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How “Transitions” Reshaped Human Rights: A Conceptual History of Transitional Justice

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ABSTRACT

This article clarifies the origins of the field of transitional justice and its preliminary conceptual boundaries. I argue that the field began to emerge in the late 1980s, as a consequence of new practical conditions that human rights activists faced in countries such as Argentina, where authoritarian regimes had been replaced by more democratic ones. The turn away from “naming and shaming” and toward accountability for past abuse among human rights activists was taken up at the international level, where the focus on political change as “transition to democracy” helped to legitimate those claims to justice that prioritized legal-institutional reforms and

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responses—such as punishing leaders, vetting abusive security forces, and replacing state secrecy with truth and transparency—over other claims to justice that were oriented toward social justice and redistribution. I end by discussing the many ways in which these initial conceptual boundaries have since been tested and expanded.

I. INTRODUCTION

Reflecting in 1989 on the question of how torture victims in Brazil, Uruguay, and repressive regimes around the world might find some measure of justice for their suffering, *New Yorker* writer Lawrence Weschler, with his usual eloquence, went straight to the heart of the matter. There was a “primordial moment which has desperately to be addressed—and as desperately by the torture society as by the torture victim.” Questions needed to be answered: “Who was there? Who was screaming . . .? Who, even now, will dare to hear . . .? Who will be held accountable? And who will hold them to account?”¹ But, there was a problem. “Good people,” he offered, “will disagree on how that holding to account ought to proceed in the context of real-life, often exceptionally precarious political situations.”²

Weschler had been a part of a “remarkable group of activists and scholars,” who, as he described it, convened in November 1988 to discuss how successor governments should deal with the crimes of their predecessors. The meeting, which was organized by the Aspen Institute and funded by the Ford Foundation, aimed to sort through the moral, political, and legal implications of recent trials, commissions of inquiry, purges, and other measures intended to hold previous regimes to account for systematic human rights abuses, as well as to foster a transition to democracy. “Over and over again,” Weschler wrote, “countries as varied as Uganda, Argentina, South Korea, Chile, South Africa, Brazil, The Philippines, Uruguay, Guatemala, and Haiti (all of whom were represented at the Aspen Conference) and the Soviet Union, Poland, Czechoslovakia, and China (which were not) confront the same sorts of questions as they attempt to move from dictatorial to democratic systems of governance—in essence, the question of what to do with the former torturers persisting in their midst.”³

The case of Argentina loomed large. With the collapse of the military dictatorship and the election of Raul Alfonsín in 1983, there had been a vigorous public debate about who should be punished for human rights

1. LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* 242 (1998).

2. *Id.*

3. Lawrence Weschler, *Afterword*, in *STATE CRIMES: PUNISHMENT OR PARDON* 89, 90, 92 (Justice and Society Program of The Aspen Institute ed., 1989).

violations and what should be done for victims of those violations. In the foreground of the debate, however, was always the threat to the stability of the new regime that such actions might pose. Alfonsín's government opted for limited prosecutions and, in a dramatic move, put the former junta leaders on trial. It also convened a commission of inquiry to find out what had happened to people who had been "disappeared" by the state security forces. Jaime Malamud-Goti, one of the chief architects, along with Carlos Nino, of Alfonsín's prosecutions policy, argued at the Aspen Institute conference that prosecutions were not only a response to victims' thirst for justice: "We agreed with the view that trying the perpetrators in the military of the worst crimes would contribute to the consolidation of democracy by restoring confidence in its mechanisms."⁴ However, the administration was divided. The minister of defense, who had the most direct relations with the military, opposed the policy on the grounds that it risked a potentially disastrous political backlash—perhaps even a military coup.⁵ Malamud-Goti and Nino worried that the judiciary, some of which was held over from the previous regime, would obstruct the prosecutions policy. Under severe pressure from the military, after a series of highly publicized trials and the publication of the commission of inquiry's report, *Never Again*, the government put an end to new prosecutions with the so-called Full Stop Law of 1986 and Due Obedience Law of 1987. A later government subsequently pardoned those still serving prison sentences.

The questions raised by the Argentine case were not only ones of justice: Whom to punish, by what authority, and on what grounds? What to do for victims and their loved ones? Rather, they were questions about justice *and* prudence: How to balance competing moral imperatives, reconcile legitimate claims for justice with equally legitimate claims for stability and social peace, and foster the relationship between justice for crimes of the past and a more just political order in the present.

A. A "Field" of Transitional Justice

At the Aspen Institute conference, José Zalaquett, a future commissioner of the Chilean National Commission on Truth and Reconciliation, reflected on the situation human rights activists faced in Latin American countries where repressive regimes had recently crumbled. "Experience has shown," he said, "that dealing with transitional political situations is a new area of

4. Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in STATE CRIMES, *supra* note 3, at 71–72.

5. Telephone Interview with Jaime Malamud-Goti, Director, Carlos Nino Institute, University of Palermo, Argentina (1 Oct. 2007).

human rights practice that poses some complex ethical, legal and practical questions”—questions that no one was yet in a good position to answer.⁶ Six years later, at a conference on “Dealing with the Past” in post-Apartheid South Africa, he came to the conclusion that “[a] pool of world experiences is contributing to an understanding of the lessons to be learned about justice in the process of transition.”⁷ This essay examines the shift, implied in Zalaquett’s observations, from the recognition of new practical dilemmas to the development of a knowledge-base to address those dilemmas through the emergence of a new field called “transitional justice.”

In particular, this article looks at how a certain understanding of “transition” helped to shape the conceptual contents of a new field. The field of “transitional justice”—an international web of individuals and institutions whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy—began to emerge as a response to these new practical dilemmas and as an attempt to systematize knowledge deemed useful to resolving them.⁸ The field of transitional justice, so defined, came directly out of a set of interactions among human rights activists, lawyers and legal scholars, policymakers, journalists, donors, and comparative politics experts concerned with human rights and the dynamics of “transitions to democracy,” beginning in the late 1980s.⁹

One window into understanding how transitions helped to structure this new field—which would later crystallize around such organizations as the US-based Project on Justice in Times of Transition (1993), the South Africa-based Justice in Transition (1994), and an international NGO called the International Center for Transitional Justice (2001), as well as pockets

6. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in *STATE CRIMES*, *supra* note 3, at 26.

7. Aryeh Neier, José Zalaquett & Adam Michnik, *Why Deal with the Past*, in *DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA* 1, 8 (Alex Boraine & Janet Levy eds., 2d ed. 1994).

8. For an application of the idea of “internal coherence” to transitional justice, see Pablo de Greiff, *Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations*, in *THE HANDBOOK OF REPARATIONS* 1 (Pablo de Greiff ed., 2006).

9. This article does not represent an analysis of a field, in the sense advocated by field-theorist Pierre Bourdieu, but rather a conceptual history—which itself offers some clues for such an analysis. Thus, it does not advance a methodologically rigorous understanding of the word “field,” in the sense of a structured set of relations among positions, occupied by actors with a particular set of dispositions, and which are hierarchically ordered and operate according to a distinctive, internal logic. However, the “looser” understanding of the word “field” used throughout this article does bear some resemblance to this concept, in that I identify as important features of the field of transitional justice the facts that it: 1) is clearly distinguishable from the field out of which it emerged, which is the field of human rights; 2) it implies a set of actors who have a set of common aims, and who are thus oriented toward one another in their practice; 3) it has developed institutions that advance those aims; and 4) it advances distinctive criteria of judgment and self-legitimation.

within other NGOs, universities, and international institutions—is a series of conferences that took place in the late 1980s and early 1990s. At the 1988 Aspen Institute conference, “State Crimes: Punishment or Pardon,” the 1992 Charter 77 Foundation conference in Salzburg, Austria, “Justice in Times of Transition,” and the 1994 Institute for Democracy in South Africa (IDASA) conference, “Dealing with the Past,” political actors, human rights activists, and observers from around the world were convened in order to compare experiences and discuss options. Each of these conferences not only featured the same kinds of participants (in terms of professional competencies), but they also had many overlapping participants, including Zalaquett, Malamud-Goti, Aryeh Neier, Juan E. Méndez, Diane Orentlicher, Lawrence Weschler, Alice Henkin, Tim Phillips, and Adam Michnik.¹⁰ Moreover, each was structured in a similar way: they dealt with a distinct set of measures—prosecutions, truth-telling, restitution or reparation, and reform of abusive state institutions—whose aims were to provide justice for victims *and* to facilitate the transition in question. The conferences optimized the possibility for comparative analysis of transitional “dilemmas.”

In examining how transitions “mattered” to the emergence of a distinctive field, one goal is to offer some preliminary answers to the question of why a field of transitional justice emerged at the time that it did and in the form that it did.¹¹ However, this article focuses on only one aspect of this question: the particular and distinctive conceptual contents of transitional justice. Although some have dismissed the relevance of the word “transitional” as a kind of syntactical error, this article contends that the idea played an important role in shaping understandings of the dilemmas that actors faced, as well as in their justifications for their actions and judgments. “Transition”—and, more specifically, “transition to democracy”—was the dominant normative lens through which political change was viewed at this time, and thus attending to its distinctive contents should shed some light on the emergence of the

10. See the annex at the end of this article showing the overlap of participants, as well as a list of all participants at the three conferences.

11. It should be noted that my choice of the word “field” is made in contrast to Kathryn Sikkink and Carrie Booth Walling’s word “network.” Sikkink and Walling have done groundbreaking work on the question of how international human rights networks have been used to raise the salience of accountability claims made on the domestic level. This is not the question addressed in this article, however. This article describes how a distinct field of activity, known as “transitional justice”—and not just “human rights”—came into being. This question is related to the international human rights networks they address, but it is not reducible to it. That is, it is entirely possible that domestic human rights groups seeking to advance accountability claims could have leveraged their international networks to aid their causes—but without a distinct field of transitional justice ever coming into existence. See Kathryn Sikkink & Carrie Booth Walling, *Argentina’s Contribution to Global Trends in Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY* 301 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

field. Indeed, attending to what was understood by transition helps to clarify what was considered to be an appropriate justice measure. It explains why the measures of prosecutions, truth-telling, restitution, and reform of abusive state institutions—not some other measures of justice, such as those associated with claims for distributive justice—were recognized as *the* legitimate justice initiatives during a time of political change.

Though this is only one small part of the story, it is a significant one because these understandings were crucial to structuring the initial conceptual boundaries for the field. These are boundaries that have since been consistently pushed, sometimes in response to practical difficulties encountered in new political contexts, and sometimes through reflection on the part of those working within the field itself. Thus, this article does not look at the shifts in practice of human rights activists in the 1980s—that is for another essay. This article also explicitly avoids analysis of justice efforts in single countries (Argentina, for example), because the aim is to show that the field of transitional justice emerged at an international level.¹² Indeed, part of the distinctive character of the field is that its knowledge-base has always been comparative. It has attempted to devise typologies of experiences and systematic knowledge of (often disparate) country contexts. This fact can be seen in the early conferences: each of them was structured around the principle of comparing national experiences among a diverse group of international participants, rather than the principle of identifying (and exporting) an ideal-type.

To illustrate the argument, this article first makes a case for identifying the late-1980s to mid-1990s as the period when the field first began to emerge. A crucial piece of evidence here is the coining of the phrase “transitional justice.” The term was invented as a device to signal a new sort of human rights activity and as a response to concrete political dilemmas human rights activists faced in what they understood to be “transitional” contexts. Having established this period as a plausible starting point, the article then turns to a consideration of what “transitions” meant at the time, in order to have a better understanding of how it might have shaped understandings of the kinds of justice claims that were considered legitimate or illegitimate in a period of transition. The article then weaves these strands together by looking at a particular case: the 1988 Aspen Institute conference, which was the first of a cluster of meetings that helped to clarify and solidify a conceptual framework for an emerging field. This conference brought together human

12. Thus, although Argentina’s Center for Legal and Social Studies (CELS) was one of the key human rights actors pushing for justice measures during the Argentine transition, its international partner, Americas Watch, played a more central role in the emergence of an international-level *field* of transitional justice, particularly through the efforts of Juan Méndez and Aryeh Neier.

rights activists, philosophers, legal experts, and political scientists from Latin America, Uganda, Haiti, and South Korea in an effort to compare experiences of the pursuit of justice initiatives in varying transitional contexts. Some of the participants had been actors in transitional justice efforts (Malamud-Goti), some would become actors in such efforts (Zalaquett), whereas others were observers with varying degrees of interest in the outcome of any particular national situation.

This conference was not chosen because it represents a founding moment for the field of transitional justice, but because, in the words of its organizer Alice Henkin, it offered an “intellectual framework” that was previously absent for discussing issues that were raised in postwar Germany, Spain, Greece, Argentina, and other places.¹³ The debates that took place and the participants involved thus give important insight into the conceptual underpinnings—if not the practical and institutional underpinnings—of an emerging field, one that came to be known several years later as “transitional justice.” If human rights activists were developing a new set of practices, how did they—as well as the thinkers, policymakers, and donors with whom they interacted—conceive of those practices and shape them into the conceptual structure for a unique, new field?

B. Where to Start?

Where to start a history of the field of transitional justice is no easy question to answer. One thinks of the Allies’ precedent-setting trials of Nazi war criminals at Nuremberg, or of the human rights policies of Argentinean President Alfonsín after the end of the military junta. But the measures we now associate with transitional justice certainly are nothing new. In *Stay the Hand of Vengeance*, Gary Bass recounts a history of war crimes tribunals that extends at least 200 years into the past.¹⁴ In *Closing the Books: Transitional Justice in Historical Perspective*, Jon Elster has written about trials and purges more than 2,000 years ago, during political upheavals in ancient Athens.¹⁵ So how do we decide where and when to start the story?

