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When Actor and Spectator Meet in the Courtroom: Reflections on Hannah Arendt's Concept of Judgment*

Can the theatre exist without an audience? At least one spectator is needed to make it a performance. So we are left with the actor and the spectator. We can thus define the theatre as what takes place between spectator and actor.

Jerzi Grotowski¹

... this critic and spectator sits in every actor ... without this critical, judging faculty the doer or maker would be so isolated from the spectator that he would not even be perceived.

Hannah Arendt²

Introduction

Plato thought that human affairs, the outcome of action, should not be treated with great seriousness; the actions of men appear like the gestures of puppets led by an invisible hand behind the scene, so that man seems to be a kind of plaything of a god.³

In her seminar lectures on Kant's political philosophy, Arendt criticizes this attitude of disdain for the *vita activa*, attributing it to the long tradition of Western philosophy. According to Arendt, this attitude is linked to the dichotomy that philosophers construct between theory and practice and to the supremacy they accord the theoretical way of life that allows them "to escape from the cave of opinions altogether and go hunting for truth."⁴ Arendt undertakes to correct this attitude with the help of Kant's *Critique of Judgment* (which she reinterprets as his real political philosophy). Even though Kant, too, preferred the theoretical pole of the dichotomy (the spectator rather than the actor), his book signaled a depar-

ture from the philosophical tradition because for him, “*the onlooking position of spectator ... is the position of the judge.*”⁵

What can we learn from this move from spectator to judge? The move is crucial in Arendt’s view because the judge does not (and cannot) wish to escape from the cave of opinions, since opinions are central to the act of judgment. In other words, his spectatorship is a situated one, within human affairs. For Kant, it should be noted, the judge was only a legal metaphor, but not so for Arendt. Her lectures were informed by her experience as a reporter for the *New Yorker* at Eichmann’s trial, where the judge was no longer a metaphor but a concrete reality. At this trial *the* judge turned out to be three Israeli judges (Moshe Landau, Yitzhak Raveh, Benjamin Halevi) who were located in space (Jerusalem) and in time (1961), performing their role of judging the deeds of Adolf Eichmann. It was there that Arendt confronted justice’s demand that the wall between actor and spectator be overcome and that real communication occur in order for a just judgment to be rendered.

Even though Arendt recognizes the importance of the move from spectator to judge, she does not articulate its full implications for her theory of judgment. Following Kant, she chooses the spectator as her own model for the concept of judgment without questioning either the dichotomy between actor and spectator or the supremacy attributed to the spectator. This choice seems to indicate a change of interest from her earlier writing where she considered judgment from the point of view of the *vita activa*. Can we learn from this reorientation that Arendt had changed her understanding of what constitutes judgment?

Arendt did not live to write the volume on “Judging” that was to complete her trilogy on *The Life of the Mind* (after “Thinking” and “Willing”), so we do not know her final answer. Yet, recognizing the centrality of this question to Arendt’s theory of judgment, several scholars have tried to reconstruct her answer. Building on the differences between the actor’s and the spectator’s judgment, Ronald Beiner suggests that Arendt’s reorientation indicates a radical change in her conception of judgment. “The emphasis shifts from the representative thought and enlarged mentality of political agents to the spectatorship and retrospective judgment of historians and storytellers.”⁶ According to Beiner, Arendt produced

two distinct conceptions of judgment. In her later writings, under the influence of Kant's philosophy, she moved judgment outside the public realm of action and chose to model her conception of judgment on the experience of the *solitary* thinker.⁷ By contrast, Richard Bernstein maintains that Arendt herself never reconciled this internal conflict in her reflections on judgment.⁸ Nonetheless, both writers agree that Arendt's vacillation between the actor's and spectator's points of view poses a problem that has to be resolved.

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I suggest, instead, that this tension should not be resolved. On the contrary, the reciprocity between the judgment of actor(s) and that of spectator(s) should be seen as essential to Arendt's conception of judgment. Caught in the dichotomy between actor and spectator (and trying to answer the wrong question), we lose sight of the way in which Arendt's theory of judgment is directly informed by her understanding of action and her experience of legal judgment. Thus, in her lectures Arendt attempts to formulate a theory of judgment that will be capable of accommodating action's tendency to force open all boundaries and bring the unprecedented into the world. This point is obscured in Arendt's more theoretical writings but is illuminated in the book dedicated to an actual legal judgment – *Eichmann in Jerusalem*.

It has been noted by others that the Eichmann trial posed the question of judgment to Arendt in all its urgency for our modern age.⁹ Indeed, Arendt's report can illuminate the source of her later theoretical reflections on judgment. I propose to take the opposite direction and examine the trial in light of Arendt's later writings on judgment. After exploring the different features of judgment, I will examine its relation to Arendt's theory of action, discerning three dimensions in which the conditions of human action relate to judgment: the Nazis' deliberate attempt to eradicate the fundamental conditions of human action, the conditions of plurality and natality, from the concentration camps (crimes against humanity); the incapacitating effects of this attempt on the actors' (Eichmann's) judgment (the banality of evil); and the process of enlarged mentality, which Arendt proposes as enabling the kind of judgment that respects the conditions of plurality and natality, in relation to the need to judge Eichmann's unprecedented crimes.

Eichmann's trial will provide a concrete legal context in which to examine the issue of judgment in general and the relations between actor and spectator in particular. The trial, as a juncture of legal, moral and political judgments, resists any attempt to reduce judgment to one of the two poles (actor or spectator) and demonstrates how judgment can only proceed from an ongoing dialogue between actor and spectator. I would argue that precisely this dialogic conception of judgment, this situating of judgment "in between" actors and spectators, is Arendt's unique contribution to our understanding of judgment.

The Theater Metaphor in Hannah Arendt's Writings

The actor/spectator metaphor is taken from the world of the theater where an audience of spectators watches actors performing. The theater metaphor can be traced back to Arendt's earlier writings on political action. In *The Human Condition* she uses it to explain her notion of the political as a realm of appearances and, in particular, to illuminate the unique quality of "action" as distinct from the more familiar modes of human existence, labor and work. Arendt explains that while labor and work point to instrumental reasons outside themselves as their *raison d'être*, action's sole purpose is its own actuality.¹⁰ As a consequence, in "action" the traditional dichotomy between being and appearance loses its hold because, as Arendt maintains, action's sheer appearance is its mode of being.¹¹ She demonstrates this point by noting the similarities between political actors and actors in the theater. A political actor discloses *who* he is through his words and deeds and therefore needs a public realm in which spectators watch him, talk about his actions and construct stories to memorize them.¹² Thus, according to Arendt, every political action needs to appear in public, in front of an audience of spectators, in order for it to gain meaning and become part of the collective memory of a community (the web of stories). "Actions," unlike natural objects, live only in the narratives of those who watch, interpret and recall them. Political action, just like a theater performance, depends on an audience of spectators for its completion.¹³ The actors and spectators reciprocate each other in the public realm: actors rely on a community of spectators who endow their actions with

meaning; spectators reenact “exemplary actions” that affirm their communal identity.¹⁴ The theater metaphor captures this reciprocity and illuminates the constitutive nature of the actor-spectator bond for the continual existence of a public realm.¹⁵

What are the relations between actor and spectator in the context of a legal judgment? Although Arendt does not pose this question directly or examine the applicability of her performative theory of action to the legal context, I would suggest that her reflections on political trials in *Eichmann in Jerusalem* address this question indirectly and therefore deserve a close examination. In the legal context the theater metaphor seems at first to lose the positive value that it carries in the political realm and appears to indicate a miscarriage of justice – the deterioration of a trial into a “show trial.” Indeed, Arendt maintains that one of the major dangers facing the Israeli judges in Jerusalem was the danger of yielding to political pressures and turning Eichmann’s trial into a political trial. The need to guard the line between a just trial and a show trial constitutes the framework for Arendt’s narrative.

Her report opens with a description of the physical space of the courtroom where the trial was conducted and traces its similarities to a theater. According to Arendt, “whoever planned this auditorium ... had a theater in mind, complete with orchestra and gallery, with proscenium and stage, and with side doors for the actors’ entrance.”¹⁶ The “stage” of Eichmann’s trial was a hierarchical structure of tiers, with the judges occupying the highest tier, and then, in descending order, the defendant facing the witnesses, the prosecutor sitting opposite the attorney for the defense, and last (but not least) the audience facing the judges. Each session opened with the usher’s announcing “Beit Ha-Mishpat” (the Court), which had the effect of lifting the curtain. Apart from these physical similarities to a theater, Arendt notes that the trial also had a “stage manager” – Prime Minister David Ben Gurion, who had ordered Eichmann’s kidnapping and arranged for the trial to take place in Jerusalem.¹⁷ She remarks that Ben Gurion, like a good stage manager, remained behind the scenes throughout the trial. Nonetheless, his presence was felt in the courtroom through the voice and rhetoric of the Attorney General Gideon Hausner. Against this “theatrical” background, Arendt raises the

question whether the Israeli judges would be able to resist the political pressures to turn Eichmann's trial into a show trial.

