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**The Politics of Retrospective Justice
in Germany and the Czech Republic**

Susan E. Scarrow, University of Houston
and
Jonathan Stein, Yale University

Abstract

Ongoing German and Czech efforts to confront legacies of injustice in their recent pasts provide an opportunity to examine policies of retrospective justice adopted where there is no threat from old elites with residual power. Instead of invoking existing explanations of these measures that concentrate on normative issues, the role of former dissidents, or the mode of transition, this account focuses on the importance of the character and structure of political representation in post-Communist regimes in general, and in the German and Czech successor regimes in particular.

The Politics of Retrospective Justice in Germany and the Czech Republic*¹

Susan Scarrow and Jonathan Stein

One of the most sensitive and complicated questions of regime transition is how governments attempting to construct stable, liberal democratic state should confront their countries' illiberal and undemocratic pasts. Wherever opponents of the old regime exposed, publicized, and condemned its abuses, the idea that "justice must be seen to be done" is likely to play a prominent part in the new regime's attempt to establish its democratic credentials. Usually, however, leaders committed to pursuing justice are forced to choose policies that reflect a dogmatically unsatisfying combination of realism and morality. In many Latin American and Southern European states over the past twenty years, the question was largely resolved by the terms of the transition itself. Legal impunity or amnesty was either explicitly negotiated beforehand, or secured subsequently by autonomous political forces (typically the military).¹

In Germany and the Czech Republic, however, no residual elites were in a position to influence such decisions either before surrendering power or later. Partly as a result, both states implemented a range of measures more far-reaching than those attempted in recent transitions elsewhere. This includes rehabilitation and compensation of victims, as well as criminal prosecution of perpetrators and their legal exclusion from certain public functions. Thus, these cases provide an opportunity to examine the measures adopted by regimes unconstrained by threats of destabilization from agents of the old order. Although the politics of these issues remains unsettled, certain trends had become apparent by 1994. In both cases, despite the regimes' greater latitude for action in this area, creating a perception of justice has been as least as difficult for these countries as for those with obvious political constraints.

One reason is that the pursuit of retrospective justice has been shaped as much by the magnitude of the transformation of state and society as by the political marginalization of the former regime's elites. Even in the comparatively rich united Germany, the dual process of institutionalizing new types of governmental and economic systems has placed unprecedented (and unanticipated) demands on scarce human, organizational, and material resources. Requirements of expertise and efficiency, not political deference to still-powerful actors or institutions, have in both cases played a dominant role in determining the extent to which the new regime punishes or disqualifies old elites and compensates their victims. To a lesser degree, normative stipulations adhered to by both regimes have also acted as a restraint on criminal prosecution.

These non-political constraints, however, have not operated as a functional surrogate for the power retained by old elites in earlier transitions. The more effectively those elites could impose fixed

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limits on justice, the less the issue could remain an object of political debate. On the other hand, resource constraints have limited the form and scope of such measures, but have not prevented the persistence of such issues on post-Communist political agendas. In contrast to earlier cases of democratization, retrospective justice has not so much stood outside the sphere of transition power matrices conditioning its realization as it has itself become embedded in politics.

Accordingly, we begin with a discussion of the role of retrospective justice as a feature of post-Communist politics. We examine several approaches that address the issue directly but inadequately, and one that contains insights from which an alternative explanation can be derived. Our hypothesis is that retrospective justice is best understood in terms of the distinctive character of political representation in post-Communist systems. With the formation of political factions in parliament and subsequent electoral pressures for their consolidation as parties, political competition is biased toward symbolic manipulation of issues that lend themselves to polarization, not negotiation and compromise. In the absence of pre-established party constituencies, party builders find such issues strategically attractive.

With this in mind, we then discuss the German and Czech cases, proposing that the course of retrospective justice in each country has been determined by the level of development of representative structures and the distribution of power within them. Finally, we proceed to an examination of the main policies and their implementation. In both countries the state's decision to engage the past has entailed unavoidable compromises, but the significance of that decision and the results of compromise have varied according to the very different institutional contexts in which they have been made.

Putting Justice in its Place

Retrospective justice has been one of the most talked-about subjects in the East European transitions, but one of the most poorly understood. Three analytic approaches specifically geared to this task are often invoked in recent scholarship. None of them provides a satisfactory account. A more persuasive explanation will be grounded in what distinguishes the regimes under study.

1) Parse the Norms This is the least helpful strategy, but it has been a very attractive one for Western social scientists and legal theorists. Policies undertaken and options under consideration are evaluated strictly from a prescriptive standpoint that seeks to demonstrate either that they inevitably entail economic inefficiencies and further injustice or that they detract from more important, forward-looking tasks.² To some extent, dissection of legal rules and the reasoning which informs them is quite valuable, for it calls attention to the limited ability of law to clarify and interpret, much less redress, a past fraught with ambiguity and paradox. This line of analysis becomes even more persuasive when resource constraints--yielding what one writer calls the regime's "moral-bureaucratic mix"--are factored in.³

Yet, however logically compelling the criticism, and however accurate the predictions, this approach invariably offers little more than schematized arguments for positions well known to protagonists

on the ground;⁴ hence it does not provide much guidance for understanding the question in terms of transition politics. Principled arguments have indeed had a prominent place in public debate, but we also want to know why regimes have ignored powerful counsel against pursuing retrospective justice.

2) The Dissident Halo Prescribers sometimes do attempt to explain, rather than simply criticize, retrospective justice. But they do so by adopting an argument that draws exclusively on psychological speculation and reflection on the metaphysics of complicity, ignoring the effect of structural and institutional factors on the political salience and mobilizational potential of a given disposition. Those who openly opposed the old system, so this argument goes, are also those most likely to deal generously with their former oppressors. Those who kept their heads down and muddled through with daily compromises, however, now feel guilt and shame, which predisposes them to seek revenge for their own humiliation. As Claus Offe puts it, "people who have been active in the struggle against the old regime, and who have hence experienced its harshness most directly, will normally advocate more moderate modes of punishment than those who have lived in conformity and acquiescence under the old regime."⁵

Offe admits that this claim is based on "unsystematic evidence," but that has not prevented it from becoming a fully-fledged social scientific "explanation" dressed up in the jargon of the trade. One recent account employs Albert Hirschman's categories of "exit" and "voice" to explain outcomes in Germany and Czechoslovakia. In East Germany, initially strong calls for punishment abated, because the former GDR government had provided a psychological safety valve by encouraging those who would otherwise have exercised voice to exit to West Germany. In Czechoslovakia, exit and voice had both been foreclosed, so the "post-transition psychological tendency was toward punishment rather than forgiveness, with the only brake on that tendency being those leaders...who had exercised the voice option in the past."⁶

This is a deeply flawed argument. It is at once crudely deterministic and indeterminate. The exit of would-be voicers in the German case (itself a large and untested assumption) could just as credibly be expected to produce exactly the opposite result, more not less pressure for retaliation, since the level of guilt and shame in the remaining population would presumably be proportionately higher. More fundamentally, this argument relies entirely upon the empirical proposition, which appears to have become a part of conventional wisdom, that 1) dissidents do not support retribution, because, having exercised voice, they are somehow better adjusted psychologically, and 2) that support for retribution comes from other non-dissident elites, who, like every non-dissident, are in need of catharsis.⁷

This proposition is simply wrong. In both countries, a significant number of ex-dissidents actually initiated demands for retaliatory measures against representatives of the old regime. In Czechoslovakia, it is likely that very little retribution would have occurred had they not. The conspiratorial habits and moral rigidity nurtured by an insular and isolated underground existence apparently left many former activists less well-adjusted to accept the compromises required by reconciliation. Events in East Germany and Czechoslovakia might better be understood, therefore, in terms of ex-dissidents' capacities for effective

voice in the new regime.

3) Let's Make a Deal This approach is taken up by comparativists who focus squarely on the political dynamics of democratization in the hope of establishing valid inferences across cases. Consequently, these analyses address the issue in terms of a typology of regime change that categorizes how the exit from authoritarian rule occurred. As Samuel Huntington has put it, "In actual practice what happened was little affected by moral and legal considerations. It was shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transition."⁸ The alpha and omega of the matter, then, is whether or not authoritarian elites were able to secure immunity from retaliation as a condition of democratization (or continued support for it). Succinctly stated, "Officials of authoritarian governments that collapsed or were overthrown were targets for punishment."⁹

This holds obvious relevance for eastern Europe, not only in terms of criminal prosecution, but also decommunization more broadly. Following in Huntington's methodological footsteps, Daniel Friedheim claims that for each country in the region, "Differences in the extent to which the state apparatus, especially its internal security agencies, has been purged...reflect pacting or collapse."¹⁰ According to Friedheim, the fact that the East German and Czechoslovak regimes collapsed resulted in purges sufficiently deep that "relatively few Communist apparatchiks have remained in a position to influence the pace of post-Communist reform."¹¹

While this approach's promise of law-like generalization is intriguing, much hinges on questions of classification. Huntington predicted that the Czechoslovak successor regime would not be receptive to prosecutions and purges, because he does not categorize its accession to power as the result of the former regime's collapse. Rather, the Czechoslovak transition was an instance of what he calls "transplacement" in which the regime began negotiating, but then lost legitimacy and power to the opposition. Friedheim does not employ Huntington's ideal types of democratization processes, and instead emphasizes the absence of a sustainable negotiated pact in defining collapse. Thus, since both transitions were actually instances of collapse and both successor regimes embarked on a policy of retribution, Friedheim appears to get it right.

Nevertheless, the nature of the proposed connection between regime collapse and retaliation is in either case vague. Both Huntington and Friedheim assert what amounts to a claim of perfect covariation, if not causation, yet neither attempt to specify any necessary relationship between democratization processes and a successor regime's pursuit of punitive retrospective justice. Instead, they simply invoke the concept of "path dependency." Regardless of the type of regime involved, once a case is properly categorized, the mode of transition can be treated as an independent variable generating observable regularities in non-trivial dependent variables. What is true of privatization, to take a much-cited example,¹² is true of justice as well.

The problem is that post-Communist transitions have not necessarily exhibited the predicted regularities in this area. For instance, whatever one chooses to call the demise of Soviet Communism, "pacted transition" does not exactly leap to mind.¹³ So where is the purge or the "targets for prosecution"? The most likely candidates, the August 1991 coup plotters and the leaders of the insurgent parliament in October 1993, were effectively pardoned and allowed to reenter public life in early 1994 under an amnesty law passed by the new parliament. Admittedly, this is an extreme example that may resemble Huntington's "transformation" category more than regime collapse.¹⁴ But Bulgaria, a clear case of "transformation," has pursued retribution.¹⁵ Even more obviously problematic is the active hostility toward, and abandonment of, decommunization in Slovakia, discussed below.

Finally, knowing when events occurred provides an insight into why they occurred, but a focus on the mode of transition says nothing to account for the timing of state action. Within Huntington's classificatory scheme, the Czechoslovak case is even more surprising, since he argues that, "In new democratic regimes, justice comes quickly or it does not come at all."¹⁶ Yet, in Czechoslovakia it took almost two years to construct a legal framework for retribution, and this cannot be explained simply by reclassifying the transition as a regime collapse.

