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WAR CRIMES AND THE LIMITS OF LEGALISM

*Gary Jonathan Bass**

BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE. By *Martha Minow*. Boston: Beacon Press. 1998. Pp. xiii, 214. \$23.

MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW. By *Mark Osiel*. New Brunswick, N.J.: Transaction. 1997. Pp. x, 317. \$34.95.

I.

In April 1945, Sir John Simon, Britain's Lord Chancellor, drew up a memorandum that was the last gasp in the diplomatic struggle against Nuremberg. Under American pressure, and despite British objections, the Allies were poised to agree to put the Axis leadership on trial for war crimes. In the kind of magnificent understatement that the British government could sometimes inadvertently achieve, it was entitled "The Argument for Summary Process against Hitler & Co." The memorandum was a series of arguments to be used by the British delegation at the San Francisco conference in a last-ditch effort to win over the Americans and Soviets. Simon's case was simple: the Nazi leaders deserved to be punished, but trials were not the way to do that. Simon feared that a trial of the Nazi leadership would drag on, wear out public interest, unearth embarrassing facts, and allow the Nazis a final chance to make propaganda. The legal difficulties also seemed daunting. It would be nightmarish to merge the American, British, and Soviet legal traditions. Nor was it clear that aggression — which was to be the main charge at Nuremberg and the focus of the American prosecution — could be considered a war crime in any conventional sense. If the Nazi defense managed to score a few small victories, the trial might be denounced as "a farce." So Simon had a simpler solution: avoid the niceties of a trial and just shoot the Nazi leaders.¹

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1. Great Britain Pub. Records Office (PRO), Kew, London: CAB 66/65, W.P. (45) 281, Simon memorandum, "War Criminals: Annex B: The Argument for Summary Process against Hitler & Co.," May 3, 1945.

These arguments were to be quashed. Led by Henry Stimson, Franklin Roosevelt's Secretary of War, the American government was determined to have sweeping trials for the Nazi war criminals. In the face of this, Britain decided not to push Simon's argument any further but to acquiesce with the wishes of its more powerful American ally with as much good grace as could be mustered.²

Whether one agrees with them — and I don't — Simon's arguments were not weak ones. But they are strange to hear nevertheless. Nuremberg is seen in retrospect as so unimpeachable, an act of such extraordinary restraint and justice, that it is disturbing to hear that it was fought with such pragmatic objections. When considering a war crimes tribunal for the former Yugoslavia and then another one for Rwanda, the United Nations did not air such debates. To the contrary, there is a kind of orthodoxy in human rights circles that regards it as almost self-evident that war crimes deserve war crimes trials. So many of the arguments against war crimes trials have been made in bad faith — by apologists for Serb or Croat nationalists and Hutu *génocidaires*, who do not really question legalistic methods but the need for punishment itself — that it is easy to forget that there are some reasonable arguments made in good faith against the trials.

At a minimum, this protribunal orthodoxy is a post-Nuremberg artifact. Many scholars and diplomats have questioned whether war crimes and mass atrocities can properly be reduced to legal questions. While the Nuremberg trials were in session, Hannah Arendt wrote to Karl Jaspers, a German intellectual:

Your definition of Nazi policy as a crime ("criminal guilt") strikes me as questionable. 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. It may well be essential to hang Göring, but it is totally inadequate. That is, this 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.³

Other thinkers, less commendably, have been more worried about the purity of American law than about punishing foreign war criminals. During Nuremberg, at the Supreme Court itself, Chief Justice Harlan Fiske Stone was quietly indignant that Justice Robert Jackson was away serving as the American chief prosecutor at the Allied tribunal:

So far as the Nuremberg trial is an attempt to justify the application of the power of the victor to the vanquished because the vanquished

2. CAB 65/50, War Cabinet 57, W.M. (45) 57, May 3, 1945, 6 p.m., pp. 331-32.

3. Letter from Hannah Arendt to Karl Jaspers (Aug. 17, 1946), in HANNAH ARENDT AND KARL JASPERS: CORRESPONDENCE 1926-1969, at 51, 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber, trans. 1992).

made aggressive war . . . I dislike extremely to see it dressed up with a false façade of legality.

