Hangman's Perspective:

Three Genres of Critique following *Eichmann*

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Abstract. This chapter identifies three perspectives for thinking and criticizing mass atrocity trials, through an analysis of three non-legal sources. First, through an engagement with Hannah Arendt's writing on the Eichmann trial, it discusses the *rule of law* genre of critique, in which mass atrocity trials are constantly suspected of becoming "show trials." Second, it turns to Shoshana Felman's work on the same trial, to identify a genre of critique premised on an experience of *catharsis*, in which the trauma of atrocity's victims is alleviated (constituting post-atrocity political community). Third, it analyzes *The Hangman*, a 2010 film about Eichmann's executioner, who suffered trauma following the hanging the convict, illustrating the unacknowledged risks of wielding the violence of criminal justice. Based on this "hangman's perspective", the chapter suggests that mass atrocity trials must be assessed in light of the questions: what transnational allocation of such risks do such trials rely upon? What preexisting inequalities, economic, ethnic, and other, determine the roles different people will end up playing in trials? At times, the need to enforce criminal justice makes some of us seem worthy of sacrifice.

The trial is the important thing, not the penalty…[1]

- David Ben-Gurion

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[1] Quoted in Yosal Rogat, *The Eichmann Trial and the Rule of Law* (Center for the Study of Democratic Institutions, 1961).

1. Introduction

If capital punishment is ever acceptable, a possible precautionary rule against its misuse could be that judges deciding to employ it would be obliged to perform executions themselves.[2] After reading the verdict, the judge would step down from the bench and neatly fold the robe. He or she would then walk alongside the convict to the gallows. Imagine Moshe Landau, the trial court judge who sentenced Adolf Eichmann to death, morosely listening from the audience as the Israeli Supreme Court rejects Eichmann's appeal. Wiping perspiration from his forehead, he repockets a handkerchief and dispassionately carries on with the killing. "You must hang" says philosopher Hannah Arendt to Eichmann towards the end of her book *Eichmann in Jerusalem: A Report on the Banality of Evil*.[3] Contrary to a number of her contemporaries, Arendt preferred that Eichmann's death be decided by judicial panel, not by the agent of an unnamed security force. In an astonishing epilogue to the book, she imagines herself replacing Landau's presiding role.[4] It is safe to assume that just like in Landau's reality, in her imagination too, the practical details of implementing the decision would be taken care of -- by others.

The Eichmann trial is one of the most iconic and foundational criminal cases in which state authorities adjudicated mass atrocities. Israel had kidnapped the suspect from his domicile in Argentina in 1960, and secretly rendered him to its own territory. Eichmann was subsequently tried for crimes he committed during the Second World War, when he participated in the Nazi program of extermination of Jews and other groups. His case began on April 11, 1961, at the Jerusalem District Court, where he was charged under the Nazi and Nazi Collaborators Law of 1950.[5] Shalom Nagar, a prison guard for the Israeli Prisons Service, placed the noose around his neck shortly after the rejection of his appeal, a few minutes past midnight, on June 1, 1962.

True to the case's historic status, it generated copious commentary touching upon the most fundamental questions of legal and political theory.[6] Its importance owes much to Arendt's classic

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[2] International law has generally abolished the capital punishment. See William Schabas, *The Abolition of the Death Penalty in International Law* (Cambridge University Press, 2002).

[3] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (The Viking Press, 1971), 279.

[4] See analysis in Judith Butler, 'Hannah Arendt's Death Sentences' [2011] 48(3) Comparative Literature Studies.

[5] For the text of the statute, see http://www.mfa.gov.il/mfa/mfa-archive/1950-1959/pages/nazis%20and%20nazi%20collaborators%20-punishment-%20law-%20571.aspx

[6] Among many, see e.g. William Schabas, 'The Contribution of the Eichmann Trial to International Law' [2013] 26(3) Leiden Journal of International Law 667; Leora Bilsky, 'In a Different Voice: Nathan Alterman and Hannah Arendt on the Kastner and Eichmann Trials' [2000] 1(2) Theoretical Inquiries in Law 509; Leora Bilsky, 'The

account.[7] Although *Eichmann* is central to a tradition of scholarship, following Arendt or often arguing against her, scholars have not yet fully conceptualized its critical bite. Following the Eichmann trial, this essay distinguishes three genres of critique directed towards the adjudication of mass atrocity, domestic or international.[8] Each of these genres answers differently a basic set of questions, namely: what are the unarticulated assumptions the adjudication of mass atrocity rests upon? What injustices can such prosecutions generate or perpetuate?[9] Rather than an emphasis on judicial opinions, the critiques below focus on the event of such adjudication -- on the trial.[10] They are "critical" (1) in that they challenge us to view such trials not only as delivering justice, but also, at times, as sources of injustice or violence; and (2) in that they cumulatively provide a set of prescriptive precautionary principles that should be followed in any new prosecution of mass atrocity today. If for no other reason, the three genres are worth grouping together for their common historical root.

The essay thus offers a modest corrective to a history of previous understandings of the Eichmann trial, and of the adjudication of mass atrocities. Each of the three genres developed below reflects a different understanding of trials dealing with "core crimes" and their potential pitfalls. Each of them is introduced through a thinker taken to be one of its most important proponents; but they all go beyond the theoretical intervention of any individual commentator, and amount to three

Eichmann Trial: Towards a Jurisprudence of Eyewitness Testimony of Atrocities' [2014] 12(1) Journal of International Criminal Justice 27.

[7] Arendt's account continues to draw attention among legal scholars. See e.g. David Luban, 'Hannah Arendt as a Theorist of International Criminal Law' [2011] 11 ICLR; More generally on Arendt in contemporary legal thought: Jan Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt,'[2007] 20(1) LJIL, 1; Christian Volk, 'From Nomos to Lex: Hannah Arendt on Law, Politics, and Order,' [2010] 23 LJIL, 759.

[8] As Jean Françoís Lyotard writes, a "genre of discourse determines what is at stake in linking phrases." There could thus be deep divides between different genres of thinking: "The stakes implied in the tragical genre, its intended success (shall we say, the feelings of fear and pity on the part of its adressees), and the stakes implied in the technical genre, its own success (shall we say, the availability of the referent for the addressor's wants) are, for their part, incommensurable…" Jean Françoís Lyotard, *Le Différend* (University of Minnesota Press, 1988). On "genres of critique" as part of a critical legal methodology, see: Karin Van Marle and Steward Motha (eds.), *Genres of Critique: Law Aesthetics and Liminality* (Sun Press, 2013). To some extent, the dynamics described below may occur in any criminal trial.

[9] Compare "genres" to "visions of fairness" in Mirjan Damaška, 'The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals [2011] 36(2) North Carolina Journal of International Law and Commercial Regulation 365.

[10] The three by no means furnish a comprehensive account of critical approaches to international criminal justice; nor do they canvass the rich literature in the field. For more see the essays in Christine Schwöbel-Patel, Critical Approaches to International Criminal Law (Routledge, 2014); and Tor Krever, 'International Criminal Law: An Ideology Critique' [2013] 26(3) Leiden Journal of International Law 701.

distinct formations of legal culture.[11] Through an appeal to one remarkable film, *The Hangman* (2010), the essay points towards a novel direction of critique: one offered from the perspective of Eichmann's prison guard and executioner.[12]

First (Part 2), the essay recounts Arendt's critique of the trial in *Eichmann in Jerusalem*. I cannot do justice to her work in this context, and will only offer a simplified distillation. Following legal scholar Yosal Rogat, this genre is labeled the *rule of law*.[13] Within this genre, mass atrocity trials are criticized for veering towards a show designed to shape public opinion and constitute a political community. This tendency generates tension with basic rule of law values such as individual accountability in criminal procedure and judicial independence. A number of other prominent authors share the related concern that the adjudication of mass atrocity is very likely to become unduly "political".[14]

Second (Part 3), the essay describes an influential type of response to Arendt. According to this genre of critique, trials of mass atrocity may prevent the victims of such crime from having their voices heard in court. The most familiar examples of legal processes that generated such an injustice are the Nuremberg trials. Literary theorist Shoshana Felman advanced a mode of critique in which the Eichmann trial's theatrical aspect – just what Arendt so vehemently rejected -- becomes its "revolutionary" contribution to criminal justice.[15] But the ramifications of Felman's intervention go far beyond a response to Arendt. Her work both reflects and influences a reorientation of law towards narrative, central to the intellectual history of mass atrocity adjudication.[16] In this genre of critique, closely tied with feminist critiques of criminal law and with

[11] On legal culture generally, see Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (The University of Chicago Press, 2000).

[12] The film at the center of this essay is Hangman (2010), directed by Netalie Braun.

[13] Rogat, *The Eichmann Trial and the Rule of Law*, n1.

[14] One assumption this genre of critique makes -- explicitly or implicitly -- is that the realms of law and of politics are meaningfully distinguishable. On the risks of trials becoming political see e.g. Eric A. Posner, 'Political Trials in Domestic and International Law' [2005-2006] 55 DLJ, 75.

