

CULPABILITY IN ATROCITY AND THE ROLE OF COMPLICIT OBSERVER

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Randle DeFalco's recent book, *Invisible Atrocities: The Aesthetic Biases of International Criminal Law*, argues that atrocity crimes are commonly associated with an aesthetic of horrific spectacle, the "'criminal' nature" of which is "intuitively recognizable." Taking DeFalco's book as a useful and provocative starting point, this Essay proposes a further dimension of the atrocity aesthetic—culpability as imagined by the observer. As Part II reviews, culpability is one of the essential elements of conventional theories of atrocity, alongside harm and scale. Yet, Part III argues culpability is largely unobserved in DeFalco's account of the atrocity aesthetic; it is described as simply self-evident. Part IIII goes on to introduce an alternate account of culpability's role in the aesthetic: Our imaginations provide indicia of culpability by filling in the blank spaces in an image, for example, as we attempt to reckon with how the scene came to be. In doing so, we make ourselves in some sense complicit—as imagined perpetrators or perpetrators of the imagination. This feeling of complicity can evoke various reactions, however, and so Part V goes on to argue that it is the sense of our complicity being intolerable that distinguishes the atrocity aesthetic—and indeed atrocities from mere tragedies—rather than the spectacular. Even the aesthetic turns on what we are willing to tolerate or accept.

I. INTRODUCTION

Here then on the table before us are photographs. . . . They are not pleasant photographs to look upon. They are photographs of dead bodies for the most part. . . . Those photographs are not an argument; they are simply a crude statement of fact addressed to the eye. But the eye is connected with the brain; the brain with the nervous system. That system sends its messages in a flash through every past memory and present feeling. When we look at those photographs some fusion takes place within us

- Virginia Woolf, *Three Guineas*¹

Why should some large-scale harms be "merely" tragedies, while others are atrocities? This question has long been relevant but is especially so in a world threatened with climate catastrophe,² and the question is not merely semantic. As

* PhD student at the University of California, Berkeley. Thanks to Randle DeFalco for his insightful work in *Invisible Atrocities*, and for the invitation to offer some thoughts on it. Thanks also to Mark Drumbl, Daimeon Shanks, and the other participants in the *Invisible Atrocities* book roundtable at the American Society of International Law's 2022 Midyear Meeting for invaluable feedback, and to the student editors of the *Temple International & Comparative Law Review* for their work.

1. Virginia Woolf, *Three Guineas* 10 (1938).

2. As the Intergovernmental Panel on Climate Change's latest report remarked, "[a]ny further

the concept of “atrocities” has come to be criminalized under International Criminal Law (ICL)³—codified into the crimes of genocide, crimes against humanity, and war crimes⁴—this question makes an enormous practical difference in terms of how harms are treated.

Atrocity is associated with a particular look, a smell, an overall aesthetic—this is the foundational component of Randle DeFalco’s argument in his first book, *Invisible Atrocities: The Aesthetic Biases of International Criminal Justice*.⁵ Specifically, atrocity is associated with “highly visible spectacles of horrific violence,” the “‘criminal’ nature” of which is “intuitively recognizable.”⁶ In DeFalco’s telling, “the tendency to refer to genocide, crimes against humanity, and war crimes collectively as ‘atrocity crimes’ both reflects and helps reproduce deep-seated normative linkages between these crimes and an aesthetics of horrific spectacle.”⁷

Relatedly, DeFalco argues, some large-scale harm—that which matches the atrocity aesthetic—receives substantial attention from and criminalization by the international legal community, while other large-scale harm—that which does not fit the atrocity aesthetic—does not receive the same treatment.⁸ Thus, DeFalco identifies famine and starvation causation, corruption, aid interference, and socioeconomic oppression and rights violations as categories of large-scale harm that are left out of the ICL framework, receiving less attention than their better-recognized criminal counterparts.⁹ But we need not delineate atrocity in this way.

Taking DeFalco’s book as a useful and provocative starting point, this essay proposes a further dimension of the atrocity aesthetic—culpability as imagined by

delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all.” INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2022: IMPACTS, ADAPTATION AND VULNERABILITY: WORKING GROUP CONTRIBUTION TO THE SIXTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 3, 33 (Hans-Otto Pörtner et al. eds., 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf; see also Melissa Stewart, *Cascading Consequences of Sinking States*, 59 STAN. J. INT’L L. (forthcoming 2023) (manuscript at 4) (on file with author) (“If we fail to meet the urgency of [climate change] with a radical new vision for our collective security, we risk our own potential demise.”).

