EVER AGAIN:
LEGAL REMEMBRANCE OF ADMINISTRATIVE MASSACRE

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I have spent many nights sleeping in the plazas of Buenos Aires with a bottle of wine, trying to forget. . . . I am afraid to be alone with my thoughts.

Argentine Captain Adolfo Scilingo, confessing to having thrown thirty people from a navy helicopter during the "dirty war."¹

Publicly coming forward to give such testimony is a way of returning to a horrible past that we are trying to forget.

Argentine President Carlos Saúl Menem, responding to Scilingo's public confession.²

[T]he struggle of man against power is the struggle of memory against forgetting.

Milan Kundera³

INTRODUCTION

All societies have founding myths, explaining where we come from, defining what we stand for.⁴ These are often commemorated in the form of "monumental didactics," public recountings of the founders' heroic deeds as a national epic. Some societies also have myths of refounding, marking a period of decisive break from their own pasts, celebrating the courage and imagination of those who effected this rupture. Myths of founding and refounding often center on legal proceedings or the drafting of legal documents: the Magna Carta (for Britain),⁵ the trial and execution of King Louis

¹ Quoted in Calvin Sims, *Argentina Tells of Dumping 'Dirty War' Captives into Sea*, N.Y. TIMES, Mar. 13, 1995, at A1, A8. Sergeant Víctor Armando Ibáñez made similar confessions. See *Confessions of a Dirty Warrior*, HARPER'S MAG., July 1995, at 15 (translating and reprinting an interview published in the April 24, 1995 issue of *La Prensa*).

² Quoted in Calvin Sims, *National Nightmare Returns to Argentine Consciousness*, N.Y. TIMES, Apr. 5, 1995, at A1, A6; see also *Argentina: The Unspoken Past*, N.Y. TIMES, Mar. 21, 1995, at A20 (noting that "authorities have actively discouraged public discussion of what went on").

³ MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 3 (Michael H. Heim trans., 1980).

⁴ See MIRCEA ELIADE, *MYTH AND REALITY* 4-5, 30-38 (Ruth N. Anshen ed., Willard R. Trask trans., 1963) (examining the purpose of "foundation myths" in society).

⁵ On the many and conflicting invocations of the Magna Carta in subsequent

XVI (for France),⁶ and the Declaration of Independence⁷ and the Constitutional Convention (for the United States).⁸ "Our country's birthday," reminds Mary Ann Glendon, "commemorates the formal signing of a legal document—a bill of grievances in which rebellious but fussily legalistic colonists recited their complaints, [and] claimed that they had been denied 'the rights of Englishmen.'"⁹

Such legally induced transformations of collective identity are not confined to the distant past. In Australia, the white population has recently come to refocus its national identity around a "discovery" or rehabilitation of the country's aboriginal population.¹⁰ At the same time, aborigines themselves have increasingly come to refocus their relations with the white majority population around several highly successful legal interactions with it: a well-publicized lawsuit vindicating indigenous claims to traditional lands and a law consolidating these claims.¹¹ Both legal events have, in turn, come to be celebrated in indigenous ceremony and popular song.¹²

English political history, by both the left and the right, see ANNE PALLISTER, *MAGNA CARTA: THE HERITAGE OF LIBERTY* 32-38, 51-62, 73, 89 (1971).

⁶ See generally SUSAN DUNN, *THE DEATHS OF LOUIS XVI: REGICIDE AND THE FRENCH POLITICAL IMAGINATION* (1994) (examining the shifting place of this event in French memory).

⁷ On how American memory of the Declaration of Independence has changed several times, in light of shifting political contexts, see MICHAEL KAMMEN, *A SEASON OF YOUTH: THE AMERICAN REVOLUTION AND THE HISTORICAL IMAGINATION* 55-65 (1978).

⁸ On the place of the U.S. Constitution in the collective memory and popular culture of Americans, see MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

⁹ MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 259 (1994). The act of founding often becomes the focal point for later disputes about its meaning and bearing, if any, on contemporary disputes that find their way into courtrooms. As Milner Ball observes, "[t]he courts are the paradigmatic spaces where the dramatic narrative of our beginning is recurred to and augmented." MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 62 (1981).

¹⁰ See Paula Hamilton, *The Knife Edge: Debates About Memory and History, in MEMORY AND HISTORY IN TWENTIETH-CENTURY AUSTRALIA* 9, 13-14 (Kate Darian-Smith & Paula Hamilton eds., 1994).

¹¹ See *Mabo v. Queensland*, 175 C.L.R. 1, 2 (Austl. 1992) (holding that "the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the lands of the Murray Islands"); Native Title Act, No. 110 (1993) (Austl.) (setting forth Parliament's objectives of providing for the recognition and protection of native title).

¹² Two such songs, composed and performed by an interracial rock group, have become best-selling hits on the Australian pop music charts. The group's name is Yothu Yindi. The songs are entitled *Mabu* and *Treaty*. The first of these appears on

In short, acts that assert and recognize legal rights have often become a focal point for the collective memory of whole nations. Secular rituals of commemoration consolidate such shared memories with increasing deliberateness and sophistication.¹³ These events are both "real" and "staged," to the point of problematizing the distinction between true and false representations of reality.¹⁴ In this way, law-related activities can and do contribute to the kind of social solidarity that is enhanced by shared historical memory. In the last half century, criminal law has increasingly been used in several societies with a view to teaching a particular interpretation of the country's history, one expected to have a salubrious impact on its solidarity.

Many have thought, in particular, that the best way to prevent recurrence of genocide, and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors—and to employ the law self-consciously toward this end. To do this effectively has increasingly been recognized to require some measure of *son et lumière*, smoke and mirrors, that is, some self-conscious dramaturgy by prosecutors and judges, I contend. For instance, western Allies in postwar war crimes trials deliberately strove "to dramatize the implacable contradiction between the methods of totalitarianism and the ways of civilized humanity through a worldwide demonstration of fair judicial procedure."¹⁵

This Article examines six recurring problems that have arisen from efforts to employ criminal prosecution to influence a nation's collective memory of state-sponsored mass murder.¹⁶ Some of

the album FREEDOM (Hollywood Records 1993), the second on TRIBAL VOICE (Hollywood Records 1992).

¹³ See DANIEL DAYAN & ELIHU KATZ, MEDIA EVENTS: THE LIVE BROADCASTING OF HISTORY 211-13 (1992) (examining official efforts to influence collective memory through television broadcasts of major public events); see also Ana Maria Alonso, *The Effects of Truth: Re-Presentations of the Past and the Imagining of Community*, 1 J. HIST. SOC. 33, 40 (1988) ("Social groups form images of themselves in relation to a set of founding events and re-enact this shared link to a collective past in public ceremony [Hence, s]ocial memory is integral to the creation of social meaning.").

¹⁴ See JEAN BAUDRILLARD, SIMULATIONS 5-6 (Paul Foss et al. trans., 1983).

¹⁵ Peter J. Fliess, 78 AM. J. INT'L L. 256, 256 (1984) (reviewing RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982)) (emphasis added).

¹⁶ I focus primarily on the legal response to the Argentine dirty war, in which between 10,000 and 30,000 citizens were murdered by the country's officer corps. Over 500 officers were indicted, and some two dozen convicted (including six junta members and individual torturers), before military uprisings forced an end to further

these suggest the task's impossibility; others, its undesirability. First, such efforts can easily sacrifice the rights of defendants on the altar of social solidarity. Second, they can unwittingly distort historical understanding of the nation's recent past. Third, they may foster delusions of purity and grandeur by encouraging faulty analogies between past and future controversies, readings of the precedent that are often too broad, sometimes too narrow.

Fourth, they may fail by requiring more extensive admissions of guilt, and more repentance, than most nations are prepared to undertake; this is because efforts at employing law to instill shared memories sometimes require substantial segments of a society to accept responsibility for colossal wrongs and to break completely with cherished aspects of its past. Fifth, legal efforts to influence collective memory may fail because such memory—almost by nature—arises only incidentally; it cannot be constructed intentionally. Sixth, even if collective memory can be created deliberately, perhaps it can be done only dishonestly, that is, by concealing this very deliberateness from the intended audience.

These obstacles establish the moral and empirical limits within which any liberal account of law's contribution to collective memory must maneuver.¹⁷ I discuss each obstacle in turn, drawing

trials. On this history, see MARTIN E. ANDERSEN, *DOSSIER SECRETO: ARGENTINA'S DESAPARECIDOS AND THE MYTH OF THE "DIRTY WAR"* (1993); ALISON BRYSK, *THE POLITICS OF HUMAN RIGHTS IN ARGENTINA: PROTEST, CHANGE, AND DEMOCRATIZATION* (1994); Ronald Dworkin, *Introduction* to COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS, *NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED* at xi (1986) [hereinafter *NUNCA MÁS*].

¹⁷ Several of these obstacles would also present problems for any effort to influence collective memory, by whatever means (that is, other than by legal proceedings). The relative efficacy of the law in this regard, compared with alternative methods of shaping memory (such as the news media, educational institutions, cinema, and so forth) will not be examined here. But see HEIDE FEHRENBACH, *CINEMA IN DEMOCRATIZING GERMANY: RECONSTRUCTING NATIONAL IDENTITY AFTER HITLER 148-68* (1995). I here examine only the law's potential contribution, largely in isolation from the rest. By "the law," I shall primarily refer to criminal prosecution, including strategic decisions by counsel on both sides and by the court. I will also allude occasionally to legislation and executive orders, although these will be of decidedly secondary concern. Still another crucial use of law to influence collective memory has involved litigation aimed at creating or increasing access (by historians and journalists) to government records documenting administrative massacres in the past. Such litigation has recently become particularly important in societies undergoing transition from nondemocratic to democratic rule, including the former Eastern Bloc states. Important as well has been the statutory provision in many criminal codes making "disparagement of the memory of the dead" an offense. See Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies"*, 85 MICH. L. REV. 277, 294 (1986). In West Germany,

on the now considerable experiences of Germany, Japan, France, Israel, and Argentina.¹⁸ My primary aim is to clarify the nature of these six problems and to illustrate the ways in which they arise. In hopes of fostering their wider recognition and consideration, I offer only the most confessedly provisional suggestions for their resolution.

Administrative massacre, as I shall use the term, entails large-scale violation of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war—civil or international, real or imagined. Mass murder is the most extreme of a broader class of harms inflicted during such episodes; these episodes routinely involve massive numbers of other war crimes and crimes against humanity, such as enslavement of labor (for example, of Korean “comfort women” by the Japanese army and of Jews by the Nazis). My premise is that state criminality of this nature, on this scale, poses special problems—in its immediate aftermath—for new democratic rulers seeking to reconstruct some measure of trust, social solidarity, and collective memory of the recent past. I assess the extent to which criminal law may effectively address these problems.

such a provision was employed, for instance, to prosecute individuals and publications that had denied the occurrence of the Holocaust. See STRAFGESETZBUCH [STGB] § 189 (F.R.G.) (prohibiting the disparagement of the memory of the deceased); see also Stein, *supra*, at 294-95 (relating the prosecution of a teacher who had denied the existence of concentration camps and that Jews had been killed in the Third Reich). More recently, several western societies, including Germany, Belgium, France, Austria, Sweden, and the Netherlands, have enacted criminal provisions specifically prohibiting “Holocaust denial.” See DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 219-22 (1993). These statutes are often justified expressly in terms of a societal interest in preserving collective memory of that event. See Stein, *supra*, at 316-18.

¹⁸ For Germany, I discuss the Nuremberg prosecution of German leaders before the International Military Tribunal; for Japan, the Tokyo War Crimes trial; for France, the prosecutions of Klaus Barbie and Paul Touvier; for Israel, the trial of Adolph Eichmann; for Argentina, the trial of the military juntas convicted of ordering the deaths of many citizens during the dirty war of the mid- to late-1970s. In each case the conduct judged by the courts involved large-scale official brutality against large numbers of victims, perpetrated by thousands of military and police officers, occupying several bureaucratic levels, over a long period of time, enjoying considerable collaboration by civilians. Notwithstanding the considerable differences between these several historical experiences, I shall treat them for present conceptual purposes as examples of what Hannah Arendt described as “administrative massacres.” See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 288-91 (Penguin Books, rev. & enlarged ed. 1977) (1963).

These problems take various shape in differing circumstances. For this reason, occasional forays are necessary into a wide range of historical experience and efforts by social theorists, of competing persuasions, to make sense of it. The strengths and weaknesses of liberal philosophy, in guiding the law's response to administrative massacre and in influencing memory of it, are a central concern in this regard. The criminal law is widely and correctly thought to embody assumptions about human nature and society that are primarily liberal.¹⁹ It follows that a sophisticated critique of criminal law, of its response to a given problem, issues very quickly into an indictment of liberalism itself. For this reason, the most influential recent criticisms of liberalism, by communitarians and postmodernists, will recurrently arise; my aim will be to see how much light such critics can shed on the law's limits and possibilities in this area.

The qualified defense of liberal law that ultimately emerges, of its conceptual resources for coping with these six problems, operates by way of a comparative history, not a conceptual analysis or metatheoretical speculation. I examine the historical experience of administrative massacre in light of what alternative theories have to say about the law's capacity to grapple with it. Conversely, I assess the theories themselves in terms of the practical successes and failures revealed by the comparative history of efforts to bring the perpetrators of administrative massacre to justice.²⁰

But first it is necessary to ask: What is at stake here? How would the obstacles just mentioned, if insurmountable, limit the capacity of liberal law to respond adequately to state-sponsored mass brutality? What would be lost if these obstacles prevented the law from effectively fostering a shared memory of such events?

¹⁹ By "liberal" I mean a theory based on the moral autonomy and rational capacity of individual persons and their corresponding rights to equal concern and respect by fellow citizens and the state. Both critics and defenders of criminal law, as a response to social deviance, routinely characterize it as based on such liberal premises. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* at xix (1978); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* at preface (1968); ALAN W. NORRIE, *LAW, IDEOLOGY, AND PUNISHMENT: RETRIEVAL AND CRITIQUE OF THE LIBERAL IDEAL OF CRIMINAL JUSTICE* at xiii (1991); Michael S. Moore, *The Moral and Metaphysical Sources of the Criminal Law*, in *CRIMINAL JUSTICE: NOMOS XXVII*, at 11, 14 (J. Roland Pennock & John W. Chapman eds., 1985).

²⁰ In developing this approach, I have relied upon NEIL J. SMELSER, *COMPARATIVE METHODS IN THE SOCIAL SCIENCES* 72-150 (1976). For an application, see Mark J. Osiel, *Lawyers As Monopolists, Aristocrats, and Entrepreneurs*, 103 HARV. L. REV. 2009, 2065 (1990).

How might the criminal law, by cultivating shared memory of administrative massacre through prosecution of its perpetrators, contribute significantly to social solidarity? For that matter, what is the proper place of such solidarity—law-induced or otherwise—within a liberal society?

I. HOW PROSECUTION ASSISTS COLLECTIVE MEMORY AND HOW MEMORY FURTHERS SOCIAL SOLIDARITY

Kundera's epigram,²¹ like the work of recent historians, suggests that in political struggle we often "use memory as a tool of power."²² The link between power and storytelling is hard-wired at the level of language, for the words "author" and "authority" have a common etymology.²³ "The state of being an originator or author itself authorizes, gives one authority," one anthropologist observes.²⁴ But it is also true that we turn to memory as a political weapon primarily when we lack more potent and effective ones. "When Lincoln referred in his first inaugural to the 'mystic chords of memory' that bound the nation together," one historian notes, "it must have struck most Americans—northern and southern alike—as a folly. This was a 'nation' getting ready to war with itself."²⁵

²¹ See *supra* text accompanying note 3.

²² PATRICK J. GEARY, PHANTOMS OF REMEMBRANCE: MEMORY AND OBLIVION AT THE END OF THE FIRST MILLENNIUM 26 (1994); see also WILLIAM ROWE & VIVIAN SCHELLING, MEMORY AND MODERNITY: POPULAR CULTURE IN LATIN AMERICA 228 (1991) (arguing that "the destruction of memory [is] a prime means of domination," and that "the Argentinean dictatorship produced an effect of public amnesia, which depended on the eradication of the normal spaces in which memory is exercised and sedimented"); Alonso, *supra* note 13, at 50 (arguing that "[p]ower and memory are most intimately embraced in the representations of official histories which are central to the production and reproduction of hegemony").

²³ See OXFORD ENGLISH DICTIONARY 797-98 (2d ed. 1989) (tracing both words to the Latin *auctor*). Georg W.F. Hegel observed one apparent consequence of this connection in THE PHILOSOPHY OF HISTORY 61-62 (J. Sibree trans., 1900) ("Only in a State cognizant of Laws, can distinct transactions take place, accompanied by such a clear consciousness of them as supplies the ability and suggests the necessity of an enduring record."). As Hayden White parses the passage, "we cannot but be struck by the frequency with which narrativity, whether of the fictional or the factual sort, presupposes the existence of a legal system against which or on behalf of which the typical agents of a narrative account militate." HAYDEN WHITE, THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 13 (1987). Another pertinent etymological connection is that between "amnesty" and "amnesia." The law of amnesty has sometimes been consciously employed in an effort to induce "forgetting" of such national traumas as administrative massacre.

²⁴ ELIZABETH TONKIN, NARRATING OUR PASTS: THE SOCIAL CONSTRUCTION OF ORAL HISTORY 39 (1992).

²⁵ Kenneth Cmiel, "A Broad Fluid Language of Democracy": Discovering the American

Here, invocation of collective memory was the last hope in the face of political impotence, testimony to social solidarity's imminent collapse.

Extravagant terms are often invoked to describe the contribution that prosecution for administrative massacre can make to such solidarity, that is, beyond the conventional objectives of criminal law (deterrence and retribution). The trial of Klaus Barbie, for instance, would provide France with "an enormous national psychodrama, psychotherapy on a nationwide scale," proclaimed historian Emmanuel Le Roy Ladurie.²⁶ The prosecution of Paul Touvier became "the subject of enormous media attention . . . and . . . the vehicle for a debate on the legitimacy and activities of the Vichy Regime, becoming popularly identified as a trial of the Vichy government."²⁷

Similarly, prosecuting the Argentine military juntas would "provide a deeply divided society with a cathartic theater," announced one legal scholar in the trials' immediate aftermath.²⁸ Concurred another,

[a]ll the media gave ample coverage to an event that was discussed in squares and cafes, by poor and rich alike. Through this discussion, a public space was reappropriated, a voice rediscovered It seemed as though common people would be able at last to come to terms with their own experiences of fear, silence, and death.²⁹

Idiom, 79 J. AM. HIST. 913, 931 (1992). Mystery writer K.C. Constantine allows one of his characters to make the point in earthier form: "[T]he surest way you know something's dead was when somebody started talking about preserving its memory." K.C. CONSTANTINE, *BOTTOM LINER BLUES* 3 (1993).

²⁶ HENRY ROUSSO, *THE VICHY SYNDROME: HISTORY AND MEMORY IN FRANCE SINCE 1944*, at 210 (Arthur Goldhammer trans., 1991).

²⁷ Leila S. Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW & SOC. INQUIRY 191, 191 (1995). For further discussion of the effect of Touvier's trial on the memory politics of France, see Nancy Wood, *Crimes or Misdemeanours? Memory on Trial in Contemporary France*, 5 FRENCH CULTURAL STUD. 1 (1994). Touvier was police chief of Lyon during the Occupation.

²⁸ Paula K. Speck, *The Trial of the Argentine Juntas*, 18 U. MIAMI INTER-AM. L. REV. 491, 533 (1987). The trial awakened enormous curiosity among Argentines. An ad hoc periodical consisting of edited trial transcripts averaged over 200,000 in street sales per week. See Interview with Emilio Mignone, Director of the *Centro de Estudios Legales y Sociales*, in Buenos Aires, Argentina (July 1985).

²⁹ Carina Perelli, *Memoria de Sangre: Fear, Hope, and Disenchantment in Argentina*, in REMAPPING MEMORY: THE POLITICS OF TIMESPACE 39, 49-50 (Jonathan Boyarin ed., 1994).

The official reports of so-called "truth commissions," however desirable, are less potent means to this end, adds Carlos Nino, top legal advisor to Argentine President Raul Alfonsín. This is because

the public presentation of the truth is much more dramatic when done through a trial, with the accused contributing to the development of the story. Furthermore, the quality of narration in an adversarial trial can not be fully replicated by other means. Even when an amnesty or pardons are issued at the end of a trial, they do not counteract the initial effect of such emphatic public disclosure.³⁰

Nino also notes a trial's effect on the public: "The drama of a trial, with the victims and perpetrators under the public light, with accusations and defenses, with witnesses from all social sectors, and with the terrifying prospect of punishment, inevitably attracts great public attention and may even provoke 'dummy' trials in the streets or around dinner tables."³¹ Given these features, "trials for human rights violations may be much closer to what Ackerman labels 'constitutional moments' than many attempts at formal or informal constitutional reforms."³² Such attempts at reform, in Latin America, are "viewed by many people as either too technical [an] affair or the result of politicians' . . . corrupt self-interests."³³

Analogous observations were made of the trial of Adolf Eichmann. By focusing on excruciating personal experiences of the victims, stories calculated "to shock the heart,"³⁴ the prosecutor, Gideon Hausner, "sought to design a national saga that would echo through the generations,"³⁵ helping to construct Israeli national identity in the process. By highlighting Jewish resistance to the

³⁰ CARLOS S. NINO, *RADICAL EVIL ON TRIAL* (forthcoming 1996). I am grateful to Owen Fiss, Nino's literary executor, for allowing me to quote from this manuscript.

³¹ *Id.*

³² *Id.* (footnote omitted).

³³ *Id.*

³⁴ TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 338 (1993); see also Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. REV. 555, 558-59 (1992) (describing the use, in the Eichmann trial, of "the agonizing picture of the Jews descending into hell" and "[w]itnesses collaps[ing] on the stand").

³⁵ SEGEV, *supra* note 34, at 336; see also *id.* at 328 (noting Ben-Gurion's belief that "[s]omething was required to unite Israeli society—some collective experience, one that would be gripping, purifying, . . . a national catharsis"); Michael Keren, *Ben-Gurion's Theory of Sovereignty: The Trial of Adolf Eichmann*, in DAVID BEN-GURION: POLITICS AND LEADERSHIP IN ISRAEL 38, 38 (Ronald W. Zweig ed., 1991) (examining Israeli Prime Minister Ben-Gurion's view of the Eichmann trial first and foremost as a legal act of a sovereign state).

Holocaust, he aimed to help young Israelis overcome their "repugnance for the nation's past," a repugnance based on their impression that their grandparents had "allow[ed] themselves to be led like lambs to the slaughter."³⁶ To serve these narrative purposes, Eichmann's trial would fill the "'need [for] a massive living recreation of this national and human disaster."³⁷ The trial, one Israeli scholar reports, "compelled an entire nation to undergo a process of self-reckoning and overwhelmed it with a painful search for its identity."³⁸ Thus, "the trial served as a sort of national group therapy."³⁹

Although painful, this process was also "poetic," in the way justice can sometimes be. One poet, who was among the several hundred thousand Israelis listening in on radio, ably captures this dimension: "The placing of Eichmann before a Jewish court was destined to fill a chaotic, inhuman void that was hidden somewhere in the experience of the Jewish people, its trials and tribulations, from the commencement of its exile until today."⁴⁰ Metaphorically, the trial captured "the duality of our existence," Gouri adds, "the Jews as a murdered people and the story of Israel as a nation sitting in judgment."⁴¹

Such trials resemble what anthropologist Victor Turner has called "social dramas": cultural performances involving the wholesale disruption, self-examination, and reconciliation of a society by means of legal or other ritual procedures. These are designed to enhance the group's ability

to scrutinize, portray, understand, and then act on itself. . . . As heroes in our own dramas, we are made self aware, conscious of our consciousness.

. . . .

. . . Since social dramas suspend normal everyday roleplaying, they interrupt the flow of social life and force a group to take cognizance of its own behavior in relation to its . . . own values,

³⁶ SEGEV, *supra* note 34, at 338 (quoting Gideon Hausner). Hausner and Ben-Gurion organized the trial so that it "would emphasize both the inability of the Jews to resist their murderers and their attempts to rebel. Hausner would almost completely ignore the Judenrats," that is, the Jewish Councils who sometimes collaborated in deportations. *Id.* at 348.

³⁷ *Id.* (quoting Gideon Hausner).

³⁸ Haim Gouri, *Facing the Glass Booth*, in HOLOCAUST REMEMBRANCE: THE SHAPES OF MEMORY 153, 155 (Geoffrey H. Hartman ed., 1994).

³⁹ SEGEV, *supra* note 34, at 351.

⁴⁰ Gouri, *supra* note 38, at 153 (quoting Natan Alterman).

⁴¹ *Id.* at 155.

even to question . . . the value of those values. In other words, [such] dramas induce and contain reflexive processes and generate cultural frames in which reflexivity can find a legitimate place.⁴²

Alongside such Promethean aspirations, the traditional purposes of criminal law—deterrence and retribution of culpable wrongdoing—are likely to seem quite pedestrian. Moreover, those committed to keeping such concerns at the center of judicial attention—that is, professionally scrupulous lawyers—are likely to come off as plodding dullards, distracted by doctrinal trivia from the issues of truly “historic” importance before them. This was, in fact, precisely the verdict reached on Hausner by Hannah Arendt.⁴³ Hausner himself had aimed to become “the impresario of a national-historic production.”⁴⁴ But for Arendt, Eichmann’s trial failed as drama, due to the studied mediocrity of its principal protagonist.⁴⁵

The real question, however, is not whether the prosecutor made a compelling hero. The question is whether it is right to seek such operatic virtuosity from proceedings of this sort in the first place, as Arendt apparently did.⁴⁶ As an aim for criminal law, the cultivation of collective memory resembles deterrence in that it is directed toward the future, where enhanced solidarity is sought. But like retribution, it looks to the past, to provide the narrative content of what is to be shared in memory. Stated most modestly, its purpose is, as Thomas Scanlon puts it, “to achiev[e] a general

⁴² VICTOR TURNER, FROM RITUAL TO THEATRE 75, 92 (1982). Although Turner lists the Dreyfus trial among the episodes exemplified by his concept of social drama, see *id.* at 70, his theory confessedly stresses how legal procedures at such times “maintain[] the *status quo*,” *id.* at 10, and “reassert and reanimate the overarching values shared by all.” *Id.* at 75. But while this is sometimes the case, more common in the episodes examined in this Article (as in the Dreyfus trial itself) has been the intention, often partly successful, of permanently altering the institutional status quo and transforming existing values. Turner’s account of trials as social dramas is heavily Durkheimian in theoretical inspiration. Hence the present account will seek to show the limits of Durkheim’s sociology in grappling with the impact of the criminal proceedings examined here. Turner views the agonistic strife aroused by such trials as leading necessarily either to reconciliation among warring parties or to secession by one of them. As we shall see, however, there is a third possibility: the reconstruction of social solidarity through public deliberation over continuing disagreement, a process by which rules constrain conflict within nonlethal bounds and often inspire increasing mutual respect among adversaries.

⁴³ See ARENDT, *supra* note 18, at 5, 8, 124-25, 276-79.

⁴⁴ SEGEV, *supra* note 34, at 338.

⁴⁵ See ARENDT, *supra* note 18, at 9, 287.

⁴⁶ On Arendt’s aestheticized conception of politics as performance, long noted by scholars, see LISA J. DISCH, HANNAH ARENDT AND THE LIMITS OF PHILOSOPHY 21, 83-84, 161 (1994).

state of mind in the country in which the unacceptability of these acts is generally recognized, so that the perpetrators become pariahs, . . . hav[ing] done something that cannot be sustained and accepted."⁴⁷

Collective memory, as I shall use the term,⁴⁸ consists of the stories a society tells about momentous events in its history, the events that most profoundly affect the lives of its members and most arouse their passions for long periods. This category of events prominently includes wars, revolutions, economic depressions, large-scale strikes and riots, and genocides—as well as the legal proceedings often arising from such upheavals.⁴⁹ These events are also

⁴⁷ Tape of Human Rights and Deliberative Democracy: A Conference in Honor of Carlos Santiago Nino, Presented at Yale Law School (Sept. 23-24, 1994) [hereinafter Nino Conference] (currently available on videotape from the Shell Center for Human Rights).

⁴⁸ Collective memory consists of past reminiscences that link given groups of people for whom the remembered events are important, that is, the events remain significant to them later on. The memory is later invoked to help define what such people have in common and to guide their collective action. As the events in question recede further into the past and those who experienced them directly no longer remain alive, the "memory" becomes, more precisely, a memory of memory, that is, a memory of what others have told future generations about their pasts. On this temporal distinction, see Amos Funkenstein, *Collective Memory and Historical Consciousness*, 1 HIST. & MEMORY 5, 9 (1989). Once survivors are no longer available to offer individualized accounts of their personal and sometimes idiosyncratic experiences, the "mass production of memory" by the state and its legal institutions increasingly becomes a realistic possibility and, for some, a terrible danger. See, e.g., Michael Geyer & Miriam Hansen, *German-Jewish Memory and National Consciousness*, in HOLOCAUST REMEMBRANCE, *supra* note 38, at 175, 178 (noting that younger Germans remember the Nazi years only by way of their subsequent representations in cinema and official ceremonies and concluding that "[w]hat we have witnessed over the past two decades is the creation of a public *through* these collective rituals and representations of remembering").

Collective memory is a woolly concept, often used casually as a metaphor, albeit an evocative one, for other things. An analytical philosopher would have no difficulty distinguishing at least ten different usages of the term in current social thought. See IAN HACKING, *REWRITING THE SOUL: MULTIPLE PERSONALITY AND THE SCIENCES OF MEMORY* 3 (1995) (noting the recent profusion of uses of collective memory and that this abundance reflects, in itself, a phenomenon of considerable interest). Discussion could profit from conceptual clarification of the term collective memory. But that is not the aim of this Article. My concerns are primarily pragmatic. I shall here employ the concept as an ideal type, for its heuristic value alone, in hopes of assessing just what this value might be.

⁴⁹ This list is decidedly focused on the "great events" of modern societies. The collective memory of peasant societies, by contrast, has often remained centered on seasonal events and hence dependent on a cyclical conception of time. See, e.g., FRANÇOISE ZONABEND, *THE ENDURING MEMORY: TIME AND HISTORY IN A FRENCH VILLAGE* 139 (Anthony Forster trans., 1984) ("The present . . . is reconstituted by reference to the past—a stable, lasting and well-ordered period, a time outside the

distinguished by the tendency for recollection of them to "hover over" subsequent events, providing compelling analogies with later controversies of the most diverse variety. When a society's members interpret such an event in common fashion, they derive common lessons from it for the future.⁵⁰ When the event—like the Dreyfus trial in France—has been deeply divisive for a society, however, its memory will later evoke the same disagreements and consolidate the same social divisions that it involved.

There is yet a third scenario. Sometimes the memory of a major legal event will initially unify the nation that experienced it, but later be interpreted so differently by contending factions that its memory becomes divisive. American memory of the Declaration of Independence suffered this fate, for instance, in the last decades of the eighteenth century. "By the end of John Adams's administration," writes a historian,

partisan politics had grown so nasty that ideological opponents could not disentangle their sense of the present from their remembrance of the past. Unable to celebrate the Fourth of July together, they held separate processions, separate dinners, and heard separate orations—a situation that continued until the Federalist party died out⁵¹

Collective memory—both the divisive and solidifying sorts—plays a much greater role in the political discourse of some societies than

reach of Time."). In such traditional societies, the content of shared memory—as recounted in social gatherings and interviews with anthropologists—remains remarkably uninfluenced by even the largest catastrophes suffered by the nation-state in which peasants reside. See, e.g., JAMES FENTRESS & CHRIS WICKHAM, *SOCIAL MEMORY* 96 (1992) (noting that peasants "tend to stress their social identity through images of resistance to the state, which are peculiarly unlikely to get into Great Events history").

⁵⁰ The idea of collective memory need not imply that the collectivity—the nation, the class, or the ethnic group—possess memories independent of those held by its members, although the concept has sometimes been interpreted in this way. See F.C. BARTLETT, *REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY* 296-98 (1932) ("[I]t is not theoretically impossible that the organization of individuals into a group should literally produce a new mental unit which perhaps feels, knows and remembers in its own right."). There is both an individual and a social component to many memories. Large-scale sociopolitical events like an administrative massacre, for instance, are experienced and hence remembered differently, in certain respects, by each of the surviving individuals affected. But many other aspects of their experiences, and the sentiments evoked, will have been shared by fellow citizens and will be recognized as such. This is the sense in which I shall speak here of collective memory. For a useful discussion of these issues, see TONKIN, *supra* note 24, at 104-06.

⁵¹ KAMMEN, *supra* note 7, at 40.

others. It plays considerably more of a role in Europe, it is often observed, than in our own society.⁵² Anthropologists have long noted that in premodern societies authoritative stories about the past often serve as "the legal charter of the community," functioning to "integrate[] and weld[] together the historical tradition, the legal principles, and the various customs," thereby providing "for cohesion, for local patriotism, for a feeling of union."⁵³ But this insight into the role of the past in non-Western societies was derived from the early legal history of the West itself.⁵⁴ This suggests that the way our law uses memory of the past—whether burying or unearthing it—may not be altogether unique or culturally idiosyncratic and that the anthropological study of collective memory may now shed some important light on law in Western society.

There are two very different ways in which the law in general, and criminal prosecution of administrative massacre in particular, might contribute to social solidarity. The first views legal proceedings as drawing upon an already-existing consensus within a country regarding its first principles and as employing that consensus to infuse a single, shared interpretation of its recent past. Solidarity results from the awareness of a common history judged by common standards, a history from which unequivocal lessons for future conduct will be learned by all.

⁵² In this regard, the United States resembles other frontier and immigrant societies, whose members often retain stronger memories of their disparate lands of origin than of their common, new-found home. The shallowness of historical memory in the United States is a central theme of Michael Kammen's recent work. See MICHAEL KAMMEN, *MYSTIC CHORDS OF MEMORY: THE TRANSFORMATION OF TRADITION IN AMERICAN CULTURE* 9-10 (1991) [hereinafter KAMMEN, *MYSTIC CHORDS*]; KAMMEN, *supra* note 8, at 13. In the 19th century, many European political theorists, novelists, and psychologists viewed social and political disorder as reflecting a loss of shared memory. See RICHARD TERDIMAN, *PRESENT PAST: MODERNITY AND THE MEMORY CRISIS* (1993). But it is a misconception, partially perpetuated by recent communitarianism, that people in preliterate societies have better developed memories and more detailed recall—presumably because they cannot turn to documents as a mnemonic crutch—than those in modern, literate societies. See Ulric Neisser, *Literacy and Memory*, in *MEMORY OBSERVED: REMEMBERING IN NATURAL CONTEXTS* 241, 241-42 (1982) (rejecting the notion that "illiterate people have particularly good memories to compensate for being unable to write things down").

⁵³ BRONISLAW MALINOWSKI, *MAGIC, SCIENCE, AND RELIGION* 116-17 (1954).

⁵⁴ See Peter Burke, *History as Social Memory*, in *MEMORY: HISTORY, CULTURE AND THE MIND* 97, 109 (Thomas Butler ed., 1989); see also M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307*, at 146-48, 297 (Blackwell Publishers, 2d ed. 1993) (1979) (discussing the place of such charters in early British society); P.H. SAWYER, *ANGLO-SAXON CHARTERS: AN ANNOTATED LIST AND BIBLIOGRAPHY* (1968).

The second view does not expect legal proceedings to draw upon, nor even necessarily to produce any society-wide consensus on such matters. Legal proceedings produce a different kind of solidarity, founded on a different basis. The proceedings are founded on civil dissensus and produce the kind of solidarity embodied in the increasingly respectful way that citizens can come to acknowledge the differing views of their fellows. I will sketch each of these two accounts of law's service to solidarity before examining how the six problems mentioned above may undercut each of them. I conclude that criminal prosecution of administrative massacre can only contribute significantly to social solidarity of the second sort and that this is precisely the kind of solidarity to which a liberal society should aspire.

A. *Crime, Consensus, and Solidarity*

Upon being recounted, the stories that constitute collective memory can contribute to social solidarity by evoking in citizens the common values that Durkheim called the collective conscience.⁵⁵ "For Durkheim," writes Garland,

the rituals of criminal justice—the court-room trial, the passing of sentence, the execution of punishment—are, in effect, the formalized embodiment of the *conscience collective*. In doing justice, and in prosecuting criminals, these procedures are also giving formal expression to the feelings of the community—and by being expressed in this way those feelings are both strengthened and gratified.⁵⁶

Garland continues, "[punishment] is a social occasion which simultaneously structures individual sentiment and gives it cathartic

⁵⁵ See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 79 (George Simpson trans., 1964) (defining the collective conscience as "[t]he totality of beliefs and sentiments common to average citizens of the same society"). The normative implications of Durkheim's criminology have been partially developed by Jean Hampton, who argues "that the moral education which punishment effects is at least part of punishment's justification." Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 208 (1984); see also JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970) (arguing that "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation").

⁵⁶ DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 67 (1990).

release."⁵⁷ Criminal prosecutions play a special role in this process.

[T]he *conscience collective* is protected by a strict code of penal law, which—unlike most law in modern society—*does* evoke deep-seated emotions and a sense of the sacred. Thus in a world of secular diversity, punishment continues to protect a residual sphere of sacred values, and draws its force and significance from this fact.⁵⁸

Indeed,

[h]anded down by our leading institutions with an aura of *gravitas* and moral seriousness, these decisions set the tone for the public's response at the very moment that they claim to express it. . . . [Such judicial decisions] prefigure popular sentiment and give it a degree of definition which it would otherwise lack. As James Fitzjames Stephen once put the point: ". . . the sentence of law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax."⁵⁹

Modern societies are held together not only by common values, of course. More important is the functional interdependence and convergent interests created by a division of labor between members of various occupational groups.⁶⁰ Law's purpose is now primarily "restitutive," as reflected in the growth of private litigation in contract and tort.⁶¹ An astringent version of liberalism is therefore prepared to reject as romantic sentimentality the notion that modern social order rests, in any significant measure, on shared values, that is, on what Durkheim labels mechanical solidarity.⁶²

⁵⁷ *Id.* at 68.

⁵⁸ *Id.* at 57.

⁵⁹ *Id.* at 58 (citation omitted).

⁶⁰ See DURKHEIM, *supra* note 55, at 147 (contending that "the ties which bind us to society and which come from the community of beliefs and sentiments are much less numerous than those which result from the division of labor" and that "co-operative law express[es] . . . the links which the division of labor brings about").

⁶¹ See *id.* at 112, 133-43, 147.

⁶² The leading exponent of this view is Niklas Luhmann. See generally NIKLAS LUHMANN, *THE DIFFERENTIATION OF SOCIETY* (Stephen Holmes & Charles Larmore trans., 1982) (arguing that modern industrial society consists of separate institutional spheres, each governed by different principles, lacking any single normative order encompassing them all and that the purpose of law is to regulate the interaction between these spheres, not to subject them and their differing logics to any single coherent moral vision); see also ERNEST GELLNER, *CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS* 96 (1994) ("Social co-operation, loyalty, and solidarity do not now presuppose a shared faith. They may, in fact, presuppose the absence of a wholly shared and seriously, unambiguously upheld conviction. They may require a

In this view, social solidarity—as mutual recognition of our interdependence—is better served by suppressing our deeper disagreements of moral principle and “forgetting” the political conflagrations to which they may historically have given rise.⁶³

This view spurns Durkheim’s confidence in law’s capacity to evoke a collective conscience. But it resembles Durkheim’s position, paradoxically, in assuming that dissensus on central normative questions is necessarily at odds with any kind of social solidarity—that if agreement cannot be reached here, solidarity must be found elsewhere (that is, in the division of labor). The range of policy choice, in the aftermath of administrative massacre, is thus reduced to one between different forms of consensus: to remember (in the same way) or to forget. “Forgetting” becomes a metaphor for a political truce, a *modus vivendi*. “The French never *really* forgot,” as historian Robert Paxton notes of Vichy collaboration; rather, “[t]here was a tacit agreement not to tear one another apart.”⁶⁴ Once the issue is framed this narrowly, the question becomes simply whether solidarity is better served by consensus in memory or consensus in oblivion.

To be sure, there remains the metaquestion of how much mechanical solidarity—how much common commitment to substantive moral principles—remains necessary in a modern, pluralistic, industrial society. But virtually all versions of liberalism acknowledge that general commitment to a core of shared principles is necessary if modern society is “not to disintegrate,” as one theorist summarizes, “into a heap of mutually antagonistic and self-seeking individuals.”⁶⁵ These moral principles may derive historically from religion, but are now most strongly embodied in criminal law,

shared doubt.”).

⁶³ Stephen Holmes is the most vigorous contemporary exponent of this reading of liberalism. See generally Stephen Holmes, *Gag Rules or the Politics of Omission*, in CONSTITUTIONALISM AND DEMOCRACY 1 (Jon Elster & Rune Slagstad eds., 1988) (arguing that liberal society must sometimes suppress controversial topics to avoid conflict). He applies this approach to recent Eastern European developments in *The End of Decommunization*, E. EUR. CONST. REV., Summer-Fall 1994, at 33 (praising the decision of most new Eastern European democracies to dispense with criminal trials or massive purges of former communist elites). See also BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 84 (1992) (arguing that Eastern European states should burn their files on domestic informers and members of the secret police).

⁶⁴ JUDITH MILLER, ONE, BY ONE, BY ONE: FACING THE HOLOCAUST 141 (1990) (emphasis added).

⁶⁵ LEWIS A. COSER, MASTERS OF SOCIOLOGICAL THOUGHT: IDEAS IN HISTORICAL AND SOCIAL CONTEXT 132 (2d ed. 1977).

according to Durkheim.⁶⁶ Once principles and stories are widely shared, they become what Durkheim called "social facts," which can be as genuine in their consequences as material facts.⁶⁷

We know very little, however, about how moral ideas sometimes come to be widely adopted as societal ideals. Surely, clearer concepts and better normative theories are neither necessary nor sufficient for social progress of this sort. Durkheim's followers have hinted at one promising approach: the ritual elevation of attempted "turning points" in a nation's history. At such times, "morality is formed in emotionalized collective states in which actors are attracted by ideals and lifted beyond themselves. . . . [Such] moments of collective effervescence transform or create social structures and interpersonal bonds."⁶⁸

If social rituals generally evoke shared values that endure, one might ask, then how could "turning points" in a society's history—when existing values are reconsidered and revised—ever serve as the focal point of ritual commemoration? The short answer (argued at greater length herein) is: When the need for a new beginning is widely felt, the very process of critical reassessment—to which the dramatic power of liberal show trials can contribute—may itself be symbolically treated (and later commemorated) as a decisive moment of collective refounding. As one scholar notes of this process:

The choice of a single event clearly provides a better opportunity for ritualized remembrance than a gradual process of transition does. The master commemorative narrative thus presents these events as turning points that changed the course of the group's historical development In turn, selection of certain events as turning points highlights the ideological principles underlying the master commemorative narrative by dramatizing the transitions between periods.

. . . [Such events] not only reflect the social and political needs of the group . . . but also become active agents in molding the group's needs.⁶⁹

⁶⁶ See DURKHEIM, *supra* note 55, at 80-82, 109.

⁶⁷ See EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 1-13 (George E.G. Catlin ed., Sarah A. Solovay & John H. Mueller trans., 8th ed. 1966). For a recent discussion, see MARGARET GILBERT, *ON SOCIAL FACTS* 237-54 (1989).

⁶⁸ Stephen P. Turner, *Introduction: Reconnecting the Sociologist to the Moralist*, in EMILE DURKHEIM: *SOCIOLOGIST AND MORALIST* 1, 19 (Stephen P. Turner ed., 1993) (parsing Durkheim's sociological theory of religious ritual).

⁶⁹ Yael Zerubavel, *RECOVERED ROOTS: COLLECTIVE MEMORY AND THE MAKING OF ISRAELI NATIONAL TRADITION* 9 (1995) (emphasis omitted) (footnote omitted).

Some disagreement always exists over what the shared principles are and how far they reach. Do they extend, for instance, only to mutual recognition of one another's basic moral rights, or also into conceptions of the good life and attendant ideals of virtuous character? In any event, it is clear (indeed, almost tautological) that in a liberal society these common principles must be primarily liberal ones. Foremost among them is respect for fundamental liberties of the individual against encroachment by others, whether public or private.⁷⁰ Individualism, in this sense, provides modern society with "the basis of our moral catechism."⁷¹

The individualism of those within modern Western society is not presocial in origin, derived from a state of nature (any more than it is antisocial or antiegalitarian in normative thrust). Rather, the modern individualism that Durkheim revered is itself the product of societal differentiation and complexity. It results from the social process by which persons come to differ from one another through membership in multiple groups and organizations, voluntary and involuntary. The overlapping and cross-cutting nature of such allegiances generates conflicting demands on the person, conflicts that each must manage and resolve to her own satisfaction, in pursuit of psychological stability and personal integrity.⁷²

Violence against individuals violates their moral rights to life and to physical integrity. Administrative massacre involves violent acts on a massive scale. Acts of violence evoke in citizens strong feelings of resentment and indignation toward the wrongdoer. Prosecuting wrongdoers also evokes—more important to Durkheimians—an awareness of *sharing* these sentiments with others, that

⁷⁰ See Steven Lukes, *Durkheim's 'Individualism and the Intellectuals'*, 17 POL. STUD. 14, 14 (1969). Contemporary "Durkheimians" often reject his conclusion here, contending that collective conscience and social solidarity rest entirely on the residue of non-liberal values and practices. See Robert N. Bellah, *The Idea of Practices in Habits: A Response*, in COMMUNITY IN AMERICA: THE CHALLENGE OF HABITS OF THE HEART 269, 271 (Charles H. Reynolds & Ralph V. Norman eds., 1988). Much closer to Durkheim's spirit in this regard, however, is the interpretation offered by MARK S. CLADIS, *A COMMUNITARIAN DEFENSE OF LIBERALISM: EMILE DURKHEIM AND CONTEMPORARY SOCIAL THEORY* 9 (1992).

⁷¹ Lukes, *supra* note 70, at 21; see also DURKHEIM, *supra* note 55, at 172 ("As all the other beliefs and . . . practices [in modern society become] less and less religious, the individual becomes the object of a sort of religion. We erect a cult in behalf of personal dignity . . .").

⁷² This conception of individualism was developed by George H. Mead. See GEORGE H. MEAD, *MIND, SELF & SOCIETY* 149-292 (Charles W. Morris ed., 1934).

is, of belonging to a community whose members are united by this very convergence and periodic reinvigoration of moral sentiment.⁷³ In criminal trials, prosecutors—as spokesmen for “the people”—tell the stories through which such sentiments are elicited and such membership consolidated. In affirming criminal convictions, appellate courts draw upon “the ritual attitude of sacred respect” for themselves and for the moral traditions they invoke.⁷⁴

In the Argentine military trials President Raul Alfonsín’s legal advisors, highly literate in social theory, hoped to put Durkheim’s undoubted insights to work. They even invoked his theoretical terminology. Nino wrote,⁷⁵ for instance, that prosecution of the juntas “is required in order to inculcate in the collective conscience and in the consciences of the groups concerned that no sector of the population stands above the law.”⁷⁶ Prosecution, in other words, was not necessary primarily for retribution (in which Nino did not believe)⁷⁷ nor for deterrence (which lies beyond the reach of the law when the criminals control the state).

The trial of the military juntas would tell a liberal story, hoped prosecutors and presidential aids, one that would strengthen public commitment to principles of liberal morality, embodied in criminal law and egregiously violated in the dirty war. The trial, in other words, was in substantial part a self-conscious attempt to “apply” Durkheimian social theory. Argentine liberals understood the application of Durkheim’s ideas not so much to entail strapping the patient down for emergency transfusions of liberal fluids, as laying the groundwork for concurrent reforms in political institutions.⁷⁸

⁷³ See DURKHEIM, *supra* note 55, at 102 (arguing that “[c]rime brings together upright consciences and concentrates them”). In other words, “[e]ach time the community moves to censure some act of deviation, then, and convenes a formal ceremony to deal with the responsible offender, it sharpens the authority of the violated norm and restates where the boundaries of the group are located.” KAI T. ERIKSON, *WAYWARD PURITANS: A STUDY IN THE SOCIOLOGY OF DEVIANCE* 13 (1966).

⁷⁴ DOMINICK LACAPRA, *EMILE DURKHEIM: SOCIOLOGIST AND PHILOSOPHER* 289 (1972). LaCapra observes of Durkheim in this regard that “[t]he vision of a society based upon truth and justice and able to reconcile reason and the ritual attitude of sacred respect was vital to Durkheim’s idea of structural reform in modern society.” *Id.*

⁷⁵ Nino was also a professor of legal philosophy and criminal law.

⁷⁶ Carlos S. Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 136 (1989).

⁷⁷ See Carlos S. Nino, *A Consensual Theory of Punishment*, 12 PHIL. & PUB. AFF. 289, 300 (1983).

⁷⁸ On several of these proposed reforms, see Carlos S. Nino, *The Debate over Constitutional Reform in Latin America*, 16 FORDHAM INT’L L.J. 635, 636-37, 646-49

As Alfonsín would announce (in a speech drafted by Nino), "[t]he full and free exercise of democratic citizenship, individual liberties and social solidarity, must now provide the foundation for constructing a modern society."⁷⁹

Editorial sympathizers with the Alfonsín government adopted a similar idiom in defending the proceedings. One wrote of the televised proceedings, for instance, that

[t]he victims, as witnesses, appeal not only to the judges but implicitly to the community at large. Each victim, finally rescued from oblivion, seeks recognition of the essential humanity that was denied him. For this reason, the trial, as an event in the life of the entire community, not only furthers legal justice but also, at the same time, helps to reconstruct the nation's ethical foundations.⁸⁰

Nino, would later strike a similarly Durkheimian chord in reflecting on what the junta trial had accomplished. "The moral consciousness of society seems to have been deeply affected by these trials. . . . [T]he months of testimony regarding the atrocities made a perceptible impact in the minds of the people."⁸¹ "[I]n its sober and thorough decisions, [the court] set forth principles conducive to the reestablishment of the rule of law"⁸² The trial had served to "awaken the dormant legal consciousness."⁸³

Even Alfonsín's critics, like his defenders, sometimes cribbed their arguments from the same tradition of social theory. Argued one such critic: "If the trials contributed to collective memory and social solidarity, then the subsequent retreat—the amnesties and the pardons—fostered collective 'forgetting' and weakened the social solidarity that criminal punishment provides."⁸⁴

(Michael E. Roll trans., 1993).

⁷⁹ Raul Alfonsín, Speech Before Delegates of the National Committee of the *Unión Cívica Radical* (Jan. 12, 1985), in ALFONSÍN: DISCURSOS SOBRE EL DISCURSO 11, 14 (Luis Aznar et al. eds., 1986) (translation by author).

⁸⁰ Hugo Vezzetti, *El Juicio: Un Ritual de la Memoria Colectiva*, 7 PUNTO DE VISTA 3, 5 (1985) (translation by author).

⁸¹ NINO, *supra* note 30.

⁸² *Id.*

⁸³ *Id.* Nino here refers favorably to, and extrapolates from, Judith N. Shklar's defense of the Nuremberg trials, in her book *LEGALISM* 112-200 (1964).

⁸⁴ Roberto Bergalli, *El Olvido Como Ideología del Discurso Jurídico-Penal*, 11 DOCTRINA PENAL 427, 430 (1988) [hereinafter Bergalli, *El Olvido*] (translation by author). Bergalli also develops his views on this subject in Roberto Bergalli, *Memoria Colectiva y Derechos Humanos*, 27 ANÁLES DE LA CÁTEDRA FRANCISCO SUAREZ 83 (1987).

Thus, wrote Roberto Bergalli—a former judge, military detainee, and exiled law professor that punishment signals the greater or lesser presence of collective memory in a society, for in reproaching those whose acts violate our most sacred beliefs and sentiments, we ensure that we remember what these are. Hence, by examining how the criminal law is interpreted and applied in a given social formation we can discern the extent to which fundamental human rights are part of that society's collective conscience.⁸⁵ President Menem's later pardons of military officers, Bergalli continued, revealed that Argentines were willing to compromise even such limited mechanical solidarity as they precariously enjoyed, that resting upon shared commitment to the morality embodied in their criminal law.⁸⁶ Such accounts of law's potential service to social solidarity expect too much, as the comparative histories that follow will suggest.

Three aspects of Durkheim's account, moreover, make it immediately untrustworthy as a guide for democratic leaders trying to reconstruct social solidarity on liberal foundations after an episode of administrative massacre. First, the salubrious impact of criminal law is to be found only in the arousal of shared sentiment or moral passion. Reason plays no role. Public articulation and defense of the moral principles underlying legal rules are treated as sociologically insignificant.⁸⁷

But in a liberal society (or a society aspiring to liberalize), it is axiomatic that courts must give good reasons for depriving anyone of her liberties. Such public reasons are often important, as well, for establishing some measure of societal agreement about the defensibility of the sanction, where agreement cannot be presumed.⁸⁸ For Durkheim, by contrast, the purpose of criminal

⁸⁵ See Bergalli, *El Olvido*, *supra* note 84, at 430-36.

⁸⁶ See *id.*

⁸⁷ For this reason, Durkheim's theory of the solidarity-enhancing impact of criminal trials applies as readily to a fundamentalist theocracy, secular totalitarian state, or neolithic tribe. On the crucial role of public justification within liberal thought, by contrast, see STEPHEN MACEDO, *LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM* 39-77 (1990).

⁸⁸ Especially troublesome in this regard, for present purposes, is the fact that Allied tribunals trying Japanese officers for war crimes did not generally deliver opinions accompanying their verdicts, offering no explanation for their conclusions. See PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945-1951*, at 39 (1979). This failure was partly due to judicial reliance on the rule of "command responsibility." *Id.* at 84-87. That doctrine requires no finding that the defendant actually knew of, or could have prevented, the wrongful

courts in society was simply to serve as authorized "interpreters of its collective sentiments."⁸⁹ For this reason, he "was curiously blind to the sociologically explanatory significance of *how* law is organized—that is, formulated, interpreted and applied."⁹⁰

It is especially odd that judicial reason-giving should play no part in a criminology stressing the role of courts in moral education, that is, in inculcating in citizens an appreciation (and, presumably, an understanding) of the moral principles said to unite them. Rather than stimulating discussion of such principles, of their meaning and proper scope, legal judgment is designed to cut it off. On this account, social solidarity can result only from moral consensus, and consensus can follow only upon closure of debate, upon ending disagreement over anything important.⁹¹ Prosecution of administrative massacre, however, has rarely succeeded in producing any such measure of agreement, either at the time or for posterity, as we shall see.

Second and closely related, Durkheim's approach leaves no room for dissenting (or even concurring) opinions, that is, for disagreement among both judges and citizens that endures at the end of the day. For legal judgment to foster social solidarity, it is insufficient that the better argument prevail in open contention with its rivals. Its superiority must be taken for granted. Only when its truth is self-evidently *presumed* can we adopt a properly reverential attitude toward it and its spokesmen. Whether the law is to help celebrate or repent from particular events in the country's past, it is essential to this conception of solidarity that no one of genuinely good faith may differ in her moral judgment on these events. If one could, then the past could never truly be shared, its memory never truly collective.

acts of his subordinates. *See id.* at 84.

⁸⁹ DURKHEIM AND THE LAW 45 (Steven Lukes & Andrew Scull eds., 1983).

⁹⁰ *Id.* at 7-8.

⁹¹ To be sure, sometimes judicial opinions are also capable of inspiring strong sentiment in those whose collective conscience they articulate. The opinions of liberal courts, at their best, entail a felicitous fusion of reason and appeal to communal sentiment. But public education, more often than law, is generally seen as the crucial institution for transmission of the shared memories necessary to social order. *See, e.g.,* Sidney Hook, *Education in Defense of a Free Society*, 78 COMMENTARY 17, 21-22 (1984) ("[The issue is] whether we possess the basic social cohesion and solidarity today to survive. . . . [N]o institutional changes of themselves will develop that bond of community we need to sustain our nation . . . without a prolonged schooling in the history of our free society, its martyrology, and its national tradition.").

Criminal judgment serves its social purpose, in Durkheim's view, by vigorously expressing the uniform sentiment of righteous indignation aroused among all conscientious citizens by the defendant's acts.⁹² Where judges differ in any significant way over whether the defendant's conduct was wrongful or culpable, this function is seriously compromised. Yet judicial dissents are likely to arise where, as at both the Nuremberg and Tokyo trials, the law must be extended or applied in new ways if the prosecution is to prevail. The possibility that competent judges—and members of the society they represent—might reasonably disagree over the suitability of punishing those who killed vast numbers of people is virtually a conceptual impossibility within Durkheim's theoretical schema. (It is also a reminder that his was a more innocent era.)

In short, Durkheim's criminology does not sufficiently confront the moral complexity present in much wrongdoing, even wrongdoing on a massive scale, complexity that criminal law—especially on *mens rea*, justification, and excuse—seeks to acknowledge and accommodate. If a criminal trial, for Durkheim, is a dramatic ritual, it is chiefly a melodrama, a traditional morality play, in which the forces of unequivocal evil are defeated by those of unequivocal good. Defendants in these cases, however, often find it relatively easy to displace so simple a tale with one of considerably greater complexity,⁹³ thereby disabling the mechanisms of solidarity-enhancement that Durkheim attributed to their prosecution.

Third, Durkheim saw criminal prosecution as serving the periodic need to reawaken and strengthen the public's feelings of moral indignation, when such feelings would otherwise remain dormant. But public disclosure of large-scale administrative massacre often arouses, even inflames, such righteous anger all too spontaneously. Outcries for massive and undisciplined vengeance will often be ubiquitous, and are in no need of official stimula-

⁹² See DURKHEIM, *supra* note 55, at 152 ("[States of collective conscience] . . . are uniform molds into which we all, in the same manner, couch our ideas and our actions. The *consensus* is then as perfect as possible; all consciences vibrate in unison."); *id.* at 102-03 ("[T]he sentiments thus in question derive all their force from the fact that they are common to everybody. They are strong because they are uncontested. . . . [T]hey are universally respected. . . . Crime thus damages this unanimity which is the source of their authority."). An anthropologist observes, "[a] successful communal event must, by definition, be able to enhance a Durkheimian collective effervescence and a sense of unity, not disagreements, within the community." Lisa Yoneyama, *Taming the Memoryscape: Hiroshima's Urban Renewal*, in REMAPPING MEMORY, *supra* note 29, at 99, 119.

⁹³ For examples, see *infra* text accompanying notes 263-268, 342-55.

tion.⁹⁴ Even in more tranquil times, after all, a central purpose of criminal law was to dampen passions for rough justice that could otherwise issue into vigilantism, as James Fitzjames Stephen noted long ago.⁹⁵ Those who prosecute and judge administrative massacre often must strike a difficult balance between the public's powerful desire for immediate retribution, on one hand, and other imperatives, such as preservation of public order and respect for the defendants' procedural protections, on the other. Durkheim saw only the first half of this complex picture, and consequently missed its dilemmatic features.

Durkheim's reflections on a particular criminal trial (that of Alfred Dreyfus) led him ultimately to appreciate how the law and its rituals might become decisive for creating and consolidating the very specific sort of collective conscience required by a modern liberal society. During that episode, "[m]any who thought they had little in common joined in intellectual and moral communion as they felt the 'horror' of the trespass against Dreyfus's rights."⁹⁶ Simply put, mechanical solidarity is possible through the felt sharing of liberal principle.

It is ironic, however, that the Dreyfus trial would lead Durkheim to realize how liberalism could supplant religion as the collective conscience of a modern society, fostering the sort of mechanical solidarity it required. For although that famous trial fostered considerable solidarity among Dreyfus's supporters (the liberals) and among his opponents (the antiliberals), it engendered only the deepest divisions between supporters and opponents, divisions that were to endure and infect French politics for decades.⁹⁷

⁹⁴ On France in 1945, see ROUSSO, *supra* note 26, at 8 (discussing how spontaneous acts of revenge against presumed collaborators caused more than 10,000 deaths in the first weeks after the expulsion of the Nazis). Michel Foucault once praised such vigilantism as superior in many ways to the later concessions and compromises of "bourgeois legality" under the reestablished republic. See Michel Foucault, *On Popular Justice: A Discussion with Maoists*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 1, 1-9, 13-14 (Colin Gordon ed., 1980).

⁹⁵ See JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 152 (R.J. White ed., Cambridge Univ. Press 1967) (1874).

⁹⁶ CLADIS, *supra* note 70, at 22 (interpreting Durkheim's reflections on the period).

⁹⁷ On the divisions introduced or exacerbated by the Dreyfus trial, see H.R. KEDWARD, THE DREYFUS AFFAIR: CATALYST FOR TENSIONS IN FRENCH SOCIETY 2, 9, 13 (1965). On the trial's enduring legacy for French politics, see FRANÇOIS FURET, IN THE WORKSHOP OF HISTORY 220 (Jonathan Mandelbaum trans., 1984) (arguing that the French right saw in the country's 1940 defeat "an opportunity for taking long-awaited revenge on the Republic" and "availed itself of the national debacle to take

For these three reasons, as well as others examined herein, Durkheim offers only the most uncertain help in understanding criminal law's potential contribution to social solidarity in times of deep political division and societal trauma. But the solidarity that can result from a shared code of substantive morality, periodically reinvigorated by punishing those agreed to have violated its first principles, is not the only sort. Solidarity is a concept that admits of several conceptions.⁹⁸

B. *Solidarity Through Civil Dissensus*

Durkheim's conception of mechanical solidarity pertains only when virtually all members of society share a particular view of justice: their fundamental ideas about how other members should be treated, ideas quintessentially embodied in their criminal law. This condition is conspicuously absent in many societies, particularly in societies just emerging from experiences of large-scale administrative massacre. Thus, prosecution of its perpetrators cannot hope to establish collective memory upon shared moral intuitions already deeply felt and culturally encoded, requiring only an occasion for their easy evocation.⁹⁹ As ritual expressions of collective conscience, trials for administrative massacre have decidedly *not* been, as we shall see, simple and unmediated reflections of moral sentiments universally felt within society toward the accused—the frequent assumption of foreign observers to this effect notwithstanding.

Episodes of large-scale administrative massacre, like the Holocaust and the Argentine dirty war, do disrupt social solidarity in decisive ways. This is amply recognized by many citizens—surviving victims, passive bystanders, and (at least low-level) perpetrators alike—who find themselves asking one another in the wake of such traumatizing events: What sort of place *is* this that such things could happen? What trust can we ever again place in

its revenge for . . . the Dreyfus affair").

⁹⁸ On the distinction between concepts and conceptions, central to the jurisprudence of Ronald Dworkin, see RONALD DWORKIN, *LAW'S EMPIRE* 71-72 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

⁹⁹ This is, in fact, more generally true of other trials. See Sally F. Moore, *Explaining the Present: Theoretical Dilemmas in Processual Ethnography*, 14 AM. ETHNOLOGIST 727, 729 (1987) ("[A legal] event is not necessarily best understood as the exemplification of an extant symbolic or social order. . . . Events may show a multiplicity of social contestations and the voicing of competing cultural claims.").

fellow citizens and political leaders who allowed such horrors to occur? Given the pervasiveness with which our society's official norms were betrayed by so many, why should we ever put confidence in anyone but our most intimate kith and kin? Julian Barnes's fictional prosecutor reflects, for instance, that "one part of his job, every day now, on television, was to help expunge that fear [of repression], to reassure people that they would never have to give in to it again."¹⁰⁰ The Argentine lawyers who prosecuted the military juntas described their professional tasks and self-understanding in similar terms.¹⁰¹

Citizens of former Soviet Bloc societies, for instance, now concern themselves with such questions as: "[H]ow is basic trust to be established when memories persist of neighbors informing on neighbors, friends on friends and husbands on wives?"¹⁰² When such questions become both inescapable and unanswerable, social solidarity of any but the most crudely economic sort threatens to collapse entirely. That threat of collapse is no mere sociological abstraction; it begins to haunt the most minor, daily interactions in profound and perplexing ways, as memoirs of these periods reflect.¹⁰³ People watch one another, in even the most private settings, with hair-trigger sensitivity to the possibility of betrayal. The fragile tissue of social life wears precariously thin.

One strand of neo-Durkheimian criminology recognizes the limits of legal rituals for restoring fractured solidarity in societies torn by internal conflict. Such rituals do not "express" emotions inertly, as Garland observes.

¹⁰⁰ JULIAN BARNES, *THE PORCUPINE* 74 (1992).

¹⁰¹ See Interview with Luis Moreno Ocampo, Assistant Prosecutor, in Buenos Aires, Argentina (Aug. 1987).

¹⁰² Michael T. Kaufman, *Lurching Toward Democracy*, N.Y. TIMES, May 14, 1995, § 7 (Book Reviews), at 8.

¹⁰³ See CARLOS NINO, *UN PAÍS AL MARGEN DE LA LEY* 54-55, 131-34, 270-71 (1990); Juan Corradi, *The Culture of Fear in Civil Society*, in *FROM MILITARY RULE TO LIBERAL DEMOCRACY IN ARGENTINA* 113, 119-28 (Monica Peralta-Ramos & Carlos Waisman eds., 1987); Ernest Gellner, *Trust, Cohesion, and the Social Order*, in *TRUST: MAKING AND BREAKING COOPERATIVE RELATIONS* 142, 142 (Diego Gambetta ed., 1988); see also JAIME MALAMUD-GOTI, *GAME WITHOUT END: TERROR, JUSTICE AND THE DEMOCRATIC TRANSITION IN ARGENTINA* (forthcoming 1996) (manuscript at 142-62, 175-85, on file with author) (describing how a pervasive distrust and fear of betrayal by government informers infected all but Malamud-Goti's most intimate familial relations during the military dictatorship and following years); Perelli, *supra* note 29, at 45 (observing how the climate of fear tended "to curb the impulse to provide assistance and comfort to one's neighbors, coworkers, or fellow students; to forego caring or sharing for the sake of staying alive").

[T]hey arouse them and organize their content; they provide a kind of didactic theatre through which the onlooker is *taught* what to feel, how to react, which sentiments are called for Rituals—including the rituals of criminal justice—are ceremonies which, through the manipulation of emotion, prompt particular value commitments on the part of the participants and the audience and thus act as a kind of sentimental education¹⁰⁴

He concludes, “[l]ike all rituals of power, punishments must be carefully staged and publicized if they are to have their intended results.”¹⁰⁵ Like other rituals, they can “*modify* social reality by modifying the agents’ representation of it.”¹⁰⁶

A traumatized society that is deeply divided about its recent past can greatly benefit from collective representations of that past, created and cultivated by a process of prosecution and judgment, accompanied by public discussion about the trial and its result. Thus, the internal dynamics of this process, especially the political implications of the choices it entails for all parties, are very significant. Durkheim grasped none of this. Yet it is this constructive process rather than any finished judicial product or authoritative pronouncement¹⁰⁷ that is most important in understanding the contribution of criminal prosecution to social solidarity at such times. Hence, Tullia Zevi, president of Italy’s Jewish communities, remarks concerning the imminent war crimes trial of Erich Priebke: “The verdict is in some ways irrelevant What is important is the trial.”¹⁰⁸

In trials involving administrative massacre, at least, we should start by conceding that the criminal courtroom will inevitably be viewed as providing a forum in which competing historical accounts

¹⁰⁴ GARLAND, *supra* note 56, at 67 (emphasis added).

¹⁰⁵ *Id.* at 80.

¹⁰⁶ PIERRE BOURDIEU, *LANGUAGE AND SYMBOLIC POWER* 128 (1991) (emphasis added).

¹⁰⁷ See Laura Nader & Harry F. Todd, Jr., *Introduction* to *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* 1, 22 (Laura Nader & Harry F. Todd, Jr. eds., 1978) (“People who write about the judicial process and the judicial decision as if the outcome were solely the product of a third party, a judge, miss the sociological relevance of the courtroom as an interactive arena.”). In postmodernist parlance, when assessing the sociological significance of the legal process, we should not subordinate its “performative” aspects to the written or “textual” elements.

¹⁰⁸ Celestine Bohlen, *Italy Opens Trial in Wartime Massacre in Rome*, N.Y. TIMES, Dec. 8, 1995, at A4. Priebke is a former SS captain accused of the 1944 killing of 335 people outside Rome. The event is considered the worst atrocity that occurred in Italy during World War II. Zevi adds, “What do I care if Priebke ends up under house arrest, or in prison for life?” *Id.*

of recent catastrophes will be promoted. These accounts search for authoritative recognition, and judgments likely will be viewed as endorsing one or another version of collective memory. To ignore this fact is to become entranced and deceived by our own (otherwise defensible) abstractions: professional, doctrinal, and jurisprudential. Better to face facts, to learn to live with the reality that such trials will necessarily be read for their "larger lessons," as monumental didactics. Let us turn this admittedly unsettling circumstance into an opportunity for liberal legality, for fostering solidarity of a liberal sort.¹⁰⁹

Simmel offered the first hints of how certain kinds of disputes might foster solidarity. He observed, as one commentator notes:

The very act of entering into conflict with an antagonist establishes relations where none may have existed before. . . . Once relations have been established through conflict, other types of relations are likely to follow. . . . Conflict, for Simmel, just as crime for Durkheim, brings out the need for application of rules that, had no conflict occurred, might remain dormant and forgotten Those who engage in antagonistic behavior bring into consciousness basic norms governing rights and duties of citizens. Conflict thus intensifies participation in social life. This very consciousness of the need for rules governing their behavior makes the contenders aware that they belong to the same moral universe.¹¹⁰

¹⁰⁹ See Robert Hariman, *Introduction to POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW* 1, 8 (Robert Hariman ed., 1990) ("[R]ather than seeing popular trials as odd or embarrassing moments in legal practice, we should recognize how they provide opportunities to articulate ideas important to our larger understandings of legal interpretation and the role of law in society.").

¹¹⁰ LEWIS A. COSER, *THE FUNCTIONS OF SOCIAL CONFLICT* 121, 123-24, 127 (1956) (parsing GEORG SIMMEL, *CONFLICT AND THE WEB OF GROUP AFFILIATIONS* 26 (Kurt H. Wolff trans., 1955) and then offering examples from legal disputes over property and contract, as well as the law of war). Albert Hirschman recently argued, to similar effect, that "the community spirit that is normally needed in a democratic market society tends to be spontaneously generated through the experience of tending the conflicts that are typical of that society." Albert O. Hirschman, *Social Conflicts As Pillars of Democratic Market Society*, 22 *POL. THEORY* 203, 216 (1994). Not all such conflicts are functional, of course. Neither Simmel nor Coser, however, offer much guidance in distinguishing functional from dysfunctional conflict, ex ante or even ex post. Their simple point, moreover, should not be subsumed under some grand Hegelian process whereby devastating conflict becomes indispensable to social progress, through the cunning dialectic of history. It is nevertheless true, as Lawrence Whitehead famously observed, that sometimes "the major advances in civilization are processes which all but wreck the societies in which they occur." *Id.* at 210.

This argument about the unifying effects of conflict applies even in Durkheim's citadel of consensus: the criminal courtroom. The court becomes a privileged site for conflicting accounts of recent history and the memories of it that citizens should preserve. At such times, the "circumstances of politics" are the following: people differ radically on their judgments of recent history (that is, on what went wrong and who is responsible), and yet share the view that some resolution of this interpretive disagreement must be reached among themselves for the country to set itself back on track.¹¹¹ If they do not reach some resolution, the social solidarity that they all seek cannot be restored. Each is thus obliged—by circumstance, not shared morality—to engage the other in hopes of persuading a more general public, and perhaps even an immediate opponent, of the superiority of a favored historical account. To be persuasive to anyone, one must display a measure of civility, even toward those one would prefer, in ideal circumstances, simply to kill or suppress.¹¹²

Deliberative Democratization

Rules of criminal procedure and professional responsibility seek to ensure, among other things, a measure of civility in the courtroom, a civility achieved even in the midst of heated conflict. Such civility is not a matter of decorum or politeness, but of compliance with rules requiring parties to treat one another with respect, as equal participants in a common task of truth-seeking. Through such "rules of engagement,"¹¹³ each party comes to learn, at the very least, what its opponent actually thinks and most deeply cares about. Through this process, dangerous misconceptions about "the other" can be overcome.

