The Eichmann Aporia
Power/Knowledge and Transitional Jurisprudence Post-Nuremberg

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"If today there is no longer any one clear vision of sacred man, it is perhaps because we are all virtually homines sacri."

– Giorgio Agamben, Homo Sacer, p. 115

Introduction

On May 11, 1960, the Israeli Mossad kidnapped Adolf Eichmann – a Nazi SS bureaucrat who played a key role in orchestrating the transportation of Jews to concentration camps such as Auschwitz and Dachau – from his home in Buenos Aires, and brought him before an Israeli court on charges of "crimes against the Jewish people."[1] Hannah Arendt later described Eichmann's role in the Holocaust as "terrifyingly normal." For Arendt, Eichmann was "neither perverted nor sadistic;" rather, his crimes were horrifying precisely because he "committed" them with a clear conscience.[2] Indeed, when the Israeli police first interrogated Eichmann in Jerusalem, they were surprised by his repeated insistence that he "always carried out his duty to the letter," as if the Israelis would interpret such diligence as a testimony to his upstanding character.[3] Neither was Eichmann "banal" just because of his freedom from psychopathy – Arendt repeatedly observed that the man was of "mediocre" intelligence, and

[1] Seyla Benhabib, "Arendt's Eichmann in Jerusalem," in The Cambridge Companion to Hannah Arendt, ed. Dana Villa (Cambridge: Cambridge University Press, 2000), 66.
[2] Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (New York: The Viking Press, 1963), 129.
[3] Simon Swift, Hannah Arendt (London: Routledge, 2009), 66.

thus prone to uttering both contradictions and clichés.[4] Despite the apparent fact that he was outstanding only in the extent of his mediocrity, the Israelis found Adolf Eichmann guilty chiefly of "crimes against the Jewish people with intent to destroy the Jewish people," and finally executed him on May 31, 1962.[5]

For Arendt and many others, Eichmann's trial and execution highlighted not the horrors of the Holocaust, but the failure of the Israeli tribunal to produce anything other than an exceptionally retroactive and selective version of transitional justice.[6] For the purposes of this paper, transitional justice refers to a "restorative approach to justice which applies in the context of societies confronting a legacy of systematic or widespread human rights abuse."[7] In attempting to confront the legacy of the Holocaust, the Israeli tribunal sought to mete out a symbolic punishment to Adolf Eichmann that would resonate on the international stage; instead, they created an enigma that I believe encompasses the insoluble problem or aporia of meting out true "justice" in the wake of atrocities such as the Holocaust.

This paper uses the "Eichmann aporia" as a starting point from which to problematize attempts at transitional justice in the so-called "post-modern" or "late capitalist" era.[8] My thesis concerning the Eichmann aporia is two-pronged. Firstly, I claim that the aporia's insolubility arises from the unprecedented nature of crimes such as those that comprised the Holocaust; secondly, I highlight the synonymy of "power-knowledge"[9] and

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[4] Arendt, 27.
[5] Benhabib, 67.
[6] Hans W. Baade, "The Eichmann Trial: Some Legal Aspects," Duke Law Journal 3 (1961): 410; Arendt, 128; Martha Minow, Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence (Boston: Beacon Press, 1998), 27; Jonathan Turley, "Transformative Justice and the Ethos of Nuremburg," Loyola of Los Angeles Law Review 33 (2000): 674; Gary Bass, "Victor's Justice, Self Justice," Social Research 69 (2002), 4: 1037-1044.
[7] Ronli Sifris, "The Four Pillars of Transitional Justice: A Gender-Sensitive Analysis," in Research Handbook on International Human Rights Law, eds. Sarah Joseph and Adam Mcbeth (Northampton, MA: Edward Elgar, 2010), 272.
[8] Jean-Francois Lyotard, The Postmodern Condition: A Report on Knowledge (Manchester: Manchester University Press, 1979); Ernest Mandel, Late Capitalism (London: Verso, 1978).
[9] Michael Foucault, Power/Knowledge: Selected Interviews and other Writings (New York: Pantheon, 1980).

