

The *Eichmann* Case and the Invention of the Witness-Driven Atrocity Trial

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A bit more than fifty years ago the Israeli government put Adolph Eichmann on trial in Jerusalem. The way was opened for this trial by the International Military Tribunal convened in Nuremberg, Germany, in late 1945. However, what the prosecutors in Jerusalem did dramatically departed from the Nuremberg trial template. The Israeli legal team assembled a sprawling case designed not simply to convict the defendant but to tell the vast story of the entirety of the Holocaust whether it involved Eichmann or not. Where Nuremberg relied on documentary proof about the actions of indicted individuals and organizations, Israel chose, instead, to present a parade of victim-witnesses. This shift to the in-court narration of the victims' stories had a dramatic impact on the template for atrocity prosecutions, resulting in cases that are longer, slower and more vulnerable to a variety of justice system breakdowns. Such breakdowns have marred the trials of John Demjanjuk and Imre Finta as well as the proceedings of the ICTY and cast a shadow over the use of trials to call the perpetrators of mass atrocity to justice.

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I. INTRODUCTION

The *Eichmann* trial was a startling event in a time filled with startling events. The trial began on April 11, 1961. The next day, April 12, the Soviet cosmonaut, Yuri Gagarin, became the first man to orbit the earth.¹ Less than a week later (April 17) the United States began its abortive invasion of Fidel Castro's Cuba at the Bay of Pigs.² Four months after that (August 13), while the trial was still unfolding, the German Democratic Republic began construction of the Berlin Wall.³ Each of these events had its roots in the new international reality arising out of the Second World War and all powerfully affected global perceptions and behavior. The organizers of the *Eichmann* prosecution were acutely aware of the trial's potential to affect local and worldwide attitudes and set out to use the case not only to convict Eichmann but to transform the world's view of the Holocaust and of Israel.

In 1945, the International Military Tribunal (IMT) trial at Nuremberg created a precedent that opened the way for Israel's prosecution of a former Nazi alleged to have been a principal architect of mass murder. The Israeli prosecutors, however, wanted more than

1. See DEBORAH E. LIPSTADT, *THE EICHMANN TRIAL* 59 (2011).

2. *Id.* at 66.

3. See DAVID CESARANI, *BECOMING EICHMANN: RETHINKING THE LIFE, CRIMES, AND TRIAL OF A DESK MURDERER* 328 (2004).

the condemnation of a Nazi paladin or repetition of the Nuremberg narrative. They wanted a trial that would, with the most emphatic evidence, document the suffering of all the Jews victimized by the Nazis in their horrific effort to achieve a “Final Solution to the Jewish Question.”⁴ This Holocaust-wide victim focus profoundly affected the case presented at Jerusalem and produced a flawed template for addressing mass atrocity by shifting the central focus of the trial from establishing the criminal wrongdoing of an accused individual to the twin objectives of creating a historical record of the entirety of the Nazis’ genocidal program and using the proceedings for the public airing of a vast array of victims’ witness narratives, whether connected to the guilt of the accused or not. This template has all too often been relied upon in recent years to prosecute those accused of genocide and related crimes, producing both trials that have placed survivor witnesses in harm’s way because of the trauma associated with testifying and decisions that were questionable because of excessive reliance on victim testimony or its utter rejection.

The Nuremberg prosecution was a novel legal proceeding that marshaled a massive documentary case against twenty-two surviving leaders of the Third Reich.⁵ The point of this effort was not simply to condemn the defendants, but to create an indelible record of the atrocious behavior of Hitler’s regime and, perhaps, to establish a limit on the sort of conduct that would be deemed acceptable by the community of civilized nations.⁶ Eichmann’s prosecutors altered both the evidentiary content and objectives of the Nuremberg model. The focus became presentation of an all-encompassing narrative of the victims’ plight through the presentation of hundreds of hours of victim testimony. This had significant consequences. The emotional and physical costs to the witnesses asked to detail their sufferings were enormous. The new strategy fostered a slow-moving sprawling presentation that was virtually impossible to control. The courtroom was flooded with heart-rending evidence that constantly assaulted the judges’ neutrality. The case ceased to focus on Eichmann. It became preoccupied with atrocity to the point where many felt their sympathies were dulled. To counterbalance the grim narrative, witnesses were encouraged to stress heroic incidents, further distracting focus from the defendant. The heart of the case became the recollections of

4. See *infra* text accompanying notes 45 and 49.

5. For the best single-volume introduction to the IMT trial at Nuremberg, see TELFORD TAYLOR, ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992).

6. See STEPHAN LANDSMAN, CRIMES OF THE HOLOCAUST: THE LAW CONFRONTS HARD CASES 1–20 (2005).

victims who were attempting to describe events that had transpired more than fifteen years before the trial, many of which had no connection to Eichmann's crimes.

Despite its costs and shortcomings, Eichmann's trial has been enormously influential. It has served as a guide for the prosecution of others accused of atrocities around the world. Its story of victimization caused thinkers from Israel and elsewhere to explore far more deeply the implications of the Holocaust. Today, more than fifty years after the trial, debate continues about the prosecution's worth.⁷ That debate has not only affected scholarly discourse but the approach used to deal with such criminals as Slobodan Milosevic and Osama bin Laden. As we move forward with efforts to bring those who have presided over mass murder to justice, it is critical that we recognize the risks inherent in the *Eichmann* prosecution's grand historical narrative and witness-dominated approach. To that end the article will, in Part II, explore the precursor to the *Eichmann* case, the trial of Nazi leaders conducted at Nuremberg beginning in 1945. It will then, in Part III, turn to a detailed analysis of the *Eichmann* trial itself, focusing on the consequences of its sprawling presentation and dramatically increased reliance on victim-witness testimony. Matters to be considered in Part III will include the prosecutors' motives for their approach, the substance of the witnesses' testimony, the human costs of witnessing and, finally, other institutional costs associated with the mounting of a grand didactic proceeding. In Part IV, the *Eichmann* legacy, its impact on subsequent atrocity trials, including those of John Demjanjuk in Israel and Imre Finta in Canada, will be examined. The article will conclude with some observations about the International Criminal Tribunal for the Former Yugoslavia followed by a weighing of the achievements and costs of the prosecution and condemnation of Adolf Eichmann.

II. *EICHMANN'S* PRECURSOR: NUREMBERG AND THE SPEEDY PROSECUTION OF NAZI SATRAPs ON THE BASIS OF DOCUMENTARY PROOF

The Nuremberg trial was a model of speed and efficiency. This might seem like an odd claim for a trial that lasted nine months, produced a forty-two-volume record, and was so turgid that it drove most of the world's leading journalists away after just a few weeks. Yet in the fairly brief span of sixty-seven trial days, the prosecutors

7. See *infra* Section V.

at Nuremberg managed to present substantial evidence demonstrating not only the crimes committed by the defendants, but by the entire Nazi regime during the twelve years of the Third Reich.⁸ This was accomplished by providing the tribunal a huge body of documentary material culled from the Nazis' own files by a veritable army of investigators who pored over tens of millions of pages of captured records.⁹ With these documents the prosecutors were able to trace virtually every step of Hitler's rise to absolute power and the atrocious conduct of those he commanded.

The prosecutors' adoption of a documentary strategy was both a product of intention and necessity. The aim of the Soviet, British and American leaders who agreed to an international tribunal was the presentation of ringing and credible proof of the unique depravity of the Nazi regime.¹⁰ To this end there could be no better material than words out of the mouths of Germany's leaders, drawn from their own archives and correspondence. Moreover, because of the National Socialists' fanatical commitment to record keeping, this sort of material could be expeditiously located in captured documents if sufficient resources were devoted to the task—a challenge that a wealthy America could meet.¹¹

A speedily mounted trial featuring "hard" documentary proof appealed to all the allies. For the Soviets, it presented an opportunity to mount a credible "show trial" that might condemn fascism and distract attention from Stalin's actions as Hitler's ally when Poland was dismembered.¹² For the British, it offered an expeditious resolution to charges regarding Germany's criminal misconduct, thereby avoiding the delays and failures that had dogged British efforts to mount prosecutions after World War I.¹³ For the Americans, it provided an unimpeachable source of evidence regarding the wisdom of the politicians who had guided the United States into global war. A documentary case had additional appeal for the Americans as a means of inoculating the nation against the sort of revisionism that had occurred after the First World War and fanned American isola-

8. See generally TAYLOR, *supra* note 5 (describing evidence presented at Nuremberg).

9. *Id.* at 78–115.

10. See LANDSMAN, *supra* note 6.

11. See Stephen G. Breyer, *A Call for Reasoned Justice*, in *WAR CRIMES: THE LEGACY OF NUREMBERG* 40, 40–41 (Belinda Cooper ed., 1999) (noting the prosecutors' use of documents of the defendants' "own making").

12. See LANDSMAN, *supra* note 6, at 3.

13. *Id.* at 2–3.

tionism in the late 1930s and early 1940s.¹⁴ Concern about revisionism seemed to undergird President Roosevelt's eventual embrace of the trial concept. Judge Samuel Rosenman, the President's confidant and representative at early negotiations on the matter with the British, said of the President:

He was determined that the question of Hitler's guilt—and the guilt of his gangsters—must not be left open for future debate. The whole nauseating matter should be spread out on a permanent record under oath by witnesses and with all the written documents In short, there must never be any question anywhere by anyone about who was responsible for the war and for the uncivilized war crimes.¹⁵

Roosevelt's sentiments were shared both by those in his administration who had originated the idea of a trial and by those charged with mounting it. One of the earliest advocates of the tribunal process was Secretary of War Henry Stimson.¹⁶ He played a critical part in dissuading Roosevelt from accepting Winston Churchill's proposal for summary executions. The Secretary of War saw the trial mechanism as critical because it offered the best "way of making a record of the Nazi system of terrorism"¹⁷ while satisfying the sense of fair play. Supreme Court Justice Robert Jackson, who became the American Chief Prosecutor, explained to President Harry Truman after Roosevelt's death: "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence."¹⁸ Jackson saw documentary proof as offering the best prospect of satisfying this objective and believed that live witness testimony was open to dishonesty and serious distortion. The chief American prosecutor, in his final report to Truman at the Nuremberg trial's conclu-

14. *Id.* at 8–9.

15. WILLIAM J. BOSCH, *JUDGMENT ON NUREMBERG: AMERICAN ATTITUDES TOWARD THE MAJOR WAR-CRIME TRIALS* 25 (1970) (citation omitted).

16. See TAYLOR, *supra* note 5, at 4–5; see also ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 54 (1984) (quoting a memorandum in which Stimson declared: "[T]he method of dealing with these and other criminals requires careful thought and a well-defined procedure. Such procedure must embody, in my judgement, at least the rudimentary aspects of the Bill of Rights, namely notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defence.").

17. DREXEL A. SPRECHER, *INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT* 31 (1999) (citation omitted).

18. TAYLOR, *supra* note 5, at 54.

sion described exactly how the prosecution had achieved its goal: “We . . . documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future.”¹⁹ Sparing no expense, the victorious allies assembled and presented their documentary case. The courtroom effort was facilitated by Article 19 of the rules of the IMT which states: “The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest extent possible expeditious and nontechnical procedure, and shall admit any evidence which it deems to have probative value.”²⁰ As the article authorized, the “technical rules of evidence” were suspended. In practice this meant that the allies were, more or less, free to introduce any document they pleased notwithstanding relevance, hearsay, authentication or best evidence concerns.

The American team took the lead in the trial and opened its case on November 20, 1945.²¹ The team’s job was to provide proof regarding Count I of the indictment, which focused on the Nazi’s engagement in a vast twelve-year criminal conspiracy. The American prosecutors informed the IMT judges that they had culled 2,500 documents from the ocean of material reviewed and placed them in a courthouse repository.²² They then proceeded in the first four hours of their case to offer 331 of those documents into evidence along with supplementary material and written argument.²³ The flood of documents was daunting to both the judges and defense counsel, so much so that by the third day of trial (November 23) the Chief Judge, Britain’s Sir Geoffrey Lawrence, refused to allow the process to continue.²⁴ Displaying the fair-mindedness that would be his hallmark throughout the proceedings, the Chief Judge insisted that documents be made available to the defense in advance and that the process of their introduction include translation and verbatim recital in open court. By November 26, Lawrence’s requirements had substantially slowed the flow of documents. However, the Americans continued to press on, albeit at a slower pace.

19. SPRECHER, *supra* note 17, at 2 (*quoting* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON TRIALS 436 (1947)).

20. Charter of the International Military Tribunal, art. 19, Aug. 8, 1945, 82 U.N.T.S. 279, *reprinted in* TAYLOR, *supra* note 5, at 651.

21. TAYLOR, *supra* note 5, at 165.

22. LANDSMAN, *supra* note 6, at 21.

23. *See* TAYLOR, *supra* note 5, at 174.

24. *Id.* at 173–77.

By November 29, the American presentation had bogged down so seriously that out of “felt necessity”²⁵ the prosecution team decided to offer a seventy-minute film prepared by Hollywood director George Stevens showing the Nazi concentration camps.²⁶ The film had a stunning effect, leaving a number of the defendants weeping and the Chief Judge declaring an immediate adjournment of the proceedings.²⁷ The next day (November 30), the Americans called their first live witness, General Erwin Lahousen.²⁸ While the film and live testimony re-energized the case, the prosecutors were shocked by the one-and-one-half days that Lahousen’s evidence consumed.²⁹ The Americans, tenaciously committed to their paper strategy, returned to documentary proof. But each time their momentum flagged they presented a witness, film or grim exhibit. In the end the American case took twenty-nine trial days, overwhelmingly devoted to written proof.³⁰

The American effort, dominated by documents, set a pattern followed by the British in their seven-day presentation regarding Count II, Waging Aggressive War.³¹ By the time the French took their turn, however, the shortcomings of a documentary case were coming to be recognized and there began something of a shift toward witness testimony and graphic proof of atrocity. The French took sixteen trial days and were followed by the Soviets, who in their fifteen-day presentation increased the amount of victim-witness testimony (the Americans had called a single victim) and screened several powerful films.³² The four prosecuting nations offered a total of thirty-three live witnesses.³³ This testimony was only the most modest part of the prosecution’s case. By contrast, the defendants offered sixty-one live witnesses in addition to the testimony of nineteen of the accused.³⁴ These efforts were, however, not particularly availing

25. *Id.* at 186.

