History and Memory in the Courtroom: Reflections on Perpetrator Trials

That the atrocities of perpetrators should describe legally recognized crimes, and that perpetrators should have to answer for their conduct in courts of criminal law are hardly controversial claims. Granted: one might argue about form, venue, and procedure – about whether, for example, domestic institutions are to be preferred over international tribunals; about whether it is proper to impose capital punishment upon those who grossly violate international humanitarian law; about whether Continental or Anglo-American norms of procedure better develop the aims of the trial; or about whether it is wise or fair to try an individual for crimes committed half a century before. One might even argue about the wisdom of trying perpetrators in light of specific conditions “on the ground” – whether, for example, the interests of transitional democracy or negotiated settlement counsel in favor of reliance on a South African style “Truth and Reconciliation Commission” over a perpetrator trial\(^1\) – still, the deeper logic and normative appeal of trying perpetrators is generally accepted as self-evident.

At its most basic, the perpetrator trial is seen as a fundamental requirement of justice itself. The concept of justice, in turn, might be said to include at the very least: the idea that impunity is a wrong, both in itself – as a violation of the fundamental moral norm that no one should benefit from his or her wrongdoing – and instrumentally, inasmuch as unpunished crimes serve to destabilize the ever-precarious balance of domestic and international power. This latter idea often finds expression in the notion that criminal trials, as impersonal acts of state- or internationally-sanctioned retribution, serve to break the cycles of revenge that often erupt in spasms of mass atrocity. This notion, in turn, is related to the idea of reconciliation – the idea that criminal trials, by providing victims with a venue for expressing their pain, and by conferring public recognition upon the suppressed history of their victimization, serve to reconcile an afflicted people to the sufficiency of legal response to their woes.\(^2\) This idea is closely related to the pedagogic aim of the trial, the idea that perpetrator proceedings can serve as tools of historical instruction. For example, Robert Kempner, a leading war crimes prosecutor, described the Nuremberg trials as “the greatest history seminar ever held.”\(^3\) The Eichmann, Barbie and Papon trials likewise aimed to use the courtroom both to clarify the historical record and to teach history lessons.

Broadly speaking, we can describe these multiple purposes of the high-level perpetrator trial as sharing a common feature: they are all didactic in nature; they push the trial in the direction of serving as a tool of instruction. In a sense, all criminal trials are didactic in two critical ways. First, they strive to demonstrate the truth of the charges brought against the accused. Second, they all seek to demonstrate the legitimacy of the process by which the first goal is pursued. The shibboleth, “justice must be seen to be done,” captures this basic insight. All criminal trials, in this regard, can be seen as normative demonstrations of the efficacy and legitimacy of the rule of law.

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\(^1\) The literature on this subject is large. For a helpful overview, see Ruth Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

\(^2\) Reconciliation is mentioned as a declared purpose of both the International Criminal Tribunal for the Former Yugoslavia, and for the International Criminal Court. To understand how the trial can further the end of reconciliation, it is important, I believe, to distinguish two possible meanings of the concept. First, “to reconcile” has a transitive meaning as captured in the expression, “the neighbors reconciled their differences.” Here the idea is that two feuding or antagonistic parties have learned to put aside their past problems. This, I would argue, is the meaning of the term as it applies to the South African Truth and Reconciliation Commission. But “to reconcile” also has a second, call it intransitive, meaning, as in the phrase, “He became reconciled to his fate.” It is this second, intransitive meaning that is at work in perpetrator trials. In this regard, such trials play a legally insular or even self-legitimating function: they serve to reconcile a people to the adequacy or sufficiency of a legal response to their sufferings.

\(^3\) Quoted in Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York, 1994), 142. Kempner was referring to both the trial of the major war criminals and the subsequent trials of Nazi criminals before American courts.
That said, I want to insist that the "perpetrator trial" defines its own specialized sub-breed of the criminal trial. Here the didactic function or quality of the trial is not an incidental feature of the inevitable process of proving charges or of upholding well-accepted and largely uncontested social norms. Instead, the didactic purpose of the trial lies at the very heart of the proceeding. Given that such trials invariably follow in the wake of episodes of mass atrocity, political upheaval, and horrific social dislocation, courts are invariably thrust in the position both of looking into the larger sweep of history and of making visible the efficacy of the law as a tool of such inquiry. If all trials are meant publicly to project the sober norms of the rule of law, perpetrator trials are burdened with the task of actively re-imposing such norms into spaces in which rule-based legality has been either radically evacuated or perverted. In part because of their explicitly didactic nature, in part because of the circumstances surrounding their staging, high-level perpetrator trials are by their very terms anomalous, unusual legal events, and as such, will invariably invite challenges to their legitimacy. They are, then, trials, which, by their very nature, place law—as a tool of deterrence, reconciliation, pedagogy and justice—on trial. If such a trial were staged in an international court, it may invite the charge of serving the ends of victor’s justice or of having been orchestrated at the behest of a select group of powerful nations (such as NATO), or, alternatively, of being hopelessly removed from the region in which the crimes occurred. If a domestic national court were to conduct the trial, it may be attacked as a partisan tool, insufficiently removed from the crimes it is asked to judge.

