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On the 30th anniversary of Argentina's Junta trials, this article reflects on their enduring significance and the tensions raised by the exercise of transitional justice in the post-Junta period. It analyses the dilemmas raised by the exercise of justice in conditions of political flux by looking at the distinct role played by public philosophers, in particular, Ronald Dworkin.

This article recalls legal philosopher Ronald Dworkin's distinctive contribution to transitional justice in Argentina in light of the past three decades. It concludes that Dworkin's influence was significant and durable, laying the basis for the enduring commitment to accountability in Argentina and in the region, a commitment not without tensions and challenges. I address the topic less from the perspective of a 'Dworkin scholar', and more from my own engagement with the transition and issues of justice in post-military Argentina. Those debates would turn out to be formative in the development of the theory of transitional justice, which would inform my book written during the 1990s' transitions.[1]

Yet, the questions raised at the time also ultimately involve a broader question about the nature of public commitment in the context of globalisation. In the US, Dworkin was a well-known public intellectual, having written many scholarly books and articles proposing a principled approach to judicial review[2] as well as writing regularly for the broader media. In this historical instance, however, Dworkin used his work to engage outside the US public sphere, in ways that had implications for our understanding of the potential of global public engagement.

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1 R Teitel, *Transitional Justice* (Oxford UP, 2000).

2 R Dworkin, *Law's Empire* (Harvard UP, 1988).

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It is probably not well known that Dworkin's first trip to Argentina was at the invitation of Raoul Alfonsín, the first democratically-elected President of the post-Junta period, and was initiated by philosophers who knew Carlos Nino, who had become a member of Alfonsín's cabinet immediately after the transition from military rule. In 1985, along with a group of philosophers, which included Thomas Nagel, Tim Scanlon and Bernard Williams, Dworkin attended at least one session of the Junta trials. The experience of these trials would have a strong effect on him. He subsequently wrote at least two papers reflecting on his time in Argentina: the first was published as the 'Preface' to the Sabato Truth Commission Report, entitled *Nunca Mas* or 'Never again',[3] while the second was an article for a broader audience, entitled 'Report from Hell', published in *The New York Review of Books*.[4] In these pieces, Dworkin demonstrated his solidarity with the new democratic regime, writing evocatively of Argentina's violent political past and the horrors of the military period, and vociferously advocating for the necessity of punishing the torturers. This was, for Dworkin, a rare foray into questions of justice in the context of political transition to democracy, and his contributions in these essays are worth a closer look.

THE PERSONAL IS THE POLITICAL? DWORKIN'S ENGAGEMENT WITH ARGENTINA'S DEBATE ON TRANSITIONAL JUSTICE

Why Argentina? In reflecting on this period, Yale Professor Owen Fiss commented that the group of philosophers who had made the trip to Argentina during the transition may have heard of Nino, but, in fact, knew very little else about Argentina, nor about the particulars of penal policymaking relating to Argentina's repressive past being debated.[5] The reasons for the trip seem to have been as much personal as political, and resulted from the presence of Nino in President Alfonsín's cabinet. Nino, who would become a friend of Dworkin's on this auspicious trip, was one of Argentina's leading philosophers at the time of the transition, and had just been appointed to Alfonsín's cabinet—a reflection of its commitment to the problem of justice in the context of Argentina's political transition. Indeed, Nino, who was grappling with how to deal with

3 R Dworkin, 'Preface', in Argentinian National Commission on the Disappearance of Persons, *Nunca Más* (Farrar Strauss & Giroux, 1986).

4 R Dworkin, 'Report from Hell' 33 *The New York Review of Books* (1986) 8.

5 OM Fiss, 'The Death of a Public Intellectual' 104 *Yale Law Journal* (1995) 1187.

atrocities of the past, would end up authoring the first systematic exploration of the problem of punishment during this period (*Radical Evil on Trial*).[6]

In post-Junta transitional Argentina, the most salient question for philosophical inquiry was how to reconcile the exercise of justice with the political realities and instability of the time. As a criminal law scholar and philosopher, Nino found himself in a difficult position in the Alfonsín cabinet. He had written the law establishing the basis for prosecuting the military, a watershed in Argentina's history. Subsequently, he presided over limiting the jurisdiction for the trials, which would ultimately pave the way for the involvement of philosophers in the Administration, followed by resistance by the military and the threatened collapse of the Alfonsín regime. Reflecting on this period of post-Junta Argentina, I argued that the conception of justice at this time could be usefully understood as 'transitional justice' as it was associated with periods of political flux and subject to particular tensions and related constraints that made policies and decision-making often provisional, and non-ideal in nature.[7]

The question this article pursues is how did these two leading philosophers—Nino and Dworkin—understand the meaning of justice in that historic transitional context: where the choice of 'peace versus justice', as it is often framed today, loomed large?[8] Ultimately, Nino's overriding commitment to establishing and maintaining democracy would lead him in a pragmatic direction. As we will see, he appeared to be supported in this by Dworkin whose principled engagement with the problem of justice tended to eschew dogmatic approaches to these dilemmas while embracing public deliberation regarding shared values, an approach he would characterise as 'integrity'.[9]