The key to the judges' success lies in their ability to remain impartial spectators, their resistance to becoming actors in a show trial.¹⁸ More particularly, Arendt argues that in a just trial the judges fulfill their duty to remain impartial spectators by focusing on the actor and his deeds, without yielding to the pressures of political bodies to broaden the scope of the trial's investigation to the victims and their sufferings.¹⁹ Thus, Arendt arrives at the unexpected conclusion that a trial is similar to a theater play in one fundamental issue: "both begin and end with the doer, not with the victim."²⁰ In other words, a trial has to focus on the doer, and everything that is presented in court has to serve the purpose of illuminating some aspect of his actions. We see that in the legal context the use of the theater metaphor is ambiguous since it can indicate both the dangers of a political trial and the virtues of a just trial.

Arendt therefore introduces another criterion for distinguishing a just trial from a political trial: the degree of independence that the judges demonstrate in their judgment. In this way she can recognize the positive theatrical qualities of the trial without relinquishing her demand (in the name of justice) to protect it from becoming a show trial.²¹ Moreover, by freeing the theater metaphor from necessarily implying a political trial, Arendt can use it to illuminate the relations between actor and spectator in the context of ordinary trials. The central question for recognizing a political trial becomes whether the judges act according to a written script, or whether they find the resources to invent their own script according to the evidence shown at court. In other words, the important question is not whether a trial resembles a theater play, but whether the judges rely on an author outside the courtroom to provide them with the scripts.²² In this formulation, a trial can remain a "theater of justice" as long as it is not turned into a puppet-show.²³ I shall argue that in order to fulfill this obligation, the judges at Eichmann's trial had to resist not only written scripts from the political domain, but also some of the scripts provided by the legal system itself, with its precedents and concepts. It is this latter aspect of legal judgment that I shall examine below.

Determinative Judgment

One of the cornerstones of criminal law in a democratic society is the rule “*nullum crimen, nulla poena sine lege*” (no crime without law).²⁴ Judges are required to apply existing rules of law to the alleged acts of the accused (the principle of legality). Indeed, the efforts of the judges in Jerusalem to fit Eichmann’s acts into old categories and to give the impression that they were acting on the solid ground of legal precedent stemmed from this obligation.

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Judging, in the ordinary course of events, involves subsuming the particular facts of the case under preexisting legal categories. This aspect of judgment was studied by Kant in his “First Critique” where he examined the problem of bridging the gap between the universal (abstract categories) and the sense-data (the “facts”).²⁵ The act of combining the particular with the general is called by Kant determinative judgment. According to Kant, judgment cannot be reduced to a mechanical operation because in bridging the gap between the facts and the concepts one has to rely on one’s faculty of imagination.²⁶ The legitimacy and proper role of discretion in determinative judgment that Kant exposed is the main concern of jurisprudential theories that discuss questions such as how judges subsume facts under legal rules and concepts, what constraints exist, and how much freedom the act of judgment allows for.²⁷

Arendt’s *Eichmann in Jerusalem* directs our attention to an altogether different problem concerning the act of determinative judgment. Unlike legal theories that admit the dynamics of occasional modifications in legal categories in order to adjust them to new fact-situations, Arendt points to the limits of this type of adjustment in yielding satisfying judgments. She identifies the line beyond which any modification in the legal rule will only inhibit the judge from reaching a just solution. In her opinion, resorting to determinative judgment in such cases can only obscure the meaning of the new facts under consideration. Arendt maintains that Eichmann’s trial is such a case because the judges’ efforts to subsume his crimes under traditional legal categories (murder, aiding and abetting a crime, obeying an illegal order) only obscured the novelty of his crimes and the nature of the criminal. It is this neglected aspect of judgment, the failure of determinative

judgment (when it is most needed), that Arendt undertakes to examine.

1. Mass Murder

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What should judges do when they are asked to judge new crimes? Determinative judgment requires the subsumption of particular acts under a general legal category. Thus, Eichmann's acts were placed under the rubric "murder," which was the available legal category, and explained as constituting murder writ large (genocide). However, within this framework, Eichmann's contention, "I never killed a Jew or, for that matter, I never killed a non-Jew," sounded preposterous, for how can we make sense of a mass murderer who insists that he never killed with his own hands?²⁸ According to the traditional conception of criminal law, responsibility increases the closer one comes to the actual act of killing. For this reason, the prosecution tried to prove individual murders committed by Eichmann in order to move him from the legal rubric of "aiding and abetting" to the core category of killing.

Arendt argues that the effort to apply traditional conceptions of criminal law to Eichmann's actions threatened to divert the court from understanding the nature of Eichmann's crimes. She claims that in order to understand individual responsibility under a totalitarian regime it is necessary to restructure our legal imagination and to invert our ordinary assumptions about responsibility and guilt. Only by deliberately avoiding the comforts of determinative judgment can the court succeed in rendering a just judgment of the unprecedented crimes produced by agents of totalitarian regimes.²⁹ Indeed, by avoiding the embedded notion of criminal law that responsibility increases the closer one is to the actual killing, the court could see that in the Nazi regime the opposite was true: "the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands."³⁰ Paradoxically, only by refraining from determinative judgment were the judges in Jerusalem able to attribute responsibility to Eichmann in relation to the magnitude of his crimes.³¹

2. Obeying an Illegal Order

Whereas the court demonstrated its ability to go beyond the confines of determinative judgment with regard to the issue of mass murder, it failed to do so with regard to the issue of “superiors’ orders.” This failure led the court to efface what Arendt considers to be the central moral dilemma posed by Eichmann’s case, namely, the relation between conscience and law:

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There remains ... one fundamental problem, which was implicitly present in all these postwar trials and which must be mentioned here because it touches upon one of the central moral questions of all time, namely upon the nature and function of human judgment. What we have demanded in these trials, where the defendants had committed “legal” crimes, is that human beings be capable of telling right from wrong even when all they have to guide them is their own judgment, which moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them.³²

Arendt’s report examines what happens to conscience under a totalitarian system where there are no “voices” from the outside that can give direction to the isolated individual. One of Eichmann’s central contentions was that he was a “law-abiding citizen.” The court considered two alternative ways to tackle this contention: either Eichmann was lying or he was telling the truth but nevertheless had failed his legal duty to disobey a manifestly illegal order.³³ Arendt argues that both ways led the court away from confronting the central dilemma that the trial posed for legal theory.

Was Eichmann lying? The prosecution tried to undermine Eichmann’s contention that he was a law-abiding citizen with evidence about his behavior toward the end of the war when his superior Heinrich Himmler, faced with the certainty of defeat, had tried to save himself by ordering an end to the death marches. Yet Eichmann had disobeyed the orders and continued relentlessly to march Jews to their death. The judges took this as proof of

Eichmann's fanaticism and hatred of Jews and concluded that he was indeed lying (an interpretation that coincided with traditional assumptions about the base motivation behind criminal acts). Yet Arendt, listening carefully to Eichmann's contentions and studying his conduct in court, arrives at a different explanation (alas, one that frustrates traditional concepts of criminal conduct). She explains that whereas the judges regarded the actual orders given to Eichmann by his superior Himmler as "acts performed on superior orders," Eichmann claimed adherence to the "law" not just to a "superior order." This distinction was crucial in the context of a legal system where the spoken word of the Führer constituted the supreme law of the land. In other words, Eichmann knew that Himmler's orders ran directly counter to the Führer's words and intentions.³⁴ Paradoxically, in the Third Reich Eichmann's refusal to obey Himmler's order fulfilled in Eichmann's eyes a duty to disobey an illegal order. In this inverted world, "[t]he sad and very uncomfortable truth of the matter probably was that it was not his fanaticism but his very conscience that prompted Eichmann to adopt his uncompromising attitude during the last year of the war."³⁵