Compounding these problems of legitimation is the fact that the multiple purposes of the didactic trial often pull courts in different directions. For example, the clarification of the historical record and the teaching of history lessons are obviously related, though importantly distinct: the former is largely descriptive and explanatory, while the latter is ineluctably normative. The distinction is important inasmuch as collective memory may have little to do with historical accuracy. The bombing of Hiroshima is remembered in the United States as a life-saving act born of military necessity, though the consensus among historians challenges this view. President Bush recently memorialized the victims of United Airlines Flight 93, recalling their heroic act of crashing their hijacked aircraft into a Pennsylvania field in order to save 1600 Pennsylvania Avenue—this notwithstanding the conclusion of the 9-11 Commission that the hijackers crashed the plane after the passengers mutinied. Trials, too, particularly those burdened with the legacy of traumatic history, often succeed at shaping the terms of collective memory precisely by demonstrating—intentionally or not—a relaxed fidelity to the historical record. By this, I do not mean to suggest that falsehoods are inserted into the historical narrative told at trial, though this, of course, may occur. Rather, the point is one of interpretation, nuance, emphasis, sympathetic imagination. Victims become, in the hagiography of the prosecution, exemplars of an unsustainable innocence, while perpetrators come to embody evil of mythic proportions. Over time, trials may find themselves subject to the very forces that they once contributed to. The Nuremberg trial, currently celebrating its sixtieth anniversary, has been hailed in many tributes as a path breaking proceeding about the Holocaust, notwithstanding the fact that the Nazis’ crimes against the Jews of Europe played a largely ancillary role in the trial before the International Military Tribunal.

Or to take another example, the desire to make visible the workings of the rule of law may pull a court in a very different direction from, say, the impulse to teach history and to honor the memory of victims and survivors. The former impulse, I would argue, pushes the Court in the direction of sobriety, while the latter gestures toward spectacle. Writing about the Nuremberg trial, which she attended as a journalist, Rebecca West famously described the proceeding as a "citadel of boredom." The Croatian journalist Slavenka Drakulic recently described the ICTY in similar terms—"painstakingly slow and boring." Yet in a certain respect the very dullness of these proceedings can be seen as an achievement. If one of the purposes of the perpetrator trial is to reintroduce norms of legality into a radically lawless space, the very dryness of the proceeding can be construed as a triumph of legal sobriety over lawless

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chaos. Granted, the Nuremberg trial might have been characterized by a supererogatory dullness. Justice Robert Jackson, the chief Allied prosecutor, considered it essential for the Tribunal to establish an unassailable factual record of Nazi atrocities, and so the prosecution tactically limited the use of "soft evidence" – eyewitness testimony – in favor of "hard evidence": trial by document. By privileging historical document over personal testimony, Jackson aimed to "establish incredible events by credible evidence": these written documents, however, had to be read into the record at trial, slowing the trial terribly. Even Sir Norman Birkett, the British alternate judge on the Tribunal, bemoaned the "shocking waste of time." In other respects, however, the dullness of the Nuremberg trial can be viewed as structural rather than idiosyncratic. Perpetrator trials – involving the adjudication of international crimes – will almost invariably have a multi-lingual complexion. The odd time-lags as faceless interpreters recast questions into another tongue and then retrieve and translate the answers; the stumbling to find proper equivalent terms; the mistimed interventions by judges and lawyers – these qualities cannot be viewed as passing or contingent qualities of perpetrator trials. On the contrary, they must be seen as structural elements of a proceeding characterized by its own peculiar and signature lugubrious tempo.

But if such trials raise novel topics for theoreticians of law – is it possible to speak of a jurisprudence of boredom? – they also refocus attention on the meaning of the spectacle in law. If certain legal actors, principally judges, aspire to sobriety, others, in particular prosecutors, often push proceedings in the direction of drama. The prosecution at the Eichmann trial structured the State's case around survivor testimony in a conscious effort to rectify the missteps of Nuremberg and to inject drama into the proceeding. Thus the decision to rely on the voice and demeanor of the survivor witness was not, in the first instance, born out of an evidentiary strategy – Attorney General Hausner later openly acknowledged that the prosecution could easily have presented its case relying exclusively on written documents – but of a didactic ambition: to capture the imagination and conscience of a domestic Israeli and a world audience. That the trial took place in a municipal theater hastily retrofitted to serve as a courtroom perhaps only underscores the complex ways in which an explicitly didactic logic informed the trial's staging.

