

December 2020

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### Recommended Citation

Walter F. Murphy, Transitions to Constitutional Democracy and the Fate of Deposed Despots, 81 Denv. U. L. Rev. 415 (2003).

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# TRANSITIONS TO CONSTITUTIONAL DEMOCRACY AND THE FATE OF DEPOSED DESPOTS

WALTER F. MURPHY<sup>†</sup>

## INTRODUCTION

This Article is taken from a chapter of a book in progress. It is entitled *Constitutional Democracy* and deals with a bevy of questions that include: What is constitutional democracy? Why would a people want it instead of a simpler political system? How do they go about establishing such a polity? Having established it, how do they maintain it? Moreover, what limits, if any, are there to how that system can be changed? The chapter from which this piece is taken addresses questions of constitutional maintenance, such as problems of reconstructing a system of civil governance after the overthrow of a ruthless regime. The specific question confronted here is, what should the leaders of a neonatal constitutional democracy do with the officials of the previous oppressive regime? The underlying issues are both practical and normative—for power and duty may not be independent of each other. I try to show some of the twisted connections among, on the one hand, political power, public outrage, and the need for a ravaged society to reconstitute itself with more than a mere modicum of mutual trust among its citizens, and, on the other hand, competing conceptions of justice, revenge, and the purposes of punishment. I argue that justice and prudence do not allow public officials to center solely on negative policies designed as retaliation for abuses committed in the past. I stress that leaders must also look to the future in order to construct positive policies that will enhance the capacity of their citizens to pursue happiness in a civil society.

### I. THE PROBLEM AND THE PRINCIPAL OPTIONS

In an odd way, the happiest solution for leaders of the new political order may be that all the former leaders and their chief minions who abused their subjects escape into exile. That event, of course, is improbable. Even if the dictator and his immediate entourage manage to escape, the hundreds, perhaps even thousands, of people who operated within the top echelons of the government are not likely to get away. Stay-behinds pose a serious and difficult problem for the new leaders, especially if

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they face widespread impassioned demands for retributive justice, and are also truly committed to constitutionalist norms of procedural fairness.

Several options, some of which can be used in combination, are obvious: (1) Through formal decree or inaction, let the ghosts (and the criminals) of the recent past fade into history; (2) expose the old oppressors to the community's scorn; (3) offer amnesty on condition of full and public confessions; and (4) initiate criminal prosecutions.

#### A. Blanket Amnesty and Social Shame

Ex-officials may have forced the first option on the new leaders as the price of a peaceful surrender of power. It might also happen, as it did to a great extent in Hungary,<sup>1</sup> somewhat so in Poland, and more so in the Russian Federation, that the budding constitutional democracy may decide on its own to ignore former oppressors. The chief security personnel can be fired (although few KGB were immediately discharged) and offenders left to social sanctions.<sup>2</sup> The rationale is that it is more important to build unity for the future than to wallow in divisive hatred. However wise such a policy might seem to outside observers, its success would depend in large part on the willingness of citizens to move on and the capacity of the leaders of the new governmental system to persuade their people that this course was the most promising.

Lustration, used as a form of political vetting and social shaming, offers a second alternative. The term originally referred to the ritual purification ancient Romans underwent after each census. Christians later applied it to any sacramental cleansing from sin, such as, for instance, baptism.<sup>3</sup> Popular for a time in Eastern and Central Europe after 1989, the policy involved opening the archives of the secret police and allowing information about who had been doing what to whom to become public knowledge. The objective was not merely to shame people who had helped the secret police, but, more broadly, to facilitate ousting communist functionaries, devout or hypercritical, from administrative posts and to allow voters to reject electoral candidates who had collaborated with the old regime.<sup>4</sup>

1. See Gábor Halmaj & Kim Lane Scheppelle, *Living Well Is the Best Revenge: The Hungarian Approach to Judging the Past*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 155, 160 (A. James McAdams ed., 1997).

2. Indeed, it has been reported that under President Vladimir Putin, "The security services have swelled and their alumni are now filling government posts at all levels." *Putin Power*, THE ECONOMIST, Oct. 11, 2003, at 15. Additionally, "Russian democracy is a cynical joke." *Id.*

3. Before the 1990s, lustration had probably become more common in discussions of witchcraft than in moral theology or politics, a usage not too far removed from what would be experienced in Central and Eastern Europe.

4. See Herman Schwartz, *Lustration in Eastern Europe*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 461, 461 (Neil J. Kritz ed., 1995); Andrzej Rzeplinski, *A Lesser Evil?*, 1 E. EUR. CONST. REV. 33, 33 (Fall 1992).

In Poland, the former East Germany, and the Czech and Slovak Republic, lustration's results were scattered, exposing not only many invidious acts and actors but also producing much social and political chaos. Husbands and wives, for instance, discovered their mates had spied on them, and patients learned about their doctors.<sup>5</sup> In addition, leaders of the resistance, even Václav Havel and Lech Walesa,<sup>6</sup> were accused of having collaborated with the secret police. Part of the confusion occurred because the former regimes, with totalitarian aspirations, had no respect for marriage or the doctor-patient relationship. Another cause of confusion was simpler: much of the information in the government's files was bogus. Secret agents must constantly prove they are diligent; reporting contacts with and rumors from fictional informants shows diligence; and security officials are seldom troubled by qualms of conscience in falsifying records to further their own careers.

Making matters worse, some people striving for power during the transitional period were quite ready to use falsified data to ruin competitors. As a result, lustration soon lost its luster. The German government quickly restricted access to the Stasi's files. Besides, after the first post re-unification election, most East Germans who had meaningful ties with the old regime dropped out of politics, either voluntarily or because of imprisonment, defeat at the polls, or having been fired. The Czechs allowed their lustration law to lapse, and the Polish constitutional court declared their law unconstitutional as a violation of the basic concepts of "a democratic state ruled by law" and "human dignity" as well as the International Covenant of Civil and Political Rights.<sup>7</sup>

### B. Conditional Amnesty

Conditional amnesty offers a third alternative, one that can partake both of amnesty's remission of physical punishment and lustration's public shaming. At least seventeen countries, including Argentina and Chile, have set up truth and reconciliation commissions (TRCs) to find out exactly what happened during their periods of authoritarian rule. Some, perhaps most, of these have been rather feeble, little more than fact-finding bodies, lacking authority to compel witnesses to appear and tes-

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5. This kind of informing on relatives, clients, and even parishioners was hardly a communist creation. In Czarist Russia, the secret police "turned" some Orthodox priests, persuading them to report any politically dangerous acts they heard under the seal of the confessional.

6. See Wiktor Osiatynski, *Agent Walesa?*, 1 E. EUR. CONST. REV. 28, 28-29 (Summer 1992).

7. After this decision, the Polish parliament watered down the statute. See Andrzej S. Walicki, *Transitional Justice and the Political Struggles of Post-Communist Poland*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 185, 198 (A. James McAdams ed., 1997); see also generally Jacek Kurczewski, *The Rule of Law in Poland*, in THE RULE OF LAW IN CENTRAL EUROPE: THE RECONSTRUCTION OF LEGALITY, CONSTITUTIONALISM AND CIVIL SOCIETY IN THE POST-COMMUNIST COUNTRIES 181 (Jiří Přibáň & James Young eds., 1999) (discussing what legal problems were faced and how they were dealt with by post-communist Poland law).

tify under oath. South Africa provides the most famous example of a vigorous TRC. It invited victims and their relatives to tell their stories and, if they could, identify their tormentors. This TRC was authorized to offer amnesty to people implicated either by this testimony or the independent investigations of its own staff. Suspects included both officials who had allegedly used heinous methods to maintain apartheid, and private citizens, who were mostly members of the African National Congress, believed to have committed crimes during its struggle with other black groups to control the campaign against apartheid. If not satisfied with the testimony of supplicants for amnesty, the Commission could, and did, recommend criminal prosecution in more than a hundred instances.<sup>8</sup> Essentially, the TRC required those seeking absolution to meet three basic conditions: to confess their offenses fully, honestly, and publicly; to demonstrate that they had committed these crimes for political rather than personal reasons; and to submit to cross-examination by prosecutors, members of the Commission, and victims or their relatives. The Commission then judged each petition on its individual merits.

Both the immunity from prosecution that leaders of outgoing authoritarian regimes negotiate for themselves, and the immunity that a truth and reconciliation commission offers raise grave moral problems. Do such agreements and procedures violate fundamental norms of justice? The implications of such issues are also practical for a new constitutional democracy, generating serious questions about the new polity's commitment to the values it claims to further. The following sections of this chapter grope with these civic and moral difficulties.

Several other issues carry moral implications but are essentially practical in nature. In the short run, to what extent can such a commission produce truth, and what can be accepted as truth? It is unlikely that a report, produced as it must be if it is to serve as a catalyst for change soon after the collapse of the old regime, can constitute a definitive historical analysis. Lurking in the shadows is a more basic question: Will knowing the truth, assuming the Commission can produce the truth, lead to reconciliation? "You shall know the truth," the author of John's Gospel asserts, "and the truth will set you free." The Indo-European root of the word "free" is the same as "to love."<sup>9</sup> If we understand "free" in this broader sense, it would include release from hate, from a desire for vengeance, impregnating the words John reported with heavy political and theological cargo. Indeed, a modest version of this broader concep-

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8. Among the more notable instances were the TRC's refusal to absolve Eugene de Kock, one of the most sadistic leaders of a security force not noted for tender regard for due process, and the five policemen implicated in the murder of Steve Bilko. Although de Kock was convicted, prosecutors dropped the charges against the five police because of insufficient evidence.

9. ERIC PARTRIDGE, *ORIGINS: A SHORT ETYMOLOGICAL DICTIONARY OF MODERN ENGLISH* 235 (2nd ed. 1959); see *THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY* 375-76 (C.T. Onions ed., 1966) (stating that the primary sense of "free" in old German is "dear").

tion must underlie such commissions. Empirical evidence for such effects is, however, less than virile.

To have a politically meaningful effect, the report of a TRC cannot merely target dispassionate and disinterested scholars who are open to persuasion about the sins and virtues of the immediate past. Rather, that message would have to reach, and persuade, two audiences, who if not deaf, are apt to be "hearing impaired." First would be those people, quite possibly a rather large number, who during the period of authoritarian rule had enjoyed moderately happy lives, having chosen, in exchange for the government's leaving them alone, to accept their own loss of liberty and ignore the suffering of others. A TRC would have to convince these quietists to peep outside their private shells, recognize the evils of the old regime, and support fundamental political change. An additional audience that might be trickier to persuade would be those people and the families of those people who had been imprisoned, tortured, or murdered.<sup>10</sup> They would need no convincing about the old system's evils or the need for change, but might well be cynical about the necessity of following the norms of constitutional democracy, both in dealing with offenders and in re-crafting the constitutional order.

Embedded here is the problem of how much truth, with or without love, people really want. Each of us has a self-image that only partly corresponds to reality. The gift the giver might give us is not one that most of us crave, nor are we likely to allow others the full truth about ourselves—precisely why Justice Louis D. Brandeis called the right to be let alone, or privacy, "the right most valued by civilized men."<sup>11</sup> So, too, every ethnic group and every nation has its self-serving myths, founding and continuing, stories that may be true, false, or synthesize both fact and fiction. Only if the past can be accepted for what it is, a saga of mixed themes, some cause for pride, others for shame, can "the truth" facilitate political reconciliation. The truth that matters, Michael Ignatieff says, is "interpretive truth," the past as refracted through one's personal and group myths, a truth that only insiders can grasp, not the factual truth that an investigatory commission might, if its members are dispassionate and skilled, produce.<sup>12</sup>

The French Revolution was not the only radical change of regimes that produced a reign of terror. "Now it's our turn!" is a very human re-

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10. Ideally, that message should also reach at least some of the people who profited from the old constitutional order. Complete acceptance, however, would be beyond reasonable hope. Officials and families of officials of authoritarian regimes have not been noted, at least not for very long, for living in monastic simplicity, and it is improbable that they could be persuaded by reason alone not only to surrender the power, money, and prestige of their official positions but also to accept guilt for assorted felonies.

11. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

12. MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE* 175 (1998).

action. It is little short of remarkable that this sort of murderous orgy did not occur after the end of apartheid in South Africa. Much of the peaceful nature of the exchange of power is due to Nelson Mandela and Archbishop Desmond Tutu's persuading their followers to work for the future rather than avenge the past. The TRC played an active role during the later stages of this peaceful transition, but its impact is disputed. After conducting a large survey in 2000-2001 regarding public reactions to the TRC's work, James L. Gibson concluded that the process contributed to acceptance among whites, coloreds, and Asians of the ugly truth about apartheid.<sup>13</sup> Even though three times as many blacks as whites said they placed confidence in the TRC's findings, Gibson found "no clear evidence" that the TRC had shaped blacks' views about apartheid.<sup>14</sup> Most likely, they had no need for further instruction in the evils of the old order. More importantly, however, interracial trust remained low. A Nielsen survey taken in 1998, while the Commission's work was still in progress, reported that two-thirds of those asked believed that the TRC's investigations led to a deterioration of race relations.<sup>15</sup> After publication of the final report, Gibson found that a majority of whites still believed blacks were likely to commit crimes and forty-one percent of blacks believed whites were likely to do so; one-third of whites thought blacks were untrustworthy, and about one-fifth of blacks deemed whites deserving of trust.<sup>16</sup> Standing alone, these data do not indicate that the TRC furthered reconciliation, at least in the short run,<sup>17</sup> a result that should not have come as a shock. In the United States, bitter memories among southern whites about Reconstruction lingered well into the twentieth century, and African Americans' folk memory of slavery and Jim Crow remains sharply alive in the twenty-first century.

The question of whether to establish a TRC cannot be intelligently decided by looking only at these commissions. It is crucial to judge their likely effectiveness in comparison with that of alternative institutions and processes. Martha Minow argues that a truth commission's exposure of atrocities can be more effective than criminal prosecutions in bringing people together.<sup>18</sup> She offers no hard evidence to support her argument

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13. See generally JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (forthcoming 2004) (on file with author).

14. *Id.*

15. See Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice, and Reconciliation*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 3, 19 (Robert I. Rotberg & Dennis Thompson eds., 2000).

16. GIBSON, *supra* note 13; see also JAMES L. GIBSON & AMANDA GOUWS, *OVERCOMING INTOLERANCE IN SOUTH AFRICA: EXPERIMENTS IN DEMOCRATIC PERSUASION* 15-38 (2003).

17. The South African government's decision to pay \$3,900 to the family of each victim of apartheid who testified, or whose family testified before the TRC, may or may not have furthered reconciliation. Although the average income of a black family there was only \$3,000, some critics attacked the amount as paltry and insulting to the victims. Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, *N.Y. TIMES*, Apr. 16, 2003, at A7.

18. See Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 235, 235-36 (Robert I. Rotberg & Dennis

for South Africa or any other nation. In any event, after analyzing respondents' answers to his survey, Gibson concludes that the Commission made important contributions toward creating a civil society in South Africa.<sup>19</sup> If his insights, gained from much time and research in South Africa, point toward this conclusion, his data do not offer muscular support for it.

As in much analysis of political causation, reasoning *post hoc, propter hoc* is a present, if not always clear, danger, as is the difficulty of unsnarling the many threads that have tangled together to create a multi-causal effect. The problem is one of multicollinearity: South Africa's most respected leaders urged forgiveness; the chief revolutionary party, the African National Congress, was tainted with the blood of rival black organizations; people were tired of a long, seemingly escalating, guerrilla war; and the new government did not rely exclusively on the Commission but also prosecuted some of the worst offenders.

The most positive assessment one can confidently make is that, as the white supremacist regime was collapsing, it had not been clear that the new republic would avoid civil war and the sort of brutal dictatorship that had taken over most Sub-Saharan countries. In this precarious context, the TRC carried out its mandate fairly and spread what its members deemed to be the truth about an ugly past, excoriating some leaders of the African National Congress (which probably angered many blacks) along with white rulers and their minions (which probably angered many whites). The Commission tried to lay the base for a political culture that values human rights and recognizes the importance of due process of law in protecting those rights. This mission is of critical importance for a constitutional democracy that will endure. Most obviously, it is likely that the decision of a government, dominated by black survivors of apartheid, to choose magnanimity over revenge, taught whites, blacks, coloreds, and Asians something about the prudence of forgiveness. That decision certainly enhanced South Africa's status as a responsible nation with powerful ambitions to become a constitutional democracy.

Despite Gibson's excellent empirical work, we still have only a series of shrewd but conflicting guesses. Against Martha Minow's claim that full and open confessions elicited by a TRC are more healing than punishment inflicted by the criminal law, we have Hannah Arendt's assertion that human beings cannot forgive what they cannot punish.<sup>20</sup> Supporting data for either claim are sparse. Neither forgiveness nor amnesia, however, is necessary for reconciliation. If either were, healing would be impossible. Great Christians, like Archbishop Desmond Tutu,

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Thompson eds., 2000); see also MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998).

19. GIBSON, *supra* note 13.

20. HANNAH ARENDT, THE HUMAN CONDITION 241 (1958).



may be able to forgive and urge others to join them, but some Christian moral theologians understand that forgetting wrongs is impossible.<sup>21</sup> What is necessary for reconciliation is a willingness to put aside hatred for a particular sector of the population. That is, black South Africans could continue to despise Afrikaner leaders such as Daniel Malan, John Vorster, Frederick W. de Klerk, and certainly Eugene de Kock; Ulster Catholics to revile Ian Paisley (and, having notoriously long memories, Oliver Cromwell); Jews who returned to Germany to detest Hitler and Himmler; Palestinians to hate Ariel Sharon, Benjamin Netanyahu, and all Mosad agents; and Israelis to revile Yasir Arafat and all members of Hamas and Hizbollah. Yet, if these people were not willing to try to accept whites, Protestants, Germans, Jews, and Arabs as fellow citizens, civil governance would be impossible in such multiethnic societies.

### *C. Criminal Prosecutions*

The extent to which the success of South Africa's TRC (if it really was a success) could be duplicated elsewhere is problematic. Without doubt, the appearance of a leader with the political skill, charisma, and righteous forbearance of Nelson Mandela is not a frequent happening. Furthermore, it may be that new leaders do not, as a practical matter, have the option of pretending to absolve offenders after they suffer only the humiliation that comes from public confessions.<sup>22</sup> Demands for retributive justice, often difficult to differentiate from plain old-fashioned revenge, may echo so loudly throughout the community so as to force the government to take more punitive action. This means choosing a fourth option: criminal prosecution. That course, however, does not necessarily offer a series of surgical strikes unless leaders can create crystalline distinctions both among state-sanctioned crimes and degrees of guilt. Even in "normal" criminal prosecutions, distinctions between felonies and misdemeanors are sometimes arbitrary. Where we deal with mass felonies committed by public officials, emotions are likely to bubble over, and the number of both victims and tormentors may be huge.

In the People's Republic of Germany, for example, the Stasi directly employed almost 100,000 men and women and, indirectly, perhaps as many as a quarter of a million more.<sup>23</sup> Even those numbers, however, seem tiny when we recall that the Hutus in Rwanda hacked to death

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21. See STANLEY HAUERWAS, *A BETTER HOPE: RESOURCES FOR A CHURCH CONFRONTING CAPITALISM, DEMOCRACY, AND POSTMODERNITY* 139-54 (2000). I should note a distinction here: morality is concerned with the duties that human beings owe to each other; moral theology focuses on these mutual obligations as derived from the duties that humans owe to the Deity.

22. Of course, offenders may experience no remorse for their crimes on behalf of the old constitutional order and thus suffer no humiliation. Indeed, their admissions may gain them a certain éclat within their reference group.

23. The figure of "official" Stasi employees was 97,000, with an additional 150,000 "unofficial collaborators." See JENNIFER A. YODER, *FROM EAST GERMANS TO GERMANS?: THE NEW POSTCOMMUNIST ELITES* 97 (1999).

about 800,000 Tutsis, and the government later arrested more than 120,000 alleged *genocidaires*. Exempting clerks and secretaries from legal sanctions may be easy, but deciding whom to punish at operational and command levels is far more difficult. Should, for instance, Rwanda have limited prosecution to the chiefs who urged their people to commit mayhem, or was it proper to include those who did the bloody chopping?<sup>24</sup> In Latin America and the former Soviet satellites, should the new governments have prosecuted only the senior officials who ordered murder and torture, or included those who shot prisoners, tore out fingernails, crushed testicles, or participated in gang rapes? Should the new leaders also have tried police who did the arresting and jailers who kept the victims imprisoned? In addition, what about informers, especially paid informers, without whose perfidy prisoners might not have been arrested at all?

Furthermore, serious questions of *ex post facto* laws may arise. Some of the most brutal acts of security officials were probably not criminal under the laws of the old regime, or shielded by statutes of limitations. Hungary's new government met this situation by criminalizing the more oppressive acts committed by officials of the old regime and amending statutes of limitations for acts that had been criminal. In 1992, however, the Hungarian constitutional court invalidated these efforts.<sup>25</sup> It may well be that security officials violated international law, but the reach of such law might raise difficult questions of applicability if the old government had not been party to relevant international agreements regarding human rights.<sup>26</sup>

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24. Faced with such an enormous burden of investigating and trying so many accused, the Rwandan government established a series of very informal tribunals called Gacca courts (gacca means piece of grass), which sat in the open near a village, so that all people in the area could attend and, if they wished, give evidence. These proceedings partook of the atmosphere of "both the Salem witch trials and a Mississippi Christian revival." Samantha Power, *Rwanda: The Two Faces of Justice*, N.Y. REV. OF BOOKS, Jan. 16, 2003, at 1. The proceedings of the Gacca courts also bore some resemblance to the grand jury in late medieval England in that they officially accused many of the defendants. The Hutus complained that they were getting victors' justice. Eventually the government freed about 80,000 of the accused without trials.

25. Alajos Dornbach, *Retroactivity Law Overturned in Hungary*, 1 E. EUR. CONST. REV. 7, 8 (Spring 1992); see also Halmay & Scheppele, *supra* note 1, at 160. The United States Supreme Court, though only by a 5-4 vote, also held that extending a statute of limitations to punish an alleged sex offender against whom the original limitations had already run, violated the constitutional prohibition against *ex post facto* laws. *Stogner v. California*, 123 S. Ct. 2446, 2452 (2003). For the majority, Justice Stephen Breyer wrote: "[T]o resurrect a prosecution after the relevant statute of limitations has expired is to eliminate a currently existing conclusive presumption forbidding prosecution, and thereby to permit conviction on a quantum of evidence where that quantum, at the time the new law is enacted, would have been legally insufficient." *Stogner*, 123 S. Ct. at 2452. Justices Kennedy, Scalia, and Thomas, and Chief Justice Rehnquist dissented. *Id.* at 2461.

