

AN EXCUSE-CENTERED APPROACH TO TRANSITIONAL JUSTICE*

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Recently, we have been witness to a tsunami. This “third wave” of liberal revolutions in Asia, Europe, Africa, and South America has begun to melt away the last frozen remnants of the cold war.¹ In the wake of these revolutions, as nations and states make the transition to democracy, the question arises: “What is to be done about wrongs of the past?”²

Transitional regimes, in contrast to their autocratic and abusive predecessors, are committed to human rights, democracy, and the rule of law. To make good on these commitments, new states must seek justice for victims and abusers. “Justice” is traditionally understood in terms of those well-worn coins³ “responsibility,” “crime,” and “punishment.” It is, then, no surprise that criminal trials and punishments often are the standard for justice in transitions.⁴ Unfortunately, traditional theories of criminal jurisprudence have, for the most part, been developed in relatively stable states

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¹ See generally, SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991).

² Contemporary conversations about transitional justice owe everything to a debate in print between Diane Ortenlicher and Carlos Nino published in the Yale Law Journal. See Diane Ortenlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, (1991) [hereinafter *Settling Accounts*]; Carlos Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, (1991); Diane Ortenlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641, (1991).

³ I allude to an image of truth adopted by Jacques Derrida from Friedrich Nietzsche, *On Truth and Lie in an Extramoral Sense*, in PHILOSOPHY AND TRUTH: SELECTIONS FROM NIETZSCHE’S NOTEBOOKS OF THE EARLY 1870’S, 92 (1979).

⁴ Miriam Aukerman, *Extraordinary Evil Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM RTS. L. J. 39, 40 (2002).

where the ideal is within the reach of aspiration.⁵ Alluding to John Rawls, Pablo DeGreiff has distinguished transitions as “very imperfect worlds.”⁶ What he points out is that efforts to seek justice in transitions face practical challenges that do not disturb views from crystalline castles.⁷ These considerations usually lead transitions to pursue “hybrid” programs of justice comprised of limited prosecutions focused on top leaders,⁸ official or *de facto* amnesties, truth commissions, lustration, and reparations.⁹

In transitions, and in transitional justice literature, hybrid programs are usually seen as compromises born of necessity.¹⁰ Transitional regimes admit that it would be better to prosecute all who had a hand in past abuses but recognize that it is simply not possible.¹¹ Transitions must settle for the best justice possible given very imperfect circumstances.¹² Some have characterized the sighs that accompany this view as hysterical overreaction, mistaking the practical challenges to justice in transitions for insurmountable obstacles rather than simple variations of challenges confronted by “ordinary justice.”¹³ There are, in fact, few, if any, hand-wringers among those interested in transitional justice. It is true that, faced with the compromises borne of necessity, most transitional

⁵ Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 *J. OF INT’L AFF.* 647, 661 (1999).

⁶ Pablo De Greiff, *International Courts and Transitions to Democracy*, 12 *PUB. AFF. Q.* 79, 79 (1998); see also BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 74, 75 (1992).

⁷ See Eric Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 *HARV. L. REV.* 761, 777-825 (2004).

⁸ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2602-04.

⁹ Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 3, 7 (Robert I. Rotberg & Dennis Thompson, eds., 2000).

¹⁰ *Id.*

¹¹ van Zyl, *supra* note 5, at 661.

¹² Michel Rosenfeld, *Restitution, Retribution, Political Justice and the Rule of Law*, 2 *CONSTELLATIONS* 309, 310 (1996).

¹³ Posner & Vermeule, *supra* note 7. Sweeping aside the madness, Posner and Vermeule characterize challenges to justice in transition as differing from the humdrum problems faced by stable states only in terms of scale. Transitional justice is, then, just “ordinary justice.” The corresponding advice to transitional justice practitioners is to grin-and-bear it. That is slim comfort. More important, it ignores the distinctive conditions of abusive regimes that are bound to problems of scale, which, when properly accounted for, provide significant guidance for a transitional jurisprudence.

justice theorists express understandable regret that “more” justice cannot be done.¹⁴ However, regret that more cannot be done is not the same as giving up on justice entirely.¹⁵

This article charts a different course, proposing a transitional jurisprudence that is, though non-ideal, decidedly positive. It argues that the unique scale of practical challenges to transitional justice present jurisprudential problems that are not satisfied by treating transitional justice as ordinary justice.¹⁶ In particular, it emphasizes the importance of recognizing that pre-transitional states are not simply crime ridden, occupied by awesome numbers of entrepreneurial and independent criminals. Rather, they are defined by social norms, ontologies, and historical teleologies that, operating through official state agents, construct a public face of law that sanctions and organizes violence perpetrated by institutional actors and private citizens.¹⁷ This approach appreciates that settling for the “best justice possible” leaves transitional justice theorists and practitioners understandably dissatisfied.¹⁸ Contrary to the “ordinary justice” approach, however, it contends that this discomfort is symptomatic of attempts to shoehorn stable-state justice theories into transitions while failing to appreciate that defining features of transitions and pre-transitional abuses have normative significance.¹⁹

¹⁴ Martha Minow, *The Hope for Healing*, in *TRUTH V. JUSTICE*, *supra* note 8, at 235, 237-40.

¹⁵ *Id.*

¹⁶ RUTI TEITEL, *TRANSITIONAL JUSTICE* 3 (2000)

¹⁷ Aukerman, *supra* note 4, at 59; PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES*, 96, 115 (1998); DANIEL GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS* 21 (1996).

¹⁸ Amy Gutmann and Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *TRUTH V. JUSTICE*, *supra* note 8, at 22, 27 (pointing out that limited prosecutions entail “political decision[s] with moral implications”).

¹⁹ Frederick Schauer, *Legal Development and the Problem of Systemic Transition*, 13 *J. CONTEMP. LEGAL ISSUES* 261, 261-66 (2003) (discussing various scales of “transition,” and recognizing that massive systemic shifts on the scale revolutions present unique practical and normative challenges).

Transitional justice is an exercise in “non-ideal” theory.²⁰ As such, it must take positive account of the unique conditions found in transitions and their predecessor regimes in constructing a transitional jurisprudence.²¹ By examining the unique conditions in societies capable of mass and institutionalized atrocities, this article argues that most folks implicated in past wrongs should qualify for an affirmative legal excuse. Further, it describes how centering transitional justice programs on the proper provision of such an excuse justifies hybrid programs featuring vertically limited trials, truth commissions, and reparations, as the best, not just the best possible, justice in transitions.²² This “excuse-centered” approach provides normative justification and practical guidance for hybrid programs sufficient to silence the sighs.²³

The excuse-centered approach advanced in this article depends, of course, on the normative sustainability of the excuse. This article focuses on that task. The first section details the “justice gap” that is the defining concern of transitional justice. The second section explores the normative significance of this gap, arguing that mass atrocities are necessarily correlated with a public face of law that provides abusers, in their roles as public agents, warrant to believe that their acts are right, necessary, or at least not subject to punishment. Given this, the section concludes that, with the exception of high-level leaders, most folks living under an abusive public face of law should qualify

²⁰ I take this term from JOHN RAWLS, *THE LAW OF PEOPLES* 5, 106 ff. (1999). Here I argue that transitional regimes are heir to what Rawls would call “unfavorable conditions,” which, as Rawls would suggest, set normative, not just practical, limitations on justice in transitions.

²¹ While the transitional justice literature is rife with descriptive efforts documenting these unique conditions, this article occupies a unique position in trying to take normative account of the defining features of transitions. See ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE*, xi, 79-80 (2004). *But see* Posner & Vermeule, *supra* note 7, at 763-65 (arguing that the conditions of transitions are neither unique nor demanding of a unique normative analysis).

²² This is an argument that has not been sufficiently made in the literature on transitional justice, but it is critical to a satisfying transitional jurisprudence. See Gutmann & Thompson, *supra* note 18, at 26.

²³ Though limited prosecutions are not a new idea in Transitional Justice debates, the demand for a normatively regulated selection procedure has yet to be filled. See Ortenlicher, *Settling Accounts*, *supra* note 2, at 2603.

for an affirmative excuse based on the legality principal, a necessary element of the rule of law to which transitional movements commit themselves. The third and fourth sections defend the proposed excuse against challenges from deontological and consequentialist legal theories, respectively. The final section provides a sketch of how the excuse, placed at the center of a transitional justice program, provides both justification and practical guidance for other elements of the hybrid approach, particularly truth commissions. While a full defense of truth commissions and reparations is beyond the scope of this article, the final section indicates how the proposed approach solves some of the most pernicious challenges to truth commissions and “restorative justice.”²⁴

I. THE JUSTICE GAP: PRACTICAL LIMITS ON CRIMINAL TRIALS IN TRANSITIONS

Among the most striking features of ancien regimes²⁵ are widespread complicity and broad participation in abuses.²⁶ Political leaders, military personnel, executive officials, and police are among the most notorious culprits,²⁷ but they only mark the surface. Abusive regimes are characterized by innumerable acts of unofficial violence, petty abuse, and discrimination.²⁸ Their histories are punctuated by murderous rampages perpetrated by erstwhile spouses, friends and neighbors.²⁹ These acts and events are, themselves, girded and sustained by pervasive public

²⁴ See generally, DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (2000); Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints*, in *TRUTH V. JUSTICE*, *supra* note 8, at 68; Jennifer Llewelyn, *Justice for South Africa: Restorative Justice and the South African Truth and Reconciliation Commission*, in *MORAL ISSUES IN GLOBAL PERSPECTIVE*, 96 (1999).

²⁵ I take this term from Ruti Teitel, who uses it throughout *TRANSITIONAL JUSTICE* (2000). In addition, I refer to these regimes variously as “predecessor regimes,” “pre-transitional regimes,” and “abusive regimes.”

²⁶ José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in *TRANSITIONAL JUSTICE VOL. I*, 3, 13 (Neil Kritz, ed., 1995).

²⁷ GOLDHAGEN, *supra* note 17, at 164-78.

²⁸ *Id.*

²⁹ This was true in Rwanda, see generally GOUREVITCH, *supra* note 17, and in Macedonia, see Julius Strauss and Christian Jennings, *Spectre of ethnic cleansing resurrected*, *DAILY TELEGRAPH*, June 27, 2001, at 13.

sentiments that provide support for abuses.³⁰ Members of the international community frequently fail to intervene.³¹ Corporate interests profit from abusive regimes and the victimization of subjugated groups.³² In some cases, victims are complicit in the abuse of others.³³ When it is time to assign responsibility, then, tens of thousands have a share.³⁴

Despite the incredible demands for justice, transitional governments face severe limitations on their capacity to carry out criminal prosecutions.³⁵ One of the most significant is the limited availability of bureaucratic resources necessary to conduct prosecutions.³⁶ There are simply not enough judges, prosecutors, police, and other officials to meet demands and provide adequate due process.³⁷ Ad hoc and permanent international tribunals that attempt to provide additional resources have proven to be woefully slow and incapable of making an appreciable dent in the demand.³⁸

³⁰ See generally SAMANTHA POWER, *A PROBLEM FROM HELL* (2002); KOSOVO REPORT, 33-64 (2000); GOUREVITCH, *supra* note 17, at 47-62, 96-131; GOLDHAGEN, *supra* note 17, at 27-163, 416-54; JAIME MALAMUD-GOTI, *GAME WITHOUT END*, 91-29-99 (1996); CARLOS NINO, *RADICAL EVIL ON TRIAL* 41-60 (1996); Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS* 111, 112-15 (Stephen Shute & Susan Hurley, eds., 1993).

³¹ POWER, *supra* note 30, at 37 (quoting the suicide note of Jewish activist Szmul Zygielbojm).

³² The infamous Indonesian oil pipeline is perhaps the most notorious recent example of this, but corporate profiteering from Nazi crimes was notorious. Justice from some of these entities has been sought and awarded. See AUTHERS AND WOLFFE, *THE VICTIM'S FORTUNE* (2002); Madeline Doms, *Compensation for Survivors of Slave and Forced Labor*, 14 *TRANSNATIONAL LAWYER* 171 (2001).

³³ ELSTER, *supra* note 21, at 152-53; ALEX BORAINÉ, *A COUNTRY UNMASKED* 128 (2000); Areyeh Neier, in *DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA* 1, 4 (Alex Boraine et al. eds., 1994).

³⁴ MALAMUD-GOTI, *supra* note 30, at 22-26; HUNTINGTON, *supra* note 1, at 2 (quoting Vaclav Havel, *New Year's Address*, *UNCAPTIVE MINDS*, 2 (Jan.-Feb. 1990)).

³⁵ ELSTER, *supra* note 21, at 208-11; Schauer, *supra* note 19, at 270-73.

³⁶ Posner & Vermeule, *supra* note 7, at 777-779.

³⁷ MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* 45 (1996).

³⁸ The International Criminal Tribunal for Rwanda, for example, has been in operation for over ten years but, as of this writing, has tried to judgment only twenty-two cases. www.ictt.org. This does not constitute a strong objection to the existence of these tribunals, whose most important contributions are to international criminal jurisprudence. These numbers are only meant to emphasize the impossibility of prosecuting, with full protection of process, all those implicated in pre-transitional abuses.

Transitions also must face the reality that many of those who could carry out criminal trials are tainted by the past.³⁹ If these officials are forced to step down, however, then there are fewer prosecutors, judges, clerks, jailers, investigators, and defense attorneys available to conduct prosecutions.⁴⁰ On the other hand, if tainted officials are left in place, transitions must be concerned that former agents of abuse cannot be relied upon to blame their cohorts, much less themselves.⁴¹ Beyond straightforward supply issues, then, transitions face questions about quality and potential conflicts of interest that compromise further their ability to prosecute.⁴²

Transitions also have limited material resources.⁴³ In addition to justice, economic reform, infrastructure, democratization, social programs, and myriad other needs make claims on these limited resources.⁴⁴ More often than not, these needs far outstrip the resources of a new nation, even without competition from criminal prosecutions.⁴⁵ In addition, transitional regimes have a limited fund of moral capital and public support.⁴⁶ The citizenry of a new state is seldom uniform in its support of a transitional regime.⁴⁷ Many will be concerned about the direction taken in transition.⁴⁸ There also may be significant skepticism about the moral standing of those charged

³⁹ Schauer, *supra* note 19, at 270-72; PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS 88 (2001); Luc Huyse, *Justice After Transitions*, in *TRANSITIONAL JUSTICE*, *supra* note 26, at 104, 109.

⁴⁰ Stanley A. Roberts, Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq, 33 *HOFSTRA L. REV.* 367, 389-90 (2004).

⁴¹ *Id.*

⁴² ACKERMAN, *supra* note 6, at 72, 74-75.

⁴³ *Id.*

⁴⁴ Zalaquett, *supra* note 26, at 20.

⁴⁵ ELSTER, *supra* note 21, at 208-15.

⁴⁶ ACKERMAN, *supra* note 6, at 72; David Pion-Berlin, *To Prosecute or to Pardon?: Human Rights Decisions in the Latin American Southern Cone*, in *TRANSITIONAL JUSTICE*, *supra* note 26, at 82.

⁴⁷ Juan Linz, *The Breakdown of Democratic Regimes*, in *TRANSITIONAL JUSTICE*, *supra* note 26, at 123, 127-28.

⁴⁸ *Id.*

with carrying out transitional programs.⁴⁹ Finally, a people exhausted by years of oppression and revolution may not have the energy to sustain long public procedures, particularly if it means delaying other transitional projects.⁵⁰ In this narrow window of opportunity, transitions must consider where it is best to spend precious resources. Efforts to address past wrongs should not be pursued at the expense of other transitional goals if the trade-off threatens the success of a transition itself.⁵¹

The practical limitations on justice in transitions translate into a number of more theoretical problems. First, procedural justice, a necessary corollary of the rule of law, is frequently compromised.⁵² In transitional circumstances, opportunities for vengeance abound and extra-judicial punishment, including execution, is common,⁵³ particularly when justice is left in the hands of those without professional training or political accountability.⁵⁴ Due process rights are threatened as those arrested wait to be charged, wait for assistance of counsel, and wait for years to get their day in court.⁵⁵ Such results threaten the moral and political standing of transitions by compromising commitments to the rule of law.

Second, equal distribution of justice is compromised. Because, as a matter of fact, not everyone implicated in past abuses can be tried, all prosecutions will be selective.⁵⁶ If the selections

⁴⁹ ACKERMAN, *supra* note 6, at 72.

⁵⁰ *Id.* at 69-81.

⁵¹ De Greiff, *supra* note 6, at 81.

⁵² ELSTER, *supra* note 21, at 88, 235-40.

⁵³ *Id.* at 97-99.

⁵⁴ *Id.*

⁵⁵ This is even true in the “more ideal” circumstances of the ad hoc criminal tribunals. See *Barayagwiza v. Prosecutor*, ICTR-97-19, Decision of the Appeals Chamber (Nov. 3, 1999) (releasing defendant for speedy trial violations).

⁵⁶ ELSTER, *supra* note 21, at 208-15; HAYNER, *supra* note 39, at 12; Gutmann & Thompson, *supra* note 18, at 26-27; van Zyl, *supra* note 5, at 666; MINOW, *supra* note 37, at 31, 40-47.

are driven by necessity, it is unlikely that choices will be made on principle.⁵⁷ Ad hoc distinctions and novel, *post facto*, rules breach transitional commitments to democracy and the rule of law,⁵⁸ while threatening to put the new regime in the same moral position as its predecessor.⁵⁹ The results of these selections are also, frequently, counterintuitive. Underlings are tried and punished while high-level leaders escape prosecution, often by exploiting the fruits of their abuses.⁶⁰ Thus, limitations on resources result in too many and too few being punished, too severely and not severely enough.

Third, if criminal punishment is the standard, then justice will not be served in transitions. Transitions cannot, as a matter of fact, prosecute all wrongdoers.⁶¹ As a result, many, if not most, of the guilty will escape scot-free, including many of those most responsible.⁶² This circumstantial parsimony implies that those who are not prosecuted are innocent of any wrongdoing and their victims have suffered no wrong.⁶³

Finally, selective prosecutions only address some wrongs, some wrongdoers, and some victims. Thus, they fail to establish a complete and publicly legitimate account of the past.⁶⁴ This failure denies justice to victims whose abuses are never made part of the record.⁶⁵ Moreover, the nature of the “truth” established in a criminal trial is limited by the purposes of the trial—to establish the guilt or innocence of particular individuals charged with particular acts—rules of

⁵⁷ MINOW, *supra* note 37, at 31, 40-44.

⁵⁸ Martin Golding, *Retroactive Legislation and Restoration of the Rule of Law*, ANN. REV. OF L. & ETHICS, 169, 170-174 (1996); see also ELSTER, *supra* note 21, at 83, 235-40.

⁵⁹ ELSTER, *supra* note 21, at 83; LON FULLER, THE MORALITY OF LAW at 39, 248-249 (1969).

⁶⁰ James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORD. INT'L L.J. 616, 641-42 (2005).

⁶¹ Aukerman, *supra* note 4, at 51-53.

⁶² Kiss, *supra* note 24, at 68; De Greiff, *supra* note 6, at 81-82.

⁶³ Pablo De Greiff, *Trial and Punishment: Pardon and Oblivion*, 22 PHIL. & SOC. CRIT. 93, 105 (1996).

⁶⁴ TRUTH AND RECONCILIATION COMMISSION, FINAL REPORT, I, chap. 1, para. 7, 24, chap. 5, para. 71, 73.

⁶⁵ Rotberg, *supra* note 9, at 3; Minow, *supra* note 14, at 235.

evidence, and other formalities.⁶⁶ This is a limited truth⁶⁷ that opens the door for revisionism and potential backlash by failing to meet the transitional need for a full, historical, and politically legitimate account of the past.⁶⁸

The justice gap that opens in transitions is most frequently filled with alternative theories of justice, such as restorative justice,⁶⁹ and alternative procedures, such as truth commissions.⁷⁰ As products of necessity, however, these efforts often appear as no more than accommodations that provide the best justice possible given the imperfect circumstances in transitions.⁷¹ This is deeply dissatisfying for both practitioners and theorists.

In my view, a valid and usable theory of transitional justice must take normative account of these practical concerns, not simply accommodate them. Given that prosecutions in transitions cannot, as a matter of fact, be complete, a “non-ideal” theory of transitional justice must propose a way to make prosecutorial selections rational.⁷² It must provide a morally sustainable justification for the parsimony implied by selectivity.⁷³ It also must present the possibility that transitions can

⁶⁶ HAYNER, *supra* note 39, at 100-02; Gutmann & Thompson, *supra* note 18, at 40-41.

⁶⁷ MINOW, *supra* note 37, at 47, 60.

⁶⁸ van Zyl, *supra* note 5, at 658-61, 667.

⁶⁹ The concept of “restorative” justice has a topic of significant discussion in the literature on transitional justice. *See e.g.* Kiss, *supra* note 24, at 68-69; Llewellyn, *supra* note 24, at 96. Restorative justice has also, increasingly, become a topic of interest for stable state theorists. *See, e.g.*, Sara Sun Beale, *Still Tough on Crime?: Prospects for Restorative Justice in the United States*, 1 UTAH L. REV. 413 (2003). This literature builds on earlier work done on rehabilitative and educative justice more generally. *See, e.g.*, Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208 (1984).

⁷⁰ Priscilla Hayner provided the first survey of contemporary truth commissions in *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 HUM. RTS Q. 597 (1994). She expanded and deepened her study in UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2001).

⁷¹ Gutmann & Thompson, *supra* note 18, at 26-26.

⁷² De Greiff, *supra* note 6, at 81.

⁷³ *Id.*

accomplish these goals within the limitations presented by their circumstances. Rationalizing transitional justice programs as the “best justice possible” simply does not turn the trick.⁷⁴

In the remaining sections, this article argues for a transitional justice program centered on making prosecutorial selections according to an affirmative defense based on the legality principle. This “excuse-centered” approach offers a rational justification for exercising selectivity in transitions and provides guidance and justification for other common features of transitional justice programs.

II. THE NORMATIVE SIGNIFICANCE OF PRACTICAL CONCERNS

Treating broad complicity as a practical limitation on trials in transitions begs a critical question confronting transitional movements: “How could so many join to perpetrate atrocities?” In this section I contend that mass atrocities are, in part, a function of social and legal norms. Absent a socio-legal environment that supports abuse, abuses on the scale confronted by transitions would not occur. Taking account of this leads me to argue that most who participated in pre-transitional abuses should be excused from prosecution.

A. *The Role of an Abusive Public Face of Law in Abusive Regimes*

Who doubts that the Argentine or Chilean murderers of people who opposed the recent authoritarian regimes thought that their victims deserved to die? Who doubts that the Tutsis who slaughtered Hutus in Burundi or the Hutus who slaughtered Tutsis in Rwanda, that one Lebanese militia which slaughtered the civilian supporters of another, that the Serbs who have killed Croats or Bosnian Muslims, did so out of conviction in the justice of their actions? Why do we not believe that same for the German perpetrators?

—Daniel Goldhagen⁷⁵

⁷⁴ Posner and Vermeule argue the contrary in *Transitional Justice as Ordinary Justice*, *supra* note 7.

⁷⁵ GOLDHAGEN, *supra* note 17, at 14-15.

Genocide, after all, is an exercise in community building.⁷⁶

—Philip Gourevitch

Mass atrocities on a scale that calls for programs of transitional justice are not phenomena of happenstance in which thousands of agents independently and simultaneously decide to murder their neighbors.⁷⁷ The scale, breadth, and duration of these abuses evidence the fact that there is something that distinguishes the targeted violence committed by and under abusive regimes from common criminal activity.⁷⁸ One salient and important distinguishing feature is the role that law, social norms, and publicly circulated and officially sanctioned beliefs,⁷⁹ collectively the “public face of law,” play in abusive regimes.⁸⁰

When looking at the Nazi Holocaust, or any number of genocides before and since, it is tempting to think that only evil, irrational, or savage people could perpetrate these horrific acts on such a terrible scale.⁸¹ Normal people, people *like us*, could never do what *they* did—at least not willingly.⁸² While comforting, this intuition obscures an essential feature of mass violence: the

⁷⁶ GOUREVITCH, *supra* note 17, at 95.

⁷⁷ GOLDHAGEN, *supra* note 17, at 15.

⁷⁸ van Zyl, *supra* note 5, at 660-61.

⁷⁹ These include a social ontology and a historical teleology. *See, e.g.*, GOUREVITCH, *supra* note 17, at 47-62, 96-131; GOLDHAGEN, *supra* note 17, at 27-164; MALAMUD-GOTI, *supra* note 30, at 71-99; NINO, *supra* note 30, at 41-60; Rorty, *supra* note 30 at 112-15. Social ontologies are normalized typologies in which individuals are typed and situated hierarchically. Teleologies provide abusive regimes with an account of the current conflict in a broader historical context. Referring to this background, abusive regimes solve current disorder by devising and executing strategies designed to make the real world better approximate their ideal end of history. This “final solution” often means eliminating the target group entirely.

⁸⁰ TEITEL, *supra* note 16, at 18-20.

⁸¹ Rorty, *supra* note 30 at 112-15.

