Crime, Law, and Regime Change

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Abstract

Complex reciprocal relationships between crime, law, and regime change are explored through a review of the literature. The first part of this article examines the stabilizing function of law for political regimes and the risks for regime stability associated with weakened rule of law and state crime. The literature on experiences from state socialist regimes prompts questions regarding the future of Western interventionist states, especially during periods of tightening government control. The second part examines crime and law during and after regime change. The focus is on (*a*) legal responses to past state crimes (or transitional justice), especially criminal trials, and effects of such responses, partly mediated by collective memories, on human rights and democracy records of new regimes and (*b*) societal crime rates after transitions to democracy and the role of law in response to rapid increases of crime in posttransition situations.

INTRODUCTION: CAUSALITIES AND ROADMAP

Regime change: a rapid transition from autocratic to democratic government and vice versa

Authoritarianism: a form of government in which absolute obedience to authorities is expected and individual freedom severely constrained

State crime: a crime committed by state actors in their capacity as agents of the state and on behalf of the state (i.e., a form of organizational rather than occupational crime)

Transitional justice: legal proceedings and decisions in the transition between political regimes, typically from autocratic to democratic, especially as they address repression and human rights violations by the previous regime

Rule of law: the principle that behaviors, especially those of government actors, are guided and constrained by legal rules

Complex interactions between crime, law, and regime change have proven fateful throughout the twentieth century. They were at play during the rise and excesses of fascism in the first half of the twentieth century, the aftermath of World War II, the emergence and processing of authoritarian regimes of the 1960s and 1970s, and the great transformations of 1989. They are now playing themselves out in the uprisings and turmoil of the beginning of the twenty-first century.

Consider the crime–regime change nexus. Waves of violence and street crime lead, at times, to massive popular discontent. In such times, Thomas Hobbes's *Leviathan*, the law and order state, appears attractive to many. Subsequent regime change, via election or coup, typically leads toward authoritarianism and dictatorship. Argentina in the early 1970s, preceding its military coup and Dirty War, is one of many examples in which regime change toward dictatorship followed a wave of societal crime and unrest and was thus welcomed, or at least not objected to, by a substantial segment of the population. Additionally, government crime, from corruption to crimes against humanity, can induce discontent and political transformation. These transformations too may take the shape of coups executed by competing factions or of popular uprisings and resulting democratic regime change. The East-Central European transformations following 1989 provide relatively stable examples, whereas the Arab Spring in Egypt or Libya has proved to be unstable and short lived.

In the other causal direction, regime change may provoke waves of crime and violence. This is especially true for state crime after the installation of new authoritarian and dictatorial regimes. Horrific governmental crimes followed the power seizure of regimes of Nazism, Stalinism, and Maoism. Waves of societal crime may also be induced by transition to authoritarianism, despite new leaders' promises of law and order. The introduction of centrally planned economies under communist rule, for example, resulted in massive dysfunctions. In Eastern Europe, shadow markets allowed economic actors to compensate for resulting shortages. Crime and the number of unreported crimes or dark figures (Popitz 1968) thus stabilized dysfunctional systems in the short and mid-term, while paving a path toward regime change. But transitions away from authoritarianism bear their own risks. The 1990s transition from communism to democracy in East and East-Central Europe provoked substantial increases in societal violent and property crimes, and the "third wave" of democratization (Huntington 1991) corresponded to a global rise in violent crime (LaFree & Tseloni 2006).

Consider further the law–regime change nexus. Law's function as a legitimizer and stabilizer of relationships of domination (Thompson 1975, Weber 1978) suffers when the autonomy of law is substantially curtailed in modern societies. An extreme example is again provided by state socialist regimes. But a weakening of law's autonomy even under democratic rule, for example in the context of the expanding regulatory state or in response to panics such as the so-called war on terror, may diminish the legitimizing role of law. Regime change becomes more likely.

A different aspect of the law–regime change nexus is transitional justice—that is, the use of legal mechanisms to manage the transition from authoritarian rule to democracy (Teitel 2000). Discussions of this mechanism have focused on the use of criminal trials against perpetrators of the previous regime (Landsman 2005, Sikkink 2011) and on truth commissions (Hayner 2001), lustration (Barrett et al. 2007), compensation (Torpey 2001), amnesties (Mallinder 2008), and other mechanisms, the ensemble of which became one distinguishing marker of the twentieth century (Minow 1998). A rich body of literature addresses the effects of transitional justice on the likelihood that new, democratic regimes will indeed abide by the rule of law, respecting human rights and democracy (Olsen et al. 2010, Sikkink 2011). Although the notion of transitional justice is accompanied by hope in the West, especially the United States, recent literature from Eastern

Europe points at dark sides and unintended consequences (Czarnota 2007, David 2003, Nedelsky 2004, Priban 2007, Stan 2012, Verdery 2012, Wilke 2007).

Implied in much of the above is the law–crime nexus. Although one manifest function of (criminal) law and its enforcement is the control of crime, law also constitutes crime: *Nullum crimen sine lege*; there cannot be, by definition, crime without law defining behaviors as such. We address the law–crime nexus only insofar as it is associated with regime change.

Each of the three pairs of terms invoked by the title thus speaks to complex conceptual themes and social processes. To reduce this complexity, but to speak to diverse aspects of the topic, we proceed in two parts before concluding by drawing out their connections. The first part addresses the risk of weakened rule of law for regime stability, especially after regime transition to authoritarianism. Here we focus on the case of formerly state socialist countries while considering implications for Western democracies. The second part examines the consequences of regime change toward democracy and law's mediating effects of such change on state crime and societal crime. The conclusion summarizes, works toward a synthesis, and points to open areas for future research.