26. It remains a legal possibility, though a politically remote one, that some officials, both of the old South African government and of the African National Congress, could be prosecuted, at least outside of South Africa. The new constitutional text forbids conviction for "an act or omission that was not an offence under either national or international law at the time it was committed or omitted . . ." S. AFR. CONST. ch. II, § 35(3)(l). Many of the acts to which people confessed before the TRC may have been, at the time of commission, offenses against international law. See John Dugard, *Retrospective Justice: International Law and the South African Model*, in TRANSITIONAL

It may also be difficult to find prosecutors and judges with clean hands. Many of these officials may have been intimately linked to oppression. Fresh judicial personnel might soon be in place; but they, having possibly been victims or relatives of victims of the authoritarian regime, might appear to be less than disinterested. This problem is not trivial if the new government is trying to teach its citizens the norms of constitutional democracy. Thus, if leaders choose criminal prosecution, they may wish to ask for the help of the UN, or utilize some other international arrangement for a tribunal to try political offenses.<sup>27</sup> In 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia, providing a forum in which to try leaders of all sides for atrocities committed before and during the civil wars in Bosnia and Kosovo.<sup>28</sup> Slobodan Milosevic, sometime president of Serbia, was the most notorious defendant to grace that court's docket. A similar resolution created a tribunal to try people accused of genocide in Rwanda. To maintain an aura of objectivity, the judges sat in Tanzania. The permanent establishment of the International Criminal Court, located at the Hague and associated with, but not part of, the UN, offers a forum to prosecute former officials accused of violating human rights and to do so without the aroma of victors' justice and with less danger of exacerbating ethnic hatreds.

## II. FAIRNESS, VENGEANCE, AND PRUDENCE

Any compromise that includes amnesty for the military, secret police, and/or civilian autocrats of the old regime will sit bitterly in the mouths of victims and their families. These people are apt to believe it is dreadfully wrong that their oppressors not stand trial for their crimes. Nevertheless, before public officials can bring a criminal action, they must have the will, power, and authority to do so. In Poland and Hungary, for example, the new governments had the two latter but chose to

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JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 269, 273 (A. James McAdams ed., 1997). For a more complete analysis of the international law relevant here, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2551-2612 (1991).

27. Belgian law allows prosecution of crimes against humanity in Belgian courts, no matter in which venue the acts were committed. Early in 2003, Belgium narrowed its code to allow such prosecutions by non-Belgians only where they themselves were directly injured. Later in 2003, the Belgian prime minister announced that his government would amend the law to allow only Belgians to file suit. The law now permits prosecutors to transfer cases to the International Criminal Court in the Hague. During the summer of 2003, Belgian courts threw out private suits against Israeli Prime Minister Ariel Sharon and General Amos Yaron, as well as against George W. Bush and General Tommy Franks. See *Too Embarrassing: Why Belgium Is Changing Its Law Against Genocide*, THE ECONOMIST, Apr. 10, 2003, at 43. American courts have civil jurisdiction over offenses under international law, though even if successful, litigants are not likely to collect from defendants.

28. The official title is "The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991." For an analysis of the UN Security Council's efforts to establish such courts under Article 41 of the UN Charter, see Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers Under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509 (1996).

be carefully selective in their prosecutions, relying more heavily on what Eric Lincoln calls “no-fault reconciliation.”<sup>29</sup>

In other situations, new leaders may have the will and authority, but lack the power to impose punishment. It is probable, for instance, that the Uruguayan army would have resumed military rule had the civilians tried to repeal the amnesty the junta had conferred on itself and its subordinates before yielding power.<sup>30</sup> In 1984, Argentina’s civilian government under President Raúl Alfonsín repealed this grant of amnesty and began to bring army officers as well as commanders of leftist guerrillas to trial for assorted violations of human rights. Several legal obstacles immediately arose. One was an existing statutory requirement that trials of military personnel begin in military tribunals, whose officers were not anxious to try their brothers. The other was the doctrine of “due obedience”—the obligation of junior officers to presume the legitimacy of orders from senior officers.

Eventually, the government was able to convict some of the principals in the “Dirty War,” including Galtieri, though for malfeasance in conducting the so-called Malvinas War against Britain rather than for kidnapping, torture, and murder. It soon became evident, however, that the civilian government’s control of the military was shaky, and prosecutions stopped after several outbreaks of mutiny. In 1989, President Carlos Menem, Alfonsín’s successor and a member of the Perónista party, an organization that had launched a goodly share of Argentina’s military coups, pardoned all those who had been convicted.<sup>31</sup> Fourteen years later, more prosecutions became possible when the legislature again repealed previous grants of amnesty. Yet it was Spanish rather than local prosecutors who moved first, and Argentina’s President Nestor Kirchner, who had himself briefly been one of the junta’s guests, nullified an earlier decree that had forbidden extradition of military personnel.

In Chile, the new civilian government was less willing and no more able to bring Pinochet’s pack to trial. Initially, the General’s retaining both his military status and the loyalty of a large portion of his troops gave him de facto immunity. During the early stages of the common law, no writ could run against the king because he supposedly controlled the physical force of the realm. For the same reason, no writ can run against

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29. C. ERIC LINCOLN, *COMING THROUGH THE FIRE: SURVIVING RACE AND PLACE IN AMERICA* 157 (1996).

30. This grant was later confirmed by a public referendum. Apparently, the Uruguayans understood the price to be paid for return to civilian rule.

31. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 *YALE L.J.* 2619, 2621 (1991). Because of the pardon, Galtieri, noted more for his overindulgence in alcohol than for his intellectual power, served only five of the twelve years of his sentence. Some years later, police placed him under house arrest while the courts adjudicated a claim that the grant of amnesty for his participation in numerous murders was unconstitutional. He died in 2003, before the issue was settled. See *Obituary: Leopoldo Galtieri*, *THE ECONOMIST*, Jan. 18, 2003.

a modern general who commands an army ready to protect him. In 2001, when Spain tried to extradite Pinochet from Britain, where he was seeking medical treatment, to try him for murdering Spanish citizens, the Chilean government claimed that its own tribunals should mete out whatever punishment was due. After winning in British courts, however, Chilean officials continued to let sleeping generals lie.<sup>32</sup> In 2003, the civilian government announced plans to try several dozen of the junta's security officials. Even then, however, prosecutors were apparently planning to let the top echelon of the old regime alone, in part out of fear of the army's reaction and in part out of a desire not to pick at the scabs of healing wounds.

The practical issues surrounding decisions to prosecute are hardly simple, but the moral issues are even more tangled, as the following section of this Article indicates. These events and nonevents, like the conditional amnesty offered by TRCs that follow the strong model of South Africa, raise grave questions about the relationships among punishment, justice, and constitutionalist values.<sup>33</sup> Beyond stirring deep anger, immunity raises issues of equality before the law and the commitment of the new constitutional order to this ideal. It would not be unreasonable for a people new to constitutional democracy to harbor suspicions of hypocrisy were the government to imprison a man who, while drunk, assaulted another patron in a barroom brawl and yet refuse to prosecute men who had ordered the murder of hundreds, perhaps thousands, of political dissidents.

It is certain, however, that if the ghouls who dominated the old regime believe surrendering power will lead them straight to the gibbet, they will have a huge incentive to fight with all their resources. More-

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32. In 2000, Chile's highest court had removed the General's immunity and ordered him to stand trial for murder. A year later, the case was dismissed on grounds that Pinochet was mentally incompetent to stand trial. In addition to having diabetes, he had suffered several strokes and was experiencing difficulty walking. Nevertheless, in 2003, he gave a talk at a meeting of retired generals, and various human rights groups went to court arguing that the General was now mentally competent to stand trial on other charges of murder and should be stripped of the immunity. The court of appeals dismissed the case.

33. Those questions may seem more serious in some countries than in others. Pardons are part of every system of law, but immunity from prosecution differs from system to system. Americans are accustomed to reading about bargains in which prosecutors and accused criminals swap guilty pleas on lesser charges for shorter prison terms. Sometimes, prosecutors even offer complete amnesty to major felons in exchange for help in convicting their bosses. See GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* 16 (2003); JULIA FIONDA, *PUBLIC PROSECUTORS AND DISCRETION: A COMPARATIVE STUDY* (1995). On the other hand, the civil law denies the legitimacy of such negotiations. Procurators and judges prefer to pretend that they even-handedly enforce the black letter of the law. It is, therefore, not at all unlikely that an agreement not to prosecute the predators who ran the old regime would incite even greater anger in countries in which the official legal myth denied plea bargaining. *But see* Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 *YALE L.J.* 240 (1977) (claiming that prosecutorial discretion in these three civil law countries differed more in candor than in fact from that in the United States. Their article triggered a long debate.).

over, an internal war is likely to cause heavy casualties among civilians. Such a conflict may not be the greatest evil that can befall a people; in fact, it may affect much good, as for instance, freeing slaves or releasing an entire people from political bondage. Yet, whatever their positive results, civil wars are always savagely divisive. They may begin as binary battles over principle, but they often mutate into conflicts among tribes or even within neighborhoods, involving jealousy, greed, and alleged personal insults, fueling hatreds that can endure for generations.<sup>34</sup> In short, a civil war can do to a nation what cross-cut shredders did to Enron's ledgers. Thus, leaders who recall the free-falls into near anarchy and oppression that occurred in Algeria, Angola, Burundi, Chechnya, Laos, Lebanon, Liberia, Nigeria, Rwanda, Sri Lanka, Yugoslavia, and Zaire must discount the enormity of these evils by their probability—which is a matter of practical judgment.

Additionally, there may be serious doubt as to who would win a civil war. Authoritarian governments may teeter without falling, as illustrated by failed revolts in Hungary in 1956 and Czechoslovakia in 1968, and the tragic fate of China's Democracy Movement in 1989. Each produced its share of corpses without yielding either democracy or constitutionalism.<sup>35</sup> For all the frustration amnesty generates, following Huntington's advice may be the price of avoiding butchery: "[D]o not prosecute, do not punish, do not forgive, and, above all, do not forget."<sup>36</sup>

Whether frightened tyrants will begin a civil war is also a matter for practical judgment for them as well as for the leaders of a movement for constitutional democracy. The old elite may choose instead to run, a possibility that fogs decisions. As Justice Brandeis once wrote, the "great difficulty of all group action . . . is when and what concession to make."<sup>37</sup> Seldom is the choice between a clear good and a clear evil. Typically, it is between evils, when doing nothing will itself produce evil. "Every decision of consequence," Hilaire Belloc said, "has grave evils attached to it—or grave risk of evil."<sup>38</sup> Multiplying that difficulty is the fact that leaders frequently must make critically important judgments under conditions of uncertainty, sometimes extreme uncertainty. They

34. See Stathis N. Kalyvas, *The Ontology of "Political Violence": Action and Identity in Civil Wars*, 1 PERSP. ON POL. 475, 475 (2003) (arguing that "[c]ivil wars are not binary conflicts, but complex and ambiguous processes that foster" an apparently massive, though variable, mix of identities and actions).

35. On the other hand, one might contend that, although the Hungarian and Czechoslovak uprisings immediately produced only bloody repression, the anger they revealed soon moved officials, especially in Hungary, to modify the harshness of their rule. What effect, if any, China's Democracy Movement had still remains to be seen a decade and a half later.

36. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 231 (1991).

37. ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 18 (1957) (internal citations omitted).

38. Letter from Hilaire Belloc to Lady Lovat (Aug. 8, 1930), in *LETTERS FROM HILAIRE BELLOC* 214, 215 (Robert Speaight ed., 1958).

cannot be sure of the effects of their choices or the reactions of opponents or even allies. Nor can they be certain that what they perceive as the range of possibilities is not skewed by their own political myopia. Thus, they may be obliged to select among partially informed guesses about the relative probability that a particular course, rather than any of several others, will guide their country to what is good. Being forced to choose between tolerating what *seems* to be a smaller evil to avoid what *seems* to be a much larger evil—and to hope, but not be certain, that their decision will yield the least evil—is itself one of the costs leaders must pay for having fallible judgment and blurred visions of the future.

