

Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust

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This paper explores the Eichmann trial in its dimension as a living, powerful event, whose impact is defined and measured by the fact that it is "not the same for all." I examine this legal event from two perspectives: Hannah Arendt's and my own. I pledge my reading against Arendt's, in espousing the State's vision of the trial, but in interpreting the legal meaning of this vision as one that exceeds its own deliberateness and distinct from the State's ideology. I use Nietzsche's terms to contrast "critical history" with "monumental history." Whereas the official State vision of the trial is, I propose, precisely one of "monumental history," Arendt's vision offers a substitutive "critical (legal) history." I analyze, one against the other, what I call the monumental legal vision of the Eichmann trial and the critical vision (or the critical version of events) offered by Arendt.

Exploring thus the monumental versus the critical as two opposed but non-exclusive and, in fact, profoundly complementary perspectives, I examine, side by side, the Eichmann trial's monumental focus on the victims and Arendt's critical objections to this focus: her objections, I show, are based in a jurisprudential conservatism coexisting with a historiographical radicalism. The Eichmann trial, in my view, is on the contrary and diametrically, historiographically conservative, but jurisprudentially revolutionary. I argue that Arendt failed to see the way in which the trial in effect did not simply repeat the victim's story,

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but historically created it for the first time. I submit, in other words, that the Eichmann trial legally created a radically original and new event: not a rehearsal of a given story, but a groundbreaking narrative event that is itself historically and legally unprecedented.

Examining the trial's transformation of victims into prosecution witnesses, I analyze the victim-oriented focus of the trial as a legal process of translation of private traumas into public ones and as a public scene of the recovery of language and legal subjecthood by victims who were formerly defined by the oppressor's language and who were, therefore, not just injured, but essentially robbed of a language in which to articulate their injury and name their victimization. I argue that the Eichmann trial expanded the space available for moral deliberation in creating a new legal language: the trial was the victim's trial only insofar as it was now the victims who, against all odds, were precisely (through the trial) writing their own history. To enable such a writing, the Eichmann trial had to enact not simply memory, but memory as change. It had to dramatize upon its legal stage before the audience nothing less than a conceptual revolution in the victim. And this, in fact, is what the trial did. This historically unprecedented revolution in the victim that was operated in and by the Eichmann trial is, I suggest, the trial's major contribution not only to Jews, but to history, to law, to culture — to humanity at large. I further argue that as a singular legal event, the Eichmann trial calls for a rethinking — and sets in motion a transvaluation — of the structures and the values of conventional criminal law. I submit that the quintessence of the Eichmann trial is the acquisition of semantic authority by victims. It was the newly acquired semantic and historical authority of this revolutionary story that, for the first time, created what we know today as the Holocaust: a theme of international discussion and world conversation designating the experience of the victims and referring to the crime against the Jewish people independently from the political and military story of the Second World War.

INTRODUCTION

In the last half century, two works have marked what can be called *conceptual breakthroughs* in our apprehension of the Holocaust. The first was Hannah Arendt's *Eichmann in Jerusalem*, which appeared in the US in 1963 as a report on the Eichmann trial held in Israel in 1961. The second was the film *Shoah* by Claude Lanzmann, which first appeared in France in

1985. Twenty-two years apart and several decades after the War, both works revealed the Holocaust in a completely new and unexpected light. Historical research, of course, existed both before these works and after them, but it did not displace collective frameworks of perception and did not change the vocabulary of collective memory. These two works did. Acceptable or unacceptable, they added *a new idiom* to the discourse on the Holocaust, which, after them, did not remain the same as it had been before them.

When they appeared, both works were in effect received as totally surprising, and the surprise was, to some, shocking and, to all, impressive and unsettling in profound conscious and unconscious ways. Both works were seen as controversial. Both works were argued with, challenged both substantively and procedurally. Particularly Arendt's book provoked, immediately upon its publication and long after, a wave of controversy and responses that in fact has not yet been exhausted and whose energy continues up until this very day. I will argue that it is not a coincidence that the two works that have forced us to rethink the Holocaust in modifying our *vocabularies of remembrance* were, on the one hand, a trial report and on the other hand, a work of art. We needed trials and trial reports to bring a conscious closure to the trauma of the War, to separate ourselves from the atrocities and to restrict, to demarcate, and draw a boundary around a suffering that seemed both unending and unbearable. Law is a discipline of limits and of consciousness. We needed limits to be able both to close the case and to enclose it in the past. Law distances the Holocaust. Art brings it closer. We needed art — the language of infinity — to mourn the losses and to face up to what in traumatic memory is not closed and cannot be closed. Historically, we needed law to totalize the evidence, to *totalize* the Holocaust, and, through totalization, to start to apprehend its contours and its magnitude. Historically, we needed art to start to apprehend and to retrieve what the totalization left out. Between too much proximity and too much distance, the Holocaust becomes today accessible, I will propose, precisely in this space of *slippage between law and art*. But it is also in this space of slippage that its full grasp continues to elude us.

I. THE BANALITY OF EVIL

Although we have become familiar with its idiom, which we have debated now for almost four decades, *Eichmann in Jerusalem* remains

today as baffling as it was in 1963.¹ The book has given rise to many misconceptions. It is remembered mostly by the catchword of its title — "A Report on the Banality of Evil" — as an argument about the moral nature of the world and as a proposition about evil.² Arendt's irony in coining her

1 Hannah Arendt, *Eichmann in Jerusalem. A Report on the Banality of Evil* (Penguin Books 1994) (1963).

Among many other foreign correspondents, Arendt traveled to Jerusalem to report for *The New Yorker* on the trial whose dramatic announcement in Israel had provoked an international excitement and captured the world's attention. Cr.C. 40/61 (Jm.), *Attorney General v. Eichmann* (1961) (English Translation of the Proceedings 1962); Cr.A. 336/61, *Eichmann v. Attorney General*, 16 P.D. 2033. Pnina Lahav summarizes the facts of the case: "Adolph Eichmann was head of Department IV B 4 in the RSHS (the Reich security services) and in charge of Jewish Affairs and Evacuation. He proved his excellent managerial skills first by performing the modest task of expelling Vienna's Jews from Austria, then by engineering the systematic murder of the majority of European Jewry. In 1944, weeks before the red army marched on Budapest, he reactivated the Auschwitz crematoria to add 400,000 Hungarian Jews to his 5.5 million victims. [*Eichmann v. Attorney General* (1962), English Translation pt. 3, at 11-12, 17-35 (1963)]. After the war, Eichmann escaped to Argentina and assumed a false identity. On May 11, 1960, as Israel was celebrating its [twelfth anniversary,] Israeli security agents abducted Eichmann and brought him to face charges in Jerusalem ... To ensure Eichmann's security, he was seated [in the courtroom] in a specially constructed bulletproof glass booth ... Cameras were allowed into the ... courtroom, a rarity in the common law world and unprecedented in Israeli judicial procedure. A battery of simultaneous translators [interpreted the trial — conducted in Hebrew — into the earphones of the foreign correspondents and of the accused and his defense attorney. However, the judges cross-examined the accused in German, without earphones and without the mediation of translators] ... After the conviction, Eichmann was hung in the summer of 1962. He was the first, and so far the only, person executed by the State of Israel." Pnina Lahav, *The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia*, 72 B.U. L. Rev. 555, 558-59 (1992).

2 On Arendt's definition of evil, see Joseph Beatty, *Thinking and Moral Considerations: Socrates and Arendt's Eichmann*, in Hannah Arendt, *Critical Essays* 57-74 (Lewis P. Hinchman & Sandra K. Hinchman eds., 1994); Lang Berel, *Hannah Arendt and the Politics of Evil*, *supra* at 41-56; Marie-Claire Caloz Tschopp, *Hannah Arendt: La Banalité du mal comme mal politique* (1998); Shiraz Dossa, *Hannah Arendt on Eichmann: The Public, the Private and Evil*, 46 Rev. Pol. 163 (1984), reprinted in Shiraz Dossa, *Public Realm and Public Self: The Political Theory of Hannah Arendt* (1989); George Kateb, *Hannah Arendt: Politics, Conscience, Evil* (1984); J. Robinson, *And the Crooked Shall Be Made Straight: The Eichmann Trial, the Jewish Catastrophe, and Hannah Arendt's Narrative* (1965); L. Abel, *The Aesthetics of Evil: Hannah Arendt on Eichmann and the Jews*, 30 Partisan Rev. (1963); Barry Clarke, *Beyond the Banality of Evil*, 10 Brit. J. Pol. Sci. 417-39 (1980); Nathan Rottenstreich, *Can Evil Be Banal?*, 16 Phil. F. 50-62 (1984); Dana Villa, *Beyond Good and Evil: Arendt, Nietzsche, and the Aestheticization of Politics*,

conceptual paradox is frequently misunderstood to mean, straightforwardly, a psychological description of the Nazi Perpetrator, and it is precisely this "psychology of evil" which becomes a subject of the controversy. Were the Nazis truly monstrous or merely banal? Both sides of the controversy, I will argue, miss the point. The "banality of evil" is not psychological, but, rather, legal and political.³ In describing Eichmann's borrowed (Nazi) language and his all-too-credible self-justification by the total absence of motives for the mass murder that he passionately carried out (lack of *mens rea*),⁴ Arendt's

20 Pol. Theory 274-308 (1992); '*Eichmann in Jerusalem*': *An Exchange of Letters Between Gershom Scholem and Hannah Arendt*, in 22 *Encounter* (1964) [hereinafter '*Eichmann in Jerusalem*': *An Exchange of Letters*].

On Arendt generally, see Julia Kristeva, *Le Génie féminin* (T 1): Hannah Arendt (1999); Etienne Tassin, *Trésor perdu: Hannah Arendt, L'Intelligence de l'action politique* (1999); *Hannah Arendt*, 1999 *Revue internationale de philosophie* 208; Yvette Theraulaz & Marie-Claire Caloz Tschopp, *Hannah Arendt, Les Sans-états et le droit d'avoir des droits* (1998); Eslin, *Hannah Arendt, L'Obligée* (1996); Martha Minow, *Stories in the Law, in Law's Stories: Narrative and Rhetoric in the Law* 24-36 (1996); Seyla Benhabib, *The Reluctant Modernism of Hanna Arendt* (1994); Maurizio Passerin D'Entrève, *The Political Philosophy of Hannah Arendt* (1994); Hannah Arendt: *Critical Essays* (Lewis Hinchman & Sandra Hinchman eds., 1994); P. Hansen, *Hannah Arendt* (1993); M. Canovan, *Hannah Arendt: A Reinterpretation of Her Political Thought* (1992); D. Watson, *Arendt* (1992); G. Tolle, *Human Nature Under Fire: The Political Philosophy of Hannah Arendt* (1992); D. Barnouw, *Visible Spaces: Hannah Arendt and the German-Jewish Experience* (1990); L. Bradshaw, *Acting and Thinking: The Political Thought of Hannah Arendt* (1989); *Hannah Arendt: Thinking, Judging, Freedom* (G.T. Kaplan & C.S. Kessler eds., 1989); Amor Mundi, *Explorations in the Faith and Thought of Hannah Arendt* (J.W. Bernauer ed., 1987); *La Pluralité Irrapresentabile: Il pensiero politico di Hannah Arendt* (R. Esposito ed., 1987); James Bernhauer, *On Reading and Misreading Hannah Arendt*, 11 *Phil. & Soc. Criticism* 20 (1985); D. May, *Hannah Arendt* (1986); A. Enegren, *La Pensée politique de Hannah Arendt* (1984); Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (1982); J.B. Parekh, *Hannah Arendt and the Search for a New Political Philosophy* (1981); S. Whitefield, *Into the Dark: Hannah Arendt and Totalitarianism* (1980); *Hannah Arendt, The Recovery of the Public World* (Melvin A. Hill ed., 1979).

- 3 "When I speak of the banality of evil," Arendt explains in the Postscript to *Eichmann in Jerusalem*, "I do so only on the strictly factual level, pointing to a phenomenon that stared one in the face at the trial. Eichmann was not Iago and not Macbeth ... Except for an extraordinary diligence in looking out for his personal advancement, *he had no motives at all* ... He merely, to put the matter colloquially, never realized what he was doing." Arendt, *supra* note 1, at 287 (emphasis added).
- 4 "Arendt insisted," Pnina Lahav writes, "that 'civilized jurisprudence prided itself ... [most] on ... taking into account ... the subjective factor' of *mens rea*. But *the Nazis formed a new category of criminals, men and women who did not possess mens rea*. This new category, Arendt insisted, had to be recognized as a matter of

question is not "how can evil (Eichmann) be so banal?" but "how can the banality of evil be addressed in legal terms⁵ and by legal means?" On what

law." Arendt, *supra* note 1, at 276-77; Lahav, *supra* note 1, at 570 (emphasis added) (citing Arendt, *supra* note 1, at 276-77).

