

Trauma, Memory, and the Law

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(Working Draft)

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“Necessarily, we must dismiss those tendencies that encourage the consoling play of recognitions.”¹

To begin with, the face and skull are pulverized. Broken teeth are exposed by the severed, dangling lower lip. The jaw is grotesquely distended. The zygomatic and sphenoid bones outside the left eye appear to have been fractured. The rest of the face is decentered, raked out of place – a ghastly cubist asymmetry drawn into lurid relief by the blood pooling on the surface behind the skull. The eyes are uncanny, open, staring upwards, frozen in agony.



Screen capture from *We are all Khaled Said* webpage

This photograph of Khaled Said, posted online by Egyptian activists in June, 2010, helped to spark a series of protests against police brutality and then the uprising in Tahrir Square that overturned the thirty year military dictatorship of Hosni Mubarak. Among the most popular social media sites that galvanized protesters was Wael Ghonim's "We are all Khaled Said" Facebook page. It juxtaposed the gruesome image with a pre-torture photograph of Khaled Said, then a handsome young middle class businessman.

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¹ Foucault, Nietzsche, Genealogy, History, in *Language, Counter-Memory, Practice* (Donald F. Bouchard, ed.; Ithica, Cornell Univ. Press 1977) 153.



Screen capture from *We are all Khaled Said* webpage

Tens of thousands of people joined the page and both images of Khaled “spread like wildfire.”² On Ghonim’s suggestion thousands of followers “change[d] their profile pictures to an anonymously designed banner of Khaled Said, featuring him against the backdrop of the Egyptian flag, with the caption ‘Egypt’s martyr.’”³ Others took photographs of themselves holding a paper sign that said “We are all Khaled Said,” a practice that also went viral.⁴ Both techniques grew out of Ghonim’s experience in online marketing (where cultivating personal consumer engagement with a product is crucial to closing a sale) not expertise as a political activist. But the logic of online marketing was tailor made for the moment. And it worked. Expressions of “solidarity extended to expatriate Egyptians around the world and to Arabs in many countries”⁵

The two original photographs and their metastatic proliferation during the Arab Spring offer a poignant example of the circuitry that connects trauma, memory, and the law. On the one hand, the image of Khaled Said’s tortured body vividly represented his traumatic death at the hands of Egyptian police. It was “impossible to forget,” recalling as it did the disappearance and torture of countless other ordinary Egyptian citizens who had dared to defy the state (in some instances, by the simple act of seeking to cast a vote), and it crystallized sentiments underlying revolutionary resistance to the state’s brutality and seemingly perpetual invocation of “emergency laws.”⁶ Ghonim and the protesters he and other activists worked to organize simply “could not stand by passively in the face of such grave injustice.”⁷ Trauma. Memory. Law. Here in a plea for legal accountability that expanded into a revolutionary demand for a new legal order. The pre-torture image, for its part, reminded viewers of Said’s middle class respectability, suggested his

² Wael Ghonim, *Revolution 2.0* (Boston; Houghton Mifflin Harcourt 2012) 62.

³ Id. 67.

⁴ Id. 68.

⁵ Id.

⁶ Id. 62. On the relationship between post-colonial Egyptian law and society see Talal Asad, *Thinking About Law, Morality, and Religion in the Story of Egyptian Modernization*, 1 *JISMOR* (2005): 13-24; Asad, *Conscripts of Western Civilization*, in *Dialectical Anthropology*, ed. Christine Ward Gailey, 333-351 (Tallahassee: Univ. of Florida Press 1992).

⁷ Id. 59.

innocence, and, as importantly, compressed the interval between Said's life as an ordinary Egyptian citizen and his death into the singular traumatic event of the police assault.⁸ The juxtaposition thus functioned as a stinging indictment written in and through the body of the victim – a body that also functioned metonymically, calling forth the body politic from its torpor and vividly displaying its loss and its suffering.

Not only was Said's body transformed into a mnemonically charged legal plea, in his earliest posts to the "We are all Khaled Said" Facebook page Ghonim wrote in the first person, posing *as* Khaled Said and using colloquial Egyptian "closer to the hearts of young Egyptians ... to overcome any barriers," providing readers a ghostly, democratic testimony in the court of public opinion.⁹ "Egyptians, my justice is in your hands," wrote Ghonim. "Speaking as Khaled gave me a liberty that I did not have ... It was as though Khaled Said was speaking from his grave.... 'The prosecution issued a preliminary report that the cause of death was drug overdose. Not only have you murdered me, but you also want to stain my reputation? God will reveal the truth and repay your lack of conscience.'"¹⁰

As the prosecutor's preliminary report indicates, the state was scarcely oblivious to the political implications of the trauma/memory/law circuit that online publicity surrounding Said's death had activated. All the more so once Said's mother gave an interview claiming that her son had been tortured and killed for exposing police corruption (he apparently possessed video of police officers "examining and then allegedly dividing confiscated drugs and money").¹¹ The state scrambled to respond on terms that would reframe public memory of the victim and the cause of death – not only claiming that Said died of an overdose, and that the deformities in the post-torture photograph were the result of an "autopsy," but posting false comments to activists' social media pages attacking Khaled as an "addict," "drug dealer," and "Martyr of Marijuana," and stating that he was wanted for four crimes including evasion of military service.¹² On this view, there was nothing to see in the post-torture photograph but the state dealing in a rational, technocratic manner with a low life who deserved his fate – the only crime and moral deficiencies were Said's, not the state's.¹³ The Ministry of the Interior also took care to physically remind activists of the regime's raw repressive power by stifling the first public protest in Alexandria sparked by the online campaign – "the security forces were prepared and decisive ... arrest[ing] many protesters and surround[ing] the rest with double their number of police officers, nearly making a perfect circle. From afar – as later seen in a photograph – the image was quite symbolic. It perfectly represented what the regime was doing to our country. Worse yet, the media, under the usual pressure from State Security, ignored the protest."¹⁴

⁸ Id. 62.

⁹ Id. 61.

¹⁰ Id. 61-62.

¹¹ Id. 65.

¹² Id. 64, 69.

¹³ Id. 65.

¹⁴ Id. 63-64.

What the regime did not anticipate, and did not then have the means to control, was the forum social media gave to the Said family to respond, outside state-controlled news organizations, to attacks on the memory of their son, or the platform it provided to eyewitnesses to the torture and murder who came forward to record videos that went viral online. Their testimony described “the viciousness of the violence” as officers repeatedly “beat Khaled’s head against the stairs” of a building near the Internet café from which they had dragged him.¹⁵ Had the Mubarak regime been even a little more tech savvy, its disinformation campaign even modestly more imaginative and thorough, the circuit might have been reversed – Said’s family and the eyewitnesses might have been rounded up, bribed, discredited, or otherwise promptly neutralized so that the state-sponsored memory of Said’s death would have saturated public consciousness and prevailed. To identify a circuit connecting trauma, memory, and the law is not to say that it serves the interests of justice in any necessary way. Moreover, the circuit is fragile, sometimes even reversible.

And of course we know what followed: the euphoria of a largely non-violent revolution, constitutional reform, the rise of the Muslim Brotherhood, retrenchment, a military coup by Abdel Fattah el-Sisi, and the return of the very kind of repression that sparked the revolution in the first place. Repression “at least as relentless – some say worse – than the bad old days of President Hosni Mubarak.”¹⁶ In December 2015 the Egyptian Commission for Rights and Freedoms “published a ... shocking report on enforced disappearances. After talking to victims, families and lawyers, it documented 340 cases in a three-month period between August and November ... with an average of three per day. Victims who were later released described undergoing various types of torture including electric shock, hanging by the hands, and threats of sexual assault.”¹⁷

Traumatic memory operates on both sides of this new repression, supporting radically different conceptions of the rule of law. Activists continue to invoke the image of Said, now to indict Sisi’s regime as an illegitimate heir, indeed a subversion, of the revolution.¹⁸ And the Sisi regime, for its part, constantly reminds Egyptian citizens that its repressive emergency measures are necessary to “find and arrest terrorists who threaten the security of the state.”¹⁹ These “security threats” include not only radicalized Islamists but the now banned Muslim Brotherhood – the memory of whose rise to power marks the failure of secular reformists’ ambitions for the 2011 Tahrir Square protests – and “all actors and political forces who directly challenge the regime and its interests,” even “those young, secular revolutionaries ... once [seen] ... as the future of a new Egypt.”²⁰ The revolution itself has, in this way, been refigured as a national trauma the return of which it is the duty of officers of the law to prevent.

¹⁵ Id. 65-66.

¹⁶ <https://www.independent.co.uk/voices/egypt-s-arab-spring-reverts-to-a-winter-of-fear-and-torture-a6858456.html>

¹⁷ Id.

¹⁸ See “We Are all Khaled Said” Facebook Page; Rania Al Malky, *From Khaled Said to Giulio Regeni: A Trajectory of EU Weakness*, Middle East Eye, March 21, 2016.

¹⁹ Id.

²⁰ Id.

To examine the structure of a trauma/memory/law circuit is thus to enter what Michel Foucault called a “hazardous play of dominations” a play that “establishes marks of its power and engraves memories on things and even within bodies. It makes itself accountable for debts and gives rise to the universe of rules, which is by no means designed to temper violence, but rather to satisfy it.”²¹ Drawing a contemporary example from the upheavals of revolutionary time highlights this play of dominations in a relatively contained time horizon, but it can be identified in all trauma/memory/law circuits. Consider the formal psychiatric recognition of post-traumatic stress disorder in the Third Diagnostic and Statistical Manual of Psychological Disorders in 1980 – a step which extended the legal salience of PTSD in the regulation of veterans’ disability benefits and the prosecution of sexual assault. As crucial as this step has been in the evaluation and treatment of trauma and in the effort to disaggregate traumatic experience from the century-long limiting effects of the “physical injury rule,” it also helped convert perpetrators of war crimes in Vietnam into victims. As one commentator summarizes:

the definition of a traumatizing experience in the DSM-III was phrased in such a comprehensive manner that it even included the experience of having committed war crimes or other severe human rights violations, such as torture or the killing of victims. Thus ... the category of PTSD made room for a new type of “self-traumatized perpetrator,” that is, for soldiers who were traumatized by their own extraordinary acts of violence, in the aftermath of which they suffered a moral and psychological conflict. ... Although, in principle, there is no reason why acknowledging that committing severe, violent crimes may have detrimental psychological effects on the perpetrators should eclipse the suffering of the actual victim, in practice, it seems, the politics of trauma and victimhood is competitive. Whereas there is an extensive literature documenting the chronic PTSD of American Vietnam war veterans, there has been no concern at all with the traumatization of the Vietnamese – with the exception of those who have come to live in the West.²²

This is of course not the conventional mode of analysis. For much of the twentieth century, at least since World War II, the Holocaust, and the Nuremberg trials, the trauma/memory/law circuit has traditionally been represented as redemptive. Naming traumatic experience by recovering the memory of victims, typically privileging their first person testimony, is seen as a basic integument of the work of seeing justice done.²³ For example, the circuit lies at the core, conceptually, methodologically, and normatively, of human rights law and its redemptive aspirations. As Jay Winter and Antoine Prost have shown in their fascinating biography of René Cassin, these

²¹ Foucault 1977 148-50 .

