restitution, by reducing government discretion, 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 counted as an economic and political success⁴⁶—the evidence suggests that restitution as a form of transitional justice does not interfere with political and economic transition whether or not it helps with those transitions as well.

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

Pogany also argues that restitution programs reinforce stereotypes “that certain national or ethnic groups tend to accumulate unfair or grossly disproportionate wealth.”⁴⁷ He is talking mainly about Jews, but also about ethnic Germans in Hungary and the Czech Republic and other groups. This argument also has its domestic analogue: the claim that welfare programs should be avoided because they stigmatize blacks, for example. It is also like saying that American Indians should not get land back because this would cause resentment among other Americans. Neither of these arguments are respectable: they depend on a speculative causal mechanism, and they are rejected by the people who are supposedly the victims of the stereotypes.

⁴² Id.

⁴³ Nations in Transit, *supra* note __.

⁴⁴ Id. at 167.

⁴⁵ Id. at 166-67.

⁴⁶ See Andrzej K. Kozminski, Restitution of Private Property: Re-privatization in Central and Eastern Europe, 30 *Communist & Post-Communist Stud.* 95, 105 (1997).

⁴⁷ Pogany, *supra* note __ at 217.

C. Retroactive Justice

A dramatic feature of some regime transitions is the retroactive application of new legal and political norms to conduct occurring 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 with the Nazis or the Vichy regime,⁴⁸ criminal trials and sentences proceed under substantive standards that are openly retroactive. In other cases, such as the trial by reunified Germany of former East German border guards for shooting attempted escapees, defense counsel claim that only impermissibly retroactive law could make the conduct illegal. 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; we will discuss the possible techniques, and their domestic analogues, in what follows.

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 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 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 and expressive 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 rights-violations will be met with sanctions. Most pragmatically, where a popular passion for retribution is widespread it is a social datum that the new regime's policymakers will have to take into account as they would other facts. To allow the former persecutors to roam free may effectively encourage unfocused private violence against innocent and guilty alike. This is just the standard channeling function of legal punishment, which substitutes public and official process for random vigilantism.

⁴⁸ For the Danish law, see Carl Givskov, 'The Danish 'Purge-Laws,' 39 J. Crim. L. & Criminology 447 (1948-49). For the Dutch case, see Henry Mason, *The Purge of Dutch Quislings: Emergency Justice in the Netherlands* 61-63 (1952). For the French case, see Roy C. Macridis, *France: From Vichy to the Fourth Republic*, in *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* 170 (John H. Herz ed. 1982).

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 to be seen to establish) a conventional liberal democracy that respects constitutional and international norms of legality. Prominent among those norms is the concept, which may be specified through a variety of conceptions, 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 also 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 liberal ends, whereas opponents argue that liberal ends can only be served through liberal means.⁴⁹ In practice, however, this stark moral dilemma is usually not resolved, but finessed. Rather than adopt a principled and thoroughgoing account that either discards substantive justice in favor of a “thick line” between past and present, or that discards procedural legality in favor of retroactive justice, leaders and institutions of the new regime, including the new regime’s judges, 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:

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 higher-law appeal are common: the appeal may lie to preexisting constitutional law, international law, or “natural” law.

In the constitutional-law case, legalists of the new regime will 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). Under this theory, the GDR law to which the border guards pointed to in justification of 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

⁴⁹ 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 the analogous settings in consolidated democracies. Perhaps regime transitions are always more vivid and visible to future generations than are moments of ordinary politics, so that regime transitions create more important social and constitutional precedents. But this consideration cuts no ice in the debate between procedural legalists and transitional-justice advocates; 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 large constitutional transitions within consolidated democracies, such as Reconstruction or the New Deal, also enjoy this heightened significance. See, e.g., Bruce Ackerman, *We the People* (1993). So here also the key variable is continuous across regime transitions and intrasystem transitions.

those acts were punishable under GDR law.⁵⁰ 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 said that use of a weapon to prevent felonies at the GDR border was justified. 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.⁵¹

If the appeal to a preexisting constitution fails, a similar technique is the appeal to preexisting rules or norms of international law. In some cases, this will be higher law that the old regime itself consented to or approved; consider that the GDR was a signatory to various international human-rights conventions, including the 1966 International Covenant on Civil and Political Rights. Although the Covenant provides an individual 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 less direct fashion to help construct an idealized version of GDR law⁵² under which the border guards could be punished. Thus the Federal Supreme Court upheld convictions in border-guards cases on the theory that supra-legal principles of justice and human rights were themselves implicit in GDR law, and were evidenced by sources such as the Covenant despite its absence of domestic legal force.

In other cases, the relevant international norms will be mandatory or jus cogens norms, such as prohibitions on genocide or war crimes; these, of course, were prominent claims in the Nuremberg prosecutions. Where, however, neither consent-based or mandatory 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 mandatory jus cogens norms and natural-law norms is 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 right[s],” despite conceding that the killings were authorized under GDR law.⁵³ 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 because the inevitable comparison to the Nazi horrors detailed at Nuremberg tends to favor defendants charged with lesser abuses.

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, positive provisions in the old regime’s code that were strictly nominal -- rarely enforced and constantly belied by administrative practice. In one border-guard trial, the court eschewed the natural-law approach and professed strict adherence to the positive law of the GDR.

⁵⁰ Quint, *supra* note 16 at 197.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 202.

But the court construed that positive law not to authorize the border killings, a startling conclusion given that the GDR government commonly gave the border guards rewards and official decorations 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 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."⁵⁴ 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 must be ignored in favor of strict adherence to the surface meaning of GDR statutes and administrative provisions. While the appeal to higher law dissolves the retroactivity problem by trumping the positive authority on which old-regime defendants rely, this approach dissolves it 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.

Interpretive statutes. In the cases we have discussed so far the retroactivity problem is avoided or dissolved by judicial interpretation of old law or by judicial identification of trumping higher law. Legislatures may, however, also contribute 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 governing positive law, despite appearances, 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, were widened through interpretive statutes to encompass less direct forms of collaboration.⁵⁵

Retroactive extension of statutes of limitations. Another relatively indirect means by which legislatures may institute retroactive justice is by retroactively extending statutes of limitations for the prosecution of old crimes. (This technique is, of course, 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 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 cannot initiate prosecution within that time. In the second case, which is legally and rhetorically much stronger for defendants, the previous limitation period has already expired, and defendants will argue that they have a vested immunity from prosecution. In either case, but most critically in the second, new governments counter with the argument 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, and the interactions between

⁵⁴ Kritz, 2 Transitional Justice, supra note 1 at 633.