My emphasis is slightly different. I see the crux of Arendt's concept of "banality of evil" not only in the new conception of "a criminal without *mens rea*," but in the added legal and linguistic factor of the superimposition of a *borrowed (Nazi) language* — of recognizable and structuring *clichés* — on this absence of subjective motive. Eichmann's quasi-parodic German, a German limited to an anachronistic use of Nazi bureaucratic jargon (noticeable during the trial by every native German speaker as the farcical survival of a sort of robot-language), *takes the place of mens rea*. This unintentional *linguistic parody that substitutes for mens rea* is what makes Arendt call Eichmann "a clown" (Arendt, *supra* note 1, at 54) and view in general the German-language version of the trial as "sheer comedy" (a comedy compounded by a farcical, inadequate simultaneous translation into German) (Arendt, *supra* note 1, at 3, 48). "The German text of the taped police examination ... corrected and approved by Eichmann, constitutes a veritable gold mine," writes Arendt, in showing how "the horrible can be not only ludicrous but outright funny. Some of the comedy cannot be conveyed in English, because it lies in Eichmann's heroic fight with the German language, which invariably defeats him ... Dimly aware of a defect that ... [during the trial] amounted to a slight case of aphasia — he apologized, saying, 'Officialese [*Amtssprache*] is my only language.' But the point here is that *officialese became his language because he was genuinely incapable of uttering a single sentence that was not a cliché* ... what he said was always the same, expressed in the same words. The longer one listened to him, the more obvious it became that his inability to speak was closely connected with an inability to *think*, namely, to think from the standpoint of somebody else. *No communication was possible with him, not because he lied but because he was surrounded by the most reliable safeguards against the words and the presence of others, and hence against reality as such.*" Arendt, *supra* note 1, at 48-49 (emphasis added). As a parrot-like "clown," Eichmann does not speak the borrowed (Nazi) language: he is rather *spoken by it, spoken for by its clichés*, whose criminality he does not come to realize. This total loss of a sense of reality regarding Nazis crimes is what encapsulates, for Arendt, the utmost moral scandal (the *ventriloquized mens rea*, the criminal linguistic "banality") typified by Eichmann. Eichmann's continued impersonation during the trial (his autistic ventriloquism) of technocratic Nazi language is what incriminates him above all in Arendt's eyes. (In this sense, it is perhaps symbolic that, as the prosecutor noted, "Eichmann almost never looked into the courtroom." Gideon Hausner, *Justice in Jerusalem* 332 (1966).)

- 5 For a similar emphasis on the jurisprudential essence of "the banality of evil," but from a different interpretive perspective, see Laurence Douglas, *The Memory of Judgement: The Law, the Holocaust and Denial*, 7 *Hist. & Memory* 100 (1996). ("The banality of evil thus can be understood to describe a bureaucratic and a legal phenomenon. Organizationally removed from the mass killing they sanctioned, functionaries such as Eichmann could claim to have participated in the Final Solution *out of a feeling of legal obligation*. So conceived, the Holocaust could be

new legal grounds can the law mete out the utmost punishment precisely to banality or to the lack of *mens rea*? How can the absence of *mens rea* in the execution of a genocide become itself the highest — and not just the newest — crime against humanity?⁶ "We have to combat all impulses to mythologize the horrible," writes Arendt:

Perhaps what is behind it all is that individual human beings did not kill other individual human beings for human reasons, but that an organized attempt was made to eradicate the concept of the human being.⁷

If evil is linguistically and legally banal (devoid of human motivations, and occurring through clichés which screen human reality and actuality), in what ways, Arendt asks, can the law become an anchor and a guarantee, a guardian of humanity? How can the law *fight over language* with this radical banality (the total identification with a borrowed language)? When language itself becomes subsumed by the banality of evil, *how can the law keep meaning to the word "humanity"*? The crux of Arendt's book, I thus will argue, is not to define evil, but to reflect on the significance of legal meaning in the wake of the Holocaust.

If the banality of evil designates a gap between event and explanations, how can the law deal with this gap? The Eichmann trial must decide not just the guilt of the defendant, but how these questions can be answered. How, moreover, can a crime that is historically unprecedented be litigated, understood, and judged in a discipline of precedents? When precedents fall

viewed as the perfection, rather than as the perversion, of legal positivism — the idea that the legitimacy of a legal command derives from its status as law, and not from any underlying normative content." *Id.* at 108 (emphasis added).)

- 6 This, in my eyes, is the quintessence of Arendt's paradox and of her unexpected legal reading of the crime. This reading stands, of course, in a sharp contrast to the prosecution's version and to the court's juridical interpretation, both of which attributed to Eichmann undoubtable *mens rea*, or a hyperbolic ("monstrous," monstrously self-conscious, and self-willed) criminal intention: "Eichmann," wrote Supreme Court Justice Simon Agranat, "performed the extermination order at all times and in all seasons *con amore* ... with genuine zeal and devotion to that objective." Cr.A. 336/61, Eichmann v. Attorney General, 16 P.D. 2033, 2099; Eichmann Supreme Court Opinion, I-70 (English), *cited in* Pnina Lahav, *Judgement in Jerusalem. Chief Justice Simon Agranat and the Zionist Century 157* (1997). For an elaborate account of the court's views in this and other legal matters, see *id.* at 145-62.
- 7 *Letter 50*, in Hannah Arendt, Karl Jaspers, *Correspondence: 1926-1969*, at 69 (Lotte Kohler & Hans Saner eds. & Robert Kimber & Rita Kimber trans., 1992).

short, Arendt will ask, what is the role of legal history and legal memory? How can memory be used for the redefinition of a legal meaning that will be remembered in its turn, in such a way that the unprecedented can become a precedent in its own right — a precedent that might prevent an all too likely future repetition? What is the redefined legal relation between repetition and the new, and how does this relation affect the recreation of authoritative legal meaning for the future? These are, I will propose, the restless questions that bring Arendt to Jerusalem.

"Israel has the right to speak for the victims," writes Arendt to her German friend and mentor, Karl Jaspers, "because the large majority of them are living in Israel now as citizens":

The trial will take place in the country in which the injured parties and those who happen to survive are. You say that Israel didn't even exist then. But one could say that it was for the sake of these victims that Palestine became Israel ... In addition, Eichmann was responsible for Jews and Jews only ... The country or state to which the victims belong has jurisdiction ...

All this may strike you as though I too was attempting to circumscribe the political with legal concepts. And I even admit that as far as the law is concerned, I have been infected by the Anglo-Saxon influence. But quite apart from that, it seems to me to be in the nature of this case that we have no tools to hand except legal ones with which we have to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms. That is precisely what makes the process itself, namely, the trial, so exciting.⁸

A. A Dissident Legal Perspective

Among the common misconceptions to which Arendt's legal stance has given rise, the most prevalent is that the book is "anti-Zionist."⁹ According

8 *Letter 274*, in Hannah Arendt, Karl Jaspers, *Correspondence: 1926-1969*, *supra* note 7, at 215-17.

9 See, for instance, Gershom Scholem's characteristic interpretation in his public letter to Arendt of June 23, 1963: "... your description of Eichmann as a 'convert to Zionism' could only come from somebody who had a profound dislike of everything to do with Zionism. These passages in your book ... amount to a mockery of Zionism; and I am forced to the conclusion that this was, indeed, your intention." *Eichmann in Jerusalem': An Exchange of Letters*, *supra* note 2, at 53.

to Arendt's own testimony, she is pro-Zionist¹⁰ — but at the outset critical of Israeli law¹¹ and critical of Israeli government. Arendt perceives the trial as the space of a dramatic confrontation between the claims of justice and the competing claims of government and power. It is as though the courtroom were itself claimed simultaneously by *two competing masters*: justice on one

10 Against an international hue and cry disputing Israeli jurisdiction in the wake of Israel's abduction of Eichmann from his hiding place in Argentina, Arendt defends Israel's right both to try Eichmann and to execute him. Although she criticizes the philosophy behind the district court opinion, she supports wholeheartedly the verdict and condones the punishment, which she deems just. (Arendt, *supra* note 1, at 234-65, 277-79.) She goes as far as to condone the kidnapping, which she acknowledges as the sole realistic (if illegal) means to bring Eichmann to justice. ("This, unhappily, was the only almost unprecedented feature in the whole Eichmann trial, and certainly it was the least entitled ever to become a valid precedent *Its justification was the unprecedentedness of the crime and the coming into existence of a Jewish State.* There were, however, important mitigating circumstances in that there hardly existed an alternative if one indeed wished to bring Eichmann to justice In short, *the realm of legality offered no alternative to kidnapping.* Those who are convinced that justice, and nothing else, is the end of law will be inclined to condone the kidnapping act, though not because of precedents." *Id.* at 264-65 (emphasis added).) A founding legal act, Arendt implies, is always grounded in an act of violence. (On the general relation between the foundation of the law and violence, compare Jacques Derrida, "Force of Law," in *Deconstruction and the Possibility of Justice*, 11 Cardozo L. Rev. 920, 941-42 (1990); Walter Benjamin, *Critique of Violence*, in 1 Walter Benjamin, *Selected Writings (1913-1926)* 237-52 (1997); Robert Cover, *Violence and the Word*, in *Narrative, Violence and the Law: The Essays of Robert Cover* 203 (Martha Minow et al. eds., 1995).

All these points, in summary, establish Arendt's stance (contrary to common opinion) as *pro-Zionist*, though critical of the Israeli government and of its handling of the trial. "How you could believe that my book was 'a mockery of Zionism,'" Arendt writes to Scholem, in a letter of reply from July 24, 1963, "would be a complete mystery to me, if I did not know that many people in Zionist circles have become incapable of listening to opinions or arguments which are off the beaten track and not consonant with their ideology. There are exceptions, and a Zionist friend of mine remarked in all innocence that the book, the last chapter in particular (recognition of the competence of the court, justification of the kidnapping), was very pro-Israel, as indeed it is. What confuses you is that my argument and my approach are different from what you are used to; in other words, the trouble is that I am independent." *'Eichmann in Jerusalem': An Exchange of Letters*, *supra* note 2, at 55.

11 She criticizes the jurisdiction in Israel of religious law over family law: pragmatically, this subordination of family law to religious law does not enable intermarriage with non-Jews; Arendt provocatively compares this exclusionary jurisdiction of Israeli religious law with the racist exclusions of the 1935 Nuremberg laws of the Third Reich. Arendt, *supra* note 1, at 7.

side and, on the other side, the incarnation of political power, embodied in the far too charismatic head of state who has precisely planned the trial for his own political, didactic, and essentially non-legal ends.¹² Arendt in this way sets up a secondary courtroom drama and a secondary case for arbitration and adjudication: not just *Attorney General v. Eichmann*, but, also, simultaneously, the drama of the confrontation between Justice and the State: *Justice v. The State* or, rather, as she sees it, *The State v. Justice*.

And Ben Gurion, rightly called the "architect of the state", remains the invisible stage manager of the proceedings. Not once does he attend a session; in the courtroom he speaks with the voice of Gideon Hausner, the Attorney General, who, representing the government, does his best, his very best, to *obey his master*. And if, fortunately, his

12 Arendt summarizes these spectacular (spectacularized) political and didactic ends: "Thus, the trial never became a play, but the 'show' Ben Gurion had had in mind to begin with did take place, or, rather, the 'lessons' he thought should be taught to Jews and Gentiles, to Israelis and Arabs These lessons Ben Gurion had outlined them before the trial started, in a number of articles designed to explain why Israel had kidnapped the accused. There was the lesson to the non-Jewish world: 'We want to establish before the nations of the world how millions of people, because they happened to be Jews, and one million babies, because they happened to be Jewish babies, were murdered by the Nazis.' ... 'We want the nations of the world to know ... and they should be ashamed.' The Jews in the Diaspora were to remember how Judaism, four thousand years old ... ,' had always faced 'a hostile world,' how the Jews had degenerated until they went to their death like sheep, and how only the establishment of the Jewish state had enabled the Jews to hit back, as Israelis had done in the war of Independence... . And if the Jews outside Israel had to be shown the difference between Israeli heroism and Jewish submissive meekness, there was a lesson for those inside Israel too: 'the generation of Israelis who had grown up since the holocaust' were in danger of losing their ties with the Jewish people and, by implication, with their own history. 'It is necessary that our youth remember what happened to the Jewish people. We want them to know the most tragic facts in our history.' Finally, one of the motives in bringing Eichmann to trial was to ferret out other Nazis — for example, the connection between the Nazis and some Arab rulers." Arendt, *supra* note 1, at 9-10. These well known and much discussed political, ideological, and educational objectives of the state in the Eichmann trial are not my concern here. My own focus in what follows is, instead, on the achievements of the trial as an unprecedented legal event *exceeding its own ideology*. Arendt's debate is with the policies of the state around the trial. These policies, and the official ideological purposes of the trial, have been thoroughly described and analyzed in Hausner, *supra* note 4; cf. Tom Segev, *The Seventh Million: The Israelis and the Holocaust* 3223-66 (Haim Watzman trans., 1993); Lahav, *supra* note 6, at 145-64; Lahav, *supra* note 1; Annette Wieviorka, *Le Procès Eichmann* (1989); Annette Wieviorka, *L'Ere du témoin* (1998).

best often turns out not to be good enough, the reason is that the trial is presided over by *someone who serves Justice as faithfully as Mr. Hausner serves the State of Israel*.¹³ Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import ... be left in abeyance.

