

## CRIME BEYOND PUNISHMENT

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### INTRODUCTION

The twentieth century witnessed atrocity on a scale beyond anything chronicled in history. The first fifty years saw one million killed in the Armenian genocide, tens of millions slaughtered by Stalin's Soviet regime, and, most infamously, the calculated extermination of eleven million innocents by Hitler's Nazis. Mass killing, torture, and systematic rape have ravaged communities in Cambodia, the former Yugoslavia, and Rwanda, while a system of racialized oppression debased the human dignity of the people of South Africa. Already, the cruel abuses of the *Janjaweed* in Darfur, and the Lord's Resistance Army in northern Uganda, confirm that this brutal trend is not slowing in the new century.

Muted after the failed criminal prosecutions in Leipzig and Constantinople following World War I,<sup>1</sup> the demand for the trial and punishment of the perpetrators of these massive crimes against humanity grew considerably after the groundbreaking Nuremberg tribunal fifteen years later. Since the end of the Cold War, this demand has been met with concerted institutional development. Special tribunals have been created to try warlords and former leaders in Sierra Leone, Cambodia, and Iraq,<sup>2</sup> the UN Security Council has created international *ad hoc* tribunals to try perpetrators of mass atrocity in the former Yugoslavia and Rwanda,<sup>3</sup> and more than fifty years after it was first considered by the UN General Assembly, we have finally witnessed the inauguration of the permanent International Criminal Court (ICC) in The Hague.

This strong preference for post-atrocity criminal punishment has yet to be given a plausible and coherent philosophical basis. In what follows, I

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<sup>1</sup> See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 58-146 (2000).

<sup>2</sup> The Special Court for Sierra Leone (SC-SL), the Special Tribunal for Cambodia, and the Iraq High Tribunal (formerly the Iraqi Special Tribunal).

<sup>3</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

examine and call into question the various justifications attempted by its advocates. Assessing the situation from the perspective of each of the leading punishment theories, from both the retributivist and consequentialist schools of thought, I demonstrate that the unique features of the post-atrocity context appear to render its punishment unjustifiable, despite its justified use in the context of ordinary crime. To be clear about the scope of my discussion, I restrict my analysis to mass atrocities perpetrated by the state or its agents against its own citizens, and, indeed, the state-led aspect of atrocity plays an important role in the arguments that follow.<sup>4</sup> Furthermore, while the arguments that follow call into question existing justifications for post-atrocity punishment, I do not foreclose the possibility that robust philosophical support for the practice might be possible. Nonetheless, the analysis presented here indicates that more serious consideration should be given to alternative methods of dealing with atrocity, not merely as second-best substitutes<sup>5</sup> or as supplements to criminal justice,<sup>6</sup> but as potentially superior alternatives that better achieve the ends that supposedly motivate the punishment model.

Specifically, the positive model I have in mind combines a Truth and Reconciliation Commission (TRC), a system of material and symbolic reparations, and reform of the public educational curriculum. Hereinafter, I refer to this combination as the “TRC model.” While an institutional alternative to the punishment model is clearly an important component of the overall argument against criminal punishment, space constraints dictate that I only briefly introduce that alternative here. As such, I begin the paper with a skeletal outline of this model’s primary benefits, and, when necessary during the arguments that follow, I draw on it as the foil to my primary focus — the criminal punishment paradigm. I must re-emphasize, however, that it is exclusively in this limited role that the TRC model appears, and that I make no pretension to fully develop or defend it in this work.

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<sup>4</sup> I bracket war crime atrocities committed by the representatives of one state on the citizens of another, as well as atrocities committed by rebel groups within a state. While atrocities can be committed by rebel actors and need not be inflicted on a state’s own citizens, the inclusion of such situations here would add a level of complexity that is beyond the scope of this paper. Nonetheless, I believe that much of the argument presented below would apply with equal force to the question of how to deal with enormities committed by rebel actors. Whether it would apply to inter-state atrocities is less clear.

<sup>5</sup> Margaret Popkin & Naomi Roht-Arriaza, *Truth as Justice: Investigatory Commissions in Latin America*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 162, 264 (Neil J. Kritz ed., 1995).

<sup>6</sup> Paul van Zyl & Mark Freeman, *Conference Report*, in *THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE* 1, 3-5 (Alice H. Henkin ed., 2002).

## I. A BRIEF SUMMARY OF THE PRIMARY BENEFITS OF THE TRC MODEL

The three key benefits of the TRC model are: (i) the official acknowledgement of victims, (ii) the moral re-education of the complicit, and (iii) the moderation of conflicting perspectives on the past.

TRCs offer victims and survivors an opportunity to provide their accounts of atrocity. The state's willingness to listen to these accounts sends the following message to those whose suffering was dismissed as irrelevant by the prior regime: "your perspectives are valid and your stories are worth hearing." Such official recognition can help restore the dignity of victims and acknowledge them as full members of the new society. In his "Minority Position", South African commissioner Wynand Malan reserved what little praise he had for the South African TRC (SATRC) for its efficacy along this dimension:

Victims often approached the Commission almost in a foetal position as they came to take their seats and relate their stories. They told their stories as they saw them, as they experienced them, as they perceived what had happened to them. And as they left their seats, the image was wholly different. They walked tall. They were reintegrated into their community.<sup>7</sup>

In a court case, the victim is solely involved to convict the perpetrator. By contrast, a TRC hearing focuses on the victim. As a result, TRC hearings avoid restricting the victim's testimony to specific criminal evidence, and challenging her with hostile cross-examination in front of a skeptical, or at best impartial, audience. Instead, they allow her to tell *her* story on *her* terms. Victims are handled with what Martha Minow terms "a tone of care-giving and a sense of safety."<sup>8</sup>

Furthermore, the benefits of acknowledgement can extend to those unable or unwilling to testify. By listening to broadcasts of public hearings, reading the transcripts of anonymous hearings, and viewing and experiencing national monuments and other symbolic reparations, these individuals find their own suffering to be vicariously acknowledged through the stories of others. As Richard Wilson observes, through the SATRC, "individual suffering, which ultimately is unique, was brought into a public space where it could be collectivized and shared by all, and merged into a

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<sup>7</sup> Wynand Malan, *Minority Position*, in 5 TRUTH & RECONCILIATION COMM'N OF S. AFR. REP. 436, 444 (Oct. 29, 1998), available at <http://www.doj.gov.za/trc/report/finalreport/TRC%20VOLUME%205.pdf>.

<sup>8</sup> MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 72 (1998).

wider narrative of national redemption.”<sup>9</sup>

The second benefit of the TRC model is what I term the “moral re-education” of the complicit. By its very nature, atrocity requires the participation — or, at a minimum, the tacit consent — of a sizable segment of a country’s population. To avoid facing responsibility, participants and bystanders often defer to the rhetoric of their leaders to deny the reality of the horrors being perpetrated in their names. Combining victim, perpetrator, and bystander testimony with the work of a variety of experts such as excavationists, forensic specialists, and social scientists, a TRC can compile and present evidence that makes the reality and scale of atrocity incontrovertible.<sup>10</sup>

Of course, evidence can also be presented in a courtroom. However, rather than producing the patchwork of individual convictions and acquittals that is the outcome of a system of trials, a truth commission is afforded the luxury of weaving historical accounts into a coherent overarching narrative. Moreover, a truth commission’s credibility with the former supporters of and participants in the atrocity regime can be bolstered by its willingness to expose and criticize the human rights violations of the resistance. This impartiality renders implausible the rhetoric of former regime leaders who might otherwise convince their erstwhile supporters that the official examination of the past is biased and misleading.

Furthermore, because a truth commission does not have to limit its report to the crimes of specific high-profile individuals, it is better placed than alternative institutions to force bystanders and political supporters to

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<sup>9</sup> RICHARD WILSON, *THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE* 110-11 (2001).

<sup>10</sup> The South African case demonstrates how minds can be changed. In a post-SATRC survey asking respondents for their reactions to the claim “Apartheid was a crime against humanity,” James Gibson found that 72.9% of whites said the claim was true, with just 23.4% claiming it was not true. JAMES L. GIBSON, *OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION?* 80 (2004). He further found that a substantial majority of whites now believe that the struggle to preserve apartheid was unjust. *Id.* at 115. While we cannot know precisely what the numbers for such questions would have been prior to the transition, the rampant electoral success of the National Party throughout the apartheid years suggests this can represent nothing other than a massive turnaround, and in that sense it indicates progress in the re-education of the complicit white population. See KADER ASMAL ET AL., *RECONCILIATION THROUGH TRUTH: A RECKONING OF APARTHEID’S CRIMINAL GOVERNANCE* 143 (2d ed. 1997) (labeling apartheid one of the “great electoral success stories of the twentieth century.”). Of course, sanguine results such as the change in white opinions on the injustice of apartheid are tempered by more pessimistic results in other areas of Gibson’s survey. Nonetheless, for the purposes of this paper, this remarkable sea change in white public opinion is sufficient as an indication of the potential of truth commissions as mechanisms for the re-education of the complicit publics that facilitate the execution of atrocity.

acknowledge their *own* roles in making atrocity possible. Combined with the recognition that what happened was wrong, this can provide a first step towards securing the new society against a return to the kind of atrocity-regime from which it transitioned. As Asmal et al. argue, “It is not enough to blame evil individuals like Hitler or Verwoerd for terrible historical events. Totalitarian leaders are not omnipotent; they too face problems of governance.”<sup>11</sup> When public support for an atrocity movement erodes, so does its capacity to return to power.

