"HOLOCAUST TRIALS & THE MEMORY OF JUDGMENT"

Wednesday, December 6, 2017
7:00 p.m. – 8:15 p.m.

Keynote speaker:

Lawrence Douglas, James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College.

Moderator:

Ethan Leib, Distinguished Professor of law, Fordham Law School.

Material for Continual Legal Education (1.5 non-transitional professional practice credits):


VENUE:

Museum of Jewish Heritage
Edmond J. Safra Plaza, 36
Battery Place, New York, NY 10280

7:00 PM Welcome by Elissa Cohen, MJH’s Senior Vice President & Deputy Director. Introduction of the moderator.

7:03 PM Introduction to the lecture by Ethan Leib.

7:10 PM Lawrence Douglas’ lecture.

7:55 PM Ethan Leib guides Q&A session

8:15 PM Conclusion.
Biographies

Moderator:

Ethan Leib, Distinguished Professor of law, Fordham Law School.

He teaches in contracts, legislation, and regulation.

His most recent book, Friend v. Friend: “Friendships and What, If Anything, the Law Should Do About Them”, explores the costs and benefits of the legal recognition of and sensitivity to friendship; it was published by Oxford University Press.

Leib’s latest scholarly articles will appear in the Yale Law Journal (on fiduciary political theory) and the University of Illinois Law Review (on form contracts and zombies). His other recent articles appear in the Georgetown Law Journal (on "regleprudence" and OIRA) and Legal Theory (on fiduciary and promissory theory).


Before joining Fordham, Leib was Professor of Law at the University of California–Hastings in San Francisco. He has served as a Law Clerk to then-Chief Judge John M. Walker, Jr., of the U.S. Court of Appeals for the Second Circuit and as a Litigation Associate at Debevoise & Plimpton LLP in New York.

Speaker:

Lawrence Douglas, James J. Grosfeld Professor of Law, Jurisprudence and Social Thought at Amherst College.

He has a JD from Yale Law School, a M.A. from Columbia University and a A.B. from Brown University. He also has a A.M. (honorary) from Amherst College.

His research has been primarily devoted to exploring the possibilities and limitations of war crimes trials as tools for responding to mass atrocities. Douglas is the author of works of both nonfiction and fiction. His nonfiction has focused on legal responses to state-sponsored atrocity.

The Memory of Judgment: Making Law and History in the Trials of the Holocaust (Yale, 2001) examined the Nuremberg, Eichmann, Barbie and Zundel (Holocaust
denial) trials as examples of what Douglas calls “didactic legality”: using criminal trials as tools of historical instruction and memory construction. His most recent book, The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial (Princeton, 2016), chronicles the lengthiest case ever to arise from the Holocaust and one of the most famous cases of mistaken identity in legal history.

Douglas is the recipient of major fellowships from the National Endowment of the Humanities, the American Council of Learned Societies, the United States Holocaust Memorial Museum, and the Institute for International Education.

He has served as a visiting professor of law at the University of London and at Humboldt Universität, Berlin, and is on the board of the Iran Human Rights Documentation Center.
Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust

Shoshana Felman

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 U.S. 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 profoundly conscious and unconscious ways. Both works were seen as controversial. Both works were argued with, challenged both substantively and procedurally. Arendt's book in particular 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 if 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 draw and demarcate 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 has 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.

1. 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 misconcep-


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. Pnina Lahav summarizes the facts of the case:

Adolf 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 Jew's from

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Arendt's irony in coining her conceptu paradox is frequently misunderstood to mean, straightforwardly, 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. 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 his 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,” Boston University Law Review 72 (May 1992): 558–59.] See Attorney-General v. Adolf Eichmann (Jerusalem), Criminal Case 40/61 (1961; English trans., 1962), and Adolf Eichmann v. Attorney-General (Jerusalem), Criminal Appeal 336/61 (1963), pt. 3, pp. 11–12, 17–35.


a psychological description of the Nazi Perpetrator, and it is precisely this “psychology of evil” that 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 question is not, How can evil (Eichmann) be so banal? but,


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 which 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. [EJ, p. 287; first emphasis mine]

4. Arendt insisted, 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, she insisted, had to be recognized as a matter of law” (Lahav, “The Eichmann Trial, the Israeli Question, and the American-Jewish Intelligentsia,” p. 570; emphasis mine; see EJ, p. 277).

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” (EJ, p. 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) (EJ, pp. 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 mild case of aphasia—he apologized, saying, “Offizialese [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
How can the banality of evil be addressed in legal terms and by legal means? On what 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 only 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

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*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 of all safeguards against the words and the presence of others, and hence against reality as such. [EJ, pp. 48–49; emphasis mine]

As a parrotlike “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 Nazi 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 notes, “he almost never looked into the courtroom”) (Gideon Hausner, *Justice in Jerusalem* [New York, 1966], p. 332; hereafter abbreviated *[JJ]*).

5. For a similar emphasis on the jurisprudential essence of “the banality of evil,” but from a different interpretive perspective, see Lawrence Douglas, “The Memory of Judgment: The Law, the Holocaust, and Denial,” *History and Memory* 7 (Fall–Winter 1996): 108:

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 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. [Emphasis mine]

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 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” (quoted in Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* [Berkeley, 1997], p. 157; see Eichmann v. Attorney-General, pt. 1, p. 70). For an elaborate account of the court’s views in this and other legal matters, see Lahav, *Judgment in Jerusalem*, pp. 145–62.

If evil is linguistically and legally banal (devoid of human motivations and occurring through clichés that 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 will thus 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 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 re-creation 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 happened 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 role of 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. According to Arendt’s own testimony, she is pro-Zionist—but at the outset critical of Israeli law and critical of Israeli government. Arendt perceives the trial as the space of a dramatic confrontation between the claims of

9. See, for instance, Scholem’s characteristic interpretation in his public letter to Arendt of 23 June 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” (“EJ,” p. 53).