⁵⁵ Mason, supra note 42 at 129-30.

domestic and international law. In both nations, new-regime legislatures enacted retroactive extensions. 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 already expired. (In the latter respect the decision goes well beyond American constitutional law, which generally speaking allows retroactive extension of nonexpired limitations, although not of expired ones). The Hungarian court's ruling was, however, softened when the government enacted a new law based on international conventions that abrogate limitations periods for egregious offenses, such as war crimes and crimes against humanity.⁵⁶ The Hungarian court upheld the statute as 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 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 limit case of retroactive criminal prosecution? Jon Elster says that "either of the two non-hypocritical positions"—openly avowed retroactive justice, a la Nuremberg, or else thoroughgoing insistence on procedural legality—"seem defensible."⁵⁷ The techniques we have canvassed for ameliorating the moral dilemma, however, Elster sees as morally indefensible "subterfuge." This is a standard plea for candor and moral transparency, but it overlooks that in consolidated democracies courts are by no means always candid. Although candor is often praised in general,⁵⁸ it remains controversial in particular settings. If this is so, then the candor argument is orthogonal to the transitional justice question: candor might or might 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, on net, promote candor. Generally, 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), 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, from the divorce between the nominal law of human rights and the brutal de facto law of party dominance; its officials benefited as well. When the new regime's courts ignore the law in action in favor of the nominal law, 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, on Elster's own criteria, candor would be better served by treating de facto authoritarian power as law, while ignoring the professed standards for limiting that power that the old regime published, insincerely, to the world.⁵⁹

⁵⁶ Kritz, 2 *Transitional Justice*, supra note 1 at 661-62

⁵⁷ Elster, *Dilemmas*, supra note 1 at 8.

⁵⁸ David Shapiro, *In Defense of Judicial Candor*, 100 *Harv. L. Rev.* 731 (1987).

⁵⁹ See Levinson, supra note 3 at 219: "[old regime officials] however much they might well have felt as a practical matter immune from punishment, can scarcely be heard to say that it is 'unfair' to hold them to the

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. Many of those techniques are not subterfuge 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. Thus the appeal to international norms weakens the wrongdoers’ 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 that was in effect when they violated it; usually that substantive law will have moral content, as opposed to being a strictly regulatory offense. In other cases, these techniques are attempts to strike a workable balance between competing moral intuitions and pragmatic needs. Taking nominal law seriously reduces the formidable decision costs of identifying the old regime’s “real” unwritten law; retroactive extensions of statutes of limitations gives new-regime officials caught up in the transitional tumult breathing space to sort out offenders and establish priorities among cases that are to be prosecuted.

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 in response to the continual transitions of lesser degree that occur in the ordinary course. 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 (for penal laws) and the Due Process, Contracts and Takings Clauses (for civil laws and laws affecting property rights).⁶⁰ In the latter setting, courts accommodate the competing claims of justice and legality under the doctrinal rubric that retroactivity is permissible unless “unreasonable,” where reasonableness takes into account the exigencies that call for retroactive lawmaking.⁶¹ Legislatures have often weighed in with interpretive statutes, and courts have proven receptive to the practice.⁶² There is also a domestic parallel to the invocation of higher law to trump the old regime’s positive law. Suits against federal and state officials for actions authorized by statutory or administrative law commonly claim that the action violated some capacious or ambiguous constitutional provision, such as the due process clause; where the court subsequently finds a violation of that preexisting provision the defendants have no valid complaint about retroactivity, at least if the later court can claim with a straight face that the right was “clearly established” when the official acted.⁶³

formal law that had been trumpeted to the world in answer to the accusations of just such conduct as in fact was occurring.”

⁶⁰ U.S. Const., art. I, § 10, cl. 1; U.S. Const., amend. V; U.S. Const., art. I, § 10, cl. 1; U.S. Const., amend. V.

⁶¹ Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 *Harv. L. Rev.* 692 (1960); *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502 (1938); *Gelfert v. National City Bank*, 313 U.S. 221 (1941) (due process cases); *Home Bldgs. Loan Assoc. v. Blaisdell*, 290 U.S. 238 (1934) (Contracts Clause); *Miller v. Schoene*, 276 U.S. 272 (1928) (takings).

⁶² See *Stockdale v. The Insurance Companies*, 87 U.S. 323 (1873) (upholding, against due process and separation-of-powers claims, a federal interpretive statute that retroactively extended the duration of a statutory tax).

⁶³ *Harlow v. Fitzgerald*, 454 U.S. 1028 (1982).

Even in the criminal setting, legislatures and courts have ample leeway to adjust the ex post facto prohibition in pragmatic style. Criminal statutes of limitations may be retroactively extended so long as the limitations period has not already run.⁶⁴ 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,”⁶⁵ or by describing the new law as “procedural” rather than substantive,⁶⁶ either technique allows the court to hold that the ex post facto prohibition has not been triggered.

The point, of course, is not necessarily to praise any of these doctrines or decisions. It is to say that these sorts of accommodations are widely used, and are successful in the minimal, pragmatic sense that they limit the worst abuses of retroactive justice while permitting powerful social demands for post-hoc adjustments of legal obligations to find some satisfaction. Any set of moral intuitions that would condemn, wholesale, pragmatic accommodations of this character should be recalibrated. The moral objections to these techniques, if there are any, would have to point to unjust consequences of particular rules and decisions, and would have to operate at retail. Candor is not the relevant criticism, and the wholesale level of analysis is not the right level of generality at which to criticize.

Eschewing Elster’s moral critique, Bruce Ackerman argues against retroactive justice squarely on pragmatic grounds. Stipulating for argument’s sake that retroactive criminal punishment is morally justifiable in transitional-justice situations, Ackerman advances imposing institutional objections to retroactive justice. The core problem is that new regimes enjoy great moral credibility, but possess low bureaucratic capacity. The legal system of the new regime will often, as we have seen, be staffed principally by officials selected under the old regime, and that system will be threatened with overload. In light of the costs, the new regime must inevitably select its targets, but any principle of selection will seem arbitrary and impractical. Prosecutions of high officials are difficult because their most culpable orders and policies are often left implicit, or simply unwritten. Prosecutions of low-ranking officials will pose the question 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.

We will take up a number of these pragmatic questions separately in other sections. Our global point is that Ackerman has the right premises, but his (apparent) conclusion that no prosecution should occur amounts to an implausibly extreme solution. Despite the practical difficulties, the optimal level of prosecutions of old-regime officials is probably not zero. It is surprisingly rare that new regimes have entirely eschewed retroactive criminal justice, as did Spain after 1975 and Russia after 1991. 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 where their target is a large and hierarchically-organized conspiracy, such as a drug cartel, or where a large number of

⁶⁴ U. S. 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. U.S.*, 23 F.2d 420, 426 (2nd Cir. 1928) (reviving a prosecution already dead distinct from giving it a longer life).

