Chapter 2
Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement

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Abstract In this chapter, I identify and critically discuss three aspects of the history and trajectory of the human rights movement from the 1970s until today: its increasing tendency toward self-critique, its roots in and ongoing struggle with a commitment to being antipolitical, and its relatively recent attachment to criminal law as its enforcement mechanism of choice. In part, I contend that the latter two aspects work in tandem to defer, even suppress, substantive debates over visions of social justice, even while relying on criminal justice systems of which the movement has long been critical. The chapter pursues this discussion through an in-depth reading of two related works by David Kennedy, the first published in 1985 and the second, which reproduces but also revisits the writing and reception of the first, in 2009. Because the pieces are primarily situated in Uruguay in 1984, it contextualizes them and my own thesis in a 25-year old struggle in Uruguay over whether to grant amnesty to military and political officials for acts committed during the dictatorship that ended in 1985.

The left lost the war. All we have now is justice.
Guatemalan Human Rights Activist, 2010

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2.1 Introduction

In 1985, David Kennedy published an article entitled "Spring Break" in the Texas Law Review, chronicling his experiences during a two-week human rights mission to Uruguay in 1984.[1] Sponsored by five scientific and medical associations in the United States, Kennedy played the lawyer in a three-member delegation that also included a physician and a writer. At the time of the trip, Uruguay was in the final months of a military dictatorship. The delegation's mission was to meet with and assess the health situation of political prisoners, especially four medical students who had been arrested the previous year. Such human rights missions were becoming increasingly common in the mid-1980s,[2] but Kennedy's approach was not. His narrative, written as nonfiction but with pseudonyms for the individuals in Uruguay, offered a keen, edgy, and self-reflective approach to the team's personal and professional encounters with both male and female prisoners with whom they met as well as with prison and other governmental officials. It also demonstrated and reflected upon the difficulty of defining the boundaries between the personal and professional. In many ways, the account called into question the innocence and politics (and their mutual imbrication) of the human rights movement, and

[1] Kennedy 1985.

[2] That said, Kennedy's delegation was the first private foreign delegation since 1978 allowed into the particular prisons in Uruguay that it visited. Breslin et al. 1984, 2. Although the International Committee of the Red Cross had visited both prisons, its reports were of course confidential. Breslin et al. 1984, 27 note 1. In the report it wrote for its sponsors, Kennedy's delegation described the government as cooperative in terms of supporting its mission to visit the prisoners, and saw such cooperation as one of several then-recent events that "raise hopes for an orderly return to democratic, civilian rule". Breslin et al. 1984, 20.

suggested ways in which the movement itself might be, what Kennedy later termed, "part of the problem".[3]

Kennedy's piece was groundbreaking. Today, such self-reflective accounts of human rights and humanitarian enterprises, as well as other more traditionally scholarly critiques of human rights law and discourse, are plentiful.[4] But in 1985, only a few years after the contemporary human rights movement had come into being,[5] Kennedy's account was unprecedented both in style and in content. As Kennedy later explained, the Harvard Law Review had initially agreed to publish the piece, but then became reluctant because, as Kennedy puts it, "[t]here was something unseemly about uncertainty in the face of suffering. To write about moral ambiguity risked sacrilege".[6] When the Texas Law Review accepted it for publication, the editors asked Kennedy to write an appendix "situating *Spring Break* in contemporary legal scholarship".[7] Apparently, the article was so unusual that it needed an explanation. Telling of the absence of critique of the human rights movement at the time, the appendix situates the work within critical legal studies and the indeterminacy critique; there is no mention of human rights or international law.

In 2009, Kennedy published *The Rights of Spring*, a short book that intersperses the 1985 story (but not the appendix) with Kennedy's musings about what happened to the human rights movement over the subsequent two and a half decades.[8] The book calls for a revisitation of the "common ambivalence and confusion, excitement, boredom, and occasional vague nausea" associated with the human rights movement in the early days from which he first wrote, before what he considers its "spectacular rise and subsequent decline".[9] For Kennedy, the movement's decline is marked by its institutionalization and bureaucratization, and its failure to represent any longer "a common global rhetoric for justice".[10] Although I disagree with Kennedy on the extent to which the movement has

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[3] Kennedy 2002.

[4] For other self-reflective accounts, see Cain et al. 2004, Fassin 2007, Orbinski 2008, Branch 2011. For a typology of scholarly critiques of human rights more generally, see Mégret 2012 (in this volume), identifying the following critiques, which I have reworded slightly: (1) human rights as indeterminate; (2) human rights as neo-colonial; (3) human rights as privileging already privileged voices; (4) human rights as substantively and problematically biased—in favor of market capitalism, individualism, rule of law; (5) human rights as institutionalized and as governance; (6) human rights as compromised politically—committed to incrementalism and tinkering—rather than revolution.

[5] Although scholars disagree about the roots of the contemporary human rights movement, I basically agree with Samuel Moyn's situation of its founding in the late 1970s, at least in or with regard to the United States, Europe, and Latin America. Moyn 2010.

[6] Kennedy 2009, 9.

[7] Kennedy 1985, 1417.

[8] Kennedy 2009. In this chapter, I cite the book, not the original article, unless some part of the article is not in the book. Still, I try to make it clear whether the part I refer to was originally written in 1985 or 2009.

[9] Ibid., 9.

[10] Ibid., 3.

declined, I do believe that together his 1985 and 2009 texts illuminate a number of significant shifts that have occurred within the movement.

In this chapter, I read "Spring Break" and *The Rights of Spring* to identify three aspects of the history and trajectory of the human rights movement from the 1970s until today, which structure the first three sections of the chapter: its increasing tendency toward self-critique, its roots in and the ongoing struggle with a commitment to being antipolitical, and its relatively recent attachment to criminal law as its enforcement mechanism of choice and for its understanding of justice. In the fourth section, I revisit the last two themes through a study of the 25-year old struggle in Uruguay over whether to grant amnesty to military and political officials for acts committed during the dictatorship that ended in 1985. In part, I contend that the early antipolitics of the movement has reemerged in the criminal justice arena, functioning to defer, even suppress, substantive debates over visions of social justice, even while relying on criminal justice systems of which the movement has long been critical.

2.2 Self-Critique and the Human Rights Movement

David Kennedy was not the first person to bring a skeptical eye to the idea of international human rights. From its first entry into international institutional discourse in the mid-1940s through the beginning of its dominance as the basis of a movement in the late 1970s, many had criticized or been wary of international human rights for a variety of reasons: its Western bias, support for property rights and capitalism, interference with local cultures, and concern for rights rather than duties of individuals.[11] Many explicitly eschewed human rights during these years for other forms of politics, namely self-determination.[12] Indeed, according to Samuel Moyn, human rights had less traction than most people assume during this

[11] As early as the mid-1940s, scholars had begun to criticize international human rights for these and other reasons. A volume edited by UNESCO published in 1949, based on a 1947 survey that it conducted of scholars from around the world about their perspectives on a declaration on human rights, demonstrates a range of these opinions. See, e.g. Hessen 1949, Laski 1949 and Sommerville 1949 (on Western bias); Hessen 1949, Laski 1949, and Maritain 1949 (on property rights and capitalism); Gerard 1949, Tchechko, 1949 and Northrop 1949 (on influence over local culture); Riezler, 1949, Gandhi 1949, Lewis 1949 and Chung-Shu 1949 (on the emphasis on rights rather than duties). Of course, if one traces the intellectual history of international human rights to the enlightenment, as some have done, critiques abound from as disparate sources as Bentham, Burke, and Marx. *See, e.g.,* Hunt 2007. See Moyn 2010, 11–43, for a challenge to such historiography due in part to its failure to capture the importance of the international aspect of the human rights movement.

[12] See Moyn 2010, 84–120, for an argument that the anticolonialist movement was a self-determination, rather than human rights, movement. For a related argument about this period and later with regard to indigenous rights, see generally Engle 2010.

time, largely because of the dominance of other utopias or visions that drove international and local social movements.

In the 1970s, however, the modern day human rights movement began to emerge, and—by the late 1970s and early 1980s—became the dominant mode of contesting dictatorships and authoritarian regimes, particularly in and regarding Eastern Europe and Latin America.[13] For a variety of complicated reasons that many have hypothesized and which I discuss in greater detail below, much of the left opposition in Latin America shifted its support from revolutionary armed struggle and socialist utopia toward what Moyn identifies as a much more minimalist strategy, that of human rights.[14] That said, Latin America "proved far more hospitable [than Eastern Europe] to the persistence of revolutionary and guerilla utopianism even as human rights took root there".[15] To the extent that some on the left did not fully embrace human rights, they nevertheless deployed it as a strategy, even if they did so alongside other strategies. They therefore learned to separate their "radical claims for social change" from their "human rights activism".[16] But, because they were using human rights, they were also not directly challenging the movement or paradigm.

I think it is fair to say, then, that in 1985, however minimalist the human rights movement might have been, there was little direct liberal or left critique of it, at least in the United States or Latin America. Moreover, there was little self-critique or questioning of what it meant for Eastern Europeans or Latin Americans to have North American or Western European interlocutors. At least in the context of Latin America, it made sense to rely on human rights organizations like Amnesty International and Helsinki Watch, precisely because they were in a position to pressure the United States, which had supported—if not designed—the overthrow of left, democratically elected governments and the rise of authoritarian regimes.[17] (The overthrow of Chilean socialist President Salvador Allende by the coup led by General Augusto Pinochet is often given as a prime and precipitating example.)