²² José Brunner, Trauma and Justice: The Moral Grammar of Trauma Discourse from Wilhelmine Germany to Post-Apartheid South Africa, in Austin Sarat, Nadav Davidovitch, and Michal Alberstein, Trauma and Memory: Reading, Healing, and Making Law (Stanford; Stanford Univ. Press 2007) 106-07.

²³ The approach has not been without controversy. See Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil (New York, Penguin Books 2006).

commitments are not accidental. Cassin, a principal drafter of the 1948 Universal Declaration of Human Rights, a “major champion and central figure of the Human Rights Commission of the United Nations” and distinguished judge on the European Court of Human Rights, was himself a World War I veteran, grievously wounded in the abdomen, arm, and chest by machine gun fire on the Western Front in the fall of 2014.²⁴

The injuries were grave, “the bullet which had ruptured his abdomen had broken his hip bone, leaving numerous fragments and destroying the abdominal wall.”²⁵ Despite his injury “he dragged himself to within shouting distance of his captain and urged him to retreat, thereby saving the company from encirclement.”²⁶ As night fell he had to bang his drinking cup on a stone to draw the attention of stretcher-bearers.²⁷ It took two operations, the first conducted without anesthesia, “to remove the casing of the explosive bullet which had been lodged in his hip.”²⁸ The surgeries saved his life but left him permanently disabled. On returning to the practice of law Cassin became part of an influential generation of advocates for wounded veterans and for international institutions to support disarmament and peaceful dispute resolution. Winters and Prost contend that Cassin’s traumatic experience in World War I profoundly shaped his work on the Universal Declaration of Human Rights, an essential component of “the construction of an international legal order based on human rights” in the wake of World War II and the Holocaust (to which Cassin, a Jew, lost 25 relatives, all deported from France to be killed by Nazis, his sister to Auschwitz in 1944).²⁹ Human rights law narrates trauma, on this account, because its provenance is traumatic memory. In and through this forensically structured narration it seeks to privilege the local experience, memory, and rights of the individual over and above those of sovereign states – indeed, to displace sovereignty from the state to its subjects.³⁰

Across the disciplines of history, psychoanalysis, law, psychology, and critical theory the literature seeking to connect testimony of traumatic memory in a metaphysically immediate way to justice and truth is voluminous.³¹ Even otherwise scrupulously conceived and executed critical treatments slip into metaphysics. Cathy Caruth’s pathbreaking work on traumatic memory repeatedly suggests that the voice of traumatic injury contains or “witnesses a truth.”³² She is acutely aware that traumatic injury offers only “enigmatic testimony” that “resists simple comprehension.”³³ But the temptation to associate what we struggle to apprehend in trauma as a (hidden, and yet

²⁴ Winter and Prost, *René Cassin and Human Rights: From the Great War to the Universal Declaration* (Cambridge, Cambridge Univ. Press 2013) xx, 21.

²⁵ *Id.* 23

²⁶ *Id.* 21.

²⁷ *Id.*

²⁸ *Id.* 23.

²⁹ *Id.* 149, 303, 348.

³⁰ *Id.* 222-27.

³¹ For a synthesis of the literature, see Booth, *Communities of Memory* (2006).

³² Caruth, *Unclaimed Experience: Trauma, Narrative, and History* (Ithica, Cornell Univ. Press 2016) 3; cf. Caruth, *Introduction to Psychoanalysis, Trauma, and Culture I* 48 *American Imago* 1, 7 (1991).

³³ *Id.* 6, 21.

insistently resurfacing) “truth” is apparently irresistible. Shoshana Felman’s revealing close reading of the film *Shoah* both insists on the “impossibility of testimony” regarding the Holocaust and “the inaugural event of finding ... testimony ... its singular significance and functioning of the story of an *irreplaceable historical performance*, a narrative performance which no statement (no report and no description) can replace and whose unique enactment by the living witness is itself part of a *process of realization* of historical truth.”³⁴

In other accounts memory work itself – remembering, testifying – *is* the work of justice, just as in psychoanalysis, recovering the traumatic experience, reducing it to first person narrative, *is* the cure.³⁵ The paradigmatic legal example of memory work of this kind is the truth and reconciliation, concentrating as it does on the restorative justice that inheres in testimony simpliciter – not criminal prosecution, lustration, civil compensation, or other monetary reparations.³⁶ And yet here too, as in the DSM-III definition, the circuit’s valence is complex. Perpetrators receive immunity from prosecution in exchange for their testimony, and their testimony frequently devolves into an account of their own trauma, their status as victims.³⁷

So too, in conventional accounts, law is typically regarded as the product of confrontation with traumatic memory, indeed a formal recognition and redemption of that memory, rather than as a social force that shapes memory and indeed causes and shapes the experience of trauma.³⁸ The fact that the process of seeking a legal remedy can become a repetition of the original trauma is well known, particularly in the area of sexual assault where the legal process can be so traumatizing as to inhibit many victims from reporting assaults in the first place.³⁹ Less commonly examined is the contradiction that nearly exclusive focus on criminal punishment feeds a carceral system in which sexual assault is pervasive, or the implications of the canonization and proliferation of victim impact statements far beyond the setting of sexual assault.⁴⁰ More broadly, as the

³⁴ Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York; Routledge 1992) 254-55.

³⁵ Roger Errera, quoted in Booth (2006) 117 (“Memory is the ultimate form of justice”).

³⁶ See Booth (2006) 121-46.

³⁷ See Brunner, in *Sarat Trauma and Memory* (2007) 112. See also Booth (2006) 152-58.

³⁸ See S. Elizabeth Bird and Fraser M. Ottanelli, eds., *The Performance of Memory as Transitional Justice* (Cambridge, Intersentia 2015) 1-3.

³⁹ See Robert C. Davis, Arthur J. Lurigio, Susan Herman, eds., *Victims of Crime* (Los Angeles, Sage Publications 2007) 40 (discussing “victim blaming, questioning of credibility, and other harsh treatment many survivors face from the criminal justice agents and health care providers when they attempt to report a rape. This treatment has been termed ‘the second rape’ or victimization.”); Shoshana Felman, *Forms of Judicial Blindness: Traumatic Narratives and Legal Repetitions*, in Austin Sarat and Thomas R. Kearns, eds., *History, Memory, and the Law* (Ann Arbor, Univ. Michigan Press 1999) 76-77; José Brunner, *Trauma and Justice: The Moral Grammar of Trauma Discourse from Wilhelmine Germany to Post-Apartheid South Africa*, in Sarat (2007) 103.

⁴⁰ On the pathologies of “carceral feminism” see Elizabeth Bernstein, *Carceral Politics as Gender Justice? The ‘Traffic in Women’ and Neoliberal Circuits of Crime, Sex, and Rights*, 41 *Theory and Society* 233 (2012); see also Victoria Law, *Against Carceral Feminism*, *Jacobin*, Oct. 17,

physical injury rule demonstrates, law often determines what counts as cognizable trauma – not only distinguishing suffering for which another is accountable from *damnum absque injuria*, but subtly influencing social understandings of suffering itself. In the 19th century, when trauma first begins to lose its more or less exclusive reference to physical injury, when it begins to be associated with psychic harm and memory, the physical injury rule reinforced deeply ideological and gendered understandings of the condition. The best studied example is railroad accident victims who walked away from accidents seemingly uninjured but suffered from nervous disorders after the fact. Victims of trauma, particularly those who could show no immediate connection to physical injury, no “red badge of courage,” were routinely characterized as shamefully “effeminate,” insufficiently rugged, “malingering,” and generally unsuited to the conditions of modern life.⁴¹ And of course the defense to liability permitted the social and economic activity responsible for the traumas to continue. If the DSM-III has finally upset this legally endorsed marginalization of some trauma victims, its social, political, and economic effects linger.⁴² Indeed, an emerging literature in psychology on resilience and hedonic adaptation can be read as endorsing the same view – that the problem with people who do not recover from the traumas of modern life is not the structure of modern life or the source of traumatic injury, but the people themselves.⁴³

Plainly the conventional account fails to capture important complexities of the trauma/memory/law circuit. This perhaps explains the emergence, particularly over the last two decades, of a literature that is increasingly skeptical of trauma and memory even as the circuit remains a predominant method of mobilization in contemporary social movements, and trauma and memory remain predominant modes of socio-legal research and analysis in an increasingly wide array of disciplines.⁴⁴ In what follows, I first provide a brief sketch of the history of the intersection of trauma, memory, and the law. Second, I synthesize the critical literature and suggest that it reflects fundamentally unresolved questions about the meaning of traumatic memory – questions that both reflect and obscure profound anxieties about the challenges traumatic experience poses to assumptions about the nature of modern life. Finally, I return to the legal complexities of traumatic memory and the specific difficulties the law confronts in attempting to assimilate it into the work of seeing justice done. If there is a practice of justice equal to the problem of traumatic experience, it has not yet been named.

I. History

2014. See Tracey Booth, *Accommodating Justice: Victim Impact Statements in the Sentencing Process* (Federation Press 2015).

⁴¹ Roger Luckhurst, *The Trauma Question* (New York Routledge 2008) 23.