In addition to acknowledging victims and re-educating complicit populations, TRCs can also help to reconcile conflicting perspectives on the past. By highlighting abuses on both sides, they forego the inevitable victors’ justice of post-atrocity criminal prosecutions. Seeing one’s own side as the bastion of good and one’s opponents as the embodiments of evil inevitably makes it difficult to come to a point of mutual tolerance.<sup>12</sup> By exposing wrongdoing on all sides, TRCs dispel the myth of one side’s purity, and thus improve the conditions for reconciliation.

A TRC model that is at least somewhat effective on each of the dimensions described above serves as the foil to the criminal punishment model in the following arguments. To reiterate, it is essential to understand that this is meant as a mere sketch, and not as a full elaboration or defense of the TRC model of transitional justice.

## II. DEBUNKING THE MYTHS OF POST-ATROCITY CRIMINAL PUNISHMENT

Advocates of post-atrocity punishment offer a variety of arguments in favor of the practice. From the retributivist perspective, it is claimed (in a seemingly straightforward fashion) that we should punish perpetrators of atrocity because they deserve it. From the consequentialist perspective, it is claimed that punishment: (i) deters future atrocity; (ii) expresses moral condemnation and helps to morally re-educate the complicit; (iii) prevents newly incarcerated perpetrators from participating in future campaigns of atrocity; and (iv) deters atrocity’s victims from retaliating with unchecked vengeance.

Regardless of their respective strengths in the realm of the philosophy of ‘ordinary’ criminal punishment, I maintain that there are several fundamental traits that render each of these theories deeply problematic in the aftermath of atrocity. First, atrocity is an abuse of *state* power, rather

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<sup>11</sup> ASMAL ET AL., *supra* note 10, at 164.

<sup>12</sup> Of course, though such even-handedness is vital for laying the groundwork for reconciliation, it is essential that truth commissions not jeopardize what Minow calls “the moral clarity of firm judgments.” MINOW, *supra* note 8, at 129.

than an act committed by an individual or group operating within a state's jurisdiction. Secondly, atrocity is committed in a qualitatively different society from that in which its punishment is implemented (whether the latter is a new post-transitional state or the international arena). Thirdly, unlike all but possibly the most heinous of 'ordinary' crimes, atrocity lies at such an extreme level of depravity that it simply defies our moral conceptions of justice and desert. Finally, atrocity involves an enormous number of perpetrators, and in many cases entire swaths of a nation may be complicit to some degree.

One or more of these four defining features of atrocity undermines the application of each of the five theories of punishment most often mobilized in support of post-atrocity criminal proceedings. Consequently, on none of those grounds can post-atrocity punishment be justified. Moreover, it is my contention that a proper implementation of the TRC model would (through the three avenues outlined in Part A, *supra*) better facilitate progress toward some of the ends to which punishment is supposed to drive, in addition to achieving advancement in further realms.

#### A. Retribution

Probably the most popular justification for post-atrocity punishment is retributivism. As Jon Elster writes, "in transitional justice the pure backward-looking argument from desert often has an overwhelming appeal. It can tap into the very strong retributive emotions that are triggered by human rights violations on a scale and of an atrocity far beyond what are found under normal circumstances."<sup>13</sup> Indeed, there is often "wide agreement that wrongdoers should get the punishment they deserve."<sup>14</sup>

While many find such sentiments intuitively appealing, to assess the position properly we must probe beyond intuition to understand *why* retributivism demands that the guilty be punished. To that end, I follow philosopher J.L. Mackie in distinguishing between positive and permissive forms of retributivism.<sup>15</sup> Permissive retributivism, in Mackie's terminology,

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<sup>13</sup> Jon Elster, *Retribution*, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY 33-56 (Jon Elster ed., 2006).

<sup>14</sup> *Id.*

<sup>15</sup> Mackie also defines negative retributivism as the prohibition of the punishment of innocents, but that is not central to my concerns here. J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in PHILOSOPHY OF LAW 780, 781-82 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000). The distinction between positive and permissive retributivism is approximately parallel to that drawn by Russ Shafer-Landau between "strong" and "weak" retributivism and that drawn by David Dolinko between "bold" and "modest" retributivism. See David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537, 541-42 (1991); Russ Shafer-Landau, *The Failure of Retributivism*, in PHILOSOPHY OF LAW 769, 775 (Joel

stipulates that we *may* punish wrongdoers, but that the fact that they did wrong is not, on its own, enough to give us a conclusive reason for doing so. Positive versions of retributivism, by contrast, see “the previous wrong act as *in itself* a reason for inflicting a penalty.”<sup>16</sup>

I submit that for retributivism to hold as a standalone source of justification for post-atrocity criminal punishment there must be a positive retributivist theory that can be applied to the post-atrocity context. A permissive theory could form part of a justification, but only alongside compelling consequentialist arguments that explain why we *should* punish rather than simply why we have a right to do so. In this Section, I focus on the obstacles facing positive retributivist theories of punishment in their application to the post-atrocity case.

### 1. Moral Desert: Annulment Theory

The longstanding version of positive retributivism — famously propounded by Immanuel Kant and G.W.F. Hegel — is what I term ‘annulment theory.’ As Hegel explains, punishment, on this view, is about “wrong and the righting of it.”<sup>17</sup>

The theory posits that wrongdoing upsets a metaphysical moral harmony that can be restored only by punishing the perpetrator and thus ‘annulling’ the crime. Indeed, Kant derives from this notion a fundamental obligation to punish wrongdoers, “so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment, for otherwise the people can be regarded as *collaborators* in this public violation of justice.”<sup>18</sup> Of course, to regain harmony, it is important not just that wrongdoers are punished, but that the appropriate punishment is delivered. As Kant reasons, the punishment must be determined by its equality with the crime so that “the position of the needle on the scale of justice, incline[s] no more to one side than to the other.”<sup>19</sup>

The moral balancing act this requires, however, is nonsensical in the aftermath of atrocity. No punishment exists that can annul the crimes of genocide or systematic mass rape. The “needle of justice” is immobile when the scale has been broken by the weight of the wrongdoing. As Charles

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Feinberg & Jules Coleman eds., 6th ed. 2000).

<sup>16</sup> Mackie, *supra* note 15, at 781 (emphasis added).

<sup>17</sup> G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 69-70 (T.M. Knox trans., Clarendon Press 1953) (1821).

<sup>18</sup> Immanuel Kant, *The Metaphysics of Morals*, in *KANT PRACTICAL PHILOSOPHY* § 6:333 (Mary Gregor ed., 1996) (1797) (emphasis added).

<sup>19</sup> *Id.* § 6:332.

Villa-Vicencio argues, “The stories of the former Yugoslavia, Rwanda, Burundi, apartheid South Africa and elsewhere reiterate the capacity of human kind to commit the kind of heinous crimes that no amount of human justice nor well-intended reparation can assuage.”<sup>20</sup> What could we possibly do to ‘right the wrongs’ of Théoneste Bagosora, Adolf Hitler, or Radovan Karadžić?

Indeed, analogous questions are posed even in the ordinary criminal context. Would Kantian supporters of the execution of murderers<sup>21</sup> endorse similarly talionic punishments for a rapist or a torturer? Even if the idea of using the instruments of the state to perpetrate “morally pernicious activities in response to heinous offenses”<sup>22</sup> were not deeply objectionable, what are we to do with a serial killer? We cannot execute her multiple times.

Its inability to answer such questions severely undermines annulment theory. We cannot make sense of a duty to punish that is sourced in a need to precisely rebalance moral harmony when it is clear that no punishment can effect such rebalancing. The problem is particularly acute in the post-atrocity setting. However, precisely because it arises with respect to ordinary criminal situations, punishment theorists have sought alternative routes to the justification of the positive retributivist conclusion. It is to these less immediately implausible theories of retributivism that I now turn.

## 2. Moral Desert: Fittingness Theory

The first — what I term ‘fittingness theory’ — follows annulment theory in requiring proportional punishment based on moral desert. However, it differs in that proportionality is not defined by Kantian mathematical precision, but is instead determined by the more abstract criterion of ‘fit’ — the punishment must fit the crime. As Michael Moore explains, such retributivists “are committed to the principle that punishment should be graded in proportion to desert; but they are not committed to any particular penalty scheme.”<sup>23</sup>

Free from the confines of *lex talionis*, fittingness theory seemingly has the potential to cope with a wider range of crimes. However, the gain in flexibility is tempered by the loss of a clearly articulated explanation for why giving people what they deserve is inherently worthwhile.<sup>24</sup> Moreover,

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<sup>20</sup> Charles Villa-Vicencio, *The Reek of Cruelty and the Quest for Healing: Where Retributive and Restorative Justice Meet*, 14 J.L. & RELIGION 165, 165 (2000).

