Introduction

Legal Modernism

> For war is the hardest place . . . [I]f comprehensive and consistent moral judgments are possible there, they are possible everywhere.
>
> —Michael Walzer[1]

This book is about legal justice, social justice, and the narrative spaces between them. It is about how our sense of justice and responsibility changes in the wake of war, that "hardest place" where our firmest convictions falter and our sense of what we ought to do—indeed of what we *can* do—erodes. And it is about how we come to restructure our world in the aftermath of catastrophe through fiction, in narratives that begin in literature but leave their mark on our culture's experience of law. Indeed, this exploration attempts to understand the very relationship between law, literature, and the modern social world, elaborating a method of cultural analysis that sheds light on how a shared sense of commitment develops among the subjects of a juridical order. It offers, moreover, a meditation on what modernity means, legally and aesthetically, bringing into focus a complex ethical framework that I call "legal modernism."

For literary critics, it has become commonplace to link modernist experimentation with subjectivity to the trauma of World War I. Building on this connection between the trauma of war and cultural innovation,[2] I work from the intersection of law and literature to reach a different conclusion. Rather than understanding modernist novelists as simply *responding* by producing accounts of the failure of viable literary subjectivity in the face of modern warfare, I read them as using the genre's capacity for narrating subjectivity (and the subject's relation to history) to create a *responsible* vision of how the modern citizen could and should rebuild a just social world. Taking Virginia Woolf's trilogy of postwar novels—*Jacob's Room, Mrs. Dalloway,* and *To The Lighthouse*—as paradigmatic,

I see them as directly engaging challenges to the law raised by the modernization that culminated in World War I. Moreover, though I make no claim that modernist novels had a direct effect on the law of their time, I argue that the legacy of these modernist forays into subjective understandings of the juridical laid the experimental groundwork for the legal modernism of the post–World War II era—that is, the radical transformations in law brought about by that war. Our understanding of concepts such as Crimes Against Humanity or Crimes Against the Jewish People is a legacy of modernism's relationship to narrative and subjectivity. My work here is to examine the inheritance of this legacy.

The Affective Life of Law, then, addresses the legal modernism of the novel between the wars, the legal modernism produced by the International Criminal Tribunal and Israeli criminal law in response to revelations of Nazi atrocities, and the connections between them. It moves from fictional explorations of the juridical nature of culture in the interwar period to nonfictional struggles to narrate the trials that came into being after the Holocaust. I emphasize the way narrative strategies developed by modernist writers Virginia Woolf and Rebecca West contribute to Hannah Arendt's post–World War II accounts of the birth of legal modernism at the Eichmann trial. While Woolf, West, and Arendt form the centerpieces of my analysis, I also draw from a range of literary and cultural figures to show how a generation of writers and thinkers engaged the most difficult crises of their times.

The relation between legal and literary modernism that I envision runs deeper than analogy or equivalence. Far from being mirror images or replicas of each other, they exist in a *contingent* relationship, in which the parameters and stakes of ethical life are set out in literature and reified—ever imperfectly—in law. These imperfections, in turn, reenter literature, bodying forth narratives that console, lament, and imagine possibilities that remain inexpressible in legal terms. Their connection is thus one of mutual implication and necessary complementarity.[3] The narratives of responsibility I examine appear as symptoms or manifestations of a complex emotional thicket: our innermost hopes, our most inconsolable anguish, and our deepest bewilderment.

