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# Judging Transitional Justice

## A NEW CRITERION FOR EVALUATING TRUTH REVELATION PROCEDURES

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Truth revelation procedures are evaluated according to various normative criteria. The authors find the concepts of false conviction and false acquittal more adequate for such evaluation than the conformity with the rule of law and apply a useful classification of truth revelation procedures into incentive-based (ITRs) and evidence-based ones (ETRs). ITRs induce perpetrators and secret agents of the authoritarian regime to reveal the truth about their past, while ETRs rely exclusively on preserved evidence and victims' testimonies. Using a simple decision-making model, the authors show that while both procedures are sensitive to the problem of falsified evidence, ITRs perform better with respect to revealing the identity of collaborators whose files were destroyed. Finally, they discuss the connection between ITRs and two modes of coming to terms with the past, endogenous and exogenous.

*Keywords:* transitional justice; lustration; truth commission; Eastern Europe; truth revelation

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### LUSTRATION AS A LEGAL BUT NOT JUDICIARY INSTITUTION

Since 1997, candidates for political office in Poland have had to deny or acknowledge that they had worked for or consciously collaborated with the communist secret police. However, ex-collaborators are not banned from holding any positions. Declarations of collaboration are published, and the voters themselves or, for positions allocated by nomination, an appropriate agency decide whether the ex-collaborator can hold the office in question despite his or her shameful past. Statements denying

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collaboration are handed over to a special prosecutor's office for verification with the use of files from the secret police archives.<sup>1</sup> The archives are closed so the declarator is unsure whether his or her past deeds appear there. The prosecutor compares the declaration with evidence from the archives. When the prosecutor finds an understatement of collaboration, the politician is accused of a "lustration lie" and tried before a special division of the appellate court (*Dziennik Ustaw* 1997). The law stipulating this requirement, *lustration*, screens politicians for their collaboration with the past authoritarian regime and limits their access to public office. However, lustration is hardly a Polish specialty. It has drawn a great deal of media attention in postcommunist Europe over the past fifteen years (see Figure 1).

It is important to distinguish lustration from decommunization. Both laws may be proposed in one bill.<sup>2</sup> Decommunization denotes purging the state's administration and bureaucracy of high-ranking communist officials and resembles denazification in Germany after World War II (McAdams 2001). In general, denazification had more severe consequences than lustration or decommunization. Lustration differs from decommunization or denazification in one important respect—namely, that in the lustration case, the former secret agent is vulnerable to blackmail. The identity of a high-ranking communist or a Nazi is common knowledge. He or she cannot be blackmailed by the threat of revealing compromising information about his or her past. Secret police agents can. A former undercover agent is very vulnerable to corruption and may be pressed to breach the norms of public service by somebody with access to his or her files.

Lustration procedures rely on the examination of the ancien régime's secret police files to verify how closely politicians collaborated with the regime, either as agents or secret informers.<sup>3</sup> It is often argued that victims (those who were spied on) should have access to their files after the regime falls. However, declassification laws (i.e., legislation allowing for the opening of secret police files to the public) may interfere with lustration if they rely on a subtle mechanism of withholding information from potential ex-informers. Therefore, declassification must be coordinated with the lustration process.<sup>4</sup> Both lustration and declassification may inflict serious moral punishment. When compromising information about a collaborator's spying activity is circulated, his or her professional career is harmed. Finally, lustration laws do not impose criminal punishment on former collaborators. Instead, lustration means that they cannot hold political and other public or quasi-public positions, such as academic teachers, doctors, and attorneys, or, in some cases, that they can hold such offices only by allowing their collaboration to become public knowledge.

1. Prior to June 1998, this function was supposed to be performed by a lustration court, whose twenty-one members were to be elected by regional councils of the judiciary. Due to widespread opposition toward lustration among the Polish judiciary (the first task of the lustration court was to lustrate itself) in some of the councils, no one volunteered to run in the elections (Lack of candidates 1997).

2. Czechoslovakia until 1993, and later the Czech Republic, was the only country where joint lustration and decommunization gained approval of all veto players in the legislation process. Initially, decommunization accompanied lustration in the Bulgarian and Albanian bills but was blocked by constitutional courts or presidential vetoes.

3. Both informers and agents were supposed to gather intelligence. The latter were assigned additional tasks such as penetrating new opposition cells or uncovering meeting places and transfer channels.

4. We elaborate on this point in the third section.

**Figure 1: Lustration in the Media, 1989-2003**

NOTE: The histogram shows the frequency with which “lustration” or “screening” appeared in the title or lead paragraphs of major daily newspapers in thirteen Eastern and Central European countries between 1989 and 2003. The data were obtained by applying the following search criteria in the Lexis Nexis World News search engine: Source of publication = European News Sources; Terms = country AND (screening OR lustration); Date range = 1989-2003.

Lustration may, but need not be, preceded by a *truth commission*, a temporary body of inquiry investigating patterns of abuses (Hayner 2001). Truth commissions prepare reports on the criminal activity of the ancien régime. Usually, they conduct public hearings of victims and sometimes name perpetrators or prepare tentative lists of collaborators. Some truth commissions have additional powers such as subpoena or search and seizure rights. The best-known truth commission is the South African Truth and Reconciliation Commission (TRC). A more recent one, from Peru, released its widely publicized report in 2003. Truth commissions may also be instituted when lustration procedures are not feasible because of lack of documents that could be used as evidence. Since lustration procedures require an archive of names and cases, it could be used only when there was a sizable secret police apparatus that documented its activities.

Lustration, truth commissions, and declassification jointly form what we call *truth revelation procedures*, which comprise a subset of institutions of *transitional justice* (TJ). Such procedures often so closely resemble traditional court proceedings and face similar problems (Posner and Vermeule 2004) that one can easily overlook the fact that they are not actual judiciary institutions. However, these laws are part of the labor code rather than of the criminal justice system. The designers of lustration in Czechoslovakia and declassification in Germany made this an explicit part of the law. The crucial difference is that the courts are not empowered to disqualify a person from a certain post.<sup>5</sup>

5. To be sure, courts may have a profound effect on lustration. For instance, court decisions can modify the consequences of lustration. A successful appeal may narrow the definition of lustration (McAdams 2001). Similarly, a ruling of the constitutional court may eliminate a lustrable category (Interviews JM 2004).

Truth revelation procedures are examples of TJ in the aftermath of transition to democracy as opposed to TJ following wars of independence or the restoration of monarchy. They are also an important part of what Elster (2004) has termed *endogenous transitional justice*. Its key features are that it is implemented (1) by the country in transition itself, not by any foreign power or court; (2) by the legislative or executive branches of the government rather than nongovernmental organizations (NGOs) or individuals; (3) shortly after transition rather than decades later; and (4) that it targets the violations of rights that occurred before or during the transition, not after it is over (Elster 1998). On the other hand, exogenous TJ denotes instances when international actors prosecute or significantly influence the prosecution of those who committed wrongdoings during the authoritarian regime. Among the most prominent examples are the Nuremberg trials and the recent trial of Slobodan Milosevic (see Bass 2000 for an illuminating account of the latter).

An important feature of TJ procedures is that they are legal institutions. What this entails becomes apparent after contrasting it with “private justice.” For instance, one of the goals of lustration is to prevent vindictiveness and excess in settling accounts with collaborators of the former political police via extralegal measures.<sup>6</sup> Sometimes, the demand for punishing former collaborators is so strong that placing them in jail protects them from popular revenge. This happened in Poland in 1831 during the anti-Russian uprising when Poles who were former Russian secret agents were incarcerated to protect them from Warsaw crowds frustrated over the insurgents’ losses to the tsar’s army. In the end, the loyalists were dragged out of their cells and lynched anyway, proving the precautions of the early lustration commission insufficient. The institutions of TJ preempt and channel the demand for revenge on political opponents. While responding to the urgent need to prosecute authoritarian wrongdoers, TJ satisfies certain norms of procedural justice, such as impartiality, and it is created via the standard legislative process.<sup>7</sup> For this reason, the infamous summary trial and execution of Nicolae Ceaușescu and his wife had little in common with TJ.