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[13] Many have theorised the reasons for the emergence of the movement at this time and what, if any, relationship there was between the pro-democracy movements in the two regions. Most trace the movement to the formation of Helsinki Watch and its many affiliates, following on the Helsinki Final Act of 1975 and the Helinki process beginning in 1977. See, e.g., Keck and Sikkink 1998, Lauren 2001, Youngs 2002, Mertus and Helsing 2006. In contrast, Moyn points to the large amount of philanthropic money poured into the cause in 1977, contending that the strength or appeal of the movement would not have been predicted in 1975: "When [the Helsinki Final Act] had been signed, no one could have predicted that Eastern bloc dissidents would mobilize in such numbers or that an American president would throw himself into the cause". Moyn 2010, 172. For discussions of the relationship in the movements between Eastern Europe and Latin America, see Moyn 2010, 133–167.

[14] Moyn 2010, 141.

[15] Ibid.

[16] Ibid., 142 (quoting Markarian 2005, 141).

[17] As Markarian puts it in the context of Uruguayan exiles, many "reevaluated the role of international organizations formerly conceived as 'tools of U.S. imperialism' such as the OAS and of allegedly 'apolitical' organizations such as AI". Markarian 2005, 177.

Many Latin American activists thus put their hope in that governmental and non-governmental activity in the United States which relied heavily on human rights. The stakes seemed too high to question the movement, the strategy or the way in which one went about participating in it.

Given this backdrop, it is both surprising and not that when Kennedy's piece first appeared in 1985, few human rights scholars or activists made mention of it. On one hand, it posed a significant challenge to the apparent consensus that had congealed around human rights practice as a strategy not to be criticized. On the other hand, there was little scholarly discussion of human rights to which he might have addressed his critique. Recall that in the appendix to the article, Kennedy himself situated the piece in critical legal studies, and not in international legal thought. Those who engaged with it in the immediate years following its initial publication did so for its use of narrative and other contributions it made to critical legal thought and methodology;[18] no one discussed it for the lessons it might teach human rights advocates or scholars. Scholars and activists working on and in Uruguay also had little apparent reason to engage with it. By the time it was published in May 1985, civilian rule had returned to Uruguay, with democratically elected President Julio Maria Sanguinetti having taken office on March 1 of the same year.

I have taught "Spring Break" to my human rights students nearly every year since 1992. For most of those years, the piece provoked intense debate. For reasons that should become clear in the ensuing discussion, some identified the piece as "daring", "refreshing", "important self-criticism", or "humanizing". Others saw it as "narcissistic", "disrespectful", "sexist", or "dehumanizing". Class debates were not about whether the piece was accurate (it was after all Kennedy's account of his own thought process, something one would be hard-pressed to challenge), but about whether he should have thought what he wrote and, more importantly perhaps, whether he should have written what he thought.[19]

Around five years ago, at least in my classes, it seems the debate stopped. Students generally agree today that the piece is riveting and an accurate reflection of tensions they themselves have experienced or that, if they were human rights advocates, they imagine they would and maybe even should experience. Kennedy identifies a similar trend in reactions to his own telling of the story:

> In the pressure cooker of academic identity politics, the whole story often seemed to be about my sexism. Torture, along with self-consciousness, faded from view. In subsequent

[18] See, e.g., Frankenberg 1988, Freeman 1988, Minda 1989, Singer 1989, Oetken 1991, Purvis 1991, Goodrich 1993. Not until the mid to late 1990s did scholars even begin to consider the work in the context of international law and human rights. See, e.g., Spahn 1994, Carrasco 1996, Abbott 1999, Howland 2004.

[19] Apparently my students were not alone in this reaction. Reflecting in 2009 on one of his own lines in "Spring Break" ("I feared that my desire to see the women prisoners, to cross the boundary guarded by these men, shared something with [the guards'] prurient fascination for our [female] guide"), Kennedy asks, "Was it wrong to think that?…In the intensity of identity politics, the flash of feminist anger that shot through the campus in the following years, I was told I should not have thought it". Kennedy 2009, 17–18.

> years, as the bloom came off the rose of human rights, whenever I taught the story, our trip seemed to foreshadow what many then were discovering about the dark sides of human rights advocacy.[20]

Perhaps, then, Kennedy's account of human rights advocacy resonates more than ever today, over two and a half decades since it was first published. But why does it not provoke in the way that it used to?

For Kennedy, the explanation is expertise. As the field became professionalised, it learned to manage and respond to the uncertainties that earlier advocates might have expressed. Advocates began to "remind one another to analyze, strategize, keep our powder dry, weigh and balance".[21] In other words, while advocates acknowledge having similar reactions to their work today as Kennedy had in 1985, they are not puzzled by them in the same way that he or others might have been in the early days. Kennedy returns to his spring break narrative in 2009, he tells us, to recall the "uncertainty, hesitation, or worry" of the early, pre-professional, days".[22] He "hope[s] that in those befuddled moments we might catch a glimpse of the elusive and heady experience of human freedom and of the weight which comes with the responsibility of moments like that", of having "the mysterious feeling of being free and responsible right now, of making it up for the first time".[23]

Having directed three human rights delegations with students over three consecutive spring breaks, from 2007–2009, I am less convinced than Kennedy about the extent to which some of those doing human rights work, at least for the first time, no longer experience those heady moments of freedom and responsibility. I find that when student delegations are involved in the "fact-finding" process, they experience the uncertainties of having entered into a world they know they will never know, of trying to make sense of conflicting narratives they hear, and of attempting to figure out how what they are listening to fits within a "human rights framework" and why it needs to. Over the course of a week of fieldwork, they oscillate between many of the feelings toward themselves, their work, and their relationships to the "victims" and "perpetrators" they meet that Kennedy so aptly describes.

That said, they also struggle with the fact that they need to find a way to write a collective report about the issues on which they are conducting fact-finding. The need to write the report often causes them, particularly as the end of the trip nears, to repress the gaps, tensions, and ambiguities within and between accounts they have heard. They find it hard to acknowledge or appreciate conflicting information from those they have come to see themselves as representing or in convincing explanations offered by government officials. They therefore become focused on collecting testimony and data that can make sense of the inconsistent information

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[20] Kennedy 2009, 97.

[21] Ibid., 98.

[22] Ibid., 99.

[23] Ibid., 102.

they have already gathered. Inconsistency and lack of clarity are no longer "facts" to be discovered in their "fact-finding missions", but problems to be resolved or explained.

To the extent that the delegation members cannot find a way to express their uncertainties and worries in the form of a human rights report, Kennedy's account of the effects of professionalism on the field seems accurate. But Kennedy in 2009, I think, might underestimate the human rights professionalism that was in fact already quite present in 1985. While human rights reports might not have been as ubiquitous or standardized at that time as they are now, a number of NGOs were engaged in the process of writing them.[24]

Although Kennedy's delegation was charged with writing an account of its trip for its sponsors, the specter of the report does not seem to have played as significant a role for that mission as it does for my students.[25] Kennedy 2009, 89–90. In part, that might be because the report the delegation eventually wrote, unlike other reports at the time and like most today, offered few recommendations to the United States or Uruguayan governments, international or regional organizations, or even the sponsoring organizations. While today many reports begin with such recommendations (and, even then, reports often used bullet points to highlight the recommendations), the report issued by Kennedy's team buries suggestions—not quite recommendations—in a conclusion. And the authors begin from a relatively optimistic perspective about the likelihood of change in the country, even while noting that "the process of democratization in Uruguay remains fragile". The latter conclusion leads to something like a recommendation, albeit not a very strong one: "The institutions involved in the mission, and others concerned about Uruguay, must continue to watch events there closely". They should also aim to support democracy by "strengthening their ties with their sister organizations in Uruguay".[26]

Regardless of the final content of the report, did its sheer existence—the formal account of the trip—permit Kennedy to write his own, self-critical account? If so,

[24] Based on the reports that Human Rights Watch includes in its historical database, the organization published at least forty-two reports between 1979 and 1986. Human Rights Watch Publications 2011. Likewise, according to its digital library of reports, Amnesty International issued at least twenty-five reports during the same period. Amnesty International Report Library 2011.

[25] That said, one of his few references to it would be familiar to my students:
So many people had told us their stories, looked to us for help, asked us to take on their struggle, to work when we got back. Even those who understood the limits of our context spoke with both resignation and hope about 'international public opinion' whose symbol we three became, if only for an instant. We kept saying that our institutions would 'remain concerned,' that we would write a report, that we would carry their story back. But three individuals cannot fulfill the promise implicit in the words 'foreign,' 'American,' 'professional,' 'authority,' 'witness'.