More broadly, there is the normative question of the potential role of the law professor or jurist as 'public intellectual'. Dworkin's public engagement was a concerted one. In the latter part of the 20th century in the US, he (more than most other legal academics) regularly took a stand on a great number of constitutional and rule of law issues. He was a frequent contributor to *The New York Review of Books*[10] where he would interpret the most relevant and important decisions of the Supreme Court regarding rule of law and individual rights

6 C Nino, *Radical Evil on Trial* (Yale UP, 1998).

7 Teitel (2000).

8 R Teitel, 'Transitional Justice Genealogy' 16 *Harvard Human Rights Journal* (2003) 69-94. On the trade-off, see J Snyder & L Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' 28 *International Security* (2004) 5.

9 See discussion of Dworkin (1988) 8-9.

10 R Dworkin, 'Why It Was a Great Victory', *The New York Review of Books*, 14 August 2008, 55.

in ways that aimed to show the continuous or, as he put it, 'coherent' thread in US constitutionalism.[11] In so doing, he epitomised the role of the public intellectual. What might this sustained engagement and interpretive approach offer Latin America in a moment of transition in its rule of law?

THE PROBLEM OF JUSTICE IN THE CONTEXT OF THE ARGENTINE TRANSITION

Even before becoming the first post-Junta elected President of Argentina, Alfonsín had campaigned on the issue of accountability for past military wrongs. Indeed, his election reflected a groundswell of opinion in favour of political accountability. Once Alfonsín took office, he commissioned two advisors, Nino and Jaime Malamud-Goti (both criminal law theorists) to guide him in relation to the new government's policy on human rights and in particular to develop criteria for the prosecution of human rights violators. Malamud-Goti, Nino and I would meet for the first time as participants in a conference in the early 1990s. There began the first of many rich conversations about the relationship of justice and democracy in the Americas.[12] Malamud-Goti, like Nino, would struggle with the particular problem of transitional justice associated with post-military junta Argentina: what should the ambit or scope of the prosecutorial policy be? Which military should be prosecuted, and for which crimes?

It is crucially important to recognise that the transitional justice question arose somewhat differently in Argentina as compared to other countries. For the Alfonsín administration, which had campaigned, and was elected, on the promise of accountability, the problem of justice was never presented as a matter of choice, as it would later be, for example, in Chile, Uruguay or South Africa ('amnesty versus justice'). Nor would it arise as an issue of 'truth or peace versus justice'. The Truth Commission, as it would be convened for the first time in the modern era in post-Junta Argentina, was aimed not at reconciliation but at justice. Indeed, the Sabato Commission Report included the names of alleged perpetrators, which were immediately forwarded to the judicial branch for prosecution.[13]

11 R Dworkin, 'What the Court Really Said', *The New York Review of Books*, 12 August 2004, 51.

12 IP Stotzky (ed.), *Transitions to Democracy in Latin America* (Westview Press, 1994); IP Stotzky, 'Creating the Conditions for Democracy', in H Koh & R Slye (eds), *Deliberative Democracy and Human Rights* (Yale UP, 1999) 157-89.

13 Argentinian National Commission on the Disappearance of Persons (1986) 481-82.

A crucial dimension of the problem of accountability for past human rights violations committed under military rule in Argentina was deciding on the right community of judgement. This was a normative question with jurisdictional ramifications: should the question of punishment, for example, be a matter of military or civilian justice? And what should be the criteria for adjudicating responsibility for human rights violations during the transition?[14] As Malamud-Goti put it:

> [s]everal critical problems arose in the course of developing substantive criteria for adjudicating responsibility. The most prominent of these problems were: (1) determining means by which to annul the self-amnesty law the military had enacted shortly before waiving power; (2) establishing degrees of responsibility for human rights violations and restricting the number of perpetrators to be brought to trial; and (3) finding procedures by which to accomplish these two objectives.[15]

Who should be held responsible for the gross human rights abuses under military rule? The question of how to delineate the scope of responsibility for past atrocities committed during the period of Junta rule would come to present extraordinary tensions for the Alfonsín government and would be the subject of heated debate both in Argentina and in the US.

This was a topic I examined for the first time in 1991 in a paper I was commissioned to write for the Council on Foreign Relations on the question of whether democracy-building in the Southern Cone transitions required trials of its military juntas.[16] In that context, and in a related meeting, I debated Diane Orentlicher, a US law professor who favoured outside intervention to ensure domestic accountability as an obligation to punish on behalf of Argentine victims—a position I contested in light of the political and legal challenges of the transition.[17] Nino too disagreed with her justification for punishment in terms of a 'duty to victims', although this view would later become popular in human

14 J Malamud-Goti, 'Transitional Governments in the Breach: Why Punish State Criminals?' 12 *Human Rights Quarterly* (1990) 1-16.