Perhaps simple is best; we should start by investigating the invention and acceptance of the term “transitional justice” itself. Interestingly, none of the existing accounts of the emergence of transitional justice explore the appearance of the term. Thus, for Ruti Teitel, the Nuremberg Tribunal is an

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13. Interview with Alice Henkin, Director, Justice and Society Program, The Aspen Institute, New York, N.Y. (13 Aug. 2007).
 14. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).
 15. JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004).

important moment in the first “phase” of transitional justice, even though none of the actors involved would have described it as such.¹⁶ Nor would those actors necessarily have ascribed the same meanings to what they were doing as Teitel and Elster do.

Here is where the question of methodology is important. An observer such as Elster, for example, treats transitional justice as a perennial problem, a timeless construct whose varieties can be understood and dissected across the ages—from ancient Athens to the present. Whatever meanings these various practices may have held for the historical actors involved (none of whom had ever heard the phrase “transitional justice”) get swept into a universal, homogeneous conception of transitional justice, whose only meaning is identical to our conventional, twenty-first century understanding of it. This kind of approach, which in historical practice is called “anachronism,” has been eloquently critiqued by Quentin Skinner, among many others.¹⁷ In Elster’s defense, he makes no claim to writing a history of transitional justice. The title of his book, which puts transitional justice “in historical perspective,” as well as its contents, suggests otherwise. Those who take a genealogical approach, such as Teitel, fare better with respect to anachronism, but they still fall into the trap of imputing ideas about “transitional justice” to actors who, presumably, were unlikely to have held them, particularly in their discussions of the immediate post-World War II era.

It makes sense when one is writing a conceptual history to begin by examining the invention of a phrase itself, as representative of the emergence of a new position, as well as its subsequent acceptance as something distinct and meaningful. Such an approach has the advantage of avoiding anachronism, while providing a less arbitrary starting point.

Following from Skinner, the invention of new terms, or the shift in meaning of old terms, in a political vocabulary are responses to concrete problems faced in political life. Some of these political terms are, moreover, intersubjectively normative. As James Tully puts it, these are “words that not only describe, but, in describing, also evaluate”—according to the context in which they are invoked.¹⁸ In a liberal-democratic context, for example, invoking terms such as “democracy,” “dictatorship,” “rational,” “tolerant” implies an evaluation, a particular normative judgment. Calling another country “democratic” or another person “tolerant” is, in this context, a description that expresses approval—which, in turn, helps to legitimate the actions of those who invoke them. Thus, the appearance and apparent ac-

16. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 70 (2003).

17. See Quentin Skinner, *Meaning and Understanding in the History of Ideas*, in MEANING AND CONTEXT: QUENTIN SKINNER AND HIS CRITICS 33–34 (James Tully ed., 1988).

18. James Tully, *The Pen is a Mighty Sword: Quentin Skinner’s Analysis of Politics*, in MEANING AND CONTEXT, *supra* note 17, at 13.

ceptance of the phrase “transitional justice” is itself a response to a set of new problems and a means of legitimating the practices used to respond to those problems. Those practices were prosecutions, commissions of inquiry, purges, and restitution policies. This article seeks to sketch out the contents of “transitional justice” when the phrase was invented, and how those contents emerged.¹⁹ This account will help answer some very basic questions about why transitional justice has resonated very strongly in some contexts, and has either been received with skepticism or completely ignored in others.

Not insignificantly, the first appearance of the term, in keyword searches of databases on international newspapers, law reviews, and social science journals, came in a *Boston Herald* article about the Charter 77 Foundation’s 1992 conference in Salzburg, “Justice in Times of Transition.” The reporter covering the conference noted in passing that this was to be “the first in a year-long series of meetings on transitional justice.”²⁰ In the lead-up to the conference, its organizers, Tim Phillips and Wendy Luers, as well as other advisers such as Herman Schwartz and Ruti Teitel, used the phrase sporadically.²¹ They ultimately opted, however, to describe their activities as “justice in times of transition.” Indeed, they subsequently founded a new organization, the Project on Justice in Times of Transition (1993), a name that Alex Boraine, the future vice chair of the South African Truth and Reconciliation Commission as well as a co-founder of the International Center for Transitional Justice, then borrowed and adapted for his organization Justice in Transition in South Africa (1994).²²

Whoever the original author of the phrase was, and there were probably several, most notable among them Teitel,²³ its transmission and acceptance

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19. Skinner actually makes a much more sophisticated argument about the interrelationship between political vocabulary and political action. As Tully notes, “Using these terms in the conventional way serves to legitimate customary practices.” Trying to use such a term in a *new* way, however, “will then serve to re-characterize, or re-evaluate, the political situation it represents; legitimizing a new range of activity or beliefs, delegitimizing or reinforcing the *status quo*, and so on.” *Id.* This account does not rest on this broader set of claims, however, but rather only on the claims cited above.
 20. Mary Jo Palumbo, *New Democracies Debate How to Punish Dictators of Past*, *BOSTON HERALD*, 5 Apr. 1992, at 16.
 21. See, e.g., Letter from Wendy Luers in which she used the phrase “transitional justice,” in Justice in Times of Transition Files, Folder, Background, to Justice Project (Early Proposals/Precursors) Cambridge, Mass (5 Dec. 1991) (copy on file with author).
 22. Boraine had worked with the Project on Justice in Times of Transition, which enabled him to invite some of the international guests to the 1994 conference, “Dealing with the Past.” When he left IDASA shortly after that conference, he formed his own organization, which was the occasion for adapting the Project on Justice in Times of Transition’s name.
 23. Ruti Teitel claims authorship of the phrase, and it is likely that she was among the very first to use it and was instrumental in its diffusion. See Ruti Teitel, *Editorial Note—Transitional Justice Globalized*, 2 *INT’L J. OF TRANSITIONAL JUST.* 1 (2008). However, there are other usages around the same time, and some even earlier. In 1989, philosopher

was most significantly aided in the mid-1990s by the publication of Neil Kritz's four-volume compendium *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* in 1995. Kritz had been in attendance at the 1992 Salzburg conference on Justice in Times of Transition. After his volumes' appearance, references to transitional justice steadily increased throughout the late 1990s. Among a range of scholarly journals in 1994, the first year in which there is any reference to transitional justice, there is only one reference to transitional justice—a citation of Kritz's volumes in Priscilla Hayner's article, "Fifteen Truth Commissions."²⁴ By 2000, a search of the same set of journals showed seventeen references. In major Anglophone newspapers uptake was slow, yet growing. Articles making reference to transitional justice appeared in the *Washington Post*, the *Los Angeles Times*, *Foreign Affairs* magazine, and *The Guardian* (UK).²⁵

Kritz's volumes were reviewed by people with a range of institutional affiliations and competencies, and in a number of influential outlets. Both Timothy Garton Ash's review in *The New York Review of Books* and Richard Siegel's review in *Human Rights Quarterly* were substantial pieces of writing that set Kritz's work in the context of books on related subjects. Theodore Piccone, a US Department of Defense lawyer under the Clinton administration, wrote the review for the *American Journal of International Law*. Brief reviews also appeared in the *Washington Post* and the *United Nations Chronicle*. The

Milton Fisk used the phrase in a discussion of transitions to socialism, MILTON FISK, *THE STATE AND JUSTICE: AN ESSAY IN POLITICAL THEORY* 304 (1989). More significantly, in 1992 US-based Argentine sociologist Juan E. Corradi made reference to "transitional justice," in an essay he wrote for an edited volume on state terror in Latin America. For him, it was "a particular and intensive type of political justice: the trial by fiat of a previous regime." He continued:

Transitional justice is both more and less than ordinary justice. It is more because it aims beyond the simple ordering of human relations: it seeks to achieve moral and political regeneration. It is less than ordinary justice because it is subject to serious irregularities, it is a political formula for the formal elimination of a scapegoat, it is imbued with problematic judgments by the power holders of the moment on the qualities and policies of their predecessors, and it is a constitutive act of a new regime.

Juan E. Corradi, *Toward Societies Without Fear*, in *FEAR AT THE EDGE: STATE TERROR AND RESISTANCE IN LATIN AMERICA* 267, 285–86 (Juan E. Corradi, et al. eds., 1992). Finally, there is a chapter entitled "Transitional Justice" in an obscure 1948 book on the US occupation of New Mexico: ARIE W. POLDERVAART, *BLACK-ROBED JUSTICE* (1948).

24. Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 *HUM. RTS. Q.* 611, 622 (1994).
25. Lexis search for "transitional justice" from 1 Jan. 1950 to 1 Jan. 2001. Of course, the measures that, taken collectively, came to be known as transitional justice have a history of their own. For example, a similar search of the term "truth commission" yields negligible results (only eighteen mentions) before 1 Jan. 1990 (certainly owing to the fact that the Argentine commission did not call itself a "truth commission")—and then skyrocketed thereafter, mainly owing to reporting on the Chilean commission, the El Salvadoran commission, and the South African TRC. Between 1 Jan. 1990 and 1 Jan. 1994, there were 404 stories that mentioned "truth commission"; from 1 Feb. 1994 to 1 Jan. 1998, there were 1,759; and from 1 Feb. 1998 to 1 Jan. 2001, there were 1,377. The spike occurred at the time of the South African TRC.

only review to appear outside of the United States was Steven R. Ratner's essay in the *European Journal of International Law*.²⁶

If Kritz's book represented a key driver in the early proliferation of the term transitional justice, then it would make sense to look at the volumes themselves to gain an approximate sense of the meaning given to the phrase, and whether the reviewers accepted that meaning. Importantly, the structure of the volumes suggests that transitional justice was a fully formed and rather well-understood set of practices in 1994—so much so, that one could compile a neat list of transitional justice measures and the controversies that might arise in undertaking them. These measures were commissions of inquiry, prosecutions, lustration or purges, and restitution or reparations programs.

What Kritz published was a canon of transitional justice literature—even before anyone was quite sure that a canon was needed. But what was that canon? The subtitle of the book provided a description of transitional justice: “how emerging democracies reckon with former regimes.” Thus, transitional justice was something undertaken by “emerging democracies”—states that had undergone a change of regime. All of the reviewers, except one discussed below, accepted this definition uncritically. For Siegel, transitional justice “characterize[d] the choices made and quality of justice rendered when new leaders replace authoritarian predecessors presumed responsible for criminal acts in the wake of the ‘third wave of democratization’”—making reference to Samuel Huntington's famous book on transitions to democracy in the late twentieth century.²⁷ For the *Washington Post*, the basic idea of Kritz's book “is to present the experiences of countries that have made a more or less successful transition to democracy—Belgium, Chile and Czechoslovakia, for example—for the benefit of those countries in the throes of the process.”²⁸ For Piccone, *Transitional Justice* addressed “how new democracies have attempted to strike a balance between redressing the abuses of the former governments and integrating victims and perpetrators in a postconflict society.”²⁹ Therefore, not only did the reviewers accept the utility of the term itself, but they also understood and accepted the contents of the term proposed in Kritz's work.

Ash was the only reviewer to call into question the utility of the linguistic invention of “transitional justice.” For him, the book was “too narrowly titled,” and in fact no word or phrase existed in English that captured the

26. Other outlets included *New Jersey Criminal Law Forum*, *Syracuse Journal of International Law and Commerce*, *Ethics & International Affairs*, and *Cambridge Quarterly*.

27. Richard Lewis Siegel, *Transitional Justice, A Decade of Debate and Experience*, 20 *HUM. RTS. Q.* 431, 433 (1998) (book review).

28. Nonfiction, *WASH. POST BOOKWORLD*, 12 Nov. 1995, at X12.

29. Theodore J. Piccone, *Transitional Justice*, 90 *AM. J. INT'L L.* 540, 541 (1996) (book review).

full range of all of its attending processes. He suggested two German words that already had a history of usage in German: *Geschichtsaufarbeitung* and *Vergangenheitsbewältigung*. "These may be translated as 'treating' the past," he pointed out, "'working over' the past, 'confronting' it, 'coping, dealing or coming to terms with' it; even 'overcoming' the past. The variety of possible translations indicates the complexity of the matter at hand."³⁰ After surveying the various methods of dealing with the past—prosecutions, purges, and various truth-telling initiatives, from official commissions to the opening of archives—Ash asked who might best be equipped to do justice to the past. "The answer is, or at least should be, historians," he decided.³¹ He continued, "Carelessly used, the records of a state that worked by organized lying, and especially the poisonous, intrusive files of a secret police, can ruin lives. To use them carefully tests the critical skills that historians routinely apply to a medieval charter or an eighteenth-century pamphlet."³² Ash worried that "truth is a big word, so often abused," and he was keen to place limits on it.³³ "The evidence has to be weighted with very special care. The text must be put in its historical setting. Interpretation needs both intellectual distance and the essential imaginative sympathy with all the men and women involved, even the oppressors."³⁴

I have discussed Ash's article at length because it offered actual resistance to the emergence of this new term. In particular, it challenged the idea that the contents of what Kritz had presented as "transitional justice" could capture real-world complexities. This dissension is significant in that it shows what was (perhaps surprisingly) lacking from the proposed canon at the moment of the term's invention: the famous German *Historikerstreit*, or historians' debate, of the 1980s. This debate was taking place in the media outlets of West Germany at the same time discussions in Latin American explored how to deal with former regimes. The historians' debate was a sophisticated, and highly public, conflict about how to interpret the Nazi era and the Holocaust. In particular it questioned how and when the memory of such events might be "overcome" or "mastered," and a more positive image of German history accepted. To a certain degree, the debate was also about who bore responsibility for the Nazi regime and its crimes—a small clique of elites who commandeered the state (making the Holocaust a historical aberration), or a broad swath of the population who actively or passively supported it (making it the end point in a "special historical path," or *Sonderweg*). Each position on this question was marked on the

30. Timothy Garton Ash, *The Truth About Dictatorship*, N.Y. REV. BOOKS, 19 Feb. 1998, at 35.

31. *Id.* at 40.