[26] Breslin et al. 1984, 20.

perhaps Kennedy's intervention is, if unwittingly, an early example of a particular type of splitting that now seems acceptable within the movement. That is, today, it seems perfectly appropriate for a human rights advocate to reflect critically on her work—in writing or in other ways—as long as it is done in an appropriate forum, one that does not interfere with the "real" work on behalf of marginalised individuals and groups that needs to be accomplished.[27]

2.3 (Anti) Politics of the Human Rights Movement

For many supporters of the human rights movement in its early days, the movement's strategy of minimalism and its insistence on being antipolitical were two of its greatest strengths. The two understandings were often connected. Speaking of the dramatic rise in membership in Amnesty International between the early and late 1970s and its principal activity of engaging in letter-writing campaigns to seek the release of individual political prisoners in Eastern Europe and Latin America, Moyn concludes that its minimalism was part of the appeal. At least initially, he contends, a small act of mailing a card was part of a larger move of "leaving behind political utopias and turning to smaller and more manageable moral acts".[28] That the movement largely grew up in reaction to left-wing regimes in Eastern Europe as well as right-wing regimes in Latin America meant that human rights had to provide a language that could be used to criticize states at both ends of the political spectrum. For those inside both regions, according to Moyn, human rights emerged in response to "the failure of more maximal visions of political transformation and the opening of the avenue of moral criticism in a moment of political closure".[29] Both Prague, Czechoslovakia in 1968 and Santiago, Chile in 1973, for example, suggested that revisionist socialism was no longer viable in either the Soviet or American spheres.

As already mentioned, Moyn does note that a human rights framework existed alongside the possibility of armed revolution for some time, at least in Latin America: "While human rights proved more lasting, utopia would remain 'armed' in the region through the end of the Cold War, if not beyond".[30] Instructively, he offers Uruguay as an example of a country with a persistent active left that refused minimalist and antipolitical approaches and instead called for a revolution in which "those who are exploited open up the doors of the jails".[31]

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[27] I have described elsewhere a similar splitting, in the context of strategic essentialism and in what is often referred to as "activist scholarship". Engle 2010, 10–13.

[28] Moyn 2010, 147.

[29] Ibid., 141.

[30] Ibid.

[31] Ibid., 142 (quoting Markarian 2005, 99).

Markarian, the historian on whom Moyn relies for much of his analysis of the Uruguayan left's approach to human rights, claims that much of the left in Uruguay resisted the human rights ideology because of its entrenchment in liberalism, even after significant repression had begun in the country in the late 1960s.[32] Moreover, she contends that the left actively resisted a victim-centered approach to torture until after the 1973 coup, when the majority of those in exile began to align with the international human rights movement to seek outside condemnation of the right-wing regime. Some in exile rejected what they considered "humanitarian laments" as incapable of "advancing our objectives", and called instead for political confrontation based on class struggle.[33] Yet, "the realization that space for radical activism was dwindling not only in [Uruguay] but also in Chile and Argentina, led to a slow but clear change in leftist politics, setting human rights violations at the top of their agendas".[34]

Based on Markarian's and Moyn's analysis, by the time that Kennedy visited Uruguay, the left, if it had not conceded its larger political aims, had subordinated discussion of them to human rights claims. As such, Kennedy's narrative is instructive of what was happening at the time more generally and also foreshadowed what was yet to come: human rights discourse would provide a way for liberal and left activists to oppose right-wing dictatorships without insisting or relying on the left's larger, redistributive, economic, and political agenda. Focusing on the embrace of human rights by Uruguayan exiles in search of those who could put pressure on Uruguay from the outside, Markarian says they ended up moving "from endorsing a socialist view of rights as only attainable in a revolutionized socioeconomic horizon to accepting the concept of universally held rights".[35] Speaking years later about the politics of this depoliticising move more generally in human rights,[36] Kennedy notes:

> [T]the human rights intervention is always addressed to an imaginary third eye—the bystander who will solidarise with the (unstated) politics of the human rights speaker

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[32] Markarian 2005, 4 (noting in general that the Latin American left "had previously rejected [a human rights] approach as 'bourgeois' and often opposed the main tenets of political liberalism"); 65 (describing a 1971 meeting organized by the National Convention of Workers and the national university on the relevance of human rights in Latin America and noting that "[d]espite being the subject of the conference, the great majority of the Uruguayan participants ignored the language of human rights used by international organizations…. In the final proceedings, the participants expressed that the 'real implementation of human rights will be only possible through a fundamental structural change and the exercise of power by the popular classes'".).

[33] Ibid., 99. She quotes here the Stockholm chapter of the Committee for the Defense of Political Prisoners of Uruguay, which also stated in the same document Moyn quotes above, "The problem of the political prisoners should be confronted politically, positioned in terms of class struggle".

[34] Ibid., 102.

[35] Ibid., 178.

[36] I use this terminology instructively, to emphasize that depoliticisation is a political strategy, if not ideology.

> because it is expressed in an apolitical form. This may often work as a form of political recruitment—but it exacts a terrible cost on the habit of using more engaged and open ended political vocabularies. The result is professional narcissism guising itself as empathy and hoping to recruit others to solidarity with its bad faith.[37]

This view is resonant with some of the same critique he expressed, albeit in different form, in "Spring Break" in 1985.

Despite the Uruguayan left's shift in strategies, it seems that Kennedy was able to glimpse some aspects of a pre-antipolitical project that were soon to disappear. Looking back from 2009, he notes some atypical aspects of his delegation in 1984, particularly in terms of its connection to scientific organizations: "In those days, scientific institutions often resisted engaging in human rights work because they feared it would diminish their scientific neutrality—ironically the very neutrality that might enable and legitimize their human rights work".[38] Thus, Kennedy reminds us that, despite the explicitly apolitical, even antipolitical, ideology of the human rights movement in the mid-1980s, "[i]t was not yet clear that human rights was ideologically safe, spoken in the name of a universal quite widely acceptable to their peers".[39] The scientific sponsors of Kennedy's delegation, he notes, overcame their doubts "through reliance on well-worn norms of professional responsibility to limit and channel what could be done, against the background of a rising confidence in the universality of human rights ideology". They began to see, for example, that "torture was, has always been and must always be, a matter of public health".[40]

The report the delegation submitted to its sponsors demonstrates how the delegation attempted to assuage the organizations' fears. It does so by borrowing from the antipolitical posture of human rights, which Wendy Brown describes as "manifesting itself in a moral discourse centered on pain and suffering rather than political discourse of comprehensive justice".[41] Indeed, the report makes clear that it is not meant to constitute "political advocacy". It insists that the delegation's positioning of itself as associated with "scientific and medical organizations having a humanitarian concern for human rights" was "one key to our success".[42] The report relies on medical ethics standards regarding the participation of medical personnel in torture, and on the codification of those ethics in United Nation documents. In what comes closest to the recommendations section of the report, the conclusion states "that precise ethical standards exist and must be applied".[43]

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[37] Kennedy 2002, 121.

[38] Kennedy 2009, 27.

[39] Ibid.

[40] Ibid., 28.

[41] Brown 2004, 453.

[42] Breslin et al. 1984, 21.

[43] Ibid., 20 (citing World Medical Association, Declaration of Tokyo: Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (1975).

Those ethics are not seen as political; to the contrary, they are standards that should be disseminated through the "non-political exchange [of] professional, scientific, and academic information", such as by having greater attendance of Americans and Europeans in Uruguayan conferences and vice versa.[44]

I do not mean to suggest that the report was not a negotiated and strategic instrument; it clearly was. Its strategy to bring scientific organizations on board and then use their authority to attempt to take advantage of a possible opening in Uruguay[45] relied upon the performance of a type of antipolitics. The report, by walking a fine line between appealing to these organizations through the denial of any political purpose and harnessing their authority for what would be difficult to deny were political purposes, provides important insight into a moment when the movement was not yet, as Kennedy puts it, "ideologically safe".

Kennedy's narrative account of his team's meeting with the warden at the women's prison makes clear how the delegation used the scientific nature of its sponsors to make themselves seem less threatening: "We explain that our concern is scientific and our motivation humane. We are interested in public health, not public policy".[46] He then adds a parenthetical with his own doubts about that distinction: "I wonder as I make that bald assertion what it could mean in such circumstance to say that public health and public policy are distinct. On the other hand, if our institutions did not think we could keep them separate, would they have sent us on this mission?"[47]

Perhaps the sponsors, and even at times the delegation, could become convinced that the work was not political. But at least two of the prisoners with whom the delegation met offered a different perspective. Although they, as with all of the prisoners interviewed, described horrific torture they had experienced, Kennedy describes these two prisoners—whom he calls Ramon and Francisco—as political and as fighters. Both, he notes, "focused on the political context of our visit and told of their torture rather matter-of-factly".[48] Specifically of Ramon, he says: "He seems to have used his body, deployed it, spent it. He is also an activist".[49]

Markarian identifies a similar approach to torture—as political and as a part of the battle—in her description of the resistance of many on the left to identifying as victims in the late 1960s and early 1970s, when torture was becoming a common tactic of the Uruguayan government. Indeed, she contends, "[e]nduring any suffering ranked high among the attributes of these militants". She offers the

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[44] Ibid., 21.

[45] The delegation seemed more positive about the possibility of an opening with the Uruguayan government than with the U.S. embassy, about which it was remarkably critical. Ibid., 7 ("[D]espite a request by the Bureau of Human Rights and Humanitarian Affairs that the United States embassy in Montevideo help us secure appointments and permission to visit the prisons, the embassy remained aloof and declined to help us in any way"). See also ibid., 8 ("The meeting was cordial in tone but empty of content").

