

JUSTICE, TRUTH, PEACE

by

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I. Introduction

The mind seems to have a natural tendency to assume that all good things go together. This may be a result partly of what psychologists call tradeoff aversion (Hedgcock and Rao 2009), partly of wishful thinking

Marx (1867, Preface)) asserted that in the transition to Communism, one should try to “shorten and lessen the birth pangs”. For a given duration of the transition, less violence would obviously be desirable; and for a given level of violence during the transition, the shorter it is the better. But a more gradual transition might involve less violence.

The movement for “socially responsible investment” is based on the premise of “doing well by doing good” (Landier and Nair 2009, Heal 2008). In some cases, the profit motive and community benefits may indeed be maximized simultaneously, as when consumers refuse to buy goods produced with the use of child labor. Typically, however, mutual funds that

refuse to buy alcohol and tobacco stocks do less well than others, because they cut themselves off from a valuable source of diversification.

Public policy is usually guided by concerns of distributive justice as well as efficiency. In practice, however, equity and efficiency may be at odds with each other, because of the problem of “the leaky bucket” (Okun 1975): when transferring wealth from a rich person to a poorer one, some wealth is usually destroyed (or not created).

The French Revolution was based on the (mostly tacit) assumption that the values of equality, liberty and fraternity supported and reinforced each other, so that more of one led to more of the others, not less. Although each of the three values is endlessly ambiguous, on many common understandings they are more likely to work against one another or limit one another than to favor one another. Radical thinkers claim that liberty is inconsistent with equality, libertarian thinkers that fraternity is inconsistent with liberty, whereas Rawls claimed that strict equality was inconsistent with fraternity because it might make the worst-off worse off than they would be under a regime of moderate inequality.

In this paper I shall consider the relation among the aims of achieving justice, truth, and peace in transitions from one political state to another. In part of the literature on this topic, there is an (again usually tacit) assumption that these three values tend to support and promote one another. While this assumption may sometimes be justified, it may also lead us to neglect important tensions and to underestimate the need to make hard choices.

Although the bulk of the literature on that issue concerns transitions to democracy after an authoritarian or totalitarian regime (Elster 2004), there is an emergent understanding that questions of justice also arise in the transition to peace (see notably Lie, Binningsbø and Gates 2007). As will be

explained below, these issues include but are not limited to transitional justice as traditionally conceived, notably punishment of wrongdoers and reparations to victims.

Whenever appropriate, I shall refer to current developments in Colombia, notably to the Justice and Peace Law. As is well known, the Columbian situation is unique and highly complex. It involves not only the government and several insurgency groups, but also paramilitary groups and drug lords. The highly opaque relations among these actors are determined by the interplay of money and violence, two currencies that in Colombia have been deployed in truly enormous quantities. Although these features may be unique, other aspects of the current situation in Colombia have much in common with what we observe in transitions elsewhere.

I shall proceed as follows. In Sections **II**, **III** and **IV** I offer a few very brief comments on, respectively, justice, truth and peace, focusing both on the ideas themselves and on their value for society. In doing so my purpose is only to lay the necessary groundwork for later Sections, not to undertake the impossibly ambitious task of providing a general analysis of these ideas and the reasons to value them. In the more substantive Sections **V**, **VI** and **VII** I address, respectively, the relation between justice and truth, between justice and peace, and between truth and peace. In the concluding Section **VIII** I summarize the main positive and negative relations that emerge from the previous Sections.

II. Justice

I shall focus mainly on measures of transitional justice, in the transition to democracy or in the transition to peace. These include, but are not limited to, retribution, purges and compensation. In addition, I discuss

questions of distributive justice that, in some transitions, may be as crucial as issues of transitional justice. For one thing, it may be as important to alleviate the suffering of non-targeted or “collateral” victims of conflict as to compensate targeted victims. For another, if distributive injustice, for instance in the form of unequal land holdings, was at the root of the conflict in the first place, redistribution may be necessary to prevent it from erupting again. Policies that only address the effects of conflict without also considering the causes of conflict may fail dismally. Colombia may be a case in point. I have also argued elsewhere (Elster 2004, Ch.1) that transitional justice in Athens following the overthrow of the first oligarchic regime in 411 B.C. failed because of lack of attention to the elements of Athenian society and politics that had caused the oligarchic coup in the first place. By contrast, the measures taken after the fall of the second oligarchic regime in 403 B. C. were durably successful because they addressed the main concerns of the oligarchs.

