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## Texas Wesleyan Law Review

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Volume 12 | Issue 1

Article 8

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10-1-2005

### Narrative Jurisprudence and Trans-National Justice

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#### Recommended Citation

Ian Ward, *Narrative Jurisprudence and Trans-National Justice*, 12 Tex. Wesleyan L. Rev. 155 (2005).  
Available at: <https://doi.org/10.37419/TWLR.V12.I1.7>

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# NARRATIVE JURISPRUDENCE AND TRANS-NATIONAL JUSTICE

Ian Ward†

I. INTRODUCTION.....	155
II. NARRATIVITY AND THE “END” OF INTERNATIONAL LAW.....	155
III. THE BALKAN TRAGEDIES.....	161
IV. TERRORIST STORIES .....	171
V. REINVESTING HUMANITY .....	184

## I. INTRODUCTION

There has been much talk about the “end” of international law. There has also been much talk about the virtues of a literary or narrative jurisprudence. Whilst there may be no immediate cause and effect, there is, I will suggest, a consonance here. The “end” of international law, an acute variant of a more familiar critique of liberal legalism itself, invites jurisprudential reconceptualization. Narrative jurisprudence offers precisely such a reconceptualization, advancing the idea that justice is something more than law, something that needs literary, even “poethical,”<sup>1</sup> supplement.<sup>2</sup> Where the law appears to run out, and it is this running out which underpins the anxieties surrounding international and trans-national justice, narrative supplement comes to the fore.

The purpose of this article is to explore this consonance in greater detail, and then to present two more particular examples of this narrative and poethic “strategy.” The first example is given by two attempts to provide some kind of juristic redress for the various atrocities suffered across southeast Europe during the successive Balkan wars of the 1990s. The second approaches the broader, and no less contemporary, experience of trans-national terrorism. In the first instance, the form of narrative, on both occasions, is that of a chronicle—a piece of extended journalism. In the second instance, the narrative is a more familiar piece of literature, a canon indeed of the modern novel—two rather different texts, but one common aspiration.

## II. NARRATIVITY AND THE “END” OF INTERNATIONAL LAW

As the twenty-first century dawns, it has become popular to pronounce the “end” of international law. Juergen Habermas suggests

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1. See RICHARD WEISBERG, POETHICS AND OTHER STRATEGIES OF LAW AND LITERATURE 4 (1992) (suggesting that “poethics” is the capacity of literature “to fill the ethical void” that lies beneath positivism and postmodernism).

2. See generally *id.*

that we are presently experiencing a “transition” phase, moving from the governance of international “law” to a governance of “world citizenry.”<sup>3</sup> For some it is more appropriately a matter of “degradation,” an almost contemptuous dismissal of the very idea of law beyond sovereign state boundaries. Since “9/11,” according to Bill Bowring, the United Nations Charter, and the law which it is supposed to enshrine, has been abruptly “jettisoned,” replaced by a jurisprudence of competing anarchisms.<sup>4</sup> “9/11,” as we shall see shortly, is a particular semiotic—for critics such as Noam Chomsky, the ultimate signifier of the “end” of international law and order.<sup>5</sup>

For some this “ending” is a matter of acute concern. The liberal jurist, such as Anne-Marie Slaughter, advocates some kind of reconstructed world order, an emergent “global community of law.”<sup>6</sup> An echo can be found in William Twining’s appeal for a jurisprudential “re-mapping,” one that can better account for the “complexities and elusiveness of reality” in our increasingly “cosmopolitan” world.<sup>7</sup> Harold Koh prefers to envisage alternative “visions of internationalism.”<sup>8</sup> Others are rather less inclined to shed tears. Martii Koskeniemi welcomes the opportunity to dismantle the “inherited ideal” of Enlightenment universalism.<sup>9</sup> Philip Allott similarly anticipates the ending of an essentially positive jurisprudence that is the very antithesis of real humanity, the “deformation of all selfhoods.”<sup>10</sup>

Unsurprisingly, such an apocalyptic vision finds a definitive confirmation in Jacques Derrida’s assertion that we must now move “beyond” an internationalist jurisprudence of “phantom-States.”<sup>11</sup> We now live amidst a new world “disorder,” Derrida advises, where the pretences of classical international law are “nowhere respected.”<sup>12</sup> In the place of the shattered visage of classical international law and order, Alain Finkielraut has memorably described a “sickness of geogra-

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3. GIOVANNA BORRADORI, *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA* 35–38 (2003).

4. See Bill Bowring, *The Degradation of International Law?*, in *LAW AFTER GROUND ZERO* 3, 14–16 (John Strawson ed., 2002).

5. See Noam Chomsky, *Moral Truism, Empirical Evidence, and Foreign Policy*, 29 *REV. INT’L STUD.* 605 (2003).

6. Anne-Marie Slaughter, *The Real New World Order*, 76 *FOREIGN AFF.*, Sept.–Oct. 1997, at 183.

7. See WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* 140, 152, 172–74, 243 (2000).

8. Harold Hongju Koh, *On American Exceptionalism*, 55 *STAN. L. REV.* 1479, 1526–27 (2003); see also Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 *passim* (1997) (expressing similar sentiments).

9. Martti Koskeniemi, *The Politics of International Law*, 1 *EURO. J. INT’L L.* 4, 7 (1990).

10. Phillip Allott, *Reconstituting Humanity—New International Law*, 3 *EURO. J. INT’L L.* 219, 247 (1992).

11. JACQUES DERRIDA, *SPECTERS OF MARX* 84–85 (Peggy Kamuf trans., Routledge 1994) (1993).

12. BORRADORI, *supra* note 3, at 110.

phy,” the reduction of superpower confrontation to “bitter little wars, to disagreements over borders, to a ridiculous and bloody hotch-potch of squabbles, to the tautology of identity politics.”<sup>13</sup> Two such “wars,” those in the Balkans, and that which is supposed to exist “against terror,” are the primary subjects of this article.

There is a distinctively post-modern tone to such observations; perhaps even a “post-post-modern” one.<sup>14</sup> It finds a clear voice in Roland Bleiker’s strident appeal for an “aesthetic turn” in international political theory.<sup>15</sup> According to Bleiker, an aesthetic “approach” to questions of international order has “to do with validating the whole register of human perceptions” and emotions.<sup>16</sup> The challenges of contemporary international order, moreover, are of such magnitude that it would be reckless “not to employ the full register of human intelligence to understand and deal with them.”<sup>17</sup> In similar vein, Twining argues that the challenge of globalization drives us towards a revitalised notion of *ius humanitatis*, one that deals “with the common heritage of mankind.”<sup>18</sup> The essentially localised nature of our modern world means that we are all, to some degree, now “citizens of the world.”<sup>19</sup> Such an existence has obvious ethical and narrative connotations. For Twining, a revitalised *ius humanitatis* should be conceived as a series of “mental maps,” the “construct of a multiplicity of impressions” and “complexes of social relations.”<sup>20</sup> It will emphasise the “complexities and elusiveness of reality, the difficulties of grasping it, and the value of imagination and multiple perspectives in facing these difficulties.”<sup>21</sup>

The extent to which this “aesthetic turn” approaches the strategies of narrativity is evidenced in David Campbell’s particular study of the Bosnian war, *National Deconstruction*.<sup>22</sup> The Bosnian wars, according to Campbell, were soaked in narrativity and semiotic, a sometimes bewildering array of competing (hi)stories, mythologies and pretended ethnicities.<sup>23</sup> Presenting the various “micronarratives” of subjective experience and confession alongside the “macronarratives” of

13. ALAN FINKIELKRAUT, IN THE NAME OF HUMANITY: REFLECTIONS ON THE TWENTIETH CENTURY 97 (Judith Friedlander trans., 2001).

14. See Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT’L L. 919, 933 (1999).

15. Roland Bleiker, *The Aesthetic Turn in International Political Theory*, 30 MILLENIUM: J. INT’L STUD. 509, 509–11, 519, 529 (2001).

16. *Id.* at 513.

17. *Id.* at 519.

18. TWINING, *supra* note 7, at 50–51.

19. *Id.* at 3.

20. *Id.* at 152, 172.

21. *Id.* at 51, 172, 243.

22. See DAVID CAMPBELL, NATIONAL DECONSTRUCTION: VIOLENCE, IDENTITY, AND JUSTICE IN BOSNIA 3–5 (1998) (discussing the deeper ethical aspirations of his work).

23. See *id.* at 34–43, 110–11 (providing Campbell’s account of narrativity, and its “limits,” in the Balkan context).

international institutions such as the International Criminal Tribunal of Yugoslavia (“ICTY”), narrativity, Campbell concludes, is a vital “strategy” in the restoration of a revitalised “ethic” of democracy.<sup>24</sup> Above all, the chronicles of the “Bosnian war” demand a revitalized sense of ethical and moral responsibility, one that attaches to a sense of common humanity. He asserts “the call of the other has rung out loud and clear.”<sup>25</sup>

It is a conclusion that finds an obvious echo in Jacques Derrida’s suggestion that, if “9/11” does indeed signal the “end” of international law, then what must replace it is a renewed politics of “hospitality” and compassion.<sup>26</sup> The dictates of “law,” Derrida urges, leave no “place for justice or responsibility.”<sup>27</sup> The invocation of compassion is striking. In *Politics of Friendship*, Derrida affirms that “the very work of the political . . . amounts to creating (to producing, to making, etc.) the most friendship possible.”<sup>28</sup> Friendship is the primal characteristic of humanity, its politics and its jurisprudence. It gears, not just “democracy,” but also “[t]ruth, freedom, necessity, and equality.”<sup>29</sup> It defines the strength of any political community, its politics and its morality. The concept of “friendship” is also centre-stage in his subsequent *On Forgiveness*—the expression of “confession” and repentance that can be found “beyond the juridical nature.”<sup>30</sup>

The ethical dimension of this deconstructionist jurisprudence has found approval in the writings of other post-modern jurists such as Drucilla Cornell and Costas Douzinas. In her *Philosophy of the Limit*, Cornell emphasises that the “responsibility” of an ethics of deconstruction is centred on preserving the necessary “disjuncture between law and justice” in the wider cause of “fundamental humanity.”<sup>31</sup> Douzinas invokes the same disjuncture in order to recast a “philosophical anti-humanism” as an alternative to arid, institutionalised conceptions of human “rights.”<sup>32</sup> Deconstruction, Douzinas avers, is a “defence of the human,” a jurisprudence that protects the “integrity of unique beings in their existential otherness, by promoting the dynamic realisation of the freedom with others.”<sup>33</sup> And, most significantly perhaps, it is a narrative and imaginary, as well as ethical and human

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24. See *id.* at 234.

25. *Id.* at 23.

26. BORRADORI, *supra* note 3, at 128–29.

27. *Id.* at 135.

28. JACQUES DERRIDA, *POLITICS OF FRIENDSHIP* 8 (George Collins trans., Verso 1997 (1994)).

29. *Id.* at 100.

30. JACQUES DERRIDA, *On Forgiveness, in ON COSMOPOLITANISM AND FORGIVENESS* 25, 28 (Mark Dooley & Michael Hughes trans., Routledge 2001) (1997); see also *id.* at 59.

31. See DRUCILLA CORNELL, *THE PHILOSOPHY OF THE LIMIT* 115–18 (1992).

32. See COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS: CRITICAL LEGAL THOUGHT AT THE TURN OF THE CENTURY* 1–19 (2000).

