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OF MONSTERS AND MEN: PERPETRATOR TRAUMA AND MASS ATROCITY

Saira Mohamed*

In popular, scholarly, and legal discourse, psychological trauma is an experience that belongs to victims. While we expect victims of crimes to suffer trauma, we never ask whether perpetrators likewise experience those same crimes as trauma. Indeed, if we consider trauma in the perpetration of a crime at all, it is usually to inquire whether a terrible experience earlier in life drove a person toward wrongdoing. We are loath to acknowledge that the commission of the crime itself may cause some perpetrators to experience their own psychological injury and scarring.

This Article aims to fill this gap in our understanding of crime and trauma by initiating a long-overdue conversation about perpetrator trauma. Specifically, this Article argues that perpetrator trauma exists and merits attention. In doing so, it traces a cultural evolution in the concept of trauma from a psychological category to a moral one, and in response, it proposes a counternarrative of trauma—one that recognizes trauma as a neutral, human trait, divorced from morality, and not incompatible with choice and agency.

Finally, this Article argues that we ignore this counternarrative of trauma at our peril. Acknowledging the reality of perpetrator trauma can improve reconciliation efforts in the aftermath of mass atrocity by exposing the need to rehabilitate perpetrators. As importantly, recognizing perpetrator trauma erodes the all-too-common perception of perpetrators as cartoonish monsters by exposing their ordinariness and

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humanity. The point is not to generate sympathy for a génocidaire. But recognizing him as a person who chose to kill, and who now suffers because of it, can illuminate both the roots of his crimes and the real horror undergirding them—that perpetrators are merely people, and that any other person could do the same. In exposing these overlooked aspects of crime, this Article unsettles understandings of suffering and violence, challenges the categories of perpetrator and victim, and makes clear that the question of how to respond to mass atrocity is even more complex than we know.

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INTRODUCTION

The former SS commander Adolf Eichmann spent the duration of his war crimes trial caged in a glass box. He sat there, day after day, for months, cleaning his glasses, shuffling sheaves of papers, and scribbling notes while dozens of the prosecution's witnesses detailed the horrors they had endured in the Holocaust.¹ The bulletproof booth in the

1. Harry Mulisch, Criminal Case 40/61, the Trial of Adolf Eichmann: An Eyewitness Account 34–65 (Robert Naborn trans., Univ. of Pa. Press 2005) (1961). For photographs of the glass booth, see Eichmann's Trial in Jerusalem: Verdict, Yad Vashem,

Jerusalem courtroom was built ostensibly to shield Eichmann from potential assailants,² but ultimately it served to put him on conspicuous display—to make him a spectacle, really. People stared.³ They watched him, they said, in hopes that if they looked long enough at his “darting,”⁴ “reptilian eyes,”⁵ at his “sharp nose”⁶ and “thin lips,”⁷ they might understand who he was and how he could have done what he did.⁸

Eichmann’s booth is now housed in a museum near Haifa,⁹ but its memory resurfaces often, whether in the fictional glass cages that hold Hannibal Lecter¹⁰ and Magneto,¹¹ or in the real ones used in courtrooms to confine the members of Pussy Riot in Russia¹² and ousted president Mohammed Morsi in Egypt.¹³ In every case, the caged perpetrator is a

<http://www.yadvashem.org/yv/en/exhibitions/eichmann/verdict.asp> (on file with the *Columbia Law Review*) (last visited Mar. 30, 2015).

2. Heavy Security Protects Nazi from Himself and from Others, *N.Y. Times*, Apr. 11, 1961, at 14.

3. Martha Gellhorn, Eichmann and the Private Conscience, *Atlantic Monthly*, Feb. 1962, at 52, 52, available at <http://www.theatlantic.com/past/docs/issues/62feb/Eichmann.htm> (on file with the *Columbia Law Review*); see also Janet Flanner, Letters from Nuremberg, *New Yorker*, 1945–1946, reprinted in Janet Flanner’s *World: Uncollected Writings 1932–1975*, at 98, 98–99 (Irving Drutman ed., 1979) (describing attendees at Nuremberg trials “squint[ing] at the prisoners . . . in an attempt to discover enlarged signs of shame, alarm, or guilt on their features”).

4. Walter Goodman, Crime and Punishment: The Trial of Eichmann, *N.Y. Times* (Apr. 30, 1997), <http://www.nytimes.com/1997/04/30/arts/crime-and-punishment-the-trial-of-eichmann.html> (on file with the *Columbia Law Review*).

5. Gellhorn, *supra* note 3, at 52.

6. Marianna Torgovnick, *The War Complex: World War II in Our Time* 64 (2005).

7. Homer Bigart, Eichmann Is Portrayed as Crueler Than Himmler, *N.Y. Times*, Apr. 19, 1961, at 1.

8. See Gellhorn, *supra* note 3, at 52 (“We are trying, in vain, to answer the same question: how is it possible? . . . What goes on inside him? Who is he; who on God’s earth is he? How can he have been what he was, done what he did? How is it possible?”); Susan Sontag, Reflections on the Deputy, in *Against Interpretation: And Other Essays* 124, 126 (2001) (describing Eichmann trial as “an occasion for attempting to make comprehensible the incomprehensible”).

9. See Adolf Eichmann Faces His Accusers, Beit Lohamei Haghetaot Ghetto Fighters’ House Museum, <http://www.gfh.org.il/eng/?CategoryID=61&ArticleID=78> (on file with the *Columbia Law Review*) (last visited Mar. 30, 2015).

10. *The Silence of the Lambs* (Orion Pictures 1991).

11. *X2* (Twentieth Century Fox 2003).

12. David M. Herszenhorn, Anti-Putin Stunt Earns Punk Band Two Years in Jail, *N.Y. Times* (Aug. 18, 2012), <http://www.nytimes.com/2012/08/18/world/europe/suspense-ahead-of-verdict-for-jailed-russian-punk-band.html> (on file with the *Columbia Law Review*) (describing defendants’ location in the glass enclosure known locally as “the aquarium”).

13. See David D. Kirkpatrick & Mayy El Sheikh, Egypt Locks Morsi in Soundproof Cage During Trial, *N.Y. Times* (Jan. 28, 2014), <http://www.nytimes.com/2014/01/29/world/middleeast/egypt-morsi-trial.html> (on file with the *Columbia Law Review*); see also David Tait, Glass Cages in the Dock?: Presenting the Defendant to the Jury, 86 *Chi.-Kent. L. Rev.* 467, 475 (2011) (attributing rise in use of glass enclosures for defendants to Eichmann trial).

specimen for examination: By placing him¹⁴ on display for study, perhaps we can learn something about his kind.¹⁵

In truth, any defendant in a courtroom is on display, cage or none.¹⁶ The public, the judge, and the jury are expected to examine the defendant and, on some level, to try to make the same determinations the Eichmann trial spectators did. This kind of assessment is particularly pronounced in a trial—like that of Eichmann—in which there is less doubt of the defendant's guilt than of the circumstances and reasons for his actions. Indeed, in many trials in the aftermath of mass atrocity, accused persons are presumed to have contributed to these horrific acts in *some* way.¹⁷ In these trials, regardless of what verdict might come, scholars and advocates scrutinize perpetrators—their words, their gestures, their faces, their bodies—for some indication of these individuals' histories, their motivations, their souls. One person becomes

14. I use the male pronoun to refer to perpetrators throughout this Article because the majority of perpetrators of mass atrocity crimes, and the majority of defendants in international criminal courts, are men. Alette Smeulers & Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations* 325 (2011). But see Wendy Lower, *Hitler's Furies: German Women in the Nazi Killing Fields* 15–31 (2013) (discussing role of women perpetrators in the Holocaust); Peter Landesman, *A Woman's Work*, N.Y. Times Mag. (Sept. 15, 2002), <http://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html> (on file with the *Columbia Law Review*) (recounting participation of woman government minister in Rwandan genocide).

15. For perspectives of attorneys on glass docks in courtrooms, see David M. Herszenhorn, *Presumed Innocent, but Caged in Court*, N.Y. Times (Nov. 18, 2013), <http://www.nytimes.com/2013/11/19/world/Europe/courtroom-cages-remain-common-despite-criticism.html> (on file with the *Columbia Law Review*) (discussing widespread criticism of using glass docks and metal cages in judicial proceedings); see also Michel Foucault, *Discipline and Punish: The Birth of the Prison* 184 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing examination as “a normalizing gaze” that “establishes over individuals a visibility through which one differentiates them and judges them”).

16. See Judith Resnick & Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* 342 (2011) (characterizing glass as “a mechanism for isolation, as well as for the transfer of voyeuristic control to a viewer watching from a distance”); see also Foucault, *supra* note 15, at 200–01 (discussing visibility of the cage in Bentham's *Panopticon*); Jeremy Bentham, *Panopticon*, in *The Panopticon Writings* 29, 45 (Miran Bozovic ed., Verso 1995) (1787) (describing windowed prison in which inmates would always fear surveillance).

17. Defendants have been found not guilty in trials for mass atrocity crimes. See Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 Va. J. Int'l L. 529, 532 (2008) (“[A]cquittal rates at international criminal trials so far tend to be somewhat higher than acquittal rates in domestic proceedings.”). Observers and even the courts themselves, however, often interpret acquittal not as evidence of the defendant's lack of culpability, but rather as a sign that the prosecution failed to do its work sufficiently well, the legal standards were too rigorous, or the defendant managed to destroy the paper trail or otherwise insulated himself from liability. See, e.g., *Prosecutor v. Ngudjolo Chui*, Case No. ICC-01/04-02/12, Judgment, ¶ 36 (Dec. 18, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf> (noting acquittal of defendant does not mean that no crimes were committed and “does not necessarily mean that the Chamber considers him or her to be innocent”).

a stand-in for all of the perpetrators connected to the same tragedy,¹⁸ and the world stares, hoping to grasp how this nightmare, this stain on humanity, could have happened.¹⁹

Has this staring yielded any greater understanding? Scholars have constructed typologies of perpetrators who participate in mass atrocity crimes so as to offer some clues as to the different reasons that individuals commit such horrific acts; they are, for example, cruel sadists or true believers or pliant conformists.²⁰ But despite these efforts to decipher these individuals, too often we buy into the metaphor of the glass cage—we accept the relationship of objectification; we embrace our stance of examination—and we cannot help but see these perpetrators as monsters.²¹

How might our interpretation shift, then, if the perpetrator were taken out of that glass cage, out of the courtroom, even, and given a stage all his own? In Joshua Oppenheimer's bewildering and acclaimed documentary *The Act of Killing*,²² perpetrators of the 1965 massacres in Indonesia—whose factions still rule, who were supported by the United States, and who have never been prosecuted or even threatened by the prospect of accountability—are invited by the filmmaker not merely to

18. See Stephan Landsman, *Retroactive Trials and Justice*, 96 Mich. L. Rev. 1456, 1466 (1998) (“Often, as at the first Nuremberg trial, . . . [individuals] are tried not only for their own deeds but as proxies for all those who acted similarly.”); Sontag, *supra* note 8, at 125 (observing Eichmann during trial as “the man, laden with hideous specific guilt, and the cipher, standing for the whole history of anti-Semitism”).

19. See David Luban, *State Criminality and the Ambition of International Criminal Law, in Accountability for Collective Wrongdoing* 61, 73–74 (Tracey Isaacs & Richard Vernon eds., 2011) (arguing that in context of mass atrocity, “the center of gravity lies in the trial, far more than the punishment . . . because the full dimensions of the human catastrophe are displayed to the world patiently, step by step, for all to see”).

20. See e.g., Raul Hilberg, *Perpetrators Victims Bystanders: The Jewish Catastrophe, 1933–1945*, at 3–103 (1992) (examining perpetrators of the Holocaust); Michael Mann, *The Dark Side of Democracy: Explaining Ethnic Cleansing* 20 (2005) (categorizing perpetrators as “elites, militants, and core constituencies”); Alette Smeulers, *Perpetrators of International Crimes: Towards a Typology*, in *Supranational Criminology: Towards a Criminology of International Crimes* 233, 243–60 (Alette Smeulers & Roelof Haveman eds., 2008) (proposing types of perpetrators in situations of mass violence).

21. See Larry May, *Genocide: A Normative Account* 242 (2010) (identifying those who perpetrate genocide as “monsters”); Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* 449 (2001) (discussing need to identify perpetrators of horrific crimes as “monsters”); Jock Young, *The Exclusive Society* 114–16 (1999) (discussing “manufacture of monsters” in popular representations of crime); see also Jeffrey Jerome Cohen, *Monster Culture (Seven Theses)*, in *Monster Theory* 3, 7–9 (Jeffrey Jerome Cohen ed., 1996) (discussing monster as “difference made flesh”).

22. *The Act of Killing (Director's Cut)* (Drafthouse Films 2013) [hereinafter *Act of Killing: Director's Cut*]; see Awards and Distinctions, *The Act of Killing*, http://theactofkilling.com/awards_distinctions/ (on file with the *Columbia Law Review*) (last visited Mar. 30, 2015) (listing major awards received).

tell, but to show.²³ They speak, dance, smile, and laugh, while themselves making a film within the film in which they reenact the killing, torture, and rape that they carried out nearly fifty years ago. Unsurprisingly, some critics condemned *The Act of Killing* for giving a mouthpiece to these murderers, while the victims continued to be silenced.²⁴ This Article, in contrast, finds this feature of the film particularly valuable for studying mass atrocity, because it depicts the perpetrator as a fully thinking, feeling human being, thus allowing the viewer to better imagine the range of experiences that perpetrators could have, experiences that may be occluded in the courtroom. When we look at the perpetrator outside of the caged context of objectification, we realize that he is someone we can recognize—almost accidentally, against our urges—as human, a man rather than a monster.

Inspired by the shift in perspective offered by the image of the perpetrator in *The Act of Killing*, this Article draws attention to what is ever-present in the film but neglected in studies of mass atrocity: the idea that *perpetrators can experience their crimes as trauma*—that is, that commission of the crime itself causes a psychological injury to the perpetrator, which can result in particular adverse physical, social, or emotional consequences.²⁵ *The Act of Killing* proposes this notion of perpetrator trauma through its depiction of a former death-squad leader, Anwar Congo—a lover of movies, the cha cha, and the garrote, a man

23. Nick Bradshaw, *Build My Gallows High: Joshua Oppenheimer on The Act of Killing*, *Sight & Sound*, July 2013, at 36, 37 (quoting Oppenheimer's recollection that he said to individuals involved in the film, "You evidently want to show me what you've done and tell me about it: show me, in whatever way you wish; I will film it.").

24. See e.g., Nick Fraser, *We Love Impunity: The Case of The Act of Killing*, 67 *Film Q.*, Winter 2013, at 21, 21–22; Jill Godmilow, *Killing the Documentary: An Oscar-Nominated Filmmaker Takes Issue with The Act of Killing*, *Indiewire* (Mar. 5, 2014, 3:49 PM), <http://www.indiewire.com/article/killing-the-documentary-an-oscar-nominated-filmmaker-takes-issue-with-the-act-of-killing> (on file with the *Columbia Law Review*); see also A.J. Schnack, *It Came from Inside the House: Community, Criticism and The Act of Killing*, *Filmmaker Mag.* (Mar. 10, 2014), <http://filmmakermagazine.com/84922-it-came-from-inside-the-house-community-criticism-and-the-act-of-killing/> (on file with the *Columbia Law Review*) (discussing criticisms of *The Act of Killing*).

25. See Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 271–74 (5th ed. 2013) [hereinafter *DSM-V*] (providing definition of post-traumatic stress disorder (PTSD) and listing symptoms such as nightmares, flashbacks, and avoidance of the original trauma); Etzel Cardeña et al., *Stress Disorders*, in *Clinical Psychology* 229, 229–31 (George Stricker & Thomas A. Widiger eds., 2004) (discussing trauma); see also John N. Briere, Catherine Scott & Janelle Jones, *The Effects of Trauma*, in *Principles of Trauma Therapy* 25, 31 (John N. Briere & Catherine Scott eds., 2d ed. 2015) (discussing variation in effects of traumatic events based on "victim-specific and social/cultural variables"). Where, in colloquial terms, "trauma" may refer to any emotionally difficult experience, see, e.g., *Trauma*, Merriam-Webster On-Line, <http://www.merriam-webster.com/dictionary/trauma> (on file with the *Columbia Law Review*) (last visited Mar. 9, 2015) (defining trauma as "a disordered psychic or behavioral state resulting from severe mental or emotional stress or physical injury" or as "an emotional upset"), this Article uses the term to describe the medical and psychoanalytical phenomenon.

whose psyche is haunted by the demons of his past.²⁶ Anwar²⁷ claims that he personally killed one thousand people during Indonesia's so-called "purge," and since that time, we learn, he has suffered for it; he has nightmares and flashbacks and at times he seems to be a detached outside observer of his own thoughts, feelings, and actions.²⁸ Anwar is a textbook example of a person who has experienced trauma and its baneful aftermath—textbook, that is, except for the fact that he is the perpetrator of a crime rather than the victim, and thus is an outlier in scholarly, judicial, and popular understandings of trauma and atrocity. And unlike the few perpetrators who do speak of their trauma in courts and truth commissions, or even in books and films, Anwar does not purport to have killed because he was a victim of circumstances.²⁹ In fact, neither he nor Oppenheimer provides much context for his crimes at all.³⁰ Anwar Congo thus represents a new type of perpetrator that is absent from the world of mass atrocity: one who is traumatized and yet makes no claim on the status of victim. This enables the viewer to imagine that the person who chooses to kill—brutally and even gleefully—may also be haunted by his acts, and that the world must—like it or not—also reckon with the meaning of that trauma.

Perpetrator trauma does exist,³¹ and that on its own should make it a worthy field of inquiry. But still, the psychic suffering of perpetrators, as opposed to that of victims, might strike readers as an unseemly, even perverse, topic. Studies of trauma have proliferated in the past several decades, with scholarship spanning the disciplines of history, literary theory, psychology, and sociology, among others.³² As we might expect,

26. See *infra* notes 181–185 and accompanying text (analyzing depiction of Anwar Congo).

27. I refer to Anwar Congo as "Anwar" throughout the Article, as most other commentators on the film do, in line with Indonesian naming conventions.

28. See *infra* notes 184–187, 191 (discussing Anwar's trauma).

29. See *infra* notes 250–251 (discussing Anwar's rationale for killing).

30. For criticisms of this directorial choice, see Robert Cribb, *The Act of Killing*, 46 *Critical Asian Stud.* 147, 147 (2014) (describing absence of military in film's depiction of Indonesian massacres as "deeply misleading"); Tony Rayns, Review: *The Act of Killing*, *Sight & Sound*, July 2013, at 72 (criticizing "near-total absence of context, either about the historical facts or about the production process itself").

31. See Dominick LaCapra, *History and Memory After Auschwitz* 41 (1998) (acknowledging perpetrator trauma); Robert S. Laufer et al., *Symptom Patterns Associated with Posttraumatic Stress Disorder Among Vietnam Veterans Exposed to War Trauma*, 142 *Am. J. Psychol.* 1304, 1307–09 (1985) (examining incidence of PTSD among Vietnam War veterans who perpetrated or witnessed "abusive violence"); Susanne Schaal et al., *Mental Health 15 Years After the Killings in Rwanda: Imprisoned Perpetrators of the Genocide Against the Tutsi Versus a Community Sample of Survivors*, 25 *J. Traumatic Stress* 446, 450–52 (2012) (studying PTSD among perpetrators of genocide in Rwanda).

32. E.g., Dominick LaCapra, *Writing History, Writing Trauma* (2001) [hereinafter LaCapra, *Writing History*]; Cathy Caruth, Introduction, in *Trauma: Explorations in Memory* 3, 3 (Cathy Caruth ed., 1995); Piotr Sztompka, *The Trauma of Social Change: A Case of Postcommunist Societies*, in *Cultural Trauma and Collective Identities* 155, 160 (Jeffrey C.

most of this work has focused on victims of abuses rather than on perpetrators, with scholars only rarely suggesting that those who commit horrific crimes may experience trauma as a result.³³ The choice to highlight the traumatic experience of victims and to downplay—or even deny³⁴—that of perpetrators may intuitively feel appropriate. Why should we devote any sympathetic attention to the individuals responsible for unjustifiable bloodshed, and what right do they have for their pain and their wounds to be recognized and respected? Alternatively, to the extent that perpetrator trauma might not be denied, it might be dismissed as a comeuppance. If individuals who have committed horrific crimes now suffer as a result, then the nightmares, the flashbacks, the isolation—these are merely a whit of what they deserve.

This Article takes the position that acknowledging the trauma experienced by perpetrators is not only appropriate, but also important. Criminal trials for mass atrocity crimes are obligated to look at the big picture as they aim to heal nations and transition societies from a period of violence to a time of peace.³⁵ Moreover, they do so under formidable

Alexander et al. eds., 2004); see also Geoffrey H. Hartman, On Traumatic Knowledge and Literary Studies, 26 *New Literary Hist.* 537, 555–57 (1995) (providing sources on trauma studies).

33. See Cathy Caruth, *Unclaimed Experience: Trauma, Narrative, and History* 2–3 (1996) [hereinafter Caruth, *Unclaimed Experience*] (describing Freud’s interpretation of Tancred’s trauma from killing his beloved Clorinda in Tasso’s *Jerusalem Delivered*); Dominick LaCapra, *History in Transit: Experience, Identity, and Critical Theory* 113 (2004) (“Nazi ideology and practice were geared to creating perpetrators able to combine extreme, traumatizing, radically aggressive acts of violence with hardness that . . . foreclosed traumatization of the perpetrator.”); LaCapra, *Writing History*, supra note 32, at 79 (acknowledging “possibility of perpetrator trauma”); Ervin Staub, *Reconciliation After Genocide, Mass Killing, or Intractable Conflict: Understanding the Roots of Violence, Psychological Recovery, and Steps Toward a General Theory*, 27 *Pol. Psych.* 867, 872 (2006) (discussing effects of trauma on perpetrators of mass violence). For more extensive explorations of perpetrator trauma, see generally Rachel M. MacNair, *Perpetration-Induced Traumatic Stress: The Psychological Consequences of Killing* (2002) (examining PTSD among individuals who cause trauma to others); Raya Morag, *Waltzing With Bashir: Perpetrator Trauma and Cinema* (2013) (introducing analysis of perpetrator trauma through cinematic representations).

