Transitional Justice Against the State: Implications of the Local Interpretations of Truth, Justice, and Reconciliation

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On 14 May 2010, Spain’s General Council of the Judiciary suspended Judge Baltasar Garzón from his post in Spain’s Audiencia Nacional for “prevarication,” or knowingly exceeding his mandate, when he launched an investigation into the 130,000 victims of the Spanish Civil War and ensuing Franco dictatorship who remain in mass graves scattered throughout the country. Although Garzón would later be acquitted of the charge on the grounds that the misinterpretation of his jurisdictional reach was not intentional, the court still ruled that he lacked the authority to launch such an investigation.¹

The suspension of Judge Garzón shocked and horrified the international human rights community. Garzón’s previous indictments of Chilean dictator Augusto Pinochet, the Basque militant group ETA, and his investigation into human rights abuses at Guantanamo Bay had earned him the moniker of “superjudge” amongst journalists and sympathetic NGOs. Reed Brody of Human Rights Watch lamented: “What bitter irony that Garzón is being prosecuted for trying to apply at home the same principles he so successfully promoted internationally” (Human Rights Watch 2012). Hugo Relva of Amnesty International sounded a similar tone: “It seems the search for truth, justice and reparation for past crimes under international law in Spain is being held hostage to this trial based on outrageous charges” (Amnesty International 2012). And the United Nations Working Group on Enforced or Involuntary Disappearances issued a press release reminding the Spanish government that “enforced disappearance is a continuing offence and a continuous human rights violation.” As such, their statement went on: “An investigation should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified” (UNOG 2012).

¹ By the time judgment was issued, this was already a moot point; Garzón had already been stripped of his position in an officially unrelated trial, which many interpret as a roundabout punishment for violating Spain’s tacit “Pact of Oblivion” not to investigate, legislate, or adjudicate the divisive past.
Spain’s moral obligations aside, the question of its legal obligation to investigate the fate of the disappeared remains far less settled than these declarations would imply. Despite the Working Group’s recent insistence that all these crimes constitute continuing crimes, when in 2002 Spain’s Association for the Recovery of Historical Memory (ARMH) submitted some 64 cases of forced disappearance to the UN Working Group on the Disappeared, only two were deemed admissable (Silva 2003: 105-109). The committee determined that all of the other cases, dating from before the foundation of the United Nations in 1945, did not fall under its mandate.

The victims of Franco’s repression met a similar fate when Rights International Spain sought to bring their demands to the European Court of Human Rights. In December 2012, the court ruled that Fausto Canales Bermejo’s complaint against the state was inadmissible, as the case was not brought “without undue delay” (Márquez and Melón 2012). The Spanish historical memory movement continues to bring forward legal cases and may yet find a venue willing to admit their claims. But at least for now, no legal body has found itself competent to rule on the Spanish state’s legal responsibilities for investigating its past crimes.

The trial and suspension of Judge Garzón highlights an important and under recognized aspect of transitional justice. The field is conventionally thought of as “the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses” (ICTJ 2013). But as the experience of Spanish civil society organizations demonstrate, transitional justice has become more than a set of law and policy proscriptions to be adapted to various post-conflict countries; it has become a set of ideals, ethical guidelines, and democratic principles by which individuals and groups define themselves, articulate their demands, and evaluate their governments.

In this paper, I examine the tensions between the legal principles of transitional justice and the social practices it inspires in contemporary Spain. Based on over 16 months of ethnographic fieldwork with the Spanish historical memory movement, I demonstrate how the legal and political theories of transitional justice scholars inspire new and unexpected reformulations. Many of these creative reinterpretations of international human rights norms point towards the inevitable problems of attempting to implement elements of political and juridical programs without the backing of states and international bodies. However, we will also see how creative reappropriations of the techniques and technologies of transitional justice may offer practitioners and theorists new ideas for best practices. And yet, even with the potential for
improving implementation that such a perspective will afford us, I argue that the tensions displayed by the Spanish movements are not simply a result of improper or incomplete application of the law, but rather stem from a fundamental tension between the ethics of transitional justice and its bureaucratic-legal form.

The Garzón trial was not the first time that Spain had come to occupy the attention of transitional justice scholars. In order to better situate the current resurgence of transitional justice in Spain, it will be helpful to contextualize the current search for the disappeared in the broader history of Spain’s relationship to the field of transitional justice.

**Historical Context: Understanding Spain’s Fraught Democratic Transition.**

On 20 November 1975, Generalissimo Francisco Franco died in his sleep, closing out his four decades as dictator of Spain. Over the next three years, Spain would complete what had until then been a rarity in the world: a successful, peaceful transition from dictatorship to democracy. Culminating the 1978 Constitution, Spain, together with Portugal’s Carnation Revolution, inaugurated what Huntington (1993) would later coin the “Third Wave of Democratization.”

Soon scholars of the emerging field of transitional justice were talking of a “Spanish model” of democratic transition (Linz and Stepan 1996, Gunther 1992, Przeworski 1991, Colomer 1991). Key features of this archetype included compromise between elites, moderation of political parties, and rising socio-economic mobility. When the Berlin wall came down, a number of Eastern European politicians traveled to Spain to study how to properly establish democracies back home (Alonso and Muro 2011:1). Spain was the paragon to be emulated by others.

