

7-1-1998

Dignity, Vengeance, and Fostering Democracy

Jaime Malamud Goti

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Jaime Malamud Goti, *Dignity, Vengeance, and Fostering Democracy*, 29 U. Miami Inter-Am. L. Rev. 417 (1998)
Available at: <http://repository.law.miami.edu/umialr/vol29/iss3/2>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

ARTICLES

DIGNITY, VENGEANCE, AND FOSTERING DEMOCRACY

JAIME MALAMUD GOTI*

| | | |
|------|---|-----|
| I. | INTRODUCTION | 418 |
| II. | WHY PUNISH STATE CRIMINALS? DIGNITY, SELF-RESPECT, AND THE ABANDONMENT OF OLD PARADIGMS..... | 419 |
| | A. <i>Deterrence and the Trials</i> | 422 |
| | B. <i>Retributivists and the Trials</i> | 424 |
| | C. <i>Revenge, Punishment, and Victim-Centered Retribution</i> | 427 |
| | D. <i>Did the Trials Further the Democratic Cause?</i> | 430 |
| | E. <i>Post-Trial Argentina</i> | 433 |
| | F. <i>The Failure of the Trials</i> | 438 |
| | G. <i>Blaming and State Terror</i> | 439 |
| III. | FORWARD INTO THE PAST OR BACKWARDS TO THE FUTURE..... | 445 |
| IV. | CONCLUSION..... | 449 |

* J.D., Ph.D., Visiting Professor of Law, University of Miami School of Law. Jaime Malamud Goti is the Former Solicitor to the Argentine Supreme Court and Human Rights Advisor to President Raul Alfonsín and author of *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (1996).

I. INTRODUCTION

Many people regard as essential to the transition from dictatorship to democracy the trial of those who have committed human rights abuses. The argument that punishment is a fundamental political tool that can raise the consciousness that is essential to effect radical political change is justifiable on many grounds. It is generally accepted that the judiciary (using the power that originates from, and is administered under, the protection of the new government) can impartially allocate criminal responsibility to those who have tortured and killed and can thereby restore belief in individual liberties and can recreate democratic authority.

Most critics of this thesis either justify or condone the violent dictatorial practices and argue either from practicality, from moral skepticism, or from fear of deepening social conflict. Those who fear deepening social conflict are concerned, among other reasons, that this retributive justice may detract from the political consensus required to create respect for rights and equality. Recent experience in Argentina, however, suggests that trials of human rights abusers may have reinforced the very same authoritarian trends they were designed to overcome. Thus, rather than destroying the political consensus, a new consensus has been created, but unfortunately the new consensus has adopted the methods of the old regime.

This essay explores how, beyond the rhetoric of "just punishment," structural features of post-dictatorial communities remain, turning human rights trials into revenge-driven retaliatory ventures. Thus, instead of "de-authoritarianizing" and pacifying the polity, these retributive measures become an independent source of disunity and persecution. In fact, as the recent history of Argentina indicates, the trials served to perpetuate and encourage state-sponsored violence rather than to consolidate democratic institutions and customs. Argentines find authoritarianism too familiar to successfully extricate themselves in the course of a few years from the social beliefs and practices that are inherent to authoritarian regimes.

This essay sets out to expose the basic misconception that, envisaged as they were in Argentina, trials and criminal punishment will improve respect for rights in post-dictatorial political systems. In fact, the civic accountability for punishment in

this context is fraught with insurmountable obstacles. This essay examines this idea and the ways in which the 1985 human rights trials in Argentina do not seem to have consolidated democratic institutions such as an independent judiciary, but rather have done the opposite: they have eroded the public's confidence in, and thus the power of, the already feeble authority of the judiciary. I also look at the empirical evidence that authoritarian practices still run rampant within that segment of the Argentine community that still favors—or at least justifies—state violence. I tackle what appears to be a contradiction between the popular support for the trials of human rights violators, on the one hand, and support of brutality on the other. It is possible to view this contradiction as a result of a lack of political authority that originated primarily under a terrorist state. I claim that the very subjective nature of blame and punishment is caused by an authoritarian practice of governance. Further, I demonstrate how this distorted practice of blame can become a lens through which we observe the Argentine human rights trials. Ultimately, this practice of placing blame, as formalized by the trials, turned into a form of revenge rather than “just punishment.”

II. WHY PUNISH STATE CRIMINALS? DIGNITY, SELF-RESPECT AND THE ABANDONMENT OF OLD PARADIGMS

Crime, punishment, and the criminal trials themselves are among the central topics of discussion in most societies.¹ This same issue of crime and punishment becomes a collective obsession when the culprits are members of brutal dictatorial regimes. For example, human rights activists hounded Haitian president Jean Bertrand Aristide to agree to prosecute military officers and attachés as early as January 1994, months before Aristide had even managed to return to Haitian soil. Top human rights groups, including Amnesty International, found it imperative to get Haiti's president to commit to the process of prosecuting and punishing torturers and assassins. The reasons for such urgency are not self-evident, considering that Haiti faces the worst predicament of malnutrition and lack of education in the Americas.

1. One has only to think of the effect of the O.J. Simpson trial on television scheduling to understand this.

Beyond deep-seated retributive emotions, the drive toward punishment is tied to the entrenched belief that criminal justice plays a central role in teaching us the truth² about past deeds.³ In addition to Haiti, this belief was the catalyst behind popular and international pressure to punish "state criminals" in Uruguay, Chile, Argentina, and now Rwanda. This belief is also responsible for retributive purges such as the Czechoslovakian Lustration law, which bans Communist Party members from holding public office.

There are indeed strong reasons to think that retributive justice can contribute to establishing a rights-based, democratic society. Perhaps most importantly, scholars and politicians link punishment to the consolidation of democratic institutions, chiefly the judiciary. This consolidation is in fact both the cause and the consequence of minimally egalitarian law enforcement. It seems only too obvious that trying state criminals in unstable political systems affirms the principle that nobody is beyond the reach of the law and that citizens have rights, the exercise of which are essential to a working democracy. Moreover, it also seems evident that punishment has a larger role than just building and unifying democratic institutions through egalitarian blame adjudicating mechanisms. Some scholars and most human rights activists imply that the act of convicting human rights violators serves a therapeutic function by instilling among members of the community a lost sense of self-respect which is the stepping stone for building respect for rights.

It is true that once dictatorships are over, individuals who had suffered or feared state persecution are less likely to regain respect for themselves or develop respect for others in the absence of prosecution and punishment of the transgressors.⁴ Fur-

2. This teaching of history is, of course, contingent upon the fact that moral blame for the gross infringements of rights under a dictatorship may be assigned to a clearly identifiable group.

3. I later suggest that this point holds insofar as the retributive emotions in which punishment is grounded stem from the drive to recover the citizens' lost dignity and self-respect.

4. Amartya Sen points out that subjugated people will abandon their belief in their own and other persons' rights in order to accommodate themselves to the attainment of "small mercies." See generally AMARTYA SEN, ON ETHICS AND ECONOMICS 45 (1990) ("A person who has had a life of misfortune ... may be more easily reconciled to deprivations than others reared in more fortunate and affluent circumstances. [Subjugated people may] take pleasures in small mercies, and manage to suppress intense suffering for the necessity of continuing survival ...").

thermore, turning terrorized individuals into respectful and responsible citizens seems a pre-condition for creating democratic institutions. This is true because the very existence of democratic institutions is contingent upon the respect they elicit among the citizenry. The argument is sound: the first effect of human rights trials—that of affirming authoritative democratic institutions—is conditional upon the second—the inducement of individuals to respect other persons' rights and choices—because it is precisely the rights and preferences of the people that democratic institutions are intended to protect.

However, the drawbacks inherent to the holding trials of human rights violators may override the potential theoretical merits of retributive measures.⁵ The Argentine case overwhelmingly supports this conclusion.