Can the legal precedents regarding a duty to disobey a manifestly illegal order apply to Eichmann's actions? The difficulty, Arendt explains, is that the duty to disobey presupposes the existence of a functioning legal system in which an illegal order can be distinguished by being an exception to the rule.³⁶ However, in the Third Reich where the general rule was "Thou shalt kill," the situation was exactly the opposite. Evil in the Third Reich lost the quality by which most people recognize it – the quality of temptation – because it was enacted into the laws of the land.³⁷ This situation raises a difficult question about conscience and how it functions at times when basic norms of the legal system are changed and the new norms are accepted as legitimate by "respected society."³⁸ When Eichmann looked to his conscience for guidance, he found it in the words of the Führer; what is more, the voice of conscience of the community around him spoke no differently.³⁹ Arendt comments that Eichmann "did not need to 'close his ears to the voice of conscience,' as the judgment has it, not because he had none, but because his conscience spoke with

a 'respectable voice,' with the voice of respectable society around him."⁴⁰

To sum up, neither alternative, that Eichmann was a fanatical anti-Semite or that he was an extreme legal positivist, fits the facts. As Arendt demonstrates, Eichmann was not the Jew-hating monster that the prosecution tried to present, at least not in the sense that his acts could be attributed to some monstrous nature or base motives. She argues that any attempt to understand Eichmann in these terms obfuscates a more fundamental aspect of the new crimes and the new type of criminal that the totalitarian system produced. Neither could his failure of judgment be attributed to extreme legal positivism. "To fall back on an unequivocal voice of conscience ... not only begs the question, it signifies a deliberate refusal to take notice of the central moral, legal, and political phenomena of our century."⁴¹ Instead of attributing Eichmann's failure to his lack of conscience, the court should have tried to understand how a totalitarian system functions to silence the "voice of conscience" by making reality disappear behind a wall of language codes. For this task, however, determinative judgment, which attempts to explain unfamiliar crimes by analogizing them to more familiar ones, is ill fitted. The judges were faced with the need to engage in a different type of judging – to arrive at a judgment without reference to existing rules and concepts.⁴²

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Reflective Judgment

Arendt turns to Kant's *Critique of Judgment* in search of an answer to the question of how we judge the "particular *qua* particular" without relying on existing rules and concepts, and how we elaborate a new framework for judgment when old standards betray us. In Kant's words:

Judgment in general is the faculty of thinking the particular as being contained in the universal. If the universal (the rule, the principle, the law) is given, then judgment which subsumes the particular under it ... is *determinant*. If, however, the particular is given, to which judgment is to find the universal, then it is merely *reflective*.⁴³

The aesthetic experience of judging something as beautiful, of finding harmony without rules by relying on our faculty of taste, suggests a solution. It points to the ability of judgment to transcend a given conceptual system and arrive at “fresh” judgments.⁴⁴ In particular, Arendt is intrigued by the process of what she terms “enlarged mentality” that accompanies the act of reflective judgment and can ensure its validity. As Kant suggested, this is achieved

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... by comparing our judgment with the possible rather than the actual judgments of others, and by putting ourselves in the place of any other man, by abstracting from the limitations which contingently attach to our own judgment ... it indicates a man of *enlarged* thought if he disregards the subjective private conditions of his own judgment ... and reflects upon it from a *universal standpoint*.⁴⁵

By bringing Kant’s ideas on aesthetic judgment to bear upon political, moral and legal judgment, Arendt hopes to solve the problem that she confronted at Eichmann’s trial: how to judge without a rule. Two features of reflective judgment in particular capture Arendt’s attention. First, judgment of the beautiful can only occur within a human community, a community that is therefore a constitutive condition for judgment.⁴⁶ Arendt’s attention is focused therefore on the attempts of totalitarian regimes to destroy the basic condition of a human community, i.e. the condition of human plurality. Second, reflective judgment relates to “the particular *qua* particular” since it does not have to rely on a pregiven rule to decide that “this flower is beautiful.” This in turn points to human spontaneity as a condition of judgment and action and to the deliberate attempt of the Nazis to annihilate this potential in their victims. Both these features of reflective judgment appeal to Arendt because they are capable of addressing the conditions of action that she explored in *The Human Condition*, in particular the conditions of “human plurality” and “human natality.”

1. Natality – Judging the Particular *qua* Particular

Eichmann's case presented Arendt with the problem of how to judge the unprecedented. She had previously considered this problem in her discussion of human action, ascribing a term coined by Augustine, "natality," to the human capacity for beginning, rooted in the fact of human birth.⁴⁷ Human beings, she explains, have the ability to initiate actions and to begin a new route, and human history provides examples of unprecedented actions.⁴⁸ The dark side of this insight is the realization that human beings can bring into the world terrible and unprecedented horrors such as the Nazi concentrations camps.⁴⁹ It also means that we can expect judgment (itself a human action) to face up to new crimes, perceive their novelty and create the conceptual tools (rules, concepts, laws) with which to confront them. In the realm of action, natality means that people can initiate new beginnings, and judgment, since it is directed to human action, should be capable of judging the new without subsuming it under pre-given categories.⁵⁰

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How do these ideas affect Arendt's understanding of the legal issues discussed at the Eichmann trial? Her report is motivated by this desire to comprehend the new and face the unprecedented. For this purpose she renders her own "fresh judgment" but does not yet give it a name or elaborate its process. Only later, in her Kant lectures, does she attempt to give her act of reflective judgment a more theoretical formulation and explain what we do when we judge without rules. In the following I will conduct a retrospective reading of Arendt's *Eichmann in Jerusalem* in the light of her Kant lectures on the issue of judgment and try to explain the process that remained unarticulated in the former work.

The Banality of Evil

Reflective judgment begins with the particular (act, event, person) by distinguishing it from what is more familiar and noticing its newness. In Eichmann's case this means putting aside moral theories about evil-doing (that men do evil because they are evil), as well as the grand narrative presented by the prosecution about Jewish history as a long tale of recurring persecution and divine rescue (Eichmann as a modern-age Pharaoh).⁵¹ Instead,

Arendt presents what can be called a phenomenology of human action. Rather than digging underneath Eichmann's answers to discover his lies, she decides to entertain the possibility that "what we see is what we have" and to take his clichés and "winged words" seriously.⁵² In so doing, she discovers a man capable of easily replacing one language code with another because he used language to block out reality.⁵³ In Michael Denney's words:

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Certainly Eichmann was not insane. He could function and apply the rules of conduct given him well enough; he was able to exercise what Kant would call determinative judgment, the ability to subsume the particular under a general concept or rule. What he was incapable of was Kant's reflective judgment ... *Eichmann's problem, or rather our problem with Eichmann, comes from the fact that he judged according to the rule only too well ... he never looked at the particular case in front of him and tried to judge it without a rule.*⁵⁴

Eichmann failed to practice reflective judgment since he blocked himself deliberately from the reality of his victims, as well as from the judgment of future spectators.⁵⁵

Confronted with Eichmann's failure of reflective judgment, Arendt offers her own judgment of the man and his deeds and calls it "the banality of evil." What she means by this expression is not that Eichmann's deeds were banal, or that we should mitigate his responsibility, but rather that his motivation was banal. Eichmann was not motivated by hatred of Jews, wickedness, ideological conviction or pathology, but rather by the job-holder's concern with success, promotion, the esteem of his co-workers and the praise of his superiors.⁵⁶ This banal motivation, which stands in sharp contrast to his deeds, could only be sustained through a deliberate refusal to relate to others and through radically isolating himself from the reality of his victims.⁵⁷ Arendt saw Eichmann's evildoing, therefore, as a superficial phenomenon in the sense that it did not have "deep roots" in monstrous feelings or a psychopathic personality. In Arendt's opinion, the "banality of evil" only makes it a more dangerous phenomenon because it can spread "like a fungus" among normal people in a totalitarian system.⁵⁸

Her judgment is a reflective one because her explanation frustrates traditional expectations that evil-doing is rooted in evil nature. With the provocative term “banality of evil” Arendt tries to alert her audience to the disjunction between motive and deed that was produced by the Nazi bureaucracy, and to a new type of criminal – the bureaucratic criminal. It is her belief that old conceptions of criminal activity should be abandoned and that the judges should find the resources to judge such unprecedented crimes, i.e. to practice reflective judgment.

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Crimes against Humanity

Arendt’s observations about the banality of evil lead her to realize the urgent need to create adequate legal rules to confront the new type of criminal and the new crimes he produces in order to prevent their future recurrence. Since she knows only too well that the unprecedented can set a precedent and that what appeared once in the world is very likely to reappear, Arendt thinks it extremely important to set the right legal precedent.⁵⁹ This approach, however, placed her in opposition to two powerful stories that pulled the court in the opposite direction. As actors in the legal system who are bound by its categories and distinctions, the judges tried to advance the story that Eichmann’s crimes could be adapted to fit existing legal precedents. As spectators at the trial, listening to the testimonies of Holocaust survivors, the judges also responded to the victims’ need to maintain the uniqueness of the Holocaust. These opposite tendencies converged in the court’s interpretation of “crimes against humanity.” The court broadened the legal category to encompass different acts, some new and some old, so that it could apply legal precedents to Eichmann’s case. At the same time, it interpreted crimes against humanity as “inhuman acts” and attributed their uniqueness to the demonic motivation behind them.⁶⁰ Arendt is critical of the court’s interpretation on both scores. She sees in “crimes against humanity” the opening chapter of a new story (of totalitarian crimes), not the last chapter in a long history of anti-Semitism as the prosecution presented it, and therefore seeks to offer her own innovative interpretation of the crimes that will take into account their unprecedented nature.

