

# Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?

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## INTRODUCTION

Legal action against those accused of committing brutal violations of human rights has flourished in the last decade. Saddam Hussein awaits trial in Iraq.<sup>1</sup> Augusto Pinochet, Chile's former military leader, has been pursued by European and Chilean prosecuting judges since Spain's Balthasar Garzón sought his extradition for murder in October 1998.<sup>2</sup> Meanwhile, at the International Criminal Tribunal for the former Yugoslavia ("ICTY"), Slobodan Milosevic is preparing his defense against charges of genocide and war crimes.<sup>3</sup> Even U.S. Secretary of Defense Donald Rumsfeld, with other senior officials, has been accused in a privately filed criminal complaint in Germany of being responsible for the torture of prisoners held in Iraq.<sup>4</sup> Such legal actions were almost unimaginable a decade ago.

These are only the most prominent cases. A dozen senior Baathist officials face prosecution by Iraq's new government.<sup>5</sup> In Argentina, a 2001 court ruling abrogated laws giving immunity to military officers who oversaw and participated in the kidnapping and secret execution ("disappearance") of as

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1. See Rajiv Chandrasekaran, *Hussein To Face Charges in Iraq Court*, WASH. POST, June 30, 2004, at A1.

2. See *Old Alone*, ECONOMIST, Dec. 18, 2004, at 48-49; Ciaran Giles, *Spain Says It Will Seek Pinochet's Extradition*, WASH. POST, Nov. 7, 1998, at A15.

3. See Toby Sterling, *Milosevic Is Allowed To Defend Himself*, WASH. POST, Nov. 2, 2004, at A11.

4. See Josh White & John Mintz, *Red Cross Cites "Inhumane" Treatment at Guantanamo*, WASH. POST, Dec. 1, 2004, at A10. The New York-based Center for Constitutional Rights filed the complaint. Although the German federal prosecutor dismissed it on February 10, 2005, the case delayed until the last minute Rumsfeld's decision on whether to attend a NATO conference in Germany. See Rowan Scarborough, *Germany Dismisses War-Crimes Case Against Rumsfeld*, WASH. TIMES, Feb. 11, 2004, at A10.

5. See Rajiv Chandrasekaran, *Iraq Assumes Legal Custody of Hussein, 11 Deputies*, WASH. POST, July 1, 2004, at A10.

many as 30,000 people between 1976 and 1983.<sup>6</sup> Two years later, Argentina's parliament annulled the laws, mooting a pending appeal and reversing nearly two decades of hostility by the country's elected leaders to criminal prosecution of perpetrators of atrocities during the dictatorship.<sup>7</sup> In 2001, a Belgian jury sentenced four Rwandans to prison for participating in the 1994 genocide of Tutsis and moderate Hutus.<sup>8</sup> Victims of Chadian dictator-turned-expatriate Hissène Habré brought a criminal complaint against him in Senegal in January 1999, alleging torture, barbarous acts, and crimes against humanity. While the case was dismissed, it opened up new possibilities for calling Habré to legal account in Chad, as the Pinochet case had in Chile.<sup>9</sup>

In addition to national courts, international criminal tribunals have recently become important forums for human rights cases. The prosecutor of the new International Criminal Court ("ICC"), veteran Argentine human rights lawyer Luis Moreno Ocampo, is investigating atrocities in Uganda, the Democratic Republic of Congo, and Sudan.<sup>10</sup> The ICTY and the International Criminal Tribunal for Rwanda ("ICTR") have imprisoned dozens of perpetrators of unspeakable horrors after trials and guilty pleas<sup>11</sup> and have delivered groundbreaking judgments advancing international law.<sup>12</sup> "Hybrid" courts with varying degrees of international involvement and independence from national court systems are prosecuting perpetrators of human rights violations in East Timor, Kosovo, and Sierra Leone.<sup>13</sup>

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6. See Anthony Faiola, *Argentine Amnesty Overturned; Ruling Could Bring Trials of Soldiers Involved in "Dirty War,"* WASH. POST, Mar. 7, 2001, at A19. See also Law No. 23492, Dec. 23, 1986, reprinted in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 505, 505–06 (Neil J. Kritz ed., 1995); Law No. 23521, June 4, 1987, reprinted in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 507, 507–08 (Neil J. Kritz ed., 1995); Neil J. Kritz, *Argentina: Editor's Introduction*, in 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 323, 323 (Neil J. Kritz ed., 1995) (stating number of "disappeared").

7. See Debora Ray, *Argentina Approves Ending Laws on Amnesty*, WASH. POST, Aug. 22, 2003, at A16.

8. See Keith B. Richburg, *Rwandan Nuns Jailed In Genocide*, WASH. POST, June 9, 2001, at A1.

9. Reed Brody, *The Prosecution of Hissène Habré—An "African Pinochet,"* 35 NEW ENG. L. REV. 321, 332–33 (2001).

10. International Criminal Court, *Current Situations and Investigations*, available at [http://www.icc-cpi.int/cases/current\\_situations.html](http://www.icc-cpi.int/cases/current_situations.html) (last visited Apr. 20, 2005) (stating that the Office of the Prosecutor is currently investigating the situations in Uganda and the Democratic Republic of Congo); S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (referring the situation in the Darfur region of Sudan to the International Criminal Court ("ICC") for investigation and possible prosecution).

11. See, e.g., Prosecutor v. Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence ¶¶ 1092–94 (Dec. 3, 2003) (finding media executives internationally criminally liable for genocide, incitement to genocide, and crimes against humanity); *Charlemagne: Carla Del Ponte, Battling for Balkan Justice*, ECONOMIST, Jan. 13, 2001, at 52 (noting surrender of Biljana Plavsic, former president of Republika Srpska); *Another Snatch in Bosnia*, ECONOMIST, Apr. 8, 2000, at 56 (reporting capture of Momcilo Krajinik, former Serb member of Bosnian presidential triumvirate).

12. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995); Nahimana, Barayagwiza, & Ngeze, Case No. ICTR 99-52-T, Judgment and Sentence, ¶¶ 1092–94 (finding media executives internationally criminally liable for genocide, incitement to genocide, and crimes against humanity); Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998) (defining rape as a crime against humanity).

13. Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 296–300 (2003).

Finally, human rights violators face civil suits as well as criminal prosecution. Victims have brought actions against their abusers, most prominently in the United States under the Alien Tort Claims Act<sup>14</sup> and the Torture Victim Protection Act,<sup>15</sup> but also occasionally elsewhere.<sup>16</sup>

Academics, politicians, jurists, and human rights activists debate the value of judicial proceedings against human rights violators. Proponents argue that they further a variety of purposes, including deterring future violations,<sup>17</sup> building the rule of law,<sup>18</sup> achieving "justice,"<sup>19</sup> creating an incontrovertible record of the abuses,<sup>20</sup> promoting reconciliation within polarized societies,<sup>21</sup> and helping victims heal psychologically.<sup>22</sup>

14. 28 U.S.C. § 1350 (2000). See *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). See also, e.g., *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); *Cabello Barrueto v. Fernández-Larios*, 291 F. Supp. 2d 1360 (S.D. Fla. 2003), *aff'd*, No. 04-10030, 2005 U.S. App. LEXIS 4216 (11th Cir. Mar. 14, 2005); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Todd v. Panjaitan*, No. CIV.A.92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994).

15. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified in the Historical and Statutory notes to 28 U.S.C.A. § 1350 (2000)). For cases brought under the Torture Victim Protection Act, see, e.g., *Romagoza v. Garcia*, No. 99-8364 (S.D. Fla. July 31, 2002), *rev'd as time-barred*, 400 F.3d 1340, 1351 (11th Cir. 2005).

16. For example, in August 1999 the Argentine Supreme Court upheld a civil award of \$1.2 million to Daniel Tarnopolsky, whose family had been disappeared by the military during the dictatorship. The award was to be paid by the Argentine government and Admiral Emilio Massera, a member of the junta ruling at the time of the crimes. See *Daniel Tarnopolsky v. Nación Argentina y Otros*, Corte Suprema de Justicia de la Nación [Supreme Court] 322 Fallos 1888, 1893 (1999). See also Noga Tarnopolsky, *The Family That Disappeared*, NEW YORKER, Nov. 15, 1999, at 48.

17. See, e.g., Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 398 (1997); Ronald C. Slye, *The Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights*, 22 WIS. INT'L L.J. 99, 110 (2004).

18. See, e.g., Naomi Roht-Arriaza, *Introduction to IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 3, 4 (Naomi Roht-Arriaza ed., 1995); Johan D. van der Vyver, Book Review, 18 EMORY INT'L L. REV. 133 (2004) (reviewing BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* (2003)).

19. See, e.g., Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH WORLD REPORT 2004 194 (Human Rights Watch ed., 2004) (equating justice with prosecution).

20. See, e.g., Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255, 265 (2001) (quoting the ICTY's President as stating that many people in the former Yugoslavia consider the tribunal most valuable to "remind people what happened here"); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2546 n.32 (1991) (quoting Supreme Court Justice Robert Jackson, chief U.S. prosecutor for the Nuremberg trials of Nazi war criminals, on the purpose of those proceedings).

21. See, e.g., Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 1, 3-4 (Eric Stover & Harvey M. Weinstein eds., 2004) (quoting former ICTY President Antonio Cassese); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 597-601 (2002).

22. See, e.g., Juan Méndez, *Comments on Prosecution: Who and For What?*, in DEALING WITH THE PAST: TRUTH AND RECONCILIATION IN SOUTH AFRICA 87, 90 (Alex Boraine et al. eds., 1994) [hereinafter DEALING WITH THE PAST] (arguing that "prosecution in itself will provide a measure of healing and show the victims that their plight has not been forgotten by the states and society"); Ivković, *supra* note 20, at 334 (the ICTY aims to provide "justice to the victims and thereby advanc[e] the processes of healing and reconciliation"); Debra Kaminer et al., *The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuses*, 178 BRIT. J. PSYCH. 373, 375 (2001) (speculating that "[i]f justice is done, and seen to be done, psychological healing may be

This Article springs from the last argument. It asks how trials of perpetrators of human rights violations psychologically affect victims of those abuses. Families of the “disappeared,” torture survivors, witnesses to the summary execution of loved ones, and other victims of brutal violations of human rights live in appalling psychological (and in many cases physical) pain. For some, the struggle to cope dominates day-to-day life. By examining how judicial proceedings affect victims, this Article attempts to advance policy-makers’, lawyers’, therapists’, and other concerned people’s understanding of how to ameliorate that pain.

Suggestions abound of how legal action against perpetrators affects victims. “Justice,” “vindication,” “truth,” and “acknowledgment” are put forward as having soothing effects.<sup>23</sup> But are these arguments correct? When a perpetrator is prosecuted or sued for horrors he or she has inflicted on others, do the victims feel better—less unhappy, less uneasy, less helpless? Are they more able to move through their hours, days, and weeks; to relate comfortably to strangers and deeply to loved ones; to feel a sense of basic security in the world? This Article moves beyond vague speculation about these questions and assesses what we know from experience.

It turns out that we know little. My extensive search of the English-language literature in psychology, medicine, political science, and law revealed no articles or books in English that focus on the psychological effects of trials of perpetrators of human rights violations on victims.<sup>24</sup> Media accounts of victims’ responses to particular trials contained only individual anecdotes, as did memoirs and oral histories recounting victims’ experiences of abuse and its aftermath. Few sources made even one or two passing comments about trials’ effects on victims. Even in the voluminous literature on the Nazi Holocaust, I found only a few anecdotes about how individual survivors had re-

facilitated”); Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 127, 129 (1996) (“[T]otal impunity, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, is immoral, *injurious to victims*, and in violation of international legal norms.” (emphasis added)).

23. See, e.g., HUMAN RIGHTS WATCH, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 747 (1999) (“Without justice, there is no relief—psychological and material—for the victims and there is no hope of reconciliation for the society.”).

24. Only two sources come close. Eric Stover’s interview study of witnesses for the ICTY, most of whom were victims of abuses, reports their views of the tribunal’s performance and their motivations for testifying. That focus is distinct from this Article’s inquiry into the psychological impact of testifying and the other aspects of judicial proceedings, although both spring from interest in the experience and views of victims. Nevertheless, respondents’ answers to a few of Stover’s questions shed light on the psychological impact of testifying, discussed in Parts III.B.1 and III.B.2., *infra*. See Eric Stover, *Witnesses and the Promise of Justice in The Hague*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY*, *supra* note 21, at 104. Daniel W. Shuman and Alexander McCall Smith consider the advisability of prosecuting “old crimes,” which seem mostly to be offenses committed decades before prosecution. See, e.g., DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, *JUSTICE AND THE PROSECUTION OF OLD CRIMES: BALANCING LEGAL, PSYCHOLOGICAL, AND MORAL CONCERNS* ix, 3, 4, 6, 7, 11 (2000). One chapter inquires about the psychological impact of trials on victims, but the authors conclude that there is too little evidence to draw firm conclusions. See *id.* at 101–15 (Chapter 7: Justice and Therapy: The Role of the Law in Healing the Victim).

acted to the many trials of Nazis and their collaborators in Germany and elsewhere after World War II and just one general discussion, a few pages long, of the effect of the 1961–62 trial of Nazi Adolf Eichmann in Israel. Two therapists who have extensively studied and written about Holocaust survivors, Dr. Dori Laub of Yale University and Professor Henry Greenspan of the University of Michigan, confirmed that they knew of no other articles or books that discussed the psychological effects of trials of Nazis on Holocaust survivors.<sup>25</sup> One after another, legal academics, lawyers, and therapists who focus on victims of human rights violations told me that this is an important question and that we do not know the answer.<sup>26</sup>

This Article begins the process of filling this intellectual void. It first examines the psychological landscape into which trials venture by summarizing the literature on the psychological effects of human rights violations on victims. It then combines that knowledge with the scattered, primary evidence we have on victims' reactions to trials.<sup>27</sup> The Article collects the few

25. Telephone Interview with Henry Greenspan, Professor of Social Science, Residential College, University of Michigan (Dec. 31, 2004); Telephone Interview with Dori Laub, Clinical Professor of Psychiatry, Yale University (Jan. 3, 2005).

26. Even literature on domestic crime has only begun to determine the psychological effects of trials of ordinary criminals on victims. See SHUMAN & MCCALL SMITH, *supra* note 24, at 102 ("The precise way in which the courts might play a role in the healing process of crime victims, however, has not been carefully explored or explained."); *id.* at 105 ("The few studies that address the psychology of crime victims [who interact with the legal system] raise more questions than they answer."); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 165 (2003) (reviewing studies and concluding that "systematic research on this topic is almost nonexistent at present"). Furthermore, as discussed in detail below in Part I.B, the psychological effects of ordinary criminal trials on victims may differ significantly from those of human rights trials.

While the reasons for the dearth of research on the psychological effects of trials of human rights violators are unclear, there are at least four possibilities. First, generally, "[a] primary weakness of writings on transitional justice is the paucity of empirical evidence to substantiate claims about how well criminal trials achieve the goals ascribed to them." Fletcher & Weinstein, *supra* note 21, at 585. Accord Weinstein & Stover, *supra* note 21, at 1, 3–4. Second, little research has examined *any* aspect of survivors' views or experiences with respect to trials of perpetrators. Among the only examples are research reported in a new study of Bosnia and Rwanda and Sanja Kutnjak Ivković's survey-based study of survivors' views of the ICTY's fairness and procedures. See Miklos Biro et al., *Attitudes Towards Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 21, at 183, 192–99; Timothy Longman et al., *Connecting Justice to Human Experience: Attitudes Towards Accountability and Reconciliation in Rwanda*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 21, at 206, 212–19; Ivković, *supra* note 20. Ivković asked such questions as whether perpetrators should be prosecuted, whether the ICTY or local courts would be fairer, whether judges would be biased or subject to political influence, what sentences would be proper, and what rights defendants should have. *Id.* at 337–46. Third, only a small proportion of human rights violators have been prosecuted or sued. The population of survivors whose reactions could be studied—who have seen the person who abused them or someone related (such as the direct perpetrator's commander) go through a legal proceeding—is therefore small. Fourth, the number of survivors who have seen their or similar perpetrators tried *and* who have had contact with therapists or others who might evaluate their psychological reactions to trials is even smaller.

27. The Article covers both criminal and civil proceedings brought in the domestic courts of the country where the abuse occurred, other countries' courts, or international criminal tribunals. Truth commissions' psychological effects on victims, which may differ greatly from those of criminal or civil actions, are beyond the scope of this Article.

published comments on that subject and analyzes works that come close to addressing it. It also draws on nine interviews with people who have worked closely with victims of human rights violations, including lawyers and therapists.<sup>28</sup> The interviewees described how individual victims they knew had been affected by trials. Each therapist also suggested effects that trials may have on victims of human rights violations generally, based on their professional training, those individual cases, and their wider experience working with victims. None of the interviewees purported to have broad enough experience or a large enough sample to generalize with confidence. Their informed speculation, however, moves beyond the vague assumption that trials are generally therapeutic.

The Article takes these scattered bits of primary evidence and informed speculation and sorts them into a typology of psychological dynamics by which judicial processes against perpetrators of traumatic violations of human rights affect victims. Some dynamics are psychologically beneficial, while others are harmful. The Article explains the psychological logic of each dynamic—that is, the connection between particular aspects of trials' processes or outcomes and changes in victims' psychology.

The typology includes ten psychological dynamics. Five may affect victims whether or not they participate in the legal proceeding, while the other five affect only victims who participate formally, in such roles as witness, criminal complainant, or plaintiff. In the first category, both participating and non-participating victims may feel that criminal and civil legal judgments acknowledge their suffering and condemn the abuses perpetrated against them. Second, successful criminal prosecutions can provide victims physical protection, and thereby psychological security, by imprisoning the perpetrators. Third, judicial proceedings can divulge new information about the circumstances of atrocities or who perpetrated them. Such information can facilitate grieving, alleviate guilt, and confer other psychological benefits. Fourth, trials can benefit victims whose societies discourage discussion of the atrocities they suffered, by breaking the social silence that isolates them and denies their experience. Conversely, the Article finds little evidence to support the claim that legal proceedings hurt victims by unearthing psychological issues that have been put to rest. Fifth, there is some evidence that trials may be psychologically counterproductive if they result in judgments for the alleged

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28. The interview subjects were: Mary Fabri, then clinical director (now director), Marjorie Kovler Center for the Treatment of Survivors of Torture, Chicago, Illinois; Rosa Garcia-Peltoniemi, director, client services and psychological services, Center for Victims of Torture, Minneapolis, Minnesota; Jerry Gray, therapist (then executive director, Center for Justice and Accountability, San Francisco, California); Henry Greenspan, professor of social science, Residential College, University of Michigan; Douglas Johnson, executive director, Center for Victims of Torture; Dori Laub, clinical professor of psychiatry, Yale University; Beth Stephens, professor of law, Rutgers University School of Law, and counsel in numerous civil cases based on the Alien Tort Claims Act and Torture Victim Protection Act; Alan Tieger, senior trial attorney, ICTY; and Noga Tarnopolsky, a journalist who has written on her cousin Daniel Tarnopolsky's lawsuit against the masterminds of the disappearance of his family in Argentina.

human rights violators or in penalties that a victim considers incommensurate with the atrocities.