State terrorism obliterates our self-respect and distorts the perception of our rights. Compromising our basic social solidarity and our goals makes us feel shame;⁶ it also instills guilt in us for deserting our loyalties. Our sense of worthlessness, of shame, and of guilt, demand a "political remedy" to dignify us in our own eyes. The affirmation by the governing institutions that we were wronged will strongly contribute to self-legitimization. Punishing those people who violated our rights is the clearest and strongest statement that a governing institution may issue to that effect.⁷ Citizens need to learn and relearn that they have rights, not only to be able to act on their own rights, but to respect other people's rights as well. As a governing institution, it

5. Concededly, I was among the many people who advanced these very arguments in support of the trials at the time.

6. By "shame" I here refer to the sentiment that stems from our incapacity to act autonomously. Shame, thus, lies beyond responsibility for making the wrong choices. In this view, shame comprises our lack of autonomy (that is, of choice itself). For an account of this emotion and its role in our construction of morality, see BERNARD WILLIAMS, *SHAME AND NECESSITY* 75-102 (1993) ("The basic experience connected with shame is that of being seen, inappropriately, by the wrong people, in the wrong condition.").

7. A clear analogy is that of rape in a sexist society. If rapists are not convicted, over time, raped women are likely to feel guilty as blameworthy participants in the wrongdoing. See generally CAROL LAMB, *THE TROUBLE WITH BLAME: VICTIMS, PERPETRATORS & RESPONSIBILITY* 22-55 (1996) (arguing that an exclusively external view of blame is problematic because it both underestimates the validity of what the victim is saying and poses a contradiction between the social-forces account and the possibility for change). In that predicament, a woman needs an institutional response to the wrongdoing to support her dignity. Criminal punishment owes its strength (and also its weakness as we shall see) to its simplistic, dual nature.

seems clear that punishment must play this role,⁸ but to do so requires a conception of punishment that is not "perpetrator-centered." In this essay I criticize traditional standard theories of deterrence and full-blooded retributivism and propose a "victim-centered" theory.

Simple, standard legal criteria do not adequately justify punishment because trying and ultimately punishing human rights abusers involves normative decisions.⁹ The appropriate time to try state criminals is frequently one of transition from authoritarian military dictatorship to civilian rule; it is a time of momentous political and social shifts. This political situation demands that the decision to try human rights violators take into account a complex set of normative facts and chiefly establish the criteria for striking down some sorts of dictatorial rule-setting. Primarily, politicians must decide what to do with self-amnesties and immunity agreements usually concocted during the authoritarian rule. They must also settle the status of prisoners held in connection with political repression and convictions grounded in the criminal rules enacted during the authoritarian regime. Holding the trials itself presupposes a decision to nullify certain *de facto* rules: trial and punishment connote the invalidation of rules that once enabled the authoritarian regime to engage in terrorism, in repressive practices, or in canceling the eventual responsibility of those who envisaged and conducted those practices.

A. *Deterrence and the Trials*

Authors who regard the causal consequences of punishment (i.e., deterrence) as the grounds for its justification will find that convicting state criminals fails to support their theoretical claim. Punishment may deter top officers from staging a new military coup. As some Argentine dictators have discovered, being exposed as criminals at home and in front of the international community is a bitter experience. Following the courts' convic-

8. Though narrowly linked to power, punishment also embodies authority. This becomes evident when we attempt to discriminate between state punishment and other forms of state coercion. See RICHARD E. FLATHMAN, *THE PRACTICE OF POLITICAL AUTHORITY: AUTHORITY AND THE AUTHORITATIVE* 157 (1980).

9. The sheer size of the state criminality in Argentina commands us to reexamine the grounds for punishment.

tions, very few officers would have liked to have stood in the shoes of the convicted Argentine military commanders. However, the deterrent effect of criminal convictions is inadequate to overcome the fear of the dictatorial state violence.

This deterrent effect is considerably attenuated for the military community at large. At best, the deterrent consequences of punishment apply only to the generals of the highest rank. Stringent organizational and time factors interfere with the deterrent effects of punishment. The lower an officer's rank, the tighter his bonds of comradeship and the stronger the peer pressure will be to perpetrate murder and to abuse prisoners. Time, on the other hand, decisively affects the intensity of our incentives. For most officers, fear of a conviction at some indefinite time in the future is largely neutralized by the immediate benefits that violating others' rights brings about: respect and support from companions and senior officers. In Argentina, the prospect of possible future punishment was apparently overridden by the immediate rewards from the transgressor's immediate circle. Very few officers retained their pre-war moral commitments and disapproved of what their companions were doing.¹⁰ Further, even if the leaders of an authoritarian political power structure are able to safeguard the continuity of their economic and political trends through democracy, the issue of personal accountability may still create a barrier to the transition to democracy.¹¹

In the case of Argentina's military cadres, the deterrent effect of the prosecutions would not have succeeded in the face of a fanaticized military. During the apogee of state terror, those officers who deviated on moral grounds from the general policy of torture and assassination were accused by their companions of acting out of complacency and cowardice. Officers who sup-

10. But even the deterrent effect of prosecutions and convictions at the top of the hierarchy would still be limited by circumstantial reasons. For example, if the military should overthrow the government in the future, the deterrent effect of punishment would probably discourage them from surrendering their power to a democratic successor, as they had done. According to some experts, after the Argentine trials were underway, the Chilean and Uruguayan military became reluctant to call for elections and, when they did, they took the necessary steps to have politicians grant them immunity.

11. See generally Adam Przeworski, *Democracy as a Contingent Outcome of Conflicts*, in CONSTITUTIONALISM AND DEMOCRACY 59, 59-80 (Jon Elster et al. eds., 1988) (discussing the inherent difficulties in establishing a democracy coupled with the additional difficulties of devolving the power of an authoritarian regime).

ported democracy encountered a great deal of hostility.¹² Thus, a strong sense of loyalty to one's comrades weakens the effects of criminal convictions as one descends the military hierarchical pyramid. Institutional instability in Argentina weakened the hypothetical deterrent effects of punishment. Junior officers assume that, in the worst case where punishment is actually imposed, the military will retain enough clout to secure amnesties or pardons in either the short or long run. The plausibility of this belief is supported by history in the four military mutinies staged in Argentina since the return of civilian rule. These mutinies were staged in support of those convicted or only prosecuted of human rights violations and against the generals who betrayed their junior officers to the civilian courts.

B. Retributivists and the Trials

Retributivism is an alternative justification for punishment of human rights abusers. The practical effects that support the retributivist theory of justification of human rights trials are no more persuasive than those that support the deterrence theory. Retributivists may consider the effects of punishment, but ignore all possible consequences of the criminal sanction as relevant to its justification. The message to the wrongdoer is: "[t]his is how

12. The best known of these groups was called Centro de Militares Democraticos Argentinos (CEMIDA). CEMIDA was a minute group of democratic military officers, most of them retired, who opposed the military regime and, most of all, the violence it resorted to. CEMIDA officers, however, were a very special clique. Colonel Augusto Rattembach, for instance, is a musician and a composer. Some of them have since acknowledged that, had they been in active service, their negative reaction to the Dirty War may have been different due to fears of total isolation. Interview with Colonel José Luis García, one of the founders of CEMIDA (July 1992). Considered disloyal by their colleagues, CEMIDA officers suffered bomb attacks and endless death threats. Moreover, in 1991, after President Menem pardoned the few officers who were still serving in jail, retired army Colonel Juan-Jaime Cesio was barred from wearing his uniform for having endorsed human rights organization complaints. Such a stigmatizing sanction was never imposed upon officers indicted for torture or murder, and these officers later benefited from the Full Stop of 1986 and the Due Obedience law of 1987, and Menem's pardons of October 1989 and December 1990. Interview with General Ernesto Lopez-Meyer, at the CEMIDA (Sept. 17, 1989). A similar sanction befell army General Carlos Dominguez who was forced into retirement simply for airing his belief that "law and order cannot be established by systematically breaking the law," a strategy which, according to Dominguez, rendered the brutality of left-wing insurgency irrelevant. See JAMES NEILSON, *EL FIN DE UNA QUIMERA: AUGE Y OCASO DE LA ARGENTINA POPULISTA* 241 (Buenos Aires, 1991).

wrong what you did was."¹³ Retributive factors—the harm done or the culpability of the actor—are moral limits on the way we are allowed to treat others. They act as tools for promoting of social and state interests. Retributivism places rigid constraints on society against using punishment of individuals as a means for promoting other people's interests. Punishment itself is an act of justice to which all members of society are morally committed. For a full-blooded retributivist, punishment is demanded of every military officer who participated in violations of human rights, even if it precipitates a new military revolt.