⁶⁵ See *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deportation is not punishment).

⁶⁶ See, e.g., *Dobbert v. Florida*, 432 U.S. 282 (1977).

people commit criminal acts, such as tax evasion. (We return to the issue of selective prosecution in II.G.1 below). Like Elster, Ackerman has exaggerated the moral and practical import of problems that are familiar in nontransitional settings and that have never proved crippling to nontransitional legal systems.⁶⁷

D. Court Congestion

One stock pragmatic argument against retroactive justice is that prosecutions or civil proceedings against old-regime officials will tie up the new legal system with endless backward-looking litigation, rather than the tasks of building a new regime. The argument reaches beyond retroactive justice in the sense of sanctions, to include lustration schemes that, as in Czechoslovakia, provide for judicial review at the behest of accused collaborators, and also schemes of reparation or compensation administered by the courts. As Clause 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.”⁶⁸

Although this is not, perhaps, the most prominent or important of the pragmatic arguments for the “thick line,” we focus on it because it illustrates very cleanly the impulse that animates opponents of retroactive justice. The impulse is to look forward rather than back; retroactive justice, and transitional justice generally, is seen 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 answering, the argument for retroactive justice, lustration, and compensation. Those tools can always be given, and always do receive, a forward-looking justification as well as a backward-looking one. Proponents of transitional measures rarely rest content with appealing to retributivism or the *lex talionis*. Retroactive justice is said to be necessary to legitimate the new regime, and to dampen private violence; lustration is justified as a prophylactic measure ensuring that the new regime will be staffed by supporters, not crypto-reactionaries; and restitution or reparations are needed to level the playing field, providing victims useable equivalents for their lost human capital and preventing old-regime collaborators from using their ill-gotten endowments to achieve disproportionate success in the new order.

There is no way to cash out the court-congestion argument without assuming away such points. Once they are admitted, the congestion “problem” simply becomes another (forward-looking) policy problem that the new regime must face. Supposing the judicial system’s capacity to be constant, the systemic effect of adding a new raft 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 is a loss only if the displaced proceedings would have made greater net contributions to the new regime’s future welfare than the transitional-justice proceedings; otherwise it is a straightforward benefit. If the judicial system’s capacity is not constant, then the question simply concerns the opportunity cost of the resources necessary to expand it (to accommodate the transitional

⁶⁷ Bruce Ackerman, *The Future of Liberal Revolution* (1992).

⁶⁸ Offe, *supra* note 1 at 84.

proceedings). The regime's problem is just to pick the forward-looking projects with the best social returns; the reference to congestion is doing no independent work.

Here too, there is an illuminating parallel to debates within nontransitional legal systems, in this case stock debates about the creation of new causes of action.⁶⁹ Opponents will complain that new causes of action will open the floodgates of litigation, swamping courts; proponents will point to the valuable compensatory and deterrent effects of the new suits. As in the transitional case, the real question is just the relative social-welfare contributions of the new lawsuits and those they would displace. The parallelism of the two debates fails in one respect, however. No one in the domestic case 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 seen, however, every type of transitional-justice measure also has important forward-looking justifications, albeit more subtle ones. Once that is recognized, it becomes clear that the congestion objection, and similar claims, are merely institutional makeweights.

E. Destruction of Reputations

One reason for drawing a thick line between past and present is that the past is so corrupt, and seems to implicate all but a few brave dissenters and perhaps even them as well.⁷⁰ Nearly all people collaborated in their own enslavement, and if there are gradations of guilt, they are too difficult to distinguish after the transition, for the past seems like a bad dream, and can no longer be understood. 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.

These criticisms focus on the Czech lustration law, which was the first in eastern Europe and has been imitated in Hungary, Poland, and other countries. Eastern Germany is a special case: hundreds of thousands of state employees were simply fired by the government of newly unified Germany, and replaced by western Germans—an option not available to other transitional states, which had to draw on their own ranks. In eastern Germany, Stasi files were made available to the people who were spied on; revelations in these files ended the careers of many prominent eastern Germans including intellectual and reformers.⁷¹ Back in the Czech Republic, complaints surfaced about the operation of the lustration law. A well known book by Lawrence Wechsler documents the torments of Jan Kavan (whom Wechsler stylishly calls "Jan K."), a former dissident whose life and political career were thrown into turmoil after he was accused of collaborating with the old regime.⁷²

In the course of a wide ranging critique of lustration and related disqualification laws, as he calls them, Offe makes a number of points about their reputational effects. 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

⁶⁹ See, e.g., W. Kip Viscusi, "The Dimensions of the Product Liability Crisis," 20 J. Leg. Stud. 147 (1991).

⁷⁰ Cf. Havel, *supra* note ____.

⁷¹ Quint, *supra* note 14 at 229-244.

⁷² Lawrence Wechsler, *The Velvet Purge: The Trials of Jan Kavan*, in 2 *Transitional Justice*, *supra* note 1 at 558-68.

political problems.”⁷³ 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. [Individuals have] the opportunity ... to give—false or accurate—testimony as to some fellow citizen’s role in the old regime, or to withhold accurate testimony and thereby extract some profit through blackmail.”⁷⁴ Third, there might arise “ 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, office holders or informers—all of which might amount to an obstacle to coming to terms with the past in an adequate, fair and critical way.”⁷⁵ Fourth, secret police records are never complete, and often contain inaccuracies, some of them created by departing officers intent on concealing their own trail and casting suspicion on their enemies.⁷⁶ Fifth,

Former 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 strategic use.⁷⁷

What concerns Offe is the delicacy of reputation, and its special potential for abuse in transitional societies, where one’s reputation as a collaborator or dissident has tremendous significance, and where nearly everyone is tainted.

Lustration involves the administrative or judicial determination that a person collaborated with the old regime. The punishment is exclusion from office and usually public exposure. Because collaboration was not a crime in the old regime, the administrative or judicial determination involves the making of moral judgments about a person’s conduct. In Germany, for example, eastern German civil servants were dismissed if they violated the “principles of humanity or the rule of law,” including rights and principles contained in international conventions.⁷⁸ This, as well as its possible stigmatizing effect, is the element of lustration that bothers critics.⁷⁹

But this element plays an important role in domestic law as well. To see the continuity between lustration and domestic law, imagine that a person has done something shameful but not illegal. (Often, as Trent Lott’s downfall illustrates, the prior behavior was not shameful at the time but became shameful after social norms changed.) Disclosure of the shameful act would harm the person by alerting employer, spouse, and friends of the misdeed. This person is in a position similar to that of the person who

⁷³ Offe, *supra* note 1 at 95.

⁷⁴ *Id.* at 95-96.

