THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY by SHOSHANA FELMAN
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In this book Felman has undertaken to investigate the unconventional link between law and trauma through an exploration of two 'trials of the century' – the Eichmann trial (1961) and the O.J. Simpson trial (1995). Her methodology diverts from the traditional legal investigation of criminal trials, which first considers their ability to determine the innocence and guilt of the accused. Indeed, Felman contends that in Nuremberg she has discovered a new paradigm of a trial whose purpose was to:

> restore the world's balance by reestablishing the law's monopoly on violence, and by conceiving of justice not simply as punishment but as a marked symbolic exist from the injuries of a traumatic history: as liberation from violence itself. (p. 1)

But in what ways can law perform this new role of healing from a collective trauma? And by so doing, can law really overcome violence?

In the last decade a therapeutic discourse about law has become prevalent, especially in the literature dealing with societies undergoing a transition to democracy (collective trauma), but also in feminist legal literature that discusses rape trials, sexual harassment trials, domestic violence, and so on. (private trauma). The dilemma that these writers often confront is how to ensure that doing 'justice to the victims' will not violate the fundamental principle of protecting the rights of the accused. One of the most innovative solutions to this dilemma is the creation of 'truth and reconciliation' commissions such as the South African TRC, to deal with collective traumas, and the turn to ADR (alternative dispute resolution) in criminal trials, also known as the 'restorative justice' paradigm.[1] By giving up punishment, the law is able to concentrate on the victims of the trauma, while creating institutional incentives for the accused to reveal the truth about their crimes. Felman's book does not investigate these solutions, which are based on the intentional fusion of the private and public spheres, but goes back instead to the Eichmann trial where the seeds to such solutions were first planted.

Hannah Arendt provides Felman with the critical lens through which to re-examine the Eichmann trial. Arendt accused the prosecutor Gideon Hausner of creating a show trial by opening the stage to the testimonies of about a hundred survivors of the Holocaust, even when their testimonies were irrelevant to proving Eichmann's guilt.[2] Felman, in contrast, argues that the prosecution's decision should be praised as 'revolutionary', since it changed our conception of the role of the victim in the trial of his or her victimizers. In this respect Felman is not a lone voice. In recent years the

1 H. Strang and J. Braithwaite (eds.), *Restoratrive Justice and Civil Society* (2001).
2 H. Arendt, *Eichmann in Jerusalem – a Report on the Banality of Evil* (1977).

Eichmann trial has attracted renewed attention, and, in particular, Hausner's position has been 'rehabilitated' by changing the focus from the treatment of the accused to that of the victims, and from the question of punishment to the question of historical representation.[3] The question that remains unanswered in Felman's book is whether justice to the victim and justice to the accused can be achieved at the same time, and if not, whether the criminal trial, as opposed to a truth commission, remains our best tool for dealing with collective traumas.

This question, although not directly posed, accompanies Felman's investigations throughout the book. She is aware that the trial may do violence to the victim. She articulates the danger of a mistrial, in terms of re-enactment of the traumatic event without liberation or closure. Felman describes the danger in dramatic terms as a struggle between law and pathology, and failure occurs when trauma has the upper hand. In these moments it is as if the juridical unconscious resurfaces during the trial:

> A pattern emerges in which the trial, while it tries to put an end to trauma, inadvertently performs an acting out of it. Unknowingly, the trial thus repeats the trauma, reenacts its structures. (p. 50)

Felman's articulation of the problem, and identification of its structure, is a very important contribution to the critical study of trials that has been developed by feminists, critical race theorists, and other scholars of law and culture. The re-enactment of the trauma, she explains, can take two forms: compulsive repetition and explosive interruption (p. 182). With the help of this insight, Felman brilliantly analyses the Simpson trial as a trial presenting a pathological repetition of the trauma of race and of violence against women in America. She coins the term 'cross-legal' to refer to previous manifestations of the trauma that were echoed in the Simpson trial, and traces them to the Rodney King trial, the Dred Scott case (1857), and others.

