

Judicial “Truth” and Historical “Truth”: The Case of the Ardeatine Caves Massacre

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1. Legal and Historical Adjudication

It is frequently claimed that adjudication before a court of law and historical adjudication are two entirely different tasks.¹ The methods and techniques employed by judges and historians contrast sharply. The judge faces many constraints, in terms of choice of subject matter, the arguments to be considered, the evidence to be evaluated, the procedural steps to be followed, the substantive rules to be applied, and the time available to reach a decision; historians, by contrast, are relatively free to choose

1. See Carlo Ginzburg, *The Judge and the Historian: Marginal Notes on a Late-Twentieth-Century Miscarriage of Justice* (London: Verso, 2002), 12–18; Asher Maoz, “Historical Adjudication: Courts of Law, Commissions of Inquiry and “Historical Truth,” *Law and History Review* 18 (2000): 559–606, especially 568–70.

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their field of research, manage their own time, gather the evidence, evaluate it, decide when findings are ready to be published, and reexamine them.²

The different rules and epistemological foundations of the two intellectual activities are easily explained by their diverging social functions: legal adjudication is primarily aimed at *resolving disputes* among individuals or between the individual and the state; historical adjudication is primarily aimed at *fostering knowledge* about past “events” and preserving long-term social memory within a community. Whereas a judicial decision is official and normative in character (and formal rules clearly determine who is a “judge”), historical adjudication is generally unofficial and descriptive (and it is not easy to answer the question: “who is a ‘historian’?”). The former directly affects the fate and fortune of a person; the latter has immediate implications only for the realm of ideas. In court, a final judgment is a source of knowledge, but its outcome is generally unreviewable; by contrast, historical knowledge, if unreviewable, is not knowledge at all.³

As a consequence, it is argued that the notions of judicial “truth” and historical “truth” cannot be confused and should be clearly distinguished.⁴ Historical grievances cannot be settled in a courtroom; legal disputes cannot be resolved by historians.⁵

2. Among the first and best analyses of the similarities and differences between the judge and the historian are the writings by Guido Calogero, *La logica del giudice e il suo controllo in Cassazione* (Padua: Cedam, 1964, originally published in 1937), 128; and Piero Calamandrei, “Il giudice e lo storico,” *Rivista di diritto processuale civile* 16 (1939): 105–28. More recently, see Claudio Pavone, “Note sulla Resistenza Armata, le rappresaglie naziste ed alcune attuali confusioni,” in *Priebke e il massacre delle Fosse Ardeatine* (Rome: L’Unità, 1996), 39–49; Yan Thomas, “La vérité, le temps, le juge et l’historien,” *Le Débat* 102 (1998): 17–36; Michael Stolleis, “Der Historiker als Richter – der Richter als Historiker,” in *Geschichte vor Gericht. Historiker, Richter und die Suche nach Gerechtigkeit*, ed. Norbert Frei, Dirk Van Laak, and Michael Stolleis (München: Beck, 2000), 173, 177–179; Pietro Costa, “In Search of Legal Texts: Which Texts for Which Historian?” in *Reading Past Legal Texts*, ed. Dag Michalsen (Oslo: Unipax, 2006), 158–81; and Maria Borrello, *Sul giudizio. Verità storica e verità giudiziaria* (Naples: Edizioni Scientifiche Italiane, 2011).

3. Massimo Donini, “La gestione penale del passaggio dal fascismo alla democrazia in Italia. Appunti sulla memoria storica e l’elaborazione del passato ‘mediante il diritto penale,’” *Materiali per una storia della cultura giuridica* 39 (2009): 183; see also Norberto Bobbio, “A quando, la libertà dagli ‘spietati doveri’?” in *Una “inutile strage”? Da via Rasella alle Fosse Ardeatine*, ed. Angiolo Bandinelli and Valter Vecellio (Naples: Pironti, 1982), 68–69 (noting that “in the court of history, there are no final judgments”).

4. Thomas, “La vérité, le temps, le juge et l’historien,” 21 (“historiens et juristes ne s’appuient pas sur une même idée de la vérité [. . .] On dit communément que la vérité en histoire est affaire d’adéquation du jugement aux faits alors que, en droit, le jugement ne constate pas, mais déclare la vérité”).

5. Stolleis, “Der Historiker als Richter – der Richter als Historiker,” 180.

These assertions are theoretically accurate and there is no reason to dispute them even from a normative point of view. The question to be raised concerns their correspondence to reality. Taking a legal realist perspective, it might be doubted that such a sharp dichotomy is exactly mirrored in the way in which law and history *actually* work in our social systems.

At least since the Nuremberg Trials,⁶ the boundaries between legal and historical adjudication have become increasingly blurred, and the two disciplines have started to interact more closely. The postwar paradigm shift has transformed the courts into a social arena in which history is frequently put on trial,⁷ with the aim of redressing wrongs, repairing historical injustices, and even fulfilling social demands for reliable knowledge and impartial "truth" about past events.⁸ Criminal trials have been naturally at the forefront in this process, but nowadays civil trials have assumed an increased importance,⁹ as is clearly shown by the Holocaust-related litigation,¹⁰ or by the slavery reparations debate.¹¹ As a result, adjudication of legal disputes is often intertwined with the

6. See Annette Wieviorka, "Justice, Histoire et Mémoire. De Nuremberg à Jérusalem," *Droit et société* 38 (1998): 59–67.

7. This is clearly shown by the impressive list of worldwide "history-related legal cases," provided by the Network of Concerned Historians, <http://www.concernedhistorians.org/content/le.html> (September 8, 2012).

8. Particularly relevant, from this point of view, is the example of the so-called truth-finding trials in Argentina: see Elena Maculan, "Prosecuting International Crimes at National Level, Lessons from the Argentine 'Truth-Finding Trials,'" *Utrecht Law Review* 8 (2012): 106–21; and Martín Abregú, "La tutela judicial del derecho a la verdad en la Argentina," *Revista IIDH Instituto Interamericano de derechos humanos* 24 (1996): 11–41.

9. Antoine Garapon, *Peut-on réparer l'histoire? Colonisation, esclavage, Shoah* (Paris: Odile Jacob, 2008); and Saul Levmore, "Privatizing Reparations," *Boston University Law Review* 84 (2004): 1291–318.

10. Leonard Orland, *A Final Accounting. Holocaust Survivors and Swiss Banks* (Durham, NC: Carolina Academic Press, 2010); Regula Ludi, "Historical Reflections on Holocaust Reparations: Unfinished Business or an Example for Other Reparations Campaigns?" in *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, ed. Max du Plessis and Stephen Peté, (Antwerpen-Oxford: Intersentia, 2007), 119–44; Michael J. Bazylar, "The Holocaust Restitution Movement in Comparative Perspective," *Berkeley Journal of International Law* 20 (2002): 11–44; and Samuel P. Baumgartner "Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases," *Washington University Law Journal* 80 (2002): 835–54.

11. Diane E. Sammons, "Corporate Reparations for Descendants of Enslaved African-Americans – Practical Obstacles," in *Repairing the Past?* (Antwerpen-Oxford: Intersentia, 2007), 315–58; Keith N. Hylton, "Slavery and Tort Law," *Boston University Law Review* 84 (2004): 1209–55; Charles J. Ogletree, "Repairing the Past: New Efforts in the Reparations Debate in North America," *Harvard Civil Rights-Civil Liberties Law Review* 38 (2003): 279–320; and Eric A. Posner and Adrian Vermeule, "Reparations for Slavery and Other Historical Injustices," *Columbia Law Review* 103 (2003): 689–747.

resolution of historical controversies, whose importance is no longer restricted to political decisions or scholarly debates. Not only has the practice of using history to support legal arguments become pervasive¹²; legal institutions—the courts, but also extrajudicial committees¹³—have also increasingly resorted to historical expertise to ascertain specific facts, elucidate their background, or evaluate opinions whose understanding goes beyond the skills or time constraints of a judge or other decision maker. In a number of cases, historians have been called upon to appear in court as expert witnesses.¹⁴ The Frankfurt Auschwitz trial¹⁵ and the Papon trial¹⁶ are two paradigmatic examples, but this phenomenon is by no means limited to criminal adjudication. Particularly in North America, the use of historical expertise has become a distinctive feature of many civil trials, chiefly deployed in regard to controversies concerning civil rights, property law, and aboriginal rights.¹⁷ History, in short, has been rendered auxiliary to law, and the ascertainment of “truth” by

12. Matthew J. Festa, “Applying a Usable Past: The Use of History in Law,” *Seton Hall Law Review* 38 (2008): 479, 488–98 (discussing the phenomenon of “law office history,” as it was first defined by Alfred Kelly).

13. As regards the role of historians within so-called truth committees, see Maria Rosaria Stabili, “Gli storici e le *Comisiones de la verdad* latinoamericane,” *Contemporanea* 12 (2009): 137–42; for an interesting account of the experience of the Swiss Bergier-Commission, an independent body created to investigate the issue of restitution of property unlawfully seized by National Socialists, see Gregor Spuhler, “Die Bergier-Kommission als «Geschichtsbareit»? Zum Verhältnis von Geschichte, Recht und Politik,” *Traverse: Zeitschrift für Geschichte* 11 (2004): 100–114.

14. See Paolo Pezzino, “‘Experts in truth?': The Politics of Retribution in Italy and the Role of Historians,” *Modern Italy* 15 (2010): 349–63; Vladimir Petrović, *Historians as Expert Witnesses in the Age of Extremes* (PhD diss. Budapest: Central European University, 2009); David Rosner, “Trials and Tribulations: What Happens When Historians Enter the Courtroom,” *Law and Contemporary Problems* 72 (2009): 137–158; Festa, “Applying a Usable Past: The Use of History in Law,” 540; Richard J. Evans, “History, Memory and the Law: The Historian as Expert Witness,” *History and Theory* 41 (2002): 326–45; and Dominique Damamme and Marie-Claire Lavabre, “Les historiens dans l'espace public,” *Sociétés Contemporaines* 39 (2000): 5, 10–16.

15. Irntrud Wojak, “Die Verschmelzung von Geschichte und Kriminologie. Historische Gutachten im ersten Frankfurter Auschwitz-Prozeß,” in *Geschichte vor Gericht*, 29–42.

16. See Henri Rousso, “Justiz, Geschichte und Erinnerung in Frankreich. Überlegungen zum Papon-Prozeß,” in *Geschichte vor Gericht*, 141, 155.

17. Olivier Dumoulin, *Le rôle social de l'historien. De la chaire au prétoire* (Paris: Albin Michel, 2003): 11, 63–106; Olivier Lévy-Dumoulin, “Des faits à l'interprétation: l'histoire au prétoire. Un exemple canadien,” *La revue pour l' Histoire du CNRS [en ligne]* 16 (2007): 1–7; Petrović, *Historians as Expert Witnesses in the Age of Extremes*, 142, 176; and Eric H. Reiter, “Fact, Narrative, and the Judicial Uses of History: Delgamuukw and Beyond,” *Indigenous Law Journal* 8 (2010): 55–79.

historians has started to influence, directly or indirectly, the definition of “judicial truth.”¹⁸

If the law turns out to be increasingly dependent on historical disciplines to accomplish its tasks, historical research has also been affected by a far-reaching phenomenon of “juridification.” It is probably going too far to claim that historiography has been “*saisi par le droit*”¹⁹; however, it can hardly be denied that today’s historians face many legal constraints both as regards the writing of history and the diffusion of its results. True, the proliferation of legal norms is not in itself proof of increasing restriction of historians’ freedom. Regulation can be perfectly freedom enhancing, as is shown by the example of state archives, whose existence and free accessibility to all are crucial to any historical inquiry.²⁰ However, the tendency in recent years, particularly in continental Europe, has clearly been toward a narrowing of the scope of historians’ freedom. Access to sources has been put under closer supervision, particularly (but not only) with the aim of safeguarding the individual’s interest in privacy and reputation.²¹ Above all, the disclosure of research results and the expression of opinions in historical matters have been—particularly in the field of contemporary history—subjected to stricter limits.²² Whether by means of judicial rulings or legislative intervention (of which the French “memorial laws” are paradigmatic), a series of official historical “truths” have been authoritatively established and protected against public contestation or gross trivialization, under threat of civil or criminal liability.²³ Holocaust denial is the most

18. For an early critique of the tendency toward a kind of “forensic historicism” see Ernst Forsthoff, “Der Zeithistoriker als gerichtlicher Sachverständiger,” *Neue Juristische Wochenschrift* 18 (1965): 574–75 (discussing the Frankfurt Auschwitz trial).

19. Carole Vivant, *L'historien saisi par le droit. Contribution à l'étude des droits de l'histoire* (Paris: Dalloz, 2007).

20. Emmanuel Cartier, “Histoire et droit: rivalité ou complémentarité?,” *Revue française de Droit constitutionnel* 67 (2006): 509, 516.

21. Particularly relevant is the Italian experience: see legislative decree 30–7–1999, no. 281 (introducing a particular regime for the processing of personal data for purposes of historical research) and the decision of the Italian Data Protection Authority, 14–3–2001, <http://www.garanteprivacy.it/garante/doc.jsp?ID=1556419> (September 8, 2012) (sanctioning the adoption of a code of self-regulation concerning the processing of personal data for purposes of historical research). See Paola Carucci, “La salvaguardia delle fonti e il diritto di accesso,” in *Segreti personali e segreti di stato. Privacy, archivi e ricerca storica*, ed. Carlo Spagnolo (Fucecchio: European Press Academic Publishing, 2001), 47–54.

22. See, generally, Diane de Bellescize, “L’autorité du droit sur l’histoire,” in *L’autorité*, ed. Jean Foyer, Gilles Lebreton and Catherine Puigelier (Paris: Presses Universitaires de France, 2008), 51–84.