Responsive law: a legal system that aims at competence of legal subjects, where legitimacy is derived from substantive justice and where rules are subordinate to principle and policy (after Nonet & Selznick 1978)

Repressive law: a legal system that pursues order but is only weakly binding on rule makers (after Nonet & Selznick 1978)

State socialism: a form of government guided by Marxist-Leninist ideology and characterized by authoritarian practices and central planning and coordinating of societal and economic processes

THE LAW–CRIME NEXUS AND ITS EFFECTS ON REGIME CHANGE

Lessons from State Socialism[1]

Law legitimizes and thus stabilizes relationships of domination (Weber 1978). It restrains the ruled, but also the rulers (Thompson 1975). The shape law takes and the degree of its autonomy—that is, its ability to process cases without interference by other government powers—affect the stability of political regimes.

In democracies, the rise of the regulatory state and the growing authority of technocratic expertise reduce law's independence. This process has been described as technocratization (Stryker 1989), substantivation (Savelsberg 1992), and a shift from autonomous to responsive law (Nonet & Selznick 1978) or from rule of law to postliberal law (Unger 1976). We do not yet fully understand the consequences of such transformations for the stability of modern democratic regimes, but speculation regarding positive functions abounds, ranging from Theda Skocpol's focus on increased steering capacity of modern interventionist states to Jürgen Habermas's emphasis on the advancement of legitimacy (as technocratization allows lawmakers to shift the responsibility for unpopular decisions to experts). Others diagnose risks of shifts from responsive to repressive law (Nonet & Selznick 1978).

Substantial and programmatic weakening of the rule of law after transitions to authoritarian systems of state socialism provides a dramatic historic example. Here law, conceived of as responsive, indeed became repressive. Lenin's fusion model, inspired by Marx's comments on the Paris Commune, sought to merge not only different branches of government but, more radically, government and society (Beirne & Hunt 1988). Intended to eliminate executive or bureaucratic barriers between the representatives of the peoples' will and the people themselves, direct popular power of the local soviets instead became absorbed by central state agencies (Beirne & Hunt 1988, p. 609). Kalman Kulcsar (1992, p. 250), Hungary's justice minister during the transition period, wrote about a "deviant bureaucracy . . . , namely a rule-creating bureaucracy instead of a rule observing one." What was to overcome participatory shortcomings of liberal democracy weakened civil society, destroying its participatory potential and generating authoritarianism [Giddens 1981

[1]We focus here on East and East-Central Europe. For African cases, see Pitcher & Askew's (2006) introduction and several articles in a special issue of *Africa: The Journal of the International African Institute* (Vol. 76, No. 1).

(1995), pp. xiii–xiv]. The ideology of comprehensive planning and regulation collided with the impotence of law that was constructed in disregard of perceived problems: a radical opposite of "living law" (Podgorecki 1996, p. 7).

The literature shows how weakened rule of law, though stabilizing in the short term, advances regime change in the long run. Consider repressive law; unconstrained policing; economic interventionism; and issues of repressed conflict, missed reform, and feedback loops.

Between autonomous and repressive law. Lenin recognized that legitimacy and reliability of government control hinged on a minimum degree of legal autonomy. Following the turmoil of the revolutionary period, he thus sought to reintroduce more traditional courts and new legal codes, modeled after former Russian and West European examples. This desire, however, conflicted with the primacy of the political sphere (Berman & Quigley 1969; Los 1988, pp. 8–25; Matthews 1989; unapologetic: Alexeyev 1990). Several mechanisms were deployed to secure political control of the legal sphere (Markovits 1989, pp. 424–26): selection of politically reliable candidates for admission to law schools (Schroeder 1987, p. 257); law school education accompanied by ideological training (Meador 1986); low social status of judges (low salaries, few benefits, and modest offices; Solomon 1987); the channeling of politically sensitive issues to particular judges and the imposition of detailed policy directives on judges (Podgorecki 1996, pp. 17–19); and, finally, the practice of so-called telephone law, the intervention by higher party officials in decisions on particular cases [see Markovits 1993, p. 44, on the German Democratic Republic (GDR)]. Politically sensitive legal practice occurred in the shadow of the party.

In the Soviet Union, the dependency of courts was most clearly formalized through the supervisory role of the procuracy, in which the functions of a public prosecutor, surveillance (police function), and review of lower court decisions were merged (Heydebrand 1996, pp. 269–70). The ensemble of these mechanisms allowed for a combination of responsive law that sought to provide substantively meaningful responses to conflicts (Markovits 1993, Scheppele 1996) and repressive law when it appeared necessary for securing the primacy of communist party rule [on the punishment of political crimes, see Lawyers' Comm. Hum. Rights (1987); on the brute force of Stalinist terror, see Solzhenitsyn's (1974/1978) literary account].

Scholarship on state socialism thus describes a state that simultaneously strives, in Nonet & Selznick's (1978) terms, for one type of law that pursues order (repressive law)—under which rules are crude and detailed but only weakly binding on rule makers, reasoning is expedient and particularistic, coercion is extensive, law is subordinate to politics, and expectations of obedience are unconditional—and for another kind of law that aims at competence (responsive law)—under which legitimacy is derived from substantive justice and rules are subordinate to principle and policy. Reasoning in this latter type of law is purposive, discretion expanded, coercion replaced by incentives, legal and political aspirations integrated, and disobedience assessed in light of substantive harm.

The contradictory nature of such an arrangement becomes visible when a semiautonomous system of responsive law contributes to legitimacy expectations that will be disappointed by the simultaneous practice of repressive law (on resulting delegitimation of the judicial system, even among judicial personnel, see, for state socialist Poland and the Soviet Union, Frankowski 1987; for Czechoslovakia, Uttitz 1991, p. 48; for criminal courts in the GDR, Markovits 1993). Contradictions between responsive and repressive law further weaken system stability and advance regime change.

Unconstrained policing. The tight control regime of state socialism became evident in the organization of law enforcement, characterized by weak due process (e.g., secret police), attempts

to merge government control with society (e.g., neighborhood officers and building block representatives), limited civil liberties (e.g., control of speech and travel), and centralization (e.g., reporting of practices to central ministries). These strategies produced high clearance and conviction rates, tough penalties, and low rates of street crime compared with those of Western societies (Savelsberg 1995, 1999), displaying the efficacy of totalitarian penal control (La Spina 1996, p. 55; for the Soviet Union and its militia, see Shelley 1996; challenging these patterns through high homicide rates in the Soviet Union, see Pridemore 2001; for Estonia, see Lehti 2001).

