A Jurisprudence of Catastrophe: An Introduction

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The Idea of Catastrophe

The study of catastrophe is a growth industry. Today, cosmologists scan the heavens for asteroids of the kind that smashed into Earth some 90 million years ago, leading to the swift global die-off of the dinosaurs. Climatologists create elaborate models of the chaotic weather and vast flooding that will result from the continued buildup of greenhouse gases in the planet's atmosphere.[1] Epidemiologists plan for the next pandemic of the proportions of the Spanish flu, which traversed the world in the waning days of the Great War and left a trail of 20 million dead.[2] Physicists ponder the chances that experiments with subatomic particles might lead to a "strangelet event": the sudden collapse of the planet into a hyperdense sphere the diameter of a football field.[3] Meanwhile, terrorist experts and homeland security consultants struggle to prepare for a wide range of possible biological, chemical, and radiological attacks: aerated smallpox virus spread by a crop duster, botulism dumped into an urban reservoir, a dirty bomb detonated in a city center.[4]

These events share the quality of being merely *possible*, but recent headlines supply more than sufficient examples of real-world catastrophes: Think of the ongoing humanitarian tragedy unfolding in the Darfur region of Sudan, the mass death that resulted from the tsunami of Banda Aceh, or the devastation visited on New Orleans by Hurricane Katrina. But if catastrophes run from the actual and the inevitable to the speculative and the highly improbable, what features do these events share such that they all can be denoted by the same term? Our brief parade of examples suggests that the term does not strictly limit itself to either natural occurrences or events caused by humans; it encompasses both. Nor does the word suggest a specific temporal dimension: Catastrophes may be sudden, caused by the strike of a storm or a terrorist, or slowly unfolding, the result of global warming or

a politics of racial exclusion culminating in genocide. And the term is more than simply a synonym for disaster: *Catastrophe* denotes something qualitatively more serious; we might agree that all catastrophes are disasters, but not all disasters are catastrophes. Catastrophe, then, is a limit term—it names a condition at the frontier and endpoint of all forms of fiasco and calamity.

In the original Greek, the term *catastrophe* denotes total "ruin" or a radical "overturning." Yet an overturning of what? As our examples suggest, we reserve catastrophe to describe events that bring about a substantial, if not mass, loss of life. Such events usually also include widespread destruction of infrastructure, collapse of public services, and massive disruptions of quotidian routine and existence. As radical disruptions of conventional processes and routines of life, catastrophes can be understood as overturning the *very concept of order itself.* Yet even this can be taken one step further, for by upsetting, if not utterly destroying, the predicates of ordered existence, catastrophe can also be understood as overturning the very belief in *normative order*—the idea that life should and can be patterned according to a system of rules.

It is this quality—the erosion of a belief in normative order—that most strikingly characterizes the response of writers and thinkers to earlier catastrophes. In the wake of the earthquake that devastated Lisbon on All Saints' Day in 1755, an event which by all accounts traumatized the Enlightenment imagination, Voltaire penned these famous lines:

> Will you say: "This is the result of eternal laws
> Directing the acts of a free and good God!" . . .
> Did Lisbon, which is no more, have more vices
> Than London and Paris immersed in their pleasures?
> Lisbon is destroyed, and they dance in Paris![5]

Move forward to the paradigmatic catastrophe of the twentieth century—the Nazi's destruction of the European Jews, denoted in Hebrew simply as the Shoah, "the Catastrophe"[6]—and we find a similar crisis of faith. In his haunting memoir *Night*, Elie Wiesel describes how Nazi policies destroyed both human beings and the possibility of a belief in God: "Never shall I forget those moments which murdered my God."[7] In *If This Is a Man*, Primo Levi echoes Wiesel's words in his remarkable description of the outrage he feels toward an inmate who, in earshot of those "selected" to be gassed, openly praises God for sparing his life: "If I was God, I would spit at Kuhn's prayer."[8]

Bringing the Law In

Framed in these terms, what would it mean to speak of a *jurisprudence* of catastrophe? If the question sounds unfamiliar, it is for the simple reason that little work has been done theorizing the relationship between law and catastrophe. The relationship between law and other limit conditions—such as states of emergency—has been the subject of a rich and growing literature.[9] By contrast, little has been written about law and catastrophe, and in devoting a volume to the subject, our hope is less to provide an overview of a well-defined field than to sketch the contours of a relatively fresh, yet crucial, terrain of inquiry.