Although it did not feature prominently in most theoretical abstractions of the Spanish model, central to its workings on the ground was a tacit “Pact of Oblivion,” whereby major Spanish political actors agreed not to legislate, litigate, or discuss the past in the public sphere. As described by one leader of the Basque National Party, the new Spain required an amnesty “from everyone to everyone, a forgetting from everybody to everybody” (in, Aguilar 2001:103). In practice, this meant that in contrast to the later democratic transitions of the 1990s:
No military trials of the like that took place in sister military dictatorships such as Argentina, Greece, and Chile to account for human rights abuses were staged in Spain. Nor did the Spaniards see fit to organize a fact-finding and truth-telling commission to chronicle the political crimes of the previous regime, as was done in South America, Central America, and South Africa during the 1980s and 1990s. Consequently, to this day there is no equivalent in Spain of the Nunca Más (never again), the series of reports convened by the military. Finally, there were no bureaucratic purges (so-called lustration) in Spain of the kind that accompanied the dismantling of Communist regimes in Central and Eastern Europe during the 1990s intended to cleanse the political system of the vestiges of the old regime (Encarnación 2008:437; see also Cardús i Ros 2000:19-21).

In effect, if not always explicitly in their modelings, scholars of democratic transition in the late 1980s and early 1990s favored a model of transitional justice that called for ignoring, or at least temporarily tabling, any reckoning with past human rights violations.

In their defense, Spanish leaders had reason to be nervous about reexamining the most traumatic moment of their country’s history. From 1936-1939, Spain was ripped apart by a bloody civil war between an insurgent fascist movement and the democratically elected yet fragile Second Republic.

Human rights violations were committed on both sides. In response to the military uprising, Leftist street gangs set about extirpating any perceived “fascist elements” from towns still under Republican control. In addition to executing numerous Falange-party activists and yellow union leaders, the leftist street gangs murdered over 6,000 priests, monks, and other Church workers (Preston 2007:124-125).

These atrocities, however, would pale in comparison with the brutality of Franco’s subsequent “crusade.” Supplied by Nazi Germany and Mussolini’s Italy, Franco’s Army of Africa quickly overran Southern Spain. Everywhere, its conquests were followed by brutal purges that made clear its goal was not simply to exert territorial control, but also to exterminate the “anti-Spanish enemy” (Preston 2007:103, 109, 120-123). Over the course of the war, at least 130,000 civilians and Republican sympathizers killed by the army, national guard, or fascist

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2 Religious themes were central to the narrative being developed by the Nationalist forces. Even before the Civil War had concluded, Franco and the Spanish right skillfully associated their campaign with the Catholic Monarchs’ Reconquista against the Moors in the 15th Century.
party activists away from the front lines and buried in mass graves. Thousands more would be killed and tens of thousands imprisoned in the years after the war, as Spain’s new dictator, Generalissimo Francisco Franco, violently purged the country of any remaining Republican sympathizers (Tremlett 2006:62).³

Spaniards were bitterly divided in the aftermath of the Spanish Civil War. Franco’s government set about commemoration his “glorious national crusade” against the “Jewish-masonic-communist alliance” represented by the Second Republic, through new textbooks and massive monuments, such as the Valley of the Fallen (Marquez 2006:70–71). Meanwhile, the Spanish Left – now mostly in exile – saw the war as the tragic defeat of a democracy largely abandoned by the war; a narrative only reinforced by the Allies decision not to overthrow Hitler’s former ally in the wake of the Second World War.

At the time of Franco’s death, Spaniards remained bitterly divided over how they understood the preceding 40 years.⁴ As such, Spanish politicians saw the past as something dangerous that had to be actively suppressed, lest the country slip back into a renewed civil war⁵ (Aguilar 2002:34). And their plans seemed to work, as Spain consolidated its democracy, living standards improved dramatically, and civil society organizations began to take root. No wonder the attention and praise heaped upon it by theorists of democratic transition.

But on the periphery, a new model of transitional justice was forming. This model was based not on the principle of elite pact making and public forgetting, but rather on public remembering and the growing inclusion of civil society representatives. At the heart of its concept of proper democratic transition lie two juridical undertakings.

First, the new model of transitional justice prominently features semi-juridical Truth Commissions, such as the 1994 Argentine National Commission on the Disappearance of Person’s Nunca Más report, South Africa’s 1994 Truth and Reconciliation Commission, and Guatemala’s 1997 Commission for Historical Clarification. Truth Commissions employ a variety

³ One estimate placed the number of Spaniards imprisoned in the early Franco period at almost 2 percent of the entire Spanish population (see Preston 2012).
⁴ Further complicating the story is the fact that the late-Franco period saw increasing economic mobility, even in the absence of political reform.
⁵ As Rigby (2000:78) points out, it is significant that the Spanish Transition was carried out prior to the rise of civil society as a renewed category in democratic theory. Thus, Spanish politicians were not required to coordinate with civil society organizations in the ways that later Transitions would.
of juridical mechanisms, including judges, forensic exhumations, and deposition of witnesses.\textsuperscript{6} Though such procedures, these commissions are tasked with the goal of producing authoritative narrations of past conflicts and human rights abuses, in an effort to forge together a fractured nation around a new collective biography of the nation.

Still, Truth Commissions largely fail to bring about criminal prosecutions of the guilty, either because, as in Argentina or South Africa (Wilson 2001; Mamdani 2002), they lacked the mandate to do so or because their recommendations for criminal prosecution were not followed through, as was the case in El Salvador (Buergenthal 1994).

Therefore, beginning in the mid-1990s policy makers and theorists of transitional justice alike renewed their attention to war crimes tribunals (see Subotic 2012). Taking inspiration from the post-World War II International Military Tribunals at Nuremberg and Tokyo, beginning in the mid-1990s the international community increasingly emphasized the role of criminal prosecution of human rights violations, beginning with the special International Criminal Tribunals for Rwanda and the former Yugoslavia and culminating in the 2002 establishment of the permanent International Criminal Court. These international efforts have been supplemented with a host of national universal jurisdiction clauses allowing local judges, such as Spain’s Baltasar Garzón, to take action against human rights violators around the world. While these criminal law efforts have produced only a limited number of successful prosecutions, as we shall see below, their effects extend beyond the content of their judgments.

