

The Judge as Tragic Hero: An Arendtian Critique of Judging

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I.

In his book *Justice Accused*,¹ Robert Cover explores how and why ante-bellum Federal judges who were opposed to slavery consistently upheld the constitutionality of the Fugitive Slave Act of 1850.² These judges claimed that despite their strong personal convictions that slavery was immoral and wrong, they were constrained by the U.S. Constitution to declare the Act constitutional.³ As Cover convincingly demonstrates, however, the arguments for the constitutionality of the Act of 1850 were not widely perceived to be ironclad, even in 1850.⁴ Nevertheless, the judges, at least some of whom were sincere in their opposition to slavery, upheld the Act.

In justifying their decision the judges relied on what Cover calls the ‘judicial can’t.’⁵ The judicial can’t is easily understood since it lies at the core of what most Americans understand judging to be: It invokes the duty of the judge to follow the law, not to make it. Confronted with claims by white lawyers on behalf of fugitive slaves that the Fugitive Slave Act was unconstitutional, the anti-slavery judges almost uniformly responded by invoking the formal limit of their powers. “As a citizen and as a man,” they said, “I may admit the injustice and immorality of slavery. ... But as a jurist, I must look at that standard of morality, which the law prescribes.”⁶ These judges felt themselves to be responding to a calling; their roles as judges required them courageously to suppress their personal morality in the service of higher principle which they understood as the impartial application of formal rules.⁷

1 Robert Cover, *Justice Accused*, (1975).

2 The Act dealt primarily with the jurisdiction and appointment of federal magistrates who would issue certificates for the return of escaped slaves. The magistrate was to oversee the proceedings and examine the affidavits of the slaveholder or his representative and then issue a certificate for the slave’s return. Slaves themselves were explicitly prevented from testifying and the Act also compensated the magistrates \$10 when they returned slaves and only \$5 when they denied the slaveholder’s petition. *Id.*, pg. 175.

3 See Article 4, US. Constitution.

4 See Cover, *supra* note 1, at 119-97.

5 *Id.* at 119.

6 *Id.* at 120 citing *Jackson v. Bullock*, 12 Conn. 39 (1837) (Judge Bissell dissenting). See also Justice McLean’s statement in *Miller v. McQuerry* that the question of the natural right of slavery “is a field which judges can not explore” (cited in *Id.* at 120).

7 For an interesting theory on why judges appear to welcome their subjection to law, see Slavoj Žižek, *The Sublime Object of Ideology* (1989). Žižek argues that the law as it is expressed from Kant onwards, is that we must deny ourselves the free reign of our inclinations. The moral law, therefore, is precisely the

I am interested in exploring why some judges, like those Cover discusses, rhetorically portray themselves as tragic heroes who are bound by the law when others, both dissenting judges and respected legal observers, argue that the law is unsettled.⁸ The questions of how judges judge, and why they judge as they do are important for two reasons. First, what judges say matters. The words judges speak are transformed into the deeds of the executioner, the warden, and the immigration official.⁹ Further, as the centrality and importance of law in society expands, judges are now frequently responsible for deciding issues of primary importance to the way we, as a society, wish to live. From issues of abortion to those of environmental protection and even of free speech, moral and political debates have become increasingly legalized. Second, when judges claim they are bound by the laws, they are making an argument—an appeal to those of us upon whose consent their judicial authority rests—that being bound by laws is the appropriate way for a judge to approach his role.¹⁰ How judges defend their approach to judging, therefore, is likely to shed light on how as a society we believe that the major social and political decisions that judges make should be approached.

Saying ‘I can’t’ rhetorically absolves the judge from having to make a choice or from assuming responsibility for the political or moral consequences of her decision. Of course the judge still makes a choice and assumes responsibility for her decision to act in accordance with the law; however, she is only deciding to act as she imagines herself to be instructed.¹¹ To say ‘I won’t’, on the other hand, frames the decision as a choice, and thus requires judges to weigh competing moral imperatives and then privilege one over the other.

