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# Democracy as the Rule of Law

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## INTRODUCTION

In American politics and political culture, eight years is not an eternity, but it can feel like one. In that time, a presidential administration and its politics can become entrenched as the regnant political culture and orient our political landscape around what comes to feel like a fixed point. It is long enough to make the transition to a new administration, especially of a different party, seem like a significant change, a meaningful reorientation of our political culture.

We are in the midst of such a change in political culture, in two senses. We are in the post-Bush era. The players in the Executive Branch have changed. The names that drew such controversy have lost some of their power to provoke, like a magnet that has lost its charge. John Yoo has returned to academia; Jay Bybee sits on the federal bench, more powerful but less notorious; Donald Rumsfeld has retired to the world of foundations, think tanks, and the like. Even former Vice President Dick Cheney, who has spoken out quite visibly since his transition from power, now possesses only as much influence as others see fit to grant him.

We are also in the Bush transition era. We are still dealing with the hangover from that era. Voices that were raised in opposition to the actions of the Bush administration in the context of post-9/11 national security issues are still asking

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not only what to do next, but also what is to be done in securing accountability for the actions of those who have left office.

These are, of course, related questions, and they raise deep issues. These issues might be thought of in terms of three guiding concepts: democracy, the rule of law, and transitional justice. These concepts, interrelated and yet, from the conventional viewpoint, distinct, share one thing in common: they are unhelpful. They are all essentially contested concepts.[1] Democracy is a concept of storied vagueness and disagreement.[2] The rule of law is more often invoked as a rhetorical flourish than a thickly defined concept, and those who give it serious thought find it almost obligatory to begin their discussions by acknowledging its "will-o'-the-wisp" nature.[3] Transitional justice fares no better, having been described as an "enigma" that "defines the contours of an entire field of intellectual inquiry, yet at the same time [ ] hides more than it illuminates. No one is exactly sure what it means."[4]

In short, to hope for an answer to the question what we should do about alleged abuses of legal authority by the Bush administration during the war on terror by simply invoking concepts like democracy, the rule of law, or transitional justice is to hope in vain. That is not to say these concepts cannot start us down the road to answering that question. Nevertheless, they do not provide us with a clear map to any useful destination.

In what follows, I ask what the question of "prosecuting Bush," or any of the members of his administration, says about the relationship between these essentially contested concepts, and the relationship between democracy and the rule of law in particular. I will take a fairly unsentimental look at these issues. I will

assume that these labels suggest little and answer nothing; that simply invoking them in an impassioned way is akin to invoking motherhood, and just as unhelpful. I will assume that these values are not metaphysical goods or ends in themselves, but rather should be viewed pragmatically in terms of how they cash out in the real world. As such, they must be weighed, balanced, and implemented by considering the costs and benefits of particular approaches in particular contexts. I will assume, in short, that what "the rule of law," "democracy," or "justice" (transitional or otherwise) demand is not absolute or sacred, but depends on the particular costs and benefits of given actions in specific circumstances.

I draw two conclusions from this analysis. First, as many others have concluded, transitional justice itself consists largely if not entirely of a pragmatic and political balance between democracy and the rule of law. It does not privilege "justice," or any other value, but involves an effort to build or preserve a reasonably healthy political environment in societies under transition. It requires a consideration of what I will call the "costs of settlement" – a balancing of past investments in and future costs to the stability and viability of both democracy and the rule of law. As such, both transitional justice and the "rule of law" itself, despite the latter term's usual assumption of universality, may require different approaches and different compromises in different societies. The rule of law, in short, at least viewed from a non-ideal perspective, is not a single value with a single solution. The same actions – say, the torture of military and/or political prisoners – may, consistently with the rule of law, be dealt with in different ways at different times.

Second, the conventional view of the relationship between democracy and the rule of law treats these as distinct, if related, concepts, and tends to treat the rule of law itself in largely, if not entirely, legalistic terms. It thinks of the *rule* of law as demanding the *remedy* of law, particularly in a juridical form: a court, a judge, and so on. This is understandable, but it risks missing something important. It fails to recognize that there may be a distinction between the rule of law and its implementation; and it obscures or neglects the possibility of treating *democracy itself* as one method of implementing the rule of law. The rule of law can be and, especially in stable democratic societies, often is implemented not just by and within the juridical process, but in the ordinary operation of the political process itself. Those critics of the Bush administration who argue that the rule of law demands a legal response to that administration's allegedly lawless actions may neglect the degree to which the very fact of that administration's passage out of power has itself provided a sufficient response, albeit perhaps an incomplete one. Democracy, in short, can be seen not as distinct from the rule of law, but as a *form* of the rule of law.

Let me note at the outset that I am making a set of factual assumptions in this paper. I assume that the Bush administration, or some of its high officials, contravened domestic and/or international law in its national security conduct following 9/11 and the wars in Afghanistan and Iraq. Although I will mention figures such as John Yoo, who provided the apparent legal cover for these actions, they are exemplars and need not be the only relevant figures embraced by this assumption. I also assume that the actions of the Obama administration going

forward might subject them to the same legal liability. But I do not focus closely on these assumptions or examine at length the arguments over whether Yoo or others in fact violated the law. These are, of course, important and controversial issues, but I simply assume them for purposes of my broader discussion.

## I. THE RULE OF LAW AND ITS IMPLEMENTATION

Although the rule of law is a protean term, attempts to define it tend to coalesce around a standard, if broad, set of values. Lon Fuller lists its attributes as "generality, publicity, prospectivity, clarity, noncontradictoriness, capability of being followed, stability, and congruence between norms as stated and norms as applied."[5] Richard Fallon offers five elements: the capacity of legal rules to be understood, efficacy, stability, the supremacy of legal authority, and the availability of impartial legal procedures.[6] Judith Shklar writes of the rule of law as demanding that law be "general, promulgated, not retroactive, clear, consistent, not impossible to perform, enduring[,] and officials must abide by its rules."[7] More abstractly, Allan Hutchinson and Patrick Monahan describe the rule of law's "central core" as "compris[ing] the enduring values of regularity and restraint, embodied in the slogan of 'a government of laws, not men.'"[8] At a still greater level of generality, Brian Tamanaha writes that "[t]he broadest understanding of the rule of law . . . is that the sovereign, and the state and its officials, are limited by the law."[9] In general terms, then, the rule of law can be said to comprise some bundle of goods that includes generally applicable, publicly available laws that are enforced against citizens and leaders alike through some form of due judicial process.

None of these goods, one will quickly notice, necessarily depends on the existence of a democratic structure. It is a common practice, in the literature on transitional justice and elsewhere, to view democracy and the rule of law as intimately connected goods.[10] Yet most serious students of the rule of law take as a given that the rule of law is a distinct value from democracy itself. By democracy, I have in mind a fairly thin definition, involving popular rule through some form of representative and electoral government.

