Notes

COLLECTIVE MEMORY, CRIMINAL LAW, AND THE TRIAL OF DEREK CHAUVIN

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ABSTRACT

This Note describes how criminal trials for prominent criminal acts contribute to the collective memory of the underlying offense. Hannah Arendt once argued that the purpose of criminal trials is to "render justice, and nothing else." Unlike criminal trials, political trials strive to produce collective memory. This Note utilizes political trials as a foil to criminal trials to identify the ways that criminal trials succeed (and fail) to produce collective memory. Several features of the criminal trial—namely, the trial's unique narrative form, constituent storytellers, capacity to capture the gravity of the offense, and jury—add to society's shared narrative of the offense. By developing and utilizing a framework for how criminal trials manufacture collective memory, this Note considers how the trial of Derek Chauvin adds to the collective memory of George Floyd's murder.

INTRODUCTION

Prior to the 1961 trial of SS Officer Adolf Eichmann,[1] the genocide perpetrated by the Nazis was suppressed in American life—seen as just

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1. Adolf Eichmann organized the Final Solution during World War II. *See Adolf Eichmann*, U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/adolf-eichmann [https://perma.cc/8WZJ-EHXY], (last updated Aug. 30, 2018) (describing Eichmann as "in charge of transporting Jews from all over Europe to the killing centers"). Following his escape from a U.S. prisoner of war camp in 1946, Israeli intelligence captured Eichmann in Argentina. *Id.* After a widely publicized trial, Eichmann was sentenced to death in 1961. *Id.*

one piece of "a holocaust" in Europe known as World War II.[2] By the time Eichmann was found guilty and executed in Jerusalem, "the Holocaust" had become a distinct event, collectively remembered as the West's most notorious crime against humanity.[3] Only after survivors testified and Eichmann's crimes were displayed on an international stage was the history of the Holocaust revived in American collective memory.[4] But the capacity of the Eichmann trial to effectuate this societal shift is largely a function of the trial's purposeful mission to craft a story about the Jewish people's suffering at the hands of the Nazis and subsequent resurrection as a nation-state.[5] Using the Eichmann trial and other *political* trials as foils,[6] this Note explains the power and limits of the U.S. *criminal* trial to contribute to the collective memory of prominent criminal acts.

Collective memory is a community's shared narrative of the past.[7] It is, in part, crafted by individual group members and, in part, forged through influences beyond individual members' control.[8] It depends on individual remembrance yet is "stubbornly impervious" to any one member's desire to escape it.[9] Open to forgetting, deformation,

2. *See* Devin O. Pendas, *The Eichmann Trial in Law and Memory*, *in* POLITICAL TRIALS IN THEORY AND HISTORY 205, 220 (Jens Meierhenrich & Devin O. Pendas eds., 2016) ("[B]y the time of the Eichmann trial in 1961, the Holocaust had been marginalized in the global discussion of World War II.").

3. *See* PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE 133–34 (1999) (observing a society-wide shift from the use of "the Nazi holocaust" to "the Holocaust").

4. *Id.* at 103, 134 (stating that "[b]etween the end of the war and the 1960s, . . . the Holocaust made scarcely any appearance in American public discourse," but that "the Eichmann trial was the first time that the American public was presented with the Holocaust as a distinct . . . entity").

5. *See* MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 62 (1997) (noting how Israeli Prime Minister David Ben-Gurion "sought to frame the courtroom narrative . . . as a tale about the Jewish community's collective victimization, suffering, resistance, resurrection . . . and, finally, redemption as a powerful nation-state").

6. For the purposes of this Note, political trials sacrifice some of the defendant's rights and try the defendant for crimes with many victims in jurisdictions either geographically or temporally beyond the reach of the regime holding the trial. *See infra* Part II.A.

7. *See* OSIEL, *supra* note 5, at 18 n.28 ("Collective memory consists of past reminiscences that link given groups of people for whom the remembered events are important, that is, the events remain significant to them later on."); JOHN BODNAR, REMAKING AMERICA: PUBLIC MEMORY, COMMEMORATION, AND PATRIOTISM IN THE TWENTIETH CENTURY 15 (1992) ("Public memory is a body of beliefs and ideas about the past that help a public or society understand both its past, present, and by implication, its future.").

8. *See* Jeffrey K. Olick, *Collective Memory: The Two Cultures*, 17 SOCIO. THEORY 333, 342 (1999) (noting the two-way relationship of individuals and collective memory).

9. *Id.*

manipulation, appropriation, dormancy, and revival,[10] collective memory is the living past—giving consequence in the present to what has come before.[11]

Collective memory matters because of its ability to affect our present-day society, politics, and law.[12] Consider the longstanding narrative of the "Lost Cause," which perpetuates—even today—a glorified myth of southern righteousness for the Civil War.[13] Or take how President Richard Nixon's Watergate scandal colors reactions to allegations of political corruption, in both namesake and substance.[14] Or look to how the Supreme Court so commonly reminds the legal world of its aversion to the days of *Lochner*, when freedom of contract plagued the Court with unacceptable levels of indeterminacy.[15]

This Note focuses on the relationship between collective memory and the law, specifically analyzing how the criminal trial influences collective memory of the underlying offense. Political philosopher Hannah Arendt argued—in reaction to observing the Eichmann trial—that the "main business" of criminal law is to "weigh the charges

10. Pierre Nora, *Between Memory and History: Les Lieux de Mémoire*, 26 REPRESENTATIONS 7, 8 (1989) [hereinafter Nora, *Between Memory and History*].

11. *See supra* note 7 and accompanying text. There is a temptation to determine a distinction between memory and history. The concepts are distinct and, in some ways, stand in opposition to one another. *See* Nora, *Between Memory and History*, *supra* note 10, at 9 ("History is perpetually suspicious of memory, and its true mission is to suppress and destroy it."). There is no scholarly consensus on drawing a line between the two. *See* Eric Langenbacher, *Collective Memory as a Factor in Political Culture and International Relations*, *in* POWER AND THE PAST: COLLECTIVE MEMORY AND INTERNATIONAL RELATIONS 13, 27 (Eric Langenbacher & Yossi Shain eds., 2010) [hereinafter Langenbacher, *Collective Memory as a Factor*] ("[M]any authors correctly argue that this distinction [between memory and history] is untenable."). This Author's view is that the symbiotic relationship between history and memory makes focusing on precise line-drawing an unworthy endeavor.

12. *See* Langenbacher, *Collective Memory as a Factor*, *supra* note 11, at 25 ("Collective memory helps to constitute a political culture, and thus it is an ideational factor that influences the thinking of individuals—if culture matters, then memory matters.").

13. *See* Michel Paradis, *The Lost Cause's Long Legacy*, ATLANTIC (June 26, 2020), https://www.theatlantic.com/ideas/archive/2020/06/the-lost-causes-long-legacy/613288 [https://perma.cc/4WZH-X5QN] ("[T]he Lost Cause recast the Confederacy's humiliating defeat in a treasonous war for slavery as the embodiment of the Framers' true vision for America.").

14. *See, e.g.*, MICHAEL SCHUDSON, WATERGATE IN AMERICAN MEMORY: HOW WE REMEMBER, FORGET, AND RECONSTRUCT THE PAST 150–51 (1992) (explaining the wide-ranging use of the "-gate" suffix for subsequent political scandals); Cory Bennett, *How Donald Trump Has Redefined Watergate*, POLITICO, https://www.politico.com/news/magazine/2020/07/05/trump-nixon-watergate-344769 [https://perma.cc/56PG-BQYE], (last updated July 5, 2020, 1:55 PM) (noting former President Trump's frequent use of Watergate when alleging corruption by his political opponents).

15. *See, e.g.*, David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 85 WASH. U. L.Q. 1469, 1523 (2005) (describing the use of "*Lochner*" as an epithet).

brought against the accused, to render judgment, and to mete out due punishment."[16] Put another way, Arendt stated that the purpose of a criminal trial is to "render justice, and nothing else."[17] Arendt's claim, while seemingly uncontroversial, fails to capture one of the criminal trial's secondary, yet consequential, functions: contributing to the collective memory of prominent offenses. This Note argues that the criminal trial does so through its unique narrative form, constituent storytellers, capacity to capture the gravity of the offense, and jury.

In times of accelerated change, societies grasp at opportunities to manifest the past into *lieux de mémoire*[18]—or sites of memory—to make better sense of the present.[19] The murder of George Floyd sparked one such moment of accelerated change. Within weeks of then-Officer Derek Chauvin kneeling on George Floyd as he took his last breath, millions of people had seen bystander Darnella Frazier's video.[20] The murder had set off what is widely considered the largest protest movement in the history of the United States.[21] For a crime of such profound effect, its trial serves as a site of memory.

Collective memory in a pluralistic society is, and should be, a competition over the meaning of the past. This Note adopts a concept of collective memory that embraces two concurrent competitions, one over who defines the past and another over what memories prevail in the collective. By offering a means of analyzing how the Derek Chauvin trial contributes to the collective memory of George Floyd's murder, this Note grapples with the trial's ability to compete with other

16. HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (Penguin Books 2006) (1963).

17. *Id.*

18. Pierre Nora coined the term *lieu de mémoire*, or "site of memory," to broadly describe "material, symbolic, and functional" locations and institutions invested with historical meaning. Nora, *Between Memory and History*, *supra* note 10, at 18–19. Sites of memory are not only physical locations or structures imbued with historical meaning—such as memorials. *Id.* at 19. Instead, sites can include far broader conceptions or rituals—such as moments of silence or community reunions. *Id.*

19. *See* Pierre Nora, *Reasons for the Current Upsurge in Memory*, EUROZINE (Apr. 19, 2002), https://www.eurozine.com/reasons-for-the-current-upsurge-in-memory [https://perma.cc/DH2A-PGK2], *reprinted in* THE COLLECTIVE MEMORY READER 437, 438 (Jeffrey K. Olick, Vered Vinitzky-Seroussi & Daniel Levy eds., 2011) ("[T]he present—which, for this very reason no doubt, now has a battery of technical means at its disposal for preserving the past—puts us under an obligation to remember.").

20. Irene Oritseweyinmi Joe, *Probable Cause and Performing "for the People*," 70 DUKE L.J. ONLINE 138, 140–41 (2021).

21. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/786W-KNLB].

sources of memory, most notably mass media, and identifies the trial's unique contributions to memory. The power of collective memory establishes the stakes of this competition and gives this Note purpose.[22]

Part I explores the concept of collective memory. Building upon this foundation, Part II analyzes how the criminal trial forges collective memory by investigating the trial's prominent features. Part II also explores the competition between the trial and the media as sources of memory and identifies how these sources contribute to memory separately and collaboratively. Part II's theoretical framework undergirds Part III's analysis of how the trial of Derek Chauvin shapes the collective memory of George Floyd's murder.

I. COLLECTIVE MEMORY: THE LIVING PAST

This Part surveys collective memory to prime Part II's discussion on how the criminal trial contributes to collective memory of the underlying offense.

A. Evolutions in Collective Memory and Pluralistic Memory

Collective memory is a community's shared narrative of the past.[23] In the early twentieth century, sociologist Émile Durkheim laid the foundations for the earliest conceptions of collective memory.[24] Most critically, Durkheim's concept of collective *conscience*—referring to "[t]he totality of beliefs and sentiments common to average citizens of the same society"[25]—informed a view of the collective as unitary and monolithic.[26] Stirred by this approach, Durkheim's own student and

22. *See* Langenbacher, *Collective Memory as a Factor*, *supra* note 11, at 33 ("[B]ecause memories are part of a society's culture, their potential influence, power, and competition are central.").

23. *See* OSIEL, *supra* note 5, at 18 n.28 ("Collective memory consists of past reminiscences that link given groups of people for whom the remembered events are important, that is, the events remain significant to them later on.").

