

Transitional Justice

Ruti G. Teitel

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TRANSITIONAL ——— ————— JUSTICE

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Printed in the United States of America
on acid-free paper

For my parents

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Preface

*T*his book project was inspired by the heady wave of liberalization at the end of the twentieth century. In the early 1980s, a debate emerged regarding the implications of “transitional justice” for states’ liberalizing prospects. The question of “punishment or impunity,” whether there is an obligation to punish in democratic transitions, was the subject of a policy meeting convened in 1990 at the Council on Foreign Relations in New York, for which I was invited to prepare the background discussion paper.¹ At the time, I concluded that, despite the moral argument for punishment in the abstract, various alternatives to punishment could express the normative message of political transformation and the rule of law, with the aim of furthering democracy.

With the collapse of the Soviet Union and the fall of the Berlin Wall, the question of transitional justice took on renewed urgency. Those of us who had been involved in the debates concerning the Latin American transitions participated in debates convened in East and Central Europe. There the debate over punishment broadened to include the implications of the sweeping decommunization measures pervasive in the region. In 1992, I received a grant from the U.S. Institute of Peace to begin this comparative project and to advise governments on the issues of justice in transitions. Participating in several conferences in the region helped shape the issues: “Political Justice and Transition to the Rule of Law in East Central Europe,” sponsored by the University of Chicago and by the Central European University in Prague in 1991, and the Salzburg Conference titled “Justice in Times of Transition” in 1992, convened by the Foundation for a Civil Society. In 1993, at a conference, “Restitution in Eastern Europe,” convened by the Central European University, I presented ideas that were later elaborated on in the chapter on reparatory justice. My ideas concerning the role of historical inquiry were shaped by a conference I helped organize at the Central European University, Budapest, in the fall of 1992, and elaborated on in a paper delivered at a conference convened in 1994 at Yale Law School titled “Deliberative Democracy and Human Rights.” Fur-

ther comparative aspects were explored at the Seventeenth Annual German Studies Association, where I presented “Justice in Transition in Unified Germany.” Study of the postwar precedents was nurtured in numerous symposia I helped to convene over the years at Boston College Law School, under the auspices of the Holocaust–Human Rights Research Project, as well as at New York Law School.

I spent my sabbatical as Senior Schell Fellow at Yale Law School, where I taught a seminar on the book and benefited from discussions both inside and outside class.

Various portions of this book were presented at Yale Law School’s Faculty Workshop, as well as workshops at Boston College Law School, Cardozo Law School, Columbia University Law School, University of Connecticut Law School, Cornell Law School, New York Law School, and University of Michigan Law School. Portions of the concluding chapter were presented at the New York University Political Theory Workshop. Portions of the constitutional justice chapter were discussed at the Georgetown University Law School Biennial Constitutional Law Discussion Group (1995). At the American Philosophical Association’s Eastern Division meeting (1996), I was a participant on a panel entitled “Justice, Amnesties, and Truth-Tellings.” Some of the issues in the criminal justice chapter were presented in an endowed lecture I was invited to give at the University of Frankfurt (January 1998). Portions of the criminal justice chapter concerning East Europe were presented at the American Association of International Law annual meeting (April 1998). Portions concerning criminal justice and clemency were presented at a workshop at the University of Edinburgh (June 1998).

Many colleagues and friends have been helpful in giving valuable comments, advice, and encouragement in this book project. First, my thanks to my editors at Oxford. My gratitude to Jack Balkin, Robert Burt, Paul Dubinsky, Stephen Ellmann, Owen Fiss, John Ferejohn, George Fletcher, Richard Friedman, Ryan Goodman, Robert Gordon, Derek Jinks, Paul Kahn, Harold Koh, Bill Lapiana, Larry Lessig, Klaus Lüderssen, Tim Lytton, Jack Rakove, Andrzej Rapaczynski, Michel Rosenfeld, András Sajó, Marcelo Sancinetti, Peter Schuck, Tony Sebok, Richard Sherwin, Suzanne Stone, Ariel Teitel, and two anonymous reviewers. Special thanks to Zoe Hilden and Jonathan Stein for their very helpful advice and editorial suggestions. I am most grateful for the support of Dean Harry Wellington at my home institution, New York Law School, and Dean Anthony Kronman at Yale Law School. My thanks to a number of constitutional court justices for their generosity in contributing to my research: Vojtech Cepl, Lech Garlicki, Dieter Grimm, Richard Goldstone, and Laszlo Solym. I am grateful to the students of human rights in transitional regimes at New York and Yale Law Schools for helpful discussion of many of the ideas here. I am indebted to Camille Broussard of the New York Law School Library and to research assistants at both New York and Yale Law Schools, including Dana Wolpert, Sabrina Bagdasarian, Federica Bisone, Jayni Edelstein, Jonathan Holub, Jessica LaMarche, Karen Owen, and Naveen Rahman, for help in the research of this book.