As a preliminary matter, we might think of the relationship between law and catastrophe in two completely different ways. In the first, catastrophe could be considered as *issuing* from law. If modern secular thought sees catastrophe as an overturning of normative order, traditional religious thought often viewed catastrophe as an *expression of normativity.* In this understanding, catastrophe was seen as an instrument of law, as a tool of justice, a form of divine sanction for the violation of God's law.[10] In biblical stories such as Noah's Ark and the destruction of Sodom and Gomorrah, catastrophe is viewed in precisely this manner. In the *Prophets*, we read:

> For three crimes of Damascus, and for four,
> I have decided irrevocably!
> . . . I will send a fire into the house of Hazael . . .[11]

Far from a random event, catastrophe is God's tool for punishing the human community in a manner that is lawful, meaningful, and even just. Of course, this is the view attacked by Voltaire when he writes, *Will you say: "This is the result of eternal law / directing the acts of a free and good God!"* But notwithstanding the secular humanist critique, we continue to hear echoes of the divine understanding in pronouncements of contemporary religious fundamentalists of all stripes.[12]

At the other pole from the divine view is the liberal account. In this genealogy, law issues from catastrophe, not vice versa. In its most influential iteration, in Hobbes's *Leviathan*, the liberal account describes a state of catastrophic disorder from which all prudent reasoning persons seek to flee.[13] Here, however, we need to justify the designation of the state of nature as a state of catastrophe. By our own reckoning, catastrophe is an overturning of a preexisting order. The state of nature, by contrast, appears to preexist order, and thus it cannot be said to overturn

anything. Yet this challenge overlooks a key aspect of Hobbes's argument. Recall that, for Hobbes, the state of nature does *not* refer to a historical condition; in this regard, he parts company with Locke, who believed that all societies evolved out of such a state. For Hobbes, the state of nature is an *analytic* condition: It is the state that societies always threaten to revert back to, given the right set of conditions.

Seen in this light, law is constituted in the effort to escape catastrophe; indeed, law is what makes possible the defeat of catastrophic disorder and violence. In this reckoning catastrophe is both juris generative[14]—it is the ever-present threat of chaos that creates the need for law—and the very antithesis or negation of law—it is the uncontrollable force that threatens to extirpate law's ordering effects on social life. Once law has been established to maintain social order, catastrophe remains law's nemesis, the unruly force that would overturn the rules and regimes so carefully constructed by the principles and practices of legality. In this picture, the specter of catastrophe plays a crucial role in law's justificatory logic, as law appears as the bulwark between civilization and catastrophic disorder.

Both of these understandings—the divine and the liberal—appear in Linda Ross Meyer's contribution to our collection, "Catastrophe: Plowing Up the Ground of Reason." Meyer explores how modern law strives to gain dominion over catastrophe; how it attempts to subdue, domesticate, and colonize it. Specifically, Meyer shows how law works to master catastrophe through its standard responses to disorder—through strategies of *anticipation*, *prevention*, and *amelioration*. Yet as Meyer points out in her close reading of the Book of Job, this was not always the case. Historically, catastrophe was conceptualized not simply as refractory to secular law's regulatory techniques but as definitionally beyond law's regulatory domain. Enfolded within the category of "acts of God"—disasters born of an opaque and inaccessible divine logic—catastrophes were viewed as "unforeseeable" events for which, say, an insurer could not be held legally liable. Rather, they were seen as beyond secular law's jurisdiction. As Meyer makes clear, over time this understanding changed. With the ascendancy of liberal jurisprudence, law came to expand its jurisdictional ambit: Catastrophe was no longer seen as beyond the law's power of control but as a challenge to it—a challenge that demanded a legal response.

According to Meyer, this jurisdictional shift left neither law nor catastrophe intact. In *The Faces of Injustice*, Judith Shklar observed that the distinction between misfortune and injustice is not natural, inevitable, or stable.[15] Shklar insisted that the traditional idea—that misfortunes refer to accidents beyond human calculation and control, whereas injustices refer to harms that result from negligent,

reckless, or intentionally wrongful human actions—is no longer sustainable in a liberal legal community. In our legal universe, the failure to ameliorate the suffering of others may transform what first seemed a "misfortune" into an "injustice." Meyer's chapter powerfully echoes and expands upon Shklar's argument. Indeed, as several of our contributors make clear, one of the distinguishing features of catastrophe is its *urgent call for response*. Commonplace misfortunes can be ignored easily enough. The state can figuratively step over the body of the homeless without triggering a crisis of legitimacy. Catastrophe, by contrast, tolerates no such absence of response.

Within the liberal state, catastrophe demands action, and the failure to act will be seen as a crucial element of catastrophe itself. In the case of Hurricane Katrina, it was the government's failure to respond, more than the storm surge itself, that was decried as catastrophic.[16] The chaos, desperation, and lawlessness that engulfed New Orleans came to be seen as only *indirectly* a consequence of the hurricane and flood; they were the *direct* result of the government's failure to mobilize an effective response. Many critics of the government's response went further still, locating the crucial failure not in the woefully bungled relief efforts but in the failure to prevent the catastrophe from occurring in the first place. Had the government invested in the construction of a more durable levee system—and it was probable, if not certain, that New Orleans would one day be pummeled by a category-four hurricane[17]—then the flood damage might have been completely averted. Indeed, such arguments echo Rousseau's famous reaction to Voltaire's response to the Lisbon earthquake of 1755. Far from seeing the catastrophe as evidence of a disordered and meaningless universe, Rousseau understood the event in terms of human failure: ". . . it was hardly nature who assembled there twenty-thousand houses of six or seven stories. If the residents of this large city had been more evenly dispersed and less densely housed, the losses would have been fewer or perhaps none at all."[18]

