Transitional Jurisprudence:
The Role of Law in Political Transformation

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At a time of political movement from illiberal rule, questions of transitional justice remain largely unaddressed. How is the social understanding behind a new regime committed to the rule of law created? Which legal acts have transformative significance? What, if any, is the relation between a state’s response to a repressive past and its prospects for creating a liberal order?

Debates about transitional justice are generally framed by the normative proposition that various legal responses should be evaluated on the basis of their prospects for democracy. The prevailing approaches yield limited positive accounts that miss the particular significance of justice claims in periods of political change. Such theorizing also fails to explain the relationship between normative responses to past injustice and the prospects for liberal transformation. This Article attempts to move beyond prevailing theorizing to explore legal responses in periods of political transformation. It suggests that these legal responses play an extraordinary constituting role in such periods.

Within comparative political theory, the dominant approach is to explain a state’s legal responses in terms of the political and institutional constraints of the transition. The dominant approach considers the search for justice an epiphenomenon, explained in terms of the balance of power. From the realist perspective, the question of why a given state response occurred is conflated with the question of what response was possible. Law is considered a product


Works that move beyond the case study or regional approach often confine themselves to a particular historical moment. See, e.g., From Dicatory to Democracy: Coping with the Legacies of Authoritarianism and Totalitarianism (John Hart ed., 1982) (focusing on postwar period). For the classic inquiry into the question of political justice, see Otto Kirchheimer, Political Justice: The Use of Legal Procedures for Political Ends (1961). Kirchheimer’s classic exploration of political justice includes successor trials as an example of the phenomenon of politically motivated justice. See id. at 304-47.

2. The explanatory power of this scholarship goes to the question of why transitional justice is a vital issue in some countries, but not in others. See Linz & Stepan, supra note 1; Transitions from Authoritarian Rule, supra note 1 (collecting essays that adopt primarily regional approach); see also Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century 215 (1991); Stephen Holmes, The End of Decommunization, 6 EUR. CONSTIT. REV. 75 (summ. 1994), at 33.

of political change. The path of the transition is thought to explain the prevailing balance of power, which in turn purportedly explains the legal response. However, to say that states do what they can does not explain the great diversity of transitional legal phenomena. To say states do what is possible, as in the realist account, conflates the descriptive account with its normative conclusions. The connection between a state’s response to the transitional problem and its prospects for liberal transformation remain essentially unjustified. Nor is the idealist account satisfactory. From the idealist perspective, the question of transitional justice generally falls back upon universalist conceptions of justice. Yet this approach misses distinctive features of conceptions of justice in extraordinary periods of transition.

The realist/idealist antinomy on the relation of law to politics shares affinities with liberal/critical theorizing about law and politics. In liberal theorizing, law is commonly conceived as following idealist conceptions unaffected by political context; while critical legal theorizing, like the realist approach, emphasizes law’s close relation to politics. Again, liberal/critical theorizing about the nature and role of law in ordinary times does not account well for law’s role in periods of political change.

Moving away from the prevailing approaches, adopting a largely inductive method, and exploring an array of legal responses, I describe a distinctive conception of law and justice in the context of political transformation. Several important legal responses discussed herein arise out of the contemporary wave of political change, including the transitions from Communist rule in Eastern and Central Europe and the former Soviet Union, as well as from repressive military rule in Latin America and Africa. Where relevant, I draw upon historical illustrations, from ancient times to the Enlightenment, from the French and American revolutions through the postwar and contemporary period.


periods. I begin by rejecting the notion that the movement toward a more liberal democratic political system implies a universal norm. Instead, the Article offers an alternative way of thinking about the relation of law to political transformation. The interpretive inquiry proceeds on a number of levels. On one level, I attempt to provide a better account of transitional practices. Study of the law’s response in periods of political change offers a positive understanding of the nature of accountability for past wrongs. On another level, I explore the normative relation between legal responses to repressive rule, conceptions of transitional justice, and our intuitions about the construction of the liberal state.

What might the study of legal responses following repressive rule tell us about the conceptions of justice in such periods? The central question of transitional justice arises within a distinctive context, a shift in political orders. The “transitional” period begins right after the revolution or political change; thus, the problem of transitional justice arises within a bounded period, spanning two regimes. In the contemporary period, the use of the term “transition” has come to mean change in a liberalizing direction; accordingly, the transitions discussed here have a concretely normative direction. In transitional periods, there are continuities among these legal responses. The next question is what rules of recognition govern transitions. Here, my aim is to shift the focus away from the traditional political criteria associated with liberalizing change to take account of other practices, particularly the nature

9. In focusing upon the stage of “transition,” I choose to shift the terms of the vocabulary employed by prior constitutional theorists to analyze the rule of law in political change. They speak in terms of revolution and suggest that law’s role comes in at the last stage of revolution. See ACKERMAN supra note 1, at 11-14; HANNAH ARENDT, ON REVOLUTION 139-79 (1963). Rather than an undefined last stage of revolution, the notion of transition is more capacious: it demarcates a postrevolutionary time period.

10. See GUILLERMO O’DONNELL & PHILIPPE C. SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 6 (1986) (defining transition as “the interval between one political regime and another”). Within political science, there is substantial debate about the meaning of the term “transition,” and by implication its limiting stage, “consolidation.” Within one school of thought, “transition” is demarcated by objective political criteria, chiefly procedural in nature. For some time, the criteria for the transition to democracy have focused on elections and related procedures. See JUAN J. LINZ, TOTALITARIAN AND AUTHORITARIAN REGIMES, IN HANDBOOK OF POLITICAL SCIENCE: MACROPOLITICAL THEORY 182-83 (Fred I. Greenstein & Nelson W. Polsky eds., 1972). For the classical articulation, see ROBERT DAKL, POLITICAL 20-32, 74-80 (1971) (Thus Samuel Huntington’s formulation, following Schumpeter, defines twentieth-century democratization to occur when the most powerful collective decision makers are selected through free, fair, and periodic elections). HUNTINGTON, supra note 2, at 7. For others, the transition ends when all the politically significant groups accept the rule of law.

See Richard Gunther et al., O’Donnell’s Illusions: A Rejoinder, J. DEMOCRACY, Oct. 1996, at 151, 153. Beyond this school are others that embrace a more teleological view of democracy. The teleological approach has been challenged for incorporating a bias toward western-style democracies. For a critique of the teleological view, see Ugo Mattei, Critical Legal Studies: Challenges and Conclusions, J. DEMOCRACY, Oct. 1997, at 160, 163-64. For illustrations of this liberalizing trend, see generally FROM DICTATORSHIP TO DEMOCRACY, supra note 1, which describes the democratic transitions of West Germany, Italy, Austria, France, Japan, Spain, Portugal, and Greece. To date, political scientists have not incorporated this positive normative direction expressly in their definition of the term. I embrace the notion that the contemporary understanding of transition has a normative component of moving from less to more democratic regimes.

8. See infra notes 93-95 and accompanying text


4. For such an argument, see HUNTINGTON, supra note 2, at 231.


8. See infra notes 93-95 and accompanying text.

11. For illustrations of this liberalizing trend, see generally FROM DICTATORSHIP TO DEMOCRACY, supra note 1, which describes the democratic transitions of West Germany, Italy, Austria, France, Japan, Spain, Portugal, and Greece. To date, political scientists have not incorporated this positive normative direction expressly in their definition of the term. I embrace the notion that the contemporary understanding of transition has a normative component of moving from less to more democratic regimes.
and role of legal phenomena. I explore the phenomenology of transition to suggest that there is a close tie between the normative shift in understandings of justice and law’s role in the construction of transition.

Because transitional justice is justice within defined political parameters, it is limited and partial. Understanding the particular problem occasioned by the search for justice in the transitional context requires entering a distinctive discourse, organized by dilemmas inherent to these extraordinary periods. The threshold dilemma lies in the context of political transformation: Law is caught between the past and the future, between backward-looking and forward-looking, between retrospective and prospective. Transitions imply paradigm shifts in the conception of justice; thus, law’s function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation. Ordinary predicates about law simply do not apply. In dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law.

The thesis of this Article is that the conception of justice in periods of political change is extraordinary and constructivist: It is alternately constituted by, and constitutive of, the transition. The conception of justice that emerges is contextual: What is deemed just is contingent and informed by prior injustice. Responses to repressive rule inform the meaning of adherence to the rule of law. As a state undergoes political change, legacies of injustice have a bearing on what is deemed transformative. To some extent, the emergence of these legal responses instantiates transition.

I will explore the role of law in periods of political change by looking at three areas that most reflect law’s transformative potential: the rule of law, criminal justice, and constitutional justice. Although these areas are generally thought to be discrete categories of the law, periods of political shift illuminate their affinities and reveal how the law’s response in such periods defies the usual categorization. These practices offer not only a way to delegitimize the political opposition, but also a form of legitimation of the present, more liberal, regime. In each Part, I will show how various legal responses in periods of substantial political change reflect similar developments in the law, enabling the construction of normative shifts. Adjudications of the rule of law reflect understandings of legitimacy; criminal justice establishes wrongdoing; and transitional constitutionalism defines the state’s political identity—all in a liberalizing direction. The analysis proposed here illuminates a distinctive understanding of law’s phenomenology in periods of political change, an understanding I term “transitional jurisprudence.”

Part I concerns the rule of law in transition. In established democracies during ordinary times, adherence to the rule of law implies the operation of principles that constrain the purposes and application of the law. In periods of substantial political change, by contrast, the transitional dilemma means that the law is unsettled, and the rule of law is not well explained as a source of ideal norms in the abstract. From the perspective of transitional jurisprudence, the rule of law can be better understood as a normative value scheme elaborated in response to past political repression supported by the prior legal system. Transitional law is set and unsettled. It is both backward- and forward-looking, as it disclaims past illiberal, and claims future liberal, norms.

Part II concerns criminal justice in transition. Successor trials have long been thought to play a foundational role in the transformation to a more liberal political order. Such trials draw a line demarcating the normative shift from illegitimate to legitimate rule. Yet the exercise of criminal power in times of substantial political change raises profound dilemmas. In the transitional context, the ordinary principle of individual responsibility for past wrongdoing is inapplicable, leading to the emergence of new criminal legal forms that may contribute to the construction of a liberal politics.

In Part III, I explore transitional constitutionalism. Transitional constitutionalism serves not only conventional constitutionalism’s constitutive purposes, but also its transformative purposes. While in ordinary times constitutions are conceived as fully forward-looking, in periods of radical change such constitutions are simultaneously backward- and forward-looking, varying along a range of constitutional entrenchment. The values protected by transitional constitutionalism, criminal justice, and the rule of law share affinities in their normative relation to past political rule.

In Part IV, I bring together and analyze the various ways in which new democracies respond to legacies of injustice. A pattern of legal responses, this Article contends, reveals affinities in the nature and uses of the law, informing

12. The constructivist approach proposed by this Article suggests a move away from defining transitions purely in terms of democratic procedures, such as electoral processes, toward a broader inquiry into other practices signifying acceptance of liberal democracy and the rule of law. This inquiry examines the normative understandings, beyond majority rule, that are associated with liberal systems. This observation has implications for certain debates in political science and constitutionalism and may well share affinities with jurisprudential debates concerning what makes for the authority of law. See Yehuda Raz, The Authority of Law 214 (1979); infra note 19.

13. Not all transformations exhibit the same degree of normative shift from precede the legal understandings. One might conceptualize transitions in terms of their relation to the predecessor regime along a transformative continuum, as “radical” or “conservative” in nature. See infra note 255 and accompanying text (discussing American transition as conservative in nature).

14. As the discussion proceeds, it shall become evident that the law’s role in periods of political change is complex. Ultimately, this Article makes two claims: one about the nature and role of law in periods of substantial political change, and another about law’s role in constituting the transition. The association of these responses with periods of political change advances the construction of societal understanding that transition is in progress. See infra Part IV.

15. The most common alternative advocate punishment of the ancien régime as a necessary element in the transition to democracy. See infra notes 96–108 and accompanying text.

16. Indeed, these practices facilitate construction of both an illegitimate opposition and a legitimate political opposition associated with democratic order.
The field of transitional jurisprudence. The analysis pursued here is constructivist, as it considers the transitional legal forms that emerge as a distinctive paradigm responsive to the extraordinary problem of law in periods of substantial political change. Analysis of these legal responses suggests that they defy traditional legal categorizations. In transitional jurisprudence, the conception of law is partial, contextual, and situated between at least two legal and political orders. Legal norms are necessarily multiple, the idea of justice always a compromise. In transitional jurisprudence, the nature and role of law centers upon its paradigmatic use in the normative construction of the new political regime.

This Article offers the language of a new jurisprudence rooted in prior political injustice. Conceiving of jurisprudence as transitional helps to elucidate the nature and role of law during periods of radical political change. By offering another way of conceptualizing law, transitional jurisprudence also has implications that transcend these extraordinary periods. The problem of justice during periods of political transformation has a potentially profound impact upon the resulting societal shift in norms and the groundwork for transformed constitutional and legal regimes. The unresolved problems of transitional justice often have lasting implications over a state’s lifetime. I suggest a new perspective through which to understand the significance of the enduring political controversies that presently divide our societies.

I. THE RULE OF LAW IN TRANSITION

I now turn to an exploration of the various legal responses to illiberal rule. In this Part, I suggest that adherence to the rule of law during periods of political upheaval creates a tension between rule of law as backward-looking and forward-looking, as settled versus dynamic. In this dilemma, the rule of law is ultimately contingent; rather than grounding legal order, it serves to mediate the normative shift in justice that characterizes these extraordinary periods. In democracies in ordinary times, the rule of law means adherence to known rules, as opposed to arbitrary government action. Yet revolution implies disorder and legal instability. The threshold dilemma of transitional justice is the problem of the rule of law in periods of radical political change. By their very definition, these are often times of massive paradigm shifts in understandings of justice. Here societies are struggling with how to transform their political, legal, and economic systems. If ordinarily the rule of law means adherence to settled law, to what extent are periods of transformation compatible with commitment to the rule of law? In such periods, what does the rule of law mean?

The dilemma of the meaning of the rule of law transcends the moment of political transformation and goes to the heart of the basis for a liberal state. Even in ordinary periods, stable democracies struggle with questions about the meaning of adherence to the rule of law. Versions of this transitional rule-of-law dilemma are manifest in problems of successor justice, constitutional beginnings, and constitutional change. The rule-of-law dilemma tends to arise in politically controversial areas, where the value of legal change is in tension with the value of adherence to the principle of settled legal precedent. In ordinary periods, the problem of adherence to legal continuity is created by the passage of time. In transformative periods, however, the value of legal continuity is not an option.

19. See F.A. HAYEK, THE ROAD TO SERFDOM 72 (1944) ("Government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its . . . powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge."); for a discussion of the general understanding of the role of rule of law in democracies as restraint on arbitrary power, see ROGER COTTERELL, THE POLITICS OF JURISPRUDENCE 113–14 (1989), which describes the danger of viewing the state as an entity above the law. For an exploration of the relation of rule of law to democracy, see Joan Hampton, Democracy and the Rule of Law, in NOMOS XXXVI: THE RULE OF LAW 13 (Ian Shapiro ed., 1994). The classic account of the minimum requirements of legality is found in LON L. FULLER, THE MORALITY OF LAW 33–94 (rev. ed. 1969). Ronald Dworkin offers the most prominent contemporary exposition of substantive rule-of-law theory. See RONALD DWORKIN, A MATTER OF PRINCIPLE 11–12 (1983) (arguing that "rights conception" of rule of law "requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights"); see also Frank Michelman, Law’s Republic, 97 YALE L.J. 1493 (1988) (presenting modern interpretation of government by law through reinterpretation of political theory of civic republicanism).

Margaret Jane Radin describes the philosophical underpinning of modern approaches to the rule of law as consisting of the following assumptions:

(1) Law consists of rules; (2) rules are prior to particular cases, more general than particular cases, and applied to particular cases; (3) law is instrumental (the rules are applied to achieve ends); (4) there is a radical separation between government and citizens (there are rule-givers and applicants, versus rule-takers and compliers); (5) the person is a rational chooser ordering her affairs instrumentally.

continuity is severely tested. The question of the normative limits on legitimate political and legal change for regimes in the midst of transformation is frequently framed in terms of a series of antinomies. The law as written is compared to the law as right, positive law to natural law, procedural to substantive justice, and so forth.

My aim is to restitute the rule-of-law dilemma by exploring societal experiences that arise in the context of political transformation. My interest is not in idealized theorizing about the rule of law in general. Rather, I attempt to understand the meaning of the rule of law for societies undergoing massive political change. This Part approaches the rule-of-law dilemma in an inductive manner by resituating the question as it actually arises in its legal and political contexts. It explores a number of historical postwar cases, as well as precedents arising in the more contemporary transitions. Although the rule-of-law dilemma arises commonly in the criminal context, the issues raise broader questions about the ways in which societies in periods of intense political change reason about the relation of law, politics, and justice. As shall become evident, these adjudications reveal central ideas about the extraordinary conception of the rule of law, and of values of justice and fairness in periods of political change.22

A. The Rule-of-Law Dilemma: The Postwar Transition

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

The transitional dilemma is present in changes throughout political history. It is illustrated in the eighteenth-century shifts from monarchies to republics, but has arisen more recently in the post-World War II trials. In the postwar period, the problem was the subject of a well-known Anglo-American jurisprudential debate between Lon Fuller and H.L.A. Hart, who took as their point of departure the problem of justice after the collapse of the Nazi regime.23 Such postwar theorizing demonstrates that in times of significant political change, conventional understandings of the rule of law are thrown into relief.24 Although the transitional context has generated scholarly theorizing about the meaning of the rule of law, that theorizing does not distinguish understandings of the rule of law in ordinary and transitional times. Moreover, the theoretical work that emerges from these debates frequently falls back on grand, idealized models of the rule of law. Such accounts fail to recognize the exceptional issues involved in the domain of transitional jurisprudence.25

The Hart-Fuller debate on the nature of law focuses on a series of cases involving the prosecutions of Nazi collaborators in postwar Germany. The central issue for the postwar German courts was whether to accept defenses that relied on Nazi law.26 A related issue was whether a successor regime could bring a collaborator to justice, and if so, whether that would mean invalidating the predecessor laws in effect at the time the acts were committed.27 Hart, an advocate of legal positivism,28 argued that adherence to the rule of law included recognition of the antecedent law as valid. Prior written law, even where immoral, should retain legal force and be followed by the successor courts until such time as it is replaced. In the positivist position advocated by Hart, the claim is that the principle of the rule of law governing transitional decisionmaking should proceed—just as it would in ordinary times—with full continuity of the written law.