26. LANDSMAN, *supra* note 6, at 25. *See also* Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995).

27. *See* LANDSMAN, *supra* note 6, at 26.

28. TAYLOR, *supra* note 5, at 187.

29. LANDSMAN, *supra* note 6, at 29.

30. *See* TAYLOR, *supra* note 5, at 165–269 (describing the trial proceedings).

31. LANDSMAN, *supra* note 6, at 23.

32. *Id.* at 33–35.

33. *Id.* at 45; TAYLOR, *supra* note 5, at 574.

34. *See* LANDSMAN, *supra* note 6, at 39–49; TAYLOR, *supra* note 5, at 574.

for the sixteen defendants who ended up being convicted.³⁵

The world viewed the Nuremberg prosecution as a great success.³⁶ A good deal of the credit belongs to Chief Judge Lawrence who struggled mightily to keep the proceedings fair and protect defense counsel from prosecutorial and other pressures.³⁷ The luster of the case was enhanced by a careful judgment that acquitted three of the defendants, rejected Soviet propaganda efforts and generally satisfied the world's desire for proof of Nazi criminality. The glow of success encouraged outsiders to view the Nuremberg case with its sprawling narrative and documentary underpinnings as a template for dealing with atrocity. What was missing from Nuremberg, however, was the voice of the victims, most particularly the victims of the Holocaust.

III. THE *EICHMANN* TRIAL: THE SHIFT TO A VICTIM-CENTERED PROSECUTION

The Nuremberg trial provided a roadmap for the trial of Nazi arch criminals and it was to that roadmap that the Israeli prosecutors turned in preparing their case against Adolf Eichmann. While embracing Nuremberg's vast didactic narrative approach, the Israelis decided that the central focus of their presentation should be the entirety of the Holocaust, not as narrated in documentary proof but through the testimony of live witnesses. This decision was driven not only by legal and moral considerations but political ones as well. It led to the airing in the courtroom of the most heart-rending material, much of it irrelevant to the criminal activities of the defendant. The witnessing experience at the *Eichmann* trial was extremely challenging. Its costs for the witnesses, the prosecutors and the State of Israel were substantial.

A. *The Trial*

In May of 1960, members of Israel's intelligence services abducted Adolf Eichmann from his hiding place in Argentina.³⁸ The

35. See TAYLOR, *supra* note 5, at 546–603 (describing final procedures and judgments at Nuremberg).

36. See LANDSMAN, *supra* note 6, at 49–50.

37. *Id.* at 50–53.

38. On the abduction of Eichmann from Argentina, see ISSER HAREL, *THE HOUSE ON GARIBALDI STREET* (1975).

very act of kidnapping signaled Israel's certitude that Eichmann was guilty of committing the most heinous crimes during the Holocaust—crimes warranting his seizure despite Israel's serious breach of international law and Argentina's sovereignty.³⁹ Any lingering doubts about Israel's belief in Eichmann's culpability were dispelled by Prime Minister David Ben-Gurion when he informed the Israeli Knesset (Parliament) on May 23: "[A] short time ago the security services apprehended one of the most infamous Nazi criminals, Adolf Eichmann, who was responsible, together with the Nazi leadership for what they called, 'the final solution to the Jewish problem'—in other words the extermination of six million of Europe's Jews."⁴⁰ So began the process leading to the trial and execution of Adolf Eichmann.

In its early pre-trial phase, the case appeared to track the Nuremberg model. The target was a man who had occupied a position of authority in the Nazi extermination machinery. He, like the officials who stood trial at Nuremberg, was implicated in great crimes by a web of Third Reich documents. He, like they, also seemed to be an appropriate representative of a murderous bureau of the German government. It is not surprising that, as at Nuremberg, the Israeli police investigative team began to build its case by reliance on the incriminating documents.

The Israeli investigators (Bureau 6 of the National Police) were not experts in the history of the Holocaust; indeed there were few such experts anywhere in 1961.⁴¹ The officers sought the assistance of Israelis thought to be well informed about such matters, including experts from Yad Vashem, Israel's Martyrs' and Heroes' Memorial Authority. The officers were instructed to examine the forty-two volumes of the Nuremberg trial record and the fifteen volumes of proceedings of the Nuremberg successor trials.⁴² This focus cemented the influence of the Nuremberg template but, in light of the limited available documentary evidence, concentrated attention on Eichmann's role in the murder of 400,000 Hungarian Jews in 1944, where documentation was most abundant. Bureau 6 recommended a

39. Criticism of Israel's action as an affront to international law and Argentina's sovereignty was widespread and extremely sharp. See LIPSTADT, *supra* note 1, at 24–25. Terms used in the press included "jungle law," "high handed," "advancement of Communist aims" and "animal vengeance." *Id.*

40. See TOM SEGEV, *THE SEVENTH MILLION* 326 (Hiam Watzman trans., 1st ed. 1993) (quoting David Ben-Gurion).

41. See CESARANI, *supra* note 3, at 248–49.

42. *Id.*

tightly focused prosecution that followed the document trail and offered something in the neighborhood of forty witnesses to demonstrate that “the [defendant] had engaged personally in criminal acts.”⁴³

The man designated to try the case was Israel’s newly appointed Attorney General, Gideon Hausner.⁴⁴ He was not at all satisfied with the Bureau 6 proposal. He did not want a narrow, document-focused proceeding limited to what could be proven against Eichmann as an individual. He wanted, instead, to present “with as much detail as possible [a narrative of] the gigantic human tragedy” that was the Holocaust.⁴⁵ This desire was not informed by a seasoned trial lawyer’s striving to fashion a persuasive story—Hausner was not a trial advocate but a commercial lawyer. Nor was it informed by a veteran prosecutor’s sense of what was needed to win conviction—Hausner had no criminal trial experience.⁴⁶ To complicate matters, Hausner had little time to work on the development of Eichmann’s case because he, as Attorney General, was deeply involved in addressing Israel’s largest securities scandal up to that time, the so-called “Lavon Affair.”⁴⁷

With scant time and no background in the history of the Holocaust, Hausner, like Bureau 6 before him, sought help from Yad Vashem. In its Tel Aviv office he found Rachel Auerbach, a survivor of the Warsaw ghetto and participant in the ghetto’s resistance movement, whose views about the need for a sweeping presentation matched his own.⁴⁸ Tom Segev, one of Israel’s foremost historians, described her advice:

Auerbach proposed focusing immediately on the extermination itself, without losing too much time on the early stages of the persecution of the Jews. She also proposed that the witnesses be led to point out “special phenomena” that would underline the Nazis’ “odiousness and satanic cruelty.” She listed such examples as the torture inflicted on victims before extermination; the special mistreatment of women, chil-

43. *Id.* at 249.

44. For details of Hausner’s background, see *id.* at 249–50; LIPSTADT, *supra* note 1, at 37.

45. GIDEON HAUSNER, JUSTICE IN JERUSALEM 292 (1st ed. 1966).

46. See *supra* note 44.

47. See CESARANI, *supra* note 3, at 250.

48. See LIPSTADT, *supra* note 1, at 52; SEGEV, *supra* note 40, at 338–39.

dren, the elderly, the ill, and religious Jews in traditional dress; the purposefully drawn-out suffering of those condemned to die in the gas chambers with an insufficient quantity of gas; the brutal smashing of babies to save ammunition; burning people alive; and finally, “that greatest of all earthly horrors—the mass graves, in which the injured shifted and whimpered for entire days and nights after the executions.” The survivors also insisted on prominent mention of deeds of self-sacrifice, resistance, rebellion, revenge, and flight, Auerbach wrote. Righteous gentiles and the non-Jewish victims of the Holocaust should be cited also, they advised.⁴⁹

Hausner adopted this strategy and set out to create a case that would tell the vast tale of Jewish Holocaust suffering and heroism. Auerbach combed the available Holocaust literature to find authors whose recollections matched the prosecution’s objectives. (She, herself, had written a book about her wartime experiences and became a witness at trial.)⁵⁰ From this research a number of witnesses were identified.⁵¹ The list was augmented by an examination of testimonies on file at Yad Vashem. An effort was made to find individuals who could narrate each temporal and geographic phase of Germany’s war against the Jews, most particularly those involving Poland and Russia from 1939 to 1943, Hungary in 1944, and the death camps from their inception to their destruction.

The problem for Hausner was that his approach concentrated much attention on events with which Adolf Eichmann had little or nothing to do. To overcome this difficulty, Hausner and Auerbach developed a theory emphasizing the “characteristic uniformity” of the slaughter in the different regions of Europe, arguably allowing the prosecution to claim that “one hand ruled over them.”⁵² The trial team convinced itself that the “one hand” was Eichmann’s. This theory allowed the framing of a vast case featuring more than 120 witnesses drawn from all parts of Europe and all phases of the Holocaust. However, it flew in the face of what we know about the evolu-

49. SEGEV, *supra* note 40, at 339.

50. RACHEL AUERBACH, *IN THE STREETS OF WARSAW 5700–03 (1940–43)*. The entire *Eichmann* trial record has been translated and published in a multi-volume work. See STATE OF ISR., *THE TRIAL OF ADOLF EICHMANN* (1992–1994).

51. See LIPSTADT, *supra* note 1, at 52–53.

52. *Id.* at 53.

tion of the Holocaust and the structure of the Nazi state.⁵³ Eichmann was a Lieutenant-Colonel, an officer far down the chain of command. Arrayed above him were Nazi leaders including Hitler, Himmler, Heydrich and Gestapo head, Heinrich Müller.⁵⁴ All were implicated in the murder of the Jews. At approximately the same level as Eichmann stood a host of other criminals with Jewish blood on their hands, including camp commandants like Höss and Globocnik to name but two.⁵⁵ This organizational reality did not mean that Eichmann was a cipher, but it did suggest that the prosecutors were laboring to paint the defendant in Jerusalem as more of a monster and more in control of the killing machinery than he was. In so doing, they could tell their expansive Holocaust story, unencumbered by historical and bureaucratic reality, yet still find Eichmann guilty.

The prosecution was substantially aided in its efforts to present a victim-centered narrative of the entirety of the Holocaust by two legal considerations. The first of these arose out of the indictment Hausner and his team drafted. Not surprisingly, its fifteen counts encompassed Nazi crimes against Jewish victims from the first days of the Third Reich to its bloody conclusion.⁵⁶ Early on, the trial court was faced with a well-founded relevancy objection to material provided by a victim who had witnessed Einsatzgruppen “Ak-

53. Peter Longerich, in a masterful analysis published in 2010 (an earlier German edition first appeared in 1998), has set out the emerging consensus among scholars about the development of the Nazi program for genocide. Longerich argues: “People who pursue their intention to carry out mass murder do so within certain structures; these structures do not act of their own volition, they do so via human beings who combine their actions with intentions [T]he initiatives of Nazi potentates in the various regions of Germany were an essential component of centrally managed policies, but the leadership role of the centre was itself safeguarded by competitiveness between the various functionaries.” PETER LONGERICH, *HOLOCAUST: THE NAZI PERSECUTION AND MURDER OF THE JEWS* 3 (2010). Eichmann was one of those functionaries, part of a regime devoted, from top to bottom, to the destruction of Europe’s Jews. *Id.* at 151–53, 174–75, 280–81, 320–21, 360.

54. Defense counsel, Dr. Servatius, in his closing powerfully and accurately derided the Attorney General’s theory: “Justice Musmanno and the psychologist Gilbert have confirmed it: The culprits were not Göring and the great paladins—everybody pointed to Adolf Eichmann. The ‘Jews’ helper,’ Himmler, did not need to commit suicide, and Bormann could emerge from his hideout. Everything has become clear, the great culprit has been found. This would be the strange result of this trial.” 5 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 2046. Professor Lipstadt agrees with Servatius’s conclusion. *See* LIPSTADT, *supra* note 1, at 54, 122, 138.

55. On Globocnik’s role as, at least, Eichmann’s equal. *See* LANDSMAN, *supra* note 6, at 90.

56. For a reproduction of the indictment, see 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 3–8.

tionen” and later was compelled to assist in the effort to obliterate evidence of such massacres. The Court ruled in its Decision 13 that the prosecution was free to produce evidence of any act encompassed by the indictment whether or not Eichmann could be shown to have had substantial connection with that act. As the court stated: “The question that has to be determined is the personal responsibility of the Accused for the acts set out in the indictment. In this connection the Prosecution has firstly to prove that all these acts were committed and secondly—the responsibility of the Accused.”⁵⁷ This, obviously, threw the courthouse doors wide open.

The second legal consideration, and a part of the basis for Decision 13, was that Section 15 of the law under which Eichmann was prosecuted, the Nazi and Nazi Collaborators (Punishment) Law of 1950, provided that the Court hearing such a case was empowered to “deviate from the rules of evidence if it is satisfied that this will promote the ascertainment of the truth and the just handling of the case.”⁵⁸ This authority to waive evidentiary restrictions mirrored that adopted at Nuremberg. As in that trial, it signaled that normal barriers had been lowered and prosecutors would have virtually a free hand.