15 Ibid 13.

16 R Teitel, 'How are the New Democracies of the Southern Cone Dealing with the Legacy of Human Rights Abuses?', in NJ Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, vol. 1 (USIP Press, 1995) 146-53.

17 D Orentlicher, 'Settling Accounts: The Duty to Punish Human Right Violations of a Prior Regime' 100 *Yale Law Journal* (1991) 2536.

rights circles. Nevertheless, there remained the question of how to justify Argentina's punishment policy.[18]

The political context for justice was described then by Malamud-Goti in terms of the political risks of over- or under-prosecution: on the one hand, too many prosecutions and the military would close ranks in resistance to the government; on the other hand; while a policy of amnesty or pardon would avoid confrontation, it would leave the military organisation intact, and the military would continue to 'survive as a state within the state, preserving its prerogatives'.[19] Accordingly, Malamud-Goti's analysis sought to balance the political risks of accountability against those of impunity.

But what were the purposes of such trials? For Malamud-Goti, there were two main reasons for bringing military officers to trial, both forward-looking. First, there was deterrence: '[p]otential perpetrators may fear isolation resulting from national and international public opinion stemming from criminal sentences.' The second purpose was to 'restore dignity' to a population that had been put down by a governmental caste: '[S]ystematic abduction, torture, rape, and similar human rights violations impinge on more than just the dignity of those who directly suffer these abuses.'[20] This legacy of repression has an impact on the broader population: 'Submitting to the criminal law nullifies the supremacy of those who previously enjoyed a dominant position to it and turns them into ordinary, accountable citizens. In this way, criminal proceedings restore dignity to the citizenry, and also demonstrate respect for victims in a broad sense.'[21]

For the philosophers in Alfonsín's cabinet in the 1980s, the government's confrontation with the generals became a crucible of accountability. As Nino recounts in his *Radical Evil on Trial* (which tells the story of the evolution of the justice question in post-Junta Argentina), a critical dilemma arose because, despite promises to punish past abuses of human rights, imposing some limit to the prosecution/punishment policy appeared to be politically necessary because the military, fearing the breadth of the accountability project, was threatening to bring the government down.[22]

18 C Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' 100 *Yale Law Journal* (1991) 2619.

19 Malamud-Goti (1990).

20 J Malamud-Goti, 'Trying Violators of Human Rights: The Dilemma of Transitional Democratic Governments', in Justice and Society Program of the Aspen Institute (ed.), *State Crimes: Punishment or Pardon* (Aspen Institute, 1989) 83.

21 Ibid.

22 E Jelin, 'Los derechos humanos entre el Estado y la sociedad' Suriano, Juan (dirección de tomo), Dictadura y democracia Nueva Historia Argentina, Buenos Aires, Editorial Sudamericana (FLACSO-México, 2005) 544.

In his earlier scholarly writing, Nino had elaborated a Kantian-inspired 'consent based' theory of punishment, based on an obligation to punish in order to respect or vindicate the moral autonomy of the perpetrator. *Radical Evil on Trial* represented an important shift away from this perspective. In this later work, it was clear that the conception of punishment was no longer conceived solely in terms of individual rights whether of perpetrators or victims, but rather of broader social goals. Accordingly, under Nino's alternative reconceptualisation of criminal justice, it would be less philosophically problematic to consider departing from the notion of the obligation to punish and to limit or select trials because these were justified in terms beyond the individual rights of perpetrators or victims–i.e. of social or collective goals. Indeed, this alternative conceptualisation would become helpful in the context of ensuing events of military resistance to Alfonsin's punishment policy and would then offer a basis for rationalising the policy of selective prosecutions. It was only after these political developments that the administration would become known for its 'select trials' programme.[23]

Dworkin's principled interpretive approach contributed in at least two ways to the debate over justice. First, it enabled its reconceptualisation as a question of public good, rather than of *individual* rights. Dworkin's writings drew a distinction between a rights-based justification, which would contemplate a universal duty to punish, and a justification according to which punishment was part of the principled pursuit of goals and policies justified by the part of political morality that is law.[24] Moreover, as is discussed below, Dworkin's interpretive approach took the view that the overriding values of human dignity and humanity could inform a forward-looking expressive and educative view of punishment.

In a passage that takes issue with the somewhat absolutist human rights position mentioned above,[25] and which displays his move away from his earlier Kantian perspective, Nino argues that:

> [p]unishing those who have relinquished their right not to be punished is not due to the recognition that the victims or their relatives have a right to that punishment. It is the consequence of a

23 C Nino, 'The Human Rights Policy of the Argentine Constitutional Government: A Reply' 11 *Yale Journal of International Law* (1985) 217 (refers to 'forward-looking measures'). See also Nino (1991) in which Nino invokes and relies on Dworkin for his distinction between individual rights established by principles and collective goals imposed by policies.