In Arendt’s view, what was unprecedented about Eichmann’s crimes was the fact that they were directed against a fundamental

condition of human existence, against what she calls the condition of human plurality. This is the second link between her theories of human action and human judgment. “Plurality” in action is based upon the multiple perspectives of participants and spectators who occupy different standpoints, yet are reciprocally connected.⁶¹ Genocide, in Arendt’s view, unlike any other crime, is an attack on this condition of human plurality:

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It was when the Nazi Regime declared that the German people not only were unwilling to have any Jews in Germany but wished to make the entire Jewish people disappear from the face of the earth that the new crime, the crime against humanity – in the sense of a crime “against the human status,” or against the very nature of mankind appeared ... [it is] an attack upon human diversity as such.⁶²

In this formulation crimes against humanity are not just “inhuman acts,” neither are they similar to more familiar crimes like mass murder. Rather, they threaten the very possibility of humanity (what she calls the “human status”) while being perpetrated upon the body of concrete nations (Jews, Gypsies, etc.).⁶³ This interpretation of “crimes against humanity” echoes Arendt’s earlier formulation of the prepolitical role of law. In *The Human Condition* she suggested that one of the central roles of law is to guarantee a protected space in which human plurality can flourish.⁶⁴ In the report on Eichmann’s trial she gives this thought a concrete legal form and interprets the legal concept of crimes against humanity as aiming to constitute this wall against the onslaught on human diversity. In judging Eichmann’s crimes, Arendt demonstrates how in order to arrive at a valid judgment, the very process of judgment has to be dialogic, i.e. respectful of human plurality.

The Problem of Retroactivity

Arendt’s interpretation of “crimes against humanity” is offered from the standpoint of the spectator, i.e. one who is an outsider to the legal game and hence does not have to abide by its rules. The Israeli judges, in contrast, were actors in the legal system. If they had attempted the kind of reflective judgment that Arendt

recommends, they would have been accused of jeopardizing one of the fundamental rules of their legal system, the rule against retroactivity.⁶⁵ At the same time, neglecting to practice reflective judgment (facing the unprecedented with new categories and concepts), they might fail their equally important obligation to set the right precedent (for which they also have to play the role of historian and spectator).⁶⁶ In this uneasy position of being both actors in a legal system and spectators of history, either route seems to undermine their power of judgment.

Can it be, then, that only a spectator, like Arendt, is able to render a just judgment in Eichmann's case? Arendt's answer to this question would be a firm no. She is well aware of this dilemma but by offering her interpretation of the rule against retroactivity she shows that there is no real conflict between the two roles of judges. Only when we think of legal judgment as limited to determinative judgment are we caught in this conflict. Arendt argues that the rule against retroactivity is based on the assumption that the act under consideration was known to the legislator and he decided against forbidding it. It helps protect individuals by giving them clear indication of the scope of their freedom to act. This assumption does not apply when we deal with unprecedented crimes. When a completely new crime like genocide is introduced into the world, justice demands that the criminal will not be able to rely on the rule against retroactivity to ensure his impunity. Arendt suggests, therefore, that the rule against retroactivity applies only to acts known to the legislator in advance. In her view, the central question should not be the retroactivity of "crimes against humanity" (because they are clearly retroactive), but whether the term applies strictly to crimes previously unknown.⁶⁷ This innovative theory, however, presupposes that reflective judgment can be practiced equally well by spectators and actors in order to justify the punishment of an agent by *ex post facto* laws.⁶⁸

2. Plurality – Actors and Spectators “Go Visiting”

Even if we are satisfied with Arendt's solution to the problem of retroactivity, there is a more serious problem with her suggestion that judges exercise reflective judgment.⁶⁹ After all, Hitler's judges

were notorious for their innovative judgments (“natality” played a role in their judgments).⁷⁰ Reflective judgment will remain arbitrary and subjective unless she elaborates the process that can ensure its legitimacy. It is only in her later Kant lectures that she describes the procedure that enables actors and spectators to arrive at intersubjectively valid judgments, terming it “enlarged mentality.” Arendt elaborates Kant’s ideas on a process in which one “goes visiting” other points of view (in conversation and with the help of imagination) before forming judgments. Beginning with subjective taste, the judging subject should enter a process of deliberation in which one gradually distances oneself from one’s particular circumstances and familiarizes oneself with the standpoints of other people. “To think with enlarged mentality means that one trains one’s imagination to go visiting.”⁷¹ The judging subject engages in a mental exercise, imagining how the world would have looked from another person’s position. This procedure is also described in Arendt’s essay “Truth and Politics”:

Political thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoint of those who are absent; that is, I represent them. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective; this is a question neither of empathy, as though I tried to be or feel like somebody else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not. The more people’s standpoints I have present in my mind while I am pondering the issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion.⁷²

In articulating the process of reflective judgment, Arendt diverges from Kant in some respects in order to accommodate her ideas about the conditions of human action. In her hands reflective judgment becomes a situated judgment which takes place within

human time and is inscribed with human perspectivity. It consists of noticing the particular, engaging in representative thinking ("enlarged mentality") and offering the community a new narrative with exemplary validity. Thus, the process of enlarged mentality is no longer a formal procedure devoid of the specific history and tradition of a concrete community, as Kant meant it to be; nor can it guarantee to judgment a universal validity. These changes are apparent in the following passage from Arendt's essay "The Crisis in Culture":

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Judgment is endowed with a certain specific validity but it is never universally valid. Its claim can never extend further than the others in whose place the judging person has put himself for his considerations. Judgment, Kant says, is valid "for every single judging person," but the emphasis in this sentence is on "judging"; it is not valid for those who do not judge or for those who are not members of the public realm where the objects of judgment appear.⁷³

In Arendt's writing, Kant's community of mankind becomes an actual community, and the process of representative thinking that takes place in judgment consists of actual engagement with others in deliberation and dialogue. As we shall see, situating judgment within the public realm of human affairs also means that Arendt's theory of judgment undermines the possibility of keeping the boundary between actor and spectator intact.

An important difference between the innovative judgments of Hitler's judges and the type of reflective judgment that Arendt recommends depends on this process of representative thinking. In Nazi Germany the judges actively blocked themselves from the people they judged. Arendt, in contrast, urges the Israeli judges to do the opposite, to try and engage Eichmann's viewpoint, to see the world from his perspective in judging him. For this purpose Arendt uses the narrative strategy of citing Eichmann in the first person and letting his voice be heard in the report. She seems to be saying, "Don't fit the man to your own stories about the monstrosity and sadism of the Nazis, but listen carefully to his words and use your imagination to understand his viewpoint." This

process, as the passage from “Truth and Politics” cited above indicates, is not to be confused with empathy.⁷⁴ In reflective judgment one should not seek complete identification with the other (empathy), since all that will be accomplished is the trading of one’s subjective viewpoint (and prejudices) with another’s. Instead, one has to rise above one’s private inclinations and interests and learn to entertain a plurality of perspectives simultaneously: “the more people’s standpoints I have in my mind ... the more valid my final conclusion.” This is the meaning that Arendt attributes to impartiality in judgment. Impartiality is not the attempt to occupy an objective viewpoint, but the ability to entertain a plurality of perspectives simultaneously.⁷⁵

Arendt herself engages in this process of representative thinking in trying to see the world from Eichmann’s point of view before rendering her judgment. However, she fails in two respects. First, she fails to practice enlarged mentality in relation to her own spectators, in particular, the Jewish victims. Second, anxious to render an “objective” judgment, she seems to forget her own role as an actor in the Jewish community.⁷⁶ Arendt’s choice of the term “banal,” her condemnation of any effort to focus the trial on the victims’ sufferings, her refusal to draw a clearer line between perpetrators and victims, all indicate a failure to “go visiting” her own people. These failures can account for some of the controversy that the book raised in the Jewish community.⁷⁷ Anxious to render a just judgment of Adolf Eichmann, Arendt forgets her own lesson that she herself is a spectator among spectators and that her judgment will be judged by others not only for *what* it says but also as disclosive of *who* she is.⁷⁸