<sup>21</sup> Kant, *supra* note 18, § 6:333.

<sup>22</sup> Shafer-Landau, *supra* note 15, at 773.

<sup>23</sup> Michael S. Moore, *The Moral Worth of Retribution*, in PHILOSOPHY OF LAW 746, 746 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000).

<sup>24</sup> Recall that annulment theory explains this with reference to the need to cancel out a



without the specificity of mathematical equivalence, the theory gives little guidance on the appropriate form of punishment for any given crime. As Shafer-Landau argues, we have:

no way of knowing that a punishment is too great or too small, and so no way of knowing whether it is commensurate with the crime. In short, there are no determinate moral criteria that can translate the gravity of an offense into even a roughly correlative measure of deserved punishment.<sup>25</sup>

To overcome these problems of indeterminacy ('why' and 'how much'), fittingness theory rests heavily on intuition.

Raw intuition provides perilous ground on which to construct cogent political philosophy, and, as such, this situation should already be of major concern. However, even if we set aside this general worry, two problems specific to the aftermath of atrocity remain — the issues of moral extremity and mass complicity.

Mass complicity is a fundamental feature of atrocity. Daniel Goldhagen estimates that between 100,000 and 500,000 Nazis perpetrated the Holocaust<sup>26</sup> and conservative calculations suggest between 75,000 and 150,000 Rwandans participated in the country's devastating 1994 genocide.<sup>27</sup> Such extensive complicity poses a daunting logistical problem for fittingness theory, which demands the punishment of all those who deserve it. As Telford Taylor writes of the post-Nazi situation, "For punishing such a multitude of convicts, neither jails nor exile would serve, and capital sentences would beggar Napoleon's slaughter of a few thousand Mamelukes on the Jaffa beaches. The practical and moral difficulties proved overwhelming."<sup>28</sup>

Though not all atrocities are on the scale of the Holocaust, all post-atrocity societies face similar problems.<sup>29</sup> Indeed, the issue is further

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wrong that will otherwise persist indefinitely. Indeed, it is Kant's claim that, should we fail to punish, we would become complicit in that persisting wrong.

<sup>25</sup> Shafer-Landau, *supra* note 15, at 777.

<sup>26</sup> DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 167 (1996).

<sup>27</sup> Villia Jefremovas, *Acts of Human Kindness: Tutsi, Hutu and the Genocide*, 23 *ISSUE* 28, 28 (1995). Others are less restrained; as Bill Berkeley reports, "By some accounts as many people killed as were killed." Bill Berkeley, *Road to a Genocide*, in *THE NEW KILLING FIELDS: MASSACRE AND THE POLITICS OF INTERVENTION* 103, 105 (Nicolaus Mills & Kira Brunner eds., 2002).

<sup>28</sup> TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 75 (1992).

<sup>29</sup> As Jaime Malamud-Goti writes of Argentina, for example, "The thought of trying all military personnel responsible for every sort of offense perpetrated during the period of the

exacerbated when we consider the number of collaborators and other morally complicit parties. As Asmal et al. remind us, white South Africans had the freedom to vote for representatives opposed to apartheid, but instead, “apartheid was one of the great electoral success stories of the twentieth century . . . . This is an important reason why such an abhorrent system survived for so long.”<sup>30</sup> Similarly, the number of Germans complicit in the Holocaust extends far beyond the estimated 500,000 active perpetrators. As Gary Bass reports:

In September 1944, McCloy told Morgenthau Jr., “There may be arguments as to how far down you should go but we can’t undertake to eliminate immediately every member of the Nazi Party.” “Why not?” asked Morgenthau. “Because there are too many of them,” said McCloy. “I think there are 13 million.”<sup>31</sup>

Only Rwanda has tried to overcome the numbers problem through a truly comprehensive system of post-atrocity prosecutions. The results have not been good. In 2000 Elizabeth Neuffer reported:

The arithmetic of justice was as discouraging as the arithmetic of the dead was overwhelming. Rwanda’s courts had handed down 2,500 verdicts in three years and set some 3,500 prisoners free. Even so, 125,000 suspects - some 10 percent of the Hutu population - remained incarcerated . . . . Nearly 40,000 of them still had no files containing the charges against them.<sup>32</sup>

The Rwandan government has recognized the impossibility of the situation and, in 2005, released 36,000 of the 80,000 that began the year in detention.<sup>33</sup> Even so, by the end of the following year, 48,000 detainees continued to await trial well over a decade after the genocide.<sup>34</sup> Attempts such as Rwanda’s are hamstrung by the typical post-atrocity combination of a dearth of judges and lawyers, popular distrust in those trained under the former regime, scarcity of government resources, and the more urgent need

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dictatorship was untenable.” Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 2-3 (1990).

<sup>30</sup> ASMAL ET AL., *supra* note 10, at 143.

<sup>31</sup> BASS, *supra* note 1, at 299. See generally KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (E.B. Ashton trans., Fordham Univ. Press 2000) (1947) (discussing collective guilt of bystanders to Holocaust).

<sup>32</sup> ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* 372 (2000).

<sup>33</sup> Amnesty Int’l, *Amnesty Int’l Rep. 2006 - Rwanda*, May 23, 2006, available at <http://www.unhcr.org/refworld/country,,AMNESTY,,RWA,456d621e2,447ff7b716,0.html>.

<sup>34</sup> Amnesty Int’l, *Amnesty Int’l Rep. 2007 - Rwanda*, May 23, 2007, available at <http://www.amnesty.org/en/region/rwanda/report-2007>.

to maintain a functioning ordinary criminal system.

The apparent dilemma is stark: either a large number of wrongdoers walk free, or tens of thousands of potentially innocent defendants face decades of detention without trial. If it is therefore impossible to punish all of those who deserve it, then surely we cannot have a moral duty to do so. ‘Ought,’ after all, implies ‘can.’ Moreover, if we do not have a moral duty to punish those who deserve it, then it is not clear that we can have a moral duty to punish any particular deserving individual. Indeed, as Carlos Santiago Nino argues, retributivism “requires some measure of even handedness, which means either punishing everybody . . . or letting everyone go free.”<sup>35</sup>

When considering whether to proceed with a specific case within a system of criminal justice, this concern might seem overly formalist. Indeed, ICTY Trial Chamber II finds, “it is preposterous to suggest that unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial.”<sup>36</sup> However, my purpose here is much broader in scope. The question is whether a system of post-atrocity criminal punishment can be given a plausible philosophical basis. Desert-based fittingness theory is problematic in this regard because it requires an even-handedness that is simply impossible in the aftermath of mass-atrocity.

This is not to say that the perpetrators and their collaborators do not deserve to be punished — we surely want to avoid basing the desert of an individual on the capacities of the government under which she lives. However, in order to avoid doing just that, we must accept that in affirming that each individual perpetrator deserves punishment, what we mean is that she could not legitimately complain if we were to punish her, *not* that we have a moral duty to effect such punishment. In so doing we unavoidably slip into Mackie’s permissive retributivist position.

One might respond here by rejecting the dilemma between punishing all perpetrators and punishing none. We *can*, after all, punish a subset of the perpetrators — in particular, the orchestrators — and one might argue that doing so would be the ‘fitting’ response to the enormity of the situation.

To evaluate this response, let us turn to the issue of moral extremity. Here we run into a problem familiar from the discussion on annulment theory — there simply exists no ‘fitting’ punishment for those guilty of choreographing genocide. As Hannah Arendt observes, even hanging Göring was “totally inadequate . . . . That is the reason why the Nazis in

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<sup>35</sup> CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL*, at xx (1996).

<sup>36</sup> Prosecutor v. Delalić, Case No. IT-96-21-T, ¶ 180 (Nov. 16, 1998).

Nuremberg [were] so smug.”<sup>37</sup> We are, therefore, again left asking the following question: if we cannot give perpetrators what they deserve then how can their desert be the sole justification for punishment? How can the notion that we should treat people in a way morally befitting their behavior be the source of our duty to treat them in a way that does not fit that behavior?

The obvious response at this point must be that these lingering questions should not stop us from punishing the culpable to the limited extent that we can. Indeed, the advocate of fittingness theory might argue that such a response simply *is* the fitting response to a situation of mass complicity.

Still, this is hardly satisfying. Given that the individual punishments cannot themselves be morally ‘fitting,’ it is just not clear — short of intuitive assertion — *why* punishing those we can to the limited extent we can would, in fact, be the fitting overall response. Moreover, even if we again bracket the over-reliance on intuition, the principle of ‘punishing those we can as best we can’ does not conclusively point us toward the criminal punishment model.

Under the TRC model, the truth commission and the system of reparations bring public shame and moral condemnation, as well as financial penalty on those who participated in the evils of the past and those who endorsed them from the sidelines. Though a few of the perpetrators would face harsher consequences under the punishment model, under the TRC model we ultimately ‘punish’ (at least in the form of shaming) most, if not all, of those complicit in the evils of the past.

