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ARTICLE

The Moral Dilemmas About Trying Pinochet in Spain

JAIME MALAMUD GOTI*

In 1998, in response to an application from Spanish Judge Baltasar Garzón, a British court placed former Chilean dictator Augusto Pinochet Ugarte under arrest while he was receiving medical treatment at a London clinic. The probe clearly singled out the general as the key figure in thousands of abuses perpetrated by military and paramilitary personnel in Chile. The Spanish court had also gathered evidence that implicated Pinochet in the commission of an assortment of crimes beyond his country's borders.¹

The judicial proceedings in England were fraught with jurisdictional controversies concerning mostly the scope of national sovereignty. Among the topics were the authority of foreign courts to try crimes committed within Chilean boundaries and the immunity of a head of state from criminal prosecution for acts performed within the sphere of his office. Pinochet's tribulations in England ended when the British government,

* There are many friends whose patience and help merit my recognition. I have benefited with ideas and suggestions from Paul Kahn, Owen Fiss, George P. Fletcher, Robert Burt, Thomas Pogge, Pablo de Greiff, Martín Farrell, Marcelo Alegre, Carlos Rosenkrantz, Lucas Grosman, Martín Bohmer, Roberto Saba, Paola Bergallo, Laura Saldivia and Juan F. Gonzalez Bertomeu. I would like to thank Leigh Macdonald for her assistance in improving this text and for her outstanding kindness. I am also thankful to Maximo Becu for his incomparable intellectual as well as moral support.

1. Among the latter was the assassination of Orlando Letelier in Washington D.C. and of Chilean General Carlos Prats in Buenos Aires. Furthermore, evidence also pointed to Pinochet as masterminding Plan Condor, a combined military terrorist campaign to suppress "subversives" throughout the Southern Cone. The extradition request, however, was confined to those offenses indirectly perpetrated by Pinochet within Chilean territory.

considering the general, in his mid eighties, too frail to withstand trial in Spain, allowed the general to fly back to Chile. After a heated political debate in Santiago, the Chilean Supreme Court expedited criminal proceedings against the general by stripping him of the parliamentary immunity he enjoyed as a senator for life. Thus, to the chagrin of millions of sympathizers of Pinochet, he is now liable to be tried for numerous criminal complaints filed against him.

Pinochet is not the only Latin American alleged human rights abuser to be indicted by European courts. In the year 2000, two Argentine military officers were under arrest outside Argentina, awaiting extradition to Spain and France.² The international underpinnings of the Pinochet extradition case have spawned an array of illuminating essays on impunity and international justice. Most of these papers tackle the issue of the limits imposed by national sovereignty to try criminals for offenses perpetrated within foreign territorial boundaries.³ Some of them also broach the issue of present and future international rule of law. There is an interesting and uneasy tension between a serious attempt to end the impunity of powerful state criminals and the decision of judges from First World countries trying state criminals from peripheral countries such as Chile and Argentina.

This creates a troublesome sense of inequity that stems from current prosecutions of human rights violations. As events are thus far unfolding, it seems feasible for French, Swiss, Spanish and U.S. courts to try and punish Argentine generals, Haitian attachés and a Chilean dictator.⁴ By contrast, prospects of trying Henry Kissinger, McGeorge Bundy, and Western European and U.S. political actors and decision-makers and war criminals seem more than remote.⁵ This apparent disparity between actors from

2. See, e.g., Kenneth Roth, *Towards an International System of Justice?* Address at Columbia University (March 9, 1999); see also Paul W. Kahn, *On Pinochet*, paper delivered at the Seminario en Latinoamérica de Teoría Constitucional y Política (SELA), 1999 La Serena, Chile (hereinafter *papers of SELA*) (on file with author).

3. See *Mexico Breaks Legal Ground*, BUENOS AIRES HERALD, Feb. 4, 2001 (One Argentine was released; there is only one pending case. In early 2001, Mexico decided to extradite Ricardo Miguel Cavallo, a former Argentine military officer accused of torturing political prisoners during the 1976-1983 military regime. The extradition request was also made by Spanish criminal judge Baltasar Garzon).

4. It evokes the arrest of strongman Manuel Noriega in his homeland Panama to have him tried and sentenced in the United States, where he now serves a life sentence for his involvement in the international drug trade.

5. It seems thus far inconceivable that a Vietnamese, Costa Rican or Brazilian

powerful and not so powerful nations causes a perceptible strain between two basic principles of law and justice. The first is that of defeating impunity as a serious form of inequality within terrorized communities.⁶ The second is the observance of some minimal evenhandedness required by the *rule of law*. Whereas one could claim that justice is served every time a human rights abuser is convicted, it is no less true that the *rule of law* is dubiously compatible with extremely sporadic and selective enforcement.⁷ Indeed, according to standard conceptions the *rule of law* is contingent upon the regular and impartial law enforcement.⁸ It is true that the notion of the *rule of law* may allow for certain degree of uneven enforcement based on political necessity and natural catastrophes. What negatively hurts the *rule of law* is the discrete prosecution of just one segment of the world's state criminals, however vicious, when disregard for other equally vicious abusers is grounded in reasons as alien to our notion of retributive justice as the disparity of power in international relations.⁹ Such considerations allow room for plenty of skepticism concerning the place we actually allot justice.

The purpose of this paper is to partake in this debate about the merits and demerits of international criminal justice in prosecuting state criminals. I tackle the topic but from a different perspective than the doctrine of national sovereignty or the tension between the *rule of law* and an uneven system of international human rights justice. Although I cannot completely

court successfully extradites Captain Medina for his part in the massacre of civilians in My Lai during the Viet Nam War. Noticeably, none of the living right-wing Franco underlings have ever been investigated, let alone indicted, for the multitudinous war crimes committed during and after the Spanish Civil War. This fact is particularly relevant considering that prosecutions for war crimes, such as the summary executions of prisoners, are not barred by any statute of limitations in force.

6. Jaime Malamud Goti, *Punishment, Dignity And Trust*, papers of SELA, La Serena, Chile (1999) (on file with author).

7. See THOMAS M. SCANLON, *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* 257-271 (Yale University Press, 1999) (Thomas Scanlon stresses the need for a minimal "evenness" between the legal treatment of analogous cases. I prefer a more relaxed view of the principle that some basic impartiality should be observed if we consider the trials of human rights as the stepping stone of a new system of international legality).