Many democratic theorists might argue that it is impossible to have democracy without the rule of law[11] – although that conclusion may turn as much on the substantive commitments that underwrite the spongy term "democracy" as it does on any consensus about what "democracy" itself actually requires. But it is widely agreed that the rule of law does not in turn require democracy. Thus, Brian Tamanaha observes that "[l]egal theorists have often made the point that legal liberty (as the rule of law) may exist without political liberty (democracy)."[12] José María Maravall argues still more bluntly that "[t]he nature of the political regime is indifferent; democracy or dictatorship is irrelevant, as long as the laws are respected and enforced."[13] Similarly, Joseph Raz writes that "if the rule of law is to have any meaning, it cannot overlap with a theory of justice or normative political philosophy."[14]

Taking things one step further, other critics have observed that the rule of law and democracy may not just be distinct concepts; they may actually *conflict*. This conflict stems from the apparent tension between the regularity and general applicability of the rule of law, with its focus on the judicial resolution of disputes,

and the more free-flowing, context-dependent, and popular nature of democratic change.[15] Thus, Ian Shapiro writes that "[w]hereas democracy revolves around infusing the law with the will of the majority, the appeal of the rule of law is an appeal to its supremacy over the wills of persons, however measured or aggregated."[16] On this view, even if democracy requires the rule of law, the relationship between the two is not simply complementary, but involves a certain tension.[17]

We are left, then, with a view of democracy and the rule of law as distinct goods with an asymmetric relationship, in which one needs the other but the reverse is not necessarily true, and in which the relationship is as much one of tension as complementarity. If we leave things at this point, we seem to have run aground, to have taken these concepts and their relationship as far as they are likely to travel together. That is, in fact, where many scholars of both democracy and the rule of law leave things.

But this is a decidedly incomplete picture. Such an approach tends to treat both democracy and the rule of law as fixed and absolute values, goods that are complete in and of themselves and whose good lies, as it were, in their very existence. It tends to treat both democracy and the rule of law as ideal theories. There is another way to think of them, however. We may think of them as nonideal theories,[18] or as theories whose ultimate meaning only crystallizes when they are implemented in some nonideal form. If we make this move, a number of further steps are possible.

In particular, we can think in terms of an important distinction: between the rule of law as an ideal, and the *implementation* of the rule of law. In American

constitutional law, the distinction between the Constitution in its ideal form and the Constitution as implemented has fueled a rich and important scholarly literature, sometimes described in terms of constitutional "decision rules."[19] The crucial point of this literature is that there is a gap between the Constitution in its ideal state, or as a series of bare textual provisions, and the Constitution as judges (and others) implement it through doctrine. Similarly, we might say that whatever the rule of law demands as an absolute or abstract principle or set of principles, it still requires implementation in practical forms, and those mechanisms of implementation may vary depending on the context. On this view, whether or not there is a unitary concept known as the "rule of law," there is no one absolute form of *implementation* of the rule of law. Its applications will be as varied as the occasions which give rise to them.

## II. DEMOCRACY AND THE RULE OF LAW

The same perspective can deepen and complicate our understanding of democracy, and of the relationship between democracy and the rule of law. Understood in nonideal terms, democracy can have a host of meanings and implementing devices. The relationship between the two concepts will also be complicated and contextual. Their relationship will not be a matter of either complementarity or conflict, but rather will depend on a variety of circumstances. How to evaluate the relationship between the two concepts, or to decide whether one concept or the other should prevail in a particular instance – that is, whether "rule of law" values or "democratic" values, roughly defined, should predominate

with respect to a particular circumstance – will itself be a highly contested, contextual, and political matter.[20]

We might go a step beyond this and say that democracy, rather than being treated as utterly distinct from the rule of law, as dependent on the rule of law, or as constrained by the rule of law, can be seen as being one among a number of possible means of *implementing* the rule of law. In other words, rather than viewing the democratic process as a different matter entirely from the values such as regularity and accountability that are usually used in describing rule of law values, we can see the democratic process as one of the means of achieving rule of law values. Perhaps somewhat counter-intuitively in light of the legalism that usually surrounds discussions of the rule of law, we might conclude that one of the ways in which the rule of law can be implemented is through *political* rather than legal means.

This might seem like an obvious point. Taking experience as our guide, it seems clear that the democratic process is generally viewed as one of the mechanisms by which we achieve the values – generality, publicity, and so on – that people usually have in mind when they invoke the rule of law. Yet this possibility is often neglected in the rule of law literature.[21] Instead, democracy and the rule of law are seen as being distinct concepts and are dealt with more or less separately. The two are often linked, but mostly in the sense of both being part of a larger package of social goods that includes both democracy and the rule of law.

This tendency to treat the two as distinct goods may be a consequence of the spirit of legalism that tends to surround discussions of the rule of law, a spirit that emphasizes the need for juridical means of implementing that value and thus

understates or opposes other, non-legal methods of implementing the rule of law. This vision of the two values as distinct goods may also be reinforced by the treatment of both democracy and the rule of law as ideal theories that are more metaphysical than practical. Or it might flow from a tendency to think of the rule of law as a value that is all about *process*, while democracy is viewed as a means (albeit a procedural means) of hashing out *substantive* disputes; that is, the rule of law is seen as being a process that is primarily *about* process, while democracy is seen as a process that is ultimately about substance. Whatever the precise reason for this tendency to view the rule of law as being both juridical in nature and distinct from democracy, it remains true that more needs to be said about democracy as a means of implementing the rule of law.

Something of this idea is present in Jean Hampton's important essay on democracy and the rule of law. Hampton draws a distinction between citizens of democratic and non-democratic societies that may help us to understand the notion of democracy as a means of implementing the rule of law that I have described here, and that will also resonate below when I bring in the concept of transitional justice. Hampton argues that in non-democratic societies, the citizen's role in maintaining or altering the metarules that govern that society is "ill-defined, often little understood, often thwarted by the rule to any extent possible, and something she and her fellow citizens 'make up as they go along.'"[22] This may be seen as a problem for which one remedy is the implementation of the rule of law. But because there are no clear means within the existing system of achieving that goal, generally the only way to do so is through revolution.

In contrast, in a democratic society, the system, as set out in a written or unwritten constitution, allows the people "not only [to] define the object political game but also [to] determine the system by which the people can revise that game, and under what circumstances they will be warranted to do so."[23] It does so by creating democratic mechanisms by which the people can not only displace current office-holders by non-violent means, but can also change both the current second-order rules (what we might call ordinary legislation, along with non-constitutional court decisions, administrative rules, and so forth) and, through constitutional amendment, the first-order rules that constitute the operating system of that society, as it were. Thus, Hampton writes, "[t]hose who fashioned modern democracies came to see that not only such activities as criminal punishment and tort litigation but also the very process of adding to or changing the political game itself could be made part of a larger conception of the 'political game.'"[24] Put starkly, in a democratic society "[v]oting is [ ] a form of controlled revolutionary activity."[25]

We can restate Hampton's insight in a form that underscores and reinforces the idea of democracy *as* the rule of law, or anyways as one form of the rule of law. As we saw above, on the conventional view the rule of law, viewed in a relatively narrow and legalistic fashion, can exist without democracy. It can display all the features of regularity, publicity, and so on that comprise the rule of law. What a non-democratic society lacks, however, is a regularized means of altering the rules and meta-rules that govern that society. This is the missing feature that is supplied by a democratic society. Without it, the rule of law exists only by sufferance. In the long run, that is not an effective means of guaranteeing its stability and ensuring

that it continues to command the respect and obedience of the people who are subject to it. By regularizing and routinizing "revolutionary activity" on this level, by ensuring that the rules of the game are ultimately subject to popular control, democracy thus serves as both an important component of, and an implementing device for, the rule of law.

Again, on the conventional view this may seem paradoxical. Politics seems to defy the qualities of regularity and general applicability that characterize the common understanding of the rule of law. Political resolutions of controverted issues can favor a particular individual or interest group or segment of the community over others. Although politics is importantly about a fair and regular process, that process certainly does not resemble the kind of juridical framework we usually have in mind when we think about the rule of law. As I have been at some pains to argue, however, the juridical framework is only one of the many means by which we realize the rule of law. And it can be an unsatisfactory one. Grant Gilmore famously observed: "The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed."[26] As we have seen, the rule of law, defined simply as a system of legal regularity, can be observed punctiliously in a non-democratic society. As Hampton points out, in the long run such a system may come to little if it does not present means of altering the rules and metarules that govern that system. Ultimately, then, democracy is or should be one of the central mechanisms by which the rule of law is established and by which it can evolve and be perpetuated.