. . . It would not disturb me greatly . . . if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime. . . .

. . . .

. . . Jackson is away conducting his high-grade lynching party in Nuremberg I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.⁴

And in his book *Profiles in Courage*, John F. Kennedy dedicated a rather unconvincing chapter to praising Senator Robert Taft for objecting to Nuremberg as a betrayal of American legal standards.⁵

There have also been more political objections. As World War I was drawing to an end, David Lloyd George, the British Prime Minister, tried to persuade the Imperial War Cabinet to approve war crimes trials for Kaiser Wilhelm II and other Germans. But Lloyd George found few takers at first. Jan Smuts, South Africa's Defense Minister, was not sure that Wilhelm II had committed any definite crime. W.M. Hughes, the Prime Minister of Australia, was emphatic that Wilhelm II could not be put on trial simply for starting the war. Austen Chamberlain did not want to make a martyr of Wilhelm II by singling him out for trial. Winston Churchill himself had, in 1915, been enthusiastic about punishing U-boat crews, but in 1918, as Minister of Munitions, worried:

It does seem to me that you might easily set out hopefully on the path of hanging the ex-Kaiser and have general public interest taken in it, but after a time you might find you were in a very great *impasse*, and the lawyers all over the world would begin to see that the indictment was not capable of being sustained.⁶

It was not only the British who had reservations. Cordell Hull, Franklin Roosevelt's Secretary of State, and Henry Morgenthau Jr., Roosevelt's Secretary of the Treasury, both preferred summary execution to trials for Nazi war criminals. Henry Stimson, Roosevelt's Secretary of War, was the administration's foremost advocate both of war crimes trials and a generous settlement that would not humiliate Germany. This generosity was presumably easier for Stimson because he, and the War Department, had never been no-

4. ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 715-16 (1956) (quoting letter from Harlan Fiske Stone to Luther Ely Smith Jan. 2, 1946) (citations omitted). For a rebuttal, see, for instance, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 228-39 (1990).

5. See JOHN F. KENNEDY, PROFILES IN COURAGE 261-77 (memorial ed. 1964).

6. CAB 23/43, Imperial War Cabinet 37, Nov. 20, 1918, noon.

ticeably exercised about the extermination of the Jews. But more than any other member of Roosevelt's cabinet, Morgenthau tried to stop the Holocaust; and once the war was coming to a close, he was too angry to contemplate giving the Nazis the luxury of a trial.⁷

Morgenthau's rage was certainly immoderate, but it was in the same vein as Arendt's critique of Nuremberg. Morgenthau and his staff at one point in 1944 were considering as many as 2,500 such executions.⁸ These plans for summary execution were enshrined in the Morgenthau Plan, a document calling for a tough peace that would pastoralize Germany lest it ever threaten Europe's peace again. At the Québec Conference in 1944, Roosevelt and Churchill agreed to follow Morgenthau's lead. It was only after the Morgenthau Plan was leaked to the press that Roosevelt turned to Stimson's plans for war crimes trials. Morgenthau did not recant. He did not want the punishment of Nazis undercut by legal niceties. For Morgenthau, justice and law were not always the same thing. "I'm not a lawyer," Morgenthau said in June 1945, as the planning of Nuremberg dragged on. "Is there any reason they can't cut all of this monkey-business out and go right to the military tribunal?"⁹

In retrospect, it is clear that Morgenthau and Hull had got the wrong end of the argument. We are right to reserve our highest praise for the people who made Nuremberg the triumph it was, like Jackson and Telford Taylor.¹⁰ But even the success of Nuremberg does not necessarily mean that trials will always work. The trials held after World War I, in Leipzig and in Constantinople, degenerated into disaster.¹¹ The Tokyo tribunal was far less impressive than Nuremberg, and seems to have made less of a contribution to Japan's postwar development away from militarism.¹²

Is law really the best way to address such atrocities? As Simon and others would point out, there are many reasons to be skeptical.