3. See RANDLE C. DEFALCO, *INVISIBLE ATROCITIES: THE AESTHETIC BIASES OF INTERNATIONAL CRIMINAL JUSTICE* 25–26 (2022) for a discussion of the international criminalization of atrocities in response to World War II. Although the concept of “atrocity” has recently become something of a term of art in this legal space, it has been with us for much longer than ICL has. The Oxford English Dictionary records the first English-language use of the term—in the sense of “[s]avage enormity, horrible or heinous wickedness”—in Sir Thomas Moore’s *Works* from 1534. *Atrocity*, OXFORD ENGLISH DICTIONARY, <https://www.oed.com/view/Entry/12664> (last visited Feb. 2, 2023).

4. See DEFALCO, *supra* note 3, at 24 (referring to these as “the so-called core crimes of ICL”).

5. See generally *id.*

6. *Id.* at 2.

7. *Id.* at 25.

8. *Id.* at 3–5.

9. *Id.* at 129–46.

the observer.¹⁰ As Part II reviews, culpability is one of the essential elements of conventional theories of atrocity, alongside harm and scale. Yet, Part III argues, culpability is largely unobserved in DeFalco's account of the atrocity aesthetic; it is described as simply self-evident.

Part IV goes on to introduce an alternate account of culpability's role in the aesthetic: our imaginations provide indicia of culpability by filling in the blank spaces in an image, for example, as we attempt to reckon with how the scene came to be. In doing so, we make ourselves in some sense complicit—as imagined perpetrators or perpetrators of the imagination. This feeling of complicity can evoke various reactions, however, and so Part V goes on to argue that it is the sense of our complicity being intolerable that distinguishes the atrocity aesthetic—and indeed, atrocities from mere tragedies—rather than the spectacular. Even the aesthetic turns on what we are willing to tolerate or accept.

II. CULPABILITY AS AN ESSENTIAL ELEMENT OF ATROCITY

In Chapter 2 of *Invisible Atrocities*, which lays out the “atrocity aesthetic” as he finds it, DeFalco reviews existing theories of atrocity and identifies three shared essential elements in these: “(1) culpability, (2) harm, and (3) scale.”¹¹ In doing so, DeFalco draws primarily on the work of Claudia Card, David Scheffer, and Scott Straus as “exemplars within the fields of philosophy, law, and political science, respectively, who have sought to define atrocity.”¹² As DeFalco describes Card's argument, “atrocities are both ‘perpetrated and suffered,’” and consequently, “there is no such thing as an atrocity that just happens or an atrocity that hurts no one.”¹³ Culpability and harm are thus requirements. But an isolated murder, for example, is not necessarily an atrocity. For that, the crime must also be of “significant magnitude,” in Scheffer's words.¹⁴

10. It is important to note DeFalco does not limit his account to visual aesthetics, although his argument often leans on this dimension—perhaps because images are easier than smells, noises, and so on to reproduce in a book. See, e.g., *id.* at 44–48 (reproducing images of Goya's *The Disasters of War*; Fenton's *Valley of the Shadow of Death*; Beato's *Interior of the Secundra Bagh after the Slaughter of 2,000 Rebels*, Lucknow; and *Life* magazine photographer preparing to photograph wagon piled with corpses after liberation of Buchenwald concentration camp). There may be reason to think that the visual is a particularly salient dimension of the atrocity aesthetic, given both that it is readily available to members of the international community scattered across the world and the special relationship we may have to images and photography in particular. See, e.g., SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 24 (2003) (“Ever since cameras were invented in 1839, photography has kept company with death.”); Amy Adler, *The Pleasures of Punishment: Complicity, Spectatorship, and Abu Ghraib*, in PUNISHMENT IN POPULAR CULTURE 236, 236–37 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2015) (arguing not only for uniqueness of photography but uniqueness of certain photographs—namely, those documenting torture at Abu Ghraib). But such examination is beyond the scope of this essay.

11. DEFALCO, *supra* note 3, at 30.

12. *Id.*

13. *Id.* at 31 (quoting CLAUDIA CARD, THE ATROCITY PARADIGM: A THEORY OF EVIL 9 (2002)).

14. DEFALCO, *supra* note 3, at 37 (quoting David Scheffer, *Genocide and Atrocity Crimes*, 1 GENOCIDE STUD. & PREVENTION: AN INT'L J. 229, 238 (2006)).