With these developments, scholars and practitioners of transitional justice soon consolidated a new dominant theory of democratic transition based upon the principles of Truth, Justice, and Reparation.\textsuperscript{7} As summarized by Amensy International (2007), these principles entail:

1) Truth: establishing the facts about violations of human rights that occurred in the past;

\textsuperscript{6} For a more detailed comparison of legal procedure in criminal prosecution and truth commissions, see Crocker 2000.

\textsuperscript{7} While most United Nations documents claim that these principles of Truth, Justice and Reparation are derived directly from earlier covenants and treaties – including, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Geneva Conventions (eg. United Nations Human Rights Council 2011) – the distillation of these scattered accords into the triad only happens with the rise of the transitional justice paradigm. As I have argued elsewhere with relation to the category of forced disappearances (Rubin 2013), this suggests that the consolidation of these principles brought with them a host of new meanings, identities, and legal categories.
2) Justice: investigating past violations and, if enough admissible evidence is gathered, prosecute the suspected perpetrators;
3) Reparation: providing full and effective reparation to the victims and their families, in its five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Today a rich field of scholars debates how best to implement these principles and whether or not such principles can be mutually reconciled (eg. Sunga 2009; Rotberg and Thompson 2010). These arguments are beyond the scope of this paper. For our purposes, it is sufficient to note that, by the turn of the millennium, the Spanish model of democratic transition, with its emphasis on amnesty for and public silence about past crimes, now appeared to be anachronistic.

Of course, Spain’s Pact of Oblivion was never quite as airtight as its idealizations in academic texts would have it. Already in the 1970s and 1980s, relatives of the disappeared quietly and without much media attention conducted a series of informal exhumations of mass graves (Ferrándiz 2010; fieldwork interviews). The private nature of such exhumations allowed them to remain relatively uncontroversial, even amongst those few Spaniards who knew about them. Academic inquiry into the Civil War – strictly controlled under the Franco dictatorship – likewise flourished anew soon after the Caudillo’s death (e.g. Larrazábal 1977; see also Graham 2004). And by the 1990s, novelists and directors were increasingly turning towards the Civil War and Franco dictatorship, albeit more often as a background for humanistic stories than as a genre of moralizing against past crimes (Labanyi 2000; Resina 2000; Faber 2005; Faber 2006). In the wake of these efforts, memories of Spain’s 20th Century slowly became more prominent in Spanish public life.

And yet, by 2000 the Pact of Oblivion remained, at least nominally, intact. So, when a young journalist named Emilio Silva successfully located the remains of his deceased grandfather in a mass grave outside of Priaranza del Bierzo, León, and, with the help of a team of forensic doctors, archaeologists, and geologists led a public exhumation, shockwaves rippled throughout Spain. At first the movement struggled to gain recognition in the national press: even after articles appeared in The New York Times and International Herald Tribune, the Spanish press was slow to report. Silva’s persistence and journalistic skills, however, soon paid

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dividends. By the middle of the decade, the historical memory movements became one of the most reported on, and controversial group of civic associations in Spain.

Without ignoring Spain’s own internal dynamics, it is difficult to understate the importance of the new regime international human rights law and transitional justice norms on Spain’s memory boom (see Golob 2008). The influence can already be seen at the very first forensic exhumation in October of 2000, as captured in the documentary film *The Steps of Memory*. There, Emilio Silva can be seen sitting on the side of the excavation site, while forensic scientists and archaeologists work excavating the remains of his grandfather, Emilio Silva Faba, along with those of twelve other civilians murdered by fascist forces and hastily buried in an unmarked common grave on 16 October 1936. Making explicit reference to the internationally acclaimed human rights investigations of Judge Garzón, Silva commented: “It seems that we are projecting ourselves into countries like Argentina or Chile, when in our ditches and beneath our orchards in places all over Spain, we have evidence that there are thousands of people” buried in mass graves [http://vimeo.com/7225833](http://vimeo.com/7225833); see also, Silva 2001:81).

Shortly thereafter, Silva published an article in the small, local paper, *La Crónica del León*, entitled “My Father was also a Disappeared” (Silva Barrera 2000). The use of the term “disappeared,” a legal category inspired by the experiences of Cyprus and Argentine, to refer to a group of people more often euphemistically described by Spaniards as “*paseados*” (those who went for a walk) or “*asesinados*” (murdered) is further evidence of the influence of international legal norms (Ferrándiz 2010; Rubin 2013). The tremendous response to the article inspired Silva to form the Association for the Recovery of Historical Memory (ARMH). Similar organizations, such as the communist-party linked Forums for Memory, soon sprung up. Together with smaller groups, these organization formed a loose network, comprised almost entirely of unpaid volunteers, that have sought out, exhumed, and publicly commemorated the disappeared.

To contemporary observers, it seemed as though the Pact of Oblivion had suddenly and dramatically crumbled before a surge of highly public commemorations (Tremlett 2006: xvii-xix). By December 2011, this “historical memory movement,” as these NGOs and individuals became collectively known, had exhumed over 303 mass graves, containing some 5911 persons killed during the Spanish Civil War (1936-1939) and ensuing Franco dictatorship (1939-1975). In the process, the historical memory movements became one of the most reported on, and controversial civil society movements in Spain. Significantly, unlike those conducted by
Spaniards in decades past, this new wave of exhumations were led by forensic doctors and archaeologists, using protocols developed for post-conflict transitional processes around the world (e.g. United Nations 1991). Soon enough, both supporters and detractors of the memory movements were talking of an “Argentinization” of Spain (Faber 2012; Julia 2010).