Of course, neither the criminal prosecutions of ringleaders nor the TRC model allow us to come anywhere close to giving the guilty what they deserve, and in that sense both options are utterly inadequate. However, precisely because of this shared inadequacy, fittingness theory cannot provide the resources to adjudicate between the two options — one is more effective in the scope and ‘even-handedness’ of punishment, the other in its depth. Under such indeterminate circumstances, we can hardly be said to have a duty to pursue one over the other.

Ultimately, if moral desert is to play a role in justifying post-atrocity punishment, it can only be in its *permissive* form — the desert of perpetrators may give us a right to punish them, but to decide whether we should exercise that right we must consider the consequences of doing so.

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<sup>37</sup> Letter from Hannah Arendt to Karl Jaspers (Aug. 17, 1946), in CORRESPONDENCE 1926–1969: HANNAH ARENDT, KARL JASPERS 54 (Lotte Kohler & Hans Saner eds., 1992).

### 3. Fair Play Theory

Positive retributivism, however, is not limited to theories of moral desert. The primary alternative is fair play theory, under which punishment is justified by the need to revoke the unfair advantage taken by a criminal when she breaks the law.

As Jeffrie Murphy notes, fair play theory rests on the social contractarian assumption “that we owe allegiance to the law because the benefits we have derived have been voluntarily [if tacitly] accepted.”<sup>38</sup> When someone breaks those laws, he takes advantage of the forbearance of others to assume a degree of freedom beyond that which has been collectively agreed upon for the purposes of social cooperation and stability. Michael Davis elaborates, “Anyone who breaks a law does not bear the same burden [of self restraint] the rest do. Unless he is punished, he will, in effect, have gotten away with doing less than others. He will have an advantage they do not.”<sup>39</sup> On this view, wrongdoing is in the past and can never be annulled, but the advantage the perpetrator gains by forgoing the collectively affirmed burden of self-restraint persists, and, because it is unfair, it must be revoked. Moreover, as Murphy argues, “having benefited from the Rule of Law when it was possible to leave, I have in a sense consented to it and to its consequences — even my own punishment if I violate the rules.”<sup>40</sup>

A key advantage for fair play theory is its capacity to deal with moral extremity. As Davis explains, to determine the appropriate punishment for a crime “we need only determine the unfair advantage the criminal would take by violating the statute in question;” the moral character of the act itself is irrelevant.<sup>41</sup> However, while avoiding one of the primary obstacles to the application of the moral desert theories discussed above, fair play theory runs into another difficulty in the post-atrocity context.

Unlike the crimes that fair play theorists imagine, crimes of atrocity are not perpetrated by individuals or groups operating within the confines of a stable system of laws justified according to a contractarian standard of tacit consent. Instead, they are directed and executed by the state itself. The government uses its coercive power to perpetrate monstrous outrages, often organizing and facilitating its activities through legislation that degrades members of a subjugated race or dramatically expands executive powers.

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<sup>38</sup> Jeffrie G. Murphy, *Marxism and Retribution*, in PUNISHMENT 3, 26 (A. John Simmons et al. eds., 1995).

<sup>39</sup> Michael Davis, *Harm and Retribution*, in PUNISHMENT 188, 192 (A. John Simmons et al. eds., 1995).

<sup>40</sup> Murphy, *supra* note 38, at 26.

<sup>41</sup> Davis, *supra* note 39, at 210.

The government perpetrator does not take advantage of the forbearance of others by breaking just laws of social cooperation while others restrain themselves. Instead, it mobilizes its control over both legislation and the coercive forces of the state to destroy that system of cooperation. As soon as the *interahamwe* and the *Forces Armées Rwandaises* (FAR) began slaughtering Tutsi civilians, or the various security organs of the Nazi and Apartheid governments started herding ethnic and racial groups into the ghettos and townships that were to demarcate their exclusion from society, the perpetrators tore up whatever social contract might have previously been in effect. Talk of tacit consent or forbearance in such situations is misplaced; all that remains is power and coercion — in the language of social contractarians, it is a return to the state of nature.

The exploitation of state power as a means to the execution of atrocity is a heinous moral wrong, but it is not wrong because it takes advantage of the cooperation of others; it is wrong because it involves the violation of the most essential human rights. The concept of a just system of social cooperation simply does not exist in the midst of government-orchestrated crimes against humanity.

#### 4. Reciprocal Rights Theory

Closely related to fair play theory, though less dependent on the idea of a collective scheme of political cooperation, is reciprocal rights theory. Warren Quinn explains, “the rights that would otherwise have barred us from doing the sorts of thing we do in punishing . . . [are] forfeited by [the perpetrator’s] own behavior.”<sup>42</sup> As Alan Goldman elaborates, “Since having rights generally entails having duties to honor the same rights of others, it is plausible that when these duties are not fulfilled, the rights cease to exist.”<sup>43</sup>

This position is more amenable to the post-atrocity context than fair play theory because it is clear that perpetrators of atrocity do violate the rights of their victims. That this violation occurs after a breakdown in the social contract should not stop us from recognizing it as a desecration of the condition of reciprocity as long as we hold the scheme of rights in question to exist outside of the context of a minimally just society.

However, as Goldman readily admits, in contradistinction to fair play theory, this rights-based theory cannot impose on us a duty to punish. “When a person violates rights of others, he involuntarily loses certain of his

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<sup>42</sup> Warren Quinn, *The Right to Threaten and the Right to Punish*, in PUNISHMENT 47, 52 (A. John Simmons et al. eds., 1995).

<sup>43</sup> Alan H. Goldman, *The Paradox of Punishment*, in PUNISHMENT 30, 31 (A. John Simmons et al. eds., 1995).

own rights, and the community acquires the *right* to impose a punishment, *if there is social benefit to be derived from doing so.*<sup>44</sup> After all, the implication of a system of reciprocal rights is that one forfeits one's rights by violating the rights of others, not that the others then have a duty to exploit that forfeiture by imposing punishment. In that sense, we again retreat to a permissive rather than positive theory of retributivism.<sup>45</sup>

Ultimately, the three issues of moral extremity, mass complicity, and the leading role of governments, all combine to make the case of atrocity and its aftermath uniquely difficult for the various theories of positive retributivism. Whether we look to moral desert theories, fair play theory, or reciprocal rights theory, it seems the only way to gain traction on punishing the perpetrators of atrocity is to loosen the position such that we have a retributivist right to punish, but no retributivist duty. The resulting theories of permissive retributivism may be plausible, but they are insufficient — beyond the right to punish, we need positive reasons in favor of doing so. It is here, that we must turn to the consequentialist arguments.

### *B. Deterrence*

The most prominent consequentialist argument is deterrence theory. Justice Robert Jackson began his opening statement as chief U.S. prosecutor at Nuremberg by justifying the tribunal based on its deterrent value, asserting, “The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored *because it cannot survive their being repeated.*”<sup>46</sup> Claims of this sort have become no less ambitious over the years. Kofi Annan has expressed the hope that the ICC will “deter future war criminals,”<sup>47</sup> and, during the conflict in the former Yugoslavia, Madeleine Albright argued, “If the architects of war and ethnic cleansing in Bosnia go unpunished, the lesson for would-be Milosevic's around the world will endanger us all.”<sup>48</sup> Professor Diane Orentlicher contends, “The fulcrum of the case for criminal punishment is that it is the most effective insurance against future repression . . . prosecutions can deter potential lawbreakers

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<sup>44</sup> *Id.* at 32 (emphasis added).

<sup>45</sup> Indeed, for Goldman, “The social goal of punishment [is] deterrence, [though] we are entitled to pursue this goal only when we restrict deprivation of rights to those forfeited through crime or wrongdoing.” *Id.* at 36.

<sup>46</sup> Robert H. Jackson, *Opening Statement for the United States of America, in THE CASE AGAINST THE NAZI WAR CRIMINALS* 1, 3 (1946) (emphasis added).

<sup>47</sup> Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A3.

<sup>48</sup> BASS, *supra* note 1, at 290 (citing Secretary Albright).

and inoculate the public against future temptation to be complicit in state-sponsored violence.”<sup>49</sup>

Against this widespread optimism, I argue that, for several reasons, post-atrocity punishment cannot deter the perpetrators of gross human rights violations.

First, as Gary Bass comments:

men willing to commit mass murder are terribly difficult to dissuade. In many of the cases when war crimes tribunals have been mooted, a regime has devoted itself to expelling or exterminating an ethnic group: Armenians, Jews, Bosnian Muslims, Rwandan Tutsi. Such a regime may be undeterrable by anything short of massive military force, and maybe not even that.<sup>50</sup>

Jon Elster agrees, explaining, “Some aspiring dictators may not even care about their personal fate. They may view themselves as being on a holy crusade against fascism or communism and genuinely set the interest of their country, as they perceive it, over their personal one.”<sup>51</sup> This kind of single-mindedly ideological attitude is exemplified by some of the bafflingly irrational decisions taken by Nazi leaders during World War II. As Bass points out, “even during Stalingrad — when one would have expected that all available resources would be thrown into fending off the Soviet Union — Germany relentlessly continued the Holocaust.”<sup>52</sup>

Of course, this argument can take us only so far; many regimes abuse their citizens out of sinister pragmatism rather than virulent ideology.<sup>53</sup> However, I submit that even these more rationally abusive regimes would be undeterred by post-atrocity punishment. Crucially, atrocity (of the kind under consideration in this paper) is perpetrated by those with political control of the country in which it occurs. The difference this makes to the efficacy of deterrence should not be underestimated. Whether post-atrocity punishment is pursued at the domestic or international level, whether through ad hoc special tribunal or permanent court, the uncomfortable fact of the matter is that perpetrators will not be prosecuted until their regime

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<sup>49</sup> Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

<sup>50</sup> BASS, *supra* note 1, at 291.