8. I concede that the rule of law could still survive the lack of regular enforcement insofar as disparities can be justified as owing to impartial reasons.

9. I give some latitude to the notion of "moral relevance," including political necessity and opportunity as different from reasons stemming from the wealth or militia power of the nations where the perpetrators belong.

detach my own perspective from criticism stemming from sovereignty, I will assume that prosecutions do not depend on power - military, economic or strategic - related differences between the nations states of culprits and judges. I lay out the thesis that, in dealing with "domestic" state abuses, the goals and purposes of criminal justice can only be satisfactorily accomplished by what I call courts *from within*, that is, by justices that belong in the same community as do victims and perpetrators. I acknowledge this stance leads to a dilemma: on the one hand, that of ending impunity in accordance with our intuitions and, on the other, avoiding a justice system that is unlikely to bring about the effects we expect from punishing state criminals. I deliberately exclude what may be considered in essence international state criminality as was the case of Nazi war crimes and crimes against humanity, the Turks' genocidal campaign against Armenian population, and so on. I also limit the notion of domestic state crimes not just to those perpetrated by some individuals against other members of their own community. For the purpose of this paper, the notion of domestic state crimes does not encompass abuses committed by state agents against citizens of the same country but who are also members of particular ethnic and religious groups.¹⁰

My point is also based on a certain notion about the goals and purposes of punishing state criminals. First, as some scholars such as Herbert Morris¹¹ and George Fletcher¹² have claimed, a retributive justice system benefits society in that punishment re-establishes the equal status of victims and perpetrators. This appeal to the equalizing function of punishment acquires special meaning in the case of state brutality. Victims of state abuse are not only the thousands of

10. See generally LIBBET CRANDON MALAMUD, *FROM THE FAT OF OUR SOULS* (University of California Press 1991) (I acknowledge the fact that the very notion of ethnicity is extremely slippery. Ethnic communities may be the concoction of certain policies and ideologies, as some Rwandans claim in relation to the distinction between Tutsies and Hutus. In essence, however, there is a patent difference between the circumstances surrounding the abuses committed in the Southern Cone in the 70's (and the persecutions carried out by Communist regimes in Eastern and Central Europe) on the one hand, and, on the other, those perpetrated against the indigenous population in Guatemala, the blacks in South Africa and the Muslims in Bosnia).

11. See generally HERBERT MORRIS, *ON GUILT AND INNOCENCE* (University of California Press 1976).

12. See generally GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* (Oxford 1996).

people killed, tortured and incarcerated but also the large segment of population living under constant great fear and instability. These numerous victims of state criminality demand that we resort to punishment as the strongest institutional remedy against shame and loss of self-respect and esteem.¹³ The perception of our rights hinges on these sentiments which are thus essential to building a rights-based democracy. Yet it seems obvious that the victim cannot recover her lost dignity without trust in the impartiality and competency of the court sentencing the culprit. It follows that to attach an equalizing effect to punishment presupposes the courts' decisions are authoritative: that verdicts be perceived as reflecting the truth about the facts and the right principles and rules.

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The rather short and barren history of trials of state criminals reveals that the courts have varied considerably both in establishing and weighing criminal responsibility. The largest perceptible difference between these criteria has mostly hinged on whether the perpetrators are tried *from within* or *from without*: on whether the justices and the perpetrators belong in the same community. The paramount exponents of trial *from without* are the post-World War II trials of German officials held at Nuremberg. Trials *from within* are illustrated by the 1985 Buenos Aires trials of the members of the military juntas that ruled Argentina from 1976 to 1983.

This distinction concerning the national origin of the judges acquires a particularly salient dimension if we take blame to be the starting point in defining the contours of criminal responsibility.¹⁴ This tack, which I will call subjective, contrasts with the traditional practice of establishing criminal responsibility in accordance with certain conditions that render the actor morally responsible, thus detaching it from any particular vantage point.¹⁵

13. Malamud Goti, *supra* note 6.

14. See Peter F. Strawson, *Freedom and Resentment*, in *FREE WILL* 59 ff. (Gary Watson, ed. Oxford University Press 1982) (groundbreaking article); See also R. JAY WALLACE, *RESPONSIBILITY AND MORAL SENTIMENTS* (Harvard University Press 1996).

15. CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (Yale University Press 1996); JAIME MALAMUD GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (University of Oklahoma Press 1996); *Una Manera Peculiar de Inculpar: Lo Que Quedó de los Juicios a los Militares*, in *EL DERECHO PENAL HOY*:

What becomes decisive if we adopt the subjective perspective in connection with trials conducted *from within* and *from without* is the fact that judges address different audiences. A consequence of this is that the "justice"¹⁶ and value of the verdicts do not reflect, at least not entirely, the express legal reasons in which these decisions are couched. Parallel to these express reasons operates implicit - and at times concealed - motives and purposes which originate in the relationship between the court and the audience it addresses. By and large, the justices in the Argentine court that tried the generals addressed their nationals; by contrast the audience was, for the judges at Nuremberg, the

