

BOOK REVIEW

Transitional Justice Comes of Age: Enduring Lessons and Challenges

JOHN TORPEY, ED., *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (LANHAM, MD: ROWMAN AND LITTLEFIELD, 2003, pp 328 \$27.95, PAPER BACK) AND JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (CAMBRIDGE: CAMBRIDGE UNIVERSITY PRESS, 2004, pp 310, \$24.99, PAPER BACK).

By
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INTRODUCTION

The study and practice of transitional justice analyzes policy choices made by regimes emerging from armed conflict and/or authoritarian rule with regard to accountability for past abuses, stability, reform, and democratization. Transitional justice emerged as a policy problem and subject of study during political transitions from dictatorships in the late 1970s in Southern European countries such as Greece and Spain, and, more recently, evolved dramatically with the transitions in Latin America and Eastern Europe in countries ranging from Argentina and Guatemala to Poland and Lithuania.¹ Most literature on the subject starts with a discussion of states emerging from authoritarian rule, civil

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1. The literature is too extensive to list here, but key texts include: PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001) [hereinafter HAYNER, *UNSPEAKABLE TRUTHS*]; *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* (Carla Hesse & Robert Post eds., 1999); *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES*, 3 VOLS. (Neil Kritz ed., 1995) [hereinafter *TRANSITIONAL JUSTICE*]; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998); ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR AND THE STRUGGLE FOR JUSTICE* (1998); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997); *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* (Naomi Roht-Arriaza ed., 1995); *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* (Robert I. Rotberg & Dennis Thompson eds., 2000).

war, state crimes, and mass atrocities. These states face a common dilemma—they are under pressure to punish or otherwise respond to past harms, but face significant obstacles in doing so. Some of these obstacles are logistical; newly democratizing states may not have the funds or the technical capacity to conduct numerous sophisticated trials for violations of international human rights or humanitarian law. Obstacles may also be political or related to security issues; some new regimes face the risk that the perpetrators of these crimes will react violently to attempts to punish them. Thus, states are not simply choosing between justice and peace, rather, the choices are much more complicated. Although transitional states and the international actors that aid them have a wide array of tools at their disposal, such as purges, prosecutions, truth commissions, apologies, and reparations, they are often forced to make compromises between the aspiration to ‘do justice’ and the need to stabilize and reform a fragile state.

As the array of international tribunals, domestic processes and organizations set up to assist transitional regimes has grown, so too has the literature examining the choices confronting these states. The literature has come of age in the past twenty-to-twenty-five years. This, however, does not mean that we have reached the end of history. Problems and responses continue to evolve, as does the literature itself. Two recent books offer different, yet important, challenges and contributions to discussions of transitional justice. Ultimately, these books promote a longer and more nuanced historical view of the transitional justice field and encourage a broader perspective of the policy choices available.

I.

BEYOND “TRANSITOLOGY”: TORPEY’S *POLITICS AND THE PAST*

The contributors to John Torpey’s edited volume, *Politics and the Past*, seek to distinguish themselves from what they refer to as “transitology.”² Transitology is a term used to characterize the burgeoning scholarly and policy fields of transitional justice, which emphasize case histories, specific typologies, and policy tools.³ The authors in Torpey’s volume view this emphasis as excessively narrow, and differentiate themselves from it on three grounds: theoretical/methodological, historical, and substantive. Though using divergent terminology, the authors prefer to address what I categorize for the purposes of this review article as “reparative justice.” “Reparative justice” focuses on a host of past harms beyond the ones typically addressed by transitional justice.⁴

2. *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* (John Torpey ed., 2003) [hereinafter *POLITICS AND THE PAST*].

3. While it is more frequently referred to as transitional justice, the Torpey book often refers to it as transitology, emphasizing the typological and causal features of transitional justice.

4. While some authors in the volume use this term, I use it here as a term of art for the entire volume, as it is more expansive than transitional justice, restorative justice, restitution, or a host of other terms utilized in the book.

In order to understand the distinct approach shared by the diverse contributions to the volume, it is important to understand the critiques of the transitional justice literature offered to date.

A. Explaining Transitology

“Transitology” literature explains and prescribes responses to past abuses undertaken by specific transitional regimes and the international actors that seek to assist them. As such, much of the literature engages in a number of activities familiar to political scientists and policymakers: the creation of typologies, normative assessments, considerations of feasibility and unintended side-effects, and even, in some instances, the construction of toolkits.⁵ These activities help scholars and policymakers alike consider which potential responses to unthinkable atrocities are appropriate. Prosecutions, purges, truth commissions, and amnesties are historically some of the most common responses. While the field as a whole does not especially favor one response to another, or even a “formula” of several of these responses, there is a general concurrence that these are the primary tools of interest in the transitional justice “toolkit.”