In this retributivist scenario, an individual is punished according to a specified set of conditions—in this case, the Argentine criminal law. Further, every person who satisfies these prescribed conditions warrants an established painful consequence. For adherents of such a thesis, punishment must be imposed on all officers who ordered, perpetrated, or aided a violation, on those who failed to avert or report the transgression, and on the civilians who aided and abetted the regime in a wide variety of ways. For example, in accordance with this view, some human rights organizations such as the Madres de Plaza de Mayo campaigned to have every officer who participated in human rights infringement punished.¹⁴ The Madres also sought the prosecution and punishment of all confederates, including Catholic priests who encouraged torture and assassination. Although there is some appeal to consequences in the Madres' rhetoric, this appeal is not based on social effects, but rather on moral or evaluative consequences. In demanding that their children be returned alive and that all those responsible for any violations (irrespective of how minor the violation) be punished, the Madres' claim that societies, qua societies, require minimal justice. Furthermore, so long as this justice is not carried out by punishing the abductors, torturers, and assassins, the Madres cannot accept that their children are dead. If they did, they would be admitting that human rights abusers are accepted by

13. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370 (1981).

14. The Madres de Plaza de Mayo is a group of mothers of youths forced to disappear during the military dictatorship. Staunchly denouncing the human rights abuses perpetrated during 1976-1983, the Madres paraded around the square that sits across the street from the Government House in Buenos Aires wearing white scarfs. This group became an important organization in the late seventies. Though currently split, it is still active today. See generally JO FISHER, *CLAIMS OF THE MADRES DE PLAZA DE MAYO, MOTHERS OF THE DISAPPEARED* (1989).

society, rendering that society non-existent as a moral community.

Retributivism has a genuine democratic appeal because it stands for equality and for constraints upon the state's power to repress individuals. A central feature of a system of constraints is generality: all guilty perpetrators ought to be punished even if, as Immanuel Kant postulated, the sky falls.

There is yet another objection that would disqualify retributivists even if we ignore the requirement that social institutions be useful: in overlooking the effects of the criminal sanction, a full-blooded retributivist must, perhaps dogmatically, believe in the intrinsic value of the rules that render the act criminal. "Just punishment" presupposes that the rules that render an act punishable are also just. But the full-blooded retributivist cannot discriminate between just and unjust rules without looking at the consequences of enforcing such rules as the ultimate reason for their existence. It makes no sense to elect to punish certain conduct as criminal without considering the consequences of such conduct and the expected effects of making those who carry it out criminally responsible.¹⁵

By a similar tack, ignoring consequences will render a retributivist unable to give a suitable answer to the question of "why punish at all?" Based on the inability of retributivists to regard consequences, H.L.A. Hart and John Rawls have adopted similar strategies to make this point. First, as H.L.A. Hart has pointed out, pure retributivists cannot appeal to considerations of social usefulness.¹⁶ Taking into account the social advantage of convictions would make the justification of punishment depend in part on its consequences, thereby abandoning the full-blooded retributivist's basic tenet. Similarly, John Rawls claims that "[a]ll ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy."¹⁷ Second, it is not self-evident that the wrongdoing to which we attach a criminal sanction demands that the offender be made to suffer. If no particular desirable consequences are associated with the

15. JOHN BRAITHWAITE & PHILIP PETTIT, *NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE* 2 (1990).

16. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 1 (1968).

17. JOHN RAWLS, *A THEORY OF JUSTICE* 30 (1971).

transgressor's suffering, we might prefer to refrain from punishing wrongdoers and elect to impose upon them a duty to compensate the victim instead.

C. Revenge, Punishment, and Victim-Centered Retribution

I do not claim that the classical utilitarian and retributive theories do not provide grounds for punishing state criminals. For example, it is correct to expect that criminal convictions have dissuasive effects. But, at most, these effects extend to only a few officers at the top of the authoritarian regime. Further, retributivists provide a cogent argument for protecting individual rights: persons who are not guilty of a wrongful act ought not be punished regardless of the loudness of the popular outcry.¹⁸ Yet this negative aspect of retributivism is modest; it refers solely to restraints on the utilization of punishment. It does not offer a positive justification for criminal convictions. Thus, it is clear that standard theories of punishment cannot justify punishing the perpetrators.

Perhaps one ought to argue for ad hoc, rather than general justificatory theories, addressed at nothing more and nothing less than specifically punishing human rights violators (i.e., that in post-dictatorial systems, punishment pacifies society). If violators are not punished, some authors claim, those connected with the disappeared will take revenge on the perpetrators.¹⁹ Under this view, refraining from punishing state criminals may steer society towards a state of nature à la Hobbes. But this seems to be an incorrect assumption, at least in post-military Argentina where not a single member of human rights associations with whom I interviewed revealed that they would ever take revenge. Beyond verbal and minor physical aggression on a few military officers, no revenge was ever attempted in Argentina in spite of the modest achievements of two post-dictatorial administrations. The Uruguayan and Chilean experiences seem to point in the same direction. Indeed, possible revenge does not seem to be a problem in spite of the lack of criminal prosecutions, let alone convictions, in these countries. However, al-

18. See J.L. Mackie, *Morality and the Retributive Emotions*, 1 CRIM. JUST. ETHICS 3 nn. 1-4 (1982).

19. See, e.g., CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996).

though both the standard and the ad hoc theses fail to account for punishing human rights criminals, intuitively, there still seem to be good reasons for punishing based on the suffering of the survivors of the Dirty War.

I have argued that punishment should contribute to the creation of a rights-based democracy. I have also suggested that institutional regard for the victims of state-sponsored crime is crucial to the furtherance of that goal. In that respect, deterrence and full-blooded retributivism are, as "perpetrator-centered" theories, intrinsically inappropriate. Additionally, experience has ruled out the ad hoc revenge-averting approach which, in not having been systematically articulated, requires no theoretical response. There are, on the other hand, theoretical reasons to assume that the victims' friends and relatives of the disappeared may give up on revenge.²⁰ I propose a "victim-centered" justification of punishment, one based on relevant (worthy of respect) moral emotions, as the most plausible, independent ground to warrant the conviction of human rights abusers.

Redress for victims is not essential for a deterrence-based justification. By giving special significance to the deterrence of potential offenders, deterrence theorists have no qualms about overlooking the plight of those who have suffered degradation from having their basic rights infringed upon or threatened. The notion of "justice for the victims" would be excluded from the deterrence calculus when exercising discretion.²¹ Full-blooded retributivists invite a similar criticism. By disregarding all consequences of punishment, proponents of this version of

20. Beyond experience, there are theoretical grounds for claiming that the relatives of the disappeared have reasons to dismiss revenge. What these indirect victims of human rights abuses seek is an authority, a referee to provide an impartial account according to which they are not responsible for the death of their loved ones. From a psychological approach, Sharon Lamb refers to this need as one of the goals of the victims of domestic abuse. LAMB, *supra* note 7, at 22-55.

21. Utilitarians may adopt the view that deterrence and reformation of the criminal are but two aspects to consider in the pursuit of overall social utility. A broader view of such utility may demand computing the welfare of the direct and indirect victims of crime. This approach, however unusual, may have some appeal when, as in the case of Argentina's terrorist state, the victims (people killed, tortured, and terrorized) were in the millions. The weakness of such an approach, however, lies in its own limitation when there are only a few victims. In that case, their interest in regaining full membership in their community may give way to preponderant interests that their cases be sealed. For an assortment of ways of defining deterrence, see FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE: THE LEGAL THREAT IN CRIME CONTROL* 74-89 (1973).

retributivism are only concerned that the wrongdoer face the consequence of his deeds.

But there is another, less popular variant of retributivism—a goal-oriented variant. According to this version, punishment ought to be directed at redressing the valued sentiments of those who were wronged. I do not have vindictive sentiments in mind; I am considering the victim's loss of purpose and sense of worth. As I have explained previously, those who endured unwarranted actual or potential chastisement from the oppressor experience shame and lack of self-respect for renouncing the personal ideals that made their life meaningful. Goal-oriented retributivists will attach to punishment the function of restoring this lost trust. What distinguishes this goal from those of deterrence and other goal-based theories is that the former result from evaluative considerations, from contemplating what analytically ensues from the very notion of punishment, rather than from the "causal" external relationships. Reducing the survivors' shame and guilt is not an "external" consequence of criminal convictions, but rather an aspect of the convictions themselves.

