

# *The Specialist* on the Eichmann Precedent: Morality, Law, and Military Sovereignty

Benjamin Robinson

## 1. Law and the Folk—Revisiting a Redefinition

The trial of Adolf Eichmann in 1961 and Hannah Arendt's report on the trial, *Eichmann in Jerusalem*, continue to draw legal scrutiny and provoke international political controversy decades after the judgment was pronounced. In the pages of this journal, Shoshana Felman invoked the Dreyfus Affair as a legal and cultural precedent for the epochal Eichmann trial.<sup>1</sup> She argues that the unjust and anti-Semitic prosecution of Captain Alfred Dreyfus in 1894 and Émile Zola's impassioned and now proverbial counteraccusation against Dreyfus's persecutors supply a model for an individual speaking out against a state legal apparatus in the name of a victim of miscarried justice. Not only the enormity of the crimes being judged in Jerusalem, but the jurisdiction of the court, the nature of the criminality, the status of the legal code with respect to the crimes, the relevance of the evidence, and the spirit of the precedent to be set all contributed to what Felman characterizes as the later trial's "monumental repetition of a primal legal scene," in which traumas of the past were radically revisited and redressed ("TJ," p. 219). The scene monumentally revisited in the Eichmann trial is, according to Felman, the Dreyfus Affair's quintessential persecution

This essay began as a presentation at the Kent State University conference "Screening the Shoah," sponsored by David Brenner, to whose comments and encouragement I am indebted. Thanks are also due to Bill Brown, John Davidson, John Rosenthal, and Jennifer James Robinson for their responses to earlier drafts of the essay.

1. See Shoshana Felman, "Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust," *Critical Inquiry* 27 (Winter 2001): 216–22; hereafter abbreviated "TJ."

*Critical Inquiry* 30 (Autumn 2003)

© 2003 by The University of Chicago. 0093-1896/03/3001-0007\$10.00. All rights reserved.

of “the Jew . . . in and through civilization—by the civilized means of the law” (“TJ,” p. 221). For Felman, the Dreyfus Affair is a nineteenth-century inheritance repeated and intensified throughout the twentieth century and finally overturned in 1961 by a “Zionism [that] 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” (“TJ,” p. 221).

While I share Felman’s sense of the relevance of the Dreyfus Affair, my analysis of the Eichmann trial—and several remarkable commentaries on and representations of it—leads me to suggest a different relationship between the trial and the Dreyfus Affair than the one Felman proposes. Zola’s challenge to the state—and to justice that is not constitutionally accountable (that is, justice delivered by a military court in the case of Dreyfus and by a non-constitutionally based legal system in the case of Israel)—was issued in the name of a universal humanism that Zola believed took priority over the real political interests of state sovereignty. As Felman emphasizes, the key outcome of the Eichmann trial was to subordinate questions of international *law* to those of international *sovereignty*, “sovereign Israeli jurisdiction.” Law in this view shapes what Felman, borrowing from Robert Cover, calls a “folktale of justice” (“TJ,” pp. 234, 238). The word *folk* here is an obvious object of concern in light of the Third Reich’s legal theorization of *völkisch* justice, especially in the work of Carl Schmitt.<sup>2</sup> Even if one embraces a salutary Whitmanesque idea of the folk, the problem goes deeper than the word’s unfortunate etymological echo, raising questions about what kind of institutions and tales constitute a folk and its justice. Here is where the most vexing issue of the Eichmann trial arises: the relationship of national law to citizens, to extranational or stateless individuals, and to other states, themselves variously conceived as *demos* or *ethnos* and equipped with vastly differing degrees of military potency. Felman’s “ultimate” argument that the trial was about “the acquisition of semantic au-

2. See especially Carl Schmitt, *The Concept of the Political* (New Brunswick, N.J., 1976) and *Staat, Bewegung, Volk: Die Dreigliederung der politischen Einheit* (Hamburg, 1935).

BENJAMIN ROBINSON is assistant professor of German at Northern Illinois University. He is completing a manuscript on the socialist imagination of an alternate modernity entitled *Other Systems: German Literature on the Ultimate Vacation from Economy*. His current book project examines incidents where literature represents the law and law tries literature in five different twentieth-century German states.

thority by victims" ("TJ," p. 233) depends on her equating victims with the Israeli state, for, as she notes, it is not the victims' individual testimony and experience, but the "new collective story that did not exist prior to the trial" that separates the story of the victims from "the political and military story of the Second World War" ("TJ," p. 234). The Eichmann trial, as Felman emphasizes, thus identifies the victims to whom it sought to give voice, not with either legally or historically articulated individuals, but with a collective ethnic identity composed *ex post facto*; that is, it assimilates the victims to a "folktale," in particular, to a Zionist narrative that Arendt summarizes as explaining "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, in the Suez adventure, and in the almost daily incidents on Israel's unhappy borders."<sup>3</sup>

This uniquely potent "folktale" on the international stage has, needless to say, continued to have enormous consequences in the conduct of American and Israeli foreign affairs, consequences that I argue are far from equitable or just. Like Felman, I consider the Eichmann trial "a living, powerful *event*—an event whose impact is defined and measured by the fact that it is 'not the same for all'" ("TJ," p. 210). To explore more closely the ongoing inequitable impact of the Eichmann event, I revisit both the trial and Arendt's critical account of it, taking as my starting point *The Specialist*, a remarkable 1999 documentary feature on the trial by Eyal Sivan, an Israeli dissident filmmaker, and Rony Brauman, the former head of the Paris-based nongovernmental organization Doctors without Borders. Through the critical optic of Sivan and Brauman's film, I will take up the issues I see as central to the Eichmann trial: the question of how the particular Holocaust narrative constructed in Israeli courts at the Eichmann trial has become a potent and portable signifier of United States national sovereignty at the expense of a more democratic and equitable world order.

## 2. Eichmann and Moral Historiography

Sivan and Brauman's French-Israeli-German production, *The Specialist*, is based on hundreds of hours of documentary footage taken by the American Leo Hurwitz during Eichmann's trial.<sup>4</sup> It edits, shapes, and digitally

3. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. ed. (1963; New York, 1994), p. 10; hereafter abbreviated *EJ*.

4. *The Specialist*, dir. Eyal Sivan, Memento, 1999. For a discussion of the ambivalent relationship between documentary film and Holocaust memory and historiography, see Susan Rubin Suleiman, "History, Memory, and Moral Judgment in Documentary Film: On Marcel Ophüls's *Hotel Terminus: The Life and Times of Klaus Barbie*," *Critical Inquiry* 28 (Winter 2002): 509–41.

manipulates this archival film, but does not supplement it with talking heads, photographs, or other material. Its goal is not authenticity, with the suspect overtones of unquestionable authority that claims to authenticity evoke. Rather, the film aims at what the filmmakers call a “desacralized, lay treatment”<sup>5</sup> of the Eichmann case, the case with which, according to Israeli historian Tom Segev, “Israel began to design its collective memory of the Holocaust”<sup>6</sup> and with which, according to Peter Novick, “the Holocaust was presented to the American public as an entity in its own right” for the first time.<sup>7</sup> Aware of the centrality of the trial for understanding the Holocaust, the filmmakers seek pointedly to oppose the “moralizing and sermonizing attitude” that would “transform suffering into redemption” (“SR”). Indeed, their film contrasts sharply with the sermonizing that characterized, for example, the 1997 ABC-PBS documentary *The Trial of Adolf Eichmann* and its accompanying instructional website, which hew closely to the Israeli prosecution’s case with its associated public political goals.<sup>8</sup> Seeking to avoid putting themselves on “a pedagogic track,” Sivan and Brauman supply no voice-over commentary that would inform viewers about the events of World War II and the Holocaust. “In return,” Brauman says, “the philosophical or political questions that arise from the mass of events and the horrors thus evoked strike viewers because they refer to actual interrogations or experiences” (“SR”).

Several distinctive aspects of *The Specialist* justify Sivan and Brauman’s hopes for its liberating effect on the public perception of the Eichmann case. It shifts the focus of attention away from the victims, where so much Holocaust narrative directs it, to the perpetrator in the dock. The perpetrator, moreover, is seen to lack literary, diabolical qualities that might otherwise make a sadistic narrative emotionally thrilling. The victims whose testimony does appear were not uniformly without agency, as in the case of the controversial Hungarian Jewish Council member, Pinchas Freudiger, whose appearance unleashes a courtroom outburst.<sup>9</sup> The testimony, rather than invoking an intimate, confessional immediacy, is always seen in its legal,

5. François Gorin, Antoine Perraud, and Joshka Schidlow, “Son rôle de rouage suffit à le condamner: Entretien—Rony Brauman et Eyal Sivan,” *Télérama*, 31 Mar. 1999, <http://www.telerama.fr/>, no longer accessible; hereafter abbreviated “SR.”

6. Tom Segev, “Genocide, a Modern Sickness: Israel and the Memory of the Holocaust,” *Le Monde diplomatique*, 13 Apr. 2001, online English language edition, <http://www.mondediplo.com/2001/04/13eichmann>

7. Peter Novick, *The Holocaust in American Life* (Boston, 1999), p. 133; hereafter abbreviated *H*.

8. *The Trial of Adolf Eichmann*, prod. Daniel B. Polin, ABC News Productions and PBS, 1997; see the PBS website: <http://www.pbs.org/eichmann>

9. For the background to the outburst against Freudiger, the highly politicized Kastner case, see Segev, *The Seventh Million: The Israelis and the Holocaust*, trans. Haim Watzman (New York, 1993); hereafter abbreviated *SM*.

institutional context. Without this context, the public constraints to which even the most private testimony conforms become conveniently invisible.<sup>10</sup> Indeed, the trial footage in the film highlights the fact that a trial is a process and a ritual—social, historical, and bureaucratic. We see in the course of the film how law, morality, and force are ambiguously intertwined, even in a case that is often taken as a decisive frame of reference for grounding legal judgments of good and evil. By foregrounding the legal *mise-en-scène* of 1961 as an event with an interpretive and political dynamic distinct from, although thickly related to, the events of the Nazi murders, the film makes its most pointed contribution to representing the Holocaust as an occurrence that like all occurrences is presentable only in its subsequent stagings. The film is a representation of a representation. Its images of the Israeli courtroom's particular contingencies, as well as its own cinematic contingencies, help a viewer question whether the Holocaust can serve as a last word—whether it, as an event apparently beyond our horizon of daily ambiguity and debate, can supply the final vocabulary for instituting and assessing morality and justice.<sup>11</sup>

In its desire to provoke a contemplative rather than an identificatory mindset, Sivan and Brauman's aim is much like Primo Levi's in writing *Survival in Auschwitz* "to furnish documentation for a quiet study of certain aspects of the human mind."<sup>12</sup> Accordingly, the immediacy of the docu-

10. My emphasis here on the necessarily public basis of confession (whether evidence, therapy, or art) is one critical difference between the approach I am advocating and psychoanalytic discussions of the Holocaust and associated issues of judgment and forgiveness of crime. Thus in an interview with Alison Rice, Julia Kristeva argues that "forgiv[ing] the unforgivable . . . can only be done in strict privacy, notably that of the analytic cure. . . . In contrast, I think that the social sphere . . . is that of judgment" (Julia Kristeva, "Forgiveness: An Interview," interview by Alison Rice, *PMLA* 117 [Mar. 2002]: 282). My problem is that language already historicizes the private sphere such that appeals to the moral immanence of the private are always questionable. Certainly personal considerations can override criminal considerations in different institutional contexts, but I do not believe it is a primarily privative quality that defines those contexts.