For their contribution to the researching of this book, I am grateful to Neil Kritz of the U.S. Institute of Peace, Dwight Semler and Ania Budziak of the University of Chicago's Center for Constitutionalism in East Europe, Holly Cartner of Human Rights Watch, Robert Weiner of the Lawyers Committee for Human Rights and Ariel Dulitsky of the Center for Justice and International Law. I am most grateful to Brenda Davis Lebron for word-processing assistance and to Belinda Cooper and Leszek Mitrus for translation assistance.

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Last, I am indebted to the late Owen M. Kupferschmid. Our many conversations about postwar justice and his loving encouragement inspired the beginnings of this project.

As this book was written over these last years, it recapitulates the breathtaking events of the end of the twentieth century. Yet, even as the writing draws to a close, the transitions continue; for example, South Africa's transition out of apartheid is still ongoing, and there are breakthroughs in Northern Ireland and elsewhere. These developments imply an inevitable incompleteness to the book. They also attest to the subject's relevance and vitality, at once humbling and a source of inspiration.

New York City
December 1999

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Transitional Justice

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Introduction

In recent decades, societies all over the world—throughout Latin America, East Europe, the former Soviet Union, Africa—have overthrown military dictatorships and totalitarian regimes for freedom and democracy. In these times of massive political movement from illiberal rule, one burning question recurs. How should societies deal with their evil pasts? This question leads to others that explore the question of the relation of the treatment of the state's past to its future. How is the social understanding behind a new regime committed to the rule of law created? Which legal acts have transformative significance? What, if any, is the relation between a state's response to its repressive past and its prospects for creating a liberal order? What is law's potential for ushering in liberalization?¹

The question of the conception of justice in periods of political transition has not yet been fully addressed. Debates about “transitional justice” are generally framed by the normative proposition that various legal responses should be evaluated on the basis of their prospects for democracy.² In the prevailing debates about the relation of law and justice to liberalization, there are two generally competing ideas, the realists versus the idealists on the relation that law bears to democratic development. Either political change is thought necessarily to precede the establishment of the rule of law or, conversely, certain legal steps are deemed necessarily to precede political transition. The privileging of one developmental sequence or another derives either from disciplinary bias or from the generalization of particular national experiences to universal norms. So it is that in political theory the dominant account of how liberalizing transition occurs comprises a sequence in which political change comes first. On this account, a state's transitional responses are explained largely in terms of the relevant political and institutional constraints. Justice seeking in these periods is fully epiphenomenal and best explained in terms of the balance of power. Law is a mere product of political change. Political realists generally conflate the question of why a given state action is taken with that of

what response is possible.³ Such theorizing clarifies why transitional justice is a vital issue in some countries but not in others.⁴ The prevailing balance of power, structuring the “path” of the transition, is thought in turn to explain the legal response. However, to say that regimes will “do what they can” does not well explain the great diversity of transitional legal phenomena. Indeed, to contend that, as in the realist account, states do what is possible simply conflates the descriptive account with its normative conclusions.⁵ The connections between a state’s response to the transition and its prospects for liberalization remain largely unjustified.

From the idealist perspective, by contrast, the question of transitional justice generally falls back on universalist conceptions of justice.⁶ Ideas of full retributive or corrective justice regarding the past are considered necessary precursors to liberal change. While, in the abstract, certain legal ideals may be thought necessary to liberal transition, such theorizing does not account well for the relation of law and political change. Ultimately, this approach misses what is distinctive about justice in times of transition.

The realist/idealist antinomy on justice in transition, like liberal/critical theorizing, divides on the relation of law and politics. Whereas in liberal theorizing, dominant in international law and politics,⁷ law is commonly conceived as following idealist conceptions largely unaffected by political context,⁸ critical legal theorizing, like the realist approach, emphasizes law’s close relation to politics.⁹ Again, neither liberal nor critical theorizing about the nature and role of law in ordinary times accounts well for law’s role in periods of political change, missing the particular significance of justice claims in periods of radical political change and failing to explain the relation between normative responses to past injustice and a state’s prospects for liberal transformation.

This book moves beyond prevailing theorizing to explore the role of the law in periods of radical political transformation. It suggests these legal responses play an extraordinary, constitutive role in such periods. *Transitional Justice* adopts a largely inductive method, and, exploring an array of legal responses, it describes a distinctive conception of law and justice in the context of political transformation. *Transitional Justice* begins by rejecting the notion that the move toward a more liberal democratic political system implies a universal or ideal norm. Instead, this book offers an alternative way of thinking about the relation of law to political transformation. Important phenomena here discussed relate to the contemporary wave of political change, including the transitions from Communist rule in East and Central Europe and the former Soviet Union, as well as from repressive military rule in Latin America and Africa. When relevant, the book draws on historical illustrations, from ancient times to the Enlightenment, from the French and American Revolutions through this century’s postwar periods up to the contemporary moment.

The interpretive inquiry proceeds on a number of levels. On one level, I attempt to provide a better account of transitional practices. Study of the law’s response in periods of political change offers a positive understanding of the nature of accountability for past wrongs. On another level, I explore the nor-

mative relation of legal responses to repressive rule, related conceptions of justice, and our intuitions about the construction of the liberal state.

