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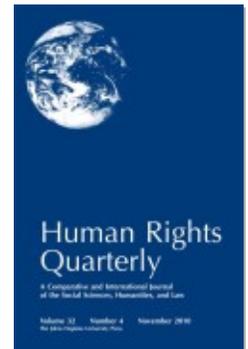
The Justice Balance: When Transitional Justice Improves
Human Rights and Democracy

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The Justice Balance: When Transitional Justice Improves Human Rights and Democracy

Tricia D. Olsen, Leigh A. Payne,** & Andrew G. Reiter****

ABSTRACT

Evidence from the Transitional Justice Data Base reveals which transitional justice mechanisms and combinations of mechanisms positively or negatively affect human rights and democracy. This article demonstrates that specific combinations of mechanisms—trials and amnesties; and trials, amnesties, and truth commissions—generate improvements in those two political goals. The findings support a justice balance approach to transitional justice: trials provide accountability and amnesties provide stability, advancing democracy and respect for human rights. The project further illustrates that, all else being equal, truth commissions alone have a negative impact on the two political objectives, but contribute positively when combined with trials and amnesty.

I. INTRODUCTION

Transitional justice mechanisms are the major policy innovation of the late twentieth century to reduce human rights violations and strengthen democracy. Recent efforts (e.g., the trial and conviction of former President Alberto Fujimori in Peru, prosecutions and sentencing of Khmer Rouge leaders in

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Cambodia, the Truth and Reconciliation Commission of Liberia, and the efforts to arrest President of Sudan Omar al-Bashir) demonstrate that transitional justice will remain at the forefront of international and domestic policy debates in the twenty-first century. Organizations like the International Center for Transitional Justice have emerged to compile information about transitional justice experiences around the world, and to respond to demands for policy guidance. An immense body of scholarly literature has corresponded to this growth in global practices; more than 2,000 scholarly works exist on transitional justice.¹ The creation of the *International Journal of Transitional Justice*, special issues of scholarly journals such as *Journal of Conflict Resolution*, and the development of courses and university programs around the world reveal a burgeoning subfield of transitional justice in international relations, socio-legal studies, political science, and sociology.

Despite the proliferation of practices, policies, and studies of transitional justice, two major gaps remain. First, scholars and policymakers have little systematic evidence to support the claim that transitional justice actually brings improvements in human rights and democracy. Second, if transitional justice does achieve its goals, neither scholars nor policy-makers clarify when, why, or how it might do so.

These gaps largely result from the tendency of transitional justice scholars to focus on single-case or small-*N* studies. Hypotheses from such studies remain largely untested due to the lack of cross-national, comparative data on transitional justice. A few quantitative studies do exist, but they rely primarily on surveys from one or a small set of countries² or involve cross-national studies of a single transitional justice mechanism.³ While some recent efforts have analyzed multiple mechanisms over a large number of countries,⁴ these studies do not address the effect of transitional justice on human rights and democracy.

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1. See Andrew G. Reiter (Compiler), *Transitional Justice Bibliography*, available at <http://sites.google.com/site/transitionaljusticedatabase/transitional-justice-bibliography>.
 2. See, e.g., JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* (2005); James Meernik, *Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia*, 42 J. PEACE RES. 271 (2005).
 3. ERIC WIEBELHAUS-BRAHM, *TRUTH COMMISSIONS AND TRANSITIONAL SOCIETIES: THE IMPACT ON HUMAN RIGHTS AND DEMOCRACY* (2009); Eric Brahm, Geoff Dancy & Hunjoon Kim, *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 J. HUM. RTS. 45 (2010); LOUISE MALLINDER, *AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE* (2008). Recent work by Kim and Sikkink include trials and truth commissions, though they do not assess the role of truth commissions used alone and, instead, only include it as a control. Moreover, they do not include amnesties in their analysis. Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, INT'L STUD. Q. (forthcoming 2010).
 4. See David Backer, *The Human Face of Justice: Victims' Responses to South Africa's Truth and Reconciliation Commission Process* (2004) (unpublished Ph.D. dissertation, University of Michigan) (on file with author); Helga Malmin Binningsbø, Jon Elster & Scott Gates, *Civil War and Transitional Justice, 1946–2003: A Dataset* (paper presented

The Transitional Justice Data Base (TJDB) project has overcome some of the weaknesses in the existing studies.⁵ First, we employ empirical analysis to confirm for the first time that transitional justice has a positive effect on democracy and human rights. Second, we propose scope conditions for when transitional justice succeeds in achieving those goals. Specifically, we find that individual mechanisms alone do not have a significant positive effect on democracy and human rights. Instead, we find that only two combinations of mechanisms—trials and amnesties; and trials, amnesties, and truth commissions—achieve these goals. These findings present a challenge for transitional justice scholarship and policies by promoting the combination of trial and amnesty mechanisms previously considered incompatible. By analyzing these combinations and how they work in tandem, the TJDB project contributes to the understanding of how transitional justice works, and develops a new approach—the justice balance—as an alternative to existing theoretical frameworks.

In this article, we first outline the existing approaches to transitional justice, categorized as maximalist, minimalist, moderate, and holistic. We then briefly introduce the TJDB project and summarize its main findings. Next, we present the justice balance approach to improving human rights and democracy and illustrate this pattern with emblematic case studies drawn from the dataset. The conclusion reflects on the importance of these findings for transitional justice theory and policies.

II. EXISTING THEORETICAL ASSUMPTIONS

Four main theoretical approaches to transitional justice and human rights violations exist in the literature. The first three consider the value of particular transitional justice mechanisms in advancing democracy and human rights protections. Placing these three approaches on a spectrum of accountability, a “maximalist” approach advocates the highest level of accountability through human rights trials and perpetrator-focused retributive justice. A “moderate” approach advances truth commissions as an alternative, victim-oriented restorative justice mechanism that holds perpetrators accountable through non-judicial processes. A “minimalist” approach warns against accountability, contending that amnesty provides the stability necessary to nurture democracy and human rights regimes. The fourth asserts that

at the TRANSITIONAL JUSTICE AND CIVIL WAR SETTLEMENTS' WORKSHOP 2005); Tove Grete Lie, Helga Malmin Binningsbø & Scott Gates, *Postconflict Justice and Sustainable Peace* (WORLD BANK POLICY RESEARCH, WORKING PAPER NO. 4191, 2007).

5. TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* (2010).

single-mechanisms are insufficient to cope with the magnitude of problems new democracies face, and promotes a “holistic” approach that involves multiple mechanisms.⁶

The maximalist approach contends that holding individuals accountable through prosecutions deters future perpetrators from committing violence, establishes and legitimizes the rule of law, and thereby strengthens democracy. The failure to prosecute, in contrast, results in a culture of impunity, erodes the rule of law, and encourages vigilante justice.