These tensions – between the teaching of history and the teaching of history lessons; between the longing for sobriety and the dramatic impulse – have led some to insist that the just didactic trial is something of an oxymoron. Hannah Arendt argued in her famous critique of the Eichmann trial that the "purpose of a trial is to render justice, and nothing else." We must be wary, Arendt insisted, of subjecting the perpetrator trial to so-called "extra-legal" pressures, lest these pressures distort the solemn dictates of justice, and turn the trial into a legal sham, a show-trial in the old Stalinist sense. Clearly this concern is important, yet in my mind it is overstated. No one, I believe, would deny that the core responsibility of a criminal trial is to resolve the question of guilt in a procedurally fair manner. To insist, however, as Arendt does, that the sole purpose of a trial is to render justice, and nothing else, defends a crabbled and unnecessarily restrictive vision of the trial form. Especially in high-profile perpetrator trials – which by their very nature – will attract intense media attention, it is unrealistic to expect and silly to demand that the trial be conducted as an ordinary exercise of the criminal law. The question, then, is not whether the trial should be used for these larger ends, but how to do so responsibly.

This claim leads us to consider the arguments of other scholars, such as Martha Minow, Michael Marrus and Mark Osiel, who have leveled a critique that is the obverse of Arendt's. Here the argument

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is not that didactic trials fail to do justice to the accused. Rather, it is that didactic trials fail to do justice to history. The law, it is argued, fails to lead to a productive engagement with the most disturbing and foundational issues raised by traumatic history, issues more satisfactorily explored through discourses of history, philosophy, literature, theology, or psychoanalysis — or through alternative fora, such as truth commissions. This is a claim I find more pressing, and I am chiefly concerned with it in my own ongoing studies of perpetrator trials. Yet at the same time that I am painfully aware of the limits of law, I also find myself appreciative of the creative labors of the legal imagination to master the problems of representation and judgment posed by episodes of mass atrocity and genocide. Let me briefly consider some of the structural constraints that scholars often say limit the usefulness of the didactic trial as a tool for exploring traumatic history. The first are procedural or evidentiary. Here it is argued that the formal procedures that constrain the production of knowledge in a criminal trial render this instrument a flawed tool for clarifying and comprehending traumatic history. Certainly I would agree that the rules of evidence and trial procedure limit the utility of the trial as a tool of historical representation. And the Nuremberg and Eichmann trials provide important examples of criminal proceedings that were governed by unusual rules of evidence designed to permit the use of hearsay and to embrace a more capacious notion of relevance. These unorthodoxies permitted survivor testimonies to assume a more fluid narrative form, quite different from the fractured, tutored testimony produced at standard adversarial trials. Did such an approach compromise the fairness of these trials? I would say no. These trials protected rights of confrontation of witnesses and other core procedures foundational to a concept of trial fairness. Bars against hearsay and rules controlling relevance, by contrast, can be seen as devices tailored for a jury system, and thus relaxing their application may serve the trial's didactic ends without eroding principles of fairness. In this regard, these trials came to look more like hybrid tribunals, combining elements of Anglo-American and Continental jurisprudence, anticipating some of the procedural arrangements that govern the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC).

This is not to deny that history and law are governed by differing epistemological and evidentiary conventions; still, it is easy to over-exaggerate the differences. After all, history and law remain deeply committed to the notion of reliable proof, even if what counts as reliable proof differs across the disciplines. Many historians, it should be noted, remain indebted to law's power as a fact-finding tool. For example, many of the path-breaking early histories of the Holocaust, most notably Raul Hilberg's magisterial The Destruction of the European Jews, could not have been written without the astonishing documentary archive gathered at Nuremberg. More recently, Daniel Goldhagen's Hitler's Willing Executioners and Christopher Browning's Ordinary Men drew largely on depositions and other documents assembled through the labor of German prosecutors.

A second argument insists that didactic trials distort history inasmuch as a complex and refractory historical record must be encapsulated to fit legal categories. Thus one prominent historian has observed, "the shape of the stories told in trials ... follows the definition of the crimes with which the accused are charged, rather than an impartial assessment of the events themselves." The famous trial of the Auschwitz guards that began in Frankfurt in 1963 provided a particularly vivid, if not egregious, example of this problem, as the atrocities committed by the defendants at Auschwitz had to be pigeonholed into the legal concept of simple "murder", the most serious criminal offense that the guards could be charged with under available German law at the time. (Although the Federal Republic of

also, Donald Bloxham, Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory (Oxford, 2001).
Germany had criminalized genocide in the early fifties, the application of the genocide law to Nazi crimes was held to run afoul of ex post facto prohibitions.)