And *Justice*, though perhaps an "abstraction" for those of Mr. Ben Gurion's turn of mind, proves to be a *much sterner master* than the Prime Minister with all his power.¹⁴

In this dramatic confrontation between Justice and the State, Arendt sees her role as that of serving, in her turn, the "much sterner master." It is against the more "permissive" rule of the competing master — the Prime Minister — that she enlists at once her analytic skills, her legal erudition, and her most biting sense of irony. She thus proceeds from the determination to speak truth to power. Standing up against the State, she mobilizes law in an attempt to build a *dissident legal perspective*. Rather than call her "anti-Zionist," we may want to propose that with respect to the legal position of the State prosecuting the accused (with respect, that is, to the official Zionist legal position), she is performing what might be called, somewhat metaphorically, "critical legal studies" before its time.¹⁵

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- 13 Compare prosecutor Hausner's own memoirs of the trial: "But the court generally considered the evidence on Jewish resistance to be extraneous to the charge, and we were soon engaged in heated arguments over different portions of this testimony. After parts of it were heard, the presiding judge remarked ... that 'the testimony digressed quite far from the object of the trial,' and that we should have asked the witness to abstain from speaking on 'external elements which do not pertain to the trial.' I replied that these matters were certainly relevant, as would become even clearer when I delivered my final address to the court ... The presiding judge replied that ... the court had its own view about the trial according to the indictment, and that the prosecution should restrict itself to the court's rulings. 'You have got a hostile tribunal,' one of the foreign correspondents jested as he passed me during the lunch recess that followed." Hausner, *supra* note 4, at 333.
- 14 Arendt, *supra* note 1, at 5. "The latter's rule," Arendt proceeds, "as Mr. Hausner is not slow in demonstrating, is *permissive*; it *permits* the prosecutor to give press-conferences and interviews for television during the trial ... it *permits* frequent side glances into the audience, and the theatrics characteristic of a more than ordinary vanity, which finally achieves its triumph in the White House with a compliment on 'a job well done' by the President of the United States. *Justice does not permit anything of the sort*; it demands seclusion, it permits sorrow rather than anger, and it prescribes the most careful abstention from all the nice pleasures of putting oneself in the limelight." *Id.* at 5-6 (emphasis added).
- 15 Of course, Arendt was not part of the critical legal studies movement. It is worth noting, however, the ways in which Arendt's approach prefigures that of the later legal movement. Both methodologies are deconstructive; both set out to analyze and

B. The Critical Consciousness of the Event

Arendt's critique has had its own historical momentum; its dissenting legal force has paradoxically become today not only part of the event in history, but part of its notorious legal historiography. This historiography, in turn, was part of the legacy of the event. Whether we choose to accept or to reject its controversial premises, Arendt's trial report, I will here argue, at once proves and seals the impact of the trial as a true event.¹⁶ "Like truth," writes the historian Pierre Nora, "the event is always revolutionary, the grain of sand in the machine, the accident that shakes us up and takes us by surprise ... It is best circumscribed from the outside: what is the event and for whom? For if there is no event without critical consciousness, there is an event only when, offered to everybody, it is not the same for all."¹⁷

to *unmask* the strategies of power that disguise themselves in the proceedings of the law; both critically lay bare the political nature of legal institutions and of trials. But whereas the later legal movement challenges in principle the presumed line of demarcation between law and politics, Arendt's critique is driven, on the contrary, by a demand for purer justice — or by a claim for a strict separation between the legal and the political in the Eichmann trial.

On critical legal studies and legal scholars' challenges to the law/politics boundary, see *Critical Legal Studies* (James Boyle ed., 1992); *The Politics of Law: A Progressive Critique* (rev. ed. 1998); Mark Kelman, *A Guide to Critical Legal Studies* (1987).

16 I define "event" by the capacity of happenings to shock and to surprise — in excess of their own deliberateness. An event is always what surpasses its own planning, what exceeds its own deliberateness, what happens in a form of surprise to — and in excess of — the ideological intentions that have given rise to it. Arendt criticizes the deliberateness of the Eichmann event: with such orchestrated deliberateness on the part of the state, the trial in her eyes cannot but involve an element of fraud. "If collective memory can be created deliberately," writes in the same vein Mark Osiel, "perhaps it can be done only dishonestly, that is, by concealing this very deliberateness from the intended audience." Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. Pa. L. Rev. 463, 463-67 (1995). My argument, however, is that Arendt's very presence at the trial and her impact on the historiography and on the memory of the event precisely prove that the event has gone beyond the known parameters that were set as its limits and has reached over to some new parameters that were unknown and unexpected. Certainly, the state has not planned, and no one could have expected, Arendt's charismatic contribution to the meaning and the impact of the Eichmann trial. This is one concrete example in which the event surpassed its own deliberateness. I will argue that the deepest significance of the event (the legal event as well as the historical event) lies precisely in its self-transcendence. An event is that of which the consequences are incalculable, irrespective of its conscious architecture and of its ideological intentionality.

17 Pierre Nora, *Le retour de l'événement*, in *1 Faire de l'histoire — nouveaux problèmes*

I view Arendt, in Nora's words, as "the critical consciousness of the event," "the grain of sand in the machine." This paper will explore the Eichmann trial, quite precisely in its dimension as a living, powerful *event* — an event whose impact is defined and measured by the fact that it is "not the same for all."

It is not the same for Arendt as for me. I respect this fact as illustrating not just the significance but the eventness of the trial. I will try to look at the event from both perspectives: Arendt's and my own. I will try to hold both viewpoints in sight of each other's critical awareness. In what follows, I will pledge my reading against Arendt's, in espousing the State's vision of the trial and in highlighting differently than Arendt what I take to be the deeper meaning of the trial and, beyond its meaning, its far-reaching repercussions as event; an event which *includes Arendt* and of which Arendt remains, to this day, the most memorable and the most lucid critical consciousness.

C. History for Life

In *The Use and Abuse of History for Life*, Nietzsche analyzes different kinds of history (different relations to the past) which are all useful, relevant to life, and whose opposing insights in fact complement each other and define each other. There is what Nietzsche calls "monumental history," consisting in an aggrandizement, a magnification of the high points of the past as they relate to man's "struggle and action"; in contrast to this history that magnifies the past and seeks in it an inspiration, a "great impulse" for a future action, there is what Nietzsche calls "critical history" — a history "that judges and condemns" and that undercuts illusions and enthusiasms. "Critical history" derives, says Nietzsche, from man's "suffering and his desire for deliverance."

If the man who will produce something great has need of the past, he makes himself its master by means of monumental history; ... and only he whose heart is oppressed by an instant need and who will

220, 223 (Jacques Le Goff & Pierre Nora eds., 1974) (author's translation). Nora speaks of the event as a historian and as a philosopher of history. Compare, from the complementary vantage point of political theory, Arendt's own reflection on the event: "Events, past and present — not social forces and historical trends, not questionnaires and motivation research ... — are the true, the only reliable teachers of political scientists, as they are the most trustworthy source of information for those engaged in politics." Hanna Arendt, *The Origins of Totalitarianism* 482 (rev. ed. 1968).

cast the burden off at any price feels the need of "critical history", the history that judges and condemns.¹⁸

I will suggest that Arendt is, in Nietzsche's precise terms, a "critical historian" of the trial. She casts aside the version of the trial presented by the State, in an attempt to free the present from the oppressive inheritances of the past. She seeks not *inspiration* from the past, but *liberation* from the past. She strives not to erect past models, but to define a purer justice. "That virtue," Nietzsche writes, "never has a pleasing quality. It never charms; it is harsh and strident."¹⁹ Whereas the official State vision of the Eichmann trial is, I would propose, precisely one of "monumental history," Arendt's vision offers a substitutive "critical (legal) history." Scholem, therefore, is quite right in pointing out that Arendt's "version of events" often "seems to come between us and the events."²⁰ Monumental history is inspirational, emotional, constructive. Critical history is often destructive and always deconstructive. I propose to analyze here one against the other what I call the monumental legal vision of the Eichmann trial²¹ and the critical vision (or the critical version of events) offered by Arendt.

II. MONUMENTAL LEGAL HISTORY

"For it was history," writes Arendt, "that, as far as the prosecution was concerned, stood in the center of the trial."²² What makes of a legal case a monumental historical case is the dramatic, totalizing way in which the legal institutions undertake to put on trial history itself, thereby setting the whole world as the stage and as the audience of the trial. Nuremberg was such a case: a legal process mastering a monumental mass of evidence and technically supported by a battery of earphones and interpreters through whose performance justice was enacted as a constant process of translation and

18 Friedrich Nietzsche, *The Use and Abuse of History for Life* 12-17 (Adrian Collins trans., Liberal Arts Press 1957) (1949).

19 *Id.* at 36.

20 '*Eichmann in Jerusalem*': *An Exchange of Letters*, *supra* note 2, at 51.

21 The monumental legal vision as I see it (and as I will present it in what follows) is not identical with the ideological and educational objectives of the state concerning the trial. For a discussion of the state's deliberate objectives, see references in *supra* note 12. My interest, as I have stated earlier, is in the way in which the monumental legal event dramatizes a legal vision that exceeds its own ideological, self-conscious and conscious deliberateness. *See supra* note 16.

22 Arendt, *supra* note 1, at 19.

transmission between different languages. The Eichmann trial follows the tradition set up by the Nuremberg tribunal, but with a crucial difference of perspective. Whereas the Nuremberg trials view murderous political regimes and their aggressive warfare as the center of the trial and as the center of what constitutes a "monumental history," the Eichmann trial views the victims as the center of what gives history its monumental dimensions and what endows the trial with its monumental significance as an act of historic justice.²³

The philosophy of history and law that sees the victims as the narrative center of history and that insists on this memorial relation between law and history was best expounded by the then-prime minister of Israel, David Ben Gurion.²⁴

American journalists, who have not suffered from the Nazi atrocities, may be "objective" and deny Israel's right to try one of the greatest Nazi murderers. But the calamity inflicted on the Jewish people is not merely one part of the atrocities the Nazis committed against the world. It is a specific and unparalleled act, an act designed for the complete extermination of the Jewish people, which Hitler and his collaborators did not dare commit against any other people. It is therefore the duty of the State of Israel, the only sovereign authority in Jewry, to see that the whole of this story, in all its horror, is fully exposed — without in any way ignoring the Nazi regime's other crimes against humanity, but as a unique crime without precedent or parallel in the annals of mankind.

... It is not the penalty to be inflicted on the criminal that is the main thing — no penalty can match the magnitude of the offense — but the full exposure of the Nazi regime's infamous crimes against our people. Eichmann's acts alone are not the main point in this trial. Historic justice and the honor of the Jewish people demand this trial.

23 "In justification of the Eichmann trial," Arendt writes, "it has frequently been maintained that although the greatest crime committed during the last war had been against the Jews, the Jews had been only bystanders at Nuremberg, and the judgement of the Jerusalem court made the point that now, for the first time, the Jewish catastrophe 'occupied the central place in the court proceedings, and [that] it was this fact which distinguished this trial from those which preceded it', at Nuremberg and elsewhere." Arendt, *supra* note 1, at 258.

24 Ben Gurion responds to the international debate and legal controversy triggered by the announcement of the trial, a world polemic in which some Western legal scholars put in question Israeli jurisdiction in calling for the constitution of a more neutral international tribunal to try Eichmann.

Historic justice and the honor of the Jewish people demand that this should be done only by an Israeli court in the sovereign Jewish State.²⁵

Criminal proceedings are, therefore, initiated by the State of Israel in unique representation of the victims' previously unheard, unknown, and unnarrated narrative. The exposure of this unknown, unarticulated, and, thus, secret monumental narrative is the trial's goal. In the Nazi scheme, this narrative was meant to be erased as part of the erasure of the Jewish people. The articulation of this narrative as a living, active historical and legal force is, therefore, in itself, an unprecedented act of historic (and not just of legal) justice. By the mere existence of the trial, genocide is countered, vanquished by an act of historical survival. Unaccountable genocidal injustice is countervailed by a rigorously applied procedure of restoration of strict legal accountability and of meticulous justice. "Adolph Eichmann," says the prosecutor at the end of his opening argument, "will enjoy a privilege that he did not accord to even a single one of his victims. He will be able to defend himself before the court. His fate will be decided according to law and according to the evidence, with the burden of proof resting upon the prosecution. And the judges of Israel will pronounce true and righteous judgement."²⁶ Thus it is that Gideon Hausner, Israel's Attorney General and the chief prosecutor in this trial, literally frames the accusation in the victims' name,²⁷ as though speaking for the dead and giving voice, materially, to the six million Jews exterminated by the Nazis:

When I stand before you here, judges of Israel, in this court, to accuse

25 David Ben Gurion, *Israel: A Personal History 575* (Nechemia Meyers & Uzy Nystar trans., 1971). Compare Michael Keren, *Ben Gurion's Theory of Sovereignty: The Trial of Adolph Eichmann*, in *David Ben Gurion: Politics and Leadership in Israel* 38 (Ronald W. Zweig ed., 1992).