The other five psychological effects of judicial proceedings affect only victims who participate formally. First, testifying in legal proceedings can be psychologically beneficial, for example by validating a victim's experience. Second, however, testifying can be severely stressful for a variety of reasons. Third, victims who participate in judicial proceedings sometimes suffer new abuses, such as reprisals or harassment through the discovery process, that cause psychological stress. Fourth, some victims find comfort and a sense of empowerment in pursuing justice through law. Finally, however, the long duration of most legal cases may psychologically strain victims involved in them.

The sparsity of available evidence precludes both conclusions about which effects of trials are most common and intense and certainty that this catalog of ten dynamics is exhaustive. More research will be necessary to settle those issues authoritatively. It may take a decade or more to begin to answer the logical next question: How do culture, the various characteristics of perpetrators and judicial proceedings, and political and social context, influence the nature and strength of trials' psychological effects on different sorts of victims?

The Article begins by clarifying several conceptual and terminological issues, in Part I. Part II gives a brief overview of the psychological effects of brutal violations of human rights on victims, which trials may alleviate or exacerbate. Part III, the heart of the Article, explains the ways trials of perpetrators may psychologically affect victims. The Article concludes, in Part IV, by recommending less emphasis on judicial proceedings as mechanisms for promoting healing, more attention by courts to victims' psychological needs in those human rights cases that do go forward, and additional research to deepen our understanding of victims' reactions to trials.

## I. METHODOLOGICAL POINTS

Several aspects of this Article's scope and methodology may require clarification at the outset. Section A of this Part specifies the range of victims whose responses to trials this Article considers. Section B discusses differences between human rights violations and ordinary crime that may be salient to the psychological effects of trials, and explains my use of research on the effects of ordinary criminal trials. Section C suggests that survivors may be psychologically affected by judicial actions against a wider range of perpetrators than one might assume. Lastly, Section D considers how the Article's sources might bias its results.

### A. Which Victims?<sup>29</sup>

This Article is concerned with victims of “traumatic human rights violations,” meaning *actual or threatened extreme violence by government agents or quasi-state actors that violates international human rights or humanitarian law*. By “quasi-state actors” I mean organized groups that the state tolerates or cannot control, such as government-supported death squads or rebel soldiers. The evidence in this Article derives from the experiences of victims of such abuses. Family members and others close to a direct victim are considered victims if they suffer long-term psychological effects as a result of the abuse.

Paradigmatic “traumatic human rights violations” include torture, which covers a wide range of brutality, including rape and other sexual violence; disappearance;<sup>30</sup> extrajudicial killing;<sup>31</sup> confinement in concentration camps; and slavery, although this is not an exclusive list of the abuses that may fit the definition. Under most circumstances, such violence violates international human rights law when committed by government agents.<sup>32</sup> When committed by private actors during war, those acts usually constitute war

29. Throughout this Article, I refer alternately to “victims” and “survivors” of human rights violations. The distinction is worth considering because it matters to many of those people themselves and because the terms connote different truths about their experiences. “Victim” emphasizes suffering and inability to stop the abuse. “Survivor” emphasizes the strength of those who have suffered terribly, but keep going. Some therapists refer to “survivors” and some to “victims.” I use both terms interchangeably to acknowledge that, for many of these people, both pain and struggling to cope with it are part of daily life.

30. The crime of “disappearance” consists of two elements: (1) arrest or abduction, followed by (2) denial of knowledge of the whereabouts of the disappeared person by persons speaking for those who arrested or abducted him or her. *See, e.g.*, ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 7(2)(i), July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998) (defining “enforced disappearance of persons”).

31. “Extrajudicial killing” refers to deliberate killing not authorized by a previous judgment of a regularly constituted court that afforded the accused the full set of due process rights generally recognized in international law as indispensable. *See, e.g.*, Torture Victim Protection Act, § 3(a). *Cf.* ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 8(1)(c)(iv) (defining “the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable” as a war crime subject to the Court’s jurisdiction).

32. The large majority of states are party to the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976) [hereinafter “ICCPR”], the CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, Dec. 10, 1984, 1465 UNTS 85 (entered into force June 26, 1987) [hereinafter “CAT”], or both. *See* UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES AS OF JUNE 9, 2004 (listing 152 out of 194 countries as party to the ICCPR and 136 as party to the CAT), available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Apr. 20, 2005). These treaties prohibit the state from committing torture, extrajudicial killing, and other extreme acts of extra-legal violence. *See* CAT, art. 2; ICCPR, arts. 6, 7. The prohibition against state torture, furthermore, has achieved the status of *ius cogens*, an international norm binding on all states regardless of whether they have consented to it by ratifying any treaty. *See, e.g.*, Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992); M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996).



crimes.<sup>33</sup> Therapists and researchers have documented that many victims of these abuses experience enduring, severe psychological pain.<sup>34</sup>

### B. *Human Rights Violations and Ordinary Crime*

This Article assumes that the psychological effects of judicial action differ for victims of ordinary violent crime and victims of human rights violations. By "ordinary crime," I mean illegal acts not perpetrated by a state or quasi-state actor.<sup>35</sup> There is insufficient empirical evidence to describe the effects of judicial actions against ordinary criminals or human rights violators reliably, let alone to assess whether they differ. Even if the effects of ordinary criminal trials had been established definitively, it would be important to assess the effects of judicial action on human rights victims separately because human rights violations and ordinary crime differ in ways that may be psychologically relevant. At the same time, similarities between ordinary violent crime and traumatic human rights abuses make evidence on the former relevant to this Article.

Therapists who work with human rights victims see differences in the ways that traumatic human rights violations and ordinary crime affect victims. Abuses perpetrated by state actors—or those the state cannot or will not check—may leave victims feeling more vulnerable than acts perpetrated by criminals the state is committed to suppressing because victims have little or no hope that the authorities will investigate them or prevent their repetition. Randall and Lutz emphasize the psychological significance of human rights victims' experience of abuse at the hands of "the larger social and political institutions charged with responsibility for ensuring their safety and well-being."<sup>36</sup> A second difference is more symbolic: To the extent that the government symbolizes the will of the community, its abuses may make the victim feel that he or she has been abused or abandoned by the society as a

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33. "War crimes," as defined in the most authoritative international instrument, the Statute of the ICC, cover a wide range of brutalities if they are "committed as part of a plan or policy or as part of a large-scale commission of such crimes." *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, art. 8(1). Acts that are war crimes when committed against civilians in any war (civil or inter-state) include, *inter alia*, "[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture," *id.* art. 8(2)(c)(i), and extrajudicial executions, *id.* art. 8(2)(c)(iv).

34. GLENN R. RANDALL & ELLEN L. LUTZ, *SERVING SURVIVORS OF TORTURE* 4 (1991).

35. This distinction between traumatic human rights violations and violent (often traumatic) ordinary crime resembles that drawn in U.S. law between private conduct and acts committed "under color of law" or with the "actual or apparent authority" of the state. *Cf.* 42 U.S.C. § 1983 (2000) (creating a cause of action for any deprivation of statutory or Constitutional rights committed "under color of" any form of non-federal U.S. law); Torture Victim Protection Act § 2(a) (creating a cause of action for torture or extrajudicial killing carried out under "actual or apparent authority, or color of law, of any foreign nation").

36. RANDALL & LUTZ, *supra* note 34, at 4. *See also* David Becker & Margarita Díaz, *The Social Process and the Transgenerational Transmission of Trauma in Chile*, in *INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA* 435, 438 (Yael Danieli ed., 1998) (arguing that "a process of cumulative traumatization can turn into chronic trauma whenever the context of the traumatic situation refers to political persecution and repression").

whole.<sup>37</sup> Finally, many traumatic human rights violations include elements that are not part of ordinary crimes, in their legal definitions or practical execution. An ordinary criminal may kidnap, but seldom has reason—or opportunity—to deny knowledge of the victim's whereabouts to inquiring family members. By contrast, family members seeking someone who has vanished often turn first to state actors, such as the police, creating an opportunity for the denial that turns kidnapping by the state into disappearance.<sup>38</sup> As Part II.G, below, explains, the denial causes distinct trauma to family members of the disappeared. While acts that constitute torture may qualify as criminal battery, in practice, torture often also includes psychological manipulation that increases the trauma it causes.

Victims of human rights violations and victims of ordinary crime may also react differently to trials of perpetrators. The state's prosecution of a crime committed by one of its own may symbolize to a victim a reorientation of social values from condoning abuse to condemning it. Also, some victims of human rights violations may identify the court with the perpetrator if the perpetrator was a state agent at the time of the abuse. Those victims may therefore be more sensitive than ordinary crime victims to the legal system's supportiveness or insensitivity.

Despite these differences, ordinary violent crime and traumatic human rights abuses also bear similarities. Both can involve killing or infliction of extreme pain through beatings, rape, and other forms of torture. Both often cause psychological trauma.<sup>39</sup> Many rape survivors' unwillingness to speak out, due to shame or fear, has been well documented by activists and scholars. Torture often tries to silence its victims—and succeeds.<sup>40</sup>

On balance, traumatic human rights violations and violent ordinary crime differ enough that the psychological effects of trials of perpetrators of those abuses should be evaluated separately. Nevertheless, because of the similarities and the paucity of sources on victims of human rights violations, this Article draws cautiously on studies of crime victims, especially survivors of sexual violence.

### C. Which Perpetrators?

The scope of this Article extends beyond the effects of legal actions on those victims whose *specific and direct* tormentor, such as a torturer, is the object of the action. Trials of the superiors who order human rights violations may affect victims, even though the superiors did not themselves carry out

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37. See *infra* Part II.D.

38. See *supra* note 30.

39. See *infra* Part II (effects of human rights violations). See also SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 215–23 (1979); Fran H. Norris & Krzysztof Kaniasty, *Psychological Distress Following Criminal Victimization in the General Population: Cross-Sectional, Longitudinal, and Prospective Analyses*, 62 J. CONSULTING & CLINICAL PSYCH. 111, 111 (1994).

40. See *infra* Part II.D.

the abuse. Similarly, actions against political leaders, such as Saddam Hussein, are worth examining for their effects on victims. Usually, as rank and distance from direct perpetration of an abuse increase—to unit commanders, generals, cabinet ministers, and heads of state—the number of victims whose suffering stemmed from the defendant's actions also increases. For example, a trial of a dictator might psychologically affect more victims than the trial of a single torturer, because more victims can trace their suffering to the dictator.

Psychological reactions are not driven by legal concepts of command responsibility, however. Survivors may be affected by judicial proceedings against perpetrators other than direct abusers and their superiors in the chain of command. Criminal or civil actions against perpetrators whom survivors see as connected or analogous to their tormenters, or as indirectly responsible for their suffering, may also have psychological impact. The trial of one torturer might affect the victim of a different torturer. A civil suit against the general who oversaw the destruction of one village could influence the psychological state of a victim of ethnic cleansing by another commander. The sparse evidence available on the reactions of survivors to judicial proceedings does not yet permit evaluation of those hypotheses. Nevertheless, their plausibility suggests that, for now, a general survey of trials' effects, such as this Article, should assume that any trial may affect a wide range of victims.

#### *D. Limitations Due to Source Material*

This Article relies on three sets of sources: empirical literature on the psychological effects of human rights violations on survivors; published comments and anecdotes about survivors' reactions to trials, from therapists and victims themselves; and interviews with people who work closely with victims, including therapists and human rights lawyers. It also draws on empirical and theoretical literature on the psychological impact of ordinary crime and of crime victims' interaction with the courts. These sources may be biased in several ways.

Most of the interviews for this Article were with therapists who work with survivors of human rights violations. Therapists also wrote a significant portion of the written sources. Therapists have contact mostly with survivors who voluntarily seek psychological help. That group's psychological characteristics may differ, on average, from those of the general population of survivors of traumatic human rights violations. Survivors who seek therapy may mostly be well-educated or come from cultures that encourage seeking professional assistance with psychological or emotional distress. Differences between those seeking treatment and the entire survivor population may have influenced how the therapists interviewed understand the psychological effects of human rights violations and of trials.

The Article's findings could be biased as well by the fact that most evidence on the psychological effects of human rights violations comes from

studies of torture survivors rather than survivors of other traumatic human rights violations. If victims of human rights violations were affected by trials of perpetrators in a way torture victims were not, this research might not detect that dynamic. However, this possible bias is limited by the breadth of the definition of torture used in psychological literature on its effects; that definition generally includes rape and sometimes includes witnessing summary executions, slave labor, and disappearance of a family member.<sup>41</sup> Furthermore, those interviewed for this Article considered how trials affect victims of traumatic human rights violations generally, not only torture victims.

## II. PSYCHOLOGICAL EFFECTS OF HUMAN RIGHTS VIOLATIONS

Gross violations of human rights can leave terrible psychological scars on their victims. Depression and extreme anxiety are common among survivors. Many have lost their sense of security in the world and go through each day terrified that something terrible will happen without warning. Fear, guilt, a sense of abandonment, and other feelings can alienate survivors from fellow citizens and even from family members. Some survivors' psychic pain is so intense that they cannot work or perform ordinary daily tasks. This Part presents the most common long-term psychological effects of traumatic human rights violations and provides a background to Part III's examination of how judicial processes might ameliorate or aggravate them.

This Part cannot provide a comprehensive understanding of the psychological condition of survivors, and individual survivors should not be presumed to suffer all, or even any, of the troubles described here. Victims' psychological responses to trauma, reactions to subsequent events, and coping processes vary greatly.<sup>42</sup> Some victims of appalling brutality suffer few last-

41. See, e.g., Diana Kordon et al., *Forced Disappearance: A Particular Form of Torture*, in *CARING FOR VICTIMS OF TORTURE* 203, 207 (James M. Jaranson & Michael K. Popkin eds., 1998).

42. Any person's psychology is complex and murky, defying complete description even by a trained psychiatrist; psychological reactions to a particular stimulus cannot be predicted with any precision. The psychology of many survivors of gross violations of human rights is yet more complicated, having been severely disrupted by trauma. Variations in the psychological effects of traumatic events may be especially great across cultures. See, e.g., Timothy H. Holtz, *Refugee Trauma Versus Torture Trauma: A Retrospective Controlled Cohort Study of Tibetan Refugees*, 186 *J. NERVOUS & MENTAL DISEASE* 24, 32-33 (1998) (finding that strong Buddhist beliefs about one's own suffering "worked to alleviate subsequent [negative] mental health symptoms" in Buddhist nuns who had been imprisoned, and in some cases tortured). Even survivors of the same trauma and from the same culture may react very differently. See, e.g., Yael Danieli, *The Heterogeneity Adaptation in Families of Holocaust Survivors*, in *THE PSYCHOLOGICAL PERSPECTIVES OF THE HOLOCAUST AND OF ITS AFTERMATH* 109, 110 (Randolph L. Brahm ed., 1988) (emphasizing the heterogeneity of responses of Holocaust survivors to their experiences and the consequent heterogeneity of effects on their families). Many individuals' conditions vary greatly over time. See *id.* at 110; Inge Genefke & Peter Vesti, *Diagnosis of Governmental Torture*, in *CARING FOR VICTIMS OF TORTURE* 43, 49 (James M. Jaranson & Michael K. Popkin eds., 1998); Finn Somnier et al., *Psycho-social Consequences of Torture: Current Knowledge and Evidence*, in *TORTURE AND ITS CONSEQUENCES: CURRENT TREATMENT APPROACHES* 56, 67 (Metin Basoglu ed., 1992) [hereinafter *TORTURE AND ITS CONSEQUENCES*]; Telephone Interview with Mary Fabri, clinical psychologist, Marjorie Kovler Center for the Treatment of Survivors of Torture (May 3, 2000).

ing psychological consequences, for reasons we do not understand well.<sup>43</sup> This Part describes the effects of trauma that therapists working with traumatized victims of human rights violations observe most often and that trials may affect.

The Part begins by describing psychological symptoms that often result from human rights violations but that also often result from other sorts of traumas, including ordinary crime. It then turns to a series of psychological effects more particular, although not unique, to human rights violations. Some of the effects may seem to overlap or shade into each other because they represent therapists' and psychologists' attempts to describe complex psychological conditions that defy simple explanation.

#### A. *Effects Common to Trauma Generally*

Some psychological effects of human rights violations also appear frequently in victims of other traumas, including ordinary crime.<sup>44</sup> These include depression and psychological problems associated with post-traumatic stress disorder (PTSD).<sup>45</sup> The PTSD symptoms most commonly observed in victims of human rights violations include anxiety, insomnia, sexual problems, difficulty concentrating, frequent flashbacks and nightmares about their abuse, and acute distress triggered by events, objects, or people that remind them of it.<sup>46</sup> A very high proportion of torture survivors experience some PTSD symptoms, and many experience all.<sup>47</sup> Family members of the disappeared,

43. See Derek Summerfield, *Addressing Human Response to War and Atrocity*, in *BEYOND TRAUMA: CULTURAL AND SOCIETAL DYNAMICS* 17, 23 (Rolf J. Kleber et al. eds., 1995). See also Derek Summerfield, *A Critique of Seven Assumptions Behind Psychological Trauma Programs in War-Affected Areas*, 48 *SOC. SCI. & MED.* 1449, 1453 (1999) (reporting the results of a UNICEF study of Rwandan children who had witnessed atrocities during the 1994 genocide).

44. See Edwin Boudreaux et al., *Criminal Victimization, Posttraumatic Stress Disorder, and Comorbid Psychopathology Among a Community Sample of Women*, 11 *J. TRAUMATIC STRESS* 665, 673 (1998); Norris & Kaniasty, *supra* note 39.

45. For the full set of symptoms of PTSD, see AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 427-48 (4th ed. 1994).