This article examines the norms that the rule-of-law tradition imposes on lustration and truth commissions in the form of the nonretroactivity condition (Schwartz 1995; Kritz 1995, vol. 1). We present reasons against judging those procedures by identical standards as courts in established democracies. In our analysis, the emphasis is placed on the positive aspects of TJ and practical constraints on its implementation. In doing so, we are not dismissing the idea of normative analysis of TJ per se. To the contrary, we believe that purely positive TJ research would be deficient without studying its normative implications and that the ultimate objective of truth revelation procedures is reconciliation between members of the society who held opposing views of the past regime. However, evaluating the institutions of TJ is an entirely new normative

6. Other goals of lustration include preventing officials from being blackmailed, as well as eliminating from public service persons who are considered not trustworthy because of their role in the *ancién* regime.

7. For a definition of procedural justice and its different types, see Rawls (1971). Since transitional justice (TJ) procedures manage to satisfy these norms only partially, they present an example of imperfect procedural justice. For a useful discussion of the preemptive role of TJ, see Elster (2004).

endeavor. It calls for a new set of criteria developed specifically for procedures that deal retroactively with authoritarian crimes and misdemeanors.

The next section begins with a discussion of the source of contention between TJ and the principle of nonretroactivity. To illustrate the point that the normative literature has misdirected its efforts in focusing on this principle, we describe how outgoing autocrats try to defend themselves against TJ by adhering to the rule of law understood as nonretroactivity. The third section makes a distinction between two kinds of truth revelation procedures: incentive-based truth revelations (ITRs) and evidence-based truth revelations (ETRs). Finally, two alternative criteria for evaluating ITRs and ETRs, the avoidance of false conviction and false acquittal, are proposed. These lead to an argument in favor of endogenous TJ, of which ITRs and ETRs are chief examples.

### IS TRANSITIONAL JUSTICE RETROACTIVE?

The most heated normative debates in TJ revolve around whether it is retroactive. The question is simple: can new laws be applied to past atrocities? Legal and political theorists have long struggled to reconcile TJ with the principles of rule of law (Teitel 2000; McAdams 1997; Welsh 1996; Huyse 1995; Schwartz 2000). By no coincidence was the initial name for TJ “retroactive justice” (Tucker 1999). We discuss arguments that may be viewed in favor and against placing such a heavily loaded label on TJ.

von Hayek (1960), who presents the rule of law as an embodiment of three principles—generality, predictability, and equality before the law—explicitly states that retroactive law stands in contradiction to all three. The first problem with such a point of view is simple. Authoritarian regimes may be willing to prosecute the political opposition, based on legislation calling for the use of all available means to prevent “counterrevolution”: this was certainly true in the Stalinist periods in virtually all Eastern and Central European countries in the Soviet Bloc. Excluding laws exhibiting any characteristics of retroactivity would prevent rectifying those wrongs.

However, a more careful look reveals that the problem is complex. Even the staunchest supporter of the nonretroactivity principle could hardly endorse the following interpretation: “If a band of crooks take power, claim that the ‘old law’ is invalid, and rule for a sufficiently long period of time on their own terms that they call ‘law’—then once they are put out of power, no legal action can be taken against them.” However, communists were neither crooks nor fully legitimate rulers. One could locate communist rule at different points, depending on the period, between this extreme case of crooks in power to a fully legitimate legal system.

von Hayek (1960) and other authors who have theorized on the rule of law provide a good argument against such a broad interpretation of nonretroactivity by referring to its meta-legal aspect (Teitel 2000). The idea of the rule of law has a different status from ordinary legislation. It goes “beyond mere legality” by implying what law *ought* to be. von Hayek states that “the principle [of rule of law] would not be satisfied if the

law said that whoever disobeys the orders of some official will be punished in some specified manner” (p. 206-7). In other words, law cannot, for example, make the citizens subject to the arbitrary discretion of bureaucrats. In fact, the legislation of communist regimes, especially in the Stalinist period, was so vague that the secret police had wide discretion to arrest and imprison the citizenry. For instance, the Polish secret police, the SB, kept a close watch on tens of thousands of Solidarity members. Whenever the regular police were called to a crime scene, they were required to consult a database to verify whether any of the persons involved were under secret political police surveillance. If they were, a high-ranking secret police officer would have exclusive authority over collecting evidence, which would then be used to blackmail the ex-Solidarity member into cooperation with the SB (Interviews D 2004). A similar tactic was employed by the StB, the Czechoslovak secret police, which was authorized to reduce or extend a political prisoner’s sentence, depending on his willingness to become a secret collaborator. Czech dissidents quote stories about former oppositionists, whose will to resist collaboration would be broken by the prospect of being released from prison early (Interviews Su and U 2004).

But does the failure of a past regime to follow the rule of law entitle a succeeding democracy to implement justice retroactively? One could argue, on the contrary, that the new democracy should maintain the rule of law in the strictest sense, even if it requires avoiding retribution. We do not endorse such a point of view. Below, we review additional arguments that can be used against such a broad application of nonretroactivity to TJ.

First, the nonretroactivity principle was formulated in a different political context. Its essence was to prevent incremental changes in law from interfering with the citizens’ sense of safety and predictability within a stable political regime (von Hayek 1960). This rationale cannot be used in the aftermath of a comprehensive regime change, especially if the past regime had committed numerous atrocities. Thus, we need to distinguish between “incremental” retroactivity that may appear in a stable political system and retroactivity that is connected to the comprehensive regime change and TJ.

Second, two broad categories of retroactive legislation should be distinguished in the context of TJ. An act that was criminal according to the past legal system can be examined or reexamined even though its statute of limitation expired or even though it had already been brought before a court prior to the transition. In such a case, we will talk about *endogenous* retroactivity. In *exogenous* retroactivity, a formerly legal act can be redefined as a criminal one on the basis of some parallel legal system with its own claims to legitimacy.

The justification for endogenous retroactivity comes from within the ancien régime’s legal system itself. The argument would proceed along the following lines: administrative incompetence, a confusing division of responsibilities among agencies of legal enforcement of the authoritarian regime, or illegal activity of secret police and other agencies, made the prosecution of crimes impossible at the time they were committed. It is thus the responsibility of the succeeding democratic court system to deal with the unsettled violation of laws of the ancien régime. The cases of endogenous retroactivity mostly amount to lifting the statutes of limitation for such criminal activities that, due



to the lack of an independent judiciary, have not been prosecuted.<sup>8</sup> The lifting of statutes of limitation is justified by *infeasibility of justice* in the past. Numerous cases of when the secret police or courts routinely violated the legal standards of their own authoritarian regime are trivial common knowledge among the former opposition members.<sup>9</sup> On other occasions, as in the case of Father Popieluszko's murder in 1985, an investigation took place, but only low-rank foot soldiers were successfully prosecuted while no high-rank perpetrators were punished. Since the transitions in 1989, endogenous retroactive cases have been reopened on the grounds of communist law that was in place when the crime was committed.<sup>10</sup>

In specific cases, numerous unexpected problems may arise. For instance, the offender might have known the criminal character of the offense, but over time, this person might have acquired an expectation that she or he would no longer be punished. If the offender originally expected to be punished, but at a later time still under the regime was sure that it would not happen due to the statute of limitations, does punishing this person after the transition violate the rule of law? Interestingly, the Hungarian Constitutional Court apparently believed so, when it struck down a statute allowing for the resuming of prosecutions for crimes committed by the ancien régime. The court explicitly interpreted the rule of law as "predictability and foreseeability" (Solyom and Brunner 2000).

Exogenous retroactivity, on the other hand, can be justified on the grounds of natural or other law after demonstrating the lack of legitimacy of the past regime. While we do not intend to dwell on the legitimacy debate, a summary of important facts is in place.<sup>11</sup> The Soviet Union installed communism in Eastern Europe by means of the Red Army's residence in the region between 1944 and 1945. By 1948, any

8. Helmke (2002) has shown that even a judiciary tied to an authoritarian executive will sometimes defy its orders, especially when the executive is losing power. Her evidence comes from Latin American constitutional courts. However, European communist states had no high echelon courts, such as constitutional courts that could compete with the communist executive. Manifestations of disobedience in lower echelon courts were infrequent. No wonder that in communist Europe, instances of "strategic defection" of the kind described by Helmke were rare.