3. Narrativity: When Actor Meets Spectator

The third feature of human action, according to Arendt, in addition to natality and plurality, is its narrativity – action produces stories and is rendered meaningful through stories. This is also the modality that Arendt chooses for reflective judgments (such as her judgment of Eichmann) since narratives have the capacity to remain connected to the particulars of the world. The narrative mode constitutes therefore the third link between action and judgment. Another advantage of narrative is that it remains open

to interpretation and retelling and thus can set in motion a process of narration in which a plurality of voices and perspectives is visited. By refusing to rush into general categorization and by proceeding piecemeal by way of narratives, Arendt celebrates the possibilities of the “in-between” (on both levels, in between individuals in a community and in between the particular and the concept). In other words, the narrative mode can best accommodate the condition of human natality and human plurality, and for this reason Arendt chooses it as the medium for her reflective judgments. Moreover, it enables the reader to reenact the process of enlarged mentality in reading the text and in this way remain critical of the judgments offered. Walter Benjamin captures this quality of narratives in his essay on storytelling:

It is half the “art” of storytelling to keep a story from explanation as one reproduces it.... The most extraordinary things, marvelous things, are related with the greatest accuracy, but the psychological connection of the events is not forced on the reader. It is left up to him to interpret things the way he understands them, and thus the narrative achieves an amplitude that information lacks.⁷⁹

Arendt echoes this insight when she describes the work of the historian as setting a narration process in motion, rather than mastering the events “once and for all”:

Such narration ... does not master anything once and for all. Rather, as long as the meaning of the events remains alive – and this meaning can persist for very long periods of time – “mastering of the past” can take the form of ever-recurrent narration. The poet in a very general sense and the historian in a very special sense have the task of *setting this process of narration in motion and of involving us in it*.⁸⁰

This approach might help us understand Arendt’s choice of the narrative mode in Eichmann’s case. It might also explain some of the misunderstanding that her judgment caused, since the critics understood the book as aiming to render a “final judgment” that

would master the events once and for all. This could not have been further from Arendt's intentions. In her view, judgment cannot be reduced to the court decision with this title, nor is it the whole book where Arendt struggles to render Eichmann's acts and deeds meaningful. Rather, judgment is an act of narration that sets a process in motion; an act of participation in the public realm, informed by a sense of individual responsibility to the community. A sign of a good judgment is the way that it binds together actors and spectators in a human community.⁸¹ Such was indeed the effect of Arendt's book. It was not meant to produce consensus but to set in motion a process of deliberation and public debate. Interestingly, Arendt herself refuses to see the same narrative function in trials.⁸² Guarding the line between the political and the legal, she criticizes the prosecution's efforts to give a stage to the victims' stories. Similarly, she opposes the "educational" role that Ben Gurion assigned to the trial – the role of creating a national narrative for the Israeli audience.⁸³ However, almost against her will, Arendt is impelled at last to admit the important role of the victims' storytelling. Hearing the testimony of Zindel Grynszpan, Arendt realizes that his story can illuminate the whole horror and senselessness of Nazi crimes. Grynszpan's story leads her to entertain the "foolish" (her words) thought that "everyone [i.e. every victim] should have his day in court."⁸⁴ More important, it is in this possibility of storytelling (however difficult) that she finds hope for humanity. Storytelling becomes the countervailing force to what she interprets as crimes against humanity – crimes that try to erase some stories from the face of the earth by eliminating the conditions for their production: human natality and human plurality.⁸⁵

Situated Judgment and the Impossibility of an Actor/Spectator Divide

So far I have examined the relation between the actor's and the spectator's judgment at Eichmann's trial. This examination led me to explore the continuity between Arendt's theory of action and her theory of judgment. I have pointed out the Nazis' attempt to eradicate the human conditions of natality and plurality and the effects this had on both victims and perpetrators. In particular, I

have argued that the possibility of reflective judgment (so sorely needed in Nazi Germany) depends on these very conditions of human action. At this point, I would like to digress from the concrete context of the trial in order to consider Arendt's more theoretical formulation of judgment. This will bring me back to the questions that opened this paper. I hope to show that although Arendt, like Kant, chooses the "spectator" as her model of judgment, her ideas about a "situated" theory of judgment (whose features we have so far explored) undermine her efforts to keep the distinction between actor and spectator intact. Developing this rather obscure theme of Arendt's lectures on Kant will enable me to offer a reconciliation between the concrete experience of judgment in the legal context and Arendt's conception of reflective judgment.

The reasons Arendt gives for preferring the viewpoint of the spectator are connected to its temporal and spatial position in relation to the events. In *The Human Condition* she explains that the end of the story can bestow meaning on its beginning. It is therefore the spectator (historian, storyteller, judge), judging retrospectively, who can better detect the meaning of the events, a meaning that is still hidden from the actors.⁸⁶ In her Kant lectures she argues that since actors take part in the events, their viewpoint is partial by definition. Spectators on the other hand, taking no part in action, can see it as a whole, impartially.⁸⁷ Knowing the end provides the spectators with the criteria to distinguish the significant from the insignificant; taking no part in action allows them to open themselves to a multiplicity of viewpoints.⁸⁸

If we take these observations to their logical conclusion we discover that the "perfect" spectator is the insular spectator who occupies the position of the umpire – "the spectator and judge outside the game of life."⁸⁹ However, this is precisely the position to which Arendt objects and which her account of reflective judgment is intended to replace. Her theory of judgment is a deliberate exercise in relocating judgment within the public realm where human affairs unfold.

Take for example Arendt's choice of the storyteller rather than the author as a model for the judgment of history. She explains that the storyteller, unlike the author, does not have a prior plan

or a model at his disposal according to which he can judge the events. Even though the storyteller (much like the historian) finds the meaning of the events retrospectively, his hindsight is never a definitive one, his judgment is never final. Rather, he occupies a point within the ongoing story of humanity from which he has to judge. This position requires an act of judgment to recognize a point in the ongoing story of human history as “the end.” However, this end-point is not a stable one because, as time passes, a different ending could suggest a different beginning that would change the previous meaning attributed to the events. Since the spectator as storyteller does not have access to the end-point of history, his judgment cannot be purely retrospective. Likewise, situating the actor’s judgment in human time shows that it cannot be a purely prospective judgment. Arendt is careful to articulate the important role of imagination in judgment that allows the actor to anticipate different end-points.⁹⁰ Thus, even though as actors we do not know the “end” of our stories in advance, we can use our imagination to anticipate a future point (project ourselves into the future) and judge our present situation accordingly.

Arendt’s insistence on keeping judgment within “human time” makes it difficult to retain the distinction between actor and spectator.⁹¹ Instead, she chooses to emphasize the difference in the *spatial* position of the actor and spectator in relation to the events. She argues that while the actor takes part in the events and is therefore partial by definition, the spectator retains a degree of uninvolvedness. However, Arendt’s insistence on keeping judgment anchored to the public realm with its plurality of judging subjects undermines this solution as well. A careful reading of her Kant lectures suggests that even when she focuses on the spectator’s judgment, Arendt does not see judgment as a solitary business because for her “spectators exist only in the plural.”⁹² As a consequence, Arendt’s ideal of impartiality in judgment is very different from the Platonic dream of jumping outside the game of life. Rather, it consists of “going visiting” different viewpoints and engaging others in conversation. This aspect of judgment decenters judgment from the standpoint of *the* spectator by situating the spectator within a community of other actors and spectators.⁹³ Moreover, by locating the source of reflective judgment in the faculty of taste, Arendt admits an indispensable subjective compo-

nent in the heart of every judgment that gives it its initial orientation but also binds it to a specific place and time. Thus, the difference between the involvement of actors in action and the uninvolved spectators becomes one of degree.⁹⁴ In sum, since Arendt does not try to deny or abolish the positionality of reflective judgment and examines it within human time and human perspectivity, her own observations about judgment undermine the possibility of a clear actor/spectator divide.

In the sentence I have quoted in the epigraph to this paper Arendt suggests a way of reconciling these two strands: "this critic and spectator sits in every actor ... without this critical judging faculty the doer or maker would be so isolated from the spectator that he would not even be perceived." She means that in order for the actor to decide his future actions and to judge their value, he has to learn to internalize the point of view of the spectator. Taking this observation a step further, we can add to it Arendt's observation that the spectator too (because he is not alone) has to learn to obtain the viewpoints of other spectators (including the viewpoint of the actor) in forming his own judgment. Thus, the ideal of reflective judgment is constituted by a reciprocal movement between the perspective of actors and spectators. There is no Archimedean point from which we can judge but only a plurality of viewpoints that we have to "go visit" and negotiate. Eichmann's trial becomes a symbol of both the success and the failure of this type of judgment. We learn of Eichmann's failure to engage his victims' viewpoint by hiding behind stock phrases and clichés (refusal of judgment) and of Arendt's attempts to engage Eichmann's viewpoint in order to judge him by making a story from the disparate details of Eichmann's crimes (responsibility of judgment). At the same time, Arendt's refusal to "go visit" the viewpoints of her own spectators before rendering her judgment indicates a failure on her part. All this makes the reader all the more aware of the heavy task laid on the Israeli judges who had to make their way between the pressures of the present (a political trial) and the pressures of the past (legal precedents) in order to arrive at a valid judgment. The trial, and Arendt's book about the trial, turn out to be variations on the theme of judgment played simultaneously by actors and spectators.