⁴² See William J. Koch, Kevin S. Douglas, Tonia L. Nicholls, Melanie L. O’Neill, *Psychological Injuries: Forensic Assessment, Treatment, and Law* (Oxford, Oxford Univ. Press 2006) 29-30.

⁴³ See Young, in *Trauma and Memory* (2007) 38-42; Luckhurst (2013) 209.

⁴⁴ Paul Saint-Amour contends that “trauma studies has been in a deepening shock of its own.” *Tense Future: Modernism, Total War, Encyclopedic Form* (Oxford, Oxford Univ. Press 2015) 15. On the “unprecedented prominence of memory” in the humanities and social sciences, see Gavriel D. Rosenfeld, *A Looming Crash or a Soft Landing? Forecasting the Future of the Memory “Industry,”* 81 *J. Modern History* 122, 123 (2009).

“the chief emphasis lay upon the patient’s resistances...”⁴⁵

The DSM-III defined trauma as the experience of an extreme event (death, serious injury, or mutilation) causing intense fear, helplessness, or horror, which recurs persistently in memory and causes a range of associated behavior and affects (e.g., avoiding triggering stimuli, numbness, and increased psychic arousal).⁴⁶ A key feature of trauma, then, is that it resurfaces in memory, that it occurs and recurs “as a break in the mind’s experience of time.”⁴⁷ Indeed, trauma and memory have been tightly linked from the beginning of the 19th century transition in usage of the word “trauma” to describe more or less exclusively physical injuries to a term that referenced a psychological condition.⁴⁸ As early as 1893 Freud insists that “the memory of the trauma ... acts like a foreign body which long after its entry must continue to be regarded as an agent that is still at work.”⁴⁹ The hysteric, he continued, “suffers mainly from reminiscences” which reproduce fractured elements of a past traumatic experience.⁵⁰ And of course in his early work Freud was confident that the symptoms of neurosis could be cured by identifying the repressed traumatic event – deepening memory work in order to consciously recover and process the event.⁵¹ In some accounts, Freud’s theory of trauma is even more closely connected to the temporal dimensions of consciousness. It’s not just that the victim suffers reminiscences of a psychically overwhelming event. The source of psychic trauma is not even the overwhelming external event in and of itself, but rather the absence of anticipatory anxiety, an absence, therefore, of a protective psychic barrier when the event takes place.⁵² The intrusions of PTSD, on this view, represent the mind’s effort, often well after the fact, to master by repetition this initial vulnerability – reproducing, over and over, the conditions that should have prompted protective anxiety.

Roger Luckhurst reminds us that even before Freud’s investigations and the intervention of other psychologists, the problem of trauma as a psychological

⁴⁵ Sigmund Freud, *Beyond the Pleasure Principle* (New York, W.W. Norton & Co., 1961): 18.

⁴⁶ Allan Young, *Posttraumatic Stress Disorder of the Virtual Kind: Trauma and Resilience in Post-9/11 America*, in *Sarat* (2007) 22-23.

⁴⁷ Caruth, *Literature in the Ashes of History* (2013) 5.

⁴⁸ (*Sarat* 5, 79)

⁴⁹ Freud and Breuer, *On the Psychical Mechanism of Hysterical Phenomena*, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud, Vol. II* (1893-95).

⁵⁰ Freud and Breuer, *Studies on Hysteria* (1895) 7; see also Freud, “*The Aetiology of Hysteria*, 1896 192-93 (“symptoms of hysteria ... are being reproduced in his psychical life in the form of mnemonic symbols”).

⁵¹ Howard B. Levine, in Arthur S. Applebaum, Lisa A. Uyehara, and Mark R. Elin, *Trauma and Memory: Clinical and Legal Controversies* (New York, Oxford Univ. Press 1997) 294, 300; Maria C. Sauzier, *Memories of Trauma in the Treatment of Children*, id. 387; Saint-Amour (2015) 15. For a critique of the mental/physical binary in traditional trauma studies, see in Peter A. Levine, *Waking the Tiger: Healing Trauma* (Berkeley, North Atlantic Books 1997).

⁵² Cathy Caruth, *Literature in the Ashes of History* (Baltimore; Johns Hopkins Univ, Press) 5-6; Paul K. Saint Amour, *Tense Future: Modernism, Total War, Encyclopedic Form* (Oxford, Oxford Univ. Press 2015) 1 (“the unassimilable nature of traumatic violence would seem to depend on the impossibility of its anticipation”).

phenomenon was deeply rooted in the shocks of modern industrial life. “[T]he railway accident was the site of the ‘first attempt to explain industrial traumata’ as it exposed the traveling middle and upper classes to the kinds of technological violence previously restricted to factories. The speed of collisions often rendered these accidents particularly gruesome events. Yet even those who survived without apparent physical injury began to report strange effects on their nerves.”⁵³ Their claims were gradually supported by increasingly refined statistical analysis of data which revealed the breadth of ostensibly idiosyncratic symptoms. Statistics thus helped to establish a record of “the puzzling and damaging consequences of modernity, not just of poverty, inequality, and disease, but records of industrial and technological accidents” – the “risky environments typical of modernity” that were supposedly controlled by “rational management.”⁵⁴

So called “railway spine” purported to describe, in a still-physicalist metaphorical register, these mysteriously persistent symptoms arising from train wrecks. Early medical case studies described “disordered memory, disturbed sleep and frightful dreams, and various types of paralysis, melancholia and impotence ... physical and mental effects [that] seemed to ramify and worsen over time.”⁵⁵ Similar symptoms surfaced in tort claims brought by mere bystanders who saw the accidents and riders who suffered no observable physical injuries.⁵⁶ Indeed, the struggle to overcome the physical injury rule and to measure and properly compensate emotional distress in tort law is apparently one of the earliest points of contact between trauma and the law, revealing a still lingering “irresolution,” as Luckhurst puts it, “of legal discourse around nervous shock.”⁵⁷

The debate about “railway spine” thus “names a conjuncture of body and machine, the violent collision of technological modernity and human agency. This inaugural version of trauma is also intrinsically ... a medico-legal problem, which is to say it is defined in and through the institutions and discourses marking the rise of the professional society in the nineteenth century.”⁵⁸ This conjunction of professional authority and distinctly modern injuries calling for recognition ensured that “[r]ival experts would henceforth seek to define the protean signs of trauma in their specific disciplinary languages.”⁵⁹ Railroad corporations and their lawyers retained medical experts to defend the physical injury rule and plaintiffs sought their own to prove that psychic injury was real even if not connected to an observable physical injury.⁶⁰ Moreover, intense legal and academic competition among experts has of course ensured that “the very act of definition contribute[s] to the mobility of symptoms” and therefore, to this day, to debate about the coherence of the concept of trauma.⁶¹

⁵³ Luckhurst (2013) 21.

⁵⁴ Id. 26.

⁵⁵ Id. 22.

⁵⁶ Id. 25.

⁵⁷ Id. 27.

⁵⁸ Id. 24.

⁵⁹ Id.

⁶⁰ Id. 23.

⁶¹ Id. 24.

In the early twentieth century, however, it was Freud and therefore the discipline of psychology that captured popular imagination and “massively extended the potential range of the term trauma,” particularly after he identified traumatic war neurosis symptoms in “shell shocked” WWI veterans – symptoms strikingly similar to those he had earlier found in hysterics.⁶² Here, as in railroad accidents, modern technology and mass society not only generated grave, new injuries (trench warfare created a “mechanized field of death” on a previously unimaginable scale), the same physicalist-psychodynamic debate resurfaced in claims for veterans’ disability benefits: “shell shock was named for a violent, exterior, physical cause yet also appeared to be an interior, psychical condition which was often completely detached from any causal connection to artillery bombardments.”⁶³ And questions persisted about the independence of the professional expertise in and through which the condition was diagnosed and treated: “[t]o recognize shell shock was to sanction what one lieutenant-colonel termed ‘a very contagious source of trouble when it gets into a battalion.’”⁶⁴ For precisely this reason, “[m]any of those treating shell shock discovered that military psychiatry was an impossible profession, caught between contradictory imperatives of cure and fitness for return to service.”⁶⁵ Even after the Great War, veterans struggled for recognition of shell shock as a compensable disability.⁶⁶ This was true even as shell shock came to “embody the traumatic experience of the Great War in collective memory,” deeply influenced “aesthetic Modernism,” and “notions of trauma, temporal dislocation, and anamnesis (loss of memory)” shaped “Western consciousness.”⁶⁷

Lockhurst’s account concentrates on two other seminal 20th century events that “ensured ... wide diffusion of the trauma paradigm” with the moral and legal “elevation” of survivor testimony after the Holocaust.⁶⁸ The first is the “all-pervasive psychological scar of camp experience.”⁶⁹ A massive body of scholarship explores the imperatives surrounding representations of this acutely traumatic experience and its influence on post-war literature, theory, and culture. The second event is the formal recognition of PTSD in the DSM-III in 1980. Vietnam veterans, second wave feminists seeking recognition of Battered Women’s Syndrome, and psychologists responsible for their treatment, joined forces to pressure for the inclusion of PTSD in the DSM-III. Human rights activists have since made it a global port-manteau for the experience of mass atrocities.⁷⁰ Luckhurst sees the recognition of trauma in the DSM as particularly pivotal, concluding that the “arrival of PTSD helped consolidate a trauma paradigm that has come to pervade the understanding of subjectivity and experience in the advanced industrial world.”⁷¹

⁶² Id. 49; Young () 23.

⁶³ Luckhurst (2013) 50-51.

⁶⁴ Id.

⁶⁵ Id. 51.

⁶⁶ Id. 52.

⁶⁷ Id. 50-53.

⁶⁸ Id. 57.

⁶⁹ Id. 63.

⁷⁰ Brunner 107.

⁷¹ Luckhurst 1.