7. See generally DAVID S. WYMAN, *THE ABANDONMENT OF THE JEWS: AMERICA AND THE HOLOCAUST, 1941-1945* (1984) (discussing the Roosevelt administration's handling of the Holocaust).

8. See 1 HENRY MORGENTHAU, JR., *SENATE COMM. ON THE JUDICIARY, 90TH CONG., MORGENTHAU DIARY (GERMANY)* 486 (Comm. Print 1967).

9. *Id.* at 1561.

10. See TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992). By Jackson, see variously, ROBERT H. JACKSON, *THE CASE AGAINST THE NAZI WAR CRIMINALS: OPENING STATEMENT FOR THE UNITED STATES OF AMERICA, AND OTHER DOCUMENTS* (1946); ROBERT H. JACKSON, *THE NÜRNBERG CASE* (1947); REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 (1949); ROBERT H. JACKSON, *Introduction* to WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* xxix (1954).

11. See JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* (1982).

12. See IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* (1995); JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II*, 443-84 (1999).

Law is an inflexible instrument, and the chaos of war and atrocity stubbornly resists shoehorning into neat legal categories. Legal goals may be at odds with those of politics. Or they may be at odds with a commonsensical understanding of substantive justice. Or the mix of politics with law may end up cheapening the law. The human rights orthodoxy — that trials are invariably helpful — may, in the end, be right; but it is not so self-evident or so uncomplicated that it should be beyond argument. Are war crimes trials really always the right way to go?

II.

Martha Minow¹³ is a quiet skeptic. The thrust of her thoughtful and humane book is that there is a broad spectrum of possible measures to try to cope with the aftermath of war or atrocity and that trials are only one possible notch along it. She asks: “Must all such societies pursue prosecutions in order to comply with international human rights standards?” (p. 2). Quite unlike those lawyers who see justice as a matter of law or nothing, Minow is acutely aware of how little law can actually accomplish in an unstable political climate. Minow upbraids the advocates of trials for overselling the virtues of their preferred solution, hyping trials as capable of grand tasks like deterring war crimes and rebuilding shattered societies (pp. 48-49).

Minow has no such illusions. She admits that almost any response — whether legalistic or not — to mass atrocity will be insufficient. She presents a long list of possible alternative responses, without placing too much hope in any of them: truth commissions, purges, reparations, apologies, memorials, naming names, and public education (p. 23). She is not quite sure what will work, and is acutely aware of the difficult line that must be walked “between too much memory and too much forgetting” (p. 118). Trials are only one part of the story.

But Minow is, of course, an expert on law, and it is for trials that she reserves her most stern language. She warns that the grandiose claims of international legalists not only go too far, they tend to breed cynicism when tribunals stumble under too heavy a load. As she puts it:

I do not think it wise to claim that international and domestic prosecutions for war crimes and other horrors themselves create an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes. Expansive claims may be tempting in order to convince international and national audiences to fund and support trial efforts, but exaggerated as-

13. Professor of Law, Harvard University

sertions are bound to yield critical and even hostile disappointment.
[p. 49]

In particular, Minow refuses to use deterrence as an argument for international war crimes trials. She admits that we do not know how to deter someone like Radovan Karadžić (p. 146). This stands in contradiction to the assertions of more orthodox human rights figures, like Madeleine Albright, Richard Goldstone, and David Scheffer.

Minow, like Arendt during Nuremberg, is aware of the limitations of law to deal with the worst horrors. These are acts that go *beyond* being criminal. Minow argues that mass violence requires “more severe responses than would any ordinary criminal conduct, even the murder of an individual. And yet, there is no punishment that could express the proper scale of outrage” (p. 121). As Minow admits, war crimes trials “depend for the most part upon symbolism rather than effectuation of the rule of law” (p. 122). There are simply too many perpetrators to be brought to justice, overwhelming any court system and threatening political chaos. Thus, in order to avoid cycles of violence, Minow would try to bring many lower-level perpetrators back into society, presumably instead of simply purging them (p. 121). She knows that many of the guilty will escape punishment. Human rights trials, as we know them, are not yet ready to deliver anything close to perfect justice.