And yet, unlike forensic interventions conducted by their peers in the immediate aftermath of civil wars and dictatorships, such exhumations in Spain are not carried out to support any a truth commission, war crimes tribunal, or any other juridical process. Rather, they are implemented entirely by civil society organizations, with hardly any support from the government. Though the legal categories and practices associated with transitional justice had come to Spain, they did so without the force of law, the backing of the state, or the support of international bodies. Nonetheless, as I shall argue below the categories of criminal law and transitional justice would have a profound impact on the state of the Spanish historical memory movement.

**Forensic Exhumations as a Microcosm of Transitional Justice**

On a hot summer’s day in 2011, just outside of the town of Joarilla de las Matas, León, a dozen volunteers for the Association for the Recovery of Historical Memory (ARMH) worked diligently uncovering the remains of 14 Asturian miners, murdered by fascist forces in November 1937 and buried in a mass grave. Kneeling shoulder-to-shoulder in a ditch dug earlier by an excavator, the volunteers worked with small shovels, chopsticks, and paintbrushes, carefully removing the earth in the imagined grid-square immediately in front of them. An archaeologist from the ARMH supervised, carefully noting on his pad each time a new body or object such as a bullet casing or, in this case, a perfectly preserved pocket watch appeared (see Fig. 1).

At first glance, the scene seems remarkably familiar to anyone who has followed the circulating images and videos of similar forensic exhumations in Latin America, Africa, and Southern Europe. So similar, in fact, that two foreign forensic and one social anthropologist who had previously worked on exhumations in Guatemala and the former-Yugoslavia had no trouble whatsoever fitting in with the procedures and practices of the experienced Spanish team. Although Spain has yet to formalize any national exhumation protocol – this despite the 2007 Law of Historical Memory mandating that one be created – experienced Spanish forensic teams...
have voluntarily adopted the sorts of professional standards utilized by forensic scientists around the world to analyze mass graves (eg. United Nations 1991).

On closer inspection, however, several subtle though significant differences begin to emerge. For one, at this exhumation I am leading an effort to gather and record as much information about the past as possible, as part of a larger project led by Dr. Francisco Ferrándiz of Madrid’s Center for Human and Social Sciences, supported and/or duplicated in function by all of the major organizations associated with the historical memory movements (see Ferrándiz 2006; Ferrándiz and Baer 2008). This effort entails video-recorded interviews at the side of the grave with relatives of the disappeared, informal interviews with villagers about those who were disappeared from their locale, and work in the municipal archive searching for suspicious and out-of-place death certificates, possibly indicating the names of those killed in wake of the fascist takeover of this locality. Prior to the exhumation too, and often times after it, researchers frequently conduct additional archival work, both regarding the specific grave at hand as well as to related cases of forced disappearance.

In this way, the Spanish exhumation functions not only to return the body of the disappeared to their relatives and not only to investigate the fate of this one grave, but also as an occasion to conduct the sort of fine-grained historical analysis and archive-building that, in other contexts, might be carried out by a Truth Commission or a national reorganization of state records.

Slight differences likewise emerge upon closely examining the archaeological methods of forensic experts. At the exhumation in Joarilla de las Matas, one of the foreign forensic anthropologists turned to me and complained that “there is a lot of fussing about here.” Whereas her experience in Guatemala entailed more quickly uncovering and removing human remains for

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8 Some of the results of this project can be seen at www.politicasdelamemoria.org
later laboratory analysis, the Spanish forensic teams painstakingly uncovered and cleaned remains, allowing for not only the technical photography required by forensic specialists, but also a more aesthetic variety, producing the sorts of images that could circulate in the mass media and be preserved by relatives of the disappeared (see Ferrándiz and Baer 2008; Rubin 2012). In this way, exhumations are meant not only as processes of discovering remains, but also as a means for symbolizing the ongoing unaddressed injustices of Franco’s repressions.

Direct communication with the public is foregrounded in much of the forensic teams’ practice. In fact, so dominant is this focus on public education that Bevernage and Colaert (2013) have described Spanish exhumations as “mobile seminars,” roaming the countryside and educating the public about the Civil War and Franco dictatorship. In the absence of state-directed actions reformulating school curricula and apologizing for past crimes, the organizations that comprise the memory movement see such interventions as critical moments for reorienting the relationship of citizens to their collective past.

At the local level, this entails regular explanations of the excavation. At least once a day, the lead forensic scientist invites relatives and passersby to gather around the grave, as he demonstrates the disposition of each skeleton in the grave, visible perimortem trauma, and anything else of note, such as found objects (see fig. 2). Beyond simply explaining the forensic process, forensic scientists often take the opportunity to answer common criticism of the movement as well as moral justifications of the importance of recovering remains for family members, uncovering the history of the country, and honoring the deceased. As former vice-President of the ARMH, Santiago Macias, frequently argued, these interventions “contribute to the normality” of the

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9 The very first time I interviewed Emilio Silva, he explained to me the impact exhumations can have, testifying: “I have seen citizens being born at 70 years old. They have never been free, including during 25 years of democracy, and when they see this [an exhumation], they are.”
village and the country alike, stripping the recovery of human remains and the discussion of past human rights violations of their taboo status and constructing a proper relationship to the past, one citizen at a time.