The evidence of victim suffering poured into the trial from its opening moment, when Hausner declared:

When I stand before you here, Judges of Israel, to lead the Prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger towards him who sits in the dock and cry: “I accuse.” For their ashes are piled up on the hills of Auschwitz and the fields of Treblinka, and are strewn in the forests of Poland. Their graves are scattered throughout the length and breadth of Europe. Their blood cries out, but their voice is not heard. Therefore I will be their spokesman and in their name I will unfold the awesome indictment.⁵⁹

As “spokesman” for the dead, Hausner called 121 witnesses who canvassed the entirety of the Holocaust.⁶⁰ More than twenty witness-

57. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 366.

58. Nazi and Nazi Collaborators (Punishment) Law, 5710–1950, 4 LSI 154, §15 (1949–1959) (Isr.).

59. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 62.

60. On the witness count and the problem of irrelevancy, see LANDSMAN, *supra* note 6, at 94.

es spoke about events in Poland and “the East.” This was overwhelming evidence that depicted the ghettos, mass shootings and death pits. The only drawback was that Eichmann had no demonstrable connection to this horrifying material.⁶¹ The prosecution’s case moved on to Germany and then the rest of Europe, mostly concentrating, again, on the victims’ plight. Here the evidence did frequently implicate Eichmann, who was responsible for moving vast numbers of those murdered from their homes to the death camps where he knew they would be slaughtered. As the prosecution neared its end, Hausner turned to Hungary where, as Bureau 6 had indicated, the evidence against the defendant was strongest. Rather than ending there, the government case again veered into territory where Eichmann had no jurisdiction—the day-to-day operations of the killing centers in the East. Ten witnesses spoke about Auschwitz, four about Treblinka and one each about Chelmno and Majdanek.⁶² In the end at least one third of the witnesses called by the prosecution had no connection to Eichmann.⁶³ To prosecute one mid-level Nazi official, Hausner used fifty-six trial days as part of proceedings that went on for ten months—longer than the trial at Nuremberg.⁶⁴ Showing its IMT roots, the *Eichmann* case also featured 1434 exhibits, including the forty-two volumes of the Nuremberg trial record, the fifteen volumes of the Nuremberg successor trial transcripts and more than half a dozen books written by wartime victims.⁶⁵

B. The Prosecutors’ Motives

The scope and shape of the *Eichmann* trial were dictated by prosecutors bent on reciting the complete history of the Holocaust and providing a context in which its victims could give full voice to the sufferings they experienced. While these were the prosecution’s core objectives, other considerations came into play as well. As a practical matter, the prosecution had to adduce sufficient persuasive proof to convince the three judges of the Jerusalem Court to convict. While that may not have been the most difficult of challenges, the in-

61. *Id.* at 78.

62. *Id.* at 84.

63. *Id.* at 94.

64. See CESARANI, *supra* note 3, at 262. In an apparent typographical error, Cesarani suggests that there were 112 prosecution witnesses at trial. It would appear that the “1” and “2” were transposed in this instance since all other sources agree on the number 121.

65. For the “List of Exhibits Submitted in the Trial of Adolf Eichmann,” see 6 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 2372–456.

roduction of moving and persuasive proof of Eichmann's misdeeds was required. The bar may have been raised significantly because Eichmann had been kidnapped from Argentina in contravention of international law.⁶⁶ Although a broad and moving narrative might not provide a legal excuse for Israel's actions, it might do a great deal to quiet criticism and assuage concerns in light of the unique depravity of the defendant.⁶⁷ Furthermore, the *Eichmann* trial was in competition for worldwide attention with a host of other events, including a space launch, a thwarted invasion and the bringing down of the Iron Curtain. To sustain international interest and affect world opinion, the prosecution may have felt some need to provide the sort of bloody evidence that makes headlines and fosters sympathy.

Judging by what they said about the matter, the *Eichmann* team's objectives went much deeper. As we have seen, Hausner began his opening statement by insisting that the voices of the victims be heard. To that end, nothing could be more effective than a sustained flow of testimony by those who had survived and could speak not only of their own suffering but of that experienced by those who died. The Nuremberg formula, described by Hausner as "a few witnesses and films of the concentration camp horrors, interspersed with piles of documents,"⁶⁸ was not sufficient. Hausner and his team felt they needed much more if they were to achieve their true goal, "to reach the hearts of men."⁶⁹ In the prosecution's view, this required overwhelming testimony (in Rachel Auerbach's words) of Nazi "odiousness and satanic cruelty."⁷⁰

The presentation was not intended simply to move, but to instruct. Hausner feared a rift between younger, native-born Israelis, and their older, European countrymen. In an attempt to forestall that rift, he sought to use Eichmann's trial to educate the young:

There was, in fact, much more to it than a desire for a complete record. I wanted our people at home to

66. See CESARANI, *supra* note 3, at 238–39. Cesarani concludes that Israel's kidnapping of Eichmann was a "violation of Argentina's sovereignty," after which Israel agreed that "international law had been breached." In response, Argentina demanded "reparations." The United Nations voted, on June 23, 1960, to condemn Israel's action and to support a claim for reparations. On August 3, 1960, Israel and Argentina issued a joint statement condemning the kidnappers (who were, fictitiously, described as private citizens) for their "violat[ion] of the fundamental rights of the state of Argentina." *Id.*

67. On the criticism leveled at Israel, see *supra* note 39.

68. HAUSNER, *supra* note 45, at 291–92.

69. *Id.*

70. See *supra* text accompanying note 49.

know as many of the facts of the great disaster as could be legitimately conveyed through these proceedings. It was imperative for the stability of our youth that they should learn the full truth of what had happened, for only through knowledge could understanding and reconciliation with the past be achieved . . . There was here a breach between the generations, a possible source of an abhorrence of the nation's yesterday. This could be removed only by factual enlightenment.⁷¹

To accomplish this end, a didactic proceeding was required—one that told the most forceful story with as many of the most powerful pieces of testimony as possible. Of course, much of this story would not be about Eichmann. Its focus would be the victims. Its objectives would be to elucidate what befell them, explain their helplessness in the face of overwhelming Nazi force and emphasize their often quiet heroism. The first goal required extensive witness narration. To accomplish the second, Hausner asked victim after victim: “Why didn’t you resist? Why did you comply with the orders?”⁷² Deborah Lipstadt has persuasively argued that the question was designed to show how “unfair” it was to judge the victims on this point in the face of overwhelming Nazi force and brutality.⁷³ Showing that alone, however, was unlikely to inspire pride and respect. To that end, the heroic element had to be added.⁷⁴ This Hausner did with persistence.

The didactic objective was not simply to bridge the gap between young and old Israelis. Hausner was in regular contact with Prime Minister David Ben-Gurion about the case. In fact, the prosecutor sent the head of the government a draft of his opening remarks, which Ben-Gurion revised.⁷⁵ While the Prime Minister shared Hausner’s concern about Israel’s youth, he saw a broader purpose for the trial—the assertion of the Jewish state’s pre-eminent right to speak and act on behalf of all Jews worldwide. As he put it in an open letter to the head of the World Zionist Organization responding to criticism⁷⁶ about the trial:

71. *Id.*

72. See LIPSTADT, *supra* note 1, at 79 (quoting Hausner) (emphasis omitted).

73. *Id.* at 79–82.

74. For a discussion on the psychological pressures generated for stories of heroism, see LANDSMAN, *supra* note 6, at 78–79; *infra* notes 106–07 and accompanying text.

75. See SEGEV, *supra* note 40, at 346; CESARANI, *supra* note 3, at 256.

76. See CESARANI, *supra* note 3, at 256.

The Holocaust that the Nazis wreaked on the Jewish people is not like other atrocities that the Nazis committed in the world, but a unique episode that has no equal, an attempt to totally destroy the Jewish people, which Hitler and his helpers did not dare try with any other nation. It is the particular duty of the State of Israel, the Jewish people's only sovereign entity, to recount this episode in its full magnitude and horror, without ignoring the Nazi regime's other crimes against humanity—but not as one of these crimes, rather as the only crime that has no parallel in human history.⁷⁷

In other words, only the nation-state of the Jews could effectively protect Jewish interests. The *Eichmann* prosecution was intended to send a clear message to the Jews of the Diaspora—Israel had become the foremost representative of Jewish interests. The trial was also used to serve other political ends. At Golda Meir's urging, material was introduced at trial demonstrating Eichmann's connection (albeit tenuous) to an ardent Arab anti-Semite, Hajj Amin al-Husseini, the Grand Mufti of Jerusalem.⁷⁸ This material had no relevance to the prosecution's charges but a powerful political payoff because it associated the Arabs with the Nazis.

The political goals pursued by Hausner, Ben-Gurion and Meir were reflected not only in what was included in the trial but what was excluded. At Ben-Gurion's request, there was a soft-pedaling of proof about the responsibility of ordinary Germans for crimes of the Holocaust. Israel was in sensitive conversations with West Germany about reparations payments and Ben-Gurion was concerned that a focus on anyone other than the Nazi hierarchy might undermine agreement.⁷⁹ In light of Christopher Browning's⁸⁰ and Daniel Goldhagen's⁸¹ work demonstrating the part played by the German citizenry in the Holocaust, it is open to the most serious question whether the picture painted at the *Eichmann* trial of the unique guilt of zealous Nazis was accurate. The other topic that was more or less excluded was Jewish collaboration in the work of Eichmann and other Nazi

77. See SEGEV, *supra* note 40, at 329–30 (quoting Ben-Gurion).

78. See CESARANI, *supra* note 3, at 256.

79. See *id.*; LIPSTADT, *supra* note 1, at 167.

80. CHRISTOPHER R. BROWNING, JR., *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1992).

81. DANIEL J. GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

killers.⁸² Israel had been rocked in 1954 by the *Kastner* case, a libel action that focused on an accusation that Hungarian Jewish leaders had cooperated with the Nazis in arranging the deportation of Hungary's Jews as a means of saving themselves and their families.⁸³ The libel case had been nasty and poorly managed by one of the judges on the *Eichmann* panel, Benjamin Halevi. Kastner had been assassinated after the charges had been aired and there was a general consensus in government circles that the *Eichmann* proceedings should avoid the collaboration issue, especially since some of those who might be accused of collaboration were now prominent social and political figures in Israel.

C. The Victim Testimony

True to their intentions, the prosecutors put together a case featuring live victim-witness testimony that demonstrated the horrifying depths of the Jews' sufferings at the Nazis' hand. The state's evidence at trial had all the characteristics Hausner's team intended. Perhaps the best illustration of this is the testimony of Mrs. Rivka Yoselewska, who appeared in Session 30 on Monday, May 8, 1961.⁸⁴

The testimony began with the Presiding Judge advising the witness to "speak as calmly as you can,"⁸⁵ suggesting the witness's high level of agitation. Despite her agitation, Mrs. Yoselewska began a narration of the events leading to the massacre of the Jews "in the townlet of Powost in the Pinsk district."⁸⁶ She described her well-off family, her marriage in 1934 and the birth of her daughter, Marka. Almost all the early questions were in leading form, as Hausner guided her down a clearly-defined path. The Nazis arrived in the summer of 1941. They defiled the synagogue (turning it into a stable) and rumors began to spread that they were killing large numbers of Jews in the region. Many, including Yoselewska, fled the village. Those who remained were gathered up. The rabbi, who had stayed, was ordered by the Nazis to put on his prayer shawl and "dance and sing."⁸⁷ He refused and was beaten, along with many of his congregants. As a testament of faith and resistance, the gathered

82. See LIPSTADT, *supra* note 1, at 158; LANDSMAN, *supra* note 6, at 83.

83. LANDSMAN, *supra* note 6, at 67.

84. See 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 514–18.

85. *Id.* at 514.

86. *Id.*

87. *Id.* at 515.

Jews cried “Shma Yisroel.”⁸⁸ (Hear, O Israel.) The Nazis then proceeded to shoot all those present. This early story was not based on Yoselewska’s eyewitness experience but on the words of the rabbi’s wife who had escaped the massacre. No objection was made to the hearsay material.

After the initial murderous assault in Powost, the surviving Jews were concentrated into a ghetto in the town. Yoselewska’s father occupied a somewhat privileged position because he had a valuable skill—he was a shoemaker. Eventually, the Nazis moved to round up all the Jews in this ghetto. The mustering began on the Sabbath when, despite Nazi edicts, people had gone down into “a cellar in the ghetto”⁸⁹ to pray. The Nazis came in force, “[f]our or five Germans for every one of our people.”⁹⁰ They compelled everyone in the ghetto to stand outside for hours. “Children began screaming. They couldn’t help it. They wanted to eat and drink.”⁹¹ Instead, all were herded to a truck. When the truck was full it pulled away. The remaining Jews were forced to run behind the truck. At a spot about three kilometers from the town the group was halted. There, a ditch or pit had been dug. Powost’s Jews were stripped, herded into the pit and shot by the “SS men.”⁹² Yoselewska’s father refused to strip, was beaten, had his clothes torn from his body and was then shot. The witness watched as her mother, 80-year-old grandmother and sister were all shot. Her child was ripped from her arms “shaking” and was killed.⁹³ When her turn came she felt the shot and fell into the death pit but was only grazed by the bullet. Some time later, “naked, covered with blood,”⁹⁴ she crawled out of the pit. At this point in the testimony the witness began a detailed description of the others she saw at the massacre site. The Attorney General interrupted her: “Please let us be brief, Mrs. Yoselewska. It is difficult to recount and difficult to listen to.”⁹⁵ The witness approached the conclusion of her testimony by providing one of the most harrowing images of the trial:

When I saw they were gone I dragged myself over to

88. *Id.*

89. *Id.* at 516.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 516–17.