Similarly, there is a difference between full-blooded and victim-centered retributivists. While the former are compelled to impose punishment given the presence of a set of conditions that render an act criminal, such generality does not apply to victim-oriented retributivists. In seeking redress for the victims, they may consistently choose to forego punishment or content themselves with merely condemning the offender, or solely the offender's deed, if they believe that exacting pain upon the perpetrator will do nothing substantial to restore the victim's self-respect and confidence. So, if the victims of certain forms of state crimes have already regained self-respect, and are confident that they will be protected against future violations because the heads of the criminal organization have been convicted, victim-centered retributivists may refrain from punishing other members of the group. There is room for considerable discretion.

Although this victim-centered justification for punishing state criminals is certainly the most plausible, it is not intended to be exclusionary, and consequently, it does not attempt to displace other justifying reasons as applicable to criminal punishment in general. A victim-centered view may recognize the futility of imposing a criminal sanction on a certain offender, yet punishing this offender may still be suitable if, for example, cir-

cumstances indicate that punishment will deter potential imitators. I have in mind the large number of rapes of female political detainees which—unlike summary executions, torture, and abductions—elicited general disapproval from the military cadres. Rape was viewed as a “common crime,” rather than as an effective response to political necessity, thus making offenders regarded by their peers as “common” criminals.²² There is still more to be said for the dignity pursuant to justification of punishment.

The applicability of a victim-based justification is not limited to establishing a rights-based democracy. It may also play a key role in improving the state of individual liberties in already existing rights-based societies. Since this approach is strongly connected with the offender shaming his victim, the thesis may also serve the purpose of justifying punishment of particularly humiliating transgressions, such as blackmail and enslavement. I contend that a “victim-centered” theory of punishment is, *prima facie*, the most significant means to the democratization of society.

D. Did the Trials Further the Democratic Cause?

The question cannot, obviously, elicit a straightforward answer, for there is no way to establish the degree to which the 1985 Argentine human rights trials of army officers may have aided democracy. Nonetheless, there are strong indicators that the trials of the generals failed to teach the Argentine citizenry the value of their own worth as individuals. This assertion suggests that the reason for the failure lies in the meaning attached to the convictions. The failure, however, is not a result of grounding the convictions in retributivist or utilitarian principles. There are indeed powerful objections even against the victim-centered justification discussed previously.

To attach a democratizing effect to the prosecution and punishment of state criminals presupposes that the courts' decisions are authoritative, and that a large enough section of the citizenry believes the courts are competent to unravel the truth and committed to fostering respect for rights—including, of

22. Interview with Mohamed Ali Seineldin, Ex-Colonel, in the military prison in Magdalena, Buenos Aires, Arg. (July 1992).

course, those of the culprits. Convictions only contribute to restoring the citizens' lost dignity insofar as the populace assumes that, beyond satisfying retributive emotions, the courts are impartial and that convictions are grounded in shared notions of moral responsibility. Indeed, one cannot expect the courts to instill any sense of worth and self-respect among citizens if the same courts fail to meet some popular sense of minimal impartiality and prudence.²³ It is at this point that simple retribution based in vengeance deviates from a respect-seeking function of punishment based upon authoritative power.

The plausibility of punishment is, in spite of the dignity-based rationale, only apparent. Indeed, the policy of trying state criminals has inevitable weaknesses. First, experience and common sense demonstrate the difficulties of selecting those to be brought to trial. Given the size and political implications of state crime, there is an inevitable air of artificiality in establishing the boundaries of responsibility among members of a terror-ridden society. By pinning the blame on a limited sector of society, human rights trials cannot escape re-inventing history. The meaning of the resulting "truth" inevitably becomes controversial, if not plainly factious. Dissatisfaction with the 1985 Argentine trials was conveyed not only by those who defended the convicted officers, but also by front-line human rights activists such as the Madres de Plaza de Mayo and several international organizations. While the former claimed the culprits were scapegoats, the latter protested that too few were actually convicted and that their sentences were too light. For both parties, the trials were "clearly political": they were inadmissibly lenient for some, and imposed undeserved punishments (perceived as "revenge") for the others.²⁴ As a result, far from administering justice, the judiciary was widely perceived to have merely adjusted to the political convenience of the executive. Accordingly,

23. I contend that restoration of self-respect requires that we are told what we assume is *true* about past events. Only "blind retribution" (largely revenge) will conform itself with punishing a wrongdoer. The relevance of being told that we are not guilty of the pain someone caused must be the consequence of an authoritative (neutral) account of the nature of the wrongdoing.

24. It must be borne in mind that not a single military officer I interviewed was flatly opposed to the trials. But, although there was consensus that *some* human rights trials were justified, there was no agreement on who the culprits should have been. Some thought it was the generals at the top. Others thought it was those who acted out of personal emotions such as greed, yet others favored punishing older and more experienced soldiers.

instead of reinforcing whatever authority the judiciary may have mustered, the trials had the opposite effect: instead of contributing to bridging a fragmented society's multiple versions of reality, the courts generated the belief that the trials were a ploy to draw consensus from a compromised account of reality.

Whereas some felt the government failed to do enough about past human rights violations, others, including a sizable number of military officers and right-wing civilians, perceived that President Alfonsín and a group of "acolytes" (which included me), were determined to destroy the country's traditions. Indeed, they thought that by bringing the whole military apparatus to trial indiscriminately, the president was deliberately damaging the armed forces.²⁵ This fragmentation of public opinion brought about all kinds of popular demonstrations to press the administration to prosecute a larger number of officers. It also provoked four military rebellions aimed at stopping the trials. I believe that the meaning of the trials was distorted by the social conception of blame.

Thus, perceived as compromising justice for some citizens, and implementing a fallacious notion of blame by most citizens, the trials deepened the antagonism between conflicting factions. The most striking feature about this fragmentation of public opinion is that hardly anybody, including lawyers, based their opinions of the 1985 federal court decision on the criminal responsibility of the members of the ruling military juntas. The court found five of the nine members of the first three juntas responsible for the assassinations, torture, rape, and larceny committed by subaltern personnel during the military dictatorship. Not even the Supreme Court's verdict delivered one year later, which essentially upheld the federal court's decision, was relevant to the citizenry's assessment of the country's recent political history. The populace's indifference to the proceedings shows that, in Argentina, judicial decisions lack authoritative-ness both in establishing the facts brought to trial and in evaluating the significance of these facts. Thus, controversy over

25. A good example of this interpretation is the work of journalists Jorge Grecco and Gustavo Gonzalez. See JORGE GRECCO & GUSTAVO GONZALEZ, ARGENTINA: EL EJERCITO QUE TENEMOS 140 (1990). Despite the lack of empirical support for many of the assertions that resulted from the investigation, the book was successful to the extent that it was awarded in that same year the first prize in "Essays and Journalistic Investigations." This award is the most important distinction for research journalism in Argentina.

what should have been done about past human rights violations goes on and on with no hope that any arbiter will bring it to an end. The hope that history will bridge the gap is of little consolation because some people believe, as I do, that the authority of the courts to avert future abuses is indispensable here and now.

E. Post-Trial Argentina

As with most dictatorships, the Argentine authoritarian, official mind of the 1970s concocted a political world sharply split between enemies and allies. The military and its allies took their first step toward implanting a rigid, bipolar logic by defining their ultimate goal as that of routing an extremely vague category, "subversion."

Extrapolated from the concept of "the enemy" in the wars in Indochina and Algeria, "subversion" in Argentina applied to a wide social segment. As governmental speeches and harangues of those times reflect, the term "subversive" was applied not only to the guerrillas and the terrorists but also to an extremely wide range of citizens that the regime considered a threat. For example, an admiral's list of characters that he considered "subversive" included the following: "the ideologues, the corrupt, the inauthentic leaders, the irresponsible, the economic delinquents and the false preachers."²⁶ In adopting an apocalyptic version of the "Marxist threat," the regime's war eliminated the logical possibility of remaining neutral; the indifferent and the ignorant were also candidates to the seduction of "international Marxism." As in Algeria and Indochina, potential enemies of the French were those who simply did not support the crusade or its terrorist methods.²⁷ Consequently, lawyers, physicians, nuns, priests, relatives, and acquaintances of political activists were among those arrested and even tortured and killed. "There are no ignorant," decried a military delegate of the military junta, Buenos Aires governor, General Iberico Saint Jean, "there are only accomplices."²⁸ Thus, from both formal and informal conversations, it is clear that the enemy sector also encompassed

26. LA NACIÓN (Buenos Aires), May 12, 1977 (quoting Admiral Luis Méndia).

27. The Argentine notion of subversion originated in France during the 1950s. Thus, the term was tailored after the war in Algeria. This fact about language and concepts does not detract from the heavy influence of the U.S. notion of national security.