⁸² GOLDHAGEN, *supra* note 17, at 14.

greatest of evils are perpetrated not by devils,⁸³ but by and with the support of average citizens.⁸⁴

Genocide and other mass atrocities simply could not occur without the participation and aid of “willing executioners.”⁸⁵

There are many implicated in mass violence who were not so willing, of course.⁸⁶ Duress is a frequent tool of abusive regimes;⁸⁷ and those faced with a “kill or be killed” ultimatum cannot, by definition, be described as “willing.”⁸⁸ Those manipulated by combinations of drugs, brainwashing, and threats, including child soldiers,⁸⁹ who have been implicated in abuses committed in Sierra Leone,⁹⁰ Liberia,⁹¹ the Ivory Coast, Uganda,⁹² Congo, and Columbia,⁹³ also do not fit neatly into the category of “willing executioners.”⁹⁴ In all abusive regimes there also are those who actively oppose, protest, and work to prevent atrocities.⁹⁵ Abusive regimes are, in short, far from homogenous.

⁸³ I use this word conscious of, but distinct from, its Kantian meaning. See, e.g., IMMANUEL KANT, PERPETUAL PEACE, 8:355-85; IDEA FOR A UNIVERSAL HISTORY WITH A COSMOPOLITAN INTENT, 8:21-6. My argument in this article is centered on the proposition that mass atrocities are perpetrated by members of the human race, Kant’s race of devils, who, having failed to bind their actions to the demands of moral right, are subjects of law. I do not, however, propose to forgive the moral lapses of pre-transitional abusers any more than Kant forgives those who fail to do their moral duty. Devils are devils still, no matter the ineffectiveness of a devils’ solution.

⁸⁴ GOUREVITCH, *supra* note 17, at 115; GOLDHAGEN, *supra* note 17, at 164-66; Rorty, *supra* note 30 at 112-15.

⁸⁵ I take this phrase from GOLDHAGEN, *supra* note 17.

⁸⁶ MINOW, *supra* note 37, at 35-36.

⁸⁷ GOUREVITCH, *supra* note 17, at 96, 249.

⁸⁸ Matthew Happold, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention*, 17 AM. U. INT’L L. REV. 1131, 1163 (2002).

⁸⁹ See generally, RACHEL BRETT & MARGARET MCCALLIN, CHILDREN: THE INVISIBLE SOLDIERS (2d ed. 1998).

⁹⁰ Norimitsu Onishi, *Children of War in Sierra Leone Try to Start Over*, N.Y. Times, May 9, 2002, at A14.

⁹¹ Human Rights Watch, *How to Fight to Kill: Child Soldiers in Liberia* (2004), available at <http://www.hrw.org/reports/1994/liberia2>.

⁹² Human Rights Watch, *Stolen Children: Abduction and Recruitment in Northern Uganda* (2003), available at <http://www.hrw.org/reports/2003/uganda0303>.

⁹³ Human Rights Watch, *You’ll Learn not to Cry: Child Combatants in Columbia* (2003), available at <http://hrw.org/reports/2003/colombia0903>.

⁹⁴ Happold, *supra* note 88, at 1138, 1158-63.

⁹⁵ ELSTER, *supra* note 21, at 99.

Even when these complexities are taken into account, however, it remains the case that institutionalized atrocities require the support and participation of broad swaths of the citizenry, including active participants, passive supporters, opportunistic profiteers, and those who indulge in naïve denial.⁹⁶ While we may applaud the heroes, then, we are left to wonder how so many were led to such madness. The key to answering this question is to take seriously the possibility that the practical realities of scale and complicity that distinguish abusive regimes are not merely differences in magnitude, as compared to the everyday problems that face “ordinary justice,”⁹⁷ but, rather, serve as markers for unique social conditions that carry normative force, making it impossible to simply dismiss transitional justice as a special case of everyday justice.

In stable states there is a close identification between norms and the norm.⁹⁸ Wrongs, as crimes, are the exception, perpetrated in violation of established and regularly enforced legal codes. By contrast, in abusive regimes targeted abuse is the norm.⁹⁹ Widespread abuses identify and are institutional tools of pre-transitional states.¹⁰⁰ In ancien regimes, black-letter law frequently fails to condemn, supports, or even demands acts of abuse.¹⁰¹ Executive and judicial agents participate in these activities, either directly or by sustaining an environment in which murder and other abuses are

⁹⁶ Frau Maria, mother of the repentant soldier in Simon Wiesenthal’s famous essay *THE SUNFLOWER*, 84-94 (1998), is the paradigmatic example for this class.

⁹⁷ Posner & Vermeule, *supra* note 7, at 777-825.

⁹⁸ van Zyl, *supra* note 5, at 661.

⁹⁹ *Id.* at 660-61

¹⁰⁰ Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, in *TRUTH V. JUSTICE*, *supra* note 8, at 45, 46-50. This “symmetric barbarity” is what Bhargava contends distinguishes pre-transitional regimes that are appropriate subjects of transitional justice from programs of abuse carried out by a few perpetrators without the popular knowledge or support of society and social institutions.

¹⁰¹ GOUREVITCH, *supra* note 17, at 96, 123; Argentina Executive Decree No. 158/83, Dec. 13, 1983, available as part of NUNCA MAS at http://www.nuncamas.org/english/library/nevagain/nevagain_281.htm. (Part V provides extensive documentation of the role played by the fight against imperialism in the minds, policies, and actions of those who fought the Dirty War.); *see also* RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* 62 (1961).

allowed to flourish.¹⁰² Police and the military join local officials in organizing and perpetrating offenses in the name of the state.¹⁰³ Other public officials organize programs of systematic discrimination.¹⁰⁴ These official acts form part of a “public face of law” that provides license for the events that cry out for justice in transition. In recognition of the role played by the public face of law in abusive regimes, transitions count amongst their highest goals sponsoring personal and institutional reforms committed to democratic ideals, human rights, and the rule of law.¹⁰⁵

The “public face of law,” composed of these elements, is not the same as black-letter law. In some regimes, black-letter law requires abuse. This is not always the case, however. In many regimes, laws on the books prohibit murder, rape, and other acts of violence.¹⁰⁶ Unfortunately, “in transitional periods, there is commonly a large gap between the law as written and as it is perceived.”¹⁰⁷ This perception, which reflects the reality of what law *is* in abusive regimes, is regulated by social and institutional elements of the public face of law, which affect perceptions of *what is* and is not prohibited¹⁰⁸ and, perhaps more importantly, *who is* and *who is not* subject to legal protections.¹⁰⁹ Mass atrocities are not a coincidental collection of independent acts. Large-scale

¹⁰² The Nazi regime presents, perhaps, the most pernicious example of official participation in abuse. *See, e.g.*, GOLDHAGEN, *supra* note 17, at 97; SIMON WIESENTHAL, *EVERY DAY IS REMEMBRANCE DAY* 11-28 (1987); EUGENE DAVIDSON, *THE TRIAL OF THE GERMANS* 7 (1966), but some level of public support is a ubiquitous and necessary condition of the mass violence that precedes transitional movements, presenting the need for systemic reform.

¹⁰³ ALAN ROSENBAUM, *PROSECUTING NAZI WAR CRIMINALS* 11-12 (1993).

¹⁰⁴ HILBERG, *supra* note 101, at 6.

¹⁰⁵ ELSTER, *supra* note 21, at 83; TEITEL, *supra* note 16, at 29.

¹⁰⁶ Sanford Levinson, *Trials, Commissions, and Investigating Committees*, in *TRUTH V. JUSTICE*, *supra* note 8, at 211, 219.

¹⁰⁷ TEITEL, *supra* note 16, at 19.

¹⁰⁸ *Id.* at 18-20.

¹⁰⁹ Abusive regimes frequently justify abuses by re-classifying victims such that they cannot be “murdered” or “raped.” *See* Rorty, *supra* note 30 at 112-114.

abuses happen for a reason.¹¹⁰ In pre-transitional regimes the institutions that organize abuse reflect a deeper social ethos, a historical ontology, and a narrative truth, that presents abusive practices as rational or, in some cases, necessary.¹¹¹ The Nazi Holocaust provides a stark example.

Nazi crimes, and the support provided by ordinary Germans during the Holocaust, were sponsored by an “eliminationist anti-Semitism”¹¹² that foretold a complete eradication of European Jews.¹¹³ Public norms and an officially sanctioned public face of law, disseminated and enforced by bureaucratic, executive, and military agents, played a critical role in the targeting of Jews and Gypsies for death in Nazi occupied Europe from 1935 to 1945.¹¹⁴ From the first experiments with violence preceding the passage of the Nuremberg Laws to *Kristallnacht* to the full-scale mechanized murders perpetrated in concentration camps, Nazis’ killing of Jews was consistent with a publicly circulated view that Jews had to be eliminated.¹¹⁵

The Nazis are not alone in drawing on historical teleology and social ontology to guide and justify mass atrocity. Richard Rorty points out that a dehumanizing ontology, in combination with a historical ontology, was at the center of atrocities perpetrated in Bosnia, where abusers did not see themselves as committing offenses because they did not view their victims as humans.¹¹⁶ In a

¹¹⁰ GOUREVITCH, *supra* note 17, at 180. This should not be confused with cultural or social determinism. The point is that certain social conditions are *necessary* for mass atrocities. Social mores do not act, however, and, just as individual choices and actions are necessary conditions, so are the individual moral failures that attend individual actions. See GOLDHAGEN, *supra* note 17, at 20-22. As I argue below, these moral failures cannot be subject to legal punishment.

¹¹¹ *Id.* at 3-26, 50; WIESENTHAL, *supra* note 102, at 15.

¹¹² GOLDHAGEN, *supra* note 17, at 49-128.

¹¹³ ROSENBAUM, *supra* note 103, at 11 (“A review of some of the fateful occurrences that eventuated in the Nazi ‘Final Solution to the Jewish Question’ will demonstrate that the exterminative activities were the outcome of, among other factors, a virulent antisemitism.”); WIESENTHAL, *supra* note 102, at 15; *also, see generally*, JEREMY COHEN, *THE FRIARS AND THE JEWS: THE EVOLUTION OF MEDIEVAL ANTI-JUDAISM* (1982); JOSHUA TRACHTENBERG, *THE DEVIL AND THE JEWS: THE MEDIEVAL CONCEPTION OF THE JEW AND ITS RELATION TO MODERN ANTI-SEMITISM* (1983).

¹¹⁴ WIESENTHAL, *supra* note 102, at 11-28; DAVIDSON, *supra* note 102, at 7.

¹¹⁵ GOLDHAGEN, *supra* note 17, at 8, 11-13, 416-54; ROSENBAUM, *supra* note 103, at 11.

¹¹⁶ Rorty, *supra* note 30 at 112-16.

chilling account of the Rwandan massacre, Phillip Gourevitch explains that the bodies that washed up on the shores of Lake Kivu and Lake Victoria were sent on their way back to Ethiopia at the direction of Hutu authorities as an expression of a historical ontology in which tall and light-skinned Tutsis were aggressors from the North to be sent back on the waters that brought them.¹¹⁷ Asserted differences in race and biology are frequent sources for abusive ontologies.¹¹⁸ An abuse sustaining truth can also be more obviously political, as was the case in Argentina, where the “Dirty War” on communism allowed state agents to torture, disappear, and murder thousands of Argentines;¹¹⁹ or even consciously constructed, as John Dower documents was the case with war crimes perpetrated in the Pacific during World War II.¹²⁰

In some cases, state approval is tacit, manifested by passivity in the face of abuses.¹²¹ In other cases state support is active and organized.¹²² In some cases laws against murder are not enforced or are interpreted as not protecting some groups.¹²³ In other cases black-letter law or official state policies requires murder.¹²⁴ In all cases, however, state support, expressed as an abusive public face of law, is a necessary corollary of mass atrocity. To conclude the contrary would be to

¹¹⁷ GOUREVITCH, *supra* note 17, at 47-62; *see also* Collette Braekman, *Incitement to Genocide*, in *CRIMES OF WAR 192* (Gutmann et al. eds., 1999); Human Rights Watch report, *LEAVE NONE TO TELL THE STORY* (1999), available at <http://www.hrw.org/reports/1999/rwanda>.

¹¹⁸ GOLDHAGEN, *supra* note 17, at 55, 66-69; RICHARD LERNER, *FINAL SOLUTIONS: BIOLOGY, PREJUDICE AND GENOCIDE* (1992); ROBERT WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* (1991).

¹¹⁹ MALAMUD-GOTI, *supra* note 30, at 71-145; NINO, *supra* note 30, at 44-50; Guillermo O'Donnell, *Modernization and Military Coups: Theory, Comparisons and the Argentine Case*, in *ARMIES & POLITICS IN LATIN AMERICA*, 96 (Abraham Lowenthal and Samuel Fitch, eds., 1986); Alexandre Barros and Edmundo Coelho, *Military Intervention and Withdrawal in South America*, in *ARMIES & POLITICS IN LATIN AMERICA* 437-443; *The Doctrine of National Security places Argentina firmly within the framework of the conflict between the Superpowers in a Third World War*, in *NUNCA MAS*, Part V.

¹²⁰ JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986).

¹²¹ The most notorious contemporary examples of tacit government approval of abuses come from Columbia. *See* Noam Chomsky, *ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* 62 (2000).

¹²² GOUREVITCH, *supra* note 17, at 85-96.

¹²³ TEITEL, *supra* note 16, at 18-20; GOLDHAGEN, *supra* note 17, at 97-98; Rorty, *supra* note 30 at 112-15.

¹²⁴ GOUREVITCH, *supra* note 17, at 96, 123.

claim that the Holocaust, the Argentine Dirty War, the abuses of Apartheid, and the Rwandan Massacre were no more than unhappy coincidences of independent criminal action.

Calls for transition, and the institutional and social reforms that transitions entail, serve as further evidence of this descriptive claim. While acts of violence stand out against the backdrop of a stable state, the acts that characterize pre-transitional societies blend into a society whose pathology runs so deep that massive political, social, cultural, and legal change is necessary.¹²⁵ The requirement for reform only makes sense if one recognizes that there is something deeply wrong with abusive regimes.¹²⁶ An abusive public face of law is both evidence of what is wrong and, as expressed and advanced through public institutions, a tool of atrocity and the social truths that rationalize and sustain abuse.¹²⁷

It does not, for the moment, matter where the “truth” that underlies and sustains abusive regimes comes from. Whether it is a result of colonial involvement, political strategy, or timeless narrative, the effect is the same: there is a rational social grounding for pre-transitional abuses.¹²⁸ This socio-ontological support combines with actual laws on the books, official doctrine, and state practice to construct an abusive public face of law that affects interpretations of legal duty in abusive

¹²⁵ van Zyl, *supra* note 5, at 661 (pointing out that criminal justice is more appropriate for stable states where abuses are the exception rather than the norm).

¹²⁶ ACKERMAN, *supra* note 6, at 5.

¹²⁷ I allude, here, to Michel Foucault’s famous “Regime of Truth.” Michel Foucault, *Truth and Power*, THE FOUCAULT READER at 74 (Paul Rabinow, ed., 1984). While the transitional justice literature does not yet include a rigorous ethnography of abusive regimes, the literature is rife with monographs documenting the intricate interplay of truth, institutions, and practices of power in the genesis of atrocities. *See, e.g.*, POWER, *supra* note 30; GOUREVITCH, *supra* note 17; MALAMUD-GOTI, *supra* note 30; NINO, *supra* note 30; GOLDHAGEN, *supra* note 17; MARK DANNER, MASSACRE AT EL MAZOTE (1993).

¹²⁸ GOLDHAGEN, *supra* note 17, at 14-15.

states and establishes the conditions necessary to perpetrate mass atrocities on a scale that requires systemic transition and transitional justice.¹²⁹

The public face of law in abusive regimes and the role that it plays in individual actions highlights a critical difference between normal criminal activity and abuses committed by and under abusive regimes without obscuring the importance of heterogeneity in pre-transitional states. Those who participate in mass violence choose to become abusers, some grudgingly, and some with frightening enthusiasm. The critical point that I will defend in this article is that these choices are not made in solipsistic isolation. Abusive regimes are “burdened” societies.¹³⁰ Atrocities committed by and under abusive regimes reflect an operating set of socially generated and publicly circulated beliefs that, in combination with institutional practices and government policies, form a public face of law that at least does not forbid violence against a victim group, and often actively encourages it.

By making this claim I do not mean to defend or rely upon cultural determinism.¹³¹ Those living under abusive regimes can choose not to participate in atrocities. That is a fact evidenced by those who oppose abusive regimes from within, often at great peril of their own lives. I also do not contend that conformance to an abusive public face of law justifies abuse. Rape, murder, and torture are evils no matter what the law says.¹³² The only claim that I will make, the only claim that need be made, is that the public face of law, as it appears to reasonable people living under an abusive regime, does not forbid, and frequently encourages, human rights violations directed against

¹²⁹ ELSTER, *supra* note 21, at 83; TEITEL, *supra* note 16, at 29.

¹³⁰ RAWLS, *supra* note 20, at 5, 106 ff.

¹³¹ *Cultural Defenses: One Person’s Culture is Another Person’s Crime*, 9 *LOY. L.A. INTL. & COMP. L.J.* 751 (1987); *The Cultural Defense in Criminal Law*, 99 *HARV. L. REV.* 1293 (1986); Julia Sams, *The Availability of the ‘Cultural Defense’ as an Excuse for Criminal Behavior*, 16 *GA. J. INTL. & COMP. L.* 335 (1986), and The defense is not all that new, however. See *Rex v. Esop*, 7 *C. & P.* 456 (1836).

¹³² Ronald Dworkin, *Internal Realism*, available at <http://www.law.nyu.edu/clppt/program2001/readings/readings2/internalrealism.pdf>; Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 *PHIL. & PUB. AFF.* (1996).

particular individuals and groups.¹³³ This official support distinguishes institutionalized mass violence from banal criminal activity or small-scale abuses of power perpetrated by cadres of opportunists¹³⁴—the conditions well-understood by “ordinary justice.”

B. *The Normative Significance of an Abusive Public Face of Law*

The fact that past wrongs enjoyed official and social approval provides the substance of significant deontological and consequentialist challenge to criminal trials in transitions to democracy.¹³⁵ Transitional movements count among their highest commitments dedication to the rule of law.¹³⁶ The rule of law, which shapes the call for trials in transitions, retains a strong commitment to the principle of *non malum sine lege*, or the legality principle.¹³⁷ Whether rendered as *non malum sine lege* or a prohibition against *ex post facto*¹³⁸ enforcement of law, the principle of legality prohibits states from punishing acts that were not against the law at the time they were committed.

The problem of legality is at the center transitional of justice debates.¹³⁹ The Constitutional Court of Hungary met the issue in its review of a law allowing prosecutions of those responsible for

¹³³ GOLDHAGEN, *supra* note 17, at 14-15, 80-163; GOUREVITCH, *supra* note 17, at 96, 110-131.

¹³⁴ Bhargava, *supra* note 100 at 46-50.

¹³⁵ Aukerman, *supra* note 4, at 59, 75.

¹³⁶ ELSTER, *supra* note 21, at 83, 235-40; Golding, *supra* note 58, at 170-174; MINOW, *supra* note 37, at 25, 30-37.

¹³⁷ *Id.*; see also, ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*, 70-74 (4th ed. 2003); HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79-87 (1968); JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW*, 27-69 (2d ed. 1960); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 650-51 (1958) [hereinafter *Reply*]; FULLER, *supra* note 59, at 39, 248-249.

¹³⁸ The United States Constitution establishes the principle in these terms. See Article I, §§9, 10.

¹³⁹ Aukerman, *supra* note 4, at 75; ELSTER, *supra* note 21, at 235-40; TEITEL, *supra* note 16, at 11-26, 33-36; David Crocker, *Truth Commissions, Transitional Justice, and Civil Society*, in *TRUTH V. JUSTICE*, *supra* note 8, at 99, 105-06; ACKERMAN, *supra* note 6, at 74 ff.; FULLER, *supra* note 59, at 245-253. Contemporary discussions of legality in the context of transitional justice owe a debt to H.L.A. Hart and Lon Fuller and their series of articles in the *Harvard Law Journal* known as the Hart-Fuller debate. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 615-24 (1958); Fuller, *Reply*, *supra* note 137, at 648-61.

the suppression of the 1956 uprising.¹⁴⁰ The law repealed statutes of limitation and criminalized activities that were encouraged under the predecessor regime. When called to rule on the constitutionality of the new law, the equally new Constitutional Court recognized a “paradox of the revolution of the rule of law” and found itself forced to decide between “the principle of predictability and foreseeability” which grounds the “criminal law’s prohibition of the use of retroactive legislation,” and the rule of law understood as “substantive justice.”¹⁴¹ For the Court, the paradox was a result of a situational division between the rule of law as an agent of right and the rule of law as a regulative ideal. In the end, the Court decided that the revolutionary role of law as an agent of change could not trump the principles of predictability internal to the rule of law.¹⁴²

German courts faced an almost identical issue in the border-guards cases.¹⁴³ The guards accused of shooting East Germans fleeing across the border claimed that they were executing a legal duty.¹⁴⁴ The German were asked to decide to what extent the law of the previous regime provided a defense. Recognizing that laws, such as those under which the border guards acted, may be formally right but were not substantively right, the Germans allowed the prosecutions to proceed.¹⁴⁵ In terms of the dilemma posed by the principle of legality, they were prepared to choose the transformative potential of the law over its formal duties to predictability and fair warning.

¹⁴⁰ *Judgment of March 5, 1992*, Magyar Közlöny No. 23/1992 (Hungary, Constitutional Court, 1992), translated in J. OF CONST. L. IN EAST. & CENT. EUR. I 136 (1994).

¹⁴¹ *Id.*

¹⁴² *Id.*; accord No. 2086/A/1991/14, in TRANSITIONAL JUSTICE, *supra* note 26, VOL. III, at 629, 635-36; *see also* SOLYOM AND BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY, 19 (2000).

¹⁴³ Berlin State Court, No. (523) 2 Js 48/90 (9/91), in TRANSITIONAL JUSTICE, *supra* note 26, VOL. III, at 576.

¹⁴⁴ *Id.*; TEITEL, *supra* note 16, at 16-18.

¹⁴⁵ *Id.*

These are but two examples. Because of the critical role played by the public face of law in abusive regimes, all transitions confront legality. That courts have come to different conclusions emphasizes the difficulty of the issues.

1. The legality principle as an excusing condition for most implicated in pre-transitional abuses.

Given that mass atrocities enjoy state support and comport with the prevailing public face of law, broad criminal prosecutions in transitions would violate the principle of legality with respect to most who might be targeted for prosecution. Taking account of legality in transitions does not, however, require forgoing all prosecutions. Rather, a proper accounting of legality concerns results in vertically limited prosecutions¹⁴⁶ that focus on high-level leaders, who are directly exposed to the demands of international law prohibitions against genocide¹⁴⁷ and crimes against humanity,¹⁴⁸ each of which can provide grounds for individual criminal liability.¹⁴⁹

¹⁴⁶ I am in debt to Paul van Zyl for this terminology.

¹⁴⁷ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277. For an exhaustive account of the Convention, its genesis, application, and challenges, see generally WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* (2000). The Convention has a colored and complicated history internationally and in the United States. For an engaging account, see POWER, *supra* note 30, at 46-169.

¹⁴⁸ Crimes against humanity first became a critical tool of international law practice after World War II as part of the Nuremberg Charter. *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing Charter of the International Military Tribunal*, 82 U.N.T.S. 279, Art. 6(c) (1951). The most current iteration of crimes against humanity in international law is found in The Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 7(1)(b).

¹⁴⁹ See, e.g., *Prosecutor v. Kayishema and Ruzindana*, No. ICTR-95-1-T (21 May 1999); *Prosecutor v. Akayesu*, No. ICTR-96-4-T (2 Sept. 1998); *Prosecutor v. Tadić*, No. IT-94-1 (7 May 1997); *United States v. Ohlendorf et al.* (“Einsatzgruppen trial”) (1948).

For an act to be a crime, it must be a transgression of law—*nullum crimen sine lege*.¹⁵⁰ The principle of legality in criminal jurisprudence is centered on two concerns. First, the fair and legitimate use of the police power of the state is predicated on an obligation of fair warning—*nulla poena sine lege*.¹⁵¹ Citizens must have a reasonable chance to know the law so that they will know which acts will be punished and which not. This is really two requirements, one of formal warning¹⁵² and one of clarity.¹⁵³ Black-letter law or consistent state action satisfy the first requirement.¹⁵⁴ Lucidity, publicity, and regular enforcement satisfy the second.¹⁵⁵ Laws that are excessively vague, providing little or no guidance, are not enforceable.¹⁵⁶

The second concern that motivates the principle of legality centers on those charged with enforcing the law. Two key principles of fairness in the enforcement of law are predictability and consistency.¹⁵⁷ Black-letter law provides enforcement officials with the basic guidelines that they need to regulate social behavior. Clear law guards against “discriminatory and arbitrary

¹⁵⁰ The legality principle is widely viewed as a central tenet of “The Rule of Law.” See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION, 102-121 (1982); FULLER, *supra* note 59, at 51-65, 245-53; JOHN RAWLS, A THEORY OF JUSTICE 238 (1971). For a more detailed account of how this principle is an essential feature of the rule of law in new democracies see Golding, *supra* note 58, at 170-174. The Constitutional Rule against retrospective enforcement, the core of the legality requirement, is set out in Article I, §§9, 10 of the United States Constitution “No bill of attainder or ex post facto Law shall be passed.”

¹⁵¹ HALL, *supra* note 137, at 27-64; FULLER, *supra* note 59, at 58, 59.