A price for such efficacy was citizens' deepening mistrust against outsiders and withdrawal from public life into constrained and tight networks of intimate social relations. According to Borneman (1992, p. 321), in East Germany (GDR) "public space had been so colonized by the state. . .that any attempt to speak the self in public became an exercise in self-effacement. Thus people's primary investments were in private lives, private niches, private selves" (on niche society, see Gaus 1983; also Lemke 1989, p. 67). Niche society was constituted by enduring and multiplex relationships. This would provide, according to classic arguments by Max Gluckman (1955), potential for control and conflict resolution (on late effects in postcommunist East Berlin, see Hagan et al. 1995). Schlapentokh (1989, p. 166) similarly describes, for the Soviet Union, a "drift to domesticity" and reports that "data from other socialist countries (Poland, Bulgaria) are perfectly consonant with Soviet data."

Private niches were places of crucial but otherwise inaccessible information (Kuran 1995). Thus, once risks of violent repression were reduced (through *glasnost* and *perestroika*), niches became cells of resistance. Opp & Gern (1993, p. 659) summarize survey-based findings on movement participation in the massive GDR demonstrations of 1989: "Incentives to participate were concentrated in personal networks of friends. Thus, personal networks were the most important contexts for mobilizing citizens" (on the role of small dormitory-centered friendship groups for the Tiananmen Square protests in Beijing, see Zhao 1998; on the emergence of antipolitics in Hungary, see Konrad 1984; relatedly, see Havel 1986 on the anatomy of reticence). Contradictions between intense control mechanisms and the mobilizing potential of niche society paved the way for regime change.

Economic interventionism. The history of strict government regulation of economic life and central economic planning under state socialism shed a new light on both Durkheim's classic thesis regarding the functionality of crime and Popitz's (1968) thesis of the functionality of the dark figure. State socialist regimes indeed invoked criminal law to enforce compliance with the economic plan (Los 1983). For example, the manipulation of accounts (padding) so as to falsely suggest fulfillment of the plan constituted a criminal act (Art. 152-1 of the Soviet criminal code). Yet, given the unsatisfactory functioning of economic planning, authorities and managers alike had an interest in and contributed to the construction of fiction (Rosner 1986, p. 25). Offenses against the centralized distribution of goods were also criminalized (Art. 153 and 154 of the Soviet criminal code, aimed at middle men and speculators). Yet again, supply was guaranteed only through a secondary and informal economy (see Rona-Tas 1997 on Hungary). Interest in the evasion of law and in the nonenforcement of law, in fact in securing the dark figure of crime, thus reached into government agencies.

These contradictions between regulatory principles and practice, however, had problematic side effects. First, informal economies did not just support fulfillment of the plan; at times they induced organized crime (Shelley 1991, p. 254; see also Handelman 1994, Los 1990). Second, although law was not always enforced, it could always be selectively enforced, arbitrarily or for reasons of political opportunism, resulting in fear, a "climate of evasion," "double-thinking," and "double-talk" (Rosner 1986, pp. 24–27, 38). Thus, in the realm of the planned economy

and selective backing by law in action too, contradictions produced dysfunctions, legitimatory challenges, and eventually regime instability.

Relevance for Western Democracies: Repressed Conflict, Reform, and Feedback Loops

Double-talk and double-thought, shadow economies (including illegal markets and organized crime), and aggressive government control policies toward segments of the population are not strangers in Western democracies either. Here too they cultivate mistrust and loss of legitimacy. Excessive punishment and the war on drugs, for example, have led to higher rates of crime in the affected populations (on the United States, see LaFree 1998), self-help (Black 1983), and vigilante justice or civil strife (Gurr 1976, Gurr et al. 1977, LaFree & Drass 1997). More broadly, shifting the pendulum radically from a focus on rights to substantive concerns may weaken legitimacy and produce resistance. Promoters of the recent war on terrorism and of excessive spying techniques may thus learn valuable lessons from the state socialist experience.

And yet, regime stability in Western democracies has thus far prevailed. Crucial for such relative stability is a relationship between contradictions, conflict, and adaptation that differs substantially from that under state socialism or other forms of authoritarianism. Where contradictions have the potential of translating into open conflict, conflict potentially provides reform incentives to ruling groups, and reforms diminish destabilizing contradictions (Chambliss & Seidman 1982). Such a dynamic stabilization model thus contrasts with the alternative of highly centralized power, repression, killings, mass incarceration, secret policing, and forced and encouraged emigration of opponents (Mueller 1999, Savelsberg 1999, Shelley 1996).

Anthony Giddens (1979, p. 145) is thus right when he argues that "some of the major traditions in social science are prone to underestimate how far force and violence (or its threat) can be successfully employed to forestall the emergence of conflict as overt struggle." The literature reviewed above suggests that we go further. Not only open struggle but also open communication falls victim to repression. Yet, the same literature also suggests that we supplement Giddens's statement by pointing out that repression promotes withdrawal into private niches (Gaus 1983) and discrepancies between public and private preferences (Kuran 1995), eventually enhancing chances of revolt and regime change when contingencies such as a diminished threat of force enter the scene (Coleman 1995, Opp & Gern 1993, Zhao 1998).

Theory, empirical evidence, and historical experience thus tell us that authoritarian regimes are always at risk. State crime, dysfunctions, and challenges to legitimacy are likely to induce regime change. Authoritarian regimes seem to be aware of this fact, as many of their seemingly self-protective measures, including state crime, suggest. We thus turn to the following questions: What consequences does regime change have for state and societal crime, and how is this relationship mediated by law?