Some examples may bear this out, and I will offer two. The first is prosecutorial discretion. Decisions not to prosecute may seem to be in some tension with the rule of law, since they suggest that the sovereign is violating the central rule of law principle that the law should apply equally and with equal rigor to everyone. Yet such decisions are a routine part of any prosecutor's daily work, driven by factors ranging from the practical (the difficulty of proving particular charges in court, or the necessity of husbanding scarce prosecutorial resources) to the qualitative and philosophical (declining to prosecute out of mercy, or because a particular individual acted out of addiction, deprivation, or some other influence) to the seemingly arbitrary. The routine and (largely) uncontroversial nature of such decisions, the fact that they are viewed as "bring[ing] us to law's limit" without necessarily undermining the very existence of the rule of law, suggests that something more than a mere tension is at work here.[27] Prosecutorial discretion is not just a matter of the "gaps, fissures, and failures" of the rule of law – although it may seem to be just that if viewed from a juridically oriented understanding of the rule of law.[28] Rather, it represents a recognition that the rule of law cannot function at all in the long run if its only means of implementation is an unstinting absoluteness of application. It will not command allegiance if its rigor allows no room at all for mercy; and neither it nor society as a whole can long function if its claim on resources is absolute. The rule of law, like everything else in a finite universe of scarce resources, requires some suppleness of application. We thus permit prosecutors, subject to some fundamental limitations, to choose how they will allocate those resources. At the same time, we retain some democratic hold

over the prosecutors – either directly, in the case of elected prosecutors, or indirectly through those who appoint them – to ensure that the rules and metarules by which those resource allocation decisions are made are fair and acceptable.

A second example is that of impeachment. In the American constitutional system, impeachment of federal officials is reserved for "high crimes and misdemeanors," and the system of impeachment, with respect to both the charging process and the trial process, is reserved for a political branch, the United States Congress (with an assist in the case of presidential impeachments from the Chief Justice of the United States, who presides at the President's Senate trial).[29] In some respects, impeachment follows the rule of law model. It redresses the violation of the law through a juridical process of sorts. In other respects, however, the impeachment mechanism is largely a political one, and the trial that results is a political trial.[30] For one thing, the "charges" that constitute the articles of impeachment often include "political as well as legal claims."[31] For another, the decision whether to impeach or convict is ultimately in the hands of political officials and may be made for political reasons. Finally, the "trial" process for an impeachment is virtually uncabined, so much so that the Supreme Court has held that the nature and scope of that process is itself a political question.[32]

The impeachment of President Bill Clinton, which was followed by an unsuccessful attempt at conviction in the Senate, serves as an illuminating example – not least because it reveals a fairly neat reversal in the lineup of views on the necessity and merits of prosecuting members of the former Bush administration. In that instance, the champions of impeachment insisted that the rule of law did not

just permit, but required, Clinton's impeachment and (on what they believed was ample evidence) his conviction. He had, on this view, clearly committed crimes, both in the broad sense of having committed specific statutory offenses and in the sense of having committed more difficult to define "high crimes and misdemeanors." To censure him, to publicly condemn his behavior, or to simply allow him to slide into historical disgrace as his tenure in office expired, was viewed as an insufficient response to the demands of the rule of law, which requires all to suffer its penalties equally. His defenders, on the other hand, in addition to arguing the facts and arguing over whether the President's actions, even if proved, constituted "high crimes" or "misdemeanors," argued that the rule of law either did not require the President's impeachment or conviction or would be sufficiently served by his censure or public condemnation, or by his being forced to serve out the remainder of his lame-duck Presidency in a state of weakened political power.

From a perspective that treats the rule of law as an absolute and ideal good, those who argued for impeachment might be viewed as having some justification for that position. There was indeed evidence (whether or not it was sufficient to merit conviction at a regular judicial trial) that Clinton had committed federal offenses, and there were sound arguments that those offenses formed a constitutional basis for impeachment and conviction.[33] The charges and evidence *could* have merited conviction following a Senate trial. If the rule of law is an end in itself that requires impeachment and conviction when the facts merit it, as proponents of prosecutions of the Bush administration have argued, then we might reasonably object to Clinton's eventual acquittal.

But the impeachment process has always melded democracy and the rule of law together; from the perspective I have offered here, it might be said that it employs democracy *as a means* of achieving the rule of law. The President was not found guilty, but he did suffer at least short-term political consequences for his actions: not only in terms of weakened political capital, but in terms of the resources he was forced to devote to defending against impeachment rather than to other matters, and the political and fund-raising capital he deeded over to his enemies. At the same time, the political environment in which impeachment is embedded worked to minimize any catastrophic costs to the system as a whole, while still ensuring a measure of accountability for the President's misdeeds. The wounds to his presidency were absorbed, at least in part, by the sheer size of the American body politic, which comprises not only the President but Congress and a multitude of state and local governments besides, as well as the judiciary and non-state actors such as the financial markets. Those wounds were both deepened and cauterized by the existence of a regular turnover in executive office, which brought an election (albeit one that was itself deeply contested and, ultimately, juridified) to change the players and sweep the slate clean.

In short, democracy created the impeachment process itself, as a rule-of-law-oriented metarule governing the fuzzy outer boundaries of the political process. It created the conditions for the President's impeachment, and for his acquittal. And it created the metarule by which the subsequent presidential election served as a form of "controlled revolutionary activity" to replace the governing regime – and, in the longer run, its opponents as well, who may have been blamed for frittering away

their time on partisan games. Just as we are all dead in the long run, so, in a properly functioning democracy, political oblivion ultimately dissolves all disputes, no matter how heated. Contrary to those who argued that the rule of law specifically demanded a legal resolution in the case of Clinton's impeachment, democracy in fact *was* the rule of law in that episode.

To summarize, it is false to view democracy and the rule of law as wholly separate goods. We must resist the urge to view the rule of law through either too idealized or too juridical a framework. The rule of law in its ideal state must be distinguished from the rule of law as implemented. On the level of implementation, the forms it takes can be political as well as legal, embracing all the varied means through which politics works. In short, democracy can be viewed as one of the many means by which the rule of law is implemented in a properly functioning democratic society.

## III. CHOOSING AMONG IMPLEMENTATION MECHANISMS: OR, THE RULE OF LAW AND THE COSTS OF SETTLEMENT

I have offered two implicit caveats so far, which may be found in the words "one of the many means" and "a properly functioning democratic society" in the previous sentence. That is, while democracy is one of the methods by which the rule of law is implemented, it is not the only one. The legal process itself, of course, is another, the one that is usually thought of when the rule of law is invoked. Furthermore, one of the necessary conditions for the use of democracy as an implementing mechanism for the rule of law is that it occur in a properly functioning democracy. Exploring the nature of these conditions is the subject of this part of the discussion, and it may

be illuminated by a consideration of the third broad concept I have raised in this paper: transitional justice.

Some of what is necessary for democracy to be a sound implementation vehicle for the rule of law should be evident from Hampton's description of democracy as "*controlled* revolutionary activity." In order for the democratic process to serve as an effective means of ensuring the kinds of values that are usually thought of as rule of law values, one needs a properly functioning political system, with a fairly open franchise, regularly frequent opportunities for elections, and so on. One almost certainly needs a variety of political rights, such as the right to organize freely and speak publicly. And one needs a mechanism – the constitutional amendment process contained in Article VII of the Constitution is ours – by which the metarules can be changed, one that itself follows some form of democratic process.