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; see EJ, pp. 234–65, 277–79. She goes so 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, moreover, important mitigating circumstances in that there hardly existed a true 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. [EJ, pp. 264–65; emphasis mine]


All these points, in summary, establish Arendt’s stance (contrary to common opinion) as pro-Zionist, though critical of 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, 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. [“EJ,” p. 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; see EJ, p. 7.
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 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 nonlegal ends.\textsuperscript{12} Arendt in this way sets up a secondary courtroom drama and a secondary case for arbitration and adjudication: not just \textit{Attorney General v. Eichmann} but also, simultaneously, the drama of the confrontation between justice and the state: \textit{justice v. the state} or, rather, as she sees it, \textit{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 \textit{obey his master}. And if, fortunately, his best often turns out not to be good enough, the reason is that the trial is presided over by \textit{someone who serves Justice as faithfully as Mr.}

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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. . . . Ben Gurion had outlined these lessons 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 a Jewish state had enabled 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 have 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.” [\textit{EJ}, pp. 9–10]
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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 \textit{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 \textit{JF}; Tom Segev, \textit{The Seventh Million: The Israelis and the Holocaust}, trans. Haim Watzman (New York, 1993), pp. 523–66; Lahav, \textit{Judgment in Jerusalem}, pp. 145–64 and “The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia,” p. 555; Annette Wieviorka, \textit{Le Procès Eichmann} (Paris, 1989) and \textit{L’Ère du témoin} (Paris, 1998).
Hausner serves the State of Israel. 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. [*EJ*, p. 5]*

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.*

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 part of it was 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. [*JJ*, p. 333]

14. “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. [*EJ*, pp. 5–6; emphasis mine]

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 here prefigures that of the later legal movement. Both methodologies are deconstructive; both set out to analyze and 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*, ed. James Boyle (Aldershot, 1992); *The Politics of Law: A Progressive Cri-
(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 argue here, at once proves and seals the impact of the trial as a true event.\footnote{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.”\footnote{17}

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 \textit{event}—an event whose impact is defined and measured by the fact that it is "not the same for all."

\footnote{16} I define \textit{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,” \textit{University of Pennsylvania Law Review} 144 [Dec. 1995]: 467; hereafter abbreviated "EA"). 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 did not plan, 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.


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, nor 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” (Arendt, \textit{The Origins of Totalitarianism}, rev. ed. [New York, 1958], p. 482).
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, Nietzsche analyzes different kinds of history (different relations to the past), all of which are 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 “action and struggle”; 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 cast the burden off at any price feels the want 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. “This virtue,” Nietzsche writes, “never has a pleasing quality. It never charms; it is harsh and strident” (UAH, p. 36). 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” (“EJ,” p. 51). Monumental history is inspirational, emotional, construc-

tive. 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 trial and the critical vision (or the critical version of events) offered by Arendt.

2. Monumental Legal History

"For it was history," writes Arendt, "that, as far as the prosecution was concerned, stood in the center of the trial" (EJ, p. 19). What makes a legal case become 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 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.

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:

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

19. 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 note 12. My interest, as I 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 above note 16.

20. "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. [EJ, p. 258]

21. Ben Gurion responded to the international debate and legal controversy triggered by the announcement of the trial, a world polemics in which some Western legal scholars
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. 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.  

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 counteracted, 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" (JJ, p. 325). 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,  


23. "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
for the dead and giving voice, materially, to the six million Jews exterminated by the Nazis:

"When I stand before you, judges of Israel, in this court, to accuse Adolph Eichmann, I do not stand alone. Here 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 heinous accusation in their name." [*JJ*, pp. 323–24; *EJ*, p. 260]

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" (*UAH*, pp. 14, 15).24

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24. 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 ("Wherever Jews lived," Arendt insists, "there were recognized Jewish leaders, and this leadership, almost without exception, cooperated . . . with the Nazis. . . . I have dwelt on 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" [*EJ*, pp. 125–26]). "Hausner," writes Tom Segev, "would almost completely ignore the Judenrats," 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 their murders and their attempts to rebel" (Segev, *The Seventh Million*, p. 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." "The younger generation was 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
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.25

Gurion told the New York Times.” 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, The Seventh Million, pp. 338, 328, 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 to the dead that took on a legal momentum of its own, later picked up by the victims’ own testimonial discourse.

25. 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 Sigmund Freud, Moses and Monotheism, trans. Katherine Jones, (1939; New York, 1967), p. 64 and pt. 2, chap. 7 throughout, and 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,” Critical Inquiry 23 (Summer 1997): 738–88. See also Felman, “Traumatic Narratives and Legal Repetitions,” in History, Memory, and the Law, ed. Austin Sarat and Thomas Keanis (Ann Arbor, Mich., 1999), pp. 25–94. 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 earlier—see Lahav, “The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia,” pp. 555, 573, and Felman, “Forms of Judicial Blindness,
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?26 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 betrayal of military secrets to Germany and sentenced to 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 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,

or "The Evidence of What Cannot Be Seen," pp. 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 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.

26. "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 persona 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. . . .

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's 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's 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's 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's innocence and advocated the necessity of reopening the case.

It should be noted that Zola's act was historically unprecedented on three counts. (1) This was the first time that a non-Jew spoke 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.27 (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.

(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

27. 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. See Plato, Crito, in The Dialogues of Plato, trans. R. E. Allen, 4 vols. (New Haven, Conn., 1984), 1:129–29.
deliberately put himself up for criminal trial in order to reopen Dreyfus's closed case. In joining thus 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's case in a nonmilitary court. He wanted to initiate a legal repetition of Dreyfus's sealed trial through a public—as opposed to the old, hidden—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 a creative use of the tool of law in order to break open the closed legal frame.28

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 in 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.”29

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

“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 that 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.30

“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.31

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:32

(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... 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,”33 trying to recapitulate at once the moral force of the historical denunciation and the subversive legal ges-


33. “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).
ture, 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."

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.34

The twentieth century repeats and takes to an undreamable extreme the structures of the nineteenth century. Behind the prosecutor's opening

34. Arendt, The Origins of Totalitarianism, pp. 91, 92. Arendt incorporates her own suspicion of the state machine (normally concentrated on totalitarian abuses of the state machine) into her analysis and into her 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 nonseparation between church and state that she sarcastically equates with reverse racism: Israeli law indicted right at the outset; see EJ, pp. 6-7). Arendt speaks truth to power, unwittingly adopting in her turn Zola's antireligious, antiracist, antimessianic, antistatist stance. Arendt challenges, indeed, Hauser's prerogative to quote Zola in pointing out that Hauser 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 voice of a government-appointed official who risks nothing" (EJ, p. 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 footnote 25.
citation of Zola's protest, the shadow of Dreyfus, at the threshold of the Eichmann trial, stands for a whole historical legal inheritance in which the Jew is the perennial accused in a lynching justice. In twentieth-century Nazi Germany as in Dreyfus's 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 just innocent, but—so he testified, “like Pontius Pilate”—innocented by its verdict on the Jews;35 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 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 in 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,

35. Compare Arendt's report in EJ:

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 was to prepare the minutes. In short, he acted as secretary of the meeting. . . .