The problem of transitional justice arises within the distinctive context of transition—a shift in political orders. By focusing its inquiry on the stage of “transition,” this book chooses to shift the terms of the debate away from the vocabulary of “revolution” often deployed by theorists to an analysis of the role of law in political change.¹⁰ Rather than an undefined last stage of revolution, the conception of transition advanced here is both more capacious and more defined. What is demarcated is a postrevolutionary period of political change; thus, the problem of transitional justice arises within a bounded period, spanning two regimes.¹¹

Of course, the above characterization continues to beg the question of transition to what? What rule of recognition governs transitions? Within political science, there is substantial debate about the meaning not only of “transition” but also of its limiting stage, “consolidation,” as well as, ultimately, “democracy” itself. Within one school of thought, “transition” is demarcated by objective political criteria, chiefly procedural in nature. Thus, for some time, the criteria for the transition to democracy have focused on elections and related procedures. For example, Samuel Huntington’s formulation, following Joseph Schumpeter, defines twentieth-century democratization to occur when the “most powerful collective decision makers are selected through fair, honest and periodic elections.”¹² For others, the transition ends when all the politically significant groups accept the rule of law. Beyond this school are others that embrace a more teleological view of democracy. Nevertheless, the teleological approach has been challenged for incorporating a bias toward Western-style democracies.¹³

In the contemporary period, the use of the term *transition* has come to mean change in a liberalizing direction, which is true concededly of the transitions discussed here. The liberalizing trend is well illustrated historically, earlier in the century in the democratic transitions of West Germany, Italy, Austria, France, Japan, Spain, Portugal, and Greece.¹⁴ To date, political scientists have not incorporated this positive normative direction expressly in their definition of the term. This book explores the significance that the contemporary understanding of transition has a normative component in the move from less to more democratic regimes. It is this phenomenology of liberalizing transition that is the subject of this book.

The aim here is to shift the focus away from the traditional political criteria associated with liberalizing change to take account of other practices, particularly the nature and role of legal phenomena. The constructivist approach proposed by this book suggests a move away from defining transitions purely in terms of democratic procedures, such as electoral processes, toward a broader inquiry into other practices signifying acceptance of liberal democracy and the rule-of-law. The inquiry undertaken examines the normative understandings, beyond majority rule, associated with liberalizing rule-of-law systems in political flux.¹⁵ The phenomenology of transition points to a close tie in the normative shifts in understandings of justice and law’s role in the con-

struction of the transition. Not all transformations exhibit the same degree of “normative shift.” Indeed, one might conceptualize transitions along a transformative continuum in their relation to the predecessor regime and value system varying in degree from “radical” to “conservative” change.

Understanding the particular problem occasioned by the search for justice in the transitional context requires entering a distinctive discourse organized in terms of the profound dilemmas endemic to these extraordinary periods. The threshold dilemma arises from the context of justice in political transformation: Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective, between the individual and the collective. Accordingly, transitional justice is that justice associated with this context and political circumstances. Transitions imply paradigm shifts in the conception of justice; thus, law’s function is deeply and inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order even as it enables transformation. Accordingly, in transition, the ordinary intuitions and predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a *sui generis* paradigm of transformative law.

The thesis of this book is that the conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition. The conception of justice that emerges is contextualized and partial: What is deemed just is contingent and informed by prior injustice. Responses to repressive rule inform the meaning of adherence to the rule of law. As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative. To some extent, the emergence of these legal responses instantiates transition. As the discussion proceeds, it will become evident that the law’s role in periods of political change is complex. Ultimately, this book makes two sorts of claims: one, about the nature of law in periods of substantial political change and, the other, about law’s role in constituting the transition. For, contrary to the prevailing idealist accounts, law here is shaped by the political circumstances, but, also challenging the prevailing realist accounts, law here is not mere product but itself structures the transition. The association of these responses with periods of political change advances the construction of societal understanding that transition is in progress.

The role of law in periods of political change is explored by looking at its various forms: punishment, historical inquiry, reparations, purges, and constitution making. In the prevailing transitional justice debates, the punishment of the ancien régime is frequently advocated as necessary in the transition to democracy; yet, exploration of the legal phenomenology in periods of political shift suggests that though these are generally thought to be discrete categories of the law, there are affinities. Illuminated is law’s operative role in the construction of transition. These practices offer a way both to delegitimize the past political regime and to legitimate its successor by structuring the political opposition within the democratizing order.

Each chapter of the book explores how various legal responses in periods of substantial political change enable the construction of normative shift. Adjudications of the rule of law construct understandings of what is fair and just. Criminal, administrative, and historical investigations establish past wrongdoing. Reparatory projects vindicate rights generated by past wrongs to victims as well as to the broader society. Transitional constitutionalism and administrative justice reconstruct the parameters of the changing political order in a liberalizing direction. The analysis proposed here focuses on law's phenomenology in periods of political change, termed "transitional jurisprudence."