⁷⁵ *Id.*, at 96.

⁷⁶ *Id.*, at 97. See also Jiri Pehe, Parliament Passes Controversial Law on Vetting Officials, 2 Report on Eastern Europe 5 (1991).

⁷⁷ Offe, *supra* note 1 at 99.

⁷⁸ Quint, *supra* note 14 at 172.

⁷⁹ Thus, it is puzzling that lustration has received more criticism from the international community than truth commissions have. Truth Commission depend mainly on reputational sanctions, but these are often significant, and sometimes provide the basis for legal proceedings. See David A. Crocker, Truth Commissions, Transitional Justice, and Civil Society 103-105, in *Truth v. Justice*, *supra* note 3. On the virtues of truth commissions, see generally Martha Minow, *Between Vengeance and Forgiveness* (1999).

collaborated with a pretransitional regime. In both cases the only thing that stands between the status quo and 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 are provided more accurate information about the person's character. If the earlier act involved dishonesty and betrayal, the employers, spouses, and friends might, by shunning the person, avoid being the victim of future bad acts. Although a strain of thought holds 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 where 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 eliminated as the result of exposure of a past misdeed. Offe suggests more darkly that these people would also group together and pose a threat to the new regime, just as those who were (literally) branded as outlaws in early modern England would form criminal gangs living outside the reach of law.⁸⁰

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 their earlier statements and deeds are disclosed to the public. 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, with the result that a person's legal guilt might be based in part on legal but morally improper behavior. And domestic truth commissions in consolidated democracies are tolerated despite the damage done to reputations.⁸¹ None of this is to suggest that stigma is not 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 constitutional doctrines and statutes 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 and lustration laws are all 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

⁸⁰ Offe, *supra* note __.

⁸¹ See Levinson, *supra* note 3 at 212-16, who discusses the United States Commission on Civil Rights and congressional investigations.

individuals to reveal the embarrassing but irrelevant portions of their past. The main difference between the laws is that lustration ferrets out hidden but significant information while privacy laws conceal information that might otherwise be discovered, but this difference is easily explained by the different background legal regimes. Privacy laws exist in open societies where people can find out anything about anybody; lustration laws exist in posttransitional regimes coming after regimes where nobody (except the government) could find out anything about anybody. Some institutional bootstrapping is needed 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 with the subpoena and other forms of legal coercion.

Seen in this light, the concerns that lustration laws cause special unjustifiable harms to reputation are overwrought. Lustration, like any civil or criminal trial, will harm the reputation of a person who is found to have engaged in wrongful conduct. This particular reputational harm is generally seen as unobjectionable in domestic law: but if people are likely to overreact, domestic law, as we have seen, provides devices like expungement or antidiscrimination rules to limit the long-term harm. Lustration, like any civil or criminal trial, might also harm the reputation of a person who is found not to have engaged in wrongdoing. But here 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 laws do not always involve individualized determinations. In many cases, a broad class of persons is prohibited from holding high offices on the ground that anyone who belongs to that class poses a threat to the new regime. Individuals in this class have no right to show that they do not pose a threat, or their right is heavily circumscribed and offered few procedural protections. The initial Czechoslovak lustration law, for example, barred all communist officials and collaborators from holding posts in the government and various government agencies, the military, the courts, the universities, and business owned by the state. Appeal was permitted, but there was, in effect, a presumption of guilt.⁸² Indeed, the post-World War II denazification laws created by the allies put the burden of proof on the defendant to show misclassification.⁸³

There are due process concerns, as we discuss elsewhere, but the important point is that deliberately overbroad prophylactic bans on officeholding will not damage reputations as much as individualized determinations. The person who falls under the ban can claim to be the special case that the overinclusive rule did not account for. Indeed, if a person is already known to have belonged to the proscribed class—as an official in the prior government, for example—the lustration does not injure reputation at all. It simply ratifies what is already known. So critics of lustration are inconsistent: they worry about harm to individual reputations but appeal to due process norms to bar more rule-based lustration schemes that would minimize reputational harm.⁸⁴

⁸² Jiri Pehe, *Parliament Passes Controversial Law on Vetting Officials*, 2 *Report on Eastern Europe* 4, 4-6 (1991).

⁸³ John H. Herz, *Denazification and Related Policies*, in *From Dictatorship to Democracy*, *supra* note ___ at 26. However, it was relatively easy to appeal or to pay a small fine. *Id.* at 27.

⁸⁴ The view that lustration is necessarily stigmatizing is widely accepted without argument, and can be found even among those who are sympathetic to lustration; see Stephen L. Esquith, *Toward a Democratic Rule of Law: East and West*, 27 *Pol. Theory* 334, 351 (1999).

Turning to the evidence, one does find anecdotal evidence about reputational harm in transitional societies but we have found no systematic account of the actual damage done. On the contrary, observers confirm that the laws have not caused widespread disruption or injustice of the kind that was predicted.⁸⁵ Jan Kavan was eventually cleared by a court, and he was elected to a seat in Parliament. Although he had to endure many painful years of uncertainty, that is true about anyone who is prosecuted under the law, and there seems to have been ample reason to be suspicious of him even if ultimately not enough to justify purging him from government.

A fine natural experiment is provided by Czechoslovakia, which enacted harsh lustration laws in 1991. These laws were inherited by the Czech Republic but not Slovakia when the two nations split. “[T]here 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.”⁸⁶ Indeed, these persons reestablished an authoritarian regime in Slovakia, one that has only recently begun to thaw, while in the Czech Republic the transition to a liberal democracy has been smooth and steady.⁸⁷ In Poland there was initially no lustration law but after a series of scandals involving high officials who were believed to have been collaborators—one such scandal caused the fall of the government—a lustration law was created in 1998.⁸⁸ The optimistic view there that a thick line could be drawn between present and past was initially supported by the public but has since been repudiated, and the new lustration law enjoys popularity.⁸⁹ The other success stories—the former GDR and Hungary—also enacted lustration laws, although after much delay and milder than the Czech Republic’s. By contrast, the failures and partial failures—Russia and its satellites—had no significant lustration laws. This pattern must disappoint those who believed that Spain’s smooth purge-free transition would provide the model for the successful transitions after 1989. But this just shows that what works in one country might not work in another.

The critics underestimated the importance of exposing collaborators and removing them from political life. They did not see that these people could do harm, that their presence would demoralize the public who would demand that they be removed. They 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 in order 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.

⁸⁵ See, e.g., Pauline Bren, *Lustration in the Czech and Slovak Republics*, 2 RFE/RL Research Report 16, 22 (1993); Nations in Transit, *supra* note __.

⁸⁶ Timothy Garton Ash, *History of the Present: Essays, Sketches, and Dispatches from Europe in the 1990s* 267 (1999).