33. *Id.* at 341.

venture, one that also promotes a jurisprudence of “passion”—a jurisprudence that is constructed from the “imaginary,” from “memories of fear, tales of pain and suffering and the experience of oppression.”<sup>34</sup>

The invocation of narrativity is not, however, the sole preserve of the Derridean and the deconstructionist, any more indeed than is the complementary invocation of a jurisprudence, and an ethics, of compassion. In her essay *Compassion and Terror*, the liberal philosopher Martha Nussbaum has recently reiterated her belief that compassion alone gives us a necessary moral “urgency.”<sup>35</sup> Nussbaum impresses the particular need to extend compassion to “others” who we cannot readily understand, or even, perhaps, discern. For “we will achieve no lasting moral progress unless and until the daily unremarkable lives of people distant from us become real in the fabric of our own daily lives, until our everyday eudaimonistic judgments about our important ends include them as ends.”<sup>36</sup> And if we are going to realise this challenge, the ability to nurture a suitably cosmopolitan ethical “imagination” will be vital.<sup>37</sup> It is the telling, and the listening to, stories, whether they be in courts of law or between the pages of books, which alone can invest in all of us “a larger sense of the humanity of suffering.”<sup>38</sup>

This more recent invocation of humanity can be placed, of course, within the context of Nussbaum’s consistent evocation of the same idea as part of a broader, and intensely narrative, political strategy. In *Poetic Justice*, she recast liberal democratic politics as a matter of “imagination, inclusion, sympathy and voice.”<sup>39</sup> In this she repeated the assertion in her earlier *Love’s Knowledge* that literature has far greater value in securing the “good society” than any number of laws, quite simply because it can more readily access our “narrative emotions,” and it is these emotions that nurture our capacity to “love” and which, ultimately, make life worth living.<sup>40</sup> As she eloquently concluded in *Cultivating Humanity*, “[this] means the ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader of that person’s story, and to understand the emotions and wishes and desires that someone so placed might have.”<sup>41</sup>

34. *Id.* at 253, 341.

35. See Martha C. Nussbaum, *Compassion and Terror*, in *TERRORISM AND INTERNATIONAL JUSTICE* 229, 231 (James P. Sterba ed., 2003).

36. *Id.* at 249.

37. See *id.* at 244–45.

38. *Id.* at 251; see also *id.* at 231, 244–45, 249–51.

39. See MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 119 (1995); see also *id.* at 73, 91, 117.

40. See MARTHA C. NUSSBAUM, *LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE passim* (1990).

41. MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* 10–11 (1997).

The resonance is immediate. For both the Derridean and the liberal humanist, narrativity is an essential “strategy” in the quest for justice. And it is, too, an essential “strategy” of “law-and-literature” scholarship. Its most striking expression can be found in Richard Weisberg’s invocation of jurisprudential “poethics.”<sup>42</sup> According to Weisberg, “[s]tories about the ‘other’ induce us to *see* the other, and once we do so, we endeavor [*sic*] consistently to understand the world from within the other’s optic.”<sup>43</sup> More recently, but in the same vein, Maria Aristodemou has appraised the potential for literature to access a “new ethics” of “otherness” in real, as well as imagined, jurisprudential contexts.<sup>44</sup> She affirms, “[n]o writing ever takes place outside the mirroring love of, and for, others . . . .”<sup>45</sup>

It is this determination to reinvest jurisprudence with a better appreciation of love, and consonant emotions such as compassion and mercy, that has become a hallmark of this emergent “legal humanism.” Its validity, as a jurisprudential strategy, finds a striking testament in Antje Krog’s chronicle of the South African Truth and Reconciliation Commission (“TRC”), *Country of My Skull*.<sup>46</sup> Such a narrative strategy, as Krog confirms, “quilted together from hundreds of stories,” provides a measure of intensely human justice that no amount of legalism can ever effect.<sup>47</sup> One particular and famous instance, chronicled by Krog, concerned the testament of one deponent before the TRC who had lost his eyesight when blinded by the police. He affirmed, what had “brought my sight back is to come here and tell the story. I felt that what was making me sick all the time is the fact that I couldn’t tell my story.”<sup>48</sup>

It is this thought, that justice depends upon the telling of stories, and providing the facility for this narrativity, that underpins the idea of a legal humanism—of the kind advocated, in their different ways, by the likes of Derrida, Nussbaum, and Weisberg. And, as intimated before, there is a coincidence which may not, in the end, be that much of a coincidence. The desire to reinvest a more nuanced, and explicitly more narrative and humanist, jurisprudence can be set precisely alongside the concomitant sense that contemporary experiences of political violence at a trans-national level have exhausted the capacity of classical liberal legalism to effect redress. To borrow a term beloved of post-modern jurists, we have perhaps moved “beyond” the law, into a realm where the supplement is no longer really a supplement, but emerges as the primary and essential text in trying to realise some

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42. See Weisberg, *supra* note 1, at 4–5.

43. *Id.* at 46.

44. See MARIA ARISTODEMOU, *LAW AND LITERATURE: JOURNEYS FROM HER TO ETERNITY 2*, 225 (2000).

45. *Id.* at 295.

46. ANTJIE KROG, *COUNTRY OF MY SKULL* (1999).

47. *Id.* at 48, 259.

48. *Id.* at 45.

measure of justice in the face of otherwise insurmountable instances of injustice. It is here, as Richard Rorty has admitted, that “sentimentality,” rather than being eschewed by the stony-faced jurist, may turn out to be “the best weapon we have.”<sup>49</sup>

### III. THE BALKAN TRAGEDIES

The Balkan wars provided a searing conclusion to the twentieth century, one which cast into ridicule the assumption that the end of the Cold War had finally secured for Europe a state of “perpetual peace.”<sup>50</sup> It ended with the Serbian militia murdering and raping its way across Kosovo, just as it and various Croat and Bosnian militia had murdered and raped their way across most of the Balkans for the previous eight years. The conclusion was hastened by NATO’s saturation bombing of Belgrade, a campaign which, despite its possible moral and political justification, was generally thought to be of questionable legality in terms of strict international law.<sup>51</sup>

Shamed, not just by the violence itself, but by the patent inadequacy of international institutions to actually bring any immediate relief to tens of thousands of who suffered Europe’s latest bloodbath, the UN established a specific legal tribunal, the ICTY, at The Hague, with the specific remit to administer some measure of redress; no matter how belated.<sup>52</sup> But the same wars, and the same sense of shame, also nurtured a compelling determination to provide alternative chronicles of injustice. Foremost amongst these are Slavenka Drakulic’s *They Would Never Hurt a Fly*,<sup>53</sup> and Elizabeth Neuffer’s *The Key to My Neighbour’s House*.<sup>54</sup>

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49. RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* 18 (3rd prtg. 1999).

50. The phrase “perpetual peace” is, of course, Immanuel Kant’s, most famously articulated in his essay of that name. The phrase “long” war has been famously deployed in PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* (2002).

51. See Mary Ellen O’Connell, *The UN, NATO, and International Law after Kosovo*, 22 HUM. RTS. Q. 57, 57–58 (2000) (providing an example of the considerable literature on this particular issue); Dino Kritsiotis, *The Kosovo Crisis and NATO’s Application of Armed Force Against the Federal Republic of Yugoslavia*, 49 INT’L & COMP. L.Q. 330 (2000); Christine Chinkin, *The Legality of NATO’s Action in the Former Republic of Yugoslavia (FRY) Under International Law*, 49 INT’L & COMP. L.Q. 910, 910–25 (2000).

52. Established by U.N. Resolutions 808 and 827 and tasked “for prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991.” S.C. Res. 808, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993); S.C. Res. 827, UN SCOR, 48th Sess., UN Doc. S/RES/827 (1993).

53. SLAVENKA DRAKULIC, *THEY WOULD NEVER HURT A FLY: WAR CRIMINALS ON TRIAL IN THE HAGUE* (Viking Penguin 2004) (2003).

54. ELIZABETH NEUFFER, *THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA* (2002).



At the heart of these two chronicles is the same strategy of “dual narrativity” that underpins Krog’s account of the TRC. On the one hand, the two chronicles impress the irreducibly human experience of injustice during the Balkan wars. On the other hand, they also stress the intensely narrative nature of proceedings before ICTY. Whilst it might be thought that “international” criminal law was as rule-based as any other form of law, as we shall see, its humanitarian impulses make it peculiarly susceptible to strategies of narrativity.

It has often been observed that popular perceptions of, and reactions to, events in the Balkans were framed by narrative and pictorial accounts provided by journalists and media—what Lawrence Freedman terms the “CNN effect.”<sup>55</sup> Freedman cites the British Foreign Secretary Douglas Hurd observing that the novelty of narrativity in the Balkan wars lay not in “mass rape, the shooting of civilians, in war crimes, in ethnic cleansing, in the burning of towns and villages [but] that a selection of these tragedies is now visible within hours to people around the world.”<sup>56</sup> He affirmed that “[p]eople reject and resent what is going on because they know it more visibly than before.”<sup>57</sup> The shelling of the central market in Sarajevo is one striking example. So were pictures of chained peacekeeping troops at Srebrenica, and in time photo images of fields outlying the town. Another example was provided by pictures of emaciated prisoners in Omarska and other, concentration camps. And each of these three instances has, accordingly, taken on a wider symbolic import in subsequent narratives of events in the Balkans. They are, in an immediate sense, defining symbols of evil, readymade narratives of (in)justice.

The Sarajevo shelling in February 1994 has a particularly central place in Neuffer’s narrative of the Balkan wars. Its impact on international public opinion, as she records, was enormous.<sup>58</sup> The shelling, which was to lie at the centre of ICTY indictments against the President of Republica Srpska, Radovan Karadzic, and his military commander, Ratko Mladic, represented a wider indictment, of the “fairy tale,” of the Bosnian Serb “nation,” at the heart of which could be found the warped logic of “ethnic cleansing.”<sup>59</sup> Notoriously, neither Karadzic nor Mladic have stood trial for their indicted crimes. And yet they have been tried. Chronicles such as Drakulic’s and Neuffer’s serve their own indictment, arraigning Karadzic, Mladic, and others before the court of international public opinion. It is Drakulic who describes Mladic striding around Srebrenica following the capitulation

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55. Lawrence Freedman, *Victims and Victors: Reflections on the Kosovo War*, 26 *REV. INT’L STUD.* 335, 338 (2000).

56. *Id.*

57. *Id.*

58. See NEUFFER, *supra* note 54, at 61–62.

59. See *id.* at 12, 19–21; ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* 157 (1998).

of the United Nations “peacekeepers,” and chattering excitedly to journalists about avenging “the Turks” and “Muslims,” thousands of whom were about to be driven in trucks to neighbouring fields and shot.<sup>60</sup>

For this reason—for their ability to lay the case against perpetrators of crimes against humanity who fail to appear before established tribunals—chronicles such as Drakulic’s and Neuffer’s have a particularly essential role to play in furthering the cause of justice. In the *Tadic* case,<sup>61</sup> prosecutor Mark Harmon admitted to the court that the failure to bring Karadzic and Mladic before it was a failure that “will haunt the victims and shame us all.”<sup>62</sup> Judge McDonald would later, and likewise, comment that the continuing failure to bring these two particular indictees to justice was in danger of making a “mockery” of the entire aspiration and process of the tribunal.<sup>63</sup> Whilst only serving to record and emphasise the shame, chronicles such as Drakulic’s and Neuffer’s can at least alleviate the ultimate fear of their victims—that their suffering will go unnoticed, and unaccounted.