In addition, the maximalist approach responds to moral, political, and legal imperatives as its bases for advocating prosecutions for perpetrators of past abuses. The moral obligation to victims and survivors of past atrocity constitutes an obligation that states cannot abrogate for strategic or political purposes.⁷ A political obligation requires democracies to bring authoritarian forces under control and lay the foundation for the rule of law.⁸ The failure to deal with the past through trials, a maximalist approach would argue, leads to cycles of retributive violence⁹ or vigilante justice.¹⁰ International law, moreover, imposes a duty to prosecute perpetrators of past atrocities. Indeed, international treaties and legal theory consider prosecutions the only effective remedy to victims of past human rights violations.¹¹

The Convention on the Prevention and Punishment of the Crime of Genocide, for example, explicitly outlines the duty of countries to enact domestic legislation to punish perpetrators of genocide, and their respon-

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6. Both retributive and restorative justice mechanisms hold similar democracy and human rights goals. They differ in the judicial and non-judicial mechanisms advanced to achieve those goals. Retributive and maximalist approaches focus on deterrence of human rights abuses and building democratic institutions, laws, rights and protections through courts' punishment of perpetrators. A moderate and restorative justice approach focuses on building democratic societies and culture of human rights through truth and acknowledgment processes. These processes advance healing and reestablishing the dignity of victims and survivors, post-conflict reconciliation, and the reincorporation of perpetrators into society. See MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).
 7. KATHLEEN D. MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); John J. Moore, Jr., *Problems with Forgiveness: Granting Amnesty Under the Arias Plan in Nicaragua and El Salvador*, 43 *STAN. L. REV.* 733 (1991).
 8. Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 *HUM. RTS. Q.* 737 (1998).
 9. JOHN BORNEMAN, *SETTLING ACCOUNTS: VIOLENCE, JUSTICE, AND ACCOUNTABILITY IN POSTSOCIALIST EUROPE* (1997); Richard J. Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation?*, 22 *HAST. CONST. L.Q.* 607 (1995).
 10. GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).
 11. Diane F. Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991); Naomi Roht-Arriaza, *State Responsibility To Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 *CAL. L. REV.* 449 (1990); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *LAW & CONTEMP. PROBS.* 63 (1996); Michael P. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation To Prosecute Human Rights Crimes*, 59 *LAW & CONTEMP. PROBS.* 41 (1996).

sibility to provide effective penalties for those found guilty. Likewise, the International Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment compels countries to ensure that all acts of torture are illegal, and requires state parties to either prosecute or extradite alleged torturers. Additionally, other international agreements that outlaw and punish hijacking, aircraft sabotage, the taking of hostages, and terrorism all include explicit extradition or punishment provisions.¹² Legal interpretations of other international treaties—including the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the American Convention on Human Rights—also suggest that prosecution and punishment are the only means of ensuring protection of the rights enumerated within the treaties. The European Court of Human Rights and the Inter-American Court of Human Rights have both ruled that only criminal accountability is an effective remedy for violations of the European and American Conventions.¹³

These moral, political, and legal obligations represent the instrumentality and social learning behind the accountability norm.¹⁴ New democracies should adopt trials because they face coercion in the form of legal obligations and because they receive incentives from other countries and investors who reward states with strong rule of law systems.¹⁵ Yet they should also seek to hold trials simply because they understand this to be the right way to deal with past human rights violations, a view endorsed by victims' groups and transnational human rights networks.¹⁶

A maximalist approach emphasizes, in short, the importance of addressing past human rights violations with trials.¹⁷ The approach strenuously opposes amnesties, particularly blanket amnesties, because they fail to meet obligations under international law.¹⁸ When particular situations warrant amnesty, a maximalist approach advocates processes that move "from broader to more tailored, from sweeping to qualified, from laws with no reference to

12. Roht-Arriaza, *supra* note 11, at 464–65.

13. *Id.* at 471–72; Orentlicher, *supra* note 11, at 2580.

14. Jeffrey T. Checkel, *Why Comply? Social Learning and European Identity Change*, 55 INT'L ORG. 553 (2001).

15. For an example of how states use rewards and punishment to spread an international norm, see AUDIE KLOTZ, *NORMS IN INTERNATIONAL RELATIONS: THE STRUGGLE AGAINST APARTHEID* (1999).

16. *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC POLITICS* (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 2000); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411 (1993); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

17. Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255 (1997).

18. Peter A. Schey et al., *Addressing Human Rights Abuses: Truth Commissions and the Value of Amnesty*, 19 WHITTIER. L. REV. 325 (1997).

international law to those which explicitly try to stay within its strictures.”¹⁹ Maximalists, in other words, would expect to see improvements in human rights and democracy where human rights trials have occurred.

Minimalists, in contrast, question the effectiveness of trials in reducing human rights violations. They contend that trials potentially perpetuate more, not less, violence and instability.²⁰ These scholars consider a maximalist approach as driven by norms and ideals, blind to the political realities of transitions from authoritarian rule or violent conflict. Often states simply lack the capacity to comply with the maximalist norm of trials.²¹ While a maximalist approach emphasizes the “justice” side of the transitional justice equation, a minimalist approach emphasizes the “transition” side.

Amnesties, according to a minimalist approach, provide the best form of transitional justice to protect transitions from a return to authoritarian rule and violent conflict. Most transitional situations involve vulnerabilities. Only in rare exceptions, such as the military defeat of the prior regime (e.g., Germany after World War II), do new democracies enjoy protection from former perpetrators. In the majority of cases, authoritarian leaders have not lost all political power. The failure to recognize the persistent strength of anti-democratic forces, including the former security apparatus and its supporters, commonly referred to as “spoilers,” jeopardizes the fragile transition.²² According to the minimalist approach, moving too far or too fast in attempts to hold perpetrators accountable will jeopardize the democratic transition by provoking the emergence of these spoilers.²³ Thus, a minimalist approach asserts that strong democracies, rule of law, and deterrence of extra-legal violence all depend on neutralizing spoilers and potential spoilers through amnesty provisions. Amnesty is necessary to strike political bargains only after which institution building and the construction of rule of law become feasible.²⁴ Though amnesties may seem unjust for victims of human rights violations, minimalists defend them as mechanisms to reduce future injustices or to protect society against grave social harms, such as continued political violence or authoritarian reversals. They provide “a far

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19. Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843, 884 (1998).
 20. For an overview of the criticisms of prosecutions see Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118 (2000).
 21. Abram Chayes & Antonia Handler Chayes, *On Compliance*, 47 INT’L ORG. 175 (1993).
 22. Steven Stedman, *Spoiler Problems in Peace Processes*, 22 INT’L SEC. 5 (1997).
 23. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 71 (1992); see also Carlos H. Acuña & Catalina Smulovitz, *Guarding the Guardians in Argentina: Some Lessons About the Risks and Benefits of Empowering the Courts*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 93 (A. James McAdams ed., 1997).
 24. Tonya Putnam, *Human Rights and Sustainable Peace*, in *ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS* 237 (Stephen J. Stedman et al. eds., 2002).

stronger base for democracy than efforts to prosecute one side or the other or both.²⁵ This minimalist approach considers the current international fixation with accountability misguided and suggests that it is “time to abandon the false hope of international justice.”²⁶

The minimalist approach hinges on political constraints that drive transitional justice choices and outcomes. Appeasing the opposition provides a stable pathway for a successful transition. Pragmatic bargains, rather than idealistic norms, establish peace.²⁷ Prosecutions, on the other hand, often backfire, causing more harm than good.²⁸ A minimalist approach argues that amnesty is superior to trials in bringing reconciliation, particularly in the aftermath of war. Scholars point to Mozambique and Namibia as success cases in which the choice of amnesty has directly led to the consolidation of peace and the healing of society in the wake of mass crimes.²⁹

Historically, states have used amnesties in conflict scenarios as an incentive to gain a tentative peace before the possibility of a transition even occurs.³⁰ Amnesties are also a means of reassuring former regime forces and their supporters that they will continue to play a role within the new political system and need not overthrow it.³¹ In the Argentine case, some scholars argue that amnesties successfully re-professionalized and depoliticized the armed forces.³² The use of amnesty also protects against feelings of victors’ justice. When one side of the conflict imposes justice on the other side, the potential for future conflict increases. Helena Cobban argues that an amnesty-reliant peace agreement can serve to “mark a clear turning point between the conflict-driven and impunity-plagued climate of the past and a new, much more peaceable social climate.”³³ Following a path of punishment instead can serve to maintain rather than reconcile differences between groups in society.³⁴

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25. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH-CENTURY* 214 (1991).
 26. Helena Cobban, *Think Again: International Courts*, 153 *FOREIGN POL’Y* 22, 22 (2006).
 27. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 *INT’L SEC.* 5 (2003); Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice*, 7 *ANN. REV. POL. SCI.* 345 (2004).
 28. Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 *DAEDALUS* 47, 51 (2003).
 29. HELENA COBBAN, *AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES* 199 (2007); Snyder & Vinjamuri, *supra* note 27.
 30. For a historical discussion of the use of amnesties see ANDREAS O’ SHEA, *AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE* 5–22 (2002).
 31. Snyder & Vinjamuri, *supra* note 27.
 32. Paul Zagorski, *Civil-Military Relations and Argentine Democracy: The Armed Forces Under the Menem Government*, 20 *ARMED FORCES & SOC’Y* 423, 433–34 (1994).
 33. COBBAN, *supra* note 29.
 34. Tom Hadden, *Punishment, Amnesty and Truth: Legal and Political Approaches*, in *DEMOCRACY AND ETHNIC CONFLICT: ADVANCING PEACE IN DEEPLY DIVIDED SOCIETIES* (Adrian Guelke ed., 2004).