"determinant judgment"[10] in attempts to mete out punishment for such crimes. I will expound upon this assertion in three sections: first, I offer a brief exegesis of the philosophical and sociological schema that is relevant to my argument. Secondly, I solidify these perspectives with reference to substantive problems within the trial of Adolf Eichmann. Finally, I conclude with a discussion of the possibilities for a postmodern model of "reflective" transitional justice.[11]

Derridean Deconstruction and Juridical Aporiae

Philosophers often invoke the concept of aporia to refer to a problem or paradox that is insoluble, but which does not involve irrationality or unreasonableness on the part of any of the actors involved. The philosopher Jacques Derrida was particularly interested in aporiae, as he believed an examination of the tensions involved in such instances could yield a more sophisticated or de-naturalized understanding of the situation.[12] In a famous essay entitled "Force of Law", Derrida identifies three aporiae which he believes characterize the relationship between law and justice. In order of appearance in Derrida's essay, the aporiae are: "the epoche of the rule", "the ghost of the undecideable", and "the urgency that obstructs the horizon of knowledge."[13]

Notwithstanding his convoluted prose style, Derrida's argument concerning each aporia is actually quite straightforward. The "epoche of the rule" concerns the commonsense observation that in order to "deliver justice" one must have free will; however, no judge ever freely delivers a ruling – each judgment is based upon an existing law.[14] In this sense, the law-abiding judge is always to some extent a "calculating machine", doomed to simply apply and

[10] Immanuel Kant, [1790], Critique of the Power of Judgment (Cambridge: Cambridge University Press, 2000).
[11] Ibid.; Lyotard, op. cit.
[12] Nicholas Royle, Jacques Derrida (London: Routledge, 2003), 92-93.
[13] Jacques Derrida, "Force of Law: The Mystical Foundation of Authority," Cardozo Law Review 11 (1990): 961-967.
[14] Ibid., 961; In Derrida's usage, the word "epoche" is synonymous with "suspension" (Lawlor 2010).

legitimate pre-existing laws.[15] On the other hand, judgments that do not follow a set of predetermined rules are arbitrary and thus also unjust. As such, the application of the law is always violent, because in its effort to avoid arbitrariness it forces each unique individual case to conform to what one can ironically describe as the prejudice of the law.[16]

In referring to the "ghost of the undecideable", Derrida highlights the omnipresence of the insight extracted from the first aporia, which holds that true justice is in fact impossible.[17] In one sense, this omnipresence is expressed in the metaphor of the "ghost" that inevitably "haunts" both judges and other subjects of justice; further, the undecideability of the aporia arises from the fact that it contains elements of justice and injustice, but cannot be "fully" or "truly" just as a result of the tension between the two. Finally, Derrida's "urgency that obstructs the horizon of knowledge" refers to the situation in which justice is indeed impossible, but constantly makes obvious the urgent need for its own presence, as evidenced by the suffering of oppressed peoples all around the world.[18] In Derrida's words:

A just decision is always required immediately, 'right away'…[but] it cannot furnish itself with infinite information and the unlimited knowledge of conditions, rules, or hypothetical imperatives that could justify it.[19]

As such, the moment of judgment in the face of the impossibility of justice is actually a "moment of madness" – it is doomed to never fully accomplish its own purpose.

In this binary juxtaposition of law and justice, Derrida accomplishes what he terms "deconstruction." Contradictory definitions of deconstruction abound in both philosophical and sociological literature, but Derrida does offer a fairly clear definition in his "Letter to a Japanese Friend." In the letter, Derrida first begins with a negative definition: he claims that

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[15] Derrida, "Force of Law," op. cit., 961.
[16] Leonard Lawlor, "Jacques Derrida," in The Stanford Encyclopaedia of Philosophy, Spring 2010 Edition, ed. Edward N. Zalta, para. 26, <http://plato.stanford.edu/archives/spr2010/entries/derrida/&gt.
[17] Derrida, op. cit., 963.
[18] Lawlor, op. cit., para. 26.
[19] Derrida, op. cit., 967.