46. See RANDALL & LUTZ, *supra* note 34, at 2-5, 29-53; LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* 239 (1998); Terence Dowdall, *Torture and the Helping Professions in South Africa*, in *TORTURE AND ITS CONSEQUENCES*, *supra* note 42, at 452, 461-62 (Metin Basoglu ed., 1992) (reporting the results of three studies finding similar symptoms, including depression, anxiety, sleeplessness, concentration problems, nightmares, and intrusive fearful thoughts); Genefke & Vesti, *supra* note 42, at 44 (finding the psychological sequela of torture to include anxiety, memory loss, depression, altered personality, frequent nightmares about prisons and torture, difficulty in remembering and concentrating, fatigue, headache, and sexual disturbances, and citing other studies of victims of torture from various areas of the world as confirming these findings); Kordon et al., *supra* note 41, at 207; William G. Niederland, *The Clinical Aftereffects of the Holocaust in Survivors and Their Offspring*, in *THE PSYCHOLOGICAL PERSPECTIVES OF THE HOLOCAUST AND ITS AFTERMATH* 45, 45-46 (Randolph L. Brahm ed., 1988) (describing Holocaust survivor syndrome); Somnier et al., *supra* note 42, at 61-66 (reviewing the results of forty-six studies).

47. See RANDALL & LUTZ, *supra* note 34, at 4 (reporting that "at least 38 percent, and probably a significantly higher percentage," of torture survivors in one study satisfied *all* PTSD diagnostic criteria, although the study was not designed with PTSD criteria in mind, and that "researchers have observed similar sequelae in individuals who were subjected to a much wider range of traumatic human rights abuses than those experienced by the study participants"). See also Genefke & Vesti, *supra* note 42, at 45-

Holocaust survivors, and witnesses to wartime violence also suffer high incidences of PTSD symptoms.<sup>48</sup> Victims of traumatic human rights violations have higher rates of depression<sup>49</sup> and perhaps of substance abuse,<sup>50</sup> too, than the general population.

### B. Sense of Reality and Confidence in Own Judgment

Human rights abusers' spoken messages can wreak long-term psychological damage. They can undermine victims' sense of reality, confidence in their own ability to evaluate their surroundings, and fundamental belief that the world functions in rational and comprehensible ways.

Torturers often tell their victims that if they respond in the right way, the pain will cease. Yet no matter what the victims say, no matter how hard they try to discern and say what the torturer wants, the torture continues. The contradiction between what the torturer tells the victim about reality and the victim's perception of it combines with the physical impact of the world-destroying<sup>51</sup> pain. These forces together undermine the victim's cognitive ability to perceive reality, make basic sense of the world based on external cues,

51 (citing findings of numerous researchers); Dowdall, *supra* note 46, at 461–62 (citing studies finding thirty-three percent and over fifty percent of samples of South African torture victims to have enough symptoms of PTSD to be diagnosed with it).

What is important here is the identification of conditions that victims of human rights violations often experience, not whether they should be diagnosed as suffering from PTSD. PTSD is a rubric for understanding psychological problems caused by extreme trauma that the victim is unable to process psychologically and recover from on his or her own. Its value as a diagnostic category and guide for treatment is controversial. See David Becker, *The Deficiency of the Concept of Posttraumatic Stress Disorder When Dealing with Victims of Human Rights Violations*, in BEYOND TRAUMA: CULTURAL AND SOCIETAL DYNAMICS, *supra* note 43, at 99; Richard J. McNally, *Progress and Controversy in the Study of Posttraumatic Stress Disorder*, 54 ANN. REV. PSYCH. 229 (2003) (surveying research). There is also debate about the value of the PTSD rubric in treating survivors of human rights violations from non-Western cultures. See Summerfield, *Addressing Human Response to War and Atrocity*, *supra* note 43; Patrick J. Bracken et al., *Psychological Responses to War and Atrocity: The Limitations of Current Concepts*, 40 SOC. SCI. & MED. 1073 (1995). Some therapists have proposed recognizing a "torture syndrome" as distinct from PTSD. E.g., Genefke & Vesti, *supra* note 42, at 48–51 and sources cited therein.

48. ANTON GILL, *THE JOURNEY BACK FROM HELL: AN ORAL HISTORY: CONVERSATIONS WITH CONCENTRATION CAMP SURVIVORS* 438–39 (1988) (describing a Holocaust survivor for whom the smell of burning leaves, sight of smoke, and sound of a fire siren trigger flashbacks to time in Auschwitz); *id.* at 453 (profiling Holocaust survivor who dreams of Auschwitz doctor Joseph Mengele); RANDALL & LUTZ, *supra* note 34, at 32–33; Kordon et al., *supra* note 41, at 207.

49. See Richard F. Mollica, *Surviving Torture*, 351 NEW ENG. J. MED. 5, 7 (2004) (stating that human rights activists' and doctors' "emphasis on PTSD has obscured the reality that the most common mental illness diagnosed in torture survivors is depression"). See also RANDALL & LUTZ, *supra* note 34, at 2; Genefke & Vesti, *supra* note 42, at 44; Kordon et al., *supra* note 41, at 208 (stating that depression is common among family members of disappeared people); Somnier et al., *supra* note 42, at 61–66 (citing numerous studies).

50. See RANDALL & LUTZ, *supra* note 34, at 2, 39; GILL, *supra* note 48, at 108; Clifford Krauss, *Pinochet Case Reviving Voices of the Tortured*, N.Y. TIMES, Jan. 3, 2000, at A1 (citing Chilean experts as saying that torture survivors suffer higher-than-average rates of alcoholism).

51. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 35 (1985) (In torture, "[i]t is the intense pain that destroys a person's self and world, a destruction experienced spatially as either the contraction of the universe down to the immediate vicinity of the body or as the body swelling to fill the entire universe.").

and distinguish truth from falsehood through use of his or her own judgment. Therapists working with Chilean torture victims describe this as a psychological "double-bind."<sup>52</sup> The intensity of the physical pain and emotional degradation sear this confusion into the victim's mind, causing psychological dysfunction that persists for years afterward.<sup>53</sup>

Disappearance has similar psychological effects. "A central element of this strategy for suppressing popular dissent is a systematic attack on people's ability to distinguish what is true from what is not true, or what they know based on personal experience as opposed to the 'official story.'"<sup>54</sup> Many families of disappeared people have seen directly, or been told by trusted witnesses, that their loved ones were abducted by state security forces. Yet their inquiries to state authorities, such as the police and courts, result only in official denials of knowledge of the missing person and misleading speculations. For example, officials often suggest that the disappeared person abandoned his or her family to emigrate or join a lover, due to unhappiness with his or her now-searching spouse. These explanations generally conflict with family members' memories of their loved ones' personalities and relationships with them, which indicate that they would never simply run away. If disappearances are a new phenomenon in a society, family members may not imagine that the vanished person has been killed.<sup>55</sup>

The authorities' lies are often the only explanations of the disappearance that the family members hear. Regimes that perpetrate disappearances terrorize their populations into silence. Victims' families may learn of the pattern of people being taken away by security forces that then deny any knowledge only after a long search for their own loved one.<sup>56</sup> In the meantime, they receive "no social validation of the events that have undermined their existence."<sup>57</sup> They have only the authorities' nonsensical speculations to explain where their family members have gone. As in torture, the conflict between victims' perception of reality and the perpetrators' description of it results in long-term damage to family members' sense of reality, ability to interpret and evaluate cues in day-to-day life, and confidence in their own judgment.

52. David Becker et al., *Therapy with Victims of Political Repression in Chile: The Challenge of Social Reparation*, 46 J. Soc. ISSUES 133, 138-39 (1990).

53. See Brandon Hamber, *Do Sleeping Dogs Lie?: The Psychological Implications of the Truth and Reconciliation Commission in South Africa*, Seminar Paper Presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 5, Johannesburg, South Africa (July 26, 1995), available at <http://www.csvr.org.za/papers/papsldog.htm> (last visited Apr. 20, 2005) ("The cognitive assumptio[n] . . . that the world is a meaningful and comprehensible place can be profoundly altered by severe forms of trauma.").

54. M. Brinton Lykes & Ramsay Liem, *Human Rights and Mental Health in the United States: Lessons from Latin America*, 46 J. Soc. ISSUES 151, 159 (1990).

55. Lucila Edelman et al., *The Transmission of Trauma: The Argentine Case*, in INTERNATIONAL HANDBOOK OF MULTIGENERATIONAL LEGACIES OF TRAUMA 447, 448 (Yael Danieli ed., 1998). Accord Kordon et al., *supra* note 41, at 205.

56. See, e.g., Edelman et al., *supra* note 55, at 448; Kordon et al., *supra* note 41, at 205.

57. Lykes & Liem, *supra* note 54, at 159.

### C. Fear and Anxiety

Most people possess a basic sense of security in the world: they go through daily life fairly confident that they will not be subjected to emotional or physical attack without warning, except perhaps in places they know to be particularly dangerous. Brutal abuse by another human being can shatter this, leaving the survivor constantly terrified of being subjected to the same torment again.<sup>58</sup> A Uruguayan torture survivor told Lawrence Weschler, “[W]alking down the block I’m in a perpetual cringe. I’m constantly stopping to let whoever is behind me pass: my body keeps expecting a blow from every side.”<sup>59</sup> Even if fear is not constant, it can be triggered by things the survivor frequently encounters in daily life. A concentration camp survivor living in New York City reports panicking one day upon seeing a policeman in Central Park. “[I]t was a very long time before I could see a policeman without feeling immediate and involuntary panic. It wasn’t helped by the fact that New York Police uniforms are superficially reminiscent of those the SS wore.”<sup>60</sup> While not all survivors experience this degree of terror, many still suffer from chronic anxiety.<sup>61</sup>

### D. Feelings of Abandonment and Isolation

Many victims feel profoundly isolated from other people and abandoned by their societies. Psychoanalyst Marcelo Vignar reports that Chilean torture survivors felt others could not understand what they had gone through.<sup>62</sup> Jerry Gray, a therapist with fifteen years of experience treating torture victims, says that feelings of shame after sexual torture “push a person to remain silent and isolated.”<sup>63</sup> Disgust or horror can make people unwilling to hear about survivors’ experiences or ongoing torment.<sup>64</sup>

Social silence about human rights violations isolates survivors. Under repressive regimes, victims and those around them often can be too afraid to speak about government abuses.<sup>65</sup> If there is little discussion of the atrocities in the media and other public fora, victims may form the impression that no one else has suffered similarly.<sup>66</sup> Even after a transition to democracy, some or all of the previous regime’s atrocities may remain undiscussed due to fear

58. RANDALL & LUTZ, *supra* note 34, at 2; Genefke & Vesti, *supra* note 42, at 46; Niederland, *supra* note 46, at 46 (listing “fears of new persecution” as an element of Holocaust survivor syndrome); Somnier et al., *supra* note 42, at 66.

59. WESCHLER, *supra* note 46, at 162.

60. GILL, *supra* note 48, at 437.

61. See Dowdall, *supra* note 46, at 461–62; Genefke & Vesti, *supra* note 42, at 44.

62. See WESCHLER, *supra* note 46, at 171.

63. Telephone Interview with Jerry Gray, then director, Center for Justice and Accountability (Apr. 26, 2000).

64. See *id.*

65. See, e.g., WESCHLER, *supra* note 46, at 88–89 (describing social atomization caused by pervasive fear under military dictatorship in Uruguay).

66. See Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 18, at 13, 19.



of a return of repression,<sup>67</sup> the desire of those who supported the previous regime to “leave the past behind,” selective societal attention to atrocities,<sup>68</sup> fellow citizens’ belief that victims were responsible for their own suffering,<sup>69</sup> or a combination of such factors.

### E. *Damaged Sense of Self and Identity*

Torturers try, and often manage, to undermine and even destroy their victims’ basic sense of self and identity, that is, what they feel defines them as individuals.<sup>70</sup> Subjected to extreme physical pain and emotional distress, victims are forced to repudiate their most deeply held political or religious beliefs.<sup>71</sup> Some survivors “indicate the experience of torture as dismantling their personalities [such that] the person they were before being tortured died at the hands of the torturers.”<sup>72</sup> Becker, Lira, and their fellow Chilean therapists explain that under torture “human beings are deprived of everything that defines them as human, and on the other hand, they are given the power to make decisions that cannot be made without destroying essential aspects of their identities.”<sup>73</sup> In particular, they explain:

The torturer . . . explicitly or implicitly imposes on his victims an extreme dilemma: to let themselves be mistreated and exposed to intolerable pain with unforeseeable physical and psychological consequences, even death—or to “betray,” to transform themselves into executioners of their own political beliefs and companions, delivering the latter to torture and perhaps death. The second alternative may save the victim from physical suffering but it destroys fundamental parts of the person’s self, identity, and collective ties that give meaning to existence.<sup>74</sup>

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67. See Douglas Johnson, *New Paradigm in Human Rights Thinking and Democracy-Building Activities*, 1998 INT’L REHAB. COUNCIL FOR TORTURE VICTIMS ANN. REP. 10, 11–12 (1998).

68. See, e.g., Krauss, *supra* note 50, at A1 (stating that, after the transition to democracy, the experiences of torture victims in Chile were “forgotten, overshadowed by the 4,000 Chileans who disappeared altogether”). But see *infra* note 157 (discussing the investigation of torture by a high-level official commission in 2003–04).

69. See, e.g., Krauss, *supra* note 50, at A1. (noting that the majority of Chileans remained “suspicious of the political left” even after the transition to democracy and “resented” torture victims).

70. See Somnier et al., *supra* note 42, at 57 (stating that torture is a unique form of trauma in being a deliberate attack aimed at destroying the individual’s identity).

71. Jews incarcerated by the military dictatorship in Argentina between 1976 and 1983 were subjected to such particularly brutal treatment “that many preferred to hide their origin, saying, for instance, that they were Catholics.” NATIONAL COMMISSION ON DISAPPEARED PEOPLE, *NUNCA MÁS* 68 (Writers & Scholars Int’l Ltd. trans., 1986) (1984) (quoting a Jewish torture victim). Some Jewish prisoners were forced to shout “Heil Hitler!” and “I love Hitler!” *Id.* at 68, 72.

72. Mary R. Fabri, *Reconstructing Safety: Adjustments to the Therapeutic Frame in the Treatment of Survivors of Political Torture*, 32 PROF. PSYCHOL.: RES. & PRAC. 452, 453 (2001).

73. Becker et al., *supra* note 52, at 139.

74. *Id.* at 138. See also Sverre Varvin & Edvard Hauff, *Psychoanalytically Oriented Psychotherapy with Torture Survivors*, in *CARING FOR VICTIMS OF TORTURE* 117, 120 (James M. Jaranson & Michael K. Popkin eds., 1998) (“For the tortured victim, the situation is often experienced as a psychotic-like situation with no possibility of predicting what will happen and no possibility of acting in a way that is in accordance

The social meaning of particular brutalities contributes to the destruction of victims' sense of self. Sexualized violence and humiliation are especially powerful, taking advantage of the centrality of gender and sexual identity in nearly every culture. In many societies female victims of sexual torture are ostracized by families and friends because their culture sees rape victims as contaminated and worthless.<sup>75</sup> Jerry Gray comments: "Modern torture—of men or women—now nearly always encompasses a sexual attack, because that goes to the very core of personal identity: are you lovable, can you have children, will your community accept you, what opinions do you have of yourself?"<sup>76</sup>

Sexual abuse was used, with other methods of torture, by U.S. soldiers to "soften up" Iraqi prisoners at Abu Ghraib prison for interrogation. This included raping prisoners with instruments,<sup>77</sup> parading them naked in front of U.S. troops of both sexes, and forcing men to masturbate in front of female U.S. soldiers.<sup>78</sup> This treatment was calculated to traumatize them, and gained additional psychological force with the threat—intended or not—that the photographs the prisoners saw taken of them would become public, "exposing [their] humiliation to family and friends" and making their shame "unending."<sup>79</sup> What we know of the psychology of torture, and sexual violence in particular, indicates that those sexually abused by U.S. soldiers are likely to suffer terrible psychological pain long after their release.

#### F. Loss of Sense of Control, Power, and Agency

Many survivors are scarred by a sense of powerlessness and malaise that makes the most basic daily activities difficult. This results from overwhelming events that are intentionally and unjustly perpetrated by other human beings and that the victims have little or no power to halt, interfere with, or otherwise influence.

Torture is in part a tool for creating this paralysis. Lawrence Weschler explains that "what is being taught is the futility of acting like a subject, of

with the tortured person's own moral values and standards and in which there is a constant threat of death.").

75. See RANDALL & LUTZ, *supra* note 34, at 108; Inge Lunde & Jørgen Ortman, *Sexual Torture and the Treatment of Its Consequences*, in TORTURE AND ITS CONSEQUENCES, *supra* note 42, at 310, 316.

76. Gray, *supra* note 63.

77. See Mark Danner, *Abu Ghraib: The Hidden Story*, N.Y. REV. BOOKS, Oct. 7, 2004, at 44 (reporting the treatment of "Detainee-07" as documented by Major General George R. Fay in his official report to the Pentagon, AR 15-6 *Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*); Translation of Sworn Statement Provided by \_\_\_\_\_, Detainee # \_\_\_\_\_, 1430/21 Jan. 04, available at <http://media.washingtonpost.com/wp-srv/world/iraq/abughraib/10.pdf> (Jan. 21, 2004) (last visited Apr. 20, 2005) (recounting rape with a police baton).

78. See Mark Danner, *The Logic of Torture*, N.Y. REV. BOOKS, June 24, 2004, at 70, 72 (reporting "the men paraded naked down the cellblock with hoods on their heads, the forced masturbation, the forced homosexual activity, and all the rest"); Sworn Statement, *supra* note 77 (stating that during an interrogation session "two American girls . . . were hitting me with a ball made of sponge on my dick. And when I was tied up in my room, one of the girls, with blonde hair, she is white, she was playing with my dick . . . And they were taking pictures of me during all these instances.").

79. Danner, *supra* note 78.

aspiring to anything beyond abject objecthood.”<sup>80</sup> Therapists Glenn Randall and Ellen Lutz describe the frequent result as “learned helplessness”:

One of the most common, as well as most devastating, types of human rights abuse is denial of control over even the most basic decisions. Faced with real helplessness, some victims feel that they have lost the capacity to take control even when it is within their power to do so. These feelings may be retained after trauma has ended and may become generalized so that survivors believe they cannot learn new coping strategies, lack the motivation to try, and feel distressed. In essence, they have learned to be helpless.<sup>81</sup>

The worst affected victims are left unable to function in a job or perform basic daily tasks.<sup>82</sup>

### *G. Families of the Disappeared: Inner Conflict and Stalled Grieving*

Therapists' work with family members of disappeared people in Chile and Argentina reveals particular torments that this human rights violation can cause. From the beginning, uncertainty about the disappeared person's condition and whereabouts causes the family terrible anxiety while also leaving hope that their loved one is alive. The contradiction between these feelings complicates and amplifies family members' emotional stress.