Of the three essential elements, culpability—the idea of “blameworthy human agency as the driving factor behind atrocities”¹⁵—is particularly significant. First, culpability polices the line between tragedy and atrocity, distinguishing types of large-scale harm from one another.¹⁶ As DeFalco notes, natural disasters and global poverty, although they may entail great harm to a large number of people, “tend to be viewed as lacking the degrees of causation and/or culpability demanded by criminal law.”¹⁷ Drawing this distinction between atrocity and other types of large-scale harm is especially meaningful because it entails, in some sense, holding suffering constant and asking only whether anyone is relevantly responsible for that suffering.

Yet culpability is also uniquely challenging to ascertain in cases of large-scale harm, especially given international criminal law’s model of individual criminal responsibility.¹⁸ It is already a philosophical challenge to understand what we mean when we say a group bears responsibility, but it is even more challenging to untangle the responsibility or culpability of individuals within groups.¹⁹ “ICL has adopted its own specialized modes of liability that provide for various culpable forms of participation in group crimes,” as DeFalco explains, but these are a necessarily incomplete answer to the question of operationalizing culpability.²⁰

III. THE MISSING AESTHETIC PIECE

In spite of culpability’s central importance—at least as one of the three core elements of atrocity conventionally understood, but perhaps even as the most pressing of these elements—culpability receives relatively little treatment as a dimension of the atrocity aesthetic. Rather, DeFalco suggests that culpability goes without saying, that it is self-evident in the conventional aesthetic of atrocity.²¹ Describing images of the Holocaust and the Nuremberg Military Tribunal’s reaction thereto, he asserts, “Clearly, the photographs and newsreels depicting emaciated concentration camp internees and masses of dead civilian bodies strewn about and piled in mass graves were a testament to the criminality of those responsible”²² Nor is DeFalco alone in suggesting that culpability is aesthetically self-evident.

15. DEFALCO, *supra* note 3, at 37.

16. *See id.* at 52 (“Atrocities are so heinous because they are perpetrated; they do not just occur in the absence of culpable human behavior.”).

17. *Id.*

18. *See id.* at 109 n.30 (discussing ICL’s focus on penalizing the individual).

19. *See generally* CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* (2000); LARRY MAY, *SHARING RESPONSIBILITY* (1992); Margaret Gilbert, *Who’s to Blame? Collective Moral Responsibility and Its Implications for Group Members*, 30 *MIDWEST STUD. PHIL.* 94 (2006); Kay Mathiesen, *We’re All in This Together: Responsibility of Collective Agents and Their Members*, 30 *MIDWEST STUD. PHIL.* 240 (2006); Robert E. Goodin, *Apportioning Responsibilities*, 6 *L. & PHIL.* 167 (1987); David Copp, *What Collectives Are: Agency, Individualism and Legal Theory*, 23 *DIALOGUE* 249 (1984).

20. DEFALCO, *supra* note 3, at 123.

21. *See id.* at 43–52 (discussing role of spectacle in atrocity aesthetic).

22. *Id.* at 55; *see also id.* at 56 (referring to the standard “representation of international crimes” as “dramatic, highly visible, [and] self-apparent”).

Describing the infamous photographs of torture at the Abu Ghraib prison,²³ for example, Jasbir Puar asserts, “these photographs divulge an irrefutable intentionality.”²⁴

Some representations of atrocity do, of course, display culpability on their surface, but these are somewhat unique. Whether a recording of a group destroying cultural heritage in the midst of an armed conflict,²⁵ or of a military leader announcing a plan to “take revenge” on a civilian population,²⁶ what has been done, and by whom, can at times be presented directly. Such direct presentation of culpability can even be part of the spectacle of atrocity, as when Abu Ghraib

23. See Philip Gourevitch & Errol Morris, *Exposure: The Woman Behind the Camera at Abu Ghraib*, NEW YORKER: ANNALS OF WAR (Mar. 17, 2008), <https://www.newyorker.com/magazine/2008/03/24/exposure-5> (profiling photographer who captured these images).

24. JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* 107 (2007).

25. In his capacity as the head of the religious police in Timbuktu for al-Qaeda in the Islamic Maghreb and the associated group, Ansar Dine, Ahmad al-Faqi al-Mahdi was “instructed to destroy mausoleums built above the tombs of saints in Timbuktu, which have been hubs of prayer and pilgrimage for centuries.” Haley S. Anderson, *Historic Condemnation of the Destruction of Cultural Heritage at the International Criminal Court: The Case of Prosecutor v. Ahmad Al Faqi Al Mahdi*, A.B.A. SEC. INT’L L., ART & CULTURAL HERITAGE L. NEWSL., Spring 2017, at 2. Al-Mahdi was recorded participating in and justifying the destruction of these recognized cultural heritage sites. See, e.g., Al Jazeera English, *ICC: Mali Fighter Jailed for Destroying Timbuktu Sites*, YOUTUBE (Sept. 27, 2016), <https://www.youtube.com/watch?v=h-gx5UjUAiI> (depicting al-Mahdi destroying cultural heritage sites at timestamp 01:06). Al-Mahdi later pled guilty and was convicted by the International Criminal Court for the destruction of cultural heritage in a time of war—a war crime—and these recordings were cited by the prosecution in that case. See *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 62–63 (Sept. 27, 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_07244.PDF (establishing guilt of al-Mahdi); Fatima Bensouda, then-Prosecutor at the ICC stated: “You can see [Mr. al-Mahdi] in video clips presented, unreservedly holding his pickaxe. You can also hear him confidently and repeatedly attempting to justify these crimes by reiterating his resolve to eliminate all things he labelled as being ‘inappropriate’ to Timbuktu.” *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15, Transcript of Trial Hearing, 20:14–17 (Aug. 22, 2016), https://www.icc-cpi.int/sites/default/files/Transcripts/CR2016_05767.PDF.

26. Ratko Mladić announced such an intention, directly into a video camera, on July 11, 1995. Standing in the shade from the late afternoon sun, Mladić’s Bosnian Serb troops had just entered the city of Srebrenica. MISHA GLENNY, *THE BALKANS: NATIONALISM, WAR, AND THE GREAT POWERS, 1804-1999*, 650 (1999). Mladić declared, referring to the majority Bosniak Muslim population of the city, that “the time has come to take revenge on the Turks in this region.” International Criminal Tribunal for the Former Yugoslavia (ICTY), *Srebrenica Genocide: No Room for Denial*, YOUTUBE (Jan. 3, 2018), <https://www.youtube.com/watch?v=Sq77TySTst0> (at timestamp 07:30). That same day, Mladić’s forces “began to commit the single biggest crime of the Bosnian war, the murder of some 8,000 unarmed Muslim men.” GLENNY, *supra*, at 650. The ICTY later convicted Mladić of genocide, crimes against humanity, and war crimes. See ICTY Media Office/Communications Service, *Trial Judgement Summary for Ratko Mladić*, ICTY (Nov. 22, 2017), <https://www.icty.org/x/cases/mladic/tjug/en/171122-summary-en.pdf> (announcing Mladić’s conviction). The video of Mladić’s declaration of revenge, corroborated by a witness who was present when Mladić made it, was used as evidence against Mladić in his trial. *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment Volume III of V, ¶ 2410 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2017), https://www.icty.org/x/cases/mladic/tjug/en/171122-3of5_1.pdf.

torturers grinned at the cameras recording their acts of torture.²⁷ But these are not examples of the aesthetic that, as I think DeFalco correctly diagnoses, we tend to associate with atrocity crimes. Instead, we think of “piles of corpses,” “rivers full of dead bodies,” “child soldiers and severed limbs,” and “literal piles of bones and skulls.”²⁸ Not only is it relatively rare to have a recording of a general ordering a genocide,²⁹ then, but these representations are not the sort with which DeFalco’s book or this essay are concerned—an aesthetic where culpability seems unspoken.

The effect of characterizing culpability as self-evident where it is unspoken is to imply it warrants no further interrogation, and this implication is underscored by the lack of such interrogation in DeFalco’s book. If culpability is self-evident, then we need not investigate it, and so the book does not. This stance, however, obscures culpability’s true place in the atrocity aesthetic: the absence of readily apparent culpability should properly be understood as itself part of the aesthetic—in a very particular and unnerving sense.

IV. COMPLICIT OBSERVERS

Rather than presenting itself on the surface, culpability draws us into the scenes of the atrocity aesthetic, appearing only in our imagined answers to the question—how did this come to be? The horror and spectacle of a pile of skulls resonates, to be sure, through the harm depicted and its scale on display. After all, skulls imply death and mutilation, and a pile implies numerous and repeated horrors of this sort. But perhaps its greatest effect is in the observer imagining how that pile, of those skulls, came together. What it took to produce the skulls, what impulse drew them into their grotesque monument.³⁰

Engaging in this process of imagining, the observer themselves steps into the scene. The observer’s own imagination provides the indicia of culpability by filling in the blank spaces in the image.³¹ If a pile of skulls is presented, then the

27. See Adler, *supra* note 10, at 236 (describing enigmatic quality of Abu Ghraib torturers’ smiles, as captured in photographs of their torture).