The competing moral imperatives in the fugitive slave cases were clear to the judges Cover describes. On one side was their belief that slavery was evil, and that it contravened both natural law and common morality. On the other side was their argument that they were rule-bound actors who were obliged to enforce the democratically enacted Fugitive Slave Act. These positions appeal to two different understandings of the verb and the action, to judge. The first appeals to judgment, understood in the Kantian sense, as a free act of autonomous yet universal legislation. The second appeals to the judges’ understanding of themselves as role-players who are bonded to the application of particular cases to general legal rules.

Yet these two positions on how a judge should approach his job of judging need not be contradictory. One may agree that a judge should understand his role as being bound by the law and not as that of a legislator. Nevertheless, contrary to the positivist assertions of the judges Cover discusses, agreement on how a judge is to approach his task is only the beginning and not the end of the judicial inquiry. Not for a lack of trying, legal positivists

renunciation of the desire to transgress the limits of the law—i.e. to subject oneself to the law. According to Žižek, what we in fact desire is the law itself.

8 The tragic flaw that compels the ante-bellum judges to uphold laws they consider inherently unjust is the supposed virtue of fidelity to the law. Like Captain Vere in Melville’s novel *Billy Budd* and Creon in Sophocles’ *Antigone*, the ante-bellum judges appeal to their role as agents of the legal order to justify actions which are, in the objective *nomos* in which the judges exist, considered unjust.

9 See Robert Cover, “Violence and the Word” 95 *Yale Law Review* 1601 (1986).

10 See Jerry Frug, “Argument As Character,” 40 *Stanford Law Review* 869 (1988).

11 The judges’ rhetorical move of presenting her role as that of merely interpreting the will of the people serves as a legitimizing discourse. *Id.*, at 869.

—those who believe judges should judge according to either a close textual exegesis or an accessible standard such as efficiency—have yet to identify a master rule on which legal interpretation can be grounded. The law does not remain static; it grows and adapts while continually incorporating new understandings and re-interpretations. Even judges who proclaim absolute fidelity to the same rules, precedents, and institutional obligations, can and often do disagree as to the outcome of a case. Despite their protestations, therefore, the ante-bellum judges who upheld the fugitive slave laws did have a choice of whether to find the Fugitive Slave Act unconstitutional.¹² Judges, Cover reminds us, are never as constrained in their legal interpretations as they claim to be.¹³

As does Cover, Hannah Arendt remains committed to the belief that people have more freedom to resist the rationalized injustices of bureaucratic institutions than they usually believe.¹⁴ Arendt attempted to balance her acknowledgment of the need for the stability guaranteed by a legal-political order with a demand that we as humans can and must assume responsibility over our collective fate. In this paper I explore Arendt's attempt to negotiate, without resolving, what I call the paradox of autonomy and limitation. We, as individuals, as citizens, and as members of various political organizations, possess some level of freedom and autonomy to create and to change who and what we are; yet we must limit that autonomy in order to live peaceably together. While Arendt addresses this paradox as part of her philosophical investigation of politics, autonomy and limitation correspond to the two understandings of judging mentioned above. Autonomy requires that a judge consider himself capable of creating new laws, while limitation demands that a judge remain bound by his duty to interpret the law. Arendt's unwillingness to resolve these paradoxes—e.g. by declaring the substantive norms and limits governing the terms of political or judicial autonomy—is ultimately, I argue, an ethical attempt to preserve a space of human freedom, autonomy, and self-creation as a dynamic force within a stable and successful legal order.¹⁵

¹² Cover advances a number of legal and constitutional theories available to the judges and advanced by the lawyers representing the slaves which could have been adopted by the judges. See Cover, *supra* note 1, at 62-119 and 131-197.

¹³ *Id.*

¹⁴ See e.g. Hannah Arendt, "Eichmann in Jerusalem: An Exchange of Letters between Gershom Scholem and Hannah Arendt," in *Jew as Pariah*, ed. by Ron H. Feldman (1978) pg. 248-9.