While the Simpson trial failed to heal the traumas of race and gender, the Eichmann trial proved to be a success. What factors can explain these differences? Felman does not give a direct answer; however, from her analysis it becomes clear that the identification of the judges and the larger community with the victims (as was the case in Eichmann's trial) and the lack of it in the Simpson trial can partly explain the difference. Another factor can be the way the court is perceived by the injured community. The Eichmann trial represented for the victims the return of lawfulness, while, as Felman explains, the African-American community was more divided in its relation to the court. While the history of race in America made the community suspect the legal system, the history of gender made it turn to the court as a possible ally. I would argue that even more important than this is

3 M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997); L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001); L. Bilsky, 'Between Justice and Politics: The Competition of Storytellers in the Eichmann Trial' in *Hannah Arendt in Jerusalem*, ed. S.E. Aschheim (2001) 232–52.

an understanding of the historical context in which the court is seen. The difference between the trials can be articulated in light of the two powerful metaphors of 'hearing' and 'seeing' that Felman invokes. While the Eichmann trial was a trial of empathic hearing of the victims' stories, the Simpson trial manifested the lack of seeing, the blindness of the law to the 'face of the injured woman'. What metaphor is more appropriate today for the Goddess of Justice? Is it still 'seeing,' or should we rethink justice in the courtroom in terms of 'hearing'? These questions receive unexpected answers in the insightful investigation of Felman.

In the Eichmann trial, Felman focuses on one episode that has created the most memorable image of the trial – the collapse in the witness stand of Yehiel Dinur, the well-known Holocaust author, who wrote under the chilling pseudonym K-Zetnik (concentration camp prisoner) 135633. Her analysis is an important antithesis to Arendt's sarcastic description of this same episode. Contra Arendt, Felman demonstrates how this apparent failure of testimony has paradoxically become the trial's greatest achievement. In order to see this, she explains, we have to expand our jurisprudential vision and examine the trial not with the conservative tools of criminal law (asking whether the testimony was accurate and the witness reliable) but rather with the revolutionary tools of psychoanalysis, as a moment when silence 'speaks', demonstrating the trauma experienced by the witness through the failure of testimony. Felman sees the testimony not as a failure but as a high point of the trial, where private trauma is given a public stage and thus the 'failed' testimony transforms our understanding of the Holocaust.

The analysis of Dinur's testimony is based on the observation that every important trial has an unconscious and that the role of the critic is to expose it, to see it with 'an educated eye' (p. 85). However, I would argue that precisely in this respect Felman's exposition lacks a crucial dimension since she still treats the silence of the survivors with the tools of traditional psychoanalysis as private trauma. Missing from her analysis is the larger historical and political context that created the silence of the victims during the fifties in Israel.

The quest to identify the (collective) trauma underlying the trial led Arendt in a very different direction. In her critique of the Eichmann trial, Arendt raised the painful and controversial issue of the *Judenräte* (Jewish Councils), that is, the collaboration of some Jewish leaders with the Nazis. In so doing, she was able to expose the collective Israeli trauma underlying the Eichmann trial – the previous trial of the Zionist Hungarian leader Rudolf Kastner (1954), which led to his subsequent assassination. Indeed, Hausner recalls that the issue of the *Judenräte* was raised by two of the leaders of the Jewish resistance in the Warsaw Ghetto, during one of Hausner's consultations with them in preparation for the trial:

> 'What will you say about the Jewish Councils?' Yitzhak asked me ... 'This is going to be the trial of the murderer, not of his victims', I replied. 'But you will not be able to avoid the issue', Zivia said ... 'No', I replied, 'and what we

shall bring forth will be the truth. No embellishments.' 'That is good', said Yitzhak. 'The whole truth must be told.'[4]