9. The reader may imagine the scale of such violations from the following story. One of us, a manager of an underground publishing house, was imprisoned in 1985 in Poland on the basis of an illegal "arrest warrant" for publishing uncensored books, an activity that was consistent with the Helsinki Accords. No search warrant was presented on entry to his landlady's apartment. The SB officer called his university, lying about a catastrophic water leakage in order to bring him home. No protocol was prepared to list confiscated books and cassettes. No rights were read to him. No contact with a lawyer was allowed. The communist-controlled TV broadcasted a defaming news clip describing the books as "pornography." He spent five months in jail as "temporarily arrested." No trial concluded his case. Finally, as he later discovered, the corrupted secret police channeled the confiscated books back into the underground Solidarity's distribution network (Kaminski 2004).

10. Examples include the trials of border guard shootings in Germany and the Czech Republic (Interviews P 2004), as well as trials of the military and police for bearing arms against peaceful demonstrators in the Wujek coalmines and Gdansk shipyards in Poland (Czubinski et al. 1997) and the village of Salgatorjan in Hungary (Halmai and Scheppele 1997). There were also trials of high-ranking secret police officers for homicidal acts against Polish dissidents in Poland, such as the above-quoted Popieluszko case; the case of the student anticommunist activist from Krakow, Stanislaw Pyjas; and the case of the high school student and son of the Solidarity leader, Grzegorz Przemys (Interviews Ur 2004).

11. For opposing positions on the positive versus natural concept of law, see Fuller (1958) and Hart (1958), as well as their subsequent writings. The Hart-Fuller debate focused on the question of the validity of the Nazi laws.



remaining opposition was purged. Except for Czechoslovakia in 1946, where the communists won a plurality in democratic elections, the election results showing communist victory were falsified in all other Eastern and Central European countries (Brzezinski 1989; Gross 1989). Communist rule was never legitimized later by free elections. However, internal resistance to communist takeovers was not the sole form of opposition to authoritarian rule. In many Central European countries, opposition took the form of governments in exile. These bodies honored the pre-World War II laws. Since holding mass elections was not a feasible option, succession of authority was regulated by the constitutional rules that specified relevant procedures in a state of national crisis. From their perspective, as well as the perspective of the laws of prewar political systems that were legitimized by free elections, the period of communist rule between 1945 and 1989 was illegal. Most communist legislation that could be considered amended “retroactively” would be itself retroactive according to the earlier laws. Following free elections in 1990 and 1991, the governments in exile symbolically surrendered their legal authority to newly elected presidents and assemblies in East and Central Europe.<sup>12</sup>

Moreover, the communist political system underwent periodic unconstitutional transitions of executive power followed by extensive purges in the remaining branches of government, as well as in the military and administrative offices. Blackmail, violent threats, and outright homicide (or rather *policide*) were common methods of replacing an inconvenient top official.<sup>13</sup> Usually, official statements referred to poor health as the cause of abdication. In a few spectacular cases, such as Nagy’s removal by Kadar in 1956 in Hungary or Dubcek’s removal by Husak in 1968 in Czechoslovakia, the illegality of the change according to the then-valid communist law was common knowledge. The new governments and, subsequently, new parliaments, judges, and laws were illegal even according to the regime’s own laws.

Internal legal inconsistencies of communist systems were exposed by the ratification of various international treaties, such as the Helsinki Accords concluding the Conference on Security and Cooperation in Europe in 1976. The signatories of the accords included, along with Western European states, Bulgaria, Czechoslovakia, German Democratic Republic (GDR), Hungary, Poland, Romania, the Soviet Union, and Yugoslavia. Chapter 7 of the accords was devoted exclusively to respecting human rights. Over the next thirteen years, the communist signatories repeatedly violated these commitments. For instance, the accords contained a commitment to allow those drafted for military service to exercise a right of conscientious objection, while the Polish military oath demanded of all conscripts that they swear to fight the enemies of the Soviet Union and forced them into taking arms. Those refusing to do that

12. For instance, in Poland, President Kaczorowski, the last head of the London-based government on exile, returned the insignia of power to Lech Walesa only after the latter was elected president in the first fully free elections in postwar Poland in 1990.

13. In the most spectacular series of internal turnovers from the 1920s to 1950s, the powerful heads of the Soviet secret police murdered or supervised murders of their predecessors. According to some versions, the Cheka creator Dzerzhinsky was poisoned by Menzhinsky, who was later replaced by Yagoda, who removed Yezhov, himself purged by Beria, who in the process of the post-Stalinist purges was strangled or shot in 1953. In an externally enforced turnover in 1956, Polish first secretary Bierut “came from his Moscow holidays in a wooden jacket,” as a Polish joke put it. Officially, he died of heart attack.

were prosecuted. Similarly, the prosecution of underground publishers violated the signatories' commitment to freedom of the press.<sup>14</sup> The recurring violations sparked opposition in the form of *Helsinki Committees*, which began with the Ukrainian Helsinki Union in 1981 and spread throughout the Soviet Bloc. Their activity culminated with the issuing of the Helsinki Memorandum in 1986, where "in addition to the usual progressive politicians, academics, and activists from the West (who risked nothing, of course, and were for the most part uninvolved in the process of dialogue anyway), there were over two hundred signatures from Poland, Hungary, Czechoslovakia, East Germany, and Yugoslavia" (Kenney 2003, 104).

The only serious claim to legality that the communist regimes could make, in addition to having the silent readiness of the Red Army's tanks, was the wide recognition of their regimes around the world, especially by the United States. However, one can hardly argue that the normative soundness of retroactive legislation in, say, Albania should depend on Uncle Sam's taste for *realpolitik*.

Bold legislative acts declaring the communist period illegal were considered in virtually all formerly communist countries after the fall of old regimes.<sup>15</sup> If these attempts were abandoned, it was usually to uphold former political commitments or due to the lack of resources necessary to handle the likely legal confusion that would result. The pre-World War II laws were inadequate to resolve disputes arising in the 1990s. All international treaties and other commitments would need to be renewed. Also, many Eastern European countries were severely affected by the arbitrary remapping of their borders by Stalin after World War II, something Churchill and Roosevelt cynically pretended not to notice. The gainers feared that the losers could revive their legal claims to lost territories, which could balkanize Eastern Europe. Poles and Czechs feared Germans; Slovaks and Romanians feared Hungarians; Ukrainians, Byelorussians, and Lithuanians feared Poles; and so on (Bartoszewski and von Weizsacker 2003; Naczelna Dyrekcja Archiwow Panstwowych 2001). Both political pragmatism and the paucity of resources contributed to decisions that lacked a sound legal foundation.

According to the next argument supporting TJ, adhering to the conservative interpretation of retroactivity benefits undeniable wrongdoers. It effectively promotes a dramatically impotent version of procedural justice and prevents substantive justice from being done. Political actors involved in transition were well aware of the distinction between rectifying wrongs and restoring rule of law, as indicated by a comment of Bärbel Bohley, an East German dissident: "We expected justice, but we got the *Rechtsstaat* instead" (McAdams 2001). The rule-of-law and nonretroactivity principles have been enthusiastically endorsed on a number of occasions by successors of the communist regime while they were negotiating the transfer of power and shortly

14. For examples of successive violations of the Helsinki Accords, see Kenney (2003).

15. For instance, in the Czech Republic, the Act on the Illegality of the Communist Regime and Resistance to It was passed on July 9, 1993. It was upheld by the Czech Constitutional Court on December 21, 1993. A proposal of a law declaring the implementation of martial law illegal was put forward by members of parliament (MPs) from the ex-dissident party, the Confederation of Independent Poland, in February 1992. It failed to gain the support of other ex-dissident MPs who participated in roundtable negotiations with Generals Jaruzelski and Kiszczak, the two top communists who masterminded the military martial law in 1981 (Walicki 1997).