28. DEFALCO, *supra* note 3, at 2.

29. It is notoriously difficult to prove the crime of genocide under international law precisely because doing so requires proving that perpetrators intend to “destroy, in whole or in part,” the targeted group. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277, https://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf; see also Morning Edition, *Why Genocide is Difficult to Prove Before an International Criminal Court*, NPR (Apr. 12, 2022, 7:15 AM), <https://www.npr.org/2022/04/12/1092251159/why-genocide-is-difficult-to-prove-before-an-international-criminal-court> (interviewing Leila Sadat, special advisor to the International Criminal Court prosecutor).

30. Sontag similarly describes viewers of horrific scenes as necessarily asking, “Who caused what the picture shows? Who is responsible? Is it excusable? Was it inevitable? Is there some state of affairs which we have accepted up to now that ought to be challenged?” SONTAG, *supra* note 10, at 117.

31. The process I propose here is similar to that found in Lacanian theory. See, e.g., Austin Sarat, Madeline Chan, Maia Cole, Melissa Lang, Nicholas Schcolnik, Jasjaap Sidhu & Nica Siegal, *Scenes of Execution: Spectatorship, Political Responsibility, and State Killing in American Film*, in PUNISHMENT IN POPULAR CULTURE, *supra* note 10, at 199, 211 (citing Todd McGowan,

commission of the atrocity takes place, so to speak, offscreen. For the actual participants, the perpetrator's essential actions of culpability took place somewhere else—in a different time and perhaps a different location.³² For observers, culpability is present only in their thought that someone must have separated heads from bodies. Someone must have gathered those severed heads or skulls together. Someone must have *piled* them.

In this way, the observer becomes, in some sense, complicit. The observer has not wielded a physical weapon, but they have conjured that weapon in their imagination to answer the questions that the image leaves open. And the sense of having any role at all—even an imagined role—in such horror should disgust the observer.³³ As Susan Sontag put it, “there is shame as well as shock in looking at the close-up of a real horror.”³⁴ This is not to say that the observer necessarily identifies with the perpetrator or that our only reaction may be shame. Describing the Abu Ghraib photographs, Amy Adler argues:

[O]ur identification as viewers oscillates within the scene among the various participants; we align ourselves with the torturers, with the victims, with the onlookers, with the photographer. We experience conflicting, simultaneous, and disavowed reactions: not only shame and disgust but also hidden pleasure, desire, complicity, guilt, and ultimately denial.³⁵

Culpability thus appears in the atrocity aesthetic through our own involvement with scenes of atrocity, in which we are ourselves necessarily but complexly implicated.

If the international community—a community of atrocity observers—has opted to take action against such aesthetics, then it should be no surprise. Imagining what it would take to produce a pile of skulls is, rightfully, sickening—and rightfully demands some response. It is intolerable. As Virginia Woolf described in her anti-war essay, *Three Guineas*, photographs of atrocities not only present claims about events that have occurred, but they draw viewers in, producing a sense of “horror and disgust.”³⁶ Retelling Woolf's argument, Sontag explains, “Not to be pained by these pictures, not to recoil from them, not to strive to abolish what causes this havoc, this carnage—these, for Woolf, would be the reactions of a moral monster.”³⁷ It was

Looking for the Gaze: Lacanian Film Theory and its Vicissitudes, 42 CINEMA J. 27, 28 (2003)) (“Lacanian theory suggests that film viewers fill in the blank spaces inherent in what they watch with their own imaginings.”). I do not mean to suggest that Lacanian theory is necessarily correct as a matter of the study of psychology, or even to indicate that my account relies on Lacan, but rather simply to describe how and where we find complicity in the atrocity aesthetic—if it indeed is present there.

32. We might also understand the existence of the pile of skulls as an ongoing act of atrocity—whether as an ongoing perpetration of the genocide or crime against humanity that produced it, or as a unique violation, such as terrorizing any remaining civilian population with the pile's presence.

33. I can only say “should” here because observers, of course, have different reactions even to images that we might wish to consider uncontroversial. See *infra* Part V for further discussion of this point.