The law of murder, however, was restrictively defined in German law – limited to killings born of "thirst of blood (Mordlust), satisfaction of...sexual desires, avarice or other base motives in a malicious or brutal manner." Inasmuch as German prosecutors had to prove that individual defendants had been motivated by such special factors as "Mordlust", this requirement had the regrettable consequence of transforming the everyday horrors and killings of Auschwitz into the "normal" against which the particularly malicious or brutal conduct of certain guards or functionaries could be measured. But if the trial of the Auschwitz guards offers a particularly troubling example of law shoe-horning complex history to fit restrictive legal categories, other trials remind us of law's bold attempts to shape concepts of criminal wrongdoing adequate to the task of naming and condemning radical transgressions. In this regard, two critical legal innovations stand out, the concept of genocide and the concept of the crime against humanity. It is not within the scope of the present essay to review the evolution of the idea of genocide and of crimes against humanity; nor do I mean to ignore the serious problems with the idea as it was first adumbrated in the Charter of the International Military Tribunal at Nuremberg. These critical problems notwithstanding, the idea of genocide and the concept of crimes against humanity must be seen as attempts on the part of the law to shape novel concepts adequate to the task of naming and condemning unprecedented atrocities. These concepts have demonstrated their importance not simply as legal terms of art that have made possible the advent of the perpetrator trial; they have also proved their value as terms of cultural meaning. Admittedly, the clash between legal and cultural usages of these terms may make for confusion. For example, the refusal of the United Nations Commission of Inquiry to characterize the atrocities in the Darfur region of Sudan as genocide aroused considerable outrage among many commentators. Part of the problem, however, can be traced to the different registers of meaning of the concept of genocide. The term genocide has entered popular parlance as a powerful vehicle for expressing profound outrage at horrific atrocities. That such atrocities have been perpetrated in Darfur cannot be denied. The UN Commission of Inquiry, however, was concerned with the investigation of crimes, not with the expression of outrage; "genocide", for the Commission, referred to acts that satisfy the definition framed in the Genocide Convention of 1948, acts that could form the basis of international trials. This is not to suggest that the Commission was correct in withholding the designation; the Darfur controversy does, however, remind us of the power of legal terms to filter into popular consciousness. Thus, far from static or insular, we find legal discourse supplying a needed vernacular by which we may name and condemn horrific crimes. It is law that has delivered the terms and concepts that have helped fill the conceptual and representational vacuum left by acts of extreme atrocity.

Moreover, the concepts produced by law must be seen as highly plastic, adaptable, an observation that challenges a third common criticism of the didactic trial. A number of scholars argue that we should eschew justice as pedagogy, inasmuch as the picture of the past that emerges from a didactic trial threatens to become the Official History, fixed, refractory to the movement of historiography. These scholars argue that "while judgments of courts are fixed, ... historiography moves." By way of response, one should first note that the sense of fixedness – the closure of the trial – describes one of

16 For a useful discussion, see Samantha Power "A Problem from Hell": America and the Age of Genocide (New York: Basic Books, 2002).
17 Suffice it to say that genocide was mentioned only fleetingly in the indictment, and then as a kind of war crime; and crimes against humanity was deemed justiciable only if committed by the Nazis in furtherance of their war aims. See Douglas, Memory of Judgment, 38-64.
18 In addition to the important arguments of Marrus, also of interest are Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston, 1998); and Tzvetan Todorov, "Letter from Paris: The Papon Trial". In: Richard Golsan, ed., The Papon Affair: Memory and Justice on Trial (New York, 2000).
the most profound attractions for using the trial as a response to traumatic history. Trials are riveting cultural dramas because stories receive resolution in judgment and narratives find emphatic closure in juridically-sanctioned violence – an advantage that trials arguably hold over truth commissions. The dramatic closure offered by trials thus frames and adds meaning to shared narrative, a process that was clearly at work in the Eichmann trial, where many witnesses testified that they were sustained by the hope that their bleak tale of survival might someday serve as legally probative evidence.