HOMENAJE AL PROFESOR DAVID BAIGUN, 385 (Editorial El Puerto, Buenos Aires 1995) (The crux of this tack is the notion of responsibility generating facts, establishing that an act fulfills certain properties that render the act worthy of condemnation. While this objective approach focuses on an act and its consequences, the subjective alternative consists in establishing the conditions under which we are entitled to condemn a certain person by crediting him with inflicting some harm on a third party. Thus, the subjective approach involves establishing the presence of certain conditions that make it morally right or fair to condemn an agent or its act. There are two properties about the subjective approach that makes it more attractive than its objective alternative. The first is theoretical. By making responsibility hinge on the concept of blame it is stripped from any metaphysical contours. Based on the external notion of "responsibility generating facts" considered independently from the stance or attitude in which allotting responsibility originates, the external approach evokes the unconvincing idea of "moral facts." The second feature that makes the internal approach more attractive is essentially practical. It lies the fact that this tack ties the notion of an offense more naturally into the wider picture of victims striving to express the truth about their suffering and having the perpetrators exposed and punished. This tack is narrowly tied to the moral sentiments of the community, especially the victim's resentment and indignation. Placing the victim at the center stage provides a particularly adequate depiction of a recurrent political scene in communities emerging from rampant state criminality. Thus, we think of a blamer in two different senses. The first is that of a person having a legitimate concern in connection with the offense: being a direct or indirect victim, having an interest in preventing future abuses, pursuing the removal of the offender from society, and so on. The second sense refers to our thinking of a blamer according to his or her legal standing: having a right to plea following the proper procedures, being entitled to accuse the perpetrator and denounce him from the witness stand. I use the quotation marks to stress the fact that I am not referring to "justice" as the virtue of certain decisions. I use the term to identify with some vagueness the outcome of applying certain (impartial) reasons and evaluations that are characteristic of the act of judging. By justice I also mean the perception, external to the act of making the decision, that it consists of something other than simply imposing coercion by the courts. In this sense, "justice" is linked to the notion of authority, that the courts are envisaged as knowing the facts that lead to acquittals and convictions and apply the appropriate rules to evaluate the action in point.

16. I am not referring to justice as the virtue or quality of a decision but rather loosely to "justice" as the authoritativeness of a decision. By the latter I mean the assumption that it is perceived as based on an informed opinion about the facts and grounded in the correct values and principles.

entire world community, although much could be said for the special relevance of the American, British, Soviet and French audiences.¹⁷ Trials and convictions are meant to teach a lesson, and therefore, the question of to whom is this lesson aimed becomes crucial. As early as 1946, Justice Wyzansky noticed that the Nuremberg Trials would not teach the German people what Nazism was all about. For the Germans, the trials were simply political in a bad sense.¹⁸ Rather, Wyzansky emphasized, they were aimed at persuading a different community, the World community.¹⁹ Like all audiences, this audience was targeted by the court as its point of persuasion, its basis of credibility.²⁰ Similarly, Telford Taylor, the Chief Counsel for War Crimes at Nuremberg, understood that the purpose of the trials of Nazi criminals was "the benefit of mankind."²¹

The particular relevance of these premises is that the courts enjoy a certain base of authority: a segment or group for which its decisions are credible in two ways. The first relates to the ability of the court to discover, select and support itself on the relevant facts. The second is to the court's impartiality in grounding its decision in the correct principles, rules and values. Credence in the "justice" of the court's decisions among those affected by its verdicts and by other members of the community enables the court to bring to a closure those conflicts brought to its decision.²²

17. See Judge Charles E. Wyzanski, Jr., *Nuremberg: A Fair Trial? Dangerous Precedent*, THE ATLANTIC MONTHLY, April 1946, vol. 177, no. 4 at 66-70 (This point was suggested as early as 1946 by Judge Charles E. Wyzanski, Jr. of the District Court of Massachusetts).

18. *Id.*

19. JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 154-5 (Harvard 1986) (Shklar is of a different opinion as to the purposes of the trials. For her, they were aimed at "eliminating the Nazi leaders in such a way that their contemporaries, on whom the immediate future of Germany depended, might learn exactly what had occurred in recent history." Shklar admits, however, that the trials were not addressed to re-install a democratic system in Germany).

20. Wyzansky, *supra* note 17 (Wyzansky distinguishes between persuasive justice and sheer propaganda. It was clear that for the Germans it would largely become the latter).

21. See Telford Taylor, Final Report of the Secretary of the Army on the Nuremberg War Crime Trials Under Contro Council No. 10, *Selection of Defendants* 73-85 (Library of Congress, Catalog Card No. 97-72142 Washington D.C. August 15, 1949) (reprinted in William S. Hein & Co., Inc., Buffalo, New York, 1997).

22. See Malamud Goti, *supra* note 6 (Elsewhere, I have distinguished different levels of authority depending on whether it encompasses only the parties or the community as a whole. This distinction is relevant, for instance, in the effects of a criminal conviction.

Thus, I submit that the relationship between the authority of the court exceeds the formal reasons that ground the verdicts. There are unexpressed ways in which the relations between the courts and the specific audiences they address model the content of their verdicts. This principle seems evident yet its consequences are not completely apparent. I set out to demonstrate that, in this connection, only trials held *from within* the community of the perpetrators are likely to fully justify a criminal conviction. To illustrate my point I draw on the 1945 trial of Ernst von Weizsaecker in Nuremberg, and the 1985 trial of Orlando Agosti by the Federal Court of Appeals in Buenos Aires.

a. *Ernst von Weizsaecker*

Ernst von Weizsaecker was secretary of state at the German foreign ministry between 1938 and 1943. He was charged under seven counts in the Ministers Case, one of the trials presided over by one of the three International Military Tribunals set up at Nuremberg. Von Weizsaecker was at first convicted on two counts: crimes against peace (waging war of aggression) and crimes against humanity.²³ The first count was reversed upon petitioning the tribunal for review. The accused could demonstrate his opposition to Germany's expansionist policies and that, at the time of the invasion, he had revealed to other officials his personal opinion that such policy would lead

Only if the court is authoritative to the victim will benefit the latter in restoring him a sense of dignity the offense annulled. Belief in the correctness of the court's decision by the community at large will restore the victim's self-esteem).

23. The extent of this credibility or authority is, however, relative to the nature and magnitude of the conflict. It is somewhat obvious that given their nature and size, certain conflicts enacted in the drama deteriorate the authority of the court, regardless of the prestige of the judiciary or the personal authority of the justices. The Lorena Bobbit, Rodney King, Dan White/Harvey Milk, and O.J. Simpson cases illustrate how, even in a strong institutional system such as the United States, certain trials depicting the collision of segments such as those of women and men, blacks and whites, and gays against straight thwart the credibility of the courts. This discredits the courts' verdicts for at least one party of the competing sector. In the O.J. Simpson case, the white segment refused to accept (and will continue to do so) that the culprit should ever have been acquitted. The opposite segment, that of American blacks, believed (and still does) that the reasons to sentence Simpson to compensate the Nicole Brown's relatives were anything but an act of "justice." The authority of the courts would be permanently damaged by widespread incredulity if cases such as Simpson's became more frequent. As I later explain, I call these trials "political" in a non-pejorative sense.