REGIME CHANGE, CRIME, AND THE MEDIATING ROLE OF LAW

Government Crime

Regime change from authoritarianism to democracy, especially after periods of grave human rights violations, has increasingly been accompanied by diverse models of transitional justice (Teitel 2000). Mechanisms include criminal trials (Gephart et al. 2013, Hagan 2003, Sikkink 2011), truth commissions (Hayner 2001), compensation (Torpey 2001), vetting procedures (Barrett et al. 2007), amnesties (Mallinder 2008), and apologies (Bilder 2006). A growing body of scholarship

has considered the conditions of transitional justice and consequences for the risk of future human rights crimes and violations of principles of democracy in the posttransition period. Brief references to work on the shape and conditions of transitional justice are followed by a review of literature on consequences.

The International Military Tribunal (IMT) at Nuremberg and the Tokyo trials were the first systematic attempts to process grave violations of human rights, war crimes, and crimes against humanity in a criminal court (Landsman 2005). In Europe, the IMT was accompanied by the Dachau trials, named for the former concentration camp where these trials were held by a US military court. Among them was the Mauthausen trial, which is notable because of the immediacy of the investigation that allowed for the involvement of former inmates, with consequences for the outcome (Jardim 2012). The IMT was followed by the Subsequent Nuremberg Trials, such as the Doctors' and Lawyers' trials (Heberer & Matthäus 2008, Marrus 2008); trials in the zones occupied by other victor powers; domestic trials, such as the Frankfurt Auschwitz trial (1963–1965) (Pendas 2006); and trials held in foreign courts, such as the Eichmann trial in Jerusalem (Arendt 1964). This wave of court proceedings against human rights perpetrators was followed by a long period of judicial silence during the era of the Cold War. Exceptions were domestic judicial interventions in posttransition situations in countries such as Greece, Portugal, and Argentina (Sikkink 2011).

Human rights crime: an offense against human rights norms that is criminalized (A crucial document is the Rome Statute of 1998, which established the International Criminal Court.)

Justice cascade: the rapid increase in legal practices that apply the principle of individual criminal liability in cases of humanitarian law and human rights violations (after Sikkink 2011)

The new balance of power of the post–Cold War era (Hagan & Levi 2005) opened the floodgates to what Sikkink (2011) has named a justice cascade, with roots in the domestic trials cited above and in manifold international conventions of the post–World War II era. Well known are international and hybrid tribunals such as those in Cambodia (Buckley 2002), Sierra Leone (Anders 2012), Rwanda (Alvarez 1999), and the former Yugoslavia (Hagan 2003). Prosecutions against individual human rights perpetrators in domestic, foreign, and international courts increased almost exponentially in the final two decades of the twentieth century and the first decade of the twenty-first century—from the single digits in the 1980s to 450 by 2009 (Sikkink 2011, p. 21). Although the vast majority of trials occur in domestic courts, the development of the Rome Statute in 1998 and the establishment of the International Criminal Court (ICC) in 2002 have solidified international prosecution (Schabas 2007). The ICC is bound by a complementarity principle. Domestic courts, however, operate in the shadow of the ICC, and they apply international law.

The proliferation of international organizations as promoters of tribunals appears to be a key condition of the increased use of law, especially international law, in the context of regime transition. Crucial on the civil society side was the emergence of transnational advocacy networks (TANs), nonstate actors motivated by principled ideas and values interacting with each other, with states, and with international organizations and forming dense exchanges of services and information (Keck & Sikkink 1998). Each network addresses a specific issue (see, e.g., Rosen 2007 on child soldiering; Boyle 2002 on female genital cutting). As TANs proliferate, they bring new ideas and norms into policy debates and promote norm implementation. Member organizations and initiatives of individuals frequently grew out of domestic organizations (on Aryeh Neier, an émigré from Nazi Germany, and his move from the American Civil Liberties Union via the Helsinki Watch to Human Rights Watch, see Hagan & Rymond-Richmond 2009, pp. 60–61; also Neier 2012).

Whereas much of this literature stresses the weight of global scripts and norms in the spread of human rights interventions, especially in situations of regime transition, Jens Meierhenrich instead focuses on domestic conditions. In *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652–2000*, Meierhenrich (2008) highlights the history of legal rules and institutions and their path-dependent impact on the democratization process that rid South Africa of apartheid rule. In *Legacies of Law*, rational actors are seen making strategic decisions in an uncertain environment in which turmoil, massive bloodshed, loss of power, expatriation,

and diverse political outcomes were at least as conceivable as the democratic rule that did in fact emerge. Meierhenrich puts to use the classic, albeit much neglected, work on Nazism's dual state by Ernst Fraenkel [1941 (2010)]. A dual state in South Africa means a state in which Max Weber's "formally rational law" is applied in the world of the white oligarchy (normative state) and his "substantively irrational law" in that of the disenfranchised majority (prerogative state). Central to the message of his book, Meierhenrich (2008, p. 4) argues further that in "apartheid's endgame, the memory of formally rational law – and agents' confidence in its past and future utility – created the conditions for the emergence of trust between democracy-demanding and democracy-resisting elites." Representations and memory created by past legal action are crucial in this account.

Meierhenrich is not the only scholar, of course, who sheds light on national conditions. Even work in the tradition of sociological neoinstitutionalism, with its focus on global scripts, offers insights into national particularities that shape law and human rights. Boyle (2002), for example, starts from a neoinstitutional framework but incorporates nation-level, local, and individual conditions when she studies the regulation of female genital cutting across nations (on other types of law, see Halliday & Carruthers 2009).

