

## Framing Trials for Past Abuses Through an “Educative Dialogue”: Recovering the Formative Role of Conflict in a Democracy

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Various thinkers of transitional democracy have attempted to justify trials for past state-sanctioned abuses by pointing to their ability to pedagogically showcase the principles and benefits of deliberation.<sup>1</sup> Such trials are thought to stage a public forum where post-conflict disagreements can be conciliated through an “educative dialogue” sustained by the consensual regulative principles inherent in court procedures. In this essay, I argue that an interpretative model that seeks to justify and understand such trials by emphasizing the effects of an “educative dialogue,” that strives for social unanimity and mutual understanding, overlooks the formative pedagogical role that conflict plays in a democracy. I unravel this point by critically engaging with the conceptual shortcomings found in the work of Mark Osiel and Carlos Nino, two legal thinkers who respectively develop a deliberative pedagogical proposal from their reading of the 1985 Trial of the Military in Argentina.<sup>2</sup> Given that their interpretation draws on certain philosophical assumptions regarding the way in which democracy and education are linked through deliberation, I begin with a gloss on how this link is generally conceived. I then examine how deliberation is envisioned by “transitional scholars” who concern themselves with the educative role that criminal trials play in a new democracy. Following my working through of Osiel and Nino’s claims, I utilize “radical democracy” theory to offer another reading of the Trial of the Military, one that necessitates a more dynamic sense of the pedagogical and can account for the formative role of conflict and exclusions in reproducing and sustaining democratic subjectivity.

### DEMOCRATIC DELIBERATION AND EDUCATION

Both democratic deliberation and education are thought to provide an index and entry to the other through their social and interactive dimension. They are mutually presented as a process of communication and joint participation through which the discovery and reconstruction of a common task is undertaken. Varied thinkers such as Amy Gutmann, Dennis Thompson, Benjamin Levin, and Stephen Macedo believe that at the core of both deliberation and education we find an emphasis upon a shared social experience, one that supposes that people can change and grow in understanding through the active exchange of ideas.<sup>3</sup>

The dynamic process of participants shaping and transforming their position on an issue through deliberation and collective learning sharply contrasts with the prevalent “aggregative model” of defining democracy. In this model, individual interests are aggregated through the mechanisms of strategizing, coalition building, and voting, consequently rendering democracy — as C.B. Macpherson critically describes — into merely a means of registering “the desires of people as they are, not to contribute to what they might be or might wish to be.”<sup>4</sup> Stripped of its dialogical dimension, democracy is thought to simply become a market mechanism:

voters are consumers and politicians are entrepreneurs. In considering only how an already constituted interest group matches or instrumentally directs itself towards a desired policy direction, the aggregative model is unable to account for how interests and preferences are pedagogically formed and often re-formed through dialogue and the sharing of public aspirations.

By highlighting the educative-dialogical dimension it is thought that we can bring into focus the ways in which those who are likely to be affected by an outcome gather to discuss, shape, and possibly expose themselves to *learning* something beyond their initial position. This affords greater democratic legitimacy than the aggregate model, since there is an obvious legitimacy from joint decisions that emerge from an open and inclusive deliberative process that not only encourages one to express one's opinions but also obliges one to rethink and rework them so that they are publicly defensible and intelligible. Learning interpersonal skills of discussion, negotiation, understanding, and respect for opposing views becomes critical for deliberation to be, not only effective, but also fully legitimate as a public discourse in a democracy. Thus, democratic education often aims to foster in learners the capabilities and dispositions to partake in such deliberations.

Deliberative democrats thus appreciate that public institutions — such as schools, but not just schools — are influential sites that function to reproduce social life in overlapping networks and civic associations that extend beyond the confines of the market place and family. Our ability to deliberate as socially uninhibited and equal citizens can be fostered through public institutions that allow us to encounter how our own positions are not uniquely reasonable or without social effects. Facing contrasting ideas and having to rationally justify our positions amid public forums consequently nurtures in us a means of living with others in mutual (rational) respect, thus helping forge a civic-space.