11. In *Contingency, Irony, and Solidarity* (Cambridge, 1989), Richard Rorty describes a "final vocabulary" as those terms of our personal doctrine that we cannot justify except with reference to themselves (p. 73). John Rawls makes the point that there can be no purely procedural justice, arguing that the procedural arrangements of justice need substantive checks.

Political authority is not mysterious, nor is it to be sanctified by symbols and rituals citizens cannot understand in terms of their common purposes. . . . [This] means, however, that our considered judgments with their fixed points . . . stand in the background as substantive checks showing the illusory character of any allegedly purely procedural idea of legitimacy and political justice. [John Rawls, "Reply to Habermas," *Political Liberalism* (1993; New York, 1996), p. 431]

The Eichmann case complicates the picture of such personal final vocabularies as moral checks on procedures or institutions because it demonstrates how conventional our most absolute intuitions can be. Our fixed points and final vocabularies are likewise subject to the contingency of the political.

12. Primo Levi, *Survival in Auschwitz: The Nazi Assault on Humanity* (New York, 1993), p. 9.

mented interrogations and testimonies is not presented as exclusive of the retrospective construction involved in deliberation. Using Brechtian effects such as an eerie, quasi-industrial soundtrack, film tinting, and digital manipulations of light, space, and motion, Sivan and Brauman remind viewers that the film, as uncommented as it is, is indeed an artful condensation of a four-month trial. This condensation of over 350 hours of footage, moreover, does not pose as a transparent abridgment, but is guided by and supports the theses of Arendt's controversial 1963 book *Eichmann in Jerusalem*.<sup>13</sup> Returning viewers to the sights and sounds of the proceedings on which Arendt reported, the film also uses her report as its interpretive framework. We see and hear testimony that takes the rough oral form of unprepared sworn statement, but still must follow the court's rules of order; the filmmakers dwell on unexpected moments where the prosecution or judges irritably call for the visibly upset defendant or a witness to properly heed a question. Thus elicited with the agonistic intent of a court proceeding to adjudicate between disparate accounts, the filmed testimonies in *The Specialist* differ from the unchallenged survivor testimonies in video archives such as Yale's Fortunoff Archive. They do, however, share the formal openness described by Lawrence Langer in his examination of these video recordings: "A written narrative is finished when we begin to read it, its opening, middle, and end already established between the covers of the book. . . . Oral testimony steers a less certain course, like a fragile craft veering through turbulent waters unsure where a safe harbor lies—or whether one exists at all!"<sup>14</sup> This openness and viewers' interaction with its assailable visual and aural presence lend Eichmann's otherwise contemptible words the vulnerable existential force that reading them cannot fully convey. Although Arendt's account of the trial does secure it between the covers of a book, her book, as we shall see, is itself ambiguous and inconclusive in its interpretations, a "fragile craft" that has led some interpreters to read it, too, in an autobiographical, testimonial framework.<sup>15</sup>

13. The controversy is documented in many biographies of Arendt; see especially Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven, Conn., 1982). Jacob Robinson's *And the Crooked Shall Be Made Straight* (New York, 1965) is a polemical "refutation" of Arendt that came out shortly after her book. Arendt herself expresses how personally painful the controversy was in her correspondence with Mary McCarthy; see *Between Friends: The Correspondence of Hannah Arendt and Mary McCarthy, 1949–1975*, ed. Carol Brightman (New York, 1995). The 1987 BBC documentary by Tristram Powell, *The Holocaust: Judgment in Jerusalem*, focuses on the anger stirred up by Arendt's book.

14. Lawrence Langer, *Holocaust Testimonies: The Ruins of Memory* (New Haven, Conn., 1991), p. 17.

15. Richard Wolin, for example, writing about Arendt's affair with Martin Heidegger asserts that

Arendt had a Jewish problem, that is, a problem with her own Jewish identity. . . . Arendt concluded [in *Origins of Totalitarianism*] that in many instances the Jews had foolishly

Testimony in the film thus assumes an unsettling temporal scheme. Like an eyewitness as yet untainted by subsequent controversy, Hurwitz's footage precedes later interpretations of the trial. Sivan and Brauman's recovery of Hurwitz, however, explicitly follows Arendt's controversial dissent from the trial, which itself testifies to an epochal moment in contemporary political self-understanding. This ongoing implication of Holocaust testimony in successive projects goes against the grain of the reception suggested by Dominick LaCapra, who is concerned with the affective representational power of the Nazi crimes considered as a special class of events he calls *limit events*.<sup>16</sup> In *The Specialist* the events under consideration are not accorded a special epistemological status; we are introduced to them in the middle

---

brought historical persecution upon themselves. . . . The theoretical groundwork for some of the uglier features of *Eichmann in Jerusalem* had already been established. [Richard Wolin, "An Affair to Remember: Hannah and the Magician," *New Republic*, 9 Oct. 1995, p. 25]

This "Jewish problem" emerged, according to Wolin, in the late 1920s as Arendt realized that Jewish assimilation had failed in Germany. This psychological interpretation of Arendt's identity problem goes against her own claim in an exchange with Gershom Scholem around the book. When he says he regards her "wholly as a daughter of our people" she responds that "I know, of course, that there is a 'Jewish problem' even on this level, but it has never been my problem—not even in my childhood. I have always regarded my Jewishness as one of the indisputable factual data of my life" (Arendt, "A Daughter of Our People": A Response to Gershom Scholem," *The Portable Hannah Arendt*, ed. Peter Baehr [New York, 2000], p. 392). For a more balanced interpretation of Arendt's Jewish identity in light of the Eichmann controversy, see Dan Diner, "Hannah Arendt—jüdisches Selbstverständnis im Schatten der Eichmann-Kontroverse," in *Hannah Arendt und die Berliner Republik: Fragen an das vereinigte Deutschland*, ed. Bernward Baule (Berlin, 1996), pp. 151–65. Where Wolin sees the failure of the secular Jewish assimilation narrative in 1920s and 1930s Germany, Diner emphasizes that Arendt's success in the postwar U.S. represents one persuasive vindication of the narrative.

16. Although LaCapra marks his differences from, among others, Felman and Langer and their "hyperbolic appeal to a 'thematic' of the traumatic and the sublime," his central vocabulary for discussing the representation of Nazi crimes is, like theirs, drawn from the literature of trauma (Dominick LaCapra, *Writing History, Writing Trauma* [Baltimore, 2001], p. 93 n. 6). Memory and its unintentional processes are more important to his work than the institutional arrangements and normative judgments that concern both Arendt and Sivan and Brauman. LaCapra's considerations are ecumenical to the point that I would suggest he is not delineating a methodology so much as calling for sensitivity to methodological complementarity. His topoi, for example, the "negative sublime" of Himmler's 1943 Posen speech, can be differentiated from the topoi of moral and political judgment and the constrained choices they imply. See LaCapra, *Representing the Holocaust: History, Theory, Trauma* (Ithaca, N.Y., 1994), pp. 105–10, *History and Memory after Auschwitz* (Ithaca, N.Y., 1998), pp. 27–29, and *Writing History, Writing Trauma*, p. 93. A political focus would obviate the need for understatements such as this: "But just as history should not be conflated with testimony, so agency should not simply be conflated with, or limited to, witnessing. In order to change a state of affairs in a desirable manner, effective agency may have to go beyond witnessing to take up more comprehensive modes of political and social practice" (LaCapra, *History and Memory after Auschwitz*, p. 12). In this sense, LaCapra's concerns are apolitical despite a methodological largesse that urges familiarity with political implications. Here I would also like to mention Novick's healthy skepticism about whether the Holocaust, as an objective set of events, actually constitutes sufficient grounds for separate theories of representation.

of an institutional process, and we understand them as both preceding and following their social interpretation. The filmmakers avoid creating effects of awe and sublimity because they do not want so much to rupture the situation of the Holocaust in human affairs that stretch from fascism to cold war to ethnic conflict as to ask viewers to consider what that continuum might help us to see about ourselves.<sup>17</sup> Just as the bluntness of Arendt's report raised accusations that she was insensitive to the collective trauma caused by Nazi crimes, so too it might fairly be averred that *The Specialist* takes no particular consideration of psychoanalytic categories, opting to let the forensic setting stand without therapeutic interventions by the filmmakers. The fallible and malleable courtroom setting, the controversial Arendt report, and the edited and modified film stock all work toward a less cathartic and more speculative, though not didactic, approach to what the filmmakers see as the quintessence of the Eichmann phenomenon—the easily effaced borderline between legitimate claims of power and the unjust violence of law, state, or individual.

I want to engage questions such as these in order to extend the film's project of discharging the aura that makes discussion of the Holocaust both so seductive and so proprietary, so symbolically transcendent and so institutionally specific. In order to do this, I want to set out in more detail the film's interpretive perspective as well as indicate some limitations of its formal re-visioning of received Holocaust tropes. The bulk of this essay will take up the film's interpretive questions about the meaning of crime, justice, and the state and develop them not only in ways that the film itself does. The goal here is to accept the film's challenge of reconsidering the Eichmann trial today, decades after its precedents for discussing the events referred to under the rubric of *the Holocaust* have become dominant norms for the historiography of morals. What kind of moment was the Eichmann trial in the history of moral thought and legal institutions? *The Specialist's* disciplined aesthetic allows us to pursue that question with a freshness that the importance of the trial for subsequent developments in the terms of sovereignty and international justice certainly justifies. After considering what the Eichmann trial has suggested about psychological, ethical, and institutional bases for establishing international law, I will consider political responses—particularly cold war responses—to the trial's consolidation of the international public significance of the Holocaust. For, perhaps more important than setting a general, codifiable legal precedent, the trial con-

17. See Emil Fackenheim, "Holocaust," in *A Holocaust Reader*, ed. Michael L. Morgan (Oxford, 2001), for a representation of the Holocaust through emphatic claims for its particularity and discontinuity: "The Holocaust is not only a world-historical event. It is also a 'watershed,' a 'caesura,' or 'rupture' in man's history on earth" (p. 126).

densed a self-evident political meaning for the Holocaust, available to those who exercise jurisdiction over it. At the end of the essay, I return to the starting point, Sivan and Brauman's film, and, more specifically, the aesthetic questions *The Specialist* poses about cinematic and literary testimony as a form for exemplifying moral judgment and political choice. I will argue that to the extent the film aestheticizes the process of evidence and adjudication—distancing it, framing it (in an echo of Heidegger's revealing technological *Ge-stell*)—it implies a notion of autonomous judgment that, while it throws into relief both the trial's politicization and moralization, suggests a nonpolitical model of justice based on perceptive intuition. The quality of the film as a (cinematic) representation of a (judicial) representation also serves as a point of critique. I suggest that, in the context of what some literary and film scholars recognize as a distinct Holocaust genre, its presentation of alternative tropes to those established in the prosecution's highly theatrical narrative, while groundbreaking, does not complete the task of moving from fresh perception of the trial to public deliberation on its wider uses. Such deliberation would indicate a more polemical (on the model of a courtroom's own agonistic procedure) juxtaposition of tropes that could illustrate to a critical public the stakes of one representation of the Holocaust versus another.<sup>18</sup> Nonetheless, *The Specialist* remains a powerful disruption of the condensation of morality, law, and statehood that the Eichmann trial in its received form has allowed to accrue to the advantage of specific sovereignties and jurisdictions of the industrial West.