In Fuller's view, the rule of law meant breaking with the prior Nazi legal regime. As such, Nazi collaborators were to be prosecuted under the new legal regime: In the "dilemma confronted by Germany in seeking to rebuild her shattered legal institutions . . . . Germany had to restore both respect for law and respect for justice. . . . [P]ainful antinomies were encountered in attempting to restore both at once . . . ."29 According to the German judiciary.

25. Recognition of a domain of transitional jurisprudence nevertheless raises again the issue of the relation of the exceptional rule of law to that in ordinary periods. This issue is only raised here, but is more fully addressed in my forthcoming book, Transitional Justice. See TETTEL, supra note 1.
26. See Recent Cases, 64 HARV. L. REV. 996, 1005–06 (1951) (citing Judgment of July 27, 1949, Oberlandesgericht (OLG) (Bamberg), 5 STRICHFREIT TURISCH JURISTEN-ZEITUNG 207 (1950) (FRG)).
27. In the "Problem of the Grundeichvermehrung," the issue raised in Bamberg is set out in a hypothetical somewhat abstracted from the postwar situation: The so-called Purple Shirt regime has been overthrown and replaced by a democratic constitutional government, and the question is whether to punish those who had collaborated in the prior regime. See Fuller, supra note 23, at 657.
28. For a thoughtful exploration of the meaning of legal positivism, see Frederick Schauer, Fuller's Internal Point of View, 13 LAW & PHILOS. 285 (1994).
29. See Fuller, supra note 23, at 657. Whereas the rule-of-law dichotomy was framed in terms of
there is a dichotomy within the rule of law between the procedural legal right and the moral right. In "severe cases," the moral right takes precedence. Accordingly, formalist concepts of the law, such as adherence to putative prior law, could be overridden by such notions of moral right. The natural law position espoused by the German judiciary suggests that transitional justice necessitates departing from prior putative law.²⁰

The above debate failed to focus, however, on the distinctive problem of law in the transitional context. In the postwar period, this dilemma arose as to the extent of legal continuity with the Nazi regime: What extent did the rule of law necessitate legal continuity? A transitional perspective on the postwar debate would clarify what is signified by the rule of law. That is, the content of the rule of law is justified in terms of distinctive conceptions of the nature of injustice of the prior repressive regime. The nature of this injustice affects consideration of various alternatives, such as full continuity with the prior legal regime, discontinuity, selective discontinuities, or moving outside the law altogether. For positivists, full continuity with the prior legal regime is justified by the need to restore belief in the procedural regularity that was deemed missing in the prior repressive regime; the meta-rule-of-law value is due process, understood as regularity in procedures and adherence to settled law. The natural law claim for legal discontinuity is also justified by the nature of the prior legal regime, but according to the conceptualization of past tyranny.³¹ The predecessor regime’s immorality suggests that the rule of law should be grounded in something beyond adherence to preexisting law.

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

In the postwar debate, both natural law and positivist positions took as their point of departure certain assumptions about the nature of the prior legal regime under illiberal rule.³² Both positions draw justificatory force from the role of law in the prior regime; nevertheless, they differ as to what constitutes

procedural versus substantive idea of justice. Fuller tries to elide these competing conceptions by proposing a procedural view of substantive justice. See id. at 642–43.

³⁰ For Fuller, however, it would not imply such a break because past "law" would not qualify as such for failure to comply with various procedural conditions. See Fuller, supra note 19, at 96–97.

³¹ See Gustav Radbruch, Rechtspolitik (1956); Gustav Radbruch, Die Vereinigung des Rechts, 2 Die Wandlimg 8 (1947); see also Markus Dirk Dubber, Judicial Positivism and Hitler’s Justice (1991) (reviewing Ingo Müller, Hitler’s Justice (1991)). On the natural law position on the rule of law, Fuller’s position appears more nuanced as it attempts to offer a procedural understanding of substantive justice values. See Fuller, supra note 23.

³² For an excellent account of this historical debate, see Stanley L. Paulson, Lon L. Fuller, Gustav Radbruch, and the "Posterior" Thesis, 13 Law & Phil. 313 (1994).

a transformative principle of legality. The positivist argument attempts to divorce questions of the legitimacy of law under predecessor and successor regimes. The response to past tyranny is thought not to lie in the domain of the law at all, but instead in the domain of politics. If there is any independent content given to the rule of law, it is that it ought not serve transient political purposes. The positivist argument for judicial adherence to settled law, however, relies on assumptions about the nature of legality under the predecessor totalitarian regime.³³ The justification for adhering to prior law in the transitional moment is that under prior repressive rule, adjudication failed to adhere to settled law. On the positivist view, transformative adjudication that seeks to "undo" the effect of notions of legality supporting tyrannical rule would imply adherence to prior settled law.

The natural law position highlights the transformative role of law in the shift to a more liberal regime. On this view, putative law under tyrannical rule lacked morality and hence did not constitute a valid legal regime.³⁴ Insofar as adjudication followed such putative law, it too was immoral in supporting illiberal rule.³⁵ From the natural law perspective, the role of law in transition is to respond to evil perpetuated under the past administration of justice. Because of the role of judicial review in sustaining the repression,³⁶ adjudication as in ordinary times would not convey the rule of law. This theory of transformative law promotes the normative view that the role of law is to transform the prevailing meaning of legality.³⁷

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

³³ See Hart, supra note 23, at 617–18.

³⁴ To some extent, in this normative legal theory, collapsing law and morality, the transitional problem of the relation between legal regimes disappears.

³⁵ Thus the cases of the Informers are characterized as “perversions in the administration of justice.” See Fuller, supra note 19, app. 245.

³⁶ This topic was discussed in the Hart-Fuller debate. See supra note 23; see also Möller, supra note 31.

³⁷ See Fuller, supra note 23, at 648.
lawmaking, even if it meant the worst criminal offenses of the prior regime would go unpunished.42

The dominant vision of the rule of law for the Constitutional Court was "security."43 "Certainty of the law demands ... the protection of rights previously conferred ..."44 The proposed law, which would have opened the way to ancien régime prosecutions, was classically ex post and as such threatened individual rights to repose. In its discussion of the meaning of security, the Court analogized the right of repose at issue to personal property rights. Although protection of personal property rights could generally be overridden by competing state interests, such interests, the Court maintained, ought not override an individual's criminal process rights to repose. By protecting the rule-of-law value of "security" from invasion by the state, the Constitutional Court sent an important message that property rights would be protected in the transition.

In ordinary times, the idea of the rule of law as security in the protection of individual rights is frequently considered to be a threshold, minimal understanding of the rule of law basic to liberal democracy.45 Yet in the economic and legal transitions of Eastern and Central Europe, this understanding represents a profound transformation. If the totalitarian legal system abolished or ignored the line between the individual and the state, the line drawn by the Hungarian Court posited a new constraint on the state: an individual right of security. Insistence on the protection of individual rights, said to be previously acquired, was constructed in the transition. This sent an important message that the new regime would be more liberal than its predecessor.

Compare a second case. In its second round of successor cases in this century, Germany's judiciary once again confronted the transitional rule-of-law dilemma when East German border guards were put on trial for Berlin Wall shootings that occurred prior to Unification.46 The question before the Court was whether to recognize defenses that relied upon predecessor regime law.47

42. The opinion begins with a statement of the Court's characterization of the dilemma it confronted: "The Constitutional Court is the repository of the paradox of the 'revolution of the rule of law....'" Constitutional Court of the Hungarian Republic Resolution No. 11/1992 (III.5) AB, translated in J. CONST. L. E. & CENT. EUR, 139 (1994) (hereinafter Zenevisz-Takacs Law); see also Stephen Schulhofer et al., Dilemmas of Justice, E. EUR. CONST. REV., Summer 1992, at 137.
43. See infra notes 46-49 and accompanying text.
44. See Zenevisz-Takacs Law, supra note 38.
The Berlin Trial Court framed the dilemma in terms of the tension between “formal law” and “justice,” and rejected former East German law because not everything is right which is law. Comparing the Communist laws to those of the Nazi period, the Court relied on postwar precedents holding that legal legislation lacked the status of law: “Especially the time of the National Socialist regime in Germany taught that... in extreme cases the opportunity must be given for one to value the principle of material justice more highly than the principle of legal certainty.” Procedurally, legal rights were distinct from moral rights. Characterized as “extreme cases,” the border guards cases were analogized to those of the postwar collaborators and accordingly guided by the same adjudicative principle.

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

Probing the language of the successor cases exposes a conception of the rule of law peculiar to the transitional moment. Judicial rhetoric conceptualizes

51. When the German judiciary ruled that the border guard case constituted an “extreme case,” it analogized Communist rule to that of National Socialism. In this way, the legal response to World War II injustice continued to guide contemporary adjudication in the transitions out of Communist rule. As in the postwar period, the Court invoked overriding principles of natural law. See supra notes 31, 34, 35, and accompanying text.

52. There has been a lively scholarly debate on this question, and recent comparative work concerning the role of adjudication under repressive rule in Germany under Nazi control, Latin America under military rule, and South Africa under apartheid rule. Despite substantial theorizing about the potential role of positivism and natural law adjudicative principles under prior tyrannical rule, to the extent that there has been empirical study of the judiciary’s role in repressive periods, neither principle of adjudication appears to correlate with greater rule of law in such periods. In varying contexts, scholars have concluded that variations in interpretive strategies whether of positivism or natural law do not well explain the judiciary’s role under repressive rule.

53. The transitional perspective on the meaning of the rule of law urged here sheds light on the puzzling gulf between American and Continental philosophers over the putative associations of various legal philosophies with repression and, conversely, with liberal rule. The fact that positivism is associated with repression or liberal rule on opposite sides of the ocean suggests a contingent and transitional response to its use by evil judges. In the United States, positivism is frequently associated with jurisprudence...
conventional understanding of the conception of tyranny is the lack of rule of law as arbitrariness, the transitional rule of law in the modern cases illuminates a distinctive normative response to contemporary tyranny. Where persecution was systematically perpetrated under legal imprimatur, the transitional legal response is the attempt to undo these abuses under the law.

C. Transitional Constructions of Legality

The above discussion leads to a more differentiated understanding of the rule of law in two senses, ordinary and extraordinary, and it illuminates an understanding of legality that is distinctively transitional. These understandings of the rule of law bridge the discontinuity from illiberal to liberal rule; as such, one might consider these values and processes to mediate the transition. I focus on three such mediating concepts in the discussion that follows. These are the social construction of the rule of law, the role of international law in transcending domestic legal understandings, and, finally, the core rule of law value: to transcend the passing politics of the time.

1. The Role of Social Construction

One mediating concept of the transitional rule of law is its social construction. What matters in establishing the rule of law is legal culture, not abstract or universal ideals of justice. The socially constructed understanding of the transitional rule of law is evident in the post-Communist adjudications. In the border guards case, the prevailing social understanding of law was used to justify the rejection of prior legal defenses. The validity of prior law depended on the social practices of the time, such as the norm’s publication and transparency. “In the then-GDR, too, justice and humanity

were illustrated and represented as ideals. In this respect, generally sufficient conceptions of the basis of a natural lawfulness were set out.” The border policy, which was generally secret and covered up whenever foreigners were in the country, lacked the transparency ordinarily associated with law. The guards stood at a geographical and juridical border. This treatment signaled an illegitimacy of regulation of the border in its legal culture. A similar concern animated Hungary’s Constitutional Court when it emphasized the rule-of-law value of security as continuity in the law. In the transitional context of political upheaval, the judiciary constructed the understanding of legal continuity. The perception of rule of law is created by the Court’s own adherence to procedure.

What makes law positive? Prevailing theorizing about the rule of law posits that among the conditions for law is that it be known. Knowledge of law equated with publication? In transitional periods, there is commonly a large gap between the law as written and as perceived. What makes law positive is the popular perception in the public sphere. This understanding broadens, indeed democratizes, sources of legality with societal involvement in the construction of legal culture. Indeed, in the contemporary media age, at any one time there may well be multiple sources of law, as well as numerous forms of publication, that overshadow the written law. Social understanding in the public sphere is a rule of recognition by which to evaluate the legal systems of illiberal regimes, an understanding of law that stands independent of the sovereign’s decrees and as such is less affected by political upheaval.

Guided by this mediating principle of transitional legality, the legitimacy of predecessor regime law would depend on popular understandings of legality in the ambient culture. Understanding the rule of law as socially constructed offers a principle for evaluating legality in periods of movement between dictatorships and democracies. Recognition of a legitimacy gap between the law as written and as socially perceived offers a useful way to explain law’s construction under illiberal rule. Indeed, as public belief in prevailing political systems wanes, one might expect this gap to widen, leading to the transition.

JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM (1970) (providing systematic effort to specify conditions for law).


60. See id. The Court found not only that the border policy did not comport with the prevailing social understanding of law, but also that the prior understanding of law was consonant with that of the West.

61. See supra note 42.

62. See RAZ, supra note 12, at 214; see also Fuller, supra note 23.

2. The Role of International Law

Another mediating concept of the transitional rule of law is international law. International law posits institutions and processes that transcend domestic law and politics. In periods of political flux, international law offers an alternative construction of law that, despite substantial political change, is continuous and enduring. Local courts rely upon these international understandings. The potential of this understanding of international law gained force in the postwar period. In the contemporary moment, international law is frequently invoked as a way to bridge shifting understandings of legality. In the post-Communist cases discussed above, the controversy over the attempt to revive old political prosecutions was ultimately resolved by turning to concepts of international law. For example, in its review of a law proposing to reopen political cases relating to the 1956 uprising, the Constitutional Court of Hungary reasoned that reopening such cases was discontinuous with prior law. In a second round of judicial review, the Court upheld a new statute authorizing 1956 prosecutions based upon offenses constituting "war crimes" and "crimes against humanity" under international law. The rule of law required continuity. Such continuity was considered to exist in international legal norms, for such norms override domestic law. Throughout the

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region, international law would become the basis for punishment policies because these norms transcended the politicized law of the past regime. In another border guards case, the judgment holding actions unlawful explicitly rests on international law. In periods of political flux, international law offers a useful mediating concept. The framing of the rule-of-law dilemma easily shifts from the antinomies of positivism and natural law to those of national and international law. Grounded in positive law, but incorporating values of justice associated with natural law, international law mediates the rule-of-law dilemma. Moreover, in its normative circumscription of the most heinous abuses, international law offers a source of normative transcendence. Whereas international law preserves the ordinary understanding of the rule of law as settled law, it also enables transformation. In so doing, it mediates the transition.

3. The Rule of Law as Antipolitics

Above, I suggested that the defining feature of the rule of law in periods of political change is that it preserves some degree of continuity in legal forms, while it enables normative change. The previous politicized nature of law and adjudication partially justifies nonadherence during the transition. This understanding of the rule of law as antipolitics is a common theme throughout

Constitution was silent on the relative priorities of domestic and international law. The Court suggested it would interpret the Constitution guided by international norms, declaring that "generally recognized rules of international law" took precedence. See A Magyar Kiztarsasag Aloromanya [Constitution] art. 7, cl. 1 (Hung.) ("The legal system of the Republic of Hungary . harmonizes the internal laws and statutes of the country with the obligations assumed under international law."). The conventions of other countries explicitly provide for such priority ranking. See, e.g., SYNTAGMA DES HELLAS [Constitution] art. 28, cl. 1 (Greek) (declaring that rules of international law shall prevail over contrary domestic law). See Burns, The Power of International Law Over Domestic Law: A Recent Decision by the Hungarian Constitutional Court, E. EUR. CONST. REV., Fall 1993/Winter 1994, at 32; Law on Geocide and Crimes Against Humanity Committed in Albania During Communist Rule for Political, Ideological and Religious Motives, translated in HUMAN RIGHTS WATCH, HUMAN RIGHTS IN POST-COMMUNIST ALBANIA supp. A. (1996) (establishing basis for prosecuting former Communists).

The role of customs in the formation of international law is described in Michael Atkinson, Custom as a Source of International Law, 47 BRIT. Y.B. INT'L L. 1 (1974-75).

For a related discussion regarding elements of natural and positivist law present in international law, see SIKLAR, supra note 55, at 126-28.

An illustration is the concept of crimes against humanity, suggesting conceptually opposite and yet related values, in the universalized normative response to penalization epitomizing absolute evil. See J. Balkin, Nested Opposites, 99 YALE L.J. 1569 (1990) (book review); see also infra Part II B.

International law principles surface in reconciling the threshold dilemma of law in periods of political transformation. See infra notes 119-22 and accompanying text.
The contemporary transitional controversies discussed above. The border guards trial was characterized as an "extreme case," justifying departure from ordinary rule-of-law considerations.\textsuperscript{73} The German Court elevated what was morally right over the political. Other cases in the region suggest similar judicial interpretations of the rule of law. Hungary's invalidation of the 1956 prosecutions law presented a limit on politicized anti-Communist policies.\textsuperscript{74} If under repressive rule the administration of justice was conducted purely as an exercise of political will,\textsuperscript{75} this understanding is most clearly disavowed when the successor regime adopts the overriding rule-of-law value that most clearly expresses a principled normative vision, independent of transitory politics.

The construction of the transitional rule of law as independent of politics shares certain affinities with the understanding of the rule of law applicable in ordinary times. Yet controversies over transitional justice in highly politicized contexts present hard cases for adherence to the rule of law. Despite radical political change, the rule of law is not primarily motivated by politics. Transitional jurisprudence reveals a shining vision of the rule of law as antipolitics.