Substantial hopes that transitional justice may pave the path toward democracy and reduce the likelihood of future state crime face potent challengers. Sikkink (2011) bases her positive expectation on analyses of her new Transitional Trial Data Set (Olsen et al. 2010 are more cautious; see also Related Resources, below). Critics argue instead that transitional justice, especially the expectation of criminal trials, will produce counterproductive consequences. They use case studies to show how the threat of criminal trials may motivate power holders to delay or impede transitions (Goldsmith & Krasner 2003, Pensky 2008, Snyder & Vinjamuri 2003/2004). Here again we encounter Meierhenrich (2008, p. 268) as one of the challengers of Sikkink when he argues that "[t]he transition from retributive justice to restorative justice. . .cleared the way for iterated cooperation in the endgame. The absence of retribution created conditions for cooperation, and removed incentives for confrontation." Is the South African case unique? Clearly Meierhenrich's is a single case study (despite a comparative excursus on Chile). Although he claims broader validity for his central theoretical arguments, how does his argument stand up against the many successful transitions documented in Sikkink's data set? Did the legacies of law always support all of them? Did other forces serve as functional equivalents? Many questions remain, and the juxtaposition of these two books produces potential for productive conflict in a field of study that is about as new as the phenomena it sets out to study. Some of that potential has since been addressed by authors who do not see retributive and restorative justice as mutually exclusive strategies (e.g., McEvoy & Mallinder 2012).

Although Sikkink's (2011) use of substantial and systematic empirical data is more convincing than the case study approaches used by some of her challengers and she identifies correlations between the use of criminal law, especially when accompanied by truth commissions, and improved human rights records (Kim & Sikkink 2010), much work toward exploring causal processes needs to be done. Might there be third variables at work, and if the relationship is indeed a causal one, what mechanisms are at work? Possible candidates are (*a*) deterrence effects based on assumptions of rational government and military leaders who register that the risk of punishment has increased from close to zero to at least a moderate level (Sikkink 2011, p. 171) and (*b*) cultural or socialization mechanisms. Collective memories created by human rights trials may have the potential to delegitimize grave human rights violations, thus reducing the likelihood of their recurrence. In reverse, once generated, such memories themselves promote the human rights movement: "The global proliferation of human rights norms is driven by the public and frequently ritualistic attention to memories of their persistent violations" (Levy & Sznaider 2010, p. 4).

A focus on cultural mechanisms that reduce the risk of state crime after regime change is supported by a new line of neo-Durkheimian work in cultural sociology. This work interprets criminal punishment as a didactic exercise, as a speech act in which society talks to itself about its moral identity (Smith 2008). Jeffrey Alexander (2004) applied these considerations to the issue of human rights when he argued that the IMT and the Universal Declaration of Human Rights (UDHR) set in motion a symbolic extension of the Holocaust and psychological identification with the victims, an identification through which members of a world audience became traumatized by an experience that they themselves had not shared (see also contributions in Karstedt 2009 and Gephart et al. 2013).

Mark Osiel (1997, p. 3), writing about the courtroom drama "in terms of the 'theater of ideas,' where large questions of collective memory and even national identity are engaged," applies a Habermasian argument: Instead of establishing mechanical or organic solidarity, legal proceedings manage to produce "discursive solidarity" (Osiel 1997, p. 51). They provide a civil arena for communicative action, in which dissenting actors can tell their stories and have to listen to each other.

Politicians and jurists have shared such hopes invested in trials of those responsible for state crime, as famous statements by actors such as President Franklin D. Roosevelt and Justice Robert Jackson, the American chief prosecutor at the IMT, indicate: "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. *We must establish incredible events by credible evidence*" (Jackson, as quoted in Landsman 2005, p. 6, emphasis added).

Despite such hopes, reaching from Justice Jackson to the writings of current-day political scientists, caution is warranted. The path from courts, especially international courts, to the publics in which cultural and socialization mechanisms are expected to work faces several impediments: (*a*) The judicial field produces a specific habitus and identities and is guided by a distinct and limiting institutional logic (Pendas 2006, Savelsberg & King 2011), (*b*) actors within the judicial field are guided by competing interests (Meierhenrich 2014), (*c*) the judicial field faces competitors such as diplomacy and humanitarian aid (Hagan & Rymond-Richmond 2008, ch. 4; Savelsberg & King 2011, ch. 5), and (*d*) international courts see their messages filtered through mass media and through domestic cultural and institutional mechanisms (Savelsberg & Nyseth 2012). Finally, as the above cautionary notes assume a relatively autonomous legal field, one additional concern must be added: The domestic judiciary is not always independent in an immediate posttransition situation; it is at risk of being instrumentalized by diverse political forces. At the international level, ad hoc courts come into being only when there is sufficient will by powerful members of the international community, and the ICC operates to some degree in the shadow of the United Nations Security Council—its willingness to refer cases and its ability to put cases on hold (Art. 16 of the Rome Statute).

Empirical research by historians and sociologists takes these concerns seriously (Heberer & Matthäus 2008). A few examples must suffice. In line with our cautionary notes, Devin Pendas's (2006) historical study *The Frankfurt Auschwitz Trial, 1963–65* is subtitled *Genocide, History, and the Limits of the Law*. Legal constraints limited the trial's representational and juridical functions, frustrating the pedagogical intent with which the authorities had advanced these collective proceedings against 22 defendants. The legal proceedings directed attention primarily to those actors who had engaged in particularly excessive cruelty, beyond the directives under which they worked in the Nazi extermination machine. Although Nazi crimes thereby came to a public and terrifying display, the trial paradoxically helped Germans to distance themselves from these crimes. Perpetration appeared, in the logic of the Auschwitz trial, as either the outgrowth of sick minds

or executed in the context of a machinery, set up by Nazi leadership, in which ordinary Germans acted without or even against their own will.

The Frankfurt trial illustrates with particular clarity what Bernhard Giesen (2004) has called the decoupling function of criminal law, disappointing Neier's (2012) hope that trials will ignite public acceptance of collective responsibility. Problems with the representational function of human rights trials are not limited to domestic, specifically German, criminal law. Historian Michael Marrus (2008) shows similar limitations for the Nuremberg Doctors' trial conducted by American authorities under occupation law. The logic of the trial produced a writing of history in which physicians involved in the Holocaust appeared as a group of conspirators, engaged in atrocious experiments, not as representatives of a profession that had long promoted public health over individual health and propagated programs of euthanasia.