### 3. Arendt's Eichmann: Political Justice or Just Politics?

Before discussing the questions raised by both *The Specialist's* medium and its narrative form, I want to analyze Arendt's book in some detail and suggest some ways in which the Holocaust functions as a signifier today in international politics. *Eichmann in Jerusalem* is structured by two main concerns: the moral psychology of a criminal whose crime is both unprecedented in scope and banal in execution and the institutionalized justice of his prosecution in a world of sovereign nation-states. The question of moral psychology that interests Arendt is most famously the empirical one that lent her book its subtitle, *A Report on the Banality of Evil*. She tries to char-

18. There are two sets of representational contrasts implied here. One is that between one set of tropes and another or, more generally, one "emplotment" or another, of the Holocaust narrative. The value of the term *emplotment* for discussing the Holocaust has been extensively debated; see, in particular, *Probing the Limits of Representation: Nazism and the "Final Solution,"* ed. Saul Friedlander (Cambridge, Mass., 1992). The other set of contrasts has a more specifically institutional dimension, namely, that set of contrasts between juridical and literary representations.

acterize with respect to language, office, and social standing the personality that Eichmann reveals over the course of 121 trial sessions. She analyzes, in other words, his testimony as a realistic thought process, considering Eichmann in terms similar to those in which she once considered the assimilated nineteenth-century German-Jewish writer Rahel Varnhagen, as a social parvenu struggling against the fear of falling back into the low status of a pariah.<sup>19</sup> She situates Eichmann in a biographical and social world, a realistic world of both inclination and duty distinct from the categorical world of moral duty alone. Thus characterizing Eichmann as a socially situated self, rather than an abstract universal citizen, she is able to examine the distance between this realistic—and unremarkable—moral psychology and the spirit of practical reason that underlay Kant's notion of morality.<sup>20</sup> In this worldly empirical respect, Arendt's concern is above all with language, which as communication allows collective moral engagement and as slogans—or “statutes and formulas,” as Kant called them—<sup>21</sup> cover for individual moral disengagement. In a world where our actions and identity are coeval with the language we speak—and this conversational world is where Arendt locates the *vita activa* that makes politics possible—we can hardly be expected *realistically* to escape the rules and formulas that speak us as much as we speak them.

Whatever men do or know or experience can make sense only to the extent that it can be spoken about. There may be truths beyond speech, and they may be of great relevance to man in the singular, that is, to man in so far as he is not a political being, whatever else he may be. Men in the plural, that is, men in so far as they live and move and act in this world, can experience meaningfulness only because they can talk with and make sense to each other and to themselves.<sup>22</sup>

That Eichmann does not at all escape the cliched language of Nazi bureaucracy, however, means that he falls short of the specifically political demands of the *vita activa*. He remains passive, as prosecutor Gideon Hausner sarcastically charges, with the limited meaning he does find in social life

19. Hanna Fenichel Pitkin discusses the applicability of the terms *parvenu* and *pariah* to Arendt's description of Eichmann: “As Arendt presents him, Eichmann was neither an anti-Semite nor a sadist but an ambitious, deferential careerist. . . . Eichmann, in short, was a parvenu” (Hanna Fenichel Pitkin, *The Attack of the Blob: Hannah Arendt's Concept of the Social* [Chicago, 1998], p. 206).

20. See Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis, 1993), p. 10.

21. Kant, “Beantwortung der Frage: Was ist Aufklärung?” *Gesammelte Schriften*, 29 vols. (Berlin, 1900–1925), 8:36.

22. Arendt, *The Human Condition* (Chicago, 1958), p. 4.

coming from the clichés offered him by both petty bourgeois life and Nazi national ideology. This language is at times so ordinary, as in Eichmann's stilted invocation of funeral oratory at his own execution, that it becomes a source of the book's most bitter satire of the human condition, for it is his passivity as a human actor and not his individual motivation and conscious responsibility that makes him guilty. Empirical crime seems fully separate from rational intention (*mens rea*).

In addition to her pessimistic anthropology of the empirical moral mind, Arendt's book is also shaped by her distinct and more historical reflection on what she calls "the challenge of the unprecedented" (*EJ*, p. 263). This challenge, phrased as it is in the terminology of criminal law, refers not only to the monstrous injustice of Nazi actions, but also, ironically, to the positive challenge to the Israeli authorities to set a precedent that would describe a supranational crime subject to an international jurisdiction, a precedent that would serve decisively to criminalize the newly emerged, technologically enabled barbarism of genocide. To do this, either the Israeli state would have had to insist that Eichmann, now in its hands, be tried by an international tribunal capable of judging a supranational crime; or the judges themselves would have had to become *de facto* legislators (judicial activists, in U.S. constitutional rhetoric) and, because "every custom has its origin in some single act," according to Nuremberg justice Robert Jackson, would themselves have had to "institute customs" that would develop into future international law (quoted in *EJ*, pp. 273–74).<sup>23</sup> Eichmann's captors fail in this pathbreaking respect, choosing to prosecute Eichmann on the same (precedented) basis as the nationally based Nuremberg successor trials in Poland, Russia, Czechoslovakia, and elsewhere. Rather than focusing on the charges of a "crime against humanity" (counts 5–12), the Israeli prosecution

23. Robinson, without grasping the spirit of paradox in Arendt's book, criticizes, I think rightly, the authoritarian implication that such unilateral judicial activism on the part of Israeli judges would have had: "To deposit, as Miss Arendt suggests, any unsolved problem resulting from lacunae in laws into the lap of a trial judge is universally considered to be an unsuitable method of filling gaps in law" (Robinson, *And the Crooked Shall Be Made Straight*, p. 67). Israel had neither jurisdiction nor a clear moral mandate, given the illegality (not criminality) of the state's own founding according to the legislative resolutions of the UN Security Council and General Assembly. The state was founded *de facto* with a "war of independence" rather than *de jure* according to established international legislation. Israel was counting on deferred legitimation. The Eichmann case played a key role in this national legitimation, and any attempt at trying to set international precedent without full national legitimation would have been foolhardy. Arendt analyzes such issues of circular legitimation in the cases of the French and American Revolutions in *On Revolution* (New York, 1963). See also Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Thousand Oaks, Calif., 1996), pp. 155–66; Beatrice Hanssen, *Critique of Violence: Between Poststructuralism and Critical Theory* (London, 2000), pp. 16–30; and David Ingram, "Novus Ordo Seclorum: The Trial of (Post)Modernity or the Tale of Two Revolutions," in *Hannah Arendt: Twenty Years Later*, ed. Larry May and Jerome Kohn (Cambridge, Mass., 1996).

focuses on what it considers its national jurisdiction and elaborates primarily Eichmann's crimes "against the Jewish people" (counts 1–4) (*EJ*, p. 244). The new and specific crime of genocide is thus left largely undefined by the Eichmann trial and, hence, uncriminalized.

Israel's decision to focus on national jurisdiction, according to Arendt, was motivated as much by a scrupulous concern to remain within precedent as it was by a strictly statist agenda of what, in the foreign policy rhetoric of today, we call nation-building. The prosecution, in spite of insistent objections by the court, thus collected procedurally irrelevant but morally harrowing testimony on the Final Solution that it then redeemed in the elaboration of one of Israel's founding myths: the Jewish ability to deliver retribution on the authority not just of law but of *raison d'état*. Thus arises a central philosophical problem that Arendt does not address as such, but that her discussion of the trial put on the agenda and whose relevance international police actions of today renew. By yoking the precedents of the Nuremberg successor trials to the creation of a new ethnic state, Israel opted clearly for a concept of law based on state enforceability, that is, on the explicit threat of national violence in the sense developed by Schmitt and echoed in the leftist language of Walter Benjamin.<sup>24</sup> Law in this sense draws its force neither from rational universal norms nor common law precedent but from ethnic *polemos*—a solidaristic conception of self versus other that Schmitt saw as underlying the concept of the political and the legal notions of sovereignty derivative from it.<sup>25</sup> Again, the legal terms involved here were

24. See Jacques Derrida, "Force of Law," in *Deconstruction and the Possibility of Justice*, ed. Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (New York, 1992), pp. 3–67, which discusses this confluence between Benjamin and Schmitt as a recognition that law must be legitimated in something beyond itself, in the originary violence of the general strike (Benjamin, relying on Georges Sorel) or of war (Schmitt, drawing on Ernst Jünger). In regard to this confluence between Benjamin and Schmitt, *Right and Left*, Derrida in a postscript dates Benjamin's essay (1921) and historicizes whatever shared premises existed in that "vertiginous" moment between Right and Left. The care with which he deals with this confluence should be kept in mind, especially with regard to the works mentioned later that conflate the difference between Left resistance and Right fascism in 1930s and 1940s Europe.

25. Schmitt rejects the negative definition of the political in opposition to the legal. He defines the political positively: "The specific political distinction to which political actions and motives can be reduced is that between friend and enemy." He goes on to say that the friend-enemy grouping is "always the decisive human grouping, the political entity. If such an entity exists at all, it is always the decisive entity, and it is sovereign." He then draws the legal conclusion from this that "to the state as an essentially political entity belongs the *jus belli*, that is, the real possibility of deciding in a concrete situation upon the enemy and the ability to fight him with the power emanating from the entity." This *jus belli*, according to Schmitt, gives the state a dual possibility: to demand its members to die and to kill its enemies. From these possibilities stem the third possibility of law: "The endeavor of a normal state consists above all in assuring total peace within the state and its territory. To create tranquility, security, and order and thereby establish the normal situation is the prerequisite for legal norms to be valid. Every norm presupposes a normal situation, and no norm can be valid in an entirely abnormal situation" (Schmitt, *The Concept of the Political*, pp. 26, 38, 45, 46). In this way, Schmitt traces the possibility of law back to an idea of a

not radical, the court having adopted them because of clear precedents, but the situation determined by both the new crime and the newly emergent state prosecuting it lent the trial unique international force. The implication of the court's claim to represent all wronged Jews as diasporaic subjects awaiting justice in the symbolic return of jurisdiction to Israel meant, generally, that ethnic minorities within nation states could only ultimately have their security guaranteed by a state that could claim their interests as its own and thus respond to any infraction against them with traditional *jus ad bellum*. The state here represents the possibility of law as coterminous with the possibility of ethnic military autonomy.<sup>26</sup> One way to make this implication of the Eichmann case clear would be to imagine how questions of jurisdiction would have been different had a binational (or nonethnic) Palestine been established in 1948 on the territory of the former British Mandate. For Arendt, in any case, the national emphasis on state sovereignty meant that the Eichmann trial never even sought, either on the basis of natural law or the positive law of some international legislative franchise, to set a precedent for the crime of genocide.