That said, it does not follow that the picture of history presented in any specific trial is fixed by the fact that a trial court must render an unequivocal verdict. On the most obvious level, legal judgment can be set aside by appeal, thus changing our understanding of the past enshrined at trial. On a deeper and more interesting level, legal judgment can be revised through a complex process of renegotiation. Particularly in the case of traumatic or sensational history, it seems the law often only reaches a satisfactory result and understanding through a processing of revisiting or re-trying the contested events. At times, civil trials may offer a more satisfactory treatment and resolution of matters incompletely or badly handled in criminal trials; in the United States, the Bernard Goetz and O.J. Simpson supply examples of this renegotiation of history in a civil proceeding. Indeed, when we speak of the didactic trial, the individual trial, as a discrete legal event, is perhaps the wrong frame of reference. Instead, attention must be paid to ways in which specific trials revisit and revise their juridical precursors, and in so doing, participate in, and contribute to, an evolving juridical understanding of traumatic history. In this regard, we can understand the Eichmann trial as a revision of Nuremberg. By placing the Holocaust at the legal core of the trial, and by satisfying the testimonial need of survivor-witnesses, the Eichmann trial offered a far more comprehensive and, from the perspective of the survivors, more satisfying treatment of the traumatic history presented in incomplete fashion at Nuremberg. The French experience is also instructive, inasmuch as the very definition of crimes against humanity – and the role that the Vichy state played in the perpetration of these crimes – importantly changed from the Barbie trial to the Touvier trial to the Papon trial. Trials before International Criminal Tribunal for the former Yugoslavia, such as the Foca case, have similarly led to a redefinition of the meaning of crimes against humanity, expanding them to now include the crime of rape. And with the expansion of the legal category, comes a broadening of the historical narrative that can be told through the law.

A fourth set of criticisms directed at the didactic trial focuses on what we may describe as the essential subject matter of these trials. Here it is claimed that criminal trials, by necessity, occupy themselves with the specific actions of a discreet defendant or group of defendants. In so doing, trials necessarily exaggerate the roles of individuals in events of greater historical sweep and compass. By focusing on the actions of individuals, the law overlooks and mischaracterizes the larger forces – political, ideological, military, bureaucracy – that inform the dark logic of genocide. Didactic trials thus allegedly create an odd disconnect between the magnitude of the crimes adjudicated and the solitary individual in the dock – a disconnect that can only be overcome by demonizing the defendant. This,

20 This, of course, is not to declaim the superiority of trials over truth commissions as tools for “calling to account”; indeed, it would be foolish to do so. In certain cases, trials may be more appropriate; in other cases, not. Context is all. Nor should we see trials and truth commissions as mutually exclusive alternatives; the two may work in tandem, with one supplementing the work of the other.

21 Perhaps the best example of this in the context of Holocaust trials was the Israeli Supreme Court’s decision to throw out Ivan Demjanjuk’s 1987 conviction. Demjanjuk had been extradited to Israel from the United States, tried by a Jerusalem court, and was sentenced to death for engaging in sadistic practices while serving as a guard at Treblinka; the Supreme Court vacated the conviction once evidence emerged that Demjanjuk had served not at Treblinka, but at Sobibor, a less well known, though equally murderous death camp. At the time, observers lamented the Supreme Court’s decision as an insult to the sacral memory of survivors (who had apparently misidentified Demjanjuk) and as giving succor to Holocaust deniers. See Yoram Sheftel, Show Trial: The Conspiracy to Convict John Demjanjuk as ‘Ivan the Terrible’ trans. Haim Watzman (London, 1994), 342.


Indeed, is a crucial aspect of Arendt’s critique of the Eichmann trial. At worst, then, genocide trials threaten to transform the defendant into something of a scapegoat, creating a false sense of legal closure and historical reckoning, as other perpetrators go unpunished and history remains unexamined, undigested. This is also the gist of Geoffrey Robertson’s criticism of the trial of Dusko Tadic by the ICTY. While acknowledging that Tadic was “a licensed thug, a freelance torturer,” Robertson insists that the defendant, as a low-level perpetrator, “takes on a symbolic capacity, a scapegoat almost, for the community of which he was part. His punishment is less an example of individual responsibility than collective guilt.”

This criticism is hardly trivial, and here I’ll confine myself to two responses. First, it is important to distinguish between the notion of collective guilt which unfairly blames an entire nation or a people for the acts of specific groups, and the notion of collective guilt that rightly recognizes the corporate nature of mass atrocities — that such acts, to be successful, require extensive technical assistance, bureaucratic organization, and logistical support. Indeed, as I have suggested, some have faulted the legal process precisely because they believe it incapable of addressing the corporate dimension of genocide. And yet even this criticism is overstated. Nuremberg, for example, was not simply a trial of twenty-two individuals. Also on trial were a number of Nazi organizations, including the entire Gestapo. Indeed, Robert Jackson, the lead prosecutor for the Allies, melodramatically insisted, “It would be a greater catastrophe to acquit these organizations than it would be to acquit the entire twenty-two individual defendants in the box.”