24 Nino (1985); T Scanlon & H Koh (eds), *Deliberative Democracy and Human Rights* (1999) X; C Nino, *The Ethics of Human Rights* (Oxford UP, 1991) 14 (published during the transition, referring to Dworkin's 'interpretive approach').

25 See Dworkin (1988) 9.

> collective goal imposed by the policy of protecting human rights for the future. Therefore, nobody may claim to universalize that punishment to other similar cases when the goal of punishment will not be satisfied.[26]

On this view, the deontological view of punishment is delimited, or one might say *relativised*, to respond to the urgency and priority of the broader political goals of democratic transition. This was reflected in Nino's idea of 'democratic justice', according to which he reasoned that effective and legitimate punishment *presumes* democracy and its institutions, and that the tensions over the prosecutions' policy of the transition were associated with the fact that, at the time these trials were curtailed, the country's democracy was also on the line. This framing reflects Nino's identification of the distinctive rule of law problem associated with political transition.[27] It followed that such limits might well be justified if what is at stake is safeguarding the future of the democracy itself. At such extraordinary times, the paramount commitment is to democracy.[28]

This was also the position supported by Dworkin in *Law's Empire* where he outlines his justification for prosecutorial discretion—so long as it is principled and not arbitrary.[29] On this question of principle, he shows how he would address the problem of limiting punishment through his principle of 'integrity', which, he argues, could provide better guidance than consistency: '[i]ntegrity is more discriminating. If a prosecutor's reasons for not prosecuting one person lie in policy ... Integrity offers no reason why someone else should not be prosecuted when these reasons of policy are absent or reversed.'[30]

Ultimately, Nino's view was that the 'formation of a social consciousness against human rights abuses depends more on the exposure of the atrocities and on the clear condemnation of them than on the number of people actually punished'.[31] In the period of transition, this limited criminal sanction[32]—along with high levels of public exposure, often through the use of other mechanisms such as truth commissions—would become the approach taken throughout much of Latin America, where alternatives to trials became the

26 Nino (1991).

27 Teitel (2000) 11-26.

28 Scanlon & Koh (eds) (1999) 110-13.

29 Dworkin (1988) 224.

30 Ibid.

31 See Nino (1985).

32 See Teitel (2000) 46-49 (identifying the 'limited criminal sanction').

practice. 'Never again' attests to the forward-looking preventative purposes of punishment.

It is interesting, then, that the argument that has become the pre-eminent justification throughout the region for the ongoing revisiting of the question of punishment of the military is 'human rights'. Hence, punishment by successor regimes is often characterised in terms of 'human rights trials'—a view ratified by precedents in the courts particularly the Inter-American Court of Human Rights.[33] Here we see that the basis for ordering punishment becomes the victims and their right to reparations grounded in the American Convention on Human Rights.[34] The Inter-American Court takes the view in cases involving crimes against humanity that the ostensible duty of accountability is absolute,[35] even where democratic deliberation among the stakeholders culminates in favouring more limited sanctions. Some of the tensions posed by this human rights-based review of punishment policy are addressed in a recent article, which considers the political challenge raised by the operation of distant judicial review regarding justice for state violence in periods of political flux.[36] Indeed, one might suggest that the Inter-American Court of Human Rights, in its review of post-Junta justice in Latin America and in exercising its centralised interpretative authority in the region, has taken a page from the model of Dworkinian interpretation.[37] Yet, the Inter-American Court's active interventions in issues of national prosecution policy also raises tensions and dilemmas.[38]

REVISITING DWORKIN'S ROLE IN ARGENTINA'S TRANSITIONAL JUSTICE DILEMMA

In *A Report from Hell*,[39] Dworkin reflects on the period that brought Alfonsín to office and to the project of establishing the human rights trials in Argentina. The pressures of the time are described in Dworkin's article in *The New York*

33 R Teitel, 'Transitional Justice and Judicial Activism—A Right to Accountability?' 48 *Cornell International Law Journal* (2015) 385.

34 See *Gomes Lund v Brazil*, Preliminary objections, Merits, Reparations, and Costs (2010) IACHR (Ser C) No 219, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf (last visited 1 October 2017), paras 103-04.