A different lesson can be gained from trials held by occupation forces in the most immediate aftermath of the atrocities. One such trial is the Mauthausen trial of the spring of 1946, noted above, which was the most prominent of 462 American military trials held at the site of the former Dachau concentration camp on the outskirts of Munich. The trial lasted only 36 days, and May 27, 1947, witnessed the hanging of the first of 49 men condemned to death at that trial. Tomaz Jardim's (2012) examination of this trial provides crucial insights. He tells the story of the investigation, which started in the camp itself, immediately following its liberation, and was conducted by a poorly equipped and staffed group of American investigators. Crucial in this context was the assistance of some of the hundreds of camp inmates who remained for weeks, eager to provide eyewitness testimony and hand over crucial documentary evidence. Being thus free from the procedural constraints of the later German court at Frankfurt and benefitting from the immediacy of victim-witness testimony, delivered just days and weeks after liberation, the Mauthausen trial was suited to draw attention to the everyday operation and organization of camp activity. Whereas the Nuremberg trials focused on a small group of leaders and the Frankfurt trial directed attention to specific cruelties, here the narrative captured the organized nature and routine brutality of the standard operating procedure of the concentration camp system.

And yet, a price had to be paid for the immediacy of the trial, conducted by occupying forces, in the context of a chaotic and war-ravaged country. The Mauthausen trial in no way reached the public attention evoked by the IMT in Nuremberg, the American Subsequent Nuremberg Trials, or the Frankfurt Auschwitz trial of the 1960s. In fact, it is now barely remembered, its stories far less cemented in the public mind. An interaction of immediacy in the chaotic conditions after the end of the war, the relatively low rank of the defendants, and the setting in a foreign military court may be at play. At any rate, the public and press were largely absent.

Little systematic empirical literature has gone beyond reconstructing the narratives constructed at trials to actually examine the imprint trials leave in collective memories. In *American Memories: Atrocities and the Law*, however, Savelsberg & King (2011) take a step in that direction. One of their case studies, on the processing of the My Lai massacre committed by an American company in the Vietnam War, reconstructs the narratives produced in three different institutional contexts: the famous journalistic work by Seymour Hersh, an Army commission, and a criminal trial. The study approximates the reflection of these narratives in the collective memory by examining American history textbooks and media reports of subsequent decades. Results show that the massacre is represented in only 40% of post–Vietnam era American history textbooks. Yet, the dominant depictions reflect the institutional logic of the law. Ironically, they do so in ways that dedramatize: Only one relatively low-level perpetrator is named (the one convicted in trial), responsibility of higher ranks is rarely mentioned (against insights by the Army Commission), the number of victims is downplayed (in line with that listed in the indictment), and the attempted cover-up on which no

conviction was achieved is generally omitted. Such selective memory plays into later trials such as those against US perpetrators during the Iraq War.

Analyses of collective representations and memories produced in judicial proceedings still partially support the cultural pillar of Sikkink's (2011) statistical findings and Neier's (2012) optimism, but they add a cautionary note. Rituals of law may cement atrocities in historic memory, possibly safeguarding against future human rights violations. Yet, memories produced by trials are filtered through the institutional logic of law (and the political constraints imposed on law) and are thus distorted from the perspective of other institutions. In addition, a country's regime stability versus rupture and its position in the international community constrain law's capacity to shape representations and memories so as to safeguard against future violations. This insight applies to the United States, among other countries.

Societal Crime

To this point, we have discussed the law–crime–regime change nexus with respect to state control and state crime, but the political form and (in)stability that always accompany regime change may also produce changes in societal crime, committed by the person in the street. In *The Civilizing Process*, Norbert Elias [1939 (2000)] argued that the expansion of the state's monopoly of power and increasing economic interdependence would lead to the growth of pacified social spaces and restraint from violence through foresight or reflection. According to Elias, increased centralization and stricter control exerted by stable state authorities fostered greater self-control, leading to a decline in impulsive and disruptive behaviors, including interpersonal violence. Indeed, empirical studies demonstrate massive declines in interpersonal violence between the mid-sixteenth and twentieth centuries that parallel processes of state consolidation in Europe (Eisner 2001, Gurr 1989) and the United States (Monkkonen 2001, Roth 2009). More recent studies indicate that the trend is not the monotonic decline suggested by Elias' thesis of the "civilizing process" and that the jagged trend reflects patterns of political (in)stability (Roth 2012; see also Cooney 1997 on the U-shaped relationship between state power and violence). It is thus not surprising that crime waves have been documented during regime change as a result of several forms of transition, including postcivil conflict (Call 2007, Kurtenbach & Wulf 2012, Steenkamp 2011), postcommunist transitions in Eastern Europe (LaFree & Drass 2002, Savelsberg 1995), and purportedly successful political transitions in South Africa (Kynoch 2005, Wilson 2006) and El Salvador (Call 2007).

Empirical examinations of the relationship between regime change and street crime have focused on transitions to democracy, the most common form of regime change over the past three decades. As an ideal-type political form, democracies are nonviolent by virtue of institutions designed to provide mechanisms for power sharing, limits on the use of violence, and accountability for exceptions (Karstedt & LaFree 2006). Yet, the process of institutionalizing democracy is not always smooth (Tilly 2007), and the outcome is frequently ambiguous. Today, hybrid political forms, characterized by a combination of authoritarian and democratic institutions and processes, represent the most common outcome of transitions away from authoritarianism (Carothers 2002). Cross-national, longitudinal analyses confirm that homicide rates are highest among such hybrid (transitioning) polities relative to fully consolidated democratic or autocratic regimes (LaFree & Tseloni 2006, Neumayer 2003). LaFree & Tseloni (2006, p. 45) predict "that if transitional democracies can continue to move toward full democracy, their crime rates may eventually begin to decline."