Chapter 1 concerns the rule of law in transition. In established democracies, adherence to the rule of law depends on the application of principles constraining the purposes and application of the law, but this is not its primary role in transitional times. In periods of radical political change, the law is unsettled, and the rule of law is not well explained as a source of ideal norms in the abstract. Within the context of a transitional jurisprudence, the rule of law can be better understood as a normative value scheme that is historically and politically contingent and elaborated in response to past political repression often perpetuated under the law. Thus, the transitional rule of law comprises distinctive values particular to such periods. While the rule of law ordinarily implies prospectivity in the law, transitional law is both settled and unsettled; it is both backward- and forward-looking, as it disclaims past illiberal values and reclaims liberal norms. Although the rule of law and constitutionalism both concern the norms that seek to guide lawmaking in democracy, these understandings are seriously challenged during transitional periods. Despite prevailing theorizing, neither the concepts of the rule of law nor constitution making are well understood as sources of idealized foundational norms. A transitional jurisprudence helps to elucidate the variation in the ideas of the rule of law across legal cultures and over time, as it also shows the rule-of-law concepts varying as a measure and in relation to past legacies of its abrogation.

Chapter 2 concerns criminal justice in transition. Successor trials are commonly thought to play the leading foundational role in the transformation to a more liberal political order. Only trials are thought to draw a bright line demarcating the normative shift from illegitimate to legitimate rule. Nevertheless, the exercise of the state's punishment power in the circumstances of radical political change raises profound dilemmas. Transitional practices show trials to be few and far between, particularly in the contemporary period. The low incidence of successor trials reveals the dilemmas in dealing with often systemic and pervasive wrongdoing by way of the criminal law. So it is that in the transitional context, conventional understandings of individual responsibility are frequently inapplicable, spurring development of new legal forms. The emergence of partial sanctions falls outside conventional legal categories. These developments offer a deeper understanding of the relation that remedies bear to wrongs and, in particular, the distinctive wrong of state persecution. The transitional sanction illuminates the relation between the concepts of democratic accountability and individual rights in their contribution to the construction of a liberal politics.

The third chapter explores the workings of historical justice. Following periods of repressive rule, transitional societies commonly create historical accountings. Historical inquiry and narrative play an important transitional role linking past to present. Transitional accountings incorporate a state's repressive legacy and by their very account draw a line that both redefines a past and reconstructs a state's political identity. Transitional historical justice illuminates the constructive relation between truth regimes and political regimes, clarifying the dynamic relation of knowledge to political power.

Chapter 4 turns to justice in its reparatory dimension. The focus of transitional reparatory justice is the repair of prior wrongs. Perhaps the most common transitional form, reparatory justice's pervasiveness reflects its multiple roles and complex functions in periods of radical political change. Reparatory measures appear most definitional of the liberalizing move, as these responses instantiate recognition of individual rights. The equal protection of individual rights is fundamental to the liberal state; therefore, this remedy plays an important constructive role in periods seeking to reestablish the rule of law. In the dual economic and political transitions that characterize the contemporary wave of political change, reparations play explicitly political roles mediating the change by enabling the creation of new stakes in the political community in the midst of transition. Transitional reparatory measures depart from their conventional compensatory role to perform functional and symbolic roles particular to the state's political transformation.

Chapter 5 explores administrative justice and the uses of public law to redefine the parameters of political membership, participation, and leadership that constitute the political community. While political purges and disabilities are concededly common after revolutions, the question is whether any principles guide such measures in political transitions. More than any other transitional response, explicitly political collective measures pose a challenge to the construction of the rule of law in the liberalizing regime. Administrative justice illuminates law's distinctive potential for restructuring the relation of the individual to the political community in the transition. These public law measures define new boundary conditions on a sweeping and explicitly political basis. Through administrative justice, public law is used to respond to the past regime, as well as to reshape the successor political order. This response exemplifies transitional jurisprudence in its most radical form.

Chapter 6 explores transitional constitutionalism. Transitional constitutionalism serves conventional constitutionalism's constitutive purposes, but it also serves transformative purposes. While our intuitions are to conceive constitutions as forward-looking and foundational texts; in periods of radical political change, constitutions are instead dynamic mediating texts, simultaneously backward- and forward-looking, comprehending varying constitutional modalities and degrees of entrenchment. Transitional constitutionalism, criminal justice, and the rule of law share affinities in the contingent relation that the norms protected bear to prior rule, as well as to the new political order.

The concluding chapter brings together and analyzes the various ways in which new democracies respond to legacies of injustice. Patterns across legal

forms¹⁶ inform a paradigm of “transitional jurisprudence.” The analysis proposes that law’s role here is constructivist, and that transitional jurisprudence emerges as a distinct paradigmatic form of law responsive to and constructive of the extraordinary circumstances of periods of substantial political change.¹⁷ In transitional jurisprudence, the conception of justice is partial, contextual, and situated between at least two legal and political orders. Legal norms are decidedly multiple, the idea of justice always a compromise. Transitional jurisprudence centers on the law’s paradigmatic use in the normative construction of the new political regime. Eschewing general prescriptive principles from legal and political theorizing, the dynamic relation of law and political change contended for here challenges the reigning rhetoric regarding the course of political development. This study of law’s role in political change suggests criteria beyond the fairness of elections, stability of institutions, or economic development by which to evaluate new democracies.¹⁸ Legal responses are both performative and symbolic of transition.