24. *See* Jeffrey K. Olick, Vered Vinitzky-Seroussi & Daniel Levy, *Introduction* to THE COLLECTIVE MEMORY READER, *supra* note 19, at 3, 16 ("[Founder of collective memory Maurice] Halbwachs's interest in memory combined insights from two important figures in late nineteenth-century France, philosopher Henri Bergson and sociologist Émile Durkheim . . . .").

25. ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79 (George Simpson trans., Macmillan Co. 1960) (1893).

26. *See* Olick et al., *supra* note 24, at 20 ("Durkheimian approaches are often accused—and often rightly so—of being radically anti-individualist, conceptualizing society in disembodied terms, as an entity existing in and of itself, over and above the individuals who comprise it."); OSIEL, *supra* note 5, at 33 ("Durkheim's approach leaves no room for dissenting (or even concurring) opinions . . . .").

founding father of collective memory, Maurice Halbwachs,[27] broke from his mentor by more carefully characterizing a pluralistic collective, theorizing that there are as many collective memories as there are groups comprising the society.[28] Yet Halbwachs still viewed collective memory as a metaphysical phenomenon that operates independently from any individual and saw individual memory as necessarily social.[29]

Since Halbwachs's influential work, collective memory has shaken off its monolithic Durkheimian roots and become more democratized.[30] Bucking a conception of collective memory that operates independently from individuals, scholars now view collective memory as more dependent on individuals—leading to a view of memory as pluralistic rather than unitary.[31] With Durkheim's monolithic foundations representing one extreme, the other extreme represents the mere aggregation of individual remembrance of an event—which might be more aptly described as collect*ed* memory.[32]

This Note adopts a concept of collective memory that settles between these extremes.[33] On the one hand, collective memory must consider the role of individual remembrance, especially that of influential leaders in society.[34] Unlike Halbwachs's vision, collective memory should not treat individual memory as entirely dependent on

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27. *See* Mary Douglas, *Introduction* to MAURICE HALBWACHS, THE COLLECTIVE MEMORY 1, 6 (Francis J. Ditter, Jr. & Vida Yazdi Ditter trans., Harper Colophon Books 1980) (1950) (discussing how Halbwachs "called upon Émile Durkheim" to train Halbwachs "as a sociologist"); Sarah Gensburger, *Halbwachs' Studies in Collective Memory: A Founding Text for Contemporary 'Memory Studies'?*, 16 J. CLASSICAL SOCIO. 396, 397–99 (2016) (surveying references to Halbwachs as a founder of collective memory studies).

28. *See* HALBWACHS, *supra* note 27, at 77 (stating that each group "has its own memory").

29. *See* MAURICE HALBWACHS, ON COLLECTIVE MEMORY 38 (Lewis A. Coser ed., trans., 1992) ("There is no point in seeking where [memories] are preserved in my brain . . . to which I alone have access: for they are recalled to me externally, and the groups of which I am a part at any time give me the means to reconstruct them . . . .").

30. *See, e.g.*, Olick, *supra* note 8, at 338 & n.9 (noting the "significant sociological examples" of the shift toward memory focused on individualistic principles).

31. *See id.* at 338 ("There is no doubt, from this perspective, that social frameworks shape what individuals remember, but ultimately it is only individuals who do the remembering.").

32. *See id.* (calling the aggregation of individual memory "collective memory").

33. While a more democratized but hierarchical collective memory concept dominates contemporary memory studies, a Durkheimian approach remains a fruitful tool to analyze the collective memory of an event—a tool this Note will invoke. For an excellent example of this tool's use, see OSIEL, *supra* note 5, at 31–32.

34. *See* Olick, *supra* note 8, at 338–39 ("[A]ccounts of *the* collective memory of any group or society are . . . particularly of those with access to the means of cultural production or whose opinions are more highly valued.").

one's social environment.[35] On the other hand, collective memory must still consider "what is genuinely social about memory," including memory that operates independently from the interests of individuals, such as deeply persisting historical narratives, myths, and folklore.[36] In sum, collective memory in this Note appreciates both individuals' memories (with appropriate weight given to their role in the community) and socially pervasive memories.[37]

B. Memory Competition and the Meaning of Memory

Collective memory—as both pluralistic and social—is an inherently competitive phenomenon.[38] The structure of this competition operates in two arenas: (1) between sources of memory and (2) between the memories themselves. First, sources of memory represent past events through visuals, slogans, and physical spaces to make meaning of the past.[39] Some sources of memory can carry more credence than others. For example, sources of "disciplinary knowledge,"[40] including prominent political figures and institutions, academies, and museums, can more effectively craft interpretations of past events. Meanwhile, grassroots sources can challenge more disciplined sources of memory, thus creating a hierarchical landscape

35. *See id.* at 338 (arguing that "social frameworks shape what individuals remember, but ultimately it is only individuals who do the remembering").

36. *See id.* at 342 (claiming that without examining how "long-term structures" impact "what societies remember or commemorate" society is "unable to provide good explanations of mythology, tradition, heritage, and the like").

37. A major limitation of this Note is its lack of empirically measured collective memory. Instead, the Note only observes when individuals' expressions about the past appear to manifest collective memory. Some scholars have studied collective memory for other historical events through more rigorous methodologies, including studying national library holdings or conducting field interviews. *See, e.g.*, Eric Langenbacher, *The Mastered Past? Collective Memory Trends in Germany Since Unification*, 28 GERMAN POL. & SOC'Y 42, 57–61 (2010) [hereinafter Langenbacher, *The Mastered Past?*] (analyzing, using keywords, the holdings of the Deutsche Nationalbibliothek); Howard Schuman & Jacqueline Scott, *Generations and Collective Memories*, 54 AM. SOCIO. REV. 359, 362 (1989) (describing the method of interviewing to obtain data on collective memory of major historical events). Similar studies on U.S. criminal trials would be a worthy endeavor but are beyond the scope of this Note.

38. *See, e.g.*, Langenbacher, *The Mastered Past?*, *supra* note 37, at 42, 59 (observing multiple competing collective memories vying for influence in German society).

39. JAMES FENTRESS & CHRIS WICKHAM, SOCIAL MEMORY 47 (1992).

40. *See* Ron Eyerman, *The Past in the Present: Culture and the Transmission of Memory*, *in* THE COLLECTIVE MEMORY READER, *supra* note 19, at 304, 306 (comparing institutionalized disciplinary knowledge with narratives that "are less institutionalized, more open and malleable").

of memory sources.[41] Second, the memories themselves—often bolstered by competing sources—compete for dominance. Memories of an event can jockey for representation and influence dramatic shifts in the event's dominant narrative.[42]

The stakes of this competition reveal why collective memory—and thus this Note—ultimately matters. Collective memory affects attitudes about the past that manifest as values and actions in the present.[43] In particular, framing the memory of a discrete event into larger memory structures, such as narratives that capture historical racism writ large, can imbue a discrete event with heightened force.[44] For example, situating a discrete event such as George Floyd's murder into the context of cumulative narratives of racism can inform political responses, business decisions, and social sentiments.[45] Compare, for instance, two different framings of George Floyd's murder within the following memory structures: the murder as part of America's irreparably racist past,[46] against the murder, and especially Chauvin's conviction, as part of America's evolution toward a more racially equitable society.[47] These respective framings impact, for example,

41. *See* BODNAR, *supra* note 7, at 13–14 (comparing public memory, or interpretations of the past from cultural leaders and authorities, with vernacular memory, or interpretations of the past from the community level).

42. *See, e.g.*, SCHUDSON, *supra* note 14, at 208–10 (outlining the competition between hegemonic liberal and conservative accounts of Watergate and noting the role of minority narratives within those memories); Langenbacher, *The Mastered Past?*, *supra* note 37, at 59 (observing multiple competing collective memories vying for influence in German society).

43. *See* Langenbacher, *Collective Memory as a Factor*, *supra* note 11, at 22 ("Collective identities are parts of cultures and allow individuals to orient themselves and to place themselves into a larger, meaning-providing context."); OSIEL, *supra* note 5, at 18 n.28 (noting that collective memory helps "define what . . . people have in common and . . . guide[s] their collective action").

44. *See, e.g.*, David Cunningham, Colleen Nugent & Caitlin Slodden, *The Durability of Collective Memory: Reconciling the "Greensboro Massacre,"* 88 SOC. FORCES 1517, 1530–31 (2010) (observing contextualization of the Greensboro Massacre within "the history of racial institutional barriers in North Carolina and recent associated battles between the CWP and klan").

45. *See, e.g.*, Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/VSH7-D2FR] (outlining the array of police reform efforts across the United States following the murder of George Floyd).

46. *See, e.g.*, Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 287–88 (2015) (describing the marginalization of Blacks and Native Americans as "an essential, perhaps irredeemable, truth about the nation's character").

47. *See, e.g.*, Larry J. Griffin & Kenneth A. Bollen, *What Do These Memories Do? Civil Rights Remembrance and Racial Attitudes*, 74 AM. SOC. REV. 594, 600 (2009) (describing hegemonic memory of the Civil Rights Movement as "one of incompleteness underpinned by

how political leaders call for radical or marginal change and how people form their self-image in relation to one another.[48] Competition between these kinds of memory structures will likely continue for years after the George Floyd murder. This Note primarily concerns the criminal trial's contributions to the discrete collective memory of an offense. However, contextualizing prominent criminal acts within a history of racism, sexism, economic inequality, or other historical wrongs exemplifies how collective memory keeps the past alive.

II. THE CRIMINAL TRIAL AS A SITE OF MEMORY

Trials for prominent criminal offenses serve as sites of memory. This Part discusses how. While other elements of the criminal trial are significant,[49] this Section will examine the primary contributors: (1) the constituent storytellers of the trial, namely the prosecutor, defendant, and judge; (2) the capacity of criminal charges to capture the gravity of the underlying act; and (3) the impact of the jury in creating an authoritative narrative of the crime. Subsequently, this Section analyzes how the trial's primary memory competitor, mass media, interacts with the trial to create collective memory. But first, this Part turns to political trials scholarship and its relationship as a foil to this Note's criminal trials inquiry.

A. Memory of Political Trials as Foil for Criminal Trials

At the outset of Adolf Eichmann's 1961 trial, few doubted the defendant's fate. In fact, Eichmann's role was not so much as a defendant, but instead "simply to be there, in the glass booth" as the trial "[gave] voice to the Jewish people."[50] As dozens of Holocaust survivors testified, Eichmann became an object of a greater mission: to frame the Holocaust as a "tale about the Jewish community's collective

optimism: important gains have been made, but the 'rights revolution' has unfinished business that must be addressed").

48. *See* Langenbacher, *Collective Memory as a Factor*, *supra* note 11, at 32 ("[I]t matters immensely which values vie to be allocated, how they are framed as alternatives, and which ones emerge to actually influence outcomes. There is an inescapable dimension of power and competition involved in all ideational phenomena.").

49. This Note does not hope to achieve an exhaustive analysis of criminal trials as contributors to collective memory. Further research into the role of eyewitnesses, expert witnesses, appeals, and trial attendees, among others, would be valuable additions to the literature.

50. TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST 358 (1993).

victimization, suffering, resistance, resurrection . . . , and, finally, redemption as a powerful nation-state."[51]

Noble as this cause may have been, Israel's unabashed illiberalism in the Eichmann trial became the topic of great controversy and spurred heated, theoretical discussions on the appropriate purpose of a criminal trial. Most prominently, Hannah Arendt derided the Eichmann proceedings as a "show trial" to "raise the specter of a Stalinist fraud."[52] She famously argued instead that "[t]he purpose of a [criminal] trial is to render justice, and nothing else."[53] Criminal law's "main business," in Arendt's estimation, is to "weigh the charges brought against the accused, to render judgment, and to mete out due punishment."[54]

While this viewpoint may sound uncontroversial to a legal professional, Arendt nonetheless has her detractors. Some argue that no properly liberal criminal trial could have adequately captured the gravity and complexity of the Holocaust but that a criminal trial was still the appropriate venue to institutionalize a narrative of the mass crime.[55] Extrapolating upon this claim, legal scholar Mark Osiel argues that criminal trials conducted in the aftermath of administrative massacre can and should create social solidarity through the intentional creation of collective memory.[56] Osiel posits that such criminal trials, which may strike liberals as antithetical to fairness, need not be viewed as pernicious.[57] Similarly, legal scholar Lawrence Douglas characterizes Arendt's view as a "crabbed and needlessly restrictive vision of the trial as [a] legal form."[58] To be sure, Douglas concedes that a political trial requires a certain level of institutional legitimacy to not be seen as a "legal farce," which would significantly hinder the pedagogical and collective memory impact of the trial.[59]

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51. OSIEL, *supra* note 5.

52. LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 3 (2001).

53. ARENDT, *supra* note 16.

54. *Id.*

55. *See, e.g.*, JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 169 (1986) (discussing the practical advantages of utilizing the trial form at Nuremberg).

56. OSIEL, *supra* note 5, at 59–60. Osiel defines administrative massacre as "large-scale violation of basic human rights to life and liberty by the central state in a systematic and organized fashion, often against its own citizens, generally in a climate of war." *Id.* at 9.

57. *Id.* at 59–60.

58. DOUGLAS, *supra* note 52, at 2.

59. *See id.* ("The danger of turning a trial into a pedagogic spectacle is that it becomes a legal farce.").

While these theorists utilize—perhaps haphazardly—the term "criminal trial" in their dialogue, they focus specifically on trials for crimes committed in the context of mass atrocity.[60] For Osiel and Douglas, the term criminal trial appears to be a proxy for a *political* trial that sacrifices some of the defendant's rights and tries the defendant for mass crimes that occurred in jurisdictions geographically or temporally beyond the reach of the regime holding the trial.[61] For the sake of clarity, this Note simply labels these "political trials."[62] While commentary abounds on the nexus of political trials and collective memory,[63] this Note is not focused on adding to that literature. Instead, this Note focuses on prominent U.S. criminal trials.

Despite the difference in scope, political trials scholarship provides a helpful foundation upon which to analyze U.S. criminal trials. Political trials, such as the Eichmann trial, are especially effective at institutionalizing historical narratives, in part because the court adds a broader social goal to the trial's traditional purposes. Assuming the trial establishes baseline institutional legitimacy, the political trial is more likely to succeed in its pedagogical goals when the court and its parties ratchet up the dramatics, even at the expense of the defendant's

60. *See* OSIEL, *supra* note 5, at 1 (defining the focus of Osiel's study as "the role of *criminal trials* in democratic transitions" (emphasis added)); DOUGLAS, *supra* note 52, at 2–3 (declaring "the criminal trial" as the focus of a survey of four Holocaust trials).

61. *See, e.g.*, OSIEL, *supra* note 5, at 14–15 (introducing the trials of Klaus Barbie, Argentine military juntas, and Adolf Eichmann, which fit the description, as subjects of the study). The rights surrendered, and norms perverted, in political trials can vary from context to context. Some include surrendering the right to counsel, to exculpatory information, and to cross-examine the prosecution's witnesses. Jeremy Peterson, *Unpacking Show Trials: Situating the Trial of Saddam Hussein*, 48 HARV. INT'L L.J. 257, 271–73 (2007). A defendant could be charged with a crime ex post facto or lack proper appeal rights. *Id.* at 274, 277–78. The trial could gain such wide notoriety as to influence the procedure in court or remain so secretive as to escape public scrutiny. *See* Jens Meierhenrich & Devin O. Pendas, *"The Justice of My Cause Is Clear, but There's Politics to Fear," in* POLITICAL TRIALS IN THEORY AND HISTORY, *supra* note 2, at 43 (noting that either extreme of publicity can make a trial political).

62. Defining "political trial" has been the subject of much scholarly debate. *See, e.g.*, Meierhenrich & Pendas, *supra* note 61, at 3–5 (describing scholarly contributions to the scope of "political trials"); Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 76 (2005) (defining political trials as trials against a person who "engag[ed] in political opposition or . . . violat[ed] a broad and generally applicable law that is not usually enforced, enforced strictly, or enforced with a strict punishment, except against political opponents of the state or the government"); Meierhenrich & Pendas, *supra* note 61, at 48–49 (including in the scope of political trials those that "crystallize[] or communicate[] a political conflict, often but not necessarily, over the distribution of social resources of one sort or another; *or* courtroom proceedings [that] are directed at the defeat of a political enemy, real or imagined").

63. *See, e.g.*, DOUGLAS, *supra* note 52, at 2–3 (introducing several scholars who have commented on the topic).

rights.[64] The criminal trial's structural and substantive differences offer an opportunity to counteranalogize and determine how the criminal trial is uniquely positioned to contribute to collective memory.

Using the political trial as a foil, this Part explores the ways in which the U.S. criminal trial could still create collective memory, while maintaining the defendant's constitutional rights and upholding the rule of law. Whereas the political trial crafts its narratives purposefully, this Part focuses on incidental collective memory manufacture in prominent criminal trials.[65] This Note's view of the criminal trial's scope will begin with opening statements and conclude with the verdict. Accordingly, any impact of the pre-trial investigation will be considered only insofar as the trial filters that information. Further, post-verdict contributions, especially at sentencing, will be left for valuable discussion beyond this Note.

B. Storytelling in Criminal Court

The criminal trial story is unlike most any story told in real life. In contrast to common story structures that follow roughly chronological and unidirectional paths, the trial, on account of its adversarial nature, necessarily produces a structure of narratives and counternarratives.[66]

Memory studies scholars have observed that organizing a historical archive into a narrative story bolsters the ability of a community to collectively remember an event.[67] In this regard, political and criminal trials share a similar quality. In the political trial context, consider, for example, the troves of documentation collected for the Nuremberg proceedings following World War II.[68] Set aside as an

64. *See* OSIEL, *supra* note 5, at 80 (describing the collective memory value of "engaging and compelling[] stories [at trial] that linger in the mind").

65. This Note claims no hard-and-fast rule based on outside viewership or scholarly commentary for a trial to have "prominence." Rather, for this Note's purpose, a prominent trial is one followed by the general public as a result of the crime having a specific sociopolitical meaning to those beyond the victim's and perpetrator's immediate community. By "specific," this Note argues that the sociopolitical meaning must deal with more than the mere fact that the crime occurred. All murders have a sociopolitical meaning, which is why the criminal justice system punishes the crime so severely. The Author aims to narrow the definition to crimes where the specific defendant or victim, number of victims, means of committing the act, etc., hold significance.

66. JANET COTTERILL, LANGUAGE AND POWER IN COURT 25 (2003).

67. *See* OSIEL, *supra* note 5, at 80 ("If the law is to influence collective memory, it must tell stories that are engaging and compelling, stories that linger in the mind because they are responsive to the public's central concerns.").

68. *See* DOUGLAS, *supra* note 52, at 12 (describing the examination of over one hundred thousand German documents, millions of feet of film, and twenty-five thousand photographs).

archive, this vast evidentiary stockpile of Nazi war crimes might serve equally well as a heinous paperweight. Brought to life as a narrative account by the Nuremberg prosecutors, the record produced the "greatest history seminar ever held."[69]

This Section examines how the criminal trial's storytelling structure enables and constrains the process's mnemonic (that is, memory) capabilities through its main constituent storytellers, namely (1) the prosecutor, (2) the defendant, and (3) the judge. In sum, the contributions of narratives and counternarratives to the public discourse can craft a rich framework of collective memories.

1. *Prosecutor: "The People" as Victim.* The prosecutor's high reasonable doubt standard for each element of the offense influences the state's narrative approach. To succeed at trial, the prosecution needs "to present a single, linear story" to avoid incoherence that might lead jurors to detect reasonable doubt.[70] This distinctive approach might be most aptly observed in witness examination, where "clarity of the elicited testimony is of paramount importance."[71]

Unlike the aggrieved in a civil suit, the victim in a criminal trial must cede the stage to the state. This construct creates an "asymmetry" at trial, whereby the victim is subjugated and "loses control of how his or her story is presented."[72] Viewed in one light, the inability of the victim or victim's family to control the narrative of the crime told in court is in direct conflict with a common form of collective memory building, whereby the direct victim-group's story is transmitted throughout the community.[73] But viewed in another light, one could argue that displacing, or minimizing, the directly impacted victim helps to effectively craft public memory through disciplinary knowledge from government officials.[74] Indeed, the prosecution, standing in for the community and the victim, could more authoritatively construct collective memory by symbolically standing for "the People."

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69. *Id.* at 2.

70. COTTERILL, *supra* note 66, at 30.

71. *Id.* at 130.

72. *See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U. L. REV. 863, 866 (1996). By contrast, counsel "devoted to his or her client's interests" represents the defendant directly. *Id.*

73. *See* Eyerman, *supra* note 40 (describing the ways that groups "exert . . . discursive influence" in their interpretation of past collective traumas).

74. *See* BODNAR, *supra* note 7, at 247 (describing the advantages that purveyors of "official culture" have over "ordinary people" in creating collective memory).

In prominent homicide trials, a victim's inability to testify raises a challenge for the prosecutor to tell a story with a sympathetic protagonist. But the victim's voice can come in through other means. Consider the strategy of the prosecutors in the O.J. Simpson trial, where the state admitted recordings of Nicole Brown Simpson's two 911 calls.[75] Introducing the victim's voice raises fairness concerns for the defendant, as the prosecution and the jury could draw inferences from ambiguous evidence without the opportunity for cross-examination.[76] However, the exclusion of much of Simpson's domestic abuse also illustrates how a dead victim's silence can be reinforced by the law and kept beyond the reach of a prosecutor's storytelling.[77]

In sum, while the prosecutor can find ways to weave in the victim's voice at trial, the prosecutor's control over one side of the story could silence the narratives that a victim or victim-group seeks to support.

2. *Defendant: The "Silent" Object of the Trial.* Whereas the prosecution seeks coherence in its narratives to secure a guilty verdict, the defense's counternarratives can thrive by highlighting incoherence. In the French political trial against Klaus Barbie, a former SS officer of Vichy France,[78] Barbie's defense attorney exploited a glaring tension between French society's "deliberately constructed . . . myth of united resistance" against the Nazis and the French prosecution's focus on Barbie's deportation of Jews—which necessarily implicated French collaboration with the Nazis.[79] Whereas French leaders hoped the pedagogic trial would honor French resistance,[80] the trial's focus on crimes against humanity enabled the defense to highlight the

75. COTTERILL, *supra* note 66, at 55.

76. *See id.* (stating that the prosecutor told the jury it would hear a 911 tape that would help the members "discern from the tone of her voice and the things that she says that she is a tough woman, but that she's also afraid and intimidated" (internal citations omitted)).

77. *See* Gewirtz, *supra* note 72, at 867 n.6 (describing the significance of Judge Lance Ito's evidentiary rulings).

78. *See generally Klaus Barbie: The Butcher of Lyon*, U.S. HOLOCAUST MEM'L MUSEUM, https://encyclopedia.ushmm.org/content/en/article/nikolaus-klaus-barbie-the-butcher-of-lyon [https://perma.cc/D6AL-2QSW], (last updated July 12, 2018) (providing a summary of the life and trial of Klaus Barbie).