deconstruction is not "destructive,"[20] neither is it "an analysis" nor "a critique."[21] Similarly, deconstruction is not a "method", an "act", or an "operation."[22] In this sense, the word "deconstructionism" is an oxymoron. Indeed, Derrida purposely avoids the verb "to be" in his definition of deconstruction; however, he argues that deconstruction "takes place" when an observer can see "the blind spots within the dominant interpretation."[23] This is precisely what Derrida gathers from the deconstruction of the opposition between law and justice – from Derrida's account, it is clear that whatever we mean when we say "transitional justice," we cannot mean "justice" in its true sense. If we accept the above deconstruction, we know that true justice is in fact impossible, yet always urgently necessary. I will now turn to the work of Friedrich Nietzsche and Michel Foucault on the relationship between power and judgment to examine the political implications of the apparently aporetic nature of justice.

Power and Justice from Nietzsche to Foucault

Both Nietzsche and Foucault were principally concerned with the politics of interpretative violence – a theme that is of central importance in understanding the significance of Derrida's deconstruction of law and justice. As Derrida observed:

It follows from this paradox that there is never a moment that we can say in the present that a decision is just (that is, free and responsible), or that someone is just a man – even less, 'I am just.' Instead of 'just', we could say legal or legitimate, in conformity with a state of law, with the rules and conventions that authorize calculation but whose founding origin only defers the problem of justice. For in the founding of law or in its institution, the same

[20] Jacques Derrida, [1985], "Letter to a Japanese Friend," in Derrida and Difference, eds. David Wood and Robert Bernasconi (Evanston, IL: Northwestern University Press, 1988), 2-3.
[21] Ibid., 3.
[22] Ibid., 4.
[23] Simon Critchley and Timothy Mooney, "Deconstruction and Derrida," in Twentieth Century Continental Philosophy, ed. Richard Kearney (London: Routledge, 1994), 366.

problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed.[24]

According to Derrida's analysis, "true" or objectively verifiable justice is thus impossible, and judgment is violent in the sense that it applies at least partially-inapplicable predetermined laws to uniquely individual cases. This subsumption of individuals under the norms of the powerful is a central theme in Nietzsche's canon; indeed, the great thread that connects everything between The Birth of Tragedy and Ecce Homo is the "revaluation of all values" – the quest to redefine the essence of "morality," "truth," "justice," and so on.[25]

For Nietzsche, concepts such as morality and truth are not semantically stable – the meaning of each concept changes over time, and fluctuates according to patterns of power and domination. In the Nietzschean sense, then, truth is a "metaphor which allows us to impose our own values and perspectives upon the world," but which subsequently "raised to the level of an objective and absolute ideal form."[26] Nietzsche's point is that the essence of a concept is a reflection of external power relations – the powerful revalue concepts as they see fit, and summarily subject the weak to these valuations.[27] Nietzsche referred to the retrospective study of the transitions between these semantic generations as genealogy; he thought that the transition from one generation to the next was the product of conflict over the concept's meaning.[28] To view Derrida's example in genealogical light, the impossibility of "true justice" implies that the semantic content of the linguistic signifier "justice" is open to the revaluation which results from power struggles.

Almost eighty years after Nietzsche died, Michel Foucault inherited an interest in genealogy but applied the method primarily in a historic-sociological – as opposed to a philosophical – direction. Indeed, Foucault was uninterested in Nietzsche's flirtations with

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[24] Derrida, "Force of Law," op. cit., 963.
[25] Lee Spinks, Friedrich Nietzsche (London: Routledge, 2003), 7-8.
[26] Ibid., 55.
[27] Robert Wicks, "Friedrich Nietzsche," in The Stanford Encyclopaedia of Philosophy, Spring 2010 Edition, ed. Edward N. Zalta, para. 37, <http://plato.stanford.edu/entries/nietzsche/&gt.
[28] Spinks, 73.