[46] Kennedy 2009, 20.

[47] Ibid.

[48] Ibid., 65.

[49] Ibid., 64.

example of an anonymous Tupamaro guerilla member who "declared that 'torture was a good experience,' since 'it contributed to self-knowledge, to know how much you can resist'".[50] She also considers a 1973 letter from Communist Party leader Rodney Arismendi to a militant who had been tortured, which reads, "[a]uthentic communists behave like you did", and indicates that those who do not "win over [torture]…cannot keep on the breast the badge of the party".[51] In sum, she says, "[t]he communists and the Tupamaros expressed two common ways of talking about torture among leftists: as a badge of revolutionary commitment and as an enriching experience".[52]

While Kennedy's interviewees certainly did not talk about torture as having been enriching—and would not have because, by the time he interviewed them, human rights provided the dominantly accepted framework for considering torture and also for his mission—they had not fully given up the sense that they were in a battle, if only a political one. There was something about the posture of Ramon and Francisco that, at least to Kennedy, made their politics, as well as their torture, legible. It also made them less in need of a human rights mission:

> Ramon and Francisco seemed to carry themselves as temporarily defeated warriors in a greater political struggle, and that is how they seemed to view their stories of capture, torture, and imprisonment. Imprisoned warriors like Ramon and Francisco seemed our equals; they needed no rescue. To them we were comrades, coparticipants in a political struggle.[53]

Ironically perhaps, as the victims transformed into comrades, Kennedy notes that this connection to them "diminished my purpose".[54]

The human rights purpose reemerged when the team met with another medical student prisoner, Victor, who Kennedy describes as "a naive and sensitive man". In contrast to Ramon's and Francisco's understanding of the political need to describe their torture to the human rights delegation, "Victor seems more interested in pleading his defense, more embarrassed to be seen".[55] Victor complained

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[50] Markarian 2005, 63 (quoting María E. Gilio, "Entrevista a un tupamaro", *Marcha*, May 9, 1969, 12–13).

[51] Ibid., 64 (quoting Letter from Arismendi to Sócrates Martínez, September 1973, in R. Arismendi, Uruguay y América Latina en los años 70, 229).

[52] Ibid. For Markarian, it is important that denunciations of torture did not draw on human rights language. Rather, these attitudes were part of "a heroic language" employed by the left, which "made abuses part of their expected political experience and eluded legalistic references in order to privilege social and economic explanations". Ibid., 65. For a detailed description of the Tupamaro National Liberation Movement from 1962 to 1972, its leftist ideology and style of guerilla warfare, see Porzecanski 1974. For a discussion of the history of the Tupamaros, including their reemergence as a part of the *Frente Amplio* in the 1980s, see Weinstein 2007. Uruguay's current president, José Mujica, was a founding member of the Tupamaros. As I discuss below, he has been strongly in favor of prosecuting former military and police under the dictatorship.

[53] Kennedy 2009, 66.

[54] Ibid.

[55] Ibid., 65.

about the process by which charges were brought against him and insisted that he was not a Communist: "Sheepishly, he describes his own political acts: attending a rally, voting against the military in a recent referendum".[56] It is then that Kennedy is reengaged. He explains, "Victor, the passive victim, awakens my indignation and motivates me to act…Victor, pleading legal procedure and propriety, rekindles our involvement, somewhat dampened by our abstract political solidarity with his fellows".[57] For Kennedy, it is Victor's lack of politics, not the pain he endured, that set him apart from the others: "[His] pain comes through plainly as he details the familiar mix of blows, shocks, and other tortures. Victor, a man without politics, suffers under the harsh prison regime".[58] That same lack of politics enabled Victor, the delegation, and the Uruguayan government to act out their roles as victim, savior, savage, as Makau Mutua would describe the actors in the human rights movement over fifteen years later.[59]

If Ramon and Francisco had an opportunity to break out of the victim role—through politics—female prisoners, it seems, were not afforded the same possibility. With important insight, Kennedy notes the difficulty that the delegation members had in seeing female prisoners as political activists in the same way as they saw Ramon and Francisco. He tells of meeting Ana, Ramon's girlfriend, in the women's prison (before the delegation has met Ramon). As she described the conditions of her and Ramon's arrest, he says, "I begin to think of Ana as a student activist; her calm willingness to speak seems to reflect a self-assured politicization".[60] But as Ana began to tell the details of her torture, Kennedy distanced himself, "find[ing] her personal story too intimate and shocking to relate to".[61]

The team met with five other female political prisoners, who also described some of the torture they had endured. And, in the process of the encounters, the delegation experienced moments of solidarity with them. Yet, after the subsequent meetings with the male prisoners and while driving back to Montevideo to meet with (male) government and military officials in the capital, Kennedy considered how gender differentiation allowed the all-male delegation to exploit the spatial and temporal distance between the female prisoners and the officials: "In prison we had been with the women, the victims, and we were returning to the men, the victimizers, in Montevideo. This spatial difference was partly sustained by contrasting the sacred woman with the profane man and partly by contrasting the female victim with the male avenger".[62]

Although, as Kennedy notes, the delegation had made "elaborate efforts to connect with Ana as a person, a politico sympatico", those efforts were lost or

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[56] Ibid.

[57] Ibid., 66.

[58] Ibid., 67.

[59] Mutua 2001.

[60] Kennedy 2009, 41.

[61] Ibid., 43.

[62] Kennedy 1985, 1404. The first sentence can also be found at Kennedy 2009, 70–71.

forgotten not just when meeting with the "avengers", but with male political prisoners as well. The delegation later "reimagined Ana's torture as an abomination", making it "possible to relate more objectively to Ramon's tales. Ramon seemed subjugated, not violated. His pain was instrumental, his body political. Ana had been trespassed upon, Ramon punished".[63] As Kennedy states elsewhere in the narrative, Ana's pain seemed "extra, gratuitous, imposed".[64] She would not, it seems, ever be able to don her battle marks in the same way as Ramon; yet, that very inability made her more capable of being represented as a human rights victim.[65]

If Kennedy attends to the different possibilities for gendered victimhood under a human rights rubric, Markarian identifies differences in the approach to male and female torture victims in an earlier period. She points out that, although there was little attention to gender issues during the revolution, "women did play an important role in leftist politics and were often imprisoned, tortured, and killed".[66] Yet, "[d]enunciations of abuses against women were different to those of similar practices against men: their nakedness before police or military personnel was considered particularly outrageous and insults to motherhood were often referred [to] as especially vicious offenses".[67] Women who had been tortured did not have access, she contends, to the language of left heroism that facilitated an understanding of torture as either a sign of revolutionary commitment or an enriching experience, as described above. That is, "[i]f men had their honor to defend in public, women had to preserve their virtue from shameful exposition".[68]

If Kennedy and Markarian are right, it seems that women might have been uniquely poised to be ideal human rights victims—once the language of heroism gave way to the apolitical discourse of victimhood. Yet, as many feminists have argued, the early human rights movement did not pay particular attention to women as victims of human rights violations or to the gendered aspects of women's victimisation. Human rights NGOs claimed to treat women who were tortured or improperly detained as human rights victims in the same way as they treated men. But they were not interested in pursuing the gendered or sexual meanings of the types of torture they experienced or of acts that might have been perpetrated by non-state actors.

I would contend, however, that, as the movement has grown, sexual violence against women has come to represent one of the quintessential violations of human rights. Human rights NGOs, intergovernmental organizations, and states alike

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[63] Kennedy 2009, 72.

[64] Ibid., 63.

[65] In 1985, Ana seemed a stand-in for all the female prisoners in this regard. In 2009, however, Kennedy points out that "[t]hinking about it later, I realized we also imagined our forty-four-old [one of the other five female prisoners] as a spent warrior, different from Ana". Ibid., 72.

[66] Markarian 2005, 63.

[67] Ibid.

[68] Ibid.

condemn, at least at a rhetorical level, sexual violence against women, particularly in armed conflict. One manifestation of this condemnation, which I and others have critically analyzed elsewhere, can be found in the treatment of sexual violence in international criminal law which, as the next section notes, has become one of the primary focuses today of the human rights movement.[69]

2.4 Criminalization and the Human Rights Movement

In 1985, in "Spring Break", Kennedy discusses a meeting between the delegation and the warden of the women's prison where Ana was held. He portrays the warden, Kleber Papillon, as a staunch defender of the high-security prison of which he was in charge and which he considered to house violent prisoners. Yet, he let the delegation in, "an admission that belied his defense".[70] In one of the passages that provoked students for many years, Kennedy describes his own attempt during this encounter to imagine the warden and Kennedy outside of their professional roles: "David and Kleber relaxing around the piano. Sherry. Wives lounging on the couches. Servants spreading dinner. My effort at empathy had placed us in a television miniseries…because I, the foreign lawyer, would never find him revealed, no longer the warden".[71]

In 2009, Kennedy continues to fantasize the warden's personal life, and—as in the 1985 account—he recognises its inseparability from Kleber's professional life. In his weaving of this fantasy, Kennedy writes a damning critique of transitional justice that voices doubts about transitional justice mechanisms that few express today:

> Twenty years on, I wonder what became of our warden. Did some transitional justice procedure educate him to our universal perspective, offer him some peace? Was he made to suffer, that he might be released from suffering? This man, this manager: perhaps he was hoisted up, hair shorn, before his enemies. Did they go too far? Or perhaps he moved to the suburbs, sold furniture, raised his family, retired, died. Did he remain, in all the years that have passed, the same self, any more than I? If he was brought to account, by his son, his neighbors, by Ana and her parents, her boyfriend, something in me wishes him well. Whether he offered apologies, felt regret, or stuck with timid self-justification, rigidity, and professionalism, it all now seems to slip through my fingers, so paltry as an accounting of responsibility, the product of a later story, a later audience. Responsibility was for then. As for the strange way all of us are separate, if he can live with it, I can too.