⁸⁷ See Nations in Transit, *supra* note __ at 161, 333. Over the last few years there have been some problems in the Czech Republic but its score for democracy and rule of law values remains greatly superior to Slovakia’s.

⁸⁸ Ash, *supra* note __ at 268.

⁸⁹ Barbara A. Misztal, *How Not To Deal with the Past: Lustration in Poland*, 40 Archives Européennes de Sociologie 31, 53 (1999).

F. Measurement Problems

A common complaint about transitional justice is that the laws rely on morally arbitrary distinctions. Critics of restitution programs, for example, point out that these programs always seem to exclude claims that are as strong as those that are included. The Holocaust restitution program excluded Gypsies and homosexuals—but both groups were murdered in large numbers just like the Jews. The Czech restitution program focused on victims of communism after 1948—when the communist dictatorship came into existence—but therefore excluded the claims of ethnic German and Hungarian citizens whose property was confiscated between 1945 and 1948. Jews who lost property during World War II were also initially excluded but after an amendment the restitution program was extended to Jews who lost property prior to 1948, but this, of course, excluded other people who lost property prior to 1948.⁹⁰ The Hungarian restitution program similarly favored ethnic Hungarians at the expense of ethnic Germans and (initially) Jews.⁹¹

Critics also argue that restitution programs are unjust because they draw morally arbitrary distinctions within the class of beneficiaries. Elster argues that a factory owner and an ordinary worker both suffer under communism: the first loses his factory, the second loses his right to sell his labor. It is unjust that restitution programs typically grant compensation to the factory owner but not to the worker.⁹² Cepl argues that reparations “cannot restore lost careers, opportunities, health and lives” and therefore should be discarded in favor of forward looking reforms.⁹³ Offe argues similarly that restitution

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.⁹⁴

Because restitution leaves less wealth available to people who were never victims, but 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 that we agree that people who suffered under communism should receive special compensation. We might still object to restitution because measurement problems will result in a compensation system that is worse than no compensation system at all. It might be worse because decisions costs are greater than the benefits, or because it is 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 thinks that because restitution programs by design have distributive consequences that favor people who lost property, they cannot use need

⁹⁰ Pogany, *supra* note 1 at 151-52.

⁹¹ *Id.* at 155-78.

⁹² Elster, *Moral Dilemmas*, *supra* note 1.

⁹³ Vojtech Cepl, *A Note on Restitution of Property in Post-Communist Czechoslovakia*, 7 *J. Communist Stud.* 368 (1991).

⁹⁴ Offe, *supra* note 1 at 126. See also Pogany, *supra* note 1 at 216-17.

as the sole or main criterion. But this is hardly an objection to them. Because the tort system is designed to deter accidents or provide compensation or punish wrongful conduct, it also cannot use need as the main criterion for awarding damages. To the extent that deterrence and compensation are worthy goals, then 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 that reparations for Japanese-American internees in the United States were unjustified because the money given to former internees would have provided greater value to the poor.

Back to the first idea. In the American tort system, victims of wrongful acts usually have a claim for compensation. Measurement error is a concern in some cases but not others. Courts easily determine damages when property with a market value is damaged or destroyed; courts can only with difficulty determine damages when property without a market value is damaged or destroyed, and when health and freedom are lost. In the long history of tort law one finds different approaches to valuation problems. Sometimes no harm is recognized or a harm is recognized but no damages (or nominal damages) are awarded: this was once true for death, pain and suffering, emotional distress, and some harms to reputation. More frequently in modern tort law damages are awarded but with the candid recognition that they 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. Then why should a similar argument be made about posttransitional 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 problems about measurement. As a result of measurement problems, a homeowner receives the market value of the house that is taken, not its actual subjective value, which would be economically correct given the goal of compensation. And because of measurement problems, apparently morally arbitrary distinctions seem to be drawn: one homeowner receives compensation for property taken by the government, but another homeowner receives no compensation when a military base is shut down, even if the loss in property value is identical.

Courts and legislatures also 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 just like 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.⁹⁵ Offe's concern that restitution favors people who lost significant assets mirrors the present day concern that compensation of the 9/11 dependents favors people whose spouses had generous salaries.⁹⁶ The responses to concerns like these are intricate and evolving, but no one takes the view that because

⁹⁵ Lisa Belkin, *Just Money*, *The New York Times*, sec. 6, p. 92 (December 8, 2002).

⁹⁶ *Id.*

morally arbitrary lines will be drawn, payments should never be made to victims of government policies or terrorist attacks.

Or consider the frequent 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 these other acts serve important functions, and are 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. That transitional justice requires morally troublesome line-drawing and crude circumventions of measurement problems that result in wealth redistribution that might conflict with other norms or ideals, does not distinguish posttransitional restitution programs from numerous popular and morally unobjectionable domestic laws.

G. The Difficulties of Judgment

We have mentioned the reluctance felt among some people about judging those who supported authoritarian regimes. Four arguments recur. (1) Perpetrators were not the instigators of crimes, but only followed orders, or were coerced into participation. (2) They were driven by genuine ideological conviction, or, conversely, were at worst opportunists who did not share the evil ideological motives of their leaders. (3) They did what they could to soften the regime's policies from time and time, and did not resign because their replacement would be even worse. (4) The sheer quantity of morally compromised people renders futile any effort to assign gradations of blame: "The past is another country" and people's behavior under an authoritarian regime cannot be evaluated objectively by those living in a liberal state.

For the critics, although each of these reasons might have more or less force in individual cases, taken as a group they suggest that transitional justice is futile. Because it is too difficult to make the proper moral distinctions necessary for justice to be done, the project of transitional justice should be abandoned. Havel's argument that nearly everyone was implicated in the crimes of the Czechoslovakian communist government is just one example.⁹⁷ Havel's view seems too broad, and was rejected by the Czech public: there are clear differences between ordinary people and those with power. Among the latter group, people should have either worked for reform or quit and joined the ranks of the powerless. As another example, Elster and others think that people in the first group—the perpetrators and chief beneficiaries of the old regime—can be judged differently. Some bear greater guilt than others. This view is surely correct, but the conclusion that they draw from it—that the moral distinctions are too hard to make, and therefore that punishment cannot be justified—is clearly wrong.

1. Relative culpability and prosecutorial discretion

⁹⁷ Adam Michnik and Václav Havel, *Confronting the Past: Justice or Revenge?*, 4 J. Democ. 20 (1993).