At the national level, this entails inviting reporters for interviews at the side of the grave and encouraging wide-spread distribution of the news of the event through the mass media. In the absence of official state-directed measures publicizing and apologizing for past atrocities, these interactions with the mass media take on unparalleled importance. As one long-time photographer explained to me: “If it does not come out in the media it is like I does not exist” (see Rubin 2012). Here, the mass media holds the potential to carry the historical and ethical messages that emerge from Spanish forensic exhumations to a wider audience, reorienting their relationship to the past.

Though subtle, the orientation to the media can at times produce a profoundly different forensic practice. Thus, describing best practices for the exhumation of contemporary mass graves, Haglund et al. warns the forensic about the importance of being reserved in their statements:

> All field notes will be court-admissible documents so there should be absolutely no comments outside those directly related to the excavation. Any notes taken should be very clear. They should omit any language that contains implications beyond the archaeologists’ expertise. For instance, a skull may contain a circular defect, but the pathologist will determine whether the cause of that defect is a gunshot wound.. (2012:63).

By contrast, at a recent exhumation in Urbasa, Navarra, Dr. Francisco Etxeberría explained to the press precisely what the circular defects on the victims’ skulled signified: “the remains presented clear signs of violent death. In two craneums there were shots from a small caliber pistol, with an entry and exit wound” (Junquera 2013). Of course, Dr. Etxeberría does not have to worry about the effects his statements might have on future court proceedings, as the exhumations conducted by the Spanish historical memory movement lacks judicial backing. As such, the only opportunity for anything resembling the authoritative decree that precedes the judge’s gavel comes when the scientific expert addresses the camera.
When properly accomplished, the memory movements insist that exhumations can effect the sorts of dramatic societal changes that transitional justice theorists so covet. One long-time ARMH activist told me of her first experience at an exhumation: At first, the forensic team was not well received by the villagers. The only people who came to the grave, came to yell at them. But little by little, local villagers started showing up, although at first with great shame and trepidation. Some came to satisfy their curiosity, others to see the bodies of those who shared the fate of their grandparents, and still others to witness history in the making. However, as they saw the work of the forensic team, slowly but surely they came to understand and accept the importance of the intervention. In the end, a thousand people showed up to the cemetery for the reburial ceremony. This, she explained, represented a “tremendous recognition that here, injustice was done.” Since the war, she continued, no one would talk about what had happened. “Now, 70 years later, they can verbalize what happened. The village is greatly improved.” In this narration, the exhumation has effected, at least on the local level, precisely the sorts of democratic change envisioned by theorists of transitional justice.

Spanish exhumations largely maintain the rigorous scientific methods of the forensic processes that inspired them (see Ríos et al 2012; Etxeberria Gabilondo 2011; Renshaw 2011; Ríos et al. 2010). Yet these techniques and technologies are put towards broader ends. Transitional justice exhumations in other places are relatively narrowly conceived as producing evidence for juridical processes and returning the bodies to families and communities. Spanish exhumations, by contrast, having been removed from state- and international-sponsored programs of democracy building, incorporate additional methods of documentation and publicity. In this way, they aim to embody some of the broader goals of transitional justice as a whole directly through the practice of exhumation and reburial.

In order to understand how this is accomplished as well as some of the limitations of this effort, we must take a closer look at how the discourses of transitional justice have been adopted, repurposed, and transformed by the Spanish historical memory movements.

Transitional Justice Comes to Spain

Every Thursday in Madrid’s central Puerta de Sol, some 200 relatives of the disappeared and their supporters gather under the banner of the Platform Against Impunity for the Crimes of Francoism (colloquially and henceforth referred to as the Platform Against Francoism).
Explicitly modeled off of Argentina’s Mothers of the Plaza del Mayo, the Spanish protest borrows much from its Southern Cone progenitors. Protesters march in a circle, counterclockwise – against the flow of time – carrying photos of the disappeared on pickets and tied around their necks to demand government action locating, exhuming, and honoring the victims of Franco’s repressive policies (see fig. 3).

As they march, the gathered shout out in unison: “The crimes of Francoism! Must be judged!” (¡Hay que juzgar / a los crímenes del franquismo!) “Purge the Francoist judges!” (¡Depuración / de los jueces Franquistas!). And, more than any other chant: “Truth, Justice, Reparation! Neither forgiveness nor forgetting! (Verdad, Justicia, Reparación / Ni olvido ni perdón!).

As evident in their shouts, the Platform Against Francoism demands the application of international legal principles, even as the bodies charged with implementing that law have repeatedly rejected their requests as untimely, out of their jurisdictions, or preempted by Spain’s 1977 Amnesty Law. And while the associations that comprise the memory movements have, as we have already seen, successfully replicated the sorts of forensic exhumations that characterize transitional justice programs elsewhere, the lack of a state-backed legal forum in which to present such findings places stifling limits on the scope of these interventions, both in terms of the number of persons these organizations can afford to exhume and in terms of the impact of its entailed reconciliation measures beyond the local level.

What such an application in Spain of transitional justice measures in general, and the international criminal justice measures desired by the memory movements in particular would entail, however, is a bit harder to imagine. The principles of transitional justice are designed for societies emerging from periods of massive human rights violations. Through a series of

Figure 3: The Platform Against Impunity for the Crimes of Franco (top) and the Mothers of the Plaza de Mayo (bottom).
exceptional measures, newly democratic states effect a historical break from past regimes, in the process reconstituting a more inclusive nation.

By contrast Spain completed its successful, if by current standards anachronistic, transition to democracy 30 years prior. And the mass atrocities in question took place, for the most part, some four decades before that. The passage of time makes the implementation of the criminal justice component of transitional justice particularly vexed (though not impossible. See Nagy 2013): while some elderly small-time criminals could theoretically be made to account, those most responsible for past crimes – including the dictator Francisco Franco and the head of the fascist party José Antonio Primo de Rivera – have long since passed on. Understanding why Spanish activists continue coveting the force of human rights law under these circumstances requires a closer examination of their stated goals and motivations.

