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Giving Voice to Women: An Israeli Case Study

INTRODUCTION

This paper examines a recent Israeli court decision from the District Court of Tel-Aviv that involved a young woman who had suffered from a series of rapes and violent attacks from her boyfriend. The issue of violence against women has become a topic of legal discussions and reforms in the last few years in Israel. The Israeli Supreme Court has responded to growing public criticism about the legal system with several precedential decisions, among them the *Buhbut* case (domestic violence) and the *Beeri* case (a rape in Kibbutz Shomrat).[1] Compared to these celebrated decisions, my choice of a case from Tel-Aviv's District Court seems to pale. In choosing to study this case, I was informed by the methodology that I employ—a methodology that concentrates not only on the end result (the court decision), but also on the legal process that led to this decision.

The paper raises the question of the woman's voice in the courtroom. Feminist literature of the last two decades has turned to examine the issue of women's voices in general. The courtroom is one of the last arenas where the human voice still enjoys a privileged position in the search for truth. Testimonies of eye witnesses are preferred over documents and professional literature. The trial court is the level where the voices of the different participants in the proceedings reign. A close study of the woman's voice in a trial court reveals that her voice is constructed and shaped to a large degree by the rules of procedure and evidence of the courtroom. This character of a courtroom proceeding makes the feminist slogan of "giving voice to women" a problematic one, since the legal process rarely allows for an independent and uninterrupted voice to be heard.

One central way of shaping the participants' voices in the courtroom is the need to fit them under predetermined legal categories. The paper studies the effects of this process on the story that is heard in the courtroom. It

argues that the neat division into legal categories such as rape and battery may obscure fundamental experiences of harm to women who do not fit either category.[2] Moreover, the study reveals that Israeli legal theory suffers from "color blindness," since it ignores the social, ethnic, and national background of the participants. I argue that these factors play a central role in shaping the voices that are heard in the courtroom. The "color blind" discourse of Israeli academe obscures the dynamic of social legitimation that parades under the guise of legal reform.

THE VOICE METAPHOR IN FEMINIST WRITING

Feminist writings in the last two decades have begun to raise the issue of women's voices. The literature examines the different ways in which women's voices are silenced, distorted, marginalized, and expelled from the public domain. The lack of voice is understood by feminist writers as a source of injustice and various ways have been devised to introduce the missing voices. This article examines the concept of "voice" in feminist writing.[3]

One does not have to go very far in order to encounter the "voice" metaphor in feminist literature.[4] Two of the most influential feminist writers, Carol Gilligan and Catharine MacKinnon, devote large parts of their works to the issue of women's voices.

Carol Gilligan opens her book, *In A Different Voice*, with,

> Over the past ten years, I have been listening to people talking about morality and about themselves. Halfway through that time, I began to hear a distinction in these voices, two ways of speaking about moral problems, two modes of describing the relationship between other and self. Differences represented in the psychological literature as steps in a developmental progression suddenly appeared instead as a *contrapuntal theme,* woven into the cycle of life and recurring in varying forms in people's judgments, fantasies, and thoughts.[5] [emphasis added]

This short paragraph reveals several assumptions that Gilligan holds about the role of "voice" in feminist work. She uses "voice" as a metaphor to describe different types of thinking and different modes of ethical/moral perception. She suggests that her way of listening can expose pre-existing voices that have so far been ignored. She also chooses the "voice" metaphor to indicate the possibility of a harmonious solution: different voices can

come together and provide a richer and more satisfying melody than the monotonal one familiar to us today.

Catharine MacKinnon also chooses to explore the issue of women's voice. She uses the word literally to indicate a human voice, but also as a metaphor about power relations between men and women. MacKinnon opens her book *Only Words* with,

> Imagine that for hundreds of years your most formative traumas, your daily suffering and pain, the abuse you live through, the terror you live with, are unspeakable—not the basis of literature . . . When you try to speak of these things, you are told it did not happen, you imagined it, you wanted it, you enjoyed it. Books say this. No books say what happened to you. Law says this. No law imagines what happened to you, the way it happened. You live your whole life surrounded by this cultural echo of nothing where your screams and your words should be.[6]

MacKinnon points to a lack of voice and interprets this lack as a trace of a struggle. She refuses to attribute the lack of voice to an innocent mistake or conceptual error. Rather, she attributes it to deliberate acts of men silencing women. The voices that are familiar to us are those that have managed to dominate the public domain by excluding oppositional voices. These voices acquire a position of hegemony to which silence is the only witness. It is the reality of conflict between men and women that explains the various ways of silencing, including trivialization, accusation of lying, and depiction of women's voices as fantasies. MacKinnon's understanding of the conflict prevents her from believing in a harmonious solution. Rather, she argues that, to allow new voices into the public domain, existing voices that monopolize it should be silenced. Indeed MacKinnon claims that one such voice is the voice of pornography.

MacKinnon and Gilligan both adopt the terminology of "voice," but understand it differently because of background assumptions about the world that they bring to the discussion: conflict vs. harmony. But why do they turn to the metaphor of voice in the first place? What is its appeal for them?

There are several reasons that can explain the attraction of the voice metaphor for feminist writers. First, silence is understood in feminist literature as a sign of powerlessness and, therefore, giving voice is seen as a political act of empowerment.[7] The voice metaphor helps feminists to break away from an epistemological framework of truth and to replace it with a political/ethical framework of empowerment.[8] Moreover, while the dis-

course of Enlightenment describes "the truth" as singular, "voice" is more readily connected with plurality.[9] Voices cannot easily be reduced to something else, since no report of a voice can capture the richness of the original voice. The plurality of voices requires that we learn to listen. As Martin Buber, the philosopher of dialogue, writes: "The multiplicity of voices emanates from the very bottom of the human condition. There is no voice that can be deduced from another voice and you cannot understand the harmony of voices by way of dissection. You have to listen to it, to listen to the multiplicity of voices and learn to listen to the way the voices interplay with one another."[10] Voice also requires an inter-subjective model of communication. One's voice is often directed to another person to listen to. It is a call that awaits an answer. As Gilligan writes, "I have chosen to speak of voice rather than talk about 'the self' because voice is an instrument of relationship. The self, in contrast, is an image characterized by borders and boundaries. The move from a visual to an auditory discourse leads to the construction of a more fluid or relational psychology."[11] The move from visual to auditory discourse also changes the type of relationship that is expected to develop. It enhances a language of proximity rather than distance. The sense of sight allows the observer to avoid direct engagement with the object of his gaze, thus enhancing the ideal of objectivity as approximated by the position of the detached spectator.[12] The sense of hearing, on the other hand, does not uphold this separation and calls for less distance and more involvement. There is also a close connection between voice and identity. The human voice carries traces of the individual and indicates her embeddedness in larger social groups, such as her ethnic group, her gender, her nationality, etc.[13] Finally, voice is used by feminists as a method to elicit new stories through the more traditional methods of interviews or to develop new methods of listening such as consciousness-raising groups.[14]

The turn to voice conceals an unarticulated assumption that is common to most of the writers who uphold it. These writers assume that "voice" is already out there waiting to be discovered (or listened to).[15] I would like to question this assumption. Our culture, which has replaced the human voice with the written word, has left out one arena in which "voice" still enjoys a privileged position—the courtroom. It is, therefore, a good place to begin our investigation of the concept of "giving voice." I shall conduct a close examination of the construction of voice in a recent Israeli court decision. This decision brought about an important change in the law's approach to domestic violence in Israel. This was the first time for an Israeli court to borrow directly from feminist literature about the syndrome

of the battered woman. The judgment also developed the law concerning date-rape and introduced new theoretical tools to confront the problem. I shall ask how the woman's voice was treated in the courtroom and whether it was really her voice that induced the legal changes.[16] Since my investigation focuses on voice, I chose a case from the trial court level—a level in which traces of the voices of the participants still infiltrate the court's decisions. Asking these questions led me to a discussion of the construction of voice in a courtroom setting and to the lessons we can draw for the introduction of feminist reforms to the law.

THE ROLE OF VOICE IN THE COURTROOM

The thrust of my argument is that the courtroom presents a very different picture of "voice" from the one that is assumed by feminist theory. First, voices in the courtroom are not discovered, but, rather, produced, constructed, and performed (voice as a performative act). Second, these voices are produced through staged interactions with pre-defined roles (between lawyer and witness, lawyer and expert witness, judge and lawyer, judge and witness, etc.). Therefore, "voice" in the courtroom is almost never a monologue. Finally, the voices are never "pure"; they are listened to and understood with the help of cultural and legal frameworks that shape and adapt them into legal discourse. Moreover, these voices often reach those who read through the reports of others. Thus, the end-product of a court's deliberation is often a multi-layered text. My purpose is to examine how these characteristics of a courtroom's deliberation shape the "voice" that reach us as readers.