79. OSIEL, *supra* note 5, at 113, 113 n.109 ("Barbie was convicted for his role in the deportation of French Jews.").

80. DOUGLAS, *supra* note 52, at 185. The French prosecutors could only try Barbie for crimes against humanity, instead of war crimes, due to an expired statute of limitations. *Id.* at 191. This charge limited the ability to discuss crimes against French resistance fighters. *Id.*

pervasiveness of French-Nazi collaboration in the Final Solution, thus putting the entire French society on trial.[81]

In U.S. criminal trials, the defense can take similar advantage of narrative incoherence, though less informed by historiographical conflict and more by tension within the prosecution's micronarrative form. A dramatic example of this tactic from the O.J. Simpson trial occurred when the prosecution asked Simpson to put on the glove allegedly worn during the murders of Nicole Brown Simpson and Ron Goldman.[82] Breaking his long silence at the trial, Simpson struggled to put the gloves on; he stated, "[T]hey're too small," which inspired the now-famous phrase from the defense's closing argument, "If it doesn't fit, you must acquit."[83]

The defense's counternarratives at trial, which seek to exploit and highlight reasonable doubt in the prosecution's case, complicate efforts to create Durkheimian notions of monolithic memory by slipping competing memories of the offense into the public discourse.[84] However, under modern collective memory conceptions, the defendant's counternarratives provide a two-fold boost to the trial's ability to create collective memory. First, the presence of counternarratives in a full and fair defense legitimates the entire trial process and gives credence to the collective memory that flows therefrom.[85] And second, the presence of counternarratives compels a more critical lens for the jury and the public to process the parties' arguments into a collective narrative of the criminal act.[86] In other

81. This example highlights an exceptional case of a defense attorney's contributions to collective memory. More often, political trials are designed to constrain the defense. *Supra* note 61. For example, the Hutu defendants in the Rwandan *gacaca* trials after the genocide in Rwanda faced little hope of a full and fair defense, as the mass number of defendants had little access to defense counsel. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 124 (1998).

82. COTTERILL, *supra* note 66, at 111.

83. *Id.*

84. OSIEL, *supra* note 5, at 33 ("Durkheim's approach leaves no room for dissenting (or even concurring) opinions.").

85. *Cf. id.* at 128–29 (arguing that reciprocity in narrative balance could foster a sense of reciprocal solidarity but asserting criminal law does not facilitate such a narrative balance).

86. *See id.* at 52 ("Narratives are valuable regardless of their persuasiveness, because they involve 'argumentation whose purpose is to bring to light and provoke contestation over implicit rules that constrain the production of new ideas and determine the boundaries of political communities.'").

words, the resulting memory competition has inherent value by stirring the public to more critically process the offense and why it matters.[87]

3. *Judge as Gatekeeper of Evidence*. The criminal trial is a struggle over storytelling in which the judge guards the boundaries of "what stories may be told at trial, how stories must be told, who is the appropriate audience, [and] how stories must be heard."[88] In the political trial context, judges understand they are writing history.[89] Justice Robert Jackson's opening statement at the Nuremberg proceedings highlights this history-making role: "The record on which we judge these defendants today is the record on which history will judge us tomorrow."[90] But that does not stop tribunals for political trials from having a role in *what* history is allowed into the courtroom and on what terms. For example, the rules governing the Iraqi Special Tribunal trial against Saddam Hussein made excluding irrelevant or unduly prejudicial evidence discretionary, thus allowing the prosecution to "discuss materials unrelated to the charges against [Hussein]."[91]

Judges in U.S. criminal trials, bound by stricter rules of evidence and constitutional protections, can still distort history through their evidentiary rulings.[92] Hardly a pejorative, distortion is the intent. For example, relevance cordons off evidence from the trial's narratives that does not bear on resolving the action before the court[93]; the prohibition on hearsay filters out facts that may very well be true[94]; and limiting instructions require the jury to only use certain evidence to evaluate X

87. *Id.* While counternarratives can spur a society to engage *more* with a prominent offense, a variety of factors could lead a memory to obtain dominance or for memories to maintain fierce competition. For an example of this phenomenon, see *infra* Part III.A.2 (discussing counternarratives in the Derek Chauvin trial).

88. Gewirtz, *supra* note 72, at 863.

89. OSIEL, *supra* note 5, at 82.

90. *Id.*

91. *See* Peterson, *supra* note 61, at 281 (discussing the Iraqi Special Tribunal's permissive evidentiary rules).

92. OSIEL, *supra* note 5, at 83–84. The judge's role in memory making is hardly confined to evidentiary rulings. *See infra* Part II.D (discussing the judge's role in venue); *infra* Part II.E (discussing the judge's role in managing media access to the courtroom). This discussion is limited to evidentiary rulings on account of their direct relationship to the nature of the narratives the respective parties can raise at trial.

93. FED. R. EVID. 401(b).

94. FED. R. EVID. 802.

but not Y.[95] This brief sampling of crucial evidentiary rules[96] highlights how the judge, as arbiter of evidence, limits the full context of a criminal offense for the jury and distorts how the ordinary public might draw inferences based on the factual record.[97] Nonetheless, the judge primarily serves an enabling function for the respective parties' storytelling, thus making the judge a significant, yet indirect, contributor to collective memory.

C. Capacity To Capture the Gravity of the Offense

While criminal statutes provide legal shape to shared moral sentiments, criminal statutes at trial may ultimately constrain crafting shared memory. Sociologist of crime David Garland drew upon Durkheim when he argued that the collective conscience of a society is "protected by a strict code of penal law, which—unlike most law in modern society—*does* evoke deep-seated emotions and a sense of the sacred."[98] Put another way, a criminal statute crystallizes in code the public's common values regarding a particular offense.[99]

In political trials, where forging collective memory is an inherent goal,[100] criminal statutes "provide the minimally necessary elements for telling a legal story of administrative massacre."[101] In some instances, such as the Nuremberg proceedings, concerns about ex post facto prosecution are set aside and charges are created *for* the defendants.[102]

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95. FED. R. EVID. 105.

96. Other evidentiary rulings and decisions are crucial to the storytelling process in court. Notably, the judge's analysis under *Daubert v. Merrell Dow Pharms., Inc*., 516 U.S. 869 (1995), for qualifying an expert witness will affect the ability of the parties to explain the facts of the case to the jury. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–48 (1999) (explaining the judge's "gatekeeping" role under *Daubert*). Evidentiary rulings are reviewed on appeal for abuse of discretion, requiring clear error to overrule. *See* Gen. Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997) ("[A]buse of discretion is the proper standard of review of a district court's evidentiary rulings.").

97. By contrast, the public remains unconstrained to contextualize the crime within more comprehensive narrative frameworks, free to begin and end the story where deemed appropriate, and able to link the present crime to historical trends no matter their legal relevance to determining the question of guilt or innocence.

98. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 57 (1990).

99. *See id.* at 58 (stating that criminal statutes are akin to a "seal . . . to hot wax" in how they shape the public's common views of a particular act).

100. *Cf.* OSIEL, *supra* note 5, at 18 (describing collective memory as an aim of "criminal law"). For Osiel, the term criminal trial appears to be a proxy for what this Note terms a political trial. *Supra* notes 60–62 and accompanying text.

101. OSIEL, *supra* note 5, at 71.

102. Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, ATLANTIC (Apr. 1946), https://www.theatlantic.com/magazine/archive/1946/04/nuremberg-a-fair-trial-a-dangerous-precedent/306492 [https://perma.cc/W3UU-6TJR]. Some political trials that respect the

The offense selected by the prosecutor then becomes the "theoretical construct" under which the story of the crime will be told.[103] However, for political trials, the legal form that drives the prosecutor's narratives at trial will also be "situated within a larger narrative of national crisis and rejuvenation."[104]

But for U.S. trials for prominent criminal acts,[105] the generic legal form of any criminal offense constrains the ability to craft a narrative in court, and for good reason. To start with, the prosecutor's role in first pursuing and then selecting the charges presents an asymmetry between the parties in crafting a narrative of the offense.[106] As explained below, the elements of the offense become boundaries for the parties' narratives in court. But one party's ability to set those boundaries reflects an imbalance driven in part by the prosecutor's motivations.[107] While a prosecutor could have collective memory in mind when deciding charges, the prosecutor will focus on other factors, including the likelihood of obtaining a conviction.[108]

Once the charge is selected and the defendant is on trial, the elements of the offense become the boundaries of the narratives and counternarratives of each party.[109] Rules of evidence, particularly the requirement for relevance, guard the prosecutor's presentation of evidence by filtering evidence extraneous to the objective of proving

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principle of legality fail to capture the gravity of the offense. For example, the 1963 trial against several Auschwitz guards featured charges of *Mordlust*, or killing another "from thirst of blood." DOUGLAS, *supra* note 52, at 189. Because the prosecutors had to prove "thirst" beyond acceptable limits of Nazi law, only the most barbaric killings at Auschwitz were chargeable. *See id.* at 188–89.

103. OSIEL, *supra* note 5, at 71.

104. *Id.*

105. *See supra* note 65 and accompanying text (outlining within the scope of "prominence" a requirement of an extra-legal sociopolitical meaning to the community).

106. *See* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 800–01 (2016) (describing the prosecutor's power over charging decisions).

107. *See id.* at 776 ("[P]rosecutors are motivated by political incentives; by professional norms; by their own conceptions of duty and justice; and by other personal motivations that are best understood as agency costs.").

108. *See id.* at 779 ("[A] prosecutor may derive greater political (or personal) benefits from bringing one case with little prospect of victory (say, against a particularly unpopular defendant, but where evidence of guilt is weak) than she would from bringing ten cases where conviction was guaranteed.").

109. *See* Lawrence Douglas, *The Didactic Trial: Filtering History and Memory into the Courtroom*, 14 EUR. REV. 513, 517 (2006) (arguing that one "set of legal filters that shapes the uses of history and memory at trial are the crimes with which the accused is charged").

the elements of the offense.[110] Further, the principle of personal liability—whereby the defendant can only be held to account for his own conduct and not his association with wrongdoers[111]—limits the capacity of the prosecutor to contextualize the accused's behavior as part of a larger sociopolitical trend.[112] The presence of these limitations differs markedly from the "fluid narrative form" one might see at a political trial, where the constraints of evidence rules go relatively unguarded, and the oft-predetermined outcome makes fitting evidence into legal elements of the offense more of a box-checking exercise.[113]

D. Jury: Proxy for the People's Judgment

The jury's composition, deliberation, and ultimate verdict play a crucial role in a trial's memory-creating ability. In political trials, the verdict itself is less important than the trial's capacity to present collective representations of the past and create public discussion about the trial.[114] Indeed, for trials where the outcome is largely predetermined, the jury's work is a matter of going through the motions to deliver its verdict.[115] Accordingly, the intrigue that drives public attention to a political trial—and thus enables a political trial's collective memory manufacture—resides in the task of laying out a substantive account of the accused and others' wrongdoings.[116]

In U.S. criminal trials, the verdict can carry far greater mnemonic power. While this Note views the jury as just one significant source of collective memory, some view the jury's verdict as an "authoritative

110. *See id.* at 516 ("[T]he rules of evidence and proof . . . control the production of knowledge in a criminal trial.").

111. *See* GABRIEL HALLEVY, THE MATRIX OF DERIVATIVE CRIMINAL LIABILITY 20 (2012) ("The essence of the principle of personal liability is the imposition of criminal liability and punishment on individuals who have chosen to commit an offense by exercising their own choice."). The principle of personal liability is in tension with theories of criminal culpability, like accomplice liability and conspiracy, but some see these theories as limited derivations of personal liability. *See id.* ("The principle of personal liability makes it possible to impose criminal liability on individuals other than the perpetrators for the exact role they played in carrying out the offense.").

112. *See* OSIEL, *supra* note 5, at 61 (explaining that the principle of personal culpability can limit the ability of the prosecutor to "paint the larger tableaux").

113. Douglas, *supra* note 109, at 516–17.

114. OSIEL, *supra* note 5, at 39.

115. *See* Peterson, *supra* note 61, at 260–61 (describing the extent to which the verdict is a "foregone conclusion" as a factor in categorizing a trial as political).