As days, weeks, and months pass without any word, the contradiction keeps family members in emotional limbo. Family members begin to suspect the worst, especially if evidence is coming out that others who disappeared were murdered by the government. On the other hand, they know that some people are detained for long periods and eventually emerge. When disappear-

80. WESCHLER, *supra* note 46, at 238.

81. RANDALL & LUTZ, *supra* note 34, at 41–42. See also Thomas W. Miller, *Long-Term Effects of Torture in Former Prisoners of War*, in TORTURE AND ITS CONSEQUENCES, *supra* note 42, at 107, 116–17 (describing learned helplessness and loss of control). The destruction of survivors' ability to act has an important sociopolitical purpose. If released, they return to society wracked with appalling psychological and often physical pain and unable to trust others. They are too terrified to take any but the most docile, apolitical action, lest the authorities detain and torture them again. Other members of the society, seeing that those released from state custody have become tormented shadows of their former selves, are terrorized into submission as well. See RANDALL & LUTZ, *supra* note 34, at 10 n.7 (Torture as a tool of authoritarian rule has “the aim of destroying the personality of the victim, intimidating others from engaging in behavior perceived as threatening, and terrorizing the entire population into submission to the will of those in power.”); LUIS RONIGER & MARIO SZNAJDER, THE LEGACY OF HUMAN RIGHTS VIOLATIONS IN THE SOUTHERN CONE: ARGENTINA, CHILE, AND URUGUAY 28–29 (Laurence Whitehead ed., 1999) (describing Argentina, Uruguay, and Chile under dictatorships in the 1970s and 1980s); Telephone Interview with Douglas Johnson, executive director, Center for Victims of Torture (Apr. 13, 2000). (Although Johnson is not a therapist himself, as executive director of the Center for Victims of Torture for seventeen years, he has discussed the effects of human rights violations on victims and their responses to therapy with the Center's clinicians almost daily.) Many activists and therapists therefore see this destruction of agency, at both individual and social levels, as one of the main purposes of torture. See, e.g., RANDALL & LUTZ, *supra* note 34, at 140; Genefke & Vesti, *supra* note 42, at 45; Johnson, *supra* note 67, at 11.

82. See Derrick Silove, *The Psychosocial Effects of Torture, Mass Human Rights Violations, and Refugee Trauma*, 187 J. NERVOUS & MENTAL DISEASE 200, 203 (1999).

ances are a relatively new phenomenon, it is especially hard to conceive, let alone come to fully believe, that a vanished loved one is dead. In Argentina in the 1970s, many parents whose sons and daughters were disappeared had never imagined “that being detained, no matter how violent[ly], would result in the disappearance and/or murder of their loved ones.”<sup>83</sup>

This understandable hope has the deleterious psychological effect of inhibiting the grieving processes that normally help people cope, immediately and over time, with the loss of a loved one. As time passes and evidence mounts that anyone who has vanished and not returned is almost certainly dead, the tension between fear that the family member is dead and hope that he or she is still alive grows more acute. “Every time I see a madman or a hobo in the street I think it may be my husband; or that he might be somewhere in a similar condition,” one woman told Chile’s National Commission on Truth and Reconciliation, which investigated disappearances and other killings by the Pinochet regime.<sup>84</sup>

Tormented, each family member faces an impossible psychological choice, write therapists who have worked with them: “If family members choose to accept the death of the loved one, they [feel like they] ‘kill’ him or her. If they choose to maintain hope, they deny their everyday experience of the loved one’s absence.”<sup>85</sup> The disappeared person is absent from their daily lives, but family members cannot go through the normal rituals of commemoration and leave-taking that provide some comfort and begin natural processes of coping with loss.<sup>86</sup> Under these circumstances, psychiatrists have found that “[s]ome families may fall into a limbo of ‘ambiguous loss,’ torn between hope and grief, unable to return to the past or plan for the future.”<sup>87</sup>

#### H. Guilt and Sense of Responsibility

Guilt of various sorts afflicts many victims of human rights violations. Some feel “survivor guilt,” a sense that their survival is unjust because so many others perished.<sup>88</sup> Therapists at the Center for Victims of Torture in Minnesota observe a different sense of responsibility: “some clients express

83. Edelman et al., *supra* note 55, at 448. Accord Kordon et al., *supra* note 41, at 205.

84. 2 COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, 781 (Phillip E. Berryman trans., Univ. of Notre Dame ed., 1993) (1991).

85. Becker et al., *supra* note 52, at 140.

86. See RANDALL & LUTZ, *supra* note 34, at 40 (stating that lack of confirmation of loved one’s death may prevent initiation or completion of mourning process); Kordon et al., *supra* note 41, at 209–11.

87. See Eric Stover & Rachel Shigekane, *Exhumation of Mass Graves: Balancing Legal and Humanitarian Needs*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, *supra* note 21 at 85, 95. The Chilean truth commission echoed this point, finding that families of the disappeared face the “unacceptable” situation of having to “bring matters to a close” by deciding to consider the disappeared person dead. 2 COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, *supra* note 84, at 781.

88. See Genefke & Vesti, *supra* note 42, at 44 (“For survivors, deep feelings of guilt and shame often occur after torture. Guilt may be caused by the mere fact of survival.”); Krauss, *supra* note 50, at A10 (“Psychologists say many of the victims [of the Pinochet regime] are still embarrassed that they survived while others were executed.”); Niederland, *supra* note 46, at 45–46 (describing Holocaust survivors).

the belief that they were responsible for their torture; if only they had answered the interrogator in one way or another, they would not have been tortured, or caused the persecution of family members, etc.”<sup>89</sup> Human rights abusers may produce such feelings by forcing victims into extreme choices, such as between seeing family members tortured and naming friends as dissidents who then will be killed. Regardless of the victim’s choice, the result is a disaster for which he or she feels responsible.<sup>90</sup>

Some relatives of direct victims may feel a painful and persistent sense of responsibility for their loved ones’ suffering. A group of psychologists from Argentina reports that fathers of disappeared people there have a higher mortality rate than other people of similar age and social situation. The psychologists attribute this to “intense feelings of impotence and self-reproach that they feel for not having been able to protect their children.”<sup>91</sup>

### *I. Personal Relationships*

Many of the effects described above cause double psychological harm by also disrupting victims’ relationships with loved ones and friends. This disruption undermines victims’ human support system, their most important external resource for recovering from trauma. Problems with interpersonal relationships represent one of the most common reasons Argentine torture victims, for example, seek therapy.<sup>92</sup>

The interference occurs in various ways. Depression can cause family and friends to pull away.<sup>93</sup> Loss of interest in sex can alienate the survivor’s spouse or partner.<sup>94</sup> Change in roles within the family may make the victim feel inadequate or other family members resentful. Older children may have to take paying jobs if a parent is emotionally or physically disabled by human rights violations.<sup>95</sup> A Uruguayan psychologist describes complex emotional dynamics between parents emerging from long-term incarceration and teenage children who have grown up in their absence:

The situation is compounded by the years of idealization on both sides—parents for whom the growing child on the outside was the thin, pure reed around which they organized their entire psychological survival; children who nurtured a fairytale conception of their absent parent’s virtue and prowess and heroism. And now the parent is back, try-

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89. Rosa E. Garcia-Peltoniemi et al., Center for Victims of Torture, Goals and Philosophies of Psychological Services 5 (Apr. 2001) (unpublished manuscript, on file with the Harvard International Law Journal).

90. See Genefke & Vesti, *supra* note 42, at 44.

91. Diana Kordon et al., *Argentina: Psychosocial and Clinical Consequences of Political Repression and Impunity*, 8 TORTURE: Q. J. REHAB. OF TORTURE VICTIMS & PREVENTION OF TORTURE 43, 44 (1998).

92. Diana Kordon et al., *Torture in Argentina*, in TORTURE AND ITS CONSEQUENCES, *supra* note 42, at 433, 446.

93. See *supra* note 49.

94. See *supra* note 46.

95. See *supra* Part II.F.

ing to regulate the volume on the record player. You see it over and over again, the kids finally shouting, "Who are you to order me around? Where were you all those years when I needed you?" The parents crumbling when faced with the dissonance of this new reality in which *they* are being cast as the arbitrary disciplinarians [akin to their own former jailors]. Families shattering under the strain. There are hundreds of divorces. You see these people who spent over a decade yearning to be with their families—and then they can't be with their families. You see them walking around the city, all alone.<sup>96</sup>

Human rights violations damage many survivors' trust in other people and sometimes even family members.<sup>97</sup> This may stem in part from a sense that either the society generally or particular people failed to protect them.<sup>98</sup> It may be an intentional consequence of their abuse: Gray states that "the point of modern torture is to break trust in other people, so that you become isolated . . . [s]o you can't organize, you can't trust your family, your neighbors, your church, your union, your party."<sup>99</sup> Some survivors feel that family members, friends, or others wonder what they said under torture and that they suspect the survivor had some responsibility for subsequent horrors, such as the arrest and torture of a colleague.<sup>100</sup>

These emotional dynamics can destroy relationships that could comfort and heal a survivor. In some cases they break up families and end friendships. Violent human rights abuses so undermine some victims' ability to relate to other people that many therapists identify rebuilding this capacity as one of the central tasks in treating them.<sup>101</sup>

### III. PSYCHOLOGICAL EFFECTS OF JUDICIAL ACTIONS

We have only an embryonic understanding of how judicial processes affect survivors of human rights violations—whether they ameliorate, exacerbate, or have no effect on the psychological aftereffects described above. Therapists, lawyers, and academics have observed individual survivors, and survi-

96. WESCHLER, *supra* note 46, at 164.

97. See RANDALL & LUTZ, *supra* note 34, at 33 (describing effects seen in survivors of traumatic human rights abuses such as torture, disappearance or summary execution of a family member or friend); Enrique Bustos, *Psychodynamic Approaches in the Treatment of Torture Survivors*, in TORTURE AND ITS CONSEQUENCES, *supra* note 42, at 333, 339.

98. See also *supra* Part II.D.

99. Gray, *supra* note 63. For authoritarian regimes this atomization created by torture has the political function of inhibiting the organization of opposition. See Johnson, *supra* note 67, at 10–11.

100. Krauss, *supra* note 50, at A10 ("Some [survivors of torture under Pinochet regime] feel shame for having given up names of comrades to their torturers, while others feel paranoia at the thought that people may think they did even when they did not."). Elaine Scarry argues passionately against holding torture survivors responsible for what they do under such horrific duress. Naming names is not "betrayal," she argues, and people tortured are not responsible for giving in to torture. Torturers use extraordinarily powerful means to compel compliance with their demands and insist on the impossible, such as that people identifying "subversives" even if they know none. SCARRY, *supra* note 51, at 330 n.10.

101. RANDALL & LUTZ, *supra* note 34, at 100; Fabri, *supra* note 42; Gray, *supra* note 63.

vors themselves have spoken about their experiences. Most of these observations are merely snippets—a single paragraph in an article, an anecdote in a speech, a comment in an interview—that report a particular victim's response to a trial or suggest a generalization about how victims react to trials.

This Part collects and analyzes this scattered written and oral evidence. It presents a typology of trials' psychological effects on victims and explains the psychological logic of each effect.<sup>102</sup> The effects are divided into two categories: those that apply to any survivor who knows about the trial or suit, and those that affect only survivors who participate in it formally, for example as complainants, plaintiffs, or witnesses. Survivors may experience more than one of these effects, positive and negative, and those participating in a judicial process may experience effects in both categories.<sup>103</sup>

#### *A. Effects Independent of the Survivor's Participation in the Judicial Process*

This Section surveys effects on survivors that do not depend on their participation in the judicial process in question (for example, as witnesses). Non-participating survivors may follow the progress of trials through direct observation in the courtroom, the mass media, or word-of-mouth.

##### *1. Relieving Victims' Sense of Abandonment by Society: Trials as Social Acknowledgment and Condemnation*

Many therapists and writers on transitional justice argue that a society must demonstrate its outrage at brutal human rights abuses to officially condemn them and to acknowledge victims' suffering and dignity. If victims feel isolated and abandoned by society after suffering brutal abuse at the hands of the state,<sup>104</sup> trials can signal society's new solidarity with them. Therapist Rosa Garcia-Peltoniemi states: "Judicial processes can be very valuable in validating victims by recognizing that the events happened, that they caused the victims great suffering, and that they were wrong."<sup>105</sup> Chilean novelist

102. Sorting out distinct effects of trials on victims inevitably simplifies psychological dynamics that are highly complex as well as little understood. Psychological recovery does not occur simply through mechanistic treatment of specific symptoms by discrete and clearly understood "effects" (such as those described in this Part) that have been generated intentionally, for example by a trial. Therapists and researchers have found that healing is a complicated process, often driven as much by fluctuations in such conditions as a survivor's family dynamics, economic well-being, security, and physical health as by the intervention of therapists or, perhaps, by trials. However, identifying more-or-less distinct psychological effects of trials on victims, as this Part does, begins to clarify the interaction of judicial processes and victims' psychology.

103. The wide variation in individual survivors' reactions to traumatic events makes it likely that their reactions to trials vary greatly as well. See *supra* note 42.

104. See *supra* Part II.D.

105. Telephone Interview with Rosa Garcia-Peltoniemi, director of Client Services and Psychological Services, Center for Victims of Torture (Apr. 28, 2000). Cf. Judith Lewis Herman, *Just Dignity*, AM. PROSPECT, Jan. 31, 2000, at 48 (describing crime victims' craving for "public acknowledgment that what happened to them was wrong" and for the "burden of shame [to be] lifted from their shoulders and placed where it belongs" and stating that trials can provide this). A study of plaintiffs in civil lawsuits against perpetrators of (ordinary criminal) sexual abuse in Canada found that eighty-two percent had

Isabel Allende describes a torture victim who “wants her suffering to be acknowledged, she needs an apology, she demands that the criminals face trial. Otherwise, how could she start healing?”<sup>106</sup>

According to Douglas Johnson, executive director of the Center for Victims of Torture, a treatment center, victims in Argentina received such benefits from the successful mid-1980s prosecutions of military officers for atrocities committed during the 1976–83 dictatorship.<sup>107</sup> Two members of the juntas that had ruled the country were convicted of multiple counts of murder and torture and sentenced to life in prison, while others received shorter prison terms.<sup>108</sup> Human rights activists and ordinary citizens also filed thousands of legal complaints that could have led to criminal charges.<sup>109</sup> A series of military uprisings, however, led President Raul Alfonsín to terminate all pending cases in 1987.<sup>110</sup>

Johnson lived in Argentina during the trials and has worked with Argentine therapists, activists, and victims since then. He reports that the trials that proceeded to completion had a “very salutary effect for victims.”<sup>111</sup> They documented the extent of the dictatorship’s human rights violations and their impact on victims, and firmly placed the blame on the military’s top commanders.<sup>112</sup> Furthermore, they brought an outpouring of attention to victims’ experience from across the society. “The repression and what the military had done was the topic of discussion [o]n street corners, [in] bars, and within families. . . . Argentines understood what had happened and why it was important to prevent it in the future.”<sup>113</sup> Johnson believes this awareness would not have come about had the trials not taken place.<sup>114</sup>

Analysts including several Latin American therapists also make this argument in the negative—that victims experience the absence of trials, guilty verdicts, or punishment as psychologically damaging.<sup>115</sup> In December 1986 Uruguayan psychoanalyst Marcelo Vignar characterized a planned amnesty

been seeking “public affirmation of wrong or closure.” Bruce Feldthusen et al., *Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse*, 12 CAN. J. WOMEN & L. 65, 75 (2000).

106. Isabel Allende, *Impunity*, Text Presented at the U.N. International Day in Support of Victims of Torture (June 26, 1999) (on file with the Harvard International Law Journal). Cf. TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE’S GHOSTS AFTER COMMUNISM* xviii (1996) (stating that victims can only “truly heal” when “their dignity and suffering have been officially acknowledged,” but not equating such acknowledgment with trials).

107. Johnson, *supra* note 81.

108. See CARLOS S. NINO, *RADICAL EVIL ON TRIAL* 89 (1996); Tarnopolsky, *supra* note 16, at 54.

109. See RONIGER & SZNAJDER, *supra* note 81, at 69.

110. See NINO, *supra* note 108, at 90–102 (describing the military unrest and political compromise leading to the Full Stop and Due Obedience Laws).

111. E-mail from Douglas Johnson (Mar. 31, 2005, 12:37:01 CST) [hereinafter Johnson E-mail] (on file with the Harvard International Law Journal).

112. *See id.*

113. *Id.*

114. *Id.*

115. Few specify which of these elements is the key to the psychological benefits they believe trials would provide, or whether all would play a role. The possible effects of trials ending in acquittal or with sentences the victims saw as insufficiently severe are seldom discussed. *See infra* Part III.A.5.



for crimes during the 1973–85 dictatorship as continuing the silence central to torture. Military torturers had told their victims, “Scream all you like, your resistance is completely futile, no one will ever know.”<sup>116</sup> After 1985, victims’ neighbors and friends indeed said that they had not known what was occurring during the dictatorship.<sup>117</sup> Vignar concluded: “This point about no one’s ever knowing was the very subject matter of the torturer’s discourse . . . [.] That’s what the torture was *all about*. That’s why an amnesty will be so terrible, because it will perpetuate the torture itself.”<sup>118</sup>

The argument that failure to prosecute human rights violators causes victims psychological pain is often phrased as a condemnation of conditions of “impunity.” The argument’s proponents describe “impunity” as “a tangible, continuing injury[,] . . . an impediment in the individual’s and society’s healing process.”<sup>119</sup> “Impunity . . . generates feelings of defencelessness and abandonment, accompanied by symptoms such as nightmares, depression, insomnia, and somatizations.”<sup>120</sup> Many victims, they say, experience the absence of judicial condemnation as a failure to take seriously the evil perpetrators inflicted on them, and feel it as a new injury.<sup>121</sup> According to a group of therapists in Argentina, for example, conditions of impunity there in the 1990s created “feelings of defencelessness and abandonment” in many victims and made them “feel that they [were] carriers of a traumatic history that could not be shared with others.”<sup>122</sup>

The literature on impunity provides some support for the inference that prosecuting perpetrators would alleviate survivors’ psychological pain. However, it is not always clear whether a state of “impunity” means simply the failure of state authorities to prosecute human rights violators, or involves more, such as aggressive public denial by perpetrators that any atrocities took place.<sup>123</sup> More importantly, therapists writing about the effects of impunity do not describe actual instances of prosecutions helping victims psychologically. The large number of ways trials may positively or negatively affect victims, detailed in this Part, suggests that predictions of trials’ effects based on victims’ condition in their absence may be highly uncertain.

