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BETWEEN PAST AND FUTURE: RECENT WORK ON TRANSITIONAL JUSTICE

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A. James McAdams, ed., ***Transitional Justice and the Rule of Law in New Democracies***. Notre Dame: University of Notre Dame Press, 1997. 306 pp.

Martha Minow, ***Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence***. Boston: Beacon Press, 1998. 214 pp.

Roy L. Brooks, ed., ***When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice***. New York: New York University Press, 1999. 536 pp.

Ruti G. Teitel, ***Transitional Justice***. Oxford: Oxford University Press, 2000. 304 pp.

Transitional justice is an emerging field in political theory and related disciplines that examines the way that societies overcome a history of human rights abuses and establish a sound foundation for democracy and the rule of law. The field has seen a burst of scholarly activity in the last ten years or so, in the wake of the transitions to democracy from authoritarian regimes in Latin America and elsewhere, from communist regimes in Eastern Europe and the former Soviet Union, and from the racist regime in South Africa. Transitional justice concerns a wide range of vexing moral and political issues involved in reckoning with the past so that the new regime may be both stable and just. Some of these issues do not usually arise under a stable democratic regime, so Western scholars for a long time ignored them. Now,

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however, there is a veritable industry growing up around transitional justice – a development that should be welcomed by those either drawn by the intrinsic interest engendered by the topic, or concerned with the establishment of stable and relatively just political regimes around the world (or both).

Each of the four books under review makes a significant contribution to our understanding of transitional justice, though each has a very different approach from the others. The McAdams volume contains eight case studies of the role of the courts and the law in regime transitions, focusing on three Latin American cases (Bolivia, Argentina, and Chile), three East European cases (Hungary, Poland, and East Germany), as well as Greece and South Africa. Martha Minow's slim volume contains many fresh insights not only into transition from an unjust regime but also into overcoming mass violence in wartime, such as occurred in the former Yugoslavia and Rwanda. Brooks' volume focuses on issues of reparations and apology, again for acts both during wartime and under an ongoing political regime, and contains a variety of materials – scholarly articles, popular articles, government documents, memoirs – on a number of cases, some arising out of World War II, others out of the history of the United States and South Africa. Teitel's volume is probably the most wide-ranging and complete work on transitional justice by a single author to date, synthesizing and engaging research from a number of disciplines, and drawing on an impressive array of cases of transitional justice. Taken together, these books provide a good sense of the state of scholarship on transitional justice, and the terms of debate in the field.

Perhaps no topic in political theory is as fraught with difficulties, tensions, and dilemmas as transitional justice. Much of the tension in the field is a result of the fact that transitional justice has both a backward-looking and a forward-looking dimension, and that the demands of each dimension often seem to conflict with those of the other. In its backward-looking aspect, transitional justice requires a reckoning with the past that involves ascertaining what occurred under the previous regime, bringing the perpetrators to justice, and acknowledging and compensating victims, among other things. If these are not done, the truth remains uncertain, the crimes go unpunished, and the victims' sense of resentment is unmitigated. On the other hand, backward-looking measures can too easily undermine the construction of a new political order of which all citizens feel a part. Attention to the past may not only ameliorate resentment but can also exacerbate it. Attempts to do justice regarding past wrongs can too easily become "victor's justice" – a perversion of justice in which legal forms and procedures mask revenge. So one of the main questions for transitional justice is how to balance the demands of the backward- and forward-looking dimensions, to achieve the two main goals of rectifying past wrongs while establishing a new regime in which they will not be repeated. It is often thought that these two goals are compatible, but in some situations this may be an optimistic assessment.

A number of strategies for pursuing both dimensions of transitional justice have become familiar: prosecutions of those involved in past abuses, truth commissions

for establishing a record of what actually occurred, reparations for victims, and "lustration" – barring officials of the previous regime from holding positions of power in the new one. Each of these can play an important role in both the backward- and forward-looking aspect of transitional justice. In some cases they are used in conjunction with one another, while elsewhere they are seen as alternatives to each other. This review will focus on these approaches, their merits and demerits, and the contribution that each book under review makes to our understanding of them. It will also briefly address the issue of the extent to which universal principles can be applied to all cases of transitional justice, or whether, alternatively, each case must be addressed in light of its own unique circumstances.

Prosecution

The tensions in transitional justice are nowhere better exemplified than by the issue of whether and how to prosecute the perpetrators of human rights violations from a previous regime. On the one hand, the use of courts and the law to deal with such acts is usually intended to mark a decisive shift away from state oppression to a genuine commitment to the rule of law. As McAdams states, "Assuming they are properly conducted, these proceedings should provide tangible evidence of the guiding principles – equality, fairness, and the rule of law – that are meant to define the new order of things" (McAdams x). But the commitment to make this shift is threatened by the difficulties involved in such prosecutions. "[N]ew democracies often find themselves on uncertain jurisprudential ground" (McAdams xi) because it is unclear whether it is possible to apply the rule of law in transitional circumstances. As Teitel asks, "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" (Teitel 11)?