Germany into a catastrophe. The assumption remained that, having served as the second official at the foreign ministry, he should have known of the genocidal policies of the Third Reich and more concretely, of the deportation of Jews to Eastern Europe and of their ultimate elimination. The tribunal believed von Weizsacker's allegations that he had opposed the Reich's policies and that he had actively plotted against Hitler. The court also believed his claim that he had remained in office for the purpose of circulating vital official information to his fellow conspirators. The tribunal found that the accused should have expressed his disagreement with Hitler's racist policies to SS officials when they queried on this matter. Thus, in not having completely discharged his moral duties, the tribunal found the culprit guilty and sentenced him to seven years in prison of which he ended up serving only one.

b. Brigadier General Orlando Ramón Agosti

Brigadier General Orlando Ramón Agosti was the commander in chief of the Argentine air force and member of the military junta that overthrew Isabel Peron in March 1976. Together with his two comrades, the commanders of the navy and the army, he was brought to trial and accused of being responsible for the multiple offenses perpetrated by personnel under his orders. Since the terrorist tactics had been planned and decided at the highest echelons of each of the three military branches, Agosti was accused of being the intellectual perpetrator of innumerable abuses. These comprised multiple disappearances and assassinations, a multiplicity of acts of torture, and the massacre of over a hundred detainees at a clandestine detention center that operated under the control of the air force. The federal court dismissed most of the charges against Agosti but still found him guilty of five counts of torture and three of robbery. He was sentenced to four years and six months of imprisonment.²⁴

Our emotions play out differently in both cases. It is true that Continental and Latin American judges enjoy sufficient leeway in sentencing to render Agosti's conviction formally

24. See Alejandro Garro and Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 Hum. Rts. L. J. 427 (1987).

consistent with the legal standards in force. It is also true, nevertheless, that the four and a half year sentence does not reflect the harshness we expect from taking seriously three counts of robbery and five of torture. The von Weizsaecker case instead seems overly exacting for any official in Hitler's Germany. Most of us would not be inclined to consider him a genuine hero rather than a criminal. Yet both decisions, however dissimilar in nature and severity, may be considered authentic "acts of justice."²⁵

What makes the severity of both decisions so radically asymmetric is the impossibility of confining the blame to strict considerations about the facts and legal and moral values. This process was strongly influenced by the political circumstances in which the verdicts were handed down and their anticipated impact. I want to stress that both were "political trials," not in a pejorative sense that suggests the utilization of the justice apparatus to favor allies or eliminate the politically undesirable. These trials did not hinge on the principle that Goebbels described as "this man must go."²⁶ They were not political like the Dreyfus case or trials of dissidents under Stalinism. In ways that require distinctions, both were political trials in a morally neutral sense.

Briefly, I call political in the morally neutral sense those trials that radically split society on politically sensitive issues. The passions enacted in the court split society in two factions that overflowed the authority of the courts: whatever the outcome, members of at least one of the segments epitomized by the parties would not accept the verdict as an impartial act of justice. As human rights trials *from within*, those of the Argentine generals were political in the sense that the O.J. Simpson and the Rodney King trials were political. The Nuremberg trials, an exponent of justice *from without*, instead, linked the culprits' actions to the roles they had played and which were contingent upon a political system. Those who thought it was not for foreign judges to condemn the system or its roles rejected the court's verdicts as genuine acts of justice. Nazi sympathizers shared this opinion with those who believed that trying political systems is way beyond the mission of the courts.

25. See Scanlon, *supra* note 7.

26. See Shklar, *supra* note 19, at 174.

Von Weizsaecker was tried and convicted *from without* the complexities of the Nazi Germany culture. The German culture itself was on trial.²⁷ It seems reasonable to assume that, through their verdict, the Allies' judges reflected the horror and the indignation aroused by the discovery of the gas chambers and the mass graves. The historic prestige of the Nuremberg trials lies with the determination to expose before the world the genocidal policies and the enslavement of entire civilian populations by Nazi Germany. These policies, the tribunal exhibited, were not the outcome of a fistful of lunatic members of Hitler's party and a limited number of officers of the SS but of an evil political system. It seems thus plausible to assume that by convicting von Weizsaecker the court set out to reveal that serving a delinquent regime as politicians or bureaucrats was itself reprehensible. The trial was on Germany as a whole.²⁸ Thus, only opposing the genocidal procedures and terrorist practices would acquit an officer from the blame even if doing so had meant certain death. It is true that this view resulted from the criterion that responsibility required that the culprit had not only held a certain formal post but also that he violated a substantive moral principle.²⁹ However, by demanding overt opposition to Hitler's policies, the court was imposing on von Weizsaecker a particularly stringent moral duty. Such strict view was the consequence of passing judgement *from without* the realm where directly or derivatively, through positive acts or omissions, millions of people contributed to the criminal design of the Nazi system. It thus seems obvious that the court's audience was not the German people on whom the impact of the verdicts was not central to the court.³⁰ It can be inferred that, for the justices at Nuremberg, a new German democracy could have never been built through the process of subtly sorting out those individuals who were morally fit to build the new German democracy from among the throngs of Nazi followers. In the eyes of the judges at Nuremberg that undertaking demanded a fresh start.

The Argentine tribunal, instead, tried the facts *from within*

27. See *Id.* at 147.

28. See *Id.*

29. See Taylor, *supra* note 21.

30. See *Id.* (This contention may be inferred from the express purposes of the trials. In the Introduction to his Report, Telford Taylor states that "the Nuremberg Trials were carried out under quadripartite authority, but in pursuit of objectives thought to be of benefit to all mankind").

the culture of the "dirty war" in which thousands of agents - involved directly and indirectly - caused the disappearance and the death of thousands of persons terrorizing the entire population. Unlike the Nuremberg trials, the audience to which the verdict was addressed was the same as that in which the perpetrators belonged. The impact the decisions were expected to effect was also different. Just as the great majority of the politicians and functionaries of Argentina's post-dictatorial community, Argentine justices had been players in the corrupt system. They had served as members of the dictatorship's judicial apparatus and, in spite of not having been the target of concrete accusations for their behavior during that period, their election by the president brought about some adverse reactions by some human rights activists and progressive politicians. By and large, and not without reservations, the population believed in these judges (insofar, at least, as their verdict did not upset their expectations.) It also seems clear that a different choice of judges would not have elicited a better outcome. The appointment of new and inexperienced magistrates would have elicited equally pungent accusations from right-wing quarters. It would have convinced them they were being tried by a kangaroo court, that the appointed judges were directly charged with convicting the defendants. Similar to the process of jury selection, electing the judges becomes crucial to the outcome of political trials in which the attainment of a basis of authority becomes essential to a democratic project.