32. *Id.*

33. *Id.*

34. *Id.*

political spectrum. Those on the “right,” such as Ernst Nolte, supported the argument that the Holocaust was an aberrational response to a particular set of historical conditions (in this case, the threat of communism). Those on the “left,” such as Jürgen Habermas, argued that it was the result of deep-rooted cultural proclivities. Note that this debate took place after forty years of prosecutions, lustration processes, and reparation programs. Those historians most intimately involved with the production of truth about the past still disagreed about what the past meant, as did large segments of the German population.

This omission tells us something about Kritz’s (and others’) conception of transitional justice. Of the forty-two texts gathered in Kritz’s thematic overview of transitional justice (Vol. 1), none were written by historians, and the German historians’ debate merits only a single passing reference.³⁵ The reason for the omission is not hard to guess: historians simply were not involved in the production of Kritz’s book, nor did they play an important role in discussions on the themes identified by Kritz—and implicitly accepted by most—as providing the conceptual content for transitional justice. Instead of “coming to terms” with historical complexities (as one might expect in an effort to deal with “the past”), transitional justice was presented as deeply enmeshed with *political* problems that were legal-institutional and, relatively, short-term in nature. So short-term, in fact, that they could be dealt with specifically during a “transitional” period.

This analysis is confirmed by Kritz’s work. We can identify three areas of interest, sometimes distinct, and sometimes overlapping: human rights, law, and comparative political science. Among human rights activists who appeared in Volume I were José Zalaquett and Aryeh Neier; excerpts from publications by Human Rights Watch and Amnesty International were also included. Among the legal specialists were Diane Orentlicher, Carlos Nino, Thomas Buergenthal, and Theo van Boven. Finally, among the political scientists were Guillermo O’Donnell, Philippe Schmitter, Samuel Huntington, Juan Linz, and John Herz.

It is tempting to divide these groups into broad rubrics, under the headings of, say, morality, law, and politics—and then argue that transitional justice was an attempt to synthesize the three. Though not entirely inaccurate, this would oversimplify a complex and often contradictory process. Of particular interest here is the perhaps surprisingly central role accorded to comparative political analysis in what was considered to be a human rights agenda.

35. See FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM, (John H. Herz ed., 1982), cited in TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, Vol. I, 132, 142 (Neil J. Kritz ed., 1995). It also appears, briefly, in Volume II. See also Lutz R. Reuter, *How Germany Has Coped: Four Decades Later*, in TRANSITIONAL JUSTICE, Vol. II, 63, 67 (Neil J. Kritz ed., 1995).

II. ON TRANSITIONS

As suggested, there was general acceptance of Kritz's definition of transitional justice as a set of measures undertaken specifically by "emerging democracies." Though Timothy Garton Ash criticized the narrowness of the term "transitional justice," offering his own German-language alternatives laden with meanings from postwar German debates, he did not appear to dispute the idea that it is democracies that should or are more likely to undertake these measures.

This is an important point. As Elster's book shows, the measures we now associate with transitional justice have been around for a very long time. Yet it is only recently that they have been justified through appeals to universal norms such as human rights, or that they have been seen as legitimate only when undertaken by a democratic polity, or that they have been seen as having an underlying, determined connection related to the normative goal of promoting democracy. In order to understand why transitional justice emerged when it did and in the form that it did, we need to understand why it took on these particular contents.

Here is where "transition" surfaces as a crucial concept. After all, the term "transitional justice" could have been simply rejected. Other terms, such as "historical justice," "justice," or Ash's "overcoming the past" might have been proposed in its place. The term might have simply been ignored altogether—a conceptual failure without a legacy. Yet the term was accepted. Why was this so?³⁶

On this point, it is important to shift from the questions of whether and how "transitional justice" resonated with its audience in the mid-1990s, to the question of how the capacity for that resonance was created—prior to the appearance of Kritz's volumes.

A. Human Rights and the "Ambiguities of Transitional Situations"

Up to the mid-1980s, the central aim of the international human rights movement had been to shame repressive governments into treating their citizens more justly. Since the regimes that organizations such as Human Rights Watch and Amnesty International investigated were, typically, repressive ones, the issue of accountability for violations had not been a central concern—since it was often impossible. The ending of repressive regimes in Latin America in the early to mid 1980s forced a shift in strategy and thinking. In a cer-

36. Of course, one could not only ascribe the "success" of the new field of transitional justice to its capacity to create resonances—an important part of the story is the creation of institutions and networks, which are not things treated in this article.

tain sense, the human rights movement might have lost—in these particular cases—what had been its central *raison d'être*.³⁷ Juan Méndez, an Argentine exile who was the Washington director of Americas Watch (now Human Rights Watch) in the early 1980s, and who is currently the president of the International Center for Transitional Justice, recalls that the common wisdom at the time was that there was “no role for us” after the fall of a dictatorship, since the country had “turned a new leaf.”³⁸ However, in the aftermath of the dictatorship in Argentina, when claims for justice were being pursued by local human rights groups, “that wisdom did not last for very long.”³⁹ According to Méndez, as the Alfonsín government mounted prosecutions of military leaders and formed a commission of inquiry into state-led abuse, human rights work “almost seamlessly turned . . . from an adversarial to a supportive position,”⁴⁰ Indeed, the summary report that he authored in 1987, *Truth and Partial Justice in Argentina*, offered a clear picture of Americas Watch’s positions on dealing with past state crimes—one that gave overwhelming attention to criminal prosecutions and an analysis and critique of the political reasons for which they had been limited and later stopped.⁴¹

José Zalaquett’s seminal article, “Confronting Human Rights Violations Committed by Former Governments,” written for the 1988 Aspen Institute conference, echoed Méndez’s views on this shift in human rights actors’ concerns. In it, Zalaquett spelled out the dilemma human rights advocates found themselves in by the early 1980s. He noted that although the human rights movement had been “a palpable presence internationally” during the fall of dictatorships in Greece, Portugal, and Spain in the 1970s,

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37. It should be noted that the practices of “naming and shaming” that we associate with the international human rights movement have also been around a long time—one thinks of the anti-slavery campaign in Great Britain and other countries in the eighteenth and nineteenth centuries, as well as the anti-torture campaign in France during the French-Algerian War (1954–1962). However, these phenomena did not themselves constitute an “international human rights” movement, but were rather antecedents of it. See Samuel Moyn, *On the Genealogy of Morals*, *THE NATION*, 16 Apr. 2007 (Review of LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* (2007)), available at <http://www.thenation.com/doc/20070416/moyn>.
38. Interview with Juan Méndez, President, International Center for Transitional Justice, New York, N.Y. (9 Aug. 2007). Margo Picken, the Ford Foundation program officer who helped to fund the Aspen Institute conference, recalls that many governments and donor agencies in the 1980s saw human rights organizations as troublemakers in these new regimes (which they supported). This perception resulted in a shift in funding away from human rights to conflict resolution organizations—a trend that was particularly striking in Latin America. Email interview with Margo Picken, Fellow, London School of Economics and Political Science (10 Dec. 2007).
39. *Id.*
40. *Id.*
41. Although Americas Watch strongly supported the aims of the National Commission on Disappeared Persons, its report devoted only three pages (out of sixty-four) to the commission. JUAN MÉNDEZ, *AMERICAS WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA: AN UPDATE* (1991). According to Méndez, the reason is that the CONADEP report was by that time very well known.

the focus of human rights activism was on current abuses and only seldom on past abuses or on preventing the recurrence of human rights violations. . . . Starting in the 1980s, however, human rights organizations have had to focus much more centrally on the human rights issues related to political transitions.⁴²

He claimed, moreover, that this turn in human rights activism posed new problems with no easy answers:

The fragile character of the gains [in new democracies] made human rights organizations aware of the fact that measures which are straightforward from the standpoint of human rights norms could have undesired political implications, which in turn would affect human rights adversely. Human rights organizations were thus unavoidably drawn into the ambiguities of transitional situations.⁴³

Political shifts, especially away from authoritarian rule, were the crucial new developments of the 1980s. The core of the debate at the Aspen Institute conference was formed around grappling with the opportunities and risks associated with these shifts. As such, political analysis and moral argumentation were the key discursive modes employed by the participants. Thus, a paper was commissioned from political scientist John Herz, a renowned scholar who had also been an actor in denazification efforts following World War II. It treated many of the same countries (Germany, Greece, Spain), that had been dealt with in his pioneering book *From Dictatorship to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism* (1982). The papers commissioned from Zalaquett and Jaime Malamud-Goti similarly considered the political implications of justice measures, and Zalaquett even proposed a typology of transitions that indicated the limits that each type would place upon justice efforts.

These political shifts were understood as taking, or were hoped to take, a particular form: transitions to democracy. This is not an inconsequential point. Changes in political regimes were in themselves nothing new. Where the changes would eventually lead was unpredictable and subsequent scrutiny has shown that many of the so-called transitions to democracy, heralded as part of the "third wave" of democratization, were no such thing. The fact that these changes were understood at the time, and almost universally, as "transitions to democracy" is a striking fact that demands an explanation.

42. Zalaquett, *Confronting Human Rights Violations*, *supra* note 6, at 24. It should be noted that although part of this article was republished in Kritz' *Transitional Justice*, Vol. 1, the opening sections, which are quoted here and which describe the reasons for a shift in human rights activism in the 1980s, were omitted from Kritz' excerpt.

43. *Id.* at 25.

B. Why a “Transitions” Paradigm

We have seen that the influential notion of a transition to democracy emerged as the principal paradigm by which to interpret the opening of authoritarian regimes. But what is a “transition,” and why did it resonate so strongly? The varied instances of political change throughout the world since World War II resist categorization in a neat typology. Many terms might be used: perhaps some countries experienced “revolutions,” others “transfers of power,” others “regime change,” or “restorations,” or “independence,” or “modernization,” or “political development,” or perhaps “transitions” of one sort or another. These terms encapsulate changes from capitalism to socialism, military dictatorship to civilian rule, authoritarianism to democracy, communism to liberal democracy, communism to a market economy, and more. The varieties of change are in fact quite staggering.

So how did one particular lens—that of a “transition to democracy”—become the dominant one through which political change was interpreted beginning in the 1980s? First, and most obvious, is the fact that democratic reform was a stated goal of important segments of the population in countries undergoing political change at the time. There may have been other goals, sometimes complementary, such as the establishment of civilian rule or the creation of a market economy, but claims for the democratization of political power were undeniable features of these events, regardless of the terms used to describe them.

Yet this point still leaves us with another question: why were these changes understood as “transitions” to democracy? Why were these phenomena not seen, for example, as merely the beginning of a long, open-ended process of establishing the social preconditions for democratic institutions—including a shift in socioeconomic structures, behavioral habits, and the structural conditions that would allow for a thriving public sphere?

This leads to a second reason for the “transitions” paradigm, much noted by observers, which is that earlier theories of democratization associated with modernization theory had lost their previous legitimacy and were due to be replaced. In the 1960s, for example, the heyday of modernization efforts, liberal Western policymakers and political scientists did not speak of “transitions to democracy,” but rather of socioeconomic modernization as a precondition of an evolutionary process of political development. One well-known example of this theory was the work of W. W. Rostow, an economist, political theorist, and national security adviser to both the Kennedy and Johnson administrations, who suggested that societies passed through stages of social and economic growth, and that such growth was a precondition for the emergence of a society capable of sustaining democratic institutions.⁴⁴

44. See W.W. ROSTOW, *THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO* (3d. 1990). On the modernization theory and its impact on US foreign policy, see NILS GILMAN, *MAN-*

The notion that a democracy could be established in almost any country without much reference to socioeconomic conditions—that is, through a shortened “sequence” of elite bargaining and legal-institutional reforms rather than through long-term socioeconomic stages—was something new.⁴⁵

Alongside critiques of modernization theory, there was a third reason: a corresponding rehabilitation of the term “transition,” and a shift in its meaning. “Transitions” had long been discussed (and implemented) by Marxists as a series of concrete steps a society could take that would lead it, in a compressed (or “telescoped”) period of time, to the establishment of a socialist or a communist society. In fact, Marxists had a virtual lock on the concept, using it as a device to understand and engineer various kinds of social transformations. Discussions of the transition from feudalism to capitalism, capitalism to socialism, and socialism to communism provoked much grand theorizing in the twentieth century, from the Bolshevik revolution to the Nicaraguan revolution.⁴⁶ These transitions, however, were typically understood as processes of social transformation—sometimes elite driven (by a “vanguard”), sometimes following a restructuring of the socioeconomic order—but always entailing changes at the structural level of society and economy. In recycling the concept of a “transition,” analysts in the 1970s and 1980s recast it in terms of political reform, rather than social transformation. In this model, transitions were construed as taking place primarily at the legal-institutional level of politics.

Sociologist Nicolas Guilhot writes about this particular conceptual transformation, locating it mainly in a critique of functionalist explanations of political change. Beginning in the early 1970s, structural explanations for social and political development (such as modernization theory) were criticized in favor of models that stressed agency and choice—particularly among political elites. “The evolution of the comparative analysis of change in the 1980s,” he writes, making reference to the studies of Juan Linz, as well as Guillermo O’Donnell and Philippe Schmitter, “indeed took the direction of inquiry into the role of ‘institutional entrepreneurs’ or elites.” But it was not only modernization theory, prevalent in North American academic and policy institutions, that took a hit. Marxist-inspired models, such as dependency theory and world-systems theory, were equally under fire. Guilhot continues,

DARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA (2003); MICHAEL E. LATHAM, MODERNIZATION AS IDEOLOGY: AMERICAN SOCIAL SCIENCE AND “NATION BUILDING” IN THE KENNEDY ERA (2000).

45. For a reference to the replacement of “stage” with “sequence” in theories of political development beginning in the late 1960s, see GILMAN, *supra* note 44, at 90.
46. See Nicolas Guilhot, *The Transition to the Human World of Democracy: Notes for a History of the Concept of Transition, from Early Marxism to 1989*, 5 EUR. J. SOC. THEORY 219 (2002).