[15] Shoshanah Felman, 'Theatres of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust' [2000] 1.2 TIL.

[16] The turn to narrative in legal theory is associated with Robert Cover, who Felman too often cites. See Robert Cover, 'Foreword: Nomos and Narrative' [1982-1984], 97 HLR.

transitional justice, adjudication becomes the basis for a collective process of community or state building. This line of argument can be called a genre of *catharsis*.[17]

Third (Part 4), the essay characterizes a perspective derived from *The Hangman*, a 2010 film directed by director Netalie Braun.[18] Braun offers a cinematic portrait of Shalom Nagar. The implicit critique of mass atrocity adjudication is presented in Nagar's own voice.[19] Unlike Arendt and Felman, Nagar is not a theorist of politics or culture (though Braun does contribute to these fields with her film). The figure at the center of this third genre of critique is a traditional Kosher butcher working in Israel. He is a man of modest means, but of significant wisdom and remarkable humor; and he has many interesting things to say about Eichmann, based on his experience as Eichmann's guardian in prison and his hangman. You may think it a stretch to call his perspective a *genre*, mainly because it is rather personal. Nagar's views, as narrated in the film, nevertheless form a third perspective that can be carefully generalized, and juxtaposed with Arendt's and Felman's. It exposes aspects of the trial that neither of them noticed, but that are relevant for the assessment of their positions. This third perspective is one in which a particular notion of *sacrifice* is central. Part 5 further elaborates the notion of sacrifice through an account of the secondary and tertiary social harms that mass atrocity trials can generate, according to this third view.

To conclude, the essay outlines the questions and precautionary principles Nagar teaches us to direct towards trials seeking accountability for mass atrocity. These are largely about the hierarchies between the actors whose work is necessary to carry criminal justice forward; and about exclusions that historically momentous trials can generate when they're designed to midwife collective political change. I argue that the hangman's perspective holds in store a significant lesson for lawyers seeking accountability for mass atrocities today.

2. Hannah Arendt: The Rule of Law

[17] The Greek term signifies a purgation or cleansing of negative emotions through the viewing of tragedy. Aristotle writes in his Poetics: "A tragedy, then, is the imitation of an action that is serious and also, as having magnitude, complete in itself […] with incidents arousing pity and fear, wherewith to accomplish its catharsis of such emotions."

[18] Netalie Bruan, *The Hangman* (2010).

[19] A documentary film is never free of interpretation or bias; the third genre might therefore be best understood as my own interpretation of Braun's rendering of Nagar's story. It is thus a mediated and synthetic register of discourse, and should be understood as such.

Arendt was not the first to articulate of "the rule of law genre." In preparation of her manuscript, Arendt read a 1961 booklet by Stanford legal scholar Yosal Rogat, titled "The Eichmann Trial and the Rule of Law."[20] Rogat made a more distinctly legal argument against Israel's decision to try Eichmann. Primarily through an analysis of the international law of the time, he claimed the decision was inimical to the rule of law, focusing on three basic points: "1) the question of his abduction; 2) the retroactive application of law; 3) the basis for Israel's claim of jurisdiction over crimes committed outside it territorial limits."[21]

While his analysis showed that each of the three issues generated considerable legal difficulties, Rogat did not think these necessarily invalidated criminal proceedings against Eichmann. He rather took a position Arendt later adopted: the case should be adjudicated before an international tribunal. The stakes were high. Absent such a plan, "the "interests of legality" were "subordinated, and perhaps sacrificed…"[22] Rogat concluded: "It has never before… been so important for nations… to satisfy these requirements and become capable of making the decision Israel failed to make."[23]

The New Yorker initially published *Eichmann in Jerusalem* as a series of articles for more-or-less popular consumption in 1963. Eichmann's execution is the last scene in the book version, just before the aforementioned epilogue and a postscript. The phrase "the banality of evil" only appears here. Arendt uses it to describe the "grotesque silliness" of Eichmann's last words: "After a short while, gentlemen, we shall all meet again. Such is the fate of all men. Long live Germany, long live Austria, long live Argentina. I shall not forget them."[24]

Arendt pokes fun at Eichmann: so tempted by ceremonial fanfare, he seemed to have mistaken the moment for someone else's funeral. Yet in her description of the rush from death sentence to execution, she too has her omissions. She mentions objections to the death penalty by Jewish dignitaries such as philosopher Martin Buber and his colleagues at the Hebrew university. She describes how Eichmann's ashes ended up in the Mediterranean Sea. But she pays no attention to the practical aspects of killing Eichmann. The men who had to carry out this task make no

[20] Rogat, *The Eichmann Trial and the Rule of Law*, n1. Arendt, *Eichmann in Jerusalem* (n3) 271.

[21] Rogat, *The Eichmann Trial and the Rule of Law* (n1) 23.

[22] Ibid, 5.

[23] Ibid, 43

[24] Arendt, *Eichmann in Jerusalem* (n3), 252.

appearance in the book, nor are their voices heard elsewhere in the copious scholarship surrounding the trial.

Arendt's "report" immediately became controversial, specifically among Jews, both inside and outside of Israel.[25] It is easy to sense why the book rubbed parts of its readership in the wrong way. Consider how Arendt mockingly reiterated that, for the Israeli prosecution -- and for Prime Minister Ben-Gurion's government -- this became a "show trial".[26] Rather than a criminal process aimed at determining guilt or innocence, she explained, the event was a theatrical and essentially political instrument. It was a spectacle designed for consumption by an audience, not a laborious process of determining facts and interpreting the law. As such, the trial was objectionable. As one commentator observed, "the central function of criminal proceedings, according to Arendt, consists in determining the criminal culpability of the suspect and not in giving expression to the severe suffering of the victims, unless the latter is instrumental to the main aim of the trial."[27]

While the details of Arendt's legal theory remain a matter of debate, her argument here rings familiar to lawyers. She speaks in the name of a defense of the rule of law from the usurpation of politics. She thus insists on the idea that a criminal trial must focus not on the victims or their society, but on "the accused."[28] Particularly, the procedural aspect of the rule of law is relevant. When a court is designed to accomplish the political ends of a society, doubt is cast on whether it can truly be independent and impartial; and on whether its judgment will ultimately be established upon an existing legal rule and the formal presentation of evidence.[29] If mass atrocity trials can go forward, they must constantly be guarded against the lurking shadow of show trials.[30]

Arendt struggles with the need to punish a defendant who displays only a very fragile criminal intent;[31] one who has acted legally in terms of the law of the Third Reich. The rule of law only allows

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[25] As amusingly captured in the film Hannah Arendt (2012), directed by Margarethe von Trotta.

[26] Arendt, *Eichmann in Jerusalem* (n3), 9.

[27] Thomas Mertens, 'Memory, Politics, and law – The Eichmann Trial: Hannah Arendt's View on the Jerusalem Court's Competence' [2005] 6(2) German Law Journal: 410.

[28] Arendt, *Eichmann in Jerusalem* (n3), 19-35.

[29] Written very much within the rule of law genre, a recent article highlights the evidential challenges in mass atrocity trials in particular (partially stemming from the demands of the second genre described below): Nancy Amoury Combs, 'Deconstructing the Epistemic Challenges to Mass Atrocity Prosecutions' [2018] 75 WLLR, 233.

[30] See generally, Gerry Simpson, *Law, War, and Crime* (Polity Press, 2007).

[31] David Luban explains: "This is the biggest challenge that Arendt poses to international criminal law. When faced with a criminal state, and 'banal' perpetrators who recognize evil only when it deviates from prevailing norms, the basis for criminal punishment must somehow be severed from *mens rea*" Luban, 'Hannah Arendt as

for retribution inasmuch as it is strictly set apart from revenge. Lacking clear illegality at the time of the crime, sentencing Eichmann may amount to revenge. But does this mean that Eichmann should not be punished?[32] Arendt followed Rogat in arguing that an international rather than a domestic tribunal could solve the conundrum. As he put it: "Perhaps the simple desire for revenge, the feeling that Eichmann must somehow be punished, should be recognized and acknowledged in some way."[33] For both authors, Israel's foundational political objectives presented a risk of tainting Eichmann's conviction. Conscious of this risk, Israeli authorities prepared a bulletproof glass box for Eichmann to sit in during court hearings.