EVA'S STORY[17]

In reporting the story of ___, I cannot even use her real name. In order to protect her, the law forbids me from providing any details that can disclose the identity of the woman in the courtroom. So I have given her the fictive name "Eva." I choose this name because it has a non-Israeli sound, which reflects the fact that Eva is a recent immigrant to Israel. I also choose it because its sound reminds me of the mythological story about the rape of Io and how she lost her voice and was turned into a cow as a result of it. I will refer to the accused by the letter G., indicating the asymmetry that is apparent in the judgment between the parties. The judge repeatedly calls

Eva by her first name (creating a sense of familiarity) while referring to G. throughout the judgment by his formal title "the accused" (strengthening a sense of distance). Israel is a small country and, therefore, I shall refrain from mentioning the names of the places where the events took place, nor can I talk directly about a factor that, as I shall show, played a central role in the court's treatment of the case—Eva's social group. I am allowed to say that Eva belongs to a small ethnic group that falls under the "Black" side of the big divide in Israeli society between Ashkenazi Jews (whites) and Mizrachi Jews (blacks). It is a group that has been constructed as the "Other" in Israeli popular culture as backward. I can also add that Eva is a young immigrant to Israel and that her mother tongue is not Hebrew, but I cannot specify where she came from. These limitations on my voice make me a participant in the same discourse that I am about to criticize—they force me to report about Eva's story by using stereotypical frameworks that construct her as a social "Other."[18] These difficulties in reporting Eva's story, formidable as they are, pale in comparison to the difficulties that Eva encountered in bringing her story to the courtroom.

There Is No "Story" out There

The law expects people to bring their stories to the courtroom and to report immediately the harms that they have suffered. What happens when these harms have no name and when there is no recognizable story that gives them meaning? What if there is an available name and story, but the woman who experiences the harm is not familiar with them?

Eva had no name to attach to her experience of the harm she suffered one night at the hands of her date, G. She cried and shouted while it happened, but saw it as her bad luck, not something that the law forbids or compensates. She kept the incriminating proofs (her torn clothes) hidden in a closet, until one day someone threw them away. She did not tell anybody because she thought there was nothing to tell.

Five months after the "event," Eva had a conversation with Yael, a student who worked as a social worker in Eva's high school. The meeting was about Eva's difficulties at school. Eva talked in a general manner about her social life and about her current boyfriend. The conversation is cited in the court's judgment:

> Eva: I did not love him, but now I cannot leave him because I love him . . . he is very different from S. With S. I have never slept and if I told him no, he would have stopped, but G. [sadly] never stopped.

Yael: You told him no and he would not stop?
Eva: Yes. It was terrible. It was very painful, I cried and it took a long time, five hours. My sister was not at home, and he could not enter. I was so closed. It pained me and I cried, and in the middle he went to bring me some water. I told him no, but he wouldn't listen [crying].
Yael: It sounds like rape to me.
Eva: Yes. [silent] In fact it was not a rape because he stayed with me afterwards. He didn't leave me.

This report reveals that, at that time (five months after the event), Eva still does not have a name for her experience. In fact, she does not even see it as a separate event, a story with a beginning, a middle, and an end. Yael is the one to suggest a name, but Eva does not see how this name fits her experience. At this stage she still talks with the voice of patriarchy, and, accordingly, the only rape that is familiar to her is "stranger-rape"—one in which the woman never sees her attacker again. Eva is not familiar with the concept of date-rape, and, therefore, G's acts do not look to her like a crime. When Yael suggests that she reports to the police, Eva refuses, afraid of losing her boyfriend's "support and protection."

Obstacles on the Way to the Court

It takes Eva two years, many sessions with the social worker, another violent rape and an on-going experience of a violent relationship to convince her to turn to the police for help. The sociology literature calls this process: "naming, claiming, blaming."[19] Usually, abused women do not report their problem until some trigger forces them to do so.[20] It can be an escalation in the violence or a change in its nature. In Eva's case she experiences a second rape that better fits the stereotypical image of rape: it was violent, she was tied down with G.'s belt and an electric wire, and all her protests against having sex during her menstruation did not help her.[21] This rape occurred after she had lived through two years of abusive relationship. During the rape, Eva cried all the time, but left without saying a word. G. followed her into the street and asked her why she left without saying a word. Eva cried harder but did not answer. In the trial, Eva reports the conversation that took place:

G: We had a good laugh, didn't we?
Eva: You have raped me. You tell me that we have laughed. I have cried all the time and you tell me that we have laughed?

Eva, who understands that she can no longer communicate her pain to G., decides to report about the violence (not the rapes) to the police. Before doing so, she turns to her mother (who spends most of her time on business trips abroad with the father) for moral support. The mother, however, is more concerned with family honor than with Eva's suffering and tries to dissuade Eva from going to the police. She encourages her to solve the problem quietly by talking with G's parents (i.e., to marry G.). Eva rejects her mother's advice and reports to the police by herself.

Having overcome the lack of name, the threats of her boyfriend, and the discouragement of her mother, Eva has finally turned to the police for help. The police take notes, but refrain for more than a month from acting on Eva's behalf. In fact, the police were not likely to do anything about the complaint but for an urgent phone call from Eva's neighbors one night reporting screams from Eva's apartment. The police arrive and interrupt G. in the middle of a violent attack on Eva. Even at this point, the police continue to do everything in their power to weaken Eva's legal case. They do not collect proof and refrain from questioning available witnesses about the violent relationship between Eva and G.[22]

Voices in the Courtroom

> Eva testified quietly and slowly. The tone of her testimony was of pain and suffering . . . She sounded as if she was having a conversation with the accused, a conversation in which she tried to understand how she reached this situation, and why the accused did that to her. Several times she smiled at the accused, a smile of acceptance that can be understood as trying to say to him—you and I know what really happened. My impression was that during her testimony Eva forgot from time to time where she was, and from her point of view, during these moments, she was, indeed, having a conversation with the accused.

In this paragraph the judge, Judge Deborah Berliner, captures a subtle and important difference between her point of view and Eva's. For the judge, listening to Eva is motivated by the need to learn about the truth. For Eva, the judge suspects that her motivation for relating her story in the courtroom is the need to communicate with the accused, to have a conversation with him in public that would confirm her experience to be real. In this sense, testifying for Eva is a speech-act attempting to establish a channel of communication that was blocked outside the courtroom. However, Eva's hope for communication is frustrated time and again. She is put in the witness stand, but her voice is controlled by the defense lawyer.

In the courtroom, the lawyer enjoys the power to define the issues and to structure the direction of the testimony with his questions. The characteristics of testimony in an adversary system have been critically discussed by William Simon.

> The client's only opportunity to tell his own story is to take the stand. Yet, if he does so, his testimony will be rigidly controlled by the lawyers and the judge in accordance with a complicated body of rules that make no sense to him. He will be repeatedly interrupted and he will be prohibited from saying much of what he wishes to say. But even the opportunity to make this expurgated, truncated personal statement can be had only at great cost. The litigant must submit to a cross-examination in which he is forced to respond, in accordance with a highly restrictive and peculiar logic and an oppressive etiquette, to a series of questions designed to distort his position and perhaps also to abuse him personally. Testifying in an adversary proceeding is a humiliating experience. Witnesses are expected to tolerate abuse, condescension, and authoritarian discipline of a sort they would never willingly submit to in private life.[23]

Only, in Eva's case, she was submitted to a similar sort of "abuse, condescension, and authoritarian discipline" in her private life, and turned to the court to help her break away from this cycle of abuse. The legal system becomes a participant in Eva's abuse through its adversary procedures. The defense lawyer, in fact, reenacts in the courtroom the same process that was deployed by G. outside the courtroom, a process of turning Eva's pain into fantasy and pleasure.

Date-Rape

Voice in trials is rarely a monologue. It is produced through the interaction of questions and answers. It is easy to mistake these questions and answers for a simple search for the truth about past events.[24] In the courtroom, only a very constrained type of truth can be heard—a truth that fits the cultural narratives that structure the questions of the lawyers and their reception by the judges.[25]

Eva's testimony about her rape is transmitted in the courtroom through the lawyers' questions, which highlight some facts and obscure others. The central questions are repeated in the opinion of the court:

- Was Eva a virgin before the first sexual encounter with the accused?
- Did she know him before?
- Did the accused bring her water during the attack?
- Did she love the accused?

• Why didn't she report immediately?