28. LA OPINION (Buenos Aires), May 29, 1978.

the "ideologues," the "defeatists," the "unconvinced," and many more.

Insofar as society is one in which a large conspiracy threatens to steal away the ignorant and the indifferent, the thin line between authoritarianism and totalitarianism wanes. The process of equating ignorance and skepticism with active opposition to the anti-subversive crusade made neutrality between state right-wing extremism and "subversion" impossible. No one conveyed the non-existence of neutrality better than General Saint Jean. He made it clear that it was logical to split the world between black and white: "We will first kill all the insurgents, later, we will kill those who collaborate with them, then we will kill those who remain indifferent and, finally, we will kill the shy."²⁹ The rhetoric's appeal to violence was clearly demonstrated by the thousands of citizens who were tortured or disappeared. Although paramount violence stopped in the early 1980s, its appeal is still quite strong.

In the Argentina of the 1990s, violence is, by and large, still appealing to a large portion of the citizenry. This is apparent from the reaction of public figures to challenging political events, as well as from the political success of individuals espousing authoritarian ideals. This success is also perceptible in the electorate, tainted by violent associations and by the general acceptance, if not plain encouragement, of police abuse.

In fact, official rhetoric still resounds with dictatorial phrasing. In July 1992, for instance, President Carlos Menem claimed that students who rallied against his educational policies could soon be made to disappear as had thousands of suspected dissidents during the military dictatorship.³⁰ In 1994, the President reacted similarly to media coverage of the alleged killing of an army conscript by his superiors in the course of a drill. Menem accused the journalists covering the case of promoting a "class struggle" and the "division of the armed forces."³¹ With the same oratory as that of his military predecessors, Me-

29. See Carlos H. Acuña & Catalina Smulovitz, *Ni Olvido ni Perdon: Derechos humanos y tensiones civico militares en la transicion argentina* (paper submitted at the XVI International Congress of the Latin American Studies Association, Washington D.C., Apr., 1991).

30. HERALD (Buenos Aires), July 10, 1992.

31. *Menem dijo que hay sectores que están incitando a la "lucha de clases,"* CLARIN (Buenos Aires), Apr. 30, 1994, at 10.

nem added that those sectors that now promoted the investigation had remained silent when the violence originated in ultra-left-wing sectors.³² Yet Menem's response, couched in the same authoritarian style as that adopted by many of his followers, was not in and of itself incompatible with a working democracy. What is in fact irreconcilable with basic democratic reactions to dissent were the repercussions of these words among the populace. Immediately after the President's denunciations, the "subversive" demonstrations shrunk to roughly one-fourth of what they had been. Likewise, journalists stopped reporting on suspicious military affairs.

On August 14, 1993, state-tolerated violence erupted once more in Argentina's public life, when an organized gang of browbeaters assailed spectators who jeered at Menem to protest against his administration's economic policies. Journalists covering the events were also the victims of the violence and some of them had their cameras smashed against the ground. Reminiscent of the military dictatorship's Dirty War tactics, the area where the president addressed the crowd seemed to have become a "free zone." The thugs enjoyed an immunity similar to that of the anti-subversive gangs in the 1970s. Indeed, not one single assailant was arrested in spite of the police and other security personnel deployed in the area.³³ Some researchers believe that some of the thugs had operated among the army's death squads and "task forces" that abducted and killed thousands during the military dictatorship.³⁴ After publishing a note in Buenos Aires newspaper *Página 12*³⁵ explaining how these browbeaters were recruited at the Mercado Central (the city's distribution market) on August 19, a journalist named Hernan Lopez Echague, was severely beaten. In what clearly seems a preemptive strike against reporters' perceived intrusiveness, a second reporter's face was slashed with a switchblade. President Menem and Eduardo Duhalde, his former vice-President, did not reveal the slightest alarm.³⁶ They nonchalantly attributed the violence to

32. *Id.*

33. See LA NACIÓN (Buenos Aires), Aug. 19, 1993, at 7.

34. See Laura Termine et al., *Las jaulas abiertas*, NOTICIAS, Sept. 5, 1993, at 72.

35. See PÁGINA 12, (Buenos Aires), Aug. 22, 1993.

36. Eduardo Duhalde is now the governor of the Buenos Aires province, the largest in the country. In October 1997, days away from a congressional election, Duhalde accused the opposition of "de-stabilizing the province" and of bringing about a "pre-subversive" situation. See HERALD (Buenos Aires), Oct. 6, 1997.

passing partisan political passions that, like the cold weather, would soon fade away.³⁷

The second reminder of the country's authoritarianism is the electoral performance of figures associated with the military dictatorship such as retired General Domingo Bussi. The general's despotic style, it is widely said, caused the deaths of many civilians. Bussi is allegedly—either directly or indirectly—responsible for abuses ranging from the summary execution of abducted suspects of "subversion"³⁸ to the violent removal of shanty town dwellers. To cleanse Tucuman from layoffs, these dwellers were literally shoved from army trucks in the bordering province of Catamarca. To advance his political aims during the dictatorship, Bussi also extorted money from industrialists by constantly threatening them with reprisals. In spite of these past actions (or perhaps because of them) the general was elected governor of the northern province of Tucuman in the last election.

Another example of the appeal of former dictators is that of retired Colonel David Ruiz Palacios, who commanded the country's Federal Police as the dictatorship's Deputy Minister of the Interior. In the 1991 elections, Ruiz was favored to win the elections by a landslide in the Chaco province. When Ruiz was barred from running because he lacked the formal requisite years of residence in the state, he hand-picked his own substitute who easily won the elections.³⁹

37. See James Neilson, *La lucha es cruel*, NOTICIAS (Buenos Aires), Sept. 12, 1993, at 76. It is interesting to note that officials were not even disturbed by the thugs' attack. Present at the scene, Secretary of Agriculture, Felipe Solá, candidly explained to the press that the attacks "were caused" by those who had attended the inauguration "to insult the President." (television broadcast, on Aug. 16, 1993.) Witness to the beating of journalists, President Menem's former ambassador to Honduras, Alberto Brito Lima, disclosed a similar view. The violence, Brito Lima stated, was a "logical reaction to the press' unfair reports." PÁGINA 12 (Buenos Aires), Aug. 18, 1993. For those familiar with recent Argentine history, Brito's statements did not come as a surprise: Brito was allegedly present at the massacre of young left wing Peronista militants awaiting Peron's arrival from Spain in June 1973. See EUGENIO BENJAMIN MENDEZ, *CONFESIONES DE UN MONTONERO: LA OTRA CARA DE LA HISTORIA* 81 (3rd ed., 1986). Thus, his assessment that "there was something they must have done to bring the beating upon themselves" was indeed foreseeable.

38. Among the firsthand sources I was able to interview was a high National Gendarmerie ("Gendarmeria Nacional") officer whom I interviewed during the middle of 1992.

39. See PÁGINA 12 (Buenos Aires), Aug. 16, 1991.

Further, in the 1990s, a large portion of Argentine society again accepts the use of torture. A large portion of the citizenry accepts the inhumane treatment of suspects when such treatment is employed to protect the security and property of "decent citizens from a growing street criminality." For example, a crowd staged a demonstration in the suburbs of Buenos Aires in support of police officer Luis Patti when Patti was indicted for torturing prisoners under investigation.⁴⁰ Moreover, the forensic experts declared on Patti's behalf that the detainees may well have harmed themselves—even those who sustained injuries from electrified wires—to cast blame on their captors. A Buenos Aires journal reports that the country's public opinion was split between those who considered Patti a torturer and those who considered him a defender of security.⁴¹ In districts where he had served, Patti's reputation for brutality earned him the blessings of a vast section of the population. Turned into a public figure, the policeman became a frequent guest at social events, including a television show where he danced the tango before millions of spectators. Patti declared that he "[n]ot only makes people dance but also dances himself."⁴² This was a macabre pun because "dancing" in military and para-military jargon means suffering inflicted pain. Furthermore, Patti's reputation induced President Menem to choose him for special assignments.