23. For a comparative overview, see Ludovic Hennebel and Thomas Hochmann, ed., *Genocide Denial and the Law* (Oxford: Oxford University Press, 2011); as regards the

salient example,²⁴ but not the only one. In 2012, the French Constitutional Court struck down the last of the so-called *lois mémorielles*, prohibiting the denial of the Armenian genocide (*loi* 23-1- 2012, no. 2012-647).²⁵ Such a phenomenon is not limited to France or Germany. In 2008, the European Union adopted a framework decision providing for the punishment of activities including “publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes.”²⁶ Historians have been deeply concerned by this development, but their responses have not been uniform; many historians have publicly opposed such content-based regulations of speech, maintaining that “[i]n a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions”²⁷; others have been less critical, considering the “institutionalization of truth” with regard to “clearly established historical facts”²⁸ as an effective instrument to drive out of the marketplace of ideas dealers that lack factual foundation and scientific legitimacy.²⁹ In practice, however, the impact of legal norms concerning the way in which history is written and publicly

French experience, see Cartier, “Histoire et droit: rivalité ou complémentarité?” 527–33 (discussing “la derive historicide du droit”).

24. Robert Kahn, *Holocaust Denial and the Law. A Comparative Study* (New York and Basingstoke: Palgrave-Macmillan, 2004).

25. Cons. Const., 28–2–2012, no. 2012–647 DC, *Les petites affiches* 70 (2012): 11, with a comment by Jean-Pierre Camby, “La loi et le négationnisme: de l’exploitation de l’histoire au droit au débat sur l’histoire”; see also Tim René Salomon, “Meinungsfreiheit und die Strafbarkeit des Negationismus,” *Zeitschrift für Rechtspolitik* 45 (2012): 48.

26. Luigi Cajani, “Criminal Laws on History: The Case of the European Union,” *Historiein* 11 (2011): 19–40; and Laurent Pech, “The Law of Holocaust Denial in Europe: Toward a (qualified) EU-wide Criminal Prohibition,” in *Genocide Denial and the Law*, 185–234.

27. The sentence quoted is taken from the “Blois Appeal” promoted by the Association “Liberté pour l’histoire,” http://www.lph-asso.fr/index.php?option=com_content&view=article&id=47&Itemid=14&lang=en (September 8, 2012); on this see Pierre Nora, “History, Memory and the Law in France, 1990–2010,” *Historiein* 11 (2011): 10–13; Luigi Cajani, “Historians between Memory Wars and Criminal Laws: The Case of the European Union,” in *Jahrbuch der Internationalen Gesellschaft für Geschichtsdidaktik* (Schwalbach/Ts: Wochenschau, 2008), 27.

28. This is the category adopted by the European Court of Human Rights to affirm the compatibility of genocide denial legislation with Article 10 of the European Convention of Human Rights. See Pech, “The Law of Holocaust Denial in Europe,” 213.

29. On this, see the remarks by Jean-Clément Martin, “La démarche historique face à la vérité judiciaire. Juges et historiens,” *Droit et société* 38 (1998): 13, 16–17; and Wolfgang Benz, “Holocaust Denial: Anti-Semitism as a Refusal to Accept Reality,” *Historiein* 11 (2011): 69–78.

represented³⁰ is certainly growing, just as it is in relation to many other disciplines and social phenomena.³¹

It seems, therefore, that the dichotomy between judicial truth and historical truth is an extremely useful ideal type; however, its orthodoxy has come under strain, and it seems sometimes to be flawed in practice. Some authors have been explicitly talking about a “judicialization of history” (“*tribunalizzazione della storia*”), adapting a famous aphorism by Friedrich von Schiller in order to designate the distinctively modern phenomenon of historical adjudication by courts of law, and the influence of legal trials on the writing of history.³² Such a development presents novel and interesting challenges both to legal scholars and to historians. If a process of enhanced communication between law and history is under way, and in particular if judicial institutions are frequently called upon to fulfill societal needs for impartial knowledge about past events, are courts to be regarded as reliable historians? Can they offer consistent narratives, between one court and another? Should historians be bound by the outcome of a trial? And should judges exercise self-restraint in second guessing the findings of historical inquiries?

These are some of the controversial issues at the intersection of law and history that we address in this article. We will not approach them from a theoretical perspective. Rather, we will start from analysis of a specific case, which will be used to illustrate in concrete terms some of the problems arising from the “judicialization” of contemporary history. The case is taken from the Italian postwar experience and consists of a complicated set of controversies which all ensued from the same chain of events: the partisan (Italian resistance forces) attack on via Rasella, Rome (March

30. On the notion of “public use of history” see Nicola Gallerano, “Storia e uso pubblico della storia,” in *L’uso pubblico della storia*, ed. Nicola Gallerano (Milan: F. Angeli, 1995), 17; Damamme and Lavabre, “Les historiens dans l’espace public”; and Dumoulin, *Le rôle social de l’historien*, 91.

31. See, generally, Gunther Teubner, ed., *Juridification of Social Spheres. A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin and New York: De Gruyter, 1987); Stefano Rodotà, *La vita e le regole. Tra diritto e non diritto* (Milan: Feltrinelli, 2006), 9–72; Lars Chr. Blichner and Anders Molander, “What is Juridification?,” Working Paper University of Oslo, 14 (2005): 2–41, https://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers-2005/wp05_14.pdf (September 8, 2012); and David Levi-Faur, “The Political Economy of Legal Globalization: Juridification, Adversarial Legalism, and Responsive Regulation. A Comment,” *International Organization* 59 (2005): 451–62.

32. Alberto Melloni, “Per una storia della tribunalizzazione della storia,” in *La storia che giudica, la storia che assolve*, ed. Odo Marquard and Alberto Melloni (Rome-Bari: Laterza, 2008), 30; see also Jean-Paul Jean, “Le procès et l’écriture de l’histoire,” *Tracés. Revue de science humaines [en ligne]* 9 (2009): 61–74, <http://traces.revues.org/4344> (September 8, 2012).

23, 1944) and the Nazi massacre of the Ardeatine Caves³³ which happened the next day (March 24, 1944). The bomb attack on via Rasella and the mass executions that occurred in response to it are two of the most significant and debated events of the story of the Italian Resistance. They are not only part of a collective—albeit strongly divided—memory, but also represent a landmark for any scholar interested in the interplay between legal and historical adjudication. An enormous amount of litigation arose out of them. Two main categories of controversies can be distinguished:

1. criminal and civil proceedings related to the *facts* that occurred in Rome on March 23–24, 1944;
2. criminal and civil proceedings related to the *discourses* about the same events.

The judgments rendered in these cases are extremely interesting. They are interesting not only because they extend over a long period of time and span the entire legal system (as they concern private law, criminal law, international law, military justice), but also because they delineate one or more judicial “truths” that interact—and sometimes conflict—with the interpretation of the same events given by historians. Particularly significant in these cases is the circumstance that rulings concerning specific facts or omissions (war crimes, civil wrongs) are combined with rulings concerning speech about the same events (defamation and privacy claims). Whereas the debate on the juridification of history has generally focused on the first type of ruling listed, disputes of the latter type are no less important, because they illustrate the way in which the law also constructs historical reality through regulation of speech concerning past events of general interest.³⁴

We will try to shed some light on these questions by referring to the judicial treatment of the violent saga that culminated in the Ardeatine Caves massacre. We will first provide the necessary historical background

33. It is a matter of debate whether the best translation of the Italian “Fosse Ardeatine” is “Ardeatine Quarries” or “Ardeatine Caves.” We opted for the latter, as “[t]he ‘Fosse’ were originally quarries, and the Italian for ‘quarries’ is *cave*, which is why they are known as ‘caves’ in English (as well as because they were underground). Soon after the war the name was changed to ‘Fosse’ which means ‘graves’, but also ‘ditches’.” (Alessandro Portelli, “The Massacre at the Fosse Ardeatine. History, Myth, Ritual and Symbol,” in *Memory, History, Nation. Contested Pasts*, ed. Katharine Hodgkin and Susannah Radstone [Piscataway, NJ: Transaction, 2005], 40). See also the entry “Ardeatine Caves,” in *The Oxford Companion to World War II*, ed. Ian C.B. Dear (Oxford: Oxford University Press, 2001), 38.

34. On this issue, see Antoon De Baets, *Responsible History* (New York–Oxford: Berghahn, 2010), especially 72–90; and Nathalie Mallet-Poujol, “Diffamation et ‘vérité historique’” *Recueil Dalloz* (2000): jur., 226–31.

(Section 2). Then we will examine the first category of cases, namely the criminal and civil proceedings dealing with the facts that occurred in Rome on March 23–24, 1944 (Sections 3–7). Finally, our attention will be focused on the second category of controversies, those concerning the discourses about the massacre, and the massacre’s causes and effects (Sections 8–11). In the final section, we will try to generalize the findings that arise out of our empirical analysis (Section 12).

2. The Historical Background of the Ardeatine Caves Massacre

On July 19, 1943, Allied aircraft bombed Rome for the first time. The main target was the railway infrastructure, but the bombing caused approximately 3000 civilian casualties.

On July 25, the “Grand Council” of the Fascist party deposed Dictator Benito Mussolini.

A few days later, on August 14, Rome was unilaterally declared (by the new Italian government) an “open city,” meaning that it was without military defenses. This declaration was not accepted by the Allies, however, who, in the following months, repeatedly bombed infrastructures and industries around the city.³⁵

On September 3 1943, Italy signed a separate armistice with the Allies. The armistice was only made public on September 8.³⁶

Immediately, German troops advanced on and overcame weak resistance by a few Italian military corps that had not disbanded, and the Germans took control of the city.

The consequences were similar to what had happened in the rest of Europe occupied by the Nazis. In October, the remaining members of the Jewish community, who had been progressively discriminated against under Fascist rule and deprived of political and civil rights, were first convinced by the Rome-based SS (and Gestapo) commander Col. Herbert Kappler to surrender all their gold and jewels. Once this had been done they were deported to concentration camps (October 16–18, 1943). Out of 1023 people, only a handful survived.

35. This fact would hypothetically have fallen under Article 25 of the Annex to the 1907 Hague Convention. “The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.” For a historical overview see Umberto Gentiloni Silveri and Maddalena Carli, *Bombardare Roma. Gli Alleati e la “città aperta” (1940–1944)* (Bologna: il Mulino, 2007), 187–202.

36. Giorgio Rochat, “L’armistizio dell’8 settembre 1943,” in *Dizionario della resistenza*, vol. I, *Storia e geografia della liberazione*, ed. Enzo Collotti, Renato Sandri and Frediano Sessi (Turin: Einaudi, 2000), 32–40.

In the 9 months of German occupation (Gen. Clark's Allied troops entered Rome on June 5, 1944), no major military incidents occurred in the city. However there was much resistance activity, mostly in the form of propaganda and sabotage.³⁷ The Nazis, together with the remnants of the Fascist militia, engaged in a manhunt: capturing, torturing, deporting, and executing many Resistance members.

On March 23, 1944, members of the central unit of "Gruppi di Azione Patriottica" (hereafter GAP), a resistance group affiliated with the Communist Party, prepared and put into action a bomb attack against German troops in Rome.³⁸ On that afternoon, explosives hidden in some garbage cans on downtown via Rasella were detonated, destroying a patrol composed of policemen—mainly from Italian South-Tyrol—of the Eleventh Company, Third Battalion, *Ordnungspolizeiregiment* "Bozen." After the explosion, partisan commandos attacked the survivors with machine guns and hand grenades. Thirty-two soldiers were killed; one died shortly after, and another nine died a few days later.

The German reaction was immediate. The military commander of the city of Rome, Gen. Mälzer, after consultations with Gen. Mackensen, Gen. Harster, and Field Marshal Kesselring, ordered reprisals: ten Italians for each German casualty. It is debated whether the Germans had requested that those responsible for the attack take responsibility in order to avoid the reprisal; however, the most recent analyses by historians, supported by official documents and oral witnesses, have ruled this out.³⁹ What is known, is that 21 hours after the attack, the German commander put into action the reprisal plan: 335 people, held by the German and Italian authorities on account of suspicion of belonging to the Resistance, as well as a few surviving Jews and a few people arrested immediately after the attack in the surroundings of via Rasella, were removed from jail and brought to a quarry near Rome: the Ardeatine Caves. There, they were executed. Subsequently, the Germans loaded and detonated explosives in the quarry, causing it to collapse in order to cover up the corpses. The corpses were not recovered until the liberation

37. See Gabriele Ranzato, "Roma," in *Dizionario della resistenza*, 412–23.

38. For a detailed account of the partisan attack on via Rasella, see Joachim Staron, *Fosse Ardeatine und Marzabotto: Deutsche Kriegsverbrechen und Resistenza* (Paderborn, München, Wien, and Zürich: Schöningh, 2002), 35–77; Steffen Prauser, "Mord in Rom? Der Anschlag in der Via Rasella und die deutsche Vergeltung in den Fosse Ardeatine im März 1944," *Vierteljahrshfte für Zeitgeschichte* 50 (2002): 269, 279–86; Ranzato, "Roma," 420; and Roberto Battaglia, *Storia della Resistenza Italiana* (Turin: Einaudi, 1964), 224.

39. See below, note 90.

of Rome. The officer in charge of the execution was Col. Kappler, who commanded approximately seventy-three SS officers and soldiers.⁴⁰

Very little was actually known of the mass execution other than a short communiqué stating that ten “Badoglio-Communists” had been executed for each of the thirty-two German soldiers killed. Col. Kappler and his aides left Rome before the arrival of the Allies, and were deployed to other war fronts. However there was an immediate outcry after the Ardeatine Caves massacre, and considerable controversy. This is because, despite the horrors of the Second World War and the fact that the war on Italian soil lasted nearly 2 years, there were only two other episodes of mass executions in Italy: 770 civilians (mostly women, children and elderly persons) were killed in the summer/autumn of 1944 at Marzabotto on the Apennine front, and 560 victims (of the same categories of people) suffered the same fate at Sant’Anna di Stazzema.⁴¹

3. Judging the Facts: Criminal and Civil Trials

After the end of the war and the Nuremberg trials, the newly born Italian Republic also prosecuted German officers and soldiers accused of war crimes. Among them were Col. Kappler along with two officers and three subordinates who had taken part in the Ardeatine Caves executions.

There were two main trials concerning the Ardeatine Caves massacre:

1. The first, held in its various instances between 1948 and 1952, was against Col. Kappler and five other former SS members. In this trial, Kappler was also accused of having extorted 50 kg of gold from the Jewish community.
2. The second prosecution, held 50 years later, between 1996 and 1998, was against two SS officers, Karl Hass and Erich Priebke.