And it is important that the horrific events that took place in Sarajevo that February lunchtime in 1994 are recorded. A 120-millimeter shell killed sixty-six and wounded over 140, including three children under the age of fifteen.<sup>64</sup> The indictments included the statistics. But the chronicle needs more. The narrative is important—shattered market-stalls, limbs lying in pools of blood, a “piece of head . . . impaled on a metal post, [b]loodstained rags . . . draped over unidentified body parts, and men, wailing and crying, heft[ing] bodies into cars doubling as ambulances.”<sup>65</sup> The narrative makes the indictment real. As Neuffer, who was present at the shelling concludes, “[i]t looked like a war crime to me.”<sup>66</sup>

Alongside Sarajevo must be placed a still more grotesque tragedy—that of Srebrenica. Between July 13 and July 19, 1995, more than 7000 Bosnian Muslims were massacred in the environs of Srebrenica, a supposed “safe-haven” under the nominal protection of the United Nations. The massacre followed the effective surrender of the UN force, and its possible complicity, even if unknowing, in the slaughter that followed.<sup>67</sup> The massacre at Srebrenica represents one of those watersheds that occasionally define, not just a war, but the fate of an ideal—a peculiar tragedy, even within the context of a war of barely

60. See DRAKULIC, *supra* note 53, at 167; NEUFFER, *supra* note 54, at 149.

61. Prosecutor v. Tadic, Case No. IT-94-1-I, 2d Amended Indictment (Dec. 14, 1995), available at <http://www.un.org/icty/indictment/english/tad-2ai951214e.htm>.

62. NEUFFER, *supra* note 54, at 208.

63. *Id.* at 362.

64. *See id.* at 62.

65. *Id.*

66. *Id.*

67. *See id.* at 154–56; DAVID HIRSCH, LAW AGAINST GENOCIDE: COSMOPOLITAN TRIALS 62 (2003).

comprehensible cruelty and atrocity.<sup>68</sup> And it is for this reason that it provides such a stunning narrative of injustice. As David Campbell notes, “to think about the events that took place at Srebrenica in July 1995 is to confront the impossibility of escaping narrativity.”<sup>69</sup>

Unsurprisingly, Srebrenica is a focal point in both Drakulic’s chronicle and also Neuffer’s chronicle.<sup>70</sup> According to the latter, it exemplified not merely the brutality of those who instigated the atrocity, but also the complicity of those who did so little to prevent it.<sup>71</sup> It was, she affirms, “a tragedy spawned by military incompetence, the UN’s trepidation, and the international community’s cowardice.”<sup>72</sup> And once again, this particular narrative is vital because no UN commander or soldier has been indicted by ICTY, and none is likely to be.<sup>73</sup> And yet the evidence that the Dutch peacekeeping force actually assisted the Bosnian Serb army in the preliminaries for the subsequent massacre, including listing and distinguishing men from women, is compelling.<sup>74</sup> A full narrative of the Srebrenica massacre needs this wider perspective.

And a full narrative can bring home the true horror of what happened, both during the massacre and afterwards. It can provide a contextual complement to the bare statistics that were provided to the tribunal—the 7000 who disappeared and the 120 United Nations troops who froze in horror and surrendered.<sup>75</sup> It can, for example, describe the “stinking stew of rotted clothes and outflung hands and hunks of flesh” that faced those who excavated the Cerska graves, and those in surrounding fields.<sup>76</sup> As Neuffer concludes, the most striking effect of viewing these graves was to impress their humanity.<sup>77</sup> At Cerska, she observed, “there was no avoiding the fact that these were not just skeletons.”<sup>78</sup> Rather they “were remains of human beings: someone’s son, lover, brother, husband.”<sup>79</sup>

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68. According to Richard Holbrooke, it was the lowest point in the history of the UN. See NEIER, *supra* note 59, at 133.

69. CAMPBELL, *supra* note 22, at 40.

70. See DRAKULIC, *supra* note 53, at 94–106; NEUFFER, *supra* note 54, at 142–49, 159.

71. See NEUFFER, *supra* note 54, at 148.

72. *Id.*

73. Though the Dutch government itself, pressed by the horror of its citizens, was persuaded to hold an inquiry, and in time both the Prime Minister and the head of the Dutch armed forces resigned.

74. See NEUFFER, *supra* note 54, at 148–59.

75. *Id.* at 3.

76. *Id.* at 215.

77. See *id.* at 215–16.

78. *Id.* at 216.

79. *Id.*

The ICTY, as she further observed, would see plenty of photographs.<sup>80</sup> But it would never experience the full horror. If we are to get a better understanding of what happened in Srebrenica, and what it means today, there is a whole lot more that we “need to know”—a whole lot more than what the transcripts of ICTY can tell us.<sup>81</sup> We “need to know,” for example, “that the poppies that sprouted from a particular spot by the side of the road were growing out of the earth piled on top of clothing stripped from Srebrenica men.”<sup>82</sup> And, perhaps more troubling still, we need to know that children who witnessed the Muslim women visiting the graves “were not waving, but giving a defiant, three-fingered Serb salute.”<sup>83</sup>

The ICTY, of course, focussed on individual responsibility or, more accurately, it focussed on both aspects of individual responsibility—the immediate and the command. In its capacity to dovetail instances of both immediate individual and command responsibility, Srebrenica offers itself as a particularly compelling jurisprudential, as well as moral and political, narrative. Narratives of immediate individual and command responsibility are presented in two of the more renowned cases to come before the trial—that of Drazen Erdemovic<sup>84</sup> and that of General Radislav Krstic.<sup>85</sup>

Erdemovic was an executioner in the Bosnian Serb army. He lost count of how many he killed. But he was profusely, and famously, sorry—famously, in the sense that the tribunal took the important step, as a precedent, of accepting his sorrow in mitigation. Erdemovic also testified against Krstic. For hour after hour, Erdemovic had stood in the hot sun shooting unarmed prisoners in a field.<sup>86</sup> His evidence was devastating, an indictment not just of himself, but of humanity. It was also a narrative, very obviously so in that Erdemovic himself emphasised how ritualistic was the process of systematic murder. It is not merely the description of line after line of prisoners shot which catches the attention, it is again the small details—the prisoners that stained their own trousers in terror, the pouring of a glass of orange juice for an old man about to be shot, the sustenance of brandy as exhaustion set in and trigger fingers numbed, the boy who knelt down in front of him and whispered “Mother.”<sup>87</sup> This again we need to know.

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80. Interestingly, it has, as the Author writes, also recovered video evidence of some of the associated atrocities. This video has been released to the press, and images duly beamed around the world.

81. NEUFFER, *supra* note 54, at 368.

82. *Id.*

83. *Id.* at 244–45.

84. Prosecutor v. Erdemovic, Case No. It-96-22, Indictment, *available at* <http://www.un.org/icty>.

85. Prosecutor v. Krstic, Case No. IT-98-33, Amended Indictment, *available at* <http://www.un.org/icty>.

86. *See* DRAKULIC, *supra* note 53, at 106–17.

87. *See id.*

Erdemovic was not a career soldier, and ICTY accepted that his options that day were strictly limited—either shoot or be shot.<sup>88</sup> There existed no such mitigating circumstances for Krstic, the commander of the infamous Drina Corps which conducted most of the Srebrenica massacre. There was no evidence that Krstic shot anyone, or even fired a gun in anger. But the responsibility for what followed, as ICTY determined, was very much his.<sup>89</sup> Drakulic records the testimony of one teenage survivor of the massacre:

Some people shouted, “Give us some water first, then kill us.” I was really sorry that I would die thirsty and I was trying to hide among the people as long as I could, like everybody else. I just wanted to live for another second or two . . . I saw rows of killed people. It looked as they had been lined up, one row after the other. And then I thought that I would die very fast, that I would not suffer. And I just thought that my mother would never know where I had ended up.<sup>90</sup>

Whilst he admitted being the commanding officer of the Drina Corps which instituted the massacres, Krstic simply denied that he had anything to do with them. He had never shot anyone. It was not his fault. When tape was played which proved his complicity, he just covered his face in his hands. “Fuck their mothers!” the tribunal heard him say, “Don’t leave a single one alive!”<sup>91</sup>

The third of the particular narratives which impressed themselves upon the wider public conscience, and which are chronicled by Drakulic and Neuffer, relates to Omarska prison camp. Pictures of inmates at Omarska, so obviously resonant of images of Auschwitz and other World War II concentration camps, led the German Foreign Minister, Klaus Kinkel, to demand that there should be an international criminal tribunal established to hold those guilty to account.<sup>92</sup>

In due course, the first indictee to appear before this tribunal would be a former Omarska guard, Dusko Tadic. His association with Omarska was oddly, even perversely, propitious; at least in the sense that the camp represented a “crime” that everyone had read about or seen pictures of.<sup>93</sup> It is often argued that the *Tadic* trial symbolises a notable weakness in ICTY’s proceedings—that it generally focuses on the “smaller fish.”<sup>94</sup> This might be true. At the same time, the crimes that Tadic was accused of committing, at Omarska and other camps, and of which he was convicted, are as serious as any that might be levelled in humanitarian law—torture, sexual abuse, and murder, all

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88. NEUFFER, *supra* note 54, at 244–45.

89. See DRAKULIC, *supra* note 53, at 84–86.

90. *Id.* at 98.

91. See *id.* at 99–105; NEUFFER, *supra* note 54, at 3.

92. NEUFFER, *supra* note 54, at 47–48.

93. NEIER, *supra* note 59, at 143.

94. See Hirsh, *supra* note 67, at 91–92.

fall readily into the ambit of “crimes against humanity.”<sup>95</sup> And it is hard to imagine more grotesque particulars—systematic rape and sodomy, including most notoriously, perhaps, his forcing one prisoner to bite off the testicles of a fellow inmate against whom Tadic bore a particular grudge.<sup>96</sup>

Omarska, according to Neuffer, perhaps more than any other event, came to “symbolize all the bestial passions of Bosnia’s war.”<sup>97</sup> One of the most bestial of all such passions is rape.<sup>98</sup> In due course, accounts of the systematic rape of countless inmates at Omarska emerged as one of the most riveting testimonies to come before ICTY. The prosecution of Tadic focussed on allegations of rape, and the judgement was historic in its acceptance of rape as a crime against humanity.<sup>99</sup> Moreover, as Martha Minow observes, the extent to which the tribunal reacted to previous documentary evidence of rape at Omarska provided a vivid example of how a legal institution could be influenced by alternative narrative and dramatic media.<sup>100</sup>

The instances of systematic rape during the Balkan wars has, unsurprisingly, led to a strident literature on the nature of rape in war as an extreme expression of a fundamental power disparity that can be traced in all aspects of male-female politics. Catherine MacKinnon made much of this supposition, emphasising the process of the ritualistic nature, as well as the sheer number of instances, of rape in camps such as Omarska.<sup>101</sup> Certainly, the Omarska rapes confirmed the theatrical nature of rape in war—a strategy designed, not just for the emotional demoralisation of enemies, but also for the delectation of compatriots and colleagues in arms.<sup>102</sup> At the same time, there is a danger in over-intellectualising such intensely personal horrors just as

95. See *id.* at 84.

96. See NEUFFER, *supra* note 54, at 42; HIRSH, *supra* note 67, at 84–93 (discussing the Tadic case, and the evidence that was brought before the tribunals).

97. NEUFFER, *supra* note 54, at 40.

98. See *id.* at 41, 47.

99. See THEODORE MERON, WAR CRIMES LAW COMES OF AGE, 194–95, 205–09 (1998) (defending the development that rape is capable of being construed as a war crime following the judgment in *Furundzija* which reaffirmed the Tadic case); Cherie Booth, *Prospects and issues for the International Criminal Court: Lessons from Yugoslavia and Rwanda*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 172–75 (Phillipe Sands ed., 2003). The statute of the International Criminal Court has recognised certain gender-specific crimes, including rape and sexual assault; a recognition which, according to Cherie Booth, owes much to events at The Hague and Arusha. See *id.* at 163–64.

100. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 6 (1998).

101. See Catherine A. MacKinnon, *Turning Rape into Pornography: Postmodern Genocide*, in MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA 81 (Alexandra Stiglmeier ed., Marion Faber trans., 1994).