Surprisingly, those ends most commonly cited by theorists of transitional justice – retribution for past crimes and future deterrence – are rarely the ones cited by these activists. Rather, the activists of the Spanish historical memory movements utilize the principles of transitional justice as a way of formulating their demand for a broader public recognition of past atrocities.

For example, one weekly attendant of the Platform Against Francoism – the granddaughter of Pedro Gallardo Escribado, a Republican mayor assassinated by fascist forces at the beginning of the war – explained the slogan of transitional justice to me, saying: “the truth is itself a bit of justice. And justice is a part of, though only a small one, of reparation.” This sentiment would be repeated over and over again throughout my fieldwork. At one exhumation I participated in, an amateur historian whose father was killed in the civil war turned to me and said: “we have to know the truth and do justice.” When I asked him what the latter consisted of, he responded, “that the truth be known. That here, there was a genocide!” In these encounters, the language of transitional justice is appropriated by local activist on the ground to articulate a demand for truth-telling and recognition, rather than for pursuing the specific policy measures that they had originally indexed.

Spanish activists place particular emphasis on the power of criminal prosecution to not only reveal the truth, but also to make such truths hegemonic. At one exhumation conducted by the Forums for Memory, an activist reacted to news of the recent conviction of two Guatemalan Generals for crimes committed during that country’s civil war by passionately arguing that Spain
needed to do the same: “We have to judge them and declare them guilty! And the people should know. And it should be written in the history books that they are guilty.” Here, a guilty verdict provides not primarily a sanction against the responsible party, nor even a deterrent against future actions, but first and foremost a fast-track into the history books (cf. Rubin 2008).

Whereas for transitional justice scholars, the slogan “truth, justice, reparation” signified three distinct yet complementary sets of actions necessary for a proper democratic transition, in Spain, the slogan is used as a way of focusing attention on the need for the Spanish government to investigate the facts of the past and popularize a proper reading of it.

As a great many philosophers of history, historiographers, and anthropologists have demonstrated, these sorts of changes to the ways history is narrated necessarily entail ethical reevaluations of the past and present as well (Koselleck 2002; Comaroff and Comaroff 1992; Danto 1985). Thus, beyond providing a language through which to formulate demands for what public acknowledgement of what past atrocities does consist, the principles of transitional justice also provide a powerful moral claim of what such claims ought to consist. Here, unfavorable comparisons of the sort drawn between Guatemala and Spain by the Forums for Memory activist effect a critique of Spain as insufficiently living up to the principles entailed in democratic transition.

These ethical dimensions of the memory movement’s narration of history become particularly evident when we examine a workshop I attended early in my field research, in the basement of the Madrid offices of the ARMH that highlighted. Following a presentation on the group’s mission and programs, one of the participants began asking a question that referenced Spain being a first-world country. Carlos Agüero Iglesias, the Madrid coordinator of the ARMH quickly cut him off, before he could finish, saying that: “in some ways yes, in other ways no. When it comes to human rights, Spain is not [even] third world – it is like fifth world, while Argentina is first-world.”

Recall that the reigning hegemonic view of transitional justice was formulated in large part in opposition to an earlier model of democratic transition exemplified by Spain. Agüero Iglesias here exploits the normative assumption of the reigning model of

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10 This rhetorical move is clearly not intended to evaluate the relative development of Spain and Argentina in the same way that GDP rankings or failed state indexes seek to do. Rather, what is at stake here is demonstrating how Spain, as a first world country, is out of sync with modernity as reflected in ways of relating to human rights (see Comaroff and Comaroff 2012:9; Koselleck 2004; Appadurai 1996).
transitional justice in order to critique the Spanish state’s previously lauded actions relating to past atrocities.

For Agüero Iglesias, Spain’s failure to live up to the principles of transitional justice is evident not only of its moral failings, but also of its failed pretensions to liberal modernity. “How is it possible to have a political community with 100,000 disappeared? Is such a society possible? And if so, what kind of a society is it?” the facilitator asked. “It puts into question our own identity.” For its experts, scholars, and proponents, transitional justice entails a process of rehabilitating the content of national identity (e.g. Humphrey and Valverde 2008). In its absence, the facilitator argues, Spanish identity remains fragmented and incomplete. In order to construct a coherent national identity, Mr. Agüero Iglesias argues, the state must intervene to support and make official the forensic and educational efforts currently being conducted by civil society organizations.

In this section, we have seen the ways the language of transitional justice allows the memory movements to formulate compelling demands for state intervention. But when the state has intervened, however, it has often failed to live up to the ideals of the movements. It is to these friction-laden interactions of the state, its bureaucratic structures, and the memory movements that I now turn to in the next section.

Bureaucratic Authority and the Limits of State Action

Over dinner one night in the Andalusian town of Alcalá del Valle, Marco González, vice-President of the Association for the Recovery of Historical Memory, informed me that the exhumation we were conducting had nearly not happened. Andalusia is one of the few regional governments to adopt a protocol for forensic exhumations of mass graves. The protocol was designed in the aftermath of the highly controversial and ultimately unsuccessful attempt to locate and exhume the mass grave in which Spain’s most famous victim of the Civil War, Federico García Lorca, who is buried in a mass grave together with three other victims (see Rubin n.d.). As such, it contained provisions mandating the closing off of the exhumation site from all non-specialist personnel, including the immediate family members (BOJA 2009).