Arendt mentions that the trial was held in *Beit Ha'am*. The Jerusalem theatre was transformed into a courthouse in anticipation of the trial. But when Arendt listened to Gideon Hausner, the Israeli prosecutor, she was convinced that the place remained a theatre, never fully managing the conversion into a courtroom. Hausner presented dramatically a theory devised by Ben-Gurion.[34] The only defense for legalism that Arendt saw in the room was the panel of judges, and particularly judge Moshe Landau. His explanations of the procedure in their native German allowed Arendt to feel at home.[35] In particularly infamous passages, Arendt referred to "the police" complaining that "It speaks only Hebrew and looks Arabic. Some downright brutal types among them" (a contemporary writer might have used the word "thugs"). And she described the hustle of people waiting to enter the court as an "oriental mob".[36] These much-commented-upon remarks are delivered as one more aspect of how the trial, set against a "colorful" background, devolved into

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a Theorist of International Criminal Law' (n8) 639 ; See also Martti Koskenniemi, 'Between Impunity and Show Trials' [2002] 6 Max Planck Yearbook of United Nations Law, 8 (explaining the problem of "banality" as a problem of *mens rea*).

[32] Arendt writes: "…[a] trial resembles a play in that both begin and end with the doer, not with the victim… In the center of the trial can only be the one who did – in this respect, he is like the hero in a play – and if he suffers, *he must suffer for what he has done, not for what he has caused others to suffer*" (italics added). , pg xx. See also Rogat: "Perhaps the simple desire for revenge, the feeling that Eichmann must somehow be punished, should be recognized and acknowledged in some way." Rogat, *The Eichmann Trial and the Rule of Law* (n1) 12.

[33] Rogat, *The Eichmann Trial and the Rule of Law* (n1) 12.

[34] His famous opening words are telling: "As I stand before you, Judges of Israel, to lead the prosecution of Adolf Eichmann, I do not stand alone. With me, in this place and in this hour, stand six million accusers." See Gideon Hausner, Justice in Jerusalem, 323 (1966).

[35] Seyla Benhabib described this as a display of "childish partisanship." See Seyla Benhabib, 'Identity, Perspective and Narrative in Hannah Arendt's Eichmann in Jerusalem' [1996], 8(2) History and Memory, 35.

[36] Yehouda Shenhav quotes this letter to Arendt's friend Karl Jaspers, and comments: "Arendt does more here than just mark the Arabness of Arab Jews. As a European Jew (of German origin), she expresses a quintessential orientalist reading of Israeli society, one that could come directly from Edward Said's *Orientalism*." Yehouda Shenhav, *The Arab Jews: A Postcolonial Reading of Nationalism, Religion, and Ethnicity* (Stanford University Press, 2006), 6.

theatre. As will become clear, however, her sneer at the Non-European backdrop of the trial becomes key to its understanding in a *third* genre of critique.

The trial was undeniably part of a political process, which aimed to consolidate society in the new Israeli state (established 1948).[37] By exposing the trial's theatrical aspect, Arendt seemed to pitch herself *against* this political project.[38] Her argument in *Eichmann in Jerusalem* is ultimately much more subtle and complex than simply the critique of a show trial. It is nevertheless worthwhile to note that this simplified version of her ideas had considerable purchase. Around the world, attempts to establish accountability for mass atrocities and core crimes remained dogged by the suspicion of amounting to show trials. As Martti Koskenniemi noted in an essay published at the heels of the Slobodan Milošević trial in 2002, international criminal law "oscillates ambivalently between the wish to punish those individually responsible for large humanitarian disasters and the danger of becoming a show trial."[39] When legally charged, former despots and suspected war criminals almost invariably reiterated a complaint for being accused by a show trial.

Arendt's insistence on rule of law values furnishes a first genre of critique based on the Eichmann trial. The rule of law genre displays faithfulness to law and its procedures. The perpetrator of mass atrocity is ideally treated as an ordinary criminal.[40] Moreover, the rule of law genre reflects a certain preference that the defendant be investigated, tried, and ultimately punished by a disinterested party, external to the events at issue. His or her crime may be considered as having enormous gravity. But there is no qualitative legal difference between mass atrocity and ordinary crime, no matter how absolutely out of the ordinary the allegations may be.

The rule of law genre of critique seeks to limit criminal law to its role of determining guilt or innocence. A criminal trial is not thought of as a forum for writing history, deliberating morality, or generating social transformation. Such varied purposes have become central to mass atrocity

[37] Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (Picador, 2000).

[38] Arendt was of course critical of Zionism in other contexts too. See e.g. The Crisis of Zionism, in Hannah Arendt, *Jewish Writings* (Random House, 2007), 329.

[39] Koskenniemi, 'Between Impunity and Show Trials' n31, 1.

[40] Arendt's willingness to justify the trial with what she thought of as no clear showing of *mens rea* is surely a significant diversion from this general observation. See n31 above.

adjudication in the second half of the 20th century. Keeping such developments in mind, Arendt's critique seems as salient and timely as ever.[41]

3. Shoshana Felman: Catharsis

Like Arendt returned to several of Rogat's key observations on the rule of law, Felman too only came second to the notion of catharsis. Before her, in *Reflections on the Deputy* (1966), literary critic Susan Sontag articulated central tenets of the genre:

> As Hannah Arendt and others have pointed out, the juridical basis of the Eichmann trial, the relevance of all the evidence presented and the legitimacy of certain procedures, are open to question on strictly legal grounds. But the truth is that the Eichmann trial not only did not, but could not have conformed to legal standards only […] The function of the trial was like that of the tragic drama: above and beyond judgment and punishment, catharsis. [42]

In a 2002 book, Felman seizes upon this passage.[43] She questions Arendt's "jurisprudentially conservative" assumptions and those common to the rule of law genre.[44] What Arendt found particularly disturbing about the trial is precisely what Felman finds "revolutionary" about it.[45]

The genre of catharsis gives different answers to the questions this essay began with: what are the unarticulated assumptions the adjudication of mass atrocity rests upon? What injustices can such prosecutions generate or perpetuate? Here, law and theatre are no longer opposites.[46] Trials seeking accountability for mass atrocity gain their meaning from their affinity with theatre (and with politics). The victims of mass atrocity become protagonists. Taking her cue from Robert Cover,

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[41] Practically speaking, this genre probably has the most to say about the importance of suspect and defendant rights in the criminal process.

[42] Susan Sontag, *Against Interpretation* (Penguin Classics, 2009), 124.

[43] Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* Felman (Harvard University Press, 2002), 162.

[44] Shoshana Felman, Theatres of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust, 1.2 Theoretical Inquiries in Law (2000): 492.

[45] Ibid.

[46] One commentator goes as far as identifying a "theatrical" history of the Eichmann trial. See Michael Bachmann, 'Theatre and the Drama of Law: A Theatrical History of the Eichmann Trial' [2010] 14 Law, Text, Culture (2010).

Felman emphasizes how the trial casts law in narrative form.[47] When mass atrocity is at issue, tragedy in particular becomes a relevant register of narration. In the tragedy-come-trial, an "encounter between law and art" adequately testifies to the "abyssal meaning of the trauma."[48] In the face of such an abyss, narrative serves the community. It helps the community define itself in terms of shared values and shared moral convictions.

Consider the testimony of Yehiel Dinoor, better known by his pen name, K- Zetnik. Felman reads the testimony as well Arendt's commentary following it, and the surrounding events: "He was called to testify because he was a crucially relevant eye witness. He had met Eichmann in Auschwitz. But he collapsed before he could narrate this factual encounter. His testimony thus amounted to a legal failure, the kind of legal failure Jackson [the American prosecutor at Nuremberg] feared."[49] Felman zeros in on this "legal failure" in Nuremberg to reinterpret what mass atrocity trials are all about.

The death camp survivor who became a Jewish-Israeli author dedicated much of his literary career to his experience during the Shoah. Arendt, for her own part, thinks of his testimony as a particularly vulgar part of the show. "The narrative of his collapse becomes, in Arendt's hands, not an emotional account of human testimonial pathos but a didactic tale that illustrates ironically what accidents can happen when a witness is, quite paradoxically, too eager to appear."[50] K-Zetnik's testimony was supposedly irrelevant for establishing the guilt of this individual defendant. It contaminated rule of law values, which the trial is supposed to embody. Dinoor famously fainted on the witness stand. For Arendt, he serves as a caricature of Israel's dizzy conflation between law and politics. He embodies a visceral and abject emotional reality which Arendt is not happy to admit into the hall of justice. Arendt's passage, which Felman quotes, is remarkably sarcastic:

> […] even Mr. Hausner felt that something had to be done about this "testimony," and very timidly, very politely interrupted: "Could I perhaps put a few questions to you if you will consent?" Whereupon the presiding judge saw his chance as well: "Mr. Dinoor, please,

[47] Robert Cover, 'The Supreme Court, 1982 Term – Foreward: Nomos and Narrative' [1983] 97(4) HLR, 4.

[48] Felman, *The Juridical Unconscious* (n40), 165.

[49] Ibid, 135.

[50] Ibid, 142.