Second, I think we should be very careful about describing an architect or even a low-level perpetrator of genocide as a scapegoat. A scapegoat is an innocent creature saddled with undeserved guilt. Wrongdoing has been displaced upon the scapegoat. An architect or accomplice or perpetrator is not, however, an innocent creature, and does not become a scapegoat when asked to answer in law for crimes orchestrated by more prominent individuals or facilitated by groups or collectives. Here wrongdoing has not been displaced but condensed in the figure of the perpetrator. It seems odd, then, to criticize perpetrator trials as performing a “symbolic function”. In a way, all criminal trials can be said to play this symbolic function, inasmuch as only a small percentage of those who violate norms of social order ever find themselves in the dock at a criminal trial. It is well accepted that trials of organized crime figures will invariably focus on the conduct of a few. Obviously, the goal is to go after the leaders of a criminal organization. At times, however, circumstances may conspire to force prosecutors to settle for underlings. The compromises may be unfortunate, but they are not unjust. In either case — the trial of the underling or the architect — the trial remains a symbolic act. But symbolic gestures are not to be shunned because they are selective. On the contrary — that is their justification and their potency.

Yet even if one were to acknowledge the limitations of the didactic trial, one must ask what follows. Here I would respond, very little. For it is one thing to agree that the most nuanced renderings of the past issue from the pen of the professional historian, another to conclude, therefore, that didactic trials have no valuable role to play as a tool of instruction in the wake of episodes of mass atrocity. So I will gladly concede that such trials are not well equipped to render history in its complexity; nor are they structured self-consciously to acknowledge the limitations of their representation of the past. In this respect, these trials are a bit like television dramas — though, again, we should recall the limits of this analogy. Television dramas, even those occasional mini-series that seek to do justice to a topic of history, tend to be controlled by the logic of entertainment. By contrast, the peculiar mix of sobriety and spectacle, as I have argued, will always characterize didactic trials. That said, the analogy to TV, however imperfectly drawn, supplies for many commentators a potent justification for eschewing law to teach history — the

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26 And it should be noted that this process of condensation — using the crimes of the perpetrator to tell a story of greater historical sweep — cuts both ways; as the Milosevic trial has made abundantly clear, once history is brought into the courtroom, it does not simply serve at the behest of the prosecution.
last thing we want, is the kind of trivial caricature of the past supplied by network television. Yet here I am reminded of the debates that surrounded the broadcast of the NBC miniseries *Holocaust: the Story of the Family Weiss* on German television some twenty-five years ago. Before the series was aired, numerous historians bemoaned the "hollywoodification" of the Holocaust, the dreadful trivialization of traumatic history into digestible bits of television drama.27 Amid the protests and hand-wringing the series was broadcast, and to the shock of the pundits, it occasioned a critical moment of national collective reckoning, stimulating a new generation of Germans to its own *Vergangenheitsbewältigung* – a wrestling with the meaning of their collective past.

Almost two decades earlier, the Eichmann trial served a similar purpose in Israel. By turning the history of the Nazi campaign of extermination into a legal drama broadcast live on Israeli radio and televised around the world, the trial permitted survivors to transform acts of tragic witnessing enveloped in silence and shame into potent juridical acts. Indeed, the Eichmann trial served in crucial respects to *create* the Holocaust.28 By this I mean the trial importantly served to transform cultural understandings of Nazi genocide. No longer simply a horrific episode of mass killing, the Holocaust emerged from the Eichmann trial as an emblematic act of the twentieth century – an act no longer continuous with the history that proceeded it, but radically disruptive of it.

But if, as I have tried to suggest, the interests of justice conventionally conceived and didactic uses of a trial are not inherently antagonistic, this is not to deny the risks that attend the staging of the high-profile perpetrator trial. The legal theorist Otto Kirchheimer located at the heart of every just criminal trial an element of "irreducible risk" – the possibility that the trial conclude in an acquittal. Absent this aspect of risk, the trial threatens to degenerate into a sham, a legal fraud.29 Obviously prosecutors will try to master this risk, but they may not engage in practices that would predetermine the outcome. Keeping in mind Kirchheimer's insight, I believe it is important to note that as we move from the ordinary criminal trial to the didactic perpetrator trial, the risks multiple. In the case of the perpetrator trial, conventional prosecutorial success - winning a conviction - does not necessarily translate into the didactic success of the proceeding. Here I should add that prosecutorial success does not necessarily require conviction of all defendants on all charges. Nuremberg concluded in the acquittal of three of the twenty-one defendants present, and though the acquittals were controversial at the time, one can say with hindsight that they importantly served to legitimate the IMT – by demonstrating the tribunal's independence and neutrality. Still, a perpetrator trial that unravels entirely – for example, the Israeli prosecution of Ivan "the Terrible" Demjanjuk that originally issued in a conviction that was later tossed out on appeal – will invariably be considered a didactic disaster. A prosecutorial failure cannot help be but seen as a didactic failure as well – unless the didactic goal is solely to make visible the sober logic of procedural justice, which, I have tried to suggest, is usually but one goal among others.