The legal context, however, can offer more than a fascinating story about judgment. It can offer a model for the relations between actor and spectator that Arendt was trying to formulate. The institutional setting of a trial endows the judges with the dual role of actor and spectator. Having to occupy both roles, judges are trained in both determinative and reflective judgment. As actors they learn to exercise determinative judgment, going back and forth between the facts and the legal categories in order to bridge the gap between them. As spectators, they are trained to remain open to the newness of each case and to bring the perspectives of all parties before the court.⁹⁵ Indeed, in reaching a decision, good judges often have to play the case all over again in their imagination from different points of view until it yields a satisfactory judgment.⁹⁶

Can the institutional setting of a trial offer a key to the problem of judgment in general? Toward the end of her report Arendt takes issue with those who argued that the Israeli judges should have refrained from punishing Eichmann because his deeds were beyond comprehension. In Arendt's view, the suffering that Eichmann brought upon his victims was indeed beyond comprehension, but not so his deeds.⁹⁷ She supports her view by pointing to the basic assumption of a trial (which she herself endorses) about the common humanity of actors and spectators.⁹⁸ Every trial creates an artificial public space where each participant is endowed with a juridical persona. On the basis of these equal terms, the participants are then called upon to communicate to each other their distinctive voices. Indeed, when this assumption is frustrated and there is no meaningful communication, as in the case of the insane, the court has to refrain from judging altogether.⁹⁹ No doubt, sometimes the need to judge someone when we were not in his place demands an immense effort of communication and reflection (as Eichmann's case demonstrates). But this does not mean that we should renounce judging altogether. I believe that the common humanity that is assumed in every trial is based upon our ability to occupy both roles of actor and spectator, i.e. our ability to "go visit." It is a human potential that can become an actuality.

In respect to the possibility of judging Nazi crimes Arendt herself changed her mind. In *The Origins of Totalitarianism* she thought

radical evil to be beyond comprehension, something that “explodes” our legal categories and defies the possibility of human judgment.¹⁰⁰ In *Eichmann in Jerusalem* she renounces her earlier belief that evil is radical and claims that it is banal. I believe that this change has to do with her reflections on the possibility of judgment in a legal context.¹⁰¹ Arendt argues that we can comprehend the banality of evil and judge totalitarian crimes. Moreover, her report is motivated by a strong belief in the obligation we owe future generations to judge these new crimes so that the abyss between past and future will be bridged. Arendt, however, did not change her mind about the inadequacy of determinative judgment for this job.¹⁰² Instead, she turned to reflective judgment as a mode of judgment that can confront the new and endow it with meaning. As we saw, she offered her judgment in the form of a narrative, a form that is capable of illuminating the new without rushing to categorization.¹⁰³ Arendt rendered her judgment as a beginning of a process of narration and expected others to come forward with their own narratives. This is the deeper message of her book, an optimistic note about the possibility of human beings to tell the story in order to feel at home again in this world. She confronts the greatest horror of this century with a simple and encouraging observation: “One man will always be left alive to tell the story.”¹⁰⁴

Notes

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- * I would like to thank José Brunner, Hagi Kenaan and Ariel Porat for reading previous drafts and offering their thoughtful comments. I would also like to thank Oren Bracha and Tami Hauzer for help in research. I am grateful to the Cegla Institute of Comparative and Private International Law at Tel Aviv University for the grant which enabled this research.
- 1 Jerzi Grotowski, *Towards a Poor Theatre* (Holstebro, 1968), 32.
 - 2 Hannah Arendt, "Appendix: Judging," in *The Life of the Mind* (New York, 1978), 262.
 - 3 Hannah Arendt, *The Human Condition* (Chicago, 1958), 185.
 - 4 Hannah Arendt, *Lectures on Kant's Political Philosophy*, ed. Ronald Beiner (Chicago, 1982), 55. (Hereafter *Lectures*.)
 - 5 *Ibid.*, 55–56 (my emphasis).
 - 6 Ronald Beiner, "Hannah Arendt on Judging," in *Lectures*, 91.
 - 7 *Ibid.*, 92–93. A similar position is expressed by Benjamin Barber, *The Conquest of Politics* (Princeton, 1988), 198.
 - 8 Richard J. Bernstein, *Philosophical Profiles* (Philadelphia, 1986), 221–37.
 - 9 Beiner, "Hannah Arendt on Judging," 97–101; Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (New Haven, 1982), 377. See Arendt's own testimony on the matter in *The Life of the Mind*, 5–6.
 - 10 Although action does not produce anything material, it produces stories and thus endows human existence with meaning. *The Human Condition*, 208.
 - 11 *Ibid.*, 199.
 - 12 *Ibid.*, 187; cf. 178–79. Bonnie Honig comments: "When they act, Arendt's actors are reborn. Through innovative action and speech, they 'show who they are, reveal actively their unique personal identities and thus make their appearance in the human world'." "Toward an Agonistic Feminism: Hannah Arendt and the Politics of Identity," in Judith Butler and Joan W. Scott, eds., *Feminists Theorize the Political* (New York and London, 1992), 219.
 - 13 Cf. Peter Brook, *The Empty Space* (New York, 1968), 127: "The only thing that all forms of theater have in common is the need for an audience ... in the theater the audience completes the steps of

- creation." Arendt notes in *The Human Condition* that "Even Achilles ... remains dependent upon the storyteller, poet, or historian, without whom everything he did remains futile" (p. 194). For an elaboration of this point, see Paul Ricoeur, "Action, Story and History: On Re-Reading *The Human Condition*," *Salmagundi*, no. 60 (1983): 60–72.
- 14 At this stage of her writing Arendt does not fully develop her ideas about the reciprocity between the actor and spectator. She depicts their relations as one-directional (from actors to spectators) and only later, in her Kant lectures, begins to elaborate the spectator's influence on the actor's actions. "We tend to forget that no one in his right mind would ever put on a spectacle without being sure of having spectators to watch it." *Lectures*, 62.
- 15 Even though Arendt seems to be saying that "action" is constitutive to the public realm (*The Human Condition*, 198), her unique understanding of action as built upon the relations between actors and spectators makes this relationship (and not action in its isolation) the cornerstone of the public realm.
- 16 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York, 1964), 4. Indeed, the trial took place in *Beit Ha-Am* (House of the People) that had originally been built as a playhouse. For a court decision that discusses the inappropriate setting of a playhouse to the conduct of a trial, see *Roberts v. State* 100 Neb. 199, 158 N.W. 930 (1916). See also T.P 40/61 *State of Israel v. Eichmann*, PM XXVII (1961), p. 169 (proceedings initiated by the Israeli government regarding the rights to film and broadcast Eichmann's trial on television and in movie theaters). The issue has been contested recently in articles about the theatrical effect of the Simpson case: Henry J. Reske, "Courtroom Cameras Face New Scrutiny," *American Bar Association Journal* 81 (Nov. 1995): 48; Trevor Aldridge, "O. J.: Open Justice," *Solicitors Journals* 27 (Oct. 1995): 139; and Jeff Brown, "Reflections on the Camera's Role in the Courtroom," *Los Angeles Daily Journal*, 16 Nov. 1994.
- 17 *Eichmann in Jerusalem*, 5. Ben Gurion was very much involved in formulating the concept of the trial. Thus, the opening address of Attorney General Gideon Hausner was submitted to him before it was delivered in court. See Gideon Hausner to Ben Gurion, 24 Mar. 1961, and Ben Gurion to Hausner, 28 Mar. 1961, cited in Michael Keren, "Ben Gurion's Theory of Sovereignty: The Trial of Adolf Eichmann," in his *Politics and Leadership in Israel* (London, 1991), 46. Keren's discussion of Ben Gurion's conception of the trial differs from Arendt's interpretation.
- 18 Note the difference between being an impartial spectator and playing a political part by allowing the lawyers to define the scope of the trial.