metaphysics, Louis Althusser's neo-Marxism, and the existentialism of Jean-Paul Sartre which was intellectually fashionable in France at the time.[29] Rather, each of Foucault's genealogical investigations attempts to show how the concepts of "power" and "knowledge" are inseparable form one another, and thus how "power-knowledge" acts to shape both particular discourses and the practices which emerge from them.[30]

Of particular interest to Foucault are the mechanisms through which norms are created and maintained in a given discipline or discourse; and more specifically, how such norms aid in the governance of a given population – whether within a field of discourse such as psychiatry or criminology, or within a nation-state.[31] Perhaps most importantly for my discussion of justice, Foucault thought that a crucial aspect of the reinforcement of norms in a given discourse is the judgment of individuals for not only the actions that they took, but also the actions which they failed to take.[32] Foucault referred to this phenomenon as "governmentality," "governmental logic," or "the art of governing," which involves not only the standard activities associated with the modern state (legislative, judicial, and regulative, et cetera) but also the more subtle processes by which the individual is brought to rule itself according to prevailing norms.[33] For Foucault, therefore, all knowledge – perhaps especially legal knowledge or legal precedent – "rests on injustice (there is no right, even in the act of knowing, no truth or foundation of truth)."[34] Viewed both under a Foucaultian lens and in light of Derrida's deconstruction of the law-justice binary, transitional justice is thus a highly

[29] Samantha Mills, Michel Foucault (London: Routledge, 2003), 21.
[30] Michel Foucault, Discipline and Punish: The Birth of the Prison (New York: Pantheon, 1977); Foucault, The History of Sexuality Volume One: An Introduction (New York: Vintage, 1980).
[31] Foucault, [1978], Security, Territory, Population: Lectures at the College de France 1977-1978 (New York: Palgrave Macmillan, 2007), 63.
[32] Gary Gutting, "Michel Foucault," in The Stanford Encylopaedia of Philosophy, Spring 2010 Edition, ed. Edward N. Zalta, para. 17, <http://plato.stanford.edu/archives/spr2010/entries/foucault/&gt.
[33] Arnold I. Davidson, "Ethics as Aesthetics: Foucault, the History of Ethics, and Ancient Thought," in The Cambridge Companion to Foucault, ed. Gary Gutting (Cambridge: Cambridge University Press, 2005), 127.
[34] Foucault, Language, Counter-Memory, Practice: Selected Essays and Interviews (New York: Cornell University Press, 1980), 167.

problematic exercise – one which is fraught with both political contestation and conflicting approaches to governmentality. Of all the attempts at international transitional justice since the Allied-backed trials of German Word War I commanders at Leipzig in 1919,[35] the state of Israel's prosecution of Adolf Eichmann in 1960 stands out as particularly controversial. I now turn to the specific details of Eichmann's case in order to illuminate the relevance of the above theoretical discussion.

Attorney-General of the Government of Israel v. Adolf Eichmann

The cynical historian will posit that Adolf Eichmann's fate was sealed the moment an Israeli Mossad agent knocked him unconscious and bundled into a getaway car near his home on the evening of May 11, 1960. The agents held Eichmann in a makeshift cell at an Israeli safehouse in Buenos Aires and "interrogated" him for nine days before sneaking him aboard an El Al flight to Tel Aviv on May 20, 1960.[36] After Eichmann's arrival in Israel, Prime Minister Ben-Gurion[37] announced to the Knesset:

> One of the greatest Nazi war criminals, Adolf Eichmann, who was responsible together with the Nazi leaders for what they called 'the final solution to the Jewish question'…was found by the Israeli Security Services…[he] will shortly be put on trial under the Nazi and Nazi Collaborators Act.[38]

It appears that as far as Ben-Gurion was concerned, there was no doubt that Eichmann was personally "responsible" for the Final Solution. As noted by several legal historians, such prejudice overshadowed the lead-up to Eichmann's trial – which was broadcast internationally on television – and threatened to delegitimatize the entire process in