The idea of justice can be defined either in intrinsic (deontological) or in instrumental (utilitarian) terms. I shall be carefully agnostic with regard to the choice between consequentialism and non-consequentialism, for the simple reason that I do not believe this is the choice we face. Full-blown non-consequentialism – let justice be done even though the heavens might fall - is absurd. Full-blown consequentialism – such as allowing the killing of innocent individuals “pour encourager les autres” – is no less absurd. Any reasonable policy must have both consequentialist and non-consequentialist components. Unfortunately I have no theory that would define the limit and the proper scope of each; nor, I believe, has anyone else.

The value of justice - the value of living in a just society – can also be intrinsic or instrumental. The knowledge that one is treated with equal

concern and respect, on a par with other citizens, can be a source of intrinsic satisfaction. More importantly, being the target of discriminatory behavior can be deeply disturbing, even when the discrimination has no material consequences. An example would be the disenfranchisement of low-income or low-education citizens. If the conception of justice in question has a consequentialist component, its realization may also make the average citizen or the worst-off citizen better off in material terms.

III. Truth

The idea of truth seems straightforward. In the context of transitional justice, however, what we seek is not truth per se, but knowledge – justified true belief. Hence the idea of justification, or proof, is crucially important. The publication of the names of allegedly guilty individuals without documentary proof or an opportunity for the accused to refute the charges does not amount to knowledge. In addition, we may note that what matters is often public knowledge, rather than simply judicial knowledge that might be kept in camera.

The value of truth is twofold. On instrumental grounds, one will usually be better able to realize one's aims if one has true beliefs about the world. Following a transition, for instance, it may be useful to be able to identify collaborators and agents of the previous regime to make sure they do not sabotage efforts to rebuild society. On intrinsic ground, one may prefer to know the truth rather than live in a fool's paradise. A person may want to get access to his security file to learn whether certain individuals informed on him, even when the latter are no longer alive. Others, when faced with the same question, may decide that, for them, ignorance is bliss.

IV. Peace

The idea of peace will be understood in a large sense. It includes the absence of armed conflict between and within states, the absence of violent repression of the population by the government, and social or civic peace. The last idea is somewhat amorphous, but will be taken to include (i) a low level of ordinary (criminal) violence, (ii) some form of psychological healing, and (iii) a cooperative attitude of public officials to the post-transitional regime. To put it the other way around, factors undermining civic peace include high rates of crimes against persons, strong emotions of hatred and resentment, and sabotage of the new regime by agents and collaborators of the former regime.

The value of peace is mainly the intrinsic one of alleviating suffering and of allowing individuals to get on with their lives. Often we value peace in the ordinary sense – the sense in which it is the antonym of war - because it brings peace of mind. For this outcome to occur, the peace must obviously be perceived as durable. In my view, peace has no instrumental value, in the sense of causing other desirable outcomes. Peace may be a condition for other good things - such as economic growth, or even justice and truth - but it does not bring them about.

V. Justice and truth.

Justice may serve the goal of truth, produced as a by-product of the ordinary workings of the justice system. Trials of wrongdoers will make the wrongdoings known to the public, especially if they are tried on camera rather than in camera. The Nuremberg trials served this function, as did the trials of the Argentine military in the 1980s. In the latter country, when “the

trial to the members of the military Juntas was initiated [...] the everyday media were flooded by the horrors of state terrorism” (Acuña 2006, p. 211).

Truth may also serve as a substitute for justice. Truth commissions, in South Africa and elsewhere, are typically created in circumstances where the leaders of an autocratic regime retain enough power to block or severely limit the extent of penal proceedings. The creation of a truth commission can then serve as a compromise. The findings of these commissions vary in their extent. In many countries, the main task has been to document wrongdoings and to identify victims. Except for South Africa and El Salvador, the task of identifying wrongdoers has not been part of the mandate of the commissions. In South Africa the exposure of wrongdoers did not lead to their prosecution if the commission found that their crimes were politically motivated. The truth commission in El Salvador also named the wrongdoers, but parliament granted them a full amnesty five days after the report was published.

