

Student Scholarship

Justice Delayed Need Not Be Justice Denied



BY KATHLEEN O'NEILL

Kathleen O'Neill '06, who has lived in Germany, Honduras, Bolivia and Colombia, earned a Ph.D. in political economy and government from Harvard University in 1999 and was an assistant professor of government at Cornell University before entering the NYU School of Law in 2003. During her second year, she became interested in transitional justice, which "asks how to accomplish justice in the context of a nascent democracy—a confluence of issues in which my interest in law and my training in political science naturally overlapped." O'Neill began developing a series of papers that probe the relationships between

various approaches to transitional justice. In this paper, she questions the frequent opposition to amnesty and prosecution in the transitional justice literature, arguing that amnesties granted early in a transitional justice process may give way to prosecutions in the longer run. O'Neill, who was a Furman Scholar with a full-tuition merit scholarship, won the Jerome Lipper Prize for outstanding work in the field of international law and was the senior articles editor for the Journal of International Law and Policy. This past year she clerked for Judge Kermit Lipetz of the U.S. Court of Appeals for the First Circuit.

THIS PAPER ADDRESSES THE CENTRAL dilemma of transitional justice: how countries emerging from a period of major human rights abuses can address past violations (provide "justice") while simultaneously consolidating a new government based on the rule of law when the outgoing regime retains a great deal of power and may respond to any thoroughgoing prosecutions with a call to arms. In particular, I argue that the transitional justice scholarship has focused too narrowly on the initial decisions of transitional administrations, missing the dynamic nature of transitional justice processes over time. The central innovation is the concept of "eventual prosecution," referring to a process in which initial amnesties are followed by truth commissions, and the later prosecution of perpetrators. Eventual prosecution is possible where the ability of perpetrators to credibly threaten a return to power wanes over time, while the desire of victims and their supporters for justice holds relatively steady or increases. It is important to note that this describes only a subset of the cases in which questions of transitional justice arise. This paper makes a theoretical argument for eventual prosecution and also considers the conditions under which it is likely to occur.

I argue that eventual prosecution may provide another model for navigating the treacherous shoals where prosecution and democratization collide by taking prosecution off the agenda during the earliest phase of democratization, yet reintroducing it when there is more stability and perhaps more bureaucratic capacity to pursue prosecution. For empirical grounding, this paper leans heavily on the experiences of Argentina and Chile—two countries that have, in recent years, begun to prosecute human rights abuses from previous authoritarian regimes (1976-1983 and 1973-1990, respectively)—and Brazil and Uruguay—two neighboring countries that, while they experienced similar human rights abuses (1964-1985 and 1973-1985, respectively) under authoritarianism, have not moved toward prosecutions.

WHAT IS EVENTUAL PROSECUTION?

The concept of eventual prosecution recognizes that the choice of whether or not to prosecute is not only taken immediately after the perpetrators cede power, but is also revisited in future time periods. As society becomes more confident that any resistance from the perpetrators is unlikely to destabilize the new regime, the benefits of prosecution to the society begin to outweigh the costs of risking retaliation.

ADDRESSING ARGUMENTS AGAINST DELAYING PROSECUTION

In situating eventual prosecution within the set of choices faced by an incoming regime, it is important to remember what other options are available. As anyone examining these questions inevitably learns, transitional justice is a study in second-best options. While those who favor prosecution for moral reasons would like to see prosecutions occur immediately and on a grand scale, such a response is rarely possible. In fact, the one country in this region that attempted early prosecutions—Argentina—was ultimately unsuccessful, as the military’s resistance terrified the population into ending the prosecution process and, eventually, led to a blanket amnesty and the pardon of the few officers who had been convicted for their crimes during authoritarianism. Moves toward prosecution in other countries, as in Uruguay, met with similar resistance; moreover, neighboring countries in the region learned from Argentina’s experience without having to repeat it. By delaying prosecution until military power is weaker, countries like Argentina and Chile have allowed democracy to consolidate and the judiciary to gain

to amnesty and so these can be prosecuted without requiring a great deal of creativity.