Concerns regarding the appropriate goals of transitional justice may in part drive the focus on juridical and punitive tools. The most common goals identified in the literature include retribution, deterrence, social pedagogy, reconciliation, vindication of victims, social peace, and resurrecting or, in some cases, establishing for the first time the rule of law and democracy.⁶ Traditionally, it has been thought that these goals would be best served either by amnesty, which allows for reconstruction or reconciliation, or specific punitive tools. The emphasis on prosecutions in the literature reflects a belief by many that only juridically-driven punishment can achieve important goals such as retribution and deterrence, and help to restore shattered legal systems. Even truth commissions, often conceptualized primarily as tools to create a more complete account of the past and vindicate victims’ accounts of their own mistreatment, are regarded primarily as instruments of punishment.⁷

Appropriately, the literature does take account of broader concerns to vindicate victims and recognizes the presence of a broader range of “restorative” tools, including reparations and restitution.⁸ However, until recently, scholars

5. The array of options is presented generally in books such as TRANSITIONAL JUSTICE and HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1. A key policy organization that advises transitional states on their options is the International Center for Transitional Justice. See <http://www.ictj.org/approaches.asp> (last visited Feb. 8, 2005).

6. These justifications are recurrent throughout the literature. I discuss these goals, their normative underpinnings, and their implications for choices about policies, in Chandra Sriram, *Truth Commissions and Political Theory: Tough Moral Choices in Transitional Situations*, 18 NETH. Q. HUM. RTS. 471-92 (2000).

7. See HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1 (examining the politics of naming the perpetrators in reports of commissions of inquiry, and the punitive effects of such publicity) at 106-32.

8. See ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000).

have not examined these issues in great detail, notwithstanding the apparent rise in the use of reparations, including specific return of property or financial restitution, or more general reparations and apologies. The Torpey volume is a useful corrective to this gap in the literature, as well as a broad challenge to “transitology’s” underlying premises and approaches. The volume differs in three dimensions, as indicated above: theoretical/methodological, historical, and substantive, each of which I now consider in turn.

B. Theoretical/Methodological

The volume’s introduction, and several of the substantive contributions, challenge what is viewed as the narrow theoretical ambit of “transitology,” a term that the authors recognize is used with a certain degree of irony. The authors criticize ‘transitology’ for focusing exclusively on the abuses of authoritarian regimes or crimes committed during armed conflict. They suggest that a more appropriate understanding of reparative politics would consider crimes committed not just by authoritarian regimes, but also those by liberal regimes.⁹ They suggest too that the methodological approach of transitology, which is largely concerned with typology, is insufficient. The typological approach leads to narrow assessments of the type of regimes that existed prior to transition and of the modes and outcomes of transition. This approach considers a narrow set of concrete, largely official tools such as prosecutions, purges, and amnesties.¹⁰ They argue that this does not address central concerns in repairing torn social fabric, such as the roles of regret, apology, and reparation; rather it focuses solely on punishment. The authors believe these considerations are necessary for victims’ harms to be adequately acknowledged, for perpetrators to take responsibility for their actions, and for societies to truly confront the past.

One contribution suggests that rather than setting a Weberian ethics of conviction and ethics of responsibility against one another, what is needed is a “responsible politics of regret.”¹¹ Such an approach is concerned not simply with political responses, but with historical consciousness. Another contribution suggests the need for scholarly and public works to recover and even generate such consciousness.¹² This chapter points to Daniel Goldhagen’s *Hitler’s Willing Executioners* and several other books as scholarly works that contribute

9. John Torpey, *Introduction to POLITICS AND THE PAST*, *supra* note 2, at 8-9.

10. See Jeffrey K. Olick & Brenda Coughlin, *The Politics of Regret: Analytical Frames*, in *POLITICS AND THE PAST*, *supra* note 2, at 43-45. Other contributions to the book further refine the roles of regret, apology, and reparation. See Alan Cairns, *Coming to Terms with the Past*, in *POLITICS AND THE PAST*, *supra* note 2, at 63; Elazar Barkan, *Restitution and Amending Historical Injustices in International Morality*, in *POLITICS AND THE PAST*, *supra* note 2, at 91; Roy L. Brooks, *Reflections on Reparation*, in *POLITICS AND THE PAST*, *supra* note 2, at 103.

11. See Olick & Coughlin, *The Politics of Regret*, in *POLITICS AND THE PAST*, *supra* note 2, at 49-50.

12. Cairns, *supra* note 10, at 70-72 (citing DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1997)).

to historical consciousness and help to 'democratize the past.'¹³

C. Historical

The contributors to the book view transitional justice literature as historically narrow or shallow. They argue that the focus upon transitions from authoritarian rule or armed conflict, beginning with the Southern European transitions of the 1970s, fails to appreciate the breadth of past harms for which some form of reparation should be made, and for which demands for reparation are already being made.¹⁴ According to the contributions to this volume, these demands arise from a substantively broader set of past harms than has been discussed in previous transitional justice literature. They include responses to the damage inflicted by slavery in the US, responses to the harmful treatment of aboriginal or indigenous peoples in Canada, the US, and Australia, and consideration of what, if anything, the West owes Africa.¹⁵ The volume generally promotes the claim that drawing upon a broader and deeper set of historical cases helps to expand the understanding of what reparative politics should entail.

D. Substantial

The book regards the subject of transitional justice as a subset of reparative justice, which may include reparations and restitution, apologies, and 'communicative history.' Communicative history includes memorials and other devices of memory.¹⁶ Much of the volume deals with these remedies, which are generally overlooked by transitional justice literature.