One must also consider, however, the actions, both criminal and civil, brought between 1949 and 1998 by the parents of some of the victims of the Ardeatine Caves massacre against the members of the partisan commando unit that conducted the operation on via Rasella.

40. For the details see Robert Katz, *Roma città aperta. Settembre 1943 – Giugno 1944*, (Milan: Il Saggiatore, 2009), 282.

41. The Sant’Anna massacre is in the background of Spike Lee’s *Miracle at Sant’Anna* (2008). There were also other terrible mass executions, such as Civitella Valdichiana (115 victims), but these were not of the same scale as Marzabotto and Sant’Anna di Stazzema. See, generally, Luca Baldissara and Paolo Pezzino, *Il massacro. Guerra ai civili a Monte Sole* (Bologna: il Mulino, 2009); Lutz Klinkhammer, *Stragi naziste in Italia. La guerra contro i civili 1943–1944* (Rome: Donzelli, 1997); and Staron, *Fosse Ardeatine und Marzabotto*, 12–13.

4. The Kappler Trial

The first thing to note is that the main trials were conducted before military courts, composed of senior officers. The judges in what would be the first trial had been variously deployed during the Second World War, originally as part of the allegiance with German troops, and afterwards in the army of liberated Italy *against* the Germans. In both trials, the legal framework was, for the most part, the wartime Military Penal Code.⁴²

A second factor that should be recognized is that the extremely detailed reconstruction of the facts that was put forth in the trial—condensed into hundreds of written pages—had as its aim the establishment (or not) of the responsibility of the accused. Therefore, it was necessarily filtered through a legal sieve. The records of the various trials undoubtedly represented the essential materials necessary for a historical reconstruction of the events of via Rasella and the Ardeatine Caves. Although many new facts were uncovered later, the trials are seen as having had a high degree of authenticity, especially if one compares the versions of events provided by the accused with those offered by witnesses for the prosecution. The trial also sheds light on a number of surrounding facts, and other people who had been involved at various levels.

Third, and more specifically, certain circumstances that might appear quite marginal in a historical reconstruction obtain central importance in the context of a trial, as will be discussed.

For example, this is clear when one considers Col. Kappler's defense: the execution of 330 persons was a legitimate act of reprisal. The execution of a further five persons was the result of a mistake in the prisoner list, and, therefore, lacked criminal intent.

Therefore the Court—in the first trial—was forced to consider whether the Germans could legitimately claim a right to retaliation. There were two options: either the via Rasella attack was an act committed by belligerents (and in that case there might be a right of reprisal), or it was committed by civilians (and in that case there might be a right to impose collective sanctions).

The obvious issue was the legal characterization of the nature of the resistance forces and of its acts. The Court of first instance concluded by virtue of Article 1 of the Annex to the 1907 Hague Convention that attacking commandos could not be considered belligerents, inasmuch as they did not “have a fixed distinctive emblem recognizable at a distance,” did not “carry arms openly,” and did not “conduct their operations in accordance

42. See, generally, Ettore Gallo, “Diritto e legislazione di guerra,” in *Dizionario della resistenza*, 338.

with the laws and customs of war."⁴³ The act, therefore, was not militarily legitimate. At the same time, the actions of the resistance movement were directly referable to the Italian state (partisan organizations had important and official coordination with the state). The Germans, therefore, were entitled to exercise a right of reprisal.

However, the Court came to the conclusion that this reprisal right was used in a disproportionate way,⁴⁴ and, further, could not be considered a legitimate act of collective sanction under Article 50 of the same Annex, as the victims had played no part in the Via Rasella attack.⁴⁵

Therefore the executions were not justified under international law.

At this point, Col. Kappler's individual position came under scrutiny. His second line of defense was that in ordering the execution he had obeyed the orders of his commanding officers, starting with Adolf Hitler at the top, and down the military hierarchy (Gens. Kesselring and von Mackensen) to his direct superior, Gen. Mälzer.⁴⁶ In response to this argument, the Court of first instance concluded that, although *in abstracto* an illegitimate order could have been challenged, when one took into consideration the rigid discipline of the SS corps, there was not sufficient evidence that Col. Kappler had acted with the knowledge and willfulness that he was executing an illegitimate order.⁴⁷ Therefore, he could not be held liable for the death of 320 of the 335 persons killed at the Ardeatine Caves.

43. Military Trib. Rome, 20–7–1948, *Rassegna di diritto pubblico* 4 (1949): II, 170, with a comment by Francesco Capotorti, "Qualificazione giuridica dell'eccidio delle Fosse Ardeatine."

44. See Philip Sutter, "The Continuing Role for Belligerent Reprisals," *Journal of Conflict & Security Law* 13 (2008): 93–122, especially 99.

45. "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."

46. Generals Kesselring, von Mackensen, and Mälzer were all sentenced to death by Allied war crimes tribunals, the last two specifically for having ordered the Ardeatine Caves massacre (see Staron, *Fosse Ardeatine und Marzabotto*, 132, 148). The verdict was commuted to life imprisonment. Gen. Mälzer died of natural causes in 1952 while serving the sentence. The other two generals were released that same year (see Pier Paolo Ravello, "Lacune e incertezze negli orientamenti processuali sui crimini nazifascisti," in *Giudicare e punire. I processi per crimini di guerra tra diritto e politica*, ed. Luca Baldissara and Paolo Pezzino [Naples: L'Ancora del Mediterraneo, 2005], 259) and died in their own beds, without ever disavowing their full adherence to Nazism and its abject and destructive policies.

47. One can observe a clear inconsistency on this point. The decision notes that the designation of Col. Kappler as executor of the reprisal order came after the head of the battalion, Maj. Dobbrick, whose battalion the attacked German patrol was part of, excused himself from the task, arguing that his men were not trained to conduct this kind of operation. Also, when Corp. Amonn, one of the soldiers entrusted with the execution, entered the Caves and saw the corpses lying on the ground, he was so horrified that he fainted (see Katz, *Roma città aperta*, 290). There were, therefore, ways to not obey the order.

A different solution was adopted by the Court concerning the ten victims that Col. Kappler added to the list after having learned of the death of another German soldier. The order he had received was to execute 320 persons. The execution of a further ten was his own initiative, for which he did not have the same authority. Col. Kappler was also held responsible for the execution of the remaining five people that make up the total, because the “mistake” made by his subordinate was the result of Kappler’s clear intention to put an end to the matter without taking the least precaution, therefore showing a reckless disregard.

The outcome was that Col. Kappler was sentenced to life imprisonment (also for the illegal seizure of gold from the Jewish community).⁴⁸ His codefendants Maj. Domizlaff, Capt. Clemens, and Sgts. Quapp, Schütze, and Wiedner were acquitted because they had acted under the orders of their commanding officer.

This decision was upheld on appeal, and became *res judicata*.⁴⁹

5. The Priebke Trial

Although at least seventy officers and soldiers had been involved in the Ardeatine Caves massacre, only six of them were brought to trial in 1948. The remainder could not be found, and it was assumed that they had died in subsequent war hostilities. One can easily understand how extremely difficult a task it was to find people and serve procedural legal summonses on them in the aftermath of the devastating war, and with millions of people displaced, especially in Central Europe. Attempts at

48. Kappler could not be sentenced to death because the Italian Military Penal Code of 1941 (article 185) punished acts of violence against civilians committed by a military force as a “common” murder and therefore with the sanctions contained in the Penal Code. The head of the Fascist police in Rome, Pietro Caruso, who, under Kappler’s orders, had drafted a list of fifty prisoners who were eventually executed at the Ardeatine Caves was, instead, sentenced to death in 1944 by a special tribunal (see below, note 84).

49. Sup. Mil. Trib., 25–10–1952, *Kappler*, *Rivista di diritto internazionale* 36 (1953): 193, with a comment by Roberto Ago; Court of Cassation, S.U., 19–12–1953, no. 26, *Kappler*, http://www.difesa.it/GiustiziaMilitare/RassegnaGM/Processi/Kappler_Herbert/Pagine/08senzenza26.aspx (September 8, 2012). It is worth remembering that in 1976, after considerable pressure from the German government, Col. Kappler was released for medical reasons (cancer) but confined in a military hospital in Rome. On the night between August 14 and August 15, 1977, his wife smuggled him out of the hospital in a large suitcase and drove him to Germany, where he was publicly acclaimed by former Nazi supporters. The German authorities refused to extradite him, arguing that as a “prisoner of war” (not a war criminal) Kappler had exercised his right to escape. He eventually died in 1978 as a result of his cancer. For a detailed account of Kappler’s escape, see Felix Nikolaus Bohr, “Flucht aus Rom. Das spektakuläre Ende des ‘Falles Kappler’ im August 1977,” *Vierteljahrshefte für Zeitgeschichte* 60 (2012): 111–41.

establishing the location of those who were not found had to be abandoned, and no further searches were made.⁵⁰ Also, an attitude played a role in the reluctance to prosecute, and was comprehensible in light of the Kappler verdict: his subordinates had all been acquitted and, therefore, it was reasonable to expect that a similar verdict would have resulted if other subordinates had been tried.⁵¹

Times changed. In May 1994, the Simon Wiesenthal Center found out that one of the officers involved in the massacre, Capt. Erich Priebke, was living undisturbed in the town of Bariloche, Argentina, where he had fled, together with many other war criminals, thanks to a strong network of sympathizers, including German religious organizations. After a lengthy process, Priebke was extradited to Italy and tried in front of the same Italian military court that had decided the Kappler case. The first issue for us to consider, concerns the competency of the military tribunal. The relatives of the seventy-five Jewish victims insisted that Priebke be tried for genocide in front of an ordinary court, which was the basic proposal underlying the request for extradition that had been granted by the Argentinean authorities.

The judge for the preliminary hearing expressed the view that as the crime of genocide had not existed in Italy until 1967, when it was introduced with the ratification of the 1948 New York Convention, such a charge could not be retroactively applied to facts dating back to 1944. This decision is in sharp contrast with the principle that had been laid down in the Nuremberg trials. However in none of the subsequent—and extremely controversial—phases of the trial was the jurisdiction of the military courts rejected, and, therefore, Priebke was charged with the same offenses as Col. Kappler had been: violence against civilians, punishable by Article 185 of the wartime Military Penal Code.

Quite predictably, Priebke’s defense was extremely simple: he had acted exactly as the other codefendants in the Kappler trial had acted; namely, under orders from his commanding officer. The second line of defense

50. Behind the weak prosecution of Nazi crimes in postwar Italy also lay political reasons. These were related, on the one hand, to the need to preserve good relationships with the new German state, and, on the other hand, to fear of a massive prosecution of Italian war criminals abroad. On this, see Filippo Focardi, *Criminali di Guerra in libertà. Un accordo segreto tra Italia e Germania federale, 1949–1955*, (Rome: Carocci, 2008), 35–40; Gerald Steinacher, “Das Massaker der Fosse Ardeatine und die Täterverfolgung. Deutsch-italienische Störfälle von Kappler bis Priebke,” in *Italien, Österreich und die Bundesrepublik Deutschland in Europa. Ein Dreiecksverhältnis in seinen wechselseitigen Beziehungen und Wahrnehmungen von 1945/49 bis zur Gegenwart*, ed. Michael Gehler and Maddalena Guiotto (Wien, Cologne and Weimar: Böhlau, 2012), 296–301.

51. See above, Section 4, discussing the decisions of Military Trib. Rome, 20-7-1968, and Sup. Mil. Trib., 25-10-1952.

was that the action against Priebke was barred by the statute of limitations (20 years after the fact).

The decisions rendered in this trial relied heavily on the facts as determined in the earlier Kappler trial. However, in order to establish the exact role of Capt. Priebke, considerable effort was made to discover exactly how the lists were compiled of those who were to be executed (Priebke was in charge of the lists at the Ardeatine Caves, and crossed the names of the victims off as they were taken down into the Caves).

The first decision (August 1, 1996)⁵² surveyed in detail the claimed status of Rome as an “open city” at the time, and came to the conclusion that this unilateral declaration made by the Italian government was neither accepted, nor binding on the Allies or the Germans, who, therefore, were entitled to quarter troops there.

The first decision came to two further findings of fact: the German Army had publicly announced as a general rule for all the Western occupied countries a ratio of ten to one in the event of reprisals for actions taken against German troops by resistance groups. However, regarding the via Rasella attack, it had been ruled out that the Germans had first asked the authors of the attack to surrender in order to avoid the implementation of the reprisal.

Coming to the more juridical aspects of the judgment, the first decision significantly differed from that of Kappler in that:

1. The “mistake” that was made in executing more than 330 prisoners was a criminal offense directly referable to Capt. Priebke, who had been checking the lists, and, therefore, had been perfectly aware of the fact that those persons were going to be executed.
2. Capt. Priebke could not hide behind the defense that he was following the orders of his commanding officer.⁵³ The reprisal obviously violated any sense of humanity, because it was so disproportionate and because the victims bore no relationship whatsoever to the partisans’ attack. Any ordinary person in Capt. Priebke’s shoes would have realized this, and the fact that Capt. Priebke was a fanatical SS officer could not be used as a justification for disregarding the rule of reasonable conduct.
3. Capt. Priebke, contrary to his assertions, not only should have refused to obey such an inhuman order, but could have done so without great risk. In this regard, it is interesting to note that the military prosecutor presented as an expert witness the German officer who at the time of trial had been in charge of the SS Archives, and that this officer declared

52. Military Trib. Rome, 1–8–1996, *Priebke*, *Cassazione penale* 37 (1997): 251.

53. See, on this issue, Giorgio Sacerdoti, “A proposito del caso Priebke : la responsabilità per l’esecuzione di ordini illegittimi costituenti crimini di guerra,” *Rivista di diritto internazionale* 80 (1997): 130.

that none of the SS members who had disobeyed similar orders had risked their lives by so doing. Rather, they had merely been subject to administrative sanctions such as removal from office, transfer to the front, or loss of career opportunities. Priebke, therefore, had a clear opportunity to personally avoid executing the criminal order he had received via Kappler.

