Introduction

Forty years after the Eichmann trial, we are still grappling with the questions, paradoxes, and dilemmas of judgment that arose in the wake of the Holocaust. This situation is all the more surprising, given the universal sense of urgency to press for immediate judgment at the end of War World II with the spectacular Nuremberg Trials of 1945. The need to come to terms with the War with a trial underlined the crisis of judgment that was felt acutely by victors and vanquished alike. This crisis may partly explain the failure of the Nuremberg Trials to adequately address and judge what happened in the Holocaust, a failure that emerged as one of the impetuses to the 1961 trial of Adolph Eichmann in Jerusalem. It is perhaps the irony of history that in the process of relying on the law and its set of tools to bring judgment that would enable historical understanding and effect political change, the act of judgment in itself posed a problem. Namely, judging according to known strictures and traditional procedures was revealed to be inadequate, raising fundamental questions of how to judge without precedents and how to adapt law to deal with genocide.

During the forty years since the Eichmann trial, there have been ongoing attempts by people from such diverse fields as history, art, psychology, political science, and law to contend with the problem of judgment in the aftermath of the Holocaust. The solutions that were offered and the new questions that were raised were, for the most part, intra-disciplinary, developing along parallel lines but without the benefit of insights garnered in other scholarly fields. The general framework of scholarship encouraged this fragmentation, as each field struggled to establish its superior authority to offer a responsible representation of the Holocaust.

It was against this background that the idea for a conference to explore the crisis of judgment after the Holocaust as understood by practitioners and theoreticians from multiple fields was born. It was our hope that with the perspective of time and in creating a forum to bring together people whose work centers on problems of judging the Holocaust in their many manifestations, new insights could be gained. The problem was first noted by the political philosopher Hannah Arendt, who came to Jerusalem to report on the Eichmann trial and subsequently devoted much of her intellectual

work to reflecting on the problem of judgment. In a letter to Karl Jaspers from December 23, 1960, Arendt wrote:

> It seems to me to be in the nature of this case that we have no tools except the legal ones with which we have to judge and pass sentence on something that cannot even be adequately represented within legal terms or in political terms. That is what makes the process itself, namely, the trial, so exciting.[1]

Arendt's book *Eichmann in Jerusalem: A Report on the Banality of Evil* provided an exciting starting point for the *Judging in the Shadow of the Holocaust* Conference. The essays in this Volume are the fruits of this conference. All underwent a process of extensive transformation as a result of the intensive discussions and multiple perspectives to which their authors were exposed.

The Volume is divided into three parts. The articles in the first part, *Judging and the Holocaust: The Human Rights Legacy*, offer critical reassessments of current debates over the possibilities and limitations of universal human rights in view of their origins in the international community's response to the Holocaust. The second part, *New Perspectives on the Eichmann Trial*, is devoted to the difficult problems that arose in the context of constructing the trial. Later perceptions of the Eichmann trial as presenting a monolithic Zionist narrative are questioned by the authors, who trace the less noticed narratives of the police investigators, survivor organizations, and mental health providers, narratives that competed for recognition in the trial, shaped it to different degrees, and, in some cases, were shaped by it. In the third part, *Arendt on Eichmann: A Reappraisal*, the authors turn to the heated controversy engendered by Arendt's *Eichmann in Jerusalem*, suggesting new ways of evaluating its critical arguments about the law by drawing on insights from psychology, literature, and political science. The division of the Volume into three parts is intended for the reader's benefit, but should not blind her to the subtle intricacies interlocking the articles. The short road-map below highlights some of these inter-connections, leaving the rest for the reader to discover.

The opening essay by Jennifer Nedelsky, *Communities of Judgment and Human Rights*, calls for the development of a much needed theory of judgment committed to the protection of human rights, yet capable of addressing the particular traditions and practices of different communities.

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1 Hannah Arendt, Karl Jaspers Correspondence 1926-1969, at 417 (Lotte Kohler & Hans Saner eds. & Robert Kimber & Rita Kimber trans., 1992).

The author takes Arendt's work on judgment as her starting point, in particular, her insight that "judgment relies on a 'common sense' shared by those who are members of a community of judging subjects." Nedelsky is aware of the problems that a community-based theory of judgment might pose for the implementation of so-called universal human rights. Nevertheless, she demonstrates how ignoring these problems, as much of the human rights discourse has done since 1948, has left us with inadequate responses to the multi-cultural defense (abuses defended in the name of culture and tradition). The author suggests replacing the binary framework of particularism/universalism that has thus far framed much of the human rights debate with a dynamic and pluralist concept of community capable of addressing problems of judging across communities and against one's own community.