34. SONTAG, *supra* note 10, at 42.

35. Adler, *supra* note 10, at 237.

36. WOOLF, *supra* note 1, at 10.

37. SONTAG, *supra* note 10, at 8.

for this very reason that, in Sontag's description, Woolf called for greater public engagement with the gruesome aesthetics of war: to provoke such horror and disgust, and in turn elicit the reaction that we must end war.³⁸ To invoke observers' sense of the intolerable.³⁹

Considering the complicit response that the atrocity aesthetic invites may help us understand why the atrocity aesthetic has been so sticky as a way of determining which events deserve the attention of international criminal law. Still, though, we have not quite answered why some large-scale harms are considered atrocities, while others are not. Two identical photographs of flooding might invite us to imagine how the flood came about, but if we imagine one results from bombing a civilian dam and the other from climate change, only the former photograph may represent an "atrocity" to us. DeFalco asserts many factors contribute to this designation, and that adherence to the atrocity aesthetic is only one of them.⁴⁰ While true, we should be sure of the atrocity aesthetic's contours to fully understand its impacts and limitations.

V. THE PROBLEM OF THE INTOLERABLE

This essay proposes that what distinguishes large-scale harm that comports with the atrocity aesthetic from large-scale harm that does not is whether observers find their engagement in the scene to imagine the culpability therein intolerable. If it is intolerable, the scene represents an atrocity, and it demands response. If it is tolerable or even agreeable to imagine how the scene came about, it cannot represent atrocity to us—tragedy or even catastrophe perhaps, but not atrocity.⁴¹

For something to be intolerable, it must meet two requirements: objection and rejection.⁴² In other words, we must both dislike or disapprove of something and we must discard or disallow it. Both requirements are necessary; neither is sufficient.

What we do not find intolerable, then, we may find tolerable, but this is not our only option. As Preston King described in his early work on toleration, in human relations, "'to tolerate' generally means to endure, suffer or put up with a person, activity, idea or organisation of which or whom one does not really approve."⁴³ Tolerance shares common DNA with intolerance in that they both require objection, but they differ in one's reaction—whether rejection or acceptance. Tolerance thus is not properly the opposite of intolerance. Where we neither object to nor reject

38. See *id.* at 3–7 (discussing Woolf's reflections on roots of war and how to deal with images of war).

39. *Id.*

40. See DEFALCO, *supra* note 3, at 5 (describing role of politics and power relations in obfuscating criminality of certain types of international crimes.)

41. I believe DeFalco would broadly agree that individuals may have different reactions that influence whether a particular scene is associated with the atrocity aesthetic, although he may resist the proposed turn from the spectacular to the intolerable in our understanding of the atrocity aesthetic. As he notes, atrocity and many related concepts are "inherently subjective and malleable." See *id.* at 29 (describing "[n]otions of massiveness, severity, horror, or what characterizes 'gross' human rights violations," as well as atrocity, in this way).

42. See PRESTON KING, *TOLERATION* 54–55 (Routledge 2012) (1998).

43. *Id.* at 21.

something, it is more appropriate to refer to our attitude as “indifference,”⁴⁴ and where we both subscribe to and accept something, we should speak of “favoritism” instead.⁴⁵

Returning to the intolerable, we might expect intolerability and spectacularity to hang together. Recall that DeFalco identifies the spectacular as an important dimension of the atrocity aesthetic, adopting the association of atrocity with “the production of horrific spectacles” from the earlier work of Sontag and others.⁴⁶ And, as I’ve suggested above, the atrocity aesthetic is associated through the element of culpability with what we find intolerable.

But the spectacular is not necessarily intolerable. Take, for example, the Abu Ghraib photographs. To many, these photographs and the conduct they reveal—both what is being photographed and the fact of the photographing itself—were horrific.⁴⁷ But this reaction was not universal. In 2004, Sontag retold the reaction of the popular political commentator Rush Limbaugh and one of the callers to his radio show:

To “stack naked men” is like a college fraternity prank, said a caller to Rush Limbaugh and the many millions of Americans who listen to his radio show. . . . What may still be capable of shocking some Americans was Limbaugh’s response: “Exactly!” he exclaimed. “Exactly my point. This is no different than what happens at the Skull and Bones initiation and we’re going to ruin people’s lives over it, and we’re going to hamper our military effort, and then we are going to really hammer them because they had a good time.” “They” are the American soldiers, the torturers. And Limbaugh went on: “You know, these people are being fired at every day. I’m talking about people having a good time, these people. You ever heard of emotional release?”⁴⁸

Not only did this response fail to demonstrate any sense of the torture’s intolerability, but it did not even express tolerance toward the violence. They did not seem to object to the conduct at all. Rather, they displayed something more like favoritism or

44. *Id.* at 54–55, 56.