Amnesty also affects who will be prosecuted. Ideally prosecutors would target perpetrators based on the severity of their crimes; however, amnesty laws limit prosecution of those whose crimes are not covered by amnesty, and these may not be the worst offenders.

Second, the delay in prosecutions means that many victims may die before their tormentors are brought to justice and—as Pinochet’s recent death underscores—many perpetrators may die without an official reckoning for their past crimes. Again, the appropriate comparison is to determine whether or not the victims could have received compensation within their lifetimes without risking a recurrence of human rights violations.

BENEFITS OF DELAYED PROSECUTION

Given its limitations, why pursue prosecution once it is politically possible? Prosecutions may help establish a valid historical record. Using the law as an instrument of justice may also help to reinforce the rule of law as the primary method of redress within a

not covered by amnesty since 1999. In Argentina, the legislature with the support of the president repealed the amnesty laws entirely in 2003, allowing prosecutions against perpetrators to multiply. Compare these two countries with those where prosecutions have been further delayed or avoided altogether: Uruguay, which falls into the former category, was thwarted by potent amnesty laws; Brazil, which falls into the latter category, has not extended its efforts beyond victim reparations legislated in the 1990s. Because of the very few cases analyzed here and the wide variety of factors that differ across these cases, this discussion is meant to be suggestive rather than definitive.

Existing studies show the lack of a clear correlation between eventual prosecution and (1) the overall level of atrocities, (2) the relative strength of the incoming regime compared to the outgoing one; or (3) the strength of victims’ and human rights groups.

My own analysis suggests that eventual prosecution is most likely when the human rights violations of the previous regime are not overshadowed by more recent human rights violations; where international media attention is focused on the crimes of past leaders—for instance through attempts to bring them to justice in the international community; where amnesties are seen as largely illegitimate and therefore susceptible to circumvention; and where prosecution can be linked to current problems of the democratic regime to create political popularity for the politicians leading the charge against the previous regime.

CONCLUSION

This analysis suggests that reformers in new democracies should think not only of the past when forming transitional justice policies, but of the future as well, because early decisions affect the array of options available later in the process. As the experiences of these countries illustrate, pushing for the maximum level of redress early on may restrict later possibilities: Argentina’s strong push toward prosecution led to sweeping amnesty laws that might not have been necessary and later restricted the categories of crimes that could be prosecuted; attempts to repeal an initial amnesty law in Uruguay led to the passage of a more capacious amnesty law. At the same time, early decisions sometimes open opportunities to later administrations, e.g., truth commissions and nongovernmental fact-finding reports have proven useful in domestic and international attempts to prosecute particular members of the former regimes. □

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both independence and confidence that its actions will not be met with reprisals. This is not a wholly costless choice, however.

COSTS OF DELAYED PROSECUTION

At least two questions loom large in assessing the merits of delayed prosecutions: (1) how does amnesty affect which crimes and which perpetrators are prosecuted?; and (2) how does delay affect victims? In both Argentina and Chile, amnesty laws created a strong barrier to actionable claims. However, prosecutors have found innovative ways around these amnesty laws. For example, the amnesty laws in Argentina and Chile did not cover kidnapping and, since many of the casualties of the authoritarian period were “disappeared,” those cases could be prosecuted under kidnapping. Additional crimes, like the taking of children from mothers during their captivity in authoritarian detention centers, are also not covered under the amnesties. Finally, crimes against humanity are never subject

consolidating democracy. In addition, prosecutions—even delayed ones—may deter future human rights violators. Deterrence is a tricky issue, however. On the one hand, eventual prosecution signals to future leaders that, while it may take some time, massive human rights abuses may eventually be punished. On the other, members of future repressive regimes may simply demand a more carefully crafted amnesty law to limit their susceptibility to prosecution. In a sense, eventual prosecution may lead to an “arms race” on both sides, as perpetrators demand more detailed amnesty laws and plaintiffs’ lawyers attempt to wring from ambiguous language a justification for prosecution.

UNDER WHAT CONDITIONS IS EVENTUAL PROSECUTION LIKELY?