Grand theorizing had thus to be replaced by a more sectoral and policy-oriented approach whereby social change would no longer be an autonomous and all-encompassing phenomenon but could be seen as an *outcome* dependent upon the specific strategies and choices of a distinct political elite.⁴⁷

Theories of socioeconomic evolution were replaced with technocratic approaches to engineering political change.

The final reason, which is related to this process of recycling the concept of “transitions” for the purposes of democratization, is the global decline of the radical Left during the 1970s and a concomitant ideological shift in favor of human rights. This deradicalization of social movements is as important in this story as the end of the Cold War, which it preceded by more than a decade. Across the Americas, as well as in Europe, left-wing ideological allegiances of the 1960s gave way to political setbacks and self-critiques. Having abandoned the Soviet Union, Cuba, and many African socialist states as desirable models in the 1970s, many on the Left turned against political ideology and toward the moral framework of human rights. Support for Eastern European dissidents became a focal point of advocacy, particularly in Europe—and such support was perhaps most vocal on the part of ex-communists or left-wing sympathizers who wished to correct their own past political errors.

Defending the rights of individuals was, in their view, the only appropriate response to the widespread abuses (and, indeed, carnage) wrought by both right-wing and left-wing forms of political repression.⁴⁸ In Latin America, among the oft-cited reasons for the decline of the radical Left’s fortunes include the death of Che Guevara in Bolivia, disenchantment with the path of the Cuban revolution, the 1973 overthrow of Salvador Allende, and the defeat of urban guerilla movements. All of these events spurred re-evaluations of the radical Left’s tactics (e.g., military action in some cases, nationalization and expropriation policies in others) in bringing about a transition to socialism, as well as an abandonment of commitments to revolution altogether.⁴⁹ Some have cited the specific impact of this shift among intellectuals—spurred either by exiles’ admiration for social-democratic experiments they witnessed in Europe or by critical thinking within the domestic intellectual community itself. In Chile in the late-1980s and early-1990s, one influen-

47. *Id.* at 235.

48. See NICOLAS GUILHOT, *THE DEMOCRACY MAKERS: HUMAN RIGHTS AND INTERNATIONAL ORDER* (2005); ROBERT PACKENHAM, *THE DEPENDENCY MOVEMENT: SCHOLARSHIP AND POLITICS IN DEVELOPMENT STUDIES* (1992); Moyn, *supra* note 37.

49. These are complicated events to which I cannot do justice in just a few sentences. For an overview of the issues, see Norbert Lechner, *De la revolución a la democracia*, CIUDAD FUTURA 2 (1986); Steve Ellner, *Latin American Studies Assoc.: The Latin American Left Since Allende: Perspectives and New Directions*, 24 *LATIN AM. RES. REV.* 143 (1989); Ronaldo Munck, *Farewell to Socialism? A Comment on Recent Debates*, *LATIN AM. PERSP.*, Apr. 1990, at 113.

tial intellectual, Javier Martínez, noted that “the Socialist party completely changed its discourse because a group of intellectuals—sociologists, philosophers, historians—in part echoing the European discussion but basically taking seriously the problem of democracy, began to question the bases of Marxist-Leninist thought.”⁵⁰ At any rate, as Guillermo O’Donnell remarked in reference to the 1980s transitions, “Never has the ideological ‘prestige’ of political democracy been higher in Latin American than now.”⁵¹

Related to this shift was the increasing attraction and visibility of international human rights organizations. Militating against ideological bias that allowed some regimes’ repression to go uncriticized, Amnesty International and the Watch Committees explicitly aimed to achieve “balance” in their coverage of abuses around the world.⁵² Founders of the humanitarian group Médecins Sans Frontières argued that the organization should publicly take the side of victims, rather than that of any particular political agenda.⁵³

In sum, the attractiveness of a transitions to democracy paradigm ought to be understood against the backdrop of four conditions: in most of the countries undergoing political change, democracy was a desirable goal for many people; the delegitimation of modernization theory; the transformation of the transitions concept from a tool of socioeconomic transformation to one of legal-institutional reform; and the global decline of the radical Left. This last phenomenon, I have suggested, had direct repercussions for the human rights movement, as many on the Left abandoned the language of class warfare to describe state violence in favor of the language of human rights. As Ronaldo Munck observes with respect to the disenchantment of the Latin American Left with socialism, “The struggle against military rule had centered largely around the issue of human rights, a defensive politics which took over from the vision of a socialist alternative.”⁵⁴ Or, as James Petras has put it, “State violence was analyzed in terms of human rights violations, not

50. JEFFREY M. PURYEAR, *THINKING POLITICS: INTELLECTUALS AND DEMOCRACY IN CHILE, 1973–1988*, at 64 (1994).

51. Guillermo O’Donnell, *Introduction to the Latin American Cases*, in *TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA 15* (Guillermo O’Donnell et al. eds., 1986).

52. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 88–90 (1998).

53. Bernard Kouchner, co-founder of MSF in 1971 and one of the leading lights of the Young Communists in France during the French-Algerian War, abandoned the “revolution vs. counterrevolution” framework through which he viewed struggles in the Third World upon a visit to Biafra in the late-1960s. For an exhaustive history of MSF’s relationship to the radical Left, see ANNE VALLAËYS, *MÉDECINS SANS FRONTIÈRES: LA BIOGRAPHIE* (2004).

54. Munck, *supra* note 49, at 114. Munck continues, “The overwhelming presence of the state under the military encouraged a self-criticism of the left’s own statism. . . . Above all, the logic of war as practiced by the military regimes led parts of the armed left to question its own past militarism.” For Munck these self-critiques fed the turn toward human rights, democracy, and a concern with fostering civil society.

as expressions of class domination.”⁵⁵ This was an important shift for those who had lived through (or taken part in) the political foment of the 1960s and early 1970s, and who had sympathized with socialist experiments.

C. Which Transition—And Why Does It Matter for Justice?

The ideological shift away from the politics of the radical Left is an important part of the story of transitional justice for yet another reason: the simple fact that transitions to socialism may entail very different kinds of justice claims than transitions to democracy. Mahmood Mamdani—a participant in the 1988 Aspen Institute conference—has written with some feeling of ambivalence about his own experience as a member of the first postcolonial generation in Africa. He describes the certainty he and his cohort felt with respect to their diagnosis of the most important legacy of colonialism: it was mainly economic, not political; it concerned social suffering, not individual human rights violations. “In the decade that followed African political independence,” he writes, “militant nationalist intellectuals focused on the expropriation of the native as the great crime of colonialism.”⁵⁶

This claim, though sweeping, was true in many cases. As a corollary, the *rectification* of colonial exploitation was often claimed to be best accomplished through a set of economic and social policies that deliberately placed state power at the center of guarantees for social justice, and that were guided by socialist, rather than capitalist or liberal-democratic, models. Socialist transitions were advocated by leaders such as Kwame Nkrumah, Sékou Touré, and Julius Nyerere not necessarily because they felt an ideological affinity with the Soviet Union, although some of them did. Rather, leaders were concerned with—as Mamdani suggests—using the state to recapture economic power that had unjustly been taken and that still lay in the hands of foreign companies, governments, and persons.⁵⁷ Newly independent states

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55. James Petras, *The Metamorphosis of Latin America's Intellectuals*, *LATIN AM. PERSP.*, Apr. 1990, at 102, 104. Using an explicitly Marxist (Gramscian) frame of analysis, Petras argues that military regimes' persecution of intellectuals and scholars in the 1970s led to an increasing dependence of this “intellectual class” on foreign support, especially emanating from the United States and Europe. He charts the rise of externally funded research centers, such as CEDES (Argentina), FLACSO (Chile), and CEBRAP (Brazil), led by “local research entrepreneurs.” These researchers constituted a “new class of ‘internationally’ oriented intellectuals . . . embedded in dependent relations with overseas networks.” Although Petras only mentions one researcher by name—Guillermo O'Donnell—much of his analysis obviously refers to Fernando Henrique Cardoso, a leading thinker in the dependency movement, co-founder of CEBRAP, and later president of Brazil. *Id.* at 106, 112 n.3.
56. Mahmood Mamdani, *Beyond Settler and Native as Political Identities: Overcoming the Political Legacy of Colonialism*, 43 *COMP. STUD. SOC'Y & HIST.* 651 (2001).
57. For a discussion of African socialism and a comparison of the ideas of Nkrumah and Nyerere, see Steven Metz, *In Lieu of Orthodoxy: The Socialist Theories of Nkrumah and Nyerere*, 20 *J. MOD. AFR. STUD.* 377 (1982).

sometimes used expropriation and nationalization as tools of rectification for past injustice and they spearheaded the effort to get social and economic rights recognized as equal counterparts to civil and political rights. Prosser Gifford and William Roger Lewis, editors of an influential two-volume work on “transfers of power” in Africa from 1940–1960, summarize what “breaking with the past” meant in these contexts. According to these countries, “a clean break must be made with the colonialist past.” Gifford and Lewis suggest, “There must be a new beginning toward the restructuring of African societies on the basis of economic equality and social justice. It would be unwise for Western students of Africa to underestimate the lingering sense of outrage at the heritage of exploitation and inequality.”⁵⁸ “Dealing with the past,” in this context, meant something quite different from current, transitional justice evocations of it.

This alternative set of claims is mentioned not necessarily to argue for them, but mainly to offer an important rebuttal to histories of transitional justice that ignore them. It is generally a mistake to make broad claims about global post-World War II history only by reference to the Cold War. Ruti Teitel, in particular, argues that the incomplete internationalization of justice represented by the Nuremberg tribunal was foreclosed by the emergence of the Cold War. Thus, transitional justice went on hiatus for nearly forty years, until the establishment of the ad hoc international tribunals to judge crimes in Rwanda and the former Yugoslavia and Rwanda. Though the claim that international justice was cut short by the Cold War is not entirely incorrect, as Cold War tensions clearly played a role, this claim dangerously simplifies and effectively collapses decades of history. In the cases of Madagascar, Kenya, Indochina, and Algeria (to name a few) the lack of international accountability for systematic repression endured by civilian populations in the 1940s and 1950s was not a “consequence” of the Cold War. One might rather propose, as many did at the time, that the reason that a standing court to try international crimes had not been set up after World War II was precisely because great powers such as France feared their own soldiers would be tried for violations they committed in the colonies.⁵⁹ And one should not forget that the ex-colonial powers—especially France—continued to play strong economic and military roles in their former colonies, making the introduction of accountability measures very difficult.

58. Prosser Gifford & William Roger Lewis, *Introduction*, in *DECOLONIZATION AND AFRICAN INDEPENDENCE: THE TRANSFERS OF POWER, 1960–1980*, at xxv (Prosser Gifford & Wm. Roger Lewis eds., 1988).

59. A claim voiced, not least of all, by Jean-Paul Sartre during the course of the 1967 Russell Tribunal, when discussing why it was that a Nuremberg-style tribunal had not been set up to try members of the French government after the 1945 Sétif massacre in Algeria. See Jean-Paul Sartre, *On Genocide*, in *AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE INTERNATIONAL WAR CRIMES TRIBUNAL* 615 (John Duffett ed., 1968).

These claims also demonstrate that there seems no reason to suppose that there are trans-historical contents to claims for justice after regime change. Postcolonial justice claims for the often massive and systematic violations of previous colonial regime existed—but they were often simply composed in a different key.⁶⁰ Yet they did not constitute what Kritz and others took to mean transitional justice.

D. Transitions from Authoritarianism to (Hopefully) Democracy

Understanding the key in which Kritz and many others composed transitional justice claims can be partly gained through an examination of the descriptions of political change that observers in the social sciences, sometimes called “transitologists,” developed in the late 1970s and 1980s. Looking at these descriptions is useful for two reasons. First, they offer keen-eyed analyses of political events that help us to understand the practical difficulties that actors were facing in countries such as Argentina, Brazil, Uruguay, and elsewhere. Thus, their descriptions will help to clarify the political contexts out of which transitional justice claims emerged. Second, it is useful to understand them because they were influential in providing a conceptual vocabulary (e.g., “transitions,” “breakdown,” “consolidation,” and “sequencing”) that were appropriated by actors in the emerging field, culminating in Kritz’s canonization of their works.

In 1978, Argentine political scientist Guillermo O’Donnell, American political scientist Philippe Schmitter, and Brazilian sociologist (and later president of Brazil) Fernando Henrique Cardoso honed in on “transitions” as a crucial area for exploration. The three were part of a newly formed advisory council for the Latin American Program at the Woodrow Wilson Center for Scholars, and with the help of the program’s director, Abraham Lowenthal, they put together a ground-breaking new project. Thinking that research could help identify political opportunities to crack open authoritarian regimes and offer strategies for pushing change along, they developed a pro-

60. Not only ex-colonial states, but also ex-colonial powers demonstrated some interest in “transitioning” to socialism. During the Portuguese revolution in 1974–1976, nationalization and land expropriation policies were enacted, and the 1976 constitution proclaimed that the aim of the new republic was to ensure the “transition to socialism.” French politics in the 1970s was also marked by a “Union of the Left” between the Socialist Party and the Communist Party, whose publicly stated goal was to nationalize more than 50 percent of the economy (the plan eventually put into effect by the Socialists in 1981 entailed vastly less than this). On Portugal, see Kenneth Maxwell, *Regime Overthrow and the Prospects for Democratic Transition in Portugal*, in *TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE* 109, 132–36 (Guillermo O’Donnell & Philippe Schmitter eds., 1986); on France, see BERNARD E. BROWN, *SOCIALISM OF A DIFFERENT KIND: RESHAPING THE LEFT IN FRANCE* (1982).

gram of papers, meetings, and conferences to take place under the auspices of the Wilson Center.⁶¹ People involved in the project included the Chilean politicians and political scientists Sergio Bitar, Claudio Orrego Vicuña, and Manuel Antonio Garretón; Spanish political scientist and politician José María Maravall; as well as noted scholars Juan Linz, Terry Lynn Karl, and Adam Przeworski. Participants thus came from a range of backgrounds, and some, like Cardoso, were both scholars and political actors. Bitar (a former minister in Allende's government) and Genaro Arriagada (a political scientist who had been affiliated with the Wilson Center's Latin America Project) later mobilized a civil society coalition against the 1988 referendum to extend Pinochet's presidency by another eight years, and then became important political figures.⁶² Orrego also continued a political career, whereas Garretón (whose brother is Roberto Garretón, a prominent human rights lawyer) has become a well-known expert on democratic transitions. Maravall, author of *La Transición a la Democracia en España* (1982), was also a minister in the Spanish government in the 1980s.