> please listen to Mr. Hausner and to me." In response, the disappointed witness, probably deeply wounded, fainted and answered no more questions.[51]

Felman's take is different. Rather than dismissing such performative aspects of the trial, she thinks of them as revealing an important truth about law. While Arendt's irony is rooted in her legally "positivistic"[52] position, Dinoor introduces into the courtroom the perspective of radically oppressed victims. Such victims' language, Felman says, has been destroyed, and it is in the risk of being pathologized when it comes before a court of law: "in the oppressor's language, the abused will sound crazy, even to himself, if he describes himself as abused."[53] It is thus the role of the Eichmann trial to invent a "new language", one in which even the collapse of a witness can bare meaning:

> To enable such writing through which the mute bearers of traumatizing destiny become the speaking subjects of 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 the *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. […] This historically unprecedented revolution in the victim which was operated in and by the Eichmann trial is, I would suggest, the trial's major contribution not only to Jews, but to history, to law, to culture – to humanity at large.[54]

In Nuremburg, documentary and visual evidence was infamously preferred over personal testimony and the human voice. The decision aimed to ensure the objectivity of those historical trials.[55] But because the Nuremberg tribunals did not give an opportunity for the victims to tell their stories, they could not ultimately provide a forum for justice in the full meaning of the term. Affective responses and the human body are, to the contrary, central to Felman's feminist thinking.[56]

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[51] Arendt, *Eichmann in Jerusalem* (n3), 224.

[52] Felman, *The Juridical Unconscious* (n40), 146.

[53] Ibid, 125.

[54] Ibid, 133.

[55] See Felman's quotation of Justice Robert Jackson, Ibid, 131-132.

[56] See e.g. Shoshana Felman, *What Does a Woman Want?: Reading and Sexual Difference* (The Johns Hopkins University Press, 1993).

Felman's trial is not about revenge, which implies a private urge to see a responsible party suffer and thus "pay the price" for its wrongdoing. It nonetheless should be charged with emotional content and with the subjective experience of the victim. She acknowledges that a difference always remains between art and law. As Cover famously wrote, law "takes place in field of pain and death."[57] Felman explains: "…a work of art cannot sentence to death. A trial, unlike art, is grounded in the sanctioned legal violence it has the power (and sometimes the duty) to enact."[58] Yet ultimately Felman gives surprisingly little attention to the death penalty in her account of *Eichmann*. It is almost as if she mentions legal violence just to shrug it away and focus on what more intensely interests her: the truth revealed in the victim's testimony. A certain diminution of the violence involved in criminal enforcement is characteristic of the entire genre of *catharsis*. The genre moves from a focus on the defendant to an increased focus on victims (and their societies). Arendt's observation that the trial was a state-building project (related to its sovereign violence) is also conveniently occluded. The label of *catharsis* is intended to emphasize how the collective moral character of the audience is revealed and vindicated. The cogency of the community and a set of ethical convictions are reaffirmed.

One must understand the elevation of trauma to *catharsis* against the backdrop of rejection and humiliation that survivors of the holocaust had previously experienced.[59] Built around the "negation of diaspora,"[60] Israeli society in its early years fashioned itself around the work of farmers and warriors. In highlighting the dignity of victims, the second genre of *catharsis* rejects such an Israeli identity to include victims and place them at the center of society. In doing so, it shuns any exclusive or formalistic focus on the rule of law. At the heart of its concerns are the humans law is supposed to serve, their perceptions, emotions, and sense of self-worth.[61] The trial and its emissaries are granted with a kind of constituent power, inasmuch as their testimonies help build a new social contract. At the same time, in Felman's work, there is no direct engagement with the question who may be excluded from this victim-centered constitutionalism or pay its price.

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[57] Robert M. Cover, 'Violence and the Word' [1986] 95 YLJ, 1601.

[58] Felman, *The Juridical Unconscious* (n40), 152.

[59] Segev, *The Seventh Million* (n35).

[60] See e.g. Amnon Raz-Karkozkin, 'Diaspora in Sovereignty: Towards a Criticism of "The Negation of Diaspora" in Israeli Culture' [1993] 4 Teoria Uvikoret, 23.

[61] See recently, Marie Soueid, Ann Marie Willhoite, Anne E. Sovick, 'The Survivor-Centered Approach to Transitional Justice: Why a Trauma-Informed Handling of Witness Testimony is A Necessary Component' [2017] 50 The George Washington International Law Review 125.

Before moving on to the third genre -- the one I identify with Nagar -- note that Felman connects with a much broader orientation towards mass atrocity trials, dominant in the intellectual history of the discipline. This orientation is reflected in three of the main conceptual developments in the field during the previous few decades:

(1) The rise of victim rights. Closely related to the emergence of feminist approaches to international law, this trend has resulted in the expansion of procedural rights for victims during several stages of the international criminal process. Felman's theory of narrative, when generalized, can be understood both as a reflection and an articulation of this important development. [62]

(2) Transitional justice. The field of transitional justice conceptualizes the ways in which trials and other legal and quasi-legal procedures help a society heal after periods of conflict or oppression, and establish its new identity. A writer like Ruti Tietel, writing within the international legal discipline, can therefore also be thought of as a central contributor to this second genre of critique.[63]

(3) Related to transitional justice, international criminal law is often conceived as having the role of creating a record of history. Following Walter Benjamin, Felman goes so far as saying that the Eichmann allowed the presentation of the standpoint of the history of the oppressed. This is a big claim that will have to be examined below against other understandings of oppression and social harm.[64]

The genre of catharsis, in Felman and other writers, brings together these three different strands of literature. To be sure, writers within this genre in legal academia do not typically write about *catharsis*, and prefer to choose vocabularies from within the discipline. They engage more directly

[62] See e.g. M. Cherif Bassiouni, 'International Recognition of Victims' Rights' [2006] 6 Human Rights Law Review 203; George P. Fletcher, 'Justice and Fairness in the Protection of Crime Victims' [2005] Lewis & Clark L. Rev. 547; Wayne A. Logan, 'Confronting Evil: Victims' Rights in an Age of Terror [2008] Georgetown Law Journal 721 (particularly the discussion of the relevance of *Eichmann* in 722-726); for a critical appraisal see Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood' [2013] 76 Law and Contemporary Problems 235.

[63] See e.g.: Martha Minow, BetweenVengance and Forgiveness: Facing History after Genocide and Mass Violence (1998); Steven R. Ratner and Jason S. Abrams, Accountability for Human Rights Atrocities in International Law (1997); Ruti G. Teitel, Transitional Justice (2000).

[64] See e.g. Mark Osiel, Mass Atrocity, Collective Memory, and the Law (Transaction Publishers, 1999); Tzvetan Todorov, 'Memory as Remedy for Evil' [2009] 3(1) Journal of International Criminal Justice 447.

with discourses centered on the rule of law.[65] Felman's account is nonetheless a powerful distillation of what is at stake in this large body of literature. And it is a compelling critique of Arendt, whose mocking gestures toward both the prosecutor and the victims may indeed reveal an artificial insistence on a distinction between law and politics. As will become clear, both Arendt's distinction between the two, and Felman's conception of their affinity, may also generate injustice.

4. Netalie Braun: Sacrifice

The third perspective can only tentatively be called a "genre". Its basic tenants have, as far as I know, so far not been articulated in scholarship. Yet they are incredibly important to grasp. This genre of critique casts a shadow both on Arendt and the notion of the rule of law, and on Felman's emphasis on *catharsis*. Just as Felman developed her perspective through a critique of Arendt, this genre too is implicitly critical not only toward mass atrocity trials: it amounts to a critique of their critique. Shalom Nagar, when listened to carefully, leads towards a cautionary theory on mass atrocity trials, warning lawyers involved in such trials of the expanding circles of harm they may generate.

Nagar is a Kosher butcher living in the Israeli city Holon. Before becoming a butcher, he held another job as a prison guard for the Israeli prison service. In this role, back in the early 1960s, he was given one assignment that ended up changing the course of his life. After the Israeli secret service kidnapped Eichmann from Argentina and placed him in pre-trial detention, Nagar was tasked with guarding his cell. When the trial was over and Eichmann received the death sentence by hanging, Nagar was tasked with carrying the sentence out. His following transformation from hangman to butcher informs this third critical genre coming out of the Eichmann trial. Like the rule of law genre, this genre too may help conceptualize the price of a conflation between legal accountability and collective foundation. Like the genre of catharsis, this genre too is closely intertwined with the psychological experience of trauma. As these two detrimental consequences of the mass atrocity trial will be unpacked, they will come to appear as a kind of *sacrifice*.

My reading of Nagar's trajectory is informed by *The Hangman* (2010), directed by Netalie Braun. The film tells the story of Nagar's life, and is built around several poignant and at times funny

[65] See Leora Bilsky's distinction between a "political trial" and a "show trial" in Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (University of Michigan Press, 2004).

interviews with him.[66] The camera follows Nagar attentively as he works in his shed, surrounded by stray cats; as he spends time with his wife in their tiny apartment; and as he accompanies his son, who is in his thirties and terminally ill. Nagar's slightly high-pitched tone and his child-like laughter, from behind his beard, are the voiceover gently leading between his elderly friends and clients, and historical material from the Eichmann trial.