This was a deal breaker for the ARMH. Ideally, an exhumation needed to be, among other things, a public education initiative for both the town and the country. But at the very least, it had to serve the living relatives of the disappeared. The kin of the dead, the ARMH insists, are
“the protagonists” of the exhumation (see fig. 4). In the end, the ARMH found a loophole, realizing that as long as they did not accept funding from the regional government, they could proceed using their own organizational exhumation protocol.

The conflict in Andalusia highlights that, for the memory movement, exhumations should be designed to compel the state to realize its responsibilities towards, amongst others, relatives of the disappeared. When organizations like the ARMH and the Forums for Memory file complaints with the civil guard, they refuse to pronounce the provenance of the grave in question, instead preferring the passive construction “human remains have appeared with signs of violence.” The responsibility for determining the cause and circumstances of death, these organizations insist, remains with the government.

However, in those few instances in which the state attempts to intervene are marked with tensions and frustrations. Hence, a few months later, at another exhumation, one local judge responded to the ARMH’s judicial complaint by sending a state-licensed forensic scientist to examine a gravesite. Exhumation work ceased for three hours as the NGO ordered a cab to deliver the expert from Seville. Having certified in the name of the state what all already knew – that the grave in question dated from the Spanish Civil War – the state’s expert returned home. Time and money wasted by this inconvenience, the organization continued its work apace.

Often, as the state assumes greater responsibilities, these sorts of delays only increase. Dr. Francisco Etxeberria tells of one exhumation he conducted wherein a judge accepted responsibility for conducting forensic analysis of the found remains, transferring the bodies to a state forensic laboratory in Barcelona. The laboratory moved far slower than Dr. Etxeberria’s ARANZADI Scientific Society, taking several years to return the bodies. “With this type of
judicialization, the family never see the body!,” Dr. Etxeberri complained. “I want to judicialize exhumations, but in the manner that they did so internationally.”

Despite their frustrating experiences with state authorities, the memory movements continue to covet their intervention. For Spanish activists, these interactions are evidence of the state’s continuing reluctance to carry out its responsibilities to the victims of human rights abuses. Certainly this analysis goes a long way towards explaining some of the frustrations these activists encounter when interacting with bureaucratic authorities. There is, however, reason to believe that their interactions with state authorities are less outliers from international practice than they are exemplars of tensions inherent to it. In order to understand the tensions inherent to state involvement in exhumation procedures, it is useful to compare Spanish civil society forensic practice with that of their state-sponsored counterparts around the globe.

The lack of official juridical oversight of the exhumation process restricts forensic interventions in significant ways, renting the scientific authority of forensic experts from the sovereign authority of judicial proclamation. Nevertheless, the accompanying lack of strict legal procedure for producing the sort of robust admissible evidence that can withstand an adversarial cross-examination also allows Spanish NGOs to adopt far more flexible practices than their international counterparts who operate in more highly regulated spaces.

Transitional justice exhumations generally take place as part of bureaucratic processes designed to produce legally admissible evidence for court proceedings, truth commissions, or other juridical processes (see Haglund et al. 2001). Because of this, exhumations teams must undertake certain procedures – from limiting access to the field site to removing remains for extended periods of time – which place them at odds with relatives and communities. As a result, Stover and Shigekane have noted that: “Over the past ten years, a growing tension has emerged between the humanitarian needs of families of the missing and the evidentiary needs of international war crimes tribunals in the aftermath of mass killings” (2004:85). In response, a growing body of literature seeks ways of accommodating family and cultural desires with the necessities of scientific procedure (i.e. Stover 2004; Sunga 2009; Shaw and Hazan 2010; Robins 2011; EAAF 2012).

Spanish exhumations, like the transitional justice exhumations upon which they are based, follow strict scientific protocols in an attempt to ensure that, in words repeated to me by several different practitioners, “our work must be incontestable.” And yet, freed from the
burdens of having to produce evidence for a legal process, the Spanish exhumation displays far more allowances for the needs and desires of the relatives of the disappeared. 

At one exhumation in Loma de Montija, one woman who had studied archaeology in college requested to take part in excavating the grave where her grandfather was buried. Although she had not originally been scheduled to participate in the digging and lacked any official certification for her skills, the forensic team decided that this was not only a reasonable request, but one whose spirit was in keeping with the overall goals of the exhumation. And so, the ARANZADI Scientific Society allowed her to dig alongside more experienced volunteers, albeit under close supervision of lead forensic doctor, Francisco Etxeberia. In the more strictly controlled archaeological environments that characterize transitional justice exhumations, allowing non-certified personnel direct access to, let alone participation in, the uncovering of human remains would most likely be prohibited as a potential contaminant of the juridico-scientific process. 

At another exhumation in Villanueva de Valdueza, Leon, the ARMH agreed to return the remains of Antonio “El Cesterín” Fernando González to his family without laboratory analysis, owing to his discovery in a sole internment and the overwhelming testimonial, documentary, and anthropological evidence indicating the identity of the remains. Once again, such flexibility is unimaginable in a state-directed process, requiring laboratory analysis for each and every uncovered grave, regardless of extenuating circumstances. 

Notably, in spite of their plasticity, the scientific validity of the Spanish memory movements forensic exhumations is hardly, if ever, challenged. This despite the fact that exhuming the bodies of Republican and civilian victims of the dictatorship’s repression remains highly controversial within Spain. But while critics accuse the memory movements of disproportionately focusing on one side or on effecting social rifts and divisions, they hardly ever question the scientific merits of the exhumation itself. This suggests that the key differences between Spanish and transitional justice exhumations practices may lie less with their relative legal standing than with their relationships to state and bureaucratic structures. 