These are all essential requirements. Beyond them, though, something more is needed, and it is not so much mechanical as social. For democracy to function as an effective implementing mechanism for the rule of law, one also needs a stable political culture. Political decisions must be viewed as settling important matters, more or less. What is settled by the political process must be *accepted* as settled, at least for the time being. Political disputes and their resolution cannot fester and break out into open violence, secession, or widespread rejection of the political process. Democracy's decisions may be treated as provisional, but they must be obeyed as far as they go, and that obedience must be a matter of general public consensus. Without that culture of consensus, it is unlikely that democracy will ensure that the people accept the legitimacy of society as a whole, let alone the

legitimacy of the rule of law in that society. In those circumstances, the "control" drops out of "controlled revolutionary activity," society breaks into open and possibly violent revolution, and all bets are off.

Another way of putting this is that how to implement the rule of law – whether through democracy, legal process, or other means – depends on a variety of social facts. Despite the conventional conception of the rule of law as general and universal, it does not exist and cannot be examined usefully without being taken in the entire context of the system in which it operates – legal, political, and cultural. That most certainly includes the strength and stability of the political system that surrounds it. This is true for *any* rule-of-law implementing mechanism. The rule of law itself cannot function effectively, even if it is implemented through the juridical process that rule of law advocates usually have in mind, unless the force of the state and the fairness of its processes are widely acknowledged. Similarly, stability and consensus with respect to the democratic process are necessary if democracy is to be an effective rule of law implementing mechanism.

What's more, the rule of law (and its implementation) is costly. Whatever metaphysical status its more romantic champions may wish to claim for it, the rule of law, like any other practical and political good, is not an absolute good. And the rule of law is not the *only* good that must be weighed. It must be balanced against, among other things, such goods as democracy itself. Any good within a social system involves costs, benefits, and tradeoffs among them.

Those costs and benefits are not always clear. For example, some argue that there is necessarily a tradeoff between liberty and security,[34] while others argue

that liberty, or other democratic goods, can actually enhance security.[35] I am thus not suggesting that we must always cut back on the rule of law for consequentialist reasons. Rather, I am suggesting that our consideration of the rule of law – what it requires, and how it is to be implemented – must include a sensitivity to its costs. Those costs will vary depending on the surrounding context. And so, too, the means by which we implement the rule of law may also vary depending on the surrounding context. How well one implementing mechanism works, and whether it is preferable to other implementing mechanisms, will depend on a host of factors, including the stability of the political system and the degree of public consensus that surrounds it.

To coin a phrase, or at least to repurpose it, we might think of the costs and benefits of various implementing mechanisms for the rule of law in terms of "the costs of settlement." I am not referring here to what are sometimes called "settlement costs" in litigation, although the concepts are related.[36] I mean instead the notion that how well the rule of law works, and how it is implemented, depends in part on the costs – social, political, and otherwise – of particular mechanisms for implementing it.

Thinking about the rule of law in terms of the costs of settlement may be a far cry from the usual rhapsodies over the rule of law that tend to surround and afflict this concept. But is also a necessary and valuable step. It reveals something – not something unknown perhaps, but something that can easily be neglected – about the rule of law and its implementation, whether through democracy or through other mechanisms. It suggests that different means of enforcing the rule of law will be

more or less necessary, and more or less costly or viable, depending on particular variables.

I will focus on two. In assessing the value and viability of particular implementing mechanisms for the rule of law, we must weigh both the amount of prior social investment in the conditions in which the rule of law is viable (call these "past investments"), and the costs that a particular implementing mechanism will have downstream (call these "future costs"). A rule of law implementing mechanism for which there have been inadequate past investments is unlikely to succeed. A rule of law implementing mechanism whose future costs are too great is unlikely to be worth the expenditure of societal resources.

This is where our third general concept, transitional justice, can play a helpful role. Although, as we have seen, transitional justice too is a vague term, it has been defined roughly as "the processes of trials, purges and reparations that take place after the transition from one political regime to another."[37] We can already see at work in this definition, with the primacy of place it grants to trials, the juridical turn that is also apparent in discussions of the rule of law.[38] As David Gray observes, "Given that 'justice' is traditionally understood in terms of those well-worn coins 'responsibility,' 'crime,' and 'punishment,' it is no surprise that criminal trials and punishments are often the standard for justice in transitions."[39] As the reference to purges and reparations suggests, however, transitional justice is not limited to narrowly juridical remedies, but consists of a wide range of mechanisms by which societies address the shift to new political regimes. These mechanisms are both backward-looking and forward-looking. They address both the shift itself and the

need to "rebuild[ ] broken communities" in order for that shift to succeed.[40] More broadly, then, we might define transitional justice as *any* set of remedies, juridical or non-juridical, that secure a lasting transition to a new political regime while addressing the wrongs worked by the old one.

Unsurprisingly, given the sheer diversity of forms of old and new regimes and the particular conditions – political, racial and ethnic, cultural, historical, and so on – in which societies experience both the injustices of the old regime and adjust to the new, transitional justice is a realm of the practical and the particularistic. As a judge in one transitional society has written, "[T]here is no one simple solution capable of addressing the complexities and subtleties inherent in a range of different factual situations. The peculiar history, politics, and social structure of a society will always inform the appropriate approach to [the] question [of transitional justice] in any given context."[41] Efforts at transitional justice thus reveal a host of mechanisms by which nations and international bodies have attempted to operationalize the rule of law and democracy in new regimes while addressing the wrongs of their predecessors.

The success and failure of these different mechanisms in different context may be viewed helpfully through the lens of the costs of settlement that I have described above. Whether a given mechanism will work at instituting transitional justice is, in large part, a function of the combination of the past investments in and the future costs to both democracy and the rule of law in a transitional society. Moreover, to the extent that regime transitions are not just legal but political, to the extent that they involve not only the implementation of the rule of law but of democracy also,

the choice of implementation mechanism in transitional justice will also depend in part on the degree to which the "rule of law" makes "democracy" more or less costly or viable.

Some examples may help fill out this picture. Some regime transitions have been effected without any of what are now viewed as the conventional mechanisms of transitional justice. Spain, for example, appears to have effectively transitioned from a fascist to a democratic system because of, or in spite of, its decision to forego any effort to redress the wrongs of the Franco regime.[42] In other regimes, by contrast, the decision has been made to aggressively pursue prosecution of the former regime leaders, even if those prosecutions threaten the stability of the new democratic regime. An interesting early example of this is the city-state of Athens, which, after the restoration of democracy in 411 B.C. following an oligarchic regime, "carried out harsh retribution" against the former oligarchs.[43] What is interesting here is that this decision proved unsuccessful. Following the restoration of democracy in 403 B.C. after another coup, the new regime responded differently. Rather than focus on punishment, it concentrated its efforts on enacting "constitutional changes to eliminate features that had brought democracy into disrepute," while treading lightly with respect to the leaders of the ancien regime; it preferred "the forward-looking goal of social reconciliation over the backward-looking goal of retribution."[44]

Still other regime changes have combined aggressive prosecution with dramatic political changes, although even here those prosecutions have often been limited in scope, and efforts to prosecute have quickly lost their vigor. One example of this is

the progenitor of modern transitional justice: the treatment of Germany following the Second World War. The Nuremberg trials resulted in the massive immediate prosecution of Nazi war criminals, accompanied by a process of purgation of civil servants. But the combination of the impracticability of a sustained prosecution and purgation of the German bureaucracy, combined with the pressure to maintain a workable German state as it became a key strategic region in the Cold War, took the wind out of the sails of denazification.[45] At the same time as they implemented a prosecutorial model of transitional justice, the Allied powers also pursued a democratic model: retributive post-war measures were combined with combined Allied and German efforts at constitutional reform, combined with massive foreign aid, to form and strengthen a new democratic German state.[46]