Trials that signify state acknowledgment of victims’ experiences and dignity, and condemnation of those responsible, might alleviate several of the

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116. See WESCHLER, *supra* note 46, at 171.

117. *Id.*

118. *Id.* at 171–72.

119. Inge Genefke, Secretary-General, International Rehabilitation Council for Torture Victims, Statement on U.N. International Day in Support of Victims of Torture (June 26, 1999) (on file with the Harvard International Law Journal). Cf. Krauss, *supra* note 50, at A10 (stating that Chilean government opposition to the requested extradition of Augusto Pinochet from the United Kingdom to Spain has “caused anger and pain among many torture victims”).

120. Kordon et al., *supra* note 91, at 44.

121. See Johnson, *supra* note 81.

122. Kordon et al., *supra* note 91, at 43–44. See also Kordon et al., *supra* note 92, at 446–47 (stating that the failure to penalize human rights violators “generates a climate of distrust among the survivors” that impedes productive therapy).

123. See, e.g., Edelman et al., *supra* note 55, at 451; Kordon et al., *supra* note 91, at 43.

traumatic effects of human rights violations described in Part II. Guilty verdicts may validate survivors' understanding of the abuses and help them regain confidence in their judgment.<sup>124</sup> Placing responsibility on the perpetrator may alleviate some victims' belief that they were responsible for their own, or loved ones', suffering.<sup>125</sup> Judicial proceedings may also alleviate survivors' loneliness<sup>126</sup> by informing society of what happened and affirming its importance.

2. *Restoring a Sense of Security: Trials as Symbols and Vehicles of Protection for Survivors*

Concrete and symbolic aspects of successful trials may somewhat alleviate the fear many victims experience and help restore their basic sense of security.<sup>127</sup> Imprisonment ensures that victims will not encounter their tormentors in daily life, as some otherwise would.<sup>128</sup> Gray founded the Center for Justice and Accountability to press for the prosecution and imprisonment of human rights violators living in the United States. Gray was impelled by the discovery that many of his immigrant patients were living alongside torturers from their home countries, who had immigrated to the same communities in the United States. Gray felt that victims' recovery would be aided if they felt others were working to protect them.<sup>129</sup>

Criminal, and perhaps civil, judgments against perpetrators may also alleviate victims' insecurity by symbolizing that society will protect them from further abuse, reversing the abandonment that permitted the original violation.<sup>130</sup> A reduction in fear can in turn alleviate other psychological sequelae of human rights violations, such as those associated with PTSD.<sup>131</sup>

124. See *supra* Part II.B.

125. See *supra* Part II.H. Becker and his fellow Chilean therapists describe a woman whose son was shot by police when she let him leave the house to watch television with neighbors. Her legal action against the police helped her "attain an emotional understanding of the fact that the police, and not she, had killed her son." Becker et al., *supra* note 52, at 143. See also Nora Sveaass, *The Psychological Effects of Impunity*, in PAIN AND SURVIVAL: HUMAN RIGHTS VIOLATIONS AND MENTAL HEALTH 211, 217 (Nils Johan Laviik et al. eds., 1994) (speculating that trials could "cleans[e]" victims of their shame by placing blame on perpetrators).

126. See *supra* Part II.D.

127. See *supra* Part II.C.

128. See, e.g., Robert Frank, *Samritb's Agony: A Cambodian Woman Explains Why Peace Hurts as Much as War*, WALL ST. J., July 19, 2000, at A1 (profiling a Cambodian woman living in the same village as those who ordered her husband's killing during the Khmer Rouge period).

129. Gray, *supra* note 63. This approach may be ineffective if the imprisoned human rights violator has allies who remain at large. As Part III.A.4 discusses, survivors who help convict a perpetrator may be targeted for intimidation or reprisals.

130. Kordon et al. describe Argentina in the 1990s, after military officers convicted of human rights violations under the 1976–83 dictatorship were pardoned:

[T]he social context was marked by the fact that those people who had carried out the military repression were at large in society. There were widespread reports about the barbaric acts that [had] occurred under military rule but there was no intention of punishing those responsible for these crimes. This left the survivors fearful and inhibited in their thought and actions. They feel the freedom of the repressors is a real threat to all the people.

Kordon et al., *supra* note 92, at 446.

131. See Silove, *supra* note 82, at 203 ("Studies on torture survivors have tended to support the hy-

### 3. Finding "Truth": Obtaining Information Through Judicial Action

After brutal human rights violations, a chief demand of many victims is for "truth": details about what was done to them or their loved ones and by whom. This information may be especially important in cases of disappearance, which can leave family members deeply conflicted about what to believe about their loved ones' fate.<sup>132</sup>

Judicial proceedings provide potent tools for uncovering such information. Civil or criminal discovery powers, including subpoena, can compel testimony by associates of the defendant, such as fellow members of security forces. Prosecutors have more time, access, and skill for investigation than most private citizens do, so their inquiries are more likely to produce answers, even before a case comes to trial. Discovery in civil suits, too, can yield therapeutically helpful information.

Even judicial action that ends before trial or conviction can obtain information for victims. In Argentina, judges interpreted the Full Stop and Due Obedience Laws, which blocked prosecutions for human rights violations during the 1976–83 dictatorship,<sup>133</sup> as permitting judicial investigations even before those laws were abrogated in 2001.<sup>134</sup> Supported by human rights organizations, several prosecutors conducted *juicios por la verdad* (trials for the truth), attempting to learn what happened to particular disappeared people.<sup>135</sup> These improved upon the efforts many families had already made by adding the investigative expertise of trained prosecutors, the financial and administrative resources of the state, and the power to subpoena testimony and documents. The "Aylwin Doctrine," a similar interpretation of Chile's amnesty law, has allowed some judicial investigations into disappearances there.<sup>136</sup> In other situations, the credible threat of prosecution may lead perpetrators to offer information in exchange for immunity.<sup>137</sup>

The information that judicial proceedings and investigations obtain, and the stamp of authority that they place on it, may ameliorate several of the psychological conditions described in Part II. These may help some victims resolve feelings of guilt or responsibility for what happened to them or to a

pothesis that the perception of threat is closely linked to the risk of PTSD.".)

132. See *supra* Part II.G.

133. See *supra* text accompanying note 6.

134. See *supra* note 6.

135. CENTRO DE ESTUDIOS LEGALES Y SOCIALES ("CELS"), 2000 DERECHOS HUMANOS EN ARGENTINA: INFORME ANNUAL 39–51 (2000).

136. See HUMAN RIGHTS WATCH, CHILE—WHEN TYRANTS TREMBLE: THE PINOCHET CASE (1999), available at <http://www.hrw.org/reports/1999/chile> (last visited Apr. 20, 2005).

137. The South African Truth and Reconciliation Commission's investigations depended largely on such a bargain: perpetrators received amnesty for their crimes if they fully confessed, providing all details requested by victims and their families as well as investigators. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 59 (1998). The Pinochet arrest spurred members of Chile's armed forces to offer information on people disappeared by the dictatorship in exchange for an end to human rights advocates' challenges to the amnesty law that shielded them. HUMAN RIGHTS WATCH, *supra* note 136.

disappeared loved one, by showing that they could not have prevented it. Official records of a survivor's detention and interrogation may clear up confusion he or she feels about what happened, helping the survivor rebuild confidence in his or her own judgment.<sup>138</sup> Those records may also help family members and friends understand problems the survivor has suffered since release, easing any tensions those problems may have caused.<sup>139</sup>

We also have strong evidence that information about what happened to disappeared loved ones, especially when accompanied by recovery of their bodies, can help their families resolve the limbo in which they hover and initiate normal grieving processes.<sup>140</sup> Exhumations of mass graves "can help individual mourners and whole communities receive acknowledgement of their loss and move forward in the grieving process. These concerns cross cultures and traditions."<sup>141</sup> Argentine forensic anthropologists with experience in thirty-one countries report that families have "a desperate need to recover remains so that loved-ones may be properly buried, and thereby close, if only partially, the circle of uncertainty."<sup>142</sup>

Judicial excavation of mass graves does not always facilitate survivors' psychological recovery, as investigators' and survivors' needs can clash.<sup>143</sup> For example, investigators from the ICTY lacked the resources and time to identify each of the thousands of bodies they dug up and examined in 1999, while seeking evidence of Serbian commanders' responsibility for war crimes in Kosovo.<sup>144</sup> Relatives of the missing have staged protests and hunger strikes over the slow progress of this and other international identification efforts.<sup>145</sup>

Information from judicial investigations occasionally leads to happier reunions. Legal actions by the Abuelas de Plaza de Mayo (Grandmothers of the Plaza de Mayo) in Argentina have located children who were "adopted" by members of the military who disappeared their parents.<sup>146</sup> While the reunion of these children with their grandparents does not bring the middle, disappeared, generation back to life, the Abuelas report "great joy" when each grandchild is identified and restored to his or her family.<sup>147</sup>

138. See *supra* Part II.B.

139. See *supra* Part II.I.

140. See *supra* Part II.G.

141. Stover & Shigekane, *supra* note 87, at 96.

142. Mercedes Doretti & Luis Fondebrider, *Science and Human Rights: Truth, Justice, Reparation and Reconciliation, a Long Way in Third World Countries*, in *ARCHAEOLOGIES OF THE CONTEMPORARY PAST* 138, 143 (V. Buchli & G. Lucas eds., 2001), quoted in Stover & Shigekane, *supra* note 87, at 85.

143. See generally Stover & Shigekane, *supra* note 87.

144. See *id.* at 92–94.

145. *Id.* at 95.

146. See Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 *HARV. HUM. RTS. J.* 123 (2001); Silvana Boschi, *La Corte dejará en la justicia civil el caso de robo de bebés*, *CLARÍN* (Arg.), July 28, 2000, at 6; CELS, *supra* note 135, at 29–33. The Grandmothers are parents of the disappeared, so the adoptees are their grandchildren.

147. See Abuelas de Plaza de Mayo, *Un buen inicio de año: "Encontramos otro nieto," available at* <http://www.abuelas.org.ar/comunicados/restituciones.htm> (Jan. 27, 2004) (last visited Apr. 20, 2005).

4. *Dredging Up the Past Versus Breaking the Silence: Trials as Awakeners of Settled Issues or Stimulants of Social Awakening?*

Debates over whether to try human rights violators often pit those who argue against “forgetting” violation and in favor of “breaking the silence” about them against those who believe that “dredging up” settled issues will do more harm than good for survivors.<sup>148</sup> This Section summarizes the evidence on this question. It strongly supports the conclusion that trials’ breaking of social silence often does, indeed, help individual victims. Conversely, there is little evidence that they painfully “reopen healed wounds” in any significant number of cases.

Evidence from Chile indicates that judicial action against perpetrators can break this silence and help survivors. When Pinochet relinquished power in 1990 after seventeen years in power, he and his allies retained control over Chile’s armed forces.<sup>149</sup> This ensured that their democratic successors did not attempt to prosecute them for human rights abuses and allowed only limited investigations.<sup>150</sup> For example, when President Patricio Aylwin created a truth commission in 1990, he mandated that it examine only atrocities that resulted in death, requiring that it ignore torture victims who survived.<sup>151</sup> Many Chilean victims of the Pinochet dictatorship kept quiet about what they had suffered, even after the transition to democracy.<sup>152</sup> Isabel Allende described a “conspiracy of silence” that prevented the social acknowledgment that victims needed and that prosecuting perpetrators could provide.<sup>153</sup> South African therapist Brandon Hamber explains how such a situation can be harmful to survivors: “[S]ilence [about trauma] can be individually destructive in the long run and results in individuals being excluded from social, emotional and political life. This leaves most survivors feeling misunderstood and that nobody is willing to hear their story.”<sup>154</sup>

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148. Individual psychology is not always a focus of these arguments. They sometimes only concern social dynamics, not the effects on individuals that are this paper’s focus. Participants’ use of metaphors from individual psychology (such as closure) often suggests unintentionally that they are speaking of individual as well as social effects. E.g., Alex Boraine, *Introduction, in DEALING WITH THE PAST*, *supra* note 22, at ix, xiii–xiv (“The focus on past violations runs the risk of being counterproductive and, instead of healing, could actually cause fresh wounds and cleavages in an already deeply divided society.”).

149. See RONIGER & SZNAJDER, *supra* note 81, at 94.

150. See *id.* at 95.

151. See Supreme Decree No. 355: Creation of the Commission on Truth and Reconciliation, art. 1 (Chile) reprinted in 1 COMISIÓN NACIONAL DE VERDAD Y RECONCILIACIÓN, *supra* note 84, at 5–9.

152. See Krauss, *supra* note 50, at A10; Lake Sagaris, *Treatment of Psychiatric Problems a Growth Industry in Midst of Chile’s Booming Economy*, 155 CAN. MED. ASS’N. J. 103, 104 (1996) (reporting Chileans’ pervasive fear of speaking about Pinochet-era human rights violations).

153. Allende, *supra* note 106. Allende’s account of a torture victim’s needs suggests that the psychological benefits of breaking social silence and receiving social acknowledgment, see *supra* Part III.A.1, shade together.

154. Hamber, *supra* note 53. Accord ROSENBERG, *supra* note 106, at xviii (“Nations, like individuals, need to face up to and understand traumatic past events before they can put them aside and move on to normal life.”).

Pinochet's October 1998 arrest in the United Kingdom, on charges that included torture, broke the silence in Chile about his regime's atrocities.<sup>155</sup> According to Paz Rojas, chief of neurological services for the University of Chile, many torture victims sought therapy after the arrest. Rojas called the arrest "a great catharsis that has begun to break the silence."<sup>156</sup> For example, it enabled Mario Fernández, tortured with beatings, electric shocks, and burns, to seek therapy after twenty-five years. "I needed to talk about the terror inside that hood they put on me, of not knowing whether they would kill me from one minute to the next," he said.<sup>157</sup>

The most compelling evidence of trials' potential to aid survivors psychologically by breaking a silence about the atrocities they suffered comes from Adolf Eichmann's trial in Israel in the early 1960s. After 1945, Israeli politicians, intellectuals, and media showed almost no interest in the experiences of survivors during the Holocaust.<sup>158</sup> Some survivors wanted to tell their stories, and felt rejected and alienated when others signaled that they did not want to hear.<sup>159</sup> In May 1960, Israeli agents kidnapped Eichmann from Argentina and flew him to Jerusalem. His showcase trial the next year broadcast a detailed account of the Holocaust to the nation for months,<sup>160</sup> "shattering two decades of silence in which the atrocities of World War II had received only fleeting, uneasy glances."<sup>161</sup> Forty-six survivors, selected by prosecutors to represent a range of Jewish communities, testified about their personal experiences as much of the country listened by radio.<sup>162</sup> Dalia Ofer, professor

155. See HUMAN RIGHTS WATCH, *supra* note 136 (stating that 1999 "has seen the first relatively open debate in the media since [1994] about the human rights legacy of the military" and that politicians "across the political board" now believe "for the first time . . . that the victims are owed answers by those responsible"). Cf. Johnson E-Mail, *supra* note 111 (stating that trial of former dictators in Argentina in the 1980s stimulated widespread discussion of their atrocities); *supra* text accompanying notes 111–114.

156. Krauss, *supra* note 50, at A10. The number of torture survivors contacting one survivor support group tripled in the year following the arrest, and demand for a church-sponsored mental health program increased by fifty percent and was continuing to rise a year later. *Id.*

157. *Id.* In 2003 the Chilean government appointed a new commission to investigate torture under the Pinochet dictatorship. The commission's report, released in late 2004, found a systematic policy of using torture in over 1100 detention centers. The Chilean government will pay modest reparations to the 27,000 torture victims the commission identified. See *Unravelling a Tortured Past*, ECONOMIST, Dec. 4, 2004, at 38.

158. See GILL, *supra* note 48, at 4; *id.* at 94 (stating that "it was for all intents and purposes impossible to talk about the Holocaust in Israel" until the Eichmann trial); *id.* at 454 (quoting an Israeli Holocaust survivor as saying, "In general, here, [the Holocaust] was little spoken of until Eichmann's trial."); Eva Fogelman, *Therapeutic Alternatives for Holocaust Survivors and Second Generation*, in *THE PSYCHOLOGICAL PERSPECTIVES OF THE HOLOCAUST AND ITS AFTERMATH* 79, 86–89 (Randolph L. Braham ed., 1988) (describing the prevailing view of Holocaust survivors in Israel prior to the Eichmann trial as reprehensibly having failed to fight back); Samantha Power, *The Stages of Justice*, NEW REPUBLIC, Mar. 2, 1998, at 32, 35.

159. See GILL, *supra* note 48, at 8, 94, 454.

160. HANNAH ARENDT, *EICHMANN IN JERUSALEM* (Penguin Books 1994) (1963). See also Cr.C. (Jm.) 40/61, *The State of Israel v. Eichmann*, 1961, 45 P.M. 3, reprinted in 56 AM. J. INT'L L. 805 (1962).

161. Power, *supra* note 158, at 35. Accord GILL, *supra* note 48, at 4, 94, 454; Fogelman, *supra* note 158, at 89.

162. See Dalia Ofer, *Israel*, in *THE WORLD REACTS TO THE HOLOCAUST* 836, 876 (David Wyman ed., 1996).

of Holocaust studies at Hebrew University, describes the effect: "The image of Jews going as sheep to the slaughter," which had prevailed throughout the 1950s among Israelis who had not suffered through the Holocaust, "was weakened by the [witnesses'] personal descriptions of the circumstances."<sup>163</sup> Through the survivors' testimonies,

the public and the press [became] able to understand their own inability to comprehend what had happened. . . . Following this realization, the press expressed its clear admiration for the survivors. . . . As a result of the Eichmann trial, the survivors would no longer be an anonymous group.<sup>164</sup>

Ordinary Israelis began to appreciate what survivors had suffered and to "make a stronger effort to empathize with the survivors and the memories that impinged on their daily lives."<sup>165</sup> For many survivors, the trial provided a social opening that enabled them to speak to newly interested others, including younger people, and this had therapeutic value for them.<sup>166</sup>

Arguments against "reopening old wounds" or "dredging up" painful issues dispute that public discussion and awareness help victims. In Cambodia, some victims have resisted the recent push for trials of Khmer Rouge leaders, saying that their pain is better handled by not discussing it and not having it discussed around them.<sup>167</sup> Some Western and Cambodian therapists believe that trials would "retraumatize" Cambodians who are currently functioning effectively and trigger post-traumatic stress disorder among them.<sup>168</sup> The dramatic rise in the number of Chilean survivors seeking therapy<sup>169</sup> could indicate retraumatization caused by the Pinochet arrest and the resulting social discussion of his crimes.