Nagar was not always as religious as he is in his present practice as a Kosher butcher. As he explains very straightforwardly, his turn to religion and to his current line of work, are a direct result of the trauma of having to perform Eichmann's execution. Since he came back home from work one day, stained with Eichmann's blood, he had a hard time finding solace. Only religious practices such as keeping the Sabbath could help. A very important aspect of Nagar's story is his personal ethnic background as a Yemenite Jewish Israeli. Nagar's non-European identity is a key to understanding why he became so badly injured. He is a member of a group that the major thinkers of both previous genres either regarded in condescension (Arendt) or ignored (Felman); Arendt may have noticed him delivering Eichmann in or out of his glass box when she referred to the police that "speaks only Hebrew and looks Arabic."

During the 1960s, Jewish Israeli society was composed mainly of immigrants, who had come to the new state from many different parts of the world.[67] Eichmann's victims, Felman's victims-heroes, were *Ashkenazim* -- immigrants from Europe. With exceptions concerning Jews from North Africa, only European Jews had suffered Nazi persecution.[68] Yet in Israel, European Jews who had arrived since the Ottoman period had established dominance over other groups of Jews and over Arab Palestinians.[69] They largely composed the upper social-economic class, and through

[66] Compare Nagar's humor with Arendt's often-funny irony, which in both cases has a profound relationship with the practice of critique they choose. As Lyndsey Stonebridge writes: "if irony turns out to be a kind of kernel of the historical and remembering self and not merely a protective shell, it is perhaps because the ironic voice positions the subject in a distinctive relation to historical injury – not only as suffering, but as a political, moral and, crucially in Arendt's later writing on judgement, *thinking* witness." Lyndsey Stonebridge, 'Hannah Arendt's Testimony: Judging in a Lawless World' [2009] New Formations 79.

[67] "From its proclamation in 1948 to the end of 1964, Israel absorbed 1,213,555 immigrants, of whom 648,160 (53%) were from Muslim countries, divided between 294,722 who came from Asia and 353,438 from North Africa." See Sammy Smooha, 'The Mass Immigrations to Israel: A Comparison of the Failure of the Mizrahi Immigrants of the 1950s with the success of the Russian Immigrants of the 1990s' [2008] 27(1) The Journal of Israeli History 3.

[68] For a recent novelistic account of the genocide of North African Jews, see Yossi Sucarry, Benghazi – Bergen-Belsen (CreateSpace Independent Publishing Platform, 2016)

[69] Smooha (2008): 8

institutionalized discrimination,[70] came to own a disproportionate part of the most valuable land in Israel's small territory.[71] They built a cultural identity in which Arabic-speaking Jewish traditions were rejected or granted only secondary status.[72] And they established disproportionate presence in military, political, professional, and academic elites.[73] Nagar does not belong to this group. He emigrated from Yemen, and following the Eichmann affair became acutely aware of his own subordination as a *Mizrahi*. It was precisely because of this *Mizrahi* background, that Nagar was chosen for the dubious task of executing Eichmann. But this outcome is not simply a result of discrimination. A more interesting dynamic is at play, intimately tied with the conditions that the "rule of law" and "catharsis" genres expect a mass atrocity trial to fulfill.

"Since I'm Yemenite, I didn't know who Eichmann was," explains Nagar. "Only later, when I guarded him, I found out who Eichmann was."[74] In one of the most fascinating conversations in the film, Nagar describes the process of his selection as hangman. He recounts a conversation with his commander at the prison service, Mr. Merhavi. The latter explained that if indeed Eichmann would be convicted, and receive the death penalty, one of them would have to execute the high profile prisoner. When Merhavi asked members of the unit: "who would like to be assigned the task?" The latter proved extraordinarily coveted. As Nagar recalls, all members of the unit expressed enthusiasm and immediately volunteered. The only one who had no desire to carry out the job was himself. But following a lottery among the Mizrahi prison guards, Nagar was chosen.[75]

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[70] On the complexities of Mizrahi discrimination in Israeli law, see Yifat Bitton, 'Mizrahis and Law: Absence and Existence' [2011] 51 Mishpatim 455 (in Hebrew); Lihi Yona, 'The Color of Dignity: Examining Israeli Dignity Through Critical Race Theory' (on file with the author).

[71] See Oren Yiftachel, Nation-Building and the Division of Space: Ashkenazi Domination in the Israeli "ethnocracy" 4(3) Nationalism and Ethnic Politics (1998); Oren Yiftachel, Social Control, Urban Planning and Ethno-Class Relationsh: Mizrahi Jews in Israel's 'Development Towns', 24(2) International Journal of Urban and Regional Research (2000); Alexandre (Sandy) Kedar and Oren Yiftachel, 'Land Regime and Social Relations in Israel' in Hernando De Soto and Francis Cheneval (eds) *Realizing Property Rights* (Frank / Wynkin de Worde, 2006), 127.

[72] Smooha (2008): 8

[73] Smooha (2008): 8

[74] *The Hangman*, -53:24.

[75] Interestingly, in a conversation with film director Braun, she expressed doubt on whether this story was in fact accurate. She surmises that the story about the lottery was a lie that Nagar heard, when in fact Merhavi had chosen him for a task that nobody wanted to carry out, and he was naïve enough to be tricked into doing. It appears this is an alternative account Braun heard from Nagar's friends and others involved in the execution. The film's narrative, which Nagar believes, is nevertheless relevant here.

Why this utter disregard to Nagar's personal preference, especially after going through the trouble of finding it out? Underlying the decision there was a certain understanding of the relationship between punishment and criminal justice. From Eichmann's arrival, Ashkenazis would not be let in to his cell. Like the bulletproof glass, Nagar was chosen due the imperative of keeping criminal punishment and revenge strictly distinct. Consider one philosopher's observation: "[r]evenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done."[76] Prison authorities apparently suspected that if a European Jew would serve as the guard for Eichmann, there would be a risk that the trial would not reach its conclusion; it could ultimately become an act of revenge. An *Ashkenazi* guard might not be able to wait patiently until the legal procedure reached its conclusion, and instead assassinate Eichmann in his cell; or possibly, he would allow someone else to enter the cell and carry out the task. That, of course, would be a national calamity. It would destroy the trial's appearance as an authentic legal process and a "world trial" ("*mishpat olami*"- a phrase Nagar reiterates). And it would eliminate Israel's high-stakes political claim, directed both domestically and internationally.

At the same time, we may also assume that an assassination before the trial concludes would destroy the theatrical role of the trial, as an opportunity for collective *catharsis.* Could the victims be vindicated if the witnesses would be heard, and then the defendant assassinated?[77] Having a *Mizrahi* prison guard do the job was essential from the perspectives of both genres characterized above. Note, however, that this practical condition – the availability of someone like Nagar - is basically taken for granted in *both* genres. The question how the violence of law is wielded, and who must pay the price for carrying it out, is left unacknowledged.

Israeli prison authorities decided: assigning guardianship to Mizrahis (the majority of the prison guards), who would have no family connections to the holocaust, would greatly diminish the risk of revenge. As the film suggests, it was precisely *because* Nagar didn't want the task of executing Eichmann, that he was perceived as particularly fit for it. This would help achieve a condition of justice that remains firm both in Arendt's and in Felman's perspectives: a clean and strict

[76] Robert Nozick, *Philosophical Explanations* (Harvard University Press, 1981), 366. Compare with an imperative in post-1967 Israeli culture to "weep" upon "shooting", implying a need to shun trigger-happiness in the military context. See e.g. Ian Black, 'Shooting and Weeping: the Unending Legacy of the Six Day War' 44(3) Jewish Quarterly 5-7.

[77] There is a deep interdependence between the two genres, "rule of law" and "catharsis", as a minimal level of rule-of-law is often necessary for a felicitous poetics of founding. Indeed, a number of authors can be categorized as combining aspects of these two "genres" as mutually dependent.

separation between punishment and revenge (even after the conviction). But, to return to the philosophical observation above: what is the price of assuming that someone would lack "emotional tone" in executing another?[78]

In practice, such a separation between punishment and revenge demands a decision within a particular social context. It implicates questions of material rather than formal equality. Here, separating between punishment and revenge rests upon existing ethnic and economic inequality. The "dirty work" of execution is imposed on a relatively disempowered member of the society; and it's given with an implicit acknowledgement: you are not truly a member of our community; your membership rests on your biographic detachment from *our* founding trauma.[79]

For Ben-Gurion, a chief target of Arendt's critique, the Eichmann trial was much about "educating the masses". As Rogat explains, he meant "To restore a vital part of their past to the younger generation and to the Asian and African Jews, who constitute about one half of the population of Israel, was therefore a very important objective of the trial."[80] Clearly, through a Zionist understanding of the holocaust, *Mizrahim* were offered, and often times actively shaped, the new Israeli citizenship.[81] But if we follow Felman, this educating mission did not mean Mizrahi Jews would also be included in *catharsis*. They were not part of the downtrodden and heroic group of victims who suffered the unspeakable trauma and therefore deserved to be purged.