¹⁵² The requirement for some form of law is central to both Roman and common law traditions. See A.T. DENNING, FREEDOM UNDER THE LAW (1949) 40-42; *Shaw v. Director of Public Prosecutions*, House of Lords [1962] A.C. 220. *Shaw* has met with some dispute in the academic community. See H.L.A. HART, LAW, LIBERTY, AND MORALITY 7-12 (1963). These objections, however, do not go to the central rule forwarded in *Shaw*, namely that judges may not create offenses for individuals out of vague commitments to public good.

¹⁵³ John Jeffries, *Legality, Vagueness and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); FULLER, *supra* note 59, at 63-65; *Judgment of the Constitutional Court of Hungary*, No. 2086/A/1991/14, in TRANSITIONAL JUSTICE, *supra* note 26, VOL. III, at 629, Preamble, Part IV(3) & (4).

¹⁵⁴ TEITEL, *supra* note 16, at 19 (“The validity of prior law depended on the social practices of the time, such as the norm’s publication and transparency.”).

¹⁵⁵ PACKER, *supra* note 137, at 287.

¹⁵⁶ Jeffries, *supra* note 153, at 192.

¹⁵⁷ HALL, *supra* note 137, at 36-54.

enforcement.”¹⁵⁸ Without law, police agents may act on their own impulses and enforcement of social mores will be arbitrary, completely dependent upon the officer, prosecutor, or judge at hand.¹⁵⁹ Law provides a hub about which enforcement activities revolve. The principle of legality ensures that regulation of social action, and the use of state police power over individuals, will be rule-bound, consistent, fair, and legitimate.¹⁶⁰

Both of these justifications of the legality principle focus on the role that the judiciary and the executive play in democratic regimes and under the rule of law. Judges and courts have the limited duty to apply law.¹⁶¹ Law itself is to be propagated by other processes of justification.¹⁶² Courts may not, as a rule, indulge in this legislative behavior. The law that they are charged with applying binds them.¹⁶³ Without law to apply, courts and police are powerless to act or, rather, without moral and legal authority to act. Exercise of state power in the absence of legal authority is a hallmark of abusive regimes.¹⁶⁴

One might favor a more active role for judges. Indeed, one of the reasons offered in favor of criminal trials in transitions suggests that trials can establish and model the rule of law and claim

¹⁵⁸ *Parker v. Levy*, 417 U.S. 773, 774-775 (1974).

¹⁵⁹ While the regulative principle of legality plays a key role in states committed to the rule of law, abusive regimes are defined by their use of state authority to emphasize the personal power of individuals and the enigmatic power of the regime. See MALAMUD-GOTI, *supra* note 30, at 125-39 (discussing the “disarticulating” use of power in abusive regimes).

¹⁶⁰ Jeffries, *supra* note 153, at 192 ff. Notably, this version of “fairness” does not include a requirement that the law is “right.” The premium is on clarity and forewarning.

¹⁶¹ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS*, 115, 171-74 (1996); R. A. DUFF, *TRIALS AND PUNISHMENTS* 138 (1986).

¹⁶² *Id.*

¹⁶³ The idea that written rules can actually bind judges is contested. See, e.g., Kenneth Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, in *INTERPRETING LAW AND LITERATURE* 115 (Stanford Levinson and Steven Mailloux, eds., 1988); STANLEY FISH, *DOING WHAT COMES NATURALLY* (1989), particularly Chapters 4, 5, and 13; *but see* RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988); Ronald Dworkin, *Law as Interpretation*, 60 *TEXAS L. REV.* 527 (1982).

¹⁶⁴ MALAMUD-GOTI, *supra* note 30, at 125-39; FULLER, *supra* note 59, at 245-53.

ground for an independent judiciary.¹⁶⁵ Moreover, the judiciary has historically proven to be a valuable agent of reform in stable societies.¹⁶⁶ Given these potentials, it might seem odd to take such a strict view of the judiciary's role in transitions when the need for reform is so great.¹⁶⁷ There are two points to be made here. First, the criminal law may not be the best tool in the arsenal of an activist court. Reflection on the legislative adventures of American and British courts, for example, favors activism only to sponsor tort or regulatory reform.¹⁶⁸ Where courts do use the criminal law in a reform capacity it is usually to add excuses or justifications rather than create new crimes. This is a reflection of the principle of legality.¹⁶⁹ Second, even if one were to approve the actions of an activist court in creating new criminal prohibitions; this does not solve the legality concern. Law written *ex post facto* is no more just for having been constructed by judges than it would be if passed by a legislature.

The principle of legality, as I have presented it, might strike some readers as unique to a positivist conception of the law.¹⁷⁰ Specifically, the principle may seem to imply that “law” is limited to black-letter law, without regard to natural right.¹⁷¹ Such a perspective begs important questions about the source and nature of law and ignores a long tradition of scholarship that argues for a close

¹⁶⁵ TEITEL, *supra* note 16, at 23-26.

¹⁶⁶ Michael Heise, *Litigated Learning and the Limits of Law*, 57 *VAND. L. REV.* 2417, 2446-51 (2004) (discussing rise of policy litigation after *Brown v. Board*).

¹⁶⁷ TEITEL, *supra* note 16, at 22-26; ACKERMAN, *supra* note 6, at 99-112.

¹⁶⁸ See generally Daniel Shaviro, *When Rules Change: An Economic and Political Analysis of Transition Relief and Retroactivity*, 99 *COLUM. L. REV.* (2000); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 *COLUM. L. REV.* 1657 (1999); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 *HARV. L. REV.* 509 (1986); Michael Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 *U. PA. L. REV.* 47 (1977).

¹⁶⁹ Jeffries, *supra* note 153, at 191-95. This strong attachment to the legality principle in the criminal context coupled with a willingness to relax the principle in tort law has long-standing in the American system. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

¹⁷⁰ *Judgment of Jan. 20, 1992*, *Juristenzeitung* 13 (1992): 691, 695 (F.R.G., Landericht, Berlin).

¹⁷¹ JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*, 184 (1954).

relationship between morality and law.¹⁷² I will discuss these concerns in later sections of this article. For now, it will suffice to raise a few points for consideration.

First, to the extent that the legality principle is positivist, the rule of law is positivist. This is not as bold a commitment as one might think. One need not believe that law and morality are entirely separable¹⁷³ to believe that laws on the books play an essential role in the fair and just exercise of legal force. The “rule of law” is not the same as the “rule of laws,” which more aptly describes the “pejorative”¹⁷⁴ use of positivism.¹⁷⁵ Non-pejorative positivism simply points out that law and morals are not necessarily linked in fact.¹⁷⁶ The principle of legality is positivist insofar as it recognizes that law and right may sometimes diverge in fact. Where this occurs, the principle contends that punishment cannot be justified based on morality alone.¹⁷⁷

Second, these debates are, in the present context, beside the point. There may be other ways to conceive of the law that, hypothetically, would not be committed to the principle of legality. Speculation about these other worlds serves little purpose in the present debate, however, because legality is, as a matter of fact, central to the rule of law as it has developed in constitutional democracies.¹⁷⁸ Faith to legality and the rule of law is a central aspirational goal of transitions,¹⁷⁹ in

¹⁷² This debate is as old as law itself and has been central to the thinking of most philosophers of law since Socrates. H.L.A. Hart and Lon Fuller discuss the problem in the Hart-Fuller debate, *supra* note 139 at 593 ff., and Fuller, *Reply*, *supra* note 137, at 630 ff. Notably, Hart concedes that laws in a well-ordered legal regime should coincide with core features of social morality.

¹⁷³ AUSTIN, *supra* note 171 at 184.

¹⁷⁴ Hart, *supra* note 139 at 595.

¹⁷⁵ Golding, *supra* note 58, at 171, 172.

¹⁷⁶ AUSTIN, *supra* note 171 at 184-85.

¹⁷⁷ HALL, *supra* note 137, at 36-54, 58-64. This position is entirely consistent with the claim that one has a moral obligation not to obey immoral demands. See Fuller, *Reply*, *supra* note 137 at 651-53.

¹⁷⁸ Guyora Binder, *Punishment Theory: Moral or Political*, 5 *BUFF. CRIM. L. R.* 321, 331 (2002).

¹⁷⁹ ELSTER, *supra* note 21, at 83, 235-36; Golding, *supra* note 58, at 171-72; FULLER, *supra* note 59, at 248-49, 252.

contrast to their predecessors. In the context of transitions to democracy, then, rejecting legality would change the face of the movement entirely, putting the transitional regime at risk of hypocrisy, thereby threatening its moral and political status and, ultimately, its potential of success.¹⁸⁰

Third, the principle of legality is not unique to positivist conceptions of the law. It is a function of other moral and political principles. As Lon Fuller argues, legality is part of the essential internal morality of the law.¹⁸¹ The “rules” in “the rule of law” are the minimum standards necessary to achieve an ordered society. Primary amongst these is a prohibition against *ex post facto* enforcement of criminal law. To ignore this principal in practice would be to undermine the moral and practical goals of law and legal practice. Thus, even if a transitional government is faced with a past regime that can, in no way, be regarded as legitimate, just, right, or moral, the new state is bound by its own commitment to the rule of law.¹⁸² To pursue a course of retroactive lawmaking would be symptomatic of the very legal pathology that the new state aspires to cure.¹⁸³

Finally, the legality principal is inextricably bound to core democratic and human rights values of autonomy and concomitant limitations on the use of state power. The core interest represented by legality is fair warning.¹⁸⁴ In order to justify coercion, a violation of autonomy, the law must provide fair warning. Agents have a right to know, before hand, that their acts are punishable under the law. If there is no law, or if the law is too vague and ambiguous, then it is not fair to punish an agent who had no warning that his actions would be punished. Efforts by courts

¹⁸⁰ FULLER, *supra* note 59, at 248-49.

¹⁸¹ Fuller, *Reply*, *supra* note 137, at 650-57; FULLER, *supra* note 59, at 39, 248-249.

¹⁸² FULLER, *supra* note 59, at 39, 248-249.

¹⁸³ *Id.*; Golding, *supra* note 58, at 182-87.

¹⁸⁴ FULLER, *supra* note 59, at 58; Golding, *supra* note 58, at 181-82.

or police to circumvent this principle undermine the very concept of the rule of law, which provides for the ultimate sovereignty of the law itself,¹⁸⁵ particularly in transitional regimes.¹⁸⁶

The principle of legality comes down to a prohibition on retroactive enforcement of law. Agents under the law must be warned that their actions are at risk of punishment. By definition, abuses in ancien régimes were not under such a threat. Thus, transitional courts cannot, out of respect for the principle of legality, punish pre-transitional bad acts insofar as they were consistent with the public face of law. To conduct criminal trials in these conditions would be to violate a foundational principle of the rule of law.

2. The positive potential of legality in transitions, a focus on public agency

As is apparent in the foregoing discussion, the legality principle is concerned centrally with persons in their roles as legal agents.¹⁸⁷ The principle points out that individuals are only subject to legal punishment in their statuses as legal agents. This is importantly different from the often similar structures of moral blame inasmuch as the law plays a necessary role in constructing legal guilt.¹⁸⁸ Moreover, the principle points out that legal punishment is grounded in a presumption that those living under the law take account of law in their decision-making. Thus, punishment is reserved exclusively for acts committed by persons in their public status as legal agents under the public face of law. This is true for both consequentialist and deontological legal theories.

¹⁸⁵ FULLER, *supra* note 59, at 157-162.

¹⁸⁶ Golding, *supra* note 58, at 180.

¹⁸⁷ James Bohman, *Punishment as Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership*, 5 *BUFF. CRIM. L. R.* 551, 552-555 (2002).

¹⁸⁸ KARL JASPERS, *THE QUESTION OF GERMAN GUILT*, 25, 57-64 (2000) (originally published as *DIE SCHULDFRAGE* (1947)).

Taking account for the role of legality in constructing legal agency and legal blame has important negative and positive consequences for transitional justice. Negatively, taking seriously the role of public agency in constructing legal blame reaffirms the consequences of legality as an objection to broad criminal prosecutions in transitions. The legality objection assumes this account of public agency in its prohibition against punishing violations of *ex post facto* law. The principle of legality, and the concerns that underlie it, justify punishment by assuming that criminals were warned.¹⁸⁹ Punishing in the absence of the warning either violates the moral autonomy of the accused¹⁹⁰ or it is pointless,¹⁹¹ or both.

As to the second, Oliver Wendell Holmes has famously argued that law is, by its nature, concerned only with effect, not moral culpability.¹⁹² His fellows and followers calculate punishment according to equations of deterrence and social cost.¹⁹³ The publicly accessible agent is front and center in such theories. Punishment is rational only inasmuch as it can, by threat, play a part in the decisions of those living under the law. As H.L.A. Hart puts it, law is designed “to guide individuals’ choices as to behavior by presenting them with reasons for exercising choice in the direction of obedience.”¹⁹⁴ “Reasons” here go beyond simple threats. Law also serves an expressive function, publicly declaring what is right.¹⁹⁵ In any event, punishing past acts based on novel shifts in the

¹⁸⁹ ASHWORTH, *supra* note 137, at 86-87.

¹⁹⁰ *Id.* at 28-30, 86-87.

¹⁹¹ IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 23 (1989).

¹⁹² Oliver Wendell Holmes, *The Path of the Law*, 1 HARV. L. R. 457, 459 (1897).

¹⁹³ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, [hereinafter *Introduction*] in THE WORKS OF JEREMY BENTHAM 86 (Bowring, ed., 2002) [hereinafter WORKS]; Jeremy Bentham, *Principles of the Penal Law*, [hereinafter *Principles*] in WORKS 365. More recently, see Gary Becker, *Crime and Punishment: An Economic Approach*, 76, J. POL. ECON. 169 (1968); Richard Posner, *An Economic Theory of the Criminal Law*, 85 COL. L. REV. 1193 (1985).

¹⁹⁴ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968).

¹⁹⁵ PRIMORATZ, *supra* note 191, at 145-154; Hampton, *supra* note 69, at 208; DUFF, *supra* note 161, at 233-240; J. FEINBERG, DOING AND DESERVING 95 ff. (1970).

public face of law is without purpose because the changes do not, by definition, have an impact on the legal agent in her pre-shift public mode and punishing based on pre-shift acts does not provide significant comparative benefit over punishment based on post-shift acts.¹⁹⁶

Taking note of the role of public agency highlighted by the legality principle also has positive import for consequentialist-oriented approaches to transitional justice. By making public agents the objects of punishment, advocates of utilitarian legal theories depend on the possibility that those living under the law could act differently under a different public face of law. Reflecting back to the principle of legality, the objection points out that former abusers might well act differently under the laws of a new state. It would be inefficient, pointless, and ultimately unfair¹⁹⁷ to assume otherwise. It follows that consequentialist law enforcement concerns, such as deterrence, are better served in transitional circumstances by focusing on post-transitional behavior.¹⁹⁸

Deontological constructions of legal wrong also invoke a public agent, suggesting negative and positive effects on transitional justice. The legality principle is, as Jerome Hall points out, a solution to the problem of coercing autonomous agents.¹⁹⁹ Treating another as an end, and not merely as a means, assumes that they had the relevant capacities and information to make a decision.²⁰⁰ Knowledge and intent are central in this model of agency. Assigning blame and

¹⁹⁶ This point is discussed at greater length in Section IV, *infra*.

¹⁹⁷ Holmes thought that the common law would “by the necessity of its nature” give up such words. As it turns out, basic principles of fairness have become more entrenched with the prevalence of Rule Utilitarian decision procedures that adopt deontological standards for qualification to and utilitarian measures of punishment. *See, e.g.*, Paul Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 *NW. U. L. REV.* 19 (1987). Holmes himself retains excuses for infants and for the insane because they are not able to participate as full public agents in their decisions. So, while he may not approve of the term “fairness” sneaking into the conversation, it is clear that he would agree with the point in this context.

¹⁹⁸ This issue is explored at greater length in Section IV, *infra*.

¹⁹⁹ HALL, *supra* note 137, at 58-64.

²⁰⁰ DUFF, *supra* note 161, at 20-39.

responsibility operates with the assumption that the accused can appreciate the wrongness of her actions. Punishment is, thus, designed to reflect on the nature of the wrong, treating the criminal as an agent who has chosen her acts. Owing to this account, Hegel argued that punishment is a right of the criminal, reflective of her autonomy.²⁰¹ Reciprocally, if, an agent could not have known that her action was illegal, as distinct from simply wrong, then there is no ground to hold her *criminally* liable.²⁰²

In a transitional context, trials violate the autonomy of agents cast in their public roles under the law by punishing them for actions that were not, in fact, against the public face of law propagated by the abusive regime. Note that this does not extend to moral blame. The legality excuse that I am proposing is exclusively a function of the split between moral and public agency and the corresponding division between moral and legal blame.²⁰³ The principle of legality provides a shield against legal punishment only. There is plenty of room left over for assignments of moral blame and responsibility for repair and reform.²⁰⁴

Beyond the deontological concern for treating individuals as ends, Kant is well-known for his assertion that law is a tool for solving the problem of justice among a race of devils.²⁰⁵ Even for Kant, then, law is, at least in part, a coercive tool, playing a role similar to that played in more purely consequentialist theories of criminal punishment. Pointing out that devils should not be punished for failures of the public face of law is simply to say that it is both unjust and pointless to “make someone suffer a punishment unless the individual was given a fair warning that his act would bring

²⁰¹ HEGEL, *PHILOSOPHY OF RIGHT*, para. 100 (Knox, trans., 1952). For an interesting critique of this argument see John Deigh, *On the Right to be Punished: Some Doubts*, 94 *ETHICS* 191 (1983/4).

²⁰² DUFF, *supra* note 161, at 20-39; JASPERS, *supra* note 188, at 25.

²⁰³ This distinction is already familiar in the common law. See ASHWORTH, *supra* note 137, at 42-46.

²⁰⁴ JASPERS, *supra* note 188, at 67-75.

²⁰⁵ KANT, *PERPETUAL PEACE*, *supra* note 83, at 8:355-85; KANT, *COSMOPOLITAN INTENT*, *supra* note 83, at 8:21-6.

it down on him.”²⁰⁶ My claim is not that abusers from the past would have acted differently if they had been living in a different legal culture; rather, the claim from legality is that it is unfair and inefficient to assume that they would not have.

Trials, as opposed to private condemnation or moral blame, assume the existence of a legal prohibition in the construction of responsibility and the justification of punishment. Understanding the agency significance of legality puts an important positive spin on objections to transitional trials derived from the legality principal. Specifically, by recognizing the role of an abusive public face of law in pre-transitional abuses, transitional regimes can recognize not only the transitional potential of political, social, and legal reform, but also the transitional potential of individual abusers. Transitional jurisprudence must take normative account of this and design transitional procedures that reflect potential for change. The legality objection is one result of this accounting. As I argue in the remainder of this article, proper distribution of an excuse based on legality provides both a normative structure for hybrid programs of transitional justice and practical guidance for executing these programs in particular transitional circumstances.

C. *An Affirmative Excuse Based on Legality*

Pre-transitional bad acts reflect an abusive public culture. An abusive culture is, in turn, linked to broad complicity in abuses committed by and under pre-transitional regimes. Broad complicity poses problems for justice in transitions both because of the large numbers of potential defendants and because it exposes deeper, more theoretical, problems for criminal trials in transitions posed by legality. A transitional movement must sort through these problems if it hopes

²⁰⁶ Golding, *supra* note 58, at 181.

to seek justice for past wrongs. The key shift in thinking that I am motivating is a realization that these challenges do more than pose problems for programs of prosecution in transitions—they point out transitional differences that must be accounted for by transitional jurisprudence, not merely accommodated.²⁰⁷

Since transitional justice is an exercise in non-ideal theory,²⁰⁸ a full accounting of these elements should provide some positive descriptive significance for a jurisprudential theory of transitional justice. One key feature of transitions that must be accounted for is the fact that there is a transition. Stable state justice is a matter of enforcing and further refining an operating vision of right. In transitions, the vision itself is under construction.²⁰⁹ Complicity, legality, and other challenges to justice in transition serve practical and theoretical notice of the shift.²¹⁰ The challenge for transitional justice is to find a way to address past wrongs that is consistent with the basic tenets of the rule of law, but takes principled account of the fact that there is a transition.

Taking note of the connection between pre-transitional conditions and pre-transitional abuses on the one hand, and between transitional movements and commitments to alter the public face of law on the other indicates how this challenge can be met. Advocates for criminal trials in transitions are rightly concerned about limitations on and objections to prosecutions because, as they see it, a transition that fails to prosecute all those implicated in past abuses compromises its duty to

²⁰⁷ Compare Posner & Vermeule, *supra* note 7.

²⁰⁸ De Greiff, *supra* note 6, at 79-82.

²⁰⁹ ACKERMAN, *supra* note 6, at 99-112.

²¹⁰ TEITEL, *supra* note 16, at 39-49.

do justice, though necessity may demand such a compromise.²¹¹ In my view, this is too drastic a conclusion.

If the factors that impose limitations on criminal prosecutions describe unique conditions that have theoretical significance for transitional jurisprudence, then it is not the case that limited prosecutions are compromises against justice in transitions. Quite the contrary, the point is that broad prosecutorial strategies are not “transitional.” They are ill-considered attempts to recreate stable state justice in transitions that fail to take account of transitional realities and to capitalize on transitional opportunities.

Recognizing the role of the public face of law in abusive states in light of transitional commitments to legality erases the apparent justice gap opened between the numbers of those implicated in past wrongs and the capacity of transitions to conduct criminal trials. Broad complicity and correspondingly large numbers of potential defendants reflect the fact that publicly and institutionally approved practices and social norms fuel pre-transitional abuses. Given that most of those who participated in pre-transitional abuses lived under an abusive public face of law, broad prosecution programs are not appropriate because most of those who would be prosecuted should not be, according to the principle of legality. It is not merely that transitions *cannot* punish all of those implicated in past abuses; most of those implicated *ought* not to be punished.

Legality concerns are best met, then, not by giving up on criminal trials altogether, but by determining who might qualify for an affirmative defense. While the details of such an excuse would be context dependant, for purposes of advancing the conversation, I offer the following:

²¹¹ Douglass Cassel, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Lessons from the America's: Guidelines for International Response to Amnesties for Atrocities*, 59 *LAW & CONTEMP. PROB.* 197 (1996); Ortenlicher, *Settling Accounts*, *supra* note 2, at 2602-04.

DEFENSE FROM LEGALITY

1. It is an affirmative defense for the actor engaged in the conduct charged to constitute an offense if the act reflects a reasonable interpretation of the prevailing public face of law. “Public face of law” encompasses formal legislation, executive orders, the body of prevailing public threats, institutional expectations represented by institutional agents, and commonly represented public and legal expectations as they would have been perceived by a reasonable person in the actor’s condition and position at the time of his act.

2. The legality defense is not available if:
 - a. The act is not within the scope of expectations present in public face of law.²¹²
 - b. The act does not reflect the public demands on the claiming agent.
 - c. The agent is not, himself or herself, subject to the relevant body of public law.
 - d. The agent is directly responsible to another body of law and is not under direct threat from the body of public law that is claimed as the source of a defense.²¹³
 - e. The actor is under obligations that reflect a special status to which he or she has voluntarily submitted where this status is expected to supercede all other demands on his or her behavior.²¹⁴

Providing a defense to agents of pre-transitional abuse based on the legality principle performs the necessary practical and theoretical task of converting the unique characteristics that define pre-transitional abuses and transitions into normative conditions relevant to transitional justice-seeking. Extension of the excuse recognizes that many, if not most, pre-transitional bad acts were committed by individuals who, given the nature of the public face of law under the abusive regime, were justified in believing that what they did was right, necessary, or at least not subject to legal punishment.

²¹² Sub-point (a) secures prosecutorial privilege in cases where agents move beyond the basic scope of the culture of abuse.

²¹³ Sub-points (b) and (c) clarify conditions of recognition for agents identified in sub-point (a), and provide independent ways to negate the defense where specific proof of motive cannot be produced.

²¹⁴ Sub-points (d) and (e) provide for prosecution of people in special positions that free them from the common demands of public law or explicitly require conduct above common public practice. The focus of (d) is on leaders responsible to international treaties and covenants. The interest in (e) is in individuals who have freely taken oaths of conduct that supercede their statuses as agents under public law.

Recognizing transitional commitments to the rule of law in this way also highlights the prospective nature of transitional justice.²¹⁵ The function of trials in stable states is to reaffirm commitments to right established by law.²¹⁶ Transitional justice is, in large part, a process of rejecting old commitments embodied in the abusive public face of law in order to establish new commitments to democratic principles, human rights, and the rule of law.²¹⁷ Transitions are defined by the need to produce significant changes in public norms, practices, and consciousness in order to carry an abuse-ridden society into a new period characterized by commitments to human rights and the rule of law.²¹⁸ Organizing transitional justice programs around recognition and extension of an excuse to individual actors serves these prospective transitional justice goals in a number of ways.

First, it highlights the potential and necessity to transform citizens of an abusive regime into citizens of a post-transitional state. The principle of legality is as much concerned with agents as laws. The proposed excuse recognizes a distinction between individuals acting in a private versus a public mode. Many of those who committed abuses in the past were acting in a public mode in ways that were, when the totality of pre-transitional public conditions is taken into account, theoretically predictable. The fact of broad complicity points out that part of the process of justice in transitions is transforming norms. The legality objection points out is that most of those complicit are candidates for change.