The adversary system, although roundly condemned by many today for stirring needless bitterness and antagonism, is nevertheless highly functional where conflict between parties has already reached

¹¹¹ I here employ Waldron's recent discussion. See Jeremy Waldron, *The Circumstances of Politics* (Sept. 2, 1994) (paper presented at the American Political Science Association Conference).

¹¹² On the role of civility in liberal discourse, see MARK KINGWELL, *A CIVIL TONGUE: JUSTICE, DIALOGUE, AND THE POLITICS OF PLURALISM* (1995).

¹¹³ On how other legal rules, such as the law of defamation, similarly aim to foster civility as a norm of public discourse and seek to make such civility a feature of national identity, see Robert Post, *Managing Deliberation: The Quandary of Democratic Dialogue*, 103 *ETHICS* 654 (1993).

a point of deep mutual incomprehension. At such times, the adversary system is indispensable, in Lon Fuller's words, as "a means by which the capacities of the individual may be lifted to the point where he gains the power to view reality through eyes other than his own."¹¹⁴ Fuller further notes that

[a]n effective consensus cannot be reached unless each party understands fully the position of the others. . . . At the same time, since an effective consensus requires an understanding and willing cooperation of all concerned, no party should so abandon himself in advocacy that he loses the power to comprehend sympathetically the views of those with different interests. . . . This implies not only tolerance for opposing viewpoints, but tolerance for a partisan presentation of those viewpoints, since without that presentation they may easily be lost from sight.¹¹⁵

At the very least, through adversarial exchanges, when constrained by civility rules, we achieve a sense of lived experience that is mutual. With better luck, we gain some appreciation of how someone could, sincerely and in good faith, come to think so differently from us about something so fundamental to us both.¹¹⁶

The experience of disagreement itself, although often unpleasant and divisive in many ways, nonetheless creates a kind of joint understanding: that we have both faced the issues dividing us, that we are united in caring deeply about them and about what the other thinks of them. The phenomenology of this interpersonal experience nowhere has adequately been captured in social or political

¹¹⁴ Lon L. Fuller, *The Adversary System*, in TALKS ON AMERICAN LAW: A SERIES OF BROADCASTS TO FOREIGN AUDIENCES BY MEMBERS OF THE HARVARD LAW SCHOOL FACULTY 34, 47 (Harold J. Berman ed., Vintage Books 2d ed. 1971) (1961).

¹¹⁵ *Id.* at 46.

¹¹⁶ This appreciation can, in turn, produce agreement on questions of constitutional structure among those retaining radically different comprehensive doctrines of the good. On how this happens, see John Rawls, *The Domain of the Political and Overlapping Consensus*, in THE IDEA OF DEMOCRACY 245, 255 (David Copp et al. eds., 1993).

On how procedural protections of dignified exchange foster a significant measure of satisfaction among civil litigants, even when they do not prevail, see E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluation of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 971-73, 981 (1990). See also W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE 171 (1981) ("When people say that trials are objective and impartial means of producing legal judgments, what they really mean is that trials rely on a standardized means of packaging and analyzing information: the story. . . . [In the litigants' view,] protection of the justice process only holds if all parties in an adjudication have the same capacity to present and judge stories.").

theory. But who among us can deny having had it, and having found it not altogether unpleasant?

So long as we follow the rules of civility that govern the discursive enterprise, we are (in an underappreciated sense) united by it, drawn willy-nilly into a form of solidarity—albeit not the mushier sort favored by Durkheim and current communitarians.¹¹⁷ A measure of social unity is achieved, not “on the mystical model of fusion,” with its political romanticism, but “on the legal model of the contract,”¹¹⁸ the classic solution of liberal political theory.

We form attachments to our adversaries not only through procedures establishing agreement on how to disagree, but through the actual human experience of the resulting exchanges, provided they conform to these civility rules. Through such exchanges, we need not transcend our differences on matters of ultimate concern. We need not come to love our adversaries in Aristotelian friendship. We may continue to view them much as we view our appendix, as an object without which we could very easily go on living and that only imperils us with the prospect of its eruption. Solidarity of this sort, then, does not claim to provide any recipe for societal happiness. Through the debate on which it is predicated, however, we may reluctantly come to acknowledge that there is a legitimate place in ongoing public discussion for the views, and hence their spokesmen, that we initially regarded as odious and contemptible.

A study of the “Waldheim affair” in Austria, concerning the former President’s participation in wartime atrocities, observes just such a change. At first, “[t]he confrontational nature of this vehicle of memory made people shun the past, rather than explore it.”¹¹⁹ As the affair developed, however, “[w]hat began as a vitriolic confrontation had evolved into a positive debate.”¹²⁰ In such debates, we often expect to remain profoundly at odds over our attributions of blame for recent national horrors and about what should be done to prevent their recurrence. But we are united in the hope of ultimately achieving a measure of agreement on certain issues—if not now, then at some future point. As seasoned partici-

¹¹⁷ On the many affinities (and some important disaffinities) between Durkheim and contemporary communitarians, see CLADIS, *supra* note 70, at 170-75, 276-79.

¹¹⁸ ALAIN FINKIELKRAUT, *THE DEFEAT OF THE MIND* 72 (1995).

¹¹⁹ MILLER, *supra* note 64, at 286.

¹²⁰ *Id.* at 86 (quoting Leon Zelman, a Polish Jew who survived three and a half years at Mauthausen, Auschwitz, and other camps).

pants report, this process of solidarity through dissensus happens routinely in democratic politics.¹²¹

This solidarity can happen, as well, in the courtroom, or through a process of discussion initiated there but continued elsewhere. It can occur even if the discussion begins only under duress: because one party to the debate, the defendants, are forced to justify themselves, in response to prosecutorial accusation.¹²² "Democracy begins in conversation," John Dewey said.¹²³ The act of conversation presupposes a measure of respect for the rational and deliberative capacities of one's interlocutor, as Jürgen Habermas contends.¹²⁴ Such respect need not always be a precondition for dialogue, however; it can also be its result. This must be our response to those who assume that a criminal trial can only reinforce existing attitudes of respect for human rights, attitudes that must already be effectively in place for the punishment to have this confirmatory effect.¹²⁵

Unlike an "ideal speech situation,"¹²⁶ in which debate must be entirely unconstrained, a real discussion between non-hypothetical antagonists requires the restraint of civility rules.¹²⁷ These rules

¹²¹ Consider, for instance, the considerable mutual respect and appreciation—indeed friendship—that developed between Senators Edward Kennedy and Orrin Hatch through their many years of work on the Senate Judiciary Committee. See Neil A. Lewis, *Orrin Hatch's Journey: Strict Conservative to Compromise Seeker*, N.Y. TIMES, Mar. 2, 1990, at A12.

¹²² Whether this process of social learning is successfully set in motion depends on many factors unrelated to law itself, such as how the mass media report the trial, the degree of forbearance opposing counsel show toward each other's adversarial excesses, the structure of the political system, and many other contingent circumstances. Much depends, as well, on the degree of "obligation one feels to the contested memory." IWONA IRWIN-ZARECKA, *FRAMES OF REMEMBRANCE: THE DYNAMICS OF COLLECTIVE MEMORY* 81 (1994).

¹²³ *DIALOGUE ON JOHN DEWEY* 58 (Corliss Lamont ed., 1959) (quoting James T. Farrell's recollections of Dewey's remarks).

¹²⁴ See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 46, 86, 187, 262-66 (Thomas McCarthy trans., 1981).

¹²⁵ This view has been proposed by Thomas Scanlon. See Nino Conference, *supra* note 47.

¹²⁶ JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* 56-59 (1993).

¹²⁷ On such rules, see Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV*, at 163, 168-69 (John W. Chapman & Ian Shapiro eds., 1993). Several readers of this manuscript have observed a resemblance here between the civility rules explicitly governing legal process and those tacitly governing faculty meetings at many American law schools. In the latter settings, even those who radically disagree on substantive questions nevertheless implicitly agree, when debating our differences, to

(of evidence, procedure, and professional ethics) serve as "enabling constraints."¹²⁸ By permitting an orderly sequence of exchanges, they enable a discussion to occur that would otherwise never take place. Without such rules, the parties would refuse to sit down together, or when they did, would quickly descend to vitriolic name-calling, theological incantation, or outright violence.

A criminal trial is one useful way to begin a discussion with an initially unwilling interlocutor. It also formulates the discussion in the favored terms of liberal morality, as this is the moral theory underpinning most of our criminal law.¹²⁹ At very least, this is a hypothesis worth considering.¹³⁰ Let us call this the "discursive" conception of how criminal prosecution might strengthen social solidarity.¹³¹ It is more consistent with what we currently know about the formation of collective memory, I shall contend, for that process proves to be "more like an endless conversation than a simple vote on a proposition," as one historian puts it.¹³²

eschew *ad hominem*s, to appeal to normative standards that we profess to share, to refrain from escalating the terms of a localized dispute into a decisive battle in "the culture wars," and to engage respectfully the arguments of those whose views, in more intimate settings, we would confess to finding loathsome. But for these unstated discursive conventions, many of which we import from our experience in legal practice, faculty meetings at many American law schools would quickly degenerate into fratricidal conflagrations, as they routinely do in the humanities and social sciences.

¹²⁸ This definition is employed by Bernard Yack, to describe a distinctive feature of liberal theory developed by Benjamin Constant and Niklas Luhmann. See Bernard Yack, *Toward a Free Marketplace of Social Institutions: Roberto Unger's "Super-Liberal" Theory of Emancipation*, 101 HARV. L. REV. 1961, 1967 & n.12 (1988).

¹²⁹ See *supra* note 19.

¹³⁰ It is somewhat unclear what would count as convincing evidence that this type of solidarity had become established in a given society, beyond the fact that its members were no longer slaughtering one another. But this methodological problem is shared with the Durkheimian-communitarian conception of solidarity. The present Article therefore limits itself to examining the extent to which each of these types of solidarity would be impaired by the six obstacles discussed.

¹³¹ Several influential theorists currently stress the importance of public discourse and the legal rules protecting it, as the basis for any legitimate authority in a modern democracy. See CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993); Seyla Benhabib, *Deliberative Rationality and Models of Democratic Legitimacy*, 1 CONSTELLATIONS 26, 26 (1994) (arguing that "legitimacy in complex modern democratic societies must be thought to result from the free and unconstrained public deliberation of all about matters of common concern"). On how legal rules settling procedures for public discourse also tacitly shape national identity, see Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 477 (1989); Post, *supra* note 113, at 678. On the contribution of open public debate to social solidarity, see Jürgen Habermas, *Justice and Solidarity*, in *THE MORAL DOMAIN* 224, 244-45 (Thomas Wren ed., 1990).

¹³² John Thelen, *Memory and American History*, 75 J. AM. HIST. 1117, 1127 (1992);

Writing just before his early death, Nino would describe the aims and achievements of the Argentine military trials in similar terms:

[T]he trials promote *public deliberation* in a unique manner. Public deliberation counteracts the authoritarian tendencies which had led, and continue to lead, to a weakening of the democratic system and massive human rights violations. All public deliberation has this effect, but even more so when the subject of the public discussion is those very authoritarian tendencies. The disclosure of the truth through the trials feeds public discussion and generates a collective consciousness and process of self-examination. Questions like, "Where were you, Dad, when these things were going on?" become part of daily discourse. The contrast between the legality of the trials and the way the defendants acted is prominently noticed in public discussion and further contributes to the collective appreciation of the rule of law. Public discussion also serves as an escape valve for the victims' emotions and promotes public solidarity which, in turn, contributes to the victims recovering their self-respect¹³³

Nino continues that

this type of value-searching deliberation was evident in the debates surrounding the trials in Argentina. The accusations, the defenses, judicial decisions, and arguments taking place among society were precisely about the role of the military and other groups in a democratic society, the moral limits for the achievement of certain goals (quite often society cited the legal manner in which terrorism was fought in European countries as a counterexample), the rule of law (the most common conciliatory argument was that the military could have achieved the same ends through summary trials and open death sentences under appropriate laws which sanctioned such actions), and the advantages of a division of power to protect human rights (it was often said that, even in the degraded democracy of Isabel Peron, there were fewer violations of human rights than under the military).¹³⁴

Nino here displays an unsullied optimism about the role of universal reason in politics. This optimism is equally conspicuous in his more philosophical writing and draws vigorous criticism from

see also *id.* at 1119 (observing that collective memory "is not made in isolation but in conversations with others that occur in the contexts of community, broader politics, and social dynamics").

¹³³ NINO, *supra* note 30.

¹³⁴ *Id.*

leading theorists on that account.¹³⁵ The "solidarity" of which Nino speaks in this passage expressly rests upon the achievement of agreement throughout Argentine society about how to judge the military's conduct in the dirty war. Nino assumes that unconstrained discussion and public deliberation could lead to no other result. He may well be correct that "reason prevailed" in most of the discussions, public and private, to which he alludes. But it did not prevail in all of them, by any means, nor in all of the most important ones, that is, among citizens with power to influence future events.¹³⁶

The solidarity that I propose, in contrast, presumes no such agreement, but merely civil engagement in disagreements by way of procedures entailing display of respect for one's adversary, respect that may be entirely procedural (and a matter of rule-following) at the outset but that often tends to grow into something more substantive—if not between the most unreconstructed of antagonists, then among the larger numbers of their more moderate sympathizers. There is a kind of solidarity, in other words, in continuing exchanges that result in the mutual recognition that agreement on a question of common concern is strongly desirable and ultimately possible, even if only at some uncertain point in the future.

Every form of social solidarity has its privileged institutional locus, Durkheim implied. Mechanical solidarity finds its favored locale in the church, especially a legally "established" one, where core values can be evoked and authoritatively interpreted with a maximum of symbolic resonance throughout the furthest reaches of a society.¹³⁷ The economy offers the institutional center for organic solidarity.¹³⁸ The division of labor involved in a modern economy makes far-flung sectors of the population and their diverse productive activities increasingly dependent upon one another—and

¹³⁵ See Nino Conference, *supra* note 47 (particularly the remarks of Bernard Williams).

¹³⁶ On hostile reaction to the trials among military and conservative circles, including (initially) many elite newspapers, see HORACIO VERBITSKY, *CIVILES Y MILITARES: MEMORIA SECRETA DE LA TRANSICIÓN* 95-108, 171-94, 371-82 (2d ed. 1987).

¹³⁷ See DURKHEIM, *supra* note 55, at 75-76, 159-73. Mechanical solidarity "comes from a certain number of states of conscience which are common to all the members of the same society." *Id.* at 109. "It is a product of the most essential social likenesses . . ." *Id.* at 106. Such solidarity "can be strong only if the ideas and tendencies common to all the members of the society are greater in number and intensity than those which pertain personally to each member." *Id.* at 129.

¹³⁸ See *id.* at 131.

increasingly *aware* of such interdependence, partly due to periodic disruption in the ever-lengthening chain of commercial exchange.

The result is an awareness of attachment to and a fate shared with others who are and will remain anonymous, but whose differing activities are meaningfully related to one's own, Durkheim inferred.¹³⁹ The law remains essential to such attachments, not by codifying a consensus on fundamental morality, but simply by providing a key symbolic code through which complexity is reduced, agreements reached, and attachments formed.¹⁴⁰

But it is the polity, especially the freedoms of press and speech integral to democratic politics, that constitute the institutional foundation of discursive solidarity. Such solidarity arises from, and consists of, the attachments formed (often unintentionally and unwittingly) through the vigorous exercise of these rights that a liberal society will most prominently display—and to which its adherents should aspire.¹⁴¹ It is the memory of our discursive engagements themselves, no less than our memory of the events we discuss, that establishes such solidarity between us. Engagements of this sort can occur as much around a dinner table, and on neighborhood street corners, as on the stage of "high" politics.

Discursive solidarity is not the third act in some social-evolutionary drama. Like the other two varieties, it is best viewed as an ideal type, a conceptual construct not expected to provide the sufficient conditions of solidarity in any actual society.¹⁴² We may expect all three varieties to be instantiated within a given country, in different degree, at a particular point in time. All three, moreover, may be necessary and desirable in the modern world, in relations both within and between national societies, if the omnipresent wolf of the Hobbesian war (all against all) is to be kept at bay.

¹³⁹ See *id.* at 55-56, 61-62.

¹⁴⁰ See LUHMANN, *supra* note 62, at 122-37; Talcott Parsons, *Law As an Intellectual Stepchild*, in *SOCIAL SYSTEM AND LEGAL PROCESS* 11, 12 (Harry M. Johnson ed., 1978).

¹⁴¹ See BERNARD CRICK, *IN DEFENSE OF POLITICS* 24 (1962):

[D]iverse groups hold together . . . because they practise politics—not because they agree about 'fundamentals', or some such concept too vague, too personal, or too divine ever to do the job of politics for it. The moral consensus of a free state is not something mysteriously prior to or above politics: it is the activity (the civilising activity) of politics itself.

Id.

¹⁴² For a discussion of this method, see MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 90 (Edward A. Shils & Henry A. Finch eds., trans., 1949).

The three types of solidarity vary as well in the significance they ascribe to the differences between individuals, and between various groups, within a society. Mechanical solidarity requires a denial, even an active suppression, of differences between individuals and subgroups in order to preserve the sharing of a single normative order among them.¹⁴³ Organic solidarity requires a preservation and cultivation of differences between individuals and subgroups in order to preserve and enhance efficiency and productivity.¹⁴⁴ Discursive solidarity, by contrast to both, requires neither the permanent denial nor affirmation of difference. It involves simply a recognition that a society's members often disagree radically regarding their conceptions of justice and the good and that they nevertheless recognize a need—arising from their interdependence—to settle upon a common scheme of association and cooperation. Rules requiring civility in the management of disagreements provide a useful device for reaching this end.

Narrative Conflict in a Liberal Voice

Postmodernist accounts of narrative view the cacophony of alternative tales about the same large-scale event, and the resulting conflict between them, as valuable in themselves. The proliferation of "little narratives," each by performative utterance, ensures that no single "grand meta-narrative" will ever consolidate itself as *the* collective memory of an event.¹⁴⁵ Such a consolidation would entail, on this view, an effective "end to narration, by revealing the meaning of narratives."¹⁴⁶ The *force* of narratives, however, is not "synonymous with the meaning that may be found in them."¹⁴⁷ Narratives are valuable regardless of their persuasiveness, because they involve "argumentation whose purpose is to bring to light and provoke contestation over implicit rules that constrain the production of new ideas and determine the boundaries of political communities."¹⁴⁸

¹⁴³ See DURKHEIM, *supra* note 55, at 129-31.

¹⁴⁴ See *id.* at 131-32.

¹⁴⁵ JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* at xi, 27-33, 60 (Geoff Bennington & Brian Massumi trans., 1984); Jochen Mecke, *Dialogue in Narration (the Narrative Principle)*, in *THE INTERPRETATION OF DIALOGUE* 195, 213 (T. Maranhão ed., 1990).

¹⁴⁶ BILL READINGS, *INTRODUCING LYOTARD: ART AND POLITICS* 63 (1991).

¹⁴⁷ *Id.*

¹⁴⁸ DISCH, *supra* note 46, at 9 (parsing LYOTARD, *supra* note 145, at xxiv). Several commentators have noted the anarchistic sensibility that such a normative ideal

In brief, postmodernism seeks to sever the link that liberalism seeks between moral argument and conflict reduction, between political deliberation and agreement production.¹⁴⁹ On this view, the law should not seek to banish all ambiguity, even regarding the wrongfulness of genocidal conduct or the culpability of its perpetrators, because the inescapability of cognitive and moral ambiguity is the very essence of the postmodern condition—hence the doubts and disagreement to which law perpetually gives rise.

In this view, it is therefore wrong to endow anyone's story about a collective event with authoritative status, for the same reason that it is wrong to endow political power with moral legitimacy: the worst abuses of power are always committed by those most convinced of the moral superiority of their cause, their civilization, or their theory of history.¹⁵⁰ Jacques Vergès, defense counsel for Klaus Barbie, subtly appealed to this pervasive preoccupation, fostered by postmodernism, turning it to his client's advantage. Vergès's public rhetoric about the prosecution sought to equate the serene confidence of the criminal law, in its judgment against his client, with that of French colonialism, now recognized to have perpetrated grave injustices in the name of lofty principles, those of Western civilization.¹⁵¹

The same principles of French culture invoked against his client, Vergès suggested, had been invoked against the Algerians and other victims of French power.¹⁵² As this incident amply reveals, the

entails. For a current leading defense of postmodernist politics, so conceived, see BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 2 (1992) (decrying the preoccupation of political theory with "the juridical, administrative, [and] regulative tasks of stabilizing moral and political subjects, building consensus, maintaining agreements, or consolidating communities and identities"). Roberto Unger's views on such issues are similar. See ROBERTO UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 22 (1987).

¹⁴⁹ See HONIG, *supra* note 148, at 2-5, 14-15; DEENA WEINSTEIN & MICHAEL A. WEINSTEIN, *POSTMODERN(IZED) SIMMEL* 115-29 (1993); see also WILLIAM E. CONNOLLY, *IDENTITY\DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* at x (1991) (Democracy, properly understood, should not "equate concern for human dignity with a quest for rational consensus. It opens political spaces for agnostic relations of adversarial respect.").

¹⁵⁰ Many have hence identified strains of anarchism in the postmodernist sensibility. See TODD MAY, *THE POLITICAL PHILOSOPHY OF POSTSTRUCTURALIST ANARCHISM* 3 (1994); Michael Walzer, *The Politics of Michel Foucault*, in *FOUCAULT: A CRITICAL READER* 51, 61 (David Hoy ed., 1986).

¹⁵¹ See ALAIN FINKIELKRAUT, *REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL AND CRIMES AGAINST HUMANITY* 32-36 (Roxanne Lapidus & Sima Godfrey trans., 1992).

¹⁵² See *id.*

logic of the postmodernist celebration of contested memory applies no less to the "disruptive" narratives of Nazi war criminals than to those of ethnic minorities or battered wives. After all, the only "counter-hegemonic narrative" publicly offered in Argentina, in opposition to that of Alfonsín and his liberal courts, was that of the officer corps, a story about military victory in a just war against foreign-inspired subversion.¹⁵³

In contrast, by valuing civil dissension as a means for developing some solidarity in a deeply divided society, the liberal account defended here occupies a midpoint on the continuum between the postmodernist celebration of permanent disruption, as an end in itself,¹⁵⁴ and the Durkheimian veneration of settled consensus over moral fundamentals, with its denial of the possibility of continuing disagreement among reasonable people at the end of the day. On the present account, the contested character of collective memory is cause neither for celebration nor despair, but a challenge to liberal solidarity and an opportunity for its conscious cultivation by dramaturgical design.

Official correction of collective memory by criminal law remains subject to an intensely practical constraint: those with an interest in collective forgetting must not get their way.¹⁵⁵ In analyzing these trials, there is a danger of over-subtlety that must be resisted. The point of such proceedings is not so much to make people remember what they have repressed and would prefer to forget—the psychoanalytical angle¹⁵⁶—but rather to confront those with something to hide with evidence they have tried to keep from coming to light.¹⁵⁷ But one should not infer from this fact that

¹⁵³ See EJERCITO ARGENTINO, *EL DERECHO A LA LIBERTAD* (1980); RAMON J.A. CAMPS, *EL PODER EN LA SOMBRA: EL AFFAIRE GRAIVER* (1983); Interviews with Argentine Military Officers, in Buenos Aires, Argentina (June-Aug. 1985).

¹⁵⁴ Postmodernists generally think that political institutions should help bring to the surface conflicts that presently lie dormant, conflicts that are merely "suppressed," in their view. See HONIG, *supra* note 148, at 2-17. The liberal perspective adopted here, by contrast, assumes that existing Western democracies already succeed in raising social conflicts to the surface of political life in ample abundance, without the need to incite these conflicts any further; political institutions, in this view, need only provide a receptive forum for deliberative discussion and resolution of such conflicts.

¹⁵⁵ This point is made with particular cogency by one Argentine who lost several family members during the dirty war. See Noga Tarnopolsky, *Murdering Memory in Argentina*, N.Y. TIMES, Dec. 12, 1994, at A19.

¹⁵⁶ Several have examined West Germany's postwar self-scrutiny—particularly the limits on that process—in psychoanalytic terms. See DOMINICK LACAPRA, *REPRESENTING THE HOLOCAUST: HISTORY, THEORY, TRAUMA* (1994); ERIC L. SANTNER, *STRANDED OBJECTS: MOURNING, MEMORY, AND FILM IN POSTWAR GERMANY* (1990).

¹⁵⁷ I am grateful to Jeffrey Herf for this observation. For much the same point,

the way in which such confrontations are orchestrated and symbolized is irrelevant to their political efficacy. As Clifford Geertz contends, "[t]he real is as imagined as the imaginary."¹⁵⁸ "[T]his prejudice . . . that the dramaturgy of power is external to its workings, must be put aside."¹⁵⁹

During periods of democratization, political conflict often extends to the question of how the prior regime and those who served it should be remembered, and how the law should be employed to that end. Sometimes, as in the recent murder prosecution of East German border guards, this conflict finds its way into the criminal courts.¹⁶⁰ It has been especially apparent in the former Soviet Bloc in recent years.¹⁶¹ The recovery of a more accurate past, the correction of collective memory, is an integral aspect of democratization. "Indeed, there is a striking correlation," observes Timothy Garton Ash, comparing the recent history of Central European states, "between the degree of facing up to the past, however clumsily, and the state of progress from dictatorship to democracy. Which is cause and which effect is a moot point: they go together."¹⁶² Describing this process in the former Soviet Union, David Remnick notes, with only slight exaggeration, that "[t]he return of history to the intellectual and political life of the people of the Soviet Union was the foundation of the great changes ahead."¹⁶³

see Saul Friedlander, *Some German Struggles with Memory*, in BITBURG IN MORAL AND POLITICAL PERSPECTIVE 27, 29 (Geoffrey H. Hartman ed., 1986).

¹⁵⁸ CLIFFORD GEERTZ, *NEGARA: THE THEATRE STATE IN NINETEENTH-CENTURY BALI* 136 (1980).

¹⁵⁹ *Id.*; see also Umberto Eco, *Semiotics of Theatrical Performance*, *DRAMA REV.*, Mar. 1977, at 107, 113 ("It is not theatre that is able to imitate life; it is social life that is designed as a continuous performance and, because of this, there is a link between theatre and life.").

¹⁶⁰ See TINA ROSENBERG, *THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM* 261-305 (1995); Kif A. Adams, *What Is Just?: The Rule of Law and Natural Law in the Trials of Former East German Border Guards*, 29 *STAN. J. INT'L L.* 271, 295-300 (1993).

¹⁶¹ The Hungarian novelist and sociologist György Konrad observes, for instance: "Today only the dissenters [that is, those who opposed Communist oppression] conserve the sentiment of continuity. The others must eliminate remembrances; they cannot permit themselves to keep the memory. . . . Most people have an interest in losing memory." CÉCILE WAJSBROT & SÉBASTIEN REICHMANN, *EUROPE CENTRALE* 84 (1991) (translation by author).

¹⁶² Timothy G. Ash, *Central Europe: The Present Past*, N.Y. REV. BOOKS, July 13, 1995, at 21, 22.

¹⁶³ DAVID REMNICK, *LENIN'S TOMB: THE LAST DAYS OF THE SOVIET EMPIRE* 41

Thus, changes in collective memory, through official efforts to revise historical understanding (by executive order, legislation, or litigation), can have monumental consequences for social and political structure. What, then, are the foreseeable obstacles to efforts at employing the law toward this end?

II. LEGAL SHAPING OF COLLECTIVE MEMORY: SIX OBSTACLES

A. *Defendants' Rights, National Narrative, and Liberal Memory*

Is liberal jurisprudence inherently at odds with any effort to orchestrate prosecution as public spectacle and for social didactics? What is the proper place within an avowedly liberal legal theory for such dramaturgical concerns about reaching a desired audience?

None, many liberals would say. They would agree, of course, that a gripping story is to be preferred to a wearisome one, *ceteris paribus*. But unfortunately—many liberals hasten to add—other things rarely turn out, on careful inspection, to be truly equal after all. What makes for a good “morality play” does not necessarily make for a fair trial.¹⁶⁴ And if it is the simplifications of melodrama that are needed to influence collective memory, then the production had best be staged somewhere other than in a court of law.¹⁶⁵ A call for monumental didactics is all too likely to be mistaken as an invitation for histrionic bellicosity and sanctimonious grandstanding—vices to which certain members of our profession are not altogether immune.¹⁶⁶

(1993); see also MISHA GLENNY, *THE REBIRTH OF HISTORY: EASTERN EUROPE IN THE AGE OF DEMOCRACY* (1990).

¹⁶⁴ The Nuremberg proceedings were condemned in precisely these terms by contemporary commentators. Their views are summarized in WILLIAM J. BOSCH, *JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR GERMAN WAR-CRIMES TRIALS* 36-39, 51, 110-11, 153, 236 (1970).

¹⁶⁵ Buruma offers a typical statement of this view:

Just as belief belongs in church, surely history education belongs in school. When the court of law is used for history lessons, then the risk of show trials cannot be far off. It may be that show trials can be good politics . . . [b]ut good politics don't necessarily serve the truth.

IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* 142 (1994). Furthermore, “[p]olitical trials produce politicized histories.” *Id.* at 166.

¹⁶⁶ Julian Barnes warns of this danger. The prosecutor, returning home from a day of particularly dramatic but underhanded point-scoring against the deposed dictator in the dock, is greeted by his wife, who pronounces his performance

Even so, there is nothing especially pernicious, in principle, about efforts to shape the dynamics of criminal proceedings for maximal dramaturgical effect. Theatrics of this sort are, after all, part of the standard repertoire of any effective courtroom lawyer.¹⁶⁷ Theatrics are not, however, thought to be a legitimate part of the judicial repertoire of courts, even when rendering judgment against violations of basic human rights. There is reason to wonder whether justice to the defendant, however heinous his wrongs, has been compromised when it can be said, as does one Israeli historian, that "[t]he trial was only a medium, and Eichmann's role was simply to be there, in the glass booth; the real purpose of the trial was to give voice to the Jewish people, for whom Israel claimed to speak."¹⁶⁸ Another Israeli scholar adds that "Eichmann rather swiftly became peripheral to his own trial, which was deliberately designed to focus more comprehensively on the Nazi crimes against the Jews."¹⁶⁹ Those initially willing to testify in his defense were deterred from so doing by threat of prosecution for their own wartime activities;¹⁷⁰ surely, they would have sought to tell a different tale.

In the trial of Klaus Barbie, "[p]ent-up feelings were vented as those who had suffered took revenge on history."¹⁷¹ Although the prosecutor and court relied almost entirely on documentary

"[w]orthy of American television." She adds: "It was vulgar and dishonest, contemptuous of the law, and you behaved like a pimp." BARNES, *supra* note 100, at 111-12.

¹⁶⁷ Moreover, some historians contend that the professional pleader of the 13th century was in origin a "remembrancer [who used] the poetic technique of the singer of tales to recall the forms of his 'tales' or pleadings." M.T. Clanchy, *Remembering the Past and the Good Old Law*, 55 HISTORY 165, 175 (1970). Other historians have traced the origins of such "memory officials," and the courts' reliance on them, to ancient Greece. See JACQUES LE GOFF, HISTORY AND MEMORY 63 (Steven Rendall & Elizabeth Claman trans., 1992).

¹⁶⁸ SEGEV, *supra* note 34, at 358. Segev writes that "[Israeli Prime Minister David] Ben-Gurion often emphasized that the man Adolf Eichmann was of no interest to him; he was concerned only with the historic importance of the trial itself." *Id.* at 327. One of Ben-Gurion's principal goals in holding the trial "was to remind the countries of the world that the Holocaust obligated them to support the only Jewish state on earth." *Id.*; see also ARENDT, *supra* note 18, at 4-5 (describing the courtroom architecture as "not a bad place for the show trial David Ben-Gurion . . . had in mind" and Ben-Gurion as "the invisible stage manager of the proceedings").

¹⁶⁹ Moshe Halbertal, *The Seventh Million: The Israelis and the Holocaust*, NEW REPUBLIC, Oct. 18, 1993, at 40, 43 (book review).

¹⁷⁰ See ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW WITH A POSTLUDE ON THE EICHMANN CASE 249 (2d impression rev. 1962).

¹⁷¹ ROUSSO, *supra* note 26, at 214.

evidence in developing their legal arguments, the trial was orchestrated to highlight very different evidence for the mass audience: "The witnesses . . . were the heroes of the trial because they gave, symbolically, faces to the dead, who were on everyone's mind."¹⁷² Such observations suggest the first of six reasons for skepticism—namely, the risk of sacrificing the defendants' rights on the altar of social solidarity—about what law might do for collective memory of administrative massacre.

The primary limit that liberalism imposes on storytelling in criminal trials is the principle of personal culpability: the requirement that no defendant be held responsible for the wrongs of others beyond his contemplation or control.¹⁷³ This entails a judicial duty to focus on a very small piece of what most observers will inevitably view as a much larger puzzle, to delimit judicial attention to that restricted place and period within which the defendant willfully acted. Episodes of administrative massacre, however, characteristically involve many people acting in coordinated ways over considerable space and time, impeding adherence to this stricture.

Moreover, to tell a compelling story, one that will persuade its intended audience that it is not unfairly singling out a serviceable scapegoat, the state (in the person of the prosecutor) must be able to paint the larger tableaux. Hence the recurrent tension, of which trial participants have often been well aware, between the needs of persuasive storytelling and the normative requirements of liberal judgment.¹⁷⁴

This tension has manifested itself in diverse ways during various prosecutions for administrative massacre. In prosecuting Eichmann, Ben-Gurion wanted, above all else, to retell the story told at Nuremberg in an entirely different way.¹⁷⁵ This retelling would conceive the offense as a "crime against the Jewish people," rather than against "humanity"—the latter concept an invention of the secular Enlightenment. Ben-Gurion's retelling was "ideologically rooted in the Zionist disappointment with liberalism," as an Israeli

¹⁷² *Id.*

¹⁷³ See FLETCHER, *supra* note 19, at 459-63, 492-95, 509-11.

¹⁷⁴ The Israeli trial court, for instance, repeatedly reproached the prosecutor for seeking to expand the narrative frame with evidence of Nazi wrongs that could not be traced to Eichmann's acts. See Attorney-Gen. of Israel v. Eichmann, 36 I.L.R. 5, 18-19 (Isr. Dist. Ct. 1961).

¹⁷⁵ See Lahav, *supra* note 34, at 559-61.

legal scholar observes.¹⁷⁶ It was designed to reflect the Zionist view that liberalism, with its aim of moral universalism, had misled the Jews into seeking assimilation within gentile societies, rather than reestablishing their own.¹⁷⁷

What better way to dramatize the link that Zionism asserted between assimilation's failure and the occurrence of the Holocaust than by a story about how Eichmann's actions assaulted the flesh of the Jewish people, as opposed to merely assaulting the liberal morality of the assimilated? For Israelis, this made for a powerful and persuasive story. Yet the narrative was willfully and unabashedly antiliberal, not merely in violating *nulla poena sine lege*, but in its very definition of the offense as one committed against a particular ethnoreligious community. In myriad ways, Ben-Gurion sought to frame the courtroom narrative in expressly communitarian terms, as a tale about the Jewish community's collective victimization, suffering, resistance, resurrection (from the ashes of failed assimilation), and, finally, redemption as a powerful nation-state.

Whereas Eichmann's seeming "banality" became the absorbing focus for Hannah Arendt and later generations of non-Israeli intellectuals,¹⁷⁸ for Israelis themselves (and many other observers) his pedestrian, non-demoniac character simply made him boring.¹⁷⁹ It became that much easier to concentrate their attention upon the very different and more compelling drama told by his victims—the survivor-witnesses (whose narratives Arendt found entirely beside the point, leaving her largely unmoved).¹⁸⁰ That the Nuremberg judgment appears in virtually every casebook and treatise on international law, while the Eichmann judgment appears in virtually none, would not have troubled Ben-Gurion in the least, one suspects. He was playing to a different audience, and he chose his theatrical techniques accordingly.¹⁸¹

¹⁷⁶ *Id.* at 560.

¹⁷⁷ *See id.* at 559-68.

¹⁷⁸ *See, e.g.,* David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2359-60 (1992) (discussing reactions of non-Israeli intellectuals to the defendants in the Nuremberg trials).

¹⁷⁹ *See* Alex Ross, *Watching for a Judgment of Real Evil*, N.Y. TIMES, Nov. 12, 1995, § 2, at 37, 40 (noting that Eichmann's courtroom persona was "lackluster," due to his "evasive pedantry").

¹⁸⁰ Virtually all Israeli studies of the Eichmann trial, and of its legacy for that nation, focus upon this. *See* SEGEV, *supra* note 34, at 345-66; Gouri, *supra* note 38, at 155.

¹⁸¹ In this regard, Arendt was right to note "the almost universal hostility in Israel to the mere mention of an international court which would have indicted Eichmann,

In the Nuremberg and Tokyo trials, illiberalism took another form. Defendants complained that the narrative of the courtroom was being framed too broadly. The Charter for the Tokyo trial, for instance, provided that "[t]he tribunal shall not be bound by technical rules of evidence . . . and shall admit any evidence that it deems to have probative value."¹⁸² Apart from the unchecked discretion this approach granted the courts, its effect may have been, as Justice Pal argued in dissent, to "operate practically against the defense only."¹⁸³

The breadth of relevant evidence followed from the breadth of the conspiracy charge, covering over a decade. As legal historian David Cohen contends:

[T]he court's discussion of the case is largely a historical narrative of the unfolding of this conspiracy rather than an examination of each defendant's conduct. The problem . . . is that a narrative structure built around a conspiracy theory inevitably emphasizes the actions of the "conspirators" as an abstract collectivity, and operates to obscure the precise connection of specific individuals to particular events.¹⁸⁴

Cohen continues, "[t]he basic strategy, then, . . . was not to delineate clearly the culpable conduct of each defendant, considered as an individual, but rather to establish participatory linkage between each defendant and a historical flow of collective activity. . . . [T]his was done without specifying the criteria which would render such participation culpable."¹⁸⁵ In short, the court's narrative framing successfully simplified some highly complicated events into an intelligible, coherent, and evocative story. But in so doing, it failed to adhere to liberalism's requirement that criminal liability be conditioned on a showing of individual culpability.

not for crimes 'against the Jewish people,' but for crimes against mankind committed on the body of the Jewish people." ARENDT, *supra* note 18, at 7.

¹⁸² TOKYO CHARTER, art. 13, cited in RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 118 (1971). A similar provision appeared in the London Charter for the International Military Tribunal at Nuremberg. See MINEAR, *supra*, at 118.

¹⁸³ U.S. DEP'T OF STATE, PUB. NO. 2613, TRIAL OF JAPANESE WAR CRIMINALS 12, 39, 42 (1946) (Pal, J., dissenting). American tribunals employed similarly relaxed evidentiary rules, allowing hearsay, unsworn statements, and "facts of common knowledge" in all postwar proceedings against Japanese defendants. See PICCIGALLO, *supra* note 88, at 38.

¹⁸⁴ David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in HUMAN RIGHTS IN TRANSITIONS (Robert Post & Carla Hesse eds., forthcoming 1996).

¹⁸⁵ *Id.*

By contrast, in the Buenos Aires trials, military defendants complained that the law's narrative framing of their conduct was far too narrow to judge it fairly. Defense counsel sought to situate the military's conduct in a wider context of the collapse of public order during the last years of Peronist rule. On this account, the military's victims were actually perpetrators and aggressors in the larger conflict, which entailed a virtual state of war by leftist guerrillas, supported in key ways by a web of sympathizers.¹⁸⁶ On this framing of the tale, the military's conduct represented only the self-defense of Argentine society, a response proportionate to the serious threat that this society had faced. The court employed traditional rules of evidence, however, to prevent this contextualizing effort, to the considerable detriment of the defendants' case, many believed.¹⁸⁷

A key question, then, is whether collective memory may be purchased only at the exorbitant price of fairness to individual defendants. An affirmative answer is suggested by the fact that those most enamored of harnessing the law to the construction of collective memory are generally those most hostile to liberal morality.¹⁸⁸ Any talk of monumental didactics evokes the fear of Stalinist "show trials," those degradation rituals¹⁸⁹ in which every invocation by defendants of procedural protections is rechar-

¹⁸⁶ Lieutenant Colonel Carlos Horacio Dominguez offers an elaborate legal argument to this effect in *LA NUEVA GUERRA Y EL NUEVO DERECHO: ENSAYO PARA UNA ESTRATEGIA JURÍDICA CONTRASUBVERSIVA* (1980).

¹⁸⁷ On how criminal law permits alternative temporal framings of a defendant's act, allowing admission or exclusion of exculpatory evidence, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *STAN. L. REV.* 591, 616-20 (1981). For a sociological perspective on this problem, see ERVING GOFFMAN, *FRAME ANALYSIS: AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974).

¹⁸⁸ I refer to cultural anthropologists and Durkheimian sociologists, who are decidedly communitarian in their ethical theory. On the philosophical dependence of criminal law, by contrast, on liberal conceptions of morality, see *supra* note 19.

¹⁸⁹ See Harold Garfinkel, *Conditions of Successful Degradation Ceremonies*, 61 *AM. J. SOC.* 420, 420 (1956). On Stalin's purge trials, especially on prosecutorial vituperation of defendants and their legal "evaluation from the point of view of class expediency," see ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO 1918-1956*, at 308 (Thomas P. Whitney trans., 1973) (quoting N.V. Krylenko, Stalin's Prosecutor General). See also Lon L. Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 *MICH. L. REV.* 1157, 1161-62 (1949) (defining show trials as "[s]ham legal proceedings, repeatedly used in the USSR and other communist countries . . . designed to dramatize specific political campaigns and/or eliminate prominent individuals"). For the standard, entirely pejorative connotation of the term "show trial," based on the Soviet experience, see *A DICTIONARY OF POLITICS* 454-55 (Walter Laqueur ed., 1971).

acterized by the court as further evidence of their seditious character as "enemies of the people." Milner Ball states the conventional wisdom: "Insofar as it is made a platform for moralizing or a forum for educating, a trial is not a trial. Trials may indeed have an educative effect, but they have this effect when, instead of deliberately undertaking to teach, they treat the parties as individuals."¹⁹⁰

In Defense of Liberal Show Trials

Liberal legal theorists will thus be tempted quickly to reject the cultivation of collective memory as a defensible objective when prosecuting those responsible for administrative massacre. But that conclusion would be premature and unfounded. The orchestration of criminal trials for pedagogic purposes—such as the transformation of a society's collective memory—is not inherently misguided or morally indefensible. The defensibility of the practice depends on the defensibility of the lessons being taught—that is, on the liberal nature of the stories being told. Whether show trials are defensible depends on what the State intends to show and how it will show it. Liberal show trials are ones self-consciously designed to show the merits of liberal morality and to do so in ways consistent with its very requirements.

"What is the cost for the individual and for society," asks one anthropologist, "when there is no meaningful framework for publicly exploring traumatic memories of political violence?"¹⁹¹ That question sounds no less powerful in a liberal society than in any other. A liberal society, to be sure, cannot officially endorse any full-bodied conception of the good.¹⁹² Hence its law, as an expression of state power, cannot aspire to provide its members a fully coherent way of life. In other words, individual rights establish side-constraints that the state must respect.

Liberalism is a theory neither about "the meaning of life,"¹⁹³ nor about the ends in service of which these rights must be

¹⁹⁰ BALL, *supra* note 9, at 56; see also Hariman, *supra* note 109, at 3 (arguing that "the more a trial appears to be a scene or product of public controversy and rhetorical artistry, the less legitimate it appears").

¹⁹¹ Rubie S. Watson, *Memory, History, and Opposition Under State Socialism: An Introduction*, in *MEMORY, HISTORY, AND OPPOSITION UNDER STATE SOCIALISM* 1, 13 (Rubie S. Watson ed., 1994).

¹⁹² See JOHN RAWLS, *A THEORY OF JUSTICE* 395-411, 446-49 (1971).

¹⁹³ See CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 69-90 (1987).

exercised. The legal storytelling in which courts necessarily engage, reproaching some and commending others, cannot seek to teach citizens how to exercise their moral autonomy, other than to respect the like autonomy of others. In this sense, the lessons taught by a liberal society and its law are necessarily and deliberately incomplete. The common culture of a liberal society can be only "loosely coherent."¹⁹⁴

Even so, a liberal state may employ a "show trial" for administrative massacre to display the horrific consequences of the illiberal vices and so to foster among its citizens the liberal virtues (including respect for basic individual rights, deliberative capacity, and toleration). "There is no reason to think that liberal citizens come about naturally"¹⁹⁵ As Macedo contends, "We need to avoid making the mistake of assuming that liberal citizens—self-restrained, moderate, and reasonable—spring full-blown from the soil of private freedom."¹⁹⁶

A criminal trial is a congenial public opportunity for collective mourning of the victims of administrative massacre. It provides a ritual that is helpful for family members and a sympathetic public in coming to terms with melancholia in even the most traumatic cases.¹⁹⁷ Just because a liberal state cannot dictate the terms on which the victims' lives could be lived does not preclude the state from providing an occasion that serves, *inter alia*, for mourning their wrongful taking. The liberal state can thus provide an institutional mechanism for mourning not only the deprivation of a victim's abstract moral rights, but the fully-developed life she might have lived in exercising those rights. In so doing, criminal law contributes significantly to the social solidarity that is based on

¹⁹⁴ STUART HAMPSHIRE, *MORALITY AND CONFLICT* 149 (1983). I later develop this point regarding the relationship between official narratives, sanctioned by criminal law, and "private" memories of personal experiences, which are often the basis for civil damage suits. See *infra* text accompanying notes 733-52.

¹⁹⁵ Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberal Constitutional Values*, in *CONSTITUTIONAL POLITICS AND CONSTITUTIONAL STUDIES* (Sotirios Barber & Robert George eds., forthcoming 1996).

¹⁹⁶ *Id.* Joseph Raz adopts a similar view in *THE MORALITY OF FREEDOM* 196-97 (1986).

¹⁹⁷ See PETER HOMANS, *THE ABILITY TO MOURN: DISILLUSIONMENT AND THE SOCIAL ORIGINS OF PSYCHOANALYSIS* 261-348 (1989). As a ritual, mourning involves a condition of grief that is repeated and expressed in a "reduced, normatively controlled, and socially supported form." LACAPRA, *supra* note 156, at 199.

shared commitment to liberal principles of mutual respect and concern among individuals.

This communal mourning is one important role that collective memory may legitimately play in a liberal society, or within a society aspiring to liberalize itself. With this provisional answer in mind, we can begin to assess how the law might properly contribute to the formation of such memory, particularly of national catastrophes like the Argentine dirty war. I shall speak of law's legitimate tasks in this regard as those of liberal memory. Is it possible, when prosecuting perpetrators of administrative massacre, to craft evidence and legal argument in a way that stimulates public discussion of the underlying issues, influencing the ensuing debate so as to foster liberal morality and solidarity? That is our central question.

Liberal stories are ones that, in treatment of their characters, reward the liberal virtues and condemn illiberal vices. Cruelty is the cardinal vice in this regard;¹⁹⁸ respect for individual life and liberty, the cardinal virtue.¹⁹⁹ All else is commentary.²⁰⁰ Liberal virtues are those dispositions of character that a liberal society must cultivate in its members in order to function effectively and to keep social conflict within tolerable bounds. First and foremost, a liberal society must inculcate the disposition to respect the moral rights of others, that is, the rights that liberal morality accords to all persons. The stories that criminal courts tell must celebrate this virtue and chastise the correlative vice. The law accomplishes this only when courts and juries themselves respect the law, that is, when they adhere to legal rules reflecting liberal principles of procedural fairness and personal culpability as conditions of criminal liability. The most gripping of legal yarns must be classified as a failure if its capacity for public enthrallment is purchased at the price of violating such strictures.

But within these principled constraints, liberals have plenty of good stories to tell. As Yack observes:

[I]f man is, as MacIntyre insists, "... a story-telling being[.]" ... then we should expect men and women to turn theories, even

¹⁹⁸ See JUDITH N. SHKLAR, *ORDINARY VICES* 44 (1984).

¹⁹⁹ Recent efforts to find a place for virtue within liberalism include MACEDO, *supra* note 87, at 131-62, and WILLIAM A. GALSTON, *LIBERAL PURPOSES* 237 (1991).

²⁰⁰ There is more to most contemporary versions of liberal theory than individual rights against others or to civic and political participation, of course. But whether a liberal society also requires social provision of "primary goods" or essential social "capabilities" is tangential to present purposes.

liberal theories which insist on impersonal and antitraditional criteria, into the basis for new stories. . . . The French turned liberty from tradition into a female figure, symbolic of the Republic's virtues and energy. American colonists turned Lockean liberal principles into didactic stories with which to educate their children. . . . Similarly, the Kantian categorical imperative has generated stories that celebrate moral courage, while social contract theories have encouraged stories that celebrate the virtues associated with self-reliance.²⁰¹

If nothing else, liberalism is very much engaged in telling the story of liberalism, the "origin" stories of Locke, Jefferson, and Madison, as well as the "horror" stories about communal intolerance—large (Stalin and Hitler) or small (tribes and towns).²⁰² In a liberal society, prosecutors (in their closing arguments) and courts (in their opinions) tell stories about individual rights and the myriad forms of the human flourishing that the exercise of such rights permits and that their violation wrongly forecloses. Liberal courts thus tell a story in which men are portrayed as autonomous subjects, choosing to conduct themselves in this way or that.

The Value of Liberal Fictions

There is an irreducibly "fictive" element here: the legal fiction that men, in obeying or breaking the law, are exercising an inalienable capacity for autonomous choice. By representing men as autonomous choosers, liberal law seeks to *make* them so—recognizing all the while that this entails forcing freedom upon some who would prefer to surrender it (to priests, parents, marital partners, or military superiors). Liberal stories in criminal cases thus always involve "side-shadowing";²⁰³ that is, they allude to

²⁰¹ Bernard Yack, *Liberalism and Its Communitarian Critics: Does Liberal Practice "Live Down" to Liberal Theory?*, in *COMMUNITY IN AMERICA*, *supra* note 70, at 147, 151-52. Yack's reference to liberty as a female figure alludes to an early effort of liberal iconography to translate republican ideas into pictorial imagery with which citizens could readily identify. On this effort, see MAURICE AGULHON, *MARIANNE INTO BATTLE: REPUBLICAN IMAGERY AND SYMBOLISM IN FRANCE, 1789-1880* (Janet Lloyd trans., 1981).

²⁰² I owe this observation to Michael Schudson.

²⁰³ See MICHAEL A. BERNSTEIN, *FOREGONE CONCLUSIONS: AGAINST APOCALYPTIC HISTORY* 7-8 (1994). As Bernstein notes:

To concentrate on the sideshadowed ideas and events, on what did not happen, does not cast doubt on the historicity of what occurred but views it as one among a range of possibilities, a number of which might, with equal plausibility, have taken place instead. . . . To keep the claims of both

unrealized possibilities more appealing and more defensible than what transpired. The story always runs: the defendant was not fated to perform his dastardly deeds; he was free to do otherwise, and should have.

But liberal courts do not merely apply first principles set in stone. While they seek to preserve the normative "integrity" of their community over time, judicial stories also involve a continual effort to rework legal rules and principles "in their best light"—to clarify and refine extant norms in the course of applying them to disputes regarding their scope and meaning.²⁰⁴ The story of the litigants and their immediate dispute is thereby woven into a larger story about the community, its history, and its evolving normative commitments. The story of what the parties did to one another is subsumed within a broader tale about what communal norms required of them and how these norms got to be the way they are.

In recounting the tale of the crimes the juntas had ordered, the obedience of their underlings, and the suffering of their victims, the military trials in Argentina told such liberal stories. But notice that a liberal story, on Yack's representative account, does no more than illustrate principles, the validity of which do not derive from the story itself or from the character-virtues of those enacting it. Stories allow the listener to intuit directly the moral lessons embedded in them. Rather than being required to "act on principle," that is, in conscious awareness of moral duties discerned from the story's proper interpretation, stories allow us to apprehend these lessons in an unmediated way: from the very vivacity of their immediate impact on the listeners' sentiments.²⁰⁵ "Ideally, a story should be self-explanatory," Gallie notes.²⁰⁶

the event and its unrealized alternatives in mind may be more perplexing as a theoretical formulation than as an ongoing act

Id.

²⁰⁴ This formulation follows Dworkin's account of how judges resemble the authors of a "chain novel." See DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 228-38. It is modeled on Rawls' account of the "constructive" process of "reflective equilibrium" by which we bring our principles into harmony with our settled moral judgments, and vice versa. See RAWLS, *supra* note 192, at 46-53.

²⁰⁵ See ADAM Z. NEWTON, *NARRATIVE ETHICS* 13 (1995) ("[By eliminating] the mediatory role of reason, narrative situations create an immediacy and force, framing relations . . . that bind narrator and listener [T]hese relations will often precede . . . understanding, with consciousness arriving late, after the assumption or imposition of intersubjective ties.").

²⁰⁶ W.B. GALLIE, *PHILOSOPHY AND THE HISTORICAL UNDERSTANDING* 23 (1964). Gallie further states that: "It is only when things become complicated and difficult—when in fact it is no longer possible to *follow* them—that we require an explicit

Still, stories are primarily a crutch, on the liberal account, for those who cannot yet reason abstractly, who must emulate the concrete lives of "role models" because they have not yet learned to formulate their aspirations at any level of generality, their moral ideals in more universalistic terms. Just as we rely increasingly on pictures for assisting memories as we age,²⁰⁷ so we initially learn (in childhood) our society's moral principles by way of stories, not moral argument.²⁰⁸ It is thus scarcely surprising that, in seeking direction or instructing our children, most of us turn more readily to biblical parables than to Kant's *Prolegomena*.

Compelling stories about the country's past—legal and otherwise—aid our remembrance not only of the events themselves, but also of the moral judgments we ultimately reached about them, often through discussions of these events with friends and fellow citizens. The principles on which we based these judgments are thus kept firmly in mind. In this way, memory of the events themselves also comes to be influenced by memory of subsequent debate about how to judge their perpetrators and accomplices.

This view of storytelling, as merely a mnemonic device, enables us—the listeners—to maintain the proper measure of critical distance from the teller. It helps us to ask such questions as: Was that really his motive? Did he accurately understand the motives of other characters? Did he correctly grasp the situation he faced and what it required of him? The best of modern drama does not encourage complete identification with its characters. Far from it. Bertolt Brecht's influential idea of the "alienation effect" involves precisely such a self-conscious effort by the dramatist to encourage a measure of impartial detachment by the audience from even the most appealing characters.²⁰⁹ It is a theatrical device for inducing the audience to confront the dramatic character and his social world—and that of the audience itself—in a critical and self-critical fashion. The objective is a form of "acting where the transforma-

explanation of what the characters are doing and why. But the more skilful [sic] the story-teller, the rarer will be the intrusion of such explicit explanations." *Id.* at 22-23.

²⁰⁷ See MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* 63-69, 112 (1981).

²⁰⁸ On the salience of storytelling in the moral education of young children, see GALLIE, *supra* note 206, at 24-25; Paul Harris, *Developmental Aspects of Children's Memory*, in *ASPECTS OF MEMORY* 132, 143-50 (Michael M. Gruneberg & Peter Morris eds., 1978).

²⁰⁹ See Bertolt Brecht, *Alienation Effects in Chinese Acting*, in *THE MODERN THEATRE: READINGS AND DOCUMENTS* 276, 277-78 (Daniel Seltzer ed., 1967).

tion of consciousness"—of the viewer into the mind and situation of the character—"is not only intentionally incomplete but also revealed as such to the spectators, who delight in the unresolved dialectic."²¹⁰

By contrast, when a legal author today tells us that her narrative can communicate "the inexpressible, the inexplicable"²¹¹ (that is, inexplicable in strictly normative or analytical terms), we often find her smuggling in "the indefensible" as well. As we are called upon to enter empathetically into her imaginative universe, we are tacitly asked to leave our critical faculties at the door. Such authors resemble the Zambian tribe whose members insist, even when testifying in court, on relating events uninterrupted, for fear that the spell cast by the storyteller will be broken. "Beware the judge who asks a witness to clarify a point!" reports one Africanist. "The witness will go back to the beginning of the tale and start over."²¹²

No doubt, my seeming depreciation of stories vis-à-vis reasoned argument will strike some as ungenerous. So be it. Liberalism rightly rejects the uncritical celebration of storytelling, so fashionable in current legal scholarship,²¹³ as no substitute for rational assessment of evidence and argument—and as often no more than self-display.²¹⁴ The resulting "meditations" less often resemble the soliloquies of Hamlet than the solipsism of Narcissus. The very people who uphold anecdotes about their personal experience as significant to legal and policy debates are often the first to decry the use of complacent anecdotes aimed at countering statistical

²¹⁰ RICHARD SCHECHNER, *BETWEEN THEATER AND ANTHROPOLOGY* 9 (1985).

²¹¹ JAMES B. WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* 863 (1973).

²¹² Jennifer A. Widner, *Building the Rule of Law: What Commonwealth Africa Tells Us About Constructing Judicial Independence* 67 (July 1995) (unpublished manuscript, on file with author).

²¹³ The literature here is enormous. See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); Symposium, *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

²¹⁴ See, e.g., Larry Alexander, *What We Do, and Why We Do It*, 45 STAN. L. REV. 1885, 1895 (1993) (noting that "critical race theory typically consists of narratives purporting to reveal how it feels to be the oppressed[,] . . . [c]oupled with . . . an implicit claim that these experiences are self-certifying"). For further critique, see Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 854 (1993) (concluding that while legal storytelling "can play a useful role in legal scholarship," it is a method weak in truthfulness and typicality, as well as reason and analysis).

arguments about deteriorating socioeconomic conditions. "For example,' is no proof," goes a Yiddish proverb.²¹⁵

In contrast to liberal memory, communitarian and conservative accounts of didactic storytelling view narratives as *constituting* the teaching, not merely illustrating it. The factual details are seen as valuable in themselves, apart from the more general principles that they may reflect. It is in the emotional savoring and shared experiencing of these resonant details that the historical continuity of a genuine community is thought to consist.²¹⁶ Shared stories themselves define the nature and boundaries of the group to whom the stories belong.

In liberal stories, by contrast, the characters generally are not large groups, let alone entire societies. As Halbwachs observes: "Ordinarily, however, the nation is too remote from the individual for him to consider the history of his country as anything else but a very large framework with which his own history makes contact at only a few points."²¹⁷ But there are certain events, he acknowledged, that "alter group life."²¹⁸ These are of such moral magnitude that they become "imbued with the concerns, interests, and passions of a nation."²¹⁹ Such transformative events may involve triumphs or catastrophes. Administrative massacre decidedly exemplifies the latter. In our century it has become the quintessential catastrophe for the collective memory of many societies. "An experience like that undergone by Argentina in the last decade," writes historian Halperin,

turns terror into one of the basic dimensions of collective life.

This necessarily redefines the horizon on which the experience of

²¹⁵ YIDDISH PROVERBS 21 (Hanan J. Ayalti ed., 1949).

²¹⁶ This conception of communal narrative defines the "premodern" condition, according to Lyotard: "[A] collectivity that takes narrative as its key form of competence," he contends, "finds the raw material for its social bond not only in the meaning of the narratives it recounts, but also in the act of reciting them." LYOTARD, *supra* note 145, at 22. For a defense of the continuing relevance of this conception of communal narrative, see ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 153 (1985) (arguing that "[i]n order not to forget [its] past, a community is involved in retelling its story, its constitutive narrative").

²¹⁷ MAURICE HALBWACHS, THE COLLECTIVE MEMORY 77 (Francis J. Ditter, Jr. & Vida Y. Ditter trans., 1992). Collective memory of such events "differs from history in . . . [that] it retains from the past only what still lives or is capable of living in the consciousness of the groups keeping the memory alive." *Id.* at 80. Halbwachs was greatly influenced by Durkheim. See Mary Douglas, *Introduction to id.* at 1, 6-9.

²¹⁸ HALBWACHS, *supra* note 217, at 58.

²¹⁹ *Id.*

every Argentine is played out. His relation to his country, to his city, to his street cannot remain untouched after having come to see them as places where death always lurks.²²⁰

When a society suffers trauma on this scale, its members will often seek to reconstruct its institutions on the basis of a shared understanding of what went wrong. To that end, they conduct surveys, write monographs, compose memoirs, and draft legislation. But mostly, they tell stories. Gottsegen writes that the "telling and retelling" of a people's central stories constitute its collective identity.²²¹ "The story's heroes, and the principles for which they stand, will become exemplary, and in every age youths will be exhorted to be like them."²²² It was a dramaturgical decision on Alfonsín's part to conduct the trial of the military juntas, for instance, in a single oral proceeding, susceptible to television coverage.²²³ (In Argentina, legal proceedings are normally conducted largely on paper, and witnesses are examined at various times, rather than sequentially, as the investigating magistrate must pursue several proceedings simultaneously.)²²⁴

This aspect of Alfonsín's approach to the junta trial, for instance, greatly enhanced its persuasive power, as its intellectual architects intended. It is almost impossible to imagine any way in which this procedural reorganization could have compromised the legal protections of the accused. Adoption of an uninterrupted oral procedure made for a more compelling public spectacle, in short, without making for any less justice. This sensitivity on the part of its legal planners to dramatic didactics in no way reduced the junta prosecution to a Stalinist "show trial."²²⁵

²²⁰ Tulio Halperin Donghi, *El Presente Transforma el Pasado: El Impacto del Reciente Terror en la Imagen de la Historia Argentina*, in *FICCIÓN Y POLÍTICA: LA NARRATIVA ARGENTINA DURANTE EL PROCESO MILITAR* 71, 72 (René Jara & Hernán Vidal eds., 1987) (translation by author). After stating this view, which he describes as widely held in Argentina, Halperin argues that it can easily distort the historiography of earlier periods. See *id.*

²²¹ See MICHAEL G. GOTTSEGEN, *THE POLITICAL THOUGHT OF HANNAH ARENDT* 100-01 (1994). Gottsegen is parsing Hannah Arendt in this passage, describing part of her argument in *HANNAH ARENDT, ON REVOLUTION* 200-14 (1963). The indispensability of shared stories and storytelling for a society's self-preservation is a common theme in literary forays into social analysis. See MARIO VARGAS LLOSA, *THE STORYTELLER* (Helen Lane trans., 1989).

²²² GOTTSEGEN, *supra* note 221, at 100-01.

²²³ See Interview with Presidential Legal Advisors, in Buenos Aires, Argentina (July 20, 1985).

²²⁴ Historically, this was standard practice throughout the civil law world. See JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 67 (1977).

²²⁵ On "show trials," see *THE GREAT PURGE TRIAL* (Robert C. Tucker & Stephen

The liberal requirement of procedural fairness to the perpetrators of administrative massacre is a greater problem for the Durkheimian account of law's contribution to solidarity than for the discursive.²²⁶ The discursive conception, after all, finds nothing threatening to social solidarity in zealous advocacy by defense counsel, that is, in its attempt to offer an alternative narrative. That counternarrative is directed not at eliciting retributive moral sentiments (universally shared by the community), but at questioning whether the defendants can be punished in a manner consistent with the community's law.

More dramatically, the counternarrative will often suggest that the defendants' cause was just, however much at odds with positive law, or that their acts should be viewed in a "larger historical context" which is extenuating. Such a counternarrative would not seek merely to introduce reasonable doubt concerning the elements of the prosecution's story, but rather to tell a different one altogether, one that is more compelling in moral and historical terms. That brings us to the second problem.

B. *Losing Perspective, Distorting History*

If the law is to influence collective memory, it must tell stories that are engaging and compelling, stories that linger in the mind because they are responsive to the public's central concerns. This proves difficult. The central concerns of criminal courts, when trying cases of administrative massacre, are often decidedly at odds with the public's interest in a thorough, wide-ranging exploration of what caused such events and whose misconduct contributed to them. Courts can easily distort such public understanding either by excessive narrowness ("legalistic" blinders) or by excessive breadth (straying beyond their professional competence). A frequent form of distortion combines the worst of both: It presents a professionally correct conclusion, perfectly suitable for traditional legal purposes, as something much more, that is, as an "official history" of the entire conflagration.

The trial court in the *Eichmann* case is well aware of these dangers. It expressly disavows such historiographic or didactic aims

F. Cohen eds., 1965) (discussing the series of show trials during Stalin's Great Purge of the Communist Party during 1936-1938); ARKADY VAKSBERG, *STALIN'S PROSECUTOR: THE LIFE OF ANDREI VYSHINSKY* (Jan Butler trans., 1991).

²²⁶ See *supra* text accompanying notes 55-74, 87-98 (introducing Durkheim's view); *supra* text accompanying notes 99-144 (introducing the discursive conception).

as beyond its ken. The first paragraph of its opinion thus struck a tone of professional modesty, observing that:

The desire was felt—readily understandable in itself—to give, within the limits of this trial, a comprehensive and exhaustive historical account of the events of the catastrophe, and, in so doing, to emphasize also the signal feats of heroism of the Ghetto-fighters Others again sought to regard this trial as a forum to clarify questions of great import

. . . [But] the Court . . . must not allow itself to be enticed to stray into provinces which are outside its sphere. The judicial process has ways of its own . . . whatever the subject-matter of the trial. Were it not so, . . . the trial would otherwise resemble a rudderless ship tossed about on the waves.

. . . The Court does not possess the facilities required for investigating general questions of the kind referred to above. For example, to describe the historical background of the catastrophe, a great mass of documents and evidence has been submitted to us, collected most painstakingly and certainly out of a genuine desire to delineate as complete a picture as possible. Even so, all this material is but a tiny fraction of the extant sources on the subject. . . . As for questions of principle which are outside the realm of law, no one has made us judges of them and therefore our opinion on them carries no greater weight than that of any person who has devoted study and thought to these questions.²²⁷

The court here admirably identifies a genuine problem: that many citizens look to the court, and to the evidence it will gather and assess, to help answer large questions that have recently become the center of public concern (and private anguish), questions over

²²⁷ Attorney-Gen. of Israel v. Eichmann, 36 I.L.R. 5, 18-19 (Isr. Dist. Ct. 1961). The court had offered these questions:

How could this happen in the full light of day, and why was it just the German people from whom this great evil sprang? Could the Nazis have carried out their evil designs without the help given them by other peoples in whose midst the Jews dwelt? Would it have been possible to avert the catastrophe, at least in part, if the Allies had displayed a greater will to assist the persecuted Jews? . . . What is the lesson which the Jews and other nations, as well as every man in his relationship to others, must learn from all this?

Id. at 18.

Similarly, the London Charter for the International Military Tribunal at Nuremberg avowed the desire of its drafters to influence historical memory, in seeking to "make available for all mankind to study in future years an authentic record of Nazi crimes and criminality." U.S. DEP'T OF STATE, PUB. NO. 3080, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 6 (1945).

which it can claim no monopoly of expertise. Yet even as the court seeks to delimit its professional tasks, to reject any role as history teacher or scholar, it cannot quite contain itself from proclaiming the trial's "educational significance" and "educational value."²²⁸ The court remains Delphically silent about what this educational significance consists of and about how to resolve possible tensions between the trial's positive educational effect and the other, more conventional aims of a criminal proceeding.

At the very least, the judges are acutely aware that their judgment will inevitably be viewed as *making* history and that their judgment will itself be subject to historiographical scrutiny. Justice Jackson's opening statement at Nuremberg acknowledged this explicitly: "[T]he record on which we judge these defendants today is the record on which history will judge us tomorrow."²²⁹ Even after Julius and Ethel Rosenberg had been executed, Felix Frankfurter penned a dissent to the Supreme Court's denial of a stay. He acknowledged that to dissent "after the curtain has been rung down upon them has the appearance of pathetic futility."²³⁰ Even so, he added, "history also has its claims."²³¹ It is those claims to which judges feel obliged to respond in the cases discussed here. The only problem—characteristic of these cases—is that Frankfurter almost certainly got those claims largely wrong, as recent historiography on the *Rosenberg* case suggests.²³²

The *Eichmann* court's vague claim about the trial's educational value is very modest compared to the more extravagant proclama-

²²⁸ Both statements appear in *Eichmann*, 36 I.L.R. at 19. Recognizing the apparent tension between its claims, the court then seeks to clarify how it views its educational function, asserting that although the record "will certainly provide valuable material for the research worker and the historian, . . . as far as this Court is concerned all these things are merely a by-product of the trial." *Id.*

²²⁹ 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 101 (1947).

²³⁰ *Rosenberg v. United States*, 346 U.S. 273, 310 (1953) (Frankfurter, J., dissenting).

²³¹ *Id.* Frankfurter's dissent inevitably focused almost entirely on procedural defects in the trial, but he concluded that such defects undermined confidence in the result.

²³² See Ronald Radosh, *The Venona Files*, NEW REPUBLIC, Aug. 7, 1995, at 25, 25-27 (summarizing the famous Venona intercepts between Soviet and American Communist Party officials, decoded by the Army Signal Intelligence Service and recently declassified, clearly establishing that Julius Rosenberg, although not his wife, spied for the Soviets). In this Article the term "historiography" refers broadly to all scholarship by professional historians rather than (as in some current discussion) more narrowly to historians' writings about the nature of historical writing.

tions of national "catharsis" and "collective psychoanalysis" by the intellectuals mentioned above.²³³ Even so, many historians have concluded that at such times the law unwittingly provides more *miseducation* than accurate historical instruction.²³⁴ The concept of historical distortion is itself somewhat problematic, to be sure, and must be scrutinized before employable in assessing judicial forays into telling a national story. As Schudson warns:

The notion that memory can be "distorted" assumes that there is a standard by which we can judge or measure what a veridical memory must be. If this is difficult with individual memory, it is even more complex with collective memory where the past event or experience remembered was truly a different event or experience for its different participants. Moreover, where we can accept with little question that biography or the lifetime is the appropriate or "natural" frame for individual memory, there is no such evident frame for cultural memories. Neither national boundaries nor linguistic ones are as self-evidently the right containers for collective memory as the person is for individual memory. . . . Memory is distortion since memory is invariably and inevitably selective. A way of seeing is a way of not seeing, a way of remembering is a way of forgetting, too.²³⁵

Still, we should not abandon the concept of distortion altogether.²³⁶ Rather, we should apply it reflexively, in both directions. What will be viewed as a distortion from the perspective of either profession may be entirely legitimate in light of the distinct purposes of the other. Inevitably, the law will often treat past events in ways that will constitute distortion from the standpoint of historiography. But if courts distort history, so too historians can

²³³ See *supra* notes 26, 28 and accompanying text (citing Henry Rousso and Paula Speck).

²³⁴ See, e.g., Browning, *infra* note 282; Strauss, *infra* note 333.

²³⁵ Michael Schudson, *Dynamics of Distortion in Collective Memory*, in *MEMORY DISTORTION: HOW MINDS, BRAINS, AND SOCIETIES RECONSTRUCT THE PAST* (Daniel L. Schachter ed., forthcoming 1995) (emphasis added). Examining postwar memory of WWII in Japan, one scholar of Japanese history makes a similar point: "No single . . . chronology can be produced by a summary of the infinite series of differently remembered personal pasts. There are too many variants of the way the 'little history' of individuals connects with the 'big history' of the nation-state." Carol Gluck, *The Past in the Present*, in *POSTWAR JAPAN AS HISTORY* 64, 78 (Andrew Gordon ed., 1993). On the reciprocal influence of individual experience on collective memory, and vice versa, over time, see Nathan Wachtel, *Remember and Never Forget*, in *BETWEEN MEMORY AND HISTORY* 307, 334 (Marie-Noëlle Bourguet et al. eds., 1986).