Political factors such as legitimacy, once largely ignored in cross-national analyses, have also received attention as of late (Chamlin & Cochran 2006; Nivette & Eisner 2013; Stamatel 2009, 2012). Scholars have pointed to political legitimacy as a potential mechanism accounting for the

association between democratization and high levels of homicide. State legitimacy, or the right to rule, captures "how power may be used in ways that citizens consciously accept," thus providing a "link between state and institutional characteristics and individual behaviors" (Gilley 2009, p. 499). Gilley (2009) operationalizes state legitimacy with three subtypes, based on both attitudinal (subjective) and behavioral components: a state's capacity to obey its own laws (legality), the degree to which civil and political values coincide (justification), and the level of behavioral compliance of the people (consent). Using Gilley's aggregate measure in a fixed-effect analysis of 65 European countries, Nivette & Eisner (2013) find that state legitimacy is negatively related to homicide rates, controlling for other known correlates of crime. Moreover, within the geographically concentrated (predominantly European) sample, the authors find that low levels of state legitimacy and high levels of homicide are clustered within post-Soviet states. Such patterns suggest that regime change may engender weakened legitimacy among a number of institutions, formal and informal, that operate to control crime directly and indirectly (LaFree 1998). Thus, disentangling effects is a tall order, further complicated by the fact that many of the conditions conducive to crime—political instability, poverty, and inequality—are also factors associated with the occurrence of regime change itself.

Patterns from Eastern Europe. Regime changes across Eastern Europe provide a prime opportunity for a comparative analysis of several trajectories emerging from culturally similar conditions (Stamatel 2006). Although criminological research under communist governments was limited by the belief that crime (and other social ills) presented a direct challenge to the ideological utopia of the communist system, criminologists have in recent years reexamined records and provided comparisons of crime rates pre and post transition.[2] For instance, in comparative research on Russia and the United States since the mid-1970s, Pridemore (2001) revealed that homicide rates in Russia were generally higher than those in the United States and that homicide rates in Russia rose dramatically with the dismantling of communism in the late 1980s and 1990s. This trend widened the gap between Russian and US homicide rates, especially as the latter began declining at this time. Likewise, homicide rates increased in postcommunist Bulgaria, Czechoslovakia, Hungary, and Poland (LaFree & Drass 2002) and 10 East-Central European countries (Stamatel 2008). Drawing on Durkheim [1897 (1951)], Pridemore & Kim (2006) proposed a test of whether rapid political changes, constituting a threat to the collective sentiment, had resulted in higher rates of crime in postcommunist Russia. Their analysis of 78 Russian regions revealed that regions experiencing the greatest amount of political change during the 1990s likewise witnessed the greatest increase in homicide rates, even after controlling for the effects of rapid socioeconomic change (Pridemore & Kim 2006, p. 93). An additional analysis of Russian homicide data from 1956 to 2002 revealed a significant increase in homicide following the dissolution of the Soviet Union (Pridemore et al. 2007). Evidence from Eastern Europe thus suggests that "even when the *public* face of the transformation was nonviolent, *private* manifestations of violence nonetheless increased" (Stamatel 2012, p. 167, emphasis in original).

The mediating role of law. Regime change may provide a window of opportunity, allowing for a strengthening of the rule of law with the potential of enhancing legitimacy and reducing future crime. And indeed, transitional governments are more prone to adopting human rights legislation (Simmons 2009). Yet, transitions from authoritarian to more democratic polities

[2]This is not to say that criminological research was nonexistent under Communist governments, but conflicting pictures of crime trends emerged (e.g., Los 1988; cf. Adler 1983, Shelley 1991).

routinely encounter challenges to institutionalizing rule of law (Dezalay & Garth 2002). Adelman & Centeno (2002) argue that in Latin America rule of law has failed to gain legitimacy domestically among citizens, despite its long history in the region.[3] Moreover, without established institutions affirming in word and practice that the ruled and rulers obey the same rules, global attempts to institutionalize legal reform may do more harm than good—exacerbating, rather than alleviating, its uneven development at the national level. Crime in the wake of regime change in Latin America may thus reflect the continued inability to bring elites under the rule of law and a corresponding lack of legitimacy of the rule of law among the broader citizenry. Examining international efforts to strengthen the rule of law in Guatemala since the signing of peace accords in 1996, Sieder (2003) echoes these concerns, arguing that the institutionally focused approach of predominant donor models ignores the historical context within which understandings of law, justice, and rights are shaped. Despite millions in foreign aid to the justice sector, Sieder found that impunity remained the rule in Guatemala—reflected by a judicial process subverted by military and criminal networks, low citizen confidence in the judicial system, and frequent recourse to nonjudicial measures, including public lynchings of suspected criminals.

As transitional justice mechanisms grow in popularity, employed under a range of types of regime change, they are likely to play pivotal roles in the future of formal legal institutions and criminal justice policy, and in the perceived legitimacy of the law (Tyler 1990) and the state. Although a review of the research reveals the failure to answer basic questions of whether transitional justice mechanisms may improve human rights outcomes or foster rule of law or democratic practices (see discussion above; also Thoms et al. 2010, p. 352), transitional justice mechanisms have arguably had some positive effect on the development of national criminal justice capacities (Dezalay & Garth 2002, Drumbl 2007). Insofar as transitional justice encourages social trust and community cohesion, it may contribute to lower levels of violence, as these mechanisms have been associated with low rates of crime (Rosenfeld et al. 2001). And yet, the perceived legitimacy of transitional justice mechanisms, especially international criminal justice, is a persistent challenge (Hagan & Ivkovic 2006).

Given recent turmoil and sociopolitical change, high rates of violent crime in the wake of democratic regime change may not be surprising, but neither are they standard. Variation has been noted in homicide rates in Latin American countries emerging from long civil wars during the early 1990s (Call 2007) and in comparative analyses of postcommunist Eastern Europe (Karstedt 2003, Stamatel 2008). Although this literature has focused on violent crime, post–World War II Germany saw much economic crime, which was likely more reflective of conditions of considerable economic scarcity than of regime change. Yet, the interaction of scarcity and the legitimacy of military (occupation) rule demands further exploration. The case of Bosnia and Herzegovina adds to these puzzles, as rates of violent crime remained low in the wake of the war and genocide of the 1990s, but organized crime appears to have developed deep roots (Pugh 2005). In the United States, not itself a site of war nor of regime change but the point of return for hundreds of thousands of military, the immediate postwar years following World War II boasted low crime rates relative to the sharp increases that characterized the 1960s and 1970s (LaFree 1998). Variation across cases thus demonstrates the need for systematic comparative analysis (though see Stamatel 2008, 2009 on Eastern Europe). The literature is unsettled with regard to explanations and whether they vary by type of regime change.