D. The Transitional Judiciary

In periods of political transformation, the problem of legality is distinct from the problem of the theory of law as it arises in established democracies in ordinary times. There is a working out of core questions about the legitimacy of the new regime, including the nature and role of the transitional judiciary. The choice of principles of adjudication implies a related question about where, as an institutional matter, the work of transformation should lie: judiciary or legislature? This is the question to which I now turn.

The transitional justice dilemma arises during periods of substantial political change. When a legal system is in flux, the challenge to ordinary understandings of the rule of law is surely at its greatest. This was less true of postwar transitions than of the more contemporary movements from Communist rule, periods of simultaneous economic, political, and legal transformation. In these periods, newly founded constitutional courts have borne an institutional burden of establishing new understandings of the rule of law.\textsuperscript{76} It could be questioned whether continuity with the prior regime is a determination properly for the transitional judge, or a political question properly subject to broader public debate. When this question arose in the contemporary post-Communist transitions, the judiciary assumed the decisionmaking responsibility. This issue began as a political question in unified Germany, but in its consideration of the question of the validity of German Democratic Republic (GDR) law in the border guards cases, the Berlin court elided the political agreement of the two Germans.\textsuperscript{77} In so doing, the Court demonstrated its independence from the legislature and its political agenda.\textsuperscript{78} Similarly, when Hungary's Constitutional Court overturned the 1956 prosecutions law, it sent a similar message of independence to the country's political branches.\textsuperscript{79} These decisions reveal a core understanding of rule of law forged by a transitional judiciary striving for independence from politics.

Political theorists often distinguish liberal from illiberal regimes by their constitutions; the role of transitional constitutionalism is discussed more extensively in Part III. Yet the central factor distinguishing liberal political systems seems to depend less on the specifics of any one institutional arrangement, and more on the degree to which there is a sense of meaningful enforcement and understanding of the rule of law. Although the Communist era constitutions enumerated rights, these were largely rights on paper that were rarely enforced. Therefore, after Communism, merely enacting new rights charters would not produce a sense of transformation in the rule of law. Responding to this distinctive legacy of injustice are the dozen constitutional courts that seek to enforce the new states' constitutions.\textsuperscript{80} This transformative role for the judiciary is a "critical" legal response that affirmatively signals a turn toward the constitutional systems of liberal democracies.\textsuperscript{81}


\textsuperscript{74} See supra note 65. In evaluating a law that would have extended the time for prosecution of crimes committed under prior rule, the Czech Constitutional Court upheld it on the basis that it would serve the goal of undoing the past politicized punishment policy and administration of justice. The law would suspend the time limitations for 41 years (the time between February 25, 1948 and December 29, 1989) for acts not previously prosecuted or punished for "political reasons." See Decision on Act No. 198/1993 Sb., supra note 41.

\textsuperscript{75} For an account of the nature of such decisionmaking in illiberal political systems see the discussion of decisionism in CARL SCHMITT, POLITICAL THEOLOGY 53–66 (George Schwab trans., 1985).

\textsuperscript{76} For description of the beginnings of this development, see Herrman Schwartz, THE NEW EAST EUROPEAN CONSTITUTIONAL COURTS, 13 MICH. J. INT'L L. 741 (1992). The burden of transformation to a rule-of-law system has to some extent devolved on the judiciary, chiefly the new constitutional courts. See Ruti Teitel, POST-COMMUNIST CONSTITUTIONALISM: A TRANSITIONAL PERSPECTIVE, 26 COLUM. HUM. RTS. L. REV. 167 (1994). For a wide-ranging collection of essays on East European constitutional courts, see CONSTITUTIONALISM IN EAST CENTRAL EUROPE (Irena Grudzińska-Gross ed., 1994). A similar transformative role can be seen in recent transitions, such as in South Africa, South Africa's transitional Constitution creates its new constitutional Court, See S. AFR. CONST. ch. VII (1993).

\textsuperscript{77} The Unification Treaty contemplated continuity in former GDR criminal law, providing that East Germany's criminal code should be applied to criminal acts committed before unification. However, the Court rejected the border guards' defenses grounded in GDR law. See Judgment of Jan. 20, 1992, Landgericht (LG) (Berlin), 13 JURISTEN ZEITUNG at 694.

\textsuperscript{78} However, the transformative response to the political was less necessary in unified Germany than elsewhere in the region because of the nature of the transitions.


\textsuperscript{80} See Teitel, supra note 76, at 169–76.

\textsuperscript{81} For discussion of comparable transformative constitutional responses, see infra notes 197–99; 277–79; and accompanying text.
The constitutional courts assist in the transformation to rule-of-law systems in a number of ways. First, the courts emerge out of systems of centralized state power; as new forums specially created in the transformation, their very establishment defines a break from past political arrangements. Second, access to constitutional courts through litigation enables a form of participation in the fledgling democracy. Over time, access to the courts could enable popular input into constitutional interpretation, developing a societal understanding of limited government and individual rights protection. Popular access to courts for individual rights enforcement is a potent symbol of a new governmental openness. Third, to the extent the constitutional courts have explicit mandates to engage in judicial review, they have become guardians of the new constitutional order. They are active in interpreting constitutional norms under prior constitutions, pursuant to general mandates to uphold the rule of law. The constitutional courts have the potential to delimit state power, and to redefine individual rights, thus creating a rights culture. Through transformative adjudication, the transitional judiciary deploys activist principles of judicial review toward normative change and a more liberal rule-of-law system.

Transformative adjudicatory practices raise a crucial question: Insofar as the transitional judiciary bears the burden of the transformation of the rule of law, to what extent are such practices compatible with the role of the judiciary in established democracies? In democracies in ordinary times, activist judicial decisionmaking is generally considered illegitimate. This is so largely for two reasons. First, retroactivity in judicial decisionmaking challenges the rule of law as settled law. Second, judicial originality is thought to interfere with democracy; unlike legislative decisionmaking, judicial decisionmaking lacks the legitimacy associated with democratic processes. To what extent are these objections relevant to adjudication in transitional times?

Our intuitions about who ought to make law depend upon implicit assumptions about democracy and democratic accountability that ought not be automatically applied to illiberal regimes, nor to regimes beginning to move away from such rule. In established democracies in ordinary times, our

82. See Ethan Klingberg, Judicial Review and Hungary’s Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Refoundation of Property Rights, 1992 BYU L. REV. 41 (discussing remarkable access implied by Hungary’s peremptory standing rules). While Hungary offers the broadest access, it is not alone in the region in contemplating participation in constitutional litigation by political actors.

83. In much of the region, broad jurisdictional rules allow abstract judicial review, and access to review by political actors, such as the president or minority factions of the legislature. See Teitel, supra note 76, at 186–87.


85. See DWOREK, Takoz Rights Seriously, supra note 6, at 84.

86. See id. at 84, 138.


88. During the initial political shift, transitional parliaments are generally vestiges of the prior repressive regime. See Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, 14 CARDOZO L. REV. 661, 674–75 (1993).

89. See supra notes 23–24 and accompanying text.

90. For a discussion relating Russia’s current plight to the absence of concentrated state power, see Stephen Holmes, Can Weak State Liberalism Survive? (Spring 1997) (paper presented at Colloquium on Constitutional Theory, N.Y. University School of Law, on file with author).

91. See Teitel, supra note 76, at 182–85.
Finally, transformative adjudication is self-regarding. By changing adjudicatory principles and practices, institutions compromised by their decisionmaking under prior rule can transform themselves. In high-profile cases, a compromised judiciary can transform itself by drawing the line on past precedent and changing its principle of adjudication. This self-regarding institutional mechanism is particularly pertinent where the judiciary supported prior repressive rule. Where the judiciary is not the successor to a compromised institution, there are other beneficial legitimating implications of transformative adjudication.

Theories of adjudication associated with understandings of the rule of law in ordinary times are inapposite to transitional periods. Our ordinary intuitions about the nature and role of adjudication relate to presumptions about the relative competence and capacities of judiciaries and legislatures in ordinary times that simply do not hold in unstable periods. Indeed, the cases discussed above illuminate an extraordinary role for courts exercising principles of transformative adjudication. In periods of political change, the very concerns for legitimacy and democracy that ordinarily constrain activist adjudication may well support such adjudication as an alternative to more politicized uses of the law.

E. The Transformative Adjudicative Domain

I began this Part by positing that there is a special dilemma in adherence to the rule of law in periods of political change. The ordinary understanding of the rule of law as adherence to settled law is in tension with transformative understandings of the rule of law. I now consider what normative rule-of-law principles are associated with adjudication in periods of political change.

In these extraordinary periods, as discussed above, rule-of-law norms do not constitute universals. The tensions posed by adherence to the rule of law in these periods are reconciled through a number of mediating concepts. Legality in such periods is socially constructed; in some part, it is judge-made. Exploration of the precedents in such periods suggests that understandings of the rule of law are constructed within a transitional context. By cabining politicized uses of the law, this principle of legal decisionmaking defines an interim postrevolutionary space on the road to democracy.

Recognizing a domain of transformative adjudication during periods of political transition has significant implications for prevailing legal theory about the rule of law. First, recognition of such a domain throws into relief the extent to which prevailing legal theory has failed to take account of the significance of varying normative understandings of the rule of law manifested in transitional, as opposed to ordinary, times. Further, the transitional rule of law poses an implicit critique of the dominant theories regarding the nature and role of law. In the dominant liberal position, lawmaking through adjudication is conceived as somehow neutral and autonomous from politics. These liberal understandings are challenged by accounting for circumstances associated with a role for transformative law, where the rule of law is defined in constructive relation to politics past.

The domain of transformative adjudication may pose a more serious challenge to critical theorizing of law. Critical legal theorizing has been criticized for going too far in collapsing law and politics. As such, this theoretical approach has lacked explanatory power for why, or in what circumstances, law has any distinctive claim on society. Although critical legal theorizing has laid claims to a diminished rule of law as a general matter, the above discussion suggests that this is most true in extraordinary political circumstances. The transitional rule of law clarifies a place and a role for hyper politicized adjudication. From the perspective of critical legal theory, the challenge posed by the transformative adjudicative domain discussed here is the challenge posed by the boundedness of law’s political action. Recognition of this domain reveals how the jurisprudence of these periods shapes the transition. Normative understandings of the role of law vary, not unsurprisingly, with political circumstances. Within transitional democracies, therefore, there is a place and a role for bounded political judgment.

Beyond adjudicatory practices, normative change constructive of a new legality is also effected through other forms of law. Criminal sanctions, ordinarily limited to punishing individual wrongdoing, play a broader role during transitions in challenging the legitimacy of past rule. These legal responses sanction and delimit abuses of past state power. In the next Part, I turn to the uses of criminal justice in transformative periods.

II. CRIMINAL JUSTICE

Transitional justice is commonly linked in the public imagination with criminal justice and the trials of ancien régimes. The enduring symbols of

92. See, e.g., MÜLLER, supra note 31, at 201–98 (discussing compromised judiciary in postwar Germany); cf. e.g., OSIEL, supra note 52 (discussing alternative strategies of judiciary under repressive Latin American rule).

93. This is a longstanding precept of the rule of law in liberal political theory, running from Friedrich Hayek to the present. See, e.g., DWORKIN, LAW’S EMPIRE, supra note 6; PÖBLER, supra note 19; HAYEK, supra note 15; LIBERALISM AND THE GOOD, supra note 6.


95. On critical legal theory, see supra note 7. For exploration of the idea of the rule of law from the perspectives of liberalism and critical legal theory, see generally ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990).

96. See supra notes 105–07 and accompanying text.
the English and French revolts are nonmonarchical. The trials of Louis XIV and Louis XVI. A half-century after the events, the monument to the nazis' defeat in World War II remains the Nuremberg Trials. Greece's trials of its colonels represent the triumph of democracy over military rule in Central Europe. Argentina's only trial marked the end of decades of repression throughout Latin America.

Successor trials dominate our understanding of justice in transitional periods. The harshest form of law has an impact on symbolic dimensions extending beyond its incidence. Criminal justice is thought to play a foundational role in the political transition. The claim is that trials can create a new sense of legal order; that in the move to more liberal democracy, trials can serve as foundations.

The notion of trials as foundations for liberalizing political change derives from longstanding practices linking such legal responses to the postwar justification for state violence. In trials going back to the Middle Ages, the tyranny of monarchical regimes is captured in the unjust war. Law's role is to express the justice of the successor regime. Thus, attribution of criminal responsibility to prior political leadership for waging unlawful war, or other analogous acts of state, is the thread running through the ancient successor trials of the city-state tyrants described by Aristotle, the trials of Kings Charles I and Louis XVI, the Nuremberg Trials, and more recent successor trials.

Contemporary political theorizing frequently justifies successor trials by relating criminal law enforcement to societal prospects for consolidating democracy. This version of the consequentialist argument is grounded in the rule of law. Successor trials are thought to advance transformation by drawing a line between regimes, through processes that simultaneously delegitimize the predecessor and legitimate the successor regimes. The trials of Kings Charles I and Louis XVI and the Nuremberg Trials have been characterized as foundational political acts: "Revolutionaries must settle with the old regime: that means they must find some ritual process through which the ideology it embodies ... can be publicly repudiated." Furthermore, "the [King's] trial was an act of destruction as well as the vindication of a new political doctrine: it represents the symbolic disenchantment of the realm as well as the establishment of a secular republic." The trials of kings expressed the principle of equality under the law, instantiating the transition from monarchy to republic.

Although successor trials are thought to play a distinctive foundational role, this Article contends that the function of such trials is less foundational than transitional. Trials offer a transitional mechanism for normative transformation to express public condemnation of aspects of the past, as well as public legitimation of the new rule of law. In particular, trials make it possible to isolate and delegitimize an individual past and wrongdoing. When societies move away from illiberal rule, the defining normative shift is in the status and treatment of the individual; construction of social understandings of individual responsibility chiefly occurs through the processes of criminal justice. Through the individuation of responsibility, trials offer a mechanism for recalling and disowning past wrongdoing, while confirming societal legal processes and institutions.

Despite the claim that successor trials serve to establish more liberal regimes, periods of political upheaval challenge the use of the criminal law for normative purposes. Using trials to construct transition implies a profound dilemma created by the tension of mediating discontinuity and continuity in the law. Successor criminal trials are expected to lay the foundation of the transition by expressing disavowal of predecessor norms, yet for such trials to realize their normative potential, they must be prosecuted in keeping with the full procedural legality associated with working democracies in ordinary times. Otherwise, paradoxically, successor trials become vulnerable to challenge as political justice, where they may even threaten the construction of a fledgling liberal system. Thus, the attempt to use the criminal laws for normative change ultimately culminates in an extraordinary partial criminal sanction, in the use of criminal law primarily for its normative rather than punitive purposes.

A. The Dilemma of State Crimes but Individual Justice

Using trials to construct individual responsibility for persecution in periods of political shifts raises a dilemma. There has long been an intuitive sense that

97. See infra text accompanying notes 111, 113–21.
98. See infra notes 163.
99. See supra note 3; infra note 131, 162.
102. See infra notes 105–07, 109–10 and accompanying text.
103. Successor trials have been defended along these grounds: "[T]he political trial may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system." SKLAR, supra note 95, at 145. Similarly, Otto Kirchheimer has written of the demand "for the construction of a permanent, unmistakable wall between the new beginnings and the old tyranny." Kirchheimer, supra note 1, at 308.
106. Id.
107. For the classical arguments for punishment's role in expressing this liberal norm, see George P. Fletcher, RETHINKING CRIMINAL LAW (1973); and H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968).
108. The nature of this transitional sanction is more fully discussed infra Section I.D.
it is fair to assign responsibility to ancien régime leadership, linking up legal and political understandings of responsibility. During transitions, justice has generally been brought to bear against the top political leadership. Historically, responsibility is commonly understood in terms of military hierarchy and related principles of command responsibility. Predicating criminal responsibility upon the basis of military ideas of official responsibility might be sensible in a postwar context, for political change often follows war. Yet such shifts also occur in other ways; thus the military analogy does not easily guide the broader question of successor justice. In particular, the historical paradigm does not fully account for how to conceptualize individual responsibility for wrongdoing perpetrated under repressive rule, and the extent to which responsibility for past wrongdoing under illiberal regimes is fairly attributable to top political leadership. Equating criminal liability with political responsibility is foreign to penal concepts applicable in ordinary times; as a political basis for prosecution, it poses a challenge to the rule of law.

B. The Nuremberg Paradigm Shift

While the historical paradigm attributed responsibility to the leadership of the ancien régime, that standard changed with Nuremberg. The Nuremberg Trials are commonly considered the archetypal case of successor criminal justice in modern times. Nuremberg’s significance leads back to the failure of trials after World War I, linked to the resurgence of German aggression and the advent of World War II. War-related guilt was said to prevent transition to democracy: The failure of accountability signified the failure of liberalization.

With Nuremberg, the paradigm of accountability shifts from national to international processes and from the collective to the individual. After Nuremberg, for the first time under international law, the response to persecution implied delimiting state power through the concept of individual responsibility. Prosecutions of past regime leaders effect this transformation. The trial sanctioned the past regime’s wrongdoing, moving beyond the state to the individual, and from political to legal judgment. In the Nuremberg Principles, for the first time, responsibility for atrocities under international law is attributed to the individual. Under traditional military rules, “due obedience” to orders was a defense, but under the Nuremberg Principles, even those acting under orders of their superiors could be held responsible. Furthermore, public officials could no longer avail themselves of a “head of state” defense based on sovereign immunity, but instead could be held criminally responsible. By eliminating the “act of state” and “superior orders” defenses, the Nuremberg Principles pierced the veil of diffused responsibility for wrongdoing perpetrated under illiberal regimes. With the challenge to traditional defenses to individual responsibility, potential individual criminal liability for state wrongdoing was dramatically expanded. These principles of criminal justice instantiate the core rule of law principle of equal applicability of the law.