Yet even in the absence of mandate, truth-finding may reveal the identity of the perpetrators. In Argentina, on a parallel track to the trials of a small number of military personnel, the government created the National Commission of the Disappeared, which documented 9, 000 persons who had “been disappeared”. The commission itself did not name perpetrators, but someone inside it leaked 1,351 names to the press. Although Brazil never had an official truth commission, the Archdiocese of Sao Paulo secretly prepared a report on “Torture in Brazil” that received wide attention when it was published in July 1985. Five months later, the Archdiocese published a list of 444 torturers. In Chile, the truth commission documented 3, 000 human rights violations and recommended extensive reparations. Although

the report did not name perpetrators, the Communist party paper, El Siglo, published a list of the names of human rights violators.

In such cases, public knowledge of the identity of wrongdoers may, at least partially, serve the purposes of justice. According to Wechsler (1978, p. 76), the Brazilian torturers “had little more to suffer than the people’s contempt”. This statement is somewhat misleading, however, since individuals publicly known to have committed wrongdoings may suffer social ostracism, which can be as painful as traditional forms of punishment. Thus A. O. Lovejoy (1961, pp. 181, 191, 199) quotes Voltaire as saying that “To be an object of contempt to those with whom one lives is a thing that none has ever been, or ever will be, able to endure. It is perhaps the greatest check which nature has placed upon men’s injustice”, Adam Smith that “Compared with the contempt of mankind, all other evils are easily supported”, and John Adams that “The desire of esteem is as real a want of nature as hunger; and the neglect and contempt of the world as severe a pain as gout and stone.” In addition to being targets of contempt and ostracism, known wrongdoers may also suffer physically. In Argentina, one navy captain who was well known for his brutal acts “suffered dozen of attacks [...] by strangers on the street or people who say he tortured them and their relatives” (New York Times August 12 1997).

Shaming and revenge, even when based on accurate information, do not amount to justice, however. In a civilized society, justice should be left to the courts, not to observers of wrongdoings or victims of wrongdoings. This statement is even more obviously true when names of wrongdoers are made public without proper verification of their guilt. In several post-Communist countries, lists of large numbers of alleged informers or collaborators have been posted on the Internet: 75,000 in the Czech

Republic and 160,000 in Poland. The security archives on which the lists were based are notoriously incomplete (full-time members of the security forces are usually not listed) and inaccurate (some files are mere fabrications), thus giving rise both to false positives and false negatives.

Although one can easily imagine the reactions of the individuals who were named, there has not, to my knowledge, been any systematic study of the subject. In a small-scale precedent from 1998, an unknown organization in Lublin (Poland) published the names of 119 persons who had allegedly cooperated with the militia before 1989. Two of the individuals who were named killed themselves (Kuk 2001, p. 209). It seems reasonable to assume that the longer lists have had similar effects. Arguably, this “rough justice” is worse than abstaining altogether from seeking justice. Note that in these cases, unlike the Latin American ones, there is not even the excuse that ordinary legal prosecution was unavailable.

Truth may also be an instrument for providing justice to victims. This idea comes in a modest and in a more ambitious version. In the modest version, fact-finding by truth-commissions can lay the factual groundwork for reparations to victims. The South African and Chilean commissions, for instance, performed this task. The South African Commission also made the more ambitious claim that truth may contribute to “restorative justice”. Knowledge of the facts is obviously a necessary condition for the victim-perpetrator interactions that are supposed to be at the core of restorative justice. Whether - in the absence of retributive justice – these interactions are likely to do much good is another matter. One might think that from the victim’s point of view, knowing who the offender is and knowing that he will go free is likely to generate resentment and bitterness rather than catharsis and healing. Given offender immunity, ignorance about offender

identity might be better. This is to some extent an empirical matter, on which the jury is still out (see special issue of Peace And Conflict 13 (1), 2007). Yet independently of the feelings that may be created, I believe – as stated earlier - that the rule of law favors a clear separation of victim and offender rather than their interaction.