There was another reason that made the day of this 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 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 élite 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." [EJ, pp. 113–14; emphasis added]
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."  

3. 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, 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 story 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

37. 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 groups contest 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, Jr., Thirteen Ways of Looking at a Black Man [New York, 1997], pp. 106–7). 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 one—with anarchy understood to mean the absence of rulers, not the absence of law.” (I am borrowing this definition of the anarchist position from Cover, “The Folktales of Justice: Tales of Jurisdiction,” Narrative, Violence, and the Law, p. 175; hereafter abbreviated “FJ.”)
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” (EJ, p. 6).

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 Adolf Eichmann, . . . 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. [EJ, p. 5]

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 thus 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” (EJ, p. 261).38

(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.39 Arendt does not put it quite so literally; I am

38. 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, and not because they killed millions of people” (EJ, p. 273).

39. Compare JJ, p. 331: “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” (emphasis added).
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 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—submits 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—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 to her conservative jurisprudential argument.

I will argue in what follows that the Eichmann trial is, at the antipoles 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, like 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. [EJ, p. 267; emphasis mine]

4. 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.”40 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 some of the testimonies that she can uncharacteristically at mo-


ments think uncritically and, as she puts it, "foolishly: Everyone, everyone should have his day in court" (EJ, p. 229; emphasis mine). In general, however, Arendt has a hard time stomaching the testimonial exhibition of atrocities and finds the listening profoundly taxing. 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 know. . . . 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. [EJ, p. 8]

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. Be-

41. 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." [JF, pp. 327, 331]

42. "I was there, and I don't know. How can you possibly know when you were elsewhere?" Elie Wiesel has 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'" (Elie Wiesel, All Rivers Run to the Sea: Memoirs [New York, 1995], p. 348).

43. In consciously unsettling the dichotomy (the segregation and the opposition) between the private and the public, the Eichmann trial was, 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.

yond the incidental scope of Arendt’s reservation 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.

(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. . . . Auschwitz is another planet,” testifies a writer named K-Zetnik, who cannot complete his testimony since he literally loses consciousness and faints upon the witness stand.44 “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” (V, pp. 1–2; trans. mod.).

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. [V, pp. 31–32; trans. mod.]

In the film Shoah, two survivors of Vilna, Motke Zaïld 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 uttered the words “corpse” or “victim” was beaten. The Germans made us refer to the bodies as Figuren.45

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.46 What is available to

45. Claude Lanzmann, Shoah: The Complete Text of the Acclaimed Holocaust Film (New York, 1985), pp. 8–9; hereafter abbreviated S.

46. This definition is inspired by the analysis of the political psychiatrist Thomas Szasz, in his book Ideology and Insanity: Essays on the Psychiatric Dehumanization of Man (New York, 1970), p. 5: “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 in his The Differend: Phrases in Dispute, trans. Georges Van Den Abbeelee (Minneapolis, 1988), pp. 3, 5: “You are informed that human beings
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.47

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.” [S, p. 9]

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 “subhumanity” 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. [S, p. 57]

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

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, among others, Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston, 1998) and “Surviving Victim Talk,” UCLA Law Review 40 (1993): 1411–46; Joseph Amato, Victims and Values: A History and a Theory of Suffering (New York, 1990); Orlando Patterson, Slavery and Social Death: A Comparative Study (Cambridge, Mass., 1982); and William Ryan, Blaming the Victim (New York, 1971).

47. Compare “FP” p. 232: “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 (Trumansburg, N.Y., 1983), pp. 33 and 112, and Catharine MacKinnon, “On Exceptionality,” Feminism Unmodified: Discourses on Life and Law (Cambridge, Mass., 1987), p. 105: “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” (“FP,” p. 251).
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. 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 that 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.

48. 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 was already at work and that will become precisely the successor to the Eichmann book—that inadvertently, intuitively draws her to the trial in Jerusalem.

49. From a different vantage point, compare Osiel’s analysis of the limits of 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. ["EA," p. 474]

My own argument concerns not simply the purposes of criminal law in their excess of traditional conceptions, but also what I have called the conceptual revolution in the very status of the victims operating in 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” (Gewirtz, “Victims and Voyeurs: Two Narrative Problems at the Criminal Trial,” in Law’s Stories, p. 139). “In 1982 alone,” writes Lynne N. Henderson, 

> California voters approved a ‘Victims’ Bill of Rights’ that made substantial changes in California law. . . . Although ‘victims’ rights’ may be viewed as a populist movement
It is a well-known fact that, prior to the Eichmann trial, the Holocaust was not discussed in Israel but was rather struck by shame, silence, 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," Stanford Law Review 37 (Apr. 1985): 937, 951]

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 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 also often 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, "Stories in the Law," pp. 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 and historical) authority (see section below entitled "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 American civil rights laws 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 that, 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 that of Arendt and from that of 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
and widespread denial.\textsuperscript{50} 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

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 \textit{universalization of the victim}. Thus, the trial as event exceeded and surpassed the intentions of its planners.


On different kinds of political victims and on victimhood more generally, see references in notes 43, 46, 47.


50. See for instance Segev, \textit{The Seventh Million}. 
change of status. “Injustices,” says Rorty in a different context,

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 looked like nature begin to look like culture, what looked like fate begin to look like a moral abomination. [“FP,” p. 233]

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. 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.

5. 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.52

51. “It came as a discovery to many that we are 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” (JF, p. 453).

52. Semantic authority is, among others things, what endows a story with transmissibility and unforgettability. “Not only a man’s knowledge or wisdom,” writes Walter Benjamin,

but above all his real life . . . first assumes 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 can tell. He has borrowed his authority from death. [Benjamin, “The Storyteller,” Illuminations: Essays and Reflections, trans. Harry Zohn, ed. Arendt (New York, 1968), p. 94]

On “the mystical foundation of authority” in law and jurisprudence, see Derrida, “Force of Law.”

On Arendt’s views of the theorist as storyteller, see Melvyn A. Hill, “The Fictions of
"Where there is experience in the strict sense of the word," writes Walter Benjamin, "certain contents of the individual past combine with material of the collective past"\(^5\) to form an "image for a collective experience to which even the deepest shock of every individual experience, death, constitutes no impediment or barrier."