These two empirical focuses of Arendt's report—moral-psychological and juridical-institutional—come together in the unresolved conceptual tension between the primacy of justice and that of politics, both of which might (and alternately do) serve as the underlying term for exploring the psychological and juridical questions of the trial. Her admiration for reserved and unworldly justice is clearly articulated in the first chapter, "The House of Justice." The words "Beth Hamishpath" (House of Justice) are the words that open both the book and the proceedings against Eichmann and, for that matter, are the first clear words of Sivan's film after an evocative babble of languages stating the charges against Eichmann. With this verbal introduction of both justice and its concrete institutional setting, Arendt sets the stage of her book as a contest between the state of Israel, represented by the Attorney General Gideon Hausner, who—in a provocative echo of the accused—"does his best, his very best, to obey his master" (*EJ*, p. 5), and justice itself, represented by Judge Moshe Landau, who does his best to prevent the trial from becoming a show trial. "Justice," Arendt asserts, taking the side of disinterested rectitude against the practical concerns of the state,

---

sovereign people that can wage a war against an enemy—that is, to an idea that itself includes no notion of justice, but only an ethnic existential claim.

26. This paradox of military sovereignty as enabling law and being outside of law is developed by Giorgio Agamben. Agamben relies on Schmitt to elaborate a view of law as an extension of the ethnic death camp. While his attention to the paradox of sovereignty is illuminating, his apocalyptic framework all but precludes historical analysis. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford, Calif., 1998).

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. . . . On trial are his deeds, not the sufferings of the Jews, not the German people or mankind, not even anti-Semitism and racism. [*EJ*, p. 5]

That she believes justice to be a real possibility in the face both of Eichmann's incommensurable actions and the Israeli state's desire for authority is made clear by her invocation of justice's austere and politically withdrawn personal ethics as the anchor of her critical standpoint. "Justice," she writes, still taking Landau as her model, "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). For Arendt, justice, unlike politics, does not speak a language of persuasion and communication, but of analysis. It is a technical language, expressed in logical rules of inference and evidence, and its stringent procedures require self-effacement. Political language, by contrast, is one of negotiation, influence, affect, and public recognition.

Yet this faith in the possibility of justice, at least liberal Kantian deontic justice, in the prosecution of Eichmann is steadily undermined by the progress of her own report. First, the empirical moral psychology of Eichmann that we have discussed gives ever greater evidence of the impossibility of basing interpersonal legal norms on the autonomous responsibility of the individual. In fact, in the second chapter, Arendt demonstrates in comical detail how Eichmann not only obeyed orders (the infamous Nuremberg defense) but also obeyed the law in both letter and spirit. Eichmann convincingly argued that his subjective intent—and according to Kant, intent, not consequence, is the test of moral integrity—<sup>27</sup> was not criminal but legally exemplary.

He was perfectly sure that he was not what he called an *innerer Schweinehund*, a dirty bastard in the depths of his heart; and as for his conscience, he remembered perfectly well that he would have had a bad conscience only if he had not done what he had been ordered to do—to ship millions of men, women, and children to their death with great zeal and the most meticulous care. [*EJ*, p. 25]

Arendt concludes that Eichmann acted according to what she calls a "little man's" Kantian imperative, which she formulates: "Act as if the principle

27. See Kant, *Grounding for the Metaphysics of Morals*, p. 13.

of your actions were the same as that of the legislator or of the law of the land” rather than that of universal law (*EJ*, pp. 137, 136). As her account reaches the eighth chapter, “Duties of a Law-Abiding Citizen,” it becomes harder and harder to believe that any but the little man’s imperative is a sound practical basis for jurisprudence, at least for an international jurisprudence that includes the full range of modern state forms.<sup>28</sup> Arendt recognizes that in most modern states *Unmündigkeit* (legal immaturity) is anything but *selbstverschuldet* (one’s own fault), as Kant believed it was once mankind embarked upon the path of enlightenment.<sup>29</sup> A sovereign state might promote individual autonomy, but should that benevolent civil condition not obtain, and it seldom, if ever, does, a citizenry has not the remotest empirical possibility—at least not without a countervailing organizational force—of attaining full ethical independence from state power.

It is a common and reassuring misreading of Arendt to see her account of Eichmann’s obedience as also one of his culpability. In this reading, his guilt is due to his letting the state (“the law of the land”) take precedence over reason (“universal law”); thus, when the state became criminal, so *no-lens volens* did Eichmann. In this reading, Arendt’s text would seem a rather

28. Contract theories of law attempt to redeem law’s moral basis by emphasizing the illocutionary act that obligates one to keep a promise rather than its semantic content. The contractarian reconstruction of moral law (see especially Rawls) can only deal with the problem of Eichmann’s little man’s imperative by extending the social contract over all humanity so that social and contractual obligation (loyalty) extends beyond national *polemos*. Traditional positive law jurisprudence emphasizes the point that law (as opposed to morality) has no stronger basis than the little man’s imperative. “Every law simply and strictly so called,” wrote John Austin in 1832, “is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme” (quoted in Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, rev. ed. [Boulder, Colo., 1990], p. 23). Thus, Arendt’s empirical emphasis leads her to hold that positive law more accurately describes the legal reality of law, even as she sees positive law as an inadequate normative tool for guiding and judging human behavior. Thus she suggests in works such as *The Human Condition* that a public sphere of virtue is more effective than law at regulating human norms.

29. See Kant, “Beantwortung der Frage,” 8:33. Benhabib’s and Albrecht Wellmer’s discussions of Kant’s *Critique of Practical Reason* and *Critique of Judgment* respectively to elucidate Arendt’s thinking on judgment are insightful (see Benhabib, *The Reluctant Modernism of Hannah Arendt*, p. 125, and Albrecht Wellmer, “Hannah Arendt on Judgment: The Unwritten Doctrine of Reason,” in *Hannah Arendt*, p. 35), as is Dana Villa’s discussion of Arendt’s position on post-*Kehre* Heidegger; see Dana Villa, “The Banality of Philosophy: Arendt on Heidegger and Eichmann,” in *Hannah Arendt*, pp. 179–96. But the emphasis in all three discussions on the autonomy of an independent faculty of judgment downplays the specifically institutional concerns of Arendt in the Eichmann report. The reference to the state and the related public-private distinction in “What Is Enlightenment” make it an important topos for further discussion. For specifically political implications of this article in light of right action conceived as precedent-setting, see Arthur Strum, “What Enlightenment Is,” *New German Critique*, no. 79 (Winter 2000): 106–36.

unproblematic one. Its moral implication would be that good citizens should strive in their behavior to transcend worldly interests, guided by the a priori universal moral compass within each of them. It would seem as though, forewarned by Eichmann's fate, we might know without further ado where opportunism conflicts with morality and accordingly limit our social ambition. But when does that superiority deteriorate into the cowardly inner emigration that Fritz Stern diagnosed as symptomatic of the *deutsche politische Misere* ever since Kant?<sup>30</sup> A careful reading of Arendt's description does not, in any case, let us take that last step of the argument from the state's criminality to Eichmann's. The problem is apparent in the space she gives to discussing the Jewish *Sonderkommandos* and *Judenräte* (see *EJ*, esp. pp. 116–25). These Jewish groups collaborated with the Nazis, but their members were excluded from criminal responsibility under a provision of Israeli law that exempted those who either had no choice or cooperated in order to “reduce the gravity of the consequences of the offence” (*EJ*, p. 91). Arendt famously argues, however, that “without Jewish help in administrative and police work . . . there would have been either complete chaos or an impossibly severe drain on German manpower” (*EJ*, p. 117). The Nazis “regarded this cooperation as the very cornerstone of their Jewish policy” (*EJ*, p. 124). It is true that the situation of Jewish victims subject to imminent state violence was ethically different from that of Eichmann, who might have at any time and without physical consequence switched his job (see *EJ*, p. 91), but empirically there was also a failure of victims to draw a principled line of moral behavior. There is, unfortunately for the moral interpretation of events, no ontotheological distinction between victims and perpetrators, a point that Arendt makes in avowing, against Martin Buber's disavowal, her “common humanity with those whom we accuse and judge and condemn” (*EJ*, pp. 251–52). Individual actors—whether victims, perpetrators, or bystanders—could not be expected, by either an anthropologist or ultimately the law, to escape their worldly situation in a state and society. Whatever one's deepest moral disposition, “opposition was indeed ‘utterly pointless’ in the absence of all organization” (*EJ*, p. 127).

Arendt's account of Eichmann's empirical psychology, as well as that of the members of the *Judenräte*, shows just how difficult it is to believe that individual moral autonomy can serve as the operative basis of legal judgment *ex post facto* or political choice *ex ante*. The relevant fact is that after the principled, militant opposition to fascism in Germany—primarily the

30. See Fritz Stern, “The Political Consequences of the Unpolitical German,” *The Failure of Illiberalism: Essays on the Political Culture of Modern Germany* (Chicago, 1975), p. 20.

Communists and Socialists—had been destroyed, there was little room left for any morally uncompromised behavior other than Kant's proverbial resignation of one's post, that is, complete abandonment of the political. While Arendt did believe that the category of guilt must be applied to actors in the Nazi state and that Eichmann, for one, was guilty and deserved to die, the judgment she finally speaks in the book's epilogue is fatalistically empirical: "Let us assume, for the sake of argument, that it was nothing more than misfortune that made you [Eichmann] a willing instrument in the organization of mass murder; there still remains the fact that you have carried out, and therefore actively supported, a policy of mass murder" (*EJ*, p. 279).

The wide berth that she leaves to accident or fate in her judgment is depressing indeed, for then it seems the response to genocide must always be *ex post facto* unless, that is, we can read her fatalism as something that might be better understood by institutional-juridical (that is, ultimately, political) rather than moral-juridical (natural law) categories. Here we see, then, how the tension between politics and justice comes to the fore in the other focus of the book, the institutionalization of law in the state; for justice, if it cannot safely be entrusted to the moral intuition of the individual, must be institutionalized in the communal life of the state. The question is, as the discussion of the Schmittian conception of justice indicates, what kind of state? The implication of fate in Arendt's judgment of Eichmann seems to be that an individual must take responsibility not only for his or her individual actions, but, more fundamentally, for the state in which his or her individuality will either thrive in justice or wilt in moral dependency. Thus, Jürgen Habermas believes that only a liberal democratic state can legitimize justice, whereas for Schmitt or even a Left-leaning philosopher such as Richard Rorty a state inevitably must be ethnocentric, the relevant question for justice only being how broadly or narrowly so.<sup>31</sup> To ignore the state and its capacity to institutionalize positive justice is to turn humanity over to the very fate that recklessly mishandled both Eichmann and the millions whose murder he abetted. One is left only with a dull lesson in the ineradicable evil of mankind. Arendt herself fears this as the chief legacy of the Eichmann trial—a fear that is not allayed by subsequent developments either in discussions of the Holocaust or in the attempts to criminalize gen-

31. See Jürgen Habermas, "Reconciliation through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*," and Rawls, "Political Liberalism: Reply to Habermas," *Journal of Philosophy* 92 (Mar. 1995): 109–80. Rawls's response is reprinted in *Political Liberalism*. For a succinct statement of Rorty's position, see Rorty, "Justice as a Larger Loyalty," in *Justice and Democracy: Cross-Cultural Perspectives*, ed. Ron Bontekoe and Marietta Stepaniants (Honolulu, 1997).