34. See infra notes 75–77 and accompanying text (discussing scholarly disagreement on perpetrator trauma in Tasso’s *Jerusalem Delivered*).

35. See Mirjan Damaška, What Is the Point of International Criminal Justice?, 83 *Chi.-Kent L. Rev.* 329, 331 (2008) (discussing goals of international criminal courts that “are far removed from the normal concerns of national criminal justice,” including “produc[ing] a reliable historical record . . . [,] giving voice” to victims, “propagat[ing] human rights values,” and “stopping an ongoing conflict”); Peter Dixon & Chris Tenove, International Criminal Justice as a Transnational Field: Rules, Authority and Victims, 7 *Int’l J. Transitional Just.* 393, 393–94 (2013) (analyzing international criminal justice as a form of transitional justice); Immi Tallgren, The Sensibility and Sense of International Criminal Law, 13 *Eur. J. Int’l L.* 561, 564 (2002) (identifying function of international criminal law as “nothing less than ‘to discourage future offenses, deter vigilante justice, promote reconciliation, and reinforce respect for the law and new democratic regimes’” (quoting Michael P. Scharf, *Reining In Impunity for International Crimes: Report of the*

circumstances: Actual perpetrators often number in the thousands, very few are held legally accountable, and in the decades after the atrocity, perpetrators and victims are in many cases forced to go on with their lives not only as compatriots, but also as neighbors.³⁶ When perpetrators of crimes return from prison terms (or when they return home unpunished after the conflict or violence has ended) and remain haunted by their acts, trauma is no longer simply the private experience of a single person. It becomes, rather, a destructive obstacle to the larger community's process of reconciliation and restoration.

Beyond that, acknowledging the suffering that perpetrators experience as a result of the crimes they commit can facilitate greater recognition of the ordinariness of perpetrators of mass atrocity crimes. The world of international criminal law is built around a fault line that runs between perpetrator and victim. We are expected to see perpetrators as different, and courts and observers treat them as different. But perpetrators are not simply monsters; they are real people who do terrible things. Acknowledging their humanity might be alarming; it forces us to reckon with the idea that, if they are capable of committing these horrors, then perhaps we all might be able to do the same. At the same time, acknowledging the ordinary humanity of perpetrators is productive,³⁷ because it forces us to examine the choices they made, and the paths that led them to commit their crimes. As Raul Hilberg wrote, “[W]ithout an insight into the actions of the perpetrators, one could not grasp history in its full dimensions . . . [H]e alone was the key.”³⁸

The methodology of this study of perpetrator trauma—juxtaposing proceedings inside courtrooms with the events captured in a documentary film—is guided by a belief that the two forums resemble each other in at least three significant ways. First, both a trial and the film are sites of performance and drama. In each, individuals play a role, they function inside a performance space, and, implicitly or explicitly, they speak to an audience.³⁹ Second, in both a trial and the film, re-creation

Rapporteur, *in* *Reining In Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference*, 17–21 September 1998, at 127, 127 (Christopher C. Joyner ed., 1998)).

36. See Thabo Mbeki & Mahmood Mamdani, Op.-Ed., *Courts Can't End Civil Wars*, *N.Y. Times* (Feb. 5, 2014), <http://www.nytimes.com/2014/02/06/opinion/courts-cant-end-civil-wars.html> (on file with the *Columbia Law Review*) (comparing Nuremberg trials, after which winners and losers did not live together, with Rwanda, South Africa, Kenya, South Sudan, and Sudan, where perpetrators and victims live as neighbors).

37. This Article does not claim that all perpetrators experience trauma, but rather that some do, and that admitting that some do experience trauma can reaffirm the humanity of all perpetrators.

38. Raul Hilberg, *The Politics of Memory: The Path of a Holocaust Historian* 61 (1996).

39. See Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 *Stan. L. Rev.* 81, 86 (1975) (analogizing courtrooms to theatres).

emerges as a central narrative strategy.⁴⁰ Indeed, as Jennifer Mnookin and Nancy West observe, “[T]rials are in fact a kind of reenactment,”⁴¹ creating through the accounts of witnesses and the details of documentary evidence a reconstruction—or, indeed, competing ones—of what might have happened at a particular time. Finally, both in a trial and in the film, the proceedings can “provide only a partial, subjective, mediated, and even fictional account of what occurred”;⁴² and yet both still aim to represent the truth, are relied upon to represent the truth, and *do* represent the truth—or at least some version of it.⁴³ The truth that emerges either way is a restricted one, cramped by doctrine and procedure or reconfigured by editing and film grammar. Moreover, like a documentary, the truth of the courtroom is a mediated truth, filtered through the questions posed by lawyer and judge (or director) and framed to satisfy the ultimate goal of the trial (or film), whatever that might be for the truth-giver.⁴⁴

That said, I do not turn to *The Act of Killing* as a source of *the truth*, and I concede that Anwar Congo and the other “characters” depicted are at least toying with elements of fiction. The film nonetheless offers an

40. See Jennifer L. Mnookin & Nancy West, *Theaters of Proof: Visual Evidence and the Law in Call Northside 777*, 13 *Yale J.L. & Human.* 329, 335 (2001) (“Reenactments and trials . . . are both, at heart, attempts to recapture the past in an authentic and credible fashion.”).

41. *Id.* at 388.

42. *Id.* at 390.

43. On truth in documentary, see Michael Renov, *The Subject of Documentary* 22–23 (2004) (discussing “fictive” elements of nonfiction film); Linda Williams, *Mirrors Without Memories: Truth, History, and the New Documentary*, 46 *Film Q.* 9, 14 (1993) (“Instead of careening between idealistic faith in documentary truth and cynical recourse to fiction, we do better to define documentary not as an essence of truth but as a set of strategies designed to choose from among a horizon of relative and contingent truths.”); Werner Herzog, *Minnesota Declaration: Truth and Fact in Documentary Filmmaking*, Werner Herzog Film (Apr. 30, 1999), <http://www.wernerherzog.com/52.html> (on file with the *Columbia Law Review*) (contrasting “truth of accountants” of Cinema Verité with “ecstatic truth” that “can be reached only through fabrication and imagination and stylization”). On truth in the courtroom, see Janet Malcolm, *The Crime of Sheila McGough* 1–2 (1999) (“The law’s demand that witnesses speak ‘nothing but the truth’ is a demand that no witness can fulfill . . . even with God’s help. It runs counter to the law of language, which proscribes unregulated truth-telling and requires that our utterances tell coherent, and thus never merely true, stories.”); Lindsay Farmer, *Trials*, in *Law and the Humanities: An Introduction* 455, 471–76 (Austin Sarat et al. eds., 2010) (“[I]t seems that there is a rather naïve belief in the capacity of the trial to uncover ‘what really happened’—a standard against which there must always be a truth deficit.”); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 23 *U. Pa. L. Rev.* 1031, 1035 (1975) (“The advocate in the trial courtroom is not engaged much more than half the time—and then only coincidentally—in the search for truth.”).

44. See Catherine M. Cole, *Performing South Africa’s Truth Commission* 26, 165 (2009) (discussing ways in which the seemingly authentic and unmediated truth presented during South Africa’s Truth Commission hearings was in fact “highly mediated”); Carl Plantinga, *What a Documentary Is, After All*, 63 *J. Aesthetics & Art Criticism* 105, 106–07 (2005) (presenting critiques of notion that “documentary is a mere recording of subject”).

illuminating opportunity for exploration of a blind spot in international criminal law and transitional justice because it proposes an *idea*, a vision of a perpetrator who both had full control over his criminal acts and nonetheless experiences trauma as a result of his crimes. By envisioning such a person, the film draws attention to a truth that has gone missing from the legal imagination, a truth that has grave consequences for the prospects of justice and reconciliation in the context of mass atrocity.

This Article proceeds in three Parts. Part I explores the concept and culture of trauma, investigating how and why it is associated with victims, as opposed to perpetrators. It attributes the predominant characterization of trauma as the province of victims to two features of trauma: first, that trauma is recognized only on the part of individuals or communities viewed as legitimate and worthy of attention; and second, the connection drawn in the humanities between trauma and reclamation of voice. As a result, the clinically describable trauma experienced by individuals who are immoral, or whose behavior should not be empathized with, is neglected in both scholarly and popular accounts of trauma. Indeed, perpetrators are considered potentially traumatized only when they can be viewed also as victims, such as child soldiers and individuals who commit crimes under duress. The idea that a person could both choose to participate in crimes and nonetheless experience them as trauma remains largely unexplored.

Part II argues that even though perpetrators experience their acts as trauma, that fact is neglected in responses to mass atrocity, with the only mentions of trauma on the part of perpetrators expediently reframed as the trauma of a victim. As background, this Part first gathers representations of perpetrators' relationships with their crimes to investigate how perpetrators themselves portray their experiences of having committed these horrific acts. Synthesizing descriptions drawn from hearings in international criminal tribunals and truth commissions, this Part concludes that defendants who concede that they have committed the acts in question typically present themselves as remorseful and penitent, as brazen and boastful, or as rationalizing and subdued—or, sometimes, as a combination thereof. In only a few instances have perpetrators revealed that they are traumatized by their crimes. When they have, they indeed present themselves as victims in some way—forced by a superior or a system to engage in activities that now haunt them.

This Part then contrasts those representations with the idea, proposed in *The Act of Killing*, of a traumatized perpetrator who claims no status of victimhood. The film conveys trauma in two ways. First, it directly confronts the suffering of perpetrators through the character of Anwar Congo, who shows classic symptoms of trauma as a result of his crimes. Second, the film invites reflection on the idea of perpetrator trauma through the reenactments that dominate the film, a form that invokes the trope of the compulsion to repeat the traumatic event, unwillingly, agonizingly, over and over again. At the same time, the film

provides no context, no excuse or justification, for Anwar's acts. As far as the viewer knows, Anwar chose to kill because he wanted to kill. Trauma, we learn, is not merely the province of the victim.

Part III explains the value of acknowledging perpetrator trauma for those who study mass atrocity. At a practical level, recognition of perpetrator trauma has implications for punishment and post-conflict recovery that at present remain largely neglected. The experience of trauma indicates that perpetrators may require rehabilitation after committing crimes in order to successfully reintegrate into society. After serving a sentence, or not being punished at all, perpetrators are soon back in their countries, back in their towns, back among the people they once terrorized. Those who suffer the aftereffects of trauma may find it more difficult to admit wrongdoing, feel empathy, or avoid violence in the future. If they, too, are terrorized by their own actions, then there may be no hope for societal reconciliation.

Beyond this policy prescription, though, there is value in recognizing perpetrator trauma, as it reveals the limits of our understanding of atrocity crimes. Acknowledging the neglect of perpetrator trauma highlights the constraints placed by courts, scholars, and the public on the voice of the perpetrator. In this "era of testimony,"⁴⁵ not everyone enjoys the privilege of witnessing. While victims and experts have clear roles to play in the work of accountability, the place of the perpetrator is more tenuous, and more fraught. Giorgio Agamben writes of the distinction between two meanings of witness: The *testis* represents a third party, the external observer who offers a neutral perspective, while the *superstes*, in contrast, is the person who directly experiences the event, the person who has "lived through" it.⁴⁶ His categorization implicitly ignores the perpetrator, who has not "lived through" the crime so much as having orchestrated it, and yet who also may be stained by it. Nonetheless, as much as perpetrators may have the capacity to bear witness, it is not clear that anyone wants to hear them.⁴⁷

Moreover, the trauma experienced by perpetrators—whether or not it ultimately finds voice in a courtroom—merits attention because it reminds us of the humanity of these purported monsters.⁴⁸ One might

45. Shoshana Felman, *Education and Crisis, or the Vicissitudes of Teaching*, in *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* 1, 5 (Shoshana Felman & Dori Laub eds., 1992); Shoshana Felman, *The Return of the Voice: Claude Lanzmann's Shoah*, in *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History*, supra, at 204, 206.

46. Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive* 17 (1998).

47. See Anneleen Spiessens, *Voicing the Perpetrator's Perspective: Translation and Mediation in Jean Hatzfeld's Une Saison de Machettes*, 16 *Translator* 315, 317–18 (2010) (discussing scholars' arguments that perpetrators should be quieted or mediated through another narrative voice).

48. See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 135–37 (2001) (describing depiction of offenders as species of

think that this is a question that is no longer up for debate; we can all accept Browning over Goldhagen and move on.⁴⁹ But the insistence that perpetrators of mass evil are different from the rest of us still thrives, both in popular opinion⁵⁰ and in legal ones.⁵¹ Of course it does: Mass atrocity today is viewed through the lens of accountability, and the very idea of accountability is built around a separation of the world into victims and perpetrators, with its own epistemological assumptions embedded in that separation. But whatever comfort or cleanness the distinction between victim and perpetrator might offer, there is value, too, to recognizing the equal humanity of the two categories, and to recognizing the capacity for the project of international criminal law to declare the commonness, the ordinariness, the humanness, of the people who commit these horrific crimes.⁵² Acknowledging trauma on the part of perpetrators might convince us that, far from monsters, these are people who make choices—choices that might be not simply stared at, but understood.

This Article is a journey through the minds of perpetrators of terrible crimes. It is a synthesis of law and theory, film sets and courtrooms, cases and confessions. Above all, it is the beginning of a conversation. It unsettles understandings of suffering and violence, it challenges the value of the categories of perpetrator and victim, and it urges that the question of how to respond to mass atrocity is even more complex than we know.

“alien other” whose conduct is “beyond all human understanding”); Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 *Yale L.J.* 1628, 1656–62 (2015) (discussing international criminal tribunals’ characterization of perpetrators of mass atrocity crimes as deviants).

49. Compare Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (2d ed. 1998) (providing account of how ordinary men with no history of violence were transformed into direct perpetrators of atrocities during the Holocaust), with Daniel Jonah Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust* 23, 131–63 (1996) (arguing Germans were motivated by “virulent and violent ‘eliminationist’ variant of anti-Semitism”); see also *infra* notes 271–290 and accompanying text (analyzing characterizations of perpetrators as monsters and others); *infra* notes 281–283 and accompanying text (discussing research on individuals’ vulnerability to pressures of authority and conformity).

50. See Martha C. Nussbaum, *Hiding From Humanity: Disgust, Shame, and the Law* 166–67 (2004) (discussing appeal of Goldhagen’s thesis in its reassurance that “monsters cause evil”).

51. See Mohamed, *supra* note 48, at 1651–62 (arguing international criminal courts “have seized on the categories of deviance and normalcy” and “emphasize the ways in which the defendants before them differ from the average person and thus may be treated as deviant”).

52. We might say that courts and law not only have the ability to do so; they have a responsibility as well, in order to respect and affirm these individuals’ capacity for choice, a necessary prerequisite for fairness in criminal punishment.

I. VICTIMS, PERPETRATORS, AND THE OWNERSHIP OF SUFFERING

This Part analyzes the concept and culture of trauma, seeking to establish and explain its orientation toward victims of violence rather than perpetrators. Perhaps this needs no explanation: If you were asked to picture a person traumatized by a violent act, you would likely imagine someone who has suffered an assault, a rape, perhaps an attempt on his life. You would likely not think of the assailant whose hands punched that person or held him down or wrapped tightly around his neck, even though he, too, may suffer, and may endure that suffering long after the crime is in the past.

Trauma as a psychological condition refers to a response to an experience that renders an individual unable to properly process that experience, which may result in symptoms such as flashbacks, nightmares, feelings of alienation, diminished empathy, or avoidance of reminders of the initial trauma.⁵³ It is a wound of the soul, and as such, it knows no categories of victim and perpetrator, good and evil. The culture of trauma, however, reinforces those divides, and it situates the experience of trauma squarely within the world of victims. What could be a neutral category instead has social meaning and moral force as a property of victims, of people who do not deserve to suffer and do deserve to be heard.

A. *The Diversity of Trauma*

Trauma has become commonplace in today's world. Mental-health professionals routinely arrive on the scene of mass killings and natural disasters,⁵⁴ some soldiers returning from battle are recognized as suffering from post-traumatic stress disorder (PTSD),⁵⁵ and compensation for individuals who have experienced not only physical harm, but also psychic harm, has become commonplace.⁵⁶ Whether used in its more

53. See DSM-V, *supra* note 25, at 271–74 (defining post-traumatic stress disorder); Trauma, Am. Psychological Ass'n, <http://www.apa.org/topics/trauma/> (on file with the *Columbia Law Review*) (last visited Mar. 30, 2015) (defining trauma); see also Ian Hacking, *Rewriting the Soul: Multiple Personality and the Sciences of Memory* 4–5 (1995) (discussing meaning of word “trauma”); Murray B. Stein & O. Joseph Bienvenu, *Diagnostic Classification of Anxiety Disorders: DSM-V and Beyond*, in *Neurobiology of Mental Illness* 525, 527 (Dennis S. Charney & Eric J. Nestler eds., 2d ed. 2005) (noting restrictiveness of DSM definition of PTSD).

54. See, e.g., M. Laurie Leitch, *Just Like Bodies, Psyches Can Drown in Disasters*, *N.Y. Times* (May 31, 2005), <http://www.nytimes.com/2005/05/31/health/psychology/31essa.html> (on file with the *Columbia Law Review*) (discussing work of mental health professionals in aftermath of natural disasters).

55. See *Mental Health Effects of Serving in Afghanistan and Iraq*, PTSD: Nat'l Ctr. for PTSD, <http://www.ptsd.va.gov/public/PTSD-overview/reintegration/overview-mental-health-effects.asp> (on file with the *Columbia Law Review*) (last visited Mar. 30, 2015) (presenting information on incidence of PTSD in veterans).

56. See, e.g., Peter H. Sand & James K. Hammitt, *Public Health Claims*, in *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* 193, 206–08

colloquial form to mean any intense suffering, or in its specific context as a particular kind of medically recognized psychological injury,⁵⁷ the notion of trauma is widespread, understood to emerge from experiences as wide-ranging as rape and earthquakes, losing a parent and witnessing a war.

The history of trauma studies attests to the recognition of diversity in traumatic experience. French neurologist Jean-Martin Charcot is credited with founding the field of trauma studies with his research on hysteria in the Salpêtrière in the late nineteenth century,⁵⁸ with Pierre Janet, Josef Breuer, and Sigmund Freud conducting their own research into trauma's causes and manifestations.⁵⁹ In subjects as varied as railway workers, soldiers, and victims of rape and assault, they saw individuals experience symptoms that appeared to be unwilling repetitions of the initial traumatizing event; only by reclaiming those traumatic memories and enabling the sufferer to put the experience into words could those symptoms be relieved and the traumatizing experience be reappropriated as a lived experience.⁶⁰ The First and Second World Wars renewed interest in the trauma of war, as service members returned home shadowed by "shell shock" and "combat fatigue." In the wake of the Vietnam War, epidemiologists, psychiatrists, and neuroscientists, among others, began to systematically and publicly investigate soldiers' experience of trauma.⁶¹ It was at that point that the trauma experienced by soldiers—largely framed as suffering as a result of witnessing killing and fearing death rather than suffering as a result of participating in killing⁶²—began to gain a foothold as a legitimate ailment. After the American Psychological Association included PTSD in the *Diagnostic and Statistical Manual of Mental Disorders* in 1980, studies of trauma began to situate themselves firmly out of the realm of combat.⁶³ Works such as Judith Herman's

(Cymie R. Payne & Peter H. Sand eds., 2011) (discussing Gulf War compensation claims made for costs associated with PTSD).

57. See Thomas Laqueur, *We Are All Victims Now*, London Rev. of Books (July 8, 2010) (reviewing Didier Fassin & Richard Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimhood* (Rachel Gomme trans., 2009)), <http://www.lrb.co.uk/v32/n13/thomas-laqueur/we-are-all-victims-now> (on file with the *Columbia Law Review*) (discussing various definitions of trauma).

58. Judith Lewis Herman, *Trauma and Recovery* 11 (1992).

59. See Shoshana Ringel & Jerrold Brandell, *Trauma: Contemporary Directions in Theory, Practice, and Research* 1–3 (2012) (discussing work of Breuer, Freud, and Janet).

60. See Herman, *supra* note 58, at 11–12.

61. See Denise Grady, *War Memories May Harm Health*, N.Y. Times (Dec. 16, 1997), <http://www.nytimes.com/1997/12/16/science/war-memories-may-harm-health.html> (on file with the *Columbia Law Review*) (describing effort of scientists to assess Vietnam War veterans for effects of trauma).

62. See MacNair, *supra* note 33, at 1–4 (noting "original assumption that 'battle fatigue' results from fear of injury or death" and offering evidence rebutting this assumption).

63. See Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 Colum. L. Rev. 1193, 1208 (2010) ("During the process of revising the DSM

Trauma and Recovery argued that victims of domestic violence experience trauma just as victims of political violence do,⁶⁴ researchers began to explore the trauma suffered both by victims of shocking experiences and by the relief workers or security forces who respond to those victims,⁶⁵ and the academic field of trauma studies was born.⁶⁶

Trauma thus is now widely understood as a wide-ranging experience. It began as an affliction attributed to persons believed to possess some particular weakness that made them more susceptible to experiencing trying events as trauma,⁶⁷ but then expanded as doctors began to confront symptoms that did not appear to coincide with any previously existing condition.⁶⁸ Once it became understood that trauma did not confine itself to individuals who already suffered from psychological infirmity, the phenomenon began to gain acceptance as potentially affecting anyone—from children to adults, from the vulnerable to the strong. Trauma became a human condition.

B. *Trauma as Property of Victimhood*

To claim that trauma became an equal-opportunity offender, however, would overstate the case. As much as trauma may in theory refer to an experience that potentially befalls anyone, no different from headaches or cancer or sadness or happiness, in the popular imagination, trauma is conceived predominantly as an experience of victims.⁶⁹ This is

in the 1980s, women's groups successfully urged incorporation of abused women's experience into the text.”).

64. See Herman, *supra* note 58, at 9. In the growth of trauma studies, different versions of trauma appeared. The DSM and many psychological definitions of trauma emphasize dissociation, or the ways in which an event is “not fully assimilated as it occurs” and returns to the experiencer of the trauma in the form of dreams, thoughts, or conduct that is connected to that original event. Caruth, *Unclaimed Experience*, *supra* note 33, at 4–5. Neuroscientists examine the ways in which the brain operates during a traumatic event. See E. Ann Kaplan, *Trauma Culture: The Politics of Terror and Loss in Media and Literature* 37–38 (2005) (describing work of neuroscientists on trauma).