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The starting premises of the trials of von Weizsaecker and Agosti necessarily distance the nature of the resulting verdicts. In Argentina, prospects of setting up a democracy compelled the judges to concoct distinctions to establish and gradate responsibility on the basis of peculiarities that we commonly regard as political. Such distinctions were a necessary step toward building a democracy under the same political leadership that had - in some way or other- largely acquiesced to the 1976-1983 terrorist regime. This peculiar process led judges and prosecutors to overlook some facts and forget others. Nations are built, explains Benedict Anderson, around great remembrances but also through obliviousness.³¹ Some degree of oversight and

31. See BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS*

forgetfulness are intimately connected with the practice of blaming.

Blame serves the purpose of simplifying social facts by singling out the morally relevant cause of some harm. We thus blame those who cause our suffering by transgressing our moral principles and values. This descriptive approach, however, provides no insight into the actual appeal of blaming wrongdoers as a social practice: the *why* and the *when* we actually blame agents for their legal and moral infringements. To account for the latter requires resorting to a manipulative, forward-looking, version of blame, which I believe, requires two conditions. The first is emotional: we cannot claim to seriously sustain a moral principle if breaches of it do not arouse emotions, largely resentment and indignation.³² Second, blaming requires that we implicitly or explicitly expect to provide reasons to discourage the wrongdoer and others from doing it again. Prosecutions and trials are forms of making our blaming public, which implies the expectation that others share our emotions and background assumptions about factual and moral beliefs. When some degree of support is hopeless to us, blaming others publicly loses its basic appeal.

In the 40s and 50s, for instance, we would not have expected a large enough segment of the community to share our privately held view that many industrialists were blameworthy for polluting our rivers and lakes. In contracting an infectious disease, the community at large turned their blame to the intoxicated water drinker or the reckless swimmer. The same is true with the effects of state terrorism and the process of targeting our blame. In the eyes of many Argentines it was also the victims' recklessness that caused their suffering in the hands of their abductors and torturers.³³ Devoid of its moral underpinnings, blame frequently befell the victim, hoping this would persuade others to adjust to the tyrant's demands.

ON THE ORIGIN AND SPREAD OF NATIONALISM 187-206 (Verso Press, New York, Revised ed. 1991) (French historian Ernest Renan stated, "*Or, l'essence d'une nation est que tous les individus aient beaucoup de chose en commun est aussi que tous aient oublié bien des choses. . .*").

32. See Bernard Williams, *Morality and the Emotions*, in PROBLEMS OF THE SELF 207 (Cambridge University Press, 1973).

33. See generally JAIME MALAMUD GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (University of Oklahoma Press 1996).

These variations in the practice of blaming are peculiar to political transitional processes.³⁴ I take the case of the 1973-75 systematic assassinations by ultra-right wing groups in Argentina. During the post-dictatorial human rights trials, the focus of the prosecutions were almost exclusively military officers. Accidentally, unwittingly and even unconsciously, prosecutors failed to take action against ultra right-wing Peronista henchmen for the systematic assassination of dissidents. The single most egregious abuse perpetrated by this group was the March 1973 massacre of their rivals of the Peronista Youth near the airport where Peron was expected to land on his return from his long exile in Spain.³⁵ Hundreds of youths were slaughtered in this gruesome incident, yet it is likely that if these abuses had not been overlooked, prosecutions of members of these groups would have been viewed as a political device geared to advance the partisan interests of the politicians in office. This belief would have reinforced the political nature of the trials in the non-pejorative sense I have explained. The effect would have been the loss of the courts badly needed basis of authority. What caused the obliviousness was thus emphasis on consensus in the attainment of democratic authority.

Prosecution and conviction of military officers was itself an example of selective blame. In the process of seeking for itself an authoritative base among its domestic audience, the court convicted five out of nine members of the military juntas that ruled Argentina between 1976 and 1983. Furthermore, only two defendants were awarded life sentences despite the fact that all of them were convicted on charges that, by ordinary standards, warranted the harshest verdicts. To reach this outcome, the court had repelled a move by the prosecution to establish the responsibility of each commander as contingent upon the activities of the juntas under which each one had served. The move by the prosecution was well-grounded in that each of the four juntas that ruled Argentina between 1976 and 1983 had formally held supreme military control over the operations that concluded in the thousands of assassinations and

34. See STEPHEN HOLMES, *PASSIONS AND CONSTRAINT, On the Theory of Liberal Democracy* 210 (University of Chicago Press 1995) (Holmes refers to the politics of "active forgetfulness" (quoting Friedrich Nietzsche) and "... keeping retribution for former crimes off the political agenda. . .").

35. See MARTIN EDWIN ANDERSEN, *DOSSIER SECRETO* 85-87 (Westview Press, Boulder, Co. 1992).

disappearances. Furthermore, there was substantial evidence pointing to the fact that there had been enough deliberation among members of each junta to credit them with full knowledge of what was happening. This created the presumption that all members had been equally cognizant of the repressive scheme as well as the ongoing terrorist campaign. The decision to establish the responsibility of each defendant separately provided the court with extra freedom to gradate the accountability of each commander.