²³⁶ Schudson agrees. See MICHAEL SCHUDSON, *WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST* 206 (1992).

distort the law—often in ways that make lawyers howl or cringe. The most notorious example among historical treatments of administrative massacre is surely the conclusion, reached by Ernst Nolte, that Hitler was entitled to treat the Jews as his enemy since leading Zionist Chaim Weitzmann—in a late 1939 speech after the outbreak of war—had expressly declared war on the Third Reich by announcing that Jews would support Britain in the imminent conflict.²³⁷

The second source of skepticism about law's potential contribution to collective memory is the converse of the first. Just as we properly wonder whether liberal morality will be sacrificed in the interests of historical storytelling, we may also suspect that judges—when faithful to liberal law and professional ethics—may make poor historians and lousy storytellers. To be sure, Western legal scholarship and historiography initially set out, in the Middle Ages, on surprisingly parallel tracks, employing similar methods, seeking similar objectives.²³⁸ But their professional paths have long since diverged in many ways.

To influence collective memory through legal proceedings, it is helpful for prosecutors to be familiar with accepted genres of storytelling. In other words, prosecutors must discover how to couch the trial's doctrinal narrative within "genre conventions" already in place within the particular society.²³⁹ These conventions are by no means universal and will often require some rather fine-grained "local knowledge." For instance, a prosecution of Emperor Hirohito could easily have been staged—without distortion of brute facts²⁴⁰—to draw upon the dramatic conventions of Kabuki, within which the "death of kings" is a recurrent and evocative theme.²⁴¹ Attentiveness to cultural particularities of this

²³⁷ See Ernst Nolte, *Between Historical Legend and Revisionism? The Third Reich in the Perspective of 1980*, in *FOREVER IN THE SHADOW OF HITLER?* 1, 8 (James Knowlton & Truett Cates trans., 1993).

²³⁸ See Donald R. Kelley, *Clio and the Lawyers: Forms of Historical Consciousness in Medieval Jurisprudence*, 5 *MEDIEVALIA ET HUMANISTICA* 25, 26-28 (1974).

²³⁹ See Bernard S. Jackson, *Narrative Theories and Legal Discourse*, in *NARRATIVE IN CULTURE* 23, 30 (Christopher Nash ed., 1990) ("Every society . . . has its own stock of substantive narratives, which represent typical human behavior patterns known and understood This is the form in which social knowledge is acquired and stored, and which provides the framework for understanding particular stories presented to us in discourse.").

²⁴⁰ John Searle coined the term "brute facts." Such facts exist independently of human observation. See JOHN R. SEARLE, *THE CONSTRUCTION OF SOCIAL REALITY* 2-3 (1995).

²⁴¹ See Masao Yamaguchi, *Kingship, Theatricality, and Marginal Reality in Japan*, in *TEXT AND CONTEXT: THE SOCIAL ANTHROPOLOGY OF TRADITION* 151, 169-75

sort, however, is a virtue to which liberal legal and political theory—with its longings for Enlightenment universalism—have not always evinced sufficient respect. But Occupation authorities in Japan proved quite savvy in formulating their other policies, even the most transformative, in indigenous terms.²⁴²

The promise of liberal storytelling will quickly founder if it turns out that the very things that make the story *liberal*—its moral universalism or impartial detachment, for instance—deprive its characters of the concreteness and particularity that make a good story, a vivid yarn. It is the vivid particularity of characters and events in good literature that makes it singularly apt as a setting for Aristotelian ethics, that is, for its teaching and analytical development.²⁴³ In contrast, *liberal* theory has rarely placed comparable emphasis on the particularities of historical context or individual character. Kant, for instance, viewed “examples” and the stories in which they were necessarily formulated as devices useful only for instructing us in how to apply moral principles and motivating such compliance.²⁴⁴

The common law method of Anglo-American courts, of course, has always prized judicial “situation sensitivity” to the infinite factual variation in the configurations presented by particular disputes.²⁴⁵ But the sensitivity of liberal jurisprudence to particularity is driven by concerns with being fair and just, not with being spellbinding. The two aims may well be at odds, as many have long supposed. Justice requires predictability, as through like treatment of like cases; a compelling story, by contrast, requires an ever-present element of surprise, to keep the listener on edge. As Gallie observes:

(Ravindra K. Jain ed., 1977).

²⁴² Japanese historian Ienaga Saburō reports, for instance, that for scholars like himself “[c]ooperation with the Occupation’s policy for reforming the teaching of history was an unexpected opportunity to put previously held beliefs into practice.” Arthur E. Tiedemann, *Japan Sheds Dictatorship*, in *FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM* 179, 194 (John H. Herz ed., 1982). Conversely, Tiedemann adds: “For almost every proposed reform there was found a Japanese who long before the occupation had developed a commitment to the concept involved.” *Id.*

²⁴³ See MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE* 148-67 (1990).

²⁴⁴ Kant’s view differed, between his *Groundwork of the Metaphysics of Morals* and his *Critique of Pure Reason*, over whether examples could accomplish merely the second or also the first of these two tasks. See LARMORE, *supra* note 193, at 2-3.

²⁴⁵ On the judicial virtue of “situation sense,” see KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 60-61 (1960).

[T]he conclusion of a good story—a conclusion which we wait for eagerly—is not something that could have been or should have been foreseen.

. . . [W]e can imagine almost any good story being presented, and probably ruined, as either a cautionary tale or as the illustration of a moral homily. . . . In the homily the persons and early incidents of the story will be introduced somewhat in the manner of instantial or factual premisses from which, in conjunction with appropriate wise saws and moral principles, the conclusion of the story—the exemplification of the appropriate moral lesson—can be deduced. But in this process the conclusion will, of course, have lost all its virtue *as the conclusion of a story*. Inevitably it will have become a foregone conclusion, possibly to be assimilated with moral profit, but certainly not to be awaited with eagerness and excitement.²⁴⁶

The solution to this problem would be simple if we could accept Durkheim's account of how criminal trials contribute to social solidarity. What sustains public attentiveness to such trials, on his account, is not any uncertainty about their likely result (or even morbid curiosity about their grisly details). In fact, any great uncertainty of this kind could easily vitiate the retributive sentiments of resentment and indignation against the accused that such proceedings are to evoke among the public. In support of Durkheim's view, it might be observed that there is little evidence the general public much cares for unpredictability in its favored narratives or for psychological complexity in the characters who people them. After all, it is generally not terribly difficult to anticipate the conclusion of most popular novels or television dramas. Nor is complex "character development" exactly the strength of, say, John Grisham's novels.²⁴⁷

Although eminently predictable and populated by stick-figure characters, such narratives maintain the attention of millions of readers and viewers every day. This simply could not occur if much particularity of character or uncertainty of result were necessary to make a story compelling for most audiences, as Gallie and Nussbaum imply. If stories must capture the popular imagination before they can foster social solidarity, the most simplistic of

²⁴⁶ GALLIE, *supra* note 206, at 24.

²⁴⁷ See Michiko Kakutani, *Chasing Ambulances Before Dreams*, N.Y. TIMES, Apr. 28, 1995, at C33 (reviewing JOHN GRISHAM, *THE RAINMAKER* (1995), and commenting on "the leadenness of Mr. Grisham's prose, the banality of his characters and the shocking predictability of his story").

narratives have little trouble in doing so. The problem, for present purposes, is precisely that trials for administrative massacre typically *lack* the simplicity of plot, character, and *dénouement* that most popular narratives involve—and seem to require for their very popularity.

Eichmann's character traits *alone* have evoked thousands of pages of scholarly commentary, much of it confessedly perplexed, beginning with Arendt's observations of his trial. Moreover, the panoramic sweep of the events at issue precludes the defendant from continuously occupying center stage. Arendt stated the problem succinctly:

A show trial needs even more urgently than an ordinary trial a limited and well-defined outline of what was done and how it was done. In the center of the trial can only be the one who did—in this respect, he is like the hero in the play No one knew this better than the presiding judge, before whose eyes the trial began to degenerate into a bloody show²⁴⁸

The discursive account of how criminal trials contribute to social solidarity can more easily accommodate the complexity of character and uncertainty of result that make for great literature, according to Gallie and Nussbaum.²⁴⁹ These very complexities and uncertainties become the object of day-to-day curiosity and concern, the subject of private discussion and public debate, consistent with the ideal of discursive democracy. The question, however, is whether such lengthy and complex tales can sustain the public's interest at all, or for very long, that is, whether Durkheimian desires for moral certainty and narrative closure will assert themselves prematurely. The record here is quite mixed, allowing little empirical basis for generalization.²⁵⁰

²⁴⁸ ARENDT, *supra* note 18, at 9; see also Jackson, *supra* note 239, at 29 (describing an empirical study of juror receptivity to competing accounts which found that "as structural ambiguities in stories increased, credibility decreased, and vice versa").

²⁴⁹ I here reject any conventional, pejorative distinction between high art and low. As Young observes, monuments of commemoration, which are often "[u]nabashedly figurative, heroic, and referential" to some historical reality, must necessarily flout contemporary standards of aesthetic sophistication. JAMES E. YOUNG, *THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING* 11-12 (1993).

²⁵⁰ See *infra* text accompanying notes 443-59.

Are Liberal Stories Boring?

By nature, many nonliberals suspect, liberal stories (and, by implication, liberal lives) must be boring. This is due to the procedural scrupulousness with which liberal law protects the rights of the villain, against whom the audience's collective conscience could otherwise be unrestrainedly loosed.²⁵¹ If liberal stories carry any dramatic power, it may be precisely because of their understatement, because of judicial aversion to self-conscious dramaturgy. To some extent, at least, it is the very absence of declamatory histrionics that makes such stories compelling, when recounted in their quiet, impersonal way by judicial opinions.²⁵² But, compelling to whom, one must ask? To liberal jurists alone?

The criminal law may present a dramatic persona of either majesty or sobriety. Uncertainty between the two, over how justice should project its public image, has long informed our assumptions about the proper rhetorical style of legal argument and opinion-writing. It has even informed debates about the law's proper architectural style. Hence the recurrent vacillation, in the design of courthouses, over "whether authority should be displayed with splendor"—to inspire awe and obedience, at risk of seeming insensitivity to the misery of the accused—"or dissimulated with a self-disciplined and severe austerity."²⁵³

On one hand, a cold, nondescript courtroom may not maximally summon up the law's potential majesty. So too, a highly self-restrained style of legal storytelling may make poor theatre.²⁵⁴ It

²⁵¹ A recent argument to this effect is offered by FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 288-89, 312 (1992). But see RICHARD E. FLATHMAN, *WILLFUL LIBERALISM: VOLUNTARISM AND INDIVIDUALITY IN POLITICAL THEORY AND PRACTICE* (1992) (arguing for a more spirited, creative ideal of liberal personhood); NANCY L. ROSENBLUM, *ANOTHER LIBERALISM: ROMANTICISM AND THE RECONSTRUCTION OF LIBERAL THOUGHT* (1987) (same).

²⁵² On the impersonal character of legal authority in modern western society, see MAX WEBER ON LAW IN ECONOMY AND SOCIETY 301-21 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967).

²⁵³ KATHERINE F. TAYLOR, *IN THE THEATER OF CRIMINAL JUSTICE: THE PALAIS DE JUSTICE IN SECOND EMPIRE PARIS* 94 (1993). Taylor observes how, according to the "splendor" school of 19th-century French architects, "the rich ambiance of the courtroom inspires the desire to fuse with the society that the courtroom represents, and so unites the diverse constituencies in the courtroom in social solidarity." *Id.* at 102. Taylor rightly notes the Durkheimian premises of this architectural strategy. See *id.* On representations of justice in sculpture and portraiture, see Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727, 1729-31 (1987).

²⁵⁴ See Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 766 (1995) (observing the rhetorically pallid character

may thus fail to evoke the retributive sentiments that Durkheim considered central to the solidarity-enhancing function of criminal law. On the other hand, an austere courthouse deprives the state of its theatrical advantage, its ritual power to define symbolically the proceedings within. Such a courtroom therefore more easily facilitates an equal exchange of views between the public's prosecutor and the accused. This is more compatible with the discursive ideal. The businesslike atmosphere of the modern courthouse is also more consistent with the unpretentious spirit of a commercial republic, whose members are held together largely in Durkheimian recognition of their economic interdependence and by a Rawlsian "overlapping consensus" concerning basic constitutional structure.²⁵⁵

Lacking the majesty of traditional rituals of state power, however, liberal-legal stories may become dull.²⁵⁶ Experience of prosecutions for administrative massacre suggests, in particular, that liberal-legal stories are likely to dwell on what many listeners regard as meaningless minutiae.²⁵⁷ Novelist Rebecca West, covering the first "historic" Nuremberg trial for *The New Yorker*, found it insufferably tedious.²⁵⁸ Her reaction was not uncommon. As one reporter notes,

of plaintiffs' pleadings even in civil rights suits alleging the most egregious—and potentially dramatic acts—of misconduct).

²⁵⁵ See Rawls, *supra* note 116.

²⁵⁶ A distinguished novelist highlights this possibility in his fictional account of the prosecution of a deposed communist dictator in an unidentified Balkan country. Three young adults are watching the televised trial. One wishes to leave. The following exchange ensues:

"No, I want to watch. We've got to."

"We've got to. It's our history."

"But it's BORING."

"History often is when it happens. Then it becomes interesting later."

"You're such a philosopher, Vera. And a tyrant."

BARNES, *supra* note 100, at 100.

²⁵⁷ Even prosecutor Taylor conceded, regarding the first Nuremberg trial: "As month after month passed . . . [the] press and public lost interest in the case as a 'spectacle.'" He immediately adds, significantly, that "the judicial foundations of the trial were strengthened by this very fact." Telford Taylor, *The Nuremberg War Crimes Trials*, INT'L CONCILIATION PAPERS, Apr. 1949, at 243, 262.

²⁵⁸ See Rebecca West, *Extraordinary Exile*, NEW YORKER, Sept. 7, 1946, at 34, 34; see also JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 203 (1994) ("The papers back home were no longer giving heavy daily play to a trial that, no matter how sensational the evidence, had already gone on for six weeks. Reporters had begun scrambling for fresh angles.").

It was the largest crime in history, and it promised the greatest courtroom spectacle. . . . [But] [w]ith their cheap suits and hungry faces, these undistinguished men did not look like the archcriminals of the age.

What ensued was an excruciatingly long and complex trial that failed to mesmerize a distracted world. Its mass of evidence created boredom, mixed occasionally with an abject horror before which ordinary justice seemed helpless Its finale, 10 messy hangings and a surreptitious suicide, was less than majestic. Its one legacy seemed to be the celebrity of Albert Speer . . . who escaped death with gestures of ambiguous atonement.²⁵⁹

In orchestrating such a trial there may be some trade-off between the goals of didactic spectacle and adherence to liberal principle, as I have suggested thus far. Yet one should not preclude the possibility that the trial may fail in both respects. Nuremberg (and, even more, the Tokyo trial) appear to have been both boring and illiberal at once, on many accounts. One is thus led to question whether it was really the principled commitment of such proceedings to liberalism that made them fail as social drama, any more than a principled commitment to dullness could have made them liberal. The dramaturgical decisions that made them dull do not seem to be ones that made the proceedings any more consistent with liberal legality. At the very least, no one has even begun to demonstrate such a connection. There is nothing necessarily illiberal for courts and prosecutors to give a little thought to props and décor, mise-en-scène and pacing of action, character development and narrative framing, stage and audience.²⁶⁰

Hannah Arendt's dismay at Eichmann's "banality" betrayed a disappointment that the defendant, in refusing "to play the villain," failed to provide the dramatic tension for which she had hoped. The prosecutor, in his preoccupation with painting a larger tableau, failed to keep his *dramatis personae* at center stage.

When a politically resonant ritual is called for, it seems that lawyers often make poor performers. One historian even argues that medieval Italy's reliance on lawyers for its historical records and "myths of origin," rather than on the superior narrative skills of clerics and chroniclers (common elsewhere in medieval Europe)

²⁵⁹ Ross, *supra* note 179, at 37.

²⁶⁰ See JOHN R. BROWN, *EFFECTIVE THEATRE: A STUDY WITH DOCUMENTATION* (1969); GEORGE MCCALMON & CHRISTIAN MOE, *CREATING HISTORICAL DRAMA: A GUIDE FOR THE COMMUNITY AND THE INTERESTED INDIVIDUAL* (1965).

seriously undermined the public legitimacy of its kings.²⁶¹ Social theorists from Weber to Foucault, moreover, contend that as Western law became ever more rational, formalized, and demystified, public trials and punishments increasingly lost their capacity to serve as spectacles, to "enchant" and captivate the public imagination by evoking deeply shared moods and sensibilities.²⁶²

Worse yet, prosecutors may labor under a particularly onerous burden, relative to defense counsel, in dramatizing their favored narrative, allowing their adversary more easily to capture the public eye and imagination. In the Barbie trial, for instance, prosecutors rightly believed that "an unpaid debt to the dead bound them to the truth."²⁶³ Barbie's defense counsel, "on the other hand was free. No debt tied him to the past; he was in a position to plant suspense in the very heart of the ceremony of remembering and to substitute the delicious thrill of the event"—especially the threat to reveal the pro-German complicity of currently prominent figures in French public life—"for the meticulous reassessment of the facts."²⁶⁴

The upshot was that the press and public, like Finkelkraut himself, quickly tired of the prosecution and plaintiffs, (the intervenors, Barbie's surviving victims), due to "the thirty-nine lawyers whose thirty-nine closing speeches talked the audience into a stupor" over a nine-day period.²⁶⁵ "Instead of making an impression, they made people yawn. Rather than satisfying the appetite for the new, they rehashed, ad nauseam, the same tired formulas."²⁶⁶ Even scholarly accounts of the Barbie trial by the most scrupulously liberal commentators have been more deeply drawn into the mental universe of defense counsel, Jacques Vergès, with "his promise of scandal, his steamy reputation, and his

²⁶¹ See Chris Wickham, *Lawyers' Time: History and Memory in Tenth- and Eleventh-Century Italy*, in *STUDIES IN MEDIEVAL HISTORY* 53, 70 (Henry Mayr-Harting & R.I. Moore eds., 1985).

²⁶² See FROM MAX WEBER: *ESSAYS IN SOCIOLOGY* 352-57 (H.H. Gerth & C. Wright Mills eds., trans., 1948) (observing the historical trend toward "disenchantment" of political authority and legal ritual); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 32-72 (Alan Sheridan trans., Vintage Books 1979) (1975) (describing how "the spectacle of the scaffold" was gradually displaced by a more diffuse system of "carceral" surveillance, whose rituals of social control were less dramatic).

²⁶³ FINKIELKRAUT, *supra* note 151, at 65.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 63.

²⁶⁶ *Id.* at 65.

consummate art of mystery," the qualities for which he came to be "adulated in the media."²⁶⁷

Hence, boredom as such is by no means the most serious problem here. The problem is that boredom tends to settle selectively upon the shoulders of those whose story is most truthful, most faithful to the past, and most vital to a legal cultivation of liberal memory. In Barnes's fictional (but entirely plausible, even compelling) treatment of such a trial,²⁶⁸ the former dictator gets all the best lines, successfully upstaging and embarrassing the public prosecutor at key points. In fact, the facility with which this diversion, this "hijacking," of narrative direction can be decisively accomplished—once traditional procedural and evidentiary rules are relaxed (to enable judicial rewriting of the period's official story)—is the organizing premise of the entire book.

Misfocusing on Minutiae

Judicial assessment of men like Eichmann and Argentine General Videla often seems to place questions at the center of legal analysis that, from any other standpoint, would surely be of marginal concern. Distortions in collective memory of administrative massacre would thus follow if courts were to train public attention upon such purely professional concerns.²⁶⁹ For instance, the Argentine prosecutors and judges felt professionally obligated to occupy themselves for a considerable time with establishing the juntas' liability for such offenses as forgery and property theft.²⁷⁰ This was surely a curious and digressive inclusion in a proceeding

²⁶⁷ *Id.* at 66. Despite his best efforts to elude ensnarement by Vergès's rhetorical stratagems, Finkelkraut—a philosophical journalist of liberal inspiration—clearly is no less entranced by Barbie's lawyer, on whom his book largely centers, than he is repulsed by him. Cf. Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1355-72 (1989) (lavishing enormous attention on Vergès's defense strategy and its postmodernist implications, and noting, at 1356, that "Vergès is known for his effective use of the media as a forum for his controversial clients' views").

²⁶⁸ See BARNES, *supra* note 100.

²⁶⁹ See Henry Rousso, *Ce que les historiens retiendront des vingt-trois journées du procès*, LIBÉRATION, Apr. 20, 1994, at 4-5 (observing that "[t]he Touvier trial was meant to be an important lesson in history, yet it sometimes got stuck in the quagmire of infinite details relative to the facts or to judicial definitions, making one lose sight of the general picture" (translation by author)).

²⁷⁰ See Interview with Judge Andrés D'Alessio, in Buenos Aires, Argentina (Aug. 1987).

whose drama was presumably to center upon a condemnation of the unrepentant slaughter of thousands.

In the Nuremberg trial, such misfocus arose because the London Charter had given jurisdiction to the International Military Tribunal not for all Nazi crimes against humanity, but only for those undertaken in preparation for, and in service of aggressive war.²⁷¹ This jurisdictional peculiarity required prosecutors to weave the Holocaust into a larger story that was primarily about perverted militarism. Justice Robert H. Jackson (United States Chief Prosecution Counsel) was thus compelled to deny that the extermination of European Jewry had been, for the defendants, a central end in itself. In so arguing, Jackson perpetrated what would be recognized a few years later as a severe historical distortion, bordering on an obscenity. To maintain his indictment within the Tribunal's restricted jurisdiction, Jackson was led to argue that

[t]he Jews . . . were used as exemplars of Nazi discipline; and their persecution eliminated an obstacle to aggressive war. His reasoning, of course, is question-begging—how can such annihilation be understood as a “measure in preparation for war”?—and historically suspect. Scholars of the Holocaust have amply demonstrated how ethnic genocide not only did not serve any military end, but effected the channeling away of critical resources from the war effort. Yet the very vulnerabilities of Jackson's argument highlights his attempts to translate Nazi crimes into an idiom familiar to the law, and to enlist the evidence of such atrocities into an argument about renegade militarism.²⁷²

Moreover, by indicting the Nuremberg defendants for the offense of “conspiracy” (to wage aggressive war), Allied prosecutors appeared to adopt a particular historical interpretation—a “conspiratorial view of history”—one that (by its particular implausibility) threatened to discredit the trial's potential contribution to collective memory.²⁷³ In their public statements, prosecutors labored to explain the meaning of conspiracy in legal doctrine and to distin-

²⁷¹ See BOSCH, *supra* note 164, at 119.

²⁷² Lawrence Douglas, *Film As Witness: Screening 'Nazi Concentration Camps' Before the Nuremberg Tribunal*, 105 YALE L.J. (forthcoming 1995) (manuscript at 60, on file with author).

²⁷³ SHKLAR, *supra* note 83, at 172. Summarizing the receptive reaction of American public opinion, Bosch notes that “[p]opular faith in Nuremberg, which at times espoused a ‘devil theory’ of history and which hoped that the Tribunal would be a ‘once-and-for-all’ antidote to the world's ills, revealed the American propensity for oversimplifying complex questions of foreign affairs.” BOSCH, *supra* note 164, at 233.

guish it as a term of art from the more conventional understanding prevalent among historians and the wider public.

Judging from contemporaneous accounts, such efforts at public explanation, however conscientious, were largely unsuccessful.²⁷⁴ These efforts also cast the profession in the unappealing position of appearing to lecture others about the "true" meaning of a concept that most listeners were quite convinced they already understood. This discrepancy between lay and legal understandings of conspiracy worked to discredit the conspiracy indictment and conviction of the Tokyo defendants even more than those at Nuremberg.²⁷⁵ Much of the conduct of the Japanese simply could not be clearly characterized in laymen's terms as a "conspiracy to wage aggressive war," considering the complex regional rivalries and balance of power politics (involving several major powers) preceding the war in the Pacific.²⁷⁶ For many laymen, the idea of conspiracy inevitably evoked the vision of a small cabal, scheming together in a single room, plotting out in meticulous detail everything that would later transpire.²⁷⁷

But of course, "[h]istory reveals on its every page the importance of contingencies—accidents, coincidences or other unforeseeable developments," as Gallie observes.²⁷⁸ The legal concept of conspiracy, in its exceptional "looseness and pliability,"²⁷⁹ fully

²⁷⁴ See BOSCH, *supra* note 164, at 113.

²⁷⁵ For one version of these definitional disparities, see MINEAR, *supra* note 182, at 128-33 (asserting that the Tokyo defendants' activities amounted to a legal conspiracy but not a historical, common-sense conspiracy). On objections to the Tokyo conspiracy indictment by defense counsel and the dissenting Justices, see PICCIGALLO, *supra* note 88, at 22-23, 29-31.

²⁷⁶ Conservative Japanese intellectuals have consistently argued, for instance, that Japan was forced to fight the United States and Britain after they imposed a blockade on oil imports. For recent arguments to this effect by Japanese legal scholars, see C. Hosoya et al., *Preface to THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM* 7, 8-9 (C. Hosoya et al. eds., 1986); Kojima Noburu, *Contributions to Peace, in THE TOKYO WAR CRIMES TRIAL, supra*, at 69, 76-78. See also PAUL W. SCHROEDER, *THE AXIS ALLIANCE AND JAPANESE-AMERICAN RELATIONS: 1941*, at 124, 221-28 (1958) (suggesting that Japan had several legitimate reasons for entering the Axis Alliance, including a need to end its diplomatic isolation and a desire to prevent the war in Europe from consuming the Pacific). Justice B.V.A. Röling, in dissent, even found such arguments *legally* compelling. See B.V.A. RÖLING, *THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER* 85-86 (Antonio Cassese ed., 1993).

²⁷⁷ On the receptivity of extremist political movements to conspiracy theories of this sort, see RICHARD HOFSTADTER, *The Paranoid Style in American Politics, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3, 4-6, 35-39 (1965).

²⁷⁸ GALLIE, *supra* note 206, at 133.

²⁷⁹ GEORGE E. DIX & M. MICHAEL SHARLOT, *CRIMINAL LAW: CASES AND*

acknowledges this fact, conceptually accommodating the need to disaggregate a lengthy period of activity by many contributors into a series of interlocking conspiracies, some of which may be characterized as a "chain," others as a "wheel." Far from a rare and improbable scenario in human affairs, the legal concept of conspiracy is frequently overinclusive, and consequently unfair to defendants, as judges and legal scholars have long acknowledged.²⁸⁰

Trials of administrative massacre have introduced still other distortions into historical understanding and, thereby, into collective memory. Early historiography of the Holocaust was based largely on the record assembled by Allied prosecutors. The prosecutors did not conceal their aspiration to do just that. Executive trial counsel at Nuremberg, Robert G. Storey, spoke openly of this purpose: "the making of a record of the Hitler regime which would withstand the test of history."²⁸¹ Wooed by the lawyers in this way, it is scarcely surprising that the first generation of postwar historians proved inattentive to the idiosyncratic nature of the law's concerns.²⁸² What came to be known among historians as "the Nuremberg view" or as "perpetrator history," for instance, focused almost exclusively on the intentions and ideologies of top leaders, an emphasis understandably reflected in the record of the legal proceedings against them.²⁸³

The prosecution's preoccupation with the intentional acts of top figures followed naturally from its desire to convict such figures of

MATERIALS 582 (1987).

²⁸⁰ See, e.g., *Krulewitch v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring) (characterizing conspiracy as an "elastic, sprawling and pervasive offense" that is typically employed when there is insufficient evidence to prosecute for the substantive offense); Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137, 1141-46 (1973) (arguing that criminal defendants may be unjustly punished when the conspiracy doctrine is used to expand the scope of the criminal law).

²⁸¹ ARENDT, *supra* note 18, at 253.

²⁸² Christopher Browning notes, for instance, that for early postwar historiography, "[t]he evidentiary base was above all the German documents captured at the end of the war, which served . . . the prosecutors at postwar trials. The initial representation of the Holocaust perpetrators was that of criminal minds, infected with racism and antisemitism, carrying out criminal policies through criminal organizations." Christopher R. Browning, *German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION"* 22, 26 (Saul Friedlander ed., 1992). Browning also observes how the enduring possibility of criminal indictment influenced the stories told by members of Police Battalion 101 concerning their participation in one large-scale slaughter of Jews. See *id.* at 29.

²⁸³ *Id.* at 26.

particular criminal offenses. But it was neither natural nor inevitable that historians of the period should have concentrated their attention to similar effect. Historians followed the lawyers' lead in this regard not only because the lawyers' documents were those most readily available, but at least partly because the then-prevalent conception of "the historian as neutral judge"²⁸⁴ established a natural affinity between how courts and historians understood their respective callings.

Only years later did historians come to realize how the evidentiary focus of the criminal proceedings had unwittingly skewed their analysis in favor of what came to be known as the "intentionalist" interpretation of the period.²⁸⁵ This focus subtly drew attention away from institutional dynamics and the "machinery of destruction," particularly the crucial role of minor bureaucrats and functionaries at all levels of German society.²⁸⁶ This problem

²⁸⁴ PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 596 (1988). On this view, "[t]he historian's conclusions are expected to display the standard judicial qualities of balance and evenhandedness. As with the judiciary, these qualities are guarded by the insulation of the historical profession from social pressure or political influence, and by the individual historian avoiding partisanship" *Id.* at 2.

²⁸⁵ Historical debates came to be "fought less by means of scholarly than legalistic arguments," one historian recently complained. "The highly emotionalized debate about . . . whether a formal order by Hitler for the policy of genocide was necessary illuminates this tendency" Hans Mommsen, *Search for the "Lost History"? Observations on the Historical Self-Evidence of the Federal Republic, in FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 101, 108. This was not the first time that the history of large-scale administrative massacre had been written under the heavy influence of legal claims against its perpetrators. See Roberto González-Echevarría, *The Law of the Letter: Garcilaso's Commentaries and the Origins of the Latin American Narrative*, 1 *YALE J. CRITICISM* 107, 108-15 (1987) (observing that several early histories of the Spanish conquest of America were written in the form of legal arguments). Uncritical reliance by historians on legal testimony is not confined to historiography concerning administrative massacre. See ROBERT F. BERKHOFFER, JR., *BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE* 151 (1995) (criticizing two influential recent books for "purport[ing] to reproduce the popular culture of the common people" from the legal records of the Inquisition, ignoring the likely effect of "the Inquisitorial power structure that produced and preserved the words in the first place" and to whose interrogators the recovered testimony was calculated to appeal).

²⁸⁶ Browning, *supra* note 282, at 26-27; see also DAVID BANKIER, *THE GERMANS AND THE FINAL SOLUTION: PUBLIC OPINION UNDER NAZISM* 89-100 (1992); CHRISTOPHER BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* at xvii (1992) (describing the battalion as composed of grass-roots civilians who became "professional killers"). The Tokyo trial similarly skewed historical understanding in Japan of the country's wartime wrongdoing in the direction of "the individualist theory of history," according to scholars, leading to the neglect of institutional and structural sources requiring more fundamental reform.

would have been aggravated if judges deliberately tried to make their stories compelling as monumental didactics, as national narrative. After all, "successful narratives often foreground individual protagonists and antagonists rather than structures, trends, or social forces," Schudson notes.²⁸⁷ Yet since individual leaders come and go, it is precisely such structures and forces—their analysis and critique—that should occupy the center stage of public deliberation in the aftermath of large-scale administrative massacre.

As in Germany, the extent of public collaboration with Nazi policies has been discovered in France. These discoveries have compelled a similar reassessment of the initial focus of postwar French criminal courts on a few top elites. Despite early outbursts of mass vigilantism, criminal prosecutions in the years immediately following the War were limited to the most high-ranking Vichy officials and intellectual defenders of Nazi collaboration.²⁸⁸ The decision to confine the scope of legal retribution in this way reflected the Gaullist story that the French nation had been substantially united in opposition to German suzerainty.²⁸⁹

A leading French historian proudly proclaims that sophisticated scholars in his country have, in this century, almost entirely abandoned the antiquated notion of writing history in the pedagogic or "epideictic" mode—a history merely concerned with ascribing praise or blame, rather than tracking long-term social and institutional change.²⁹⁰ Perhaps it is no coincidence, then, that it took the work of non-French historians, published decades after the War, to disprove the Gaullist myth of a nation united in Resistance, to demonstrate the pervasiveness of collaboration at many levels of French society.²⁹¹ It required two decades of litigation to compel

See Steven T. Benfell, *The Construction and Change of Japanese National Identity* (Sept. 2, 1995) (paper presented at the American Political Science Association Conference in Chicago) (on file with author).

²⁸⁷ Schudson, *supra* note 235, at 20.

²⁸⁸ See HERBERT R. LOTTMAN, *THE PURGE* 132-68 (1986); see also DIANE RUBENSTEIN, *WHAT'S LEFT?: THE ECOLE NORMALE SUPÉRIEURE AND THE RIGHT* 137-63 (1990) (describing the trials of collaborationist journalists and intellectuals).

²⁸⁹ In his August 25, 1944 speech to liberated Paris, De Gaulle proclaimed that the city had been "freed by itself, by its own people with the cooperation and support of the whole of France . . . of the eternal France." R.J.B. BOSWORTH, *EXPLAINING AUSCHWITZ AND HIROSHIMA: HISTORY WRITING AND THE SECOND WORLD WAR, 1945-1990*, at 112 (1993); see also *id.* at 112-13 (describing "the Gaullist line of the naturally united French, apart from a few criminals, resisting to a man and a woman").

²⁹⁰ See Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 *REPRESENTATIONS* 7, 11-12 (1989).

²⁹¹ Browning thus notes, for instance, that "[t]he initial representation of the

correction of French schoolbooks, so that they would describe the roundup of Jews for deportation as an entirely French, not German, operation.²⁹²

Master Narrative by Legal Decree?

The immediate upshot of such historiography, however, was to discredit the story that early postwar French courts had sought to tell at De Gaulle's urging: that a handful of collaborationists—Laval, Pétain, and a few intellectual journalists—had sold out the good and noble nation. The recently renewed efforts at prosecution of French war criminals, although still focused on a handful of high-ranking collaborationists, has been inspired, in part, by these historical revelations and the pall they cast on early efforts to protect such individuals from public scrutiny.²⁹³ Such prosecutions have also relied increasingly on historical scholarship and the expert testimony of professional historians, reversing the earlier pattern of reliance.²⁹⁴ In short, the judicial preoccupation with

Holocaust perpetrators was that of criminal minds, infected with racism and anti-Semitism, carrying out criminal policies through criminal organizations." Browning, *supra* note 282, at 26. For more recent examinations of pervasive collaboration, see FURET, *supra* note 97, at 219-20; BERTRAM M. GORDON, *COLLABORATIONISM IN FRANCE DURING THE SECOND WORLD WAR* (1980); JOHN F. SWEETS, *CHOICES IN VICHY FRANCE: THE FRENCH UNDER NAZI OCCUPATION* (1986). See generally MICHAEL R. MARRUS & ROBERT O. PAXTON, *VICHY FRANCE AND THE JEWS* (1981) (describing how the French Vichy government "energetically persecuted Jews" with policies that were "usually supported by French public opinion"); ZEEV STERNHELL, *NEITHER RIGHT NOR LEFT: FASCIST IDEOLOGY IN FRANCE* (David Maisel trans., 1986) (describing the penetration of France by fascist ideas); MARCEL OPHÜLS, *THE SORROW AND THE PITY* (Mireille Johnston trans., 1972) (discussing life in a French city under Nazi occupation). Such collaboration has only recently received official recognition. See Marlise Simons, *Chirac Affirms France's Guilt in Fate of Jews*, N.Y. TIMES, July 17, 1995, at A1 (quoting French President Jacques Chirac officially affirming, for the first time, that "the criminal folly of the occupiers was seconded by the French, by the French state"). Paxton and Gordon are American, Marrus is Canadian, Sternhell is Israeli, and Ophüls is a German Jew. As a legal matter, surviving family members of those whose property had been seized before their "deportation" may be able to sue the French state for compensation. The present value of that property is likely to prove enormous. See *id.* at A3.

²⁹² See MILLER, *supra* note 64, at 145 ("The textbooks are now impeccable," reports Serge Klarsfeld, who spearheaded the litigation, "[b]ut it was one hell of a battle.").

²⁹³ On the success of conservative French bishops at harboring Paul Touvier for over forty years in a series of monasteries while the French state publicly sought his apprehension and prosecution, see RENÉ RÉMOND ET AL., *TOUVIER ET L'ÉGLISE* (1992); Ted Morgan, *The Hidden Henchman*, N.Y. TIMES, May 22, 1994, § 6 (Magazine), at 31.

²⁹⁴ See Tony Judt, *The Past Is Another Country: Myth and Memory in Postwar Europe*,

identifying and punishing a small subset of culpable elites told a story that first led historians astray for many years and then enabled them, upon finding a more fitting focus, to discredit persuasively the courts' accounts as national narrative.

In focusing on the acts and intentions of these very top elites, the courts not only missed the macropicture: the story of mass collaboration and institutional support for administrative brutality. They also missed the micropicture: the story of the victims—the human experience of uncomprehending suffering that official brutality produced. It is that experience which many historians now seek to recapture and to place at the center of any narrative about the period.²⁹⁵ At Nuremberg there was little testimony by surviving victims of the concentration camps and entirely nothing about their felt experience of life there or its emotional aftermath.

It is this confessedly subjective experience—irrelevant to criminal law, if not to civil claims—that oral historians have only recently sought to explore. In this respect, scholars have perceived a need to overcome what they perceive as a 'legal' concern with the factual accuracy of personal testimony in order to apprehend its historical significance. That is, these scholars try to grasp the meaning of the period's most traumatic events through the continuing memory of those who lived through its trauma. One such scholar writes:

Testimonies are often labelled as 'subjective' or 'biased' in the legal proceedings concerning war crimes. The lawyers of war criminals have asked the most impertinent questions of people trying to find words for a shattered memory that did not fit into any language . . . to describe those days and months in which the only chance of survival was to forget that there had ever been a world of goodness, warmth, and beauty. . . . The fault is not theirs, but lies with a certain method of argument on the part of the lawyers They demand precise statements of facts, and in this way deny that in the concrete process of remembering, facts are enmeshed within the stories of a lifetime. . . . A lawyer's case is after all merely another kind of story

. . . It is not the task of oral historians to give the kind of evidence required in a court of law. . . . [Some historians attempt

DAEDALUS, Fall 1992, at 83, 98 (noting that early postwar myths of massive resistance to Nazism unravelled on account of "the work of professional scholars working in relative obscurity, their conclusions and evidence surfacing into the public realm only when a particularly egregious case . . . caught the headlines").

²⁹⁵ See LAWRENCE L. LANGER, *HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY* (1991) (summarizing testimonies of Holocaust survivors).

to uncover] the way in which suffering is remembered and influences all other memory. . . . [O]ne is dealing with an effort to create a new kind of history that cannot be used as legal evidence since it explicitly records subjective experience.²⁹⁶

Such historians adopt what can fairly be described as a reverential attitude toward the personal "testimony" of their informants, particularly when testifying about the extreme trauma that modern history has inflicted upon them. This attitude of sanctity is deeply at odds with the skeptical, scrutinizing posture of any competent cross-examiner, such as defense counsel at the trials we are considering. Not surprisingly, at the Argentine junta trial, witness-survivors found themselves facing questions concerning, for instance, their membership in guerrilla groups, questions identical to those their abductors had asked them under torture. The witnesses, of course, found such questions deeply offensive; the experience of public testimony was thus personally degrading, rather than empowering.²⁹⁷ But their experiences here may simply reveal an inherent limitation of criminal proceedings (that is, those consistent with liberal ideals of due process) as a vehicle for fostering reverential public attitudes toward such victims and their stories and for endowing their narratives with authoritative public meaning. A similar problem arose in the case against John Demjanjuk. As historian Peter Novick observes:

Much of the outrage which greeted the Israeli Supreme Court's overturning the verdict . . . was a result of the Court having based its decision on its plausible view that, while there was no question of subjective bad faith [by Demjanjuk's victim-accusers], fifty-year-old memories, however "sacred," were fallible. The decision was thus, literally, "sacrilege."²⁹⁸

In sum, contemporary historians, whether focused on impersonal structures of complicity or intimate survivors' sensibilities, have found that the legal record of Nuremberg and other such trials, gathered with a view to criminal prosecution, is not particularly useful for current purposes of description or explanation.

²⁹⁶ Selma Leydesdorff, *A Shattered Silence: The Life Stories of Survivors of the Jewish Proletariat of Amsterdam*, in *MEMORY AND TOTALITARIANISM* 145, 147-48 (Luisa Passerini ed., 1992).

²⁹⁷ See Interview with Renee Epelbaum, President of *Madres de la Plaza de Mayo, Linea Fundadora*, in Buenos Aires, Argentina (July 1987).

²⁹⁸ Peter Novick, *Pseudo-Memory and Dubious "Lessons": The Holocaust in American Culture* 2 (Apr. 1995) (paper presented at the Project for Rhetoric of Inquiry Symposium, University of Iowa) (on file with author).

Lawyers and even legal scholars, examining these proceedings many years later, have been largely deaf to such shifts in historical sensibilities, lamenting only that Nuremberg has not been taken more seriously as binding legal precedent.²⁹⁹ As legal advocates we are intimately familiar with how to use the historical record to support a particular interpretation of the law. But we are almost entirely blind to how our legal interpretations, and the records they create in a given dispute, may favor—subtly but decisively—one of the competing historical interpretations of a period.

Lawyers are not the only professionals creating problems for historical interpretation and public understanding of such events. Just as the law, with its special preoccupations, can easily lead historians astray for long periods, so too can it derail journalists, who infuse misunderstandings directly into collective memory. When political leaders are acquitted in a criminal proceeding, they choose (unsurprisingly) to interpret this legal result as a complete vindication of their story. Their claims to this effect, in turn, are widely disseminated throughout society by the mass media.

But the failure of a jury to find guilt “beyond a reasonable doubt” is, in fact, well short of vindication of the defendant’s story.³⁰⁰ Insofar as legal standards governing the burden of proof in criminal proceedings have uncritically infiltrated public deliberation about unrelated matters, the quality of such deliberation is degraded. This posed a threat to any effort at reading historical lessons from the Touvier trial, for instance: “if France was ‘in the dock’ along with Touvier, France could also be acquitted along with Touvier, a distinct if disquieting possibility given the fragile legal construct on which his prosecution rested.”³⁰¹

The collective memory of administrative massacres in several famous cases has been distorted because the frequent acquittal of some defendants is mistakenly read as an authoritative endorsement of the stories the defendants had offered to the court.³⁰² Even

²⁹⁹ See Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833 (1990).

³⁰⁰ See Frederick Schauer, *Slightly Guilty*, 1993 U. CHI. LEGAL F. 83, 83.

³⁰¹ Wexler, *supra* note 27, at 217; see also Jennifer Merchant, *History, Memory, and Justice: The Touvier Trial in France*, 23 J. CRIM. JUST. 425 (1995).

³⁰² For a particularly egregious example of this mistake, see KATE MILLETT, *THE POLITICS OF CRUELTY: AN ESSAY ON THE LITERATURE OF POLITICAL IMPRISONMENT* 230 (1994) (contending that since some of the junta defendants were acquitted of certain offenses, “the results of the Argentinean trial are deplorable, virtually an exoneration of the military and all its brutality, . . . an outcome . . . very reassuring not only for the Argentinean military but for all other military regimes in the

where the prosecution prevails entirely at final judgment, some contend that press reports may seem to favor the defense by inevitably focusing on its scoring of small points, however insignificant to central issues.³⁰³ Misreading acquittals as historical vindication is one of a larger set of obstacles to the law's effective influencing of collective memory: because few citizens can be expected to read the judicial opinion (or to follow closely the proceedings that produce it), much of any story that the courts recount about an episode of administrative massacre must be filtered through the mass media. The media, however, have a short list of narrative genres—each with conventions of its own—that simplify and stereotype the story of liberal legality in ways largely uncondusive to public deliberation and discursive democracy.³⁰⁴

The trial of the Argentine juntas offers another telling example of how the law often focuses on issues ancillary to the larger claims of history and collective memory. In prosecuting the juntas, the courts lavished enormous time and attention on the question of which doctrine of "indirect authorship," among the several authorized by current law, ought best be invoked to link the acts of the subordinates to the intentions of the superiors.³⁰⁵ This

region"). It would be difficult to write a sentence about the trial that is more mistaken in both its general point and all of its details. Still, a distinguished sociologist manages to do so, observing—in a chapter-length analysis of the dirty war and its aftermath—that "in Argentina, as elsewhere in Latin America, the military, when it gave up power, managed to protect itself from retribution." DANIEL CHIROT, *MODERN TYRANTS: THE POWER AND PREVALENCE OF EVIL IN OUR AGE* 286 (1994). Chirot makes no mention of the trials of the junta members or other officers, the indictment of hundreds more, the successful civil suits, or the purging of many top generals and admirals.

³⁰³ See Robert A. Kahn, *Holocaust Denial Litigation in Canada* 19-21 (July 3, 1995) (paper presented at the Law and Society Association Conference) (on file with author). Kahn studied the Canadian trial of Ernst Zundel for "Holocaust Denial" and its treatment by the Canadian press. He concludes: "Even as the revisionists are proven wrong on point after point, an air of revisionism lingers in the courtroom and media." *Id.* at 29. The trial thus "reinforced the idea that a legitimate debate [is] under way" between Holocaust deniers and their accusers. *Id.* at 22.

³⁰⁴ For sociological studies of this process, see HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK, AND TIME* (1979); GAYE TUCHMAN, *MAKING NEWS: A STUDY IN THE CONSTRUCTION OF REALITY* (1978). On how the news media distort the representation of criminal trials, see PHILIP SCHLESINGER & HOWARD TUMBER, *REPORTING CRIME: THE MEDIA POLITICS OF CRIMINAL JUSTICE* 207-47 (1994); BARBIE ZELIZER, "COVERING THE BODY": THE KENNEDY ASSASSINATION, THE MEDIA, AND THE SHAPING OF COLLECTIVE MEMORY 49-98 (1992); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 785 (1993).

³⁰⁵ See *Argentina: National Appeals Court (Criminal Division) Judgment on Human*

question proves quite fascinating for legal theorists, and it consequently preoccupied Alfonsín's advisor-philosophers for a considerable time.³⁰⁶

The question was irrelevant, however, in the larger public debate, since no one seriously questioned that the subordinates' wrongful acts had been authorized by their superiors. Public advocates for the disappeared, as well as for military officers, may have agreed on very little. But they agreed that this central question, preoccupying the courts, was entirely superfluous to a historical assessment of the period, and hence to its place within national memory. Given such disparities between the claims of law and memory, it did not strike many Argentines as particularly strange that one of the junta defendants would even announce to the court that he was prepared to accept "the judgment of history" (that is, of disinterested historians, presumably), but not that of the tribunal.³⁰⁷

No less than the right, those on the left, including most of Argentina's historians and social scientists, found the legal narrative of the junta trial largely unpersuasive as the basis for memory of the period. Particularly offensive was the insistence of the Alfonsín government and the prosecutors on viewing the dirty war not in terms of social struggle and its suppression, but as the deprivation of individual rights, an insistence rightly seen as based upon the law's liberal premises. For Argentine leftists, who view liberal law as an illegitimate expression of class power, the problem with the government's approach to memory construction

arises from the idea or the experience of political violence as the chaotic and intractable opposite of law. . . . [This] opposition of the order of law and the chaos of violence . . . led to the omission of collective motivation not only of victimizers (national security doctrine as political program) but of victims as well, who were

Rights Violations By Former Military Leaders (Excerpts), 26 INT'L LEGAL MATERIALS 317, 327 (1987) [hereinafter *Judgment on Human Rights*].

³⁰⁶ Malamud-Goti has since conceded that this emphasis was misplaced. See Interview with Jaime Malamud-Goti, in Buenos Aires, Argentina (Aug. 1987).

³⁰⁷ *Galtieri Espera el Juicio de Dios y de la Historia*, EL DIARIO DEL JUICIO (Buenos Aires), Sept. 30, 1985 (translation by author) (quoting Gen. Leopoldo Galtieri). General Roberto Viola similarly proclaimed during the trial that "the judgment of history will be highly unfavorable towards the prosecutor's conduct." EL DIARIO DEL JUICIO (Buenos Aires), Oct. 22, 1985 (translation by author). Admiral Emilio Massera also expressed a willingness to be judged only by history. Emilio Massera, Speech Delivered at the Chamber of Public Relations, Plaza Hotel, Buenos Aires, Argentina (Apr. 1978).

defended as individuals whose human rights had been violated rather than as political activists (a concept that even the prosecution refused to contemplate).³⁰⁸

The result of the government's approach was that "[t]he collective nature of the experience, of agency, and of guilt together have remained obscured and forgotten, . . . incomprehensible and inutterable."³⁰⁹ In short, "[b]ecause they saw the crimes . . . as resulting from the suspension of [the] legal system, [they] were adamant that their investigations should be understood within a context of legal concepts and language."³¹⁰ The effect was harmful, even perverse: The legal language used to protest terror in these documents is itself exclusionary: it "collude[s] with the deeds they 'expose.'"³¹¹ In fact, "[t]he goals of the Repression . . . found its echo in the law."³¹²

For those who shared this view, including many leaders of human rights groups, the dirty war was defined by social forces of class oppression—international capitalism and its domestic, military representatives—battling forces of mass resistance, the guerrillas and their sympathizers.³¹³ Both the defendants and the victims were

³⁰⁸ Julie Taylor, *Body Memories: Aide-Memoires and Collective Amnesia in the Wake of the Argentine Terror*, in BODY POLITICS: DISEASE, DESIRE, AND THE FAMILY 192, 198 (Michael Ryan & Avery Gordon eds., 1994). Taylor's remarks here mirror criticisms offered by the military defendants themselves and the defense counsel, who similarly accused the court of ignoring left-wing political activities and sympathies of many of the disappeared. For a critique (similar to Taylor's) of Italy's courts, in their treatment of prosecutions of the Red Brigades, see Alessandro Portelli, *Oral Testimony, the Law, and the Making of History: The 'April 7' Murder Trial*, HIST. WORKSHOP J., Autumn 1985, at 5, 9-11, 15, 31 (1986) (criticizing judicial narratives, in applying legal concepts of conspiracy, for denigrating and denying mass support for the Red Brigades among students and workers as a genuine social movement).

³⁰⁹ Taylor, *supra* note 308, at 202. Taylor's argument here will be familiar to American readers. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 203-19 (1974) (observing drawbacks of conceiving organized struggles for social change in terms of individuals' rights).

³¹⁰ *Id.* at 193.

³¹¹ *Id.* at 196.

³¹² *Id.* at 197.

³¹³ See BRYSK, *supra* note 16, at 139 (observing that the Madres have "adopted an analysis of human rights that posits a direct relationship between capitalism, imperialism, and repression, and a stance of implacable opposition to the Radical government" of Alfonsín). Class analysis of the dirty war is equally common in the social science literature. See GUILLERMO O'DONNELL, ¿Y A MÍ, QUE ME IMPORTA?: NOTAS SOBRE SOCIABILIDAD Y POLÍTICA EN ARGENTINA Y BRASIL 20-24 (1984); David Pion-Berlin, *THE IDEOLOGY OF STATE TERROR: ECONOMIC DOCTRINE AND POLITICAL REPRESSION IN ARGENTINA AND PERU* 104 (1989); WILLIAM C. SMITH, *AUTHORITARIANISM AND THE CRISIS OF THE ARGENTINE POLITICAL ECONOMY* 249 (1991).

agents of objective historical forces, not mere bearers (or deniers) of individual civil rights. The national narrative had to be told in these aggregate terms. One need not accept Taylor's leftist views here to accept her critique of lawyerly hubris. For many such leftists, the junta trial would have been more persuasive *as law* if the government had not also sought to portray it as the new "official story"—as collective memory by legal mandate.³¹⁴ By trying to use the trials to shape collective memory, rather than solely to find the legal truth and justice, their value—limited, but important—was undermined.

It was the aspiration to combine matters of legal and historical judgment—to settle them at once, and by the state, that weakened the trial's ultimate persuasiveness as either. For the many Argentines of leftist sympathies who, no less than Alfonsín, favored severe punishment of many military defendants, the junta trial would have been more compelling had it been staged and publicly defended in a way that kept its ambitions within more modest bounds. It would also have been more compelling had liberal law not sought to do what, for the left, it could not do (that is, offer persuasive social analysis).

In Praise of Law's 'Superficiality'

The utility of legal rules, particularly in a society deeply divided over conceptions of justice, is precisely that they often allow agreement about how to handle a matter (such as punishing Argentine officers) without requiring agreement on the reasons for doing so.³¹⁵ The criminal law's very "superficiality" in social-historical analysis of administrative massacre is thus its cardinal virtue. To employ it primarily to shape collective historical memory, then, is to risk depriving ourselves of its more modest, traditional contribution by discrediting it altogether. Those for whom the liberal state, newly reestablished, inspired only the most precarious support—which in Argentina meant both the left and right—were willing to accord it qualified legitimacy for the essential

³¹⁴ The government itself, in an official report documenting the disappearances, found that the National Commission on the Disappeared's "first steps within the framework of the precise powers laid down for it by the Decree, stimulated immediate public response in an incredible process of reconstructing public memory." NUNCA MÁS, *supra* note 16, at 429.

³¹⁵ See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995).

tasks of ensuring social order and public provision, but not for the writing of a liberal "official story" that they could not endorse.

A similar concern with misfocusing of historical attention arose in the French prosecutions of Klaus Barbie and Paul Touvier, for different doctrinal reasons. Because the statute of limitations had expired for all their offenses except crimes against humanity, both trials focused almost exclusively on their misconduct toward Jews.³¹⁶ But scholars of the period concurred that this had not been Barbie's or Touvier's principal concern or responsibility. As Rousso notes, the court's exclusive attention to offenses that were still chargeable against Barbie and Touvier led to neglecting the fact that the primary role of the Milice was the battle against the Resistance:

Memories, which now enjoyed the symbolic support of the law, began to crystallize Judges found themselves forced to write history and pronounce historical judgment in the historian's place. In this role they were profoundly uncomfortable, as a glance at the records of the Fauvignon, Touvier, and Barbie cases makes clear. The courts in many cases were forced to rely on shaky interpretations of events, and thus the trials unintentionally exacerbated the existing tension between memory, history, and truth.³¹⁷

Touvier's defense counsel, Jacques Tremolet de Villers, hoped that the tension between collective memory and the search for legal truth might work to his client's advantage. Indeed, it had the desired effect in public debate of pitting spokesmen for the Resistance, irritated by the trial's curious "misfocus," against members of the Jewish community.³¹⁸ Touvier's attorney then sought to discredit the legal proceedings in the public mind by highlighting this genuine discrepancy between the law's concerns and history's claims, claims for which most laymen had greater sympathy. That is, the discrepancy between the law's need for an

³¹⁶ See Leila S. Wexler, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 323-25, 331-33 (1994).

³¹⁷ ROUSSO, *supra* note 26, at 160-61; see also John Dixon, *Manipulators of Vichy Propaganda: A Case Study in Personality*, in VICHY FRANCE AND THE RESISTANCE: CULTURE & IDEOLOGY 41-61 (Roderick Kedward & Roger Austin eds., 1985); Wexler, *supra* note 316, at 349. On the role of the Milice, see JOHN F. SWEETS, *THE POLITICS OF RESISTANCE IN FRANCE, 1940-1944: A HISTORY OF THE MOUVEMENTS UNIS DE LA RÉSISTANCE* 27 (1976).

³¹⁸ Alain Finkielkraut characterizes the view of many Frenchmen during the Barbie trial in the following terms: "Why do the Jews want to monopolize the status of victim? people say. This is their new greed, they say." MILLER, *supra* note 64, at 117.

offense with which the defendant could still be charged, on one hand, and history's concern with the relative importance or "centrality" of particular motives and events to the period in question, on the other, became a patent weapon of Touvier's attorney to discredit the trial tool.

Again, the issue of "centrality" would remain entirely irrelevant to the law were the law not universally seen in such cases as necessarily engaged in writing history. The recent French trials hence struck many Frenchmen as peculiar in their "overemphasis" upon the Jews, just as the Nuremberg trial has since struck many historians as equally peculiar in its tendency to minimize the predominantly Jewish origins of most of the defendants' victims.³¹⁹

Collective memory in France had come, by this point, to center on Resistance heroism. A legal proceeding that seemed to minimize the importance of that movement, and its repression by pro-German collaborators, was highly unlikely to find a sympathetic national audience. Here, the collective memory of national resistance—exaggerated by nationalist hubris to be sure—was shrewdly invoked and opportunistically deployed to weaken public receptivity to prosecution. The public spotlight was thereby deflected from the inherent wrongfulness of Barbie's acts.³²⁰ The French court was only able to stir up a hermeneutic hornet's nest, not to shape decisively a shared interpretation of these acts. The tribunal was then constrained to "adopt" the least persuasive reading of the acts' historical significance (that is, Barbie against the Jews), thus undermining its authority as national storyteller.

If there is a lesson here, it is surely that when collective memory has already become comfortably entrenched, the law's efforts to excavate and scrutinize it are only likely to discredit the law and its professional spokesmen. In the Barbie case, a direct and insurmountable conflict arose between the requirements of historical truth and those of social solidarity; the law was forced to choose

³¹⁹ See, e.g., MICHAEL R. MARRUS, *THE HOLOCAUST IN HISTORY* 4 (1987) (observing that, in contrast to the Eichmann trial, crimes against the Jews "never assumed a prominent place" at Nuremberg); LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT* (forthcoming 1996) (manuscript on file with author) (noting "the failure of the Nuremberg trial [to] adequately . . . address Nazi genocide [of the Jews]").

³²⁰ Barbie was convicted for his role in the deportation of French Jews. See Judgment of December 20, 1985, Cass. crim., 1986 J.C.P. II G, No. 20,655, 113 J. DU DROIT INT'L 127, 127 (1986). But Barbie was publicly known and reproached primarily for his role in the death of Resistance hero Jean Moulin. See Alice Y. Kaplan, *Introduction* to FINKIELKRAUT, *supra* note 151, at ix, xv-xvi.

between the two. Gaullists had deliberately constructed postwar solidarity in France on the basis of a self-flattering myth of united resistance that the courts, informed by the best recent historiography, could not fail—in compliance with their professional duties and the liberal moral principles these entailed—to attack and discredit.

The defense could draw upon such historiography no less than the judges and prosecution. Although Robert Paxton served as a prosecution witness in the Barbie trial, his scholarship, which revealed the pervasiveness of collaborationism,³²¹ offered at least equal support for the defense in its effort to portray the defendant's wrongs as enabled by the support of many other now-influential Frenchmen.

The law's difficulty in "getting its history right" is further complicated by the fact that historians themselves are certain to disagree about the relative centrality and significance of particular individuals and events in the larger tableau of administrative massacre. "Such irresolution, which no amount of factual information can resolve, allows for a proliferation of possible narrations of this past," as Friedlander notes regarding the Holocaust.³²² Just as the law's requirements necessarily focused on certain aspects of German and French wartime history over others, so too the more recent demands within Germany for the restoration of national identity have tended to displace the acts of Eichmann and judgments against the Nuremberg defendants from historical centrality. In both cases, the perceived needs of the present came to dominate interpretation of the past.

Historians have their favored tropes: tragedy, triumph, subordination, resistance to subordination, irony, and so forth. Scholarly debate often consists of disagreements over which such master trope best "fits and justifies" the known facts of a given place and period.³²³ Criminal law has its own favored trope: the vindication of society's basic norms protecting individuals' rights to life and liberty against whoever, by his conduct, denies them. Thus,

³²¹ See *supra* note 291.

³²² SAUL FRIEDLANDER, *MEMORY, HISTORY, AND THE EXTERMINATION OF THE JEWS OF EUROPE* at ix (1993).

³²³ The terminology of "fit and justify" is that of Ronald Dworkin. DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 239. The meaning of "justify" in the present context, however, does not imply any approval of the conduct so classified. In this normatively neutral sense, to justify is "to confirm or support by . . . evidence," or "to adjust to exact shape, size, or position." 8 OXFORD ENGLISH DICTIONARY 329, 330 (2d ed. 1989).

when law and lawyers consciously aspire to influence collective memory, they enter into competition with historiography and historians, who understandably respond by criticizing the law and defending the centrality of their favored tropes.

Legal Precedent vs. Historical 'Uniqueness'

One particular aspect of historical interpretation has caused the criminal law considerable embarrassment: whether, and in what respects, the Holocaust is "unique." Certain scholars of Jewish history have cared a great deal about establishing the "unprecedented" character of the Holocaust, resisting its use as an analogy to lesser crimes.³²⁴ In some such quarters, the very idea of comparing the Holocaust to earlier or subsequent episodes of administrative massacre (for analytical and scholarly purposes) is regarded as obscene, "an affront to the memory" of the six million. However, lawyers, including some who have devoted their professional lives to prosecuting Nazi war criminals, will find this notion puzzling to the point of incomprehensibility.³²⁵

In fact, the concept of historical incommensurability is almost uncognizable in legal terms. As lawyers, if we were compelled to conclude from historical investigation and comparative analysis that the events judged at Nuremberg were utterly incommensurable, we would be driven to the corollary conclusion that the legal rules developed from that experience must be strictly construed; this approach would make them inapplicable to virtually all subsequent experiences of administrative massacre, since such experiences are almost invariably "distinguishable" in significant ways. Those who

³²⁴ See LUCY S. DAWIDOWICZ, *THE HOLOCAUST AND THE HISTORIANS* 11-21 (1981).

³²⁵ See, e.g., TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 122-53 (1970) (comparing war crimes in both World War II and the Vietnam War in light of international law as developed by the four Geneva Conventions of 1949). For a defense of such comparisons, for both conceptual and theoretical purposes, see CHARLES S. MAIER, *THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY* 69-71 (1988) ("Comparison is a dual process that scrutinizes two or more systems to learn what elements they have in common, and what elements distinguish them. It does not assert identity; it does not deny unique components."). On how the comparative analysis of genocide arguably illuminates the Holocaust's distinctiveness, see EDWARD T. LINENTHAL, *PRESERVING MEMORY: THE STRUGGLE TO CREATE AMERICA'S HOLOCAUST MUSEUM* 228 (1995) (describing the views of Michael Berenbaum, Director of the U.S. Holocaust Museum, and stating that the representation of various groups of victims of the Holocaust in the museum "serves as a way to portray Jewish uniqueness *through* comparison with various others").

decry the dangers of comparison presumably do not desire this result.

Historians and political analysts became increasingly dismayed, however, that the Nuremberg court would subsume the most unparalleled features of the defendants' wrongs under longstanding doctrines in the law of war, reducing the Holocaust merely to one among several methods employed for the "waging of aggressive war." By training and temperament (that is, by *déformation professionnelle*), it seemed, prosecutors and judges were inclined to tell a tale of continuity, even when the facts before them struck most laymen as involving a violent rupture with all prior experience.³²⁶

After all, courts generally downplay the elements of uniqueness in the facts before them, subsuming these under more general, preexisting concepts and precedents, which are extended, if at all, only in the most modest and guarded ways.³²⁷ The problem of "representing the Holocaust," an event unintelligible through prior understandings of human conduct, has become a central concern and an insurmountable obstacle for virtually all serious scholarly disciplines.³²⁸ The law does not even recognize it as a problem.³²⁹ "Concerned as it must be with precedent, the Court treats

³²⁶ This gap between lay and lawyerly perceptions of the Holocaust is an important but neglected theme in Arendt's classic work on the Eichmann trial. See ARENDT, *supra* note 18, at 253-54; see also Douglas, *supra* note 272 (arguing that "the extraordinary effort to accommodate the Holocaust to prior conceptions of justice resulted in a failure to see the Holocaust in its full malignity" and attributing this failure to the legal concept of precedent).

³²⁷ See Richard Wasserström, *Postscript: Lawyers and Revolution*, Address at the Annual Convention of the National Lawyers Guild (July 6, 1968), in 30 U. PITT. L. REV. 125, 129 (1968) ("[Law] seeks to assimilate everything that happens to that which has happened. . . . [T]he lawyers' virtually instinctive intellectual response when he is confronted with a situation is to look for the respects in which that situation is like something that is familiar . . .").

³²⁸ See Anton Kaes, *Holocaust and the End of History: Postmodern Historiography in Cinema*, in *PROBING THE LIMITS OF REPRESENTATION*, *supra* note 282, at 206, 207 (noting that "[t]he insistence on the impossibility of adequately comprehending and describing the final solution has by now become a *topos* of Holocaust research" (footnote omitted)).

³²⁹ In this regard, despite her hyperbolic and overheated prose, Hannah Arendt remains the most incisive critic of the law's failure.

The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough . . . [T]his guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug.

Letter to Karl Jaspers, in HANNAH ARENDT KARL JASPERS: CORRESPONDENCE 1926-1969, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992).

the Holocaust in precisely the fashion rejected by so many scholars—as just another historical event about which unpopular claims can be made.”³³⁰

The problem has reappeared in recent prosecutions for “Holocaust denial.” Since the early 1960s, the Nuremberg proceedings have been criticized for failing to respect the Holocaust’s specificity as a crime against the Jews.³³¹ Partially in response to that concern, legislation has been adopted in several Western countries criminalizing “Holocaust denial.”³³² Such statutes are defended on the ground that the Holocaust’s uniqueness warrants greater encroachment upon freedoms of speech and press than would be constitutionally acceptable concerning other statements that are also factually false, but nondefamatory.

This approach seeks to establish the Holocaust’s uniqueness by legal fiat, however. It has thus been criticized as yet another instance of lawyerly encroachment on historiographical questions beyond the professional competence of courts.³³³ Judges show themselves understandably uncomfortable about assuming this new role.

But the response to such unwelcome intrusions has sometimes been merely to employ legal fiat in service of the opposing claim: in *denying* the Holocaust’s uniqueness. The 1985 West German provision thus criminalizes denial not only of the Holocaust, but also of another massive wrong that the legislators regarded as “comparable,” the Soviet expulsion of German peoples from parts of Eastern Europe.³³⁴ The German statute reinstates the earlier problem: treating the Holocaust as “morally equivalent” to other,

³³⁰ DOUGLAS, *supra* note 319.

³³¹ For evidence of this failure, see 5 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 368-426 (1947), wherein the French prosecutors, responsible for presenting evidence of war crimes and crimes against humanity, included no evidence of the annihilation of European Jewry as one of the Nazis’ transgressions. On this omission, see DOUGLAS, *supra* note 319 (observing that the Nuremberg Tribunal adopted an “approach that placed the Holocaust on the margins of the legally relevant”).

³³² See LIPSTADT, *supra* note 17, at 219-22 (discussing legislation criminalizing “incitement to hatred; discrimination; or violence on racial, ethnic, or religious grounds”).

³³³ See Letter from Professor Herbert A. Strauss to Professor Eric Stein, in *Correspondence on the “Auschwitz Lie”*, 87 MICH. L. REV. 1026, 1029 (1989) (“The ‘majority opinion’ among scientific scholars must be formed in a scientific way, and every intervention of the judiciary power has to be rejected”).

³³⁴ See Stein, *supra* note 17, at 307-08.

lesser wrongs, only now doing so more explicitly.³³⁵ In sum, it has proven difficult to employ the law in condemning Holocaust denial without also lending judicial authority to one or the other side of a legitimate scholarly dispute concerning historical uniqueness.

The difficulty of drafting Holocaust denial laws suggests that law is likely to discredit itself when it presumes to impose any answer to an interpretive question over which reasonable historians differ. After all, in recent decades many historians and social scientists—on both the right and the left—have come to question and deemphasize the Holocaust's unique features.³³⁶ These scholars have sought to reassess the idiosyncrasies of that experience, in both its methods and scope, with a view to situating it within a comprehensive understanding of the horrors of our century, in light of the several genocides and many mass atrocities that preceded and followed it.³³⁷

Early legal analysts of the Holocaust defined "crimes against humanity" as involving ordinary crimes committed for particular motives.³³⁸ Underlying this doctrinal move was a normative concern with stripping high-ranking officials of their asserted immunity under international law, by depicting them as "common criminals"—no different in nature from garden variety murderers, despite their statesmanlike air and plumage. This way of cognizing their conduct, however, came to be seen as "banalizing" or trivializing the historically unprecedented features of their wrong.³³⁹ Additionally, jurisprudential efforts to reconceptualize crimes against humanity

³³⁵ See *id.* at 309-14 (discussing the final compromise in the law's wording).

³³⁶ Although the conservative variants are today better known, there has long been a leftist version of the thesis that the Holocaust was the outgrowth of trends and social forces by no means unique to Germany, but latent within all modern capitalist societies. This thesis was first proposed by the early Frankfurt school, was elaborated by Hannah Arendt, and now finds many sympathizers among scholars in several fields. See ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 9 (1989); ANDREAS HUYSEN, *TWILIGHT MEMORIES: MARKING TIME IN A CULTURE OF AMNESIA* 252 (1995). The affinity between the views of the far right and far left go further. The early history of Holocaust denial in France, at least, has been persuasively traced by scholars to the far left of the late 1960s and early 1970s. See Nadine Fresco, *Negating the Dead*, in *HOLOCAUST REMEMBRANCE*, *supra* note 38, at 190, 192-98 (discussing the early life and later influence of Paul Rassinier—French author and former concentration camp inmate).

³³⁷ Klaus Barbie's defense counsel, Jacques Vergès, was to give this argument for "balance" special salience at Barbie's trial. See *infra* text accompanying notes 782-91.

³³⁸ See Jacques-Bernard Herzog, *Contribution à l'étude de la définition du crime contre l'humanité*, 18 *REVUE INTERNATIONALE DU DROIT PENAL* 155, 168 (1947); Wexler, *supra* note 316, at 356-57.

³³⁹ See Wexler, *supra* note 316, at 358.

in more limited ways greatly impeded effective prosecution of their perpetrators, by introducing doctrinal requirements that are exceedingly difficult to meet, as the prosecution of Paul Touvier abundantly revealed.³⁴⁰

In sum, the criminal law has been perceived as straying beyond its proper realm, thus embarrassing itself by both denying the uniqueness of the Holocaust and by later asserting it. From such mistakes, it is easy to see why many would conclude that courts ought therefore to stay out of the history game altogether. The problem with that entreaty, as we shall see, is that courts are increasingly drawn into deciding historical questions unwittingly in ways they cannot entirely escape.³⁴¹

For Historical "Balance," Against "Moral Equivalence"

The interested public has often found historians' accounts more persuasive than those of the courts, particularly the Tokyo and Nuremberg courts. This is primarily because historians are seen to be more concerned with "balance" in proportioning blame among all parties, including the courtroom accusers.³⁴² For the courts, it mattered little to the validity of criminal proceedings against Axis leadership that Allied victors had committed vast war crimes of their own.³⁴³ Unlike the law of tort, criminal law has virtually no place

³⁴⁰ See *id.* at 359-62.

³⁴¹ See *infra* text accompanying notes 693-706.

³⁴² To be sure, many historians today reject "balance" as a professional ideal, finding it either impossible or undesirable. See NOVICK, *supra* note 284, at 264-91, 421-62, 603-05. Public perception of historiography's tasks, however, still largely cleaves to this traditional ideal, as reflected in the remarks of Galtieri and Massera, *supra* note 307.

³⁴³ See HANS J. MORGENTHAU, *POLITICS AMONG NATIONS* 218-19 (1954) (noting that in World War II, the laws of war were systematically violated by the participants). Allied war crimes prominently included the saturation and fire bombing of civilian population centers such as Dresden, Hamburg, Tokyo, Yokohama, Hiroshima, and Nagasaki without discriminating between military and non-combatant targets. As one noted historian summarizes the data, the death toll of Japanese civilians from bombings of 66 cities was approximately 400,000. American military deaths in all of WWII were about 300,000. See JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* 295-300 (1986). On Soviet war crimes, see ALLEN PAUL, *KATYŃ: THE UNTOLD STORY OF STALIN'S POLISH MASSACRE* 103-17 (1991). If the Nuremberg trials produced poor historiography, this was due only partly to liberal law's inherent limitations. Surely more important was the fact that "for fifty years, the largest single participant in [the] war imposed a policy of almost total historical selectivity, while the other victors basked in the illusion of their own impartiality." Norman Davies, *The Misunderstood Victory in Europe*, N.Y. REV. BOOKS, May 25, 1995,

for "comparative fault,"³⁴⁴ no doctrinal device for mitigating the wrongdoing or culpability of the accused in light of that of the accuser.