One constellation of excuses offered by officials of the old regime, or citizens who collaborated with the regime, involves pointing to another (potential) defendant whose culpability is greater. Commonly the defendant will claim that he was merely following the orders of a superior authority, that he was at most a passive actor who acquiesced in others' unjust actions. In the extreme case, the claim is that the superior authority would have killed or imprisoned the defendant for not carrying out the unjust commands, or for resisting; in such circumstances, the argument runs, there is no moral obligation to undertake heroic measures of resistance, even if heroic resistance would have been morally praiseworthy. In all these 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 complaints. Taken separately, each is unimpressive, and it is not clear that their conjunction is any more successful. One complaint 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.”⁹⁸ But this is trivially true of any nontransitional criminal-justice system. The requirement that there be evidence creates a risk of false negatives, cases in which the guilty go free for lack of proof; the requirement also minimizes false positives, and is presumably worth the costs. The possibility of moral luck is neither here nor there. One bank robber happened to face the hidden camera and gets twenty-five years; the other, who faced away from it, gets a hung jury or a favorable plea bargain. The first robber may well curse the fates, but he has no moral or legal grievance that any justice system would recognize.

But in fact the new regime's transitional prosecutors will not even prosecute all those against whom a case could be made, given the evidence; to make things worse, they will often prosecute defendants who can plausibly argue that those not prosecuted are more culpable than they. The problem with the defendants' complaint, and the parallel criticisms of transitional justice, is that the new regime's prosecutors are not in the business of assessing moral desert, any more 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 in order to achieve systemic aims.

To return to our example of a large, hierarchically-organized drug cartel: who is morally more 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 system's other goals. At the level of law enforcement policy, prosecutors may offer plea bargains to low-level conspirators to obtain evidence against the kingpins, or may offer the kingpins a deal if they will 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 the latter cases.

⁹⁸ Fritz Weinschenk, *Nazis Before German Courts: The West German War Crimes Trials*, 10 *Intl. Lawyer* 515, 528 (1976).

To get the kingpins, prosecutors may resort to indirection, charging them with lesser crimes, or satellite crimes, that are more easily proved. Erich Mielke, the GDR head of state security, was prosecuted on an outstanding murder charge dating back to 1934; Harry Tisch, a trade unionist and GDR insider, was convicted of using union funds to rebuild his weekend house. These results outrage the critics of transitional justice, for unclear reasons. Al Capone went to prison for tax evasion, not racketeering.⁹⁹ 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 where proof of those charges fails, the best second choice is prosecution on the lesser charge.

At the level of constitutional law, all this is perfectly acceptable. Courts—transitional or nontransitional—will adopt a hands-off policy, 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).¹⁰⁰ Subject to the ordinary requirements of proof and guilt, nontransitional courts do not set the criminally guilty free merely because some third party, not (yet) prosecuted, was also criminally 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 in ordinary times never do, and that nobody thinks it is reasonable to demand.

The parallels to transitional-justice settings are striking, although obvious. The GDR regime might well be seen as just a very large criminal conspiracy. Post-unification prosecutors and courts convicted some of the border guards from the Berlin Wall, as we have seen; the sentences were typically light, and carefully graded to factual assessments of culpability. The top echelon of GDR leaders were 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 ever 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 ones, or at least not clearly immoral or imprudent ones, given resource constraints on courts and prosecutors and the competing costs and benefits of leniency and severity.

Ackerman gives Argentina as an example of a failed campaign of prosecution.¹⁰¹ There the leftist Alfonsín government's efforts to bring Peronist military officers to justice resulted in convictions of five of the top echelon, but repeated rebellions by mid-level army officers forced Alfonsín to recognize a defense of "due obedience" to superior orders, sharply restricting the class of eligible defendants. His Peronist successor Carlos Menem quashed the remaining cases, pardoned the convicted, and turned from punishment to reparations, obtaining a sweeping compensation law for victims and their relatives. Pace Ackerman, all this shows nothing about transitional prosecutions in

⁹⁹ See Kenneth Allsop, *The Bootleggers: The Story of Chicago's Prohibition Era* 300-31 (1961).

¹⁰⁰ See *United States v. Armstrong*, 517 U.S. 546 (1996); Teah Lupton, *Prosecutorial Discretion*, 90 *Georgetown L.J.* 1279 (2002).

¹⁰¹ Ackerman, *supra* note __ at 78-80.

particular, as opposed to either nontransitional prosecutions or other transitional measures. All it shows is that where new regimes are relatively weak, old-regime elements, such as the army, may retain enough political muscle to block attempted punishment, or lustration, or any other measures that impose direct costs. The reparations program, by contrast, succeeded because it did not encroach on the autonomy of the old-regime military. The political situation may constrain the new regime's choices, but this is not a normative argument for, or against, any transitional measure that is within the politically feasible set.

If the defense of superior orders includes the claim that disobedience would have been punished harshly, it resolves 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 polar extreme or another. In the West German prosecutions of Nazi officers, the duress claim was frequently made and just as frequently rejected, on factual grounds. “[D]espite 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.”¹⁰²

Elster tries to complicate this picture in two ways.¹⁰³ 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. But this has nothing to do with transitional justice; the issue is equally important, or unimportant, for nontransitional duress claims.¹⁰⁴ The second complicating question is whether it makes a difference if the victims of the victim of duress would have been harmed in any event, by someone else, had the victim of duress not harmed them.¹⁰⁵ Here the point seems to be that the added counterfactual deepens the moral problems, whatever the law's response.¹⁰⁶ Doubtless that is so; ethical casuistry feeds off similar hypotheticals.¹⁰⁷ 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

¹⁰² Weinschenk, *supra* note 81 at 526. To be sure, the mere assertion of the duress defense imposes systemic costs, and the defense is more frequent in transitional trials than in nontransitional settings, because the old regime will often have systematically coerced its officials into committing atrocities -- though not always, as the Nazi example in text shows. But other defenses common in nontransitional settings are less so in transitional ones. An example is the simple claim that the evidence is insufficient to show that the defendant participated in the crime: as we have seen, the complicity of the old regime's bureaucracy in its illiberal policies will often mean that documentary evidence of complicity is plentiful. So it is by no means clear that the net system costs of a given number of transitional trials are higher than an equivalent number of ordinary trials.

¹⁰³ Elster, *Dilemmas*, *supra* note 1 at 27-28.

¹⁰⁴ The general rule is that the defendant's belief (in imminent injury or death) must be “reasonable.” See Wayne R. LaFare, *Criminal Law*, 3d ed., §5.3 (2000).

¹⁰⁵ Note that in most jurisdictions the legal defense of duress does not excuse or justify a homicide. See Joshua Dressler, *Understanding Criminal Law*, 3d ed., §23.04 (2001).

¹⁰⁶ Elster, *Dilemmas*, *supra* note 1 at 28.

