The Virtues of Hybridity: Response to Symposium Contributions

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I am most grateful to James Stewart for hosting this symposium on my book *The Holocaust, Corporations, and the Law: Unfinished Business*, and I would like to thank him and the other contributors, Annika van Baar, Chimène Keitner, Joanna Kyriakakis, Mayo Moran and Franziska Oehm, for their insightful and thought-provoking comments.

In my book I argued that Transnational Holocaust Litigation (THL) offers a hybrid model, integrating criminal and civil law and conceptions of individual and collective responsibility. The different contributors acknowledge the THL model's potential for addressing the responsibility of the business corporation but raise various questions about the need for such a hybrid approach, especially considering what seems to be its biggest concession – the need to refrain from addressing the issue of moral blame. Thus, some of the responses suggest that the book overlooked the advantages offered by criminal law, while others argue that it did not go far enough in harnessing the possibilities offered by civil law responsibility. In my short response, I shall engage the different essays, dividing them along the criminal law/private law axis, and conclude by considering whether THL can provide a model for the future.

On the "criminal law" side we find **Franziska Oehm**, who challenges the notion of transnational civil class action settlement as the "better" tool for addressing corporate atrocities. She raises two main points. With regard to the class action mechanism, she notes the lack of an international institution competent to deal with class action lawsuits, and its relative weakness in many domestic jurisdictions outside the United States. With regard to the role of victims, she claims that the preference for a civil track holds true only in relation to well-defined and organized groups. Moreover, she rightly points out that some criminal law systems (such as in Argentina) do indeed allow for the initiation and participation of victims.

I would like to focus on the latter point, which questions the advantages for victim participation provided by the THL model as compared with criminal proceedings. Indeed, one of the goals of my book was to emphasize the importance of allowing victim groups to organize, initiate proceedings and participate in the legal process. In

particular, I pointed to the possibilities that the THL model offers for overcoming the barriers to such participation set by states (in both the domestic criminal track and the international track). Regarding the question of what kinds of groups may have the chance to harness these possibilities, I believe that THL provided mixed results. On the one hand, weaker groups such as the Roma were unable to receive significant compensation, but on the other hand, while the lawsuits were indeed initiated and led by strong Jewish organizations, most of the compensation paid by German corporations was channeled to weaker groups of former forced-laborers and their families in Eastern Europe. Substantively, I agree that victim groups' initiation and participation are no longer limited to civil litigation, and in my book I also pointed to parallel developments in International Criminal Law (ICL) concerning victim participation, such as in the Rome Statute. However, I argue that the solutions that were developed in THL to deal with problems of representation and conflicts of interest can prove fruitful for addressing these issues which are now resurfacing in ICL. In other words, in light of the trend toward victim participation in domestic and international criminal law, THL may provide a source of inspiration for creating better solutions to issues of mass representation.

Also writing from a criminal law perspective, **Joanna Kyriakakis** thinks that the book "gave up" too quickly on International Criminal Law (ICL) with regard to business corporations, partly because it focused on the Nuremberg model as opposed to modern ICL. Kyriakakis reminds us that, in fact, no corporation was put on trial in Nuremberg, so that the power of criminal law over corporate defendants was not really tested. **James Stewart** also contends that the book downplays the possibilities offered by modern ICL. Stewart rightly distinguishes between Nuremberg's jurisprudence, which was based on "conspiracy" and "criminal organizations" in order to move beyond the direct perpetrator, and modern ICL, "which has replaced them with a plethora of 'modes of liability' that are better suited to implicate corporations." On a deeper level, Stewart questions whether "civil liability is a sufficient response to what Raphael Lemkin once called 'barbarous practices' reminiscent of the darkest pages of history." At issue for him is the particular function that criminal law serves – one that is uniquely tailored to addressing moral blame through its expressive function, by insisting on prohibition as opposed to payment, or by prohibiting plea-bargains altogether.

