



THE JUDICIAL IMAGINATION

WRITING AFTER NUREMBERG

LYNDSEY STONEBRIDGE

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Illustrations

- Figure 1 Rebecca West's Visitor Pass for the International Military Tribunal at Nuremberg. Reproduced by kind permission of the Special Collections, McFarlin Library, University of Tulsa.
- Figure 2 From *The Specialist* (1999), Rony Brauman and Eyal Sivan. Reproduced by kind permission of Eyal Sivan.

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Gathering Ashes: The Judicial Imagination in the Age of Trauma

She thought: there will have to be a terrible justice blowing all over the world to avenge all the needless suffering [. . .] It will take a long time to change this, she thought, we learn very little, we learn very slowly. She was afraid she would be reporting disaster and defeat her whole life.

I'm not getting anywhere, she thought. What I need is an opening sentence, not a conclusion.

Martha Gellhorn, *A Stricken Field* (1940)¹

Justice requires us to calculate with the incalculable.

Jacques Derrida, 'Force of Law'²

Witness to the first convulsions of the Nazi occupation of Europe in Czechoslovakia, journalist Mary Douglas, in Martha Gellhorn's extraordinarily prescient 1940 novel, *A Stricken Field*, imagines a future justice: a terrible justice, she thinks it will have to be, to avenge all this senseless, needless suffering. But even as the demand for justice lies everywhere around her – in the arbitrary arrests, capricious violence, lines of desperate refugees, and lost and starving children that the novel describes with such immediacy – Mary has doubts. What if we take so long to understand the nature of this crime that it simply keeps on perpetrating itself? What if we can never catch up with justice? On the other hand, if we arrive at justice too soon, do we not risk falsely concluding an event we have only begun to comprehend? I need a beginning, not a conclusion, she thinks.

It is not just because she is pressed too close to the moment that Mary cannot find her beginning. You do not form a sense from Gellhorn's novel that, given time, history will eventually unravel itself into a moral narrative. Something about what Mary witnesses resists

being put into writing. Gellhorn knew this; in fact, it was why she wrote the novel in the first place. Much of *A Stricken Field* incorporates passages from the reports she filed at the same time, as if she had to be in Czechoslovakia twice in 1938, once in fact and once in fiction, to capture what she is seeing. Even the novel's fictional retelling is a belated form of historical witness. Gellhorn later claimed that she wrote about Czechoslovakia because she could not bear to write about the suffering she had seen in the Spanish Civil War. ('The enemy was the same; the people were equally abandoned, alone, and related by pain.'³³) Desiring a future justice, a conclusion before the end, Gellhorn, like her fictional self-portrait, is instead pulled back to a present of ever-heaping atrocity.

After the war, the law and politics set about furnishing the sort of conclusion desired by Mary Douglas and so many others. As the Nuremberg trial and the Paris Peace Conference in 1946, the drafting of the Universal Declaration of Human Rights in 1948 and, thirteen years later, the trial of Adolf Eichmann in Jerusalem all demonstrated, the law was at its most audacious and creative in the immediate postwar period. This, we are often told, was the dawn of the new era of human rights: a conclusion to the worst that could have happened that would give the world a new moral and political beginning. However much a newly chilly political postwar reality meant that this beginning never really got started, the imaginative pull of that juridical moment was – and remains – considerable. It was a fiercely engaged passion for the future of justice that drew many of the writers discussed in the pages that follow to those events: Rebecca West to Nuremberg, Hannah Arendt and Muriel Spark to the Eichmann trial, Elizabeth Bowen to the Paris Peace Conference, and Martha Gellhorn to all three. But as these concerned and complicated women all also understood, just because the law was at work again, it did not necessarily follow that justice was finally happening. It was not simply a return to the law that was so desperately needed in the wake of Nazi lawlessness, but a way of imagining how what had happened profoundly changed the ways in which it was possible to think about justice and judgement in the first place. Before the world could conclude, it needed to begin again.