In Rousseau's argument, we hear the position that Meyer describes as the colonizing impulse of the law—the desire to wrestle catastrophe from the realm of "acts of God" and to place it under the regulatory auspices of secular law. Thus, as we begin to theorize the relationship between law and catastrophe, Meyer's contribution frames two additional insights. First, *pace* Shklar, the distinction between catastrophes caused by nature and those orchestrated by humans is neither clear nor stable. Second, it is in the nature of catastrophe that any post hoc response will tend to be viewed as insufficient and belated. In terms of the triumvirate of ordering strategies available to the law, catastrophe demands that law be geared to

anticipation and prevention rather than amelioration. When the law finds itself in the position of mobilizing ameliorative actions, it has already failed in important respects to master the challenge of catastrophe.

Anticipation and Prevention

Regulation can be understood as the "act or process of controlling by rule or restriction."[19] In our contemporary legal universe, the concept of regulatory law specifically refers to orders or rules enforced by administrative agencies. These agencies are often responsible for articulating and enforcing rules that attempt to anticipate and prevent catastrophes.[20] The Securities and Exchange Commission, for example, establishes, interprets, and enforces rules designed to prevent a catastrophic collapse of the stock market. The Transportation Security Administration is responsible for regulating passenger and freight transportation in the United States in a manner that will safeguard against catastrophic accidents and attacks. Although most regulatory agencies tend to focus on anticipation and prevention, this is not always the case. As an administration specifically geared to disaster relief and assistance, the Federal Emergency Management Agency stands as the prime example of a regulatory administration with a focus on amelioration.

Yet regulatory agencies and administrations alone do not occupy the field of law's response to catastrophe. Viewed conceptually, it is helpful to distinguish between regulatory strategies (and by this we do not mean to limit our discussion to the world of administrative law) that involve criminal law and those that rely on civil law. *Criminal* law's response has been preoccupied with two kinds of catastrophic threats: those posed by states and those posed by terrorist groups. Under the former, we think of trials of perpetrators of state-sponsored atrocities such as genocide and crimes against humanity. Yet, as we'll see when we examine the concluding contributions to our volume, it is often difficult to say whether such actions are, at their core, preventive or ameliorative. In the case of terrorist threats, the law's response has clearly been aimed at anticipation and prevention, though this itself has emerged as a subject of intense controversy. Indeed, the most pressing constitutional issues of the day now involve questions such as the following: Does the executive branch enjoy inherent powers to order wiretaps of alleged terrorist suspects in the absence of congressional authorization or judicial warrants? Does the executive have inherent powers to authorize the use of "unorthodox" interrogation techniques for terrorist suspects?[21] Should terrorist suspects be

entitled to the full panoply of rights and procedures that come with trials before Article III courts?[22] And how can we characterize the powers claimed by the executive branch? Are they either legal or illegal, or is it important to use another characterization altogether such as "extralegal"?[23] These controversies raise the larger question of how we should go about striking the proper balance between civil liberties and collective security in an age of terrorism.

However we might think about these matters, we must recall that it is not terrorism per se that creates the need for a recalibration of what might be considered law's most critical balance. After all, anarchist groups were widespread at the turn of the twentieth century, and the terror they spawned was considered of epidemic levels.[24] New, then, is not the existence of terrorism but the *nature* of the threat that it poses. As Michael Ignatieff's *The Lesser Evil*[25] and Richard Posner's *Catastrophe: Risk and Response*[26] make clear, what distinguishes today's terrorists is their power to inflict catastrophic damage, which was the lesson learned on 9/11. It is this fact—the specter of catastrophe—that has changed the terms of the debate for those on the left and the right. At the most basic level, the need to anticipate and prevent terrorist-sponsored catastrophes has raised foundational questions about the substance and procedures of criminal law. Predictably enough, the answers to these questions often fall back on classic Hobbesian arguments: that in the face of catastrophic violence, the interests of security trump all. And yet this logic is peculiarly self-defeating: The law's draconian efforts to anticipate and prevent catastrophic terrorism threaten to erode law's distinctive status as a *normative* tool of social order.

As we shift our attention to civil law—from the topic of terror to the problem of error—the strategies for anticipating and preventing catastrophe are perhaps less controversial. In the world of civil law, catastrophic threats originate not in Al Qaeda plots but in corporate malfeasance. The paradigmatic instance remains the Bhopal disaster,[27] and the paradigmatic response involves the assignment of risk: The law shifts risk to the party best able to assess and manage it. This is the "costs of accidents" approach pioneered by Guido Calabresi and now familiar to all students of torts.[28] Calabresi's approach can be seen as a nice illustration of the historical development described by Meyer, as tort law comes to abandon the categorical and jurisdictional approach to calamity (acts of God) and instead enshrines the principle of *foreseeability*. Yet as Meyer implicitly suggests, the cost of accidents applies only imperfectly in the case of catastrophes. Calabresi's system, we recall, remains largely agnostic with respect to the question of prevention or amelioration.