But if prosecutorial success is generally speaking a necessary condition for didactic success, it is not sufficient. A perpetrator trial can succeed in our first sense – end in a conviction – yet fail in the second – as a didactic exercise. This will most often happen, I believe, in cases in which the *defense* puts history on trial. So far I have considered the didactic trial as an affair of the prosecution; the didactic trial of the *defense* is, however, a far more problematic and destabilizing affair. A didactic trial staged by the prosecution must remain ever mindful of the basic need to secure a conviction while respecting the conventional requirements of due process. The didactic trial of the defense is burdened with no such reciprocal obligation. In these cases, we often encounter a defendant less interested in acquittal than in martyrdom, intent upon hijacking history toward this end. In such cases, the defense attorney – or the defendant mounting a *pro se* defense – acts less like a conventional advocate, focusing on the conduct of the accused, than as a radical historical revisionist. Here we think of Jacques Verges and his "trial of
rupture", threatened though only incompletely delivered upon in his defense of Klaus Barbie, and of Slobodan Milosevic, who, alas, has been quite effective in taking history hostage in The Hague. In such cases (and one worries that the future trial of Saddam Hussein might supply another example), the perpetrator trial turns into a revisionist, or even negationist, spectacle, as the disputed terms of history take the legal fore of the proceeding. Courts can, of course, muzzle disruptive defendants, but it is hardly surprising that judges have on the whole proved reluctant to do so in high-profile perpetrator trials. Inasmuch as didactic trials are, as I have argued, anomalous proceedings, we should hardly be surprised to find judges struggling to demonstrate legitimacy by bending over backwards to accommodate even the most tendentious displays by the defense – a phenomenon vividly on display in the Milosevic trial.

The risk of subversion by the defense thus remains a substantial risk of didactic trials. The Eichmann trial remains instructive in this regard, if only as a counter-example. Much as been written about the character of Adolf Eichmann; for some – most notably Raul Hilberg – Eichmann was a zealous and brilliant technocrat of death; for others, such as Arendt, he was a completely replaceable cog, a dreary exemplar of the banality of evil. But whatever our take on the issue, it is clear that Eichmann contrived to make his trial a success. Through his submissive behavior and obedience, Eichmann curiously helped to legitimate the court that sentenced him to death. Gabriel Bach, an assistant prosecutor at the Eichmann trial and later a Justice on the Israeli Supreme Court, recalls as his sharpest and proudest memory of the trial the moment that Eichmann rose to his feet and stood as the judges entered the court for the first time. On one hand, Bach’s sense of pride can be easily understood – here we have the once-powerful SS officer – a key player in the effort to destroy the Jewish people – humbly submitting to the authority of a Jewish court. And yet the defendant’s gesture must be seen as more than an act of submission to superior power; it is also an act that acknowledges the authority of the force arraigned against him – an acknowledgement that Milosevic has tenaciously refused to tender in The Hague. But memorable as Eichmann’s gesture may have been, it was also entirely consistent with his character: the very craven obedience to authority that arguably made him a morally ungrounded perpetrator of genocide also made him into a model defendant.

But if the Israeli court had the good fortune of having an obedient defendant – and by that I do not mean cooperative: Eichmann’s answers routinely mixed bona-fide candor with infuriating obfuscation – it other regards, the trial created its own success. Most crucially, the prosecution and the judges serendipitously struck a balance between the conventional legal interests of justice and the didactic purposes of the trial. As I have mentioned, the Eichmann prosecution sought not simply to win a conviction, but to use the trial as a tool of instruction and commemoration. In its written judgment, however, the court largely ignored the didactic ambitions of the prosecution and focused narrowly on the materiality of the evidence as it applied to the charges brought against the accused. This is as it should be. This dialectic, in which the prosecution presented its case in broadly didactic terms while the court hewed to its juridical function conventionally conceived, permitted the trial to succeed as both an exercise in collective pedagogy and as an instrument of legal justice. Here the balance between spectacle and sobriety was largely, if fortuitously, maintained.