Many of the difficulties involved in transitional prosecutions were present in the trials that serve as a precedent for recent prosecutions, the post-World War II trials in Nuremberg and Tokyo (Teitel 31–36). Minow identifies three problems that have plagued both the post-World War II trials and more recent prosecutions during regime transition. The first is retroactivity, the fact that individuals are tried and convicted for acts that were not specifically defined as crimes when the acts were committed, and they are tried according to norms and principles that were also not previously articulated. While certainly there existed international norms and treaties before World War II, and international law has developed a great deal since then, it remains the case that these were and are highly unspecific and indeterminate by the standards of domestic criminal law. Issues such as statutes of limitations, proper investigative and court procedures, rules of evidence, etc., are simply not settled by established international law. This means that at Nuremberg and Tokyo, the rules and procedures had to be formulated

while the process was proceeding, in violation of some of the basic norms of the rule of law. And fifty years of the development of international law has not eliminated this difficulty. As Teitel notes, "[i]nternational penal law remains in its infancy: There is still no international criminal code" (Teitel 32). This problem plagues recent trials, such as the International Tribunal for the Former Yugoslavia, which, according to Minow, "involves the application of norms that were not known to him [the defendant] or to anyone else when he participated in the massacre... There is a certain quality of 'making it up'" as the prosecution goes along (Minow 37). Recent transitions, in response to this difficulty, have tended to rely more on domestic law than international law, but this creates problems of its own. For example, in some cases the abuses that occurred were legal under the old regime. In this circumstance, which course is more compatible with the rule of law, prosecuting despite the shortcomings of international and domestic law, or allowing the violations to go unpunished (Teitel 14)?

The second difficulty that Minow identifies is politicization of the law, the use of the law, courts, and other legal institutions to achieve political ends. In ordinary times in well-established liberal democracies, the law is supposed to be separate from politics. Courts are independent of the political institutions, and this independence is essential to the impartial application of the law. In transitional times, however, it is often quite explicit that legal institutions and procedures are used to achieve political ends. Prosecutions are conducted not only to punish the guilty, but also to close one chapter in the country's history and open a new one. The political motivation behind transitional prosecutions often explains the willingness of participants to run roughshod over the conventional principles of the rule of law. In such cases, "what are so palpably political uses of legal forms" (Minow 37) threaten to turn the pursuit of justice into mere "victor's justice", or what Teitel calls "political justice" or "successor justice" (Teitel 30, 31).

The third problem with these prosecutions is their selectivity (Minow, 40–47). In cases of widespread violence or systematic oppression, prosecution is almost inevitably selective, and that selectivity threatens to undermine the fairness of the prosecutions that are undertaken. Still, some prosecutions are often thought to be better than none, for they affirm the principle of individual responsibility that was established at Nuremberg. As Teitel explains, "In eliminating the 'act of state' and 'superior orders' defenses, the Nuremberg Principles pierce the veil of diffused responsibility characterizing the wrongdoing perpetrated under totalitarian regimes" (Teitel 34). Yet selectivity may undermine any benefit from affirming these principles. It also raises other questions, for example, who to prosecute, and for which acts? It is often easiest to prosecute those at the bottom of the hierarchy, those who actually carried out the acts in question, but those who issue the orders are often thought to be more proportionally responsible (Teitel 36). Furthermore, evidence of those orders is sometimes missing, so prosecution of higher officials often depends upon their very status in the hierarchy. And prosecution of ongoing repression is often difficult, so that, for example, in the former Communist states,

prosecutions have focused either on acts committed at the very beginning of the regime or on the last-ditch efforts to save it (Teitel 42). There is something unsatisfactory about prosecuting these acts but not the ongoing violations that maintained the regime over time.

These difficulties lead Minow and Teitel to be quite ambivalent about the use of prosecutions as a tool of transition. On Minow's account, "If the goal to be served is establishing consensus and memorializing controversial, complex events, trials are not ideal" (Minow 47). Teitel expresses a similar sentiment, and defends the discretion not to prosecute on rule-of-law grounds: "As becomes clear, even in ordinary times, the rule of law is not predicated on a fully enforced criminal justice, and the reasons for forbearance are often, as in transitional times, political" (Teitel 55).

This attitude toward trials stands in stark contrast to the idea that there is always an obligation to prosecute past human rights violations. This is the position taken by Juan E. Méndez in McAdams' volume, who shows no signs of the others' ambivalence (McAdams chap. 1). His chapter opens in the following way: "Redressing the wrongs committed through human rights violations is not only a legal obligation and a moral imperative imposed on governments. It also makes good political sense in the transition from dictatorship to democracy" (McAdams 1). Méndez asserts that, as a legal and moral matter, there is little of the discretion that Teitel defends as a normal part of stable and transitional times. Méndez argues that the affirmative obligation to punish past human rights violations is "an emerging principle of international law" and goes on to argue that "[b]lanket amnesties or pardons that prevent the process of pursuing justice from taking place at all are quite simply an abuse of majoritarianism, even if arrived at in full, open, and democratic debate" (McAdams 7). He is highly critical of those negotiated transitions in which the officials of the previous regime insist on amnesty in exchange for relinquishing power, and where these officials often retain enough power under the new regime to threaten instability if prosecutions are pursued. "Yielding to these pressures only amounts to letting democracy be blackmailed and starts the transitional period on shaky ground" (McAdams 9). Still, Méndez acknowledges a number of practical constraints on prosecution that may render it undesirable in certain circumstances, such as where it would be overly selective, where adequate evidence is lacking, and where the process could not be completed within a reasonable length of time (McAdams 17–18).