4) Dis-Interested Democracy According to this approach, in order to understand the politics of post-Communist retrospective justice, we should focus on what is peculiar to post-Communist regimes rather than on the various routes they took to becoming post-Communist. Arguments for maintaining an analytical distinction between post-Communist and earlier "third wave" transitions typically emphasize the difference between the destructive and constructive stages of democratization. While the processes of authoritarian breakdown are comparable across regime types, "when attention shifts to the critical and much longer constructive phase...the utility of the existing transition literature and the comparability of the...transitions diminish sharply."¹⁷ According to an extreme variant of this argument, post-Communism should be viewed as a uniquely fluid social non-formation in which everything necessary for social scientific comparison, from individual subjectivity to the institutions that shape it to the emergence of a structured environment at all, is defined by uncertainty, contingency, and accident.¹⁸ At the center of all attempts to reject the applicability of earlier transition theory, however, is the relative importance ascribed to the type of regime that preceded democratization.¹⁹

In this vein, David Ost has argued that the constructive stage of the transition (or democratic consolidation) is a qualitatively different process in post-Communist societies because they lack at the outset a politics of interest such as that found in authoritarian regimes where market relations remained essentially undisturbed. In the latter cases, opposing interests were created and organized themselves "regardless of the dictatorship"; hence the common struggle that ended with the removal of the authoritarian regime "began a period where the different interests could compete among themselves."²⁰ In contrast, "the interests that exist in post-communist society emerge from a state socialist framework that

repressed the development of autonomous classes and made all groups dependent on the state," and this means that their organization for and under conditions of marketization "is necessarily very weak."²¹

This distinction has important consequences for the emergence of political parties, the agents sine qua non for consolidation of representative democracy.²² In the earlier transitions, autonomously organized interests, with their previously developed programs and orientations, provided ready-made social bases for structuring party competition and political representation. In post-Communist transitions, however, incipient parties have no such interests with which to identify, because the interests shaped and mobilized into politics under a market economy do not yet (or no longer) exist.

For party builders, therefore, successful electoral strategies will employ a highly ideological political fundamentalism that appeals to non-economically mediated identities. The specific content and genealogies of these fundamentalisms is less important than their role in creating "maps of problematic social reality."²³ Nationalism and ethnically-based politics is one possibility; religious confessionality is another; anti-Communist outbidding and promises to settle accounts with old masters offer still another.²⁴ Retrospective justice, then, fills the void occupied in earlier transitions by the pluralist political struggles of democratized capitalism. In contrast to Huntingtonian analysis, it is one possible strategy of (proto)democratic construction, not an outcome solely determined by the specific process of pre-democratic destruction.

This approach has several analytical advantages. First, it can account for cases that would otherwise appear anomalous. Slovakia was a part of the strongly centralized Czechoslovak state when Communist rule broke down, and it would be implausible to argue that the regime collapsed in one but not the other. Slovak rejection of retrospective justice is attributable instead to the rise of an alternative and incompatible fundamentalism after the opposition took power, a development structured by the formation of mutually exclusive party systems at the republic level and by the revitalization of the existing constitution's federalizing provisions. While anti-Communism came to define the terms of political discourse in the Czech lands, nationalism took on the same role in Slovakia. And, because Slovak nationalists allied themselves with a stratum of former Communist elites, they rightly perceived anti-Communism as a direct threat to their organizational efforts, which could be (and was) successfully countered by indignantly portraying it as a federal encroachment on national autonomy.²⁵

Furthermore, although the representatives of approaches 2), 3), and 4) address only retributive measures, approach 4) can more easily account for the non-punitive dimension of retrospective justice, i.e., compensation policies, as well. These policies receive virtually no attention in analyses that seek to generalize findings from Latin American and southern European cases, but for reasons having more to do with their marginal place in those transitions than with post-Communist realities. Compensation was simply not a subject of utmost concern for authoritarian regime elites when the time came to negotiate a pact or, as in Argentina, to threaten a successor regime intent on retribution. Since the acknowledg-

ment of victims did not threaten victimizers either individually or collectively, compensation policies had no decisive impact on the democratization process. Naturally, therefore, they have not interested students of these transitions much either.²⁶ Furthermore, where compensation was undertaken, it was relatively easy to define and identify the victims of these regimes, and, once this was accomplished, providing reparations turned out to be a straightforward process.²⁷

In contrast, the nature of persecution under the Communist regimes, and the comparatively weak bases for political competition in the post-Communist transitions, have established expectations and incentives leading to prolonged battles over the form and scope of reparation. Not only were there politically motivated executions, imprisonment, torture, and sabotage of entire careers, but the "expropriation of the expropriators" created a much larger group of those who could be defined as victims. More importantly, however much we may want to single out the "worst injustices" as particularly worthy of redress, or establish compensation scales according to whether one lost an apartment house or ten years in a uranium mine, we first need an agency capable of making authoritative determinations and sustaining them against rivals.²⁸ Post-authoritarian societies, with their more fully developed systems of political representation, were able to marshal the consensus necessary for this task.²⁹ In post-Communist systems, including those where pact-making defined the exit phase of the transition, such determinations have been inherently unstable, because they are themselves constitutive of the representational order.

Finally, since this approach implies 1) that the political meaning of retrospective justice differs according to the pre-history of the democratizing successor regime; and 2) that these differences derive from the nature and relative maturity of representational linkages between governors and governed, we are better able to explain variations that have emerged, despite similar exit phases, between the German and Czech cases. Although in both countries retrospective justice started down similar paths immediately after the demise of the old regimes, the German case soon involved not just a transition from one regime to another, but from one state to another. Thereafter, some measures became indistinguishable from the wider process of the incorporation of East German society into the ongoing democratic regime. Others became shaped almost entirely by demands emanating from the West. But this also means that these demands entered a field of already existing organized (and competing) interests, against which they have been balanced. In contrast, the Czech Republic, with its infant parties and lack of clearly defined interests, continued to hew much more closely to the pattern of retrospective justice understood as a form of constitutive political fundamentalism. We flesh out this explanation below in order to isolate political representation as the appropriate independent variable with which to explain the course of developments.

Party Justice in Germany and the Czech Republic

German policies for dealing with injustices of the East German regime can best be understood by emphasizing the rapid process of German unification, and the unequal strengths of western and

eastern political elites after the 1989 opening of the Berlin Wall. In the immediate aftermath of the unexpected collapse of communist regimes in eastern Europe, the Federal Republic's chancellor, Helmut Kohl, led an assertive campaign to rally domestic support for, and international acquiescence to, the immediate unification of the two Germanies. Kohl's success at home was sealed in the March 1990 East German legislative elections, when voters strongly endorsed the Christian Democratic proponents of unification.

These electoral results also powerfully shaped the subsequent development of the party system in eastern Germany, because they demonstrated the weakness of popular support for the dissidents who had helped precipitate the overthrow of the old regime, and they showed the success of western German political parties in persuading voters and would-be representatives to accept western categories of political alternatives. By the end of 1990, after the first all-German elections, all of the eastern parties except the Party of Democratic Socialism (PDS) (formerly the ruling Socialist Unity Party--SED) had merged with western counterparts. Particularly for the eastern Social Democrats (SPD) and Christian Democrats (CDU), this meant absorption into strong parties with established agendas and well-entrenched elites. It also helped facilitate the transfer of western politicians into party and public offices in the east.

The unification process was completed in less than one year, a speed achieved by elevating its status to the most pressing moral and practical imperative. During that year, debates in the West German media focused more on such technical problems as the proper conversion rate for East German currency than on questions about how to treat perpetrators and victims of the past regime's injustices. In the 1990 all-German elections, unification was the most prominent issue in the contest between Kohl and Oskar LaFontaine, the SPD's chancellor candidate, but disputes centered much more around the timing and proper distribution of the economic costs of unification, than around moral questions raised by the collapse of the old regime.³⁰

In the four years after Kohl's decisive victory and the reformation of a Christian Democrat/Free Democrat governing coalition, economic aspects of unification remained at the top of Germany's political agenda, but some of the most hotly debated issues raised in the wake of unification were ones which tapped into pre-existing West German party conflicts: questions about abortion and about the use of German troops in UN peacekeeping missions. Even as German policymakers poured vast amounts of economic and bureaucratic resources into the east, German political competition and debate continued to be defined to a great extent by western party labels, western political elites, and western political concerns. The only indigenously organized eastern political force, the PDS, obviously had no interest in pursuing questions of retrospective justice, though by the 1994 state and federal elections they had become much more vocal about the human costs of compensation measures.

The Czechs, on the other hand, did not escape the condition in which all other post-Communist regimes found themselves after 1989. They are "democratic in the sense that free, competitive, and

regular elections are now held, but voting fails to produce representative government, for the winners do not represent established institutions."³¹ But must winners represent existing institutions in order for government to be representative? Do institutions and the interests they shape have to be fully developed in order for representation to be real? Herbert Kitschelt has proposed that the electoral outcomes that would result if institutionalized interests gained representation are realized through virtual representation of what individuals anticipate will be their social position and interests in the future. The aggregate distribution of orientations and hence of parties is, in turn, "influenced by the level of economic development and its sociocultural correlates," with the number of "pro-market/libertarian" voters and parties increasing in direct relation to industrialization.³² Kitschelt admits that individuals may not be equipped to frame their choices in terms of rational expectations while institutions are in flux and knowledge of a market economy is thin, but this will have a strong affect only on the first elections. "[O]ver time individuals begin to learn the value of their resources and acquire information about the likelihood that certain political parties will promote the profitable use of such resources."³³

This theory of party formation presents an obvious challenge to the claim, implicit in Ost's thesis, that the absence of an interest-based civil society means that post-Communist systems are equally susceptible to the dominance of identity politics. Since individuals do begin to develop rational expectations despite institutional upheaval and the absence of market-generated interests, Kitschelt's theory can "identify under what individual and aggregate circumstances, characterized by personal marketable endowments, existing property rights, and levels of industrialization, the inclination to vote on particularist group identifications is high."³⁴ The predictions this generates accord well with the results of the second parliamentary elections in Czechoslovakia in 1992. The most avowedly pro-market party, federal Finance Minister Václav Klaus's Civic Democratic Party (ODS), gained by far the largest plurality (roughly one-third of the popular vote) in the Czech lands--the most industrialized region of post-Communist Europe.³⁵

Nevertheless, this explanation can be reconciled with Ost's argument for two related reasons. First, Ost does not limit the category of illiberal appeals to ethnic, national, or religious particularism, but includes political anti-Communism as well. Second, Kitschelt's model predicts that in "all East European party systems" economically liberal parties will also embrace politically liberal ("cosmopolitan" or "libertarian" in his words) commitments such as equal citizenship and expansion of opportunities for political participation.³⁶ Yet in the Czech Republic support for the most politically illiberal anti-Communist measures was joined precisely by those most committed to rapid liberal economic reform, by ODS, a result consistent with Ost's assertion that under post-Communism, "the political and economic aspects of liberal democracy seem inevitably to come apart."³⁷

Ost and Kitschelt are both right, because uncertainty about political orientations under post-Communism is a two-way street. Elites search for electoral support, and voters for representatives with

whom they agree. Yet, while virtual representation may indeed gain force over time, elites in nascent parties pushing for market-oriented reform cannot be sure it is working to their advantage, and thus may still feel compelled to resort to fundamentalist politics. In Czechoslovakia, the uncertainty of party-builders, and thus the relevant incentives, may have been compounded by the extremely short cycle of only two years between the first and second elections in 1990 and 1992. This helps explain why, once ODS's ability to compete on the basis of pro-market economic ideology was verified electorally, Klaus has attempted to steer the party away from—if not repudiate altogether—the agenda of retrospective justice.

For narrative simplicity, this agenda can be broadly divided into two categories: policies designed to improve the current situation of victims and those intended to punish perpetrators. The latter will be further divided between criminal sanctions and civil disqualification. However, in the Czech case some overlap in our discussion is inevitable not only because rationales for specific policies may coincide, but, more concretely, because they are politically interdependent; advocates of one policy often support others, and this means that developments affecting one area may have important, if not always desired or intended, effects elsewhere. The more intense politicization of all aspects of retrospective justice in the Czech Republic reflects its central place in party competition.

Compensating Victims

In both countries, the least controversial policies were those that distributed non-material benefits and those affecting public goods with the intention of signifying a more global break with the past. Thus, in short order, the names of many streets, cities, and schools were restored or changed, holidays were abandoned and others revived. To take another example, within six months of the communist regime's demise, Czech and Slovak students who had been expelled from university for political reasons were given their degrees or allowed to resume their studies.