65. See Kaplan, *supra* note 64, at 87–100 (analyzing “vicarious trauma”).

66. See Andreas Killen, *Pundits of Pain*, Salon (Feb. 11, 2000, 11:00 AM), http://www.salon.com/2000/02/11/trauma_3/ (on file with the *Columbia Law Review*) (discussing development of trauma studies as academic discipline in late twentieth century).

67. See Josef Breuer & Sigmund Freud, *Studies on Hysteria* 6 (James Strachey ed. & trans., 2000) (1895) (noting variance in “susceptibility” of persons affected); Edgar Jones & Simon Wessely, *A Paradigm Shift in the Conceptualization of Psychological Trauma in the 20th Century*, 21 *J. Anxiety Disorders* 164, 167 (2007) (describing early twentieth-century views that war trauma stemmed in part from “pre-existing or latent psychological disorder”).

68. See Ben Shephard, *A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century* 152 (2001) (describing breakdown of conventional wisdom about predisposition to psychological infirmity).

69. See Kirby Farrell, *Post-Traumatic Culture: Injury and Interpretation in the Nineties* 14 (1998) (defining trauma as “both . . . a clinical concept and . . . a cultural trope”).

not to say that all victims experience trauma.⁷⁰ But those individuals who do experience trauma are recognized primarily as victims. As Didier Fassin and Richard Rechtman argue in their study of trauma, subtitled “An Inquiry into the Condition of Victimhood,” trauma has shifted from a neutral category that identifies an experience that is universal (at least in its possibility) to a label that validates, even extols, the suffering of those whose experiences warrant recognition.⁷¹ Trauma is not merely a psychological disorder; it is a moral category that identifies its subject as a person who merits empathy and deserves to be heard.⁷²

This common identification of trauma with victims might explain why the prosecution and the defense in the trial of Oscar Pistorius reacted so differently to an expert finding that Pistorius, charged with the murder of his girlfriend, Reeva Steenkamp, was suffering from PTSD on account of her death. Pistorius, who was convicted of culpable homicide,⁷³ did not deny shooting Steenkamp, but the case turned on whether he intended to kill her, or whether he mistook her for an intruder when he fired the shots that resulted in her death. The defense argued that the diagnosis of PTSD demonstrated unequivocally that Pistorius never meant to kill Steenkamp. If he was haunted by her death, then surely he could not be the bad guy in this scenario: He was the aggrieved victim of a terrible loss, not the heartless killer of an innocent woman.⁷⁴ The prosecution, meanwhile, tried to downplay the diagnosis, apparently concerned that the defense could succeed in convincing the jury of Pistorius’s sadness, and therefore his innocence. Both the prosecution and the defense, however, were missing the point. Pistorius’s PTSD tells us nothing about whether he murdered his girlfriend or lost her in a tragic accident. It tells us only that he now suffers.

The understanding of trauma as the experience of victims not only has taken hold in popular opinion, but also has seeped into scholarly

70. See Christine E. Agaibi & John P. Wilson, Trauma, PTSD, and Resilience: A Review of the Literature, 6 *Trauma Violence Abuse* 195, 203–09 (2005) (“It is a truism to say that not everyone develops PTSD following trauma . . .”).

71. Didier Fassin & Richard Rechtman, *The Empire of Trauma: An Inquiry into the Condition of Victimhood* 5 (Rachel Gomme trans., 2009).

72. *Id.* at 7. This idea is echoed in the fact that trauma is colloquially identified and validated through the root event—the war, the tsunami, the mass shooting, the ethnic cleansing—rather than through the symptoms. A person, however, could experience any range of events as trauma: The choice to shoot another person is no less valid as a trauma than the experience of being shot oneself.

73. Sarah Lyall & Alan Cowell, A Trial Concludes, but for South Africans, the Debate May Be Just Beginning, *N.Y. Times* (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/africa/oscar-pistorius-verdict-guilty-of-culpable-homicide.html> (on file with the *Columbia Law Review*).

74. See Alan Cowell, Oscar Pistorius at Increasing Risk of Suicide, Lawyer Says, *N.Y. Times* (July 2, 2014), <http://www.nytimes.com/2014/07/03/world/africa/pistorius-at-increasing-risk-of-suicide-lawyer-says.html> (on file with the *Columbia Law Review*) (discussing characterization by defense of Pistorius’s PTSD).

discussions of trauma. Ruth Leys, for example, challenges Cathy Caruth's reading of the story of Tancred and Clorinda from Tasso's *Jerusalem Delivered*, emphasizing the incongruity of Caruth's decision to identify the subject of the trauma as Tancred—a man who (in a tale quite similar to Pistorius's claim) unwittingly kills Clorinda, the woman he loves. To Leys, Tancred simply cannot have experienced trauma because in the slaying of Clorinda he is the perpetrator, not the victim.⁷⁵ Amy Novak, too, is troubled by Caruth's reading of Tancred as a subject of trauma. She states, simply, as if her point were obvious: "But Tancred does not experience the trauma; Clorinda does."⁷⁶ Reflecting a common association between trauma and victims, Novak imports the language of perpetrator and victim of violence and identifies in her reading a perpetrator and victim of trauma.⁷⁷

This Article attributes the association of trauma and victimhood to two contemporary dynamics of trauma. First, recognition of trauma is contingent upon recognition of the person who suffers the trauma as a subject worthy of attention or respect. As Judith Herman explains, "[t]he systematic study of psychological trauma . . . depends on the support of a political movement."⁷⁸ Suffering, pain, and loss are more naturally forgotten—or at least silenced—than kept alive.⁷⁹ To recognize suffering that would otherwise be ignored, there must be "a political movement powerful enough . . . to counteract the ordinary social processes of silencing and denial."⁸⁰ Herman characterizes the recognition of trauma in

75. See Ruth Leys, *Trauma: A Genealogy* 294–97 (2000) (criticizing Caruth's reading of Tancred as traumatized).

76. Amy Novak, *Who Speaks? Who Listens?: The Problem of Address in Two Nigerian Trauma Novels*, 40 *Stud. Novel* 31, 32 (2008). The association of trauma and victimhood appears, fascinatingly, in the battle over abortion, as pro-life activists (and some Justices of the Supreme Court) have seized on the idea of post-abortion trauma as a reason to limit access to abortion. In this narrative, women are victims of their own abortions and need to be protected from that experience. See *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007) ("Whether to have an abortion requires a difficult and painful moral decision . . . [which] some women come to regret . . ." (citation omitted)); Suk, *supra* note 63, at 1196 (discussing concerns that Supreme Court's "talk of protecting women from psychological harm caused by their own decisions seems to recapitulate archaic, paternalistic ideas" about "women as emotionally unstable and lacking agency"); Emily Bazelon, *Is There a Post-Abortion Syndrome?*, *N.Y. Times Mag.* (Jan. 21, 2007), <http://www.nytimes.com/2007/01/21/magazine/21abortion.t.html> (on file with the *Columbia Law Review*) (discussing idea of post-abortion trauma).

77. See Novak, *supra* note 76, at 32 (describing Caruth as "reading[] . . . Tancred not as the perpetrator of trauma but as the victim of it").

78. Herman, *supra* note 58, at 9.

79. See Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering* 7, 10 (2001) (discussing refusal to acknowledge suffering); Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* 16 (1998) (suggesting perpetrators of atrocities seek to "blot[] out memories" of their crimes).

80. Herman, *supra* note 58, at 9; see also Fassin & Rechtman, *supra* note 71, at 282 (noting Toulouse residents were recognized as traumatized by the 2001 AZF factory

survivors of domestic violence as a consequence of the broader political successes of the feminist movement in raising awareness about violence against women.⁸¹ The same dynamic of political legitimacy facilitating recognition of trauma appeared to be at work for Vietnam War veterans. Acknowledgment of veterans' suffering was linked to the legitimacy of the antiwar movement and the association of those veterans with antiwar efforts.⁸² Indeed, as Derek Summerfield describes, PTSD was a "powerful and essentially political transformation," through which Vietnam veterans who had once been perceived as "perpetrators or offenders" became recognized "as people traumatized by roles thrust on them by the U.S. military."⁸³

Because recognition of trauma requires recognition of the subject as worthy of respect and attention, more sympathetic individuals will more likely succeed in establishing themselves as subjects of trauma. Accordingly, a lack of choice in bringing about the traumatic experience facilitates acceptance of the subject as worthy of recognition. In both of the above examples—the survivor of domestic violence and the survivor of the Vietnam War—the person suffering from trauma has had that trauma "thrust on them." Because they had little control or agency in the act that gave rise to the trauma, they merit empathy rather than blame.⁸⁴

Second, the predominant characterization of trauma as an experience of victims stems from the understanding in trauma studies of trauma and healing as corresponding to silence and voice. Trauma is an

explosion, but factory workers, who were "stigmatized by the disaster, . . . were not fully accorded this status").

81. Herman, *supra* note 58, at 30.

82. Edgar Jones & Simon Wessely, *Shell Shock to PTSD: Military Psychology from 1900 to the Gulf War 130* (2005) ("Having identified what they believed to be the delayed effects of trauma, anti-war campaigners . . . lobbied determinedly for an end to the war."). In *Interviews with My Lai Veterans and Winter Soldier*, Vietnam War veterans talk about the killing, rape, and torture of civilians and of prisoners and reveal the suffering they have experienced as a result. In their stance against the war, however, these films suggest that these perpetrators are also victims, victims of a system in which the powerful continued to prosecute an immoral and inadvisable war and forced the vulnerable to fight, whether because of the draft or because of poverty and lack of opportunity. See *Interviews with My Lai Veterans* (Laser Film Corporation 1970); *Winter Soldier* (Winterfilm Collective, 1972).

83. Derek Summerfield, *The Invention of Post-Traumatic Stress Disorder and the Social Usefulness of a Psychiatric Category*, 322 *Brit. Med. J.* 95, 95 (2001).

84. *Id.* (arguing that recognizing trauma in Vietnam veterans "legitimized their 'victimhood' [and] gave them moral exculpation"). This dynamic might be connected to a third factor in the connection between victimhood and trauma: the notion that victims are a "moral beacon," because "suffering results in accelerated moral development." Marie Smyth, *Putting the Past in Its Place: Issues of Victimhood in Northern Ireland's Peace Process*, in *Burying the Past: Making Peace and Doing Justice After Conflict* 125, 141 (Nigel Biggar ed., 2003); see also Laurence Mordekhai Thomas, *Suffering as a Moral Beacon: Blacks and Jews*, in *The Americanization of the Holocaust* 198, 202–11 (Hilene Flanzbaum ed., 1999) (discussing notion of suffering as moral beacon). If suffering is associated with moral standing, then it is more difficult to acknowledge suffering in immoral actors such as murderers.

event that exists as an absence; because “the observing and recording mechanisms of the human mind are temporarily knocked out” when the trauma occurs, that event represents “a record that has yet to be made.”⁸⁵ In various formulations, trauma is described as “a blockage,”⁸⁶ “anti-narrative,”⁸⁷ or a “violent event [that] occur[s] as an absolute inability to know it.”⁸⁸ Reflecting that same sense of trauma as absence, architect Daniel Libeskind relies on the imagery of voids in his work on Holocaust memorials.⁸⁹ These interpretations of trauma call for subjects to reclaim their voices in order to transform traumatic experiences into experiences that are incorporated into one’s consciousness and thereby freed of their painful symptoms.⁹⁰ They demand also that wider audiences recall and acknowledge the source of the trauma.⁹¹ To cure the trauma and transform it into a lived experience, one that is controlled in memory rather than controlling, it must be recognized, made legible, spoken of, heard.

On its own, this understanding of trauma does not necessitate an association with victims rather than perpetrators of crimes. But when coupled with the political dynamics of trauma recognition hinging on the legitimacy of the subject, the hurdles to acknowledging trauma on the part of a murderer become clearer. In domestic law, we have become more accustomed to accepting that such a person experienced some suffering in childhood—abuse by a family member, a parent’s addiction, extreme deprivation or loss—that contributed to his criminal wrongdoing later in life.⁹² But it is quite another thing to suggest that the

85. Dori Laub, *Bearing Witness, or the Vicissitudes of Listening*, in Felman & Laub, *supra* note 45, at 57, 57.

86. Brian Diemert, *Checking Out*, in *Trauma and Romance in Contemporary British Literature* 216, 217 (Jean-Michel Ganteau & Susana Onega eds., 2013).

87. Roger Luckhurst, *The Trauma Question* 79 (2008).

88. Cathy Caruth, *Traumatic Awakenings*, in *Violence, Identity, and Self-Determination* 208, 208 (Hent de Vries & Samuel Weber eds., 1997).

89. See Daniel Libeskind, *Trauma*, in *Image and Remembrance: Representation and the Holocaust* 43, 44–45 (Shelley Hornstein & Florence Jacobowitz eds., 2003).

90. See Caruth, *Unclaimed Experience*, *supra* note 33, at 2–3 (discussing role of voice in understanding trauma); LaCapra, *Writing History*, *supra* note 32, at 86 (discussing victim testimonies).

91. See Janet Walker, *The Traumatic Paradox: Documentary Films, Historical Fictions, and Cataclysmic Past Events*, 22 *Signs* 803, 806 (1997) (“We have an ethical and political obligation to remember, acknowledge constantly, and deal with traumatic events of the past.”).

92. See *Brewer v. Quarterman*, 550 U.S. 286, 295–96 (2007) (deciding defendant had right to present history of depression and childhood abuse to jury at trial); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 259 (2007) (deciding defendant’s “evidence of childhood deprivation and lack of self-control” was relevant to jury’s determination of moral culpability for purposes of deciding whether to impose capital punishment); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 *Colum. L. Rev.* 1538, 1565 (1998) (analyzing results of interviews of jurors regarding views on aggravating and mitigating factors at sentencing); Sarah Elizabeth Richards, *How to Humanize a Killer*, *Salon* (June 7, 2006, 9:00 AM), http://www.salon.com/2006/06/07/mitigation_specialists/ (on file with the *Columbia Law Review*) (reporting on work of mitigation specialists). But see

murderer suffers from trauma on account of the murder itself. Even if we accept in theory that the person suffers on account of the crime he has committed, the configuration of trauma as an experience of victims prompts us to think that even if that is possible, or even if it is true, there is no good reason to talk about it. The traumatic suffering of the murderer is of no concern.⁹³

The context of mass atrocity further amplifies the connection between trauma and victims, exacerbating the incongruity of perpetrator trauma. In genocide and other mass crimes, victims are individuals not only who have suffered unjustifiably, but also who have been silenced by history, to paraphrase Shoshana Felman.⁹⁴ They have been killed or disappeared or muted by fear or by shame; their experiences are denied, covered up, ignored. To right the wrongs they have suffered requires restoring their voice and enabling them to bear witness to the horrors they have endured. Perpetrators, in contrast, have no need to bear witness; they are the ones who have controlled the narrative and silenced the oppressed. Reading trauma as entangled both with a right to be heard and with the privilege of witnessing, then, renders perpetrator trauma if not unfathomable, then at least unworthy. Unworthy, that is, unless the perpetrator is also a victim.

II. PERPETRATORS IN COURTROOMS, PERPETRATORS ON CAMERA

The notion that only victims, and not perpetrators, experience violent crimes as trauma resonates in the law of mass atrocity, with claims of trauma framed (when they do, on occasion, appear) within claims of victimhood. Perpetrators do speak about their crimes, but their reflections are cabined and constrained, not only by courtroom procedure, but

Elizabeth Beck et al., *In the Shadow of Death: Restorative Justice and Death Row Families* 72 (2007) (“[M]ost media coverage of capital offenders paints them in simple terms, such as monster Too often, issues such as mental illness and addiction are demonized rather than explained.”).

93. Other kinds of suffering on the part of the murderer, however, are of greater interest. Indeed, retributivism is built around the idea that there is value in the perpetrator suffering on account of his criminal wrongdoing. Victor Tadros, *The Ends of Harm: The Moral Foundations of Criminal Law* 25–27 (2011) (“The idea that wrongdoers deserve to suffer in proportion to the wrong they have committed is a central component of what is commonly called a *retributivist* view of punishment.”); see also Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 195 (W. Hastie trans., Augustus M. Kelley Publishers 2d ed. 1974) (1887) (“Juridical Punishment . . . must in all cases be imposed only because the individual on whom it is inflicted *has committed a crime*.”). Remorseful suffering that is “empathic and oriented to the other rather than to the offender’s own emotional pain” is seen as valuable to the victim, or as a sign of the transformation of the perpetrator, whereas “[s]uffering that is suspected to be self-serving or self-oriented is antithetical to the judicial perception of how true remorse should be demonstrated.” Richard Weisman, *Showing Remorse: Law and the Social Control of Emotion* 36 (2014).

94. See Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* 126–27 (2002) (“[H]istory by definition silences the victim . . .”).

also by the epistemological assumptions about perpetrators that greet their words.

This Part, accordingly, begins by providing a sketch, synthesized from across cases and courtrooms, of the ways that perpetrators in the hallowed halls of accountability—trials and truth commissions, that is—typically describe their relationships with their crimes: stories of remorse, of pride, and of justification, and sometimes of more than one.⁹⁵ This Part then unearths the few cases in which perpetrators have characterized themselves as traumatized by their criminal acts, finding in those cases a consistent framing of the perpetrator as a victim, and a rejection of the idea that a perpetrator could experience trauma without that experience of victimization.

It then turns to an alternate reality, the world of *The Act of Killing*, where the bright glare of impunity allows perpetrators to shine in the sun while victims hide in the shadows, nowhere to be heard.⁹⁶ There is immense occasion for shock and for horror in the film, as has been observed widely in commentary since its release.⁹⁷ What has yet to be noticed, however, and what makes the film so powerful for those who are interested more broadly in how and why atrocities take place, and how they may be stopped, is its depiction of a perpetrator who both exercised full agency in committing his crimes—who embraces his crimes and even takes pride in them—and nonetheless experiences those crimes as trauma. In *The Act of Killing*, the perpetrator is traumatized by his acts, but he is undoubtedly not a victim.

A. *Perpetrators' Reflections on Their Crimes*

1. *Remorse.* — Polish poet Wislawa Szymborska succinctly offers an explanation for the privilege accorded to remorse in life and in the law: “On this third planet from the sun / among the signs of bestiality / a

95. The lack of variety in these depictions might be attributed in part to the limits of courtroom procedure. There is little opportunity—or reason—for a perpetrator to address his own suffering in the courtroom. Because the possibility of conviction looms, accused persons may be dissuaded from testifying at all. Beyond that, even when they do choose to testify, their statements are bound to focus more on their crimes themselves than on their current relationship to those crimes. Still, perpetrators could raise the issue of trauma at sentencing, but they almost never do. See Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* 396–99 (2010) (addressing mitigation at sentencing); see also Paul H. Robinson et al., *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 *Vand. L. Rev.* 737, 743–47 (2012) (discussing consideration at sentencing in U.S. courts of “[o]ffender [r]eaction to the [o]ffense,” including acknowledgement of guilt, remorse, and apology).

96. The impunity depicted in *The Act of Killing*—and the absence of victims in the film—provides a stark contrast with what Shoshana Felman described as “a *conceptual revolution in the victim*,” which made “the victim’s story *happen* for the first time.” Felman, *supra* note 94, at 126.

97. See Schnack, *supra* note 24 (describing reactions to *The Act of Killing*).

clear conscience is Number One.”⁹⁸ Szymborska taps into a common intuition that human beings differ from the animals with whom we share the earth because of our capacity for conscience, our ability not only to know right from wrong, but also to feel regret for having made the wrong choice between the two. Szymborska does not merely recognize this difference; she praises it.

Szymborska is not alone in extolling remorse. The law, too, customarily regards remorse as particularly valuable for both the offender and the offended.⁹⁹ In international criminal law, remorse is a mitigating factor that frequently operates to reduce defendants’ sentences.¹⁰⁰ Perhaps because of the reward for expressing remorse, many defendants in international criminal courts have expressed contrition for their crimes.¹⁰¹ These statements are often emotional and sweeping;

98. Wislawa Szymborska, In Praise of Feeling Bad About Yourself, *in* *Poems New and Collected 1957–1997*, at 168, 168 (1998).

99. See Austin Sarat, Remorse, Responsibility, and Criminal Punishment, *in* *The Passions of Law* 168, 168 (Susan A. Bandes ed., 1999) (“Traditionally, law has encouraged remorse by rewarding it.”); see also R. A. Duff, Punishment, Communication, and Community 94–96 (2001) (discussing value of apology for reconciliation).

100. See Barbara Hola, Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law, *Amsterdam L.F.*, Fall 2012, at 3, 20 (“Expression of remorse is a mitigating factor frequently accepted by ICTY and ICTR judges . . .”); James Meemik & Kimi King, The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis, 16 *Leiden J. Int’l L.* 717, 745 (2003) (evaluating impact of remorse and other mitigating factors in ICTY). In the ICTY and ICTR, only a sincere expression of remorse will be considered as mitigation. See *Prosecutor v. Rugambarara*, Case No. ICTR-00-59-T, Sentencing Judgement, ¶ 33 (Nov. 16, 2007), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-00-59/trial-judgements/en/071116.pdf>; *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgement, ¶ 715 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), <http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf>; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgement, ¶ 705 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004), <http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf>; see also *Prosecutor v. Nzabirinda*, Case No. ICTR-2001-77-T, Sentencing Judgement, ¶ 69 (Feb. 23, 2007), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-01-77/trial-judgements/en/070223.pdf>; *Prosecutor v. Serugendo*, Case No. ICTR-2005-84-I, Judgement and Sentence, ¶ 63 (June 12, 2006), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-05-84/trial-judgements/en/120606.pdf>; *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement, ¶ 1087 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003), <http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf>.