Ironically, the more rigid strict scientific protocols utilized by forensic anthropologists in transitional justice contexts may not be necessary for their successful inclusion in legal processes. Clyde Snow, who pioneered the use of forensic science in post-conflict scenarios, tells of his own experience testifying before an Argentine court:
Statistics can be very valuable in a forensic investigation, but when you’re giving testimony, you want to tell a story. So instead of talking about all our cases, we decided that we would pick a couple. In the case of the young woman, Liliana Pereyre, we picked her not only because she was quite a beautiful girl, but also because she was one of several hundreds of young women who happened to be pregnant at the time they were detained…And with her skull, we went through all the slides showing identification stages and then the last slide was this beautiful young woman. That was the end of my testimony. One could say it made a big impression on the judges and also the spectators. They told me later that many of the news-men up in the balconies were crying (Weizman 2011:72).

For Snow, it is not the strict scientific protocol, repeated on body after body that allows for effective testimony. Rather, effective testimony emerges through compelling narrativizing, allowing one woman’s tragedy to stand in metonymically for the widespread atrocities of the regime.

Scientific protocol is necessary to the ability of forensic scientists to authoritatively speak to the identity and histories of the bodies they uncover. And yet, the strict control over access to the burial site and the timing of returning remains may be less a consequence of this scientific rigidity than of the bureaucratic processes which accompany their application in processes of transitional justice. The limits of Spanish exhumations are evident of the need for strong state and international backing of exhumations and complimentary mechanisms for achieving the goals of transitional justice.

Despite these shortcomings, the positive relationships between the Spanish historical memory movements and relatives of the disappeared resulting in large part from the deference demonstrated by these civil society organizations provide important lessons for practitioner and theorists of transitional justice alike. Finding ways to incorporate such flexibility into exhumation practices has the potential to dramatically alleviate some of the tensions between communities and scientists that continue to emerge out of forensic exhumations around the world.
Conclusions:

As the trial of Judge Baltasar Garzón aptly demonstrated, Spanish adaptations of transitional justice discourses and practices stand in an awkward relationship to the law. While local NGOs and international organizations continue to appeal to Spain to fulfill its legal obligations to the disappeared and their living kin, no forum has yet to emerge in which the Spanish state can be held to account for its lack of action. As a result, Spanish NGOs have had to adopt forensic practices developed in the context of bureaucratic-legal processes elsewhere in the service of non-legal goals.

There are obvious shortcomings to the what Ferrándiz (2013) has called the “outsourcing of human rights.” Spanish NGOs’ limited resources mean that forensic teams can exhume only a fraction of the mass graves of which they are aware. Financial limitations also prevent more thorough archival, oral, and technical data gathering processes, further limiting the scope of such interventions. Beyond the financial burdens, civil society organizations cannot provide the sort of official state recognition of past wrongs and continued suffering so highly valued by relatives of victims (see also Androff Jr. 2012). As Dr. Etxeberria commented, “the only think that I search for is the truth. The problem is that they don’t make it official” (Conde 2012).

In this environment wherein transitional justice discourses and techniques are reappropriated directly by civil society organizations, truth, justice, and reparation have become more than a series of policy proscriptions for newly democratic states. Among the activists who comprise the Spanish historical memory movements, they have become a measure of democratic legitimacy tout court. In the process, the categories utilized by transitional justice scholars have taken on new meanings.

Scholars of transitional justice frequently argue for the importance of considering local customs and practices in the application of transitional justice. Rosalind Shaw and Lars Waldorf, for instance, argue in favor of a place-based model of transitional justice that how people affected by human rights violations experience and evaluate the juridical mechanisms they encounter (2010:6-7). Similarly, Stover and Shigenkane have argued for the need to “develop a coordinated strategy that satisfies both the humanitarian needs of the families of the missing and the legal needs of international war crimes tribunals” (2004:86). The message is even beginning to work its way into the discourse of those who design and implement such programs. In 2004,
UN Secretary General Kofi Annan declared the Security Council’s need to “learn as well to eschew one-size-fits-all formulas and the imposition of foreign models” (United Nations 2004).

If Spain is any indication, however, we will see that this incorporation of local perspectives is not simply a matter of reconciling complementary or even competing value systems (cf. Iliff 2012). Rather, it will often be a contest over the meanings of the terms which the United Nations, transnational NGOs, and scholars of transitional justice have so successfully popularized. In this context, those designing and implementing democratic transitions will have to be open to reinterpretations of their principles. For as the Spanish historical memory movement shows, truth, justice, and reparation may take on any number of meanings when utilized at the local level. Moreover, in this reconciliation of international legal programs with local interpretations, NGOs such as the ARMH and the Forums for Memory which directly serve relatives even as they follow international scientific norms may play a vital role in mediating between competing interpretations, serving the needs and desires of relatives and communities without compromising the legal or scientific validity of the exhumation.

Even in the best case scenario, however, some tensions will remain. In order to be successful, transitional justice mechanism must be state-directed enterprises. As such, they will be subject to the restrictions inherent to bureaucratic and legal processes. The scientific procedure requires removing human remains, sometimes for extended periods of time, in order to establish their identity. Likewise, evidentiary rules will necessitate strict control over the creation and maintenance of information, lest the entire forensic process be called into question in adversarial proceedings. Even under ideal circumstance, forensic exhumations will remain incapable of meeting the expectations and necessities of every individual case they encounter. Hence, as scholars continue to push for ever better and more responsive practices for the implementation of transitional justice regimes, we must also attend to the disciplinary regimes, violences, and forms of state power that are entailed in democratic transitions.

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