Hannah Arendt was one of the first to grasp the political and historical magnitude of this task, which is why her work is the seam that runs straight through this book. The real monstrosity of Nazi totalitarianism, she observed during the Nuremberg trial, was that by making anything possible its crimes exploded 'the limits of the law'. That is why the Nazis on trial at Nuremberg look so smug, she complained in a much-quoted letter to Karl Jaspers; they know that their guilt,

in contrast to all criminal guilt, oversteps and shatters any and all legal systems [. . .] We are simply not equipped to deal, on a human, political level with a guilt that is beyond crime and an innocence that is beyond goodness or virtue. This is the abyss that opened up before us as early as 1933 (much earlier, actually, with onset of imperialistic politics) and into which we have finally stumbled. I don't know how we will ever get out of it.⁴

It is possibly because Gellhorn's Mary Douglas senses the law-shattering potential of what she was witnessing in Europe that she imagines a 'terrible' and avenging postwar justice: as if only an apocalyptic whirlwind – divine justice – could reach down into the abyss. But in his reply, Jaspers cautions Arendt against bestowing Nazi crime with a streak of Biblical 'greatness'. Once you are at the limits of legal reason, it is all too easy to spiral away from the political sense of human justice Arendt so anxiously wants to revive. 'The way you do express it', he writes, 'you've almost taken the path of poetry.'⁵ For the rest of her life, Arendt will attempt to arrive at an idiom of judgement that neither normalises the law-shattering nature of Nazi crime, nor turns it into poetry; to find a way of writing, as well as a political philosophy – the tight entwining of the two will prove crucial – capable of rescuing political and juridical life from the abyss into which it had been thrown. Her and others' effort to imagine justice from within the stricken fields of Nazi atrocity is at the heart of the project of this book.

Traumatised law

If the legal system did not shatter, as Arendt first feared, then it continually encountered its own limits in the second half of the twentieth century. Nowhere in the history of postwar justice was this more evident than in the overwhelming testimonies of the survivors who, after years of silence, finally took the stand during the Eichmann trial in 1961. If, today, attending to the traumatic memories of the survivor has become our contemporary judicial paradigm, this, in part, is because of the decision to place witness testimony at the heart of the trial in Jerusalem. The stories told on the witness stand, however, no more fitted into a narrative of beginnings and endings than did the experience Gellhorn struggled to put in writing in 1938. To give a much-cited instance, when the writer and survivor, Ka-Zetnik, finally collapsed in the courtroom, unable to speak any longer, what he testified to was not the story of Auschwitz but the sheer difficulty, some would say impossibility, of putting the experience of the camps into the language demanded by the law. Eichmann may have been the one on trial, but it

was the survivors who made their appeal to the court – an appeal to the reality of the camps.

Ka-Zetnik's breakdown in Jerusalem is key to Shoshana Felman's *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002), the first study to disclose the connections between trauma and the law, the trial and literature, legal and poetic justice, also central to my concerns here. For Felman, Ka-Zetnik's collapse embodies the psychic lacuna at the heart of the historical experience of trauma.⁶ 'It was', Martha Gellhorn wrote similarly of the trial's testimonies in an article for *The Atlantic*, 'visible torture for all the witnesses to speak; one wandered in his head, screamed something wordless but terrifying to hear, fainted, remembering Auschwitz.'⁷ Often, tortured speech erupts in the middle of testimony, as though the abyss into which not only the victims, but the world, had been thrown opens up in the middle of the courtroom. Gellhorn again: 'The old man cried out suddenly, "A planet without a visa!"' The man, a lawyer himself, had been describing carefully, and with a legislator's eye for detail and evidence, what life had been like for Jews in Germany before the war.⁸

Witnessing the testimonies of survivors in the Jerusalem courtroom in 1961, Gellhorn finally discovers the objective and ethical correlative for the justice she had begun to seek in the refugee fields of Czechoslovakia. Neither was she alone in recognising that the outpouring of grief in Jerusalem signalled the beginnings of a new kind of justice. Many see the traumatic testimonies of the Eichmann trial, and those that have followed in more recent trials, as part of a crucial turn from cold universalising reason towards the more contingent hazards of ethical witnessing in postwar legal history. The narrative that leads from silence to witness, from the calculations of the law to recognising the incalculable nature of what was on trial, has today become standard in understandings of postwar law and justice.⁹