¹⁵ In reading Arendt as ethically clearing a space in which politics and judgment is held to be both necessary and impossible, I am suggesting a connection between Arendt and what certain contemporary philosophers have called ethical deconstruction. See e.g. Drucilla Cornell, *The Philosophy of the Limit*, (1992) pgs. 81-90 and Jacques Derrida, "The Force of Law," 11 *Cardozo Law Review* 919 (1990). Ethical deconstruction, as developed by Jacques Derrida and Drucilla Cornell relies on what they call a double move in reading through which the reader must both be responsive to what is being read, and also take responsibility for what the reader makes the text become as a result of his reading. Translated into the sphere of ethics, the subject must recognize that the Other she confronts exists as other and can never be known. No matter how one tries to bring the Other into oneself, the Other as Other always resists such a sublimation and maintains itself as Other through its excess—its *jouissance*—which cannot be unmediately represented. The Other therefore imposes certain limitations on an ethical subject's attempt to know, to understand, or to read the Other. An ethical reading is one in which the reader is understood to exercise responsibility to the otherness of the text, a self-imposed limit to the reader's claim of autonomy which respects the integrity of the other. Likewise, ethical judgment requires that the judge take seriously the particularity of the person be judged and refrain from unproblematically subsuming particular persons and events under general rules. For a more detailed analysis of ethical deconstruction in Cornell's philosophy, see my review of Cornell's work, "Risk of the Self: Drucilla Cornell's Transformative Philosophy," 9 *Berkeley Women's Law Journal* 175 (1994).

In exploring Arendt's unwillingness to resolve the paradox of autonomy and limitation, I read Arendt's own act of judging in the epilogue of her book *Eichmann in Jerusalem* as an ethical critique of the Israeli judges who, in sentencing Eichmann to death, justified their decision by appealing to their role as interpreters of general laws. In appealing to laws and legal precedents, the positive legal system, which, Arendt argues, was completely inadequate to justify the court's decision, the Israeli court, like the ante-bellum judges in Cover's study, sought to deny their autonomy in a case in which ethical acceptance of their at least partial autonomy was called for. Rather than meet the unique and exceptional case presented by Eichmann in its terrifying particularity, the Israeli judges subsumed Eichmann's compliance with a genocidal regime under the existing criminal laws of Israel. By opposing her confident and definitive judgment as an appeal to the normative community to the judges' rule-bound approach, Arendt suggests that judges, at least in certain extraordinary circumstances, should recognize their freedom to judge freed from the constraints of general guidelines and autonomously will themselves to act. Arendt appeals to all of us, judges as well as those of us who may seek to maintain our innocence by faithfully obeying the law, to assume our obligation to think, to judge, and to act in response to particular events without the illusory assurance of the judicial 'can't.' Such an attitude toward the law need not deny the importance of law as a stabilizing and moral force in society; it does, however, suggest that obedience to law should proceed under the aegis of a law that acknowledges transformative potentialities, rather than operate under the fiction of legal certainty.

II. Thoughtlessness

In *Eichmann in Jerusalem*, Arendt argues that Eichmann's complicity with the Nazi regime and participation in carrying out the Final Solution illustrates what she terms the banality of evil;¹⁶ the fact that evil can be and is sometimes perpetrated by individuals whose only fault is the bureaucratic virtue of blindly obeying the law. While the Israeli court perceived that Eichmann's crimes were unprecedented, it was unable or unwilling to understand that Eichmann was not an evil monster, a devil, or even a virulent anti-Semite,¹⁷ but rather that he was "terribly and terrifyingly normal."¹⁸ Eichmann's complicity in genocide was not the result of his being a fanatic or an ideologue, Arendt argues, but rather of his being shallow and thoughtless. Eichmann did not think about what he was doing. Inured by his thoughtlessness against intermittent flashes of reality—his recognition that the Jews were as human as himself—Eichmann saw himself as a victim, a cog in a machine, who was simply doing his duty by following orders.¹⁹

The banality of evil accompanies what Arendt decries as the rise of thoughtlessness. Thoughtlessness, "the heedless recklessness or hopeless confusion of our time,"²⁰ presents

16 Hannah Arendt, *Eichmann in Jerusalem* (1963) at 252 [hereafter *Eichmann*].

17 Arendt notes that Eichmann had never read *Mein Kampf* (*Id.* at 33) and professed to have Jewish friends and family which he presents as proof that he had no ill will toward Jews (*Id.* at 29-30).