The decision to pursue justice in new democracies is restricted, according to Jon Elster, by hard and soft constraints.³⁵ Hard constraints, originating in the dynamics of the transition itself, make some options “absolutely unfeasible.”³⁶ There may be a trade-off between justice and the very survival of the new regime. Soft constraints, such as the need for economic reconstruction or the transition to a market economy, limit the feasibility of reparations and prosecutions in the eyes of the new regime. Thus even without the presence of a hard constraint that eliminates the possibility of justice, there may be a host of other issues taking precedence. Justice is typically lower on the list of priorities for a new regime than a maximalist approach recognizes. A minimalist approach, in contrast, serves as the most effective means of dealing with the past that allows the new democracy to avoid instability and focus on issues deemed more crucial to the country’s survival (e.g., health care, infrastructure, employment). Minimalists therefore argue that amnesties reduce human rights violations and strengthen democracy.

Minimalist and maximalist approaches both consider truth commissions the second-best option for dealing with the past. A maximalist approach acknowledges the accountability features of truth commissions, but doubts their effectiveness in improving the rule of law, strengthening courts, and eroding the culture of impunity. A minimalist approach sees truth commissions as less potentially destabilizing to democracies than trials, and they often include amnesty provisions. A minimalist approach nonetheless raises concerns about those acts that remain outside the amnesty protections and how potential spoilers might respond to inquiries into the past.

A moderate approach, in contrast, finds truth commissions to be uniquely effective in enhancing democracy and human rights by establishing a middle ground between a maximalist promotion of accountability through prosecution on one hand, and a minimalist endorsement of amnesties and respect for political constraints on the other. Truth commissions, moderates argue, document past atrocity, thereby establishing accountability and condemning human rights violations, while simultaneously avoiding prosecutions that might mobilize anti-democratic forces.

A moderate approach sometimes concurs with maximalist support for prosecutions as an ideal form of justice, but cautions against a maximalist tendency to ignore political and legal constraints on the process. A moderate approach does not share the view that a country has a moral or legal duty to hold trials. Instead, this approach emphasizes the duty to hold the authoritarian regime accountable and restore the dignity of victims and survivors. It encourages new governments to find the optimal mechanisms to achieve that

35. JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* 188–215 (2004).

36. *Id.* at 188.

goal.³⁷ Decisions are “dictated, in most instances, by the mode and politics of the particular situation.”³⁸ Scholars of this approach recognize that when a new democracy boldly and blindly promotes prosecutions it potentially jeopardizes the regime by strengthening and mobilizing domestic spoilers. To retain control over these spoilers, a moderate approach advocates making some concessions to them.³⁹

Additionally, trials of perpetrators tend to be divisive, impeding reconciliation efforts.⁴⁰ The growing international support for trials ignores the limitations of prosecutions to deliver rights-based democracies.⁴¹ Trials may result in exonerating perpetrators rendering less, not more, accountability and respect for rule of law. The trials of General Magnus Malan and Dr. Wouter Basson in South Africa provide examples of lengthy judicial proceedings for major human rights violations that nevertheless resulted in acquittals.⁴² Moderates might point to the role that the South African Truth and Reconciliation Commission played in overcoming the limitations of courts in finding culpability for past wrongs. Indeed, courts in new democracies face particular constraints in reaching judgments against perpetrators. The authoritarian leaders may have appointed judges before the democratic transition, rendering biased outcomes; evidence is often missing or tainted. Witnesses either do not exist, or feel intimidated to speak out against perpetrators, and courts often have to apply laws adopted from authoritarian codes.⁴³ Recognizing the legal constraints on accountability through trials, the moderate approach advocates non-judicial remedies and rehabilitation.⁴⁴

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37. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 127 (1996); MINOW, *supra* note 6; Ruti Teitel, *How Are the New Democracies of the Southern Cone Dealing with the Legacy of Past Human Rights Abuses?*, in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 146 (Neil J. Kritz ed., 1995).
38. Alexander L. Boraine, *South Africa's Amnesty Revisited*, in *THE PROVOCATIONS OF AMNESTY: MEMORY, JUSTICE AND IMPUNITY* 165, 166 (Charles Villa-Vicencio & Erik Doxtader eds., 2003).
39. Jaime Malamud-Goti, *Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments*, in *STATE CRIMES: PUNISHMENT OR PARDON* 71 (1989); Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 *HUM. RTS. Q.* 1 (1990); Aryeh Neier, *What Should Be Done About the Guilty?*, *NEW YORK REV. OF BOOKS*, 1 Feb. 1990; Carlos S. Nino, *The Duty To Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 *YALE L.J.* 2619 (1991); CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (1996).
40. Eric Stover & Harvey M. Weinstein, *Conclusion: A Common Objective, a Universe of Alternatives*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH* (Eric Stover & Harvey M. Weinstein eds., 2005).
41. RAMA MANI, *BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR* (2002).
42. Charles Villa-Vicencio, *Restorative Justice: Ambiguities and Limitations of Theory*, in *THE PROVOCATIONS OF AMNESTY*, *supra* note 38, at 30, 35.
43. José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, 13 *HAMLIN L. REV.* 623 (1990).
44. JAIME MALAMUD-GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (1996); *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* (NIGEL BIGGAR ed.

In addition to providing a middle ground between trials and amnesties, advocates of truth commissions point to their ability to establish accountability through the public exposure and condemnation of perpetrators for their past violence. They restore the dignity of citizens victimized by the violence by publicly confirming their accounts of past criminal acts. Indeed, according to their advocates, truth commissions more effectively acknowledge, condemn, and deter violence, than trials or amnesties, and they do so without jeopardizing democracy and the rule of law.⁴⁵ Rather than mounting a principled defense for either amnesty or prosecution, a moderate approach advocates a number of middle-range options that navigate accountability through the troubled waters of potential spoilers.⁴⁶ They provide, in other words, a victim-centered process of accountability that balances political constraints with justice demands. To confirm the assumptions made in the moderate approach, truth commissions should have a positive impact on human rights and democracy.

Minimalist and moderate approaches prove consistent with some international relations views of state compliance.⁴⁷ Hathaway, in particular, emphasizes the high degree of non-compliance by states on human rights agreements.⁴⁸ Because authoritarian rule often decimates civil society, the absence of organized domestic political actors to effectively push for trials further compounds non-compliance.⁴⁹ In short, international relations scholars might view the relatively low cost of non-compliance with the accountability norm as an explanation for the appeal of the minimalist/amnesty and moderate/truth commission approaches to transitional justice. If they can, states will tend to avoid potentially destabilizing trials.

Some scholars and policymakers reject all three approaches—maximalist, minimalist, and moderate—to transitional justice. They consider these approaches limited because they largely “confine the struggle for human rights to one set of institutions or one approach to deal with the past.”⁵⁰ The Inter-

2003); Lyn S. Graybill, *Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods*, 25 *THIRD WORLD Q.* 1117 (2004).