Hausner, however, did not keep his promise. This may well be because only in the early 1960s was Israeli society beginning to mature beyond the painful stage of blaming the victims for their own disaster (by going like 'sheep to the slaughter') and slowly shifting the full blame onto the perpetrators. Arendt, who had a keen ear for silences, raised the issue, even though she considered it as the unresolved past of the Jews.[5] It may well be that her decision was driven by a different understanding of trauma, whose pathologic repetition can be prevented not by staged silences, but rather by an honest and open discussion.[6] Only by openly addressing the issues of Jewish cooperation and confronting the painful questions it raised could Israeli society become truly reconciled with its past and avoid moving in circles of blame and counter-blame.

Felman is right to observe that one of the results of the Eichmann trial was the rehabilitation of the victim, making him or her a reliable witness of the Holocaust. However, the failure to deal with the trauma of the *Judenräte* in the trial resulted in a continuous silence, and pathological re-eruptions in Israeli society. This failure became evident much later in the demonstrations preceding the 1995 assassination of Israeli Prime Minister Yitzhak Rabin, who was accused by the extreme Right of collaborating with Arafat, like a modern-day *Judenrat*.

It seems, therefore, that to present the disagreement between the Israeli prosecutor and Hannah Arendt as 'revolutionary jurisprudence' (Hausner) versus 'conservative jurisprudence' (Arendt) is not accurate, since *both* were concerned not only with the legal precedent but also with creating the 'narrative precedent' (p. 129) that would allow the law to judge correctly. However, the story that they sought to articulate was very different indeed: Hausner was looking for ways to transmit the trauma of the victims, and through this, the unprecedented violence committed against the Jews during the Holocaust, while Arendt wanted to explain a new type of evil by concentrating on the perpetrators and their collaborators.

Felman's book is a wonderful contribution to interdisciplinary legal scholarship as she is aware of the benefits of bringing together texts from different disciplines, but is also very careful to remind the readers of the different goals and means of each discipline. The underlying and fascinating question that connects the different parts of Felman's narrative is what tools each discipline (law, psychoanalysis, literature) can offer to make silence speak. She explains that while law judges by creating a distance (setting limits), art allows understanding through closeness:

4 G. Hausner, *Justice in Jerusalem* (1966) 294–95.
5 Arendt, op. cit., n. 2, p. 125.
6 This point is elaborated in 'Truth and Politics' in H. Arendt, *Between Past and Future* (1954) 227–64.

> Because it is by definition a discipline of limits, law distances the Holocaust; art brings it closer. The function of the judgment in the Eichmann trial was paradoxically to *totalize* and *distance* the event: the trial *made a past out of the Holocaust*. (p. 153)

This tension between the two disciplines was poignantly seen in the testimony of Dinur, who found no words to describe the horror when questioned by the court. However, there are also many ways in which the different disciplines come together and fertilize each other. For example, Claude Lanzmann's film, *Shoah* was in important ways a continuation and elaboration of the Eichmann trial, as all of its 'heroes' had previously appeared as witnesses in the trial. By returning to their testimonies from the perspective of art, Lanzmann was able to expose different aspects of the trauma that had remained hidden in the trial itself. Likewise, Felman masterfully demonstrates the way literature can help the law 'see' by reading together the Simpson trial and the *Kreutzer Sonata* by Tolstoy.

The book begins with Benjamin's *Storyteller* and ends with Hannah Arendt's unfinished work of mourning for her lost friend Walter Benjamin, and her own lost life in Germany. In an interview with Günter Grass, Arendt was asked what remained of her previous life in Germany. Her reply was: 'language remains'.[7] Felman's book is a perceptive demonstration of the power of language to overcome trauma and to create something else out of it, not only in the room of the psychologist, or in a work of art, but also in the most mundane place – the courtroom.

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7 H. Arendt, '"What Remains? – The Language Remains": A Conversation with Günter Grass' in *Essays in Understanding 1930–1954*, ed. J. Kohn (1994) 1–23.

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