Second, focusing on the role of public norms in abuses sets the stage for production of a full account of the past that allows a transitional movement to mark sites for change and publicly establish commitments to new norms. Proper extension of the excuse requires establishment of a

²¹⁵ De Greiff, *supra* note 63, at 95; ACKERMAN, *supra* note 6, at 70-79.

²¹⁶ HABERMAS, *supra* note 161, at 115, 171-74.

²¹⁷ MINOW, *supra* note 37, at 2-3.

²¹⁸ TEITEL, *supra* note 16, at 28-33.

clear historical record of the past in order to determine who should and who should not be excused and to further the necessary process of converting the old public face of law into the new. Trials, on the other hand, run the risk of neglecting the fact that there is a transition. By trying to keep transitions in the mold of stable state criminal jurisprudence, trial advocates fail to take account of the fact that transitional justice must be both prospective and retrospective in ways that stable state justice is not.²¹⁹

This proposed defense invites obvious objections, particularly when it is pointed out that abuses commonly violate the most basic tenets of civilized law.²²⁰ Concerns may also be raised as to the premium the excuse puts on the principle of legality. Committed consequentialists might, for example, argue for rejection or suspension of the legality principle in favor of practical goals such as deterrence and incapacitation. I address these concerns in the next two sections of this article. Building on this discussion, in the last section I suggest how transitional justice procedures can be “excuse-centered,” and how this approach provides justification, support, and guidance for truth commissions and other elements of the “hybrid” approach.

III. DEFENDING THE DEFENSE PART 1: OTHER SOURCES OF LAW

Section II argued against individual criminal liability in transitions by making use of the principle *non malum sine lege*, commonly called the legality principle. This position may seem unattractive for a number of reasons. Among these is that the legality objection, as I have developed it so far, seems to rely on a strictly positivist account of law. A naturalist might object, arguing that

²¹⁹ *Id.* at 11-26.

²²⁰ Cassel, *supra* note 211, at 199-208.

laws demand obedience as a function of their proximity to natural right, that state codes inconsistent with natural law cannot demand obedience, that natural law exists independently of state codes, and that natural law creates direct obligations regardless of conflicting state codes.²²¹ From this, a naturalist could conclude that everyone has a standing obligation to the natural law that is not excused by interference from immoral state codes of conduct.²²²

This is an argument with some currency in transitional justice debates.²²³ It was, for example, used at Nuremberg²²⁴ and in the German border guard cases.²²⁵ Beyond this historical significance, this basic line of response, which appeals to a source of “law” outside of state codes, can be applied equally to justify punishment based on, for example, international law. In this section I respond to this line of argument by motivating a distinction between legal culpability and moral responsibility that is based on epistemic duties unique to agents in their public versus private modes. I proceed by suggesting that the “strict liability” approach to blame suggested by the naturalist line does not account for the role that the public face of law plays in the lives of public agents. I conclude, however, that the unique positions occupied by high-level leaders *vis-à-vis* international law leave them vulnerable to prosecution.

²²¹ See generally, AQUINAS, *SUMMA THEOLOGICA*, passim; THOMAS HOBBS, *LEVIATHAN*, Chapters 14 and 15; SIR WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, Introduction and Chapter 1.

²²² DUFF, *supra* note 161, at 75.

²²³ TEITEL, *supra* note 16, at 14-15; P. NOVICK, *THE HOLOCAUST IN AMERICAN LIFE*, 179, 246 (1999).

²²⁴ *The Legal Basis of the Nuremberg Trial*, a 1945 publication of the United States State Department, Office of International Information, at XVIII.

²²⁵ Berlin State Court, No. (523) 2 Js 48/90 (9/91), in *TRANSITIONAL JUSTICE*, *supra* note 26, VOL. III, at 576; ELSTER, *supra* note 21, at 238-39

A. *Fears of Radical Skepticism*

I will grant, both for purposes of the argument and because I think it is true, that murdering thousands of innocents is wrong, even if no domestic laws recognize that it is so.²²⁶ My argument for an affirmative defense does not imply that there are not higher callings than laws on the books.²²⁷ Neither does it imply that “bad” laws can demand obedience.²²⁸ My focus is on the fact that the public face of law in abusive states intervenes between individuals and moral right in such a way that reasonable people living in these regimes may make mistakes about what they ought and ought not to do. Because the source of this confusion benefits from the apparent stamp of official state approval,²²⁹ is external to the agent, and is, by definition, removed in the process of transition, the legality principle points out that punishment is inappropriate. That this is so implies neither that pre-transitional abuses were right nor that those implicated did not have a duty to know better and do otherwise.

The naturalist objection is, at its core, fed by fear of a skepticism of duties to the good that my argument does not implicate. To illuminate the point it is useful to consider the full extent of the naturalist critique by way of a discussion of excuse defenses. Mistakes of fact generally provide an excuse from legal blame.²³⁰ Consider, for example, a hiker who, walking through a public forest,

²²⁶ I am hardly alone in this view. See e.g. Ronald Dworkin, *Internal Realism*, *supra* note 132 (extending arguments appearing in *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* (1996)).

²²⁷ Hart, *supra* note 139 at 617-21.

²²⁸ *Id.*; see also PLATO, *APOLOGY*, *passim*.

²²⁹ This distinguishes the legality excuse as I am developing it from the more familiar excuse of ignorance of the law, which is not, in most circumstances, a viable defense against criminal liability, though it may mitigate culpability

²³⁰ ASHWORTH, *supra* note 137, at 234-37; HALL, *supra* note 137, at 36-76.

unwittingly takes a path leading onto private property, thus committing the crime of trespass.²³¹

Unless this is a strict liability offense, the trespasser would not, and should not, be blamed for his trespass if he both did not know and could (or should) not have known that he was walking on private rather than public land.²³²

The naturalist objection sees the legality defense as proposing a parity between mistakes of fact and mistakes of the good such that blameless errors of right should provide an excuse on par with mistakes of fact. The argument proceeds from the premise that blameless moral ignorance is just as possible as blameless ignorance of facts. There are really two ideas here. The first is that moral ignorance is possible. The second is that one can be blameless for these mistakes. Sincere differences in moral belief provide ample proof of the first assertion. While a relativist may look at such differences and claim that neither disputant is “mistaken,” the abuses perpetrated in pre-transitional regimes provide examples of opinions that challenge the moral agnostic to stay neutral.²³³ The more interesting issue is, then, whether blame is appropriate when a wrongdoer acts in accord with a mistaken belief that what he is doing is right, or, at least, not wrong.

The legality excuse I have proposed contends, without apparent limitation, that blame is not appropriate if bad acts are functions of social beliefs, practices, and norms. While my proposed defense is not a cultural defense, there are some parallels that are worth considering in the face of the naturalist objection. Consider, for example, a Hittite living in the Near East in 100 B.C.²³⁴ The

²³¹ I take this example and the argument for radical skepticism from Gideon Rosen’s unpublished paper *Responsibility and Moral Ignorance* available at <http://www.law.nyu.edu/clppt/program2001/readings/index.html>. Rosen presented this paper to the 2001 Philosophy Colloquium at New York University School of Law. There Rosen made clear that this paper is an experiment and is not to be taken as representing his final thoughts on the subject of moral responsibility.

²³² J. L. Austin, *A Plea for Excuses*, in 1 *ARISTOTELIAN SOCIETY PROCEEDINGS*, LVII, 20 (1956-1957) (discussing duty to take reasonable care in order to avoid preventable ignorance).

²³³ MARK OSIEL, *MASS ATROCITY: COLLECTIVE MEMORY AND THE LAW* at 24-35 (1997).

²³⁴ I borrow this example from Rosen, *supra* note 231.

Hittite would have been shaped by the ubiquitous practice of slavery and the commonly shared belief system that made slavery a perfectly acceptable practice. He would, predictably and naturally, have grown up thinking that, while it was bad to be a slave, there is nothing inherently wrong with the practice of slavery.²³⁵

Of course, it is one thing to claim that the Hittite did not know that slavery is wrong. It is quite another to contend that this mistake is excusable. To render the Hittite truly blameless for his mistake of right, it is necessary to contend that he did not breach a duty to “rethink the non-controversial principles that form[ed] the framework for [his] relations with other people.”²³⁶ This included premise makes a claim about epistemic duty, what one has a duty to know in the context of norm-guided action. The legality excuse raises concerns for the naturalist because it seems to endorse this added premise, asserting that duties to right begin and end with the duty to know what public norms require, no matter how evil or misguided those norms might be. This is, of course, an uncomfortable proposition.

Fortunately, there are good reasons to doubt the veracity of the added premise. Specifically, it seems to miss a significant distinction between mistakes of fact and mistakes of right. Focusing on this distinction suggests that we may have duties to know our duties, epistemic duties, that go farther and are more demanding than is suggested by the quick switch from mistakes of fact to mistakes of the good. Aristotle provides just such an argument in *Nicomachean Ethics*.²³⁷

²³⁵ The Hittite is not alone in this belief. Aristotle, for example, famously argues for slavery on the basis of an ontology that includes natural slaves and natural masters. ARISTOTLE, *POLITICS*, I. 4-8.

²³⁶ Rosen, *supra* note 231, at 12.

²³⁷ ARISTOTLE, *NICOMACHEAN ETHICS* (W.D. Ross, trans., 1925).

B. Mistakes About Particulars vs. Mistakes of the Good

In Book III of *Nicomachean Ethics*, Aristotle takes aim at Plato's claim that nobody does what is bad knowing that it is bad.²³⁸ Plato's position is, in Aristotle's view, tantamount to thinking that evil acts are not *voluntarily* committed.²³⁹ Adoption of such a view shatters intuitive notions of blame and praise by denying that anyone can be blamed for their evil acts. Aristotle's response attempts to reconstruct the possibility of blaming evildoers by distinguishing between mistakes of particulars and mistakes of right. Aristotle writes:

Now every wicked man is ignorant of what he ought to do and what he ought to abstain from, and it is by reason of error of this kind that men become unjust and in general bad; but the term "involuntary" tends to be used not if a man is ignorant of what is to his advantage—for it is not mistaken purpose that causes involuntary action (it leads rather to wickedness), nor ignorance of the universal (for *that* men are *blamed*), but ignorance of particulars, i.e. of the circumstances of the action and the objects with which it is concerned. For it is on these that both pity and pardon depend, since the person who is ignorant of any of these, acts involuntarily.²⁴⁰

On this view, ignorance that may pardon is not of right and wrong, but ignorance of critical exigent facts and circumstances that thwart an individual's ability to achieve the intended consequences of her actions. Bad acts perpetrated in the fog of ignorance of particulars are excused²⁴¹ because the action is truly involuntary. To use one of Aristotle's examples, if Metrope had known that the figure looming in the darkness was not an enemy soldier but his son, then he would not have shot. Due to this mistake, Metrope cannot be said to have voluntarily shot his son.

²³⁸ PLATO, *MENO* at 77 c-e. Plato's position, like the ignorance line attributed to legality above, is grounded in the claim that those who commit evil acts do so out of ignorance, simply mistaking the bad for the good. While Plato's position is much broader, he does not distinguish between blameless and blameworthy mistakes of right, it is analytically close enough to the legality line to make Aristotle's response worth considering in the present context.

²³⁹ This is, as we will see, importantly different from "involuntary." On Aristotle's view, only acts that are involuntary qualify for an excuse.

²⁴⁰ ARISTOTLE, *supra* note 237, at III, 1.

²⁴¹ OLIVER WENDELL HOLMES, *THE COMMON LAW* 48 (1963).

His involuntary mistake of fact qualifies him for pity, for his mistake and the loss of his son, not blame.

Ignorance of right and wrong is, as Aristotle points out, quite different from ignorance of particulars. Failing to seek out and know the nature of good will certainly lead to bad acts done by reason of ignorance. Unlike Metrope's mistake, however, these are errors of evaluation. Perpetrators of such acts can only be called "wicked." The wicked actor intends both act and outcome, though she mistakes bad for good.²⁴² If a wicked person who has intentionally done wicked things cannot be blamed, it is hard to see who can be.

This distinction has obvious application to the legality excuse that I have proposed. Consider the case of a Hutu who engages in genocide because he truly believes what the public face of law tells him, that the Tutsi "cockroaches" must be exterminated.²⁴³ According to my discussion of legality, true believers of this ilk should qualify for an excuse because the beliefs that they acted upon are traceable to an abusive public face of law. On Aristotle's view, the Hutu's mistake is a mistake of evil for good. He is, then, wicked. The wicked deserve blame, not pity. So, on Aristotle's argument, the Hutu's ignorance does not excuse his act because the ignorance is an expression of bad character.²⁴⁴ This claim for responsibility in transitions is bolstered by the fact that in abusive states there are those who recognize the evil around them and actively work against it.²⁴⁵ If it is not impossible to know right from wrong in an abusive state then there seems no reason

²⁴² ARISTOTLE, *supra* note 237, at III, 1.

²⁴³ Though contested by the defendants in the "Media Trial," the ICTR held that "cockroach" is the appropriate translation of "inyenzi," which was used to refer to Tutsi's during the periods leading up to and including the 1994 holocaust in Rwanda. See *Prosecutor v. Nabimana, Barayagwiza, & Ngeze*, No. ICTR-99-52-T, para. 171 (Dec. 3, 2003).

²⁴⁴ ARISTOTLE, *supra* note 237, at III, 1. As a further test, Aristotle points out that "the doing of an act that is called involuntary in virtue of ignorance of this sort must be painful and involve repentance."

²⁴⁵ See, e.g., GOUREVITCH, *supra* note 17, at 110-144 (describing the efforts of Paul Rusesabagina, manager of the Hôtel des Mille Collines, to provide safe haven for Tutsis during the 1994 holocaust).

to not hold responsible and punish those who fail to live up to their ethical duty to know right from wrong.

Aristotle's arguments seem to provide grounds for a devastating attack on the excuse I have proposed. As it stands, the legality excuse appears to shift blame for bad acts, via bad character, to an abusive public face of law. By focusing on a distinction between ignorance of particulars and ignorance of the good and corresponding differences in epistemic duty, Aristotle seems to have destroyed the premise that individuals have no duty to inquire beyond the claims of right present to them in the form of the public face of law.²⁴⁶ Thereby, it seems appropriate to blame pre-transitional abusers even if they act from real ignorance that corresponds to the public face of law. They are wicked, after all.²⁴⁷

C. *Legality and the Epistemic Role of Law in Public Agency*

The Aristotelian/Naturalist line of attack misses the critical role, highlighted by the legality principle, that the state plays in constructing legal responsibility. In abusive regimes, the public face of law is such that reasonable people can conclude that what they are doing is, at least, not against the law. Focusing on this feature of pre-transitional regimes suggests two responses to the natural law objection bolstered by Aristotle's distinction. First, the state must, in transition, accept some responsibility for the ignorance producing conditions that existed under the old regime. Second, the disjunction between law and moral right in abusive regimes highlights a distinction between private

²⁴⁶ A similar argument can be made from Jean-Paul Sartre's argument for radical responsibility. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS, Chap. 2, Part 1. On first flush, the excuse I have proposed may, in Sartre's terms, seem like the worst sort of "bad faith." The distinction that I press in this section, between moral responsibility and legal liability, provides a response to Sartre just as it does to Aristotle and the naturalist.

²⁴⁷ PRIMORATZ, *supra* note 191, at 75-79.

moral agency and public legal agency. Taking this into account suggests that, at least as a practical matter, a distinction between moral culpability and legal liability should be made in transitions.²⁴⁸

This approach preserves the possibility of moral blame but, by forgoing legal punishment, appreciates the commitment to fair-warning that girds the legality principle.

Aristotle's defense of moral responsibility comes down to an argument that we each have an unmediated duty to know our duty. While this position may be sustainable, it does not properly apply in the legal context. To see how this is so, it is important to focus on the conditions that create excusable ignorance. Even for Aristotle, ignorance of particulars is not a complete defense.²⁴⁹ We each have a basic responsibility to know facts and conditions that a reasonable person in our position would know. Ignorance produced by laziness and inattention is not excusable. Agents are excused, however, for "ignorance for which they are not, themselves, responsible."²⁵⁰ If our ignorance is a result of deception or misinformation from another source then we may not be to blame when this ignorance leads us to do harm. Despite this admission, Aristotle stands firmly by his claim that "wickedness is voluntary"²⁵¹ and not to be excused, no matter, it seems, the role that external conditions might play.

These positions may seem somewhat at odds. The solution, which is resident in Aristotle's argument, is that agents have different levels of epistemic duty with respect to particulars on the one hand and the good on the other. Specifically, what Aristotle must argue is that, as autonomous and reflective beings, moral agents have the capacity and, thus, the duty, to discover directly the moral truth on their own. While conditions in the world may affect moral knowledge, the external world

²⁴⁸ JASPERS, *supra* note 188, at 25-27, 45-64.

²⁴⁹ ARISTOTLE, *supra* note 237, at III, 1.

²⁵⁰ *Id.*

²⁵¹ *Id.*

does not mediate between agents and the good. Therefore, conditions in the world cannot waive duties to know the good.

Knowledge of particulars, by contrast, can only be gained through our senses. By virtue of this fact, conditions in the world directly mediate between the truth about particulars and knowledge of particulars. Agents do not, then, have exclusive control over their knowledge of particulars. In Metrope's case, for example, the play of light and shadows, conditions of the world that he could not control, led to his mistaking his son for an enemy soldier.²⁵² It follows that agents cannot be kept to the same stringent epistemic duties that hold with respect to the nature of the good. For knowledge of particulars, the highest reasonable epistemic duty is the duty to take care.²⁵³ For knowledge of the good, the duty is absolute.

I agree that wicked people who do wicked things should be blamed. I agree that pre-transitional abusers, wicked people indeed, should be subject to blame. I maintain, however, that they should not be subjected to legal punishment. To see how I can hold both views it is critical to focus on the limited impact of the affirmative excuse I am proposing. The legality excuse does not propose to exonerate wrongdoing or to shift epistemic duties entirely. Provision of the excuse does not imply that no wrong has been done or that those implicated in pre-transitional abuses should not have acted otherwise. It is a legal excuse derived from the failure of a regime to provide fair warning of the legal consequences of an action. The excuse focuses on the privilege to punish and the conditions that a state must meet in order to claim this privilege. It points out that if a state fails to meet its burden then it must forgo its privilege to punish. Pre-transitional states fail to meet burdens of fair warning. It follows that a transitional regime, as heir to the past, must provide a legal

²⁵² *Id.*

²⁵³ *Id.*

excuse for those who acted within the behavioral boundaries established by an abusive public face of law.

Responses to legality concerns that focus on individual responsibility, such as those attributed to Aristotle and the Naturalist here, indulge in a *non sequitur*. The failure of a state to fulfill the formal requirements that it must in order to claim the privilege to punish is separable from concerns relating to ethical duties to know right from wrong and moral obligations to act appropriately. A state's duty to inform its citizens about what the law requires also has epistemic consequences. The legality principle proscribes that fair warning is a prerequisite to just punishment.²⁵⁴ What the principle highlights is that, from a criminal law point of view, the state necessarily mediates between the natural law and citizens. It may well be the case that a state that fails in its duty to conform state law to the natural law does not deserve faith and respect.²⁵⁵ It may even be true that there is no obligation to obey bad law so that state law that is contrary to the natural law cannot bind citizens.²⁵⁶ None of this implies, however, that a state that propagates an abusive public face of law is morally entitled to punish citizens who obey just because that law does not conform to the natural law. Such would be both "brutal" and "absurd."²⁵⁷

The state is a conduit for knowledge of right and wrong within the pathway of criminal justice leading up to prosecution and punishment. Therefore, while citizens may have the capacity and bear the duty to know the good on an individual basis, there can be no criminal consequence for failure to fulfill this epistemic duty.²⁵⁸ The only epistemic duty that can have criminal consequences

²⁵⁴ HALL, *supra* note 137, at 58-59.

²⁵⁵ Hart, *supra* note 139 at 618; Fuller, *Reply*, *supra* note 137, at 657-61.

²⁵⁶ Hart, *supra* note 139 at 616-17.

²⁵⁷ FULLER, *supra* note 59, at 59.

²⁵⁸ Hart, *supra* note 139 at 619-20.

is the duty to know what the public face of law demands.²⁵⁹ Where, as in abusive states, the public face of law creates conditions in which reasonable people can be led to make mistakes about what is right, those who act out those mistakes cannot be held criminally accountable without violating legality²⁶⁰ because they have met their public legal duty by knowing what the law demands. They may be blamed for their moral failures, but they may not, consistent with core demands of the rule of law, be punished criminally.²⁶¹ Reciprocally, the regime that has enabled that mistake loses its moral entitlement to punish.²⁶²

None of this is inconsistent with praising those who rise above the abusive conditions of a pre-transitional state. We can, and should, celebrate the Oskar Schindlers of the world. That we do, however, does not require that we punish those who follow the law. Legal wrong is not the same as wickedness. The state bears responsibility for defining legal wrong and for establishing conditions consistent with legal education and habituation of citizens. Given this duty, citizens may, in their public roles as legal agents, rely on the public face of law as the standard bearer of legal right and wrong. When the state fails to do its part, the legality principle dictates that the state must sacrifice its privilege of punishment in deference to fairness and respect for the autonomy of its citizens. For a transitional regime to do otherwise would put it in no better a moral position than its predecessor.²⁶³

The excuse I have proposed is limited to legal agents in their public modes. It has no footing in and no consequences for moral agency. Moral blame may still be appropriate for the

²⁵⁹ Consistent with this view, mistakes of law generally do not provide an excuse from legal punishment.

²⁶⁰ *Id.*

²⁶¹ The distinction proposed here between legal and moral punishment is not new. For its application in the context of transitional justice, however, credit is due to JASPERS, *supra* note 188.

²⁶² Fuller, *Reply*, *supra* note 137, at 652-57.

²⁶³ *Id.* at 657-61; FULLER, *supra* note 59, at 39, 248-249.

knowing commission of any act that is wrong.²⁶⁴ A morally blameworthy act may also have legal consequences, but this need not be the case. In a similar vein, morally appropriate acts may sometimes be subject to criminal consequences. There is, as a practical matter, no necessity in this relationship²⁶⁵ and so, no legal right to punish may be drawn from morality alone.

The legality principle respects the distinction between legal and moral blame by marking a derivative distinction between individuals in their public legal mode and agents in their private moral modes. People, in their roles as legal agents, are operated on by the laws, which make claims on their behavior. Legal agency comes with its own obligations and epistemology. Legal punishment pursues those who fail in their duties as legal agents. Punishment is forgone when agents meet the demands placed on them in public, despite the fact that they lie to their mothers about taking the garbage out. The legality principle points out that the same argument goes for all other acts that are not prohibited under the law. Actions *mala in se*, like acts *mala prohibita*, are punishable only if they are prohibited by law. That they are wrong regardless of the law is beside the point.

D. Justification and Application

This position is consistent with a familiar distinction, made in all rule ordered practices, between justification and application.²⁶⁶ Games, for example, operate with a specific set of rules. From time-to-time some of these rules may reveal themselves to be less than ideal with respect to the greater goals of the game. Movements develop and opportunities to change the rules are presented. These opportunities are limited to times and places outside of actual games, however.

²⁶⁴ *Id.* at 25, 26.

²⁶⁵ AUSTIN, *supra* note 171, at 184.

²⁶⁶ JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 19-112 (Ciaran P. Cronin, trans., 1994).

Therefore, if a striker in a soccer match is called offside she might appeal the accuracy of the call but it would not be appropriate for her to appeal the fairness of the offside rule. In the game, the rules are applied. Conversations about their justification are reserved for other times and forums.

Law is similar to games in recognizing a firm distinction between justification and application.²⁶⁷ The principle of legality is an expression of this commitment. The debate over the source of law and the legitimacy of law is part of the broader conversations that rationalize, justify, and, eventually, generate laws.²⁶⁸ They are the sorts of conversations engaged in by legislators, policy wonks, citizens, and sometimes even philosophers, and are reserved for the senate floor, classrooms, and civil society. Fetal norms that have not completed their gestation do not, until fully mature as sanctioned law, justify punishment.

To illustrate the point, imagine that I am driving at 34 m.p.h. on a stretch of road that is clearly marked as a 35 m.p.h. zone. When pulled me over and charged with speeding I contest, claiming that I was within the marked speed limit. Now imagine that the officer agrees. He adds, however, that this is his usual patrol and he has noticed an unacceptable number of fatal accidents on this road. Furthermore, his department has conducted a study, the conclusion of which is clear: if cars traveling that stretch of road drove at 25 m.p.h. dozens of lives would be saved every year. Thus, he says, the speed limit really, by all measures, practical and moral, should be 25 m.p.h. He writes me a ticket for going 9 m.p.h. over the correct—not the posted—speed limit.

Now we go to court. The officer acknowledges that I was within the posted limit, but presents the judge with the findings of the study. Intrigued, the court conducts an evidentiary hearing, finds in favor of the patrolman, and fines me for driving faster than I should have. In my

²⁶⁷ HABERMAS, *supra* note 161, at 115, 172.

²⁶⁸ *Id.*

appeal, my argument is clear: the judge and the patrolman overstepped their bounds. It was their job to apply the law as they found it. By overstepping, they have created a Kafkaesque world of inscrutable legal expectations.²⁶⁹ They have also unjustly used the law to punish me for an act that was not, by definition, illegal at all.