Although we lack sufficient evidence to generalize with confidence, what we know suggests that trials seldom hurt survivors by reviving psychological issues they have addressed and put to rest. Even if the ex ante judgments of therapists about Cambodia are correct, the rarity of such views among therapists elsewhere suggests that they may be culturally specific to Cambodia. And Chilean therapists quoted in news reports do not interpret the increase

163. *Id.* at 877.

164. *Id.* at 877, 880.

165. *Id.* at 880.

166. See GILL, *supra* note 48, at 438 (describing a survivor mother who shared her experience with her son only after the Eichmann trial); Fogelman, *supra* note 158, at 89. *But see* HOWARD ROITER, VOICES FROM THE HOLOCAUST 175–76 (1975) (describing a survivor's disappointment that, after the Eichmann trial, fellow Israelis showed little interest in his experience in Treblinka). *Cf.* ANNETTE KAHN, WHY MY FATHER DIED 206 (1991) (describing how the 1987 trial of Klaus Barbie led to her mother's telling the author for the first time the story of her experience in a Nazi concentration camp); *id.* at 238 (stating that the trial brought out and showed her the story of her father's life, including his death at Barbie's order).

167. See David Lamb, *Cambodia Struggles to Confront Its Past*, L.A. TIMES, Apr. 17, 2000, at A1.

168. Anette Marcher, *Khmer Rouge Trials Could Renew Trauma*, PHNOM PENH POST (Cambodia), Aug. 6–19, 1999, at 9.

169. See Krauss, *supra* note 50, at A1, A10.

in survivors seeking therapy as the result of an upsurge in trauma. Rather, they see survivors as finally feeling able to speak about their experiences, a psychologically positive phenomenon. Lastly, none of those interviewed for this Article even suggested that social silence would be preferable to the risk of “dredging up” difficult memories and one specifically rejected the notion.<sup>170</sup> On balance, the evidence supports the conclusion that, at least in some cultures, trials have a psychologically positive effect on victims when they lead to public discussion of the abuses they suffered, breaking a former silence.

### 5. *Betrayal and Disappointment: Failed or Insufficient Trials as Psychologically Harmful*

The last psychological dynamic that may affect survivors who do not participate in judicial proceedings is hurtful, not salutary. There is some evidence that failed trials or civil suits<sup>171</sup> may cause survivors psychological distress that they would not have suffered if their hopes had never risen. Even partial victories may sometimes do more psychological harm than good. Guilty verdicts on only lesser charges, such as negligent treatment of a prisoner, may feel to survivors like a denial of greater horrors the defendant has perpetrated, such as torture.

There is contradictory evidence from Argentina on this point. As described above, in 1987 President Alfonsín terminated an ambitious campaign of prosecutions of members of the military for human rights violations committed during the 1976–83 dictatorship.<sup>172</sup> In 1989 and 1990 his successor, Carlos Menem, pardoned all those who had been convicted and were serving prison sentences. Daniel Tarnopolsky's entire immediate family had been disappeared by members of the Argentine navy when he was eighteen. His psychological pain was so intense that he suffered sudden seizures for years afterward.<sup>173</sup> After the military leaders' convictions, he had felt able to return to Argentina after years in exile.<sup>174</sup> Alfonsín's termination of prosecutions, however, destroyed this newfound equanimity. When Menem pardoned and released two admirals who had been members of the juntas, Tarnopolsky “felt that my parents had been killed a second time.”<sup>175</sup>

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170. Johnson specifically stressed that one of the ways the failure to prosecute human rights violators hurts individual victims is by maintaining a silence about their atrocities. Johnson, *supra* note 81. Fabri and Gray implicitly endorsed the value of speaking out, although they did not discuss this subject specifically. Fabri, *supra* note 42; Gray, *supra* note 63.

171. See, e.g., *Jury Clears Ex-Salvadoran Generals*, WASH. POST, Nov. 4, 2000, at A9 (reporting a Florida jury's ruling against relatives of nuns murdered in El Salvador in their suit under the Alien Tort Claims Act against Salvadoran generals allegedly responsible).

172. See *supra* text accompanying notes 108–110.

173. Tarnopolsky, *supra* note 16, at 54.

174. *Id.*

175. *Id.* at 55. This despair dissipated nearly a decade later, in 1999, when Tarnopolsky won an unprecedented civil verdict against the two admirals and the Argentine government. See *infra* text accompanying notes 248–250.



On balance, however, the campaign of prosecutions may have helped victims, even if Tarnopolsky's reaction was common (which we do not know). Johnson argues this vigorously, based on his experience in Argentina at the time and contact with the country since.<sup>176</sup> The trials officially acknowledged survivors' experiences and pain, educated their fellow citizens about those, and identified and condemned the perpetrators.<sup>177</sup> Even though termination of the trials was a setback for victims, Johnson believes the trials that did take place were very valuable for victims.<sup>178</sup>

There is some evidence that prosecution that victims see as half-hearted, or penalties they consider grossly inadequate, may also cause them psychological distress. Garcia-Peltoniemi explains:

If there is a conviction, but the victim feels the penalty is too little, this can create a new sense of victimization, because the victim feels that the world now knows his or her story, yet the judges, who represent the world, don't recognize his or her pain and the pain of the others who suffered.<sup>179</sup>

According to a psychiatrist who worked with concentration camp survivors, these survivors were distressed by West Germany's prosecution of Nazis after World War II.

[F]ormer Nazis were given sentences like three years for killing 150 people—ridiculously lenient, notional sentences. Awareness of these trials [among survivors] brought tension, and the fact that these criminals were clearly not being considered as all that "guilty" after all came as a terrible blow for these survivors.<sup>180</sup>

Some plaintiffs in civil suits who receive damages below what they expect feel emotional distress even though they have won. A study of Canadian survivors of sexual abuse who filed lawsuits or claims with Canadian government compensation boards<sup>181</sup> concluded that "[f]ailure to achieve one's compensatory goals poses a serious therapeutic risk."<sup>182</sup> The study found that plaintiffs

176. Johnson E-mail, *supra* note 111 ("[I]t doesn't make any sense to say that [trials] made things worse for victims than if they hadn't happened at all.")

177. *Id.*

178. *Id.*

179. Garcia-Peltoniemi, *supra* note 105. Research on ordinary crime supports this view. See KATZ & MAZUR, *supra* note 39, at 199 (stating that "[t]he gap between the [rape] victim's expectations [of the results of a prosecution]" and acquittal, which is common, "makes later adjustment even more difficult").

180. GILL, *supra* note 48, at 108 (quoting Professor Leo Eitinger).

181. These two quasi-judicial compensation systems were the Ontario Criminal Injuries Compensation Board, a statutory body that grants restitution to victims of violent crime, and the Grandview Agreement, which provided for government compensation to former female juvenile delinquents who had been sexually assaulted in a state reform school. See Feldthusen et al., *supra* note 105, at 72-73.

182. *Id.* at 98. One plaintiff received an award she saw as grossly inadequate, which made her feel "like I wasn't worth very much." *Id.*

“who did not receive an award or who received one that was felt to be below average were deeply hurt.”<sup>183</sup> The study included victims of ordinary crime committed by private actors, as well as victims of state-connected violence who had been sexually assaulted while incarcerated.<sup>184</sup> However, its findings may apply in a general way to survivors of traumatic violations of human rights.<sup>185</sup>

### B. Effects on Survivors Who Participate

This Section lays out psychological effects of judicial action against alleged perpetrators of human rights violations that usually affect only those who participate formally in proceedings, for example as plaintiffs, witnesses, or deponents.

#### 1. Testifying: Psychological Benefits

Telling one's story as a witness at trial or through a deposition, or having it told by one's attorney or a prosecutor, may confer a variety of psychological benefits. If trials symbolize society's acknowledgment and condemnation of what survivors suffered,<sup>186</sup> those who participate in them as complainants, plaintiffs, or witnesses may feel especially acknowledged and validated.<sup>187</sup>

Evidence from some survivors' experiences supports this contention. Helen Todd, who won a civil suit against an Indonesian general responsible for her son's killing in East Timor,<sup>188</sup> reported that having an official body take her testimony seriously gave her important validation.<sup>189</sup> Norberto Liwski, who was imprisoned in Argentina during the 1976–83 dictatorship and then testified in the junta members' trial, states: “The trial eliminated the spectral nature of the testimonies that were moving around in society . . . . It presented the victims *as human beings*, giving them equal standing with the rest of humanity.”<sup>190</sup> Researcher Eric Stover quotes one witness at the ICTY as saying that while testifying he felt that power “flowed back from the ac-

183. *Id.*

184. *Id.* at 72–75.

185. See also Brandon Hamber, *The Need for a Survivor-Centered Approach to the Truth and Reconciliation Commission*, COMMUNITY MEDIATION UPDATE, Issue 9 (Community Dispute Resolution Trust, Johannesburg, South Africa), Jan. 1996, at 5, available at <http://www.csvr.org.za/articles/arttrcdrt.htm> (last visited Apr. 20, 2005) (stating that “[u]nfulfilled expectations” constitute the most potentially destructive effect of the South African Truth and Reconciliation Commission on victims).

186. *Supra* Part III.A.1.

187. *But see supra* Part III.A.5.

188. *Todd v. Panjaitan*, No. CIV.A.92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994). See Randolph Ryan, *Indonesia Aide Told to Pay \$14m in Suit over Death*, BOSTON GLOBE, Oct. 28, 1994, at 6.

189. Telephone Interview with Professor Beth Stephens, Rutgers University School of Law at Camden (Apr. 14, 2000). Stephens has represented numerous survivors of human rights violations (both direct victims and their family members), including Todd, in civil suits.

190. Interview with Norberto Liwski (at Centro de Estudios de Estado y Sociedad (Oct. 1990)), quoted in Elizabeth Jelin & Susana G. Kaufman, *Layers of Memories: Twenty Years After in Argentina*, in THE POLITICS OF WAR: MEMORY AND COMMEMORATION 89, 94 (T. G. Ashplant, Graham Dawson, & Michael Roper eds., 2000).

cused to me.”<sup>191</sup> Stover reports that for many of the ICTY witnesses he interviewed, “merely being in the courtroom with the accused while he was under guard helped to restore their confidence in the order of things.”<sup>192</sup>

Alan Tieger, an ICTY prosecutor, supports Stover’s finding. He feels that many survivors of human rights violations he has worked with as witnesses have found psychological value in testifying.<sup>193</sup> Tieger describes one witness who had found it “extremely painful” during preparation to discuss the events he had witnessed.<sup>194</sup> After testifying, however, the witness “looked fifteen years younger than he had earlier in the day,” a change that struck others as well as Tieger.<sup>195</sup> In Tieger’s view, “[t]here could be little doubt that testifying had been a profound and positive experience for that witness.”<sup>196</sup> More generally, he judged, “it appeared that testifying was a positive experience for the vast majority of witnesses. Even those who found the courtroom difficult seemed to find great satisfaction and strength from the fact of their participation.”<sup>197</sup>

The psychological effects of human rights violations also provide reason to believe that some survivors find therapeutic value in telling their stories to legal authorities. By listening to a torture victim’s testimony in court or in formal deposition sessions, judges, prosecutors, and even defendants’ lawyers counter the message that no one will believe the victim, a silencing therapist Marcelo Vignar describes as central to torture’s psychological damage.<sup>198</sup> This attention, perhaps especially from judges as representatives of the state, can acknowledge the reality and seriousness of the survivors’ experience, countering any sense of isolation and abandonment. Garcia-Peltoniemi adds another source of potential psychological value: by taking survivors’ testimony seriously, courts and lawyers can validate their sense of reality,<sup>199</sup> partially counteracting the destruction of it that the original human rights violation may have caused.<sup>200</sup> The witness quoted by Stover suggests that testifying can also give survivors a sense of power.<sup>201</sup>

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191. Stover, *supra* note 24, at 118–19.

192. *Id.* at 118.

193. Telephone Interview with Alan Tieger, former Trial Attorney, International Criminal Tribunal for the former Yugoslavia (“ICTY”) (Mar. 30, 2000). At the time of publication, Tieger was Senior Trial Attorney at the ICTY.

194. *Id.* Tieger emphasizes, however, that the witness was able to testify coherently and powerfully at trial.

195. *Id.*

196. *Id.*

197. *Id.* Tieger acknowledges that relief at finishing their testimony, which for some had loomed as a potentially stressful experience, may have accounted for some of this positive feeling. *Id.* He states, however, that “the emotions seemed to go deeper than that” and to persist in several witnesses he encountered weeks or months later. *Id.* Tieger’s position could of course bias his perceptions, making him more aware of positive effects of testifying than of negative ones, but there is no specific reason to question the accuracy of his observations.

198. *See supra* text accompanying notes 116–118.

199. Garcia-Peltoniemi, *supra* note 105.

200. *See supra* Part II.B.

201. *See* Stover, *supra* note 24, at 118–19. *See also supra* Part II.F.

The view that testifying is psychologically beneficial is not held universally, however. Law professor Laurel E. Fletcher and psychiatrist Harvey M. Weinstein vigorously contest the claim that criminal trials are therapeutic. "This hypothesis is based upon a profoundly simplistic view of how psychotherapy works."<sup>202</sup> They emphasize the importance of "a supportive trusting relationship and the development of insight over time,"<sup>203</sup> because "'healing' is a long-term process that requires far more than testimony in a courtroom . . . ."<sup>204</sup>

This Article's findings do not contradict Fletcher and Weinstein if they mean that testifying in itself does not provide dramatic psychological healing. However, the evidence above suggests that testifying can be helpful under at least some circumstances. Fletcher and Weinstein are correct to call attention to differences between receiving therapy and giving evidence in legal proceedings, though. Legal processes' psychological value for survivors who testify may be critically affected by the ways those processes constrain how they tell their stories and the ways they are treated by people present, especially judges and lawyers. Numerous therapists specify that retelling one's story is therapeutic only in a "safe" environment.<sup>205</sup> "The psychologically healing process of testifying or telling one's story is not dependent upon the content of the story (as lawyers tend to assert) but rather on the environment and the process of the actual re-telling," writes Hamber.<sup>206</sup> Herman explains, "[t]he fundamental premise of the psychotherapeutic work [with survivors of severe trauma] is a belief in the restorative power of truth-telling."<sup>207</sup> Fabri states: "In telling their stories some people find meaning in being heard, in having a witness who affirms that [their abuse] did happen, that it was terrible, that it was not their fault."<sup>208</sup> To the extent judicial processes provide such affirmation, testifying may have this therapeutic value.<sup>209</sup>

202. Fletcher & Weinstein, *supra* note 21, at 593.

203. *Id.* at 594 n.72.

204. *Id.*

205. See Hamber, *supra* note 53; Steven Weine & Dori Laub, *Narrative Constructions of Historical Realities in Testimony with Bosnian Survivors of "Ethnic Cleansing,"* 58 *PSYCHIATRY* 246, 256 (1995). Cf. Feldthusen et al., *supra* note 105, at 84 ("In the case of all survivors interviewed in our study, having an opportunity to share their story in an unhurried, comprehensive way in a safe and non-threatening environment was essential.")

206. Hamber, *supra* note 185.

207. JUDITH HERMAN, *TRAUMA AND RECOVERY* 181 (1992).

208. Fabri, *supra* note 42.

209. They do not always provide it. Primo Levi evokes the hope of acknowledgment, and its evaporation: "I had dreamed, we had always dreamed, of something like this, in the night at Auschwitz: of speaking and not being listened to, of finding liberty and remaining alone. After a while I remained alone with the lawyer; a few minutes later he also left me, urbanely excusing himself." PRIMO LEVI, *IF THIS IS A MAN AND THE TRUCE* 227 (Stuart Woolf trans., Sphere Books 1987) (1979), *quoted in* Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES* 1, 1 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997).

Some studies of non-human rights-related legal proceedings document positive effects of testifying. See Feldthusen et al., *supra* note 105, at 85 (reporting that "a small number of civil litigants [in sexual abuse cases in Canada] stated that they were excited to tell their story in a public forum"); *id.* at 101 (reporting that forty-eight percent of the combined sample of civil litigants and claimants in quasi-judicial compen-

## 2. *Testifying: Psychological Strains*

Of all of the psychological effects of trials on survivors, the one that comes up most often in published sources and the interviews for this Article is the psychological strain felt by some who testify. That evidence supports the conclusion that a significant proportion of the survivors who testify at trials suffer some psychological distress, and that some may be badly hurt. The same may be true of some who do not testify at trial but give information to investigators or lawyers through informal interviews or formal depositions.

Many aspects of criminal and civil trials strain survivors of human rights violations who participate in them and make them anything but a "safe" environment for telling their story.<sup>210</sup> Legal proceedings are not designed to help survivors cope: they aim to determine legal liability that could impose serious penalties. Eric Stover observed that at the ICTY "[j]udges can—and often do—admonish witnesses who stray from the facts, which in turn can frustrate victims who have waited years to tell their story publicly."<sup>211</sup> Safeguards of defendants' rights in many jurisdictions open both the content of testimony and its source's motivation and character to challenge, even when the source is a victim of the very abuses the court is examining and may be psychologically tender. Due process requires some of these safeguards, but they may impose significant psychological cost on many victims. Furthermore, judges' and lawyers' limited understanding of how the process affects survivors, and the often minimal psychological support judicial institutions give victims may make participation more difficult for them, without enhancing defendants' rights.

Herman's account of ordinary crime victims' experiences testifying in U.S. criminal proceedings presents the problems starkly:

The mental health needs of crime victims are often diametrically opposed to the requirements of legal proceedings. Victims need social acknowledgement and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court re-

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sation systems reported that the overall experience of claiming had given them "a sense of closure, validation, empowerment, or relief"); Roht-Arriaza, *supra* note 66, at 20 (stating that generally "[p]eople value the opportunity to state their views to a decision maker, regardless of the influence of those views on the outcome of a dispute") (citing TOM TYLER, *WHY PEOPLE OBEY THE LAW* 116 (1990)). However, at least one study of sexual assault victims has found no correlation between whether a case was prosecuted or victims' perceptions of their treatment by the judicial system, on the one hand, and psychological health (as measured by symptoms of PTSD) six to twelve months after the conclusion of trial, on the other. Patricia A. Frazier & Beth Haney, *Sexual Assault Cases and the Legal System: Police, Prosecutor, and Victim Perspectives*, 20 *LAW & HUM. BEHAV.* 607, 621–22 (1996).