Even though Stewart embraces the contextual and pragmatic approach of my book, and rightly observes that it should not be read as an argument for the "ascendance of civil redress and/or settlement as a blanket rule," I would like to address his concern about the ability of THL to tackle the issue of moral blame. In his essay, "Undoing Historical Injustice,"[1] legal historian Robert Gordon explains that the familiar critique of structural approaches to remedies is that they obscure the moral significance of social injustice. "Without acknowledgment of wrongful, personal agency, there is no shame; without shame, no assumption of responsibility, no possibility of redemption."[2] However, as Gordon is quick to remind us, "in practice it has been the agency-based approaches, rather than the structural ones, that have tended to be exculpatory: the new regime turns on the bad agents as scapegoats for wrongs that really derived from the routine functioning of an entire social system."[3] For Gordon, the capacity of criminal law to move from "narrow agent" to "broad agent" approaches by perfecting our "modes of liability" will not solve the problem because the very insistence on individual moral guilt to address problems of structural crimes will continue to hinder the law's ability to correct the structure. Gordon concludes that "Agency-based theories are really of very limited use as a framework either for understanding systemic or society-wide injustice or for ensuring it does not happen again."[4] This problem may arise from the commitment of criminal law to a traditional model that views the state as the source of legality and the criminal as a deviator from the norm, while the structural crime requires this conception to be reversed. As I wrote in the book:

> In this [the traditional criminal law] model, the culprit characteristically is an individual, and the state intervenes as the accuser and the agent for enforcing and defending violated norms of community order. The jurisprudence of atrocity begins with the opposite assumption. Here the state is no longer the locus of legality, but rather the source of illegality.

Structural approaches to responsibility begin with this reversal, attempting to "fix" the system first, by bracketing the issue of individual moral responsibility. Moreover, it should be noted that the issue of individual moral blame is not completely absent from

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[1] Robert Gordon, *Taming the Past, Essays on Law in History and History in Law*, 382-415.
[2] Id. at 411.
[3] Id. at 412.
[4] Id. at 409.

THL, but due to its new "division of labor" between judge and historian, it is relegated to the historical commissions.

Surprisingly, a similar concern with the adequacy of THL to deal with the question of moral blame was also raised from the side of private law by **Mayo Moran.** While endorsing a civil law perspective, Moran, like Stewart, raises doubts about the need to sidestep the issue of moral blame in order to address institutional responsibility. However, while Stewart upholds the conception of "retributive justice" offered by criminal law, Moran points to the potential of the unique private law conception of "reparative justice." Moran argues that "the role that private law's distinctive conception of responsibility could play in Bilsky's hybrid approach is limited by her view that adopting the structural reform model requires giving up on individual liability." Moran contends that the relationship between THL and private law remains not fully developed in the book, which moves between instrumental and intrinsic justifications and overlooks the intrinsic justification of private law as a means for reparative justice. As Moran put it, "The book misses an opportunity to harness the normative power of private law responsibility to provide a substantive account of why reparations – or at least an effort to repair – matter intrinsically to THL and not just pragmatically." In her view, we should return to the fundamental value that informs the requirement of compensation from the wrongdoer to the victim as "grounded in private law's respect for personhood – compensation is the mechanism by which the law insists that wrongful injuries be repaired by those who inflicted them." Moran rightly points to the book's chapter on humanitarian payment, where I criticize the German defendants' attempt to sidestep the reparative justice dimensions of the compensation by redefining it as a humanitarian gesture responding to the suffering of victims, thus severing the link between the responsibility of corporations (studied by the historical commissions) and the compensation paid to victims.

As I demonstrated in the book, the American model of structural reform litigation had to abstain from questions of moral blame in order to repair structural failures. In contrast, the criminal model offered by the Nuremberg trials focused on moral blame and therefore had to limit its reach only to the culpable individual. Moran asks if there is a way to integrate the recognition of both moral blame and institutional responsibility. In this respect, she rightly points to important developments in private law concerning the general duty of care in negligence law, as allowing for private law today to engage

with structural responsibility without limiting its view to the deviant individual (as exemplified by litigation concerning the system of residential schools for First Nations children in Canada).