afterwards. These successors have sought to use these principles as a shield from TJ. They supported as strong a judiciary as possible in the new system. For example, during the final stage of the roundtable negotiations in Czechoslovakia, when Vaclav Havel suggested that the new federal government ought to have some authority over the justice system, communist Prime Minister Calfa objected “that the judicial structures should be subject to the legislature only and that the judiciary should check the executive.” Calfa was counting on the fact that replacing the communist judiciary elites would take longer than the turnover of members of parliament.<sup>16</sup> Valdemar Komarek, an independent participant of the negotiations, responded that debating checks and balances was entirely superfluous when the communist nomenclature dominated virtually all social and political institutions (Caldá 1996). One can perhaps interpret the outgoing Hungarian communists’ insistence on establishing a constitutional court and the Bulgarian communists’ desire to see a constitution in place before handing over power in a similar manner. Both tried to construct institutions that would save them from retroactive justice after the transition (Bozoki 2002; Schwartz 2000).<sup>17</sup>

Finally, we believe that all arguments based on retroactivity must take into account the type and severity of punishment. In nine out of eighteen cases of truth revelation procedures labeled as mild (see the appendix), the sanction is simply releasing compromising information to the public. One can plausibly argue that the softer the punishment, the weaker the argument against retroactivity. On the other hand, publicizing information about a politician’s past political activity may and has been interpreted as a very basic right of a voter (Solyom and Brunner 2000; McAdams 2001). When applied to elected politicians, as is the case with many lustration laws, putting them in the spotlight is no more than what the free media have been doing for many years—or what candidates in elections have been doing to themselves during campaigns. There is little doubt that a legal procedure can handle sensitive information about a candidate’s past better than a tabloid or his or her opponent’s campaign manager.

### TRUTH REVELATION PROCEDURES

The development of truth revelation procedures independent of mainstream judiciary proceedings has drawn the attention of policy-oriented human rights organizations. For instance, the *gacaca* (“grassroots”) court procedure recently adopted in Rwanda offers a significant sentence reduction to those responsible for the 1994

16. Calfa’s intuition was correct. In Czechoslovakia, the first postwar noncommunist parliament emerged quickly by means of “cooptation.” Existing MPs would decide who among them was too compromised by their involvement in the ancien régime to continue work in parliament. Such persons were replaced by members of the dissident Civic Forum. The internal reform proceeded very swiftly. On the other hand, the judiciary took a very long time to change. Justices of lower echelon courts had their lifetime appointments substituted with five-year contracts. A constitutional court independent of the communist executive was not operational until 1992.

17. Hungarian communists wanted to set up the constitutional court prior to free elections to get the widest control over the nomination of justices (Halmai 1995; see also Schwartz 2000). The developments in the Hungarian Constitutional Court took an unexpected turn when Imre Konya and Laszlo Solyom rewrote the draft legislation for setting up the constitutional court so that the nomination of justices could not be controlled by the outgoing communist regime (Interviews S 2004).

genocide who testify to their crimes. In one of its press releases, Amnesty International commented on the Rwandese procedure by saying that the “extrajudicial nature of *gacaca* and the inadequate preparation for its start, coupled with the present government’s intolerance of dissent and unwillingness to address its own poor human rights record, risk subverting the new system.” It urged both the Rwandese government and the international community to “take steps to ensure that *gacaca* complies with minimum international standards of fair trial” (Amnesty International On-line 2002). The international organization wanted the Rwandese authorities to abandon the self-revelation mechanism “because it violated due process.”

Before we analyze the criterion that we consider more appropriate for judging truth revelation procedures than their compatibility with the nonretroactivity principle, we need to define a few concepts. The normative literature on TJ makes a clear distinction between truth commissions and lustration laws, with the former predominant in Latin America and Africa and the latter present in postcommunist Europe (Hayner 2001; Rotberg and Thompson 2002; Kritz 1995, vol. 1). As we argued elsewhere, another kind of distinction is useful as well (Nalepa 2003). The main fire of criticism is directed at ITRs, one of the two types of procedures.

An ITR procedure is legislation that provides ex-collaborators with incentives for revealing themselves. Examples of ITRs include both Eastern European lustration laws and various African and Latin American truth commissions such as the *gacaca* procedures or Polish lustration described previously (see the appendix). ITRs operate in the reverse order of traditional court proceedings. They create incentives for perpetrators to step forward and testify against themselves before any trial takes place. The reward offered to the perpetrator or ex-collaborator is usually immunity from criminal charges or significant sentence reduction. Such procedures can prompt admissions from wrongdoers even when objective evidence is no longer extant.

An example of ITR is provided by the Polish lustration law, described earlier. It is worth noting that to preserve the truth-inducing power of lustration, ITR elements had to be introduced into the declassification law. The agency overseeing the archives of the former secret police, the Institute for National Remembrance (INR), makes files available exclusively to victims. Every person wishing to inspect her or his file must declare in the application that she or he was a victim of the system but not an informer. Similarly as with the lustration procedure, the declaration is confronted with the contents of the archives. The INR’s response to an application is either (1) positive, indicating that the applicant’s files as a victim are in possession of the INR, or (2) negative, indicating that no such files designating the applicant as a victim of informing have been found. The negative response does not specify whether the applicant is denied viewing because her or his files as a victim have been lost or because the files implicate this person as an informer and not a victim (Dziennik Ustaw 1999). Thus, a former collaborator who asks for his or her file, pretending to be a victim, cannot learn more than he or she already knows.

The Rwandese *gacaca* courts use yet another inducement for self-revelation. During the genocide, about 800,000 people were killed in 100 days, and 124,800 suspected participants in the killings were incarcerated. The *gacaca* courts have authority over three categories of detainees (categories 2, 3, and 4 of Rwanda’s

genocide legislation). The self-revelation mechanism applies to prisoners in the second category, comprising alleged perpetrators or “accomplices to intentional homicides or serious assaults that led to death” (Amnesty International On-line 2002). In return for confession, the accused may have their sentences reduced by up to 50 percent. For many detainees, this means immediate release, as they have remained imprisoned since the Arusha Peace accord in 1995 (Rae-Olson 2002). Category 2 defendants who do not confess and are convicted face maximum terms of imprisonment of between twenty-five years and life. Category 3 contains persons accused of other serious assaults against individuals. Category 4 covers persons who committed property crimes. Category 1 relates to the “most serious genocide offences and includes individuals who allegedly organized, instigated, led or took a particularly zealous role in the violence. Category 1 defendants will continue to be tried by the formal court system” (Amnesty International On-line 2002).

Certain procedures resemble ITRs but lack their fundamental property of putting a lustrated person under incomplete information and verifying his or her declarations. In post-World War II Germany, after the Germans had taken over the responsibility for denazification from the Allies, they distributed a questionnaire among civil servants, teachers, doctors, lawyers, and the wider state bureaucracy. The aim was to identify former Nazis; 11,674,152 responses were returned. However, the answers were not confronted with existing evidence, and each questionnaire was processed separately without cross-examination. Thus, there was no incentive on the part of the questioned to reveal the truth except, perhaps, to obtain the psychological benefit of coming to terms with one’s own personal past (Frei 2002). A similar problem appeared in the Czech screening process for verifying who was a member of the People’s Militia. Since no central register of all members ever existed, it was impossible to verify the truthfulness of declarations (Interviews P 2004).

An ETR procedure does not provide incentives for revealing the truth and operates in a fashion similar to an ordinary court system. ETRs apply traditional prosecution methods and rely on gathering evidence of collaboration from archival resources or from victims’ testimonies. When evidence is found, a report is issued or a politician is held accountable for his or her involvement as a secret informer. Examples of ETRs include both lustration laws and truth commissions. The appendix lists all major truth revelation institutions and their key characteristics.