Finally, other transitional regimes have combined political reform with alternative measures that break from a "binary approach to the matter of accountability that reduce[s] the choice to trials or no trials."[47] The most famous such model is that of the truth and reconciliation commission, as in South Africa.[48] Elsewhere, as in Central and Eastern Europe following the downfall of the Soviet regime, transitional justice was achieved largely administratively, through a process of "lustration" or purgation, under which former officials of or collaborators with the ancien regime were barred from positions of public power or influence in the new, democratic regimes.[49]

This is only a brief tour of some of the approaches to transitional justice that have been employed by different emerging democracies, and many emerging democracies have combined various elements of these approaches. What is

important here is the recognition that the choice of particular transitional justice mechanisms, and their efficacy, depends in each case on the balance of past investments in, and the future costs of, democratization and the institution of the rule of law.

These factors can work in cross-cutting directions. Consider first what I have labeled past investments in democracy and the rule of law. Where a prior regime has been thoroughly undemocratic and particularly cruel in its application of force to some segment of the population, some measure of retributive justice may be more necessary in order to establish either the rule of law *or* democracy in the emerging society. Without it, the new regime simply will not be able to command the respect of its citizens, many of whom have been victims of serious crimes. Or it may be that the emerging society is still too weak to provide a stable democratic process by which these wrongs can be addressed. We may see this, for example, in the establishment of international criminal tribunals to mete out justice in societies emerging from despotic and genocidal political regimes. At the same time, conditions on the ground will still determine the course that this prosecutorial approach takes. As the international status of the last example (or of the Nuremberg tribunal itself) suggests, a publicly acceptable domestic forum for trial and punishment may be unavailable where the existing judicial ranks are either non-existent or are tainted by too close an association with the old regime.

In short, an important factor in evaluating the efficacy of various transitional justice measures based on past investments in democracy and the rule of law will be the extent to which the emerging society has an existing foundation of democratic

and law-abiding institutions and officials to draw on.[50] Thus, democratization could be a more effective measure for ensuring the rule of law and a successful political transition in postwar countries such as Belgium, France, and the Netherlands, whose "[p]rewar [democratic] institutions and their personnel were shattered but not eliminated" by the war.[51] In each case, in evaluating the efficacy of various transitional justice measures in new regimes, the successor governments will have to assess whether the new institutional structure is built on solid foundations, whether the crimes it must judge are particularized enough to make successful prosecutions likely or whether those crimes are either so diffuse or so difficult to prove as to make successful trials unlikely, whether the judges in such a cause are likely to command popular consent with their rulings, whether the political institutions that might serve as an alternate forum for resolution of these issues are sufficiently hardy, and so on.[52]

Just as important as past investments, however, is the question of future costs. As Jon Elster writes, "The incoming forces often have two conflicting desires: for a peaceful transition and for transitional justice. When negotiating with the outgoing leaders to achieve the first goal, they may have to sacrifice the second."[53] Any selection of transitional justice mechanisms thus must weigh the future costs to stability that those mechanisms might impose. In some cases, the future costs to democracy and the rule of law will counsel *against* impunity. In political transitions in Central and South America, for example, some form of legal accountability was considered to be a necessary part of the transition in order to move the society out of an ongoing cycle of repression and conflict.[54]

In other cases, the incoming regime is aware that, for a variety of reasons, it cannot make "justice" complete without endangering the success of the transition to a democratic regime – and hence, in the longer run, reducing the prospect that the rule of law will flourish in that society. South Africa's decision to implement a truth and reconciliation process rather than a fully-fledged system of criminal trials is a leading modern example. In negotiating the transition to democracy, the African National Congress was well aware of the threat that the outgoing officials of the apartheid regime would not cede power quietly, and doubtless was thinking too of how to balance the need for black South Africans to feel that some measure of justice had been done with the need for white South Africans to honor the legitimacy of the new democratic process. The Truth and Reconciliation Commission thus "worked to provide a measure of justice sufficient to legitimate the new order, but which would not upset the military and economic status quo – a status quo understood to be vital to nonviolent transition. Justice and reconciliation were to be balanced as both necessary to the stability of any new political order."[55]

Thus, the selection of transitional justice implementation mechanisms involves a tradeoff between what might seem like the absolute claims of "justice" and the longer-term need for the successor regime to effectively institute a workable system of both democracy and the rule of law. These tradeoffs reveal "the political and instrumental character of [transitional justice mechanisms] and their asserted relation to societal reconciliation and, relatedly, to the restoration of the rule of law."[56] Even in an age where international law and the prospect of international criminal tribunals loom large, "domestic political conditions" are still the prime

mover in effecting the transition to a new democratic regime, and negotiating those conditions will help determine the choice and effectiveness of particular policy instruments to govern the transition.[57]

Transitional regimes must always weigh not only whether the past investments in democracy and the rule of law are sufficient to support a particular policy instrument, but also whether the future costs of that choice of instrument will outweigh its gains. "Efforts to address past wrongs should not be pursued at the expense of other transitional goals if the trade-off threatens the success of transition itself."[58] Building or rebuilding a robust rule-of-law system will not be worth it if that system ultimately endangers the democratic process, which in turn will put at risk the viability of the rule of law. Conversely, a new regime may need to provide at least a modicum of retributive justice if it is to command the assent of the people to the new democratic system. These choices will always be difficult and contingent.

## IV. RULE OF LAW MECHANISMS IN STABLE DEMOCRACIES

The discussion in the last section focused on emerging democratic regimes, whose transitional status may render them fragile and subject to a host of difficult considerations concerning the costs and benefits of different policy mechanisms. Now consider how the same questions play out in stable democratic regimes. Transitional justice studies normally focus exclusively on fledgling democracies. But if Hampton is right to call democracy a system of "controlled revolutionary activity," then some of the same questions are surely present with each change of government in a functioning and stable democracy. As Eric Posner and Adrian Vermeule have written, "legal and political transitions lie on a continuum, of which

regime transitions are merely an endpoint."[59] In stable democratic societies, too, the processes of "ordinary lawmaking" must contend with shifts in political leadership, popular opinion, and other factors.[60]

Now, it should be evident that in stable and law-abiding democracies, the past investments in democracy and the rule of law have, *ex hypothesi*, been sufficient to provide for a functioning system. Regime changes through the established democratic process are accepted as legitimate; in turn, the rule of law commands wide public consensus and the use of prosecutions to secure rule of law values is accepted. This is true even when the juridical implementation of rule of law values has political aspects, provided again that the democratic system that underwrites those political aspects is stable. To reprise the examples I noted earlier, the fact that prosecutors in our society husband their prosecutorial resources and make decisions about how to allocate them has not seriously damaged widespread belief in the legitimacy of the criminal law, although sometimes prosecutors may be publicly questioned, condemned, and replaced through the political process based on how they allocate those resources. And despite all the grave talk of political and constitutional crisis that surrounded the Nixon and Clinton impeachments, neither incident was met with armed resistance, and both of them faded quite rapidly from public memory once the democratic process had secured a changeover in leadership. So we might say that there is every reason to believe that the prosecution of, say, a major official of the Bush administration for alleged crimes committed in connection with the war on terror might proceed without raising any of the costs of settlement we have seen at work in less stable transitional societies.