These questions do not follow naturally from the formal requirements of the law of rape. The law does not limit the protection of rape law to cases of stranger-rape, i.e., situations in which the victim doesn't know the attacker beforehand, nor does it consider the love of the victim toward the attacker as mitigating the rapist's culpability.[26] However, these are not random questions. Their logic is based on a cultural narrative about "real rape" that is familiar to all the participants in the trial.[27] Even when Judge Berliner tries to modify these social expectations, she does not try to challenge the privileged position that the narrative of stranger-rape still enjoys in the court's deliberations, nor does she try to introduce a "counter story" about date-rape.[28] As we shall see, the judge chooses to rely on the formal requirements of the law, which are broader than the background narrative of "stranger-rape," in applying the law to Eva's experience. The discussion reveals that the narrative about stranger-rape remains the unarticulated norm upheld by the court. This means that the court's willingness to extend the protection of the law to Eva's case comes with the price of depicting the experience of date-rape (like Eva's) as the exception to the norm. This is alarming, since research about sexual attacks against women in Israel indicates that the opposite is true. The latest available statistics (from the year 1994) indicate that in 22 percent of sexual-attack cases the attacker was a family member of the victim, in 15.6 percent the attacker was a friend or acquaintance, in 12.4 percent there was a shallow acquaintance between the victim and the attacker, and in 10.9 percent their familiarity was the result of circumstances such as doctor-patient relationship. This data confirms feminists' claims that most violent attacks on a sexual basis against women are conducted by people who are familiar to the victim. Only in 14.3 percent of the complaints was the attack committed by a stranger. Since in 20.1 percent of the cases, the identity of the attacker and his relation to the victim were not reported, the researchers concluded that, in 65 percent of reported cases, there was a degree of prior familiarity between the victim and the attacker.[29]

Listening with a Framework of "Stranger-Rape"

The court's deliberation is structured by a series of questions, all of which introduce the background story of stranger-rape which tend to undermine the validity of Eva's charges.

1. *Did Eva know G. before the attack?*

This question relies on the paradigmatic story of rape as "stranger rape.' According to this story the rapist is depicted as a stranger to the victim. Any prior familiarity of the victim with the accused undermines the credibility of

her charge of rape. Notice that this story also structures Eva's own understanding of rape in the beginning. In her conversation with the social worker she does not consider her experience to amount to rape because she assumes that rape is by definition a "stranger-rape." During the trial this understanding resurfaces in Eva's testimony, when she stresses that she did not really know the accused before the first rape. A large part of the questions of the defense lawyer about the behavior of G. during that night (bringing her water and tissue paper) are meant to distance G. from the paradigmatic rapist by referring to this popular narrative.

2. *Was Eva a virgin before the first rape?*

This question introduces another aspect of the cultural background that the participants bring to the court's deliberation. According to this part of the story women are divided into "bad girls" and "good girls." Good girls do not have sex before their wedding night, bad girls are permissive and might cover up their promiscuity by fabricating accusations of rape to avoid the social stigma. The fact that Eva lost her virginity to G. before a wedding night puts an additional weight on her to counter the suspicion that she was lying about the rape in order to avoid the social stigma.

The centrality of the issue of virginity in this trial serves another function. Israeli society is a heterogeneous society composed of many different social groups. More traditional groups still consider the virginity of the woman as central to her social status. The defense lawyer emphasizes the traditional social background of Eva and G. in order to highlight the pressures on Eva to lie about her experience, because women who lose their virginity before marriage are considered to be a "defective commodity" (the lawyer's words) in Eva and G.'s social group.

In a case of a social group that has not yet fully integrated into the norms of mainstream Israeli society, it seems only fair to judge the case in its social context. However, contextual judgments can lead in different directions. Judge Berliner rejects the defense lawyer's attempt to use the social norms familiar to Eva and G. as a sign of Eva's lying. Instead, the judge explains that the impact that the loss of virginity had on Eva's behavior should be read as supporting her version. Losing her virginity, the judge writes, exerted additional pressure on Eva to stay with G. and stopped her from complaining about the crimes to the authorities earlier on. Contextual judgment that takes into account the effect of the norms and beliefs of the actor's social group is preferable to an "objective" standpoint that remains blind to such considerations, as long as we refrain from taking one further step. It is a short step from recognizing the centrality of the woman's virginity in a social group to attributing the problem of date-rape as a whole

to the backwardness of this social group. Such a move can work to limit the problem by locating it in marginal social groups. The judgment remains unclear on this point. I will return to examine the use of contextual judgment as a legitimation mechanism in the last section of the article.

3. *Why didn't Eva try to escape?*

According to the prototypical story of stranger-rape, the woman is expected to flee away from her attacker. Israeli rape law does not require resistance of this sort any longer, but the woman's story in the courtroom is still heard against this expectation. In order to make sense of Eva's experience, an alternative (counter)story should be articulated. In her opinion, the judge rejects the attorney's interpretation of Eva's staying as a sign of consent, because Eva was raped in her own house and had nowhere to run. However, the judge stops short of introducing an alternative story about date-rape that would question the cultural expectation of "running away" as appropriate expectation from rape victims. The judge does not challenge the centrality of the framework of stranger-rape in the court's deliberation and only adapts this framework to the special circumstances of the case at hand.[30]

4. *Why did Eva delay her complaint?*

This question is based on the expectation that victims should report crimes unless they are coerced or threatened not to do so. This was not the case with Eva. The law interprets her delay in reporting as a sign of lying.[31] The assumption is that, if a victim does not report immediately for no apparent reason, the late complaint is suspect as a fabrication. Only in exceptional circumstances does the law accept a late complaint. The judge, who believes Eva, makes an exception to the rule in her case by stressing her special circumstances: being a new immigrant, alone in the country,[32] very young, and socially dependent on her boyfriend.

It is this reframing of Eva's story according to the legal requirements of withheld testimonies that conceals from sight the serious obstacles that stood in her way of reporting the crimes. By concentrating on "exceptional circumstances" we no longer hear the ordinary story about the difficulties women generally experience when entering the process of "naming, claiming, and blaming"—difficulties that are prevalent in cases of date-rape and other legal harms such as sexual harassment and domestic violence, which have gained legal recognition in the last twenty years. To see these difficulties, we need to challenge the adequacy of the legal doctrine about withheld testimony in crimes such as date rape. This doctrine is based on several assumptions about the world that do not fit the victim's experience: first, an event happens in the world; second, time elapses between the event and the

report about it; third, there is no coercion or threat that stops the victim from reporting the crime—Conclusion: the victim is lying. These assumptions do not take into account cases in which the victim lacks (for a long period of time) the name and the story to subsume her experience under existing legal categories.

The report of Eva's social worker indicates that none of these assumptions fit Eva's experience. Five months after the event Eva still did not see her experiences as a defined "event." She did not have the name for it and resisted the social worker's retelling of her experience as rape. In these circumstances, it would be a mistake to try to point to "exceptional circumstances" that explain the delay. The concept of *delay* is foreign to a case in which a name and a story is still missing.

By adapting Eva's story to legal doctrine, the judge finds a way to help Eva. However, this way carries an additional cost. It makes it difficult to listen to Eva's story about the harm of silencing, because it diverts our attention from the problem of naming. Helping Eva by creating an exception in her case also stigmatizes Eva as a social "Other" (an immigrant who is not familiar with the ways of the country) and introduces the problem known in feminist literature as "the double bind."[33] This approach also does not help reform the law so that complaints of more women who struggle to find their voice could be heard as reliable testimonies in the courtroom. In short, the judgment fails to develop the conceptual tools to listen to all those women who are the victims of date-rape and who have to struggle with social expectations about "real rape" in making sense of their experience.

Domestic Violence

The law judges by breaking down human experience into events and reordering them according to legal categories.[34] This process is understood as helping to expose the truth; in Eva's case, however, this process only disguises the dynamics of domestic violence by focusing on "episodes" of violence instead of on the dynamics of violence over a period of two years.

Eva's experience is divided by the judge into two legal categories: rape and assault. Under the legal category of assault, the court assembles all the parts of her story that deal with the physical violence she has suffered. The legal category of assault assumes that the violence is an isolated event, bounded in time and in space. For this reason, the court's investigation focuses on two violent episodes. The relationship between Eva and G. in the period that led to these violent attacks and the events that followed them are not discussed. This narrow temporal framework leaves out the periods "in

between the violent attacks."[35] These periods, however, are crucial for understanding how Eva could develop feelings of love toward G. and how G.'s terror tactics weakened her resistance. The result is that the story of Eva's love and the strength of her will disappear from sight, and Eva's helplessness becomes the defining attribute of her psychological constitution.[36]

The key questions in the court's investigation are "why didn't she leave?" "how could she love her abuser?" The background story that structures the questions of the defense lawyer about domestic violence is the conventional story about a fight in the pub. "Staying" and "loving" are nonsensible reactions when one is attacked by a stranger in the pub. To counter this story, Judge Berliner introduces, for the first time in Israeli law, the psychological theory about the "battered woman syndrome."[37] The court gives the theory a broad interpretation so that it applies to married and unmarried women alike. However, the court does not try to integrate the legal category of assault with the story about domestic violence. This means that the court does not consider extending the time-frame of assault to include the events that led to the attack and those that followed it so that the legal category will reflect the cycles of violence typical in cases of domestic violence. Without such integration, the narrow framework with which the court listens to Eva's testimony allows it to recognize only her helplessness at the outbreak of violent attacks. The psychological theory of the battered woman syndrome is introduced only to "explain" this helplessness and not to challenge the legal framework of battery itself.