Just as quickly as trauma achieves formal medial recognition, however, controversies not altogether unlike the accusation of “maladies simulées” and “pension neurosis” in 19th century accident victims and hysterics resurface.⁷² Among the most prominent and vexing examples is the extended, vituperative debate in the 1980s and 1990s over so-called “recovered memories” of childhood sexual abuse and accusations that therapists have not only induced clients to “recall” completely false memories – abuse that never took place – but taken the stand to testify as experts in defense of recovered memory.⁷³

Luckhurst’s attention to the influence of the DSM-III is undoubtedly warranted, but it has the disadvantage of privileging, both conceptually and methodologically, the very competition among experts and legal contestation that he reveals as a structural problem in understanding the emergence of trauma in the nineteenth century. The history of that competition is very real, its influence on the concept of trauma powerful. But it may give undue weight to the battle of experts and at the same time subtly reinforce the normative view that professionally contested aspects of social experience – particularly aspects that appear rather decisively to elude professional consensus – are suspect.

What remains missing is a broad, synthetic socio-legal study of the development of the trauma/memory/law circuit in the nineteenth and twentieth centuries giving due weight to its cultural and aesthetic salience.⁷⁴ Studies of memory, particularly those which concentrate on the practices, ideologies, and genealogies of individual and collective commemoration are a very important first step insofar as they join social history, aesthetics, performance studies, and rhetorical analysis.⁷⁵ But a comprehensive account would also have to take up literary critical studies of transformations in the meaning of tragedy. Trauma can be interpreted as marking the disruption of pre-modern structures of social meaning according to which evil and suffering were experienced and assimilated (through grief, retribution, heroism, and self-blame) within the painful but psychically reassuring register of tragedy. As Soren Kirkegaard observed in *Either/Or* modern suffering “has no epic foreground, no epic remainder. The hero stands and falls entirely on his own deeds. . . . and when the age loses the tragic, it gains despair. In the tragic there is implicit a sadness and a healing . . . the sorrow more profound, the pain less.”⁷⁶ Traumatic experience reflects this loss of epic foreground and remainder, just as it expresses the severed connection between sadness and healing.

Profound loss and cruelty are scarcely new phenomena. What seems distinctive about the development of trauma is not only its close association with modern

⁷² Id. 25, 34.

⁷³ Id. 11.

⁷⁴ Luckhurst attends closely to cultural manifestations of the “trauma paradigm” from the late 1980s through the 2000s, particularly in America. See Luckhurst (2013) 79-208.

⁷⁵ See, for example, Nina Silber, *The Romance of Reunion: Northerners and the South, 1865-1900* (Chapel Hill, Univ. North Carolina Press 1993). See Booth (2006) 44-51.

⁷⁶ *Either/Or*, Howard and Edna Hong, eds. and trans. (Princeton, Princeton Univ. Press 1987) 143-47.

technological and industrial life, but its “resistance to conceptual assimilation” in the memory of the victim as tragic experience, and of course, as we have seen, its resistance to redemptive appropriations, in both law and culture.⁷⁷ A full history would take up these forms of resistance, not least of which because they figure prominently in critiques of the concept of traumatic memory.

II. Critical Assessments

“This, then, was the complete game
– disappearance and return.”⁷⁸

First, at the definitional level, there is a persistent oscillation in the characterization of trauma. On the one hand, psychic trauma is regularly characterized as an overwhelming or shattering event – an event which, as Galanter-Levy describes, “puts the ego out of action,”⁷⁹ or, as another commentator describes, an event that causes “a collapse of the autonomous, conscious self-control of the individual, a rupture in the sense of time.”⁸⁰ On the other hand, trauma is frequently characterized as a universal attribute of psycho-sexual development fundamental to modern identity formation and the concept of the divided subject.⁸¹ On this view, derived from Freud, the modern subject is formed by the traumas of separation from the mother, the prohibitions of the father, Oedipal conflict, and the terrifying recognition of death.⁸² This is not the only example of universalization: human rights advocates have been criticized for exporting a fundamentally western conception of trauma to the experiences of oppression and suffering in other cultures, and post-colonial theorists have written about the imperialist implications of certain forms of post-traumatic memory in the perpetrators of colonial violence.⁸³ And of course as the concept has penetrated popular consciousness the term is also deployed as a thoroughly banal, not necessarily ironic, adjectival commentary on the quotidian frustrations and disappointments of everyday life.⁸⁴

⁷⁷ See Caruth, *Unclaimed Experience* (2016) 117 (“a kind of not-knowing at the heart of catastrophic experience”). See also Caruth (2013) 80 (psychoanalysis bears witness “to the shock of a history it cannot assimilate but only repeat”).

⁷⁸ Freud, *Beyond the Pleasure Principle*, 14.

⁷⁹ Robert M. Galanter-Levy, *Psychoanalysis, Memory, and Trauma*, in *Trauma & Memory* (1997) 142.

⁸⁰ Brunner, in Sarat (2007) 98.

⁸¹ Caruth 2013 ch.1.

⁸² See Caruth, *Unclaimed Experience* (2016) 103, 107. The DSM-III’s broad definition of PTSD arguably contributes to this definitional oscillation.

⁸³ See Renato Rosaldo, *Imperialist Nostalgia*, 26 *Representations* 107 (1989) (“agents of colonialism long for the very forms of life they intentionally altered and destroyed [and this nostalgia can] transform the responsible colonial agent into an innocent bystander”). See also *id.* at 111, 119-20 (on the complicity of anthropologists). See also Caruth (2016) 117 (discussing critiques of the “Eurocentric perspective of ... ‘classical’ trauma theory”); Bird & Ottanelli (2015) 2 (*same*).

⁸⁴ Ian Sample *One Star Restaurant Reviews Show Signs of Trauma* *Linguists Say*, *The Guardian* Feb. 15, 2015; “micro traumas” Mark Banschick, *Every Day Trauma: 8 Ways to Feel Better*, *Psychology Today*, Jan. 9, 2013 (“I wonder if all the stress of contemporary life is a form of

Second, at the level of phenomenology and epistemology there is a fundamental dispute over whether trauma is in fact a real, indelible event in psychic life, or, on the other hand, a delayed, “recovered,” and therefore contingent after-effect of memory,⁸⁵ a reflection of purportedly inferior, “weak-willed,” “malingered,” insufficiently masculine moral and psychic constitution,⁸⁶ or worse still, a figment of imagination, suggestion, or pure fabrication.⁸⁷ The latter claims are reinforced by well documented instances of nakedly fraudulent appropriations of trauma narratives. Among the most outrageous is the mid-century novelist and anti-Semite Louis-Ferdinand Céline, who “proudly asserted” that he was a victim of shell-shock after World War I, offering as proof a photograph with his head wrapped in bandages (taken when he was in fact suffering from a toothache).⁸⁸ In 1932 he published a celebrated war novel falsely claiming that a principal character’s war trauma was based on his own.⁸⁹ These disputes about the phenomenology and verifiability of psychic trauma, present as we have seen from the beginning of the use of the term, have only deepened as cognitive psychologists and neuroscientists have exposed the remarkable “plasticity” of memory.⁹⁰

Third, and relatedly, trauma figures both as a legitimate, necessary object of dispassionate, academic inquiry, on the one hand, and an experience figured as fundamentally unknowable, or at least unmeasurable, either because (a) it cannot

complex trauma. I call these injuries micro traumas....”); see also Luckhurst (2013) 3 (describing the “worryingly transmissible” aspect of trauma).

⁸⁵ Levine 297, 303. Popular representations of this are abundant. See, for example, the film *The Tale*, directed by Jennifer Fox. Gamechanger Films, 2018.

⁸⁶ Luckhurst (2013) 33-35, 36, 52.

⁸⁷ See Ira E. Hyman, Jr., and Elizabeth Loftus, *Some People Recover Memories of Childhood That Never Really Happened*, in Applebaum, ed., *Trauma and Memory: Clinical and Legal Controversies* (Oxford, Oxford Univ. Press 1997) 9-13; Howard B. Levine, *Psychoanalysis, Reconstruction, and the Recovery of Memory*, in Applebaum, ed., *Trauma and Memory: Clinical and Legal Controversies* (Oxford, Oxford Univ. Press 1997) 306-1. See also Allan Young, *Posttraumatic Stress Disorder of the Virtual Kind: Trauma and Resilience in Post-9/11 America*, in Sarat (2007) 24-25; Luckhurst (2013) 73; Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (New York, Routledge 1992) 59-60.

⁸⁸ Jay Winter, *Remembering War: The Great War Between Memory and History in the Twentieth Century* (New Haven, Yale Univ. Press 2006) 64-67.

⁸⁹ *Id.*

⁹⁰ In contradistinction to Freud’s position that traumatic memory is “immutable,” and research confirming that certain aspects of traumatic experience are seared into memory, other research reveals that at least episodic memory is “intrinsically malleable” and “associative.” Paul S. Applebaum, *Reflections on Trauma and Memory*, in Applebaum, ed., *Trauma and Memory: Clinical and Legal Controversies* (Oxford, Oxford Univ. Press 1997) 514-15; see also Robert M. Galanter-Levy, *Psychoanalysis, Memory, and Trauma*, in Applebaum (1997) 141; Bessel A. Van Der Kolk, *Traumatic Memories*, in Applebaum (1997) 246-252. On the “polysemic ... malleable” attributes of collective memory, see Jeffrey K. Olick and Joyce Robbins, *Social Memory Studies: From “Collective Memory” to the Historical Sociology of Mnemonic Practices*, 24 *Annual Review of Sociology* 105, 127-28 (1998).

ethically be reproduced in lab conditions,⁹¹ (b) it produces so overwhelming a form of “atavistic anguish,” as Primo Levi once put it, as to be beyond representation,⁹² or (c) it is so overwhelming as to swallow not only the victim but her post hoc analysts. Psychologists, historians, lawyers, judges, and bureaucrats are all, on the latter view, constantly at peril of losing or surrendering their prized neutrality in approaching the trauma victim and her searing memories.⁹³ The problem is captured poignantly in the French Holocaust historian Henry Rousso’s refusal to testify in a Nazi war crimes case on the ground that the “judicialization of history” confuses memory with history and does violence to the nuances and subtleties of true historical research.⁹⁴

Fourth, at the temporal level, traumatic memory is generally understood to exist outside of time – ordinary consciousness and memory are ruptured and the trauma victim experiences fragmentary elements of the underlying event more or less immediately. The PTSD victim is literally swept out of the present.⁹⁵ On the other hand, at least since Freud’s early work, it has been assumed that traumatic memory can be reduced to temporal sequence, pinned by narrative in time, and thereby tamed. This temporal indeterminacy is paralleled at the level of symptoms by the fact that some traumatic memories are indeed intrusive while others are completely repressed in the form of amnesia; and the victim may oscillate between states of utter numbness and extremely high affect.⁹⁶

Finally, at the clinical level of allopathic treatment, even Freud equivocated toward the end of his career, most notably in *Beyond the Pleasure Principle*, on the question whether traumatic neurosis is actually curable – whether there are not certain irreducible barriers to recovery, among them perhaps most notably the death wish.⁹⁷ Both clinical treatment and, as I have elsewhere written, the work of seeing justice done are motivated by a desire for cure and closure which trauma not only triggers and feeds, but stridently resists.⁹⁸

These tensions account in no small measure for the combination of “urgency and bewilderment of clinicians” in the face of traumatic memory.⁹⁹ We can also perhaps appreciate the emergence of accusations of “semantic contagion” in the use of the word trauma,¹⁰⁰ the “polemics” and the profound “academic struggles and ... conflict of ideologies of knowledge” even among those for whom traumatic memory is an organizing

⁹¹ Bessel A. Van Der Kolk, in Applebaum (1997) 246.