In this book, I track a parallel path through the same history. However, rather than taking traumatic testimony as the end point for a more ethical justice, in the chapters that follow I linger with the blocks, political as well as ethical, that Nazi crime put (and continues to put) on historical and judicial understanding. The crime which nobody was meant to see, I argue, left a truly blinding legacy. Not only, as the Nuremberg legislators worried, would seeing not necessarily mean believing (the court made the calculated decision to minimise witness testimony on this basis), but also one of the most pernicious legacies of the camps was the way they set endless demands on comprehension itself. Those demands do not always lead to clarity (which was why Hannah Arendt was critical of the prosecution's promotion of witness

testimony during the Eichmann trial). How to judge in a world still fog-bound by Nazi crime is a question that preoccupies most of the writers drawn to the question of justice in this period; the answers they give are not always easy.

Gellhorn, for example, gives an uncomfortable measure of the difficulty of thinking through the fog when she crosses through Jerusalem's Mandelbaum Gate (the no-man's-land that separated Israel and Jordan) in 1961, a passage she describes as a entering into 'world of dream'. (Later Muriel Spark will graft Gellhorn's description of this journey into her novel of the same name.) While her report on the Eichmann trial brilliantly invokes the force of the trauma she witnessed in the courtroom, and is itself an act of ethical witness, the tone for her companion report for *The Atlantic*, 'The Arabs of Palestine', is very different. Measured, precise, descriptive: one might be tempted to describe it as trauma-free, were it not for the sense that the invocation of the trauma of Eichmann's victims makes itself felt in the absolutism with which Gellhorn denies the possibility that the trauma can translate across historical experience. 'None of these Arabs has suffered anything comparable to what survivors of modern war know,' she writes, and then, with breathtaking certainty, 'none can imagine such catastrophe.'¹⁰ There is a deeply felt politics here. Gellhorn was absolutely unwavering in her support for Israel; that was one lesson she said she took from Dachau and she never forgot it. (Gellhorn was one of the first journalists to enter the camp.)¹¹ More troubling, perhaps, for the ethical turn in some contemporary trauma theory, is the way she grounds that politics on empathy – on imagining the catastrophe.

The Palestinian refugees lack 'empathy', Gellhorn writes (she has been asking them about the Eichmann trial); and it is because they lack the capacity for 'entering into the emotions of others', for hearing and responding to testimony, that Gellhorn in turn feels no empathy for them. 'It is hard to feel sorrow for those who only sorrow over themselves.' Indeed it is. But on what grounds does lacking empathy disqualify one from the entitlement of justice? If justice is to be tied to an empathetic imperative – an imperative to witness and absorb the suffering of the other – how soon before it falters before the fantasy of deserving or undeserving victims? How virtuous does one need to be before one's cries for justice are answered? Absolutely, it seems: 'To wring the heart past all doubt, those who cry aloud for justice must be innocent,' Gellhorn concludes. Empathy, then, becomes the pivot upon which political judgement turns. It is as though the work of 'imagining the catastrophe' (a formulation also evoked in some current trauma theory) can only begin by circumscribing the catastrophe's experiential and imaginative limits.

The point of this example is not to condemn piously the narrowness of Gellhorn's ethical range, as though she should have passed through the Mandelbaum Gate bearing witness to the suffering of all who she encountered, like some kind of saint. The politics of that moment then, as now, are far too bleak. (The intransigence of the political is partly my point here.) It is rather to emphasise how the blinding nature of the Nazi crime can perpetuate itself in the very discourses that are intended to put it on trial. This was a paradox of which Hannah Arendt was keenly aware. As much as historical and judicial comprehension can be transformed by trauma (which is the argument of Felman's *The Juridical Unconscious*), it can also be thwarted or blocked by the effort to contain it, which is my argument here.