4. Capt. Priebke was, therefore, responsible for the murder of all 335 victims and was, therefore, *in abstracto*, subject to the punishment of a life sentence. However, *in concreto*, some mitigating circumstances had to be taken into account. These included having obeyed an order—albeit illegitimate—from his commanding officer, and having after the war conducted his life in a way that was at odds with his previous Nazi affiliations. Factoring in these circumstances, a maximum sentence of 21 years in prison was warranted, and, therefore, applying the rules on prescription, the action was barred after 1966. Therefore, Capt. Priebke was acquitted and released.
5. The principle that crimes against humanity are never time barred could not be applied in order to avoid prescription in this case, because, as mentioned earlier, the law against genocide had been introduced after these facts had occurred.

The Priebke case decision provoked a public commotion.⁵⁴ To put it in rather blunt terms, Priebke had been already condemned as a Nazi by history and by public opinion, and the military tribunal should have delivered a decision in conformity with such extrajudicial conclusions.

In the end, however, the decision was short lived. On October 27, 1996, the Italian Court of Cassation ("*Corte di Cassazione*") quashed the decision on procedural grounds.⁵⁵ Prior to Priebke's trial in the court of first instance, the head judge who had been assigned to preside over the military tribunal hearing it, had criticized the action brought by the military prosecutor, expressing the view that Priebke should not be held criminally liable and that there was little sense digging up cases from more than 50 years earlier in order to prosecute an elderly man. The judge was, therefore, disqualified by the high court, and a completely new trial was ordered.

This was promptly held, and, in addition to Capt. Priebke, another officer was added who had participated in the massacre: Maj. Karl Hass.⁵⁶ On

54. See Steinacher, "Das Massaker der Fosse Ardeatine und die Täterverfolgung," 308–9.

55. Court of Cassation, 15–10–1996, *Priebke, Foro italiano* 120 (1997): II, 5.

56. What is astonishing, and revealing in terms of the lack of any real search for those involved in the Ardeatine Caves massacre, is that Maj. Hass, after the war, was recruited by United States intelligence agencies and operated in Italy under a false name. Subsequently, he returned using his real name. In 1969 he even played the role of a Nazi officer in the movie "La caduta degli dei" ("The Damned") by Luchino Visconti (see

July 22, 1997 a new decision was rendered by the military tribunal of first instance.⁵⁷

The only factual difference from the previous decision concerns the role of Maj. Hass: although he was at the murder site and personally shot at least one prisoner, his role was quite different from that of Capt. Priebke. He was involved mostly in intelligence activities against resistance movements, and, in that position, had considerable indirect contact with resistance leaders.⁵⁸

From a legal point of view, this time the tribunal avoided the time limit issue through highly technical reasoning: according to the Italian Penal Code there is no time limit for crimes *in abstracto* punishable by a life sentence, even if the facts of the case would bring about—through mitigating circumstances—a different, and shorter, sentence. Conscious of this highly debatable principle that was affirmed (generally time limits are applied on an *in concreto* basis), the Court argued that according to customary international law, war crimes were no longer subject to time bar since the issuance of the 1880 Oxford “The Laws of War on Land” Manual. Therefore, the law applicable to the Ardeatine Caves massacre did not invoke prescription, and the existing provisions of the Italian Penal Code were to be construed in an internationally oriented way.

The final verdict was a 15 year sentence for Capt. Priebke and a 10 year sentence for Maj. Hass. However, the Court applied a limited amnesty granted in 1996, which involved a number of crimes falling under the Military Penal Code. This resulted in deleting 10 years of imprisonment from the sentences. Maj. Hass was, therefore, released. Capt. Priebke still had 5 years to serve.

This decision again caused public outrage, especially in light of its practical consequences: for Hass, only a few months of detention awaiting trial; for Priebke, only a few years behind bars.

This decision was appealed both by the two ex-German officers and by the military prosecutor. The Military Court of Appeals, in its subsequent decision of March 7, 1998, came to some important conclusions in its

Steinacher, “Das Massaker der Fosse Ardeatine und die Täterverfolgung,” 311). When he was arrested in 1996 he had been living near Milan for at least 20 years and his name was in the telephone directory.

57. Military Trib. Rome, 22–7–1997, *Hass, Priebke, Diritto penale e processo* 3 (1997): 1510.

58. One of Hass’ defense witnesses was the eminent professor of criminal law and Minister of Justice Giuliano Vassalli, at that time a young member of the Resistance held by the Gestapo. Hass managed to postpone Vassalli’s execution, which had been ordered by Col. Kappler; eventually Vassalli, through the intercession of Pope Pius XII, was set free on June 2, 1944 (see Katz, *Roma città aperta*, 352).

interpretation of the facts, although the facts themselves were, in substance, always the same.⁵⁹ The new interpretations included:

1. Because of the inconsistency of a verdict against Col. Kappler of responsibility for only 15 killings, while there was a verdict of responsibility for 335 killings for his subordinates, the new judgment launched a headlong critique of the 1948 decision. This move, although highly debatable from a procedural point of view, as it defied the principle of *res judicata*, was without cost from a practical point of view: Kappler had died 20 years earlier, and it was improbable that a new criminal action would be started against his subordinates who had previously been acquitted.
2. The Court of Appeals denied granting any mitigating circumstances to Priebke and Hass, as their actions were the expression of "unparalleled evil." They were, therefore, sentenced to life imprisonment. This also allowed the judgment to avoid the slippery issue of statutes of limitations *in abstracto* versus *in concreto*, and did not require the application of any limited amnesty, as it could not be used against life sentences.

Next, the Italian Court of Cassation (decision of November 16, 1998) rejected a subsequent appeal by the two German officers on the basis of strictly formal arguments, which do not seem relevant here.⁶⁰

Priebke and Hass were granted house detention in 1998. Hass died, at 92 years of age, in 2004 in a rest house. Priebke was granted parole in 2007, and as of the date of this writing, is still alive, and has celebrated his 100th birthday.

6. The Trials Against the Authors of the via Rasella Attack

Although there has never been any doubt concerning the criminal nature of the Ardeatine Caves massacre, there has been considerable controversy about the nature of the via Rasella attack, which led to the German reprisal.

This controversy exists across two different, yet connected, levels: historiographic and judicial. The historiographic debate has been occupied mostly with "revisionist" studies aimed at denying legitimacy to the resistance movement, which in 1945 spearheaded the move toward a democratic and anti-Fascist republic.⁶¹ The judicial debate is related to the various lawsuits launched by relatives of the Italian victims of the via Rasella attack and of the Ardeatine Caves massacre.

59. Military Court App. 7–3–1998, *Hass, Priebke, Diritto penale e processo* 4 (1998): 1122.

60. Court of Cassation, 16–11–1998, *Hass, Priebke, Foro italiano* 122 (1999): II, 273.

61. See, generally, Filippo Focardi, *La guerra della memoria: la Resistenza nel dibattito politico italiano dal 1945 ad oggi* (Rome-Bari: Laterza, 2005), 19–32.

The debate on this latter level started immediately after the war, even before the final decision had been rendered on the Kappler case. In 1949, the relatives of several of the Ardeatine Caves victims brought a civil suit against the actual perpetrators of the via Rasella attack, as well as against the leaders of the resistance movement in Rome who, purportedly, had authorized this attack. They argued that the partisan attack was not only unlawful, but also unreasonable, and that it caused the German reprisal and the death of so many victims. The claim was highly emotional: on one side were the relatives of the innocent victims of the Nazi fury, and on the other side were the heroes of the resistance movement, many of whom were already members of the democratic Parliament, and one of whom (Sandro Pertini) would many years later become president of the Republic.⁶²

The basis for the claim was the statement contained in the 1948 Kappler case decision, which had characterized the via Rasella attack as an illegitimate act of war committed by persons who could not be considered as belligerents. The commandos had operated despite the fact that the head of the Italian military forces, who was operating incognito in Rome, had repeatedly given instructions not to attack the German forces within the city, because this would lead—as it actually did—to severe reprisals. The members of the commando unit and their political inciters had, therefore, acted in violation both of the Military Penal Code, and of the general principle of *neminem laedere*, through their reckless disregard for the foreseeable consequences of their action and its direct causal link with the Ardeatine Caves massacre.

The decision in the trial of first instance (Rome civil court, June 9, 1950) rejected this claim on the basis that, after the war, members of the resistance had been assimilated to the Armed Forces.⁶³ In particular, the decision was grounded on Decree no. 194 of 1945, which stated that “The acts of sabotage, the requisitions, and every other action by the patriots in their fight against the Germans and the Fascists during the period of enemy occupation are considered war actions and therefore are not punishable at law. This provision applies to the military corps under the command

62. Also among the defendants in this case was Franco Calamandrei, member of the partisan commando unit and son of the distinguished jurist Piero Calamandrei. On the emotional atmosphere surrounding this trial, see Franco Cipriani, “Piero e Franco Calamandrei tra via Rasella e le Fosse Ardeatine,” *Clio* 45 (2009): 65; Carlo Galante Garrone, “Via Rasella davanti ai giudici,” in *Priebke e il massacro delle Fosse Ardeatine*, 51–56; and Focardi, *La guerra della memoria*, 28.

63. Court of Rome, 9–6–1950, *Giurisprudenza italiana* 102 (1950): I, 2, 577, with a comment by Domenico Riccardo Peretti Griva, “L’attentato di via Rasella e le responsabilità per l’eccidio delle Fosse Ardeatine.”

of the National Liberation Committee and to all other citizens that have aided them or, under their order, participated in operations fostering their success."

The judgment took into account the statement contained in the first Kappler decision, which characterized the attack on via Rasella as an illegitimate act of war because it did not meet the criteria set by the 1907 Hague Convention. However, the Court stated that whereas the Convention was binding with regards to the relationship between states, with regards to domestic jurisdiction and controversies between private parties, Italian law (and specifically Decree no.194/45) prevailed.

The decision also tried to separate clearly the legal sphere from that of historical or moral judgment. In particular, it stated that although the GAP groups (including the commandos in via Rasella) were distinguishable from other resistance groups by the terrorist character of their actions ("*carattere anche terroristico delle organizzazioni 'gappiste'*"), it was not up to the Court to establish whether these groups should have considered beforehand the consequences, namely German reprisals in response to their actions, and whether they should have surrendered to the Germans, acknowledging their responsibility, in order to attempt to avoid the reprisal.

This decision was upheld on appeal and by further judgment in the Court of Cassation.⁶⁴ The latter, in its decision of July 19, 1957, no. 3053, confirmed all of the reasoning of the judgment of first instance, stressing that from the point of view of domestic law, the via Rasella attack could not be considered an illegitimate act in violation of the (nonexistent) status of Rome as an "open city." The kind of attack executed in via Rasella was, on the contrary, the only form of action possible, considering the disproportion between the might of the German army and the scarce number of resistance forces, ill-equipped and scarcely armed, with hardly any training and no logistical support. Therefore, the attack being a legitimate war action, there could be no responsibility for its consequences, which had themselves been declared an illegal act of reprisal.

Nearly 50 years later, a new action—this time criminal—was brought against the surviving members of the via Rasella commando unit through a private criminal complaint (provided for under Italian law) filed by the relatives of the two Italian civilian accidental victims of the attack.

The judge to whom the inquiry had been entrusted set aside the claim on the basis that the attack was to be considered a patriotic act against the German occupation, and, therefore, fell within the exemption set by Decree no. 96 of 1944.⁶⁵ However, before rendering the decision, the

64. Court of Cassation, S.U., 19–7–1957, n. 3053, *Foro italiano* 80 (1957): I, 1398.

65. Decision by the Rome judge for the preliminary hearing, 16–4–1998.

judge made further inquiries concerning the deaths of the two civilian victims. In particular, he investigated one of the recurrent accusations against the commandos; namely, that they had planned the attack as part of a general strategy within the Italian Communist Party to delegitimize the National Liberation Committee, which had a much more cautious approach, by presenting it with a *fait accompli*.

In his decision, the judge ruled out consideration of the attack as a legitimate act of war falling under Decree no. 194 of 1945 (which had been the basis of the 1950 and 1957 decisions by the civil courts in the wrongful death cases). The attack was, instead, characterized as having been of a terrorist nature, and, therefore, not exempted from liability. However, like many other acts of violence committed in those times, it fell under the amnesty established by the aforementioned Decree no. 96 of 1944. The decision concluded by expressing a position similar to that found in the civil cases: "After all that has transpired, one could ask whether what happened on via Rasella on March 23 1994 was really necessary or even merely appropriate considering the foreseeability of a harsh German reprisal. These questions, which have been put insistently by the private parties, may legitimately enter an ethical, political and historical debate, but cannot have any legal relevance to this trial. Nor can the judge express his opinion on issues which do not pertain to the legal problem that is in front of him."