101. See, e.g., *Nzabirinda*, Case No. ICTR-2001-77-TT, Sentencing Judgement, ¶ 70; *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, Judgement and Sentence, ¶ 126 (Apr. 13, 2006), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-00-60/trial-judgements/en/060413.pdf>; *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶ 71 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003), <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>; *Prosecutor v. Todorović*, Case No. IT-95-9/1-S, Sentencing Judgement, ¶ 92 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2001), <http://www.icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf>; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 775 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>; Transcript of Sentencing Hearing at 609, *Prosecutor v. Plavšić*, Case No. IT-00-39&40/1-S (Int’l Crim.

defendants voice regret not only for the wrongs they have committed themselves, but also for the crimes of their compatriots, both present and past. For example, Dragan Nikolić, a Serbian charged with war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY), told the court of the “repentance and contrition” that were “deep inside” him. He apologized not only to those who had been in the detention camp that he commanded, but also to those who had never been there, those “now scattered all over the world as a result of the conflict.”¹⁰²

Nikolić’s co-defendant, Dragan Obrenović, tied his own admission of guilt to the *raison d’être* of the ICTY itself—vitiating collective guilt by assigning individual responsibility and, ultimately, preventing such crimes from ever happening again. Obrenović’s statement of remorse was long, eloquent, and, it seems, elegantly crafted by his lawyer. An excerpt offers a hint of the tone:

I am to blame for everything I did at that time I am also to blame for what I did not do, for not trying to protect those prisoners Thousands of innocent victims perished. Graves remain behind, refugees[,] general destruction and misfortune and misery. I bear part of the responsibility for this My testimony and admission of guilt will also remove blame from my nation because it is individual guilt, the guilt of a man named Dragan Obrenović. I stand by this. I am responsible for this. The guilt for this I feel remorse and for which I apologise to the victims and to their shadows[.] I will be happy if this contributed to reconciliation in Bosnia, if neighbors can again shake hands, if our children can again play games together, and if they have the right to a chance It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world.¹⁰³

Obrenović’s statement reminds the audience of the purpose of remorse, the reason that it is prized at sentencing: It may contribute to reconciliation. We might imagine a host of reasons to value—indeed, to incentivize—an expression of remorse. Stephanos Bibas and Richard

Trib. for the Former Yugoslavia Dec. 17, 2002), available at <http://www.icty.org/x/cases/plavsic/trans/en/021217IT.htm> (on file with the *Columbia Law Review*); Transcript of Sentencing Hearing at 185–93, *Prosecutor v. Erdemović*, Case No. IT-96-22-T (Int’l Crim. Trib. for the Former Yugoslavia Nov. 19, 1996) [hereinafter *Erdemović Transcript*], available at <http://www.icty.org/x/cases/erdemovic/trans/en/961119IT.htm> (on file with the *Columbia Law Review*).

102. Transcript of Sentencing Proceedings at 501, *Prosecutor v. Nikolić*, Case No. IT-94-2-S (Int’l Crim. Trib. for the Former Yugoslavia Nov. 6, 2003), available at http://www.icty.org/x/cases/dragan_nikolic/trans/en/031106ED.htm (on file with the *Columbia Law Review*).

103. Transcript of Sentencing Proceedings at 1556–57, *Prosecutor v. Obrenović*, Case No. IT-02-60/2 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 30, 2003), available at <http://www.icty.org/x/cases/obrenovic/trans/en/031030ED.htm> (on file with the *Columbia Law Review*).

Bierschbach observe that judges in U.S. courts believe that expressions of remorse “indicate that an offender is not ‘lost,’ that he has some self-transformative capacity that justifies (or requires) a lesser punishment.”¹⁰⁴ The remorseful defendant, accordingly, might be able to rehabilitate without as much intervention by the state.¹⁰⁵ In international courts, remorse is more often tied to the possibility of reconciliation, as an expression of remorse might convince victims that their suffering has been acknowledged and that they can move past the harms that the perpetrator inflicted on them.¹⁰⁶ Statements of remorse are thus spoken to the public. They are not merely announcements of the defendants’ change of heart; they are performances, designed for consumption, directed outward far more than inward.¹⁰⁷

2. *Pride*. — At the opposite end of the spectrum, defendants occasionally reflect on their crimes with pride. Perhaps the quickest example to come to mind is the brazen performance of former Serbian President Slobodan Milošević, who, acting as his own lawyer before the ICTY, secured far more airtime than the average defendant. On trial for war crimes, crimes against humanity, and genocide, Milošević used the trial to launch an attack on the court and on the West more generally. Observers described Milošević as a skillful and shrewd attorney, one who

104. Stephanos Bibas & Richard A. Bierschbach, Integrating Remorse and Apology into Criminal Procedure, 114 *Yale L.J.* 85, 94–95 (2004).

105. *Id.* at 95.

106. See *Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgement, ¶¶ 73–81 (discussing value of remorse in reconciliation). After expressing remorse at trial and receiving a light prison sentence as a result, Plavšić asserted that she “ha[d] done nothing wrong.” Daniel Uggelberg Goldberg, *Bosnian War Criminal: “I Did Nothing Wrong,” Local* (Jan. 26, 2009, 14:57 GMT+01:00), <http://www.thelocal.se/20090126/17162> (on file with the *Columbia Law Review*). Observers at the time of Plavšić’s statement of remorse were split on the question of its sincerity. Compare Slavenka Drakulić, *The False Repentance of Biljana Plavšić*, *Eurozine* (Oct. 23, 2009), <http://www.eurozine.com/articles/2009-10-23-drakulic-en.html> (on file with the *Columbia Law Review*) (reflecting on credibility of Plavšić’s remorse), with Jelena Subotić, *The Cruelty of False Remorse: Biljana Plavšić at The Hague*, 36 *Southeastern Eur.* 39, 46 (2012) (discussing reactions of individuals who did not believe Plavšić’s expressions of remorse).

107. See Carol Sanger, *The Role and Reality of Emotions in Law*, 8 *Wm. & Mary J. Women & L.* 107, 111 (2001) (observing existence of “an array of officially approved emotions” in legal processes and noting that at sentencing “[t]here is no question about what the convicted defendant . . . is supposed to express,” as he “can put on a great show of remorse and be rewarded for the display”); see also Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* 148–49 (2004) (discussing possibility that perpetrator “knows that the right response is to perform compassion and contrition”). As if to make clear their design for outside consumption, the ICTY makes available all of these statements by defendants who have pleaded guilty on one website. See *Statements of Guilt*, UN ICTY, <http://www.icty.org/sid/203> (on file with the *Columbia Law Review*) (last visited Mar. 9, 2015).

might even succeed in making his case.¹⁰⁸ A New York Times reporter commented that “[e]ven among experts who loathe Mr. Milošević, there [we]re worries over whether the proceedings may look like victors’ justice.”¹⁰⁹ As much as Milošević’s swagger sought to mock the court, however, he continued to deny his crimes. He played the victim, an honorable leader framed by the lies of Western governments and media.¹¹⁰ As far as Milošević was concerned, he had done nothing wrong.

Vojislav Šešelj, in contrast, has embraced the acts that the ICTY describes as his crimes; the defiance that he has shown during his trial—which has yet to reach a verdict after nearly eight years¹¹¹—makes Milošević appear compliant in comparison. Charged, among other things, with inciting violence, Šešelj does not deny that he used inflammatory speech during the war, but he insists that his behavior was typical of any leader. Šešelj, formerly the deputy prime minister of Serbia, asserted, “[P]articipation in war is not a crime. Making a contribution to the Serbian war efforts is not a crime.”¹¹² During his closing arguments, he noted that at more than one hundred rallies, he had quoted the lines of one of his favorite songs. He called out to the courtroom: “To armed citizens, let’s form battalions, advance and advance, and let the soiled blood fill the traces of our steps.”¹¹³ Turning to the Chief Judge, Jean-Claude Antonetti of France, he remarked, “I’m sure that you have recognized the verses as soon as I started reciting them. This is the French national anthem.”¹¹⁴ Šešelj took no pains to deny what he had done; instead, he was proud—what he did was normal, what anyone in his position would do and

108. See, e.g., Yuval Shany, *The Legitimacy Paradox of Self-Representation*, in *The Milošević Trial: An Autopsy* 174, 176 (Timothy William Waters ed., 2013) (discussing tension between right to self-representation and Milošević’s attempts to undermine ICTY).

109. Ian Fisher, *Trial of Milosevic Will Peel Layers of Balkan Guilt, Too*, N.Y. Times (Feb. 11, 2002), <http://www.nytimes.com/2002/02/11/world/trial-of-milosevic-will-peel-layers-of-balkan-guilt-too.html> (on file with the *Columbia Law Review*).

110. Gary J. Bass, *Milošević in The Hague*, *Foreign Aff.*, May/June 2003, at 82, 90–91 (describing Milošević’s claim that atrocities “were faked”); Joseph Lelyveld, *The Defendant*, *New Yorker*, May 27, 2002, at 82, 85 (“[T]here has never been an accused so deeply committed to his own sense of victimization.”). Milošević died before the end of the trial. *The Trial: IT-02-54, Prosecutor v. Milošević*, in *The Milošević Trial: An Autopsy*, supra note 108, at 53, 71.

111. See Marlise Simons, *Serb Nationalist’s Trial Begins in The Hague*, N.Y. Times (Nov. 8, 2007), <http://www.nytimes.com/2007/11/08/world/europe/08hague.html> (on file with the *Columbia Law Review*) (reporting on initiation of trial); see also Case Information Sheet, Vojislav Šešelj, http://www.icty.org/x/cases/seselj/cis/en/cis_seselj_en.pdf (on file with the *Columbia Law Review*) (last visited Apr. 2, 2015) (detailing proceedings).

112. Transcript at 17,489, *Prosecutor v. Šešelj*, Case No. IT-03-67-T (Int’l Crim. Trib. for the Former Yugoslavia Mar. 20, 2012), available at <http://www.icty.org/x/cases/seselj/trans/en/120320IT.htm> (on file with the *Columbia Law Review*).

113. *Id.* at 17,490–91.

114. *Id.* at 17,491; Marlise Simons, *As a Defendant Bullies and Boasts, Questions Arise on a Court’s Limits*, N.Y. Times (Apr. 16, 2012), <http://www.nytimes.com/2012/04/17/world/europe/in-the-hague-a-debate-on-grandstanding.html> (on file with the *Columbia Law Review*).

should do. “This is the way one speaks when we are at war,” Šešelj proclaimed.¹¹⁵ “We are not supposed to commend the enemy.”¹¹⁶ He questioned the very basis for the charges as he embraced his actions: “[A]m I on trial because I’m not a peacemaker? Because I’m not a peace-loving person? . . . I am not a peace-loving person. Am I on trial because I am an aggressive person [and] I have an aggressive character? It’s my right to be aggressive.”¹¹⁷

At times, pride bubbles up to the surface unexpectedly, perhaps accidentally. In what is described as one of the most chilling moments in the course of the South African Truth and Reconciliation Commission (TRC), police officer Jeffrey Benzien not only demonstrated the “wet bag” method of torture for which he was famous, but also betrayed the regard he continued to have for its cruel efficiency—despite the shame that he claimed to feel about his career as a torturer and murderer.¹¹⁸ Indeed, when Tony Yengeni—who had been tortured by Benzien—asked Benzien to demonstrate how he used the wet bag, Benzien readily complied with the request.¹¹⁹

The scene astonishes. After warning the audience that he “may not be as agile as what [he] was then,”¹²⁰ Benzien sat astride a volunteer from the room who offered to play the victim. Benzien held a blue pillowcase over the victim’s head, looking up at the Commissioners to answer their questions—and, it seemed, to win their approval. One of the Commissioners complained that he did not have a proper view; another responded, “We will just have to stand and have a look.”¹²¹ Simply recounting these words from the transcript of the hearing, however, fails to convey what happened there. On paper, it is only a series of technical questions—“Will you just show how you release it?” “Sorry, could we put on record, I think you pull the bag down and then tight about his neck?”¹²² But in photographs and video, the strangeness of the moment is amplified, making clear the muscle memory that guided Benzien.¹²³

115. Transcript at 17,491, Prosecutor v. Šešelj, Case No. IT-03-67-T (Int’l Crim. Trib. for the Former Yugoslavia Mar. 20, 2012), available at <http://www.icty.org/x/cases/seselj/trans/en/120320IT.htm> (on file with the *Columbia Law Review*).

116. *Id.*

117. *Id.*

118. Transcript, Benzien Hearing, Part 3, S. Afr. Truth & Reconciliation Comm’n (Oct. 20–21, 1997), http://www.justice.gov.za/trc/amntrans%5Ccapetown/capetown_benzi3.htm [hereinafter Benzien Hearing, Part 3] (on file with the *Columbia Law Review*); Transcript, Benzien Hearing, Part 1, S. Afr. Truth & Reconciliation Comm’n (July 14, 1997), http://www.justice.gov.za/trc/amntrans/capetown/capetown_benzi1.htm [hereinafter Benzien Hearing, Part 1] (on file with the *Columbia Law Review*).

119. Benzien Hearing, Part 1, *supra* note 118.

120. *Id.*

121. *Id.*

122. *Id.*

123. For video recording of parts of the hearing, see Truth Commission Special Report: Episode 57 (SABC television broadcast July 20, 1997), available at

The scene stands in stark contrast to the rest of the hearing, during which Benzien repeatedly stated that he could not remember whom he tortured, when he tortured them, where he tortured them, or why he tortured them.¹²⁴ In the moment of reenactment, in contrast, the memory of his body was vivid and clear. And he made no effort to deny that memory, no effort to hide the very act that he claimed was shameful. Instead, he performed it willingly, the words “Truth, the Road to Reconciliation” singing out from a banner behind the commissioners’ desk as cameras flashed and video rolled.¹²⁵

Moreover, Benzien’s eager recreation of the crimes seemed to trigger his ability to remember details about *how* he tortured, and he remembered them proudly. He seemed to boast throughout his amnesty hearing that the “wet bag” method always managed to break the victim within thirty minutes.¹²⁶ After the reenactment, Benzien reminded Yengeni of how quickly Yengeni had caved to the torture and disclosed the whereabouts of another anti-apartheid activist. Benzien even took credit for Yengeni’s own status as a victim rather than a perpetrator: “Mr. Yengeni, with my absolutely unorthodox methods and by removing your weaponry from you, I am wholly convinced that I prevented you . . . from being branded [a] murderer nowadays.”¹²⁷

What is to be made of these expressions of pride? According to Yazir Henry, another activist who was brutalized by the police under the apartheid regime in South Africa, Benzien “continued to torture” his victims during his hearing before the Commission; in his words and deeds, he maintained his control over them and subjected them to his violence once again.¹²⁸ But in another view, the image of Benzien,

<http://sabctr.saha.org.za/tvseries/episode57/playlist.htm> (on file with the *Columbia Law Review*). For photographs of the hearing, see Benzine [sic] and Wetbag Torture Demo, 1994, S. Afr. Hist. Online, <http://www.sahistory.org.za/content/trc-benzine-and-wetbag-torture-demo-1994> (on file with the *Columbia Law Review*) (last visited Mar. 9, 2015); Truth and Reconciliation Commission, Univ. of Cape Town, <http://www.specialcollections.uct.ac.za/20-years/truth-reconciliation-commission> (on file with the *Columbia Law Review*) (last visited Mar. 9, 2015).

124. See Benzien Hearing, Part 1, supra note 118 (“Due to a lack of recollection, inter alia due to a lapse of time, I can’t remember exactly who, where and why I arrested and questioned people.”).

125. See Benzine and Wetbag Torture Demo, supra note 123 (posting photograph of Benzien demonstrating “wet bag” method).

126. See Benzien Hearing, Part 1, supra note 118 (“All the abovementioned members of the liberation movement provided us with the necessary information within one [wet-bag] session, which never lasted longer than half an hour.”).

127. *Id.*

128. Yazir Henry, *Where Healing Begins*, in *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* 166, 171 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000). Yengeni was so troubled by Benzien’s allegations about how Yengeni turned on Jonas that he testified again to the Commission to clarify that he had not turned on his colleagues during his detention. Yengeni Refutes Suggestions Betrayal, S. Afr. Press Ass’n (Oct. 21, 1999), <http://www.justice.gov.za/trc/media/1999/9910/p991021a.htm> (on file with the *Columbia Law Review*); see also Transcript, Siyali Hearing, S. Afr. Truth and

displaying not only his utter cruelty, but also his embrace of that cruelty, was a victory for the Commission. The weekly South African news wrap-up on the proceedings declared that in that hearing, “the torturer . . . was confronted by the tortured.”¹²⁹ But it was not merely the confrontation that made this moment a triumph; it was also the confirmation of Benzien’s crime. Yengeni could sit back, satisfied that the man who had waved death in front of his eyes had shown himself to the world for what he really was.

3. *Rationalization.* — While a few defendants express unmitigated remorse or unmitigated pride, most fall somewhere in between, with only shades of those two extremes occasionally showing themselves.¹³⁰ The vast majority of defendants who speak about their crimes do so in terms that aim to rationalize their acts—to justify them as the right thing to do or to excuse them as forgivable or understandable in light of the circumstances. They might express remorse at the same time that they rationalize those acts, as did Drazen Erdemović, who both apologized for taking part in a firing squad that killed over a thousand people and explained that he did so because he would have been killed had he refused.¹³¹

For other defendants, the rationalization is implicit. Pleading guilty to crimes against humanity in the International Criminal Tribunal for Rwanda (ICTR), Paul Bisengimana stated that he had “failed in his duty to protect human life and that he did not show the courage that his citizens expected” of him.¹³² Bisengimana, however, expressed remorse not for those failures, but rather for “not having *been able*” to save lives.¹³³ Bisengimana, who had been a mayor of the commune of Gikoro in Rwanda during the genocide, seems to attribute his failure not to his choice, but to his capabilities; in his telling, there was nothing he could have done. Another local leader, Vincent Rutaganira, also framed his apology in terms of capability rather than choice: “I regret not being able to save the people who were at the church” in Kibuye, where some five

Reconciliation Comm’n (Oct. 21, 1999), http://www.justice.gov.za/trc/amntrans/1999/99101828_ct_991021.htm (on file with the *Columbia Law Review*) (documenting statement by South African policeman Patrick Siyali suggesting Yengeni led police to Jonas and subsequent questioning by Yengeni of Siyali in effort to confirm Yengeni’s innocence of the allegation).

129. Transcript, *Truth Commission Special Report: Episode 57* (SABC television broadcast July 20, 1997), <http://sabctr.c.saha.org.za/tvseries/episode57/section1/transcript2.htm> (on file with the *Columbia Law Review*).

130. See Murray Edelman, *Constructing the Political Spectacle* 5–6 (1988) (“Only in bad novels and comic books do characters knowingly do evil and boast of it. In life, people rationalize their actions in moral terms . . .”).

131. See Erdemović Transcript, *supra* note 101, at 185–93.

132. *Prosecutor v. Bisengimana*, Case No. ICTR-00-60-T, Judgment and Sentence, ¶¶ 137–138 (Apr. 13, 2006), <http://www.unict.org/sites/unict.org/files/case-documents/ictr-00-60/trial-judgements/en/060413.pdf>.

133. *Id.* (emphasis added).

thousand people were murdered on Rutaganira's orders.¹³⁴ In the ICTY, Pavle Strugar apologized, rather distantly, for "all human casualties and for all the damage caused," for "all the victims, all the people who were killed in Dubrovnik, as well as for all those young soldiers killed" in Srd, where he had ordered an attack, "as well as in other areas and positions."¹³⁵ Strugar did not apologize for what he did or failed to do; instead, he was "sorry that [he] was unable to do anything to stop and prevent all that suffering."¹³⁶

4. *Trauma*. — Perpetrators of mass atrocity thus have varied relationships with their crimes after the fact. They may regret them or embrace them; they may see themselves as having had no choice, or they may see themselves as responsible for horrible choices. Perhaps because these reactions are so common, they are well studied. Scholars have devoted much attention to remorse and apology, to justifications and excuses, and, of course, to the rare defendant who continues to embrace his crimes in the courtroom.¹³⁷ Very little attention has been paid, in contrast, to the perpetrators who cast themselves as traumatized.¹³⁸ Accordingly, this Section gathers those few instances in which perpetrators have spoken of, and authorities have evaluated, their trauma.

There are, indeed, only a few. In proceedings before the ICTY, Erdemović detailed the anguish that he felt after he participated, at the barrel of a gun, in the massacres at Srebrenica. He could not sleep, he

134. Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgement and Sentence, ¶ 157 (Mar. 14, 2005), <http://www.unict.org/sites/unict.org/files/case-documents/ict-95-1c/trial-judgements/en/050314.pdf>. The trial chamber still found the expression of remorse sufficient for mitigation. Id. ¶ 158. Rutaganira was released from prison in 2008. Press Release, Vincent Rutaganira Released After Completing His Sentence, Int'l Crim. Trib. for Rwanda (Mar. 3, 2008), <http://www.unict.org/en/news/Vincent-rutaganira-released-after-completing-his-sentence> (on file with the *Columbia Law Review*).

135. Transcript at 8808, Prosecutor v. Strugar, Case No. IT-01-42 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 9, 2004), available at <http://www.icty.org/x/cases/strugar/trans/en/040909IT.htm> (on file with the *Columbia Law Review*).

136. Id. The trial court accepted Strugar's apology as sincere but noted its disagreement with Strugar's assessment that he was unable to do anything to stop the suffering. Prosecutor v. Strugar, Case No. IT-01-42, Judgement, ¶ 471 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005), <http://www.icty.org/x/cases/strugar/tjug/en/str-tj050131e.pdf>.

137. E.g., Elies van Sliedregt, *Individual Criminal Responsibility in International Law* 213–67 (2012) (discussing defenses in international criminal law); Arne Johan Vetlesen, *Evil and Human Agency: Understanding Collective Evil* 178 (2005) (describing Serbian politicians' creation of "atmosphere of fear" in which Serbs saw themselves as "innocent victims of aggression" and thus could "tak[e] pride in the killing of the 'original' sinners"); Alan Tieger, *Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia*, 16 *Leiden J. Int'l L.* 777, 779–84 (2003) (discussing impact of remorse on sentencing in ICTY).