Having made the case for eventual prosecution, I explore the conditions under which it is most likely to occur by comparing cases where prosecutions have been undertaken. In Chile, prosecutors have pursued claims

Four Arguments for Expanding the Transnational Scope of Patent Law



BY MELISSA FEENEY WASSERMAN

A love of science combined with a curiosity about innovation policy led Melissa Wasserman '07 to focus her research in intellectual property. "One reason why I find patent law so interesting is that every time a new field of technology is developed, we are left asking if this new technology should be patentable and, if so, does current patent law adequately protect the incentives to innovate?" she says. This paper addresses the latter question with respect to networking and telecommunications. Published in the April 2007 issue of the NYU Law Review as "Divided Infringement: Expanding the Extraterritorial Scope of Patent Law," this note has won the grand prize in the Seventh Annual Foley & Lardner Intellectual Property Writing Competition and won the 2006 George Hutchinson Writing Competition. Wasserman earned a Ph.D. in chemical engineering from Princeton University in 2004 before entering the NYU School of Law, where she was articles editor of the Law Review and a recipient of the Finnegan Henderson Diversity Scholar-

ship. She is currently serving as a law clerk to the Honorable Kimberly A. Moore of the U.S. Court of Appeals for the Federal Circuit.

PATENT LAW HISTORICALLY HAS been territorial in nature. U.S. patents do not protect against the manufacture, use or sale of inventions outside the United States. However, technology is not easily contained within national borders. In particular, networking technology allows one to reap the benefits of a patented invention within the United States but practice all or part of the invention outside its borders. Thus, because of the territoriality of U.S. patent laws, unauthorized practice of a patented invention across national borders, which I refer to as divided infringement, is not actionable under U.S. patent law. Furthermore, no country's patent law may cover the infringer's activity, even if the inventor owns patents in each relevant country. The result is a legal no-man's-land:

a patented invention is being infringed, but no country's laws give rise to liability. Potential infringers who take advantage of this legal gap are able to circumvent patent law.

While it has always been possible to evade the patent system in this manner, it was not until recently that this questionable behavior has presented a real threat for patent holders. The advancement of networking and communications technology now make it possible to transmit information across national borders cost-efficiently. Before the advent of the computer network, evasion of the patent system seldom occurred because sending part of a patented process or method offshore was prohibitively expensive. Now, would-be infringers can practice an invention in multiple jurisdictions, reap the returns of a market, and escape patent infringement liability in each relevant jurisdiction. As one would expect, we have seen a dramatic increase in the practice of divided infringement over the last several decades.

While the overall trend has been to expand the transnational nature of patent law, the recent extraterritorial expansion of patent law does not go far enough. In particular, there are still a number of ways to evade the patent system and escape liability for divided infringement. I offer a number of normative justifications for expanding the transnational scope of patent law.

First, the primary purpose of patent law, to "promote the Progress of Science and useful Arts," is being thwarted by the current limited transnational reach of U.S. patent law. An inventor receives a patent as a quid pro quo for disclosing a new invention. Congress decided that in return for the disclosure of a novel, nonobvious, and useful invention, the inventor receives the right to exclude others from practicing the invention for a period of years. If a potential infringer can escape liability by placing part of the invention in another jurisdiction, this prevents the patentee from garnering the financial rewards associated with her exclusive rights. If divided infringement stunts the economic impetus to innovate, inventors will turn their focus to developing inventions that cannot be easily distributed among multiple countries. The result will be a skew in innovation.

Software and network-dependent fields will lag behind other fields whose inventions can more readily be contained within national borders.

Second, encouraging innovation is not the only consideration when expanding the transnational scope of patent law. As with any extraterritorial application of U.S. law, comity concerns arise. The major comity concern with the expansion of the extraterritorial scope of patent law is allowing something that is the public domain (not patentable) in one country to be actionable (or give rise to patent infringement) in another country. Countries are concerned that allowing this type of liability will result in a chilling of innovation within their borders. The United States is a party to a number of bilateral or multinational intellectual property agreements that enable each participating country to control its own affairs, including what is public (not patented) and what is private (patented) within its territorial borders.