Two contributions highlight the increased use of reparations and restitution in Latin America and Rwanda.¹⁷ Reparations and restitution are considered more than just tools to pay victims for their losses, although in some instances monies are transferred. Rather, it is understood as a way of acknowledging victimhood and loss.¹⁸ Alternatively, reparations seek to compensate a group, and perhaps help to restore group dignity and honor, rather than compensate

13. See *id.*, at 70-80. The conception of democratizing the past is not unproblematic, but that is beyond the scope of this review.

14. See Torpey, *Introduction* to POLITICS AND THE PAST, *supra* note 2, at 1; Barkan, *supra* note 10, at 91; Brooks, *supra* note 10, at 103.

15. Dalton Conley, *Calculating Slavery Reparations: Theory, Numbers, and Implications*, in POLITICS AND THE PAST, *supra* note 2, at 117; Ruth B. Phillips & Elizabeth Johnson, *Negotiating New Relationships: Canadian Museums, First Nations, and Cultural Property*, in POLITICS AND THE PAST, *supra* note 2, at 149; Rhoda E. Howard-Hassman, *Moral Integrity and Reparations for Africa*, in POLITICS AND THE PAST, *supra* note 2, at 193.

16. See Torpey, *Introduction* to POLITICS AND THE PAST, *supra* note 2, at 6.

17. See Sharon F. Lean, *Is Truth Enough? Reparations and Reconciliation in Latin America*, in POLITICS AND THE PAST, *supra* note 2, at 169; Stef Vandeginste, *Victims of Genocide, Crimes Against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, in POLITICS AND THE PAST, *supra* note 2, at 249.

18. See Barkan, *supra* note 10, at 94.

specific losses. This is true regarding reparations for losses sustained in the relatively distant past, with no apparent surviving victims.¹⁹ Finally, reparations may seek to address the resultant and continuing harms arising from that past wrongdoing, rather than to compensate past harms *per se*. This is the case, for example, with slavery.²⁰ Some argue that it is difficult if not impossible to calculate appropriate reparations and to identify appropriate beneficiaries and appropriate proxies for 'perpetrators.' Instead, reparations might seek to address the consequences of slavery, including structural disadvantages suffered by many African-Americans, as well as the continuing impact of racist attitudes and behavior.²¹ As discussed above, contributions to the book also highlight the importance of historical memory beyond that created or preserved by truth commissions. Scholarly works, memorials, and general historical consciousness are also of concern, as are tools or acts in which everyone, at least in theory, might participate.

II.

SOME CAVEATS AND OBJECTIONS

The book addresses some of the limitations of the contemporary discussions of transitional justice. Nonetheless, there are at least some responses or caveats available to each of the criticisms made by the authors. This is the case with the authors' claims regarding theory and methodology, history, and substance.

A. Theoretical/Methodological

The goal of democratizing the past, which is to make history available to all who experienced it, whether as victim, perpetrator, or onlooker, may be admirable.²² So are efforts to recognize the broader range of remedies for victims and torn societies, including regret, apology, and repair. However, the critique of transitology as being too concerned with typology is perhaps overstated. The literature has always addressed the issue of social repair and acknowledgement of victimhood, even though those goals have rarely been at the forefront of discussions of transitional justice as they are in *Politics and the Past*.²³

The contributors should call for an expanded understanding of the goals

19. See Conley, *supra* note 15.

20. See *id.*

21. See *id.*

22. It should be noted that the conception of making the past available to those who experienced it, is not without some obvious ironies; the goal generally must be to affirm their experience of history, or offer a construction of the past that is in some sense consistent with it.

23. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1, at 170-82, devotes one short chapter to the subject of reparations. RUTI G. TEITEL, TRANSITIONAL JUSTICE 119-47 (2000) devotes a slightly longer chapter. BARKAN, THE GUILT OF NATIONS, *supra* note 8, is the rare book devoted to the subject.

and the tools available rather than simply turning away from typologies. Much of the literature has emphasized elite and international choices; apologies, reparations, and restitution will continue to depend upon these. What is unique, and not the stuff of elite politics, is the role of history. Theoretically, anyone can democratize history. However, in practice, the concerted development of historical consciousness might not be particularly democratic, as it is likely to be the preserve of scholars, and in many instances, of external scholars.²⁴ Moreover, typologies, while always incomplete, are important heuristic devices, particularly for policymakers facing difficult choices in short time frames with high risk of violence.