45. Malamud-Goti, *Trying Violators of Human Rights*, *supra* note 39, at 71; Jaime Malamud-Goti, *Transitional Governments in the Breach*, *supra* note 39; Neier, *supra* note 39; Nino, *The Duty To Punish Past Abuses of Human Rights Put into Context*, *supra* note 39; NINO, *RADICAL EVIL ON TRIAL*, *supra* note 39.
46. Kritz, *supra* note 37; MINOW, *supra* note 6.
47. George W. Downs, David M. Locke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 *INT'L ORG.* 379 (1996).
48. Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002). Recent work, however, is beginning to challenge this assumption, see BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).
49. Andrew Cortell & James Davis, Jr., *How Do International Institutions Matter? The Domestic Impact of International Rules and Norms*, 40 *INT'L STUD. Q.* 451 (1996).
50. Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 *J. INT'L AFFAIRS* 647, 667 (1999).

national Center for Transitional Justice (ICTJ) has elaborated an alternative, holistic, approach intended to overcome the weakness of the single mechanisms advocated by many other scholars and practitioners. Single mechanisms, the holistic approach argues, cannot address the many problems governments and societies face after atrocity. The large number of victims, inadequate legal systems, and traumatized societies require countries to adopt multiple transitional justice mechanisms. The ICTJ concludes, "no single measure is as effective on its own as when combined with the others."⁵¹

The holistic approach adopted by the ICTJ and increasingly by other scholars and practitioners claims that:

Without any truth-telling or reparation efforts . . . punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as "blood money"—an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims' legitimate expectations of justice, truth and reparation, is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms.⁵²

Advocates of the holistic approach hope to avoid the pitfalls of promoting a single approach—by combining mechanisms—to address a range of experiences and contemporary realities. Their emphasis, therefore, is on the importance of designing combinations of mechanisms that fit the complexity of particular situations. Advocates of this approach, however, have not yet advanced any particular mixes of mechanisms that should prove most effective to achieve the goals of transitional justice.

The proliferation of mechanisms and these multiple interpretations of their success notwithstanding, we know very little about whether transitional justice actually achieves its goals. If it does, we do not yet have the evidence to determine which mechanism or set of mechanisms advocated in the literature lead to that success, or why and when they succeed. To develop a theory around when, why, and how transitional justice succeeds, and to guide policymakers considering these mechanisms, we have conducted a systematic cross-national analysis of the effects of transitional justice on democracy and human rights.

51. Int'l Ctr. for Transitional Justice, *What Is Transitional Justice?*, available at <http://www.ictj.org/en/tj/780.html>.

52. *Id.*

III. THE TRANSITIONAL JUSTICE DATA BASE (TJDB) PROJECT

The TJDB project includes data on five transitional justice mechanisms—trials, truth commissions, amnesties, reparations, and lustration—for all countries in the world from 1970–2007. The beginning of this timeframe corresponds roughly to the start of the third wave of democracy, in which transitional justice began to assume a more prominent role in the aftermath of political transitions.⁵³ The data base was constructed by systematically analyzing one primary source: *Keesing's World News Archives*.⁵⁴ Following a brief description of the TJDB and other data used in these analyses, we summarize our findings on the role transitional justice plays in improving human rights and democracy.

A. Transitions and Transitional Justice Mechanisms Data

To analyze the effect of transitional justice on human rights and democracy outcomes, this article focuses on three primary mechanisms—trials, truth commissions, and amnesties.⁵⁵ The TJDB project defines trials as situations in which a court of law holds alleged perpetrators of human rights violations criminally accountable. To be included in the data set, a verdict must conclude the trial.⁵⁶ In addition to domestic courts, the TJDB also includes

53. For more on the third wave of democratization see HUNTINGTON, *supra* note 25.

54. Keesing's World News Archives includes Keesing's Contemporary Archives (1931–1987) and Keesing's Record of World Events (1987–Present). A team of researchers closely analyzed 24,599 pages (23,733–48,332) of the Keesing's archive, a catalog of world events, for information on transitional justice mechanisms. Keesing's provides the coverage—geographically and temporally—necessary to develop a cross-national data set of transitional justice over a period of nearly four decades. Utilizing news sources from around the world, including newspapers, wire services, and government reports, Keesing's provides an unparalleled source of unbiased summaries of world events. Finally, Keesing's focuses its coverage on political, social, and economic events, and is a respected, reliable source for this type of data, making it an ideal source for information on transitional justice mechanisms. See Keesing's World News Archives, available at <http://www.keesings.com/>. For others who have used this as a primary source for data collection see Jan Oskar Engene, *Five Decades of Terrorism in Europe: The TWEED Dataset*, 44 J. PEACE RES. 1 (2007); MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS* (2006); BARBARA F. WALTER, *COMMITTING TO PEACE: THE SUCCESSFUL SETTLEMENT OF CIVIL WARS* (2002).

55. For the purposes of this article, we focus only on the three major forms of transitional justice mechanisms, the other two (reparations and lustration) mechanisms have too few observations to generate meaningful conclusions regarding their effect on human rights and democracy.

56. Other studies include all years in which trial proceedings are underway, whether or not they reach a verdict. Such an approach may both over-count lengthy judicial proceedings, or under-report trial processes that fail to get media attention. Trial verdicts, on the other hand, provide an accurate count for the number of trials that have occurred in any given country.

judgments in international or hybrid courts jointly administered by international and domestic actors.⁵⁷

The TJDB defines truth commissions as newly established, temporary bodies officially sanctioned by the state or an international governmental organization to investigate a pattern of human rights abuses.⁵⁸ This definition closely matches those used in other studies.⁵⁹ We exclude pre-existing government institutions that investigate past human rights violations as part of their official duties. We further exclude commissions created to investigate corruption, embezzlement, fraud, and similar crimes.

Transitional justice studies tend to exclude amnesties from systematic analysis.⁶⁰ Yet Snyder and Vinjamuri and others contend that state leaders consider amnesty a vital tool for resolving past atrocities.⁶¹ Scholars who include amnesty argue that an official declaration of an amnesty by a state serves as a formal acknowledgement of the crimes committed. This public acknowledgement potentially influences societal understanding of past atrocities and legitimizes victims' claims against perpetrators. The TJDB thus includes amnesties, defining them as situations in which a state officially declares that those accused or convicted of human rights violations, whether individuals or groups, will not be prosecuted, further prosecuted, and/or will be pardoned for their crimes and released from prison.

Our sample consists of all transitions to democracy between 1970 and 2004. To determine when a transition occurred, we rely on Polity IV's Regime Transition Variable.⁶² Polity provides several methods for identify-

57. We do not include universal jurisdiction, defined as trials in one country for crimes committed in another. While this is an interesting avenue for research, such events say more about the state of human rights in the country in which the trial was held, rather than in the country in which the crimes were committed, which is the focus of this project. Nor do we include regional courts. The majority of these cases do not address human rights violations as defined in our analysis. The European Court of Human Rights, for example, has made over 10,000 judgments, the vast majority of which would not qualify. Extracting the relevant cases is simply beyond the scope of this project. Finally, we exclude the International Criminal Court because to date it has yet to render a verdict.
58. We exclude non-state, independent projects that investigate and uncover the truth about past violations since they do not represent official decisions on behalf of state actors. Future research could expand the dataset and catalogue these efforts.
59. PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2001); Brahm et al., *supra* note 3.
60. See, e.g., *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* (NAOMI ROHT-ARRIAZA & JAVIER MARIEZCURRENA EDS., 2006). The distinction between an amnesty and a pardon is analytically meaningless; we use amnesty to refer to both actions.
61. Snyder & Vinjamuri, *supra* note 27.
62. Monty Marshall & Keith Jagers, *Polity IV Project: Political Regime Characteristics and Transitions, 1800–2004*, available at <http://www.systemicpeace.org/polity/polity4.htm>. For a similar use of Polity IV's data to determine transitions and regime types see, for example, David L. Epstein, Robert Bates, Jack Goldstone, Ida Kristensen & Sharyn O'Halloran, *Democratic Transitions*, 50 AM. J. POL. SCI. 551, 545 (2006); Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 J. PEACE RES. 427, 433 (2007). We also conducted the analysis using the coding for

ing transitions: a three or more point increase in the democracy (POLITY) score; a move from autocracy (a negative or zero POLITY score) to either a partial democracy (a 1–6 POLITY score) or a full democracy (a 7–10 POLITY score); and particular scores on the regime transition (REGTRANS) variable (i.e., 97 for state transformation or 99 for state creation) when the first year of the new polity is a partial or full democracy and the previous polity was autocratic. With this, our analysis yields ninety-one transitions to democracy in seventy-four countries during this period, a full list of which is located in the appendix.⁶³ Within these transitional countries, we find forty-nine trials, thirty truth commissions, and forty-six amnesties.