ocide. The Eichmann trial, Arendt predicts, will not “serve as a valid precedent for future trials of such crimes” (*EJ*, p. 272). If we are content, like the state prosecution and more ethnoreligious commentators such as Elie Wiesel or Irving Greenberg, with the Holocaust serving as an example of revealed fate, an accident that isn’t one, like a miracle or a crucifixion whose sacral character consists in its ontological status as pure singularity, then we need have no further concern for the precedents the trial failed to set. Arendt, by contrast, suggests grimly, but with ultimately hopeful pragmatism, that “the unprecedented”—in the form of a crime—

once it has appeared, may become a precedent for the future. . . . If genocide is an actual possibility of the future, then no people on earth . . . 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. [*EJ*, p. 273]

The state, through the dictatorial formation of legislative will, can precede justice for the worse by preempting liberal criteria of guilt, as we see in Arendt’s analysis of totalitarianism. The state can also enable justice for the better, as we see in her regret over the missed judicial/legislative opportunity of the Eichmann trial. What this dependent justice finally *is* does not concern Arendt. Her report on the trial, as she states in the postscript she wrote in the aftermath of the bitter controversy that the book generated in the early 1960s, does not aim at a speculative theory of justice, but at a detailed description of a trial and its immediate implications. Yet, importantly, it was one of the book’s chief merits that it did generate controversy about the political conditions of justice in, at least, this one very important instance. Because Arendt did not settle the case’s questions with absolute versions of justice or politics, moral philosophy or democratic institutional theory, she was also not ready to draw vast Holocaust “lessons.” She pointed, rather, to the ambiguities that such an extreme (and supranational) crime coupled with such an ordinary (and patriotic) criminal raise for the foundations of contemporary political identities.

#### **4. Between States and Citizens: Eichmann in the Cold War and Beyond**

Because it was the ordinariness of Eichmann that most haunted or threatened Arendt’s commentators, it is worth looking at our own legal and political normalcy today in light of developments since the Eichmann trial. In particular, I want to consider what different cold war responses to the

precedent set by the Eichmann trial reveal about it, especially because the trial's opening coincided with two of the most symbolic moments of the cold war, Yuri Gagarin's manned space flight and the CIA-sponsored Bay of Pigs invasion, and its closing coincided with the building of the Berlin Wall. In the trial's subsequent political vicissitudes, just as in the courtroom itself, issues that might have had very general implications for international law or politics ended up being decided on the basis of more parochial institutional interests. While a narrow interest in state sovereignty often guides state theory and actual policy, what makes the Eichmann case so distinctive in this respect is that, however parochial the legal and political terms in which it was institutionalized, its symbolic terms—what Felman calls its folktale—have taken on exceptional universal currency. In turning from a state to an interstate context for the trial, I want to illustrate how misleading the universalist terms of Holocaust discussion can be in light of a cold war legacy dominated by specific modes of sovereignty.

In *The Origins of Totalitarianism*, Arendt claims that France, the first modern nation-state, already embodied the tension between the institutionalization of universal laws and the cohesive idea of national sovereignty:

The same essential rights were at once claimed as the inalienable heritage of all human beings *and* as the specific heritage of specific nations, the same nation was at once declared to be subject to laws, which supposedly would flow from the Rights of Man, *and* sovereign, that is, bound by no universal law and acknowledging nothing superior to itself.<sup>32</sup>

With this characteristic tension of nation-states still far from being superseded in a globalizing world—and with its geopolitical exacerbation through Israel's military measures against Palestinian sovereign aspirations—the link between the Eichmann precedent and subsequent calls for *selected* war criminals to face even the sort of international tribunals that Arendt hoped for in the Eichmann case suggests the ease with which international law turns into its opposite. Without norms or mechanisms guaranteeing equal protection, these tribunals readily serve the interests of sovereignty instead of consistently applying standards of universal rights.<sup>33</sup>

32. Arendt, *The Origins of Totalitarianism* (New York, 1951), p. 230.

33. Michael Ignatieff makes a case for allowing selective application of the law in prosecuting international criminals. American exceptionalism lies in "a commitment to law as an expression of national sovereignty." He concludes with a decidedly nationalist-utilitarian, rather than universal-ethical, view of international law: "As a matter of equity and ethics, it may be undesirable for the United States to support international tribunals for others but not for its own citizens. It is less clear, however, that this prevents American support for these tribunals from being effective" (Michael Ignatieff, "No Exceptions?" *Legal Affairs* 1 [May–Jun. 2002]: 60, 61).

In this sense, it is revealing to step back from seeing Israel as a constituted jurisdiction with sovereign claims for judging crimes against Jews—however correctly Arendt reads these claims as hindering the establishment of a cosmopolitan precedent on the basis of the Eichmann case—and to consider the actions and decisions by which its sovereignty among nations was established.

From its 1948 constitution as a Jewish state on military terms, contrary to the negotiated two-state partition provided for by United Nations Resolution 181, Israeli's sovereign identitarian interests were bound to take precedence over universalist rational interests codified in natural law. In 1949 this nationalism took on exceptional international significance as Soviet hopes for friendly relations with Israel were dashed and the U.S. and Israel consolidated a strategic cold war alliance. This alliance would later allow the U.S. to develop Israeli claims of legal jurisdiction over the Holocaust into a narrative of righteous state power—a very different form of cosmopolitan authority than law. Novick has demonstrated how both in American life and, on the basis of American superpower, in international life the Holocaust has come to form a pervasive ideogeme. As such, it is apolitical, occupying a position between the intimate sphere and an unworldly sphere of modern civil religion. Commentators are quick to deplore any attempt at its politicization as an instrumentalization,<sup>34</sup> defending an intuition of the Holocaust in a categorical mode distinct from the negotiation and utilitarianism of empirical, hypothetical rationality.<sup>35</sup> As a result

34. In discussion, for example, of Eastern bloc treatment of the Holocaust this word comes up repeatedly. See Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge, Mass., 1997); Angelika Timm, *Jewish Claims against East Germany: Moral Obligations and Pragmatic Policy* (Budapest, 1997); Thomas C. Fox, *Stated Memory: East Germany and the Holocaust* (Rochester, N.Y., 1999); and Thomas Jung, "Nicht-Darstellung und Selbst-Darstellung: Der Umgang mit der 'Judenfrage' in der SBZ und der frühen DDR und dessen Niederschlag in Literatur und Film," *Monatshefte* 90 (Spring 1998): 49–70. See also Paul O'Doherty's sharp, effectual demonstration of how "instrumental" some of these critiques of East German instrumentalization themselves are (Paul O'Doherty, "Die 'Judenfrage' in der DDR: Über die Diskrepanz zwischen Theorie und Praxis," *Monatshefte* 92 [Spring 2000]: 68).

35. This appeal to a categorical intuition through the Holocaust is apparent in the use of the aesthetic notion of the sublime in connection with it in the work of LaCapra and Friedländer. Can the aesthetic sublime be a source of practical moral will in Kant? While Arendt argues that it cannot, she holds that it is still the source of a valid judgment. She quotes Kant from the *Critique of Judgment* (§83) as saying of war, "In spite of the dreadful afflictions with which it visits the human race . . . it is . . . a motive for developing all talents serviceable for culture to the highest possible pitch." Thus, Arendt argues, "even though Kant would always have acted for peace, he knew and kept in mind his judgement. Had he acted on the knowledge he had gained as a spectator, he would, in his own mind, have been criminal" (Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner [Chicago, 1982], pp. 53–54; hereafter abbreviated *LK*). On such accounts, a "pure" intuition of the Holocaust can easily serve to brush aside moral reservations in favor of military aggression aesthetically legitimated by the Holocaust's sublimity. Ariel Sharon can thus assert on behalf of military attacks on the Palestinian Authority, "Israel cannot return to the '67 borders. Abba Eban long ago called them 'Auschwitz borders'. . . . All countries seeking

of this attitude, first-order aesthetic representations of the Holocaust in the civil sphere are scrutinized with great moral sensitivity, while the most explicitly instrumental deployments of the Holocaust as a moral sanction within political and legal discourses remain relatively uncontested. In international policy discussions from Ben-Gurion to George W. Bush, the Holocaust serves as a universal equivalent, the gold standard of evil, which, applied to an otherwise politically contestable (mis)deed, functions to anchor the deed in a wrong beyond politics. The second-order, implicit politics of invocations of the Holocaust's civil authority can thus operate with all the less democratic procedural encumbrance. As Arendt's chronicle of the Israeli prosecution's political interest in creating an overwhelming moral narrative shows, this first-order sacralization coupled with a second-order politicization has clear roots in the Eichmann trial. Novick notes about the trial in particular that it was the event that differentiated the Holocaust from the whole of Nazi atrocity: "In the United States, the word 'Holocaust' first became firmly attached to the murder of European Jewry as a result of the trial" (*H*, p. 131). Moreover, directly contrary to the desires of Arendt—as well as those of Sivan and Brauman in *The Specialist*—to focus the scrutiny of justice on perpetrators rather than victims, the actual trial's heavy use of witnesses inaugurated "a shift in focus to Jewish victims rather than German perpetrators that made its discussion more palatable in the continuing cold war climate" (*H*, p. 144)—a climate in which West Germany was the key "front state" ally of the U.S. in its conflict with the Soviet Union. A focus on perpetrators, who might include high-ranking individuals in government or industry in West Germany, would raise uncomfortable questions. "There was something," according to Segev, "about which the prime minister was even more sensitive [than who would testify about the destruction of European Jewry]—West Germany. Shortly after Eichmann was arrested, Adenauer contacted Ben-Gurion and asked him to take action to ensure that the trial did not waken a new wave of anti-German sentiment in the world" (*SM*, p. 340). Focusing on victims meant very specifically bracketing out the touchy political discussion of either the social causes of victimization or the social prospects of resistance. While official Soviet-sphere positions maintained that fascism and its atrocities were rooted in the crises of capitalism, and thus continued the dominant oppositional narratives of 1920s and 1930s politics, in the West these narratives had become taboo. Rather than raising difficult questions about political and social responsibility, the Adenauer government, as well as the American

---

peace should pray that the Israeli Defense Forces succeed in their mission" (quoted in William Safire, "A Talk with Sharon," *New York Times*, 1 Apr. 2002, p. A19).

and Israeli governments, sought hasty reconciliation with the idea of “a different Germany,” as Ben-Gurion called the Federal Republic.<sup>36</sup>

Already in 1952 the Luxembourg treaty between West Germany and Israel, providing for the payment of DM 3 billion in compensation, was signed despite apparently prohibitive emotional obstacles. “It was the economic crisis in Israel,” maintains Angelika Timm, “that caused Prime Minister David Ben Gurion to begin negotiations, whereas the West German government regarded the agreement as a possible means of showing the face of a new Germany to the world.”<sup>37</sup> In particular, for West Germany, the Luxembourg treaty allowed it to join NATO and begin its rearmament program without, however, extensively prosecuting former Nazi criminals. Thus, when a decade later the Eichmann trial consolidated the process of focusing on victims over perpetrators and presented the Holocaust to a world public as the central lesson of the war, West Germany became more ready to join an international discourse about victims and martyrs and to open up its own discussion of the Holocaust without, it should be noted, broadly soliciting either the forensic testimony or public acknowledgment of its own citizens’ participation in the duly honored martyrdom of innocent victims.<sup>38</sup> It would be wrong to underestimate the stubborn efforts to come to terms with the past that have nonetheless been promoted in both Israel and West Germany, especially on the part of artists, journalists, and activists. But the dominant pattern of emphasis established in the Luxem-

36. Segev writes of Ben-Gurion that “cold, pragmatic and powerful, he forced Israel to make up with ‘the different Germany,’ as he liked to describe the Federal Republic. He did this with determination, and perhaps too quickly. He brought Israel into the Western bloc led by the United States at a time when many other countries played with the idea of remaining neutral between East and West” (*SM*, p. 191). In *War by Other Means: Soviet Power, West German Resistance, and the Battle of the Euromissiles* (New York, 1991), Herf discusses how the German euromissile debate of the early 1980s relied on lessons drawn from the Nazi past. For Herf, the relevant Holocaust lesson was that NATO must station anti-Soviet Pershing missiles in West Germany. The discussions between Adenauer and Ben-Gurion during the Eichmann trial had set the precedent for Herf’s and the German Right’s interpretation of the Holocaust’s anti-Soviet lesson.