102. See generally Catherine C. Niarchos, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 HUM. RTS. Q. 649 (1995) (commenting on rape as both an aesthetic and a “legal” phenomenon in the context of the ICTY and the Balkan wars); Todd A. Salzman, *Rape Camps as a Means of*

there is an even greater danger in playing with slide-rules.<sup>103</sup> Various statistics have been churned out with regard to how many rapes there might have been. All are, ultimately, guesses, subject to various multipliers based on supposed numbers of abortions, births, and so on. The rape of one person, as part of what the United Nations General Assembly condemned as a systematic “weapon of war,” is as heinous, in terms of its simple violence and injustice, as the rape of many.<sup>104</sup>

There can be few better examples of where individual narratives provide so much more effective a chronicle of abuse than the slide-rule of the mathematician.<sup>105</sup> Both Drakulic and Neuffer present a series of rape narratives. And what is so memorable about these narratives, of course, is the retrieval of all the context that is lost to the official court transcript—the fact that the one witness, who along with her daughter was repeatedly raped, could not do more than utter “a tiny sound” in court; that her sobbing, on being shown a picture of her daughter who subsequently disappeared, “sounded as if there were a microphone inside her belly”; that one of the defendants had a daughter of precisely the same age; and above all, perhaps, that each of the defendants seemed so ordinary, and unthreatening in the flesh.<sup>106</sup> Narrating one particular meeting with a rape victim, Drakulic reinforces one of the most familiar aspects of contemporary rape critique—that rape is not, as the legal process would have it, an event, but an experience:

In her quick glances I recognized fear. She held her head bent slightly forward, as if expecting a blow at any moment. She knew some of her rapists in the camp by name—they were from a neighboring village—but this did not help her. She described the feeling of humiliation, of [utter] helplessness, of a kind of absence from her own body; she told of her desire to disappear, to die instantly. The rape [had] left her feeling dirty, she said, as though she had been wrapped up in a layer of filth, [almost] like a blanket.<sup>107</sup>

Omarska is an epitome of evil; as are Sarajevo and Srebrenica. They are not, of course, isolated instances of horror, or indeed of telling images of complicity.<sup>108</sup> But, taken together, they do serve to focus

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*Ethnic Cleansing: Religious, Cultural and Ethical Responses to Rape Victims in the Former Yugoslavia*, 20 HUM. RTS. Q. 348 (1998).

103. There is also a danger, as Charli Carpenter has graphically shown, in forgetting that children born of “forced impregnation” are victims too; and stigmatised as such by academic commentators. See R. Charli Carpenter, *Surfacing Children: Limitations of Genocidal Rape Discourse*, 22 HUM. RTS. Q. 428 *passim* (2000).

104. NEIER, *supra* note 59, at 182.

105. The European Commission suggested in a 1993 report that the figure in Bosnia was likely to be around 20,000 instances of rape. The Bosnian government preferred 50,000. For a cautionary comment on slide-rule rape statistics, see *id.* at 175–91.

106. DRAKULIC, *supra* note 53, at 51–55.

107. *Id.* at 60.

108. Another notorious image was the picture of ICTY indictee, and one time President of Republica Srpska, Biljana Plavsic, stepping over dead bodies in Bijelina in

our attention on the human aspect of crimes against humanity, and they do so in a way in which simple court testimony alone cannot. Narrative, once again, makes (in)justice real.

And it is for this reason that the kind of supplements provided by Drakulic and Neuffer are so vital. They can bridge this jurisprudential chasm, providing a narrative supplement to the aridity of the legal process itself. Whilst much of their particular chronicles might record testimony that came before the tribunal, by placing it within a critical context, Drakulic and Neuffer transform an intermittently staid chronicle presented to a tiny audience into a compelling, even poetic, invariably tragic, narrative which will be read by a vastly greater audience. As Richard Goldstone acknowledged, “people don’t relate to statistics, to generalizations.”<sup>109</sup> They can only “relate and feel when they hear somebody that they can identify with telling what happened to them.”<sup>110</sup> This is not, again, to deny the place of more formal institutions of law, if such institutions exist, and can effect a measure of justice. The ICTY, called into being by United Nations Resolution 808, and tasked “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991,” has a necessary role.<sup>111</sup> As Richard Goldstone confirms, a “credible judicial process” can still contribute to the “healing” process so necessary in any traumatised community.<sup>112</sup>

Neuffer readily admits the same conclusion. Whilst the tribunal might try to shape the kind of stories witnesses wish to relate, it does at least provide a means for their relation in the first place.<sup>113</sup> Moreover, whatever its various merits and demerits as an institution capable of effecting justice, no one can deny the effect the ICTY has had on the development of humanitarian and international criminal law.<sup>114</sup> In prosaic terms, as Neuffer concludes, it makes the world a “smaller, more uncomfortable place for war criminals.”<sup>115</sup> In terms of popular, and academic, interest, humanitarian law suddenly seems to matter.

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order to throw her arms around the neck of the notorious militia leader, and mass-murderer, “Arkan.” “I always kiss the heroes,” she later explained. The image returned to haunt her as she stood arraigned in The Hague. *See id.* at 180–81; GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 259–60 (2000). Milosevic’s observations regarding the depth of Plavsic’s obsession regarding ethnicity and eugenics are intriguing and immediately resonant of doubts held by senior Nazis regarding the sanity of Rudolf Hess. Even by the perverse standards of the more rabid Serbian nationalists, Plavsic seemed peculiar.

109. MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOSEVIC ON TRIAL* 53 (2002).

110. *See id.* at 14–15.

111. S.C. Res. 08, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993).

112. *See* RICHARD J. GOLDSTONE, *FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR* 65 (2000). Interestingly Goldstone hazards the thought that a truth commission might, in time, have a value in the Balkans. *See id.* at 72–73.

113. *See* NEUFFER, *supra* note 54, at 390.

114. *See* NEIER, *supra* note 59, at 10–20.

115. *See* NEUFFER, *supra* note 54, 310.



As Theodore Meron concludes, the ICTY has “generated an unprecedented interest in humanitarian law,” in the fate, not just of the accused, but of those who suffered at their hands.<sup>116</sup>

Furthermore, commentators have readily acknowledged the extent to which the ICTY has promoted a series of overtly narrative “strategies” in order to place the law “in context.” It has, for example, countenanced the presentation of evidence that has placed alleged events within a wider political, ethnic, and geographical context.<sup>117</sup> In its very first case, the *Tadic* case,<sup>118</sup> the trial chamber entertained expert witness evidence that reached back to the fourth century in order to provide some kind of historical and cultural context for the wars of the 1990s. The immediate purpose of this tactic was to persuade the chamber that the wars in Bosnia could be classified as “international,” rather than merely civil, wars, and thus fall within the ambit of “international” laws of war.<sup>119</sup> Strikingly, the tribunal’s judgment sought the same recourse to cultural contextuality. In order to try to understand why someone like Tadic could do what he did, the chamber felt obliged to dig deeply into the darker recesses of the Balkan ethnic mind-set.<sup>120</sup>

And not least, the ICTY itself presents a chronicle; tasked, in the words of United States Secretary of State Madeleine Albright, to chronicle and to invigorate “our collective memory.”<sup>121</sup> For many, this is a primary responsibility of such tribunals.<sup>122</sup> The aspiration was famously articulated at Nuremberg by Sir Hartley Shawcross. Shawcross explained that “this Tribunal will provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth and future politicians for warning.”<sup>123</sup> As Michael Ignatieff has more recently observed, regardless of the procedural limitations which tribunals tend to enforce, and by which they can exclude certain narratives, they can at least authenticate by means

116. Meron, *supra* note 99, at 283. See also *id.* at 282–83, 297–301; GOLDSTONE, *supra* note 112, at 125.

117. See SCHARF & SCHABAS, *supra* note 109, at 14–15.

118. *Tadic*, Case No. IT-94-1-T.

119. Whilst the tribunal accepted Tadic’s defence, that the wars were in fact “internal,” and thus out of the ambit of the Geneva Conventions, it also held that this did not preclude the application of customary humanitarian law. See MERON, *supra* note 99, at 262–77, 286–95; NEUFFER, *supra* note 54, at 181–82.

120. For a commentary, see Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 786–90 (1998).

121. NEUFFER, *supra* note 54, at 63. Albright was, as Gary Bass also emphasises, one of the few “true believers” in the idea of international tribunals. BASS, *supra* note 108, at 263; MINOW, *supra* note 100, at 60.

122. For a couple of intriguing perspectives regarding the effectiveness of ICTY, written in 1995 and 1998, see Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259 (1996); Akhayan, *supra* note 120, at 737–816.

123. See MINOW, *supra* note 100, at 47.

of conferring legitimacy on accounts of injustice.<sup>124</sup> David Campbell reaches the same conclusion, observing that “the greatest contribution of the war crimes trials may come from the construction of an archive and the furtherance of historical memory they aid . . . .”<sup>125</sup>

#### IV. TERRORIST STORIES

Terrorism has taken the academic world by storm. It has always been there, as its more nuanced commentators have duly noted.<sup>126</sup> Acts of terrorism are scattered across biblical and classical texts.<sup>127</sup> But the most recent “wave” of terrorism, culminating most spectacularly in the events of “9-11,” has become a centerpiece of contemporary musings on the subject of international law and (dis)order.<sup>128</sup> Jacques Derrida confessed: “[S]omething terrible [happened] on September 11 and in the end we don’t know what.”<sup>129</sup> But we are not short of opinions, particularly scary ones. It is argued that we now live in an age of “hyperterrorism,”<sup>130</sup> where the nature and scale of terrorism has reached a new level, and that the question of “[h]ow to deal with international terrorism is quickly becoming the defining issue of our age.”<sup>131</sup> The “spirit of the laws” itself is at stake.<sup>132</sup>

United States President George W. Bush has advised of a “lengthy campaign” against terrorism, one that will dictate whether “civilisation” can defeat the forces of “evil.”<sup>133</sup> It will be the defining battle for “progress and pluralism, tolerance and freedom.”<sup>134</sup> Ours is a world, the President advises, in which “there are no rules.”<sup>135</sup> A similarly fantastical rhetoric could be found in German Chancellor Gerhard Schroeder’s claim that “9-11” represented a “declaration of war against all of civilization.”<sup>136</sup> Perspective can temper the hyperbole.<sup>137</sup> But in a world of impressions, cold facts are of limited value. If the

124. See Akhavan, *supra* note 120, at 770.

125. CAMPBELL, *supra* note 22, at 234.

126. See WALTER LACQUEUR, *TERRORISM 7–20* (1977); Frédéric Mégret, *Justice in Times of Violence*, 14 EUR. J. INT’L L. 327, 328 (2003).

127. See James P. Sterba, *Introduction to TERRORISM AND INTERNATIONAL JUSTICE*, *supra* note 35, at 1, 2–3 (James P. Sterba ed., 2003); LACQUEUR, *supra* note 126, at 7–9, 21–22.

128. See ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 11–12 (2002).

129. BORRADORI, *supra* note 3, at 87.

130. See DERSHOWITZ, *supra* note 128, 11–12.

131. *Id.* See also DOMINICK MCGOLDRICK, *FROM ‘9/11’ TO THE ‘IRAQ WAR 2003’: INTERNATIONAL LAW IN AN AGE OF COMPLEXITY* 1–2 (2004) (articulating a similar question).

132. See Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 23–24 (2002).

133. MCGOLDRICK, *supra* note 131, at 11.

134. *Id.*

135. *Id.* at 87.

136. Mikkel Vedby Rasmussen, ‘A Parallel Globalization of Terror’: 9–11, *Security and Globalization*, 37 COOPERATION & CONFLICT 323, 333 (2002).

success of terrorism is calculated in terms of how great is the terror spread, the current experience of “hyperterrorism” seems to be remarkably effective. The discourse of terrorism today is an apocalyptic one; both terrorists and counter-terrorists prefer it that way.<sup>138</sup>

Terrorism is an elusive subject, evading precise political, jurisprudential, and cultural definition. Joseba Zulaika and William Douglass have observed that “terrorism becomes that heart of darkness” within which there appears to be no precise definition or understanding.<sup>139</sup> Beset by alternative terrorist and counter-terrorist strategies of evasion and allusion, it emerges as a sort of “dehumanized world that has lost all touch with reason and morality.”<sup>140</sup> It is within this frustrating context that recourse to literature and narrativity, once again, has its value. As Walter Lacqueur observed, as long ago as 1977, “[f]iction holds more promise for the understanding of the terrorist phenomenon than political science.”<sup>141</sup> The purpose of this part of the article is to suggest, using one particular example, Joseph Conrad’s *The Secret Agent*,<sup>142</sup> just how apposite Lacqueur’s observation is.