In this process of establishing different degrees of responsibility among some defendants and acquitting the rest, the court employed a high degree of selectivity, including the dismissal of numerous charges. Formally, the court's criterion on responsibility lay with the culprits' actions, positive and omissive; informally, the tribunal also relied on each force's comparative role in the criminal campaign as well as the player's public image. The actual standards - those that resulted in Agosti's extremely light sentence - were based on complex and politically sensitive criteria. The outcome would have been inexplicable without this sensitivity that partly accounted for domestic public opinion. I am doubtful, however, that the trial's approach was actually successful in attaining widespread credibility among most segments of society. I contend that failure to prosecute ultra-right wing Peronista vigilante groups and differentiating between the military top officers was the right strategy to avoid fracturing the polity into two unwavering rival segments. This fracture, furthermore, corresponded with the social split that wound up in state terrorism. In passing judgement, a trial *from without* would have been impervious to these consequences. I later return to this topic.

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The difference between courts *from within* and *from without* is crucial. In the process of building for itself a basis of authority, the former risks surrendering too much moral ground to the political, whereas the latter seems too prone to oversimplify the political reality of the community where the perpetrators belong. Because of its stronger proclivity to radically split the population, trials *from without* dramatically limit the formation of judicial authority. Two Rwandan high officials - who refused to convey whether they considered themselves to be Hutu or Tutsi - assured me that, in assuming that the barbaric persecutions had

been based on clearly differentiated ethnicities, national and international human rights trials in their country had artificially re-created their tribal identities. Through the process of blaming Hutus, the criminal proceedings had a strong impact in shaping the country's subsequent reality. The consequence was the lack of credibility of the courts among the Hutu. In fact, they reproduced one of the achievements of the Belgian colonial policy, namely that of stringently splitting the native population into two clearly, and artificially, confrontational native groups. It is true that the ethnic undertones clearly differentiate this case from those of Chile and Argentina. It provides an example, however, of how formalized blame may contribute to strengthen division and, eventually, deepen antagonism, as well.

Formalized blame is a powerful factor in shaping the political and social reality of a community. This applies, of course, to post-Pinochet Chile. There is little doubt that Pinochet committed heinous crimes in the most orthodox sense. But some state criminals like him have millions of followers, many of whom do not hesitate to take to the streets to express their disavowal of the criminal investigations; especially those conducted by a foreign judge or prosecutor. The effects of a hypothetical trial and conviction of Pinochet by a court *from without* are unpredictable at best. Trials *from within* seem far more promising.

The direct participation of the justices in the life of the dictatorial community lead to the politically-based discriminating decisions I have been mentioning. The consequence of applying to the Argentine military the standards applied to von Weizsaecker would have split society into two camps. The first would have encompassed those who directly or indirectly supported the military regime and its tactics. The second would have consisted of the regime's direct and indirect victims.³⁶ This predicament, similarly artificial to that of the Tutsies and Hutus, would have stripped the sentencing tribunal from minimal authoritativeness. Clearly, authority is not achievable in a

36. AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 143-152 (Ed. by J.H. Burns and H.L.A. Hart, with a new introduction by F. Rosen, Oxford University Press, Oxford-New York 1996) (To define indirect victims, I pick on Bentham's criterion that "crime generates among all members of a community fear from suffering from an infringement analogous to that one that the concrete victim suffered").

society split into two strongly contending factions. If not neutrality, authority can only emerge in a community where a large segment would place itself inside a gray area where they qualify their allegiance to their cause. In this area, citizens must be amenable to acknowledge that there are grounds in which the party they support may have gone wrong. Without gray areas, it is very likely that each faction will attribute the conviction of members of their own side to some association between the court and the contending segment.

To select the relevant deeds and to lay out a different standard for conviction, a court *from within* would have taken an entirely different approach. As the Argentine case suggests, in allotting responsibility, it was the fact of the justices and culprits belonging in the same community that resulted in responsibility limiting criteria. Agosti's sentence may have caused discontent among some human rights activists and a few politicians who aligned with them, but it was never the cause of serious frustration. As it happened, the court avoided a major social split and in this way improved the chances of a successful political transition.

In connection with the goal of advancing democracy, the task of a court charged with trying Pinochet *from within* would be twofold. First, it would have to generate widespread awareness about the past, to establish the way in which state terrorism actually took place, the extent and style massive violations were ordered, encouraged, and tolerated from the top echelons of the state apparatus. This is an enlightening endeavor. It stems from the moral purposes of the trial, namely, as I later explain, the attainment of conditions that justify punishment. Second, based on extra-legal and moral grounds, the tribunal must craft subtle distinctions among the thousands of actors that directly or obliquely, through positive acts or omissions, participated in the "dirty war." A "dirty war," it seems too obvious to mention, demands the participation of a vast segment of the population. In such environment, some individuals were at one time perpetrators and at another time victims. The Chilean and Argentine experiences reveal that, turned into wrongdoers themselves, many victims betrayed their comrades.³⁷ In a

37. See PAMELA CONSTABLE and ARTURO VALENZUELA, *A NATION OF ENEMIES: CHILE UNDER PINOCHET* 144-147 (W.W. Norton and Company, New York-London 1991) (In the case of Argentina, see MALAMUD GOTI, *supra* note 33, at 119

terrorized community, breaches of intimate relations were frequent and trust was often betrayed. There were desertions among friends and colleagues; there were those who failed to aid and succor members of their inner circle.³⁸ Codes of ethics were pervasively overlooked. To take some salient examples, physicians refused to assist those in need of attention and most lawyers rejected to furnish legal counsel to the families of the disappeared and detainees undergoing systematic abuses.

The task of allocating and weighing individual moral responsibility within a terrorized community - as was so in Germany and Argentina - is a complicated endeavor. As Sartre expresses in "The Dirty Hands," we are all victims and at the same time accomplices. If we are thoroughgoing in trying the abusers *from without*, our determination to convict Ernst von Weizsaecker presupposes, both legally and morally, that we also indict hundreds of high ranking officials who were knowledgeable of the Nazi atrocities and legally required to report them, thwart their execution and so on.³⁹

When the abusers are tried *from within*, placing blame becomes an entirely different proposition. Even if criminal blame were to zero in exclusively on the inner circle of power and the most conspicuous murderers and torturers, the cases of Agosti and Pinochet suggest that this process is intricate at best. Decisions would require a high degree of selectivity grounded in political considerations and a gradation of responsibility based on predictions on the verdict's anticipated consequences. Teasing out from the responsibility of the members of the inner circle the hundreds of subordinate agents who also were, by normal standards, morally and legally responsible for torturing and murdering, may prove to be extremely artificial. This differentiated treatment in favor of serious transgressors is likely to be devoid of any justification other than that based on furthering democratic authority.⁴⁰

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38. See CONSTABLE, *supra* note 37 (in the case of Chile).