<sup>51</sup> Elster, *supra* note 13, at 50.

<sup>52</sup> BASS, *supra* note 1, at 291-92.

<sup>53</sup> The more opportunistic approach to atrocity was particularly characteristic of the kinds of abuses committed by military dictatorships in Latin America in the latter half of the twentieth century. Apartheid South Africa, for all its racist ideological rhetoric, was also very pragmatic in the way it maltreated its non-white citizens.



loses power.

No atrocity regime will prosecute its own leaders or their agents for pursuing its core aims, and the ICC (like the ICTY and ICTR before it) has no police force and, quite simply, cannot arrest a perpetrator until her domestic government decides to hand her over. Given that the domestic government is the orchestrator or, at a minimum, the facilitator of the atrocity, prosecution will not happen without regime change.

As Kim Jong-Il watched the prosecutions of Slobodan Milošević and Saddam Hussein, he would have known that he would find himself in a similar situation only if he were to lose control of North Korea. Indeed, even when political transition occurs, the domestic government may find it difficult to prosecute former regime members that retain sufficient popular support. Thus, despite their ICTY indictments for genocide and crimes against humanity, Bosnian Serb leader Radovan Karadžić was arrested only very recently, more than a decade after losing power, and his military chief Ratko Mladić remains at large.

Precisely because punishment occurs only after political power is lost, the threat of punishment is too remote to have even a minor deterrent effect on abusive tyrants. The immediate costs and benefits of atrocity will inevitably play a much larger role in the calculations of a leader who expects to rule for the duration of his life, than could any cost or benefit that will be felt only in the unlikely future scenario that he loses power. Indeed, often the very reason a pragmatic tyrant engages in atrocity is to strengthen his authority — to make the prospect of regime change less likely.

Moreover, in the rare case when a leader is to consider the distant prospect of a transition from power, he is presumably far more concerned with how to avoid the fate of Nicolae Ceaușescu — who was executed three days after his regime was overthrown — than he is with the prospect of facing imprisonment in an air-conditioned personal jail cell in the Hague.<sup>54</sup> In an atrocity society, as in situations of war, “life is valued cheaply, and death is the expected price for political failure.”<sup>55</sup>

As noted above, it is not just the orchestrators that perpetrate atrocity. One might argue that criminal punishment is justified by its capacity to deter the foot soldiers of atrocity, if not their leaders. This, however, seems equally unrealistic. Like their superiors, lower-level perpetrators are far more likely to be influenced by their more immediate incentives than by

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<sup>54</sup> The ICTY detention unit, for example, “has been described as the world’s most luxurious prison, more a hotel than a jailhouse.” Chris Stephen, *Milosevic jail under scrutiny*, BBC NEWS, ¶ 4 (Mar. 13, 2006), <http://news.bbc.co.uk/1/hi/world/europe/4801626.stm>.

<sup>55</sup> Aaron Fichtelberg, *Crimes Beyond Justice? Retributivism and War Crimes*, 24 CRIM. JUST. ETHICS 31, 34 (2005).

what might happen in the improbable event of a transition from power. In Rwanda, as one génocidaire relates, “Voicing disagreement out loud was fatal on the spot.”<sup>56</sup> Thus, when the district prefect of Butare refused to order the Hutu of his region to slaughter their Tutsi neighbors, he was quickly executed and replaced.<sup>57</sup>

When faced with such immediate and brutal threats, one is hardly likely to be swayed by the possibility of distant and uncertain criminal prosecution. Moreover, in the extraordinary cases when the foot soldiers of atrocity can look beyond their immediate incentives to weigh the long-term consequences of their actions, they often have more to fear from not being prosecuted. Many suspected génocidaires who have had charges against them dropped by the authorities in Rwanda were killed shortly after their release by angry genocide survivors.<sup>58</sup> For the former foot soldiers of atrocity, incarceration may be a blessing in disguise.

Charting the decline of Athenian rule of law during the plague, Thucydides describes how “no one was held back in awe . . . by the laws of men . . . because no one expected to live until he was tried and punished for his crimes.”<sup>59</sup> It is under such circumstances that the architects and executors of atrocity operate — criminal punishment is insignificant compared to the harsher and more immediate incentives they already face. The notion that it could nonetheless influence their decision-making in the way the likes of Jackson, Albright, and Annan hope seems extremely far-fetched.

One might object that ex-leaders of atrocity regimes do not face a simple choice between the fates of Ceaușescu and Milošević. Former Chilean leader General Augusto Pinochet, for example, lost power in 1990 only to live in luxurious amnesty until his temporary arrest in London in 1998. One might therefore contend that the prospect of post-atrocity punishment could have a slight impact on the decisions of tyrants because it would remove their preferred outcome (amnesty) from the range of post-atrocity possibilities, thus at least marginally increasing the overall risk of engaging in atrocity.

However, from another perspective, cases such as Pinochet’s in fact

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<sup>56</sup> JEAN HATZFELD, *MACHETE SEASON: THE KILLERS IN RWANDA SPEAK* 76 (2003).

<sup>57</sup> Helen M. Hintjens, *Explaining the 1994 Genocide in Rwanda*, 37 *J. MOD. AFR. STUD.* 241, 272 (1999).

<sup>58</sup> For example, “Persons provisionally released from detention were reportedly killed in Cyangugu and in December 1996 twenty-four persons who had been released were said to have been killed in several communes of Butare.” ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 765 (1999).

<sup>59</sup> Thucydides, *History of the Peloponnesian War*, in *READINGS IN CLASSICAL POLITICAL THOUGHT* 35, 44 (Peter J. Steinberger ed., 2000).

illustrate how post-atrocity punishment may incentivize *greater atrocity* than would occur in its absence. Such leaders are only able to leave power without consequence because they leave from positions of strength.<sup>60</sup> Rather than holding Pinochet to account on his departure from office, an effective 1990 version of the ICC would have incentivized him to resist stepping down, thus extending his regime of atrocity and likely provoking even greater suffering than ultimately occurred.<sup>61</sup> As Elster writes, under the threat of prosecution, “dictators . . . will hang on to [power] longer and apply more violent means to retain it, reasoning that they might as well be hanged for a sheep as for a lamb.”<sup>62</sup> It is in anticipation of precisely this kind of calculation that even pioneers in international criminal justice, such as Antonio Cassese, have questioned the wisdom of charging Sudanese President Omar al-Bashir while he still has control over government in Khartoum, as well as over the fates of many of the surviving Fur, Massaleet, and Zagawa civilians who have been terrorized by government-backed militia in the Darfur region of Africa’s biggest state.<sup>63</sup>

Ultimately, deterrence relies on changing the perpetrator’s incentives to a degree such that it is rational for her to choose not to commit the crime in question. Yet the above examples are indicative of systematic factors that make this impossible with respect to crimes of atrocity. Atrocity is perpetrated by governments on their own people, and, as such, punishment can be brought to bear only *after* the abusive regime has transitioned from power. This is a problem because the incentives operating in the chronological window between the decision to commit atrocity and the prospective punishment overwhelm the threat of punishment. Moreover, in the rare case that a transition from power is imminent in the minds of leaders and foot soldiers, criminal prosecution is far less painful a prospect than some of the other possible post-atrocity outcomes they face, and therefore seems unlikely that it would alter their decisions. In the even rarer case, that

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<sup>60</sup> In Pinochet’s case, he retained control of the army.

<sup>61</sup> Indeed, as an ongoing example, the profoundly abusive rebel Lord’s Resistance Army (LRA) is currently reluctant to end hostilities by signing a peace agreement with the Ugandan government because the ICC has indicted several of the LRA top brass, thus undermining President Yoweri Museveni’s proposal of amnesty for peace. This could well result in a longer period of human rights abuse than might have been the case absent ICC interference.

<sup>62</sup> Elster, *supra* note 13, at 50.

<sup>63</sup> See, e.g., Antonio Cassese, *Flawed Justice for Sudan*, THE NAMIBIAN, July 25, 2008, available at <http://www.namibian.com.na/news/full-story/archive/2008/july/article/flawed-justice-for-sudan/> (“It may harden the Sudanese government’s position, endanger the survival of the peace-keeping forces in Darfur, and even induce al-Bashir to take revenge by stopping or making even more difficult the flow of international humanitarian assistance to the two million displaced persons in Darfur.”).

regime change seems imminent and summary execution or the equivalent is highly unlikely (because the atrocity regime members expect to retain control of the military, for example), the threat of punishment might actually create an incentive to prolong the regime and extend the atrocity. For these reasons, punishment is systematically doomed to fail as a deterrent to state-perpetrated enormities.