Yet this is not at all how their advocates advertise them. Trials are supposed to pin individual guilt upon individual criminals, so that no one can point to an entire nation as guilty. This argument comes up repeatedly, including in Minow’s book (p. 123), but it has never been a particularly convincing one. Tribunals never punish anything remotely near the number of actual perpetrators, so the guilt or innocence of vast numbers of individual Germans or Serbs remains a mystery. In addition, some war criminals can never be charged, not because they are innocent, but because there is scant evidence of their crimes that would stand up in court. By purporting that a war crimes tribunal has actually established individual responsibility in so many cases, some advocates of tribunals extend to huge numbers of unindicted war criminals an undeserved moral amnesty in addition to a *de facto* legal one.

There are a few things not to like in this book. Minow’s book has some jarring factual slips. She says that the U.N. set up the war crimes tribunal for ex-Yugoslavia in 1992; it was in fact in 1993.¹⁴ She points out that Dražen Erdemović, an executioner at Srebrenica in 1995, joined the Bosnian Army (p. 35), but neglects to mention that he was in the Bosnian Serb Army when he committed

14. P. 34. ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 111 (1998).

his murders¹⁵ — no trivial point, for uninformed readers may come away from her version thinking that the Bosnian Army was responsible for the atrocities at Srebrenica. She writes that Stalin and Churchill both considered summary execution for the Nazis (p. 29); but she does not qualify this by pointing out that Stalin — true to form — had actually suggested killing 100,000 Germans, while Churchill furiously rejected Stalin's sweeping proposal and limited the British blacklist to 50 or 100 top Axis leaders, insisting on trials for all the war criminals not in the highest levels.¹⁶

Minow's most impressive contribution is her refusal to get swept away. She is appropriately daunted by the difficulty of restoring shattered societies and tries to consider a broad range of policy tools that might help. And she is not so dazzled by the spectacle of war crimes trials that she loses her professional skepticism.

III.

If Martha Minow is a quiet skeptic, Mark Osiel¹⁷ is a true believer with a twist. Not only does he believe that law can do great things even amidst political chaos, he has written an unsettling book on how to trim legalistic justice to the demands of theatricality. Unlike Minow, who reacts to the limitations of trials by casting her eye around the horizon for other alternatives, Osiel tries to recast the institution of the trial so that it will fit his sweeping purposes better.

Osiel's primary concern is not "the criminal law's more traditional objectives" of deterrence and retribution (p. 2). As Minow notes, it is by no means clear that human rights trials do a good job of those two tasks. But Osiel has bigger fish to fry. Trials, he argues, "when effective as public spectacle, stimulate public discussion in ways that foster the liberal virtues of toleration, moderation, and civil respect. Criminal trials must be conducted with this pedagogical purpose in mind" (p. 2).

To be sure, Osiel thinks that storytelling is already inherent in trials in liberal courts (pp. 68-72), and that even "liberal show trials" — to use his striking phrase — must be conducted within the limits of procedural fairness (p. 69). But the play is the thing. He wants spectacular criminal trials in which both the judges and lawyers are explicitly concerned with what Osiel calls "the 'poetics' of

15. See DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA* 128-29 (1997).

16. CAB 66/42, W.P. (43) 496, Churchill, "The Punishment of War Criminals," Nov. 9, 1943, at 265-66; Bohlen Minutes, Tripartite Dinner Meeting, November 29, 1943, 8:30 p.m., Soviet Embassy, in *FOREIGN RELATIONS OF THE UNITED STATES: THE CONFERENCES AT CAIRO AND TEHRAN* 1943, at 554 (1961).

17. Professor of Law, University of Iowa.

legal storytelling” (p. 3). The drama of the courtroom is to be turned into a “theater of ideas,” focusing on “large questions of collective memory and even national identity . . .” (p. 3). This, Osiel argues, will contribute to a “social solidarity” (p. 3). These trials “should be unabashedly designed as monumental spectacles” (p. 3). Or, as he puts it at another point, what is required is “some measure of *son et lumière*, smoke and mirrors, that is, some self-conscious dramaturgy by prosecutors and judges” (p. 7).