[35] Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton: Princeton University Press, 2002), 59.
[36] David Cesarani, Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a "Desk Murderer" (Jackson, TN: Da Capo Press, 2007), 233.
[37] David Ben-Gurion was Israel's first Prime Minister; he headed the Israeli government between 1948-1954 and 1955-1963. The Knesset is the Israeli legislature.
[38] Matthew Lippman, "The Trial of Adolf Eichmann and the Protection of Universal Human Rights Under International Law," Houston Journal of International Law 5 (1982), 1:1.

the eyes of international audiences.[39] Prejudice, however, would prove to be neither the only nor the most salient problem with Eichmann's trial.

Aside from the international tort that Israel inflicted on Argentina by violating its territorial sovereignty,[40] the Eichmann trial violated two foundational principles of the Continental legal tradition, of which the Israeli juridical system is mostly a product: nullum crimen sine lege[41] and nulla poena sine lege,[42] Eichmann was charged under the Nazis and Nazi Collaborators (Punishment) Act that the Knesset passed in 1950, even though neither law nor the state of Israel was in existence at the time that Eichmann committed his crimes.[43] Most controversially, the Act retroactively classified Eichmann's membership in the SS as criminal, in accordance with Article Nine of the International Military Tribunal Charter, which was first applied at Nuremberg in 1945.[44] Since the Israeli prosecution could easily prove that Eichmann was a member of the SS (he was head of the SS "Office for Jewish Questions" between 1938 and 1945), his complicity in the crimes committed by the SS was established by default;[45] however, the prosecution also wanted to prove that Eichmann was personally responsible for "crimes against the Jewish people with intent to destroy the Jewish

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[39] Baade, op. cit.; D. Lasok, "The Eichmann Trial," International and Comparative Law Quarterly 11 (1962); J.E.S. Fawcett, "The Eichmann Case," British Yearbook of International Law 38 (1962); Lippman, op. cit.; Turley, op. cit.

[40] United Nations Security Council, "Question Relating to the Case of Adolf Eichmann," UN/S/4349 (New York: United Nations, 1960).

[41] No crime can be committed except in accordance with the law.

[42] No punishment can be imposed without having been prescribed by a previous penal law; L.C. Green, "The MaximNullum Crimen Sine Lege and the Eichmann Trial," British Yearbook of International Law 38 (1962); John K.T. Chao, "Individual Responsibility in International Law for Crimes Against Humanity: The Attorney-General of the Government of Israel v. Adolf Eichmann," Chinese (Taiwan) Yearbook of International Law and Affairs 24 (2006): 47.

[43] Israel Ministry of Foreign Affairs, [1950], Nazis and Nazi Collaborators (Punishment) Law, 5710-1950 (Tel Aviv, IL: Israel Ministry of Foreign Affairs, 2008), <http://www.mfa.gov.il/MFA/MFAArchive/1950_1959/Nazis%20and%20Nazi%20Collaborators%20-Punishment-%20Law-%20571&gt.

[44] International Military Tribunal, [1945], Constitution of the International Military Tribunal (New Haven, CT: Lillian Goldman Law Library), Article 9, <http://avalon.law.yale.edu/imt/imtconst.asp&gt.

[45] Arendt, 115.

people," "crimes against humanity," and other war crimes.[46] Indeed, Eichmann's membership in the SS automatically guaranteed that he would receive a minimum seven year prison sentence, but it quickly became apparent that the prosecution's goal was to pursue a strong enough conviction to warrant the death penalty.[47]