35 Ibid 406-07 (discussing the Court's insistence on punishment as a remedial measure).

36 Ibid 385.

37 Dworkin (1988).

38 Teitel (2015) 385.

39 Dworkin, 'Report from Hell' (1986) 8.

Review of Books: 'The government was subject to intense political pressures on both sides of these two issues. The human rights community, and particularly the Mothers of the Plaza, were outraged at the possibility that the army could be left to judge itself, or that those who had actually butchered and tortured their fellow citizens might escape condemnation altogether.' But as Dworkin recognises there was also the forward-looking argument:

> Argentina needed to bury its past as well as to condemn it, and many citizens felt that years of trials would undermine the fresh sense of community Alfonsín's victory had produced. And any general program of prosecution, reaching far down the command structure, might anger the military and make it regard the new government as its enemy, which would be unwise in a nation where military coups had become almost a ritual.[40]

Dworkin then reflected on two pivotal questions: what jurisdiction should there be regarding punishment of the military; and what should be the scope of individual responsibility in such adjudication given the security apparatus context? He recognised that a statute Law 23.049 of 14 February 1984, drafted chiefly by Nino (by then one of Alfonsín's advisers) would resolve the issue of jurisdiction in that all prosecutions of the military for alleged crimes committed under cover of a 'war' against subversives, were to be tried in the first instance by the Armed Forces Supreme Council.[41] Later, these Supreme Council decisions would be subject to automatic review by the civilian Federal Chamber of Appeal. Hence, one can see a balance was adopted as to military and civilian justice.

Next, Dworkin addressed the normative question of the parameters of criminal responsibility. The law enacted by the successor Argentine government provided, in Article 11, that in the absence of any evidence to the contrary, 'any member of the military who acted "without decision-making capacity" would be presumed justifiably to have regarded all the orders he received as legitimate orders, except that this presumption would not hold if the acts he committed were "atrocious" or "aberrant"'.[42] In so doing the statute provided for three categories of defendants: high-ranking officers, who were not entitled to the defence that they were merely following orders; and junior officers and servicemen who could use that defence.

40 Ibid.

41 Dworkin (1988).

42 Dworkin, Nunca Mas (1986) xix.

In the face of this legal complexity, Dworkin's analysis for *The New York Review of Books* identified a Solomonic resolution of the central dilemmas involved in the problem of post-Junta justice. First, there was the problem of jurisdiction: how to pierce the shield of the military after the so-called 'dirty war' via civilian law? Ultimately, a compromise was reached: while punishment policy would be initiated within the military system, review was contemplated in civilian courts. Moreover, one could see here ways that the Argentine policy offered a modification of the Nuremberg principles,[43] which famously contemplated that 'following orders' would offer no defence to prosecution for crimes against humanity, even if it could be taken into account for sentencing purposes. However, in the immediate post-Junta context, this legal understanding was ostensibly amended to provide that there was no defence to 'atrocious' or 'aberrant' orders.

THE TRIALS OF THE TORTURERS: JUSTICE FOR DEMOCRACY

Beyond his analysis of, and reflections on, the nature of the legislation establishing criminal jurisdiction, Dworkin also wrote about his experience of attending the trials of the torturers:

> I attended the trials for a day with a small group of British and American philosophers and lawyers who had come to Buenos Aires to discuss human and civil rights with members of Alfonsín's government. We heard two pieces of testimony in that single day that confirmed the arbitrary and absolute lawlessness, and the sexual violence, of the world the torturers had created for themselves and their victims. Most of the witnesses had much the same story to tell the court: the story of abduction and torture made familiar by *Nunca Mas*. The grim and shocking details were in turn reported to the nation later, in the daily papers and special journal, and on television.[44]

In Dworkin's words, the trials of the military had a huge impact upon Argentine society: 'So the trial of the commanders is over, and it was an event of immense importance. It explored, judicially, in general and in detail, the entire network of official lawlessness and outrage; the publicity the trial attracted served as a national catharsis.' The political purpose they served was clear:

43 See Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 279. On war and international law see G Simpson, *Law, War and Crime: War Crimes, Trials and the Reinvention of International Criminal Law* (Polity, 2007).

44 Dworkin (1988) 10.

> The verdicts vindicated the fundamental principle that government cannot be above law, and have largely satisfied the world that Argentina has returned to respect for human rights and the rule of law. In many ways, however, the trial of the commanders was legally much easier, morally less perplexing, and politically less dangerous than the further trials, of those lower in the structure of command, that advocates of human rights hope will now follow. There were no serious problems of proof in the commanders' trial.[45]

Dworkin was clear too about the moral necessity of the trials:

> It was only necessary to show what *Nunca Mas* had already established, that the pattern of terror was so consistent and organized that those ultimately in charge must have known of and endorsed it. There could be no moral objection to holding them responsible for what they had directed or allowed. There was no question of their acting under orders of anyone superior to them.[46]

For Dworkin, then, there was no question that those who were in charge of the Junta's torture policy should be held accountable. The bigger dilemma or philosophical question was about the direction of the remaining punishment project. He then went on to discuss other dilemmas regarding the parameters of responsibility with respect to the rest of the military. Beyond the punishment of the commanders, who else should be held responsible? What normative principle might guide transitional justice? Dworkin acknowledged the then fragility of the transition in Argentina, in regard to its political and economic conditions. The new government was not yet fully confident of political stability. Electoral violence from the right following congressional elections had led to the declaration of the state of emergency and a sense of real threat of disturbance. 'In these circumstances', recognised Dworkin, 'the government has good reason to avoid divisive policies that might alienate the armed forces.'[47] Yet, this fraught political context did not mean that the trials should be stopped. Dworkin did not support the placing of limits on the torturers' trials. On the contrary, he argued that:

> we must hope that the Alfonsín government will take that risk and prosecute anyone it can prove tortured or killed civilians, even under orders, though it may turn out that only a relatively small number can be convicted . . . . The world needs a taboo against torture. It needs a

45 Ibid.

46 Dworkin, Nunca Mas (1986) xxiv.

47 Ibid xxvii.

> settled, undoubted conviction that torture is criminal in any circumstance, that there is never justification or excuse for it, that everyone who takes part in it is a criminal against humanity.[48]

Dworkin went on to elaborate what was special about these trials:

> Argentina will serve the cause of human rights best by not losing a dramatic opportunity to endorse that conviction. Torture is already almost everywhere condemned; even the youngest Argentine soldiers apparently knew that what they did was illegal and wrong, But torture is also almost everywhere used, and the discrepancy is partly the result of a widespread opinion that it is justifiable sometimes, that it is defensible when carefully aimed only at extracting information needed to save lives from terrorism, for example . . . . The Argentine nightmare shows one of the several fallacies of this view. Torture cannot be surgically limited only to what is necessary for some discrete goal, because once the taboo is violated the basis of all the other constraints of civilization, which is sympathy for suffering, is destroyed.[49]

Dworkin exhorted for criminal justice without exceptions:

> the best guarantee against tyranny, everywhere but especially in countries like Argentina where tyranny has often seemed acceptable to the majority, is a heightened public sense of why it is repulsive. Trials that explore and enforce the idea that torture can have no defense may encourage that sense. Allowing known torturers to remain in positions of authority, unchallenged and uncondemned, can only weaken it.[50]

What to make of Dworkin's strong argument for punishment? Writing on the basis of what he had seen and heard at the trials, regarding the torture and suffering of those who were kidnapped, it was also clear to Dworkin that these were some of the most dramatic moments of the Alfonsín government's confrontation with the past and related wrongdoing. Even while acknowledging that the Alfonsín administration was under siege by the ongoing military opposition, and bearing witness to this as an invitee of the government, Dworkin articulated a strong, independent but nuanced position supporting the continuation of the trials, not on the basis of retribution or even on behalf of the victims—that is to say, arguing from the idea of 'affirmation', informed by the

48 Ibid.

49 Ibid. Compare J Waldron, 'Torture and Positive Law: Jurisprudence for the White House' 105 *Columbia Law Review* (2005) 1681 (making a rule of law argument for the law's torture taboo and related accountability).

50 Dworkin, Nunca Mas (1986) xxviii.

normative punishment debate[51]—but rather for broader forward-looking reasons, which he called 'the best guarantee against tyranny'.[52]

First, in the insistence that there be a *governmental* response to state sponsored torture, Dworkin seems to frame the relevant issue in a humanitarian Rousseau-inspired view. In writing about the distinctive problem posed by state-sponsored torture, Dworkin articulates the importance of a basic humanitarianism—the need to condemn torture because of our shared humanity:[53] 'because once the taboo is violated the basis of all the other constraints of civilization, which is sympathy for suffering, is destroyed'.[54]

Dworkin's insistence that there be a government condemnation of government torture echoes philosopher Judith Shklar's writing in support of the post-war Nuremberg Trials, insofar as these involved prosecution of crimes against humanity. 'If the Nuremberg Trial can be justified as an act of legalistic statesmanship and on the basis of its immediate effects on German politics, it is due to the revelations about crimes against humanity which it produced.'[55] While Shklar considered particular prosecutions to be justified on liberal grounds, unlike Dworkin, she stopped short of arguing for their necessity.

Upon reflection, Dworkin's interpretive principle might offer a way to reframe and mediate the view of ostensibly dichotomous or opposite poles of interests and rights. While, on the one hand, appearing to comprehend the fragility of the Alfonsín administration, and the government's attempts to contain the trials, which would result in the so-called 'full stop law' (that put an end to possible prosecutions by shortening the relevant statute of limitations), Dworkin nevertheless argued for the prosecution of *every* torturer. To what extent might there have been a gap between Nino and Dworkin regarding this goal? Or, might Dworkin's absolutist-sounding language have been strategic?