In such situations, hurling moral blame may itself be morally reckless. It would take large globs of information about evil goals and ignored information—in short, convincing evidence of criminal stupidity, criminal negligence, or criminal purposes—to confidently brand as morally wrong a decision to exchange amnesty for a peaceful exit. Philosophers in the safety of their proverbial armchairs may deem a civil war's cost in human lives to be irrelevant to questions of abstract justice, but that price cannot be irrelevant to public officials who are responsible for those lives. Leaders of the new constitutional order could shout, "*Fiat justitia, ruat coelum!*" That cry, however, is more likely to send souls to hell ahead of schedule than to bring peace on earth or cause the heavens to tumble. If the best judgment of the leaders of the new constitutional order sees the options as civil war or amnesty, then the pleasure of inflicting on tyrants the punishment they have earned will have to take second place to saving lives. In any event, the new leaders will have a massive task convincing the new citizens that their choice among public policies was the best possible under the circumstances.<sup>39</sup>

The situation the new constitutional order faces when it considers establishing a commission of truth and reconciliation may be quite different from that which existed before the old regime surrendered power.<sup>40</sup> (In South Africa, the apartheid government apparently insisted on such a procedure as a condition of peaceful exit from office.) Although civil war might well remain a possibility when the government's authority, if not all of its power, has moved into the hands of the new leaders, open warfare is not as likely to occur, and if it does, it is less

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39. One palliative on which new leaders can insist is the restriction of amnesty to past acts. These pacts should not extend any immunity beyond the date of the agreement, lest the old leaders, as they exit from power, continue to commit criminal deeds. Absolution for past felonies should not become license for future crimes.

40. There are also tricky procedural issues. John Dugard argues that the decisions to set up such a commission and the rules under which it will operate should proceed not from political compromises, but from legal principles and historic experience. Dugard, *supra* note 26, at 287. Dugard makes a strong, but ultimately unconvincing argument—unconvincing because the problem of what to do about past public crimes is eminently political in Aristotle's sense of the word. The real questions center around the issues of what compromises should be accepted.

likely to cause the slaughter civil war could have wreaked when the old officials fully controlled the state's instruments.<sup>41</sup>

A dogging practical question that leaders of a fledgling constitutional democracy must face is whether criminal prosecutions will accelerate or slow reconciliation, bringing the citizens of a new constitutional democracy together into a just society. To what extent would establishment of a truth and reconciliation commission facilitate or impede that process? Forgoing the sweetness of retaliation against predators can be a cost worth paying.

On the other hand, the quality of mercy has often been strained, Portia to the contrary notwithstanding. The case for amnesty, conditional or absolute, may not be convincing. The new government might be able to follow a punitive policy, assuming its officials, again operating under conditions of imperfect knowledge, correctly judge such a course prudent. Important here will be considerations of whom the old regime, if only virtually, represented. If the rulers constituted a rather small group, say a clique of military officers who had managed to come to power by controlling the military and security forces, then perhaps imprisoning or executing them and their principal henchmen might not produce enduring social disruptions. If, however, as in the remnants of old Yugoslavia, South Africa, or Rwanda, those responsible for criminal atrocities were representative of a larger social or ethnic group, or were so perceived by large segments of such a group, then the result might tear the nation apart, beyond the power of the current or even the next generation to stitch together. If such leaders were to be punished, any hope for restored social unity would allow punishment only by outside force, as actually happened to many leaders who organized massacres in the Balkan wars of the 1980s and 1990s.

The new government might find it perilous to offer amnesty if the popular demand for revenge were so strong that the alternative to criminal trials was widespread private vengeance. Mob rule is more likely to provoke anarchy (and perhaps make another coup welcome) than it is to further any system of civil governance. There are no assurances that the new government could control its people, punish the oppressors, or even remain in power. Older Europeans had vivid memories of mobs battling in the streets of Weimar Germany and the political system that resulted from public yearnings for order. A dismal drama may well play out: lynchings followed by preventive indictments, which incite mobs and

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41. Even so, the dangers might not be trivial. In South Africa, Archbishop Desmond Tutu warned his countrymen that many true believers in apartheid "are still in the security forces and part of the civil service. These people have the capacity of destroying this land. . . . If there were not the possibility of amnesty, then the option of a military upheaval [would be] a very real one." Amy Guttman & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 22, 39 (Robert I. Rotberg & Dennis Thompson eds., 2000) (internal quotations omitted).



mutinies, which lead to a coup and a return to authoritarian government. Fearing these kinds of effects, the new leaders might refuse to agree to blanket amnesty or, having so agreed, renege on their promise. A clever casuist (or an ordinary attorney) could construct a plausible argument that neither murderers nor torturers have a right to the truth, or that the promise of amnesty was made under duress. In either situation, so a wily casuist could contend, breaking a promise made to criminals does not really constitute lying.

Whatever the outcome, a cry for revenge is a typical human reaction to cruel rule. One moral theologian has compared the driving force of righteous indignation to that of sex.<sup>42</sup> Individual men and women may believe that keeping faith with their dead and wounded requires retaliation in kind, and most legal systems incorporate an understanding both of this felt individual need to strike back and a social need for the state to control vengeance. Islamic law, the *shari'a*, clearly recognizes retaliation, allowing, for instance, relatives of a murdered man to serve as executioners for the government.<sup>43</sup> (More civilized American states merely permit relatives to witness the prisoner's final writhing.) More subtly, the civil and common law also acknowledge a legitimate role for revenge in the operations of criminal processes. Indeed, Oliver Wendell Holmes, Jr., the Archangel of Legal Realism, claimed "not only that the law does, but that it ought to, make the gratification of revenge an object."<sup>44</sup> He then went on to quote Sir James Stephen: "The criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."<sup>45</sup> Three-quarters of a century later, a former Lord Chief Justice of the United Kingdom told the House of Lords that it was "praiseworthy that the country should be willing to avenge crime."<sup>46</sup>

### III. JUSTICE AND PRUDENCE: A CLASH OF VIRTUES?

In the years immediately before and after a constitutional democracy replaces a brutal authoritarian regime, justice and prudence may seem to make competing, even conflicting, demands. Let us begin by eliminating two relatively easy problems. First is the justice in punishing the predators who had been operating an oppressive regime. It could

42. JAMES TUNSTEAD BURTCHAELL, PHILEMON'S PROBLEM: THE DAILY DILEMMA OF THE CHRISTIAN 102 (1973).

43. Islam does not distinguish between church and state in a fashion comparable to that of western nations. Therefore, the *shari'a* is both religious, and where adopted by civil authority (usually in a modified form), secular law. Over the centuries, Islamic jurists/moral theologians have deduced the *shari'a*'s precepts from sacred texts and scholarly commentaries. Thus, this body of law is derivative and even more "unwritten" than the common law was during its early centuries. Nevertheless, many, perhaps most, devout Muslims consider it morally binding.

44. OLIVER WENDELL HOLMES, THE COMMON LAW 36 (Mark DeWolfe Howe ed., Belknap Press 1963) (1881).

45. *Id.* Holmes was a bachelor when he quoted Stephen.

46. H.L.A. HART, LAW, LIBERTY AND MORALITY 61 (1963) (internal quotations omitted) (discussing capital punishment—he approved).

hardly be unjust for the new regime to hold these people to account under the criminal law, assuming they were accorded the functional equivalent of due process. The argument would run along such lines as: These officials seized or accepted power and claimed to act in the name of the nation and for the good of that nation and its citizens/denizens. Having reaped the rewards of the power their offices bestowed, they assumed an obligation to govern for the benefit of their people. It is hardly unfair that they pay for abuses of power so gross that they are major felonies under the laws of all civilized states.

A second easy problem concerns a decision not to punish the tyrants who are willing to surrender the governmental apparatus controlling the military and internal security forces, only on the condition of being excused from punishment. The previous section dealt with these issues. We need only add that new leaders would exchange what they do not have, the power to punish, for what they also do not (yet) have, the power to help build decent lives for their fellow citizens. Far from Faustian, this bargain would promote justice by facilitating the creation of a civil society. Even Diane F. Orentlicher, who constructs a very careful argument that an assortment of international agreements imposes a duty on successor governments to prosecute tyrants,<sup>47</sup> concedes that “international law does not require governments to commit political suicide.”<sup>48</sup>

The truly difficult moral question is whether justice imposes on a constitutional democracy a *moral obligation* to punish the criminals who ran the old regime. To address that issue, let us first assume that leaders who wish to peacefully change political systems and stabilize the new constitutional democracy decide it is prudent to negotiate absolute or conditional amnesty for the chiefs of the old regime and their henchmen. Even granting this assumption, Guttman and Thompson assert, the “stability of a political regime itself is not a moral good or a sufficient reason to sacrifice justice for individuals.”<sup>49</sup> The *Final Report* of South Africa’s Truth and Reconciliation commission expressed a similar concern, noting that victims of apartheid voiced a common refrain: “We’ve heard the truth. There is even talk about reconciliation. But where’s the justice?”<sup>50</sup>

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47. See generally Orentlicher, *supra* note 26.

48. Diane F. Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641, 2641 (1991).

49. Guttman & Thompson, *supra* note 41, at 23. Similarly, when Charles Taylor, the sometime President-Dictator of Liberia who had been brutally fighting efforts to depose him and had been indicted for terrorist acts by Sierra Leone, was allowed to go peacefully (and splendidly) into exile in Nigeria, two journalists protested, “Peace cannot be bought at the price of justice.” Donna E. Arzt & Lucille M. Rignanes, *West Lets Liberia’s Taylor Escape*, ALBUQUERQUE JOURNAL, Aug. 8, 2003. Alas, peace has often been bought at the cost of justice—and every other virtue, for that matter.

50. I TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 104 (2d ed. 1999) (internal quotations omitted) [hereinafter TRC REPORT]. For an excellent discussion, see Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68 (Robert I. Rotberg & Dennis Thompson eds., 2000).

At the heart of most of the moral arguments for the necessity of punishment lies a belief that punishing criminals is essential to victims' realizing justice. This assumption seems to underlie what Guttman and Thompson, as well as millions of less learned people, feel. The claim would have to be that retributive justice is a victim's right, a claim that would surely be emotionally gratifying to those who suffered from the old regime's brutalities. There are three bases for such a belief: Victims have a right grounded in (1) the positive law of the state; (2) international law; or (3) justice itself.

#### A. Positive Law

An argument from positive law is that victims have a right, which the state has implicitly or explicitly contracted to enforce, that public officials who viciously abuse their fellow nationals be punished. In some legal systems victims may, in fact, have some such positive legal right. Certainly, in countries that apply the *shari'a*, a man (less probably, a woman) would have a right to take private action, including killing a family member, usually a woman, who has offended the family's honor. Furthermore, as we have seen, members of a victim's family have a right to participate in executing a murderer. It is significant, however, that the putative right here runs only against other private citizens/denizens. In most Islamic countries, individuals have as little as three remedies against abusive officials: (1) informal political pressure exerted through an influential patron; (2) assassination; or (3) joining a terrorist or revolutionary organization.<sup>51</sup>

Both the civil and common law, as Holmes explained, recognize a human inclination toward retaliation. Because outside of Africa and Latin America these two legal systems operate in (sometimes struggling) representative or constitutional democracies, they allow aggrieved citizens significant political remedies that encourage officials to pursue criminal charges. Nevertheless, these two legal systems substitute state action for private retaliation. Civil suits, perhaps including petitions for injunctions and challenges to the basic constitutionality of the official's action, are the principal legal remedies. On the one hand, constitutional democracies deny private citizens a right to exact personal vengeance and also restrict the capacity of individual citizens to institute criminal proceedings. The rationale for state-imposed punishment, Carlos S. Nino argued, is not based on a "recognition that the victims or their relatives have a right to that punishment."<sup>52</sup> Instead, "[i]t is the consequence of a

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51. Pakistan occasionally had a form of judicial review, and several Arab countries, most notably Egypt, have the beginnings of such an institutional arrangement. So far, however, no constitutional court has intervened to try to block official policies that utilize such methods as arbitrary imprisonment or torture. For an analysis of the real, but fragile, growth of constitutionalism in the Arab world, see NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* (2002).