Members of this group of scholar-activists were often chosen precisely because of their dual credentials—something that was not extraordinary under Latin American dictatorships. O'Donnell himself was representative of this group, as he had been the leader of anti-Peronist students while pursuing a law degree in the 1950s and then went into politics upon graduation. Appointed the youngest deputy minister in Argentine history in 1963, his career was cut short by General Juan Carlos Onganía's coup in 1966, after which he left Argentina and ended up at Yale. There he undertook research that would lead to his now-classic work, *Modernization and Bureaucratic Authoritarianism* (1973).⁶³ O'Donnell's case was not unique. In Chile, for example, political repression had pushed opposition politicians into academia and research centers, as one of the few "liberal" spaces where they could meet and discuss—and where they could receive funding for their work from outside actors such as the Ford Foundation.⁶⁴ According to Bitar, there emerged "a kind of strange mixture of political intellectuals," meaning "intellectuals who take up politics and politicians who for the first time reflect from a more doctrinal perspective on great state issues."⁶⁵

The privileged institutional location and the weighty intellectual and political capital associated with the Transitions project makes it of particular

61. Cardoso, though a principal architect of the project, was forced to scale back his participation when he became involved in electoral politics in Brazil in late 1978. Interview with Abraham Lowenthal, Professor, University of Southern California, via telephone (6 Aug. 2007).

62. *Id.*

63. See GUILHOT, *THE DEMOCRACY MAKERS*, *supra* note 48, at 123–24.

64. PURYEAR, *supra* note 50, at 57.

65. Sergio Bitar, *quoted in id.*

significance for grasping how transitions may have “mattered” to human rights. This is not to say that this project was the origin of a transitions concept or the only important actor in its proliferation—there was not just one such concept and there were other actors.⁶⁶ For example, a parallel effort was also underway at the time under the direction of John Herz, a participant in the Aspen Institute conference.⁶⁷ While this effort should also be acknowledged, this essay focuses on the Transitions project, mainly because it operated at a nexus of elite Latin American and US scholars with direct access to, and involvement in, policy and politics. A key actor in this nexus was Lowenthal, who was the director of studies at the Council on Foreign Relations before establishing the Latin American Program at the Woodrow Wilson Center, and who later developed, after consulting with Cardoso, the idea for the Inter-American Dialogue, a policy discussion group comprised of high-level politicians, business leaders, and academics from the Americas.⁶⁸

The Transitions project resulted in the publication of the books *Transitions from Authoritarian Rule* (1986), which offer a rigorous and influential window onto the processes, risks, and challenges of democratic transitions—particularly in many of the cases, such as Spain, Argentina, Uruguay, and Brazil, that were important to the development of the field of transitional justice. Although O’Donnell and Schmitter remarked in their “tentative conclusions about uncertain democracies” that it was by no means assured that a transition away from authoritarianism would lead to democracy, they did

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66. Nicolas Guilhot describes in much greater depth the vectors of transmission of the “transitions” idea in GUILHOT, *THE DEMOCRACY MAKERS*, *supra* note 48. He makes an important distinction between the left-leaning analysis of transitions evinced by actors such as the Woodrow Wilson group and the neoconservative analysis promoted by those associated with Reagan foreign policy.
 67. Herz organized two meetings in 1979 and 1980 on a comparative analysis of “the breakdown of dictatorships and their transformation into successor democracies” at the City University of New York. The outcome was *FROM DICTATORSHIP TO DEMOCRACY*, *supra* note 35. This work, of course, excludes consideration of Latin American cases and focuses mainly on post–World War II transformations in Europe and Japan. It also considers Greece, Portugal, and Spain.
 68. Interview with Lowenthal, *supra* note 61. Lowenthal recalls that the motivation for the Dialogue was to find a way to counterbalance the Reagan administration’s policies in Latin America. During a trip to Chile and Peru in 1982, just after the Malvinas War, he was struck by how “flabbergasted” people were by the administration’s obsession with Central America. Convinced that people were more agitated than he had ever seen them in his career since the 1960s, and that Washington was not paying attention, he wanted to find a way to inject their concerns into discussions in Washington. He made a last-minute lunch-time visit to Cardoso in Brazil, who then helped him to develop the idea. The first meeting of the Dialogue in November 1982 included an hour long exchange with Secretary of State George Shultz and ended with an hour and a half debriefing with Vice President George H. W. Bush. Today, the Dialogue includes among its members Cardoso, Alfonsín, Bitar, former Chilean President Ricardo Lagos, Joaquin Villalobos, Moisés Naím, plus a whole host of prominent US politicians and opinion-makers. See *Inter-American Dialogue*, available at <http://www.thedialogue.org>.

acknowledge that the normative impulse guiding their work was that a transition to democracy was a desirable outcome, and that they wanted to offer a “usable instrument” for those trying to effect a transition to democracy.⁶⁹

One of the reasons why the project was so influential was because it decisively shifted focus away from an analysis of the structural conditions for democracy that had been the mainstay of earlier social science and policy concerns. These included issues such as the behavioral, institutional, social, or economic conditions of democracy—issues that tended toward structural rather than causal explanations of democracy. Indeed, Dankwart Rustow noted an important gap in structural accounts in a seminal 1970 article, “Transitions to Democracy: Toward a Dynamic Model,” namely, that researchers had hitherto tended to

ask the same sort of question and support their answers with the same sort of evidence. The question is not how a democratic system comes into existence. Rather, it is how a democracy, assumed to be already in existence, can best preserve or enhance its health and stability.⁷⁰

Thus, the type of question almost universally asked is why it is that Anglo-Saxon and Scandinavian countries have smoothly running democracies whereas France and Germany are prone to crisis—instead of attempting to understand processes in countries “on the verge of democracy” such as “Ceylon, Lebanon, Turkey, Peru, or Venezuela.”⁷¹

It was precisely this orthodoxy that the Transitions project challenged. Its key theme was that the origins of democracies are to be found in political choices rather than in structural conditions—and these choices are made by elites. Drawing on the case studies they had commissioned for the project, O’Donnell and Schmitter emphasized the inherent uncertainty of transitional outcomes, rejecting the contention that approaches applicable to stable periods were appropriate to transitional ones. They similarly placed enormous causal power in decisions taken, particularly by elites. They also emphasized the significance of bargaining on political outcomes, particularly in the form of pacts among elite groups. This latter point was one of the central elements of their argument. They divided the sequence of transitional “moments” into a series of pacts, each of which would offer various interest groups mutual guarantees of protection—starting with the army, and working toward business and political elites. Though inherently undemocratic in terms of procedures, pacts are the best method of maintaining the stability necessary to establish a democracy, they concluded.⁷²

69. GUILLERMO O’DONNELL & PHILIPPE SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 5 (1986).

70. Dankwart A. Rustow, *Transitions to Democracy: Toward a Dynamic Model*, in TRANSITIONS TO DEMOCRACY 14 (Lisa Anderson ed., 1999).

71. *Id.* at 340.

72. O’DONNELL & SCHMITTER, *supra* note 69, at 37–39.

O'Donnell and Schmitter offered further refinements. They placed a strong accent on the resurrection of civil society and the necessity of "restructuring public space" during a transition. Of particular concern was that political identities were largely repressed under authoritarian rule, and thus modes of political participation had to be either created or created anew after the fall of the authoritarian regime.⁷³ As a corollary, they focused on "citizenship" as the key criterion for democracy—establishing or reestablishing equality before the law and possession of rights against a repressive state were crucial. Finally, O'Donnell and Schmitter's overwhelming focus in their "tentative conclusions" was on both averting a coup and on assuaging fears of a coup (even in those cases where it is unlikely).

O'Donnell and Schmitter also addressed the problem of "settling a past account," as they put it, "without upsetting a present transition." Focusing solely on prosecutions and purges of the state security forces, they asserted, "Transitional actors must satisfy not only vital interests but also vital ideals—standards of what is decent and just," and that "we believe that the worst of bad solutions would be to try to ignore the issue [of past violations]." Confronting past abuse, especially gross violations of human rights, were important in their view in order to transform the military's "messianic self-image" as *the* institution representing the interests of the nation, to combat impunity, and to reinforce the ethical values necessary to social health.⁷⁴

Thus, given their synthesis of a range of country cases, the central usable instruments they recommended centered on the transformation of a repressive state security apparatus and the instauration of procedures and practices of democratic citizenship. The main actors involved in this transformation are, as mentioned above, elites who enter into a series of bargaining arrangements with one another as a means of managing risks to their interests. The main focus of these actors is legal-institutional reform, rather than transformation at the socioeconomic level. The outcome, if all goes well, would be a set of elections and the installation of party politics.⁷⁵

This brief summary of the Transitions project at the Woodrow Wilson Center and O'Donnell and Schmitter's interpretation of transitions to democracy is not intended to displace the interpretations of those who were

73. In this respect, O'Donnell and Schmitter placed great weight on a few key elements: symbolic gestures of protest, often made by inspirational individuals; the activity of human rights organizations, which typically enjoy high prestige and moral authority in the wake of a political transformation; and the reactivation of working class and union identities hitherto suppressed by the regime. *Id.* at 48–49.

74. *Id.* at 28, 30, 31.

75. Given my argument above concerning the relevance of what is being "transitioned to," it is interesting to note that O'Donnell and Schmitter do not rule out the possibility (or desirability) of an eventual transition to socialism (or, as they call it "socialization"). For them, however, such a transition would best take place only after a transition to democracy has been consolidated. *See id.* at 11–12.

actually experiencing those events (although some of these people, such as Cardoso, Bitar, and Arriagada, were active participants, and others, such as O'Donnell, Garretón, and many others, were hardly disinterested observers). It is rather to provide a clearer picture of what a transition was understood to entail, even if it could never be guaranteed to happen. Thomas Carothers has argued that, in the US context at least, policymakers interested in democracy promotion came to much the same conclusions as O'Donnell and Schmitter, even if the direct influence of their work boiled down to nothing more than a lending of basic concepts and terms.⁷⁶ In any case, the question of direct influence is beside the point. The "transition" idea was indeed influential, and certainly did make its way into policy circles and domestic public spheres around the globe. Both Méndez and Zalaquett recall the concept of transition being borrowed from the social science research going on in the 1980s (both specifically cite the work of O'Donnell and Schmitter), even if a direct influence is difficult to trace.⁷⁷ Alex Boraine writes in his memoir that Aryeh Neier—who had been present at the Aspen Institute conference—"urged me not only to consider the examples in Eastern and Central Europe but also to look at the literature of recent transitions in Latin America and in particular in Argentina and Chile."⁷⁸ And, of course, the work of O'Donnell and Schmitter is cited in many seminal articles and books in the field and canonized in the Kritz volumes.

The intention in discussing O'Donnell and Schmitter is to better understand the contexts in which political actors operated as well as the specific political challenges they faced. Given the constraints and normative aims of these kinds of transitions in the 1980s, a normative agenda on issues relating to the transformation of an abusive state security apparatus and the reinstatement of democratic citizenship helped to shape the emerging field of transitional justice. It was this agenda that strongly colored perceptions of what justice entailed, or could become, during a time of transition.

76. See Thomas Carothers on relationship between policy and scholarly discussions on "transitions" in THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 93 (1999). Given the much stronger links between academia and politics in Latin American countries than existed in the United States, perhaps there was more possibility for cross-fertilization.

77. Interview with Méndez, *supra* note 38; Telephone Interview with José Zalaquett, Professor, University of Chile, Santiago (9 Oct. 2007).

78. ALEX BORAINÉ, *A COUNTRY UNMASKED* 16 (2000).

III. AN INTELLECTUAL FRAMEWORK FOR TRANSITIONAL JUSTICE

A. The 1988 Aspen Institute Conference

The 1988 Aspen Institute conference on state crimes was the brainchild of Alice Henkin, the director of the Justice and Society Program at the Aspen Institute. After hearing Julio Raffo of the important Argentine human rights organization Center for Legal and Social Studies (CELS) speak at an Americas Watch meeting about the “Full Stop” law, she telephoned Stephen Marks at the Ford Foundation. As it happens, Marks had just heard Raffo speaking on the same issue at the Ford Foundation offices, and his interest was piqued enough to recommend that his program should make an investment of \$47,380 in order to investigate “the general problem of how countries in transition to democracy deal with past abuses.”⁷⁹ Henkin promptly started canvassing people she knew such as Aryeh Neier and Juan Méndez at Human Rights Watch, an organization for which she was a board member.⁸⁰

The reference to Raffo, CELS, and the Full Stop law in this negotiation was not simply fortuitous since, of course, the real origins of the conference were the dramatic events that had been taking place in Latin America and around the world in the 1980s, as well as the response to them on the part of those interested in promoting human rights. What the conference did—and this is the reason for which it is of historical interest—was to try to develop an intellectual framework that could grasp the common issues faced in Argentina, Uruguay, Brazil, the Philippines, and elsewhere. Specifically, the conference sought to clarify the political, moral, and legal challenges that those seeking justice for state crimes faced in the democratic transitions of the 1980s.

