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## Democracy + Guarantees

Juan F. González Bertomeu\*

But then they took him to the jailhouse  
Where they try to turn a man into a mouse.

– Bob Dylan, Hurricane

### 1. Introduction

Constitutional protections from the State's punitive power are necessary.<sup>1</sup> Defending them is often unpopular. It is also controversial: as occurs on other topics, their substance is not always defined in every detail by the Constitution and therefore democratic organs can vindicate an exclusive role in their interpretation. The Argentine Supreme Court has interpreted them relatively generously in recent years. The main question is whether this should be cause for celebration, or if on the contrary it is a good result reached in the worst fashion.

In this essay I will analyze the issue: what justification must an academic adopt who is simultaneously concerned with reinforcing the democratic project of the country and with protecting the rights of weakest sectors (as are a good part of those subject to the state punitive apparatus). For those of us who sustain on a normative level – and with a degree of abstract refinement – that the political branches can be respectful of rights, some resentment might be felt at the prospect of losing monopolistic control over important decisions of penal planning. Leaving this task in the hands of a small group, whether it be a few judges or technicians, might

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<sup>1</sup> In this essay I do not provide a conceptualization of these protections, although I offer some examples of them. When I refer to these constitutional protections I have in mind things like the limits of police forces to investigate crimes; standards about arrest and pre-trial detention, as well as the validity of evidence collected; the right to be assisted by state-appointed counsel, to appeal a conviction, and to be tried within a reasonable period of time; standards about the condition of penitentiaries and the rights of inmates, etc.

emanate an elitist flavor. At the same time, however, if we value decisions such as the ones mentioned that protect rights, then we might find quite problematic the fact that the choices of the majority of the political body are or might be different from those decisions.

The debate is related to normative and empirical questions but also incorporates a methodological turn. What are the dangers and what are the advantages of confiding in democracy when decisions regarding guarantees in criminal cases must be taken? More to the point, how do we begin to answer this question without the aid of a metric for gauging the dangers, or for measuring the practical operability of the concept of ‘democracy’? This piece, then, turns around possible relationships and tensions between “guaranteeism” [*garantismo*], penal populism, and democracy. Without doubt, it is another manifestation of the long-standing debate between constitutionalism and judicial review. But it is a manifestation of it in an especially sensitive area that presents pointed implications and challenges for those of us who strive to defend the rights of the weakest sectors in societies that, albeit democratic, are still dealing with major deficiencies.

The way I have laid out the question might invite an automatic reaction: How can anyone nowadays question the important role of judges in protecting penal guarantees? After all, a good amount of modern thought on penal law (from classics such as Beccaria<sup>2</sup> to contemporaries such as L. Ferrajoli<sup>3</sup>) emphasizes the necessity of protecting a nucleus of individual values against efforts to implement tougher punishments, and these efforts have been primarily headed by political powers. This response, however, does not turn out to be obvious to many people, including people who are genuinely concerned with promoting (some version of) equality. Here

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<sup>2</sup> See CESARE BECCARIA, ON CRIMES AND PUNISHMENT.

<sup>3</sup> See DERECHO Y RAZÓN, TEORÍA DEL GARANTISMO PENAL. See also GARANTISMO, UNA DISCUSIÓN SOBRE DERECHOS Y DEMOCRACIA [Not available in English].

is what interests me: pondering whether, at least in countries with the characteristics and ailments such as those in our region, we can have it all: democracy + guarantees. And whether, when judges advance, the appropriate reaction should be a mere sentiment of nostalgia or one, by contrast, of affirmation.

Criticism of a position like the one I defend can take at least two similar but non-identical perspectives. I will call them the perspectives of ‘democratic wager’ and of ‘genuine democracy.’ The first is inspired by possible readings of theories critical of judicial review such as that proposed by Jeremy Waldron.<sup>4</sup> Whether this reading of Waldron’s work is correct is less important than its substance; there are many other authors that defend similar arguments. As we know, Waldron emphasizes the fact that contemporary political communities suffer from radical disagreement over normative questions.<sup>5</sup> Yet there are two possible interpretations of the implications of this statement. According to one (the canonical one; the one he himself seems to defend at the outset), the fact of reasonable pluralism should keep judges out of this space. It is not up to them. Disagreements must be settled through votes by the community itself; that is how differences are respected. When they intervene, judges typically reproduce the disagreement behind closed doors in the courts. In order to concentrate on the discussion that interests me, I am going to set aside this interpretation. Although accepting the thesis of normative skepticism is not conceptually obligatory for it, this interpretation adopts a hostile bias against the idea that there exists a nucleus of values that we do not want to renounce, an idea like the one I defend in this essay and one I return to near the end. However much we may disagree as to the exact substance of these nucleic values, we accept that many possible interpretations fall outside the bounds of admissibility.

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<sup>4</sup> See JEREMY WALDRON, *LAW AND DISAGREEMENT*.

<sup>5</sup> *Id.*

The second reading of Waldron's theory differs from the first in a relevant aspect.<sup>6</sup> The issue is no longer that resolving disagreement is impossible and as such must be settled through voting. Disagreement continues to exist. This reading, however, insists that the political system is capable of respecting a commitment to rights (incorporated from outside the legislative system) as competently or even more competently than judges, and of providing good answers regarding the exact content of those rights. This results from a combination of tools that limit the power of majorities and further strengthen deliberation. It also results from the very legislative function: the type of arguments that legislators often adopt (arguments that are less technical than those of judges, which makes it easier to directly attack the substantive issue at stake), and the special position that they occupy facing the electorate. When political bodies are bypassed, the voice of those who have the greatest democratic credentials is ignored, and with it the voice of those who have good chances of reaching acceptable solutions.

This reading (of the 'democratic wager') represents the first perspective hostile to the idea of a special role for judges in penal matters. The second perspective is represented in the region by the work of Roberto Gargarella. In many of his writings, Gargarella denounces the democratic shortfalls of criminal law.<sup>7</sup> He does it with an underlying concern that I share for the need to find alternative solutions to punishment. Yet I will suggest that such a position could force acceptance of a conclusion that is different from that of the author. According to Gargarella, criminal law grew out of the pendulum movement between penal populism and an elitism that is respectful of guarantees. In fact, the author denies that there is a sharp distinction between these two phenomena. In both cases, the problem is that a political elite adopts decisions

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<sup>6</sup> This seems to be the position Waldron defends in *The Core of the Case against Judicial Review*.