39. See Sanford Levinson, *Responsibility for Crimes of War*, in WAR AND MORAL RESPONSIBILITY 133 (R.B. Brandt, et. al. eds., Princeton University Press, Princeton, N.J. 1974) (It is clear that the Nuremberg Tribunal became aware of these difficulties, as Sanford Levinson claims).

40. See Jaime Malamud Goti, *Punishment and a Rights Based Democracy*, 10-2. CRIM. JUST. ETHICS 3 (1991); see also Jaime Malamud Goti, *Dignity, Vengeance and Fostering Democracy*, 29 U. MIAMI INTER-AM. L. REV. 417-450 (1998) (Robert Burt

It is clear that allocating blame *from without* should not be quite as taxing save perhaps for logistic limitations and time constraints. Telford Taylor stresses the importance of expediency, and thus weighing the available evidence in selecting targets for prosecution becomes a critical factor.⁴¹ Trials *from without* will very often threaten the democratization process. Those charged with exercising prosecutorial discretion are placed in a position that could easily create a threat to the democratic process. The outcome would be an extreme polarization such as that of Tutsies and Hutus. In Argentina, Chile, and Uruguay, the dramatic split between the “crusaders” and the “subversives” would now turn into one between the “guilty” and the “innocent.” This new split would rekindle old conflicts and generate an infinity of tensions caused by the intense resentment among members of both factions. However, these consequences are only contingent outcomes. What is certainly not contingent in a society thus split is the impossibility of authority. Authority becomes unattainable because, in such a setting, there is no room for impartial allocation of blame. In this scenario, those convicted will per force view the verdict as scapegoating, vengeance, or both, rendering the trials political. Analogously, acquittals will be interpreted as resulting from some form of alliance with the ultra-right.

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The thesis I espouse may raise two kinds of interrelated objections. The first is, in the case of trials *from within*, that conflict compels judges to attach too much import to the political. They may be viewed as weighing too thoroughly the (political) consequences of their decisions for these to deserve our respect as impartial acts of justice. In favoring this kind of trials, I strip them from their justification as a source of justice in the broadest sense. The critique would claim, in other words, that I reduce the meaning of convictions and acquittals of state criminals to an essentially political question. Furthermore, in providing the wrong incentives, sensitivity to political effects is likely to backfire: it may convince the military that being restive intimidates judges thus reducing the likelihood of convictions.⁴²

suggests that this approach is a genuine source of compassion. I support his view which may apply to some officers who were legally responsible for serious wrongdoings).

41. See Taylor, *supra* note 21, at 74.

42. E-mail from Thomas Pogge, Professor of Philosophy, Columbia University, (on

The second objection is that the verdicts that result from these trials clash with our notion of "just punishment." What seems to follow from differentiating trials *from within* and trials *from without* is that just deserts are central only to the latter. I respond to the first objection here and devote the following section to the second.

I have elsewhere espoused the thesis that the justification of punishing state criminals lies in the dignifying - and in some relevant sense equalizing - effect of punishment.⁴³ By establishing the truth and the moral meaning of the facts, criminal convictions, for this thesis, have the primary effect of dignifying the direct and indirect victims of the abuses. State terrorism has a powerful influence on the community at large and the individuals' perceptions of their own rights. Confusion, uncertainty and constant fear cause people to forsake their ideals and betray their loyalties and principles. This process leads to shame and guilt and, consequently to the loss of our self-respect and esteem and awareness of our rights. In Chile, Argentina, Uruguay, Rwanda and Guatemala, victims of state terrorism were not only the tortured, the murdered and those who were close to them, but were also those who suffered the humiliating experience of securing their survival by adjusting to whimsical impositions. The latter are the innumerable indirect victims of state terrorism.

Consistent with this approach, punishment ensures the victim an equalizing effect: the attainment of respect and consideration others enjoy.⁴⁴ This effect does not benefit the direct victims only, but also those who experienced fear of becoming the victims of future abuses; punishment also quells the resentment and indignation that result from the wrongdoing.⁴⁵ Yet, to attach an equalizing, self-respect-building

file with author) (I am in debt to Thomas Pogge for pointing out this possibility. I should add that the reason such possibility was not present in the case of trials *from without* was the consequence that the latter were frequently backed by a strong protective military presence).

43. See Jaime Malamud Goti, *Punishment and a Rights Based Democracy*, 10-2. CRIM. JUST. ETHICS, 3 (1991); see also JAIME MALAMUD GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* (University of Oklahoma Press, 1996); *Poder y justicia después del terror: Ediciones de la Flor*, (2000); Malamud Goti, *supra* note 6.

44. See, e.g., CHARLES K.B. BARTON, *GETTING EVEN: REVENGE AS A FORM OF JUSTICE* ch. 2 (Open Court, Chicago and La Salle, 1999).

45. See generally, JEAN HAMPTON and JEFFRIE G. MURPHY, *FORGIVENESS*

effect to punishment presupposes that the courts' decisions are authoritative: that by convicting or acquitting verdicts reflects the truth about past events. It is idle to expect that the victim can fulfil his retributive desire and recover his dignity without trust in the competency and impartiality of the courts. Some minimal authority is still essential to terminate conflict even for one who disagrees with this forward-looking retributivist approach. Attaining this degree of authority seems far more likely to result from trials *from within* for two reasons that sharply differentiate them from trials *from without*. The first one lies in the fact that, according to the reasons I have laid out, the former are much less likely to have a polarizing effect than the latter. The second is more obvious; it stems from the (physical and cultural) proximity between the court and the society where state terrorism took place. Closeness, more precisely cultural closeness, allows the audience to better witness and understand the debated arguments,⁴⁶ which in turn makes verdicts credible.