*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.\(^5\)\(^4\)

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 judgement 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," "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" ("FJ," p. 176). 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:

For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it

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meaning, law becomes not merely a system of rules to be observed, but a world in which we live.55

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.56

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 the 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. [Quoted in “FJ,” p. 196 n. 67; emphasis mine]

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.57 I have argued against Arendt that the function of the trial was not to create a legal precedent but to create a legal narrative, a

56. Compare Douglas, “The Memory of Judgement,” p. 107, underscoring “the failure of the Nuremberg trial adequately to address the Nazi’s most spectacular crimes” and observing that the Nuremberg tribunal adopted an approach that placed the Holocaust on the margins of the legally relevant.
57. Arendt regrets “the extreme reluctance of all concerned to break fresh ground and act without precedents,” and charges,

the 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 . . . . 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 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 Adolf 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 else-
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.'" 58 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. 59 This newborn sacred

where—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. [FJ, pp. 262, 263, 272–73]

58. "Thus," Cover insists, "the claim to a 'law' is a claim as well to an understanding of a literature and a tradition" ("FJ," p. 177).

59. Compare Derrida's analysis of the principle of "man's sacrality" (as understood by Walter Benjamin) in Derrida, "Force of Law," pp. 920, 1028–29:

"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. [Emphasis mine]

On the foundational value of the Eichmann trial's inadvertent testimonial constitution of a "sacred narrative," compare 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 recountings of the founders' heroic deeds as a national epic. Some societies also have myths of refounding, making a period of decisive break from 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 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. ["EA," pp. 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" ("EA," p. 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" later gave rise to decanonizing and desacralizing critiques of the political, commercial, and manipulative uses and abuses made of the memory of the Holo-
narrative was, and could not but be, at once a tale of jurisdiction and a collective tale of mourning.

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

caus 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, "The Eichmann Trial, the Jewish Question, and the American-Jewish Intelligentsia," pp. 574–75; Segev, The Seventh Million; and Idith Zertal, "From the People's Hall to the Wailing Wall: A Study in Memory, Fear, and War," Representations, no. 69 (Winter 2000): 39–59.
I perhaps accompanied—at last!—by the love of those unloved, I on the way to myself, up here.  

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*.

“The Right Wrong Man: John Demjanjuk And The Last Great Nazi War Crimes”

Introduction

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Introduction

_Die Zeit_, the German weekly, called it the “last great Nazi war crimes trial,” a designation that misled on almost every count.¹ The defendant stood accused of assisting the SS in the murder of 28,060 Jews at the Sobibor death camp—but not of being a Nazi. Nor did the trial involve war crimes, since the systematic extermination of unarmed men, women, and children was not an act of war. Then there was the question of “greatness.” By all accounts, the defendant, John (Ivan) Demjanjuk, had been little more than a peon at the bottom of the Nazis’ exterminatory hierarchy. Compared with Nuremberg, where twenty-one leaders of the Nazi state faced an international military tribunal, or with the Jerusalem trial of Adolf Eichmann, logistical mastermind of a continent-wide scheme of deporting Jews to their death—or even with the French trial of Klaus Barbie, the so-called Butcher of Lyon—the proceeding against Demjanjuk looked almost inconsequential. Add the fact that the defendant was at the trial’s start a near nonagenarian, seemingly in frail health, and that sixty-seven years had elapsed since his alleged crimes, and the most remarkable aspect of the trial was the fact that it was staged at all. All the same, in putting Demjanjuk on trial, German prosecutors had assumed a radical risk. An acquittal would have been disastrous, a highly visible and final reminder of the failure of the German legal system to do justice to Nazi-era crimes. For _Die Zeit_ was almost surely right on one count: whatever else one might say about the case, it was likely to be the last, or at least the last Holocaust trial to galvanize international attention.
INTRODUCTION

Even the flood of attention had less to do with Demjanjuk’s personal notoriety and more to do with the awkward fact that he had previously been mistaken for a truly notorious figure. Demjanjuk’s legal odyssey traced back to 1975, when American officials first received sketchy word of the wartime activities of a Ford machinist living in a quiet suburb of Cleveland. Demjanjuk had been born in the Ukraine in 1920 and had entered the United States in 1952, settling in the Cleveland area and becoming a naturalized US citizen in 1958. By the late 1970s, American prosecutors had identified him as the former Treblinka guard whose wanton acts of sadism had earned him the fearful sobriquet Ivan Grozny, “Ivan the Terrible.” In the most highly publicized denaturalization proceeding in American history, Demjanjuk was stripped of his citizenship and extradited to Israel, where he was tried as Treblinka’s Ivan Grozny. Convicted in 1988 and sentenced to death, Demjanjuk idled in an Israeli prison for five years, while his appeals ran their course. Then, in the summer of 1993, the Israeli Supreme Court tossed out his conviction, after newly gathered evidence from the former Soviet Union showed the Israelis had the wrong Ivan. Demjanjuk returned to the United States a free man, ending one of the most famous cases of mistaken identity in legal history.

But it hardly spelled the end of Demjanjuk’s legal travails. Resettled in suburban Cleveland with his American citizenship restored, Demjanjuk became the subject of a fresh denaturalization proceeding. While Demjanjuk might not have been Treblinka’s Ivan the Terrible, evidence showed that he had nonetheless been a “terrible enough Ivan” who served at Sobibor, an equally lethal Nazi death camp. In 2001, Demjanjuk earned the distinction of being the only person in American history to lose his citizenship twice. Still protesting his innocence, he remained barricaded in his middle-class ranch house in Seven Hills, Ohio, while American officials searched fruitlessly for a country willing to accept him. After Poland and Ukraine declined, Germany, which had long resisted accepting alleged Nazi collaborators from the United States, somewhat surprisingly said yes. Demjanjuk was flown to Munich, arriving on German soil on May 12, 2009.

Two years later to the day, on May 12, 2011, a German court convicted the by-now ninety-one-year-old defendant of assisting the SS in the murder of 28,060 Jews at Sobibor. But punishment would never be
meted out: ten months later, with his appeal still pending, John Demjanjuk died in a Bavarian nursing home. It was perhaps fitting that the most convoluted, lengthy, and bizarre criminal case to arise from the Holocaust never reached a definitive conclusion.