<sup>7</sup> See ROBERTO GARGARELLA, *DE LA INJUSTICIA PENAL A LA JUSTICIA SOCIAL* (Siglo del Hombre Editores, Universidad de los Andes).

with its back to democracy. When the elite is committed to protecting individual guarantees, the formulation of criminal law is allocated to “governmental experts and professional litigants – the product of ‘expert knowledge and empirical research.’” But elitism is not even abandoned when the pendulum swings to the opposite extreme. In this sense, populism is the product of a select, politically conservative minority that “acts or claims to act in the name of the majority,” a supposed majority that is in turn fueled by the communication media.<sup>8</sup> Gargarella suggests avoiding the trap of elitism by embracing a deliberative conception of democracy (comprising what I identify here as the search for ‘genuine democracy’):

[Populist norms are] created in the absence of ... a collective, equitable discussion; they arise in a context characterized by social fragmentation and economic inequality, which normally implies a process of public communication that turns out to depend on money. [E]ven if opinion polls truly indicated a convergence between ‘tough’ criminal policies and the will of the majority, we would still face a long path before being able to say that ... those norms were the expression of the democratic will. In any case, they can only be considered that expression if an extraordinary weak sense of the democratic will is adopted, such that it is reduced to what ... certain opinion polls say that the citizenry believe. We must ... refuse the invitation to honor any norm whatsoever by qualifying it as democratic; in the end, refusing the invitation to reduce democracy to the happenstance of some opinion poll or other more or less random sampling of opinions.<sup>9</sup>

In a text whose target is precisely L. Ferrajoli, Gargarella goes through arguments similar to those mentioned, particularly criticizing judges in contrast to the defense of them that the Italian makes. For Gargarella, elitism and its biases apply to them:

In the first place, we can say that the passions, interests, the flights of irrationality, are not the exclusive heritage of any group. It so happens that there are no reasons to believe that our legal system is invulnerable to bias based on class, gender, religion, or race that we would like to see kept outside consideration when resolving conflicts between rights ... The make-up of the legal establishment in our countries has clearly shown itself to be biased in such terms, at least

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<sup>8</sup> *Id.*, at 56-57.

<sup>9</sup> *Id.*, at 57-58.

according to the few sociological studies available (most judges are white, middle-class, Catholic, conservative, etc.), and in turn there appears to be a high correlation between the prevalence of a certain profile and the outcomes of judicial decisions. Empirical evidence on this last aspect, at least, is not insignificant.... Things become even more complicated when we recognize that ... judges must necessarily become involved in the interpretation of the rights at stake in order to define their contours, reach, and substance. And there, predictably, is where biases such as those indicated begin to operate, normally unduly so.<sup>10</sup>

In this essay, I will suggest that both the ‘democratic wager’ position and the ‘genuine democracy’ alternative are flawed. The first, because of the high costs that accepting it in the name of democracy might impose. The second, because the concept of democracy it implies is too distant from a position where an examination of reality on a local level is possible, so it loses operational capacity. My response is that, in the end, penal guarantees – constitutionally determined – must be given firm protection by judges. And when this happens we should celebrate instead of – merely – bowing to it. This does not imply that we do not have to make a commitment to improving democracy. The questions are not mutually exclusive, and my conclusion regarding the role of judges will change once the political organs demonstrate sustained support for guarantees.

In offering this response, I will try to avoid the rhetorical maneuver of evoking the brutally bleak scenarios that could result if the protection of these guarantees is left in the hands of political organs. For this reason, I will bring up a case that is both real and non-extraordinary (that started with a public demonstration in Argentina demanding more intensity in the state punitive reaction) to illuminate some of the risks of such a strategy while stopping short of portraying it in the worst light possible. As I will argue later, it is not necessary to eulogize judges in order to defend them (I largely share Gargarella’s wariness). They are not heroes and it

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<sup>10</sup> Roberto Gargarella, *Cuatro problemas en la teoría de Ferrajoli*, available at <http://seminariogargarella.blogspot.com/2009/11/criticando-ferrajoli.html>

is perhaps not a coincidence that the Spanish verb *fallar* means both to hand down a sentence and to be defective.

In spite of my constant reference to them, I am not going to elaborate a detailed defense of criminal guarantees or protections in this essay.<sup>11</sup> They do not occupy all of the terrain in criminal law. There are many criminal policy decisions that can remain in the domain of the representative organs (what actions to penalize, what general structure to give the criminal justice system, etc.) insofar as they do not involve direct ties to these protections. In any case, I am assuming that there is consensus regarding the protections among the participants of SELA, even if there are differences of opinion regarding their precise content (“Can a homeowner’s consent excuse police who enter without a warrant?”; “Is the principle that holds that evidence illegally obtained cannot be used against the accused absolute or are there exceptions?”; etc.). Naturally, however, I also assume that, as a general pattern, we believe that the bodies with the best democratic credentials need to be the ones that define public policy in a community. Readers of this piece will find little sense in it if they feel these general presumptions are mistaken (as far as they are concerned). But in this essay I am not concerned with trying to convince people who disagree with these premises.

In the next section (2), I lay out the case in Argentina just referred to. First I describe the popular demonstration and its fate in congress, and then I offer a comment on the reaction of the courts. I close the section with an allusion to the process of constitutional reform in Argentina. I will dissect the discussion already mentioned using this case as a reference in section 3. I analyze the practical implications of the affirmation that democracy can be respectful of criminal

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<sup>11</sup> *But see supra* note 1.



protections, and highlight in fairness the potential costs of the strategy. Section 4 comprises a very brief conclusion.

## 2. One phenomenon, many faces

a) On Thursday afternoon, April 1, 2004, around one hundred fifty thousand people gathered in front of the Argentine Congress to demand better security. They were reacting against a wave of kidnappings and what they perceived to be a rise in the number of crimes committed against property and personal safety. They were answering a call formulated by a spontaneous and improbable leader, who had risen up to become the informal representative of the victims of crime: Juan Carlos Blumberg, the grieving father of a young man assassinated in the course of a kidnapping. At the end of the march, Blumberg presented Congress with a petition demanding, among other measures, harsher sentences for delinquents and limited possibilities for release.<sup>12</sup>

This march would be followed by four more between 2004 and 2006 in what was a forceful demonstration of an incipient social movement that was not completely organized and whose primary reclamation was for toughening punitive reactions of the State. The daily diatribes of Blumberg against judges contained colorful phrases: “We don’t want to see early release for good behavior or anything else. Our judges are more on the side of the criminals and assassins than they are on our side, the community’s side.”<sup>13</sup> Or more synthetically: “It would appear that human rights are for delinquents, not for citizens like you.”<sup>14</sup> The media echoed the

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<sup>12</sup> *Masiva marcha frente al Congreso para pedir seguridad*, Diario Clarín, digital edition, April 1, 2004, available at <http://www.clarin.com/diario/2004/04/01/um/m-734923.htm>. *Multitudinaria marcha contra la inseguridad*, Diario La Nación, April 1, 2004, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=588493](http://www.lanacion.com.ar/nota.asp?nota_id=588493).

<sup>13</sup> *Id.*

<sup>14</sup> Jorgelina Vidal and Pablo Abiad, *Otra vez fue masiva la marcha de Blumberg reclamando seguridad*, Diario Clarín, August 27, 2004, available at <http://www.clarin.com/diario/2004/08/27/elpais/p-00302.htm>.

message, amplifying it generously and converting it into a recurring theme lasting months that was as voluminous as it was monotonous.