94. *Id.* at 517.

95. *Id.*

the grave and wanted to jump in. I thought the grave would open up and let me fall inside alive. I envied everyone for whom it was already over, while I was still alive. Where should I go? What should I do? Blood was spouting. Nowadays, when I pass a water fountain I can still see the blood spouting from the grave. The earth rose and heaved.⁹⁶

This testimony is an almost perfect realization of Auerbach's and Hausner's goals. It is focused on an act of extermination carried out by "SS men." It describes deeds that are "odious" and "satanic[ally]" cruel. It details the "special mistreatment of women [and] children."⁹⁷ At its center is the "mass grave" with its almost incomprehensible horror. Woven into the narrative are moments of quiet heroism such as when the rabbi refused to dance in his prayer shawl, the people of Powost cried "Shma Yisroel," and Yoselewska's father and others defied Nazi edicts by going to Sabbath prayers. The emotional impact of the testimony is hard to gauge, but Presiding Judge Landau's urging that the witness speak calmly and his later request that the prosecutor "lead her somewhat"⁹⁸ all suggest a hearing at the edge of overwhelming the courtroom.

In its near perfection, this testimony also underscores the risks of the prosecution's victim-witness-centered presentation. First, the massacres at Powost had no demonstrated connection to the defendant, Eichmann. They were the acts of Nazi killers in one of the so-called Einsatzgruppen, the creation of men like SS-Obergruppenführer Reinhard Heydrich.⁹⁹ The fact of this massacre added nothing to the State's case against the man in the dock. Second, the emotional impact of the material is hard to doubt. Who could fail to be moved as a mother described the cold-blooded murder of her trembling little daughter, "Markele?"¹⁰⁰ Another part of the cost of offering such testimony is also displayed in the record. Yoselewska suffered some sort of breakdown and did not appear to testify at the

96. *Id.*

97. *See supra* text accompanying note 49.

98. *Id.* at 516.

99. In a powerful cross-examination of American jurist Michael Musmanno, Robert Servatius (Eichmann's counsel) demonstrated that Eichmann was never mentioned in the Nuremberg successor trial concerning the Einsatzgruppen, that Gestapo head Heinrich Müller directed the activities of this group and that Reinhard Heydrich was charged with overseeing Müller's efforts. 2 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 704–29.

100. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 517.

scheduled time (May 5).¹⁰¹ Attorney General Hausner told the court “it appears that she has suffered a heart attack.”¹⁰² Yet, she arrived at the next court session (May 8), suggesting not a heart attack in the medical sense but an emotional collapse at the prospect of narrating her dreadful experiences.

This testimony, and many others like it, put the defense in an untenable position. No questions Dr. Servatius might ask could help his client. He wisely decided not to ask any.¹⁰³ But the terrible story had been heard by the judges and could not help but color their view of Nazis, including the one before them. Yoselewska was one of approximately 20 witnesses who described the suffering of the Jews in Eastern Europe where Eichmann did not operate. She was one of at least 40 whose evidence was irrelevant.¹⁰⁴ This proof’s cost to the proceeding in terms of time spent, emotion engendered and distraction created is likely to have been significant. The strategy of presenting expansive victim-witness testimony, much of which was irrelevant to the question of Eichmann’s guilt, suggests that the prosecution privileged both didactic and political goals over the goal of establishing Eichmann’s individual guilt. Indeed, the costs of this manner of proof in terms of time, emotional exhaustion of both witnesses and judges, and the distraction such testimony engendered, may have harmed the legitimacy of the proceeding as a criminal trial. Such trade-offs highlight the various (and possibly conflicting) purposes pursued by the prosecution.

D. The Witnessing Experience

Why did so many survivors, like Yoselewska, agree to testify at Eichmann’s trial? Of course, no single motive can encompass the feelings of all the witnesses. Some may have spoken to strike back at a hated enemy who had abused them, hoping through their testimony to secure the punishment of someone associated with their tormenters. This may have been the case with Avraham Gordon, who claimed to have seen Eichmann kill a Jewish boy with his own hands in Hungary. Defense counsel demonstrated that the witness could not have seen what he claimed.¹⁰⁵ It would appear that in his desire

101. *Id.* at 499.

102. *Id.*

103. *Id.* at 518.

104. See LANDSMAN, *supra* note 6, at 94 (“At least 40 of the 121 witnesses had nothing to say about Eichmann.”).

105. 3 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 930–55; CESARANI, *supra* note 3,

to assist the prosecution Gordon went well beyond what he knew. Others may have come to court in the hope of satisfying listeners' desires for stories of heroism. The pressure exerted by the prosecution and by the public in this regard may have been too much for a number of witnesses. Lawrence Langer, the award-winning author of *Holocaust Testimonies*, describes how this pressure may come about:

[M]any Holocaust commentators cling to a grammar of heroism and martyrdom to protect the idea that the Nazi assault on the body and spirit of its victims did no fundamental damage to our cherished belief that, even in the most adverse circumstances, character is instinctively allied to the good.¹⁰⁶

Langer goes on persuasively to argue that this idea is one foisted on the victims by listeners and seldom reflects the victims' perceptions.¹⁰⁷

The regular punctuation of Mrs. Yoselewska's story with heroic asides gives the appearance of having been designed by Hausner to serve this end. Hausner forcefully led his witness until the climax of her story at the death pit. It was only when she began to speak of that murderous and tragic moment that she appeared to depart from the prosecutor's script and the flow of heroic material slowed.¹⁰⁸ Rachel Auerbach herself testified at the *Eichmann* trial. As might be expected, she punctuated her narrative with story after story of Jewish heroism.¹⁰⁹ She spoke of the brave efforts of Jewish organizations in the Warsaw ghetto to assist all of its residents, of the saintly acts of Emanuel Ringleblum, the director of those efforts and much more besides. Hausner asked questions like: "Would it be possible to define the situation thus—that on the brink of destruction there was some joy of Jewish creativity in Poland?"¹¹⁰ Clearly this material had nothing to do with the guilt of Adolf Eichmann or even the crimes of the Holocaust. It was material of exactly the sort Langer

at 269.

106. See LAWRENCE L. LANGER, *HOLOCAUST TESTIMONIES: THE RUINS OF MEMORY* 162 (1991).

107. *Id.* at 162–205. This final chapter in Langer's book is entitled "Unheroic Memory."

108. Compare Mrs. Yoselewska's early testimony, where the prosecutor constantly leads and the witness gives one line answers, with her later testimony where there is very little leading interrogation and the witness's answers expand, often to ten or even twenty lines. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 515; *id.* at 517–18.

109. *Id.* at 421–25.

110. *Id.* at 423.

suggests commentators or narrators insert in an effort to place a heroic spin on events.

For most victim-witnesses the motivation lay far deeper. Few have written more discerningly about such matters than the great Italian author and Auschwitz survivor, Primo Levi. In his last and most powerful book, *The Drowned and the Saved*,¹¹¹ Levi includes a number of letters he wrote to German interlocutors after his first book, *Survival in Auschwitz*,¹¹² was published in Germany. In one of the letters he says: “[I]f I think of my life and the aims I have until now set for myself, I recognize only one of them as well defined and conscious, and it is precisely this, to bear witness.”¹¹³ For many other survivors, too, the imperative was to speak of what they had seen, of what those who died had suffered and to leave an indelible memorial through their words. The traditional method of doing so has been, as in Levi’s case, the writing of books. Auerbach and Hausner searched for witnesses who had done this and placed a number of them in the witness box. Other survivors have sought to bear witness by contributing written or oral statements to Holocaust repositories like Yad Vashem. Such sources were a key component in the prosecution’s search for witnesses.

The value of archived or written statements is to be found in their uninterrupted and wide-ranging narratives—a true bearing of witness. The problem for victims seeking to bear witness in courts of law is that a criminal trial is not a very accommodating place for uninterrupted narrative. Questions are asked one after another and brief relevant answers are expected. Evidentiary restrictions are imposed (at least sometimes) and the time available is short. Perhaps most difficult for the victim who wishes to tell her tale is that both the court and defense counsel may question the accuracy of the witness’s recollections. This last consideration may cause those who come to court to testify the greatest pain. Levi, repeating a passage from the writings of Simon Wiesenthal at the outset of *The Drowned and the Saved*, quotes the words of a gloating SS man: “However this war may end, we have won the war against you; none of you will be left to bear witness, but even if someone were to survive, the world will not believe him.”¹¹⁴ Victim-witnesses, handled in the manner nor-

111. PRIMO LEVI, *THE DROWNED AND THE SAVED* 174 (Raymond Rosenthal trans., 1989).

112. PRIMO LEVI, *SURVIVAL IN AUSCHWITZ* (Stuart Woolf trans., 1958).

113. LEVI, *supra* note 111, at 174.

114. *Id.* at 11 (quoting SIMON WIESENTHAL & JOSEPH WECHSBERG, *THE MURDERERS AMONG US* (1967)).

mal to the courtroom, may feel that they have not been allowed to bear witness and have not been believed. The emotional impact of this experience may be devastating. This is not to suggest that victims should never be called as witnesses nor that they should be immune to the normal rules of the courtroom (within the bounds of reason) but that atrocity witness' goals and hopes may be thwarted in the legal process. This cost should be recognized and witnesses used with restraint to minimize their suffering.

Such may not have been the case in the *Eichmann* prosecution. A number of potential witnesses should, perhaps, never have been approached by the prosecutors because they could not stand the strain of even pretrial inquiry, let alone the prospect of courtroom interrogation. Dr. Josef Lowenherz died after prosecutors initiated contact with him, apparently of a massive coronary.¹¹⁵ Dr. Imre Reiner was removed from the witness list because of fears that he could not stand the strain.¹¹⁶ The only female member of the prosecution team, Victoria Ostrovski-Cohen, was eventually relieved from duty as initial interviewer of potential witnesses because she was overwhelmed by the tragic stories the Holocaust witnesses told.¹¹⁷ The burden on potential witnesses was considerable and exacerbated by their courtroom appearance. Holocaust author Yehiel Dinur was called to give evidence about his experiences at Auschwitz. Hausner, according to Deborah Lipstadt, "pressured him to testify."¹¹⁸ He came to court in his death camp prisoner's garb and began his testimony by announcing his intention to narrate his horrific tale until the "world is aroused."¹¹⁹ Hausner tried to intervene to question him saying: "Perhaps you will allow me, Mr. Dinur, to put a number of questions to you, if you will agree."¹²⁰ Dinur ignored him and Judge Landau cautioned the witness: "Mr. Dinur, kindly listen to what the Attorney General has to say."¹²¹ With that, Dinur rose from the witness box, "descend[ed] from the witness stand, and collaps[ed] on the platform."¹²² He was rushed to a hospital in a coma and never

115. See LANDSMAN, *supra* note 6, at 281 n.102.

116. *Id.*

117. See HAUSNER *supra* note 45, at 293. Hausner took over interviewing duties from Ostrovski-Cohen after he "noticed that she was beginning to show the strain of the assignment." *Id.*

118. LIPSTADT, *supra* note 1, at 161.

119. 3 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 1237.

120. *Id.*

121. *Id.*

122. *Id.*

returned to testify.¹²³ The clash between the desire to bear witness and the demands of the courtroom were here dramatized in the most powerful way. The cost of Hausner's importuning was substantial. One can hardly resist speculating about the impact of this scene of an emotionally and physically crushed Holocaust victim on the trial judges.

Other witnesses too suffered on the stand. Mrs. Yoselewska appeared to lose her grip near the end of her testimony, as if she were reliving the terrible time at the death pit. Joel Brand was called to describe Eichmann's part in 1944 negotiations to barter the lives of one million Jews for 10,000 trucks.¹²⁴ Brand, without any reason, blamed himself for the failure of a deal that was likely to have been nothing more than a ploy by Himmler to improve his image among the Western powers as the war ground towards its conclusion.¹²⁵ Brand's shame and guilt were plainly on display in the courtroom. He cried out: "[Eichmann] destroyed my life. Eichmann put a million human beings on my back, most of whom, I am sorry to say, were murdered by him."¹²⁶ As if to underscore his suffering, Brand repeatedly began shouting during his testimony and had to be urged to calm himself. He pathetically responded: "I am trying, Your Honor, but I get excited."¹²⁷ His testimony was riddled with errors and the courtroom experience clearly unnerved him. At the conclusion of the examination, Judge Halevi felt it necessary to reassure the broken witness, citing the view of a high official that "Mr. Brand [was] extremely trustworthy and honest."¹²⁸ Such bromides could not assuage the pain Brand suffered, nor could a courtroom appearance relieve him of his shame and guilt.

Some of the witnesses who left the courtroom carried with them wounds inflicted by the experience. Yisrael Gutman reported to the court that an earlier witness, Noach Zabłudowicz, suffered deeply because of a Judge Halevi question that challenged his credibility. Gutman said Zabłudowicz's witness-stand experience at Halevi's hands "pains him to this day."¹²⁹ Halevi admitted his error

123. See HAUSNER, *supra* note 45, at 171.

124. 3 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 1015–27, 1028–40, 1060–70.

125. See LANDSMAN, *supra* note 6, at 66 (arguing that Himmler's potential deal was likely a ploy).

126. 3 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 1035.

127. *Id.* at 1064; LANDSMAN, *supra* note 6, at 103 (describing shouting during Brand's trial testimony).

128. 3 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 1070.

129. *Id.* at 1156.

and his remorse about the incident. This episode not only speaks about the cost to victim-witnesses but also, once again, the impact on the judges whose questions could wound so deeply and who were asked to judge a man perhaps responsible for rendering the witnesses so vulnerable.