The judge is faced with the dilemma of how to reconcile Eva's testimony about the love she feels toward G. and the cultural assumption that violence and love contradict each other. A change in the temporal framework of the discussion could allow the court to expose the cycles of love and violence in Eva and G.'s relationship, where fear and love co-existed. As I said, the court leaves the narrow temporal framework of the assault category intact. The end result is that the judgment emphasizes the lines of helplessness and irrationality in Eva's story and its empathy is bought at the high cost of labeling Eva's behavior as abnormal.[38] Eva can talk about her daily resistance, she can describe the long and complicated struggle for control, but without the conceptual framework to connect these details into a meaningful story of survival, they remain just that—details.

A good example of how Eva is heard and yet not heard is the judge's explanation of the love that Eva expresses toward her abuser:

> I have no doubt that Eva developed a dependency on the accused and the love she is talking about is part of this dependency. When she says that the accused

> was "my life, my air, my food, everything, I loved him very much," there is no reason to doubt her words, and we can understand the chain of events that brought this about.[39]

THE UNHEARD STORY: THE VIOLENCE OF SILENCING

I would like to offer an alternative story about Eva's experience. My story is based on a different reading of Eva's testimony in court. I take her testimony to be more than a report about the physical harms of violence that she has suffered. I understand her testimony as a *speech-act*, an act of communication that stands up against a process of silencing and distortion. This understanding of a courtroom's testimony will help me expose a story that could not be heard in the proceedings and that failed to be communicated to the court. I would argue that this story was not heard because the law did not offer a framework that could make it comprehensible.

My access to Eva's voice is mainly through the report of the court.[40] The court's judgment often cites from Eva's testimony. If we listen carefully to Eva's words, we hear that, each time she is called by the court to describe the harm she has suffered, Eva chooses to talk in terms of a loss of voice. I suggest that we take her words seriously. The first time that we hear about Eva's fear of a loss of voice is during her testimony about the second rape. In the middle of a concrete description of her rape, Eva's narrative suddenly comes to a halt, and she resorts to the help of a metaphor.

> There is something like this in our dreams. When you want to run away and cannot, when you try to scream and no voice comes out. This was my reality. I tried to scream, to tell him something and no voice came out.

Eva testifies about an experience of disconnection between body and voice—trying to speak but no words come out. During her second attempt to tell the court about her rape we witness another "digression" in Eva's testimony. Instead of concentrating on the act of penetration that is central to the legal accusation, Eva describes one frozen visual image: she sees G. trying to put his penis in her mouth. This frozen picture brings to mind MacKinnon's challenge to Gilligan's "other voice"; the silence of women, she suggests, is often the result of the fact that "his foot is on her throat."[41] It is as if Eva tries to explain to the court that, by reducing her experience to physical harms, it is missing something crucial in her experience: the harm of silencing, which has no name.[42] The third time we hear about the loss of

voice is when Eva is called to explain the incriminating pictures presented to the court by the defense attorney—pictures that were taken during the trial at G's home in which she is shown hugging and kissing G. The defense lawyer presents a video-tape that was taken secretly without Eva's knowledge. Eva's voice is conspicuously absent from the video-tape and the judge suspects that her voice was erased deliberately.[43] No sooner does Eva uncover the power of her voice in the public domain than G. tries to "cut her tongue" by erasing her voice from the tape. This erasure is symbolic: against a woman's voice the man resorts to the power of the eye (the camera). This symbolism is captured by MacKinnon:

> In this thousand years of silence, the camera is invented and pictures are made of you while these things are being done . . . the camera gives the pictures a special credibility, a deep verisimilitude, an even stronger claim to truth, to being incontrovertibly about you, because they happened and there you are.[44]

In this passage we encounter the two protagonists: the Eye (man) against the Voice (woman). In western culture, the eye enjoys a privileged position as having a "stronger claim to truth."[45] Susan Sontag explains that "[p]hotographs supply evidence. Something we heard about and is still in doubt is seen as proved when its pictures are shown to us. Photographic documentary has the power to convict."[46] The camera has the power to produce an effective silencing of women by showing their pictures and depicting their pain as signs of pleasure. Indeed, G's pictures "prove" that Eva's words about her nightmarish fear of a loss of voice were prophetic words, because they predicted precisely what he was going to do to her during the trial.[47] This development is not surprising because of the law's tendency to reenact in the courtroom the same dynamics of silencing that the victim experiences outside the courtroom.

It is worthwhile to contrast the use of camera as witness with the use of voice (tape-recorder) as witness. In a prior confrontation between Eva and G. that was conducted in the police station, G., who thought that they were alone in the room, approached Eva and begged her (in their mother tongue) to take pity on him and to drop the charges.[48] This tape was presented in the trial as incriminating evidence against G. Interestingly, when we have "voices" as witnesses, a very different truth about the nature of the relationship is heard. It is especially revealing that this aspect of their relationship comes out when they are left alone to conduct a conversation in their mother tongue (which is inaccessible to the court) without knowing that they are being recorded.

When Eva is called upon to explain the video-tape, she resorts once more to the issue of voice. She tells the court that, during the trial, G. has gradually succeeded in turning all her friends against her and convincing them that she is a liar. Frustrated by the lack of communication in court (she can be heard only through the cultural framework of the lawyers), Eva says that she decided to meet G. outside the courtroom to convince him to stop distorting her story:

> All our common friends think I am a liar. He tells everybody that I am a liar and they think I want to put him in jail. I feel that everybody hates me. *I am alone. I have no one to talk with.* Even my girl friends go to him and do not call me. My parents are abroad. [emphasis added]

Eva gives testimony to the continuation of the harm of silencing throughout the trial. We see that, in the three times in which Eva was called to explain, she chose to speak about voice and about the search for voice. Still the judgment has no name to give to this harm and no legal category to translate it to legal language. We need to develop a legal framework that will allow us to hear this unheard story.

THE NEED FOR AN INTEGRATIVE STORY

The court is careful to divide Eva's experience into neat categories: rape, battery, another rape. I have shown how unarticulated expectations about these categories infiltrate the legal deliberation and structure Eva's voice according to paradigmatic narratives about a "stranger-rape" and a "pub-fight." I have also examined the various ways in which the judge tries to reform the law by extending its protection to date-rape and domestic violence. However, the law does not offer an integrative framework that can connect the experiences of assaults and rapes that Eva has suffered. I suggest that such a framework should concentrate on the connection between violence and silence. Such a framework will help us hear Eva's testimony as a connected story.[49] Moreover, it will allow us to notice the very complicity of the legal system in the harm of silencing and to develop ways to confront this risk.

Eva's testimony is an attempt to try to break away from the constraining categories that the law offers her in order to tell a different story. Her testimony describes continued attempts to silence her voice and control her life. For example, the two rapes that she experienced were not isolated

events. Rather, they were calculated to gain control over her by breaking her resistance. The first rape was strategically aimed to make Eva dependent on G. because of the cultural significance that their social group attributes to the woman's loss of virginity. Indeed, thereafter, Eva is caught in a violent relationship with G. and has to fight him from a disadvantaged position. The second rape was an integral part of this struggle for control over Eva. At the time of this rape, Eva and G. had been together for two years; therefore, the second rape cannot be explained as stemming from a sexual impulse. The timing of this rape is crucial to understanding its meaning—G. forces himself on Eva during her menstruation. When we view the two rapes together, we can see that the second rape was also a calculated attempt to further invade her autonomy and to gain control over her life. G. was using this rape to send a message to Eva that she (including her time) belonged to him completely and she must make herself available to him at any time, including the period of her menstruation. Thus, the rapes that occur in strategic timing constitute an integral part of the struggle for control.[50] The recurrent physical assaults, on the other hand, should not be understood simply in terms of physical violence. As I have said, when we connect the different "episodes" together we can see that their intensity grows in direct relation to Eva's attempts to communicate her suffering to the external world. They are carefully orchestrated to silence Eva's voice before it reaches the outside world.