[3]This finding differs from Meierhenrich's (2008) argument for South Africa, discussed above, according to which rule of law traditions help with the transformation of a political order (he did not, however, speak primarily to the acceptance of rule of law by the broader populace after transformation).

Our account of contradictory findings demonstrates, among other things, the need for a differentiation of arguments by type of regime change. Regime change, a substantial change in the institutional structure of political authority, may occur relatively peacefully, as in the disintegration of the Soviet Union in 1991, or violently, as in the overthrow of the government by revolutionary regimes in Cuba in 1959 or regime change as a result of military defeat in the cases of Germany and Japan after World War II (Goldstone et al. 2010). Studies examining how dynamics of regime transition, including the trajectory of regime change and methods of conflict resolution and transitional justice, impact violent and economic crime after conflict are needed and challenging. Scholars should also move beyond type of transitional justice to consider variation in implementation. Central variables are many, but cases are relatively few, at least when compared with research at the microsociological level. Additionally, exploration of regional and temporal variation in the impact of regime change, and the role of law, within a society may be dependent on mesolevel conditions (e.g., localized crime policy and local variation in state legitimacy, organizations, localized shadow economies, drug markets, and local criminal actors) that mediate the relationship between regime change at the state level and geographic patterns of crime across and within the state. Such research will necessitate creative data collection efforts in order to reconstruct reasonably reliable estimates of crime (especially estimates that are comparable across regimes). Within states, future research should emphasize change over time, a task that is difficult under stable political conditions but inherently more challenging when spanning regime types. Nevertheless, collaborative data collection efforts (see Related Resources, below) make such examinations increasingly feasible.

CONCLUSIONS

What have we achieved? In examining interactions between crime, law, and regime change, we first addressed literature on the effect of law, constrained law, patterns of crime and dark figures, and regime (in)stability. We focused on the case of state socialism but sought to explore implications for Western democracies. We then examined the impact of law and transitional justice on regime crime and, finally, the impact of regime change on societal crime. We showed that patterns identified in the literature raise at least as many new questions as they answer old ones. We conclude by adding questions we did not address, notably those regarding the reverse causal process leading from crime, government or societal, in post–regime change situations to the stability of new democracies. What occurs when both societal and government crime are high? Syria in 2013 is a terrifying example. What is the outcome of massive violations of human rights and other governmental crimes in combination with low societal crime? What might we expect when a rule of law–abiding state encounters massive rates of societal crime? And what about a failed state that leaves conflicts and their resolutions to a diversity of societal organizations, many of them criminal by standards of international law? And, under what conditions can a state achieve stability, a situation in which low government crime encounters low rates of societal crime?

The encounter of solidly institutionalized social sciences with waves of regime change is a new phenomenon. The scholarly agenda is vast. Key avenues to address include (*a*) varying types and degrees of rule of law and their effects on regime stability; (*b*) specific frame conditions under which distinct types of transitional justice affect democracy and human rights after regime change; (*c*) specific mechanisms through which transitional justice may contribute to improved human rights records; (*d*) the respective roles of global human rights norms versus domestic forces, and their potential interactions; (*e*) specification of the relative effect of political transition or democratic transition on changes in crime and law; (*f*) differential assessment of effects by type of regime change; and (*g*) transition effects disaggregated by time and space, allowing for examination

of the role of local actors, institutions, and processes and for more sophisticated longitudinal analyses (see Future Research, below, for details).

SUMMARY POINTS

1. Law secures relationships of domination through legitimization and thus enhances regime stability, whereas weakening rule of law entails chances of a loss of legitimacy and of regime change.
2. Weakening rule of law increases the risk of state crime, human rights violations, and a transformation of civil society into niche society.
3. State crime undermines legitimacy, and niche society can become a motor of regime change when immediate threat of force diminishes, as the experience of European state socialist regimes illustrates.
4. Use of law in periods of regime change (transitional justice) may, under specific circumstances, reduce future state crime and human rights abuses and thereby enhance the stability of democratic regimes.
5. Transitional justice may be abused as a means of repression by dominant political forces in posttransition periods, especially when judicial powers are relatively weak.
6. Posttransition trials against perpetrators of human rights crimes committed under authoritarianism hold the potential to foster delegitimizing collective memories of past abuses and, thus, to stabilize democracy.
7. States with transitional polities tend to exhibit higher rates of homicide than states with institutionalized authoritarian or democratic regimes. Homicides rates tend to increase following regime change but stabilize over time.
8. Societal crime, including vigilante justice, appears to be higher where judicial capacity has been weakened. Transitional justice may serve to increase such capacities.

FUTURE RESEARCH

1. Scholars need to explore the way in which varying types and degrees of rule of law contribute to securing or threatening regime stability.
2. Historical comparative and quantitative research is needed to determine the specific frame conditions under which different types of transitional justice, including the threat of criminal trials against past rulers, enhance or threaten democracy and human rights after regime change.
3. Scholars need to determine the specific mechanisms through which transitional justice may contribute to improved human rights records after regime change. The role of collective memory and its (de)legitimizing functions deserve particular attention.
4. Tensions in the scholarly literature over the respective roles of global human rights norms versus domestic forces, and their potential interactions, demand exploration through future research.

5. Research to date has focused on transitions to democratic regimes, making it difficult to determine whether changes in law and crime result from political transition or democratic transition. Scholars need to differentiate arguments by types of regime change, including transitions to authoritarian regimes or to regimes without fully coherent authoritarian or democratic political institutions.
6. Disaggregated analyses will allow for (*a*) exploration of regional and temporal variation, expanding the potential variation in types and degrees of transition; (*b*) examination of the role of local actors, institutions, and processes; and (*c*) more sophisticated longitudinal analyses.

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