Six years later (I write this on April 1, 2010), little remains of this social phenomenon as such. Its decline was spurred in part by Blumberg himself, a figure who gradually lost the interest of many of his supporters after committing obfuscations<sup>15</sup> and making controversial statements (expressing understanding after ‘gun-happy’ policemen killed a young man;<sup>16</sup> defending weighted voting systems<sup>17</sup> and the death penalty;<sup>18</sup> and displaying racist tendencies<sup>19</sup>).

This is not to say he did not achieve his immediate goals. For although this movement which initially lacked a defined structure has dissipated (at least for now), it left behind something quite important: a set of laws approved in the heat of the supposed popular demand, all of which are in force today.<sup>20</sup> These laws – known as the “Blumberg laws” – set out measures for “increased sentences for illegally carrying or possessing weapons, which will no longer be eligible for early release, [registering] cellular telephones, increased sentences for crimes such as

<sup>15</sup> Blumberg liked to be referred to as ‘Mr. Engineer’, despite the fact that he did not have the corresponding professional accreditation. He tried to justify it: “People used to call me ‘Engineer’, ‘Engineer’, and so I got used to it.” *Siempre me decían ingeniero, ingeniero, y uno se acostumbra*, Diario Clarín, June 17, 2007, available at <http://www.clarin.com/diario/2007/06/17/elpais/p-00301.htm>.

<sup>16</sup> Blumberg defended the Mendoza police department, which was responsible for killing a young man in 1997. He said that “[t]he young man used drug and had misbehaved when he insulted a police officer.” Rafael Morán, “Polémica declaración de Blumberg sobre el crimen de Sebastián Bordón”, Diario Clarín, May 19, 2004, available at <http://www.clarin.com/diario/2004/05/19/policiales/g-03801.htm>.

<sup>17</sup> In an interview with Diario Clarín, Blumberg stated that “he always said to Axel [his murdered son] that in this country there should be a weighted voting system. People should be allowed to vote depending on their level of education. The vote of an educated person should count for two or three votes.” Diario Clarín, “La gente ve que la política no funciona”, August 26, 2004, available at <http://www.clarin.com/diario/2004/08/26/elpais/p-01101.htm>.

<sup>18</sup> During an interview broadcast on television, he argued that death penalty should be the adequate punishment for kidnapping and murder: “Anyone who kills a person should be killed. I will have none of that human rights talk.” Available at <http://www.youtube.com/watch?v=JJ17KI4IRbw>.

<sup>19</sup> When asked during an interview about his alleged racist stances, Blumberg denied it. He tried to defend himself by saying: “No, no, of course I am not a racist. I do not discriminate. I will even tell you more: I have friends in Brazil, who surely have black skin, but have a white soul; see?” *Id.*

<sup>20</sup> Statute 25.882 (harsher punishment for violent robbery), published on April 26, 2004. Statute 25.886 (crimes using weapons), published on May 5, 2004. Statute 25.892 (restriction of release on bail), published on May 26, 2004. Statute 25.893 (harsher punishment for crimes against sexual integrity), published on May 26, 2004. Statute 25.928 (harsher punishment for the commission of independent crimes), published on September 10, 2004.

homicide, kidnapping, and rape, ... restrictions on early release and raising the maximum limit for consecutive sentences for different offenses ... to 50 years.”<sup>21</sup>

The response of Congress to the first demonstration was automatic: the very day of the march, the House of Representatives called a special session to consider a series of measures to increase sentences. In Congress, Blumberg found legislators who were receptive to his arguments, even among those of whom one would have expected greater resistance (such as several of the representatives of an administration that made efforts to associate itself with progressive positions).<sup>22</sup> One of the reasons that might explain the headway made in the relatively inert Congress (besides the unreserved support of some of the legislators) was the fear of its members in the face of a phenomenon that was growing in popularity. Not long before, in the end of 2001, a severe economic crisis had struck the country. The crisis had political repercussions: the gulf separating the represented from the representatives had been exposed, and popular indignation had been unleashed in a series of demonstrations which in some instances demanded the resignation of every last government official.

Facing this situation, no legislator wanted to be left out, even those whose political platforms did not include any such position towards crime. This could explain the dismal quality of the legislative debate. The words of the deputy Rosario Romero, from the party in power, are eloquent: “Blumberg was in our office every day telling Maria del Carmen (Falbo) and me that

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<sup>21</sup> Adriana Meyer, “Para pasar más leyes de mano dura el ingeniero tiene menos espacios”, Página 12, September 3, 2006, available at <http://www.pagina12.com.ar/diario/elpais/1-72449-2006-09-03.html>.

<sup>22</sup> Statute 25.892 (restriction of release on bail) was approved in the Senate with 58 senators voting in favor (including the current President); 1 senator voted no. In the House [Diputados], 162 deputies voted for it, while 38 voted no, and 3 abstained. Statute 25.886 (crimes using weapons) was approved in the Senate by 48 votes; 4 senators said no. In the House, 205 deputies voted for it, 3 voted no, and 2 abstained. Statute 25.928 (harsher punishment for the commission of independent crimes) was approved in the Senate, with 53 members voting for it; 5 said no, and 1 abstained. In the House, 95 deputies voted for it, 18 against it, and 46 abstained. The ruling Peronist party supported all the laws, and only a few of its legislators voted against them.

we were advocating for criminals, so you can see it was very difficult ...”<sup>23</sup> In the Senate, Diana Conti, also from the ruling party, tried to denounce the support for the laws: “As I will not be used and am ideologically opposed to the fascist posture that this Congress has adopted, I will not support any measure produced by the insanity that has taken hold of this country’s House of Representatives. And I strongly hope that if the President ... takes everything that is happening into account, he will, despite the political costs, pay the necessary attention to rational arguments and immediately form a commission to reformulate the Criminal Code to incorporate the proper rationality and sentences.”<sup>24</sup>

The ruling party’s leader in the Senate, M. A. Pichetto, responded: “I would like to speak in a language that is ... clearer. I don’t know ... if society is listening, but if someone is and they do not know the Criminal Code, the idea is that they might understand ... [that] we are trying to avoid impunity in Argentina, ... [so that] in the face of grave crimes committed by dangerous criminals ... the offenders are not allowed to walk free soon afterwards ... What I mean is that the Senate does not have fascist intentions.”<sup>25</sup> If a harder hand was what they wanted, a harder hand they would get. The laws had already passed six months after the first demonstration.

b) That was one of the phenomenon’s faces, but there is another: the actions of one sector of the judicial branch before, during, and after the series of dramatic events. The judicial branch is made up of a set of complex and varied organs. I am principally concerned with its head, the Supreme Court, and only bring up the occasional fact with regards the lower judges. From a descriptive perspective, one might expect that the – at least supposed – popular demand for a

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<sup>23</sup> According to media reports, Romero voted no, but her party [the ruling Peronists] supported all the laws. *See* Adriana Meyer, *supra* note 21. *See also* note 22.

<sup>24</sup> Argentine Senate, official transcript of the session of May 19, 2004.

<sup>25</sup> *Id.*

harder line on crime would make an impression and have an impact on judges' decisions. Judges form part of the community, and are open to greater or lesser degree to the influence of the greater community's values or reactions (whether or not they are initially convinced by them).