Returning to Arendt

'*Beyond the capacities of human comprehension*' (italics in original) is how Arendt once described a world that has rendered the categories of guilt and innocence immobile with its insouciant reduction of human life to mere matter. From Arendt's perspective, to claim, like Gellhorn, that only the absolutely innocent are entitled to justice would be to miss totally the true monstrosity of a crime that attacks not only guiltless victims, but the very basis of comprehension, and hence justice, narrative and history too. 'Human history has known no story more difficult to tell,' she wrote in a 1946 review essay of *The Black Book: The Nazi Crime Against the Jewish People*, one of the first attempts to document the genocide for a disbelieving world. Innocence beyond virtue, and guilt beyond crime, are no longer categories by which to judge, for Arendt, not least because such distinctions have been corrupted irretrievably by the very absolutism that condemned all Jewish people, saints and sinners, small children and those old enough to have good cause for regret, to the 'status of possible corpses' in the first place. Absolute innocence does not wring the heart of all doubt, as in Gellhorn's disturbing formulation; it sets impossible terms on historical judgement itself. This 'monstrous equality in innocence . . . destroys the very basis on which history is produced – which is, namely, our capacity to comprehend an event no matter how distant we are from it.'¹² For Arendt, there can be no future, no new insights, no new memories, unless the 'real story of the Nazi-constructed Hell is told' with this profound rupture in thought and memory firmly in mind.¹³

In what follows I read Arendt as a judicial historiographer of that constructed Hell. In this I take my cue from Seyla Benhabib's *The*

Reluctant Modernism of Hannah Arendt (2000). Reading sometimes with, sometimes against Arendt, Benhabib's study reveals the extent to which she is (like her friend Walter Benjamin) as much a late modernist historiographer of fragmentation, dislocation, displacement and rupture as she is (like her former lover and tutor Martin Heidegger) an early modernist caught in a nostalgic search for 'the lost and concealed essence of phenomena'.¹⁴ While Benhabib's work (like that of Richard Bernstein, Dana Villa, Mary Dietz and Patricia Owens, among others) has done much to retrieve Arendt's work from the cliché of the 'anti-modernist lover of the Greek polis' for political theory, by contrast Anglo-American literary history (unlike comparative literary studies) has been slow to return to her work with a similar curiosity and rigour.¹⁵ This seems strange, to put it mildly, considering just how steeped in literary culture Arendt's work is. Not only does she write, and brilliantly so, on writers such as Schelling, Lessing and Heine, and their heirs, Kafka, Benjamin, Brecht and Isak Dinesen; it takes a peculiarly cloth-like ear not to appreciate the extent to which Arendt understood the close proximity between her thinking and writing. Crystalline structures shatter and re-form in her prose, treasures are lost and found in the art of the essay, as Arendt pursues the foundations of her own thought in a language both stylised and unmistakably edgy. Only now is this aspect of her work coming into critical view.¹⁶

One suspects, however, that this relative neglect is not just because Arendt's European literary archive is mistaken for a nostalgic evocation of a time before tradition was irretrievably broken (as though she herself had not noticed), but more tellingly because she writes so emphatically outside of the framework of traumatic testimony that has come to dominate discussion of postwar justice. It was, after all, her own cloth ears to the testimony of survivors in *Eichmann in Jerusalem* (1963) which made the book offensive to so many when it was first published. As early as her 1946 review of *The Black Book*, Arendt was clear that, while the real story of the camps must be told, she had doubts about the political-juridical value of such testimony by itself: 'Those who one day may feel strong enough to tell the whole story will have to realize . . . that the story *in itself* [italics in original] can yield nothing but sorrow and despair – least of all, arguments for any specific political purpose.'¹⁷

Many have read this as a failure of empathy on Arendt's part. (Note how ethics, again, turns on the presence or absence of an empathetic imagination.) But, as I suggest in Chapter 2, this repudiation has less to do with the depth of Arendt's feelings for suffering (which, in any case, we can never know) and more with her sense that the trauma of the camps must be pushed into thinking and judgement. Accusations

that Arendt thereby locks suffering out of the political world, thus condemning the victims of the crime she sought to understand all her life to voicelessness, overlook the extent to which the politics of the voice traumatised by Nazi crime is at the very heart of her project. As Benhabib has shown, Arendt's affirmation of the political realm is driven (some might say haunted) by her earlier engagement with the homelessness at the heart of being (*Dasein*) uncovered by existential philosophy. To act in the political world, for Arendt, is to speak that homelessness. Her famous critique of totalitarianism, in this respect, is an attempt to rescue Heidegger's phenomenological subject from a politics of nostalgic despair, for a future politics of plurality.