The rest of the McAdams volume is composed mainly of extremely useful case studies of transitional justice, which in this book is defined somewhat narrowly as the use of law and the courts in transitional periods. The Latin American cases reflect a range of responses which were largely a function of the circumstances prevailing in each country. René Antonio Mayorga (McAdams chap. 3) portrays Bolivia's transition as a success, because "[i]t was the first successful attempt in Latin America by a democratic system to 'settle accounts' with a legacy of

military dictatorship... [and] the only country in Latin America where a former dictator and his collaborators are currently imprisoned for their crimes" (McAdams 83, 86). Despite the drawn-out process, in which he says "the 'trial of the century' threatened to become a 'century of trial'" (McAdams 65), the "transition through rupture" made possible the successful prosecution of the former dictators. The outcome in Argentina was somewhat less satisfactory (McAdams chap. 4). The authors of this chapter, Carlos H. Acuña and Catalina Smulovitz, emphasize the positive in declaring that Argentina "remains the only Latin American case in which the military leadership has publicly recognized the illegitimate character of the repression and systematic violations carried out during the years of dictatorship" (McAdams 93). But the fact remains that, after many officials were tried, convicted, and sentenced to long prison terms, President Menem felt sufficient pressure from the military to pardon all those accused and convicted. How this constitutes "a victory" for human rights and democracy (McAdams, 118–19) is not clear, but the chapter is certainly informative about the process that brought about this result. The Chilean case is even less satisfying (McAdams, chap. 5). This was a case of negotiated transition in which amnesty laws protected the officials of the former regime. As is well known, however, Pinochet spent many months in Britain under threat of prosecution in Spain before returning to Chile, where his immunity from prosecution has recently been stripped. Clearly, as the author of this chapter, Jorge Correa Sutil, notes, "this transition is far from over" (McAdams, 148). Sutil's chapter is an excellent account of the process up to 1997, despite his portrayal of some issues as being trade-offs between "morality and prudence" where they would be better understood as tensions among the competing claims of morality itself.

The East European cases yield similarly mixed results. The chapter by Gábor Halmai and Kim Lane Scheppele portrays Hungary's transition as a success story, particularly with respect to the role of the newly created Constitutional Court (McAdams, chap. 6). The Hungarian parliament did not try to criminalize past acts that were legal under the old order, but it did change the statutes of limitations to open the way to some prosecutions, and this was struck down by the court as unconstitutional. Parliament then rewrote some of the legislation, relying on international law, which was then upheld in part and struck down in part. Throughout all of this, the court's public support was substantial, despite the fact that it struck down about one in three transitional measures. Its role ensured that the rule of law would play an important part in Hungary's transition. The case of Poland is not nearly as encouraging, and the analysis offered by Andrzej S. Walicki is not nearly as easy to sympathize with (McAdams, chap. 7). According to Walicki, those who desired a "clean break" from Poland's communist past were either "political primitives for whom evil had to be personified", "moral fundamentalists for whom any genuine compromise with the 'communists' was unacceptable in principle", or "ambitious and power-hungry politicians" (McAdams, 190–91). The chapter goes into great detail on the politicized nature

of Poland's transition, and the attempt by competing politicians to use transitional measures to their political advantage. But the chapter is marred by a tone that minimizes the abuses that occurred under the previous regime, that dismisses people's desire for justice as "their private problem", and that implausibly cites philosopher John Rawls in support of this position (McAdams, 229). Still, Walicki is no doubt right that Poland's transition "is really a very sad story, and there is still no good solution in view" (McAdams, 228).

The usefulness of these case studies lies in part in their rich empirical detail, which can serve as corrective to some misunderstandings that can arise out of more theoretically-driven analysis. One can see this, for example, by juxtaposing the chapter on East Germany by A. James McAdams (McAdams, chap. 8) with the analysis offered by Ruti Teitel on the same case. Teitel contrasts the East German border guard cases with Hungary, emphasizing the latter's adherence to traditional standards of the rule of law, especially in its attention to ex post facto concerns. In the East German cases, she says, ex post facto issues were avoided when "the post-communist Berlin court invoked overriding principles of natural law" (Teitel, 17). This reliance on "higher law", she says, shows that "the meaning of the rule of law is highly contingent" (Teitel, 18). The court, Teitel goes on to argue, "elevated what was morally right over the political" when it "rejected the border guards' defenses grounded on GDR law" (Teitel, 21). She also calls the border guard trials "lopsided" because they involved low-level actors, while leaders such as Erich Honecker were not tried (Teitel, 45). But McAdams shows that this analysis entirely misconstrues the East German case. It is true that in the first border guard trial, the judge relied on "higher law" to reach his verdict, raising concerns about ex post facto punishment. But in the second border guard case, which Teitel does not cite, this approach was rejected in favor of relying on GDR law that was in force at the time of the alleged offenses. In this case, the guards' defense was rejected, but it was rejected not based on higher law, but on GDR law. This latter decision was the precedent invoked in subsequent trials, so the East German case is not the stark contrast with Hungary that Teitel portrays it to be. Furthermore, Honecker was not tried because of his poor health, which upholds rather than violates ordinary standards of the rule of law. So while Teitel argues that the meaning of the rule of law is "highly contingent", this suggestion is not borne out by the East German case. In fact, no liberal order – whether emerging or established – can ignore ex post facto issues. Far from being a case of unbridled prosecution, some in Germany complained that "[w]e expected justice but we got the *Rechtsstaat* instead" (McAdams, 240).