Dr. Robert Servatius was Eichmann's sole defense counselor for the entire trial, and pursued what can be broadly described as a "rupture defense."[48] The goal of a rupture defense is to exploit the "collision of worlds" which results in case of revolutionary struggle, regime change, or transitional justice; or in a Nietzschean lexicon, the revaluation of values which occurs in the genealogical transition between semantic generations of "the just." A rupture defense highlights the arbitrary nature of the relation between "accused" and "accuser," and seeks to portray any ruling other than an acquittal as an outpouring of victor's justice.[49] In his brilliant reading of Hannah Arendt's Eichmann in Jerusalem, the philosopher Giorgio Agamben notes how within the context of the Israeli courtroom, one can actually view Eichmann as the Nazi equivalent of the Israeli prosecutor.[50] Indeed, Dr. Servatius repeatedly insisted that Eichmann was a "man of the law" who simply carried out "acts of state," not unlike the prosecutor and jurists that he and Eichmann were faced with.[51] Servatius also tried to make the case that Israel did not have the jurisdiction to try Eichmann, since he was not Israeli, did not commit any offences in Israel, and had allegedly harmed individuals who were not Israeli at the time of the commission of the offences.[52]

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[46] Chao, 48.
[47] Green, 458.
[48] Emilios Christodoulidis, "Strategies of Rupture," Law Critique 20 (2009): 3.
[49] Jacques Vergès, De La Stratégie Judiciaire (Paris: Les Éditions de Minuit, 1968), 97.
[50] Giorgio Agamben and Judith Butler, "Eichmann, Law, and Justice," European Graduate School Open Lecture Series, (Saas fe, CH: European Graduate School, 2009), <http://www.egs.edu/faculty/giorgio-agamben/videos/giorgio-gamben-and-judith-butler-eichmann-law-and-justice-2009/&gt.
[51] Arendt, 115.
[52] Baade, 416.

Since it became obvious in the early stages of the trial that Eichmann did not commit a single count of murder or assault with his own hands,[53] the prosecution spent a considerable amount of time attempting to reveal that Eichmann actually experienced a moral conflict about his role in the SS, but instead chose to ignore his conscience in favour of pursuing upward mobility in the Nazi party hierarchy. This became an increasingly problematic position for the prosecution to pursue, especially as Eichmann's various statements and communications from the end of the war came to light. In an address to the SS men under his command in 1944, Eichmann allegedly stated: "I will laugh when I leap into the grave because I have the feeling that I have killed 5,000,000 Jews. That gives me great satisfaction and gratification."[54] Perversely, Eichmann's apparent delight in his role in the Nazi Final Solution was perfectly legal under German law during World War II – in fact, Eichmann's superiors almost certainly encouraged it, and such zeal doubtlessly helped to advance Eichmann's career.

On December 11, 1961, the Israeli tribunal finally delivered its verdict. Eichmann was found guilty of fifteen counts of "crimes against the Jewish people with intent to destroy the Jewish people," crimes against humanity, war crimes, and membership in three criminal organizations – the SS, SD, and the Gestapo.[55] It should be noted that Eichmann was found personally responsible for these crimes, even though he was not physically implicated in any of the acts themselves; as such, Dr. Servatius' claim that Eichmann only "aided and abetted acts of state" which resulted in crimes was dismissed in its entirety.[56] Instead, the court found that Eichmann had actually "acted as his own superior" and that his actions eclipsed those who were further up on the Nazi party hierarchy – a claim that remains quite controversial to this day.[57] Despite an appeal and pleas for mercy from both Eichmann and various Jewish and Gentile groups around the world, the tribunal sentenced Eichmann to death on May 29, 1962, and had him executed two days later.

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[53] Arendt, 115.
[54] Cesarani, 193.
[55] Arendt, 114.
[56] Ibid., 115.
[57] Ibid., 116.