This decision was appealed by members of the commando unit, who saw in it a rejection of the defining meaning of their lives. The decision was entirely reversed in terms of its reasoning by the Court of Cassation.⁶⁶ The attack on via Rasella was a legitimate act of war—and not a terrorist attack—and, therefore, fell entirely within the provisions of Decree no. 194 of 1945. No legal consequence, whether civil or criminal, could, therefore, ensue from it.⁶⁷

66. Court of Cassation, 23–2–1999, no. 1560, *Foro italiano* 122 (1999): II, 273.

67. One should note here the caution that is required in using judicial materials as sources of historical fact finding. The decision just cited states, at para. 6, as an argument to quash the decision of the judge of the preliminary hearing, that the 1952 final decision in the Kappler case (see above, note 49) had reversed the prior decisions as regards the legitimacy, from a *ius in bello* perspective, of the via Rasella attack. The 1999 decision states, literally: "The Supreme Military Court, with its decision 25–10–1952, n.1711 (*Rassegna della Giustizia Militare*, 83) has overturned this thesis, declaring the reprisal unlawful in relation to the lawfulness of the Italian action: 'Via Rasella, in light of the norms of international law, must be evaluated with rigorous coherence. It cannot be characterized otherwise than an act of hostility against the occupation armed forces, committed by persons who possessed the status of legitimate belligerents.'" If one consults the 1952 decision as printed in the law review (published by the Italian Ministry of Defense in a special issue in 1996 devoted entirely to war crimes trials) one finds the phrase as transcribed. But when one goes to verify the text of the decision by examining it as published in many law reviews in the year 1953,

7. Some Observations Concerning the via Rasella/Ardeatine Caves Trials

The reasons why the Ardeatine Caves decisions are important to the debate on the relationship between historical truth and judicial truth are manifold. They include:

1. From an empirical point of view, we have a single set of facts—concentrated in the space of 2 days (March 23 and 24, 1944)—which involves several persons. These facts are not—substantially—challenged and do not change throughout the years. What changes is the judicial interpretation of those facts.
2. Although there has been a torrent of first-hand accounts and of historical publications concerning the Ardeatine Caves massacre, any contemporary analysis must necessarily refer to the records of the first trial (1948–1952).⁶⁸ Through the years, a number of additional details have been added, and the credibility of some accounts, especially of the accused, has been questioned. On the whole, however, it would be difficult at

one realizes that its sense is opposite, because the 1996 reprint omitted a “not.” The correct phrase—completely consistent with the context of the decision—is, therefore: “committed by persons who *did not possess* the status of legitimate belligerents” [emphasis supplied]. To make things even more complicated, for unknown reasons the whole phrase was omitted in the on line text of the 1999 decision published on the Italian Ministry of Defense web site, http://www.difesa.it/GiustiziaMilitare/RassegnaGM/Processi/Priebke_Erich/Pagine/17_23-02-99.aspx (September 8, 2012). After notification by the authors of this article, it was eventually corrected in January 2012. The mistaken quote in the 1996 decision has been repeatedly used in many writings and public debates as the judicial seal on the historical truth of the via Rasella attack: see *ex multis* Luigi Miragliuolo, “I fascisti fornirono perfino scorte armate ai treni per Auschwitz,” <http://www.storiaxisecolo.it/deportazione/deportazionefascismo11.htm> (September 8, 2012); Raimondo Ricci, “Processo alle stragi naziste? Il caso ligure. I fascicoli occultati e le illegittime archiviazioni,” <http://www.istitutoresistenza-ge.it/Pubblicazioni/ricci.html> (September 8, 2012); <http://www.finanzaonline.com/forum/arena-politica/1231494-priebke-bisogna-avere-pieta-per-chi-non-e-ha-mai-avuta-8.html> (September 8, 2012); and <http://forum.axishistory.com/viewtopic.php?f=6&t=143733> (September 8, 2012). All of this helps us to understand how much the historical debate regarding Via Rasella remains a heated topic in Italy, more than 65 years after the fact. For an interesting insight into how the extremely detailed entry on via Rasella in Wikipedia (http://it.wikipedia.org/wiki/Fatti_di_via_Rasella [September 8, 2012]) was debated, see http://www.territorioscuola.com/wikipedia/?title=Discussione:Attentato_di_via_Rasella (September 8, 2012). For a literary account of how history can be changed by the insertion or the omission of a “not” see José Saramago’s novel, *The History of the Siege of Lisbon* (New York: Harcourt Brace, 1996).

68. See, for example, Staron, *Fosse Ardeatine und Marzabotto*, 22–27, 37; Prauser, “Mord in Rom?,” 269–301; and Klinkhammer, *Stragi naziste in Italia*, 4–5.

Table 1. Outcome of criminal trials

Accused	Year of Trial	Sentence	Practical Outcome
Caruso	1944	Death	Execution
Kesselring	1945	Death	7 years of imprisonment
Von Mackensen	1945	Death	7 years of imprisonment
Mälzer	1945	Death	7 years of imprisonment
Kappler	1948/52	Life	29 years of imprisonment
Domizlaff	1948	Acquittal	
Clemens	1948	Acquittal	
Quapp	1948	Acquittal	
Schütze	1948	Acquittal	
Wiedner	1948	Acquittal	
Priebke	1996/98	Life	2 years of imprisonment and 8 years of house arrest
Hass	1996/98	Life	2 years of imprisonment and 5 years of house arrest

this stage to suggest that there are still elements of the 2 day sequence of events that are unclear in the development of the case.⁶⁹

3. There is an obvious inconsistency among the various judgments, as shown in Table 1.

The above mentioned inconsistency, however, has to do with justice, not with history. It demonstrates that the courts may be reliable microhistorians, but fail to provide a compelling, consistent view of the past because, for structural and procedural reasons, they do not always yield coherent decisions, between one court and another.

4. It is extremely difficult for different courts, with different rules, and sitting at different times, to render parallel decisions on the basis of the same facts. There is no single “judicial truth,” but, rather, multiple case outcomes, which themselves become part of history. This is even more clear when comparing the decisions regarding the German war criminals with those concerning the members of the via Rasella commando unit. In the former cases, the assault at issue was not considered to be a legitimate act of war, in the latter cases it was. To paraphrase a famous common law expression, the 1907 Hague Convention could be used as a “shield” by the German defendants (who could legitimately claim a right to retaliation), but not as a “sword” by the Italian plaintiffs (who could not sue the

69. What is still an object of debate is the role that the Catholic Church, and Pope Pius XII, played in the case. Robert Katz’s book *Death in Rome* (New York: Macmillan, 1967) describes an attitude of inertia on the part of the Pope, whose intervention might have saved the victims. This reconstruction of events (entirely apart from its judicial scrutiny) has, however, been challenged (see below, note 117, sect. 11).

- perpetrators of the attack on via Rasella for violating the Convention and for the mass executions of civilians that occurred in response to it).
5. If "Truth" with a capital "T" cannot be expected from the courts, even less can—and should—it be expected from historians; nor can historians' research come to the same conclusions as those reached by courts. The Ardeatine Caves case is a classic example of this. Does it make sense for historians to only condemn Col. Kappler for having killed fifteen prisoners and extorted 50 kg of gold from the Jewish community, as the courts acquitted him of the killings of the other 320 victims, and he was not tried for the deportation of more than 1000 Roman Jews? And must historians' accounts also adhere to the judicial finding that the authors of the via Rasella attack should bear no legal consequence for it?
 6. Although facts may remain unchanged, their perception in different historical periods can be extremely different. For example, it is very clear that "historical memory" of the Holocaust and of Nazi crimes had an enormous influence on the final outcome of the 1997–98 Ardeatine Caves trial. The 1996 decision was deemed irreconcilable with what was considered to be the historical truth. And the first 1997 decision was contrary to what was perceived as "just" in the world outside the courts. The Court of Appeal decision even went against *res judicata*, by posthumously establishing the liability of Col. Kappler for the killing of the 320 victims of which he had been, in his own trials, acquitted. If in the postwar defamation and privacy cases the attempt was to try to rewrite history through judicial decisions,⁷⁰ in the Priebke case, there was an overt attempt to make the judicial outcome conform to historical judgment. Similarly, the Court of Cassation in its 1999 judgment concerning the terrorist nature of the via Rasella attack quashed the prior decision, and engaged in a detailed analysis of the facts and of their legal characterization, an operation that is highly debatable for a court of last resort.
 7. How should the Ardeatine Caves case be legitimately synthesized in an academic history book? Can the condemned be named? Should reporting be limited to the result of the legal judgments? Is a historian bound by those decisions?

8. Judging the Discourses: Criminal and Civil Trials

All of the abovementioned controversies deal with civil and criminal responsibility for the *facts* of what happened at via Rasella and the Ardeatine Caves. A second set of cases remains to be considered. These are focused on the postwar *discourses* concerning the same events. Shortly after Italian Liberation, the Ardeatine Caves massacre attracted a huge amount of public attention and became an iconic symbol of the

70. See Giorgio Resta, *Talking about History: A Comparative Analysis of Post-War Personality Rights Litigation in Europe*, on file with the author.

tragedies of the war and of the sufferings of the Italian population under German occupation.⁷¹

Various factors contributed to this: it was the only mass execution of civilians to have happened in a metropolitan urban context in Europe, and in a country's capital (unilaterally declared an "open city");⁷² unlike other Second World War -era massacres, this one was characterized by an extensive heterogeneity of the victims, who hailed from all over Italy, and from all social classes, belonged to different ethnic groups, and held a diversity of political orientations (there were Monarchists, Fascists, Communists, Socialists, Liberals, Christian Democrats, and even a priest);⁷³ it happened in response to a bloody partisan attack, which was never fully supported either by the whole spectrum of political forces engaged in the war against the German occupation, or by the Roman citizenry (and even less by the ecclesiastical authorities).⁷⁴

The cruelty of the massacre took firm root in the collective memory of Romans, and this was a main factor leading to the tragic death of Donato Carretta, former director of the Roman prison of Regina Coeli, who was the star prosecution witness at the trial of Police Chief Caruso.⁷⁵ During Caruso's trial, when Carretta was recognized by the crowd, he was dragged from the courtroom and horribly beaten to death by the frenzied mob (on September 18, 1944).⁷⁶ This episode, as well as other momentous scenes of the Caruso trial, were filmed live by the director Luchino Visconti and shown in the documentary "Giorni di Gloria" ["Days of Glory"] by Mario Serandrei and Giuseppe De Santis (1945).⁷⁷ The first decade after the Liberation represented the golden age of the Italian neorealist artistic movement, and many masterpieces by Luchino Visconti, Vittorio De Sica, and Roberto Rossellini—starting with "Roma città aperta" ["Rome,

71. See Rebecca Clifford, "The Limits of National Memory: Anti-Fascism, The Holocaust and the Fosse Ardeatine Memorial in 1990s Italy," *Forum for Modern Language Studies* 44 (2008): 128–39; and Michela Ponzani, "La memoria divisa intorno alla strage delle Fosse Ardeatine (parte prima)," *Il secondo Risorgimento d'Italia* 18 (2008): 27, 37.

72. See Portelli, "The Massacre at the Fosse Ardeatine," 31.

73. *Ibid.*

74. See Ponzani, "La memoria divisa intorno alla strage delle Fosse Ardeatine," 34.

75. See Gabriele Ranzato, *Il linciaggio di Carretta – Roma 1944. Violenza politica e ordinaria violenza* (Milan: Il Saggiatore, 1997), 35; and Katz, *Roma città aperta*, 371.

76. Later it was found out that Carretta secretly helped the anti-Fascist activists detained in Regina Coeli and resisted the removal of the men on Caruso's list from the prison (Katz, *Roma città aperta*, 371).

77. This impressive documentary is freely accessible at: http://www.mediatecaroma.it/mediatecaRoma/permalinkView/1/IL3000088764/Giorni_di_gloria.html (September 8, 2012).

open city”]—dealt with episodes of the Resistance.⁷⁸ The Ardeatine Caves massacre itself became the subject of various movies and documentaries, one of which gave rise to a legal controversy that is of importance to our analysis.

9. The Caruso Case

In 1953, Romolo Morcellini directed a documentary called “Dieci anni della nostra vita” [“Ten years of our life”]. It was produced by the company Documento Film and it covered various incidents that had happened in Italy during the period 1943–1953. One of the topics was the Ardeatine Caves massacre. The documentary made basic mistakes in the exposition of the facts and in their interpretation. In particular, it openly stated that the list of the 320 persons to be executed in retaliation for the partisan attack had been compiled by the Italian Police Chief Pietro Caruso, who also added a further fifteen names to those originally listed. This was without question a false statement of fact, as Pietro Caruso’s list actually comprised “only” fifty individuals. Also, the documentary proposed an interpretation of the events that was seriously flawed, insofar as it presented Caruso as the only person responsible for the massacre, omitting even to mention the role of the German authorities.

Caruso’s relatives sued in tort, on the basis of a posthumous violation of the dignity and reputation of the prominent police officer.⁷⁹ There were two critical issues: 1) whether the ignorance of the falsity of the defamatory statements constituted a valid excuse; and 2) whether reputational losses suffered by a person who brought permanent dishonor upon himself could be recovered.

This case led to multiple judgments. First, a decision of the Court of Appeal of Rome (September 29, 1956) was quashed by the Court of Cassation on May 13, 1958; the case was tried again, but also a second

78. See Ermanno Taviani, “L’immagine della nazione nella cinematografia tra fascismo e repubblica,” in *1945–1946. Le origini della Repubblica*, ed. Giancarlo Monina (Soveria Mannelli: Rubbettino, 2007), 239–76; and Claudio Vercelli, “Cinema resistente: uno sguardo d’insieme sulla raffigurazione della Resistenza dal dopoguerra ad oggi,” *Asti contemporanea* 11 (2005): 303–88. As regards the importance of film and other media in understanding the climate surrounding the postwar trials, see Staron, *Fosse Ardeatine und Marzabotto*, 24, 115.

79. Throughout the twentieth century, European law developed a far-reaching system of post mortem protection of privacy and personality interests, which is generally alien to common law jurisdictions, and particularly United States law: see Hannes Rösler, “Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law,” *Berkeley Journal of International Law* 26 (2008): 153–205.

decision of the Court of Appeal of Florence (March 11, 1960) was quashed by the Supreme Court in 1962.⁸⁰ The principles affirmed by the Court of Cassation are nonetheless quite clear: on the one hand the Court ruled out any requirement that in order to be held liable for defamation, a person must have actual knowledge of the falsity of the allegations;⁸¹ on the other hand, it laid down a principle according to which even a person who has lost his or her own good reputation remains capable of suffering an injury and should be granted the right to obtain compensation for damages resulting from the libel.⁸² The latter is firmly grounded in the constitutional guarantee of human dignity, and cannot be seriously contested; it is worth noting, however, that it has not always been unanimously followed by subsequent case law.⁸³ More significant to our discussion is the corollary derived from the former principle: after having remarked that truth is an absolute defense to a defamation claim, the Court of Cassation urged the trial courts to compare the defamatory statements with the “historical truth.” The question is, where should such a “historical truth” be derived from? The answer given by the Court of Cassation was unequivocal: it should be inferred, in this case, from the judgment of the High Court of Justice dated September 21, 1944,⁸⁴ by which Pietro Caruso was sentenced to death for (among other crimes) the role he played in the Ardeatine Caves massacre.⁸⁵

This superposition of two different notions, of “judicial truth” and “historical truth,” is noteworthy: once a court has evaluated facts and behaviors in the course of a trial, this trial judgment itself makes history, at least in the sense that it enters the judicial archives, and tends to influence further decisions in a circular and self-referential way.

However, this is not a sufficient guarantee against inconsistent court findings, as previous analysis of war crimes trials has clearly shown. Often the passage of time and changes in public opinion alter the way in which the same facts are perceived, leading to contradictory rulings.