Truth Commissions

Given the difficulties involved in using criminal prosecution in the service of transitional justice, it is not surprising that many observers come to the conclusion

that trials ought to be supplemented with, if not replaced by, other measures, and chief among these is the truth commission. The truth commission that is best known, and that is discussed in all of the books under consideration here, is the South African Truth and Reconciliation Commission (SATRC). But as Minow and Teitel note, the SATRC was not the first of its kind, and it was able to build upon the experience of previous commissions elsewhere. Especially in Latin America – such as in Argentina, Chile, El Salvador, Honduras, Haiti, and Guatemala – truth commissions had been established to document the fate of the "disappeared" and other facts about the authoritarian regimes. Perhaps the most interesting Latin American "truth commission" was an effort by private lawyers in Brazil to document the acts of the authoritarian regime in that country. This was achieved over the course of four years by legally "checking out" individual records, photocopying them, and compiling a twelve-volume report, *Brazil: Nunca Mais*, documenting the systematic murder and torture that had taken place (Minow, 54; Teitel, 80–81). A similar private effort was undertaken in Uruguay, with the final report also titled *Nunca Más*, never again.

Truth commissions can be seen as either alternatives or supplements to criminal trials. One role of a public trial, especially a high-profile trial in a transitional period, is to establish a public record of what occurred. However, it is important that this role be a subordinate one, not overshadowing the main function, which should be establishing justice in a particular case. If the former does overshadow the latter, the danger is that it becomes a "political trial" in violation of traditional legal norms (Teitel, 75–76). By the same token, truth commissions may function something like a trial, as "[e]xposure of perpetrators' offenses itself is an informal form of punishment, of 'shaming'" (Teitel, 90). Ideally, perhaps, each measure, trials and truth commissions, would be employed for what they do best: trials to establish individual guilt, and commissions to establish the full historical record. The latter are not bound by the rules of evidence and procedure found in a trial, and a trial can focus on the case at hand without regard to its wider significance. Nevertheless, inevitably we find trials and truth commissions serving similar goals, especially where only one of these means is pursued. In cases where immunity has been granted, for example, only the truth commission avenue may be available.

In this context, what is significant about the South African TRC is its conditional grant of immunity. Perpetrators under the apartheid regime could apply for amnesty, and would be granted it if they fully disclosed their acts to the TRC. Many, such as the family of Steven Biko, objected to this conditional amnesty, arguing that it prevented victims and their families from pursuing justice (Minow, 56). Their position finds some support in the analysis of John Dugard (McAdams, chap. 9). Dugard argues that the TRC process "is out of line with international law, for it envisages the granting of amnesty to persons guilty of serious crimes under international law" (McAdams, 279).

The SATRC is defended by Minow, who, as noted above, is keenly aware of the limits of trials as a means to regime transition. The SATRC is a far better means to establishing the truth, especially since trials often provide few incentives for perpetrators to come forward, while the possibility of amnesty did provide them with such incentive. The SATRC also gives a greater forum for victims to tell their story, while in trials victims often have little or no role. However, Minow's enthusiastic endorsement of the TRC is couched in terms that will make some uncomfortable. Minow conceives of the TRC as fostering not so much justice as healing, seemingly rejecting a juridical perspective in favor of a therapeutic one. "The language of healing casts the consequences of collective violence in terms of trauma; the paradigm is health, rather than justice" (Minow, 63). Still, even if one does not wish to endorse this "paradigm shift", it is easy to agree with Minow that truth commissions are best seen, not as second-best alternatives to trials during transitional periods, but as superior to them in achieving many of the goals of transition (Minow, 88).

Those looking for some more detailed information about the SATRC would do well to consult the section on South Africa in the Brooks volume (Brooks, Part 8). Like the other sections in the book, it contains selections from the writings and testimony of those who participated in the abuses – both victims and perpetrators – as well as analysis of the forms of redress that have been contemplated or undertaken. One can read, for example, a brief but chilling excerpt from the testimony before the SATRC of Jeffrey T. Benzien, describing "the wet bag method" of torture that he employed as a South African policeman (Brooks, chap. 76). His tone is entirely unapologetic, but he is happy to change with the political circumstances. "[W]e are all now on the same side... It is now reconciliation, forgive and forget at its best" (Brooks, 458). One can also read the testimony of Bassie Mkhumbuzi, a member of the African People's Liberation Army, who participated in the bombing of a white church while mass was taking place, killing eleven and injuring more than 50 (Brooks, chap. 77). Most of the rest of the section is composed of more academic reflections and arguments about the merits of South Africa's approach to transitional justice. Taken together, the selections offer the reader a good sense of the issues involved in the South African case, mostly from the words of South Africans themselves.

Clearly, whether a truth commission can or should be part of the transition process in a given country depends a great deal on context. As Teitel points out, there is a good reason why truth commissions have been prominent in Latin American transitions but absent in East European transitions. In Latin America, much of the terror of the authoritarian regimes involved not knowing what happened to the victims. From the state there was often only silence. The situation was quite different in Eastern Europe, where part of the repression took the form of "official histories" that attempted to whitewash the past. In this context, the idea of a new, post-transition official history does not hold much attraction (Teitel, 92–93, 217).