⁹² Luckhurst (2013) 68.

⁹³ Luckhurst (2013) 3; Applebaum (2007) 523; Booth (2006) 62. Howard B. Levine, *Psychoanalysis, Reconstruction, and the Recovery of Memory*, in Applebaum (1997) 310-11.

⁹⁴ Evans (2002).

⁹⁵ Felman and Laub (1992) 69; Saint-Amour (2015) 4-5, 14.

⁹⁶ Julia A. Golier, Rachel Yehuda, and Steven Southwick, *Memory and Posttraumatic Stress Disorder*, in Applebaum (1997) 225.

⁹⁷ Caruth (2013) Ch. 5.

⁹⁸ Spaulding, *Resistance, Countermemory, Justice*, 41 *Critical Inquiry* 132 (2014).

⁹⁹ Levine, in Applebaum (1997) 297.

¹⁰⁰ Luckhurst (2013) 74.

intellectual construct,¹⁰¹ and the alleged “abuses of the trauma concept” as it approaches cultural saturation and becomes nested “at the root of many national collective memories.”¹⁰² Indeed, the more sustained, intense, overwhelming, and widespread the specific trauma one examines, the more acute these tensions appear to be. Taking the tensions together, one is inclined to conclude that demand for and resistance to assimilation is a structural feature of traumatic memory, not merely an artifact of the interdisciplinary nature of the concepts of trauma and memory, nor the long inter-professional competition for mastery of the phenomenon, its various markets, and its attendant power-knowledge matrices. Trauma demands recognition and at the same time defies positivistic assessment. It is oscillating, queer, uncanny, polymorphous, and polysemic.

III. Law

“[T]here really does exist in the mind a compulsion to repeat which overrides the pleasure principle.”¹⁰³

Demand for and resistance to assimilation of traumatic memory is particularly evident in the law. To begin with, trauma operates both as exception and rule. Law regularly takes up traumatic experience in criminal trials, in cases involving constitutional and dignitary torts, in claims for emotional distress, in human rights litigation, in claims for reparations, and in the immunity doctrines that make alternatives to litigation such as truth and reconciliation commissions possible. There are of course many ordinary civil and criminal cases that do not involve traumatic injury, but Shoshana Felman only just overstates the case in contending that “trauma ... is the basic underlying reality of the law.”¹⁰⁴ And where trauma is involved, law is often expected to complete the circuit.

And yet we know that the law quite regularly, and sometimes quite spectacularly, fails to assimilate trauma. There is, as we have seen, the well documented difficulty of English and American courts in moving beyond the physical injury rule, the resistance of courts and bureaucrats to “shell shock” claims on behalf of war veterans, and the fact that adjudication often reproduces for survivors the very trauma it purports to remedy. More fundamentally, Felman asserts that where traumatic memory is concerned “what has to be heard in court is precisely what cannot be articulated in legal language.”¹⁰⁵ Law, she contends, seeks but ultimately fails to “contain,” let alone “master,” trauma.¹⁰⁶ She points to a pivotal moment in the trial of Adolf Eichmann when Auschwitz survivor and author Yehiel De-Nur loses consciousness at the beginning of his testimony as an example

¹⁰¹ Felman, *Juridical Unconscious* (2002) 175.

¹⁰² Luckhurst (2013) 1,13.

¹⁰³ Freud, *Beyond the Pleasure Principle*, 24.

¹⁰⁴ Felman, *Juridical Unc.* (2002) 172.

¹⁰⁵ Felman, *Juridical Unc.* (2002) 4.

¹⁰⁶ *Id.* 5,150.

of law stumbling before the “abyss” of trauma: “a dimension (of reality, of desire, of disaster) that the law has to confront but is structurally bound to miss.”¹⁰⁷

Other examples could be elaborated, including the problem of retroactive prosecution for crimes that did not exist at the time they were committed,¹⁰⁸ the constraints imposed by statutes of limitation on the temporal fluidity of traumatic memory, trying perpetrators in the victor’s or victim’s courts,¹⁰⁹ the gap between the complexity of historians’ archival evidence of mass atrocities, the fluidity of victim’s memories, and ordinary rules of evidence,¹¹⁰ the free speech paradoxes of Holocaust denial laws,¹¹¹ the loss of collective and structural accountability in methodologically individualistic procedures of traditional criminal and civil adversary litigation,¹¹² the loss of individual voice in collective procedures, the false closure provided by doctrines of repose such as *res judicata* and double jeopardy, and of course the utter inadequacy of monetary relief and criminal punishment when compared to the depth of suffering associated with traumatic injuries.¹¹³ If the law is to assimilate traumatic memory, it apparently cannot remain within ordinary liberal democratic boundaries for the administration of justice. And yet to transgress those boundaries, to generate exceptions, is both to risk the law’s legitimacy and to subvert the project of assimilation.

In the context of the debate about reparations for slavery and appropriation of the lands of indigenous people, for instance, handwringing about these risks ended a series of late twentieth century and early twenty-first century legal claims. The most intriguing aspect of this was not the strident formal affirmations of ordinary legal boundaries in American courts but the vigor with which left-leaning legal and political theorists rose to defend these boundaries. The two core principles they invoked were (a) prescription: that rights which might otherwise give rise to remedies can be superseded by the mere passage of time and should be superseded where present expectations and economic arrangements have settled around changed circumstances – the rights of putatively innocent current property holders trump the rights of victims and their descendants¹¹⁴; and (b) counter-factual comparison: where current members of victimized groups owe their very existence to those who survived the direct traumas of slavery and expropriation, there can be no recovery because existence is a benefit that offsets any associated losses –

¹⁰⁷ Id. 144, 150.

¹⁰⁸ Stina Loytomaki, *Law and the Politics of Memory* (New York, Routledge 2014) 73.

¹⁰⁹ Eric Lichtbrau, *The Painstaking Hunt for War Criminals in the United States*, *New Yorker*, July 22, 2018. More broadly, see Olivera Simic, *An Introduction to Transitional Justice* (New York: Routledge Press 2017); Ruti G. Teitel, *Transitional Justice* (Oxford; Oxford University Press 2002). On the problems of time and retroactivity, see Booth (2006) 116.

¹¹⁰ See Loytomaki (2014) 53-56; Felman and Laub (1992) 59-60.

¹¹¹ See Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (New York, Palgrave Macmillan 2004); see also Loytomaki (2014) Ch. 4.

¹¹² See Booth (2006); Volker Roelcke, *Trauma or Responsibility? Memories and Historiographies of Nazi Psychiatry in Postwar Germany*, in Sarat, *Trauma and Memory* (2007) 230; Loytomaki (2014) 32, 47.

¹¹³ Many of these themes are explored in Caruth’s excellent analysis of the Ariel Dorfman play “Death and the Maiden.” See Caruth (2013) 54.

¹¹⁴ Jeremy Waldron, *Superseding Historical Injustice*, 103 *Ethics* 4 (1992). Cf. Booth (2006) 118.

victims simply cannot show that they would have been better off if the injuries had not occurred.¹¹⁵

Both principles have been subjected to withering academic criticism.¹¹⁶ But they resonate with and reinforce a stable consensus of public and judicial opinion that has defeated claims for reparations.¹¹⁷ The trauma/memory/law circuit, in this context, has not only short-circuited, a regnant conception of law underwrites cognitive dissonance and collective amnesia. Most Americans tremble at the thought of any true reckoning with the “abyss” of the legacies of slavery, segregation, Native American genocide and land theft, and, underneath it all, the persistence of white supremacy.¹¹⁸ Indeed, against the failure of the reparations movement, the more recent controversies regarding confederate monuments, buildings named after slaveholders, and racist mascots read as displacements. The revisionist movement treats memory work itself as a means of seeing justice done, and with good reason, but one wonders if it is not more post-script than preface to a genuine reckoning with traumatic memory. After all the very theorists who opposed monetary reparations advocated this turn – claiming that symbolic remedies should be used to address mass historical injustices.¹¹⁹

The legal/symbolic dichotomy is of course false. The Nuremberg trials were designed to reverberate as an affirmation of specific ideas about the rule of law well beyond the individual counts in each indictment. All public criminal trials are in fact exemplary. And monuments provide more than cultural documentation of heroism,

¹¹⁵ See Stephen Kershnar, *Justice for the Past* (2004) 44-46; Christopher W. Morris, *Existential Limits to the Rectification of Past Wrongs*, 21 *Am. Phil. Q.* 175, 176-78 (Apr. 1984).

¹¹⁶ See Booth (2006) *passim*; Seana Valentine Shiffrin, *Reparations for U.S. Slavery and Justice Over Time*, in *Harming Future Persons: Ethics, Genetics and the Nonidentity Problem* 334-35 (Malinda A. Roberts and David T. Wasserman, eds., 2009); Janna Thompson, *Historical Responsibility and Liberal Society*, 9.1 *Intergenerational just. rev.* 13 (2009); Janna Thompson, *Historical Injustice and Reparation: Justifying the Claims of Descendants*, 112 *Ethics* 114 (Oct. 2001).