The witnesses' suffering arose not only out of terrible recollections and the curtailment of witness narratives but from the revival of the deep sense of guilt many of the survivors felt. Once again, Levi is perhaps the best guide to the survivors' feelings. He describes the overwhelming "guilt" many felt in looking back on their experiences.¹³⁰ What guilt could innocent survivors feel when looking back? Levi says: "[A]ll of us had stolen: in the kitchen, the factory, the camp" to stay alive.¹³¹ Many felt "accused and judged."¹³² All had, in the struggle to survive, "omitted to offer help."¹³³ Almost all felt they had fallen into a "gray zone" where morality had collapsed and all had been degraded to the point where staying alive seemed a kind of complicity with the Nazis.¹³⁴ In what are perhaps his darkest words, Levi declares: "[T]he worst survived, the selfish, the violent, the insensitive, the collaborators of the 'gray zone,' the spies."¹³⁵ While to us, looking from the outside, this may seem absurd, it captures the feelings of a vast number of Holocaust victims—a fact attested to by Lawrence Langer in his review of hundreds of survivor statements held in the Fortunoff Video Archive for Holocaust Testimonies at Yale University. In the end, Langer concludes, these testimonies are deeply painful. "As audience, we sit in the presence of unheroic memory as it dredges up the anguish of loss with guilty demeanor and grieving conscience, though neither satisfies the need to understand or to gain reconciliation with the past."¹³⁶ When prosecutors ask victims of the Holocaust to come to court, they are entering this territory. The need to do so for the sake of securing justice may warrant the cost, but each life touched and harmed ought to be seen as precious and should not be intruded upon unless absolutely necessary. In a case where 121 witnesses were called and vast numbers had nothing to contribute to the prosecution of the defendant, one can wonder at the cost. It is not without significance that Primo

130. LEVI, *supra* note 111, at 76.

131. *Id.* at 75.

132. *Id.* at 78.

133. *Id.*

134. *Id.* at 36–69.

135. *Id.* at 82.

136. LANGER, *supra* note 106, at 189.

Levi, the man who devoted his life to bearing witness, eventually chose to take that life by suicide.¹³⁷

Levi's words allow us to understand more deeply a second function of the *Eichmann* model of prosecution. By allowing such expansive testimony, the prosecution sought to transform the courtroom into a forum for bearing witness. Such a forum creates an indelible legal record of the Holocaust. However, the project of bearing witness may stand in tension with the objective of adducing relevant, reliable evidence of an individual's guilt or innocence. Insofar as the witnesses were motivated by the desire to bear witness, their motivations (in addition to Hausner's and Ben Gurion's) may not have been fully consistent with the purposes of a criminal trial.

E. Other Costs of the Jerusalem Witnessing Trial

The Israeli prosecution's witness-dominated approach had other significant costs as well. These began to mount before the first witness was called. The devastating impact that gathering witness stories had on Victoria Ostrovski-Cohen suggests the difficulty that the effort posed for the lawyers. Dealing with the most harrowing of proof and damaged of witnesses imposes burdens that can undermine prosecutorial judgment, fostering excessively aggressive attitudes toward the defendant and bonds of sympathy with witnesses that may interfere with sound judgment about credibility. The witness-dominated strategy posed grave problems for defense counsel as well. Eichmann's lawyer, Robert Servatius, did not contend that the Holocaust was fictitious or that the witnesses (with a few exceptions) presented distorted testimony. Rather he quite appropriately argued that much of the witness testimony had nothing to do with his client. Once the court decided to admit the evidence there was little he could do. He was "hamstrung."¹³⁸ As a result he questioned virtually none of the witnesses from the East or the death camps, lest he anger the court or provoke even greater sympathy for them. Hence, much of the material that flooded into the case, as exemplified by the testimony of Rivka Yoselewska, was exceptionally moving and prejudicial. While it had no link to Eichmann, it cried out for some sort of action against the Nazis. Eichmann was the only Nazi available to be punished.

The judges too faced substantial difficulties because of the

137. See MYRIAM ANISSIMOV, *PRIMO LEVI: THE TRAGEDY OF AN OPTIMIST* (Steve Cox trans., Autumn Press 1998) (1996).

138. LIPSTADT, *supra* note 1, at 87.

victim-witness flood. Early on, Servatius had argued that evidence of the slaughter of Europe's Jews would overwhelm Israel's judges and prejudice their decision. Judge Landau responded:

In the examination of this question it will not be difficult for us to maintain the guarantees ensured to the Accused in any case conducted according to our criminal law procedure, namely that every man is deemed to be innocent and that his case must be tried only on the basis of the evidence brought before the Court.¹³⁹

While Landau worked diligently to make good on his assertion, the weight of the atrocity proof created a heavy burden for the court, one it could not always manage effectively. This was apparent in several contexts. The witnesses' Holocaust narratives were often impossible for the court to control. Abba Kovner was a hero of the Jewish resistance in Vilna and a well-known poet in Israel.¹⁴⁰ In his courtroom testimony he presented a series of heartrending stories, one featuring a three-year-old girl who upon being liberated turned to her mother and asked: "Mother, are we allowed to cry already?"¹⁴¹ The problem was that stories like this were irrelevant to Eichmann and likely to trigger the strongest emotional response. At the end of Kovner's affecting and perhaps manipulative evidence, the Presiding Judge said:

Mr. Hausner, we have heard shocking things here, in the language of a poet, but I maintain that in many parts of this evidence we have strayed far from the subject of this trial. There is no possibility at all of interrupting evidence such as this, while it is being rendered It is your task . . . to eliminate everything that is not relevant to the trial, so as not to place the Court once again—and this is not the first time—in such a situation.¹⁴²

Hannah Arendt, who attended a good bit of the trial and wrote perhaps the most famous book about it, *Eichmann in Jerusalem*, described the prosecution's parade of victim-witnesses as "a bloody show, 'a rudderless ship tossed about on the waves.'"¹⁴³ As if in

139. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 60.

140. See LANDSMAN, *supra* note 6, at 70–71, 281 n.116.

141. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 455.

142. *Id.* at 466.

143. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 9 (Penguin Books 1994) (1963).

confirmation of that observation the judges repeatedly allowed victims to amplify upon their testimony or wander far afield and then turned to criticize Hausner for placing them in a position where they could not maintain control of the case. When they did challenge a witness or otherwise exert control they often seemed to regret their action, as was the case with Halevi's apology about his treatment of Noach Zabłudowicz and his reassurances to Joel Brand. When judges act this way trials are likely to become slow, meandering affairs prone to the consideration of irrelevancies—a not inaccurate description of the *Eichmann* case.

Some observers thought that the intense focus on atrocity evidence had a counterproductive impact. James Cameron of the *London Daily Mail* said that the parade of this sort of material had an “anaesthetizing” effect.¹⁴⁴ One of the keenest contemporary analysts of the case, Harold Rosenberg, writing about the victims' testimony declared: “Too much, too much—the mind of the audience is becoming dulled, the horrors are losing their effect. And still another witness, one who had crawled out from under a heap of corpses, had to tell how the victims had been forced to lay themselves head to foot one on top of the other before being shot.”¹⁴⁵ This was part of a larger problem with the case. Its length, complexity and repetitiousness made it extremely boring, led journalists to flee and audience members to sleep.¹⁴⁶ While a prosecutor has an obligation to lay out the state's proof without pandering to popular taste, the mounting of a case that dulls sympathy and renders the horrific boring risks undermining prosecutorial obligations.

Thus far concerns about the witness-driven package put together by Hausner and Auerbach have assumed its fundamental accuracy and sought to examine its impact on those who were to judge and those who were to tell the world about the trial. The strategy the Attorney General adopted also posed significant risks that a distorted and inaccurate narrative would be presented in the Jerusalem courtroom. The pressure exerted for a heroic narrative was noted above. That pressure was regularly yielded to by Hausner and his team. It had the effect, as in the Yoselewska testimony, of fostering the image of a noble and resistant population—a picture that most victims would reject and some witnesses would find hard to maintain. For some, including Yoselewska herself, real feelings would break through lending the testimony a schizophrenic feeling. For others the

144. See CESARANI, *supra* note 3, at 328 (quoting Cameron).

145. Harold Rosenberg, *The Trial and Eichmann*, 16 COMMENT. 369, 372 (1961).

146. See CESARANI, *supra* note 3, at 328.

demand for hero stories fostered what historian David Cesarani has described as a “tendentious” attitude: combative and committed to the prosecution line.¹⁴⁷ This, in turn, led the judges to press for shorter, more controlled testimony which yielded “brutally short answers,” “fragmented” narrative, “confusion, frustration and irritation.”¹⁴⁸ Perhaps more deeply concerning than all this was the prosecution’s reliance on the testimony of victim-witnesses to prove events as much as twenty-five years in the past—a strategy highly vulnerable to error. As Primo Levi explains, the prisoner witnesses were not in a good position to observe:

For knowledge of the Lagers, the Lagers themselves were not always a good observation post: in the inhuman conditions to which they were subjected, the prisoners could barely acquire an overall vision of their universe In short, the prisoner[s] felt overwhelmed by a massive edifice of violence and menace but could not form for [themselves] a representation of it because [their] eyes were fixed to the ground by every single minute’s needs.¹⁴⁹

Moreover, the depredations of time take their toll on witness memories in all contexts. Holocaust memories are no more indelible than other memories.¹⁵⁰ Levi points out:

[T]he passage of time has as a consequence other historically negative results. The greater part of the witnesses, for the defense and the prosecution, have by now disappeared, and those who remain, and who (overcoming their remorse or, alternately, their wounds) still agree to testify, have ever more blurred and stylized memories, often, unbeknownst to them, influenced by information gained from later readings or the stories of others.¹⁵¹

Such failures of memory may be observed at the *Eichmann* trial. There Moshe Bahir testified that he was certain he had seen the defendant make two visits to the Sobibor death camp. Bahir said he was sure of his identification because after the war he had been

147. *Id.* at 338.

148. *Id.*

149. LEVI, *supra* note 111, at 16–17.

150. See WILLEM A. WAGENAAR, IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY (1988).

151. LEVI, *supra* note 111, at 19.

shown a photograph of Eichmann by the Institute of Documentation in Poland.¹⁵² When the court asked about the photograph, the witness said it was reproduced in a volume entitled *We Shall Never Forget*.¹⁵³ The court asked that he bring it in to reinforce his testimony. He went home, examined the volume and found he was mistaken. He appeared at the trial the next day and informed the judges of his mistake, declaring: “[M]y memory must have failed me.”¹⁵⁴ Judge Landau observed: “[T]he evidence was not incidental.”¹⁵⁵ As reliance on victim-witnesses expanded, the risk of this sort of inaccuracy grew. The problem might have done more to undermine the *Eichmann* trial were it not for the prosecution’s care to avoid potential witnesses who claimed to have “‘seen Eichmann’ at places where he had never been or where ‘no one could have identified him in those days.’”¹⁵⁶

In sum, the costs and risks of the vast witness-based trial were many and serious. They marred the *Eichmann* proceedings at every turn. That justice was seen to have prevailed is attributable to the diligent efforts of the judges, most particularly the Presiding Judge, who resisted the allure of atrocity proof, accurately located Eichmann within the context of the larger Nazi death apparatus and prevented the case from becoming a paean to the murdered.

IV. THE *EICHMANN* LEGACY

The *Eichmann* witness-driven approach to atrocity trials has served as a model for prosecutors around the world. It profoundly influenced the way Israeli prosecutors approached the 1986 prosecution of John Demjanjuk on charges arising out of crimes committed at the Treblinka death camp during World War II. It had a similar impact on the 1989 Canadian trial of Imre Finta who was accused of presiding over a facility used to arrange the transportation of Hungarian Jews to the Auschwitz killing center. Its reach has spread beyond Holocaust cases and profoundly influenced the proceedings at the International Criminal Tribunal for the Former Yugoslavia (ICTY). In all these cases it has yielded long, slow trials with rafts of highly prejudicial victim-witness testimony that contributed to flawed pro-

152. 3 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 1181.

153. *Id.*

154. *Id.* at 1220.

155. *Id.*

156. LIPSTADT, *supra* note 1, at 54.

ceedings and questionable results.

A. *The Demjanjuk Trial*

In 1986, a quarter century after *Eichmann*, Israel decided to mount its second major trial of an alleged Holocaust perpetrator when it requested the deportation of John Demjanjuk from the United States to face charges that he was the infamous Treblinka gas chamber operator Ivan “Grozny” (the Terrible)—a man who sliced off ears with a sword and otherwise brutalized those on their way to the extermination chambers.¹⁵⁷ The American courts, after five years of proceedings, had decided to denaturalize and deport Demjanjuk, a Ukrainian, primarily on the strength of eyewitness testimony that identified him as the Treblinka monster.¹⁵⁸ In discussions between Israeli officials and United States prosecutors, Colonel Menachem Russek of the Israeli Police suggested that the U.S. consider extraditing Demjanjuk to Israel for trial.¹⁵⁹ Why the Jewish state decided to make this request and undertake a second major Holocaust prosecution is not entirely clear. What is clear, however, is that the new case was, from the start, designed to proceed along the lines established in *Eichmann*. The case was intended to be a follow-up to *Eichmann*, focusing on a perpetrator who had killed with his own hands.¹⁶⁰ The proof was to, again, focus on victim-witnesses and the sweeping story of the Holocaust. What was different was the nature of the question the prosecution had to answer. There had been no doubt of *Eichmann*’s identity or the gravity (in general terms) of his criminal wrongdoing. In Demjanjuk’s case there was a very real question of identity—was he Ivan the Terrible of Treblinka or someone else?