For the public, however, particularly in postwar Japan and West Germany, and among conservative Argentines, it mattered *greatly* in gauging the legitimacy of the trials that they seemed tendentiously selective, aimed at focusing memory in partisan ways. It mattered for such listeners that the defendants in all these episodes of administrative massacre had constituted only a single side to a two- or multi-sided conflict, one in which other parties had similarly committed unlawful acts on a large scale. This unsavory feature of the Nuremberg judgment has undermined its authority in the minds of many, weakening its normative weight. When Nuremberg's relevance to the dirty war as legal precedent was pointed out to him, for instance, one Argentine general observed: "Yes, but if the Germans had won the war, the trials would have been held not at Nuremberg, but in Virginia."³⁴⁵ He was surely right.

Tu quoque is the conceptual peg on which this moral intuition is usually hung, but as a legal argument its scope is exceedingly narrow.³⁴⁶ Kirchheimer describes its logic:

Against the inherent assertion of moral superiority, of the radical difference between the contemptible doings of those in the dock

at 7, 11. In a spirit of Allied comity, "[f]ew historians were willing to ask if the country which played the major role in winning the war against Hitler might also have played a part in causing it." *Id.* at 10.

³⁴⁴ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 14 (2d ed. 1986) (stating that in criminal law "the contributory negligence of the victim is no defense"); Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1184 (1994) (advocating a role for comparative fault within the criminal law).

³⁴⁵ Nino Conference, *supra* note 47 (remarks of Judge Andrés D'Alessio).

³⁴⁶ For a sweeping rejection of the *tu quoque* defense at Nuremberg, see 13 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 521 (1948) ("We are not trying whether any other powers have committed breaches of international law . . . we are trying whether these defendants have."). The court nevertheless accepted much of the defense *sub rosa* where Allied activities were virtually identical to Axis illegalities, as in the common use of 'unlimited' submarine warfare. See OTTO KIRCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* 338 (1961). Judicial deliberation about *tu quoque* issues was explicit, but only recently acknowledged publicly. See RÖLING, *supra* note 276, at 60. Although a plaintiff must have "clean hands" for a civil suit in equity, there has never been any analogous requirement for the party alleging criminal harm. The prevalence of comparable misconduct by non-defendants is legally relevant only to establishing prevailing international custom and the consistency of the defendant's conduct with such custom.

and the visions, intentions, and record of the new master, the defendants will resort to *tu quoque* tactics.

....

... [This] implies more an argument addressed to the public at large and the future historian than a legal defense. In asserting that an accident of history rather than an inherent quality of those who govern determines who should sit in judgment and who should be the defendant, it tries from the outset to devalue the meaning and import of the judgment.³⁴⁷

In so doing, it tries for too much. As an affirmative defense, such an argument aims to be fully exculpatory. But *tu quoque* evidence might be deployed more convincingly in mitigating a sentence. It closely resembles "character evidence" in this regard. To the extent that Japanese aggression throughout Asia, for instance, could be convincingly viewed as partially a defensive response to a still-pervasive Western imperialism there³⁴⁸—to which the testimony of professional historians would be indispensable—this would testify to the non-malicious character of Japanese actions and of those who directed them. With such questions, the law does not insist on any bright lines, as between guilt and innocence.

A second form of balance displayed by historiography, particularly good biography, that legal judgments generally lack is a rounded assessment of the strengths and weaknesses of the leading characters. In criminal law, to be sure, evidence of good character is admissible by the defense in mitigation of sanction, and even to establish reasonable doubt regarding liability.³⁴⁹ It may not be used, however, to argue that the defendant's character is so virtuous as to warrant his complete exemption from liability on this ground alone, if he has culpably committed the wrongful act of which he is accused. But these legal rules prove particularly troubling for defendants who, like Marshall Pétain, had been national heroes for many years³⁵⁰ before (very late in life) disgracing themselves by complicity in administrative massacre. The delimited relevance the law accords to character evidence also deprives legal judgments of

³⁴⁷ KIRCHHEIMER, *supra* note 346, at 336-37 (emphasis added).

³⁴⁸ Justice Röling, in dissent, found this argument partially persuasive. See RÖLING, *supra* note 276, at 889.

³⁴⁹ In American law, for instance, the defendant may introduce evidence of good character to establish that his mental state was not what the prosecution alleges it to have been, and even to establish a reasonable doubt as to whether the defendant is the type of person capable of committing the wrongful act. See FED. R. EVID. 404.

³⁵⁰ See STEPHEN RYAN, PÉTAINE THE SOLDIER (1969).

historical balance when the defendant can plausibly claim, in the court of public opinion, to have done much good in the very course of perpetrating his offense.

Pétain again provides a telling example:

Every time [prosecutor] Mornet cited a concession granted to the Germans, Pétain's lawyers could cite a concession wrung from them. For every pro-Axis public act the lawyers could show a pro-Allied private one. The testimony bogged down into a balancing of profit and loss—exactly the chosen terrain of the defense.³⁵¹

The law can easily discredit its judgments, when proclaiming these as monumental didactics, by relegating such defensive efforts at historical balancing beyond its framing of the story. Surely, such evidence is relevant to any effort to portray Pétain, for example, as the story's unscrupulous villain, pure and simple.³⁵²

A third form of concern about historical balance, also unacknowledged by criminal law, arises from the fact that citizens of aggressor nations suffer in many ways from their wartime losses and the deprivations of defeat, often exacerbated by victors' misconduct. They therefore have an affinity for portrayals of the preceding events as a "tragedy,"³⁵³ as a story of good people and evil acts on both sides, rather than a simpler tale of noble victims (their enemies) and nefarious victimizers (themselves).³⁵⁴ As applied,

³⁵¹ PETER NOVICK, *THE RESISTANCE VERSUS VICHY: THE PURGE OF COLLABORATORS IN LIBERATED FRANCE 176* (1968). Since Pétain's offenses had resulted in death for many victims, his counsel could not claim that Pétain's "pro-Allied" actions legally "justified" his collaborationist actions as a "lesser evil." On the longstanding exception to the lesser evil defense for actions causing death, see FLETCHER, *supra* note 19, at 787-89.

³⁵² On the transformation of Pétain from hero to traitor, see HERBERT R. LOTTMAN, *PÉTAIN: HERO OR TRAITOR, THE UNTOLD STORY* (1985).

³⁵³ Moral philosophers generally understand a tragic situation as one in which an individual, when contemplating action, faces conflicting claims of right that are binding upon him, that is, not based upon some misunderstanding of his situation or his moral duties. See BERNARD WILLIAMS, *Ethical Consistency*, in *PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972*, at 166, 166 (1973). Many wars arise from situations in which all or most parties have some legitimate claims of right. Wars and the administrative massacres to which they often give rise also routinely present soldiers with such moral dilemmas, as through superior orders requiring commission of such unlawful acts. See MARK J. OSIEL, *OBEYING ORDERS* (forthcoming 1996) (manuscript, on file with author).

³⁵⁴ See MINEAR, *supra* note 182, at x ("We need to rethink the causes of the Pacific war from what can only be described as a tragic view, one which takes no comfort in scapegoats and offers no sanctuary for private or national claims of moral righteousness" (alteration in original) (quoting historian John W. Hall on the Tokyo trial)).

criminal law tends to dichotomize the participants in just this way. It thereby conceals many pertinent moral complexities, denying the genuinely tragic dimension of these events,³⁵⁵ a dimension that lingers prominently in the memory of many survivors.

A fourth source of concern about historical balance involves the psychodynamics of reconciliation between antagonists—whether individuals, partisan groups, or nation-states. When considering apology, one generally seeks forgiveness from the party who has been harmed. The process is interactive. For instance, when an aged Japanese veteran recently sought to atone for his role in an especially vicious torture of a British officer, the latter saw fit (in fact, felt morally obliged) to come forward to accept the apology.³⁵⁶ Only when apology succeeds in eliciting forgiveness does reconciliation occur. Such reconciliation is often a precondition to restoring relations of trust and interdependence.³⁵⁷

Negotiating this reconciliation can prove highly complex, since often each party will have valid grievances against the other. In such circumstances, apology is easiest when it is reciprocated, that is, when X can acknowledge its wrongs against Y as Y acknowledges

³⁵⁵ Only the vanquished tend to recognize this moral complexity and the consequent need for historical balance. This is the element of truth in the condemnation of the Nuremberg and Tokyo trials as “victors’ justice.” Among the victors, the general public characteristically *resists* any effort to infuse such balance into collective memory. It is only professional historians who sometimes favor it. An example of this phenomenon is the recently failed effort by American historians to redress the perceived imbalance in public memory of the Hiroshima and Nagasaki bombings. The historians’ attempts to depict those events in a way suggesting some moral complexity in the Smithsonian exhibition commemorating the 50th anniversary of the Second World War’s end was successfully opposed by organizations of war veterans. See David E. Sanger, *Coloring History Our Way*, N.Y. TIMES, July 2, 1995, § 6 (Magazine), at 30, 31 (“The veterans want the exhibit to stop when the doors to the bomb bay opened. And that’s where the Japanese want it to begin.” (quoting a Smithsonian official, concerning the Enola Gay controversy)); *The History That Tripped over Memory*, N.Y. TIMES, Feb. 5, 1995, at E5 (noting that critics claimed that the exhibit was a revisionist insult to the American soldiers who fought in the Pacific); see also Nicholas D. Kristof, *Japan’s Plans for a Museum on War Mired in Controversy*, N.Y. TIMES, May 21, 1995, at A4 (describing the similar disputes in Japan itself over whether to include material on its soldiers’ extensive atrocities).

³⁵⁶ The British officer, Eric Lomax, recounts the story in *THE RAILWAY MAN: A POW’S SEARING ACCOUNT OF WAR, BRUTALITY, AND FORGIVENESS* (1995).

³⁵⁷ Japan’s failure to apologize for its enslavement of Asian comfort women is thus often seen as an obstacle to better relations with its Asian neighbors. See, e.g., *Lawyers Urge Government to Compensate “Comfort Women”*, JAPAN POL’Y & POL., Jan. 30, 1995, available in LEXIS, News Library, Curnws File (“Japan cannot build an honorable position in the international community without resolving the issue” (quoting Koken Tsuchiya, Chairman, Japanese Federation of Bar Associations)).

its against X. Reciprocity is particularly fitting where the adversaries have become "mutually implicated in each other's . . . vices."³⁵⁸ This is often true of war, as each side escalates its wrongdoing in retaliation for the enemy's wrongs, real or imagined.³⁵⁹ It is not surprising, then, that even the *Montonero* leader, Mario Firmenich, was impelled to apologize this spring for the crimes of his guerrillas (two decades after the fact), immediately following a comparable apology by Army Chief Martín Balza (for the military's crimes against guerrillas and others in the dirty war).³⁶⁰ Among antagonists who must go on living together in the same society, a judicial narrative perceived as "balanced"—in recognizing valid claims and wrongdoing on both sides—is best suited to facilitate reconciliation and reconstruction of social solidarity.

There is nothing in either the substance or process of criminal law, however, to facilitate such narrative balance and to help set in motion a process of reciprocal conciliation. On the contrary, the criminal law sets up a bright line between the parties, labeling one as victim, the other as wrongdoer.³⁶¹ It encourages attitudes in the former of righteous indignation, attitudes that the latter inevitably view in turn as self-righteous selectivity.

Moral and legal theory do little better in this regard than legal doctrine. They are preoccupied with notions of excuse and justification. In the present cases, however, the wrongs done by X to Y neither excuse nor justify those done by Y to X.³⁶² The bombing of Nagasaki does not excuse or justify the Rape of Nanjing,

³⁵⁸ DONALD W. SHRIVER, JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 74 (1995).

³⁵⁹ In authorizing "reprisal" for war crimes, the law of armed conflict may aggravate this problem, as commentators have long noted. See, e.g., PAUL CHRISTOPHER, THE ETHICS OF WAR AND PEACE: AN INTRODUCTION TO LEGAL AND MORAL ISSUES 189-99 (1994); MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 207-22 (1977).

³⁶⁰ See *Autocrítica a medias de Firmenich*, CLARÍN (Buenos Aires), May 3, 1995, at 1.

³⁶¹ Private law at least allows the possibility of a counterclaim by the defendant. But a compulsory counterclaim must arise out of the same transaction as that on which the plaintiff's claim is based. See FED. R. CIV. P. 13. This presents a major obstacle when the events to be linked in this way by a single legal story cover vast expanses of time and space. One would be hard-pressed to say, for instance, that Japanese aggression on the Asian continent during the early 1930s was part of the same "transaction" or event as the United States' bombing of Nagasaki in 1945.

³⁶² Moral theory has had virtually nothing to say about the element of *mutual* wrongdoing in many situations fitting for apology, and (by implication) forgiveness. Leading studies of forgiveness have little to say about reciprocity, while studies of reciprocity lack any discussion of forgiveness. See LAWRENCE C. BECKER, RECIPROCITY (1986); JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1990).

as all sensible people readily acknowledge. But this fact does not, in the minds of many Americans and Japanese, exhaust the possible range of moral links between the two events or their perpetrators. If legal doctrine and theory dismiss such widespread moral intuitions as misguided, the result is merely to limit the law's potential contribution to international reconciliation.

Consider in this light, the reaction of many Japanese to the American reluctance, as in the recent Smithsonian controversy, to debate openly the legality and moral defensibility of our use of nuclear weapons at the end of World War II. This reluctance "has fueled the self-righteousness of Japanese apologists for the Pacific War," observes one Asia specialist. "If Americans refuse to question *their* war record, they ask, then why should Japanese risk the reputation of Japanese soldiers by questioning *theirs*?"³⁶³

In the aftermath of large-scale violence, the essential task of statesmanship often consists precisely in putting forth a formulation of national identity (or international community, as in the Marshall Plan) that allows former enemies to live together under a common regime, a compelling narrative that restrains the powerful temptations toward an interminable cycle of recrimination and reprisal over the past. That is certainly how Abraham Lincoln, at least, understood his responsibilities in the aftermath of the Civil War.³⁶⁴

Elaine Scarry observes:

[O]nce those final labels [winner and loser] are designated and the war is over, it will cease to matter how the casualties . . . were distributed [For] these verbal constructions will tend to be replaced by one in which the casualties . . . collectively substanti-

³⁶³ Ian Buruma, *The War Over the Bomb*, N.Y. REV. BOOKS, Sept. 21, 1995, at 26, 29. For instance, the head of the Japanese Veterans Association, Masao Horie, observed: "At the 50th anniversary of the Dresden firebombing, . . . I didn't hear the Allies apologizing. And the U.S. dropped atomic bombs on Hiroshima and Nagasaki and killed huge numbers of innocent Japanese people, and never apologized for this." Nicholas D. Kristof, *Why Japan Hasn't Said That Word*, N.Y. TIMES, May 7, 1995, at E3.

³⁶⁴ See John G. Randall, *Introduction* to JONATHAN T. DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON: THE RESTORATION OF THE CONFEDERATES TO THE RIGHTS AND PRIVILEGES, 1861-1898, at xiii, xiv-xxi (1953). In the interests of national reconciliation, Presidents Lincoln and Johnson both favored leniency toward those guilty of treason and sedition. In December 1863 Lincoln proclaimed an amnesty for most who had taken up arms against the Union, provided they take an oath of future allegiance to it. In 1868, Andrew Johnson extended the terms of amnesty, making it unconditional and universal in scope. See *id.*

ate, or are perceived as the cost of, a single outcome: . . . "The young America was maimed by the slavery of which it was necessary to rid itself violently: 534,000 died in the Civil War." Thus a Southern boy who may have believed himself to be risking and inflicting wounds for a feudal system of agriculture, and until the end of the war will have suffered much hardship and finally death for those beliefs, will once the war is over have died in substantiation of the disappearance of that feudal system and the racial inequality on which it depended.³⁶⁵

This process of redescription does not happen automatically or effortlessly, however, as Scarry seems to imply. Lincoln's pardons and amnesties of confederate soldiers, and even leaders, offered a legal device that helped later generations to retell the story of the war to one another in a conciliatory fashion: a narrative in which even the losers die for a just cause, and thereby rejoin the society of the winners. The story is extended to a later point of conclusion, from which the war's immediate outcome becomes almost irrelevant to collective memory.

Where to Begin the Story? Where to End?

The primary way defendants have sought to introduce greater balance into proceedings for administrative massacre has been to enlarge the temporal "frame" relevant to legal judgment (beyond that proposed by the prosecution), so that the narrative encompasses events both earlier and later in time. They have often stressed the arbitrariness and indefensibility of the spatiotemporal borders established by courts, at the prosecution's behest. In this critique, they could easily draw theoretical sustenance today from postmodernists, who rightly observe that always there is "another story 'waiting to be told' just beyond the confines of 'the end.' . . . [T]he sequence of real events goes on: that's what it is to be 'real.'"³⁶⁶ The choice of where to begin the story and where

³⁶⁵ ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 116-17 (1985). Zerubavel observes a similar process of mythic redescription in contemporary Israel regarding heroes who died in unsuccessful military campaigns, such as the Masada defenders and Bar Kokhba. "The display of readiness to sacrifice one's life for the nation is thus glorified as a supreme patriotic value that diminishes the significance of the outcome." ZERUBAVEL, *supra* note 69, at 221.

³⁶⁶ Louis O. Mink, *Everyman His or Her Own Annalist*, in *ON NARRATIVE* 233, 238 (W.J.T. Mitchell ed., 1981) (emphasis omitted) (quoting Hayden White); see also ZERUBAVEL, *supra* note 69, at 221 (noting how selecting the points at which a story will begin and end "reveals how simple construction of boundaries confers a minimal

to end it often determines who will play the villain, who the victim.

Defendants in the Tokyo trial, for instance, sought to tell a tale that began not with Pearl Harbor, but with America's Lend-Lease policy and the blockade on Japan's lifeline of oil imports.³⁶⁷ The story would begin not with the Japanese invasion of China, but earlier, with the Western colonialism throughout Asia that Japanese forces sought to displace. From within that narrative frame, Japan's conduct could be described as a "war of aggression" only through the grossest of historical oversimplification.

Just as the story would have a different beginning, it would have a different ending. It would end somewhat later than the prosecution preferred, not with Allied victory at Okinawa, but with the nuclear destruction of Hiroshima and Nagasaki, at a time when all but the final, minor details of Japanese surrender had been resolved through negotiation.³⁶⁸

Similarly, German historians now seek to enlarge the narrative framing of combat on the Eastern front, depicting the brutal methods of German forces as the first phase of Western resistance to what would soon prove to be Soviet imperialism into Eastern and Central Europe, resistance that bought the West essential time for regrouping.³⁶⁹ Had the Nuremberg trial been held a few years

fictive structure and meaning on an otherwise meaningless time flow").

³⁶⁷ See *supra* note 276.

³⁶⁸ See AKIRA IRIYE, *POWER AND CULTURE: THE JAPANESE-AMERICAN WAR, 1941-1945*, at 263-65 (1981). A wider spatiotemporal framing would not entirely have worked to mitigative effect, however. Prosecutors could easily have employed it to tell the story of Japan's enslavement of many thousands of women throughout its Asian empire into compulsory prostitution, for the entertainment of Japanese soldiers. See GEORGE HICKS, *THE COMFORT WOMEN: SEX SLAVES OF THE JAPANESE IMPERIAL FORCES* (1994). Writes one Japanese historian, "[t]he perfect opportunity for such reflection came during the postwar Allied occupation, but it was lost. Regrettably, at the Tokyo War Crimes Tribunal the voice of the Asian peoples who had suffered was not heard sufficiently." Yoshiaki Yoshimi, *Japan Battles Its Memories*, N.Y. TIMES, Mar. 11, 1992, at A23.

³⁶⁹ This historical argument (introduced by Ernst Nolte, *The Past That Will Not Pass: A Speech That Could Be Written but Not Delivered*, in *FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 18 and ANDREAS HILLGRUBER, *ZWEIERLEI UNTERGANG: DIE ZERSCHLAGUNG DES DEUTSCHEN REICHES UND DAS ENDE DES EUROPÄISCHEN JUDENTUMS* (1986)), with its implicit criticism of the story told by the Nuremberg court, has in turn been adopted by conservative German politicians. See, for example, the recent letter signed by over 300 leading German conservatives, arguing that what ought to be commemorated on May 8 is not the Allied victory, but rather the Soviet "expulsion by terror, oppression in the East, and the partition of our country." Nader Mousavizadeh, *States of Denial*, NEW REPUBLIC, June 19, 1995, at 40, 42 (book review) (quoting the letter titled *Against Forgetting* in the *Frankfurter*

later than it was, defense counsel would likely have sought to make just such an argument. Notice, moreover, that these proffered enlargements of the legal-historical frame would not require that the court undertake the large leaps across time and space of the sort later employed in the defense of Klaus Barbie.³⁷⁰ The upshot, then, is that the defendants' right to a fair hearing in such trials has often been compromised not only by indulgent relaxation of evidentiary rules (including legal relevance and hearsay) in favor of the prosecution, but also by hyperstringent enforcement of such evidentiary rules against the defense.

In viewing the criminal trial as a simplistic "morality play," Durkheim did not perceive how certain forms of criminality, such as large-scale administrative massacre, often cannot fairly be characterized as pitting the forces of unequivocal good against those of unequivocal evil. If courts could find a way to tell the tale as a genuine tragedy, alternately eliciting a measure of sympathy and antipathy for each side, dramatic tension would be enhanced, evoking more attention from the public. Such sustained attention would help stimulate the public discussion and collective soul-searching that is the primary contribution of criminal prosecution to social solidarity at such times, according to the discursive theory offered here.³⁷¹

In the Argentine junta trial, the defendants' accusation of historical imbalance entailed the insistence that their conduct be viewed as an intelligible response, however excessive with the benefit of hindsight, to the genuine threat to public order presented by the leftist guerrilla movements. The temporal frame adopted by the court discredited the entire proceeding, in the view of the officer corps and most civilian conservatives, by not extending sufficiently backward in time to before the 1976 coup d'état.³⁷²

Allgemeine Zeitung). The authors add that "a view of history that ignores or represses this reality, or that compares it to other realities, cannot be the basis for the self-understanding of a confident people." *Id.*

³⁷⁰ See *infra* text accompanying notes 782-91.

³⁷¹ See *supra* notes 99-135 and accompanying text.

³⁷² See HORACIO LYNCH & ENRIQUE DEL CARRILL, DEFINITIVAMENTE—NUNCA MÁS: LA OTRA CARA DEL INFORME CONADEP (1985). By contrast, the United Nations "Truth Commission" on El Salvador was expressly chartered to examine illegal violence by both the military and the FMLN, a fact that contributed to wider public acceptance of its conclusions, according to Thomas Buergenthal, one of its members. See Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 528 (1994). The Chilean truth commission adopted a similar approach. Despite the current preference of many new democracies for such

The Alfonsín government and its prosecutors were well aware of this danger and consciously sought to guard against it, periodically reminding through their public statements, and even in closing arguments at trial, that leaders of the leftist guerrilla groups were being simultaneously prosecuted as well, for many of the same offenses.³⁷³

This narrative frame quickly acquired the label of "The Doctrine of the Two Demons": that the country had been destroyed by similar extremisms of left and right, both equally hostile to liberalism and the rule of law, the rhetorical banner of the new democratic government. As a matter of dramaturgical strategy, this narrative was calculated to avoid giving offense either to military officers, who had escaped substantial involvement in the dirty war, or to surviving supporters of the *guerrilla*, who had already endured considerable suffering by illegal detainment, torture, and loss of family members through disappearance.³⁷⁴ Thus, the doctrine of the two demons and the legal strategy it entailed were selected "to provide an adequate frame to reprocess memory without increasing the chasms that separated Argentine society," as one social scientist observes.³⁷⁵

But although this framing of the story made for "good law," in that it was entirely consistent with existing doctrine, it made for "poor history" in the eyes of those many people, mostly on the left, who felt it necessary—as a matter of historical balance—to stress the much greater measure of harm inflicted by the officer corps on Argentine society, in service of aspirations far less noble than those of the *guerrilla*.³⁷⁶

In Argentina, as earlier in Japan and West Germany, the battle of interpretations between prosecution lawyers and spokes-

commissions over criminal trials, commissions do not escape the controversy created by the question of how widely to define the scope of their inquiries. Activists in the human rights community, for instance, often challenge the inclusion of material concerning criminal conduct by leftist guerrillas, whose cause they consider more just. See, e.g., Jorge Mera, *Chile: Truth and Justice Under the Democratic Government*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 171, 174-75 (Naomi Roht-Arriaza ed., 1995) (noting that "[h]uman rights arise historically as demands to limit state power and are now a limit on state sovereignty").

³⁷³ See Executive Decree No. 157/83 (ordering the trial of suspected leaders of the *Montonero* guerilla movement).

³⁷⁴ See VERBITSKY, *supra* note 136, at 57-66.

³⁷⁵ Perelli, *supra* note 29, at 48.

³⁷⁶ See Interviews with human rights leaders, in Buenos Aires, Argentina (Aug. 1987).

men for "historical balance" was fought out in the elite press. Its wider influence beyond the upper middle classes cannot be presumed.³⁷⁷ Historiography has often had no more influence than judicial proceedings in influencing non-elite memory of many such events, as historians themselves readily admit.³⁷⁸ "The Enola Gay is flying solo on the Mall in Washington," an American journalist wryly observes, "without any serious examination of whether the bomb was needed to force Japan to surrender, a question that is debated more seriously today [by scholars], and with more compelling evidence, than at any time in postwar history."³⁷⁹

Like lawyers, professional historians must take a skeptical attitude toward the veracity of all sources. But popular memory of a community's catastrophes is often demonstrably inaccurate, even concerning fundamental facts of record. It is precisely these persistent deviations between the memories of those who were directly affected by such events and the later conclusions of elite professionals—both lawyers and historians—that have become a central focus of much current field work and reflection among scholars of collective memory.³⁸⁰

³⁷⁷ We should recall, in this regard, the finding of survey researchers that while over half of Americans knew who presided over "The People's Court," fewer than 10% knew that the Chief Justice of the Supreme Court was William Rehnquist. *Can TV Rescue Rehnquist from Obscurity?*, *NEWSDAY* (N.Y.), June 28, 1989, at 64.

³⁷⁸ See KEITH THOMAS, *THE PERCEPTION OF THE PAST IN EARLY MODERN ENGLAND* 24 (1983); YOSEF H. YERUSHALMI, *ZAKHOR: JEWISH HISTORY AND JEWISH MEMORY* 14-15 (1982). The recurrent resistance of popular memory to elite efforts at shaping it is examined *infra* text accompanying notes 624-28.

³⁷⁹ Sanger, *supra* note 355, at 30. Sanger alludes especially to the recent scholarship of Barton Bernstein, Gar Alperowitz, Rufus Miles, Jr., and John R. Skates. Moreover, the text initially proposed by the Smithsonian historians for the 50th anniversary of the bombing of Hiroshima exhibit was not at all unsympathetic to President Truman; after weighing the arguments for and against his decision, it concludes that "the bombing of Hiroshima and Nagasaki . . . played a crucial role in ending the Pacific War quickly." *JUDGMENT AT THE SMITHSONIAN: THE BOMBING OF HIROSHIMA AND NAGASAKI* 117 (Philip Nobile ed., 1995).

³⁸⁰ See, e.g., FENTRESS & WICKHAM, *supra* note 49, at 91 (contending that "inaccurate memories . . . shed a more unmediated light on social memory than accurate ones do: they are not, so to speak, polluted by 'real' past events"); ALESSANDRO PORTELLI, *THE DEATH OF LUIGI TRASTULLI AND OTHER STORIES: FORM AND MEANING IN ORAL HISTORY* 2 (1991) (noting that "'wrong' tales . . . allow us to recognize the interests of the tellers"). For an Argentine study of this phenomenon, see Lindsay DuBois, *Contradictory Memories of Dictatorship in Argentina* 4-5 (Dec. 1, 1994) (paper presented at the American Anthropological Association Conference) (on file with author) (noting how electoral supporters of former military officer Aldo Rico sometimes misremember the human rights abuses of the dirty war, 1975-1980,

On occasion, prosecutors of administrative massacre have felt obliged to tailor their legal approaches in light of what they thought would make a more persuasive story, on account of popular understandings of the period. Most notably, the chief American prosecutor at Tokyo, Joseph Keenan, was ordered not to indict Emperor Hirohito.³⁸¹ Prosecutors also encouraged some witnesses to mention the Emperor's role and presence at key meetings as little as possible, if at all.³⁸² The Occupation authorities, and General MacArthur in particular,³⁸³ were convinced that the Japanese public, although willing to blame the Emperor's underlings, would not tolerate the punishment and consequent dethronement of Hirohito himself. Public understanding of recent history thus set serious limits on the choice of legal strategy, compromising the moral and legal integrity of the proceedings in crucial ways.³⁸⁴

These compromises also ensured that the "Tokyo Trial version of history," as it came to be derisively known, would ultimately be rejected—not only in Japan, but in much of the West as well.³⁸⁵ It would be rejected not merely as morally and legally suspect,³⁸⁶ but simply as poor historiography, on account of its unpersuasive and obviously opportunistic exclusion of a central character.³⁸⁷ It is one thing to acknowledge that prosecutors have a legitimate range

as having occurred during the *prior* military regime, that is, 1966-1973).

³⁸¹ See MINEAR, *supra* note 182, at 111 n.74.

³⁸² See *id.* at 113-14.

³⁸³ See DOUGLAS MACARTHUR, REMINISCENCES 287-88 (1964) (noting MacArthur's fear that guerrilla warfare would break out if the Emperor were indicted, and that many thousands of U.S. troops would be needed to enforce the Allied Occupation); see also MINEAR, *supra* note 182, at 110-17 (analyzing the decision not to prosecute the Emperor as political, rather than based on the legal merits).

³⁸⁴ On the much-belated explosion of debate and conflict over Hirohito's wartime role, in the months preceding and immediately following his death, see generally NORMA FIELD, IN THE REALM OF A DYING EMPEROR (1991).

³⁸⁵ See Kojima Noboru, *Contribution to Peace*, in THE TOKYO WAR CRIMES TRIAL, *supra* note 276, at 69, 78, 109. See generally MINEAR, *supra* note 182 (presenting a widely disseminated example of this rejection of the Tokyo Trial's version of history).

³⁸⁶ See MINEAR, *supra* note 182, at 117 (quoting the dissenting opinion of Justice Henri Bernard, who argued that the Emperor's absence "was certainly detrimental to the defense of the accused").

³⁸⁷ Perhaps the trial's greatest distortion (by understatement) of Japan's war crimes involved not its refusal to examine Hirohito's share of responsibility, but its exclusion of all evidence concerning Japan's extensive use of prisoners of war for bacteriological weapons experimentation. The U.S. apparently sought to preserve the secrecy of these experiments to learn their results and to keep them from the Soviets, according to some accounts. See B.V.A. Röling, *Introduction to THE TOKYO WAR CRIMES TRIAL*, *supra* note 276, at 15, 18.

of dramaturgical discretion; it is quite another for them to attempt a staging of Hamlet without the prince. The very effort to trim the legal proceedings in line with popular prejudice thus proved counterproductive, ultimately undermining the precarious legitimacy that such compromise had aimed to secure for the trials. Thus, criminal trials can fail to influence collective memory both when they *adhere* to the internal requirements of legal doctrine, ignoring popular understandings at odds with these requirements (the Barbie example), and conversely, when such trials *depart* from the law's own logic, deferring to such prejudices (the Hirohito example).

In the final analysis, neither historians nor legal advocates approach the past disinterestedly. While both bring contemporary concerns to bear upon their investigations, neither considers it defensible to ignore evidence disconfirming the story one initially wished to tell. Thus, despite the differences highlighted here, there are important similarities in how law and historiography approach the past. Legal advocates have always known that their inquiries were not disinterested; most historians have recognized this only recently.³⁸⁸

The very idea that the past has an integrity of its own, that it can be studied "for its own sake" and on the terms of its long-deceased denizens, that its interpretation should not be harnessed exclusively to present concerns, is a peculiarly modern notion, dating only from the late eighteenth century.³⁸⁹ As professional commitment to that preoccupation has waned in the last two decades, the overlapping "moralizing" concerns of law and historiography have become ever more apparent. These emergent similarities make it more difficult to denounce judicial forays into national historical narrative as either a betrayal of internal professional scruple or an external encroachment on alien terrain.

The Durkheimian account of law's service to social solidarity encounters greater difficulty than the discursive in coping with the

³⁸⁸ The long history of rear-guard action in resistance to this recognition is well told by NOVICK, *supra* note 284, at 38-39, 260-74, 295-301, 513-21. For an early statement of this view, see CARL L. BECKER, EVERYMAN HIS OWN HISTORIAN 253-54 (1935) (arguing that "[n]either the value nor the dignity of history need suffer by regarding it as . . . an unstable pattern of remembered things redesigned and newly colored to suit the convenience of those who make use of it").

³⁸⁹ See JANET COLEMAN, ANCIENT AND MEDIEVAL MEMORIES: STUDIES IN THE RECONSTRUCTION OF THE PAST 276, 291, 324 (1992); THOMAS, *supra* note 378, at 1. For a recent effort to rehabilitate the ancient view, see MICHAEL OAKESHOTT, *Present, Future, and Past*, in ON HISTORY AND OTHER ESSAYS 1, 7-19 (1983).

recurrent tension between the favored stories of lawyers, on one side, and historians or other interested parties, on the other. This is because the Durkheimian view presumes that only one story—the evocation of shared indignation for unambiguous breach of moral principles universally agreed upon—is compatible with social solidarity.³⁹⁰ The discursive conception, by contrast, makes no such assumption. It acknowledges that a plurality of interpretations may coexist within a pluralistic society, one whose members do not agree about the nature of justice, and that such disagreement will inevitably extend to the meaning of the country's recent horrors.

On this account, courts may legitimately tailor the stories they tell in order to persuade skeptical publics of the merits of liberal morality, but may not exclude incompatible stories from public hearing. Prosecutors and judges can strive to make the liberal story about these events more persuasive than its alternatives, but cannot suppress them. In fact, the discursive view *requires* the effective public presentation of counter-narratives in order to have any chance of refuting them where they are inconsistent with the liberal one.³⁹¹ Other stories, such as those advanced by historians of various persuasions, have an entirely legitimate place within the public discussion of a liberal society. Law's proper contribution to social solidarity must be conceived in a manner consistent with this fact.

C. *Legal Judgment As Precedent and Analogy*

This danger is the corollary of the preceding. Just as it is wrong to yoke a society's understanding of its history tightly to present needs (for legal judgment), it is also wrong to address a society's present problems by exclusive reference to the lessons of its history, that is, to a privileged reading of its past. There are opposing perils here. At one extreme lies the view, defended in legal thought by Savigny, that the study of history provides not "merely a collection of examples but rather the sole path to the true knowledge of our own condition."³⁹² Nothing ever changes so drastically as to prevent the past from "rendering perennial its

³⁹⁰ See *supra* text accompanying notes 55-74, 87-98.

³⁹¹ See *supra* text accompanying notes 107-44.

³⁹² REINHART KOSELLECK, *FUTURES PAST: ON THE SEMANTICS OF HISTORICAL TIME* 38 (Keith Tribe trans., 1985) (quoting FRIEDRICH K. VON SAVIGNY, 1 *ZEITSCHRIFT FÜR GESCHICHTLICHE WISSENSCHAFT* 4 (1815)).

store of experience."³⁹³ At the other extreme lies the view of history, including legal history, "as a burden man has to shoulder and of whose dead weight the living can or even must get rid of in their march into the future."³⁹⁴ Modern technology and society change too dramatically, in this view, for history (including the history of legal judgments upon it) to offer meaningful prescriptions for present predicaments.

Criminal trials for administrative massacre can contribute, paradoxically, to errors of both sorts, at both ends of the continuum governing the past's pertinence to the present. Among victims of such horrific experiences, memories have often provided resonant analogies for the analysis of more current controversies.³⁹⁵ Sympathetic others often will be inclined to accord considerable authority to such victims as natural spokesmen for the lessons of this momentous experience. "[T]he recall of past evil [is] a critical source of empowerment," Hacking observes.³⁹⁶ But precisely because the past becomes so powerful a metaphor in present debate, it can be abused in various ways. Its "proper" interpretation—to which legal judgments may contribute—tends to be invoked as an all-purpose touchstone, purporting to offer answers to all future questions, however far afield.

It might be said that this is one form of historical distortion that criminal prosecution can introduce into collective memory, and this point is thus a refinement of the preceding. But what was at issue before was only historical understanding as such, the societal interest in preserving the past's integrity within our representations

³⁹³ *Id.* at 23 (attributing this view to Cicero and most other Hellenistic thinkers).

³⁹⁴ HANNAH ARENDT, *BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT* 10 (1961). Arendt does not defend this view.

³⁹⁵ To be sure, it is only the most vocal minority of surviving victims who generally assert a broad reading of the public lessons to be learned from their experiences. Langer's study of memory among Holocaust survivors reports, for instance, that the vast majority conclude that their personal experience is almost entirely insusceptible to description, that it confirms no moral theories, and that it offers no models for heroic emulation or redemption. Langer thus argues that most reflections on the Holocaust, in searching for its lessons, provide only false solace. See LANGER, *supra* note 295, at 162-205.

³⁹⁶ HACKING, *supra* note 48, at 213. One might add that to have no memory is to lack an essential feature of personhood, on many accounts. On neurological disorders resulting in extreme memory loss, see generally PHILIP J. HILTS, *MEMORY'S GHOST: THE STRANGE TALE OF MR. M. AND THE NATURE OF MEMORY* (1995) (describing a famous patient who, through a surgical mistake, lost all prior memory and all capacity for subsequent memory, but who now has recurrent dreams in which he is a surgeon).

of it. What is at stake here, by contrast, is how such historical representations influence present policy, for better or worse, that is, how a past experience of administrative massacre, and our legal judgments upon it, should guide future politics. Broadly speaking, the dispute is about "the different ways of integrating the experience of the past into the texture of contemporary life."³⁹⁷

The more narrowly the experience is read for its "precedential value," the more authority we accord its immediate victims to speak to us in its name. But the power this accords them sometimes proves intoxicating. As they begin to read the precedent more broadly, their right to assume its mantle, to speak with the special authority it affords—rather than simply with their own voices, as coequal citizens—is rightly called into question.

This presents the mobilized victim-survivor with a dilemma of political strategy. At one extreme, she can preserve her monopoly over the collective memory only by reading its relevance so narrowly as to make its lessons inapplicable to even the most similar events (for example, another nearby episode of administrative massacre). At the other extreme, the victim-turned-activist can extrapolate the lessons of the events that caused her suffering into such universal terms as to make them applicable to innumerable public controversies. This can be done, however, only at the cost of abandoning any plausible claim to monopoly over the invocation of the event from which these lessons are allegedly derived.

Too often, a sense of *déjà vu*—and the hope of refighting old battles with more successful results than the first time around—unwittingly substitutes for critical analysis of current predicaments. In several societies, this has proven a recurrent pathology in the aftermath of administrative massacre. To label it a pathology, of course, is not to deny the need for sympathetic understanding toward those permanently haunted by such events, those suffering its symptoms.

They resemble the central character in Jorge Luis Borges' well-known story, *Funes, the Memorious*, who can remember everything he has perceived.³⁹⁸ Like Funes, we may become incapacitated for rational deliberation and principled action by a surfeit of memory. "[W]hat Funes has gained in memory," writes one Borges scholar,

³⁹⁷ STEPHEN BANN, *THE INVENTIONS OF HISTORY: ESSAYS ON THE REPRESENTATION OF THE PAST* 101 (1990).

³⁹⁸ See JORGE L. BORGES, *Funes, the Memorious*, in *FICCIONES* 107 (Anthony Kerrigan ed., 1962).

"he loses in the realm of general concepts" ³⁹⁹ Consumed by the wealth and resonance of narrative details, he lacks any "capacity to organize these into categories" or relate them to principles. ⁴⁰⁰ "And because his mind is always vividly recollecting to the level of pathology . . . Funes can barely sleep." ⁴⁰¹ In short, lurid details of lived experience—no matter how moving and memorable the resulting stories—offer no guidance unless one can extract general principles facilitating conceptualization and comparison between past and present events. ⁴⁰²

Extrapolated to the level of nation-states, the lesson is clear: overburdened by the weight of a catastrophic recent history, we are sometimes better off to forget. Nietzsche was surely right that "life in any true sense is impossible without forgetfulness [W]e must know the right time to forget as well as the right time to remember, and instinctively see when it is necessary to feel historically and when unhistorically." ⁴⁰³ This problem—the inability to forget, when forgetting is entirely appropriate—is, in a sense, the obverse of that dwelled upon by the psychohistorians: the repression or denial of memory, so that what is repressed later "returns" through "acting-out." ⁴⁰⁴ Obsession with memory can be as perilous as its repression, anamnesia as problematic as amnesia. "Hys-

³⁹⁹ GENE H. BELL-VILLADA, *BORGES AND HIS FICTION: A GUIDE TO HIS MIND AND ART* 97 (1981). This author diagnoses Funes's ailment as "a deep-seated incapacity for thinking in terms of general ideas." *Id.* at 101. Montaigne similarly remarked that "excellent memories are prone to be joined to feeble judgments." MICHEL DE MONTAIGNE, *THE COMPLETE WORKS OF MONTAIGNE* 22 (Donald M. Frame trans., Stanford Univ. Press 1958) (1580).

⁴⁰⁰ BELL-VILLADA, *supra* note 399, at 97.

⁴⁰¹ *Id.* at 97-98; see also NAOMI LINDSTROM, *JORGE LUIS BORGES: A STUDY OF THE SHORT FICTION* 41 (1990) (observing that "[t]he main issue examined in [Funes . . . is . . . the need to organize knowledge in the mind by means of judicious omission and the selective concentration of attention]").

⁴⁰² The best known versions of this process within current liberal theory are Dworkin on "law as integrity" and Rawls on "reflective equilibrium." See DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 225-75; RAWLS, *supra* note 192, at 48-51.

⁴⁰³ FRIEDRICH NIETZSCHE, *ON THE USE AND ABUSE OF HISTORY* 7-8 (Adrian Collins trans., Bobbs-Merrill Co. 1957) (1874).

⁴⁰⁴ The major works in this tradition, as applied to repressed memory of state-sponsored brutality, are those of LACAPRA, *supra* note 156; ALEXANDER MITSCHERLICH & MARGARETE MITSCHERLICH, *THE INABILITY TO MOURN: PRINCIPLES OF COLLECTIVE BEHAVIOR* (Beverly R. Placzek trans., 1975); SANTNER, *supra* note 156. See also Eric L. Santner, *History Beyond the Pleasure Principle: Some Thoughts on the Representation of Trauma*, in *PROBING THE LIMITS OF REPRESENTATION*, *supra* note 282, at 143, 150 (noting that "one can acknowledge the fact of an event, that is, that it happened, and yet continue to disavow the traumatizing impact of the same event").

terics," Breuer and Freud noted, "suffer mainly from reminiscences."⁴⁰⁵ One recent author states the dilemma with particular poignancy:

Pain can sear the human memory in two crippling ways: with forgetfulness of the past or imprisonment in it. The mind that insulates the traumatic past from conscious memory plants a live bomb in the depths of the psyche—it takes no great grasp of psychiatry to know that. But the mind that fixes on pain risks getting trapped in it. Too horrible to remember, too horrible to forget: down either path lies little health for the human sufferers of great evil.⁴⁰⁶

Criminal law can contribute to either mistake: as much through the premature closure of a universal amnesty, as through interminable proceedings aimed at rooting out every whiff of collaborative impropriety. With so much talk in Argentina about the twin dangers of "wallowing in the past" and "forgetting," it is scarcely surprising that Funes himself now makes periodic appearance in Argentine discussions of the dirty war and its memory.⁴⁰⁷ As one Argentine historian rightly cautions:

⁴⁰⁵ JOSEF BREUER & SIGMUND FREUD, *STUDIES ON HYSTERIA* 7 (James Strachey et al. trans., 1955). Primo Levi, who made a successful international literary career out of his inability to forget his time in Auschwitz, nevertheless experienced this mnemonic hypertrophy as a form of illness, one which may have proven fatal (he committed suicide in 1988). Levi notes:

[I]t has been observed by psychologists that the survivors of traumatic events are divided into two well-defined groups: those who repress their past *en bloc*, and those whose memory of the offense persists, as though carved in stone, prevailing over all previous or subsequent experiences. Now, not by choice but by nature, I belong to the second group. Of my two years of life outside the law I have not forgotten a single thing.

PRIMO LEVI, *MOMENTS OF REPRIEVE* 10-11 (Ruth Feldman trans., 1986).

⁴⁰⁶ SHRIVER, *supra* note 358, at 119. Eric Stein formulates the dilemma in the terms of recent conservative German historians concerning the need for national self-confidence:

To allow the sense of responsibility to vanish from the collective memory would distort history and would harbor the danger of new excesses. [But] [t]o make people wallow in nightmares of guilt so as to impair the self-confidence of the young and their positive view of the future might bring about a destructive backlash against democratic institutions. The problem is one of a delicate balance; there is perhaps a modest role for law and the courts in helping to maintain it.

Stein, *supra* note 17, at 321-22.

⁴⁰⁷ See Eduardo Rabossi, *Algunas Reflexiones, a Modo de Prólogo*, in *USOS DEL OLVIDO: COMUNICACIONES AL COLOQUIO DE ROYAUMONT* 7, 10 (Yosef H. Yerushalmi et al. eds., 1989); Tarnopolsky, *supra* note 155, at A19 (noting the coincidence that

[T]he notion that terrible and extraordinary events are particularly fecund in historical lessons derives from a conception of history that expects to find it charged with meaning, like a good melodrama [But history] has little to teach us about the meaning of terror, apart from the obvious fact that it has been used many times before in the nation's crusades, and [our recent experience of] terror has little to teach us about our older history, except to record yet again that we generally prefer to forget all about it⁴⁰⁸

Like the Bourbons, we are unlikely to learn anything from such a past, on this account, even if we forget nothing of it. Like U.S. foreign policymakers in the mid-1960s, we may find that the seemingly straightforward lessons of World War II leave us conceptually ill-equipped for coping with the ensuing age—one of colonial insurrection, in which virtually all the rules of the geopolitical game were changed.⁴⁰⁹ Those who remember the past receive no guarantee that it shall not be repeated, to them or by them, Santayana's famous platitude notwithstanding.⁴¹⁰ "If anything . . . too sharp a sense of one's own victimization can easily lead to a compensatory urge to tyrannize over others, and those convinced of their unique victimhood are quite likely to prove tyrants both to themselves and to others if given a chance," one author has recently observed.⁴¹¹

Law Against Apocalyptic History

The notion of *in extremis veritas*, that the most essential truths—of broadest import and relevance—are discovered only through the most extreme tests at the darkest times, is surely "an unexamined

the judge who recently awarded a \$3 million judgment to the one surviving family member of one of the disappeared shares the name of Borges's fictional character, Funes, for whom, she writes "the burden of memory becomes his torment and undoing, as it has been Argentina's").

⁴⁰⁸ Halperin, *supra* note 220, at 94.

⁴⁰⁹ See YUEN FOONG KHONG, *ANALOGIES AT WAR: KOREA, MUNICH, DIEN BIEN PHU, AND THE VIETNAM DECISIONS OF 1965*, at 209-50 (1992).

⁴¹⁰ Santayana observed: "Those who cannot remember the past are condemned to repeat it." 1 GEORGE SANTAYANA, *THE LIFE OF REASON* 12 (1905).

⁴¹¹ BERNSTEIN, *supra* note 203, at 88. Bernstein is specifically referring to particular demands by minority groups for changes in university curricula and to the statements offered by black U.C. Berkeley students who bragged of participating in the Los Angeles riots following the state-court acquittal of Rodney King's assailants.

and deeply false commonplace."⁴¹² As Peter Novick suggests of the Holocaust:

Lessons for dealing with the sort of issues that confront us in ordinary life, public or private, are not likely to be found, I would think, in this most extraordinary of events. But mine is obviously a minority view: Holocaust education, "confrontation" with the Holocaust, most recently, via viewing *Schindler's List*, is presented as a promising way of addressing a staggering array of social ills.⁴¹³

This is an inherent danger, I would add, of excessive reliance on storytelling, on the moral intuitions a poignant well-told story will arouse, at the expense of more careful, precise analysis.

If criminal prosecutions inevitably become the focus and forum for such lesson-mongering, they may simply be a mistake, a misguided expenditure of great effort, energy, and emotion. Judicial judgments possess a feature that makes them particularly vulnerable to abuse in this fashion: they do not merely pass judgment upon the past, but articulate social norms in ways designed to be binding upon the future. They authoritatively establish and reformulate the norms by which present activity is to proceed. For that reason, judicial judgments lend force to anyone who can persuasively invoke them—albeit by broad analogy—within the larger forum of political debate, interpreting them in support of a particular position on current controversies.

On the other hand, the law's preoccupation with precedent forces even the most extreme injustices, the most radical evil, to be apprehended in terms of something that has gone before, and hence to be approached in a willfully "prosaic" way. This is normally seen as a vice by critics of liberal law, who view lawyers as plodding dullards, insistent on forcing every historical novelty into the Procrustean bed of professional tradition.⁴¹⁴

But this lawyerly disposition can also be a virtue,⁴¹⁵ discourag-

⁴¹² *Id.* at 94. For instance, novelist Ernesto Sábato, in the prologue to the official report of the Argentine "truth commission," proclaims that "[g]reat catastrophes are always instructive." NUNCA MÁS, *supra* note 16, at 6.

⁴¹³ Novick, *supra* note 298, at 13.

⁴¹⁴ See ARENDT, *supra* note 18, at 276-79, 287-96.

⁴¹⁵ An eloquent, even poetic, defense of such prosaics is offered by BERNSTEIN, *supra* note 203, at 120-22. See generally DAVID G. ROSKIES, AGAINST THE APOCALYPSE: RESPONSES TO CATASTROPHE IN MODERN JEWISH CULTURE (1984) (showing how Jewish writers and artists have reworked traditional genres and materials—prophetic, gnostic, cultic, and mystical—to represent historical catastrophe since the destruction of the

ing unduly apocalyptic interpretations of the past and extravagant readings of its relevance to quotidian questions. Criminal proceedings might actually serve as a useful counterweight to the pervasive tendency of political actors, especially partisan intellectuals, to exaggerate the scope of the "lessons" to be gleaned from such an "historic" experience, and to read the precedential value of those lessons far too capaciously.

When partisans invoke a legal precedent—"the lessons of Nuremberg," for instance—in political debate, they rarely confine their exhortations to an explication of the judicial record itself. But judges *invite* such expansive readings of their opinions when, in the interests of collective memory and monumental didactics, they admit evidence, or engage in fact-finding, beyond the scope of what is strictly necessary to apply the law. In short, judicial efforts at writing administrative massacre into the national narrative necessarily lend themselves to the most wide-ranging of later utilizations. The terrible episode and the courts' judgments upon it begin to "hover over" the most diverse of subsequent events and controversies, in ways that threaten to escalate the most routine disputes among reasonable people into apocalyptic conflagrations and holy wars.

The scope of history's teachings from such an episode, like those of a leading case and its judicial opinion,⁴¹⁶ must be treated as subject to a range of legitimate disagreement.⁴¹⁷ Discursive democracy requires that people be able to engage in a civil exchange of competing views about just what should be learned by whom from such a national experience. This fails to occur either when the victims claim a monopoly over the meaning of the event, brooking no disagreement over its interpretation and the reach of its relevance, or when partially complicit parties treat the legal

Second Temple).

⁴¹⁶ A classic statement of the omnipresent availability of both broad and narrow readings of a legal precedent is presented by KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 66-69 (1951).

⁴¹⁷ Whatever their weaknesses in other respects, poststructuralist histories (beginning with Foucault's) at least never risk exaggerating the legitimate claims of the past upon the present. But they skirt this danger only by succumbing to a version of its opposite. All prior claims to truth are viewed, instead, as mere expressions of indefensible power; all alleged discoveries and resulting knowledge about the nature of "man" are dismissed as reflecting only the particular configuration of professional and disciplinary interests prevalent during specific historical periods, viewed as entirely discontinuous with our own.

condemnation of others as irrelevant to a moral assessment of their own conduct during the period.

For an example of the first of these problems, consider the following pronouncement. Israeli President Menachem Begin told his Cabinet, on the eve of war in Lebanon: "You know what I have done and what we have all done to prevent war and loss of life. But such is our fate in Israel. There is no way other than to fight selflessly. Believe me, the alternative is Treblinka."⁴¹⁸ To this use of collective memory, an Israeli philosopher responds:

Such a commemoration enforces the hawkish psychology of paranoia corrected by aggression. . . . It is also handy for relaxing the moral demands made on [ourselves] [t]his is a politically suicidal use of memory, that forgetfulness would better serve the national interest than [such] fatalism. . . . The memory of the Holocaust should be banished from political discourse. For the memory of such a nightmare is deranging. A political system cannot sanely function with Auschwitz as one of its central terms. If there are political lessons to be learned from the Holocaust, let the criminals ponder them, not the victims.⁴¹⁹

In short, if collective memory of national tragedy will be invoked only for divisive, aggressive, or fatalistic purposes, it is better to forget, to institute an informal "gag rule" making such invocations taboo in debate of current policy.⁴²⁰

Begin's words, as Halbertal interprets them, reflect a disposition toward partisan use of the past that has had a partial analogue in postwar France, where this disposition has come to be called *résistantialisme*.⁴²¹ This is the belief that wartime resistance to the

⁴¹⁸ Halbertal, *supra* note 169, at 46.

⁴¹⁹ *Id.*; see also LACAPRA, *supra* note 156, at 63 (observing that "the Holocaust may serve as 'symbolic capital' or as a pretext for self-serving monumentalization"). Novick elaborates:

Where once it was said that the *life* of Jews would be a "light unto the nations"—the bearer of universal lessons—now it is said to be the "darkness unto the nations" of the *death* of Jews that carries universal lessons. There is a good deal of confusion, and sometimes acrimonious dispute, over what these lessons *are*, but that has in no way diminished confidence that the lessons are urgent.

Novick, *supra* note 298, at 9.

⁴²⁰ Begin's statement is also objectionable, from a religious perspective, in that it places the dead in the service of the living, viewing their memory not as intrinsically worthy of reverence, but worthy primarily in terms of its current utility. See ALAIN FINKIELKRAUT, *THE IMAGINARY JEW* 54 (1994).

⁴²¹ See ROUSSO, *supra* note 26, at 28-30, 59. A similar phenomenon has recently emerged in Eastern Europe. One journalist observes:

Nazis displayed the superior moral insight and courage of its participants in a way that authorizes them thereafter to speak for the nation with great moral authority on virtually any national controversy. In more sympathetic terms, it is the disposition to trust, and sometimes defer to, the conscience of those who displayed this virtue when it was most needed by the nation and most lacking in its officials.⁴²²

But in claiming to have spoken for the nation in its time of trial, such people could not very well acknowledge that most of the nation did not actually stand behind them in support. The French and Italian Communist Parties, for instance, "had no objection to exaggerating the resistance record of the mass of the French or Italians, so long as they could themselves inherit the benefits of this illusion at the voting booth and in the national memory."⁴²³

The implication of *résistantialisme* is that active resistance to the unequivocal evil of state-sponsored mass murder provides the touchstone by which many later controversies may be understood and judged. This assumption, as Rousso observes, encouraged the making of many strained and faulty analogies between present and prior problems throughout postwar French history.⁴²⁴ It also fostered simplistic "interventions" by the most prominent French intellectuals, invoking their *résistantialiste* credentials, in genuinely complicated matters of public policy on which they had little knowledge or, for that matter, moral sense.⁴²⁵ Like Begin's invocation of Treblinka to explain and justify the invasion of

The struggle to define the past is one of the most important ways eastern Europeans compete for control of the present. These [competing] myths about the past are being constantly rewritten to fit the current political debate. Indeed, many political parties define themselves entirely in terms of the past: "We were the dissidents!" or "Trust us to be toughest on the Communists!" At times these claims are true. Often they merely reflect a very human forgetfulness of one's own complicity.

ROSENBERG, *supra* note 160, at xiv-xv.

⁴²² Consider, for instance, the following 1943 editorial from *Combat*: "On the morrow of the Liberation, France will pose this question to each of her sons: what did *you* do during the years of shame and misery? And it is on the basis of their answer . . . that she will choose those who will have the honor of representing her."

NOVICK, *supra* note 351, at 36 (citation omitted).

⁴²³ Judt, *supra* note 294, at 91.

⁴²⁴ See ROUSSO, *supra* note 26, at 28-30.

⁴²⁵ On the history of such intellectual interventions, see generally TONY JUDT, *PAST IMPERFECT: FRENCH INTELLECTUALS, 1944-1956* (1992). For German analogues, see *CONTENDING WITH HITLER: VARIETIES OF GERMAN RESISTANCE IN THE THIRD REICH* (David C. Large ed., 1991).

Lebanon, this too was an abuse of collective memory. If public prosecutions of French collaborators were not employed to such didactic ends, this was only because elite complicity had been so extensive as largely to foreclose their political possibility, until all but a handful of potential defendants had expired.⁴²⁶ The French courts thus deserve no credit for not allowing the law's abuse by *résistantialisme*.

Debts to the Dead: A Dangerous Metaphor

In Argentina, there has been a similar and equally powerful tendency to view the dirty war, that is, its "proper understanding," as a moral guidepost to present and future controversies of the most disparate kind. This is especially true of Ms. Hebe de Bonafini, president of *Las Madres de Plaza de Mayo*. In her public pronouncements, she does not hesitate to invoke the disappeared, and the political causes for which her sons agitated, in service of controversies as far-afiel as wage disputes between labor and management, and questions of foreign economic policy.⁴²⁷

Memory of the dirty war became, for such family members of the disappeared, a bloody shirt to be waved at every possible opportunity, to gain the moral high ground in political arguments of all sorts. Their profound suffering was taken (by themselves, if not generally by their opponents) to reflect the greater profundity of their moral and political insight, to confer not only spiritual strength, but also an ethical advantage in debate—an asserted superiority that, of course, did not at all follow from the fact of their greater suffering.

Family members of the disappeared were widely recognized as national spokesmen for human rights concerns, to be sure. For this reason, their leaders were understandably tempted to enhance their influence by turning virtually every political controversy into one "about human rights." The broader the reading given the dirty war

⁴²⁶ See ROBERT O. PAXTON, *VICHY FRANCE: OLD GUARD AND NEW ORDER 1940-1944*, at 332-46, 381-83 (1972) (describing the extensiveness of complicity among several sectors of French society).

⁴²⁷ See ALEJANDRO DIAGO, *HEBE: MEMORIA Y ESPERANZA* (1988). For a balanced assessment of Ms. Bonafini's leadership, superior to the already vast hagiographic literature, see MARIFRAN CARLSON, *EVIL IN THE SOUTHERN CONE: INTERVIEWS WITH THE SURVIVORS AND WITNESSES OF THE ARGENTINE DIRTY WAR* (forthcoming 1996). See also BRYSK, *supra* note 16, at 73 (quoting Hebe de Bonafini in her objection to forensic exhumation techniques: "We reject exhumations, because we want to know who the murderers are—we already know who the murdered are").

as precedent, binding on the present, the greater the political power of those who could plausibly claim to invoke its memory. It is scarcely surprising, then, that other political contenders would seek to ally themselves with such groups, in hopes of benefiting from the considerable resonance the Madres and other human rights organizations enjoyed within Argentine politics in the mid-1980s. In this way, the Madres became closely allied with leftist political parties, who sought to use them for their own ends.⁴²⁸

These are highly sensitive matters, so it is important to be precise about what is objectionable here. There would have been nothing untoward had the Madres merely chosen to take up the particular political causes for which their loved ones had fought on the grounds that those causes were justified.⁴²⁹ What is objectionable about invocations of the disappeared in contemporary Argentine debate is the implication that the country owes a moral debt to the victims and their families that can be repaid not by mourning, nor even by prosecution of the perpetrators, but only in deference to the beliefs of those who were murdered in the country's name. It was problematic enough to demand that the law punish all culpable parties. As Bernstein notes, "because it is so dismissive of temporal development and historical context, any ideology that endows victimhood with a singular authority to make claims upon others who were not themselves the agents of the injury strikes [us] as morally incoherent."⁴³⁰

⁴²⁸ See BRYSK, *supra* note 16, at 123-27, 129; EMILIO F. MIGNONE, *DERECHOS HUMANOS Y SOCIEDAD: EL CASO ARGENTINO* 97-124 (1991). Such affiliations provoked a split within the Madres, and the formation of a subgroup (the *Fundadores*) which opposes what it regards as overbroad invocations of the dirty war's lessons. Each group marches separately, every Thursday, in the *Plaza de Mayo*. The chief organization of human rights lawyers, *Centro de Estudios Legales y Sociales*, was even infiltrated by active guerrilla groups. See BRYSK, *supra* note 16, at 118-21. One prominent lawyer-activist, for instance, was among the participants in a 1989 attack on the *La Tablada* garrison, during which several draftees and noncommissioned officers were killed. See *id.*

⁴²⁹ Publications by the Madres and related groups often adopt this line. Deborah Norden provides several examples. See Deborah L. Norden, *Between Coups and Consolidation: Military Rebellion in Post-Authoritarian Argentina* (1992) (unpublished Ph.D. dissertation, University of California (Berkeley)). As Norden notes, "the radical factions of the Madres and Familiares injured their own credibility, by simultaneously portraying the disappeared as innocent victims of a cruel and unwarranted repression, and as heroes fighting for a just cause," a cause they often describe as "the defeat of imperialism." *Id.* at 182.

⁴³⁰ BERNSTEIN, *supra* note 203, at 93.

Promiscuous use of collective memory in contemporary Argentina is not confined to the left, however. Sympathizers of the officer corps, for instance, soon founded an organization, FAMUS, to commemorate soldiers killed by leftist guerrillas in the 1970s.⁴³¹ It holds religious masses in the soldiers' honor every month, officiated by sympathetic clergy. Speeches follow. In the mid-1980s, these speeches invariably denounced Alfonsín, the "liberals," "social democrats," "the Jews" behind him, and the "pornographic democracy" established by the new civilian administration.⁴³² The organization, its creators explained, was

founded because of the increasing loss of memory by Argentine society concerning those who died in its defense. We have been moved by fear that the sacrifice of our loved ones' lives will be forgotten. We found this organization with the aim of permanently commemorating those who valiantly confronted subversive terrorism We also dedicate ourselves to the indefatigable defense of the moral, spiritual, and political values for which they gave their lives.⁴³³

Its goal, in short, is collective memory. Specifically, the goal is to restore a form of social solidarity in which shared remembrance and celebration of the victorious war against leftist terrorism would provide the common core of value-consensus. Until Menem's pardons, the ritual life of the organization focused on its denunciations of Alfonsín's military prosecutions.⁴³⁴ The liberalism of the law thus became the symbolic centerpiece of its demonology. The continuing influence of "subversion" within the country's educational and cultural elite was also frequently decried at such gatherings.⁴³⁵

The enduring subversion in these quarters was thought to be responsible for historical distortions of the dirty war disseminated by the courts, public schools, and mass media, who defamed those killed in the war against it. They claimed that war must continue unabated in order to honor their name, and to foster national memory of the cause they served. The institution of the "blood feud," after all, is based on the all-consuming memory of a grievance originating in the distant past, that is, based on an inability to

⁴³¹ See FAMUS, *OPERACION INDEPENDENCIA* (1988).

⁴³² See Amos Elon, *Letter from Argentina*, *NEW YORKER*, July 21, 1986, at 74, 82-83.

⁴³³ FAMUS, *supra* note 431, at acknowledgment page (translation by author).

⁴³⁴ See Elon, *supra* note 432, at 82.

⁴³⁵ See *id.*

put aside what any reasonable person in a modern liberal society would prefer to forget.⁴³⁶ Criminal trials originated largely to put an end to such processes, not to escalate them.

While some succumb to overbroad readings of precedent, others often fall victim to the opposite peril: too narrow a reading. This takes the form of a pervasive tendency toward self-flattering denial of one's own measure of complicity.⁴³⁷ Since only a few will ever be prosecuted, the many who collaborated in myriad ways are discouraged from any serious self-examination. In fact, they often prominently join the ranks of the accusers, hurling invective at the former rulers whose policies they implemented and whose lies they chose to believe.⁴³⁸

The trials of political and military chieftains are seen merely as applying legal rules of properly delimited scope to those who have violated them, rather than as embodying larger principles of liberal morality pertinent to assessing their own conduct. In short, such people underestimate the scope of the lessons properly to be learned from such legal proceedings. The danger here is not that the audience will prove unreceptive to the courtroom drama, but on the contrary, that it will prove all too responsive to the unduly circumscribed character of the narrative frame.

Thus, even when such proceedings succeed in summoning up the collective conscience, as Durkheim hypothesized, they may do so only in a way that unduly narrows the public understanding of the principles thus reinvigorated. This peril was especially apparent in the French public's receptivity to the conviction of Klaus Barbie who, as a German, enabled Frenchmen to point the accusatory finger at others, to evade any confrontation with the historical

⁴³⁶ On blood feuds as quasilegal institutions, see WILLIAM I. MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* 179-257 (1990). On the link between revenge and amnesia (the inability to forget), see generally Rebecca N. Comay, *Redeeming Revenge: Nietzsche, Benjamin, Heidegger and the Politics of Memory*, in *NIETZSCHE AS POSTMODERNIST* 21 (Clayton Koelb ed., 1990). Argentine sociologist Juan Carlos Torre recently predicted "that Argentine society would probably never come to terms with the dirty war but would 'continue with this open wound and carry it around with us for centuries.'" Calvin Sims, *Argentina to Issue New List of Missing in 'Dirty War'*, N.Y. TIMES, Mar. 25, 1995, at A4. On some of the extremities to which this process now extends, including the adoption of Jewish names by German gentiles, see Jane Kramer, *Letter from Germany: The Politics of Memory*, NEW YORKER, Aug. 14, 1995, at 48, 49-50.

⁴³⁷ For an example, see EMILIO F. MIGNONE, *IGLESIA Y DICTADURA: EL PAPEL DE LA IGLESIA A LA LUZ DE SUS RELACIONES CON EL RÉGIMEN MILITAR* (2d ed. 1986) (detailing the extensive complicity of the Catholic Church in the dirty war).

⁴³⁸ See *infra* text accompanying note 449.

reality of French collaboration, and to reinvigorate the Gaullist myth of national purity.

Even when the defendant was unavoidably French, as in the trial of Paul Touvier, the French courts eagerly contributed to national efforts at moral evasion by interpreting the Nuremberg Charter to require the defendant to have acted in compliance with the orders of an Axis power.⁴³⁹ Acts motivated by anti-Semitism of purely French inspiration were thereby excluded from the definition of "crimes against humanity."⁴⁴⁰ Touvier was therefore criminally liable, as a matter of law, only to the extent that he was shown to have acted under German hegemony. Again, the story was told in such a way that the Germans became the real culprits, the French merely their long-suffering agents and grudging instruments.

Reading Precedent Restrictively

Criminal prosecution itself can, paradoxically, facilitate self-deception through active misreading and misremembering. In eliciting and focusing the punitive sentiments of the many upon the very few, criminal trials thus tend not only to distort historical recollection by the general population, but also to discourage the discursive deliberation essential to liberal memory and solidarity. This is particularly apparent in how judicial condemnation of Germany's leaders at Nuremberg assisted many Central and Eastern Europeans—even those who had collaborated most extensively with Jewish deportations—to view themselves as victims of Nazism.⁴⁴¹ A Japanese historian similarly observes that, "[b]y thrusting the full responsibility onto the few who were executed, the Japanese effectively absolved themselves of any blame."⁴⁴² The past can have little relevance to the present when it is understood as a story about how the evil few led the innocent many astray.

By declining to discuss official policies of the 1930s and 1940s, Japan has rendered many of its citizens virtually incapable of debating the question of when military power may defensibly be employed. Today, few students will engage in the discussion, on

⁴³⁹ See Wexler, *supra* note 316, at 361-63.

⁴⁴⁰ Wexler offers an able doctrinal analysis and critique of how this legal conclusion was reached. See *id.* at 353-62.

⁴⁴¹ See Judt, *supra* note 294, at 87.

⁴⁴² Yoshimi, *supra* note 368, at A23.

account of the pacifist reading of the War predominant among young Japanese.⁴⁴³

This is the wrong variety of societal self-reckoning, for as it has been observed of collaboration under long-lasting despotic regimes, "the line usually did not run clearly between Us and Them, but rather through the heart of each man and woman."⁴⁴⁴ Alfonsín's top legal advisor, Malamud-Goti, now concludes that the danger of scapegoating a handful of aging elites is almost intrinsic to the bipolar logic of criminal law, with its insistence on dividing the world into mutually exclusive categories of people: legally, into guilty and innocent; sociologically, into blamers and blamed.⁴⁴⁵

These binary oppositions were deployed with brilliant casuistry by political elites in postwar France to minimize the moral questions raised by pervasive Nazi collaboration. Both De Gaulle and the metropolitan Resistance demanded prosecution of high-ranking Vichy officials.⁴⁴⁶ To justify such prosecution as consistent with the law (of treason and sedition) required a finding that Pétain's Third Republic had been established by unconstitutional means.⁴⁴⁷ But that conclusion entailed a corollary very convenient for collaborators not in the dock. Because the Vichy regime was illegal *ab initio*, none of its villainous acts—even those receiving *de facto* endorsement by a majority of Frenchmen—could be ascribed to France itself. Since it had come to power through defects of constitutional procedure, it could not be said to represent the true will of the French people.

⁴⁴³ On such attitudes, see BURUMA, *supra* note 165, at 92-111.

⁴⁴⁴ Ash, *supra* note 162, at 22 (paraphrasing Václav Havel).

⁴⁴⁵ But in seeing the problem as inherent in law, he explicitly assumes that legal discourse must retain its formalist contours. In other words, he assumes that even when courts judge administrative massacre, their deliberation and reasoning may entertain only such considerations recognized as relevant by positive law, not the wider range of factors admittedly indispensable to moral and political judgment of such events. See MALAMUD-GOTI, *supra* note 103, at 269-70. In this regard, he displays the jurisprudential commitment to positivist formalism. This commitment has long been characteristic of Latin American liberals. It is due to their considerable experience with the "naturalist" jurisprudence of courts during periods of authoritarian rule. See Mark J. Osiel, *Dialogue with Dictators: Judicial Resistance in Argentina and Brazil*, 20 LAW & SOC. INQUIRY 481, 495 (1995).

⁴⁴⁶ See LOTTMAN, *supra* note 288, at 32-43.

⁴⁴⁷ On the arguments employed by French legal scholars to reach this conclusion, see NOVICK, *supra* note 351, at 21-24 (noting the "peculiar constitutional theory, which was to be the juridical foundation of the future Provisional Government, and, *pari passu*, of the purge").

Even if this France of innocent purity was a pure abstraction, it was *the law's* abstraction, hence highly authoritative when later invoked in political debate. It was the corollary of legal fictions thought necessary to convict the Nazis' most obvious henchmen. The very doctrines employed to ascribe legal responsibility to a few Frenchmen were thus increasingly employed in moral and political argument to absolve the rest. For instance, President François Mitterrand's self-serving contention of only last year: "The Republic had nothing to do with this [Jewish deportation]. I do not believe France is responsible."⁴⁴⁸ In this way, the trials themselves played into the propensity for self-deception, so powerful in the aftermath of collective catastrophe, by inviting an unduly narrow reading of their lessons.