From the outset, however, leaders in both East Germany and Czechoslovakia also argued that material compensation should be provided to at least some past victims of state-sponsored injustice. But they reached different conclusions about the scope and content of state compensation. The most difficult challenge for both countries was to construct policies compatible with the government-endorsed goals of rapid privatization. The first steps taken in each country reflected not only the constraints on economic and administrative resources, but also the standing of those affected by governmental choices concerning who to include.

The Czechoslovak government, initially dominated by former dissidents, adopted a spate of relatively broad policies of symbolic rehabilitation and financial compensation for political victims of the previous legal system. As a first attempt to compensate individuals, the new government passed the Law on Legal Rehabilitations in April 1990, which disposed of roughly 90% of all cases by retroactively invalidating most laws covering political offenses. In the remaining cases, mostly those where the use of

violence or "propagation of fascism" had been alleged, individuals were given the option of reopening their cases. This legislation won broad political support, though some objected that the post-Communist judicial system was unprepared to handle the surge in cases the law would create, and no one was able to provide a reliable estimate of the financial costs of compensation.³⁸ Supporters argued that some of these costs would be met by the sale of confiscated Communist Party property, even though it was not at all clear whether this source would be either large or liquid enough to finance the rehabilitation law's ambitious program of prompt financial settlements.³⁹

The fact that Czechoslovak legislators acted without prior knowledge of the state's institutional or financial capacity indicates the depth of their conviction that rehabilitation was crucial to establishing popular legitimacy, a conviction perhaps underpinned by the absence up to that point of more formal modes of legitimation, namely elections. Implementation has proven to be at least superficially vigorous, but marked by administrative slowness and procedural gaps that seem to have been intentionally allowed to widen. In the first three years after the Law on Legal Rehabilitations entered into effect, courts in the Czech Republic rehabilitated 205,912 people, or 95.7 percent of those considered wrongfully condemned by Communist courts between 1948 and 1989. By the end of 1993 the state had paid out over three billion crowns (\$100 million) in compensation.⁴⁰

However, the state's potential fiscal burden has been considerably reduced by substantive and structural provisions of the law. Roughly half the cases involved the superseded charge of "illegally leaving the republic." While all people in this category are eligible to be rehabilitated, only those who can prove they were forced to leave may receive compensation. This underscores the law's separation of formal rehabilitation and application for compensation. These provisions may explain why only 75,000 of those rehabilitated have applied for compensation. The Ministry of Justice, moreover, has revealed that most of those who do apply usually seek less than the full sum for which they qualify, a situation it apparently has little interest in remedying.⁴¹

Rehabilitation of East German victims of communist injustice was far slower to receive any legislative attention whatsoever in united Germany. Although the elected East German legislature passed rehabilitation legislation a few weeks before unification, this was promptly nullified by the Unification Treaty, which merely obligated the new German state to provide "appropriate" compensation for victims of East German (GDR) injustice. Subsequently, the united German government treated rehabilitation legislation as an unpleasant and politically unrewarding task--indeed, one observer described rehabilitation as "the unloved child" of the German unification process.⁴²

The "First Law to Clean up SED Injustice," which was not introduced by the government until 1991, grants victims of wrongful East German convictions a state payment for time unjustly spent in prison.⁴³ By the beginning of 1993, there were almost 100,000 pending requests for "rehabilitation" through the reversal or modification of GDR legal judgments.⁴⁴ However, this law, unlike its East German

predecessor, contained no compensation for those whose careers (and therefore income and pensions) had suffered as a result of political considerations. Legislation to provide very limited economic "rehabilitation" for victims of this second type of state-authorized injustice was debated in the German Bundestag throughout 1993. Successive government drafts were strongly shaped by an appreciation of the scarcity of public funds to pay compensation claims. Thus, one draft provided for minor income adjustments, and then only for those able to demonstrate that their suffering was both ongoing and the result of particularly grave instances of politically motivated injustices--a narrow funnel of clauses intended to limit drastically the number who claim compensation.⁴⁵

Although the Germans lagged behind the Czechoslovak government in compensating those who had suffered personal mistreatment by the East German legal system, they moved far more forcefully in endorsing policies to reverse property expropriations. The initial German policies in this area reflected the international power balance in 1990, and, more tellingly, the commitment of Christian Democrat/Free Democrat governments (and of their big business/small shopkeeper constituents) to affirming the priority and inviolability of property rights.

The German unification treaty, negotiated between East and West German leaders in the spring and summer of 1990, committed future German governments to two major principles which were to guide future remedies to property-related injustices: first, almost all former owners were to be restituted not merely compensated--even though this raised the threat that many East Germans would be evicted from premises that they had long called their own. Second, only those who had suffered as a result of the actions of a German government would be compensated. The fairly significant confiscations carried out by the occupying Soviet troops from 1945 to 1948 were specifically excluded on the grounds that Germany lacked sovereignty during this period. Though the Kohl government claimed that this time period was chosen in deference to the Soviet Union, it also had the undeniable economic advantage of reducing the number of potential claims, particularly those from the former Prussian nobility, whose estates were confiscated in the first waves of agricultural reform.

In fact, however, both guidelines were eventually weakened in the process of attempting to create procedures that were politically and legally acceptable, economically feasible, and administratively workable. Though more than 1.5 million claims for restitution were filed by the registration deadlines in the fall of 1990,⁴⁶ three years later the government was still trying to devise a constitutionally acceptable, and self-financing, policy. By this time the Kohl government, which initially had conceived the principle of "restitution before compensation," was itself trying to circumvent this obligation in the interest of more speedily untangling the stalled eastern property market. Constitutional amendments devised by the parties to the Unification Treaty permitted legislative dilution of in-kind restitution, and these were used to clear the way for a series of laws giving unambiguous priority to efficiency concerns over the claims of former owners.⁴⁷ At the same time, however, while the Constitutional Court in 1991 upheld the

Unification Treaty's differential treatment of victims of Soviet--as opposed to GDR--confiscations, later drafts of the government's restitution policies reflected increasing sensitivity to the demands of individuals and corporations that had lost property during the Soviet occupation.⁴⁸ Even after the adopt of clear and fixed policies, the resolution of individual claims will be extraordinarily difficult and time consuming.

The initial commitments made by German restitution policy ignored many of the foreseeable economic and psychological costs of implementation. It was entirely predictable that the lack of property records for much of the east would make adjudication of claims a protracted process; that unclear and slow restitution policies would slow investment in the east; and that physical restitution of property to former owners, most of whom were in the west, would threaten to deprive many easterners of homes to which they felt entitled. However, once Chancellor Kohl decided to embrace rapid unification, the West German government committed itself to policies intended to placate existing (property-owning) constituencies. Financial constraints became important for framing restitution legislation only after it became clear how large a portion of the CDU's old and new supporters would bear the costs of these policies without benefitting from them.

In contrast, leaders in Czechoslovakia from the start gave much more attention to the possible economic difficulties associated with restitution policies. As a result, Czechoslovak policy was at the outset more tilted toward considerations of general economic welfare than was the initial German policy, which was primarily concerned with the interests of former property owners and their heirs. The broad consensus that accompanied the initial Czechoslovak Law on Legal Rehabilitations was absent in the subsequent debates surrounding restitution, probably because the country's economic problems were better known by the end of 1990, when legislators began considering such policies. Perhaps more importantly, advocates of swift marketization had consolidated their position in the government and gained the upper hand in setting economic policy.⁴⁹ In comparison with their German counterparts, the architects of Czechoslovak economic reform (most prominently Finance Minister Klaus and Economy Minister Vladimír Dlouhý) devoted much more attention to restitution's potential to delay allocation of legal title.

While Klaus and Dlouhý could not ignore demands--fueled in part by the adoption of the Law on Legal Rehabilitation--for further reparations, they sought to ensure that any provisions for in-kind restitution rather than compensation be reconciled with rapid privatization. This is implicit in the very language they used to make their case, replacing restitution with "reprivatization," a term which emphasized the policy's purely instrumental benefits. The first such measure, the so-called "Small Restitution Law" of October 1990, included only about 80,000 small stores, houses, apartment buildings, workshops, hotels, and inns which had been seized with little or no compensation by the Communist government between 1955 and 1961.⁵⁰

The quick disposal of state-owned properties under the Small Restitution Law encouraged demands for the more far-reaching restitution measures of the 1991 Law on Extrajudicial Rehabilitation,

which became known as the "Large Restitution Law." Large Restitution mandated the return of property or compensation to those discriminated against for political or religious reasons, and to those imprisoned without trial--a group that some reckoned to be as large as two million people. Since an estimated ten percent of all state-owned property was to be privatized under this law, restitution was poised to become a major channel of privatization.⁵¹

Yet Czechoslovak guidelines about the form of further reparation were never as clearly stated as the German principle of "return instead of compensation." The Czechoslovak government first emphasized physical restitution of property, then switched course, proposing instead limited compensation to former owners in cash or securities. The shift reflected the well-founded fears of Klaus and Dlouh. According to Klaus, physical restitution should be carried out only in those "few instances" where discrete properties could be returned to easily identifiable owners or their heirs (thus his support for Small Restitution); any additional "reprivatization," however, should occur within the framework of the country's voucher privatization program.⁵²

Following further disputes between the government and the Federal Assembly, restitution in-kind was reinstated as a central principle of the Large Restitution. Nevertheless, a number of important qualifications were ultimately incorporated into the enacted law with the aim of harmonizing competing moral and economic agendas. The new law limited restitution to physical persons, and thus excluded political parties, religious groups, and corporations. Likewise, it made no provision for restitution of intangible assets, such as stocks or intellectual property. Use limitations (in the form of a ten-year lease-back requirement) were also imposed on those who recovered buildings housing embassies, schools, and other cultural or public institutions. Furthermore, as with Small Restitution, applicants were given six months to file claims. Yet this provision now gained greater significance in light of other efforts intended to restrict the number of applicants, such as limiting applications by exiles and emigrés to those who quickly reclaimed Czechoslovak citizenship and reestablished permanent residency.

Czechoslovak lawmakers had greater initial success than their German counterparts in maintaining an economically advantageous temporal threshold for their restitution policy, which was limited to expropriations that took place after February 25, 1948 (the date of the Communist takeover). Policymakers made no secret about why they chose this date: had the date been extended back to 1945, the government would have had to recognize claims of Germans and Hungarians who were forced out of the country in 1945. Their very expulsion meant that both groups had little political representation in contemporary Czechoslovakia. Public opinion still firmly supported the original confiscations, and neither the German nor the Hungarian governments (nor the sizeable Hungarian minority in Slovakia) exerted strong pressure on Czechoslovakia to recognize the claims of their expellee populations.⁵³

Aside from these claims, the cutoff date guaranteed continued state control over the disposition of the remainder of the roughly sixty percent of the economy (and eighty-six percent of industrial plant)

that was nationalized between 1945 and 1948. As a result, Czechoslovakia was able to use the date of the formal establishment of the Communist regime to produce a restitution program that could claim to be both limited and self-financing. In line with Klaus's proposal, for those industrial properties that were affected, restitution was combined with so-called "mass privatization," thereby replacing the return of physical property with recognition of non-specific claims to state assets. Claimants were eligible for cash compensation up to 30,000 crowns (\$1,000). Above this amount, they received shares in the Restitution Privatization Fund, managed under the authority of each republic's National Property Fund. Each firm's privatization plan in turn was required to set aside three percent of shares for the fund. These securities, the law points out, do not create any financial obligation on the part of the state.⁵⁴

Even with all of the significant limitations concerning eligibility and type of compensation, however, judicial and bureaucratic manpower shortages have delayed the final resolution of claims. As in Germany, the number of in-kind restitution claims allowed under the law has been sufficient to cause serious backlogs in the courts. In comparison to Germany, the Czech judiciary was almost certainly even more understaffed and less experienced.⁵⁵ The Ministry for the Administration of National Property and its Privatization recently admitted it has been able to settle only one-fifth of compensation claims. Similarly, the Finance Ministry conceded that it has been able to resolve only one-tenth of the claims it has received. Thus, while the main goal of compensating victims was to inspire confidence in the new regime, in 1994 the Czech parliament--two years after the last cases were to have been settled--amended the relevant laws to extend the state's deadline another three years.