As we noted before, the experience of modern, or perhaps post-modern, terrorism has been a primary factor amidst discussions surrounding the alleged “end” of international law. Giovanna Borradori addresses the question of whether the most devastating act of terrorism in history represents the symbolic moment when modernity itself “ended”?<sup>143</sup> Certainly, according to the United Nations Ambassador for War Crimes, it has “changed the world . . . forcing us to re-examine our traditional notions of security, our understanding of our attackers, and our approaches to bringing the perpetrators to justice.”<sup>144</sup> Frederic Megret identifies a new “grammar of political terror,” one which is “apocalyptic” rather than ideological—a terrorism of “transcendental nihilism.”<sup>145</sup> Such a view attaches to those who prefer the term “hyperterrorism” to suggest a kind of terrorism that is nourished by the technological advances of globalization. Emphasising the symbolic affinity, Jean Baudrillard has notoriously suggested that the ter-

137. As Zulaika and Douglass observe, between 1974 and 1994, more people died each year of bee-stings in the US than of any terrorist related events. This a country in which approximately 100,000 are murdered each year. See JOSEBA ZULAIKA & WILLIAM A. DOUGLASS, TERROR AND TABOO: THE FOLLIES, FABLES, AND FACES OF TERRORISM 6 (1996).

138. *Id.* at 30.

139. *Id.* at 25.

140. *Id.*

141. LACQUEUR, *supra* note 126, at 149. Even if fiction, as he adds, “is no place for leisurely strolls.” *Id.* at 150.

142. JOSEPH CONRAD, *THE SECRET AGENT* (John Lyon ed., 2004).

143. See BORRADORI, *supra* note 3, at 1-20; ALEX HOUEN, TERRORISM AND MODERN LITERATURE: FROM JOSEPH CONRAD TO CIARAN CARSON 1-5 (2002) (expressing a more sceptical view).

144. MCGOLDRICK, *supra* note 131, at 21.

145. MEGRET, *supra* note 126, at 330-31.

rorism which the “west” is presently experiencing represents “triumphant globalization battling against itself.”<sup>146</sup> “9/11” uncovered the “secret coalition” that rules the post-modern global landscape, between the terror of globalisation and the counter-terrorism of fundamentalist resistance.<sup>147</sup>

Moreover, such an analysis chimes very obviously with that already described, which proclaims a new post-modern world order, of which globalization and trans-national terrorism are cited as key signifiers.<sup>148</sup> John Gray has argued that the emergence of more sophisticated trans-national terrorist networks, such as Al-Qaeda, is a “by-product” of globalisation and the “weakened” condition of the modern state. He confirms, “[t]he Hobbesian anarchy that flows from failed states has enabled stateless armies to strike into the heart of the world’s greatest power.”<sup>149</sup> There is, very obviously, a rhetorical strategy here—a conscious attempt to nurture a popular “fascination” with the apocalyptic, with events that appear to defy reason, to deny it even.<sup>150</sup>

At a more prosaic level, these rhetorical strategies find voice in strident calls for a “war” against terror, for a “crusade” versus evil. Terrorism might seem to be rather elusive, but the idea of “war” is something everyone can latch on to.<sup>151</sup> The problem, notoriously, is that the idea of a “war” on terror has no real meaning, certainly not any sensible jurisprudential or legal meaning. As Peter Fitzpatrick has suggested, the essential “vacuity of content and range” that lies behind the rhetorical notion of a “war” against terror is reinforced by the sense that terrorism is an experience to be contained, rather than an event to be defeated.<sup>152</sup> The reason why terrorism, and any presumed war, or indeed law, against it is so allusive is simple, and also impossibly difficult. As Zubaika and Douglass observe, the world in which the modern terrorist and the modern counter-terrorist work is a world of “collective enchantment.”<sup>153</sup>

Lawyers do not like to operate in enchanted worlds. The fact that there is no obvious “law of terrorism” causes anxiety. Progress towards a determinate “law” of terrorism is said to be “patchy” at

146. See JEAN BAUDRILLARD, *THE SPIRIT OF TERRORISM* 11–12, 15, 19, 87, 94, 104–05 (Chris Turner trans., 2d ed., 2003).

147. See *id.* at 55, 64–66, 73–74, 100–01.

148. See Costas Douzinas, *Postmodern Just Wars: Kosovo, Afghanistan and the New World Order*, in *LAW AFTER GROUND ZERO*, *supra* note 4, at 20, 20–21, 32. See also generally BOAVENTURA DE SOUSA SANTOS, *TOWARDS A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN PARADIGMATIC TRANSITION* (1995) (providing a compelling, if controversial, account of a postmodern world order).

149. JOHN GRAY, *AL QAEDA AND WHAT IT MEANS TO BE MODERN* 1–2, 73–75 (2003).

150. See BAUDRILLARD, *supra* note 146, at 28–30.

151. See ZULAIKA & DOUGLASS, *supra* note 137, at 82.

152. See Peter Fitzpatrick, *Enduring Right*, in *LAW AFTER GROUND ZERO*, *supra* note 4, at 36, 41; GRAY, *supra* note 149, at 116.

153. See ZULAIKA & DOUGLASS, *supra* note 137, at 183.

best.<sup>154</sup> Perhaps, as Rosalyn Higgins has urged, we would be better off just giving up the chase.<sup>155</sup> For this reason, Higgins dismisses terrorism as a “term without legal significance.”<sup>156</sup> Instead, it has become a “convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.”<sup>157</sup> The General Convention on Terrorism tends to eschew simple definitions, preferring instead enumeration of kinds of “criminal and unjustifiable” actions.<sup>158</sup> For this very reason, Vaughan Lowe is equally skeptical as to whether there is a “need” for a “law” of terrorism.<sup>159</sup>

Terrorism does not seem to fit. In some jurisdictions it is remitted to ordinary domestic criminal law; but this is, of course, to deny the simple reality that terrorist crimes, replete with their inevitably political or cultural charge, are not ordinary crimes.<sup>160</sup> Alternatively, it is sometimes argued that trans-national terrorism requires a trans-national response—perhaps within the jurisdiction of the International Criminal Court, or alternatively a dedicated tribunal.<sup>161</sup> Perhaps terrorist acts can be dispatched within established laws of war. There again, as Terry Jones has asked, “[how] do you wage war on an abstract noun?”<sup>162</sup> Indeed, as Dominic McGoldrick has argued, so obvious are the discrepancies between the classical “law of war” and the more obviously elusive experience of terrorism that there can be no sensible meaning to the notion of a “war on terror.”<sup>163</sup> It is certainly not an “international armed conflict” as understood in the Geneva Conventions.<sup>164</sup> So perhaps the safest recourse is to leave it in abeyance, dispatched to the kind of legalistic black-hole located at Guanta-

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154. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 11 (2002).

155. Rosalyn Higgins, *The General International Law of Terrorism*, in TERRORISM AND INTERNATIONAL LAW 13, 13–14 (Rosalyn Higgins & Maurice Flory eds., 1997).

156. *Id.* at 28.

157. *Id.*

158. See Jean-Marc Sorel, *Some Questions About the Definition of Terrorism and the Fight Against its Financing*, 14 EUR. J. INT’L L. 365, 368–70 (2003) (discussing this approach). The European Union Framework Decision on Terrorism also includes a list of eight identifiably terrorist “acts” ranging from hostage taking to “major economic loss” to “disrupting the supply of water.” Steve Peers, *EU Responses to Terrorism*, 52 INT’L & COMP. L.Q. 227, 228–29 (2003).

159. Vaughan Lowe, *The Iraq Crisis: What Now?*, 52 INT’L & COMP. L.Q. 859, 864 (2003).

160. See Tomis Kapitan, *The Terrorism of “Terrorism”*, in TERRORISM AND INTERNATIONAL JUSTICE 47, 60 (James P. Sterba ed., 2003).

161. For a judicious overview of the alternatives, see Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 15–26 (2003).

162. MCGOLDRICK, *supra* note 131, at 28.

163. See *id.* at 32.

164. *Id.*; Mégret, *supra* note 126, at 337–41.

namo Bay, a place inhabited not by prisoners of war, but by “unlawful combatants, and their guards.”<sup>165</sup>

It does not fit, and no one seems to know what it is; at least not in a precise or definitional sense. Lacqueur has recently reaffirmed that any attempt at “specific” definition is “bound to fail, for the simple reason that there is not one but many different terrorisms.”<sup>166</sup> Terrorism, it seems, is not a matter of reason, but of mythology. Cognition has little purchase in an enchanted world. Terrorism is an impressionistic experience. Terrorists are thoroughly immersed in forms of artistic expression, generally wittingly, occasionally not. The expressions might be grotesque, even repellent, but they remain artistic in that they intend to convey impressions.<sup>167</sup> It is mythic, theatrical, and fetishistic—a “world of secrecy, masks and hidden agendas.”<sup>168</sup> As Joseba Zulaika and William Douglass have confirmed, the terrorist and the counter-terrorist are essentially engaged in the same literary endeavour—to craft a narrative of events, and in so doing elevate impression to the status of reality, even truth. The world of the “terrorist” is not just a world of rhetoric and counter-rhetoric, but of narrative and counter-narrative too.<sup>169</sup>

According to Don DeLillo, “9-11” was a “narrative” event; one that, moreover, has placed the narrative power in the hands of the terrorists.<sup>170</sup> One of the defining characteristics of the modern terrorist is a desire, to use John Gray’s words, “to remake the world by spectacular acts of terror.”<sup>171</sup> The “9-11” acts were just the most obviously spectacular of all. Indeed, “9-11” has itself ceased to be a date and instead become a symbol—cherished, paradoxically, by both terrorist and counter-terrorist.<sup>172</sup> It has been suggested that the destruction of the Twin Towers was an act of “poetic power,” as Damien Hirst and Karl Heinz Stockhausen both termed it, a “work of art.”<sup>173</sup> And it has been suggested that the suggestion is controversial. But it is not. The apparent categorization might seem to be somehow inhuman—to detract from the real human tragedy, from the exceptional

165. David Meltzer, *Al-Qa’ida: Terrorists or Irregulars?*, in *LAW AFTER GROUND ZERO*, *supra* note 4, at 71, 82.

166. WALTER LACQUEUR, *THE NEW TERRORISM: FANATICISM AND THE ARMS OF MASS DESTRUCTION* 46 (1999).

167. See LACQUEUR, *supra* note 126, at 3–4.

168. ZULAIKA & DOUGLASS, *supra* note 137, at 226; see also RICHARD W. LEEMAN, *THE RHETORIC OF TERRORISM AND COUNTERTERRORISM* 3–17, 52–55 (Bernard K. Johnpoll ed., 1991).

169. See ZULAIKA & DOUGLASS, *supra* note 137, at 3–4, 14–17, 65–90.

170. See Keith Hayward & Wayne Morrison, ‘*Locating Ground Zero*’: *Caught Between the Narratives of Crime and War*, in *LAW AFTER GROUND ZERO*, *supra* note 4, at 139.

171. GRAY, *supra* note 149, at 22.

172. Rasmussen, *supra* note 136, at 342.

173. See Hayward & Morrison, *supra* note 170, at 144. For a similar sentiment, see BORRADORI, *supra* note 3, at 28.

nature of events. But it does not. It merely paints the picture more vividly.