The Israelis cited a number of reasons for their desire to return to the courtroom. The one most often repeated was set forth by the lead prosecutor, Michael Shaked, in his opening statement at the trial: “There can be no doubt this may be one of the last trials where it is possible to bring to the stand witnesses who can say, ‘We were

157. See LANDSMAN, *supra* note 6, at 110–72.

158. *Id.* at 114–36.

159. *Id.* at 136.

160. Yonah Blatman, one of the Israeli prosecutors, declared: “While *Eichmann* was a bureaucrat and a planner of these atrocities, a bureaucrat who even was taken aback and frightened when he witnessed these atrocities, Demjanjuk had an actual hand in perpetrating these acts.” See LANDSMAN, *supra* note 6, at 143 (quoting TOM TEICHOLZ, *THE TRIAL OF IVAN THE TERRIBLE* 102 (1990)).

there, we saw what happened with our own eyes.”¹⁶¹ The urge to allow the victims to bear witness one last time before old age and death silenced them must have been powerful in Israel. That urge had produced a triumph of justice and national identity in the *Eichmann* case and was, undoubtedly, perceived as offering a similar opportunity again. Other considerations too were at work. Israel was no longer the fledgling state it had been in 1961. It was the victor in two wars (1967 and 1973) and the occupier of a great expanse of territory with a Palestinian population. That population was restive and moving toward open revolt (the so-called Intifada of 1987).¹⁶² Israel was being depicted in much of the world’s press as an occupying power using heavy-handed tactics to suppress legitimate aspirations for freedom. A major Holocaust-themed trial could, perhaps, remind the world that the Jewish state had been born out of terrible oppression and needed to fight for its survival. The political climate in Israel had changed with the 1977 election of the conservative politician Menachem Begin.¹⁶³ Tough-minded Israeli leaders may have been attracted to a prosecution signaling that, in an era of growing terrorism, Israel would not tolerate the murder of Jews wherever and whenever it occurred. Further, Demjanjuk, the Ukrainian, offered a defendant who was not a German national and would not be likely to upset Israel’s close relations with the Federal Republic of Germany.

The prosecutors, adhering to the *Eichmann* model, assembled a huge case with expert testimony about the death camp at Treblinka as well as an incredibly elaborate analysis (fifty court days, 191 trial hours and 8,000 pages of transcript) of the one important document in the case, the Trawniki identification card that demonstrated Demjanjuk’s association with the death camps (albeit with a focus on another camp, Sobibor, rather than Treblinka).¹⁶⁴ But at the heart of the case was the testimony of five survivor witnesses who, in moving detail, described their horrifying experiences at Treblinka, the brutality of Ivan Grozny and their belief that Demjanjuk was Grozny.¹⁶⁵ The defense was led by an Israeli lawyer, Yoram Sheftel, who vehemently protested against the introduction of testimony concerned with Treblinka, declaring: “[W]e submit that this is not for the sake of this hearing, but for the sake of the sixteen television cameras in

161. TOM TEICHOLZ, *THE TRIAL OF IVAN THE TERRIBLE* 103 (1992) (quoting Shaked).

162. See JOHN COLLINS, *OCCUPIED BY MEMORY: THE INTIFADA GENERATION AND THE PALESTINIAN STATE OF EMERGENCY* (2004).

163. See ERIC SILVER, *BEGIN THE HAUNTED PROPHET* (1984).

164. See LANDSMAN, *supra* note 6, at 150.

165. *Id.* at 144–49.

the hall . . . to turn this into a show trial for the sake of the mass media. The most outstanding example in history of this [is] the Moscow trials”¹⁶⁶ Sheftel’s charge stung the court not only because it compared the proceedings to the infamous Purge Trials organized by Josef Stalin to destroy his political rivals,¹⁶⁷ but because it underscored the fact that the case had been made into an enormous media event, one of such magnitude that the judges, in contravention of Israeli notions regarding judicial ethics, had retained a clipping service to provide them daily reports on the media’s coverage of the event.¹⁶⁸

In the face of Sheftel’s challenge, the Presiding Judge, Supreme Court Justice Dov Levin, appeared to rely on the *Eichmann* precedent to justify a panoramic proceeding. Levin declared: “A great many people in the world and in Israel, too, and even in this hall, do not know all the facts in full detail.”¹⁶⁹ Full detail was what the court thought was appropriate and full detail was what the prosecution aimed to deliver with a steady stream of evidence that lasted for months. (The trial went on for a year, including one long break when Judge Zvi Tal suffered a heart attack.)¹⁷⁰ The problem with this was that, unlike the *Eichmann* case, the *Demjanjuk* trial boiled down to a simple criminal justice question: Was the defendant really Ivan Grozny? The victim-witnesses all testified that they were certain of their identifications although forty-five years had elapsed. The defense offered the testimony of the distinguished Dutch social scientist, Willem Wagenaar, to challenge this assertion because police identification procedures had been extremely sloppy, marred by suggestive photo arrays, biased investigators and witnesses all too eager to help in this last effort against a Nazi henchman.¹⁷¹ Although eyewitness identification is the cause of many justice system errors, the court embraced it without reservation, advancing the proposition that it was impossible for the witnesses to forget. As the court put it:

We must ask: is it at all possible to forget? Can people who were in the vale of slaughter and experienced its horrors, who lived in an atmosphere of oppression, terror, fear and persecution within the narrow confines of the extermination camp; people who saw, day after

166. See TEICHOLZ, *supra* note 161, at 104.

167. See generally ROBERT CONQUEST, *THE GREAT TERROR: STALIN’S PURGE OF THE THIRTIES* 496–573 (1st ed. 1968).

168. See LANDSMAN, *supra* note 6, at 158.

169. See TEICHOLZ, *supra* note 161, at 98.

170. See LANDSMAN, *supra* note 6, at 155.

171. See generally WAGENAAR, *supra* note 150; LANDSMAN, *supra* note 6, at 155–57.

day, the killing, the humiliation, the brutality, the abuse by the German oppressors and their Ukrainian vassals in the Treblinka camp, forget all this? Can people who were forced to perform despicable and degrading “work,” with the fear of death hanging over them day and night, can these people, who have experienced this and survived, manage to repress these horrible events?¹⁷²

The court answered its question with a resounding “no.” Again the echoes of *Eichmann*, with its emphasis on the worth of Holocaust victim testimony, may be heard.

The Israeli court condemned John Demjanjuk to death, declaring itself committed to building a “monument” to the “souls [of] the holy congregations that were lost.”¹⁷³ The conviction began to unravel almost as soon as it was announced. American journalists on the television program *60 Minutes* raised serious questions.¹⁷⁴ These were amplified upon by the research of the Holocaust historian, Gitta Sereny.¹⁷⁵ Documents previously disclosed by the Soviet Union to American prosecutors resurfaced and strongly suggested that Demjanjuk had been at Sobibor, not Treblinka.¹⁷⁶ The weight of the contrary evidence continued to grow until it became overwhelming. On July 23, 1993, the Israeli Supreme Court reversed Demjanjuk’s conviction and, after some delay, set him free.¹⁷⁷ He was not Ivan Grozny. (His work as a guard at Sobibor eventually led to his prosecution in Germany. He was convicted at age ninety-one, in May of 2011.)¹⁷⁸ The *Demjanjuk* debacle showed the serious vulnerability of a slow-moving elaborate, witness-dependent trial fashioned along *Eichmann’s* lines. It might work once to address a major criminal about whose guilt there was virtually no doubt but it created serious obstacles to a fair appraisal of a case against a defendant accused of being a foot soldier of atrocity by victim eyewitnesses. The effort to

172. See LANDSMAN, *supra* note 6, at 162 (providing discussion and consolidated citations to the Israeli court documents).

173. *Id.* at 161.

174. *Id.* at 164–65.

175. *Id.* at 165.

176. *Id.* at 118–19.

177. *Id.* at 166.

178. See Karin Matussek, *Demjanjuk Convicted of Helping Nazis Murder Jews During the Holocaust*, BLOOMBERG NEWS (May 12, 2011, 11:15 AM), <http://www.bloomberg.com/news/2011-05-12/demjanjuk-convicted-of-helping-nazis-to-murder-jews-during-the-holocaust.html>.

extend the *Eichmann* precedent in *Demjanjuk* cost Israel a year-long trial, seven years of litigation, a national uproar and the major embarrassment of a wrongful conviction. More serious than all this, Israel would never again seek to pursue the murderers who had carried out the Holocaust. Perhaps the window of opportunity to prosecute had closed, but what Israel did was nail it shut with a monument to the dangers of a grand narrative built on highly inflammatory witness testimony and disregard for sound prosecutorial practice.

Pursuing the *Eichmann* paradigm allowed Demjanjuk's prosecutors to retell the story of the death camps but it undermined their ability to achieve the main objective of criminal prosecution, the presentation of proof that establishes, beyond reasonable doubt, that the accused has carried out the crimes with which he is charged. It failed because the victim-witness focused proceeding produced powerfully distorted and prejudicial evidence, because the court's judgment became clouded by an irresistible urge to build a "monument" to the fallen and because the evidence raised the social and political stakes to such a degree that the judges could not resist the pressure to convict.

B. *The Finta Trial*

Shortly after the *Demjanjuk* prosecution, Canada began its own trial of an alleged war criminal. To all appearances, it too was powerfully influenced by the *Eichmann* template, relying on the victim-witness driven methodology. The accused was Imre Finta, a Hungarian immigrant who had been a captain in the Hungarian Gendarmerie in the Second World War and who had supervised the concentration and entrainment of several thousand Jews at Szeged, Hungary, for removal to Auschwitz.¹⁷⁹ During the 1980s, Canadians had become increasingly concerned about the possibility that war criminals had entered the country at the end of the war in Europe.¹⁸⁰ Evidence emerged that the post-war Canadian government had been instructed by Britain to overlook war criminals' backgrounds as a means of serving various political ends. When Jewish Canadians

179. See LANDSMAN, *supra* note 6, at 172–239 (providing the facts underlying Imre Finta's case).

180. Ralph Blumenthal, in an article for the New York Times reported (erroneously, as it turned out) that the infamous Nazi physician who presided at Auschwitz, Joseph Mengele, may have sought to enter Canada. Ralph Blumenthal, *Papers Indicate Mengele May Have Been Held and Freed After War*, N.Y. TIMES, Jan. 23, 1985, at A4, available at <http://www.nytimes.com/1985/01/23/world/papers-indicate-mengele-may-have-been-held-and-freed-after-war.html>.

learned that war criminals might be living in Canada they pressed for action. Opposing such a step was a large part of the Eastern European immigrant population that had come to Canada to escape Communist regimes. As a political compromise Ottawa's government adopted a virtually unique piece of legislation that authorized the prosecution of defendants who had committed Canadian statutory offenses like murder, robbery and kidnapping, if they were committed in the course of war crimes or crimes against humanity.¹⁸¹ Finta became the target of the first prosecution under this law after gaining public notoriety because of a libel case he filed against a Jewish accuser.

The Canadian government established a special prosecution unit to handle the matter and placed Christopher Amersingh in charge. He had previously handled the extradition of an alleged Nazi criminal to Germany after an elaborate trial.¹⁸² Amersingh subscribed to the *Nuremberg/Eichmann* approach, relying on an elaborate retelling of the Nazis' brutality toward the Jews and on victim-witness testimony. For the *Finta* trial the Canadian prosecutor not only gathered experts to tell the Hungarian Holocaust story and documents implicating Finta but twenty eyewitnesses as well. The case was tried before Judge Archie Campbell, a jurist who had spent most of his career on legal aid matters, and had little experience presiding over criminal prosecutions, especially those involving juries. The Canadian Charter of Rights and Freedoms required that the case be tried to a jury.¹⁸³

Finta was defended by Douglas Christie, a lawyer who had made something of a specialty of defending those who espoused extreme right-wing views, often of the most anti-Semitic sort.¹⁸⁴ From

181. See Canadian Criminal Code § 7 (3.71), R.S.C. 1985, c. C-46; see also LANDSMAN, *supra* note 6, at 238.

182. Amersingh sought and obtained the extradition of Albert Helmut Rauca from Canada to Germany. Rauca was alleged to have been involved in the murder of more than 11,000 Jewish residents of the Kovno ghetto. See LANDSMAN, *supra* note 6, at 174 & 287 n.1.

183. The Deschênes Commission which drafted Canada's law declared in its report: "As these prosecutions should be heard before ordinary courts following ordinary rules of evidence, in the same vein the traditional right to jury trial should be recognized to the accused." JULES DESCHÊNES, COMMISSION OF INQUIRY ON WAR CRIMINALS REPORT, PART I: PUBLIC 167 (1986).

184. Christie represented, among others, John Keegstra, an Eckville, Alberta school teacher who taught his high school students anti-Semitic doctrines, and Ernst Zundel, the publisher of a tract that denied the existence of Holocaust (DID SIX MILLION REALLY DIE?). See *R. v. Keegstra*, [1995] 124 D.L.R. 4th 289 (Can.); LANDSMAN, *supra* note 6, at 180 &

the very start, Christie's approach to the trial was to deny the reality of fundamental aspects of the Holocaust including the existence of the gas chambers.¹⁸⁵ He also pressed powerfully anti-Jewish themes including that Hungarian Jews were mostly Communists who were traitors to their country and were, often, collaborators in sending their co-religionists to the Nazi camps. Judge Campbell, whether from concern about the excessive reach of the Canadian law or sympathy with the 70-year-old defendant, allowed Christie extreme latitude in his cross-examination of the victim-witnesses. The defense counsel hammered away at the elderly Holocaust victims, often asking them the same question five or six times. He shouted at and insulted them. Judge Campbell would seldom intervene. The judge at one point said he would allow the continued badgering of an elderly survivor because she did not "seem to be in any [visible] distress."¹⁸⁶ The idea that the questioning of a victim ought to be permitted until it physically overwhelms her is both absurd and cruel.