While TRCs and reparations systems are no more capable of establishing a deterrent than are criminal tribunals, there is reason to believe that they *can* contribute to decreased likelihood of future atrocity via another route. As described above, a TRC's exposure of the unassailably brutal individual stories of victims, combined with its presentation of a coherent and balanced narrative describing the system of atrocity, can render the complicit population's long-held strategies of denial and self-deception unsustainable. This can then lead to the erosion of support for the political movement that orchestrated the atrocities. Through its role as a catalyst in this process, a TRC can thus diminish the political base from which former leaders could launch a comeback, and in that way, reduce the chance of atrocity recidivism.

### C. *Moral Expressivism and Moral Education*

Of course, post-atrocity punishment advocates might respond that criminal trials can also achieve moral expression and re-education, and, indeed, that trials are better suited to that task than truth commissions.

#### 1. Moral Education Theory

American Colonel Murray Bernays wrote in 1944 that the proposed trial of Nazi war criminals would "arous[e] the German people to a sense of their guilt, and to a realization of their responsibility for the crimes committed by their government."<sup>64</sup> Looking back at the effect of Nuremberg, Judith Shklar contends that the tribunal was highly successful in this regard. She argues that the prosecution of crimes against humanity helped Germany "to a more decent political future."<sup>65</sup>

Of course, Shklar stresses that Germany may have been uniquely susceptible to such change, arguing that it was "because of the traditional legalism of Germany's professional and bureaucratic classes [that] evidence presented in this way, and judgment delivered upon such deliberations as the

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<sup>64</sup> Murray C. Bernays, *Memorandum: Trial of European War Criminals*, in *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945*, at 33, 33-37 (Bradley F. Smith ed., 1982) (1944).

<sup>65</sup> JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 165 (1964).

Trial offered, could be effective.”<sup>66</sup> Moreover, as Bass explains:

Nuremberg’s glory is partially a reflected glory. The rehabilitation of Germany after World War II is one of the great political successes of the century, turning a fascist enemy into a democratic ally; Nuremberg gains prestige as part of that terrific success . . . . But Nuremberg was only the most spectacular element in a broader Allied program of denazification.<sup>67</sup>

The economic and social rehabilitation effort was extensive, including rewriting textbooks, providing extensive economic aid, and bussing German civilians to concentration camps to see the horrors of the Holocaust for themselves. As such, it is difficult to isolate the impact of the tribunal and, more specifically, the punishment of the Nazi leaders. Indeed, the significant delay between the trials and German acceptance of the ‘moral message’ renders the causal claim that it was Nuremberg that changed the hearts and minds of German civilians quite tenuous.<sup>68</sup>

Rather than relying on the German case, therefore, we must examine, at a more theoretical level, how punishment might achieve its educational aims in the aftermath of atrocity. There are two points to keep in mind.<sup>69</sup> First, for punishment to be morally educational, it must be accompanied by judicial reasoning. Indeed, it is in that reasoning that the moral message is to be conveyed. Second, we cannot lose sight of the targets of moral education. It is not victims whose minds we hope to change; a surviving Rwandan Tutsi is all too aware of the heinous nature of the crimes that left her family dead and her village razed. The primary targets must instead be the perpetrators and, even more importantly, the complicit population of bystanders and supporters.

The target audience thus has a predisposition to the political ideology of

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<sup>66</sup> BASS, *supra* note 1, at 156.

<sup>67</sup> *Id.* at 295.

<sup>68</sup> As Bass argues, “The popular image of Nuremberg as a lightning catharsis, transforming Germany at a stroke from a thoroughly Nazi country to a penitent democratic one, is much overstated.” *Id.* at 296. Quite the opposite, “Four years after Nuremberg, only 38 percent of German respondents in the American zone thought well of subsequent trials. By 1949, many Germans disapproved of Allied trials of industrialists and senior military men.” *Id.* As Joseph Lelyveld explains, “it’s useful to remember that the Nuremberg trials failed totally in postwar Germany to kindle an interest in the subject of war crimes and crimes against humanity. The German encounter with that past started in earnest only in the sixties, a full generation later.” Joseph Lelyveld, *The Defendant: Slobodan Milosevic’s Trial, and the Debate Surrounding International Courts*, THE NEW YORKER, May 27, 2002, at 82.

<sup>69</sup> For a complete statement of the moral education theory of punishment see Jean Hampton, *The Moral Education Theory of Punishment*, in PUNISHMENT 112, 113 (A. John Simmons et al. eds., 1995).

the orchestrators of their nation's atrocities. Hitler convinced his supporters that a Jewish threat required extermination; the various architects of the Rwandan genocide persuaded hundreds of thousands of Hutu that unless they slaughtered all living Tutsi, the latter would rise up and return to their colonial-era over-lordship; and the National Party leaders in South Africa convinced whites that the subjugation of the black majority was justified by nature, religion, and national security. The question now is how best to change the minds of the members of these bystander and perpetrator populations.

Trials offer the chance for both prosecutor and defendant to present their respective cases, the rationale being that the process of pitting argument against argument is the best way to discredit falsehood and affirm truth. In a post-atrocity courtroom, however, the two sides do not debate on the same terms. While the prosecution — if it adheres to its remit — presents *legal* arguments relevant to the case at hand, the perpetrator often engages in *political* and *ideological* rhetoric in his defense. In other words, the arguments are not pitted against each other at all. While the prosecution tries to convince the judges of the defendant's guilt on a very specific crime, the defendant appeals to our target audience with arguments that have been proven to strike a chord in the past. As Lelyveld reports, "When [Milošević] speaks, the court is invited to listen, but he wants it to be understood that he is really addressing the Serbian public and the wider world."<sup>70</sup> Saddam Hussein engaged in similar behavior during his trial in Baghdad.<sup>71</sup>

The problem is not only that the defendants use their trials as platforms for political grandstanding, but a deeper worry is that they may often seem justified in their indignation. As noted above, perpetrators of atrocity are only put on trial after losing political power. Either they leave power voluntarily having secured an amnesty, or they are overthrown in circumstances that are more violent. The latter situation typically provides them with at least the beginnings of a *tu quoque* argument. As Bill Wringer admits, "In many, if not all, wars, atrocities are committed by both sides. However, when we look at war crimes trials we find that it is almost invariably those on the losing side who are tried and punished."<sup>72</sup> Milošević

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<sup>70</sup> Lelyveld, *supra* note 68, at 82.

<sup>71</sup> On his first day on the witness stand, "Saddam Hussein refused to answer questions . . . [and instead] shouted exhortations for Iraqis to unite to fight American forces . . . the judge told him, 'You are in front of the court, not a political forum.' 'I am in front of the people,' Saddam said before returning to the speech he had written on a yellow legal notepad." Thomas Frank, *Saddam gives the judge a speech, but no answers*, USA TODAY, Mar. 15, 2006, available at [http://www.usatoday.com/news/world/iraq/2006-03-15-saddamtrial\\_x.htm](http://www.usatoday.com/news/world/iraq/2006-03-15-saddamtrial_x.htm).

<sup>72</sup> Bill Wringer, *Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment*, 25 LAW & PHIL. 151, 164 (2006).

pointed to the crimes of various ex-Yugoslav foes and the civilian deaths caused by NATO; Rwandan génocidaires reference the massacres committed by the Rwandan Patriotic Front (RPF) as they marched to Kigali; Nazi sympathizers highlight Allied atrocities such as the firebombing of Dresden; and Ba'athists remind us of the illegal American occupation and of the abuses of Abu Ghraib. In each case, there is a valid argument that the opposition to the atrocity regime engaged in some human rights violations or war crimes.

Even though the atrocity-regime's abuses may dwarf those of its opponents, the apparent partiality of the prosecutions gives defendants the rhetorical leverage they need to garner sympathy and support among the bystander populations upon whose support, endorsement, acceptance, silence, and inaction they relied while targeting other groups. Indeed, as Michael Ignatieff observes, members of such populations are often unconvinced by any "truth" established by a criminal justice proceeding against their former leaders.<sup>73</sup>

These high profile defendants are often able to create an 'us and them' mentality, decrying their accusers in terms that will carry weight with the trial's target audience (the bystander population). If this kind of rhetoric picks up enough momentum, support for a former leader could provoke an ideological backlash against the post-atrocity regime. As Bass cautions, "Soberingly, in Weimar Germany, Allied calls for war crimes trials stirred up nationalist resentment across much of the political spectrum. And in the Ottoman Empire, anti-British backlash helped undermine the sultanate when it cooperated with British legalism."<sup>74</sup> Such is the backlash in Serbia, that even the political opponent that ousted Milošević, Vojislav Koštunica, argues, "The Hague court is not an international court, it is an American court and it is absolutely controlled by the American government."<sup>75</sup> The chasm between those states of the former Yugoslavia whose populations believe in the proceedings before the ICTY, and those whose populations do not trust the institution, is stark. A 2002 survey found that 83% of the Kosovar population trusted the work of the ICTY at that time and that 51% of the population of the Bosnian Federation felt the same way.<sup>76</sup> By contrast, trust for the Tribunal was 8% in Serbia and just 4% in Republika

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<sup>73</sup> MICHAEL IGNATIEFF, *THE WARRIOR'S HONOR* 184-86 (1998).