Going against the popular fervor and its rapid legislative reception, several lower judges held that the norms were unconstitutional, although it should be noted that these decisions were not immediate.<sup>26</sup> And the Supreme Court? The best (and only) manner to analyze its work is to take the cases in which constitutional protections were at stake in the face of state punitive power (the court did not directly take up the 'Blumberg laws'<sup>27</sup>). The Court's composition, remember, had changed in 2003 with the arrival of Nestor Kirchner in power. In part to reinforce the social backing of a government that had won the election with a mere 22% of the votes, Kirchner gave orders to stage political trials of several of the judges from the so-called 'automatic majority' of the ex-President Carlos Menem. After one and a half years, these judges, who had backed several grossly illegal measures during Menem's administration, had been removed from their posts or had resigned in the face of imminent removal. At the same time, Kirchner implemented an unheard of mechanism, both transparent and participatory, to improve the selection process for Supreme Court judges. This led to the designation between 2003 and 2004 of four new judges (of whom two women were named for the first time in the democratic history of the country) through a process that everyone saw as a qualitative leap forward with respect to prior experiences. To the government's displeasure, which was in some cases expressed very openly, the judges began very soon to display a certain degree of independence.

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<sup>26</sup> Both an appeals court in Buenos Aires [the Cámara del Crimen de Buenos Aires] in 2006 and a trial court [the Tribunal Oral en lo Criminal n° 1] in 2009 struck down statute 25.886, the most controversial of the statutes. *See* "Rechazo de la Justicia a una 'ley Blumberg'", Diario La Nación, August 6, 2009, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=1159093](http://www.lanacion.com.ar/nota.asp?nota_id=1159093). *See also* Adriana Meyer, *supra* note 21.

<sup>27</sup> The Court decided not to review a case where one of the statutes had been challenged. Supreme Court of Argentina, "Lemes" decision, September 9, 2009. As explained in the text, the Court has discretion to get rid of appeals without providing further reasoning.

The period between 1994 and 2007 pre- and post-dates not only the ‘new’ Court but also the beginning of the ‘Blumberg phenomenon’ (we shall see that 1994 was an important year, as it was then that the constitutional reforms were implemented). When someone accused or convicted of a crime during this period claimed a constitutional guarantee of theirs had been violated, in 72% of the cases the Court sided with them.<sup>28</sup> After the change in the Court, and rise of Blumberg, this tendency became more marked: the proportion rose to 82%, never falling below 75% in any year.<sup>29</sup> The numbers themselves are not categorical; we do not know, for example, which claims deserved greater protection and what the Court’s response in these cases was. The high baseline of the proportions also hides methodological issues: the proportions are calculated solely on the basis of cases selected by the Court (which has the discretionary capacity to refuse cases) and many of the cases are similar if not identical. They are very significant just the same. It would be peculiar, for example, if all of the claims involving these themes, despite having strong constitutional protection, were refused.

This quantitative aspect has a qualitative correlation: during this period, the Court changed a good number of criteria with the very aim of increasing protections in the face of state punitive power. Among them were: criteria related to conditions for detention and the state of prisons (especially in response to a class action – the Verbitsky case – that involved thousands of untried prisoners in the Province of Buenos Aires); the right to free and competent counsel; the right to contest evidence brought by the prosecutor; the right to impartiality, preventing a judge who investigates a case from passing sentence; the right to a trial that is carried out in timely

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<sup>28</sup> The data comes from my own research, based on 241 observations. The dataset includes all decisions dealing with criminal protections published by the Court, as well as by commercial databases *La Ley* and *Abeledo Perrot* (formerly known as *Jurisprudencia Argentina*). It excludes all cases rejected by the Court on discretion, and those rejected due to technical deficiencies of the appeals.

<sup>29</sup> The data comes from my own research, based on 136 observations. See methodology *supra* note 28.

fashion, the failure of which requiring charges to be dropped; the illegality of indefinite prison sentences; the right of the accused not to incriminate themselves; the invalidity of convictions reached in the absence of formal charges by the state prosecutor; and the invalidity of evidence illegally obtained.<sup>30</sup>

Some of the standards (which, as in the ‘Blumberg laws,’ are as procedural as they are substantive) could be better defined or even more robust. The Court, for example, faltered in a case regarding the imprisonment of minors.<sup>31</sup> And one should not believe that the Court demonstrated heroic character in all of the other cases either. The image is not one of Herculean judges resisting the clamor of a mobilized citizenry. The overwhelming majority of the population probably did not realize that the Court was handing down these incremental, apparently ‘technical’ decisions, given the extremely lower amount of repercussion in the media there was compared to the phenomenon described in the previous section. Even so, the trend is indisputable. It is explained, in part, by the new composition of the Court (one of the new members, Judge Zaffaroni, is an influential criminal law scholar who has supported a minimalist approach to criminal law). Keeping this last factor in mind, the temptation is to assume that the Court’s decisions enjoyed the blessing of the government who had appointed the new judges. Following this assumption, this judiciary response had double meaning: it personified both the voice of the Court and that of the government in terms of its philosophical, legal, and political approach to the crime problem.

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<sup>30</sup> See ASOCIACIÓN POR LOS DERECHOS CÍVILES, *LA CORTE Y LOS DERECHOS 2005-2007* (Siglo XXI editores, 2009), for a comprehensive discussion of these developments.

<sup>31</sup> See Juan F. González Bertomeu, *El diálogo de la liberación. La Corte y el caso ‘García Méndez’*, in LEONARDO PITLEVNIK (ED.), *JURISPRUDENCIA PENAL DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN, VOLUMEN 7* (Hammurabi, Buenos Aires, 2009).

If this relationship between the Court and government did in fact exist, it was altogether weak. The government's position was, if nothing else, unclear; it could come out as much in favor as against the trend described. A large majority of legislators from the ruling party had supported the 'Blumberg laws.' Some of the indicators of Nestor Kirchner's attitude on crime are not promising: "The courts do not only err when they set poor criminals free, but also when delinquents from good families are released despite having been tried and found guilty." This declaration does not necessarily imply that he, his government, or that of his successor (the ex-Senator Cristina Fernández) are against constitutional protections. Perhaps the declaration could even be neutralized by others that communicate an opposing sense. The most accurate explanation is probably that these grandiloquent phrases are produced opportunistically in the heat of political battle according to the intensity of public perception of insecurity (Kirchner might even have been similarly motivated when deciding to meet with Blumberg several times). But the commitment, if it exists, is unclear.