And it is not, of course, an isolated instance. Hijacked planes are intended to be spectacular events, as are the often grotesque videos of kidnapped victims, pleading for their lives, sometimes being filmed as they are killed. Victims kidnapped in Iraq are paraded in the living rooms of the “west,” just as are the final testaments of putative suicide bombers, and the various harangues of terrorist leaders. It has been alleged that, “[w]ithout television, terrorism becomes rather like the philosopher’s hypothetical tree falling in a forest: no one hears it fall, and therefore it has no reason for being.”<sup>174</sup> There is no point, as one of Bin Laden’s senior aides puts it, in terrorist “volunteers” killing, and being killed, “in silence.”<sup>175</sup> Publicity is the oxygen that the terrorist and counter-terrorist crave. Their mutual relation, and their “symbiotic relationship” with the media, is the pivot around which modern terrorist discourse revolves.<sup>176</sup>

The aesthetic, and rhetorical, battle between self-styled terrorist and counter-terrorist is joined with a vengeance.<sup>177</sup> The “terrorist” aspires to fetishism, to fabricate a mythic image of transcendental heroism, and even of goodness.<sup>178</sup> The Russian nihilist Stepniak, who assassinated the Russian General Mesentzoff in 1878, wrote that the terrorist should be regarded as “noble, terrible, irresistibly fascinating, for he combines in himself the two sublimities of human grandeur: the martyr and the hero.”<sup>179</sup> It might be a “grotesque” aspiration, as Lacqueur observes, but it has inspired countless thousands for countless thousands of years; the freedom fighter obliged to “play” an “heroic, yet tragic” role for the greater benefit, but one in which he or she just happens to murder innocent victims in the process.<sup>180</sup>

The immediate counter-terrorist strategy is to attempt to retrieve this narrative, on the one hand to destroy the myth of the terrorist as hero, and on the other to present a counter-rhetoric of defiance and vengeance.<sup>181</sup> The terrorist is portrayed as grotesque, as the “paradigm of inhuman bestiality.”<sup>182</sup> Terrorists join cults. Counter-ter-

174. ZULAIKA & DOUGLASS, *supra* note 137, at 7 (quoting Ted Koppel, ABC News).

175. Jason Burke, *Theatre of Terror*, OBSERVER (U.K.), Nov. 21, 2004, at Review 2.

176. See HOUEN, *supra* note 143, at 11–13; ANTHONY KUBIAK, STAGES OF TERROR 1–2, 157 (1991).

177. See LEEMAN, *supra* note 168, at 2–22.

178. See ZULAIKA & DOUGLASS, *supra* note 137, at 37–44 (providing a compelling account of ETA attempts to craft such a narrative).

179. HOUEN, *supra* note 141, at 57 (citing SERGEI KRAVCHINSKY, UNDERGROUND RUSSIA 44 (London, Smith & Elder 1883)).

180. See, LACQUEUR, *supra* note 126, at 3–4.

181. See Hayward & Morrison, *supra* note 170, at 151–52; LEEMAN, *supra* note 170, at 2–5.

182. ZULAIKA & DOUGLASS, *supra* note 137, at 6.

rorists go to church, and believe in real gods.<sup>183</sup> The rhetorical struggle is a slippery one, engaged in a linguistic environment, to borrow Derrida's phrase, of "semantic instability."<sup>184</sup> The adage of today's terrorist being tomorrow's liberator is an old one. But the adage has force too.<sup>185</sup> Counter-terrorist rhetoric is all about ascribing the soubriquet "terrorist," then damning the subject, and then re-ascribing as is necessary.

But it is not, of course, the only strategy. Another is the necessary invocation of fear.<sup>186</sup> A striking example can be found in President Bush's State of the Union address in January 2002, where he warned that "[t]housands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spreading throughout the world like ticking time bombs, set to go off without warning."<sup>187</sup> In this spirit, Slavoj Zizek has argued that the "west" has constructed a "war on terrorism" as the most obvious, and most convenient, successor to the now defunct Cold War.<sup>188</sup> But rhetorical strategies are, as we have already noted, elusive and allusive too. Terrorist acts, as Juergen Habermas observes, are, by definition, expressions of a "distortion in communication," expressions that actually represent the failure of communicative expression.<sup>189</sup>

We, the audience, have to try to make some sense of all this—pick our way through the heroes and anti-heroes, the mythologies and the realities. It is not easy. For a start, we are not supposed to engage our own imaginations too much. As Zulaika and Douglass observe, "interaction with the terrorist 'other' is violation of a taboo."<sup>190</sup> We are supposed to be terrified. We are not supposed to do anything that might lead us to understand, still less sympathise, with this "other." Richard Hofstadter famously referred to the "paranoid style" in modern terrorist discourse, the determination to effect a "curious leap in imagination" at "some critical point in the recital of events."<sup>191</sup> David Burrell, quoting Norman Mailer, puts it more succinctly, but no less convincingly. If we are not to fall prey to the kind of "media fabrication" that our political elite likes to fashion, if we are not to lose sight of the real human context, then we must fervently preserve our "built-in crap detectors."<sup>192</sup>

183. See *id.* at 103–04, 109–11, 178–80; HOUEN, *supra* note 143, at 3.

184. BORRADORI, *supra* note 3, at 105.

185. See Sorel, *supra* note 158, at 366.

186. See Kapitan, *supra* note 160, at 53.

187. Rasmussen, *supra* note 136, at 332.

188. Slavoj Zizek, *Are We in a War? Do We Have an Enemy?* 24 LONDON REV. BOOKS (2002), available at [http://lrb.co.uk/v24/n10/zize01\\_.html](http://lrb.co.uk/v24/n10/zize01_.html).

189. BORRADORI, *supra* note 3, at 35.

190. ZULAIKA & DOUGLASS, *supra* note 137, at x.

191. Richard Hofstadter, *The Paranoid Style in American Politics*, in *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 37 (Alfred Knopf ed., 1965).

192. See David B. Burrell, *Narratives Competing for Our Souls*, in *TERRORISM AND INTERNATIONAL JUSTICE*, *supra* note 35, at 88, 88.



Someone who was keen that we should be able to recognise crap when we see it was Joseph Conrad. Two of Conrad's novels specifically approach the issue of terrorist violence: *The Secret Agent*,<sup>193</sup> published in 1907, and *Under Western Eyes*,<sup>194</sup> published in 1911. The latter was written very obviously within the context of Russian imperialism; a subject which, for an émigré Pole such as Conrad, was a matter of immediate, and personal, interest.<sup>195</sup> It is the former novel, *The Secret Agent*, which speaks to the more universal experience of terrorist violence. It is a novel about indiscriminate terrorist violence of the kind that can happen anywhere, at any time. Its pertinence as a universal narrative of terrorism has long been appreciated. Writing in the mid-1970s, Lacqueur recorded a United States Congressional Committee being urgently advised that all police officers in America should be made to read *The Secret Agent*.<sup>196</sup> A similar injunction was placed on the FBI officers who sought the notorious Unabomber Theodore Kaczynski between 1975 and 1998. Kaczynski was himself fascinated by the novel, and used it as something of a terrorist handbook.<sup>197</sup>

*The Secret Agent* is commonly presented as the first literary account of terrorism; or at least the first to be found in what we can loosely term canonic literature. It is often equally credited as being one of the most perceptive and nuanced—according to F.R. Leavis an “unquestionable” classic; for Thomas Mann, a “thrilling” example of Conrad’s “narrative genius.”<sup>198</sup> Conrad famously found the writing of it excru-

193. See CONRAD, *supra* note 142.

194. JOSEPH CONRAD, *UNDER WESTERN EYES* (Penguin Books 1996) (1911).

195. The Korzeniowskis were members of the landowning gentry. Conrad's father aligned himself with the putatively revolutionary “Reds.” Conrad eschewed such overt radicalism, but the nature of his sympathies, and his behind-the-scenes activities in émigré circles, should not be underestimated. See ELOISE KNAPP HAY, *THE POLITICAL NOVELS OF JOSEPH CONRAD* 31–80 (1963); Owen Knowles, *Conrad's Life, in THE CAMBRIDGE COMPANION TO JOSEPH CONRAD* 1, 4–9 (J.H. Stape ed., 1996); M.B. Biskupski, *Conrad and the International Politics of the Polish Question, 1914–1918: Diplomacy Under Western Eyes, or Almost The Secret Agent*, 31 *CONRADIANA* 84 (1999). Michael Bakunin famously referred to Russia as the “wicked stepmother” to the masses, and centred his influential *Statism and Anarchy* on the associated questions of the demise of Russian autocracy and the cause of Polish liberty. See MICHAEL BAKUNIN, *STATISM AND ANARCHY* 61 (Marshall S. Shatz trans., 1990). At the time of composing *Under Western Eyes*, Conrad admitted that the “subject” of Russia “haunted me.” HOUEN, *supra* note 143, at 72.

196. LACQUEUR, *supra* note 128, at 3, 173.

197. The extent to which the still-unidentified Kaczynski drew from *The Secret Agent* in his “Manifesto,” led the FBI to consult Conrad experts in their increasingly frantic investigation. Of course, Kaczynski was also, at least until his capture, a figure of myth and fetish. According to the *New York Times*, on his capture, he was suddenly demoted from “brilliant,” if evil, genius to “nut.” See James Guimond & Katherine Kearney Maynard, *Kaczynski, Conrad, and Terrorism*, 31 *CONRADIANA* 3 (1999); HOUEN, *supra* note 143, at 14–16.

198. According to Barbara Arnett Melchiori, it is “exquisite in its varying layers of subtlety.” BARBARA ARNETT MELCHIORI, *TERRORISM IN THE LATE VICTORIAN NOVEL* 74 (1985). See also ZULAIKA & DOUGLASS, *supra* note 137, at 47, 137; Ian

ciating.<sup>199</sup> It is, at once, both comic and tragic—the tale of bumbling, largely indolent terrorists, incapable of effecting any kind of violence upon anyone other than themselves and their nearest and dearest.<sup>200</sup> The novel carries with it, as a contemporary reviewer noted in the *New York Review of Books*, a stunningly “stark humanity.”<sup>201</sup>

There is much in the novel of very obvious relevance to various aspects of terrorism studies. But it is this sense of “stark humanity” that resonates most obviously with the aspirations of narrative jurisprudence. The novel was composed within the context of “propaganda by deed” terrorism that had fascinated, and terrified, much of respectable Europe during the final decades of the nineteenth century.<sup>202</sup> The novel’s plot was based on an actual event that took place in Greenwich in 1894, when one Michel Bourdin, a putative terrorist, blew himself up whilst apparently on a mission to bomb the Observatory. Conrad deploys precisely the same target.<sup>203</sup>

The Observatory, like the bomb which was intended to destroy it, is presented as part of the “sacrosanct fetish” for science which so fascinated the “bourgeoisie” and of which Conrad was so wary.<sup>204</sup> The great virtue of the bomb, according to Vladimir, the shadowy and, by implication, Russian spymaster, is that it has “all the shocking senselessness of gratuitous blasphemy.”<sup>205</sup> But there is nothing particularly thrilling, or virtuous, about a science that can effect, in the words of

Watt, *Modern Criticism: General Trends*, in CONRAD, *THE SECRET AGENT* 66, 66–76 (Ian Watt ed., 1973) (providing various modern views); Thomas Mann, *Joseph Conrad's The Secret Agent*, in CONRAD: *THE SECRET AGENT*, *supra*, at 99, 101.

199. Just as he found writing *Under Western Eyes*, and pretty much everything he wrote at the time. For an account, see Ian Watt, *The Composition of The Secret Agent*, in CONRAD: *THE SECRET AGENT*, *supra* note 198, at 13, 13–25.