52. Nino, *supra* note 31, at 2621.

collective goal imposed by the policy of protecting human rights for the future."<sup>53</sup>

### B. International Law

In many countries, international law may provide another remedy. Citing numerous international agreements, judicial opinions, and memoranda by international commissions, Orentlicher makes an eloquent argument that international agreements obligate successor governments to punish the people who organized and commanded systematic atrocities.<sup>54</sup> Two points detract from her conclusion. First, these agreements have loopholes that allow signatories some, if limited, discretion. Second, and more importantly, a decision to prosecute for a high crime against the state is essentially a political, not merely a legal, matter. It is political, not in the journalistic usage of the term as referring to things petty, partisan, or expedient, but in the Aristotelian sense of politics as most truly the master art, being concerned with virtue above all things, in an effort to make citizens good and obedient to the laws.<sup>55</sup> Politics, thus understood, looks to the long and short term good of citizens, which often lies beyond satisfying immediate desires. Enhancing the chances of citizens to live free and decent lives must take precedence over punishing criminals, however gratifying such punishment may be. Distinguishing between what is merely expedient and what is necessary is, again, a matter of practical judgment.

### C. The Basic Concept of Justice

The third basis for what Nino called "mandatory retribution" is justice itself.<sup>56</sup> Defining this notion is a necessary first step toward discovering its demands. The answer to the question, "What is justice?" is hardly self-evident. Even Socrates was better at exploding false understandings of the concept than in exposing its true essence.<sup>57</sup> For public officials and political theorists who are pure pragmatists or consequentialists,<sup>58</sup> the

53. *Id.* In distinguishing between "rights established by principles and collective goals imposed by policies," *id.*, Nino was following RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-100 (1977).

54. Orentlicher, *supra* note 26, at 2612-13.

55. ARISTOTLE, *NICOMACHEAN ETHICS* 95-6, Bk. I, ch. 2, 1094b, ch. 13, 1002a (Christopher Rowe, trans., Oxford Univ. Press 2002) [hereinafter ARISTOTLE, *ETHICS*].

56. Nino, *supra* note 31, at 2620.

57. Socrates's claim that only the just man is happy, does not, I believe, entitle one to conclude, as Hans Kelsen did, that Socrates equated justice and happiness. See HANS KELSEN, *What Is Justice?*, in *WHAT IS JUSTICE?: JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 1, 2 (1971).

58. The philosophy (or philosophies) of pragmatism, as formulated somewhat differently by Williams James (a psychologist of sorts) and Charles Peirce (a mathematician of sorts), is complex, based on a metaphysics and epistemology that challenged traditional thought of the late nineteenth century. Its overriding concern for consequences originated, so Peirce believed, in Kant's assertion that once "an end is proposed, then the conditions for attaining it are hypothetically necessary." IMMANUEL KANT, *CRITIQUE OF PURE REASON* 686 (Paul Guyer & Allen W. Wood trans. & eds., Cambridge Univ. Press 1998). For good introductory essays, see LOUIS MENAND, *THE*

question of justice is much less important than whether policies of amnesty or criminal prosecution would produce the desired goal(s), which in this context mean furthering the peaceful transition and political stability of a constitutional democracy. In fact, the question of justice is one that a consistent pragmatist or consequentialist would consider trivial unless he or she believed that other significant political actors would use it to stir up public opposition. The solution would then be to give enough lip service to the prevalent conception of justice, whatever it might be, to weaken opponents. It is, however, difficult to find a pure pragmatist or consequentialist in the real world. Even Judge Richard A. Posner is not always doctrinally orthodox, though he comes close to being what Max Weber termed an "ideal type."<sup>59</sup> It is equally, if not more difficult, to find someone who is totally indifferent to the effects of decisions. Indeed, it is almost impossible to conceive of a system of morality that did not factor likely effects into its calculus. Thus, almost every decision maker is pragmatic in the limited sense of being seriously concerned about consequences.

For intellectually consistent moral relativists (i.e., moral conventionalists), the task of defining justice should not pose moral or philosophical problems much more difficult than what pragmatists would face. Moral relativism denies that universal standards of morality or justice exist or, if they do exist, they are not demonstrable. (An offshoot of this belief is that all values are equal—itsself a value judgment—and therefore clashes among them are not resolvable through intellectual analyses.) Because, so says the relativist, judgments about justice and morality are either idiosyncratic or culture-bound, the most a government need do to settle the legitimacy of an agreement with exiting officials is to discover what constitutes "a moral good" or "justice" according to the particular standards and conventions dominant within a particular community at a

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METAPHYSICAL CLUB 201-34, 337-76 (2001); and HENRY STEELE COMMAGER, *THE AMERICAN MIND: AN INTERPRETATION OF AMERICAN THOUGHT AND CHARACTER SINCE THE 1880'S*, at 91-107 (1950). In its extreme form, consequentialism, a close ally of pragmatism, also looks primarily to results: The end justifies, if not any means, certainly almost any. Judge Richard A. Posner tries to distinguish pragmatism and consequentialism, at least in the context of adjudication. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 59-71 (2003). Posner states: "I do not know of any pragmatists who have considered themselves consequentialists, but two notable precursors, Bentham and John Stuart Mill, did, and there is no doubt that pragmatism is closer to consequentialism than it is to deontology (duty-based as distinct from consequence-based ethics)." *Id.* at 65.

59. Indeed, it is doubtful that anyone can be a consistent pragmatist or consequentialist, at least insofar as these "philosophies" would not use moral considerations in decision making. The essential difficulty in using results as the criterion of choice is that one must still evaluate results by some standard. Posner, for example, wants to maximize economic efficiency. But why? There are competing values. One has to give convincing reasons why an individual or a society should prefer economic efficiency over other values or would be better off by opting for economic efficiency—or any of its competitors. Offering economic efficiency itself as the reason would be circular. It remains unclear how a pragmatist can, with intellectual consistency, justify any particular goal. For a somewhat similar critique, see Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447 (1990) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

particular time. For example, if an overwhelming majority of the people in an Islamic society accept the *shari'a* and deem it a grievous moral wrong for an infidel to convert a Muslim to another religion, an intellectually consistent relativist would have to concede that an agreement giving amnesty to old rulers who had rigidly enforced the *shari'a*'s prescription of death for such deeds<sup>60</sup> is not unjust for that society. Quite the contrary, punishing these rulers would be unjust. For moral relativists, freedom of religion, as well as other "rights," such as the equality of men and women, can only be conventions. In addition, the reach, content, and authority of mere conventions vary from society to society.

To be sure, determining what data are relevant, then gathering and analyzing them, can present enormous difficulties. These, however, are largely problems for experts in such fields as political sociology, polling public opinion, and quantitative analysis. Except insofar as the methodology of the social sciences raises epistemological issues, moral relativism can have little to say that is interesting or fundamentally important about justice as a concept. In effect, moral relativism transforms issues of morality into empirical questions about the customs, attitudes, and opinions that prevail in a given society at a given time. In this analytical context, Guttman and Thompson could be correct. If the moral opinion dominant in South Africa was that it was unjust to give conditional amnesty to officials who viciously enforced apartheid, then the government's so acting was, by definition, unjust.<sup>61</sup>

For certain kinds of analytical jurisprudence, the problem is even easier than for its kissing cousin, moral relativism. Justice, according to modern legal positivism's prophet, Hans Kelsen, "is not ascertainable by rational knowledge at all. . . . Justice is an irrational ideal."<sup>62</sup> By "irrational," Kelsen meant that justice is one of society's more or less arbitrary choices among values, rather than a conclusion that can be justified by tightly logical deductions from lexically prior principles or induced from empirical evidence according to the commands and procedure specified by what he calls "the basic norm."<sup>63</sup> For a consistent positivist,

60. *Deuteronomy* 13:9-10, commanded a person who was tempted by another Israelite to worship false gods to identify the tempter, even if a brother or son, and have him stoned to death.

61. Guttman and Thompson explicitly refer to punishment as being necessary to "criminal justice as it is commonly understood." Guttman & Thompson, *supra* note 41, at 25. They do not specify whether this common understanding is that of South Africa alone, or, rather, that of most or some nations. They are probably right that this is the common understanding of all nations, although they offer no data. The data that Gibson reports in *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?*, *supra* note 13, and as Gibson and Gouws report in *OVERCOMING INTOLERANCE IN SOUTH AFRICA: EXPERIMENTS IN DEMOCRATIC PERSUASION*, *supra* note 16, neither demonstrate nor deny the existence of a dominant moral judgment that amnesty was unjust.

62. Hans Kelsen, *The Pure Theory of Law. Its Method and Fundamental Concepts.*, 50 *LAW Q. REV.* 474, 482 (1934) (Charles H. Wilson trans.).

63. See, e.g., HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* (Anders Wedberg trans., 1945). For an heroic effort to restate (and rescue) legal positivism, see ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998). Sebok's excellent book discusses justice only indirectly, however, and the word justice does not even appear in the index.

there can be only particular justice for a particular legal system. What the law says is just is to be treated as just, at least within that jurisdiction at that time. *Res ipsa loquitur*: The “thing,” the nation’s law, speaks for itself, and its word is final. If the explicit terms of relevant statutes do not provide a determinate answer, careful analysis should do so.

Of course, doctrinal chastity no more estops legal positivists from having a deep concern for justice within any given legal system than moral relativism prevents conventionalists from being concerned about how their own society practices its values.<sup>64</sup> Analytical jurists such as H.L.A. Hart have been very sensitive about justice within common law systems, especially about what they call “formal justice,” the rules that judges should apply and how they should find those rules.<sup>65</sup> In fact, one serious legal scholar claims that Hart’s brand of legal positivism is not incompatible with the universalism of natural law: Hart and his colleagues merely ask questions different from those that moral realists or natural-law theorists would pose.<sup>66</sup>

Yet, other people manage to proclaim universal moral truths on issues dear to them while asserting moral relativism on lesser matters. On the one hand, they reject the possibility of universalistic moral judgments; on the other, they pay tribute to certain rights they baptize as “human.”<sup>67</sup> The most famous effort of the twentieth century to make sense of such a bifurcation was John Rawls’s restatement of the theory of social contract.<sup>68</sup> As he used the term, justice equals fairness, a usage that comes close to Aristotle’s equating “the just” with “the lawful and the fair.”<sup>69</sup> Despite this venerable intellectual provenance, fairness carries its

64. A moral relativist might apply Kelsen’s methodology and try to arrange a society’s values in hierarchical order and argue that endorsement of a basic value, for example, human equality, logically requires that society to accept derivative values, such as sexual and racial equality. To the extent that the mass of that society also accepts logical consistency as a value, such an argument could both fit within moral relativism’s parameters and even convince others. It is, however, also possible that most members of a society are perfectly willing to accept exceptions to their general principles or to interpret those principles in particularistic ways. For instance, a society may construe “all men are created equal” to mean “all white males are created equal.” If, however, that society accepts the exceptions or particularistic interpretations—“facts” not always any more easy to establish than that the society truly accepts the general principle—then a consistent moral relativist must also accept the exceptions and/or interpretations. Relativists deny the existence of universal moral principles that trump a society’s conventions.