TESTIMONY AS A PERFORMATIVE SPEECH-ACT

Eva's resort to the court system should be understood as part of a struggle over voice. Eva seeks external help only after all her attempts to communicate her pain to G. have failed. The judge is right in observing that the meaning of "giving testimony" for Eva is first of all an attempt to carry on a conversation that has failed outside the courtroom. Viewing trials with an epistemological framework of truth prevents us from understanding this aspect of giving testimony. For Eva, giving testimony is an attempt to confirm her experience in public. As Hannah Arendt explains, for human beings, reality is intimately connected with speech; what is unspeakable has no reality.[51] Human beings are political beings in a very literal sense—they need to communicate their experiences to others. They need a community that will confirm their experience as real. Eva, who continuously encounters attacks on the validity of her experience when each painful experience is immediately translated by G. to mean pleasure and games, turns to the court as a last resort to confirm the reality of her pain.

Eva does not bring a *coherent story* to the courtroom. A central part of the harm she suffers is precisely that her experience does not connect to form a coherent story. It is as if she turns to the legal system in the hope that, in court, she will be able to piece together her experience. It is an attempt to overcome the silent world in which she has found herself enclosed, and to force her abuser to enter into a dialogue with her. However, the court's interactions between lawyer and witness, frustrate her expectations. The lawyer enjoys the power to direct the discussion and to reframe the witness' story under conventional legal rubrics. Moreover, the lawyer's questions judge Eva's experience against a background of cultural expectations (a stranger-rape and a pub-fight) that cast doubt on its validity. We have seen how Eva's testimony is cut down into small pieces ("episodes") that present her either as a liar or as a helpless and irrational victim. Moreover, during the trial the legal system turns Eva herself into a criminal when she disobeys a court order that forbids her from meeting with G. In order to communicate with G. (a communication that has failed in the courtroom) Eva has to break the law. Trying to speak becomes her crime. The pictures of this attempted communication are then presented as evidence against her by G.'s attorney. Being a "witness" in the trial (and not enjoying the status of a litigant), Eva does not have a lawyer of her own to guide her about this matter, and she is summoned to the court for questioning with no prior preparation about the incriminating pictures.

When we change the framework from an epistemological to a communicative framework (testimony as an act of giving voice), we begin to notice the responsibility of the legal system to the harm of being silenced.[52] Not only do the police, through their gross negligence, take part in this silencing, but also the legal system, which provides categories that do not help Eva to construct a comprehensible "story" out of her divided experience, is responsible. If we understand "giving testimony" as a political act of trying to build together a story in public, the attempts of the legal system, in the name of truth, to cut down Eva's experience in order to fit it under unfit legal categories, constitute another type of silencing. The court has thus failed both to understand Eva and to translate into legal language her stuttering search for a voice. Finally, the communicative model of testimony should lead us to rethink the ethics of a courtroom's investigation that repeats (and reenacts) the act of silencing.[53]

Adopting a "speech-act" framework also helps clarify the complaints in the courtroom of many women witnesses who have been victims of rape and domestic violence. We are familiar with the phenomenon that such crimes are often "crimes without a victim" in the very literal sense that no victim comes forward to give testimony (and if she comes forward she often

retreats). The reason given for this is that, in the courtroom, the victims suffer a repetition of the painful experience. The adversarial system creates the conditions for reenacting the crime in the courtroom—rape victims feel that they have been raped again in their cross examination and that their privacy has been violated.[54] Likewise, battered women have to go through a courtroom deliberation that makes them look helpless and irrational.[55]

In this article, I have identified another type of reenactment typical to such trials—the reenactment in the courtroom of the violence of silence. The "performative theory" of a courtroom's deliberation is capable of highlighting the empowering aspects of a trial that bestows a mask of formal equality on the participants and creates a forum for their autonomous actions.[56] The dark side of a trial that the performative theory exposes is the various reenactments of the original crime that sometimes occur during trial.[57] Since the problem is systematic, we should begin to take seriously the complaints of survivors about being subjected to a "second rape" and a "third battery" in the courtroom and to devise procedures that will counterbalance this tendency.[58] I believe that the introduction of limitations on the scope of questions about the victim's intimate life and the movement to give voice to victims in criminal trials are attempts in this direction that should be thought of in a more systematic way.[59]

VOICE AND THE CONSTRUCTION OF THE OTHER

A legal judgment often contains a report on the events that took place in the courtroom. It describes the testimonies and the voices that were convincing to the court and those that were rejected as unreliable. In our case the judgment cites generously from the testimonies of the witnesses, allowing us to hear their own words. This technique of quotation can be understood as an act of empathy with the victim on the part of the judge, or as an attempt to understand the events from the point of view of the participants.[60] It can also be understood in more traditional terms as a way for the court to report the "signs of truth."

I would like to consider another (hidden) role of direct quotation. I would call this role "social legitimation." The courtroom is a meeting place for people from very different social groups.[61] Judges who quote from the witnesses' testimonies sometimes use this technique as a way to signal to their readers an unarticulated distinction between their world and the world of the participants. Quotations can be used by the court to construct a social group as an Other to the judge's social world. This use of quotations

can serve to legitimize existing social practices by attributing the problem to society's Other.

Legitimation through an Opposition to the Other

In an important passage in the court's discussion of the meaning of rape, the judge resorts to the words of Eva and of Yael, the social worker. I have quoted above the part of the report where Yael suggests to Eva that what she has experienced was rape. Yael, ends the report with her own words "Still, it was a rape!" The judge quotes from this report and then gives her own definition of rape:

> As for the definition of the event as a rape—Eva explains why she thinks this was not a rape: it is not a rape because "he stayed with me, he did not leave me." It is interesting to note that in the margins Yael wrote: "this was still a rape!" Thus, the common sense understanding of a student in the university (not a law student) with concepts that were not shaped by legal terminology but by a basic understanding of what constitutes a rape, Yael comes to the conclusion that this was rape. Yael's understanding, of course, is not constitutive to the legal definition of rape, just as Eva's understanding is not material.

In this paragraph the judge quotes Yael's words, Yael's report of Eva's words, and the Judge's own interpretation of these words. We can find three stages in the process of attributing the problem to a social Other. In the first stage, the judge contrasts Eva's understanding of what constitutes rape with Yael's understanding. The two views are presented as equal, but Yael gets the advantage of having the last word. In the second stage, the judge explains that Yael's understanding represents a basic and prevailing social understanding of rape in Israel. This explanation, when read against the thick cultural background about the marginality of Eva's social group, helps construct Eva's understanding as deviating from the norms of Israeli society and the hegemonic power that the "stranger-rape" story enjoys in Israeli society. It also helps to hide the pervasiveness of date-rape in Israeli society. In the third stage, the judge resorts to a position of formal legal neutrality from which Yael's understanding is seen as no better than Eva's. The law and the law alone, the judge writes, is to determine what constitutes rape. However, given the two prior stages that ensure that Yael's understanding will be taken as the norm (simple and basic understanding), the law's position is in fact equated with Yael's understanding. The three stages help locate the problem in a group of a social Other and stop the court from discussing the more general problems of date-rape in Israeli society.

It is worthwhile to note the complexities in the notion of "voice" that such a paragraph reveals. Both Gilligan and MacKinnon use the term "voice" to denote a unifying picture of the group of women. This assumption has been exposed to growing criticism from feminists who undertake to discuss the internal conflicts among women who come from different ethnicities, nationalities, and social backgrounds.[62] In the above paragraph, the judge uses these differences between the social worlds that are represented by Yael and Eva in order to avoid dealing with the perversity of the problem of date-rape in Israeli society. Another example of this use of direct quotations as a way of signaling Eva as a social Other appears in the judge's treatment of the battered woman syndrome. The judge tries to explain the apparent contradiction between the abuse that the battered woman suffers and the love she expresses toward her abuser. This the judge does by "visiting" Eva's point of view.

> I have no doubt that Eva developed a dependency on the accused and the love she is talking about is part of this dependency. When she says that the accused was for her "*my life, my air, my food, everything. I loved him very much,*" I have no reason to doubt her words. As I explained, we can understand the events that brought her to this. Eva's bad luck is that she has not freed herself from this dependency in the accused even though she is an intelligent girl and understands that these relationships are wrong from the beginning. As she herself admits: "*When I look from a distance I can see how much I suffered.*" [emphasis added]

In this paragraph the judge tries to enter Eva's shoes. She explains that what is seen by Eva as love is what "we" call dependency. It is here that we can see the danger of the technique of "going visiting," because, by the very attempt to enter the world of Eva, the judge also signals that this world is foreign to ours. Yet the technique creates the illusion that the judge can represent Eva's world to us without distortions.[63] Interestingly, to create a sense of reciprocity, the judge puts Eva in the position of a judge over herself and cites from Eva's testimony saying that she could understand how someone from the outside would only see her suffering. This reciprocity creates a false impression of interchangability of social positions between Eva and the Judge.