B. Democracy and Human Rights Measures

To test the effect of transitional justice on political outcomes, we use widely accepted measures of human rights and democracy to calculate the change in these scores over time.⁶⁴ Polity IV and Freedom House projects measure democracy slightly differently, but they tend to concur in their assessments of democracy overall. The first measure, POLITY2 from the data set Polity IV, is a weighted score derived from coding the competitiveness of political participation, the regulation of participation, the openness and competitiveness of executive recruitment, and constraints on the executive.⁶⁵ This measure is especially attractive because of its comprehensive temporal and geographical coverage. The second measure of democracy comes from the Freedom House project, which provides measures of political rights (focused on participation) and civil liberties (institutional aspects of democracy and freedom of expression).⁶⁶ One limitation of this data source for the project is that it begins in 1980. Despite this concern, and criticisms of the Freedom House project,⁶⁷ it provides a measure of the specific aspects of democracy (rights and freedoms) that transitional justice may be likely to affect.

We also use two respected measures of human rights in our analysis. The Physical Integrity Rights Index (PHYSINT) generated by Cingranelli and

transitions taken from Milan Svolik, *Authoritarian Reversals and Democratic Consolidation*, 102 AM. POL. SCI. REV. 153 (2008), and the results do not differ significantly.

63. We are limited to 2004 rather than 2007 due to the coverage of the most recent version of Polity IV.
64. The change in democracy and human rights scores is calculated by subtracting the score of ten years post-transition from the score of year of transition. This analysis, therefore, only includes those mechanisms used in the first ten years of the democratic transition.
65. Marshall & Jaggers, *supra* note 62.
66. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2008: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES*, available at <http://www.freedomhouse.org/template.cfm?page=363&year=2008>.
67. Gerardo L. Munck & Jay Verkuilen, *Conceptualizing and Measuring Democracy: Evaluating Alternative Indices*, 35 COM. POL. STUD. 5 (2002).

Richards⁶⁸ and the Political Terror Scale (PTS)⁶⁹ use the same sources for their data: Amnesty International (AI) Reports and the US State Department Country Reports on Human Rights Practices. Despite common sources, each measures human rights differently. Cingranelli and Richards' PHYSINT provides a scale that quantifies government protection against specific human rights violations, including torture, extrajudicial killing, political imprisonment, and disappearance. The Cingranelli and Richards database has limitations because it begins in 1980 and its coverage is somewhat sporadic during democratic transitions.⁷⁰ It nonetheless remains a widely-accepted measure of human rights violations. PTS provides a "terror scale" indicating whether terror has expanded to the entire population or if citizens are relatively safe and protected from wrongful imprisonment and torture.⁷¹ PTS begins in 1976, which limits some observations included in our analysis, although not to the same degree as the Cingranelli and Richards data.⁷² Using a variety of human rights measures is essential. Davenport, for example, has shown that democracy affects physical integrity and civil liberties differently.⁷³ As such, it is plausible that transitional justice mechanisms do not have the same effects across measures.

To determine the effect of transitional justice mechanisms on human rights and democracy, we use multivariate regression analysis.⁷⁴ It is important to note that we control for several alternative explanations for those improvements, specifically wealth, timing of transitions, level of repression, level of pre-transition repression, and region.⁷⁵ Because democratic theory often assumes that the wealthier the country, the more democratic it will be and the lower its level of human rights violations, we include GDP per capita to control for economic explanations.⁷⁶ The World Bank's World Development Indicators provides the appropriate measures to control for this factor.⁷⁷

68. David L. Cingranelli & David L. Richards, The Cingranelli-Richards Human Rights Dataset (CIRI Human Rights Data Project), available at <http://www.humanrightsdata.org>.

69. Mark Gibney et al., *Political Terror Scale 1976–2006*, available at <http://www.political-terrorscale.org/>.

70. Cingranelli & Richards, *supra* note 68.

71. Gibney et al., *supra* note 69.

72. *Id.*

73. CHRISTIAN DAVENPORT, *STATE REPRESSION AND THE DOMESTIC DEMOCRATIC PEACE* (2007).

74. For a full description of the methods and findings see OLSEN, PAYNE & REITER, *supra* note 5.

75. We also estimated alternate specifications that controlled for whether a country had previously experienced a civil war and found no major changes. This robustness check is in line with other human rights research, including Steven C. Poe, Neal Tate & Linda Camp Keith, *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993*, 43 INT'L STUD. Q. 291 (1999).

76. ADAM PRZEWSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990* (2000). This also follows previous work by Poe, Tate, and Camp Keith that finds economic development decreased human rights violations, see *id.*

77. GDP per capita is adjusted to be in constant 2000 USD to facilitate comparison across cases.

Timing may also influence democracy and human rights measures. Improvements in democracy and human rights might surge early in the transition.⁷⁸ We might also expect that those countries that have had a long, stable democracy, regardless of the mechanism adopted, will have had more time to improve their democracy and human rights. Thus, a country that transitioned in the 1970s may have had the time to firmly establish democracy and improve its human rights record, compared to one that transitioned in the 1990s. Therefore, we also control for the timing of a country's transition.

The prior level of repression is also an important factor to consider. Studies have shown that high levels of abuses in previous years are a strong predictor of the level of repression in a given year.⁷⁹ Though our analysis explains changes in democracy and human rights measures, past levels of repression may affect these outcomes. As such, we include Polity IV's POLITY2 score for the transition year and the year prior to ensure we are accounting for this factor.⁸⁰

Regional effects may also influence human rights and democracy outcomes. Some scholars assume that transitional justice and its success follow regional trends.⁸¹ Success, in this view, has little to do with transitional justice mechanisms, but instead with historical patterns and cultural attributes of the regions in which transitional justice has penetrated most successfully. Moreover, many scholars believe transitional justice has a contagion effect, whereby mechanisms spread to countries due to geographic proximity. To account for these possible effects, we use regional indicators as control variables.⁸²

C. Summary of Findings

The TJDB produces the empirical evidence about which transitional justice mechanisms—or mechanism combinations—improve human rights and democracy. It concludes that transitional justice overall has a positive effect on

78. Christian Davenport, *The Weight of the Past: Exploring Lagged Determinants of Political Repression*, 49 POL. RES. Q. 377 (1996).

79. Poe, Tate & Camp Keith, *supra* note 75.

80. Note that although we include the transition year and prior year measures of Polity, these variables are not highly collinear (correlation = 0.06).

81. For example, scholars particularly note the concentration of transitional justice mechanisms in Latin America. See Sikkink & Walling, *supra* note 62.

82. Based on the UN Statistics Division's region codes, we categorize each country according to whether it is a member of the Americas, Europe, Africa, or Asia. Composition of UN regions can be found at the UN Statistics Division, available at <http://unstats.un.org/unsd/methods/m49/m49regin.htm>. Note that we combine Asia and Oceania into one region, Asia, to better facilitate comparison. We also include Taiwan, which is not given a UN region code, as a member of Asia.

the change in human rights and democracy measures.⁸³ The findings affirm that dealing with past violence is better for these political outcomes than ignoring it. With these findings, we propose a theory about when and why transitional justice improves democracy and human rights.