It would still be unjust for the judge to punish me for speeding in this case if I revealed that I had read the study before that fateful evening. It would be unjust even if I agreed with the study, and thought that everyone should drive 25 m.p.h. Even if all of this were true, the laws on the books set the limit at 35 m.p.h. More importantly, the signs on the road clearly read “Speed Limit: 35 m.p.h.” My duty as a legal agent was, then, to respect that 35 m.p.h. limit. So long as I have done this, I am guilty of no legal transgression, even if, in a moment of private reflection, I agree that I *should* have kept it under 25 m.p.h.

The same is true of someone who abided by the laws in place under an abusive regime. Brought before a transitional tribunal he may, rightly, claim that he was following the law at the time. It would be odd and out of place for the judge to respond by saying that those were bad laws and the defendant should have known better. Just as it is not a defense in law to claim that the law is wrong,²⁷⁰ there cannot be a *legal* obligation to ignore or break laws that go against moral law. This is not to say that there is no moral obligation to disobey evil laws. As Socrates argues in the *Apology*, there is.²⁷¹ In a more contemporary vein, under United States law, those who claim objective fear of future persecution may not gain asylum if they participated in persecution of

²⁶⁹ More than most applications, “Kafkaesque” is singularly appropriate here. In Kafka’s *THE TRIAL*, K confronts a situation similar to that I am describing here. The duty of clear warning that is captured by the legality principle is meant to guard against the specter that Kafka constructs.

²⁷⁰ PLATO, *CRITO*, *passim*.

²⁷¹ PLATO, *APOLOGY*, *passim*.

another,²⁷² even if under duress.²⁷³ By contrast, while applicants may not normally claim fear of persecution based on threats of lawful punishment in their home countries,²⁷⁴ if the law violated demanded participation in persecution, then fear of punishment based on a refusal to participate can provide a basis for asylum.²⁷⁵ This apparent disparity is explained by the fact that duress is a legal excuse, not a moral justification;²⁷⁶ and “asylee” is a moral, not legal, status.²⁷⁷ Denial of asylum to an applicant who has, under duress, participated in the persecution of others, is acceptable because it is a function of moral culpability, not legal liability.²⁷⁸

Legal liability is different from moral culpability. The legality principle marks this distinction, recognizing that, while private moral considerations may be relevant to the justification of law and to private decisions to obey or not, these private reflections do not provide warrant for public sanction. Absent preexisting and legitimate, if not just, public threats, states lose their privilege to punish. None of this, as I discuss further in the last section of this article, excludes advancement of various forms of private guilt. Nor, as I argue in the next sub-section, does it exclude punishment of high-level leaders.

²⁷² 8 U.S.C. § 1101(a)(42)(2000).

²⁷³ *Fedorenko v. United States*, 449 U.S. 490 (1981).

²⁷⁴ *Saleh v. United States Dep't of Justice*, 962 F.2d 234, 239 (2d Cir. 1992).

²⁷⁵ *Islami v. Gonzales*, 412 F.3d 391 (2d Cir. 2005). *Cf. Bab v. Ashcroft*, 341 F.3d 348 (5th Cir. 2003).

²⁷⁶ ASHWORTH, *supra* note 137, at 221-30; IMMANUEL KANT, *THE METAPHYSICS OF MORALS*, 6:235-36 (Mary Gregor, ed., 1996).

²⁷⁷ *Matter of Rodriguez-Majano*, 19 I. & N. Dec. 811 (BIA 1988).

²⁷⁸ Happold, *supra* note 88, at 1158-63.

E. *International Law: Distinguishing High-Level Leaders from those Excused*

To now, I have focused on responses that refer to natural law or the demands of moral right. Those interested in prosecuting present-day abusers need not rely on such abstractions. Our contemporary international human rights culture²⁷⁹ boasts a well-stocked toolbox of treaties, charters, and jurisprudence of crimes against humanity and *jus cogens* law, each of which may serve as touchstones for transitional trials.²⁸⁰ In this section, I argue that these sources do not provide warrant to prosecute those who live under an abusive public face of law, but do provide ground for prosecuting high-level leaders exposed directly to threats of punishment under international law.

Crimes against humanity have been in the toolbox since at least the seventeenth century,²⁸¹ but came into prominent use at Nuremberg.²⁸² The Nuremberg Tribunals determined that unconditional surrender entitled the Allies to establish criminal laws *ex post facto*.²⁸³ This position, which smacks of “might makes right,” is only persuasive, if at all, on a practical level. Contemporary prosecutions for crimes against humanity need not rely on this dubious ground, of course. Going forward, the Nuremberg prosecutions established the international threat of punishment for crimes against humanity.²⁸⁴

Appeals to crimes against humanity seem to solve legality concerns by replacing fuzzy presumptions of universal right with solid claims of international law grounded in historical events

²⁷⁹ Rorty, *supra* note 30 at 115-16.

²⁸⁰ Cassel, *supra* note 211, at 197; Ortenlicher, *Settling Accounts*, *supra* note 2, at 2546-96.

²⁸¹ HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, Ch. 10 (1625); Emerich de Vattel, *THE LAW OF MEN* 232-33 (1758); Richard Zouche, *Iuris et Iudicii Feccialis, Sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio* (1650), in *THE CLASSICS OF INTERNATIONAL LAW* (1911).

²⁸² *Legal Basis of the Nuremberg Trial*, *supra* note 224, at XVIII.

²⁸³ *Id.* at XVIII. I assess this as a response in the next section.

²⁸⁴ MINOW, *supra* note 37, at 33.

and institutions, including prosecutions at Nuremberg, the International Tribunals for the Former Yugoslavia²⁸⁵ and Rwanda,²⁸⁶ and, going forward, the International Criminal Court.²⁸⁷ With slave trading and piracy, crimes against humanity also form the traditional core of universal jurisdiction,²⁸⁸ allowing foreign states to pursue prosecutions where transitional regimes are not able or willing.²⁸⁹ In light of recent prosecutions, pursued by individual states²⁹⁰ and by international tribunals, crimes against humanity appear to provide both normative justification for transitional prosecutions and a standing threat of punishment that persists where domestic laws enable abuse.

The duty and privilege of punishing crimes against humanity falls not on a particular power but on humanity as a whole.²⁹¹ Just as sovereign states committed to the rule of law must earn the privilege to punish, so too, any authority that seeks to prosecute crimes against humanity must demonstrate that it has earned this right. Members of the international community assert the privilege based on previous enforcement efforts and on consistent defense of core human rights norms.²⁹² While compelling as a vision, this response to legality concerns fails to provide substantial ground for punishing those who live under an abusive public face of law.

²⁸⁵ Statute for the International Criminal Tribunal for the former Yugoslavia, art. 5, U.N. Doc. S/RES/827 (1993).

²⁸⁶ Statute of International Criminal Tribunal for Rwanda, art. 3-4, Nov. 8, 1994, U.N. Doc. S/Res/955 (1994).

²⁸⁷ Rome Statute on the International Criminal Court, art. 7, July 17, 1998, U.N. Doc. A/CONF/189/9, 37 I.L.M. 999 (1998).

²⁸⁸ Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 *NEW ENG. L. REV.* 399, 403-06 (2001).

²⁸⁹ *Id.*

²⁹⁰ Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 *AM. U. INT'L L. REV.* 301, 314-55 (2003).

²⁹¹ Broomhall, *supra* note 288, at 404-405; Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785, 789-90 (1988).

²⁹² *Id.*; Sriram, *supra* note 290, at 301 ff.

While crimes against humanity represent a critical advance in international human rights law, their presence on the international scene does not solve legality concerns in the unique circumstances of abusive states, at least for those living under an abusive public face of law. To meet core legality concerns of clarity, regular enforcement, and fair warning, the threat of prosecution for violations of crimes against humanity must be present to those on the ground in abusive regimes. Otherwise, crimes against humanity have no more normative significance with respect to legality than remote laws of foreign states or laws propagated in secret. Unfortunately, for most living under pre-transitional regimes, international law, including crimes against humanity, is obscured by the local and immediate demands of an abusive public face of law.

Just as abusive regimes operate to obscure the demands of natural right, so do they hide from domestic view the threats and demands of international law.²⁹³ This has two consequences. First, as heir to abusive regimes, transitional governments have no more moral authority to punish based on international law than natural law. Second, abusers living under an abusive public face of law, because insulated from the body of threats maintained by the international community, are not subject to the fair warning required by legality. Absent the coherent, clear warning demanded by legality, members of the international community have no better claim to punish crimes against humanity than do domestic authorities. That the failure is the regime's, rather than the international community's, is neither here nor there with respect to the autonomy of prospective defendants.

Leaders are situated differently. Rather than living *under* an abusive public face of law, high-level leaders have a duty to conform domestic law to the demands of natural right and to the core

²⁹³ I argue this point more extensively in the next section where I address consequentialist responses to my proposed excuse.

demands of international human rights law.²⁹⁴ While failing to fulfill this duty does not give rise to individual criminal liability,²⁹⁵ recognition of this institutional role points out the unique position of high-level leaders. As opposed to their subjects, leaders are exposed directly to the international community. They may not claim ignorance of or insulation from threats of punishment posed by prosecutions for crimes against humanity. That the vast majority of these prosecutions have focused on high-level leaders²⁹⁶ strengthens the threat, and the point. So, while the historical fact of prosecutions for crimes against humanity does not solve legality concerns with respect to those living under an abusive regime; it provides ample authority for prosecuting high-level leaders who use their positions of authority to construct and preserve a public face of law that encourages crimes against humanity.²⁹⁷

Jus cogens and international treaties face similar limitations, derived from externality²⁹⁸ and the intervention of domestic law. In addition, they face significant jurisprudential problems. *Jus cogens*, “norm[s] accepted and recognized by the international community of States,”²⁹⁹ for example, are only enforceable by states against other states and do not provide grounds for individual criminal liability.³⁰⁰ The few international treaties that provide grounds for individual liability usually require

²⁹⁴ Vienna Convention of the Law of Treaties, art. 26, 27, 1155 U.N.T.S. 331; Convention on the Prevention and Punishment of the Crime of Genocide, art. 5, 78 U.N.T.S. 277; International Covenant on Civil and Political Rights, art. 2(2), 999 U.N.T.S. 171.

²⁹⁵ Heads of state and governments, collectively, may, however, be prosecuted for criminal acts. *See generally* E. VAN SLEIDREGT, *THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL LAW* (2003).

²⁹⁶ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2602-04.

²⁹⁷ This is an established ground for criminal liability in contemporary international criminal jurisprudence. Rome Statute, *supra* note 287, art. 7.

²⁹⁸ Sriram, *supra* note 290, at 312-24, 374-400.

²⁹⁹ Vienna Convention on the Law of Treaties, May 23, 1969, n.48, Art. 53, U.N. Doc. A/CONF.39/27, 8 I.L.M. 679; *see also* Cherif Bassiouni, *Accountability for International Crime and Serious Violation of Fundamental Human Rights, International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *LAW & CONTEMP. PROBS.* 63 (1996).

³⁰⁰ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 (1990); Randall, *supra* note 291, at 787-88; *see also* Bassiouni, *supra* note 299, at 68.

domestic execution. While it is argued that some treaties are not so limited,³⁰¹ this is a contested view,³⁰² diffusing any clear warning that the Genocide treaty, for example, might provide for those living within the dense folds of an abusive regime. Regardless, even self-executing treaties are obscured in pre-transitional regimes by an abusive public face of law.

High-level leaders in abusive regimes have good reason to question their commitments to death and destruction. Since 1948 most countries, including most abusive regimes, have made formal commitments to refrain from atrocities by becoming parties to the Universal Declaration of Human Rights and other treaties and conventions.³⁰³ In addition to these documents, leaders have become regular targets for prosecutions based on transgressions of international law.³⁰⁴ These commitments provide the elite with adequate warning that they may be subjected to prosecution under international law. This warning, unique to the normative and phenomenal positions of high-level leaders, resolves legality concerns, which, I have argued, counsel against prosecutions directed against those who live under an abusive public face of law.

The significance of the distinction between subjects and sovereigns is amplified by the fact that abusive regimes are frequently autocratic. There are relatively few people in influential decision-making roles who are responsible for advancing institutional programs of abuse.³⁰⁵ Moreover, those most responsible are often identifiable by the fact that they have authored and executed the key

³⁰¹ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2553 ff.

³⁰² Schwarzenberger, *The Problem of International Criminal Law*, in *INTERNATIONAL CRIMINAL LAW* 3, 10, 16 (Mueller & Wise, eds., 1965).

³⁰³ A list of these treaties with updated lists of their signatories and parties is available at www.untreaty.org.

³⁰⁴ See, e.g., *v. Nahimana, Barayagwiza, & Ngeze*, No. ICTR-99-52-T, para. 171 (Dec. 3, 2003).

³⁰⁵ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2601-03.

elements of an abusive public face of law.³⁰⁶ Having done so, leaders in these positions cannot use as a shield the sword that they have forged.

IV. DEFENDING THE DEFENSE PART 2: CONSEQUENTIALIST RESPONSES TO LEGALITY

To now this article has focused on deontological issues. This discussion has largely ignored approaches to the problem of just punishment that focus not on abstract principles but on the achievement of social goals, such as prevention of crime. In this consequentialist world, it might be argued that the principle of legality can and should be rejected or modified if it interferes with the efficient achievement of these goals.³⁰⁷ In this section, I argue that these concerns suggest a program of limited prosecutions focused on high-level leaders as a solution to problems of transitional justice.

Consequentialist approaches to criminal punishment are goal oriented.³⁰⁸ For the most part they are, as Nigel Walker puts it, reductive:³⁰⁹ they seek to reduce crime. There are, in the traditional literature, five main services that trials and punishment provide to this end:

1. Deterring the offender with painful memory of prior punishment
2. Deterring others, using the punished as an example
3. Reforming the offender so that she is less inclined to commit crimes
4. Educating the offender and the public to take a more serious view of the criminal act
5. Protecting the public by incapacitating the offender³¹⁰

³⁰⁶ *Id.*

³⁰⁷ I am in debt to Richard Kraut for his vigorous pursuit of this critical line.

³⁰⁸ PLATO, PROTGORAS at 324ab.

³⁰⁹ NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA 26-27 (1980).

³¹⁰ *Id.*

These justifications are replicated in transitional justice debates. For example, Douglass Cassel argues for domestic and international criminal trials in order to deter present and potential human rights violators.³¹¹ Others argue that trials can aid in carrying a transition forward,³¹² in part by demonstrating a public commitment to democracy and the rule of law.³¹³ By deterring and by educating, trials also hope to decrease human rights abuses.³¹⁴ In addition, the goal of incapacitation may justify transitional trials in order to prevent future abuses or counterrevolution.

This section argues that consequentialist goals of incapacitation and deterrence do not support the use of criminal trials in transitions, at least for those who qualify for the proposed affirmative defense. Most pre-transitional abusers, living under the immediate control of an abusive regime and an abusive public face of law, are unlikely to be deterred by remote threats of punishment.³¹⁵ Further, given the shifts in law occasioned by transition, most pre-transitional abusers are best treated as candidates for change. For those who are not, transitional regimes have authority to punish post-transitional crimes. Consistent with previous sections, I maintain that high-level leaders and others with direct exposure to the international community may be punished in order to deter those in similar positions in other abusive regimes. Though I continue to argue against broad prosecutions, I leave room for procedural approaches that focus on reform and rehabilitation by arguing that most pre-transitional “offenders” are candidates for participation in

³¹¹ Douglass Cassel, *International Truth Commissions and Justice*, 5 *ASPEN INST. Q.* 77 (1993); Cassel, *supra* note 211, at 197; Ortenlicher, *Settling Accounts*, *supra* note 2, at 2542.

³¹² TEITEL, *supra* note 16, at 11-67, 213-28; Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 *YALE L. J.* 2009 (1997).

³¹³ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2542.

³¹⁴ Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 *LAW & CONTEMP. PROBS.* 9, 20-22 (1996).

³¹⁵ Aukerman, *supra* note 4, at 67; KANT, *supra* note 276, at 6:235-36.

the broader reforms that constitute transitions. Pursuit of reform and reintegration come at the price of withdrawing the threat of punishment in most cases, however. The section concludes that, by coordinating limited trials and truth seeking procedures, it is possible to avoid most of the dangers of uncritical, *de facto*, amnesties while securing efficiently the transitional benefits that advocates hope to achieve through criminal trials and punishment.

A. *Detering Future Human Rights Abusers*

Deterrence theories focus on the decision-making processes of prospective criminals.³¹⁶ Transitional trials motivated by deterrence attempt to create an environment in which the balance of threatened punishment and provisional benefits tilts firmly against abuses.³¹⁷ Transitional trials may also hope to deter by publicizing the facts of past abuses,³¹⁸ lifting the veil of secrecy upon which abusers frequently rely.³¹⁹ Finally, trials may hope to deter other potential human rights abusers abroad.³²⁰ The deterrent effect of truth and punishment on the international scene is a central argument in favor of an international criminal court and for international jurisdiction.³²¹

This section makes two main arguments against transitional trials as a deterrent strategy. First, criminal prosecutions are theoretically and practically unlikely to provide significant deterrent

³¹⁶ Johs Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949 (1966); CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* (1996 ed.)

³¹⁷ Cassel, *supra* note 211, at 215; Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, HUM. RTS. Q., 1, 10 (1990). Professor Malamud-Goti rejects this strategy in *GAME WITHOUT END* (1996).

³¹⁸ Cassel, *supra* note 311, at 78.

³¹⁹ van Zyl, *supra* note 5, at 662.

³²⁰ This was an argument made in favor of prosecuting Augusto Pinochet. See, Lorna McGregor, *Military and Judicial Intervention: The Way Forward in Human Rights Enforcement?*, 12 *INT'L & COMP. L. REV.* 107, 117 (2001); AMNESTY INTERNATIONAL, UNITED KINGDOM: THE PINOCHET CASE-UNIVERSAL JURISDICTION AND THE ABSENCE OF IMMUNITY FOR CRIMES AGAINST HUMANITY, AI Index EUR 45/01/99, 20 (1999).

³²¹ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2542-43.

effect against future institutionalized human rights abuses.³²² Second, to the extent that future abuses can be deterred, transition itself, including shifts in social norms and public threats, provides sufficient threat to prevent future abuses. The force of this argument is derived from the contention that deterrence justifications, though initially appealing, fail to take account of pre-transitional conditions, the places of individual abusers in pre-transitional states, and the impact that transitions themselves may be expected to have on victims and abusers.

Jeremy Bentham describes the concept behind deterrence theory, often called as the “classic school” of criminology, thus:

Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to draw him, as it were, from the commission of that act. If the apparent magnitude, or rather value, of the pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it. The mischief which would have ensued from the act, if performed, will also by that means be prevented.³²³

The concept is not difficult to grasp. If the consequences of an action are more bad than good for an agent, then she will refrain. Deterrence as a justification of and goal for public policy is somewhat more complex, of course. Bentham’s formula simplifies the conditions in which crimes are committed, and the subjective positions of criminals.³²⁴ It presumes that potential criminals are rational utility maximizers.³²⁵ It also assumes a single, identifiable, and univocal punitive authority.³²⁶ It further assumes that the authority’s demands can be and are clearly communicated to agents.³²⁷

³²² Aukerman, *supra* note 4, at 66-67.

³²³ Bentham, *Introduction*, *supra* note 193, at 86.

³²⁴ NIGEL WALKER, WHY PUNISH?, 13-18 (1991).

³²⁵ Bentham, *Principles*, *supra* note 193.

³²⁶ Thomas Mathiesen, *General Prevention as Communication*, in A READER ON PUNISHMENT 231 (Anthony Duff and David Garland, eds., 1994).

³²⁷ *Id.*

Finally, it simplifies the concept of “consequences,” which are a function of punishment and degree of certainty, the latter being divisible into risk of detection and risk of the consequence obtaining.³²⁸ All of these considerations make the deterrence thesis much more complex than it first appears. To measure the potential of criminal trials in transitions to prevent future abuses of human rights it is necessary to expose and investigate these complexities.

Deterrence theory makes law and criminal punishment a strategic game between rational agents disposed to maximize the possibility of benefit and minimize risk of harm.³²⁹ The game leaves open the question of who the players are, however. In transitions the subjective conditions that affect participation in deterrence games are more numerous and the possible identities of players more diverse than in stable states.³³⁰ Deterrence advocates usually fail to take proper account of these added complexities. However, it is essential to be clear about who is deterring whom to understand the dynamic relationships in the game.³³¹ Absent this, the hopeful claims of deterrence are too abstract to justify criminal punishment in transitions given the significant costs of trials in respect of other transitional goals.

B. *A Three Dimensional Analysis of Deterrence in Transitions*

³²⁸ Aukerman, *supra* note 4, at 64. In formulaic terms: Deterrence = Severity of Consequence x (Risk of Detection x Risk of Conviction). I am in debt to Richard Posner for deriving this formula for me.

³²⁹ Posner, *supra* note 193, at 1193; Becker, *supra* note 193, at 169; Bentham, *Introduction*, *supra* note 193, at 86-91; Bentham, *Principles*, *supra* note 193, at 365.

³³⁰ Elster, *Coming to Terms with the Past: A Framework for the Study of Justice in the Transition to Democracy*, 39 *EUR. J. SOC.* 7, 37 (1998).

³³¹ J.Q. Wilson, *Punishment and Opportunities*, in *A READER ON PUNISHMENT*, *supra* note 326, at 177, 187.

This section describes a three-dimensional model of deterrence in transitions, taking account of those who might be deterred, their subjective motivations, and the source of deterrent threats. The next section argues, based on this model, that only high-level leaders provide reasonable objects for deterrence in transitions.

1. The first dimension: objects of deterrence

In traditional deterrence theory, punishment is designed to have either an individual or a general deterrent effect.³³² In the former, punishment tries to imprint the cost of crime on the criminal herself, using her memory of the punishment to deter her from committing future crimes.³³³ General deterrence hopes that public punishment of criminals will put fear in the hearts of others and, thereby, prevent them from breaking the law.³³⁴ In transitions, advocates also justify punishment as a tool for preventing counter-revolutions³³⁵ by marking a change in the public face of law and deterring those who oppose transition.³³⁶ Punishment also aspires to create an environment of accountability where before there was impunity.³³⁷

Individual transitions to democracy are not isolated. They are part of broader efforts to establish and extend a human rights culture.³³⁸ Punishing in a particular transition may, then, have a

³³² I take these terms from Andenaes, *supra* note 316, at 949, and John Andenaes *General Prevention--Illusion or Reality?*, 43 *J. CRIM. L., C. & P.S.*, 176 (1952).

³³³ Nigel Walker, *Reductivism as Deterrence*, in *A READER ON PUNISHMENT*, *supra* note 326, at 212.

³³⁴ For a vivid account of this theory in action see Michel Foucault's description of the drawing and quartering of a "regicide" in the Introduction of *DISCIPLINE AND PUNISH* (1977). The theme of deterrence by raw fear and spectacle is repeated in more detail in "The Spectacle of the Gallows."

³³⁵ Aukerman, *supra* note 4, at 65.

³³⁶ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2542.

³³⁷ *Id.*

³³⁸ Rorty, *supra* note 30 at 115 ff.

“super-general” deterrent effect, discouraging current or prospective abusers in other states.³³⁹ Of course, to make the case for punishment on the basis of a “super-general” deterrence effect, there must be compelling reason to believe that a domestic spectacle will reach across lines of history, culture, and nationality. If this hope is too thin then advocates must accept limitations on trials derived from other practical and moral considerations.

2. The second dimension: sources of deterrence

Transitions also leave open the question of who should take responsibility for creating the deterrent threat.³⁴⁰ In stable states the answer to this question is obvious: the right of punishment is reserved for a sovereign authority.³⁴¹ In transitions, however, the candidates are more numerous, including an outgoing government, a provisional government or successor regime, the United Nations, regional transnational organizations,³⁴² special tribunals, and a permanent international criminal court. More recently, third party states have also made efforts to conduct trials. Spain’s attempt to extradite Augusto Pinochet on charges of crimes against humanity is, perhaps, the most notorious;³⁴³ but Belgium was the first to enjoy contemporary success in these endeavors, when, in

³³⁹ Cassel, *supra* note 211, at 205-215; Jennifer Balint, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: The Place of Law in Addressing Internal Regime Conflicts*, 59 *LAW & CONTEMP. PROB.* 103 (1996).

³⁴⁰ There are, of course, related questions as to who has the authority to carry out or demand trials in a particular transition. These questions are beyond the immediate scope of the present discussion.

³⁴¹ KANT, *supra* note 276, at 6:331-32.

³⁴² The Organization for African Unity, for example, has a permanent human rights enforcement arm, the African Commission on Human and Peoples’ Rights, though it lacks formal enforcement power. *See* African Charter on Human and Peoples’ Rights, art. 45.

³⁴³ AMNESTY INTERNATIONAL, UNITED KINGDOM: THE PINOCHET CASE-UNIVERSAL JURISDICTION AND THE ABSENCE OF IMMUNITY FOR CRIMES AGAINST HUMANITY, AI Index EUR 45/01/99 (1999) for both a description of the case and a normative argument for the prosecution.