I would suggest further that in shifting the grounds of study to include past harms more broadly, focusing on reparative justice obscures what may be distinct about transitional justice. In particular, I am concerned about the blurring of the distinctions between the political and the socio-economic insecurity confronting transitional regimes. They face particular dilemmas that do not confront liberal regimes. While the return of stolen aboriginal property in the form of land or cultural artifacts, or restitution to persons of Japanese descent interned in Canada and the US during WWII, may be politically contentious, it is unlikely to result in a coup or to otherwise undermine governance. Rather, what becomes contentious in such circumstances is who ought to be the beneficiary, who ought to make reparations, and in what fashion those reparations are to be made. These disputes are conceptually and practically distinct from those in countries such as Argentina, which experienced several coups and coup attempts as it sought to try members of the military junta responsible for the so-called “Dirty War.”²⁵

B. Historical

I also disagree with the description of the historical limitations of transitology in the book. While much of the literature on transitional justice has focused on relatively recent events, there are some notable exceptions. Many discussions of transitional justice actually begin with the crimes of WWII and the Nuremberg and Tokyo tribunals, as well as the legacy of subsequent trials of former Nazis and Nazi collaborators such as Adolf Eichmann and Klaus Barbie.²⁶ An obvious exception, although it deals with international tribunals rather than domestic responses, is Gary Bass’s *Stay the Hand of Vengeance*, which begins with the aftermath of the Napoleonic wars and the detention of

24. See Cairns, in *POLITICS AND THE PAST*, *supra* note 10, at 83.

25. See JAIME MALAMUD-GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (1996) (the human rights advisor to transitional Argentinean President Raúl Alfonsín, discussing the backlash against trials in that country).

26. E.g., Gary J. Bass, *The Adolf Eichmann Case: Universal and National Jurisdiction*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 77* (Stephen Macedo ed., 2004). Henry Rousso, *Justice, History, and Memory in France: Reflections on the Papon Trial*, in *POLITICS AND THE PAST*, *supra* note 2, at 282-85, deals in passing with the trial of Barbie.

Napoleon at St. Helena.²⁷ Indeed, the other volume reviewed here, by Jon Elster, examines Athens in 411 and 403 BC and the French Restoration in some detail, and also briefly examines a series of cases dating back to the 17th century.²⁸ Thus, although it is important to remember that concerns with the past and reparative politics did not first emerge with the transitions of the 1970s and 1980s, the accusation that the literature is historically shallow is perhaps overstated.

Thus, while temporal and spatial removal does not eliminate the need for some mode of reparations, it does drastically alter what is at stake and many of the substantial issues. Rather than consider whether any reparative measure is even possible, the debate should turn on what measures are most appropriate and feasible, and on what might have the greatest symbolic as well as substantive (whether through financial compensation or return of specific stolen goods) meaning.

C. Substantial

The book makes the greatest contribution, not in its theoretical or historical critique, but in its expansion of the ambit of transitional and reparative justice. Clearly, the political tools of punishment, purge, pardon, and even truth commissions may be too narrow to address the needs of societies dealing with past harms. Apologies, reparations, and restitution, as well as the development of historical consciousness, may serve to restore dignity to victims and help societies to understand and process the past in ways that common tools of transition do not. Beyond academics, policymakers at the national and international level should be concerned about the possibility of apology, funding for reparative policies, and ways to spark or facilitate broad-based historical discourse.

The discussions in the volume may be important in their development of the “victim-oriented” strain of the transitional justice literature. Such a victim-oriented approach, advocated by Naomi Roht-Arriaza and others, does not denigrate tools of transitional justice such as trials or truth commissions, but emphasizes the importance of victims’ needs, and of dealing with the psychological trauma inflicted by state terror and atrocity.²⁹ In particular, this strain of thought has emphasized the need to assist victims in lessening their own sense of victimization and regaining a sense of control.³⁰ This may

27. See GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 37-57 (2000).

28. See JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* 3-76 (2004) [hereinafter ELSTER, *CLOSING THE BOOKS*].

29. See Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 1, at 19-21 (recognizing that victims may be satisfied with results other than the incarceration of perpetrators, and may be satisfied with recognition, through a document or otherwise).

30. *Id.*

mitigate the often widespread ostracizing of apparent victims on the grounds that “there is something she must have done,” which places the blame on the victims rather than the perpetrators.³¹ The transitional justice literature increasingly focuses on the need of victims for catharsis, and on tools that might help serve to support their healing. It has also simultaneously begun to recognize that tools such as trials and commissions might not always serve those purposes, but might rather serve to re-traumatize them, and traumatize others as well.³² Victims may feel the need to be listened to and have their stories validated, but truth commissions may not be the best or only mechanisms to do this and may not fully address the other harms that the victims suffered.³³ As the contributors to the Torpey volume rightly note, past harms leave enduring psychological and material scars: apologies and reparations, alone or jointly, may begin to address victims’ trauma. However, this is not an entirely new perspective. As several authors in the volume discuss, as well as Priscilla Hayner, a leading expert on truth commissions, reparations, and restitution have been offered in a number of post-atrocity situations, particularly in Latin America.³⁴

III.

AN EXPANSIVE HISTORICAL PERSPECTIVE: JON ELSTER’S CLOSING THE BOOKS

Jon Elster’s *Closing the Books: Transitional Justice in Historical Perspective*, takes an expansive historical perspective, examining cases beginning in classical Athens and stretching to present day. It nonetheless shares a typological approach with “transitology.” In fact, the author indicates his aim is to “describe and explain variations in how societies close their open accounts from the past after regime transitions.”³⁵ In addition to presenting an impressive historical sweep of the field, the work offers a fine-grained set of categories of moral culpability of victims and wrongdoers, of emotions and constraints, and of the myriad of options available to states to respond to past wrongdoing. One would expect nothing less of Elster, a renowned political philosopher. However, while his moral typologies are thorough and subtle, his empirical and causal typologies are less than complete and convincing.