It should be stressed that *The Affective Life of Law* does not seek to provide a comprehensive historical account of either legal or literary modernity. The movement it traces, however, must be understood within the framework of certain important historical shifts, sea changes characterizing the beginning of the twentieth century, which saw subsequent transformations in the common law. Signs

of technological progress could not be teased apart from symptoms of social and ethical upheaval: the expansion of railways and the growth of cities; the spread of the motor car and with it, automobile accidents; the rise of factories and consequently, of industrial accidents. Legal doctrine was not far behind in responding to the emergence of this increasingly impersonal, mechanically inflected world. The early part of the twentieth century was marked in law by efforts to develop a legal account of traumatic injury; by the shift from old notions of noncriminal harm (which traditionally fell under the legal category of trespass) to the doctrine of negligence as a means of assigning blame. These modifications responded not just to a world altered by mechanization, urbanization, population growth, and bureaucracy. They also served as markers of people's sense of how the world they had known was becoming less and less recognizable and habitable: the burgeoning anxieties about who was responsible when no one appeared blameworthy; the confusion of diagnosing and treating injury that was psychological rather than physical; the anguish of realizing that long-held ideas of inheritance no longer made sense in an era when so many young men died before they had a chance to make wills—or, for that matter, to accumulate enough wealth worthy of a will. These subjective conditions demanded expression not only in the pages of literature and history but also in the annals of law. In keeping with the trajectory of modernist studies, then, I connect historical and cultural upheaval with aesthetic innovation and subjectivity. But the history I attend to is legal, and the aesthetic innovation at the heart of this book's concerns is not only that of modernist fiction but also of new legal forms and juridical language.

Among the transformations in the first half of the twentieth century, and to a great extent at work in all of them, is the modern condition of anonymity, which emerges as one of the central aesthetic, ethical, and historical problems of modernity.[4] If Emmanuel Levinas saw ethics as rooted in the face-to-face encounter, the opportunities for such moments were becoming increasingly rare in the twentieth century—which certainly goes a long way in explaining why Levinas saw them as so very fertile to begin with. In both legal and literary modernism, making sense, and making do, with this anonymity required nothing less than a new ethical subject—or in some cases, a traditional ethical subject recast in modern terms.

By thinking about responsibility after war through both tort law—the body of law associated with private harms and individual compensation—and the private world of modernist "fictions of interiority," I am well aware of the incongruence

that comes of setting private justice and public trauma alongside each other. But I invite such inconsistency because I believe that responsibility begins precisely in questions that seem far too personal to accommodate the public nature of war. It is no coincidence that these supposedly private questions are the very issues being worked out in the interwar period in both novels and courtrooms, which looked to individuals to determine the shape of social and legal responsibility. One of the main achievements of recent modernist studies has been to complicate this binary relationship between public and private, finding more in Woolf, Joyce, or Proust than their so-called inward turn and refocusing our attention on how such subjectivity participated in our most public endeavors: the formation of nationalism, the creation (or reclaiming) of culture, the establishment of political order, or the critique of bureaucracy, to name a few.[5]

In this book's understanding of modernity, the public and private intersect—or more aptly, collide—at the site, state, or body of injury, which I suggest can only be recognized in individual terms. It is here, faced with the mass trauma of World War I, that Walter Benjamin would conceptualize an injured Europe through the individual, vulnerable body in "The Storyteller" (1936):

> For never has experience been contradicted more thoroughly than strategic experience by tactical warfare, economic experience by inflation, bodily experience by mechanical warfare, moral experience by those in power. A generation that had gone to school on a horse-drawn streetcar now stood under the open sky in a countryside in which nothing remained unchanged but the clouds, and beneath those clouds, in a field of force of destructive torrents and explosions, was the tiny, fragile human body.[6]

What began as this "tiny, fragile human body," however, would eventually set the terms of political identity, creating nations and communities from injured bodies and, in Wendy Brown's diagnosis, laying the groundwork "for infelicitous formulations of identity rooted in injury" and "litigiousness as a way of political life."[7] The personal becomes political under modernism in new, jurisprudential ways, and my intention in these pages is to read the narrative sources—literary and legal—of this jurisprudence of injury.