Of course, even this was considerably quicker than in Germany, where many claimants were still waiting in mid-1994 for compensation procedures to be approved, itself a reflection of the lower salience of the issue for German politics. But the greater importance attached to these policies in the Czech case should be viewed in the context of lingering ambivalence concerning their underlying rationale. Failure to resolve this fundamental question has left all compromises prone to later political and legislative developments, which, as we shall see, have reinvigorated arguments that compensation generally, and restitution in particular, is a vital moral imperative not to be limited by more "mundane" economic considerations.

Criminal Prosecution

Deciding the extent to which victims of state-sponsored persecution should be compensated is only one of the major challenges of retrospective justice taken up by the German and Czech regimes. A second is the attempt to assess legal responsibility for the acts of their predecessors. The effects of such a policy depends upon several variables whose interaction cannot always be anticipated beforehand.⁵⁶ The way that outcomes are perceived is influenced by the selection of defendants, the nature of the charges brought, and the ability of courts and prosecutors to negotiate the political subtext

of proceedings by virtue of their own integrity and ability to safeguard procedural fairness. All are important since a major political goal of such trials, almost by definition, is to standardize justice across regimes.

In both countries there was broad popular support for trials of at least some leading figures of the old regime, and, since few of them had fled, most were readily available for possible prosecutions. But in both cases, it has proved to be extraordinarily difficult to hold particular individuals criminally accountable for the most egregious acts. With very few exceptions, the decision to prosecute has entailed a shift in judicial focus away from offenses involving politically motivated persecution toward those of which could be committed by venal politicians and brutal police anywhere.

In part, this shift can be explained by the fact that identification and prosecution of specifically politically motivated crimes is difficult to achieve without violating a primary legal norm upheld by both successor regimes, namely, the proscription of retroactive application of legal norms. (This principle was enshrined in both countries' constitutions.) Thus, officials deciding at the outset how to proceed had only two ways to establish legal accountability. They could apply the previously existing penal code in ways not formerly used, or they could invoke higher laws, be they "laws of humanity" or treaty obligations protecting human rights (such as those agreed to under the Helsinki Accords).

While obligations of the second type provide a strong justification for prosecution, they do not usually form the basis of charges. As a rule, both countries have followed the first strategy, thereby avoiding the difficulties modern legal systems confront in attempting to apply some variant of natural law.⁵⁷ Of course, this has also meant a priori a certain dilution of whatever pedagogic effect such trials were supposed to have. Because they largely recognize the legal rules of the previous regime as valid and binding, judgment of the system of which they were a part can play no relevant role in criminal proceedings.

Nevertheless, even under this more modest strategy, convictions on serious charges might have had a strong effect by publicly highlighting the moral corruption of the old regime. Instead, it has proven no simple task to win convictions even on lesser charges, and prosecutors' difficulties have been compounded by short statutes of limitations, improperly gathered evidence, and unavailable or recalcitrant witnesses.

German state and federal agencies embarked on a vigorous prosecution campaign, spurred on after unification by perceptions that West Germany had not done enough to prosecute Nazi collaborators. In early 1990, the East German Round-Table government took the first steps towards bringing to justice high-ranking members of the former regime, temporarily arresting the former head of state, Erich Honecker, and bringing charges against local party leaders for electoral fraud in the May 1989 local elections. Prosecutors in unified Germany eventually won convictions in several cases of the latter sort, in part because some defendants admitted to violating the letter of East German law--although even in

these cases, the validity of the trials was contested.⁵⁸

Most other cases required considerable ingenuity on the part of persistent state prosecutors, and the magnitude of the task overwhelmed the special directorate of the Berlin state prosecutor's office, which initially inherited the leading role in prosecuting cases against former GDR officials. One well-known instance of such procedural innovation was the decision to try the former head of East German state security, Erich Mielke, not for his work as Stasi director (where charges under DDR-law were difficult and evidence thin), but for a murder he allegedly committed in 1931.⁵⁹ Although prosecutors finally obtained a conviction against Mielke in 1993, the trial raised difficult questions about the admissibility of evidence collected by totalitarian states, and about the accountability of sick old men.

Other highly publicized trials raised equally difficult questions which helped undermine public support for the legal efforts. In a series of trials beginning in 1991, several former East German border guards were convicted for their part in carrying out East Germany's "shoot-to-kill" policy on the intra-German border. Although such actions were authorized by a 1982 DDR law, the Federal German Court ruled that the unrestrained shots of the border guards violated provisions of the East German constitution which promised to protect human rights. But many Germans viewed the verdicts in these cases as inadequate as long as those at the top of the chain of command were not also convicted. German prosecutors later brought charges against six leading SED members said to have authorized the shoot to kill policy.

The most famous member of this group was the former head of state, Erich Honecker. Yet efforts to hold Honecker criminally accountable ultimately failed, defeated in the end by the former leader's age and ill health. And while three of Honecker's co-defendants were eventually found guilty of "instigation to murder" for their part in authorizing the shoot-to-kill border policy,⁶⁰ prosecution of other GDR officials proceeded only slowly. By the summer of 1993, the Berlin prosecutor's Workgroup on Government Criminality had brought charges against 1750 former officials, but had settled fewer than 100 of these cases.⁶¹

Despite (or perhaps on account of) a steady stream of mostly low-level convictions and ongoing trials, by the end of 1993 the German legal system had proved unable to satisfy those trying to come to terms with the abuses of the old regime. Popular support faded as the impression grew that the criminal justice system could successfully prosecute only minor perpetrators, while those at the top of the old system continued to evade punishment. As early as mid-1992 large and growing minorities in both east and west felt that it was time to draw a line under the past.⁶² Nevertheless, even in the face of waning public approval, in the autumn of 1993 federal legislators hurriedly extended the statutes of limitations on many offenses committed in the GDR, an action they took only days before some were due to take effect. Party leaders from eastern states divided themselves between the strong supporters and the strongest supporters, as well as some of the strongest opponents, of this legislation.⁶³ However, in the

Bundestag, only the PDS voted against the measure.

However, this legislative vote represented the only instance of parliamentary involvement in retributive justice in Germany. Members of the Bundestag did join in a cross-party effort to uncover facts about the operation of the East German regime, but this was a generally low-visibility effort that concluded in mid-1994 with parliamentary debate about and acceptance of a final report.⁶⁴ When German legislators finally did get actively involved in aiding the process of prosecution of former officials (by extending the statute of limitations), they were responding to the concerns of state prosecutors, not out of a need to shore up popular support or create ideological markers. While some may have seen the vote as another way to harass the PDS,⁶⁵ they clearly did not view it as central to their political identity; and disagreements remained contained within existing parties.

The path to retribution followed a much different course in the Czech Republic. While the German justice ministries took the lead in prosecuting individuals for acts committed under the aegis of the former GDR, in Czechoslovakia legislators, not state prosecutors or courts, most visibly urged criminal proceedings. Two features of Czechoslovakia's post-revolutionary administrative and political structure can account for this. First, the new regime lacked a professional, untainted civil service that could initiate and carry out independent investigations. Second, even after the June 1990 elections, the mandate gained by the new government was in fact plebiscitary in nature, based on rejection of the Communist alternative and charismatic faith in the revolution's leaders.⁶⁶

Rejection of the past offered a possible basis for the legitimation of leaders and institutions alike in large part because the premises of "velvet revolution"--taken here to imply a moral emphasis on tolerance over dogmatism, moderation over fanaticism, and reconciliation over revenge--were never entirely accepted by former dissidents themselves. In early public discussions, highly vocal anti-Communist groups called for swift and decisive action against former Communists. In 1990, for example, the Confederation of Political Prisoners (KPVČ) demanded the prosecution of former president Gustáv Husák along with other former leaders, and of members of the former secret police (Státní bezpečnost--StB). The KPVČ, along with the Club of Committed Non-Party Members (KAN), also called for an international tribunal to be formed in Prague to "condemn communism as a fascist and criminal movement."⁶⁷ Both groups had close ties and overlapping memberships with each other and with Civic Forum, the organizational embodiment of the revolutionary movement. Thus, for example, it was the newspaper Respekt, the direct successor to Civic Forum's official organ during the revolution, that published many of the demands and rationales.

These included a particularly influential argument by Federal Assembly deputy Pavel Bratinka, a prominent ex-dissident intellectual who at the time was a member of Civic Forum and the Inter-parliamentary Club of the Democratic Right. Bratinka agreed with the KPVČ and KAN that officials of the former regime, and particularly agents of the secret police, should be tried either under existing statutes

or for crimes against humanity. However, he differed from the other groups in arguing that only the Federal Assembly, not an extraordinary tribunal, should be entrusted with the task of judging the past.⁶⁸ The demand for justice was the same, but Bratinka's formulation possessed a much firmer grasp of constitutional reality. To declare Communism criminal by appeal to an authority outside established institutions, as the KPVČ and KAN desired, would have called into question the legal continuity with the Communist-era constitution upon which those institutions were based. Judgment of the past, as Bratinka saw it, must serve to reestablish discredited institutions, above all the Federal Assembly, as themselves legitimate sources of power.

Whatever its merits as a realistic or coherent strategy, KPVČ and KAN pressure was merely a more extreme version of a widely held commitment on the part of many former dissidents. Czechoslovak President Václav Havel, in particular, revealed a disturbing tendency to confuse the purposes of criminal proceedings with the equally serious but institutionally distinct task of historical investigation. His 1990 New Year's address, in which he urged that everyone assume responsibility for the totalitarian past, is often cited as evidence of his supposedly conciliatory position. In a much-overlooked passage, however, he also recommended what an ungenerous observer might call show trials, suggesting that prosecutions were necessary in order to "bring to light the truth about our recent past."⁶⁹

Thus, it is understandable that more radical and single-minded ex-dissidents would focus attention on the continuing failure of prosecutors to take action against former Communist elites. As of April 1993, prosecutors had prepared charges against 198 former government and party functionaries, prosecutors, judges, and spies, yet only twenty-eight had resulted in convictions. A year and a half later, the number of those facing charges had risen to 243, but there was not a single additional conviction. Most of those convicted were charged with abuse of power or petty corruption, and their prison sentences have not exceeded three or four years, with probation and fines being the more common forms of punishment.⁷⁰ No high-level official has been tried or convicted on more serious charges, and Husák faced no criminal charges whatsoever when he died of cancer in late 1991.