There is also some evidence that in the aftermath of a civil war, physical separation rather than interaction favors peace. The amnesty that the Athenian democrats granted to the oligarchs in 403 B. C. went together with a demand that the oligarchs leave the city. The French wars of religion came to an end only when the Protestants were granted their own fortified cities, after the failure of earlier attempts to have Protestants and the Catholics coexist on a local basis (Christin 1997). Writing about Bosnia, Nalepa (2005) writes that “the strategy developed by the War Crimes Chamber staff is to begin prosecutions with those perpetrators who are most visible in public life. If administered consistently, this will gradually create an incentives mechanism for former perpetrators to shy away from public office [...]. This outcome also satisfies victims, who are not confronted by the glaring presence of their former perpetrators on a daily basis”. In the Colombian context, a relevant measure might to ensure that demobilized paramilitaries and members of guerilla forces do not resettle in areas where they inflicted harm on civilians. To cite another example, it may be impossible to settle the Israeli-Palestine conflict if Jerusalem is to be the Holy City of both religions.

VI. Justice and peace

In 1944, Henry Morgenthau, Secretary of the Treasury in the Roosevelt administration, devised a plan for how to deal with Germany after

it was defeated (see Elster 2004, Ch. 7 for details and references). He wanted to set the clock back to 1810, and turn the country into a “pastoral economy”. The coal mines in the Ruhr should be flooded or dynamited and sealed for fifty years to make the Germans “impotent to wage future wars”. The Germans should be prohibited from developing any kind of industry that could be converted into military production (ploughshares into swords). “If you have a bicycle, you can have an airplane. [...] If you have a baby carriage, you can have an airplane.” Although Morgenthau initially persuaded both Roosevelt and Churchill to go along with his plan, they backed off when it became clear that it might have negative effects on the conduct of the war. As George Marshall, William Donovan and others pointed out, knowledge of the extreme severity of their punishment would stiffen the German will to resistance. For this reason (and for several others), the plan was not implemented in its draconian form.

Justice and peace have been at odds in other cases too. In Bosnia, France and Britain “saw the issue of war criminals as a potential impediment to making peace in ex-Yugoslavia, binding the hands of policymakers who might have to cut a deal with criminal leaders” (Bass 2000, p. 211). In another example, a “perverse scenario of inducing a dictator to fight for his survival may have happened recently when the prosecutor for Sierra Leone’s International Criminal Tribunal indicted Charles Taylor in Nigeria. This action prevented diplomatic efforts from striking a deal with the former dictator, who arguably could have facilitated a smoother transition” (Kaminski and Nalepa 2006, p. 396).

We have to be careful, though, in characterizing these conflicts in terms of justice versus peace. Morgenthau’s desire for a heavy punishment was based on a non-consequentialist desire for vengeance. In recent

discussions, the demand for severe punishment of dictators and autocrats has been based on the consequentialist argument that courts must set a clear precedent to dissuade would-be dictators in the future. As noted by Otto Kirchheimer (1960, p.325 n.290), the precedent might “backfire, however, if it induced the leaders of a future war to fight to the bitter end rather than surrender and face the possible future of war criminals.” It is possible (although in my opinion psychologically implausible) that some aspiring dictators might refrain from grabbing power because of the consequences of losing it. It is certainly plausible, as we have seen, that the same fear may cause dictators to hang on to power longer than they would otherwise have done. I have yet to see a convincing argument why the first of these effects would dominate the second. Orentlicher (1991, p. 2549) merely asserts, with no argument (and one example), that “the prospect of facing prosecutions is rarely, if ever, the decisive factor in determining whether a transition will occur”. If that were so, why would the prospect of facing prosecution be a decisive dissuasive factor?

Even if an argument to that effect were forthcoming, the advocate of strong punishment would also have to show that the long-term net benefits dominate the short-term cost of prolonging or rekindling conflict. For the non-consequentialist, this cost is of course irrelevant. After the fall of the military dictatorship in Argentina some human rights activists refused the pragmatic line of President Alfonsín, who feared that extensive punishment of the military might trigger a new coup. Consequentialists cannot, however, ignore short-term costs or risks. To accept the prolongation of a given conflict for the sake of the non-beginning of future conflicts they have to argue not only that the expected smaller number of future conflicts offsets their expected longer duration, but also that the net effect in the future

exceeds the costs in the present. If one believes – as I do – that neither of these arguments can successfully be made, the idea of “sacrificing peace for justice” by punishing dictators severely has no consequentialist foundation. In fact, a consequentialist argument could be made for treating all dictators leniently, if I am right in my belief that this policy would reduce the duration of current and future conflicts while having little impact on the number of conflicts.