¹¹⁷ See, e.g., *See In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 763 (7th Cir. 2006); *United States v. Hatahley*, 257 F.2d 920 (10th Cir. 1958); Ariela Gross, *When Is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 *Cal. L. Rev.* 283 (Feb. 2008); Matthew L. M. Fletcher, *The Supreme Court's Indian Problem*, 59 *Hastings L.J.* 579, 623-24 (2008).

¹¹⁸ Ralph Ellison has emphasized that “[p]erhaps more than any other people, Americans have been locked in a deadly struggle with time, with history. We’ve fled the past and trained ourselves to suppress, if not forget, troublesome details of the national memory, and a great part of our optimism, like our progress, has been bought at the cost of ignoring the processes through which we’ve arrived at any given moment in our national existence.” Ellison, *The Blues*, reviewing LeRoi Jones’ *Blues People* in *The New York Review of Book*, Feb. 6, 1964. Compare Robert Leicht’s claim against the conservative revisionists during the Historikerstreit of the 1980s (the “historians’ controversy) that the German people would always, after the Holocaust, have to live with a “broken relationship” to their history, standing forever “in the shadow of a history that we can no longer heal.” Leicht, in Ernst Piper, ed., *Forever in the Shadow of Hitler* (Humanities Press 1993) 247-51.

¹¹⁹ See Waldron’s discussion of symbolic remedies in *Superseding Historical Injustice*, 103 *Ethics* 4 (1992).

sacrifice, and loss. They assign historical guilt and innocence, and they embody collective aspirations and commitments regarding the social order (political, economic, moral, and quite often constitutional).¹²⁰ Confederate statues do not belong in public squares on any reasonable understanding of the history of white supremacy, and yet simply removing them can invite the very cognitive dissonance and self-serving amnesia regarding the odious history their unmediated presence sustained.¹²¹

As importantly, the academic criticism and the debates surrounding monuments, building names, and mascots miss the most galling contradiction regarding remedies for mass historical injustices: the more grave, enduring, and seemingly irreparable the injury flowing from an injustice, the longer the claims of traumatic memory have been repressed, the more urgently needed and yet apparently less capable are the law's powers of assimilation.

In both redemptive and prescriptive accounts, the emphasis is generally on the availability and adequacy/necessity of law as an *ex post* remedial tool. Law arrives after trauma and therefore generally appears in varying degrees of verisimilitude as the rational, deliberative, dispassionate, skeptical, and crucially for present purposes, innocent and interrogative compliment to the survivor's or survivor community's traumatic memory.¹²² But emphasis on this version of the circuit has sometimes distracted legal observers from the intriguing and profoundly important respects in which law is present *ex ante* and *in media res* – respects in which there is no trauma without law. To begin with, at the individual psychoanalytic level, “law” is present at the primal scene in the form of the father's prohibition – the very prohibition that sparks the engine of repression that drives repetition compulsion. Whether this is a necessarily traumatic experience and a universal condition of psychic life, the desire for law activated in the trauma/memory/law circuit may be linked to the initial prohibitions, particularly the libidinal charge with which the authority of prohibition is thereafter invested.¹²³

Post-colonial theorists have also revealed the instrumental role that secular, Western legal ideals and ostensibly “universal” rights played in the work of colonization – the way Western law functioned as “a technology of colonial rule ... and of particular

¹²⁰ See Sanford Levinson, *Written in Stone: Public Monuments in Changing Societies* (Durham, Duke University Press 1998).

¹²¹ Much depends on whether the removed statues are destroyed or preserved in settings that relate their proliferation to the history of white supremacy. See Jonah Engel Bromwich, *University of Texas at Austin Removes Confederate Statues in Overnight Operation*, N.Y. Times, Aug. 21, 2017; Noah Caldwell and Audie Cornish, *Where Do Confederate Monuments Go After They Come Down?*, NPR, Aug. 5, 2018.

¹²² Cf. Spaulding, *The Enclosure of Justice: Courthouse Architecture, Due Process, and the Dead Metaphor of Trial* 311, 340 (2012).

¹²³ See Judith Butler, *The Psychic Life of Power: Theories in Subjection* 56 (Stanford; Stanford Univ. Press 1997) (“The ‘afterlife’ of prohibited desire is in the prohibition itself.”); see also *id.* 81, 103. Cf., Butler, *Subjects of Desire: Hegelian Reflections in Twentieth Century France* (New York; Columbia Univ. Press 1999) 186-204.

forms of violence.”¹²⁴ Esmeir describes the displacement of the traditional khedival legal order in Egypt by the concept of a “juridical human” according to which “the colonial state attempted to juridically humanize the colonized, and in so doing ... it also revealed how humanity came to be thought of as something that could be confiscated or allocated,” either excluding or “binding the living to the state.”¹²⁵ Crucially, this established the terms for withdrawing the subject’s legal entitlement to the protection of the state and unleashing the full power of colonial violence. At the level of theory, Esmeir provocatively links and juxtaposes these claims about law as a technology of subordination to Hannah Arendt’s assertion that “the first step toward total domination” in the rise of totalitarianism and associated mass atrocities in mid-twentieth century Europe “consisted in the ‘murder of the juridical person.’”¹²⁶ Destroying the juridical personhood of the victim is of course a political, cultural, and *legal* process.¹²⁷

Law is not only an intendment of traumatic experience, it also plays an important role in regulating the boundaries of anticipatory trauma.¹²⁸ We know that in the name of community policing and preventive “order maintenance” specific minority groups have frequently been targeted for spectacles of excessive state violence. Consider *Lyons v. City of Los Angeles*,¹²⁹ a case brought by an African American man subjected to a chokehold during a routine traffic stop that rendered him unconscious. Lyons requested an injunction ordering the police department not to use the chokehold and offered evidence that the chokehold was used without regard to the degree of threat posed to an officer (a violation of the Fourth Amendment) and that that a majority of the deaths caused by the technique were suffered by African Americans (a potential violation of the Fourteenth Amendment). The crux of the case was thus anticipatory trauma – the reasonableness of Lyon’s fear of re-victimization as against the reasonableness of officer’s fear of black bodies.

The Supreme Court disregarded the evidence of racial bias and held that Lyons had no standing to seek injunctive relief because he had no reasonable fear, based on his past traumatic experience, that he personally would be pulled over again and subjected to a chokehold. If he feared being pulled over again, he need only drive safely, the Court reasoned, and if he feared excessive force, he need only comply with an officer’s orders. So while his suit for monetary relief to recover for the past chokehold could proceed, the lower courts were powerless to prevent the police from continuing to rely on the chokehold policy. The chilling effects of the anticipatory trauma with which African Americans live were thus rendered essentially non-justiciable in *Lyons*. The case was decided in 1983, a decade before the Rodney King beating, before the ensuing criminal

¹²⁴ Samera Esmeir, *Juridical Humanity: A Colonial History* (Stanford, Stanford Univ. Press 2012): 11.

¹²⁵ *Id.* at 3, 10.

¹²⁶ *Id.* at 8.

¹²⁷ See David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham, Carolina Academic Press 2005). See also Thomas Mertens’ excellent essay reviewing Fraser’s book, *Continuity or Discontinuity of Law?*, 8 *German Law J.* 534 (2007).

¹²⁸ Paul St. Amour ().

¹²⁹ 461 U.S. 95 (1983).

prosecutions of the officers revealed that police brutality of the kind Lyons suffered was a disturbingly common experience for African American residents of Los Angeles – long before pervasive videos recorded on twenty-first century smart phones and body cameras revealed the brutality of similar use of force policies in police departments all around the country. But Justice Marshall’s dissenting opinion in *Lyons* makes painfully clear that the Court already had a disturbing record of racially motivated police violence before it. Along with the expansion of the defense of qualified immunity doctrine and the government’s indemnification of the few officers who are held liable for monetary damages,¹³⁰ *Lyons*’s denial of standing for injunctive relief legally endorsed a culture of impunity.

In other instances, anticipatory trauma offers a highly visible justification *supporting* statist intervention. In *Gonzales v. Carhart*, as Jeanne Suk has brilliantly shown, the Supreme Court relied on a theory of so-called “traumatic abortion regret” to uphold a statute banning partial birth abortion.¹³¹ The theory of the majority opinion was that learning details regarding a specific abortion procedure *after the fact* could be so retrospectively traumatizing for the woman as to justify outlawing the procedure altogether, even those administered with the patient’s informed consent. As Suk notes, the Court not only appropriated second wave feminist trauma theory associated with battered women’s syndrome and rape to supposedly protect women from abortion, it did so *proleptically* – converting a potential, anticipated traumatic event into a state interest that legitimates prospective legislative interference with the doctor-patient relationship.¹³² Or consider the relationship between the endorsement of vicarious “participant-observer” PTSD in American television viewers who watched the repeatedly looped September 11, 2001 terrorist attacks and the torture, targeted killing, and seemingly permanent suspension of civil liberties that followed as the United States entered a state of exception in order to prevent future attacks.¹³³

What each of the final examples have in common is the expansion of the legal, regulatory, and biopolitical reach of the state under the aegis of averting traumatic experience (crime, abortion regret, future national security threats), vindicating and reifying highly charged understandings of individual and collective memory under the aegis of a fragile, anxiety ridden concept of security, and externalizing the costs onto marginalized populations on terms that all too frequently cause further trauma. Felman insists that trauma is the basic underlying reality of law, but law is clearly an underlying reality of trauma too. Law not only stumbles in the face of traumatic memory, struggles to assimilate it, recoils even; it is in and of itself a source of trauma, and it appropriates

¹³⁰ See John C. Jeffries Jr., What’s Wrong with Qualified Immunity, 62 Florida Law Review 851 (2010).

¹³¹ Suk, The Trajectory of Trauma: Bodies and Minds of Abortion Discourse, 110 Columbia Law Review 1193 (2010).

¹³² Id. 1236-37, 1246.