Unfortunately, Teitel's otherwise insightful analysis of truth commissions is marred by the relativism that pervades many of her arguments. Here she suggests that "all regimes are associated with and constructed by a 'truth' regime. Changes in political regimes, accordingly, mean attendant changes in truth regimes" (Teitel, 70). This would be reasonable if the word "truth" in this analysis stayed within scare quotes, indicating something like "what passes for truth". But this does not seem to be what Teitel intends. Rather, she insists on "truth's contingency, [which] is dramatically exemplified in the transitional context" (Teitel, 72). If this were the case, it is unclear how a post-transition regime could "[e]stablish that victims were unarmed civilians, and not combatants" (Teitel, 84), for on Teitel's account of truth's contingency, which of these is true depends on the regime in power. Victims were not civilians in any real sense, but because the new truth regime says so. Ultimately, this notion makes a mockery of truth commissions, for it portrays them, not as trying to find out what actually happened, but as simply imposing a new version of "truth" with no more or less validity than the old one.

While truth may not be contingent in the way that Teitel suggests, she is surely right that it will never be uncontested. Here her warning on the limits of truth commissions as a means of establishing, once and for all, the truth about the past, should be heeded. "[T]he impetus to fix the past... is a futile attempt to stop the state's historical accounting, to exhaust its politics and its potential for progress" (Teitel, 117). Or, as South African satirist Pieter-Dirk Uys put it, "Remember, the future is certain. It is the past that's unpredictable" (Minow, 86).

Reparations

After periods of massive human rights abuses, the issue of reparations to the victims is inevitably raised. But reparation, like prosecution and truth commissions, involves a number of thorny questions, such as: who is entitled to reparations, especially given the fact that those most victimized often are no longer alive to receive them? For those who can still collect, how do we distinguish between victims and nonvictims (or between those victimized more and those less)? If everyone is a victim, how can anyone be compensated? How much reparation is due, and can it ever be adequate compensation? Or should reparations come in nonmonetary form? Finally, does the focus on reparation place too much emphasis on transitional justice's backward-looking aspect, and thereby neglect or even undermine its forward-looking goals?

In the introductory essay to his volume, titled "The Age of Apology", Brooks makes some distinctions that are no doubt essential in thinking about reparations (Brooks, chap. 1). He first distinguishes between reparations and settlements, where only the former involve an admission of wrongdoing, whereas the latter involve payment with no such admission. Both reparations and settlements can be

monetary or nonmonetary, and examples of the latter include amnesty, affirmative action, and educational programs. Finally, payments and other measures can be compensatory – directed to individual victims and intended to return them to a status quo ante – or they can be rehabilitative, directed to the whole community and intended to aid group empowerment (Brooks, 8–9). Though Brooks does not say so, it seems that an apology in itself can be thought of as a form of reparation, that is, nonmonetary rehabilitative reparation. Other measures that can be included in this category are monuments, national holidays and days of remembrance, and other symbolic measures meant to signify a rejection of the injustices of the past.

This broader understanding of reparations is important because, as Minow emphasizes, seen as purely individual compensation for actual losses, reparations are almost inevitably inadequate. In most cases reparations are likely to be "token gestures" and "[a]s statements of actual value, they trivialize harms" (Minow, 93). Despite being mainly symbolic, reparations can play an important role in reconciliation. "Yet even inadequate monetary payments or an apology without any reparations can afford... opportunities for a sense of recognition and renewal for survivors, observers, and offenders" (Minow, 93). Minow is impressed by the paradoxes involved in reparations. They attempt to compensate what cannot be compensated, and in doing so they "cross[] over differing lexicons of value", (Minow, 104) making the incommensurable somehow commensurable. They cannot undo what has been done, and yet somehow they do (Minow, 114). For Minow, reparations "provide a specific, narrow invitation for victims and survivors to walk between vengeance and forgiveness" (Minow, 106).

As with prosecutions, the main precedents for reparations are provided by the post-World War II experience. "Out of World War II's unconditional surrender and the ashes of the camps arose a reparatory project that still remains the most sweeping in history, totaling in the tens of billions of dollars in the last half century" (Teitel, 122). Germany's payments to Jewish victims and to the state of Israel "were not contemplated by the international law of the time, nor were there precedents for such payments" (Teitel, 123). The German payments to Israel were unlike previous war reparations, and "implied adopting the fiction that Germany and Israel were 'belligerent' states" even though Israel had not existed at the time of the war (Teitel, 123). This relaxing of the conditions under which reparations are contemplated has transformed them from payments due victors from the vanquished after war to domestic obligations as well. "The newly developing obligations under the law of war regarding reparations to abused victims of other states led to the national obligations to compensate citizens for violations" (Teitel, 123). Hence we arrive at "the transitional reparatory obligations for past state wrongs assumed by successor regimes" (Teitel, 124).

The Brooks volume provides an array of materials pertaining to three reparatory issues that emerged out of World War II: German reparations for Nazi crimes (Brooks, Part 2); Japanese payments to Asian "comfort women" who were used as sex slaves for the Japanese Imperial Army (with some discussion of the