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In the following pages, we will explore the elaborate and strange story of Demjanjuk’s legal odyssey. But for all its extraordinary twists and turns, the Demjanjuk case also places deeper, more persistent claims on our attention. It asks us to think critically about the justice of trying old men for superannuated crimes. It invites us to reflect on the nature of individual responsibility in the orchestration of state-sponsored crimes. It demands that we think carefully about the nature, causes, and possible justifications of collaboration in the perpetration of atrocities. And it provides a crucible in which three distinct national legal systems—the American, the Israeli, and the German—sought to create legal alloys potent enough to master the legal challenges posed by the destruction of Europe’s Jews.

Using criminal prosecutions to address that destruction severely tested traditional conceptions of law and jurisprudence. The law typically views criminal acts *microscopically*. The standard model, dutifully studied by law students around the globe, construes crimes as deviant acts committed by individuals against other individuals that harm community order. Different legal systems reach different conclusions about which specific acts constitute such a threat, but all legal codes condemn foundational wrongs such as murder, and instruct the modern nation-state to respond aggressively, mobilizing and deploying its investigatory and judicial resources to apprehend, prosecute, and ultimately punish perpetrators. In Thomas Hobbes’ *Leviathan*, arguably the greatest work of Western political thought, the state is more than simply the bulwark of order; it is the force that protects us from the mortal violence of strangers. And in John Locke’s *Two Treatises of Government*, the state both defends law and submits to its neutral dominion.

Nazi crimes exploded this model and its assumption that private violence represented the most basic threat to the fabric of social life. Nazism revealed the terrible capacity of the state itself to turn reprobate, a phenomenon the German philosopher Karl Jaspers designated with the
term *Verbrecherstaat*, “the criminal state.” This idea—that the state, far from acting as the locus and defender of law and order, might itself commit the worst acts of criminality—simply lay beyond the ken of the conventional model of criminal law and was indeed unintelligible to it. Jaspers’ term named the novel achievement of Nazism, how it turned the state into the principal perpetrator of crimes, the very agent of criminality. In the peroration of his opening address at Nuremberg, chief American prosecutor Robert Jackson framed the legal challenge posed by the *Verbrecherstaat*: “Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance.”

The Nuremberg trial and its progeny offered a distinctive answer to this question. Nuremberg insisted that law was adequate to the task, but that the effort would require extraordinary legal innovations. Mastering the crimes of the *Verbrecherstaat* would require special courts, new jurisdictional principles, unorthodox evidentiary conventions, and, most of all, novel categories of wrongdoing. These new categories would have to be sufficiently flexible and capacious to handle crimes that spanned a continent, enlisted the participation of tens of thousands of perpetrators, and were supported by a complex organizational and logistical apparatus.

The prosecution of the major Nazi war criminals before the International Military Tribunal (IMT) in Nuremberg marked a crucial first step. Nuremberg was not in the first instance a Holocaust trial; the twenty-one defendants in the dock were principally charged with “crimes against peace”—that is, of having planned and launched a war of aggression in violation of international law. Yet the trial conferred judicial recognition on “crimes against humanity,” as it called acts of state-sponsored atrocity; and the prosecution used this novel legal channel to bring much of the evidence of the Holocaust before the IMT. American prosecutors subsequently built on this precedent in the twelve so-called successor trials staged by the US military, also at Nuremberg. In these trials of leading German state and economic functionaries, American prosecutors shifted away from the IMT’s focus on aggressive war and now treated crimes against humanity as the Nazis’ central offense.
Nazi atrocity prodded the legal imagination to recognize a second novel incrimination. In a book published in 1944, *Axis Rule in Occupied Europe*, Raphael Lemkin, a Polish-Jewish adviser to the US War Department, coined a new term to describe the Nazis’ treatment of Jews in occupied countries. Wedding an ancient Greek word for group (*genos*) to a Latin word for killing (*cide*), Lemkin’s neologism sought to describe something distinct from mass murder, and more grave: “a coordinated . . . destruction of the essential foundations of the life of . . . groups, with the aim of annihilating the groups themselves.” The newly coined word *genocide* made its way into the IMT indictment, then gained far greater currency in the Americans’ successor trials at Nuremberg, where it served to characterize the Nazis’ crimes against humanity. On December 9, 1948, the United Nations General Assembly voted to recognize genocide as denoting its own independent crime in international law. The Convention on the Punishment and Prevention of the Crime of Genocide officially entered into force early in 1951; 144 states have since ratified the Convention, and today genocide stands, in the words of William Schabas, as the “crime of crimes”—the most serious crime recognized by any legal code.

The effort to punish Nazi atrocity also gave rise to novel jurisdictional principles capable of puncturing the shield of sovereignty that traditionally insulated state actions from outside legal scrutiny. Likewise it stimulated the development of specialized investigatory units that revolutionized the role that professional historians would play in preparing criminal cases. It led jurists to experiment with flexible rules of evidence equipped to facilitate rather than frustrate the prosecution of state-sponsored crimes. And it sparked the establishment of special courts, some international, some domestic, specially tasked with trying crimes of genocidal sweep. In large measure, the field that we now call “international criminal law” owes its existence to the law’s attempt to grapple with Nazi mass atrocity.

Not all legal systems embraced what I shall call the “atrocity paradigm”—the use of special law and processes to respond to Nazi crimes. As we shall see, Germany, spurred by resentment of the Allies’ war crimes trial program, rejected the new incriminations designed to facilitate the prosecution of Nazi exterminators. But even where these
legal innovations gained acceptance, they encountered an even more fundamental problem raised by the atrocities of the *Verbrecherstaat*. In the classic model of retributive punishment that found its most enduring exposition in the works of Kant, punishment is seen as a *just dessert*. In this view, punishment is something the criminal has *earned*; its purpose is not to rehabilitate or correct the wrongdoer, but to restore the moral imbalance caused by his crime. Nazi atrocity introduced a radical disequilibrium into this Kantian equation. Writing about the Nuremberg trial, Hannah Arendt famously observed, “For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters all legal systems. . . . We are simply not equipped to deal, on a human level, with a guilt that is beyond crime.”

Years later, Israeli Attorney General Gideon Hausner would make much the same point during the Eichmann proceeding, openly acknowledging that “it is not always possible to apply a punishment which fits the enormity of the crime.” The problem of the inadequacy of punishment was hardly a trivial matter; to the contrary, as Arendt suggested, it raised profound jurisprudential questions. Incriminations such as “crimes against humanity” and “genocide” may have enabled prosecutions of perpetrators of Nazi atrocity, but if such crimes exploded classic theories of retributive justice, then what purpose exactly did the trials serve? As Arendt understood it, the problem was not that the law would fail to do justice to the defendants; instead, it was that no juridically sanctioned punishment could serve as a coherent response to mass atrocity. Such crimes exposed the limits of law as a retributive scheme.