Czech prosecutors have been only marginally more effective in prosecuting lower-level officials, and they have focused mainly on events surrounding the revolution itself. Even here, however, charges against twenty-eight (of the more than 1600) policemen involved in violently repressing the initial Prague demonstration on November 17, 1989 have resulted in only fourteen convictions. It was not until August 1993, after three years of adjournments, that the first of 140 witnesses was questioned in the trial of Michal Danišovič and Bedřich Houbal, two police officials charged with ordering the action. Again, the most severe sentence handed down so far in these cases has been a single four-year prison term.⁷¹

The justice system's slowness in prosecuting crimes committed under the former regime was a result both of political decisions (or non-decisions) and institutional shortcomings. Responsibility for investigating possible crimes was first given to the Federal Interior Ministry (FMV), which retained a large

number of former StB agents.⁷² The first post-1989 interior minister, Richard Sacher, was a member of the People's Party, which until the revolution had been a Communist satellite. Sacher argued in early 1990 that using the legal system to hold past collaborators responsible, as the KPVČ and KAN advocated, threatened "to stir up the dangerous self-defense tendencies" of these agents.⁷³ In any case, during the massive reorganization of the Interior Ministry that followed in 1990 and 1991, the FMV clearly lacked the bureaucratic capacity to carry out effective investigations; nor, despite severe criticism of Sacher within the Federal Assembly, was there a move to allocate the resources necessary to punish old masters. Thus, during the first two years after the revolution none of the hundreds of complaints received by the FMV was turned over to a prosecutor--hardly surprising, since the department charged with determining their merit had only a single employee.⁷⁴

A final and very significant obstacle to criminal prosecutions has been Slovak nationalism and the breakup of the federation, which directly affected the only two cases involving top officials. The first concerned Vasil Bělák, the sole surviving signatory of a letter to the Soviet leadership used to justify the 1968 invasion, and widely viewed as one of the principal political and ideological pillars of the post-invasion "normalization." As the letter was the key piece of evidence against Bělák, Czechoslovak officials formally requested in 1990 that the Soviet government turn it over to them. Yet the investigation was conducted by the Office of the General Prosecutor of the Czech Republic. By the time the Yeltsin government produced the letter two years later, Czechoslovakia had already become a caretaker state more preoccupied with ensuring a smooth separation than initiating a legally complicated prosecution. Bělák claimed Slovak citizenship, and Slovakia has shown no inclination to take action against him.

The second case more amply illustrates the polarization of Czech justice and Slovak nationalism. General Alojz Lorenc, a former deputy interior minister and the last man in charge of the secret police, was convicted in October 1992 by a military court on the territory of the Czech Republic on charges of exceeding his authority by ordering the detention of dissidents at the start of the revolution. Like Bělák, he became a Slovak citizen and settled in Bratislava while free on appeal, but unlike Bělák, he did not choose to keep silent. He gave numerous interviews to the nationalist press in which he very effectively portrayed himself as a victim of arbitrary political vengeance and others' ambitions.⁷⁵ He lost his appeal in the Czech Republic in May 1993, but the Slovak government has not taken action against him. On the contrary, though his claims of arbitrariness evoked little sympathy in the Czech Republic, they resonated with nationalist sentiments in Slovakia.⁷⁶

Excluding Collaborators

Measures adopted in both Germany and Czechoslovakia identify classes of "collaborators" who are to be denied benefits and/or excluded from certain public and quasi-public roles. The affected classes have been defined according to two criteria: 1) higher-level membership in the Communist Party,

membership in party para-military organizations, or participation in various security-related training courses; or 2) employment by, or services rendered for, the secret police, the primary evidence of which is the secret police's own records.

From the standpoint of its supporters, this strategy has two advantages over criminal trials as a way of assessing responsibility for the past, although in neither country has it superseded them. First, it adds a forward-looking national security interest (legitimizing categorical exclusion as a defense of democracy and reform) to non-legal, backward-looking moral intuitions against permitting those in the defined classes to continue in, or gain access to, visible public positions. Second, whatever justification is chosen, categorical exclusion is seen as a far more efficient way to apportion blame since by definition it avoids the cumbersome institutional constraints and procedural guarantees obtaining where individual guilt must be determined. In neither country, however, has disqualification remained confined to the task of allocating responsibility for the past.

Again, Germany was unique among post-Communist states because the West German workforce constituted a large alternative source of bureaucratic and judicial expertise: here, if anywhere, the personnel would have been available to conduct a thorough political purge of East German state employees. West Germany already had a tested legal tradition that permitted governments to refuse employment to applicants because of their political beliefs, or because of past or present political affiliations. Yet disqualification has instead become inseparable from the wider process of social absorption.

Post-unification policies regarding the retention and hiring of public employees were made at both the state and federal levels. States pursued these policies with varying degrees of vigor and with attention to different areas. Overall, however, perhaps the most thorough political purges of public employees focused on school teachers, reflecting the importance which both the new and old regimes attached to civic education. But the comparative thoroughness displayed in this field may also have reflected the fact that the post-unification states could more easily afford to lose many of these employees, since they found themselves to be saddled with an excessive number of teachers, even while they lacked sufficient employees elsewhere, for instance in police forces.

For school teachers and other public employees, evidence of past work as an official or "unofficial" State Security Ministry (Stasi) employee was usually treated as grounds for dismissal or for unemployment. That Stasi records were even available had much to do with the efforts of opponents of the former East German regime. In the first weeks and months after the collapse of the old regime, local citizen committees helped to prevent the destruction of many (though not all) of the local and national Stasi files. Public figures in both East and West held an impassioned debate about whether to preserve these files, and, if so, who should be granted access to them. Some in the East argued that the information contained in the files was irredeemably tainted and should be destroyed in the interests of reconciliation.

Many prominent ex-dissidents, however, argued for the rights of victims to learn the full details of how they had been persecuted by former GDR authorities, and by whom. Of all the decisions that have been made in Germany concerning policies to deal with the legacy of GDR injustice, it is with regard to the decision to preserve these records, and to keep them open for the use of the new regime, that former dissidents' calls for justice had the clearest impact.⁷⁷

After unification, the disorganized Stasi files were transferred to a newly created federal archive, known as the "Gauck Office" after its first director, the former East German dissident minister Joachim Gauck. This office was given the herculean task of responding to state and federal government requests for Stasi background checks of public employees and would-be employees. Because of the condition of the files, however, examining them was a slow process that was still underway thirty months after unification. In the summer of 1993 there were pending appeals by 3,200 of the 4,700 schoolteachers fired by the state of Saxony because of their past affiliations with the Stasi or with the SED;⁷⁸ meanwhile, Saxony's governing CDU (led by the popular westerner, Kurt Biedenkopf) was publicly complaining about the more than 2,600 alleged former Stasi collaborators then employed by the federal government.⁷⁹

The slowness of the process, and the Saxon government's complaints, serve to highlight the tension between the logic of "checking" Easterners and the considerable pressure on the part of western German leaders to carry out unification by rejecting the East German past *in toto*. This is readily apparent in the development of the political parties in the eastern states. While neither Germany nor the Czech Republic passed laws to prevent election of those identified as collaborators, most parties in both countries either screened their own candidates or chose not to support colleagues accused by sensational media reports of collaboration with the former security services. Such accusations forced one after another East German politician to resign from public office. Probably the best-known early victim of such charges was Lothar de Maziere, the only democratically elected East German prime minister. Immediately after the 1990 "unification election," allegations about de Maziere's Stasi past forced him to surrender his seat in Helmut Kohl's cabinet, and eventually his Bundestag seat as well. State governments in the east were decimated by similar scandals. Because even party screening processes proved vulnerable to new evidence from Stasi files, they could not neutralize the incentives for eastern parties to avoid getting bogged down in issues of the past by simply importing West German politicians to fill top party posts.

It is this broader process of wholesale elite replacement that, paradoxically, has rendered past behavior a practically unimportant criterion under German disqualification procedures. Unification imposed neutral western standards of performance in most occupations that might otherwise be targets of a purge carried out on purely political grounds. The legal framework for disqualification was constructed and has been applied more often with a view to technical competence than to past associations or actions, a process facilitated by a more or less eager horde of latter-day carpetbaggers.⁸⁰ Nor

is this normative displacement limited to elites, for the sudden obsolescence of entire industries caused by unification means that far more occupations have been affected. Whatever special moral opprobrium was to be attached to the disqualification of a particular class of actors has been subsumed, along with the only victory dissidents could claim as their own, under an economically determined fate that is much more widely shared by East Germans.

In Czechoslovakia, no reserve army of bureaucratic replacements existed, and the new society has had to develop from within. As a result, there was a much greater overlap between arguments invoking moral considerations in favor of disqualification, and those justifying it as a pragmatic measure aimed at defending, or rather completing, the revolution. The central aspect of the debate's actual political dynamics, however, was that key actors were able to waver strategically between the two justifications in order to unify a segment of the political elite internally and mobilize electoral support externally.

Seen from this perspective, Havel's role in bringing about the main legislation in Czechoslovakia, the Lustration Act adopted in October 1991, comes much more clearly into view. The law enacted by the Federal Assembly was an amended version of a government bill that would have disqualified only those proven to have violated human rights. Along with many other former dissidents within the government, Havel is generally credited for his opposition to the law's final form, which he strongly criticized as legislating the principle of collective guilt. Yet Havel himself helped prepare the ground for the amended version by implicitly and explicitly endorsing calls for further "revolutionary" measures.

Militant ex-dissidents surely took comfort from the fact that many of their number were among the president's closest advisors. These included Jan Ruml, a former editor of Respekt appointed by Havel to be Deputy Interior Minister in response to complaints within Civic Forum about Sacher's apprehensive leadership. Ruml did much to advance the cause of lustration by, among other things, insisting that the files at his disposal be used to screen candidates prior to the 1990 elections, causing predictable scandals and charges of manipulation by Civic Forum.

More revealingly, Havel delivered a speech two months after the 1990 elections on the anniversary of the 1968 Soviet invasion in which he condemned the continued existence of "the old bureaucracy at all levels" of government and industry, and argued that "the main part of the revolution must still happen." He appealed to the Federal Assembly to amend the labor code to force the removal of "incompetent or sabotaging nomenklatura," and called on "individual citizens" to act to bring about the removal of those representing the "old structures."⁸¹ Havel thus provided legitimacy for assumptions about the threat constituted by the former elite which could later be invoked by supporters of the amended bill.

This is an important point, because, while many were certainly motivated by sincere beliefs concerning the need for disqualification, others clearly acted from a desire to bring sharper contours to the political scene before the June 1992 elections. The legislative debate came after the split of Civic

Forum's parliamentary and governmental delegations (a rift precipitated by disagreements about whether Civic Forum should transform itself into a West European-style political party). ODS emerged as the larger parliamentary party from this split, but its only cabinet representative was Václav Klaus. ODS thus evolved into an internal opposition, and it supported the amended version of the Lustration Act as a wedge to distinguish itself from its anti-party rivals in the Civic Movement (OH), whose members dominated the government and framed the original bill.

Underlying features of the political context made the issue an attractive one for those trying to establish a high-profile political identity. In particular, there were few available alternatives. Given the underdevelopment of social stratification, those committed to party development were in no position to differentiate themselves as advocates of group economic interests. Support for religiously-based confessional politics was weak among the predominantly secular Czechs, with the relatively ecumenical Christian Democrats averaging about 8.5% in elections to various legislative bodies in 1990. Nor was nationalist assertion an available option, not only because of the near ethnic homogeneity attained in the Czech lands following World War II, but also because an overwhelming majority of Czechs favored maintaining a common state with the Slovaks.⁸²

Moreover, differences among Civic Forum's two main successors about the aims and pace of economic reform were not yet readily perceived by the public. Voters most supportive of economic reform were split almost evenly between ODS and OH through early 1991, although ODS started building a lead by April. Meanwhile, however, party leaders became increasingly aware of the need to find a polarizing issue with which to mobilize voters, as opinion polls conducted in mid-1991 revealed that fewer than half of Civic Forum voters expressed allegiance to either group.⁸³ In a setting defined by low levels of grassroots activity, widespread suspicion of all political parties, undisciplined voting within highly porous parliamentary clubs, and approaching elections, elites intent on establishing strong party channels were eager to discover an issue guaranteed to produce a high level of voter interest and party polarization.