From the standpoint of strict social efficiency, the decision to invest, say, in a safer workplace enjoys no particular advantage over the decision to pay damages for workplace-related injuries. In the case of catastrophe, however, the costs of amelioration are so staggeringly high that emphasis must be on prevention.

This also is a central argument of Posner's *Catastrophe: Risk and Response*. For Posner, the law often falters in response to catastrophe as a result of the "bafflement that most people feel when they try to think about events that have an extremely low probability of occurring even if they will inflict enormous harm if they do occur."[29] At times, Posner inadvertently underscores the difficulties, and the grotesqueries, that arise from the attempt to calculate catastrophic risks. Balancing the potential benefits of a series of planned physics experiments at a new laboratory at Brookhaven against their potential costs, Posner calculates as follows:

> RHIC's (Brookhaven's Relativistic Heavy Ion Collider) net present value would be $400 million. This figure is arrived at by subtracting from $2.1 billion—the present value of a stream of annual benefits of $250 million for 10 years discounted at 3 percent—$1.1 billion, the present value of the annual operating costs, similarly discounted, and $600 million, the accelerator's fixed costs.
>
> But now suppose the cost of extinction of the human race, which . . . can very conservatively be estimated at $600 trillion . . .[30]

Clearly, there is something farcical about this reasoning, though Posner delivers it with a straight face. Still, it underscores the centrality of the claim that the specter of catastrophe upsets the costs of accidents formulae; in responding to the challenges posed by catastrophe, civil law must emphasize prevention rather than amelioration.

At first blush, this point finds strong support in Ronen Shamir's contribution, "Catastrophes and Humanitarian Corporate Responsibility: A Conceptual Critique." Shamir explores the relationship between multinational corporations (MNCs) and humanitarian catastrophes, such as the unfolding genocide in the Darfur region of Sudan. Although many commentators have argued in support of submitting the atrocities of Darfur to a criminal tribunal,[31] Shamir is less interested in the perpetrators than in their corporate allies. To his credit, Shamir rejects the standard antiglobalist critique that lays the blame for all the world's disasters at the doorstop of the MNCs. At the same time, he is highly critical of the prevailing neoliberal ideology, which views the exercise of corporate social responsibility—the decision of a parent company to divest itself of a subsidiary doing business with a criminal regime, for example—as largely a matter of civic

virtue and voluntary action. Against this prevailing ideology, which also informs the larger logic of humanitarian relief, Shamir exhorts us to use the law to prod MNCs to do more to prevent and ameliorate catastrophe.

Yet beneath Shamir's normative argument, and almost concealed by it, lies a striking and troubling insight. Like Meyer, Shamir reminds us of the instability of the distinction between natural and human-made catastrophes; he notes, for example, that "it is now widely acknowledged that famines are not the result of natural causes alone" (p. 46). Instead, they typically result from a confluence of factors: political corruption, administrative ineptitude, failed infrastructure, deficient planning, and so forth. But from here, Shamir goes on to destabilize the distinction between prevention and amelioration—or to use the corollary terms in the world of MNCs, between *development* and *relief*—that informs Posner's jurisprudence of catastrophe.

Drawing on the vast literature of "dependent development,"[32] Shamir points out that efforts at development may result in propping up corrupt regimes that perpetrate grave humanitarian abuses. On the other hand, relief efforts in the absence of development (e.g., sending food to a region devastated by famine) may do little to help the people on the ground and may simply contribute to the vicious logic of socioeconomic dependence. Worse yet, efforts to address one catastrophe may only exacerbate another: Imagine, for example, a program designed to eliminate catastrophic levels of infant mortality that inadvertently contributes to catastrophic overpopulation: How do we assess the efficacy and justice of such initiatives? Posner's work on catastrophe assumed a relatively stable distinction between prevention and amelioration and offered seemingly sound reasons for devoting resources to the former rather than the latter. Shamir's chapter, however, problematizes these neat and well-meaning policy recommendations. Law's efforts to respond to the threat of calamity may lead it to precipitate the very thing it is trying to prevent.

This conundrum that law's efforts at prevention and amelioration may only exacerbate the problem is likewise the focus of Sylvia Schafer's chapter, "Political Catastrophe and Liberal Legal Desire: Two Stories of Revolution, Remediation, and Return from the French Nineteenth Century." While Meyer examined the ways in which law attempts to colonize catastrophe and render it judicially manageable, a mere blip in the grid of law's order, Schafer examines the ways in which catastrophe upends legal order in unanticipated ways. In her reading of Balzac's *Colonel Chabert*, she examines how the law's tools of colonization—actuarial thinking, policies

of indemnification, principles of risk management—all backfire in spectacular fashion in the case of the novel's eponymous protagonist. Here, law's attempts to mitigate the devastation of the Napoleonic Wars end up destroying what they aim to repair. Unable to deal with the resurfacing of a lost soldier deemed legally dead, the law succeeds where war failed—at utterly destroying the survivor.