Given that my analysis of law is primarily cultural and rhetorical, I have chosen to emphasize the shared heritage of common law, a shareability implied by its very name. As such, I move fluidly between British and American texts so as to gain a wider cultural perspective, rather than one confined exclusively to a specific nation's legal or literary history. The argument I develop pertains to a broader legal consciousness, one that emerged on both sides of the Atlantic

around the same period, a time when both Great Britain and the United States faced similar historical pressures of modernization and industrialization, when decisions served (as they had historically done) as precedents in both countries, and when modernism was making its cultural presence felt in London as in New York. Thus, some chapters—most notably, Chapter 2 on *Mrs. Dalloway*—take their legal material from one nation (here, Judge Benjamin Cardozo's opinion for the New York Court of Appeals in *Palsgraf v. Long Island Railroad*) and their literature from another (Woolf's resolutely English novel). The transit from the Long Island Railroad to the streets of London implies neither causality nor pure coincidence. *Palsgraf* may not have influenced *Mrs. Dalloway,* but the two texts share a mutual historical basis in their attempt to engage the pervasive question of what strangers owe to each other in the modern city. Their narratives, in other words, represent the shaping of an ethical landscape in which expectations of responsibility needed to be redrawn—narrowed, in *Palsgraf's* case, and widened, in Woolf's.

It is no doubt obvious that my arguments in this book can only have emerged from the body of work that is law and literature theory. But let me explain in more detail how modernist studies and law and literature studies seem to me to dovetail, and also about how I hope this book suggests new avenues for both. The field of law and literature today is as varied as the range of approaches and methodologies in both of its subfields. No clear consensus exists as to what law and literature is or does. There are thematic approaches that examine trials, imprisonment, or capital punishment; philosophical or rhetorical work on the speech acts of legal discourse; and psychoanalytic treatments of law's place in our experiences of trauma or desire, to name just a few modes of inquiry.[8] What binds this diverse interdisciplinary field together—indeed, what makes it a "field" to begin with—is an underlying belief that the texts of law and literature jointly contribute to what legal scholar Robert Cover called a *nomos* or normative universe. A nomos, it should be stated, is not synonymous with ideology or dogma. Less articulable and more supple, a normative universe emerges from the integration of our acts, ideologies, beliefs, and associations—and more generally, from the assimilation and psychic calibration of the countless narratives that enter our diverse frames of reference.

Placing law and literature on equal footing, Cover insists in "Nomos and Narrative"[9] that in the formation of a nomos, the law participates as but one normative possibility among many. One may find a particular nomos expressed in a

legal opinion, and another at times conflicting normative framework articulated in literary, religious, or political discourses. The range of *nomoi,* like the expanse of texts, is limitless, and the practical business of daily life depends on how (or whether) these normative worlds coexist. Though the term might seem somewhat technical or abstract, it is useful for my purposes because it helps us envision as related the various forms of a community or collectivity shaped around a shared, normative set of values. The nomoi my study examines include the commitment to compensating everyone for their injuries, the belief that we can pass along our possessions to future generations, and the conviction that even the dullest instances of justice ought to be remembered.

I should emphasize here some subtleties of a point crucial to the trajectories of my argument: the idea that the modernist novel contributes to this nomos differently from its predecessors in that it is "normative." Drawing as I do from the field of law and literature studies, normative means something quite different than it does in literary or cultural studies. In a legal framework, the term refers to a belief in what *ought* to be as opposed to what *is*. It involves the conviction that the law can help to move society toward this goal of "ought" by initiating changes consonant with shifting perceptions, innovations, and progress. In literary studies, the term *normative* generally means, following Foucault, the imposition of culturally and arbitrarily shaped norms—sexual, racial, national—upon a social reality. Normative, in this context, has pejorative connotations associated with punishing difference and rewarding conventionality. And while it can certainly take on such negative registers in legal discourse, I use it to refer to the commitment of moving from is to ought, a move that is particularly helpful in recognizing a crucial difference between modernist writers and their predecessors. Victorian writers like Charles Dickens or George Eliot mounted their criticism through social realism's ethical critique; their novels contain strong ideas of what is wrong with the world, but little about how to address these wrongs. Writers in the twentieth century, however—at least those with whom this book is concerned—would press these ethical claims into normative ones, suggesting not only what was wrong with the world, but also how the affective experiences produced by these wrongs could be harnessed to do something right. Thus, central to my understanding of Woolf's fiction is the claim that she pursues an ethical vision of how a world tragically altered by World War I can be inhabited along normative lines, emphasizing *how* to live rather than *what* is wrong. From this

vantage, I argue that Woolf's preoccupations with responsibility and memory after the war posit her as a profoundly normative novelist rather than just a sensitive observer of modern life.