31. See MALAMUD-GOTI, *supra* note 25, at 23 (discussing the popular dismissal in Argentina of allegations of torture and disappearances).

32. See HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1, at 28-29 (highlighting the importance of addressing the needs and interests of victims), 141-44 (examining the danger of re-traumatization).

33. See *id.* at 136-37 (discussing the sense of relief or vindication victims gain by relating their own stories).

34. E.g., Lean, *Is truth enough?*, *supra* note 17; HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1, at 170-82 (discussing reparations for state crimes, be they restitution, compensation, or other tools).

35. ELSTER, CLOSING THE BOOKS, *supra* note 28, at ix (emphasis in original).

A. History and Transitional Justice

Elster grounds his study in historical examples not often considered by the literature on transitional justice, such as classical Athens and the two French Restorations. He also examines the so-called “larger universe of cases,” including some thirty-odd cases arising primarily in the context of transitions to democracy in the 20th century.³⁶

As discussed below, Elster contends that these less familiar instances of transition present similar dilemmas and responses as more familiar contemporary transitions. These older transitions also involved elements of negotiated transition rather than complete defeat; thus, compromise was required. At different junctures, the goals of transitional regimes included retribution or reconciliation.³⁷ Elster identifies a variety of key actors who remain important in classical and contemporary transitions: wrongdoers, victims, neutrals, resisters, and beneficiaries from wrongdoing. In both old and new cases, appropriate definitions of wrongdoing or culpability were matters of dispute. According to Elster, the result was that transitional justice was limited or delineated by the nature of political constraints, the range and demands of key actors, and conceptions of wrongdoing. Elster first identifies these elements in his discussion of classical Athens and the French restorations. However these elements, which heavily emphasize the post-WWII and post-communist transitions, as well as more recent transitions frequently examined in the literature, remain a concern throughout the duration of the book.

B. Agents, Agency, and Moral Culpability

Elster, as already noted, takes an explicitly typological and often causal approach, considering motivations, key actors, and constraints as sources of outcomes of transitional justice. As I shall discuss below, it is his causal argument that is least compelling. However, his discussion of motivations, agents, and constraints offer important and fine distinctions, and constitute the most substantial contributions of the book. I turn to these first. Rather than offering simplistic approaches to perpetrators and victims, to culpability and excuse, and to political constraint, he offers well-elaborated distinctions amongst categories that admit no simplistic moral assessment.

Elster’s assessment is at its finest in his discussions of agents of transitional justice, which for him constitute more than just victims, perpetrators, and advocates. While he emphasizes wrongdoers and victims in particular, he recognizes that these categories are neither absolute nor static, and also takes account of a host of other relevant agents with varying degrees of culpability for past abuses or involvement in advocating transitional justice. Other relevant agents he discusses include helpers, resisters, neutrals, and promoters of

36. *Id.* at 47-76.

37. *Id.* at 21-23, 44-46.

transitional justice. Elster's examples draw from the universe of cases discussed earlier in the book, but also rely heavily upon post WWII and post-communist transitions.³⁸

According to Elster, victimhood and culpability are not simple categories. Rather, there are 11 different "role combinations" he discusses, ranging from those that do harm but do not benefit, to those who passively benefit from a system that harms others, to those who switch sides.³⁹ These permutations offer a refined moral universe in which good and evil exist in gradations. For example, even those who collaborated with Nazi occupation, such as the Vichy regime in France, may argue after the fact that they were playing a "double game," collaborating with occupation in order to limit the harm that might otherwise be inflicted, or to allow simultaneous support to resistance activities.⁴⁰

A nuanced understanding of agents, constraints, and emotions of transitional justice helps us to understand variation in demands for justice.⁴¹ However, as I discuss below, whether these suffice to explain the actual outcomes is less clear. First, however, I turn to victims and wrongdoers. In the subsequent section I take up Elster's discussions of emotions and constraints.

C. Wrongdoers

Human rights advocates, and even some of the more sophisticated literature on transitional justice, treat wrongdoers or perpetrators as a relatively undifferentiated class. Those who do harm, whether directly torturing a person or issuing the order that results in a massacre, are understood to be morally responsible for their actions regardless of the degree of harm inflicted on society as a whole. But in reality, mitigating factors, such as extenuating circumstances, duress, or countervailing protective actions may affect our assessment of that person's culpability. Thus, Elster develops three primary categories of wrongdoers—fanatics, opportunists, and conformists—that can further be broken down into seven more refined categories.⁴²

According to Elster, fanatics are motivated by a belief in a cause or end. They may have no expectation of personal gain from their action, although such gain may accrue. For example, we might consider the established zealots in the Nazi regime fanatical. In contrast, opportunists may have no particular stake in the agendas of fanatics, but simply take personal advantage of a situation. Opportunists include profiteers, those who seek career advancement, and those

38. *Id.* at 99-116 (analyzing multiple categories of agents), 136-87 (analyzing wrongdoers and victims, respectively).

39. *Id.* at 99-116.

40. *Id.* at 101-02 (discussing the use of this strategy as offsetting or mitigating culpability before some courts).