116. *See* Gewirtz, *supra* note 72, at 865.

version of the crime narrative."[117] But several factors can influence the relative authority of the verdict. Consider first how jury composition affects the construction of narratives and counternarratives by the advocates as described above. Through voir dire, the parties can seek to match their intended narrative approaches to the persons selected or rejected.[118] Voir dire provides an opportunity for the attorneys and the judge to filter apparent political, professional, and personal bias among the given jury pool.[119] Once seated, the advocates—even indirectly through witness examination—must adapt their storytelling to the jury before them.[120]

Jury composition also impacts public perception of the legitimacy of the verdict. Consider first the role of venue in altering the jury pool. On the one hand, the public perception of the verdict can be bolstered by the appearance of independence and by efforts to limit the role of emotion in jury decision-making. For example, Judge Richard Matsch decided in *United States v. McVeigh*[121] to move the trial outside of Oklahoma,[122] where the defendant killed 168 people by bombing a federal building in Oklahoma City.[123] Specifically, Judge Matsch was concerned that Oklahoman jurors would have a "personal stake in the outcome" or "a sense of obligation to reach a result [that] will find general acceptance in the relevant audience."[124]

On the other hand, jury "selection" by venue can directly undermine the legitimacy of the verdict as well. Prior to the trial of four Los Angeles police officers who were filmed beating Rodney King,[125] Judge Stanley Weisberg moved the trial's venue from Los Angeles

117. COTTERILL, *supra* note 66, at 59. Arguably, the jury could be considered one of the "constituents" of a trial, as discussed in Part II.B. However, the passive nature of the jury suffices to keep it analytically separate.

118. *See id.* at 13 ("It is clearly a highly attractive proposition for lawyers to be able to influence the configuration of a jury panel—to *design* the *audience*—in such a way that they may be predisposed to respond favourably to their particular arguments.").

119. Briana M. Clark, *Social Dominance Orientation: Detecting Racial Bias in Prospective Jurors*, 39 YALE L. & POL'Y REV. 614, 619 (2021).

120. *See* COTTERILL, *supra* note 66, at 121 ("[T]he jury [is] more or less explicitly identified as the ratified recipient of trial talk.").

121. United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996).

122. JODY LENEÉ MADEIRA, KILLING MCVEIGH: THE DEATH PENALTY AND THE MYTH OF CLOSURE 139 (2012).

123. *Oklahoma City Bombing*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing [https://perma.cc/UT4P-ALFR].

124. MADEIRA, *supra* note 122.

125. Powell v. Superior Ct., 232 Cal. App. 3d 785, 789 (1991).

County to Ventura County[126]—a county that had a 79.1 percent white population and 2.3 percent Black population.[127] By effectively whitewashing the jury pool, Judge Weisberg helped produce a jury with no Black members and only two people of color.[128] A defense attorney for one of the officers said after the verdict, "I wouldn't say the case was won [after the venue change], but if it hadn't been granted, the case would have been lost, no question."[129] The predetermination resulting from this kind of venue change directly sullies the legitimacy of the verdict and creates a collective memory of the crime focused on the resulting failure of the judicial branch to hold the police accountable.

Lastly, the jury deliberation process, like the composition of the jury itself, could influence the collective memory of the underlying crime. First, verdicts, unlike many other decisions in court, almost never come with an explanation as to what testimony, arguments, or even emotions led to the outcome.[130] This unambiguous account by the jury would satisfy Durkheimian notions of collective memory by presenting a simplistic narrative of the crime to the public.[131] But in a legal system that champions reasoned judgment and shuns arbitrariness, such an "authoritative" account could undermine the legitimacy of the verdict to some public onlookers. Second, the duration of the jury deliberation could play a role in public interaction with the criminal trial. While the public generally gains no access to the contents of the "black box," the public does gain access to how long the jury spends in there.[132] One could argue that a deliberation too

126. Note, *Out of the Frying Pan or into the Fire? Race and Choice of Venue After Rodney King*, 106 HARV. L. REV. 705, 705 n.3 (1993).

127. Marvin Zalman & Maurisa Gates, *Rethinking Venue in Light of the "Rodney King" Case: An Interest Analysis*, 41 CLEV. ST. L. REV. 215, 216 n.5 (1993). By contrast, Los Angeles had a 56.1 percent white population and 11.2 percent Black population. *Id.*

128. The jury composition was ten white jurors, one Hispanic juror, and one Asian juror. *Id.*

129. David Margolick, *As Venues Are Changed, Many Ask How Important a Role Race Should Play*, N.Y. TIMES (May 23, 1993), https://www.nytimes.com/1992/05/23/us/as-venues-are-changed-many-ask-how-important-a-role-race-should-play.html [https://perma.cc/6EPQ-LTRN].

130. *See* Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 861 (2017) ("A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations.").

131. *See* OSIEL, *supra* note 5, at 33 (stating that "Durkheim's approach leaves no room for dissenting (or even concurring) opinions").

132. *See, e.g.*, Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), https://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html [https://perma.cc/NA9J-8XCG] ("The jury [for the trial of George Zimmerman], which had been sequestered since June 24, deliberated 16 hours and 20 minutes over two days.").

short could have cross-cutting impacts on views on the verdict. For some, a quick verdict could show that the decision was obvious and authoritative; for others, a quick verdict might indicate arbitrariness or a lack of reasoned judgment.[133]

E. Media as a Memory Competitor of the Criminal Trial

Undergirding competition between collective memories is a competition between sources of memory.[134] This Section will focus on the criminal trial's primary competition: mass media.[135]

1. *Mass Media, Criminal Acts, and Collective Memory*. Mass media is a significant creator of collective memory, especially given modern technological advancements in the media industry.[136] By selecting, articulating, and transmitting reported events, media "endow [events] with public significance" and raise public awareness of events such that they are "channeled and sedimented in collective memory."[137] In particular, photos and videos have become potent tools to "bring[] to visibility what ordinarily lies outside the range of vision of all but a small minority of direct witnesses."[138]

By utilizing photos and videos of criminal acts, mass media burnishes its collective memory might by bringing the viewer a pseudo-experience of the crime itself.[139] The democratization of video technology through recorders and cell phone cameras has led to the proliferation of "citizen journalism," which can document crimes on-

133. *See* COTTERILL, *supra* note 66, at 227 ("[T]he length of the deliberation period [for the O.J. Simpson trial] was judged to have been indecently short, considering the amount and the complexity of the evidence to be evaluated."). The same could go for a lengthy deliberation—whereby some could view the decision as a close call and unauthoritative, while others could imbue the verdict with greater legitimacy on account of its nuance.

134. *See* FENTRESS & WICKHAM, *supra* note 39 (discussing the interplay of memory sourced from sound and images).

135. Other sources of memory for criminal offenses are significant and worthy of further research. Some to consider include memorials, protests, history books, and legislative investigations.

136. JEFFREY ANDREW BARASH, COLLECTIVE MEMORY AND THE HISTORICAL PAST 114 (2016).

137. *Id.*

138. *Id.* at 114, 124.

139. The experience is a pseudo-reality because video retains a temporal and spatial separation from the actual lived experience. *Id.* at 148.

site.[140] Consider, for example, the role of the media in disseminating the footage of the four Los Angeles police officers kicking, beating, and tasering Rodney King in 1991.[141] The footage, filmed on a video camera by citizen George Holliday outside of his home, sparked near-instantaneous international news coverage.[142] In Los Angeles specifically, the media's broadcast of the video along with intensive print reporting in the aftermath of the crime fed much of Los Angeles's "[o]utrage and indignation" following an acquittal that directly contradicted what viewers had witnessed.[143] In this sense, the media's furtherance of certain memories of the King beating—for example, that the crime was a heinous and criminal abuse of authority—seemed to take on greater dominance in Los Angeles than the account by the jury that acquitted the officers.

Accordingly, the nature of the media's collective memory contributions can diverge dramatically from those deriving from criminal trials. In terms of discrete memory, media can freely pursue stories that arrange photos and videos in ways that provoke heightened emotional impact but do not care to avoid undue prejudice.[144] The media can highlight the impact on victims or dig into the perpetrator's background without providing limiting instructions.[145] And the media can compile eyewitness testimony that need not account for the Confrontation Clause.[146]

But the media nearly overpowers the criminal trial in its capacity to contextualize the crime within larger memory frameworks. For the

140. Jo Livingston, *How Video Shaped Our Understanding of the L.A. Riots*, NEW REPUBLIC (Apr. 28, 2017), https://newrepublic.com/article/142341/video-shaped-understanding-la-riots [https://perma.cc/GLN7-QZH3].

141. Powell v. Superior Ct., 232 Cal. App. 3d 785, 789–90 (1991).

142. Clay Risen, *George Holliday, Who Taped Police Beating of Rodney King, Dies at 61*, N.Y. TIMES (Nov. 1, 2021), https://www.nytimes.com/2021/09/22/us/george-holliday-dead.html [https://perma.cc/68Y9-6BH7].

143. Ronald N. Jacobs, *Civil Society and Crisis: Culture, Discourse, and the Rodney King Beating*, 101 AM. J. SOCIO. 1238, 1263 n.20 (1996).

144. *See* BARASH, *supra* note 136, at 118 (explaining that information in mass media is commonly juxtaposed in a haphazard fashion, where adjacent, unrelated, but significant pieces of information create a heightened sense of immediacy).

145. *See, e.g.*, Aaron Morrison, *In His Final Days, Ahmaud Arbery's Life Was at a Crossroads*, AP NEWS (Nov. 24, 2021), https://apnews.com/article/life-of-ahmaud-arbery-e869ad7dc4ae6b86635507d412e63319 [https://perma.cc/8CB3-FY73] (providing a profile of Arbery's life prior to being murdered by three men on February 23, 2020).

146. *See* Crawford v. Washington, 541 U.S. 36, 59 (2004) (holding that the Confrontation Clause prohibits testimonial out-of-court statements by witnesses unless the witness is unavailable or the defendant had a prior opportunity to cross-examine the witness).

criminal trial to "render justice, and nothing else,"[147] or even to come close to that ideal, the trial cannot purposefully situate the defendant's offense within transcendent narratives about structural racism, domestic abuse, or wealth inequality. The institution is simply not built for pursuing this kind of memory work. By contrast, the media is practically addicted to the task.

Consider Kyle Rittenhouse's case, where Rittenhouse killed two Black Lives Matter protestors and wounded a third.[148] After the shooting, and surrounding his trial, the media hosted wide-ranging debates about what Kyle Rittenhouse's case said about white supremacy[149] and the appropriateness of a strong self-defense when accounting for the proliferation of guns.[150] Whereas the trial could not—and ought not—have been the place for these debates, the media could ably forge collective memory of the offense, which includes both discrete memory of the act and efforts to situate that memory within larger memory frameworks.

2. *Competing in the Courtroom: Mass Media at Trial.* While mass media plays a critical role in crafting narratives of the criminal offense by disseminating footage of and commentary on the crime, media also contributes to collective memory by covering and broadcasting the trial. While the First Amendment protects journalists' access to the courtroom, television broadcasts of state trials are a relatively new phenomenon and remain limited in federal courts.[151] Judges can maintain safeguards, like a camera "kill switch," to limit the influence

147. ARENDT, *supra* note 16.

148. Michael Tarm, Scott Bauer & Amy Forliti, *Jury Finds Rittenhouse Not Guilty in Kenosha Shootings*, AP NEWS (Nov. 19, 2021), https://apnews.com/article/jury-finds-kyle-rittenhouse-not-guilty-in-kenosha-shootings-27f812ba532d65c044617483c915e4de [https://perma.cc/8WKE-HBP5].

149. *See, e.g.*, Jeneé Osterheldt, *Kyle Rittenhouse, White Supremacy, and the Privilege of Self-Defense*, BOS. GLOBE (Nov. 19, 2021, 7:32 PM), https://www.bostonglobe.com/2021/11/19/metro/kyle-rittenhouse-white-supremacy-privilege-self-defense [https://perma.cc/84UZ-F7Q8] ("Had he been white and protecting Black lives in Kenosha instead of purportedly protecting cars, he'd be in prison. . . . Rittenhouse has the privilege of white power.").