The Argentine experience in this connection is similarly disconcerting. The trial of the Argentine juntas did not, by any means, put an end to manifestations of willful blindness about the pervasiveness of public sympathy for despotic rule. The very effectiveness of the junta trial in influencing present and future memory of the dirty war induced many Argentines to revise their *prior* memory of the period in more flattering terms. In the mid-1980s (shortly after public revelation of massive disappearances), Argentine sociologist Guillermo O'Donnell observed, when revisiting respondents he had interviewed years before during military rule, that:

[a]ll of them "remembered" what they had told us before in a way that sharply contrasted with what they had actually told us. They were wrong, but evidently sincere, as they had been sincere before, in telling us, in the reinterviews, that they had always strongly opposed the regime and had never accepted its injunctions. In the first interviews those respondents had given distressing responses to our probings concerning the abductions, tortures and murders that were going on: these were only "rumors" or "exaggerations" and, at any event, "there must be some reason" why some persons were so victimized. . . .

. . . [T]hey had rewritten their memories to fit [the] discovery [of what they felt they should have believed during the years of harsh repression]. The sense of continuity of their personal identity was preserved and, thus, they could look at the past without conscious guilt or shame[. T]hey . . . had known little or nothing of those atrocities. . . .

⁴⁴⁸ Simons, *supra* note 291, at A3.

. . . This, at least, preserved them . . . for the moment when it eventually would become not too dangerous to "know" and, thus, to become indignant about what had happened. . . . [Through selective memory they imagined] that they had "always" been opposed to the regime⁴⁴⁹

It is scarcely surprising, then, that the military juntas felt they had been betrayed by a convenient failure in collective memory concerning the public connivance the juntas had once enjoyed. In his closing statement to the court, Admiral Massera thus bitterly denounced the "fickleness" of Argentina's memory, a charge that O'Donnell's research painfully substantiates.⁴⁵⁰ When a mass circulation newspaper in Buenos Aires first printed notice of numerous disappearances (tentatively testing the waters, in 1978), thousands of readers canceled their subscriptions.⁴⁵¹

Discursive deliberation cannot get off the ground if people simply "tune out" messages they don't wish to hear. O'Donnell provides a reminder that "identification with the aggressor and blaming the victim," and their origins in rationalization and cognitive dissonance, were identified long ago in studies of Nazi Germany.⁴⁵² He might have added that the self-congratulatory revisionism that often follows, which his interviewees display, bespeaks a recurrent feature of transitions from authoritarianism to democracy. The French case is notorious in this regard: a substantial portion of the adult wartime survivors "remember" having assisted the Resistance in significant ways.⁴⁵³

⁴⁴⁹ Guillermo O'Donnell, *On the Fruitful Convergences of Hirschman's Exit, Voice, and Loyalty and Shifting Involvements: Reflections from the Recent Argentine Experience*, in DEVELOPMENT, DEMOCRACY, AND THE ART OF TRESPASSING: ESSAYS IN HONOR OF ALBERT O. HIRSCHMAN 249, 264-65 (Alejandro Foxley et al. eds., 1986). Malamud-Goti makes a similar observation regarding public enthusiasm for the junta trial: "Only in the sense of stifling a widely shared guilt, shame and anguish in the common knowledge that it was the same disappeared who we ought to censure did blame contribute to . . . social solidarity." MALAMUD-GOTI, *supra* note 103, at 259-60.

⁴⁵⁰ See O'Donnell, *supra* note 449, at 264.

⁴⁵¹ See Vezzetti, *supra* note 80, at 5. The news article appeared in mid-1978.

⁴⁵² See O'Donnell, *supra* note 449, at 264. He is presumably alluding to the influential study by MITSCHERLICH & MITSCHERLICH, *supra* note 404, at 1-67, which sought to show that many Germans had managed to block out any memory of having glorified Hitler.

⁴⁵³ See Stanley Hoffman, *Foreword* to ROUSSO, *supra* note 26, at vii, vii-viii.

Overcoming Willful Blindness

The only way in which trials for administrative massacre have thus far been able to overcome such thick layers of willful blindness, as manifested by O'Donnell's interviewees, is by self-conscious use of powerful dramatical devices, particularly film. The quintessential case of its use was at Nuremberg, where Allied prosecutors showed "German Concentration Camps" to the Tribunal.⁴⁵⁴ The film ends with footage of a bulldozer pushing enormous mounds of human bodies into a mass grave at Bergen-Belsen. When the court adjourned for the day at the completion of the showing, several of the defendants were seen stifling tears.⁴⁵⁵ One scholar observes,

whatever evasions and duplicities permitted a person to sweep the camps from his or her frame of vision cannot survive contact with the world captured on [this] film. . . . [It] does not simply instruct or produce visual knowledge of atrocity; rather, it overwhelms one's senses, creating an irrefutable imprint upon the mind, a trauma of sight. . . . The corpses force their memory upon the coward's mind.⁴⁵⁶

Where the perpetrators still hold considerable power, however, as did the Argentine military during the junta trial, prosecutorial stagecraft is more likely to work by understatement, by more subtle appeals to conscience, than by such efforts to overpower the senses and defense mechanisms. Although many mass graves had been uncovered in Argentina by the time of the junta trial, no such cinematic images were employed to elicit support for the junta trial. Such images had earlier been selectively broadcast as part of the "Truth Commission" report. However, they were preceded by remarks from Alfonsín's conservative Interior Minister, who situated the military's crimes in the context of the guerrilla violence.⁴⁵⁷ Although Alfonsín allowed state television to broadcast the junta trial, he insisted that coverage be confined to photographic images

⁴⁵⁴ See 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 346, at 104, 121, 431-33, 536 (originally shown at Nuremberg, 1945-1946).

⁴⁵⁵ See ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 160 (1984).

⁴⁵⁶ Douglas, *supra* note 272 (manuscript at 49). The same film was also shown at the Eichmann trial.

⁴⁵⁷ See BRYSK, *supra* note 16, at 71.

and exclude the harrowing oral testimony.⁴⁵⁸ Nino confides that this was for fear of aggravating military tempers.⁴⁵⁹

Propensities for faulty analogy and self-deception, for overbroad and overly narrow readings of the precedent, pose problems for liberal law that are intertwined. On one hand, if the law contents itself with a narrow notion of responsibility, punishing only a small portion of culpable parties, it reinforces the powerful inclination of many others toward self-deception, that is, against any enduring recognition of their own, genuine moral failures and what might be learned from them.

On the other hand, if the law endorses a very broad reading of these moral failures and of their attendant lessons, it will necessarily be asked to accomplish things far beyond its power—and will then be condemned for failing to achieve them. Legal proceedings cannot, for instance, convict an entire society, unmask the international economic system allegedly responsible for the dirty war, or bring back the dead—all longstanding and continuing demands of *Las Madres de Plaza de Mayo* and their political sympathizers.⁴⁶⁰

Criminal law cannot further social solidarity if the story it tells exculpates most of the morally culpable parties—either through political prudence or because they are “culpable” in ways that liberal jurisprudence does not recognize. *That* story—of a few “bad apples” leading the innocent nation astray—will be persuasively attacked by good journalists, historians, and social scientists (like O'Donnell effectively does) as incomplete, as concealing more extensive complicities, to which its judicial narrators become accessories after the fact.⁴⁶¹

But the alternative narrative is no less problematic. The law cannot hope to further social solidarity if its story promises a “happy ending”—by punishing all responsible parties, however numerous—that it cannot deliver. The law cannot provide anything but the most morally compromised narrative because what is most urgently desired by those seeking a complete accounting (such as the Madres), is a thorough condemnation of *all* those sharing any responsibility for the atrocities—plus a publicly enforced recollection of the enduring “debts” to victims and their families thus incurred.

⁴⁵⁸ See Interviews with Argentine Presidential Legal Advisors, in Buenos Aires, Argentina (Aug. 1985).

⁴⁵⁹ See NINO, *supra* note 30.

⁴⁶⁰ See BRYSK, *supra* note 16, at 124-25.

⁴⁶¹ See O'Donnell, *supra* note 449, at 263-65.

The courts' credibility in telling a national story, one that will powerfully shape collective memory, is thus alternately threatened by the narrowness or breadth of the narrative framing. The broader narrative framing is politically imprudent, to the point of imperiling the new democratic regime were a court to try telling it. The narrower framing, however, is politically unpersuasive because it must rely upon distinctions in degrees of culpability likely to be publicly perceived as logically weak or morally indefensible. Between the broader and narrower story lines, there may be no stable middle ground for courts to occupy.

In seeking to influence collective memory of administrative massacre, then, judges and prosecutors need to be able publicly to acknowledge and explain the law's limits and potentialities, even as they go about performing their more fundamental tasks. More readily than the Durkheimian view, the discursive conception of law's service to social solidarity can confront the differing views about the scope of the law's legitimate aims in such circumstances. It can also confront the recalcitrant reality of enduring disagreement, in the aftermath of administrative massacre, over how broadly the lessons of the country's recent horrors should be interpreted. The discursive conception, after all, allows for solidarity despite continuing disagreement about such things as whether the precedent established by the recent past and binding upon the present is fairly applicable to any particular question of public policy that may arise in the future.

It bears mention, in conclusion, that uncritical over-reliance on the purported "lessons of history" is a danger against which the most influential versions of liberalism, such as Kant's, have always been well-guarded.⁴⁶² The notion of a hypothetical social contract, for instance, forces one to start afresh, stripped of historical grievances and prejudices, to reason from a moral point of view, without appeal to prior status as (victimizing) power or (powerless) victim.⁴⁶³

⁴⁶² See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 313 (Norman K. Smith trans., 1964) ("Nothing is more reprehensible than to derive the laws prescribing what *ought to be done* from what *is done*, or to impose upon them the limits by which the latter is circumscribed."); see also WILLIAM A. GALSTON, *KANT AND THE PROBLEM OF HISTORY* 36-37 (1975) (contending that Kant, in contrast to much Greek classical thought, "denies that experience can serve as a guide"); LARMORE, *supra* note 193, at 1-5 (observing Kant's inconsistent views on the usefulness of examples in moral reasoning).

⁴⁶³ If anything, liberal moral philosophy almost certainly undervalues what can be

D. *Breaking with the Past, Through Guilt and Repentance*

There is a fourth source of skepticism about the extent to which criminal prosecution of administrative massacre can contribute to collective memory. Is it *possible*, whether by legal judgment or other means, to construct group identity upon shared recollection of moral failure?

We know that a group can create a myth of refounding, a complete break with the past, that does not entail any recognition of responsibility for its wrongs, that is, of the good reasons it might have for wishing to break with its past in the first place. The German Democratic Republic provides the clearest case. Communist leaders there consistently affirmed, in thousands of speeches and declarations over forty-five years, that their citizens bore no responsibility for Nazism or the Holocaust; these had resulted from fascism and capitalism, with which the East had decisively broken after the War.⁴⁶⁴ They claimed that the new state, in fact, had been founded by a victorious antifascist and anticapitalist movement, which had cleared the country of the reactionary elements (that is, big business) responsible for past horrors.⁴⁶⁵

Disingenuous denials of this sort have been distressingly common in many societies. The legal act of creating a new sovereign entity, where none had before existed, only contributes to the delusion that the past has no claim upon the present. A superficial legal rupture substitutes for a serious moral reckoning.

We also know that collective memory can be based on catastrophe; the role of the Holocaust in Israeli national identity makes that clear.⁴⁶⁶ In fact, it has been quite common for national groups to foster internal cohesion among members by the authoritative telling of stories—sometimes fanciful, often accurate—about the many injustices done to its ancestors by other nations. The “notion of having been victimized by the Germans,” notes one leading

acquired from historical experience and its study, such as the virtue of seasoned judgment. For an unusually explicit attempt to employ historiography to this end, see generally RICHARD E. NEUSTADT & ERNEST R. MAY, *THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS* (1990).

⁴⁶⁴ See Frank Trommler, *The Creation of History and the Refusal of the Past in the German Democratic Republic*, in *COPING WITH THE PAST: GERMANY AND AUSTRIA AFTER 1945*, at 79, 86-87 (Kathy Harms et al. eds., 1990).

⁴⁶⁵ Only in its final years did East German leaders begin to acknowledge, in part, the responsibility of their people for past injustices. See *id.* at 79.

⁴⁶⁶ This is a central theme in both FRIEDLANDER, *supra* note 322, at 113-14, and SEGEV, *supra* note 34, at 223-26.

Europeanist, "became an absolutely indispensable staple of the collective memories of most postwar European peoples, even those significant in number who have in fact benefited from Germany's power and presence during the Nazi era."⁴⁶⁷ As a result, "victimization by the Germans developed into an essential pillar of the 'foundation myth' in these societies."⁴⁶⁸

If criminal prosecution has not often been used to advance this narrative purpose, this is only because it has usually proven impossible to acquire jurisdiction over (that is, get one's hands on) the alleged culprits. But resentment over the wrongs inflicted on one's nation has often, nonetheless, been a fertile source of collective self-definition, and self-assertion.⁴⁶⁹ Shared memory of the humiliation represented by the Versailles Treaty was evoked with notorious success by Hitler himself, to resurrect German identity in the aftermath of the First World War.⁴⁷⁰ Again, a legal document became the focal point for a national myth of origin, here one of *refounding* and reconstruction.

We know, moreover, that national identity can be constructed on the basis of stories about the moral failings of a society's founders. This is true even when these founders appear otherwise heroic, even superhuman. After all, in ancient Greece, tragic dramas for theatre were written about real events in the remembered past.

[T]he tragic dramatists of the Greek city-states were . . . concerned with reconstituting the history of their forefathers as tragic myth. Prometheus and Io, and later Oedipus and Antigone, belong to an antiquity which fifth-century Greeks could recognize as part of a sacrificial struggle for their own collective identity. They are legendary figures.⁴⁷¹

⁴⁶⁷ Andrei S. Markovitz & Simon Reich, *The Contemporary Power of Memory: The Dilemmas of German Foreign Policy* (Sept. 3, 1995) (paper presented at the Annual Convention of the American Political Science Association).

⁴⁶⁸ *Id.*

⁴⁶⁹ On the central role of resentment in nationalist movements, see LIAH GREENFELD, *NATIONALISM: FIVE ROADS TO MODERNITY* 15-17, 222-28 (1992).

⁴⁷⁰ See Erich Matthias, *The Influence of the Versailles Treaty on the Internal Development of the Weimar Republic*, in *GERMAN DEMOCRACY AND THE TRIUMPH OF HITLER: ESSAYS IN RECENT GERMAN HISTORY* 13, 22 (Anthony Nicholls & Erich Matthias eds., 1971). For evidence in the autobiographies of Nazi activists, see generally PETER H. MERKL, *POLITICAL VIOLENCE UNDER THE SWASTIKA: 581 EARLY NAZIS* (1975).

⁴⁷¹ JOHN ORR, *TRAGIC DRAMA AND MODERN SOCIETY: A SOCIOLOGY OF DRAMATIC FORM FROM 1880 TO THE PRESENT* at xiii (2d ed. 1989).

The life history of such figures, imprinted in collective memory, can function to forge identity and form character in mere mortals, partly because the personal frailties of a given founder—his “tragic flaw,” in Aristotle’s terms—often entail a one-sided exaggeration of a virtue; his life history thus usefully instructs us, his successors, in the merits of moderation and in the continuous need for critical self-assessment even when—perhaps especially when—acting pursuant to our most deeply held ideals and commitments.

What is much less clear, however, is whether national identity can be constructed on the basis of shared acceptance of responsibility for wrongs one’s *own* nation has done to *others*. Is it true, as some lament,⁴⁷² that memory of one’s own grievances against others is the only kind that can provide the mnemonic basis of collective identity? Surely it can be no accident that such founding myths almost invariably offer highly flattering accounts of the nation’s early accomplishments and the virtues displayed by its founders. On most recountings, America’s myth of origin does not exactly give pride of place to the genocide of the Native American, except perhaps if rendered as “subdu[ing] savages.”⁴⁷³

We are hardly alone in this type of omission. The writing and telling of most national myths of origin entail acts of compulsory “forgetfulness,” notes Derrida,⁴⁷⁴ because the creation of most nation-states has entailed acts of violent dispossession. What must be forgotten in this process is not only the dispossession itself, but also the notions of right, often embodied in customary law, on which prior claims of possession and entitlement were based.

A nation’s myths of its origins establish a “cult of continuity,” one historian observes: “The greater the origins, the more they magnified our greatness. Through the past we are venerated above all ourselves.”⁴⁷⁵ Providing such stories with a legal imprimatur,

⁴⁷² See Novick, *supra* note 298.

⁴⁷³ Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 8.

⁴⁷⁴ See Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”* (Mary Quaintance trans.), in *DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE* 3, 47 (Drucilla Cornell et al. eds., 1992); see also Ernest Renan, *What Is a Nation?*, in *NATION AND NARRATION* 8, 11 (Homi K. Bhabha ed., 1990) (contending that to create and unite a nation, such as France, requires inducing its members to “forget” the savage conflicts, as between Protestants and Catholics in the 16th century, that have long divided them). On the exclusionary aspects of leading cases establishing American national identity, see PRISCILLA WALD, *CONSTITUTING AMERICANS: CULTURAL ANXIETY AND NARRATIVE FORM* 22-37 (1995).

⁴⁷⁵ Nora, *supra* note 290, at 16.

as by official holidays for their commemoration, grants them special authority and solidarity-enhancing impact. To employ such an occasion, like the Bicentennial of the U.S. Constitution, for serious self-criticism of a society's foundational legal commitments is likely to be regarded as ill-considered and inappropriate during such a festive occasion, even by those otherwise sympathetic to the substance of such criticism, as Justice Marshall learned.⁴⁷⁶ What has been here described as historical "balance," a nuanced judgment of our collective strengths and weaknesses in relation to others, is precisely what is *least* welcome at such moments.⁴⁷⁷

Professional historiography, to be sure, now explicitly distinguishes itself from popular memory on the basis of its more self-critical capacities and on its willingness to turn a skeptical gaze upon the self-congratulatory memory of the society that sponsors it and upon the more celebratory accounts of earlier historians.⁴⁷⁸ Even so, history textbooks for school children are self-consciously aimed at constructing collective memory, and have almost everywhere been notoriously silent about the less glorious acts of the famous dead.⁴⁷⁹ A recent study of how Western and Eastern

⁴⁷⁶ Many editorialists criticized Marshall for his choice of timing, while sharing much of his substantive view. See William B. Reynolds, *For the Record*, WASH. POST, June 11, 1987, at A22; Jack Valenti, *Despite Slavery, a Constitution That Built a Nation*, N.Y. TIMES, June 6, 1987, at A27; Edwin M. Yoder Jr., *That 'Defective' Constitution: The Alternative Was a Lot Worse*, WASH. POST, May 14, 1987, at A25.

⁴⁷⁷ More precisely, the sort of balance that is sought is aimed exclusively at mitigating one's own wrongs, rather than a disinterested and impartial assessment. Hence, the statement of Masao Horie, head of the Japanese Veterans Association, in response to demands for a parliamentary apology for the country's war crimes: "At the 50th anniversary of the Dresden firebombing, in which many people died, I didn't hear the Allies apologizing' . . . 'And the U.S. dropped atomic bombs on Hiroshima and Nagasaki and killed huge numbers of innocent Japanese people, and never apologized for this.'" Kristof, *supra* note 363, at E3. On August 14, 1995, for the first time since the end of the war, the Japanese Prime Minister, "expressed 'heartfelt apology,'" admitting that "Japan had 'through its colonial rule and invasion, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations.'" Sheryl WuDunn, *Japanese Apology for War Is Welcomed and Criticized*, N.Y. TIMES, Aug. 16, 1995, at A3 (quoting Prime Minister Tomiichi Murayama). The Prime Minister rejected the possibility of compensating Japan's victims, however, stating that such questions had been resolved by treaty with Asian neighbors long ago. See *id.*

⁴⁷⁸ See Nora, *supra* note 290, at 9 ("At the heart of history is a critical discourse that is antithetical to spontaneous memory. History is perpetually suspicious of memory."); see also YERUSHALMI, *supra* note 378, at 14-15 ("Even in the Bible . . . historiography is but one expression of the awareness that history is meaningful and of the need to remember, and neither meaning nor memory ultimately depends upon it.").

⁴⁷⁹ Until recently German textbooks in public schools exhibited "scant interest in

Europeans remember the Holocaust, in textbooks and other media, concludes: "In every country, every culture I explored, irrespective of national character or political ideology . . . self-deception has usually triumphed over self-revelation."⁴⁸⁰

One may thus reasonably "wonder whether a national identity can be built on guilt and repentance, bereft of the ordinary pride of other nations."⁴⁸¹ Opinion surveys suggest that many Germans and Americans are "sick and tired of having to remember"⁴⁸² Nazi crimes against the Jews, prompting one author to observe that:

Most human minds grow weary of negatives. They can absorb only so much repetition of truths that are unwelcome from the beginning. And this psychological reaction suggests that the victims of any vast suffering *should worry over the tactics* as well as the morality of their public protests against forgetfulness.⁴⁸³

Whether criminal prosecution is an effective tactic toward this end thus becomes an inescapable question. As Sheldon Wolin observes, "a society which insisted upon periodically reviewing great historical wrongs it had committed would probably invite all the familiar metaphors about 'obsessively picking at its own scabs.'"⁴⁸⁴

the broader circles of complicity involved in murdering millions of men, women, and children." Walter F. Renn, *Federal Republic of Germany: Germans, Jews, and Genocide*, in *THE TREATMENT OF THE HOLOCAUST IN TEXTBOOKS: THE FEDERAL REPUBLIC OF GERMANY, ISRAEL, AND THE UNITED STATES OF AMERICA* 128, 128 (Randolph L. Braham ed., 1987). Recent U.S. efforts to implement uniform "History Standards," with their modest efforts to qualify an otherwise celebratory account of American history with reminders of slavery and Indian genocide, have been widely rejected. See John Fonte, *Flawed History Standards Must Go*, N.Y. TIMES, Feb. 19, 1995, at D12. The detention of Japanese-Americans during the Second World War did not appear in high school history textbooks until the 1980s. See Rubie S. Watson, *Making Secret Histories: Memory and Mourning in Post-Mao China*, in *MEMORY, HISTORY, AND OPPOSITION*, *supra* note 191, at 65, 67.

⁴⁸⁰ MILLER, *supra* note 64, at 279; see also HERBERT HIRSCH, *GENOCIDE AND THE POLITICS OF MEMORY* 28 (1995) ("Most nations attempt to avoid honest self-recognition, especially when their past behavior may be viewed as less than morally justifiable.").

⁴⁸¹ Francis Fukuyama, *The War of All Against All*, N.Y. TIMES, Apr. 10, 1994, § 7 (Book Reviews), at 7 (reviewing MICHAEL IGNATIEFF, *BLOOD AND BELONGING* (1994)). German historian Hans-Peter Schwarz proposes a corollary: "When national consciousness is replaced by consciousness of guilt, patriotism is programmed to degenerate into defeatist pacifism." JÜRGEN HABERMAS, *Closing Remarks*, in *THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE HISTORIANS' DEBATE* 241, 247 (Shierry W. Nicholsen ed., trans., 1989).

⁴⁸² SHRIVER, *supra* note 358, at 103.

⁴⁸³ *Id.* (emphasis added).

⁴⁸⁴ SHELDON S. WOLIN, *Injustice and Collective Memory*, in *THE PRESENCE OF THE PAST* 32, 34 (1989). Wolin is describing and criticizing the views of the French

Perhaps a national culture can "keep its shape," as Mary Douglas has written, only by inducing members "to forget experiences incompatible with its righteous image, and . . . bring[] to their minds events which sustain the view . . . that is complimentary to itself."⁴⁸⁵

To be sure, this view may unduly hypostatize a nation's culture, endowing it with a powerful instinct of self-preservation that protects its essence from criticism and reform by its very carriers. Even so, the "screen memory" that, according to Freud,⁴⁸⁶ helps individuals suppress painful experiences from conscious memory may have an analogue in the process by which historical events enter into (or are filtered from) the memory of an entire society and the national identity of its members.⁴⁸⁷

Perhaps. But we should be reluctant to accept any such easy isomorphism, such direct parallelism between the workings of individual memory (over personal trauma) and collective memory (of national trauma). As James Young wisely warns:

If memory of an event is repressed by an individual who lacks the context—either emotional or epistemological—to assimilate it, that is one thing. But to suggest that a society "represses" memory because it is not in its interest to remember, or because it is ashamed of its memory, is to lose sight of the many other social and political forces underpinning national memory.⁴⁸⁸

nationalist Ernest Renan for arguing that "a society can ill afford to reexamine collectively a special class of political events [here, Catholic persecution of the Huguenots] in which the members of society feel tainted by a kind of corporate complicity in an act of injustice done in their name." *Id.*

⁴⁸⁵ MARY DOUGLAS, *HOW INSTITUTIONS THINK* 112 (1986).

⁴⁸⁶ See Sigmund Freud, *Screen Memories*, in 3 *THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD* 303 (James Strachey et al. eds., 1962). Elsewhere, Freud quotes Nietzsche approvingly on the mental process involved here: "I have done that," says my Memory. "I could not have done that," says my Pride, and remains inexorable. Finally, my memory yields." SIGMUND FREUD, *THE PSYCHOPATHOLOGY OF EVERYDAY LIFE* 153 (1914).

⁴⁸⁷ For a representative statement of this view, see, for example, Gluck, *supra* note 235, at 76 (noting that often today "[s]tudents of memory describe how individuals construct and reconstruct their memories in much the same way as nations do their histories, creating what Borges called a 'fictitious past'").

⁴⁸⁸ YOUNG, *supra* note 249, at xi (focusing on the architecture, artistry, and official rituals of Holocaust commemoration). Psychoanalytic concepts, like "aftereffect" or "return of the repressed," may have some limited heuristic value here, if the metaphorical nature of their usage is acknowledged. Alas, this generally is not the case. The psychoanalytic concepts are simply transposed from the individual to the society with minimal attention to this radical shift in the level of analysis. See, e.g., SANTNER, *supra* note 156, at 4 (discussing the inability of Germans to remember the past and blaming "the remarkably efficient deployment of a set of defense mechanisms"); Steven Ungar, *Vichy As a Paradigm of Contested Memory*, in SCANDAL

Limits of the Memory Metaphor

Individual memory works in ways different from collective memory. For instance, reliance on written and computer records makes it easier for individuals to forget things, in the knowledge that they can always "look it up." But such records enormously expand the capacity of a national society for preserving memory of

AND AFTEREFFECT 1, 2 (1995) (suggesting that France's postwar "obsession" with the Vichy period is a Freudian "aftereffect," or *nachträglichkeit*, of its failure to "work through" the moral issues raised by extensive French collaboration in Nazi rule and Jewish deportation). Their periodic denigration of the "economic miracle" (and, by implication, the capitalism that produced it) as diversions from the more sober business of societal self-scrutiny in the wake of administrative massacre, is purely rhetorical. See SANTNER, *supra* note 156, at 4; Ungar, *supra*, at 2. Neither of these authors identifies any analytical or causal connection between market institutions, on one hand, and societal "repression" of unpleasant historical memories, on the other.

The much greater force with which memories of genocide have been officially repressed in Communist societies further belies any such inherent connection between capitalism and memory repression. For a contrast between Communist Party efforts in East Germany to suppress memory of the Holocaust and West German efforts to foster memory of that experience, see JEFFREY HERF, *DIVIDED MEMORY: THE NAZI PAST IN THE TWO GERMANIES* (forthcoming 1996).

Social psychology suggests, moreover, that a measure of economic security, afforded by a society's prosperity, may be necessary before most people will be inclined to examine complex normative issues of personal responsibility, such as those raised by episodes of administrative massacre. See generally ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* (1970) (positing a hierarchy of human needs, beginning with food and shelter, ending in "self-actualization").

Other historians of equally leftist tilt frequently assert that national decline and economic *stagnation*, such as that of postwar Britain, discourage a serious and critical engagement of collective memory with past injustices. For a survey of such views among British socialist historians, see Keith Thomas, *Retrochic*, LONDON REV. BOOKS, Apr. 20, 1995, at 7, 7-8 (reviewing RAPHAEL SAMUEL, *THEATRES OF MEMORY VOL. I: PAST AND PRESENT IN CONTEMPORARY CULTURE* (1995)).

Still others of similar political orientation defend a position very much at odds with the first view above; they contend that Germany's seemingly sincere remorse about its war guilt is a capitalist ploy, calculated to smooth the way for current international commerce, to ensure the success of German exports. For this view, see Jonathan Boyarin, *Space, Time, and the Politics of Memory*, in *REMAPPING MEMORY*, *supra* note 29, at 1, 12-13; Lothar Baier, *Les bénéfices de la mauvaise conscience*, 68 LE GENRE HUMAIN 211 (1988). But if guilt and repentance were compelled by the "needs" of German capitalism, it is surely puzzling that Japanese political leaders and institutions have proven so reluctant for so long to accept any such responsibility, despite persistent demands for it by trading partners throughout Asia (who are clearly reluctant to become heavily dependent on a neighbor who shares so little of their collective conscience). See TAKASHI INOGUCHI, *JAPAN'S INTERNATIONAL RELATIONS* 109-11, 133-36, 142-47 (1991).

In any event, those who do not share the antipathy of these several authors for market society will be tempted to ask: Which is it? Does capitalism encourage or discourage acceptance of responsibility for war guilt?

its past. Embarrassing documents have a way of turning up at the most 'inopportune' times, in response to the most adamant public denials of what they proceed irrefutably to establish, such as the recently uncovered documents demonstrating the Japanese government's wartime decision to enslave Asian women as prostitutes for its soldiers.⁴⁸⁹

On account of such differences, the capacity of a society to induce criticism of its culture and institutions may well be greater in many ways than the individual capacity for fundamental self-criticism and identity transformation. A particular prosecution for administrative massacre might fail to induce much moral self-scrutiny among its perpetrators and their sympathizers, while nevertheless inducing considerable scrutiny—among young people and an emergent political leadership—regarding the institutional sources of collective responsibility for that horrendous event.

Conversely, when a society prudently decides not to pursue all those complicit in a large-scale administrative massacre, this decision should not be diagnosed as merely a case of Alzheimer's disease writ large. Individual memory can be effectively worked upon without an immediate issuance into concomitant institutional change. Argentina may not have redesigned its political institutions in light of the "lessons" offered by its courts when convicting military officers, but the country currently has the highest per capita concentration of psychiatrists of any society.

When a criminal trial for administrative massacre becomes a massive public spectacle, it can serve as one powerful means to this end by stimulating debate about the morality of the defendants' conduct and the nature of the institutions they controlled. That has sometimes been precisely the result of prosecutions for administrative massacre, perhaps its most salubrious result—albeit one uncognizable in doctrinal terms. The central question thus becomes: How can the criminal law be most effectively deployed, through the dramaturgical choices of prosecutors and judges, to foster national soul-searching of this sort—or more precisely, to stimulate the deliberative criticism of a society's political culture and

⁴⁸⁹ The documents were discovered in the library of Japan's Self-Defense Agency by historian Yoshiaki Yoshimura, who was prompted (by watching a government spokesman's denials on television) to remember having seen such documents years before. Yoshiaki thereby produced the documentary "smoking gun," requiring Japan's Prime Minister to apologize for the "error." See Margaret Scott, *Making the Rising Sun Blush*, FAR E. ECON. REV., Mar. 30, 1995, at 50, 50 (reviewing HICKS, *supra* note 368).

institutions by its members? In this regard, a major obstacle to this national self-examination is not only the complex psychology of repression and "denial," but simply the number of culpable individuals who remain alive—and fearful of the law's response.

Still, psychoanalytic studies of postwar Germans have even contended that societal self-analysis, however difficult to induce, is essential to restoring a nation's mental health and social solidarity in the aftermath of administrative massacre. "A very considerable expenditure of psychic energy is needed to maintain th[e] separation of acceptable and unacceptable memories," the Mitscherlichs argued.⁴⁹⁰ Writing in the early 1970s, they contended:

What censorship has excluded from German consciousness for nearly three decades as a memory too painful to bear may at any time return unbidden from the past; it has not been "mastered"; it does not belong to a past that has been grappled with and understood. The work of mourning can be accomplished only when one knows what one has to sever oneself from. . . . And, without [a meaningful relation to the past], the old ideals, which in National Socialism led to the fatal turn taken by German history, will continue to operate within the unconscious.⁴⁹¹

This problem—the "unmastered past"—is faced not only by those who led the nation into disaster, but by those who followed them as well.

If Germans had to live with the unvarnished memory of their Nazi past—even if their personal share in that past was merely in being obedient, fatalistic, or enthusiastically passive—their ego could not easily integrate it with their present way of life. Insistence upon historical accuracy in tackling that area of Germany's past would very quickly reveal that the murder of millions of helpless people depended on innumerable guilty decisions and actions on the part of individuals, and that the blame can by no means be shifted onto superiors . . . with such self-evident ease as we Germans at present assume.⁴⁹²

⁴⁹⁰ MITSCHERLICH & MITSCHERLICH, *supra* note 404, at 16. One should acknowledge, moreover, that not only perpetrators and bystanders, but even the surviving victims of state-sponsored brutality often wish to forget their most horrific experiences. This suggests that the mechanisms inducing such "forgetting" may operate independently of any "bad faith" on the individual's part. See AHARON APPELFELD, *BEYOND DESPAIR* 50-54, 72-74 (1995) (describing the author's efforts to hold off traumatic wartime memory by immersing himself in frenetic activity for several years upon leaving Europe).

⁴⁹¹ MITSCHERLICH & MITSCHERLICH, *supra* note 404, at 66.

⁴⁹² *Id.* at 20-21.

Even the *children* of such obedient servants often suffer from their parents' repression of memory, on some accounts.⁴⁹³ If there is any truth to such analysis, it would follow that thorough self-scrutiny would be especially desirable, for both the individuals involved and for society at large, in the aftermath of administrative massacre. If criminal prosecutions could be tailored to foster that end—in forcing unpleasant subjects onto the agenda of discussion and offering compelling narrative accounts of shared experience—so much the better.⁴⁹⁴

Theorists of widely variant persuasions distinguish Western modernity from other cultures precisely on the basis of our willingness continuously to attack and revise our intellectual foundations, to question even those commitments seemingly “constitutive” of our collective identities.⁴⁹⁵ The capacity for critical self-scrutiny of the most thorough sort, to admit that “we were wrong,” then, is not altogether foreign to us. In fact, it is clearly a source of pride and self-confidence in those invoking this cultural capacity to distinguish the West from the rest. To tell a

⁴⁹³ See JILLIAN BECKER, *HITLER'S CHILDREN: THE STORY OF THE BAADER-MEINHOF TERRORIST GANG* 15 (1989); ANTON KAES, *FROM HITLER TO HEIMAT: THE RETURN OF HISTORY AS FILM* 24 (1989). Kocka offers a more cautious statement of possible relationships: “Without understanding these deficits [that is, parental repression and avoidance of their collaboration] we cannot understand the acuteness of the protest movements of the late 1960s and early 1970s.” Jürgen Kocka, *Hitler Should Not Be Repressed By Stalin and Pol Pot: On the Attempts of German Historians to Relativize the Enormity of the Nazi Crimes*, in *FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 85, 86.

⁴⁹⁴ Those who commented on the Nuremberg trial at the time sometimes acknowledged this possibility. See Robert L. Birmingham, Note, *The War Crimes Trial: A Second Look*, 24 U. PITT. L. REV. 132, 137 (1962) (noting that “[p]sychologically healthy expression of grief and anger may be obtained through a judicial proceeding such as the Nuremberg trials”).

⁴⁹⁵ The view that certain attachments, as to one's ethnoreligious group, are constitutive of the self, and hence ineliminable for purposes of moral reflection, is a central tenet of all nontrivial versions of communitarianism. For opposing views of the self and cultural identity in Western society (as infinitely revisable), see, for example, ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 36-39 (1987) (observing that the first thing one learns about non-Western cultures, upon any serious study of them, is their virtually uniform hostility to civilizations other than their own, that is, their ethnocentrism, and their view of their culture's foundational premises as sacred and immune from serious criticism). According to Derrida, postmodernism reflects the West's abandonment of its self-understanding as occupying the center of the world, a self-understanding common among other civilizations. See JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 209-19 (Alan Bass trans., 1982); see also ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* 19-20 (1990) (parsing Derrida on this point).

liberal story about the history of a society that has inflicted large-scale administrative massacre is necessarily to tell a story of rupture and remaking, a story about its efforts to break with what is most reprehensible in its past.

To break with the past—assuming responsibility for its wrongs and a duty to remember them—requires a choice, an exercise of moral autonomy. For communitarians of both left and right, however, such choice is impossible or undesirable. We are necessarily “thrown into” a social world that provides us with constitutive and irrevocable identities, in ways to which the liberal ideal of autonomy is simply deaf. This, if you will, is the alternative hypothesis, against which the comparative history of legal efforts at collective reconstitution must be assessed.

Useful Myths, Discomforting Truths

Those seeking to construct a liberal mythology for their society necessarily labor under a special burden: *their* myth must be truthful, not merely pleasant. To be truthful, such a story must “correspond” to known facts of political history, not merely “cohere” with other authoritative narratives.⁴⁹⁶ Truthful stories about the origins of most nation-states, however, cannot be entirely flattering, and so are unlikely to be solidarity-enhancing. For communitarians, by contrast, the societal value of stories does not turn on their truth; what matters is the significance that such stories have for their tellers and listeners, the meanings derived from these stories for collective identity and direction. In a certain sense, such stories *are* true: they are true as part of the self-definition of the community.⁴⁹⁷

A liberal will thus be troubled by the following story in a way that a communitarian will not. France’s state television refused for a decade to show Marcel Ophüls’ *The Sorrow and the Pity*, documenting extensive French collaboration in Jewish deportation.⁴⁹⁸ When it was finally shown, it was denounced by a prominent senator, himself an ex-member of the Resistance, as “destroying myths of

⁴⁹⁶ On the difference between correspondence and coherence in theories of truth, see ALAN R. WHITE, TRUTH 102-21 (1970).

⁴⁹⁷ See Allan Megill, Memory, Identity, and Questions of Evidence 11 (June 23, 1995) (paper presented at the Project on Rhetoric of Inquiry Symposium, University of Iowa) (on file with author).

⁴⁹⁸ See *supra* note 291.

which the French still have need.”⁴⁹⁹ A philosopher adds, “[w]hat you must understand is that our myths were positive. They enabled France to recoup and rebuild.”⁵⁰⁰

Such statements—judging myths by their political usefulness, regardless of their truth—necessarily give pause to good liberals, reawakening our doubts about the very idea of national mythmaking in a liberal society. They suggest that to be effective for social solidarity, a national myth must necessarily exclude the story of wrongs the nation has done to others. They suggest that a solidarity-enhancing story cannot be about how the nation has acknowledged these wrongs, redressed them, and kept memory of both the wrongs and their redress firmly in its collective consciousness.

If this kind of collective memory is impossible to achieve, practically speaking, then liberalism had best return to its initial Cartesian, hard-core Enlightenment position: that there is no place for national mythology in a truly liberal society, that the notion of liberal memory is an oxymoron, that what should hold us together is simply economic interdependence and shared commitment to abstract principles of liberal morality, however imperfectly these have been embodied in our history.

Hence our characteristic ambivalence, our “underlying uneasiness,” as Kammen puts it:

On one hand there is the proof-seeking and critical view of myth as inaccurate or even distorted history. On the other there is an approving notion of socially cohesive legends or stories rich in symbolic meaning, comprised of incidents and characters who are larger than life, regardless of whether they are heroes or villains.⁵⁰¹

To help effect a needed break with the past, the law can be employed in very different ways. At times, a constitutional convention is an especially fitting device toward this end. At other times, nothing so radical is required. It is simply necessary to take seriously the “law on the books”—particularly the criminal code—as never before: holding former chiefs of state to long-valid legal rules that they flouted indiscriminately, with confidence of impunity. In asking whether law can help to place guilt and repentance at the center of collective memory, postwar Germany and Japan provide

⁴⁹⁹ BOSWORTH, *supra* note 289, at 111 (quoting an unnamed senator).

⁵⁰⁰ MILLER, *supra* note 64, at 141 (quoting Alain Finkielkraut).

⁵⁰¹ KAMMEN, *MYSTIC CHORDS*, *supra* note 52, at 481.

the major tests. Each offers conclusions somewhat at odds with the other. This difference could be summarized by saying that, although the territory of both nations was occupied by the victors, the national mind was successfully 'occupied' much more in the Federal Republic than in Japan.⁵⁰²

In Japan, the U.S. bombing of Hiroshima is commemorated, by several much-visited shrines, as a war crime of unprecedented proportions. It has had an enormous impact on Japanese self-understanding, by all accounts. Because of the centrality of Hiroshima to Japanese memory of the period, it has become "virtually impossible," notes one Asia scholar, "to recall that Japan had been waging a war of aggression prior to Hiroshima and Nagasaki."⁵⁰³ In contrast, the impact on national memory of the Yamashita and Tokyo War Crimes Trials—widely broadcast to the population—has been virtually nil,⁵⁰⁴ until very recently. Leading Liberal Democratic politicians still continue publicly to deny Japanese culpability for the "Rape of Nanjing" and for Japan's many other atrocities against prisoners of war and noncombatants throughout Asia.⁵⁰⁵ The remains of defendants convicted of (and

⁵⁰² This slightly oversimplifies the matter, since serious reassessment by Germans of their nation's wartime misconduct began only some 17 years after the War, that is, with the trials of the Auschwitz guards. Still, it is fair to say, with one recent historian, that "the paradigm shift . . . occurring in all the other combatant societies, has never happened in Japan." BOSWORTH, *supra* note 289, at 186.

⁵⁰³ FIELD, *supra* note 384, at 45.

⁵⁰⁴ See, e.g., BURUMA, *supra* note 165, at 60-66, 161-66 (noting the frequent derisory references by contemporary Japanese to "the Tokyo Trial View of History," and that "the trial left them with an attitude of cynicism and resentment"); HOSOYA ET AL., *supra* note 276, at 194 (noting that "the legal consciousness of the Tokyo trial has not taken root among the Japanese people"); see also Ōnuma Yasuaki, *Beyond Victors' Justice*, 11 JAPAN ECHO 63, 71 (1984) (observing that the majority of the Japanese people regarded the Tokyo trial "as an event completely divorced from their own lives"). On the ignorance still prevalent among Japanese youth concerning the country's war crimes, see Gluck, *supra* note 235, at 90 (noting that since young people had received "such minimal instruction in the subject . . . they could not be accused of forgetting what they had never been adequately taught"); A. Minhee Lee, *War and Memory*, N.Y. TIMES, Mar. 2, 1995, at A22 (observing that "young Japanese . . . have little or no idea of the aggression and cruelty that was manifested in the generations before them").

⁵⁰⁵ On the systematic nature of battlefield atrocities by Japanese troops, see MEIRION HARRIES & SUSIE HARRIES, *SOLDIERS OF THE SUN: THE RISE AND FALL OF THE IMPERIAL JAPANESE ARMY 475-84* (1991). On recent denials of such events by political leaders, see BURUMA, *supra* note 165, at 122; James Sterngold, *At Tokyo Shrine to War Dead, a Ritual Persists Despite All*, N.Y. TIMES, Aug. 16, 1994, at A8; James Sterngold, *Japan Official Forced to Quit over Remark*, N.Y. TIMES, Aug. 15, 1994, at A5. On continuing denials by Japanese law professors, see the remarks of Takigawa

executed for) war crimes at the Tokyo trial are housed in official shrines.⁵⁰⁶

Why did the numerous postwar trials of Japan's military leaders for war crimes⁵⁰⁷ have so little effect on collective memory of the war and atrocities these leaders authorized? There are several possibilities here. First, it might be said that the Japanese, however extensive their war crimes, had not perpetrated anything like the Holocaust, that is, had not sought or accomplished the extermination of an entire ethnoreligious group of their own citizens, and so had much less to repent or remember.

Perhaps, but there was still plenty to atone for, had the full record been placed before the Tokyo court. It was not. Much of the most egregious Japanese misconduct, such as biological warfare,⁵⁰⁸ vivisection of POWs,⁵⁰⁹ and the sexual enslavement of the comfort women,⁵¹⁰ was deliberately excluded from the story the prosecution was allowed to tell.⁵¹¹ Had the legal narrative encompassed this much wider range of war crimes, and been staged to maximize sympathy for its victims (such as the comfort women, whose marital prospects after the War became nil), the impact on Japanese opinion might have been greater, might have resembled that of the Auschwitz trials.

We should not be too quick to attribute Japan's failings, for this reason among others, to any cultural predisposition toward "shame"

Seijirō, one of the defense counsel at the Tokyo trial, in *THE TOKYO WAR CRIMES TRIAL*, *supra* note 276, at 58.

⁵⁰⁶ See GAVAN DAWS, *PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC* 375 (1994).

⁵⁰⁷ The most comprehensive description of these proceedings is offered by PICCIGALLO, *supra* note 88.

⁵⁰⁸ See SHELDON H. HARRIS, *FACTORIES OF DEATH: JAPANESE BIOLOGICAL WARFARE 1932-45 AND THE AMERICAN COVER-UP* (1994); PETER WILLIAMS & DAVID WALLACE, *UNIT 731: JAPAN'S SECRET BIOLOGICAL WARFARE IN WORLD WAR II* (1989).

⁵⁰⁹ See DAWS, *supra* note 506, at 360 (concluding that by war's end more than one-quarter of the original 140,000 white Allied prisoners in Japanese custody were dead); Nicholas D. Kristof, *Japan Confronting Gruesome War Atrocity*, N.Y. TIMES, Mar. 17, 1995, at A1 (describing medical experimentation by Japanese army physicians on prisoners, involving deliberate exposure to plague, anthrax, and vivisection).

⁵¹⁰ Between 100,000 and 200,000 women were involved. See HICKS, *supra* note 368, at 19. On their recent damage claims, still pending, against the Japanese state, see Yvonne P. Hsu, "Comfort Women" from Korea: *Japan's World War II Sex Slaves and the Legitimacy of Their Claims for Reparations*, 2 PAC. RIM L. & POL'Y J. 97 (1993); Karen Parker & Jennifer F. Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497 (1994); Janet L. Tongsuthi, "Comfort Women" of World War II, 4 UCLA WOMEN'S L.J. 413 (1994).

⁵¹¹ See RÖLING, *supra* note 276, at 48.

over "guilt," as some have done.⁵¹² A more thoughtful orchestration of the Tokyo trial could well have elicited a more sympathetic response. For although the Japanese public remains largely unpersuaded by the conviction of its leaders for "waging aggressive war" against the Western Allies, the public has grown highly sympathetic to the plight suffered by the fellow Asians whom their leaders colonized, brutalized, impressed (into involuntary military service), and enslaved.⁵¹³ Had the Tokyo trial focused not on Japanese wrongs inflicted on those who dropped atom bombs on Hiroshima and Nagasaki, but rather on the industrial rape of the Asian comfort women, or on the human vivisection of Filipino POWs, the trial's impact on Japanese collective memory would likely have been quite different.

The Allied decision to exclude Emperor Hirohito from prosecution was a particularly significant dramaturgical decision in this regard, in ways that have become apparent only following his recent death. Indeed, the decision unwittingly impeded the sort of searching self-examination of national morality and identity that war crimes trials successfully induced in West Germany. The "Tokyo Trial View of History," as progressive Japanese intellectuals derisively label it, became widely accepted by the Japanese populace. This is because the historical narrative promoted by the trial pinned the blame for the country's misconduct exclusively on the recklessness of its military leaders—not on the people themselves or the Emperor they revered.⁵¹⁴ An historian observes:

If the villains were clear, so were the victims: not the victims of Japanese aggression but the Japanese people themselves, who, it was said, "were embroiled" in the war by their leaders . . . Th[is] stance was confirmed by both the popular past, in which the people appeared as helpless before the state, and by personal

⁵¹² Buruma invokes this familiar distinction in connection with Japan after the war. See BURUMA, *supra* note 165, at 116.

⁵¹³ An opinion survey in 1994 suggested, for instance, that nearly three quarters of the Japanese population felt that their government had not adequately compensated the Asian peoples subjugated by Japan's prewar and wartime empire. See Nicholas D. Kristof, *Many in Japan Oppose Apology to Asians for War*, N.Y. TIMES, Mar. 6, 1995, at A9.

⁵¹⁴ This view was immediately embraced by postwar textbooks in Japanese public schools. See Carol Gluck, *The Idea of Shōwa*, in SHŌWA: THE JAPAN OF HIROHITO 1, 13 (Carol Gluck & Stephen R. Graubard eds., 1992); see also SABURŌ IENAGA, JAPAN'S LAST WAR: WORLD WAR II AND THE JAPANESE, 1931-1945, at 250 (1979) (noting that books published soon after the war are "full of pacifist sentiment and disdain for militarism").

memory, which viscerally recalled helplessness and suffering. Thus, the stark narrative of culpability produced by the "War Crimes Trial view of history" in the immediate aftermath of war survived the nearly half-century since.⁵¹⁵

She adds, "[h]ad things truly been that simple, and inevitable, the burdens of Showa history would be light indeed."⁵¹⁶ The trial's favored narrative "had disadvantages since it froze the condemnation of the war into orthodoxy at a stage when the division of villains and victims seemed starkly clear."⁵¹⁷ In consequence, "the Japanese remember the war, not the system that engendered it,"⁵¹⁸ nor their participation in that system. At the epicenter of that system was the Emperor.

Because the Emperor was worshipped as divine, to hold him responsible for war crimes would have been to allow mere humans—foreigners at that—to treat him as if he were a politician like any other. This would have been to deny his divinity and the infallibility that it entailed.⁵¹⁹ When the person is not fully distinguished from his "office,"⁵²⁰ to judge the conduct of the present occupant is necessarily to judge the institution itself. It would also have been to hold responsible the people who worshipped him for failing to question his political judgment when it proved profoundly mis-

⁵¹⁵ Gluck, *supra* note 235, at 83; see also Buruma, *supra* note 363, at 31 (arguing that MacArthur's decision not to prosecute Hirohito "had serious consequences, for so long as the Emperor, in whose name the war had been waged, could not be held accountable, the question of war guilt would remain fuzzy in Japan, and a source of friction between Japan and its former enemies").

⁵¹⁶ Gluck, *supra* note 514, at 12. "Shōwa" refers to the period of Hirohito's rule. Gluck notes that recent Japanese historiography suggests that:

[T]he responsibility for war lies far more broadly in society than was earlier believed, or hoped . . . [V]ast numbers of ordinary people were entwined in the complex mesh of war . . . Even those who did not actively march or collaborate are now judged as participants. It takes both states and societies—which is to say the individuals who comprise them—to make a total war.

Id. at 13.

⁵¹⁷ *Id.* at 12-13 (noting that this narrative "contributed to the emphasis on what the Japanese people suffered at the hands of the villains in the docket").

⁵¹⁸ *Id.* at 13.

⁵¹⁹ See KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING 220 (1991); Kosuke Koyama, *Forgiveness and Politics: Japanese Experience*, in BREAD AND BREATH: ESSAYS IN HONOUR OF SAMUEL RAYAN, S.J. 139, 145-46 (T.K. John ed., 1991).

⁵²⁰ See MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 330 (A.M. Henderson & Talcott Parsons trans., 1947) (discussing the centrality of this distinction to modern, legal-rational authority).

guided.⁵²¹ To criticize him was thus to criticize them, that is, their "constitutive," foundational beliefs, and to require profound self-criticism at the level of national identity. That was unlikely to succeed, according to Occupation authorities, particularly MacArthur.⁵²² In fact, it was likely to provoke mass resistance to Occupation authorities and their other, less controversial policies.⁵²³

In any event, the Book of Military Rules informed Japanese soldiers that "the command you receive from your superior officer is the command you receive from the emperor himself."⁵²⁴ According to this principle, if it was wrong for soldiers to obey their orders, then it was wrong for the Emperor—by way of his servants—to have issued them. But that was literally inconceivable, since there was, in principle, no independent standard from which to evaluate the moral or legal defensibility of the Emperor's conduct.⁵²⁵ The people supported the "Emperor system," and the Emperor supported (what international law would later categorize as) a war of aggression, involving many war crimes by imperial servants.

Thus, to exclude the Emperor from criminal liability was also implicitly to exclude the Japanese people at large from moral responsibility, although the precise connection was by no means clear in the minds of Occupation decision-makers or prosecutors.⁵²⁶ Shriver states it succinctly: "A political culture that has

⁵²¹ This was what General Douglas MacArthur had in mind when, in contemplating alternative postwar fates for Hirohito, he declared that, "[t]he problem basically is theological." Koyama, *supra* note 519, at 143.

⁵²² On the internal policy debates in this regard, see Robert E. Ward, *Presurrender Planning: Treatment of the Emperor and Constitutional Changes*, in *DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION* 1, 3-18 (Robert E. Ward & Sakamoto Yoshikazu eds., 1987).

⁵²³ See *id.* at 15.

⁵²⁴ Koyama, *supra* note 519, at 158.

⁵²⁵ The most influential study of imperial ideology observes that:

[The Emperor] . . . is the centre of all authority and the fountainhead of all virtue, occupying the apical position in a hierarchy . . .

. . . .

. . . In such a scheme, where everything is based on the idea of an absolute central entity, there is no room for a concept like international law, which is equally binding on all nations.

MASAO MARUYAMA, *THOUGHT AND BEHAVIOR IN MODERN JAPANESE POLITICS* 19, 20-21 (Ivan Morris ed., 1963). Maruyama also notes that "[w]hat determined the everyday morality of Japan's rulers was neither an abstract consciousness of legality nor an internal sense of right and wrong, nor again any concept of serving the public; it was a feeling of being close to the concrete entity known as the Emperor." *Id.* at 13.

⁵²⁶ See INOUE, *supra* note 519, at 160-220 (discussing how American lawyers and

long been accustomed to accord unimpeachable and exclusive authority to an Emperor will not generate among citizens much conversation over questions like: 'Is it right or wrong? Who is responsible? What shall we do to change the course of the nation?'"⁵²⁷

The responsibility of the Japanese people could not be candidly examined until it was possible candidly to examine that of their Emperor. That was judged politically imprudent in the extreme. And because of his longstanding and continuing symbolic centrality to the political system, examination of Hirohito's wartime role did not become possible until his death.

Proustian Justice: The Trial As *Aide-Mémoire*

Beginning at the point of Hirohito's death, however, a veritable floodgate of personal memory and public discussion has opened in ways that few had anticipated.⁵²⁸ A robust discussion of the

constitutional reformers misunderstood the Emperor's role within the Japanese political system and his centrality to its legitimacy among the public).

⁵²⁷ SHRIVER, *supra* note 358, at 135-36. Well aware that any such summary statement inevitably oversimplifies a complex range of differences between cultures, Shriver quickly adds, "[t]hese questions are rare enough in the conversational culture of the West, and they can virtually disappear in wartime. But they do have roots in Western angles of vision." *Id.* at 136; see also BURUMA, *supra* note 165, at 116-17, 294-97 (favoring a religious and cultural explanation of prevailing Japanese attitudes). On the far-reaching ramifications of differences between Japanese and American conceptions of moral responsibility, see generally V. LEE HAMILTON & JOSEPH SANDERS, *EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES* (1992). Such culturalist accounts, however, cannot explain the unresponsiveness of Japanese courts to meritorious legal arguments, that is, to the valid legal claims of plaintiffs who have overcome whatever cultural burdens they labored under before recognizing and asserting their rights. See J. MARK RAMSEYER & FRANCES M. ROSENBLUTH, *JAPAN'S POLITICAL MARKETPLACE* 2-3, 161-66 (1993) (arguing that it is not national culture, but executive and legislative control over the judiciary, which explains the latter's unresponsiveness to legal claims by unpopular minorities).

⁵²⁸ See Carol Gluck, *Foreword* to DAIKICHI IROKAWA, *THE AGE OF HIROHITO: IN SEARCH OF MODERN JAPAN* at vii, vii (Mikiso Hane & John K. Urda trans., 1995) (noting of the robust public debate following the Emperor's death that "[i]t was as if a dam had broken on thoughts long held but seldom spoken"); see also Kristof, *supra* note 509, at A1, A12 (noting that "[h]alf a century after the end of the war, a rush of books, documentaries and exhibitions are unlocking the past and helping arouse interest in Japan in the atrocities committed by some of Japan's most distinguished doctors" including those who became president of the Japanese Medical Association, head of the Japan Olympic Committee, and the Governor of Tokyo). On recent revelations and public responses, see SHRIVER, *supra* note 358, at 136-39 (noting the prominent role of the Socialist Party, including its first Prime Minister, and Christian leaders in raising the possibility of an official apology and putting this question on the

country's war guilt has now definitely begun, and the courts quickly became a favored forum toward that end. Civil courts, not the criminal law, have provided the primary vehicle to date. They have succeeded, at least, in stimulating precisely the kind of discursive deliberation and civil disagreement here proposed as the necessary foundation of liberal memory and solidarity. Japanese historians have repeatedly sued their government, for instance, to compel more forthright treatment of the country's war crimes in its school textbooks.

Even when their efforts have failed to gain judicial endorsement,⁵²⁹ they have succeeded in eliciting media coverage, and in putting this uncomfortable issue at least peripherally on the public agenda.⁵³⁰ The damage claims recently brought by comfort women, forced to serve as prostitutes for Japanese soldiers at the front, enjoy enormous public support within Japan.⁵³¹ In June 1995, the lower house of Parliament finally approved a resolution of "remorse" for Japanese conduct in World War II.⁵³²

parliamentary agenda); Gluck, *supra* note 235, at 90 ("The issue of Hirohito's war responsibility occasioned open debate, and polls and letters made it clear that significant numbers of Japanese agreed that the emperor bore some responsibility for the war, although they had seldom before said so in public."); *id.* at 77 ("[T]he standard of acceptable public utterance of personal memories altered, as it seemed to become possible to say things aloud that one had privately felt for years."). Recent Japanese scholarship supports the conclusion that Hirohito's role in war-related decisions was often considerable. See IROKAWA, *supra* note 528, at xv (concluding that "the emperor [was] the person most responsible for the war").

⁵²⁹ On the mixed results of this litigation, see LAWRENCE W. BEER, *FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY* 264-70 (1984). In the last two years, in response to complaints by Japan's Asian neighbors, several new textbooks have nonetheless been introduced offering more accurate accounts of Japan's war crimes and the litigation by victims to which such conduct has recently given rise. See *Japanese Textbooks Carry War Damage Compensation Issues*, Japan Econ. Newswire, May 13, 1994, available in LEXIS, News Library, JEN File (quoting one author as saying that he was surprised the Education Ministry did not ask him to cut or rewrite several sections dealing with compensation demands from war victims).

⁵³⁰ See BEER, *supra* note 529, at 273 (observing "the increasingly uninhibited media presentation of opposite viewpoints in films and TV programs" resulting from the textbook controversies); Saburo Ienaga, *The Glorification of War in Japanese Education*, 18 INT'L SECURITY 113, 115 (1994) (noting that this litigation "has served as a focal point for a continuing debate over Japan's role in the war . . . and the willingness of its government and its people to examine that role and that conduct").

⁵³¹ A 1994 opinion survey found that by a 4 to 1 margin Japanese voters believe that their government "has not adequately compensated the people of countries Japan invaded or colonized." Kristof, *supra* note 513, at A9. However, some 5 million signatures were gathered for a petition opposing a parliamentary resolution of apology. See *id.*

⁵³² The resolution's language was highly qualified, however, and cannot be

In other civil litigation reaching the Japanese Supreme Court, the widow of a postwar military officer sought to prevent the inclusion of her husband's name on a Shinto shrine honoring the country's war dead.⁵³³ The plaintiff, Mrs. Nakaya Yasuko, belongs to a Christian denomination whose current leadership had recently acknowledged the church's responsibilities for having supported the War.⁵³⁴ This public acknowledgment prompted Mrs. Nakaya to object to the "deification" of her husband in a shrine praising the conduct of Japan's wartime soldiers.⁵³⁵ In a proceeding lasting fifteen years, the trial and first appellate courts accepted her contention that the shrine, the construction of which was publicly funded, violated the establishment clause of Japan's Constitution, which mandates the separation of church and state.⁵³⁶

In public discussions, Mrs. Nakaya explained that she did not wish to see future mothers and wives deceived by the state into supporting participation by their loved ones in aggressive wars and war crimes.⁵³⁷ With considerable media attention trained upon them, the courts became the forum in which a struggle was waged for control of memory, that is, over the use of Mr. Nakaya's memory in service of conflicting accounts of the country's conduct during the Pacific war.

In a second trial, also widely publicized by the press, an Okinawan businessman was prosecuted for desecrating the Japanese flag.⁵³⁸ He was protesting the government's recent insistence that the flag be raised at every public occasion.⁵³⁹ Okinawans had refrained from so doing for many years following the war, not wishing to identify with a state whose army had been responsible (in the battle of Okinawa) for the murder of hundreds of civilian

considered a genuine "apology" in the Western sense, according to language specialists. See Nicholas D. Kristof, *Why a Nation of Apologizers Makes One Large Exception*, N.Y. TIMES, June 12, 1995, at A1, A4. Moreover, only 230 members in the 511-member chamber voted for the resolution; the rest boycotted or voted against. See *id.* at A1.

⁵³³ See Judgment of June 1, 1988, Saikosai [Supreme Court], 42 Minshū 277 (Japan).

⁵³⁴ See FIELD, *supra* note 384, at 121-22.

⁵³⁵ See *id.* at 121-24.

⁵³⁶ Japan's Supreme Court ultimately rejected this view on the grounds that the Veterans' Associations, not the state itself, had established the shrine, and that Mrs. Nakaya suffered no "coercion" as a result of inclusion of her husband's name. See *id.* at 141.

⁵³⁷ See *id.* at 124.

⁵³⁸ See *id.* at 44-45.

⁵³⁹ See *id.* at 52-53.

noncombatants.⁵⁴⁰ The state's prosecution of Chibana Shōichi, particularly Shōichi's eloquent defense of his views and act, elicited an unprecedented public debate in Okinawa, where the atrocities during that final retreat (before advancing American troops) had remained unacknowledged.⁵⁴¹ Collective memory of these events has, in consequence of this legal proceeding, been significantly revised.

The Mayor of Nagasaki, Motoshima Hitoshi, finally broke the taboo on public discussion of the Emperor's responsibilities for the War.⁵⁴² In response, he was attacked and nearly killed by far-right gangs.⁵⁴³ But his pronouncement also elicited enormous public sympathy, expressed in many letters endorsing his remarks and praising his courage.⁵⁴⁴ A group of citizens formed an organization to support him. They declared:

"As citizens of a nation that imposed immeasurable terror and misery upon the people of Asia in the last war, we believe, in order to gain the trust of the people of the world in international society, that we must reflect with humility on our history of aggression and promote free and wide-ranging debate on the emperor system and the emperor's responsibility for the war. This is because a democratic society must not tolerate taboos of any kind."⁵⁴⁵

In addition to accepting national responsibility for wartime misconduct, this formulation squarely casts the issue in terms of the centrality of open discussion of controversial views (that is, civil dissensus) within a liberal democratic society. Here, the Mayor's supporters invoked the law—constitutional freedom of expression—

⁵⁴⁰ See *id.* at 53-56. Gluck notes:

Public memory in postwar Okinawa was vigorous and vivid, and the tales it told . . . constructed a history with a different political meaning [than on the main Islands]. Subjugated by the Satsuma domain during Tokugawa, Okinawa's . . . people were . . . made victims twice over, once of the Japanese imperial army, who massacred the allegedly inferior Okinawans as spies, and once of the fighting in one of the bloodiest battles of the Pacific War.

GLUCK, *supra* note 235, at 88. This battle occurred after the inevitability of defeat had become apparent, and some Okinawan civilians wished to surrender. See FIELD, *supra* note 384, at 56-58.

⁵⁴¹ See FIELD, *supra* note 384, at 53-66.

⁵⁴² See *id.* at 178-79.

⁵⁴³ See *id.* at 179-93.

⁵⁴⁴ See *id.* at 200-20.

⁵⁴⁵ *Id.* at 233-34 (citation omitted).

not to impose their own favored account of collective memory (nor to oppose that of others), but to open up a public sphere for less constrained debate about what such memory should involve. The declaration also accepts the need for placing a collective recognition of wartime guilt and repentance at the center of collective memory, if not quite at the center of national identity.

Even more than these recent Japanese developments, the postwar German experience belies the pessimism voiced by so many theorists, quoted above, about the capacity to make repentance from a society's historical wrongs the basis of its shared memory.⁵⁴⁶ On the fortieth anniversary of World War II's termination, for instance, Federal President Richard von Weizsäcker explicitly affirmed, in a well-received speech, that "the Germans' need to continue the discussion of individual moral guilt and to accept history as the basis of national identity and lasting German responsibility."⁵⁴⁷

Opinion surveys suggest that initial German response to the trials of major war criminals was quite positive⁵⁴⁸ and that interest was high,⁵⁴⁹ although both declined over time.⁵⁵⁰ The surveys also suggest that only from the Nuremberg trial did a substantial majority of Germans learn about the existence of concentration camps.⁵⁵¹ Nearly a quarter of Germans became aware of the extermination of the Jews in this way.⁵⁵² Yet only when the first postwar generation reached adulthood in the mid-1960s was the Holocaust reexamined, and discussed in great depth.

⁵⁴⁶ See *supra* notes 483-85.

⁵⁴⁷ Lutz R. Reuter, *Political and Moral Culture in West Germany: Four Decades of Democratic Reorganization and Vergangenheitsauseinandersetzung*, in *COPING WITH THE PAST: GERMANY AND AUSTRIA AFTER 1945*, at 155, 179 (Kathy Harms et al. eds., 1990) (citing Federal President Richard von Weizsäcker, Speech Given on the 40th Anniversary of WWII and the Nazi Tyranny (Bonn, May 8, 1985)).

⁵⁴⁸ See *PUBLIC OPINION IN SEMISOVEREIGN GERMANY: THE HICOG SURVEYS, 1949-1955*, at 10 (Anna J. Merritt & Richard L. Merritt eds., 1980).

⁵⁴⁹ See *PUBLIC OPINION IN OCCUPIED GERMANY: THE OMGUS SURVEYS, 1945-1949*, at 35 (Anna J. Merritt & Richard L. Merritt eds., 1970) (reporting that nearly 80% of German respondents in the American zone indicated that they had read newspaper articles about the trial).

⁵⁵⁰ See THOMAS A. SCHWARTZ, *AMERICA'S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY* 159 (1991); Claudia Koonz, *Between Memory and Oblivion: Concentration Camps in German Memory*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY* 258, 262 (John R. Gillis ed., 1994).

⁵⁵¹ See Koonz, *supra* note 550, at 262.

⁵⁵² See *id.*

Law's Role in "Mastering the Past"

The law played a significant role in the process of "mastering the past." The 1964 prosecution of the Auschwitz guards, and of similar Majdanek officials between 1975 and 1981 for crimes against humanity, captured the imagination of millions of young Germans as virtually nothing about the country's past had done before.⁵⁵³ "The effect upon the public consciousness was devastating," writes Gordon Craig, "and has not diminished."⁵⁵⁴ The Auschwitz prosecution, concurs Ian Buruma, "was the one history lesson . . . that stuck."⁵⁵⁵ The foreign attention focused on these trials was no less consequential, for they prompted the 1964 French enactment removing the statute of limitations for crimes against humanity, a change that would permit the prosecution of Barbie and Touvier over two decades later.⁵⁵⁶

In German public awareness, these trials effected a symbolic severing of ties to the past.⁵⁵⁷ They evoked and articulated pervasive sentiments of indignation and reprobation, in a way that criminal prosecutions can do with particular efficacy. Through this experience, writes one historian, "Germans constructed a new identity based on a fresh start [and] a clean break with the past. . . . [T]hey forged a new . . . identity based on a rejection of

⁵⁵³ See Hannah Arendt, *Introduction* to BERND NAUMANN, *AUSCHWITZ: A REPORT ON THE PROCEEDINGS AGAINST ROBERT LUDWIG MULKA AND OTHERS BEFORE THE COURT AT FRANKFURT* at xi, xi (1966); Aleksander Lasik, *Postwar Prosecution of the Auschwitz SS*, in *ANATOMY OF THE AUSCHWITZ DEATH CAMP 588* (Yisrael Gutman & Michael Berenbaum eds., 1994).

⁵⁵⁴ Gordon Craig, *An Inability to Mourn*, N.Y. REV. BOOKS, July 14, 1994, at 43, 44 (reviewing BURUMA, *supra* note 165). On the considerable attention given by the German mass media to the 50th anniversary of the Allied liberation of Auschwitz, see Stephen Kinzer, *Confronting the Past, Germans Now Don't Flinch*, N.Y. TIMES, May 1, 1995, at A1, A10; Stephen Kinzer, *Germans Reflect on Meaning of Auschwitz*, N.Y. TIMES, Jan. 28, 1995, at L5.

⁵⁵⁵ BURUMA, *supra* note 165, at 149. Traveling in mid-1991, Buruma observed, "[t]he German war was not only remembered on television, on the radio, in community halls, schools, and museums; it was actively worked on, labored, rehearsed. One sometimes got the impression . . . that German memory was like a massive tongue seeking out, over and over, a sore tooth." *Id.* at 8. One should also note the striking contrast between the German Bishops' recent and incredibly blunt recognition of Catholic responsibility for the Holocaust and the refusal of the Polish Bishops to sign the declaration. On the deficiencies of Polish memory in this regard, see IRWIN-ZARECKA, *supra* note 122, at 18, 37-38, 48, 77-78, 92-93, 120, 142-43 (1994).

⁵⁵⁶ See Judt, *supra* note 294, at 97.

⁵⁵⁷ These trials became a means by which Germany's "present is to be separated from what preceded it by an act of unequivocal demarcation." PAUL CONNERTON, *HOW SOCIETIES REMEMBER* 7 (1989).

Nazism."⁵⁵⁸ The memory of judgment by the international community continues to weigh heavily upon the making of German foreign policy in particular, according to specialists in that field.⁵⁵⁹ The lesson would seem to be, *pace* Mary Douglas,⁵⁶⁰ that a nation *can* be united and guided not only in the collective memory of its triumphs, but also in shared expiation for its wrongs, in the common commitment neither to forget nor repeat the injustices its predecessors have inflicted on their neighbors. Habermas offers a ringing defense of this conclusion, while alluding to legal concepts of continuity and judgment:

Can one become the legal successor to the German Reich and continue the traditions of German culture without taking on historical liability for the form of life in which Auschwitz was possible? Is there any way to bear the liability for the context in which such crimes originated . . . other than through remembrance, practiced in solidarity, of what cannot be made good, other than through a reflexive, scrutinizing attitude toward one's own identity-forming traditions?⁵⁶¹

Such invocation of legal language as relevant to historical assessment drew particularly acerbic reproach from Habermas's opponents, who accused him, for instance, of "mak[ing] himself solicitor general of the kingdom of morality in the province of history," and assigning historiographical matters to a "special court, to which the accused must be extradited."⁵⁶²

What Habermas describes as "a reflexive, scrutinizing attitude toward one's own identity-forming traditions" was embraced by President Alfonsín as a central objective of the junta trial and, in

⁵⁵⁸ Koonz, *supra* note 550, at 262. Even those who think adoption of this new German identity has been a mistake widely concede that it has, in fact, become pervasively established. See, e.g., Christian Meier, *Condemning and Comprehending, in FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 24, 24 (observing "an identity that has entered our self-comprehension and our imagination and that expresses itself in grief and shame").

⁵⁵⁹ See Thomas Banchoff, *The Past in the Present: Historical Memory and German National Security Policy* (Sept. 2, 1995) (paper presented at the American Political Science Association Conference); Thomas Berger, *The Contemporary Power of Memory: The Dilemmas for German Foreign Policy* (Sept. 2, 1995) (same); Andrei Markovitz, *Historical Memory and the Sources of German Power* (Sept. 2, 1995) (same).

⁵⁶⁰ See DOUGLAS, *supra* note 485.