26 Hausner, *supra* note 4, at 325 (citing the 1962 proceedings of the Jerusalem District Court in *Attorney General v. Eichmann*).

27 "I kept asking myself," Hausner recalls, "what the victims themselves would have wished me to say on their behalf, had they had the power to brief me as their spokesman, now that the roles were reversed and that the persecuted had become the prosecutors. I knew that the demand for retribution had resounded in many of the last messages bequeathed by the dead: 'Avenge our blood!' ...

There was no way to implement this in the literal sense. The historic 'vengeance' was Jewish survival itself After much heart-searching I felt that I should interpret the last will and testament of the departed as a demand to set a course for scrupulous fairness. For they had been put to death though innocent of any crime. That their chief murderer should now receive a meticulously just trial was the only way they could be truly avenged. This, I thought, would be the real vindication of their memory." Hausner, *supra* note 4, at 322.

Adolph Eichmann, I do not stand alone. With me at this moment stand six million prosecutors. But alas, they cannot rise to level the finger of accusation in the direction of the glass dock and cry out *J'accuse* against the man who sits there. For their ashes are piled in the hills of Auschwitz and the fields of Treblinka ... Their graves are scattered throughout the length and breadth of Europe. Their blood cries to Heaven, but their voice cannot be heard. Thus it falls to me to be their mouthpiece and to deliver the awesome indictment in their name.²⁸

Thus the Eichmann trial sets out to perform what I call in using Nietzsche's term "monumental history": it sets out to present a "'monumental' contemplation of the past" that will provide an impulse for a future action and that will analyze events through their effects rather than through their causes, as "events that will have an effect on all ages."²⁹

28 Attorney General v. Eichmann (Proceedings of the District Court of Jerusalem, 1962), cited in Hausner, *supra* note 4, at 323-24; cf. Arendt, *supra* note 1, at 260.

29 Nietzsche, *supra* note 18, at 14-15. It is not surprising that in thus establishing for the first time the victims' story and their monumental history, the prosecution tends to censor what Arendt famously will analyze and underscore as the victims' own collaboration with their executioners. (Arendt, *supra* note 1, at 121-25, 132-34: "Wherever Jews lived," Arendt insists, "there were recognized Jewish leaders, and this leadership, almost without exception ... cooperated with the Nazis ... I have dealt with this chapter of the story, which the Jerusalem trial failed to put before the eyes of the world in its true dimensions, because it offers the most striking insight into the totality of the moral collapse the Nazis caused ... not only among the persecutors but also among the victims.") "Hausner," writes Tom Segev, "would almost completely ignore the Judenrates," avoiding an exposure of the coerced collaboration of the Jewish Councils in the deportations. In contrast to the state's discretion on, and to the trial's marginalization of, this chapter of collaboration of the Jewish leadership in the death of their own people, the State would try to underscore the victims' heroic activism: Hausner and Ben Gurion organize the trial so that it "would emphasize both the inability of the Jews to resist and their attempts to rebel." Segev, *supra* note 12, at 348. By highlighting the rare cases of Jewish resistance to the Holocaust, prosecutor Hausner aimed to help young Israelis overcome their "repugnance for the nation's past," a repugnance based on their impression that their grandparents had "allowed themselves to be led like lambs to the slaughter." Hausner, *supra* note 4. "The younger generation were to learn that Jews were not lambs to be led to the slaughter but, rather, a nation able to defend itself, as in the War of Independence, Ben Gurion told the *New York Times*." Segev, *supra* note 12, at 328. Prosecutor Hausner "sought to design a national saga that would echo through the generations," in concert with Ben Gurion's underlying grand vision that "something was required to unite Israeli society — some collective experience, one that would be gripping, purifying, ... a national catharsis." Segev, *supra* note 12, at 336, 328.

I submit that these pragmatic goals, while carried out, were also overwhelmed and exceeded by the subterranean force and the volcanic impact of the trial's reference

I am borrowing, however, Nietzsche's concept of "monumentality" and of a monumentalized historical perception in displacement of this concept. In Nietzsche, monumental history records the deeds and actions of great men. Monumentality (endurance of historical effects) consists, in other words, of the generic way in which history is written by great men. In the Eichmann trial, in contrast, as the prosecutor's monumentalizing opening address dramatically makes clear, monumental history consists not of the *writing of the great* but of the *writing of the dead*; the monument the trial seeks to build in judging Eichmann is erected not to romantic greatness (not to those who make or *have made* history) but to the dead (a monument to those who *were subject* to history).

It is striking that the prosecutor's monumentalized indictment starts with a historical citation. Monumental history is not only the trial's theme and legal subject. History inhabits here the legal utterance stylistically from its first word. In a unique dramatic and rhetorical self-definition, the prosecutor's opening argument initiates itself through the quotation and the recapitulation of another historical speech act of accusation.³⁰

to the dead which took on a legal momentum of its own, later picked up by the victims' own testimonial discourse.

30 I have analyzed elsewhere what I have called "the cross-legal nature" of historic trials: their typical articulation through a reference to a different trial, of which they reenact the legal memory and the traumatic legal content. I have thus shown how what Freud calls "historical dualities" — the tendency of great historical events to happen twice, to give rise to a twin historical event emerging as a posttraumatic duplicate or a belated double — applies to legal history as well and structures in particular key trials touching on great collective traumas that equally quite often manifest a tendency to duplication or to what I termed (in conjunction with the O.J. Simpson case) "a compulsion to a legal repetition," in structurally picking up (unconsciously or by deliberate design) on the traumatic legal meaning of a previous trial. A psychoanalytic logic of traumatic repetition often governs inadvertently what seems to be the purely legal logic of proceedings dealing with major historical phenomena of trauma. See 2 Sigmund Freud, *Moses and Monotheism* 64 (Katherine Jones trans., 1967) (Chapter 7); Shoshana Felman, *Forms of Judicial Blindness, or the Evidence of What Cannot Be Seen: Traumatic Narratives and Legal Repetitions in the O.J. Simpson Case and in Tolstoy's The Kreutzer Sonata*, in 23 *Critical Inquiry* 738 (1997) [hereinafter Felman, *Forms of Judicial Blindness*]. See also Shoshana Felman, *Traumatic Narratives and Legal Repetitions, in Memory, History and the Law* (Austin Sarat & Thomas Kearns eds., 1999). The Eichmann trial is yet another illustration of this phenomenon. Not only does the trial try to heal the legal trauma of the Kastner trial that took place in Israel five years before (see Lahav, *supra* note 1, at 573; Felman, *Forms of Judicial Blindness, supra* at 738, 746.) It also formulates precisely the unprecedented nature of its case in reference to a different case articulated in a different language, in a different century and through a different legal culture (the Dreyfus case, France

The six million dead, says the prosecutor, can no longer speak in their own name and formulate their own "*J'accuse*." It is, therefore, the indictment formulated by the State that will articulate for them their silenced accusation and will thus enable them not simply to accuse but to claim a legal subjectivity — to legally say "I" for the first time.

A. *J'accuse*

What would it mean for the dead to say "I" through the medium of the trial?³¹ What is the significance — for those whom history deprived precisely of their "I" — of saying "I accuse" before a court of law and before the world? Why must the dead say "I" precisely in a foreign tongue, in borrowing a French expression? From whom do the dead borrow? What sort of foreign discourse, what legal/literary speech act do the dead quote to say "I accuse" for the first time?

"*J'accuse*" — "I accuse" — was the title of a famous text of vehement denunciation of racist injustice published in 1898 by the best known French writer of the time, Emile Zola, as an explosive public letter to the President of France and as an artist's intervention in the legal controversy of the Dreyfus affair in France. In 1894, Captain Alfred Dreyfus, a Jewish officer in the French army, was convicted of having betrayed military secrets to Germany and sentenced to a solitary life imprisonment in the penal colony Devil's Island. When the fact of espionage was discovered and the military high command was pressured to supply the criminal's identity, it was natural

1884-1906). The Eichmann trial thereby chooses to articulate, quite paradoxically, its very claim to legal originality in reference to (the legal trauma of) a previous trial.

- 31 "Yes, each dead person leaves a little goods, his memory, and asks that it be taken care of," writes the French historian Jules Michelet. "For the sake of him who has no friends, the magistrate, the judge must substitute for friends. For the law, justice is more reliable than all our forgetful tendernesses, our tears so quickly dried.

This magistrate's jurisdiction is History. And the dead are, to borrow an expression from Roman law, these *miserabilis personae* with whom the judge has to preoccupy himself.

Never in my whole career have I lost sight of this historical duty. I have given to many forgotten dead the assistance of which I myself will have need when the time comes.

I have exhumed them for a second life ...

History welcomes and renews these disinherited glories ... Its justice [creates] a common city between the living and the dead." Jules Michelet, *Histoire de France*, in 21 Oeuvres complètes 268 (1971) (author's translation).

for the army hurriedly to suspect and to scapegoat Dreyfus because he was a Jew. The conviction was obtained through an illegal secret process in a military court. Under the pretext of a threat to State security, the evidence was hidden not just from the public but from the accused and from his lawyer. After the trial, it emerged that the incriminating piece of evidence was a forged document and that the real spy was another officer, Major Esterhazy. But Dreyfus' conviction as a traitor had meanwhile triggered throughout France and its colonies an outburst of anti-Semitic fury. In spite of the accumulating evidence confirming Dreyfus' innocence, the army and the politicians refused to admit their judicial error. A second military court judged Esterhazy only to acquit him and to ratify, thus, through a second trial, the authority of the closed case of Dreyfus' guilt. Appearing in a daily newspaper with the effect of an exploding bomb, Emile Zola's pamphlet publicly accused the army and the government of a cover-up and of a miscarriage of justice. It strongly proclaimed Dreyfus' innocence and advocated the necessity of reopening the case.

It should be noted that Emile Zola's act was historically unprecedented on three counts. 1) This was the first time that a non-Jew had spoken for Jews to publicly accuse — denounce — *legal* anti-Semitism or racist judicial injustice from the victim's point of view and in the victim's name. 2) In thus protesting for the victim, Zola broke in a revolutionary way with the prevailing Western or Platonic ethical and philosophical tradition, according to which a victim of judicial injustice had to *resign himself* on moral grounds to the legal authority of the decision wronging him, in order to safeguard the rule of law for culture's and civilization's sake.³² 3) And most important: in an unprecedented manner, Zola mobilizes art as the victim's ally in the victim's struggle against law and against his oppression by the law. It is not by chance that such an accusation against law required art (both marginality and power of expression) to articulate itself. Only an artist could, indeed, take up the challenge of arguing with the legitimacy of an act of State. For the first time, a literary writer understands his task as that of giving *legal* voice to those whom the law had deprived of voice. In identifying art's voice with the victim's voice, Zola universalized the victim.

32 Thus, Socrates as a condemned philosopher and as role model gives the example of refusing to escape from Athens to avoid the death sentence the polis has unjustifiably inflicted on him. His only recourse, the philosopher tells his disciple Crito, is persuasion of the court within the legal framework of the trial. Socrates thereby accepts and legally assumes and consummates his role as victim of injustice so as to safeguard (and teach) the supreme principle of the rule of law. Plato, *Crito*, in 1 The Dialogues of Plato 123-29 (R.E. Allen trans., 1984).

B. The Truth Is on the March

Zola knew that consequent to his audacious published accusations against the justice system, he himself would unavoidably be charged with libel and be prosecuted for slander of the army and the government. He deliberately put himself up for criminal trial, in order to reopen Dreyfus' closed case. In thus joining the victim of the flagrant injustice and in taking, in his turn, the position and the role of the accused, Zola hoped to force the legal system to review the evidence of Dreyfus' case in a *non-military* court: he wanted to initiate a legal repetition of Dreyfus' sealed trial through a public — as opposed to the old hidden, secret — legal process and, thereby, to bring to light the Jewish officer's innocence through his own trial. Thus the artist made — at his own cost — a revolutionary intervention in the legal process of the Dreyfus case. The writer chose politically to make creative use of the tool of law in order to break open the closed legal frame.³³

But Zola was, in turn, convicted and had to flee from France to England. Finally in 1899, after a change of governments and a long chain of legal twists, Dreyfus was pardoned and, in 1906, fully exonerated and reinstated to his military rank. Zola was no longer alive to witness this longed for triumph. "Let us envy him," Anatole France said at Zola's funeral, "He has honored his country and the world with an immense body of work and a great deed ... For a brief moment, he was the conscience of humanity."³⁴

"The truth is on the march," Zola wrote in *J'accuse*, "and nothing shall stop it ... the act that I hereby accomplish is but a revolutionary means to hasten the explosion of truth and justice."³⁵ In terms that reverberate into our century, Zola charged:

It is a crime to mislead public opinion, to manipulate it for a death-dealing purpose and to pervert it to the point of delirium. It is a crime ... to whip reactionary and intolerant passions into a frenzy while sheltering behind the odious anti-Semitism, of which the great liberal France of the rights of man will die if it is not cured of it. It is a crime

33 Compare *supra* note 28.

34 Cited in Jean-Denis Bredin. *The Affair. The Case of Alfred Dreyfus* 456 (Jeffrey Mehlman trans., 1986) (translation modified).