The people Henkin brought together had a range of experiences and competencies. Lawrence Weschler—who wrote about the conference in a 1989 *New Yorker* article about repression and impunity in Uruguay, as well as in the postscript of his 1990 book *A Miracle, A Universe*—was there. The philosophers Ronald Dworkin and Thomas Nagel were also present. Both of them had already been part of a group of five philosophers that Carlos Nino invited to Argentina in April 1986 (with funding from the Ford Foundation) to discuss human rights policy with himself and Jaime Malamud-Goti.⁸¹ And

79. See Ford Foundation Archives, Grant No. 885-0149, § 4, Letter from Alice H. Henkin to Stephen Marks (26 Mar. 1987); Inter-Office Memorandum from Stephen P. Marks to Shepard Forman (17 Mar. 1987).

80. Interview with Henkin, *supra* note 13.

81. The group also included Owen Fiss, Tim Scanlon, and Bernard Williams. Interview with Malamud-Goti, *supra* note 5.

it was Nagel who, at the conference, came up with the now well-known distinction between knowledge and acknowledgment, the latter signifying the importance of official, public recognition of truths about past crimes.⁸² Also there were political scientists such as Mahmood Mamdani (an Africanist), Margaret Crahan (a Latin America specialist), and Samuel Fitch (a specialist on civil-military relations). There were religious leaders such as Father Luis Perez Aguirre, whom Weschler famously wrote about in *A Miracle, A Universe*. There were other notables, as well, such as Diane Orentlicher, Paulo Sergio Pinheiro, Theodore Meron, and Hugo Fruhling.

The conference was anchored, however, around three papers written by Herz, Zalaquett, and Malamud-Goti. John Herz was a prominent political scientist who had edited *From Dictatorship to Democracy* in 1982, which was the first synthetic analysis of dealing with legacies of prior regimes (and which also, perhaps unintentionally, shared the title of Zalaquett's 1985 *New Republic* article). A German-Jewish émigré from Nazi Germany who arrived in the United States in 1938, Herz had been a major force in the emergence of the realist approach to international relations in the 1950s and 1960s, and also did work on comparative politics.⁸³ As he recounts in his article, however, he had the additional advantage of having been involved in US denazification policy following World War II. Herz was thus invited to give an overview of the issues from a "historical perspective" although he was not a historian.

According to Méndez, it was he and Neier who suggested to Henkin that she invite Zalaquett to write the centerpiece of the conference: an article laying out a theory of justice during transitional periods.⁸⁴ Zalaquett, a Chilean, had been a part of the Allende government overthrown in Chile in 1973, and he was arrested several times in conjunction with his work defending human rights as legal director of the interfaith Comité Pro Paz group, the forerunner of the important Vicaría de la Solidaridad. Exiled in 1976, he began to work for Amnesty International, holding a number of prominent positions within the organization until he was allowed to return to Chile in 1986. Through his work with Amnesty, Zalaquett had a privileged view on events: in 1984, he met with Alfonsín and the commission of inquiry that was looking into disappearances in Argentina. He also met with President Julio Sanguinetti just after the latter took power in Uruguay in 1985. Later, in 1987, the Ford Foundation asked him to visit Uganda, where Museveni was establishing a truth commission to examine abuses under Idi Amin. Zalaquett had also already begun to reflect on his experiences: in 1985,

82. WESCHLER, *supra* note 1, at 4.

83. M. BENJAMIN MOLLOV, *POWER AND TRANSCENDENCE: HANS J. MORGENTHAU AND THE JEWISH EXPERIENCE* 4, 125 (2002).

84. Interview with Méndez, *supra* note 38; Interview with Zalaquett, *supra* note 77.

he published a cover story in *The New Republic* called “From Dictatorship to Democracy” (with the fitting subtitle of “Kicking out the generals is only the first chapter”) in which he emphasized that the key element in political transformation of the military dictatorships in the Southern Cone was holding the armed forces accountable for abuses.⁸⁵

Henkin also canvassed her husband, the influential Columbia University legal scholar Louis Henkin, who put her in touch with Malamud-Goti, who had been a visiting professor at Columbia lecturing on drug policy the previous year.⁸⁶ Malamud-Goti, as previously mentioned, was one of the architects of Alfonsín’s prosecutions policy, along with Carlos Nino. In anticipation of the end of the dictatorship, he and Nino, who were both on academic fellowships in Germany, started to think about the issue of accountability. They began to “shop around” for a politician, and since Nino was already in Alfonsín’s political party, they met with him, and Alfonsín subsequently invited them to be his advisers when he won the presidential election in 1983. Malamud-Goti recalls the prosecutions policy as a messy process marked by strong popular support as well as by sharp political setbacks and constraints—defined, in particular, by the capacity of military members and judges to close ranks and obstruct the process. Indeed, the article he wrote for the Aspen Institute conference was an adaptation of an argument he made in order to defend the Full Stop Law—the 1986 law, which he helped to author, that put an end to prosecutions of the armed forces.⁸⁷ Although he had spent years working on human rights issues in the Alfonsín government, this was his first expression of a reasoned justification for his views on prosecutions—in particular, for placing limits on them in the context of democratic transitions. This was thinking that responded directly to new dilemmas. Malamud-Goti’s ideas were among those at the conference that expressed crucial stakes still under debate within the field today.

B. The Stakes of the Debate

The participants in the conference seemed to be aware that they were discussing something new. According to Henkin, those in attendance “were unanimous that the Conference was important, but only an important beginning.” The goal of the conference was “to discuss the moral, political,

85. José Zalaquett, *From Dictatorship to Democracy*, *NEW REPUBLIC*, 16 Dec. 1985, at 17–21.

86. Interview with Henkin, *supra* note 13; Telephone Interview with Malamud-Goti, *supra* note 5. Malamud-Goti was actually recruited by Paul Martin, who worked with Louis Henkin at the Center for the Study of Human Rights at Columbia.

87. Malamud-Goti was responding to an article written by Julio Maier. Interview with Malamud-Goti, *supra* note 5.

and jurisprudential issues that arise when a government that has engaged in gross violations of human rights is succeeded by a regime more inclined to respect those rights."⁸⁸ In these discussions, the central issues were: whether there was an obligation under international law to punish violators of human rights; whether there was a minimal obligation of states to establish the truth about past violations; whether "discretion and prudence" should play a role in making decisions about justice measures; and how specifically to deal with human rights abuses by military authorities.

There were disagreements—often sharp ones—about the answers to these questions. The first question concerning the obligation under international law to punish violators of human rights was, however, fairly easy to dispatch. According to Henkin, "It was agreed that there was no general obligation under customary international law to punish such violators. Various international treaties, however, may require punishment expressly or by implication."⁸⁹ That is to say, the basis at the time was still rather thin. Following a panel discussion between Louis Henkin and Ted Meron on the relevance of international law, Méndez recalls Lawrence Weschler saying lightheartedly that the pair "reminded him of cavemen who rub sticks of wood together, and a little fire comes up only immediately to die out."⁹⁰ Although the Inter-American Court of Human Rights had just handed down its judgment in the important 1988 Velásquez-Rodríguez case, appeals to international law in debating these particular issues were difficult to make salient.⁹¹ Moreover, a quick glance at the Americas Watch report (authored by Méndez), *Truth and Partial Justice in Argentina*, confirms that international law did not seem to enter into the calculations of actors pursuing justice initiatives in the Alfonsín government.⁹² There is no mention of international law in the detailed descriptions of Argentina's human rights policies, indicating that the actors in Argentina themselves did not see a link, or at least did not rely on it. Where international law did come in, however, was in articulating Americas Watch's own positions with respect to justice in the Argentine case. For example, Americas Watch made specific appeals to Argentina's obligations as a signatory of the UN Convention Against Torture.⁹³

88. Alice H. Henkin, *Conference Report*, in *STATE CRIMES*, *supra* note 3, at 1, 9.

89. *Id.* at 4.

90. Interview with Méndez, *supra* note 38.

91. Angel Velásquez-Rodríguez was a student who had been detained by the Honduran police and then never seen again. The court ruled that the government had a responsibility under the American Convention on Human Rights to perform due diligence in preventing, investigating, and punishing disappearances. Since it did not do so in this case, it was obliged to pay compensation to the student's family. This ruling would be one of the bases for a later right to justice enshrined in the "Joinet Principles." See MARK FREEMAN, *TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS* 9 (2006).

92. MÉNDEZ, *supra* note 41, at 59.

93. *Id.*

Real progress in this area would have to wait until the early- to mid-1990s, bolstered by Diane Orentlicher's groundbreaking 1991 article,⁹⁴ and then solidified by the elaboration of UN principles. Orentlicher recently recounted that the genesis for this article came directly from her participation in the Aspen Institute conference: "While some of my contemporaries had fairly well-developed views about what international law required, most believed that further study and analysis was needed. In the course of the Aspen seminar, many participants urged me to take up that challenge."⁹⁵ The 1997 publication of a UN-commissioned report on combating impunity known as the "Joinet Principles," which advocated for the rights to know, to justice, and to reparations, was also a signal event in this regard.⁹⁶

As to whether states had a minimal obligation to establish the truth about past violations, there was a resounding consensus: there was indeed such an obligation. The stakes of the debate were not those of the oft-invoked "truth" versus "criminal justice" debate, in which truth-telling emerges as an alternative to prosecutions in cases where there has been an amnesty, thus making prosecutions impossible. Indeed, according to Henkin,

There was common agreement that the successor government has an obligation to investigate and establish the facts so that the truth be known and be made part of the nation's history. Even in situations where pardon or clemency might be appropriate there should be no compromising of the obligation to discover and acknowledge the truth.⁹⁷

Lawrence Weschler similarly affirmed,

Over and over again, the same sorts of issues get played out, and over and over again, as the participants at the Aspen Institute Conference began to realize, the same two imperatives seem to rise to the fore—the intertwined demands for [criminal] justice and for truth.⁹⁸

There were, however, some disagreements regarding the role of discretion and prudence in decisions to pursue justice measures. On the one hand, Herz, Zalaquett, and Malamud-Goti all affirmed the importance of political judgment in developing justice policies. As we already know, Zalaquett was

94. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Previous Regime*, 100 *YALE L.J.* 2537 (1991).

95. Diane F. Orentlicher, *Settling Accounts Revisited: Reconciling Global Norms with Local Agency*, 1 *INT'L J. TRANSITIONAL JUST.* 10, 12 (2007).

96. See *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Revised Final Report Prepared by Mr. Joinet, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 49th Sess., Agenda Item 9, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (1997). A brief overview of the development of international law and transitional justice can be found in FREEMAN, *supra* note 91, at 6–9.

97. Henkin, Conference Report, *supra* note 88, at 4–5.

98. Weschler, *Afterword*, *supra* note 3, at 92.

cautious about the “ambiguities of transitional situations” and the difficulties human rights advocates might have in navigating them. Malamud-Goti, who had navigated the treacherous political terrain in Argentina during the junta trials, also admitted that “the applicability of criminal provisions is largely a matter of political judgment” for transitional governments.⁹⁹ Indeed, in his view, decisions about whom to prosecute were political decisions, which explains the reference to “dilemmas of transitional democratic governments” in the title of his essay.¹⁰⁰

Neier and Méndez, however, chafed at the idea that political concerns should limit justice. Many of the participants recall a vigorous debate between Neier and Zalaquett on the issue that was not represented in the conference report.¹⁰¹ The disagreement essentially turned on whether there was a duty to punish human rights violators, and, if so, what the purpose of punishment should be. Neier defended the view that such a duty exists, and that allowing political struggles to impinge upon its fulfillment was wrong. This view had already been articulated strongly in Méndez’s *Truth and Partial Justice* report. “We . . . recognize that statesmen have to make difficult judgments and that it lies beyond the capacity of an outside organization with a special agenda—the promotion of human rights—to evaluate all the factors that enter into that process,” he wrote. He continued that, although this was the case, it was important to point out the “disturbing” way in which the prosecutions had been cut short: “We see a government and a Congress legislating under duress; under the ominous threat, by a powerfully armed elite, to eliminate the country’s democratic process.”¹⁰² Of course, this chain of events was likely disturbing to many people; the question was how to remedy it. Neier thought that violators of human rights should be punished because they deserved to be punished, not for some other end. This was, as Méndez put it, Neier’s “just deserts theory of punishment,” and it fed expressly into a view that human rights principles agreed upon at the international level should stand as absolute values, incorruptible by politics.¹⁰³

The answer to the final question—how specifically to deal with human rights abuses by military authorities—is a crucial one. In this conference, as well as in subsequent articles and conferences leading up to the publication of Kritiz’s compendium of “basic texts,” there was a vague but discernible coherence at work. Dealing with human rights abuses by repressive states during a supposed transition to democracy entailed specific measures that have since been handed

99. Malamud-Goti, *Trying Violators of Human Rights*, *supra* note 4, at 76.

100. *Id.* at 72.

101. The only extant account of their debate is WESCHLER, *A MIRACLE*, *supra* note 1, at 243–45.

102. MÉNDEZ, *supra* note 41, at 60.

103. Interview with Méndez, *supra* note 38; Interview with Henkin, *supra* note 13; Telephone interview with Zalaquett, *supra* note 77; Telephone interview with Margo Picken, Fellow, London School of Economics and Political Science (11 Oct. 2007).

down as *the* legitimate transitional justice measures, in spite of their subsequent application to very different sorts of political and practical dilemmas.

C. An Implied Structure for Transitional Justice: Two Normative Aims

It was not by chance that the structure of conversations at this conference—and similar conversations at the 1992 Charter 77 Foundation conference and the 1994 IDASA-sponsored conference on dealing with the past in South Africa, as well as Kritz's work—consistently reflected an interest in a particular set of measures as objects of debate: prosecutions, truth-telling, transformation of an abusive state security apparatus, and rehabilitation or compensation for harms. Nor is it by chance that this structure implied that a comprehensive approach, including elements of all of these measures, should at least be considered by transitional regimes.