2001, several individuals connected to the 1994 Rwandan massacre were convicted in Belgian courts.³⁴⁴

These possibilities suggest nine model cases that deterrence advocates might have in mind when they call for trials in transitions:

- 1) Domestic enforcement agents use punishment of individual abusers to deter those same abusers from committing future abuses.
- 2) International and transnational agents use punishment of individual abusers to deter those same abusers from committing future abuses.
- 3) Foreign governments use punishment of individual abusers to deter those same abusers from committing future abuses.
- 4) Domestic enforcement agents use punishment to deter generally future abusers in the domestic sphere.³⁴⁵
- 5) International and transnational agents use punishment to deter generally future abusers in the domestic sphere.
- 6) Foreign governments use punishment to deter generally future abusers in the domestic sphere.
- 7) Domestic enforcement agents use punishment to deter generally present and future abusers in the international sphere.
- 8) International and transnational agents use punishment to deter generally present and future abusers in the international sphere.
- 9) Foreign governments use punishment to deter generally present and future abusers in the international sphere.

Punishing agents need not confine themselves to one object population. The International Criminal Court, for example, might hope to deter specific domestic agents, the general domestic population, and the general population in other nations. Neither is it necessary that one agency take

³⁴⁴ THE NEW YORK TIMES, April 30, 2001, pg. A3.

³⁴⁵ By “domestic sphere” I mean the political and physical world within the sovereign control of a transitioning state.

responsibility for trying and punishing all candidates for justice.³⁴⁶ Domestic and international agents might coordinate prosecutions. The categories are not exclusive. They are merely a tool.

3. The third dimension: subjective dispositions of those deterred

Though they add some depth to an understanding of punitive relationships in transitions, these nine models leave out what is, perhaps, the most significant dimension of analysis. Abusers are not faceless agents who have indistinguishable attitudes and occupy identical positions. Abusive regimes reflect a broad spectrum of abusers, running from dedicated leaders, to enthusiastic followers, to those who abuse only to save themselves. It is worth distinguishing five groups in particular:

1. Leaders motivated by deep political or ethical convictions tied to an institutionalized worldview.³⁴⁷
2. Leaders motivated by personal interest and ambition.³⁴⁸
3. Followers motivated by deep political or ethical convictions tied to an institutionalized worldview.³⁴⁹
4. Followers motivated by personal interest or ambition who take advantage of conditions under the abusive regime (opportunists).³⁵⁰

³⁴⁶ The possibility of multiple agencies conducting trials raises unique equitable and procedural concerns. See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 *BU INT'L LJ* 163 (2000) (providing a comparative analysis of the ICTR and Rwandan domestic trials and documenting procedural and substantive abuses in the latter); AMNESTY INTERNATIONAL, *RWANDA: UNFAIR TRIALS: JUSTICE DENIED*, AI-index: AFR 47/008/1997 (1997) (documenting due process and human rights concerns at all levels of the domestic trial process in Rwanda). While not insurmountable, these additional worries must be part of the calculus.

³⁴⁷ This is how Goldhagen wants his readers to think of the perpetrators of the Holocaust who were “Germans first.” GOLDHAGEN, *supra* note 17, at 7. Hitler would certainly fit this category, as would Stalin and some Hutu Power leaders in Rwanda.

³⁴⁸ This includes individuals who participate in abuse to advance their careers, and individuals who take advantage of the vulnerability of victims to achieve more immediate personal and material goals. Foday Sankoh in Sierra Leone and Charles Taylor in Liberia fit into this category.

³⁴⁹ This category includes members of the Rwandan *interahamwe*, members of the East German Stazi, junta followers in Argentina, and members of the German SS.

5. Abusers motivated by physical or social pressures, including threats of harm and pressure from peers to conform.³⁵¹

The primary reason for adding this dimension is to point out that abusers have different orientations to abuse. Deterrence theorists often are accused of falsely presuming that criminals are no more than interest calculators.³⁵² While I think this objection is overstated, the underlying point, that the position and orientation of actors is a significant factor in their relation to crime and deterrent threats, is significant.³⁵³

With this three-dimensional model in view, the remainder of this section will argue that most individuals who commit human rights abuses are unlikely to be reached by general deterrence strategies, with the exception of leaders, directly exposed to the international sphere. In addition, for followers, punishment does not promise a significant benefit beyond the preventive and deterrent effects of transitional changes to the public face of law. Together these arguments lead to a vision of limited trials that is consistent with the excuse-centered approach advanced in this article.

³⁵⁰ ELSTER, *supra* note 21, at 110-11. This includes Germans and Lithuanians who participated in the maintenance and cleansing of the ghettos, art collectors who purchased works taken from Jews during the Holocaust, industrialists who took advantage of slave labor, and international financial institutions that profit from abuses.

³⁵¹ Examples of this category are common in Kosovo, Bosnia, East Timor, and Rwanda where direct threats to personal safety and family were common tools used to recruit and retain abusers. This category also includes those affected by the upside-down world of praise and blame that characterizes abusive regimes. *See e.g.* Malamud-Goti, *supra* note 317 (discussing the role that institutional praise for human rights abuses that characterized military culture in Argentina during the 1970's and early 1980's).

³⁵² J. Q. WILSON, THINKING ABOUT CRIME 118 (1984).

³⁵³ Wilson, *supra* note 331, at 174-177, arguing that most criminals, particularly repeat offenders and "career criminals," are rational in their decision-making. Wilson also points out that criminals' decisions may appear irrational to law-abiding citizens, but that this is due to a disparity in information about the real risks of crime. Law-abiding citizens tend to inflate the risks of being caught and punished. For a more general survey of literature on the rationality of criminals *see* DAVID J. PYLE, THE ECONOMICS OF CRIME AND LAW ENFORCEMENT (1984), Chapter 3.

C. *The Limited Prospects of General Deterrence from Transitional Trials*

“[G]eneral prevention functions in relation to those who do not ‘need’ it. In relation to those who do ‘need’ it, it does not function.”³⁵⁴ Deterrence is forward looking, designed to inhibit persons from choosing³⁵⁵ criminal activity in the future by imposing costs on criminal activity sufficient to outweigh benefits.³⁵⁶ Deterrence presumes that criminals make rational cost-benefit choices.³⁵⁷ This general conception of agency has some currency in common sense and in jurisprudential theories advanced by eminent philosophers from Jeremy Bentham³⁵⁸ through Cesare Beccaria,³⁵⁹ John Stewart Mill,³⁶⁰ Oliver Wendell Holmes,³⁶¹ and H.L.A Hart,³⁶² to contemporary proponents of Rational Choice Theory³⁶³ and Law and Economics.³⁶⁴ Intuitively, it certainly seems that we are inclined to do those things that provide us benefit and disinclined to do those things that bring us pain.³⁶⁵ Even granting this, however, it does not follow that everyone works this way in all circumstances.

³⁵⁴ Mathiesen, *supra* note 326, at 231.

³⁵⁵ One of the most common arguments against capital punishment as a deterrent contends that most murderers do not, in fact, act reasonably. See, e.g., David A. Conway, *Capital Punishment and Deterrence: Some Considerations in Dialogue Form, in* PUNISHMENT, 261, 264-65 (A. John Simmons, et. al., eds., 1995).

³⁵⁶ Posner, *supra* note 193, at 1205-1214.

³⁵⁷ I do not want to commit myself to the view that instrumental reason is the only function of our rational faculties. Kant, among many others, has argued, quite persuasively, that we have facilities for practical as well as instrumental reason. METAPHYSICS OF MORALS, *supra* note 276, 6:211-14. For the present, however, I am staying on consequentialist ground.

³⁵⁸ Bentham, *Introduction*, *supra* note 193, at 86; Bentham, *Principles*, *supra* note 193, at 365.

³⁵⁹ BECCARIA, *supra* note 316.

³⁶⁰ JOHN STUART MILL, UTILITARIANISM (2004 ed.); John Stuart Mill, *On Liberty*, in ON LIBERTY AND OTHER WRITINGS, 1 (1989).

³⁶¹ HOLMES, *supra* note 241, at 34-62.

³⁶² HART, *supra* note 152; HART, *supra* note 194; Hart, *supra* note 139, at 593.

³⁶³ JON ELSTER, RATIONAL CHOICE, 1 (1986); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY, 5 (1957).

³⁶⁴ Posner, *supra* note 193, at 1193; PYLE, *supra* note 353, Chapter 3.

³⁶⁵ MILL, UTILITARIANISM, *supra* note 360, at Ch. 1, part 1.

One common critique of the deterrence theorist's model of agency is that it fails to take account of crimes of passion.³⁶⁶ Crimes of passion pose a problem for deterrence in two ways. First, passionate criminals by definition, do not act out of a fully rational state and are, thus, unlikely to be swayed by remote threats of deterrence.³⁶⁷ Thus, policies focused on general deterrence are unlikely to reduce crimes of passion. Second, passionate criminals, and particularly murderers, are unlikely to repeat their crimes, so punishment serves no individual deterrent purpose.³⁶⁸

In pre-transitions, "true believers," committed to the ethical, political, and cosmological visions constitutive of an abusive public face of law, commit most atrocities³⁶⁹ and do so with the most enthusiasm.³⁷⁰ The fact that many pre-transitional acts reflect passionate commitments raises serious concerns for the prospects of deterrence in abusive regimes.³⁷¹ Like passionate criminals, true believers, caught up in the fervor of mass violence, are unlikely to be affected by remote threats, particularly when the prevailing public face of law supports the view that what they do is necessary and right.³⁷²

Not all crimes are crimes of passion, of course. One might wonder why, then, the presence of laws and law enforcement do not deter all criminals in stable states. One possibility is that

³⁶⁶ PRIMORATZ, *supra* note 191, at 39-41.

³⁶⁷ Andrew Ashworth, *Deterrence*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 50 (Andrew von Hirsch & Andrew Ashworth, eds., 2d ed. 1998); WALKER, *supra* note 324, at 16. *But see* Posner, *supra* note 193, at 1223 (arguing that crimes of passion should be more severely punished in order to overcome strong temptation—this response misses the point, of course, which is that threats of punishment, no matter how severe, are not sufficiently present in the minds of passionate offenders to produce deterrent effects. As Posner notes, these concerns do not diminish incapacitation justifications.).

³⁶⁸ PACKER, *supra* note 137, at 52-53.

³⁶⁹ Kiss, *supra* note 24, at 74; Rorty, *supra* note 30 at 112-116.

³⁷⁰ *Id.* See also GOLDHAGEN, *supra* note 17, at 49-163 (arguing that the pervasive anti-Semitic culture that prevailed in Germany during the period leading up to the Holocaust provided Hitler with "willing executioners.")

³⁷¹ Aukerman, *supra* note 4, at 68-69.

³⁷² Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 *EMORY L.J.* 205, 210 (2000); Sriram, *supra* note 290, at 394.

criminals are “broken,” or at least significantly enough unlike the rest of us to act like they are.³⁷³ In cases of those with psychopathological and socio-pathological tendencies this may be true, at least to some degree.³⁷⁴ But even sociopaths have sufficient interest in their own pain and pleasure to allow decision-making consistent with the vision of rational agency critical to deterrence.³⁷⁵ The same can be said of many, if not most, perpetrators of large-scale human rights abuses. Referring to the model outlined above, true believers, opportunists, careerists, and even those under physical or psychological duress, all make rational choices, though we may fail to fathom their logic.³⁷⁶ With the promise of punishment, then, we might hope to tip the scales.

One might also speculate that criminals are different from law-abiding citizens in ways that inoculate them against the deterrent forces of criminal law. For example, non-criminals are predominately more risk averse than criminals, and are apt to inflate or take more seriously threats of punishment.³⁷⁷ Non-criminals are also more concerned with public stigma and personal guilt than are many criminals.³⁷⁸ Again, that this may be so does not require wholesale rejection of deterrence theory. To the contrary, it proves the broad success of deterrence. Without any threat, more people might be criminals.³⁷⁹ Law-breakers and recidivists may simply have a higher deterrence threshold or they may not be in a position to appreciate fully deterrent threats. Either way, the fact of crime does little to disprove the deterrent effect. Even the most criminally inclined are unlikely to commit

³⁷³ Wilson, *supra* note 331, at 177.

³⁷⁴ Posner, *supra* note 193, at 1223-25 (arguing that under a deterrence view, insanity defenses should be limited to a limited class of “undeterrables”).

³⁷⁵ *Id.*

³⁷⁶ See generally GOLDHAGEN, *supra* note 17, at 164-202; Rorty, *supra* note 30 at 112-15.

³⁷⁷ See generally Posner, *supra* note 193, at 1193; Wilson, *supra* note 331, at 177 ff.

³⁷⁸ *Id.*

³⁷⁹ This point is often made in the context of debates about the death penalty. See, e.g., Conway, *supra* note 355, at 264-65.

a crime if they know they will be caught and punished. This fact demonstrates that most criminals are rational. Assuming, for the moment,³⁸⁰ that pre-transitional abusers are as well has interesting consequences for deterrence in transitions.

Many pre-transitional abuses are perpetrated by true-believers who act from conviction as much as passion.³⁸¹ True believers do not weigh threats of punishment in the same way as stable state criminals. They are motivated not by the prospect of immediate gain, but by a desire to bring about a specific vision of the world as it ought to be.³⁸² These are goals worth not only killing, but, perhaps, dying for. A remote threat of criminal sanction is unlikely to be weighed conclusively in the mind of such an agent. In fact, rather than deterring, policies of punishment, whether international or domestic, often strengthen the commitments of true believers, deepening the damaging effects of the oppositional or bi-polar logic that girds abusive regimes.³⁸³

True believers are not the only perpetrators of pre-transitional abuses of course. There are those who abuse under physical, psychological, or social duress.³⁸⁴ These agents, though more risk averse than true believers, are already acting out of a risk assessment that, reasonably and predictably, puts a priority on present and immediate threats over remote threats of possible future punishments. In general, agents who act under duress are unlikely to be deterred by exogenous threats of future punishment.³⁸⁵

³⁸⁰ That pre-transitional abusers frequently perpetrate atrocities openly, suggests that this assumption is not wholly warranted.

³⁸¹ ELSTER, *supra* note 21, at 139; Rorty, *supra* note 30 at 112-116.

³⁸² ELSTER, *supra* note 21, at 139.

³⁸³ MALAMUD-GOTI, *supra* note 30, at 83-91; *see also* ELSTER, *supra* note 21, at 94; GOUREVITCH, *supra* note 17, at 82-83.

³⁸⁴ Happold, *supra* note 88, at 1163; GOUREVITCH, *supra* note 17, at 96, 249; MINOW, *supra* note 37, at 35-36.

³⁸⁵ Aukerman, *supra* note 4, at 67.

Abusers who act out of ambition or purely private motives may be more likely to feel the threat of deterrence. Corporate agents and businesses are a good example of risk-averse groups that may take a longer view of their actions in abusive regimes.³⁸⁶ The threat of future sanction might well provide sufficient threat to deter generally opportunists if they have significant exposure to the international community and the threats posed by domestic and international prosecutions.³⁸⁷ High-level leaders, international corporations, and international financial institutions provide the most promising targets.³⁸⁸ The same is not obviously true of domestic opportunists. They, like smaller corporate agents, have a narrower view of the world, limited to the reality projected by an abusive regime. Remote future threats are unlikely to dissuade most such agents. More importantly, these are individuals best viewed as candidates for change. Those who are not will identify themselves by attempting new crimes, solving selectivity problems and avoiding legality concerns.

D. *Identification Concerns and the Limited Prospects of General Deterrence*

Deterrence effects are not determined wholly by the receptiveness of potential abusers, of course. General deterrence is also a function of how “present” threats are in the minds of those living in abusive regimes. Certainty, not severity, is the engine of deterrence.³⁸⁹ Without sufficient risk of detection and conviction, even the most severe punishment will fail to deter. In light of the

³⁸⁶ Cf. Levmore, *supra* note 168, at 1657.

³⁸⁷ One might hope that banks, for example, will be less likely to support abusive states after recent lawsuits brought against Swiss banks by holocaust victims. See Elizabeth J. Cabreser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 *Vand. L. Rev.* 2211, 2248 (2004). But see Saul Levmore, *Speculating Law: Beyond Cigarettes and Swiss Banks*, 52 *Ala. L. Rev.* 639, 647 (2001).

³⁸⁸ MALAMUD-GOTI, *supra* note 30, at 10.

³⁸⁹ BECCARIA, *supra* note 316, at 68; Andenaes, *supra* note 316, at 949 (citing studies).

unique conditions of abusive regimes, threats of punishment are too ephemeral, removed, and temporally remote to provide the degree of certainty necessary to deter.

In order to be deterred, prospective abusers must identify with those punished. If they can distinguish themselves and their situations then they are unlikely to feel the threat of punishment, and, thus, unlikely to restrain themselves out of fear.³⁹⁰ The three-dimensional model of abusers described above indicates that punishing abusers from one category will fail to provide a general deterrent effect across categorical lines. For example, there is no reason to think that punishing leaders and intellectual architects will deter on-the-ground abusers.³⁹¹ Likewise, punishing active abusers is unlikely to deter passive opportunists.

The problems presented by deterring across classes are common to all categories identified above. Whether the punishing authority is a transitional regime, an international organization, or a foreign state, potential abusers will not feel threatened by punishments applied to characters playing different roles. To the contrary, those who might feel some empathetic connection to Slobodan Milosevic, say, would more likely be motivated to reduce their apparent responsibility by creating a shield of plausible deniability or by spreading responsibility³⁹² than to refrain from pursuing ideologically motivated programs of abuse.³⁹³

Taking account of these concerns seems to argue in favor of broader, more inclusive prosecutorial strategies that can capture the attention of all prospective abusers. As I pointed out above, however, it is simply impossible for transitions to prosecute everyone who has had a hand in

³⁹⁰ Malamud-Goti, *supra* note 317, at 10.

³⁹¹ Aukerman, *supra* note 4, at 67; MALAMUD-GOTI, *supra* note 30, at 10.

³⁹² See, e.g., GOUREVITCH, *supra* note 17, at 96.

³⁹³ This is, in part, due to the unique motivations and subjective positions of pre-transitional abusers, and particularly true believers discussed above.

pre-transitional abuses. Some selections must be made. In order to both meet this constraint and avoid the difficulties of cross-class deterrence, a transition might elect to prosecute representatives from each category in the hope of striking fear in the hearts of other caste members.³⁹⁴ While this inverted class action approach has some immediate appeal, it fails to address the core worry that I have identified.

The “cross-class” problem points out that transitional trials and punishments cannot provide substantial certainty of punishment. Total immunity of a class of bad actors fails utterly to deter because it leaves members of that class certain that they will not be punished. Symbolic punishment of a few members of a class that may number in the millions fails to deter because it does not provide the necessary degree of certainty.³⁹⁵

Unlike cross-class concerns, risk problems derived from intra-class selectivity do not affect all abuser categories equally. Selectivity concerns counsel against picking punitive projects that cannot be completed.³⁹⁶ By contrast, projects that can be completed may provide sufficient promise of deterring those similarly situated in other regimes.³⁹⁷ These considerations recommend prosecutions focused on high-level leaders.³⁹⁸ Leaders comprise a group sufficiently small to allow complete, and therefore effective, deterrence programs.³⁹⁹ Leaders, exposed to the international sphere, also have more perfect information, enhancing their subjective exposure to threats from international trials. Programs that focus on top leaders therefore provide real hope of creating

³⁹⁴ I am in debt to Paul van Zyl for sharing with me this argument for “horizontally-limited” trials.

³⁹⁵ Aukerman, *supra* note 4, at 67-68; Andenaes, *supra* note 316, at 949 (discussing the coordinated role of severity and risk in the deterrence effect).

³⁹⁶ De Greiff, *supra* note 6 at 81.

³⁹⁷ van Zyl, *supra* note 5, at 665-66.

³⁹⁸ MALAMUD-GOTI, *supra* note 30, at 10.

³⁹⁹ *Id.*

productive individual and general deterrence effects, particularly if pursued through stable and predictable international enforcement regimes.⁴⁰⁰

E. *Proximity Concerns and the Limited Prospects of Deterrence*

Ignorance and uncertainty, along with delay and debates about the actual rationality of most criminals form the core of stable state contests about deterrence.⁴⁰¹ My discussion of the subjective orientations of pre-transitional abusers to their bad acts has already substantially increased these concerns in the transitional context, as have concerns about the degree of risk of punishment that can be brought to bear on pre-transitional agents. Failures to communicate derived from isolation and ignorance further diminish the possibility that a general deterrence effect can affect institutional violence in abusive states.

In stable states, legislatures and judges do not have direct lines of communication with prospective criminals.⁴⁰² This allows criminals and potential criminals to discount or misunderstand the possible costs of their crimes.⁴⁰³ In the transitional context these problems are magnified. If domestic authorities are conducting trials then the deterrent threats postdate abuses. With respect to past wrongs, then, trials serve no deterrent purpose at all. If transition itself can prevent future domestic abuses, then there is no reason to conduct domestic trials to deter domestic abuse.

Domestic trials designed to produce a general deterrence effect in other countries are equally unpromising. Though the threat derived from a previous transition in country A is prospective with

⁴⁰⁰ van Zyl, *supra* note 5, at 665-66.

⁴⁰¹ Wilson, *supra* note 331, at 178.

⁴⁰² Mathiesen, *supra* note 326, at 228-29.

⁴⁰³ *Id.*; see also Wilson, *supra* note 331, at 177-181.

respect to those in country B, any domestic trials eventually conducted in B still require the retroactive enforcement of codes and punishments novel to citizens in B. This natural isolation of abusers limits the hope of using domestic prosecutions to communicate clearly with those living in other abusive regimes,⁴⁰⁴ particularly given the fact that a primary tool of abusive regimes is isolation of its citizens from the international human rights culture and its members.⁴⁰⁵

Citizens of abusive regimes must piece together inevitably diverse and conflicting interpretations of events in foreign transitions.⁴⁰⁶ It is unlikely that these filtered facts and rumor-filled theories will provide a clear and coherent deterrent threat.⁴⁰⁷ Thus, there is little hope that, however well thought out, the deterrent message from a transitioning country will be felt and heard by those living under foreign regimes.

International authorities or a single nation acting as a global prosecutor for crimes against humanity might produce a consistent message.⁴⁰⁸ It remains uncertain, however, that residents of abusive regimes can or will feel the threat of these foreign prosecutions.⁴⁰⁹ Mass violence and institutionalized human rights abuses are a result of the coordinated efforts of abusive regimes.⁴¹⁰ Abusers on the ground may, then, have no clear idea about what goes on outside their borders. To the extent that they do, the messages sent by international prosecutions is inevitably obfuscated, if

⁴⁰⁴ Sriram, *supra* note 290, at 394-95.

⁴⁰⁵ Aryeh Neier, *The Quest for Justice*, N.Y. REV. BOOKS, Mar. 8, 2001, 31, 32.

⁴⁰⁶ *Id.*

⁴⁰⁷ This isolation may be fortuitous or, as Malamud-Goti argues, an essential part of an abusive regime's strategy of disarticulating power. See MALAMUD-GOTI, *supra* note 30, at 124-128.

⁴⁰⁸ Douglass Cassel, *Why We Need the International Criminal Court*, 116 THE CHRISTIAN CENTURY 532, 533-35 (1999).

⁴⁰⁹ James Blount Griffin, *A Predictive Framework for the Effectiveness of International Criminal Tribunals*, 34 VAND. J. TRANSNAT'L L. 405, 449-3 (2001).

⁴¹⁰ The Radio Télévision Libre de Mille Collines (RTLM) in Rwanda provides a striking example of the role that public propaganda can play in genocide. The principals in the RTLM were convicted of genocide and incitement of genocide before the ICTR in 2003.

not perverted, by the abusive regime. True believers are particularly vulnerable to counter-claims on behavior made by an abusive public face of law since they are easily convinced of global conspiracies against their causes.⁴¹¹

Though, as I have pointed out, leaders who are true believers may not properly account for threats of punishment from an International Criminal Court or Belgium, say, they are certainly in a position to have clear and convincing evidence that they are vulnerable to prosecution. We may hope, then, that leaders directly exposed and responsible to international law may be deterred by the prosecution of those like them.⁴¹² This may be an unrealistic hope, given the horrible potentials of ambition and zealotry,⁴¹³ but at least there is structural promise of deterrence in these cases. There is little or none with respect to those living behind the veil of an abusive public face of law.

F. *Immediacy and the Limited Prospects of Transitional Deterrence*

Immediacy is central to the effectiveness of general deterrence strategies.⁴¹⁴ Criminals naturally discount threats of punishment that are too far in the future.⁴¹⁵ As argued above, most who commit abuses in pre-transitions are unlikely to feel the threat of punishment from international agents. For those who might feel some external threat, the threat is not immediate or definite enough to provide a significant deterrent effect, given that immediately present domestic institutions support abuse through, at least, the public face of law.

⁴¹¹ See e.g. GOUREVITCH, *supra* note 17, at 210-212.

⁴¹² Cassel, *supra* note 408, at 534.

⁴¹³ Aukerman, *supra* note 4, at 68.

⁴¹⁴ BECCARIA, *supra* note 316, at 68.

⁴¹⁵ Edmund S. Howe & Cynthia J. Brandau, *Additive Effects of Certainty, Severity and Celerity of Punishment on Judgments of Crime Deterrence Scale Value*, 18 *J. APPLIED SOC. PSYCHOL.* 796, 806 (1988).