- For an interesting exposition of the political role of the judges in defining the scope of the trial of Klaus Barbie, see Guyora Binder, "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie," *Yale Law Journal* 98 (1989): 1324–39.
- 19 Despite her criticism of the fair procedure of the trial, Arendt concludes that on the whole the Israeli judges were successful in resisting political pressures. For example, while the prosecution wanted to focus on the events in the East, where the victims' suffering had been the greatest, even though Eichmann's contribution to the evacuation of Jews in the East had been minimal, the judges decided to concentrate on the events in the West (although they discussed the events in the East), where Eichmann's deeds had most contributed to the administration of the Final Solution. *Eichmann in Jerusalem*, 220–21.
 - 20 Ibid., 9. For a current legal controversy about the role of victim in a criminal trial, see Paul Gewirtz, "Victims and Voyeurs at the Criminal Trial," *Northwestern University Law Review* 90 (Spring 1996): 863–97; Alon Harel, "Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault," *California Law Review* 82 (Oct. 1994): 1181–229; and Jeffrey Miles, "The Role of the Victim in the Criminal Process: Fairness to the Victim and Fairness to the Accused," *Criminal Law Journal* (Aug. 1995): 193–208.
 - 21 Speculating about the possibility of having had Eichmann assassinated in Argentina and then putting the assassin on trial, Arendt makes this point most clearly: "The trial, it is true, is again a 'show' trial, and even a show ... while at the same time the trial character of the proceeding is safeguarded, because *it is not 'a spectacle with prearranged results'* but contains that element of 'irreducible risk' ... an indispensable factor in all criminal trials." *Eichmann in Jerusalem*, 266 (my emphasis).
 - 22 Cf. *The Human Condition*, 184–86, where she distinguishes between authorship and storytelling.
 - 23 This analogy (theater of justice) is taken from Jeremy Bentham, "Rationale of Judicial Evidence," in *Works of Jeremy Bentham*, ed. John Bowring (New York 1962), 6:353, 354.
 - 24 Lon L. Fuller, *The Morality of Law* (New Haven and London, 1964), 59.
 - 25 Immanuel Kant, *Critique of Judgment*, trans. J. H. Bernard (New York, 1951), 10. Kant's formulation was "thinking the particular as being contained in the universal." According to Arendt, when Kant was thinking about determinative judgment the lawyer and doctor served as his models. See *Lectures*, 36.
 - 26 See Immanuel Kant, *Critique of Pure Reason*, trans. Norman Kemp Smith (London, 1950), 180–87 (A137/B176–A147/B187). For an interesting discussion of the relevancy of Kant's analysis to legal judgment, see

- Anthony Kronman, "Practical Wisdom and Professional Character," in Jules Coleman and Ellen Frankel Paul, eds., *Philosophy and Law* (Oxford, 1987), 203.
- 27 Ronald Dworkin, *A Matter of Principle* (Cambridge, 1985), 9–11, 158–61; idem, *Law's Empire* (Cambridge, 1986), 87–88, 244–45, 255–58; idem, *Taking Rights Seriously* (London, 1977), 81–130; Roscoe Pound, *Jurisprudence* (Minnesota, 1959), iv, 3–20; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Oxford, 1989), 387. In legal theory, especially when it comes to criminal law, there is a strong need to play down this element of discretion in judgment. See Rosemary Pattenden, *The Judge, Discretion, and the Criminal Trial* (Oxford, 1982).
- 28 *Eichmann in Jerusalem*, 215; Bruno Bettelheim explains the dilemma as one of incongruity "between all the horrors recounted, and this man in the dock, when essentially all he did was to talk to people, write memoranda, receive and give orders from behind a desk." Bruno Bettelheim, "Eichmann; the System; the Victims," *New Republic*, 15 June 1963, 23.
- 29 *Eichmann in Jerusalem*, 246.
- 30 Ibid., 247.
- 31 Ibid., 185.
- 32 Ibid., 294–95.
- 33 The duty to obey a higher law in accordance with the dictates of natural law was also the framework that was applied at the Nuremberg trials.
- 34 As Arendt explains, "it was not an order but a law which had turned them all into criminals." *Eichmann in Jerusalem*, 149.
- 35 Ibid., 146.
- 36 Ibid., 293.
- 37 Ibid., 150.
- 38 Ibid., 127–28.
- 39 Arendt illustrates the failure of respected society to convey clear condemnation with the example of a clergyman Propst Gruber. Ibid., 130–31.
- 40 Ibid., 126.
- 41 Ibid., 148. On the contrary, Eichmann was aware of his duty to go beyond the letter of the law and beyond his superiors' orders. His distorted version of Kant's categorical imperative (act so that the maxim of your action can become a general law) read "act in such a way that the Führer, if he knew your action, would approve it." Ibid., 136. He therefore cannot be characterized as a legal positivist who applied orders in a mechanical manner. For a discussion of the

- different senses of legal positivism, see Markus Dirk Dubber, "Judicial Positivism and Hitler's Injustice," *Columbia Law Review* 93 (1993): 1820–31; and Anthony J. Sebok, "Misunderstanding Positivism," *Michigan Law Review* 93 (1995): 2054–132.
- 42 As in the case of those who resisted the totalitarian regime: "those few who were still able to tell right from wrong went really only by their own judgment, and they did so freely; there were no rules to be abided by, under which the particular case with which they were confronted could be subsumed. They had to decide each instance as it arose because no rules existed for the unprecedented." *Eichmann in Jerusalem*, 295.
- 43 Kant, *Critique of Judgment*, 15. Arendt's own formulation of the problem of judgment echoes this passage: "The chief difficulty in judgment is that it is 'the faculty of thinking the particular'; but to think means to generalize, hence it is the faculty of mysteriously combining the particular and the general. This is relatively easy if the general is given – as a rule, a principle, a law – so that the judgment merely subsumes the particular under it. The difficulty becomes great 'if only the particular be given for which the general has to be found.' For the standard cannot be borrowed from experience and cannot be derived from outside. I cannot judge one particular with another particular." *Lectures*, 76.
- 44 I borrow this term from Fish, *Doing What Comes Naturally*, 503–505.
- 45 Kant, *Critique of Judgment*, 136–37 (original emphasis); also cited in *Lectures*, 43.
- 46 For an examination of the relations between taste judgments and sociability in Kant's *Critique of Judgment*, see Paul Guyer, "Pleasure and Society in Kant's Theory of Taste," in Ted Cohen and Paul Guyer, eds., *Essays in Kant's Aesthetics* (Chicago, 1982), 21.
- 47 *The Life of the Mind*, 109.
- 48 *The Human Condition*, 177.
- 49 As explained in her essay "Social Science Techniques and the Study of Concentration Camps," *Jewish Studies* 49 (1950): 60–63, it was the novel purpose of Nazi totalitarianism to experiment with the human condition itself, i.e. to eradicate the conditions of natality and plurality for the occupants of the camps by erasing their individuality and spontaneity.
- 50 "Even though we have lost yardsticks by which to measure, and rules under which to subsume the particular, a being whose essence is beginning may have enough of origin within himself to understand without preconceived categories and to judge without the set of

- customary rules which is morality." Hannah Arendt, "Understanding and Politics," *Partisan Review* 20 (1953): 391.
- 51 See *Eichmann in Jerusalem*, 19. See also a letter to Jaspers in response to his concern about the demonization of Eichmann, in *Hannah Arendt-Karl Jaspers Correspondence, 1926-1969*, ed. Lotte Köhler and Hans Saner, trans. Robert and Rita Kimber (San Diego, 1993), 54, 62, 69.
- 52 *Eichmann in Jerusalem*, 48.
- 53 *Ibid.*, 50. The ease with which Eichmann switched language codes was demonstrated time and again at the trial. See Hannah Arendt, "Thinking and Moral Considerations: A Lecture," *Social Research* 38, no. 3 (Autumn 1971): 417, 419.
- 54 Michael Denny, "The Privilege of Ourselves: Hannah Arendt on Judgment," in Melvyn A. Hill, ed., *Hannah Arendt: The Recovery of the Public World* (New York, 1979), 254-55 (my emphasis).
- 55 *Eichmann in Jerusalem*, 49: "The longer one listened to him, the more obvious it became that his inability to speak was closely connected with an inability to think, namely, *to think from the standpoint of somebody else*" (my emphasis).
- 56 *Ibid.*, 287.
- 57 Arendt believes that a sense of reality is guaranteed to human beings only through their communication with one another (through their "sensus communis"). *The Human Condition*, 208. She identifies the danger of a totalitarian system in its systematic isolation of people from one another. The glass box in which Eichmann was put during the trial can be read as a metaphor of Eichmann's failure of judgment. Glass separates us but we can see through it. Eichmann's inverted use of words deluded the listeners, who mistook them for acts of communication (they forgot the glass), while Arendt saw them as glass barriers that helped Eichmann to remain separated from the reality of others.
- 58 In a letter to Gershom Scholem Arendt generalizes her observations on Eichmann: "It is my opinion that evil is never 'radical,' that it is only extreme, and that it possesses neither depth nor any demonic dimension. It can overgrow and lay waste the entire world precisely because it spreads like a fungus on the surface. It is 'thought defying,' as I said, because thought tries to reach some depth, to go to the roots, and the moment it concerns itself with evil, it is frustrated because there is nothing. That is its 'banality.' Only the good has depth and can be radical." "'Eichmann in Jerusalem': An Exchange of Letters between Gershom Scholem and Hannah Arendt," *Encounter* (Jan. 1964): 56.
- 59 *Eichmann in Jerusalem*, 273.
- 60 For legal purposes the motivation as opposed to the immediate