45. *Id.* at 54–55, 58.

46. See DEFALCO, *supra* note 3, at 41 (citing SONTAG, *supra* note 10, *passim*).

47. See, e.g., Teju Cole, *What Does It Mean to Look at This?*, N.Y. TIMES MAG. (May 24, 2018), <https://www.nytimes.com/2018/05/24/magazine/what-does-it-mean-to-look-at-this.html> (“In stripping prisoners naked, piling them up into a pyramid or ordering them to masturbate, Private Graner and other American soldiers might have intended to use humiliation to ‘soften’ their prisoners up for interrogation. But the images, once they were released into the world, had a much more shocking and enraging meaning.”); see also Maha Hilal, Opinion, *Abu Ghraib: The Legacy of Torture in the War on Terror*, AL JAZEERA (Oct. 1, 2017), <https://www.aljazeera.com/opinions/2017/10/1/abu-ghraib-the-legacy-of-torture-in-the-war-on-terror> (“In 2004, when photos emerged documenting extensive torture ranging from prisoners on leashes to bodies piled atop each other in pyramid structure to prisoners standing in crucifixion like postures, there were global shockwaves at the displays of brutality.”); see also Susan Sontag, *Regarding The Torture Of Others*, N.Y. TIMES MAG. (May 23, 2004), <https://www.nytimes.com/2004/05/23/magazine/regarding-the-torture-of-others.html> (“[T]he horror of what is shown in the photographs cannot be separated from the horror that the photographs were taken—with the perpetrators posing, gloating, over their helpless captives.”).

48. Sontag, *supra* note 47.

perhaps indifference—to what has been described as “massacre art.”⁴⁹

Nor should this positive reaction of Limbaugh and his caller be surprising, even if it did come as a surprise to some.⁵⁰ Indeed, a chillingly similar display is available in photographs of the lynchings of Black Americans in the latter half of the nineteenth century and first half of the twentieth century. Those images bear formal similarities in their presentation of violated victim and gleeful audience,⁵¹ and they illustrate a similar ambiguity in responses. While many are repulsed by these photographic tools of terror, at least the spectator-perpetrators depicted certainly approved.⁵² And copies of these photographs “were purchased as picture postcards, and passed between friends and families like holiday mementoes.”⁵³ The spectacular is not necessarily intolerable—even when we might most fervently wish it to be.

Indeed, almost anything can be made spectacular if it is presented in a spectacular way. Even paradigmatic examples of spectacular atrocity, such as the Holocaust, are spectacular only because we are perceiving the end of a process. As Sontag notes, drawing on the work of Hannah Arendt, the spectacular horrors we associate with the Holocaust—piles of bodies and emaciated survivors—are not actually how that atrocity unfolded.⁵⁴ DeFalco echoes this point, commenting “even paradigmatic atrocity events . . . are often much longer-term processes that build up ‘beneath the threshold of visibility.’”⁵⁵

It is perhaps not surprising, then, that other sorts of processes can be presented in a spectacular moment, including some of the crimes that DeFalco categorizes as “unspectacular.” Famine, for example, is the first of the four forms of “aesthetically unfamiliar atrocity modalities” that DeFalco identifies,⁵⁶ noting “ICL does not explicitly address famine causation or mass starvation in any systematic way.”⁵⁷ But

49. PUAR, *supra* note 24, at 108.

50. Sontag’s 2004 piece, *Regarding the Torture of Others*, has been criticized for its desire to distinguish the alleged novelty of the Abu Ghraib photographs from the history of racist violence and the legacy of slavery in the United States. *See, e.g., id.* at 107–08; *see also* Hazel Carby, *A Strange and Bitter Crop: The Spectacle of Torture*, OPEN DEMOCRACY (Oct. 10, 2004), https://www.opendemocracy.net/en/article_2149jsp/ (arguing Sontag’s question of how someone can grin at the sufferings of another human being “is evidence that even the best-educated have learned little from the history of American racialised violence”). In this sense, as Puar and Carby argue, engagement with and enjoyment in torture should not come as a surprise.

51. As Sontag notes, lynching photographs “show Americans grinning beneath the naked mutilated body of a black man or woman hanging behind them from a tree.” Sontag, *supra* note 47.

52. As an Equal Justice Initiative report on lynching describes, “Many [lynchings] were carnival-like events, with vendors selling food, printers producing postcards featuring photographs of the lynching and corpse, and the victim’s body parts collected as souvenirs.” EQUAL JUSTICE INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 33 (3d ed., 2017), <https://lynchinginamerica.eji.org/report/>.