150. *See, e.g.*, Shaila Dewan & Mitch Smith, *When It Comes to Self-Defense, the Prosecution Has a Heavier Burden*, N.Y. TIMES (Nov. 19, 2021, 7:58 PM), https://www.nytimes.com/2021/11/19/us/rittenhouse-acquittal-self-defense.html [https://perma.cc/3TLS-DKWF] ("If we're going to have a country in which guns are pervasive and the law has little or nothing to say about where and when one may carry a gun and display a gun then we are going to have a situation where self-defense law can't really handle it." (quoting Professor Samuel Buell)).

151. BARASH, *supra* note 136, at 164.

of cameras.[152] Nonetheless, cameras in the courtroom, when available, provide the "voyeuristic" public with a narrow viewpoint into the trial.[153]

Accounting for the media's and the trial's respective contributions to this coverage may be a futile exercise, but this arena of competition highlights that jockeying for memory dominance often includes instances where sources of memory operate symbiotically. The function of the media as a filter of the trial appears most potent when a video of the crime is not available for the public. Unlike the trial for the Rodney King beating that centered around a video of the offense,[154] the O.J. Simpson trial had no video evidence of the crime itself. As a result, the trial, disseminated through the media, became the primary wellspring of information about the crime, and media coverage produced drastically polarized narratives of the crime along racial lines on the question of guilt or innocence. One poll prior to the verdict indicated that 77 percent of white people believed Simpson was guilty, while 72 percent of Black people believed Simpson was innocent.[155] Following acquittal, for which a sizeable segment of the population was incredulous, ABC News' legal counsel described the fundamental disconnect between the public and jury's trial experience: "They're not in the courtroom; they don't see what the jurors see. . . . [They] don't see the nonverbal behavior of witnesses in the same way as you see it on a television camera. . . . [They] don't see some of the photographs."[156] Thus, the O.J. Simpson trial highlighted that even live broadcast of a trial can craft narratives different from those created in the courtroom.

152. *See* COTTERILL, *supra* note 66, at 109 (describing Judge Ito's "kill switch" for the TV cameras, which were used once when the camera showed a juror whose anonymity was to be protected).

153. Gewirtz, *supra* note 72, at 884 ("[T]he new technology of cameras in the courtroom and Court TV . . . have made the general public an immediate audience for many trials.").

154. *See* Risen, *supra* note 142 ("Mr. Holliday's video played a critical role in the assault trial of four officers involved in the King beating.").

155. Joe Chidley, *The Simpson Jury Faces the Race Factor*, MACLEAN'S (Oct. 9, 1995), https://archive.macleans.ca/article/1995/10/9/the-simpson-jury-faces-the-race-factor [https://perma.cc/X34D-4CYX].

156. BARASH, *supra* note 136, at 166 (quoting Peter Arnella).

III. THE TRIAL OF DEREK CHAUVIN

On May 25, 2020, Derek Chauvin murdered George Floyd.[157] Following a 911 call reporting that Floyd had attempted to purchase cigarettes with a counterfeit twenty-dollar bill, police arrived on the scene.[158] Efforts to place Floyd in the police cruiser failed. Soon thereafter, then-Officer Chauvin pinned Floyd to the ground by placing his knee on Floyd's neck for nine minutes and twenty-nine seconds.[159]

On instinct, one bystander, Darnella Frazier, began recording the scene on her cell phone camera.[160] Frazier posted her video, which captured Floyd's pleas and eventual final breath, to her Facebook account later that day.[161] The video spread across continents in hours and set off what is widely considered the largest protest movement in the history of the United States.[162]

Accounting for the collective memory of George Floyd's murder within just a few years of its occurring may be a task fraught with speculation. After all, a community's understanding of a past event can lay dormant or evolve slowly for decades.[163] This Note proposes no answer to how much time is required to reflect on an event to analyze its collective memory. Instead, this Part recognizes the near certainty that narratives surrounding George Floyd's murder will evolve as time progresses, and it consequently examines how the trial of Derek Chauvin could contribute to that mnemonic evolution. Using the framework developed in Part II, this Part examines the trial's constituent storytellers, the capacity of the unintentional second-degree murder charge to capture the gravity of the George Floyd

157. *See* Verdict, Count I, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Apr. 21, 2021) (stating that jury found Chauvin guilty as to "Count I: Unintentional second-degree murder while committing a felony").

158. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Jan. 24, 2022), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/U9W3-HNRF].

159. *Id.*

160. Chao Xiong & Paul Walsh, *'World Needed to See,' Says Woman Who Took Video of Man Dying Under Officer's Knee*, MINNEAPOLIS STAR TRIB. (May 26, 2020, 11:44 PM), https://www.startribune.com/world-needed-to-see-says-woman-who-took-video-of-man-dying-under-officer-s-knee/570774152 [https://perma.cc/VC97-9PUJ].

161. *Id.*

162. Buchanan et al., *supra* note 21.

163. *See, e.g.*, SCHUDSON, *supra* note 14, at 210 (describing the evolution of Watergate memory as those personally involved in the scandal "pass from the scene").

murder, the role of the jury, and the media's contributions as a competitor to the trial.

A. Narrative Storytelling and Roles of Parties at Derek Chauvin's Trial

1. *Prosecution Narrative and Filling in for George Floyd.* In a homicide case, the prosecutor's limited capacity to bring in the victim's voice can constrain the prosecutor's ability to craft a collective memory.[164] In the trial of Derek Chauvin, prosecutors, led by Minnesota Attorney General Keith Ellison, stood in for George Floyd's voice.[165] Taking the case from a local prosecutor in whom Black community leaders lacked trust,[166] the attorney general's prosecutors arguably instilled legitimacy into its narratives of the offense. And despite George Floyd's silence in court, the prosecutors made ample use of video testimony to bring in George Floyd's voice.[167]

Several of the prosecution's narrative themes helped craft certain memories of the offense.[168] First, the prosecutor called on the jurors to "believe [their] eyes" when watching the video.[169] The prosecution's straightforward reminder highlights an apparent risk that the jurors might discount Chauvin's undisguised act as worthy of criminal sanction. Instead, the narrative boosts the video's ability to further memories centered around guilt by reminding the jury that the public nature of Chauvin's brutality ought not undermine the legitimacy of the video itself.

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164. *See supra* Part II.B.1.

165. Stephen Montemayor, *Latest Chapter of Keith Ellison and Mike Freeman's Partnership Could Define Their Careers*, MINNEAPOLIS STAR TRIB. (June 17, 2020, 11:17 PM), https://www.startribune.com/officer-prosecution-latest-test-for-keith-ellison-mike-freeman/571316632 [https://perma.cc/LW4D-6WQU].

166. *Id.* ("Ellison, who has a deep history in civil rights activism, enjoys a trust from Minnesota's black community that Freeman cannot claim.").

167. *See* Cheryl Corley, *How Using Videos at Chauvin Trial and Others Impacts Criminal Justice*, NPR (May 7, 2021, 10:28 AM), https://www.npr.org/2021/05/07/994507257/how-using-videos-at-chauvin-trial-and-others-impacts-criminal-justice [https://perma.cc/79WF-3562] ("In the Chauvin trial, video was the star.").

168. The narratives presented in this Section come exclusively from the pre-verdict stage of the trial, as significant victim impact testimony during the sentencing phase of the trial falls outside the scope of this Note.

169. Transcript of Proc. at 2669, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 29, 2021) (Transcript Vol. 13) ("[Y]ou can believe your eyes that it's a homicide, it's murder, you can believe your eyes.").

Second, Prosecutor Jerry Blackwell famously rebutted the defense's counternarrative on alternative causes of death by saying, "You were told . . . that Mr. Floyd died because his heart was too big . . . . The truth of the matter is that the reason George Floyd is dead is because Mr. Chauvin's heart was too small."[170] Employing expert testimony, the prosecution proved this artful point with cold, scientific precision. Pulmonologist Dr. Martin Tobin, who highlighted that George Floyd exhibited a normal respiratory rate prior to asphyxiation, compared normal respiratory rates against someone with heart disease to explain that George Floyd's heart condition did not cause him to experience a low level of oxygen independent of Derek Chauvin's choke hold.[171] Additionally, Dr. Tobin used this data point, as well as George Floyd's carbon dioxide level, to dispel the notion that residual fentanyl detected in his system contributed to his low level of oxygen—thus isolating Derek Chauvin's small heart as the cause of death.[172] Because cause of death was one of the primary issues at trial and in the public eye,[173] the prosecution's use of expert testimony to scientifically establish Derek Chauvin as the cause of death contributes to narratives of the offense that center on Chauvin's guilt.

Lastly, the prosecution sequestered Derek Chauvin from his role as a police officer and explicitly disentangled the case from systemic police misconduct. Among an array of expert witnesses on reasonable force, Minneapolis Police Chief Medaria Arradondo explained that Derek Chauvin's conduct violated the department's definition of neck restraint, defensive tactics, and reasonable force, and the department's policy on rendering aid.[174] In closing arguments, Prosecutor Steve Schleicher furthered, "The defendant is on trial not for being a police officer, it's not the State versus the police. He's not on trial for who he

170. Transcript of Proc. at 5910, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Apr. 19, 2021) (Transcript Vol. 27) [hereinafter Transcript Vol. 27].

171. Shaila Dewan, *Expert Witness Pinpoints Floyd's Final Breath and Dismisses Talk of Overdose*, N.Y. TIMES (Apr. 14, 2021), https://www.nytimes.com/2021/04/08/us/george-floyd-breath-oxygen.html [https://perma.cc/MTV2-2TEK].

172. *Id.*

173. Lenny Bernstein & Holly Bailey, *At the Heart of Derek Chauvin's Trial Is This Question: What Killed George Floyd?*, WASH. POST (Mar. 10, 2021, 7:58 PM), https://www.washingtonpost.com/health/george-floyd-fentanyl/2021/03/10/c3d4f328-76ec-11eb-9537-496158cc5fd9_story.html [https://perma.cc/2RRT-N5ME].

174. Erin Ailworth & Joe Barrett, *Derek Chauvin Violated Department Policies, Minneapolis Police Chief Says*, WALL ST. J. (Apr. 5, 2021, 6:38 PM), https://www.wsj.com/articles/george-floyd-emergency-room-doctor-said-lack-of-oxygen-was-most-likely-cause-of-death-11617640266 [https://perma.cc/WV46-4SPK].

was, he's on trial for what he did."[175] This narrative is logical in the context of the trial: the prosecution's divorcing Derek Chauvin from his occupation helped undermine the notion that Chauvin's conduct was objectively reasonable. But this prosecution narrative may undermine the effective contextualization of the offense that fits Floyd's murder within larger memory structures of systemic police misconduct, highlighting how even the prosecution could counterintuitively produce memory at odds with that generally pursued by activists of criminal justice reform.

2. *Derek Chauvin's Counternarratives*. The defense's counternarratives raised at trial, while ultimately unavailing, still carry memory-producing power beyond their legal use in court. First, the defense argued that Chauvin had used objectively reasonable force.[176] The argument, while seeking to satisfy a legal definition set in *Graham v. Connor*,[177] serves two mnemonic functions as well. One, by contextualizing Chauvin's behavior within professional conduct, the defense sought to refurbish Chauvin's status as a police officer. And two, by presenting a longer timeframe of the struggle to arrest George Floyd, the defense displayed a more complex picture leading to the fateful choke hold, even if utterly unworthy of excusing Chauvin's conduct.