- intention of the perpetrator is irrelevant for the establishment of legal responsibility and can therefore remain "unique." See George Fletcher, *Rethinking Criminal Law* (Boston, Toronto, 1978), 452. Hence, the court could insist on the uniqueness of Eichmann's motivation (inhuman, beastly), without undermining the legal grounds for punishing him (legal precedents about war crimes and mass murder).
- 61 In other words, plurality has the twofold character of equality and distinction. See *The Human Condition*, 175.
- 62 *Eichmann in Jerusalem*, 268.
- 63 *Ibid.*, 269.
- 64 *The Human Condition*, 194–95.
- 65 Cf. the situation in Nazi Germany in which the rule against retroactivity was one of the first to be abolished in section 2 of the revised criminal code that stated that an act could be punished if "the spirit of a rule of criminal law and healthy folk feelings" justified punishment. 1 Reichsgesetzblatt at 839, cited in Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (London, 1991), 74.
- 66 Legislating new rules against the new crimes is not satisfactory because this still allows the first perpetrators of the crimes to go unpunished. Even outside the scope of criminal law this solution is not wholly satisfactory because legislation is not quick enough to adjust to new economic and social conditions. For an early formulation of the problem, see John Dewey, "Logical Method and Law," *The Cornell Law Quarterly* 10 (1924): 17, 26.
- 67 *Eichmann in Jerusalem*, 254.
- 68 This line of argument is still missing from Arendt's report, but is developed later in her lectures on Kant. For Arendt's solution to this problem, which involves a thorough examination of the role of common sense ("sensus communis") in judgment, see Leora Y. Bilsky, "The Narrative Turn in Legal Scholarship" (J.S.D. diss., Yale Law School, 1995), 319–50.
- 69 *Eichmann in Jerusalem*, 274.
- 70 Müller, *Hitler's Justice*, 70–81; this charge is raised by one of the critics of Arendt's report, Jacob Robinson, *And the Crooked Shall Be Made Straight: The Eichmann Trial, the Jewish Catastrophe, and Hannah Arendt's Narrative* (Philadelphia, 1965), 66–67, 134.
- 71 *Lectures*, 42–43.
- 72 Hannah Arendt, *Between Past and Future* (New York, 1993), 241.
- 73 *Ibid.*, 221. See also *Lectures*, 72 ("when one judges one judges as a member of a human community").
- 74 A confusion that made many of Arendt's critics accuse her of sympathizing with Eichmann. See Marie Syrkin, "Hannah Arendt and the

Clothes of the Empress," *Dissent* (Autumn 1963): 342, 346–47, 348; idem, "Miss Arendt Surveys the Holocaust," *Jewish Frontier* (May 1963): 7, 9–10; Jacob Robinson, "A Report on the Evil of Banality: The Arendt Book," *Facts* 15, no. 1 (July–Aug. 1963): 263; and Richard I. Cohen, "Breaking the Code: Hannah Arendt's *Eichmann in Jerusalem* and the Public Polemic: Myth, Memory and Historical Imagination," in Dina Porat and Shlomo Simonsohn, eds., *Michael: The Diaspora Research Institute*, vol. 13 (Tel Aviv, 1993), 29, 61.

- 75 *Lectures*, 42. Her rejection of "love" and "empathy" from judgment was misunderstood as an attempt to transcend particularity and reach a universally valid judgment. See Barber, *The Conquest of Politics*, 198. Even though Arendt rejects "empathy" as a proper stance for judgment because it destroys the "inbetween which relates us to and separates us from others," she remains critical of an "objective" stance that erases the space between actor and spectator by attempting to jump outside the mêlée of opinions altogether. See *Between Past and Future*, 11. Either position (empathy, objectivity) commits the same mistake of trying to reduce judgment to one of the poles (actor or spectator respectively).
- 76 See Young-Bruehl, *Hannah Arendt*, 343; and Daniel Bell, "The Alphabet of Justice: Reflections on 'Eichmann in Jerusalem'," *Partisan Review* (Fall 1963): 417; cf. Seyla Benhabib, *The Reluctant Modernism of Hannah Arendt* (Thousand Oaks, CA, 1996), 185.
- 77 See "'Eichmann in Jerusalem,' An Exchange of Letters between Gershom Scholem and Hannah Arendt," 51. For criticism of her ironic style, see Syrkin, "Hannah Arendt and the Clothes of the Empress," 346; and Bell, "The Alphabet of Justice," 417, 418. Arendt's ironic style can also be read as a narrative strategy intended to ensure that her readers will refrain from sentimental judgments and will retain a proper distance to enable their critical judgment (prepare them for enlarged mentality). See Dagmar Barnouw, *Visible Spaces: Hannah Arendt and the German-Jewish Experience* (Baltimore and London, 1990) 238. Cf. Brecht's ideas about creating an "alienation effect" in the theater for the sake of developing the critical approach of the audience. Bertolt Brecht, "Alienation Effects in Chinese Acting," in *The Modern Theater*, ed. D. Seltzer (1967), 276, 277.
- 78 See *Between Past and Future*, 223: "By his manner of judging, the person discloses to an extent also himself, what kind of person he is, and this disclosure, which is involuntary, gains in validity to the degree that it has liberated itself from merely individual idiosyncrasies."
- 79 Walter Benjamin, *Illuminations*, ed. Hannah Arendt, trans. Harry Zohn (New York, 1969), 89.
- 80 Hannah Arendt, *Men in Dark Times* (London, 1970), 21 (my emphasis).

- 81 For an elaboration of this humanizing effect of public judgment, see Arendt's essay on Lessing in *ibid.*, 3–31.
- 82 For a discussion of the use of narratives as sense-making tools in trials, see Peter Brooks and Paul Gewirtz, eds., *Law's Stories* (New Haven, 1996).
- 83 Keren, in "Ben Gurion's Theory of Sovereignty," explicates the role of the trial in building the legacy of Israeli sovereignty through the symbols of law. Once the role of narratives in trials and their contribution to communal identity are admitted, it becomes critical to explore the type of identity that they facilitate. See Binder, "Representing Nazism."
- 84 *Eichmann in Jerusalem*, 229.
- 85 *Ibid.*, 232–33.
- 86 *The Human Condition*, 192.
- 87 *Lectures*, 55, 68–69.
- 88 Cf. the traditional understanding of the role of the judge in common law adjudication as performing retrospective, detached judgment and the current changes in this role toward more involved and future-oriented judgments. Lon Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978): 353; Owen Fiss, "The Supreme Court 1978 Term, Foreword: The Forms of Justice," *Ibid.* 93 (1979): 1.
- 89 *The Life of the Mind*, 207.
- 90 Arendt, "Imagination," in *Lectures*, 79–85.
- 91 *Between Past and Future*, 11. For a discussion of the temporality of human action and its implication for historical judgment, see David Carr, *Time, Narrative, and History* (Bloomington, IN, 1986), esp. 45–99. Carr uses the insights of phenomenology to challenge the whole distinction between actor and spectator.
- 92 *Lectures*, 63.
- 93 *Ibid.*, 72.
- 94 Cf. Arendt's position about the ability of the Israeli judges to render a just judgment notwithstanding their being part of the group of the Jewish victims. *Eichmann in Jerusalem*, 259.
- 95 Martha L. Minow and Elizabeth V. Spelman, "Passion for Justice," *Cardozo Law Review* 10: (1988): 37–76.
- 96 Milner Ball, "The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater," *Stanford Law Review* 28 (Fall 1975): 103–104.
- 97 *Eichmann in Jerusalem*, 211.
- 98 *Ibid.*, 251–52.
- 99 *Lectures*, 64.

- 100 Hannah Arendt, *The Origins of Totalitarianism* (New York, 1958), 459. See also Young-Bruehl, *Hannah Arendt*, 371.
- 101 Richard J. Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge, MA, 1996), attributes the change from radical to banal evil to Arendt's switch in focus from superfluosness to thoughtlessness (p. 152), although he does not explain the source of the change. I would suggest that superfluosness is linked to the experience of the *victims* of totalitarian regimes, which was Arendt's focus in *The Origins of Totalitarianism*, while in *Eichmann in Jerusalem* she turned her attention to the thoughtlessness of the *perpetrators*, i.e. the lack of judgment of Eichmann the actor.
- 102 Cf. *The Origins of Totalitarianism*, viii; *Eichmann in Jerusalem*, 263.
- 103 *Men in Dark Times*, ix.
- 104 *Eichmann in Jerusalem*, 233.