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[69] See, e.g., Engle 2005; Halley 2008.

[70] Kennedy 2009, 34.

[71] Ibid., 33. In discussing the oscillation he experienced between relating to the warden in the warden's professional and personal roles, Kennedy notes that he was likely to place the violence in the institution when they connected in their professional roles, but in the warden personally when they were sipping coffee together (even if inside the prison). "Working with this ambiguity…I avoided both blaming the prisoners for the violence against them and openly rebuking Warden Papillon's account of their suffering". Ibid., 34.

> I hope, given the chance, I would choose not to take responsibility for desiring his confession, his punishment, his enlightenment.[72]

Kennedy's paragraph goes against a near-universal consensus among human rights activists and scholars today on the centrality of impunity to the protection of human rights. For a number of reasons I consider below, it is instructive that Kennedy did not write this paragraph in the mid-1980s. Indeed he could not have done so; it simply would not have made sense. In 1984, prosecutions were going forward against former military leaders in Argentina, and then-opposition party members in Uruguay were engaged in conversations over whether, post-transition to democracy, those in the military and police would be tried for criminal actions committed during the dictatorship.[73] But, as I discuss in more detail in the next section, the issue had largely been deferred in public negotiations between the parties. Moreover, "transitional justice" was not a term used at the time, and there were no international criminal tribunals or courts in existence.[74]

By 2009, however, both the state of the human rights movement and the state of Uruguay had changed significantly from the mid-1980s. The remainder of this section considers some of the shifts in the human rights movement. The next section turns more specifically to Uruguay.

Today's human rights movement places the fight against impunity at its center. This focus is the culmination of a governance project in which the movement has been engaged for close to two decades that puts an enormous amount of attention on and faith in criminal justice systems—international, transnational and domestic. In *The Rights of Spring*, Kennedy makes a similar observation from the vantage of 2009, when considering some of the questions the delegation had in 1985 about the effectiveness of the mission. ("After we had found the facts, would our institutions return like avenging angels? Would the 'international community'? Was history on our side? What had our warden to fear?"[75]) For Kennedy, these types of questions provided the impetus for the criminalization we see today: "In the years since, the urgency of these questions has led human rights practitioners to construct an entire Potemkin village of international courts and tribunals, stage props to instill the fear of retribution when activists speak in the name of norms".[76]

Moyn considers transitional justice as one of several examples of a "transformation from antipolitics to program" that has taken place over the years.[77] That perspective seems to accord with Kennedy's observation that "activists speak in the name of norms". At some level, I agree. The transitional justice movement does appear to be a much more maximalist—and programmatic—project than the

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[72] Ibid., 23–24.

[73] Markarian 2005, 160–169.

[74] For a genealogy of the term "transitional justice", which places its earliest use in 1992, see Arthur 2009, 329–330.

[75] Kennedy 2009, 31.

[76] Ibid., 31–32.

[77] Moyn 2010, 221.

early human rights movement. Yet, I hope to show, in the context of Uruguay in the next section and Guatemala in the conclusion, that the fight against impunity reflects and promotes an antipolitical stance that mirrors that of the early movement. In some instances, it seems to be leading to acquiescence in, if not support for, the prosecution of former state and non-state actors alike. In the context of those two countries, that means that former guerilla members might be subject to the same investigation as former military and police officers.

On one hand, this new reliance on criminal justice is a big shift from where the human rights movement started. Recall that Amnesty International's (AI) initial letter-writing campaigns in the 1960s were largely aimed at *releasing* political prisoners. And, although it almost seems too obvious to mention, *amnesty* was central to its mission. By the 1970s, AI had begun to work more broadly on the treatment of prisoners in custody, challenging detentions without trial, and ensuring the right to fair trial.[78] While some criminal justice systems might have been more suspect than others, all were considered as capable of abusing power. Today, AI consistently opposes amnesty laws for those responsible for human rights violations and, to my knowledge, the organization has not challenged the treatment of prisoners accused of gross human rights violations in either domestic or international criminal justice systems.[79] Thus, if AI is representative, the same human rights movement that has long been critical of criminal justice systems is now dependent on criminal punishment for enforcement.

On the other hand, the change might not be as great as it seems. While the early international human rights movement's focus was on issues of imprisonment and detention, it was largely concerned with those who had been wrongfully detained, or detained for reasons for which one ought not to be detained. "Common criminals" have rarely been the focus of the human rights movement, with the exceptions of consideration of the death penalty and of general prison conditions.[80] Thus, to be a human rights victim is largely to be innocent. As the discussion of Kennedy's treatment of torture in the previous section suggested, it has often been only the innocent who are seen to suffer the indignity worthy of victimhood.

As the human rights movement has become increasingly focused on criminalization, particularly by advocating for the application of universal jurisdiction and the development of international criminal law regimes, it has gone after perpetrators with a vengeance. It also has opposed, as an international legal matter, most amnesties, and has pressured transitional countries to prosecute former human

[78] Clark 2001.

[79] For examples of opposition to amnesty laws, see Amnesty International 2011a (Uruguay), Amnesty International 2011d (Yemen), Amnesty International 2011c (Libya), Amnesty International 2010b (Sudan), Amnesty International 2010a (Chile).

[80] For reports on the death penalty in the United States, see Amnesty International 2011b (United States), Amnesty International 2010a (United States), Amnesty International 2007 (United States), Amnesty International 2003 (United States). For a recent report on prison conditions, see Amnesty International 2011e (United States).

rights violators. While, during the 1990s the legality and political sensibility of both international and domestic prosecutions (and whether the former should be encouraged or required when the latter has failed to occur) were debated *within* the human rights community, today that debate has largely waned.[81] South Africa's Truth and Reconciliation Commission, for example, in which amnesty was exchanged for truth, was once seen by a sizeable number of human rights advocates and institutions as an acceptable form of amnesty, in part because it constituted neither self-amnesty nor blanket amnesty.[82] Over time, however, those distinctions have largely become eroded, with most NGOs, international institutions and courts having moved away from the position that any amnesties are compatible with human rights.

The jurisprudence of the Inter-American Court of Human Rights is instructive here. In 2001, it issued its decision in *Barrios Altos v. Peru,* which was considered path-breaking for its finding that self-amnesty laws, such as those in Peru, are "manifestly incompatible with the aims and spirit of the [American] Convention [of Human Rights]" because they "lead to the defenselessness of victims and perpetuate impunity".[83] In a subsequent case involving what the Court considered to be self-amnesty in Chile, the Court began to suggest that its analysis would extend to other types of amnesty as well.[84] In 2010, in a case against Brazil, the Court found it unnecessary to consider whether the challenged amnesty could or should be considered self-amnesty. The case posed a new challenge because the Brazilian Federal Supreme Court had upheld the law, in large part on the ground that it represented "a political decision [in] a moment of conciliatory transition in 1979".[85] The Court responded: "In regard to [arguments] by the parties regarding whether the case deals with an amnesty, self-amnesty, or 'political agreement,' the Court notes…that the

[81] For a sense of this debate through the 1990s, see Roht-Arriaza 1990, Cohen 1995, Zalaquett 1995, Cassese 1998, Scharf 1999, Minow 1999.

[82] For a lively debate over the nature of South African amnesty, see Meintjes and Mendez 2000, 88, arguing that South African amnesty "is a significant step in the evolution of domestic efforts to deal with the past in a manner that satisfies the requirements of international law," and Rakate 2001, 42, responding that South Africa's Truth and Reconciliation Commission was "totally unsatisfactory, but that it is what South Africans had to accept, because no other solution was politically or materially conceivable", and contending that victims received nothing in the way of compensation and that the perpetrators remain convinced of their innocence. For a counter to Rakate, see Meintjes and Mendez 2001.

[83] Inter-Am Ct. H.R. 2001, Case 75, *Barrios Altos* v. *Peru,* Judgment, para 43.

[84] Inter-Am Ct. H.R. 2006, Case 12.057, *Almonacid Arellano* et al. v. *Chile*, para 120 ("[E]ven though the Court notes that Decree Law No. 2.191 basically grants a self-amnesty, since it was issued by the military regime to avoid judicial prosecution of its own crimes, it points out that a State violates the American Convention when issuing provisions which do not conform to the obligations contemplated in said Convention….[T]he Court…addresses the *ratio legis*: granting an amnesty for the serious criminal acts contrary to international law that were committed by the military regime").