The two subsequent articles in the first section explore the consequences of a community-based theory of judgment in light of current developments in international law. Ulrich Preuss' article, *The Force, Frailty, and Future of Human Rights under Globalization*, examines the inherent weakness of the international community as the guarantor of universal human rights. Preuss identifies this weakness as a product of the international community's post-Holocaust realization of the urgent need to develop an institutional framework to protect universal human rights, on the one hand, but, on the other hand, the limitations of the international community to perform this task. In contrast to those who see globalization only as a threat to human rights, Preuss sees much promise in this process. He claims that globalization helps to create the functional networks of economic, political, and military power necessary for turning the idea of a global moral community that guarantees universal rights into an actuality. The idea of a community of humankind is further problematized by Fionnuala Ni Aolain in *Rethinking the Concept of Harm and Legal Categorization of Sexual Violence During War*. The author discusses the limitations of a universalized and atomistic conception of human rights for adequately addressing the unique ways in which violence was directed towards and experienced by women during the Holocaust. Likewise, Ni Aolain demonstrates the failure of international law to heed the ways in which harming women in times of war bears profound effects on their larger communities. The author concludes that the notion of human rights will have to undergo important changes in order to address these types of harms.

The concluding article of the first section offers an extreme example of the intimate connection between community and judgment. Melech Westreich's *One Life for Another in the Holocaust: A Singularity for Jewish Law* reveals how even Jewish law, with its rich tradition, was rendered speechless in the

face of the systematic and unparalleled attack of the Nazis on the Jewish communities. Westreich points to the surprising lack of any Holocaust-period rabbinical deliberation of the question of sacrificing one life to save another, a particularly urgent and relevant matter during that time. This silence cannot be attributed to a lack of precedents in Jewish law (*halacha*) on this issue; indeed, throughout the ages, the rabbinical sages contended with the issue in extensive rulings on the matter. Rather, the author surmises that the silence was the result of the extreme disparity between the circumstances of the Holocaust and those discussed in the rabbinical rulings. This, however, can only explain the failure of "determinative judgment" (applying old rules to new situations). Westreich's article brings us back full circle to Nedelsky, offering yet another explanation for the failure of judgment: in destroying the Eastern European Jewish communities, the Nazis also ruined the basis for reflective judgment (judging the particular situation without pre-determined rules) on the part of Jewish law (*halacha*), which had regulated those communities from time immemorial.

The Volume's second set of articles turns to the Eichmann trial, discussing the ways in which it acted as a vehicle for overcoming the silence of the survivors and the difficulties involved in putting history on trial. Hanna Yablonka's *Preparing the Eichmann Trial: Who Really Did the Job?* challenges the public conception of the trial as wholly identified with its prosecutor, then Attorney General Gideon Hausner. Her historical investigation reveals that the form the trial took was not the outcome of a top-to-bottom process, with the Israeli political authorities unilaterally dictating the shape and scope of the trial. Rather, the scope of the trial's narrative was formed through a grassroots process, in which multiple groups with often conflicting agendas took part. In particular, the author studies the work of the police investigation unit that prepared the criminal file for the trial and whose conception of the trial's objective often conflicted with that of the prosecutor. Some of the most memorable features of the trial, such as the central role given to the oral testimonies of Holocaust survivors, are traced back to the efforts and pressures of various survivor organizations to expand the scope of the trial. This point is further developed in the Volume's third set of articles. Yablonka recasts the trial as a tension-laden process in which different voices, stories, and historical understandings conflicted and competed for recognition. The essay calls for a refinement of the commonly-held understanding of the relationship between law and politics.

Judith Stern's article, *The Eichmann Trial and Its Influence on Psychiatry and Psychology*, further examines the relationship of Holocaust survivors to the Eichmann trial. Stern goes in the opposite direction from that taken by

Yablonka: instead of inquiring into the input of social groups to the formation of the trial, she examines the way in which the trial shaped and changed the approach taken by the psychological and psychiatric establishments towards Holocaust survivors. The article challenges the common view on the general passage of stories from the private realm of psychotherapy to the public sphere of law. The author shows how in the Eichmann trial, this movement was reversed. The trial's rules and procedures enabled survivors to talk in public for the first time about their repressed traumatic experiences. In turn, the general narrative of the Holocaust that emerged in the trial propelled mental health providers to break the "collusion of silence" (therapists who did not ask and patients who did not speak) with regard to survivor traumas by providing a framework within which the private traumas could be acknowledged and discussed. Stern's study details the way in which the Israeli "common sense" about the Holocaust was changed through an act of legal judgment and how this judgment cleared the way for the social process of understanding.