Second, the defense countered the prosecution's theory of cause of death by positing that George Floyd's drug use and heart condition caused the death.[178] The defense, by introducing a video of a prior arrest where Floyd exhibited similar behavior, attempted to establish that the struggle to overcome Floyd's claustrophobia and place him in the police cruiser was the product of drugs.[179] This argument, while legally significant, also allowed the defense to dig into George Floyd's

175. Transcript Vol. 27, *supra* note 170, at 5722.

176. Michael Tarm, *Explainer: How Is 'Reasonableness' Key to Chauvin's Defense?*, AP NEWS (Apr. 17, 2021), https://apnews.com/article/us-news-trials-death-of-george-floyd-racial-injustice-us-supreme-court-8ee9b9b218e92faa434d241ef55f5488 [https://perma.cc/X5BT-CSGN].

177. Graham v. Connor, 490 U.S. 386 (1989).

178. *See* Kathleen Foody, *Explainer: State, Defense Differ on Impact of Floyd Drug Use*, AP NEWS (Apr. 19, 2021), https://apnews.com/article/trials-us-news-death-of-george-floyd-racial-injustice-a7c9b49984016908d0bdbb385db66ec1 [https://perma.cc/CW23-K9CK] ("Defense attorney Eric Nelson incorporated drug use into his central argument.").

179. *See* Shaila Dewan, *Defense Focuses on George Floyd's Prior Arrest and Drug Use*, N.Y. TIMES (Apr. 7, 2021) [hereinafter Dewan, *Defense Focuses on George Floyd's Prior Arrest and Drug Use*], https://www.nytimes.com/2021/04/07/us/george-floyds-prior-arrest-drug-use.html [https://perma.cc/7LUS-75PX].

life in front of the jury and the public. For certain dominant memories of the crime, inserting what amounts to potentially damaging victim character evidence could undermine an essentialist good versus evil dynamic. For others still, the prior arrests and drug use could help to fortify efforts to contextualize the crime within cumulative memory frameworks that feature systemic failures of the criminal justice system.

Altogether, the mere presence of the defendant's counternarratives promotes the legitimacy of the trial in the public eye in a way that many may take for granted. One could argue that slipping these arguments into the public sphere undermines monolithic Durkheimian narratives of the crime.[180] But that is not—and ought not be—the point of criminal trials. Instead, the very presence of counternarratives in the Derek Chauvin trial helps to accomplish what Osiel labels discursive solidarity, or "a recognition that a society's members often disagree radically regarding their conceptions of justice and . . . nevertheless . . . settle upon a common scheme of association and cooperation."[181] And furthermore, the opportunity to present a full defense legitimizes the process and boosts the trial's capacity to contribute to public narratives of the offense.

3. *Judge Cahill as Evidentiary Arbiter.* The trial judge's domain over evidentiary rulings distorts the history of the crime by limiting the trial to legally relevant facts for legally permissible purposes.[182] Taking on an enabling function for the parties' respective storytelling, Judge Peter A. Cahill highlighted the role dependency of a judge's memory making, even for notable evidentiary rulings. For example, Judge Cahill admitted testimony under Minnesota's "spark of life" doctrine to allow the state to call witnesses to speak to George Floyd's life.[183] George Floyd's brother, Philonise Floyd, and girlfriend, Courteney Ross, testified to Floyd's standing in the community and his struggles with addiction to help paint a fuller picture of Floyd's life.[184]

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180. *See* OSIEL, *supra* note 5, at 33 (explaining that Durkheim's approach "leaves no room" for alternative narratives).

181. *Id.* at 51.

182. *See supra* Part II.B.3.

183. Jonathan Allen & Joseph Ax, *'Spark of Life': Jury To Hear from George Floyd's Brother in Quirk of Minnesota Law*, REUTERS (Apr. 8, 2021), https://www.reuters.com/article/us-usa-race-georgefloyd-spark/spark-of-life-jury-to-hear-from-george-floyds-brother-in-quirk-of-minnesota-law-idUSKBN2BV23Z [https://perma.cc/VP25-ZT6J].

184. *Id.*

Additionally, Judge Cahill admitted bodycam video of George Floyd's prior arrest that occurred one year before the murder.[185] At the earlier traffic stop, George Floyd ingested Percocet and required emergency medical attention.[186] Judge Cahill had initially excluded the arrest before reversing his own ruling upon the subsequent discovery of methamphetamine in the police cruiser in which George Floyd was briefly forced.[187] This significant ruling, representing one of the closer calls, ultimately enabled the defense's theory of drugs as the cause of death.[188] Regardless of public misgivings about the spark of life doctrine and fair critiques of admitting Floyd's prior arrest, Judge Cahill had a role in lawfully guarding the factual record upon which the parties crafted their narratives. Such an impact exemplifies the judge's enabling function for memory making.

B. Capacity of Unintentional Murder to Capture the Gravity of the Offense

Criminal statutes provide the boundaries of the advocates' narratives at trial.[189] While the prosecutor's power to select the charges creates an asymmetry between the parties, both must proceed to prove or undermine how the evidence fits into the offense's rigid elements.[190]

The prosecution charged Derek Chauvin with second-degree unintentional murder, third-degree murder, and second-degree manslaughter.[191] The second-degree unintentional murder charge, the highest offense, is a felony-murder charge.[192] Conviction requires committing or attempting to commit felony third-degree assault while unintentionally causing the death of another.[193] Third-degree assault requires the defendant intentionally inflict substantial bodily harm.[194]

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185. Dewan, *Defense Focuses on George Floyd's Prior Arrest and Drug Use*, *supra* note 179.

186. *Id.*

187. *Id.*

188. *See id.* ("Derek Chauvin's defense hinges on an argument that George Floyd's drug use, not Mr. Chauvin's knee, caused his death.").

189. *See supra* Part II.C.

190. *Id.*

191. Amended Complaint at 1–2, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. June 3, 2020).

192. Greg Egan, *George Floyd's Legacy: Reforming, Relating, and Rethinking Through Chauvin's Conviction and Appeal Under a Felony-Murder Doctrine Long-Weaponized Against People of Color*, 39 LAW & INEQ. 543, 543 (2021).

193. MINN. STAT. § 609.19(2) (2020).

194. MINN. STAT. § 609.223 (2020). The third-degree murder charge requires causing the death of another by "perpetrating an act eminently dangerous to others and evincing a depraved

None of the charges against Chauvin required that the prosecution prove he intended to cause Floyd's death *directly*. The highest charge brought against him, felony murder, only requires proving the intent of the underlying felony—in this case, third-degree assault.[195] In other words, the jury only had to find Chauvin intended the assault, not the homicide. Setting the narrative boundary here—where Chauvin's mental state is attributable to the death only *indirectly*—poses a challenge to the mnemonic power of the charge to capture the gravity of the offense. Imposing the specific intent of the felony assault onto the death seems in some ways to cheapen a homicide that set off an "awakening" on systemic racism and police brutality in America.[196] For a crime that so profoundly shifted the conversation on race and stirred millions to the streets, one could argue that the indictment's inability to directly capture a mens rea ordinarily reserved for more abhorrent crimes undermines the mnemonic power of the trial.

On the other hand, focusing on the minutiae of the offenses—something legal professionals are admittedly trained to do—could fail to capture how the public consumed information about the offenses. While polling on the public's comprehension of the various offenses for which Chauvin was convicted is lacking,[197] speeches, statements, and media coverage of the verdict indicate that the public was largely told a story of the crime focused on one offense: murder, plain and simple.[198] This begs the question whether the specificity of the offense as first-, second-, or third- degree murder is of great importance with respect to

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mind, without regard for human life." MINN. STAT. § 609.195(a) (2020). The second-degree manslaughter charge requires causing the death of another by "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm." MINN. STAT. § 609.205(1) (2020). This Note avoids redundancy by focusing on the highest charge only. The intent analysis that follows could apply to the two lower charges.

195. *See* MINN. STAT. § 609.19(2) (2020) (stating the crime requires "caus[ing] the death of a human being without intent to effect the death of any person, while intentionally inflicting or attempting to inflict bodily harm upon the victim").

196. Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020, 6:41 AM), https://time.com/5851855/systemic-racism-america [https://perma.cc/F87B-G66P] ("[T]he debate over systemic racism has spread across the nation and around the world.").

197. *See, e.g.*, Eli Yokley, *Most Americans Approve of Derek Chauvin's Conviction, but Fewer See Justice for George Floyd*, MORNING CONSULT (Apr. 22, 2021, 3:00 PM), https://morningconsult.com/2021/04/22/chauvin-conviction-floyd-response-polling [https://perma.cc/G6RP-YTLG] (providing polling on views on the trial but not on comprehension of the charges).

198. *See, e.g.*, President Joseph R. Biden, Remarks by President Biden on the Verdict in the Derek Chauvin Trial for the Death of George Floyd (Apr. 20, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/20/remarks-by-president-biden-on-the-verdict-in-the-derek-chauvin-trial-for-the-death-of-george-floyd [https://perma.cc/3N5K-GTYF] (calling the crime "murder" with no qualification on five occasions).

its contributions to collective memory. But for George Floyd's brother, Philonise, the fact that Chauvin was convicted of *unintentional* murder did not appear to undermine its historical significance: "In contrast to the jury that 66 years ago refused to convict the men who brutalized, maimed and killed Emmett Till, this jury took a decisive stand for justice. As much as this verdict is a vindication for George, it is for Emmett, too."[199]

C. Chauvin Trial Jury Composition and Deliberation

The composition and deliberation of the jury can directly impact the public's perception of the legitimacy of the verdict.[200] The jury composition and deliberation in the Derek Chauvin trial bolstered the legitimacy of its "authoritative" account of the crime.[201]

The twelve-person jury in the Derek Chauvin trial was drawn from a jury pool in Hennepin County, where the murder occurred.[202] Ahead of trial, Chauvin moved for a change of venue, arguing that "[t]he 'barrage' of prejudicial publicity surrounding this case ha[d] created 'so huge a public passion' that a fair trial [would be] impossible . . . ."[203] In denying this motion, Judge Cahill argued, "I don't think there's any place in the state of Minnesota that has not been subjected to extreme amounts of publicity on this case."[204] To further protect against bias, the court distributed a questionnaire in the mail that asked ten questions to gauge potential jurors' familiarity with the case, views on the defendant, and desire to serve on the jury.[205]

The resulting twelve-person jury had seven women and five men, and four Black people, six white people, and two who identified as

199. Philonise Floyd, Opinion, *For My Brother George Floyd, This Is What Justice Feels Like*, WASH. POST (Apr. 21, 2021, 11:33 AM), https://www.washingtonpost.com/opinions/2021/04/21/philonise-floyd-chauvin-verdict-justice [https://perma.cc/7FZX-V3CX].

200. *See supra* Part II.D.

201. *See* COTTERILL, *supra* note 66, at 59 (arguing that the jury "reaches the final decision about the coherence of the authoritative version of the crime's narrative").

202. Tim Arango, *Twelve Jurors Seated in Chauvin Case*, N.Y. TIMES (Mar. 18, 2021), https://www.nytimes.com/2021/03/18/us/chauvin-jury-selection-george-floyd.html [https://perma.cc/H8D9-F3WR].

203. Defendant's Memorandum of Law in Support of New Trial and Change of Venue at 2, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 18, 2021).

204. Transcript of Proc. at 2122, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Mar. 19, 2021) (Transcript Vol. 10).

205. Special Juror Questionnaire, State v. Chauvin, No. 27-CR-20-12646 (Minn. Dist. Ct. Dec. 22, 2020).

multiracial.[206] The decision to maintain the venue in Minnesota's most diverse city, despite the high level of publicity, helped the jury avoid the legitimacy concerns that plagued the jury in the Rodney King trial. Legal experts "expressed concern about . . . an all-white—or nearly all-white—jury," arguing "that diversity was necessary for the trial to be accepted within the Black community as legitimate."[207] In fact, the jury represented an even higher percentage of Black people than Minneapolis itself.[208] Despite Chauvin's concerns about a tainted jury pool, the added efforts to control for bias and achieve diversity in the panel likely helped legitimize the jury's voice in the public's collective memory of the murder.