The strength of Nuremberg as precedent is not evident in international trials a half-century later. Nevertheless, Nuremberg’s real legacy is that it spawned the dominant approach to state injustice. How justice was done


110. The military paradigm offers a way to conceptualize a regime’s accountability. In the law of war, the principle of command responsibility affords a basis for attributing responsibility to superiors for wrongdoing. This is reinforced by the Nuremberg principles that lifted the defense of immunity from heads of state. The extreme in status-based prosecutions after Nuremberg is illustrated in the Tokyo war crimes trials, where the principle of command responsibility was broadly enforced. See Judgment in the Tokyo War Crimes Trial, 1948, reprinted in Part in CRIMES OF WAR: A LEGAL, POLITICAL, DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS AND SOLDIERS FOR CRIMINAL ACTS IN WARS 113 (Richard Falk et al. eds., 1971); see also In Re Yamashita, 327 U.S. 1, 13–18 (1946) (noting that charges against commander of Japanese forces “adequately allege” violation of law of war).

In subsequent trials of high-ranking German army officers, the Iwakuma standard was rejected, as the courts insisted on knowledge and individual participation, or acquiescence in the criminal acts or criminal neglect. See 11 TRAILS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462 (U.S. v. von Leeb) (1948); id. at 1230 (U.S. v. Lins).

This version of the command responsibility principle would become entrenched in the international legal conventions governing war. Failure to take measures to avert particular harm is proscribed by the postwar Geneva Conventions. Explicitly rejecting Iwakuma’s standard, the 1949 Geneva Conventions, Article 8 of the Conventions, measures to “prevent or repress breaches” of Article 50 of the Conventions, knowledge triggers a duty to take all “feasible measures” to “prevent or repress the breach.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Protocol I, June 8, 1977, 1125 U.N.T.S. 3, 43, 16 I.L.M. 1391, 1428–29.

111. See SHEKAR, supra note 55, at 145.

112. Despite the Allies’ attempt to obligate Germany to hold its war criminals accountable, few trials were held, and there were virtually no convictions. For an account of these failed national trials, see George Gordon Battle, The Trials Before the Leipzig Supreme Court of Germany Accused of War Crimes, 5 VA. L. REV. 1 (1921).


115. See id. Principle I (“Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.”).

116. See id. Principle IV (“The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.”).

117. See id. Principle III (“The fact that a person committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”).

118. See supra text accompanying notes 93–95. Here we see affinities between transitional understandings of the rule of law and of criminal justice.

119. The first such international criminal proceedings occurred a half-century later, convened in the Hague. See Statute of the International Tribunal for the Former Yugoslavia, art. 5, annexed to Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 908, U.N. GAOR.
at Nuremberg has become virtually synonymous with successor justice.\textsuperscript{120} Nuremberg's transformation of our understanding of individual responsibility for grave state crimes implies a great potential for successor criminal justice. Yet it also leads to the following dilemma: The Nuremberg Principles imply a radical expansion of potential individual criminal liability, at both ends of the power hierarchy, with no clear stopping point.\textsuperscript{121} The Principles offer no guidance for deciding among all those potentially liable whom to bring to trial.

The post-Nuremberg expansion in potential criminal liability raises a real dilemma for successor regimes deliberating over whom to bring to trial and for what offenses. After Nuremberg, what are the normative priorities in successor punishment policy? How should individual criminal responsibility be conceived in the attempt to use successor justice as the normative response to past evil? As a practical matter, the vast numbers of persons implicated in modern persecution, the scarcity of judicial resources in transitional societies, and the frequently high political costs of successor trials result in few trials.\textsuperscript{122} Given these constraints, viable successor criminal justice has been furthered through selective or exemplary trials.\textsuperscript{123} Yet this approach to successor criminal justice appears to revert back to the historical paradigm.\textsuperscript{124} Selective prosecutions targeting high officials threaten the liberal principle of individual responsibility,\textsuperscript{125} hence this is a paradoxical approach to transitional criminal responsibility. Insofar as the selective prosecutions approach elevates official status over traditional understandings of criminal liability, it challenges our sense that the level of fault should determine criminal responsibility.\textsuperscript{126} Nevertheless, our intuitions regarding the nature of criminal liability in ordinary times may not account well for transitional criminal justice. State crimes perpetrated in the context of illiberal rule commonly imply a special case of government wrongdoing, of violation of special duties, such as official responsibility for subordinates and the state's duty to protect its citizens.\textsuperscript{127} Exemplary prosecutions must walk a thin line if they are to express the intended democratic ideal.\textsuperscript{128}

Contemporary successor trials have generally attempted to hold the political leadership accountable for the worst abuses of repressive rule. After World War II, the actions of the National Socialists and their collaborators prompted massive attempts at criminal accountability.\textsuperscript{129} In the second wave of political change in Southern Europe, Greek and Portuguese juntas were brought to trial.\textsuperscript{130} In the third wave of political change, there were national trials in Latin America, East Europe, and Africa. Argentina put its military on


\textsuperscript{121} See generally Hart, supra note 107, at 114-35 (exploring elements of mens rea giving rise to criminal responsibility).

\textsuperscript{122} For exploration of some of these questions, see generally Sanford Levinson, Responsibility for Crimes of War, in WAR AND MORAL RESPONSIBILITY 104 (Marshall Cohen et al. eds., 1974); Dennis F. Thompson, Criminal Responsibility in Government, in NOMOS XXVII: CRIMINAL JUSTICE 201 (J. Roland Pennock & John W. Chapman eds., 1985); and Richard Wasserstrom, The Responsibility of the Individual for War Crimes, in PHILOSOPHY, MORALITY, AND INTERNATIONAL AFFAIRS 47 (Virginia Held et al. eds., 1974).

\textsuperscript{123} For an example in the Greek Torture Trials, see O'Donnell & Schmittner, supra note 10, at 29-30, which discusses Greece's selective prosecutions.

\textsuperscript{124} Prosecutions of those implicated in World War II atrocities still comprise the largest body of precedent regarding criminal accountability. These national trials span close to five decades, encompassing common law, civil, and socialist legal systems. See supra notes 110-17 and accompanying text. See generally Randolph L. Braham, Genocide and Retribution (1983); Inge S. Neumann, European War Crimes Trials (1951); Rocker, supra note 41; Symposium, Holocaust and Human Rights Law: The Fourth International Conference, 12 B.C. THIRD WORLD L.J. 1 (1992); Justice Minister: 5,570 Cases of Suspected Nazi Crimes Remain Open, WEEK IN GERMANY, May 3, 1996, at 7 (reporting Germany has prosecuted 5,786 war criminals, 6,494 convicted). For a full bibliographic listing, see War Crimes, War Criminals, and War Crimes Trials (Norman F. Todd, ed., 1946) [hereinafter War Crimes Bibliography].

\textsuperscript{125} For a discussion of the Greek trials, see infra note 163 and accompanying text. For a discussion of the Portuguese transition, see Kenneth Maxwell, Regime Overthrow and the Prospect for Democratic Transition in Portugal, in TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE 109-37 (Guillermo O'Donnell et al. eds., 1986).
There were trials convened as well in Rwanda and South Africa, and recently in Asia. In isolated trials of Communists in East Europe, the pervasiveness of wrongdoing in totalitarian societies has generally defied principled attempts to secure criminal retribution. The difficulty of holding the prior political leadership accountable stems from other recurring questions of justice in periods of massive political change. In the successor trials following totalitarian rule, the attempt to apply a priority principle based on political status and to bring the leadership to justice for the worst crimes has meant successor prosecutions of offenses perpetrated either at the very beginning of Communist rule or during the regime's last gasps. Returning to offenses committed in the course of the Communist takeover means going back half a century. Bringing trials after such a lengthy passage of time incurs grave jurisdictional problems necessitating tampering with prevailing law. Such irregularities undermine the legality of the trials, and risk a message of political justice. Thus attempts to prosecute past wrongdoing have tended to focus on the violence attending last-ditch efforts to sustain Communist rule. These attempts at securing individual accountability seem strangely beside the point. Prosecuting offenses committed in the predecessor regime's last gasps misses the nature of totalitarian rule, and thus cannot express a normative response to its distinctive form of repression.

Contemporary trials hold the leadership accountable on the charge of "bad rule." Bad rule after the Soviet collapse has generally meant economic crimes. In the recent transformations from command economies to free market systems, economic crimes prosecutions delegitimize the predecessor and legitimate the successor regimes. To the extent past party practices could be shown to be corrupt and unlawful, the effort was to put Communism outside the bounds of legitimate political choice. Just as the trials of the eighteenth-century transitions from monarchic rule were used to attack the institution of kingship, so too in the twentieth century, transitional successor trials are used to delegitimize Communist rule.

This prosecution policy raises rule-of-law problems endemic to successor justice. Successor trials commonly raise the problem of retroactivity, because

114. See Payem Akhavan, The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment, 93 Minn. L. Rev. 267, 274 (1998); Robert Green, South African Apartheid Assasiastion Trials, 70 N.Y.U. L. Rev. 786, 840 (1995);see also supra notes 101–02. Prior to the lifting of the ban on travel in 1996, it was illegal to visit Cyprus or Turkey, which have been treated as ad litem movements.
115. See The Mighty Fall in South Korea, ECONOMIST (London), Aug. 31, 1996, at 31 (discussing treason charges against former Presidents for putting down Kwangju uprising); Tim Shorrock, Ex-Leaders Go on Trial in Seoul, J. COMM. Feb. 27, 1996, at 1A.
116. For a judicial account of the response in the region, see Tina Rosenberg, The Haunted Land (1996). By far, the majority of the trials have been in unified Germany. In Germany, there have been trials at all levels, relating to the border shootings, as well as other Communist-era wrongdoing. More recently, in the post-Communist transitions, there have been scattered trials of the top leadership in Romania and Bulgaria, and trials of high- and mid-level party officials, in the Czech Republic. See infra note 138. Following political regime changes in the Balkans and in Rwanda, there have been domestic and international war crimes trials. See supra note 132; infra notes 143, 150, 155.
117. For a discussion of these dilemmas in adjudications of the rule of law in transformative periods, see Stephen Rose and Tova孩子, "Political Trials in Transitional Countries," 60 Int'l L. Rev. 25 (1996).
118. In Hungary, for example, a 30-year limitations law blocked trials of those who had used violence to put down the 1956 uprising. The attempt to lift the law after the fact was deemed unconstitutionally ex post facto, for all except the most serious crimes. See supra notes 42–45, 68–69, and accompanying text. For related discussion see supra notes 100–08 and accompanying text. Similarly, in Poland, the statute of limitations was lifted in 1991 on crimes committed between 1946 and 1952, to allow the initiation of new criminal prosecutions. See Patricia Kola, Former Security Officers Go on Trial for Torture in Prisons, UPI, Oct. 13, 1993, available in LEXIS, Nexis Library, UPI File. Similar tampering with the prior limitations law occurred in the Czech Republic, and was even sustained by its Constitutional Court. See Decision on Act No. 198/1993 5b, supra note 41.
119. For discussion of the role of law issues raised by such irregularities, see Schulhofer et al., supra note 38, at 17.
120. Whether under socialist or conventional law, criminal liability is generally circumscribed on the basis of passage of time. Perhaps the extreme case of the attempt to nevertheless accommodate the criminal response after totalitarian repression was Germany's prosecution of its former East German Stasi security police for murder. The attempt to bring this senior official to justice led the law back to 1931, involving 61-year-old offenses relating to murder committed in the last days of the Weimar regime. Prosecuting Mielke for offenses committed under the predecessor regime hardly related to the abuses perpetrated under Communist leadership. Mielke's case epitomizes the difficulty of responding to repression within ordinary understandings of criminal justice. See Erich Mielke Sentenced to Six Years for 1951 Murders, Faces Other Charges, WEEK IN GERMANY, OCT. 29, 1993, at 2.
normative change frequently implies prosecutions of new offenses enacted after
the fact. When prosecutions fail to guarantee prospectivity, as when they imply
predominant offenses that have lost force, they challenge ordinary
understandings of the rule of law. When the elements of political authority and
the gravity of offense become disconnected, the purpose laid bare is the
political one of eliminating the opposition. This policy risks being perceived
as political justice, threatening the normative purposes of prosecution.

An alternative line of successor trials focuses criminal accountability on
those most politically responsible, but instead upon perpetrators of the worst
offenses. This offense-based approach leads all the way down to the lowest
rung of the totalitarian state, to the police and guards who personally
committed brutalities. Greece’s 1975 “torturers’ trials” represent an illustration
of offense-based trials. A more contemporary example is the Balkans
trials. As with the trials of the political leadership, offense-driven trials do not
fit easily within the criminal justice framework applicable to ordinary
times. Although the trials comprehend the most serious offenses of prior rule,
the gravamen of these prosecutions, torture or war crimes, are not generally
considered offenses under prevailing law. When offense-based successor trials
imply tampering with prevailing procedure, these irregularities can undermine
the rule of law. Moreover, insofar as such trials seem to exonerate leaders,
they appear to scapegoat those brought to justice. Such prosecutions raise the
perception of politicization, and challenge criminal justice’s ability to construct
the transition.

C. The Crime Against Humanity and Contemporary Tyranny

The normative potential of transitional criminal justice is most clear in the
response to the most extreme form of persecution. Prosecution of the crime
against humanity exemplifies a transitional measure of a critical transformative
form. By definition, the crime against humanity is the core offense of
modern repressive rule, the paradigmatic offense against mankind. The crime
against humanity comprises grave offenses, such as murder, deportation, and
torture—long considered crimes when committed in wartime against civilians—as well as persecution based on political, racial, and religious
grounds. Crimes against humanity are offenses that transcend national

146. At Nuremberg, prosecution was limited to those crimes against humanity also in some way
related to the war. Though formally an independent charge, the crime against humanity was assimilated
into other war crimes offenses, including violating the boundaries of permissible war. For an account,
see Taylor, supra note 140, at 8–20. See also EUGENE DAVISON, THE TRIALS OF THE GERMANS 1–38
(1966).

147. Through its international prosecutions, Nuremberg epitomized the central concepts of the crime
against humanity, but the concept precedes its codification at Nuremberg. Such international remembrances
occurred, for example, in response to German-Turkish warfare in 1827. See generally WAR CRIMES
BIBLIOGRAPHY, supra note 129, at 114–19; Egon Schweitz, Crime Against Humanity, 23 B.R.T. Y.B. INT’L
L. 173 (tracing development of concept of crimes against humanity since Hague Convention of 1907).
Similarly, in the early 1900s, there were international remembrances “in the name of humanity” against
persecution in Romania and Russia. Regarding the World War I period, there were international responses
above to Turkish war crimes. See JAMES E. WILDS, PROLOGUES TO NUREMBERG: THE POLITICS AND
DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 157 (1982) (referring to 1919 characteristic
of Armenian massacres as offending “what might be called the law of humanity or the moral law”)
(quoting 1919 remark of Greek Foreign Miniser Nicolas Politis). Following World War I, a commission
convened regarding the methods used in the waging of the war and declared that those practices violated the
“established laws and customs of war and the elementary laws of humanity” and were accordingly
liable to criminal prosecution. See U.N. WAR CRIMES COMM’N, HISTORY OF THE UNITED NATIONS WAR
CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 36 (1948); Commission on
Responsibility of the Authors of the War and on Enforcement of Penalties, Mar. 20, 1919, reprinted in 14
AM. J. INT’L L. 95 (1920). The 1917 offenses were similar to those later described after World War II;
only crimes which either by their magnitude and savagery or by their large number or by the
fact that a similar pattern is applied at different times and places, endangered the international
community or shocked the conscience of mankind, warranted intervention by states other than
that on whose territory the crimes have been committed, or whose subjects have become their
victims.

See U.N. WAR CRIMES COMM’N, supra, at 175.

148. See International Law Commission, supra note 114, Principle II. The fact that internal law does
not impose a penalty for an act that constitutes a crime under international law does not relieve the person
of War, Aug. 12, 1949, 6 U.S.T. 3510, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions
the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have

149. transitional jurisprudence has a broader function than the mere neutralization of state power or
the protection of individual rights. As the crime against humanity is often prosecuted
outside the affected territory, in the absence of regime change, it is perhaps the
purest illustration of the potential of law to effect normative transition and to
offer a way to mediate the dilemma of successor justice. The concept is
exemplified whenever states respond to atrocities in ways that transcend
national borders. Indeed, the very response to the crime against humanity
instantiates its core value of transcendent justice.
the crime occurs is considered the place of the wronged community, every
state could consider itself wronged by a crime against humanity, and thus
every state is free to bring perpetrators to trial. The central idea of the
crime as an offense against all humanity is inextricably connected to the
jurisdictional principle of universality and prosecutability by all nations.
Similarly, such prosecutions are unconstrained by the ordinary parameters
of time. While ordinarily criminal offenses must be written into domestic penal
law to avoid violating basic principles against retroactivity, the crime
against humanity is considered an offense “among civilized nations,” and it is
therefore punishable with or without legislation. Thus, between the Nazi
and Communist reigns of terror and their successor prosecutions, there are gaps
of close to half a century, colliding with our ordinary intuitions about
criminal justice delayed.
In the crime against humanity, distinguished by absence of ordinary jurisdictional limits, the potential of the criminal law transcends political boundaries and the need for regime change.
Over the years, the meaning of the crime against humanity has a
forged the definition of modern persecution. At first, the crime was conceptualized on an objective basis, as an offense defined in terms of classes of victims. Thus,


150. Thus, in the Eichmann case, the jurisdictional principle of universality is considered inextricably bound up with the nature of the crime against humanity. Adolf Eichmann’s abduction from Argentina and his prosecution in Israel for crimes committed in Europe during the war epitomizes the principle of universality relating to jurisdiction for crimes against humanity. Because of the distinctive nature of the crime against humanity, Eichmann’s trial was considered to violate neither retroactivity nor territoriality principles. See Attorney Gen. of Israel v. Eichmann, 36 I.L.R. 5 (D.C. Isr. 1961), aff’d, 36 I.L.R. 277 (S. Ct. Isr. 1962).