35 Emile Zola, *J'accuse, in J'accuse...! La Vérité en marche* 111-13 (1988) [hereinafter Zola, *J'accuse*], translated in Emile Zola, *The Dreyfus Affair (J'accuse and Other Writings)* 52-53 (Alain Pagès ed. & Eleanor Levieux trans., 1996) (English translation occasionally modified by author according to the French original) [hereinafter Zola, *The Dreyfus Affair*]. Unless otherwise indicated, page references in parentheses following Zola's quotations will be to the English edition.

to exploit patriotism to further the aims of hatred. And it is a crime to worship the sword as the modern god.³⁶

"I have but one goal," Zola said in very simple words at the conclusion of *J'accuse*, "I have but one concern: that light be shed, in the name of mankind which has suffered so much and has a right to happiness":

My ardent protest is but *a cry from my very soul*. Let them dare to summon me before a court of law. Let there be trial in the full light of day.

I am waiting.³⁷

"France," Zola wrote in another publication printed just a week before *J'accuse*,

France, those are the people I appeal to! They must group together! They must write; they must speak up. They must work with us to enlighten the little people, the humble people who are being poisoned and forced into delirium.³⁸

In his final "Statement to the Jury" at the closure of his trial, Zola said,

I did not want my country to remain plunged in lie and injustice. You can strike me here. One day, France will thank me for having helped to save her honor.³⁹

C. Race Hatred, or the Monumental Repetition of a Primal Legal Scene

The pathos of Zola's historical denunciation of nationalistic racism had worked itself into the Eichmann trial, through the relation of the victim's silent, *unarticulated* cry to the *legal articulation* of the prosecutorial argument.

With me at this moment stand six million prosecutors. But alas, they cannot rise to level the finger of accusation in the direction of the glass dock and cry out *J'accuse* against the man who sits there. For their ashes are piled in the hills of Auschwitz and the fields of Treblinka

36 Zola, *The Dreyfus Affair*, *supra* note 35, at 51.

37 *Id.* at 53 (translation modified; emphasis added).

38 Letter to France (January 7, 1898) in Zola, *The Dreyfus Affair*, *supra* note 35, at 42.

39 Emile Zola, *Déclaration au Jury, in J'accuse...! La Vérité en marche*, *supra* note 35, at 127 (author's translation).

... Their blood cries to Heaven, but their voice cannot be heard. Thus it falls to me to be their mouthpiece and to deliver the awesome indictment in their name.

It is not an accident if, in his opening argument against the Nazi criminal, the Israeli prosecutor picks up on the primal legal scene and on the primal soul cry of Zola's *J'accuse*,⁴⁰ trying to recapitulate at once the moral force of the historical denunciation and the subversive legal gesture, the revolutionary legal meaning of Zola's reversed speech act of accusation.

Monumental history, says Nietzsche, proceeds by analogy. The Dreyfus case in France was both a European trauma and a Jewish trauma. In parallel, the Holocaust in Germany was, on a different and undreamt-of scale, a Jewish trauma that became a European trauma. But Germany, alas, had no Zola.

"While the Dreyfus Affair in its broader political aspects belongs to the twentieth century," writes Hannah Arendt, "the Dreyfus case [is] quite typical of the nineteenth century, when men followed legal proceedings so keenly because each instance afforded a test of the century's greatest achievement, the complete impartiality of the law ... The doctrine of equality before the law was still so firmly implanted in the conscience of the civilized world that a single miscarriage of justice could provoke public indignation from Moscow to New York. The wrong done to a single Jewish officer in France was able to draw from the rest of the world a more vehement and united reaction than all the persecutions of German Jews a generation later."⁴¹

All this belongs typically to the nineteenth century and by itself would never have survived two World Wars ... The Dreyfus affair in its political implications could survive because two of its elements grew in importance during the twentieth century. The first is hatred of the Jews. The second, suspicion of the republic itself, of parliament, and the state machine.⁴²

40 "Ma protestation enflammée n'est que le cri de mon ame," ["My ardent protest is but a cry from my very soul,"] Zola said. The challenge Zola met was that of a *translation* of "the cry" to a creative legal action. It is a similar challenge that confronts the prosecutor at the Eichmann trial: the central legal question in the trial is how to articulate creatively — yet in a legal idiom that all recognize — the cry? (the victim's cry, the soul cry, the cry of the dead, the cry of history that no one has as yet heard within the space and in the language of a trial).

41 Hannah Arendt, *The Origins of Totalitarianism* 91 (Harcourt Brace 1958) (1973).

42 *Id.* at 92. Arendt extends her own suspicion of the state machine (normally concentrated on *totalitarian abuses* of the state machine) to her analysis — and her

The twentieth century repeats and takes to an undreamed extreme the structures of the nineteenth century. Behind the prosecutor's opening citation of Zola's protest, the shadow of Dreyfus stands at the threshold of the Eichmann trial for a whole historical *legal inheritance* in which the Jew is the perennial accused in a lynch justice. In twentieth-century Nazi Germany, as in Dreyfus' nineteenth-century France, persecution ratifies itself as persecution in and through civilization — by the civilized means of the law. The Wannsee Conference legalizing genocide as a sweeping indictment and penalization of all Jews by virtue of their being Jews is but the crowning culmination of this history. As the secretary of that conference who *transcribed* it while feeling not merely innocent, but as he testified, "like Pontius Pilate" *innocented* by its verdict on the Jews,⁴³ as the ruthless agent of administrative genocide and as the Nazis' so-called "Jewish specialist," Eichmann is an emblem of this history. But this whole insidious framework of legal persecution and of *legalized abuse* can now, for the first time, be dismantled legally, since Zionism has provided a tribunal (a state justice) in

critique (her "critical history") of the State of Israel's handling of the Eichmann trial. In this sense, *Arendt formulates her own J'accuse* against the state and its judicial system (the non-separation between state and church that she sarcastically equates with reverse racism: Israeli law indicted right at the outset; Arendt, *supra* note 1, at 6-7). Arendt speaks truth to power, unwittingly adopting in her turn Zola's anti-religious, anti-racist, *anti-nationalistic, anti-statist stance*. Arendt challenges, indeed, Hausner's prerogative to quote Zola in pointing out that Hausner is "a government-appointed agent," not a defiant individual who undertakes to challenge the very justice of the state and the legitimacy of the state's implementation of its judicial system. With her usual sarcasm focused on the chief prosecutor, Arendt writes: "The '*J'accuse*', so indispensable from the viewpoint of the victim, sounds, of course, much more convincing in the mouth of a man who has been forced to take the law into his own hands than in the mouth of a government-appointed official who risks nothing." Arendt, *supra* note 1, at 266. Ironically and without meaning to do so, Arendt will also, like Zola, open herself to trial by the defenders of the state. The Dreyfus affair is thus, in more than one sense, archetypal of positions in the Eichmann trial. The Eichmann trial takes place in the shadow of the distant lessons and of the structural cross-legal memory of the Dreyfus case. *See supra* note 28.

- 43 Compare Arendt's report in *Eichmann in Jerusalem*: "The aim of the conference was to coordinate all efforts toward the implementation of the Final Solution It was a very important occasion for Eichmann, who had never before mingled socially with so many 'high personages' He had sent out the invitations and had prepared some statistical material ... for Heydrich's introductory speech — eleven million Jews had to be killed, an undertaking of some magnitude — and *later he had to prepare the minutes*. In short, he *acted as secretary of the meeting*."

There was another reason that made the day of that conference unforgettable for Eichmann. Although he had been doing his best right along to help in the Final Solution, he had still harbored some doubts about 'such a bloody solution

which the Jew's victimization can be, for the first time, *legally articulated*. In doing justice and in exercising sovereign Israeli jurisdiction, the Eichmann trial tries to legally reverse the long tradition of traumatization of the Jew by means of law. The voiceless Jew or the perennial accused can for the first time speak, say "I" and voice his own "*J'accuse*." "This," Prime Minister Ben Gurion said, "is not an ordinary trial nor only a trial":

Here, for the first time in Jewish history, historical justice is being done by the sovereign Jewish people. For many generations it was we who suffered, who were tortured, were killed — and we who were judged. Our adversaries and our murderers were also our judges. For the first time Israel is judging the murderers of the Jewish people. It is not an individual that is at the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history. The judges whose business is the law and who may be trusted to adhere to it will judge Eichmann the man for his horrible crimes, but responsible public opinion in the world will be judging anti-Semitism, which paved the way for this most atrocious crime in the history of mankind. And let us bear in mind that only the independence of Israel could create the necessary conditions for this historic act of justice.⁴⁴

III. ARENDT'S OBJECTIONS

Arendt disputes this vision of the trial and rejects the monumental history that it constructs on two conceptual grounds — the first, juridical, linked to a different conception of the function of the trial (based on a different, more conservative philosophy of law), and the second, epistemological, linked to a different historical perception of the Holocaust and amounting, ultimately, to a different philosophy of history. On both historical and legal grounds,

through violence', and these doubts had now been dispelled. '*Here now, during this conference, the most prominent people had spoken, the Popes of the Third Reich.*' Now he could see with his own eyes and hear with his own ears that not only Hitler ... but the elite of the good old Civil Service were vying and fighting with each other for the honor of taking the lead in these 'bloody' matters. '*At that moment, I sensed a kind of Pontius Pilate feeling, for I felt free of all guilt.*'" Arendt, *supra* note 1, at 113-14 (emphasis added).

44 Ben Gurion, *supra* note 25, at 599. Compare Michael Keren, *Ben Gurion's Theory of Sovereignty: The Trial of Adolph Eichmann*, in David Ben-Gurion: Politics and Leadership in Israel (Ronald W. Zweig ed., 1992).

Arendt takes issue with the very narrative perspective that puts the victims at the center of the trial. At odds with the narrative effort of the State, Arendt's competing effort is to *decenter* systematically the prosecution's story⁴⁵ and to focus the historical perception that transpires not on the victim, but on the criminal and on the nature of the crime.

A. For a More Conservative Philosophy of Law: Arendt's Jurisprudential Argument

The prosecutor's grandiose rhetoric of speaking for the dead, the monumentalized indictment uttered in the name and in the voice of the deceased, undermines for Arendt the sobriety of the proceedings, since what is presented as the victims' outcry — the victims' search for justice and accountability — might be perceived as a desire for revenge. But if the prosecutor's public anger is what the cry of the deceased amounts to, Arendt would rather do without that cry. A courtroom is, indeed, no place for cries. Justice for Arendt is a thoroughly ascetic, disciplined conceptual experience, not an emotional stage for spectacular public expression. "Justice" — Arendt protests — "does not permit anything of the sort; it demands seclusion, it permits sorrow rather than anger. And it prescribes the most careful abstention from all the nice pleasures of putting oneself in the limelight."⁴⁶

Justice demands that the accused be prosecuted, defended, and judged, and that all the other questions of seemingly greater import ... be left in abeyance. Justice insists on the importance of Adolph Eichmann,

45 Arendt thus offers what Henry Louis Gates calls a "counternarrative" to the official story of the Eichmann trial. "People," writes Gates, "arrive at an understanding of themselves and the world through narratives — narratives purveyed by schoolteachers, newscasters, 'authorities', and all the other authors of our common sense. Counternarratives are, in turn, the means by which a group contests that dominant reality and the framework of assumptions that supports it. Sometimes delusion lies that way, sometimes not. There's a sense in which much of black history is simply counternarrative that has been documented and legitimized, by slow, hard-won scholarship." Henry Louis Gates, *Thirteen Ways of Looking at a Black Man* 106-07 (1997). Arendt's critical history is the decanonizing and iconoclastic *counternarrative* of a resistant reader, whose faith is in diversity and separation (rather than in unity and in communal solidarity) and who speaks truth to power, from a "position ... close to the classical anarchist — with anarchy understood to mean the absence of rulers, not the absence of law." (I am borrowing this definition of the anarchist position from Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, in *Narrative, Violence, and the Law*, *supra* note 10, at 175).