Nagar recounts how Eichmann and he spent long days together throughout pretrial detention and the entire trial. Nagar humorously recalls how he discovered that even a Nazi has his human needs and must urinate and defecate. He accompanied him to the toilet, shackled him and unshackled him, so as not to let anything happen to the precious prisoner while he's busy there. Nagar further laughs about how he was impressed by the way that Eichmann kept himself remarkably clean ("they are evil!"). And Eichmann would often thank Nagar for such assistance: "Gracias" was the

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[78] Note that this reverses otherwise socially accepted stereotypes, according to which *Mizrahim* are "hot headed" and *Ashkenazim* are rational and cool.

[79] As Mehager writes following Arendt: "The trajectory that was drawn for *Mizrahi* youth as the 'dirty workers' of the Zionist regime did not only direct them towards inferior economic class, and towards life in Israel's geographic and cultural periphery; not less importantly, it intentionally designed a morally inferior class." Tom Mehager and Mati Milstein (photos), 'Maraa Shkhora' 2 September 2015, Ha'oketz (blog post), available at http://www.haokets.org/2015/09/02/%D7%9E%D7%A8%D7%90%D7%94-%D7%A9%D7%97%D7%95%D7%A8%D7%94/ (author's translation from Hebrew). On "our" founding trauma compare with Hannah Yablonka, *Harchek Me-Hamisla: Hamizrahim Ve-Hashoah* (Ben-Gurion University Press, 2008).

[80] Rogat, *The Eichmann Trial and the Rule of Law* (n1), 18.

[81] Yochai Oppenheimer, 'The Holocaust: A Mizrahi Perspective' [2010] 51 Hebrew Studies 303.

closest he could get to Nagar's preferred Yemenite Arabic. The two got along, and generally enjoyed each other's company.

Nagar would also deliver Eichmann's food to his cell, and in order to prevent Eichmann's poisoning, Merhavi ordered Nagar to eat some of it first.[82] Once, Nagar asked Merhavi why should he eat Eichmann's food before Eichmann does. Nagar paraphrases Merhavi's reply: "if we lose one Yemenite, it's no great loss… [laughter] A lot of Yemenites died, so another will die. But with Eichmann it was a problem because it was a world trial."[83] The need to try the perpetrator of atrocity – conceived of in terms of the rule of law or in terms of *catharsis* – is elevated above contemporary human life.

After the conviction, Nagar held Eichmann with the noose around his neck. He describes his pale complexion and bulging eyes and tongue. Nagar relates that Eichmann probably tried to say something while he was hung. Arendt quoted his celebratory words about Germany, Austria, and Argentina. Nagar, for his own part, remembers things a little differently. Perhaps Eichmann planned to curse, or something similar, he guesses. When his body fell and lost its life, part of the air he had in his lungs was still trapped there. Nagar obeyed Merhavi's order and moved the fresh corpse. The air was released from the lungs, emitting a bizarre babbling sound. This voice was not produced by a living body or a willing person, but was simply a mechanical discharge. While Nagar tells the story to a friend with a smile, it is clear this voice haunts him. "There goes another Yemenite," he chuckles.[84]

The visceral description shines a different light on Felman's emphasis on narrative. Felman's centering of the literary categories of *catharsis* ends up bifurcating the enactment of the law from its fundamental relationship to violence. For Felman, narrative is the ultimate cure against trauma; the trial is about telling stories. As I have argued, the emphasis on narration results in a distraction not only from the accused, but also from the coercive mechanisms of enforcement.[85] Nagar's story brings law back to its fundamental relationship with violence.[86]

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[82] Netalie Braun, *The Hangman*, -50:17

[83] Ibid., -49:52

[84] Ibid., -37:57.

[85] Signaling what is a remarkable different between Felman and an author she relies on, Robert Cover.

[86]

The execution of Eichmann profoundly traumatized Nagar. In the film he colloquially describes the symptoms of Post Traumatic Stress Disorder – an ongoing sense of "fear" that didn't leave him ever since, as well as recurring nightmares and sleeplessness.[87] To put it simply, the construction of a narrative that helped in healing Ashkenazi victims of the holocaust ended up transferring the trauma to this Mizrahi executioner. The ironic outcome became possible only because Nagar was deemed unrelated to the original trauma – a "disinterested" third party; such a third party is a necessary condition for a trial in the rule of law genre, and to some extent is a requirement of *catharsis* as well. From Nagar's own perspective, positioning him as a third party external to the trauma was a measure of de-humanization.[88]

The trauma of having to carry out Eichmann's sentence never leaves Nagar. After the mission is accomplished, he sinks into depression. It is from here that his turn to religion begins. Only by following tradition and faith can he reconstruct his life. The film returns time and time again to Nagar's words of blessing and to the craft involved in slaughtering lambs and chicken for Kosher consumption. This constant focus on the work of slaughter charges it with multiple layers of meaning. A metaphoric relationship is implied with the traumatic act of executing the convicted Nazi, which is constantly reenacted. Nagar described how he had come home filthy with Eichmann's blood. Now he chooses to spend his days in a blooded apron. And of course, there is an ironic allusion to the atrocity that Eichmann himself had perpetrated. In the Zionist culture of the time, Holocaust victims were looked down upon for having gone "like lambs to the slaughter."[89]

But why is Nagar so traumatized? He is determined that the execution was in fact the right thing to do.[90] Still, one might think that at the center of Nagar's trauma is the moral relationship between

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[87] Netalie Braun, *The Hangman*, -36:21. For the definition of PTSD, see the DSM-5: https://www.ptsd.va.gov/professional/ptsd-overview/dsm5_criteria_ptsd.asp

[88] Hannah Arendt is often criticized as relegating labor and the human body, and with them women and slaves, to inferior and non-political roles. For a critique of Arendt, see e.g. Jacques Rancière, 'Who is the Subject of the Rights of Man?' [2004] 103 (2/3) The South Atlantic Quarterly 297. This raises the question whether there is any relevant difference between Nagar and other laborers whose work is necessary for criminal justice but who are not acknowledged as agents of such justice (e.g. the cleaning person). The present perspective, however, focuses on those who are required to carry out the violence of criminal justice.

[89] Segev, *The Seventh Million* (n35), 110.

[90] Nagar explains this by reference to the Biblical imperative to annihilate the nation of Amalek (see e.g. Deutronomy 25:17-19). The rule has often been regarded as controversial, as it seems to impose an obligation to commit genocide. The association of the Nazis with Amalek is not unique to Nagar, it reflects a meta-historical understanding of persecution against Jews starting from ancient times. In a way, this reflects an internalization of the understanding of the holocaust that Ben-Gurion had advanced, transferred from the realm of political theology to theology proper.

himself and the individual, Adolf Eichmann. This is a relationship between two men who experienced intimate proximity between their bodies, in which one ends up taking the life of another (with the requirement that this be punishment under law). It is entirely possible that having to kill another person in the name of the law at times ends up mentally scarring the executioner.[91] This may remain true even if the latter believes that the execution was warranted.[92] Like in Felman's work, somatic experience is emphasized; but here it promises no rise from the "abyss."

Another aspect of the violence that Nagar experienced is the kind of social rejection that led him to carry out the dubious task. It is because of a hierarchical relationship between himself and the *Ashkenazi* guards that this unwelcome task ultimately falls in his hands. He explains that his colleagues at the prison knew full well that he might be "sacrificed" by having to perform this act. But they could not have cared less about such a result, at least as far as he's concerned. After all, he was "just a Yemenite." As a *Mizrahi* Jew, he was not granted the status of a full member of the group this trial was designed for. His own life and his own mental integrity could be wasted for the sake of achieving the kind of *catharsis* that Felman describes.

5. Outer Circles of Harm

[91] Note that according to a recent study conducted in the US, rates of Post-Traumatic Stress Disorder among prison guards may be equal or higher of those among soldiers coming back from combat (the occupation of Iraq and Afghanistan). According to the study female and black prison guards are at relatively higher risk of PTSD. See Lois James and Natalie Todak, 'Prison Employment and Post-Traumatic Stress Disorder: Risk and Protective Factors' [2018] 8(1) American Journal of Industrial Medicine, 1. An earlier study found that rates of PTSD among prison guards typically double those among military personnel: Caterina G. Spinaris, Michael D. Denhof, and Julie A. Kellaway, 'Posttraumatic Stress Disorder in United States Corrections Professionals: Prevalence and Impact on Health and Functioning [2012] NCJRS, available at https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=264389; Jason Leopold, 'Guantanamo's untold Trauma' The Intercept October 25, 2016, available at https://news.vice.com/en_us/article/9kn9p3/guantanamo-guards-have-high-rates-of-post-traumatic-stress-exclusive-documents-show Compare with Michael J. Osofsky, Albert Bandura, and Philip G. Zimbardo, 'The Role of Moral Disengagement in the Execution Process' [2005] 29 Law and Human Behavior.