True believers are unlikely to either respect or fear external threats.⁴¹⁶ Moreover, their commitments to the normative, ontological, and teleological systems that justify abuses, in combination with commitments to abusive regimes, make them comfortable with risk.⁴¹⁷ Domestic opportunists might be more vulnerable to deterrence, but they too act within the mediating threat structure of an abusive regime, and are more likely to act in accordance with these immediate demands, discounting remote, vague, external, and future threats.⁴¹⁸

Those acting under duress are even less likely to be deterred by the distant threats of outside agencies. By definition, these individuals are both risk averse and predisposed not to commit human rights abuses. They participate in the violence only because of direct and immediate danger to them or their families. Like opportunists, it is unreasonable to expect them to expose themselves to immediate harm in order to avoid distant and remote threats of punishment.

Immediacy is also a problem for leaders. In order to feel the force of any deterrent threat, they must imagine that their power is limited and that their reign will end—and soon. Unfortunately, humility and a healthy sense of mortal vulnerability are not common characteristics of despots. Zealots and leaders motivated by ambition are unlikely to modify their behavior by looking toward the day when they will have fallen from power. While this concern is real enough, it is not a structural problem. The worry is essentially the same as the more general concern that criminals are hard to deter because they do not commit their crimes expecting to be caught.⁴¹⁹ In

⁴¹⁶ Elster, *supra* note 330, at 36-38.

⁴¹⁷ *Id.*

⁴¹⁸ Aukerman, *supra* note 4, at 67; *Cf.* MALAMUD-GOTI, *supra* note 30, at 10-12.

⁴¹⁹ David Anderson, *The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging*, 4 *AM. LAW & ECON. REV.* 295, 308 (2002) (discussing variety of psychological dispositions limiting effectiveness of deterrence).

theory, then, an international enforcement regime could provide sufficient risk of punishment for leaders directly exposed to international law.

G. *Transitions Deter Future Domestic Abuses*

As with all policies justified by a balancing of consequences, punishment as deterrence must provide more benefit than harm.⁴²⁰ Trials present real risks of harm to transitions and transitional goals of peace, stability, and the rule of law.⁴²¹ These risks are justified only if there is no less costly way to prevent future abuses.⁴²² Trials, with the exception of trials focused on high-level leaders, do not add significantly to the deterrent effects provided by transition itself. Taking account of this balance points toward a strategy of vertically limited trials identical to that proposed by my excuse-centered approach.

One of the main arguments advanced in this article is that human rights abuses on a scale that calls for transitional justice are a function of abusive cultures and systems of institutionalized violence that constitute an abusive public face of law. Absent a pervasive and institutionalized anti-Semitism the Holocaust would not have happened.⁴²³ Absent widespread commitments to a “Hamitic myth,” supported by public institutions, there would have been no slaughter in Rwanda.⁴²⁴ Without a war on communism, accompanying beliefs about the pernicious communist threat, and an

⁴²⁰ Jamal Benomar, *Justice After Transitions*, in *TRANSITIONAL JUSTICE*, *supra* note 26, at 32, 41-42.

⁴²¹ MALAMUD-GOTI, *supra* note 30, at 5.

⁴²² Ruti Teitel, *How are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?*, in *TRANSITIONAL JUSTICE*, *supra* note 26, at 146, 149.

⁴²³ GOLDHAGEN, *supra* note 17, at 27-178.

⁴²⁴ GOUREVITCH, *supra* note 17, at 40-96.

institutional reliance on the military there would have been no “Dirty War” in Argentina.⁴²⁵ This suggests a simple objection to deterrence in transitions.

If large-scale human rights abuses are, in part, a function of extraordinary historical, political, legal, and cultural circumstances that create unique incentive structures,⁴²⁶ and transitions, by their nature, mark a shift in these conditions, then transitions may expect that there will be an accompanying shift in citizens’ public behavior.⁴²⁷ For those whose actions were a function of conditions in the past regime, shifting conditions in transition prevent future abuses by removing motivation, justification, and opportunity. Given transitional shifts in the public face of law, punishment does not provide additional benefit with respect to preventing future abuses.⁴²⁸ This is true individually and generally.

Prompt and certain prosecutions of post-transitional bad actors will serve notice of a new regime’s authority and its commitment to securing human rights. It will also heighten transitional notice, targeting deterrent threats at those who are contemplating future abuse. Retroactive punishment of pre-transitional crimes does not, as I have argued, so clearly communicate the objective and direction of the new state’s deterrent will;⁴²⁹ nor would it be narrowly targeted to the audience most in need. Moreover, retrospective trials would draw on limited police and judicial resources, limiting the capacity of a new regime to deal with new offenses quickly and consistently.⁴³⁰

⁴²⁵ MALAMUD-GOTI, *supra* note 30, at 2-56.

⁴²⁶ GOLDHAGEN, *supra* note 17, at 21.

⁴²⁷ Aukerman, *supra* note 4, at 70-71 (arguing that changing personal beliefs and social norms provide better hope of preventing crime).

⁴²⁸ TEITEL, *supra* note 16, at 66.

⁴²⁹ For example, these efforts may, as I argued above, be seen as arbitrary, vengeful, or purely political.

⁴³⁰ van Zyl, *supra* note 5, at 652; ACKERMAN, *supra* note 6, at 72.

The purposes of prospective deterrence are, then, best served by punishing post-transitional offenses rather than reaching into the past.

One might argue that some criminal review of past wrongs might make these deterrent threats more convincing.⁴³¹ I admit the possibility of this effect. However, doing so does not commit me to more trials than those already allowed under my excuse-limited scheme. Punishing high-level leaders would certainly serve as sufficient demonstration of a new regime's commitment to protect rights once routinely violated. Selective punishment of others would serve no additional good. The better course in most cases is to focus on truth commissions and other procedures designed to capitalize on the transitional potential of former abusers and solidify transitional commitments.⁴³² Social conversion is, of course, a long-term goal. In the meantime, prosecutions based on post-transitional offenses provide necessary deterrence and security.

H. Transitions Obviate the Need for Incapacitation

A transitional regime might justify incarceration for the practical purpose of incapacitation.⁴³³ On closer examination, however, the need for incapacitation and the balance of its costs and benefits suggests limiting its application in ways similar to those of deterrence. Incapacitation faces two main objections in stable states. First, incapacitation presents a moral problem in that individuals are punished for offenses that they have not yet committed.⁴³⁴ Second, incapacitation

⁴³¹ MINOW, *supra* note 37, at 50-51.

⁴³² Villa-Vicencio, *supra* note 372, at 209-14.

⁴³³ Ortenlicher, *Settling Accounts*, *supra* note 2, at 2542-44.

⁴³⁴ Preface to: Norval Morris, *Dangerousness and Incapacitation*, in *A READER ON PUNISHMENT*, *supra* note 326, at 238, 239.

depends on an ability to predict accurately who is likely to commit crimes in the future.⁴³⁵ Both these concerns are salient to transitional justice.

The first objection is primarily moral and, for a consequentialist, is not difficult to set aside. We do, as a matter of fact, deny innocent people their freedom because of the potential danger they pose to the public when we institute quarantines. Such policies are warranted in light of necessity and a familiar balance of harm and benefit.⁴³⁶ Loss of freedom and compromises against fairness may be costs in the equation, but are not determinative. The same is true of potential criminals. They pose a risk of harm accruing to society. In transitions they may even represent a risk of counter-revolution and a return to the oppressive ways of the past. This seems like more than enough danger to justify incapacitation. It may seem unfair to make assumptions, but the alternative is to ask a young democracy to bear the burden of a severe risk. An argument can be made, then, that transitions should not worry too much about making abusers, who have already committed harmful, though not criminal, acts, shoulder the risk instead.

Of course, no society can put everyone in prison. To justify incapacitation there must be some way to narrow the numbers, identifying particular individuals or narrow classes for isolation. Despite the popular concerns that incapacitation can justify imprisoning folks with an extra Y chromosome,⁴³⁷ or a history of being abused as children,⁴³⁸ this is not what is at stake in serious jurisprudence.⁴³⁹ Most incapacitation literature is only interested in predicting recidivism and

⁴³⁵ *Id.*

⁴³⁶ Posner, *supra* note 193, at 1214-17.

⁴³⁷ Cecilee Price-Huish, *Born to Kill? "Aggression Genes" and Their Potential Impact on Sentencing and the Criminal Justice System*, 50 *SMU L. REV.* 603, 621-22 (1997).

⁴³⁸ JOHN MONAHAN, *RETHINKING RISK ASSESSMENT*, 100-01 (2001).

⁴³⁹ Though hardly serious jurisprudence, this is a popular theme in fiction. *See e.g.* PHILLIP KERR, *A PHILOSOPHICAL INVESTIGATION* (1993).

criminal advancement.⁴⁴⁰ This is no easy task; and even the best models are accurate only one-third of the time.⁴⁴¹ Using these results as the basis for sentencing would mean that sixty-six percent of the resources dedicated to incapacitation strategies would have been wasted. Even if such a low average could overcome moral objections, this is not an acceptable ratio in resource-starved transitional societies.

These concerns provide a new perspective on the agency arguments from Sections II and III of this article. Incapacitation as a justification for imprisonment is grounded in a past offense.⁴⁴² Most advocates of incapacitation do not see abstract risk, as a function of genetics, class, race, or environment, as sufficient to warrant imprisonment. This is, in part, due to moral concerns, but it also reflects the fact that risk predictions are nearly useless in non-criminal populations. An overt criminal act is, thus, a necessary risk factor.⁴⁴³ Guilt is a necessary first step for justifying incapacitation.⁴⁴⁴ This puts us back on the hook of earlier concerns about establishing guilt for many abusers from the past regime.

The reader might think that this misses the point slightly. Former abusers have, after all, done wrong. Whether the overt act is a “crime” or not is irrelevant next to the fact that it signifies a propensity to such activities and presents a risk to the new regime. This response fails to understand the significance of public agency here and in the legality discussion above. The consequentialist, to justify incapacitation in transitions, must rely almost exclusively on past acts that were publicly accepted, and sometimes expected, as evidence that those who followed the rules in the past will

⁴⁴⁰ JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981); JEAN FLOUOD AND WARREN YOUNG, *DANGEROUSNESS AND CRIMINAL JUSTICE* (1981).

⁴⁴¹ Morris, *supra* note 434, at 46. *See also*, *Barefoot v. Estelle*, 463 U.S. 880, 899 n.7 (1983).

⁴⁴² *See generally*, Christopher Slobogin, *The Civilization of the Criminal Law*, 58 *Vand. L. Rev.* 121 (2005).

⁴⁴³ WILSON, *supra* note 352, Chapter 8.

⁴⁴⁴ Morris, *supra* note 434, at 248.

break them in the future. This requires making the unwarranted assumption that former abusers will not change their behavior as the political culture and legal structure of society change. An agent-centered understanding of pre-transitional abuses should lead us to see many, if not most, former abusers as candidates for change.⁴⁴⁵ Presuming, without further warrant, that they are not eligible for reform, raises moral concerns that also have consequential import.

Given the fact of transition and accompanying shifts in law and public norms, it seems neither fair nor useful to assume that those who abided by the public face of law in the past will not do so in the future. Moreover, the agency focus makes the point that strategies of broad prosecution will alienate individuals who might be valuable to a transition, provided that they are not under personal threat if it succeeds.⁴⁴⁶ Further, incapacitation policies run the danger of perpetuating pre-transitional divisions,⁴⁴⁷ making counter-revolutions more likely,⁴⁴⁸ and increasing the chances that the transition will ultimately fail to deter future crimes.⁴⁴⁹

This discussion preserves the possibility of punishing high-level leaders. Leaders have a significant personal and ideological investment in counter-revolutions. They also have the demonstrated capacity to motivate large groups of individuals to perpetrate horrific acts. Given these demonstrated motives and capacities, incapacitation of leaders, through imprisonment or exile, will frequently be a justifiable transitional cost, particularly if these leaders have perpetrated overt acts during or after transition that present a direct threat to peace, stability, or the rule of law.

⁴⁴⁵ Villa-Vicencio, *supra* note 372, at 209.

⁴⁴⁶ *Id.*

⁴⁴⁷ GOUREVITCH, *supra* note 17, at 95

⁴⁴⁸ MALAMUD-GOTTI, *supra* note 30, at 26-27, 89; ACKERMAN, *supra* note 6, at 77.

⁴⁴⁹ van Zyl, *supra* note 5, at 651-53.

As a final note on this topic it is worth pointing out a distinction between the political necessities of transition and legal punishment. Though law and politics are heavily intertwined, more so in transitions, there is still a distinction. Transitions are committed to transparency when making decisions to punish.⁴⁵⁰ If security is the sole justification, that should be made explicit. If it is for treasonous activity, that should be explicit. If it is simply a reflection of the transition itself, as lustration might be,⁴⁵¹ then this should be made explicit. Failure to provide public justifications runs contrary to transitional commitments to democracy and the rule of law and replicates the disarticulating use of power that defines abusive regimes.⁴⁵²

V. THE EXCUSE-CENTERED APPROACH IN CONTEXT

Transitions cannot, due to practical realities, prosecute all or even most of those implicated in widespread abuses perpetrated by and under abusive regimes.⁴⁵³ This selectivity poses a number of threats to transitional justice programs. High among these is the hard-to-swallow fact that most of those involved in past wrongs will not be held responsible.⁴⁵⁴ This failure to assign responsibility carries with it the morally disturbing implication that those not punished are not culpable or guilty.⁴⁵⁵ Failures to prosecute also present the possibility that the truth of what happened in the past will

⁴⁵⁰ Villa-Vicencio, *supra* note 372, at 209.

⁴⁵¹ Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 *COLUM. J. TRANSNAT'L L.* 357, 359 (1999).

⁴⁵² MALAMUD-GOTI, *supra* note 30, at 19-39.

⁴⁵³ ELSTER, *supra* note 21, at 208-15; HAYNER, *supra* note 39, at 12; Gutmann & Thompson, *supra* note 18, at 26-27; van Zyl, *supra* note 5, at 661, 666; MINOW, *supra* note 37, at 31, 40-47.

⁴⁵⁴ De Greiff, *supra* note 63, at 94-97.

⁴⁵⁵ *Id.*; De Greiff, *supra* note 6, at 82.

never be publicly established,⁴⁵⁶ allowing abusers to carry on without consequence. Failure to establish a publicly legitimate factual account of the past also perpetuates injustices against victims by denying them the acknowledgement they deserve.⁴⁵⁷ This “oblivion”⁴⁵⁸ hampers efforts to identify causes and consequences of pre-transitional institutions and abuses,⁴⁵⁹ limiting transitional efforts to carry out effective reform.⁴⁶⁰ Without a publicly legitimate account of the past, transitions may also face revisionism, denial, and perhaps, counterrevolution.⁴⁶¹

These circumstances and concerns create tremendous theoretical and practical challenges for justice in transitions. This article has sketched a solution to one of these: the need to provide theoretical guidance and normative justification for prosecutorial selection. To this end, I have argued that transitional justice programs should provide an affirmative defense that would, as a matter of fact, excuse from criminal prosecution most of those associated with pre-transitional abuses. While this is a valuable contribution to transitional jurisprudence, it does not solve other transitional concerns, particularly those that flow from the gap between participation in abuses and prosecution for past wrongs. For example, vertically limited trials do not fully appreciate the complicity of those not prosecuted.⁴⁶² While they do provide a forum for establishing the truth about the past in broad strokes, prosecutions of a few top leaders do not provide public

⁴⁵⁶ *Id.*; HAYNER, *supra* note 39, at 12-14.

⁴⁵⁷ HAYNER, *supra* note 39, at 28-29; Gutmann & Thompson, *supra* note 18, at 31; Crocker, *supra* note 139, at 99, 100-01.

⁴⁵⁸ De Greiff, *supra* note 63, *passim*.

⁴⁵⁹ Crocker, *supra* note 139, at 101-02.

⁴⁶⁰ Kiss, *supra* note 24, at 74-79.

⁴⁶¹ MALAMUD-GOTI, *supra* note 30, at 26-27; ACKERMAN, *supra* note 6, at 77.

⁴⁶² De Greiff, *supra* note 63, at 101-06.

acknowledgment for most victims. Thus, they neither meet entirely demands for truth nor do they avoid altogether the dangers of oblivion.⁴⁶³

In most transitions, these concerns have led to compromise programs, featuring limited prosecutions that focus on top leaders, amnesties, truth commissions, and reparations.⁴⁶⁴ Many European transitions have also utilized lustration.⁴⁶⁵ Just as prosecutorial selections may be criticized as compromises against justice, the other elements of hybrid programs are usually seen as gap filling strategies.⁴⁶⁶ Together, they provide the best approximation of justice in a very imperfect world.⁴⁶⁷ In this final section, I discuss how my excuse-centered approach can provide significant promise for resolving these concerns while providing guidance and justification for other elements of hybrid justice programs.

A. The Affirmative Defense Approach Guides and Justifies Prosecutorial Selection

Structuring prosecutorial selectivity around an affirmative defense has significant advantages in the context of transitional justice specifically and transitions to democracy more generally. First, it requires substantial engagement with abusers, victims, witnesses, and society. If the burden of overcoming the defense fell on prosecutors then usual procedural protections and natural motives of defendants to avoid punishment would prevent a full hearing of the facts and circumstances.⁴⁶⁸ By

⁴⁶³ MALAMUD-GOTI, *supra* note 30, at 18-27; De Greiff, *supra* note 6, at 81-82.

⁴⁶⁴ Rotberg, *supra* note 9, at 3.

⁴⁶⁵ Boed, *supra* note 451, at 357; Mark Ellis, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: Purging the Past: The Current State of Lustration Laws in the Former Communist Bloc*, 59 *LAW & CONTEMP. PROB.* 181 (1996).

⁴⁶⁶ HAYNER, *supra* note 39, at 12-14.

⁴⁶⁷ van Zyl, *supra* note 5, at 648.

⁴⁶⁸ Ronald Slye, *Amnesty, Truth, and Reconciliation*, in *TRUTH V. JUSTICE*, *supra* note 8, at 170, 173-77.

making the defense affirmative, transitions put the burden of revelation on defendants.⁴⁶⁹ Because former abusers cannot claim the defense without producing evidence on their own behalves, making the defense affirmative provides individual motivation for pre-transitional bad actors to participate in revelatory processes such as truth commissions, dramatically enhancing the quality of the “truth” produced by commissions.⁴⁷⁰

Second, making the defense affirmative gives prosecutors more control over selections. Evidentiary limitations might well force officials to forgo prosecutions if defendants have a presumptive defense. Affirmative defenses allow prosecutors to make principled decisions based on real information rather than allowing circumstances to force them to make blind choices or to provide *de facto* amnesties.⁴⁷¹ Selections made on rational evidentiary grounds also preserve scarce prosecutorial and judicial resources⁴⁷² while providing publicly justifiable reasons for prosecutorial selections.⁴⁷³

B. The Transitional Contributions of Truth Commissions

Truth commissions have been integral parts of transitional justice programs in many countries.⁴⁷⁴ While a discussion of these procedures is beyond the scope of this article, this sub-

⁴⁶⁹ *Id.*; Kiss, *supra* note 24, at 76-77; Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in TRUTH V. JUSTICE, *supra* note 8, at 141, 148.

⁴⁷⁰ Slye, *supra* note 468, at 173-77; *see also* Kent Greenwalt, *Amnesty's Justice*, in TRUTH V. JUSTICE, *supra* note 8, at 189, 190-91.

⁴⁷¹ De Greiff, *supra* note 6, at 81-82.

⁴⁷² Carroll, *supra* note 346, at 189; Huyse, *supra* note 39, at 107.

⁴⁷³ De Greiff, *supra* note 6, at 81.

⁴⁷⁴ Priscilla Hayner provided the first survey of contemporary truth commissions in *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 *HUM. RTS Q.* 597 (1994). She expanded and deepened her study in UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2001).

section describes some of the goals and aspirations of commissions in order to explain how an excuse-centered approach can advance these goals.

There are a number of truth commission models.⁴⁷⁵ At base, however, all share a common conviction: that construction of a publicly legitimate and descriptively accurate account of the past is critical to political struggle and reform in transitions to democracy.⁴⁷⁶ What counts as “truth” in this context varies widely.⁴⁷⁷ At a minimum, truth commissions try to produce a detailed and accurate account of what happened to whom, when, and how.⁴⁷⁸ Commissions also try to determine who was implicated in past wrongs,⁴⁷⁹ why atrocities were committed,⁴⁸⁰ and how perpetrators were able to pursue programs of destruction.⁴⁸¹ The mandate of the South African Truth and Reconciliation Committee, for example, was to “establish as complete a picture as possible—including antecedents, circumstances, factors and context of such violations as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.”⁴⁸²

The provision of a publicly acceptable account of the past serves several transitional goals. Most prominent is prevention of future abuse.⁴⁸³ By uncovering the causes and circumstances of past abuses, transitional regimes hope to develop new social norms and public procedures that will

⁴⁷⁵ HAYNER, *supra* note 39, at 32-85, 305-11.

⁴⁷⁶ *Id.* at 24-29; Rotberg, *supra* note 9, at 3. *Cf.* Michel Foucault, *Film and Popular Memory*, *RADICAL PHILOSOPHY* XI, 24-26 (1975).

⁴⁷⁷ HAYNER, *supra* note 39, at 72-85.

⁴⁷⁸ Boraine, *supra* note 469, at 151; Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 99 *ETHICS & INT’L AFF.* 43,49 (1999).

⁴⁷⁹ Kiss, *supra* note 24, at 70-74; Boraine, *supra* note 469, at 151.

⁴⁸⁰ Bhargava, *supra* note 100 at 57-58.

⁴⁸¹ Boraine, *supra* note 469, at 148.

⁴⁸² Promotion of National Unity and Reconciliation Act, No. 34 (1995), Section 3(1)(A). *See generally* BORAINÉ, *supra* note 33.

⁴⁸³ Jeremy Sarkin and Erin Daly, *Too Many Questions, Too Few Answers: Reconciliation in Transitional Societies*, 35 *COLUM. HUM. RTS. L. REV.* 661, 694-97 (2004); HAYNER, *supra* note 39, at 29-30.

reduce the chance of future violence.⁴⁸⁴ In addition to content, then, truth commissions provide important opportunities to model procedural commitments violated under the old regime.⁴⁸⁵ By publicizing accounts of the past, for example, commissions mark a break from abusive regimes, where opacity and rarified power are essential tools of disarticulate power.⁴⁸⁶ Commissions also offer recognition of victims and the wrongs they have suffered,⁴⁸⁷ modeling transitional commitments to democratic principles of recognition, inclusion, and participation.⁴⁸⁸

Truth commissions also count restoration and reconciliation high among their goals.⁴⁸⁹ By providing opportunities for past abusers to confess and for victims to tell their stories, truth commissions hope to reconcile a transitional society with its past and to set the stage for victims to be reconciled with their abusers.⁴⁹⁰ Through this process of confrontation and reconciliation, truth commissions aspire to establish the conditions necessary for social, political, and legal justice.⁴⁹¹ In addition, by identifying what went wrong in the past⁴⁹² and charting new public norms and procedures that will prevent future abuses,⁴⁹³ commissions establish and model the public

⁴⁸⁴ Bhargava, *supra* note 100 at 45.

⁴⁸⁵ van Zyl, *supra* note 5, at 658.

⁴⁸⁶ HAYNER, *supra* note 39, at 25.

⁴⁸⁷ *Id.* at 658-661; Bhargava, *supra* note 100 at 54-56; Andre du Toit, *The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition*, in TRUTH V. JUSTICE, *supra* note 8, at 122, 135-39; De Greiff, *supra* note 6, at 93.

⁴⁸⁸ Gutmann & Thompson, *supra* note 18, at 35-42; Bhargava, *supra* note 100 at 50-51.

⁴⁸⁹ *See generally* Sarkin & Daly, *supra* note 483; Kiss, *supra* note 24, *passim*.

⁴⁹⁰ *See generally*, TUTU, *supra* note 24; Minow, *supra* note 14, at 235.

⁴⁹¹ De Greiff, *supra* note 63, at 105-06.

⁴⁹² van Zyl, *supra* note 5, at 648 ff.

⁴⁹³ Kiss, *supra* note 24, at 72.

commitments that form the foundation upon which a new society committed to democracy, human rights, and the rule of law can be built and sustained.⁴⁹⁴

A publicly established truth about the past can also provide some consequences for wrongdoers.⁴⁹⁵ While actual criminal punishment is usually divorced from or excluded by truth commissions,⁴⁹⁶ publicized truth can provide a form of public shaming that is punitive in character.⁴⁹⁷ By identifying wrongs and wrongdoers, often with the aid of dramatic victim testimony and forensic reports, truth commissions also set the stage for individuals to recognize what they have done and to assume moral accountability for the past.⁴⁹⁸ This educative function of truth procedures is aided by victim participation,⁴⁹⁹ providing obvious benefits for prevention and restoration.⁵⁰⁰

Civil society should play a critical role in and be a significant beneficiary of truth commissions.⁵⁰¹ South Africa provides a good example.⁵⁰² There, daily events were broadcast and nightly analyses conducted.⁵⁰³ The processes of the TRC, as well as its daily product, were publicly accessible and were the source and topic of significant discussion and debate.⁵⁰⁴ Nigeria took a

⁴⁹⁴ Gutmann & Thompson, *supra* note 18, at 35-42.

⁴⁹⁵ Dumisa Ntsebeza, *The Uses of Truth Commissions: Lessons for the World*, in TRUTH V. JUSTICE, *supra* note 8, at 158, 163-65; van Zyl, *supra* note 5, at 662.