152. There is an understanding raised in most legal systems by laws establishing time limits, even for the most serious crimes. Regarding the crime against humanity and imprescriptibility, see Pierre Morena, L’Imprescriptibilité des crimes de guerre et des crimes contre l’humanité, 51 REVUE DE DROIT PENAL ET DE CRIMINOLOGIE 204 (1970).

153. This special exemption of crimes against humanity from the ban on retroactive legislation, recognized at Nuremberg, has now become ratified as part of the European Convention on Human Rights: “This . . . shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.” European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 10, 213 U.N.T.S. 225, 230.

154. More than a half-century after the events, World War II-related trials are taking place not only throughout Europe, but also in Canada and Australia. On the question of the passage of time and legal responses, see, for example, David Cesarean, Justice Delayed (1992), which describes the British campaign to find Nazi war criminals; David Matas, Justice Delayed: Nazi War Criminals in Canada (1987); and Symposium, supra note 149, passim. On the delay in the United States, see Allan A. Ryan, Jr., Quiet Neighbors: Prosecuting Nazi War Criminals in America (1994).

155. In the 1987 prosecution of Klaus Barbie, the Nazi chief in occupied Lyon, for ordering deportations to death camps, the critical issue was whether armed members of the resistance could nevertheless be protected under the rubric of the “crime against humanity.” For purposes of the crime against humanity, the French High Court held that the relevant question was not the victims’ status, i.e., whether they were civilians or resistance, but whether the accused had acted with the requisite intent. The significance of the crime against humanity was the purpose of persecution. See Barbie, 78 I.L.R. at 139–40.

156. The jurisprudence of the first international war crimes tribunals since the postwar period, concerning violations in the former Yugoslavia and Rwanda, goes well beyond Nuremberg. The various acts constituting crimes against humanity are: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds, and other inhumane acts. See Tribunal for the Former Yugoslavia, supra note 113, at 1173. The understanding of the Commission of Experts was that the International Tribunal had jurisdiction over crimes against humanity, whether the conflict was “international” or “internal.” As a matter of international customary law, the Commission of Experts considered that no matter the nature of the conflict, universal jurisdiction existed for crimes against humanity and genocide. See Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780, U.N. Doc. S/1994/674, at 13 (1992); see also Tadić, 35 I.L.R. at 48–73. Further, the Tribunal’s jurisdiction extends to crimes not committed by agents of the state, so long as committed “under color” of the state. Article 2 on the competence of the International Tribunal provides: “The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949,” and then goes on to list specific offenses. See Tribunal for the Former Yugoslavia, supra note 119, at 1171.

157. For an analysis of such legislation, consider the French crimes against humanity law which incorporated the Nuremberg Charter, showing the sense in which the offenses of crimes against humanity has become universalized. C. PEN. ART. 213–5 (Fr.).
When criminal justice denounces these crimes, such prosecutions have a systemic impact transcending the implicated individual. 138 To society, such trials express the normative value of equality under the law, a threshold value in the transformation to liberal democratic systems.

The normative implications of the legal response to tyranny transcend periods of political change. The transitional element of the crime against humanity becomes generalized. Even after the passage of time, these criminal sanctions can be used to reinvent the differences between liberal and illiberal regimes. For the late twentieth century, persecution for reasons of politics, race, ethnicity, and religion is incontrovertibly the paradigm of contemporary tyranny. 139 In the crime against humanity jurisprudence, the strongest sanction in law is invoked to condemn past state evil. Where past systems of persecution were perpetrated under law, prosecution of persecution is an undoing that sends a message about a new legality.

D. The Transitional Criminal Sanction

The paradigm shift in notions of justice and fairness relating to application of criminal justice in periods of political change involves numerous recurring dilemmas discussed above. In the ordinary understanding of criminal justice, identifying and establishing wrongdoing and penalties are generally conceived

138. Debates over whether to prosecute throw into relief the distinctive gravity of the crime against humanity. Lifting time limitations has been justified as an exception for "atrocious" crimes. See, e.g., The Question of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, U.N. Economic and Social Council, Commission on Human Rights, 22d Sess., Agenda Item 4, at 54. U.N. Doc. E/CM.4/990 (1996). In the debates over whether to extend the statutes of limitations for World War II-related murder, extensions were justified under a retributive rationale on the basis of the crime's heinousness. On the international level, the dilemma was resolved by the enactment of the United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Oct. 10, 1968, 754 U.N.T.S. 31. After a heated debate in 1965, when, according to prevailing penal law, 20-year limits on war-related charges would have set in, the West German Parliament attempted to put a stop to the trials; ultimately, the resolution was to limit most of the World War II-related offenses, but to lift the time limits applicable to offenses comprising crimes against humanity (defined as "base motive") murder. See Robert Monroe, The West German Statute of Limitations on Murder: A Political, Legal and Historical Exposition, 30 AM. J. COMP. L. 609, 610-11 (1982). For an account of Germany's arguments for lifting the statute of limitations on World War II-related murder, see Martin Chusmutter, The Statute of Limitations for Murder in the Federal Republic of Germany, 29 ICLQ 473, 478 (1980). Arguments are rejected on the grounds they would offend the dignity of tyranny's victims.

139. Justifications for criminal accountability on the basis of the victims' dignity also appear in the more current transitions. For discussion of the punishment/impartiality debate, see Jane Madge-Most, Punishment and a Right-Based Democracy, CRIM. JUST. ETHICS, Summer 1991, at 3. Regarding the role of victims in the punishment process, as a general matter, see Jeffre G. Murphy, Getting Even: The Role of the Victim, in CRIME, Culpability, and REMEDY 209 (Ellen Frankle Paul et al., eds., 1990).

159. Thus, in American constitutional jurisprudence, for example, state-sponsored racial, ethnic, and religious discrimination is considered to be a grave abrogation of equality, and is accorded the highest constitutional protection. Racially motivated crimes can revive past-state-sponsored racial persecution even constitutional protection. Racially motivated crimes can revive past-state-sponsored racial persecution even when state-sponsored, and can have profound significance. The persistence and understanding of the nature and role of successor criminal justice may well help to explain the special significance of contemporary domestic trials involving racial crimes.

as a unitary practice, but in the criminal sanction's transitional form these elements become detached from one another. The partial criminal process, emphasizing prosecution over punishment, distinguishes the transitional criminal sanction.

The transitional criminal sanction prosecutes past regime wrongs but does not necessarily culminate in individual culpability and punishment. The emergence of this transitional criminal sanction in periods of political change is illustrated throughout history, for example in the post-World War I trials, the World War II cases, 161 the postmilitary trials of Southern Europe, as well as contemporary successor criminal justice in Latin America 162 and Africa. In the wave of political change in Central Europe that followed the fall of the Berlin Wall, a similar sequence unfolded. 163 Throughout the region, there has been a general movement toward the limitation of criminal proceedings and punishment. 164 As in the postwar period, successor justice after totalitarian rule has revealed a de facto limiting of the criminal sanction.

The emergence of the transitional criminal sanction in periods of political flux presents an alternative to the complete waiver of punishment. 165 In

159. See see Sheldon Glueck, War Criminals: Their Prosecution and Punishment 19-36 (1944) (providing account of history of action taken against German war criminals under Treaty of Versailles), see also Wilds, supra note 147, at 116-39, 174-76 (exploring post-World War II efforts to punish war criminals as precedents for Nuremberg).

160. Many convicted in the Control Council Law No. 10 trials by occupation authorities were lightly punished under a clemency program supervised by U.S. High Commissioner John McCloy. See Frank M. Bischoff, THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955, at 63-64 (1989).

161. Shortly after the 1980s Argentine junta trials there were limits on the follow-up trials and pardons. Ultimately, presidential pardons would extend to everyone convicted of atrocities, even high-ranking junta leaders. See Americas Watch, Truth and Partial Justice in Argentina: An Update 45-52, 65-70 (1991); Pino-Berlin, supra note 131.


163. In Germany's border guards trials, suspension of sentences has been the norm. Of the 11 guards tried as of November 1992, only one has actually served time in jail. See UPI, Nov. 3, 1992, available in LEXIS, News Library, UPI File. Many prosecutions in the Czech Republic culminated in suspended or conditional sentences; only a handful of top Communists, such as Prague party chief Miroslav Stropan, served prison terms, lasting no more than two years. See 29 Communists officials Tried for Anticonstitutional Activity, CTK NAFL News Wire, Sept. 21, 1994, available in LEXIS, News Library, CTK File; David Stamp, East Europe's Communist Elite Evades Prosecutors, REUTERS WORLD Serv., Feb. 14, 1994, available in LEXIS, News Library, Reuters File. In Romania, all of the former Communist leaders and police officers convicted in the December 1989 massacre were released over a two-year period, either on health grounds or as a result of presidential pardons. See Romanians protest over Communist Bosses' Release, REUTERS WORLD Serv., Sept. 21, 1994, available in LEXIS, News Library, Reuters File. In Bulgaria, Todor Zhivkov failed to serve time for embezzlement, while Erdemov, his former prime minister, has been pardoned. Similarly, in Albania, an amnesty law immunizes prime minister leaders sentenced for abuse of power, even the country's last Communist President. See Former Albanian President Has Sentence Cut by Three Years, AGENCE FRANCE PRESSE, Nov. 30, 1994, available in LEXIS, News Library, AFP File; see also Holmes, supra note 2.

164. Despite amnesties, criminal investigations would provide a record relating to prior military rule. Unlike other instances of the limited sanction discussed above, penalties would be dropped in advance, and on condition of confession to wrongdoing. See Human Rights Watch—America's Unsettled Business.

165.
postapartheid South Africa, for example, the declaration of amnesty for political crimes left a window for investigation and documentation of past wrongdoing. Contemporary international legal responses suggest a similar development in the tribunals convened to try atrocities committed in the former Yugoslavia and Rwanda. An emphasis on prosecution rather than punishment reflects the extraordinary nature of transitional justice.

How does partial punishment lead to the common perception that justice was done? Consider the transitional criminal sanction. Ordinarily, the criminal sanction is justified by identifying and punishing individual offenders, while the limited criminal sanction is largely justified by distinctly transitional purposes. These transition-related purposes are both backward- and forward-looking in nature. In successor trials in periods of political change, the criminal process condemns past wrongdoing. Formal criminal processes enable factfinding about past wrongdoing at a high standard of certainty. In periods of substantial political change, the heuristic purposes of the criminal investigation relate to the prosecution of offenses with a public dimension. Such trials clarify the criminal actions perpetrated under the prior regime. This knowledge about the past is often constructed for the first time in the context of the criminal trial. Identification and documentation of predecessor crimes, even where not fully individuated, enable the denunciation of the prior regime, as the society has to understand what happened before it can condemn and delegitimize.

Furthermore, establishing knowledge of past actions committed under color of law and its public construction as wrongdoing is the necessary threshold to prospective normative uses of the criminal law.

The emergence of the limited sanction, therefore, signals a practical resolution of the central dilemma of transitional criminal justice: how to attribute individual responsibility for grave wrongdoing perpetrated under repressive rule. Without fully assigning individual guilt, the transitional criminal sanction nevertheless enables societies to recognize and condemn past wrongdoing perpetrated under repressive rule. A line is drawn between regimes, thereby allowing the political transformation to justify the transition. In the next Part, I turn to the constitutional responses in periods of change. Just as the transitional criminal response expresses a normative shift against past political power abuses, transitional constitutionalism also embodies a normative shift that delimits and transcends the political past.

III. CONSTITUTIONAL JUSTICE

I now turn to the nature and role of constitutionalism in periods of political change. The central dilemma is how to reconcile the concept of constitutionalism with revolution. Revolutionary periods and their aftermath are times of political flux, and, as such, present tensions with constitutionalism, which is ordinarily considered to bind the political order. I begin by exploring the prevailing conception of the relation of constitutional to political change, and in particular, the modern claim for constitutionalism as foundational to democracy. Rather than arguing against the prevailing model, I contend that this model best describes an eighteenth-century view of the relation of the constitutional to the political. Hence it cannot capture the constitutional developments associated with political change during the last half century, and needs to be supplemented. I will explore manifestations of constitutionalism in periods of substantial political change, and suggest that these give rise to another paradigm of transitional constitutionalism, which

172. It is my contention that the partial criminal sanction associated with periods of political transformation as a practical matter resolves the central successor justice debate over punishment or impunity. Neither full punishment nor full impunity characterizes the transitional sanction. On the punishment/impunity debate, see generally the essays collected in STATE CRIMES: PUNISHMENT OR PARDON, supra note 1. See also Carlos S. Nino, The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina, 100 YALE L.J. 2619 (1991); José Zalaquett, Balancing Ethical Imperatives and Political Constraints, 43 HASTINGS L.J. 1425 (1992).

173. See generally Joel Elster & Rune Slagstad, CONSTITUTIONALISM AND DEMOCRACY (1988) (collecting essays that discuss relation of constitutionalism to democracy).
provides an alternative account of constitutionalism in its third century.\(^{175}\)

Constitutionalism in periods of political change stands in constructivist relation to the prevailing political order. Transitional constitutionalism not only is constituted by the prevailing political order, but is also constitutive of the perception of political change.\(^{176}\) These constitutions arise in a variety of different processes, and play multiple roles, serving conventional constitutions' aspirational purposes as well as other purposes in a transformative politics. Transitional constitutionmaking responds to past repressive rule, through principles delimiting and redefining the prevailing political system. They, in turn, effect further political change in the system. Such constitutions are simultaneously backward- and forward-looking, yet informed by a conception of constitutional justice that is distinctively transitional.

A. The Prevailing Models

To the extent that there has been theorizing about the nature and role of constitutionalism in periods of political change, it is commonly guided by competing realist or constructivist perspectives. In the realist view, constitutions in periods of political change are thought simply to reflect the prevailing balance of political power, and are therefore epiphenomenal with, and arise by virtue of, the provenance of the political change.\(^{177}\) Under this view, it is not at all clear what distinguishes the making of a constitution from other lawmaking; what, if anything, is the distinctive value of constitutions in the transition. As such, this approach offers little to the project of discerning the significance of the nature and role of constitutionalism in such periods. It follows that idealists have provided the dominant approach to exploration of constitutionalism in periods of political change.

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175. In this Article, I propose an alternative paradigm, though I have not fully addressed all of the questions the proposed alternative paradigm raises for our understanding of constitutionalism, judicial review, or interpretive principles.

176. I refer here to the constructivist role of the constitutional document. See supra note 17. The use of the term constructivism in this analysis is drawn primarily from supra note 21, regarding constitutional change bears a certain similarity to the processes characterized by Rawn in his elaboration of gradual transformation of political consensus. See RAWLS, supra note 6, at 90-99 (defining "political constructivism"). Rawn uses the term "political constructivism" to describe the gradual emergence of constitutional consensus as a result of a step-by-step decisionmaking process which narrows the area of parties' political differences. My analysis is constructivist in a somewhat different sense. While I agree with Rawn that new constitutional changes cannot be fully understood without reference to the process through which they were adopted, I also claim that each change in the constitutional order changes the perspective of the participants, in turn changing their view of the way constitutional possibilities and hence, the potential for constitutional consensus.


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178. See infra notes 181-83 and accompanying text. Although the classical understanding of constitutionalism generally is not considered to follow an idealist model, in view of the relation of constitutionalism to political change, it shares affinities with the model discussed herein.

179. See infra notes 185-88 and accompanying text.

180. See infra notes 189-94 and accompanying text.


182. See ARISTOTLE, supra note 181, at 198 ("The association which is a state exists not for the purpose of living together but for the sake of action.").
Yet this account leads to the following questions: What is the relationship between reconstitution and political change? How does the new constitutional consciousness that defines the transition occur? The classical paradigm invites, but does not elaborate, a theory of the role of constitutionalism in the process of political change.

2. The Modern Claim

As distinguished from the classical view, modern constitutional theory emphasizes normative limits on state power of a structural and individual rights nature. The paradoxical role of modern constitutions is that they are considered to provide such limits on government despite periods of political change. How is one to reconcile the modern view of constitutionalism with constitutional change?

This is the dilemma of constitutionalism in the context of massive political change. For Hannah Arendt, the dilemma is resolved through a rethinking of the theory of constitutionalism. Rather than conceptualizing constitution-making as counterrevolutionary, and the opposite of political change, the "truly revolutionary element in constitution-making" is "the act of foundation." The Arendtian vision of revolutionary constitution-making draws heavily from American constitution-making. In this version, the apparent dilemma of the incompatibility of revolution and constitution disappears; the two political acts merge. The constitution is deemed the culmination of revolution; it is the "deliberate attempt by a whole people at founding a new body politic." The Arendtian account resolves the tension between revolution and constitutionalism through the mediating idea of foundation. The notion of a Founding elegantly reconciles the dilemma of political change with constitutional permanence. Though paradoxical, the very nature of the revolutionary change sought is the constitutive act of founding. American constitutionalism is distinguished by the paradox of constitutional change: It is revolutionary but lasting. The American posture toward its revolution ushered in a paradigm of constitutionalism as foundational to its democratic order. In this paradigm, constitutionalism was something other than its classical sense, identified with the political order. It was also more than constitutionalism in the Magna Carta sense, as protective of negative liberties. The idea of constitutional democracy transcended protection of individual rights. An idealized constitutional model, foundational constitutionalism had the potential to embody the full normative sweep of the revolution.

Building upon the Arendtian account, American constitutionalist Bruce Ackerman also makes a strong normative claim for constitution-making as foundational to democratic revolution. On this view, constitution-making is the necessary and final stage of liberal revolutions, a revolutionary "constitutional moment" of rupture from the ancien régime and the founding of a new political order. In the more contemporary constitutional theorizing, transformative constitution-making is not limited to the revolution; instead, there are potentially many more such constitutive moments. By extending the possibility of transformative constitution-making beyond the revolution, Ackerman contributes to the modern model a helpful categorical distinction between ordinary and constitutional politics. Within the "dualist democracy" framework, ordinary political change and constitutional change proceed on separate tracks, offering a neat resolution of the dilemma posed by constitutionalism in revolutionary periods. By a move defining "dual" categories of "ordinary" decision-making by government as opposed to "higher" lawmaking by "the People," the dilemma with which this Part begins, of constitutionalism and radical political change, seemingly falls away. In a dualist democracy, the dilemmas of constitutional beginnings, constitutional change, and constitutional review are made to disappear.