Another question raised by some of the contributors is whether THL can provide a model for the future. **Chimène Keitner**, who addresses the "civil" law legacy of the Holocaust litigation, wonders whether the THL can serve as a model as it may have been feasible only due to particular historical circumstances: "[O]ne could justifiably wonder whether the model of transnational Holocaust litigation could ever be replicated to enable wide-scale corporate accountability for participation in mass atrocities outside of the forum state" given the significant unraveling of the idea of universal jurisdiction (*Kiobel*, 2013; *Jesner*, 2018), and the ability to bring claims as class actions (*Wal-Mart*, 2011; *Daimler AG*, 2014). **Annika van Baar**, acknowledges the importance of the interplay between law and history in my account of THL and its capacity to challenge common distinctions (between public and private and between ideological and economic motives) that hinder our understanding of business operation during the Third Reich. However, she also doubts whether the THL model could provide a promising model for other contexts, considering the exceptional status of the Holocaust in history.

The question whether THL can provide a model for the future may be answered by considering the underlying pressures that lead to legal developments in both criminal and private law. The different contributors thoughtfully challenge the model by presenting innovations in criminal and civil law that provide better tools for addressing the problem of collective responsibility and avoiding the false binary choice between individual and state/corporate liability. These include developments in criminal law offering new modes of liability that can implicate corporations (Stewart) and new mechanisms for victim participation (Oehm); and developments in private law that expand the duty of care standard and overcome procedural impediments like immunities and limitations-periods, thus opening up new possibilities for organizational liability (Moran).

I think that in order to see the larger potential in THL we should broaden our lenses beyond specific legal setbacks. Contra Keitner's contention that *Kiobel* and *Wal-Mart* have rendered THL a historical model that cannot be repeated, I suggest that we consider the wider context of the socio-legal turn to restitution. By expanding our view to cross-cutting developments in Europe as well as in the United States, we may

recognize the underlying influences of THL on the emergence of a reparative model of responsibility that integrates historical research with responsibility, compensation and rehabilitation. For example, inspired by the THL model, different government ministries in Germany, including the ministries of justice and foreign affairs, started appointing historical commissions to study their specific responsibility for crimes that took place during the Third Reich (as opposed to their general responsibility as part of state responsibility).[5] Similarly, historian Constantin Goschler[6] contends that the influx of restitution claims in Europe helped to shift attention from the responsibility of the German state to that of municipalities, schools and other local institutions. He argues that while Nuremberg and criminal law portrayed local actors solely as "victims," it was the turn to private law and its reparative model of justice that helped to expose their agency and co-responsibility and pointed the way to new means of reparation for specific victims. Indeed, as Moran rightly observes, a similar approach has emerged in the United States in relation to new demands for reparations for slavery. While these attempts failed in the formal legal tracks, they led several institutions (such as Georgetown University) to research their history and respond to demands of specific victims groups. We may also note in this context the current turmoil experienced by museums throughout the world in response to demands to acknowledge their colonial legacy, and the rise of provenance research as a device for addressing the problem of looted art.

In my view the way forward may also require looking backwards to forgotten legal struggles. For example, my current research on formulations of the crime of genocide in the immediate postwar period, which were developed by victim groups, both Jewish and Polish, who contested Nuremberg's war-crimes framework, reveals an early attempt to promote an integrative approach linking criminal liability for genocide with collective-group reparation and rehabilitation. The separation between the two tracks, which transpired for example in the Genocide Convention of 1948 (which excluded

[5] For example, the Independent Commission of Historians was appointed in 2005 to examine the role of the foreign service during the National Socialist era. Its report appeared as a book, *Das Amt und die Vergangenheit: Deutsche Diplomaten im Dritten Reich und in der Bundesrepublik Gebundenes Buch* (Munich: Karl Blessing, 2010) by Eckart Conze, Norbert Frei, Peter Hayes and Moshe Zimmermann.

[6] Constantin Goschler, "The Dispossession of the Jews and the Europeanization of the Holocaust," in Hartmut Berghoff, Jürgen Kocka, & Dieter Ziegler (eds.), *Business in the Age of Extremes: Essays in Modern German and Austrian Economic History*, Publications of the German Historical Institute (Cambridge: Cambridge University Press, 2013), 189-203.

cultural genocide and rejected the remedy of reparations), is at the root of the current movement of reparative justice.

In conclusion, instead of asking which law, civil or criminal, is better suited to address structural crimes, I believe that we must try to understand how both could and should adapt to meet the challenge. The lessons offered by THL can help us do just that.