At the same time that Schafer's reading reminds us of the fragility of legal personhood, it also supports Shamir's implicit challenge to Posner. In the second half of her essay, Schafer turns her attention away from the dislocations of the Napoleonic Wars to the trauma of the revolutions of 1848. As violence gripped the continent, the law was faced with a dilemma: How was it to deal with spasms of lawless uprisings by the impoverished classes? Formally conceived, this problem perfectly recapitulates and anticipates Shamir's discussion of the social responsibility of multinational corporations. Threatened with the specter of large-scale chaos in 1848, some social reformers urged the path of "relief": They believed that by providing legal assistance to the poor, the impoverished class could find help in the courts and so would renounce violence in the streets. These reformers, however, were opposed by those who resisted liberalizing access to the law. Doing so, they feared, without fundamentally altering the underlying social conditions of poverty, would only embolden the poor to more violence, creating greater social upheaval. In Shamir's terms, "relief" without "development" would only lead to greater social instability. And so Schafer locates a crisis, if not a tragedy, at the heart of the liberal legal project. As the attempt to help the socially disadvantaged threatens to mobilize a "predatory collectivity," the law becomes paralyzed by the specter that its gestures of amelioration will only create greater chaos. Legal efforts to contain catastrophe are haunted by the fear that they will only aggravate it.

Amelioration

We have already observed that the nature of catastrophe suggests that law's energy be devoted to anticipation and prevention rather than amelioration. Yet we have also seen that the distinction between prevention and amelioration is neither neat nor stable. Further, we have noted that attempts to ameliorate catastrophe will always remain troubled by the specter of insufficiency and belatedness, if not plagued by the concern that ameliorative gestures often exacerbate harm. Does this mean that law has no ameliorative role to play in the wake of catastrophe? This is the question addressed in the chapters by our final two contributors, Ravit Pe'er-Lamo Reichman and James E. Young.

Both Reichman and Young examine the nature of the law's response to the Holocaust, perhaps the most extraordinary and emblematic catastrophe of the twentieth century. As we've seen, Meyer argues that catastrophes were once viewed as acts of God, beyond law's jurisdictional reach, but that modern law resists this approach, claiming dominion over catastrophe. Meyer's claim again finds provocative support in the case of international law's response to Nazi genocide. In an effort to bring Nazi perpetrators to justice, international jurists articulated novel incriminations, such as the crime against humanity and the crime of genocide. They also pioneered the use of unorthodox jurisdictional theories, such as universal jurisdiction.[33] Such innovations were specifically intended to bring catastrophic crimes within law's jurisdictional reach. The success of these gestures is borne out by the fact that when we think of the law's response to the Shoah, we can't help but conjure images of Goering on trial at Nuremberg or of Eichmann in the glass booth at Jerusalem.

The Holocaust thus presents a prime example of catastrophe prompting law to innovate. But how do we characterize the nature and purposes of these innovations, and how do we measure "success" in terms of the prevention–amelioration continuum that we encounter throughout our volume? This question loomed large at the Nuremberg Trial, the subject of Reichman's chapter. Before, during, and after the historic trial before the International Military Tribunal, commentators asked whether any legally imposed sanction could ever right the scales of justice against the terrible weight of crimes against humanity and genocide. In his famous opening statement before the International Military Tribunal, chief allied prosecutor Robert Jackson addressed this issue when he observed, "In the prisoners' dock sit twenty-odd broken men . . . It is hard now to perceive in these men as captives the power by which as Nazi leaders they once dominated much of the world and terrified most of it. Merely as individuals their fate is of little consequence to the world."[34] Hannah Arendt, years before she essayed her famous banality of evil thesis, also spoke to the adequacy of a legal response in a letter to Karl Jaspers: "It may be essential to hang Goering, but it is totally inadequate. That is, this guilt, in contrast to criminal guilt, oversteps and shatters any and all legal systems. That is why the Nazis in Nuremberg are so smug."[35]

Given the unbridgeable gap between crime and sanction, what ends are served by submitting catastrophic crimes to legal judgment? Certainly, there are those who attempt to justify such a response in terms of conventional ideas of prevention—that is, deterrence. The International Criminal Tribunal for the former Yugoslavia[36] and the International Criminal Tribunal for Rwanda[37] invoke this justification

in their enabling language, and the statute of the International Criminal Court specifically speaks of the determination "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[38] Many observers, however, remain unconvinced by the deterrence justification.[39] Nuremberg, for example, did little to deter Pol Pot or Slobodan Milosevic, and Milosevic's trial, in turn, obviously made little impression upon the rebel leaders in Sudan.

Other scholars, by contrast, defend these processes as tools of amelioration rather than of prevention. Such trials, it is argued, provide a needed account of the history of a catastrophic episode and offer a valuable forum in which memories of survivors and witnesses can be publicly shared, recognized, and honored.[40] By serving the interests of history and memory, these proceedings can help persons, groups, and nations come to terms with the dreadful legacy of catastrophe.