41. *See id.* at 220-29 (discussing emotion in response to types of harm and demands for retribution).

42. *Id.* at 137-43.

who change sides as the fortunes of different factions shift. These actors may be facilitators or accomplices to wrongdoing. Examples include the relative latecomers to Hitler's regime who were interested in personal advancement. Finally, conformists fail to challenge the status quo and specific harms resulting from the status quo. Conformists may include the rank and file, who benefit from a system and fail to challenge it, including any number of white South Africans under apartheid.⁴³

Elster does not suggest that because these agents vary in their culpability that some ought not to be punished. Rather he argues that these variations may form the grounds for a wide variation in demands for accountability. This may further be true because there is a range of plausible, and often at least partially satisfactory, justifications for any alleged wrongdoing.

Elster distinguishes between justifications, excuses, and mitigated circumstances—the three justifications for reducing culpability.⁴⁴ As he points out, if an otherwise wrongful act is justified, it ceases to be wrongful, as is arguably the case when one kills one person to save many more.⁴⁵ Excuses such as self-defense, by comparison, remove the culpability from a wrongful act. Finally, Elster observes, mitigating circumstances reduce the culpability of an actor but do not eliminate it.⁴⁶ Such categories are commonly utilized in domestic criminal law, and logically have applicability to other wrongful acts, including those in violation of international law, and even including, “unspeakable” or heinous mass crimes. Justifications, excuses, and mitigations may involve a host of counterfactual claims, largely suggesting that greater harm was in some way prevented by the actor's behavior.⁴⁷ An agent accused of wrongful acts may then plead the lesser evil justification, contending that if she had not acted, something worse might have resulted at the hands of someone else. Or she might offer an instrumentality justification such as the double-game one, that acting wrongfully also placed her to act against an oppressive regime. She might also plead duress, or that she acted under threat of death or serious harm. Finally, she might plead futility, in that refusing to act would have made no difference. As Elster discusses in some detail, collaborators from German-occupied territories frequently offered similar justifications.⁴⁸

D. Victims

Elster does not conceive of “victim” as a single category, but rather a diverse set of categories, describing the nature and degree of victim-hood, and the types of correctives demanded.⁴⁹ Victims may experience material

43. *Id.* at 138-42 (discussing fanatics, opportunists, losers, and conformists).

44. *Id.* at 143.

45. *Id.* (arguing that “to kill one person to save ten may be justified”).

46. *Id.*

47. *Id.* at 144.

48. *Id.* at 143-65.

49. *Id.* at 166-83.

suffering, and as Elster discusses, there might well be variation in the hierarchy even of material loss. In post-war Europe, for example, loss of real property such as land, which affected largely non-Jewish elites, was often viewed as a greater loss than that of “movable” property, including artwork, the contents of bank accounts, and gold, more often stolen from Jews.⁵⁰ Victims might, by contrast, experience personal suffering, such as torture, loss of family members, or as during WWII, enslavement or forced labor.⁵¹ Finally, victims might suffer intangible harms, such as the loss of opportunities in education, the workplace, or elsewhere.⁵²

E. Emotions and Retributive Demands

Elster offers a detailed account of the range and role of emotions in demands for accountability in transition. He distinguishes among anger, Cartesian indignation, hatred, contempt, and Aristotelian indignation, each of which demand distinct reactions.⁵³ He suggests, elaborating upon the work of Carlos S. Nino, that demands for retribution vary according to the heinousness of the crimes, the nature of abuses, the passage of time, the spread of responsibility, and features of relationships and the relative well-being of victims and perpetrators.⁵⁴ These types of conditions drive the beliefs and emotions triggered, which in turn drive the nature of actions demanded by victims, society, or even the international community. For example, he suggests that the result of anger is a desire to cause the object of emotion (i.e. the perpetrator) to suffer, likely generating calls for forms of retributive responses while contempt is more likely to result in ostracism and avoidance.⁵⁵

The account of emotions is an important contribution to transitional typologies, helping to explain why it is that not all past crimes, however heinous, give rise to demands for punishment, or for identical responses of any sort. It makes sense to suggest not only that emotions drive demands, but that emotions change and possibly fade over time, rather than being static. Elster’s examples from post-communist transitions bolster this philosophy.⁵⁶ If true, we might expect to see a decline in demands for legal action as the temporal

50. *Id.* at 168-75 (discussing although not endorsing these disparities).

51. *Id.* at 175-80 (discussing the disputes over reparations to those who suffered forced or slave labor).

52. *Id.*, at 180-83 (discussing the curtailment or loss of opportunities).

53. *Id.* at 229-30 (defining the types of emotions, and figure 8.1, offering a causal chain from belief to emotion to action tendency to legal reaction). Emotions such as anger are relatively straightforward, but two require further explanation. Cartesian indignation is, for him, the “third party” emotion felt by an individual towards a wrongdoer who has harmed a third person; Aristotelian indignation is the feelings of a person towards a second party whom the first believes enjoys “undeserved good fortune.”

54. *Id.* at 220-21 (*citing* CARLOS S. NINO, *RADICAL EVIL ON TRIAL* 126-27 (1996) (discussing these and other factors)).

55. *See id.* at 218 (figure 8.1, offering an account of the relationship between emotion and action tendency).