Rape of Nanking) (Brooks, Part 3); and the payments by the American government to its citizens and residents of Japanese descent who were interned in camps for most of World War II (Brooks, Part 4). Each of these sections contain the same variety of documents found in the other sections, from personal testimony to government documents and academic analyses. Some of the selections reflect the difficulties of reparations discussed above. For example, in his discussion of German reparations to Jews, Hubert Kim argues that the payments have been inadequate and reflect poorly on German sincerity about compensating its victims, and yet he nearly admits that this is probably necessarily the case, that no amount of compensation would really compensate (Brooks, chap. 10). "In the end, one wonders whether meaningful redress for all deserving victims will ever be made, or if Germany has truly atoned for its past sins. Perhaps full redress for atrocities such as those committed by the Nazis is an impossible task" (Brooks, 80). Indeed, German reparations are a real success story, at least if compared to other attempts to recover compensation. The Asian comfort women have been frustrated by the Japanese government's unwillingness to fully acknowledge its responsibilities and to compensate its victims. They consider the apology from the Japanese Prime Minister inadequate because it involved no act of parliament itself. Similarly, the "Asian Women's Fund" established to pay compensation is inadequate because it is privately funded, and hence does not reflect the responsibility of the Japanese government. The case raises important questions about who may apologize and who should pay compensation, and the answers to these questions carry substantial symbolic weight. The U.S. payments to Japanese Americans who were interned in camps can be seen as a success, but the twenty thousand dollars that surviving victims received nearly fifty years after their confinement is surely too little too late, if considered as full compensation for the actual losses that the internment entailed.

In the recent regime transitions, the issue of reparations has almost always been raised. In Latin America, the Inter-American Court of Human Rights held that successor governments have a positive obligation to compensate victims of previous regimes (Teitel, 125). In the case of Chile, this meant not only actual payments but also "moral reparations" which were recommended by Chile's Truth and Reconciliation Commission "to publicly restore the good name of those who perished from the stigma of having been falsely accused enemies of the state" (Teitel, 126). As Teitel shows, the issue of reparations is more complex in post-communist societies. There is first the issue of how far back into history the societies should look in determining who is entitled to compensation. Choosing a baseline, a status quo ante, necessarily involves choosing among victims. Furthermore, as both Václav Havel and Jon Elster have suggested, if everyone is a victim, how can compensation be paid only to some (Teitel, 132)? If victimization was (nearly) universal, and compensation cannot be, does this imply that no one should be compensated? Teitel rightly resists this line of reasoning, arguing that even under these circumstances reparations can be justly applied, as long as

similar cases are treated similarly and some proportionality is observed. Again, the reparations will not fully compensate for actual harms, but "in working democracies doing something ameliorative, even if it is partial, is an accepted feature of corrective projects" (Teitel, 132).

While reparations always have both backward- and forward-looking dimensions, this is especially the case in Eastern Europe and the former Soviet Union. That is, reparations always involve compensation for past crimes, but they also seek to mark a transition to an era in which such crimes will no longer be committed. In post-communist societies, there is the additional forward-looking objective of establishing a capitalist economy, and reparations have often been used to foster this goal. Hence, property that was confiscated under the previous regime is returned to its original owners or their heirs, both to compensate them for the seizure and as a means to privatize property. "In this way, reparatory principles do the work of transition to a market economy" (Teitel, 131). Unfortunately, this too involves picking among victims. In cases where ordinary citizens have taken up residence in apartments or homes that had been seized, returning the property to its original owners arguably involves victimizing the current occupants by depriving them of the only home that they have known for years or even decades.

The United States clearly has unaddressed (or poorly addressed) reparations issues of its own. For example, the Brooks volume contains a section on the American government's attempts to settle the claims of Native Americans for compensation for the seizure of their land and for the violation of numerous treaties (Brooks, Part 5). To this end, the U.S. established the Indian Claims Commission (ICC) in 1946, which was empowered to hear the claims and pay reparations. Unfortunately, this effort is generally seen as a failure, as is demonstrated, for example, by Nell Jessup Newton's excellent chapter (Brooks, chap. 41). Newton criticizes the ICC's legalism and formalism, as well as the premise of the ICC, that monetary payments can compensate for the loss of land and all that it entails.

In the case of Native Americans, at least it can be said that the U.S. government acknowledged its debt by the very creation of the ICC, despite its inadequacies. The same cannot be said in the case of African Americans. Here too the Brooks volume is very useful, containing two sections on African Americans, one on slavery (Brooks, Part 6) and one on "Jim Crow", the period of legally enforced racial segregation in the American south from the late nineteenth through the middle of the twentieth century (Brooks, Part 7). Like the other sections in the book, these contain a wide range of documents. Perhaps most useful is the chapter by Brooks and Boris Bittker (Brooks, chap. 65). This is an updated version of the main argument advanced in Bittker's book, first published in 1973, *The Case for Black Reparations*, which is still among the best arguments for reparations to African Americans.

Though the United States is generally regarded as one of the oldest and most stable democracies in the world, these outstanding issues place matters in a different light. They suggest that, in some respects, the U.S. is better seen as a transitional democracy, or at least as a democracy with unaddressed transitional issues. Teitel raises this point in several contexts throughout her discussion, pointing to "a problem of unresolved transitional justice" in the United States (Teitel, 66). The prosecution of those who committed violence in the 1960s as part of their resistance to the Civil Rights Movement is important, even now, as an indication of the state's commitment to the goals of the movement, and is not unlike other transitional prosecutions (Teitel, 66). Hate-crime and hate-speech legislation in the U.S. is akin to similar legislation in post-fascist Europe which signals the state's commitment not to allow previously victimized groups to be terrorized by private citizens who may have preferred the previous regime (Teitel, 107-08). And current debates about an apology for slavery and affirmative action should be seen as lingering issues of reparation that are as yet unsettled (Teitel, 141-43). Teitel persuasively argues that "[l]egacies of state oppression do not simply go away of their own accord" (Teitel, 143). As long as these issues are unaddressed, and as long as they are analyzed from an ahistorical and myopic point of view, as they usually are in American political discourse, they will remain with us.