As Hannah Arendt would later cynically suggest, a more honest verdict for Eichmann might have read:

> You told your story in terms of a hard-luck story, and, knowing the circumstances, we are, up to a point, willing to grant you that under more favourable circumstances it is highly unlikely that you would ever have come before us or before any other criminal court…[but] in politics obedience and support are the same. And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations – as though you and your superiors had any right to determine who should and who should not inhabit the world – we find that no one, that is, no member of the human race, can be expected to want to share the earth with you. This is the reason, and the only reason, you must hang.[58]

As such, an alternative way to interpret the tribunal's ruling is that Eichmann's true crime was not the autonomous commission of crimes against humanity, but the failure to resist both orders he received and the "illegal" organization that he worked for. This development is extremely interesting when viewed under a Foucaultian lens. As mentioned earlier, one of the key aspects of governmentality for Foucault is the normalizing judgment of individuals not only for the actions that they took, but also the actions that they failed to take. I assert that this is an example of the way in which Foucault's metaphor of "power-knowledge" adequately describes how the interests of the powerful shape both the content and application of concepts such as justice and morality. Indeed, what is so chilling about the Eichmann case is that many (if not all) of us are implicated in power structures that we have to come view as natural and legitimate, but which perpetuate oppression and inequality to some degree. However, it is only when these structures crumble – or are reversed – that we begin to truly awaken to the implications of our actions. I believe that much of the

[58] Ibid., 130.

fascination with Adolf Eichmann's trial in Jerusalem stems from the fact that – to their horror – many people are actually able to see a brief reflection of themselves in Eichmann, the genocidal bureaucrat.

Recognizing the "Differend": Kant, Lyotard, and Reflective Judgment

In the late eighteenth century, Immanuel Kant drew a distinction between "reflective" and "determinant" judgment that still resonates in debates on morality today.[59] For Kant, a "determinant judgment" occurs when the outcome of individual cases is predetermined by an existing theory or structure; for example, when "the structure of arithmetic determines the result of its internally generated problems, such as those of addition or subtraction."[60] By contrast, Kant developed the idea of the "reflective judgment" to describe appraisals of beauty or other highly subjective qualities which are not guided by an overarching theory or structure.[61] In other words, while the individual may have a certain set of aesthetic tastes, these tastes do not automatically generate a standardized judgment when presented with a new objet d'art. It is precisely this tension between determinant and reflective judgment that Hannah Arendt highlights in her seminal report on Adolf Eichmann's trial in Jerusalem. As Arendt wrote:

There remains, however, one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time…those [Germans] who were still able to tell right from wrong went really only by their own judgments, and they did so freely; there were no rules to be abided by, under which the particular cases with which they were confronted could be

[59] Kant, 43.
[60] Thomas Docherty, "Postmodern Theory: Lyotard, Baudrillard, and Others," in Twentieth Century Continental Philosophy, ed. Richard Kearney (London: Routledge, 1994), 409.
[61] Swift, 62.

subsumed. They had to decide each instance as it arose, because no rules existed for the unprecedented.[62]

In Arendt's view, Nazi war criminals were not the only actors who failed to make reflective judgments – the Israeli postwar tribunal arguably made exactly the same mistake.[63] In this sense, Eichmann's trial was thus not about Eichmann at all – the latent function of the court was not only to judge Eichmann's actions, but also the legitimacy of the fascistic ideology which influenced him prior to and during the Second World War. By ignoring Eichmann's banality, his normalcy, and his bourgeois predictability, the Israeli tribunal simply transformed him into a conduit through which they could retroactively channel a politico-moral appraisal of the insanity of the Holocaust. In doing so, the Israelis failed to take advantage of an opportunity to ask important "reflective" questions about fascism and genocide vis-à-vis ideology and human nature.

In reflecting upon the Holocaust, Jean Francois Lyotard advanced the notion of the "differend" to encompass the problem of passing determinant judgments in the postmodern age.[64] In legal discourse, a "differend" is a specific type of aporia which arises when two opposed parties in a dispute are in the right according to their own "terms of reference," but:

> cannot accommodate, or refuse to accommodate, with the other party; and there is no common ground or third set of terms of reference which will allow an adjudication between the two parties while respecting their terms of reference.[65]

In other words, the differend exists wherever those who are in a position to pass judgment lack a neutral framework through which to effectively process radically different narratives. This acknowledgement of judicial inadequacy stands in direct opposition to modernist conceptions of justice. Historically speaking, "the just" is often associated with "the true" – justice often depends on a "revelation of truth" or an uncovering of fact.[66] Under