That is only part of the story, however. Our weighing of the costs of settlement must include not only a consideration of past investments in democracy and the rule of law, but also the future costs to those values of any particular policy instrument for resolving alleged past misconduct. And on that side of the ledger, some future costs might weigh against choosing a juridical and retributive rather than a political and democratic means of addressing the past wrong.

First, we must consider the possibility that one of the reasons a functioning democracy is stable is precisely that it has proved itself capable of implementing the rule of law through the democratic process. That is, a functioning democracy may command sufficient popular respect that its citizens accept as settled disputes that might have been resolved through retributive juridical processes, but are instead dealt with through the regular political and electoral process. Its success in doing so – the fact that both the winners and the losers in those disputes accept the political settlement as just and worthy of respect – tends to reinforce and perpetuate popular accession to and participation in the political process. To the extent that we value such a functioning democracy, and recognize the ways in which its continued existence both represents and strengthens the rule of law, we might justifiably hesitate to upset that balance by pressing for the resolution of these disputes in a different, non-political forum.

We might thus be concerned about the costs to the existing democratic system, and the rule of law, of proceeding by a prosecutorial rather than a political route in attempting to address particular instances of alleged wrongdoing by political officials. As we have just seen, one such cost might be the destabilizing of the

existing democratic political structure. Where the incoming and outgoing political elites and their followers have agreed to abide by a compromise in which everyone accepts the results of the ongoing political process, pursuing prosecutorial rather than political remedies might upset that compromise.

But resolving a dispute through the justice system rather than the political process may have costs for the rule of law as well. Suppose that the party in power decided to pursue its political adversaries not only through the political process, but also, or primarily, through the legal process. Such a decision might introduce a virus into the body politic. The targets of such prosecutions would argue vigorously that the prosecutions were fundamentally political, thus weakening the public sense of the legitimacy of the rule of law. They would have every incentive to engage in retaliatory prosecution, using those levers available to them at the moment (which might be considerable in a system like ours, in which power is divided both horizontally and vertically), or biding their time until they reached a position of power and could turn the tables. In the meantime, the party in power would have an added incentive to insulate itself from future accountability, whether through lawful or unlawful means, and to entrench itself in power, perhaps by seeding the judiciary and the civil service with its allies. Both democracy *and* the rule of law would be the losers in such a system.

This is not a wholly chimerical concern. To some extent, it is, in fact, a description of the American political scene in the late 1790s and early 1800s, in which the orderly transition of power between political parties at the federal level was by no means guaranteed. A host of mechanisms, both legal and political, were employed

as weapons in the partisan conflicts of the day, including prosecutions under the Alien and Sedition Acts, the attempt to entrench the outgoing party within the federal judiciary, and the retaliatory attempt to dislodge those appointees through impeachment. One of the resolutions of this conflict was the Supreme Court's famed decision in *Marbury v. Madison*,[61] which is commonly understood as entrenching the rule of law in the American legal and political landscape.[62] Equally important, however, was the fact of the transition of power itself – the fact that the results of the controversial election of 1800 were ultimately accepted and that politics, rather than violent revolution (with the obvious and glaring exception of the Civil War), came to be accepted as the conventional mechanism by which power would change hands in the United States. That the rule of law came under such a threat in the early Republic, and that the resolution of this threat was as much political as legal, should demonstrate the potential future costs to both democracy and the rule of law of the pursuit of legal and prosecutorial rather than political and democratic mechanisms for resolving politically divisive disputes.

All of this suggests what might be a somewhat startling conclusion. Whatever the particular balance of considerations might recommend with respect to the choice of rule of law implementation mechanisms in emerging democracies, an examination of the costs of settlement suggests that implementing the rule of law through prosecutorial legal means rather than through the political process may be sub-optimal in fully functioning and stable democratic systems – even though those are precisely the systems whose past investments in the rule of law make prosecutions both available and viable. In these systems, the past investments in the rule of law

are matched by past investments in democracy; and the future costs to both democracy *and* the rule of law may counsel in favor of political resolutions of disputes, rather than juridical approaches that might unsettle the viability of those goods in the long run.

To be sure, that does not mean that redress for violations of law by political officials is always or necessarily best handled through the political process rather than a prosecutorial model. Nor does it mean more generally that political rather than legal resolutions of such matters are always preferable. Sometimes both the rule of law and democracy will best be vindicated in whole or in part through a retributive legal process. Nuremberg may offer such a model: it may be that vigorous prosecutions of former officials of the Nazi regime were required for both democracy and the rule of law to flourish in the new German state. Similarly, in other cases the need for retribution may be so strong, politically speaking, and the available resources for prosecution may be sufficiently stable while the political resources are not, that a legal model of redress is preferable to a political one. [63] As always, it will depend on the context. But in each case, a careful weighing of the costs of settlement will be necessary in selecting an appropriate enforcement mechanism. And it may well be that in stable democratic societies, a political rather than a legal model of addressing past wrongs will be better and less destabilizing in the long run for both democracy and the rule of law. In some cases, "controlled revolutionary activity" will simply be better than, or at least the best available form of, "justice."

## V. REVISITING DEMOCRACY AS THE RULE OF LAW: THE CASE OF THE BUSH ADMINISTRATION

That brings us, finally, to the question confronted by this book: whether it is necessary to prosecute former members of the Bush administration (or, potentially, current members of the Obama administration) for wrongs committed in connection with the war on terror in order to vindicate the rule of law. What I hope the discussion thus far has demonstrated is that this is not a simple question, and that it certainly cannot be answered simply by invoking "the rule of law."

Whatever the rule of law may mean precisely, one must distinguish between the rule of law as such and its implementation. The rule of law may be implemented through a variety of devices, and the democratic process itself can be one of those implementing mechanisms. Thus, asking whether "prosecuting Bush" is necessary to vindicate the rule of law is the wrong question. We should ask instead whether democracy *and* the rule of law are best served by resolving any disputes over the Bush administration's actions through a prosecutorial model, or through the mechanism of politics. And the answer to that question will turn on a weighing of the costs of settlement implicated in these competing mechanisms.

Without definitively resolving this question, I believe there are good reasons to believe that the costs of settlement weigh against the prosecutorial model and in favor of the political model in this case. To be sure, as I have argued, the past investments in our society in democracy and the rule of law are such that there would be available resources for pursuing a prosecution. But the future costs posed by the prosecutorial model for the stability of our system are potentially great. Even if the prosecutorial system has ample resources to pursue cases against former Bush administration officials, allocating those resources would inevitably embroil the

current administration in a controversy whose protracted and divisive nature would lock up its time and detract from its attention to more pressing policy concerns – including the very national security matters that gave rise to the controversy in the first place.[64] More generally, pursuing a prosecutorial model would risk destabilizing the compromise by which controlled revolutionary activity is pursued by common consensus through the political process, and risk a vicious circle of strategic retaliation and retrenchment among and between parties and administrations. The public would refight battles that had seemingly been settled politically, with resulting consequences for public faith in both democracy *and* the rule of law.

Against these costs – which are, admittedly, a matter of risks rather than certainties – we must weigh the sufficiency of the political process as a means of implementing the rule of law with respect to the former administration's actions in the war on terror. To concede that the political process cannot resolve all of these issues decisively, and that leaving these issues to the political process rather than the legal process might itself have negative consequences for the rule of law, is not to say that the political process has not done an *adequate* job of vindicating the rule of law, and one that might have fewer negative consequences than a legal model would.