We have demonstrated above the inadequacy of applying the principle of non-retroactivity to the evaluation of truth revelation procedures. However, if we were forced to compare ITR with ETR performance with respect to this principle, ITRs would emerge as a clear winner, even though ETRs are close cousins of traditional court proceedings while ITRs differ from them in many important respects. Note that collaborating with the authoritarian regime was not a crime at the time it occurred. Just the opposite—it was officially encouraged. For this reason, one would expect the nonretroactivity principle to be in conflict with both types of lustration. However, in ITR lustration procedures, it is not former collaboration but the act of “public lying” that is sanctioned by a ban from office. ITRs can be shown to be superior to ETRs also in terms of another important aspect of procedural justice, the assignment of individual responsibility. The determination of individual guilt is built into every



ITR institution because the procedure begins with a statement from an individual. A claim to innocence is further verified by a lustration agency or truth commission, again on an individual basis. ETRs, on the other hand, frequently overlook the need to determine individual responsibility. They establish the target was involved in the activity investigated but pass over the question of actual guilt. An illustration of how this can lead to mistakes is provided by the lustration procedure adopted in the Czech Republic, where the problem of destroyed evidence was solved by using the well-preserved Czechoslovak secret police registers as the sole source of evidence. The StB register (*seznam*) contains citizen contacts and agents, but it also includes persons who had been contacted but refused to collaborate and those who had been suspected of underground opposition activity. The use of the seznam as a source of evidence was criticized for neglecting the obligation to prove individual guilt, both through memoranda issued by international organizations and on the floor of the Czech legislature when it was implemented (Interviews U, K, JM 2004).<sup>18</sup>

### AVOIDING FALSE ACQUITTAL, KEEPING FALSE CONVICTION LOW

We are going to discuss criteria that follow from two major criticisms of lustration laws and truth commissions. First, the documentation of abuses committed in the past may be *incomplete*. Second, some of such material may constitute *false evidence*. Prosecuting perpetrators with incomplete evidence is unfair because it reaches only those whose collaboration is documented, leaving other collaborators intact. The consequence of this, *false acquittal*, can be associated with Type II errors in statistical hypothesis testing (i.e., the failure to accept a true hypothesis). On the other hand, when fabricated evidence is used, innocent persons may be accused of human rights violations. This kind of injustice, *false conviction*, relates to Type I errors in statistical hypothesis testing (i.e., accepting a false hypothesis).<sup>19</sup> Table 1 illustrates when both errors arise.

Changing the legal threshold of evidence for filing charges of collaboration affects both the guilty and the innocent. If only minimal evidence is sufficient to file charges, the innocent will suffer. Their files may include fabricated documents, and the regime will continue to victimize those who fought against it, even after it is gone. If the threshold increases, the innocents will be less likely to be wrongly accused but perpetrators whose records have been misplaced or partially destroyed will evade justice.

18. The International Labour Organization issued *Recommendation to the Czech Federal Assembly to Repeal the Screening Act of October 16, 1991* (Kritz 1995); the Council of Europe issued *Memorandum on the Applicability of International Agreements to the Screening Law* (Kritz 1995). For internal criticism about collective guilt of the screening law, see speeches to Federal Assembly of the CSFR on October 16, 1991 (Parliament of the Czech Republic On-line 1990).

19. The terminology of false acquittals and false convictions pertains to truth revelations procedures generally. However, since lustration is not a judiciary institution per se, and using the words *conviction* or *acquittal* may seem out of place, *false conviction* should be interpreted as false disqualification, while *false acquittal* should be interpreted as “failure to disqualify” (this suggestion is due to James McAdams).



TABLE 1  
Two Types of Errors in Truth Revelation Procedures

<i>Outcome of Truth Revelation Process</i>	<i>The Target Is</i>	
	<i>Innocent</i>	<i>Guilty</i>
Do not name "collaborator"	Correct	False acquittal error
Name "collaborator"	False conviction error	Correct

It is obvious that there is a trade-off between the two principles. An immediate question is, what are the relative weights we should give to them? This issue can be developed in a normative discussion using the arguments from criminal justice. Consider the following reasoning:

Intrinsic . . . to the criminal law . . . is the escape of some violators from effective enforcement. The escape of some violators is unavoidable and therefore is not unjust. The proper objective of an enforcement program is not the unrealistic one of penalizing all violators, but the practical one of penalizing enough violators to induce a satisfactory degree of compliance. Therefore, the prime requirement of justice is not to penalize all violators, but to avoid penalizing the innocent. . . . Justice is done as long as only the guilty are penalized. (Davis 1969, 81-2)

The argument presented above can be summarized in the context of our terminology with two points. First, false acquittal errors are unavoidable in any criminal justice system. The normative assumption is that the objective of justice is to keep compliance with law at a "satisfactory" level. Of course, in our case, compliance does not mean "Don't collaborate." It means "Tell the truth about your past." This objective of "general deterrence" is achieved through a successful *deterrence* of potential violators. The argument holds that as long as practically all violators are unsure that they are safe and the probability of punishment is sufficiently high, justice is not threatened. Second, false conviction errors are a more serious threat to the operation of a just criminal system. Since satisfactory compliance can be achieved without punishing all violators, it is unjustified to pay the cost of tracking all of them down, which is the conviction of some innocents. The threshold for conviction should be set high.

This line of reasoning must be modified before we can apply it to the TJ context. First, instead of being a deterrent, harsh punishment may create the opposite incentive, as the expectation of harsh TJ may actually prevent dictators holding power from stepping down and making the transition to democracy possible. A dictator who expects to be prosecuted for past human rights violations has a strong incentive to hold onto that post, even if at the cost of vast atrocities. A perverse scenario of inducing a dictator to fight for his survival may have happened recently when the prosecutor for Sierra Leone's International Criminal Tribunal indicted Charles Taylor in Nigeria. This action prevented diplomatic efforts from striking a deal with the former dictator, who arguably could have facilitated a smoother transition (Bravin 2003).

Second, false acquittal interferes with the most desirable consequence of TJ—reconciliation. It is often argued that naming and punishing human rights violators

promotes reconciliation between former dissidents and the oppressors by healing the wounds of the dissidents and their supporters.<sup>20</sup> Research conducted with focus groups tends to confirm this insight (Backer 2004).

Third, the biggest problem with truth revelation procedures is their nonrandom selection of targets. In lustration, evidence of past abuses may have been destroyed so as to protect the most prominent functionaries or agents of the authoritarian regime.<sup>21</sup> In truth commissions, victims who suffered more atrocities may be more reluctant to testify. Only ITRs deal with this problem.

Finally, and unfortunately, Davis's (1969) "prime requirement of justice"—not penalizing the innocent—cannot be satisfied. One can never be certain that a given file is not a product of some unusual circumstances. Secret police officers would receive special benefits for recruiting famous or important agents.<sup>22</sup> Hence, those who fall prey to false accusations are likely to be ex-dissidents or celebrities (see, e.g., Kavan 2002). Widely known in Prague is the extraordinary case of Ladislav Stros, a famous stage director of the State Opera, professor, and director of the National Theatre. After he was renominated after the transition for his managerial (and lustrable) position, he applied for a lustration certificate and received a negative one. When he was invited to see his file, he suffered a heart attack. He was listed as a secret police collaborator! After a long process, he was cleared of charges.<sup>23</sup>

When former dissidents are unjustly accused of collaboration with the regime, they are revictimized through the legal institutions of the new democracy. The problem can be dealt with only by setting the threshold for declaring a lustrant guilty sufficiently high. Such a threshold is set independently of whether a truth revelation institution is an ITR or ETR. Thus, we will evaluate both institutions with respect to identical guilt thresholds.

Conceptually, an ETR lustration is simple. Either a lustrant's file meets the legal criteria for declaring him or her a "collaborator" or not. The ITR case is strategically

20. See Hayner's (2001) account of the complaints of victims, who see their oppressors walking freely while other abusers of human rights are prosecuted.

21. For instance, according to an anonymous historian of IPN, the most valuable agents of Polish secret police were granted an opportunity to destroy their own files. However, since a "valuable" agent was typically very active, the records of his activity were usually well preserved in the files of his victims (Czuchnowski 2004).

22. Recruiting an émigré dissident gave the secret police officer a chance to accumulate quite a sum out of per diems paid in foreign currency (Interviews D, K 2004).