⁵⁶¹ JÜRGEN HABERMAS, *On the Public Use of History*, in *THE NEW CONSERVATISM*, *supra* note 481, at 229, 236.

⁵⁶² Helmut Fleischer, *The Morality of History: On the Dispute About the Past That Will Not Pass*, in *FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 80, 83.

fact, of his administration. Attending the trial, Owen Fiss would thus herald it as "an exercise in self-examination," revealing "the nobility of a great nation, prepared to judge itself."⁵⁶³ In a country where public discourse often harkens back to grander days of national prosperity, Alfonsín chose instead to distance himself altogether from the country's past. He portrayed its earlier history not as a golden age and guidepost from which recent leaders had strayed, but as a tale of chronic failure, a story of continuing recrudescence of illiberal vices, displayed not only by elites but by significant segments of society at large: "intolerance of dissent," "inability to compromise," "violence as the preferred response to adversaries," "a conception of social order as requiring the suppression of all conflict," and "authoritarianism as the natural mode of interaction between leaders and led."⁵⁶⁴

This was a crucial component of the story that Alfonsín wanted the courts to tell, and was clearly reflected in the judgment against the juntas.⁵⁶⁵ In his most important public address, the President announced:

In December 1983 we initiate for the first time an effort at democratization based on the recognition that the key to the past authoritarian regimes lay less in their intrinsic power, than in the possibilities they had of establishing themselves in a political culture generally inclined to accept such authoritarian regimes.

For us, to defend and consolidate democracy means to fight not only against the objective anti-democratic forces, but also against the widespread subjective receptivity of many to such forces, a disposition that has provided the basis of their objective power

. . . .

. . . [A] new stage in our history has begun.⁵⁶⁶

This address was rightly seen at the time as representing a sea change in the country's presidential discourse.⁵⁶⁷ Its novelty consisted in its insistence that the source of Argentina's problems lay in its "political culture," as the President put it, rather than in the intervention of foreign states, the constraints of the international

⁵⁶³ Nino Conference, *supra* note 47 (remarks of Owen Fiss) (also describing the trial as "a people inquiring into what they had done to each other").

⁵⁶⁴ Alfonsín, *supra* note 79, at 20-22 (translation by author).

⁵⁶⁵ See *Judgment on Human Rights*, *supra* note 305, at 327-28.

⁵⁶⁶ Alfonsín, *supra* note 79, at 22, 39 (translation by author).

⁵⁶⁷ See the several responses, later published as a book, along with the speech itself, in ALFONSÍN: DISCURSOS SOBRE EL DISCURSO, *supra* note 79.

capitalist system, or the conspiracies of a corrupt national oligarchy. Only a few would be prosecuted criminally, but virtually all should accept moral responsibility for having permitted, and often encouraged, the defendants' seizures of power. It was no coincidence that the speech was drafted by Carlos Nino, the liberal legal theorist who had traveled widely and shared none of the prevailing nationalist enthusiasms of Argentina's intellectuals.⁵⁶⁸

The Evanescence of Guilty Memory

For several years, at least, it seemed as if criminal prosecution in Argentina—its ethical evocations in the public mind—would play a major role in revising national identity on the basis of a complete break with the past, through a reconstitution of the country's political culture on liberal terms, much as occurred in West Germany.

But Argentines ultimately proved reluctant to travel very far down this road. Public support for punishment of even the most unrepentant torturers soon waned, as more pressing problems arose.⁵⁶⁹ Only a few years thereafter, state-sponsored torture and murder—now by police, of common criminals—was applauded by many Argentines, including those in prominent public office.⁵⁷⁰

Perhaps least persuasive to conservatives was the President's insistence on the need for a redefinition of national identity, a concept long central to Argentine rightists. Nino himself would later describe their worldview as positing a

National Being [that] *does not evolve* with the history of the country; its structure is not dependent on the Constitución, which is seen

⁵⁶⁸ A related matter must be broached with some delicacy. It is pertinent in this regard that both Nino and Malamud-Goti were Jewish. Argentine nationalism—both its Peronist and Integralist varieties—has always been, and largely remains, deeply hostile toward Judaism and the Jews. See generally ROBERT WEISBROT, *THE JEWS OF ARGENTINA* (1979) (documenting the history of the Jews in Argentina from the time of the Spanish Inquisition to the rise of Perón). On the myriad forms of nationalist thought among Argentine intellectuals, see ENRIQUE ZULETA ÁLVAREZ, *EL NACIONALISMO ARGENTINO* (1975).

⁵⁶⁹ See ROSENDO FRAGA, *LA CUESTIÓN MILITAR: 1987-1989*, at 137 (1990) (summarizing opinion survey data reflecting the Argentine public's lack of strong interest in human rights issues during the late 1980s). Two former military officers, notorious for their prominent role in the dirty war and later uprisings, even ran for public office, receiving many votes. One was elected governor of a major province. See *Bussi Vuelve a Gobernar la Provincia de Tucumán*, CLARÍN (Buenos Aires), Int'l Ed., June 27-July 3, 1995, at 1, 3.

⁵⁷⁰ See MALAMUD-GOTI, *supra* note 103 (manuscript at 197-206).

as a mere instrument; nor is its will expressed through the democratic process. . . . [T]he military defended the sacrifice of innocent individuals . . . as a necessary means for *preserving th[is] National Being*.⁵⁷¹

Even one of the principal architects of the trials would ultimately conclude that, rather than stimulating serious moral deliberation or self-scrutiny, the prosecutions of military officers had fostered public embrace of a simplistic division between the guilty and the innocent.⁵⁷²

West Germans, too, proved to have second thoughts about their willingness to base national identity on a complete repudiation of their country's past. In the 1980s the country witnessed, in the so-called "historians' debate," a wrenching reassessment of whether the Holocaust ought properly to remain at the center of the nation's self-understanding, even its understanding of German society during the Third Reich.⁵⁷³ The considerable public appeal of the new interpretations, to judge from responses in the elite press, lay in its assertions of continuity over time and space, its rejection of any need for a total break from the past.

First, German atrocities had not been unique or uniquely horrible. They may have been inspired by early Soviet "experiments" with the Gulag, it was argued, a system that ultimately

⁵⁷¹ Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2633 (1991) (emphasis added).

⁵⁷² See MALAMUD-GOTI, *supra* note 103 (manuscript at 256-64). It is wrong to suggest, as do some poststructuralists, that the category structure of law necessarily reflects (and requires) a binary opposition regarding guilt. See RUBENSTEIN, *supra* note 288, at 158 (suggesting that, in French postwar trials of collaborationists "the use of the binary opposition is to contain guilt to at least one easily delineated segment of the population that can be purged symbolically"). Perelli similarly concludes that the junta trial "failed socially and culturally, as it did not enable people to work out their own experiences of paralyzing terror, repressed guilt, and projection." Carina Perelli, *Settling Accounts with Blood Memory: The Case of Argentina*, 59 SOC. RES. 415, 418 (1992).

⁵⁷³ See generally RICHARD EVANS, IN HITLER'S SHADOW OF HITLER: WEST GERMAN HISTORIANS AND THE ATTEMPT TO ESCAPE FROM THE NAZI PAST (1989) (discussing the West German historians' debate over how the Holocaust should be remembered). My account of the debate aims only to show its relevance to the social theoretical concerns of the present essay. Those concerns, distinct from those of both sides to the dispute, do not warrant or require endorsement of either. My sympathies are with Habermas and his defenders. But the social theoretical questions examined here require acknowledging the difficulties that have been encountered by efforts to use criminal law for constructing national identity (in Argentina, Japan, and Germany) on the basis of collective guilt. In so doing, I concede the significance and inescapability of the neorevisionists' concerns, if not their conclusions.

caused suffering on a greater scale.⁵⁷⁴ Subsequent genocides throughout Africa and Asia similarly called into question the long-standing view that the Germans had committed a crime incommensurable with any other, one for which they needed forever to atone, even as other nations mimicked German wrongs without apology. The German experience of administrative massacre, in other words, was not entirely discontinuous with that of other societies, before or since.

Second, until the War began to take its toll, Germans were relatively content with their government. Their economy grew rapidly under Hitler, significantly improving their standard of living. Hence the unofficial memory of these years, quietly preserved by those who lived through them, was considerably more favorable than, and tacitly at odds with, the memory of Nazi rule officially cultivated during the Occupation and thereafter.⁵⁷⁵ In fact, German society between the wars displayed trends and trajectories, on all major economic and social indicators, quite similar to those of other West European societies.

In other words, there was considerable socioeconomic continuity both between the Nazi and post-Nazi years within Germany, as well as between German and other Western societies of the interwar period. Insofar as impressive development under Nazi rule had partly contributed to the later postwar economic miracle,⁵⁷⁶ there was no need for any *complete* break with the past as the basis of national identity, or national pride.⁵⁷⁷

⁵⁷⁴ See Nolte, *supra* note 237, at 12-14 (suggesting that the Holocaust "was the fear-borne reaction to the acts of annihilation that took place during the Russian Revolution"); Nolte, *supra* note 369, at 22 (arguing that the Holocaust was inspired by the Gulag).

⁵⁷⁵ See FRIEDLANDER, *supra* note 322, at 88-92.

⁵⁷⁶ Assertions such as this one were particularly offensive to many since they seemed to deny, as Habermas puts it, the "complex connections between the criminality and the dubious normality of everyday life under Nazism, between destruction and vital productivity, between a devastating systematic perspective and an intimate, local perspective." Jürgen Habermas, *A Kind of Settlement of Damages: The Apologetic Tendencies in German History Writing*, in *FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 34, 41.

⁵⁷⁷ Several participants in the historians' debate have observed an alleged trend toward restoring some measure of national "pride" among Germans, a pride incompatible with the "Nuremberg Trial view of history." See, e.g., Hanno Helbling, *A Searching Image of the Past: What Is Expected from German History Books*, in *FOREVER IN THE SHADOW OF HITLER?*, *supra* note 237, at 98, 99 (noting the desire by some for instruction in "a German history that does not have to be read as a prehistory of National Socialism"); Meier, *supra* note 558, at 26 (noting that in 1983 the parliamentary leader of the Christian Democratic Union had suggested "that the

As in Argentina, the dispute evolved from one between advocates of memory and those of oblivion into a dispute between competing versions of collective memory, conflicting narratives of the nation's past. What is significant for present purposes is not the new scholarly "discoveries" as such, but the apparent receptivity to them, and hence their likely impact on memory.⁵⁷⁸ This was a later generation of Germans, both the historians and their public audience, people with no personal complicity. Hence it is impossible to attribute their attitudinal shift purely to self-exculpatory apologetics.

We are thus forced to consider the possibility, as Edmund Burke long ago argued (and as communitarians like Charles Taylor and Alasdair MacIntyre seek to remind us), that many people are emotionally constituted in ways that require a sense of connectedness to their country's more distant past, a feeling of continuity with forebears—however puzzling and perverse many of us liberal theorists may find this.⁵⁷⁹ On this account, great events in legal history can be, and often are, woven into the larger story, but seamlessly (in the common law fashion), without ripping apart the rest of the social fabric.

It follows that trials for administrative massacre, however spectacular their public staging, cannot easily transform collective memory, because they involve both a radical break with well-settled interpretations of the nation's past—hard enough for many well-meaning citizens—as well as acceptance of some responsibility by many who have themselves suffered genuine deprivation during, or as a result of, the country's recent calamities. To expect this is to expect a great deal.

The new doubts about any need for a complete break with the past, for a national identity founded at "zero hour" upon only the

Germans should finally 'step out of Hitler's shadow'). In July 1985, Japan's Prime Minister similarly contended that the "nation must move from shame to glory" in order to establish a national identity. Koyama, *supra* note 519, at 160. He blamed its failure in this regard on "a view of history influenced by the results of the Far Eastern War Criminal Tribunal." *Id.*

⁵⁷⁸ See Alan Cowell, *Teaching Nazi Past to German Youth*, N.Y. TIMES, June 9, 1995, at A12 (quoting several high school youths, expressing such complaints as, "[y]ou can't say: 'I'm proud to be a German.' Beethoven was a German, too, but everything now is seen through the Second World War").

⁵⁷⁹ Halbwachs viewed collective memory in just such Burkean terms: "The collective memory is a record of resemblances and, naturally, is convinced that the group remains the same . . . , whereas what has changed are the group's relations or contacts with other groups" HALBWACHS, *supra* note 217, at 86.

Nuremberg principles and "constitutional patriotism," take the form of an explicitly communitarian theory of collective memory, in the arguments of revisionist historians. Habermas aptly summarizes their claim:

Without the memory of this national history [preceding 1933] . . . , a positive self-image cannot be created. Without a collective identity, the forces of social integration decline. The lamented "loss of history" is even said to contribute to the weakness of the political system's legitimation This is used to justify the compensatory "creation of meaning" through which historiography is to provide for those uprooted by the process of modernization.⁵⁸⁰

This notion that a stable identity—personal and national—rests on an awareness of continuity with a beloved past, whose noteworthy achievements are preserved in collective memory, is entirely consistent with Halbwachs's original theory of collective memory and with the Durkheimian conception of mechanical solidarity that it presupposed. Halbwachs claimed that collective memory necessarily "immobilizes time."⁵⁸¹ Hence his very limited and conservative view of commemoration as "reviv[ing] the deep traditions of a community that might otherwise be modified over time, as impressions of the past grow vague By enhancing the structure of mnemonic imagery, commemoration lends clarity and stability to collective memory."⁵⁸² If this were generally true, such

⁵⁸⁰ HABERMAS, *supra* note 561, at 235. For an American version of the view that Habermas refutes, see BELLAH ET AL., *supra* note 216, at 152-53.

⁵⁸¹ "Every group . . . immobilizes time in its own way and imposes on its members the illusion that, in a given duration of a constantly changing world, certain zones have acquired a relative stability and balance in which nothing essential is altered." HALBWACHS, *supra* note 217, at 126. An ethnography of French peasants similarly highlights the fundamental conservatism of collective memory in traditional societies:

The collective memory . . . constantly tends to seek permanence, to re-create what is indestructible and so ensure its own survival. It is as if the community needed to lean on its own unchanged past, where the ups and downs of History and the vagaries of modern life disappear The present . . . is reconstituted by reference to the past—a stable, lasting and well-ordered period, a time outside the reach of Time.

ZONABEND, *supra* note 49, at 138-39.

⁵⁸² Patrick H. Hutton, *Collective Memory and Collective Mentalities: The Halbwachs-Ariès Connection*, 15 HIST. REFLECTIONS 311, 315 (1988) (parsing HALBWACHS, *supra* note 217). This view of official commemoration is firmly rejected by contemporary creators and scholars of contemporary public monuments. See YOUNG, *supra* note 249, at 14-17 (praising an approach to public monuments that "may save our icons of remembrance from hardening into idols of remembrance" (footnote omitted)).

memory could never extend to a collective agreement to break decisively with the society's past, unless perhaps this meant returning to some long-lost golden age.

But Halbwachs's claim is not an iron law, and the Israeli experience offers a telling exception. After 1948, national identity initially developed not through memory of victimization by others, but through rejection of features within Judaism and Jewish secular culture itself thought to have made European Jews especially vulnerable to such victimization. Few if any efforts at the construction of national identity have been so self-critical, before or since.⁵⁸³ If there were to be a radical break with the past, it was to entail a break with what being Jewish had meant to the Jews. Specifically, it was to mean a repudiation of millennia of ingratiating of hostile majorities at whose sufferance they existed. It was therefore to mean a sovereign state. The reconstitution of national identity was also to mean an unapologetic attitude toward the exercise of military power in self-defense⁵⁸⁴ and a corresponding reassessment of the relative importance of mental and manual labor.

But this attempted redefinition of Jewish identity on the basis of historical rupture—induced by law, in significant part—made it very difficult for the new Israeli-born generation to sympathize with its predecessor, that is, with the many thousands of Holocaust survivors still among them. The Eichmann trial, with its deliberate emphasis on how little the victims could do and how they had resisted nonetheless,⁵⁸⁵ was intentionally designed to restore a sense of continuity with the past, to extend collective memory in this regard.⁵⁸⁶

⁵⁸³ There was ample precedent for this, however, in the Old Testament's appeal to remember the past, given that "many . . . biblical narratives seem almost calculated to deflate the national pride" and are by no means "actuated by the normal . . . desire to preserve heroic national deeds from oblivion." YERUSHALMI, *supra* note 378, at 11.

⁵⁸⁴ On the repercussions of this transformation for the identity of many American Jews, see generally PAUL BREINES, *TOUGH JEWS: POLITICAL FANTASIES AND THE MORAL DILEMMA OF AMERICAN JEWRY* (1990). See also Barry Schwartz et al., *The Recovery of Masada: A Study in Collective Memory*, 27 SOC. Q. 147, 151 (1986) (observing that Jewish interest in the Masada story arose only with the rise of Zionism in this century, as it came to symbolize military valor, national resolution, and heroism against high odds).

⁵⁸⁵ See SEGEV, *supra* note 34, at 348. The opinion of the district court mentions this resistance several times in the first paragraph alone. See Attorney-Gen. of Israel v. Eichmann, 36 I.L.R. 5, 18-19 (Isr. Dist. Ct. 1961).

⁵⁸⁶ See SEGEV, *supra* note 34, at 348.

The trial's dramatic focus, in other words, derived from a conscious executive decision to rebuild historical links that, although initially repudiated, were now recognized as crucial to solidarity between generations.⁵⁸⁷ At the same time, the trial was designed to suggest a new relationship between the Jews and their persecutors: its pedagogic value for Ben-Gurion lay, one scholar suggests, in its capacity to provide "a people that had not experienced sovereignty and was as yet unused to it, the feeling of power and independence that the judicial process imparted."⁵⁸⁸

Liberal Memory As "Constitutional Patriotism"

Perhaps it is only liberal philosophers and liberal social theorists, like Emile Durkheim, Carlos Nino, and the later Habermas, who find it easy to imagine basing their nation's identity entirely on universal values, shared by many others, rather than on memorable experiences uniquely "ours."⁵⁸⁹ But this is an oversimplification of what they actually sought, which was something less abstract: to condemn the past by legal judgment, to be sure, but also to etch into collective consciousness the memory of that very act of condemnation—including the spectacular courtroom events, at Nuremberg and Buenos Aires, by which it was achieved.

Still, it may be, as communitarian theorists imply, that only those already too thoroughly deracinated, feeling little solidarity with fellow nationals, can find firm identity and direction in "critical morality," that is, in the abstract principles for which liberal theorists consider themselves (not coincidentally) the preeminent spokesmen.⁵⁹⁰ It is noteworthy in this connection that the

⁵⁸⁷ The Eichmann trial also convinced American and European Jews that the Holocaust—until then a matter central to Jewish memory, "but not paraded before a general public"—might realistically be made central to international memory. The trial, combined with victory in the Six-Day War shortly thereafter, "created a new openness and pride among Jews about their Jewishness." Schudson, *supra* note 235.

⁵⁸⁸ Keren, *supra* note 35, at 49.

⁵⁸⁹ Habermas developed his views on this subject in the context of the so-called "Historians' Debate." See JÜRGEN HABERMAS, *Historical Consciousness and Post-Traditional Identity: The Federal Republic's Orientation to the West*, in THE NEW CONSERVATISM, *supra* note 481, at 249, 249-67; HABERMAS, *supra* note 561, at 229-40.

⁵⁹⁰ An example of such an approach is Habermas's notion of "constitutional patriotism," according to which social solidarity and national identity are to derive directly from the citizen's articulate commitment to moral principles embodied in a liberal constitution, such as that of contemporary Germany. See HABERMAS, *supra* note 589, at 262-66. The approach adopted in the present Article views social solidarity arising more circuitously, from the "civilizing process" of disagreement

speeches drafted by Nino for Alfonsín virtually never invoked the names of Argentina's national heroes, as presidential discourse—in Argentina, as elsewhere—customarily does. The evidence presented here suggests that an effort—by criminal trials, in conjunction with other means—to rewrite a society's myth of origin in a manner condemning much of its historic past from the standpoint of universal principles shared by other societies, is indeed difficult, but not impossible.

If the reconstruction of collective memory sought by Nino (for Argentina) and Habermas (for Germany) is possible, surely it cannot be accomplished, in any event, through the "quick fix" of criminal trials, however riveting their gruesome details, however profound their momentary impact on opinion surveys. In their most optimistic moments, Alfonsín and his advisor-philosophers hoped that the epiphanic impact of the trial, with its revelations of rampant official lawlessness and the scale of the resulting suffering, would instill a deep and abiding recognition that official respect for individual moral rights was an imperative that could "never again" be compromised.⁵⁹¹ In this, they expected too much. Even the most compelling story, dramatizing the redemption of the disappeared and the resurrection of liberal morality, could not in itself achieve that objective, surely not if predicated on such a thoroughgoing self-criticism.

But despite efforts by Peronist opponents to portray them as political naifs, President Alfonsín and his legal advisors were always prudent enough to set certain limits on their Kantian universalism and on their hopes of instilling it in their countrymen. They refrained, for instance, from indicting the juntas under international law for "crimes against humanity," although all doctrinal requirements for such an indictment would have been met. They rightly feared that any such reliance on international law would only further stir the passions of Argentine nationalism.⁵⁹² For this substantial segment of public opinion, the Nuremberg precedent represented not the triumph of international human rights, but merely the revenge of the Jews. Again, legal strategy was consciously tailored to make the government's favored story more compelling

(over such things as the meaning and application of criminal law), channelled by procedural restraints.

⁵⁹¹ See Interviews with Argentine Presidential Advisors, in Buenos Aires, Argentina (Aug. 1985).

⁵⁹² See Interview with Jacobo Timerman, in Buenos Aires, Argentina (Aug. 1987).

to skeptical publics, to influence collective memory in more persuasive and perduring ways.

Let us now briefly compare the cases. They differ from and resemble one another in several ways. Did criminal prosecution work to unite citizens in community by evoking shared sentiments of indignation or, contrariwise, did it only further divide society into mutually suspicious subgroups, each adopting the moral universe and favored narrative of prosecution or defense? In Argentina, the effect was ultimately quite divisive, with family and friends often bitterly at odds over whether "forgetting" was necessary for (or incompatible with) the restoration of democracy and solidarity.⁵⁹³ The narrative fostered by Alfonsín's courts failed to win anything close to universal public endorsement for very long, being rejected by both right and left. In this respect, the social impact of criminal prosecution resembled the divisiveness occasioned by the Dreyfus trial.

By contrast, the West German and Japanese experiences display the potentially unifying effect of criminal prosecution on collective memory and social solidarity, but in very different ways. Neither experience, moreover, is entirely consistent with Durkheim's argument. In the Federal Republic since the mid-1960s, criminal trials powerfully united young Germans in repudiation of the complicity of their parents' generation, a complicity represented by the "ordinary men" (camp guards and mid-level officials) finally in the dock. In Japan, by contrast, the Tokyo and other war crimes trials were widely rejected for their lack of moral "balance," their refusal to frame the story of Japanese "aggression" in the wider context of superpower rivalry in the Pacific (a context permitting Japanese behavior to be characterized as partially defensive), or to weigh the defendants' authorization of war crimes (against POWs and noncombatants) in relation to analogous Allied crimes (bombing of Japan's civilian population centers).

These trials, in short, united the Japanese populace in substantial rejection of the story they sought to tell,⁵⁹⁴ much as the

⁵⁹³ Stories were common, for instance, of courting couples quarreling upon the discovery that one's views on a question were not shared by the other. For a public incident of such discord, see Calvin Sims, *National Nightmare Returns to Argentine Consciousness*, N.Y. TIMES, Apr. 5, 1995, at A1.

⁵⁹⁴ It is nonetheless true, as already noted, that certain aspects of the courts' historical narrative ultimately became all too persuasive to many Japanese, insofar as it exempted them (and the Emperor they worshipped) from any trace of culpability. See *supra* text accompanying notes 513-19.

Nuremberg proceedings failed to influence German adults in the same years. The unity achieved among Germans by prosecutions (in the 1960s and 1970s) differed from that achieved among the Japanese not only over whether such trials were defensible. Another difference was equally crucial: the story around which Germans reached consensus was factually accurate, whereas that adopted by the Japanese—frozen in the 1940s, unraveling only at Hirohito's death—was not.

The Argentine and Japanese experiences resemble each other in one disquieting way. In both societies, criminal trials exercised considerable appeal for many citizens for the "wrong" reasons. Many Argentines favored prosecution of the juntas not because they had murdered thousands of citizens in the dirty war, but only because they had lost the recent Malvinas/Falklands war.⁵⁹⁵ Similarly, many Japanese were all too happy to see their country's military leadership punished, on account of imprudently involving the country in a costly war it could not win.

Far less persuasive to Japanese citizens, however, were the legal arguments for prosecutions of the extensive war crimes and crimes against humanity perpetrated in their name during that conflict. In both Japan and Argentina, prosecutors were well-aware that the public's antipathy toward the defendants, however superficially consistent with their own, arose from very different concerns—even as prosecutors sought to utilize such public sentiment in support of the law's purposes. This strategy involved a risky gamble, as Argentine prosecutors learned to their painful chagrin, for it was unlikely to work for very long in a society deeply divided and politically unstable.⁵⁹⁶

The Argentine trials resembled the post-Nuremberg German ones in an important way that distinguishes them both from the Japanese experience. The Tokyo and Nuremberg trials (as well as other Allied-sponsored war crimes trials throughout Asia and Europe) involved foreigners prosecuting nationals for violations of international law. This approach proved largely unsuccessful in evoking the moral sentiments of nationals in support of the

⁵⁹⁵ Fiascos in strategic and logistical planning caused the collapse of the military regime. This permitted the restoration of civilian rulers (who initiated the criminal proceedings). See ANDRÉS FONTANA, *FUERZAS ARMADAS, PARTIDOS POLÍTICOS Y TRANSICIÓN A LA DEMOCRACIA EN LA ARGENTINA* (1984).

⁵⁹⁶ On the depth of social and political conflicts plaguing Argentina since the 1930s, see generally CARLOS H. WAISMAN, *REVERSAL OF DEVELOPMENT IN ARGENTINA* (1991).

proceedings. By contrast, the prosecutions of Argentina's military rulers, like those of the Auschwitz guards and Majdanek officials, involved nationals prosecuting other nationals for violations of domestic law. This approach proved considerably more effective in generating moral consensus (and mechanical solidarity), especially in the Federal Republic, but also among the substantial majority of Argentines (over ninety percent) who strongly endorsed the junta trial.⁵⁹⁷

In cases involving large-scale administrative massacre, the Durkheimian account of criminal law's contribution to social solidarity has much greater difficulty than the discursive in handling the muddiness of the moral and legal line between accusers and accused. This is because Durkheim saw solidarity arising out of the shared indignation of the innocent many toward the guilty few. But where many thousands bear some culpability for the harm at issue, this premise is invalid. "Coming to terms" with administrative massacre requires some means by which society at large can collectively acknowledge its guilt, collectively repenting its wrongs.

Only when the law is conceived as a forum for public dialogue can it accommodate the possibility (and societal need) for periodic reversal of roles between accuser and accused, for the accusatory finger to be pointed in both directions. This is particularly apt in situations, such as the Nuremberg and Tokyo trials, where accuser and accused, in an escalating cycle of criminality, have become, to some extent, "mutually implicated in each other's . . . vices."⁵⁹⁸ The objective, as in much modernist theatre, is a "fractured reciprocity whereby beholder and beheld reverse positions in a way that renders a steady position of spectatorship impossible."⁵⁹⁹ Only the discursive conception of law's function will allow us to apprehend and appreciate the kind of solidarity that can emerge through such exchanges.

⁵⁹⁷ The greater efficacy of national versus international law in this context confirms Walzer's view that "internal" criticism, based on a society's own moral norms, is almost always more persuasive to citizens than "external" criticism based on universal moral standards, discovered by "prophets" and delivered "from the mountaintop." MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 36-66 (1987).

⁵⁹⁸ SHRIVER, *supra* note 358, at 74.

⁵⁹⁹ BARBARA FREEDMAN, *STAGING THE GAZE: POSTMODERNISM, PSYCHOANALYSIS, AND SHAKESPEAREAN COMEDY 1* (1991).

E. *Constructing Memory with Legal Blueprints?*

[M]emory is . . . a very important factor in struggle [I]f one controls people's memory, one controls their dynamism. . . . It's vital to have possession of this memory, to control it, administer it, tell it what it must contain.

Michel Foucault⁶⁰⁰

Although Foucault is surely engaged here in willful hyperbole, it is true that myths of origin (and the collective memory they establish) do not bring themselves into being. "[S]tates of origin are conceived as extraordinary only when someone is motivated to point them out and define them as such," writes another sociologist.⁶⁰¹ "The sanctification of social beginnings must be induced and sustained"⁶⁰² Hence official "truth commissions," established in the aftermath of administrative massacre, sometimes specifically recommend measures "to preserve the memory of the victims [so as to] promote a culture of mutual respect and observance of human rights."⁶⁰³

This is a tall order. Foucault's aphorism, for instance, is surely offered less as a sociological proposition than as a political provocation, less in exhortation than incantation. That no one could mistakenly take his aphorism literally is itself significant and worthy of some reflection.

The political repercussions of the Dreyfus trial dominated French politics for over half a century.⁶⁰⁴ Since then, at least, it has been clear that criminal prosecutions can contribute significantly to collective memory of major events in a nation's history and that collective memory of such proceedings can thereby significantly effect national identity. Much less clear, however, is whether any of

⁶⁰⁰ *Film and Popular Memory: An Interview with Michel Foucault*, 11 RADICAL PHIL. 24, 25 (1975) (citation omitted).

⁶⁰¹ Barry Schwartz, *The Social Context of Commemoration: A Study in Collective Memory*, 61 SOC. FORCES 374, 376 (1982) (parsing a statement by Halbwachs).

⁶⁰² *Id.*

⁶⁰³ Naomi Roht-Arriaza, *Overview to IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 372, at 147, 158 (quoting Commission for the Historical Clarification of the Human Rights Violations and Violent Acts That Have Caused Suffering to the Guatemalan People); *see also* Taylor, *supra* note 308, at 196 (observing that the Argentine military "trials were a public and explicit strategy to conclude one historical period and begin another with a decision concerning how to remember").

⁶⁰⁴ *See* KEDWARD, *supra* note 97, at 111-12; Benjamin Martin, *Political Justice in France: The Dreyfus Affair and After* (Sept. 2, 1994) (paper presented at the American Political Science Association Conference) (on file with author).

these effects may be achieved *deliberately*. This is a fifth reason to doubt whether societies can intentionally employ the law to influence collective memory of administrative massacre. It may be that collective memory is essentially a by-product—and so too the social solidarity it promotes.

There are certain mental and social states, as Elster observes, that “can only come about as the by-product of actions undertaken for other ends. They can never, that is, be brought about intelligently or intentionally, because the very attempt to do so precludes the state one is trying to bring about.”⁶⁰⁵ This is not to deny “the widespread tendency to erect into goals for political action effects that can only be by-products.”⁶⁰⁶ It is only to say that such efforts are doomed to fail. We do not normally legislate what the members of a society ought to remember, after all, although the memory of administrative massacre is a notable exception to this general rule.⁶⁰⁷

Memory seems to have a mind of its own, as suggested by its frequent verbal invocation as an independent actor or agent. One reads, for instance, that “[m]emory selects from the flux of images of the past those that best fit *its* present needs.”⁶⁰⁸ Even if memory need not “immobilize time,” as Halbwachs thought, perhaps its very dynamism and flux work in slippery ways that elude self-conscious control, including control by liberal elites nominally in charge of an illiberal society, as was the case in Argentina. Hence, Schudson is right to insist on “the incompleteness of this hegemonic

⁶⁰⁵ JON ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 43 (1983). There is a fallacy, Elster notes, in “searching for the things that recede before the hand that reaches out for them.” *Id.* at 107. Within the class of “states that are essentially by-products,” reside phenomena so diverse as sleep, class-consciousness, benevolence, magnificence, the contribution of jury participation to civic education, and self-respect. *See id.* at 43-45, 71-77, 96, 100.

⁶⁰⁶ *Id.* at 44.

⁶⁰⁷ Fifteen U.S. states, including California, New York, Illinois, Pennsylvania, and Florida, have legislation mandating or strongly recommending instruction concerning the Holocaust in their public schools. *See* U.S. Holocaust Memorial Museum, *State Requirements and Holocaust Studies* (July 7, 1995). Significantly, though, the Illinois mandate became the focus of aggressive parental opposition, charging that a small minority was attempting to “manipulate our children for their political and national purposes.” LIPSTADT, *supra* note 17, at 15 (quoting a letter from Safet M. Sarich to Winnetka educators (May 1991)).

⁶⁰⁸ Hutton, *supra* note 582, at 314 (emphasis added). Hutton further contends that “memory colonizes the past by obliging it to conform to present conceptions. It is a process not of retrieval but of reconfiguration.” *Id.*

process and the social mechanisms that *keep* it incomplete" in liberal societies.⁶⁰⁹

The very act of ordering someone to forget an experience, for instance, necessarily reminds him of the very experience that he must forget—or more precisely—remember to forget. This paradox is inherent in any "official campaign[s] of coercive forgetting,"⁶¹⁰ such as those regularly employed by "state socialist" regimes. Hence, the law may compel teachers not to offer instruction on certain events. But it can do so only by periodically reminding large numbers of them (in terms calculated to ensure their enduring recollection) of what it is, exactly, that is *so important* for them not to share with their charges.

The "official rewriting of history" in which such regimes engage highlights, unwittingly, the rulers' self-perception that their legitimacy hangs precariously on public acceptance of a particular historical interpretation, conspicuously inconsistent with others recently foisted upon the public with equal vehemence.⁶¹¹ (Unfortunately, a pleasing paradox cannot be allowed the last word here: there are vast expanses of the globe where authoritarian states have been all too successful for long periods in inducing collective forgetting of the administrative massacres they have inflicted.)⁶¹²

A converse problem with official orchestration of memory arises in modern liberal societies for the opposite reason: because historical understanding plays *so little* a role in the claims of their rulers to legitimate authority. Official efforts at memory construction by modern liberal societies have hence struck several observers

⁶⁰⁹ SCHUDSON, *supra* note 236, at 209 (emphasis added). He elsewhere notes: "In liberal societies and in a porous international system where it is difficult or impossible to curtain one population from the next, instrumentalization [of collective memory] is more often attempted than achieved." Schudson, *supra* note 235.

⁶¹⁰ On such practices in the former Soviet Union, see Watson, *supra* note 191, at 17-19. On similar practices in China, see Vera Schwarcz, *Strangers No More: Personal Memory in the Interstices of Public Commemoration*, in MEMORY, HISTORY, AND OPPOSITION, *supra* note 191, at 45, 55. On Czechoslovakia, see KUNDERA, *supra* note 3, at 158-59.

⁶¹¹ See, e.g., Ungar, *supra* note 488, at 18 (observing of leadership succession in Czechoslovakia that "[n]o longer even a matter of choosing between rival accounts, it was as if each regime irrupted with its own past fully formed. Of course, this invented past was neither natural nor neutral, but rather revised by each regime according to the ambitions on which it grounded its claim to legitimacy").

⁶¹² See, e.g., HEDRICK SMITH, *THE RUSSIANS* 247-48 (1976) (reporting conversations at an elite Soviet high school with students who, when asked how many people had died in Stalin's gulag, consistently gave estimates in the low hundreds, rather than in the millions).

as hopelessly artificial, incongruously sentimental, even absurd. As a French historian laments, in modern Western society:

lieux de mémoire are fundamentally remains, the ultimate embodiments of a memorial consciousness that has barely survived in a historical age that calls out for memory because it has abandoned it. They make their appearance by virtue of the deritualization of our world . . . maintaining by artifice and by will a society deeply absorbed in its own transformation[,] . . . one that inherently values . . . the future over the past. Museums, archives, cemeteries, festivals, anniversaries, treaties, depositions, monuments, sanctuaries, fraternal orders—these are the boundary stones of another age, illusions of eternity. It is the nostalgic dimension of these devotional institutions that makes them seem beleaguered and cold—they mark the rituals of a society without ritual; . . . signs of distinction and of group membership in a society that . . . tends to recognize individuals only as identical and equal.⁶¹³

Combining this point with the preceding, we might be led to conclude that memory construction in modern societies is doomed to failure because historical awareness plays either too insignificant a role in political legitimacy and social solidarity (in liberal democracies), on one hand, or too important a role in that regard (in modern totalitarian regimes), on the other.

⁶¹³ Nora, *supra* note 290, at 12. Nora's conclusion here embraces the so-called theory of "mass society." *Id.* at 7-9. Rejecting that theory, as I do, entails very different conclusions concerning the possibility of meaningful collective memory within a modern liberal society. Many now reject the very idea of collective memory, not because shared memory has been shown to be nonexistent or impossible, but simply because they regard it as undesirable. In a society divided along socioeconomic or ethnic lines, they imply, the memory of large-scale events—particularly revolutions and general strikes, of course, but major "national" events more generally—must necessarily vary for members of different socioeconomic groups, since such events inevitably impose very different burdens upon each such group. Halbwach's idea of "collective memory" is currently all the rage in the human sciences. But its history traces directly to Durkheim, and particularly to Durkheim's preoccupation with social solidarity through moral consensus. This preoccupation is not at all shared by contemporary theorists, who focus instead on the centrality of conflict, domination, and resistance in modern societies. See Randall Collins, *The Durkheimian Tradition in Conflict Sociology*, in *DURKHEIMIAN SOCIOLOGY: CULTURAL STUDIES* 107, 107 (Jeffrey C. Alexander ed., 1988) (observing that Durkheim's view of social solidarity has never been as unpopular among sociologists in the seventy years since his death). Such theorists view the notion of collective memory as possible only at the level of societal subgroups and desirable only as a political weapon against the dominant majority. The present Article seeks to preserve the link between collective memory and social solidarity, while decoupling the latter from Durkheim's conception of it.

It would follow that collective memory of administrative massacre—in either the West or the East—may be necessarily an unintended consequence, that is, a consequence of something other than the law's efforts to create it. If so, it would be self-defeating for prosecutors and judges, through choice among alternative narrative devices, to aspire to influence such memory directly. In other words, one might ask, with Eduardo Rabossi, Alfonsín's Undersecretary of Human Rights, "is it possible to determine collective remembering or forgetting *by official decree*?"⁶¹⁴ This question seems immediately to invite a negative answer, but only because its formulation is too stark and simplified. In fact, there is much that the law can do to influence collective memory (and hence to reconstruct some solidarity after administrative massacre) in powerful ways, I shall suggest.

The Legal Malleability of Collective Memory

One source of skepticism about the law's potential here is the fact that courts, acting in the immediate aftermath of the events they judge, lack historical hindsight. Only such hindsight permits an interpreter to situate events, particularly ones so traumatic and disorienting to contemporaries, within an enduring frame of intelligible context, persuasive to future generations. To be sure, no historical judgment—even one offered centuries after the events—is immune from periodic revision.

But hindsight confers, at least, a much wider perspective than contemporaries enjoy. This advantage in perspective facilitates, in turn, formation of "settled judgments" that persist for long periods and that often filter, through the press and mass media, into popular understanding. This is the most to which professional historians now aspire.

Lacking such a retrospective vantage point, prosecutors and judges who strive self-consciously for intergenerational didactics are likely to make embarrassing mistakes, as ensuing examples suggest.⁶¹⁵ Only when the defendant is apprehended many years

⁶¹⁴ Rabossi, *supra* note 407, at 7 (emphasis added) (translation by author).

⁶¹⁵ Surely the most controversial recent "revision" of judicial historiography proposed by professional historians, although not examined here, is that of Ernst Nolte, Andreas Hillgruber, and other German conservatives. These scholars contend that German military resolve against the Red Army on the Eastern Front, although condemned at Nuremberg as part of the Reich's "waging of aggressive war," must now be seen in retrospect as a crucial first step in the West's defense against

his offense, as with Eichmann or Touvier, is some such hindsight possible. But even when this passage of time has not compromised the defendant's due process right to a speedy trial, it will often have deprived prosecutors—through statutes of limitations—of the indictments that would let them tell the most accurate and compelling tale, as occurred in the Barbie trial.

In addition, leaders of new democratic regimes generally believe that they must act very quickly against the perpetrators, while the latter's powers are at low ebb, having been just recently removed from office, sometimes in ephemeral disgrace.⁶¹⁶ This need to act quickly—before adversaries can regroup and profit from waning public memory and more recent dissatisfactions with current rulers—is inconsistent with the need for hindsight, in striving for a narrative that will be persuasive in the long run.

This problem is compounded by the fact that legal judgments necessarily aspire to a degree of finality that historians' interpretations do not. A host of legal doctrines—*res judicata*, collateral estoppel, *stare decisis*, double jeopardy, mandatory joinder, statutes of limitations, and restrictive standards of appellate review—are designed to prevent courts from reevaluating, again and again, particular facts and the issues they raise. For most legal disputes, society's interests in finality are weighty.

The same is not true of historical understanding, or of the collective memory to which such understanding contributes. Whereas legal judgment is final, collective memory can be fickle.⁶¹⁷ One might say, more sympathetically, that collective memory is necessarily fluid. Prevailing understandings of a given event will inevitably change as the interpreters' standpoints move

what would prove to be a Soviet invasion of Central Europe. That invasion, the German scholars add, would almost certainly have occurred much sooner, and hence have gone much further territorially, but for the persistent valor of German soldiers in combat. For a discussion of this issue, see OMER BARTOV, *HITLER'S ARMY: SOLDIERS, NAZIS, AND WAR IN THE THIRD REICH* 8-9 (1991); MAIER, *supra* note 325, at 19-23.

⁶¹⁶ See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 231 (1991).

⁶¹⁷ This is demonstrated, for instance, in the waxing and waning of the reputations of prominent political figures over time. See GLADYS E. LANG & KURT LANG, *ETCHED IN MEMORY: THE BUILDING AND SURVIVAL OF ARTISTIC REPUTATION* 317 (1990); Barry Schwartz, *The Reconstruction of Abraham Lincoln*, in *COLLECTIVE REMEMBERING* 81 (David Middleton & Derek Edwards eds., 1990).

ever further into the hermeneutic horizon.⁶¹⁸ Subsequent events require periodic revision of how earlier ones are remembered.⁶¹⁹

Still later developments alter the concerns that future generations will bring to bear in reexamining the event in question.⁶²⁰ If historical writing does not aspire to finality, then, this is not because it lacks the law's authoritative imprimatur. It simply faces powerful obstacles, ones that the law confronts as well. It would thus be wrong to hope for very much from the law's efforts to stamp a particular reading of the recent past into collective memory, in ways likely to long endure.

Because the judgments of courts (when tackling conventional legal questions) acquire greater fixity than those of historians, it is that much more embarrassing for judges—and threatening to the law's legitimacy—when judicial decisions embodying historical interpretations fail to stand “the test of time.” Because our expectations of closure are greater, we are more disappointed when they are frustrated. Newly discovered information, increased geopolitical constraints, shifting moral sensibilities among the public: any or all of these may require “revision” of the court's allocation of responsibilities, in the form of executive grants of pardons or clemency to those convicted.

Many pardons were granted in Argentina, as well as in Japan and Germany, only a few years after the convictions themselves, in most cases.⁶²¹ Because the courts have seemed, in convicting such

⁶¹⁸ This terminology is that of Hans-Georg Gadamer. See HANS-GEORG GADAMER, *TRUTH AND METHOD* 217, 269, 356 (Garrett Barden & John Cumming eds., Sheed & Ward Ltd. trans., 2d ed. 1986). This observation does not imply that those who did not live through an event are necessarily less likely to understand it. In contemporary France, for instance, surveys suggest that young people have a more accurate understanding of the extent of French collaboration with the Nazi occupation than do their elders. See *SOFRES Survey*, *LIBÉRATION*, Jan. 9-12, 1986.

⁶¹⁹ See, e.g., ROUSSO, *supra* note 26, at 10-11 (noting how historical memory of the Vichy period in France continued to change depending on what was at stake at a particular moment).

⁶²⁰ Postmodernists have no special claim of priority to this insight. See GADAMER, *supra* note 618; LUCY M. SALMON, *WHY IS HISTORY REWRITTEN?* 99-100 (1929); Carl N. Degler, *Why Historians Change Their Minds*, 45 *PAC. HIST. REV.* 167, 174 (1976). Once condemned as a vice, the “intrusion” of the historian's own concerns is now more often seen not merely as inevitable, but even as potentially a virtue. Hence Nora contends, for instance, that today “a new type of historian emerges who, unlike his precursors, is ready to confess the intimate relation he maintains to his subject. Better still, he is ready to proclaim it, deepen it, make of it not the obstacle but the means of his understanding.” Nora, *supra* note 290, at 18.

⁶²¹ See DAWS, *supra* note 506, at 373 (noting that, due to commutations and clemency, the longest sentence actually served by any Japanese war criminal was less

defendants, to blame them for their country's recent calamities, a pardon will inevitably be interpreted (as it was in these three societies) not so much as a professional reconsideration of the legal merits of the case, but rather as a political repudiation of a judicial foray into historiography and national narrative. Yet what had made a criminal proceeding so appealing in the first place as "a genre of public discourse," as a forum for memory-practice, was "the key element of symbolic closure provided by the trial's verdict."⁶²²

In its ephemeral flux, collective memory more closely resembles historiography than legal judgment. Neither memory nor history has any strong interest in finality. Neither possesses any institutional mechanisms for attaching itself, over long periods, to any stable resting point. Recent generations of historians, including legal historians, do not presume to provide "the judgment of history." They uniformly disavow such aspirations as hubristic. To claim that one has written "the definitive account" of a period or personage would today be to invite not merely immediate revision, but outright ridicule. Like historical writing, collective memory does not preserve any single, dispositive account of what happened, still less of its meaning. What is remembered evolves with the changing interests and ideals of whoever is doing the remembering, as scholars in several fields have shown.⁶²³

In interpreting episodes of administrative massacre, judges are more like journalists in this regard than like historians. Journalists must content themselves with uncovering the basic facts and offering them a quick gloss. Historians seek, by contrast, to fit such facts into a larger interpretive framework, encompassing preceding and subsequent events. Later events inevitably alter the meaning of

than 13 years and that by the end of 1958 all war criminals were free). The emergence of the Cold War was the decisive consideration in West Germany and Japan. See FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946-1955*, at 118-19, 143, 150 (1989); IENAGA, *supra* note 514, at 255; Sakamoto Yoshikazu, *The International Context of the Occupation of Japan*, in *DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION*, *supra* note 522, at 42, 61. In Argentina, the electoral losses of Alfonsín's Radical Party largely accounted for his successor's pardons of the military juntas and other convicted officers. See *Argentina: Presidential Pardons*, in 3 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 528, 528-32 (Neil J. Kritz ed., 1995) (reprinting Argentine Presidential Decrees 1002/89 and 2741/90).

⁶²² Hariman, *supra* note 109, at 1-2.

⁶²³ See BECKER, *supra* note 388, at 242; MOSES FINLEY, *THE USE AND ABUSE OF HISTORY* 31-33 (1975).

prior ones, disclosing certain features of the historical landscape as far more significant than they appeared to participants at the time, others far less. Judges, like journalists, would have to be outstandingly prescient—in ways their jobs do not conventionally require—if their interpretations are to have an enduring effect on collective memory, in the face of the future's inevitable revision and reassessment. It would be wrong to expect courts, in the immediate aftermath of national trauma, to achieve in this regard what neither the most thoughtful journalism nor the best historical scholarship can expect to accomplish.

But where historians fear to tread, political leaders often enter—and blunder about—quite intrepidly, sometimes employing the law and courts to their ends. After all, political leaders often seek to create, as a prominent French historian notes, “nonevents that are immediately charged with heavy symbolic meaning and that, at the moment of their occurrence, seem like anticipated commemorations of themselves; contemporary history, by means of the media, has seen a proliferation of stillborn attempts to create such events.”⁶²⁴

Vernacular Memory vs. the “Official Story”

Consider several examples of such failed attempts to “lawyer” history (or, more generously, at historiographic lawyering), while the ashes of administrative massacre were still warm. Allied prosecutors at the Tokyo War Crimes trials, for instance, deliberately refrained from indicting Emperor Hirohito—who retained enormous prestige and public approval—in order to make the prosecution of lesser officials more legitimate in the eyes of the Japanese public.⁶²⁵ Despite this tactical concession to public opinion, the tactic failed, as the trials won little popular support. MacArthur was content, however, to purchase grudging acquiescence, since he feared the alternative to be mass resistance.

Elsewhere, the “vernacular memory” of major events has often proven quite different from, and largely resistant to direct influence

⁶²⁴ Nora, *supra* note 290, at 13; see also DAYAN & KATZ, *supra* note 13, at 68-73 (describing what might be called a “pathology” of media events caused by media broadcasters’ broad and subjective decision-making power over what events are selected for full broadcast coverage).

⁶²⁵ See BURUMA, *supra* note 165, at 176. Witnesses were even instructed to “include the fact that Hirohito was only a benign presence when military actions or programs were discussed at meetings that, by protocol, he had to attend.” *Id.* at 175 (quoting Aristides George Lazarus, defense counsel of one of the generals on trial).

by, the public commemorations of such events orchestrated by state elites.⁶²⁶ An ethnography of one blue-collar neighborhood in Buenos Aires, for example, finds that vernacular memory of the dirty war differs from "the official story," promulgated by Alfonsín's courts, in several ways: "[M]ost remember orderliness and lack of crime as positive characteristics of the military period, often at the same time as they disapprove of the human rights violations"⁶²⁷ Alfonsín's chief legal advisor ultimately reached an even more pessimistic conclusion: that the courts' judgments proved

irrelevant to the citizenry's view of its recent political history. This verdict shows that despite the theoretical claim that a judicial determination will establish an authoritative truth, in Argentina judicial decisions lack authoritativeness both in establishing the facts brought to trial and in evaluating these facts. Thus, controversies about what should have been done about past human rights violations continue unabated, with no hope that any arbiter will bring them to an end.⁶²⁸

Malamud-Goti's suggestion here that the courts' judgments on the dirty war had no effect on collective memory, however, proved unduly pessimistic. Even the military leadership would ultimately acknowledge the judicial narrative as authoritative. In April 1995, the head of each of the Argentine armed services finally admitted the responsibility of his respective branch for gross illegality in the

⁶²⁶ Vernacular memory is oral, while legal judgments and elite historiography are written. The dynamics of written and oral communication are so different that this alone may explain much of the distortion when a story is translated from the first medium into the second. See WALTER J. ONG, *ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD* 69, 74, 105 (1982); see also MONA OZOUF, *FESTIVALS IN THE FRENCH REVOLUTION* 102-05 (1988) (observing how officially staged festivals in France commemorating revolutionary events often escaped police control, becoming violent or carnivalesque); David Cressy, *National Memory in Early Modern England*, in *COMMEMORATIONS*, *supra* note 550, at 61, 71 (explaining how by the end of the 17th century, popular memory in England differed substantially from the national commemorations created by the political elite).

⁶²⁷ Lindsay DuBois, *Popular Memory in Practice and Theory: Reflections on a History Workshop in Argentina* 2 (Mar. 1994) (paper presented at the Latin American Studies Association Conference) (on file with author); see also Elizabeth Jelin, *The Politics of Memory: The Human Rights Movement and the Construction of Democracy in Argentina*, 21 *LATIN AM. PERSP.* 38, 39-46 (1994) (emphasizing the role of memory of political movement militants in curbing contemporary and future human rights violations).

⁶²⁸ Jaime Malamud-Goti, *Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE*, *supra* note 372, at 160, 164.

dirty war. In his public statement to that effect, Admiral Enrique Molina Pico (Navy Chief of Staff) commented:

Human justice is imperfect, because it is based on incomplete truth. Nevertheless, the firm and clear judgment of the Supreme Court has established the legal truth by which we abide. That judgment clarifies and makes an accounting of the methods employed—methods denied at the time and until the present—methods that today, in another step toward reconciliation, we admit recognizing.⁶²⁹

The Court's judgment, in short, had finally been accepted—at least for its statement of facts, as a point of departure for further discussion between soldiers and civilians over the meaning and memory of these events.⁶³⁰

Efforts to induce collective forgetting may fail in the same ways as efforts to induce collective remembering. In pardoning convicted officers and later praising their "war against subversion,"⁶³¹ for example, Alfonsín's successor, President Carlos Saúl Menem, sought self-consciously to diminish memory of the state's criminality during the 1970s. Yet, as Halperin reminds:

Today when General Videla takes a stroll in the evening, his neighbors cross the street to avoid sharing the sidewalk with him, and this is less a political statement than a reflection of the horror he inspires. It is true that this is small consolation for his victims, and that many of his neighbors' horror is strictly retrospective

. . . [E]ven so, this kind of reaction has no equivalent in Argentine history since the fall of Rosas [an early dictator] and has important political consequences, first among them, the incredible loss of political clout of the army, that allows [Finance Minister Domingo] Cavallo to be as stingy with officers' salaries as with those of the rest of government, and to privatize or close at will army factories and enterprises, and to abolish the draft

⁶²⁹ Enrique Molina Pico, CLARÍN (Buenos Aires), Int'l Ed., May 2-8, 1995, at 7, 7 (translation by author). Molina acknowledged, moreover, that social reconciliation regarding the dirty war could not be expected shortly, on the simple basis of such confessions by military leadership. See *id.*

⁶³⁰ In fact, in recent months it has become "hard to find active-duty Argentine officers who identify themselves with the repressive military of the dirty war [E]xperts say that civilian control of the military is stronger today than ever in Argentine history." *Argentina's Enlightened Chief of Staff*, N.Y. TIMES, Oct. 27, 1995, at A30.

⁶³¹ *Menem Expelled from Human Rights Group for Defending State Terrorism*, LATIN AM. NEWS UPDATE, Jan. 1995, at 28, 28.

without even consulting military opinion (and the military put up with it . . .).⁶³²

These are no small achievements in a society as thoroughly dominated by military power as was Argentina in the preceding half-century. They suggest the continuing impact of the criminal convictions on collective memory. This shared revulsion toward convicted junta members and the attendant ostracism they suffer in their daily life bespeaks a reinvigoration of the social solidarity, founded on liberal morality, that Durkheim longed for, and for which Alfonsín's legal advisors had hoped.

In modern France, persistent efforts by liberal lawyers and officials often failed to influence shared memory of the country's postrevolutionary past. In fact, right-wing nationalism has often expressly sought to distinguish the *pays réel* from the *pays légal*, the "True France" of the people from that officially controlled by republican legal authorities.⁶³³ The virtues of the former have been consistently celebrated by nationalist conservatives precisely for their immunity from the liberalizing influence of the *pays légal*, and the secular, cosmopolitan elites who staffed it.⁶³⁴ But the essential logic of the distinction is politically neutral. In fact, it closely resembles that drawn by "progressive" legal realists in the U.S. between the "law on the books" (bad) and the "law in action" (good).

Social division in modern France was thus rhetorically formulated in terms of a war between those for whom the national

⁶³² Letter from Tulio Halperin Donghi to Author (Feb. 3, 1995). (Halperin is one of Latin America's most distinguished historians.) Alfonsín also reduced the military's budget by over 50% and curtailed staffing considerably at all levels. See Andrés Fontana, *La Política Militar en un Contexto de Transición* (Mar. 1990) (paper presented at the Shell Center for Human Rights, Yale University) (on file with author). Menem was even able to privatize several public enterprises long controlled by the military, sell off large real estate holdings of the armed forces, and terminate their participation in the Condor II missile development project.

The Madres have continued their weekly marches in the *Plaza de Mayo*, maintaining the issue of the disappeared in the public spotlight. Their "occupation of the main public space of Buenos Aires acquired the force of a ritual of counter-memory." ROWE & SCHELLING, *supra* note 22, at 228.

⁶³³ This distinction, dating from the Orleanist monarchy, was resurrected in the 1930s by Charles Maurras. See HERMAN LEOVICS, *TRUE FRANCE: THE WARS OVER CULTURAL IDENTITY, 1900-1945*, at 136-38 (1992). Ernst Nolte's invocation of the German *pays réel* in the "Historians' Debate" is thus particularly ominous, given the term's prior, consistently anti-Dreyfusard (hence anti-Semitic) usage. See Nolte, *supra* note 369, at 19.

⁶³⁴ See LEOVICS, *supra* note 633, at 137.

identity of France was defined by its law and those for whom it was defined by enduring predispositions and prejudices particularly insusceptible to legal "tampering." Conservative historians were therefore drawn to *early* (that is, prerevolutionary) French law because they viewed it, unlike its degenerate modern variant, as growing naturally and spontaneously from the customs of the French people, reflecting their inalterable essence.⁶³⁵ These conflicting views of the relation of law to national identity in France took conspicuous expression in its painting, sculpture, and architecture.⁶³⁶

The postwar German experience is pertinent as well. Until the late 1940s, American occupation authorities engaged in considerable publicity efforts, including frequent radio broadcasts of the Nuremberg proceedings, to induce the German people to accept responsibility for the wrongs of the Nazi state. That initial effort, admittedly reliant on some rather heavy-handed methods, clearly failed.⁶³⁷ To establish new models of heroic virtue, many speeches were given commemorating the resistance movement and the personal sacrifices made by its leaders.⁶³⁸ Yet much German opinion continued to view the wartime resistance negatively, even as treasonous.⁶³⁹ The Nuremberg trials greatly influenced non-German memory of German crimes, to be sure. This influence was carefully and self-consciously cultivated by the U.S. government, for

⁶³⁵ See Keith M. Baker, *Memory and Practice: Politics and the Representation of the Past in Eighteenth-Century France*, REPRESENTATIONS, Summer 1985, at 134, 134. See generally DONALD R. KELLEY, HISTORIANS AND THE LAW IN POSTREVOLUTIONARY FRANCE (1984) (arguing that French societal struggles over the "proper" way of viewing French history are encapsulated in the disputes over legal philosophy in postrevolutionary France). On similar currents in British legal and political thought, see J.G.A. Pocock, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW 275-80 (2d ed. 1987).

⁶³⁶ See generally JONATHAN P. RIBNER, BROKEN TABLETS: THE CULT OF THE LAW IN FRENCH ART FROM DAVID TO DELACROIX (1993) (tracing the evolution of legal imagery in French art from the late 18th century to the middle of the 19th century).

⁶³⁷ Koonz provides several examples. See Koonz, *supra* note 550, at 261-62; RON ROBIN, THE BARBED-WIRE COLLEGE: REEDUCATING GERMAN POWS IN THE UNITED STATES DURING WORLD WAR II (1995); JAMES F. TENT, MISSION ON THE RHINE: REEDUCATION AND DENAZIFICATION IN AMERICAN-OCCUPIED GERMANY 117, 275, 287 (1982).

⁶³⁸ See David C. Large, *Uses of the Past: The Anti-Nazi Resistance Legacy in the Federal Republic of Germany*, in CONTENDING WITH HITLER, *supra* note 425, at 163, 164. Theodor Adorno described this attitude as "the rancor against re-education." Theodor W. Adorno, *What Does Coming to Terms with the Past Mean?*, in BITBURG IN MORAL AND POLITICAL PERSPECTIVE, *supra* note 157, at 114, 116.

⁶³⁹ See Large, *supra* note 638, at 166.

public and elite opinion regarding the desirability of such trials was at first highly equivocal. This effort was quite successful.⁶⁴⁰

Even here, however, the ultimate effect on collective memory in the U.S. (and elsewhere) was distinct from that desired. Allied prosecutors, like the Tribunal itself, heavily concentrated on establishing the criminality of German acts involved in "waging aggressive war." Prosecutors and judges clearly expected that international punishment of such acts to be the central legacy of the trials, and of their professional labors. Today, after hundreds more aggressive wars, we understand the legacy of Nuremberg quite differently. It is almost universally remembered, both among the literate public and international lawyers, for its contribution to the criminalization of "crimes against humanity."⁶⁴¹ Hence, even when law succeeds in intentionally influencing collective memory of administrative massacre, it often does so in unintended ways.

The Andean highlands offer a second example of the law's unintended effects on the collective memory: here, on the memory of an indigenous people, the Cumbal Indians of Colombia and Ecuador.⁶⁴² In conquering the region, Spanish explorers were responsible for many massacres of these Indians. But indigenous memory now focuses instead on Spain's more positive, legal legacy: its legislation endowing indigenous communities with rights over designated lands.⁶⁴³ The Spanish intended this legislation primarily to reduce the territory controlled by Cumbales, that is, to legalize the Spanish conquest and the seizure of native lands.⁶⁴⁴ The legislation achieved this imperial objective, of course.

But in the process, it also entitled the Indians to far more territory than subsequent generations of Spanish and *mestizo* inhabitants would wish to acknowledge. This colonial legislation, later adopted as binding by the independent state of Colombia, became the basis for several decades of litigation by Indians against

⁶⁴⁰ As Bosch suggests, "the State Department conducted an active program of informing and molding public opinion to favor legal procedures . . . [T]he people who were not in favor of or were not interested in the trial method . . . changed their positions completely." BOSCH, *supra* note 164, at 116; *see also id.* at 21-39 (illustrating various methods by which this alteration of public opinion came about).

⁶⁴¹ I am indebted to Jeffrey Herf for this observation.

⁶⁴² This analysis is drawn from JOANNE RAPPAPORT, *THE POLITICS OF MEMORY: NATIVE HISTORICAL INTERPRETATION IN THE COLOMBIAN ANDES* (1990) [hereinafter RAPPAPORT, *POLITICS*] and JOANNE RAPPAPORT, *CUMBE REBORN: AN ANDEAN ETHNOGRAPHY OF HISTORY* (1994) [hereinafter RAPPAPORT, *CUMBE*].

⁶⁴³ *See* RAPPAPORT, *CUMBE*, *supra* note 642, at 5.

⁶⁴⁴ *See id.* at 2-4.

territorial encroachment by more powerful, non-Indian farmers.⁶⁴⁵ The tangled history of this litigation has become the centerpiece of native storytelling in the region.⁶⁴⁶

In fact, it has become the focal point of group identity, according to ethnographies of the area.⁶⁴⁷ This is because the Cumbales, who no longer speak their ancestral Pasto language and who have assimilated other Western ways, must reassert Indian identity—through continuity of lineage with those whose lands were wrongly seized—in order to establish a right to reclaim them.⁶⁴⁸ Recounted in ritual gatherings, the legal history of this struggle, by individual family claimants and local Indian leadership, has even become the narrative support for renewed political militancy by the Cumbales against the Colombian state and its majority *mestizo* population.⁶⁴⁹ In taking up colonial law to help their people, the Cumbales had first sought only the economic and “material” goal of regaining their lands.

After many decades of such efforts, however, this litigation had significantly strengthened the authority of local governing councils, responsible for allocating regained (and collectively owned) lands, thereby also strengthening the identification of individual members with the governing institutions of the group, through which such new resources are distributed.⁶⁵⁰ Such are the puzzling twists and perplexing turns of the law’s impact on collective memory.

But it may be that the Spanish conquistadors, like the Nuremberg prosecutors—in venturing onto uncharted legal territory—were merely shortsighted, that they could in principle have better anticipated the long-term legacy of their efforts. It may not therefore be a *necessary* truth that all such efforts must fail, as

⁶⁴⁵ See *id.*; see also RAPPAPORT, *POLITICS*, *supra* note 642, at 198-202 (citing pertinent cases).

⁶⁴⁶ See RAPPAPORT, *CUMBE*, *supra* note 642, at 7 (reporting that “many of the stories I heard . . . are couched in the language of jurisprudence or are organized as though they constituted evidence for legal briefs”).

⁶⁴⁷ See *id.* at 26 (“In effect, the European construction of the other, as it is interpreted in law, is basic to an indigenous definition of self.”).

⁶⁴⁸ See RAPPAPORT, *POLITICS*, *supra* note 642, at 185 (noting that “oral tradition is restricted by Indian legislation, which defines the means by which native communities can legitimize their identity”). For a similar story of how long-ignored legal rights, and the lands to which they may offer title, prompted a reconstruction of collective memory and identity among Native Americans in the U.S., see JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 277 (1988).

⁶⁴⁹ See RAPPAPORT, *CUMBE*, *supra* note 642, at 7.

⁶⁵⁰ See *id.* at 10-11.

Elster's thesis implies.⁶⁵¹ As legal experience (and scholarly reflection upon it) gather over time, it may become possible at some point to say which legal maneuvers work in influencing collective memory and which do not. After all, courts have only recently learned the extent to which *individual* memory can be influenced (and distorted) by therapeutic suggestion,⁶⁵² in ways posing enormous problems for legal fact-finding.⁶⁵³ Memory, we have learned, can present itself as having been innocently "repressed" from within, when in fact it has been insinuated (sometimes insidiously) from without.

Successful Legal Stagecraft

There is reason to believe that similar fabrication at the *societal* level is equally possible. Here, of course, the law is more likely to be the perpetrator of distortion than its victim. Nonetheless, recent studies of collective memory have discovered many instances of successful efforts by officers of the law to influence collective memory in precisely the manner intended.⁶⁵⁴ Within Western Europe, for instance, collective memory of the Holocaust is weakest and least accurate, to judge from opinion surveys and textbook treatments, in precisely those societies that did *not* conduct any (or any numerically significant) postwar trials of collaborators, that is, in Austria, Poland, Italy, and the Netherlands.⁶⁵⁵

⁶⁵¹ See *supra* note 605.

⁶⁵² See generally RICHARD OFSHE & ETHAN WATTERS, MAKING MONSTERS: FALSE MEMORIES, PSYCHOTHERAPY, AND SEXUAL HYSTERIA (1994) (arguing that psychotherapists can unintentionally implant false memories into their patients' minds). An influential early study is found in Ernest G. Schachtel, *On Memory and Childhood Amnesia*, PSYCHIATRY, Feb. 1947, at 1.

⁶⁵³ See Cynthia Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. (forthcoming Jan. 1996).

⁶⁵⁴ On the enduring impact of prosecution upon collective memory in Greece, for instance, see Neil J. Kritz, *The Dilemmas of Transitional Justice*, in 1 TRANSITIONAL JUSTICE, *supra* note 621, at xix, xxii (observing that "nearly twenty years after the conviction of junta leaders who had overseen the torture of hundreds, plans to release them from prison still prompted huge protests").

⁶⁵⁵ See MILLER, *supra* note 64, at 72-73, 111, 153, 210, 285-86 (suggesting that the trials of quislings elsewhere in Europe, however divisive they may have been, at least clearly revealed, and inscribed in memory, the extent of collaboration to a greater degree than in these four countries). Such legal revelations had considerable influence on the memory of younger generations, especially in West Germany, according to many accounts. See, e.g., Judt, *supra* note 294, at 96 (observing a relationship between how certain European societies portrayed themselves in the postwar period entirely as victims of German wrongdoing and the fact that their

Traditions, we learn, have often been "invented," including legal traditions.⁶⁵⁶ Innovations, in other words, have regularly been presented—surreptitiously but successfully—as a legacy of time immemorial. Common law is especially receptive to this practice; even the most radical innovations, after all, have often been couched as part of a seamless web of evolving doctrine.⁶⁵⁷ Legal

actual "experience with Fascism was left largely unrecorded in public discussion"). On Dutch exaggeration of their wartime resistance to Nazi occupation, see GERHARD HIRSCHFELD, *NAZI RULE AND DUTCH COLLABORATION: THE NETHERLANDS UNDER GERMAN OCCUPATION, 1940-1945* (1988); MILLER, *supra* note 64, at 111; Peter Hayes, *A Historian Confronts Denial*, in *THE NETHERLANDS AND NAZI GENOCIDE* 521, 522 (G. Jan Colijn & Marcia Littell eds., 1992); Leydesdorff, *supra* note 296, at 161-62. Austria offers the extreme, limiting case in this regard. See RICHARD BASSETT, *WALDHEIM AND AUSTRIA* 79-80, 137-38, 158 (1988). Although there were massive purges of public employees and Nazi sympathizers (nearly 500,000 people) in Austria, there were no public proceedings and hence no deliberative airing of issues. Those who were purged were never ostracized. In fact, they were soon pardoned and fully rehabilitated. See Frederick C. Engelmann, *How Austria Has Coped with Two Dictatorial Legacies*, in *FROM DICTATORSHIP TO DEMOCRACY*, *supra* note 242, at 135, 143-47. On the paucity and political insignificance of postwar trials in Italy, see ROY P. DOMENICO, *ITALIAN FASCISTS ON TRIAL, 1943-1948*, at 90-91 (1991); Giuseppe Di Palma, *Italy: Is There a Legacy and Is It Fascist?*, in *FROM DICTATORSHIP TO DEMOCRACY*, *supra* note 242, at 107, 116-22. On the limitations of Polish memory regarding national complicity in the Holocaust, see IRWIN-ZARECKA, *supra* note 122, at 77-78, 92-93; SHOAH (Les Films Aleph & Historia Films 1985). On the greater accuracy of school textbooks in countries where trials were held, etching the proceedings into collective memory, see HIRSCH, *supra* note 480, at 28.

⁶⁵⁶ See Eric Hobsbawm, *Mass-Producing Traditions: Europe, 1870-1914*, in *THE INVENTION OF TRADITION* 263, 263-65 (Eric Hobsbawm & Terence Ranger eds., 1983) (characterizing late-19th-century Europe as a period of particularly fervent efforts to construct national monuments, rituals, and traditions in hopes of overcoming the profound social conflict generated by industrialization). To be sure, elite efforts to invent traditions and impose them upon populations often fail, and Hobsbawm's influential analysis tells us virtually nothing about when or why such efforts only intermittently succeed. On such recurrent failures, and the resilience of vernacular memory that they entail, see SAMUEL, *supra* note 488, at 17 (1994). Durkheim's preoccupation with solidarity and how it might be reconstructed in modern society was itself an expression of this prevalent concern among 19th-century cultural elites. See Burke, *supra* note 54, at 6.

⁶⁵⁷ See REINHARD BENDIX, *MAX WEBER: AN INTELLECTUAL PORTRAIT* 331 (1960) ("As a matter of principle it is out of the question to create new laws which deviate from historical norms. However, new rights are created in fact, but only by way of "recognizing" them as having been valid "from time immemorial."") (quoting MAX WEBER, *STAATSSOZIOLOGIE* 101 (1956))). The legal history of product liability provides a well-known modern illustration of how such unacknowledged, incremental evolution can add up to a veritable revolution. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055 (1916); see also MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 58-61, 132-33 (1988) (explaining how Cardozo, in *MacPherson*, changed product liability law by altering the substance but not the form of existing law). On the place of surreptitious invention within legal tradition, see Clanchy, *supra* note 167,

change can often be disguised as continuity, as the preservation or elaboration of practices existing since time immemorial.

In Tudor-Stuart England, collective memory was willfully "shaped by those leaders and preachers who invested particular parts of their history with special meaning," writes an historian of the period.⁶⁵⁸ Even in predominantly peasant societies, the historical beliefs of the general public, although not always highly responsive to legal suasion, "are not the pure water of oral tradition, springing unpolluted from the font of popular memory," and have even been shown to originate in "high" or learned literature.⁶⁵⁹ The much-vaunted immunity of popular memory from elite manipulation has been shown to be largely a populist shibboleth.⁶⁶⁰

Although political elites, in particular, often invoke legal history to legitimate their social position and political claims,⁶⁶¹ elites have not monopolized this practice. In the seventeenth and eighteenth centuries, for instance, British yeomen couched their opposition to private enclosure of common pasture in terms of the eternal birthrights of freeborn Englishmen at common law.⁶⁶² Legal doctrines of usufruct proved potent weapons for the poor, since they grounded claims of enforceable right on longstanding memory of social practice, memory as ancient as the commonalty itself. In legal systems heavily reliant on customary law (generally

at 172 (observing how French, German, and British legal historians have "all emphasized the flexibility and relative newness of customary law," particularly its ability to conceal innovation).

⁶⁵⁸ Cressy, *supra* note 626, at 71.

⁶⁵⁹ THOMAS, *supra* note 378, at 7; *see also* FENTRESS & WICKHAM, *supra* note 49, at 103-07 (tracing local Brazilian folklore to European epics); GEARY, *supra* note 22, at 12 (noting the role of politics and historians in shaping both collective memory and historical beliefs).