It would be naive to conclude from the example of Patti that Argentines are particularly tolerant of, or even devoted to, extreme violence. There are sadistic and violent policemen everywhere, and people who justify them are not so hard to come by; but there is more than this to Patti's story. After his indictment, President Menem selected Patti to investigate the María Soledad case in the northern province of Catamarca. The case is one in which a minor was raped and eventually killed, and the suspects were a host of local and national politicians and ranch owners. Besides showing his callousness, Menem's choice proved to be unwise. Patti befuddled the investigation and many conjecture he helped a suspect to flee. Yet these circumstances did not hinder the officer's fresh political career; Patti is presently serving

40. PÁGINA 12 (Buenos Aires), Sept. 14, 1990.

41. AMBITO FINANCIERO (Buenos Aires), Oct. 19, 1990.

42. Patti made this statement when asked to dance on a television show (Channel 9, Silvio Soldan's show in Buenos Aires.); Argentina's vice-president, Eduardo Duhalde, pointed out that Patti was a "model for policemen." See HERALD (Buenos Aires), Aug. 8, 1991. See also PÁGINA 12 (Buenos Aires), Sept. 14, 1991.

as the mayor of San Miguel, a middle class neighborhood in the outskirts of Buenos Aires. Thus, together with considerations stated above, Patti offers a clear example of Argentina's lingering propensities.

The preceding evidence illustrates that the trials of the military did not accomplish their intended purpose. The President and his faction's intimidating rhetoric, the political appeal that ultra-right-wing officers enjoy since the 1991 elections, the present indifference toward current police abuses,⁴³ and the enduring impact of threats on the populace all suggest that authoritarian ideals and methods still prevail. The perplexing point about the previous examples of authoritarianism lies in the fact that many of those who recently rallied to have torturers brought to justice are now supportive of the same practices they condemned. This contradiction demonstrates that the human rights trials did not reflect the country's abomination of violence. It also indicates that the trials did not achieve the goal of fostering reliable democratic values among Argentina's society. The trial and conviction of the generals failed to instill the democratic notion of the supremacy of individual worth and responsibility. Further, the trials and convictions did not teach Argentine society that some things we do to people are unjustifiable, save, perhaps, in cases of extreme necessity.

F. The Failure of the Trials

There are three factors that largely explain the failure of the trials to help bring about changes in the direction of a rights-based democracy. These factors, as I will explain, affect the pedagogical value of the criminal trials and convictions. First, by depicting the world as consisting of the innocent and the guilty, the trials reproduced the authoritarian view that the world is split between allies and enemies. Second, under this same bi-polar criterion, those who were not declared guilty were judged to be innocent of the terror campaign, regardless of their direct or indirect participation in creating or setting the grounds that led to state terror. Third, as the trials were necessarily restrained in scope, they re-invented history by pinning the blame

43. See generally Paul G. Chevigny, *Police Deadly Force as Social Control: Jamaica, Argentina and Brazil*, 1 CRIM. L.F. 389, 389-425 (1990) (containing Chevigny's recent research about the relation between police brutality and popular consent to such violence).

almost entirely on one particular social group: the military. On the one hand, this process led to the view that only a limited number of citizens were responsible for the extreme violence. On the other hand, it led to scapegoating, as members of a social sector were accused by, among others, those who should have shared the moral and legal responsibility for supporting the systematic use of violence. To summarize, the trials' deficiencies rest with the epistemic function we attach to the criminal courts. It is on this count that the trials failed to provide a satisfactory account of what happened, to tell the citizenry who "caused the suffering" and which are the facts and principles on which the adjudication is grounded. Based on a sharp division between the guilty and the innocent, the truth resulting from the criminal trials is, however, too narrow to become grounds for our building of history.

An indirect and ironic consequence of the three negative factors I just specified is that in post-dictatorial, fragmented societies, human rights trials tend to erode the same democratic authority that they are devised to restore. The section that follows deals with the third effect, the notion of blame, and the obvious contradiction of Argentine society—namely, that of adamantly advancing the cause of the trials of perpetrators of human rights abuses—while simultaneously condoning a similar violence and supporting those who practice it. I claim that the seemingly obvious plausibility of setting up the human rights trials as a means to achieve democratic change in terrorized communities is likely to be overridden by the negative effects of such trials which stem from the social practice of blaming.

G. Blaming and State Terror

I have mentioned how state-sponsored violence became a way of life in the Argentina of the 1970s and, in an ameliorated version, continues to be one today. Still pending is a brief reference to political power in an environment in which communication among citizens—and these citizens and the government—is seriously distorted by the uncertainty caused by a terrorist state. It is clear that, far from coordinating the actions of individual terrorists, state power aims to thwart concerted activities of those believed to be adversaries. For those who perceive political reality as a vast, subversive conspiracy, power can only be exer-

cised by thwarting concerted action, and terror becomes a necessary method for achieving this end.

Terror generates confusion among the populace, and this confusion inevitably disables the state apparatus to organize the polity. Indeed, state terror makes the existence of effective, organizational power relations extremely difficult at best. Administered from the top, random brutality keeps individuals guessing about what behavior will keep them out of trouble. This violence dislocates social communication both horizontally (among the citizenry) and vertically (between the government and the populace). As the system of threats and offers upon which standard organizational political power is built begins to crumble, direct coercion further replaces mere threats of punishment. The lack of spontaneous compliance based on respect for authority and the ineffectiveness of ambiguous threats is replaced by an increasing use of direct violence. The evidence of this trend is that the military regime preferred to rule under a state of siege decreed by Isabel Perón back in 1983. States of emergency are devised to justify a considerable dosage of arbitrariness in the curtailment of basic liberties. Indeed, the military maintained the uncertainty of the state of siege, only lifting it five years after the army's proclaimed victory over insurgency. The dictatorship restored the formal rule of law in October 1983, when the general elections were held.

A terrorist state has little room for articulating individual actions in the pursuit of common goals. The entire notion of political power, usually exercised as coordinating the actions of individuals, is mostly turned into uncertain coercion. This perceived need to resort to violence, along with the thousands of persons tortured and made to disappear, instilled among the citizenry the notion (implicit or explicit) that, in Argentina, suffering was an inevitable fact of life. For the population at large, the inevitability of pain explains the transformation of the acquired practice of blaming from those who cause other people's suffering to those who were the very victims of brutality. This practice of blaming the victim constituted a substantial part of a new ideology developed under the uncertainty of a state of terror.

For most moral and criminal law theorists, blame plays an important role in the social life of a rights-based community. In such a community, individuals value their own—and other people's—choices of how to live their own lives and are confident

that institutions will protect their pursuit of personal goals and ideals from the interference of third parties, including the state itself.⁴⁴ When some individuals break the rules of this society, causing harm to others, outrage for these acts is converted into blame. By blaming the transgressors, we foster a sense of moral responsibility both in the perpetrator and among members of society at large. Agreement among the citizenry on whom to blame and for what actions also strengthens solidarity.⁴⁵ As a vehicle of control, blame conveys moral disapproval for harmful actions and attempts to convert into persuasion the indignation that these actions arouse. By blaming those who infringe our rights we are sending a message to society that such actions ought not to be repeated, while at the same time we are providing reasons for the wrongdoer to realize that she has betrayed social values that she also should uphold if she were rational.⁴⁶ This ideal form of blame is entrenched in our moral practices in two ways: first, by denouncing those who break society's rules; and second, by convincing those who have wronged others that they deserve our condemnation. Thus, while based on past events, blame is also forward-looking in that its practice, especially through criminal punishment, constitutes an incentive for the transgressors and their potential imitators to respect just institutions and social values.⁴⁷ For this ideal version, blame bolsters the moral authoritativeness of legal rules and practices. This notion of blame, and the punishment that we often connect to it, is thus only a moral ideal.

Attaching lofty moral overtones to blame assumes that we can squarely identify those actions that bring about harm. This process of identifying those morally responsible for harming others is typically the case in "guilty" transgressions of the criminal law. Based on the dichotomy of "guilty" and "innocent," criminal legislation and practice provide clear parameters within which to establish which actions are relevant in bringing about certain harms. Beyond the realm of criminal law, however, the issue of moral responsibility is, by and large, subject to disagreement,

44. BRAITHWAITE & PETTIT, *supra* note 15, at 137-55.

45. See DAVID GARLAND, *PUNISHMENT AND SOCIETY: A STUDY IN SOCIAL THEORY* 47-81 (1990).

46. See T.M. Scanlon, *The Significance of Choice*, in *EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES* 39, 39-104. (Stephen Darwall ed., 1995).