This shifting between ontology and politics, and correspondingly between trauma and speech, matters for the project of this book because it opens up a different set of connections between trauma, language, and legal and literary justice, from those exposed by theorists of traumatic testimony. When Arendt writes about Eichmann she does so with a biting irony that does not so much (or at least not only) repudiate suffering, as dramatise what it means to think and act in the wake of the catastrophic collapse of distinctions – the making anything possible – of the camps. Irony is not the kind of literary justice that Felman finds disclosed in the mute body of Ka-Zetnik, but it starts from a very similar acknowledgement of the limits of legal reason.¹⁸ It is, indeed, precisely this refusal to abandon political judgement from within, as it were, an abyssal collapse of conceptual categories that gives the texture of Arendt's writing its extraordinary historical charge.

While Arendt's turn to the question of judgement in the wake of the Eichmann trial is well documented in the scholarship on her work (often as a source of political and philosophical trouble), identifying her idiom of judgement as a kind of irony here gives me a starting point from which to reconstruct the development of another tradition of literary justice in the postwar period. Running parallel to the struggle for the victims to have the reality of the camps acknowledged by the law – and the slow and difficult ascent of that reality into the world's juridical consciousness is part of the story I tell here – is the writing of a generation of writers who, having cut their intellectual teeth on the cosmopolitan ambitions of an earlier modernism, forge new literary idioms of judgement in their postwar encounters with the law. These are secondary witnesses to Nazi crime: public intellectuals who inhabit courtrooms, diplomatic meetings, public committees, refugee camps, newspapers and magazines, as well as write novels, reviews and essays; and who voice the dilemmas of their time, not only in their commitment to justice, but in the riskiness of their prose.

'Judging without banisters' was how Arendt described the challenge of the Eichmann trial to Jaspers.¹⁹ Writing without banisters well describes the responses to the Nuremberg International Military Tribunal and the Eichmann trial discussed in the first three chapters of this book. Running through this writing is a sense of a world unable to imagine a justice big enough for the crime which those courts attempted to try. In Rebecca West's reports on Nuremberg and Muriel Spark's novel of Jerusalem in 1961, *The Mandelbaum Gate* (1965), for example, both first published, like Arendt's reports on the Eichmann trial, in William Shawn's *New Yorker*, the sense of there being a moral void at the heart of legal reason is fleshed out through the creative deployment of melodrama. With its overdrawn villains and victims and moral absolutism, melodrama enacts the same discrepancy between legal and literary justice that Felman identifies as exposed by traumatic testimony. With melodrama, however, it is the absence of the experience of justice itself, not, as in testimony, the trauma to which it has to answer, which is pushed into the foreground. When West later complained that Nuremberg was an event 'that did not become an experience', what she meant was that it failed to deliver an aesthetics of judgement adequate to the crime.²⁰

An experientially meaningful sense of justice is not only mourned at mid-century (as, for example, in the lost certainties performed in melodrama); its absence is also angrily and bitterly decried. Whence Arendt's biting irony in her report on the Eichmann trial: a repudiation of the pathos of suffering that was echoed by her fellow *New Yorker* contributor in Jerusalem, Muriel Spark. If, for this generation, the time had not yet come for the ethics of memory to put the world to rights, and if imagining the suffering at the heart of the catastrophe seemed to miss the moral mark, this was not least because these writers felt that they were still very much living within the crime itself. Indeed, it is because, as Spark will put it in her account of the Eichmann trial, the 'massacre is still living', that a furiously ironic voice also frequently marks the distance that justice has yet to travel in this writing.²¹

The calamity of the stateless

'The massacre is still living.' 'The real story of the Nazi-constructed hell is desperately needed for the future,' Arendt wrote in her *Black Book* review, not least because its facts 'have become the basic experience and the basic misery of our times.'²² Arendt does not only mean that the camps have 'poisoned the very air we breathe' and 'inhabit our dreams

at night and permeate our thoughts during the day'.²³ The massacre does not only live on in our minds. What she means is that totalitarianism's rendering superfluous of human life has insinuated itself into the world at a fundamental level; the misery is not over, because the conditions for that basic misery are still in place. The death camps (Arendt is clear on this) were absolutely and traumatically unprecedented in their radically non-utilitarian senselessness. But key among the constellation of different strands that made them possible was the creation of what she called the 'calamity of the stateless'. The second reason why Arendt's writing runs through this book is her acute political, historical and linguistic understanding of how that calamity became the basic misery of our times.