46 Arendt, *supra* note 1, at 5.

... the man in the glass booth built for his protection ... On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism or racism.⁴⁷

The jurisprudential understanding of a crime cannot be focused on the victim. A criminal is tried not with the aim of vengeance on the part of those whom he has injured, but in order to repair the community that he has endangered by his action. "Criminal proceedings," Arendt writes, "since they are mandatory and initiated even if the victim would prefer to forgive and forget, rest on laws whose 'essence' ... is that a crime is not committed only against the victim but primarily against the community whose law is violated ... it is the general public order that has been thrown out of gear and must be restored, as it were. It is, in other words, the law, not the plaintiff, that must prevail."⁴⁸

B. For a Less Conservative Philosophy of History: Arendt's Historiographical Argument

The second argument Arendt articulates as an objection to the trial's focus on the victims is historical and epistemological. The trial perceives Nazism as the monstrous culmination and as the traumatic *repetition* of a monumental history of anti-Semitism. But for Arendt, this victim's perspective, this traumatized perception of history as the eternal repetition of catastrophe, is *numbing*.⁴⁹ Arendt does not put it quite so literally: I am translating freely what I feel to be the intellectual and the emotional thrust of her argument. Repeated trauma causes numbness. But law cannot indulge in numbness. As a typical response to trauma, numbness may be a legitimate effect of history; it cannot be a legitimate effect of law, the language of sharpened awareness. A trial, Arendt deeply and intensely feels, is supposed to be precisely a translation of the trauma *into consciousness*. But here the numbing trauma is mixed into

47 *Id.*

48 Arendt, *supra* note 1, at 261. In Arendt's eyes, the focus on the victims trivializes both the nature of the accusation (the indictment) and the nature of the crime (of the offense). "For just as a murderer is prosecuted because he has violated the law of the community, and not because he has deprived the Smith family of its husband, father and breadwinner, so these modern, state-employed murderers must be prosecuted because they violated the order of mankind, not because they killed millions of people." Arendt, *supra* note 1, at 273.

49 Compare Hausner, *supra* note 4, at 331 (emphasis added): "It was often excruciating merely to listen to one of these tales. Sometimes we felt as if our reactions were paralyzed, and we were *benumbed*. It was a story with an unending climax."

the form of the trial itself. In litigating and in arguing the charges on the basis of a numbing repetition of catastrophe, Jewish historical consciousness — and the trial as a whole — submit to the effects of trauma instead of remedying it. History becomes the illustration of what is already known. But the question is precisely how to learn something new from history. In the Israeli vision of the trial, the monumental, analogical perception of the repetition of the trauma of anti-Semitism *screens the new*: it hides from view precisely the unprecedented nature of the Nazi crime, which is neither a development nor a culmination of what went before, but is separated from the history preceding it by an abyss. This abyss — this epistemological rupture — is what the Eichmann trial and its monumental history fail to perceive in Arendt's eyes. This radical critique encapsulates Arendt's revolutionary concept of the Holocaust, as opposed to her conservative legal approach and her conservative jurisprudential argument.

I will argue in what follows that the Eichmann trial is, at the antipodes of Arendt, historiographically conservative but jurisprudentially revolutionary. Arendt, on the contrary, is historiographically revolutionary but jurisprudentially conservative. I will further argue that the paradox of *Eichmann in Jerusalem* proceeds from the creative tension between Arendt's philosophical, historiographical, and epistemological radicalism and her jurisprudential conservatism.

The Holocaust, Arendt contends, requires a historiographical radicalism. But the Eichmann trial is — quite disappointingly — not capable of such a radical historical approach. It fails to give a revolutionary lesson for the future because it is imprisoned in the endless repetition of a catastrophic past. It is locked up in trauma and in repetition as a construct that prevents a grasp of the unprecedented. "I have insisted," Arendt writes, "on ... how little Israel, and the Jewish people in general, was prepared to recognize, in the crimes that Eichmann was accused of, an unprecedented crime":

In the eyes of the Jews, thinking exclusively in terms of their own history, the catastrophe that had befallen them under Hitler, in which a third of the people perished, appeared not as the most recent of crimes, the unprecedented crime of genocide, but on the contrary, as the oldest crime they knew and remembered. This misunderstanding ... is actually at the root of all the failures and the shortcomings of the Jerusalem trial. *None of the participants ever arrived at a clear understanding of the actual horror of Auschwitz, which is of a different nature from all the atrocities of the past ... Politically and legally, ...*

these were "crimes" different not only in degree of seriousness but in essence.⁵⁰

IV. EXTENDING THE LIMITS OF PERCEPTION

Arendt thus situates the problematic of the Eichmann trial in a particularly meaningful relation between repetition and the new, between a memory of history and law as an experience and a discipline of precedents, and the necessity to break fresh ground, to project into the future and into the structure of the precedent the legal meaning of the unexampled and the unprecedented. I will argue, in my turn, that in focusing on repetition and its limits in the Eichmann trial, Arendt fails to see the way in which the trial in effect does not *repeat* the victim's story, but historically creates it for the first time. I submit, in other words, that the Eichmann trial legally creates a radically original and new event: not a rehearsal of a given story, but a groundbreaking narrative event that is itself historically and legally unprecedented.

"Universalist philosophers," writes Richard Rorty, "assume, with Kant, that all the logical space necessary for moral deliberation is now available — that all important truths about right and wrong can not only be stated, but be made plausible, in language already to hand."⁵¹ As a believer in the universalist language of the law, Arendt makes such an assumption in coming to Jerusalem and in reporting as she does on the trial's shortcomings. But the Eichmann trial, I would argue, strives precisely to *expand* the space available for moral deliberation through law. The trial shows how the unprecedented nature of the injury inflicted on the victims cannot be simply stated in a language that is already at hand. I would argue that the trial struggles to create a new space, a language that is not yet in existence. This new legal language and this new space in which Western rationality as such shifts its horizon and extends its limits are created here perhaps for the first time in history precisely by the victims' first-hand narrative.

A. Private and Public

Over a hundred witnesses appear with the determination to translate their private traumas to the public space. To her surprise, Arendt is so moved by

50 Arendt, *supra* note 1, at 267 (emphasis added).

51 Richard Rorty, *Feminism and Pragmatism*, 30 Mich. Q. Rev. 231-32 (1991).

some of the testimonies that she can uncharacteristically, at moments, think uncritically and, as she puts it, "foolishly: 'Everyone, everyone should have his day in court'."⁵² In general, however, Arendt has a hard time stomaching the testimonial exhibition of atrocities and finds the listening profoundly taxing.⁵³ She is embarrassed by the unreserved disclosures of human degradation and is deeply discomforted by what she experiences as an exposure of the private to the public ear:

... this audience was filled with "survivors", ... immigrants from Europe, like myself, who knew by heart all there was to know⁵⁴ ... As witness followed witness and horror was piled on horror, they sat there and listened in public to stories they would hardly have been able to endure in private, when they would have had to face the storyteller.⁵⁵

In relegating the victim experience to the private realm and in expressing her discomfort at the mixture of the private and the public, Arendt fails to recognize, however, how the very essence of the trial consists in a juridical and social *reorganization* of the two spheres and in a restructuring of their jurisprudential and political relation to each other.⁵⁶ Beyond the incidental

52 Arendt, *supra* note 1, at 229.

53 The difficulty of listening was underscored even by the prosecutor. "The narratives," he later writes, "were so overwhelming, so shocking, that we almost stopped observing the witnesses and their individual mannerisms. What impressed itself on the mind was an anonymous cry; it could have been voiced by any one of the millions who had passed through that Gehenna. The survivors who appeared before us were almost closer to the dead than to the living, for each had only the merest chance to thank for his survival ...

It was often excruciating merely to listen to one of these tales. Sometimes we felt as if our reactions were paralyzed, and we were benumbed. It was a story with an unending climax. Often I heard loud sobbing behind me in the courtroom. Sometimes there was a commotion, when the ushers removed a listener who had fainted. Newspaper reporters would rush out after an hour or two, explaining that they could not take it without a pause ...

The prosecution team was thankful for the 'documentation sessions.'" Hausner, *supra* note 4, at 227, 331.

54 "I was there, and I don't know. How can you possibly know when you were elsewhere?" Elie Wiesel asked Hannah Arendt. "Her reply: 'You're a novelist; you can cling to questions. I deal with human and political sciences. I have no right not to find answers.'" 1 Elie Wiesel, *All Rivers Run to the Sea: Memoirs (1928-1969)* 348 (1995).

55 Arendt, *supra* note 1, at 8.

56 In consciously unsettling the dichotomy (the segregation and the opposition) between

scope of Arendt's reservations and of her anger at what she experiences as an invasion of the public by the private, I argue that the trial is, primarily and centrally, a *legal process of translation* of thousands of private, secret traumas into one collective, public, and communally acknowledged one.

the private and the public, the Eichmann trial is, in 1961, ahead of other legal movements (such as feminism, black studies, gay studies) that would equally seek to unsettle this dichotomy in their political struggles during the seventies, the eighties, and the nineties.

For feminist critiques of the public/private divide, see, for example, Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *The Disorder of Women: Democracy, Feminism and Political Theory* 118 (1989); Nicola Lacey, *Theory into Practice? Pornography and the Private/Public Dichotomy*, 20 *J.L. & Soc'y* 93 (1993); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence*, 8 *Signs: J. Women Culture & Soc'y* 635 (1983); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *Harv. L. Rev.* 1497 (1983); Elizabeth M. Schneider, *The Violence of Privacy*, 23 *Conn. L. Rev.* 973 (1992). For critiques of the dichotomy of private/public by critical race theorists, see, for instance, Patricia Williams, *The Alchemy of Race and Rights, Diary of a Law Professor* (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 *U. Chi. Legal F.* 139; Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 *Duke L.J.* 431; Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 *Mich. L. Rev.* 2320 (1989). For critiques of the private/public distinction from a gay-rights perspective, see, for instance, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *Harv. L. Rev.* 1285 (1985); Mary Anne Case, *Couples and Coupling in the Private Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 *Vill. L. Rev.* 1643 (1993). On the history of the public/private distinction generally, see Morton J. Horwitz, *The History of the Public/Private Dichotomy*, 130 *Pa. L. Rev.* 1423 (1982); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *Pa. L. Rev.* 1349 (1982).

In her perspicacious analysis of the Eichmann trial, Pnina Lahav analyzed the trial's deconstruction of the private/public dichotomy with respect not to the victim experience but to the fact of Jewishness and to its relevance. Lahav, *supra* note 1. See also Lahav, *supra* note 6, at 145-64; Annette Wieviorka, *L'Avènement du témoin*, in *L'Ere du témoin* 81-126 (1998).

For analyses of the ways in which Arendt's political theory contested traditional understandings of private and public (based on Arendt's own analytical distinction between "the Private" and "the Public" and between "the Social" and "the Political" in *The Human Condition* and in *On Revolution*), see Benhabib, *supra* note 2, at 173-215; Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, in *Hanna Arendt: Critical Essays*, *supra* note 2, at 261-88; Dossa, *supra* note 2.

B. The Revolution in the Victim

But such translation is not given. The victim's story has to overcome not just the silence of the dead, but the indelible coercive power of the oppressor's terrifying, brutal silencing of the surviving and the inherent, speechless silence of the living in the face of an unthinkable, unknowable, ungraspable event. "Even those who were there don't know Auschwitz ... For Auschwitz is another planet,"⁵⁷ testifies a writer named K-Zetnik, who cannot complete his testimony since he literally loses consciousness and faints upon the witness stand. "That mute cry," he later will write, "was again trying to break loose, as it had every time death confronted me at Auschwitz; and, as always when I looked death in the eye, so now too the mute scream got no further than my clenched teeth that closed upon it and locked it inside me."⁵⁸

But what can I do when I'm struck mute? I have neither word nor name for it all. Genesis says: "And Adam gave names ..." When God finished creating the earth and everything upon it, Adam was asked to give names to all that God had created. Till 1942 there was no Auschwitz in existence. For Auschwitz there is no name other than Auschwitz. My heart will be ripped to pieces if I say, "In Auschwitz they burned people alive!" Or "In Auschwitz people died of starvation." For that is not Auschwitz. People have died of starvation before, and people did burn alive before. But that is not Auschwitz. What, then, is Auschwitz? I have no words to express it; I don't have a name for it. Auschwitz is a primal phenomenon. I don't have the key to unlock it. But don't the tears of the mute speak his anguish? And don't his screams cry his distress? Don't his bulging eyes reveal the horror? I am that mute.⁵⁹

In the film *Shoah*, two survivors of Vilna, Motke Zaidl and Itzhak Dugin, testify about the Nazi plan in 1944 to open the graves and to cremate the corpses, so as to literally erase all traces of the genocide:

The last graves were the newest, and we started with the oldest, those of the first ghetto ... The deeper you dug, the flatter the bodies were ... When you tried to grasp a body, it crumbled, it was impossible to pick up. We had to open the graves, but without tools ... Anyone who

57 Ka Tzetnik 135633, Shivitti. *A Vision at x* (Eliyah Nike De-Nur & Lisa Herman trans., 1987) (I am using Arendt's orthographe to transcribe the writer's name ("K-Zetnik")).

58 *Id.* at 1-2 (translation modified).