[85] Inter-Am Ct. H.R. 2010, Case 11.552, *Gomes Lund* v. *Brazil*, Judgment, para 136 (quoting Vote of the Rapporteur Minister in the Non-Compliance Action of the Fundamental Principle No. 153 resolved by the Federal Supreme Court).

non-compatibility with the Convention includes amnesties of serious human rights violations and is not limited to those which are denominated, 'self-amnesties'".[86]

With this position established, if arguably only in dicta, the Court was poised to face the issue squarely in 2011 in *Gelman v. Uruguay*. As I discuss in more detail in the next section, the 1985 democratically elected government in Uruguay was responsible for the 1986 amnesty law (called "*Ley de Caducidad*", or "Expiry Law"),[87] which was challenged under the American Convention in this case. Unlike in other countries in Latin America, the question whether the law should be repealed had been put to voters through public referenda, in 1989 and again in 2009. Both times, voters refused to repeal the law, placing Uruguay in a unique position among those states defending amnesty laws. In its decision, the Court reiterated its view that the prohibition on amnesty is not limited to self-amnesty.[88] It makes clear that the referenda do not constitute an exception: "[T]he protection of human rights constitutes a[n] impassable limit to the rule of the majority, that is, to the forum of the 'possible to be decided' by the majorities in the democratic instance".[89]

Some have argued that the Court's strict position against amnesty in Latin America is due to the particular circumstances of the history of military dictatorships there, and that it should therefore not necessarily be applied to those outside the region.[90] Yet, the Inter-American Court insists that its position is in compliance with other international and domestic fora. In the *Gelman* case, for example, the Court considered a variety of other institutional decisions to claim the following relatively uniform view: "This Court, the Inter-American Commission on Human Rights, the organs of the United Nations, and other universal and regional organs for the protection of human rights have ruled on the non-compatibility of amnesty laws related to serious human rights violations with international law and the international obligations of States".[91] That said, in several of the documents and decisions the Court cites, the concern seems primarily to be about amnesties that preclude investigation, not simply prosecution, of crimes. And some scholars do continue to argue that amnesties that are an important part of the truth process, such as in South Africa, are or should be permissible under international law.[92] Still, to the extent that there continue to be debates about the reconcilability of amnesties and international

[86] Ibid., para 175.

[87] El Senado y la Cámara de Representantes de la República Oriental del Uruguay, Ley N° 15.848 *Ley de caducidad de la pretensión punitiva del estado,*1986.

[88] Inter-Am Ct. H.R. 2011, Case 221, *Gelman v Uruguay*, Merits and Reparations, para 229.

[89] Ibid., para 239.

[90] See, e.g., Seibert-Fohr 2009, 108–109.

[91] Inter-Am Ct. H.R. 2011, Case 221, *Gelman v Uruguay*, Merits and Reparations, para 195.

[92] See, e.g., Mallinder 2007.

law, they are largely positioned as questions about the permissibility of exceptions to a background presumption against amnesty that is rarely contested.[93]

2.5 Uruguay and the Battles Over Amnesty

Given this near consensus against amnesty among human rights advocates and institutions, Kennedy's (2009) comment on transitional justice is particularly provocative. Ironically, one place in which it might have lacked shock value in 2009 is in Uruguay, given that in that year voters defeated by six points an attempt to repeal the same amnesty law that was later challenged in the *Gelman* case discussed above.[94]

Amnesty in Uruguay has a long and complicated history, and Uruguay is exceptional for the progression of its laws regarding amnesty for political prisoners as well as for the military, its (failed) referenda in 1989 and 2009 to repeal the 1986 Expiry Law, the way that some prosecutions have gone forward despite the law, and the legislature's recent eventual repeal of the law in 2011. The story of the birth and death of the Expiry Law sheds light on both the antipolitics ideology of the human rights movement discussed in the second section of this chapter and the movement's drive against impunity addressed in the third section.

As I have already mentioned, even before Sanguinetti was elected president of Uruguay in 1985, discussions had been taking place among representatives of various political parties and of the military—as a part of transition talks—about whether those in the military regime who had engaged in human rights violations should be subject to criminal liability for their actions. At the same time, parties on the left were largely focused on a different type of amnesty—the release of political prisoners. The two issues were intertwined in a variety of ways.

Markarian traces left support for amnesty for political prisoners back to the early 1970s, before the 1973 coup, and notes that the understanding of amnesty for some on the left was relatively broad, as "some kind of amnesty and even an implicit mutual forgiveness [were seen] as necessary steps to open negotiations among parties, the military, and guerilla groups".[95] She points to the 1971 platform of the *Frente Amplio* (a then new coalition of left-wing parties), which called for using amnesty "as a tool to reincorporate all sectors of society to legal political life…[It will] comprise all those who committed political offenses…with the aim

[93] For an example of a recent argument in favor of amnesty on utilitarian grounds, see Freeman 2010. A review of the book suggests how unusual any argument for amnesty is today. "International popular opinion now stands firmly in opposition to amnesty and transitioning societies are generally expected to aggressively prosecute individuals responsible for human rights violations". Minogue 2010, 307.

[94] 52.64 percent voted against repeal. Corte Electoral de Uruguay 2009.

[95] Markarian 2005, 133.

of transforming current political, economic, and social structures".[96] That said, Markarian notes that in the ensuing years, with increased government repression against left opposition, the left began to turn away from use of the term "amnesty". By the time of the 1973 coup, she notes, the left referred only to "political prisoners", avoiding the word "amnesty" so as not to suggest reciprocal forgiveness".[97]

In the late 1970s, however, Uruguayan exiles in Europe began to use the term again by, for example, forming the *Secrétariat International de Juristes pour l'Amnistie en Uruguay* (SIJAU) in 1977 in Paris.[98] When they did so, the meaning of the term was not clear. For instance, some connected to amnesty groups in Europe supported asylum (which would effectively constitute amnesty) for a former military official who fled Uruguay for Europe claiming that he had been punished for refusing to torture, others did not. As Markarian notes, the debate over this issue foreshadowed later discussions on what would be called "transitional justice".[99]

Although during various stages of transition negotiations in the early 1980s, amnesty both for political prisoners and for military and police involved in human rights violations were on the table, the issue of amnesty for the military and police was ultimately deferred. At least in open meetings, there was little discussion of it, in large part because it was a hot-button issue.[100] Meanwhile, even before elections in November 1984 and before Sanguinetti's term began on March 1, 1985, some political prisoners were released. Yet, proposals from both the right and the left attempting to enact legislation regarding their release had failed.

When Sanguinetti came to power, he successfully pushed for what is commonly referred to as the *Ley de Pacificación Nacional* (National Pacification Law), although its official title is "amnesty law". That law decreed amnesty for political crimes committed since the beginning of 1962.[101] While Sanguinetti had originally proposed a law that would exclude those jailed for violent crimes from the amnesty, he was unable to get the support he needed for such an exclusion. Nevertheless, the law fell short of what many on the left had called for in that it included a review of cases and a possible sentence reduction for early release, rather than unconditional amnesty, for those who had committed intentional

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[96] Ibid. (quoting the *Frente Amplio* platform).

[97] Ibid., 134.

[98] Ibid.

[99] Ibid., 136–137.

[100] There has, however, been much speculation that, behind closed doors, an agreement had in fact been made in which Sanguinetti, with the acquiescence of some on the left, agreed to grant amnesty for the military. While the agreement—called the Naval Club Pact—"had not included explicit assurances of impunity, such an outcome was allegedly arranged". Barahona de Brito 2001, 129.

[101] El Senado y la Cámara de Representantes de la República Oriental del Uruguay. Ley N° 15.737 *Se aprueba la ley de amnistía*, 1985.

homicide.[102] Still, the National Pacification Law did more for most political prisoners than grant amnesty; it also attempted to ensure their reintegration into civic, political and economic life.[103]

Importantly, the law specifically excluded "those members of the police or military, whether on duty or working on their own, who were the perpetrators, authors or accessories to inhumane, cruel or degrading treatment or to the detention of people who disappeared, or who have concealed any such conduct".[104] Once most political prisoners were released, therefore, many had assumed that prosecutions against the military would begin. Although charges were brought in a number of cases, they were stalled for a variety of reasons, including that military officers often refused to appear in person before civilian courts (sometimes at the behest of the defense minister), and that military courts challenged civilian court jurisdiction over members of the military. When Sanguinetti eventually responded by proposing two different laws that would grant unconditional amnesty for the military (either during certain periods or for all but the gravest crimes), opposition parties on both sides balked. After a series of alternative proposals and a Supreme Court decision upholding civilian court jurisdiction over the military, Sanguinetti convinced a majority of legislators (though none from the Christian Democrats or the *Frente Amplio*) to pass the Expiry Law.[105]

The Expiry Law essentially prevented the prosecution of members of the military or police for human rights violations committed prior to March 1, 1985. Although investigations or prosecutions would be permitted to proceed in very limited circumstances, the executive would be required to agree to pursue them, which is something that no president took seriously for twenty years.[106] The new

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[102] Ibid. at Articles 1, 8–10. For discussion of these provisions and of the law that Sanguinetti initially proposed, see Mallinder 2009, 30–33.

[103] Mallinder 2009, 34–35 (discussing articles 12 & 13 of the law). The law also returned all seized property and assets of those imprisoned or in exile, created the *Comisón Nacional de Repatriacón* (National Commission for Repatriation) to support returning exiles and ensured that public officials who had been dismissed because of their political beliefs could regain their former jobs or that their relatives would receive their pensions. Ibid., 35–36 (discussing Articles 24 and 25).