At first blush, Dworkin's imperative to punish may be seen as deontological, drawing from Kant's duty to punish perpetrators, a theory which animated Nino's early writing. Pursuant to this view, punishment was justified primarily on the basis of respect for the free will of the perpetrator. Nevertheless, upon closer look, this is not what is animating Dworkin's normative argument. Rather, Dworkin is manifestly writing from principle regarding democratic or democratic education, advocating trials as lessons on the

51 Scanlon & Koh (eds) (1999) 357, 269-70.

52 Dworkin, Nunca Mas (1986) xxvii.

53 Teitel (2011) 19-33.

54 Dworkin, Nunca Mas (1986) xxvii.

55 J Shklar, *Legalism: Law, Morals and Political Trials* (Harvard UP, 1986) 192-93.

ostensible foundations of democracy, the centrality of human dignity, and concern for humanity and its protection.[56]

There is surely a parallel or overlap here with Nino's forward-looking preventative justification.[57] In telling the story of the evolution of Argentina's justice policy in *Radical Evil on Trial*, Nino articulates the trials' 'educative purposes', and proposes that these are the antidotes to the closed decision-making characteristic of authoritarian societies, which he calls 'epistemic moral elitism'. In Nino's words, 'the *educative* effect of the trials may be felt by different sectors of society ... by society at large which discovered it was turning a blind eye, by the groups that actively sponsored the perpetrators, who through trials, were forced to admit the magnitude of the atrocities ... and by those who precipitated the human rights violations.'[58]

Nino, the government's advisor, relying on Dworkin, went on to argue for punishment in order to promote democracy:

> the result is a process of collective deliberation that is especially conducive to overcoming the tendency toward the type of moral elitism that endorses the undemocratic decision making that underlies such massive violations. Through the process of deliberation, these people may come to shed their previously held convictions and, at the same time, realize that elitist moral knowledge is highly unreliable .... There is also the possibility that deliberation, despite all the tensions will facilitate a convergence around basic values or create, in Ronald Dworkin's terms, 'a community of principles' so vital for a democracy.[59]

Elaborating the added democracy-related justification, Nino notes in the same account how we might understand the Junta trials' distinctive contribution:

> The trials promote public deliberation in a unique manner. Public deliberation counteracts the authoritarian tendencies which led, and continue to lead, to a weakening of the democratic system and massive human rights violations. All public deliberation has this effect, but especially when the effect of the public discussion is those very authoritarian tendencies. The disclosure of the truth through the trials feeds public discussion and generates a collective consciousness and

56 See L Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale UP, 2005); L Douglas, 'The Didactic Trial, Filtering History and Memory into the Classroom' 14 *European Review* (2006) 513.

57 Nino (1998).

58 Ibid 132.

59 Ibid 208-24 (citing Dworkin (1988) 208-24).

> process of self-examination . . . The contrast between the legality of the trials and the way the defendants acted is prominently noted in public discussion and further contributes to the collective appreciation of the rule of law. Public discussion also serves as an escape valve for the victims' emotions and promotes public solidarity, which in turn contributes to the victims recovering their self-respect.[60]

Indeed, this perspective on the nature of the trials' contribution to public democratic processes was hardly an argument in the abstract. In post-Junta Argentina, the convening of the public trial with related media coverage and follow-on newspaper and other publications did, in a sense, bring missing sectors of civil society into the courtroom. This outreach promoted ensuing debates over the role of the elite and other factors that had helped pave the way to Argentina's military rule, and in so doing promoted democratic accountability.

FORESHADOWINGS

What of Argentina today? How would one evaluate the current trials policy related to past human rights abuses under Nino's and Dworkin's approaches that were developed for the context of the original post-Junta political transition to democracy? Contemporary trials relating to the military period continue, but they are conducted in the shadow not of a recent vulnerable or fragile democratic transition but rather of the Inter-American Court of Human Rights which has, starting with *Velasquez-Rodriguez v Honduras*[61] and, later, *Gelman v Uruguay*,[62] developed a human rights doctrine establishing a right of victims and their families to investigation and punishment of past human rights abuses. This evolving doctrine I have described in other work as tantamount to a 'right to accountability'.[63] Indeed, after the *Barrios Altos* case in the Inter-American Court of Human Rights,[64] Argentina resumed its prosecutions policy following related domestic litigation.[65]

60 Nino (1985) 147.

61 *Velasquez-Rodriguez v Honduras* (1988) IACHR (Ser C) No 4, available at http://hrlibrary.umn.edu/iachr/b_11_12d.htm (last visited 1 October 2017).

62 *Gelman v Uruguay* (2011) IACHR, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf (last visited 1 October 2017).

63 Teitel (2015).

64 *Barrios Altos v Peru*, Merits, Judgment (2001) IACHR (Ser C) No 75, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf (last visited 1 October 2017).

65 M Bohmer, 'Hybrid Legal Cultures, Borrowings and Impositions: The Use of Foreign Law as a Strategy to Build Constitutional and Democratic Authority' 77 *Puerto Rican Law Review* (2008) 411; (discussing the *Simon* case and impact of regional IACHR decisions on Argentina). For a critique of

To what extent should these human rights trials take into account societal considerations relating to democracy, that is to say, the nature of deliberative processes informing punishment politics? So far, one might say that the jurisprudence of the Inter-American Court does not adequately take into account the significance of the provenance or processes of punishment policies that emerge from domestic democratic deliberation, or the demands of democratic state-building in defining the contours or limits of victims' rights to accountability.[66]

Limited amnesty based on consistent and equally applied policies that are grounded in democratic political morality may be compatible with law as a realm of moral principle. At the same time, the demands of democratic political morality, understood in a transitional context of social re-education for democracy, could conceivably require, as Dworkin argued for example, that *every* torturer must be prosecuted.