59 *Id.* at 31-32 (translation modified).

said "corpse" or "victim" was beaten. The Germans made us refer to the bodies as *Figuren*.⁶⁰

A victim is, by definition, not only one who is oppressed, but one who has no language of his own, one who, quite precisely, is *robbed of a language* with which to articulate his or her victimization.⁶¹ What is available to him as language is only the oppressor's language. But in the oppressor's language, the abused will sound crazy, even to himself, if he describes himself as abused.⁶²

60 Claude Lanzmann, *Shoah, The Complete Text of the Film 12-13* (1985).

61 This definition is inspired by the analysis of the political psychiatrist Thomas Szatz, in his book *Ideology and Insanity, Essays on the Psychiatric Dehumanization of Man 5* (1970): "Rulers have always conspired against their subjects and sought to keep them in bondage; and, to achieve their aims, they have always relied on force and fraud. Indeed, when the justificatory rhetoric with which the oppressor conceals and misrepresents his true aims and methods is most effective — ... the oppressor succeeds not only in subduing his victim but also in robbing him of a vocabulary for articulating his victimization, thus making him a captive deprived of all means of escape." Compare the philosophical analysis of Jean-François Lyotard, *The Differend: Phrases in Dispute 3, 5* (Georges Van Den Abbeele trans., 1988): "You are informed that human beings endowed with language were placed in a situation such that none of them is now able to tell about it. Most of them disappeared then, and the survivors rarely speak about it. When they do speak about it, their testimony bears only upon a minute part of this situation. How can you know that the situation itself existed?... In all of these cases, to the privation constituted by the damage is added the impossibility of bringing it to the knowledge of others, and in particular to the knowledge of a tribunal." For other theories of victimhood, see generally Joseph Amato, *Victims and Values: A History and Theory of Suffering* (1990); Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998); Martha Minow, *Surviving Victim Talk*, 40 *UCLA L. Rev.* 1411 (1993); Orlando Patterson, *Slavery and Social Death* (1982); William Ryan, *Blaming the Victim* (1976).

62 Compare Rorty, *supra* note 51, at 133: "For until then only the language of the oppressor is available, and most oppressors have had the wit to teach the oppressed a language in which the oppressed will sound crazy — even to themselves — if they describe themselves as oppressed." Rorty is interpreting and summing up the teachings of feminist writings such as Marilyn Frye, *The Politics of Reality* 33, 112 (1983), and Catharine MacKinnon, *On Exceptionality, in Feminism Unmodified: Discourses on Life and Law* 105 (1987): "Especially when you are part of a subordinated group, your own definition of your injuries is powerfully shaped by your assessment of whether you could get anyone do anything about it, including anything official." Rorty proceeds to comment, reformulating the insights of both Frye and MacKinnon: "Only where there is a socially accepted remedy can there have been a real (rather than crazily imagined) injury." Rorty, *supra* note 51, at 251.

The Germans even forbade us to use the words "corpse" or "victim." The dead were blocks of wood, shit. The Germans made us refer to the bodies as *Figuren*, [that is, as puppets, as dolls], or as *Schmattes*, [which means "rags"].⁶³

In the new language that it is the function of the Eichmann trial to invent and to articulate from scratch, the Jews have to emerge precisely from the "sub-humanity" that has been linguistically impressed on them even inside themselves by the oppressor's language. "We were the bearers of the secret," says Philip Muller, *ex-Sonderkommando* member, in the film *Shoah*:

We were reprieved dead men. We weren't allowed to talk to anyone, or contact any prisoner, or even the SS. Only those in charge of the Aktion.⁶⁴

Because history by definition silences the victim, the reality of degradation and of suffering — the very facts of victimhood and of abuse — are intrinsically inaccessible to history. But the legally creative vision of the Eichmann trial consists in the undoing of this inaccessibility. The Eichmann trial is the victims' trial only insofar as it is now the victims who, against all odds, are precisely *writing their own history*.

To enable such a writing through which the mute bearers of a traumatizing destiny become the speaking subjects of a history, the Eichmann trial must enact not simply memory, but *memory as change*. It must dramatize upon its legal stage before the audience nothing less than a *conceptual revolution in the victim*. And this, in fact, is what the trial does. In this sense, the Eichmann trial is, I would submit, a revolutionary trial.⁶⁵ It is this revolutionary transformation of the victim that makes the victim's story *happen* for the first time and happen as a legal act of *authorship of history*. This historically unprecedented revolution in the victim which was operated in and by the Eichmann trial is, I would suggest, the trial's major contribution not only to Jews, but to history, to law, to culture — to humanity at large. I will further argue that as a singular legal event, the Eichmann trial calls for a rethinking — and sets in motion a transvaluation — of the structures and the values of conventional criminal law.⁶⁶

63 Lanzmann, *supra* note 60, at 12.

64 *Id.* at 68.

65 Arendt does not see the trial as a revolution. She does not underscore or does not fully recognize the revolutionary dimension of the trial. I will argue nonetheless that it is, among others, her newborn interest in revolutions — the subject of the book on which she works already and that will become precisely the successor to the Eichmann book — that inadvertently, intuitively draws her to the trial in Jerusalem.

66 From a different vantage point, compare Mark Osiel's analysis of the limits of

It is a well-known fact that prior to the Eichmann trial, the Holocaust

traditional criminal law in its response to administrative massacre. "Alongside such Promethean aspirations," Osiel remarks, "the traditional purposes of criminal law — deterrence and retribution of culpable wrongdoing — are likely to seem quite pedestrian ... As an aim for criminal law, the cultivation of collective memory resembles deterrence in that it is directed toward the future, where enhanced solidarity is sought. But like retribution, it looks to the past, to provide the narrative content of what is to be shared in memory." Osiel, *supra* note 16, at 463, 474.

My own argument concerns not simply the purposes of criminal law in their excess of traditional conceptions, but what I have called the conceptual revolution in the very status of the victims operated by and through the Eichmann trial. *My claim is that the posture of the Eichmann trial with respect to victims is unique* — and different from the legally familiar definitions of the issues for debate, currently discussed in legal scholarship through its contemporary reassessment and reformulation of the role of victims in criminal trials. Within the context of these contemporary debates, Paul Gewirtz notes how "modern law enforcement continues to struggle to find an appropriate place for victims and survivors in the criminal process ... Indeed, no movement in criminal law has been more powerful in the past twenty years than the victims' rights movement, which has sought to enhance the place of the victim in the criminal trial process." Paul Gewirtz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in *Law's Stories: Narrative and Rhetoric in the Law*, *supra* note 2, at 139. "In 1982 alone," writes Lynne N. Henderson, "California voters approved a 'Victims' Bill of Rights' that made substantial changes in the California law ... Although 'victims' rights' may be viewed as a populist movement responding to perceived injustices in the criminal process, genuine questions about victims and victimization have become increasingly coopted by the concerns of advocates of the 'crime control' model of criminal justice." Lynn N. Henderson, *The Wrongs of Victims' Rights*, 37 *Stan. L. Rev.* 937 (1985). Martha Minow "worries," thus, about "the contemporary prevalence in legal and political arenas of victim stories": "One who claims to be a victim invites, besides sympathy, two other responses: 'I didn't do it', and 'I am a victim, too'. No wonder," Minow writes, "[that] some describe contemporary political debates as exhibitions of 'one-downmanship' or as the 'oppression Olympics.' Victim stories risk trivializing pain and obscuring the metric or vantage point for evaluating competing stories of pain. Victim stories often also adhere to an unspoken norm that prefers narratives of helplessness to stories of responsibility, and tales of victimization to narratives of human agency and capacity." Minow, *supra* note 2, at 31-32.

Arendt objects, precisely, to the focus on the victims in the Eichmann trial because she too prefers existential "stories of responsibility" to "narratives of helplessness." My point is different and could be summarized as follows:

- 1) In 1961, the Eichmann trial gives a central role to victims in historical anticipation of the political emergence of the question of the victim at the forefront of criminal jurisprudential debates today.
- 2) What is at issue in the Eichmann trial is not (what today's scholars focus on as) "*victims' rights*" but rather (what I will define as) the question of the *victims'* (legal

was not discussed in Israel, but was rather struck by shame, silence, and

and historical) *authority* (see *infra* Conclusion: The Web of Stories), insofar as this newborn authority changes not simply our *ethical* perception of the victim but our *cognitive* perception of history.

3) The debates on "victims' rights" perceive the victims as individuals; the Eichmann trial creates a collective, a community of victims.

4) Ordinarily (in current legal discourse and analysis) *the victim is perceived in opposition to the state* or as victimized mainly by the state. (Although there are moments in which the state divides against itself to correct its own abuses, as in the case of the American Civil Rights Law enforced by the Federal government against the resistance of individual states.) The Eichmann trial is *a unique moment* and a unique case in which *the state defends the victims, who were made victims by another state*. The trial performs a unique exchange between victims and state, in that, *through the trial, victims and state mutually transform each other's political identity*. The state that represents the victims plans the trial, and the victims' stories add up to a saga and create the case of the state which, in its turn, creates a transformation (here analyzed as a conceptual revolution) in the victims.

5) My approach in this respect is therefore different both from Arendt and from her opponents: it is distinct from the accepted interpretations of the role of the victims in the Eichmann trial. In my view, the victims/witnesses are not simply expressing their suffering: they are *reclaiming legal subjecthood* and autobiographical personhood. They *change within the trial* from being merely victims to something else. *They are carrying out a prosecution* (a *J'accuse* articulated through a legal process). Through this recovery of speech and this recovery of history, they reinvent an innovative logos that is *no longer simply victims' logos*, but constitutes a new kind of legal language. In the act of claiming their humanity, their history, their story, and their voice before the law and before the world, they are actively (and sovereignly) reborn from a kind of social death into a new life.

6) Arendt sees and takes great pains to point out the danger inherent in the fact that the state creates a monumental history: for her, the combination of monumental history with the self-authorization of the state spells Fascism. My argument, however, is that, although the Eichmann trial was monumental history created by the state for political purposes that were particularist and Zionist-nationalistic, the consequences of the trial were momentous, in that the trial has in fact created (or enacted) a *universalization of the victim*. Thus, the trial as event exceeded and surpassed the intentions of its planners.

Legal scholars continue to debate the proper role for victims in criminal prosecutions. For a contemporary victim-oriented vision of criminal justice, see George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (1995). Fletcher argues that "[t]he minimal task of the criminal trial ... is to stand by victims, to restore their dignity, to find a way for them to think of themselves, once again, as men and women equal to all others." *Id.* at 6. For a critique of Fletcher's approach, see Robert P. Mosteller, Book Review, *Popular Justice*, 109 Harv. L. Rev. 487 (1995). For an overview of the law surrounding victims, see Douglas E. Beloof, *Victims in Criminal Procedure* (1999).

For discussions of the modern victims' rights movement in criminal law, see

widespread denial.⁶⁷ Holocaust survivors did not talk about their past, and when they did, they were not listened to. Their memories were sealed in muteness and in silence. Their stories often were kept secret even from their families. The emotional explosion triggered by the Eichmann trial and by the revolution in the victims it dramatically and morally effected publicly unlocked this silence.

Now, for the first time, victims were legitimized and validated and their newborn discourse was empowered by their new roles not as victims but as prosecution witnesses within the trial. I argue that a new moral perception was made possible precisely by this change of role and change of status. "Injustices," says Rorty in a different context,

Injustices may not be perceived as injustices, even by those who suffer them, until somebody invents a previously unplayed role. Only if somebody has a dream, and a voice to describe that dream, does what

generally Robert Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (1990); Andrew Karmen, *Crime Victims: An Introduction to Victimology* (1984); Josephine Glitter, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepp. L. Rev. 117 (1984); Abraham Goldstein, *Defending the Role of the Victim in Criminal Prosecutions*, 52 Miss. L. Rev. 515 (1982); Donald Hall, *Victims' Voices in Criminal Courts: The Need for Restraint*, 28 Am. Crim. L. Rev. 937 (1991); Lynne Henderson, *The Wrongs of Victims Rights*, 37 Stan. L. Rev. 937 (1985); Leroy Lamborn, *Victim Participation in the Criminal Justice Process: The Proposal for a Constitutional Amendment*, 34 Wayne L. Rev. 125 (1987); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. Rev. 1411 (1993); President's Task Force on Victims of Crime, *Final Report* (1982); U.S. Dep't Justice, *Four Years Later: A Report of the President's Task Force on Victims of Crime* (1986).

On different kinds of political victims and on victimhood more generally, see *supra* notes 47, 52, 53.

On victim impact statements, see generally Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. Chi. L. Rev. 361 (1996); Vivia Berger, *Payne and Suffering: A Personal Reflection and a Victim-Centered Critique*, 20 Fla. St. L. Rev. 22 (1992); Angela P. Harris, *The Jurisprudence of Victimhood*, 1991 Sup. Ct. Rev. 77; Dina Hellerstein, *The Victim Impact Statement: Reform or Reprisal?*, 27 Am. Crim. L. Rev. 371 (1989); Carole A. Mansur, *Payne v. Tennessee: The Effect of Victim Harm at Capital Sentencing Trials and the Resurgence of Victim Impact Statements*, 27 New Eng. L. Rev. 713 (1993); Victor Vytal, *Payne v. Tennessee: The Use of Victim Impact Evidence at Capital Sentencing Trials*, 19 T. Marshall L. Rev. (1994).