200. Albert Guerard described the novel as both a “macabre comedy” and a “tragedy.” See Albert J. Guerard, *A Version of Anarchy*, in CONRAD: *THE SECRET AGENT*, *supra* note 198, at 150, 151, 155; MELCHIORI, *supra* note 198, at 74–75; Sung Ryol Kim, *Violence, Irony, and Laughter: The Narrator in The Secret Agent*, 35 CONRADIANA 75 (2003).

201. Ian Watt, *Contemporary Reviews*, in CONRAD: *THE SECRET AGENT*, *supra* note 198, at 26, 56.

202. Inspiring similar novels by the likes of Zola, Stevenson, and Henry James. See LACQUEUR, *supra* note 126, at 53, 151–53; MELCHIORI, *supra* note 198, at 34–58; Ian Watt, *The Political and Social Background of The Secret Agent*, in CONRAD: *THE SECRET AGENT*, *supra* note 198, at 229, 238 (suggesting that the decades surrounding the turn of the nineteenth and twentieth centuries represented something of a “golden age” for the terrorist *agent provocateur*). A primary example of “propaganda by deed” terrorism was taken to be Fenian bombings in Ireland and mainland UK.

203. The debate over the extent to which he did so consciously remains. It is difficult to conceive that it could be anything but conscious. Initially Conrad admitted the inspiration. “This book is that story,” he confessed in the *Author's Note* to the first edition. Later he denied it. For a comprehensive discussion of Conrad’s use of the 1894 Observatory bomb “outrage,” see Norman Sherry, *The Greenwich Bomb Outrage and The Secret Agent*, 18 REV. ENG. STUD., NEW SERIES, 412, 412–28 (1967).

204. See CONRAD, *supra* note 142, at 24–25; HAY, *supra* note 195, at 243–44 (providing a commentary on the issue).

205. CONRAD, *supra* note 142, at 25.

Inspector Heat, “ages of atrocious pain and mental torture . . . [that can] be contained between two successive winks of the eye.”<sup>206</sup>

The heartbeat of *The Secret Agent* lies in the juxtaposition of ordinary people and extraordinary, in this instance violent, events. Conrad’s determination to explore this conjunction, and the human frailty it reveals, creates an immediate tension in *The Secret Agent*. It should be a novel of thrills and derring-do, of spies and terrorists, heroes and anti-heroes. But it is not. Instead, it is, to quote Hugh Walpole, a novel about desperately “normal people.”<sup>207</sup> Not only are they normal, but so too are they flawed, troubled, and in many cases degenerate, and degenerating. For Conrad, the human condition, famously, is one in which degeneration is an inevitable, indeed defining, component.<sup>208</sup> At first glance, the centre of the novel appears to oscillate around the “secret agent,” Verloc. The most interesting thing about Verloc, however, is how uninteresting he is.<sup>209</sup> His is not the thrilling life of the glamorous spy or the liberator of the masses.<sup>210</sup> Verloc is a seedy pornographer, who supplements his income by pretending to be an *agent provocateur*. Conrad, of course, wanted it this way. It was important that the spy-in-chief should be dull and degenerate, the kind of man, indeed, who “generally arrived in London” from his sojourns on the continent “like the influenza.”<sup>211</sup> Yet, whilst Verloc is repulsive, he is not diabolic. Verloc’s is a very ordinary kind of degeneracy.<sup>212</sup> Most importantly Verloc is indolent, possessed of a “fanatical inertness.”<sup>213</sup> He is happy to be a “secret agent,” even to plot acts of terrorism. But he cannot really be bothered to carry them out. He

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206. *Id.* For a commentary, see Carol Vanderveer Hamilton, *Revolution Form Within: Conrad’s Natural Anarchists*, 18 *THE CONRADIAN: J. JOSEPH CONRAD SOC’Y* 31, 42–43 (1994).

207. Hugh Walpole, *From A Conrad Memorial Library*, in *CONRAD: THE SECRET AGENT*, *supra* note 196, at 113, 115.

208. See J. Hillis Miller, *From Poets of Reality*, in *CONRAD: THE SECRET AGENT*, *supra* note 198, at 179, 179–80, 186 (discussing Conrad’s depiction of the “intrinsic absurdity” of human life).

209. According to Irving Howe, Verloc “remains a dull-minded complying Englishman, a beef-and-ale patriot whose ordinariness has served, by a wild curve of irony, to place him beyond the limits of ordinary society.” Irving Howe, *Conrad: Order and Anarchy*, in *CONRAD: THE SECRET AGENT*, *supra* note 198, at 140, 141. The ordinariness of Verloc was also cited by F.R. Leavis as one of the triumphs of Conrad’s irony. See F.R. Leavis, *From The Great Tradition*, in *CONRAD: THE SECRET AGENT*, *supra* note 198, at 120, 121. One contemporary review, in *Country Life*, concluded that, in creating Verloc, “Mr Conrad had set himself the impossible task of trying to make dullness interesting.” See Watt, *supra* note 201, at 28.

210. See Ian Watt, *Some Other Critical Issues*, in *CONRAD: THE SECRET AGENT*, *supra* note 198, at 77, 77.

211. *CONRAD*, *supra* note 142, at 5.

212. *Id.* at 10.

213. *Id.*

is stunned when Vladimir tells him that it is time he did some terrorising.<sup>214</sup>

Verloc is not, of course, the only putative terrorist. His parlour is supposed to be the haven for an elite group of dedicated, energetic revolutionaries.<sup>215</sup> But it is not. Verloc's cronies are an equally degenerate bunch—led, if that is the right word, by Michaelis with his “enormous stomach and distended cheeks,” the “toothless” Yundt, and the pompous and cowardly Ossipon.<sup>216</sup> The most degenerate of all is the sinister Nietzschean “megalomaniac,” the Professor, the only putative terrorist who is actually prepared to terrorise.<sup>217</sup> We are supposed to despise these “fanatics.” Far from elite or dedicated, or even capable, Verloc's anarchists are as verbose and incompetent as they are physically decayed.<sup>218</sup> As the Professor acerbically comments, “you talk, print, plot, and do nothing.”<sup>219</sup> Even Verloc wonders precisely what could “be expected [from] such a lot.”<sup>220</sup> The destruction of this particular myth, of the dedicated clique, is central to Conrad's counter-terrorist strategy.<sup>221</sup>

Conrad's own conservatism is well-known, and he made no secret of it. *The Secret Agent* is indeed a “defence of the Establishment.”<sup>222</sup> But *The Secret Agent* is not uncritical of the Establishment. The forces of terrorism, and counter-terrorism, as Conrad repeatedly alleges, are equally culpable in nourishing each other's fantasies of legit-

214. See *id.* at 17. Vladimir's harangue and Verloc's stunned silence represent, according to Thomas Mann, the “satirical height” of the novel. See Mann, *supra* note 198, at 108.

215. For a discussion of this idealised idea of a revolutionary clique, see LACQUEUR, *supra* note 126, at 84–86 and LEEMAN, *supra* note 168, at 60–62.

216. As Thomas Mann observed, “hardly lovable types.” Mann, *supra* note 198, at 107. There are various suggested caricatures at play—Michaelis as Kropotkin and Yundt as Bakunin are the most famous.

217. See CONRAD, *supra* note 142, at 54, 61. For a commentary on the Professor's character, and possible caricature, see Edward W. Said, *Conrad and Nietzsche*, in JOSEPH CONRAD: A COMMEMORATION 65 (Norman Sherry ed., 1976).

218. According to Irving Howe, in describing the bunch, Conrad “drops to a coarse-minded burlesque.” Howe, *supra* note 209, at 145. Conrad was not alone in being fascinated by the grotesque in terrorism. Similar portrayals can be found in Dostoevski, Zola, Stevenson, and James. See LACQUEUR, *supra* note 126, at 53, 151–53; Guerard, *supra* note 200, at 158.

219. CONRAD, *supra* note 142, at 54.

220. *Id.* at 39.

221. Although, in portraying his terrorists in this fashion, as grotesques and degenerates, Conrad is himself engaging in a rhetorical strategy common to counter-terrorism. See LEEMAN, *supra* note 168, at 72–75; ZULAIKA & DOUGLASS, *supra* note 137, at 112–13.

222. See MELCHIORI, *supra* note 198, at 81; Watt, *supra* note 202, at 245 (describing Conrad as an “arch-reactionary” as a young man, and only marginally milder as an older one). Irving Howe wondered if Conrad could be termed a “Tory anarchist,” but concluded that he was probably better described as a “Tory with repressed affinities for anarchism.” Jon Surgal, *The Secret Agent: A Simple Tale of the XIX Century?*, 29 CONRADIANA 123, 130 (1997) (quoting from IRVING HOWE, *POLITICS AND THE NOVEL* (1957)).

imation. Verloc's situation, as protected double-agent, is only the most obvious example of this internecine dependency. They are, as the Professor affirms, all in the "same basket."<sup>223</sup> This indulgence, and complacency, is subjected to withering irony. The Secretary of State prefers to dismiss the terrorists as "nasty little children."<sup>224</sup> But they are more than that, as Chief Inspector Heat realises, musing on the "shattering violence of destruction" which had reduced Stevie's body to a "heap of nameless fragments."<sup>225</sup> It is Heat who articulates Conrad's own despair at the particular "absurdity" of terrorist killing. The irony lies in the fact that Heat's own complacency, his unwillingness to take anarchism "seriously," makes him so obviously culpable too.<sup>226</sup>

Verloc and his cronies threaten much and do nothing. To this extent, they are indeed caricatures of the grotesque. Altogether more intriguing are the two characters who actually perpetrate, and suffer, acts of violence—"the novel's real anarchists."<sup>227</sup> The first is "poor Stevie," the "delicate" boy who lives with his sister Winnie and Verloc, in the shadows of their increasingly dislocated domestic life.<sup>228</sup> It is Stevie who is entrusted with the bomb and who stumbles and blows himself up.<sup>229</sup> Of all the incompetents who populate Verloc's little gang, Stevie appears to be something of an epitome. There is, however, something more about Stevie. For he is also a boy of "immoderate compassion" and "convulsive sympathy," someone who is prepared to play a role in terrorist outrages, but who also feels pity for beaten horses.<sup>230</sup> Immoderate compassion troubled Conrad, for, as with Stevie, it invariably promotes an equally immoderate and "pitiless rage."<sup>231</sup> The witless, eager-to-please Stevie is just the sort of naïf whose life can be so easily ruined by the pompous terrorist—"blown to fragments in a state of innocence and in the conviction of being engaged in a humanitarian enterprise."<sup>232</sup>

The second of the more nuanced characters in the novel is Verloc's wife, Winnie.<sup>233</sup> The fates of Stevie and Winnie are inexorably inter-

223. CONRAD, *supra* note 142, at 221.

224. *Id.* at 101.

225. *Id.* at 65.

226. *Id.* at 65-72.

227. HELEN FUNK RIESELBACH, CONRAD'S REBELS: THE PSYCHOLOGY OF REVOLUTION IN THE NOVELS FROM *Nostramo* to *Victory* 39 (1985).

228. CONRAD, *supra* note 142, at 6-8.

229. A gesture of ironic, even comic, simplicity, according to Sung Ryo! Kim. See Kim, *supra* note 200, at 78-79. For a discussion of Stevie's simplicity, see M. Ray, *Conrad, Nordau, and Other Degenerates: The Psychology of The Secret Agent*, 16 CONRADIANA 125, 127-31 (1984); Surgal, *supra* note 220, at 125-27; Hamilton, *supra* note 206, at 43-45.

230. CONRAD, *supra* note 142, at 44-45, 123-24.

231. *Id.* at 124.

232. *Id.* at 195.