65. See *inter alia*, H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. HART, *THE CONCEPT OF LAW* (1961); HART, *supra* note 46; see also B. E. King, *The Basic Concept of Professor Hart’s Jurisprudence: The Norm out of the Bottle*, 1963 CAMBRIDGE L.J. 270; NEIL MACCORMICK, H.L.A. HART (1981).

66. ROBERT N. MOLES, *DEFINITION AND RULE IN LEGAL THEORY: A REASSESSMENT OF H.L.A. HART AND THE POSITIVIST TRADITION* (1987). Moles believes that Hart and Ronald Dworkin were unaware of the absence of conflict because they did not understand the history of legal theorizing.

67. See, e.g., RONALD DWORIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORIN, *LAW’S EMPIRE* (1986).

68. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *THEORY OF JUSTICE*]; JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001).

69. ARISTOTLE, *ETHICS*, *supra* note 55, at 158-59, Bk. V, ch. 1, 1129a-b.

own ambiguity.<sup>70</sup> In addition, Rawls's description of the original position carefully, perhaps wisely, and surely deliberately, excluded from discussion of the background of his fictional social covenant one of the most basic moral issues: Do "normal" humans possess an innate capacity to reason about the nature of good and evil—a capacity that would precede, make possible, and shape the content of an original covenant? In any event, Rawls used as a model "the original position" in which people operating under a "veil of ignorance" manage to agree on a set of basic (constitutional) rules for a "well-ordered society."<sup>71</sup> Not knowing who they will be in the new society, rich or poor, male or female, white, brown, or yellow, they seek rules that are just in the sense of being fair to all members of society.<sup>72</sup>

Rawls makes much of justice's requiring reciprocity. Justice as reciprocal fairness does carry more intuitive meaning than justice simply as fairness. Aristotle's notion of justice as proportionality fits that intuition. Moreover, the Philosopher says, justice differs from the other virtues in that it is concerned with the good of other people. Thomists, philosophic disciples, though seldom blind followers of Thomas Aquinas, tend to agree.<sup>73</sup> John Finnis understands Aquinas's conception of justice as meaning that a person is ready to give to others what is theirs. The difficult questions center around what belongs to whom, as Socrates, Aristotle, Aquinas, and Rawls, among others, recognized.<sup>74</sup>

70. Judge Richard A. Posner complains that "[t]he problem with words like 'fairness' and 'equality' is that they have no definite meaning." POSNER, *supra* note 58, at 66.

71. RAWLS, *THEORY OF JUSTICE*, *supra* note 68, at 136-42, 448.

72. Although, when discussing economic justice, Rawls specifies that his "founders" do not know if they will be rich or poor in the society to come, when discussing abortion, he does not use the veil of ignorance. Rather, he analyzes the issue as arising among people who are already born. RAWLS, *POLITICAL LIBERALISM*, *supra* note 68, at 243 n.32. It would seem that: (1) Questions about the value of human life and when it begins are more politically (and morally) significant than allocations of property; and, therefore, (2) the veil of ignorance should obscure the vision of decision makers so that, when constructing their basic constitutional order, none of them would not know whether he or she would be among the born or the aborted. It is probable, however, that ringing down that veil would have given an answer different from the one that Rawls preferred. Here he was more a partisan of a specific policy than a detached political philosopher offering a general method of constructing a just society.

73. See, e.g., JOHN FINNIS, *AQUINAS, MORAL, POLITICAL, AND LEGAL THEORY* 133 (1980) [hereinafter FINNIS, *AQUINAS*].

74. Kelsen claimed this definition "is an empty formula, because the decisive question, what is that which is everybody's own, is not answered . . ." KELSEN, *supra* note 57, at 13. On this point, Kelsen's reading was either less than careful, or less than honest. Some two millennia earlier, Socrates had addressed this very difficulty. When Polemarchus quoted Siminodes's definition as "to pay everyone what is owed to him," Socrates replied: "Simonides is a wise and inspired man. . . . But what on earth does he mean by [that]?" PLATO, *THE REPUBLIC* 6, Bk I, 331:e (Tom Griffith trans., G. R. F. Ferrari ed., Cambridge Univ. Press 2000). Aristotle, Aquinas, and modern Thomists have spent a great deal of time and effort trying to demonstrate how a broad concept of justice applies to specific situations in real life. In fact, it would be just to characterize these writers as treating justice less as a general concept and more as a carefully developed attitude reflected in habit. For all of his brilliance, Kelsen was not above creating and then attacking straw men. See generally Robert P. George, *Kelsen and Aquinas on "The Natural-Law Doctrine,"* 75 *NOTRE DAME L. REV.* 1625 (2000), in which George juxtaposes what Kelsen claimed Aquinas said and what Aquinas actually said. The result does not flatter Kelsen's scholarly integrity. See *supra* note 58, for a discussion of



Public officials and political theorists who are not pragmatists, moral relativists, or legal positivists, and who differentiate themselves from Rawls, confront very complex sets of philosophical issues that defy easy solutions. Their analyses move beyond cultural, geographic, and temporal boundaries in an attempt to determine if a putative moral good is indeed good under universally applicable standards. Thomists are the usual suspects here, although hardly the only culprits.<sup>75</sup> They speak of certain actions that are bad in themselves, regardless of actors' motives or the specific circumstances surrounding the choice.<sup>76</sup> Thus, contradicting consequentialists and pragmatists, but following Paul of Tarsus, they deny that a good end, even if pursued for the most noble of motives, can justify any means; rather, only those means are justified that are themselves either good or morally indifferent. Carefully derived predictions about the results of an action, whether in the long or short term, are important elements in moral choice. Nevertheless, good results cannot justify an act such as the deliberate taking of innocent life, itself an evil.

Thomists also differentiate between those things that are good in themselves and those that are instrumentally good.<sup>77</sup> As means to other ends, these latter take their moral stamp from the character of their ends.<sup>78</sup> The first argument, that good ends do not justify evil means, has

Kelsen's spurious argument that Socrates's (Plato's) claim that only the just man can be happy meant that Socrates equated justice and happiness. For a more favorable, though not entirely uncritical, evaluation of Kelsen's general theory, see POSNER, *supra* note 58, at ch. 7.

75. Leo Strauss was a bitter enemy of moral relativism and legal positivism, which explains why he counted Hans Kelsen, a fellow refugee from Hitler, among his chief intellectual enemies. Strauss, however, disclaimed belief in Thomistic natural law. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* (1953). In his seminars, he repeatedly asserted that the first step toward philosophy was to distinguish between one's own benefit and the good. See also the writings of the so-called moral realists, especially: Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453 (1987) (reviewing RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985)); Michael S. Moore, *Moral Reality Revisited*, 90 MICH. L. REV. 2424 (1992); Sotirios A. Barber, *Judge Bork's Constitution*, in *COURTS, JUDGES, & POLITICS* 641 (4th ed., Walter F. Murphy & C. Herman Pritchett eds., 1986); Sotirios A. Barber, *The New Right Assault on Moral Inquiry in Constitutional Law*, 54 GEO. WASH. L. REV. 253 (1986); Sotirios A. Barber, *Epistemological Skepticism, Hobbesian Natural Right and Judicial Self-Restraint*, 48 REV. POL. 374 (1986). For a critical, but not hostile, analysis of Barber's thesis, see Stanley C. Brubaker, *Book Review*, 2 CONST. COMMENT. 261 (1985) (reviewing SOTIRIOS BARBER, *ON WHAT THE CONSTITUTION MEANS* (1984)). Hadley Arkes takes a position quite similar to that of the moral realists. HADLEY ARKES, *FIRST THINGS: AN INQUIRY INTO THE FIRST PRINCIPLES OF MORALS AND JUSTICE* (1986).

76. Nevertheless, for a Thomist, specific circumstances are important. One example of what he would consider an evil act under all circumstances is the wanton taking of human life. But, he would also argue, one must know the context of the act to decide whether the killing was wanton, in self-defense, or in defense of another (and innocent) human being.

77. See, e.g., FINNIS, AQUINAS, *supra* note 73, at 86-90; ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* 8-18 (1993); ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* ch. 2 (1999). Aristotle, of course, made a similar distinction. Because he was not a moral theologian, he did not make as much of the point as did Aquinas and his followers. See ARISTOTLE, *ETHICS*, *supra* note 55, at 95, Bk. I, ch. 2, 1094a.

78. I deliberately exclude discussion of motives. Like the road to hell, the path to vicious tyranny is paved with good intentions. Archbishop Desmond Tutu, for example, said that despite the evils of apartheid, some of the Afrikaner officials "genuinely believed" that this policy offered "the best solution to the complexities of a multiracial land . . ." TRC REPORT, *supra* note 50, at 14

obvious relevance to political morality and resonates well with constitutional democracy, for much of constitutionalism is concerned with regulating, even prohibiting, certain means, such as bills of attainder and *ex post facto* laws, even when directed to laudable goals. The second argument, about the distinction between things good in themselves and merely instrumental goods, is somewhat less valuable for analyses of the justice of granting amnesty to vicious felons because the question centers on instrumental goods—the policies made by governmental institutions, processes, and policies. These are designed to accomplish certain ends, and so are morally colorable according to the goals sought and the means employed. In the latter choices, the notion of actions evil in themselves becomes relevant.

Even constitutional democracy itself is only an instrumental good. As with any political system, its goodness depends, as Aristotle would have put it, on the extent to which the goals it pursues and the means it utilizes maximize the chances for its citizens to live decent lives.<sup>79</sup> Obviously, a political system that tries to respect the great and equal dignity of every human being, as constitutional democracy claims to, is not evil in itself. Insofar as the regime's policies conform to its preachments, it is a positive good. Alas, no constitutional democracy always lives up to its own standards. Thus, political stability would enhance such a regime's capacity to do good; but, in a flawed world, it might also enhance the political system's capacity to do evil.

#### IV. JUSTICE AND PUNISHMENT

We have danced around, rather than answered, except for pragmatism, moral relativism, and Kelsen's classic legal positivism, the question whether justice, or more broadly, basic morality, mandates punishment for tyrants. An affirmation of that demand threatens to legitimize state-imposed vengeance, and most, though hardly all moralists argue against the propriety of revenge. As a practical political matter, the consequences of revenge will differ, as we have seen, between situations in which the old officials form a relatively small coterie of thugs and those in which, while still thugs, seem to represent a large ethnic group or social class.

In the second situation, it is highly unlikely that vengeance will heal social wounds. It is more likely to breed hatred and incite counter-revenge, starting, as Martin Luther King said, a society onto a downward spiral toward darkness. Giving back harm for harm certainly establishes a reciprocal relationship, but whether tit-for-tat heals is doubtful, as Ro-

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(foreword by Chairperson D.M. Tutu). Similarly, no one doubts that Adolf Hitler thought the world would be a better place if every Jew were dead.

79. *C.f.* THE FEDERALIST NO. 45, at 307 (James Madison) ("It is too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object.").

meo and Juliet attested.<sup>80</sup> Moreover, nothing in the history of violence and counter-violence between Catholics and Protestants in Ulster, between Israelis and Palestinians, or among various ethnic groups in the Balkans indicates a therapeutic effect. Nevertheless, strong themes in Jewish, Christian, and Islamic theology, which still provide the foundations of much of modern morality, even among non-believers, make precisely the argument that God does, and man should, punish all wrongdoing.<sup>81</sup> *Leviticus* and *Deuteronomy* command Israel to put to death kidnapers, perjurers, and those who commit adultery, sodomy, incest, homicide, or have sex with animals, gather wood on the Sabbath, or curse either of their parents. These capital crimes include both sins against Yahweh and violations of the persons or property of other humans. The basic principle of the civil and criminal law of ancient Israel was simple and direct:

When one man strikes and disfigures his fellow-countryman, it shall be done to him as he has done; fracture for fracture, eye for eye, tooth for tooth; the injury that he inflicted upon another shall be inflicted upon him. Whoever strikes a beast and kills him shall make restitution; but whoever strikes a man and kills him shall be put to death.<sup>82</sup>

The same sort of retaliatory theme was echoed in the oft-repeated biblical refrain of national survival. This chorus had five stages that varied only in detail: Israel sins, suffers, does penance, is forgiven, and lastly is liberated, its redemption confirmed by a new covenant. All is well for a short time, but sin quickly re-ignites the cycle.