210. See Stover, *supra* note 24, at 106. Cf. *supra* notes 205–208 and accompanying text.

211. Stover, *supra* note 24, at 106.

quires them to respond to a set of yes or no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator.<sup>212</sup>

Anecdotal evidence about crime victims in the United States and Canada, particularly rape survivors, and a small number of studies of them support Herman's points.<sup>213</sup>

The evidence on survivors of traumatic human rights violations suggests that Herman's account also applies to many of them. Fabri, Garcia-Peltoniemi, and Tieger state that testifying can be emotionally difficult. A number of aspects can cause this strain, including recalling the trauma, assembling memories coherently, experiencing aspects of the environment as similar to the original trauma, and having to prove that one suffered.

For some survivors, recounting their experiences under *any* circumstances is harmful. Fabri commented that some victims even in therapy sessions become tangential and disorganized and experience extreme anxiety.

It's not good for them—it's better to shore up their defenses and help them learn how to cope. There are other individuals whom you have to slow down because they retraumatize themselves. I've seen people whom I'd describe as vomiting their story out, in a way that isn't helpful. We've had clients who tell their story over and over and over again and it doesn't change anything—it's like they just keep vomiting.<sup>214</sup>

Numerous anecdotes describe the deleterious psychological impact that testimony has on some survivors. Bosnian Muslim women kept as sex slaves

212. Herman, *supra* note 26, at 159–60. See also LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 91–107 (1991) (detailing aspects of the criminal justice process that may cause psychological distress for rape survivors).

213. KATZ & MAZUR, *supra* note 39, at 198–200; MADIGAN & GAMBLE, *supra* note 212; Ken Eikenberry, *Victims of Crime/Victims of Justice*, 34 WAYNE L. REV. 29 (1987); Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 25, 18–20, 22–26 (1987); Arthur J. Lurigio & Patricia A. Resick, *Healing the Psychological Wounds of Criminal Victimization: Predicting Postcrime Distress and Recovery*, in *VICTIMS OF CRIME: PROBLEMS, POLICIES AND PROGRAMS* 50, 60–61 (Lurigio et al. eds., 1990) and studies cited therein.

As Herman notes, however, we lack systematic data on the mental health impact of crime victims' participation in the criminal justice system. Herman, *supra* note 26, at 165. The study of Canadian victims of sexual abuse who claimed compensation under two quasi-judicial arrangements and civil suits is among the few attempts at scientific study. See Feldthusen et al., *supra* note 105. Seventy-three percent of the civil litigants reported having "great difficulty" with pre-trial discovery and trial, *id.* at 82–83, and many found testifying "completely anti-therapeutic," *id.* at 85–86. Eighty-four percent of the survivors, including those who used the quasi-judicial processes, reported "some negative emotional consequences" from their participation in the judicial process (not just from testifying), including depression, suicidal tendencies, frustration, and anger. *Id.* at 83.

214. Fabri, *supra* note 42.

by Bosnian Serb soldiers sobbed frequently while testifying at an ICTY trial.<sup>215</sup> One of Fabri's patients found that giving evidence to prosecution investigators about his torture drew him back into the experience in a way "disruptive" to his coping.<sup>216</sup> Speaking more generally, Fabri explains that torture survivors who give evidence often "sit in a hearing or in an office and talk about things in a controlled fashion, then leave and don't sleep that night," experiencing nightmares and then flashbacks once they awake.<sup>217</sup> Some grow unable to "tolerate being around people [and] become hypervigilant and suspicious again."<sup>218</sup> "These may have been things they've gotten control of," Fabri concludes, "But once someone's been tortured, the vulnerability remains with them the rest of their life, and there can be stressors or triggers that bring it all back."<sup>219</sup>

Survivors who testify must describe their experiences in a way that is intelligible to finders of fact. Yet even this requirement of coherence could damage some, according to Fabri. "Lots of survivors compartmentalize the issues and retrieve the memories in disjointed fashion to protect themselves from being overwhelmed by the whole memory" of their trauma.<sup>220</sup> For them, explaining meticulously what happened would require putting these pieces together and could bring the whole memory flooding back.

Some torture survivors experience giving testimony as resembling their original trauma, although far less intense. One of Fabri's clients had to testify to officials investigating charges she had filed against her torturers. "[W]hen asked questions about her torture, her emotions distorted her perception of the intent of the questions. Thus, being asked questions reminded her of being interrogated during the torture experience . . ."<sup>221</sup> A lawyer's or judge's adversarial tone in questioning may trigger this psychological connection.<sup>222</sup> Fabri judges that several of the seven or eight survivors she has treated who have served as witnesses or been deposed for judicial proceedings against human rights violators were retraumatized by the similarity between their questioning and the torture they had suffered.<sup>223</sup> Other sources support her point that this is a significant risk for survivors of human rights violations who provide evidence for judicial proceedings.<sup>224</sup>

215. See Marlise Simons, *Bosnian War Trial Focuses on Sex Crimes*, N.Y. TIMES, Feb. 18, 2001, at 4.

216. Fabri, *supra* note 42.

217. *Id.*

218. *Id.*

219. *Id.* Cf. Kilpatrick & Otto, *supra* note 213, at 20 (stating that for ordinary crime victims in the United States reviewing the details of the crime and encountering any physical evidence introduced in court can reawaken psychological symptoms that had faded, such as fear).

220. Fabri, *supra* note 42.

221. Fabri, *supra* note 72, at 455.

222. Questioning about the original trauma, or something closely related, may make the reaction more likely, but in human rights trials survivors are likely to be called to testify on subjects unconnected to their trauma.

223. Fabri, *supra* note 72, at 455.

224. Cf. Garcia-Peltoniemi et al., *supra* note 89 (noting that asylum hearings could have the same effect); Herman *supra* note 26, at 160 (stating that refugees from countries with brutal police forces "may

Retraumatization may be more common in legal systems that uncover legally relevant facts through an adversarial, party-driven process, such as that of the United States. In many civil law systems, neutral judges rather than parties primarily direct discovery and questioning of witnesses.<sup>225</sup> Lacking an interest in proving one side of the case,<sup>226</sup> civil law judges view neither side's witnesses as inherently hostile.<sup>227</sup> Civil law judges may therefore be less likely than common law defense lawyers to treat testifying survivors in ways that feel antagonistic or aggressive to them.

Being forced to prove that they were hurt can be another source of distress for survivors who testify, especially if they struggle daily with the psychological consequences of their abuse. Judicial proceedings may challenge victims' account of what happened and thereby exacerbate their loneliness,<sup>228</sup> alienation,<sup>229</sup> confusion about what happened,<sup>230</sup> and sense that they might be responsible for the horrors that befell them.<sup>231</sup> Garcia-Peltoniemi explained:

When you have to prove the legal status of the terrible events—such as that they amount to genocide—according to technical criteria, even though it seems clear to you that they do—this can undermine the meaning and value of the judicial process for victims. It can make them wonder what the purpose is, and eliminate the validation that the process might otherwise give them. It undermines the possibility of reaching a common basis for acknowledging by others and with others (the larger society, the world) the facts and the harm that they have caused.<sup>232</sup>

These challenges can come in court proceedings, deposition sessions, or informal interviews, and from prosecutors, the survivor's own lawyer, defense lawyers, or judges. Lawyers defending Bosnian Serbs accused of sexual enslavement and gang rape argued that some of the women had consented to sex.<sup>233</sup> They also contended that the "alleged" victims had not been "exposed to any severe physical or psychological suffering," even if they had been raped.<sup>234</sup>

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be terrified of any encounter with state authorities"). Even a survivor's own lawyers may be insensitive in this way. Fabri recalled suggesting to one lawyer that he sit next to, rather than opposite, the survivor during an interview. The lawyer refused, even in the face of Fabri's explanation of the psychological rationale, and Fabri sensed that he felt insulted: "I'm here in this person's best interests. I'm a kind, understanding person. I need to see eye contact." Fabri, *supra* note 42.

225. See, e.g., Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. (forthcoming July 2005) (manuscript at 71–74, describing French procedure), available at <http://ssrn.com/abstract=630613> (last modified Dec. 12, 2004) (last visited Apr. 20, 2005).

226. *Cf. id.* at 62 (stating that litigants in the U.S. system "now have enormous opportunities and incentives to pervert the truth-seeking function of litigation").

227. Indeed, witnesses need not be identified as supporting a particular party.

228. See *supra* Part I.C.

229. *Id.*

230. See *supra* Part I.C.

231. See *id.*

232. Garcia-Peltoniemi, *supra* note 105.

233. See Simons, *supra* note 215.

234. *Id.*



Fabri comments that many survivors she works with who have testified or given evidence to investigators “feel like they’re not believed [and t]his increases their sense of fear and isolation and alienation.”<sup>235</sup>

Survivors also can face insensitivity unrelated to zealous defense advocacy and tolerated, or even perpetrated, by judges. The audience broke into laughter as a child witness at the Special Court for Sierra Leone (“SCSL”) elaborately explained how he had identified, as burning human flesh, a smell wafting from where the defendants’ soldiers were working. One judge commented that it was “good to have witnesses like this to break the monotony.”<sup>236</sup> By contrast, another SCSL judge intervened “when a member of one of the defense teams seemed to be laughing at a witness.”<sup>237</sup> Although the markers of respect vary greatly across cultures, it seems unlikely that survivors whose testimony draws laughs from lawyers, judges, or even audience members believe that they are being taken seriously. Indeed, the experience may leave them feeling yet more abandoned, isolated,<sup>238</sup> and powerless<sup>239</sup> than they did before testifying.<sup>240</sup>

The evidence presented here, indicating that testifying can be psychologically deleterious to survivors, qualifies rather than contradicts Section B.1’s evidence that testifying can be beneficial. Some survivors experience testifying as difficult and even deeply undermining, while others find it valuable. Future research should assess what factors determine whether the net psychological effect on a particular witness-survivor will be positive or negative. Survivors considering testifying, therapists working with them, and lawyers on the cases should consider all of these possible effects in evaluating the advisability, for that survivor, of testifying. All participants in judicial processes should consider how they could reduce the psychological strains of participation for survivors without compromising due process protections for defendants.<sup>241</sup>

### 3. *Intentional New Abuses: Reprisals and Invasion Through Discovery*

Participating in a judicial proceeding against a human rights violator may expose a survivor to new abuse by the perpetrator or his or her associates. These abuses can take at least two forms: threatened or actual violent retri-

235. Fabri, *supra* note 42.

236. Sara Kendall, *Cross-Examination of Witness TF2-067*, SPECIAL COURT MONITORING PROGRAM UPDATE NO. 15 (Berkeley War Crimes Studies Center, Berkeley, CA), Dec. 3, 2004, available at <http://ist-socrates.berkeley.edu/~warcrime/weeklyupdate.htm> (last visited Apr. 20, 2005).

237. Sara Kendall, *Courtroom Demeanor*, SPECIAL COURT MONITORING PROGRAM UPDATE NO. 20 (Berkeley War Crimes Studies Center, Berkeley, CA), Dec. 3, 2004, available at <http://ist-socrates.berkeley.edu/~warcrime/weeklyupdate.htm> #11february (last visited Apr. 20, 2005).

238. See *supra* Part II.D.

239. See *supra* Part II.F.

240. The harm may also reach beyond the witness box by suggesting to victims with similar experiences that they are merely objects of amusement.

241. For recommendations on how to do so, see *infra* Part IV.B.

sals outside the legal process and use of the defendant's subpoena and cross-examination powers to intimidate or emotionally damage the survivor.

Many survivors decline to initiate or join legal cases or give testimony against their abusers out of fear for their or their family's safety.<sup>242</sup> Those who do may face threats or actual violence. Juan Romagoza, a Salvadoran doctor, was tortured by National Guard soldiers for three weeks in the early 1980s. In 1999 he filed a civil suit against the men who served as minister of defense and commander of the Guard at the time, after discovering they, like him, had resettled in the United States. Romagoza received numerous anonymous letters and telephone calls threatening him and his family in El Salvador. "If you weren't happy with your rape in El Salvador," one told him, "we will rape you here."<sup>243</sup> Even if a survivor overcomes his or her initial fear of reprisal and testifies, the fear may still return later.<sup>244</sup> If the original perpetrator *does* retaliate, this new abuse may cause the survivor psychological, as well as physical, damage.<sup>245</sup>

At least in adversarial legal systems, defendants may be able to use legal powers to attack survivors' psychological health. Adversarial systems, such as that of the United States, grant defendants broad discovery and cross-examination powers to ensure their trials are fair. I found no accounts of accused human rights violators using these powers to harass victims who lodge criminal complaints or civil suits or testify against them, nor of such use causing victims psychological harm. However, parties in U.S. civil suits readily make litigation unpleasant as a means to drive their opponents to drop cases or settle, and U.S. criminal defense attorneys zealously pursue sensitive personal information, such as rape victims' sexual histories.<sup>246</sup> Human rights defendants might similarly attempt to use invasive discovery in bad faith, hoping that the resulting emotional stress would induce survivors to drop their cases or decline to testify.

242. See Gray, *supra* note 63. See also HUMAN RIGHTS WATCH, *supra* note 23, at 742–43 (reporting reluctance of witnesses to testify at the International Criminal Tribunal for Rwanda ("ICTR") due to fear of reprisals); *id.* at 759–60 (describing specific incidents of reprisals); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97, 101 (1999) (stating that rape charges against defendant Dušan Tadić were dropped because his victim was afraid to testify).

243. Joshua E.S. Phillips, *The Case Against the Generals*, WASH. POST MAG., Aug. 17, 2003, at W6. It is unclear whether this is a paraphrase or the exact wording of the threat.

244. It is also possible that a survivor's anxiety about retaliation could decrease after testifying if he or she was not, in fact, attacked.

245. See generally *supra* Part II. Retaliation against victims who complain or testify also is a risk in ordinary criminal prosecutions. See Kilpatrick & Otto, *supra* note 213, at 20; Herman, *supra* note 105, at 48 (reporting that "many victims have well-founded fears of retaliation, should they come forward"); Herman, *supra* note 26, at 160.

246. See, e.g., T. R. Reid, *Rape Shield Law Upheld in Bryant Case*, WASH. POST, June 11, 2004, at A7 (describing the attempt by lawyers for basketball star Kobe Bryant to obtain information on the sexual history of the woman accusing him of sexual assault). Judges in civil law systems who direct fact-finding may be less aggressive. See *supra* text accompanying notes 225–227.

#### 4. *Empowerment Through a Struggle for "Justice"*

Some survivors find meaning and energy in pressing for legal action against those who hurt them or their loved ones, especially if they win. By fighting back they may regain a sense of agency and capacity to act that the original abuse sapped. They may feel that by inducing authorities to prosecute the perpetrator, bringing a civil suit against him or her, or participating in the proceeding as a witness, they continue the important political work that the perpetrators intended to stop by torturing them or killing their loved ones.

Survivors' tales are compelling. The Argentine government's cessation of further prosecutions in 1987 and pardoning in 1989 and 1990 of those already convicted devastated Daniel Tarnopolsky, whose family was disappeared by members of the Argentine navy during the country's dictatorship.<sup>247</sup> For twelve years he pressed a civil suit against two admirals and the government. Despite personal opposition from President Carlos Menem, he won a landmark judgment in 1999. According to his cousin Noga Tarnopolsky, who profiled the case in *The New Yorker*, "Daniel's life changed radically with the verdict."<sup>248</sup> The successful "fight for justice" had "a remarkable redemptive effect" on him.<sup>249</sup> "I'm different than I was before," he told her. He described changed dreams, a sense of resolution, and a feeling that he had done all he could for the family taken from him.<sup>250</sup>

Some successful plaintiffs in civil suits in the United States against human rights violators have described other rewards. Neris Gonzalez, tortured in her native El Salvador in 1979, joined Romagoza's civil suit against the National Guard commander and minister of defense to further her psychological recovery.<sup>251</sup> "Without the case, my therapy would have been about words, not action . . . . It took a great weight off me. The trial was the best therapy I ever had," she said after winning the case.<sup>252</sup> Romagoza writes that after the verdict he "feel[s] a peace in terms of my own inner wounds and trauma. . . . Now I can see [the defendants'] weakness."<sup>253</sup> The parents who sued over the killing of their children in *Filártiga v. Peña-Irala*<sup>254</sup> and *Todd*<sup>255</sup> drew consolation from the knowledge that they had forced those responsible

247. See *supra* text accompanying notes 173–175.

248. Telephone Interview with Noga Tarnopolsky, journalist and cousin of Daniel Tarnopolsky (May 15, 2000).

249. *Id.*

250. See *id.*

251. See *supra* text accompanying note 243.

252. Julia Lieblich, 'My Dreams Will Never Be the Same,' CHI. TRIB. MAG., May 25, 2003, at 8.

253. JUAN ROMAGOZA, STATEMENTS BY JUAN ROMAGOZA ON THE SIGNIFICANCE OF ROMAGOZA, GONZALEZ, & MARURICIO V. GARCIA & VIDES CASANOVA: A CASE AGAINST TWO HIGH RANKING SALVADORAN GENERALS FOR TORTURE COMMITTED 1979–83 (n.d.), available at <http://www.cja.org/forSurvivors/reflect.doc> (last visited Apr. 20, 2005).

254. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (finding a former Paraguayan police chief liable under the Alien Tort Claims Act, for torturing to death the plaintiff's son).

255. *Todd v. Panjaitan*, No. CIV.A.92-12255-PBS, 1994 WL 827111 (D. Mass. Oct. 26, 1994) (finding an Indonesian general liable under the Alien Tort Claims Act for the summary execution of the plaintiff's son in East Timor).

for the deaths of their sons to flee from the United States.<sup>256</sup> Alerte Belance sued the Haitian paramilitary group FRAPH as part of a campaign “to seek justice for the hundreds of Haitians killed by the Haitian military and their allies.”<sup>257</sup> For her, the suit was a way of “speaking for the dead who can’t talk for themselves and [stopping] more from being murdered.”<sup>258</sup>

Therapists’ analysis sheds additional light on the psychological value of pursuing justice. Garcia-Peltoniemi concludes that

some victims find it meaningful and helpful to testify at trials of those who abused them. They find value in taking action, in doing something, especially because they feel it may prevent these things from happening again to other people. The feeling that they can do something for others helps them focus outside themselves, feel less powerless, and feel that they can take action that is valuable.<sup>259</sup>

Such action could alleviate “the intense, lonely inward focus and the sense of powerlessness” that the abuse created in these survivors.<sup>260</sup> Randall and Lutz agree that “[p]articipation in lawsuits and other legal proceedings against perpetrators of human rights abuse can help to relieve the feelings of helplessness produced by the victimization process.”<sup>261</sup>

### 5. *Stress of Protraction*

In many jurisdictions both criminal and civil proceedings against perpetrators of human rights violations can take years, from the filing of charges to the delivery of a verdict, then through several levels of appeals. Daniel Tarnopolsky’s civil litigation lasted twelve years. Slobodan Milosevic’s trial took over two years even before the defendant began presenting his case.<sup>262</sup> Six years after Pinochet was detained in the United Kingdom on Judge Balthasar Garzón’s arrest warrant, no trial has begun.