This book offers the language of a new jurisprudence rooted in prior political injustice. Conceiving of jurisprudence as transitional helps to elucidate the nature and role of law during periods of radical political change. Transitional jurisprudence also has implications that transcend these extraordinary periods. Offering another way of conceptualizing law should have ramifications affecting our intuitions about the nature and function of law more generally. The problem of justice during periods of political transformation has a potentially profound impact on the resulting societal shift in norms and the groundwork for transformed constitutional and legal regimes. Unresolved problems of transitional justice often have lasting implications over a state’s lifetime. This book offers a new perspective by which we can understand the significance of the enduring political controversies that presently divide our societies. Ultimately, the recent changes of Latin America, East and Central Europe, the former Soviet Union, Africa, as well as the historical European transitions, offer us an opportunity to reflect on what is a liberal democratic response to the illiberal state, as well as, more broadly, on the potential of law in a transformative politics.

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CHAPTER ONE

The Rule of Law in Transition

*T*his chapter explores the various legal responses to illiberal rule and the guiding rule-of-law principles in these times. The attempt to adhere to the rule of law during periods of political upheaval creates a dilemma. There is a tension between the rule of law in transition as backward-looking and forward-looking, as settled versus dynamic. In this dilemma, the rule of law is ultimately contingent; rather than merely grounding legal order, it serves to mediate the normative shift in values that characterizes these extraordinary periods. In democracies, our intuition is that the rule of law means adherence to known rules, as opposed to arbitrary governmental action.¹ Yet revolution implies disorder and legal instability. The threshold dilemma of transitional justice is the problem of the rule of law in periods of radical political change. By their very definitions, these are often times of massive paradigm shifts in understandings of justice. Societies are struggling with how to transform their political, legal, and economic systems. If ordinarily the rule of law means regularity, stability, and adherence to settled law, to what extent are periods of transformation compatible with commitment to the rule of law? In such periods, what does the rule of law mean?

The dilemma of the meaning of the rule of law transcends the moment of political transformation and goes to the heart of the basis for a liberal state. Even in ordinary periods, stable democracies struggle with questions about the meaning of adherence to the rule of law. Versions of this transitional rule-of-law dilemma are manifest in problems of successor justice, constitutional beginnings, and constitutional change.² The rule-of-law dilemma tends to arise in politically controversial areas, where the value of legal change is in tension with the value of adherence to the principle of settled legal precedent. In ordinary periods, the problem of adherence to legal continuity is seen in the challenge posed by political and social change over the passage of time. Accordingly, the ideal of the rule of law as legal continuity is captured in the principle of *stare decisis*, a predicate of adjudication in the Anglo-American legal sys-

tem. “[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”³ In transformative periods, however, the value of legal continuity is severely tested. The question of the normative limits on legitimate political and legal change for regimes in the midst of transformation is frequently framed in terms of a series of antinomies. The law as written is compared to the law as right, positive law to natural law, procedural to substantive justice, and so forth.

My aim is to resituate the rule-of-law dilemma by exploring societal experiences that arise in the context of political transformation. My interest is not in idealized theorizing about the rule of law in general. Rather, the attempt is to understand the meaning of the rule of law for societies undergoing massive political change. This chapter approaches the rule-of-law dilemma in an inductive manner by resituating the question as it actually arises in its legal and political contexts. It explores a number of historical postwar cases, as well as precedents arising in the more contemporary transitions. Although the rule-of-law dilemma arises commonly in the criminal context, the issues raise broader questions about the ways in which societies in periods of intense political change reason about the relation of law, politics, and justice. As shall become evident, these adjudications reveal central ideas about the extraordinary conception of the rule of law and of values of justice and fairness in periods of political change.

The Rule-of-Law Dilemma: The Postwar Transition

In periods of substantial political change, a dilemma arises over adherence to the rule of law that relates to the problem of successor justice. To what extent does bringing the ancien régime to trial imply an inherent conflict between predecessor and successor visions of justice? In light of this conflict, is such criminal justice compatible with the rule of law? The dilemma raised by successor criminal justice leads to broader questions about the theory of the nature and role of law in the transformation to the liberal state.

The transitional dilemma is present in changes throughout political history. It is illustrated in the eighteenth-century shifts from monarchies to republics but has arisen more recently in the post–World War II trials. In the postwar period, the problem was the subject of a well-known Anglo–American jurisprudential debate between Lon Fuller and H.L.A. Hart, who took as their point of departure the problem of justice after the collapse of the Nazi regime.⁴ Such postwar theorizing demonstrates that in times of significant political change, conventional understandings of the rule of law are thrown into relief.⁵ Although the transitional context has generated scholarly theorizing about the meaning of the rule of law, that theorizing does not distinguish understandings of the rule of law in ordinary and transitional times. Moreover, the theoretical work that emerges from these debates frequently falls back on grand, idealized models of the rule of law. Such accounts fail to recognize the

exceptional issues involved in the domain of transitional jurisprudence. Recognition of a domain of transitional jurisprudence, however, raises again the issue of the relation of the rule of law in transitions to that in ordinary periods.