These measures fit closely with two normative aims that many of the participants expressed: first, the goal of providing some measure of justice to those who suffered under repressive state regimes and, second, the goal of facilitating an exit from authoritarianism and shoring up a fragile democracy. The argument here is *not* that these discussions were similar because the Aspen Institute conference influenced the shape of subsequent discussions, though because so many of the same people were involved it may have. Rather, these discussions were similar because the practical problems faced in various countries were understood in similar ways, and because the legitimate range of responses to those problems was defined similarly. This conceptual structure may have defined the emergence of the field, independent of whether individual participants were aware of it.

A brief look at each of these measures provides a picture of this structure and how it was justified, which will in turn help to draw out the connections between each of these two normative aims. Prosecutions, which may be considered the most contentious ethical question for a post-authoritarian regime given the potential political resistance to them, were intended to fulfill “a duty owed to the victims” that would “give significance to their suffering and serve as a partial remedy for their injuries,” according to Henkin's summary.¹⁰⁴ They would also, in the words of Malamud-Goti, “provide a unique means by which to assert democratic values” through their five consequences: establishing tangible facts about past crimes, offering disapproval of official policies, promoting confidence in the new political arrangements, restoring to citizens full membership in society, and improving chances for a transformation of military/civilian relations.¹⁰⁵

104. Henkin, Conference Report, *supra* note 88, at 3.

105. Malamud-Goti, *Trying Violators of Human Rights*, *supra* note 4, at 81–82. Although Herz also mentions that giving a “clear and unvarnished picture of the true character of the

Truth-telling efforts, which were acclaimed as a minimum requirement of justice by all the participants at the conference, “respon[d] to the demand of justice for the victims,” according to Henkin’s summary.¹⁰⁶ Without disclosure of the truth about what happened to their loved ones, “the actual suffering and indeed violation of the rights of the relatives of the victims” would be perpetuated, in Zalaquett’s view.¹⁰⁷ Yet it would not be enough that only families of victims know the truth about what happened to their loved ones; all citizens must know, and the knowledge must be officially recognized. Zalaquett emphasized that official truth-telling is important in order to prevent “the military or other groups or institutions responsible for past abuses to escape the judgment of history and insist on exculpatory versions of what happened; new recruits will absorb an institutional tradition which has not expunged its most objectionable aspects. All this can only weaken efforts to prevent the recurrence of human rights abuses and to reinforce the rule of law.”¹⁰⁸ Herz similarly argued for “the need for successor democracies to present to the people . . . a clear and unvarnished picture of the true character of the regime,” precisely in order to act as a counterweight to the propagandistic character of official information given by the secretive authoritarian regime.¹⁰⁹ According to Henkin, truth-telling “facilitates national reconciliation.”¹¹⁰

Transformation of the state security apparatus was argued by Zalaquett and others to be a necessary part of providing guarantees to victims that violations would not be repeated.¹¹¹ Beyond this aim however, such a transformation was argued to “create a democratic climate in a successor democracy,” through activities such as prosecutions, purges, and human rights training. Also important was the reaffirmation of civilian authority over the military through the denial of the military ideologies of “national security” that were used to support practices such as disappearances, and the denial of security forces’ claims that human rights abuses were mere “excesses,” rather than systematic, sanctioned undertakings.¹¹²

Finally, rehabilitation and compensation for harms, though the least discussed and least developed theme of the conference, was nonetheless recognized as an essential element of coming to terms with an authoritarian

regime” was one of the aims of the postwar Allied trials, in fact, “they had little effect.” John H. Herz, *An Historical Perspective*, in *STATE CRIMES*, *supra* note 3, at 19–20.

106. Henkin, Conference Report, *supra* note 88, at 5.

107. Zalaquett, *Confronting Human Rights Violations*, *supra* note 6, at 31.

108. *Id.*

109. Herz, *An Historical Perspective*, *supra* note 105, at 19.

110. Henkin, Conference Report, *supra* note 88, at 5.

111. Zalaquett, *Confronting Human Rights Violations*, *supra* note 6, at 38.

112. Henkin, Conference Report, *supra* note 88, at 16, 6–7; Zalaquett, *Confronting Human Rights Violations*, *supra* note 6, at 60–61.

regime. For Zalaquett, even though repair for the damage caused to victims “cannot be fully achieved,” it was desirable that “every possible effort . . . be made to compensate victims of human rights violations and their families.”¹¹³ Beyond the moral exigency to repair the harms of individual victims, however, such programs were claimed also to have broader public benefits. According to Herz, “Rehabilitation and indemnification of those who have suffered under the former regime is important for equity as well as for general symbolic and moral reasons.”¹¹⁴ He also pointed out the morally problematic way that reparations had been carried out in postwar Germany, where mainly Jews of German origin had been compensated, whereas others had not, and where wives of resisters who had been killed received no benefits while widows of high-ranking Nazis lived comfortably on government-supplied pensions.¹¹⁵ Zalaquett further asserted that truth-telling and apologies operate as a form of reparation “for the victims, for the society and, not least, for the soldiers or policemen who did not participate in repressive activities or who were forced to implement illegal policies.”¹¹⁶

In sum, it seems uncontroversial to say that the conceptions of justice that drew together these different responses to past human rights violations rested on two normative aims: achieving justice for victims, and achieving a more just, democratic, order. This latter aim placed an enormous burden on such measures. Sweeping claims about the capacity of justice measures to facilitate a political transition—and, in particular, to aid the instauration of practices of democratic citizenship and the reform of a repressive state security apparatus—suggested a general enthusiasm and optimism. It would remain to be seen whether such claims would be borne out empirically, or, after systematic investigation, possibly scaled back.

IV. THE PROBLEM OF TRANSITIONAL JUSTICE

This account of the conceptual foundations of the field of transitional justice began with an investigation into the origins of the term “transitional justice,” and has ended by suggesting some of its conceptual contents at the time of its emergence. It has argued that “transitions” have mattered to human rights for two reasons: first, human rights practice had to adapt itself to new practical challenges; and second, that political change, understood as a “transition to democracy,” had important effects for the kinds of justice claims that were considered legitimate. Indeed, the widespread acceptance of the

113. *Id.* at 36.

114. Herz, *An Historical Perspective*, *supra* note 105, at 20.

115. *Id.*

116. Zalaquett, *Confronting Human Rights Violations*, *supra* note 6, at 36–37.

reigning “transitions paradigm” and its focus on legal-institutional reforms and responses was a crucial factor in legitimizing the field of transitional justice. Transitions to democracy, for the many reasons discussed above, had become the dominant normative lens through which to view political change. Transitional justice fit into that lens.

A. The Distinctiveness of the Field

But is the field of transitional justice really new, or is it simply part of the human rights movement? This examination of the origins of transitional justice strongly suggests that it is a distinct field. Aryeh Neier’s forceful disagreement with José Zalaquett at the Aspen Institute conference about the justification for punishment provides an important illustration of the distinction. For Neier, “punishment is the absolute duty of society to honor and redeem the suffering of the individual victim,” and other aims, such as facilitating a transition, were either irrelevant or dubious. “I want to quarrel with the assumption that a principle reason for seeking justice, or criterion for evaluating its efficacy, should be the future stability of a reconstituted democracy,” he asserted.¹¹⁷ But this position, though important, was not the general one represented at the conference, nor the one that continued to animate the emergent field. In a way, Neier unwittingly identified the precise factor that makes the field of transitional justice distinctive: the second normative aim of facilitating a transition to democracy.

Unlike the broader human rights movement, transitional justice relies on two sorts of beliefs: principled beliefs, which are “normative ideas that specify criteria for distinguishing right from wrong and just from unjust”; and causal beliefs, which are “beliefs about cause-effect relationships which derive authority from the shared consensus of recognized elites, whether they be village elders or scientists at elite institutions.”¹¹⁸ The human rights movement has built its practical activity around advancing and defending norms, particularly at the international level. The field of transitional justice has also taken on this task of norm “entrepreneurship,” but has added to it the burden of trying to systematize knowledge about the cause-and-effect relationships between justice measures and transitions. That is no easy task.

This article only tells part of the story. It has defined the emerging field of transitional justice as an international web of individuals and institutions

117. WESCHLER, A MIRACLE, *supra* note 1, at 244.

118. Judith Goldstein & Robert Keohane, *Ideas and Foreign Policy: An Analytical Framework*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 9–10 (Judith Goldstein & Robert O. Keohane eds., 1993). See also Keck and Sikkink’s discussion of how “principled beliefs” are at the heart of human rights work. KECK & SIKKINK, *supra* note 52, at 1.

whose internal coherence is held together by common concepts, practical aims, and distinctive claims for legitimacy. So far, there is no single theory of transitional justice, and the term does not have a fixed meaning. It remains to be explained how the elementary conceptual structure explored here interacted with the other elements of the emerging field. Moreover, the focus on these early discussions necessarily omits an important and ongoing development in the emergence of the field: the rapid expansion of international law on transitional justice issues throughout the 1990s.

B. Challenges to the Initial Conceptual Boundaries of Transitional Justice

In conclusion, this section addresses challenges to this initial structure that have since come to play an important role in understandings of—and debates about—the conceptual boundaries of transitional justice.

The first of these challenges arises with respect to the question of whether and how the chosen end point of a transition (e.g., democracy, socialism, enlightened despotism, etc.) may matter for the kinds of justice claims advanced. There was an explicit democratization frame for the initial conceptualization of transitional justice. What happens when a different frame is used? In the case of South Africa, for example, there has been a reactivation of distributive justice claims associated with transitions to socialism rather than transitions to democracy. Some critics of transitional justice have argued that justice for the crimes of apartheid requires more than the legal-institutional reforms required for an instauration of democratic citizenship and a transformation of an abusive state security apparatus; it requires a redistribution of wealth that was unjustly accumulated through an inhuman political and economic system. This challenge was, indeed, already recognized at the Aspen Institute conference. John Herz concluded his remarks by noting that in some contexts, democratic transitions (and the legal-institutional reforms that go along with them) may not mean very much: “Where, as in Brazil, Guatemala, El Salvador, and Haiti or the Philippines, land-owning is concentrated in large *latifundia*, with a dependent and impoverished peasantry, the overthrow of the Marcoses or the Duvaliers may mean little without a reform of the socio-economic system.” He also concluded, however, that this problem represents “another story” from the one being told at the conference.¹¹⁹ But on what grounds could one argue that such claims should not be considered transitional justice claims? If they can be considered transitional justice, then what specific form should they take, and which measures (nationalization, special taxation, expropriation, affirmative action, etc.) are most appropriate to their fulfillment?

119. Herz, *An Historical Perspective*, *supra* note 105, at 22.

Similarly, it must be asked whether a “transition to peace” really is different in kind than a transition to democracy, and if so whether a new normative aim must either replace or be added to the initial normative aims undergirding the transitional justice field. The practical dilemmas actors face in peacebuilding can be quite different from those involved in the instauration of democratic citizenship and the transformation of an abusive state security apparatus. Justice claims in such contexts are much more likely to revolve around reintegration of ex-combatants, ethnic cleansing, war crimes, internal displacement, property restitution, power sharing, wealth sharing, and claims for self-determination. The measures of prosecutions, truth-telling, reparations, and reform of an abusive state apparatus should not be assumed to map neatly onto these very different practical problems—if at all. Neier, for example, explicitly questioned the value of a truth commission in a post-conflict setting in a 1995 letter to the *New York Review of Books*.¹²⁰ For him, commissions were a logical response to the need to uncover tightly guarded state secrets. “What is it that a commission could tell us about the indiscriminate bombardment of Sarajevo or the radio-incited genocide in Rwanda that would assist in confronting such a past?” he queried.¹²¹ Moreover, prosecutions and vetting are unlikely to be adequate measures in a post-conflict setting, where the problem of ex-combatant reintegration requires at least consideration of local-level, restorative justice approaches. Perhaps new norms and methods of realizing them need to be identified and refined. Should those working in transitional justice develop a new set of measures to address the specific justice concerns of transitions to peace? And if so, should they engage directly with social science literature on conflict resolution, state building, and peacebuilding to do so?

The second challenge is a response to the difficulties of transposing the regional diagnoses of Latin American observers to other parts of the world with different histories, cultures, and positions within the world economy. One of the most important critiques of the “transitions to democracy” literature was made in the mid-1990s by a group of Central and Eastern European regional specialists, who argued for the unique characteristics of the political transitions that took place in the post-communist countries.¹²²

120. Aryeh Neier, *Do Trials Work?* N.Y. REV. BOOKS, 19 Oct. 1995 (in response to Timothy Garton Ash, *Central Europe: The Present Past*, N.Y. REV. BOOKS, 13 July 1995).

121. *Id.*

122. See Philippe C. Schmitter with Terry Lynn Karl, *The Conceptual Travels of Transitologists and Consolidologists: How Far to the East Should They Attempt to Go?*, 53 *SLAVIC REV.* 173 (1994); Valerie Bunce, *Should the Transitologists Be Grounded?* 54 *SLAVIC REV.* 111 (1995); Terry Lynn Karl & Philippe C. Schmitter, *From an Iron Curtain to a Paper Curtain: Grounding Transitologists or Students of Postcommunism?*, 54 *SLAVIC REV.* 965 (1995); Valerie Bunce, *Paper Curtains and Paper Tigers*, 54 *SLAVIC REV.* 979 (1995). Also of interest is Sarah Meiklejohn Terry, *Thinking About Post-communist Transitions: How Different Are They?*, 52 *SLAVIC REV.* 333 (1993).

In these countries, “transition” had entailed sweeping social and economic reforms that could be characterized as revolutionary. Latin American countries in the Southern Cone had had strong capitalist classes independent of the state under their “bureaucratic” authoritarian regimes, whereas communist countries were single-party states where the party was uniquely responsible for economic decision making. Moreover, in their “pre-transition” phase, communist countries typically had more egalitarian class structures than their Latin American counterparts, meaning that class was unlikely to be mobilized as a political interest during the transition—instead, ethnic, national, or religious identities were more likely to become politically salient. Indeed, the critics point out that Latin American countries typically had established national identities, whereas post-communist countries did not. Finally, there is the fact that in the Southern Cone (Central American countries are considered an exception on this point), demands for social, economic, military, and administrative transformations were generally met sequentially—whereas in the post-communist states they occurred all at once, with little opportunity to prioritize among them.