By way of conclusion, I think it is also important for us to bear in mind that the success of the didactic trial can only be measured over broad space and time. Such trials play before multiple audiences: the victims clamoring for justice; the perpetrators, wrapped in their own misplaced sense of aggrievedness and victimization; a legal community both on the ground and abroad; and a larger international community watching with periodic spasms of interest amid long stretches indifference. The multiple and far-flung audiences of the didactic trial raise important concerns about what might be described as the “spatiality” of justice, a matter which has gained increasing salience as legal scholars and actors weigh international tribunals against domestic courts as the most efficacious tools for dealing

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31 Gabriel Bach, in conversation with the author.
with mass atrocity. Here I will confine myself to two observations. Many of the most famous photographs associated with the Eichmann trial, at least at the time of its staging, were not the images of the man in the glass booth. Rather, they were shots of the spectators at the trial reacting to the testimonial drama in the courtroom: expressions of grief, disbelief, anger, horror. If at the Eichmann trial the glass booth made the defendant into a specimen of display and scrutiny, the spectators were organically part of the proceeding. Their gasps, snickers, whispers, and occasional violent outbursts were part of the trial and constituted a crucial point of primary reception for the journalists following the case. Contrast this to the organization of space and spectatorship at the Milosevic trial in The Hague. There it is the court itself that sits in the glass booth, sealed from the gallery of spectators by sheets of glass thick enough to repel rocket propelled grenades. The glass is also soundproof; the only sounds that the spectator can hear are those broadcast over the headsets made available to each observer; the court is likewise sealed from any sounds from the spectators. As a consequence, there is no interaction between the court and the spectators — usually no more than a handful, though on occasion, filling the gallery. For the observer, the feeling is akin to watching an elaborate psychology experiment through one-way glass: the spectator cannot suppress the feeling that he or she is entirely invisible to the Tribunal. The spectator gallery is supplied with TV-monitors that track the proceeding; one finds oneself watching the monitors instead of the courtroom — as powerful a trope as any for the formal removal of the court from the region in which the crimes took place. This element of spatial displacement must, I believe, undercut the didactic value of the trial, particularly in terms of its contemporaneous reception. Still, we must remember that perpetrator trials play before multiple audiences, each of which will perceive the trial differently and will measure its success by different standards. Perhaps more to the point, these perceptions will also transform over the course of years, as the dynamics of space yield to the imponderables of time.

In part this is a consequence of the fact that it is very difficult to predict what aspects of a trial will live on in collective memory. In the United States, the O.J. Simpson murder trial is remembered in an ungrammatical ditty, "If the glove don't fit, you must acquit." The Nuremberg trial remains remembered in the American popular imagination through the vehicle of the famous Hollywood movie, Judgment at Nuremberg, which, in fact, had nothing to do with the trial before the International Military Tribunal. In Israel, the Eichmann trial is powerfully associated with the collapse on the stand of Yehiel Dinur, aka Katzetnik, a sequence captured on film that is ritually rebroadcast on Israeli television on Yom Hashoah, the national day of Holocaust remembrance. These moments of collective memory can all be described as juridically unstable, in that they evade the sober ordering strategies deployed by courts at the time of trial. They remind us that regardless of the power of courts to control difficult proceedings and to submit refractory histories to legal judgment, they are unable to control the way in which the trial will itself become a cultural artifact and an article of collective memory.

But if the workings of time refuse to submit to juridical control, that does not mean that such instabilities are necessarily deleterious. At the time of its staging, the Nuremberg trial aroused utter indifference in the vast majority of Germans. In the fifties, Germans viewed the trial with contempt, as an exercise in victor's justice. (In particular, Germans vilified Nuremberg for treating "aggressive war" as an international crime.) Now, however, the trial is generally viewed in Germany with respect — both as an event that prodded Germans to a collective reckoning with their troubled past, and as a vital contribution to the developing body of international law. And today it is German jurists who have taken the lead in codifying "aggressive war" as a crime to be judged before the fledgling International Criminal Court, the court that the US is shamefully boycotting. And so success must be measured over broad space and time. Just as the didactic trial must struggle to do justice to history, history also takes time to do justice to the trial.

32 For an excellent study of the politics of collective memory of the Nuremberg trial in Germany see, Norbert Frei, Vergangenheitspolitik: die Anfänge der Bundesrepublik und die NS-Vergangenheit (Munich: Beck, 1996).
33 I'm grateful to David Scheffer for pointing this out.
Lawrence Douglas

Geschichte und Erinnerung im Gerichtssaal: Reflektionen über Kriegsverbrecherprozesse

