

Review

The Emergence of Historical Forensic Expertise : Clio Takes the Stand by Vladimir Petrovic (Senior Researcher at the Institute for Contemporary History in Belgrade and Visiting Professor at the History Department of Central European University.). New York: Routledge. 2016. ISBN 978-1-138-69064-6.

Historians and legal practitioners, it is said, inhabit a relationship of intimate antagonism. Antagonism perhaps because they recognize much of one another's craft in each other's work. A series of metaphors have been employed by commentators to describe the connections and similarities between the two disciplines; Alfred Kelly's 'Illicit Love Affair' being the most recurring in American literature. Scholarship in both fields, pre-modern and modern, has discussed and confirmed these connections. For example, Donald R. Kelley argued in 1970 that modern legal scholarship and modern historiography share a common origin in the interaction between late medieval and early modern philology and the reinterpretation of Roman law in Western Europe. Peter Burke has described how law and history share a rhetoric of proving and judging. And Carlo Ginzburg, following the Italian literature on the subject which Benedetto Croce started, has pointed out in –o.a. works- his *Il giudice e lo storico* from 1991 that here are similarities in the epistemic systems of law and history. The connections between both fields have increasingly been re-examined in the second half of the twentieth century as historical testimony has found its way into the courtroom. Common law courts –especially in the US -, and supranational judicial bodies in their wake, increasingly refer to historical empirical evidence and not solely in the form of the precedent focused originalist histories. It is exactly this evolution which constitutes the subject matter of Petrovic's book: namely the different shapes and forms of historical testimony introduced in court over time.

An overviewing work encompassing a growing literature on this subject has been warranted for years. A first step towards this goal was taken by the Belgian legal historian Alain Wijffels who edited a volume entitled *History in Court* published in 2001. The following synthesizing work entitled *Contemporary History on Trial* was co-edited by Jones, Östberg, and Randerad and published in 2007. In 2009, Petrovic successfully defended his doctoral dissertation under the title in *Historians as Expert Witnesses in The Age of Extremes*. The unpublished manuscript soon found its way into the literature on the subject where it since has held a prominent place. I have published *Historians as Expert Judicial Witnesses in Tobacco Litigation* in 2016 which focused on historians testifying in tobacco litigation in the US. Now, Petrovic has published a monograph which will find its place in the standard literature on historical legal testimony.

Petrovic's analysis of the interaction of law and history specifically in the form of forensic history – following Wijffels- is interdisciplinary, covers a global trend and thus multiple law systems as well as different fields of law during a period that covers a little over a century. The case studies Petrovic presents are on inquisitorial criminal proceedings in late 19th century France and post-World War Two Germany as well as on adversarial civil rights trials in the United States in the second half of the twentieth century. For all the comparative challenges this analyses poses –for which the author accounts in the book- Petrovic keeps the focal point of his research clear: the use of historical testimony in court and how that phenomenon has changed and increased over time.

The book's first part of call is the so-called incompatibility these which is, as a scholarly debate Petrovic notes -quoting Morgan Kousser-, "wider than it is deep". (2) Petrovic reviews the debate and points to several of its most recurring elements: that historians and legal practitioners have different methods of fact finding, that the fields do not share the same standards of evidence selection, that law has an obligation to render a verdict and history has not, that law practitioners and historians have different standards of ethics, that legal truths and historical truths are not the

same, and that the nature of facts and narrative structures in both fields is different. (1-22) Petrovic's work does not focus on responding let alone solving these points of argument. Rather he uses the terms of the debate to provide him with the analytical tools to discuss his material. In doing so, he provides several insightful comments on this debate as he moves along his case studies.

I will discuss Petrovic's case studies in a chronological manner as they are rendered in the book. He commences with the *Dreyfus Affair* (1894-1906) in France. During the retrial of Dreyfus' case several historians of the *École des hautes études* testified on the authenticity of key diplomatic documents which had been used to wrongfully convict Dreyfus. Their testimonies contributed to Dreyfus' release from imprisonment and reinstatement in the army. Petrovic provides a second example of a court case from that same period wherein the authenticating capacities of historians played a central role. (23-28) In the Friedjung trial from 1909 an Austrian historian Heinrich Friedjung was defending in a defamation lawsuit filed by Serbian dignitaries who Friedjung had accused of stirring up war between Serbia and Austria-Hungary. The diplomatic correspondence on which Friedjung had based his accusations became the subject of intense scrutiny and several historians testified on the authenticity of the documents. In the end the plaintiffs withdrew their complaints upon the conditions of a settlement under which Friedjung issued a public statement of apology and recognized the questionable nature of his sources. (28-32) Petrovic successfully establishes in this chapter that the first forays of historians into the modern day courtroom in Europe were legitimized by the professionalized methods of source criticisms that had been developed in the nineteenth century in historical research institutes in Germany and France. In addition, overall, the legal participants in these cases recognized that these historians testified from an expert's point of view and therefore held a certain authority which could validate or invalidate legal evidence. These three elements –institutionalized historical scientific methodology, expertise on document authentication, and the derived authority thereof- are of considerable importance to understand how historians in their professional capacity first crossed the threshold of the courtroom as witnesses.