<sup>74</sup> BASS, *supra* note 1, at 286.

<sup>75</sup> Gary J. Bass, *Milosevic in the Hague*, 83 *FOREIGN AFF.* 82, 93 (2003).

<sup>76</sup> International Institute for Democracy and Electoral Assistance (IDEA), South East Europe (SEE) Public Agenda Survey (Apr. 4, 2002), [http://www.idea.int/europe\\_cis/balkans/see\\_survey.cfm](http://www.idea.int/europe_cis/balkans/see_survey.cfm).

Srpska.<sup>77</sup> Thus, some have argued that the record established by the ICTY may become more of “a useful foil in the hands of political propagandists to solidify a sense that their national group is a misunderstood or unacknowledged victim of the conflict.”<sup>78</sup>

This problem of persuading the skeptical population of former bystanders to atrocity is further exacerbated by the constraints the legal domain places on the kind of case the prosecution can make. In Nuremberg, questions over what was and was not *illegal* (as opposed to what was and was not *wrong*) resulted in a particularly convoluted and morally confusing justification for the punishment of those involved in the Holocaust. Chief U.S. prosecutor Robert Jackson argued:

The purpose, as we have seen, of getting rid of the influence of free labor, the churches, and the Jews was to clear their obstruction to the precipitation of aggressive war. If aggressive warfare in violation of treaty obligations is a matter of international cognizance, the preparations for it must also be of concern to the international community. Terrorism was the chief instrument for securing the cohesion of the German people in war purposes.<sup>79</sup>

In other words, ‘The oppression and murder of German Jews was wrong because it facilitated aggressive war.’ This is hardly the moral message one would have wanted to convey to the German population. Asmal et al. comment, “Such an argument placed history on the altar of prosecutorial expediency. It was a clear understatement of the place of virulent anti-Semitism as a distinct driving force of Nazism.”<sup>80</sup> While defendants rouse their supporters with political rhetoric, prosecutors constrained by the limits of the legal case at hand can struggle to articulate the evil of atrocity.

Truth commissions do not face these same obstacles. Through public victims’ hearings and widely circulated final reports, they can present balanced, but firm and coherent, moral narratives. By condemning the violations of the former opposition, as well as the atrocity-regime, TRCs can discredit the victors’ justice rhetoric of former regime leaders, and in so doing can focus attention on the massive discrepancy between the scale of the human rights violations committed by either side, rather than the fact that

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<sup>77</sup> *Id.*

<sup>78</sup> Laurel E. Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUMAN RIGHTS Q. 573, 601 (2002).

<sup>79</sup> Jackson, *supra* note 46, at 48.

<sup>80</sup> ASMAL ET AL., *supra* note 10, at 20.



only one side is being targeted with repercussions. Unencumbered by the restrictions of specific criminal cases, they can properly articulate moral outrage in a direct and impactful language. Moreover, they put the focus on the suffering of the victims rather than the grandstanding of the politicians, thus rendering denial and ideological backlash far less likely.

## 2. Moral Expressivism

Moral expressivism is distinct from education theory in that it does not aspire to change the minds of its audience, and as such, it avoids some of the pitfalls discussed above. Its leading exponent, Joel Feinberg, describes three of the core features of the theory.<sup>81</sup> First, expressivism takes it to be crucial that “the state *go on record*” condemning certain crimes and that “the law *testify to the recognition* that [those crimes] are wrongful.”<sup>82</sup> Mere verbal condemnation would fail to express adequately society’s censure; “denunciation [and] nonacquiescence in the crime seem virtually to require punishment.”<sup>83</sup> Second, the punishment of a particular criminal can provide “absolution” for non-guilty suspects by “reliev[ing] [them] of suspicion and informally absolv[ing] them of blame.”<sup>84</sup> Finally, effecting punishment “vindicates” the law by affirming that it carries real consequences. A law that is broken without consequence, Feinberg argues, loses its character as law.

However, as should be obvious given the arguments above, these concepts are highly problematic when applied to the post-atrocity context. If criminal punishment condemns those who are convicted and exonerates those who are not, post-atrocity punishment will inevitably exonerate more of those worthy of condemnation than it will condemn. If punishment is *required* to vindicate international criminal law, international humanitarian law, or even international human rights law, one might worry that the law will be undermined by the impossibility of prosecuting more than a tiny fraction of those who violate it.

Of course, the guilty avoid punishment regularly in ordinary criminal systems, so one might ask why this should be a problem particular to atrocity. The reason is as follows: in the ordinary context, when a serious criminal is not punished, it is generally not because the state decides to let her *qua* criminal remain at large. It is instead because she is tried and

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<sup>81</sup> For more detail on expressivism see Joel Feinberg, *The Expressive Function of Punishment*, in *PHILOSOPHY OF LAW* 688, 688-98 (Joel Feinberg and Jules Coleman eds., 6th ed. 2000).

<sup>82</sup> *Id.* at 691 (emphasis in the original).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 692.

incorrectly found not guilty, there is insufficient evidence to put her on trial, or she does something good to offset her crime (such as providing evidence on a superior in an organized crime ring). In none of these cases does the state endorse the crime, nor does it absolve the agent that committed the crime from moral guilt. Instead, it mistakenly fails to identify the true criminal as that agent or recognizes that her good behavior merits lenient sentencing.

The situation in a post-atrocity society is quite different. Many perpetrators of the former regime will be known human rights violators, and in many cases there would be enough evidence to convict. However, simply because of the enormous number of guilty parties, the state is unable to prosecute or punish the vast majority of those who partook in the enormities of the past regime. In most cases, then, only the leaders are punished, leaving scores of past perpetrators free to participate fully in society without censure. On Feinberg's account, this failure to punish must inevitably amount to an official absolution for the lower-level perpetrators, and an endorsement of their contributions to the atrocity.<sup>85</sup>

Moreover, a system of punishment that punishes perpetrators but not regime supporters seems, under Feinberg's theory, to officially exonerate the behavior of the complicit masses. This is the wrong moral message to send, but due to its all-or-nothing, guilty-or-innocent character, criminal punishment is unable to send any other.

Truth commissions, by contrast, can express disapproval of actors at all levels, from those who voted for a regime to those that ran it, condemning equally those acts of atrocity that were domestically legal and those that were criminal. Of course, the expression may be diluted somewhat by the absence of harsh consequences, but the best selling reports of the Argentine and Brazilian TRCs, and the daily headline news coverage of the SATRC, show that truth commissions are more than capable of impacting the public consciousness.

Punishment may be a useful conduit for moral expression and education in ordinary society where crimes are committed by individuals and small groups, but in the post-atrocity context its message gets lost amid the sheer scale of criminal participation. What is needed instead is an institution that can provide an overarching perspective on the events and behaviors that led to such massive crimes against humanity. This means focusing not on making criminal cases against specific individuals, but on exposing the overall system of atrocity, including both the roles of orchestrators *and* the participation and complicity of the masses. On this basis, moral

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<sup>85</sup> Of course, to the extent ordinary criminal punishments *are* waived for similar reasons, the same problem applies there.

expressivists should favor the TRC model.

*D. Incapacitation*

Accepting my argument thus far, one might nonetheless advocate criminal punishment on the grounds that “trials can remove dangerous leaders from politics.”<sup>86</sup> This is a post-atrocity version of the ‘incapacitation theory’ of punishment. Philosopher C.L. Ten explains, “When an offender is serving his sentence in prison, he is taken out of general social circulation and is therefore prevented from committing a variety of offences, even though he may neither be deterred nor reformed by punishment.”<sup>87</sup>

Of course, given the issue of mass complicity, for incapacitation theory to make sense post-atrocity, it must be the case that the incarceration of a few key perpetrators can debilitate the broader atrocity-movement through the courtroom equivalent of a decapitation strike. This is not an easy case to make.

First, if the atrocity movement is sufficiently strong, new leaders will arise. Thus, the prosecution of even a relatively large number of the political elite may not incapacitate the underlying atrocity movement, particularly if those prosecutions are considered unfair. Thus, the underlying ideology that gripped the génocidaires of Rwanda in 1994 continues to live on in the eastern region of the Democratic Republic of Congo, despite the prosecution of numerous leaders, both domestically and at the ICTR.<sup>88</sup>

Second, in the immediate aftermath of defeat, a leader is already at a disadvantaged point from which to ignite a comeback. With his control of the media finally broken, he struggles to regain his dominance of the political space, let alone coordinate further atrocity. Under such circumstances, far from shackling him, a courtroom provides him a powerful and much-needed platform from which to propagandize. It immediately returns him to the center of national attention, affording him the opportunity to mobilize nationalist *tu quoque* arguments to spark an ideological backlash and reinvigorate the movement that undergirded the atrocity regime.

Bass finds such an interpretation overly pessimistic. Pointing to Yugoslavia, he argues, “as obnoxious as Milosevic has been while on trial in The Hague, he would have been far worse — and more threatening politically — back in Belgrade.”<sup>89</sup> This, however, is debatable. As Bass

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<sup>86</sup> Gary J. Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 404 (2004).