47. See, e.g., MARION SMILEY, *MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY: POWER AND ACCOUNTABILITY FROM A MORAL POINT OF VIEW* 177 (1992).

negotiation, and constant change.⁴⁸ While retaining its façade of a moral claim, the practice of blaming has shifted from time to time, as did the notions of causation, harm, and moral responsibility as opposed to simple "accidents" that just happen to us.⁴⁹ Beyond the practice of the criminal law, explanations that posit the blame on a single party, "one-factor explanations," are usually both the source and the consequence of over-simplifying events.⁵⁰ Thus, as a general principle, the more realistically we think about the origins of suffering, the more we view this suffering as the outcome of a complex set of circumstances instead of the result of a single cause. In defining reality as one of friends and enemies, the authoritarian mind is prone to oversimplifying the notions of both blame and the "innocent" victim.

A terrorist state drastically modifies the connections between blame, morality, and the transgression of explicit rules. Silencing our outrage at brutality becomes a structural feature of society because conscious indignation against state violence is both too painful and too dangerous to express to others. Moreover, the sense of inevitability strips the practice of blaming of its mission of inhibiting future harmful actions.⁵¹ Blame ceases to be a morally-based mechanism of social control, at least in the sense of compelling citizens to abide by explicitly agreed-upon principles and values. As a consequence of this process, Argentine society developed the habit of viewing the victims of repres-

48. *Id.* at 167.

49. Blame is sensitive to power shifts because the very notion of blame is closely connected to that of power. Think of the changes power can make in relationship to seemingly blameless outcomes. Being struck by lightning will *normally* elicit the verdict that we were victims of an accident, that we had bad luck. Suppose now that some extremely powerful individual—the emperor, the Pope—were the victim of the same lightning. A set of new evaluative considerations may now change the victim's normative status and, consequently, our understanding of *what* happened. We may want to inquire if those in charge of the victim's security should not have prevented him from exposing himself to an approaching thunder-storm. We may even blame the host official of the country for not issuing a timely warning about the country's weather. If this were the case, we may now want to call it negligent—or consider it even an intentional omission that put the victim's life at risk. Thus, one may claim, misfortune and injustice will often depend on power relations between the parties involved. What is then the difference between the preceding facts and the outcome, other than the victim's power? See, e.g., JUDITH N. SCHKLAR, *THE FACES OF INJUSTICE* (1988).

50. PAUL WATZLAWICK ET AL., *CHANGE: PRINCIPLES OF MORAL FORMATION AND PROBLEM RESOLUTION* 45 (1974).

51. For the concept of harm, I propose the basic notion of curtailing someone's personal autonomy, offending her dignity, and causing pain above a certain threshold. See CARLOS SANTIAGO NINO, *THE ETHICS OF HUMAN RIGHTS* (1991).

sion as the object of blame. In essence, Argentines shifted the focus of their anguish from the perpetrators to the victims. The terrorist regime had, in Barrington Moore's words, "expropriated" the citizen's moral outrage.⁵²

This seemingly strange practice of transferring the object of blame on to the victim is impeccably described by CONADEP⁵³ in the prologue of *Nunca Mas*:

In the society, the idea of un-protection became increasingly entrenched, the dark fear that anybody, no matter how innocent, could fall victim to that infinite witch hunt. Some were absorbed by overwhelming fear, while others were controlled by the conscious or unconscious proclivity to justify horror: 'It must be something s/he must have done, was the whisper, as wanting to favor inscrutable Gods, looking at the children or parents of the disappeared as if they were pest-ridden. These sentiments were vacillating, because it was known that so many had been swallowed up by that bottomless abyss without being guilty of anything; because, carried out with the drift that characterizes the hunting of witches and the possessed, the struggle against the 'subversive' had been turned into a dementedly generalized repression. Because the epithet 'subversive' had such a vast and unpredictable reach.⁵⁴

Many Argentines now remember how in 1976, society developed the generalized practice of understanding violence by looking at the victim rather than the perpetrator.⁵⁵ The standard practice of blaming the victim for some unspecified conjectural involvement in "something" can be compared to the chauvinistic male's description of rape as a process in which the woman's seductive role is essential to her plight. A woman may be suspected of "causing" the rape by seeming to express her sexual desire. Thus, this form of blame fed into the well-known

52. BARRINGTON MOORE, JR., *INJUSTICE: THE SOCIAL BASIS OF OBEDIENCE AND REVOLT* 500 (1978).

53. CONADEP was the acronym of the National Commission for the Disappearance of Individuals set up by President Alfonsín soon after stepping into office in December 1993.

54. Prologue to *NUNCA MAS: INFORME DE LA COMISION NACIONAL SOBRE LA DESPARACION DE PERSONAS* 9 (14th ed. 1986).

55. This point is made, for instance, by Marcelo Suarez-Horozco, *The Grammar of Terror: Psychocultural Responses to State Terrorism in Dirty War and Post-Dirty War Argentina*, in *THE PATHS OF DOMINATION, RESISTANCE AND TERROR* 219-59 (Carolyn Nordstrom & JoAnn Martin eds., 1992).

authoritarian view that the notion of "human rights" was an instrument to serve the interests of those who threatened the "fatherland's basic values." Only those who sympathized with subversion would condemn the regime, or even worse, lobby at foreign and international human rights forums against the military rule. After all, the Argentine community itself had realized that only the ill-intentioned, the reckless, and the stupid were the objects of torture and assassination.

By instilling among the citizenry a bipolar interpretation of the world as one of "the guilty" and "the innocent," the criminal trials recreated a bipolar scheme akin to that of "if you are not with us you are against us." As the vague notion of "subversive" had split society into the good and the bad, this same society was divided once more by institutionalized blame. What had formerly been "subversives" versus "crusaders," had, in the social environment of the mid-1980s, been split into the dichotomy of the "guilty" versus the "innocent," on the basis of formalized criminal blame. Paradoxically, the most attractive feature about the trials—establishing one common truth by limiting the relevant facts to those applicable to criminal guilt and innocence—was also their greatest weakness. This weakness was the inevitable over-simplification of history as one for which there was no middle ground between the innocent and the guilty.

When grounded in the procurement of self-respect and confidence, blame leads us to attempt to convince violators that they injured us, preventing them and potential imitators from harming us again. Within the Argentine context, the practice of blaming arose from sentiments other than those of self-respect and confidence. By persuading the wrongdoer that he betrayed our values, this conception of blame implies that we treat transgressors as moral agents, that we deal with them as our equals, who deserve that we furnish reasons for our indignation. There is one condition to render blaming those who harm us a moral practice: that we submit our reasons to those we blame, and engage in an exchange of views with them.⁵⁶ Unlike this practice, by placing the fault with the disappeared and the murdered as a class different from ours, blamers lose their claim to prevail morally in the exchange of reasons; they forfeit their claim to be

56. Few authors have emphasized the moral value of deliberation as does Carlos Nino. See CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* 107-43 (1996).

morally right. Also at variance with moral blaming, vengeful resentment does not require from us that we supply convincing reasons for our causing pain to those we blame. In the Argentina of the 1970s, this social practice served the purpose of suiting the self-interest of the blamers. In a bid to lessen our anguish and frustration, the use of blame became an implicit way to circumscribe the violence within a defined social group. Like our blaming the disappeared, in post-Dirty War Argentina, our blame was focused upon a group segregated from our own community; the population shifted its focus to the military as the single-factor explanation of our suffering. In the 1970s, blame was neither an expression of moral indignation nor a means to single out those who used violence against our lives and freedom. Blaming consisted, instead, of the result of (unilaterally) manipulating our deeply rooted retributive emotions to achieve three possible outcomes. First, blame made us feel less guilty for failing to succor the direct victims of brutality. Second, it neutralized the shame that resulted from our giving up our "dangerous" association with the politically undesirable because it was their "undesirability" that made them unworthy. After all, blame had driven us to believe that their suffering was the consequence of their defective character. Third, blame neutralized our anguish. By conceiving chastisement as grounded in some of the victims' distinct properties or deeds, we muffled the terror that we would be next on the hit lists. We were, after all, different from those who suffered. Only in the sense of stifling widely shared guilt, shame and anguish in the common knowledge that it was the same disappeared who we ought to censure did blame contribute to some form of social solidarity. We turned blame into a short-cut to seek relief from fear, remorse, and impotence.