This is no small task, as Osiel admits. Having laid out his argument, he spends much of the rest of the book qualifying it, until in his conclusion he allows that “[i]t remains to be seen whether liberal courts can entirely reconcile the traditional, delimited functions of criminal law with the dramaturgical demands of monumental didactics” (p. 293). In rambling pages that could have used a good editor — there is far too much jargon and foggy prose — Osiel tries to answer some objections to his planned smoke and mirrors; mostly that a delusionary kind of history will be created.

Osiel makes much of the Buenos Aires trials for members of the junta that waged Argentina’s “dirty war.” Among political scientists at least, these trials, and the subsequent amnesties, have a more dubious reputation. As Samuel Huntington, perhaps the single most distinguished figure in the study of comparative politics, writes, “the efforts to prosecute and punish in Argentina served neither justice nor democracy and instead produced a moral and political shambles.”¹⁸

Osiel points out that the witnesses were selected from many regions and social classes, which, he argues, was meant to convey subtly the message that the junta had targeted not just leftists and guerrillas but Argentines of all strata. This, he writes, “made a better story” (p. 237). He talks of Argentine story-telling as a way of restoring civil society, and praises Argentina’s President Raul Alfonsín for, among other things, packaging the junta trials in a single hearing that could easily be televised (pp. 76-77). Unlike Minow, Osiel seems interested only in trials. Truth commissions, for instance, according to the late Carlos Santiago Nino, the legal advisor

18. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 221 (1991). As a matter of social science, Osiel — a sociologist as well as a law professor — stumbles by only looking at cases where there were trials. One needs to make comparisons among cases. If trials are supposed to be the cause of social solidarity, Osiel would need to look at cases of trials and cases of something *other* than trials. (In the jargon of political science, Osiel’s explanatory variable does not vary.) See GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994). Minow does not use social scientific jargon — more credit to her — and she does not make Osiel’s mistake: she examines trials but also alternatives like truth commissions and amnesties. Osiel also doesn’t draw a systematic distinction between international and domestic trials, even though the political dynamics are in many respects quite different. Osiel admits that his empirical work is anecdotal, and shies away from a rigorous social-scientific study that would systematically ask what trials really do. P. 239.

to Alfonsín, and a hero of Osiel's, lack the requisite drama of a courtroom confrontation (p. 15).

Osiel has great expectations from human rights trials, so long as the trials are not too dryly legalistic. In this, he is in many ways pitting himself against a more traditional view of war crimes trials. One of Hannah Arendt's less controversial criticisms of Israel's trial of Adolf Eichmann was a matter of due process (the court hadn't allowed defense witnesses), as was one of her points of praise (the court had given a more clear definition of crimes against humanity than at Nuremberg).¹⁹ She did want justice to be seen to be done, but her emphasis was on procedural fairness. She was withering about Israeli Prime Minister David Ben-Gurion's attempts to use the trial as a showcase for Jewish suffering and for Zionism:

There is no doubt from the very beginning that it is Judge Landau who sets the tone, and that he is doing his best, his very best, to prevent this trial from becoming a show trial under the influence of the prosecutor's love of showmanship. . . . And Ben-Gurion, rightly called the "architect of the state," remains the invisible stage manager of the proceedings. Not once does he attend a session; in the courtroom he speaks with the voice of Gideon Hausner, the Attorney General, who, representing the government, does his best, his very best, to obey his master. And if, fortunately, his best often turns out not to be good enough, the reason is that the trial is presided over by someone who serves Justice as faithfully as Mr. Hausner serves the State of Israel. Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import — of "How could it happen?" and "Why did it happen?," of "Why the Jews?" and "Why the Germans?," of "What was the role of other nations?" and "What was the extent of co-responsibility on the side of the Allies?," of "How could the Jews through their own leaders cooperate in their own destruction?" and "Why did they go to their death like lambs to the slaughter?" — be left in abeyance. Justice insists on the importance of Adolf Eichmann On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism.²⁰

Osiel takes just the opposite position. He is endorsing showmanship. As he writes in his conclusion: "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" (p. 298).

19. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 251-52 (1963).

20. *Id.* at 2-3. For a criticism of Arendt's controversial emphasis on Jewish passivity, see GERSHOM SCHOLEM, *On Eichmann, in ON JEWS AND JUDAISM IN CRISIS: SELECTED ESSAYS* 298 (Werner J. Dannhauser ed., 1976). For a less contentious account of the trial, see TOM SEGER, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 323-66 (1994).

IV.

The best aspect of Osiel's book is its reminder that justice must not only be done but also be seen to be done. This is a lesson that the two current U.N. tribunals have largely failed to grasp. Although the ex-Yugoslavia tribunal in The Hague is belatedly starting work on some kind of an outreach program, to date the tribunals have been spectacularly unsuccessful at showing their efforts off to Bosnians and Rwandans. It is a long way from Sarajevo to The Hague, and from Kigali to Arusha; it is quite possible to be in Sarajevo and have no idea that a trial is going on in The Hague.

This is particularly ironic because Sarajevo is a bustling hub of international humanitarian organizations, all of them highly visible. (The European Union took to painting Sarajevo trams in the colors of EU flags — navy blue with gold stars — to show off its contribution to the rebuilding of Bosnia; so did Saudi Arabia, so that trams would line up, one Euro blue and the next with a desert scene and images of Mecca.) The Hague tribunal is the only institution that is invisible.

The Allies did not make the same mistake during Nuremberg. They went to considerable lengths to explain to the German public exactly what the Nazi leadership stood accused of: Allied forces handed out pamphlets, screened documentaries, and made broadcasts on German radio.²¹ When Buchenwald was liberated, American military police marched a thousand residents of nearby Weimar through the camp to show them the nightmare reality there.²² Like the Allies, Osiel understands that such crucial trials must be part of the painful reeducation of a society.

But how to accomplish such a massive task? What exactly would an Osiel-style trial look like, and why would this help a shattered society? It is at this point that the book begins to unravel.

Osiel places enormous faith in a clash of narratives, which he thinks will make a trial compelling and thereby help to knit a society together. He argues that the "experience of disagreement itself, although often unpleasant and divisive in many ways, nonetheless creates a kind of joint understanding" (p. 43). Osiel sees trials as a the first step in a dialogue when the other side is "initially unwilling" (p. 46). "At the very least," he writes,

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

21. See RICHARD L. MERRITT, *DEMOCRACY IMPOSED: U.S. OCCUPATION POLICY AND THE GERMAN PUBLIC, 1945-1949*, at 151 (1995).

22. See *Forced Tour of Buchenwald: Weimar Residents Shown Round*, *TIMES* (LONDON), Apr. 18, 1945, at 3.

good faith, come to think so differently from us about something so fundamental to us both.

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 theory. But who among us can deny having had it, and having found it not altogether unpleasant? [pp. 42-43]

Victims of a war can deny it. Osiel's bookish formulation seems less than relevant to Bosnia and to the very societies that he is ostensibly writing about. The "experience of disagreement" is not at all the same thing as a war or civil conflict. Disagreeing in Congress over Medicare may not be "altogether unpleasant." Disagreeing in the Bosnian parliament over who is plotting a genocide — as the Bosnian Serb nationalist leader Radovan Karadžić and Bosnian President Alija Izetbegović did shortly before Slobodan Milosević's wars in Yugoslavia spread into Bosnia — is in fact a good deal worse than altogether unpleasant. And that was *before* the war.

It is true that some of the defendants at the U.N. tribunal in The Hague, for instance, have come to have a less jaundiced view of U.N. justice in the course of their trials. They have noticed that they don't get tortured or starved, that the judges are not in cahoots with the prosecution, that they might get acquitted, and so on. This, however, does not seem likely to rise to the level of deliberation as theorists of deliberative democracy like Amy Gutmann or Seyla Benhabib would recognize it.