In the contemporary model, constitution-making relates to revolution through higher lawmaking, yet the distinction between higher and lower lawmaking remains ambiguous. What distinguishes higher lawmaking is a distinctive process, a particular timing, and heightened, deliberative decision-making. Foundationalists embrace the view that the special status of constitutional politics derives from its popular sovereignty, expressed

188. See id. at 157 (observing that "[c]onstitution-making" was considered by Framers as "the foremost and noblest of all revolutionary deeds.").

189. See ACKERMAN, supra note 1, at 61 ("If the aim is to transform the very character of constitutional norms, a clear break seems desirable ... "). For Ackerman, a "legitimate order" depends on "a systematic effort to state the principles of the new regime." Id. at 57 (emphasis omitted). See generally CONSTITUTIONALISM, IDENTITY, DIFFERENTIATION, AND LEGITIMACY (Michel Rosenfeld ed, 1994) (analyzing relationship between constitutionalism and group identity).


191. See id.

192. Ackerman describes a constitutional onset period, a window of time for constitution-making or "constitutional moments." Constitution-making occurs prior to the establishment of other laws and institutions. See ACKERMAN, supra note 1, at 35.

193. See id. at 14 ("The higher lawmaking track ... is designed with would-be revolutionaries in mind. It employs special procedures for determining whether a mobilized majority of the citizenry give their considered support to the principles that one or another revolutionary movement would pronounce in the people's name.").
through special constitutional convention processes. Constitutional politics is considered to correspond to a higher level of popular deliberation and consensus, and as such, is distinguishable from ordinary politics. This conception relies heavily upon the circumstances of the American Founding. In the prevailing contemporary paradigm, there is a strong claim for linkage between meaningful political change and constitutional change. The constitutional ideal is forward-looking; the purpose is to put the past behind and to move to a brighter future. Constitutionmaking is conceived as the foundation of the new democratic order.

Although its claims have been universalized, contemporary constitutional theory itself derives from a distinctive political context, specifically the eighteenth-century revolutions. Whereas the modern understanding does not define constitutionalism as a state’s political arrangements, as in the classical understanding, the modern vision of constitutional politics is inextricably connected to particular revolutions and past political orders. Yet the view of constitutions as foundational to liberalizing political change offers only a theoretical resolution to the dilemma posed by postrevolutionary constitutionmaking. The dominant model is highly idealized, and as such cannot account for many constitutional phenomena associated with periods of political transformation. Instead, contemporary constitutionalism necessitates rethinking the prevailing theorizing about the relation of political to constitutional change. With constitutions in their third generation, constitutional precedents of the late twentieth century suggest that the model overstates the differences between ordinary and constitutional politics. As the next Section demonstrates, instances of constitutionalism in periods of substantial political change reveal diverse manifestations of constitutional politics.

194. This conception of constitutional politics depends on the view that the American constitutional conventions implied broad popular consensus. This claim is somewhat controversial, as some scholars suggest the constitutional ratification elections were marked by low voter turnout. See Peter Berkowitz, BOOK REVIEW, 26 EIGHTEENTH CENTURY STUD. 692, 693 (1995) (reviewing 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991)).

Perhaps the processes considered to be predicates of constitutional foundationalism ought to be interpreted at a higher level of generality. Understood this way, low participation in constitutional ratification processes would not be fatal, so long as participation is higher than the ordinary political participation of the time. As is discussed below, see infra text accompanying notes 223–24, a transitional perspective helps to explain why in periods of political upheaval, even limited popular participation may well suffice to legitimate constitutional transformation.

195. Although the American experience is thought to exemplify foundational constitutionmaking, in recent years a broader prescriptive claim has been levied at other states in the process of transition. Thus, in The Future of Liberal Revolution, the foundationalist vision is extended to the contemporary post-Communist transitions. See ACKERMAN, supra note 1. Invoking the United State’s constitutionmaking, Ackerman exhorts fledgling East European democracies to put aside ordinary politics and to cap their revolutions with a constitution. See id. at 193. For a related continental argument along Ackerman lines, see ULRICH PREUS, CONSTITUTIONAL REVOLUTION (Deborah Lucas Schneider trans., 1995).

196. Further, despite the contribution of contemporary constitutional theory to the political science debate over the criteria for liberalizing change, see supra text accompanying notes 10–13, this Article contends that liberalizing political change is associated with varieties of legal responses, beyond the constitutional.

B. A Transitional Counteraccount

Here I propose another account of a transitional constitutionalism, which better captures constitutional politics associated with transformative periods. Constitutionalism in periods of radical political change reflects transitionality in its processes and normative commitments. In transitional constitutional processes, as developments in periods of political upheaval suggest, constitutions are not created all at once, but in fits and starts. Constitutionmaking often begins with a provisional constitution, predicated upon the understanding of subsequent, more permanent constitutions. Despite our ordinary notions of constitutional law as the most forward-looking and enduring of legal forms, transitional constitutionmaking is frequently impermanent, and involves gradual change. Many constitutions that emerge in periods of political transformations are explicitly intended as interim measures. Whereas the prevailing model conceives of constitutions as monolithic and enduring, some features of transitional constitutions are provisional, while others become more entrenched over time.

Transitionality has normative implications. Within prevailing theory, constitutionalism is commonly understood as unidirectional, forward-looking, and fully prospective. Once retrospective political understandings are included, the contemporary ideal becomes a poor model for transitional constitutional phenomena. The picture of a polis at constitutional point zero might have been appropriate for describing constitutionalism in the eighteenth century, but in the late twentieth century, constitutions associated with political change generally succeed preexisting constitutional regimes and are thus not simply created anew.

The construction of new constitutional arrangements in periods of radical political change is informed by a transitional conception of constitutional justice. Constitutional law is commonly conceptualized as the most forward-looking form of law. Yet transitional constitutionalism is ambivalent in its directionality; for the revolutionary generation, the content of principles of constitutional justice relates back to past injustice. From a transitional perspective, what is considered constitutionally just is contextual and contingent, relating to the attempt to transform legacies of past injustice.

The study of constitutionalism in periods of political change suggests that transitional modalities vary in constitutional continuity. In its "codifying" modality, constitutionalism expresses existing consensus, rather than transformative purpose. In its transformative modality, in "critical" constitutionalism, the successor constitution explicitly reconstructs the political

197. The constitutional types proposed here, like Weberian ideal types, do not lay claim to comprehending all constitutional phenomena but rather are offered for their help in understanding diverse constitutional phenomena.
order associated with injustice. 198 In another transformative form, where successor constitutions are used to return to the pre-predecessor constitutional order, such constitutionalism might be considered as "restorative." Where the successor constitution is a holdover from prior rule, one might consider these manifestations of constitutional continuity to be "residual." As review of illustrative constitutional developments in periods of political flux will show, many transitional constitutions incorporate aspects of more than one of the proposed types. These constitutional constrictions mediate periods of political change.

My aim here is to interpret how states move from illiberal regimes to those that are more liberal, and to explore the role constitutions play in constructing these political changes. Below, I explore a number of cases that illuminate the nature and role of constitutionalism in periods of political transformation. The phenomenon of transitional constitutionalism goes back to ancient times, to the account of the constitution written after the Athenian revolution. 199 With such historical transitions came the dilemma of squaring revolutionary political change with constitutionmaking. As we shall see, similar gradual constitutional processes take place in contemporary transitions.

1. Brokering out of Authoritarian Rule

In contemporary theorizing, the constitutional ideal is the culmination of the revolution, and the foundation of the new democratic order. The constitution somehow transcends its politicized origins, as constitutional politics transcends ordinary politics. By contrast, in the realist model, the nature and role of constitutions in negotiated transitions is largely conceived in political terms, and constitutions are conceived as extensions of ordinary politics. 200 The two prevailing views take opposing positions on the place of constitutionalism in transformative politics. Neither model, however, adequately explains the nature of constitutional politics in contemporary political change. Examining the role of constitutions in periods of postauthoritarian rule illuminates the constructivist constitutional paradigm. 201 While constitutionmaking is shaped by periods of radical political change, it also helps construct the political opening that allows transition.

Transitional constitutions broker the political shifts from authoritarian rule. They construct interim periods of substantial liberalizing political change, albeit not equivalent to a fully democratic order. Such constitutions are transitional in a number of senses: Their processes are plainly transient; their instruments are at least in part provisional. Such constitutions frequently suffer from features held over from the predecessor constitutional regime, features one might consider residual. Examples of such constitutions arise in Europe's historical negotiated transitions, as well as in the more recent wave of political change.

Although war provides the distinct break frequently considered a threshold to constitutional foundation, political shifts often occur without such ruptures, following prolonged and tortuous political negotiations. Transitional constitutions may emerge in the negotiated shifts out of authoritarian rule. Where the prior regime has not collapsed, and where the political shift occurs only as a result of negotiations, constitutions play a role not well accounted for within prevailing constitutional theory. 202 Transitional constitutions are not simply revolution-stoppers, but they also play a role in constructing the transition. Early in the process, constitutions can jump start and instigate political change. Insofar as such constitutions destabilize rather than stabilize a political order, the transitional constitution's "disentrenching" role is analogous to the ordinary codifying constitution's "entrenching" role in this respect.

A contemporary illustration of the "disentrenching" constitution is postapartheid South Africa. Likened to a "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence... for all South Africans," 203 South Africa's postapartheid Constitution exemplifies the uses of transitional constitutions following authoritarian rule. The Constitution embodies the political agreement and shift from minority rule over a disenfranchised population to a representative democracy. This constitutional pact enabled the political transformation to occur. To what extent can new constitutional legitimacy derive from an agreement ratified by the old apartheid-era Parliament? To what extent would the procedural linkage to the past regime compromise constitutional processes? The transitional constitution's origins in the apartheid regime are mitigated by its express provisionality. Constitutional change began with the old Parliament's enactment of an interim constitution, itself predicated upon the making of another, prospective constitution. 204

199. With the revolution, there was much debate about the nature of the desired political system. The debate culminated in two draft constitutions, one for the "immediate" crisis and another "for the future." See ARISTOTLE, THE ATHENIAN CONSTITUTION chs. 29–33 (P.J. Rhodes trans., 1984).
200. For such a scholarly approach, see generally LINZ & STEPHAN, supra note 1, at 10; and O'DONNELL & SCHMITTER, supra note 10.
201. For a discussion of this term, see supra note 176 and accompanying text.
202. For an account based on the path of the transition, see LINZ & STEPHAN, supra note 1.
203. S. APR. CONST. ch. 15, § 251 ("National Unity and Reconciliation") (1995). Other constitutional arrangements reflecting such political compromise are provisions contemplating continuation of the executive power, oversee by a Transitional Executive Council. See id. ch. 15, § 235.
204. The Constitution's preamble contemplates that it will be in force pending a final constitution: "Whereas it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution..." Id. preamble (emphasis added).
South Africa's 1993 transitional Constitution reflected complex modalities. Although generally provisional, it included binding constitutional principles. These binding principles related in large part to equality and representation rights. By reaffirming the protection of racial and ethnic groups, the Constitution transformed the legacy of racial prejudice in the move out of repressive apartheid, setting forth enduring liberal constitutional values.

Transitional constitutions have been particularly useful in political movements from military rule. In the Southern European transitions, for example, the first post-Franco Constitution of 1978 helped to steer Spain out of military rule. The first successor Constitution's transitionality is reflected in the absence of a complete withdrawal of military power; while the military is made subject to constitutional rule, much about the new power sharing is left undefined. Similarly, the threshold question in Portugal's 1974 transition was whether the military would have a place in the successor regime. By creating a constitutional structure that made room for the Armed Forces, the first postrevolutionary Constitution enabled the transition to democracy by structuring the allocation of military and civilian power.

Throughout Latin America, transitional constitutions have served to broker the way between military and civilian regimes. An example is Brazil after military rule. Through the Constitution's limits on state power that previously led to abuses, the authoritarian structure was reconstructed to effect political transformation. The Brazilian Constitution of 1988 was conceded provisionally: After five years, there was to be constitutional review with an eye to amendment. According to the reigning constitutional model, the provisional nature of the 1988 Brazilian Constitution defeated a written constitution's basic purpose: to preserve a distinct vision of state power over time. From a transitional perspective, this critique is inapposite. Where a political regime is not yet consolidated, it makes little sense to insist on constitutional permanence. To the contrary, the constitutional opening may well be contingent upon its transience. The possibility of reform associated with the first interim constitution is predicated upon and bound by the assumption of a deferred, more plenary constitutional process. Chile's contemporary Constitution dramatically illustrates this possibility. Its 1991 Constitution helped to extricate the country from rule by military dictatorship, but only at a constitutional cost. The first transitional Constitution maintained some residual continuity with past rule by accommodating military dictatorship within its constitutional structure. This transitional change enabled civilian/military power sharing and the move to a more liberal democratic regime.

205. Indeed, the transition of the Constitution has been an ongoing question. The contemplated second Constitution was held invalid by the country's Constitutional Court pursuant to the transitional Constitution's amending principles. See In re Certification of the Constitution of the Republic of South Africa, 1996 (4) SAIL 744 (CC) (S. Afr.). The revised final Constitution was certified shortly before this Article's publication. See id. In its structure, South Africa's first postapartheid Constitution shares affinities with Germany's postwar constitution. Despite its transitional nature, Germany's Basic Law also entrenched core provisions guiding the state's liberal political identity. See GRUNDEMPFETZ [Constitution] (BG) art. 79(5) (F.R.G.) (so-called perpetuity clause); infra notes 239–40 and accompanying text.

206. Schedule 4 sets forth "Constitutional Principles" not to be altered or contradicted by any subsequent constitution, such as:

- The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity.

- The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

207. Indeed, the way the constitutional consolidation process is expected to work was clarified in the Constitutional Court's decision invalidating the subsequent proposed constitution. See supra note 205.

208. See ANDREA BONNER-BLANC, SPAIN'S TRANSITION TO DEMOCRACY: THE POLITICS OF CONSTITUTION-MAKING 31 (1987); Jordi Solé Tura, Iberian Case Study: The Constitutionalization of Democratization, in CONSTITUTIONALISM AND DEMOCRACY, supra note 174, at 287, 292–94. See generally O'DONNELL & SCHMITTEK, supra note 10, at 37–72. The subject of the military in civilian rule is incomplete, however; the Constitution contemplates military power to protect the constitutional order. According to Art. 104 of the Spanish Constitution, the Security Forces and Corps which are instruments of the Government shall have the mission of protecting the free exercise of rights and liberties and that of guaranteeing the security of the citizens.

- An organic law shall determine the functions, basic principles of action and the Statute of the Security Forces and Corps.

CONSTITUTION art. 104 (Spain).

209. For an account of the transition, see Maxwell, supra note 130, at 109–37.


212. For examples of new limits placed on the exercise of states of siege, see Articles 136 and 137 as well as the presidential lawmaking associated with states of emergency. The Constitution of Brazil provides: "Legislative power is exercised by the National Congress,..." CONSTITUCION FEDERAL [Constitution] (C.F.) art. 44 (Bras.). Article 62 provides: "In important and urgent cases, the President of the Republic may adopt provisional measures that have the force of law; however, he must immediately resubmit them to the National Congress which, if it is in recess, shall be convened in special session in order to meet within 5 days..."

- Provisional measures shall lose their effectiveness as of the date of publication if they are not converted into law within 30 days from the date of their publication, and the National Congress shall make provisions to regulate any legal relationship that may stem from such measures.

Id. at 62, 213. For an example of this argument, see Rosenn, supra note 211, at 783.

214. In a deliberate series of constitutional amendments negotiated between the ruling military junta and the opposition groups lay the groundwork for the return to democracy in Chile. The constitutional amendments limited the power of the military, as well as other institutions supporting military rule, and lifted the ban on opposition parties in the Senate. For a brief overview of the negotiations, see CHILE: CHRONOLOGY 1985–1991, in IV CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 53–56 (Albert P. Blaustein & Gilbert H. Flanz, eds., 1991). Article 9 on political parties was amended, as were Articles 95 and 96, which had the effect of weakening the National Security Council.
Colombia provides a good historical illustration of disentrenching constitutional change. Analogized to a treaty, the recent Constitution of Colombia truly enabled the peace. A longstanding political crisis between the government and the guerrillas exploded in the 1980s with the partial collapse of the state. The political crisis signaled the need for overhaul of the constitution, but the problem was how to enact constitutional reforms without the support of the Congress and in contravention of existing constitutional law. As is characteristic of transitional constitutionmaking, Colombia departed from its preexisting constitutional procedures to allow interim constitutional change, pending greater constitutional reforms. These ingenious measures constituted the transition; they opened a political space and provisionally constrained the political process in a way that permitted the shift to freer democratic rule. The Colombian Constitution embodied a boldly constructive mechanism for political transformation. Self-consciously provisional, it was intended to restructure an unstable political order. Transitory provisions laid down rules for the first free elections, reconstructed the political order, granted amnesty for past political crimes, and reintegrated demobilized guerrillas. Constitutionalism first implied disentrenchment, followed by reconstitution.

The transitional constitutions discussed above are explicitly political. For example, they all ratify features of political agreements. The politicized nature of such constitutions is also evident in their affinities with transitional criminal measures. In shifts out of harsh rule, transitional constitutions often ratify amnesty provisions. Thus in transitional times, constitutions delineate the parameters of what is permisibly political and, consequently, what is unjust. In the context of these political changes, constitutions serve not as the culmination or endgame of revolution but rather as actors in the construction of the transformation. As such, these constitutions are frequently explicit provisional measures that facilitate political transformation. Successor constitutions delimit provisional political agreements and structures, creating a new political space constructive of the political transition. The superentrenching of certain critical constitutional norms reflects boldly constructive responses to past repressive rule. While the concededly transitional nature of the balance of these constitutions chiefly relates to structures of state power, the normative principles relating to individual rights norms are intended to be transformative and enduring, guiding the state’s liberal democratic identity. There is a higher law, higher even than the constitution, that could be understood as the “constitution’s constitution.”