Yet this policy could run into either of two related problems: unpopularity and lack of credibility. The population at large may require that those responsible for wrongdoing and atrocities be severely punished. If they are not, the government might fall and the peace process might come apart. The wrongdoers, however, may not be willing to step down if they face the prospect of spending the rest of their life in prison. The question, then, is whether there exists a degree of punishment that is severe enough to satisfy the population and mild enough to satisfy the wrongdoers. In Colombia this window seems to exist, because of the threat of extradition to the United States that, as recent events show, is a highly credible one. At the same time, the Justice and Peace Law opened for the possibility that drugs lords could go free or receive reduced sentences, and at any rate escape extradition to the US, by virtue of the clause that granted amnesty for crimes with an “indirect” political purpose, the drug trafficking being a “means” to finance political ends. This clause was later struck down by the Constitutional Court.

The Law in its original form was negotiated between the government and the paramilitaries. The fact that this crucial clause was struck down by the Court points to an intrinsic problem in the negotiated settlement of conflict in a democracy. When the government negotiates with insurgents or paramilitaries, the latter know – or should know – that the government is

constrained by parliament and the courts. It is in fact a defining characteristic of democracy based on the separation of powers that the government cannot force the legislative and judiciary branches to uphold its promises. This has been an acute issue in Latin American as well as in East European transitions (Elster 2004, Ch. 7; Nalepa forthcoming, Ch.5). In Colombia, the threat of extradition was credible, because the government had both the power and the motivation to carry it out if necessary, but it could not make a credible promise of amnesty for political crimes.

So far I have discussed tensions between peace and transitional justice. There is a need, however, also to address the relation between peace and distributive justice, a question that is especially important in the aftermath of civil wars. The general issue is the following: if a conflict settlement fails to address the root causes of the conflict and limits itself to the problems created by the conflict itself, the peace may very well fail to be a durable one. (The distinction between problems causing the conflict and problems caused by the conflict is not always sharp, since the root causes may be exacerbated by the conflict. Yet in many cases it is clear enough.) Root causes include distributive injustice, such as unequal distribution of land, but other causes such as religion and discrimination of minorities are also found. Here I limit myself to conflicts arising on distributive grounds, with the implication that a durable peace requires distributive and not only transitional justice.

The following anecdote provides an illustration. In one of the several conferences in Bogotá that I have co-organized with Antanas Mockus and Vice President Santos over the last years, James Fearon (Stanford University) made the following perceptive remark. “If a conference on political conflicts in Colombia had taken place here forty years ago, the

name most frequently cited would have been Marx. Today, it is Hobbes.” In Colombia today, Hobbesian violence rather than Marxian exploitation is perceived as the main social ill. To create a durable peace, however, it is not enough to address the issue of violence by measures of transitional justice. One will also have to address the issues of exploitation, inequality and poverty by measures of distributive justice. Land reform is even more needed today than in the past, because of the vast landed properties concentrated in the hands of drug lords and paramilitary leaders. Note, however, that for this group confiscation and redistribution of land will be perceived as a punishment.

Ideally, new regimes should aim at both transitional and distributive justice. In South Africa the bulk of the black population received neither. Wrongdoers were not brought to justice, reparations to victims have been minimal, and there has been almost no land reform. The country today has among the highest rates of murder, armed robbery and rape in the world. Although the causality is opaque, it is not unthinkable that this failure of civic peace can be traced back to the failures of justice. Although there is no collective violence that might be transformed into a civil war, the high level of individual violence shows that the conflict resolution is very far from perfect.

Given the need for both transitional and distributive justice, governments face the problem of allocating scarce resources. They must decide whether to give priority to compensating victims of the conflict itself or to improving the situation of the landless poor in general. In abstract terms, should compensation be made on the basis of entitlement or need (Elster 2004, Ch. 6)? The aim of a durable peace may favor the latter criterion and that of transitional justice the former. Whereas redistribution

often encounters great resistance among entrenched elites, transitional justice may command greater agreement. In the current demobilization process in Colombia, scarce resources are also devoted to subsidizing the ex-paramilitaries to prevent them from taking up their arms again. Although this may be a necessary measure to ensure a durable peace, victims of the conflict may see this subsidy to perpetrators as deeply unjust.

VII. Truth and peace

Earlier I distinguished between several components of peace. With regard to the impact of truth on peace, I shall focus on peace as the absence of violent repression and as civic peace.