In what follows, I trace the utilization of these ideas through another register, namely, through an interdisciplinary field that considers how trials for past abuses enact an educative deliberative forum.

#### EDUCATION, DELIBERATION, AND LEGAL TRANSITIONAL STUDIES

The field of “transitional studies” concerns itself with the complex process of shifting from an authoritarian rule to a democratic one. A conglomeration of political thinkers and social legal theorists in this field have grappled with the *social educative role* that criminal trials play in societies reckoning with the abuses of a prior regime.<sup>5</sup> Their approach assumes and incorporates a number of the same assumptions regarding deliberation and education glossed above.

According to these scholars we can discern certain pedagogical outcomes from trials dealing with past abuses. For instance, not only can such trials teach and cultivate a shared historical narrative of the past, but they can also provide (or so it is thought) a pedagogical occasion for recognizing and commemorating victims of past violence. Moreover, such trials are thought to stage a communicative process for building and securing solidarity around the deliberative and institutional virtues of liberal democracy. It is thought that the very form and procedures structuring the

trial itself, the way in which each party comports itself and tells their story through the rules and procedural norms of the court, reiterates and helps to inculcate the liberal democratic virtues of toleration, reciprocity, and civil respect. While there might be failures and compromises of law in such pedagogical trials, the important point, according to this reading, is to pay attention to the ways in which such trials foster collective memories, experiences, and normative shifts that help bind a society together in the extraordinary period of a transition.

We are clearly dealing with a different analytical appreciation of the law's role than what is conventionally understood. For suggesting that the law is responsive to extraordinary times, or that it pedagogically participates in cultivating normative shifts, profoundly stretches the commonly understood significance of the law as a measure of order and stability that stands independently from societal influences. Admittedly, then, there can be no simple compatibility between the rule of law (as an insurer of settled norms) and such pedagogical trials, which are part of the vast social endeavour to transform and re-legitimate previously defunct institutions and norms.<sup>6</sup>

How are we to understand, then, the role of law in societies undergoing transitions, during a time when a society cannot properly claim the law as an established ground, or as an insurer of continuity or settled norms? The suggestion, implicitly at work in this literature, is to understand the showcasing of law during a transition as a performative or pedagogical instance that draws on the *symbolic* sense of the rule of law, rather than on its actuality. In other words, there is an appreciation here that, in a transitional society where institutions have to re-ground their legitimacy after periods of social upheaval, the rule of law is called upon as a performative proposition, as a necessary fictional precedent that helps to stabilize and authorize the normative shifts underway during such times. Invoking the rule of law as an exemplar — that is, invoking it symbolically pedagogically during such an exceptional period — paradoxically ensures both a measure of continuity (through the appeal to a non-arbitrary set of legal norms) and yet at the same time helps to facilitate normative change.<sup>7</sup> The law is thought to play an explicitly theatrical pedagogical role here, lending its symbols and rituals of legitimate measured change to the uncertainty gripping the transition period, and in so doing teaching us about the rule of law.

This is perhaps one of the more productive points implicit in the work of those who underscore the pedagogical dimension of law, since it opens up messy questions around the symbolic, contingent, and performative educative role that law needs to play when, apparently, there are no established foundations or precedents. Rendering these issues explicit can conceivably make us sensitive to the contradictions, tensions, and inevitable exclusions underlying the need to establish a new order and forge operative norms during such an exceptional moment. However, where the analysis becomes problematic is when such trials are thought to provide an exemplary educative model that can teach us how to deliberate about the divisive past so that we can enter into an “edifying conversation” with normally unwilling participants.