Our findings, summarized in Table 1 below, however, challenge existing theoretical approaches regarding the mechanisms that produce that success. We find, first, that none of the transitional justice mechanisms on their own reduce human rights violations or improve democracy. Neither trials advocated by the maximalist approach nor amnesties advocated by the minimalist approach have a statistically significant effect on those particular political objectives. While truth commissions are statistically significant, the effect is negative. This means that, contrary to moderates' assumptions, using truth commissions alone to resolve past violence is likely to harm, rather than improve, human rights scores. This supports recent work that has questioned the success of truth commissions in achieving their goals.⁸⁴ The single-mechanism approaches simply do not hold up to empirical testing. The holistic approach moves in the right direction, but because it simply promotes more mechanisms, it remains underspecified. Our findings do not concur, for example, that trials and truth commissions, or amnesties, and truth commissions produce positive results. Instead, only two combinations work: (1) trials and amnesties, and (2) trials, amnesties and truth commissions.

While challenging these existing assumptions, our findings confirm some aspects of existing theoretical approaches. In addition to supporting the basic notion of the holistic approach, we confirm a maximalist view that trials are essential to improvements in human rights and democracy. Both combinations that succeed in those political objectives include trials. Our findings also confirm, however, a minimalist view that amnesties are essential to improvements in human rights and democracy since both successful combinations also include amnesties. While maximalists and minimalists would view trials and amnesties as incompatible, our findings suggest that they work together to produce positive change in human rights and democracy measures. We also confirm the moderate perspective that truth commissions can advance those political objectives. This positive role, however, only occurs when states combine truth commissions with trials

83. The key independent variable in this analysis is ordered by the level of accountability a country adopted within the ten-year period where an amnesty is 1, truth commission is 2, and a trial is 3. While we recognize that coding a variable in this way introduces strong assumptions (namely, that the difference between choosing between an amnesty and truth commission is the same as choosing between a truth commission and trial), we are only interested in the direction of the effect, not its size.

84. David Mendeloff, *Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice*, 31 *HUMAN RIGHTS QUARTERLY* 592 (2009); WIEBELHAUS-BRAHM, *supra* note 3.

and amnesties. These surprising results have led us to develop an alternative theoretical approach to transitional justice—the justice balance.

IV. THE JUSTICE BALANCE

Underlying the justice balance approach is the notion that trials and amnesties together contribute to improvements in human rights and democracy, with or without truth commissions. We consider this crucial combination of trials and amnesties as a balance between accountability provided by trials and stability guaranteed by amnesty. Accountability without stability simply cannot advance human rights and democracy objectives. Similarly, stability without accountability also fails to achieve those goals. Truth commissions do not get in the way of the justice balance, nor do they contribute to it by reinforcing accountability and stability. It is the balance provided by these two or three mechanisms in combination that is essential to success.

The maximalist approach already identifies why accountability is crucial to improvements in human rights and democracy. Trials demonstrate the willingness, capacity, and effectiveness of courts in challenging impunity. When courts try former authoritarian leaders, they show that no one, regardless of political or economic power, is above the law. Trials of powerful political figures further demonstrate the courts' independence from social and political pressures. Victims, as citizens, receive redress through the courts, a process denied to them under authoritarian rule. Trials are therefore crucial to establishing the moral and legal accountability necessary for deterring human rights violations, building institutional enforcement mechanisms, and thereby enhancing democracy. The justice balance contends, however, that trials are necessary, but not sufficient, to explain transitional justice's success.

A maximalist approach cannot explain how or why amnesties combined with trials would provide the necessary and sufficient conditions for transitional justice success. Amnesties, according to this approach, erode the positive effect of trials by perpetuating a culture of impunity. The justice balance suggests, in contrast, that amnesties provide parallel and complementary functions that enhance democracy and human rights, rather than undermine the effect of trials. That function is economic and political stability, necessary to a successful transition from authoritarian rule.

A minimalist approach tends to view amnesties as crucial for political stability, to prevent the emergence of democratic spoilers by appeasing them. The justice balance suggests that amnesties most likely play such a role in certain types of transitions. Specifically, when the prior authoritarian regime retains enough political strength to negotiate its withdrawal from power, new democracies may fear that putting these forces on trials will jeopardize the transition. Thus, they may accept the regime's previous self-amnesties or pass new amnesty laws as a mechanism to protect the transition from

Table 1.
Effect of Transitional Justice on Human Rights and Democracy

TJ Overall	Only Trial	Only Amnesty	Only TC	Trials & Amnesties	Amnesties & TCs	Trials & TCs	Trials, TCs, and Amnesties
Polity	0	0	0	+	0	0	0
Civil Liberties (Freedom House)	0	0	0	0	-	0	+
Political Rights (Freedom House)	0	0	0	0	0	0	0
Physical Integrity	0	n/a	-	n/a	n/a	n/a	0
Political Terror Scale (Amnesty International)	0	0	-	+	0	0	+
Political Terror Scale (US State Department)	n/a	n/a	-	+	n/a	n/a	+

Note: "n/a" signifies that the model was not meaningful; "+" and "-" mean statistically significant positive or negative relationships; "0" means that we found no evidence of a statistically significant relationship. A detailed methodological appendix that includes complete estimation results can be found here: <http://sites.google.com/site/transitionaljusticedatabase/publications>.

potential spoilers. While amnesties provide stability consistent with a minimalist perspective, trials would appear to disrupt, rather than enhance, this process. The justice balance suggests that, in these cases, trials follow, rather than occur prior to or simultaneous with, amnesties. Trials sequenced after initial amnesty laws provide the time to strengthen democratic governance and judicial institutions to permit delayed justice. In addition, human rights groups pressing for trials may use the early years of the democratic regime to find loopholes in the amnesty law or to overturn previous amnesty laws and permit trials.⁸⁵ In this scenario, amnesties provide stability shortly after the transition and trials follow, playing the necessary accountability function. The short-term stability provided by amnesties does not necessarily prevent the long-term benefit of accountability through trials. The sequencing of amnesty and trials over time provides for improvements in democracy and human rights.

Our data provide support for this scenario. The timing of amnesties and trials, for example, would suggest that trials tend to occur after amnesties. While amnesties, on average, occur 2.5 years after the transition, trials, on average, occur 4.2 years after the transition. Recent research by Laurel Fletcher, Harvey Weinstein, and Jamie Rowen also finds that “transitional justice is a long-term process and that a state may only be adequately prepared years later to take on the challenge of adjudicating trials or exposing wrong-doing through a truth commission.”⁸⁶ Our initial findings also confirm the importance of the timing and sequencing of transitional justice mechanisms.

The case of transitional justice in Uruguay provides an illustration of this sequenced process following negotiated transition. The 1973–1985 Uruguayan military regime ended as a result of the Naval Club pact between the military and political parties.⁸⁷ The transitional government that followed issued an amnesty law in 1985 and, subsequently, an immunity law (*Ley de Caducidad*) in 1986.⁸⁸ The amnesty provisions severely limited the capacity of courts to investigate or prosecute the thousands of estimated

85. For more on the concept of delayed justice see David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?*, 36 J. LAT. AM. STUD. 479 (2004); Terence Roehring, *Executive Leadership and the Continuing Quest for Justice in Argentina*, 31 HUM. RTS. Q. 721 (2009); Rebecca K. Root, *Through the Window of Opportunity: The Transitional Justice Network in Peru*, 31 HUM. RTS. Q. 452 (2009).

86. Laurel E. Fletcher & Harvey M. Weinstein with Jamie Rowen, *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 219 (2009).

87. Luis R. Roniger & Mario Sznajder, *The Legacy of Human Rights Violations and the Collective Identity of Redemocratized Uruguay*, 19 HUM. RTS. Q. 55, 57 (1997).