My discussion of how a nomos is rebuilt in the aftermath of war approaches the legal modernism of both law and literature through a range of emotional responses to justice or injustice, affective experiences that I see as central to the ethical and normative imagination.[10] Drawing upon the interrelationship of affect and justice, I attend not to discrete emotions like love or grief but to intuitions and sensibilities that need to be narrated because they cannot be summed up by any one term. These feelings about "the way things ought to be" are arrived at only through sentences or entire narratives—discourses that I locate in both literature and law. I look to the messy contours of emotional life in order to understand how justice, as an official and unofficial ethic of responsibility, builds itself upon a substructure of sensibility.

If subjectivity figures prominently within modernist studies, it is not an altogether foreign presence in legal studies. Oliver Wendell Holmes Jr., the proverbial father of modern American law, declared in his famous opening to *The Common Law,* "The life of law has not been logic: it has been experience."[11] In turning away from the prospect of justice as a science, denying it mechanical predictability, Holmes embraced the supple, elusive realm of feeling and intuition: "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[12]

Expanding upon Holmes's claim, we might say that responsibility has a *sensibility,* an underlying rhetorical, psychological, and normative structure that stimulates (and stipulates) modern law as it does modernist fiction. This sensibility forms the infrastructure upon which the syllogistic propositions and reasoned decisions of law, like the forms of fiction, are built. Perhaps it should not surprise us, then, when radical innovation in literature happens at a time of radical innovation in law, or at least that literary invention is followed by the realization that the law will have to be drastically changed because it is no longer adequate to the exigencies of modern life.

My convictions here should be clear: law is not limited to what happens in the courtroom. Its reaches run far deeper: we live in a legal world, inhabit a legal

culture, even if we never come before a jury or witness a trial.[13] Just as a legal opinion can be literary without discussing a novel, so can a work of literature be juridical (and, I believe, is more likely to be so) without depicting a trial. In this richer vein, Woolf's ideas about accidents and character, the treatment of strangers, and the negotiation of the material world of possessions, incorporate or recast some of the basic principles in torts and property.

In liberating Woolf from a tradition of scholarship that identifies her with domestic or largely private concerns, this book shares a sensibility with others who have discovered in her work a rigorous engagement with public life, but sets her texts within the specific contours of a legal imagination.[14] The book's first section thus posits Woolf as a normative writer who draws on the power of a juridical imaginary to shape her response to the war. I examine Woolf's novels alongside concepts from torts and property law, reading her as an intellectual deeply engaged with issues of ethics and judgment, the urgency of which was particularly felt in the wake of World War I. To think about the legal imaginary through a writer unconcerned with law in practice—with trials, attorneys, or judges—ultimately allows us to appreciate more fully the complex relation between law and culture. And it brings into view a figure quite different from the politically detached author Woolf is generally taken to be. Engaging her works in this uncharacteristically juridical way both suggests how the literary imagination contains deep legal structures—and in turn, how the legal imagination partakes of the literary.

With this in mind, Chapter 1 considers how injury—and specifically the accidental, traumatic injuries of World War I—challenges conventional notions of character, responsibility, and community. Through tort law's concepts of negligence and duty of care, I examine how law accounts for accidents and how this legal treatment of accidents informs a modern literary sensibility in Woolf's first experimental novel, *Jacob's Room*. This postwar novel both appeals to and extends legal notions of duty of care and negligence, questioning the viability of relying on past precedent—in law, the doctrine of *stare decisis*—to respond to unprecedented historical tragedy.