The Hart-Fuller debate on the nature of law focuses on a series of cases involving the prosecutions of Nazi collaborators in postwar Germany. The central issue for the postwar German courts was whether to accept defenses that relied on Nazi law.⁶ A related issue was whether a successor regime could bring a collaborator to justice and, if so, whether that would mean invalidating the predecessor laws in effect at the time the acts were committed. In the "Problem of the Grudge Informer," the issue raised is set out in a hypothetical somewhat abstracted from the postwar situation: The so-called Purple Shirt regime has been overthrown and replaced by a democratic constitutional government, and the question is whether to punish those who had collaborated in the prior regime.⁷ Hart, an advocate of legal positivism,⁸ argued that adherence to the rule of law included recognition of the antecedent law as valid. Prior written law, even when immoral, should retain legal force and be followed by the successor courts until such time as it is replaced. In the positivist position advocated by Hart, the claim is that the principle of the rule of law governing transitional decision making should proceed—just as it would in ordinary times—with full continuity of the written law.

In Fuller's view, the rule of law meant breaking with the prior Nazi legal regime. As such, Nazi collaborators were to be prosecuted under the new legal regime: In the "dilemma confronted by Germany in seeking to rebuild her shattered legal institutions . . . Germany had to restore both respect for law and respect for justice . . . [P]ainful antinomies were encountered in attempting to restore both at once." Whereas the rule-of-law dichotomy was framed in terms of procedural versus substantive ideas of justice, Fuller tries to elide these competing conceptions by proposing a procedural view of substantive justice.⁹ According to the German judiciary, there is a dichotomy within the rule of law between the procedural legal right and the moral right. In "severe cases," the moral right takes precedence. Accordingly, formalist concepts of the law, such as adherence to putative prior law, could be overridden by such notions of moral right. The natural law position espoused by the German judiciary suggests that transitional justice necessitates departing from prior putative law. For Fuller, however, it would not imply such a break, because past "law" would not qualify as such for failure to comply with various procedural conditions.¹⁰

The above debate failed to focus, however, on the distinctive problem of law in the transitional context. In the postwar period, this dilemma arose as to the extent of legal continuity with the Nazi regime: To what extent did the rule of law necessitate legal continuity? A transitional perspective on the postwar debate would clarify what is signified by the rule of law. That is, the content of the rule of law is justified in terms of distinctive conceptions of the nature of injustice of the prior repressive regime. The nature of this injustice affects consideration of the various alternatives, such as full continuity with the prior

legal regime, discontinuity, selective discontinuities, and moving outside the law altogether. For positivists, full continuity with the prior legal regime is justified by the need to restore belief in the procedural regularity that was deemed missing in the prior repressive regime; the meta-rule-of-law value is due process, understood as regularity in procedures and adherence to settled law. The natural law claim for legal discontinuity is also justified by the nature of the prior legal regime but according to the conceptualization of past tyranny. On the natural law view of the rule of law, Fuller's approach appears more nuanced, as it attempts to offer a procedural understanding of substantive justice values. Given the predecessor regime's immorality, the rule of law needs to be grounded in something beyond adherence to preexisting law.¹¹

To what extent is adherence to the laws of a prior repressive regime consistent with the rule of law? Conversely, if successor justice implied prosecuting behavior that was lawful under the prior regime, to what extent might legal discontinuity instead be mandated by the rule of law? The transitional context fuses these multiple questions of the legality of the two regimes and their relation to each other.

In the postwar debate, both natural law and positivist positions took as their point of departure certain presumptions about the nature of the prior legal regime under illiberal rule.¹² Both positions draw justificatory force from the role of law in the prior regime; nevertheless, they differ on what constitutes a transformative principle of legality. The positivist argument attempts to divorce questions of the legitimacy of law under the predecessor and successor regimes. The response to past tyranny is thought not to lie in the domain of the law at all but instead in the domain of politics. If there is any independent content given to the rule of law, it is that it ought not serve transient political purposes. The positivist argument for judicial adherence to settled law, however, relies on certain assumptions about the nature of legality under the predecessor totalitarian regime.¹³ The justification for adhering to prior law in the transitional moment is that under prior repressive rule, adjudication failed to adhere to settled law. On the positivist view, transformative adjudication that seeks to "undo" the effect of notions of legality supporting tyrannical rule would imply adherence to prior settled law.

The natural law position highlights the transformative role of law in the shift to a more liberal regime. On this view, putative law under tyrannical rule lacked morality and hence did not constitute a valid legal regime. To some extent, in this normative legal theory, collapsing law and morality, the transitional problem of the relation between legal regimes disappears. Insofar as adjudication followed such putative law, it, too, was immoral in supporting illiberal rule. Thus, the cases of the informers are characterized as "perversions in the administration of justice."¹⁴ From the natural law perspective, the role of law in transition is to respond to evil perpetuated under the past administration of justice. Because of the role of judicial review in sustaining the repression (this topic was discussed in the Hart-Fuller debate),¹⁵ adjudication as in ordinary times would not convey the rule of law. This theory of transfor-

mative law promotes the normative view that the role of law is to transform the prevailing meaning of legality.¹⁶

In the postwar debate, the questions arose in the extraordinary political context following totalitarian rule. Yet, the conclusions abstract from the context and generalize as if describing essential, universal attributes of the rule of law, failing to recognize how the problem is particular to the transitional context. Resituating the problem should illuminate our understanding of the rule of law. I now turn from the postwar debate to more contemporary instances of political change illustrating law's transformative potential. Those instances exemplify the tension between idealized conceptions of the rule of law and the contingencies of the extraordinary political context. Struggling with the dilemma of how to adhere to some commitment to the rule of law in such periods leads to alternative constructions that mediate conceptions of transitional rule of law.