Most ominously, on occasion Yahweh might even punish sinners after He had apparently forgiven them. According to 2 *Samuel*, for instance, David confessed to the Prophet Nathan that he had Uriah the Hittite slain so that he could add Bathsheba, Uriah's wife, to his own stable. Nathan replied: "Yahweh, for His part, forgives your sin; you are not to die. Yet because you have outraged Yahweh by doing this, the [first] child that will be born to you [and Bathsheba] is to die."<sup>83</sup> This passage

80. Theorists of rational choice may differ, arguing that rational actors are likely to prefer some sort of compromise to the destructiveness of endless retaliation and counter-retaliation. Among the best works here is, ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984). There are two general difficulties—though less so with Axelrod's book than most such studies. The first is the simple fact that people do not always behave rationally or even intelligently—a difficulty especially large when, as immediately after liberation from brutal rule, emotions are likely to run high. The second difficulty is that, in order to understand what political actors deem rational, one has to know their hierarchy of values. During the 1960s, Secretary of Defense Robert McNamara began bombing Ho Chi Minh's small factories in an effort to persuade him to stop his campaign against South Vietnam. Minh, a former peasant, did not value factories in the same way as did McNamara, the former President of Ford Motor Company. As a result, the North's incentive to compromise was far weaker than McNamara had supposed.

81. For God, at least, the data are weak. In this world, punishment that we can ascribe, albeit with small confidence, to the Deity seems random.

82. *Leviticus* 24:17-21.

83. 2 *Samuel* 12:13-14.

also provides a concrete example of Yahweh's wrath extending beyond the current generation. The author of *2 Samuel* does not speak of any sin committed by the child Bathsheba was carrying.<sup>84</sup> "Fearing" the rage of this "great and terrible" God was prudent indeed.

The standard Christian story of salvation conveys a similar message of justice as retribution: God demands that mankind expiate sin through suffering. Sinners are not forgiven through contrition alone. Only the agony of a sacrificial Lamb's slow, asphyxiating, death on a cross could satisfy divine justice after Adam and Eve's disobedience. The point of Jesus's death was to change God, not man.<sup>85</sup> Operating within this paradigm, Augustine saw punishment and justice as reciprocal and God as a heavenly Rottweiler, ever waiting to pounce on those who violate His laws. To support his speculations, the holy bishop quoted the sixth chapter of Luke's gospel: "With the same measure that ye mete withal it shall be measured to you again?"<sup>86</sup> Indeed, Augustine went so far as to say: "As a rule, just wars are defined as those which avenge injuries, if some nation or state . . . has neglected to punish a wrong committed by its citizens, or to reclaim something that was wrongfully taken."<sup>87</sup> Across a dozen centuries, Jonathan Edwards, the great American Protestant Divine, echoed Augustine's message about sinners: "[J]ustice calls aloud for an infinite punishment . . . . The wrath of God burns against them; their damnation does not slumber; the pit is prepared; the fire is made ready; the flames do rage and glow."<sup>88</sup>

The *shari'a's* endorsement of retaliation is directly based, so Islamic jurists aver, on the *Qur'an*. That collection of Mohammed's saying sends complex messages of Allah as the all-merciful, both "benign and forgiving."<sup>89</sup> Still, He accepts repentance "only of those who are guilty of an evil out of ignorance yet quickly repent . . . ."<sup>90</sup> Islamic jurisprudence has resolved such ambiguities in favor of vengeance.

To the extent that the Bible, the standard Christian story of salvation, the *Qur'an*, and *shari'a*, express the traditional religious thinking of Jews, Christians, and Muslims, the weight of these moral theologies is clearly on the side of mandatory punishment. Outside the world of Islam, the force of these orthodoxies may have weakened over the centuries but still exert power over many minds. The move from a divine retribution that imposes eternal damnation as payback for sin, to a necessity that

84. An atheist might construct an alternative hypothesis that is kinder to Yahweh: Bathsheba had an abortion and the author of *2 Samuel* provided a cover story.

85. Burtchaell argues that this account has the story backwards: The real point of Jesus's death was to change Man, not God. See generally BURTCHAELL, *supra* note 42, at 79-88 & ch. 4.

86. See generally SAINT AUGUSTINE, THE CITY OF GOD 763, Bk XXI, §§ 11-14 (Marcus Dods trans., Modern Library 1950).

87. BURTCHAELL, *supra* note 42, at 191 (citation omitted).

88. *Id.* at 81.

89. AL-QUR'AN 80, ch. 4, verse 43 (Ahmed Ali trans., Princeton Univ. Press 1988).

90. *Id.* at 76, ch. 4, verse 17.

human authorities punish wrongdoing, has been a smooth skate, helping to cloud distinctions between, on the one hand, vengeance and, on the other, rehabilitation, deterrence, restoration of individuals' losses, and repair of damages to the public order. Even assuming what takes a blind leap of mindless faith to accept, that commentators on these texts have accurately described their infinitely loving God as a vindictive double-entry bookkeeper,<sup>91</sup> extrapolating from the supernatural to the mundane is a dangerous conceit. The commands of Man's justice are murky and the relationships between sinful humans, punishment, and justice are labyrinthine, not linear.

Examination of the purposes of punishment might clarify its relation to justice. Three justifications are generally accepted for inflicting punishment: rehabilitation, deterrence, and restoration. Socrates emphasized the rehabilitative function, though he was impressed by Protagoras's emphasis on deterrence. Using an analogy that both Aristotle and Aquinas<sup>92</sup> would adopt, Socrates compared punishing a person who had committed a crime to giving medicine to a sick person. It was needed "so the wrong-doer may suffer and [be] made whole."<sup>93</sup> From a different perspective, the eminent moral theologian, James Tunstead Burtchaell, speaks of the necessity of penance as the repentant sinner's "celebration of what God has been forgiving."<sup>94</sup> In actual practice, however, the therapeutic value of punishment for the moral sclerotics who have commanded the machinery of brutally authoritarian governments is doubtful. None of those who ordered or operated the German concentration camps or Russian *gulags*, incited the slaughter of the Tutsis in Rwanda, or organized murders for the Argentine or Chilean generals, has publicly offered to do penance.

Furthermore, only rarely have any of these people demonstrated even a hint of remorse for having committed murder and torture on a mass scale. According to Mitscherlich and Mielke's analysis of the trials of the doctors who conducted the Nazis' experiments on live human beings, most of whom pleaded guilty as charged, not one of them said "I am sorry."<sup>95</sup> Even Albert Speer, who is sometimes cited as the one lead-

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91. Jewish commentators might respond that much of the work of Talmudists has been directed toward softening the *Torah's* harsh strictures. Moreover, not all Islamic jurists accept the dominant interpretations of the *shari'a*.

92. ARISTOTLE, *ETHICS*, *supra* note 55, at 113, Bk. II, ch. 3, 1104b; 1 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Pt. I-II, Q. 87, art. 7, at 997 (Fathers of the English Dominican Province trans., Benzinger Brothers, Inc. 1947) [hereinafter AQUINAS, *SUMMA THEOLOGICA*]. For a listing of citations to other places in which Aquinas used this analogy, see FINNIS, AQUINAS, *supra* note 73, at 212 n.141.

93. PLATO, *Gorgias*, in 3 *THE DIALOGUES OF PLATO* 1 (B. Jowett trans., Charles Scribner's Sons 1911 (1887)).

94. BURTCHAELL, *supra* note 42, at 333.

95. ALEXANDER MITSCHERLICH & FRED MIELKE, *DOCTORS OF INFAMY: THE STORY OF THE NAZI MEDICAL CRIMES* 18 (Heinz Norden trans., 1949) (quoted in TZVETAN TODOROV, *FACING THE EXTREME: MORAL LIFE IN THE CONCENTRATION CAMPS* 234 (Arthur Denner & Abigail Pollak trans., 1996)).

ing Nazi who admitted evildoing, accepted only responsibility for his actions; he waffled about his own guilt. "It is not only specific faults that burden my conscience, great as these may have been," he wrote after twenty years in Spandau Prison. "My moral failure is not a matter of this item and that; it resides in my active association with the whole course of events." The expectant reader waits for a *mea maxima culpa*. Instead, a sadly inadequate explanation oozes out: Technology made me do it. "Dazzled by the possibilities of technology, I devoted crucial years of my life to serving it. But in the end my feelings about it are highly skeptical."<sup>96</sup> And the dog, about whom *we* should be highly skeptical, ate his homework.

Josef Stalin and Adolf Hitler died without expressing remorse, and Idi Amin and Leopoldo Galtieri departed equally silent. Augusto Pinochet slipped into senility urging his former generals to remain loyal to the cause of anticommunism. In testimony before the TRC, some of South Africa's former officials did appear contrite, even though the commission's rules did not require them to do so. One does not, however, have to be a cynic to doubt the sincerity of defendants who hoped that evidencing sorrow would keep them out of prison. Although Christians believe repentance, conversion, and redemption are always possible, moral rehabilitation of deposed despots is not an outcome on which Las Vegas bookmakers would give odds. Thus, rehabilitative justice for officials of the old regime remains only a remotely possible, not probable, outcome of punishment.

Threats of punishment may deter decent people who are disinclined to commit serious crimes anyway, which is not a small accomplishment, of course.<sup>97</sup> But its capacity to restrain, either psychologically or morally, career criminals, or the sort of men who operate brutally oppressive governments is doubtful. The much publicized trials of war criminals at Nuremberg and Tokyo, followed by the execution of most of the defendants, did not slow, much less stop, Stalin, Chiang Kai-Shek, Mao Tse Tung, Idi Amin, Kim il Sung, Kim Jong-il, Slobodan Miloslovic, Saddam Hussein, or any of several dozen Latin American generals and African dictators from terrorizing their own people. As Reinhold Niebuhr said, "The

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96. ALBERT SPEER, *INSIDE THE THIRD REICH: MEMOIRS* 524 (Richard Winston & Clara Winston trans., 1970). I once shared an editor with Albert Speer. I had remarked that at least Speer had acknowledged his guilt. Our editor corrected me. In their conversations, Speer had conceded that the charges against him were true, but, when our editor made the same comment as I, Speer interrupted to say that he accepted responsibility, not guilt.

97. According to the Federalist Society, "of recidivists incarcerated [in state prisons] for a violent offense, the number with only nonviolent priors actually exceeds the number with a violent prior. The notion that criminality is neatly segmented into violent and nonviolent is fundamentally wrong." Federalist Society White Paper, *The USA Patriot Act of 2001: Criminal Procedure Sections 16-17* (2001), available at <http://www.fed-soc.org/Publications/Terrorism/TerrorCrimPro.pdf> (last visited Apr. 10, 2004).

whip of the law cannot change the heart.”<sup>98</sup> Like Mafia Dons, gangsters who are in power do not believe they will be caught. Often they are right.