In particular, Osiel is worried that human rights trials are sometimes too easy, that the conviction of the defendants will lack the requisite punch. In order for the clash of narratives to fit his bill, Osiel thinks, the prosecution and defense must be allowed

to widen the spatial and temporal frame of courtroom storytelling in ways that allow litigants to flesh out their competing interpretations of recent history, and to argue these before an attentive public. Only in this way can the debate within the courtroom be made to resonate with the public debate beyond the courtroom walls. Just as hard cases can make bad law, so too easy cases can make for poor drama (i.e., within the genre of the theatre of ideas, as a basis for discursive solidarity). [p. 296]

For Osiel, trials will only be able to "weav[e] their strictly legal conclusions into a plausible and relatively capacious narrative about the country's recent conflagration" if they "ensure that all antagonists feel they have received a fair hearing" (p. 298).

All antagonists? This seems a bit much. Hermann Göring, in jail at Nuremberg, was convinced that his trial was purely a matter

of victor's justice, and that the trial was rigged. As he told the prison psychiatrist,

[a]s far as the trial is concerned, it's just a cut-and-dried political affair, and I'm prepared for the consequences. I have no doubt that the press will play a bigger part in the decision than the judges. — And I'm sure that the Russian and French judges, at least, already have their instructions. I can answer for anything I've done, and can't answer for anything I haven't done. But the victors are the judges . . . I know what's in store for me.²³

As it turned out, Göring held up well on the stand under questioning by Robert Jackson, the American prosecutor. But one would no more wish to make the success of a war crimes trial contingent on the opinion of Göring than one would wish to judge a murder trial a failure because the murderer didn't think he got to air his motivations to his heart's content.

Is it really necessary that a Göring or a Karadžić not just get their day in court, but get to have it to their liking? There are times that call for dialogue, but the situations under discussion in Osiel's book tend to be those furthest removed from the ideals of dialogue. In practice, Osiel's suggestion of widening "the spatial and temporal frame of courtroom storytelling" would mean the unenlightening experience of, say, hearing a Serb concentration camp guard attempt to justify himself by talking about the Battle of Kosovo Polje in 1389, or about how the "Turks" (the Bosnian Serb nationalist epithet of choice for Bosnia's largely secular Muslims, who are roughly as Turkish as Karadžić is) were plotting to make Serb women wear the veil. The situations are depressingly close to being zero-sum.

Nor is it clear that a new consensus will only occur from dialogue with the perpetrators. It is clear that the radicals in Serbia and Croatia need to be weaned off their nationalist myths, but it is less clear that courtroom dialogues with the worst offenders will do the trick. The courtroom appearances of Goran Jelisić (who called himself "the Serb Adolf") and Tihomir Blaškić (the Bosnian Croat commander who led the sack of Bosnia's Lasva Valley) in The Hague are a matter of imposition, just as the Dayton Peace Accords only worked because they were imposed by NATO's military force and just as the Allied occupation of Germany and Japan was a matter of imposition. Jelisić did not just misunderstand the Bosnians; he *hated* the Bosnians.

Much of the virtue of a human rights trial is precisely that it is not a dialogue. The criminal is stuck. He is not there because he wants to be, or to tell his story. He is not being improved by the experience. He is being judged, and then punished and humiliated.

23. G.M. GILBERT, NUREMBERG DIARY 12-13 (1947).

This might be a source of some comfort to the victims. Watching such a spectacle in The Hague, what one appreciates about a war crimes trial is precisely that it no longer allows the war criminal to set his terms. During the war, the war criminal had the pleasure of the exercise of extraordinary power; now he is powerless. During the war, the war criminal could use his brute force to get attention for his paranoias and bigotries; now he is stuck in a forum where the law gives not a fig for these fictions, only for the stark documentation of his cruelty.