⁶⁶⁰ The most persuasive evidence of resourceful resistance to official efforts at memory construction are to be found in totalitarian regimes, where the costs of harboring "counter-memory" are greatest. *See* Geoffrey A. Hosking, *Memory in a Totalitarian Society: The Case of the Soviet Union*, in *MEMORY: HISTORY, CULTURE AND THE MIND*, *supra* note 54, at 115, 121-22; Watson, *supra* note 191, at 13.

⁶⁶¹ On the framers' deliberate effort to encourage public reverence for the U.S. Constitution, *see* MICHAEL LIENESCH, *NEW ORDER OF THE AGES: TIME, THE CONSTITUTION, AND THE MAKING OF MODERN AMERICAN POLITICAL THOUGHT* 164-83 (1988).

⁶⁶² *See* E.P. THOMPSON, *CUSTOMS IN COMMON* 97-184 (1991); *see also* WILLIAM SEWELL, *WORK AND REVOLUTION IN FRANCE: THE LANGUAGE OF LABOR FROM THE OLD REGIME TO 1848*, at 38-39, 194-95 (1978) (discussing the popular use of medieval corporate legal idiom for formulating political demands in early modern and 19th-century Europe).

unwritten), collective memory of customary practices becomes particularly central to legal argument.⁶⁶³

This invocation of collective memory to interpret and defend current claims often leads to considerable historical distortion. As one sympathetic scholar concedes, villagers "collectively created a *remembered village* and a *remembered economy* that serve as an effective ideological backdrop against which to deplore the present. . . . That they do not dwell upon other, less favorable, features of the old order is hardly surprising, for those features do not contribute to the argument they wish to make today."⁶⁶⁴

If "the people" themselves sometimes drop the ball, sympathetic scholars often seek to pick it up and run with it themselves. Hence some self-declared "radical historians" have come to view their vocation as preserving the memory of labor's struggle to organize and legalize union activity, in hopes that the "lessons of the good fight" will not die with those who fought it.⁶⁶⁵ Such historians aspire to revive a collective memory of working class struggle that the working class itself has largely forgotten. Their avowed aim is, in part, to enable future workers to recognize their "own" past in that of the socioeconomic group or category to which the radical historian seeks to ascribe them. The nonnarrative character of such historiography, however, makes it singularly inapt for political mythmaking and collective memory, since the "stories" it tells are generally statistical.

Deliberate efforts to cultivate memory date from the Greeks, who devised the art of "mnemotechnics" for impressing places and images on memory.⁶⁶⁶ These techniques, passed on to the

⁶⁶³ See BERNARD LEWIS, *HISTORY: REMEMBERED, RECOVERED, INVENTED* 66 (1975) (noting that in some preliterate societies mental recollection was vital in determining "immemorial rights and privileges").

⁶⁶⁴ JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* 178-79 (1985). Scott refers here specifically to the legal claims of Malaysian peasants, but his point is of more general relevance. See *id.* at 180.

⁶⁶⁵ See PORTELLI, *supra* note 380, at 1-27; Marianne Debouzy, *In Search of Working-Class Memory*, in *BETWEEN MEMORY AND HISTORY*, *supra* note 235, at 261, 264-74; Michael H. Frisch, *Towards a People's History: The Memory of History*, *RADICAL HIST. REV.*, Fall 1981, at 9, 10. For criticism, see FRANÇOIS FURET, *INTERPRETING THE FRENCH REVOLUTION* 4-10 (Elborg Forster trans., 1981) (accusing radical historians of endowing obscure, short-lived sects with excessive historical importance in order to establish links between the French revolution, conceived as a myth of national origin, and the partisan preoccupations of such historians).

⁶⁶⁶ See FRANCES A. YATES, *THE ART OF MEMORY* 1-4 (1966). On medieval preservation of these methods, see generally MARY CARRUTHERS, *THE BOOK OF MEMORY: A STUDY OF MEMORY IN MEDIEVAL CULTURE* (1990) (discussing medieval

Romans and in common use among Roman lawyers,⁶⁶⁷ were crucial for cultural transmission before the advent of the printing press and the growth of mass literacy.⁶⁶⁸ Although today these methods strike us as terribly artificial, they were understood as essential in preserving cultural inheritances across generations in preliterate societies.⁶⁶⁹ Their widespread use was predicated on the idea that the content of our memories—individual and shared—need not be left to chance, and that a society's survival could be furthered by its official adoption of practices by which members periodically remind one another of its greatest achievements and the moral principles they embody. In traditional societies, after all, members feel a powerful *moral* duty to remember their shared past. In ancient Greece, memory was literally a god (Mnemosyne), the mother of the Muses, hence the source of imagination.⁶⁷⁰

These facts suggest that to contemplate the "intelligent and intentional" creation of collective memory is not oxymoronic. The memory of sentiment, no less of places and images, can be willfully induced by an *aide-mémoire*, as Proust famously suggested.⁶⁷¹ The law might serve, perhaps through annual commemoration of its conviction of official mass murderers, much like Proust's *petit madeleine*.

preservation of memory); GEARY, *supra* note 22, at 20-21 (describing some tools used in the preservation of medieval memory). On the transmission of these methods to the non-Western world, see JONATHAN D. SPENCE, *THE MEMORY PALACE OF MATTEO RICCI* 4 (1984).

⁶⁶⁷ See FENTRESS & WICKHAM, *supra* note 49, at 11; see also 1 *LAWS OF EARLY ICELAND* 187-88 (Andrew Dennis et al. trans., 1980) (noting how medieval Icelandic lawspeakers were to commit their entire law code to memory).

⁶⁶⁸ For a fictional examination of mnemotechnic transmission of subversive knowledge—Western literary classics—in a postliterate dystopia, prohibiting their publication, see RAY BRADBURY, *FAHRENHEIT* 451 (1953).

⁶⁶⁹ See CLANCHY, *supra* note 54, at 172-77, 297 (observing of illuminated manuscripts painted by medieval monks, that "the schoolmen were trained to make physical objects create graphic images in the memory to which they attached their abstract ideas").

⁶⁷⁰ See ROBERT E. BELL, *WOMEN OF CLASSICAL MYTHOLOGY: A BIOGRAPHICAL DICTIONARY* 310 (1991).

⁶⁷¹ See generally MARCEL PROUST, *SWANN'S WAY* (1928) (describing a method of inducing sentimental memory). For Proust, an initially *involuntary* memory, followed by intense *voluntary* mental effort, could induce the recollection of the individual's prior emotional experience. For the law, an initially voluntary effort (criminal prosecution, periodically commemorated thereafter) would be necessary to induce, in time, the involuntary and spontaneous recollection by a society's members of their—or their ancestors'—prior emotional experience (of shock at the discovery of administrative massacre and of the indignation first felt, individually and collectively toward responsible parties).

Some success stories: Israel's secular, socialist founders, in search of a unifying narrative for the new nation, self-consciously sought to make the ancient Masada defenders (who killed themselves as the Roman army lay siege to the beleaguered city) into central figures of national mythology for the modern state. To attain this pivotal place in collective memory, however, the story had to be recharacterized in terms of political martyrdom, for suicide remains contrary to Jewish law. Religious law carried great weight with the substantial population of Orthodox and ultra-Orthodox Jews, whose numbers in Israel have increased significantly in recent years. Only an authoritative legal judgment on the matter enabled the Masada story to become universally accepted as part of the national narrative, as a story whose meaning could be shared.⁶⁷²

In the Eichmann trial, Hausner's and Ben-Gurion's dramaturgical decisions were highly effective in enhancing *sabra* sympathy for Holocaust victims, a matter on which prevailing sentiment had hitherto been quite ambivalent.⁶⁷³ Reshaping the young nation's identity was a conscious goal, and the trial was staged with that goal directly in mind. Perhaps judges within a new democracy, in Latin America or Eastern Europe, could help enhance respect for the rule of law by means more expeditious than simply conducting themselves judiciously. If so, it was entirely reasonable for Argentine legal officials to infer that, during a transition from authoritarianism to democracy, renewed appreciation of the "rule of law" might be deliberately cultivated among the public. This would not merely be done indirectly, by ensuring that judicial officials soberly displayed its perennial virtues, but more directly, by dramatically affirming the law's principles through the theatrical spectacle of a trial, shrewdly staged to maximal effect.

The Rise of International Memory

Between the Nuremberg trials and those in Buenos Aires, experience and observations had accumulated concerning the impact of criminal prosecution on collective memory of administrative massacre in various places, from Athens to Jerusalem.⁶⁷⁴ A

⁶⁷² See ZERUBAVEL, *supra* note 69, at 203-07.

⁶⁷³ See SEGEV, *supra* note 34, at 327-30, 338-39, 342; Sidra D. Ezrahi, *Revisioning the Past: The Changing Legacy of the Holocaust in Hebrew Literature*, SALMAGUNDI, Fall 1985-Winter 1986, at 245, 260-61.

⁶⁷⁴ On the prosecution and conviction of Greek colonels for seizure of power, see generally AMNESTY INTERNATIONAL, *TORTURE IN GREECE: THE FIRST TORTURERS*

process of political learning had occurred; most efforts at prosecution were now preceded by intensive study of preceding ones. In fact, national memory of prior efforts had become international memory, through networks of informal assistance from lawyer-activists, legal scholars, and nongovernmental human rights organizations throughout the world.⁶⁷⁵

Alfonsín's advisors were easily able to consult a considerable literature on the Eichmann trial, for instance, and even borrowed (from one analysis of the Israeli judgment) the legal theory of "indirect authorship" used to convict the juntas.⁶⁷⁶ In short, as international experience began to accumulate from prior prosecutions of administrative massacre, it became possible to begin discerning "what had worked" in influencing collective memory, and why.

President Alfonsín and his advisors could thus imagine accomplishing, with the junta prosecution, something akin to what Ben-Gurion had achieved—in impact on national self-understanding—with the conviction of Adolf Eichmann, or that accomplished by Chancellors Adenauer, Brandt, and Schmidt through conviction of the Auschwitz guards and Majdanek officials. In all these cases, government prosecutors—with executive prompting and tutelage—were highly self-aware about crafting the proceedings in a fashion calculated to produce maximum impact on collective memory. To this end, they accentuated certain facts and issues while deemphasizing others—entirely apart from their strictly jurisprudential significance. The resulting decisions have rightly been described as no less "dramaturgical" than doctrinal.⁶⁷⁷ More precisely, legal doctrine established only the broadest boundaries within which

TRIAL 1975 (1977). On the assimilation of that story into the institutional memory of the human rights community, see Margaret Popkin & Naomi Roht-Arriaza, *Truth As Justice: Investigatory Commissions in Latin America*, LAW & SOC. INQUIRY, Winter 1995, at 79, 79-116 (employing experience gained through other investigations to the truth commissions employed in Chile, Honduras, El Salvador, and Guatemala).

⁶⁷⁵ On the advent and expansion of these international networks, see Kathryn Sikkink, *The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 139, 153-54 (Judith Goldstein & Robert O. Keohane eds., 1993).

⁶⁷⁶ The borrowed analysis was that of German legal theorist Klaus Roxin. See Claus Roxin, *Sobre la Autoría y Participación en el Derecho Penal*, in PROBLEMAS ACTUALES DE LAS CIENCIAS PENALES Y LA FILOSOFÍA DEL DERECHO 55 (1970).

⁶⁷⁷ See SEGEV, *supra* note 34, at 336 (describing Hausner's preparations for trial as "a production far more elaborate than what was necessary to convict Adolf Eichmann in court").

prosecutors were relatively free to choose their narrative focus in light of dramaturgical criteria.

Alfonsín and his legal advisors, for instance, privately participated in drafting charges against military officers.⁶⁷⁸ They also engaged in *ex parte* discussions with members of the court engaged in trying the juntas, discussions that included the political implications of alternative doctrinal options.⁶⁷⁹ Ben-Gurion similarly interceded, with equal secretiveness, in the prosecutorial decisions concerning the Eichmann trial.⁶⁸⁰

Witnesses in the Argentine junta trial, moreover, were selected not for their eloquence or the severity of their suffering (as Hausner did in the Eichmann trial),⁶⁸¹ but for their regional and social diversity.⁶⁸² The goal was to emphasize the breadth of victim class, the fact that repression extended to all provinces and socioeconomic groups. The intended message in this regard, never publicly articulated, was that the dirty war had not been directed primarily at the upper-middle-class university students who chiefly populated the leftist guerrilla movements and fellow-traveling circles of the period.

Rather, the target had been Argentina itself, in all its breadth and diversity. Irrespective of its accuracy (which I do not wish to question), the latter version undoubtedly made for a more receptive audience, especially in the hinterlands, and hence a more felicitous form of collective memory. In a word, it made a better story. In sum, while the law and its spokesmen cannot simply declare what collective memory of administrative massacre shall be, they can significantly influence such memory in subtle and decisive ways.⁶⁸³

The real question at present is not whether collective memory of national history *can* be constructed, but whether it ever *cannot*. Ever since the early 1930s, social psychologists have shown that "remembering appears to be far more decisively an affair of

⁶⁷⁸ See Interviews with Confidential Sources, in Buenos Aires, Argentina (Summers 1985 and 1987).

⁶⁷⁹ *Id.*

⁶⁸⁰ See SEGEV, *supra* note 34, at 336, 338, 346.

⁶⁸¹ See *id.* at 339.

⁶⁸² See Interview with Luis Moreno Ocampo, Argentine Assistant Prosecutor, in Buenos Aires, Argentina (Aug. 1987).

⁶⁸³ Michael Kammen reaches a similar conclusion, regarding the Declaration of Independence and the American Revolution. Kammen asserts that the development of "collective memory and myth-making . . . is partially inadvertent and partially intentional, societal as well as individual in its application, often implicit rather than explicit in its articulation." KAMMEN, *supra* note 7, at 211.

construction rather than one of mere reproduction."⁶⁸⁴ We have become conscious, in short, that someone must choose—omitting, combining, rearranging the details of the past in an active way—the stories by which we develop our collective memory and define our national identity. We suspect that shared stories about “our common past” have been influenced by the self-interest of the tellers. And we have learned, with Hayden White, that:

the historian arranges . . . events in the chronicle into a hierarchy of significance by assigning events different functions as story elements in such a way as to disclose the formal coherence of a whole set of events considered as a comprehensible process [T]he very claim to have discerned some kind of formal coherence in the historical record brings with it theories of the nature of the historical world . . . which have ideological implications⁶⁸⁵

Despite White's insinuations here, this process of ideological construction need not be illegitimate, nor necessarily accomplished by sleight of hand. In aspiring to infuse liberal memory, judges may justifiably construe the record of administrative massacre to tell a compelling story vindicating the preeminent liberal virtue: respect for the moral rights of individuals.

The fact that collective memory can be methodically manufactured stands at odds with the orthodox Durkheimian view of law's service to social solidarity,⁶⁸⁶ in a way that is not the case with the discursive account. To be sure, Durkheim saw the primary purpose of sociology itself as self-consciously establishing a sort of civic religion, thereby providing the solidarity once created by shared religious commitments. But he viewed the criminal law as already embodying a common morality that was spontaneously summoned up, willy-nilly and unwittingly, by any effort of prosecutors to enforce it—without a thought to self-conscious theatrical strategy.

⁶⁸⁴ BARTLETT, *supra* note 50, at 205.

⁶⁸⁵ HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 7, 21 (1973); *see also* LOUIS O. MINK, *HISTORICAL UNDERSTANDING* 22-23 (Brian Fay et al. eds., 1987) (noting that there are infinitely many ordering relations among true statements); Roland Barthes, *The Discourse of History*, in 3 *COMPARATIVE CRITICISM: A YEARBOOK* 3, 15-16 (1981) (noting that the structure in Herodotus, by itself, refers to a “certain philosophy of history”).

⁶⁸⁶ *See* DURKHEIM, *supra* note 55, at 128, 80 (contending that “states of [collective] conscience are strong only in so far as they are permanent” and that the collective conscience “does not change with each generation, but, on the contrary, it connects successive generations with one another”).

In contrast, the discursive view admits the limited scope of any such shared morality and the need for prosecutors to be attentive to these limits when seeking to foster collective memory of such divisive events as administrative massacre. The discursive account, in other words, acknowledges that shared moral sentiments in such circumstances cannot be presumed to arise spontaneously, that they must be consciously cultivated through strategic decisions about how the public spectacle might be most compellingly staged.

Many sociologists (of more scientific disposition than the author) would insist, at this point, on going beyond the anecdotes of success and failure to ask a more systematic question: Under what conditions do deliberate legal efforts at memory cultivation work, and under what conditions do they collapse? In a more lawyerly idiom, one would ask: What *distinguishes* the Eichmann and Auschwitz trials from the Tokyo trials—either in prosecutorial strategy or in environing circumstances—that explains their highly differential impact on collective memory and national identity in Israel, Germany, and Japan?

In my view, the vicissitudes of memory formation simply have not yet been studied sufficiently in particular cases to permit persuasive generalization here. It is possible, nevertheless, to identify at least one key factor impeding the success of any such effort: the fact that the public spotlight is trained so brightly upon participants in such proceedings makes it very difficult for prosecutors and judges to conceal—and to insulate from incisive criticism by defense counsel—their effort to frame the legal narrative in light of the public's anticipated response to alternative tropes and story lines.

F. *Making Public Memory, Publicly*

What remains uncertain is whether public memory can be fashioned *publicly*, by criminal trial or other means. Even if memory can (to considerable degree) be willfully created, must the fact of its fabrication be obscured from public view in order for such fashioning to be effective? Must prosecutorial decisions about the dramatic staging of a trial for administrative massacre be kept "backstage," in Goffman's terms,⁶⁸⁷ never acknowledged in public,

⁶⁸⁷ See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 111-15 (1973).

for fear of being charged with partisan "manipulation" or with breaching the judicial ethic of impartiality?

In constructing collective memory, can legal officials *explain* what they are trying to do while *doing* it? In such an enterprise, may they lay their cards on the table, or must they necessarily play the game with mirrors? There is reason to fear that any effort to push "on-stage" certain strategic and dramaturgical decisions by courts or prosecutors would only set in motion a self-defeating process: further decisions would still need to be made—inevitably, backstage—about how to produce those parts of the proceeding now being added to the on-stage production, that is, about how to make them seem as if they were really "behind the scenes." Such a process could lead to an infinite regress, ensuring that the most important decisions about how the tale will be told always remain under firm control and shrouded in secrecy.⁶⁸⁸

After all, no one is ultimately deceived by directorial efforts to create the appearance of total spontaneity and improvisation through such devices as a "play within a play," a "play within a film,"⁶⁸⁹ or a "film within a film"⁶⁹⁰ any more than by a "painting within a painting."⁶⁹¹ Although audiences were first shocked and disarmed by such devices, viewers now quickly recognize them as artifices, as involving only the simulation of spontaneity.⁶⁹² In fact, we now know that the successful use of such devices always results from meticulous stagecraft and dramatic calculation. So too, with scripted colloquy, disguised as genuine legislative debate. The same proves true of strategic courtroom displays of "refreshing candor."

The problem can be succinctly stated in syllogistic form:

1. In cases of administrative massacre, with the world's eyes trained upon them, prosecutors and judges are inevitably under-

⁶⁸⁸ For one examination of this general problem, see DEAN MACCANNELL, *THE TOURIST: A NEW THEORY OF THE LEISURE CLASS* 91-107 (1976) (observing that as more of native culture is put on display for tourists, the more important to natives become those practices and beliefs to which tourists are denied access). Theorists of *cinéma vérité* similarly observe that the most important truths often recede from cinematic view the closer one seems to come to capturing them.

⁶⁸⁹ For a recent example, see *VANYA ON 42ND STREET* (Sony Pictures Classics 1994) (directed by Louis Malle, from a David Mamet play and Anton Chekhov's *Uncle Vanya*).

⁶⁹⁰ For a recent illustration, see, for example, *INTERVISTA* (Castle Hill Productions 1987) (directed by Federico Fellini).

⁶⁹¹ An example is Diego Velazquez's *Las Meninas*, painted in 1656.

⁶⁹² See Eco, *supra* note 159, at 110-11.

stood to be engaged in "writing history" and influencing collective memory, whether or not they so intend.

2. Writing history is now understood as necessarily involving a choice between alternative interpretive framings, a fact that endows historiography with a similarity to fiction and mythmaking.

3. Thus courts, when engaged in writing the history of administrative massacre, must be understood as involved in mythmaking and partially fictive storytelling. To this end, their narratives—like those of the best contemporary historians—ought to be self-disruptive, periodically reminding readers that the persuasive coherence they seamlessly present is an illusion, secured only by compliance with disciplinary conventions that must themselves be made transparent and subject to critical scrutiny.⁶⁹³

After all, judges are not the *only* people engaged in mythmaking and storytelling about these events, the events they presume authoritatively to judge. We are therefore inexorably led to ask: on what basis might *their* favored narratives legitimately acquire the authoritative status of collective memory, a status to which—in proclaiming a trial's "educational value," for example—they clearly aspire and sometimes successfully enjoy for long periods? To disclose the fictive or mythical element of adjudication in such cases—that is, to disclose them publicly and directly—would risk stripping courts of their traditional and generally accepted claim to be authoritative finders of fact and appliers of society's central norms. The present section of this Article examines that perilous possibility.

Recognizing the social construction of collective memory does not threaten judicial legitimacy to the extent that might first appear, given a proper understanding of the traditional task of liberal courts: to reformulate continually the community's historical commitments (as reflected in its past political decisions) in their best light, as they bear on contemporary problems at hand. In short, leading legal theory already acknowledges an element of

⁶⁹³ For a particularly extreme example of such self-disruptive strategies of historical representation, see SIMON SCHAMA, *DEAD CERTAINTIES: UNWARRANTED SPECULATIONS* 321-26 (1991). For recent programmatic statement, see BERKHOFER, *supra* note 285, at 282-83 (arguing that "any new historical textualization must show how it goes about achieving its representation at the same time as it represents the past as history . . . [and] must include multiple viewpoints in addition to . . . the author's . . . in genuine dialogue").

"social construction" ineradicably present in the very nature of legal interpretation within a liberal community.⁶⁹⁴

Even more than the preceding sources of skepticism, this one must be approached only by way of informed speculation, that is, through speculation informed by such hints and traces (disclosed by participants in these "historic" trials) about how these proceedings were "emplotted." Such revelations invariably disclose a troubling pattern: that the contours of criminal prosecution were consciously but secretly tailored in light of perceived public sensibilities, in ways not at all cognizable within doctrinal or jurisprudential terms.

General MacArthur's disclosure regarding his decision to oppose indictment of Hirohito exemplifies this pattern. Despite considerable pressure from members of Congress and American opinion to indict Hirohito, MacArthur based his decision on his fears that such prosecution would evoke mass unrest and organized Japanese resistance to Allied Occupation. Calculations of an equally prudential sort inspired Alfonsín's legal advisors, prosecutors, and judges in many ways, requiring them to maintain an acute sensitivity to perceived shifts in the military's mood as indictments burgeoned in number and the military trials proceeded.⁶⁹⁵

Had MacArthur or Allied prosecutors in Tokyo honestly explained the reasons for their exclusion of the Emperor they would have made a mockery of the trial, discrediting it altogether. One can imagine the public reaction to a candid statement of American policy such as the following: "[a]ny attempt to persuade the emperor to participate in his own 'debunking' should be made in . . . a manner . . . unknown to the Japanese people and . . . give no suggestion of compulsion."⁶⁹⁶

Alfonsín's decision to curtail prosecution of military officers on account of their demonstrated restiveness would similarly have been impossible if its rationale had been publicly acknowledged.⁶⁹⁷ The President thus felt compelled, in announcing an amnesty barring further indictments, to insist publicly that the decision had been in

⁶⁹⁴ See DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 228-37.

⁶⁹⁵ See Interviews with Confidential Sources, *supra* note 678.

⁶⁹⁶ Ward, *supra* note 522, at 14 (quoting language from a critical in-house document codifying United States policy).

⁶⁹⁷ On the considerable backstage wrangling over this and related decisions, see NINO, *supra* note 30 (acknowledging direct presidential intercession to encourage the court, while drafting its opinion in the junta trial, to set limits on future prosecutions of junior officers not directly involved in atrocities).

no way influenced by the several military uprisings that immediately preceded it. Although unconvincing to all informed observers, this proclamation proved to be less embarrassing and delegitimizing in effect than the more candid alternative.

The resemblance of law to theater is again inescapable here, but in ways rather less flattering than in preceding sections. An effective dramatic performance traditionally camouflages the fact that it is a performance, for otherwise we would never be drawn into the story.⁶⁹⁸ The actors implicitly deny that they are actors, that they are playing roles—specifically, that these roles are fictive—in order to be persuasive to us. Moreover, in a highly publicized trial, even more than in a theatrical production, the audience surely would not be as powerfully moved to endorse the drama's ultimate conclusion—and remember its moral implications—if listeners were continuously reminded, at every turning point in the story, of other equally plausible paths that its characters, authors, and directors chose not to follow.⁶⁹⁹ A semiotician thus observes that when “theatrical performances, requir[e] appreciation of staging, acting, costumes, or sets, [they] draw the attention from the story space to the stage space, and break the spell of referentiality.”⁷⁰⁰

Keeping Legal Stagecraft “Backstage”

In order to grip us and draw us into its world, a legal-historical narrative need not represent itself as predetermined by fate, denying the contingent choices of human agency.⁷⁰¹ But for prosecutors and judges *publicly* to attempt to influence collective memory is to acknowledge the impact upon such memory of political power, which is not equally shared and often illegitimate in

⁶⁹⁸ See JOHN DRYDEN, *Of Heroic Plays: An Essay*, in 1 ESSAYS OF JOHN DRYDEN 148, 154-55 (W.P. Ker ed., 1961); J.L. Styan, *The Mystery of the Play Experience: Quince's Questions*, in PERFORMING TEXTS 9, 13 (Michael Issacharoff & Robin F. Jones eds., 1988).

⁶⁹⁹ Such reminders, however, are commonplace in 20th-century theater. The classic work in this regard is Luigi Pirandello, *Six Characters in Search of an Author*, in THREE PLAYS 3 (Edward Storer trans., 1934), in which the characters converse with the author, the actors with the audience, and the audience with the author.

⁷⁰⁰ JEAN ALTER, A SOCIOSEMIOTIC THEORY OF THEATRE 71 (1990) (emphasis omitted).

⁷⁰¹ On the problems with representing collective catastrophes, like the Holocaust, as the only possible outcome of preceding historical events, see BERNSTEIN, *supra* note 203, at 95-119 (arguing for the superiority in historical fiction and historiography of “sideshadowing”—identification of unrealized possibilities available to historical actors—over foreshadowing of what actually transpired).

the eyes of some. Admitting the influence of power and self-interest upon how a story is being told undermines its persuasiveness, its asserted claim to represent impartial truth, its "truth-effect" in postmodern idiom. It was sheer power, after all, that permitted the Allies to narrow the narrative frame of the Tokyo and Nuremberg trials, excluding the substantial record of war crimes by the accusers as legally irrelevant. And it was precisely the recognition of this power, of how it thus shaped the story, that led to the lingering charge that the trials were no more than "victors' justice."

Of course, all competent litigators privately acknowledge the inexpungibly rhetorical, even fictive, element in their work: the client's story can be told in many ways (for example, with alternative witnesses, lines of questioning, material evidence, and so forth), and the attorney must evaluate the relative risks of each. Yet, when arguing in court, every competent litigator will also "make every effort to disguise the fact that this story is his creation and to present it, instead, as a simple revelation of the objective truth."⁷⁰²

We might entertain the possibility, at least, that modern judges—like modernist novelists, dramatists, and painters—might revise their self-conception to acknowledge the performative aspect of their work within the work itself, without undermining the defensibility of their entire enterprise in the process. The scaffolding might, in other words, be left in place—as in some avant-garde architecture. After all, whereas war memorials were long secretly designed by elites, today the form that they should take is routinely debated in society at large and in the local communities that often sponsor and house them.⁷⁰³ Inserting the storyteller into the legal story—the prosecutor and judge as self-conscious narrators of liberal memory and democratization—may at first appear an impertinence, of a piece with the "self-referentiality" (often a euphemism for self-absorption) of much modern art. But the practice might better be viewed as an expression of modesty, of a willingness to step down from the pedestal of omniscience.

⁷⁰² Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1559 (1990) (reflecting on 12 years experience as a litigator).

⁷⁰³ See GEORGE L. MOSSE, *FALLEN SOLDIERS: RESHAPING THE MEMORY OF THE WORLD WARS* 220-21 (1990) (describing the debate in Britain over whether war memorials should take the "liturgical" form of national shrines, in which only commemoration is encouraged, or rather the "utilitarian" form of parks and gardens, focused as much on pleasure for the living as honoring the dead); JAY WINTER, *SITES OF MEMORY, SITES OF MOURNING: THE GREAT WAR IN EUROPEAN CULTURAL HISTORY* (1995).

Yet, modernist art, unlike legal professionalism (or contemporary communitarianism), almost entirely repudiates the aim of telling a coherent tale—one with an intelligible beginning, middle, and end, and with clear “moral lessons” for its audience. In fact, for modernist culture such aims represent the height of philistinism.⁷⁰⁴ Modernist novelists and painters relish their embrace of an antithetical objective: disrupting the illusory *appearance* of coherence and integrity already at the heart of what they see as the “bourgeois perception” of personality and society.⁷⁰⁵ Surely, the legal theory of a liberal society should be reluctant to adopt such a self-subverting stance. As Dworkin notes, even in “hard cases,” where any interpretation of the parties’ respective rights and duties will be controversial, lawyers argue (and judges defend their conclusions) as if only *one* result were ultimately possible at the end of the day.⁷⁰⁶

To admit the equal availability of alternative answers to crucially important legal questions has been considered, by liberals and “critical” skeptics alike, as inconsistent with “the rule of law.” By its nature, the law—or so it has been generally thought—can only tell one true story about who is right in a given dispute, can lend its authority to only one of the competing narratives about what happened and about what, legally speaking, it “meant.” For example, the legal narrative favored by the Argentine juntas—that they were employing necessarily unconventional methods in fighting a just war against an unconventional enemy—is squarely incompatible with the story put forth by Alfonsín’s prosecutors—that no state of war existed and that the defendants ordered the murder of thousands of innocent people, without justification or excuse.

Yet lawyers and legal theorists readily acknowledge that the same set of facts, undisputed by either side, can often be conceptualized for legal purposes in several alternative ways, all of these

⁷⁰⁴ When once asked by an interviewer “whether your films have a beginning, a middle, and an end,” avant-garde director Jean-Luc Godard responded, “Yes, but not necessarily in that order.” MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923-1950*, at 176 (1973).

⁷⁰⁵ See GERALD GRAFF, *LITERATURE AGAINST ITSELF: LITERARY IDEAS IN MODERN SOCIETY* 63-102 (1979); DONALD M. LOWE, *HISTORY OF BOURGEOIS PERCEPTION* 17-33 (1982); ROBERTO M. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 33-34, 297 (1984).

⁷⁰⁶ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 98, at 82-90. This proposition has been called “the right answer thesis.” Dworkin retreated from it slightly in a later work. See DWORKIN, *LAW’S EMPIRE*, *supra* note 98, at 90-96.

consistent with existing doctrine.⁷⁰⁷ A single, harmful act may implicate both civil and criminal law—state, federal, and international. A major crime may encompass several “lesser included offenses.”⁷⁰⁸ For instance, the “same act” of violence by an Argentine officer against a civilian might be legally cognizable as attempted murder, battery, aggravated assault, deprivation of civil rights, a “crime against humanity,” or even genocide, on some accounts.⁷⁰⁹ Prosecutors have to choose between such alternative conceptualizations of the wrong, on the basis of considerations not governed by law.

Prosecutors can use the same set of facts to tell very different legal stories—all of them inculpatory, albeit in different ways and to varying degree. Hence arise the need for prosecutorial choice and the possibility that such choice might significantly be influenced by dramaturgical considerations of the sort discussed here.

The central issue—the existence of prosecutorial discretion concerning the charging decision—is by no means unique to administrative massacre and routinely arises in other contexts. In fact, a considerable literature now exists on the question of how prosecutorial discretion, given its inescapability, ought to be exercised responsibly.⁷¹⁰ Contemporary legal thought now fully appreciates that those drafting the provisions of criminal law cannot carve up nature at the joints: particular offenses, each with its required elements, are ultimately no more than verbal constructions capturing only certain aspects of a larger tableau of actions and events momentarily under the law’s gaze.⁷¹¹ Various offenses

⁷⁰⁷ See STEVEN J. BURTON, *AN INTRODUCTION TO LAW AND LEGAL REASONING* 48-53 (1985).

⁷⁰⁸ See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524-32 (1981); see also *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979) (finding constitutional a statute permitting prosecutors to elect between two offenses, carrying greatly different sanctions, but prohibiting the same conduct).

⁷⁰⁹ Each of these offenses requires a different mental state: the same act may be prompted by the intent to destroy an ethnoreligious group, which the immediate victim represents in the perpetrator’s mind, or simply the individual victim as such, regardless of her ethnoreligious membership. Available evidence in these cases often permits either or both of these characterizations of the defendants’ mens rea.

⁷¹⁰ See, e.g., Vorenberg, *supra* note 708, at 1560-73 (proposing a principled system of prosecutorial discretion).

⁷¹¹ The theoretical foundation for this conclusion lies in the influential work of Ferdinand de Saussure. See F. DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 76 (Charles Bally & Albert Sechehaye eds., Roy Harris trans., 1983) (showing that a verbal “signifier” is necessarily arbitrary since the link between it and the “signified” reality it seeks to represent is purely a matter of convention, as revealed by how each

simply place different aspects of this background into the foreground. Inevitably, the "same" set of events, particularly those involving the coordinated activities of many people over a long period, can be conceptualized in alternative ways. Just as a given historical episode can be recounted through a wide range of literary genres and tropes (from epic tragedy to light ironic farce), so too is the same large-scale wrongdoing often legally cognizable by several alternative offenses, criminal and civil.

We can only hope that, in the interests of due process (that is, the avoidance of retroactivity), at least *some* of our existing legal concepts prove to have captured the morally pertinent features of historically novel forms of wrongdoing, such as those examined here. But virtually no one seriously thinks that, in recognizing the existence of prosecutorial discretion in matters of charging, the conceptual world of liberal law has collapsed.⁷¹²

Positivist historians may once have believed that their job was to unearth and articulate the true meaning already immanent within historical events. Such people were therefore embarrassed to discover that they were, in fact, imposing conceptual frames that "endow[] a particular sequence with moral closure."⁷¹³ But the inexpungibly moral element in storytelling has never been lost upon criminal lawyers, whether arguing for the prosecution or defense. The question has been, by contrast, what the moral of the story should be and whether the legal concepts available for telling it accurately capture the full range of moral complexities. In particular, is it a story of radical evil—one that should elicit from us only sentiments of indignation—or is it a story of tragic choices and inescapable moral dilemmas, a narrative trope evoking more complex and nonjudgmental sentiments?

particular language divides in different ways the verbally expressible world).

⁷¹² For a theoretical defense of how our law deals with one key example of "the redescription problem," as it is generally called, see Michael S. Moore, *Foreseeing Harm Opaquely*, in ACTION AND VALUE IN CRIMINAL LAW 125 (Stephen Shute et al. eds., 1993).

⁷¹³ Mink, *supra* note 366, at 238. The embarrassment also arose from the moral skepticism of many such scholars; their suspicion that conclusions about "what justice demands," for instance, were merely arbitrary expressions of personal preference or political power. On a "realist" or even "constructivist" conception of morality, however, there is nothing embarrassing about our having to judge historical events and their perpetrators by moral (and legal) ideas not "immanent" in the historical process or shared by historical actors themselves, but grounded only on reasoned reflection. See Geoffrey Sayre-McCord, *Preface* to ESSAYS ON MORAL REALISM at ix, ix-x (Geoffrey Sayre-McCord ed., 1988).

The point here is entirely compatible with the central concerns of postmodernism: with preserving an awareness that many differing stories—all of them offering at least part of the truth—may be told with the same set of brute facts. Its infuriating excesses notwithstanding, postmodernism has at least made us “more aware that there are alternative ways of truth telling, and that we are therefore responsible for the forms we use to tell our truths.”⁷¹⁴ Criminal law will be useful for telling some of these stories, tort law (in private actions against torturers, for instance) for telling others. Nonlegal narratives will be necessary to capture still further aspects of any complex political experience. Liberals would part company with postmodernists only in insisting that the law’s alternative stories, those receiving authoritative endorsement, not have wildly different “morals.”

Acknowledging Legal Artifice

The narrative indeterminacy reflected in the exercise of prosecutorial discretion differs substantially from legal indeterminacy of the conventional sort, which arises only after the allegations have been formulated, the authorities examined, the legal questions focused, the strengths and weaknesses of alternative answers assessed. Acknowledging publicly the availability of what we might call “narrative indeterminacy” would not undermine the law’s legitimacy in the same way as acknowledging the equal availability of alternative “right answers” to the same legal question.

In choosing among alternative defendants and indictments, prosecutors of administrative massacre faced only the less troublesome of these two types of indeterminacy. To admit the existence of narrative indeterminacy—regarding what the story should be about, how its contours should be framed (and which legal questions will thus be asked)—presents no inherent threat to the court’s legitimacy, just as the now-widespread acknowledgment of narrative indeterminacy among historians is recognized to present no inherent threat to the legitimacy of their endeavors.

It is entirely possible to imagine prosecutors publicly explaining such choices while making them, at least where they are not restricting the scope of prosecution in capitulation to the raw power of potential defendants. Thus far, however, prosecutors have

⁷¹⁴ RICHARD H. BROWN, *SOCIETY AS TEXT: ESSAYS ON RHETORIC, REASON, AND REALITY* 3 (1987).

sought to justify the way they exercised such narrative discretion only many years after the events at issue.⁷¹⁵ To be sure, all this would make the ultimate persuasiveness of the strictly legal story—conviction of particular parties for particular offenses by means of particular testimony—turn explicitly on the persuasiveness of the larger historical frame that underpins it.

But that is already, inevitably, the case, as the legacy of the trials examined here makes abundantly clear. Argentine conservatives, for instance, would never accept the legitimacy of the junta trial—however scrupulous the courts in applying the Alfonsín government's chosen offenses against its chosen defendants—as long as these prosecutorial decisions derived from a larger narrative frame that such conservatives could never endorse (that is, denial of pervasive subversion and unconventional war). This is why the choice of narrative frame must itself be publicly acknowledged and defended. Otherwise, the real issues will never be joined, and the courtroom adversaries will talk past one another, in a "dialogue" of the deaf.

Ideally, liberal memory could be cultivated in a manner consistent with the Kantian "publicity principle."⁷¹⁶ That principle holds that officials act wrongfully when they adopt policies that they could not persuasively defend before interested publics. If true,⁷¹⁷ this principle would seem to require that if the performative possibilities of trials for administrative massacre cannot be publicly acknowledged without delegitimizing the proceedings, then these

⁷¹⁵ For one such long-belated disclosure, see generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (explaining how the indictment-drafting committees at Nuremberg decided which individuals should be named as defendants).

⁷¹⁶ See IMMANUEL KANT, *Eternal Peace*, in *THE PHILOSOPHY OF KANT* 425, 518-25 (Carl J. Friedrich ed., 1993); see also RAWLS, *supra* note 192, at 133, 177-82 ("The point of the publicity condition is to have the parties evaluate conceptions of justice as publicly acknowledged and fully effective moral constitutions of social life.").

⁷¹⁷ For recent skepticism in this regard within liberal theory, see ROBERT GOODIN, *MOTIVATING POLITICAL MORALITY* 124-49 (1992); David Luban, *The Publicity Principle*, in *THE THEORY OF INSTITUTIONAL DESIGN* (Robert Goodin & Geoffrey Brennan eds., forthcoming 1995). The principle is most plausibly interpreted, in any event, as requiring the possibility of public justification regarding theory choice, that is, the general principles on the basis of which more particular policies will be chosen, rather than the details of particular policies themselves. This is Rawls's view. See RAWLS, *supra* note 192, at 175-82, 454-57; see also Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 302-03 (1990) (stating that while the notion of "publicity" is a good one, judges should have their own views about judging).

possibilities should be eschewed, their potential for deliberate shaping of collective memory left unrealized.

The problem with this response, however, is that Pandora's box is already open. We know, from the historians and anthropologists examined here, that there have been many successful efforts at constructing collective memory. We also know something about how this has been done, and that the law has often provided a potent set of symbolic tools to that end. As a result, it is now impossible for collective memory to develop altogether naively, spontaneously, unreflectively, without self-consciousness. Writes one Argentine intellectual, "[m]emory results only from an *active reworking* of 'what happened' and 'what is recalled about it.'" ⁷¹⁸ What at first seems the purest font of mnemonic authenticity—say, a death camp survivor's personal testimony, of the sort on which war crimes tribunals routinely rely—turns out with disturbing frequency to have been unconsciously influenced, as Primo Levi observed, by "information gained from later readings or the stories of others." ⁷¹⁹

Today a prosecutorial decision *not* to employ the full dramatic potential of a criminal trial (as we have come to recognize that potential), so as to avoid the appearance of manipulation, has necessarily become a partly strategic maneuver, taken in light of perceived preconditions for the legitimacy of the proceedings, particularly in skeptical quarters. A prosecutorial decision to minimize public scrutiny of a legal proceeding, a decision *not* to make it memorable—perhaps to avoid antagonizing still-powerful military officers—could no longer be taken in innocence of this very implication.

Even if one managed somehow to miss the implication oneself, one's critics would be certain to point it out. This occurred, for instance, when human rights activists in Argentina, and their supporters among legal scholars, publicly identified the innumerable ways in which even Alfonsín's initial plans for military prosecutions (that is, before organized opposition arose from military ranks) stopped well short of what the law allowed, and may even have

⁷¹⁸ Vezzetti, *supra* note 80, at 3 (emphasis added).

⁷¹⁹ PRIMO LEVI, *THE DROWNED AND THE SAVED* 19 (Raymond Rosenthal trans., 1988). Such unintentional reformulation of memory is sometimes more self-conscious, although still without guile. To refresh their memory of traditional practices in preparation for interviews by anthropologists, Cherokee chiefs have been known to "bone up" through books by earlier anthropologists. See DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 207 (1985).

required.⁷²⁰ In short, the telling of legal stories about administrative massacre necessarily confronts the modern condition, in the sense that modernity is, as Clifford writes, "a state of being in culture while looking at culture, a form of personal and collective self-fashioning."⁷²¹ In other words, memory-practice, as it is now sometimes called,⁷²² has become at once transparent and self-conscious (in both the positive and negative senses of the latter term).

We have become acutely aware, moreover, that the fashioning of national identity through cultivation of collective memory is almost inevitably conflictual. Historians remind us that "whenever memory is invoked we should be asking ourselves: by whom . . . against what?"⁷²³

Argentina, in particular, has "never agreed on its guiding fictions."⁷²⁴ It has even been called, by V.S. Naipaul, a society "without a history, still only with annals."⁷²⁵ Such erudite distinctions are not merely the preoccupation of poststructuralist theoreticians.⁷²⁶ At his trial, defendant Emilio Massera invoked the

⁷²⁰ Particularly incisive in this regard is MARCELO A. SANCINETTI, *DERECHOS HUMANOS EN LA ARGENTINA POSTDICTATORIAL* (1988). Such scholar-activists stress, for instance, that under Argentine law prosecutors have no discretion to refrain from indicting potential defendants against whom evidence has been gathered that is sufficient to justify such indictment. Alfonsín's chief legal advisor acknowledges this. See Jaime Malamud-Goti, *Human Rights Abuses in Fledgling Democracies: The Role of Discretion*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 225, 236 (Irwin P. Stotzky ed., 1993) (ascribing this commitment to the "full-blooded retributiv[ism]" of the Argentine legal system). For an accessible summary of the legal approach that was favored by the human rights community, see Emilio Mignone et al., *Dictatorship on Trial: Prosecution of Human Rights Violations in Argentina*, 10 YALE J. INT'L L. 118 (1984).

⁷²¹ JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 9 (1988). Law's problem here is not unique to law, of course. See WALTER T. ANDERSON, *REALITY ISN'T WHAT IT USED TO BE* 4 (1990) ("We do not know how to live in a world of socially constructed realities, yet we find it increasingly difficult to live in anything else.").

⁷²² See John Gillis, *Memory and Identity: The History of a Relationship*, in *COMMEMORATIONS: THE POLITICS OF NATIONAL IDENTITY*, *supra* note 550, at 3, 16.

⁷²³ Natalie Z. Davis & Randolph Starn, *Introduction to Memory and Counter-Memory*, 26 REPRESENTATIONS 1, 2 (1989); see also Charles Tilly, *Afterward: Political Memories in Time and Space*, in *REMAPPING MEMORY*, *supra* note 29, at 241, 253 (noting that today "we see the contestation that surrounds every effort to create, define, or impose a common memory—to form a coherent discourse about the origins of a people, the source of citizens' rights, the lessons of previous challenges").

⁷²⁴ NICOLAS SHUMWAY, *THE INVENTION OF ARGENTINA* 299 (1991).

⁷²⁵ V.S. NAIPAUL, *THE RETURN OF EVA PERÓN* 151 (1980).

⁷²⁶ See, e.g., Mink, *supra* note 366, at 233 (distinguishing the annalist from the historian on the basis of the former's lack of "a principle for assigning importance or significance to events . . . [and] a notion of a social system for whose survival or

distinction between discovering and declaring brute facts, on one hand, and integrating them into a persuasive national narrative, on the other. He proclaimed: "My critics may have the chronicle, but history belongs to me, and that is where the final verdict will be decided."⁷²⁷

The lack of shared sense of a common past—of collective memory, in sociological shorthand—is what makes possible claims of this sort, and precludes their casual dismissal. A Durkheimian focus on criminal law's capacity to invigorate existing consensus on basic morality reaches its limits in such circumstances. For as Gillis observes, "[m]odern memory was born . . . from an intense awareness of the conflicting representations of the past and the effort of each group to make its version the basis of national identity."⁷²⁸

Competing Views of Collective Memory: Liberal, Communitarian, and Postmodern

Trials for administrative massacre have become one prominent field on which such interpretive conflict over the constitution of national identity and the meaning of national history takes place. Such conflict, based on rival memories of painful recent events, increasingly means that it is no longer possible to advance a particular interpretation of national identity in blissful unawareness of doing so or in the naive belief that one is merely eliciting shared memory and evoking the collective conscience. Thus, it has now become moot whether it is desirable for officers of the court to engage self-consciously in memory construction. Their own sophistication in such matters, the advance of cultural self-awareness in this regard, has made it impossible for them *not* to do so.

That it has become impossible not to try, however, does not mean that success is easy. In fact, it has become harder. Despite loose talk about "the invention of tradition,"⁷²⁹ the audience, like the performers, is increasingly aware that collective memory can be socially constructed, with legal blueprint in hand. As the public for such proceedings, we have become suspicious of efforts—by judges,

change some events had more significance than others").

⁷²⁷ EL DIARIO DEL JUICIO (Buenos Aires), Oct. 8, 1985, at 25. For a discussion of Massera's remark, see Marguerite Feitlowitz, *Night and Fog in Argentina*, SALMAGUNDI, Spring-Summer 1992, at 40, 71.

⁷²⁸ Gillis, *supra* note 722, at 8.

⁷²⁹ THE INVENTION OF TRADITION, *supra* note 656.

prosecutors, or defense counsel—to shape criminal trials with an eye to collective memory, for we will have learned that any effort to organize memory is also an effort at “organized oblivion.”⁷³⁰ We periodically remind ourselves, in fear of being “taken in” by her artfulness, that the teller’s reliance on one trope—say, the nation’s rise to greatness—necessarily reflects her tacit rejection of another—suppression of subgroups and neighbors, perhaps, who got in its way.

When trying cases of administrative massacre, judges must act willy-nilly as historians—seeking to tell persuasive stories about large-scale events. They thus necessarily confront the obstacles faced by historians themselves in this enterprise. One such obstacle is that to the extent we first find a story coherent and compelling, we are sure to remind ourselves almost immediately that the coherence lies not “out there” in history itself, but rather in narrative conventions about how history ought properly to be written and, more generally, in our assumptions about how the world ought to be apprehended and rendered intelligible.⁷³¹ As the audience becomes armed with this awareness, it turns ever more difficult for historians—and hence for judges-as-historians—to pass off their preferred narrative of a recent national catastrophe as definitive, that is, to impart their professional authority to any particular version of collective memory.

The problem is not simply that different stories betray different ideologies, but that we have even become suspicious of stories themselves, that is, of their capacity to capture and impart important truths.⁷³² Perhaps, as Hayden White contends, the “value attached to narrativity in the representation of real events arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary.”⁷³³ But such strictures against the hunger for narrative

⁷³⁰ Koonz, *supra* note 550, at 258.

⁷³¹ See Brian Fay et al., *Introduction* to MINK, *supra* note 685, at 1, 22-23.

⁷³² This key insight of postmodernism has yet to penetrate the current legal scholarship, professedly inspired by postmodernism, that celebrates storytelling (and its presumptive superiority over analytical argument). See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

⁷³³ WHITE, *supra* note 23, at 24; see also FRANK KERMODE, *THE SENSE OF AN ENDING: STUDIES IN THE THEORY OF FICTION* 64 (1967) (“It is not that we are connoisseurs of chaos, but that we are surrounded by it, and equipped for coexistence with it only by our fictive powers.”).

wholeness are better directed at communitarians than at liberals. Liberal theorists have *always* been hostile to the notion that public narratives, those endorsed by the state and its courts, should seek to satisfy the private longings of its citizens for meaning and wholeness, for "coherence, integrity, fullness, and closure."⁷³⁴ Thus, despite the postmodernist cast of White's observations, they are entirely consistent with the longstanding aversion of liberal theory to official endorsement of any full-bodied conception of the good life or of the stories by which such a conception will be imparted and remembered.

Postmodernists like White are thus valuable in disclosing the dangers of a communitarian conception of collective memory, like that of Durkheim and the authors of *Habits of the Heart*.⁷³⁵ Such communitarians insist that, as individuals, we are bereft of direction and meaningful attachment if we cannot situate our personal experience within the larger narrative of a community, one that precedes our birth and will endure beyond our death. If liberal law cannot help to provide the needed link between individual and community (as it cannot, they insist), then so much the worse for the law. Postmodern theorists of history rightly respond that there are necessarily many stories—consistent with known facts—that can be told about the history of a given community and the relations among its subgroups.⁷³⁶ To insist that *one* such story be shared by all members as constitutive of their identity would thus be factually mistaken and morally indefensible.

That much is consistent with liberal jurisprudence. Where postmodernists go astray, however, is in their failure to give serious thought to the question of *which* such stories belong within the law, that is, which ought to receive official imprimatur and which, by contrast, ought to remain private matters about which reasonable people may differ.⁷³⁷ To acknowledge that there are many accu-

⁷³⁴ WHITE, *supra* note 23, at 24. On liberalism's rejection of this objective, see, for example, LARMORE, *supra* note 193, at 45-47, 69-76.

⁷³⁵ See BELLAH ET AL., *supra* note 216, at 152-55.

⁷³⁶ See, e.g., Wachtel, *supra* note 235, at 307-08 (comparing different methods used by Eastern European Jews to preserve their collective memory through the Holocaust); Hayden White, *Historical Pluralism*, 12 CRITICAL INQUIRY 480, 488 (1986) (discussing the idea that there are many "plausible" interpretations of historical events).

⁷³⁷ The failure arises from the consistent refusal of leading postmodernists to admit the defensibility of any distinction between legitimate and illegitimate power.

[W]e have two schemes for the analysis of power. The contract-oppression schema, which is the juridical one, and the domination-repression . . .

rate stories that can be told about the Argentine dirty war, for instance, is not to say that it would be wise for the law to concern itself with arbitrating between them all—the hopeless quagmire into which the Barbie trial, under Vergès's prompting, threatened to descend.⁷³⁸ There are other, more fitting fora—both public and private—for the expression of opposing views about such a society-wide catastrophe and for the critical questioning of particular accounts of its meaning.

This conclusion, however, is not shared by postmodernists. One distinguished anthropologist (of that persuasion) writes of the official reports and legal judgments against the Argentine military, for instance, that the

well-intentioned effort to expose the terror . . . [involved] a mode of liberal collective remembering [that] preserves the state in that it monopolizes the public sphere and limits general access to other kinds of remembering, restricting them to the personal, private anguish of individual memories or deferring their public expression to another . . . less troubled, time. In this way, political order is preserved and saved from the implications of its own darkest episodes of excess.⁷³⁹

Marcus implies that prosecutors cannot choose certain defendants and indictments, that is, certain narrative framings, in light of their own political objectives, without doing an injustice to the "small narratives" of the victims themselves, without forcing these

schema for which the pertinent opposition is not between legitimate and illegitimate, as in the first schema, but between struggle and submission.

. . . .

. . . Right should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates.

Michel Foucault, *The Juridical Apparatus*, in LEGITIMACY AND THE STATE 201, 207, 211 (William Connolly ed., 1984).

⁷³⁸ See *infra* text accompanying notes 783-88.

⁷³⁹ George E. Marcus, *The Official Story: Response to Julie Taylor*, in BODY POLITICS, *supra* note 308, at 204, 207-08. Marcus's title alludes to the Luis Puenzo film, THE OFFICIAL STORY (Almi Pictures Inc. 1985), which received the Academy Award for best foreign film in 1985. The film was so titled in satiric commentary on the military's public account of disappearances during its rule, described at the time by skeptical Argentines as "the official story." After the junta trial, Argentine intellectuals on the left (like Marcus here) began to employ the term in a doubly ironic sense, to characterize the decision of the courts and the Alfonsín government to apportion responsibility for the disappearances exclusively to a few top military brass. See ROWE & SCHELLING, *supra* note 22, at 228; Halperin, *supra* note 220, at 78-79. In Spanish, the word *historia* denotes both "story" and "history," and thus connotes a narrative about both the present and the past.

little stories (only as footnotes, perhaps) into liberalism's grand narrative. There will always be other framings, other stories about the dirty war, that are excluded—marginalized, in current parlance—by an official story of this sort, Marcus insists. Even a liberal story is “repressive” in this sense, notwithstanding its tolerant veneer. Marcus is *not* simply asserting, with the legal realists, that any private sphere is likely to be a product of legal rules which are themselves publicly created, and hence susceptible to periodic modification. Rather, he asserts that the public-private distinction is inherently repressive, wherever the line is drawn, in that it necessarily marginalizes whatever is made to fall on the private side of this line.

At times, to be sure, official efforts to provide an authoritative account of recent history, even a partly self-critical account, are indeed intended precisely to suppress the public recounting of individual narratives that would prove still more critical and uncomfortable. This was the case, for instance, with the official acknowledgements of wrongdoing by the chiefs of Argentina's armed services in April 1995. These admissions were prompted by a new willingness of retired officers to reveal and publicly discuss their illegal actions.

It was hoped that such individuals would no longer feel impelled by conscience to come forward with details about *particular* atrocities if the armed services at large were finally to admit that it had ordered this *general type* of activity—and had been wrong in so doing. The individual revelations, increasing in frequency and drawing much media attention, were proving particularly embarrassing to President Menem (on the eve of his reelection effort), because it was he who had pardoned the junta members and others convicted of ordering atrocities.

Menem was quite candid about the relation he hoped to establish between official acknowledgement of atrocity—in the aggregate, dispensing with gruesome details—and the containment of more personal (and potentially never-ending) revelations by particular “dirty warriors” turned loose cannons. A few days after the official admissions, Menem observed of them, “[if these had not happened,] we would have continued until eternity with two out of every three individuals coming forth to make their own declarations.”⁷⁴⁰

⁷⁴⁰ CLARÍN (Buenos Aires), Int'l Ed., Apr. 25-30, 1995, at 7. Menem's calculation

Marcus's critique, his concern over premature closure of debate, is thus well-directed against such policies of Menem, but not against *Nunca Más* or its official authors.⁷⁴¹ In that regard, in fact, his statement must be entirely unpersuasive to anyone committed to a liberal society. Without argument, he summarily denies any meaningful distinction between the proper concerns of the state and those of civil society, between public and private life. The moral bankruptcy of the liberal state, on this account, is presumably demonstrated by the fact that its courts do not provide a forum for every autobiographical introspection—for every narcissistic meandering.

It may be largely true, as concludes a recent study of collective memory in the former East Germany, that "[i]f the past could be worked through, it would happen in smoky pubs and around kitchen tables."⁷⁴² It is also true that as time passes, the kinds of stories publicly told about an administrative massacre do change, often focusing less on explaining and judging the "big picture" and more on sympathetically interpreting the myriad forms of human experience involved—for small subgroups, or simply for particular individuals, however idiosyncratic their experience.

Moreover, the courts cannot become aloof to concerns that are primarily "private." For example, they must remain available for civil suits by private citizens seeking redress for the wrongs done them by the state and its torturers, as has been the case in Argentina.⁷⁴³ To this extent, the law must necessarily place its stamp of approval on the "personal" stories of individual victims, as victims. By implication, it marginalizes and occludes other stories, such as

here was based on a common pattern in Argentine political history. When military officers criticize one another in public, this usually reflects disagreement between organized factions within the corps (each with substantial supporters). When such an internal dispute goes public, it is because one faction suddenly seeks civilian allies in its intramilitary rivalries.

⁷⁴¹ See NUNCA MÁS, *supra* note 16.

⁷⁴² ROSENBERG, *supra* note 160, at 355, 356-94. Rosenberg is referring especially to a series of personal encounters between a Stasi informer and the colleagues against whom he informed. She adds, "[t]he state could lend its endorsement to a nationwide examination of conscience, but the desire had to come from individuals, as victims confronted their spies and interrogators in more intimate settings." *Id.* at 355.

⁷⁴³ Surviving victims of the dirty war have recovered damages from the Argentine State in a successful effort to enact compensatory legislation. See BRYSK, *supra* note 16, at 86-87. A November 1994 civil judgment found the federal government and junta members Emilio Massera and Armando Lambruschini each liable for \$1 million to the children of a *desaparecido*. See Tarnopolsky, *supra* note 155, at A19.

those portraying the "victims" as fallen soldiers in the struggle against capitalist imperialism—that is, the story favored by many in Argentina's human rights organizations.

Criminal law, preoccupied with wrongs to public order at large, begins to assume a less salient role over time, while private law, concerned primarily with compensation, waxes more prominent.⁷⁴⁴ But these private stories are *consistent with* the larger one told by criminal law—and with the liberal lessons that such law, in furtherance of discursive solidarity, seeks to stamp upon collective memory. While the criminal law must necessarily make one story *authoritative*, it may also, in so doing, *authorize* and thus encourage the telling of other, more personal stories, both within courts and elsewhere in society.⁷⁴⁵ That these other stories must be consistent with the grand narrative of liberal memory, constructed by criminal courts, is another form of "enabling constraint."

By limiting the stories that will receive public authorization, the requirement of consistency enables thousands of victims to tell stories that, without such official encouragement, would never publicly be told. Lyotard may be right that "a culture that gives precedence to the narrative form doubtless has no more of a need for special procedures to authorize its narratives than it has to remember its past."⁷⁴⁶ But, such is not the culture we inhabit.

Individuals who seek to inject their personal stories into the public realm—stories at odds with currently prevailing official narratives—are free to invoke the law to that end, that is, in a liberal society. In fact, the criminal law can be surprisingly useful in this regard. In recent months, for instance, Captain Adolfo Scilingo was able singlehandedly to reopen Argentine public debate about the dirty war by going public with his story of obeying orders to throw dozens of victims to their deaths from a navy helicopter.⁷⁴⁷ Scilingo then pressed criminal charges against the Navy Chief of

⁷⁴⁴ Cf. Geyer & Hansen, *supra* note 48, at 178 (arguing that as survivors of the Nazi years have died off and the state has sought to influence collective memory of the period through official rituals of remembrance, "German memory-work became less and less private and individual"). The authors concede, however, that there has been "a broad and swelling stream of confessional literature," allowing later generations to preserve and profit from the distinctive memories of particular individuals. *Id.* at 184.

⁷⁴⁵ I am grateful to Virginia Dominquez for suggesting this distinction.

⁷⁴⁶ LYOTARD, *supra* note 145, at 22.

⁷⁴⁷ See Sims, *supra* note 1, at A8.

Staff, Admiral Enrique Molina Pico, for the offense of "concealing evidence of murder."⁷⁴⁸ It was Scilingo's official accusation that forced the Chiefs of Staff to reconsider an issue they thought they had long since put behind them (with the 1990 pardons and earlier amnesty statutes). The filing of this legal denunciation ultimately led to the first official military admission of wrongdoing and responsibility by all three armed services, in April 1995.⁷⁴⁹

While communitarians lament "[t]he atomization of a general memory into a private one,"⁷⁵⁰ postmodernists instead decry the opposite danger. Suspicious of all power, they warn against any desire for an authoritative determination of whose stories are most accurate, most important, most deserving of official recognition and collective approval. A flexible, sophisticated liberalism can absorb the insights and exhortations of both camps.

After all, liberal political theory has always been suspicious of state power, and so shares the postmodernist distrust of any attempt to employ the law to impose a comprehensive national story, one within which every citizen must find personal meaning and his conception of the good. But liberalism need not entirely dismiss the communitarian concern with social solidarity as if it were merely a conservative ploy for suppressing the discordant voices of the powerless—the postmodernist view.⁷⁵¹ There is a sort of solidarity, based on and arising from civility in the expression of disagreements, that is wholly consistent with the liberal ideal, I have suggested.

When called upon to write national history, liberal courts should not aspire to the anachronistic ideal of a single national story with a single metaphysical "meaning," within which the lives of all groups and individuals find their proper place. Liberal courts thus need not construe their accounts of collective catastrophe as part of some seamless web of national narrative with which no reasonable person may differ. The postmodernist accusation that they fail in this endeavor is misdirected, since the courts have never aspired to accomplish anything so pretentious.

Criminal law must eventually tell only one version of the story, and that version will become authoritative, but only for the criminal

⁷⁴⁸ *Ratificó Scilingo Sus Denuncias*, CLARÍN (Buenos Aires), Int'l Ed., Mar. 7-13, 1995, at 8 (translation by author).

⁷⁴⁹ *See id.*

⁷⁵⁰ Nora, *supra* note 290, at 16.

⁷⁵¹ *See* JENNIFER LEHMANN, *DECONSTRUCTING DURKHEIM* (1993).

law's limited purposes. The serious question is what those purposes are, or ought to be, in cases of administrative massacre, given the somewhat idiosyncratic nature of their contours. Is the criminal law a good device, for instance, in constructing collective memory at such times, if not necessarily in accomplishing its more traditional objectives?

To be sure, the judicial and prosecutorial authors of the story told by criminal law today will often aspire to the larger ambition of influencing collective memory as well. But in so doing, they will be compelled to compete with a multitude of storytellers, offering conflicting accounts about the same events. In this regard, Schudson notes what should perhaps be self-evident, but which each generation must apparently learn anew and today requires vigorous rearticulation:

In liberal societies, multiple versions of the past can safely coexist. An all-powerful monolithic version of the past will not triumph in a pluralistic society where conflicting views have a good chance of emerging, finding an audience, and surviving. This is not to say that dominant views do not exist, simply that—again, in a liberal society—they are never invulnerable.⁷⁵²

Consistent with this view, it is important that the judiciary of Argentina, for instance, be able to invoke liberal principles in both holding the juntas accountable for their crimes and also in refuting the larger story they told its citizens for many years about the dirty war and its moral defensibility.

As the postmodernists rightly suggest (for reasons of their own), we are not always sure that we *want* the courts to attempt authoritatively to establish common understanding of a fratricidal history, be it our own or those of other societies. But this is not because courts cannot, in principle, do so in a manner consistent with liberalism. It is only because the commitment to liberal morality is actually so weak in many quarters. To the extent that many societies retain any strong collective conscience at all, it is not a liberal one: it is not based upon mutual respect for the moral autonomy of all persons.

Hence we may rightly doubt whether the ritual powers of courts, in societies like contemporary Argentina (or Eastern Europe) are adequate to the task of evoking liberal values in parties with radically discrepant, and often profoundly illiberal (ethnic, racist, or theological) conceptions of "the good" and of national identity.

⁷⁵² SCHUDSON, *supra* note 236, at 208.

Still, large-scale administrative massacre is not the sort of event in regard to which we feel comfortable about letting a hundred interpretive flowers bloom.⁷⁵³ There is nothing "fascistic," Lyotard and the postmodernists notwithstanding, in *striving* for some measure of consensus here, even if the law is unlikely to attain it on its own.⁷⁵⁴

There is something about large-scale administrative massacre that brings out the residual positivist—sometimes deeply "repressed," as within postmodernist intellectuals⁷⁵⁵—in virtually everyone.⁷⁵⁶ Before there is any debate about who is morally or legally responsible for what, or about which lessons must be learned to prevent the catastrophe's recurrence, people want to know "the facts." The banners they proclaim through the streets might just as well carry the motto of the nineteenth-century German historian, Leopold von Ranke: to discover the past "as it really was"—a view today treated as only the object of ridicule by professional historians. Vocally and vigorously, however, a newly mobilized citizenry begins to demand the facts as soon as they are permitted to do so, that is, as soon as the regime that perpetrated the massacre cedes power to those allowing more open public discussion of the past. Hence, "[t]he first indispensable reparation demanded by society after fundamental institutions had been restored," reports the Argentine National Commission

⁷⁵³ "[I]n the face of these events," Friedlander notes, "we feel the need of some stable narration; a boundless field of possible discourses raises the issue of limits with particular stringency." Saul Friedlander, *Introduction* to *PROBING THE LIMITS OF REPRESENTATION*, *supra* note 282, at 1, 5.

⁷⁵⁴ See JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* 56-57 (Georges Van Den Abbeele trans., 1988); LYOTARD, *supra* note 145, at 18-40. For commentary on Lyotard's characterization in this regard, see Friedlander, *supra* note 753, at 5 ("The striving for totality and consensus is, in Lyotard's view, the very basis of the fascist enterprise.").

⁷⁵⁵ See, e.g., McGill, *supra* note 497, at 29 (defending the "forensic" or legal approach to historiography, as "a scientific project aimed at getting at justified truth concerning the past," as "more honorable, in its austerity" than various alternatives). McGill is the author of several sympathetic works on postmodernism. See ALLAN MCGILL, *PROPHETS OF EXTREMITY* (1985).

⁷⁵⁶ By "positivist" in this context I refer not to legal positivism but to positivistic philosophy of science, specifically to its notion that knowledge derives from empirical evidence and experience rather than exclusively from *a priori* categories. It holds, in short, that there exist facts independent of the observer who claims to discern them and of the cultural categories through which they are described. Its slogan is captured in the title of a recent Honduran government report, *THE FACTS SPEAK FOR THEMSELVES: PRELIMINARY REPORT ON DISAPPEARANCES OF THE NATIONAL COMMISSIONER FOR THE PROTECTION OF HUMAN RIGHTS IN HONDURAS* (1994).

on the Disappeared, "was to ascertain the truth of what had happened, to 'face up' to the immediate past and let the country judge."⁷⁵⁷

Our most sophisticated theorists today, of course, would counsel such benighted people that the facts are ultimately unimportant, because they can always be plausibly interpreted in competing and inarbitrable ways. Such counsel derives from the idea, most influentially espoused by Lenin, that historical "facts" are utterly insignificant until situated within a proper historical *understanding*, that is, within a coherent *theory* of history, that is, Marxism.⁷⁵⁸ Particularly striking in this regard is Lyotard's observation that those who deny that the Holocaust occurred cannot be disproven because they shrewdly shift the terms of debate from the empirical level to an epistemological or methodological plane, where the question becomes the nonfactual one of whether anyone who has not himself been gassed can provide dispositive evidence on what transpired within these rooms.⁷⁵⁹ Such arguments—both by the "revisionists" themselves and by postmodernists deploying these points to their own ends—would surely strike most citizens in societies victimized by administrative massacre as too clever by half, if not simply obscene.

⁷⁵⁷ NUNCA MÁS, *supra* note 16, at 428. Similar statements frequently appear during most democratic transitions. In Romania, for instance, the president of the Association of Former Political Prisoners, currently an opposition senator, writes: "The trial of communism . . . pursues restoration of the historic truth, the recuperation of the memory of our past, of the sense of social justice' . . . 'All we want is the truth.'" Edwin Rekosh, *Romania: A Persistent Culture of Impunity*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 372, at 129, 139-40, 142 (quoting Constantin Ticu Dumitrescu). The mandate of the Chilean Truth Commission was "to 'contribute to the overall clarification of the truth about the worst violations carried out in recent years.'" Mera, *supra* note 372, at 172 (quoting the official mandate of the Commission on Truth and Reconciliation); see also SERVICIO PAZ Y JUSTICIA, URUGUAY NUNCA MÁS: HUMAN RIGHTS VIOLATIONS, 1972-1985 (Elizabeth Hampsten trans., 1989), reprinted in *Nunca Más Report on Human Rights Violations*, 2 TRANSITIONAL JUSTICE, *supra* note 621, at 420 ("The facts do not only speak, they call out in the midst of an intolerable silence, that is being imposed on the immediate past. Silence has become a cornerstone—placed in the past by the dictatorship and in the present by those who believe that it can assure a peaceful future. But the facts, the victims, are there; they speak or call out to us. There is no future in pretending to be deaf to what they are saying.").

⁷⁵⁸ See V.I. LENIN, MATERIALISM AND EMPIRIO-CRITICISM: CRITICAL COMMENTS ON A REACTIONARY PHILOSOPHY (1927).

⁷⁵⁹ See LYOTARD, *supra* note 145, at 27-31.

Recovery of Memory As a Social Movement

In Argentina, El Salvador, and the former Soviet Empire, much of the population rises up in support of the view that there is a bedrock of basic facts—about who did what to how many, when, and in what fashion—that must be authoritatively established, to provide the foundation for any legitimate public discussion of these events. It is not enough that the facts be generally known; they must also be publicly acknowledged, in Thomas Nagel's distinction.⁷⁶⁰ When crucial facts are concealed, even for many, many years, each new revelation—often the discovery that a high-ranking perpetrator or collaborator remains in a prominent position—prompts yet another public scandal, and a new round of general debate about whether the country has fully confronted its inner demons, mastered its past.

During democratic transitions, people view the facts—in all their unmediated pretheoretical innocence—as the surest antidote to the flatulent rhetoric, glittering slogans, and radiant abstractions of the authoritarian rulers, recently displaced.⁷⁶¹ A salient feature of the reformist program is a demand that is unabashedly positivist: “getting the numbers right.” Hence the recent demand by leaders of an Argentine human rights group: “What we want is the military lists, detailing who kidnapped which person, at what date and for what reason, where that person was taken, where he was killed and where he is buried.”⁷⁶² Appelfeld states the aim in more lofty terms: “to rescue the suffering from huge numbers, from dreadful anonymity, and to restore the person's given name and family name, to give the tortured person back his human form, which was snatched away from him.”⁷⁶³

⁷⁶⁰ Nagel defines this acknowledgment process as “what happens and can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene.” LAWRENCE WESCHLER, *A MIRACLE, A UNIVERSE: SETTLING ACCOUNTS WITH TORTURERS* 4 (1990).

⁷⁶¹ See MILLER, *supra* note 64, at 287 (“Abstraction is memory's most ardent enemy. It kills because it encourages distance, and often indifference. We must remind ourselves that the Holocaust was not six million. It was one, plus one, plus one . . .”). Many recent truth commissions thus emphasize their mandate to identify the fate of individual victims. On the Chilean commission's mandate in this regard, see Mera, *supra* note 372, at 172.

⁷⁶² Sims, *supra* note 436, at A1 (describing litigation resulting in a federal court order requiring the Argentine government to release any records left by the former military regime that would help identify people who were killed or who had disappeared).