If the law struggled to catch up with justice in the postwar period, this was not least because the trauma was still being lived not only in the memories of survivors (often in a silent hell imposed by a disbelieving or indifferent world), but also by new categories of stateless persons that emerged in Europe, Asia and the Middle East. Before the Eichmann trial finally legitimised the memory of the camps (and before, we could say, the intractability of trauma appeared on the political horizon), the continuities between the refugee and the death camps were visible to many observers; few, however, would have gone so far as Giorgio Agamben in claiming a 'perfectly real filiation' between the unspeakably cruel, but at least nominally utilitarian, herding of the stateless into camps, and the absolute lawlessness of the death factories.²⁴ Indeed, cast within a history of political statelessness, Gellhorn's later repudiation of the Palestinian refugees' claims to justice also begins to look like a disavowal of an unwelcome historical and political proximity. (Neither will this be the last time when an ethics of empathy and identification disguises the role that the politics of nationalism plays in the creation of suffering.)

The question of the political and moral power of the nation state was a matter of much late-modernist anxiety; indeed, one can track the move from high to late modernism through the catastrophic decline of cosmopolitan horizons from the 1930s through to the Cold War.²⁵ Rebecca West's concern with the small states of Yugoslavia in the mid-1930s, for example, is the crucial background to her attendance at the Nuremberg trial. Those small states, like Czechoslovakia, came into being as the result of the treaties that concluded World War One. At the same time, the Minority Treaties were drafted to protect those minorities who suddenly found themselves stateless and unprotected by their host countries. Charging, as Arendt put it, a rather pathetic 'League of Nations with safeguarding the rights of those who, for reasons of territorial settlement, had been left without national states of their own', the

Treaties threw into sharp relief the paradox of human rights. The claim that human rights were inalienable had been in tension with the fact that only the positive workings of state sovereignty could grant rights to citizens ever since the eighteenth century. As countries pushed their stateless minorities across their borders with an ever more audacious impunity, by 1938 no fiction of natural rights could fuzz the fact that to be stateless was to be rightless. Arendt's account of this moment in her famous chapter, 'The Decline of the Nation-State and the End of the Rights of Man' in *The Origins of Totalitarianism* (1951) is as remarkable for its clarity as it is for its prescience:

man had hardly appeared as a completely emancipated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people. From the beginning the paradox involved in the declaration of inalienable human rights was that it reckoned with an 'abstract' human being who seemed to exist nowhere, for even savages lived in some kind of social order . . . The full implication of this identification of the rights of man with the rights of peoples in the European nation-state system came to light only when a growing number of people and peoples suddenly appeared whose elementary rights were as little safeguarded by the ordinary functioning of nation-states in the middle of Europe as they would have been in the heart of Africa.²⁶

As European imperialism began to gorge on itself, the continent found a new *leitmotif* in the figure of the refugee.

Arendt's critique of human rights has found a second life in contemporary critical refugee studies, particularly since Agamben's appropriation of her work for his vision of a biopolitical life without rights.²⁷ My interest in the second half of this book, however, is with what happens when this new extra-judicial category of being – a 'new kind of human beings', in Arendt's evocative hybrid translation – gets into writing. Arendt gave her own brilliant answer to this question in an early essay, 'We Refugees' (1943), in which she stakes out a vanguard for the refugee in a political speech which is powerfully charged with its own homelessness (the subject of Chapter 4). For Arendt, to speak 'as' a refugee is not simply to claim missing rights; it is to enact that deprivation in language. The irony that marked Arendt's response to Eichmann's crime turns out to have its origins in the dislocation of statelessness. To judge after the camps, I claim, for Arendt at least, is to also to speak from within the very homelessness that made them possible.

When the refugee inmates of the Woomera detention camp in Southern Australia sewed their mouths together some sixty years later, in 2002, they, too, enacted the political deprivation of the stateless in an eloquent and ironic performance of speechlessness.²⁸ This is a totally