Domestic Violence or the Violent Other

The judgment of the district court in Eva's case is important to the reform of the law of violence against women in Israel. It develops the law and introduces new theoretical tools to confront the problems of both domestic

violence and date-rape. It is for this reason that we should be alert to the message that the judgment sends about these problems. My claim is that the social context of the case played an important role in the decision. It is not by accident that the court chose to reform the law of domestic violence in this case. The social context allowed the court to recognize the problem and at the same time to cover it up. The court engaged in a double movement that allowed it to sound progressive without having to question basic legal concepts. This double move resulted in a further legitimation of the *status quo*. The court recognized the problem only to attribute it to marginalized groups.

Israeli society is a heterogeneous society consisting of many social groups, as I have previously stated. In popular culture, it is divided according to big binaries: Religious and Secular; West (Ashkenazi) and East (Mizrachi); Jews and Arabs. Violence and social deviation have been attributed for many years to Mizrachi Jews (immigrants from North Africa, Arab countries, Asiatic countries, etc.). This social stereotype of Mizrachi Jews as violent helps conceal the pervasiveness of the problem of violence and the violence of the law itself. It can also justify non-action on the part of the state, because the common assumption is that, once these groups will be integrated into modern Israeli society, the violence will disappear of itself.

Haim Dworin, a former judge and a deputy president of the district court in Tel-Aviv, writes in his memoirs (published in 1985) about the problem of domestic violence in Israel. His words are revealing.

> Why, not withstanding all those laws, is the phenomenon of battered women so prevalent? . . . My opinion in short is that we live in a Levantine state in which many of the residents still think, if I may use metaphoric language, in Feudal and Patriarchal terms. They see the woman as an object or a piece of furniture, or as the property of the husband.[64]

Judge Dworin is confronted with society's secret—the harsh reality of battered women and the pervasiveness of the problem. He finds it necessary to provide an explanation. As a man, it is difficult for him to attribute the problem to the violence of men. As an officer of the state, it is difficult for him to attribute the continuation of the problem to the failure of the state to fight it. As a judge, it is difficult for him to acknowledge the co-responsibility of the legal system. So he is left with the only explanation that does not implicate him under any of his roles, he attributes the violence to the cultural Other—the Levantine Jew.

Judge Berliner, who wrote the opinion of the court in our case, is a

woman. This fact makes a difference. As a woman, she finds more ways to empathize with the battered woman Eva, but she is also careful to distinguish between their social worlds. She can recognize in Eva's story a familiar experience of love, and she objects to the attempt to deny the love of the battered woman because of her "irrationality." She reminds the readers that every love experience has this hard core of irrationality. However, Judge Berliner is also quick to distinguish between her own experience (true love) and Eva's experience (dependency and helplessness). Unlike Judge Dworin, she is willing to acknowledge the responsibility of the state for the violence and criticizes the police inaction with harsh words. She is also critical of the legal system with its inadequate categories. To change this situation she introduces the "battered woman syndrome" as a conceptual tool to aid the courts to deal with such cases. But Judge Berliner stops short of recognizing the problem as one that is general in Israeli society. Instead, she resorts to the easy way of attributing the problem to the Otherness of Eva and G. The judge constructs the accused as an Other to Israeli society by reproducing what she calls a "collection" of his typical expressions. These expressions are all examples of low slang and a patriarchal world view.[65]

> —I never raise a hand on her, only when she gets on my nerves.
> —We were like a husband and a wife and I would protect her . . . I told her: think about what you have just done. I slapped you for a reason.
> —She would not keep her hands to herself and would have slapped me . . . she would curse and hurt my honor. I cannot just slap her for no reason. She would bring me to such a state that I could not control myself, and I would slap her and then feel sorry for a couple of days.

This collection depicts G. as an Other to mainstream Israeli males—violent and ignorant. For G., violence is so ordinary that he uses the word "slap" to express it. He understands his role as an educator and protector of the woman while, all along, battering and raping her. The most important thing for him is his honor, and he often loses control. I do not claim that these expressions are not accurate depictions of G. They probably are. However, the judge does not try to overcome their strangeness, although she knows how to use quotations in a way that tries to overcome cultural differences. She does it several times with Eva's testimony. For example, when the judge considers an important omission in G.'s testimony—the fact that Eva attacked him with a knife—the judge does not try to understand this omission in terms of G.'s world view. G. explains that he omitted this fact from his testimony because he was ashamed to admit that a woman attacked him

with a knife; it undermined his honor as a man. The judge considers this explanation to be "illogical," because Eva's attack could clearly strengthen G.'s version. She concludes that this omission was a deliberate attempt to conceal Eva's desperation. This unwillingness to enter G's world raises the suspicion that, with G., the judge opts for an easy solution to a difficult problem—she judges G. according to a standard of reasonablness that embodies conceptions of Western tradition that are foreign to G's world view. This method helps to attribute the problem of violence to a marginalized social group of immigrants. Thus, the use of authentic voices in the judgment, instead of exposing the "truth" about the Other, further constructs him as a mythical Other—a G.[66] Listening to Others' voices proves to be a tricky endeavor indeed.

CONCLUSION

In this article I proposed to put the concept of "voice" on trial. I suggested looking into three characteristics of voice in the courtroom with a performative speech-act model in mind: 1) voice as the product of staged interactions between lawyer and witness, judge and lawyer, and judge and witness; 2) voice as a performative speech act of the witness who turns to the court to help her create a story in public and to rebuild a channel of communication that has broken outside the courtroom; and, 3) a court's judgment as a meeting place of people from different social worlds, translated as a multi-layered text of "voice" reporting on other "voices."

Listening to an Israeli court's deliberation with a communicative/performative model helped me expose some systematic problems that the attempt to "give voice" to women is likely to encounter in the courtroom. First, the staged interactions are based on conventional stories that filter the woman's story according to cultural expectations about rape and battery. These cultural spectacles are not an issue of critical examination in the courtroom and they tend to undermine the validity of the woman's testimony. Second, we saw that the epistemic model of litigation conceals the important function of testimony as a speech-act. The performative model helps identify a harm of silencing that many women suffer when they come forward to give testimony in the courtroom. We also saw that the law itself participates in this silencing and shares responsibility for the harm. Third, the use of quotations by the court had a double edge: on one hand, it helped the judge make a bridge between the social worlds of herself and that of Eva, and enabled her to offer a more contextual judgment of the events; on the

other hand, it contributed to a process of social legitimation that attributed the problem of violence against women to a marginal social group instead of recognizing the pervasiveness of the problem in Israeli society at large.

I believe that there are no "voices out there." Rather, voices in the courtroom are the products of complicated rules of procedure and evidence. We should examine these rules not just as ways to reach the truth of the matter, but also as enhancing or frustrating the articulation of public stories about private harms. We should also learn to notice the function of social recognition that the court is called upon to fulfill.

Perhaps it is not by accident that the goddess of justice is depicted as a female figure who carries scales and sword and covers her eyes with a blindfold.[67] Perhaps Justicia covers her eyes in order to enable her to better hear the voices of people who come in front of her in the courtroom. We should also learn to listen, and we should devise procedures that will enable today's judges to join the old tradition of searching for auditory justice.[68]

Notes

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1. For a critical evaluation of the cases see, Ron Shapira, "The Criminal Law: From a Focus on the Individual to a Focus on Group Conflicts," *Yearbook of the Law in Israel,* (1996) 629–71; Leora Bilsky, "Battered Women, From 'Self Defense' to 'Defense of the Self'," *Plilim*, 6 (1997) 1–88 [Hebrew].

2. Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law," *Harvard Law Review*, 101 (1988) 1331–87

3. This article concentrates on the issue of voice for feminist works. This issue has also been extensively discussed in connection with race scholarship. See, for example, Richard Delgado, "When a Story is Just a Story: Does Voice Really Matter?" *Virginia Law Review*, 76 (1990) 95–111; Stephen Carter, "The Best Black and Other Tales," *Reconstruction*, 1 (1990) 6; Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York, 1989). For a critique of the turn to voice in race scholarship, see Randall L. Kennedy, "Racial Critiques of Legal Academia," *Harvard Law Review*, 102 (1989) 1745–1819, where Kennedy challenges the existence of a "voice of color" and its privilege to speak to certain race related issues. For a rejoinder, see also Alex M. Johnson, "The New Voice of Color," *Yale Law Journal*, 100 (1991) 2007–63, which introduces the subdivision into dialects within the "voice of color."

4. My discussion will be limited to American feminist literature, because of its proximity to legal theory, and to the concerns of voice in the courtroom, which is my interest here. More experimental writings related to the idea of women's language have been developed by French feminists. See, for example, Helene Cixous, "The Laugh of the Medusa," in Elizabeth Abel and Emily K. Abel (eds), *The Signs Reader: Women, Gender and Scholarship* (Chicago, IL, 1983); Luce Irigaray, "When Our Lips Speak Together," *Signs*, 6 (1980) 69–79.

5. Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge, MA, 1982) 1.