The result of all this was a nightmarish experience for the witnesses and a case cluttered with anti-Semitic innuendo and worse. After a defense closing marked by a series of Christie threats and distortions, the jury acquitted Imre Finta. Whether this was because they accepted the defense denial of essential elements of the Holocaust or because the elderly witnesses had a difficult time identifying Finta and recalling his actions after fifty years is hard to say. The prosecution appealed the acquittal (a step allowed under Canadian law) and the Supreme Court of Canada not only upheld the acquittal but gutted the Canadian law under which Finta was charged.¹⁸⁷ The result of the trial was the withdrawal of Canada from all further prosecutions of alleged war criminals and the powerful discouragement of any further prosecutions throughout the old British Commonwealth.¹⁸⁸

The witness-centered trial established by *Eichmann* had, once again, proven itself an inadequate tool for dealing with a supposed Holocaust henchman. It concentrated almost all attention on the credibility of the witnesses and, in the absence of judicial control, the cruelest of cross-examinations. Where *Demjanjuk* erected a naïve

288 nn.13–15.

185. At one point in the examination of Dr. Randolph Braham, defense counsel Christie asked: "But sir, you recognize that historians now hold that there's very little evidence for those gas chambers and what there is is unreliable." See LANDSMAN, *supra* note 6, at 191.

186. LANDSMAN, *supra* note 6, at 204.

187. R. v. Finta, [1994] 1 S.C.R. 701 (Can.). See LANDSMAN, *supra* note 6, at 227–29.

188. See LANDSMAN, *supra* note 6, at 231.

monument to victims by embracing their testimony unquestioningly, *Finta* produced the mirror-image result, a shameful discrediting of all the victim-witnesses might say. Following the *Eichmann* precedent had led the courts to an ever more extreme approach to Holocaust-related charges, one that invited erroneous appraisal of witness testimony and defendant guilt. *Finta* illustrates how the *Eichmann* approach focuses such intense concentration on victim-witness testimony that it invites the harshest sort of defense counsel attack, which, when successful, can both traumatize witnesses and lead to skewed results out of line with the ground facts of history and the proven misdeeds of defendants.

C. *The International Criminal Tribunal for the Former Yugoslavia*

It would be reassuring to believe that the lessons taught by cases like *Demjanjuk* and *Finta* regarding the dangers of grand witness-preoccupied proceedings had been absorbed by the international community. That, unfortunately, has not been the case. The prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY) have embraced the *Eichmann* strategy, fashioning sprawling narratives based on the testimony of large numbers of witnesses. The very first case tried at the ICTY, that of Dusko Tadic, featured eighty-six prosecution witnesses, 367 exhibits, 7,000 pages of transcript and a six-month trial for a defendant alleged to have been the lowest level camp guard.¹⁸⁹ Misleading information was injected into the case by several witnesses who had been pressured by various intelligence services and the case dragged on for far too long.¹⁹⁰ (In fairness, it should be noted that at this first trial the prosecution had a legitimate concern that it would not be offered any further opportunities to air its proof about the horrors of the Balkans war, circumstances not so very different from those perceived by the Nuremberg prosecutors when they set out to fashion their case, albeit with documents and against the highest ranking survivors of Hitler's regime rather than a foot soldier of atrocity.)

Tadic was followed by a series of overstuffed proceedings. The Kupreskic brothers were tried for their alleged involvement in a massacre in the Bosnian Muslim village of Ahmići. In this trial there were 1,574 witnesses, more than 700 exhibits and a fourteen-month

189. *Id.* at 251–52. See Michael P. Scharf, *The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Trial Since Nuremberg*, 60 ALB. L. REV. 861 (1996–1997).

190. LANDSMAN, *supra* note 6, at 251–52.

trial.¹⁹¹ What is more, the conviction was overturned as “a miscarriage of justice” on appeal because of the use of unreliable eyewitness testimony.¹⁹² The pattern of *Demjanjuk* and *Finta* seemed to be repeating itself. Perhaps most troubling of all was the trial of Slobodan Milosevic. It ground on for almost five years (in striking contrast to the Nuremberg proceeding, which was concluded in nine months) and ended when the alleged architect of the Serbian ethnic cleansing campaign died in his jail cell with the case unresolved.¹⁹³ On her retirement from the ICTY, the highly respected American appellate judge, Patricia Wald, blasted the ICTY for the slow pace of its proceedings, the exaggerated scope of its prosecutions, the excessive number of witnesses called and its inflated indictments.¹⁹⁴ The attractiveness of a grand *Eichmann*-style victim-witness prosecution, which creates a historical record and which gives voice to victims, has continued to seduce prosecutors into adopting methods inappropriate for a criminal trial.

V. PASSING JUDGMENT ON THE *EICHMANN* TRIAL

The *Eichmann* prosecution transformed the Nuremberg approach to the prosecution of the gravest atrocities. On the one hand, it compelled the world to attend to the Holocaust. It seemed to trigger a flood of narratives about the Nazis’ efforts to exterminate the Jews¹⁹⁵ and made the problem of murderous obedience to authority a subject of concern around the world, fueling the meditations of philosophers like Hannah Arendt and the experiments of social scientists like Stanley Milgram.¹⁹⁶ In all these ways the trial powerfully contributed to the world’s coming to grips with the systematic evil men and governments can do. Yet, the *Eichmann* trial, despite the prosecution’s best efforts, told only a part of Eichmann’s story and only a part of the larger story of the Shoah. The case was used for the sort of didactic purposes that have, all too often, been nothing but propa-

191. *Id.* at 255.

192. Prosecutor v. Zoran Kupreskic et al., Case No. IT-95-16-A, Judgment, ¶ 245 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

193. See PATRICIA M. WALD, TYRANTS ON TRIAL: KEEPING ORDER IN THE COURTROOM (2009).

194. Patricia Wald & Jenny Martinez, *Provisional Release at the ICTY: A Work in Progress*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 231 (Richard May et al. eds., 2001).

195. See CESARANI, *supra* note 3, at 339–41.

196. *Id.* at 352–55.

ganda ploys. Israel's effort produced a legal precedent vulnerable to misuse and, perhaps, sowed the seeds of worldwide disengagement from the rule of law with respect to the cases of those accused of the most heinous crimes. An appraisal of the *Eichmann* case after half a century requires a careful weighing of both its positive and negative impact.

Some of the most thoughtful and influential analysts of the Holocaust and post-war justice have found great value in the *Eichmann* trial. Deborah Lipstadt recently published a short book on the case. In it she considered the question of the case's worth and argued that its critical contribution was "the human story of the Jewish victims' suffering."¹⁹⁷ The witnesses' narratives "inaugurated a slow process whereby the topic of the Holocaust became a matter of concern not only to the Jewish community but to a larger and broader realm of people."¹⁹⁸ Lipstadt does not claim that the prosecution, on its own, drew the world's attention to the Shoah, but that it was a catalyst through which "both the event and the people whose lives it had devastated had to be embraced,"¹⁹⁹ first by the Jewish state and then by the world at large. From this perspective the *Eichmann* trial's presentation of the victims' stories was the didactic mechanism that first taught the Israelis, and later, others, the true nature and depravity of the Nazi war against the Jews. For Lipstadt this is a powerful justification for the case.

Others too saw in the *Eichmann* proceeding and its victim focus as the communication of invaluable lessons about the Holocaust. General Telford Taylor was second in command of the American prosecutorial team at the Nuremberg trial and in charge of the American successor trials held in Nuremberg. He went to Jerusalem to observe the *Eichmann* prosecution and declared: "At Jerusalem the victims speak and the Holocaust is at the centre of the trial. Its enormity is somehow more readily grasped in distant retrospect than it was in the post-war daze."²⁰⁰ From the vantage of one intimately connected to Nuremberg, the 1961 case provided a superior perspective to encompass the vast scope and horror of the Nazis' campaign to destroy the Jews. Again, the trial was being lauded as a great didactic achievement, making the horror known through the medium of the victims' testimony. This view was seconded by the distinguished British historian, Hugh Trevor-Roper, who described the trial as a

197. LIPSTADT, *supra* note 1, at 192.

198. *Id.* at 193.

199. *Id.*

200. CESARANI, *supra* note 3, at 328.

“necessary supplement to Nuremberg.”²⁰¹

David Cesarani, another British historian, and author of perhaps the finest volume about Eichmann’s life,²⁰² amplified upon these arguments praising the Jerusalem prosecution. He argued that not only did the trial present, in the most affecting way, the story of its victims, but it encouraged many other victims to speak out. It, and the ensuing trial analysis, most particularly Hannah Arendt’s controversial volume, *Eichmann in Jerusalem*, “greatly raised awareness of the catastrophe and permanently reshaped the intellectual and cultural landscape.”²⁰³ What is more, Cesarani argued, it “emboldened survivors to record their memories on audiotape, videotape, and in memoirs.”²⁰⁴ Through the *Eichmann* prosecution witnessing received the most potent endorsement. Cesarani cites some powerful statistics to help make his point. In 1960 Yad Vashem recorded seventeen Holocaust statements. In 1961 (the year of the trial) the number was twenty-nine. There were twenty-six in 1963 and thirty-five in 1964. From 1961 to 1971 there were 250 survivor narratives published around the world. By 1997 the number had risen to 261 in a single year.²⁰⁵ Eichmann’s prosecution helped open the floodgates. Whether it was the key to the ignition of public discourse is open to question, but that it significantly contributed to the movement in that direction seems beyond serious doubt.

It is ironic that the vastly expanded Holocaust story presented in Jerusalem was attacked by some trial observers as not going far enough. Included among such critics were the celebrated American cultural critic, Harold Rosenberg, and Elie Wiesel, who would eventually win a Nobel Peace Prize for his work concerning the Holocaust. Rosenberg, writing in *Commentary* magazine in November, 1961, began with the proposition that: “The Trial was held in order to tell the story of the Jews of Europe.”²⁰⁶ Based on that contestable assumption he decried the legal niceties and testimonial format which he thought produced “a splatter of atrocities but without an active human center.”²⁰⁷ At that center, Rosenberg argued, should have been a murderously raging Eichmann but, because the trial was im-

201. *Id.* at 329.

202. *Id.*

203. CESARANI, *supra* note 3, at 325.

204. *Id.* at 339.

205. *Id.* at 339–40.

206. Rosenberg, *supra* note 145, at 377.

207. *Id.* at 375.

ped by legal constraints, all that was visible in Jerusalem was “the courtroom identity which Eichmann had created over the years for just this courtroom situation.”²⁰⁸ The defendant in the bulletproof glass booth gave the appearance of being a petty bureaucrat obsessed with forms and never taking the initiative. What Rosenberg wanted was a deep exploration of Eichmann’s “real” character. “Eichmann’s personality should be made central to the question of his guilt.”²⁰⁹ Obviously, this was not a recipe for a trial in a court of law where acts, not personality, must be the central concern. What Rosenberg wanted was the sort of examination that even the most expansive of prosecutions could not supply.

Elie Wiesel too was a sharp critic of the trial. In a December 1961 article in *Commentary*, he argued that the trial needed to address “more clearly a whole epoch of our history.”²¹⁰ The proceedings, according to Wiesel, failed to do this job effectively. They “got stuck inside the rules of the legal game.”²¹¹ They ignored vital questions including the assistance rendered to the Nazis by local non-Jewish populations all too eager to betray their Jewish neighbors. They also failed to “dwell much on the failure of the whole outside world, which looked on in a kind of paralysis and passively allowed whatever was being done to be done.”²¹² Again, any restraints involving the relevance of evidence or the parameters of a criminal trial were seen as the shortcomings of the courtroom.

There are substantial grounds to challenge both the praise for the expansive nature of the *Eichmann* trial and the criticisms suggesting that it should have been even more expansive. First, the constant repetition of atrocity evidence risked desensitizing judges and the public to the atrocities committed, thus undermining the legitimacy of conviction and the message that such acts are truly vile and will be condemned as such when disclosed in legal proceedings. As already noted, members of the press complained of the “anaesthetizing” effect of such material. They were joined by Harold Rosenberg, who wrote in *Commentary*: “Too much. Too much”²¹³ This view is concurred in by David Cesarani who found the atrocity testimony “numbing” and the courtroom process “unavoidably alienating and

208. *Id.* at 377.

209. *Id.* at 378.

210. Elie Wiesel, *Eichmann's Victims and the Unheard Testimony*, 32 COMMENT. 510, 510 (1961).

211. *Id.* at 511.

212. *Id.*

213. Rosenberg, *supra* note 145, at 371.

boring.”²¹⁴ Too much horror can render judges insensitive, can blur the message of criminal condemnation and interfere with the ability to attend to and accredit victim-witness testimony. Francis Biddle, one of the two American judges on the IMT panel, wrote in his autobiography: “There was no end to the horrors of the testimony. The mind shrank from them, grew tired, rejected the imaginative and systematic cruelties. Or one tried to feel, to share the heroism of the victims.”²¹⁵ Increasing the number of victim avowals of mistreatment does not, necessarily, strengthen a case. They can distort assessment of the seriousness of offenses and the credibility of witnesses, leading adjudicators to be distracted by stories of heroism like those solicited by Hausner. This does nothing to enhance understanding of the Holocaust, let alone the case against a specific defendant.