¹⁰⁷ Judith Jarvis Thompson, *The Trolley Problem*, 94 *Yale L.J.* 1395 (1985); Bernard Williams *Moral Luck* (1982) (Jim and the Indians); Leo Katz, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* (1996).

excused for injuring C whether or not A would have injured C (as well as B) had B refused. Nontransitional courts are not in the business of moral casuistry; no more should be expected of transitional courts.

2. Ideology and opportunism

Ideology was invoked as an excuse with great success by former Nazi judges in criminal trials conducted by West German authorities after 1950. The former judges, who imposed the death penalty on Jews, dissidents, and other undesirables, argued that they did not have a criminal motive. The motive was not profit or advancement or bloodlust but serving the Nazi regime in which they believed with all their heart.¹⁰⁸ After 1989, efforts to prosecute officials of the former authoritarian states ran into similar problems. The spy chief of East Germany had, as a spy chief, 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, prosecutors sought to tie him to a murder that occurred sixty years earlier.¹⁰⁹

Ideology is not a defense in criminal cases in domestic courts, though it is relevant to determining the degree of culpability and the severity of the punishment. Jonathan Pollard, for example, argued that his motive for spying on the United States was the security of Israel, not pecuniary compensation from his handlers.¹¹⁰ 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. This assumption is also reflected in the use of pecuniary motive as an aggravating factor in capital sentencing.¹¹¹ Similarly, we regard robbers as ordinary criminals unless they use their takings to finance a revolution or ideological crusade, in which case they might be regarded, if caught, as political prisoners subject to special rules.

There are moral and practical reasons for punishing opportunists more severely than ideologues. The motive of opportunists is their own self-interest, and that 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. But ideology is not always a mitigating factor. When the vision is abhorrent, then the ideologue is worse than the opportunist. Hitler was worse than the many opportunists who filled the Nazi party. It is thus not surprising that sometimes an act motivated by ideology 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 difficult in general, even if they might be in certain 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.

¹⁰⁸ Müller, *supra* note 15 at 275-76.

¹⁰⁹ See *supra* note ____.

¹¹⁰ *United States v. Pollard*, 959 F.2d 1011 (D.C. Cir. 1992).

¹¹¹ Model Penal Code § 210.6(3)(g) (1985).

There is a related, but slightly different, exculpatory argument that the milieu or culture of the old regime made the defendant ignorant of the oppressive effects of the regime's policies, or morally insensitive to them.¹¹² Domestic law confronts the same problem when defendants in criminal cases use the excuse of cultural relativism. The defendant argues that it was excusable for him to carry an illegal knife because he is a Sikh, and everyone he knows does it;¹¹³ or to kiss children's' genitals, because that is what is done in Afghanistan;¹¹⁴ or to take private vengeance on a wrongdoer, because in Vietnam everyone knows that the authorities cannot be trusted.¹¹⁵ Courts and prosecutors sometimes recognize the force of these arguments and reduce the charge or the punishment, but no one thinks that cultural relativism is always or even usually exculpatory. Individuals with exotic 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 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 where the illegal act is not particularly harmful and the cultural distance is great, but for sufficiently wrongful behavior the claim that the defendant did not have the proper mental state will not be credible.

3. *The "Schindler's List" defense*¹¹⁶

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 would have produced bad consequences for the resistance or opposition. The replacement might have been a fanatic adherent of the old regime's evil ideology, whereas the reluctant official can 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 Petain. Many argued that it should be taken 'since the alternative was to see captured *resistants* come before a judiciary even more Petainized than it already was. . . . Frequently it had been a question of passing an unjust sentence short of

¹¹² See Offe, *supra* note ___ at 102-03.

¹¹³ See *People v. Singh*, 516 N.Y.S.2d 412 (1987).

¹¹⁴ See *State v. Karger*, 679 A.2d 81 (Me. 1996).

¹¹⁵ See *Ha v. Alaska*, 892 P.2d 184 (Ct. App. 1995). For overviews of the cultural-defense issue, see Jeremy Waldron, 59 *Wash & Lee L Rev* 3 (2002); Nancy A. Wanderer & Catherine R. Connors, *Culture and Crime: Karger and the Existing Framework for a Cultural Defense*, 47 *Buff. L. Rev.* 829 (1999).

¹¹⁶ Oskar Schindler participated in the Nazi regime by providing industrial goods to 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 newly moved plant was deliberately designed to produce defective military material while it funneled profits to the Resistance. See Matthew Lippman, *War Crimes Trials of German Industrialists*, 9 *Temp. Int'l & Comp. L.J.* 173 (1995). Thanks to Eric Truett for this comparison.

death lest the case—of future cases—be taken out of the judge’s hand and put in those of a Vichy fanatic.’¹¹⁷

The difficulties of assessing such an argument are seemingly formidable. The excuse is self-serving if offered to avoid prosecution or purgation by the new regime; should it then be discounted? Should some sort of discount be applied as well for the empirical uncertainties that afflict this excuse? For one thing, perhaps it is not clear that the meliorist official would have been replaced by a fanatic. For another, perhaps it would be better for the cause of resistance in the long term, though not for individual defendants in the short term, if only the fanatical judges are deciding cases; the increased injustice might spur international condemnation or increased domestic resistance. Most generally, if the old regime is evil, should resignation from its offices and (perhaps) participation in the resistance be understood as deontological duties,¹¹⁸ not to be excused by even the most convincing showing that the consequences of overt resistance would be 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 context. The philosophical conundrums surrounding duress are indeed formidable, but the legal system finesses or ignores the conundrums in fine pragmatic style.

All this holds true as well of the Schindler’s List defense. Here the domestic analogue is the defense (technically it is a justification, not an excuse) of necessity or the choice of evils, under which defendants argue that committing one crime is necessary in order to produce a greater good or avoid a greater harm. Consider the Schindleresque claim at issue in *State v. Green*,¹¹⁹ in which one of the participants in a multi-party criminal conspiracy claimed that he elected to participate in order to prevent harm to his son, also a conspirator. For tactical reasons the unwilling participant was never tried, but the court stipulated that, had he been on trial, it would properly have instructed the jury on duress and necessity.

Defenses of this sort are not common in domestic settings, in part because many jurisdictions require that the defendant have had no legal alternatives to the crime charged, or have exhausted those alternatives; calling the police is usually a better option than meliorist participation in a conspiracy. This requirement might be thought a decisive disanalogy between the transitional-justice version of the necessity defense and the domestic version. After all, by hypothesis the old regime dominated the institutions of lawmaking and of justice, so there were no legal alternatives, at least if we ignore the possible recourse to international law and institutions. But the point of asking about legal alternatives isn’t 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

¹¹⁷ Elster, *Dilemmas*, supra note 1 at 26 (quoting Peter Novick, *The Resistance Versus Vichy: The Purge of Collaborators in Liberated France* 85-86 (1968)).