53. David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 L. & SOC. REV. 793, 794 (2005).

54. SONTAG, *supra* note 10, at 84.

55. DEFALCO, *supra* note 3, at 102 (quoting Norbert Finzsch, *War, Violence, and Population: Making the Body Count*, 13 J. GENOCIDE RSCH. 187, 188 (2011) (reviewing JAMES A. TYNER, *WAR VIOLENCE, AND POPULATION: MAKING THE BODY COUNT* (2009))).

56. *Id.* at 129–30.

57. *Id.* at 130–31.

famine is also associated with a particular spectacular iconography, as exemplified, in David Campbell's rendering, by the *New York Time Magazine* cover of July, 13, 2003: "With a montage of 36 black-and-white photographs depicting famines in various African countries between 1968 and 2003, the unchanging reliance on portraits of either lone children or women in distress was there for all to see."⁵⁸

Although many photographers' images were included, the montage nonetheless demonstrated a persistent "photographic style across time and place."⁵⁹ Perhaps reacting to this aesthetic consistency, Sontag refers to famine alongside war as a crime that provides one of the "memorable sites of suffering documented by admired photographers."⁶⁰ Famine may not be spectacular in the way it is committed, but neither is genocide. Both are—or can be—made spectacular in their depiction.

Conversely, events can be presented as intolerable without being presented as spectacular. An excellent example of this is in Saidiya Hartman's *Scenes of Subjection*, where she examines subjugation under slavery and after so-called emancipation in the United States. Hartman rejects the spectacular, arguing that engaging in the "routine display of the slave's ravaged body"⁶¹ is obscene: "Only more obscene than the brutality unleashed at the whipping post is the demand that this suffering be materialized and evidenced by the display of the tortured body or endless recitations of the ghastly and the terrible."⁶² Instead, she portrays countless non-spectacular horrors—among these, portrayals of Black characters in popular entertainment,⁶³ dances at which slaves socialized with the permission of those who enslaved them,⁶⁴ and burdened "freedom" after Emancipation.⁶⁵ These horrors are no less intolerable for their seeming mundanity. The spectacular and the intolerable thus come apart.

The crucial point around which the atrocity aesthetic and associated definitions of atrocity turn is thus not spectacularity but intolerability—specifically, the intolerability of our imaginations making us complicit. Presenting an event as spectacular may help draw attention, but making it spectacular is not enough to make it intolerable.

VI. CONCLUSION

This essay proposes to adjust DeFalco's astute identification of the atrocity aesthetic and its influence by giving greater attention to the role of culpability within

58. David Campbell, *The Iconography of Famine*, in *PICTURING ATROCITY: PHOTOGRAPHY IN CRISIS* 79, 80 (Geoffrey Batchen, Mick Gidley, Nancy K. Miller & Jay Prosser eds., 2018).

59. *Id.* For the cover image Campbell is referring to, see Merlijn Geurts, *The Atrocity of Representing Atrocity. Watching Kevin Carter's 'Struggling Girl'*, 1 *AESTHETIC INVESTIGATIONS* 1, 8 fig.2 (2015), <https://aestheticinvestigations.eu/article/view/12001/13563>.

60. SONTAG, *supra* note 10, at 37.

61. SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 3 (1997).

62. *Id.* at 4.

63. *See id.* at 17–48 (examining situations where enslaved people were sources of enjoyment).

64. *See id.* at 49–78 (remarking how enslaved people were forced to perform for their enslavers' amusement).

65. *See id.* at 115–63 (analyzing the enduring effects of slavery in the post antebellum period).

that aesthetic. Asserting that culpability is self-evident within the atrocity aesthetic gives short shrift to this key dimension of observer engagement—engagement which prompts a reaction in observers of some kind. Precisely what type of reaction is a vital and overlooked dimension of the atrocity aesthetic. For large-scale harm to be considered atrocity, it must be intolerable for the observer to imagine how it came about. Atrocity is in the eye of the beholder.

If we wish to conceive of a wider scope of harm within the atrocity framework,⁶⁶ the work we have to do is in making that harm intolerable—intolerable to participate in, of course, but also even to imagine. Intolerable like, perhaps, living in a world that is becoming increasingly uninhabitable.

66. As DeFalco notes, there may be good reasons to resist this impulse. *See* DEFALCO, *supra* note 3, at 9–10 (cautioning against linking criminal law prosecution with justice).