56. *See id.* at 216-44.

distance from the original crime extends.⁵⁷ Of course this may not turn out to be true, as the demands for reparation for crimes against aboriginal peoples, and for the harm of slavery, discussed in detail in the Torpey volume, or demands for the reparation of victims of German and collaborationist harms, as discussed by Elster, continue to the present day. Elster suggests that “[i]n transitional justice, these five emotions map into distinct legal and administrative reactions,” suggesting that emotionally driven demands generate more or less direct results, unmediated by other constraints.⁵⁸ Nevertheless, while Elster offers a clear account of how these emotions tie into *demands*, it is less clear what their effect upon *outcomes* may be.

IV.

CAUSATION AND OUTCOMES

The book offers an exceptionally refined account of agents and culpability, and of the role of emotions in driving particular sets of transitional demands. However, Elster is less successful at making the case for the broader causal argument that is offered early in the volume. While the chapter discussing the larger universe of cases offers both a typology and some features of a causal argument, Elster does not maintain this argument throughout the volume. Indeed, the chapters dealing with the key elements of this argument—the actors, constraints, and politics, and the ‘structure of transitional justice,’—are neither well-integrated nor mutually reinforcing. As a result, the causal claims are somewhat unclear, as is the support for them, and the account of transitions, while exceptionally fine with regard to certain agents and elements (such as emotions), fails to fully capture the transitional dynamic.

A. Typologies of Transition and the Structure of Transition

In his discussion of the larger universe of cases, Elster suggests that a classification or typology emerges, “based on the endogenous or exogenous nature of the pre-transitional regime and of transitional justice, the duration of the pre-transitional regime, and the duration of transitional justice.”⁵⁹ While Elster acknowledges the context-dependence of the process in the subsequent section of the book, addressing analytics of transitional justice, he basically explains and compares cases. He insists that he is not offering a *theory* of transitional justice.⁶⁰ Elster is wise to be wary of simple generalizations and perhaps equally right to seek to simply order and explain the cases before him. Nonetheless, the explanation is not maintained throughout the remainder of the book. Elster offers a two-by-two table categorizing regimes and justice as endogenous or exogenous, and additionally introduces the temporal dimension,

57. *See id.* at 234-40.

58. *Id.* at 232.

59. *Id.* at 49.

60. *Id.* at 77.

suggesting that it matters whether justice is attempted during and directly after transition, or is delayed.⁶¹ However, while he indicates that these dimensions and analytics matter, he does not clearly describe the likely effects of them upon an outcome.⁶²

It is worth taking up briefly Elster's discussion of constraints in negotiated transitions. Elster recognizes that constraints may be both "hard" and "soft." Hard constraints are those that absolutely rule out certain options, while soft constraints are those dictating that other goals, such as reconstruction, may take precedence.⁶³ Elster rightly notes that options during transitions are limited. The limitations arise, not merely from valid fears of a backlash by perpetrators, but also from problems of scarcity and incompatible demands.⁶⁴ Scarcity means that reparations and other measures may be difficult to achieve in addition to being politically contentious. Trials and other measures may be at odds with concerns to stabilize a country and with important demands for rule of law. What is less clear from the discussion, however, is how and when constraints limit the available outcomes regarding accountability, and when trade-offs with regard to other goals occur.

Unfortunately, the discussion of the politics of transitional justice does not cast greater light upon the impact of the aggregate of actors, emotions, and constraints upon outcomes of justice. The chapter on politics focuses on the role of political parties in shaping transitional justice.⁶⁵ Elster illustrates his account of the range of parties with examples from post WWII transitions, describing the ways that actors can engage in vote-seeking and vote-denying behavior.⁶⁶ However, while he offers up fine accounts of the range of actors from moderate to extremist, and the range of demands they may make, he does not elucidate how these demands are mediated by other factors in society or broader constraints.

Regrettably, the introduction of agents, constraints, and politics of transitional justice do relatively little to support either the typology or a broader explanatory argument. This is not to say that they could not, but rather that Elster has not offered the evidence or presented the argument that could do so. Yet the intuitions and typologies he offers are now under close examination in the field of transitional justice. Studies, including my own, have sought to ascertain whether the nature and extent of past abuses matter for outcomes of justice, and whether the role of external actors has any tangible effect. Additionally, researchers have sought to examine the dynamic choices of transition, linking existing constraints and current demands to clarify options of transition, as well as choices commonly made.

61. *Id.* at 74-76 (discussing the temporal dimensions of transitional justice).

62. *Id.* at 73-76.

63. *Id.* at 188 (defining hard and soft constraints).

64. *Id.* at 208.

65. *Id.* at 245.

66. *Id.* at 252.