Drawing largely from the example of the 1985 Trial of the Military in Argentina, the respective work of Mark Osiel and the late legal philosopher Carlos Nino offer perhaps the most exemplary and sustained analyses of this position. While Nino and Osiel share many of the same assumptions about the pedagogical effects of such trials, they differ in emphasis as to the role that the “substantive” dimension plays in the deliberative process. For Nino, the Trial of the Military stages a formal conciliatory dialogue that can guide historical interpretation and public understanding in such a way that a “collective consciousness” around the “truth” and the “public good” can be derived.<sup>8</sup> Whereas Nino emphasizes the way in which the public dialogue inspired by the Trial teaches a rational moral consensus to the divisive events of the past, Osiel for his part brackets such assumptions. Instead, he claims to focus on how the formal procedures of the Trial enables and guides an educative dialogue between exemplary adversaries so that “even the deepest disagreements are channelled into a single conceptual framework, providing common terms” but not necessarily a consensus on the good (*MA*, 49). Rather than garner a sense of solidarity forged around certain core values that may be uncovered through the Trial, Osiel forefronts a solidarity that ensues from commonly adhering to rules on how to proceed with a civil discussion of deeply divisive issues. Writing about his differences with Nino’s interpretations of the Trial of the Military in Argentina, Osiel tells us that: “The solidarity that I anticipate (and observed there) in contrast, presumes no such agreement, but merely civil engagement in disagreements by way of procedures entailing display of respect for one’s adversary, respect that may be entirely procedural (and a matter of rule following) at the outset” (*MA*, 48).

Whether it is for the loftier goal of forging a “collective consciousness,” as Nino would have it, or whether it is simply to initiate, as Osiel concedes, those procedural norms structuring the public engagements of former adversaries, both interpretations esteem the pedagogical *model of dialogue* (utilized by the trial) as the means of overcoming conflict and securing democracy amidst the precarious state of transition. For these thinkers the model of dialogue extracted by the trial becomes the means of learning to translate conflict into “disagreement,” into a matter of misunderstanding that can be reconciled. This is ultimately a hermeneutical lesson, one that seeks to overcome and settle the social disruption or dissensus at play back into the folds of mutual understanding. The significance of disagreement, for both Nino and Osiel, thus lies in how it draws out different positions so that they may modify and act on each other, setting in motion a process where conflicting presuppositions can be gradually worked out and settled. According to Osiel, “although often unpleasant and divisive in many ways, the [disagreement encountered through dialogue] creates a kind of joint understanding: that we have both faced the issues dividing us, that we are united in caring deeply about them and about what the other thinks of them” (*MA*, 43). The trial envisioned as a hermeneutical theatre is thought to provide a forum where various groups can agree to submit their contrasting memories and allegiances to the mediation of a shared normative order that establishes mechanisms to dialogue and solve eventual conflicts peacefully, consequently helping to consolidate the new social order.

Inasmuch as this public process depends on working through contrasting memories of the past wrongs, such trials, according to Osiel, become secular rituals of commemoration, a collective site for remembering and learning about the past (MA, 6). However, whereas conventional commemorative activities often invoke memories of social trauma through an overly affective structure of identity that tends to be celebratory and divisive, trials for administrative massacre, which place emphasis on the deliberative dialogic process for organizing memory, provides a more tempered, dialogically educative means of reaching broader solidarity and reconciling social strife.

What can be so problematic with this reading? Do we not have a type of agonistic educative democratic forum here? That is, do we not have here a means of teaching and learning how to render the *enemy* into an *adversary*, into someone who can, through common rules, if not a set of minimal core values, sit down with us and engage us through their differing terms?