23. A tragicomic story of his very thick file unfolds as follows: in 1967, Stros traveled to Edinburgh with the National Theatre. At that time, he was introduced to a man who presented himself as "from the Czechoslovak ministry of culture." Stros did not find his company particularly worthwhile, but his wife did. Mrs. Stros, an otherwise quiet housewife, appreciated that someone took interest in her. She met with the StB officer in Edinburgh on a couple of occasions and then back in Prague, where the officer opened a file "Olivier" for Mr., not Mrs., Stros. Over the next ten years, Mrs. Stros told the StB officer anything he wanted to learn about her husband. The officer was rewarded with promotions and finally with early retirement. To prevent someone from taking over his recruit and discovering his trick, he asked his supervisors to end the collaboration altogether, explaining that working with the famous stage director was too sensitive to survive a change of leading officers. His request was approved. Stros's file was closed and sent to the archives. Like most closed files, it survived the transition since mostly files of active or "live" informers were destroyed (Interviews C, G, P, Su 2004). In light of the Czech lustration law, Stros was guilty of collaboration. He was cleared of charges in the lustration appeal case only because his lawyer found the retired officer and convinced him to testify in court to Stros's innocence (Interviews R 2004).

much more interesting. Consider the following decision model representing a former secret agent's ITR dilemma. The agent has to decide whether to admit his collaboration. It is common knowledge that a certain proportion of files documenting the secret informer network have been destroyed. However, the decision maker is ignorant as to whether his particular file was destroyed or whether recriminating information may be retrieved from the files of his victims.<sup>24</sup>

At time 1, the agent decides whether to reveal his collaboration. At time 2, if he revealed himself at time 1, this information is publicized and the outcome is  $c$  (he is publicly announced a "collaborator"). If he did not reveal himself at time 1, the screening agency consults the available files, and the following results:

1. With probability  $p$ , the secret files demonstrating the agent's involvement still exist. If they do, he is exposed and suffers sanctions for public lying. The outcome is situation  $l$  (he is denounced as a lustration liar as well as a collaborator).
2. With probability  $1 - p$ , the evidence does not exist (perhaps the agent's files and related material have been destroyed), and the screening agency has to accept his statement. The outcome is  $n$  (not identified as a collaborator).

Figure 2 represents the agent's decision problem.

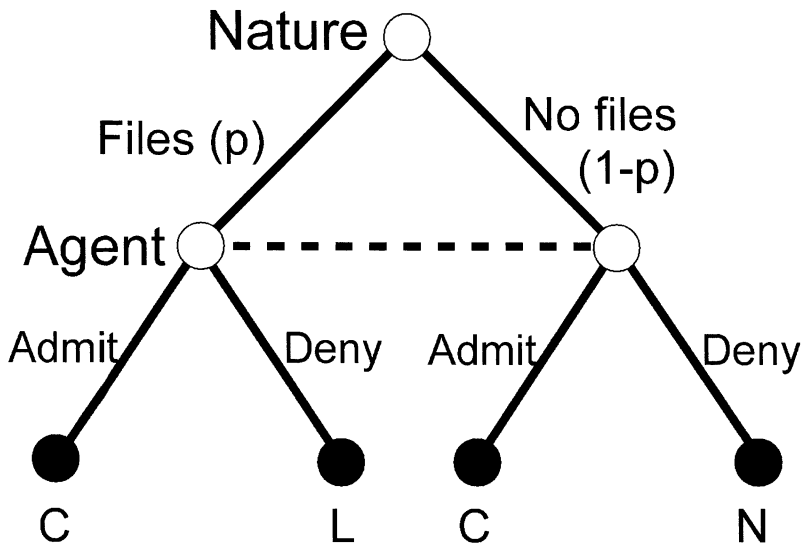
Let the agent's preferences be represented by  $L$ ,  $C$ , and  $N$  such that  $L < C < N$  are von Neumann–Morgenstern utilities (capital letters denote payoffs associated, with the outcomes represented with corresponding lowercase letters). The best outcome is to be considered a noncollaborator ( $N$ ), but it is better to be publicly identified as an agent or collaborator ( $C$ ) than recognized as both an agent and a lustration liar ( $L$ ). For simplicity, we set the reference utility of being declared a noncollaborator at  $N = 0$ . The agent chooses between getting  $C$  for sure versus a lottery of  $L$  with probability  $p$  and  $N$  with probability  $1 - p$ . He declares collaboration if and only if  $C \geq pL + (1 - p)N$ , or  $p \geq [(-C)/(-L)]$ . The final condition is

$$p \geq C/L. \quad (1)$$

Condition (1) has a very intuitive interpretation. An agent has an incentive to declare collaboration if the probability of the files surviving is not smaller than the ratio of the punishment for being declared a collaborator to the punishment for being a lustration liar. Note that for many different agents, the model could be easily modified to account for personal differences in  $C$  and  $L$ . Such parameters could depend on the type of personality of the former collaborator, his or her social environment, or the political position to which he or she aspires. Also,  $p$  may be interpreted as a subjective probability of an agent that his or her file survived. Thus,  $p$  also varies among agents, not just because they may be optimistic or not but because they may have different objective evidence of their files' survival.

We can now compare the performance of ETRs and ITRs. It is plausible that under the circumstances of the transition to democracy, the conditions for revealing collaboration hold for many former collaborators—namely, those who believe that the

24. The naming convention comes from the lustration context. An incentive-based truth revelation (ITR) truth commission can be represented with the same model after suitable changes of terminology.



**Figure 2: The Former Secret Agent's Dilemma**

NOTE: Agent = decision maker (former secret agent); agent's action space = [Admit, Deny];  $p$  = probability that the evidence of collaboration (files) exists. Payoffs: C (collaborator); N (noncollaborator); L (lustration liar);  $L < C < N$ .

probability of their files surviving is sufficiently high in comparison to relative punishment. The interpretation of this result is straightforward. Every collaborator for whom evidence exists will be revealed under both ETR and ITR procedures. However, ITR makes it possible to extract more declarations of collaboration than can be supported by existing evidence. Thus, keeping Type I errors constant, Type II errors can be reduced in ITRs relative to ETR procedures. In other words, under plausible conditions, ITR lustration laws and truth commissions are more resistant to false acquittal errors while performing exactly as well as ETRs with respect to false convictions.

ETRs are extremely susceptible to false acquittals because all perpetrators whose evidence was destroyed will be declared noncollaborators. However, ITR procedures make use not only of the existing evidence but also the beliefs of perpetrators about the evidence preserved. Thus, ITRs can exploit perpetrators' uncertainty as to whether evidence documenting their criminal activity exists. Gacaca courts reduce sentences, while the TRC grants amnesty to perpetrators who testify. Polish, Romanian, Lithuanian, and Estonian screening laws allow ex-collaborators who acknowledge their past involvement with the secret police to continue their political careers. On the other hand, wrongdoers who refuse to testify and are revealed as human rights violators, as well as collaborators who are found to be "lustration liars," are exposed to criminal sanctions (gacaca, TRC) or have their political careers at least temporarily

suspended (lustration). In ITR, the collaborator may choose a mild penalty with certainty instead of a lottery that brings a possibility of a harsh punishment.<sup>25</sup> If the punishment for not coming forward is sufficiently high, ex-collaborators prefer to pay the cost of testifying about their abusive behavior to risking criminal prosecution or professional banishment. If the incentives in ITR procedures are adequately designed, referral to external evidence might be entirely redundant. The threat of using potential evidence against perpetrators may be sufficient. For instance, Hayner (2001) reports that in South Africa, just a few initial convictions in high-profile trials for apartheid-era activity substantially increased amnesty applications. In addition, “in order to increase the pressure on perpetrators to apply for amnesty the commission held some investigative hearings behind closed doors, keeping secret the names mentioned and the crimes detailed.” A similar incentive-based plan was implemented in Poland, as described in the previous section. Under the ideal ITR procedure, only wrongdoers testify to their collaboration, while the innocent refrain from doing so.

We can now clarify the meaning of the argument recommending no TJ at all. TJ institutions responsible for uncovering the truth and sanctioning past human rights violations are unavoidably subject to false acquittals and false convictions. Should policy makers and lawmakers refrain from designing such institutions altogether? Doing this would be equivalent to accepting an outcome in which all innocents—and unavoidably all guilty as well—are acquitted.