Lustration

Like the other issues of transitional justice, lustration is an area that is fraught with controversy. The term "lustration" has come to refer to the barring from public office of people who collaborated with a previous, illiberal regime. Such exclusions are often thought essential to the legitimacy and success of the new regime which, if occupied by personnel from the rejected past, would hardly constitute a decisive break from that past. But it is difficult to know just who should be barred from public office, exactly how much (and what kind of) collaboration with the previous regime should disqualify one from participation in the new. As Méndez argues, "This type of disqualification is tantamount to a penal sanction, even if it implies a lesser severity than a prison term. Such a penalty should not be applied under any circumstances without due process of law and a fair trial" (McAdams, 20). Unfortunately, holding a trial for each individual who is a candidate for lustration is often not practicable when confronted with thousands of officials of a former regime, and thousands more who may have participated in it in some capacity. Faced with this reality, the choice is sometimes between no lustration at all, which may mean that the regime change is less decisive than it otherwise might be, or lustration without perfect due process, which may undercut the new regime's claim to govern through the rule of law.

This dilemma is brought out in two cases mentioned by Minow. As she notes, there is something disturbing about the notion of the South African policeman

Jeffrey Benzien, mentioned earlier, being granted amnesty and continuing to work as a policeman in post-apartheid South Africa (Minow, 136). At the same time, however, it is difficult to codify in general laws or regulations who should be barred, and it seems all too easy to exclude those who should not be excluded. Minow cites the story told by Tina Rosenberg in her book, *The Haunted Land*, about Rudolf Zukal, who suffered greatly as a dissident under the Czech communist regime. He became a member of parliament in post-communist Czechoslovakia, and voted for a sweeping lustration law that barred from office anyone mentioned as a collaborator in the secret files of the previous regime. It turned out that an undercover agent had befriended Zukal many years before, and had reported on their conversations. On this basis, Zukal had to step down, illustrating, in Minow's words, "difficulties with a purge practice in a regime of secret spies and subtle collaborators" (Minow, 137).

But as Halmai and Scheppele point out, the Czech case is an extreme one, representing "perhaps the harshest approach" of presuming anyone listed in the secret police files to be guilty of collaboration. Though under Czech law individuals can go to court to rebut the charge, the presumption of guilt is very troubling (McAdams, 155). A more praiseworthy case is that of Hungary. Hungary's lustration law established three-judge panels to determine whether public officials had performed "lustratable" actions under the previous regime. In cases where they had, the officials were notified of this determination, and were given the choice of resigning and keeping this information secret, or staying in office and having it made public. They could also appeal the determination before any action was taken. As with other transitional laws, Hungary's Constitutional Court reviewed the measure and found it to be unconstitutionally sweeping because of, among other things, the wide range of officials to which the law applied, including university officials. The revised law applied only to public officials who take oaths of office. Hungary's lustration measures, then, involved no presumption of guilt, provided for due process, and was ultimately limited by the Constitutional Court, all in accordance with rule-of-law norms.

A contrast to the Hungarian case is provided by Poland. Under its lustration law, Poland's Minister of Internal Affairs produced a long list of "collaborators", among whom were Lech Walesa and many other active politicians, including many strong advocates of lustration (McAdams, 197). As Walicki notes, "the fact that *almost everybody* could see themselves as being personally threatened by this also had a positive side. It created a common desire to put an end to the affair" (McAdams, 197). Many people, then, had reason to be relieved when Poland's Constitutional Tribunal ruled the lustration law unconstitutional (McAdams, 198). Overall, Walicki persuasively argues, "Poland *is not* a country in which the problems of decommunization and lustration have been solved... in a completely peaceful way. On the contrary, these two issues have been very divisive through the entire postcommunist period, and they have repeatedly been used as instruments in the struggle for political power" (McAdams, 204).

Politicization is the problem that all lustration policies raise, according to Teitel, though her argument on this point is not as clear as one might wish. Teitel discusses recent attempts at lustration in the context of historical precedents, such as what occurred in post-Civil War United States and denazification efforts in post-World War II Germany. Both of these were generally failures if the goal was to bar all officials of the previous regime from participating in the new one. In the case of denazification, Teitel argues that it should have failed. The failure indicates a flaw in the policy itself, namely that it cut too deeply into the civil service, and potentially condemned the new democracy to being governed by inexperienced administrators (Teitel, 159). More fundamentally, Teitel argues that "the democratic argument" for lustration – namely, that lustration is necessary for the establishment of democracy – is "misguided and internally incoherent: For the force of the democratic justification for political disability was seemingly premised on the assumption that democracies were shaped more by their personnel than by their structures, institutions, and procedures. Yet this reasoning appears to run counter to liberal political theory" (Teitel, 160). This is an extremely odd assertion. Teitel, or anyone else, would be hard pressed to find a liberal theorist who would say that it does not matter whether state officials are committed to the basic norms of liberal democracy. There may be a range of views on the relative importance of institutions versus individuals, but surely no one would say that the values of the individuals involved do not matter for how the institutions operate. Given this, it is difficult to see how lustration contradicts liberal political theory.