138. For a rare mention of perpetrator trauma in international courts, see Sylvia D'Ascoli, *Sentencing in International Criminal Law* 170 (2011) (reflecting on small number of cases in which defendant's mental suffering is addressed).

wanted to drink, he sent his wife and child away from him.¹³⁹ In the court's view, these experiences underscored the remorse that he repeatedly expressed. Erdemović was the ideal defendant to benefit from a statement about his mental suffering.¹⁴⁰ He was, if not a victim, then at least not a fully autonomous agent, in the court's view; because he had a gun to his head, he had no choice but to kill.¹⁴¹ In other cases, defendants have sought to present themselves in the image of victim, but have done so unsuccessfully. Dragan Kolundžija argued in the ICTY that he suffered from PTSD as a result of his time as a guard at the Keraterm detention camp in Prijedor, Bosnia. He told the court that he was "a victim of his service at Keraterm, just as the other people who were inmates there were victims."¹⁴² The claim was, not surprisingly, rejected.¹⁴³

Perhaps the most detailed discussion of perpetrator trauma in a mass atrocity setting took place in the South African TRC, during the hearings for Benzien, who claimed that he suffered from PTSD as a result of his crimes. The hearing's discussions around trauma reflect, again, an assumption that trauma befalls victims and victims only. Victims' lawyers challenged psychologists' testimony about Benzien's PTSD, asserting, for example, "that people that suffer from post-traumatic stress disorder are victims, they are not perpetrators who can stop the event at any time."¹⁴⁴

139. See Erdemović Transcript, supra note 101 ("I could not sleep . . . I started drinking. I just hated myself . . . I just wanted to drink . . . I told my wife to go back to her parents, to Tuzla, and to take our son with her.")

140. See Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, Sentencing Judgement 16–17 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf> (discussing Erdemović's remorse and experiences of post-traumatic stress); Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement ¶¶ 86, 96–98 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj961129e.pdf> (same).

141. See Mohamed, supra note 48, at 1652–58 (discussing Erdemović decision).

142. Transcript at 206, Prosecutor v. Sikirica et al., Case No. IT-95-8-PT (Int'l Crim. Trib. for the Former Yugoslavia Jan. 24, 2000), available at <http://www.icty.org/x/cases/sikirica/trans/en/000124SC.htm> (on file with the *Columbia Law Review*); see also id. at 207 (claiming Kolundžija suffers from PTSD and "acute psychological traumatic disorder" stemming from crimes he committed as guard commander at camp when 140 prisoners were murdered).

143. See Prosecutor v. Sikirica et al., Case No. IT-95-8-PT, Order on Motion of Accused Kolundžija for Access to Certain Confidential Materials (Int'l Trib. for the Former Yugoslavia Feb. 3, 2000), <http://www.icty.org/x/cases/sikirica/tord/en/00203EV511737.htm> (basing decision on Rule 75(d) of the Rules of Evidence and Procedure, concerning requests for confidential materials from another trial).

144. Benzien Hearing, Part 3, supra note 118 (presenting testimony of psychologist Ria Kotze attesting to Benzien's PTSD); Transcript, Benzien Hearing, Part 2, S. Afr. Truth & Reconciliation Comm'n (Oct. 20–21, 1997), http://www.justice.gov.za/trc/amntrans%5Ccapetown/capetown_benzi2.htm (on file with the *Columbia Law Review*) ("We're instructed on expert advice that the post-traumatic stress disorder which is the alleged cause of the amnesia [of Benzien] . . . is a condition which befalls people who are tortured or victims rather than perpetrators."); see also Fear of TRC Appearance May Have Triggered Benzien's Breakdown, S. Afr. Press Ass'n (Oct. 21, 1997), <http://www.justice.gov.za/trc/media%5C1997%5C9710/s971021a.htm> (on file with the *Columbia Law Review*) (describing

They attributed this affiliation between trauma and victims to the role of choice—or rather a lack thereof—in an event that would give rise to PTSD: Those who suffer from PTSD “are helpless people who are faced with an event beyond their control.”¹⁴⁵ Psychologist Ria Kotze responded that she disagreed with this characterization, and she tried to insist that anyone—not only victims—could experience trauma. Ultimately, however, she conceded the point, stating that Benzien was a victim of “circumstances due to his work environment,” a “victim of his work duties,” and “a victim of the system.”¹⁴⁶ Benzien agreed: “I did terrible things, I did terrible things to members of the ANC, but as God as my witness, believe me, I have also suffered. I may not call myself a victim of Apartheid, but yes Sir, I have also been a victim.”¹⁴⁷

Although Benzien’s attempt to receive recognition for his trauma failed, at other moments the TRC explored, accepted, and acknowledged the existence of trauma on the part of perpetrators. It did so, however, in the context of perpetrators whom it also saw as victims.¹⁴⁸ For example, John Deegan, a member of the police counterinsurgency unit Koevoet, testified that in the years since leaving the unit his life had been governed by a “big element of self-destruction,” and he disclosed that he had “basically destroyed the people around [him], [his] friends and family.”¹⁴⁹ Deegan’s testimony, however, was delivered during a special hearing on conscription, a subject of concern in the TRC because the apartheid government’s system of compulsory military service for young white men had pulled so many into the state’s violence.¹⁵⁰ Framed thus as actions he undertook against his will, Deegan’s account of trauma was made more palatable to the audience around him. The chair of the hearing even welcomed the testimony on trauma and remarked that the hearing was being held in part to recognize those experiences of trauma

view of victims’ lawyer that “victims, and not perpetrators, of human rights violations suffered from [PTSD]”).

145. Benzien Hearing, Part 3, *supra* note 118.

146. *Id.*

147. Benzien Hearing, Part 1, *supra* note 118.

148. See Truth & Reconciliation Comm’n, 5 Truth and Reconciliation Commission of South Africa Report, ch. 4, ¶ 44 (1998) [hereinafter TRC Report Vol. 5], available at <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf> (on file with the *Columbia Law Review*) (“Some perpetrators may also be considered victims of gross human rights violations and there is a need to address their struggle to live with the consequences of their experiences and actions.”); *id.*, ch. 9, ¶ 26 (noting difficulties for ex-conscripts in coping with decriminalization of individuals they had killed because they had thought of them as enemies).

149. Transcript, Conscription Hearing, S. Afr. Truth & Reconciliation Comm’n (July 22, 1997), <http://www.justice.gov.za/trc/special/conscrip/conscrip03.htm> (on file with the *Columbia Law Review*).

150. Psychologist Trudy de Ridder also testified on trauma experienced by conscripts. TRC Report Vol. 5, *supra* note 148, ch. 9, ¶ 26.

on the part of people like Deegan.¹⁵¹ Individuals who were conscripted, obeying orders, threatened, or indoctrinated into the system of apartheid all fell into what the TRC identified as a “potential grey area”¹⁵² between perpetrator and victim. For perpetrators who also may be considered victims, the Commission wrote, “there is a need to address their struggle to live with the consequences of their experiences and actions.”¹⁵³

In contrast, the TRC did not acknowledge trauma outside of the context of victimhood, even though it stated in its formal recommendations that perpetrators require rehabilitation and treatment.¹⁵⁴ For example, separate from his testimony in the conscription hearing, Deegan disclosed in a written statement that he felt “guilt and horror” in dreams about the bodies he had harmed, about meeting the people he had shot.¹⁵⁵ In response to this statement, and to those of other individuals who claimed to experience trauma after they had committed violent acts against innocent people, the TRC noted in its final report that PTSD represents a condition of victims, not of perpetrators.¹⁵⁶ The report even went so far as to detail the “distinction between the perspectives of victims and the motives and perspectives of the persons responsible for the commission of the violations.”¹⁵⁷ The report explained that “[h]orror is usually seen in the victim’s terms,” whereas for the perpetrator the act “is often ‘a very small thing.’”¹⁵⁸ Reflecting a resistance to acknowledging perpetrator trauma, the report claimed, moreover, that “[p]erpetrators tend to have less emotions about their acts than do victims.”¹⁵⁹ Based on this perspective, it makes sense that the Commission restricted its definition of perpetrator trauma to situations in which perpetrators were victims of circumstances.

The assumption that only victims experience trauma pervades studies of mass atrocity outside of courts and truth commissions as well. Many studies of child soldiers, for example, have recognized that children who

151. Transcript, Conscription Hearing, S. Afr. Truth & Reconciliation Comm’n, *supra* note 149.

152. TRC Report Vol. 5, *supra* note 148, ch. 7, ¶¶ 53–54. The Commission was careful to note, however, that recognizing the position of certain individuals as both perpetrators and victims “should not be regarded as absolving perpetrators of responsibility for their deeds.” *Id.* ¶ 54.

153. *Id.* ch. 4, ¶ 44; see also Truth & Reconciliation Commission of South Africa Report, ch. 5, ¶¶ 38–39 (1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> [hereinafter TRC Report Vol. 4] (on file with the *Columbia Law Review*) (describing trauma experienced by medical professionals in military who were “forced” to commit human rights abuses).

154. TRC Report Vol. 5, *supra* note 148, ch. 8, ¶ 15.

155. *Id.* ch. 7, ¶ 90.

156. *Id.* ¶ 89.

157. *Id.* ¶ 47 (internal quotation marks omitted).

158. *Id.* ¶ 47a (quoting Roy Baumeister, *Evil: Inside Human Violence and Cruelty* 18 (1997)).

159. *Id.* ¶ 47b.

perpetrate crimes in the course of armed conflict or mass violence often experience those acts as trauma.¹⁶⁰ But these studies also define child soldiers as victims whose crimes cannot be fairly attributed to their own choices. The groundbreaking 1996 report by Graça Michel, *Impact of Armed Conflict on Children*, characterizes child soldiers who perpetrate abuses as “manipulated by adults,”¹⁶¹ a position that has taken hold in both law and policy.¹⁶² In 2007, states gathered to draft principles related to children and armed conflict and asserted their commitment to “ensure that children under 18 years of age who . . . are accused of crimes against international law are considered primarily as victims of violations against international law and not as alleged perpetrators.”¹⁶³ Child soldiers squarely occupy the space of victims, not perpetrators, thus locating efforts in mental-health recovery within the safe confines of victim rehabilitation and assistance.¹⁶⁴

B. *Trauma in The Act of Killing*

1. *The Happy Killer?* — Now, take these images of the tormented conscript, of the vulnerable child soldier, of the man who pulls the trigger because he has a gun to his head. Imagine instead the person who boldly chooses to kill—no draft or coercion or indoctrination to blame. A person who enjoys it, even. Can you also imagine him having nightmares about it for decades to come?

160. E.g., Report of the Expert of the Secretary-General, *Impact of Armed Conflict on Children*, ¶ 177, U.N. Doc. A/51/306 (Aug. 26, 1996) (identifying child soldiers as having suffered “especially traumatic experiences”); see also Michael Wessels, *Child Soldiers: From Violence to Protection* 134 (2006) (“[B]y implying that [child soldiers] are damaged, the trauma label encourages children to step into the role of victim.”); Elizabeth Schauer & Thomas Elbert, *The Psychological Impact of Child Soldiering*, in *Trauma Rehabilitation After War and Conflict: Community and Individual Perspectives* 311, 321–30 (Erin Martz ed., 2010) (discussing trauma and child soldiering).

161. Report of the Expert of the Secretary-General, *Impact of Armed Conflict on Children*, ¶ 250, U.N. Doc. A/51/306 (Aug. 26, 1996).

162. See Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* 35–40 (2012) (“The portrayal of child soldiers as faultless passive victims has proven central to the campaign to end child soldiering.”).

163. Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, ¶ 11, Feb. 5–6, 2007, http://www.icrc.org/eng/assets/files/other/pariscommitments_en.pdf (on file with the *Columbia Law Review*); see also Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, ¶¶ 3.6, 7.39, Feb. 2007, <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf> (on file with the *Columbia Law Review*); cf. Drumbl, *supra* note 162, at 94–101 (arguing these instruments identify children either as victims or witnesses and fail to explore their identities as perpetrators).

164. Guided perhaps by a similar idea that children who commit abuses are not responsible for those choices, the ICTY and ICTR have not prosecuted anyone under the age of eighteen, even though their statutes do not prohibit it. The Rome Statute of the International Criminal Court limits jurisdiction of the Court to persons who are eighteen years or older. See Rome Statute of the International Criminal Court, art. 26, 2187 U.N.T.S. 90 (July 17, 1998).

This is the world of *The Act of Killing*: the world of the perpetrator who embraces the murders he commits, but still suffers trauma on account of those crimes. Director Joshua Oppenheimer focuses his lens on some of the men who carried out mass killings in Indonesia during the purge of 1965–1966. Led by the country’s soon-to-be dictator, General Suharto, paramilitaries and gangs of thugs killed an estimated half a million people, raped and assaulted masses of others, and interned thousands more in concentration camps and prisons.¹⁶⁵ Although the campaign purported to be a necessary anti-Communist security measure, that category included any person deemed a threat to the regime for any reason—ethnic Chinese, intellectuals, union members. The U.S. government—which is now known to have supported the violence¹⁶⁶—described the purge as “one of the worst mass murders of the twentieth century, along with the Soviet purges of the 1930s, the Nazi mass murders during the Second World War, and the Maoist bloodbath of the early 1950s,” and asserted that it was “one of the most significant events of the 20th century.”¹⁶⁷ Nearly fifty years have passed since the purge; during that time, Suharto has resigned and died, Indonesia’s National Commission on Human Rights has called for prosecutions of those responsible for gross human rights violations in the 1960s, and the world has become more aware of what happened during that time. Nonetheless, there has been no accountability for the individuals who carried out the purge, and no real threat of it, either.¹⁶⁸ In the Indonesian province of North Sumatra, where the film takes place, the former death-squad leaders are celebrities, and survivors continue to fear retribution if they speak openly about what they have endured.

Oppenheimer initially had tried to construct a film around survivors, but he found that they were reluctant to speak about their experiences.¹⁶⁹ He then turned to the perpetrators and discovered that

165. See Helen-Louise Hunter, *Sukarno and the Indonesian Coup: The Untold Story*, at xi (2007); see also Robert Cribb, *How Many Deaths? Problems in the Statistics of Massacre in Indonesia (1965–1966) and East Timor (1975–1980)*, in *Violence in Indonesia* 82, 82 (Ingrid Wessel & Georgia Wimhöfer eds., 2001) (examining death tolls in massacres in Indonesia).

166. See John Roosa, *Pretext for Mass Murder: The September 30th Movement and Suharto’s Coup D’Etat in Indonesia 194–96* (2006) (describing U.S. support for Suharto’s actions); Michael Wines, *C.I.A. Tie Asserted in Indonesia Purge*, *N.Y. Times* (July 12, 1990), <http://www.nytimes.com/1990/07/12/world/cia-tie-asserted-in-indonesia-purge.html> (on file with the *Columbia Law Review*).

167. U.S. Cent. Intelligence Agency, *Indonesia—1965: The Coup that Backfired* 71 (Dec. 1968), available at http://www.foia.cia.gov/sites/default/files/document_conversions/14/esau-40.pdf (on file with the *Columbia Law Review*).

168. See Sara Schonhardt, *Veil of Silence Lifted in Indonesia*, *N.Y. Times* (Jan. 18, 2012), <http://www.nytimes.com/2012/01/19/world/asia/veil-of-silence-lifted-in-indonesia.html> (on file with the *Columbia Law Review*).

169. See Joshua Oppenheimer, Director’s Statement, *The Act of Killing* [hereinafter Oppenheimer, Director’s Statement], <http://theactofkilling.com/statements/> (on file with the *Columbia Law Review*) (last visited Mar. 12, 2015) (discussing victims’ reluctance to speak

they eagerly shared their stories about participating in the purge. In the regime's official version of history, recorded in government-issued schoolbooks and broadcast for years to the country in a film that aired on the anniversary of the killings, the perpetrators are heroes who saved the country from a leftist coup, not murderers.¹⁷⁰ Motivated perhaps by their confidence that the law will never touch them, or perhaps by their hope of renewing interest in their acts as their hair begins to gray and their celebrity begins to fade, they set about describing their role in the purge to Oppenheimer with pride, even glee.¹⁷¹ For these men, however, mere words are not adequate.¹⁷² Rather than simply recount their crimes, they choose to reenact them. *The Act of Killing* thus becomes a documentary about the making of another movie, one in which the men who carried out the purge relive their glory days by acting out their bloody, violent, cruel acts anew.

The scenes they choose to make for their movie—which Anwar Congo, the lead “character,” imagines will be a “beautiful family movie”¹⁷³—are astonishing and horrifying. In one, the former death squad leaders act out the interrogation and strangulation of a prisoner, played by a former neighbor of Anwar¹⁷⁴ who, earlier in the film, admits uncomfortably that his own stepfather was murdered in the purge.¹⁷⁵ As he recounts the story of his stepfather's death, he nervously laughs and reassures Anwar and the others, “I promise I'm not criticizing you.”¹⁷⁶ As he inhabits the role of victim, he weeps uncontrollably and begs for his life, the pain he portrays in the film bleeding into the pain he surely imagines his stepfather experienced in the last moments of his life.¹⁷⁷

In another scene, Herman Koto, a gangster who appears in drag in many of the film-within-the-film scenes,¹⁷⁸ feigns eating Anwar's liver,

openly). Oppenheimer's follow-up to *The Act of Killing* will examine the purge from the perspective of survivors. See Joshua Oppenheimer's New Documentary, “The Look of Silence”, Has Been Selected for this Year's Toronto International Film Festival, Final Cut for Real (July 30, 2014), http://www.final-cut.dk/news.php?mit_indhold_id=5&nyhed_id=148 (on file with the *Columbia Law Review*).

170. Ariel Heryanto, *State Terrorism and Political Identity in Indonesia* 50–52 (2005).

171. For other stories of pride in perpetrators, see *supra* Part II.A.2.

172. The failure of narrative memory, and the resort to reenactment, themselves invoke the idea of trauma. See *infra* notes 206–210 and accompanying text (contrasting perpetrator's inability to describe details of crimes with his ready reenactment of them); *supra* notes 124–127 and accompanying text (same).

173. Oppenheimer, Director's Statement, *supra* note 169; see also *Act of Killing*: Director's Cut, *supra* note 22, at 1:29:00–1:29:30 (“It's a good family movie . . .”).

174. *Act of Killing*: Director's Cut, *supra* note 22, at 1:05:10–1:06:40.

175. *Id.* at 56:45–58:30.

176. *Id.* at 58:30–59:30.

177. *Id.* at 1:05:25–1:06:30.

178. See Saskia E. Wieringa, *Sexual Politics as a Justification for Murder in The Act of Killing*, 46 *Critical Asian Stud.* 195, 195–98 (2014) (discussing myths about Communist women in justifications for violence in the Indonesian purge).

plucking the bloodied organ from a grotesque disemboweled body that lies next to a cartoonish construction of a severed head.¹⁷⁹ Contrasting with these graphic depictions of violence and cruelty is a scene set by a waterfall, with a massive building shaped like a fish taking up most of the frame. The ghost of a murdered “communist” gives Anwar a gold medal in appreciation for sending him to heaven. Women in brightly colored costumes dance, while the song “Born Free” swells in the background.¹⁸⁰

The film’s particular depiction of Anwar Congo, too, is astonishing and horrifying. Now in his seventies, Anwar is said to have personally killed one thousand people during the purge.¹⁸¹ The film introduces the viewer to Anwar on a rooftop where he performed many of his executions. Smiling, he explains that he had initially killed his victims by beating them, but there was simply too much blood, so he began to use a wire to strangle them instead. He reenacts this method of killing on a friend, and then he dances a cha cha, light on his feet.¹⁸² He was, he says, a happy killer.¹⁸³

Our first glimpse of this blithe and carefree man, however, yields to a more somber and disturbed one. In the same scene in which he demonstrates how he used to garrote his victims, Anwar says that he has relied on music and dancing, along with drugs and alcohol, to help him forget the murders he committed.¹⁸⁴ Later in the film, he reveals that he has recurring nightmares about a man he beheaded with a machete. In his dreams, the eyes of the man—eyes that remained open after Anwar killed him—continue to follow Anwar, watching his every move. Anwar admits that he asks himself repeatedly why he never bothered to close those eyes.¹⁸⁵ While filming the “beautiful family movie,” he is unable to finish a scene in which he himself plays the role of a torture victim about to be killed. When he watches the footage of that scene later, he tells Oppenheimer that he now knows the terror that his victims knew: “I could feel what the people I tortured felt.” (Oppenheimer points out that the experience of the real victims was far worse, as they knew they would die, whereas Anwar merely was playing a part in a movie.¹⁸⁶) At the end of the film, Anwar goes back to the rooftop where we first met him, the rooftop where he strangled so many. He paces back and forth, quiet and seemingly disturbed. He then doubles over, heaving, and retches over and over again, apparently moved by horror or grief or remorse or disgust.¹⁸⁷

179. Act of Killing: Director’s Cut, *supra* note 22, at 1:43:00–1:43:50.

180. *Id.* at 2:28:40–2:31:00.

181. *Id.* at 1:52:00–1:52:30; see also *id.* at 2:28:40–2:31:00 (depicting scene in which victim thanks Anwar “one thousand times” for sending him to heaven).

182. *Id.* at 9:00–11:45.

183. *Id.* at 17:05–18:05 (“It was like we were killing . . . happily!”).

184. *Id.*

185. *Id.* at 1:32:50–1:35:50.

186. *Id.* at 2:33:00–2:36:00.

187. *Id.* at 2:37:10–2:43:00.

2. *Separating Trauma from Victimhood.* — What are we to make of Anwar Congo? Some commentators interpret Anwar as a remarkable character because he is a killer who is humanized. We are invited to see him as an ordinary person: He shows his grandchildren how to care for an injured duck, and having once committed unspeakable acts, Anwar now experiences remorse for what he has done.¹⁸⁸ For others, Anwar is the embodiment of the film's perverse take on morality. Critics charge that there is no need, no reason, to give screen time to these monsters—and even less need or reason to allow them to direct their film themselves.¹⁸⁹ Still others reflect on whether Anwar's remorse is genuine or staged. He loves movies, and he clearly loves being in front of the camera. Surely he knows how to craft a Hollywood ending for his own story.¹⁹⁰

Viewing Anwar Congo against the backdrop of perpetrators from South Africa, Rwanda, and the former Yugoslavia, however, offers a different reading of the film. Real or performed, Anwar Congo presents a fascinating portrait of a character who is otherwise missing from most accounts of perpetrators (both real and performed): the perpetrator who performed his acts of violence willingly, and who nevertheless experiences that violence as trauma.