Understanding and judgment is the focus of the third part of the Volume, with three essays that reassess Hannah Arendt's claims in *Eichmann in Jerusalem*. What is the relationship between judging and understanding? Does the process of understanding undermine our ability to judge? Or maybe the contrary is true, that judgment is possible only when its subject is understandable? If judgment requires distance and understanding requires empathy (overcoming distance), is there an inherent impossibility to trying to judge the Holocaust by trying to understand it? These questions lie at the heart of José Brunner's *Eichmann's Mind: Psychological, Philosophical, and Legal Perspectives*. Introducing the rarely noted psychological evaluations of Eichmann that were produced by the mental health experts for the prosecution, Brunner succeeds in challenging the Arendt-Hausner dichotomy of the "banality" and the "monstrosity" of evil as the two exclusive options for understanding Eichmann's mind. By juxtaposing the various representations of Eichmann's mind by the lawyer, the judge, the philosopher, and the mental health expert, the essay problematizes the relationship between judgment and understanding. Whereas for Arendt, understanding always implies judgment, for Brunner, there is often tension between the two activities, a tension that underlies the different methods of understanding and judging that characterize the fields of law and psychology. Brunner shows an ironic convergence between the two fields in the context of the trial, as the mental experts were unable to suspend judgment with regard to their subject, while the judges were limited by objective, legal criteria in judging Eichmann's state of mind.

While Brunner renders Arendt's claim of the "banality of evil" problematic

in light of the mental health evaluations of Eichmann, Shoshana Felman argues that we should not understand Arendt's claim as a psychological one, but, rather, as legal and political in nature. In *Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust*, Felman suggests reading the book as raising the question of how the phenomenon of the "banality of evil" can be addressed by means of legal doctrine and procedure. Arendt saw two main obstacles to accomplishing this task: the way in which the trial rendered historical events and the central role survivor testimonies took in the trial. Arendt maintained that both led to a judgment that focused on historical repetitions, rather than recognition of a new crime and a new type of criminal. Felman, in contrast, argues that Arendt failed to notice the way in which the trial "enacted Jewish memory as change" through the testimonies of victims, thus creating a "conceptual revolution in the victim." This change is considered by the author to be the major contribution of the trial to our understanding of the Holocaust.

The concluding essay changes the focus from Arendt's claim about the "banality of evil" to her criticism of the Jewish leadership's cooperation with the Nazis. *In a Different Voice: Nathan Alterman and Hannah Arendt on the Kastner and Eichmann Trials* develops a reading of Arendt's book as an exercise in judging against one's own community. Arendt's critical intervention is compared to that of the Israeli poet Nathan Alterman on the occasion of the *Kastner* trial in Israel in the 1950s. The surprising continuities and affinities between the two controversies further complicate our understanding of the relationship between judgment and community. In both cases, the social critic constructs an alternative trial that competes with the court's judgment, and in both cases, his or her criticism is viewed as an act of betrayal of the community's fundamental values. These controversies take us back to the opening article, giving content to its concept of community as contested and dynamic.

In concluding this short road-map, let me return to the idea that initiated this Volume. In response to the harsh criticism she received for her report on Eichmann's trial, Hannah Arendt wrote a postscript in which she explained the central problem that she saw in the trial:

> There remains ... one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time, *namely, upon the nature and function of human judgment.* What we have demanded in these trials, where the defendants had committed "legal" crimes, is that human beings be capable of telling right from

> wrong even when all they have to guide them is their own judgment, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them.[2]

The fragility of judgment, in other words, was exposed at the very moment that it was divorced from its basis in community. In order to begin to grapple with the puzzles of judgment thus exposed, we chose the opposite direction, forming a "community of judgment" through the forum that was provided by the Conference and this special issue of *Theoretical Inquiries in Law*. I wish to thank the Ghethe Institute, the Cegla Institute for Comparative and Private International Law, and the Minerva Center for Human Rights for enthusiastically adopting this idea and for generously providing us with the means to follow it to its conclusion. Ariel Porat's guidance and support were invaluable to me, for which I thank him. My gratitude also goes to Keren Dewitt-Arar, Leora Tec, and Dana Rothman for their editing work on the Volume, as well as to the assistant editors, Einat Fischer, Hadassa Greenberg, Yael Simon, and Marc Daugherty. Finally, special thanks from the entire editorial staff to Ms. Osnat Cohen for her work and efforts towards the publication of this Volume.

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2 Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 294-95 (1963).