One may raise the point here that ITRs’ superiority to ETRs can be defended only on the grounds of consequentialist theories of justice. A successful ITR results in revealing the truth about past human rights violations or about collaboration with the secret communist police, but the success in inducing ex-collaborators to step down comes at a price: the immunity from criminal liability or the interruption of their professional careers. The incentive offered in exchange for truth inhibits the execution of justice in any deontological sense. Kant and Hegel’s *lex talionis* interpretation of justice requires that crimes be rectified by a punishment that matches the crime, whatever the consequences of inflicting such punishment: “Let the world perish, but all guilty be punished” (Kant 1970). According to deontologists, revealing the truth does not come close to compensating the wrongs committed by authoritarian regimes and falls short of satisfying even the mild contemporary interpretation of retribution of Reiman (1995), which demands that the punishment be merely proportional to the crime. To make the case for ITRs’ supremacy, one must demonstrate that the consequentialist perspective is more appropriate for the transitional context. In fact, consequentialism at the transition stage and deontology at a later stage are not inconsistent. Transitional justice procedures are not meant to be a permanent part of the political system. They are intended to operate only in the initial stage of the transition, when the demand for holding the wrongdoers accountable for human rights violations persists. While one may argue that in constitutional democracies, laws should be executed in a deontological fashion, one may also agree

25. In the case of the Truth and Reconciliation Commission (TRC), even though the perpetrator is granted amnesty, having to make a public confession is itself a form of punishment. This is the view of Justice Richard Goldstone: “the perpetrators suffered a very real punishment—the public confession of the worst atrocities with the permanent stigma and prejudice it carries with it” (qtd. in Gibson 2002, 544).

that their design should be governed by forward-looking considerations. In other words, once in place, laws of the newly democratized state should always be followed. However, in the stage of institutional design, one should be guided by the long-term desirability of their future outcomes.

Moreover, in typical cases of lustration, the reward for revealing oneself is not immunity from criminal charges for past offenses but only eligibility for a political position. Such a declaration does not constitute self-incrimination in any specific criminal case, but it also does not save the target of lustration from potential criminal charges.

Finally, there is another important advantage that ITRs hold over ETRs. ITRs reduce the workload of a transitional court system. Similarly to martial courts, ITRs are applied whenever time or other resources are unavailable to carry out full-scale procedures. The preemptive declarations result in truth, unburdened with the transaction costs of (unfeasible) court justice. The mechanism at play is similar to that described by the U.S. Supreme Court in its defense of plea bargaining:

Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities. (*Santobello v. New York* 1971)

This last point suggests a possible reason why ITRs have been adopted exclusively in endogenous modes of transitional justice. International tribunals firmly reject the possibility of plea bargaining. The prohibition of “bargaining with war criminals” has come at the cost of letting some authors of gross human rights violations thrive unpunished.<sup>26</sup> Since the Nuremberg trials, prosecuting war crimes by international tribunals has become incredibly selective. In fact, almost all guilty are left unpunished.<sup>27</sup>

### **IMPERFECTION OR IMPOTENCE: IN DEFENSE OF ENDOGENOUS TRANSITIONAL JUSTICE**

Endogenous TJ is a foundational act for a new democracy (O’Donnell and Schmitter 1986). However, some legal theorists dismiss it on the grounds that it gives the former dissidents an excuse for taking political revenge on authoritarian wrongdoers. Giving the new democracy a free hand in punishing its own perpetrators is criticized for

26. In Nuremberg, plea bargaining was offered to some high-ranking, but not top-ranking, Nazi criminals. Erich von dem Bach, the commander of Nazi forces fighting with the 1944 Warsaw Uprising, was responsible for the death of more than 200,000 civilians in Warsaw and mass executions in Belarus, Estonia, and eastern Poland as well as the idea of setting up the concentration camp in Auschwitz. “In exchange for his testimony against his former superiors at the Nuremberg Trials, von dem Bach was never accused of any war crimes. Similarly, he was never extradited to Poland and the USSR” (Wikipedia 2005).

27. Although the International Criminal Tribunal for Rwanda was established in 1995 shortly after the Yugoslavian Tribunal, it has achieved just eight convictions and one acquittal (as of April 2002). The number of detainees responsible for the 100-day genocide of 800,000 Tutsis is around 124,800 (Walsh 2002). One cannot even say they have been falsely acquitted, since 99.99 percent of the guilty have never even been charged.



promoting “victors’ justice” or, even more harshly, “witch hunting” (Rosenberg 1995). The two categories of TJ examined here, lustration and declassification, are particularly criticized for retroactivity and undermining the rule of law. Some consider them akin to violent political revenge, almost on par with the crimes of the authoritarian regime itself (Schwartz 1995). But if the proponents of exogenous transitional justice are correct in reducing endogenous transitional justice to bare political vengeance, how can they explain the postcommunists undertaking such “acts of violence” against themselves? Such “self-lustration” is frequent in Central and Eastern Europe (Kaminski and Nalepa 2005). Remorse of the ex-autocrats is hardly an explanation for self-inflicted lustration and the opening of the ancien régime’s secret police files authorized by the very persons who are implicated by them. Most important, no criticism can ignore the fact that bare acts of vengeance are harsher. It does make a difference whether Mr. Ceausescu is shot in the head in front of the camera or whether a note that he was a communist official is published in the Romanian government bulletin. (We believe that Mr. Ceausescu would have agreed had he been given a chance to register his opinion.)

The incentives in exogenous and endogenous transitional justice recall those attributed by Mancur Olson (2000) to “roving bandits” and “stationary bandits,” respectively. Stationary bandits, in contrast with roving ones, have every incentive to make their subjects thrive economically. Like “roving bandits,” international actors do not have any vested interest in the long-term prosperity of the countries in which they implement transitional justice. The careers of nomadic prosecutors are not linked in any meaningful way with the success of a transition in Rwanda, South Africa, or Hungary. Prosecutors who help a postauthoritarian country bring its wrongdoers to justice are rewarded with the immediate publicity in the international arena. They doubt the postauthoritarian country is capable of exacting justice on its own perpetrators, and so they sideline the local politicians. However, democratic consolidation depends critically on reviving citizens’ spirit and reconciling former oppressors with former dissidents. Outside intervention can be of little help in this process. A country’s prospects for reconciliation and, eventually, consolidation are rather poor if, at the outset of its democratic experiment, the most crucial judicial decisions are monitored or performed by international courts. The Serbian reaction to Milosevic’s trial in The Hague is a telling example. When Milosevic’s trial started in The Hague, his popularity surged, as upset Serbs, deprived of the right to try the dictator by their own courts, increasingly took his side. Rwanda’s resort to gacaca tribunals in response to the impotence of the International Criminal Tribunal for Rwanda provides another illustration.<sup>28</sup> International courts and tribunals earn praise and attention for doing justice in the short term and in a few spectacular cases. In the long term, they may leave a society incapable of coming to terms with its own past. Using mechanisms such as ITRs lays better foundations for the state of law.

28. In addition to criticizing the International Criminal Tribunal (ICT) for Rwanda for being slow, the Rwandan government has frequently accused it of being ineffective or even biased. The ICT has also been enmeshed in scandals, such as when three international judges burst out laughing during the cross-examination of a rape victim (Walsh 2002).