¹¹⁸ For an overview of the relevant moral problems from a nonconsequentialist perspective, see Frances M. Kamm, “Harming Some to Save Others From the Nazis,” *Philosophy and the Holocaust* (forthcoming).

¹¹⁹ *State v. Green*, 915 S.W.2d 827 (Tenn. Crim. App. 1995)

perspective, whether there were courses of action, other than the crime charged, which would have avoided the threatened harm at 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.

In the transitional-justice setting the key question is identical: was complicity in the old regime's illegal or unjust action the lowest-cost alternative? Consider "Case 3"—the Nuremberg trial of German jurists that followed upon the major war crimes trials. The principal defendant, Schlegelberger, a former high official in the Reich Ministry of Justice, argued that "if he were to resign, a worse man would take his place." 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 because "[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."¹²⁰ Whether or not we agree with this assessment 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 nontransitional courts ask as well.

It might also be thought 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 counterfactuals), on a larger scale, than the domestic analogues. The first idea is just wrong; duress and necessity are always predicated on counterfactual assertions about the consequences of hypothetical action or inaction. As for the second idea, it too makes a fetish of the distinction between cases that evaluate conduct in past political regimes and cases that do not; the scale of the relevant factual and counterfactual questions is, sometimes, as great or greater in the second category of cases. Consider real-life examples, in which courts have reached varying and fact-sensitive decisions: whether the activities of the Internal Revenue Service may be obstructed to protest the government's financial aid to El Salvador (no)¹²¹; 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)¹²²; whether a private posse may round up and deport striking miners who planned to destroy lives and property (yes)¹²³; and (most famously) whether seamen adrift in a lifeboat may cannibalize a sickly cabin boy to stay alive (no)¹²⁴.

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 factbound 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

¹²⁰ Quoted in Muller, *supra* note 15 at 271-2.

¹²¹ See *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1992).

¹²² See *People v. Bordowitz*, 588 N.Y.S.2d 507 (N.Y. Crim. Ct. 1991); but see *Com. v. Leno*, 616 N.E. 2d 453 (1993).

¹²³ *State v. Wooton*, Crim. No. 2685 (Cochise Cty., Ariz., 1919) (jury acquittal).

¹²⁴ *Regina v. Dudley and Stephens*, 14 Q.B.D. 273 (1884).

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.”¹²⁵ Moral theorists will recognize this as an old ethical chestnut.¹²⁶ 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 events, and adjusting punishment accordingly. This is what the Gaullist court did; it sentenced “four 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.”¹²⁷

The point here is not to take sides in the debate between moral theorists and pragmatists.¹²⁸ 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 some people when everyone is guilty, and that it is impossible to use ordinary notions of guilt and innocence when evaluating conduct in a pretransitional society.¹²⁹ Quint argues that the Western 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 really constitute election fraud.”¹³⁰ Quint thinks the court’s ruling reflects incomprehension about the nature of life in a totalitarian regime rather than, what is more likely, a conventional legal subterfuge for performing substantive albeit retroactive justice. And if the Westerners did not fully understand the East German past, the Easterners surely did, and many of them complained bitterly that justice was not more severe. But his larger point—that normative transformations accompanying transitions make judgments about the past hazardous—is widely shared.

However, normative transformations are not unknown in societies with consolidated democracies. In the United States the clearest was the nationwide transformation of racial attitudes during the second half of the twentieth century. As we discussed in II.A., this transformation has embarrassed public officials who supported segregation in the 1950s and 1960s, from Harold Carswell to Trent Lott. But there have been other transformations as well. The backlash against communism after World War II

¹²⁵ Novick, *supra* note __ at 85 n. 18.

¹²⁶ Williams, *supra* note __ (Jim and the Indians).

¹²⁷ Novick, *supra* note __.

¹²⁸ Compare Richard Posner, *The Problematics of Moral and Legal Theory* (1999) with Martha C. Nussbaum, *Still Worthy of Praise*, 111 *Harv. L. Rev.* 1776 (1998).

¹²⁹ Or that 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 or citizen but for the monstrosity of the bureaucratic end. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 276 (1994 ed.).

¹³⁰ Quint, *supra* note 16 at 206.

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. But the most serious transformations result in more significant public action than the resignation of officials. Changing racial attitudes contributed to the decision to provide reparations to Indian tribes and to Americans of Japanese descent who were interned during World War II. They have also contributed to the adoption of affirmative action and proposals to award reparations to the descendants of slaves. In none of these cases did the implication of American society—as beneficiaries (arguably) of the actions and institutions—rather than a few wrongdoers provide a reason for not performing reparative 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 does seem to take a realistic view, and does not demand from officials a past life free of actions that are blameworthy by current standards. Instead, the public requires a clear repudiation of these past actions as evidence that the officials share the new attitudes or will not work against them. People at the vanguard of change—the dissenters and dissidents who are eventually vindicated—take on heroic status, but those who resisted change are not necessarily condemned. This is true for consolidated democracies and it is true for transitional democracies. 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 those who passively collaborated and those who used force against change; 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 posttransitional societies can make reasonable moral distinctions is proven by the survival of many of the communist parties in eastern Europe, which refashioned themselves as leftist parties in the posttransition 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 officials of the GDR. He argues that the cases criminalized the ordinary politics of the GDR rather than picking out moments of great injustice. 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 criminal law.”¹³¹ One could say exactly the same thing about denazification, which involved the processing of millions of German citizens, but, because of resource constraints, with relatively few punishments and most of them trivial.¹³² But criminal law frequently serves an educative function: it stigmatizes forms of lawbreaking that are harmful but widely tolerated. The prosecutions of former officials of the GDR had a grander scope than domestic prosecutions do, 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, made the point that the

¹³¹ Id. at 215.

¹³² Herz, *supra* note 42.

activities of the prior regime were wrongful rather than just a matter of political disagreement.

CONCLUSION

The urge to wipe the slate clean and start at Year 0 is deep and understandable, but it has been resisted by most states that go through transitions because 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 not worth doing because it interferes with the development of democratic institutions and the market economy. The interference takes diverse forms: overburdening courts, undermining property rights, depriving the government of experienced personnel, draining the treasury, burdening officials with complex technical problems, and confronting people with insoluble moral dilemmas. We have shown that these objections are 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. The many parallels between transitional and ordinary justice are overlooked by the academics but recognized and exploited by transitional institutions, and this no doubt has contributed to the successes of transitional justices in those states that have tried.

Readers with comments may address them to:

Eric A. Posner
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
eric_posner@law.uchicago.edu

Adrian Vermeule
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
a-vermeule@uchicago.edu

University of Chicago Law School

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