When I stress the requirement that courts be authoritative, I have in mind two different levels at which the courts may muster respect. The first resides in the belief that the court's conviction implies more than sheer violence, that the court is a legitimate source of coercion.⁴⁷ This notion of authority correlates with that of justice and punishment as opposed to scape-goating and revenge. In this sense, the legitimacy of the verdict lies in that it originates in the correct source and that is thus entitled to enforce its ruling.⁴⁸ To claim that the courts have authority at a second level means that, in grounding their decisions in morally acceptable legal principles and rules, they are conveying to the victim that he is right in experiencing resentment, that his claims stem from reasons genuinely based on justice.⁴⁹

AND MERCY (Cambridge University Press 1988); see also Peter Strawson, *Freedom and Resentment*, in *FREE WILL* ch. V (Gary Watson, ed. Oxford University Press 1982).

46. See generally CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (Yale University Press, New Haven and London 1996).

47. See H.L.A. HART, *THE CONCEPT OF LAW* (Clarendon Press, Oxford 1961) (H.L.A. Hart appeals to this notion which he calls the rule of recognition, the acknowledgment that the court is the source of binding decisions).

48. See generally RICHARD FLATHMAN, *THE PRACTICE OF POLITICAL AUTHORITY: AUTHORITY AND THE AUTHORITATIVE* 156-158 (University of Chicago Press 1980).

49. I can think of a third level at which the court's rulings garner widespread support from the population which thus legitimizes and reasserts the victim's claim. For

This idea of authority points to the ways in which verdicts affect direct and indirect victims. These effects are based, as I pointed out, in some notion of justice and thus cannot be confined to a politically based apportionment of responsibility. A sizeable portion of a brutalized citizenry has no perception of their own rights, and thus they ignore the moral relevance of the facts. It is the role of retributive justice to generate this awareness, enabling the victims to press their claims against the government and the individual transgressors. In the domain of punishing state crimes, the political and the legal are very much intertwined, but clearly the latter does not engulf the former.

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I now turn to the issue of just deserts and retribution. In *The Human Condition*,⁵⁰ Hannah Arendt confronts us with the perplexing paradox that we can forgive only what we can punish, and we can only punish what we are in a situation that makes forgiveness possible. This constraint upon punishing the most nefarious crimes in history seems to clash with our sense of justice and deepest emotions. It is evident to us that only by inflicting pain can we allay the outrage and abomination aroused by Hitler, Pol-Pot, Stalin and Pinochet. Rather than proper punishment, however, limited to just retributive reactions, these passions lead us more in the direction of what we characterize as revenge.⁵¹ I have argued that, unlike revenge, we attach to punishment the capacity to bring conflicts to a closure and to restore to the victim the dignity and self-esteem that the abuser denied him. This can only happen if we meet the conditions required for punishment to bring about desirable moral consequences. This requires that the judges enjoy sufficient moral authority to muster enough trust in their impartiality. Furthermore, the reasons that support the verdict should be sufficiently general to convince not only the victim, but also all reasonable members of the community, including a reflective perpetrator.

reasons of succinctness I set aside this third conception of authority in spite of its relevance.

50. HANNAH ARENDT, *THE HUMAN CONDITION* 236-243 (University of Chicago Press, New York-London 1958)

51. *See Id.* (In the absence of a civil authority (e.g. authoritative courts) to exact the suffering, Kant himself conceives of the pain as revenge rather than punishment. Unlike punishment, revenge is unfit to bring conflict to an end).

This goes to show that there cannot be a "just retribution" of radical evil if we refrain from exacting particularly painful and debasing forms of chastisement. Appeal to such treatment, as Kant reminds us, would annul our own dignity,⁵² thus defeating the very purpose of punishment. It seems indeed that no such punishment can fit wrongdoing that we characterize as "radical evil." Retributivism conceives of punishment as returning evil to where evil originated. How can we then even think of **meeting out** just punishment on the genocide perpetrated by the Nazis and the Kmer-Rouge? There doesn't seem to be a straightforward answer to this question simply because these deeds fail to fall within the realm of moral discourse.⁵³ The assertion that the Nazis acted wrongly, unjustly, or badly seems simply nonsensical. There are in fact no appropriate moral qualifications for the acts performed under Pinochet or the protection of the Argentine juntas. There is not either an appropriate punishment or the possibility of actual pardon. These facts strip society from the resources required by what we could phrase as "doing precise and complete justice." With these boundaries, it seems that the best option is to pursue other morally desirable goals, such as the furtherance of the most just attainable political arrangement.

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I hope my explanations warrant my skepticism about the consequence we can reasonably expect from justice imposed *from without*. This skepticism becomes all the more justified when, rather than international tribunals, retributive justice is left in the hands of municipal courts. I relapse on my introductory caveats. First, this principle does not, of course, encompass the trials of abuses committed in the course of international wars nor genuine inter-ethnic conflicts. Any attempt to set up a Yugoslavian domestic court to try Serbs for crimes committed against Muslim populations - and vice versa - seems doomed from its inception. In such cases, the very existence of domestic courts seems impossible. Second, the thesis I have laid out should not be interpreted as a rejection of coercive practices in general. Investigations and reports by foreign countries and human rights organizations deserve full support and so do

52. See generally IMMANUEL KANT: POLITICAL WRITINGS 197 (Hans Reiss, ed. Cambridge University Press 1991).

53. See NINO, *supra* note 46.

embargoes and trade sanctions aimed at compelling a regime to end inhumane practices and eventually to surrender its power to elected authorities. We should even support efforts of foreign administrations to try and punish members of their own ranks. This does not comprehend the endorsement of justice imposed *from without*. My main contention is that when foreign intervention consists of the riddling question of criminally blaming certain actors, courts in foreign countries thwart complicated processes whereby contending segments reach peace agreements and "gag accords"⁵⁴ that over time may turn into some kind of "reconciliation." Courts *from without* may also interfere with strategic forgetfulness and with a community determination to pardon what can (if anything at all can) be pardoned. These trials also run the risk of transgressing the Kantian moral reason that demands the intervention of an acknowledged civil authority: absence of an international civil society reduces the notion of punishment to that of the vengeful infliction of suffering.⁵⁵

54. See HOLMES, *supra* note 34.

55. See IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE: PART II OF THE METAPHYSICS OF MORALS 125 (James W. Ellington, trans., Bobbs-Merrill Company, Inc., Indianapolis and New York 1988).