A misunderstanding of liberal political theory also seems to underlie Teitel's overarching argument about lustration. She argues that lustration is highly problematic because it involves "illiberal means to liberal ends" (Teitel, 149). Yet even in established democracies individuals may be barred from public office for past behavior, such as committing a serious crime. Surely actively participating in the violation of human rights and other abuses under a previous regime constitutes a similar offense for which, in some cases, lustration is appropriate. Why, then, is lustration in transitional times problematic? Teitel's account never fully addresses this question. While she establishes that many lustration measures suffer from "procedural irregularity", "lack of prospectivity", "[a] fluid approach to individual and collective responsibility", and "explicit politicization" (Teitel, 185), Teitel fails to demonstrate that these are inherent features of lustration. Hence Teitel's argument is best understood as presenting practical difficulties confronting lustration policies, rather than principled objections to it.

Conclusion

Lying just beneath the surface of all of these issues of transitional justice is another, more fundamental one. It is the question of whether transitional justice is always constrained by universal norms that should apply to all cases, or whether

each national context is so distinct that it must find its own approach to its transition to democracy. On this issue there is a range of views, some of which are represented in the works under review.

For example, one view represented in the literature on transitional justice holds that there is a universal moral and even legal obligation for states to prosecute those guilty of human rights abuses. This view implies that, no matter what the circumstances or the local needs, no matter what may be said in favor of amnesty or the other measures that may be more conducive to transition in a particular case, such prosecutions must be pursued, and failure to do so constitutes a violation of the rights of the victims of the abuses. As discussed above, this is roughly the view defended by Juan Méndez (McAdams, chap. 1). For Méndez, "a policy of letting bygones be bygones... is morally wrong because it fails to recognize the worth and dignity of each victim" (McAdams, 3–4). Méndez acknowledges that "[v]ictims do not have a right to a specific form of penalty; they have a right to see justice done" (McAdams, 7), but it is not entirely clear what counts as justice in his view. He seems to equate justice with prosecution and punishment, ignoring other aspects of justice. He also elevates (his conception of) justice above other moral considerations. While Méndez acknowledges a number of practical barriers to prosecutions, he fails to give due weight to principled reasons for not pursuing prosecution.

If some err on the side of insisting too much on the application of universal norms to all cases of transition, others fall into the opposite error of excessive contextualism, where there are no norms whatsoever. This is essentially the position defended by Teitel, whose relativist leanings have already been noted. Teitel states that the thesis of her book is that the conception of justice that operates in transitional periods is "constructivist... contextualized and partial" (Teitel, 6). Throughout the book, Teitel insists on the contingent nature of justice, truth, and the law during regime transitions, and she states that "ideal theory is simply not the relevant yardstick by which we can judge legal action in these periods" (Teitel, 227). This is to take contextualism too far, for as both an empirical and a normative matter, ideal theories of justice are more relevant to transition than Teitel suggests. As an empirical matter, it would be false to say that the actors involved in regime transition consider the usual ideals of justice as irrelevant to their enterprise. And as a moral matter, it is incorrect to say that the norms that operate in ordinary times in liberal democracies are not relevant to transitional periods. The extent to which they apply and the way in which they are relevant may be complex matters, but to say they are simply irrelevant is to misconstrue both the empirical and the normative analysis of transitional justice.

Excessive contextualism hampers Teitel's analysis. She states that "[u]nderstanding the rule of law as socially constructed offers a principle for evaluating legality in periods of movement between dictatorships and democracies" (Teitel, 20), but she never states what this principle is. Furthermore, a principle of evaluation is precisely what her social constructionism seems not to provide –

indeed it denies the existence of such a principle. When Teitel states that "transitional resolutions appear to converge... on transcendent values informed by human rights norms capable of mediating the transitional political divide" (Teitel, 228), she gets the relations exactly backwards. Transitional resolutions do not happen to converge on common norms and values, rather it is those common norms and values that drive, to some extent at least, the various transitions. Finally, when she states that "[w]hat is fair and just in extraordinary political circumstances is determined not from an idealized archimedean point but from the transitional position itself" (Teitel, 224), Teitel again misconstrues the issue. Her analysis implies that either an archimedean point, a transcendent perspective, is possible, or each transition is entirely determined by contextual factors. This is to implausibly cast the philosophical possibilities into a dichotomy of either universal or contextual. Teitel's failure to perceive the alternatives between these poles leads her to embrace one of them, which in turn undermines much of her overall argument.

On this issue, as on so many others, Minow strikes just the right balance. Minow does not attempt to impose a comprehensive vision upon the cases she discusses, nor does she say that norms have no role to play. Her attitude emphasizes the inadequacy of all responses to past injustice, not because of a lack of applicable norms, but because of the magnitude of the crimes and the vast array of considerations that must be taken into account during periods of transition. She writes: "I do not seek precision here... Two reasons animate my resistance to tidiness. First, [is] the variety of circumstances and contexts for each nation... The second, and perhaps more crucial reason to resist any implication of exactness or closure in such matters is that *no* response can ever be adequate" (Minow, 4–5). This is quite a different attitude from both the assertion of obligations to pursue one path to transition and the position that no general considerations intrude into the transitional process. "Saying that context matters is not the end of analysis. Rather, it is the beginning" (Minow, 5). This means that we must be attuned to the particularities of context, but it also implies that context is not everything. Each democratizing nation must rely on international norms, but it must also forge its own path. As they do so, works such as those discussed here, and the experience upon which they reflect, will no doubt be essential.

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