18 *Id.* 276

19 Arendt argues that Eichmann understood himself and reality only through 'officialese,' what he called his only language. Officialese, the language of clichés and empty talk proved to be "the most reliable of all safeguards against the words and the presence of others, and hence against reality as such." *Id.* at 49.

20 Hannah Arendt, *The Human Condition*, (1958) pg. 5 [hereafter HC].

the modern world with the danger not of disruptive transgression, but of unthinking obedience to an unjust authority. Eichmann's thoughtlessness represents only one frightening example of what Arendt fears that the people of the world are becoming. When Arendt describes Eichmann as 'normal,' she means that he, at least as he perceived himself, was simply trying to secure for himself and his family the modern bourgeoisie lifestyle he, like most of us in the Western industrialized world, had been taught to respect. It was ambition rather than hatred, Arendt argues, that motivated Eichmann to join the SS.²¹

In addition to economic security, however, Arendt argues that Eichmann justified complicity in the Final Solution by denying personal responsibility. Bureaucratic authority serves as an essential condition for denying responsibility, Arendt argues, because it allows people to refuse to think about what they do. State and private bureaucracies require a rationalized division of labor and emphasize hierarchy and efficiency, to provide ready rationalizations for 'normal jobholders and family men' to justify their otherwise unjustifiable actions.²² Their "conscience cleared through the bureaucratic organization of their acts," these shallow men, who "out of sheer passion ... would never do harm to a fly," were able systematically to murder millions of Jews and Gypsies, and still not to think about what they were doing long enough to recognize themselves as murderers.²³

Arendt defines totalitarianism as a "methodical genocide 'within the frame of a legal order.'"²⁴ Her insight is that there is no bureaucracy yet invented that is better geared to absolving its actors from personal responsibility for their acts and thus encouraging the rise of thoughtlessness than the modern legal system. Because the efficacy of law depends so heavily on its ability to do violence, it must develop and employ "cues that operate to bypass or suppress the psycho-social mechanisms that usually inhibit people's actions causing pain and death."²⁵ In other words, the wardens and executioners who voluntarily exercise the acts of violence and domination required by the law, need to overcome the

21 Eichmann, supra note 16, at 33. In his search for security and prestige, Eichmann is similar to what

Arendt terms the *pater familias*, the family man. [Hannah Arendt, "Organized Guilt and Universal Responsibility," in Arendt, The Jew as Pariah, supra note 14, at 232.] In her early attempts to understand why so many 'normal' Germans participated in the Nazi genocide machine, Arendt suggests that the 'chaotic economic conditions of our time' have uprooted families and elevated a concern for security to the forefront of the bourgeoisie mind. For the sake of his economic security and his family, the bourgeoisie family man, Arendt argues, "was ready to sacrifice his beliefs, his honor, and his human dignity ... The only condition he put was that he should be fully exempted from responsibility for his acts." Id.

22 Id.

23 Id. at 234. Arendt quotes a dialogue between an American correspondent and a German soldier:

Q: Did you kill people in the Camp? A: Yes.

Q: Did you poison them with gas? A: Yes.

...

Q: What did you think of what was going on? A: It was bad at first but we got used to it.

Q: Do you know the Russians will hang you? A: (Bursting into tears) Why should they? What have I done? [Id. pg. 231, (quoting PM, Sunday, Nov. 12, 1944)].

As Arendt remarks, "Really he had done nothing. He had only carried out orders and since when has it been a crime to carry out orders?" at 231.