Similarly, comparative research on African democratic experiments of the early- to mid- 1990s has also yielded alternative accounts of the most salient characteristics of sub-Saharan African political transitions. These accounts begin with a theory of the most prevalent type of autocracy in the region: neopatrimonialism, or “strongman” politics based on large, personal systems of patronage. In these cases, the very authority of the state rested on clientelist relationships that began to dissolve along with the austerity regimes imposed on so many debtor nations in the 1980s. These researchers stress that transitions from neopatrimonial-style states are likely to begin with mass protest, owing to the withdrawal of state subsidies to the vast clientele networks, rather than with elite pacts (with the exception of transitions away from settler oligarchies such as South Africa).¹²³ Such transitions sometimes lead to state fragility or failure, meaning that the very state institutions upon which transitional justice measures depend are weak or absent. Moreover, given the particularities of these kinds of states, corruption logically arises as one of the central justice issues of such transitions.

Given all of these differences, if it is agreed that the particular concerns and conceptual structure of transitional justice took shape in response to events in Latin America, to what degree can these concerns and conceptual structures be transposed to other regions?

Another challenge arises in the applicability of transitional justice in contexts where there is no discernible “transition.” In many long-standing liberal democracies, for example, there remain important questions of “his-

123. See MICHAEL BRATTON & NICOLAS VAN DE WALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* 118 (1997).

torical justice," which is discussed typically in cases where there has been long-term, systematic marginalization, often over centuries. The victims of the actual abuses may be dead, but the abuses live on by negatively structuring the life experiences and life chances of the victims' descendents. Examples include the legacy of slavery for African-Americans and of settler colonialism for indigenous peoples. It is far from clear, however, given that the initial impetus for the field of transitional justice was historically located in Latin American transitions from authoritarian rule, that claims for the rectification of historical injustices in mature democracies would best be satisfied through "standard" transitional justice measures. Indeed, many working in the field of historical justice have flatly rejected the relevance of anything so narrow as transitional justice. For these critics, transitional justice is intimately linked with measures specifically designed for the brief duration of a political transition. They emphasize the importance of long-term efforts at transformation that involve some element of social restructuring, such as affirmative action or land reform, which they see as fundamentally different from the limited aims of prosecutions, reparations, and the like.

Yet another challenge is the fact that, since the mid-1990s many observers have cast significant doubt on the transitions paradigm itself, mainly on empirical grounds—the observation that a number of countries that were supposed to be making a transition to democracy had ultimately failed to do so.¹²⁴ For these observers, the paradigm had raised false hopes, perhaps mostly among democracy promoters, of an easily identifiable, sequential path toward a new political regime. One critic of the post-communist aftermath in Russia, *Nation* columnist and Russian historian Stephen Cohen, excoriated the "near orthodoxy" status of the transitions paradigm among Western democracy promoters, whom he credited with a "Bolshevik-like experiment" that led not to democracy, but rather to an immense and unintentional redistributive scheme that skewed wealth fantastically at the top of the Russian social pyramid.¹²⁵ In another trenchant critique, Thomas Carothers advocated for the removal of a "transitions lens," as it did more to muddle political analysis than it did to clarify it. For him, those interested in democratization

should start by assuming that what is often thought of as an uneasy, precarious middle ground between full-fledged democracy and outright dictatorship is actually the most common political condition today of the countries in the developing world and the post-communist world. It is not an exceptional category . . . it is a state of normality for many societies.¹²⁶

124. See Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22 (Nov.–Dec. 1997); Robert D. Kaplan, *Was Democracy Just a Moment?* ATLANTIC MONTHLY, Dec. 1997, at 55; Thomas Carothers, *The End of the Transition Paradigm*, 13 J. DEMOCRACY 5 (2002).

125. STEPHEN F. COHEN, FAILED CRUSADE: AMERICA AND THE TRAGEDY OF POST-COMMUNIST RUSSIA 24, 94 (2001).

126. Carothers, *The End of the Transition Paradigm*, *supra* note 124, at 17–18.

Given the doubt cast on the very utility of the transitions paradigm, should justice measures continue to make empirical claims related to facilitating transitions? If so, then on what empirical basis can one claim that particular actions taken during a transition affect its outcome—and are such claims useful or even desirable?

A final challenge to this initial conceptualization of transitional justice would follow this critique of the transitions paradigm and simply reject the transitional framework altogether—perhaps on the grounds that it is too tainted by a specific political project (democratization) and by the support of specific institutional actors (US democracy-promoting organizations). One might be tempted to argue that the term “transitional justice” should be abandoned, and replaced with something along the lines of “mass atrocity” justice. The attempt to shift meaning in this way might make sense given the immense expansion of international principles and law on these issues since the late 1980s, and the emergence of an “anti-impunity” movement, which, though related to transitional justice, has a different history and conceptual background.¹²⁷ Should transitional justice be folded into an anti-impunity movement centered on the development of international norms and law, which would allow the contents of the word “transitional” simply to wither away?

This latter challenge echoes Aryeh Neier’s comments at the Aspen Institute conference. His skepticism concerning the relationship between justice and a “reconstituted democracy,” as well as his strong assertion that “punishment is the absolute duty of society to honor and redeem the suffering of the individual victims” may prove to have been quite prescient.¹²⁸ This final challenge has a distinct chance of succeeding, and in a sense it would represent an unsurprising historical outcome given the expansion of international law and principles—often called “international justice”—that has taken place since the Aspen Institute conference. It may be argued, however, that what made the field of transitional justice distinct from human rights was its addition of causal beliefs about facilitating a transition to the principled beliefs of human rights actors such as Neier about right and wrong. Resolving that tension by placing decisions about justice squarely in the sphere of international law might, on that definition, effectively announce the dissolution of transitional justice itself.

127. This movement has been analyzed in terms of a “justice cascade.” See Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHL. J. INT’L L. 1 (2001). See also Sikkink & Walling, *supra* note 11.

128. WESCHLER, A MIRACLE, *supra* note 1, at 244.

Annex: Attendees of Several Conferences, 1988–1994¹²⁹

This chart is comprised of the participants at three conferences that treated the issues of justice in transitional periods. In the first part of the chart, I identify those people who attended more than one of these conferences. In the second, I listed all the other participants.

<i>State Crimes: Punishment or Pardon?</i>	<i>Justice in Times of Transition Charter 77 Foundation Salzburg, Austria March 7–10, 1992 Funders: German Marshall Fund of the United States, the Charles Stewart Mott Foundation, the National Endowment for Democracy, Open Society, the Rockefeller Family & Associates, the Rockefeller Foundation, and the Charter 77 Foundation-New York</i>	<i>Dealing with the Past Institute for a Democratic Alternative for South Africa Somerset West, Western Cape February 1994 Funder: Open Society</i>
Aspen Institute Wye, Maryland November 4–6, 1988 Funder: Ford Foundation		
Henkin, Alice H. The Aspen Institute, New York, USA	Henkin, Alice H.	
Malamud-Goti, Jaime Buenos Aires University, Argentina	Malamud-Goti, Jaime	
Méndez, Juan E. Americas Watch, Washington, D.C., USA		Méndez, Juan E.
	Michnik, Adam Editor-in-Chief of <i>Wyborcza</i> , Member of Parliament, Poland	Michnik, Adam
Neier, Aryeh HRW, New York, USA		Neier, Aryeh
Orentlicher, Diane Columbia University, New York, USA	Orentlicher, Diane	
	Sajo, Andras Legal Advisor to President Arpad Göncz, Hungary	Sajo, Andras
Weschler, Lawrence The New Yorker, New York, USA	Weschler, Lawrence	Weschler, Lawrence

129. STATE CRIMES, *supra* note 3; CHARTER 77 FOUNDATION, PROJECT ON JUSTICE IN TIMES OF TRANSITION, (Report of the Project's Inaugural Meeting), Salzburg, 7–10 Mar. 1992; DEALING WITH THE PAST, *supra* note 7, at 159. These lists are based on available sources, but may be incomplete.

<p><i>State Crimes: Punishment or Pardon?</i> Aspen Institute Wye, Maryland November 4–6, 1988 Funder: Ford Foundation</p>	<p><i>Justice in Times of Transition</i> Charter 77 Foundation Salzburg, Austria March 7–10, 1992 Funders: German Marshall Fund of the United States, the Charles Stewart Mott Foundation, the National Endowment for Democracy, Open Society, the Rockefeller Family & Associates, the Rockefeller Foundation, and the Charter 77 Foundation-New York</p>	<p><i>Dealing with the Past</i> Institute for a Democratic Alternative for South Africa Somerset West, Western Cape February 1994 Funder: Open Society</p>
<p>Zalaquett, José (Esq.) Santiago, Chile</p>		<p>Zalaquett, José</p>
<p>Bajeux, Jean-Claude Ecumenical Center of Human Rights, Port-au-Prince, Haiti</p>	<p>Alfonsín, Raúl President of Argentina, 1983–89</p>	<p>Adam, Heribert South Africa</p>
<p>Crahan, Margaret Occidental College, Los Angeles</p>	<p>Bence, Gyorgy Philosopher, Hungary</p>	<p>Asmal, Kader South Africa</p>
<p>Dworkin, Ronald New York University New York, USA</p>	<p>Biedenkopf, Kurt Minister President of Saxony, Germany</p>	<p>Boraine, Alex IDASA, South Africa</p>
<p>Fitch, Samuel University of Colorado, Boulder, USA</p>	<p>Bratinka, Pavel Member of Federal Assembly, Czechoslovakia</p>	<p>Burton, Mary South Africa</p>
<p>Fruhling, Hugo Academia de Humanismo Cristiano, Santiago, Chile</p>	<p>Degutis, Arunas MP, Lithuania</p>	<p>Calata, Nomonde South Africa</p>
<p>Henkin, Louis Columbia University, New York, USA</p>	<p>Errera, Roger Conseiller d'état, France</p>	<p>Canas, Roberto El Salvador</p>
<p>Herz, John H. City University of New York, USA</p>	<p>Garretón, Roberto Deputy Foreign Minister of Chile</p>	<p>Du Plessis, Lourens South Africa</p>
<p>Mamdani, Mahmood Makerere University, Kampala, Uganda</p>	<p>Goldman, Robert American University Law School Washington, D.C., USA</p>	<p>Du Toit, André South Africa</p>
<p>Meron, Theodor NYU, New York, USA</p>	<p>Grossman, Claudio American University Law School, USA</p>	<p>Gauck, Joachim Germany</p>
<p>Mulet, Edmond (Cong.) Guatemala City, Guatemala</p>	<p>Güttler, Vojen Justice, Constitutional Court of Czechoslovakia</p>	<p>Gcina, Paizoah South Africa</p>

*State Crimes:
Punishment or Pardon?*

Aspen Institute
Wye, Maryland
November 4–6, 1988
Funder: Ford Foundation

Justice in Times of Transition

Charter 77 Foundation
Salzburg, Austria
March 7–10, 1992
Funders: German Marshall
Fund of the United States, the
Charles Stewart Mott Foundation,
the National Endowment for
Democracy, Open Society, the
Rockefeller Family & Associates,
the Rockefeller Foundation, and the
Charter 77 Foundation-New York

Dealing with the Past

Institute for a
Democratic Alternative
for South Africa
Somerset West, Western
Cape
February 1994
Funder: Open Society

Nagel, Thomas
NYU, New York, USA

Holmes, Stephen
Professor of Political Science,
University of Chicago, USA

Goldstone, Richard
South Africa

Nakchung, Paik
University of Seoul, Korea

Huntington, Samuel
Olin Institute
Harvard University, USA

James, Wilmot
South Africa

Pérez Aguirre, Luis (Father)
Servicio Paz y Justicia,
Montevideo, Uruguay

Laber, Jeri
Executive Director, Helsinki Watch

Lapsley, Michael
South Africa

Picken, Margo
Ford Foundation, New
York, USA

Luciani, Claudia
Council of Europe

Motlana, Nthato
South Africa

Pinheiro, Paulo Sergio
Universidade de Sao
Paulo, Brazil

Michelini, Rafael
Deputy in Chamber of
Representatives, Uruguay

Ntsebeza, Dumisa
South Africa

Posner, Michael
Lawyers Committee for
Human Rights, New York,
USA

Navasky, Victor
Editor, *The Nation*
USA

Osiatynski, Wiktor
Poland/USA

Skweyiya, Lewis (Esq.)
Durban, South Africa

Offe, Claus
Professor of Political Science,
University of Bremen, Germany

Petrova, Dimitrina
Bulgaria

Osiatynski, Wiktor
Advisor to Polish government on
drafting a new constitution, Poland

Rosenberg, Tina
USA

Petovar, Tanja
HR Lawyer, Belgrade, Yugoslavia

Sachs, Albie
South Africa

Phillips, Tim
Charter 77 Foundation, New York,
USA

Schwarzenberg, Karel
Czech Republic

Rodrigo, Fernando
Fundacion Ortega y Gasset,
Madrid, Spain

Slabbert, Frederik Van Zyl
IDASA, South Africa

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Democracy, Open Society, the
Rockefeller Family & Associates,
the Rockefeller Foundation, and the
Charter 77 Foundation-New York

Dealing with the Past

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Democratic Alternative
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Somerset West, Western
Cape
February 1994
Funder: Open Society

Roginsky, Arseny
Board Member of Memorial,
Russian Human Rights Organization

Rupnik, Jacques
Advisor to Mitterrand, France

Schwartz, Herman
American University Law School
Co-chair, Project on Justice in Times
of Transition, USA

Steigenberger, Helmut
Former Justice of the FRG
Constitutional Court, Germany

Szajer, Jozef
MP, Hungary

Teitel, Ruti
New York Law School, USA

Urban, Jan
Journalist for *Livdove noviny*,
Czechoslovakia