The 'Blumberg phenomenon' occurred during an administration that – if nothing else – was not opposed to maintaining the protections such as those mention in force. Other governments in recent history would have probably displayed an equal or greater commitment to them. And others would have displayed palpably less. At the start of the decade, for example, the then-governor of the Province of Buenos Aires, Carlos Ruckauf, promised leniency for future police brutality when he said: "Criminals need to be shot."<sup>32</sup> A proposal from the current governor, Daniel Scioli, perhaps the national government's principal ally, is not very different. According to Scioli, "in times like these, with so many demands by the public for more order and stricter, harsher, tougher policies, we have to do everything in our reach within the limits of the

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<sup>32</sup> *Ruckauf: 'Le dije a Scioli que se debe encarar una solución a la italiana contra el delito'*, Diario La Nación, November 17, 2009, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=1200964](http://www.lanacion.com.ar/nota.asp?nota_id=1200964).



rule of law...” And he added: “If the police have to take down criminals during a confrontation, they will do it. Me, I back up my police.”<sup>33</sup>

Expressions such as the ones noted are voiced in contexts of prison overpopulation, especially in Buenos Aires, the largest province of the country, where an overwhelming majority of prisoners are waiting for their sentence in overcrowded conditions (this context, in fact, would eventually stir the Court to intervene in the case on prison conditions already mentioned). The expressions also occur in a context of a notoriously dysfunctional police force that has dozens of cases of violence and abuse on its record.

c) The Argentine Constitution includes both protections against punitive power and positive obligations regarding the purpose of criminal sentences and prison conditions. The text adopted in 1853 already had them, but they were significantly reinforced as part of the constitutional reforms of 1994. The reforms incorporated into the Constitution’s hierarchy a series of international agreements (the American Convention on Human Rights and the International Covenant on Civil and Political Rights being two examples) that protect such values with vigor and specificity.<sup>34</sup>

The change was very meaningful. For example, when handing down decisions on issues such as the ones already mentioned, the Court often invokes the constitutional protections that follow from it. What led to the change? With startling frequency, it turns out that constitutional reforms are provoked by the wrong reasons; that is, reasons that are not neutral. The process in

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<sup>33</sup> Valeria Musse, *Inseguridad: Scioli pide leyes más duras*, November 3, 2009, available at [http://www.lanacion.com.ar/nota.asp?nota\\_id=1193766](http://www.lanacion.com.ar/nota.asp?nota_id=1193766). The relationship between Scioli and Ruckauf is not a distant one. See *Diario La Nación*, *supra* note 32.

<sup>34</sup> Most of the original protections entrenched in the Constitution come from Article 18. The treaties include plentiful new clauses. Mostly, they are contained in Articles 5, 6, 7, 8, 9, and 10 of the American Convention, and Articles 6, 7, 8, 9, 10, 11, 14, and 15 of the International Covenant on Civil and Political Rights.

1994 was no different. The Constitution was reformed in order to allow then-President Carlos Menem to run for reelection. As the government did not enjoy the super majority needed to reform the Constitution, it threatened to employ desperate measures; one of which was to proceed with the changes in violation of the relevant requirements. Supposedly in order to avoid this last possibility, the opposition Radical Party stopped blocking the process, offering their votes after receiving concessions from the government meant to lighten the weight of the executive branch in the political system. Because of distrust that the agreement would not be honored, the bill that called for the reforms introduced a fixed set of items that the convention could only approve or reject as a whole, but never modify.<sup>35</sup> At the same time, in a series of clauses, the bill allowed the convention to introduce further changes, of which one was to create “instruments for the integration and hierarchy of international treaties.” The debate among constituents does not provide many clues as to the motives that led to the incorporation of the treaties, or what criterion guided the selection of those that would be given hierarchical supremacy. The principal finality, most likely, was making a symbolical break with Argentina’s violent, authoritarian past.<sup>36</sup> Effort was also made to integrate the country into the international legal community – regionally and globally – of human rights.<sup>37</sup> There is not much evidence in the public debates to suggest the degree to which those at the convention anticipated any of the concrete implications of incorporating treaties; in particular, the implication of incorporating more generous guarantees against state punitive power. The greater part of the brief debate over

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<sup>35</sup> Statute 24.309, Article 2.

<sup>36</sup> See Debate at the 1994 Constitutional Convention [Session 3, Meetings 22 and 23, August 2, 1994, and August 3, 1994, respectively], available at <http://www1.hcdn.gov.ar/dependencias/dip/Debate-constituyente.htm>. See also Leonardo Filippini, *El derecho internacional de los derechos humanos no es un préstamo*, Revista de Palermo, Año 8, Número 1 (Septiembre de 2007), pp. 191-202. See also Carlos Rosenkrantz, *Advertencias a un internacionalista (o los problemas de “Simón” y “Mazzeo”)*, Revista de Palermo, Año 8, Número 1 (Septiembre de 2007), pp. 203-213.

<sup>37</sup> *Id.*

the issue of giving treaties hierarchical supremacy was spent in discussion over abortion, the right of rebuttal for anyone who is attacked in the media, and (what comes closest to our topic) the prohibition of the death penalty.

There are two more or less references to signal in the debate. One is the comment attributed to J. P. Cafiero, who stated that the incorporated rights included, “appeals before ... Criminal Courts; personal freedom, personal integrity, the permanent prohibition of the death penalty, the condition of penitentiaries, and liability for judicial error.”<sup>38</sup> The other is an admonition from A. Albamonte, pointing to a contradiction between the American Convention, which “establishes the right to have convictions or sentences reviewed by a higher court, while the current Procedural Code only establishes the right to the first instance.” Albamonte, an ally of the Menem government, promised his support only on condition that, “the current guarantees recorded in the Declarations of Rights and Guarantees that make up the first part of this Constitution be clearly safeguarded.”<sup>39</sup> Which is to say, as long as the most restrictive interpretation of the old Constitution predominated. There is not much else.

The 1994 reforms, then, reinforced constitutional protections, making the text the most robust it had ever been since the country’s foundation.<sup>40</sup> And it did so without open citizen participation in the decision, in the basic sense of being previously informed of the reforms to be approved and what implications (at least broad ones) could arise from approving them, if in fact anything could be anticipated. The specific proposal was not clear at the moment when representatives to the reform convention were chosen on April 10, 1994, and it is likely that it

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<sup>38</sup> Debate at the 1994 Constitutional Convention, *supra* note 36.

<sup>39</sup> *Id.*

<sup>40</sup> *See supra* note 34.

remained unclear later on as well. The main question is what kind and how large a problem this is.

### 3. Democracy and Guarantees: What is at Stake

A crime wave awakens fear in a segment of the population. The media feed off the situation (the subject sells); the fear and the feedback combine to generate more fear. Part of the political class is swayed. Part is not, but cedes anyways because doing so has a political payoff and because they do not want to expose themselves to reprisals for not going along.

The case offers an opportunity to examine themes relevant to democratic and constitutional theory. The occasion is opportune because it illustrates a relatively common case in our societies. The previous summary does not describe the laboratory experiment, which rarely occurs in reality, in which a majority (in the strong sense of the term: a majority of the population and its correlating representation in Congress) persecutes a minority, grotesquely violating its rights. Despite the enormous dramatic quality of this scenario, cases of this type are not particularly interesting at a theoretical level. If the violations are too serious, generalized, or structural, the question is not so much what should be done (whatever can be done to minimize the violations as soon as possible; the remaining difficulties are significant but regard the implementation of remedies, not answering the central question) nor is the question who should undertake the task (whichever institution can). The question in these cases is why action to end the violations has not already been undertaken, even though in such cases, it is probably unrealistic to expect much of institutions taken as a whole.