<sup>87</sup> C.L. Ten, *Fantastic Counterexamples and the Utilitarian Theory*, in PHILOSOPHY OF LAW 732, 732-46 (Joel Feinberg and Jules Coleman eds., 6th ed. 2000).

<sup>88</sup> See, e.g., Chris McGreal, “We have to kill Tutsis wherever they are”, GUARDIAN (London), May 16, 2008, at 9 [G2].

<sup>89</sup> Bass, *supra* note 86, at 406.

admits, when Milošević left Yugoslavia he was already “powerless and disgraced” to the extent that “there was little popular protest at his extradition.”<sup>90</sup> Yet, as Andrew Purvis reports, “approval of the ex-President . . . doubled in the first week of his trial . . . to 20% and stayed there.”<sup>91</sup> Indeed, so powerful was Milošević’s bombast that even political opponents were swayed by his performance: “‘In principle I hate him,’ says Luka Raspopovic, 19, a student lounging by the Sava River. ‘But I am rooting for him in the trial. He’s alone against the world.’”<sup>92</sup>

When Milošević died before the end of the trial, Serbs expressed their feelings in a public outpouring of grief and support for the unapologetic mass-murderer.<sup>93</sup> Moreover, in January 2007, less than ten years after the Kosovo War, the Serbian Radical Party of Vojislav Šešelj, one of Milošević’s chief henchmen in perpetrating many of the atrocities for which the latter was charged, garnered a plurality of the national vote.<sup>94</sup> Such political success, despite the intensive application of criminal punishment to the orchestrators of Yugoslavia’s atrocities, undermines the contention that the incapacitation of a movement’s leader can serve the broader goal of incapacitating the movement.<sup>95</sup>

In short, incapacitation theory cannot apply to the post-atrocity context for two reasons. First, it is impossible to incarcerate the full range of perpetrators. Second, attempts to incapacitate the atrocity movement, through punishing its leaders, risk being tragically counterproductive.

The TRC model takes a different approach. Rather than trying to decapitate the atrocity movement, it attacks the political base from which it sprouts. Of course, it is a matter of debate whether this will ultimately prove successful if the most charismatic leaders of the former regime remain at large. I have argued above that TRCs are better at discrediting those leaders than are tribunals. However, if the political charisma of the likes of

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<sup>90</sup> *Id.*

<sup>91</sup> Andrew Purvis, *Star Power in Serbia*, TIME, Sept. 22, 2002, available at <http://www.time.com/time/magazine/article/0,9171,901020930-353524,00.html>.

<sup>92</sup> *Id.*

<sup>93</sup> As the BBC reported, “Before the coffin was brought to Pozarevac, about 50,000 people attended a memorial ceremony outside the federal parliament of Serbia and Montenegro in Belgrade. Many wept, clutching photos of the former leader and shouting his nickname ‘Slobo, Slobo.’” *Milosevic buried in his home town*, BBC NEWS, ¶ 10 (Mar. 18, 2006), <http://news.bbc.co.uk/1/hi/world/europe/4819158.stm>.

<sup>94</sup> Ian Traynor, *Nationalists triumph in Serbian elections*, GUARDIAN (London), Jan. 22, 2007, at 20.

<sup>95</sup> It is of course true the Serbian Radical Party’s electoral victory did not lead to atrocities such as occurred during the conflicts of the 1990s. However, the point here is that the popularity of the ideology that spawned those atrocities was not debilitated by the criminal prosecution of the demagogue that originally mobilized the population.

Milošević and Hussein remains a threat, then perhaps we should consider a third option — political exile.

By removing former leaders from the country and denying them the political platform of the defendant's dock, we can better attain the goals of incapacitation without risking instigating an ideological revival among the political and military supporters of the atrocity regime. Moreover, without a major political trial to distract attention and divert resources, the post-atrocity state can focus on the message of the truth commission — a message that can begin the process of diminishing the political base from which atrocity derives its nourishment.

#### *E. Victim Deterrence*

A final concern remains. Some observers claim that if we fail to punish the perpetrators of mass atrocity, outraged victims will inevitably take justice into their own hands. Given the number of victims and perpetrators involved, the resulting wave of unchecked vengeance would be severely destabilizing, possibly even provoking a spiral into civil or international war. Thus, Neuffer argues that post-atrocity punishment is essential to give “victims a sense that justice has been done and future vengeance is unnecessary,”<sup>96</sup> and Judith Shklar insists that “the only consequence of officially doing nothing [after the Holocaust] would have been to invite a perfect bloodbath . . . [it was a matter of] protecting all the members of society against themselves, against the corrosive effects of their own passion for vengeance.”<sup>97</sup>

I contend, however, that there is good reason to remain skeptical as to the victim-deterrent impact of post-atrocity punishment. Even when trials are held and perpetrators successfully prosecuted, the nature of atrocity is such that the desire of victims for vengeance simply will not be satisfied by a system of criminal punishment.

First, there is the issue of moral extremity — no adequate punishment exists for crimes of atrocity. The success of victim deterrence depends on victims being at least somewhat satisfied that ‘justice has been done,’ such that further vengeance is not necessary. But, as Rwanda’s Deputy Minister of Justice laments, “What you end up with in post-genocide society is not

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<sup>96</sup> Elizabeth Neuffer, *Elusive Justice: It Will Take an International Court to Deter War Criminals*, THE BOSTON GLOBE, Dec. 29, 1996, at D1. This argument is closely related to what Feinberg calls “the escape-valve version [of vindictive punishment theory].” Joel Feinberg, *The Classic Debate*, in PHILOSOPHY OF LAW 727, 731 (Joel Feinberg and Jules Coleman eds., 6th ed. 2000).

<sup>97</sup> SHKLAR, *supra* note 65, at 158.

justice. Perhaps we should use another word for it.”<sup>98</sup>

Second, there is the issue of mass-complicity. Even if it were possible to punish an individual perpetrator to the degree necessary to satisfy victims, the number of perpetrators walking free would render the remaining ‘justice deficit’ large enough to motivate extensive extra-judicial vengeance. The strategy of punishing the orchestrators cannot overcome this problem. As Neuffer explains with regard to Rwanda, survivors and victims “had come face to face with the genocide’s footsoldiers,” not its architects.<sup>99</sup> To them, the punishment of leaders could, at best, “provide a symbolic and not a particular justice.”<sup>100</sup> Resentment for the bureaucrats who organized the killing teams cannot realistically match the anger victims feel against the individuals who actually raped them or killed their family members.

Ultimately, the combination of moral extremity and mass-complicity means that providing a satisfying or ‘just’ outcome is beyond the capacity of any legal system, domestic or international. Indeed, despite what are widely regarded as the most successful post-atrocity prosecutions in history, anti-Nazi private vengeance was astoundingly prolific,<sup>101</sup> exemplified by a plan by Abba Kovner, former leader of the Vilna ghetto uprising, to poison the West German drinking water to kill six million Germans.<sup>102</sup>

While truth commissions cannot provide the retributive justice sought by angry victims, they can at least acknowledge and respect those victims through establishing public hearings in which the emphasis is on affirmation and understanding, rather than skepticism and debate. In addition, while forgiveness should not be a goal of post-atrocity truth commissions, there can be little doubt that the affirming nature of the SATRC played a large role in enabling a surprisingly large minority of victims to forgive their former tormentors.<sup>103</sup>

## CONCLUSION

There is an undeniable intuitive appeal to the claim that we should punish the perpetrators of atrocity. However, this intuition rests on the false assumption that atrocity crimes can be analyzed through the same lens as ordinary crime. I argue that, due to the unique features of atrocity and its

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<sup>98</sup> Quoted in NEUFFER, *supra* note 32, at 259.

<sup>99</sup> *Id.* at 376.

<sup>100</sup> *Id.*

<sup>101</sup> As Elster reports, “The number of extralegal executions after World War II in France and Italy, for instance, was around ten thousand in each country.” Elster, *supra* note 13, at 33.

<sup>102</sup> See BASS, *supra* note 1, at 305.

<sup>103</sup> See 5 TRUTH & RECONCILIATION COMM’N OF S. AFR. REP. 371-77 (Oct. 29, 1998), available at <http://www.doj.gov.za/trc/report/finalreport/TRC%20VOLUME%205.pdf>.

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aftermath, punishment cannot provide retributive justice, will not deter or incapacitate the ‘atrocious movement’ within a society, and is severely limited in its capacity for moral expression, education, and victim deterrence. To justify post-atrocity criminal punishment, a new and more specifically tailored philosophical approach is necessary. With no such justification advanced, we must take more seriously the TRC model as a superior alternative, not merely a second-best substitute for, or supplement to, criminal justice.

Of course, the TRC model has only been presented in preliminary form here. In that sense, this article must be seen as part of a larger project. My contention, which has been signaled above, but which must now be defended properly in future work, is that the TRC model has the potential to facilitate greater progress toward the primary end at which deterrence, incapacitation, and moral expression each aim — namely a reduction in the likelihood of future atrocity. There is no such thing as adequacy in the aftermath of atrocity, but the TRC model offers greater hope for a better future than does the misapplication of a system designed and suited for the control of ordinary crime.