Israel set out in *Eichmann* to teach the world about the Holocaust. Its intentions, at least as described by Hausner and Ben-Gurion, were overtly didactic. There are serious risks in attempting to use trials to teach history lessons. Both the Nazis and the Soviets opted for lesson-teaching trials in the 1930s, and both produced travesties of justice. In September of 1933 the Nazis began a criminal prosecution to punish those who had allegedly set fire to the Reichstag.²¹⁶ In addition to a demented Dutchman named van der Lubbe, the German prosecutors sought to convict a number of well-known Communists. The Nazis did all they could to influence the trial’s outcome—selecting sympathetic judges, pressing independent counsel to withdraw and allowing Göring and Goebbels to address the proceedings “to express [themselves] under oath concerning accusations and slanders which have been directed against [them] from certain quarters.”²¹⁷ The prosecution’s evidence was so weak that even this group of judges felt obliged to acquit all but van der Lubbe. The Nazis sought in this prosecution to influence international opinion and fix the verdict of history. While they failed, their didactic approach marred the judicial process and undermined legal legitimacy. Shortly after this, in 1936, the Soviets mounted show trials of their own in Moscow. These were out-and-out shams that, notwithstanding their dubious character, served in the short run to clothe Stalin’s

214. CESARANI, *supra* note 3, at 338.

215. FRANCIS BIDDLE, IN BRIEF AUTHORITY 432 (1962).

216. See generally FRITZ TOBIAS, THE REICHSTAG FIRE (Arnold J. Pomerans trans., 1964); INGO MÜLLER, HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH 28–29 (Deborah L. Schneider trans., 1991); THE REICHSTAG FIRE TRIAL (London, The Bodley Head, Ltd. 1934).

217. THE REICHSTAG FIRE, *supra* note 216, at 178.

regime in undeserved legitimacy.²¹⁸ Israel was, of course, not trying to do anything like Hitler or Stalin's regime, but the power of a government to fashion a criminal case and the temptations to use that power to pursue political ends can lead down a dangerous path.

Trials are delicate processes. Once they are taken over for didactic purposes the threat to justice is substantial. Going down the didactic road is fraught with peril, most particularly the distortion of evidence to serve political ends. The credibility of the trial mechanism suffers when it is used this way and the chance for a miscarriage of justice is greatly increased.

The purpose of a didactic proceeding is to present evidence that persuades onlookers not simply of a defendant's guilt but of a set of political and social propositions supportive of the prosecuting government's views and actions. Those to be persuaded often include representatives of the media. In the *Eichmann* case there was a real risk that the intended didactic message would not even be heard. The case started slowly, bogging down because of Hausner's long and tedious argument about the court's jurisdiction. This was so uninspiring an opening that many of the journalists who had come to cover the trial fled.²¹⁹ For those who remained there was a constant battle to convince editors to give reports prominence, especially in light of competition from space launches, invasions and Cold War developments. The didactic effort, even if warranted, is vulnerable to the vagaries of pressmen's attention spans and the drumbeat of other news. David Cesarani has argued that reporting about the *Eichmann* trial had only the most "patchy impact" on world attitudes.²²⁰ What eventually attracted public attention, according to Cesarani, was the publication of Hannah Arendt's highly controversial volume, *Eichmann in Jerusalem*. It was the book that triggered worldwide debate and "over 200 books and articles."²²¹

Assuming that the didactic effort gains world notice, it can only succeed if it is powerful enough to influence attitudes. Those who prepare such cases are under intense pressure to find material that will convince the public. Few things seem to have more appeal to those trying to persuade than bloody deeds and poignant stories. The didactic objective may make the lure of such evidence irresistible. Its forensic value, however, is frequently open to question. Proof of gross brutality will often heighten the emotional reaction of

218. See CONQUEST, *supra* note 167.

219. See CESARANI, *supra* note 3, at 259; LIPSTADT, *supra* note 1, at 59–60.

220. CESARANI, *supra* note 3, at 325.

221. *Id.*

judges, jurors and onlookers in ways that will prejudice them against the accused even when the evidence has no real connection to the case. Poignant facts, as Justice Oliver Wendell Holmes pointed out, create a “hydraulic pressure” that heightens the intensity of feeling²²² and is likely to undermine effective analysis. The more the advocates yield to the temptation of atrocity or other poignant proof the more likely it is that they will mislead the factfinder and distort the record. Criminal trials often deal with tragic and moving facts. In recognition of this a wide range of evidentiary protections are built into the process to ensure that the trial does not get out of hand and improperly inflame the decision maker. In the *Eichmann* proceedings all such protections were abrogated by law and, at the prosecutor’s insistence, the most affecting and provocative evidence flooded the courtroom, increasing the risk of a botched adjudication.

If a prosecutor too zealously commits himself to teaching lessons he may lose sight of the dictates of fundamental decency and use witnesses in ways that cause them unjustifiable harm. In the grand didactic case this risk is amplified because the stakes are higher and the large number of witnesses tends to reduce the interpersonal bond between witness and lawyer. There is a striking example of prosecutorial abuse of a witness in Hausner’s treatment of Tel Aviv Magistrate Moshe Beisky.²²³ The witness had been imprisoned in the Plaszow concentration camp. He was asked while testifying to describe the execution of a fifteen-year-old boy at the camp. As he began his answer, the witness, who had insisted on standing to deliver his testimony (as most witnesses do in Israeli trials), seemed to falter and Judge Landau said: “I would ask you please to be seated.”²²⁴ The witness declined. Almost immediately the prosecutor asked the cruelest possible question: “Why didn’t you attack [the camp guards], why didn’t you revolt?”²²⁵ The question staggered Beisky, who plaintively requested permission to be seated. The judge granted his request, adding, “[Y]ou may also rest for a while.”²²⁶

Deborah Lipstadt examined this incident in her book and reported that Beisky, “shaken and angry,” confronted Hausner after leaving the stand, asking: “Why did you not at least warn me beforehand?”²²⁷ Hausner answered that he wanted a “spontaneous re-

222. *N. Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

223. 1 TRIAL OF ADOLF EICHMANN, *supra* note 50, at 343–54.

224. *Id.* at 348.

225. *Id.* at 349.

226. *Id.*

227. LIPSTADT, *supra* note 1, at 81.

action,” to help the prosecution demonstrate the impossibility of resistance. Hausner claimed Beisky’s answer “brought the trial to a new moral peak.”²²⁸ To achieve that “peak” Hausner was willing to confront his unprepared witness with the most hurtful sort of question. This *after* the witness was already faltering and had become a source of concern to the Presiding Judge. The morality of this sort of “use” of a witness is open to question. Is it really appropriate to lacerate a Holocaust victim on the stand to score a didactic point for the prosecution? Most decent lawyers would demur. Hausner did not. Others too were asked this question, one that Primo Levi tells us is more painful than any other a victim may be asked.²²⁹

These criticisms of the didactic approach, while important, do not get at the essence of what is wrong with a case put together with the objective expressed by Hausner and Ben-Gurion. A criminal trial in the Anglo-American-Israeli tradition is a proceeding in which the government is charged to prove by admissible evidence in open court that a defendant has committed acts prohibited by the criminal law. Such a trial is not a search for the definitive history of any event save the defendant’s specific violation of a criminal statute. A criminal trial is not an invitation to explore a defendant’s character (at least until he has been convicted). It is not an open forum where witnesses are free to say whatever they wish. It is not a place for exploring the acts or omissions of individuals not connected with the defendant. It is not a television drama or media briefing. When it becomes any of these things it loses its character as a criminal trial and jeopardizes the legitimacy of any verdict it may reach. A trial is a disciplined process of interrogation in which a lawyer asks a witness questions, one at a time, and the witness responds so long as the question and answer fall within the parameters established by the charges and the rules of evidence. It is arranged this way to protect and promote the fairness of the process. Prejudicial, misleading and irrelevant materials are excluded so that the neutral adjudicator (whether judge or jury) can do a fair job of making a decision. As Hannah Arendt observed in her book, the *Eichmann* prosecution trampled on many of these principles, pushing it toward becoming “a bloody show, ‘a rudderless ship tossed about on the waves.’”²³⁰

The harm that is done by ignoring these limitations is not done simply to the particular case but to all cases where the model is used as a precedent. Unfortunately, a large number of prosecutors

228. *Id.* at 82.

229. See LEVI, *supra* note 111, at 150–52.

230. ARENDT, *supra* note 143, at 9.

have turned to the *Eichmann* trial as their procedural guide. Relying on *Eichmann* led the prosecutors in *Demjanjuk* to marshal a vast Holocaust narrative centered on victim-witnesses when the key issue in the case was the soundness of a handful of eyewitness identifications after fifty years. The emotional impact of the victims' testimony drove the court to declare the infallibility of Holocaust witness testimony. That declaration was not simply wrong, but destructive of justice. The court in *Demjanjuk* condemned the wrong man. When the error was discovered it caused serious social disruption and convinced Israel to foreswear the pursuit of Nazi war criminals. Relying on the *Eichmann* model, with its parade of witnesses, the Canadian prosecutor too produced a grand Holocaust narrative centered on victim testimony. In *Finta*, however, the court allowed an assault on both the Holocaust and the victims when neither was appropriate. The consequence was a victory for Holocaust denial and the deepest pain for victim-witnesses. Canada also chose to withdraw from the pursuit of Nazis. Such cases as these raise the stakes too high in terms of the pursuit of the authors of atrocity and tend to produce exaggeration of either deference to or damnation of victims. The vulnerabilities of the *Eichmann* model are displayed in all their troubling sweep in these two prosecutions. Moreover, reliance on the *Eichmann* template has perhaps, blocked the development of simple, speedy processes especially designed to deal with those accused of lesser crimes.

The results in recent sprawling, didactic victim-witness-centered cases are corrosive of our faith in the rule of law. They suggest that we cannot handle the challenge of mass atrocity in the courtroom. They seem to indicate that prosecutions, inevitably, will be slow, costly, risky affairs that may produce what are perceived as miscarriages of justice. It was perhaps with this in mind that the distinguished dean of the Yale Law School and, more recently, the legal advisor to the State Department, Harold Koh, suggested in 2001, that if Osama bin Laden were ever to be captured, America should not rely on an ICTY sort of prosecutorial mechanism because it would be too "slow and expensive."²³¹ While urging the use of the federal courts, rather than an international one or a military tribunal, Koh said: "I hope never to see Osama bin Laden alive in the dock."²³² It would appear that the government of which Koh is today a part shared his sentiments. A recent *New Yorker* magazine article about

231. Harold Koh, *We Have the Right Courts for Bin Laden*, N.Y. TIMES, Nov. 23, 2001, at A39, available at <http://www.nytimes.com/2001/11/23/opinion/23KOH.html>.

232. *Id.*

the killing of bin Laden at his hideout in Pakistan clearly suggests that there was no consideration of taking the terrorist alive or bringing him before a court of law. Quoting an unnamed “special-operations officer,” the *New Yorker* journalist, Nicholas Schmidle, who appeared to be remarkably well informed about every aspect of the raid, wrote: “There was never any question of detaining or capturing him—it wasn’t a split-second decision. No one wanted detainees.”²³³ In a violence-torn world made far worse by Osama bin Laden, it is easy to understand the lure of arguments in favor of summary execution. Unfortunately, the arguments on the other side, championing the rule of law through trial, were, perhaps, irreparably damaged by the cases that employed the *Eichmann* model and brought discredit to the idea of courtroom justice. It is certainly not the *Eichmann* case alone that discouraged resort to law instead of bullets. *Eichmann* was, however, responsible for the innovations that made atrocity trials longer, more tendentious and politically risky. *Eichmann* turned its back on any effort to foster a simpler, more effective sort of trial that might be employed on a regular basis. It made Nuremberg’s grand narrative grander and more unwieldy. Precedents have influence and those that are perceived as successes often shape what follows. The *Eichmann* precedent had that effect.

VI. CONCLUDING THOUGHTS ABOUT SUCCESS AND FAILURE

These are somber days for the notion of using courts to mete out justice for atrocity and a part of the blame may be laid at the feet of the *Eichmann* prosecutors. Yet there are good grounds to contend that *Eichmann* itself was not a failure, but a success. Despite the exertions of the prosecution the case was one in which justice was done and was seen to be done. Adolf Eichmann was a murderous Nazi whose bloody deeds were proven in open court by his own admissions, documentary proof and at least a number of the proffered witnesses. It is in large measure because of the painstaking work of Chief Judge Moshe Landau that justice prevailed. He stubbornly resisted Hausner’s efforts to turn the trial into a show. He engineered a written decision that precisely and persuasively identified Eichmann’s crimes and the limits of his responsibility. Nuremberg was a success because one judge, Sir Geoffrey Lawrence, insisted on a fair process. *Eichmann* was saved by another such judge.

The work of these jurists extended the rule of law. It con-

233. Nicholas Schmidle, *Getting Bin Laden*, THE NEW YORKER, Aug. 8, 2011, at 35, 43, available at http://www.newyorker.com/reporting/2011/08/08/110808fa_fact_schmidle.

vinced the world that trials could be an effective response to atrocity and that law might be able to make a real difference in addressing the conduct of nations. Any effort that teaches those lessons is one to celebrate. Moreover, the *Eichmann* trial and reaction to it was an important milestone in the world's progress toward a deeper understanding of the Holocaust. The Shoah was a seminal event in the history of human relations. It signaled a turning point toward a level of inhumanity never seen before. It sounded an alarm that, although faint, has sparked concern about Cambodia, Yugoslavia, Rwanda, Sudan and elsewhere. That the list of genocidal activities is so long must distress and accuse us. *Eichmann* helped foster an effort that someday may provide an effective response to such barbarity. Its flaws and ours explain why that day has not yet arrived.