37. Timm, *Jewish Claims against East Germany*, p. 80.

38. Trade-offs between justice and reconciliation have become a dominant issue in establishing human rights in “transitional regimes.” Truth and Reconciliation commissions such as South Africa’s after apartheid have set a model for an institutionally practicable trade of perpetrators’ testimony for amnesty. Doubts have been raised about whether subsequent commissions are giving away too much amnesty for too little testimony. See Reed Brody’s paradoxical formulation of the problem in “Justice: The First Casualty of Truth?” *The Nation*, 30 Apr. 2001, pp. 25–32. West Germany was much more comfortable with a discourse commemorating victims than one prosecuting perpetrators. East Germany, which conducted almost as many postwar trials of former Nazis (especially after Eichmann, when the categories of crimes included genocide) even though it had a fraction as many perpetrators, was much more aggressive in representing the Holocaust through a discourse of perpetration and resistance, rather than victimization. See the Dutch website collating information on individual cases in East and West Germany: <http://www.jur.uva.nl/junsv/inhaltsverzeichnis.htm>

bourg agreement and strengthened in the Eichmann trial was a pattern that was clearly reflected in the two disparate ways of thinking about Nazism across the cold war divide. The U.S., West Germany, and the Western alliance focused simultaneously on legal precedents in civil restitution and criminal retribution that emphasized ethnic and state jurisdictions and private property claims and, outside of the strict juridical framework, on a spiritual, commemorative attitude toward victims that implicitly separated universal moral from contingent political stances toward events.

East Germany, meanwhile, was in a radically different position. The Luxembourg agreement established the civil precedent for successor organizations of destroyed Jewish communities to collect compensation for heirless property, departing from the principle that heirless property would be inherited by the state.<sup>39</sup> In the process of nationalizing all private property, East Germany was hardly likely to accept such a precedent. Timm discusses, for example, the case of Julius Pohly, a U.S. citizen who sought information on his property in the fall of 1953 only to find that this property had been nationalized after 1945 as part of the economic transformation of East Germany into a socialist state. Superficially, the state appropriation would seem continuous with previous precedent, while, in fact, it represented the radical nature of social transformation in the former Soviet sector of Germany. Restitution would be inconsistent with a program that held that “the government of the German Democratic Republic has done everything in its power to destroy German fascism at its roots and create conditions that preclude the possibility of another threat to the security and existence of other peoples—including the Jewish people—arising in Germany,” as an official communiqué had it.<sup>40</sup> While this East German emplotment of the Holocaust in a master narrative is considered by commentators to be a communist instrumentalization of Jewish suffering,<sup>41</sup> it is also a narrative that does not try neatly and artificially to separate the moral and political spheres of justice as does the master narrative established at the Eichmann trial. As in West Germany, there was very little reference to the Holocaust as such in East Germany until the Eichmann trial. While the trial was an occasion for West Germany to solidify its relationship with Israel and the U.S. and to consolidate its importance in the cold war,

39. See Timm, *Jewish Claims against East Germany*, p. 80.

40. Quoted in *ibid.*, p. 87.

41. See Herf, *Divided Memory*. I do not mean to deny that recorded history is “emplotted,” only that the one-sided emphasis on the mythologizing constructivism of Soviet sphere narratives is unfair. Hayden White’s theories on the inevitable interpretive emplotment of historical narrative led to a heated discussion about how the Holocaust sets limits to acceptable representations of history, collected in Friedlander’s *Probing the Limits of Representation*. Surely the implications of that discussion apply to the histories of the political antifascist resistance.

East Germany used the occasion of the trial to focus on Nazi perpetrators high in the West German political hierarchy, causing particular controversy with its exposure of Hans Globke, the director of Chancellor Adenauer's office and a former Nazi judge. There is no doubt that East Germany, doubly defensive under the Hallstein and Truman Doctrines, saw Israel and Jewish successor organizations in the framework of the cold war rather than World War II. However, the contrast between East and West German commemoration can be examined not only to impugn East Germany for failing to live up to the by no means disinterested standards of Holocaust moralizing in the West but to make visible the basic fact that Holocaust representation took place with strong reference to real political alliances and aims.

While official East German antifascist narratives were not democratically plural,<sup>42</sup> the West has shown little tendency to narrative pluralism in the wake of its cold war victory. Western commemorations of antifascist politics come up short compared with those that existed in the East. In fact, the process of devaluing antifascist narratives as self-aggrandizing myths of communist parties and successor organizations of partisan groups has accelerated alarmingly since the end of the cold war. In Italy, Renzo DeFelice's students have been assiduously debunking partisan narratives.<sup>43</sup> In France, the groundbreaking work of Marcel Ophuls in exposing the extent of French complicity has been taken up by a much less scrupulous political right to discount partisan activity as not much different.<sup>44</sup> Lutz Niethammer ex-

42. Herf makes his case for the illiberalism of official GDR narratives by concentrating on the exception who proves the rule, Paul Merker, who alone among the top KPD functionaries demonstrated sustained concern with the racial component of Nazi injustice; see Herf, "German Communism, the Discourse of 'Antifascist Resistance,' and the Jewish Catastrophe," in *Resistance against the Third Reich, 1933–1990*, ed. Michael Geyer and John W. Boyer (Chicago, 1994). However, for plural, unofficial narratives, see O'Doherty, *The Portrayal of Jews in GDR Prose Fiction* (Amsterdam, 1997).

43. See Renzo De Felice, *Interpretations of Fascism*, trans. Brenda Huff Everett (Cambridge, Mass., 1977). In the U.S., see also Michael Ledeen, whose interview with De Felice was published as De Felice, *Fascism: An Informal Introduction to Its Theory and Practice* (New Brunswick, N.J., 1976) and who went on to write neoconservative potboilers; see, for example, Michael Ledeen, *Freedom Betrayed: How America Led a Global Democratic Revolution, Won the Cold War, and Walked Away* (Washington, D.C., 1996). See also Alessandro Portelli, whose *L'ordine è già stato eseguito* (Rome, 1999) reconsiders the myths blaming Italian partisans for the 1944 Nazi execution of civilians in the Ardeatine caves outside Rome, "myths that Mr. Portelli says have been growing in recent years as Italy's neo-Fascist party has been working hard to rehabilitate itself" (Alexander Stille, "Prospecting for Truth in the Ore of Memory," *New York Times*, 10 Mar. 2001, p. B9).

44. See Robert J. Soucy, "The Debate over French Fascism," in *Fascism's Return: Scandal, Revision, and Ideology since 1980*, ed. Richard J. Golsan (Lincoln, Neb., 1998), pp. 130–51. Soucy discusses, as one side of a debate, a group of historians that includes the American Eugen Weber, the Israeli Zeev Sternhall, and the German Ernst Nolte, also known as the main protagonist of the 1986 *Historikertreit* in Germany. This scholarly circle tends to regard fascism as an irrational movement, which on the level of its irrational fever cannot be separated from leftist movements in principle.

poses antifascism as a “foundational myth” of the GDR state, and Julia Hell’s recent book on East German literature equates what she calls “post-fascist fantasies” with fascist fantasies, altogether effacing *socialist* narratives as worthy of historical memory.<sup>45</sup> What is most important here about the dominant narrative replacing the Communist emplotments is how much it resembles the Holocaust narrative established at the Eichmann trial. The trial rendered moot both the partisan narratives (such as that presented—in a Zionist framework—by Abba Kovner, a leader of the Vilna uprising) and the collaboration narratives (as were aired with virulent partisanship in the 1954 Kastner trial and revisited in the Freudiger testimony). The so-called two ways debates that the Kastner trial unleashed, comparing the moral-political merits of the ameliorating Jewish Councils versus ghetto uprisings, were effectively settled by the prosecution’s highly considered decision to focus the Eichmann trial overwhelmingly on victimization rather than agency of *either* sort. The kernel of this common displacement of antifascist political narratives, whether in Israel or in Eastern Europe, is to be found in its repudiation of any emplotment of militant agency outside of the stark representation of either legitimate (Allied) or illegitimate (Axis) state violence. Thus Communist antifascists, just like Vilna Jewish partisans, are best ignored in favor of either martyrdom stories or the stories of victorious national armies; vindication is a matter of well-founded state authority—Daniel Goldhagen or Tom Brokaw. Or, to put it in cinematic terms, either *Schindler’s List* or *Saving Private Ryan*, but neither *Partisans of Vilna* nor *Ashes and Diamonds*. The clear lesson is that it is better and purer to be a victim than to risk the culpability of militant action outside of a state framework. In appealing to national jurisdiction and in retrospectively legitimating the militarily achieved Israeli state, the Eichmann trial set a precedent faithfully followed in major representations of the Holocaust well beyond the courtroom.