In an earlier book, I argued that jurists sought to solve this dilemma by reconfiguring the basic purpose of the atrocity trial. In researching the records of Holocaust trials, I was struck by the fact that numerous prosecutors defended the proceedings as *didactic* or *pedagogic* exercises. Attorney General Hausner was explicit in this regard; in his account of the Eichmann trial, he insisted, “we needed more than a conviction; we needed a living record of a gigantic human and national disaster.” Hausner’s words were hardly anomalous; American prosecutors at Nuremberg, German prosecutors at the famous Frankfurt-Auschwitz trial (1963–65), and French prosecutors at the Barbie trial (1987) sounded many of the same chords. In these cases, jurists explicitly sought to use
the trial as a means of teaching history, creating narratives from which political lessons could be teased. In calling such cases didactic trials, I intended no criticism, and in fact sought to distinguish such legal exercises from the corrupt show trials staged in the Soviet Union under Stalin. My deeper argument was that far from being an incidental feature of Holocaust trials, the didactic aspect represented a juristic solution to a juristic problem. If Nazi atrocity revealed the limits of the conventional criminal trial as a retributive exercise, the didactic trial delivered an expanded justification for prosecuting. While the atrocity trial would continue to perform the conventional function of ascertaining guilt and assigning punishment, it would also serve to teach history and history lessons.

The atrocity trial as didactic exercise has not escaped criticism. Oddly and disappointingly, the most influential critic was Arendt herself, who, in her famous report on the Eichmann trial, first published in the New Yorker in 1962 and a year later in book form, vehemently attacked Hausner’s prosecutorial tactics. “The purpose of a trial,” Arendt insisted, “is to render justice, and nothing else; even the noblest of ulterior motives—the making of record of the Hitler regime which would withstand the test of history’ . . .—can only detract from the law’s main business: to weigh the evidence against the accused, to render judgment, and to mete out due punishment.”10 In making this argument, Arendt appeared to forget what she had written about Nuremberg—that Nazi atrocities had so distorted the fabric of justice that no amount of “due punishment” would suffice to “render justice.” While Arendt was certainly correct that a criminal trial must first and foremost fairly weigh the evidence against the accused, her dismissal of all other purposes betrayed an odd shortsightedness. Far from serving merely “ulterior motives,” the didactic trial represented a solution to the very problem that Arendt herself first identified.

The atrocity trial as didactic exercise reached its purest elaboration in the Eichmann trial. Everything about the case was unusual, beginning with Eichmann’s spectacular capture and kidnapping by Mossad agents, who plucked the former SS Obersturmbannführer off a street in suburban Buenos Aires. At trial, Israel relied on unusual jurisdictional theories to buttress its authority to try a man whose crimes had been committed on a different continent before the birth of the Israeli state. It also used a special charging statute, the Nazis and Nazi Collaborators
(Punishment) Law, passed by the Knesset in 1950, that incorporated into domestic Israeli law both Nuremberg’s definition of “crimes against humanity” and a modified version of the United Nations’ definition of genocide. The three-judge tribunal that presided over the trial was a special court, specially constituted to try persons accused under the 1950 statute. And the trial itself presented a drama of legal didactics, undertaking to teach history through the lived memory of survivor witnesses. This effort represented a dramatic departure from Nuremberg, where prosecutors had relied on documentary evidence largely to the exclusion of victim and survivor testimony. Many observers had questioned Nuremberg’s documentary approach, as a trial that aimed to serve as the “greatest history seminar” became dull, repetitive, and tediously long. The Eichmann prosecution sought to correct this misstep. By presenting history through the anguished memory of survivors, the trial turned a younger generation of Israelis into witnesses of the witnesses. It conferred honor and public recognition on the experience of survivors, and communicated to younger Israelis the existential perils that menaced the Jewish people. It delivered a comprehensive and gripping account of the Holocaust while casting Zionist self-sufficiency and military preparedness as the necessary bulwarks against the repetition of any such catastrophe. At the same time, it galvanized attention around the world, particularly in America and Germany, and so began the work of transforming collective understandings of the Holocaust—which in time would come to be seen not merely as a horror of World War II, but as the signature event of the twentieth century.

If the Eichmann trial represented the Holocaust trial in its purest form as a didactic exercise organized around survivor testimony, Demjanjuk’s “Ivan the Terrible” trial in Jerusalem represented the collapse of the paradigm. While the causes of this disastrous case of misidentification were, as we shall see, far from straightforward, the calamitous trial made abundantly clear the perils of didactic legality, showing how the desire to honor the lived memory of survivors of atrocity can easily lead a criminal court badly astray. The collapse of the Israeli case against Demjanjuk also exposed the limits of the American approach to dealing with Nazi crimes, an approach that differed dramatically from the atrocity model I have sketched above.
American jurists had been the pioneering force at Nuremberg and in years immediately afterward gathered a store of experience in trying former Nazis—not just in Nuremberg, but also at the site of the former Dachau concentration camp, where the US Army tried hundreds of former camp guards and other Nazis for war crimes and crimes against humanity before specially constituted military commissions. By the 1970s, however, when American jurists began dealing with the problem that Eric Lichtblau has called “the Nazis next door,” this institutional memory had faded. The bold legal creativity that American jurists showed at Nuremberg was either ignored or forgotten. Lawyers of the 1970s simply assumed that US courts lacked jurisdiction over Nazi crimes; with the very laws that Americans had pioneered at Nuremberg unavailable, jurists were left addressing our domestic Nazi problem with ordinary legal tools. Former Nazis and Nazi collaborators who had acquired American citizenship would only face civil charges, arising under immigration law. Those like Demjanjuk—persons alleged to have perpetrated or served as accessories to mass crimes—were simply handled as persons who had entered the country illegally or under false pretenses. These denaturalization trials had little in the way of a didactic component, and few attracted great attention, the one exception being the spectacular Demjanjuk/Ivan the Terrible case. Essentially, the cases served as a means of lustration—they symbolically sought to purge America of persons undeserving of membership in a nation based on tolerance and equality.

In theory, such civil cases should have posed fewer obstacles to prosecutorial success than criminal trials. In point of fact, several botched cases exposed the difficulty of using ordinary legal instruments to handle state-sponsored atrocities. Prosecutors learned that asking aging survivors of profound trauma to accurately identify their past tormentors could prove a perilous undertaking. A deeper problem was institutional, as a decentralized collection of immigration lawyers and local US attorneys struggled to assemble cases against persons alleged to have lied about crimes committed decades earlier in far-flung lands.