80. The decisions published in the law reports are Cass, 13–5–1958, no. 1563, *Foro italiano* 81 (1958): I, 1117; Court of App. Florence, 11–3–1960, *Foro padano* 15 (1960): I, 96, with a comment by Mario Fabiani, *Diffamazione e prova della verità del fatto narrato*; *Foro italiano* 83 (1960): I, 1028; and Cass., 24–4–1962, no. 816, *Foro italiano* 85 (1962): I, 1722.

81. Cass, 24–4–1962, no. 816, 1724–25.

82. Cass, 13–5–1958, no. 1563, 1120.

83. See Court of App. Rome, 14–2–2005, *Diritto dell'informazione e dell'informatica* 21 (2005): 256, denying that Capt. Priebke's reputation is capable of being further injured by the attribution of untrue facts (namely, alleged execution of the trade unionist Bruno Buozzi and thirteen other anti-Fascists in La Storta, Rome).

84. See High Court of Justice, 21–9–1944, *Giustizia Penale* 50–51 (1945–1946): II, 42; on this trial see Staron, *Fosse Ardeatine und Marzabotto*, 103.

85. Cass, 24–4–1962, no. 816, 1724–25.

Sometimes new facts are discovered that alter the meaning of the old findings, and result in new interpretations of past events. Delicate issues may arise: supposing inconsistent rulings do occur, on which basis should a subsequent decision be built? If the judicial evaluation of facts is by definition limited and partial, should the courts exercise self-restraint in challenging the results of research by historians?

10. The Reputation of the Partisans

The courts were confronted with the first issue (inconsistent rulings) in a group of cases arising from a series of press campaigns that took place in Italy during the 1990s.

The extradition and trial of Capt. Priebke again ignited the (never extinguished) political and ideological conflict surrounding the interpretation of the Resistance.⁸⁶ Shortly after Priebke's arrival from Argentina in November 1995, neo-Fascist and neo-Nazi groups started to raise their voices against the prosecution of the old SS captain; graffiti appeared on walls in Rome calling for "freedom for Priebke."⁸⁷ At the same time, Priebke's prosecution sparked intense media debate over moral responsibility for the reprisal, and the legitimacy and appropriateness of the partisan attack on via Rasella.⁸⁸

Old myths resurfaced and were presented to the public as untold truths. In particular, new credibility was given to the myth that, in the aftermath of the via Rasella attack, the Germans had requested that the perpetrators take responsibility in order to avoid a reprisal.⁸⁹ This had been proven false at Kappler's trial, where it emerged that the reprisal had been kept (and conducted) in secret for security reasons; namely, to avoid the risk of a popular revolt. Several studies by professional historians have unequivocally confirmed this finding,⁹⁰ alluded to earlier. Nonetheless, the myth held

86. See generally Filippo Focardi, "La questione dei processi ai criminali di guerra tedeschi in Italia: fra punizione frenata, insabbiamento di Stato, giustizia tardiva (1943–2005)," *Annali della Fondazione Ugo La Malfa* 20 (2005): 179–212.

87. See Katz, *Roma città aperta*, 384–85.

88. See Michela Ponzani, "La memoria divisa intorno alla strage delle Fosse Ardeatine (parte finale)," *Il Secondo Risorgimento d'Italia* 19 (2009): 11, 35–38; the climate created by the revisionist press is described in detail in the autobiography of the partisan Rosario Bentivegna, written in collaboration with the historian Michela Ponzani; see Rosario Bentivegna, *Senza fare di necessità virtù. Memorie di un antifascista*, (Turin: Einaudi, 2011).

89. On this myth, see Battaglia, *Storia della Resistenza italiana*, 227; and Steinacher, "Das Massaker der Fosse Ardeatine und die Täterverfolgung," 294–95.

90. See Alessandro Portelli, *L'ordine è già stato eseguito: Roma, le Fosse Ardeatine, la memoria* (Rome: Donzelli, 1999), 317–34; Alessandro Portelli, "The Massacre at the Fosse

widespread belief within the collective memory of Romans, and was used instrumentally in order to put the blame on the partisans, who, in accordance with this narrative, should have given themselves up to the Germans to prevent the massacre of innocent civilians at the Ardeatine Caves.

A few days before the opening of Priebke's trial, the newspaper *Il Tempo*, as part of an article by Pierangelo Maurizio headlined "The Secrets of via Rasella," reproduced a photograph of a human head. This was said to be the head of 13-year-old Pietro Zuccheretti, who had been passing by on via Rasella at the time of the partisans' attack, and who was killed by the bombing. The photograph—it would later be demonstrated at trial—was a falsification, but it worked well to make the case against the partisans emotionally stronger.

This was the political climate that led to a second wave of litigation over the facts of via Rasella and the Ardeatine Caves.⁹¹ On the one hand, the relatives of the young boy who was killed in the partisan attack had lodged a criminal complaint against the surviving members of the commando unit, Rosario Bentivegna, Carla Capponi, and Pasquale Balsamo.⁹² On the other hand, the partisans decided to fight in court all defamatory statements aimed at distorting their version of reality and weakening the moral legitimacy of the Resistance. Whereas in the parallel trials of Priebke and Hass, the focus had been on the German retaliation, in these proceedings the issue became the legal characterization of the partisan attack. Was it a criminal offense? Or was it a legitimate act of war?

As has been discussed, the 1999 judgment of the Court of Cassation intended to resolve the long-lasting inconsistency between the criminal and the civil evaluation of the same events, holding that the partisan attack was a "legitimate act of war against a foreign army occupying the country, and was directed at a military target."⁹³ This was probably meant to be the last word on the story of via Rasella, but it was not. The memory of those days was still a divided one, and no judicial intervention could settle the political and historiographical dispute about the meaning of the partisans' behavior.

Ardeatine," 29, 33; Pavone, "Note sulla Resistenza Armata, le rappresaglie naziste ed alcune attuali confusioni," 46; Staron, *Fosse Ardeatine und Marzabotto*, 46; Maria Ferretti, "Mémoires divisées, Résistance et guerre aux civils en Italie," *Annales* 60 (2005): 627, 630; Michela Ponzani, "Trials of Partisans in the Italian Republic: The Consequences of the Elections of 18 April 1948," *Modern Italy* 16 (2011): 121, 133; and Ponzani, "La memoria divisa intorno alla strage delle Fosse Ardeatine (parte finale)," 36.

91. For further details in Katz, *Roma città aperta*, 385.

92. See above, note 65 and corresponding text.

93. Court of Cassation, 23-2-1999 (quoted above, note 66).

Shortly after the Supreme Court decision, the newspaper *Il Tempo* published an article critical of the ruling, entitled “The Court of Cassation honors as heroes the slaughterers of civilians on via Rasella.” Carla Capponi (who was awarded the Gold Medal for Military Distinction in the 1950s) sued, claiming that she had been libeled by the epithet “slaughterer of civilians.” The Court of Rome and the Court of Appeal dismissed the charges, stating that the legal characterization of the attack as a legitimate act of war did not prevent other persons from expressing critical views about the appropriateness of the attack. The Court of Cassation—10 years after publication of this article—reversed the lower court decisions, holding that, although the characterization of the attack as an act of war did not prevent others from expressing critical views about its appropriateness and moral justification, the epithet “slaughterer of civilians” went beyond legitimate criticism and constituted an unlawful infringement of the plaintiff’s rights of honor and dignity.⁹⁴

More difficult had been the task of the trial courts and the Court of Cassation in a parallel case, which arose from an allegedly defamatory article—headlined “The boy who was killed on via Rasella”—published on the front page of *Il Giornale* (a right-wing newspaper edited by Vittorio Feltri and owned by the Berlusconi family).⁹⁵ The plaintiff in this trial was the partisan Rosario Bentivegna (Carla Capponi’s husband). He sued the publisher for damages, claiming that the entire press campaign was unfair, and that he had been libeled by various statements in the article. Among other elements of the coverage, he contested the claim that the partisans knew about the presence of a 13-year-old boy close to the rubbish cart containing the explosives and decided to ignite the fuse nonetheless. He also denied that the target of the attack constituted—as stated in the article—old unarmed soldiers of Italian citizenship. Also, he alleged that it was insulting that the editorial cast him as the moral equivalent of Priebke.

The Court of Milan dismissed the action on the basis of free speech’s constitutionally protected status. This decision was overturned by the Court of Appeal of Milan, which held that freedom of speech is a valid defense in an action for defamation only if the statements refer to true facts, or at least to facts that reasonably appeared to be truthful in light of the available sources of information. At trial, several statements were found to be false, drawing also on professional historical expertise. In particular: 1) the

94. Cass. civ., 21–7–2009, no. 16916, *Foro italiano* 132 (2009): I, 2974, with a comment by Domenico Maltese, “La stampa sulla vicenda di via Rasella,” and by Mirella Chiarolla, “Il peso delle parole.”

95. Cass. civ., 6–8–2007, no. 17172, *Nuova giurisprudenza civile commentata* 24 (2008): I, 241; on this decision, see Vincenzo Zeno-Zencovich, “Il giudizio della storia e la storia attraverso il giudizio,” *Nuova giurisprudenza civile commentata* 24 (2008): II, 34–40.

photograph of the decapitated head was judged to be a falsification (although this issue is still debated)⁹⁶ as uncertainty about the position of the youth at the moment of the explosion meant it could not be demonstrated that the partisans saw him and decided nonetheless to go on with the attack; 2) the soldiers were armed members of the *Ordnungspolizeiregiment* “Bozen”, many of whom were born in Italian South-Tirol but who had opted for German citizenship;⁹⁷ 3) the number of civilians who died in the partisan attack was two, not seven; and 4) no warning was ever given by the Germans about pending retaliation absent the surrender of the perpetrators, and the reprisal was conducted in utmost secrecy only 21 hours after the attack; therefore it could not be argued that the partisans consciously refused to surrender to the Germans in order to save the lives of the civilians massacred at the Ardeatine Caves. Also, the Court placed particular importance on its characterization of the partisan attack as a legitimate act of war against a foreign enemy, expressly referring to the various prior rulings in the postwar wrongful death cases. This decision was in turn upheld by the Court of Cassation and is therefore now *res judicata*.⁹⁸

It seems, therefore, that 60 years after the events of via Rasella, the legal dispute about how to characterize the attack has finally been settled. According to Italian law (but not necessarily international law), it was a legitimate act of war against foreign occupants. Public discourse must tolerate criticism and differing opinions about these events. However, if the reputation and dignity of other persons is at stake, those opinions may not be expressed in a dignity-offending way, facts may not be misstated, nor may the legal characterization of the events be altered.

This “judicial truth,” therefore, starts to work as an external limit on the freedom of the media to report on the historical event. But what if the contested speech exists within the category of historical research?

11. The Silence of Pope Pius XII

On November 28, 1973, the niece of Eugenio Pacelli, Pope Pius XII, brought a private criminal complaint against Robert Katz, Carlo Ponti

96. See Gian Paolo Pelizzaro, “... E Pietro, 12 anni, saltò. In aria...,” *Storia in rete* (2009): 42, <http://www.storiainrete.com/wp-content/uploads/2009/02/05-via-rasella-pdf.pdf> (September 8, 2012) (arguing that historical expertise did not consider relevant details of the places, and concluding that the photograph is not a fake).

97. As regards the history of the *Regiment “Bozen”* see Prauser, “Mord in Rom?” 279–82; and Lorenzo Baratter, *Dall’Alpenvorland a via Rasella. Storia dei reggimenti di polizia sud-tirolesi (1943–1945)* (Trento: Publilux, 2003), 51–77, 79–96.

98. Cass. civ., 6–8–2007, no. 17172.

and George Cosmatos. She argued that the legacy of Pope Pius XII—who died in 1958—had been damaged by Katz’s book *Death in Rome. The Massacre of the Ardeatine Caves* and by the movie “Rappresaglia” [“Reprisal”], which was based on it.

Robert Katz, who recently died, was an American journalist and (non-professional) historian. He was the author of several books and essays concerning the Second World War and the German occupation of Italy. *Death in Rome*, originally published in the United States in 1967, focused on the Ardeatine Caves massacre but also covers the other most significant events of March 1944 in Rome. Among the many issues discussed by Katz is the political role and behavior of Pope Pius XII in those stormy days. In a nutshell, Katz claimed that the Pope had information about the planned reprisal, yet made no effort to stop it or even delay it. Not only—it is argued—did he remain silent about the extermination of the European Jews; he, the Bishop of Rome, the “*defensor civitatis*,” also chose not to use his power to raise his voice against the massacre of members of *his* own city. This silence was alleged to be part of a sophisticated political strategy: the Pope was concerned about the territorial integrity of the Vatican and the status of Rome as an “open city”; he feared an uprising of the Roman population led by Communist forces within the Resistance, and, therefore, he had to rely on the Germans to keep public order and allow for a “peaceful” passage of power to the Allies.⁹⁹ Katz concluded with the following words: as regards the Ardeatine Caves massacre, the Pope’s position was “not only flawed, but also immoral.”¹⁰⁰

The book *Death in Rome* came out only 3 years after the publication of the famous book *Pie XII et le IIIe Reich. Documents*, by the professional historian Saul Friedländer, as well as Hochhut’s controversial play *The Deputy*, in which it was insinuated that the Pope had sympathies for the National Socialist regime.¹⁰¹ Given this atmosphere of growing criticism of the figure and role of Pope Pius XII, Pacelli’s relatives decided to fight in court against this denigration of the Pope’s legacy. The case, however, was not an easy one: Katz invoked the constitutional safeguards of freedom of speech and historical research as a general defense against the defamation charges. He argued, in particular, that his statements concerning the Pope’s failure to act did not represent a calculated and

99. Robert Katz, *Morte a Roma. Il massacro delle Fosse Ardeatine* (Rome: Editori Riuniti, 1996), 224–31.

100. *Ibid.*, 231.

101. On the various types of criticism of the role played by Pius XII during the totalitarian era see, *ex multis*, Francesco Malgeri, “La chiesa di Pio XII tra guerra e dopoguerra,” in *Pio XII*, ed. Andrea Riccardi (Rome-Bari: Laterza, 1984), 95; and Melloni, “Per una storia della tribunizzazione della storia,” 20–23. See also the studies quoted below, note 114.

malicious attack on the person of Eugenio Pacelli, but simply a historical judgment based on substantial evidence.