The situation that interests me is more nuanced and by that I mean more relevant. It is one in which the majority of the population, perhaps circumstantially, perhaps without a

corresponding majority in Congress, mobilizes in pursuit of measures whose constitutional validity is dubious. Even the movement's success is no guarantee that the laws will not be revoked by the same legislature once the storm is past (although, as I said, this still has not occurred in Argentina). Nor does **the movement's success** mean the result could not have been worse. In spite of the questionable method by which the laws mentioned were approved, none of the changes went very deep. The movement did not, at least openly, ask for extreme but recurrent measures such as the death penalty (something unlikely to be achieved because of the constitutional ban on it) but instead only sought harsher sentences and added restrictions on prison release (something likely prohibited but subject to some interpretation). Theoretically, an alternative reading of the 'Blumberg phenomenon' is possible: one that portrays the legislators as succumbing to the pressure for greater criminal prosecution, but also containing and dulling the passion of the demands.

Cases such as this one (that lack gross abuses, incessantly persecuted minorities, or institutions so deficient that nothing can be expected of them) are helpful for rethinking the role of politics and justice in an area as potentially sensitive as criminal law and the safety of citizens. Without exaggerating the weaknesses of one institution or the strengths of another. The main question, again, is whether it is justified for the democratic systems of the region, embodied by the local communities and their representative institutions, to define the limits of criminal prosecution and the protections for citizens with prevalence over the judiciary. A central element in this inquiry is the risk entailed by the venture. Let us not forget that we are presupposing that it is important to defend these protections against the State.

Although one familiar way to take the bull by the horns is to deny that granting judges preeminence over political institutions is incompatible with democracy, I would rather not take

this route. The central question is not semantic: what I am interested in examining is whether a political community meets adequate conditions to make definitive decisions *without* the presence of judges capable of opposing it. Of course the question remains vague phrased in this way, since it is not clear what we mean by ‘democratic system,’ or how we identify the concrete instances in which this system becomes operative. This is a familiar problem for constitutional theory, and a very important one for the present investigation.

My answer to the question is going to be negative. But let us suppose for the time being that it was affirmative. The democratic system, then, would be perfectly well-equipped for the task of defining the entire content of criminal policy, including the protections extended to people thought to be guilty of crimes committed against the State. Of course, such positions should be able to give an account of the real world; in our case, of the example guiding the exposition of this essay. There are two possibilities, both of which are potentially problematic for our discussion. When examining them, we should not forget that they are partially artificial. In the actual systems we know, judges *already perform* the task of looking after constitutional protections – even if they do not do it with rigor – and this task might exert influence over the democratic organs by restricting their sphere of action. In any case, it is important to ask the question.

The first perspective, the one we called ‘democratic wager’ (after a possible interpretation of Waldron’s theory), starts by considering a movement such as the one led by Blumberg as an expression of democratic exercise. But it would add that the political organs can adequately guarantee rights. If they are not capable of quelling calls for a harder line on crime, they can at least weaken them. Previously, I left open the possible interpretation of the Congress’ reaction along these lines (although the laws that were approved could represent a *real* limitation

of the guarantees). And even if the political organs were unable to impede the change at a certain point in time, there will always be an opportunity in the future to counteract or neutralize its effect. This position is clearly plausible. In spite of the defects that the political institutions of the region possess, they are not so great as to prevent such attempts at self-reflection and change.

As I will explain, what makes the position problematic is the cost implied by the transition between the two moments; what is at stake during the interval. These circumstances might lead an author such as Waldron to withdraw his wager.<sup>41</sup> The cost is so high that it justifies a degree of risk-aversion that might not exist for other issues. Yet, once again, nothing in my position suggests that political organs will necessarily always be indifferent to criminal protections. I try to keep my focus based on reality, but reality can change. In fact, our commitment to democracy requires that we do everything in our reach to improve the operation of the political system. But since the harm that this can cause is high, the margin of error (or our threshold of tolerance) must be minimized, and our attempts to elevate the quality of democratic discussion will have to (at least for the time being) coexist alongside the work done by judges. Still, my focus is dynamic: when the political system shows a sustained rise in its respect for criminal guarantees, the judiciary will have less room to operate, even when this respect comes about as consequence of the very activity of the judges (by giving shape to the public debate, conditioning options, and analyzing the justification for guarantees). Both sides of the discussion must meet the challenge. True, the right-protective side of the democrat will have to demonstrate that the defense of judges furthers improvement in the operation of the political organs, or at the very least does not impede it. But the democratic side of the person insisting on protections will

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<sup>41</sup> In *The Core of the Case*, Waldron conditions his attack of judicial review to the satisfaction of a number of assumptions. Two of them are, first, that the political system functions adequately, and that the community is committed to respecting rights. It is not obvious that, for Waldron, these assumptions can be made when analyzing the region. See Juan González Bertomeu, *Against the Core of the Case: Structuring the Evaluation of Judicial Review*, unpublished manuscript (on file with author), on the interpretation of these assumptions.

have to prove that the risks mentioned should not alert us to the need for an external umpire, especially if it is not obvious that it would obstruct improvement of the political system.

The second approach, that of ‘genuine democracy’ (a type of approach inspired by Gargarella’s proposals), is more complex and problematic, and for this reason I will address it in greater length. It implies denying that phenomena like the one headed by Blumberg are the authentic expression of democratic exercise. These kinds of campaigns, a defender of the position might suggest, are mere populism. They are equivalent to extending a microphone to someone who has just been the victim of a crime; enabling a flood of retributionist instinct to flow freely. True democracy lies elsewhere. The question, then, is where? In the political institutions themselves? Not if that means the ones we actually *have*. The phenomenon criticized is precisely a product of the way they function. And it is a product that is ‘natural’ enough. It is something that reoccurs on a regular basis, in Argentina as well as in other countries in the region. A popular demonstration was not even necessary for Ruckauf, the ex-governor of Buenos Aires, to suggest that criminals “be shot.”

But what about the institutions that we *could* have? Without doubt, a more deliberative political system or one that placed greater filters on the majoritarian will could display respect for protections against state punitive power. Leaving to one side the possible objections to ascribing to such a view (for example, regarding the loss of the majoritarian potential of the political system), this strategy must confront two problems. One is that it alienates us discursively. It deprives us of the possibility to refer to systems that we know, those in which we spend our lives together day-by-day, as democratic. The problem is not so much that our conception of democracy is too demanding, but rather the consequence that this brings: the



conception loses practical operability. We need a vocabulary in order to deal with the democracies that we currently have, however imperfect they are.

The second problem follows from the first. As I suggested in the analysis of the first approach, our demands on the political system might be more moderate, by requiring not so much more than what we have today (a little more discussion, involving arguments of slightly higher quality). Thus, a defender of this view could say that ‘genuine democracy’ is within our reach. But without an evident operative concept – or some way to be sure of when reality fits this concept – the temptation to only qualify solutions that appear acceptable to us as ‘democratic’ will always be latent. This could lead to counter-intuitive results. For example, insisting that the ‘Blumberg phenomenon’ was not democratic although a future decision to neutralize the effect of its achievements would be. We can agree that the best decisions tend to be produced by more discursive processes. But bad decisions will continue to exist independently of the quality of the discussion, if indeed there is an external criterion for evaluating the correctness of a decision (beyond that of the procedure itself). And the argument over the lack of discussion surrounding the ‘Blumberg laws’ can just as easily be applied to whatever replaces them.