This scattered approach, and the mistakes it led to, demonstrated the need for a specialized organization to handle such cases; and the creation of the Office of Special Investigations (OSI) in the Justice Depart-
ment in 1979 represented a critical step toward mastering the legal problems posed by the Nazi next door. Bringing together teams of lawyers and professional historians in unprecedented collaboration, the OSI developed a model for dealing with Nazis that would pay impressive prosecutorial dividends by the mid-1980s. Alas, this model had yet to be adequately developed by the time of Demjanjuk’s first denaturalization trial, and the OSI would pay dearly for inheriting its signature case before it was sufficiently equipped to handle it. In denaturalizing Demjanjuk as Treblinka’s Ivan the Terrible, the OSI committed a colossal blunder that its later successes—even in the second Demjanjuk denaturalization case—could never fully correct. Institutions managed with competence and integrity develop and learn over time, which is what the OSI did. Yet for the OSI, the course corrections came too late to avoid the early disaster that continued to taint its reputation.

As we shall see, the Cold War also contributed mightily to this early calamity; indeed, the Cold War—both its waging and its dissolution—profoundly affected the course of all Nazi atrocity trials in the United States, Israel, and Germany. The most basic and obvious challenge for jurists lay in gaining access to evidence secured in archives behind the Iron Curtain. But to call the Cold War a complicating backdrop to these cases is too anodyne a characterization; it was, in effect, a major player in them. It fostered doubts about the quality and authenticity of evidence; it shaped institutional responses; it infiltrated rhetoric, inculcated belief systems, and came ultimately to define the realm of action, the structure of political and legal choice. It supplied the very ether through which jurists moved. The end of the Cold War was no less profound in its influence. History by counterfactual is a tricky business, but we can say with some confidence that had the Cold War continued there would have been no second Demjanjuk denaturalization trial in the United States. And there certainly would have been no prosecution in Germany.

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In May 2009, at the time of Demjanjuk’s arrival by US government jet in Munich, I was living with my family in Berlin. Within a two-hundred-yard radius of our apartment were three separate monuments
to Nazi atrocity. Embedded in the sidewalk in front of our building was a pair of Stolpersteine (literally, “stumbling blocks”), brass cobblestones memorializing two Berlin Jews deported to Auschwitz. Across the street in a small park stood a sculpture of what I first took to be a stack of waffles but that closer inspection revealed to be a pile of stylized corpses (the sculpture was called Treblinka). And around the corner, a plaque affixed to an elegant prewar building informed passersby that the building, now home to luxury condos, had formerly housed a military court that condemned thousands of innocent persons to death during the Third Reich.

Politically and culturally, Germany is the poster boy for national self-reckoning, the land willing to face down its monstrous past. Turkey and Japan have yet to accept responsibility for crimes of genocidal sweep. France still struggles with its complicity in Nazi crimes. Austria continues to indulge the myth of the “first victim” of Nazism. Spain, which fancies bringing foreign human rights violators to justice, suddenly becomes prickly when a local magistrate shifts his attention to Franco-era crimes. By contrast, Germany has approached the difficult collective task known as Vergangenheitsbewältigung—confronting the past—with Teutonic thoroughness, making its past atrocities the subject of countless memorials, symposia, films, and other public discussions. When all else fails, German law serves as the muscle of memory, stepping in to prosecute Holocaust deniers.

When it came to bringing Nazi perpetrators to the bar of justice, however, the postwar German legal system amassed a pitifully thin record. It is true that in the years directly following the war, German courts operating under the watchful eye of Allied zonal occupiers conducted over forty-six hundred trials of crimes committed during the Nazi period—but the impressive-sounding number obscures the fact that the majority of these cases involved relatively trivial property crimes committed in the last months of the war, when Germany witnessed a collapse of public order. In the early years of the Federal Republic, trials involving Nazi atrocities came to a virtual standstill; in 1955, for example, West German courts convicted a grand total of twenty-one persons for Nazi-era crimes. Early on, East Germany demonstrated greater resolve in pursuing Nazi criminals, but some of these
proceedings amounted to little more than Stalinist shows; later, East Germany lost interest in trials, insisting that most unpunished Nazis remained in the West.12

Today, the field known as “transitional justice” asks what role a judicial reckoning with a previous criminal regime should play in the transition to a democratic one. The West German answer was: not much of one. In the Federal Republic, the obstacles to successfully prosecuting former Nazis were many and formidable. Where Nuremberg pioneered the notion that special law and institutions were necessary to do justice to Nazi crimes, Germany insisted on treating Nazi atrocities as ordinary crimes to be treated by ordinary courts applying ordinary German law. As a consequence, German law (here I will use “German” and “Germany” to refer to the Federal Republic; East Germany will be designated as such) often frustrated rather than facilitated prosecutions. Generous amnesty statutes insulated many former Nazis from prosecution, including virtually all the bureaucrats who had helped plan and implement the Holocaust. German prosecutors could not try former Nazis for genocide or crimes against humanity, as these special incriminations were dismissed as ex post facto law. Barred from using the very incriminations designed to facilitate the prosecution of Nazi atrocities, German prosecutors had to rely on conventional crimes as defined by German statute. And so the most a prosecutor could do was to charge a former Nazi with ordinary murder. After 1960, murder was the only charge that a prosecutor could file, as the statute of limitations had tolled for all other crimes committed during the Third Reich. Even murder was controlled by a prescriptive period, which was lifted only thanks to a series of stopgap measures by a German parliament ultimately unwilling to face the international opprobrium and internal rancor that would have resulted from letting the statute of limitations expire on all Nazi-era crimes.

As we shall see, the fact that German courts had to address acts of genocide through the category of conventional murder created immense problems for prosecutors. Investigations were abandoned midstream, charges were brought only to be dismissed, those trials that did go forward often resulted in bewildering acquittals or frustratingly lenient sentences, and the occasional stiff sentence rarely escaped reduction or commutation. Thanks to the peculiarities of German legal doc-
trine, judges treated the Holocaust as if it had been perpetrated by no more than a handful of men—Hitler, Himmler, Heydrich, and Göring, and a few others thrown in for good measure. Everyone else, including SS men who had directly participated in mass shootings or had supervised the exterminatory process, were treated as mere accessories.