233. Winnie was the "real heroine of the story" according to Edward Garnett. Garnett's comment was made in his famous review of *The Secret Agent*, published in *The*

twined. Winnie puts up with Verloc no matter how much, with each passing day, she comes to despise him more. It is only when she realises that Verloc was instrumental in Stevie's death, and that he seems so insensitive to it, and to her, that she snaps and wreaks vengeance.<sup>234</sup> Ironically, of course, in doing so, Winnie is the only one who actually commits any wilful act of violence. And it is Winnie who, in murdering her husband and restoring a state of silent "respectability" to her parlour, murders an agent of the state.<sup>235</sup> For this reason it has often been suggested that Winnie is the true anarchist; at least insofar as she visits an apocalyptic destruction on her own domestic world.<sup>236</sup> Winnie certainly reinforces Conrad's fear that real violence is the complement of "immoderate" emotions. On hearing of Stevie's death, Winnie sits in a "pose" of "perfect immobility, [overcome with] rage and despair, all the violence of tragic passions."<sup>237</sup>

The three lives that are destroyed are those of Stevie, Verloc, and in turn Winnie. And they destroy themselves. None sought their fate, and none intended it. Terrorism, as Conrad implies, is a necessarily "immoderate" and imprecise kind of violence. It promotes unintended consequences. Verloc identifies two types of terrorists. There are the "fanatics" who operate out of a "sense of justice."<sup>238</sup> Then, there are the rest, the "remaining portion of social rebels," whose motivation is "accounted for by vanity, the mother of all noble and vile illusions, the companion of poets, reformers, charlatans, prophets, and incendiaries."<sup>239</sup> The fanatic and the deluded both fail to anticipate the misery that their haphazard violence will cause to real people—that spectacular public acts can only lead to devastating private consequences.

The final chapter of *The Secret Agent* drives home the danger of such delusion. We are left with the image of the Professor, undeterred by the bungled bombing of the Observatory, busying himself in his laboratory making new bombs and scurrying around London with them strapped to his body, "like a pest in the street full of men."<sup>240</sup>

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*Nation* in September 1907, and quoted in Watt, *supra* note 201, at 44. See CONRAD, *supra* note 142, at 44 for Conrad's own observation. David Mulry has described the extent to which Conrad revised earlier drafts of the novel in order to give greater substance to Winnie's character. See David Mulry, *Patterns of Revision in The Secret Agent*, 26 *THE CONRADIAN: J. JOSEPH CONRAD SOC'Y* 33, 52–54 (2001). For a broad discussion of Winnie's "story," see Ellen Harrington, *The Anarchist's Wife: Joseph Conrad's Debt to Sensation Fiction in The Secret Agent*, 36 *CONRADIANA* 51 (2004).

234. In fact, Verloc is "shaken morally to pieces," but cannot bring himself to admit the fact to his wife. See CONRAD, *supra* note 142, at 169.

235. CONRAD, *supra* note 142, at 192–93.

236. See HOUEN, *supra* note 143, at 54; Leavis, *supra* note 209, at 123 (lauding the murder scene as one of "genius").

237. CONRAD, *supra* note 142, at 156.

238. *Id.* at 39.

239. *Id.*

240. *Id.* at 227. For a commentary on the "terrifying simplicity" of the Professor's "madness," see Kim, *supra* note 200, at 84–85.

There will always be Professors, just as there will always be Stevies, and Winnies. The novel closes with Ossipon contemplating the “madness and despair” wreaked by just one bomb.<sup>241</sup> Conrad wants us to be troubled. He wants us to debunk the fetish, and see inhumanity for what it is.

## V. REINVESTING HUMANITY

The nature of Conrad’s enterprise was fully appreciated in a contemporary review of *The Secret Agent* published in the *Times Literary Supplement*:

To show how narrow the gulf is fixed between the maker of bombs and the ordinary contented citizen has never before struck a novelist as worth while, the subterranean world in which the terrorists live having up to the present been considered by him merely as a background for lurid scenes and hair-raising thrills. And then comes Mr Conrad with his steady, discerning gaze, his passion for humanity, his friendly irony, and above all his delicate and perfectly tactful art, to make them human and incidentally to demonstrate how monotonous a life can theirs also be.<sup>242</sup>

The monotony is important; it affirms the humanity. Both Drakulic and Neuffer emphasise the sheer ordinariness of proceedings at The Hague; an ordinariness that can be both reassuring and distracting.<sup>243</sup> The realisation that the most hideous of crimes might be conducted by the most banal of criminals was, of course, the great insight of Hannah Arendt’s famous account of the Eichmann trial.<sup>244</sup> So often the perpetrators seemed to be so nice; like Goran Jelisec, who murdered prisoners at Brcko police station and Luka camp, but who, the court was informed “would never hurt a fly,” at least not ordinarily.<sup>245</sup> The grotesque vies with the banal.

If Conrad, Drakulic, and Neuffer, in their different ways, urge their various readers to do anything, above all else, it is to look behind the mask, to appreciate the intensely human experiences and emotions that are obscured by the associated rituals and taboos, mythologies and fetishes that pervade the associated fetishes of political vio-

241. CONRAD, *supra* note 142, at 226–27.

242. Watt, *supra* note 201, at 33.

243. Gary Bass is also struck by the sheer ordinariness of defendants such as Dusko Tadic. See BASS, *supra* note 108, at 206; Scharf & Schabas, *supra* note 109, at 4–5 (referring in particular to the appearance of Milosevic at ICTY).

244. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253–79 (Rev. ed., Penguin Books 1977) (1963). See also Mark J. Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HUM. RTS. Q. 118, 122–23 (2000) (providing a thoughtful recent assessment of Arendt’s work, in the context of ICTY and the Rwanda Tribunal).

245. See DRAKULIC, *supra* note 53, at 58, 64, 68–73.

lence.<sup>246</sup> As Razumov, the protagonist in Conrad's other terrorist novel, *Under Western Eyes*, came to realise, the "real drama [is] not played on the great stage of politics," but in private lives, in the ordinary struggles of ordinary people against the innately destructive ravages of those who represent the state, and those who seek its dissolution.<sup>247</sup>

It is here that we entertain, once again, the kind of intensely human philosophy articulated by the likes of Martha Nussbaum, Richard Weisberg, or Richard Rorty. To borrow the latter's conceptualisation, the political morality that counts, in this analysis, is a morality of feeling, of compassion indeed, a morality of "feelings and ideas," "cruelty and kindness," rather than presumed absolutes of truth and falsehood, right and wrong.<sup>248</sup> Writing in 1971, George Steiner asked "[h]ow is one to address oneself without a persistent feeling of fatuity, even of indecency, to the theme of ultimate inhumanity?"<sup>249</sup> The question has lost nothing of its pertinence. Neither has his sorry conclusion that whilst we might have acquired the "technical competence to build Hell on earth," we have lost the capacity to "bring sweetness and light to men."<sup>250</sup>

Tribunals such as the ICTY, perhaps even anti-terrorist legislation such as that found in the U.S., U.K., and elsewhere, may have a value. But it is limited, as is, in a broader sense, the facility of law. The need to reinvest a due sense of humanity has never been greater than it is today. And so, correspondingly, is the need for a narrative supplement in the various practices of law and jurisprudence. It is the latter, perhaps only the latter, which can nourish the former. Conrad's *The Secret Agent*, like Drakulic's chronicle and Neuffer's chronicle, presents precisely such supplements. The narratives impress the humanity of suffering and of compassion, which any political violence engages. In so doing, they can address the need for what John Kenneth Galbraith has termed a "coalition of the concerned and the compassionate."<sup>251</sup> As Robert Falk has argued, "only by reconstructing intimate relations on a humane basis can the world move toward the wider public and collective realities of human community."<sup>252</sup> Indeed. A trans-national jurisprudence, just like any other, but seemingly to

246. See Guerard, *supra* note 200, at 154; RIESELBACH, *supra* note 227, at 56 (stating that ultimately "terror has an effect only in the domestic realm.").

247. CONRAD, *supra* note 194, at 238.

248. See Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES* 111, 130 (Stephen Shute & Susan Hurley eds., 1993); RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 96–97 (1999).

249. GEORGE STEINER, *IN BLUEBEARD'S CASTLE* 31 (1971).

250. *Id.* at 17–18, 31–32, 47–48, 64–65, 105.

251. JOHN KENNETH GALBRAITH, *THE GOOD SOCIETY* 143 (1996).

252. RICHARD A. FALK, *ON HUMANE GOVERNANCE: TOWARD A NEW GLOBAL POLITICS* 69 (1995).



an even greater, more compelling, degree, needs to be a narrative jurisprudence.

At one stunning moment in Drakulic's account of proceedings at The Hague, she recalls dozing off, rendered virtually immune to the seemingly bottomless legalism of proceedings.<sup>253</sup> Hearing the judge in one trial, the *Zigic* trial, ask why there was blood on the wall of a particular room in Keraterm camp, she is suddenly awakened from her dozing:

Suddenly I see that picture in front of my eyes, and I realize what the judge is talking about. The death of 120 prisoners is no longer an abstraction, no longer mere words. Now the tedious, precise interrogation takes on a new meaning. Now I realize how much we are all poisoned by the trials depicted in television shows and Hollywood movies, with their rapid exchange of arguments between good-looking lawyers in expensive suits. In The Hague there is no such false drama. The drama here is that everything really happened: there were real deaths, real victims and real murderers. Real blood. The drama is that there can be no escape from that reality. When at the end of that day in the court I take a long look at the defendants, they suddenly seem different to me. I see what I did not see before, not their dull faces, but a room with walls splashed with blood.<sup>254</sup>

Any court of law has an inherent dramatic, and narrative, import. As Drakulic attests, what happens at The Hague is, essentially, a "theatrical performance," albeit a "deadly serious" one.<sup>255</sup> It presents a story, or rather a series of stories. One of the most telling commentaries in Neuffer's chronicle is the account of Hamdo Kharimanovic's testimony in the *Tadic* trial, and most strikingly the attempt of the prosecutor to get his witness to resist the temptation to "reverie."<sup>256</sup> Hamdo had a story to tell of a neighbour with whom he had exchanged keys, and much else, but who had, when the opportunity arose, thought nothing of persecuting him and his family.<sup>257</sup> At The Hague, he was allowed to tell part of it. But he had an awful lot more to say.

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253. See DRAKULIC, *supra* note 53, at 21–22.

254. See *id.* at 22–23.

255. *Id.* at 83. The same metaphor is actively deployed by Scharf and Schabas in their particular account of the Milosevic trial *Slobodan Milosevic on Trial*. Scharf & Schabas, *supra* note 109. It is, they repeatedly aver, a drama replete with *dramatis personae*. See *id.* at 74–85.

256. The same point is acknowledged by one of the ICTY prosecutors, Geoffrey Nice, who observes, the "abiding impression I have, after calling so many of the witnesses, is that the process of coming to The Hague is inevitably imperfect for them. Under pressure of time, the advocates on both sides squeeze from them what is necessary to the case and deny them the chance to speak at length when they want to." Geoffrey Nice, *Trials of Imperfection*, 14 LEIDEN J. INT'L L. 383, 392 (2001).

257. See NEUFFER, *supra* note 54, at 183–86. She provides a similar account of witnesses struggling to be allowed to tell their "stories" in the "Celebici" case. *Id.* at 297–99.

The formal law cannot itself secure justice. This latter, altogether grander aspiration, requires the supplement of further narratives. As Gary Bass observes, there “is no such thing as appropriate punishment for the massacres of Srebrenica or Djakovica; only the depth of our legalist ideology makes it seem so.”<sup>258</sup> Law that otherwise struggles to establish its juristic credentials, such as public international law or international criminal law or the “law” of terrorism, needs these supplements more than most. It needs the kind of supplements that Martha Minow eloquently urges, supplements that nurture the “production of new historical narratives,” that can help to “build bridges between past and present,” whilst also “maintaining a moral stance” against the temptations of “genocide and collective violence.”<sup>259</sup> The stories presented by Drakulic and Neuffer and Conrad, in their very different ways, do just that.

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258. Bass, *supra* note 108, at 13.

259. For Minow’s eloquent confirmation, see Minow, *supra* note 100, at 143.