Then came the First and Second World War. Petrovic argues that these events changed the use of historical testimony in legal proceedings. Petrovic calls this 'the great shift' and argues that the shift takes place during the Nuremberg Tribunal (1945-1946). After the war, the Allies organized the prosecution of several high ranking members of the Nazi regime and German military in Nuremberg. The proceedings created a principle for international law which today still functions as the basis for human rights especially as to war crimes and crimes against humanity. The Nuremberg Tribunal and it's lesser-known equivalent held in Japan -the International Military Tribunal for the Far East (1946-1948)-, decided that some crimes were so horrendous and so adverse to the history of civilized nations that even when committed legally, the international community had a right and a duty to prosecute them according to the rules of international law and natural law. The Nuremberg Tribunal in a more political sense was also a history lesson which not only tried individual Germans but also Germany itself, it's people and its history all at once. Thereby the tribunal's members were writing and rewriting the history of the crimes they were adjudicating. The Nuremberg Tribunal and verdict, not in the least because of its substantial documentary value to historians, has indeed had a considerable influence on the historiography of World War Two also well as public memory of those events. (52-74) After reviewing these developments, Petrovic concludes that 'a major reconfiguration' took place in the relationship between law and history, (75) I think he is right to stress this moment and influence on the use of history in legal proceedings. After Nuremberg, historical testimony in court in Europe was no longer focused on document authentication but judges allowed historians serving as witnesses to bring broad histories into the courtroom, thereby significantly expanding the scope of relevance of historical testimony for different genres of litigation and arguably, depending on the case, its potential importance in deciding a case.

A particular test ground for this new role of history in legal proceedings that had to deal with the atrocities of World War Two was the Federal Republic of Germany. In his third chapter Petrovic presents a detailed analysis of the trial of Ernest Remer, an SS-officer who founded a socialist party

after the war which gained considerable support in post-war elections in West-Germany. (97-104) Several historians provided the court with written reports and testified against Remer. Petrovic notes that in the Remer trial the expert historians “acted more like witnesses for the prosecution, rather than experts of the court.” (104) This is another theme in Petrovic’s work, the pressures historians are under by parties, by courts, and by the rules of procedure. Germany continued to struggle in the post-World War Two decades with finding a manner of introducing rigorously researched historical testimony without turning the criminal proceedings against an individual into a pedagogic history lesson. Much, Petrovic argues, was improved with the establishment of the Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Gewaltverbrechen (Central Office of the State Justice Ministries for the Investigation of National Socialist Crimes of Violence) in 1958. The institute, Petrovic notes, instituted “a new kind of cooperation between historians and prosecutors.” (109) The historians connected to the institute were specifically focused on studying the cases of individuals and providing historical testimony to the courts rather than to one of the parties. This cooperation between lawyers and historians has previously been described by Eric Haberer under the term ‘the Ludwigsburg Paradigm’. Petrovic in this chapter adds significant new material on the works of historians under this paradigm. (87-112)

Chapter four of the book goes into the work three historians did in drafting a legal brief for the NAACP in the American landmark civil rights case *Brown v. Board of Education* from 1954 as well as the testimonies provided by historians to the Indian Claims Commission. The inclusion of these American case studies support Petrovic’s overall theme of the great shift in a particular manner. Even before the World Wars, historical argumentation and the mechanism of precedent in American adjudication played a considerable stronger role in American common law than in civil law or British common law for that matter. As the American Supreme Court Justice Oliver Wendell Holmes famously wrote in 1881: “The life of the law has not been logic, it has been experience.” The Americans, who strongly influenced the Nuremberg Tribunal’s proceedings with Supreme Court Justice Robert Jackson serving as the chief prosecutor, did, as Petrovic’s work on the Nuremberg Tribunal shows, continue an already apparent affinity for historical arguments and testimony which opened the door for more historical testimony in the future worldwide and certainly at home.

In chapter five, Petrovic returns to the great shift he previously described with case studies of the Eichmann trial and the Frankfurt Auschwitz trial. The Eichmann trial (1961) has strong links with the German trials as to its subject matter and political conceptualization of conducting pedagogic lessons in court. Hannah Arendt, who was reporting on the trial from Jerusalem for the *New Yorker*, noted that Eichmann had become a side figure at his own trial. A subject she later expanded upon in her book *The Banality of Evil*. Israeli prime minister David Ben-Gurion successfully turned the trial’s main focus into an adjudication of the Holocaust and the creation of a foundational history for Israel. This focus is also noticeable in the testimony of the historian called to testify in the Eichmann trial. Salo Baron. Baron a Jewish professor of history working and living in the United States. He testified at the trial on the general history of Germany and the Holocaust, rather than on Eichmann’s specific role in the Shoah. Petrovic compares this with the Frankfurt Auschwitz trials (1963-1965) held in Frankfurt during which mostly former camp guards and lower ranking Nazi officials were tried. During 193 trial sessions five historians testified in addition to providing written reports. Their task was described as “to assist the Court by painting as clearly as possible a picture of this background.” (191) In this task, Petrovic argues, they succeeded by building on the institutionalized organization of the Ludwigsburg Paradigm of interdisciplinary collaboration and previous experiences. (193)

In his concluding chapter Petrovic brings his genealogical account of historical forensic testimony to a close. He points out how inspirations from both common and civil law systems have shaped contemporary historical expertise in courts. Chapters two and three, with the new original work on the Friedjung and Remer cases as well as on the Ludwigsburg paradigm, are notable additions to the literature of historical expertise in legal proceedings. This book is furthermore, due to its quality and overviewing nature, suited as a textbook for courses on legal history, philosophy of law, and

theoretical history. Petrovic has delivered a long awaited interdisciplinary and transnational work which should be read by all who labour at the crossroads of history and law.

Ramses Delafontaine

Department of History, University of Ghent, Belgium

August 11, 2017