Nonetheless, expansion of the extraterritorial scope of patent law does not necessarily violate principles of comity; rather, it can be consistent with them. The limited extranational application of U.S. patent law can prevent the circumvention of U.S. law without adversely affecting the incentives to innovate in foreign countries. A would-be infringer who circumvents the U.S. patent system is preventing the U.S. patentee from receiving her full scope of return of the American market. A patentholder who seeks enforcement of a U.S. patent presumably seeks a remedy within the United States. The expansion of the extranational scope of patent law in this case does not breach the spirit of the bilateral or multinational intellectual property agreements the United States has adopted with other countries. These agreements normally account for national treatment of intellectual property law under which patent holders enjoy rights regardless of the inventor's citizenship. When the harmful effects of divided infringement are largely limited to the U.S. market and its patentholders, however, the concerns of other countries will likely be minor.

This is not to say that the other countries have zero interest in the extraterritorial application of U.S. patent law. However, from the point of view of patent law, the issue is not whether another country has any interest but whether the enforcement of a U.S. patentee's rights affects the purpose of the other country's patent system by preventing that country's patentee from garnering the financial rewards of that

country's market. Every extraterritorial application of U.S. law will affect another country; the question with respect to divided infringement is what effect or interest is most important in relation to patent law and its policies and purposes. With respect to divided infringement, the focus should be on whether patentees are receiving their full financial awards of the market in which they hold a patent.

Third, the transnational application of certain inventions is oftentimes intentional. For example, the radio navigation system at issue in *Decca* lacked utility unless at least one station was outside the territorial boundaries of the United States. Therefore, it would have been impossible for the inventor to draft claims that only referred to domestic activity yet still satisfied the utility requirement of the Patent Act. In addition, the extranational application of

to the evolution of technology than trademark and copyright law. Patent law must constantly evolve to keep pace with emerging technologies, whereas the connection between trademark and copyright law and science is more tenuous. There are numerous instances where Congress or courts have expanded the scope of patent law to account for new technologies. For example, the breadth of patentable subject matter often expands to incorporate new fields of science. Today, an inventor can obtain a patent on biological materials, business methods, and software. Thus, as progress in science has caused the courts to expand the scope of patentable subject matter, it should also be the impetus behind expanding the transnational effect of patent law. The last Supreme Court case interpreting the direct infringement statute of the Patent Act was in 1971. At that time, the Court did not have

While patented goods were historically easier to contain within the United States, the advancement of networking and communications technology has destroyed this presumption.

many networking-dependent inventions is inevitable. For example, the Blackberry system in the *NTP* case transmits information across borders and would do so even if the relay station were located within the United States.

Finally, other areas of intellectual property law, such as trademark law and copyright law, are also drifting toward greater extraterritoriality. It is not surprising that trademark law was the first intellectual property regime to have its transnational scope expanded. Trademark law focuses on the reputation of the trademark holder and the *Bulova* court must have realized that it is very difficult to localize the reputation and trademark of goods that are known internationally to one specific jurisdiction. However, while patented goods were historically easier to contain within the United States, the advancement of networking and communications technology has destroyed this presumption. Therefore, the localization of patented goods is becoming as difficult as the localization of the reputation of a trademark.

Several differences between trademark, copyright and patent law support the expansion of the extraterritorial reach of patent law. First, patent law is linked more closely

to face technology that infringers today easily use to thwart the patent system. As technology evolves, so too must U.S. patent infringement law, otherwise we risk jeopardizing the purpose of the patent system.

The second difference between trademark law and patent law is that, in contrast to patent law, trademark protection has no expiration. The law protects a mark as long as the mark is in use. The limited tenure of patent rights should cut in favor of extending extraterritorial protection to acts occurring outside the United States.

In sum, there are many reasons to expand the transnational scope of patent law. Some arise from the similarities and differences between patent law and other areas of intellectual property law that have greater extraterritorial application. Others highlight policy considerations, such as incentives to innovate, while some account for the reality that a number of inventions are made specifically to cross national borders. However, all suggest that the current limited transnational reach of patent law falls short. □

The author gratefully acknowledges the assistance of Professors Rochelle Dreyfuss and Harry First.