The debate over lustration satisfied both requirements. First, its narrative structure reduced the ambiguities of historical interpretation to a series of personal and political contests with determinate outcomes. In this sense, it was a "spectacular" issue in which the mass media were intensely interested.⁸⁴ Because the parties' infrastructures were at best rudimentary (and confined to Prague or Brno), journalists, publicists, and editors became their most important organizers. Their interest was sustained and reinforced by the attention devoted to it by Havel, his aides and appointees, and other "newsworthy" leaders, as well as by several highly visible scandals in the months preceding the parliamentary debate. These included, as in the German Bundestag, the public exposure of several Federal Assembly deputies as alleged StB collaborators. Forty percent of the population watched the live broadcast of the proceedings on television, and a further thirty-three percent followed the story in the press.⁸⁵ Second, there was not only widespread agreement that the persistence of former Communists in leadership

positions posed a problem; there was also virtual unanimity within Civic Forum and its successors, and among non-Communist forces generally, that the problem should be addressed through legislation, often justified as necessary to preempt private acts of revenge.⁸⁶ Yet despite this consensus, there was, as with previous retrospective measures, no settlement on the purposes the law should serve, and how it would do so. Combined with nearly unanimous support for some law, this lack of agreement on its proper rationale—and consequently its mode of operation—became politically exploitable.

ODS leader Klaus embraced the anti-subversion justification previously advocated by Havel. At the time Havel advanced it, however, Klaus himself had argued that "no litmus test exists which could precisely divide good and evil between Communists and non-Communists," a statement hardly consistent with the logic of categorical disqualification.⁸⁷ Klaus had never been a dissident, and neither his earlier position nor the pragmatic basis of his later change of heart make it likely that he was motivated by shame, guilt, a craving for catharsis, etc. Rather, by adopting this argument now, Klaus and his supporters could safely ignore liberals' objections to the amended law and Havel's request that it be changed. He began arguing that privatization was being subverted by "silent agreements" between "old structures" and "several parties and movements."⁸⁸ If actual "sabotage" existed, as Havel had earlier claimed, more was needed than a law that would disqualify only those individually proven guilty of past rights violations. Moreover, the judicial system had already displayed its manifest inability to make precisely such determinations.

At the same time, adopting a pragmatic rationale for the legislation made it possible to draft the policy in such a way as to limit the affected positions and categories of people, thereby preserving the employability of much of the current technocratic and political elite—many of them former low-level Communists who had joined Civic Forum.⁸⁹ Most importantly, by crafting categories that aimed at singling out the most visibly complicit, the issue served one of ODS's most important stated goals, namely greater unity and cooperation among the parties of the Czech Right. The issue united "pragmatists" like Klaus with radical ex-dissidents who argued for categorical disqualification more as a matter of morality than one of immediate practical necessity. Prior to the 1992 elections, for example, Klaus appealed directly to KAN to place its representatives on ODS's candidate list, saying "we are united in the opinion that it is necessary to settle accounts with the communist past."⁹⁰

Earlier debates over high-visibility retrospective measures, particularly those concerning restitution, had either divided potentially allied parliamentary factions—including Klaus's own—over precisely these competing moral and pragmatic concerns, or else had placed ODS and OH deputies on the same side of the vote. The lustration vote, as Klaus explained, finally made it "possible for us to clarify who stands where, who really wants consequential change for our society, our economy, and who, on the other hand, wants to draw us into new experiments carried out by the old experimentors we know so well."⁹¹

The vote not only divided Left (and Center) from Right, with many opponents, including most OH

deputies, abstaining rather than voting with the Communists against the bill; it once again revealed deep differences between Czechs and Slovaks. Polls found that Czechs were much more likely than Slovaks to consider the legislation necessary.⁹² Deputies of the opposition nationalist Slovak parties, (Vladimír Mečiar's Movement for a Democratic Slovakia--HZDS, and the Slovak National Party--SNS), refused to participate in the vote altogether. In the months preceding the 1992 election, right-wing Czech parties used their support of the law to great advantage, tying it straightforwardly to support for pro-market program, and implying that the law's opponents were subversive. "It is no accident," Klaus argued, "that the same people opposing our economic reform and privatization for the past twenty months now oppose the lustration law."⁹³ Meanwhile, Mečiar, the winner in Slovakia, campaigned in part on an explicit promise not to apply the law there.⁹⁴

Mečiar kept his promise, and government-sponsored efforts to punish the Communist regime's active supporters, whether individually or collectively, thus ceased in Slovakia after the division of the federal state. Yet even in the Czech Republic lustration has been carried out unevenly. The law itself initially permitted exceptions in cases where its application would harm "an important security interest of the State." Although the Czechoslovak Constitutional Court struck down this clause in November 1992, the Court was powerless to change the fact that the law established no sanctions whatsoever for non-compliance. Now, as before passage of the law, the decision whether and to what extent to "lustrate" is largely dependent on the inclinations of individual power-holders, as well, of course, on the extent to which Interior Ministry files were destroyed or stolen under Sacher's tenure as Interior Minister. The absence of sanctions has also allowed official leaks and publication of alleged collaborators' names to go unpunished, thereby negating the justification that lustration would at least guarantee a transparent process regulated by law.

Predictably, doubts about enforcement have led to continuing charges and denials concerning the individuals' backgrounds, although this appears to be due in part to the self-interest of the new bureaucracies set up in the wake of the law.⁹⁵ Yet there have also been instances that have exposed the limits of lustration's legalistic approach as such, sometimes producing absurd ironies. In December 1993, the Prosecutors' Office revealed that "a majority" of those working on rehabilitation cases had worked as prosecutors in the 1950's, were thrown out after 1968, and brought back on the basis of the Law on Extrajudicial Rehabilitation. As long as they don't fall into any of the Lustration Law's categories, they cannot be removed. But the Deputy Prosecutor General admitted that "everyone who worked in the Prosecutor's Office before November 1989 in one way or another took part in that which we are now rehabilitating."⁹⁶

In fact, the purely categorical basis of the law has been itself undermined by the Constitutional Court's decision. The law established an appeals commission, but the Court ruled that it was insufficiently independent of the Interior Ministry, the agency entrusted with carrying out the screenings. As a result,

appeals are now heard by the courts, which have uniformly held that mere registration in the StB's files, in the absence of concrete evidence of subsequent acts of conscious collaboration, cannot serve as the only basis for disqualification. Because such evidence is rarely discernible in the materials used by the Interior Ministry, the courts have ruled in favor of the appellants in over ninety percent of the cases heard so far.⁹⁷ Thus, as those penalized on the basis of categorical proscriptions have gained some of the procedural protection afforded under criminal law, lustration has come to resemble the process it was partly intended to avoid.

The Birth of the Czech Republic: An Anti-Communist Christening

The triumph of ODS in the 1992 elections, the breakup of the federation, and the adoption of a new constitution finally created the legal discontinuity required to condemn the past legislatively. In July 1993, this resulted in the Law on the Illegality of and Opposition to the Communist Regime. Most clauses take the form of a resolution, that is, they do not establish clear rules binding individuals or institutions. The law does not ban the Communist Party, and the "illegality" of its regime consists in the "systematic destruction of the traditional values of European civilization"; "moral and economic decay"; "the replacement of a functioning market economy with a command economy"; "abuse of education, science, and culture"; and "destruction of the environment." Meanwhile, the law declares opposition to the regime on political, moral, and religious grounds, whether at home or abroad, "legitimate, just, morally justified, and honorable."

Natural law reasoning underlies even those clauses having the character of statutory legislation. Thus, the law suspended the statute of limitations on crimes committed from 1948 to 1989 if prosecution was not carried out for "political reasons incompatible with the basic principles of the legal order of a democratic state." It did not, however, provide any criteria for making that determination. Similarly, the law expanded the scope of rehabilitation to include those who committed what are still regarded as criminal acts. But the hijacker or saboteur must show that s/he was resisting the regime. Both provisions, and the law as a whole, effectively recognized longstanding demands of the KPVČ and KAN, as well as the quasi-constitutional principle, so forcefully enunciated by Bratinka, that the power to judge the past should be entrusted to parliament.

Some observers saw the law as a way finally to put an end to debates about the past, allowing the newly independent Czech Republic to turn toward the future—a sentiment also expressed by Havel when he signed it.⁹⁸ Instead, it has been precisely those provisions that Havel regarded as "merely" declarative that have contributed most to keeping the past exposed to partisan politics. Rather than accurately reflecting a teleological moral consensus that could produce wide agreement on guidelines for action, these provisions have become a legal oasis for many understandings of crimes, criminals, and victims.

The consequences are easily discernible in the continuation of battles over restitution. Since, for example, the law equally values the resistance of those living abroad and those who remained at home, and since it can even be construed to mean that emigration was itself a form of resistance, limitations placed on emigrants' restitution rights by the initial legislation appear far less defensible. Three years after the main restitution legislation was enacted, a group of parliamentary deputies successfully petitioned the Constitutional Court to strike down the provision requiring permanent residence in the Czech Republic, a decision whose farreaching potential to upset established property relations has caused what one commentator called a "legal nightmare."⁹⁹ Much will depend on whether the newly authorized claimants view the Court's symbolic vindication of their equal citizenship status as sufficient compensation.¹⁰⁰ Whatever the ruling's ultimate impact, it is symptomatic that none of the petition's signatories and supporters attempted to assess the move's consequences for private investment, the state budget, or judicial caseloads.

The law's substantive provisions have not fared much better. By February 1993, the Czech prosecutor general and the interior minister had created a special agency to investigate crimes committed by officials of the Communist regime (the Coordination Center for the Documentation and Investigation of Violence Against the Czech Nation). After the law was enacted, the Center's director concluded that the investigations were going to require "a number of years."¹⁰¹ Indeed, as of September 1994, only three prosecutions of those specifically targeted by the suspension of the statute of limitations--primarily those implicated in the Stalinist terror of the 1950's--were being considered. Despite employing twenty-five workers, the director of the renamed Center for the Documentation of the Illegality of the Communist Regime has urged that the statute of limitations, the last of which expires at the end of 1994, be extended yet again.¹⁰²

None of this has much to do with justice anymore. It has more to do with ODS leaders' efforts since the 1992 elections to curtail the state's involvement in attempting to right past wrongs. Just as the party's past support for state action was shaped by both economic and political considerations, so too with the party's new course. Klaus has proposed legislation to prohibit extending restitution rights to previously excluded groups, a proposal intended, in his words, to avoid "the absurd situation that almost every citizen, having been victimized by life under the Communist regime, could ask that someone compensate him."¹⁰³ But it is simultaneously an attempt to drive retrospective justice from political debate, which has only made the issue more attractive to the smaller parties in his own coalition which are searching for a wedge issue and an electoral constituency (precisely as Klaus used the issue prior to the 1992 elections.)¹⁰⁴

It would seem, then, that Klaus badly miscalculated by supporting the Law on the Illegality of and Resistance to the Communist Regime, because it has such great potential to thwart his current goals. In fact, he had little choice but to follow the logic of his own prior strategy, for anti-Communism remains

an important component of ODS's own internal cohesion and identity. Although KAN ran separately and unsuccessfully in 1992, for example, its chairman later became a member of ODS's executive committee, a choice evidently intended to accommodate the leanings of many members.¹⁰⁵ ODS backbenchers routinely split with the leadership over further retrospective measures; for instance, one group recently proposed using the law's declarative provisions to strip StB employees of their pensions.¹⁰⁶ In short, whatever reservations other leaders may have had about the law, they could not easily repudiate a fundamental commitment built into the very structure of the party. Similarly, support for the law reaffirmed a key, if highly unstable, premise of the Czech Right's unity.¹⁰⁷

Extricating both his party and the coalition intact from their anti-Communist roots will be a complicated task for Klaus. He now argues that the "agent mania" touched off by lustration has improperly emphasized questions of individual guilt over systemic transformation, and that restitution falsely assumes the primacy of crimes against property.¹⁰⁸ But his (re)turn to liberal sentiments may depend in part on authoritarian means. A few weeks after uttering these words, the executive vice-chairman of ODS forced the removal of the editor of a pro-government newspaper after it began openly criticizing what it described as the party leadership's close relations with "old structures." These include alleged former StB agents in the managements of newly privatized firms.¹⁰⁹ Replacing editors, however, has its limits as a long-term solution: the evidence for the newspaper's criticism was provided by ODS's own interior minister, Jan Ruml.