88. *Id.* at 59.

cases of political imprisonment and torture.⁸⁹ Human rights organizations mobilized in response, attempting to overturn the amnesty provisions in a 1989 referendum.⁹⁰ Alexandra Barahona de Brito attributes the narrow defeat of the referendum (53 percent), and thus the persistence of amnesty, to a strong perception within Uruguay that trials could jeopardize the democratic process.⁹¹

Despite the failure to overturn the amnesty provisions, former President Juan Bordaberry was arrested in 2006 and was convicted and sentenced to thirty years in prison for his role in the 1973 coup. In addition, mobilization by the human rights community against the immunity law continues. In April 2009, a petition was presented to parliament with 340,000 signatures to hold another plebiscite on the immunity law.⁹² The effort to revoke the amnesty law in the plebiscite in October 2009 failed, however, with nearly 53 percent opposed. Just days before the plebiscite, the Uruguayan Supreme Court ruled that the amnesty law's application to a particular crime was unconstitutional, thereby eroding the law to some degree. The Uruguayan case thus highlights the vulnerability experienced in negotiated transitions and the reliance on amnesty to pave the transitional path. It further illustrates how courts and human rights communities have mobilized, and have sometimes successfully by-passed and even overturned amnesty laws to hold trials.

Not all transitions face the same vulnerability to spoilers. Transitions that involve collapse of the old authoritarian order may face fewer political constraints. While some of the democratic transition literature would still caution new democracies about moving too far, too fast with prosecutions,⁹³ we might still expect such transitions to avoid morally and legally suspect amnesties in favor of trials. The justice balance claims, however, that even these types of transitions would experience improvements in democracy and human rights if amnesties accompanied trials.

Greece provides an example of a collapsed authoritarian regime that combined trials and amnesties to deal with its authoritarian past. A weak military regime (1967–1974) faced final collapse with its nationalist effort to

89. SERVICIO PAZ Y LA JUSTICIA URUGUAY, *URUGUAY NUNCA MÁS: HUMAN RIGHTS VIOLATIONS, 1972–1985* (1992).

90. Roniger & Sznajder, *supra* note 87, at 71.

91. Alexandra Barahona de Brito, *Truth, Justice, Memory, and Democratization in the Southern Cone*, in *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* 119, 131 (Alexandra Barahona de Brito, Carmen González-Enríquez & Paloma Aguilar eds., 2001).

92. Joshua Frens-String, *Uruguayans Call for a National Vote on Impunity Law*, *UPSIDE DOWN WORLD*, 4 May 2009, available at <http://upside-downworld.org/main/uruguay-archives-48/1844-uruguayans-call-for-a-national-vote-on-impunity-law>.

93. GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (vol. 4 1986).

take over Cyprus.⁹⁴ Turkey invaded Cyprus to expel the Greek forces, undermining the military regime and restoring democracy.⁹⁵ Constantine Karamanlis returned from exile to assume his role as Prime Minister.⁹⁶ Three days later, the transitional government adopted a controversial blanket amnesty law.

The amnesty law, however, did not prevent trials. Initiated only a few months later by a private Athenian attorney, the transitional government responded with a constitutional act that permitted prosecution of former regime perpetrators in national courts. The transitional government, "concerned about the potentially disruptive, derailing, and politically costly impact of developments or events that might get 'out of control,'" restricted the number of trials by imposing time limits on filing cases: six months for top officials and three months for others.⁹⁷ More than 400 trials occurred between 1975 and 1976.⁹⁸ While some trials ended in acquittal, the highest-ranking officers were sentenced to death (commuted to life sentences) in August 1975. The trials sparked a backlash; the new government discovered and thwarted a conspiracy by former regime supporters in February 1975.⁹⁹ Trials and purges of military leaders continued nonetheless and the country advanced in democratic strength and human rights improvements.

Greece and Uruguay demonstrate the prevalence of amnesties in different types of transitions. Regardless of the type of transition, both countries recognized the potential threat of democratic spoilers and granted an amnesty to offset that threat. The role of the authoritarian forces in negotiating their exit in the Uruguayan transition suggests that they retained relatively more power within the new democratic government than was the case in Greece. The Greek democratic government, perhaps owing to its own questionable legitimacy, also granted an amnesty. Such an amnesty, however, appeared to weaken the democratic government's legitimacy, rather than strengthen it. Societal forces in Greece, moreover, had more success in pushing for trials sooner. Trials, therefore, accompanied the partial amnesty provisions. Rather than a blanket amnesty followed by delayed justice, as in the Uruguayan case, the collapse scenario allowed for the combination of partial amnesties and select trials. Both scenarios allowed the transitional governments to seek stability through amnesty while also bringing accountability and justice for past violations through trials.

94. Nicos C. Alivizatos & P. Nikiforos Diamandouros, *Politics and the Judiciary in the Greek Transition to Democracy*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES*, *supra* note 23, at 27, 29.

95. *Id.*

96. *Id.* at 28.

97. *Id.* at 37.

98. See Transitional Justice Data Base, *available at* <http://sites.google.com/site/transitionaljusticedatabase/>.

99. Alivizatos & Diamandouros, *supra* note 94, at 29.

The logic behind the justice balance does not rely on the perception of threat from democratic spoilers alone. In some cases it is economic stability rather than, or in addition to, political constraints that may explain the decision to delay or limit trials. Elsewhere, our findings illustrate that those countries that are experiencing greater economic growth are more likely to adopt trials and less likely to grant an amnesty or “do nothing” than those countries with less economic growth.¹⁰⁰ The justice balance suggests that authoritarian regimes that collapse may leave in their wake greater economic difficulties than those capable of negotiating their exit. Thus, while regime collapse may provide new democracies with greater political advantage over former authoritarian forces, economic crises will likely limit widespread, expensive trial proceedings. In these cases, for pragmatic economic reasons, new democracies may opt to use scarce economic resources to prosecute only a select number of perpetrators, while granting amnesty to the rest. Amnesty provides the economic stability necessary to the democratic governments’ survival. This political economy explanation is consistent with Elster’s view that where countries face other pressing problems, there may be lower societal demand for accountability.¹⁰¹

The transitional environment thus provides some insights into how new democracies combine amnesties and trials, with or without truth commissions, to adopt a justice balance approach and bring improvements in democracy and human rights. Figure 1 below depicts this balance.

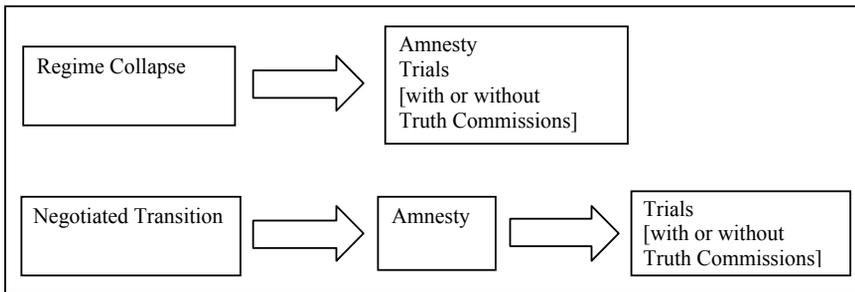


Figure 1. The Justice Balance

100. We use an ordered probit for this analysis, where the dependent variable has an underlying scale of cost, that is trials as the most expensive transitional justice mechanism (receiving a value of 3 in our coding schema), followed by truth commissions (2), amnesties (1) as least costly, and de facto amnesty (0). Our findings illustrate that the change in GDP per capita and the time since transition both positively affect the likelihood a country will move up the underlying scale of transitional justice mechanisms. See Tricia D. Olsen, Leigh A. Payne & Andrew G. Reiter, *At What Cost? A Political Economy Approach to Transitional Justice*, 6 *TAIWAN J. OF DEM.* 165 (2010).
101. RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY (Jon Elster ed., 2006). Elster also considers other pressing matters in transitional societies (e.g. religious, ethnic, linguistic, or sub regional conflicts).