Transitional constitutionmaking, to some extent, provides a reflection of prevailing ideas about the state and political change. Unlike the dominant constitutional model, the transitional constitution is flexible in the entrenchment of norms, as seen in the emergence of interim or provisional constitutional phases regarding controversial questions of a constitutional nature. Over time, a first round of constitutional changes can further transform the political scene, enabling greater constitutional change. Finally, rather than expressing existing popular consensus, these constitutions’ normative principles are best accounted for within a transitional account, as their very purposes are bound up in constitutionalism’s transformative possibilities.

2. Victor’s Constitutional Justice

The course of constitutionmaking after war appears to follow the idealized sequence of rupture and new beginnings. Although postwar constitutionalism implies a “clean break,” it hardly implies the superdemocratic processes and popular sovereignty predicates of the contemporary constitutional model. Two illustrations discussed here are postwar West Germany and Japan, which adopted constitutional schemes following Allied victory and unconditional surrender. Both the West German and the Japanese Constitutions illustrate a distinctive transitional constitutionalism: the “victor’s” constitution. To varying degrees, these are imposed constitutions. The postwar Constitutions’ transitional purposes are seen in their heightened critical function: As is reflected in their substantive mandates, both West Germany’s Basic Law and Japan’s 1946 Constitution were expressly designed to transform past repressive legacies.

Perhaps the extreme case of victor’s constitutional justice is the postwar Japanese Constitution. Adopted under almost absolute American domination, drafted by a small group under General Douglas MacArthur’s direction, and


217. Going outside prevailing procedures under Colombian law, a referendum on constitutional change was put on the ballot in the May 1990 elections. See id. at 56–57. By this referendum, a popular decision was made to elect a constituent assembly to redraft the constitution. The referendum was followed by elections to the constituent assembly. See id. at 37. By then, the former guerrilla movement had demobilized, had made a strong showing as an independent force in electoral politics, and ultimately would take an active role in the constitutionmaking. See Fox & Stenton, supra note 215, at 142, 145. Because the central abuses lay in the allocation of executive/legislative power, the new Constitution gave the President extraordinary legislative powers, as well as creating a new “mini-congress” to take effect until the installation of a new congress.

218. See CONSTITUTION transitory art. 6 (Colom.); (describing National Constituent Assembly); id. transitory art. 59 (vesting President with “extraordinary powers” to “issue decrees with the force of law” for three months); id. transitory art. 30 (concerning amnesties).

220. Political agreements are often contemporaneous with transitional constitutions and directive of subsequent constitutional change. As such agreements are generally not subject to broad political participation, this challenges the sense in which constitutionmaking is democratic.

219. While the constructivist constitutional paradigm proposed here is drawn from inductive reasoning, based upon comparative analysis of a variety of societal practices in periods of political change, it bears similarities to the theoretical model of gradual constitutional consensus-building processes proposed by Rawls. See RAWLS, supra note 6, at 133–72.
forced upon the Japanese Parliament for ratification, the 1946 Japan Constitution cannot be understood as an expression of popular sovereignty in this occupation context. Despite undemocratic constitutional beginnings, the postwar Constitution's continuing authority suggests that other mechanisms operate to legitimate victors' constitutions over time. To some extent, the victor's constitution exemplified by postwar Japan is simply a more extreme version of a constitutional process that, in this century, is common to transitions. In periods of political transition, after war or repression, constitutional processes are often mediated by occupying powers or other influential countries. The leverage of the mediating actor affects the sense in which constitutionmaking processes represent popular sovereignty. Perhaps the legitimacy of postwar constitutions devolves upon their mandates, and the degree to which these constitutional processes nurture democracy and create norms to shape the transition's political structure. In this respect, much of the postwar Japanese Constitution reflects a transitional modality that I previously have characterized as transformative and critical. The Constitution's explicit purposes were to transform the political tendency toward militarism and imperial nationalism. Thus, Japan's warmaking power is renounced completely, and its Emperor reduced from a near deity to a figurehead. There is a broad attempt to displace the prior legal regime, and to move Japan to a formally more egalitarian democracy.

The 1946 Japanese Constitution evinces several critical aspects in presenting a retributive response to the prior regime. The Constitution's delimiting of the Emperor's powers appears as an express alternative to criminal justice. In limiting the Emperor's powers, the new Constitution

provided a compromise for the threat of punishment that had destabilized the imperial role. Like the eighteenth-century trials of kings, constitutional limits on imperial sovereignty drew a normative line between prior rule and the new regime. Successor constitutionmaking, like trials, offered formal, public legitimation of the transformation from the implicated political systems.

Victor's justice would not be as complete in Germany. Although Germany surrendered unconditionally, subsequent Cold War political change gave it leverage over its constitutional reconstruction. The occupying powers instigated but did not control constitutional reconstruction. Thus, despite Allied calls for the convening of a constituent assembly to draft a constitution to be adopted by popular plebiscite, Germany resisted the demand for a permanent constitution, adopting instead the so-called Basic Law, which was avowedly enacted as a transitory document. Hence the Basic Law's provisory cannot be fully accounted for within the prevailing constitutional model. The proposed paradigm of transitional constitutionalism, however, illuminates the Basic Law's normative commitments. Its dominant purpose was transformative: to counter the abuses of power that enabled the past regime's evil. As such, the Basic Law follows the critical constitutional type introduced above.

Further, unlike the eighteenth-century constitutions, in the Basic Law the normative constitutional concern regarding the potential threat to democracy transcends the abuses of state power to the polity itself. The sense in which this concern responds to the prior repression is best explained from a transitional perspective.

The meaning of constitutional justice from a transitional perspective is conceptualized and constructed in terms of prior constitutional and political regimes. In Germany, the lessons of the Weimar Republic steering the postwar constitutional course. Responding to this legacy, the Basic Law aggressively countered the fascist tendencies in the political order that culminated in Nazi dictatorship. In the Basic Law, presidential powers are rendered largely symbolic. Similar to the postwar Japanese Constitution's

221. See supra Part II for the comparative role of trials in transition. See generally WAR CRIMES BIBLIOGRAPHY, supra note 129, at 257-82 (listing sources on war crimes trials in Asia).
222. See BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY (1949), translated in PETER H. MUELLER ET AL., THE ODE AND THE GOVERNMENT OF GERMANY 213 (1963) [hereinafter BASIC LAW] ("The German people . . . has, by virtue of its constituent power, enacted this Basic Law . . . to give a new order to political life for a transitional period.") (emphasis added). The Basic Law was intended to be ratified by state legislatures, with plenary constitutionmaking processes postponed until after the country's prospective reunification; but the constitutional moment of ratification never arrived. See MUELLER, supra, at 3-19 (1963); see also CONSTITUTIONAL POLICY IN UNITED GERMANY (KLAUS H. GOETZ & PETER J. CULLEN eds., 1995) (collecting articles on German constitutionalism).
223. See id., supra note 222, at 22-24, 80-89.
224. Fascism's success is commonly attributed to the Weimar constitutional scheme, which combined a strong executive with a weak legislative branch, enabling the rise of subversive movements. See, e.g., id., at 23.
treatment of its wartime Emperor, the Federal President is bereft of power, the wartime institution deposed, and power diffused more broadly to the Parliament. As with Japan’s postwar constitution, Germany’s Basic Law also reflects the sense in which criminal and constitutional mechanisms posit fully alternative responses to prior evil rule. Both punishment and constitutionmaking construct normative limits on past abuses of state power. Detailed rights provisions prohibit the racial and religious persecution rampant under the Nazi regime. While such equality rights are common to modern constitutions, the Basic Law has been characterized as a “militant” democracy. “Militant democracy” may appear to be a paradoxical construct, but it captures the sense of the instrument’s primarily transformative purposes. Transitional constitutionalism operates differently from our prevailing intuitions about the role of constitutionalism. Protection against similar future persecution is not limited to the enumeration of individual rights; transitional constitutions set limits not only upon the political majority, but also upon an illiberal polity. The view that fascism was a political expression of a populist nature leads to the attempt to constrain such expression, even where it is that of a supermajority; a seemingly paradoxical endeavor in the service of constitutional democracy. Adopted as a provisional constitutional instrument, the Basic Law nonetheless reflects varying degrees of transitionality and constitutional entrenchment. Some constitutional norms are provisional, whereas relating to the instrument’s animating normative liberal values, such as protection of individual rights of dignity and equality, are utterly unamendable and supererogatory, thereby defining

the state’s liberal political identity. Germany’s Basic Law, as interpreted by the country’s Constitutional Court, becomes the guardian of the liberal state. These postwar constitutions illustrate constitutionalism in its third century. In the move from authoritarian rule, set against a backdrop of prior constitutional regimes, such constitutionalism plays a distinctive critical function: It is boldly reconstructive of past constitutional tendencies identified with illiberal politics. While postauthoritarian constitutionmaking often lacks the legitimacy afforded by full constitutional processes predicated in the foundationalist model, delegitimation of the predecessor regime clears the path for constitutional reconstruction. The postwar constitutions pose a problem for the prevailing idealized constitutional model. These constitutions can hardly be understood as full-blown expressions of a heightened popular consensus and revolutionary agenda. Indeed, such constitutions would often seem to be just the reverse. The absence of popular consensus in constitutionmaking processes, and the failure of heightened democratic commitments implicit in the view of constitutions as political foundations, is also borne out in such constitutions’ normative principles. Modern constitutions are generally conceived and designed as structures to constrain state power, but transitional postauthoritarian constitutions counter illiberal tendencies more broadly. In realist theorizing, constitutions would be largely explained in terms of the balance of political power. Yet the notion of constitutionalism as a product of the balance of political power does not well explain cases of total transition, such as the following war, unconditional surrender, or other regime collapse. Further, both the idealist and realist models assume that the triumph of the revolutionary regime over its predecessor implies fully forward-looking constitutionmaking. As these constitutional normative structures are not well explained by idealized types, nor by explanations in terms of current political forces, they illuminate a distinctive transitional constitutionalism.

3. Velvet Revolutions and Their Constitutions

What are the implications for constitutionalism of velvet revolutions? Like many of the postauthoritarian transitions, the fall of Communism occurred through the collapse of the prevailing Communist regime or negotiated political change. Political changes in the former Soviet bloc were largely peaceful, and hence known as velvet revolutions. As such, constitutional change in the

235. Chapter V, entitled “The Federal President,” consists of eight articles. Article 61 relates to impeachment. See BASIC LAW, supra note 233, art. 61; see also MERKEL, supra note 233, at 178–82.
236. Postwar sovereignty would be restored when the Allies ended occupied trials, and Germany committed to constitutionmaking. For a historical account, see BUSCHER, supra note 161.
237. For example, Article 3(3) provides: “No one may be prejudiced or privileged because of his sex, his descent, his race, his language, his homeland and origin, his faith or his religious and political opinions.” BASIC LAW, supra note 233, art. 3(3). Article 4(1) provides: “Freedom of faith and conscience and freedom of creed in religion and in philosophy of life (religions- und philosophische Grundfreiheit).” Id. art. 4(1).
239. Although the Basic Law placed democratic conditions on both individuals and political parties, antibeast elements were excluded from political life. A militant constitutional order is vigilant not only to the excesses of state power, but also to those of popular sovereignty. Thus political parties which “by reason of their aims or the conduct of their adherents, seek to impair or do away with the free democratic basic order or directly endanger the existence of the Federal Republic of Germany, shall be unconstitutional.” BASIC LAW, supra note 233, art. XXI, § 2. Moreover, individuals forfeit their constitutional rights to expression where there is abuse of the use of speech, press, teaching and assembly “in order to undermine the free democratic basic order.” Id. art. XVIII.
240. See BASIC LAW, supra note 232, art. LXXIX, § 3 (setting forth “security” or “perpetuity” clauses referring to unamendability of “basic principles” laid down in Articles I and X).
area did not follow the dominant constitutional model patterned on eighteenth-century-style revolution. The velvet revolutions generally lacked clear breaks, and as such did not culminate in constitutional change of a foundational sort. Years after the political changes, and in much of the region, the story is of constitutional continuity. What emerges is an initial transitional constitutionalism displaying aspects largely of a residual type. Even states in the more advanced stages of economic reform still rely on amended Communist-era documents.

What does smooth political change—or velvet revolution—imply about the attendant constitutional change? Whereas revolution by violent means implies rupture in the constitutional regime, velvet revolution implies forced continuity instead. The dilemma of the tension between constitutionalism and political change disappears, for there is no discontinuity, only constitutional continuity. As in other negotiated transitions, constitutions play a role in ratifying the agreements constructing the political shift, as well as in restoring the prerevolutionary constitutional order.


244. For a discussion of the Velvet Revolution, see generally Lübeck, Revolution, Fortschritt und Verhältnis (1990); and Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY, supra note 189, at 165.

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Post-Communist constitutionalism reveals several affinities between theories of political and constitutional change. Just as political change occurred in domino fashion after the Soviet collapse, so too there is a domino quality to the constitutionalism prevalent throughout the region. Constitutional change occurred through negotiation; as such, it did not rely on popular sovereignty. On the contrary, the first such constitutional change occurred through bargaining conducted by representatives of a political elite. In the velvet revolutions, the predecessor regime was dislodged rather than overthrown.

Constitutional amendments ratified the move from one political regime to another. In the negotiated transitions, the first constitutional changes involved disentrenching the prior political order from power and constitutionalizing the move to power sharing. Thus post-Communist constitutional change has less to do with delineating state power than party power. This first round of constitutional change was provisional, reflecting affinities with other transitional legal responses. Constitutional processes in the region were not the culminating stage in revolutionary change, but instead were inextricably linked to gradual political processes. Constitutional change was so closely associated with political change that it implied a constitutional politics not readily distinguishable from ordinary politics.

Nevertheless, the legitimacy of constitutional changes did not appear to be affected by this similarity. Rather than following the ideal of constitutionalism as a foundational expression of a preexisting political consensus, here constitutional amendment comes first, laying a foundation for further political change. Thus the constitutionalism of the velvet revolutions challenges foundationalist understandings of the relation of constitution and revolution.

There is another face to post-Communist constitutionalism, that of "restoration" constitutionalism. In the former Czechoslovakia, the revolution began in November 1989 with a demonstration commemorating the fifteenth anniversary of the closing of the Czech universities by occupying German forces. These auspicious beginnings underscored the deep historical sense of political occupation pervading the region. Upon the end of political occupation, there was a virtually automatic revival of the constitutional order that preceded the occupation. I call this dimension of transitional constitutionalism
"restoration constitutionalism." In the post-Communist bloc, restoration constitutionalism is rampant, implying a partial return to the pre-Bolshevik constitutional regime. Turning to restorative constitutions enabled countries to eliminate the constitutional regime associated with Communism. However, some countries returned to these old constitutional structures out of nostalgia and the desire for stability. Indeed, the very term "restoration" suggests the normative pull of the old order. Yet the post-Communist restorations offer dubious stability. Although these regimes may be expressions of traditional and national identity, they can hardly be regarded as an expression of true existing social consensus. Nevertheless, restorative constitutions have a normative pull that manages to evade the dilemma of constitutional beginnings. To the extent that such transitional constitutions are restorative, there are seemingly no constitutional beginnings, only returns. Such constitutionalism eliminates the tensions inherent in constitutionalism in periods of political change.

These cases illustrate varying modalities of transitional constitutionalism. Where there is constitutional change, it has tended to occur not through special bodies or procedures but in piecemeal fashion, through negotiations and ordinary political processes. Such constitutional change has been inexorably bound up with the processes of political change. Much of the remaining constitutional order is residual, reflecting constitutional continuity. To the extent that there has been transformative constitutional change away from the prevailing political order, often it has been to revert to the constitutional and political order that prevailed before totalitarianism, a form of restoration constitutionalism.

4. The American Constitution: A Transitional Account

Finally, I turn to the American Constitution, the paradigmatic case of foundational constitutionalism. Despite this status, the American case does not completely fit the dominant theoretical model, suggesting that the model is incomplete and must be supplemented.

248. Restoration has certain affinities with the notion of "reactionary" change. See ALBERT O. HIRSCHMAN, THE RISE AND FALL OF THE HABITATION 1-10 (1991) (discussing "reactionary" change).


250. See supra note 245, at 854-55 (arguing that restoration of such constitutions established in East-Central Europe in 1989 were expressions of reactionary nationalism).


Retelling the American constitutionmaking from a transitional perspective adds a different narrative to the prevailing account. In the idealized version, the American revolution culminates with constitutionmaking. The Constitution embodies a putative immediacy bound up in the revolution, as well as a permanence. Yet the relationship between the United States Constitution and the American Revolution reflects a transitional constitutionalism both in its process and in its normative mandate. There was a stepwise progression from a backward-looking constitutionalism toward a more forward-oriented one. The Revolution did not immediately culminate with a foundational constitution, but rather produced a number of constitutive documents. In the first postrevolutionary five-year period, the Articles of Confederation constituted a transformative, critical response to a regime distinguished by minimal state power. A more expansive scheme of state power was created only upon the adoption of the Constitution of 1787. The addition of the Bill of Rights and the post-Civil War amendments to the American Constitution represented yet additional constitutive stages.

Told this way, the story of the United States's constitutionmaking shares some affinities with transitional constitutionalism. This transition was not as dramatic, however, given the passage of time between the American Revolution and the enactment of the Constitution, and the nature of the American transition from limited monarchy rather than from the worst of dictatorships. Such a transition seems markedly conservative compared to others discussed here, the American constitutional instrument itself reflects this.