It is precisely Nuremberg's relationship to memory that is the focus of Reichman's essay, "Committed to Memory: Rebecca West's Nuremberg." Reichman comes to the trial through the reportage of Rebecca West, the famous British novelist and writer who covered the trial for London's *Daily Telegraph*. If, at the Eichmann trial, Arendt was drawn to the prosecution's failure to comprehend the character of the accused,[41] West was drawn to a very different feature of the Nuremberg Trial: its boredom. West suffers no writer's block in characterizing this boredom; she returns to it time and again, capturing the quality of dullness with the most vivid language and images: "the courtroom was a citadel of boredom"; "Nuremberg . . . was . . . water-torture, boredom falling drop by drop on the same spot of the soul"; "the symbol of Nuremberg was a yawn"; "this was boredom on a huge historic scale."[42]

Yet as Reichman makes clear, West doesn't locate Nuremberg's boredom in any particular legal failing (e.g., the ineptitude of the prosecutors or the long-windedness of the defense counsels). Rather, she locates the source of Nuremberg's boredom in *disappointed expectations*: the first international war crimes trial failed to deliver a spectacle commensurate with the crimes to be judged. Put another way, Nuremberg was boring because, alas, Nuremberg was a trial. This parsing invites us to see disappointed expectations as a structural feature of criminal law's contact with catastrophe: This is the corollary of our observation that all attempts at amelioration will remain belated, incomplete, and unsatisfactory. Of course, in certain respects, it is possible to see the dullness of Nuremberg as a legal success. If one of the purposes of trials of catastrophe is to reintroduce norms of legality into

a radically lawless space, the very dryness of the proceeding can be construed as a triumph of legal sobriety over lawless chaos.

Yet in Reichman's reading, West is less concerned with interpreting the meaning of Nuremberg's boredom than in using the experience as a means of arriving at a fuller phenomenology of the trial. For West, the experience of boredom was deeply productive, as it created the space for memory to take root and grow. What kind of memory? Certainly not the kind of "responsible memory" that the Eichmann trial strove to encourage. By permitting survivors to testify in open court, the Eichmann trial aimed to make the trial's spectators into witnesses of the witnesses, now morally burdened with the memory of catastrophe narrated in a juridical setting.[43] For West, however, memory is not forged through the confrontation with acts of tragic witnessing. Instead, it is the experience of boredom that permits West to locate the voice of memory not simply in the courtroom and during the proceedings but just as crucially outside the courtroom, in encounters with citizens of Nuremberg. The vacancy of the words uttered in court thus makes her all the more attentive to the voices of gardeners, servants, former soldiers — Germans with whom she has chance, fleeting, yet resonant encounters during her perambulations in the ruined city. The experience of boredom invites a distinctly modernist form of reportage in which memory is forged out of the collision of multiple and conflicting voices. The memory of catastrophe cannot be controlled or dictated by the prosecution's script. Rather, it emerges out of the dialogue created between voices inside and outside the courtroom. Through these juxtapositions and shifts of perspective, we gain insight into the meaning of law's confrontation with catastrophe at Nuremberg.

James Young's chapter, "Mandating the National Memory of Catastrophe," is likewise concerned with the law as a means of mandating memory in the wake of the Holocaust. War crimes trials, however, play no role in his analysis. Young's interest is legislative, not judicial: He explores the law's role in mandating memory through official acts such as the creation of sites and days of commemoration. The story he tells is a fascinating one that invites comparison not only with Reichman's contribution but with Schafer's as well. In Schafer's reading of Balzac's *Colonel Chabert*, we encountered the flesh and blood survivor who found himself stripped of legal identity and citizenship as a result of being falsely reported as dead. In Young's essay, by contrast, statelessness and the absence of a legal identity appear not as a consequence of catastrophe but as a prelude to it. As Arendt observed in *The Origins of Totalitarianism*, rendering persons stateless is a crucial step to

denying them all human rights, including the basic right to exist.[44] Young describes Israel's provocative effort to confer posthumous Israeli citizenship upon the perished Jews of Europe, a gesture that can be read as both an effort to redress the legal injustices occasioned by the Nuremberg laws of 1935 and those suffered by Balzac's doomed protagonist. Equally provocative is his account of the legislative genesis of Yom Hashoah, Israel's official day of Holocaust remembrance. In tracking the Knesset's attempt to pick a fitting day for Holocaust commemoration on the Jewish calendar—a calendar already crowded with the burden of the Jews' long, and often calamitous, history—Young reminds us that the protection and nurturing of memory are deeply political acts, as much prompted by a vision of the present as by a respect for the past.[45]

At the same time, Young ponders the matter of form, the particular mode of expression chosen by the Israeli parliament in its memorial gesture. If we tend to think of law as declarative and discursive, if not directly fulsome,[46] how do we make sense of the commemorative logic of Yom Hashoah, which honors memory through silence? Certainly, silence is a common form of paying respect to the dead, but as Young makes clear, in mandating silence over speech, Israeli law also deconstructs the logic of classic state-sponsored commemorative gestures. These earlier efforts, which often took the form of grand monumental and architectural statements, were designed to dictate the terms of collective memory and script the meaning of sacrifice to a national audience. Yom Hashoah, by contrast, resists this totalizing logic. By mandating collective silence, the Israeli law opens a space for memories to coalesce, collide, and collect. If Reichman describes a productive boredom that can give rise to memory, Young tells of a silence in which memory can speak. In its answer to catastrophe, law eschews the impulse to fix meaning. By choosing silence as its mandated response to catastrophe, the law both acknowledges the limitations of any gesture of amelioration and, at the same time, recognizes that only in the solemnity of silence can memory begin the project of repair.