Oppenheimer depicts trauma in Anwar Congo in two ways. First, we see the symptoms directly. His nightmares about his acts of killing, his avoidance for years of the sites where he used to kill, and his detached affect all point to his experience of those crimes as trauma.¹⁹¹ Second—and far more fascinating and jarring as a method of film construction—we see trauma in the reenactments. In these gruesome scenes, the

188. See, e.g., Warren Chrichlow, "It's All About Finding the Right Excuse" in Joshua Oppenheimer's *The Act of Killing*, 67 *Film Q.*, Winter 2013, at 37, 37–38 (2013) (discussing Anwar Congo's remorse). Oppenheimer claims that Anwar felt genuine remorse. See Joshua Oppenheimer, Production Notes, *The Act of Killing*, <http://theactofkilling.com/background/> (on file with the *Columbia Law Review*) (last visited Mar. 11, 2015) (characterizing Anwar's experience of watching film-within-the-film as "provok[ing] feelings of remorse" and noting that reenactments "le[ft] him full of doubt about the morality of what he did").

189. E.g., Fraser, supra note 24, at 22 (questioning value of hearing from perpetrators).

190. See, e.g., Laurie J. Sears, Heroes as Killers or Killers as Heroes?, 46 *Critical Asian Stud.* 204, 204 (2014) ("Did director Joshua Oppenheimer fool the thugs into making the movie he wanted, or did they fool him into making a movie that made them more sympathetic than they ever should be?"); Bill Nichols, Irony, Cruelty, Evil (and a Wink) in *The Act of Killing*, 67 *Film Q.*, Winter 2013, at 25, 27 (2013) (describing Anwar Congo's experience on rooftop as Anwar's "idea of how a movie should end, with the hero showing his vulnerable side and winning some measure of sympathy from an incredulous audience").

191. See *Act of Killing: Director's Cut*, supra note 22, at 49:35–51:30; 1:30:35–1:32:25; supra notes 53, 185 and accompanying text (discussing aftermath of trauma and Anwar's experience); see also Emeran A. Mayer, Somatic Manifestations of Traumatic Stress, in *Understanding Trauma: Integrating Biological, Clinical, and Cultural Perspectives* 142, 145–47 (Laurence J. Kirmayer et al. eds., 2007) (addressing manifestations of trauma aside from PTSD).

former death-squad leaders recite their lines from a script they authored, they wear full costumes and makeup, and they perform imagined acts of cruelty that at one time were their reality.

Oppenheimer has stated that he saw reenactment in the film as “a way of exposing impunity.”¹⁹² Only in a lawless society can murderers stage their acts of violence out in the open and still walk down the street untouched. Only in a system of impunity can murderers appear on a local talk show and be greeted by wild applause from the audience, as we see in *The Act of Killing*. Compare those scenes to the grainy, flickering images of Treblinka commander Franz Suchomel in Claude Lanzmann’s *Shoah*, the epic, nine-hour documentary about the Holocaust.¹⁹³ Suchomel details the operations of the concentration camp and the activities of the Nazis there, but he does so only after Lanzmann reassures him (falsely, of course) that the interview is not being recorded and that Suchomel’s identity will not be revealed. As the interview begins, we see not Suchomel, but the van parked outside his home that is receiving the feed from Lanzmann’s hidden Paluche camera.¹⁹⁴ It is clear that Suchomel is hiding—a stark contrast to perpetrators like Anwar Congo who announce their acts unreservedly.

The reenactments in *The Act of Killing* function not only to expose impunity, as Oppenheimer primarily intends; they also function as a way of exposing trauma.¹⁹⁵ In collapsing linear time, and depicting the past resurfacing as a vivid present, Oppenheimer refers to a “central trope” of the study of trauma—the “inability to distinguish present time from the time of the traumatic wound,” and the consequent reappearance through mimesis of the traumatic event.¹⁹⁶ For Anwar, the original trauma—the mutilations, the killings, the rapes—have never been properly consigned to the past, and as a result, they reappear in his present. Nor have they ever been properly assimilated into his memory; he separates himself from what he has done and seeks to turn those crimes into nothing more

192. Katie Kitamura, Joshua Oppenheimer on *The Act of Killing*, Al Jazeera (Sept. 22, 2013, 6:00 AM), <http://america.aljazeera.com/articles/2013/9/22/joshua-oppenheimeronfilming-theactofkilling.html> (on file with the *Columbia Law Review*).

193. *Shoah* (New Yorker Films 1985).

194. See *id.*; see also Richard Brody, Witness: Claude Lanzmann and the Making of *Shoah*, *New Yorker* (Mar. 19, 2012), <http://www.newyorker.com/magazine/2012/03/19/witness-5> (on file with the *Columbia Law Review*) (describing “surreptitious filming of Franz Suchomel”). The transcript of the Suchomel interview is reprinted in Claude Lanzmann, *Shoah: An Oral History of the Holocaust* 52–57, 61–63, 105–11, 118–20, 146–47 (1985).

195. See Kitamura, *supra* note 192 (discussing role of trauma in the film in an interview with Oppenheimer).

196. Madhu Dubey & Elizabeth Swanson Goldberg, New Frontiers, Cross-Currents and Convergences: Emerging Cultural Paradigms, *in* *The Cambridge History of African-American Literature* 566, 599 (Maryemma Graham & Jerry W. Ward, Jr. eds., 2011); see also Caruth, Unclaimed Experience, *supra* note 33, at 1–6 (explaining trauma’s “inadvertent and unwished-for repetition”); Stephen K. Levine, Trauma, Tragedy, Therapy: The Arts and Human Suffering 66–69 (2009).

than a performance.¹⁹⁷ The creation of the film within the film is thus a manifestation of Anwar's "repetition-compulsion," Freud's term for the return of the traumatized person to the initial traumatizing event—whether through reenactment, flashbacks, or dreams.¹⁹⁸ While the reenactments might appear at first glance to be a sign of Anwar's lack of concern about his acts of killing, the film instead offers through these scenes a narrative of trauma.

Oppenheimer is not the first documentary filmmaker to explore trauma in perpetrators of mass atrocity crimes. More than ten years before *The Act of Killing*, Cambodian filmmaker Rithy Panh investigated the trauma experienced by perpetrators, also through reenactments, in the deeply disturbing documentary *S21: The Khmer Rouge Killing Machine*.¹⁹⁹ S-21 was the code name of the Tuol Sleng prison in Phnom Penh, where an estimated fourteen to twenty thousand Cambodians were tortured and killed during the reign of the Khmer Rouge from 1975 to 1979.²⁰⁰ The regime was so effective and so all-powerful that only a handful of people survived the prison.²⁰¹ Panh lost most of his family to abuses by the Khmer Rouge and fled a forced labor camp when he was fourteen, managing to reach a refugee camp in Thailand and eventually resettling in France. He has focused his life's work on the Khmer Rouge and the legacy of those devastating years. In *S21*, he chose to investigate the experience of perpetrators because, in his words, "we the victims also need the words of the perpetrators, to tell their side of the story."²⁰²

197. See Homay King, *Born Free? Repetition and Fantasy in The Act of Killing*, 67 *Film Q*, Winter 2013, at 30, 32 (2013) (proposing connection between performance, dissociation, and fantasy).

198. Sigmund Freud, *Beyond the Pleasure Principle* 19–25 (C. J. M. Hubback trans., 1922); see also Caruth, *Unclaimed Experience*, *supra* note 33, at 1 ("[C]atastrophic events seem to repeat themselves for those who have passed through them."). If trauma is associated with silence, then one might wonder why trauma would be relevant here, in a society in which these men have dictated the official history. But here, too, silence has covered up what happened in the past; there is no truth to that official history.

199. *S21: The Khmer Rouge Killing Machine* (First Run Features 2002).

200. See David Chandler, *Voices From S-21: Terror and History in Pol Pot's Secret Prison 6* (1999) (noting that "at least fourteen thousand men, women, and children had been held by S-21" and that "the true number of prisoners was undoubtedly higher"); Peter Maguire, *Facing Death in Cambodia* 56 (2005) ("[B]etween 14,000 and 20,000 people entered [Tuol Sleng].").

201. Estimates of the number of survivors vary, but most settle on around seven survivors. The Documentary Center of Cambodia estimates that some two hundred prisoners made it out of Tuol Sleng alive. See Dacil Keo, *Documentary Ctr. of Cambodia, Fact Sheet on "S-21" Tuol Sleng Prison 1–2* (2010), available at http://www.cambodiatribunal.org/assets/pdf/reports/dccam_s21_tuol_sleng_fact_sheet.pdf (on file with the *Columbia Law Review*).

202. Leslie Camhi, *The Banal Faces of Khmer Rouge Evil*, *N.Y. Times* (May 16, 2004), <http://www.nytimes.com/2004/05/16/movies/film-the-banal-faces-of-khmer-rouge-evil.html> (on file with the *Columbia Law Review*).

Panh persuaded a number of former guards, interrogators, and other prison staff to talk with him about their side of the story, on camera, inside the walls of S-21 itself, which has been preserved over the years and now houses the Tuol Sleng Genocide Museum.²⁰³ But these men not only talk about their years of guarding, torturing, and killing innocent people; they also reenact them. Or, more precisely, they *relive* them. Unlike *The Act of Killing*, there is no film within the film; there are no costumes, no scripts, no laughing, no levity, whether feigned or genuine. Standing again in the hell they once ruled over, these perpetrators seem as if they are unable to help but repeat their actions. In one of the most haunting scenes in *S21*, Khieu Ches, a former guard, seems to disappear from this world, and emerge in an all-too-present past.²⁰⁴ He shouts at inmates who are visible to no one but him. He locks a cell door; he kicks and beats a disobedient prisoner. The scene feels undirected, as though the viewer has simply stumbled upon this horrifying display.

Deirdre Boyle reads this scene as “emblematic of traumatic memory,”²⁰⁵ as “memory relived.”²⁰⁶ In a society in which denial represented, for so long, the chosen approach to the horrors of the past,²⁰⁷ Ches cannot speak about his experiences; and yet, he cannot help but relive them.²⁰⁸ Ches confronts the viewer with a startling representation of the failure of narrative memory—the ability to talk about an experience, to reflect on it—in the face of traumatic memory—the memory that overtakes the body unwillingly.²⁰⁹ In Panh’s explanation, although Ches would not—could not—talk about his actions at S-21, “his gestures, the memory of his body, came flooding back. Because someone trained him to do this. And the memory of the body never lies.”²¹⁰

Panh’s representation of perpetrator trauma, however, cabins itself within the recognition that these perpetrators were young, often taken from their families and brainwashed by the regime. Ches was twelve years

203. See Judy Ledgerwood, *The Cambodian Tuol Sleng Museum of Genocidal Crimes: National Narrative, Museum Anthropology*, Mar. 1997, at 82, 87–89 (discussing opening of Tuol Sleng Museum).

204. See Camhi, *supra* note 202 (quoting Panh explaining that in the scene, Ches’s “gestures, the memory of his body, came flooding back”).

205. Deirdre Boyle, *Shattering Silence: Traumatic Memory and Reenactment in Rithy Panh’s S-21: The Khmer Rouge Killing Machine*, 50 *Framework: J. Cinema & Media* 95, 98 (2009).

206. *Id.* at 100.

207. See Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions 2004–05* (2d ed. 2010) (addressing idea that “Cambodians wanted to simply forget the past, and that they showed no interest in speaking about that period” because of both “fear of talking about a still contentious period and the result of the Cambodian and Buddhist tendency not to confront conflict”).

208. For further discussion of Ches’s reenactment, see Boyle, *supra* note 205, at 100.

209. *Id.* at 99 (describing how “dissociation of traumatic memories may render them virtually inaccessible through language until they can be translated into the symbolic language necessary for linguistic retrieval and thus brought into consciousness”).

210. Camhi, *supra* note 202.

old when he first worked as a guard at Tuol Sleng; his experience echoes that of many of the perpetrators of crimes under the Khmer Rouge.²¹¹ Panh thus shows us perpetrators who also are victims, thereby situating the film, and its unorthodox depiction of perpetrators and their continued suffering, safely within the tolerable bounds of a world of victims' trauma. Indeed, the film's subtitle refers to the "killing machine" that was the Khmer Rouge;²¹² Panh is interested in the entire massive, complex institution that ultimately caused the death of one million people.²¹³ He seeks to explore a system of horror and destruction that these men—in many cases, these boys—simply could not avoid, at least if they were to stay alive.²¹⁴

Oppenheimer, in contrast, presents a unique—and far less sympathetic—subject: a perpetrator who is traumatized by what he has done but is not a victim of circumstances. In contrast to Panh's portrayal of perpetrators who operated within a systematic, state-run killing machine, Oppenheimer omits all context from his film. Was Anwar Congo indoctrinated? Desperate for money or power in a system that oppressed him or people like him? Coerced by a superior? Forced? These are facts that would form the core of an argument for a defense or mitigation in a criminal trial and that would present themselves in expert testimony and scores of pages of opinions on political factions, land disputes, ancient hatreds. But in *The Act of Killing*, these facts are nowhere to be found. The viewer knows nothing except that Anwar did these things, and we have no reason to question that he did them of his own free will. He chose his acts of killing, he reveled in them, and he continues to embrace them. And yet, he suffers for them.

III. THE HUMANITY OF THE TRAUMATIZED PERPETRATOR

What lesson does *The Act of Killing* teach? If there were a Hollywood ending to the film, it would be that reenactment brings reflection, anagnorisis, remorse. But *The Act of Killing* is not *The Murder of Gonzago*.²¹⁵

211. See Meng-Try Ea & Sorya Kim, *Victims and Perpetrators?: Testimony of Young Khmer Rouge Comrades 13–43* (2001) (collecting testimony of Cambodian children recruited by Khmer Rouge and proposing that "these children should be viewed not only as perpetrators, but also as victims").

212. See David P. Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution Since 1945*, at 286 (1991) (referring to S-21 as "killing machine").

213. *Id.* at 1 (estimating total number killed by Khmer Rouge was around one million).

214. See *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶¶ 110, 384–385 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/20100726_Judgement_Case_001_ENG_PUBLIC.pdf (on file with the *Columbia Law Review*) (discussing widespread killing of individuals perceived to be "internal enemies").

215. The film readily brings to mind Hamlet's plot to trap Claudius into revealing his guilt or innocence as to the murder of his father by staging a play in which a similar killing occurs. See William Shakespeare, *Hamlet*, act 2, sc. 2.

Anwar himself is directing, not Oppenheimer; and the play does not, it seems, “catch the conscience of the King.”²¹⁶ At the end of the film, Anwar Congo has not taken full responsibility for his crimes, and he has not atoned for his sins. As he retches on that rooftop where he killed so many people, we see his attempt at catharsis fail: There is nothing there. The film closes with another glimpse of Anwar’s bizarre redemption fantasy: giant fish, blue skies, green grass. The trauma remains unhealed.²¹⁷

In the world of accountability, too, reenactment’s track record is spotty. Aside from Benzien’s reconstruction of his chosen method of torture before the South African TRC, there are only limited examples of reenactment on which to draw. The Cambodian war crimes tribunal, established in 2001 to try Khmer Rouge leaders, attempted something of the sort in 2008, during the trial of the man who ran S-21—Kaing Guek Eav, known as Duch. The court asked Duch to participate in what it called a “crime scene reenactment” at Tuol Sleng and Choeng Ek, one of the killing fields near the prison where some sixteen thousand people had been slaughtered and buried in mass graves.²¹⁸ In front of survivors of the prison and cameras that were recording for posterity, Duch tearfully expressed his “indescribable remorse” and vowed to do anything he could to ensure that the victims and survivors would “receive justice.”²¹⁹

216. *Id.* (“The play’s the thing / wherein I’ll catch the conscience of the King.”).

217. *Act of Killing: Director’s Cut*, *supra* note 22, at 2:43:03–2:43:45.

218. See *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 002/14-08-2006, Annex 1: Report of Crime Scene Reenactment at Tuol Sleng on 27 February 2008 (Extraordinary Chambers in the Cts. of Cambodia Feb. 27, 2008), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E3_245_EN.PDF (on file with the *Columbia Law Review*) (documenting Duch’s visit to Tuol Sleng); *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 002/14-08-2006, Report of Crime Scene Reenactment at Cheung Ek on 26 February 2008 (Extraordinary Chambers in the Cts. of Cambodia Feb. 26, 2008), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E3_242_EN.PDF (on file with the *Columbia Law Review*) (reporting on Duch’s visit to Choeng Ek); *Prosecutor v. Kaing Guek Eav alias Duch*, Case No. 002/14-08-2006, Notification of Interview to On-Site Visits and Confrontation to Co-Prosecutors (Extraordinary Chambers in the Cts. of Cambodia Feb. 20, 2008), <http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/00164248-00164249.pdf> (on file with the *Columbia Law Review*) (announcing “on-site visits” at Choeng Ek and Tuol Sleng); Khmer Rouge Leader “Enacts Role,” BBC News (Feb. 26, 2008, 7:45 AM), <http://news.bbc.co.uk/2/hi/asia-pacific/7264203.stm> (on file with the *Columbia Law Review*) (describing Duch visit to Choeng Ek).

The Court justified the visit as “a normal part of judicial investigation.” ECCC Media Alert: Public Notice of OCIJ On-Site Investigation, Extraordinary Chambers in the Courts of Cambodia (Feb. 22, 2008), http://www.eccc.gov.kh/sites/default/files/media/Public_Notice_of_OCIJ_On-Site_Investigation.pdf (on file with the *Columbia Law Review*). This is reflected in the Court’s rules of procedure, which provide that judges may “take any investigative action conducive to ascertaining the truth,” including “conduct[ing] on-site investigations.” Internal Rules of Extraordinary Chambers in the Courts of Cambodia, Rev. 1, Rule 55.5 (Feb. 1, 2008), available at <http://www.eccc.gov.kh/sites/default/files/legal-documents/IRv1-Eng.pdf> (on file with the *Columbia Law Review*).

219. Extraordinary Chambers in the Courts of Cambodia, Compilation of Statements of Apology Made by Kaing Guek Eav Alias Duch During the Proceedings 13–14, available at http://www.eccc.gov.kh/sites/default/files/publications/Case001Apology_En_low_res.pdf

At least some victims, however, believed they saw only crocodile tears, and Duch's eventual request to be released suggested that he was not in fact willing to do anything for justice.²²⁰ A very different type of reenactment took place in the trial of Simon Bikindi, the Rwandan singer and songwriter who was prosecuted by the ICTR on charges including incitement of genocide based on his pop hits that were playing on the radio throughout the bloodletting in the summer of 1994.²²¹ During his trial before the ICTR, Bikindi was asked to sing those same songs, and thus to recreate the very acts for which he was being prosecuted.²²² The trial judges asked him to sing, they said, so that they could record the lyrics of his songs into the trial record, and he did—beautifully, with a smile on his face. Why did the judges need Bikindi to sing his songs rather than simply speak their lyrics? Perhaps they believed they could hear something telling in Bikindi's reenactment of the alleged crime. But little came of it; the moment gives some pause, but then, the proceeding moves on, with little attention paid to what has just occurred.²²³

These isolated incidents—and a review of courts' procedural rules²²⁴—suggest that there might not be a promising future for reenactment in the world of accountability for mass atrocity.²²⁵ None-

(on file with the *Columbia Law Review*) (last visited Mar. 9, 2015); see also *id.* at 11 (including photograph of Duch speaking with survivors at Tuol Sleng).

220. See Thierry Cruvellier, The Khmer Rouge's Perfect Villain, *N.Y. Times* (Feb. 9, 2012), <http://www.nytimes.com/2012/02/09/opinion/the-khmer-rouges-perfect-villain.html> (on file with the *Columbia Law Review*); Victims Not Impressed by Duch's Remorse, *Cambodia Herald* (Feb. 24, 2012), <http://www.thecambodiaherald.com/cambodia/detail/1?page=11&token=Y2U0OWQ0OWUxNTM2ODAzZjNIODRkZWl5ODMwMjBk> (on file with the *Columbia Law Review*).

221. See James Parker, The Musicology of Justice and Incitement to Genocide at the International Criminal Tribunal for Rwanda, in *Soundtrack of Conflict: The Role of Music in Radio Broadcasting in Wartime & in Conflict Situations* 211, 211–15 (M. J. Grant & Férdia J. Stone-Davis eds., 2013) (describing trial of Bikindi).

222. See *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgement, ¶ 203 (Dec. 2, 2008), <http://www.unict.org/sites/unict.org/files/case-documents/ict-01-72/trial-judgements/en/081202.pdf> (“Bikindi stated that he composed *Amahoro* in the fall of 1993. Sung into the trial record, this song was essentially a repetition of the word ‘peace.’”); Transcript at 34–36, *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T (Oct. 31, 2007) (on file with the *Columbia Law Review*).

223. Video recording: *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T (Oct. 31, 2007) (on file with the *Columbia Law Review*).

224. Defendants in international criminal courts have a right against self-incrimination, which would make any requirement of participating in a reenactment impossible. For a truth commission, different rules of procedure could of course be constructed. M. Cherif Bassiouni, Issues Pertaining to the Evidentiary Part of International Criminal Law, in 3 *International Criminal Law* 581, 589–90 (M. Cherif Bassiouni ed., 3d ed. 2008).

225. Outside of the courtroom, however, reenactment has been used for therapy. See Miller James & David Read Johnson, Drama Therapy in the Treatment of Combat-Related Post-Traumatic Stress Disorder, 23 *Arts in Psychol.* 383, 384 (1997) (discussing use and success of drama therapy for veterans); Sue Halpern, Virtual Iraq: Using Simulation to Treat a New Generation of Traumatized Veterans, *New Yorker* (May 19, 2008), <http://www.newyorker.com/magazine/2008/05/19/virtual-iraq> (on file with the *Columbia*

theless, there is much to take from *The Act of Killing*, and the idea of perpetrator trauma, for those who study mass atrocity. This Part details those lessons, moving from the practical implications of acknowledging perpetrator trauma to its conceptual implications. Greater attention to perpetrator trauma, this Article contends, can transform our thinking about the role of rehabilitation in postconflict reconciliation, about the breadth of trauma itself, and about the humanity of perpetrators.