The Chauvin jurors deliberated for five hours over two days.[209] At least one juror has spoken about the deliberation experience to the press.[210] In the sequestered room, the jurors voted on each offense, starting with the second-degree manslaughter charge and working up to the second-degree unintentional murder charge.[211] Following an initial 11–1 vote on the manslaughter charge, a discussion eventually convinced the one holdout.[212] The next day, the jurors resumed deliberations on third-degree murder, where the same holdout needed three-and-a-half hours of detailed discussion to eventually vote to convict.[213] The most severe offense, second-degree unintentional murder, took just twenty-to-thirty minutes for a unanimous vote to convict.[214]

While scholar Janet Cotterill argues that the jury's verdict reflects the "authoritative" account of the criminal offense, this Note poses several alternative sources of authority and reasons as to why the jury's authority might be questioned. Measuring the impact of the Derek Chauvin jury on the collective memory of the offense may be particularly challenging because of widely shared public beliefs on the

206. Arango, *supra* note 202.

207. *Id.*

208. Liane Jackson, *Lessons from the Chauvin Conviction: Justice Requires Diverse Juries*, 107 A.B.A. J. 9, 9 (2021).

209. Joe Barrett & Deena Winter, *Derek Chauvin Juror: 'We All Agreed at Some Point That It Was Too Much,'* WALL ST. J. (Apr. 29, 2021, 11:44 AM), https://www.wsj.com/articles/a-juror-in-derek-chauvin-trial-lifts-the-curtain-on-deliberations-11619705799 [https://perma.cc/552S-QKMN].

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

defendant's guilt. Polls around the time show that 75 percent of Americans believed Chauvin was guilty—with 70 percent of white Americans and 93 percent of Black Americans holding this view.[215] While those polled likely heard only portions of the testimony and faced none of the profound responsibility of imposing criminal sanctions,[216] overwhelming support for the jury's verdict suggests the jury, at a minimum, had a buttressing effect for dominant collective memory of the crime focused on guilt or innocence. As the following Section highlights, however, the binary simplicity of the verdict makes for an incomplete account of the crime.

D. Media's Contributions as a Competitor to the Derek Chauvin Trial

Collective memories and their sources can jockey for dominance, and the two primary sources of memory for criminal acts are the trial and the media.[217] While the trial of Derek Chauvin serves as a site of memory for George Floyd's murder, the media played a critical role in establishing societal narratives of the offense.[218]

The trial of Derek Chauvin is unique because "George Floyd died in all of our living rooms."[219] Darnella Frazier's instinctual decision to film the abuse of authority unfolding before her allowed "millions of people [to] watch the last 9 minutes and 29 seconds of Floyd's life."[220] Through the video's publication on TV and social media, the public gained widespread and relatively unfiltered access to the crime—sparking an unprecedented protest movement.[221]

The media had a built-in advantage in establishing collective memory of George Floyd's murder. While memory can evolve over

215. Jennifer de Pinto, *CBS News Poll: Widespread Agreement with Chauvin Verdict*, CBS NEWS (Apr. 25, 2021, 10:30 AM), https://www.cbsnews.com/news/Chauvin-verdict-opinion-poll [https://perma.cc/AHD2-CXQX].

216. *See* Barrett & Winter, *supra* note 209 ("'I almost broke down from that,' . . . . 'We decided his life. That's tough. That's tough to deal with. Even though it's the right decision, it's still tough.'" (quoting Chauvin juror Brandon Mitchell)).

217. *See supra* Part I.B; *supra* Part II.E.1.

218. While this Note focuses on media as the primary competing source of memory, physical memorials around the United States also play a critical role. For an overview of the memorials to George Floyd (and their demise) two years from the date of the murder, see Charles M. Blow, Opinion, *The Great Erasure*, N.Y. TIMES (May 20, 2022), https://www.nytimes.com/interactive/2022/05/20/opinion/blm-george-floyd-mural.html [https://perma.cc/KGN9-N6FW].

219. Skylar Hughes, *A Look Inside the Most Dynamic Criminal Trial of 2021*, DUKE RSCH. BLOG (Sept. 22, 2021), https://researchblog.duke.edu/2021/09/22/even-with-video-evidence-it-was-a-fraught-case [https://perma.cc/CHS3-QQ2Z] (quoting Prosecutor Jerry Blackwell).

220. Oritseweyinmi Joe, *supra* note 20, at 140.

221. Buchanan et al., *supra* note 21.

time, the media had the opportunity to set the foundation for collective memory of the offense by being first to the game relative to the trial. For example, major news outlets transformed disparate video sources and eyewitness accounts into comprehensive explanations of what occurred in front of Cup Foods on May 25, 2020.[222] As the author of the "first rough draft of history,"[223] the media had the opportunity to begin to sediment narratives of the murder in the minds of the public well before the trial even began.

Further, the media holds a superior mnemonic authority by virtue of its ability to contextualize George Floyd's murder as part of larger memory structures—particularly memories of police misconduct against Black Americans. While the Chauvin prosecutors explicitly isolated Chauvin from his profession,[224] the media faced neither the prosecutor's task of convincing potentially police-sympathetic jurors nor the principle of personal liability.[225] For example, journalists across outlets featured stories on the history of police violence in Minneapolis, the Black Lives Matter movement, and society-wide shifts on views of systemic racism.[226] More specifically, the media, unlike the trial, could forge together the memory of Breonna Taylor's death at the hands of police two months prior, which broadened discussions about police misconduct to include more intersectional dialogue on race and gender.[227]

Accounting for each source's contributions in TV broadcast and coverage of the trial is likely a futile exercise. The symbiotic

222. *See* Hill et al., *supra* note 158 (providing a ten-minute analysis of how George Floyd died).

223. EDWIN AMENTA & NEAL CAREN, ROUGH DRAFT OF HISTORY: A CENTURY OF US SOCIAL MOVEMENTS IN THE NEWS 1 (2022) ("Journalists like to say that newspapers provide the first rough draft of history.").

224. *See supra* Part III.A.1.

225. *See* HALLEVY, *supra* note 111 ("The essence of the principle of personal liability is the imposition of criminal liability and punishment on individuals who have chosen to commit an offense by exercising their own choice.").

226. *See, e.g.*, Wesley Lowery, *Why Minneapolis Was the Breaking Point*, ATLANTIC (June 12, 2020, 4:45 PM), https://www.theatlantic.com/politics/archive/2020/06/wesley-lowery-george-floyd-minneapolis-black-lives/612391 [https://perma.cc/6VAR-4HBA] (contextualizing Floyd's murder within Minneapolis' history of police misconduct); Buchanan et al., *supra* note 21 (analyzing the Black Lives Matter movement); Worland, *supra* note 196 (describing the United States' racial "awakening" following George Floyd's murder).

227. Alisha Haridasani Gupta, *Why Aren't We All Talking About Breonna Taylor?*, N.Y. TIMES (Oct. 30, 2020), https://www.nytimes.com/2020/06/04/us/breonna-taylor-black-lives-matter-women.html [https://perma.cc/G94P-6DYE] ("Black women's experiences of police brutality and their tireless contributions to mass social justice movements have almost always been left out of the picture . . . .").

relationship between the two almost certainly contributed to collective memory of the crime. Several broadcasts serviced continuous coverage of the trial,[228] with viewership peaking on the day of the verdict when at least 23.2 million viewers tuned in in the United States.[229] The media played a considerable role by providing commentary and filtering significant segments of the trial for more convenient consumption. For instance, several outlets provided daily trial highlight reels and analysis of the parties' arguments.[230]

But most distinctively, the media's contextualization of the verdict helps to situate the crime within larger memory frameworks of racism. The verdict alone has considerable memory power. But the verdict sparked vigorous debate about what the case means for racial justice. For some, the verdict vindicated a narrative of racial improvement, especially when compared to the perceived failure of the trial for the officers who beat Rodney King thirty years prior.[231] For others still, the offense itself showcases racial injustice that no verdict could upend.[232]

It is likely too early to determine the "dominant" source of memory for George Floyd's murder, but each source's structural advantages in memory production point to a robust competition. While the media facilitated the American public's consumption of the crime video and creation of broader contextual narratives, there remains a role for the trial, particularly through the disciplinary production of storytelling.

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228. Eric Deggans, *With Audience in Mind, Media Offers Varied Treatment of Chauvin Trial*, NPR: ALL THINGS CONSIDERED (Apr. 10, 2021, 5:03 PM), https://www.npr.org/2021/04/10/986125475/with-audience-in-mind-media-offers-varied-treatment-of-chauvin-trial [https://perma.cc/C2XJ-4TRL] ("[W]e've seen some cable TV news channels go into continuous coverage mode as the trial is going on . . . .").

229. *Nielsen: At Least 23.2 Million Watched Chauvin Verdict*, AP NEWS (Apr. 22, 2021), https://apnews.com/article/george-floyd-death-of-george-floyd-arts-and-entertainment-90295405db812108acd9c45433b2a879 [https://perma.cc/KE6H-SXJU].

230. *See, e.g.*, Joe Barrett & Erin Ailworth, *Trial of Derek Chauvin in George Floyd's Death Opens With Clash Over Evidence*, WALL ST. J. (Mar. 29, 2021, 6:36 PM), https://www.wsj.com/articles/derek-chauvin-betrayed-this-badge-in-subduing-george-floyd-prosecutors-say-11617031299 [https://perma.cc/JMQ7-LPKG] (providing highlight clip and analysis of Chauvin trial); *Apr. 19 Highlights for the Murder Trial of Derek Chauvin*, NBC NEWS (Apr. 19, 2021, 10:17 PM), https://www.nbcnews.com/news/us-news/live-blog/derek-chauvin-trial-2021-04-19-n1264442 [https://perma.cc/RZ7N-JEC6] (providing a highlight clip and commentary on the Chauvin trial).

231. *See* Erin Aubry Kaplan, *Have We Really Come That Far Since Rodney King?*, POLITICO (Apr. 24, 2021, 7:00 AM), https://www.politico.com/news/magazine/2021/04/24/have-we-really-come-that-far-since-rodney-king-484494 [https://perma.cc/2BJS-7NW6] (describing the Chauvin verdict as progress since the King case).

232. *See* Hughes, *supra* note 219 ("Don't call it justice, because if it were, George Floyd would still be alive." (quoting Prosecutor Jerry Blackwell)).

CONCLUSION

On May 25, 2020, a few "members of the community, all converged by fate by one single moment in time . . . to witness 9 minutes and 29 seconds of shocking abuse of authority, to watch a man die."[233] Beyond those witnesses, the country collectively remembers George Floyd's murder through Darnella Frazier's video, through its subsequent dissemination in the media, and, as this Note argues, through the trial of Derek Chauvin.

Collective memory shapes attitudes about the past to inform values and actions in the present. While political trials appear better equipped to craft collective memory, U.S. criminal trials have the tools to instill historical meaning in prominent criminal acts. The evolution of the memory of George Floyd's murder will continue to shape calls for racial justice and police reform. The Derek Chauvin trial contributes to that memory through storytelling, the capacity of the charges to capture the gravity of the murder, and the jury's ultimate verdict. What the murder means within larger memory frameworks will shift in the coming years. For some, the crime could signal a tipping point for police misconduct.[234] For others, it remains a call to action: "[T]here's so much more work to be done . . . . What happens when there's no camera, right?"[235]

233. Transcript Vol. 27, *supra* note 170, at 5776.

234. *See generally* Tamara F. Lawson, *Awakening the American Jury: Did the Killing of George Floyd Alter Juror Deliberations Forever?*, 58 HOUS. L. REV. 847, 848 (2021) (considering "whether the collective trauma of witnessing police violence in 2020 . . . has any translative impact upon the American jury and its future deliberations").

235. Emma Bowman, *'Finally': America Reacts to Chauvin Guilty Verdict*, NPR (Apr. 20, 2021, 11:15 PM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/20/989335036/finally-america-reacts-to-chauvin-guilty-verdict [https://perma.cc/QT72-URGF].