Shifting Visions of Legality: Post-Communist Transitions

The "velvet" revolutions' rough underside has been revealed in courts of law, where debates about the content of the political transformation continue to simmer. A number of controversies over successor criminal justice exemplify the transitional rule-of-law dilemma. Here, I focus on two: In the first case, a Hungarian law allowed prosecutions for offenses related to the brutal Soviet suppression of the country's uprising in 1956;¹⁷ in the other, unified Germany prosecuted border guards for shooting civilians who were attempting to make unlawful border crossings along the Berlin Wall. The cases involve weighty symbols of freedom and repression: 1956 is considered the founding year of Hungary's revolution, whereas the Berlin Wall and its collapse are the region's central symbols of Soviet domination and demise. The cases illustrate the dilemmas implied in the attempt to effect substantial political change through and within the law. Although the two cases seemingly suggest diverging resolutions of the rule-of-law dilemma, they also reveal common understandings.

After the political changes of 1991, Hungary's Parliament passed a law permitting the prosecution of crimes committed by the predecessor regime in putting down the popular 1956 uprising. Despite the passage of time since these crimes were committed, the law would have lifted statutes of limitations for treason and other serious crimes,¹⁸ effectively reviving these offenses. Similar legislation reviving the time bars elapsing during the Communist regime was also enacted elsewhere in the region, as in the Czech Republic.¹⁹ The problem of statute-of-limitations laws commonly arises after long occupations when societies attempt to prosecute crimes committed under predecessor regimes. Thus, in the postwar transitions in Western Europe, the rule-of-law problem posed by the passing of statutes of limitations did not arise in the immediate postwar period but only later in the 1960s.²⁰ The controversy over the statute-of-limitations law raised a broader question: To what extent is a successor regime bound by a prior regime's law?

Hungary's Constitutional Court described the dilemma in terms of familiar antinomies: the rule of law understood as predictability versus the rule of law understood as substantive justice. So framed, the choices seemed irreconcilable; yet, ultimately the statute-of-limitations law and the proposed 1956-era prosecutions were held unconstitutional. The principle of the rule of law required prospectivity in lawmaking, even if it meant the worst criminal offenses of the prior regime would go unpunished. The opinion begins with a statement of the court's characterization of the dilemma it confronted: "The Constitutional Court is the repository of the paradox of the 'revolution of the rule of law.'" ²¹ Why a paradox? "Rule of law," the court said, means "predictability and foreseeability."²² "From the principle of predictability and foreseeability, the criminal law's prohibition of the use of retroactive legislation, especially *ex post facto* . . . directly follows. . . . Only by following the formalized legal procedure can there be valid law."²³

The dominant vision of the rule of law for the Constitutional Court was "security."²⁴ "Certainty of the law demands . . . the protection of rights previously conferred." The proposed law, which would have opened the way to ancien régime prosecutions, was classically *ex post* and, as such, threatened individual rights to repose. In its discussion of the meaning of security, the court analogized the right of repose at issue to personal property rights. Although protection of personal property rights could generally be overridden by competing state interests, such interests, the court maintained, ought not override an individual's criminal process rights to repose. By protecting the rule-of-law value of "security" from invasion by the state, the Constitutional Court sent an important message that property rights would be protected in the transition.

In ordinary times, the idea of the rule of law as security in the protection of individual rights is frequently considered to be a threshold, minimal understanding of the rule of law basic to liberal democracy. Yet, in the economic and legal transitions of East and Central Europe, this understanding represented a profound transformation. If the totalitarian legal system abolished or ignored the line between the individual and the state, the line drawn by Hungary's Constitutional Court posited a new constraint on the state: an individual right of security. Insistence on the protection of individual rights, said to be previously acquired, was constructed in the transition. This ruling sent an important message that the new regime would be more liberal than its predecessor.

Compare a second case. In its second round of successor cases in this century, Germany's judiciary once again confronted the transitional rule-of-law dilemma when East German border guards were put on trial for Berlin Wall shootings that occurred before Unification. The question before the court was whether to recognize defenses that relied on the predecessor regime's law. The Berlin trial court framed the dilemma in terms of the tension between "formal law" and "justice" and rejected former East German law because "not everything is right that is formally right." Comparing the Communist laws to those of the Nazi period, the court relied on postwar precedents holding that evil legislation lacked the status of law: "Especially the time of the National Socialist regime in Germany taught that . . . in extreme cases

the opportunity must be given for one to value the principle of material justice more highly than the principle of legal certainty." Procedurally, legal rights were distinct from moral rights. Characterized as "extreme cases," the border guards cases were analogized to those of the postwar collaborators and accordingly guided by the same adjudicative principle.