[104] El Senado y la Cámara de Representantes de la República Oriental del Uruguay, Ley N° 15.737 *Se aprueba la ley de amnistía*, 1985, Article 5 ("Quedan comprendidas en los efectos de esta amnistía todas las personas a quienes se hubiera atribuido la comisión de estos delitos, sea como autores, coautores o cómplices y a los encubridores de los mismos, hayan sido o no condenados o procesados, y aun cuando fueren reincidentes o habituales").

[105] This general history is relatively well-known and can be found, with some differences in emphases and detail, at Mallinder 2009; Markarian 2005; Barahona de Brito, 1997; Skaar 2011; Inter-American Commission on Human Rights 2010, Case 12.607, *Gelman* et al. v *Uruguay*, Application, paras 81–85.

[106] See El Senado y la Cámara de Representantes de la República Oriental del Uruguay, Ley N° 15.848 *Ley de caducidad de la pretensión punitiva del estado,* 1986, Articles 3 & 4. For a discussion of various efforts by President Tabaré Ramón Vázques Rosas, elected in 2005, to pursue investigations, partly by interpreting narrowly the scope of amnesty provided for in the Expiry Law, see Mallinder 2009, 65–68.

government argued that such amnesty had been assumed in the 1984 transitional agreement between the military and those political parties that participated, often referred to as the Naval Club Pact.[107]

According to Elin Skaar, "[t]he human rights community was appalled at the law and its negative consequences for the pursuit of legal justice".[108] In response, a number of human rights groups successfully mobilized alongside trade unions and politicians opposed to the amnesty to collect signatures for a public referendum on the repeal of the law. The referendum was held in 1989, and it failed by over thirteen points, with 56.7 percent voting against and 43.3 percent voting for repeal. Many explanations have been given for the outcome, from fear of military retaliation to the desire to put the past behind for a variety of reasons. As Skaar notes, however, "[s]ince no systematic academic work has been done on the political, cultural, or psychological motivations driving the outcome of the referendum, nothing conclusive can be said about why the people approved the law".[109]

Given international debates during this time period over the best means to achieve peace and democracy in transitional societies, the ambivalence in Uruguay is not surprising. And the ambivalence was perhaps deeper, even among some involved with the human rights movement, than Skaar suggests. While human rights groups might have supported repeal of the law in 1989, many on the left, including some who had employed human rights discourse during the dictatorship, in fact had concurred—implicitly if not explicitly—with the amnesty that was codified in the Expiry Law. Indeed, Markarian sees the 1984 transitional agreement's failure to ensure human rights prosecutions against the military as stemming from a series of compromises. Such compromises were made because for many people, including many on the left who had adopted human rights in exile but returned to a country where the discourse had not developed or prevailed, "finding a rapid way out of the current situation was considered more important than demanding truth and justice for human rights violations committed by the outgoing regime".[110] Ironically, the very language of human rights that the left in exile had adopted (which she equates with both truth and justice) was now "often deemed too radical to fit the leftist coalition's negotiating approach to transitional politics in Uruguay".[111] In contrast, "human rights language, once toned down and bereft of radical claims for accountability, became a useful tool for presenting the left as a reliable political actor—one that had not only endured the bulk of

[107] Indeed, the law itself states that it results from "the logic of events originating in the agreement between the political parties and armed forces in August 1984". El Senado y la Cámara de Representantes de la República Oriental del Uruguay, Ley N° 15.848 *Ley de caducidad de la pretensión punitiva del estado,*1986, Article 1 ("como consecuencia de la lógica de los hechos originados por el acuerdo celebrado entre partidos políticos y las Fuerzas Armadas en agosto de 1984").

[108] Skaar 2011, 145.

[109] Ibid., 147.

[110] Markarian 2005, 167.

[111] Ibid., 168.

repression by the military but that was also willing to give up on revenge and embrace democratic politics".[112]

Whatever the motive might have been for some to negotiate away criminal accountability, Uruguay was not unique in passing amnesty laws during this period. In its region, Argentina, Chile, Brazil, and Peru passed similar laws.[113] While in ensuing years, some of those countries repealed their amnesty laws—through legislation or as a result of constitutional or Inter-American Court decisions (or a combination)—Uruguay continued to put the question of repeal to popular vote. Indeed, Uruguay seems to be "the only case in world history in which the people of a democratic country have ratified a law granting the military impunity through a referendum".[114] When it did so for the second time in 2009, it was clear that the consensus among human rights NGOs and institutions was that the law violated international law. Yet, the majority of the electorate voted against repeal, in part because, since 2005, President Tabaré Vásquez, former Tupamaro and the first president elected from the *Frente Amplio*, had—unlike any other president—been approving the launching of investigations under the exception in the law discussed above.[115] Indeed, former president Juan Maria Bordaberry (1971–1976) and former head of the military junta and de facto president General Gregorio Alvarez (1981–1985) had both been arrested and prosecuted for crimes committed during their rule.[116]

Still, that voters rejected repeal came as a surprise to many, particularly because in the same year voters elected the *Frente Amplio*'s candidate, José "Pepe" Mujica, as their president. Mujica is a former Tupamaro guerilla leader, and he opposed the 1986 Expiry Law.[117] Moreover, the Supreme Court had recently unanimously

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[112] Ibid., 175–176. The refusal to push for accountability during the Naval Club Pact reappeared in the electoral campaign that elected Sanguinetti in 1985. According to Barahona de Brito, "although expressing sympathy with accountability, [the Blancos and the *Frente Amplio*] did not consistently or determinedly champion it". Barahona de Brito 2001, 127.

[113] For Argentina, see El Senado y Cámara de Diputados de La Nación Argentina, Ley 23.492 *Ley de punto final*, 1986 and El Senado y Cámara de Diputados de La Nación Argentina, Ley 23.521 *Ley de obediencia debida*, 1987. For Chile, see La Junta de Gobierno de Chile. Decreto Ley 2.191 *Decreto ley de amnistía*, 1978. For Brazil, see Congresso Nacional do Brasil. Lei 6683 *Lei da anistia*, 1979. For Peru, see El Congreso Constituyente Democrático, Ley 26.479 *Conceden amnistía general a personal militar, policial y civil para diversos casos*, 1992 and El Congreso Constituyente Democrático, Ley 26.*492 Interpretación y alcances de la ley de amnistía*, 1995.

[114] Skaar 2011, 146.

[115] See discussion of Article 4 of the law in *supra* note 106 and accompanying text. Although Vásquez opposed repealing the law, he did so on the ground that he could and would continue to pursue convictions under Article 4. Mallinder 2009, 65–66.

[116] For discussion of the bases of the charges and convictions, see Galain Palermo 2010, 607–609, 616. Bordaberry died in July 2011 under house arrest after having been sentenced in 2010 to thirty years.

[117] Skaar 2011, 185.

found the law unconstitutional in a case that the (previous) president had not pursued because he contended it did not fit under an exception provided in the law. The ruling, however, only applied to that particular case, and did not overturn the Expiry Law.[118] The task of repealing the law, it seemed, would be left to the voters.

I have already revealed at least part of the end of the story. In February 2011, in the *Gelman* case discussed in the previous section, the Inter-American Court of Human Rights found the Expiry Law to violate the American Convention, notwithstanding the democratic vote supporting it. In May 2011, however, a subsequent Supreme Court decision, in contrast to the direction the Court seemed to have been heading, handed a defeat to those who were pushing for prosecutions. The Court refused to classify forced disappearance as a crime against humanity or a gross human rights violation and also found it barred from consideration as a common crime because it was not listed as a crime in the criminal code until 2006.[119] In late October 2011, President Mujica signed legislation that effectively repealed the law. Had the legislation not been passed or signed, some were concerned that the Supreme Court might use the statute of limitations on common crimes to bar further prosecutions after November 1, 2011.[120] The new law responds to this and other concerns by reinstating the possibility of prosecution for all crimes committed as acts of State terrorism before March 1985, and by declaring that such crimes constitute crimes against humanity under international law treaties to which Uruguay is a party.[121]

As Uruguay moves forward, in step with international standards against impunity, a number of questions are raised that have implications more broadly for the meaning of transitional justice. In one of the first news releases of the eventual repeal of the Expiry Law, the following was reported:

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[118] Ibid., 183-84 (referring to Suprema Corte de Justicia de Uruguay, *Nibia Sabalsagaray Curutchet,* Sentencia no. 365/09 (October 19, 2009)). Two subsequent decisions of the Court, one in October 2010 and another in February 2011, also found the application of the Expiry Law unconstitutional. Brunner 2011, note 19 (citing cases) and accompanying text.

[119] Brunner 2011, notes 20–22 and accompanying text (discussing Suprema Corte de Justicia de Uruguay, *Gavazzo Pereira, José Nino y Arab Fernández, José Ricardo,* Sentencia no. 1501 (May 6, 2011)). For Brunner, the recent Supreme Court cases as a whole suggest that "[t]he Uruguayan judiciary's approach to cases involving human rights abuses committed during the dictatorship appears to be as equivocal as that taken by the executive".