[92] As one NGO explains: "Because death row guards can develop empathy towards prisoners, a separate team often conducts execution. Giving small roles to different guards (such as walking the prisoner to the execution spot or putting a hood over the prisoner's head) aims to reduce the emotionally damaging effects of executions […] The emphasis on working 'efficiently' and 'professionally' also aims to reduce feelings of culpability, with execution teams trained to focus not on 'the meaning of their activity, but on performing the sub-functions proficiently.'" Prison Reform International, 'Prison Guards and the Death Penalty' [2015] briefing paper available at https://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prison-guards-briefing-paper.pdf.

In his essay *Between Impunity and Show Trials*, Koskeniemmi offers insight on what is at stake.[93] As he explains, in mass atrocity trials there's almost always a controversy on an overarching historical narrative in which the relevant events take place. While the prosecution interprets such events to frame them as crimes, the defendant will likely interpret them as legitimate policies of war, viewing prosecuting authorities instead as criminal. In the Eichmann trial, a related disagreement on what constitutes law became visible when the defendant claimed he was acting legally under the law of that applied in the Third Reich.

For Koskeniemmi, in order to truly hear a defendant's testimony, the court is obliged to consider such an alternative interpretation of history. This often involves casting the tribunal as siding with the aggressor. If it refuses to hear such objections to its own authority, the tribunal will lose its status as truly representing the rule of law. Defendants in mass atrocity trials often find themselves before tribunals that cannot assess their responsibility in terms they can accept. Shunned out the tribunal's discourse, Koskenniemmi explains, defendants enter the circle of those who are, in fact, being harmed by the trial.[94] This is the position philosopher Jean François Lyotard first developed, calling it *Le Différend.* Remember that Felman employs a similar theoretical apparatus on a different "actor" in the trial: a history of oppression destroyed the victims' language, and they are the party made to appear before the tribunal at a loss for words. Through her portrait of Nagar, Braun captures a related insight, but shifts its relative location yet again. During the 1960s, Nagar's perspective too could not be heard before the tribunal, or anywhere in the proceedings before the Jerusalem court.

Indeed, if there is a kind of harm inflicted by becoming voiceless before the tribunal, Nagar the executioner is far more radically harmed than the defendant (Eichmann). Within the rule of law genre, ensuring that the defendant is granted an opportunity to speak is a necessary condition for an acceptable trial. This is not something the genre of catharsis takes issue with or denies.[95] No (legalist) conception of criminal justice exists without the right to present a defense before the tribunal. The tribunal, in turn, must at the very least make an attempt to hear the perspective the defendant conveys and consider reality from their standpoint. Such thinking from the point of view

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[93] Koskenniemi, 'Between Impunity and Show Trials' (n31).

[94] A discussion of perpetrator trauma is also ultimately relevant to expanding the "circles of harm": Saira Mohamed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity [2015] 115 CLR, 1157; and her discussion of An Act of Killing (2012), Directed by Joshua Oppenheimer.

[95] The two first genres described above are ultimately interlinked and often analytically interdependent.

of the defendant may occur during the trial itself or in the sentencing phase, and ideally will be a part of both. Within the catharsis genre, Felman articulates the role of the court as *inventing a new language for the victim*.[96] No similar aspiration to empower Nagar or the class he represents can be identified.

The agents tasked with enforcing the law are in a very different position when compared to the defendants' and the victims' (recognized) muteness. As Penal Reform International has noted, prison guards' work "often goes unrecognised despite the vital role of prison staff in the achievement of the aims of criminal justice, notably the rehabilitation of offenders, as well as in the meeting of prison standards."[97] Whether in the investigation stage, pretrial detention stage, during the trial, or finally when implementing the sentence, their wellbeing is taken for granted.[98] Within a rule of law framework, the hangman's perspective is basically external to the process of criminal justice. The authorities implementing the punishment and allowing for it to proceed are understood in instrumental terms. They are there to carry out a task but are not imagined as having a claim upon the proceedings – even if the proceedings are expected to help constitute the community. One might even argue that the entire tradition of criminal law is oblivious and blind about its consequences towards the class of "hangmen" it must necessarily rely upon. This is particularly remarkable against the backdrop of a history of criminal law, shaped by the need to protect judges from the sin of meting out unwarranted punishment.[99] Braun shows us how not only defendants, but an entire class of enforcement agents, can also be rendered inaudible by the criminal procedure. For all his disarming charm and profound sensitivity, Nagar does not represent a singular case. He rather reveals structural class and race dynamics which are ordinarily left un-problematized in the theory of punishment.[100] Such dynamics are outside the circle of potential harms we usually imagine as unwanted potential consequences of criminal adjudication.

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[96] Felman, *The Juridical Unconcious* (nxx), 133.

[97] Penal Reform International, *Prison Staff: Overworked and Underpaid?* (pull-out section) 2 available at https://www.penalreform.org/wp-content/uploads/2016/05/Global_prison_trends_report_2016.pdf

[98] This is reflected in low salaries and high representation from minority groups, ibid, 3.

[99] James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (Yale University Press, reprint edition, 2016).

[100] See also Shubhangi Agarwalla, 'The Hidden Cost of the Death Penalty in India' [2018] The Oxford Human Rights Hub (blog post, 2 March 2018), available at http://ohrh.law.ox.ac.uk/the-hidden-cost-of-death-penalty-in-india/

In the rule of law genre, critical of show trials, mass atrocity adjudication is constantly suspected of devolving into politics. The characteristic concern is that punishment and revenge become indistinguishable. Nagar's story demonstrates a completely different insight, worth reiterating: the social construction of a distinction between punishment and revenge may itself become a form of oppression. It was precisely in his attempt to uphold such a distinction, that Merhavi chose Nagar. This choice that rested upon the social and economic subordination of *Mizrahi* Jews in general: a class that is not part of the group that is expected to experience *catharsis*. The linguistic analysis Koskenniemmi and Felman offer following Lyotard identifies the potential harms of criminal adjudication. But it does not suffice to reveal such harms. One must return to an account of legality's violence (as distinct from its words). And one needs to insert the social, economic, and historical context in which the role of wielding legality's violence is allocated among different social strata.

In their insistence upon a strict separation between punishment and revenge, rule of law orientations ignore the prices that punishment may inflict upon members of disempowered classes and ethnic groups. The "sacrificed" hangman is exposed to moral harm because he or she belongs to a group that suffers from structural discrimination. Yet this harm comes to appear as part of an attempt to ensure a fair and objective process; it becomes invisible because it is thought of as a necessity of the legitimate rule-of-law and political goals of the trial. Just when Commander Merhavi was most sensitive to the concern that the Eichmann case will end up devolving into revenge, he inflicted trauma upon the Hangman, Nagar.

Progressive and left-leaning critics of criminal law have often emphasized that subordinated classes and ethnic groups are those who end up finding themselves as defendants. In mass atrocity trials, the analysis may be different. Here, perpetrators are not as often members of a disempowered class or race (at least not within their own political communities). Whether we are thinking of Post WWII trials, or more contemporary trials such as those of the *ad-hoc* tribunals or the International Criminal Court, they more often come from positions of power in the ranks of a defeated opponent. Disempowered members are those who end up implementing law's violence – police officers, prison guards, and other "hired guns." Such people perform their tasks because they need the monthly salary. A genre of sacrifice focuses on the injustices that mass atrocity trials disseminate in their attempts to rise above such "banal" concerns. These injustices are generated as byproducts of attempts to construct seemingly objective standpoints from which not only individual

defendants, but entire histories, can be judged. They may be the starkest when the trial amounts to an attempt to constitute a political community (acknowledged or not).

Nagar figures as a kind of scapegoat: in order for *Ashkenazi* victims of the Shoah to experience catharsis, trauma has to be transferred onto a third "disinterested" party. Collective catharsis does not emerge "for free." By asking who pays the price of *the rule of law* – and who pays the price of *catharsis* -- *sacrifice* becomes an important contemporary genre of critique. The accused no longer stands, exclusively, at the center of the analysis, as Arendt insists within a rule of law framework. The victim too loses their ambiguously sovereign position, as an underdog-hero, which Felman thoroughly theorizes.

This genre emphasizes the victimization of individuals who must carry out the violence of law, but who are left unacknowledged as willing and thinking agents of the law (as judges and prosecutors are). Theirs is alienated legal labor. Considering the Eichmann trial through the lens of sacrifice, one comes to see that Israeli society is galaxies away from a cathartic community that has overcome its traumatic past. Trauma continues and is shifted among members of the society. It becomes an unwanted weight, the tracking of which illustrates the internal and subterranean tensions and conflicts that society rests upon. Far from any cleansing understanding of history, we are left with history as a site of struggle, in which the question whose trauma is recognized as such is constantly up for wrestling.

