

The Problems of Lustration: Prosecution of Wrongdoers by Democratic Successor Regimes

This issue went to press almost exactly four years after the death of Charles Gillespie, in whose honor I wish to dedicate the lustration symposium. A political scientist at the University of Wisconsin with a broad range of comparative interests, Charlie's major work chronicled the reemergence of democracy in Uruguay. He would doubtless have been a contributor to this issue were he still alive, and there were many times during the course of working on it when I wished I could have asked for his advice. In addition to his passion for democracy, I remember Charlie for his learning and his humor, both of which he wore with an elegant English grace. Throughout his long illness, he never lost his appreciation for the silly; his life was proof that stoicism and courage need not be cold virtues, and the world is a much poorer place in his absence.

Several years ago, political scientist Francis Fukuyama declared that we had reached "the end of history." Put crudely, what he meant was that the struggles that characterized worldwide political evolution had been decisively won, at least at an ideological level. Liberal democracy was victorious; according to Fukuyama, there was no serious ideological alternative left to challenge its superiority, either as political theory or as political practice.

If Fukuyama turns out to be right—of course, his grand pronouncement has met with considerable skepticism from many sources—then the subject of this symposium will ultimately take on an aura of quaint scholasticism. Even if Fukuyama is correct, however, I think there are at least two reasons why we should care about how democratic regimes deal with wrongdoing by their nondemocratic predecessors. While the end of history may be in view, especially if you use a powerful *telos*-scope, it is hard to argue that we're already there. The latest survey by Freedom House found that 54

countries were unfree and 61 partly free, with only 77 (40%) completely democratic; only 20% of the world's population enjoys full political rights. So the problems of lustration seem destined to haunt us for some time yet, even under the most optimistic scenario.

The second reason we should care about lustration and the problems of democratic transition is that they place in sharp focus certain central issues about law, morality, and politics. The articles in this symposium, explicitly or implicitly, touch on many of these questions. A newly democratic regime coming to power over the wreckage of its nondemocratic and often corrupt and brutal predecessor faces some of the most important questions of political and legal theory, and faces them in a highly concrete and immediate fashion. What does it mean for a prior government to have operated outside the law? When and how does law—as opposed to political tradition, culture, inertia, or luck—serve to constrain the power of the state? Is there a trade-off between coming to terms with the past and building a stable polity for the future? What are the sources of political legitimacy? And what role does law play in creating a legitimate government?

These are difficult philosophical questions, but they become even harder to answer when posed empirically, as all the articles in this symposium do. The reader will soon see that we are still searching for the appropriate vocabulary with which to frame and analyze the problems of lustration. Is it a human rights issue? Or a legal question? Or one of practical politics? That no single answer emerges from this symposium—even from Arthur Stinchcombe's provocative overview—is indicative of the early stage of the whole research program. My goal in putting together this issue was to begin debates, not resolve them.

ACKNOWLEDGMENTS

I would like to thank the scholars who refereed the work in this symposium for their extremely valuable and detailed comments on the papers they read. And thanks especially to the authors, who responded to their comments with such good grace, turning strong papers into even stronger ones. It has been a pleasure working with everyone involved.

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—PETER SIEGELMAN

THE AUTHORS IN THE SYMPOSIUM

Those who have contributed to this Symposium have long been concerned with human rights issues and the workings of law and the state. In the following paragraphs we provide some background for each of them.

Stanley Cohen grew up in South Africa, where he studied sociology as an undergraduate. He left for England in 1962, where he completed his Ph.D. in Sociology at the London School of Economics. He has taught at several English universities and, since 1980, at the Hebrew University, Jerusalem. His research has been in the areas of juvenile delinquency, political crime, violence, prisons, criminological theory, and social control. His chief books include *Folk Devils and Moral Panics* (1972), *Psychological Survival: The Experience of Long Term Imprisonment* (1973), *Visions of Social Control* (1985), and *Against Criminology* (1988).

Cohen has been active in the human rights movement in Israel and has written a number of reports on the detention of Palestinians in the Occupied Territories. This experience drew him into a broader interest in how people react to information about human rights violations. He recently completed a research project on this subject for the Ford Foundation International Human Rights Program and is now working on a more theoretical book, tentatively entitled *The Sociology of Denial*.

The major part of **Luc Huyse's** research activity has been directed at the development of the Belgian political system since the 1960s. No observer of Belgian politics can ignore the profound passions that the events of World War II have provoked, passions that echo strongly to this day. The trials of those who collaborated with the Germans are still a very divisive topic on the country's political agenda.

From his own country Huyse learned the importance of dealing with the past after a regime transition. This inspired him to broaden the scope of his research to include comparisons among the postwar purges in Belgium, France, and The Netherlands. Recently he has begun to look at the post-1989 countries in Eastern and Central Europe and other transitional societies such as South Africa and Ethiopia. He has written:

The elites of young democracies have to face numerous and sometimes excruciating problems. They have to obtain legitimacy, produce political stability, and give their countries economic impetus. But they must, at the same time, find an answer to the question of what to do with the crimes of the past and those who committed them. My research has convinced me that there are no miraculous solutions to this problem. Any policy choice has its advantages and disadvantages, both of which will inevitably haunt the future, as they did in Belgium. But I also believe that by far the worst solution is to try to ignore the problem.