¹³³ Young, in Trauma and Memory (2007) 21; Saint-Amour (2015) 16. On the legal implications of the response to the September 11th attacks, see David Luban, Torture, Power, and Law (Cambridge, Cambridge Univ. Press 2014); Claire Finkelstein, Jens David Ohlin, and Andrew Altman, Targeted Killings, Law and Morality in and Asymmetrical World (Oxford, Oxford Univ. Press 2012).

the threat of future trauma to underwrite violent statist interventions. Notice the strange conjunction of temporalities here – amnesic with regard to mass historical injustices, stubbornly presentist and/or perfectionist regarding their lingering manifestations, and yet paranoid with regard to potential future traumas of concern to the state. The law arrives both too late, if at all, and far too early. Moreover, the legal subject of this law is no longer a hyper-masculine, rugged individual, but instead a simultaneously hyper-vigilant, proleptically symptomatic, and yet forgetful individual dependent on the state and experts for recognition.¹³⁴

The trauma/memory/law circuit is not just disrupted by resistance to assimilation, it is defined by it. This becomes even more clear once we probe the roots of anticipatory trauma. In his path-breaking study, Paul Saint-Amour contends that the dreadful temporality constituted by surviving one trauma and living in the near certainty of another -- a temporality in which anticipation itself becomes “weaponiz[ed]” -- is an inheritance of the interwar period.¹³⁵ The memory of World War I air raids in European metropolises and order maintenance bombings in colonial outposts during the interwar period weighed upon and deepened anxieties about the next war and even more deadly air power, turning time “and anticipation in particular ... [into] a new medium of delivering injury.”¹³⁶

[T]he aerial bombing of civilians and population centers, fundamentally altered the temporality of urban experience, turning cities and towns into spaces of rending anticipation ... [where] the dread of another massive conflict saturated the Anglo-European imagination, amounting to a proleptic mass traumatization ... *whose symptoms arose in response to a potentially oncoming rather than an already realized catastrophe*. ... During those years ... the memory of one world war was already joined to the specter of a second, future one, framing the period in real time as an interwar era whose terminus in global conflict seemed, to many, foreordained.¹³⁷

In this period, “a future event becomes a force in the present, producing effects in advance of its arrival” as the “memory of one conflagration is shadowed by the suspicion or conviction that another, even worse one, is in the offing.”¹³⁸ An uncanny temporality accompanies anticipatory trauma of this kind: anxiety is “routinized”¹³⁹; people find themselves “waiting for the unprecedented to return”¹⁴⁰; the symptoms induced by “false alarms” may be as powerful those produced by a real threat¹⁴¹; and the future itself

¹³⁴ See Wendy Brown, *States of Injury: Power and Freedom in Later Modernity* (Princeton, Princeton Univ. Press 1995), and Anthony Paul Farley, *Law as Trauma and Repetition*, 31 *N.Y.U. Review of Law and Social Change* 613, 617-19 (2007) (“The perfection of slavery is the struggle for law.... The rule of law is the trauma-conceived idea that escapes the slave’s mind only to stand over and above the slave as god.”).

¹³⁵ Saint-Amour (2015) 8.

¹³⁶ *Id.* 7.

¹³⁷ *Id.* 7-8 (emphasis added).

¹³⁸ 12-13, 306.

¹³⁹ *Id.* 62.

¹⁴⁰ *Id.* 65.

¹⁴¹ *Id.* 111.

becomes warped, “worthless,” “foreclosed,” delivering only the “foregone conclusion” of a new collective catastrophe.¹⁴² We know that Freudian thought stresses the retrospective dimensions of traumatic experience – the delayed psychic action of a past traumatic experience working in, through, and as repressed memory.¹⁴³ Saint-Amour draws our attention to the present effects a future event all the more disabling, all the more powerful an object of dread, because it reproduces, adaptively iterates, and promises to be more painful than the event already fixed in memory.

He also reveals the role of law in interwar anticipatory trauma, most alarmingly the failure of international law advocates, who were all too familiar with the technological innovations of warfare from their own military experience, to agree to rules in the 1920s that would have constrained air power even as its unrivaled capacity for the destruction of civilian life became undeniable. “[P]rospective signatories” to the 1923 Hague Commission rules on the use of force “were unwilling to rule out targeting urban factories, war-industry workers, and civilian morale of their adversaries in a future conflict” not just because they doubted the enforceability of such laws in the heat of war but, more fundamentally, because total war theory had already posited the strategic significance of leveling massive strikes against civilian populations “*before war was formally declared* ... while the law was asleep.... Even if they were ratified, legal guarantees of civilian immunity would hold only until the moment before they were needed.”¹⁴⁴ Why bother to adopt laws whose futurity is already foreclosed by the inexorably expanding technologies of annihilation and the theories of war that rationalize their preemptive use?

The complicity of law in the anticipatory trauma of interwar experience is even more starkly evident in the imperial projects of Western twentieth century powers. The British RAF relied on air raids across the middle and near east in the interwar period both for the purpose of “colonial policing” and as an experiment and public relations exercise designed to prove that air power “could efficiently and affordably contribute to ‘imperial defense.’”¹⁴⁵ Between 1922 and 1932 “air control over Iraq ... provided an alternative to ground occupation at a fraction of the cost in soldiers’ lives and pounds sterling” and the RAF was fond of explicitly racializing its fictional targets in displays of air power conducted back home.¹⁴⁶ But “[b]ecause the violence wrought” by the British empire, for example, “took place outside the boundaries of the national body, such violence went virtually unacknowledged by classical air power theory and other forms of next-war discourse, including international law.”¹⁴⁷ Indeed, the law failed to treat “anti-colonial or national liberation movements” as armed conflicts subject to the laws of war (and war crimes) until 1977, thus freeing the RAF to use “the imperial periphery as a testing range.”¹⁴⁸

¹⁴² Id. 8, 12, 13.

¹⁴³ Id. 18.

¹⁴⁴ Id. 70.

¹⁴⁵ Id. 73.

¹⁴⁶ Id. 75-86.

¹⁴⁷ Id. 72.

¹⁴⁸ Id. 72-73.

And we remain “interwar” to this day, Saint-Amour insists, not just because of the seemingly irreversible fact of nuclear proliferation and first strike capabilities – the ever looming possibility of a nuclear apocalypse – but because “even when wars end formally, a state’s legal war powers can persist long after the surrender documents have been signed,” and the state’s emergency powers are spectacularly elastic.¹⁴⁹ Drawing on the work of Mary Dudziak, Saint-Amour notes that “the only non-war period after World War II, other than a period of seven months in 1990, was from October 15, 1976 to November 4, 1979.”¹⁵⁰ Thus although in theory a state of war is supposed to be “superseded by the rule of law when peacetime resumes,” it is the arrival of peace and the ordinary operation of law that increasingly appears a rare, constantly deferred exception to states of emergency.¹⁵¹ Indeed, if we focus on the “real-time experience of remembering past war,” which is never fully past, “while awaiting and theorizing a future one[,] we begin to see how a period could go on, even in near perpetuity, feeling like an interwar era”¹⁵² Paradoxically, we find ourselves to be perpetually interwar.¹⁵³

IV. Living With Trauma

“What we cannot reach flying, we must reach limping... The Book tells us it is no sin to limp.”¹⁵⁴

In closing I want to make two extrapolations from Saint-Amour’s concept of anticipatory trauma. First, the link between traumatic memory and the anticipation of future traumatic experience offers a perhaps more penetrating explanation for the vernacularization of trauma than the formal recognition of PTSD in the late twentieth century. After 1945, after the bombing of Hiroshima and Nagasaki, the anticipatory trauma of air war becomes generalized, ominously quotidian. We suffer not only paralyzing fear and amnesia about the bombs we know are raining down on civilian populations around the world at any given point in time, and about our habituation to the enduring states of emergency that serve as predicate and provocation for this bombing, but about the existential threat posed by atomic warfare ... *the bomb*. It is one of the few truly universal conditions of late twentieth and early twenty-first century life. The “interwar,” Saint-Amour insists, names “a wound *that remains open in the present*” – open both because the military and cultural legacy of the period has so profoundly shaped modernist sensibilities, and because we see “the futures past of the historical interwar period ... as still partly continuous with our own futurities.”¹⁵⁵ To be perpetually interwar, on this view, is to be perpetually inter-trauma, anxiously awaiting the arrival of an already “foreclosed” future.

¹⁴⁹ Id. 304.

¹⁵⁰ Id. 304.

¹⁵¹ Id. 305.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Freud, *Beyond the Pleasure Principle*, 78.

¹⁵⁵ Id. 37 (emphasis added).

And we are not only interwar. Total war is but one of the more volatile elements of modern social life that “alters the experience of space and time ... warps sociality’s forms ... [and yet] becomes routinized, expected, almost ordinary.”¹⁵⁶ The #MeToo movement has again exposed the extent to which women and other vulnerable people are perpetually inter-rape, haunted by the memory of sexual assault (personal, mediated, and historical) and prone to (re)victimization in an astonishingly wide array of social settings despite legal reforms designed to eliminate precisely this threat.¹⁵⁷ The Black Lives Matter movement has exposed the perpetual inter-lynching status of African Americans and the extent to which this status is enforced by officers of the law on public streets – all too often, it must be said, in broad daylight and at the behest of white people paranoid about the appearance of black bodies in civic space.¹⁵⁸ And the We Are All Khaled Said Facebook feed continues to archive, nearly a decade after the protests in Tahrir Square, the inter-torture status of citizens who dare to demand legal reforms from systematically oppressive regimes.

On this view, while the vernacularization of trauma may reflect the kind of opportunism that triggers suspicion about fraud, malingering, psychotherapeutic suggestion, and false recovered memory, and while it may raise the specter of a feminization of rugged individualism, of a disabling attachment to injury, and of inter-professional competition for authority, it also expresses a basic fact of modern life: the inexorable reproduction of traumatic experience in an age ostensibly defined by the principles of enlightenment, material and technological innovation, and the rule of law. As Foucault predicted in a 1963 essay, the “twentieth century will undoubtedly have discovered the related categories of exhaustion, excess, the limit, and transgression – the strange and unyielding form of these irrevocable movements which consume and consummate us.”¹⁵⁹

Perhaps then, and here is the final point, the mistake is the effort to assimilate traumatic experience in the first place, our collective obsession with a future perfect in which law and other authoritative narrative practices redeem past trauma and arrest its

¹⁵⁶ Id. 95.