#### THE LIMITS OF DELIBERATION: RECOVERING THE POLITICAL PEDAGOGICAL DYNAMICS

The seemingly benign emphasis on dialogue offered by both Nino and Osiel needs to be critiqued on various levels, lest we miss the specificity of the *political*. Hence, at one level we need to take issue with their under-theorized claim that such trials can redirect memory, with all its messy affects and identifications, away from the realm of contestation towards the realm of orderly deliberation. Their rendering of memory into a “safe and proper object” through deliberation cannot account for those instances of excess, those other dejected ways of (non)speaking that, in their very incapacity to enter into an “edifying dialogue,” signal what cannot be settled through deliberation, what must be otherwise remembered beyond this forum, and what remains irruptive and disruptive of the present settlements. At another level, which I unravel below, we need to account for how the educative-dialogical model that they celebrate and claim to have observed in Argentina, actually provides little or no context, consequently abstracting the *specificity* of the event and foreclosing any appreciation of the constitutive role that conflict plays with the turn to democracy. To better situate this critique, I need to gloss over the rather complicated legacy of the Trial of the Military in Argentina.

With the turn to democracy in Argentina, a legal process was set in motion in order to publicly account for the dictatorship’s repressive strategy of disappearances. Although responsibility for the disappearances was spread widely throughout the ranks, the 1985 Trial of the Military was intended, by the government of Raúl Alfonsín, as an exemplary educative trial limited to the most senior level of the military. However, public resolve for more trials grew as it was seen to be an effective means of marking and gaining answers to the fate of those disappeared, answers which the military was not willing to divulge voluntarily. Faced with an increasing number of trials against a military that was once again closing ranks and publicly making gestures to derail the turn to democracy, Alfonsín legislated a series of amnesty laws that sought to contain further prosecutions. In 1990, in the name of

reconciliation, the convictions and precedent established by the Trial of the Military were further eroded and overturned through a set of pardons issued by Alfonsín's successor Carlos Menem.

It is revealing that Nino and Osiel's reading provides no sustained analysis of how the amnesty laws, which sought to contain further trials, refract and impact on the actual legacy of the Trial. Their work makes no attempt to access the type of lesson that could be garnered from a trial whose precedent and justification for further prosecutions was actively eroded and overturned by the state in the name of reconciliation. What could it mean to reconcile public disagreements through dialogue in a context where the state actively works to close down the demand for law? Who specifically desires to dialogue and learn how to overcome differences under these terms?

Both thinkers leave these issues unspecified and unexplicated. The model of dialogue that they extract from the Trial thus remains an abstraction — a *pure form* — that never references the historical context. While the model of dialogue that they invoke entails its own intrinsic normativity for learning how to overcome conflict, it stops short of understanding the crucial feature of dialogue “as a situated practice, one implicated by the particulars of who, when, where, and how the dialogue takes place.”<sup>9</sup> Without an appreciation of the specificity of dialogue a problematic relativization ensues, collapsing the distinct ways in which various subjects are affected and positioned by the closing down of further trials. The invitation to settle disagreements through dialogue, especially in the transitional context, is never a simple or neutral matter. For it is never purely a momentary engagement between two or more reasonable people who just misunderstand each other. Rather, it is a discursive relation situated against the background of previous relations, which are not simply matters of rational choice.<sup>10</sup>

In truth, there is something rather odd about the desire to extract an exemplary educative-model of dialogue from the 1985 Trial. Osiel claims that the Trial “enabled a discussion to occur that would otherwise never take place” between “parties that would otherwise refuse to sit down together” (*MA*, 49). While certainly there was an “orderly sequence of exchanges” structured through the Trial's procedural norms, a “discussion,” let alone an exemplary one as Osiel envisions it, never really took place. For a discussion, where those affected by an outcome gather to discuss, give shape, and possibly expose themselves to *learning* something beyond their initial position, seems unlikely to ensue in the adversarial setting between defendants and prosecution. In a courtroom setting such a discussion would appear rather thin, if not impossible, given the constraints and consistency in which parties must state their case through norms of argumentation designed to satisfy the law and not the terms of an edifying educative encounter.