Conclusion

There are doubtless many reasons and motivations that account for the manner in which post-Communist regimes confront the acts and persons of their predecessors. We do not deny that widespread complicity in the past may result in popular feelings of guilt and shame in the present (although this is not particularly amenable to empirical measurement). Indeed, these feelings may be all the more pronounced where former complicity was based more on belief than on opportunism. The Communists received over forty percent of the Czech vote in 1946, their biggest electoral success in eastern Europe; even after revelations about the Stalinist purges of the 1950's, much of the public renewed its faith in socialism and the Party and rallied around Dubček in 1968. Whatever residue of guilt and shame exists may have been intensified by an elemental sense of betrayal.

Nor do we believe that the mode of transition plays no role in the process (although in explaining outcomes it may be analytically misleading to separate the breakdown of the old regime from its overall repressiveness). At the very least, a collapse will create opportunities for action that would not otherwise be present. Similarly, there are probably other more pedestrian and narrowly self-interested motives at work that we have not addressed. At the bottom of the most challenging and high-sounding moral debates and recriminations may be the fairly uncomplicated quest for the boss's desk.

The issue is not so much that the rationales and mechanisms others have identified are irrelevant, but rather that the diversity of reasons and motivations underlying support for retrospective justice represents a necessary but insufficient condition for its realization. Nor are they helpful in explaining its manifestation in the form of actual policies. Similar circumstances prevailed at the outset in East Germany and Czechoslovakia, yet the measures that have resulted have been so different as to suggest that they were determined by none of them. What stands out instead is the relative weight accorded retrospective justice within existing structures of representation, and this is ultimately dependent on the character of those structures themselves.

The course of retrospective justice in East Germany has been determined by the incorporation of that state into the Federal Republic, including near total incorporation into the Federal Republic's party system. The result has been, on the one hand, policies that command comparatively little attention on the political agenda and that reflect a balance of power clearly favoring the interests of established western German constituencies; and on the other, the forced redundancy of millions of easterners in which considerations of political responsibility for the past play at best a secondary role. Communist officials continue to be prosecuted and the Stasi files' secrets disclosed, but these actions have not noticeably reduced eastern Germans' estrangement from the new regime since unification.¹¹⁰ Indeed, the strong showing of the PDS in 1994 elections suggests that quite the opposite may be the case in the long term. As with virtually every other aspect of German unification, retrospective justice can no longer be considered a function of the East German regime's collapse, but rather of the Federal Republic's intervention. Still, this is a question of the concrete workings of representation, not of the abstract classification of transition processes.

Czechoslovakia is a case in point. There, what is classified as a regime collapse produced two very different results. While the dominant Czech elites have pursued retrospective justice vigorously, Slovakia's have just as vigorously rejected it. In neither case was the issue justice *per se*. For reasons that require a more searching historical and cultural analysis than can be provided here, Czechoslovakia's constituent republics adopted mutually contradictory political fundamentalisms whose role was the same: to construct from scratch a system of party representation without social bases in autonomously organized interest groups.

Against such structural underpinnings of political development, Western liberals' blandishments have proven quite helpless, and probably irrelevant. It would have been nice if the state had kept its nose out of attempting to interpret and rectify the past; the fact that it did not has indeed proved divisive and inconclusive. But we can now perhaps better see why, in the absence of other indigenous or imposed lines of political division, a successor regime nevertheless may make justice central to its consolidation. Equally, we can better understand why that decision will come to haunt those who initially supported it for that purpose.

1. For an overview of such instances, see Samuel Huntington, The Third Wave: Democratization in the Late Twentieth Century (Norman: University of Oklahoma Press, 1991), pp. 215-31.
2. Claus Offe, "Disqualification, Retribution, Restitution: Dilemmas of Justice in Post-Communist Countries," Journal of Political Philosophy, 1, 1 (1993), pp. 17-44; Jon Elster, "On Doing What One Can," East European Constitutional Review, Summer 1992, pp. 15-17; Bruce Ackerman, The Future of Liberal Revolution (New Haven: Yale University Press, 1992), Ch. 5.
3. Ackerman, The Future of Liberal Revolution, p. 73.
4. Offe, for example, calls his study a "qualitative empirical analysis of normative argumentation" that is based on "journalistic accounts, opinions published by intellectuals, or statements by politicians and legislators, on the one hand, or formal legal norms, on the other." "Disqualification, Retribution, Restitution," p. 23n15.
5. Ibid., p. 26.
6. John P. Moran, "The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget," Communist and Post-Communist Studies 27, 1 (1994), pp. 95-109, quote on p. 105.
7. Both Offe and Moran adopt the distinction between dissidents and all others from Jeri Laber, "Witch Hunt in Prague," New York Review of Books XXXIX, 7 (1990).
8. Huntington, The Third Wave, p. 215.
9. Ibid., p. 218.
10. Daniel V. Friedheim, "Bringing Society Back into Democratic Transition Theory after 1989: Pact Making and Regime Collapse," East European Politics and Societies 7, 3 (Fall 1993), pp. 487.
11. Ibid., p. 488.
12. David Stark, "Path Dependence and Privatization Strategies in East Central Europe," East European Politics and Societies 6, 1 (Winter 1992), pp. 17-54.
13. See Russell Bova, "The Political Dynamics of the Post-Communist Transition: A Comparative Perspective," World Politics 44, 1 (October 1991), p. 131; Michael Urban, "December 1993 as a Replication of Late-Soviet Electoral Practices," Post-Soviet Affairs 10, 2, pp. 127-58.
14. "In transformations those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system." The Third Wave, p. 124. Events in the Soviet Union and Russia clearly have been driven by struggles among ruling elites, all of whom became elites through the Communist Party, not by opposition from external challengers.
15. Moran, "The Communist Torturers of Eastern Europe," pp. 105-7.
16. Huntington, The Third Wave, p. 228.

17. Sarah Meiklejohn Terry, "Thinging (sic) About Post-communist Transitions: How Different Are They?," Slavic Review 52, 2 (Summer 1993), p. 334.
18. Valerie Bunce and Mária Csanádi, "Uncertainty in the Transition: Post-Communism in Hungary," East European Politics and Societies 7, 2 (Spring 1993), pp. 240-75.
19. For a particularly ardent critique of the applicability of the transition literature to post-Communist regime change that argues along these lines, see Ken Jowitt, "The Leninist Legacy," in his New World Disorder (Berkeley: University of California Press, 1992).
20. David Ost, "The Politics of Interest in Post-Communist East Europe," Theory and Society 22 (1993), p. 458.
21. Ibid., p. 456.
22. See, for example, Giovanni Sartori, Parties and Party Systems (Cambridge: Cambridge University Press, 1976), Vol. 1; and G. Bingham Powell, Contemporary Democracies (Cambridge: Harvard University Press, 1982).
23. Clifford Geertz, "Ideology as a Cultural System," in David E. Apter, ed., Ideology and Discontent (New York: Free Press, 1964), p. 64.
24. Ost, "The Politics of Interest," p. 478-79; see also Bunce and Csanádi, "Uncertainty in the Transition," p. 266. Ost's argument has been endorsed by some specialists on earlier, post-authoritarian transitions, although they still hold out hope of meaningful comparison across regime types. See, for example, Philippe C. Schmitter with Terry Lynn Karl, "The Conceptual Travels of Transitologists and Consolidologists: How Far to the East Should They Go," Slavic Review 53, 1 (Spring 1994), pp. 179-80.
25. On the revolution in Slovakia, see the documents gathered in Ke'ď sme brali do rúk budúcnosť (Bratislava: Archa, 1990). On the emergence of a nationalist-communist alliance that gained organizational coherence following the split of the revolutionary Public Against Violence in early 1991, see Soňa Szomolányi, "Formovanie politick ch elít na Slovensku," Sociológia 25, 3-4 (1993), pp. 327-41. For a good example of the nationalist critique of anti-communist measures, see Literárny týždenník 30, July 18, 1992.
26. For example, the most commonly cited work on these transitions, Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead, eds, Transitions from Authoritarian Rule (Baltimore: Johns Hopkins University Press, 1986), does not contain a single discussion of compensation policies.
27. In Chile, for example, the matter was resolved after a National Commission for Truth and Reconciliation established by President Aylwin investigated roughly 4,000 cases of "disappearances" and torture, and then recommended legislation, later enacted, to compensate victims and their families. See José Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," Hastings Law Journal 43, 6 (1992), pp. 1434-35.
28. In prescriptive analyses, this capacity is simply presupposed. See, for example, Ackerman's earnest proposals for structuring reparations. The Future of Liberal Revolution, pp. 92-5.

29. Describing Chile's National Commission for Truth and Reconciliation, of which he was a member, Zalaquett emphasizes that it was comprised of "people from across the political spectrum," thereby ensuring that its work would be perceived as "too important to be treated in a partisan manner." "Balancing Ethical Imperatives and Political Constraints," p. 1433. Without understating the importance of the Commission's work, we might nevertheless speculate that the presence of a political spectrum reflecting orientational categories other than those generated by opposition to the former regime lowered the stakes of participation for its members, thereby increasing the odds of consensus. From the opposite starting point, the same reasoning may account for the fact that no East European regime has established a similar body.

30. Manfred Küchler, 'Framing Unification: Issue Salience and Mass Sentiment 1989-1991,' in Russell Dalton ed. The New Germany Votes (Providence, RI: Berg, 1993) pp. 29-55. Holli Semetko and Klaus Schoenbach, 'The Campaign in the Media', in Russell Dalton ed. The New Germany Votes (Providence, RI: Berg, 1993), pp. 187-208.

31. Richard Rose, "Postcommunism and the Problem of Trust," Journal of Democracy 5, 3 (July 1994), p. 19.

32. Herbert Kitschelt, "The Formation of Party Systems in East Central Europe," Politics and Society 20, 1 (March 1992), pp. 20-21.

33. Ibid., pp. 26-7. Quote appears on p. 27 (emphasis in original).

34. Ibid., p. 27.

35. The theory also accords well with electoral results throughout the region. For an analysis of these results which assumes the core of Kitschelt's argument, see Andrew Janos, "Continuity and Change in Eastern Europe: Strategies of Post-Communist Politics," East European Politics and Societies 8, 1 (Winter 1994), p. 27.

36. Kitschelt, "The Formation of Party Systems in East Central Europe," pp. 16-19. Quote appears on p. 20.

37. Ost, 'The Politics of Interest in Post-Communist East Europe,' p. 480.

38. Representatives of the public prosecutor's office and the Ministry of Justice, for example, estimated that the cost would come to \$4 billion. See Jan Obrman, "Rehabilitating Political Victims," Report on Eastern Europe, December 14, 1990, pp. 5-8; and Jirf Pehe, "Reforming the Judiciary," Report on Eastern Europe, August 23, 1991, pp. 9-13.

39. Martin Kupka, "Transformation of Ownership in Czechoslovakia," Soviet Studies, 44, no. 2 (1992), p. 300.

40. Lidové noviny, August 12, 1993.

41. Mladá fronta dnes, January 14, 1994.

42. Ingrid Köppe, Günther Saathoff, "Aufarbeitung der Stasi-Vergangenheit: Täter, Opfer, Unterlagen," Vorgänge, no. 110, April 1991, p. 99.