¹⁵⁷ Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein’s Accusers Tell Their Stories*, New Yorker, October 23, 2017. See also Aparna Nancherla, *Who Gets a Second Chance*, N.Y. Times, Sept. 1, 2018; William D. Cohan, *Women Say a Rigged System Allows Wall Street to Hide its Sexual-Harrassment Problem*, New Yorker, January 7, 2018; Jessica Bennett, *The #MeToo Moment: No Longer Complicit*, N.Y. Times, Dec. 7, 2017; Somini Sengupta, *The #MeToo Moment: What Happened After Women Broke the Silence Elsewhere?*, N.Y. Times, Dec. 22, 2017.

¹⁵⁸ See Daniel Victo, *When White People Call the Police on Black People*, N.Y. Times, May 11, 2018; Timothy Williams, *Study Supports Suspicion that Police Are More Likely to Use Force on Blacks*, N.Y. Times July 7, 2016 (describing empirical research showing that “although officers employ force in less than 2 percent of all police-civilian interactions, the use of force is disproportionately high for African Americans – more than three times greater than for whites”); Matt Apuzzo, *Charges Sought in Eric Garner’s Death, but Justice Officials Have Doubts*, N.Y. Times, April 20, 2018; *Investigation of the Ferguson Police Department*, United States Department of Justice, March 4, 2015;.

¹⁵⁹ Foucault, *A Preface to Transgression*, in *Language, Counter-memory, Practice*, 49.

reproduction. Perhaps instead the underlying premises of a legal order that is itself complicit in the reproduction of trauma – one that keeps promising a future it cannot deliver, one that constantly excuses its past and present failings in the perfectionist future tense of rights-talk – should itself be interrogated. As Saint-Amour notes, this interrogation has begun only in fairly recent iterations of queer theory – in Heather Love’s analysis of “ruined subjectivity” and “a politics that allows for damage”¹⁶⁰; as well as in Lee Edelman’s strident commitment to negativity, “to the primacy of a constant *no* in response to the law of the symbolic.”¹⁶¹ Edelman interrogates “the very space that ‘politics’ makes unthinkable: the space ... outside the conflict of visions that share as their presupposition that the body politic must survive ... the place of the social order’s death drive.”¹⁶² This of course demands a radical critique of identity (“of every substantialization of identity”), of history (of representations of time “as linear narrative (the poor man’s teleology) in which meaning succeeds in revealing itself”) and of law as an essential instrument in both projects – both the constant substantialization of identity in the sovereignty of a rights-bearing subject and the fixation of meaning and collective memory in linear, forensically authenticated history.¹⁶³

There are important parallels between Edelman’s account of future perfect resistance to “negativity” – the perpetual “demand to translate the insistence, the pulsive *force*, of negativity into some determinate space or ‘position’ whose determination would thus negate it”¹⁶⁴ – and the seemingly irresistible desire to assimilate, narrate, adjudicate, and thereby emplot and redeem traumatic memory, to move decisively into an afterward, a post-traumatic period neither haunted by traumatic memory nor overshadowed by traumatic anticipation.¹⁶⁵ Is there a practice of justice that does not demand the negation of negativity? One capable of affirming the pulsive, inter-temporal, subject-rending force of living *with*, *not* after, trauma and its reproduction? *With* the foreclosure of the future perfect and all its more perfect unions? Or is this transgressive, queer project a pernicious nihilism traveling by another name – a project anathema to all imaginable orders of law?

These are, in my view the most pressing twenty-first century questions for the trauma, memory, law circuit. Answers with which we can live might begin by evaluating transgressive forms of living *with* trauma, with a foreclosed future, with the admission that the sources of traumatic experience (racism, misogyny, homophobia, exploitation, poverty, genocide, the threat of nuclear Armageddon, etc.) are ineradicable conditions of modern life ... which must nevertheless be opposed. Holocaust counter-monuments,¹⁶⁶

¹⁶⁰ Saint-Amour (2015) 22, n.32.

¹⁶¹ Edelman, *No Future: Queer Theory and the Death Drive* (Durham, Duke Univ. Press 2004) 5; Saint-Amour (2015) 29-30.

¹⁶² Edelman (2004) 3.

¹⁶³ The “law” implicated in this critique is law in the very widest linguistic sense of Lacan’s Symbolic Order, not merely the juridical structures for the administration of justice. Id. 7, 29.

¹⁶⁴ Id. 4.

¹⁶⁵ Edelman makes the connection explicit in writing that the queer embodies the social “order’s traumatic encounter with its own inescapable failure.” Id. 26.

¹⁶⁶ James E. Young, *The Texture of Memory: Holocaust Memorials and Meaning* (New Haven, Yale Univ. Press 1994).

Foucault's concept of counter-memory,¹⁶⁷ the African American blues tradition, the protest stagecraft of Pussy Riot,¹⁶⁸ the dissident activities of the Czech underground in the 1970s,¹⁶⁹ and a wide range of contemporary literary and visual art,¹⁷⁰ all share what Ellison called "an impulse to keep the painful details and episodes of a brutal experience alive in one's aching consciousness, to finger its jagged grain."¹⁷¹ If there is a kind of transcendence or catharsis on offer in this "aching" historical consciousness, and Ellison believed there is, it arrives "not by the consolation of philosophy" – not, that is, by metaphysical sleight of hand or the fantasy of redemption in the future tense of ordinary liberal politics, but rather "by squeezing from [brutal experience] a near-tragic, near-comic lyricism."¹⁷²

The blues form, the central aesthetic element in what Ellison elsewhere insisted African Americans have practiced "in the place of freedom,"¹⁷³ involves not merely a precipitously direct angle of approach to the jagged grain of traumatic experience. It involves syncopated rhythmic play upon the traditional role of peripeteia in tragedy (defiantly lingering, returning, oscillating *within* the catastrophic, rather than moving beyond it, after it, or otherwise seeking to fix it in the past), and an at once ironic, absurdist, queer, disposition toward denouement (hence the minor-key "near" in "near-tragic, near-comic lyricism" undercutting the resolution found in traditional tragic and comic forms). Put simply, the blues is a form of non-redemptive struggle – refusing both nihilism *and* the baleful "consequences of grounding reality in denial of the [death] drive."¹⁷⁴ It shares with other transgressive forms of living with trauma precisely this concept of non-redemptive struggle.

From this perspective, the most important question for the law and any reconfiguration of the trauma/memory/law circuit (hard-wired as it is to the yawning gap between what modernity promises and what it delivers) does not concern the minutiae of a specific reform, remedy, or jurisprudential innovation – activations of the circuit that simply "instigat[e] new dominations."¹⁷⁵ It concerns the capacity of lawyers and judges

¹⁶⁷ Spaulding, *Resistance, Counter-Memory, Justice* (2014).

¹⁶⁸ Masha Gessen writes that one must be able to live in and indeed cultivate a "constant state of discomfort" to engage in "protest art"; but the discomfort cannot paralyze – "One also has to possess ... the sense of being entitled to speak and to be heard." Gessen, *Words Will Break Cement: The Passion of Pussy Riot* (New York, Riverhead Books 2014).

¹⁶⁹ Jonathan Bolton criticizes Vaclav Havel's "metaphysical" narrative and insists on the movement's desire both to "destroy the establishment and to ignore it ... one of the formative contradictions for the whole underground experience ... [captured] in the two values" of "zbesilost (madness or rage) and pokora (humility)." *Worlds of Dissent: Charter 77, The Plastic People of the Universe, and Czech Culture Under Communism* 128 (2012).

¹⁷⁰ See Caruth's discussion of Ariel Dorfman's play *Death and the Maiden*; *Literature in Ashes*, Ch.4 (2013). See also Felman and Laub (1992).

¹⁷¹ Review of Richard Wright's *Black Boy* Reprinted in *Shadow and Act*.

¹⁷² *Id.*

¹⁷³ Ralph Ellison, *The Blues*, reviewing LeRoi Jones' *Blues People*, *New York Review of Books*, Feb. 6, 1964.

¹⁷⁴ Edelman (2004) 17.

¹⁷⁵ Foucault (1977) 151.

to internalize this disposition of living with, not after, trauma. For sworn officers of the court this demands uncomfortable memory work: taking, as a condition of any reconfiguration of the circuit, direct responsibility for the limitations of the law, openly confronting the history of law's failure *in* the circuit, and admitting their pleasure "in the promised blood" of "seizing the[] rules" in order to see justice done.¹⁷⁶ They must linger upon the disfigured face of Khaled Said and recognize in the imperative to see justice done the darkness of their own sanguinary will to power, all without letting that understanding "kill action."¹⁷⁷

¹⁷⁶ Id. (The original French is "La règle, c'est le plaisir de l'acharnement, c'est le sang promis."). I have written extensively about what this responsibility would entail in the context of American constitutional interpretation. See Spaulding, *Redeeming the American Founding?*, *The Oxford Handbook of Legal History* (Tomlins & Dubber, Eds. Oxford Univ. Press, forthcoming 2018); Spaulding, *Paradoxes of Constitutional Faith: Federalism, Emancipation, and the Original Thirteenth Amendment*, 3 *Critical Analysis of Law* 306 (2016); Spaulding, *Remembering Our Second Revolution: Sesquicentennial Reflections on Civil War Historiography*, in Neil Cogan, ed., *Union and States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter* (2013); Spaulding, *Constitution as Counter-Monument: Federalism, Reconstruction and the Problem of Collective Memory*, 103 *Columbia Law Review* 1992 (2003). On the desire of lawyers and judges to affirm the rules of a new regime, particularly when they have been complicit in the injustices of the prior regime, see Loytomaki (2014) 52-53; see also Mubarak Acquitted in Final Ruling on Egypt's April Spring Deaths, *The Guardian*, Mar. 2, 2017; David D. Kirpatrick and Merna Thomas, *Egyptian Judges Drop All Charges Against Mubarak*, *N.Y. Times*, Nov. 29, 2014.

¹⁷⁷ Friedrich Nietzsche, *The Birth of Tragedy*, in Raymond Geuss and Ronald Speirs, *The Birth of Tragedy and Other Writings* (Cambridge, Cambridge Univ. Press 1999) 40.