This is not to say that such imposition is an easy thing. But this, too, points to another problem in Osiel's argument. In most of the recent wave of democratizations, the *ancien régime* has negotiated itself out of power, usually insisting on amnesty as a precondition for its quiet exit. In a few cases, like Greece and Romania, the authoritarian regime suddenly collapsed, making trials or executions possible. But it is unusual to be able to impose one's political will as the Allies did after World War II.

The pattern is one of amnesty. When the dictators and thugs have made amnesty the price of their ouster, there is scant prospect of successful human rights trials. In Argentina, the case in the book with which Osiel has firsthand experience, Menem eventually decided to issue amnesties. Osiel admits at one point that attempting to prosecute the junta, as Raul Alfonsín unsuccessfully did, risked a military coup and the end of civilian rule (pp. 162-64) — a steep price to pay for a narrative.

If we are in the narrative business, then the moral story of the democratization may come off as an inglorious one that buries the past. Osiel admits that there were rather ignominious political calculations going on in MacArthur's decision to let Hirohito off without prosecution, as well as in Alfonsín's legal team, which had to mollify the military during the junta trials. But as Osiel puts it, if MacArthur's team had ever "honestly explained the reasons for their exclusion of the Emperor they would have made a mockery of the trial, discrediting it altogether" (p. 243). Alfonsín, too, Osiel writes, would have made a mockery of the Buenos Aires trials if he had publicly admitted that he was scrapping the trials because he was spooked by the unruly military. Osiel also admits that Alfonsín's pragmatic motivations were clear to most everyone observing the Argentine scene (pp. 243-44).

The problem is that such political amnesties underlie most of the recent democratizations. Osiel is recommending that we pursue narratives that, by his own account, will make "a mockery" of the trials among those people who grasp the underlying politics.²⁴ It

24. Osiel, in two confusing passages, argues that amnesties are also sometimes good for social solidarity. He writes: "rewriting the national story by such legal devices as pardons,

may be true, as Ernest Renan famously said, that “[g]etting its history wrong is part of being a nation.”²⁵ But one would like to think that there might be better ways to build a democratic citizenry.

V.

Minow, in her skepticism and modesty, is much more typical of liberal political thought on the question of postwar trials. In *Legalism*, which remains the single most thought-provoking work on the moral and practical meaning of political trials, the political theorist Judith Shklar wrote:

It is not that legalism and law, even in the narrowest juristic sense of the term, do not educate people and do not promote specific values and ideologies, but that their method is limited, and with it the scope of their influence upon the lives of individuals. . . . On the political level it is thus the manipulative state that is the real rival of the legalistic state, and the policy of inducement, whether by propaganda or by terror and related pressures, competes with the policy of legalism.²⁶

These kinds of trials already operate under a huge burden. They must be seen as fair, even in conditions where the requirements of due process must be stretched and where there is massive public and political pressure. If the trial is international — as in the case of Nuremberg, Tokyo, and the two current U.N. tribunals — then national court systems are being amalgamated on the fly, often in ways that are baffling to the participants. At the London Conference held to design the Nuremberg court, the American, British, and French delegations had to contend with a revenge-minded and Vishinsky-inspired Soviet delegation, and at Nuremberg they had to deal with Vishinsky himself. If the trial is national, then it will be hugely politicized, under pressures that might tear either society or the justice system apart. These trials tend to be stretched to the breaking point anyway. One might be forgiven for not rushing to add to the burden.

In the aftermath of war and slaughter, it is entirely possible that nothing will work to bind up wounds except the passage of time, maybe measured in generations. Minow and Osiel are both looking for something better and quicker, which is a noble aspiration. But Minow's particular strength is her modesty in the face of such an enormous, miserable task.

amnesties, and acts of clemency can sometimes greatly further the restoration of solidarity at such times.” P. 132. He also notes that the Tokyo war crimes trials “united the Japanese populace in substantial rejection of the story they sought to tell.” P. 206.

25. Ernest Renan, *Qu'est-ce que c'est une nation?* 7-8 (Conférence faite en Sorbonne le 11 mars 1882), in E.J. HOBBSAUM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 12 (2d ed. 1992).

26. JUDITH N. SHKLAR, *LEGALISM* 120 (1964).