⁴⁹⁶ Kiss, *supra* note 24, at 79 (citing Desmond Tutu's introduction to the final report of the TRC).

⁴⁹⁷ Ntsebeza, *supra* note 495, at 163-65; van Zyl, *supra* note 5, at 662; *see also* Douglas N. Husak, 18 PHIL. TOPICS 79 (1990).

⁴⁹⁸ Kiss, *supra* note 24, at 74-79.

⁴⁹⁹ van Zyl, *supra* note 5, at 647-58.

⁵⁰⁰ *Id.*

⁵⁰¹ HAYNER, *supra* note 39, at 234-39; Crocker, *supra* note 139, at 109-14; du Toit, *supra* note 487, at 129.

⁵⁰² Rotberg, *supra* note 9, at 13.

⁵⁰³ van Zyl, *supra* note 5, at 653-56.

⁵⁰⁴ Crocker, *supra* note 139, at 113.

similar approach.⁵⁰⁵ This daily presence encourages truth seeking outside of the commission while working to prevent oblivion, denial, and revisionism. Public truth commissions also provide a model for civil society, establishing the groundwork of a transparent politics of inclusion.⁵⁰⁶

These varied goals require that commissions regard “truth” as multi-faceted.⁵⁰⁷ A primary benefit of commissions, as compared to criminal trials,⁵⁰⁸ is a freedom from rules of evidence and other procedural limitations on testimony, including rights against self-incrimination and limitations on hearsay evidence.⁵⁰⁹ Truth commissions can afford these looser protocols because they cannot, by definition, result in individualized criminal sanctions.⁵¹⁰ Truth commissions provide plenty of room for normative evaluation, however. Assessment of right and wrong is critical to acknowledging what happened, recognizing the suffering of victims, and striking a contrast between past and future.⁵¹¹ The latitude afforded to truth commissions also provides the opportunity to hear from a wide variety of sources, including victims, witnesses, and abusers.⁵¹² Further, testimony can take the form of narratives of personal experience.⁵¹³ This flexibility expands further the scope of truth while offering recognition to those whose stories were, in a past, suppressed and ignored.⁵¹⁴

⁵⁰⁵ Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 *COLUM. J. TRANSNAT'L L.* 89, 140-41 (2001).

⁵⁰⁶ du Toit, *supra* note 487, at 124-26.

⁵⁰⁷ Gutmann & Thompson, *supra* note 18, at 33-42; van Zyl, *supra* note 5, at 667.

⁵⁰⁸ Aukerman, *supra* note 4, at 74-75.

⁵⁰⁹ *See generally* Levinson, *supra* note 106, at 211.

⁵¹⁰ Aukerman, *supra* note 4, at 49. *But see*, HAYNER, *supra* note 39, at 107-109, 127-132.

⁵¹¹ HAYNER, *supra* note 39, at 29-30.

⁵¹² Minow, *supra* note 14, at 239; van Zyl, *supra* note 5, at 657.

⁵¹³ Kiss, *supra* note 24, at 70; Boraine, *supra* note 469, at 151.

⁵¹⁴ *Id.* at 72-74; Minow, *supra* note 14, at 239.

Commissions need not produce a final decision or reflect a perfect consensus.⁵¹⁵ Given the broad scope of commissions, consensus may well be impossible.⁵¹⁶ A consensus truth might also fail to capture the complexity of the past.⁵¹⁷ This is not a disadvantage. Destruction of diverse opinion is, after all, a hallmark of abusive regimes.⁵¹⁸ Forcing commissions to pursue a consensus view is, in this light, radically undemocratic.⁵¹⁹ What truth commissions can do is provide a shared experience of pursuit and, by conducting themselves in the light of transitional commitments to human rights and the rule of law, create a shared “universe of comprehensibility” of the past.⁵²⁰

Finally, truth commissions seek to define new social, political, and individual normative identities. Anthony Duff and Jean Hampton, among others, have argued that trials play an important role in society by expressing and reaffirming social and legal commitments.⁵²¹ For these theorists, the process of trial and punishment is a process of re-presenting social norms and expressing social approbation and approval. Truth commissions have the same potential, though their orientation is prospective and aspirational rather than retrospective.⁵²²

C. *An Excuse-Centered Approach Justifies and Organizes Truth Commissions*

The excuse-centered approach to transitional justice proposed here provides important structural guidance and motivational support for truth commissions. It also advances the goals and

⁵¹⁵ Gutmann & Thompson, *supra* note 18, at 32, 35-42.

⁵¹⁶ *Id.* at 34-35.

⁵¹⁷ *Id.*

⁵¹⁸ MALAMUD-GOTI, *supra* note 30, at 72-83.

⁵¹⁹ Gutmann & Thompson, *supra* note 18, at 32-33.

⁵²⁰ KADAR ASMAL, ET AL., RECONCILIATION THROUGH TRUTH, 46 (1996).

⁵²¹ DUFF, *supra* note 161, at 124-26; Hampton, *supra* note 69, at 208.

⁵²² De Greiff, *supra* note 63, at 95; ACKERMAN, *supra* note 6, at 70-79.

opportunities of truth commissions while avoiding the most pernicious objections to these procedures and the amnesties that they entail.

A critical practical feature of the defense proposed is that it is *affirmative*. Within the rule of law embraced by transitions, prosecutors carry the burden of proof in criminal trials.⁵²³ Affirmative defenses represent an exception to this rule. Defendants who assert an affirmative defense must prove the elements of the proposed defense.⁵²⁴ Truth commissions are ideal forums for developing the record needed to make these selections, particularly if those who seek to avoid prosecution must testify about what happened, what they did, and why.⁵²⁵ They cannot be taken at their word, of course. Commissioners must investigate these accounts by hearing additional testimony and by examining relevant evidence.⁵²⁶ After the investigation is complete, commissioners acting within the model I am developing here would make recommendations to prosecutors who will make final selections based on these recommendations and their own independent assessments.⁵²⁷

A model of transition justice that requires testimony at a truth commission as a pre-requisite for securing immunity from prosecution may seem to create motivational⁵²⁸ and, perhaps, due process problems.⁵²⁹ These concerns are easily salved by “use immunity” and “derivative use-

⁵²³ *In re Winship*, 397 U.S. 358, 362-63 (1970).

⁵²⁴ *Patterson v. New York*, 432 U.S. 197, 202 (1977).

⁵²⁵ This is similar to the requirement for amnesty imposed by the TRC. Boraine, *supra* note 469, at 148-49; van Zyl, *supra* note 5, at 653-56; Ntsebeza, *supra* note 495, at 163-64; Slye, *supra* note 468, at 173-77

⁵²⁶ van Zyl, *supra* note 5, at 655.

⁵²⁷ This approach is not unlike that adopted by the TRC in South Africa, *see* van Zyl, *supra* note 5, at 653-56, and East Timor, *see* On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10 13 July 2001, §§ 24, 32, 33, 38, 40.

⁵²⁸ With perjury and contempt, self-incrimination forms what Justice Goldberg has called the “cruel trilemma.” *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 55 (1964).

⁵²⁹ South Africa’s Truth and Reconciliation Committee recognized this concern and acknowledged that it was sacrificing strict due process protections in favor of truth. *See* the FINAL REPORT, *supra* note 64, at 153-155.

immunity” arrangements.⁵³⁰ Within these agreements, prosecutors may not use information learned, from compelled testimony to prosecute their case against the accused.⁵³¹

This excuse-centered structure enhances significantly the truth seeking potential of commissions. Because commissioners cannot produce a verdict, their recommendations to prosecutors are not binding, and the evidence they produce is not accessible for prosecutions, commissions are free of the constraints and pressures of evidentiary rules and due process protections. This freedom from constraints allows commissions to develop more detailed and complete accounts of the past than would be possible in a criminal trial.⁵³² Rather than establishing what truth they can within procedural constraints, commissioners can, and should, concentrate on developing an extensive and detailed account of what happened, who was involved, and why.⁵³³ These open procedures produce accounts of the past that are broader, deeper, more detailed, more accessible, more acceptable, and more legitimate in the public eye than would be possible in trials.⁵³⁴

Unlike criminal trials, truth commissions organized for the purpose of making prosecutorial selections provide a compelling motivational structure that supports truth seeking.⁵³⁵ First, by virtue of the formal separation between commissions and trials, nothing a former abuser says in a truth commission procedure can be used against him. Second, where admission to crimes in a criminal trial brings the promise of punishment, admission to abuses before a truth commission offers hope of security from prosecution. Third, abusers know that lies and omissions may leave them

⁵³⁰ See, e.g., Nigeria’s *Tribunals of Inquiry Act*, § 8.

⁵³¹ *Kastigar v. United States*, 406 U.S. 441 (1972).

⁵³² Rotberg, *supra* note 9, at 13.

⁵³³ De Greiff, *supra*, note 63, at 105; Gutmann & Thompson, *supra* note 18, at 32-42.

⁵³⁴ De Greiff, *supra*, note 63, at 105; Gutmann & Thompson, *supra* note 18, at 32-42.

⁵³⁵ Kiss, *supra* note 24, at 76-77; Gutmann & Thompson, *supra* note 18, at 26-27; Minow, *supra* note 14, at 235.

vulnerable to future prosecution.⁵³⁶ Finally, because testimony cannot be used to prosecute others, witnesses, including both victims and abusers, need not fear reprisals. Further, as opposed to criminal trials, victims are not limited as to the form of their testimony or subjected to aggressive cross-examination.⁵³⁷ Instead, victims tell their stories in their own ways, offering a moment of public acknowledgment, denied to them by oppressive regimes and by trials, where the focus is on the defendant and his rights.⁵³⁸

This, then, is the outline of how the excuse-centered approach would function procedurally within a broader transitional justice program. Open truth commission procedures, protected by use immunity safeguards, would provide a forum for developing a full account of the past. At reasonable times during these procedures, commissioners would make recommendations to prosecutors regarding who should and should not benefit from the proposed affirmative excuse. Prosecutors would make the final decision. Any bargains accepted by prosecutors would ultimately be subject to revocation if later discoveries revealed that an abuser has withheld significant facts about his past bad acts.⁵³⁹ Alternatively, if officials decide to prosecute an abuser based on or despite the recommendations of commissioners, then they would not be allowed to make investigative or prosecutorial use of testimony or evidence presented to a commission.

⁵³⁶ The Truth and Reconciliation Committee imposed this rule. See Kiss, *supra* note 24, at 76.

⁵³⁷ Kamali, *supra*, note 505, at 140-41 (noting that adversarial structure of Nigerian truth commission severely diminished its reliability).

⁵³⁸ du Toit, *supra* note 487, at 122.

⁵³⁹ Kiss, *supra* note 24, at 76.

D. An Excuse-Centered Approach Resolves Dilemmas of Truth Commissions

Truth commissions, as they are usually understood, propose a “trade-off” between justice, as criminal punishment, and truth.⁵⁴⁰ In order to minimize what is lost in this trade-off, advocates for commissions have developed jurisprudential theories designed to satisfy the call for justice in transitions.⁵⁴¹ In “The Moral Foundations of Truth Commissions,” Amy Gutmann and Dennis Thompson argue that these theories must satisfy three minimal demands.⁵⁴² First, commissions must appeal to a moral principle that is at least comparable to the moral principle of punishment sacrificed in the trade-off.⁵⁴³ Second, commissions, in order to reflect commitments to democracy, human rights, and the rule of law, and in order to maximize the public legitimacy of the truth they produce, must be inclusive and broad in spectrum, providing an opportunity for recognition and participation to as many individuals as possible, including both victims and abusers.⁵⁴⁴ Third, commissions must develop morally rich practices that reflect their principled goals but also provide a model for democratic and rule of law procedures going forward.⁵⁴⁵ The second and third requirements are simple design challenges. The more difficult task is to provide a morally satisfying justification for the “trade-off.” Theories of “restorative justice” have emerged as the most common response.⁵⁴⁶

⁵⁴⁰ Gutmann & Thompson, *supra* note 18, at 22-24.

⁵⁴¹ Kiss, *supra* note 24, at 68. This effort has been aided by recent contributions from traditional criminal theory circles. See, e.g., GERRY JOHNSTONE, *RESTORATIVE JUSTICE: IDEAS, VALUES, DEBATES* (2002); LODE WALGRAVE, ed., *RESTORATIVE JUSTICE AND THE LAW* (2002). Restorative justice presents numerous promises and problems, a full discussion of which must wait for a later time.

⁵⁴² Gutmann & Thompson, *supra* note 18, at 23.

⁵⁴³ *Id.* at 23, 27.

⁵⁴⁴ *Id.* at 23.

⁵⁴⁵ *Id.* at 23-24.

⁵⁴⁶ ASMAL, *supra* note 520, at 12-27; FINAL REPORT, *supra* note 64, Chapter 5 titled *Concepts and Principles*; TUTU, *supra* note 24, *passim*; Kiss, *supra* note 24, at 68-69; Llewellyn, *supra* note 24, at 96-111.

The central insight of restorative justice in the transitional context is that pre-transitional abuses are symptoms of social and political pathologies. Liberal revolutions represent breaks with the past.⁵⁴⁷ Restorative procedures provide a path to the future by laying the groundwork for social, political, and legal change.⁵⁴⁸ In addition, they seek to produce shifts in public institutions and the public and private consciousnesses of citizens.⁵⁴⁹ The ultimate goal, of course, is to reconcile a transitional society with its past, and, perhaps, victims with abusers, in order to prepare the ground for a stable society dedicated to democracy, human rights, and the rule of law.⁵⁵⁰

Criminal punishment represents, in the restorative justice scheme, both a failure to appreciate the unique features of past abuses and a practical threat to the success of transition.⁵⁵¹ So viewed, broad programs of prosecution conflict, theoretically and practically, with transitional demands to restore or create the conditions necessary to ensure the success of a new regime.⁵⁵² Given this conflict, restorative justice advocates argue that establishment of a stable post-transitional society provides a moral imperative that trumps obligations to punish.⁵⁵³

In place of punishment, restorative justice seeks to, descriptively enough, restore (or create) the social conditions necessary to ensure the success of transition.⁵⁵⁴ Truth commissions, by

⁵⁴⁷ Bhargava, *supra* note 100 at 50-51, MINOW, *supra* note 37, at 2-3.

⁵⁴⁸ Sarkin & Daly, *supra* note 483, at 697-700; van Zyl, *supra* note 5, at 667.

⁵⁴⁹ Minow, *supra* note 14, at 243-45; De Greiff, *supra*, note 63, at 105.

⁵⁵⁰ Minow, *supra* note 14, at 250-52; van Zyl, *supra* note 5, at 667.

⁵⁵¹ Aukerman, *supra* note 4, at 66.

⁵⁵² Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT'L LEGAL PERSP. 73 (2002).

⁵⁵³ Minow, *supra* note 14, at 252-55; MINOW, *supra* note 37, at 91-92; *see also* TUTU, *supra* note 24.

⁵⁵⁴ *See generally* TUTU, *supra* note 24, Kiss, *supra* note 24, at 68 ff.

focusing on admission and contrition⁵⁵⁵ rather than adversarial prosecution and punishment, better reflect the demands of restorative justice.⁵⁵⁶ In addition, careful attention to how commissions conduct their business provides the promise that they can construct a foundation for transitional commitments to human rights and the rule of law and provide a model for democratic procedures.⁵⁵⁷ These goals, along with more purely practical demands bound up with resource allocation and stability,⁵⁵⁸ justify the truth for justice trade-off.

I think that the restorative rationale for truth commissions presents serious concerns. While a full discussion of these is beyond the scope of this article, it is enough for now to recognize that even these hopeful theories must live with sighs of resignation lurking in the background.⁵⁵⁹ Whether truth commissions mean to fill in the gaps or to provide an exclusive alternative to trials, theorists and practitioners admit that something is being given up.⁵⁶⁰ Public admission and even public shame are not what most think about when they call for punishing abusers.⁵⁶¹ Solace taken from restorative justice theories is just that, solace. The trade-off still exists, leaving truth commissions and interests in restoration with the damning label of “best possible justice.”⁵⁶²

Truth commissions conducted within an excuse-centered approach need not wither in this darkness. Suggestions that commissions involve a trade-off are only sensible if one assumes that

⁵⁵⁵ Neither contrition nor forgiveness can be forced, of course, and the success of commissions should be contingent on neither. See Minow, *supra* note 14, at 249; JEFFREY MURPHY AND JEAN HAMPTON, FORGIVENESS AND MERCY 80, 149 (1988).

⁵⁵⁶ Kiss, *supra* note 24, at 79-83.

⁵⁵⁷ Gutmann & Thompson, *supra* note 18, at 35-42.

⁵⁵⁸ van Zyl, *supra* note 5, at 648-53.

⁵⁵⁹ Gutmann & Thompson, *supra* note 18, at 22-26.

⁵⁶⁰ Rotberg, *supra* note 9, at 7.

⁵⁶¹ Gutmann & Thompson, *supra* note 18, at 25.

⁵⁶² Rosenfeld, *supra* note 12, at 310.

those offered amnesty *should* be punished, but, due to circumstances, *cannot* be. Within the excuse-centered approach, those implicated in past wrongs are invited to participate in truth seeking procedures, along with victims, witnesses, and other relevant sources, in order to determine what justice demands. Provision of an excuse within this model is, by definition, in accord with the demands of justice. Thus, truth commissions conducted in service of an excuse-centered approach do not trade truth for justice; *they elicit truth in the service of justice*. Provision of an excuse does not imply an exchange of truth for punitive right because those who qualify for the affirmative excuse *should not* be punished.

None of this discussion minimizes the significant benefits to transitions that truth commissions may bring in terms of restoration and other important goals. Within an excuse-centered jurisprudence of transitional justice, these goals just do not provide primary justification for truth commissions. Rather, commissions serve criminal justice needs first. This is what justifies their place in a transitional justice programs.

This brief discussion does not claim to address sufficiently all of the intriguing issues raised by truth commissions in the context of transitional justice. It is meant only to present some of the most significant concerns in order to explain how an affirmative excuse-centered approach can provide structural and theoretical support for commissions. It also points out some of the features that commissions, conducted at the service of prosecutorial selections, must have. While further discussion of the issues raised in this section would be well worth the time spent, such it is beyond the narrow scope of this article. The present purpose is only to provide a schematic account of the role that truth commissions play in a transitional justice strategy guided by the proposed affirmative defense.

VI. Conclusion

This article has defended the proposition that most of those implicated in wrongs committed by and under abusive regimes should not be subject to criminal prosecution. It has argued that the prevailing social, legal, and political conditions that characterize abusive regimes provide good reason to excuse those who acted consistently with an abusive public face of law, which is a distinguishing feature of pre-transitional regimes. Provision of this excuse does not deny that those implicated in pre-transitional abuses have done wrong. They certainly have. Consistent with this fact, the excuse preserves room for assignments of moral and political guilt.⁵⁶³

None of this discussion makes past events disappear. Clarifying the standing of law and public agents in transitions does not meet all transitional justice requirements. It does, however, provide a better picture of what a full transitional justice program might look like. First, it will be centered on extending and developing transitional reforms committed to democracy, the rule of law, and human rights.⁵⁶⁴ Second, the process must provide for the constructive participation of all those affected by these changes, including those who legitimately claim the legality defense.⁵⁶⁵ Third, as a function of these two, transitional justice programs must provide opportunities for citizens to transition into their new public roles.⁵⁶⁶ Public agents are candidates for change just as are public norms; they should be recognized as participants in a process.⁵⁶⁷

Truth commissions as part of the excuse-centered approach fit the unique conditions of transitions. For a justice to be transitional it must acknowledge that it has a duty to justify and

⁵⁶³ JASPERS, *supra* note 188, at 112-17.

⁵⁶⁴ TEITEL, *supra* note 16, at 215-19; ACKERMAN, *supra* note 6, at 5-24.

⁵⁶⁵ Gutmann & Thompson, *supra* note 18, at 35-38.

⁵⁶⁶ van Zyl, *supra* note 5, at 658-59, 666-67.

⁵⁶⁷ Slye, *supra* note 468, at 173-77.

establish new public norms.⁵⁶⁸ This implies taking a coordinative orientation⁵⁶⁹ with respect to most involved in events of the past, while retaining the goal of social expression that is central to both justification and application of public law.⁵⁷⁰ By putting a priority on establishing facts, while acknowledging that most participants in past events cannot be held criminally liable, truth commissions reflect this premium on coordination.

Transitions are not wholly coordinative enterprises, of course. As in functioning democracies, there are coercive outcomes. Those who disagree with changes in public consciousness and norms cannot opt for the old ways. There is another aspect to the focus on public agency that comes to the fore here. Even Kant, perhaps the staunchest of the legal deontologists, understood that law has an instrumental character.⁵⁷¹ In and after transitions the mark of public agency provides for the possibility that those who acted in accord with the public face of law in the past will do the same when the law changes. At least, absent compelling evidence to the contrary, a transitional regime should assume that they will.

The provision of an affirmative defense for most pre-transitional bad actors also preserves the possibility of reparations for victims of the past regime.⁵⁷² “Responsibility” is a notoriously difficult word. One use of responsibility is found in criminal law. “Responsible” can also have a

⁵⁶⁸ De Greiff, *supra*, note 63, at 105-06.

⁵⁶⁹ Gutmann & Thompson, *supra* note 18, at 38-42.

⁵⁷⁰ DUFF, *supra* note 161, at 124-26, 235-46.

⁵⁷¹ KANT, *supra* note 276, at 6:232-33.

⁵⁷² This discussion of reparations is meant only as a sketch. A full defense of reparations would require much more. For a helpful discussion of the terrain, see Eric Posner and Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 *COLUM. L. REV.* 689 (2003); Thomas McCarthy, *Vergangenheitsbewältigung in the USA: On the Politics of the Memory of Slavery*, 30 *Political Theory* 623 (2002); Thomas McCarthy, *Reparations for African Americans*, in *REPARATIONS FOR AFRICAN AMERICANS* (McGary, ed., 2005).

moral dimension, suggesting a free act of will for which the actor is held to blame.⁵⁷³ It can also have a political dimension.⁵⁷⁴ Finally, “responsibility” can have a looser meaning, more prominent in some branches of tort law that relies on cause as a key feature generating responsibility to repair.⁵⁷⁵ Forgoing criminal blame does not release individuals from responsibility for contributing to the success and stability of the new regime. First, though abusers may not be punished, they are still morally culpable for their acts.⁵⁷⁶ Second, recognizing that many agents of harm in the past regime were acting according to the demands placed on them in their public roles suggests that responsibility for many pre-transitional abuses falls also on the society that made them possible.⁵⁷⁷ Corresponding assignments of moral and political guilt provide ample justification for reparations.⁵⁷⁸ Individual duties to repair will vary, of course. Citizens may bear a higher tax burden in order to pay for social programs that benefit victims.⁵⁷⁹ Corporations and states that realized gains by colluding

⁵⁷³ JASPERS, *supra* note 188, at 25-26, 57-64.

⁵⁷⁴ van Zyl, *supra* note 5, at 667.

⁵⁷⁵ The famous example of the ship’s captain, attributed to H.L.A. Hart, captures much of the spectrum, including this band.

As captain of the ship, X was {1} responsible for the safety of his passengers and crew. But on his last voyage he got drunk every night and was {2} responsible for the loss of the ship with all aboard. It was rumored that he was insane, but the doctors considered that he was {3} responsible for his actions. Throughout the voyage he behaved quite {4} irresponsibly and various incidents in his career showed that he was not a {5} responsible person. He always maintained that the exceptional winter storms were {6} responsible for the loss of the ship, but in the legal proceedings against him he was found {7} criminally responsible for his negligent conduct, and in separate civil proceedings he was {8} legally responsible for the loss of life and property. His is still alive and he is {8} morally responsible for the death of many women and children.

⁵⁷⁶ Kiss, *supra* note 24, at 76; JASPERS, *supra* note 188, at 57-64.

⁵⁷⁷ Kiss, *supra* note 24, at 78; Bhargava, *supra* note 100 at 60-63; JASPERS, *supra* note 188, at 69-75.

⁵⁷⁸ I leave a full account of how this is so to another day.

⁵⁷⁹ This has been a part of reparations programs in the United States, proposed and actual. See Tuneen E. Chisolm, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C.L. REV. 477 (1998); 50 U.S.C. 1989b (1994); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993).

with an abusive regime may be required to return ill-gotten profits and to contribute to reform and reparation programs.⁵⁸⁰ Others may be called upon to return land or other property appropriated under the eye of the old guard.⁵⁸¹ What is important, however, is that these duties flow not from criminal liability but from a recognition that abuses of the past would not have occurred but for the complicity of an abusive society, its members, and enablers.

As a practical matter, the excuse-centered approach advanced here does not suggest radical changes to transitional justice practice. Due to a number of circumstances, most transitional regimes adopt hybrid strategies of transitional justice that look much like the excuse-centered program. What the approach offers is normative justification and guidance for what otherwise are ad hoc strategies that appear to involve significant compromises against justice. By providing a detailed excuse and defending its elements against common concerns that circulate through transitional justice debates, this article has attempted to provide practical as well as theoretical guidance for practitioners faced with the unique challenges of seeking justice in transitions.

⁵⁸⁰ Rosenfeld, *supra* note 12, at 324-27.

⁵⁸¹ Ben Hlatshwayo, *Land Expropriation Laws in Zimbabwe and their Compatibility with International Legal Norms*, 11 ZIMBABWE L. REV. 41 (1993). *But see*, Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 607 (1992).