43. Hannes Kaschkat and Harry Schlip, "Zur Entschädigung der Opfer," Deutschland Archiv, 24, no. (1991), pp. 238-246.
44. Rudolf Wassermann, "Zur Aufarbeitung des SED-Unrechts," aus Politik und Zeitgeschichte, 35, no. 4 (1993), p. 9.
45. Hannes Kaschkat, "Die Haftung für DDR-Unrecht und der Entwurf des 2. SED-Unrechtsbereinigungsgesetzes," Deutschland Archiv, 26, no. 5 (1993), pp. 598-602. Günther Saathoff, Jürgen Roth, Jutta vom Stein, "Kritik am Entwurf der Bundesregierung für ein 2. SED-Unrechtsbereinigungsgesetz," Deutschland Archiv, 26, no. 5 (May 1993), pp. 602-606. "Böses Ende", Spiegel, 50, 1992, pp. 105-109.
46. "Das gibt furchtbaren Ärger," Spiegel, 2, 1992, pp. 66-68.
47. Ulrich Preuss, "Restitution vs. Investment," East European Constitutional Review, Summer 1992, pp. 22-24.
48. "Grober Unfug," Spiegel, 28, 1992, pp. 27-30. "Entschädigungsgesetz--Bonn versucht sich in der Quadratur des Kreises," Frankfurter Rundschau, July 31, 1993, p. 9.
49. See Peter Rutland, "Thatcherism Czech-style: Transition to Capitalism in the Czech Republic," Telos, Vol. 94 (Winter 1992-1993), pp. 107-9. For a statement of the competing positions on the pace of reform, see Jan Adam, "Transformation to a Market Economy in the Former Czechoslovakia," Europe-Asia Studies, Vol. 45, No. 4 (1993), pp. 639-41.
50. Josef Burger, "Politics of Restitution in Czechoslovakia," East European Quarterly, 26, no. 4 (1993), p. 486.
51. "Two Landmark Bills on Privatization Approved," Report on Eastern Europe, March 15, 1991, p. 13; "Czechs to Return Seized Property," New York Times, February 27, 1991. Jan Macháček, "Privatization: More Than an Economic Goal," East European Reporter, January-February 1992, p. 56.
52. Kupka, "Transformation of Ownership in Czechoslovakia," p. 305; Karel Kuehnl and Jan Obrman, "Interview with Finance Minister Václav Klaus," Report on Eastern Europe, September 21, 1990, p. 13.
53. A 1993 opinion poll found that 76% of the Czech population regards the question of the "transfer" of the German population as settled once and for all. Lidové noviny, August 10, 1993. For an important analysis of the way restitution laws have been framed to preserve the increased national homogeneity achieved in Central European states after the Second World War, see Shlomo Avineri's contribution to "A Forum on Restitution," East European Constitutional Review, Summer 1993, pp. 34-7.
54. Roman Frydman, Andrzej Rapaczynski, and John S. Earle, The Privatization Process in Central Europe (London: Central European University Press, 1993), p. 77.
55. Rudé právo, June 18, 1994.
56. For a definitive treatment of the types of political trial, including "trial by fiat of the successor regime," see Otto Kirchheimer, Political Justice: The Use of Legal Procedure for Political Ends (Princeton: Princeton University Press, 1961), chs. 3 and 8.

57. See H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961), ch. 9.
58. Detlef Krell, "Ein schwieriges Verfahren zwischen Politik und Justiz," Das Parlament, no. 19, 1993, p. 10.
59. "Warum es so schwer ist, Erich Mielke den Prozeß zu machen," Spiegel, 4, 1992, pp. 30-31.
60. "DDR-Politiker zu Haft verurteilt," Frankfurter Rundschau, September 17, 1993, p. 1.
61. "1750 Verfahren, aber erst fünf rechtskräftige Urteile," Frankfurter Allgemeine Zeitung, July 26, 1993, p. 3.
62. Mathias Jung, "Drei Jahre SED- und Stasi-Aufarbeitung," Politische Studien, 43, no. 324, 1992, p. 79.
63. "Thüringens Justizminister dringt auf Strafen für DDR-Delikte," Frankfurter Allgemeine Zeitung, July 22, 1993, 1.
64. "Der Bundestag will noch keinen Schlußstrich unter die jüngste deutsche Vergangenheit ziehen," Frankfurter Allgemeine Zeitung 18 June 1994, p. 1.
65. On the hostility the PDS has faced in the Bundestag, see Ann L. Phillips, "Socialism with a New Face? The PDS in Search of Reform," East European Politics and Societies 8, 3 (Fall 1994), pp. 504-5.
66. Only half of Civic Forum voters, and 42% of voters for its Slovak counterpart, Public Against Violence, cited these groups' electoral programs as an influence on their decision to support these groups. See "Nazory na politické strany, hnutí a koalice a na volební programy" (Prague: Institut pro výzkum veřejného mínění, July 1990), p. 10, Table 2.
67. Respekt, October 17-23 and November 7-13, 1990.
68. Respekt, October 17-23, 1990.
69. "Projev k občanům na Nový rok," in Václav Havel, Projevy (Prague: Vyšehrad, 1990), p. 14. Oddly, even experienced Western analysts focus only on the conciliatory features of Havel's rhetoric. Huntington, for example, cites only those passages of the same speech that indicate opposition to criminal prosecutions. The Third Wave, pp. 214, 228.
70. Lidové noviny, March 31, 1993; Mladá fronta dnes, September 21, 1994.
71. Mladá fronta dnes, August 24, 1993 and February 26, 1994.
72. See Jan Obrman, "Reform of the Security Apparatus Continues," Report on Eastern Europe, September 14, 1990, pp. 17-21.
73. Lidové noviny, April 4, 1990.
74. Respekt, April 8-14, 1991.

75. For typical examples, see Život, nos. 8-10, 1992; Nové slovo, November 23, 1992; Smena, November 25, 1992.
76. The editor-in-chief of a Slovak government-supported newspaper, for example, claimed the Czechs were persecuting Lorenc solely because of his Slovak nationality. The claim was made in Republika, published at the time by the Press Agency of the Slovak Republic. Reported in Práce, June 14, 1993.
77. John Torpey, "Coming to Terms with the Communist Past," German Politics, 2 (1993), pp. 415-435.
78. "Disziplinärverfahren gegen Nowak" Frankfurter Allgemeine Zeitung, July 9, 1993, p. 5
79. "Sachsens CDU im Streit über Versöhnung," Frankfurter Allgemeine Zeitung, 14. July, p. 4.
80. See Offe, "Disqualification, Retribution, Restitution," pp. 29-30, and p. 29n28 for an analysis of the relevant legal provisions.
81. See Václav Havel, Vážení občané. Projevy červenec 1990-červenec 1992 (Prague: Lidové noviny, 1992), pp. 16-18.
82. See, for example, "Nazory čs. veřejnosti na státoprávní uspořádání a na další existenci společného státu" (Prague: Institut pro výzkum veřejného mínění), October 31, 1991. In this poll, only 6% of Czech respondents favored an independent Czech state.
83. Jan Herzmann, "Volby v kontextu v voje veřejného mínění 1989-1991," Sociologick časopis 28, 2, pp. 178-9. Herzmann notes that this loss of support represented "a far larger part of the electoral base than was the case with other parties and movements."
84. See Murray Edelman, Constructing the Political Spectacle (Chicago: University of Chicago Press, 1988), esp. Ch. 5, "The Ambiguities of Political News." Edelman mentions court trials as analogous events, but it is worth adding here that, while trials could conceivably have contributed to the legitimacy of the new political elite as a whole, they could not directly serve to differentiate between individual elites or tendencies among elites as is the case with a parliamentary battle.
85. Bohumil Jungmann, "Čs. veřejnost o tzv. lustrační diskusi ve Federálním shromáždění" (Prague: Institut pro výzkum veřejného mínění), Report no. 91-12, April 17, 1991.
86. See, for example, Havel's remarkable statement after the enactment of the Lustration Law: "It is an example of how difficult it is to define this borderline [between justice and revenge] in legal terms--yet it must be defined in such terms, because a severe law is better than no law at all." Adam Michnik and Václav Havel, "Justice or Revenge?," Journal of Democracy 4, 1 (January 1993), p. 24.
87. Respekt, November 7-13, 1990.
88. Václav Klaus, Proč jsem konservativcem? (Prague: Edice Top, 1992), p. 44. The Economist Intelligence Unit stated bluntly that such arguments had "little validity. Privatization is proceeding more slowly than hoped because it is an intrinsically slow process." Economist Intelligence Unit, Czechoslovakia Country Report, No. 3, July 8, 1991, pp. 11-12.

89. Thus, the current Czech government includes five ministers who had been Communists. These include Finance Minister Ivan Kočárník as well as Dlouh , now the Minister of Industry and Trade, who remained in the Party until December 1989.

90. Interview in Zemědělské noviny, March 9, 1992, reprinted in Klaus, Proč jsem konservativcem, p. 38.

91. Ibid., p. 45. "Old experimentors" was a reference to the prominence within OH of 1968-era reform Communists, many of whom later became dissidents.

92. Forty-two percent of the Czech population considered the law necessary, compared with twenty-five percent of Slovaks. Similarly, thirty-one percent of Czechs, but forty-nine percent of Slovaks, considered it unnecessary. The remainder of those surveyed expressed no opinion. Miluše Rezková, "Postoje veřejnosti k 'lustračnímu zákonu'" (Prague: Institut pro výzkum veřejného mínění), Report no. 91-23, November 21, 1991.

93. Klaus, Proč jsem konservativcem?, p. 45.

94. Rudé právo, April 30, 1992.

95. Thus, Lubomír Blažek, the head of the Interior Ministry's Bureau for Documentation and Investigation of StB Activities, complains that former agents continue to hold high positions in "political, scientific, and cultural life," and that all public positions, not just top managerial posts, should be barred to those who "even once failed morally." See Rudé právo, January 8, 1994.

96. Mladá fronta dnes, December 13, 1993.

97. Mladá fronta dnes, January 7, 1994. Every appeal lodged by the Federal Assembly deputies publicly lustrated in March 1991 has been successful, including, most recently, that of Jan Kavan, whose case generated the most international publicity. Rudé právo, September 24, 1994.

98. Jan Obrman, "Czech Parliament Declares Former Communist Regime Illegal," RFE/RL Research Report, August 13, 1993, p. 10. Obrman clearly shares this judgment. For Havel's benign view of the law, see the interview in Rudé právo, September 11, 1993.

99. Jíří Pehe, "Legal Difficulties Beset the Czech Restitution Process," RFE/RL Research Report, July 15, 1994, pp. 6-13.

100. As the Secretary of the Union of Czechoslovak Associations in Switzerland, commenting on the Constitutional Court's decision, put it, "for us it was not about property, but about our relationship with our country." Lidové noviny, July 14, 1994. Still, estimates of the number of new claims range from several hundred to the several thousands.

101. Respekt, August 16-22, 1993.

102. Rudé právo, September 30, 1994.

103. Rudé právo, March 21, 1994.

104. The depth of disagreement between Klaus and the other government parties was pithily revealed by a leader of the Christian Democratic Union-Czech People's Party: "We want to end restitution not by stopping it, but by completing it." Rudé právo, March 30, 1994.

105. Interview with Filip Marco, ODS headquarters, Prague, June 3, 1994.

106. Lidové noviny, November 29, 1994.

107. In fact, anti-Communism may be the only ideological tenet defining the Czech coalition as rightist. Laissez faire rhetoric notwithstanding, the state remains highly interventionist, continues to subsidize industries and rents, guarantees a minimum income, and actively seeks to maintain social peace through corporatist pacts. See Rutland, "Thatcherism Czech-style." See also Karla Brom and Mitchell Orenstein, "The Privatized Sector in the Czech Republic: Government and Bank Control in a Transitional Economy," Europe-Asia Studies 46, 6 (1994), pp. 893-928.

108. See, for example, the interview in Rudé právo, August 13, 1994.

109. Nominally independent, the newspaper is wholly owned by a bank in which the state has a forty-five percent stake; two ODS members sit on the bank's supervisory board. While Klaus denied direct involvement, a former head of his team of advisors renounced his party membership over the affair, and a protest was lodged by the Paris-based Journalists Without Borders. Lidové noviny, September 6 and 12, 1994.

110. See Michael Minkenburg, "The Wall After the Wall," Comparative Politics, 26, 1 (October 1993), pp. 53-68.

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