Consider the more recent setting of the US where the spectre of the global war on terror has been invoked to challenge established constitutional commitments, and where the problem of torture has been revisited. In an analysis in *The New York Review of Books* in 2008, reproduced in the subsequent book, *Is Democracy Possible Here?*, Dworkin condemned torture in clear and absolute terms: 'If I am right, the claim presupposes that we do not subject those we hold without trial to harsh treatment and objectionable methods of interrogation. But we should be willing, out of respect for our own traditions and values, to accept whatever unknown loss of efficiency this deference to morality may entail.'[67] In a sense, then, Dworkin was revisiting the issues he had discussed in the Argentine context, describing 'torture as the most profound insult to humanity, the most profound outrage of human rights'.[68] He also pointed out that this argument is already a matter of constitutional right:

> our Constitution demands that we run that risk in our ordinary criminal process: The world is shocked by our willingness to abandon what we claim to be our most fundamental values just because our victims are foreigners. We must hope that Camp X-Ray and Abu Ghraib soon become symbols of a national aberration, like the

these developments, see FF Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers' 23 *American University International Law Review* (2007) 195; See R Gargarella, *Justicia Penal International y Violaciones Massivas de Derechos Humanos*, in R Gargarella (ed.), *La Justical Penal a la Justicia Social* (Siglo del Hombre Editores, Universidad de los Andes, 2008).

66 Teitel (2015).

67 R Dworkin, *Is Democracy Possible Here?* (Princeton UP, 2008) 29.

68 Ibid.

> Japanese-American internment camps of World War II, that we must take care not to repeat, rather than evidence of what, to our shame, we have now become.[69]

Writing in a similar vein, Jeremy Waldron has characterised torture and the need to condemn it in absolute terms as 'archetypal' to the law.[70] He argues that failure to condemn and punish torture would go beyond the expectations associated with justice for torture as crimes against humanity and challenge the very essence of the rule of law.[71]

PHILOSOPHISING AND POLITICAL TRANSITION: CHANGE FROM WITHIN AND FROM WITHOUT?

Why bring Ronald Dworkin and his cadre to Argentina and to the trials of the former military leaders? There was no lack of philosophy. Indeed, for a time, Argentina had two leading legal philosophers in its cabinet tasked with shaping the country's justice and related rights policy. Nor was there a sense (unlike the contemporary moment with transnational actors' involvement in global justice) that the policies adopted had to be legitimised in right terms before a supranational body or the world community. Quite the reverse: consider Nino's 'democracy-related' reasons for opposing the 'elite interventionism' of certain well-minded outside experts.[72] Indeed, one of the first lines of the prosecution's opening statement at the military trials ('this is no Nuremberg') appeared to take pride in Argentina's trials and, therefore, 'local' ownership of its punishment policy.[73]

My own view is that the visit of Dworkin and the other outsider philosophers went beyond the simple legitimation of the policies adopted, or the application of higher expertise or wisdom in the making of the policies. Rather the involvement of outside philosophers enriched the pedagogical resources needed for transition to democracy. Instead of legitimating the choices made by

69 Dworkin (2004) 51.

70 Waldron (2005) 1718-30, 1734, 1743; J Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford UP, 2010).

71 Ibid.

72 Nino (1991). This connects with his defence of democracy, which he extended to the international sphere, based on its epistemic value for reaching correct (i.e. impartial) moral solutions for inter-subjective conflicts.

73 See generally E Dahl & AM Garro, 'Argentina: National Appeals Court (Criminal Division), Judgment on Human Rights Violations by Former Military Leaders (Excerpts)' 26 *International Legal Materials* (1987) 317.

Argentina to the outside community, the presence of outside philosophers facilitated the world *learning* from the transitional challenges facing Argentina and how it chose to respond. On the potential of trials as lessons, one might compare the earlier notorious visit by Hannah Arendt to the Eichmann trial in Jerusalem during Israel's transition.[74]

Dworkin's approach is one that promises the integration of policies and rights within a framework informed by moral principle—specifically, liberal democratic political morality. He may have seen a special need for his distinctive philosophical pedagogy in the circumstances of Argentina's transition out of authoritarian rule. Moreover, revisiting the lessons that Dworkin brought to and from Argentina's transition might bring greater clarity and a surer moral compass to the US as it revisits the depths of its own recent past and reflects on other experiences. The ongoing force of these precedents can be felt not only in Argentina, but throughout the continent and beyond.

74 H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking, 1963).