Chapter 2 extends the analysis of tort law and interwar responsibility to Woolf's next novel, *Mrs. Dalloway,* examining the importance of "stranger cases" in tort law, as well as the estranging language of legal decisions like the landmark opinion *Palsgraf v. Long Island Railroad*. By comparing the law's treatment of strangers to *Mrs. Dalloway,* I show how Woolf challenges the postwar generation

to pursue the very encounters that tort law aims to regulate. If law works to set limits on potential plaintiffs by asking who might foreseeably be affected by an act, Woolf—unconstrained by legal procedure—insists that unforeseeable encounters with strangers create the most potent opportunities for responsibility.

Chapter 3 considers Woolf's *To the Lighthouse* as a work that refigures the law's relationship to inheritance in the context of war. World War I inaugurated a new kind of memorial culture, one that invoked traditional techniques of memory but infused them with a normative—and distinctly legal—sensibility. This discourse unfolded in a context that challenged traditional notions of inheritance, marked by the painful and widespread occurrence of the return of dead soldiers' personal effects to their families at a time when the war dead were not repatriated. The arrival of these unwilled belongings was often met with confusion: it was unclear what one was to do with them or whether to keep them at all. This chapter examines the business of inheriting such painful and impractical effects, a process I call traumatic inheritance. In detailing how traumatic inheritance lies at the heart of postwar mourning and commemoration, I demonstrate how *To the Lighthouse*'s conception of memorial architecture balances the public display of war memorials (such as London's Cenotaph) with the private sense of grief and memory, and thus offers the possibility of inheriting without a will.

The first half of *The Affective Life of Law,* then, examines fictional legal modernism through these three novels by Virginia Woolf. The second section of the book examines how the relationship between law and literature characteristic of modernism is radically reworked after World War II. The Nuremberg and Eichmann trials signaled a dramatic shift in how the collective trauma of war came to be represented in both legal and literary terms. For if World War I placed new pressures on novelists, the unimaginable scale of atrocity inflicted by the Third Reich thrust the burden of representation onto jurists, carving justice out of the remnants of society. Chapter 4 traces how an ethical responsibility for trauma on a mass scale shifted from the literary to the legal sphere by taking up Rebecca West's three-part series for *The Daily Telegraph,* "Greenhouse with Cyclamens." West lived through the two world wars and wrote extensively on both. Her aesthetics, like her politics, follow the trajectory of modernism; indeed, her biography could be seen as emblematic of modernism itself. Her work appeared in the inaugural issue of *Blast,* the avant-garde journal founded by Wyndham Lewis, and she was an early suffragette and a lifelong, self-proclaimed feminist. After World War II, she wrote about treason, Nuremburg, and many other trials,

and her writing in the public press added a new civic dimension to her role as a woman of letters. And like many of her female contemporaries, including Virginia Woolf, West dealt with the far-reaching ethical questions of her times through attention to the ordinary world, privileging everyday experience as a means of grasping the ethical possibilities of a world shattered by war.

As a modernist novelist who then turned to a nonfiction narration of Nuremburg, West, in the shape of her career and in her literary preoccupation with the quotidian, instantiates my claim that our Arendtian notions of contemporary justice have roots in modernist understandings of narrative subjectivity. My reading of West's coverage of the Nuremburg trial examines her depiction of the legal event as a powerful instance of modernist self-consciousness. The trial may have been newsworthy, but it was also, to quote Walter Benjamin's criticism of journalism, "poor in noteworthy stories."[15] In seeking out these stories for herself, West discovers legal drama outside the courtroom and thus creates possibilities, through her modernist sensibility in fiction, to commit an event as unprecedented and extraordinary as Nuremberg to memory and to convey what it felt like to bear witness to historical justice. Rather than approaching the trial as a monumental turning point in jurisprudence, West describes it as a staggering instance of boredom "on a huge, historic scale." Her insistence on dullness inaugurates a strategic and psychological process through which postwar legal experience and ultimately, modern legal memory, are born. In shaping the trial's afterlife through narratives that seem to have little to do with the Tribunal's proceedings, West suggests that "legal drama" is no less than an oxymoron—and in the process, posits a uniquely historical connection between literature and law, one decidedly normative in its claims.