We should not be entirely surprised by this record of disappointment. The simple fact is that postwar Germany was full of former Nazis. Many occupied leading positions in the Federal Republic’s government and judiciary. Even among those who smoothly adjusted to the new realities of a democratic Germany, few welcomed the aggressive prosecution of their former confederates. There is no denying, then, that the continuing influence of former Nazis contributed to Germany’s refusal to use the atrocity model to prosecute Nazi crimes. But this is not to say that all the political, institutional, legal, and doctrinal roadblocks to successful prosecution were exclusively the handiwork of former Nazis. The law is not infinitely pliable, at least not in a liberal democracy; doctrine may accommodate and reflect political interests and partisan agendas, but it also evolves by its own internal logic and rules.

Then there is the matter of institutions. Like the United States, Germany has a federated legal system, one that unavoidably frustrated the centralized, coordinated investigation and prosecution of Nazi atrocities. For some, of course, this was a blessing. But for others it was a national embarrassment—if not a direct scandal. And so a full two decades before the creation of the OSI in the United States, Germany established Die Zentrale Stelle der Landesjustizverwaltungen zur Aufklärung nationalsozialistischer Verbrechen (The Central Office of the Regional Administration of Justice for the Investigation of National Socialist Crimes, hereafter, the Central Office), a special unit empowered to launch investigations of Nazi-era crimes. In contrast to the OSI’s relatively unsexy civil law caseload, the Central Office dealt only with criminal matters; indeed, with the expiration of the statute of limitations for all other crimes, the Central Office investigated exclusively murder cases. And yet the Central Office has never enjoyed a basic authority granted to the OSI: to try its own cases. From its inception in 1958, the Central Office has served as an investigative agency only, able to prepare preliminary investigations but dependent on regional prosecutors to file charges and try cases. Partly as a result, of the 120,000 in-
vestigations launched by the Central Office since its creation, only 5,000 cases went to trial, resulting in fewer than 600 convictions. But trials there were; and the efforts of German investigators, prosecutors, and judges to bring perpetrators of Nazi atrocities to justice were no less remarkable than the obstacles thrown in their way.

By the start of Demjanjuk’s trial in November 2009, however, the last prosecution to attract substantial media attention lay decades ago, and most Germans assumed that Nazi trials were a thing of the past. Many who previously had defended such trials now favored closing the book on this chapter of German history. And so the decision to bring Demjanjuk to Germany to stand trial made for surprise, even alarm. What exactly did Germany hope to achieve? Those most familiar with German case law openly predicted that the prosecution—if the aged defendant survived it—would end in failure.

And yet the trial, I will try to demonstrate, resulted in an important and even a historic success. If Nuremberg was a trial by document and the Eichmann and Ivan the Terrible cases were trials by survivor testimony, Demjanjuk’s Munich trial was a trial by historical expert. Here the testimony of professional historians did much more than provide background and context to the crimes under consideration; rather, it enabled the resolution of the basic legal questions facing the court. Demjanjuk’s Holocaust-as-History trial reflected more than the inescapable actuarial reality that the defendant was an old man and no survivors were around to identify him. It showcased the unusual role that historians had come to play in every aspect of atrocity cases, from the drafting of the indictment to the core of the court’s judgment. While the Jerusalem trial of Ivan the Terrible marked the end of the Holocaust trial as a didactic exercise organized around survivor testimony, Demjanjuk’s Munich case represented the advent of a very different kind of Holocaust trial: the Holocaust as History.

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In writing this book, I was drawn to many aspects of the Demjanjuk case. Primary among them were how the vectors of law and Cold War politics converged in Demjanjuk’s trials, and how the case brought into stark relief the efforts of three different domestic legal systems to ad-
dress the crimes of the Holocaust. I was also interested in how the trial threw into stark relief the difference between treating Nazi extermination as a special challenge—one demanding legal innovation—and treating it as an ordinary crime. The manner in which the trial brought the prerogatives of memory and the conclusions of history into collision raised the question of how law treats the passage of time and handles the vexed issue of collaboration. Furthermore, I wanted to explore how legal systems develop and self-correct, how doctrine responds to the pressures of politics, and how law accommodates, digests, and frames the conclusions of history.

My interest was not with Demjanjuk the person. No one familiar with the case can seriously doubt that Demjanjuk served as a camp guard—not just at Sobibor, but at Majdanek and Flossenbürg, too. All the same, no evidence has ever been adduced to suggest that Demjanjuk distinguished himself by his cruelty, and I am prepared to believe that he did not. I can also readily imagine how, by the end of his life, he had come to view himself as a victim—of the Germans, who took him as a prisoner of war, impressed him into guard service, and ultimately brought him to trial; of the Israelis, who demonized and nearly executed him in a badly handled case of mistaken identity; and of the Americans, whose dogged determination to see him brought to justice must have looked like prosecutorial vindictiveness to an old man with deep reserves of self-pity. It is true that Demjanjuk never chose to be taken prisoner of war or assigned guard duty at a death camp. But life, particularly in times of historic upheaval, often thrusts us in situations not of our making. In such situations we must ask ourselves whether a difficult, or even terrible choice is the same as having no choice at all. Alas, in his stubborn and dissembling claim of absolute innocence, Demjanjuk deprived the law of a frank and nuanced reckoning with the meaning of his collaboration.

At the end of the day, I cannot say with assurance that, had I been a prosecutor on the case, I would have supported the decision to try Demjanjuk in Munich. But in writing about the trial, I find myself strongly supporting the verdict—not because I believe it was vital to punish Demjanjuk, but because the German court delivered a remarkable and just decision, one which few observers would have predicted from Germany’s long legal struggle with the legacy of Nazi genocide.
In the following pages, I hope to convince you that the German trial did more than bring the bizarre and meandering case against Demjanjuk to a fitting close. It demonstrated the power of courts to self-correct and to learn from past missteps, offering a powerful example of how criminal trials can deploy history in a responsible way to shift and recenter doctrine. As we shall see, while still nominally treating the Holocaust as an “ordinary” crime, the Munich court managed to shatter the old paradigm and comprehend the Holocaust as a crime of atrocity. It is perhaps ironic that a man whom prosecutors first mistakenly pursued because of his alleged singular viciousness ultimately was convicted in Munich as the ultimate replaceable cog in an extermination machine. Yet as the court rightly recognized, a machine cannot run without its small constituent parts. Demjanjuk was rightly convicted not because he committed wanton murders, but because he worked in a factory of death. He was convicted of having been an accessory to murder for a simple and irresistible reason—because that had been his job.