The most important effect of truth commissions is perhaps to make it impossible to deny that massive wrongdoings took place prior to the transition. In South Africa, many members of the white elite might have refused – in more or less good faith – to believe claims about apartheid wrongdoings had they not been so fully documented in the hearings of the Truth and Reconciliation Commission. The work of the commissions in Argentina and Chile also made it impossible to sustain the myth that the dictatorships were justified by the task of weeding out of criminal subversive elements. If the truth had not been publicly recognized, the new regimes might have been jeopardized and the previous repressive regime been restored. The work of the truth commissions underwrote the enormously effective message “Never again”.

The most important impact of truth on civic peace concerns the effort to stabilize the new regimes. If agents and collaborators of the old regime remain in high office after the transition, there is a risk that they may either work actively to undermine the new regime or be vulnerable to blackmail by

members of the former security services who are aware of their past involvement. For both these reasons, it is important to find out the truth about their past. In Poland, Romania, Estonia, and Lithuania, security files have been used as an instrument of truth revelation, by creating an incentive for individuals to tell the truth about their involvement with the pre-transitional regime. In this procedure, known as “lustration” (Kaminski and Nalepa 2006), individuals seeking elective or high appointive office are asked whether they ever collaborated with the security services under Communism. If they answer Yes, voters or administrators are free to elect or appoint them – or not. If they answer No and are later found out to have lied, they are blocked from office for a certain number of years. (This solves the problem of retroactivity, since they are not penalized for “what they did then” but for “what they say now about what they did then”). A similar procedure has been used in South Africa, where individuals testifying before the Truth and Reconciliation may be denied amnesty if they do not tell the full truth about their involvement with apartheid crimes.

The gacaca courts in Rwanda offer sentence reduction in exchange for full disclosure. This idea is also applied in the Colombian peace process. The Justice and Peace Law has created the possibility of “gambling with the truth”, by offering the incentive of reduced sentences in exchange for full confession and reparation to victims. If a serious wrongdoer gambles (does not apply for the benefits provided by the Law) and loses (if he is found out), he faces ordinary criminal law sentences, which are five or ten times higher than those imposed by the Justice and Peace Law. If he wins (if his crimes are not discovered), he remains free. The efficacy of this procedure obviously depends on the government’s knowledge (or more accurately: on

the belief of the wrongdoers about the government's knowledge) about serious crimes and on its capacity to enforce prosecutions.

VIII. Summary

I have pointed to *four possible negative relations* among the three values:

N1. The anticipation of justice tomorrow may be an obstacle to peace today, if the anticipation of punishment or redistribution prolongs the conflict.

N2. Justice today maybe an obstacle to peace tomorrow. If severe punishment is intended to send a signal to future dictators and actually does so, the net effect may be to increase rather than decrease human-rights violations.

N3. The pursuit of truth may be an obstacle to justice, if names of wrongdoers are published without due process.

N4. Truth may be an obstacle to peace, if truth-finding that reveals the identity of perpetrators is not accompanied by their punishment.

Note the difference between N1 and N2. The first is the question about how to act in a given situation. The second turns on a rule-consequentialist argument about the net long-term effect of a given policy.

In addition, I have pointed to *four possible positive relations*:

P1. Truth may be a condition for peace, by making it impossible to deny past injustices.

P2. Truth may be a condition for civic peace, by screening officials and politicians for possible collaboration with the pre-transitional regime.

P3. Transitional justice may be a condition for peace, by satisfying demands for retribution that, if unmet, might create unrest.

P4. Distributive justice maybe a condition for a durable peace, by addressing the root causes of conflict.

There may be a tension between N1 and P3 or P4. In the worst case, the maximal punishment or redistribution that wrongdoers will accept may exceed the minimal measures that will satisfy the population. In other cases, as perhaps in Colombia, there may be a narrow window of consistency.

I have obviously been painting with very broad strokes. The purpose has been to sketch a conceptual framework rather than offering a theory or a policy. I am too deeply aware of the ambiguities of actual conflicts and the inadequacy of formal analytical treatments to believe one can go very far in a discussion pitched at this level of generality. I hope, nevertheless, that the framework might suggest some hypotheses for the case studies that, ultimately, are the coin of the realm for social science.

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