Conclusion

Taken as a whole, what do these essays suggest about the relationship between law and catastrophe? We began by noting two conflicting master narratives: the divine and the liberal. In the former, catastrophe serves as an instrument of law; in the latter, law emerges out of the primordial chaos of catastrophe. In the liberal genealogy, catastrophe—conceptualized as the state of nature, the war of all against

TABLE 1.1
Regulative strategies of liberal legality

Strategy	Criminal Law (terrorism, genocidal regime)	Civil Law (corporate malfeasance such as industrial accident, collusion with genocidal regime)
Anticipation	Terrorism: domestic spying, torture and aggressive interrogation, preemptive military strike, etc. Genocidal regime: preemptive military strike	Promulgation and enforcement of regulatory norms (administrative law response: can have criminal law component) Assignment of corporate risk, doctrine of foreseeability (tort law response)
Prevention	Terrorism: indefinite preventive detention, torture, regime change Genocidal regime: regime change, war crimes trials (deterrence: weak justification)	Promulgation and enforcement of norms of safety and infrastructural development, expanded norms of corporate responsibility (administrative law response: can have criminal law component) Shifting of risk (tort law response), shareholder actions, divestment
Amelioration	War crimes: regime change, domestic and international trials, monuments, days of remembrance	FEMA (administrative law), strict liability (tort law), humanitarian relief

all—remains law's ultimate nightmare at the same time that it provides law's raison d'être. Law is indebted to catastrophe as it is vexed and troubled by it.

As a tool of maintaining social order through rules, liberal legality is predicated on certain basic divisions and regulative strategies. At its most basic, the world of harm is divided into criminal and civil wrongs, while law's regulative strategies involve techniques of anticipation, prevention, and amelioration. In its contact with catastrophe, we have seen law's struggle to assimilate extreme events into a regulative grid (Table 1.1).

Yet as our contributors have demonstrated, law's ordering strategies are neither conceptually neat nor altogether efficacious when it comes to regulating catastrophe. It is in the nature of catastrophe that it *demands* a legal response, at the same time that all ameliorative responses will be seen as insufficient and belated. Catastrophe demands that law's regulative strategies be devoted principally to anticipation and prevention, but as a limit condition, catastrophe has the power to distort and frustrate law's regulatory ambitions. In the domain of criminal law, draconian efforts to master the threat of catastrophic terrorist attacks threaten to

erode liberal law's distinctive attractions as a tool of normative order. In the case of civil law, law's regulatory efforts reveal the instabilities in the distinction between prevention and amelioration, just as they threaten to exacerbate the very problems they are asked to relieve.

The relationship between catastrophe and liberal law is, in the end, at once constitutive and foundational, yet also liminal and unstable. Born out of catastrophic chaos, law strives to gain dominion over unmasterable calamity. Some, but not all, of these efforts may bear the traces of legal hubris and what Meyer describes as the colonizing impulse. We have also seen how contact with catastrophe also elicits law's humility, its respect of silence, and unscripted memory. Yet in its gestures of both hubris and humility, the law reveals its stress points in its continuing contacts with the specter of catastrophe. As the essays in this volume suggest, these stress points are both structural and contingent—built into the processes of legality but also amenable to change and reform. And while it will fall to future scholars of law and catastrophe to explore this balance between the structural and contingent more fully, we can say with certainty that these stress points will be tested severely in the years to come.

Notes

1. See, for example, Elizabeth Kolbert, *Field Notes from a Catastrophe: Man, Nature, and Climate Change* (New York: Bloomsbury, 2006).

2. See, for example, Laurie Garrett, *The Coming Plague: Newly Emerging Diseases in a World out of Balance* (New York: Farrar, Straus and Giroux, 1994).

3. Martin Rees, *Our Final Hour: A Scientist's Warning: How Terror, Error, and Environmental Disaster Threaten Humankind's Future in This Century—On Earth and Beyond* (New York: Basic Books, 2003).

4. See, for example, Anthony Cordesman, *Terrorism, Asymmetric Warfare, and Weapons of Mass Destruction: Defending the U.S. Homeland* (Westport, CT: Praeger, 2002); and Russell D. Howard and Reid L. Sawyer, eds., *Terrorism and Counterterrorism: Understanding the New Security Environment* (Guilford, CT: McGraw-Hill, 2003).

5. Voltaire, *The Complete Works of Voltaire*, Theodore Besterman et al., eds. (Geneva: Institut et Musée Voltaire, 1968).