The transitional courts of East and Central Europe, despite facing different legal issues, confront a problem common to successor regimes: What are the rule-of-law implications of prosecuting for actions that were "legal" under the prior regime? As the earlier postwar debate suggests, this question raises (at least) two questions, one about the legitimacy of law in both predecessor and successor periods and another about the relation between the two. The juxtaposition is always between the rule of law as settled norms versus the rule of law as transformative. In the contemporary cases, as in the postwar debate, what emerges are new transitional understandings of the rule of law. Considered together, the two decisions present an interesting puzzle. For the Berlin court, the controlling rule-of-law value was what was "morally" right, whereas for the Hungarian court, the controlling rule-of-law value was protection of preexisting "legal" rights. In one case, the rule of law requires security understood as prospectivity, with the consequence of forbearance in the criminal law. In the other view, justice is understood as equal enforcement of the law. Can the two approaches be reconciled?

Probing the language of the successor cases exposes a conception of the rule of law peculiar to the transitional moment. Judicial rhetoric conceptualizes the problem in terms of multiple competing rule-of-law values in seemingly intractable conflict: one value deemed relative, and the other essential. The transitional judiciaries in these cases characterized the dilemma they confronted as involving a balancing of two senses of the rule of law: the rule of law as it is ordinarily understood versus a transformative understanding. Which of these values will dominate the transitional balance will depend on distinctive historical and political legacies. Accordingly, after totalitarianism, the dominant vision of the rule of law in Hungary is to draw a bright line of positive security on which individuals can rely and which is beyond the reach of state power. In unified Germany, the transitional rule of law is defined within a preexisting jurisprudence, which continues to respond to legality under Fascism. When the German judiciary ruled that the border guards cases constituted "extreme cases" it analogized Communist rule to that of National Socialism. In this way, the legal response to World War II injustice continued to guide contemporary adjudication in the transitions out of Communist rule. As in the postwar period, the post-Communist Berlin court invoked overriding principles of natural law. After Nazi rule, under which a repressive security apparatus functioned outside the law and the legal machinery was itself used to persecute, the dominant sense of the rule of law was of equal protection in the administration of justice. These are transformative understandings.

Despite idealist theorizing to the contrary, the transitional precedents suggest that no one rule-of-law value is essential in the movement toward construction of a more liberal political system. Transcendent notions of rule-of-

law values in transitional societies are highly contingent, depending, in part, on the states' distinctive political and legal legacies and, in particular, on the role of law in the predecessor regime. There has been a lively scholarly debate on this question and recent comparative work concerning the role of adjudication under oppressive rule in Germany under Nazi control, Latin America under military rule, and South Africa under apartheid rule. Despite substantial theorizing about the potential role of various adjudicative principles under tyrannical rule, to the extent that there has been empirical study of the judiciary's role in repressive periods, neither positivist nor natural law adjudicative principles correlate with greater rule of law in such periods. In varying contexts, scholars come to disparate conclusions, suggesting that variations in interpretive strategies, whether of positivist or natural law, do not in and of themselves explain the judiciary's role under repressive rule. Thus, some claim Nazi judges' free-ranging principle of interpretation led to support of repressive rule, while others emphasize the positivist jurisprudence understood as the separation of law and morality.²⁵ The meaning of the rule of law is highly contingent in relation to the social meaning of injustice in the region and its response.

This transitional perspective on the rule of law offered here sheds light as well on the puzzling gulf between American and Continental philosophers over the putative associations of various legal philosophies with repression or, conversely, with liberal rule. That positivism is associated with repression and with liberalism—on opposite sides of the ocean—clarifies its contingency as a transitional response to its use by evil judges. Thus, in the United States, positivism is frequently associated with the jurisprudence that upheld the slavery regime, whereas in Germany, it is not positivism but the natural law interpretation that is associated with the Reich judiciary.²⁶ Whereas the conventional understanding of the conception of tyranny is the lack of the rule of law as arbitrariness, the transitional rule of law in the modern cases illuminates a distinctive normative response to contemporary tyranny. From its inception in the ancient understanding termed “isonomy,” the ideal of the rule of law emerges in response to tyranny. In ancient times, isonomy is forged in response to tyranny understood as arbitrary and partial enforcement of the law. Because prior tyranny is associated with lawmaking that is both arbitrary and unequal, the ancient understanding of the rule of law comprehended both values of security in the law and equal enforceability of the law. As in ancient times, the contemporary ideal of the rule of law is forged in the context of the move from repressive to more liberalizing rule.²⁷ Where persecution is systematically perpetuated under legal imprimatur, where tyranny is systematic persecution,²⁸ the transitional legal response is the attempt to undo these abuses under the law.

Transitional Constructions of Legality

The discussion above leads to a more differentiated understanding of the rule of law, and it illuminates an understanding of legality that is distinctly transi-