6. Catharine A. MacKinnon, *Only Words* (Cambridge, MA, 1993) 3.

7. See, for example, Mary Field Blenky, Blythe McVicker Clinchy, Nancy Rule Goldberger, and Jill Mattuck Tarule (eds), *Women's Ways of Knowing: The Development of Self, Voice, and Mind* (New York, 1986). This is not a necessary connection. Sometimes a refusal of voice is an act of resistance. A famous example is Dora's resistance to Freud's treatment by refusing to talk and leaving the treatment. See Sigmund Freud, *An Analysis of a Case of Hysteria* (New York, 1963). Susan Gal, "Between Speech and Silence: The Problematic of Research on Language and Gender," in Micaela di Leonardo (ed), *Gender at the Crossroads of Knowledge: Feminist Anthropology in the Postmodern Era* (Berkeley, Los Angeles and Oxford, 1991) 175. Gal explains that, in social institutional situations such as psychotherapy, police investigations, and bureaucratic interviews where talking is required, silence is often an act of resistance.

8. Nancy S. Love, "Politics and Voice(s): An Empowerment Knowledge Regime," *Differences*, 3 (1991) 85–103; For an exploration of the political/ethical aspects of feminist scholarship in the law, see Katharine T. Bartlett, "Feminist Legal Methods," *Harvard Law Review*, 103(4) (1990) 829–88.

9. Hannah Arendt, "On Humanity in Dark Times: Thoughts about Lessing," in Hannah Arendt, *Men in Dark Times* (San Diego, CA & New York, 1968) 3, 30. French feminists connect the plurality of women's voices to their sexuality. See, for example, Luce Irigaray, *This Sex Which is Not One* (C. Porter, trans.) (Ithaca, NY, 1985)—"Even without speaking of the hysterization of her entire body, one can say that the geography of her pleasure is much more diversified, more multiple in its differences, more complex, more subtle, than is imagined—in an imaginary centered a bit too much on one and the same"; Cixous, "The Laugh of Medusa"—"She lets the other language speak—the language of 1,000 tongues which knows neither enclosure nor death." The turn to the body to develop a woman's language that will embody the plurality among women is beginning to infiltrate American legal feminism. See Marie Ashe, "Zig Zag Stitching and the Seamless Web; Thoughts on 'Reproduction' and the Law," *Nova Law Review*, 13(2–3) (1989) 355–83.

10. Martin Buber, *Besod Siach al-haAdam ve-Amidatao Nochach haHavayah*, (Jerusalem, 1980) 241 [Hebrew version]. Original German version, entitled "On the educational deed," was published in 1925)

11. See pp. 17 and 22 in Carol Gilligan, "Getting Civilized," *Fordham Law Review*, 63 (1994) 17–31.

12. Martin Jay, *Downcast Eyes* (Berkeley & Los Angeles, 1993) 25.

13. See Mari J. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction," *Yale Law Journal*, 100(5) (1991) 1329–1407.

14. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA, 1989) 83–154.

15. This is also true for French Feminists who turn to the woman's body as a way to discover the distinctive voice of women.

16. For a similar investigation in an American courtroom setting, see Lucie E. White, "Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.," *Buffalo Law Review*, 38(1) (1990) 1–58.

17. Criminal Case 107/96 Tel-Aviv District Court (4 February 1997).

18. Patricia Williams captures a similar experience in her academic writing: "What was most interesting to me in this experience was how the blind application of principles of neutrality, through the device of omission, acted either to make me look crazy or to make the reader participate in old habits of cultural bias" (p. 48). Patricia J. Williams, *The Alchemy of Race and Rights: A Diary of a Law Professor* (Cambridge, MA, 1991).

19. William L.F. Felstiner, Richard L. Abel and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming," *Law and Society Review*, 15(3–4) (1980) 631–54.

20. See pp. 37–63 in Raquel Kennedy Bergen, *Wife Rape, Understanding the Response of Survivors and Service Providers* (Thousand Oaks, CA, 1996).

21. There are indications in the judgment that the escalation in G's violence is partly due to his extensive exposure to pornography. Since using pornography is not a crime in Israel, the connection between violence and pornography is not examined by the judges.

22. This gross negligence on part of the police occurred after a public committee was assigned to investigate police treatment of battered women in Israel and after its recommendations were adopted by the police in 1992. See pp. 280–306 in Francise Radai, Carmel Shalev, and Michel Liban-Kooby (eds), *Ma'amad haIsha baHevra u baMishapt* [The Status of Women in Society and in the Law] (Tel-Aviv, 1995) [Hebrew]; Esther Eillam, *Rape Survivors, Rape Crimes and the Authorities* (The Jerusalem Institute for Israel Studies, Jerusalem, 1994) [Hebrew]

23. William Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," *Wisconsin Law Review*, 29 (1978) 98–99.

24. For a critique of an understanding of trials as simple truth finders, see Arthur A. Leff, "Law and . . .," *Yale Law Journal*, 87(5) (1978) 989–1011.

25. For an analysis of the cultural spectacles used by judges, see Wendy W. Williams, "The Equality Crisis: Some Reflections on Culture, Courts, and Feminism," *Women's Rights Law Reporter*, 14(2–3) (1982) 151–74; Vicki Schultz, "Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument," *Harvard Law Review*, 103 (1990) 1749–1843.

26. A reform in the definition of rape from 1988 was meant to clarify these points. The original definition of rape stated that: "A person who has a sexual intercourse with a woman, who is not his wife, against her will, while using force or threats of death or threats of serious body injury, or when she is unconscious or in a state that does not allow her to resist, will be imprisoned for fourteenth years" (Article 345 of *The Criminal Law of 1977*). The new definition states that "A person who has a sexual intercourse with a woman . . . without her free *consent* as a result of a use of force, causing physical suffering, use of pressure techniques, or a threat of one of the above . . . is a rapist and will be imprisoned for 16 years (Correction from the year 1988).

27. Prior to the feminist critique of rape, the dominant narrative about rape was based upon misguided assumptions about normality and abnormality in sexual relations between men and women. Sex was the normal interaction while rape was constructed as the extreme deviation. As explained by Ken Plummer: "The normal man was active sexually and that, while often seen as regrettable, was unavoidable; the abnormal man had excessive desire and was a monstrous sex fiend or pervert . . . The normal woman was pure and passive and hardly likely to be raped because she would be loyal to her husband and would never be in positions or places where her honour could be at risk; the abnormal woman was a whore—enticing the man, leading him on and then saying no, thoroughly enjoying the forced attentions on her . . . it meant that much rape could be simply dismissed and not taken seriously: only if the woman was very clearly not a whore and the man was very clearly some kind of pathological freak could a clear case of rape emerge." Ken Plummer, *Telling Sexual Stories: Power, Change and Social Worlds* (London & New York, 1995) 65–6. For an elaboration on the stranger-rape narrative as the basis for rape laws, see Susan Estrich, *Real Rape* (Cambridge, MA, 1987).

28. For a discussion of the concepts "hegemonic stories" and "counter stories" (or "subversive" stories), see Richard Delgado, "Storytelling for Oppositionalists and Others: A Plea for Narrative," *Michigan Law Review*, 87(8) (1989) 2411–41; Patricia Ewick and Susan S. Silbey, "Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative," *Law and Society Review*, 29(2) (1995) 197–226. Ewick and Silbey define "hegemonic stories" as stories that reproduce existing relations of power and inequity and "subversive stories" as those that come to challenge the taken-for-granted hegemony. For an exploration of the concept of "hegemony" in Gramcian terms, see Crenshaw, "Race, Reform, and Retrenchment."

29. The data was provided to me by the Tel-Aviv crisis center for sexual assault. These statistics from 1994 are the latest available ones that are country-wide. The categories of research are still not accurate enough, and they are presently undergoing changes. Thus, the research does not differentiate between stranger-rape and date-rape. The differentiation according to the amount of familiarity between the victim and the attacker concerns all types of sexual attacks (including incest, sexual harassment, and rape), so I was not able to isolate the exact division within the category of rape. It should be noted that rape covered about 43 percent of all cases of sexual attack.

30. For an analysis of the stages in the elaboration of an alternative story and the politicization of the problem, see Plummer, *Telling Sexual Stories: Power*, 67, who lists the stages as: 1) the debunking of myths; 2) the creation of history; and, 3) the writing of a political plot.

31. Yaacov Kedmy, *On Evidence* (Pt I) (Tel-Aviv, 1991) 261 [Hebrew].

32. Eva had a younger sister whom she had to care for. Her parents were often on business trips abroad and left the two sisters alone. She also had a grandmother who lived nearby, but Eva did not get along with her.