The judges were confronted with two main issues in this case: 1) may a court of law review findings of historical research, or are historians granted a sort of immunity, provided that they respected the basic canons of professional ethics and 2) if a review of the findings is admissible in principle, were the defamatory statements here justified by the truth of the allegations?

The Court gave the first question a clear answer: the historian is not granted any special privilege by the Italian Constitution.¹⁰² The protection of freedom of the arts and of scientific research, contained in Article 33 of the Constitution, applies only to teaching. By contrast, divulging of the results of the research is regulated by Article 21, concerning freedom of expression. According to this provision, and under the interpretation it was given by the courts until the 1980s, a defamatory statement is excused only if the facts referred to in it are truthful.¹⁰³ The defamer bears the burden of proof of the truth of the statements.

The crux of the problem, therefore, became ruling on the truth of the following statements:

1. Pius XII had some knowledge of the planned reprisal.
2. He had channels of communication with the authorities in charge of the reprisal operations.
3. Intervention by him would have had some chance of preventing the reprisal.
4. He deliberately decided not to act in favor of the victims.¹⁰⁴

The truth of statement no. 1 was clearly the most important issue, and at the same time, the most difficult to answer. In his book, Katz alleges facts that make it reasonable to conclude that the Pope had relevant information about the planned retaliation. He refers to six separate sources, some of them testimonies by SS officers (such as Col. Dollmann, who described a meeting on the night of March 23 with Father Pancratius Pfeiffer) and a German diplomat (Albrecht von Kessel), but also public documents (such as an editorial published in the Vatican newspaper *L'Osservatore*

102. Court of Rome, 27–11–1975, *Temi romana* 25 (1976): 636, with a comment by Fernando Della Rocca, “Un processo storico.”

103. In the 1980s the courts started to allow the defendant merely to prove that the facts reasonably appeared to be truthful on the basis of the available sources of information. See Vincenzo Zeno-Zencovich, “Damage Awards in Defamation Cases: An Italian View,” *International and Comparative Law Quarterly* 40 (1991): 692.

104. Court of Rome, 27–11–1975, 648.

Romano the same day as the partisan attack).¹⁰⁵ He also states that he tried to get further information from the Vatican, without success.¹⁰⁶ He ends his book by expressing the hope that the passage of time and the disclosure of new sources of information might make it easier for historians to find out the truth about what actually happened in those dramatic days in Rome.

The judges in charge of the proceedings questioned Katz’s analysis of these sources and spent great effort trying to get further information about the days of March 23 and 24, 1943. The Court travelled to Gaeta to take testimony from Col. Kappler, detained in the military prison there; then to Germany, to hear from Col. Dollmann as a witness; finally, they entered Vatican City to question Card. Nasalli Rocca, who acted as a link between the Vatican and the administrator of the Regina Coeli prison in Rome. Several other witnesses were heard from, and documents collected. After almost 2 years of investigation, the Court reached a conclusion, determining as the “one and only truth” that Pius XII did not know anything—or, at least, it could not be demonstrated that he knew anything—about the planned reprisal.

The information cited by Katz was deemed insufficient to substantiate the claim that the Pope *chose* to remain silent. Therefore, the entire edifice built by Katz collapsed and his “moral” and “historical” judgment about the Pope’s behavior was considered a libel.¹⁰⁷ Accordingly, he was sentenced to 1 year in prison and fined.

On subsequent appeal, this decision was quashed.¹⁰⁸ The Court of Appeal did not replace one “truth” with another; it simply decided not to interfere with the historical ascertainment of truth. Granting the historian an almost absolute immunity on the basis of Article 33 of the Italian Constitution (providing an explicit guarantee of freedom of the arts and sciences), the Court expressly stated that “the ‘truth’ of the information provided by history, considered as a science, cannot be controlled by the judge, whose analytical tools and methodological criteria differ greatly from those of the historian.”¹⁰⁹ The judges opted, therefore, for a “procedural” approach, refusing to review the specific findings of historical analysis and contenting themselves with scrutiny of the methods adopted by the historian as well as that historian’s form of expression. They also underlined the need to recognize heightened protection of freedom of speech concerning public figures. Applying such criteria, they came to

105. Katz, *Morte a Roma*, 224–25.

106. *Ibid.*, 226.

107. Court of Rome, 27–11–1975, 648.

108. Court of App. Rome, 1–7–1978, *Temi Romana* 27 (1978): 313, with a comment by Fernando Della Rocca, “Ancora del processo su Pio XII e le fosse Ardeatine.”

109. *Ibid.*, 317.

the conclusion that *Death in Rome* was a sufficiently serious work and that the criticism of Pius XII was based on reliable sources and expressed in a moderate way.¹¹⁰ Accordingly, Katz was acquitted.

This ruling was reversed again by the Court of Cassation, which refused to grant the historian any particular privilege.¹¹¹ Article 21 of the Italian Constitution, and not Article 33, applied to the publication of historical research. As a result, defamers could not be excused unless they proved that the relevant facts were truthful, or at least that they reasonably appeared to be truthful on the basis of the sources of information available. These principles enunciated, the case was remanded to the Court of Appeal of Rome for a new decision on the merits.

A new trial was held. New witnesses were heard—among them Sen. Giulio Andreotti and Consul Eitel Friedrich von Möllhausen—and more documents collected. In July 1981, the Court rendered judgment against Katz, reinstating the original “truth”: Pius XII had no previous knowledge of the planned retaliation.¹¹² The decision is an extremely long one and strikes one as more like a historical treatise than a judicial opinion. In particular, the judges discuss at length controversial issues, such as the alleged “pro-Germanic” stance of Pius XII, his fear of Communist Russia, and the Pope’s attitude toward the Italian resistance movement. As a result, Katz’s findings are replaced with the Court’s own authoritative version of the story.

The Court of Cassation handed down the final word on this controversy in 1984.¹¹³ In response to an appeal by Katz, it confirmed the 1981 decision, but added that the offense was not punishable, because of an intervening amnesty.

Katz’s confrontation with the Italian criminal justice system was over. However the underlying issues remain unresolved. The controversy about the figure and role of Pope Pius XII has not been extinguished by these judgments and still attracts great interest.¹¹⁴ Documents released by the CIA and the Vatican Archives have added new tiles to the mosaic. Robert Katz, in his most recent book *The Battle for Rome: The Germans*,

110. *Ibid.*, 320–23.

111. Cass. pen., 19–10–1979, *Foro italiano* 104 (1981): II, 243.

112. Court of App. Rome, 2–7–1981, *Temi Romana* (1981): 715, with a comment by Fernando Della Rocca, “Brevi considerazioni conclusive sul processo contro l’accusatore di Pio XII (a proposito dell’eccidio delle fosse Ardeatine).”

113. Cass., 29–9–1983, *Giustizia Penale* (1984): II, 325.

114. See *ex plurimis* the important studies by Giovanni Miccoli, *I dilemmi e i silenzi di Pio XII. Vaticano, Seconda guerra mondiale e Shoah* (Milan: Rizzoli, 2007); and Andrea Riccardi, *L’inverno più lungo. 1943–1944: Pio XII, gli ebrei e i nazisti a Roma* (Rome-Bari: Laterza, 2008).

the Allies, the Partisans, and the Pope, highlighted the significance of an official document contained in the Vatican Archives and disclosed only in 1980.¹¹⁵ It consists of a note written under the letterhead of the Secretariat of State of His Holiness and dated March 24, 1944, 10:15 a.m. (a few hours before the massacre). It reads as follows:

Mr. Ferrero, of the Governatorato of Rome, reports the following details about yesterday's incident: the German victims numbered twenty-six soldiers; among the Italian civilians there were, unfortunately, three or four deaths; it is not easy to reconstruct what took place because everyone escaped; some apartments were sacked and the German police took complete control of the area, prohibiting any interference by other authorities; in any case, it seems that a column of German vehicles passing through Via Rasella was responsible for provoking the Italians who then hurled grenades from the building alongside Palazzo Tittoni; the countermeasures are not yet known: it is however foreseen that for every German killed ten Italians will be executed. Mr. Ferrero hopes to provide further details later.¹¹⁶

Katz argues that this document unequivocally proves that the Vatican had previous knowledge of the planned German reprisal operations. Other historians object that this note reveals only that the Germans were planning to execute ten Italians for every German killed, but does not say anything about the date or time of the reprisal; in particular, there is no mention that it was expected to happen within 24 hours of the attack on via Rasella.¹¹⁷ Who should settle this controversy? The courts or the historical community?

115. Katz, *Roma città aperta*, 278.

116. English translation by Robert Katz, http://www.theboot.it/mar_intros.html#anc6 (September 8, 2012). The document was originally published in *Actes et documents du Saint Siège relatifs à la seconde guerre mondiale, vol. 10, Le Saint Siège et les victimes de la guerre, Janvier 1944 – Juillet 1945*, ed. Pierre Blet, Robert A. Graham, Angelo Martini and Burkhard Schneider (Vatican City: Libreria Editrice Vaticana, 1980), doc. no. 115, 189–90. In the original version, it reads as follows: “*Récit de l’attentat de la Via Rasella. Contremesures encore incertaines.* L’Ing. Ferrero, del Governatorato di Roma, dà i seguenti particolari circa l’incidente di ieri: il numero delle vittime tedesche è di 26 militari; tra i civili italiani si lamentano tre o quattro morti; non è facile ricostruire la scena dato che tutti si sono dati alla fuga; alcuni appartamenti sono stati saccheggiati e la polizia tedesca ha preso l’assoluto controllo della zona senza permettere ingerenza di altre autorità; sembra ad ogni modo che una colonna di automezzi tedeschi attraversando via Rasella abbia la responsabilità di aver provocato gli italiani che poi avrebbero lanciato delle bombe dall’edificio di fianco al Palazzo Tittoni; finora sono sconosciute le contromisure: si prevede però che per ogni tedesco ucciso saranno passati per le armi 10 italiani. L’Ing. Ferrero spera di dare più tardi maggiori particolari.”

117. For a critical evaluation of the new evidence provided by Katz, see Giorgio Angelozzi Gariboldi, “Pio XII e le Fosse Ardeatine,” *Nuova storia contemporanea* 5 (2001): 135–42, especially 139; and Giuseppe Vedovato, “Ancora sul “silenzio-non assenso”

12. Writing History in the Courtrooms?

In our discussion of the via Rasella/Ardeatine Caves litigation, we distinguished three main classes of controversies: 1) the criminal prosecutions of the Nazi offenders, 2) the actions for damages (and private criminal proceedings) initiated against the partisans responsible for the via Rasella attack, and 3) the defamation cases, arising from the public portrayal of these events in the mass media. The first two categories specifically deal with responsibility for the facts of what transpired at via Rasella and the Ardeatine Caves; the last one concerns the *words* uttered in relation to these events. The defamation cases extend over a period of 50 years and reflect some interesting features of Italian society. In particular, in the last 15 years, actions for damages have been brought mainly by former partisans, which is a clear sign that, even a half century after the end of the War, Italy continued to hold a divided memory of the Resistance. Its values, openly contested by a revisionist press and a center-right political majority, had to be enforced in court. Table 2 schematizes the essential features of the controversies at issue. It is an uncommon but useful exercise to examine simultaneously the decisions about the facts and those about the discourse. Doing so sheds light on multiple dimensions of the legal reconstruction of a historical reality, bringing to the fore the problems created by the contemporary trend toward a “judicialization” of the past,¹¹⁸ as well as the inherent limitations of courts as truth-finding institutions. We will try to generalize the outcomes of our empirical analysis.

First of all, it should be noted that there tends to be a circular relationship between judgments about facts and judgments about speech. By adjudicating the issue of legal responsibility for acts and omissions, courts are called upon to ascertain facts, to characterize them according to legal rules, and to derive specific normative conclusions from this characterization. Whereas the judicial interpretation of a given event may vary over time, the ascertainment of facts—at least in legal systems without an all-lay jury¹¹⁹—is generally more stable and less open to controversy. It frequently happens that courts refer to historical facts and behaviors as they were reconstructed in earlier cases (e.g., the sequence of events in the via Rasella attack, or the

di Pio XII,” *Rivista di studi politici internazionali* 72 (2005): 99–111. See also Miccoli, *I dilemmi e i silenzi di Pio XII*, 270–71; and Riccardi, *L’inverno più lungo*, 324–28.

118. The expression “*judiciarisation du passé*” is used by de Bellecize, “L’autorité du droit sur l’histoire,” 52.

119. The presence of an all-lay jury seems to prevent the trial from accomplishing its “epistemic tasks”. See Michele Taruffo, *La semplice verità. Il giudice e la costruzione dei fatti* (Rome-Bari: Laterza, 2009), 183–91.

Table 2. Outcome of defamation cases

Parties	Relevant Decisions	Legal Basis	Outcome
<i>Caruso v. Soc. Documento Film Katz</i>	Cass. 1958; Court of App. Florence, 1960; Cass. 1962 Court of Rome 1975; Court of App. Rome 1978; Cass. 1979; Court of App. Rome 1981; Cass. 1983	Arts. 2043-2059 civil code; art. 595 penal code Art. 595 penal code	Liability in principle; decision quashed for procedural mistakes 1 year and 1 month prison – € 200 fine/ not punishable because of intervening amnesty
<i>Capponi Bentivegna v. Soc. L'editrice Romana</i>	Court of App. Rome 2004; Cass. 2009	Arts. 2043-2059 civil code; art. 595 penal code	Liability: damages
<i>Bentivegna v. Feltri, Chiocci and Soc. Editrice Europea</i>	Court of Milan 1999; Court of App. Milan 2003; Cass. 2007	Arts. 2043-2059 civil code; art. 595 penal code	Liability: damages

involvement of Police Chief Pietro Caruso in the mass executions of the Ardeatine Caves) and take these as a starting point for further inquiries.¹²⁰ This leads to an interesting result in the field of historical adjudication: the judgments about the facts give rise to one or more “judicial truths,” which influence the way in which controversies over speech are decided. Seen from a legal realist perspective, this means that the prior rulings may work—not differently from statutes prohibiting the public contestation or gross trivialization of a specific historical occurrence¹²¹—as an external limit on freedom of expression in historically related matters. Anybody could claim, without fear of sanctions, that Kappler’s (or Priebeke’s) conduct was not morally reprehensible, as it represented the execution of a military order. Nobody could write, by contrast, that the partisans’ attack was a criminal act, which should have been punished just as severely as the murders committed by the Nazis. Such a statement infringes the rights to dignity and reputation of the partisans, as interpreted in light of the

120. See above, sect. 9, discussing the Court of Cassation decision of 24-4-1962, and sect. 10, discussing the defamation cases concerning the partisans involved in the via Rasella attack.