Invocations of the Holocaust’s moral authority work today to inscribe U.S. foreign policy and that of its allies, including Germany, in a righteous narrative; in other words, contingent policy is naturalized by an appeal to universal moral sentiment. Thus the NATO-led wars that ended the twentieth century, such as those in Iraq and Yugoslavia, are often justified—as a qualitatively different sort of war than those that inaugurated the century—with reference to both the Holocaust (as the ideal type of the alleged

45. In Julia Hell’s version of East Germany, socialism becomes an irrational fantasy, just as fascism becomes a fever for Weber. Both Hell and Weber are able to erase a principled difference between Right and Left on the basis of these fascist/Communist/postfascist fantasies; see Julia Hell, *Post-Fascist Fantasies: Psychoanalysis, History, and the Literature of East Germany* (Durham, N.C., 1997).

crime being sanctioned) and international law (as the legitimation for meting out universal justice with war planes).<sup>46</sup> Given the ambiguous genealogy of the term's universal significance that we have been exploring, it is ironic (but not surprising) that the leading superpower today uses it in the same capacity in which it emerged at the Eichmann trial: as a signifier that blurs the distinction between justice, in all its complex articulations, and *raison d'état*.<sup>47</sup> During the NATO interventions in Yugoslavia, for example, Elie Wiesel traveled to Kosovo at the behest of the U.S. administration "to focus attention," according to the *New York Times*, "on the moral argument that they say underpins NATO's bombing campaign against Yugoslavia."<sup>48</sup> The Holocaust repeatedly occupies the position of exhibit A in the case for a militarily enforceable global law based on universal human rights, a case supported by such influential thinkers as Habermas and John Rawls. At the same time, as we have seen in Arendt's account, the popular sense of the Holocaust originated not in the "uncoerced consensus" of a self-legislating law of international subjects but in the cauldron of legal-political interests accompanying the establishment of the postwar political order of nation-states.<sup>49</sup>

Of course, this is not to argue that the injustice of the Holocaust, as we now understand it, should not awaken human hopes for political justice as expressed by the idea of what Rawls calls "a realistic utopia and Kant's *foedus pacificum*."<sup>50</sup> The problem is rather that the Holocaust's current institutional memory does not clearly convey Habermas's and Rawls's utopian ideas, but instead the confused perception that our dominant international institutions already embody those ideas. In *Between Facts and Norms*, Ha-

46. General Colin Powell, then chairman of the U.S. Joint Chiefs of Staff, claimed that in the Gulf War "decisions were impacted by legal considerations at every level. Lawyers proved invaluable in the decision-making process" (quoted in Christopher af Jochnick and Roger Normand, "The Role of Law in the Gulf War: Protection of Civilians or Legitimation of Violence?" in *War and Its Consequences: Lessons from the Persian Gulf Conflict*, ed. John O'Loughlin, Tom Mayer, and Edward S. Greenberg [New York, 1994], p. 70). The Pentagon Report claimed that coalition forces had "scrupulously adhered to fundamental law of war proscriptions" (quoted in *ibid.*, p. 70). Over 200 lawyers accompanied the U.S. army alone in the theater of operations. The law procedurally legitimated the war in a way that had a questionable relationship to substantive justice.

47. Another way of putting this distinction would be as that between justice as fairness and legitimacy as normal procedure; see Rawls, "Reply to Habermas," p. 429.

48. David Rohde, "Wiesel, a Man of Peace, Cites Need to Act," *New York Times*, 2 Jun. 1999, p. A14.

49. The Holocaust and its trauma are often cited as the compelling ethical background to the development of Israel's still officially unacknowledged nuclear capacity: "Israel's nuclear project was conceived in the shadow of the Holocaust, and the lessons of the Holocaust provided the justification and motivation for the project" (Avner Cohen, *Israel and the Bomb* [New York, 1998], p. 10).

50. Rawls, *The Law of Peoples* (Cambridge, Mass., 1999), p. 21.

bermas recognizes that the relationship between a universalistic Kantian morality and positive law is complicated, with positive law not simply subordinate to moral law. His rational reconstruction of contractarian law, however, needs an epistemological notion of democracy as being a discussion leading to uncoerced, and thus valid, consensus on legal principles. "The *democratic process*," he writes, "bears the entire burden of legitimation."<sup>51</sup> The problem with Habermas's attempt to reconstruct cosmopolitan law as neither derived from a Platonic higher truth nor empirically reducible to contingent legislative decisions is that the democratic process that would legitimate it has virtually no institutional presence in interstate or suprastate relations. Its presumptive emergence in the victory of parliamentary democracies over socialist dictatorships, as discussed in Habermas and also in Rawls's *The Law of Peoples*, is undermined by the substantive inequality between nations as either contracting people or discussing people.<sup>52</sup> The Eichmann trial is so important here because its historical institutional setting and political circumstances embody a conflict that might otherwise be abstracted as a philosophical one between moral universalism and legal realism. With the Eichmann trial we see that the issue is not whether the idealist or realist narrative is emphasized as a matter of philosophical principle but that both are subordinate to the institutional advantages of those militarily enforced sovereignties who exercise jurisdiction. The enormity of the Holocaust crime does not give us a way out of a critical legal and moral historicism that questions the authority of its judges, enforcers, and chroniclers.

### 5. From Evidence to Self-Evidence: *The Specialist's* Return to Aesthetic Judgment

While the film medium is no stranger to the Eichmann story, from the initial television coverage to an excellent 1987 BBC documentary<sup>53</sup> and the orthodox 1997 ABC-PBS documentary, what makes Sivan and Brauman's

51. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass., 1996), p. 450.

52. For a pointed and insightful discussion of the illegal ends to which the rhetoric of international law has been put, see two pieces by John Rosenthal, "'Nouveau' droit international ou absence de droit?" *Recherches Internationales*, nos. 60–61 (Feb.–Mar. 2000): 163–86, and "Kosovo and the 'Jewish Question,'" *Monthly Review* 51 (Feb. 2000): 24–43. In this latter essay, Rosenthal explores in detail how loose analogies with the Holocaust were used to legitimate U.S. and NATO military activity in the former Yugoslavia.

53. The 1987 BBC documentary by Tristram Powell, *The Holocaust: Judgment in Jerusalem*, though it has none of *The Specialist's* technical virtuosity and intensity, does present the Eichmann trial and the controversy around Arendt's book in a framework that allows a viewer to assess some of the forces that contributed to the way Holocaust memory has been mediated by political realities of the post–World War II period.

film exceptional is that it intervenes in the public perception of the Holocaust to question the authority of the judges. Not, that is, to mitigate the crime, but to see the judgment as an exercise of state sovereignty. In the preceding sections I hope I have raised significant questions about the trial itself and the trial's secondary representations as an event. In regard to the trial, I asked whether the courtroom established a clear precedent for a universal judgment on crimes against humanity and whether the sovereign jurisdiction of a nation can serve to address the moral issues of inequality and force between nations. In regard to the trial's subsequent representation in policy arenas outside of the juridical framework, I have considered whether the moral exemplarity of passing judgment on such a crime confers on state prosecutors and their allies a moral exemplarity in inverse proportion to the moral atrocity of the crime. In reconsidering *The Specialist* here, I want to ask what the film's intervention accomplishes as well as noting key limitations to its strategy. After describing some of the film's powerful effects, I consider the political weakness of the film's aesthetic model of judgment, which follows closely Arendt's late political thought and runs the risk of obscuring consideration of the very sort of questions the film has otherwise admirably raised: the political dangers of symmetrically projecting the retrospective judgment of a crime into the prospective exemplarity of a precedent.

As *The Specialist* begins, we, the jury of spectators, hear a babble of languages, almost liturgical in sound, uttering the charges against Eichmann in the tongues of the lands where he is accused of committing his crimes. The plain, though condensed, images set us into a cinematic framework of immediacy, similar to what Heidegger has called a *Ge-stell*, a technological ordering that challenges us to forget what we presume so that we might be open to what will be revealed.<sup>54</sup> Less grandly, we are encouraged by the direct but impassive camera gaze to look at the trial naively, with neither presumption nor ignorance. With no representation of Eichmann's crimes building up to his appearance, just a narrow focus on him and the institutional context—judicial, liturgical, or theatrical—the film's anticipation of the opening curtain does not evoke an unsettled, retributive mood, but rather a classical sense of waiting for the inevitable. When Eichmann appears in the now legendary glass box, there is, as a reader of Arendt knows, no catharsis of confrontation with evil; just the opposite, it is as though a distillate of human moral frailty were on display that had been overlooked in the more potent spectacle of catastrophe. Eichmann's ordinary vulner-

54. See Martin Heidegger, "The Question Concerning Technology," *The Question Concerning Technology and Other Essays*, trans. William Lovitt (New York, 1977), pp. 3–35.

ability confronts the spectator—precisely the vulnerability of an empirical sentience in an overwhelming institutional setting. One image of Eichmann dissolves into the next so he appears subject to an eternal vigilance of fading and changing guards; or, vice versa, the guards sit as he fades, evanescent in the court's transcendence of arbitrary will. Eichmann appears as both nostalgia for the plainly guilty tormentor and a nightmare of insecure self-recognition: idiot, boy scout, eager-to-serve *specialist*. Images of death camps are projected diegetically on a screen for the courtroom, but the camera is angled too steeply for a theater audience to recognize the scenes. Sivan and Brauman digitally insert a faint reflection of the projections over Eichmann's grimaced, but immobile, expression. During the course of the film we accept (if we do) a psychological phenomenology of Eichmann with the calming knowledge that we have no instrumental task to serve, that his crimes have been judged. The law by which they have been judged, however, remains elusive for us, undiscovered, in the legal sense. At the end of the film, as the glass box and police guards are dissolved out of the image to leave Eichmann sitting free at a desk as the modern bureaucratic Everyman, we hear a decrepit Russian dance by Tom Waits, the troubadour of the dissolute regret and ironic sentimentality of the pariah. A Russian dance: the pariah's lost world of the East, the world of victim and persecutor. Everyman, it turns out, is still rattling his bones with impunity in the global shtetl.

In its refusal to draw specific lessons, *The Specialist* is a document that could not have been made at the time of the Eichmann trial. It shows no images of atrocity, it refrains from voice-over narration, allowing Eichmann, rather than the prosecution's "picture painting" (*EJ*, p. 225), to fill the bulk of its time. As did Arendt, it concentrates on Eichmann's empirical psychology as he is called to account for his actions. The discrepancy between what the film does today—distancing itself from the didactic sensationalism of the trial in favor of its banal individual dramas—and what most media accounts did in 1961 does not so much illustrate the dispassion of historical distance, for public memory of the Holocaust has only been more stimulated since 1961, as it reveals in its very reserve how saturated the public has become with media representations of the Holocaust. Sivan and Brauman's pointed references in interviews to the Israeli occupation of Lebanon, to the Israeli-Phalange massacres of Palestinians at Sabra and Shatila refugee camps, to the state bureaucratic manipulation of nongovernmental organizations such as Doctors without Borders, which Brauman headed until his resignation in 1994, and to the general loss of humane judgment in the face of state power all indicate that they mean to recapture Eichmann's testimony in its most unpre-determined frankness and re-present it outside of its original context in Ben-Gurion's state-building enterprise;

Eichmann's criminal susceptibility (though not his actual crimes) emerges as equivalent (though not identical) to that of his prosecutors and judges.