⁷⁶³ APPELFELD, *supra* note 490, at 39. He adds: “Man as a number is one of the horrors of dehumanization,” and by using “the language of statistics” we are following

Public acknowledgment of facts concerning rights abuse is also intensely valued at such times in redress for suppression of speech. "For some, ten years or more had gone by in silence and pent-up anger," reports a member of the United Nations Truth Commission for El Salvador, of the testimony heard from citizens there.⁷⁶⁴ "Finally, someone listened to them, and there would be a record of what they had endured."⁷⁶⁵ Such official records give voice to the silent. That is precisely what the most distinguished theorists of postmodernism *reject* about them. For such records (and the official efforts to produce them) implicitly "privilege" voice over silence; they insist on trying to "represent" the unrepresentable: the silence of the true victims, the murdered dead.⁷⁶⁶

This social movement for factual recovery, which often adopts "correction of collective memory" as an explicit part of its program, has almost invariably appeared, in one form or another, in the aftermath of administrative massacre: in Russia, the former Soviet Bloc societies, El Salvador, Argentina, Chile, Guatemala, and elsewhere.⁷⁶⁷ The state's sympathetic response to this popular upsurge of demand for the facts can take many forms, from official "truth commissions," parliamentary inquiries, town meetings, textbook revisions, and criminal trials to sponsored scholarly inquiry

"the murderers' own well-proven means." *Id.* at 28.

⁷⁶⁴ Buergethal, *supra* note 372, at 539.

⁷⁶⁵ *Id.*

⁷⁶⁶ See READINGS, *supra* note 146, at 60-62 (discussing Lyotard's and Derrida's views in this regard). There is an uncomfortable affinity here between the postmodernist claim that the living cannot speak adequately for the dead and that of the Holocaust deniers, to the effect that only those who were gassed can speak adequately about Nazi use of the gas chambers. In fact, many of the dead speak eloquently for themselves, through their surreptitious diaries of resistance and resignation, maintained even in recognition of their imminent fate. See Sara Horowitz, *Voices from the Killing Grounds*, in HOLOCAUST REMEMBRANCE, *supra* note 38, at 42, 42-58 (describing the secret production and preservation of the *Lodz Ghetto Chronicle* and the *Oneg Shabbes* records of the Warsaw ghetto).

⁷⁶⁷ For discussion of such demands in these societies, see ROSENBERG, *supra* note 160, on Czechoslovakia, Poland, and Germany; BOSWORTH, *supra* note 289, at 159-60, on the current interest of Russians in scholarship concerning the number of those killed by Stalin; Burke, *supra* note 54, at 25, on memory movements in Poland and Russia, and the importance of secret Soviet Supreme Court archives to their investigations; Priscilla Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 611-34 (1994), on recent truth commissions in Africa; Popkin & Roht-Arriaza, *supra* note 674, at 79, on truth commissions in El Salvador, Chile, and Guatemala; Kathleen E. Smith, *Destalinization in the Former Soviet Union*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 372, at 113, 124-25, on mock trials against the Communist Party held in Russian schools, universities, and other public fora, charging officials with "crimes against humanity."

into newly opened government archives. Within the human rights community, there is a thoughtful international debate taking place concerning the relative merits and demerits of these various options.⁷⁶⁸

Although criminal courts are by no means the worst forum in which to conduct such inquiries, they have not been preferred or privileged. This is entirely appropriate, on account of many of the problems discussed in this and preceding sections. Moreover, judicial fact-finding often operates by way of evidentiary presumptions (sometimes irrebuttable), legal fictions, and deliberately "tilted" allocations of the evidentiary burden, devices ill-suited for putting the interpretive contestants on a "level playing field." The resulting perception—among defendants and their many sympathizers, especially—that "the game is rigged" is uncondusive to discursive deliberation, however defensible such doctrinal devices may be for the limited purpose of ascribing criminal liability.

A second feature of popular sentiment and opinion at such times, equally embarrassing to postmodernism, is the widespread insistence that the facts, once established, be officially recognized as such and recounted *by the state*. In short, the state must tell an "official story," encompassing the entire pertinent period, about the extent and allocations of responsibility. To constitute a story, rather than merely a chronicle or annals, the official account must include a complex series of causal assertions about how the conflagration developed. It must embed these within a normative framework governing the inclusion and exclusion of particular facts and the connections between them.⁷⁶⁹ As Hayden White puts it, "narrativity is a mode of description which transforms events into historical facts by demonstrating their ability to function as elements of completed stories."⁷⁷⁰

To be truly a story, in short, the state's official account must judge and explain. It must have a "moral," even if the moral

⁷⁶⁸ See, e.g., Naomi Roht-Arriaza, *Conclusion: Combating Impunity*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 372, at 281, 281-92 (preferring trials over truth commissions, because the former permit victims publicly to confront their oppressors); Aryeh Neier, *What Should Be Done About the Guilty?*, N.Y. REV. BOOKS, Feb. 1, 1990, at 32, 34 (defending truth commissions over criminal trials).

⁷⁶⁹ On how these features distinguish historiography from a mere chronicle or annals, see MORTON WHITE, FOUNDATIONS OF HISTORICAL KNOWLEDGE 222-25 (1966).

⁷⁷⁰ Hayden White, *The Narrativization of Real Events*, in ON NARRATIVE, *supra* note 366, at 249, 251.

does not (as it often cannot) extend to a demand for criminal prosecution of the responsible parties. The state must express remorse and repentance for the acts of its agents, done in its name. It must tell a story that delegitimizes the prior regime, the claims made by its leaders and by its contemporary apologists on their behalf. It must affirm as well-warranted the victims' feelings of resentment and indignation, for this affirmation is the only way for society at large to show that it acknowledges and takes seriously their condition as victims.⁷⁷¹ "What contributes to reestablishing their self-respect," as Nino observed, "is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators' acts are officially condemned."⁷⁷²

The very idea of involving the state in imposing such a single, moralistic metanarrative is, of course, deeply offensive to postmodernist sensibilities, which insist that the postmodern condition is defined precisely by the repudiation of all such grand narratives—including that of the liberal Enlightenment, with its story about the triumph of truth and freedom over superstition, ideology, and intolerance.⁷⁷³ The discourse of moral judgment and legal condemnation, in this view, is merely one of several conceptual grids that can plausibly be laid upon the facts. It offers simply one among several possible "language games" that skilled rhetoricians can play with such facts.⁷⁷⁴ When we tire of one, exhausting its creative or merely disruptive potential, we will switch to another.

Significantly, however, in the aftermath of administrative massacre, the victims and their families (as well as the substantial portion of society sympathetic to them) characteristically want just such a moral-legal story, stamped with the state's imprimatur—and

⁷⁷¹ See Nino Conference, *supra* note 47 (remarks of Martín Farrell).

⁷⁷² NINO, *supra* note 30. Nino rightly adds that this justification for punishment is nonretributive, since any suffering inflicted upon the perpetrators is not designed to "neutralize" that experience by the victims, *see id.*, a notion that Nino found unconvincing.

⁷⁷³ See, e.g., BERKHOFFER, *supra* note 285, at 220 ("The good postmodernist prefers fragmenting, differentiating, specifying, particularizing, deconstituting practices to deconstruct the spurious unities and reveal the contradictions of social and textual practices."); LYOTARD, *supra* note 216, at xxiv, 30, 39, 72-73 (contending that in the West narrative knowledge has served to legitimate new authorities); WHITE, *supra* note 23, at 14, 20-25 (arguing that narrativizing always aims at moralizing).

⁷⁷⁴ See JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, *JUST GAMING* 49-61, 93-105 (Wlad Godzich trans., 1985).

brook no other. The victims seek, in short, a new myth of national refounding, a grand metanarrative of liberal redemption, recounting an epic of collective destruction and rebirth—by an authoritative affirmation of their resentment and indignation and a corresponding effort to ostracize the perpetrators.

Telford Taylor, in his opening statement in the Nuremberg prosecution of Nazi physicians, ably expressed this public yearning for an authoritative declaration of both facts and their “moral,” a yearning that is especially acute where the normal instruments of criminal sanction appear inadequate, their purposes mocked.

The mere punishment of the defendants, or even of thousands of others equally guilty, can never redress the terrible injuries which the Nazis visited on these unfortunate peoples. For them it is far more important that these incredible events be established by clear and public proof, so that no one can ever doubt that they were fact and not fable; and that this Court . . . as the voice of humanity, stamp these acts, and the ideas which engendered them, as barbarous and criminal.⁷⁷⁵

It is not necessary or sufficient, in other words, that everyone feel emboldened to tell his personal story, to seek private catharsis in unburdening himself of his horror by sharing his memories with whoever will listen. There is also a powerful and pervasive desire at such times, to which the new democracies often rightly respond, that such private accounts be woven together into a larger narrative about the period as a whole, and etched into collective memory.

The Argentine Commission on the Disappeared thus incorporates in its final report the tales of dozens of particular victims, by way of lengthy quotations from their personal testimony to the Commission.⁷⁷⁶ This noble effort to do justice both to the private, “subjective” dimension of the victims’ suffering, however statistically unrepresentative, and to the larger institutional apparatus of repression responsible for such suffering is perhaps the greatest strength of *Nunca Más*, its textual aid to liberal memory and solidarity.⁷⁷⁷

⁷⁷⁵ 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 27 (1946) (opening statement in *United States v. Brandt*).

⁷⁷⁶ See *NUNCA MÁS*, *supra* note 16, at 12-75.

⁷⁷⁷ Marcus’s critique of this document, see Marcus, *supra* note 739, at 204-08, shows no awareness of its considerable attention to the “phenomenological” experience of individual victims, the “local narratives” that postmodernists universally applaud. In fact, Marcus’s critique—offered as a sympathetic response to Taylor’s critique, see Taylor, *supra* note 308, at 192—evinces no sign whatsoever of his having

Still, this very effort creates another dramaturgical dilemma: the stories most likely to stay in public memory (and so to be selected by prosecutors and commission members) will be the most extreme. The most extreme stories are necessarily idiosyncratic. Their unrepresentativeness thus evokes criticism—entirely plausible, albeit primarily from the defendants and their sympathizers—that collective memory has been willfully distorted, historically unbalanced by the state's efforts to influence it. But this is just to say that there is a place, in orchestrating the prosecutorial script, for prudent use of understatement, a conventional rhetorical device with which all competent litigators (like other good storytellers) are intimately familiar.

Again, courts of law are not necessarily the best forum for this sort of official narrative, albeit not altogether useless. Korean former comfort women are beginning to learn, for instance, that although the law may accord them rights to monetary compensation, there is no legal right to an official apology—in international law, Japanese law, or anywhere else. There is no legal right, one might say, to authoritative correction of collective memory. Official truth commissions, such as the recent Chilean one, may *choose* to offer a formal apology on the government's behalf for the acts of its agents,⁷⁷⁸ but apology is not the remedy that the law—civil or criminal—affords for the wrongs suffered.

While the law reviews are already full of creative arguments for overcoming legal obstacles to damage claims by the comfort women,⁷⁷⁹ journalists who interview such plaintiffs in depth report that what they most passionately desire is simply an official recognition by the Japanese state of the facts concerning what it did to them, and an apology for having done so. "I am not interested

read the report itself, which has long been available in English.

Perelli makes an antithetical objection, that "the collective dimension of repression tend[s] to be lost in this bleak recitation of individual pain and despair. There [is] no place in this narrative for the common people," who have not been tortured or detained, but who have been victimized nonetheless by the regime's "culture of fear." Perelli, *supra* note 29, at 50. Such conflicting indictments and exhortations simply suggest that these authors are criticizing the legal system for failing to solve problems beyond its ken, and that they are thus making unreasonable demands upon it. Liberal theory owes them an account of why these demands are unreasonable, an account consistent with its own defense of a role for liberal courts in constructing collective memory of such events.

⁷⁷⁸ See Mera, *supra* note 372, at 172 (discussing the formal apology issued by Chilean President Aylwn on behalf of the government for acts of its agents).

⁷⁷⁹ See *supra* note 510.

in money," one such woman insists, "because no emotion can be bought with money."⁷⁸⁰ Some of these women even regard the idea of money as offensive, as do family members of the disappeared in Argentina, on the grounds that it treats the wrong as merely civil, rather than criminal in nature. (Serious crime, after all, has always been thought to offend against public values and interests that make it incommensurable, hence partially uncompensable, in monetary terms.)

These women seek compensation from the Japanese government primarily as a definitive acknowledgement of state responsibility. Hence their continuing opposition to the government's recent compromise: a *private* foundation to help compensate surviving members of this group, involving no official participation beyond encouragement of private donations.⁷⁸¹ What the victims want is an authoritative narrative, an "official story," as the remedy for the wrongs they have endured.⁷⁸²

A criminal trial, particularly, is not well-designed for establishing society-wide consensus over the interpretation of tremendously controversial events. Klaus Barbie's defense counsel, Jacques Vergès, was surely correct when he observed:

A trial is an event. It provokes, it creates drama, a spectacle desired by others, and it is up to us to create the image to our own

⁷⁸⁰ Peter McGill, *War Crime Victims Unite to Shame Japan*, INDEPENDENT (London), Jan. 28, 1995, at 6 (quoting Mrs. Son Shindo, age 73), available in LEXIS, News Library, Curnws File. The organization of Korean former comfort women, as well as other sympathetic rights organizations, rejected a government proposal for a privately funded trust, since this proposal did not involve any official recognition of responsibility and was thus unresponsive to their "demand[] that the historical record be set straight." Scott, *supra* note 489, at 50; see also Naomi Roht-Arriaza, *Punishment, Redress, and Pardon: Theoretical and Psychological Approaches*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, *supra* note 372, at 13, 21 (noting the greater importance of such "symbolic redress" than monetary compensation to many victims of administrative brutality).

⁷⁸¹ See *South Korean Group Seeks Compensation for Comfort Women*, ASIAN POL. NEWS, Apr. 10, 1995, available in LEXIS, News Library, Curnws File. The private foundation has been titled the "Asia Peace and Friendship Fund for Women," a name that in no way suggests any wrongdoing on the part of the Japanese government. See *id.* In fact, a government spokesman expressly described the fund's purpose, at its creation, as "an expression of sympathy." Many comfort women and their legal advocates understandably felt that such statements, and the policy they sought to justify, merely added further offense to injury. See *id.*

⁷⁸² To this end, the litigation, in conjunction with diplomatic pressures, has been useful in eliciting from the Japanese government several tentative steps toward an official apology, including a personal apology from the Prime Minister while visiting South Korea.

liking. And by creating the image, I mean not manipulation but giving significance to the facts in our possession⁷⁸³

Such a debate could prove quite salubrious for a society at these times, breaking silence at last on central questions of national morals. The lessons that Vergès sought to teach were certain to be contested: that Barbie's acts paled in comparison to subsequent atrocities of purely French doing, wrongs that warrant a more central place in the country's collective memory.⁷⁸⁴

Shared memory is unlikely to result from treating the defendant as a coequal participant in shaping the terms of debate. But such debate can itself contribute to social solidarity—to discursive variety—precisely by way of the civil engagements it engenders.

The Barbie trial had been initiated at the strenuous and persistent prompting of Nazi hunters Serge and Beate Klarsfeld, who viewed it chiefly as an opportunity to demonstrate publicly (and sear into France's collective memory) the extent of the nation's voluntary cooperation in the extermination of French Jewry.⁷⁸⁵ Yet under the clever promptings of Vergès, the French were ultimately asked to accept responsibility for *all* of their major twentieth-century massacres, as in resisting independence movements in Algeria and other former colonies. The *special* evil of the Holocaust, and hence the special evil of French collaboration in it, was thus to be effectively neutralized.⁷⁸⁶ And it had been that evil which, in the view of Klarsfeld and many Jews, justified both the creation of a Jewish state and the moral imperative of strong French support for its survival.⁷⁸⁷ By the end of the trial, however, defense counsel had managed to turn the narrative tables to a considerable extent, in the judgment of certain observers,⁷⁸⁸ irrespective of the strictly legal result—the defendant's conviction.

⁷⁸³ JACQUES VERGÈS & ÉTIENNE BLOCH, *LA FACE CACHÉE DU PROCÈS BARBIE* 32-33 (1983) (translation by author).

⁷⁸⁴ On Vergès's legal and political strategy in this regard, see FINKIELKRAUT, *supra* note 151, at xxix-xxx; ERNA PARIS, *UNHEALED WOUNDS: FRANCE AND THE KLAUS BARBIE AFFAIR* 146 (1985); Binder, *supra* note 267, at 1355-72.

⁷⁸⁵ See SERGE KLARSFELD, *VICHY-AUSCHWITZ* 8 (1983); PARIS, *supra* note 784, at 110-29.

⁷⁸⁶ See FINKIELKRAUT, *supra* note 151, at 34-44, 52-53; see also *id.* at 34 (arguing that Vergès's narrative framing strove to depict "Hitler's racism as [a] symptom[] of Western racism and imperialism").

⁷⁸⁷ For this point and for general guidance on postwar French politics, I thank Professors Rosemarie Scullion and Sarah Farmer.

⁷⁸⁸ See FINKIELKRAUT, *supra* note 151, at 44, 66.

A criminal trial—unless it really is a Stalinist show trial—differs crucially from a theatrical production in that there is no single stage “director.” A serious danger that the courtroom narrative might suddenly take an unexpected direction at the defendant’s persuasive urging, a direction unfavorable (even deeply embarrassing) to the prosecution, would surely shake the firm Durkheimian foundations of the entire endeavor, by preventing the trial from serving its proper, orderly, preordained, consensus-affirming functions.

But the possibility that the defendant’s proffered counter-narrative might actually prove at least partly persuasive, at least briefly convincing, is unthreatening to the discursive account of law’s service to solidarity.⁷⁸⁹ In fact, it is precisely the genuine uncertainty of result that gives a *liberal* show trial both its normative legitimacy and the dramatic intensity so conspicuously absent where conviction on all charges is a foregone conclusion. This feature of legal storytelling is also consistent with the postmodernist point that stories can always turn out differently than they do, that their ending is always uncertain and contestable.

The defendant’s efforts to project his own interpretation of disputed events ensure that such proceedings are as likely to stir national controversy as to still it. The interpretation favored by Barbie and Vergès, after all, could appeal to the considerable self-interest of many elder Frenchmen, including President Mitterand himself,⁷⁹⁰ in suppressing any close examination of their wartime activities. Insofar as Vergès successfully redirected its narrative focus, Barbie’s trial was not likely to foster much “mechanical solidarity,” the social integration enhanced by punishment of one whose conduct is universally despised.⁷⁹¹ After these trials, “[o]ur collective memory is a battlefield, a place of combat,” observes philosopher Bernard-Henri Lévy.⁷⁹² But that is not so sorry a fate—and surely an improvement over forty years of coerced silence—provided that the ensuing verbal combat adheres to the discursive equivalent of the law of war.

⁷⁸⁹ On discursive solidarity, see *supra* text accompanying notes 99-144.

⁷⁹⁰ Mitterand worked as a civil servant for the Vichy regime for 18 months. Until the early 1980s, he maintained a close friendship with René Bousquet, a former Vichy police official responsible for organizing the Jewish deportation. Bousquet was ultimately charged with crimes against humanity. A recent book establishes the President’s close wartime affinities with the far-right. See PIERRE PÉAN, *UNE JEUNESSE FRANÇAISE* 315-22 (1994).

⁷⁹¹ See DURKHEIM, *supra* note 55, at 70-71.

⁷⁹² MILLER, *supra* note 64, at 147.

Loose talk about the need for national storytelling may tend to conjure up the denizens of some homogeneous enclave—gathered around the tribal fire—responding together on cue, in laughter and tears. In modern societies, telling stories that resonate identically in all quarters is much more problematic. When citizens gather at all to this end, they are likely to disagree about how the story goes. Someone is certain to be accused of having “missed the point.” This recalcitrant reality is inevitably reflected as well in *legal* storytelling, the narrative of the courtroom—even when all agree that the tale is a tragedy, that recounts a national failure of the first order.⁷⁹³ It is wrong to expect the law to provide the nation with narrative coherence at such times, if “coherence” is understood to entail stilling argument over “the moral” of the story.

Judicial efforts to tell a persuasive national story, one that resonates in the personal experience of all who lived through the period, cannot assume that the audience constitutes a traditional *gemeinschaft*.⁷⁹⁴ Even so, judicial efforts at national storytelling are not inevitably condemned to failure, for neither is modern Western society a *gesellschaft*—an agglomeration of lost souls, doomed to find their personal experience of the period utterly unintelligible and incommunicable to their fellows.

The least we might fairly expect from courts, at such trying times, is a stimulus to democratic dialogue between those who wish us to remember very different things. A courtroom may not be the optimal place for such a dialogue to occur, still less to be resolved. But a courtroom is one place where it might fruitfully begin. If its

⁷⁹³ One author observes that this is perhaps the single point of agreement in the national stock-taking following the dirty war: that Argentina is a “has-been” nation and that what requires explanation is why its early democratic and economic promise, prior to 1930, was not later realized. See Perelli, *supra* note 572, at 415.

⁷⁹⁴ For communitarian arguments explicitly linking the possibility of meaningful collective memory to the survival of premodern social structures, and specifically to Ferdinand Tönnies’ social theory, see TERDIMAN, *supra* note 52, at 44 (noting that “*gemeinschaft* is the paradise of memory”). See also EDWARD CASEY, REMEMBERING: A PHENOMENOLOGICAL STUDY 7 (1987) (arguing that it “is regrettable that reminiscing as a social practice has faded from style. . . . In a more leisurely age . . . [it] was a frequent feature of family gatherings and other social settings”); WOLIN, *supra* note 484, at 32-33 (describing modern Western democracies as forming “an anti-mnemonic society” that, unlike “mnemonic societies,” displays no deference to custom or tradition). Such communitarian lamentations about the loss of memory through social change resemble those of 12th-century monks, who decried the spread of writing for seeming “to kill living eloquence and trust and substitute for them a mummified semblance [of memory] in the form of a piece of parchment.” CLANCHY, *supra* note 54, at 296-97.

initiation is impeded by the jurisprudence of formalism, then we should doubt the value of this professional orientation at such times.

The real question, then, is whether modern courts can, by widening the acceptable scope of legal discourse, effectively influence collective memory of administrative massacre by telling liberal stories about it. Whether any of the six skepticisms I have identified in this Article prove to be insurmountable obstacles to the law's deliberate influence on collective memory thus depends, in part, on how we conceive the law itself and the proper social function of courts.

In the contemporary world, then, collective memory must inevitably be fabricated in the face of public awareness about its constructed character. This fact is far more easily accommodated by the discursive than by the Durkheimian account of law's contribution to social solidarity. The former stresses the inevitability and salubriousness of the collective soul-searching that often follows a society's experience of administrative massacre. It also highlights the courtroom's utility as a forum for vigorous debate about the meaning of such events and their implications for the redefinition of national identity.

Public memory can be constructed publicly if the law advances social solidarity by ventilating and addressing disagreement, rather than concealing it—by acknowledging and confronting interpretive controversy, not suppressing it. Durkheim's account, in contrast, inevitably views any profound disagreement about how criminal law ought to be applied in such circumstances as reflecting, and perhaps contributing to, a lack of social solidarity.⁷⁹⁵ When the courtroom becomes a forum for expression of deep disagreement about the meaning of the society's fundamental values, the criminal law necessarily fails to provide the solidarity that is its primary social function, on this account.

In sum, if we wish to use prosecutions for administrative massacre to help enhance the solidarity so essential in the aftermath of such events, trials should be orchestrated in light of more adequate understanding of social solidarity itself, that is, of its

⁷⁹⁵ See W. Paul Vogt, *Durkheim's Sociology of Law: Morality and the Cult of the Individual*, in EMILE DURKHEIM, *supra* note 68, at 91 (Durkheim "claimed that except in pathological circumstances 'all ordinary consciences' agree on what is right and wrong, on the gravity of particular wrongs, and therefore on what ought to be a crime and what its punishment should be.").

proper place within a liberal society. In this respect, contemporary theorists of deliberative democracy offer greater guidance than Durkheim's sociology of criminal law.

Dramatic Genres for Legal Narrative

Certain literary genres prove better than others in choosing particular facts—among all chronicled ones—and arranging them into a national narrative that can effectively foster discursive solidarity and liberal memory. I have suggested in passing that the stories that litigants seek to tell in prosecutions of administrative massacre tend to correspond at least roughly with the genres of the “morality play” and “tragedy.” Prosecutors put forth the former; defense counsel, the latter. The courtroom drama hence tends to become, to great extent, a conflict about which such genre best fits and justifies the facts of recent history. Which genre provides the most suitable framework for historical interpretation and public understanding of these horrors? Neither of these genres, however, is particularly congenial for fostering the sort of civil dissensus that enhances social solidarity of the discursive variety.

Both genres, when well-executed, are too successful in achieving resolution and closure before the curtain falls, in tying up loose ends, in leaving no moral “remainder.”⁷⁹⁶ It is this remainder, however, that provides the impulse for continued discussion and public deliberation after the end of the proceeding. The genre best suited to cultivating discursive solidarity in the aftermath of administrative massacre is therefore the “theater of ideas,” I shall suggest.⁷⁹⁷ The task for the court is to prevent the other genres and their professional advocates, however persuasive in strictly doctrinal terms, from altogether overwhelming the judicial role in shaping liberal memory, a role best served by recourse to this third dramatic form.

Every literary genre has particular conventions for representing the world. “The function of genre conventions,” writes Jonathan Culler, “is essentially to establish a contract between writer and reader so as to make certain relevant expectations operative and

⁷⁹⁶ I employ here the terminology of Bernard Williams. See WILLIAMS, *supra* note 353, at 177-79.

⁷⁹⁷ Although it has many predecessors, this genre largely originates in the dramas of Henrik Ibsen, George Bernard Shaw, and Bertolt Brecht. Its current leading representative is Tony Kushner, who has employed its conventions in virtually all of his plays.

thus to permit both compliance with and deviation from accepted modes of intelligibility."⁷⁹⁸ Hence, "[t]he use of a given dramatic form is in some sense a proposal to elicit a given kind of response."⁷⁹⁹ This response involves a measure of sympathy for certain characters and antipathy toward others—or ambivalence toward them all.

The purpose of genre-choice in the present context is little different from "real" theater. This is because of how social life, particularly in the courtroom, involves no small measure of role-playing and thus is not entirely discontinuous with theatrical performance.⁸⁰⁰ This connection implies, for instance, that "when we describe real-life events as tragic, we emphasize . . . [how] the event in life seems organized in the manner of the tragic form in drama."⁸⁰¹ In our attempts at understanding the world, "we structure real experiences in the same way that tragedy organizes them in drama."⁸⁰²

In the morality plays of the early Elizabethan period, the characters functioned allegorically, representing the various virtues and vices.⁸⁰³ These dramas were "intended to convey a lesson for the better conduct of life," in the words of one interpreter.⁸⁰⁴ They were "to serve a ritual social purpose," notes another, "to demonstrate and therefore to verify Christian doctrine."⁸⁰⁵ The simplifications of character, plot, and worldview that they involved were considered necessary for rendering learned theological themes accessible to a largely illiterate audience.⁸⁰⁶

⁷⁹⁸ JONATHAN CULLER, *STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE* 147 (1975).

⁷⁹⁹ ELDER OLSON, *TRAGEDY AND THE THEORY OF DRAMA* 168 (Wayne State Univ. Press 1966) (1961).

⁸⁰⁰ See GOFFMAN, *supra* note 687, at xi; Eco, *supra* note 159, at 113.

⁸⁰¹ RICHARD H. PALMER, *TRAGEDY AND TRAGIC THEORY: AN ANALYTICAL GUIDE* 9 (1992).

⁸⁰² *Id.*

⁸⁰³ See ROBERT POTTER, *THE ENGLISH MORALITY PLAY: ORIGINS, HISTORY AND INFLUENCE OF A DRAMATIC TRADITION* 105-55 (1975); JAMES A. REYNOLDS, *REPENTANCE AND RETRIBUTION IN EARLY ENGLISH DRAMA* at v (1982) (noting that "[t]he major characters, through both speech and action, correspond to specific agents of good and evil in the morality tradition").

⁸⁰⁴ 2 J. PAYNE COLLIER, *THE HISTORY OF ENGLISH DRAMATIC POETRY TO THE TIME OF SHAKESPEARE* 259 (AMS Press 1970) (1831); see also CLIFFORD DAVIDSON, *VISUALIZING THE MORAL LIFE: MEDIEVAL ICONOGRAPHY AND THE MACRO MORALITY PLAYS* 4-13 (1989) (reiterating and exploring Collier's conclusion).

⁸⁰⁵ POTTER, *supra* note 803, at 16. "In each case we have a . . . tangible substantiation of higher principles. In each case the Truth comes true. In each case we have a drama . . . with a positive and reinforcing conclusion." *Id.*

⁸⁰⁶ On the central aim of popularizing Christian moral teachings, see DAVID N.

Morality plays were not mere sermons or theological arguments. They were "concerned more amply with moving the emotions, not merely with impressing on the mind clear and distinct ideas."⁸⁰⁷ It was this feature that enabled them "to elicit pleasure and/or to purge passions," to "exert[] an ideological action on the spectators, reinforcing their common faith."⁸⁰⁸ This reinforcing of common faith provides the link to Durkheim's view of criminal prosecution. After all, prosecution was to serve as a public ritual for awakening and consolidating the collective conscience, the content of which increasingly consisted, he believed, of our "common faith" in ideas of respect for individuals and their rights.⁸⁰⁹

Today, however, the weakness of the morality play as a genre for social drama and mnemonic didactics is relatively clear. It lies in the polarity of the conclusion: the unequivocal triumph of the unflinchingly good over the unregenerately evil. One will be tempted to respond, of course, that in cases of large-scale administrative massacre this proves almost entirely accurate as a rough characterization, at least, of the central *personae*—the mass murderers and the murdered—and of their predominant features.

But when complicity in such crimes is widespread throughout a society, because of diffuse support or connivance enjoyed by the immediate perpetrators, the simple bipolarity of the morality play is inadequate. Specifically, its genre conventions offer poor guidance for a society in need of a deeper and more far-reaching process of self-reckoning. That need has surely been present in all of the situations examined here, and is sometimes even widely acknowledged.

Like modern melodrama, the morality play displays a psychological structure that is "monopathic," in the words of one scholar.⁸¹⁰ Since it is based "on the victor-victim polarity, there is no counterfeeling to offset the dominant emotion: the approval of victory easily expands into the delights of self-congratulation."⁸¹¹ This pattern has been especially conspicuous in the Argentine reaction

BEAUREGARD, VIRTUE'S OWN FEATURE: SHAKESPEARE AND THE VIRTUE ETHICS TRADITION 28-29 (1995); DAVID M. BEVINGTON, FROM MANKIND TO MARLOWE: GROWTH OF STRUCTURE IN THE POPULAR DRAMA OF TUDOR ENGLAND 48-67 (1962).

⁸⁰⁷ BEAUREGARD, *supra* note 806, at 29.

⁸⁰⁸ ALTER, *supra* note 700, at 39.

⁸⁰⁹ See *supra* text accompanying notes 70-72.

⁸¹⁰ See ROBERT B. HEILMAN, TRAGEDY AND MELODRAMA: VERSIONS OF EXPERIENCE 87 (1968).

⁸¹¹ *Id.*

to the junta prosecution and in Japanese response to the Tokyo Trial, as we have seen. In morality plays, as in the melodramas of mass culture, "victory is not tempered with the rigors of cost accounting, nor defeat with the reckoning of spiritual growth."⁸¹²

In the wake of administrative massacre, the very success of the prosecution in eliciting and purging the punitive passions via the genre conventions of the morality play thus constitutes at once its deepest failure, that is, its failure as a vehicle for generating discursive solidarity between current accusers and former sympathizers of the accused. This failure is especially problematic where the crimes of the accused recently received pervasive sympathy from the accusers themselves or, more precisely, from a substantial segment of the public whom the prosecutorial accusers represent.

Where the prosecution aims to change the audience's beliefs and memories, rather than to confirm existing ones, other genres are more promising as dramatic vehicles for legal narration of recent events. Tragedy immediately recommends itself in this regard. This is not so much because such events are clearly "tragic" in the lay sense of involving terrible suffering and misfortune. Rather, a tragic framing of events suggests itself because of the complexity that this dramatic genre admits in the distribution of wrongdoing and blame.

The story becomes, instead, one about how good and evil people are to be found on both sides of the conflict, and about how good people on each such side were made to suffer by evil people on the other. This story will tend to implicate the accusers (and those for whom they speak), depriving them of "clean hands" and weakening confidence (even self-confidence, at times) in their moral standing to accuse and to judge.

This effect of tragic drama upon its audience has been noted and decried at least since Rousseau. He contended (as a recent commentator observes) that in tragedy

the passions are made more attractive, while virtue becomes the preserve of special kinds of beings. . . . Men are softened . . . ; they hear vice, adorned with the charms of poetry, defended in the mouths of villains; they become accustomed to thinking of the most terrible crimes and to pity those who commit them⁸¹³

⁸¹² *Id.*

⁸¹³ Allan Bloom, *Introduction* to JEAN-JACQUES ROUSSEAU, *POLITICS AND THE ARTS: LETTER TO M. D'ALEMBERT ON THE THEATRE* at xi, xxv (Allan Bloom trans., 1960).

This softening effect follows directly from an essential feature of tragedy as a literary genre. A drama scholar thus writes:

While the stresses of melodrama can unite an audience against a common enemy and a common evil, those of tragedy can be more painful because they are difficult or impossible to resolve. You can throw rotten eggs at the villain of melodrama, a gesture impossible in tragedy, whose villain hides inside your own head.⁸¹⁴

This effect was exactly that sought by Vergès, for instance, in pointing the accusatory finger at France itself, and its postwar foreign policy in particular: to hide inside the head of the national audience, disrupting the tranquility of its desired *dénouement*.⁸¹⁵ In seeking to soften up the judgmental passions of an audience, the idiom of *tu quoque* offers a congenial device and has hence been prominent in defense narratives—not only at Nuremberg and Tokyo, but also in the more recent trials (Buenos Aires, Paris, and Lyon) examined here.

The question then proves to be whether it is possible to render the historical narrative more complex in this fashion—as the intended basis for collective memory—without thereby also undermining the *legal* result. After all, only the defendants can be convicted and imprisoned, not “society” at large. A tragic framing of their clients’ conduct and circumstances appeals to defense counsel precisely because of how it weakens the plausibility and persuasiveness of such a conclusion to the legal story. The moral complexity of the tale is brought to the fore—and deployed to maximal theatrical effect—in hopes of enervating the audience’s initial moral passions, which are often (as in the trials of Barbie and the Argentine juntas) intensely punitive.

Classical tragedy displays a second drawback, for present purposes. It ends with the restoration of the cosmic order that has been disrupted by the characters and events.⁸¹⁶ This tranquility serves to “transcend the carnage” with which such plays commonly end. But this purified state of peacefulness, offered only by grace of the gods, has been widely and understandably thought to render such endings unpersuasive to modern audiences—even irrelevant to

⁸¹⁴ J.L. STYAN, *DRAMA, STAGE AND AUDIENCE* 72 (1975).

⁸¹⁵ See *supra* text accompanying notes 782-88.

⁸¹⁶ See PALMER, *supra* note 801, at 150 (noting that “[t]ragic theorists persistently advance the idea of a cosmic order upset by the character’s actions but restored at the play’s end”).

the modern condition, a condition said to be "characterized by fragmentation rather than by the ever-uniting synthesis."⁸¹⁷ A dramatic form that "assert[s] . . . the ultimate unity of the moral order"⁸¹⁸ is surely not well-calculated to stimulate continuing discussion at the end of the play or proceeding; it is thus poorly suited to foster discursive solidarity among parties to such a much-needed discussion.

Rendering the national narrative as tragedy thus overcomes the weakness of emplotting it as melodramatic morality play. But it does so only by introducing serious, perhaps insurmountable obstacles to justifying severe punishment for a limited few. A tragic emplotment is likely to fail, in any event, because its genre conventions require a concession of wrongdoing and an expression of remorse by the central character—the defendant. Such concessions have been almost entirely absent in prosecutions of administrative massacre. The exception of Albert Speer, in this respect, only serves to reveal the extreme rarity of such a response.⁸¹⁹ In short, the defendant himself generally proves unwilling to assume the mantle of tragic hero, insofar as this requires disclosing a "tragic flaw."

The closest that most defendants will come to satisfying this genre convention is to allege that their acts were determined by fate, by bad luck—a common theme in classical tragedy.⁸²⁰ Hence the recurrent claim of Eichmann and even higher-ranking Nazi officials, for instance, that they were mere "cogs" in an organizational machine, one that would have produced identical effects without them. If their absence would have made no difference, then their

⁸¹⁷ MURRAY KRIEGER, *THE TRAGIC VISION: VARIATIONS ON A THEME IN LITERARY INTERPRETATION* 6 (1960). An influential argument for this view is espoused in Georg Lukács, *The Sociology of Modern Drama*, TUL. DRAMA REV., Summer 1965, at 146 (Lee Baxandall trans.).

⁸¹⁸ KRIEGER, *supra* note 817, at 6. "The cathartic principle itself, in maintaining that pity and fear are not merely to be aroused but to be purged, is evidence of the need in tragedy to have dissonance exploded, leaving only the serenity of harmony behind." *Id.* at 3; see also ROBERT BRUSTEIN, *THE THEATRE OF REVOLT: AN APPROACH TO THE MODERN DRAMA* 4 (1964) (observing that in the traditional "theatre of communion," including the works of Sophocles and Shakespeare, "traditional myths were enacted before an audience of believers against the background of a shifting but still coherent universe").

⁸¹⁹ See GITTA SERENY, *ALBERT SPEER: HIS BATTLE WITH TRUTH* (1995).

⁸²⁰ See DWIGHT FURROW, *AGAINST THEORY: CONTINENTAL AND ANALYTIC CHALLENGES IN MORAL PHILOSOPHY* 68 (1995).

presence must be viewed as merely a matter of moral luck, they imply.

In the interests of discursive engagement between the parties (and their respective followers), the court must resist the narrative framings offered by the antagonists, passing judgment only on their legal arguments. Whatever legal conclusion is ultimately reached on the merits, the story enacted within the public drama of the courtroom (and thus infused in collective memory) should be one that serves the needs of what I have called discursive solidarity. To this end, the most suitable dramatic genre is surely the "theater of ideas."⁸²¹ Its leading theorists spoke explicitly of the "theater as tribunal."⁸²² The affinities this suggests make it defensible to consider, at least, the merits of the tribunal as theater.

The drama of ideas involves, writes George Bernard Shaw, "the introduction of the discussion and its development until it so overspreads and interpenetrates the action that it finally assimilates it, making play and discussion practically identical."⁸²³ The effect is that

the drama arises through a conflict of unsettled ideals rather than through vulgar attachments, rapacities, generosities, resentments, ambitions, misunderstandings, oddities and so forth as to which no moral question is raised. The conflict is not between clear right and wrong: the villain is as conscientious as the hero, if not more so: in fact, the question which makes the play interesting (when it *is* interesting) is which is the villain and which the hero.⁸²⁴

In fact, notes a scholar, "the dramatist may feel so ambivalent about both sides . . . that he refuses to permit either to score a clear victory."⁸²⁵ Such principled irresolution should not be confused with mere indecisiveness. Tragedy and melodrama, whatever their differences, resemble each other in this crucial respect: questions about "which is the victor and which the vanquished . . . are pre-

⁸²¹ For studies on major exemplars of this tradition, see *IDEAS IN THE DRAMA: SELECTED PAPERS FROM THE ENGLISH INSTITUTE* (John Gassner ed., 1964).

⁸²² TIMOTHY J. WILES, *THE THEATER EVENT: MODERN THEORIES OF PERFORMANCE* 75 (1980) (quoting Erwin Piscator).

⁸²³ [GEORGE] BERNARD SHAW, *The Quintessence of Ibsenism*, in *MAJOR CRITICAL ESSAYS* 1, 146 (1932).

⁸²⁴ *Id.* at 139.

⁸²⁵ Vivian Mercier, *From Myth to Ideas—and Back*, in *IDEAS IN THE DRAMA*, *supra* note 821, at 42, 46.

cisely the questions which a drama of orthodoxy cannot afford to leave in doubt."⁸²⁶

Bertolt Brecht's "alienation effect" can contribute to this process of deliberate disruption, because such "[a]lienation allows both players and audience to deliberate upon the action with full awareness of how events"—including the events on stage—"are manipulated."⁸²⁷ Cross-examination by opposing counsel can be viewed as a theatrical device in the public drama for ensuring that the testimony of a given witness, no matter how initially sympathetic, is subjected to such an alienation effect. Brechtian drama, remarks Roland Barthes, is thus "a theatre that invites, requires explanation, but does not give it; it is a theatre that provokes History, but does not reveal it, that poses the acuity of the problem . . . but does not solve it."⁸²⁸

The drama of ideas does not involve mere intellectual debate between embodied representatives of abstract ideas. Emotions play a key role. These are not the emotions of uncritical sympathy with some characters and unqualified loathing of others (as in the melodrama), but rather "the sense of justice, the urge to freedom, and righteous anger."⁸²⁹ No identifiable hero ("proletarian" or otherwise) is allowed to monopolize these noble sentiments, moreover. The dramatic result is to achieve a great degree of moral complexity without succumbing to the cosmic resolution and resulting tranquility of classical tragedy.

Surely this is the dramatic form most hospitable to the courtroom, especially when the defendants view their conduct as just and honorable and are prepared to defend it publicly as such. By enforcing the adversarial structure of the proceeding and the civility-rules governing it, the court can induce the antagonists to engage each other's historiographical interpretations. If dramatic catharsis and social connection are to result, they must emerge from

⁸²⁶ *Id.*

⁸²⁷ FREDERICK BURWICK, *ILLUSION AND THE DRAMA: CRITICAL THEORY OF THE ENLIGHTENMENT AND ROMANTIC ERA* 6 (1991); see also WILES, *supra* note 822, at 86 (describing "the theatrical reality of Brechtian actors observing and commenting upon the characters they play before a critical audience which judges rather than empathizes").

⁸²⁸ ROLAND BARTHES, *BRECHT, MARX, ET L'HISTOIRE*, *CAHIERS DE LA COMPAGNIE MADELEINE RENAUD/JEAN BARRAULT* 21, 23 (1957); see also WILES, *supra* note 822, at 75 (noting that Brecht "left his plays unresolved so that his audience would seek to solve problems outside the theater, in the world").

⁸²⁹ WILES, *supra* note 822, at 76 (quoting Bertolt Brecht).

this very process of civil dissensus, rather than from any hope of its immediate resolution by the court.

To orchestrate the trial in this way does not require that we regard the architects of genocide as "men of ideas," although they themselves—from Adolf Hitler to Ramon Camps—have often viewed their lives in just this way. It requires only that we provide them with the occasion to demonstrate the moral bankruptcy of their ideas and acts, when publicly subject to critical scrutiny and examination. To the extent that such defendants altogether fail to persuade anyone of their crack-pot historical theories, prosecution of them will easily evoke the righteous indignation of the collective conscience, much as Durkheim hypothesized. To the extent that the defendants succeed in remaining persuasive to significant numbers of fellow citizens, those citizens will at least be drawn into discursive solidarity, through civilized debate, with others whose views they oppose, debates modeled on those initiated and observed in court.

The dilemma thus becomes: how to *authoritatively resolve* the legal question of the defendants' criminal liability, while expressly holding open larger questions about collective memory that the court now admits as legitimately open to debate within the forum it provides. How can judges, by telling liberal stories in their opinions, effectively influence collective memory of administrative massacre, while nonetheless disavowing any professional monopoly over questions of ultimate meaning? In the present Article, I seek only to bring this tension more clearly to the surface of our discussion and to clarify its terms.

III. COLLECTIVE MEMORY IN THE POSTWAR GERMAN ARMY: A CASE STUDY

Consider, in conclusion, a final example of an effort to use the law, with some success, to influence shared memory and group identity in the face of all six obstacles discussed above. It is useful, in evaluating the preceding argument, to observe the interaction between these obstacles in a single case. It is also fruitful to observe how the argument applies beyond the collective memory of an entire society to that of particular institutions within it.⁸³⁰

⁸³⁰ For a discussion of how formal organizations, certain professions, and particularly the judiciary develop institutional memory in ways partially independent of memory formation in society at large, see HALBWACHS, *supra* note 217, at 160-65.

I hypothesize that any large institution employing law to influence the collective memory of its members will confront the six problems examined above. In most societies, the army is considered an institution with which its members must strongly identify in order to elicit from them the supreme sacrifices sometimes expected in its service. Thus, army leadership virtually everywhere employs periodic rituals, commemorating the country's military successes, to invigorate the collective memory of its soldiers, with a conscious view to inspiring them to comparable future feats.

To elicit courage, combat cohesion, and self-sacrifice from their soldiers, armies—in a word—need heroes and the memory of their accomplishments. How, then, was the West German armed forces, newly reconstituted after the Second World War, to meet these universally acknowledged requirements? Could a coherent narrative of institutional identity, consistent with liberal principles, be fashioned under such circumstances? The postwar civilian leadership set out to try.⁸³¹ The problem, in short, was:

The disasters of German history compelled the leaders of the West German armed forces to examine the past, a demand that worked against the formation of a tradition free of problems. Other countries in the twentieth century seemed quite willing to select the best from their pasts and ignore their failures, or to idealize their defeats into victories. . . . [But] any attempt by the Bundeswehr to interpret its history in perhaps a less harsh light would be interpreted by its critics as an act of restoration.⁸³²

This problem established the terms of debate. Was there anything worth remembering, besides the mistakes of the past? Could those mistakes themselves become the exclusive basis of the army's institutional identity? At one extreme were the "re-educators," such as Adenauer's Defense Minister Baudissin, who wanted to decree "an official image of history,"⁸³³ establishing a new ideal of the "citizen in uniform" and denying the existence of

⁸³¹ The ensuing discussion draws from DONALD ABENHEIM, *REFORGING THE IRON CROSS: THE SEARCH FOR TRADITION IN THE WEST GERMAN ARMED FORCES* (1988). For further discussion of the subject, see JAMES DIEHL, *THE THANKS OF THE FATHERLAND: GERMAN VETERANS AFTER THE SECOND WORLD WAR* (1993).

⁸³² ABENHEIM, *supra* note 831, at 198.

⁸³³ *Id.*

any distinctively military virtues, exemplified and enshrined in Germany's military past.

This legal decree was to celebrate as heroes the officers in the July 20th plot against Hitler and the earlier Prussian tradition of military reformers, who had sought to preserve some professional independence from political manipulation by civilian leadership.⁸³⁴ The "traditions decree," as it came to be known, was to refrain from honoring even ordinary soldiers, innocent of atrocities, who obediently and unquestioningly served the Nazi state in its aggressive wars.⁸³⁵ The decree would prohibit relations (via veterans' associations) between retired Wehrmacht officers and active duty officers in the new Bundeswehr.⁸³⁶ It would even prohibit the flags, standards, and traditional pageantry employed during (but also long before) the Third Reich.⁸³⁷

At the other extreme were the conservatives, who viewed the army's institutional continuity, reinforced by enduring insignia and intergenerational relations between retired and active-duty officers, as necessary for organizational solidarity.⁸³⁸ They doubted the possibility of "decreeing" collective memory by executive order, given the inevitable autonomy of custom and tradition from legal mandate. They questioned the suitability of the July 20th conspirators as models of military morality, in all but the most exceptional circumstances. They resisted ostracizing either Wehrmacht officers or enlisted personnel who had served honorably at the front, been innocent of atrocities and ignorant of the extensive criminality occurring elsewhere, and so "took another path of obedience out of honest conviction."⁸³⁹

From the late 1950s until the mid-1980s, an extensive debate ensued between the advocates of these two views, both within civilian leadership (of the Christian Democratic and Social Democratic Parties) and between these civilians and the officer corps.⁸⁴⁰ Several drafts of the traditions decree were widely discussed and

⁸³⁴ See *id.* at 200.

⁸³⁵ See *id.* at 211.

⁸³⁶ See *id.* at 213.

⁸³⁷ See *id.* at 211.

⁸³⁸ See *id.* at 213.

⁸³⁹ *Id.* at 190 (quoting Major Schütz).

⁸⁴⁰ See *id.* at 256-82.

two versions ultimately issued, in 1965 and 1982.⁸⁴¹ How were the six problems confronted and addressed?

First, although only the highest ranking Wehrmacht officers were to be prosecuted or purged,⁸⁴² the question inevitably arose of whether to stigmatize in other less stringent ways officers, noncommissioned officers, and enlisted personnel who were to remain in service and assume even greater rank under the Federal Republic's newly formed Bundeswehr. Would these soldiers be wronged, in any serious sense, if denied public recognition—in the traditions decree and the ceremonies it would sanction—of their dutiful service and considerable sacrifice for their country? After all, as Abenheim observes: “[D]espite the political failings and crimes of the military leadership, the soldiers of the Wehrmacht had fought well against terrible odds. They had mastered their operational craft on the battlefield and in the staff room, and, until the very end, the Wehrmacht retained its cohesion.”⁸⁴³

Many leaders thought it unfair to deny the loyal service and sacrifices of these individuals any place in collective memory and associational life of the army. The 1965 decree sought a compromise: to condemn the Wehrmacht, as an institution, and its leadership for the role it played in the Nazi state, in traditional war crimes, and in the “new” international crime of waging aggressive war, but to exonerate and even praise the courage of the less-aware rank and file, including intermediate-level officers.⁸⁴⁴

The 1982 decree abandoned this compromise.⁸⁴⁵ Historical research in the preceding years made it impossible to sustain any such distinction between the criminality of the very top leaders and the innocence of middle and lower ranking officers, now discovered to have been deeply involved in the slaughter of the Jews.⁸⁴⁶ The eventual retirement in the 1970s of officers who had served in the

⁸⁴¹ See *id.* at 282. Until this point, I have largely equated the law's likely response to administrative massacre with criminal prosecution. The legal procedure involved in the German traditions debate, however, involved an executive order, with discussion focusing on what its content should be. The significance of this difference for the law's relative success or failure in influencing collective memory cannot be examined here.

⁸⁴² See *id.* at 39.

⁸⁴³ *Id.* at 293.

⁸⁴⁴ See *id.* at 208-12, 279-81.

⁸⁴⁵ See *id.* at 271-81.

⁸⁴⁶ See, e.g., *id.* at 275-76 (discussing the research of Manfred Messerschmidt, Chief Historian of the Military Historical Research Office in Freiburg).

Wehrmacht and SS facilitated this revision of the decree.⁸⁴⁷ Solidarity within the army, and a salubrious relation between it and civilian society, now seemed to permit, if not require, a more unequivocal condemnation of wartime wrongdoing by German soldiers, without fear of unfairness to those whose reputations and family names would thereby be besmirched.

Second, concerns about distorting the historical record continuously infused German debate over the traditions decree. Historians, serving actively as consultants throughout, were charged with finding in German military history "individuals and deeds worthy of emulation" for preservation in the army's collective memory.⁸⁴⁸ Some historians balked at this agenda, asserting that "it was against the essence of historical scholarship," which must allow for changing interpretations over time, "to 'decree' an image of history."⁸⁴⁹ Certain drafts were similarly condemned as "too long for a decree and too short as a history."⁸⁵⁰ In search of military heroes, the 1965 decree turned to early Prussian reformers and the July 20th conspirators.⁸⁵¹

But later research revealed that the Prussian reformers never accepted the postwar soldierly ideals of "freedom in obedience" and moral autonomy from superior orders. Historians now claimed that "[t]here had never been . . . [any] good soldierly traditions of political thought and responsibility in the German armed forces."⁸⁵² Moreover, as historians began to uncover the coparticipation of Wehrmacht units with SS killing squads, and as these discoveries began to enter into wider political discussion, the initial decree's distinction between "the guilt of certain individuals and groups and the enduring integrity of the institution appeared ever less credible."⁸⁵³ Historical learning, first harnessed to provide evidentiary support for the original decree, thus came to undermine its legitimacy and proved to be its ultimate undoing. Rather than

⁸⁴⁷ See *id.* at 229.

⁸⁴⁸ *Id.* at 265.

⁸⁴⁹ *Id.* at 205; see also *id.* at 197 ("Historical thinking rightly defends itself against falsifying history for a specific political purpose." (quoting historian Gerhard Ritter)); *id.* at 195 ("The person who believes in tradition . . . is . . . conservative. . . . [H]e imposes his ideas and those of his time on the past [But] [h]istory . . . seeks to comprehend problems in their own time, neither as symbols nor as spiritual and moral values. It does not support tradition" (quoting historian Meier-Welcker)).

⁸⁵⁰ *Id.* at 205.

⁸⁵¹ See *id.* at 186.

⁸⁵² *Id.* at 276.

⁸⁵³ *Id.* at 231.

authoritatively shaping collective memory, the law had to catch up with it, and historians' impact upon it.

Third, there was the issue of how broadly to read the lessons of the July 20th conspiracy as a precedent to guide future generations of military leaders. These wartime officers, who had plotted Hitler's death, were still seen by many Germans nearly as traitors.⁸⁵⁴ But young cohorts in the officer corps, especially after 1968, began to display considerable sympathy for the conspirators and to participate actively in the official ceremonies commemorating their acts.⁸⁵⁵ More conservative, elder officers continued to hold that however necessary those acts of rebellion against civilian leadership may have been, the circumstances that justified them were too unique and unsusceptible of repetition to warrant elevating the conspirators, by legal decree, into the archetype of military morality.⁸⁵⁶ Such a move would risk inviting future disobedience by officers to lawful commands from civilian superiors whose ideology officers did not share or whose strategic judgment they did not respect.

These fears were partially confirmed when mutinous French officers invoked the precedent of the July 20th conspirators to justify armed resistance to official French policy favoring Algerian decolonization.⁸⁵⁷ The question became whether the military resistance to Hitler, commemoration of which was to be incorporated into the army's institutional memory by decree, provided a faulty analogy to current predicaments in the postwar world.

Then there was the fourth problem of breaking decisively with the past through acknowledgment of guilt and repentance. Those who perceived a strong need for institutional continuity found this break impossible. The 1965 traditions decree sought to pay obeisance to their concerns: "Tradition is the handing down of the valid heritage of the past. The maintenance of tradition is a part of military education. It opens the way to historical examples, experiences, and symbols; it should enable the soldier better to understand and to fulfill his mission today and tomorrow."⁸⁵⁸ Academics such as Gerhard Ritter remained dissatisfied with this

⁸⁵⁴ See *id.* at 213-16. For a discussion of different forms of German resistance during the Third Reich, see Large, *supra* note 638.

⁸⁵⁵ See ABENHEIM, *supra* note 831, at 192 (observing that the yearly celebration of the *Attentat* proved popular among the younger soldiers).

⁸⁵⁶ See *id.* at 196.

⁸⁵⁷ See *id.* at 193.

⁸⁵⁸ *Id.* at 208 (citation omitted).

concession, however, warning that "overemphasis on the negative aspects of history . . . posed a threat to the political integration of the [former Nazi] soldier in society."⁸⁵⁹ A refusal to honor the past's great achievements would "destroy contemporary self-confidence," they complained.⁸⁶⁰

Yet even the 1965 decree, with all its compromises, stressed that for military memories and traditions properly to endure required their compatibility with universalistic Western principles, embodied in constitutional and international law.⁸⁶¹ One provision thus provided that "the measure for the understanding and maintenance of tradition is the Basic Law [the Constitution] and the tasks and duties which it assigns to the Bundeswehr. The Basic Law is the answer to German history."⁸⁶² Another provision stipulated that "[t]he duties of the soldier—loyalty, bravery, obedience, [and] comradeship . . . achieve their moral standing in our time by being bound to the Basic Law."⁸⁶³ Such legal commitments marked a decisive "break with the past"⁸⁶⁴ in the self-understanding of the German officer corps, as one historian notes. He concludes, with regard to the army's recognition of its war guilt, that its twenty-five years of internal debate over the traditions decree and its revisions "represented an attempt among professional soldiers to address the past in an intelligent and responsible fashion . . . further remarkable because no other major social group in West Germany underwent a similar process of historical self-examination."⁸⁶⁵

Fifth, could German leaders realistically hope to shape the army's collective memory by means of legal decree? Perhaps a high-ranking officer was right to observe, in half-serious self-deprecation, "[o]ne really has to be a German to decree in writing what a tradition must be."⁸⁶⁶ Many participants in the intragovernmental debate protested that the Defense Ministry ought to allow the Bundeswehr to form its own traditions without interference from

⁸⁵⁹ *Id.* at 197.

⁸⁶⁰ *Id.* (quoting Professor Gerhard Ritter).

⁸⁶¹ *See id.* at 281.

⁸⁶² *Id.* (citation omitted).

⁸⁶³ *Id.* (citation omitted). This language reflected the arguments of people like Meier-Welcker, a German historian and participant in the official debate, who contended that "[t]he values of the present must be the sole measure of the spiritual direction of the Bundeswehr; only they could guide the choice of what was worthy of tradition." *Id.* at 196.

⁸⁶⁴ *Id.* at 281.

⁸⁶⁵ *Id.* at 295.

⁸⁶⁶ *Id.* at 185 (quoting General Gerd Schmückle).

above.⁸⁶⁷ From this standpoint, collective memory was (what I have called, following Elster) a necessarily unintended consequence.⁸⁶⁸

But the possibilities and limits of shaping institutional memory by decree itself became an explicit subissue in the debate among the politicians, officers, and historians. One side held that "all artificial attempts to found tradition would inevitably alienate people; instead, one should allow tradition to grow of its own accord."⁸⁶⁹ Others responded that this was a false dichotomy, that "'tradition is neither 'grown' in place nor made artificially. Rather it can and should be guided, awakened, and planted through many sensible deliberations.'"⁸⁷⁰ Despite the doubts of many, two generations of German political leaders—in part through the "traditions debate" itself—proceeded to try.

Sixth, to a considerable extent, the decision regarding how the law ought to shape collective memory, and hence organizational solidarity, was made *publicly*, with full consideration of the views of the very people whose memories were to be influenced. That there was a robust debate, over many years, among all interested parties is perhaps the most striking feature of how the postwar West German military handled the question of collective memory. This discussion primarily took the form of a flurry of interagency memoranda, white papers, and decision memoranda. But it exhaustively explored the strengths and weaknesses of virtually every conceivable answer to the question, and regularly found a forum in the elite press, if only rarely in the mass media.

Despite the view of some that shared memory and tradition must—almost by definition—be noncontroversial, a vigorous controversy nonetheless developed (involving hundreds of high-ranking officers, party leaders, military lawyers, and historians) concerning what the content of the army's institutional memory ought to be and how its memories ought to be symbolized and commemorated.

This experience suggests, in short, that it is possible to use the law to influence collective memory about administrative massacre in the face of all the obstacles examined in this Article.

⁸⁶⁷ See, e.g., *id.* at 269 (referring to the 1979 White Paper in which Defense Minister Hans Apel contended, "[t]radition . . . cannot be planned. It has to grow").

⁸⁶⁸ See *supra* note 605.

⁸⁶⁹ ABENHEIM, *supra* note 831, at 197 (describing the views of Percy E. Schramm).

⁸⁷⁰ *Id.* (quoting Professor Werner Conze).

CONCLUSION

It remains to be seen whether liberal courts can entirely reconcile the conflicts between the traditional, delimited functions of criminal law and the dramaturgical demands of monumental didactics. But from the prior discussion it should be clear, at least, that criminal courts *have* often shaped collective memory of such national tragedies as administrative massacre, and that prosecutors, defense counsel, and executive officials have sought to influence judicial conclusions toward this end, sometimes successfully. Such successes, and the promise they hold out, ensure both that courts will continue to be drawn willy-nilly into the process of memory construction and that we, the audience, will nevertheless be increasingly wary of the resulting potential for their political manipulation, injustice to defendants, distortion of the historical record, and for fostering dangerous delusions of purity and grandeur. If courts have already been thrown into these bracing waters, the principal task for liberal sociology and jurisprudence is to teach them to swim.

In accentuating the negative, in emphasizing the problems inevitably to be confronted, I mean only to emphasize that the courts cannot perform so large a job on their own. In so doing, I wish to suggest how the many nonlawyers engaged in other media of memory-practice might target their own contributions more pointedly toward compensating for the criminal law's particular weaknesses. In addition, the preceding analysis may help sensitize prosecutors and judges involved in cases of administrative massacre to both the perils and promise that such cases present for cultivating liberal memory and solidarity,⁸⁷¹ to exploit the promise and confront the perils more directly than they otherwise would do. I

⁸⁷¹ See, for example, the pending United Nations proceedings against Bosnian Serbs and Rwandan Hutus, as well as the current trial in Ethiopia against 44 former military leaders. All three trials involve indictments for war crimes and crimes against humanity. See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 2, U.N. Doc. S/Res/955 (1994) (establishing an international tribunal for prosecuting violators of international humanitarian law in Rwanda"); S.C. Res. 827, U.N. SCOR, 47th Sess., 3217th mtg., at 2, U.N. Doc. S/Res/827 (1993) (establishing an international tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia"); OFFICE OF THE SPECIAL PROSECUTOR, TRANSITIONAL GOVERNMENT OF ETHIOPIA, THE SPECIAL PROSECUTION PROCESS OF WAR CRIMINALS AND HUMAN RIGHTS VIOLATORS IN ETHIOPIA (1994) (mandating the establishment of an historical record of the abuses of the Mengistu regime and bringing those criminally responsible for human rights violations and/or corruption to justice).

am acutely aware of having raised far more questions than I have answered. My modest hope has been to open up consideration of a question not presently on the agenda of liberal jurisprudence and to recast some existing issues of sociological theory in a new light.

As a tool for the construction of collective memory of administrative massacre, criminal prosecution has both the strengths and weaknesses here identified. It does some things rather well, other things only passably well, and makes an utter hash of still others. Despite frequent, energetic assertions that the problems are "inherent" in the law or liberalism,⁸⁷² that case has nowhere been made, or even seriously argued. When we examine the actual cases, those discussed here, the obstacles we encounter are localized, discrete, historically contingent: this statute of limitations, that definition of the elements of an offense, the other jurisdictional quirk.

From all this we should no more conclude that criminal trials are inevitably insignificant as a font of liberal memory than that they are uniquely potent instruments toward that end. Discussion of such trials by both legal scholars and those in the human sciences, I have suggested, has frequently been characterized by overgeneralization: by exaggerated claims for the pedagogical value of these proceedings no less than by hyperbolic dismissals. The present Article has sought to show the need for greater subtlety and discrimination in our judgments here.⁸⁷³

To cultivate liberal memory in the aftermath of administrative massacre requires that courts treat easy cases as if they were hard ones, because legal concepts and doctrines will often have lost their normal connection to the underlying moral and political issues at stake. This in turn demands that judges allow both prosecutors and defense counsel to paint with a broader brush (as they have demonstrably done, in any event), to widen the spatial and temporal frame of courtroom storytelling in ways that allow litigants to flesh

⁸⁷² See, e.g., Douglas, *supra* note 272, at 7 (attributing Nuremberg's failure as historiography to the doctrine of precedent); Letter from Professor Herbert A. Strauss to Professor Eric Stein, *supra* note 333, at 1027 (pointing out the absurdity of lawyers and judges still applying law handed down from the Nazi period and arguing that this absurdity is "inherent in legal forms of thinking"); Wood, *supra* note 27, at 21 (suggesting, on the basis of the Touvier trial, that "the 'limits of juridical logic' impose necessary restrictions on the historical, educative and commemorative functions of law").

⁸⁷³ Perhaps the modesty of my conclusions in this regard will, at least, temper the overly ambitious reach of my historical and theoretical purview.

out their competing interpretations of recent history, and to argue these before an attentive public.

The result will be to make the prosecution's case, however strong on strictly doctrinal grounds, more vulnerable to refutation by contextualizing historical arguments that courts would normally disregard as legally irrelevant, excluding all evidence proffered in their support. The side whose story has greater "fit" with existing rules would no longer win hands-down on that account, for fit must be weighed against other values, especially those of robust public deliberation and memory-practice.⁸⁷⁴

What will be lost by prosecutors in terms of enhanced vulnerability will be gained, many times over, in the judgment's ultimate persuasiveness as the foundation for collective memory of the disputed events. This will often mean a slower, more circuitous route to judgment, dramaturgically designed as much to raise public understanding about the underlying morality of criminal law as to view these particular defendants in its light.

The response to both the Argentine junta members and the Japanese generals would thus have had to be that: first, even on their utilitarian assumptions about morality, their respective reactions to the leftist guerrilla (mass torture of nonguerrillas and disappearances) and to Western imperialism (Japanese war crimes throughout Asia) were grossly "disproportionate" to the threat in question; and second, the criminal law of a liberal society and international community must, in any event, reject such utilitarian calculations, when they conflict with the most fundamental moral rights of persons—to life, liberty, and physical integrity. These judicial responses would set the terms for the ensuing debate.

A "slam dunk" conviction, summarily condemning the defendants as "radical evil" incarnate,⁸⁷⁵ is certain to shut off the very dialogue that most needs to be initiated among fiercely hostile opposing camps of political partisans, ready to renew their geno-

⁸⁷⁴ My argument here differs from Dworkin's, in which "fit" is devalued against other objectives when legal rules look very bad from a moral point of view. See DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 256-57. In my cases, the applicable legal rules themselves (against murder, for instance) are morally unproblematic. They are nonetheless traded off against other important values—to justify punishment more persuasively to more people, and thus to shape collective memory. Fit will be compromised most clearly regarding legal rules on admissibility of evidence and the customary scope of fact-finding.

⁸⁷⁵ This view of the Argentine junta defendants is reflected, for instance, in the title of Carlos Nino's posthumous book, *RADICAL EVIL ON TRIAL*, *supra* note 30.

cidal efforts (or avenge those of their more successful adversaries) at the first opportunity.

The path that I propose could have made military trials not merely more compelling as public spectacle, but more urgently demanded by the Argentine public, permitting them to go forward without the amnesty and pardons. It could also have done more to educate morally the Argentine populace about the issues dodged during the dirty war. "Pedagogically-motivated taboos"⁸⁷⁶ not only make for poor historiography, as German revisionist historians rightly warn, but in the longer run even, paradoxically, for poor pedagogy. Opening the law at such times to the full range of moral and historical arguments that we use in real life to govern and judge our actions would have better served the ends of legal didactics, social solidarity, and political reform.

Only in this way, by ensuring that all antagonists feel they have received a fair hearing, can the courts hope to impart a measure of professional authority—however limited—to their judgments, weaving their strictly legal conclusions into a plausible and relatively capacious narrative about the country's recent conflagration. To insist on punctilious judicial adherence to any notion of legal formalism at such times is to guarantee the failure of courts to cultivate liberal memory when this objective is vital to successful democratization.

Because courts do not conventionally have authority to resolve issues of collective memory and national mythology, conventionalist accounts of judging would not authorize judges to address them. This stricture would apply even to passages of an opinion that no reader would take for anything but dicta and to testimony that no observer would mistake as anything but "general background."⁸⁷⁷

Judicial conventions should be revised accordingly. By simply applying "the rules laid down," without extended discussion and defense of the principles on which they rest, formalist approaches to judicial process shut off the very discussion that is most needed, when judging the conduct of those who do not share the law's assumptions.⁸⁷⁸ Formalist judging assumes that widespread

⁸⁷⁶ FRIEDLANDER, *supra* note 322, at 66 (summarizing arguments of the revisionists).

⁸⁷⁷ For a discussion of this sort of conventionalism, its close relation to what others call legal positivism, and its limitations as a conception of the judicial role, see DWORKIN, *LAW'S EMPIRE*, *supra* note 98, at 114-50.

⁸⁷⁸ Although discursive democratization is ill-served by formalist judging, that approach has paradoxically produced most laudable results (in judicial resistance to

societal agreement on fundamentals already exists, when agreement at such times is conspicuously absent, and when steps toward its social construction—through reasoned debate and persuasion—are so imperative. As Sanford Levinson observes, many theories of punishment “assume[] . . . the existence of a single community organized around a coherent moral code reflected in its criminal law.”⁸⁷⁹ Because people thus essentially agree about morality, the courtroom need not become a forum for extended debates about its nature and demands. Correspondingly, judges need not examine its ambiguities when applying the legal rules embodying it to what the law regards as easy cases.

But whether any such shared moral code exists and whether it is accurately reflected in the community’s criminal law prove to be highly problematic propositions—by no means to be casually assumed—in the historical circumstances where large-scale administrative massacre occurs. Even when most people largely agree in their moral judgments, this “conventional morality” may often be uncritical, that is, less rationally defensible than the liberal morality formally embodied in the criminal law applicable to the defendants’ conduct.

Such was very much the case in several of the episodes examined here, such as the German and Argentine. Levinson’s observation thus suggests a vital link between legal positivism and consensualist sociology: the latter presupposes a societal agreement on basic morality that is thought to be reflected in rules of positive law, rules that should therefore generally be applied in a straightforward, syllogistic fashion—the hallmark of formalist judging.⁸⁸⁰

wicked law) during periods of authoritarian rule. See Osiel, *supra* note 445, at 493-95, 522-26, 533-45.

⁸⁷⁹ Sanford Levinson, *Responsibility for Crimes of War*, 2 PHIL. & PUB. AFF. 244, 249 n.10 (1973). Levinson is specifically referring to the view of Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 413 (1958).

⁸⁸⁰ The philosophy of legal positivism by no means logically entails the judicial practice of mechanical formalism. See generally H.L.A. HART, *THE CONCEPT OF LAW* 121-50 (1961) (arguing that, due to “open texture,” every legal system contains a large area in which judges and other officials need to exercise discretion). But as a practical matter of judicial self-understanding, the close affinity between legal positivism and formalism is often difficult to disconfirm. See generally Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958) (arguing that a theory of interpretation which focuses on the purposes of rules and statutes would solve the seeming problem of law’s indeterminacy and would enable positivistic philosophy to achieve its ideal of fidelity to law). Even Fred Schauer, a leading positivist, concedes that there is plainly an affinity between legal positivism and rule-based decision-making. See Fred Schauer, *Rules and Rule of Law*, 14 HARV.

This link between legal positivism and consensualist sociology suggests common weaknesses in any effort to employ either perspective for guiding and assessing the law's response to the conflictual periods surrounding administrative massacre. Only nonformalist conceptions of the judicial role, by encouraging litigants to examine the law's underlying moral principles and social policies, allow courts some legitimate latitude to stimulate this broader process of public deliberation, or to initiate it where memory remains repressed. At such times, legal analysis can be confined within narrow, positivistic terms only at the cost of sacrificing all public persuasiveness and societal resonance.

In short, as an approach to judging, legal formalism tacitly relies on the conclusions of Durkheimian sociology. To concede the absence of the moral consensus that Durkheim presupposed is to concede the limitations of any judicial philosophy that rests upon his foundations. In the deeply divided societies where administrative massacre occurs, it is too much to hope (in a Durkheimian spirit) that, through criminal law, judges can easily elicit shared sentiments of liberal morality in ways that all will endorse.

But it is not too much to hope that courts might make full use of the public spotlight trained upon them at such times to stimulate democratic deliberation about the merits and meaning of such principles. In the ensuing debate, with the recent memory of official intolerance and repression firmly in everyone's minds, liberal morality will do very well on its own. That debate can signally contribute to the special sort of solidarity—through civil dissensus—to which a modern pluralistic society may properly aspire.

This conclusion is implicit in the more eloquent statement of Henri Glaeser, the son of one of Touvier's victims, in his remarks to the French jury. "My father was not judged by anyone. He was arrested, thrown five hours later against a wall, and assassinated."⁸⁸¹ The present forum offered a striking contrast, notwithstanding the vigorous controversy within it. "I am happy to find myself in front of a court that is democratic, engaged in an adversarial debate where everyone can speak, anything can be said, even by the accused."⁸⁸²

J.L. & PUB. POL'Y 645, 676 (1991). On the implications of this connection for judicial enforcement of wicked law, see generally Osiel, *supra* note 445.

⁸⁸¹ Laurent Greilsamer, *Le procès de Paul Touvier devant la cour d'assises des Yvelines: 'mon père, lui, un ne l'a pas jugé . . .'*, LE MONDE, Apr. 10, 1994, at 13 (translated in Wexler, *supra* note 27, at 220).

⁸⁸² *Id.*