Given this fundamental orientation toward violence and conflict, one may ask where the Palestinians are in this story. Arguably, the dispossession and oppression of Palestinians in in Israel and the Occupied Palestinian Territories represents the starkest price any group ever paid for Jewish victimization during the Shoah. Perhaps surprisingly, Nagar's story allows a tiny glimpse of this issue too, further expanding a theoretical understanding of the circles of potential harms of criminal adjudication.[101] In one of his interviews, Nagar describes his experiences when he was positioned as a prison guard in a facility in the West Bank city of Hebron. This was early after the occupation of the west bank began in 1967. Israeli authorities often inflicted physical violence on Palestinian detainees, during interrogation and otherwise.[102] Nagar shares his memory of having

[101] Compare this expansion to Kendall and Nouwen's "*narrowing* of the pyramid" in Kendall and Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood'(nxx), 241-252.

[102] Itamar Mann and Omer Shatz, 'The Necessity Procedure: Laws of Torture in Israel and Beyond', *1987-2009* [2010] 6 Unbound: Harvard Journal of the Legal Left, 59.

heard the Palestinian detainees cry and shout in pain when they were beaten. These nightly voices become yet another aspect of the service that mentally scarred him.[103] Yet he made a real attempt to stop the beatings and treat the Palestinians humanely. One main way of doing that, for him, was sharing jokes in the facility's yard.

While not mentioned in the film, the reference to detainee abuse is historically connected to Judge Landau. Remember that in Arendt's reporting from the trial, Judge Landau was described as a beacon of rule of law values. Years later, the Eichmann case became one of two important moments in Israeli history in which Landau's name was central. The other was the 1987 Landau Commission Report, which approved what the committee euphemistically called "moderate physical pressure" on detainees as a measure of interrogation.[104] The committee is largely understood to have legalized torture, at least until the 1994 Israeli Supreme Court ruling that invalidated its findings. Symbolically, Nagar encountered Landau's legacy twice, not once, in his lifetime. Once was when he carried out the death sentence that Landau decided upon. Another was when he heard the sounds of detainees being beat – a practice Landau later rubber stamped. Both instances contributed to his traumatization, and left the reputation the German-Jewish judge largely intact.

Lastly, the recurring image of chicken, sheep, and goats being slaughtered is not only a metaphor for Eichmann's crimes or for the victims of Nazi extermination. It must also be taken literally – an outer limit of the circles of harm the film directs one to imagine. It thus stands for yet another aspect of victimization, in which animals are sacrificed. In other words, these animals are made to pay with their lives for Nagar's own process of healing from his trauma.

In the opening scene of the film, Nagar holds a live chicken above the head of an elderly woman, mumbling the words of a prayer for atonement: "This chicken will be your surrogate and your atonement…" This is the ceremony of *Kaparot*, which traditionally occurs in the Jewish Day of Atonement, *Yom Kipur*. Many Jews pray on this day to be forgiven for their sins. When the ceremony is over, Nagar ceremoniously informs the old woman: "This chicken will now go to the slaughter, and you, to a good life, a long life, and good health… Amen." The ritual, recalling the

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[103] Netalie Braun, *The Hangman*, -30:00. This of course does not mean that Nagar's trauma is comparable to that presumably sustained by victims of torture.

[104] Available here: http://www.hamoked.org/TimelineFramesPage.aspx?returnID=timelinetorture&pageurl=http://www.hamoked.org/Document.aspx?dID=Documents1643%22

mythic scene of the bonding of Isaac, is premised on the idea that an animal is "punished" instead of a person. The chicken supposedly suffers a divine "death penalty" to substitute the human who has sinned (and who will nevertheless be allowed to survive).

It is not merely by chance that this scene starts the movie. There is an implicit parallel here between the chicken and Nagar himself. Arendt identified a way in which the Israeli state has "sinned": it executed Eichmann after a process that was seemingly designed to apply the law, but that diverted from rule of law principles and became a show trial. Nagar was assigned with concluding this process, and was consequently "killed" (mentally if not physically). By delegating the task of execution to Nagar, his person became a substitute for state of Israel, or more concretely, for the Zionist designers of the trial, Ben-Gurion and Hausner; the two never "paid" for the wrongdoing that Arendt identified. "The Sheep is as innocent as I am," says Nagar in one scene. Thanks to his new role as Kosher slaughterer, Nagar is rehabilitated and empowered. But just like Nagar became the victim of the victims' catharsis, one must also ask who the victims of his religious cleansing are.[105]

The latter is intimately related to Nagar's own personal pain and suffering, but is not ultimately articulated as an injustice perpetuated by the trial. While the death and suffering of animals appear in the images of the film, they are never discussed or problematized. And Nagar is far from being portrayed as a villain in his relationships with animals. He is rather gentle and avuncular in his affection towards the animals he slaughters as well as the stray cats. Perhaps the most challenging aspect of critique the genre of sacrifice demands is to direct attention to this kind of "transparent" violence too, when considering injustices that mass atrocity trials disseminate. The film offers no formula for how to do so; and animals may not be the only creatures pushed to this position of the transparent victims of the victims. But they are unquestionably there.

6. Conclusion

Recall the provocation this essay began with: Instead of Nagar, it proposed that Landau should have bloodied his hands in the name of law. The proposal inserts an ethical and personal dimension

[105] It is here that Arendt's framing of the "banality" of evil in *Eichmann in Jerusalem* becomes salient. Rather than belittling Eichmann's wrongdoing, Arendt's important philosophical challenge was to expose how evil acts can and do become accepted as obvious, transparent acts of the day-to-day. By returning to the act of slaughtering in *The Hangman*, Braun gently brings up a similar aspect of our own societies: the acceptability of animal death and suffering.

into criminal procedure.[106] Such a thought experiment need not be limited to the death penalty. If the violence of criminal law extends to prison sentences, one might expand and expect judges to become not only executioners but also populate the ranks of prison guard services. But of course, criminal enforcement de-personalizes such violence and allocates it to supposedly abstract entities through a social division of labor. Mass atrocity trials are no exception in this regard; perhaps just a radical case in which the burden of giving meaning to an entire history is particularly cumbersome.

This essay has analyzed three genres of critique directed towards mass atrocity adjudication, which all relate to this underlying de-personalizaiton. The first, which I have called the *rule of law* genre, is an attempt to explain it and insist upon it as a normative imperative. The court or tribunal ideally becomes a disinterested third party that can punish even the most heinous crimes objectively, based on the defendant's criminal actions, as revealed by evidence. Hannah Arendt's reading of Eichmann was central to this first genre.

Ultimately, however, the claims of the rule of justice genre are never air-tight. By speaking in the second person (you must hang) -- but from behind the judicial panel's veil -- she too betrays that this is a very personal affair.[107] The second, labeled the genre of *catharsis*, emerges precisely as a rejection of such abstraction. According to this view, de-personalized abstraction and its purported objectivity are not only impossible. They also serve to deny justice, turning criminal procedure into a rigidly formal exercise, wholly alienated from the people it should serve. Such betrayal's as Arendt's, albeit her uncompassionate prose on K-Zetnik, may be regarded by legal discourse as incomprehensible lacunae; but they are deeply empowering moments for victims and their societies. Shoshana Felman was the main protagonist in a story largely about the turn to victims' rights, transitional justice, and narration of history. The intellectual terrain in this context is vast and variegated, and other authors could have been chosen just as well.

The contribution of this essay is its introduction of a third genre of critique I label as *sacrifice*, through a film by Netalie Braun. The point of this genre of critique is to inquire *how* is legal violence allocated to *seemingly* abstract entities. It is never merely by chance that one person can judge and another must execute. Such divisions rest on preexisting inequalities, economic or ethnically-

[106] Elsewhere, I have attempted to elucidate the importance of such encounters for human rights law: Itamar Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge University Press, 2016).

[107] See Butler, 'Hannah Arendt's Death Sentences'.

determined, either within a society, or on the transnational level. They need to appear as part of the stories we tell ourselves about criminal law, domestic or international: who determines the transnational allocation of risk, mental and physical, associated with the need to carry out criminal justice? A critique focused on such questions aims to shed light on the material underbelly of criminal justice.

A *rule of law* orientation towards adjudication conceals the background hierarchies which any allocation of legal violence rests upon. It may even be the case that it is precisely when legal institutions try to ensure the "objectivity" of disinterested parties, that they rely most on such hierarchies. (This hypothesis needs to be researched further). On the other hand, an orientation toward *catharsis* is revealed as an extreme abstraction of its own kind.[108] Its emphasis on narrative aestheticizes legal violence and distracts us from the inequalities enforcement rests upon. Its pretense to purge trauma may simply transmit it to others.

Lawyers should try to expand their view of the potential harms momentous trials can generate, including upon groups that may at first blush seem external to the alleged crimes. Let us not resign ourselves to saying: "there goes another Yemenite."

[108] Kendall and Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood'253-258.