In my own examination of transitional justice, studying five cases in detail and 26 “global experiences” of transitional justice, I sought to test some of these explanatory links. What I found, perhaps not surprisingly, was that the nature and extent of past abuses did not have any clear impact on transitional outcomes. Rather, in some instances extensive abuses generated stronger responses, while in others the broad complicity of society and overwhelming numbers of perpetrators generated policies of amnesty.⁶⁷ Similarly, I sought to examine the role of international actors in transition in more detail. Also not surprisingly, I found that they helped to promote certain modes of accountability, and that external change created a permissive space for justice. Specifically, the end of the Cold War meant that states could no longer use external threats or “bogeymen” to justify internal repression, undermining the hold of many authoritarian regimes.⁶⁸

Finally, I would suggest that it is possible to introduce a dynamic account of transition. In addition to agents and constraints, this account examines strategies and trade-offs of transition involving complicated balancing of goals, including not just accountability but also democratization and security. Thus, they may pursue accountability, but also limit it, in order to pursue policy reform and purges.⁶⁹ I do not suggest that Elster ought necessarily to have pursued a typological approach with explanatory intent, but instead I posit that these elements, while included, are the weaker portions of the book. For example, while Elster’s explanation of the role of emotions in driving *demands* for justice is illuminating, one might be left wishing to know when these demands have been used more or less successfully.

Elster does offer one important contribution to the typological approach to transition that should be duly noted. His treatment of, not merely transitions to democracy, but also the restoration of monarchy, as cases of interest, is an important corrective to the present literature.⁷⁰ Much of the literature presumes that transitions occur only after authoritarian regimes or armed conflict, and that the outcome or desired outcome is democracy.⁷¹ Elster’s monarchic restorations remind us that one can pursue other outcomes, but that the agents and constraints might nonetheless be quite similar.

It is worth noting that exercises in transitional justice often take place in the absence of any proper “transition.” For example, in Sri Lanka, efforts to address

67. It is perhaps immodest to offer my own work as a counterpoint here, but the attempt is merely to offer the types of evidence and argumentation that might have helped to flesh out some of Elster’s causal claims. See CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS. PEACE IN TIMES OF TRANSITION 39, 205 (2004) [hereinafter SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS] (offering a table of global cases, with constraints and outcomes, and finding that the nature of abuses is not clearly determinative).

68. See *id.* at 204-05.

69. See *id.* at 205-07 (discussing strategies of transition, and the finding that prosecutions occur far more frequently than conventional wisdom would suggest).

70. ELSTER, CLOSING THE BOOKS, *supra* note 28, at 49.

71. See generally HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1; RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR (2002); TEITEL, *supra* note 23.

disappearances and abuses by state security forces began in earnest after the election of president Chandrika Kumaratunga in 1994, but the country was, before and after the election, both a democracy and roiled by internal armed conflict.⁷² Similarly, Honduras was formally a democracy beginning with military handover of power in 1982, yet the military maintained effective political control well into the 1990s. In that country, the “transition”—if there was one—was a slow consolidation of civilian control over the military, and the state conducted some investigations into disappearances and prosecutions.⁷³

V.

CONCLUSION

The two volumes here take different structural and philosophical approaches to problems of past harms. Both, however, offer important contributions to the literature, and fill significant gaps in knowledge and analysis to date. In particular, the two books compel us to view transitional justice not merely as a historical event emerging in the last quarter-century, but as a more generalized human and political phenomenon. Each book has its virtues and flaws, but the widening of historical scope is perhaps the most significant contribution to the literature. As stated in the introduction, transitional justice literature is now coming of age. Yet these two recent works reveal that while academic analysis is just beginning to evolve, the practice of transitional justice has been with us for centuries.

One should not overemphasize the similarities in historical practice at the expense of the differences. As I have already discussed, the expansion of the concept of reparative justice, including past harms committed by democratic regimes, and/or harms committed in the relatively distant past is important substantively but problematic conceptually. Elster’s discussion of the central dilemma of transitional justice, emerging in largely negotiated transitions where there are hard or soft constraints, is largely absent from the discussions in the Torpey book on reparative justice. The challenges of reparations for slavery or confiscation of aboriginal cultural artifacts or land are significant, but distinct in that they are practical and political, but not fundamentally tied to the stability of the societies considering reparation.

Elster’s book offers significant conceptual refinement of key categories of transitional justice including the categorization of agents, constraints, culpability, retribution, and other emotions. His book offers a more

72. See HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1, at 64-66; Chandra Lekha Sriram, *Dilemmas of Accountability: Politics, the Military and Commissions of Inquiry During an Ongoing Civil War, The Sri Lankan Case*, 5 CIVIL WARS 96-121 (2002) (discussing Sri Lanka as an unusual “transitional” case).

73. HAYNER, UNSPEAKABLE TRUTHS, *supra* note 1, at 19 (discussing the report into disappearances produced by the government’s human rights ombudsman at his own initiative); SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS, *supra* note 67, at 127-46 (discussing the Honduran regime and efforts at accountability including and beyond the report).

sophisticated analysis of the role of various actors in perpetuating injustice. As such it offers an important refinement to general discussions of victims and perpetrators in the literature, which often simply presume that perpetrators will never be victims, nor victims perpetrators, and which tend not to seriously consider justifications, excuses, and mitigations for wrongdoing.

As I have discussed, each of these volumes has strengths and weaknesses. Taken and interpreted together, however, they signify an evolution of methodology and thinking in this important political area. The fact that two significant books offering clear challenges to the methodological status quo and philosophical refinement of central concepts can emerge at this point in time signifies that the literature of transitional justice is maturing.