121. See above, note 23 and corresponding text.

various rulings on liability for the via Rasella attack.¹²² One could conclude that once a “judicial truth” is created (or selected among alternative possible “judicial truths”),¹²³ it tends to influence the way in which history is publicly represented, particularly by the media.

Second, if a sort of hermeneutical circuit is created among courts deciding different but related cases, this does not mean that adjudication by judicial institutions is a completely closed and autoreferential process. Just as a system of law is embedded within the culture of a specific society,¹²⁴ so the courts—its oracles—are simply a node within a complex political and institutional network, whose stability depends upon the ability to evolve through reflexive adaptation. Deciding cases is an integral part of this evolutionary process, and should not be regarded as a purely technical activity detached from its social environment. The judicial process of “truth-building” in postwar Italy shows how significant this dialogical dimension can be. As we have seen throughout this article, the decisions of the 1940s and the 1950s concerning the Ardeatine Caves massacre display a clear reluctance on the part of the judges—sitting in military courts—to affirm the responsibility of subordinates acting under orders from their superiors.¹²⁵ This appears consistent, *mutatis mutandis*, with the overall trends during the first decades after the War of how the past was elaborated by the Italian judiciary. As many legal historians have pointed out, the high degree of personal continuity within the judiciary,¹²⁶ the cultural inheritance of the judges, and the political conditions of postwar Italy, all led to an exceedingly indulgent attitude toward the wrongs committed by former Fascists (and a disproportionately severe stance regarding partisans’ behavior).¹²⁷

122. Cass. civ., 6–8–2007, no. 17172.

123. For the selection over time of a specific judicial “truth,” see above, sect. 6 and 10, concerning the legal characterization of the via Rasella attack.

124. See generally Richard Hyland, *Gifts. A Study in Comparative Law* (Oxford: Oxford University Press, 2009), 69.

125. See above, sect. 4 discussing The Kappler Trial.

126. On this, see the important study by Guido Neppi Modona, “La magistratura dalla liberazione agli anni cinquanta. Il difficile cammino verso l’indipendenza,” in *Storia dell’Italia Repubblicana*, vol. III, *L’Italia nella crisi mondiale* (Turin: Einaudi, 1997), 83–137.

127. Donini, “La gestione penale del passaggio dal fascismo alla democrazia in Italia”; and Luigi Lacché, “‘Sistemare il terreno e sgombrare le macerie’. Gli anni della Costituzione provvisoria: alle origini del discorso sulla riforma della legislazione e del codice di procedura penale (1943–1947),” in *L’inconscio inquisitorio. L’eredità del Codice Rocco nella cultura processualpenalistica italiana*, ed. Loredana Garlati, (Milan: Giuffrè, 2010), 271–304. As regards the double standard and the so-called “judicial offensive against the Resistance,” see Michela Ponzani, *L’offensiva giudiziaria antipartigiana nell’Italia repubblicana (1945–1960)*, (Rome: Aracne, 2008); Ponzani, “Trials of partisans in the Italian Republic,” 133; Focardi, *La guerra della memoria*, 28–30; Emilio Franzina,

By contrast, when the “new and tardy phase of transitional justice” began in the 1990’s,¹²⁸ the political and institutional climate was completely different, and the solutions adopted 40 years ago were no longer socially acceptable. Hence the radical change in the perspective adopted by the courts. Change that is epitomized, on one hand, by the Priebke decision of the Court of Cassation, in which the SS officer was convicted of the same crimes that his superior Kappler had been acquitted of in the 1950s;¹²⁹ and, on the other hand, by the various rulings concerning defamation of the partisans, unequivocally endorsing the thesis that via Rasella was a legitimate act of war (a conclusion sharply contested in the aftermath of the War).¹³⁰

We have noted, therefore, a dual variation in the “judicial truths” arising out of via Rasella and the Ardeatine Caves.¹³¹ First, a synchronic variation: the same fact (via Rasella), evaluated by military courts applying international law, is characterized as an illegitimate terrorist attack; meanwhile, civil courts, applying tort law, instead characterized it as a legitimate act of war. Second, a diachronic variation: the same events (the mass executions ordered by Kappler and his subordinates), as seen through the lenses of a 1940 versus a 1990 court, have different legal meaning, leading to opposite results in terms of personal responsibility. This pattern is a significant phenomenon. It not only reminds us that adjudicating cases of historical relevance may be part of the more general project of identity-building politics, aimed at constructing the future by means of a peculiar reconstruction of the past.¹³² It also suggests that judges should not be considered experts on “truth” in a more detached and impartial way than historians, who also—as famously argued by Benedetto Croce—look at the past through the lenses of the present.¹³³

“L’azione politica e giudiziaria contro la Resistenza (1945–1950),” in *La democrazia cristiana dal Fascismo al 18 Aprile: Movimento cattolico e Democrazia cristiana nel Veneto*, ed. Mario Isnenghi and Silvio Lanaro, (Venice: Marsilio, 1978), 220; and Achille Battaglia, *I giudici e la politica* (Rome-Bari: Laterza, 1962), 10.

128. Pezzino, “‘Experts in truth?’” 349.

129. Court of Cassation, 16-11-1998; Military Court of Appeal, 7-3-1998 (discussed above, sect. 5).

130. The Court of Cassation discussions quoted above, note 94 and note 95.

131. See above, sect. 7, discussing the outcomes of the criminal and civil proceedings related to the “facts” of via Rasella and the Ardeatine Caves.

132. The adjudication of cases by courts of law is regarded by Jon Elster as one of the many institutional devices available to achieve the aims of transitional justice: see Jon Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004), 79–135; see also Danilo Zolo, *La giustizia dei vincitori. Da Norimberga a Baghdad* (Rome-Bari: Laterza, 2006), 140–67.

133. See, generally, Jacques Le Goff, *Histoire et mémoire* (Paris: Gallimard, 1988), 186–93; more specifically, on the influence of the contemporary “moralization of the past” on

This brings once more to light the delicate issue of the relationship between judge and historian. Our inquiry confirms the main findings of the literature concerning similarities and differences between the two professions' activities,¹³⁴ but also discloses a certain gap between theory and practice. As far as similarities go, the cases analyzed throughout the article clearly illustrate the fact that, despite the different orientation of the two activities, the method followed by the judge has several points in common with the method employed by the historian.¹³⁵ Both have to reconstruct the past and decodify its meaning in a way that is rationally sound and as little arbitrary as possible. Describing things "as they happened" (von Ranke) remains a fundamental canon for both professional activities. At the same time, there are obvious differences in the overall goals and instruments of the truth-finding process for the judge versus the historian, and these create a clear disciplinary divide between them. As argued famously by Marc Bloch, "when the scholar has observed and explained, his task is finished. It yet remains for the judge to pass sentence."¹³⁶ Such a divide easily explains, for example, the heightened debate concerning the use of historical expertise in court,¹³⁷ and also the traditional attitude of respect, on the part of the judiciary, for the so-called *franchises de l'histoire*.¹³⁸ According to a maxim widely diffused in French case law and approved by the European Court of Human Rights¹³⁹, "*les tribunaux [...] n'ont ni qualité, ni compétence pour juger l'histoire; [...] démunis de tout pouvoir de recherche inquisitoriale ou d'action d'office, ils n'ont pas reçu de la loi mission de décider comment doit être représenté et caractérisé tel ou tel épisode de l'histoire nationale ou mondiale.*"¹⁴⁰

historiographical practice (and on the very notion of "historical truth") see Marina Cattaruzza, "How Much Does Historical Truth Still Matter?," *Historien* 11 (2011): 49–55.

134. See above, note 2.

135. Calamandrei, "Il giudice e lo storico," 107; see also Stolleis, "Der Historiker als Richter —der Richter als Historiker," 177–78.

136. Marc Bloch, *The Historian's Craft* (New York: Vintage Books, 1953), 138.

137. See above, note 14.

138. Jean-Pierre Le Crom, "Juger l'histoire," *Droit et société*, 38 (1998): 37.

139. European Court of Human Rights (ECHR), 29-9-2004, App. n. 64915/01, *Chauvy and others v. France*, para. 69: "[t]he Court considers that it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation."

140. Tribunal de Grande Instance (TGI) Paris, 8–7–1981, *Recueil Dalloz* (1982): jur., 59; see also TGI Paris, 14–2–1990, *Gazette du Palais* (1991): II, 452; TGI Paris, 2–4–1998, *Les petites affiches* 85 (1998): 24. Similar words can be found in *Irving v. Penguin Books, Lipstadt* (2000) England and Wales High Court of Justice, Queen's Bench Division 115 (leave to appeal denied in [2001] England and Wales Court of Appeals Civ. 1197):

This means that, when courts are called upon to rule on the public representation of past events, they should in principle refrain from second-guessing the "content," that is, the outcomes, of historical research, limiting their supervision to the methods employed by the historian.¹⁴¹

This position is intimately consistent with the idea of a disciplinary divide, because it is aimed at safeguarding the functional autonomy of the historical science, preventing the courts from becoming the forum of last resort for the resolution of academic controversies. However, it is increasingly under strain, as the contemporary tendency seems to be toward a heightened scrutiny over the exercise of a historian's freedom of research.¹⁴² This is to some extent the logical result of the changing role of history in the public space: the wider its social importance, especially its presence in the mainstream media domain, the stronger the need for institutional controls against an "irresponsible use of history."¹⁴³ The court system is one of the main institutions in charge of this supervision; as a practical matter, however, achieving an acceptable balance between judicial control and respect for historians' freedom is not an easy task. Judicial self-restraint, emphatically affirmed in theory, is often disregarded in practice.¹⁴⁴ If the recent French case law gives an insight into the risks of a too-rigid interpretation of the prohibitions against genocide denials,¹⁴⁵

"Needless to say, the context in which these issues fall to be determined is one which arouses the strongest passion. On that account, it is important that I stress at the outset of this judgment that I do not regard it as being any part of my function as the trial judge to make findings of fact as to what did and what did not occur during the Nazi regime in Germany. It will be necessary for me to rehearse, at some length, certain historical data. The need for this arises because I must evaluate the criticisms of or (as Irving would put it) the attack upon his conduct as an historian in the light of the available historical evidence. But it is not for me to form, still less to express, a judgment about what happened. That is a task for historians. It is important that those reading this judgment should bear well in mind the distinction between my judicial role in resolving the issues arising between these parties and the role of the historian seeking to provide an accurate narrative of past events" (Gray J.).

141. Bernard Edelman, "L'office du juge et l'histoire," *Droit et société* 38 (1998), 52.

142. de Bellescize, "L'autorité du droit sur l'histoire," 66–76; Dumoulin, *Le rôle social de l'historien. De la chaire au prétoire*, 123–46.

143. de Baets, *Responsible History*, 16–39.

144. Thomas Hochmann, "Les limites à la liberté de l'historien' en France et en Allemagne," *Droit et société* 69–70 (2008): 537–38.

145. See, in particular, TGI Paris, 21–6–1995, *Forum des Association Arméniennes de France c. Lewis, Les petites affiches* 117 (1995): 17, holding the prominent Orientalist Bernard Lewis liable under Article 1382 c.civ. for denial of the Armenian genocide. See also the Pétré-Grenouilleau affair, recalled by Nora, "History, Memory and the Law in France, 1990–2010," 11, and by Melloni, "Per una storia della tribunizzazione della storia," 45.

the trial of Robert Katz is an illustrative example of a potentially problematic confusion between the role of the judge and the role of the historian.¹⁴⁶ Called to rule upon the defamation claims lodged by Pope Pius XII's niece against the American writer Katz, courts have not resisted the temptation to use judgments to impart lectures on the history of the Second World War. They did so by asserting, for example, that it was absurd to argue that the Pope could fear an armed insurrection and seizure of power by the forces of the Resistance;¹⁴⁷ or that it was clearly false that Pius XII had a "pro-Germanic" stance, capable of conditioning his political choices.¹⁴⁸ To embark on such difficult and delicate historical evaluations does not seem necessary or useful in order to decide a legal controversy. Judges are not reliable historians, for the simple reason that the issues before them "are framed in a microcosm: the resolution of a dispute between one party and another."¹⁴⁹ What they can provide is simply a *fragment* of truth, which will remain always dependent on the particular facts of the case and the evidentiary limitations of the trial.¹⁵⁰ If the proper role of responsible historical research is to understand and to explain, the proper role of a court is to judge the *responsible* use of history, and not the history itself.

146. See above, sect. 11, discussing the various rulings concerning the defamation of Pope Pius XII.

147. Court of App. Rome, 2–7–1981, 722.

148. *Ibid.*, 726.

149. Stephen Whinston, "Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens-Slave Labor Cases," *Berkeley Journal of International Law* 20 (2002): 160–75.

150. See, for a clear example, the critical analysis of the Priebke trial provided by Michele Battini and Paolo Pezzino, *Guerra ai civili. Occupazione tedesca e politica del massacro. Toscana 1944* (Venice: Marsilio, 1997), 223–51, 253–58. The two historians argue that the reconstruction of the Ardeatine Caves massacre offered by the court was not entirely convincing, as the judges omitted to hear from Col. Dietrich Beelitz—Field Marshal Kesselring's chief of operations—as a witness. Col. Beelitz, informed by Gen. Mälzer of the attack on via Rasella while the Field Marshal was away from headquarters, telephoned the news to the German Armed Forces Supreme Command and witnessed the discussions that preceded the decision to execute ten Italians for every German killed. The authors conclude that by hearing from Col. Beelitz as a witness—as occurred in other proceedings—the judges could have ascertained the responsibility of the *Wehrmacht* (and of Field Marshal Kesselring in particular) for the reprisal and the massacre of hundreds of innocent civilians.