The justice balance approach may also explain the negative truth commission finding. Truth commissions by themselves provide neither accountability nor stability, undermining human rights. When they accompany trials and amnesties, however, they do not block the accountability and stability those mechanisms provide. Indeed, some argue the restorative justice features may reinforce accountability and stability.¹⁰² Truth commissions that name perpetrators or require perpetrators' confessions enhance the accountability mechanism provided by trials. When democracies implement truth commission recommendations for financial reparations and institutional reforms, they may contribute to political and economic stability that strengthens political outcomes. In other words, truth commissions either enhance the justice balance by complementing the accountability and stability mechanisms of trials and amnesties, or at least fail to block those mechanisms from functioning.

The South Korean case provides an example of truth commissions' role in the justice balance. The mobilization of civil society forces against the authoritarian regime led to a democratic transition in 1988, under the tutelage of the military dictatorship of Roh Tae Woo. Prior to the transition, the dictatorship granted an amnesty to 2,335 political prisoners, most famously the future democratic president Kim Dae-Jung. The new democratic government continued to grant amnesties and extended these protections not only to political prisoners but also to other perpetrators of political crimes. Despite these amnesties, two former dictators, Roh Tae Woo and Chun Doo Hwan, were convicted and sentenced to death for the 1980 Kwangju massacre of democratic opposition forces, along with other charges. Their subsequent pardon by democratic President Kim Young Sam, coupled with reparations paid to individual victims, provoked criticism in the human rights community, who perceived the government as attempting to cover-up, rather than expose and acknowledge, past violence.

Efforts by subsequent democratic governments to reveal the past through a series of commissions of inquiry led to the 2005 establishment of the South Korean Truth and Reconciliation Commission (TRCK). The TRCK could be viewed as reinforcing prosecutorial accountability by investigating particular crimes. Indeed, the TRCK has suggested that certain crimes, particularly the Kwangju massacre, should be investigated and judged by courts and not by the truth commission.¹⁰³ Public opinion polls reveal a complex set of attitudes toward the role of the TRCK. According to a recent *Sisa Journal* poll,

102. Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 235 (Robert I. Rotberg & Dennis Thompson eds., 2000).

103. See Ahn Byung-ook, *The Reality of Settling the Past in Korea and Its Challenges*, Truth and Reconciliation Commission, Republic of Korea (n.d.), available at http://www.ekoreajournal.net/upload/html_20030820.org/HTML4231.

Korean society is divided nearly evenly between those who perceive the truth commission as advancing an important process of democratic development, those who consider the truth commission negative to the process of democratic development, and those who believe that the process began before Korean society was ready to embrace it.¹⁰⁴ While victims have mobilized successfully, a prevailing view that the military regime put Korea on the pathway to development has checked the accountability function.¹⁰⁵ Indeed, victims, rather than the state, have initiated the recent trials, working outside the TRCK. The Commission voted against continuing its inquiries and closed in June 2010. By that time, it had investigated 10,860 cases and settled 9,987 of them (89.5 percent).¹⁰⁶ The Commission documented 4,934 executions in November 2009, a number far lower than the 60,000 to 200,000 estimated by scholars of Korean history.¹⁰⁷

The high expectations on the TRCK and its limited success in achieving anticipated goals, illustrate the problems other new democracies that use only truth commissions encounter. In those scenarios, truth commissions tend to exacerbate social problems rather than ameliorate them. Because South Korea adopted a justice balance approach, with truth commissions accompanying amnesties and trials, stability and accountability functions evolved. Indeed, the truth commission complemented and reinforced those functions.

V. CONCLUSION

The TJDB findings suggest that the zero-sum approach that dominates the existing literature of transitional justice misses an important interaction between trials, amnesties, and truth commissions that allows for improved human rights and democracy outcomes. This interaction, moreover, has important policy implications.

First, new democracies and NGOs advocating transitional justice should avoid promoting single mechanisms as the pathway to democracy and human rights. The assumption that trials, amnesties, or truth commissions by

104. The poll found 36 percent who felt that the truth commission process was necessary, 29.4 percent who believed it was unnecessary and deepened the social divide in the country, and 26 percent who found it was somewhat necessary, but occurred too soon. *Id.*

105. TRUTH AND RECONCILIATION COMMISSION, REPUBLIC OF KOREA, *TRUTH AND RECONCILIATION: ACTIVITIES OF THE PAST THREE YEARS* 8 (2008).

106. Moon Gwang-lip, *Mission over for Unit that Cleared People's Names*, JOONGANG DAILY, 5 July 2010.

107. See estimates by Kim Dong-choon and Park Myung-lim in Charles J. Hanley & Hyung-jin Kim, *Korea Bloodbath Probe Ends; US Escapes Much Blame*, WASH. POST, 11 July 2010.

themselves provide a successful pathway to these political objectives simply does not hold up to empirical testing. Holistic approaches offer a more compelling argument, but only when trials and amnesties are balanced, with or without truth commissions.

Second, democracies do not have to choose between trials and amnesties. Neither one turns out to be harmful to human rights and democracies by itself. Combined, they advance those political processes. Even those governments saddled with self- or blanket amnesties passed by former authoritarian regimes or their vulnerable successors, may initiate trials. Indeed, delayed justice, or sequencing trials after amnesties, allows for the justice balance that improves human rights and democracy.

Third, amnesties do not weaken democracy and human rights. Certainly, as long as partial amnesties allow for some human rights trials, or mobilized human rights and legal communities find ways to circumvent or overthrow amnesty laws, these amnesties can help to strengthen human rights and democracy.

Appendix:
Transitions from Authoritarianism to Democracy, 1970–2004

<i>Country</i>	<i>Transition Year</i>
Albania	1992
Albania	1997
Algeria	2004
Argentina	1973
Argentina	1983
Armenia	1991
Armenia	1998
Azerbaijan	1992
Bangladesh	1972
Bangladesh	1991
Belarus	1991
Benin	1991
Bolivia	1982
Brazil	1985
Bulgaria	1990
Burkina Faso	1978
Cambodia	1993
Central African Republic	1993
Chile	1989
Congo, Republic of the	1992
Côte d'Ivoire	2000
Croatia	2000
Czechoslovakia	1990
Dominican Republic	1978
Ecuador	1979
El Salvador	1984
Estonia	1991
Ethiopia	1995
Georgia	1991
Germany	1990
Ghana	1970
Ghana	1979
Ghana	1996
Greece	1975
Guatemala	1986
Guinea-Bissau	1994
Guinea-Bissau	2000
Haiti	1990
Haiti	1994
Honduras	1982
Hungary	1990
Indonesia	1999
Iran	1997
Kenya	2002
Latvia	1991
Lesotho	1993
Lesotho	2002
Liberia	1997
Lithuania	1991
Macedonia	1991

 Appendix Continued

<i>Country</i>	<i>Transition Year</i>
Madagascar	1992
Malawi	1994
Mali	1992
Mexico	1997
Moldova	1991
Mongolia	1992
Mozambique	1994
Nepal	1990
Nicaragua	1990
Niger	1992
Niger	1999
Nigeria	1979
Nigeria	1999
Pakistan	1973
Pakistan	1988
Panama	1989
Paraguay	1989
Peru	1980
Peru	1993
Philippines	1987
Poland	1991
Portugal	1976
Romania	1990
Russia	1992
Senegal	2000
Serbia and Montenegro	2000
Sierra Leone	1996
Sierra Leone	2002
Slovenia	1991
South Korea	1988
Spain	1978
Taiwan	1992
Thailand	1974
Thailand	1978
Thailand	1992
Turkey	1973
Turkey	1983
Uganda	1980
Ukraine	1991
Uruguay	1985
Zambia	1991