256. See BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 234 (1996).

257. *Id.* See *Belance v. FRAPH*, No. 94-2619 (E.D.N.Y. filed June 1, 1994).

258. Dennis Bernstein, *Haitian Exile Links Junta to Death Squads in Lawsuit*, Pacific News Service, Apr. 25–29, 1994, at 5 (quoted in STEPHENS & RATNER, *supra* note 256, at 234 n.13). Stephens describes the parent of another human rights activist, murdered by a repressive government, as “combative” by nature but as having been “paralyzed” by the child’s death. That survivor found that a civil suit against a responsible government official helped overcome that sense of helplessness. Stephens, *supra* note 189.

259. Garcia-Peltoniemi, *supra* note 105.

260. *Id.* Garcia-Peltoniemi noted that some survivors may feel compelled to take legal action by guilt on the suffering of others, such as loved ones. In some such cases the legal action would be less likely than other coping methods to alleviate the guilt.

261. RANDALL & LUTZ, *supra* note 34, at 143. See *id.* at 143–44 (describing a survivor who was able to “pull[ ] himself together [and] surmount what previously seemed to be an insurmountable problem” because of the “satisfactory conclusion of a legal proceeding”).

262. See Toby Sterling, *After Delays, Milosevic Opens Defense*, WASH. POST, Sept. 1, 2004, at A11.

Long judicial proceedings against perpetrators impose additional stresses on survivors involved in them. Beth Stephens, who has represented numerous victims of human rights violations in civil suits against perpetrators, highlights this issue.<sup>263</sup> Before filing a case, she and her colleagues at the Center for Constitutional Rights explain to the survivors involved that winning is uncertain and collecting any judgment very unlikely. Nevertheless, she says, some plaintiffs feel a creeping disappointment as the lawyers fight back and forth over pre-trial motions or discovery drags on.<sup>264</sup> Survivors may find it difficult to keep their hopes modest if they allow themselves to imagine bringing the person who has caused them enormous suffering to account.<sup>265</sup>

More tangible aspects of the judicial process, too, can cause psychological stress. Missed work time to testify, attend hearings, or handle the emotional strain of trial can reduce the incomes of plaintiffs and witnesses. Survivors of traumatic human rights violations may find these costs especially hard to absorb if depression, loss of motivation, and other consequences of their trauma have diminished their capacity to work.<sup>266</sup> Herman finds that victims of violent crime who participate in an assistance program in Cambridge, Massachusetts also tend to experience stress during their attacker's trial, and find it diminishes afterward.<sup>267</sup> She suggests that an ongoing legal case may keep a trauma close to a victim's mind, delaying healing that the passage of time sometimes provides.<sup>268</sup>

Survivors may find diminishing value in protracted cases. The legal system's lack of alacrity in addressing the defendant's acts may strike them as a failure to acknowledge their seriousness.<sup>269</sup> Changes in survivors' psychological needs over time may reduce the proceeding's value to them. Stephens remarks that a judicial action that once seemed psychologically promising for a particular survivor can lose its relevance as years pass and the survivor realizes that he or she may never win the case.<sup>270</sup>

#### IV. RECOMMENDATIONS

Many survivors of torture and other gross violations of human rights suffer intense psychological pain for years after their abuse ends. Sympathetic policymakers, professionals, and ordinary citizens have worked with survivors to seek ways to alleviate this suffering, and have promoted prosecution

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263. Stephens, *supra* note 189.

264. *Id.*

265. Survivors who do not participate in a particular case, but follow it from afar could also experience this disillusionment. For example, it is possible that off-and-on legal proceedings against General Pinochet in Europe and then Chile since 1998 have kept some of his many victims in a psychological limbo.

266. See RANDALL & LUTZ, *supra* note 34, at 100.

267. Herman, *supra* note 26, at 165.

268. Cf. MADIGAN & GAMBLE, *supra* note 212, at 99 ("We have never met a [rape] survivor who took a pending court trial lightly and didn't to some degree become obsessed with it."); Fabri, *supra* note 42 (citing the therapeutic effect of the passage of time).

269. Cf. *supra* Part III.A.1.

270. Stephens, *supra* note 189.

of the perpetrators and civil suits against them as one vehicle for healing. This is not the only factor in decisions about whether to pursue human rights violators through the courts. Policymakers and activists choose that course for a wide range of reasons. Prosecution and, less often, civil actions are put forward as means to deter future abuses, promote the rule of law, create public awareness of atrocities, and achieve other purposes, as well as to heal victims' psychological wounds.

Such claims should have empirical foundation if they are to drive policy decisions.<sup>271</sup> This Article has collected available evidence to assess one of them, moving our understanding of how trials affect survivors beyond isolated anecdotes and theories. The research reported above finds ten distinct psychological dynamics that connect particular aspects of judicial processes and outcomes to victims' psychological states. These findings show that judicial actions have therapeutic value for some survivors, but also counsel caution. Only some of the survivors who have seen those responsible for their abuse brought to trial have found comfort, and some have experienced additional distress.

The three sets of recommendations in this concluding Part rest on those findings. The first set addresses the relative therapeutic promise of trials and other mechanisms available to policymakers and activists. The second set considers how judicial processes can be adapted to victims' psychological needs. The third recommends avenues for systematic research into trials' impact on victims.

#### A. Pursue a Wider Range of Methods for Assisting Healing

Policymakers, activists, and survivors themselves should hesitate to pursue judicial action against human rights violators as a means for helping victims psychologically, until and unless further research shows that judicial actions have a net therapeutic effect on most survivors. This is not a general argument against trials: prosecution or civil suits may be important for other reasons, such as to promote the rule of law. Furthermore, in particular situations survivors and their allies may be able to determine with reasonable confidence that most survivors will benefit psychologically from a contemplated judicial action. Generally, however, those seeking to help traumatized survivors heal should put less faith in trials. Instead, they should devote greater attention to non-judicial initiatives that may address psychological aftereffects of human rights violations more reliably.

The feasibility and effectiveness of particular endeavors to assist survivors depends on political, cultural, and other aspects of context, and the preferences of victims themselves. There are many promising possibilities, however. For

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271. Cf. Weinstein & Stover, *supra* note 21, at 4 (commenting on the scarcity in literature on the aftermath of war and political violence of "objective evidence to substantiate claims about how well criminal trials or other accountability mechanisms achieve the goals ascribed to them").

example, if many in a society do not know that particular human rights violations occurred or how much those who survived them suffer, then public campaigns to break this silence may be valuable. Statements by religious and political leaders or the mass media can acknowledge survivors' experiences and perpetrators' responsibility, delivering psychological benefit to survivors and promoting public understanding. Memorials like Argentina's Naval Mechanical School, a former detention center, can have similar value.<sup>272</sup> Under pressure, responsible institutions may acknowledge their responsibility, as Chile's military recently did.<sup>273</sup> Financial reparations can help survivors recover important aspects of their lives, for example by resuming schooling interrupted by detention, and thereby help rebuild their identities. Policymakers can provide funding for long-term psychotherapy that may assist some survivors.<sup>274</sup> Survivors may find several kinds of psychological aid in mutual support groups. Regular contact with others who have suffered similarly can alleviate feelings of isolation and help rebuild interpersonal relationships. Groups of survivors such as Khulumani, in South Africa, and Abuelas de Plaza de Mayo, in Argentina, lobby policymakers for reparations and reforms to prevent the recurrence of atrocities. In addition to promoting desired policy changes, lobbying and other collective action may help those groups' members recover a basic sense of agency or influence, which the atrocities against them may have eroded.

### *B. Adjust Judicial Processes According to Victims' Psychological Needs*

In some cases, human rights violators should and will be brought to trial. This Article's second major recommendation is that judges, court staff, and lawyers conduct those proceedings in ways that maximize their psychological benefit to survivors while minimizing their possible harm. Creative comparison of judicial procedures with the ways trials psychologically affect victims can yield adjustments that could benefit survivors without significantly disadvantaging defendants.

International criminal tribunals illustrate some of the possibilities. The ICTY, ICTR, and the SCSL have offices that facilitate protection of witnesses and provide a range of support to them before, during, and after they testify.<sup>275</sup> For example, staff of the ICTY's and ICTR's victims and witnesses

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272. See *Crimes Past, Crimes Present*, ECONOMIST, June 5, 2004, Survey at 5.

273. See *Unravelling a Tortured Past*, ECONOMIST, Dec. 4, 2004, at 38–39.

274. See *supra* notes 203–208 and accompanying text. In some cultures and for some individuals in any society, however, individual psychotherapy may be less effective than other methods of healing. See Summerfield, *Addressing Human Response to War and Atrocity*, *supra* note 43, at 22–24 (noting cultural variation and criticizing the assumption that all victims of particular sorts of atrocities, such as war, require professional help).

275. See HUMAN RIGHTS WATCH, BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE 29–30 (2004); Patricia M. Wald, *Dealing with Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 221 (2002); ICTR, Fact Sheet No. 9: Witnesses and Victims Support Section (Feb. 2001), available at <http://www.ictor.org/ENGLISH/factsheets/9.htm> (last visited Apr. 20, 2005). These offices support all witnesses, not only those who have survived human rights violations,

units arrange witnesses' travel to the tribunals and sometimes meet witnesses in their home countries to accompany them.<sup>276</sup> At least one member of the SCSL's Victim and Witness Support Unit attends all court hearings to assist if a witness becomes upset on the stand.<sup>277</sup>

National courts as well as international tribunals should attempt to reduce stresses of testifying. For example, judges in adversarial systems can discourage defense attorneys from trying to confuse or rattle testifying victims, distinguishing such tactics from rigorous probing of their consistency and veracity. Survivors may find support in having a companion such as a therapist or family member sit silently next to them while they testify. Discussions among counsel and the court that may distress survivors present may be held outside their presence.<sup>278</sup> When witnesses become distraught, a recess may be appropriate to help them regain their composure.

The Statute of the ICC gives victims a larger role than in any previous international criminal tribunal.<sup>279</sup> Victims have standing in their own right at the ICC, which must "permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court," consistent with defendants' rights.<sup>280</sup> Victims have a right to be heard, as well as to speak: the prosecutor and judges must consider victims' interests in making a range of decisions, including whether to initiate an investigation into particular allegations<sup>281</sup> and whether to bring charges.<sup>282</sup> The ICC statute's most innovative provision allows the court to reject a plea bargain or request the presentation of evidence against a defendant who has already

but the greater vulnerability of the latter, on average, may make the offices' services especially important to them. See *supra* Part II.

276. ICTR, *supra* note 275. See also Holger C. Rohne, The Victims and Witnesses Section at the ICTY: An Interview with Wendy Lobwein 7 (Feb. 2005), available at [http://www.iuscrim.mpg.de/forsch/krim/docs/ewald2\\_LobweinICTY.pdf](http://www.iuscrim.mpg.de/forsch/krim/docs/ewald2_LobweinICTY.pdf) (last visited Apr. 20, 2005).

277. Michelle Staggs, *Witness protection: treatment of distressed witnesses*, SPECIAL COURT MONITORING UPDATE NO. 14, (Berkeley War Crimes Studies Center, Berkeley, CA), Nov. 26, 2004, available at <http://list-socrates.berkeley.edu/~warcrime/weeklyupdate.htm> (last visited Apr. 20, 2005).

278. This does not necessarily require excluding all observers, a step that might infringe on the defendant's right to a public, transparent trial. For example, in a recent hearing at the SCSL, judges worried that a child witness testifying via closed-circuit television from a room outside the courtroom would be "psychologically affected by . . . perceived antagonism in the trial chamber" during arguments between defense and prosecution lawyers. They therefore asked him to remove his headphones so he could not hear the discussions. Sara Kendall, *Testimony of Witness TF2-067: Special measures for child witness testimony*, SPECIAL COURT MONITORING PROGRAM UPDATE NO. 15 (Berkeley War Crimes Studies Center, Berkeley, CA), Dec. 3, 2004, available at <http://list-socrates.berkeley.edu/~warcrime/weeklyupdate.htm> (last visited Apr. 20, 2005).

279. See Theo van Boven, *The Position of the Victim in the Statute of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 77, 77 (Herman A. M. von Hebel et al. eds., 1999). Cf. *id.* at 81 (noting that "the ICTY Statute and Rules place victims largely in an auxiliary role"). See generally Sam Garkawe, *The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis*, 8 INT'L REV. VICTIMOLOGY 269 (2001). For an account of debates over the ICC's relationship to victims during the drafting of the statute, see van Boven, *supra*, at 82-85.

280. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 68(3).

281. *Id.* art. 53(1)(c).

282. *Id.* art. 53(2)(c).



pled guilty if “a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims.”<sup>283</sup>

These provisions of the ICC’s statute express its drafters’ aspiration that the court assist victims, as well as judge perpetrators. This Article’s findings suggest that they are well-founded. By ordering the presentation of evidence even if they accept a defendant’s plea, the ICC’s judges can address victims’ needs for information,<sup>284</sup> reassurance that they were not responsible,<sup>285</sup> and official acknowledgment of their importance and their abuser’s culpability.<sup>286</sup> Other ways the ICC can promote victims’ needs depend less on particular provisions of its statute and are available to many courts. By soliciting and considering victims’ perspectives, the ICC’s judges and prosecutors can affirm the injustice of the atrocities they suffered. By listening carefully, they can implicitly affirm victims’ understanding of what happened, helping repair their confidence in their own judgment.<sup>287</sup> Judges may also be able to comment explicitly on the seriousness of abuses and express sympathy with victims without prejudicing defendants.<sup>288</sup>

The judges and staff of the ICC, other international tribunals, and national courts should heed the ICC statute’s call to consider victims’ needs in judicial proceedings. Consistent with strict neutrality in assessing defendants’ guilt, courts and individual judges should consider expanding victims’ roles and taking other steps that may enhance trials’ salutary effects on victims and ease their stressful aspects.<sup>289</sup>

### C. *Conduct Systematic Research on the Effects of Trials*

This Article has identified ten psychological effects that criminal and civil trials of human rights violators may have on survivors. It has depended, however, on therapists’ observations of a relatively small number of patients who have been through trials or followed them as non-participants, anecdotal

283. *Id.* art. 68(4).

284. *See supra* Part III.A.3.

285. *See supra* Part II.H.

286. *See supra* Part III.A.1.

287. *See supra* Part II.B.

288. At a minimum, judges should treat victims respectfully and require the same from lawyers, courtroom personnel, and observers, preventing potentially hurtful displays such as those described *supra*, in text accompanying notes 236–237. Because signs of respect vary across cultures, participants in legal proceedings may need to adjust their styles of verbal and non-verbal communication depending on the background of the survivor in question. Judges and lawyers may benefit from training on cross-cultural communication and the specific cultures of the survivors with whom they have most contact.

289. Some national legal systems already give victims rights in criminal proceedings. *See* Micah S. Myers, Note, *Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance With International Obligations*, 25 MICH. J. INT’L L. 211, 244–49 (2003). For example, in France and Spain, individuals may file criminal charges, bypassing the prosecutors who serve as gatekeepers in the United States. *Id.* at 247–49. Denmark and the Netherlands recognize a right to be informed about aspects of a proceeding. ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIME UNDER INTERNATIONAL LAW 30 n.45 (2004). In the vast majority of U.S. jurisdictions victims may make statements to the court between a guilty verdict and sentencing. *See* Donald J. Hall, *Victims’ Voices in Criminal Court: The Need For Restraint*, 28 AM. CRIM. L. REV. 233, 234 n.8 (1991).

tal comments by survivors in books and the media, and research on the psychological effects of human rights violations themselves. Future researchers should investigate the topic more scientifically—most basically by examining the mental health of victims both before and after trials. Studies could eventually illuminate which of the dynamics identified in this Article affect survivors most commonly and intensely. With more data, researchers could refine the typology presented here and sharpen the explanations of individual dynamics. They might also turn up effects this Article has not identified.

Researchers should examine the influence of trials on several aspects of victims' response. The dependent variable could be the net psychological effect of the trial (positive or negative) on a victim, the intensity of one specific dynamic, and the length of time any effects persist. Many factors may well influence these dependent variables. These include characteristics of the defendants, proceedings, and context. For example, victims may be affected more, less, or differently, by trials of commanders who supervised human rights violations, of political leaders who ordered them, or of footsoldiers who carried them out. They may respond differently to criminal and civil proceedings, and to trials in common law rather than civil law systems. Researchers should study particular aspects of procedure; for example, more extensive presentation of evidence on the defendant's alleged crimes may affirm victims' experiences or cause them strain by delaying a verdict. A trial in an international tribunal might have more impact on survivors than one in the domestic courts of the country where the abuse took place, or less.<sup>290</sup> Part III.A.5, above, suggests that the outcome of a proceeding may affect its psychological impact on victims. Relevant contextual factors may include the length of time between abuse and trial, or the level of social awareness of the abuses prior to the trial.

Finally, researchers should study how different victims respond to similar trials. For example, the victim's role in the proceeding may be important: Are victims who participate as plaintiffs or complainants affected differently from those who merely observe? The type and severity of the human rights violation that victims suffered may affect judicial proceedings' psychological impact on them. The role of a victim's culture and religious beliefs certainly merits study.

These are only a few of the plausible hypotheses about how trials of perpetrators may affect victims. Evaluating them and others that researchers generate will require many studies. The insights that ultimately result can contribute to decisions on which perpetrators should be tried, how proceedings can be adjusted to victims' psychological needs, and other important policy questions.

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290. Researchers could also consider trials in the national courts of other countries, such as Belgium's prosecution of perpetrators of the Rwandan genocide. See Richburg, *supra* note 8.

*D. Conclusion*

This Article has assembled and analyzed evidence on the impact of criminal and civil trials of perpetrators of brutal human rights violations on victims. By doing so, it has attempted to enrich decisions about whether to pursue perpetrators through legal action, to enhance the therapeutic value of trials that do occur, and ultimately to provide some assistance to survivors who struggle daily with the effects of their abuse by fellow human beings.