Yet, there is always an “on the other hand” in such matters as deterrence. Whatever the value of studies of threats of, and actual punishment on, “ordinary” criminals, the number of coprophagers who have done the dirty work of authoritarian political systems remains small when compared to mass populations in prisons. That fact may speak well for human nature but it does prevent statistical analysis on which scholars can rely. Aryeh Neier, when he was Executive Director of Human Rights Watch, spoke for “the other hand:” “Who’s to say that clemency won’t simply further embolden the torturers, thereby inviting rather than preventing future abuses?”<sup>99</sup>

Punishment’s capacity to affect restorative (corrective) justice is also problematic.<sup>100</sup> Heavy fines, in the unlikely event that the new government could force ousted officials to pay, might compensate for damages to property.<sup>101</sup> But no punishment can restore the murdered to life. “My son can rest now,” a mother in New Mexico said in 2003 when the killer was ordered to serve a minimum of thirty years in prison. That sentence may have quenched the mother’s thirst for vengeance, but it is doubtful that her son knew about it or, if he knew, cared. Not even the Comanches’ practice of skinning prisoners alive, and leaving them to toast in the desert sun, can restore the murdered to life, or make whole the numbed minds or crippled bodies of people who have been tortured; nor can permanently locking a tyrant in a cage give back to those wrongly incarcerated the lost years of their lives. Time swaps occur only in science fiction.

Criminal trials may also serve a commemorative function. Stalin allegedly said that the death of one man is a tragedy, the slaughter of hundreds of thousands a mere statistic. By allowing victims and their relatives to testify, criminal trials could memorialize those who suffered. No longer would victims be merely anonymous numbers. They, and their families, could confront their tormentors in public and tell their stories—a process that transfigures faceless victims into flesh-and-blood human beings with personal histories of courageous opposition to oppression. Even if that testimony does not penetrate the thick armor of their tormentors’ moral autism, it can comfort victims, as well as reinforce the revul-

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98. BURTCHAELL, *supra* note 42, at 213 (internal quotations omitted).

99. Lawrence Weschler, *A Miracle, a Universe: Settling Accounts with Torturers*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 491, 497 (Neil J. Kritz ed., 1995).

100. For “restorative justice,” Aristotle employs a term that Richard McKeon, using the Oxford translation, renders as “rectificatory justice.” ARISTOTLE, *Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 1008 n.6 (Richard McKeon ed., 1941).

101. For a thorough analysis, see LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* (1990).

sion that the outside world feels, serving as a reminder, as the perpetrators stand humiliated in the dock, that the face of evil, although always hideous, is also often ordinary. Moreover, there is something comforting, perhaps wrongly so, in watching a cruel hunter become the prey. That scene may also be morally instructive and, in a limited sense, educate the educable, if not to deter the incorrigible.

On the other hand, testimony before a truth and reconciliation commission, again, modeled on that of South Africa, might more effectively achieve that commemorative goal. Such an institution can provide the stage for what Elizabeth Kiss calls "a national morality play."<sup>102</sup> Victims, or their families, can tell their stories and present their evidence as coherent packages, rather than in the piecemeal fashion required by the less flexible rules of a court. "Retrospectively," Lawrence Wechsler concludes, "the broadcasting of truth to a certain extent redeems the suffering of the former victims."<sup>103</sup> More than post-conviction pleadings for a reduced sentence, the prospect of amnesty could pressure even conscienceless pirates to confess their crimes and express remorse. If these former officials craved absolution, they would be compelled to testify and then submit to cross-examination. If they did not, they would not be before the commission. In addition, they would know perjury could result in double punishment, for the crimes about which they lied, and for the perjury itself. Although these people, often being psychopaths, sadists, egomaniacs, or all three, would probably not feel any shame, their publicly expressing contrition would further tar themselves and, more importantly, the political order that their crimes helped maintain. Moreover, if those seeking amnesty were questioned about the fates of the thousands of people whom the regime made disappear, the victims' families could have whatever the thin comfort closure brings. This sort of epiphany is not likely to happen in Argentina or Chile.

Possibly the most important result of putting political predators in prison is to prevent them from again harming fellow citizens. As Niebuhr completed his thought about "the whip of the law:" "But thank God [government] can restrain the heartless" until they grow new hearts, which, in this context probably translates "until death do us part." Removal from office usually prevents tyrants from continuing their oppression, although nothing less than swift executions, as Nicolai Ceaucescu and his wife suffered, can guarantee an end to their vicious careers. Tyrants have been known to rise from political graves. Executions, however, may actually help a totalitarian movement by creating martyrs who might be, as Rosa Luxemburg was, more useful to lost causes than are live heroes. New leaders might also find it prudent to recall a stanza from William Blake's "The Grey Monk:"

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102. Kiss, *supra* note 50, at 70.

103. Wechsler, *supra* note 99, at 498.



The hand of Vengeance found the bed  
 To which the Purple Tyrant fled;  
 The iron hand crush'd the Tyrant's head  
 And became a Tyrant in his stead.<sup>104</sup>

Punishment's protecting citizens against future harm leads to another function, which Thomists classify as retributive, but might be more accurately characterized as rehabilitative for the community. Sin, Aquinas argued, disrupts the divine order of things, which only punishment can restore.<sup>105</sup> By analogy, he reasoned that offenses committed by public officials disrupt society's order. This "inequality of justice" can only be rectified by imposing "bads they are unwilling to undergo."<sup>106</sup> The purpose of government's inflicting punishment goes beyond paying a debt to injured individuals; more importantly, it tries to restore (or generate) harmony for the community. Punishment "is requisite" not only so the criminal's soul will be healed but also so that

the disorder [in society] may be remedied by the contrary of that which caused it. Moreover punishment is requisite in order to restore the equality of justice, and to remove the scandal given to others, so that those who were scandalized . . . may be edified [instructed and deterred?] by the punishment . . . .<sup>107</sup>

Seven centuries later, Lord Denning offered a variation on these themes. "It is a mistake," he wrote to the Royal Commission on Capital Punishment, "to consider the object of punishment as being deterrent or reformatory or preventive and nothing else."<sup>108</sup> Punishment's "ultimate justification," he asserted, consists in its statement of the community's

104. William Blake, *The Grey Monk*, in *POEMS* (Dante Gabriel Rossetti ed., 1863).

105. Although I am not sure I would be welcome in the fold, I count myself a Thomist. Nevertheless, I find this argument utterly unconvincing, as I do all arguments that, while accepting God's omnipotence, try to specify limits on His unlimited and unlimitable power.

106. FINNIS, AQUINAS, *supra* note 73, at 211-15, espec. n.153, has an excellent analysis of Thomas's short disquisition on punishment and justice. Throughout this brief discussion, Aquinas's focus is on sin and the punishment to which he usually refers is that which God (supposedly, because Thomas offers no data) imposes on sinners. The argument is thus theological, not political. Occasionally, however, Aquinas does include a reference (an aside?) to unjust and criminal acts done to fellow men and to punishment imposed by rulers. For instance: "This restoration of the equality of justice by penal compensation is also to be observed in injuries done to one's fellow men." AQUINAS, *SUMMA THEOLOGICA*, *supra* note 92, Pt. I-II, Q. 87, art. 6, 977. Aquinas's views on tyrannicide, even punishing tyrants, are less than clear—in part because he died before completing *De Regimine Principum*, the work in which he most thoroughly examined those problems. His student, Ptolemy of Lucca, finished the essay and it is impossible to say what in that analysis was written by whom.

107. AQUINAS, *SUMMA THEOLOGICA*, *supra* note 92, Pt. I-II, Q. 87, art. 6, Reply Obj. 3, 977; *see also id.* at Q. 87, art. 2, Reply Obj. 1 ("Sometimes indeed [punishment] is for the good of those who are punished . . . . But it is always for the amendment of others, who, seeing some men fall from sin to sin, are the more fearful of sinning."); *id.* at Q. 87, art. 3, Reply Obj. 1 ("Even the punishment that is inflicted according to human laws is not always intended as a remedy for the one who is punished, but sometimes only for others. Thus when a thief is hanged, this is not for his own amendment, but for the sake of others, who at least may be deterred through fear of punishment . . . .").

108. HART, *supra* note 46, at 65.

“emphatic denunciation” of a crime.<sup>109</sup> In a broader sense, of course, Aquinas and His Lordship were talking about an educative function—the state’s publicly reaffirming its values by imposing severe physical harm on people who violated those norms. As an educational device, punishment can play an important role for constitutional democracy, instructing its people about the polity’s basic values. Then, so can the hearings and final report of a truth and justice commission, as earlier paragraphs contend.

#### CONCLUSION: POLITICS AND JUSTICE

What does this long excursus tell us about justice’s demanding punishment of former officials? The question would not be of much interest to either pragmatists or consequentialists. Moral relativists and legal positivists would defer to either local conventions or the rules of local legal systems. Augustine and Jonathan Edwards, convinced retributionists, would insist on scourging, imprisoning, or executing deposed tyrants. Aquinas, encumbered by a felt obligation to import into politics a theology that included a vindictive God, would tend to agree, though with less vehemence and joy. Socrates and Aristotle would prefer but probably not require punishment. Still, the latter two, and Aquinas as well, tintured their public morality with splashes of political realism and might have been quite willing to compromise. Rawls’s theory of justice, with its heavy infusion of reciprocity, would allow punishment, but it is not certain that his conception of justice as fairness would demand retribution over amnesty.

There is always the haunting question: How much justice, fairness, or retribution, do we as individuals really want? When Hamlet asks Polonius to take care of the actors who will put on the play he wrote to “catch the conscience of the king,” the Chamberlain promises, “My Lord, I will use them according to their desert.”<sup>110</sup> Hamlet responds: “God’s bodykins, man, much better: use every man after his desert, and who should ‘scape whipping?’”<sup>111</sup> Dante hammered home a similar point: The most frightening aspect of his *Inferno* is that each person agonizing in one of the circles of a horrible Hell is getting exactly what he or she has earned—not a cheering thought for self-reflective people who are not blindly self-righteous. Few of us have committed such crimes as mass rape, torture, or murder. Yet, by acts of omission as well as commission, most of us have hurt our fellow humans. We have, for example, driven an automobile too fast or after one or two drinks too many, spoken thoughtless racial or ethnic slurs, padded an expense account, or failed to report cash income on tax returns. For any of us to insist on exacting exact retribution is hazardous. For others, we may demand a strict ac-

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109. *Id.*

110. WILLIAM SHAKESPEARE, *HAMLET* act II, sc. 2.

111. *Id.*

counting of wrongdoing, demand punishment, and call that process justice. For ourselves we prefer a looser conception of justice, one tempered by mercy.

For pure pragmatists, moral relativists, legal positivists, and, for very different reasons, retributionists like Augustine, the question of whether the basic concept of justice requires the new government to punish the old tyrants is easy. But for those of us who think both that justice is not an empty word and that it differs from revenge, the problem is shrouded in mist. Deciding the moral issue is not, however, a hopeless task, only a very difficult one. Some of that mist may lift with a realization that justice has a positive as well as a negative aspect. It is concerned not merely with punishing wrongful actions but also with facilitating actions that will build a new life for citizens, actions that will enable the members of that society to pursue their own happiness while respecting the same right of their fellow citizens.

For a new constitutional democracy, there is, the drafters of South Africa's interim constitutional text of 1993 wrote in the epilogue to that document, "a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* [humaneness] but not for victimization."<sup>112</sup>

Decisions to prosecute, or to compromise and offer conditional amnesty, or even to grant full absolution and attempt "no-fault reconciliation" are thus eminently political, again in Aristotle's sense. They are concerned with authoritatively establishing goals for society and determining the means that are both most efficiently directed toward those ends and most consonant with the principles of constitutional democracy. Whatever the choice among kinds of punishment and amnesty, the goal, at least for men and women who hope to establish a viable polity, must be reconciliation rather than division. A nation fragmented by hate and anger is unlikely able to honor norms of constitutional democracy or even remain at peace with itself. The ideal society for the survival of constitutional democracy is one in which citizens trust and respect one another. The minimum condition is a society in which citizens do not hate and fear one another.

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112. S. AFR. INTERIM CONST. ch. 16 (1993).