24 George Kateb, Hannah Arendt, (1984) pg. 76 citing Hannah Arendt, "Personal Responsibility Under Dictatorship."

25 Cover, "Violence and the Word," supra note 9, at 1613.

normal inhibitions which restrain their autonomous behavior. One of the most effective ways in which the law does this is through its division of labor between judges who are responsible for interpreting the law's words, and prison and court officers who are responsible for administering the law's deeds. As Robert Cover argues in his essay "Violence and the Word," the legal bureaucracy facilitates the job of those charged with doing its violence by separating them from the responsibility for thinking about the justice of their acts. "No wardens, guards or executioners," Cover writes, "wait for a telephone call from the latest constitutional law scholar, jurisprude or critic before executing prisoners, no matter how compelling the interpretations of these others may be."²⁶ The bureaucratic division of labor makes it easier, therefore, for

"[p]ersons who act within social organizations that exercise authority [to] act violently without experiencing the normal inhibitions or the normal degree of inhibition which regulates the behavior of those who act autonomously. When judges interpret, they trigger agentic behavior within just such an institution or social organization"²⁷.

In justifying his actions, Eichmann did not claim, as did the German generals at Nuremberg, the defense of obeying orders. It was not simply orders which Eichmann obeyed; Arendt argues that to understand Eichmann's compliance—his agentic behavior—it is necessary to understand that Eichmann saw himself as duty-bound to obey the laws. In the Nazi regime, where the will of the Führer was the law, Eichmann was a law-abiding citizen.²⁸ As Arendt shows, there were times when Eichmann explicitly disobeyed Himmler's bureaucratic directives seeking to moderate the Final Solution because "Eichmann knew that Himmler's orders ran directly counter to the Führer's order."²⁹ Eichmann saw Himmler as corrupt, someone who thought himself above the law, and thus Eichmann justified his disobedience by appealing to the law. Eichmann did not oppose Himmler's moderation at the end of the war out of a "boundless hatred of Jews," as the prosecution in the Israeli trial argued; he did so because his conscience prohibited him from disobeying the law as he knew it. In the Nazi regime, conscience becomes an unreliable guide which is demonstrated by the fact that Eichmann felt bound by his conscience to obey the law.³⁰

It is just such a situation that the Eichmann trial presented to the Israeli court and to Arendt. Eichmann invoked his own version of the Kantian formula of duty: To be a law-abiding citizen meant not merely to obey the laws, but to act as if one were the legislator of the laws that one obeys.³¹ As Arendt argues, this interpretation of Kant's categorical

²⁶ *Id.* 1625.

²⁷ *Id.*, at 1613-1615.

²⁸ Arendt, *Eichmann*, *supra* note 16, at 24. This of course is a controversial claim in legal theory debates. See H.L.A. Hart, "Legal Positivism and the Separation of Law and Morals," 71 *Harvard Law Review*, 598 (1958).

²⁹ Arendt, *Eichmann*, *supra* note 16, at 147.

³⁰ "For the 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, as it had prompted him to move in the opposite direction for a short time three years before." *Id.*, at 146.

³¹ *Id.* at 135-36. It is interesting to note that Hegel warned of the danger of Kant's being read in this subjectivist way in the Preface to the *Philosophy of Right*. See Hegel, *The Philosophy of Right*, trans. by T.M. Knox (1952) pgs. 5-6. For an argument that Hegel's attack on J.F. Fries and the nationalistic, ant-Semitic, and terrorist

imperative missed what she believes to be the essential element of Kant's formulation: That by thinking and the use of 'practical reason,' one must act according to the principles that could and should be the principle of universal laws. What Eichmann drops out of Kant's imperative is universality.

The problem of the banality of evil reaches its height when the duty to obey the laws can be invoked in the name of evil. Because obedience to the law remains for many a cardinal virtue—even greater than the simple virtue of obedience to orders,—we need not think about what we are doing when we obey laws. Like wardens and executioners, businessmen whose lawyers tell them that it is not illegal to build dangerously defective cars or to pollute the world's environment, do not usually call up their local constitutional scholars or moral philosophers to discuss the implications of their acts. While reflection and argumentation may (or may not) suggest that executing a murderer is different from exterminating entire races of people, the agents of the legal system, like Eichmann, rely on legal authorization of their actions to justify their violence. It is easier for an executioner, instead of thinking about the death penalty in general or its specific application to the prisoner before him, simply to throw the switch and consider himself as a law abiding citizen. Indeed such rationalizations are necessary for the efficient workings of our modern society.