Margaret Popkin is a lawyer (J.D. Boalt Hall, 1979) who served as Deputy Director of the Central American University's Human Rights Institute (IDHUCA) in San Salvador from 1985 to 1992. Throughout that period, she documented human rights violations and analyzed the country's evolving human rights situation. After Salvadoran troops murdered the University Rector, Vice-Rector, the Director of the Human Rights Institute and three other Jesuit priests and two women who worked with them, Ms. Popkin worked with the Central American Jesuit Provincial's office and the Lawyers Committee for Human Rights to monitor the case and provide support to the private prosecution.

Ms. Popkin has closely monitored El Salvador's peace process and institutional reform efforts, preparing reports for the Lawyers Committee for Human Rights and the U.N. Development Program and serving as a consultant to the U.N. Truth Commission for El Salvador. Since returning to the United States in 1993, Ms. Popkin has been engaged in writing about the Salvadoran peace process and how it has dealt with the problem of impunity and the challenge of judicial reform. Some of the research for this article was carried out while she was a Schell Fellow at the Orville H. Schell, Jr. Center for International Human Rights at Yale Law School during the 1993–94 academic year, with grant funds provided by the John D. and Catherine T. MacArthur Foundation. Ms. Popkin is currently a fellow at the Washington Office on Latin America.

Naomi Roht-Arriaza is trained as a lawyer (J.D. Boalt Hall 1990) and a public policy analyst (M.P.P. University of California, 1990). She teaches international human rights law at the University of California's Hastings College of the Law in San Francisco. Professor Roht-Arriaza has also worked as a journalist in Central America and has been active in documenting and monitoring human rights conditions in Guatemala since the late 1970s. She has lived in Chile, Guatemala, and Costa Rica.

The Symposium article by Popkin and Arriaza grew from two previous efforts: a 1990 article in the *California Law Review*, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law," and a forthcoming book edited by Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (Oxford, 1995). The book is a discourse on the emerging international law of human rights violations, as well as a compendium of case studies from Europe, Africa, Asia, and Latin America.

Maria Łoś is a Professor of Criminology at the University of Ottawa. She is a sociologist who was educated in Poland, receiving her Ph.D. in 1971. Prior to her 1977 political dismissal from the University of Warsaw, she worked for 10 years at that institution and at the Polish Academy of Sciences. She has taught at Ottawa since 1980, and is also an adjunct pro-

fessor at the Institute for Soviet and East European Studies at Carleton University.

Łoś has published extensively in the sociology of law, especially with respect to (post)communist countries. Her work stresses the evolution of communism as a dynamic process and portrays political and economic corruption of the communist *nomenklatura* as an important historical force. An earlier work, *Multi-dimensional Sociology*, illustrates her skepticism about the exclusionary intellectual atmosphere and spurious labeling within academia. She sees lustration as an extraordinarily difficult, but genuine, dilemma.

Lynn Berat is President of International Initiatives, an international consulting firm, and a Visiting Scholar at Yale University's Program on Non-Profit Institutions. Holder of a doctorate in history from Yale and a J.D. degree from the University of Texas, she has written widely on South African human rights issues.

Her co-author **Yossi Shain** is Associate Professor of Political Science at Tel Aviv University and a Visiting Fellow at St. Anthony's College, Oxford. Berat and Shain have a longstanding interest in interim governments, including their role in democratization in South Africa, a topic on which they have published numerous articles. Together they also have published a series of articles on the transition to democracy in other countries.

Leila Sadat Wexler began teaching at Washington University in the fall of 1992 after practicing and studying law in Paris for several years. She is a graduate of Tulane Law School (J.D.) and the Columbia Law School (LL.M.) as well as the University of Paris I-Sorbonne (D.E.A.). Although she teaches courses that touch on both private and public international law, her abiding interest is in achieving peace through law. Her study of the Touvier prosecution and its significance for both France and the international community yielded an article in the *Columbia Journal of Transnational Law* ("The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again"), in which she analyzes how the French courts have transformed and applied the Nuremberg principles in their judgments on crimes against humanity. She is now working on problems of cultural pluralism in the European community, specifically the issues of language and the difficulties involved in building a peaceful polity around a population with many linguistic components.

Erhard Blankenburg has been teaching the sociology of law and criminology at the Free University of Amsterdam since 1980. He holds a Master's degree from the University of Oregon and a doctorate from Basel and Freiburg. After teaching sociology and sociology of law at Freiburg University from 1965 to 1970, he served as a consultant with the Quickborn Team Hamburg until 1972, as a senior research fellow at the Prognos AG Basel until 1974, at the Max Planck Institute, and at the Science Policy Center in

Berlin from 1974 to 1980. He has written on police, public prosecutors, civil courts, labor courts, legal aid, and the sociology of law in general.

Arthur L. Stinchcombe is Professor of Sociology, Political Science and organizational Behavior at Northwestern University. His interest in terror, civil liberty, war, and constitutions stems from early political commitments to the American Civil Liberties Union, Amnesty International, the Congress of Racial Equality, and, broadly, social-democratic politics. The comparative legal content of his scholarship was inspired by Max Weber but was applied early to studies in Latin America, where the relations of constitutions to military exceptionalism was particularly problematic. His forthcoming book *The Political Economy of the Caribbean, 1775–1900* (Princeton) studies special exceptions to ordinary civil law in the law of slavery, and their abolition during the 19th century. Abolishing terror by constitutions or civil law, then, is an old problem as well as a new one.