Nevertheless, Osiel insists that courtroom deliberation is capable of staging a mutual dialogue where, “through this process, we can learn to overcome dangerous misconceptions about ‘the other’” (*MA*, 42). But this ignores how in fact the defence of the Junta leaders, and their supporters beyond the courtroom persistently refused

to revise or modify their position regarding the so called, “enemies of the nation.” Believing that they, the naturally appointed “guardians of the nation,” fought a “righteous Christian war” against “the evil of communism,” they often maintained that they were ultimately not answerable to the “secular and arbitrary” laws of the new democracy.<sup>11</sup>

In this context, what is to be gained by proposing that a trial is a useful way to begin a discussion with an initially unwilling adversary? What exactly is socially edifying about a discussion between perpetrators and victims? Nino and Osiel never address these issues, for a simple equivalence between the participants is presumed in their pedagogical model. Given the reassertion of the military in politics, and the appeasement of the military by the state with its amnesty laws, we can appreciate that many sectors in civil society, committed to democratic politics, obviously did not aspire to dialogue so that everyone could learn “to acknowledge the differing views of their fellows.”

For the sake of forging democratic politics there are very good reasons not to enter into dialogue here. At an obvious level, there was no point in fashioning a dialogue with those who, through intimidation and through claims of fulfilling the “true will” of the nation, sought to foreclose all competing terms. Drawing from “radical-democracy” theory, specifically the work of Chantal Mouffe,<sup>12</sup> a more important analytical point to note is that, for democratic groups the *incommensurable position* (enacted between themselves and the military) needs to be maintained precisely as an *incommensurable point*, since it provides, a *constitutive demarcation* that is vital for defining and holding steadfast to the *democratic imaginary* at this crucial juncture. In other words, the re-articulation of the incommensurability between an “authoritarian imaginary” and a “democratic imaginary” allows the values of democracy — the very terms and promises that legitimized the transition in the first place — to be critically brought to the fore at a time when the state is seen to be betraying and compromising the turn to democracy. The re-articulation of the values and commitments to democracy in this way can provide the grounds to resist the politics of reconciliation; that is, the amnesty laws compromising the principles of the transition.

The emphasis on dialogue, deliberation, and reconciliation ends up missing the significant *formative role* that conflict plays in the transitional moment. For this is a moment when, in order to effect the turn to a new possibility, it becomes crucial to *publicly out* certain values as being incommensurable and in conflict with democratic values. Clearly there is politics of demarcation, a process of expunging and re-forging, which needs to be operative during a transition. For marking a distinction between the abject and the object of our goals and commitments is obviously constitutive of the very possibility of a transition.

This account perhaps has striking implications for understanding the pedagogical reproduction of democratic subjectivity, since it emphasizes limits and exclusions as opposed to often celebrated claims for an all-embracing inclusiveness. To envision democratic subjectivity as something that can be learned and forged

through the inclusive norms of deliberation, elides the necessary demarcations, refusals, affects, the very politics involved in reproducing any subject position. It is thus imperative to draw-out how the reproduction of democratic subjectivity is *subject* to particular, albeit provisional, *limits*.<sup>13</sup> Rendering the limits explicit not only avoids spinning into relativism, but also makes clear that there is inevitably a politics of inclusion and exclusion at work in forging any identity or social order. Once we appreciate this we are in a better position to face the political problem of how to keep a particular democratic order from closing in on itself, from rendering unjust exclusions. For although limits are constitutive and formative, this does not mean that they should not be questioned or challenged. In other words, explicitly acknowledging the limits of a particular *demos* implies accounting for its inevitable exclusions. Whether these exclusions are justifiable or not, these very exclusions nevertheless provide an outside point (a remainder) from which to question and interrupt the immanence (the self-enclosure) of any social order.