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[62] Arendt, 137.
[63] Swift, 63.
[64] Lyotard, The Differend: Phrases in Dispute (Manchester: Manchester University Press, 1988).
[65] Docherty, 408.
[66] Simon Malpas, Jean Francois Lyotard (London: Routledge, 2003), 53-54.

modernism, the task of judgment is essentially an epistemological one – it involves a process of stripping away illusory layers of appearance to reveal the true nature of reality beneath.[67] Much of modern thought is concerned with this project – from the Marxist task of shedding "false consciousness," to Ferdinand de Saussure's semiological search for a "signified" beneath each linguistic "signifier," to Claude Levi-Strauss' attempts to uncover a universal structure of kinship relations in anthropology.[68]

Lyotard's point is that such structuralism is no longer an adequate model for seeking justice in the postmodern present; after Auschwitz, the grand historical metanarratives of Enlightenment "Reason and "Progress" are demystified as social constructions, and history becomes a series of "events" which are open to interpretation. Instead of the structuralist quest to distinguish between "appearance and reality," Lyotard's imperative to develop the capacity for reflective judgment highlights history as a relation between the "appearance and disappearance" of different forms of "the real" or "the true."[69] This style of analysis acknowledges that Nazism did indeed contain its own style of "morality" which guided the actions of its adherents[70] – notwithstanding how twisted such morality appears to contemporary observers – but stops short of careless relativism or nihilism. It is precisely this capacity for reflective judgment that I believe needs to be cultivated in order to develop a more legitimate transitional jurisprudence for the coming decades.

Conclusion

In Survival in Auschwitz, Primo Levi describes an identifiable category of concentration camp prisoners called the Muselmänner (Muslims):

[67] Docherty, 409.
[68] Hugh J. Silverman, "French Structuralism and After: De Saussure, Levi-Strauss, Barthes, Lacan, Foucault," inTwentieth Century Continental Philosophy, ed. Richard Kearney (London: Routledge, 1994), 323-325.
[69] Docherty, 409.
[70] Claudia Koonz, The Nazi Conscience (Cambridge, MA: Harvard University Press, 2003).

> One hesitates to call them living: one hesitates to call their death death, in the face of which they have no fear, as they are too tired to understand…if I could enclose all the evil of our time in one image, I would choose this image which is familiar to me: an emaciated man, with head dropped and shoulders curved, on whose faces and in whose eyes not a trace of thought is to be seen.[71]

The Auschwitz prisoners called these people Muslims because of the literal translation of the word "Islam" – peaceful submission to the will of God.[72] Above all, the Muselmänner were resigned to their fate – a state which Giorgio Agamben refers to as "bare life"[73] – both physically and psychologically, they were totally exposed to the power of the state. Tragically, even the most casual perusal of history shows that Auschwitz was not the sole domain of theMuselmänner; in actuality, they dwell wherever exploitation reigns supreme. Perhaps even more tragically, exploitation knows no ideological boundaries – neither capitalist, communist, nor fascist. It is not my intent to conclude that Eichmann's willful adherence to Nazism absolves him of responsibility for his actions; rather, my point is that we should not judge Eichmann without simultaneously judging ourselves. A self-reflexive model of transitional jurisprudence is thus based on a politics of anxiety; it notes the self-affirming tendencies of all ideologies and constantly seeks to transcend its own descent into moral decadence through a hermeneutics of suspicion. Such an approach may in fact be the only plausible way forward if transitional justice initiatives are to maintain their legitimacy throughout the coming decades.

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[71] Primo Levi, Survival in Auschwitz (New York: Touchstone, 1996), 90.
[72] Giorgio Agamben, Remnants of Auschwitz: The Witness and the Archive (Cambridge, MA: MIT Press, 1999), 45.
[73] Agamben, Homo Sacer: Sovereign Power and Bare Life (Palto Alto: Stanford University Press, 1995).