While I write this article, several sectors of civil society are trying to introduce into the public forum a set of proposals regarding personal safety and criminal policy.<sup>42</sup> They are trying to call attention to structural drivers and causes of (a good amount of) crime, and push for a balance between protecting safety and respecting rights. My instinctive reaction is automatic: I am inclined to esteem that a discussion such as this one would be genuinely democratic. But I must check my instinct, since my conclusion could be influenced in obvious ways: by prior

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<sup>42</sup> Diario Página 12, *Diez puntos de acuerdo por la seguridad democrática*, December 29, 2009, available at <http://www.pagina12.com.ar/diario/elpais/1-137771-2009-12-29.html>.

sympathy for these proposals or for their source. The very fact that they meet with more or less widespread approval cannot provide much indication: the ‘Blumberg laws’ had also met with a similar reception. Whether the substance of the proposals is acceptable or correct should not have any bearing on their democratic credentials.

The dilemma facing this strategy is becoming clear. Either we recognize that even a system that better filters public opinion or is more committed to deliberative mechanisms might make mistaken decisions (and that – given what is at stake – this may be unacceptable), or we adopt a circular definition of democracy, according to which only that which we like following our preconceived positions is considered democratic. As democrats, we may place our faith in political institutions to achieve positive results. What we cannot do is *only* accept as democratic those positive results. Either we make a commitment to the process, or to the product of the process. If the cost of making incorrect solutions is high, we must look for institutional arrangements that minimize the risk.

There is an additional point. The account just given of the possibility that political organs manage to achieve correct results as regards criminal policy – something I can agree with – seems to presuppose the existence of a Constitution that provides a relatively clear framework for what is permitted. As I mentioned, in Argentina it is evident that the death penalty is not, and so the attempts to implement it tend to resemble murmurs that have little effect in the daily operations of these organs. It is perhaps for this reason that earlier I maintained that the ‘Blumberg phenomenon’ did not openly call for it, even when some of the movement’s members – and in a prominent way its leader – voiced support for it. If these reclamations are nothing more than an epiphenomenon, it is in part because of the gravitational effect exerted by the text of the Constitution. When qualifying a proposed criminal policy as ‘acceptable,’ we do not lose

sight of the degree to which it respects the constitutional framework. And when a proposal is clearly outside it, we strip it of importance (to the degree that it is politically unviable).

Partisans of the ‘genuine democracy’ approach (as it is laid out in this essay) could condition their position on the existence of a Constitution charged with denoting limits and organizing debate. Without these limits, they could argue, political organs would be less respectful. The approach, of course, should justify why these limits would actually be legitimate, but not those imposed by the judges interpreting them. But to push further, it could be that this scenario is artificially skewed in favor of the ‘genuine democracy’ approach. If we truly confide in the power of political institutions to take decisions on criminal matters, perhaps we should, be it as an analytic tool, stir ourselves to take another step. We should consider the possibility of dispensing with the constitutional framework altogether. Then the constitutional gravity or inertia would cease to operate. Without reference to the framework (a reference which is among other things epistemic), political institutions would have complete freedom. This liberty could be used for different purposes. At the outset, this could be interpreted positively. But if in general we trust that the guarantees we have are indispensable (even when there is disagreement over their exact content), why risk losing this achievement by betting on greater freedom? Of course it is possible that the political system will lead us there anyhow. But there are shorter paths involving far lesser risks.

The ‘genuine democracy’ perspective has one last variant, and it is the least acceptable of all. Of course – someone might say – there could be results that arise from the political system as it goes about its daily business that we esteem dangerous or mistaken. But it is a mistake to stake so much on it. Democracy is grounded in the Constitution. Not in the whims of a fleeting majority, but rather in an exceptional, deep reflection and the set of moral, political, and social

aspirations that find expression in the calm, collected voice of the people we call the Constitution.

Employing this argument with its Hamiltonian tone in order to justify keeping criminal policy exclusively in the hands of democratic institutions – not in those of judges – will not get us very far. In the first place, fully accepting it implies that someone must watch over the political institutions to make sure they honor their commitments in the course of their daily activities (and this someone, if in fact we believe that the political institutions in place could actually dishonor these commitments, must be exogenous to them). But the argument does not work in Argentina, either, as an illustration of the promises of democratic policy on the subject. As we saw, the strategy adopted for the constitutional reforms in 1994 was completely transformative (giving hierarchical supremacy to international treaties) without forasmuch openly informing the public of what was going on. If we criticize the work of judges as elitist, why not the work that is carried out by a few representatives largely outside the public's sight? If we qualify this strategy as democratic only because the representatives at the convention had been elected by popular vote, why not qualify the 'Blumberg laws' as democratic? After all, as condemnable as they may be, these laws were preceded by a significant social mobilization, while no such mobilization preceded the constitutional reforms.

Symbolically, the reforms were very important. In the end they came of consensus between opposing political forces and managed to transcend their immediate goal of extending in time the mandate of a government. All in all, our approval represents to a good degree a retrospective judgment made in the light of the modestly positive effects that the reforms have had. And these efforts are due to the achievements of the reforms that we consider most valuable, especially the incorporation of the treaties. Otherwise, sanctifying this constitutional moment as

a great democratic achievement without looking at it in terms of its basic components (some elections and a series of discussions) can only have rhetorical meaning.

In sum, my answer to the question as to whether it is better for democratic institutions to define criminal policies without having to answer to judges is negative, or suggests formulating another question about the character of these institutions. Although one might think that my position implies renouncing the promises of democracy and abandoning hope that change can be brought by this path, just the opposite is the case. Paradoxically, holding that the democratic system (if by the term we mean the institutions of political representation) will not always be able to protect these values forces us to safeguard the use of the concept of democracy. It means affirming that our systems, despite their innumerable problems, remain democratic. It means recognizing that a more robust democracy will be able to minimize, although not eliminate, the risks of infringements to these values. It is better to recognize the deficiencies in our political institutions than to determine our definition of democracy in response to the concrete problems we confront. To recognize that the Constitution is not completely majoritarian, and that neither is the judiciary. And that despite all this, it is better – on whole, for now – to allow the latter to intervene and have an important say in defining the outline of constitutional protections.