From a transitional perspective, the American Constitution is not a monolithic Founding instrument, but a nuanced document. The depiction of American constitutionmaking as a self-conscious founding glosses over the pronounced conflict among the Framers as to their purposes. Transitional

251. My description is no doubt an oversimplification of the American constitutional model. For a thoughtful account, see PAUL W. KAREK, LEGITIMACY AND HISTORY 58-59 (1992), which argues that the process of constitutionalism shifted from revolution to maintenance.

252. A sequence of constitutional changes put in motion by the revolution led to the adoption of the Constitution of 1787. The chain of constitutive documents begins with the Declaration of Independence’s statement of justification to break with the prior regime. Even when the Framers convened in 1787, it was with the purpose to amend the previous constitutive charter. See RICHARD B. ONION, THE MAKING OF THE AMERICAN CONSTITUTION 106 (1987). For an argument that continuity between the American Revolution and the United States Constitution was part of a single political experience, see David A. Richards, Revolution and Constitutionalism in America, 14 CAMBRIDGE L. REV. 577, 577-78 (1993).

253. Though some scholars suggest the Declaration incorporates the Declaration, comparable claims have not been made about the Articles of Confederation. Nevertheless, the Constitution implicitly assumes some continuity with the Articles; for example, the Union assumed all debts of the Confederation. See U.S. CONST., art. II, § 7.

analysis exposes the unseen Constitution, those parts steeped in the historical and political contingencies of the day. That these provisions have been generally overlooked by contemporary scholars may well attest to this transient nature. A leading feature of the American Constitution’s transitional nature is its provision for amendment. Because the amendment process is difficult to incorporate within the dominant account, it has occasioned lively scholarly debate. The paradigm proposed by this Article suggests that the amendment process should not be considered in isolation, but in light of other aspects of the constitution. In the American constitutional making sequence, the antecedent structural Constitution is the predicate to ultimate recognition of individual rights.

Transitional also marks the constitutional provisions regarding rights, the leading transitional feature of which was the controversial issue of slavery. The 1787 Constitution postponed any change regarding federal legislative regulation of the slave trade until 1808. Thus the Constitution’s resolution is twofold: There is one Constitution for the moment, where political debate is constrained and a federal solution imposed. The provision language of the document, however, leaves open the possibility of another prospective resolution. When it came to perhaps the most politically contentious issue, the Constitution offered only an interim guiding principle. A transitional perspective also illuminates the distinctive understanding of constitutional justice. The Constitution’s protections of freedom and its related conception of tyranny are better understood in the context of colonial rule. The primary constitutional response, often considered the Constitution’s crowning achievement, is the reconstruction of state power.

1981 (expressing skepticism over desirability of frequent constitutional upheaval and revision), with Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in THE PORTABLE THOMAS JEFFERSON 415, 417 (Merrill D. Peterson ed., 1973) (arguing that “a little rebellion now and then is a good thing”).

257. See U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislature of two thirds of the several States, shall call a Convention for proposing Amendments . . . .”). On the amendment process, see RESPONDING TO IMPERFECTION (Safford-Levenson ed., 1995).

258. Much contemporary constitutional theory has focused on the question of how to reconcile the contemporary idealized foundationalist view of the enduring Constitution with constitutional change, whether predicated on the Article V amendment process, or through principles of constitutional interpretation departing from the original understanding, or by other means. See Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043 (1988) (evaluating whether Article V ought to be regarded as sole source of constitutional change.

259. See U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .”). The Constitution also provides for the capture and extradition of fugitive slaves. See id. art. IV, § 2, cl. 3.

260. This reading seems to be supported by the express limitation in Article V on such amendments and 1801, cited infra. See infra Note 215.


262. The Federalist defense of the new scheme of state power is orchestrated in terms of an argument from history, based on the experience of tyranny characterized by British Parliamentary sovereignty. See THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) (“The accumulation of all critical response to monarchic rule is its definition of executive power; an even more pronounced response to strong executive power is evident in the interim constitutional measures adopted after the revolution. The same was largely true of the state constitutions, where the governors’ terms were limited and their powers few. Justifications for the structure of executive power relied on the historical experience of prior monarchic rule. The Constitution’s provisions concerning republican rule also suggest a transformative function. First, reconstitution of the political order occurs through redefinition of political participation, membership, and leadership. The allocation of military and civilian power responds to abuses of military rule. A transitional perspective illuminates the contemporary understanding

powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”).

263. Note that the United States is virtually unique in turning to a presidential system. Most former monarchies move from strong executive systems to parliamentary systems. See Karl Loevenstein, The Presidency Outside the United States: A Study in Comparative Political Institutions, 11 J. POL. 447, 462 (1949). The American anomaly is best explained within a transitional analysis.

264. At the time of the Articles of Confederation, discount of centralized power was so powerful that the Constitutional Congress was impotent to tax and regulate commerce. Article VIII provided that: [E]xpenditures that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, . . . . The ratio for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States . . . .

ARTICLES OF CONFEDERATION, 1781, art. VIII. Article IX, in turn, provided: The United States in Congress assembled, shall have the sole and exclusive right and power of . . . entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from . . . prohibiting the exportation or importation of any species of goods or commodities whatever . . . .

id. art. IX.

265. For an argument suggesting a reading of the American Constitution in light of its historical legacy in the Articles of Confederation, though one not explicitly characterized as transitional, see Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1121, 1150–51 (1991).


267. The reasoning in the Federalist arguments for the proposed executive power works backward from the institution of the King. Whereas the King’s rule was unbound, the four-year limited presidential term prevents abuse of power. See THE FEDERALIST NO. 69, at 415–16 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Other features of the proposed presidential powers have analogous justifications: Because the King’s veto power was plenary, it followed that the qualified presidential veto is limited and appropriate. See id. at 416–17. The extent of historical monarchic powers is used to justify the proposed qualified presidential treaty power, as well as the President’s constrained war power. See id. at 417–20.

268. Anti-acrotastic features appear in a number of constitutional provisions, most prominently in the express prohibition of nobility. See U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); id. art. I, § 10, cl. 1 (“No State shall . . . grant any Title of Nobility.”); THE FEDERALIST NO. 84, at 511–14 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Qualifications and terms for political participation and representation indicate a critical response to the prior order. See art. I, § 2; id. art. II, § 1; id. art. III, § 3; see also THE FEDERALIST NO. 52, at 327–30; 330–32 (James Madison) (Clinton Rossiter ed., 1961).

269. See U.S. CONST. art. I, § 8, cl. 11–16 (granting Congress significant military powers); id. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”); id. amend. III (“NoSoldier shall, in times of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by . . . .")
of rights provisions such as the Second Amendment.\textsuperscript{269} A vivid illustration of transitional constitutionalism is Reconstruction, a time of profound struggle over how to transform the Union. The Reconstruction Amendments appear highly backward-looking, as they normatively structure the constitutional status of the confederate secession.\textsuperscript{270} The Amendments respond to the evil of slavery by imposing new obligations on the Southern States; only by affirming the principle of equality under law, could states reenter the Union and be equally represented in Congress.\textsuperscript{271} Conditions for public office in the Fourteenth Amendment disqualified Confederate supporters.\textsuperscript{272} Reconstruction's political disabilities would ultimately be short-lived.\textsuperscript{273} Nevertheless, they remain forever in the text of the American Constitution as an enduring expression of extrastitutional politics. Understanding the transitional relationship between post-Civil War constitutional law and politics has profound implications for contemporary debates concerning the interpretation of the Reconstruction Amendments.\textsuperscript{274} A transitional perspective evaluates the Reconstruction jurisprudence within its context of political transformation, with implications for contemporary controversies.

This Section has suggested ways in which the American Constitution can be better understood from a transitional perspective. By offering a more nuanced view of the nature and role of constitutionalism, the above discussion complements the prevailing model. Transitional constitutionalism also has implications for constitutional interpretation. A transitional perspective contributes a unique view to debates over the ongoing relevance of "original

\textsuperscript{law". See id. amend. II; Sanford Levinson, Comment: The Embarrassing Second Amendment, 90 Yale L.J. 637, 648 (1981) (noting that one foundation of Second Amendment was "well-justified concern about political corruption and consequent government tyranny.")

\textsuperscript{270} See U.S. Const. amend. XIV, § 4 ("Neither the United States nor any State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.");

\textsuperscript{271} See id. amend. XIV, §§ 1–3.

\textsuperscript{272} The Fourteenth Amendment states: No person shall be a Senator or Representative in Congress, or an elector of President and Vice President, or hold any office, civil or military, under the United States, or any State who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Id. amend. XIV, § 3. This Section took effect in July 1868.

\textsuperscript{273} As provided for in the Amendment itself, most of the disqualifications were removed by Congress by 1872. See Kenneth M. Stampp, The Era of Reconstruction 193 (1972).


\textsuperscript{275} See Bork, supra note 277 (defending originalism); Robert H. Bork, The Taming of America: The Political Seduction of the Law (1981); Bork, supra.

\textsuperscript{276} On the "fidelity" to the Constitution, see generally Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1153 (1993). The central idea of this interpretive theory is the preservation of meaning across time and context. But see Lawrence Lessig, What Drives Derivability: Responses to Responding to Imperfection, 74 Tex. L. Rev. 839 (1996). From a transitional perspective, however, the problem in this approach is that it generally assumes a unitary, constitutional purpose over time, missing other more transformative purposes of a dynamic nature.

\textsuperscript{277} See supra notes 197–98 and accompanying text.
reinforces democracy. In ordinary times, constitutionalism appears in conflict with democracy, but during times of transition, constitutionalism plays a unique role in facilitating the move to a more liberal regime.

Transitional constitutionalism provides an alternative paradigm. The paradigm's distinctive paradox is that, as in the premodern conception, constitutionalism does not stand independently from the political order but is inextricably enmeshed in transformative politics. Nevertheless, as in the modern conception, transitional constitutions also transcend transitory political arrangements. The transitional paradigm elaborates a more nuanced relationship between constitutional and ordinary politics: Transitional constitutions not only operate as codifications of prevailing consensus but also transform that consensus. Moreover, these two concepts of constitutional purpose are not mutually exclusive; indeed, they may well coexist within a single instrument. Thus the view proposed here complements prevailing constitutional theory. What distinguishes the transitional constitutional paradigm is its constructive relation to a political order in flux. Transitional constitutionalism comprehends different phases, ranging from provisional measures intended to shape the transient political order for a limited time to those entrenched and even superentrenched laws that guide a state's core political identity. In its disentrenching role, the transitional constitution ratifies new political arrangements to liberalize political space, enabling a more liberal order. Transitional constitutionalism varies from provisional to ultracentralized, as guardian of the future constitutional order.

The paradigm of transitional constitutionalism illuminates the special contribution of constitutionmaking in periods of political change. In eschewing the prevailing tendency to collapse constitutionalism with revolutionary political change, the proposed paradigm has the virtue of creating a space for the critique of the nature and role of constitutionalism in periods of transformation. The paradigm of transitional constitutionalism also has implications for our understanding of constitutionalism's normative force and its relation to other uses of the law. Critical constitutionalism implies an explicitly transformative response to prior repressive rule. To the extent that the constitutions discussed above reflect a critical response to the legacy of the ancien régime, transitional constitutionalism enables a sense of justice. Critical constitutional responses to the predecessor political regime also play a justificatory role for the transition by delegitimizing aspects of the ancien régime and legitimating its successor. To the extent that these structural principles enable normative expressions of accountability, they overlap with other normative uses of the law, such as criminal law, in these extraordinary periods. Contemporary postmodern constitutional norms delimit and transcend the structuring of state power to guide broader normative understandings of the social order. Finally, a transitional constitutional perspective offers a glimpse of constitutional progress. This vision of progress is not essential or universal but limited and contingent. Understandings of distinctive national legacies of injustice enable construction of constitutional constraints truly responsive to a state's political, historical, and constitutional legacies.

IV. A TRANSITIONAL JURISPRUDENCE

Let us return to the questions posed at the outset: What is the relationship between legal responses to past repression and a state's prospects for meaningful liberalizing political change? How do societies make the transition from illiberal regimes? What are the nature and role of law in this transformation? The legal responses analyzed here occur within a bounded period following the change in regime, heralding a shift to a more liberal regime. Such periods are not easily captured within prevailing theorizing about the rule of law in a liberal state. Transitional jurisprudence examines the way law mediates such periods and constructs the transition, thereby describing this bounded domain. Affinities in the forms of responsive law—adjudicatory, punitive, and constitutional—point to a paradigm of transformative law. Legal practices in such periods reveal a struggle between two points, between settled and revolutionary times, as well as a dialectically induced third position. Persistent dichotomous choices arise as to law's role in periods of political change: backward versus forward, retroactive versus prospective, continuity versus discontinuity, individual versus collective, law versus politics. Transitional legal mechanisms mediate these antinomies.

In periods of political change, the role of law defies the categories and guiding principles governing ordinary periods. In ordinary times, law is largely continuous and prospective. In transitional times, by contrast, law's directionality is ambivalent; it is simultaneously continuous and discontinuous, retrospective and prospective. Thus in the "transitional domain," the rule of law does not follow idealist conceptions: Instead, the rule of law is constructed in relation to past conceptions of injustice, and an extraordinary form of the rule of law emerges. The role and function of the transitional criminal law are similarly distinctive from punishment in ordinary times. In the transitional criminal sanction, an extraordinary form of limited sanction emerges. Sanctions ordinarily establish individual responsibility for past wrongdoing, but in transitional times, the foci are the relations of the past to the present and the
individual to the collective.\textsuperscript{281} Transitional constitutional law also takes on a distinctive form. In ordinary times, constitutionalism is conceived as entirely forward-looking in nature, designed to endure for generations. Constitutionalism in transitional times is particularly retrospective in nature, justificatory and constructive of the political transformation.\textsuperscript{282}

Transitional law is fluid in form. This fluidity bears on the central normative question in this area of study: Which ideal legal response is most likely to usher in a lasting democratic system?\textsuperscript{283} Yet with the breakdown in categorical uses of the law, the question becomes irrelevant, a remnant of ordinary times. Transitional constitutions serve apparently ordinary, regulative purposes. Criminal and civil sanctions are used interchangeably to generate rights and duties. Transitional adjudication seems unfair, trials lack punishment, and constitutions do not last. Affinities in the various forms of transitional law—procedural, penal, constitutional—underscore law’s ultimate transformative role in the construction of transition. The law expresses new norms and the work of reconstruction.

What is the role of law in periods of transformation? For some time, critical theorists have been engaged in comparative work regarding transitions, yet the object of inquiry has generally been the transmittal of societal norms or societal reproduction across generations and over time.\textsuperscript{284} But the ordinary social construction and legitimation problems are inapposite in extraordinary periods of political upheaval. The question of social transformation replaces the question of social reproduction. Although such periods are commonly envisioned as moments of rupture, I suggest that there is rarely such total discontinuity but instead various processes and mechanisms that enable mediation of the past towards transformation. It is through familiar forms that societies comprehend liberalizing change. The question then becomes how to synthesize transformation within the law.

How do legal responses help to enable the transition? In the transitional model, transformation occurs through the use of law to clarify and sanction past wrongs. Through investigatory and condemnatory processes, the law exposes and delegitimizes the value system associated with past rule, clearing the way for transformative norm change. Legal measures promote creation of public knowledge about past wrongdoing, and judicial opinions, trials, and constitutions provide formal, public justifications. The law, therefore, contributes to the epistemological and interpretive changes necessary to comprehend transition; through public justification legal forms reconstitute state and societal interests, thereby instantiating transition. The uses of the law here are particularly well-suited to the legitimation problems inherent in periods of massive political change. All of these practices, in one fashion or another, are attempts to delimit and pass judgment upon past abuses of state power. Affinities in these responses suggest that these practices do not arbitrarily depart from the rule of law but recognize past abuses of power by the state. The legal responses to systematic persecution attempt to supervene and transcend prevailing politics.

The analysis of transitional jurisprudence offers some sense of how societies work through repressive periods to periods of greater liberality. Indeed, we might conceive of the transitional legal mechanisms as mediating between repressive and liberal regimes. Ultimately it is in part through these legal phenomena that we grasp whether a transition has occurred. These legal responses help to construct the transition. These mediating mechanisms and structures publicly elucidate and justify the normative changes associated with political transformation. These mechanisms, whether adjudicatory procedures, trials, or constitution-making, are ultimately the symbols of working liberal regimes; thus, as the transitional justice problem is resolved, the society has already begun to operate as a more liberal order. Although transitional jurisprudence comprehends justice claims associated with liberalizing change, these claims are not equivalent to those of a fully established democracy. Accordingly, recognition of a transitional jurisprudence provides a vocabulary for critical appraisal of legal developments in the context of liberalizing political change.

Further, the field of transitional jurisprudence has implications for better understanding of law’s role in social change. The operation of the law in these periods follows neither the traditional liberal view of law as largely autonomous from politics, nor the critical view of law as apophenomenal. Recognition of this domain raises a challenge to critical legal theorizing. As distinguishable from the role of law in ordinary times, the uses of the law discussed above construct the very understandings of radical political change. Recognition of this hyperapoliticalized transformative domain is inconvenient for liberal theories of law as well as for political theorizing that attempts to make normative forecasts about law’s bearing upon societal prospects for liberal consolidation.

V. Conclusion

This Article gives an account of the nature and role of law in periods of political transformation. It suggests that legal forms during such periods point to a transitional jurisprudence constituted by and constitutive of the transition. The transitional jurisprudence associated with periods of political upheaval ultimately also plays a role in shaping the sense of liberalizing change.
Recognizing a distinct domain of transitional jurisprudence should have profound consequences for prevailing legal theorizing, and, in particular, for our normative understanding of law's relation to politics. Beyond its contribution to understanding law's role in periods of political change, transitional jurisprudence advances the critique of prevailing theories of justice. An understanding of the conception of law proposed here can help mediate the liberal-critical debate over theories of law. The liberal idealization views law as independent from culture and politics, and conceptualizes justice from an idealist "original" position. The view of justice offered here, by contrast, is conceded from a transitional position. The legal practices discussed above suggest that the content of justice and rights are understandings determined not in the abstract, but rather in response and in relation to legacies of injustice within a distinctive transitional context.