Arendt's awareness and fear of thoughtlessness is linked to her enduring commitment to and engagement with the relation between thought and political freedom. The greatest threat to that freedom today, Arendt argues, is the thoughtless acceptance of our individual and collective powerlessness.³² When people act as if they are constituted by their society—i.e. if they understand their condition to be one of heteronomy—then politics, the process of choosing how to live, becomes secondary if not meaningless. It is when we as citizens internalize Eichmann's conclusion that he "no longer 'was master of his own deeds,' [and] that he was unable 'to change anything,'"³³ that we, as he did, cease to think about who we are and where we are going. It is precisely when the members of a society cease to think and thus abdicate their responsibility for self-creation, Arendt argues, that the potential of evil in modern society arises.

In spite of over two centuries of social science research that has sought to prove that individuals are constituted and determined by their environment, Arendt strives to remind us that we retain some measure of autonomy. To assert autonomy is neither vainly to assert our absolute freedom from the past nor to claim our sovereignty and mastery over the world. Arendt recognizes that we are, as Heidegger argues, always already 'thrown' into this world, and that who we are is in a significant way 'rooted' in the

student movement which Fries supported is presented as a warning against the degeneration of Kantian philosophy into an "ethic of mere subjective intentions," see "The Owl of Minerva and the Critical Mind," by Shlomo Avineri, in *Hegel's Theory of the Modern State*, ed. by Avineri (1972), pg. 120.

³² While Arendt recognized that outright resistance to totalitarian regimes is sometimes impossible, she does argue that even if one does not resist, he has the power to 'do nothing' (Arendt, *Jew as Pariah*, supra note 14, at 248). Even members of the SS, Arendt notes, could ask to be relieved of their duties without any penalties. (249) For another account of how individual people within post-totalitarian or bureaucratic regimes can exercise power simply by asserting their right to not participate in the regime's programs, see Vaclav Havel, "The Power of the Powerless," trans. by P. Wilson, in Vaclav Havel, *Living in Truth*, ed. by Jan Vladislav, 1986.

³³ Arendt, *Eichmann*, supra note 16, at 136.

history into which we are born.³⁴ Autonomy does assert, however, that people are the source of their laws—i.e. they have at least some capacity for self-creation—and that they are at least partially free to choose or judge who and what they will be.

For people who claim autonomy and with it the freedom to judge particular events according to their wills, there are two related dilemmas.³⁵ The first is the dilemma of autonomy itself: how do we who are free and thus without ultimate grounds, make choices or judgments about how to organize our lives? The second is the dilemma of limitation: once we have chosen how to live our lives, how can we ensure that we (and our posterity) will choose to abide by our choices and live according to the institutions we have created? Together, the dilemmas of autonomy and limitation comprise one of the central paradoxes of politics as it is understood in the Greek and Western tradition. Much of Western political theory has been obsessed with resolving or, at the least, taming this paradox; against this trend, I argue in the next two sections that Arendt sought instead to articulate and affirm this paradoxical need for both autonomy and limitation. To accept limits of the way the world is is to foreclose the possibility and the need to aspire to a better world; it is to imprison oneself in positivism and thus to eclipse the transformative possibilities and potentialities of imagining a new future. Throwing away the limits of the present, however, even in the name of a more just future order, ignores the basic rootedness within which we live. For Arendt, there is no ethical or productive way to reconcile the needs of freedom and order except by courageously and simultaneously embracing both.