For a summary of the issues of identity and representation and for an analysis of the question "who can speak for whom?," see Martha Minow, *Not Only For Myself: Identity, Politics and Law*, 75 Or. L. Rev. 647 (1996).

⁶⁷ See, e.g., Segev, *supra* note 12.

looked like nature begin to look like culture, what looked like fate begin to look like a moral abomination.⁶⁸

The trial was, thus, a transforming act of law and justice: a Jewish past that formerly had meant only a crippling disability was now being reclaimed as an empowering and proudly shared political and moral identity. Living Israelis were connecting to the dead European Jews in the emerging need to share the Holocaust.⁶⁹ Broadcast live over the radio and passionately listened to, the trial was becoming the central event in the country's life. Victims were, thus, for the first time, gaining what as victims they precisely could not have: authority; historical authority, that is to say, *semantic authority* over themselves and over others. Ultimately, I would argue, the acquisition of semantic authority by victims is what the trial was about.

CONCLUSION: THE WEB OF STORIES

Prior to the Eichmann trial, what we call the Holocaust did not exist as a collective story. It did not exist as a semantically authoritative story.⁷⁰

"Where there is experience in the strict sense of the word," writes Walter Benjamin, "certain contents of the individual past combine with

68 Rorty, *supra* note 51, at 233.

69 "It came as a discovery to many that we were actually a nation of survivors," prosecutor Hausner noted in his memoirs of the trial, "The editor of a leading newspaper told me, after listening to the shattering evidence of a woman witness in court: 'For years I have been living next to this woman, without so much as an inkling of who she was.' It now transpired that almost everyone in Israel had such a neighbor." Hausner, *supra* note 4, at 453.

70 Semantic authority is, among others things, what endows a story with transmissibility and unforgettability. "Not only a man's knowledge," writes Walter Benjamin, "but above all his real life ... first assume transmissible form at the moment of his death. Just as a sequence of images is set in motion inside a man as his life comes to an end — unfolding the views of himself under which he has encountered himself without being aware of it — suddenly in his expressions and looks the unforgettable emerges and imparts to everything that concerned him that authority which even the poorest wretch in dying possesses for the living around him. This authority is at the very source of the story.

Death is the sanction of everything that the storyteller has to tell. He has borrowed his authority from death." Walter Benjamin, *The Storyteller*, in Walter Benjamin, *Illuminations. Essays and Reflections* 94 (Hannah Arendt ed., 1968).

On "the mystical foundation of authority" in law and jurisprudence, see Jacques Derrida, *Force of Law, in Deconstruction and the Possibility of Justice*, 11 *Cardozo L. Rev.* 919 (1990).

material from the collective past"⁷¹ to form an "image of a collective experience to which even the deepest shock of every individual experience, death, constitutes no impediment or barrier":⁷²

Memory creates the chain of experience which passes a happening from generation to generation. It starts the web which all stories together form in the end. One ties on to the next, as the great storytellers ... have always readily known.⁷³

It is this new collective story that did not exist prior to the trial — a story at the same time of the victims' suffering and of the victims' recovery of language — and the newly acquired semantic and historical authority of this revolutionary story that, for the first time, create what we know today as the Holocaust: a theme of international discussion and of world conversation designating the experience of the victims and referring to the crime against the Jewish people independently from the political and military story of the Second World War.

Israel's claim to a law through Eichmann's judgment and the monumental legal history constructed by the trial have, thus, to some extent, fulfilled the mission of the law to be, in Robert Cover's concept, "a bridge to the future." "Law," writes the renowned American legal philosopher in his article *Folktales of Justice*, "Law is neither to be wholly identified with the understanding of the present state of affairs nor with the imagined alternatives. It is the bridge — ... a bridge built out of committed social behavior."⁷⁴ Law ratifies an aspect of commitment in our lives, and the commitment obligates itself toward a future that we hope will be a better future. Our legal commitments are, in turn, formed by lessons and prescriptions we derive from narratives about the past and from our readings of these narratives. "No set of legal institutions exists apart from the narratives that locate it and give it meaning," Cover reminds us,

On Arendt's views of the theorist as storyteller, see Melvyn A. Hill, *The Fictions of Mankind and the Stories of Man*, in Hannah Arendt: The Recovery of the Public World (Melvyn A. Hill ed., 1979); David Luban, *Explaining Dark Times: Hannah Arendt's Theory of Theory*, in Hannah Arendt: Critical Essays, *supra* note 2, at 79-110; Benhabib, *supra* note 2, at 91-95.

71 Walter Benjamin, *On Some Motifs in Baudelaire*, in Walter Benjamin, *Illuminations. Essays and Reflections*, *supra* note 69, at 159.

72 Benjamin, *supra* note 69, at 102.

73 *Id.* at 98.

74 Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, in *Narrative, Violence and the Law: The Essays of Robert Cover*, *supra* note 10, at 176.

For every constitution there is an epic, for every decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.⁷⁵

For the world to be livable after the Holocaust, a human narrative of the past catastrophe and of the past devastation needed to be legally articulated and combined with future rules of law. The legal narrative of Nuremberg did not suffice, since it did not articulate the victims' story, but subsumed it in the general political and military story of the War.

What Nuremberg did do (and this was its unmatched juridical accomplishment) was to establish an unprecedented legal concept of "crimes against humanity" and to set up the death penalty against the Nazi perpetrators of these crimes as a new norm or new legal precedent. "We have also incorporated its principles into a judicial precedent," writes Justice Robert Jackson, the architect and chief prosecutor of the Nuremberg Trials,

"The power of the precedent," Mr. Justice Cardozo said, "is the power of the beaten path." One of the chief obstacles to this trial was the lack of a beaten path. A judgement such as has been rendered *shifts the power of the precedent* to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law — and law with a sanction.⁷⁶

Arendt deplores the fact that, through its legal excesses and its conceptual failures, the Eichmann trial, unlike Nuremberg, has failed to project into the future an innovative legal norm or a valid (universal) legal precedent.⁷⁷ I have

75 Robert Cover, *Nomos and Narrative*, in *Narrative, Violence, and the Law: The Essays of Robert Cover*, *supra* note 10, at 95-96.

76 The report to the President by Justice Robert H. Jackson, U.S. Representative to the International Conference on Military Trials, from October 7, 1946, *cited in* Robert Cover, *Narrative, Violence and the Law: The Essays of Robert Cover*, *supra* note 10, at 196 (emphasis added).

77 Arendt regrets "the extreme reluctance of all concerned to break fresh ground and act without precedents" (Arendt, *supra* note 1, at 262) and charges that "[t]he court ... never rose to the challenge of the unprecedented, not even in regard to the unprecedented nature of the origins of the Israel state ... Instead, it buried the proceedings under a flood of precedents" (*id.* at 273). "I think it is safe to predict," Arendt concludes, "that this last of the Successor trials will no more, and perhaps even less, than its predecessors, serve as a valid precedent for future trials of such

argued against Arendt that the function of the trial was not to create a legal precedent but to create a legal narrative, a legal language, and a legal culture that were not yet in existence, but that became essential for the articulation of the unprecedented nature of the genocidal crime.

"Each community," says Cover, "builds its bridges with the materials of sacred narrative that take as their subject much more than what is commonly conceived as 'legal'."⁷⁸ The Eichmann trial, I submit, was a singular event of law that, through its monumental legal record and its monumental legal chorus of the testimonies of the persecuted, unwittingly became creative of a canonical or *sacred narrative*.⁷⁹ This newborn sacred narrative was, and could not but be, at once a tale of jurisdiction and a collective tale of mourning.

crimes. This might be of little import in view of the fact that its main purpose — to prosecute and to defend, to judge and to punish Adolph Eichmann — was achieved, if it were not for the rather uncomfortable but hardly deniable possibility that similar crimes might be committed in the future ... If genocide is an actual possibility of the future, then no people on earth — least of all, of course, the Jewish people, in Israel or elsewhere — can feel reasonably sure of its continued existence without the help and the protection of international law. Success or failure in dealing with the hitherto unprecedented can lie only in the extent to which this dealing may serve as a valid precedent on the road to international penal law." *Id.* at 272-73.

78 "Thus," Cover insists, "the claim to a law is a claim as well to an understanding of a literature and a tradition." Cover, *supra* note 10, at 177.

79 Compare Jacques Derrida's analysis of the principle of "man's sacrality" (as understood by Walter Benjamin) in Jacques Derrida, *Force of Law, The Mystical Foundation of Authority* 920, 1028-29 (emphasis added): "'Thou shall not kill' remains an absolute imperative ... which forbids all murder, *sacralizes life* ... Benjamin ... stands up against the sacralization of life *for itself*, natural life ... *What makes for the worth of man [what makes for 'man's sacrality'] ... is that he contains the potential, the possibility of justice, the yet-to-come of justice, the yet-to-come of being just, of his having-to-be just. What is sacred in his life is not his life but the justice of his life.*"

On the foundational value of the Eichmann trial's inadvertent testimonial constitution of a "sacred narrative," compare Mark Osiel's analysis of the way in which legal proceedings constitute foundational narrative events: "All societies have founding myths, explaining where we come from, defining what we stand for. These are often commemorated in the form of 'monumental didactics,' public recounting of the founders' heroic deeds as a national epic. Some societies also have myths of refounding, making a period of decisive break with their own pasts, celebrating the courage and imagination of those who effected this rupture. Myths of founding and refounding often center on legal proceedings or the drafting of legal documents: the Magna Carta (for Britain), the trial and execution of King Louis XVI (for France), and the Declaration of Independence and the Constitutional Convention (for the United States) ... Such legally induced transformations of collective identity are not confined to the distant past ... These events are both 'real' and 'staged,' to

"One evening," writes the poet Paul Celan, "after the sun (and not only the sun) had gone down in the West,"

the Jew went for a walk, ... the Jew, the son of a Jew, and his name went with him, his unspeakable name, as he walked and went on and went shuffling along, you could hear it, going with stick, going on stone ...

And who do you think came towards him? His cousin, ... his own first cousin came towards him, ... he was tall, ... Tall came to Small ...

... and there was a stillness in the mountains where they went, he and the other ...

"You came from far away, came here ..."

"So I did. I came. I came, like you."

"I know that." ...

"You do know. You know what you see: The Earth has folded up here ... and split open in the middle ... — for I ask, for whom is it meant, this earth, for I say it is not meant for you or me — a language, to be sure, without I or Thou, merely He ... , do you understand ..."

"I understand, I do understand. Because I came, ah yes, from afar, ah yes, like you ...

"... And nonetheless you came, ... why, and whatever for?"

"Why and whatever for ... Perhaps because I had to talk to myself or to you, because I had to talk with mouth and tongue, not only with

the point of problematizing the distinction between true and false representations of reality. In these ways, law-related activities can and do contribute to the kind of social solidarity that is enhanced by shared historical memory." Osiel, *supra* note 16, at 463, 464-66.

However, as Osiel points out, "sometimes the memory of a major legal event will initially unify the nation that experienced it, but later be interpreted so differently by contending factions that its memory becomes divisive." *Id.* at 476. Thus, the act of founding can become "the focal point for later disputes about its meaning and bearing ... on contemporary disputes." This has been the case of the foundational legal event of the Eichmann trial. The canonical meaning of the victims' solidarity amounting to (what can be called) the trial's "sacred narrative" has later given rise to decanonizing and desacralizing critiques of the political, commercial, and manipulative uses and abuses made of the memory of the Holocaust and of the trial. Arendt's was in fact the first *decanonizing and desacralizing reading* of the "sacred narrative" offered by the trial. For other "desacralizing" political critiques of the fantasies, distortions, and political abuses born of, or sanctioned by, the Eichmann trial, see Lahav, *supra* note 1, at 574-75; Tom Segev, *supra* note 12; Idith Zertal, *From the People's Hall to the Wailing Wall: A Study in Memory, Fear and War*, 69 *Representations* 39-59 (2000).

stick. For to whom does he talk, the stick? He talks to stone, and the stone — to whom does he talk?

"To whom does he talk, cousin? He doesn't talk, he speaks, and he who speaks, cousin, talks to no one, he speaks because no one hears him ... Do you hear?

"Do you hear, he says — I know, first cousin, I know ... Do you hear, he says, here I am, I am, I am here, I have come. Come with my stick, I and no other, I and not he, I with my hour, appointed not deserved, I who was dealt the blow, I who was not, I with my memory, I, with my memory failing ...

"I here, I: I who could tell you all, who could have told you, ... I perhaps accompanied — at last — by the love of those unloved, I on the way to myself, up here."⁸⁰

It might well be precisely through its *legal inimitability* that the Eichmann trial, matching legal chronicle to legal parable, has succeeded in creating at the same time an unprecedented legal narrative of private and collective trauma and an unprecedented cultural and historical juridical citation for the future: the privileged text of a modern *folktale of justice*.

80 Paul Celan, *Conversation in the Mountain*, in *Last Poems* 207-12 (1986).