If West's contribution to a wider understanding of law's impact on the historical and narrative imagination remains largely overlooked, her attention to legal banality is given new life in Hannah Arendt's notion, seventeen years later, of the banality of evil. Yet the resonance between West and Arendt goes beyond their respective appreciation of banality, whether of law (West) or the bureaucratic criminal (Arendt). Indeed, these writers represent necessary companion pieces to a deeper appreciation of the relationship between law and narrative in the twentieth century. Witnessing the two most famous post-Holocaust trials as reporters, West and Arendt provide us not with erudite explanations of international law but with narratives that trace a modern, cultural, and literary encounter with justice. Chapter 5 is devoted to Arendt's famous account of the

Eichmann trial, *Eichmann in Jerusalem: A Report on the Banality of Evil*. My reading of Arendt as a modernist writer maintains that her narrative's most significant contribution was not, as is commonly noted, her insistence on the defendant's ordinariness as an inherent feature of his relationship to radical evil. In contrast to this view, I claim that the value of Arendt's work lies in its enunciation of a sense of responsibility with counterintuitive roots in Anglo-American tort law rather than international criminal law.

My treatment of Arendt illuminates how her evaluation of the trial draws upon a basic tenet of torts, the neighbor principle, which sought to define negligent behavior by setting limits on people to whom one owes a duty of care. In a manner resembling Woolf's earlier treatment of social obligation in *Mrs. Dalloway*, *Eichmann in Jerusalem* widens the legal scope of due care by imagining the trial as identifying not simply a nation of victims, litigants, or witnesses, but a society comprised of neighbors obligated to listen to each other. The book's final movement thus completes my outline of a genealogy that runs from a modernist literary sensibility that is fundamentally concerned with ethics to Arendt's development of the concept of social responsibility in the notion of "care for the world," by which she meant the investment in institutions such as a legal system or a political process. I read this "care" and this "world" as a set of emotional and ethical responses undergirding these public institutions and which, in turn, these institutions—law and trials, novels and culture—are meant to safeguard.

In elucidating how modernist fiction and law together arrive at new ways to address the various forms of postwar injury, the chapters that follow bring us time and again to an incontrovertible fact: that all of the central figures in *The Affective Life of Law* are women. While feminist ethics lie beyond the scope of this book, one would be hard-pressed not to adumbrate the potent connections between the iterations of care that provide its explicit and implicit framework: the legal formulation of "duty of care" in torts, Arendt's "care for the world," and the ethic of care associated with the feminist interventions of Carol Gilligan in psychology and Robin West in law.[16] In literature, we find a related sense of care in the careful attention to the everyday, an investment in the allegedly trivial long associated with women's writing.[17] At the very least, these connections between legal and feminist thought suggest that there is something resolutely ordinary about even the most revolutionary moments of justice, and that the question of whether these moments have a life beyond the law—a cultural and social future—has to do with whether they can be absorbed into everyday experience

and its attendant emotions. Whether we choose to *give* it that future is itself a normative question: a matter not of what justice is, but of what it *ought* to be—and of how we get to this "ought."

Modernist writers like Woolf, West, and Arendt put forth a notion of commitment built upon the experience of *feeling* responsible. How, to return to Holmes, might we trace and elucidate the felt necessities and intuitions that enter not only the life of law, but the broader sense of justice upon which we construct this law and against which we test it? What does responsibility look and feel like in the aftermath of historical catastrophe? It is my hope that the narrative maps through which these inarticulate sensibilities are expressed—or often suppressed, put up with, or transformed—demonstrate how a normative world is built over a scaffolding of affect. To talk about a nomos in the wake of the two world wars is to address an emotional, intuitive world, and to step into the daunting task of making practical differences from intangible but all-too-real experiences.