The complex temporality of *The Specialist's* reevaluation of received Holocaust values serves to foreground how so central an event of the century is never a sovereign truth with respect to its sedimentation in public discussions and representations. Such sovereignty—whether it is based on the force of state (and cultural) institutions or the a priori reason of universal laws—seeks to transcend the contingency of empirical will and perception. Sivan and Brauman, however, are concerned that the empiricism of open-minded experience emerge again from behind the imposing grandeur of law and propaganda and serve as a yardstick, if not for normative values, then for actual behavior in the modern world. Whether or not we have laws and institutions capable of judging Eichmann from a secure spot beyond the contingency of power, we can certainly reflect upon this circumstance from the distance of spectatorship. The violence for which Eichmann bears guilt—in the judgment of the film, though certainly not that of the trial—is not categorically distinct from the violence attributable to states that set themselves apart from fragile empiricism of daily life. In this sense, the film conveys a moral judgment based not on Kantian principles of disinterested rational autonomy—which are nowhere on display in the trial's confusion of interests and inclinations—but on the fact of human sentience. The virtue of this judgment, as opposed to legal judgments, is that it does not suggest a precedent or a program that can be appropriated by a judging authority. Here authority instead resides in a temporal suspension, a phenomenological epoché of cause and effect. The absence of any conceptually formulated lesson in the film—and its omission of the pronouncement of judgment and sentence on Eichmann—emphasize the similarity between the film's judgment, once removed from the trial's, and aesthetic judgment; without a conceptualization, our apprehension of Eichmann's guilt remains within Kant's famous formulation of the aesthetic as that “which is cognized without a concept,” relying only in our a posteriori spectatorship and “the free lawfulness of the imagination.”<sup>55</sup>

An aesthetic model of judgment was the last, uncompleted project of Arendt's career, and the film, though based upon an earlier Arendt work, conveys the sense of that model. It thus suggests in its revisioning of the trial neither a procedural model of justice nor a deontic model. It exposes the hollowness of any claims to the universality of the judgment and, hence, its conceptual portability by the state into different contexts. The justice the

55. Kant, *Critique of the Power of Judgment*, trans. Paul Guyer, ed. Guyer and Eric Matthews (Cambridge, 2000), §22, p. 124.

film documents, with its all too human contingency, appears as a positive judgment that might exemplify a righteous moment of *kairos*, but which has no broader prescriptive value. The presiding judge in the Eichmann case, Moshe Landau, has in fact gone on to rule in favor of the right of the Israeli security force, the Shin Bet, to torture Palestinians and to deplore later court decisions that try to elevate judicial authority over the legislative authority of the Knesset.<sup>56</sup> In short, the historical record would seem to indicate that the judgment in the Eichmann case affirms only the immobility of justice beyond its positive determinations. Yet the model of aesthetic judgment the film evokes seems itself to be a risky model, though the risks it runs are of a different sort than those that the film exposes. By examining several implications of the film's critique of the trial and its precedent, I will conclude with a few thoughts about what I will argue is the virtue of a legal and aesthetic historicism that is narrower than universal schemes, but broader than individual perceptual intuitions.

Given the number and importance of historical events that converged in the trial, the filmmakers' decision to distill Eichmann's testimony as the heart of the proceedings necessarily sidesteps the most important legacy of the Eichmann trial: not its missed opportunity to do moral good but its seized opportunity strategically to yoke morality and sovereignty rather than morality and law. While Arendt indeed argues that "the focus of every trial is upon the person of the defendant, a man of flesh and blood with an individual history, with an always unique set of qualities, peculiarities, behavior patterns, and circumstances" (*EJ*, p. 285) and even claims that "Eichmann's testimony in court turned out to be the most important evidence in the case" (*EJ*, p. 222), the actual trial did not limit its focus as Arendt thought it should, nor did the evidence matter centrally to a judgment whose verdict was never in doubt. One controversial aspect of Arendt's book is that she so strongly criticized what the trial was from the point of view of what for her it ought to have been: legally and democratically sensitive and utopian. *The Specialist*, by audiovisually rectifying the prosecution's decision to focus on "a great number of purposes . . . all of which were ulterior purposes with respect to the law" (*EJ*, p. 253) and returning Eichmann to

56. Criticizing court trespass on political and executive authorities, Landau said in a *Ha'aretz* interview, "the very decision that states that we have a constitution that includes court oversight of Knesset legislation was made by the court itself." Because Israel has no written constitution, the Knesset has final authority over any law. Landau's reluctance to embrace a moral or universalist view of secular constitutional law is consistent with the Eichmann court's reluctance to try to establish a precedent outside the ethnic-based Declaration of Independence (and, later, the 1992 Basic Law, which repeats the Declaration) that holds that the fundamental values in Israeli law are "Jewish and democratic" (quoted in Emily Bazelon, "Let There Be Law," *Legal Affairs* 1 ([May–Jun. 2002]: 27, 32).

center stage, is unable to address the historical significance of the way the trial in fact was conducted and its implications for hegemonizing public memory. “The show that Ben-Gurion had had in mind to begin with,” Arendt claims, “did take place, or, rather, the ‘lessons’ he thought should be taught to Jews and Gentiles, to Israelis and Arabs, in short, to the whole world” (*EJ*, p. 9). While Sivan and Brauman refuse these lessons, their film restricts itself to a phenomenology of perception.

The empirical psychology revealed in *The Specialist* rests on the film’s sharp focus on the person of the accused. This perceptual acuity has both an empirical side, which contributes greatly to the film’s critique of the trial’s false universalism, and a phenomenological side, which implies an anthropological universality of perception. The former aspect of the film lends it considerable contrarian potency in a historical moment where the international force of Holocaust discourse, blending moral, legal, and national claims, is out of all proportion to any public deliberation over who is entitled to the force of that discourse. The latter aspect, however, leads to a depoliticization at the point where the film might have indicated a reconsideration of the unequal distribution of moral authority through legal and aesthetic institutions of sovereignty. This ambiguous outcome can be clarified by examining its Arendtian model of spectatorship and exemplarity in judgment. For Arendt, the important fact of a judgment is not its abstract, categorical nature. Judgment works on the model of a paradigm supplied in apprehending a specific case. This paradigm, rather than categorical reason, supplies what Kant calls *exemplary validity*. Arendt glosses Kant’s term with the example of a table. Where Platonism deduces the necessary concept of a table and an empirical induction arrives at the common denominators of a table over many cases, both concepts of validity represent a retreat from the perceptually particular. Arendt thus emphasizes

judgments that are not cognitions: one may encounter or think of some table that one judges to be the best possible table and take this table as the example of how tables actually should be: the *exemplary table*. . . . This exemplar is and remains a particular that in its very particularity reveals the generality that otherwise could not be defined. [*LK*, p. 77]<sup>57</sup>

57. The issue of exemplarity that Arendt raises here can also be seen in the light of several more recent discussions. Hanssen writing on Walter Benjamin’s “Critique of Violence” considers his “politics of noninstrumental means” a third force between law (which is a means to an end: justice) and sovereignty (*Staatsgewalt* as a means to legitimacy). In Hanssen’s analysis, Benjamin’s pure means avoids the thetic and normative force of locutionary concepts. In Arendt’s sense, then, they are “exemplary”; free from instrumentality in the present, they are open toward the unprecedented future (Hanssen, *Critique of Violence*, p. 19).

One can see why Arendt's model of judgment would be appealing to filmmakers working in the public sphere of culture rather than in the narrow legislative realm. The emphasis on particularity allows for the sensual representational gaze of the camera, and the qualitiveness (*quidditas*) revealed by aesthetic discretion stands in favorable contrast to the relentlessly commensurate that is the object of judicial weighing and deciding.<sup>58</sup> Habermas, however, points out a key limitation of using aesthetic perception as a model of judgment:

Mental representations . . . are, in each case, my representations or your representations; they must be ascribed to a representing—either perceiving or imagining—subject who can be identified in space and time. Thoughts, on the other hand, overstep the boundaries of an individual consciousness. Even if in each case they are apprehended by a variety of subjects in various places and at various times, in the strict sense thoughts remain the *same* thoughts in regard to their content.<sup>59</sup>

Habermas's reservations about models of judgment based in perception or imagination indicate the importance to him of conceptual *communication* as the basis of validity. In this sense, Habermas's critique is relevant to understanding the limitations of Sivan and Brauman's film.

In a further sense, however, both the film and Habermas are open to the criticism with which I will conclude the essay, namely, the public reflection on justice (in the film) and the theory of public deliberation (in Habermas) emphasize, respectively, valid examples and valid rules, each containing normative force. By contrast, I would argue that it is essential to step beyond the specific mode of validity and account for the historical institutionalization of the validity claims. In this sense, I am not picking an epistemological fight with Habermas so much as I am doubting the excessive emphasis on the normative over the factual in his account of actually existing international law. I am likewise not contesting Sivan and Brauman's insight into the manipulative ease with which a judgment can be transmuted into a concept and thereby extended beyond the relevant boundaries

58. In her Kant lectures, Arendt accounts for the dialectic of quantity and quality involved in judgment by noting that the Kantian idea of dignity, central to his moral theory, demands that each individual be seen as an individual, without any comparison and principally incommensurable; meanwhile the Kantian doctrine of progress, focusing on the human species demands comparison and utility. "It is," she concludes her lecture, "against human dignity to believe in progress" (*LK*, p. 77). This observation is reminiscent of her earlier claim in the lectures that if Kant acted on his judgments he would be criminal. In other words, one might judge war as provident, but a trespass on dignity. Where, then, does this leave a theory of international law that might include things like *jus ad bellum* or *in belli*?

59. Habermas, *Between Facts and Norms*, p. 10.

of moral righteousness and exploited for other means—transmuted, that is, from law into sovereignty. What I am doubting is whether their film's focus on the unique, singular, and qualitative aspects of Eichmann, the criminal and the human being, adequately grasps the need for comparison, juxtaposition, and discursiveness for a constructive politics—a counter-hegemony—rather than an oppositional lament.

Sivan and Brauman reshape a crucial Holocaust memory, but they do not analyze the context in which their project is received; they bid to reform memory without offering an archeology of how it has arrived at its current form. They thus run the risk of inserting utopia where they want to reveal the inescapability of some configuration of power in both our best and worst judgments. Moreover, as recent scholarship on the Holocaust film as a distinct genre has demonstrated, a shift in representation from victims to perpetrators (or, say, from a redemption narrative to a narrative of existential guilt or to a legal drama) does not simply depict another side of the Holocaust without further implication but comments unavoidably on established genre convention. Genre-bending films such as *The Specialist* or Errol Morris's documentary of the same year, *Mr. Death*, risk becoming invisible within the horizon of genre expectations rather than provoking a revision of convention. Morris joked wryly that his film "would be the first Holocaust-themed documentary not to be nominated for an Oscar," rightly assessing both it and the exclusionary rules of the genre.<sup>60</sup> Cultural memory calls more strongly upon the same identitarian logic (or logic of identification, recognition, exemplarity) that underlies sovereignty than it does upon the discursive logic of natural law. In staking their opposition to received Holocaust memory as an artifact of specifically constituted and militarily dominating sovereignties on the ground of aesthetic judgment strictly conceived, Sivan and Brauman effectively counter the clichéd sentiments of moral smugness such memory production affords the status quo. They do not, however, supply a ground on which to build an alternative discourse. That ground would indeed have to be more institutional, historical, and discursive in character.

In that spirit, I have suggested here a critique of international law based on a political account of how the Holocaust has been hegemonized by imperial sovereignty. The historical and political dimension of judgments and memories of fascism and Nazi genocide formed during the cold war has been widely effaced. Yet given the power of Holocaust "memories" in international life today, their ability to form a civic consensus where, say, Hiroshima or the Vietnam War cannot, demands that their exemplarity be

60. Quoted in Carl Bromely, "While the Academy Slept," *The Nation*, 2 Apr. 2001, p. 44.

disrupted again by the old controversies they seemed to resolve and by the new ones they stifle. In 1949, as the Israeli parliament was still debating the “Law against Genocide and the Nazi and Nazi Collaborators (Punishment) Law,” which later formed the legal basis for the Eichmann trial, a Knesset member made an observation that is even more apposite in a world with only one superpower to enforce all that falls under its sovereign jurisdiction: “The principal danger threatening the future of mankind, and of human culture, is the possibility that the precedent of Auschwitz will merge with the precedent of Hiroshima: if that happens, mankind is doomed” (quoted in *SM*, p. 333).