**APPENDIX**  
**Major Truth Revelation Procedures Created in the**  
**Aftermath of the Third Wave of Democratization**

<i>Country/Type of TJ</i>	<i>Description of TJ</i>
Albania/harsh ETR LL	Targets: candidates in parliamentary elections, high government officials, and supreme court justices; targeted activity: senior party or government position in the former communist regime or collaboration with the secret police; targeted period: 1945-1990; dates in force: September 1995 to April 1996; source of evidence: files of the Sigurimi secret police. Comment: Candidates positively screened were banned from politics for five years (Done 1995).
Argentina/mild ETR TC	Targets: military officers; targeted activity: investigations of the military against political opponents and the disappearances of 8,960 people; targeted period: 1976-1983; dates in force: 1983-1984; source of evidence: several thousand testimonies and 50,000 pages of nongovernmental organizations' (NGOs') documents. Comment: The Argentinean CONADEP was victim oriented rather than perpetrator oriented. However, "the information collected by the commission . . . was critical in the trials of senior members of the military juntas" (Hayner 2001, 34).
Bolivia/mild ETR TC	Targets: military units combating political opponents; targeted activity: disappearances of 155 persons; targeted period: 1967-1982; dates in force: 1982-1984; source of evidence: victims' testimonies. Comment: Commission was disbanded without completing work (Hayner 2001).
Bulgaria/harsh ETR LL	Targets: academics and university administration and bank managers; targeted activity: membership in the Communist Party and/or teaching Marxism-Leninism; period covered: 1945-1990; dates in force: 1992-1997; source of evidence: register of Secret Service Information and Bulgarian Communist Party archives. Comment: LL was ruled unconstitutional in July 1992 (banks) and February 1993 (academia). The refusal to provide statement was regarded as "admission that the person does not meet the requirements for membership in those [academic] organizations" (Kritz 1995, 1:701).
Chad/mild ETR TC	Targets: political police (DDS), Police Security Branch (RG), National Union for Independence and Revolution (UNIR), and Presidential Investigative Service (SIP); targeted activity: illegal imprisonments, detentions, assassinations, disappearances, tortures, and acts of barbarity; targeted period: 1980-1990; dates in force: 1991-1992 (eight months); source of evidence: interviews with high ranking DDS and Habre officials, testimonies of victims' relatives and testimonies of former prisoners. Comment: The commission named perpetrators in the report and advised authorities of the posttransition state not to rehire former DDS employees (Chad Decree 014 1995, 48-100).
Chile/mild ETR TC	Targets: armed forces and police during the Junta government; targeted activity: disappearance, torture resulting in death, executions, killings by "private citizens for political reasons" of the leftist opposition; targeted period: September 1973 to March 1990; dates in force: 1990 (nine months); source of evidence: testimonies of family members of 3,400 victims, available death certificates, autopsy reports for victims, and 160 testimonies of armed forces and police officers. Comment: Commission could not name perpetrators but could forward all its evidence to courts (Kritz 1995, 3:101-68).

*(continued)*

**APPENDIX  
(continued)**

<i>Country/Type of TJ</i>	<i>Description of TJ</i>
Czech Republic/harsh ETR LL	Targets: all nonelected politicians and civil servants; targeted activity: secret police officer or informer, Communist Party official, member of the People Militia, or member of 1968 verification committees; targeted period: 1945-1990; date initiated: October 1991; source of evidence: register of collaborators. Comment: More than 420,000 persons have been subjected to LL. Source: Interviews (2004, SI).
East Germany/harsh ETR LL	Targets: members of federal and state governments and parliaments, employees of public service (including the municipal level), international organization of which West Germany was a member, or churches, public notaries, attorneys, and all managerial positions; targeted activity: full-time STASI employees or secret police informers; targeted period: 1951-1990; dates in force: 1991-present; source of evidence: files and documents of STASI, including microfiche, film, and electronic records. Source: Kritz (1995, 3:278-9).
El Salvador/mild ITR TC	Targets: government officials, judges involved in the civil war, and the members of Frente Farabundo Martí para Liberación Nacional (FMLN); targeted activity: connection with death squads of the FMLN or with political police and military of the governmental side; targeted period: 1980-1991; dates in force: 1992 (six months); source of evidence: testimonies of all persons willing to testify, including perpetrators. Comment: The commission was entitled to offer confidentiality. The policy was known as the "open doors [for testimony]-closed doors [for confidentiality] policy." Source: Kritz (1995, 3:186).
Estonia/harsh ITR LL	Targets: all citizens; targeted activity: officer or informer of the KGB; targeted period: 1945-1991; dates in force: February 1995; source of evidence: declarations of targets and KGB files. Comment: Membership in Nazi Germany intelligence agencies was also listed as targeted activity. Source: Keesing's Record of World Events (1995).
Hungary/mild ETR LL	Targets: candidates in national elections; targeted activity: informers for the III/III secret police; targeted period: 1945-1990; dates in force: December 1996 to 2001; source of evidence: files from the former III/III department of the Ministry of Interior. Comment: About 600 persons were subject to LL. Targets proven to be collaborators were "advised to leave office," but this "advice" was not enforced. Source: Halmaj and Scheppele (1997).
Lithuania/harsh ITR LL	Targets: deputies to parliament, members of ministerial departments, employees of State Service, and administrators and deputies of cities and districts; targeted activity: KGB officer or informer; targeted period: 1940-1991; dates in force: 1991-2001; source of evidence: declarations of targets and KGB files. Source: Kritz (1995, 3:427-8).
Peru/harsh ETR TC	Targets: Communist Party of Peru-Shining Path (PCP-SL), Tupac Amaru Revolutionary Movement (MRTA), state police forces, armed forces, and self-defense committees; targeted activity: participation in violent political struggle, which resulted in the death of 69,280 persons; targeted period: 1980-2000; dates in force: 2001-2003; source of evidence: public hearings of victims and documentation from state archives. Source: Truth and Reconciliation Commission of Peru (2005).

*(continued)*

## APPENDIX (continued)

<i>Country/Type of TJ</i>	<i>Description of TJ</i>
Poland/mild ITR LL	Targets: candidates for parliament and other national-level elected posts, president, justices, and lawyers; targeted activity: secret agents, secret police, ordinary and military intelligence or counterintelligence; targeted period: 1946-1989; dates in force: 1997-present; source of evidence: secret police files and targets' declarations. Comment: A total of 23,000 persons were subject to LL. Source: Interviews (2004, L).
Rwanda/harsh ITR and ETR special court	Targets: foot soldiers (mostly Hutu) responsible for "100-day genocide"; targeted activity: categories 2, 3, and 4 of crimes covered by the Genocide Laws; targeted period: 1994 (100 days); dates in force: 2002-present; source of evidence: testimonies of perpetrators offered before gacaca courts. Comment: In late 2001, more than 10,000 gacaca tribunals were set up; they involved 260,000 adults of "integrity, honesty and good conduct" selected by local communities to serve as magistrates. At that time, 110,000 Rwandese were awaiting trial since 1995 in detention centers. Source: Rossouw (2002).
South Africa/harsh ITR TC	Targets: apartheid military and police forces, armed African National Congress (ANC) combatants; targeted activity: commission of a crime out of a political motive; targeted period: March 1960 to March 1993; dates in force: December 1995 to 2003; source of evidence: testimonies of victims and perpetrators. Comment: Perpetrators who committed crimes out of political motives were granted amnesty after giving full details of their crimes. A total of 23,000 statements were obtained from victims and their families, and 7,000 applications for amnesty were filed. Source: Boraine (2000); Gibson (2004).
Uganda/mild ETR TC	Targets: military government of Obote; targeted activity: arbitrary arrests, detentions, torture, and killings by government security forces; targeted period: 1962-1986; dates in force: May 1986-present; source of evidence: testimonies of victims and their families. Source: Kritz (1995, 3:256-8); Hayner (2001).
Uruguay/mild ETR TC	Targets: security forces; targeted activity: disappearance during military rule; targeted period: 1972-1984; dates in force: April 1985-present; source of evidence: 164 victims' testimonies. Comment: Mandate did not extend to cases of torture, which were much more frequent than disappearances. Source: Kritz (1995, vol. 1).

NOTE: The first column lists the name of country and the main features of its truth-revealing transitional justice (TJ): if it is incentive-based revelation (ITR) or evidence-based revelation (ETR); if it is a lustration law (LL), truth commission (TC), or other institution; and the type of punishment: "harsh" procedures usually demand from targets demonstrating that they had not performed the targeted activity and specify more severe sanctions than releasing compromising information to the public; in "mild" procedures, the sanction is usually only releasing compromising information. The second column provides the following bits of information about a TJ institution: the main targets (i.e., the main social groups or organizations whose members' past is supposed to be revealed); the type of past activity, social role, or crime under examination; the historic period under investigation, the date of implementation, sunset provisions, and so on; archives, depositories, registers, and so forth that were the primary source of evidence; comments; and the source of data for the country.

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