The fact that political organs may at times yield to demands for harsher punishments – or react indolently to violations of criminal guarantees – does not mean that judges will always resist or that they see themselves as the protectors of these guarantees. This does not alter the gist of my argument. The political organs and judges effectively belong to the same institutional system, and the differences between them cannot be radical. Frequently, judges are part of the problem. But when they are less protective than the legislative branch, the legislators can counter by introducing more generous legislation. We have the tendency to affirm that the strongest

rights against the State are those of the people subjected to its punitive apparatus (the rights of victims of common crimes, despite their weight, do not outweigh them). Consequently, the judiciary would not be able to maintain that the legislature, by being more generous in terms of the protections, limits other rights that are equally strong. Let us imagine a situation in which judges obstinately maintain a more restrictive position than the political organs, even when the latter emphatically insist on amplifying the protections. This is not the case in Argentina. Although the judges have not provided monolithic protection of the guarantees, the response by the political powers has been even more deficient (and as I will explain, their *lack* of response is part of the problem). In any case, however, in the imaginary situation the political branches could do an incredible amount to improve the protection of individuals without relying on judges: from increasing the budget for public defenders, to reforming police departments, prisons, and procedures with the aim of raising the quality of the poor standards in place. Much of the substance of criminal protections concern actions that do not directly involve judges, but rather the intervention of agencies whose budget and management they do not control.

Why is it so important to privilege these protections even at the expense of side stepping political bodies with more direct democratic credentials? There are multiple reasons, the majority of which are obvious. Most of us live in countries with authoritarian pasts, and this is projected into the present: abuses by police and penitentiary officials are not exceptional, and nor are procedural frame-ups of innocent people. Mistreatment not only stems from repressive action by the State and its agencies, but also from its inaction. It is indolence, for example, in response to prison overpopulation and overcrowding that is at fault in cases where minimum standards – not just those dictated by law, but also those dictated by decency – are not met by institutions.

Those who end up in the state punitive network are mostly those who are worst off socioeconomically. Their weakness on the economic level translates into (while also resulting from) weakness on the political level. Inmates who have been convicted are not allowed to vote. Until very recently, even the detainees awaiting trial did not vote; if they do now it is only because of judicial intervention.<sup>43</sup> They cannot voice their complaints in the political arena: their participatory rights are reduced and their position unpopular. Although the unpopularity of a measure cannot in general serve as a valid parameter for defending it from outside the political sphere (to give it more weight than it would merit in the political arena), things are different when the fundamental values such as those described are involved.

People who enter the criminal justice system face high risks of becoming trapped in it. Not only because their conditions make them more prone to repeated criminal activity, but also because the agencies of criminal prosecution – having previously registered them into the system – can keep them on their radar more easily. While cost-benefit analysis is implausible when fundamental rights are at stake, nor is it demonstrable that the restriction of rights and guarantees and reinforcing punitive response actually improve public safety. It is not uncommon for the principal criminal networks to enjoy police protection and so elude prosecution, and there are also offenses for which preventive measures are simply ineffective. What these policies do surely achieve is filling prisons, generally with people from the subordinate strata of society. Imprisonment only worsens their precarious conditions. As the legal process, moreover, can take years, whether innocent or guilty, detainees are forced to await their verdict isolated from society and exposed to all types of abuse. This process in itself condemns them.

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<sup>43</sup> Supreme Court of Argentina, “Mignone” decision, April 9, 2002.

Yet, is it not strange that we fear giving political organs the last word on these issues when we delegate decisions of enormous consequence on our lives, such as those concerning essential aspects of political economy? There are several ways to respond to this question, but I will focus on one. While we resist the idea that custodial interests over rights can be entirely negotiated (sacrificed to obtain certain goals), the political terrain is by definition the sum of all interests. The distinction between the character of rights or principles and that of political decisions is not a sharp one.<sup>44</sup> But we tend to require the State, when taking economic decisions, to promote the interests of the greatest number. Yet we deny that this is its duty when criminal guarantees are at stake. Preventing such aggregate considerations from potentially determining whether or not an individual is subjected to criminal law deservedly constitutes a historic achievement.

It is true that the State might violate rights as a result of (bad) policy. It could, for example, blatantly ignore property rights. As this right possesses a component that is more instrumental than intrinsic, not every restriction of property is invalid, which does not imply that any restriction is valid. Furthermore, an economic policy could seriously abridge social rights, thus aggravating the burden of groups that are already vulnerable. But these are *also* cases where we tend to invoke the protection of non-political groups.

At the same time, we should not lose sight of the type of harm that debilitating criminal protections can cause. Punitive presumptuousness on the part of the State does not only threaten personal freedoms. It also involves the dignity, integrity, equality, and inviolability of human beings, especially in the contexts already described where state agencies are so deficient. We

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<sup>44</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, and RONALD DWORKIN, *A MATTER OF PRINCIPLE*, for a sharper distinction between the domain of policies and the domain of principles or rights.



usually assign greater importance to these values than to economic interests or property rights. When the State infringes on them, it causes harm that is by definition direct: a right is sacrificed in order to promote common or less notable interests. The harm is not only material. It also has strong symbolical content. It reveals the readiness of the State to turn its back on the basic standards for treatment of people living in it. Those who directly benefit from the maintenance of these standards may be guilty of having violated rights or goods of inestimable importance, but this does not mean they are less deserving of the protections. To the contrary: these people become especially vulnerable from the moment they are subjected to the punitive arm of the political community.

People who generally suffer keen socioeconomic deprivation might experience contempt that is similar. As I said, several of these hardships could constitute violations of social rights and therefore be remediable in courts. We know that in the domain of social rights arguments – although not necessarily conclusive or correct – are often laid out to demand that the decision not completely remove itself from political considerations (progressivity, budgetary scarcity, the necessity of a systemic perspective when designing public policy, etc.). Some of the deficiencies in criminal matters have a structural component as well, and include violations of social rights. This typically occurs in the situation of prisons and the rights of those deprived of their freedom. In such circumstances, the judiciary could indicate a path for the political branches to take without completely defining the range of options open to the representative organs. In many other cases, however, the value at stake is of a less graduated nature (the domicile is or is not inviolable; a judge can or cannot condemn the accused if the prosecutor did not press charges; police can or cannot extract a confession, et cetera), and these arguments cannot then be employed with equal force.

Both protection against crime and recognition of victims' suffering are significant obligations for a political community. As important as they are, however, they cannot be honored at the expense of violating the basic rights of others, especially when those others are already in a vulnerable position and the repressive apparatus contains serious flaws such as the ones mentioned. The democratic argument cannot demand indulgence from us in these circumstances. It does not go that far.

#### 4. Conclusion

In this essay, I tried to argue that the political process cannot have the last word in defining criminal protections. Not because they cannot be safeguarded through political action in certain instances, but rather because the failure to do so is too frequent, and because the transition cost between one moment and another (between the time a hard line policy is implemented and the moment it is rescinded) is very high, at least right now. We must search elsewhere for protection, and judges are well placed to provide it. Naturally, judges might also mistakenly offer overly restrictive interpretations, but in such cases, the congress that does not agree would be able to amplify the interpretation without major difficulty, thus leaving judges with even fewer grounds for resistance. Even when judges remained obstinate (due to their ideology or yielding to pressure from portions of the population), the political branches would still have the capacity to significantly improve the protections. When we cannot have everything we want, we must make choices. Democracy is very important to us, but so are rights. And if we lack the guarantee that the political organs will be respectful of rights, then we must be respectful of the guarantees.