A. *Rehabilitation and Reconciliation*

Accepting perpetrator trauma as a reality should prompt consideration of whether anything should be done about it. The most obvious answer is that perpetrators who suffer trauma need treatment. Rehabilitation is commonly recognized as a standard consequentialist purpose of punishment. Rehabilitation, encompassing anything from mental-health services to education to work programs, generally seeks both to prevent the perpetrator from engaging in crime again and to reintegrate the perpetrator into society after the punishment is complete.²²⁶ In international criminal justice (and in some domestic criminal justice systems, including that of the United States), rehabilitation receives little attention.²²⁷ The ICTY has stated that rehabilitation should not carry “undue weight” in sentencing,²²⁸ and one Trial Chamber conceded that even though it “fully supports” rehabilitation for imprisoned persons serving out their sentences, consideration of rehabilitation in deciding

Law Review) (reporting on Virtual Iraq, a “virtual-reality program[]” funded by Department of Defense for treatment of PTSD in combat veterans); Virtual Reality Exposure Therapy, USC Inst. for Creative Techs., <http://ict.usc.edu/prototypes/pts/> (on file with the *Columbia Law Review*) (last visited Mar. 9, 2015) (describing “virtual reality exposure therapy . . . aimed at providing relief from post-traumatic stress”).

226. Thom Brooks, Punishment 51–63 (2012).

227. See Jonathan Simon, Fashioning a Liberal Approach to Crime and Punishment in the Twentieth Century, in *Looking Back at Law’s Century* 109, 109–10 (Austin Sarat et al. eds., 2002) (suggesting rehabilitative approaches to criminal justice received less attention beginning in 1970s and 1980s). In contrast to traditional Anglo-American approaches to criminal justice, restorative justice emphasizes rehabilitation for both victim and offender. See Howard Zehr, Changing Lenses: A New Focus for Crime and Justice 200 (1990) (“[Offenders] often need emotional support. They may need to learn to channel anger and frustration in more appropriate ways. They may need help to develop a positive and healthy self-image. And they often need help in dealing with guilt.”).

228. Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgement, ¶ 806 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), <http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; see also Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Sentencing Judgement, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 4, 2007), <http://www.icty.org/x/cases/zelenovic/tjug/en/zelsj070404-e.pdf>; Prosecutor v. Banović, Case No. IT-02-65/1-S, Sentencing Judgement, ¶ 35 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003), <http://www.icty.org/x/cases/banovic/tjug/en/ban-sj031028e.pdf>; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶¶ 780–782 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000), <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf>.

the sentence itself is another matter altogether.²²⁹ Rehabilitation is taken into account as significant only in a determination of the appropriateness of commutation of sentence after the defendant has served some portion thereof.²³⁰

Rehabilitation is subordinated to other priorities in this context in part because offenders are not likely to find themselves again in a situation in which they are able to engage in mass violence. Accordingly, rehabilitation is believed to be less important than other priorities such as victim rehabilitation.²³¹ Perhaps for this reason, during the final negotiations leading to the creation of the International Criminal Court (ICC), several delegations raised the importance of victim rehabilitation and child soldier rehabilitation, but only one person—the United Nations High Commissioner for Human Rights—noted the importance of perpetrator rehabilitation.²³² Beyond this, rehabilitation is thought to be irrelevant to mass atrocity because criminals of the kind that these institutions are dealing with simply have no hope for reform. As Immi Tallgren explains, “The context of the most serious crimes against international law made it nonsensical . . . to discuss rehabilitation: how do you reform someone guilty of genocide?”²³³ Just as trauma is ignored, the prospects for rehabilitation are widely overlooked, except for groups such as child

229. Prosecutor v. Kunarac, Case No.IT-96-23-T, Judgement, ¶ 844 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

230. See Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 125, U.N. Doc. IT/32/Rev. 49 (May 22, 2013), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf (on file with the *Columbia Law Review*) (listing “demonstration of rehabilitation” among factors to be considered in determining appropriateness of commutation or pardon); Int’l Crim. Trib. for Rwanda, Rules of Procedure and Evidence, Rule 126 (Apr. 10, 2013), available at http://www.unict.org/sites/unict.org/files/legal-library/130410_rpe_en_fr.pdf (on file with the *Columbia Law Review*) (same); see also Meernik & King, *supra* note 100, at 723 (discussing ICTY’s consideration of rehabilitation at sentencing).

231. See Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* 51 (2007) (discussing unimportance of offender rehabilitation in international criminal law); see also Gwen Robinson & Iain Crow, *Offender Rehabilitation: Theory, Research and Practice* 10 (2009) (discussing purpose of rehabilitation to “make ‘honest citizens’ of former offenders” in order to “maximize the availability of useful, contributing members of society” and to “protect society from future crime”); cf. Cherif M. Bassiouni, *Introduction to International Criminal Law* 681, 697 (2003) (“Retribution and just desert are more appropriate as philosophical and policy bases for the punishment of international crimes, whereas rehabilitation and social integration goals are more relevant to that of national criminal justice systems.”).

232. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2nd plen. mtg., ¶ 100, June 15, 1998, U.N. Doc. A/CONF.183/SR.2 (Nov. 20, 1998).

233. Tallgren, *supra* note 35, at 577; see also Jonathan H. Choi, Note, *Early Release in International Law*, 123 *Yale L.J.* 1784, 1811 (2014) (claiming “rehabilitation of international convicts . . . does not affect public safety” because “it is difficult to imagine recidivism in international criminal law”).

soldiers, who are seen to have a particular right to—or capacity for—rehabilitation.²³⁴

Discounting rehabilitation, however, ignores the strong arguments in favor of it. One could justify rehabilitation in deontological terms, on the grounds that individuals have a right to rehabilitation. The International Covenant on Civil and Political Rights states that imprisonment must aim toward prisoners’ “reformation and rehabilitation,”²³⁵ while the Standard Minimum Rules on the Treatment of Prisoners, a nonbinding instrument, asserts that because “[t]he treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it,” authorities should work toward the “social rehabilitation” of prisoners.²³⁶

Even setting aside the rights of génocidaires, however, still leaves a convincing case for rehabilitation, and especially mental-health services for traumatized perpetrators, in light of the connection between rehabilitation and reconciliation. Unlike in domestic contexts, where victims and offenders typically do not have contact with each other after a serious crime like a murder, in the aftermath of mass atrocity perpetrators often live beside the people they brutalized. Dozens of individuals convicted by the ICTY and ICTR have served their sentences in far-away countries and returned home.²³⁷ Thousands more like them serve

234. See, e.g., Allison Marston Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, 87 Va. L. Rev. 415, 444 n.110 (2001) (“Rehabilitation may . . . be an important consideration in future applications of international criminal law, especially if the relevant conflict includes juvenile combatants”); Mark A. Drumbl, The Expressive Value of Prosecuting and Punishing Terrorists: *Hamdan*, the Geneva Conventions, and International Criminal Law, 75 Geo. Wash. L. Rev. 1165, 1185 (2007) (noting importance of reconciliation and rehabilitation in conflicts involving child soldiers). For a notable exception, see William A. Schabas, Sentencing by International Tribunals: A Human Rights Approach, 7 Duke J. Comp. & Int’l L. 461, 516 (1997) (advocating rehabilitation as goal of sentencing in international tribunals).

235. International Covenant on Civil and Political Rights, art. 10(3), S. Exec. Doc. E, 95-2 (1978), 993 U.N.T.S. 3, Dec. 16, 1966.

236. Standard Minimum Rules for the Treatment of Prisoners, ¶ 61, May 13, 1977, available at <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf> (on file with the *Columbia Law Review*) (emphasizing importance of rehabilitation in treatment of prisoners, but not identifying right of access to rehabilitation).

237. See Gideon Boas et al., International Criminal Procedure 413–15 (2011) (explaining how sentences imposed by international criminal tribunals are enforced through agreements with individual states); see also Rome Statute of the International Criminal Court, art. 103(1)(a), 2187 U.N.T.S. 90 (July 17, 1998) (“A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.”); Documents, U.N. Int’l Criminal Tribunal for Rwanda, <http://www.unictr.org/en/documents> (on file with the *Columbia Law Review*) (last visited Mar. 11, 2015) (listing, under bilateral agreements tab, states agreeing to enforce ICTR sentences); Member States Cooperation, UN ICTY, <http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation> (on file with the *Columbia Law Review*) (last visited Feb. 11, 2015) (listing states with agreements to enforce ICTY sentences).

sentences in their home states,²³⁸ or will never be punished at all. They might share the same town or draw their water from the same well as their former victims and enemies.²³⁹ Sometimes this cannot be avoided; they lived together before the violence, and for some there is nowhere else to go when it is over. But sometimes, it is deliberate. In Rwanda, for example, perpetrators and victims now live together in “reconciliation villages” intended to force peace.²⁴⁰

Trauma, then, is particularly troublesome in this setting. Reconciliation need not mean deep trust and true forgiveness, but it does require, at its most basic level, coexistence without violence.²⁴¹ And the traumatized perpetrator can pose a threat to even this minimal version of reconciliation. Those who are traumatized are less likely to have empathy for others, and more likely to continue to “devalue and blame” victims.²⁴² When perpetrators and victims or survivors live beside each other, a gap in understanding or connection between the two may lead to continued victimization on an individual level or even to renewed conflict and mass violence at a collective level. In the context of mass atrocity, then, psycho-

238. See Thierry Cruvellier, *Court of Remorse: Inside the International Criminal Tribunal for Rwanda* 169 (2006) (noting that in 1998, 130,000 individuals were imprisoned in Rwanda in connection with the genocide).

239. See Jean Hatzfeld, *The Antelope's Strategy: Living in Rwanda After the Genocide* 77–91 (2009) (describing close contact between former perpetrators and victims in Rwanda); Dinka Corkalo et al., *Neighbors Again? Intercommunity Relations After Ethnic Cleansing*, in *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* 143, 143 (Eric Stover & Harvey M. Weinstein eds., 2004) (examining relations among formerly warring ethnic groups in Mostar, Prijedor, and Vukovar in 2000 and noting that in Prijedor and Vukovar no physical demarcation exists between Bosniaks and Croats).

240. See Benjamin Durr, *Rwanda Genocide Survivors Back Reconciliation*, *Al-Jazeera* (Apr. 5, 1994, 8:30 AM), <http://www.aljazeera.com/indepth/features/2014/04/rwanda-genocide-survivors-back-reconciliation-20144215732338738.html> (on file with the *Columbia Law Review*) (describing efforts to create and sustain reconciliation villages in Rwanda).

241. See Inst. for Democracy & Electoral Assistance, *Reconciliation After Violent Conflict: A Handbook* 12 (2003), available at <http://www.un.org/en/peacebuilding/pbso/pdf/Reconciliation-After-Violent-Conflict-A-Handbook-Full-English-PDF.pdf> (on file with the *Columbia Law Review*) (discussing meaning of reconciliation); Joanna R. Quinn, Introduction, in *Reconciliation(s): Transitional Justice in Postconflict Societies* 3, 5 (Joanna R. Quinn ed., 2009) (discussing many definitions of reconciliation); Harvey M. Weinstein, Editorial Note: The Myth of Closure, the Illusion of Reconciliation: Final Thoughts on Five Years as Co-Editor-in-Chief, 5 *Int'l J. Transitional Just.* 1, 7 (2011) (expressing doubt in prospects for reconciliation after mass atrocity and advocating for more modest goal of “living together peacefully without overt violence”).

242. Staub, *supra* note 33, at 872; see also Combs, *supra* note 231, at 51 (“[I]nternational offenders are . . . apt to retain the deeply held racist, nationalistic, or religious views that motivated their offenses, and these views can not only impede reconciliation but, under certain circumstances, can precipitate future conflict.”); Jodi Halpern & Harvey M. Weinstein, *Rehumanizing the Other: Empathy and Reconciliation*, 26 *Hum. Rts. Q.* 561, 565 (2004) (discussing challenge of enabling individuals in formerly violent societies to “overcome systematic dehumanization to see their neighbors once again as people”).

logical rehabilitation is not simply a matter of the perpetrator; it is a matter of peace. Ignoring trauma may imperil efforts at reconciliation and thus may undermine the consolidation of a stable peace. Without healing on the part of all affected individuals, reconciliation will necessarily suffer.

Of course, to offer up “more rehabilitation!” as a policy proposal would ignore the practical challenges to such programs. First, there is hardly enough money to fund victim rehabilitation, let alone perpetrator rehabilitation.²⁴³ Second, at the ad hoc tribunals for Rwanda and the former Yugoslavia and at the ICC, convicts serve their sentences in individual states’ prisons. Those states govern the conditions of confinement, and the courts have no involvement with the treatment of those prisoners. In some cases, prisoners do not speak the language, and vast cultural chasms separate them from the local population, which impedes their ability to participate in rehabilitation programs or even psychological evaluations.²⁴⁴

The neglect of rehabilitation, however, reflects a wider inattention to the psychological stability of the perpetrator, even outside the courts. In disarmament, demobilization, and reintegration (DDR) programs for former combatants, rehabilitation often does not figure into reintegration, except for unique populations like child soldiers,²⁴⁵ even though psychological trauma exists for individuals other than those whose agency was circumscribed when they committed their criminal acts.²⁴⁶ This, too, is a

243. Cryer, *supra* note 95, at 490–92 (noting resource constraints).

244. Jessica Kelder, *Rehabilitating War Criminals: What Happens to Those Convicted by the ICTY and ICTR Post-Conviction?*, Ctr. for Int’l Crim. Just., http://cicj.org/?page_id=1636 (on file with the *Columbia Law Review*) (last visited Mar. 11, 2015).

245. Lars Waldorf, *Int’l Ctr. For Transitional Justice, Transitional Justice and DDR: The Case of Rwanda 12–14* (2009), <https://ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf> (on file with the *Columbia Law Review*) (discussing rehabilitation only in context of child soldiers); see also Massimo Moratti & Amra Sabic-El-Rayess, *Int’l Ctr. For Transitional Justice, Transitional Justice and DDR: The Case of Bosnia and Herzegovina 28* (2009), <http://www.ictj.org/sites/default/files/ICTJ-DDR-Bosnia-CaseStudy-2009-English.pdf> (on file with the *Columbia Law Review*) (“[T]here was a critical lack of governmental engagement in helping former soldiers face the material and psychological challenges of returning to normalcy.”). At times, there is a second “r” for rehabilitation. See Robert Muggah, *Disarmament, Demobilization, and Reintegration, in Post-Conflict Peacebuilding: A Lexicon 123, 125–26* (Vincent Chetail ed., 2009); see also Sierra Leone Truth & Reconciliation Comm’n, *2 Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Comm’n ch. 4, ¶¶ 36–38* (2004), available at http://www.sierraleonecrtc.org/index.php/view-the-final-report/download-table-of-contents/volume-two/item/witness-to-the-truth-volume-two-chapters-1-5?category_id=12 (discussing rehabilitation of perpetrators and “widely held perception that the state had taken better care of ex-combatants rather than the victims of the conflict”).

246. See Int’l Peace Acad., *A Framework for Lasting Disarmament, Demobilization, and Reintegration of Former Combatants in Crisis Situations 2–8* (2002), www.ciaonet.org/wps/hal07/hal07.pdf (on file with the *Columbia Law Review*) (describing need for increased focus on psychological rehabilitation of ex-combatants in DDR programs). I adopt the language of circumscribed agency from Mark Drumbl’s *Reimagining Child Soldiers*. See Drumbl, *supra* note 162, at 17 (describing “circumscribed actor” as someone who “has the

problem of resources, but it is also a symptom of the larger problem of ignoring or denying the existence of—and importance of—the psychological suffering of perpetrators. A paradigm shift is needed; perpetrator trauma demands to be recognized not only as real, but also as profoundly affecting the future of societies riven by violence. Even if observers are not willing to concede that perpetrators deserve acknowledgment in this way, trauma still requires attention for the sake of the communities to which these people return.

B. *The Trauma of the “Free Man”*

The problem of perpetrator trauma is important, however, not only because it urges some change in our understanding of rehabilitation and reconciliation. Acknowledging the existence of perpetrator trauma also calls attention to the nature of trauma itself and opens up space for a new cultural understanding of trauma as a condition that can befall anyone—victims and perpetrators, objects and subjects, those who are acted upon and those who act upon others.

The perpetrators of *The Act of Killing* repeatedly note in the film that the Indonesian word for “gangster”—*preman*—means “free man.”²⁴⁷ This reminds the viewer that this is the world of impunity, in which the violent criminal rules the streets.²⁴⁸ But describing Anwar Congo as a “free man” also should call attention to the autonomous nature of his crimes. The film provides almost no context at all: After a mention that the killings were carried out under the auspices of the military in the film’s opening text,²⁴⁹ the military, and the state more generally, is absent from explanations of the crimes themselves. There is, moreover, no suggestion that Anwar had no choice but to kill, no intimation that he was coerced or brainwashed or even desperate to put food on the table to feed his family. Toward the end of the movie, Anwar states that he “had to do it.”²⁵⁰ But he does not blame the Indonesian government or the military or his commanders or his peers for making him kill; instead, he says that he “had to do it” because *his* “conscience told [him] they had to be killed.”²⁵¹ When Anwar Congo killed one thousand people, he was a free man; he wanted to kill and chose to kill on his own.

ability to act, the ability not to act, and the ability to do otherwise than what he or she actually has done,” but “effective range of these abilities . . . is delimited, bounded, and confined”).

247. See Tim Lindsey, *The Criminal State: Premanisme and the New Indonesia*, in *Indonesia Today: Challenges of History* 283, 284–85 (Grayson Lloyd & Shannon Smith eds., 2001) (analyzing “preman” in Indonesian society); see also *Act of Killing: Director’s Cut*, supra note 22, at 15:08–15:13; 37:35–37:42; 1:50:31–1:50:54.

248. See *Act of Killing: Director’s Cut*, supra note 22, at 1:10:30–1:10:55 (presenting views on victor’s justice).

249. *Id.* at 2:30–3:20.

250. *Id.* at 2:38:00–2:38:20.

251. *Id.* at 2:39:35–2:39:55.

In addition to constructing a character free of any suggested coercion or even context, Oppenheimer further underscores Anwar's agency, his exercise of choice in the crimes he committed, by demonstrating that for Anwar—for all of these men, really—killing was an act. We are told that they used to go to the movies before they massacred because it made them feel confident, primed, in the mood to kill.²⁵² We see them assume the character of death-squad leader and easily shed the role when they adopt the part of husband, father, grandfather.²⁵³ They were not innately monsters, not driven by some uncontrollable evil inside them to commit these horrific crimes. Instead, they took on a role, they did a job, they chose to behave this way.

This demonstration of agency, in turn, makes Oppenheimer's depiction of perpetrator trauma even more powerful, and even more unusual. Rony Brauman writes of the "100 per cent victim"²⁵⁴—the victim who is "entirely lacking agency"²⁵⁵—as the victim most likely to be recognized and met with sympathy.²⁵⁶ This is also the victim whose trauma is most likely to be acknowledged.²⁵⁷ The South African Truth and Reconciliation Commission and Rithy Panh both broke ground in describing perpetrators as suffering trauma on account of their crimes, but those men were not wholly perpetrators. Their agency, their opportunity to choose a different path, was compromised by conscription, by childhood, by a very real possibility of death as the only alternative. This compromised agency, in turn, moves them from the category of perpetrator into a "grey area," where perpetrator can be understood as victim as well.²⁵⁸ Anwar Congo, in contrast, is "100 per cent" perpetrator—the perpetrator who was entirely exercising agency when he performed the acts that now haunt him, and whose trauma arising out of that exercise of agency is least likely to be recognized.²⁵⁹ Accordingly, in ascribing the trauma of perpetrating crime to a quintessential perpetrator, as opposed to

252. See *id.* at 17:20–18:05 (depicting Anwar discussing "killing happily" after going to movies); see also *id.* at 1:16:30–1:17:28, 1:51:12–1:51:40 (depicting Anwar and others discussing how movies inspired their killings).

253. See, e.g., *id.* at 51:30–52:42 (depicting Anwar teaching grandchildren to care for an injured duck); 2:31:50–2:33:15 (depicting Anwar watching his reenactment with grandchildren and appearing happy).

254. Rony Brauman, *When Suffering Makes a Good Story*, in *Life, Death and Aid: The Médecins Sans Frontières Report on World Crisis Intervention* 149, 154 (François Jean ed., 1993).

255. R. Charli Carpenter, 'Innocent Women and Children': Gender, Norms and the Protection of Civilians 111 (2006).

256. Brauman, *supra* note 254, at 154.

257. See *supra* Part I.B (describing role of legitimacy and voice in recognition of trauma).

258. TRC Report Vol. 5, *supra* note 148, ch. 7, ¶¶ 53–54; cf. Primo Levi, *The Drowned and the Saved* 36 (Raymond Rosenthal trans., 1989).

259. In contrast, trauma arising out of situations in which the perpetrator did not exercise agency—such as abuse in childhood—is more likely to be acknowledged. See *supra* note 92 and accompanying text (discussing mitigating effect of such trauma in domestic law).

someone whose opportunity for choice was restricted and who thus is at least partly a victim in the traumatizing act,²⁶⁰ Oppenheimer encourages us to release trauma from its attachment to victimhood. A person may be a “victim of trauma” in the sense of being a person who experiences an event as trauma, without being *the victim* in that traumatic event. Acknowledging perpetrator trauma thus can restore trauma as a category with no predetermined moral status.

C. *The Humanity of Perpetrators*

Recognizing the existence of perpetrator trauma not only should transform the way we think about trauma, but also can change our understanding of crime, and the people who perpetrate crime, in the most horrific contexts. As Martha Nussbaum writes, “We very often tell ourselves that the doers of heinous wrongs are monsters, in no way like ourselves.”²⁶¹ To admit and acknowledge that perpetrators of atrocious crimes experience those crimes as trauma is to admit and acknowledge their status as people rather than monsters. Most defense attorneys will assert that humanizing perpetrators of terrible crimes is a challenging task, and is often the most important part of their work as defense counsel.²⁶² That may well be true, but the humanity of perpetrators matters even beyond those who seek to mitigate their punishments. It is an idea, a fact, that should matter to anyone interested in understanding atrocity and working to prevent it.

1. *Perpetrators as Monsters.* — The stories that perpetrators tell about their crimes might shock or fascinate or even repel. Anwar Congo draws us in with his smiles and his apparent vulnerability; it is hard to look away when Jeffrey Benzien recreates his act of torture. In part, these reactions stem from the content of the stories. Fans of true crime and Court TV can attest to their endless fascination with whether perpetrators of violent crimes are driven by all-consuming rage or numbed by mental illness or aggrieved by some prior injustice.²⁶³ This Article posits,

260. See Kathryn Abrams, *Complex Claimants and Reductive Moral Judgments: New Patterns in the Search for Equality*, 57 U. Pitt. L. Rev. 337, 348 (1996) (“[T]he categories of perpetrator and victim are understood to be simple and unitary: the perpetrator enjoys full agency, and the victim either lacks as a categorical matter, or loses . . . virtually all capacity for self-direction.”); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. Rev. 520, 548–50 (1992) (describing and critiquing “false dichotomy” of victim and agent).

261. Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* 450 (2001).

262. See Abbe Smith, *The “Monster” in All of Us: When Victims Become Perpetrators*, 38 Suffolk U. L. Rev. 367, 369 (2005) (“[A]mong those who have committed serious crime, it is the rare perpetrator who has not also suffered.”); Richards, *supra* note 92 (discussing work of mitigation specialists).

263. See Joseph E. Kennedy, *Facing Evil*, 104 Mich. L. Rev. 1287, 1289–95 (2006) (discussing serial killers as celebrities in American popular culture); Joyce Carol Oates, *The Mystery of JonBenét Ramsey*, N.Y. Rev. Books (June 24, 1999), <http://www.nybooks.com/>

however, that these sketches engross us not only because of morbid curiosity, but also because of limits on how the voices of perpetrators are heard.

The widespread shock that greeted Joshua Oppenheimer's choice to portray the leaders of the Indonesian death squads²⁶⁴ reflected the same controversy that met Jonathan Littell's *The Kindly Ones*,²⁶⁵ a novel about a fictional SS officer, and Jean Hatzfeld's *Machete Season*,²⁶⁶ which presented the accounts of génocidaires in Rwanda.²⁶⁷ Perpetrators are more often denied the privilege of testimony, omitted from the world of *superstes* and *testis*.²⁶⁸ We are simply not accustomed to hearing their stories.

Even when perpetrators' stories are heard, reactions to them are colored by assumptions about good and evil, ordinary and abnormal, capacity and incapacity for choice and feeling. In an earlier work, I establish how international criminal courts interpret the perpetration of mass atrocity through the lenses of ordinariness and abnormality, aiming to emphasize perpetrators' particular and unique deviance.²⁶⁹ Instead of treating them as ordinary people who are capable of doing terrible things, just like anyone else, these courts construct categories of individuals—those in the military, for example, or those who are well educated—who, they argue, should have behaved differently from the ordinary person. This enables the courts to emphasize the deviance—the monstrosity—of the persons who commit mass-atrocity crimes, even when those crimes are distressingly common.²⁷⁰

articles/archives/1999/jun/24/the-mystery-of-jonbenet-ramsey/?insrc=toc (on file with the *Columbia Law Review*) (tracing history of true crime's popularity).

264. Michael Meyer, False Fronts: *The Act of Killing* Shatters Indonesia's Sense of Self, *Colum. Journalism Rev.* (Sept. 3, 2013, 12:00 AM), http://www.cjr.org/critical_eye/false_fronts.php?page=all (on file with the *Columbia Law Review*).

265. Jonathan Littell, *The Kindly Ones* (Charlotte Mandell trans., 2009).

266. Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (Linda Coverdale trans., 2006).

267. See Madelaine Hron, Gukora and Itsembatsemba: The "Ordinary Killers" in Jean Hatzfeld's *Machete Season*, 42 *Res. Afr. Lit.* 125, 126 (2011) (describing "horrified" responses provoked by *Machete Season*); Susan Rubin Suleiman, When the Perpetrator Becomes a Reliable Witness of the Holocaust: On Jonathan Littell's *Les Bienveillantes*, *New German Critique*, Winter 2009, at 1, 2 (discussing challenges of representing subjectivity of perpetrators of mass atrocity and noting such representations "put[] both author and reader on uncomfortable ethical ground").

268. See *supra* note 46 and accompanying text (discussing Agamben's writing on witness).

269. See Mohamed, *supra* note 48, at 1651–62 (reflecting on notions of deviance and ordinariness in ICTY and ICTR decisions).

270. *Id.* at 1651–65, 1679–80. Restorative justice approaches, in contrast, urge humanization of the perpetrator. See Nick Smith, Justice Through Apologies: Remorse, Reform, and Punishment 106 (2014) (discussing restorative justice approaches to "humaniz[ing] the offender"); Daniel W. Van Ness & Karen Heetderks, Strong, Restoring Justice: An Introduction to Restorative Justice 95 (5th ed. 2015) (describing method of

These courts are not alone in their view of perpetrators. To see these people as something other than human is natural and, indeed, common. When Ron Rosenbaum used a baby photo of Adolf Hitler as the cover of his book *Explaining Hitler*,²⁷¹ it was met with bafflement. It should come as no surprise that Hitler was once a child, and yet, the photo simply startles.²⁷² Representing Hitler as a baby surely was intended to be provocative—Rosenbaum had an interest in selling books, after all—but it also vividly betrays the pervasive discomfort with the very idea of understanding people like Hitler as human. To some, understanding people like Hitler *at all* makes no sense. Claude Lanzmann described the idea of a book about Hitler's childhood as "obscene"; to Lanzmann, there should be—*can* be—no attempt to understand these people, because understanding will lead to forgiveness, and forgiveness will lead to amnesia, and amnesia will lead to recurrence.²⁷³

The blind spot for perpetrator trauma is a symptom of this common assumption or expectation that perpetrators are monsters, incapable of the same humanity as the people they have attacked. For some people, surely, there is no trauma, no regret, no pain at the site of violence. But as researchers have shown, for many others, there is no innate evil; there are only terrible choices, an embrace of a world—or a slow sinking into it—in which ideology and hatred take over, at least for a time.²⁷⁴ To recognize trauma requires admitting that the sufferer of that trauma is human—no different in psychology or mental or emotional capacity from anyone else. The perpetrator is capable of being hurt just as he can inflict hurt; he is capable of suffering just as he can inflict suffering. He does not necessarily have a stronger stomach for violence than a person who does not inflict violence.

Otherring the perpetrator of mass atrocity has clear social functions. As Emile Durkheim argued, identifying deviants enables members of

"encounter" between victim and offender, which can result in "humaniz[ing] them to one another").

271. Ron Rosenbaum, *Explaining Hitler: The Search for the Origins of His Evil* (2d ed. 2014) (1998).

272. See, e.g., Robert S. Boynton, Review of Ron Rosenbaum's *Explaining Hitler: The Search for the Origins of His Evil*, *Newsday*, July 19, 1998, at B9; Alex Ross, Regarding Hitler, *Slate* (July 1, 1998), http://www.slate.com/articles/arts/books/1998/07/regarding_hitler.html (on file with the *Columbia Law Review*) (reviewing Ron Rosenbaum, *Explaining Hitler: The Search for the Origin of His Evil*) (noting "Problem of the Baby Pictures" and describing "[b]aby pictures of Hitler" as "eerie").

273. See Rosenbaum, *supra* note 271, at xv–xvi ("For Lanzmann, the attempt to explain Hitler is not merely futile but immoral—he calls the very enterprise of understanding obscene."); see also Claude Lanzmann, The Obscenity of Understanding: An Evening with Claude Lanzmann, in *Trauma: Explorations in Memory* 200, 205–06 (Cathy Caruth ed., 1995) (describing Lanzmann's views on "obscurity of the very project of understanding").

274. See *infra* notes 281–283 and accompanying text (describing psychological and historical research indicating social environments can motivate individuals with no predisposition toward violence or cruelty to commit violent or cruel acts).

society to reaffirm their community of shared values.²⁷⁵ To treat the perpetrator of mass atrocity as a unique monster can convince us all that we are different from them, that we share a common sense of decency and humanity, and that none of us could ever slide into that same darkness. This is a comforting message.²⁷⁶ It is a message that says we are different from *those* people, and that we are better. It says the Holocaust or the Rwandan genocide or the destruction across Yugoslavia cannot happen again absent those same unique monsters who unleashed death and cruelty across Europe at that time. It says we need not worry.

2. *Perpetrators as Human.* — Nonetheless, the impulse to dehumanize, however natural and common, and the refusal to understand, however valid its motivation, should be resisted in the study of mass atrocity. Dismissing perpetrators as monsters ignores the choices they made, and offers them an out. If they are mere monsters, then we cannot imagine that they might have behaved differently.²⁷⁷ This kind of thinking, in turn, can prevent understanding of how these crimes happen. To admit that perpetrators are not monsters can encourage deeper examination of their choices and motivations, which can lead to more productive investigations of how to secure compliance with laws and resistance to campaigns of destruction.²⁷⁸ Moreover, assuming that perpetrators of atrocities are somehow different, whether monsters or others or deviants, may impede recognition of wrongdoing when the perpetrator appears no different from the average. Dehumanization campaigns that look like politics as usual may go unnoticed because their leaders seem to be normal human

275. See Emile Durkheim, *The Division of Labor in Society* 63 (W.D. Halls trans., 1997) (characterizing “real function” of punishment as “maintain[ing] inviolate the cohesion of society by sustaining the common consciousness in all its vigour”); see also Jacques Derrida, *Plato’s Pharmacy*, in *Dissemination* 61, 133 (Barbara Johnson trans., 1983) (describing scapegoat’s role in delineating boundary between society’s inside and outside).

276. See Omer Bartov, *Ordinary Monsters*, *New Republic*, Apr. 29, 1996, at 32 (reviewing Daniel Jonah Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust*) (describing appeal of Goldhagen’s theory that the Holocaust occurred because of a sui generis culture existing in Germany at the time).

277. See Mohamed, *supra* note 48, at 1681 (“Characterizing a person in these circumstances as having either no choice but to kill or no choice but not to kill fails to consider the complexity of the choice, and it misses the opportunity that resides in trying to understand that complexity.”). Beyond that, if they are monsters, then there may not be any justice in punishing them. See Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 *Ohio St. J. Crim. L.* 423, 425 (“[I]f remorseless wrongdoers really are ‘bestial’ or ‘malignant by nature,’ they may be seen as standing outside the moral domain in which such concepts as desert or guilt or punishment make clear sense.”).

278. See Alexander Laban Hinton, *Why Did They Kill?: Cambodia in the Shadow of Genocide* 4 (2005) (advocating greater research on individual choices); see also Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 *N.Y.U. L. Rev.* 1449, 1498–1501 (2005) (discussing costs of defendants’ silence in U.S. criminal courts).

beings, far from the monsters and savages we expect to see behind acts of great cruelty.²⁷⁹

Understanding the perpetrator as a suffering person need not undermine the goal of respecting victims and giving voice to their experiences. As elucidated in *The Act of Killing*, to recognize perpetrators as suffering trauma does not entail a reconfiguration of the perpetrator as a victim. It does not require a denial of Anwar Congo's crimes. It does not require sympathy or forgiveness. It is painful to watch Anwar Congo's failed catharsis on that rooftop, but one does not feel sorry for him and certainly does not forgive him. Recognizing trauma does, however, require recognition of the humanity of perpetrators, and it does therefore allow them, in one sense, to share the same space with victims. Both perpetrator and victim are thinking, feeling beings.²⁸⁰

Recognizing the equal humanness of perpetrators and victims might prompt two reactions from critics: either it is obvious, or it is unacceptable. On the first point, I resist the temptation to say that the world has evolved to a point where it can now accept that the perpetrators of atrocious crimes are people, too. To be sure, in some ways this has been established convincingly by research into the conditions that breed mass atrocity crimes. Stanley Milgram's shock experiments confirmed that people with no history of violence will hurt innocents if an authority figure tells them to do so, even if they are uncomfortable with the task.²⁸¹ Philip Zimbardo proposed through his Stanford prison experiment that individuals immerse themselves in the roles they are asked to play, and that they will then perform cruelty when those roles demand it.²⁸² Christopher Browning's *Ordinary Men* established that the individuals who massacred Polish Jews during the Holocaust were not Nazi fanatics, but rather regular people who were driven by pressures to conform and to obey authority.²⁸³ But as much as it might be common knowledge that

279. See Philip Zimbardo, *The Lucifer Effect: Understanding How Good People Turn Evil* 378 (2007) (discussing U.S. political leaders' responsibility for normalizing torture).

280. Cf. Kinch Hoekstra, *Hobbesian Equality*, in *Hobbes Today: Insights for the 21st Century* 76, 112 (S. A. Lloyd ed., 2012) (discussing "nature of Hobbes's commitment to equality" and noting "[i]t is not because we are equal that Hobbes says we ought to treat each other as equals; rather, it is because we ought to treat each other as equals that Hobbes says that we are equal").

281. See Stanley Milgram, *Obedience to Authority: An Experimental View* 143–49 (1974) (describing study assessing individuals' willingness to obey authority). In the experiment, volunteers played the role of teacher, and another group of individuals—who were part of the experiment—played the role of learner. *Id.* The experimenters instructed the teachers to ask questions of the learners and to administer a shock to the learner when an incorrect answer was given. *Id.*; see also *Obedience* (Penn State Media Sales film, 2008) (documenting Milgram experiments in 1962).

282. See Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 *Int'l J. Criminology & Penology* 69, 69, 80–81, 89 (1973) (describing study in which participants played roles of prison guard and prisoner).

283. See generally Browning, *supra* note 49, at xvi (describing how "grass-roots perpetrators became 'professional killers'").

ordinary people can do horrible things given the right circumstances, such recognition of the humanity of the perpetrator derives from facts about the perpetrator and the context before and up until the crime. The commander who demands violence of his subordinates, the radio broadcasts calling citizens to arms, the fear that drives a person to kill his neighbors—these are the stories told in the “ordinary person” narrative of mass atrocity.²⁸⁴ In the domestic context, the alcoholic father, the lack of education, the absence of opportunity—these are the stories that humanize the killer.²⁸⁵ Once the crime is committed, however, is that ordinary person still an ordinary person? A person at all?

Trauma indicates that he certainly is, but in the separation of the world into victim and perpetrator, it is too easy to forget the answer to that question. The invention of international prosecutions for mass atrocity crimes was justified by the idea that the perpetrator of these crimes is *hostis humani generis*—the common enemy of all mankind.²⁸⁶ Originally reserved for pirates, the term has come to encompass anyone whose crimes offend all of humanity. Hannah Arendt described Eichmann as “in actual fact *hostis generis humani*”;²⁸⁷ now, the torturer, the concentration camp commander, the *génocidaire*, and the terrorist are all, in the eyes of the law, enemies of all mankind.²⁸⁸ As a doctrinal innovation, *hostis humani* serves a narrow purpose in establishing why international courts or national courts exercising universal jurisdiction have a right to try individuals for crimes where otherwise there would be no jurisdictional basis for doing so.²⁸⁹ But *hostis humani generis* is much more than a doctrinal innovation. It is a rhetorical strategy, too—a term that establishes the inhumanity of perpetrators of mass atrocity crimes, that confirms their position as “enemies or strangers to humankind,” as others, as monsters.²⁹⁰ Ordinary people, perhaps at one time, but transformed by the stain on their soul into something else entirely.

On the second point, perhaps some will respond that allowing perpetrators to occupy the same space of humanity as their victims is too

284. See, e.g., Ervin Staub, *Overcoming Evil: Genocide, Violent Conflict, and Terrorism* 329 (2010) (advocating shift from “seeing [perpetrators] as evil to seeing them as human beings who engaged in horrible actions”).

285. See *supra* note 92 and accompanying text (noting use of evidence of suffering or deprivation earlier in life as mitigation for criminal punishment).

286. See 4 William Blackstone, *Commentaries* *71 (adopting Edward Coke’s characterization of pirates as *hostis humani generis* and arguing the pirate “has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature”).

287. Hannah Arendt, *Eichmann in Jerusalem* 276 (Penguin Classics ed. 2006) (1963).

288. See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (“[T]he torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.”).

289. Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* 162 (2007).

290. Jody Greene, *Hostis Humanis Generis*, 34 *Critical Inquiry* 683, 688 (2008).

jarring or even simply inappropriate. This position suggests that the separation of the world into victim and perpetrator might be the most significant collateral damage of the age of accountability.²⁹¹ There is, to be sure, some value to these categories. In the logic of international criminal law, naming individual perpetrators breaks the cycles of collective blame that fuel group conflicts.²⁹² Identifying victims, in turn, restores dignity to those who have been harmed by acknowledging their experience and, at times, offering them some recompense for their suffering.²⁹³ Nonetheless, the ubiquity of these categories also has costs in impeding the recognition that perpetrators of mass violence have equal humanity, that they make choices and can be held responsible for those choices.

Although recognizing the humanity of perpetrators might undermine the clear separation of perpetrator and victim at the heart of accountability in the context of mass atrocity, recognizing the common humanity of perpetrators and victims ultimately resonates with the goals of criminal punishment. If international criminal law seeks to reestablish the rule of law and to end the system in which the perpetrator enjoys unlimited power over the victim, then to render them both human and equal should be part of this goal. In this light, Yengeni's self-satisfied response to Benzien's reenactment of his wet-bag torture method makes

291. See Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 *Mich. J. Int'l L.* 1013, 1016 (2005) (arguing individual criminal accountability omits crucial category of bystanders). Outside of criminal processes, too, the categories of victims and perpetrators prevail. In the South African TRC, a process dedicated to restorative rather than retributive justice, see Desmond Mpilo Tutu, *No Future Without Forgiveness* 54–55 (1999), the Commission created an official list of victims, see *Truth & Reconciliation Comm'n*, 7 *Truth and Reconciliation Commission of South Africa Report* 936–76 (2002) (listing names of officially recognized victims), and identified perpetrators by name, see *Truth & Reconciliation Comm'n*, 6 *Truth and Reconciliation Commission of South Africa Report* 642–725 (1998). The *Government Gazette* also published the names of everyone who applied for amnesty. See *Promotion of National Unity and Reconciliation Act* 34 of 1995, § 20(6), available at <http://www.justice.gov.za/legislation/acts/1995-034.pdf> (on file with the *Columbia Law Review*).

292. See Simpson, *supra* note 289, at 54–55 (discussing benefits of identifying perpetrators).

293. See Victims' Rights Working Grp., *Statement at the 11th Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court* (Nov. 14–22, 2012), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/GenDeba/ICC-ASP11-GenDeba-VRWG-ENG.pdf (on file with the *Columbia Law Review*) (“For victims, a case before the ICC means that the international community hears their suffering . . . [and] is also the first step towards giving victims back the dignity they had lost through these crimes.”); see also Laurel E. Fletcher & Harvey M. Weinstein, *Transitional Justice* and the “Plight” of Victimhood, in *Research Handbook on Transitional Justice* (Dov Jacobs ed.) (forthcoming 2015) (manuscript at 42) (on file with the *Columbia Law Review*) (characterizing “imagined victim” of transitional justice as “the innocent victim who requires active intervention”); Sara Kendall & Sarah Nouwen, *Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood*, 76 *L. & Contemp. Probs.* 235, 253–58 (2014) (discussing abstract idea of “the victim” in ICC rhetoric).

more sense. In that hall, Benzien not only proved himself to be the brutal torturer that Yengeni knew he was, but also showed himself to be nothing more than a man, at the mercy of the rules of the Commission and the shadow of public opinion. Moreover, if criminal punishment can reassert the equality between victim and perpetrator after a crime has claimed the latter's superiority,²⁹⁴ as Jean Hampton proposes, then allowing ourselves to recognize the possibility of trauma in a perpetrator contributes to that restoration of balance.²⁹⁵ The trauma of the perpetrator cuts him down to size, makes clear that he is nothing more than a mere mortal.

Reflecting on the *Sonderkommandos* under the Nazis, David Rousset wrote that "the lesson of the camps is brotherhood in abjection."²⁹⁶ Perhaps with greater acceptance of the reality of trauma in perpetrators, the lesson of mass atrocity might be brotherhood in common humanity.

CONCLUSION

All victims suffer, but not all who suffer are victims. This seems obvious enough, but it can still be difficult to recognize the suffering of a person who seems to deserve no such recognition. Susan Sontag wrote that a "modern sensibility . . . regards suffering as something that is a mistake or an accident or a crime. Something to be fixed."²⁹⁷ Thus, to acknowledge that a person is suffering is to suggest that something should be done about it, and to acknowledge that a perpetrator of a crime suffers for having committed that crime is to suggest that that suffering should be corrected. This impulse—to help the perpetrator—conflicts with, and even upends, the victim-oriented approach of international criminal justice today.²⁹⁸ It also conflicts with, and perhaps upends, the impulse to cast the perpetrator in the role of the monster.

Fassin and Rechtman write that the "concept of trauma asserts the equal humanity of all suffering people."²⁹⁹ When we look at the perpetrator of mass killings, torture, rape, ethnic cleansing, it is not clear that we *want* to accept their humanity. To do so would be to admit the possibility that any of us might commit a horrible crime, that any of us might

294. See Jean Hampton, *The Retributive Idea*, in *Forgiveness and Mercy* 111, 124–43 (1988) (proposing that punishment can reestablish balance between perpetrator and victim).

295. See Jeffrie G. Murphy, *Moral Death: A Kantian Essay on Psychopathy*, 82 *Ethics* 284, 291–92 (1972) (explaining how claiming right to be punished preserves offender's "status as a moral person").

296. Agamben, *supra* note 46, at 17 (internal quotation marks omitted).

297. Susan Sontag, *Regarding the Pain of Others* 99 (2003).

298. See Felman, *supra* note 94, at 126 (discussing concept of "victims . . . writing their own history" in context of Eichmann trial (emphasis omitted)).

299. Fassin & Rechtman, *supra* note 71, at 283. Fassin and Rechtman write with a concern about the extension of victim status to all who suffer trauma and the failure to distinguish between victims and perpetrators, as opposed to this Article's interest in removing the linkage between trauma and victimhood. See *id.* at 280–82.

have some evil inside us just like the monster we see.³⁰⁰ But this possibility—this reality—merits recognition, even as it disturbs. The glass cage conveniently separates us from the person inside it, but it also reflects our own gaze.³⁰¹ If we look long enough, we might just see—against our urges, but productively, nonetheless—ourselves.

300. See Nussbaum, *supra* note 50, at 166–67 (“[W]hen we see Nazis depicted without disgust, as human beings . . . this is alarming because it . . . warn[s] us that we might well have done the same . . .”).

301. See Kati Blom, *Transparency and Catatonia*, in *Constructing Place: Mind and Matter* 189, 196–97 (Sarah Menin ed., 2003) (describing architecture theory on glass as means of both scrutiny and reflection).