In fact, the political model seems to have done rather a good job of addressing and vindicating the rule of law concerns raised by the Bush administration's actions (which, again, I assume to be valid concerns for purposes of this discussion). As with any presidential contest, the changeover of power represented by the election

of 2008 was hardly a single-issue referendum, and we might ask whether the outcome would have been the same without the intervention of the economic crisis. But thanks to the Twenty-Second Amendment, the executive leadership would have changed no matter which party won. As it turned out, the then-party in power suffered significant electoral losses, in Congress as well as the Executive Branch. All of the central decision-makers who formulated and executed the Bush administration's national security policy are gone from executive office. Most of them are out of public service entirely, and some of them, including some of the key players in the national security drama – John Yoo and Alberto Gonzales among them – have suffered no shortage of public and professional condemnation for their actions while in office.

Of course, just as transitional justice in practice generally involves not a binary choice between trials and nothing, but a hybrid of different implementation mechanisms, so a preference for a political rather than a legal process of dealing with the Bush administration's assumed misdeeds does not imply amnesty or preclude *any* legal or quasi-administrative means of addressing those actions. Of course, political oblivion is itself a remedy of sorts, and one that a politician is likely to experience as having real weight. Beyond elections themselves, however, a host of legal remedies short of prosecution are still potentially available. For those Justice Department officials who were involved in dispensing legal advice that I assume here was both legally wrong and violative of the law or complicit in legal violations, there remains the possibility of ethical sanctions, both by the Justice Department itself and by the appropriate state bar authorities.[65] The possibility of

civil redress for legal violations by those officials also remains,[66] although there may be cause for concern about such actions.[67] Finally, and following something like the truth and reconciliation model pursued by South Africa and other African nations, the political model does not rule out the possibility of investigation of the former administration's actions by appropriate political bodies within both Congress and the Executive Branch, just as internal and congressional investigations followed in the wake of the COINTELPRO revelations and the Iran-Contra affair.

That leaves the prospect of international justice – of some form of prosecutorial model pursued at the international level or by a single nation invoking universal jurisdiction.[68] Other contributors to this book address this possibility in greater detail, but a few words are in order. The latter model is somewhat limited by the narrow category of crimes for which universal jurisdiction is contemplated under international law.[69] Even so, leaving aside any reservations one may have about universal jurisdiction,[70] the argument I have pursued here certainly suggests that any nation contemplating the exercise of this power should keep in mind that the democratic process can itself be a form of domestic response to the violation of the rule of law by the defendant's home state. It should thus step lightly, lest it disturb the balance of democratic and rule of law goods in that state and impose settlement costs about which it lacks information and expertise.

As for the former model, the Statute of Rome establishing the International Criminal Court, to which the United States is not a party, precludes the exercise of jurisdiction where a case has been or is being investigated or prosecuted by the state with principle jurisdiction over that case, and that state has not been shown to

be unwilling or genuinely unable to carry out that investigation or prosecution.[71] Again, given the costs of settlement I have discussed here, how that provision is interpreted should at least take into account the possibility that the democratic process, as well as investigation by duly authorized political bodies such as Congress, can itself be a way of addressing potential international law violations.

In sum, given the costs of settlement I have described above and the relative efficacy of the political response to the Bush administration, I am not convinced that pursuing a prosecutorial model rather than a political model in the case of the former Bush administration is *necessary* in order to vindicate the rule of law. The rule of law is surely one good to be addressed, but it is not the only one; the costs to democratic stability must also be considered. In any event, it should not be assumed that a political model of addressing the Bush administration's actions is contrary to the rule of law; rather, democracy can be seen as a *form* of implementation of the rule of law.

On that view, the Bush administration's current state of political oblivion is itself a form of vindication of the rule of law – a "controlled revolution" that adequately addressed, if not redressed, any legal violations committed by that administration in the course of the war on terror. The question is not therefore one of trials or nothing, or of whether the rule of law will remain un-vindicated unless the members of the administration are brought to trial; it is whether any additional gains to the vindication of rule of law realized by pursuing a legal remedy *in addition to* the political remedy that we have already experienced will be offset by the potential

costs to both democracy and the rule of law if we proceed down that path. Seen from this perspective, the game may not be worth the candle.

**CONCLUSION**

This may seem, to some domestic and international critics of the Bush administration's actions, both too little and too late. Forced political retirement, with nothing more, may seem like an insignificant response to the actions of the Bush administration. On this view, to vindicate a grand value such as the rule of law, one that is generally seen as sounding in terms of legal process, nothing less than a fully-fledged trial will do.

But the point I have been pursuing here is that the rule of law, whatever it may be, cannot be evaluated at such an abstract level and should not be viewed in strictly juridical terms. What is needed to vindicate the rule of law cannot be judged without considering the context, and weighing the costs of settlement involved in particular enforcement mechanisms. Nor, as the international experience with transitional justice suggests, can it be judged in splendid isolation and without counting the costs to both democracy *and* the rule of law of pursuing a purely or predominantly legal and prosecutorial vision of the rule of law. The rule of law and democracy are in fact closely related goods; each may affect the other, and each may be a method of *implementing* the other. What the peaceful transition from the Bush era to the Obama era teaches us is that democracy itself can be the rule of law, and that sometimes it may be the best available method of vindicating the rule of law. Whatever else it may be, the rule of law is not just the rule of legalism; it can be the rule of politics too.

[1] *See* W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1956).

[2] *See, e.g.,* John Ferejohn & Lawrence Sager, *Commitment and Constitutionalism*, 81 TEX. L. REV. 1929, 1933 (2003) ("Democracy is an essentially contested concept"); *see generally* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999) (noting widespread international disagreement over the meaning and implementation of democracy).

[3] ALLAN C. HUTCHINSON & PATRICK MONAHAN, *Preface*, in THE RULE OF LAW: IDEAL OR IDEOLOGY, eds. ALLAN C. HUTCHINSON & PATRICK MONAHAN iii, at iv (1987). For other examples, see, *e.g.,* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3 (2004) ("Notwithstanding its quick and remarkable ascendance as a global ideal, . . . the rule of law is an exceedingly elusive notion. Few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to the risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means. . . . The theory experts have it no better. Political and legal theorists also often hold vague or sharply contrasting understandings of the rule of law."); Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1,(1997) ("The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before."); JUDITH N. SHKLAR, *Political Theory and the Rule of Law*, in THE RULE OF LAW: IDEAL OR IDEOLOGY, at 1(noting the possibility that the phrase "rule of law" has "become meaningless thanks to ideological abuse and general over-use").

[4] Jens David Ohlin, *On the Very Idea of Transitional Justice*, 8 WHITEHEAD J. OF DIPLOMACY & INT'L RELATIONS 51, 51 (2007); *see also* Christine Bell, *Transitional Justice, Interdisciplinarity, and the State of the 'Field' or "Non-Field,'* 3 INT'L J. TRANSITIONAL JUSTICE 5, 27 (2009) (observing that the goals of transitional justice are themselves "often 'essentially contested concepts'").

[5] Fallon, *supra* note 3, at 8 n.27 (summarizing LON L. FULLER, THE MORALITY OF LAW 33-39 (1964)).

[6] *See id.* at 8-9.

[7] SHKLAR, *supra* note 3, at 13.

[8] HUTCHINSON & MONAHAN, *supra* note 3, at iv.

[9] TAMANAHA, *supra* note 3, at 114.