33. Margaret J. Radin, "The Pragmatist and the Feminist," *Southern California Law Review*, 63(6) (1990) 1699–1726.

34. Karl Lewellyn, *The Bramble Bush* (New York, 1930)—"Where are the facts? . . . is it not clear . . . that when you pick up the facts which are left and which do seem relevant you suddenly cease to deal with them in the concrete and deal with them instead in categories which you, for one reason or another, deem significant?" (p. 48).

35. For an analysis of the temporal frameworks of justice, and for an articulation of alternative frameworks that might work better to highlight harms to women (relational frameworks), see Bruce Ackerman, "Temporal Horizons of Justice," *The Journal of Philosophy*, 1997 (1997) 299.

36. For an elaboration of this point, see my article, "Battered Women: From Self Defense to Defense of the Self," *Plilim*, 6 (1997) 1–88 [Hebrew]; see also, Christine A. Littleton, "Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women," *University of Chicago Legal Forum*, 23 (1989).

37. The first psychologist to develop this theory was Leonore E. Walker, *The Battered Woman Syndrome* (New York, 1984).

38. For this line of criticism, see Elizabeth M. Schneider, "Describing and Changing: Women's Self-defense Work and the Problem of Expert Testimony on Battering," *Women's Rights Law Reporter,* 14(2–3) (1992) 213–41.

39. For a critique of the difficulties of the courts to listen to "contradictory" stories of battered women with existing legal categories, see Littleton, "Women's Experience and the Problem of Transition"—"Jo gave three reasons for staying—love, faith and fear. The law only had a category—self-defense—for the last, and so it heard only fear" (p. 44).

40. It is also based on several interviews with the state-prosecutor Ms. Miriam Diskin and on a television debate between the defense attorney, Dr. Haim Misgav, and myself that dealt with the complexities of bringing date-rape to court.

41. Conversation between Carol Gilligan and Catharine MacKinnon, Mitchell Lecture Series, State University of New York at Buffalo School of Law (20 November 1984), reprinted in "James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation," *Buffalo Law Review*, 34(1) (1985) 11–87.

42. The defense lawyer tried to use Eva's digression to prove that her concern was not with the rape (penetration to the vagina), but with the attempted oral sex.

The judge rejected this interpretation, saying that the two harms do not contradict each other. However, not even the judge, who is very sensitive to Eva's position ("I can understand why this picture was frozen in Eva's mind, it is indeed a picture with a surrealist and nightmarish quality"), did not hear in Eva's testimony a story about the harm of silencing.

43. The judge writes, "I have no doubt that the camera was chosen to commemorate the physical acts of love instead of a tape-recorder that could have commemorated the conversation."

44. MacKinnon, *Only Words*, 3–5.

45. Martin Jay, *Downcast Eyes* (Berkeley & Los Angeles, CA, 1993). Even in trials that are structured upon oral testimonies (voice), an eyewitness enjoys a privileged position as having better access to the truth, while "hearsay" is usually excluded from consideration as unreliable evidence.

46. Susan Sontag, *On Photography* (New York, 1977). See pp. 9–11 in the Hebrew addition.

47. For the incorporation of dreams in the research of terror under Nazi Germany, see Reinhart Koselleck, *Futures Past on the Semantics of Historical Time* (Keith Tribe, trans.) (Cambridge, MA, 1985) 213–30.

48. The police technique itself of confronting the victim with her attacker in a small police room is the subject of growing feminist criticism in Israel. The police do not always inform the victim of her right to refuse this confrontation and often pressure her to participate. There is a built-in asymmetry between the accused and the victim's preparations for this confrontation; while the former often enjoys the guidance of a lawyer, the victim is unrepresented, and the police do not provide enough guidance. Many women report that this confrontation, as it was conducted, was traumatic, and they felt as if they were being raped a second time. This is the result of the accusatorial questions directed at them about their "unsuitable" clothing and "provocative" behavior, and because, in many confrontations, the police investigator leaves the victim and the accused alone in the room, as was done in Eva's case. For a recent newspaper article on this issue, see "As if once is not enough . . ." *Ha'ir*, 9 January 1998 (on file with the author). The details of this report were confirmed by private interviews with volunteers in the crisis center, and with a police investigator of sex crimes, although some improvements of police interrogation are currently underway.

49. For a call to develop such a framework that will be more receptive to women's storytelling, see Martha Minow, "Words and the Door to the Land of Change: Law, Language and Family Violence," *Vanderbilt Law Review*, 43(6) (1990) 1665–99; Iris Young, *Intersecting Voice: Dilemmas of Gender, Political Philosophy and Policy* (Princeton, NJ, 1997) 60–74.

50. For an integrative theory of domestic violence as a struggle for control, see Martha R. Mahoney, "Legal Images of Battered Women: Redefining the Issue of Separation," *Michigan Law Review*, 90(1) (1991) 1–94.

51. Hannah Arendt, *The Human Condition,* (Chicago & London, 1958) 199.

52. This type of harm is captured by Jean-François Lyotard, *The Differend: Phrases in Dispute* (Minneapolis, MN, 1983) (Georges Van Den Abbeele, trans.)—"This is what a wrong [tort] would be: a damage accompanied by the loss of the means to prove the damage. This is the case if the victim is deprived of life, or of all his or her liberties, or of the freedom to make his or her ideas or opinions public, or *simply of the right to testify to the damage, or even more simply if the testifying phrase is itself deprived of authority*" (p. 5) [emphasis added]

53. See Simon, "The Ideology of Advocacy."

54. Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge, MA, 1987) 82.

55. Whenever the judge describes Eva, she resorts to the imagery of helplessness. We hear about the courage and assertiveness of Eva only in the Judge's descriptions of G.'s behavior in relation to Eva.

56. Milner S. Ball, "The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater," *Stanford Law Review*, 28 (1975) 85–115.

57. A good example of such reenactment is given in the film *Judgment in Nuremberg*, where the defense lawyer questions one of the witnesses about his mental abilities in order to prove the innocence of his client (a judge under the Nazi regime). In doing so the lawyer reenacts the same type of interview that was conducted by the Nazis before sterilizing people.

58. Littleton, "Women's Experience and the Problem of Transition"—"It is often said that rape victims are raped twice—once by the rapist and once by the legal system. If that is so, then, battered women are battered three times—once by the batterer, a second time by society and finally by the legal system" (28–9).

59. See, for example, Paul Gewirtz, "Victims and Voyeurs at the Criminal Trial," *Northwestern University Law Review*, 90(3) (1996) 863–92; For changes in the legal procedures of rape trials in international law, see Fionnuala Ni Aolain, "Radical Rules: The Effects of Evidential and Procedural Rules on the Regulation of Sexual Violence in War," *Albany Law Review*, 60(3) (1997) 883–905.

60. This technique is recommended by Martha Minow and Elizabeth Spelman, "Passion for Justice," *Cardozo Law Review*, 10(1–2) (1988) 37–76.

61. It is also a meeting place for women from different social positions and with different roles in the legal game. In our case the trial brings together Eva—the victim and witness for the prosecution, Miriam Diskin—the state prosecutor, Judge Deborah Berliner. Moreover, the conflict between men and women took a formal significance in this case as the defendant chose a male attorney (Dr. Haim Misgav), and Eva was a witness to a female prosecutor (Miriam Diskin). The panel of judges consisted of two female judges and one male judge. The presiding judge was judge Berliner who comes from a middle-class, Jewish orthodox background.

62. See for example, Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," *The University of Chicago Legal Forum*, (1989), reprinted in Katharine Bartlett and Rosanne Kennedy (eds), *Feminist Legal Theory* (Boulder, CO, 1991).

63. For a critique of the technique of "going visiting" (enlarged thought), see Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy*, (Princeton, NJ, 1997) 38–59.

64. Haim Dworin, *Memories from the Courtroom* (Tel-Aviv, 1985) 23 [Hebrew].

65. For a neglected topic of anti-discrimination law—discrimination on the basis of slang—see, Matsuda, "Voices of America."

66. My decision to use the letter G. instead of a fictional name indicates this asymmetry in the judge's treatment of G. and Eva.

67. Judith Resnik, "The Iconography of Justice," *Harvard Law Review*, 40 (1982) 374–448; Dennis E. Curtis and Judith Resnik, "Images of Justice," *Yale Law Journal*, 96(8) (1987) 1727–72. The blindfold was added only in the sixteenth century, and, by the end of that century, it had become a symbol of impartiality.

68. Indeed, Jean-François Lyotard argues that the sense of justice is connected to listening rather than seeing: "For us, a language is first and foremost someone talking. But there are language games in which the important thing is to listen, in which the rule deals with audition. Such a game is the game of the just. And in this game, one speaks only inasmuch as one listens, that is, one speaks as a listener, and not as an author." Jean-François Lyotard and Jean Loup Thebaud, *Just Gaming* (Wlad Godzich, trans.) (Minneapolis, MN, 1985).