III. FORWARD INTO THE PAST OR BACKWARDS TO THE FUTURE

It now seems clear that the common desire to have the military punished expressed the qualified, though popularly-felt need to promote social solidarity. The current appeal of police violence and the electoral success of key figures of the military regime strengthens my own belief that the pursuit of punishment is unrelated to promoting the dignity of individuals. The retributive emotions behind the rallies and public protests were aimed at achieving a kind of social solidarity the country had ex-

perienced during the apogee of the military regime. In 1978, for example, the Madres de Plaza de Mayo were widely scolded for damaging the country's international "image" during the soccer World Cup held in Argentina. During the soccer event the scene of the Madres' processions to denounce the disappearance of their children was seen as close to treason. Viewed as similarly perfidious were the interloping international human rights organizations, prying into the country's affairs in 1979, driving an aggravated population to boast its disapproval with car stickers that said "*Los Argentinos somos derechos y humanos*" ("We Argentines are humane and right"). The campaign in the 1980s to punish military officers must be regarded in the same light.

Even if the popular sentiments behind the trials did not stem from the citizens' sense of justice, or from recovering individuals' dignity and responsibility, one may suggest that holding these trials was preferable to sheer passivity. While doing nothing confirmed our impotence, the community was able to convey its power by bringing military officers to trial. Members of the community, one may assume, are more likely to learn about their rights from "humbling" those who humiliated them.⁵⁷ There are however considerable drawbacks to the strategy of humbling trials. By zeroing in almost exclusively on a relatively small and defined number of human rights abusers, the trials threatened to become the formal instrument to thwart the basic logic on which we build the notion of responsibility. As a direct consequence of the criminal trials, formalized vengeful blame absolved many civilians who had supported the military dictatorship in the belief that they were not among the blamed but rather among the accusers. Based on the criminal justice's bipolar logic on "innocent" and "guilty," the trials contributed to the widely shared conviction that those not prosecuted were simply innocent.

Thus, the negative side of the trials constituted a dilemma. First, the expedient of responsibility through the expedient of considering that a vast sector of society had been responsible for the brutality diluted responsibility. This meant that turning the trials into a theater in which, by picking out a varied assortment of representative citizens, society was punishing itself by trying

57. For a similar approach, see HANNAH ARENDT, *A REPORT ON THE BANALITY OF EVIL: EICHMANN IN JERUSALEM* 226 (1963).

mere samples of a very wide variety of citizens: if everybody is responsible, then nobody really is. I refer here specifically to pressing charges against thousands of civilians and military actors who supported, encouraged, or in many ways strengthened the fanaticism that led to the brutality of the Dirty War. The second alternative would be to (as Argentines have done) punish only a few violators for what we considered to be distinctly horrendous infringements on other people's rights. In this case, most former allies of the accused military were free to become accusers themselves. Indeed, those who supported the regime until the financial debacle in 1979, or the 1982 Malvinas/Falkland Islands fiasco, saw themselves as being entitled to become accusers. This perceived betrayal by their former allies confirmed the military conspiratorial theory. They now viewed themselves threatened by an even larger number of conspirators who had posed as their allies until it became advantageous to turn against the armed forces. These former allies were now supporting the politics of revenge. Indeed, the military felt that, having been encouraged by the citizenry to annihilate "subversion," to restore order, they had now become repositories of all the violence in the country since the beginning of the 1970s. Society's authoritarian single-cause explanation of the sources of its distress consisted no longer in blaming the victims; the single cause was now the military.⁵⁸ This prevalent readiness to turn against the military may have contributed to Ex-General Videla's claim, in 1993, in which he repeated his long-held conviction that he was a scapegoat.⁵⁹

The military felt that the cruelty of many civilians as well as their vast pro-dictatorial support had been overlooked and that all the brutality of recent times had come to be laid at their door. Remorse, shame, and even simple reflection, were all swamped by the bitterness of being pinpointed, as they presumed, merely for being members of the armed forces. The sense of being laden freed these officers from a minimal sense of moral responsibility

58. In spite of President Alfonsín's instructions to prosecute a very small number of ERP and Montonero militants, many of whom had by that time been made to disappear or had fled the country, there was a general atmosphere of obliviousness of right- (and left-) wing civilians directly or indirectly involved in the violence. Among these individuals were top politicians, trade union leaders and other ultra-right-wing civilians who had earlier engaged in extreme violence together with Peron's underling, José Lopez Rega.

59. See James Neilson, *Parque Jurásico*, NOTICIAS (Buenos Aires), July 18, 1993.

for what they had actually ordered and done. The perception of betrayal by former allies, now turned into accusers, overshadowed the civilian government's emphasis that the trials did not address the military as such but only those responsible for concocting the ruthless campaign or for committing abhorrent crimes. Thus, as the means of instilling a basic sense of individual responsibility, the bipolar nature of the criminal trials impaired the politics behind the trials.

The persistence of single-factor explanations suggests—as corroborated by the recent Patti case—that the populace will again support a dictatorial intervention if the country's background conditions deteriorate. The electoral appeal of General Bussi and Colonel Ruiz-Palacios also suggests that the desire for a tough hand to reinstate social order may be as strong now as it was back in the 1970s. The single-cause approach to reality invites an analogy between the 1970s subversives and 1990s property offenders. The cases in which children and youngsters are killed for posing petty threats to private property, and the police and judicial reactions to these episodes, can only be explained with the assistance of a bipolar logic. This logic is based on the still reigning “if you are not with us you are against us” approach to reality and its corollary, the single-cause approach to socially complex events.

The single-cause approach basically disregards the obvious fact that the military dictatorship and everything that went with it had been a phenomenon isolated from the “real country.”⁶⁰ Present tolerance of violence indicates that the collective drive to punish military abusers did not sufficiently promote respect for persons as an indispensable ingredient of “actual, unprejudiced punishment,” and as a means of attaining a rights-based democracy. Placing the blame on a single sector of society had perceived “advantages.” By refusing to accept the painful fact that terror originated in the very entrails of the community, the single-factor mechanism enabled the populace to stifle both their guilt and their shame for their passivity toward the suffering. It is readily apparent that looking at the pain as the consequence of the activities of a well-defined sector means rewriting the recent history of Argentina. In some sense, the guilt of many military officers for the terror they caused does eliminate the appeal of

60. *See id.*

their claim of being scapegoated. However, beside the shameful deeds of many officers there stand no less shameful actions of many civilians.

To challenge the interpretation of the country's recent past by exposing the nature of the cause of brutality invites questioning the very motives behind the massive support of the human rights trials. It seems clear that, whatever its strength, credence in the courts did not rest on the prospects of an impartial decision of the criminal responsibility of military officers. Present lack of respect for the courts' verdicts stems from a general belief, leaving no room for judicial independence. For instance, it is difficult to imagine the popular reaction if Ex-Generals Videla and Camps had been acquitted as a consequence of the evidence that they had, for instance, ignored what was happening under their noses or that they were mentally handicapped. It seems that the authority of the courts did not rest on the popular respect for their judgment, but rather, on their ability to formalize, in the best possible legal style, a previous political decision to put some officers away. The sentences, then, may have allayed widespread retributive emotions, but said nothing meaningful about the truth of recent history.

IV. CONCLUSION

There is much to be said for and against the post-dictatorial criminal trials. Arguments based on politics and policy, pragmatism and idealism, present and future, have been presented on both sides and there are surely still more points to be made. Punishing members of certain groups, as it stands today, is highly intermixed with the less accepted concept of revenge. The strategy of impunity, however, is highly counter-intuitive and cannot be argued for without a strong sense of insincerity. If pressed for one, an answer to this plight may lie half-way between punishing a group of officers—at the risk of facing the second horn of the dilemma—and not punishing anybody at all. Perhaps lighter sentences to a larger sample of members of the community that includes business-people, technocrats, religious persons and professionals would provide a more accurate picture of what happened. This solution would be plausible if—and only if—we could come up with good moral reasons for singling these people out, thus avoiding the first horn of the dilemma. Perhaps the latter strategy provides a clearer picture of those involved in

planning and executing horrendous crimes against groups of individuals. By and large, experience indicates that the high expectations posited in the trials will be frustrated sooner or later. The issue demands further thinking about the democratic mind and the role of the criminal justice system.