Operating on the cusp of an emerging order, the deliberation envisioned by Nino and Osiel aims to educate and render the “good citizen” whose competence and conscience is to be attuned to the liberal virtues required for conciliation. My emphasis on conflict, limits, and exclusions is an attempt, not only to recover the specificity elided by deliberation, but importantly, also, to recover a more dynamic sense of the pedagogical than the deliberative model offers. By pedagogical, I do not mean a process whereby we learn how to settle issues by applying appropriate rules or terms for understanding, but rather a *reflexive encounter* with the limits. This implies a double encounter with the inside and the outside of our terms, a *pedagogy of the limits* where learning is forged through handling the residue or point of exclusion which can reveal or reactivate the contingency of our *demos*. More specifically, the pedagogical is invoked here as an encounter where (1) we endeavour to learn about the operative limits which define us, and, (2) whereby learning to ask after what remains or has been excluded, we come to better appreciate the indelible closures and exclusions upon which our political judgements and commitments are based. This pedagogy of the limits, this double gesture *to read our terms*, can help us to appreciate how the moment of closure, while necessary for defining and identifying democratic subjectivity, is ultimately contingent and open to contestation.

Claude Lefort tells us that the originality of democracy is the institution of the *empty place of power*, an opening where society can project its conflicts, and tests its various inclusions and exclusions.<sup>14</sup> Democracy can be well served by a pedagogy, a reflexive encounter, that can make us attentive to the limits, since democracy needs to guarantee that nobody can occupy or pretend to incarnate the empty place of power, and that any such pretensions can be publicly contested by that which is excluded. While different political forces might aim to cover over the traces of power and exclusion that they effect, a pedagogy of the limits can teach us how to read the demarcations of a particular position so that it becomes *publicly* visible and its inclusions/exclusions enter the terrain of contestation. Learning to be attentive to the politics of the limits can help correct interpretative models that elide the



particularities of an issue through all-inclusive claims or reconciled solutions. It can also allow us to be more attuned to the contingency structuring any social order, to the contestations over what remains, to what is excluded through any settlement or claim to identity. This has particular resonance in societies, like Argentina, where justice still remains to be done, where the remains *remain* unburied and unaccounted for, where the past remains divisive and thus inherently irruptive and interruptive of any present settlement.

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1. Eric Posner provides a concise summary of various thinkers grappling with the pedagogical dimensions of transitional (political) trials. See, in particular, "Pedagogical Trials," in "Political Trials in Domestic and International Law," *Chicago Public Law & Legal Theory Working Paper* 87 (2005): 61–70.
  2. Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (London: Transaction, 1997). This work will be cited as *MA* in the text for all subsequent references. Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996).
  3. Amy Gutmann and Dennis Thompson, "Deliberative Democracy Beyond Process," *Journal of Political Philosophy* 10, no. 2 (2002): 153–174; Benjamin Levin, "The Exceptional Requirement for Democracy," *Curriculum Inquiry* 28, no. 1 (1998): 57–79; and Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge: Harvard University Press, 2000).
  4. Cited in Levin, "Exceptional Requirement," 58.
  5. See Posner, "Political Trials," 61–70; also Mario Di Paolantonio, "Contesting after the Law" (PhD diss., University of Toronto, 2003), 26–34.
  6. Ruti Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), 11.
  7. *Ibid.*, 223.
  8. Nino, "Radical Evil," 147, 132–133.
  9. Nicholas C. Burbules, "The Limits of Dialogue as a Critical Pedagogy," in *Revolutionary Pedagogies: Cultural Politics, Instituting Education and the Discourse of Theory*, ed. Peter P. Trifonas (New York: Routledge, 2000), 261.
  10. *Ibid.*
  11. Frank Graziano, *Divine Violence* (San Francisco: Westview, 1992), 226.
  12. Chantal Mouffe, *The Democratic Paradox* (New York: Verso, 2000).
  13. See Ernesto Laclau, *Emancipation(s)* (London: Verso, 1996), 52–53.
  14. Claude Lefort, *Democracy and Political Theory* (Minneapolis: University of Minnesota, 1988), 17; also see Claude Lefort, "Inventar la democracia: entrevista con Claude Lefort," *Metapolítica* 1, no. 4 (1997): 617–627.