[120] Ibid., notes 23 and 24 and accompanying text.

[121] El Senado y la Cámara de Representantes de la República Oriental del Uruguay, *Ley de Imprescriptibilidad*, 2011, Article 1 ("Se restablece la pretensión punitiva del Estado para todos los delitos cometidos en aplicación del terrorismo de Estado hasta el 1° de marzo de 1985); Article 3 ("Declárase que, los delitos a que refieren los artículos anteriores, son crímenes contra la humanidad de conformidad a los tratados internacionales de los que la República es parte").

> Retired Colonel William Cedrez president of the Military Club, cautioned if amnesty was eliminated the military was ready to denounce former Tupamaros, an armed movement in which Mujica was involved, as many of them never went to trial for their crimes because they either fled the country or were not prosecuted.[122]

What will or should be the position of the human rights movement on whether to investigate former members of the guerilla? If it takes an antipolitical stance, might it need to support such investigations and perhaps even repeal of the 1985 amnesty law for political prisoners as well? Where would the cycle end?

One one hand, it seems that criminal prosecutions on both sides would strip both the right and the left of their historical and ongoing political positions. The drive against impunity, as with human rights discourse more generally, often serves to submerge the reasons why on side initially engaged in revolutionary struggles as well as why the other side might have found the oppositional ideas so threatening.[123] On the other hand, were those on the left to attempt to revisit issues of distributional justice, might there be a way to do so without simply representing themselves as victims of human rights violations? If they were to be reclassified as potential perpetrators through the prospect of criminal investigations against them, might that paradoxically provide them a way to articulate the aims of their struggles and consider the extent to which even former guerillas in power today might have lost sight of the distributional aims that originally motivated them?

With regard to criminal justice, how should the prosecutions move forward? Is there a way in which they might avoid what Daniel Pastor has identified as *neopunitivismo*, "the renewed messianic belief that criminal power *can and should* be extended to all corners of social life, to the point that it completely obscures the civil and constitutional protections in favor of criminal law".[124] In an article speaking mostly of post-amnesty-repeal trials in Argentina, but also of the jurisprudence of the Inter-American Court of Human Rights in striking down amnesty provisions, Pastor contends that "[w]e have elevated "the penal" to a level of a social "painkiller" the likes of which have no precedence".[125] He is particularly concerned about what he calls the "'relaxation' of the restraints on the penal

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[122] La Voz Interior, 28 Oct 2011. In the days following the repeal, numerous newspapers in Latin America and the United States repeated Colonel William Cedrez's words. But, since then, no other member of the military has publically dencounced former Tupamaros and no cases have been filed against them.

[123] In contrast, Markarian discusses how, in the early 1980s, many leftists gave testimonies that, rather than identifying those responsible for human rights abuses, "pursued…goals somewhat independent from the issue of criminal prosecutions". Some of these appeals, she contends, differed from human rights language "in highlighting the ideological and political attachments of those who endured abuses, as well as in connecting human rights claims with their fight for further political and social change". Markarian 2005, 169–170.

[124] Pastor 2006, 1. ("*Neopunitivismo*, entendido ello como corriente político-criminal que se caracteriza por la renovada creencia mesiánica de que el poder punitivo *puede y debe* llegar a todos los rincones de la vida social, hasta el punto de confundir por completo, como se verá más abajo, la protección civil y el amparo constitucional con el derecho penal mismo".).

[125] Ibid.

system", in which those accused of grave crimes get less protection than other criminal defendants.[126]

After noting that "[t]he criminal justice function of human rights as of late has been entirely inverted in that the protection of the accused has ceased to be a point of attention",[127] Pastor contends that "uncontrolled and unlimited, 'the penal' has disrupted and transformed the human rights movement, discrediting it completely".[128] Although I do not agree with him that the human rights movement is in fact discredited by *neopunativismo* (to the contrary, I think it is a way in which it has legitimized itself within the international legal sphere), I do agree with Pastor's observation of the inversion of positions. Given the wide documentation of the injustices that flourish in nearly every criminal justice system in the world, particularly for already disadvantaged groups, why would the human rights movement rely on such a system?

2.6 Conclusion

I conclude with two accounts of justice and transition that I believe illustrate a number of the tensions I have described above. The first centers around current events in Guatemala. The second comes from Kennedy.

At the end of 2010, I met with family members of a number of those disappeared during years of state repression in Guatemala. Many of them are now working with Guatemalan prosecutors to investigate the disappearances of their loved ones. Unlike Uruguay's Expiry Law, Guatemala's 1996 National Reconciliation Law, which grants some forms of amnesty, specifically excludes crimes that violate fundamental human rights. It lists genocide, torture and forced disappearance as examples of such violations.[129] Yet, for many years, there was little political will to engage in such investigations and little assurance of protection for those who investigated, prosecuted, judged or served as witnesses. Moreover, when there were prosecutions, courts would often find that the prosecutions did not fit the exceptions to amnesty granted in the law. As in Uruguay, after the left (leaning) government was elected, in this case in 2007, the number of prosecutions increased. Moreover, the Constitutional Court rejected claims to

[126] Ibid., 3. Other scholars have also begun to make observations about the illiberality of international criminal law more generally. See, e.g., Robinson 2008, 927 (specifically asking: "How is it that a liberal system of criminal justice—one that strives to serve as a model for liberal systems—has come to embrace such illiberal doctrines?").

[127] Pastor 2006, 2.

[128] Ibid., 3.

[129] El Congreso de la República de Guatemala, Decreto N° 145–196 *Ley de reconciliación nacional*, 1996, Article 8.

amnesty in important cases.[130] And, as in Uruguay, the human rights community in the country rallied around such prosecutions.

I spoke with an activist who was considering opening a case against the National Police for the torture of one of his siblings who had fought with the guerilla. I asked him whether he was concerned that transforming his brother into a victim might take away from the very politics for which his brother had been willing to fight and die. As we began to talk about the substantive agenda of the (old) left in Guatemala, and about its aim of a massive redistribution of wealth that is still so badly needed in the country, the activist made clear he understood my question. But his response was clear. "The left lost the war. All we have now is justice". By justice, he meant individual prosecutions.

Less than one year after this conversation, former General Perez Molina was elected president of Guatemala on a right-wing platform. Given his background and connection to many former military and police officers whose prosecution has been sought or was underway, human rights activists feared he would attempt to put the brake on the prosecutions.

Even before Perez Molina took office, however, he announced his public support for Attorney General Claudia Paz y Paz, who had been responsible for many of the prosecutions under the previous administration. Within Perez Molina's first two weeks in office, Guatemala appeared to be moving forward on a path against impunity. A judge had ordered former military dictator Efraín Ríos Montt to appear in court on an investigation of genocide charges, and it seemed that the new president would make no effort to interfere in the case. Moreover, legislators from the president's conservative party initiated Congress's ratification of the Rome Statute, which means that Guatemala has now consented to the jurisdiction of the International Criminal Court.

It would appear, then, that in Guatemala (at least at the time of the writing of this chapter—at the end of January 2012), the idea of criminal prosecutions for human rights violations has gained mainstream, even right-wing, support. To the extent that human rights has become the *lingua franca* of political discourse both domestically and internationally, so has the fight against impunity.[131] And, as in Uruguay, it might cut both ways in Guatemala. At the end of 2011, family members of former military personnel and businessmen in Guatemala brought criminal complaints against former guerillas, including relatives of Attorney General Paz y Paz, for crimes they say were committed during the war.[132] They accused the Attorney General of bias in her investigations and prosecutions, maintaining that crimes had been committed on all sides. Perez Molina's support

[130] See, e.g., Impunity Watch 2009 (reporting the Constitutional Court's decision regarding the El Jute massacre to reject the appeal of Guatemalan army officer Marco Antonio Sanchez Samoa, who claimed he was entitled to amnesty under the 1996 law).

[131] That said, also at the time of writing of this chapter, Judge Baltasar Garzón was being tried in Spain for investigating crimes perpetrated by the Franco regime during the Spanish Civil War that were covered by a 1977 general amnesty.

[132] Valladares 2011.

for Paz y Paz was important with regard to the bias allegations, but indications are that she might counter such accusations by ordering investigations into the actions of the former guerillas. Prosecutions are the new site of political struggle; what type of justice they are likely to exact, and for whom, is yet to be seen.

After fantasizing the life of the prison warden in 2009 and the effect that transitional justice might have had on him, Kennedy turns back to Ana, one of the prisoners under the warden's control. He imagines the relationship between her well-being and the warden's punishment, and writes:

> I hope Ana has found peace, love, power. Though I must say, she seemed remarkably at peace when we met, in love, her life transformed by her exercise of power. I would not want to freeze her in a story of suffering that could be unlocked only by some confession from the man who was once her warden. Doing so would make her live her time in prison forever, would render our warden a strange frog-prince, alone able to grant her closure and set her free.[133]

Kennedy reminds us of some of the reasons that many once gave, including in the human rights movement, for amnesty, for moving on. If, after all these years, the state were to decide to prosecute the prison warden, should Ana be given a meaningful choice about whether and how to participate? Would a refusal on her part to assist with the investigation be considered a political act? Would it mean that she were against justice?

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[133] Kennedy 2009, 23–24.

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