6. Moishe Postone and Eric Santner, eds., *Catastrophe and Meaning: The Holocaust and the Twentieth Century* (Chicago: University of Chicago Press, 2003).

7. Elie Wiesel, *Night*, Stella Rodway, trans. (New York: Bantam Books, 1982), 32.

8. Primo Levi, *If This Is a Man*, Stuart Woolf, trans. (New York: Everyman's Library, 2000), 155.

9. See, for example, Nasser Hussain, *A Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).

10. See, for example, *The Selected Writings of Martin Luther* (New York: Anchor Books, 1959).

11. Amos 1:3–4.

12. Consider, for example, Pat Robertson's recent suggestion that God smote Ariel Sharon for "dividing God's land," http://www.cnn.com/2006/US/01/05/robertson.sharon/.

13. Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 2002).

14. See Robert Cover, "Nomos and Narrative," in *Narrative, Violence, and the Law*, Martha Minow, Michael Ryan, and Austin Sarat, eds. (Ann Arbor: University of Michigan Press, 1995).

15. Judith Shklar, *The Faces of Injustice* (New Haven, CT: Yale University Press, 1990).

16. See, for example, Radley Balko's Fox News commentary: "Sept. 11 is no longer the most catastrophic failure of government in my lifetime. Its response to Hurricane Katrina is. Government at all levels, run by both parties, regardless of race, inexcusably failed to secure the safety of the people of New Orleans. The lesson here is not the failure of one party or the other. The lesson here is the failure of government." http://www.foxnews.com/story/0,2933,168732,00.html.

17. See, for example, the five-part series that ran in *The New Orleans Times–Picayune*, June 23–27, 2002, http://www.nola.com/hurricane/?/washingaway/.

18. Jean-Jacques Rousseau, *The Collected Writings of Rousseau*, vol. 11, Roger D. Masters and Christopher Kelly, eds. (Hanover, NH: University Press of New England, 1990).

19. *Black's Law Dictionary Eighth Edition*, Bryan A. Garner, ed. (St. Paul, MN: West Publishing, 2004), 1311.

20. For a recent critique of this process, see Cass Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (Cambridge: Cambridge University Press, 2005).

21. For controversial answers in the affirmative, see John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005).

22. See, for example, the pieces by Daryl Mundis, Ruth Wedgwood, and Harold Koh collected in "Agora: Military Commissions," *American Journal of International Law 96*, no. 2 (April 2002), 320–44.

23. See, for example, Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven, CT: Yale University Press, 2002).

24. See, for example, Bonnie Honig, "Bound by Law? Alien Rights, Administrative Discretion, and the Politics of Technicality: Lessons from Louis Post and the First Red Scare," in *The Limits of Law*, Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, eds. (Palo Alto, CA: Stanford University Press, 2005).

25. Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton, NJ: Princeton University Press, 2004).

26. Richard A. Posner, *Catastrophe: Risk and Response* (New York: Oxford University Press, 2004).

27. See, for example, Paul Shrivastava, *Bhopal: Anatomy of a Crisis* (Cambridge: Ballinger, 1987).

28. Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven, CT: Yale University Press, 1970).

29. Posner, *Catastrophe: Risks and Response*, 9.

30. Ibid., 140–41.

31. See, for example, Gérard Prunier, *Darfur: The Ambiguous Genocide* (London: Hurst, 2005).

32. See, for example, Peter Evans, *Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil* (Princeton, NJ: Princeton University Press, 1979).

33. See Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001).

34. *Trial of the Major War Criminals before the International Military Tribunal*, vol. 1 (Nuremberg: International Military Tribunal, 1947), 99.

35. *Hannah Arendt–Karl Jaspers Correspondence 1926–1969*, Lotte Kohler and Hans Saner, eds., Robert Kimber and Rita Kimber, trans. (New York: Harcourt Brace Jovanovich, 1992), 54 (footnote omitted).

36. http://www.un.org/icty/legaldoc-e/index.htm; see specifically, Security Council Resolution 827, S/RES/827 (1993).

37. http://65.18.216.88/ENGLISH/Resolutions/955e.htm; see specifically, Security Council Resolution 955, S/RES/955 (1994).

38. William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001), 167.

39. See, for example, Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998).

40. See, for example, Douglas, *The Memory of Judgment*.

41. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin, 1994).

42. Rebecca West, *A Train of Powder* (New York: Viking Press, 1955), 3, 8, 9, 11.

43. See, for example, Hanna Yablonka, *The State of Israel vs. Adolf Eichmann*, Ora Cummings, trans. (New York: Schocken Books, 2004); and Douglas, *The Memory of Judgment*.

44. Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, 1951), 275.

45. See also James Young, *The Texture of Memory: Holocaust Memorials and Meaning* (New Haven, CT: Yale University Press, 1993); and *At Memory's Edge: After-Images of the Holocaust in Contemporary Art and Architecture* (New Haven, CT: Yale University Press, 2000).

46. See, for example, Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric, and Legal Analysis* (London: Macmillan, 1987).