[10] *See, e.g.,* TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES VOL. 1, ED. NEIL J. KRITZ 68 (1995) (noting one Uruguayan judge's argument that "[d]emocracy isn't just freedom of opinion, the right to hold elections, and so forth. It's the rule of law. Without equal application of the law, democracy is dead.") (quoting from Lawrence Weschler, *The Great Exception I—Liberty*, THE NEW YORKER, April 3, 1989, p. 84); *see also, e.g.,* Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1443 (2008)("[T]he idea of the rule of law is often used as a handy shorthand way to describe the extremely complex bundle of cultural commitments and institutional

structures that support peace, human rights, democracy, and prosperity."); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 838 (2005)("Transitional justice evokes many aspirations: rule of law, legitimacy, liberalization, nation-building, reconciliation, and conflict resolution.").

[11] *See, e.g.,* TAMANAHA, *supra* note 3, at 37 ("The relationship between the rule of law and democracy is asymmetrical: the rule of law can exist without democracy, but democracy needs the rule of law, for otherwise democratically established laws may be eviscerated at the stage of application by not being followed.").

[12] *Id*.

[13] JOSÉ MARÍA MARAVALL, *The Rule of Law as a Political Weapon*, in DEMOCRACY AND THE RULE OF LAW, ed. José María Maravall 275 (2003).

[14] *Id.*, citing Joseph Raz.

[15] *See* WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, *Politics, Interpretation, and the Rule of Law*, in NOMOS XXXVI: THE RULE OF LAW, ed. Ian Shapiro 266 (1994).

[16] IAN SHAPIRO, *Introduction*, in NOMOS XXXVI: THE RULE OF LAW, ed. Ian Shapiro 1, 2 (1994).

[17] *See* HUTCHINSON & MONAHAN, *supra* note 3, at 99.

[18] A similar conclusion has been drawn about the third member of the trio of concepts I discuss here, transitional justice. *See* David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621, 2623 (2006).

[19] *See, e.g.,* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1140-46 (2008) (discussing and collecting references to this literature).

[20] *See, e.g.,* JOSÉ MARÍA MARAVALL & ADAM PRZEWORSKI, *Introduction*, in *DEMOCRACY AND THE RULE OF LAW* ed. José María Maravall 15 (2003) ("The conflict between rule of majority and rule of law is just a conflict between actors who use votes and law as their instruments. Whether legislatures or courts prevail in particular situations is a matter of politics. Rule of law is just one possible outcome of situations in which political actors process their conflicts, using whatever resources they can muster. When law rules, it is not because it antecedes political actions. We wrote this book because we believe that law cannot be separated from politics.").

[21] As always, there are exceptions. The most sophisticated treatment of the relationship between democracy and the rule of law that I have seen is the collection edited by MARAVALL & PRZEWORSKI, *supra* note 20. I also draw heavily in this section on JEAN HAMPTON, *Democracy and the Rule of Law*, in NOMOS XXXVI: THE RULE OF LAW, ed. Ian Shapiro, *supra* note 16, at 13-45.

[22] HAMPTON, *supra* note 21, at 36.

[23] *Id.*

[24] *Id.* at 35.

[25] *Id.* at 34.

[26] GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

[27] Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 391 (2008).

[28] *Id.* at 413.

[29] *See* U.S. Constitution, Article II, sec. 4.

[30] *See, e.g.,* Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 76 (2005) (defining political trials); *see also id.* at 93 (discussing impeachments as a form of political trial).

[31] *Id.*.

[32] *See Nixon v. United States*, 506 U.S. 224 (1993).

[33] *See, e.g.,* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON (1999).

[34] *See, e.g.,* RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[35] *See, e.g.,* Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CAL. L. REV. 301 (2009).

[36] *See, e.g.,* William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 21 J. LEGAL STUD. 399 (1973); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[37] JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 1 (2004).

[38] *See* Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34 J. L. & SOC'Y 411, 412 (2007) (noting the "dominance of legalism" as a key trend in transitional justice).

[39] Gray, *supra* note 18, at 2621.

[40] Jens David Ohlin, *On the Very Idea of Transitional Justice*, 8 THE WHITEHEAD JOURNAL OF DIPLOMACY AND INTERNATIONAL RELATIONS 51 (2007).

[41] RICHARD GOLDSTONE, *Preface* to HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA, eds. Carla Hesse & Robert Post (1999).

[42] *See, e.g.,* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 768 (2004).

[43] Elster, *supra* note 37, at 3.

[44] *Id.*

[45] *See, e.g., id.* at 54-55.

[46] *See, e.g., id.* at 206.

[47] Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 927(2009).

[48] *See, e.g.,* ROBERT I. ROTBERG & DENNIS THOMPSON, EDS., *TRUTH V. JUSTICE* (2000) (collected essays discussing the South African Truth and Reconciliation Commission and its proceedings).

[49] *See, e.g.,* Roman Boed, *An Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justice*, 37 COLUM. J. TRANSNAT'L L. 357 (1999).

[50] *See also* RUTI TEITEL, TRANSITIONAL JUSTICE 17-18 (2000)("[T]he transitional justice precedents suggest that no one rule-of-law value is essential in the movement toward construction of a more liberal political system. Transcendent notions of rule-of-law values in transitional societies are highly contingent, depending, in part, on the states' distinctive political and legal legacies and, in particular, on the rule of law in the predecessor regime.").

[51] LUC HUYSE, *Justice After Transitions: On the Choices Successor Elites Make in Dealing With the Past*, in TRANSITIONAL JUSTICE, *supra* note 10, at 104, 111.

[52] *See also* Gray, *supra* note 18, at 2623 (transitional justice "must take positive account of the unique circumstances found in transitions and their predecessor regimes in constructing a transitional jurisprudence").

[53] Elster, *supra* note 37, at 190.

[54] Bell, *supra* note 4, at 13.

[55] *Id.*

[56] Teitel, *supra* note 50, at 54.

[57] James Cavallaro & Stephanie Erin Brewer, *Never Again?: The Legacy of the Argentine and Chilean Dictatorships for the Global Human Rights Regime*, 39 Journal of Interdisciplinary Study 233, 234 (2008).

[58] Gray, *supra* note 18, at 2626.

[59] Posner & Vermeule, *supra* note 42, at 763.

[60] *Id.* at 764.

[61] 5 U.S. (1 Cranch.) 137 (1803).

[62] *See, e.g.,* William E. Nelson, Marbury v. Madison, *Democracy, and the Rule of Law*, 71 TENN. L. REV. 217 (2004).

[63] *See, e.g.,* Thomas Humphrey, *Democracy and the Rule of Law: Founding Liberal Democracy in Post-Communist Europe*, 2 COLUM. J. E. EUR. L. 94, 105 (2008) ("[I]n contrast to Western consolidated democracies that generally exhibit a predisposition to liberal virtues, in transitional environments democratic elections alone tend to be insufficient" to vindicate liberal rights).

[64] *See, e.g.,* Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*, 103 NW. U. L. REV. 1067 (2009).

[65] *See, e.g.,* HAROLD H. BRUFF, BAD ADVICE: BUSH'S LAWYERS IN THE WAR ON TERROR 294 (2009); Jose E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 215-21 (2006) (discussing the professional responsibility implications of the "torture memos" penned by Yoo and others in the Office of Legal Counsel).

[66] *See Padilla v. Yoo*, -- F. Supp. 2d --, 2009 WL 1651273 (N.D. Cal. June 12, 2009) (denying motion to dismiss in civil suit brought by Jose Padilla against John Yoo alleging constitutional violations).

[67] *See* Bruff, *supra* note 65, at 294 (arguing against both criminal and civil liability for Executive Branch lawyers based on the legal advice they provided in the course of the war on terror on the grounds that it might inhibit similarly situated lawyers in the future).

[68] *See, e.g.,* Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 (2009); Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347 (2007).

[69] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).

[70] *See generally* George P. Fletcher, *Against Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 580 (2003); Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301 (2003).

[71] *See* Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).