III. Autonomy and Limitation

Man is a political animal, Arendt argues, not only because he has the faculties of speech and action, but also because he is to an important degree fated to try and found stable and lasting institutions and conventions in which he can live together with others. Politics is about the founding and maintenance of collective social structures within which man must live. Citizens can, through politics, partially escape the constraints of the social and historical processes which otherwise govern their lives, and come to understand the true meaning of autonomy: that people are the makers of their norms and the partial masters of their fate.³⁶

34 See Martin Heidegger, *The Metaphysical Foundations of Logic*, (1984) pg. 138. The characteristic of thrownness (*Geworfenheit*) is a metaphysical presupposition of our being in, and therefore, to a certain degree, overwhelmed by and governed by, our world.

35 For a more involved account of these dilemmas see Cornelius Castoriadis, “The Greek Polis and the Creation of Democracy,” in Cornelius Castoriadis, *Philosophy, Politics, and Autonomy* (1991), pg. 81 [hereafter Castoriadis].

36 Arendt usually speaks of freedom and not autonomy and she has significant reasons for doing so. Because action is always narrative, and thus indeterminate, man can, as she says, never master his world. [Arendt, *HC*, supra note 20, at 234] Autonomy, understood as self-rule, is in many ways closer to sovereignty which Arendt recognizes as an impossible but necessary aspiration. Yet Arendt’s use of freedom is often very similar to what I mean by autonomy. Freedom, she says, “is the freedom to call something into being which did not exist before, which was not given, not even as an object of cognition or imagination, and which therefore, strictly speaking, could not be known.” [Hannah Arendt, “What is Freedom?,” in *Between Past and Future*, ed. by Hannah Arendt (1977) pg. 151 {hereafter Freedom}] Thus freedom includes the ability to create, even if such creation is ultimately indeterminate and contingent. Understood in this way, freedom and autonomy are synonymous. I favor autonomy because I think it better represents the thrust of Arendt’s meaning, even

Politics, Arendt argues, requires both autonomous action and the limitation of that action. Action, she argues, has three basic features: plurality, natality, and narrativity.³⁷ Plurality signifies that all people are both alike and unique and is, Arendt argues, “the basic condition of both action and speech.”³⁸ Plurality is both what defines all people as members of the same species and what recognizes their unique individuality and capacity for individual thought. Natality refers to the capacity of equal and yet distinct subjects to speak and to act publicly and thus through “word and deed” to insert themselves “into the human world.”³⁹ Natality is like a ‘second birth’ and the capacity for creation. To act, Arendt writes, is to take an initiative, to begin, and to create something new, something which may be extraordinary and unexpected. “The fact that man is capable of action means that the unexpected can be expected from him, that he can perform what is infinitely improbable.”⁴⁰ Natality is necessary for politics—especially for a politics that is to recognize man’s autonomy. It is only if man retains the possibility of action that he can truly call himself free and that he is capable of participating in politics. While plurality and natality define the conditions of the possibility of man’s autonomy, narrativity reconnects man’s actions to the human world. Action and speech are always immersed in and revealed through a web of human relationships.⁴¹ Thus, while natal actions are marked by their assertion of autonomy, the narrativity of action ensures that human action will be subject to an unending series of interpretations and re-interpretations that prevents man from ever attaining complete freedom, sovereignty, or autonomy.⁴² The narrativity of action prevents natal actions from establishing themselves as certain and ensures the unending need for politics operating in the insurmountable yet fertile space of autonomy and limitation.

While action understood as plurality, natality, and narrativity is necessary for politics, it is not by itself sufficient. Politics also requires a stable space, a space of appearances, which provides the institutional framework within which action and politics occur. The space of appearance serves as a place where citizens can speak and act among others. It is, as Arendt says, “a kind of organized remembrance,” both for the heroic acts of individuals and for the polis “as it arises out of acting and speaking together.”⁴³ The space of appearance exists when people gather to act together and is the precursor of the “formal constitution of the public realm and the various forms of government, that is, the various forms in which the public realm can be organized.”⁴⁴ The space of appearances is the pre-political constitution—i.e. the way of being—of the citizens of the polis and therefore includes certain presuppositions about the way that decisions and politics will be organized.

though I recognize that in doing so I risk the implication of sovereignty which is unintended.

37 See Seyla Benhabib, “Judgment and the Moral Foundations of Politics in Arendt’s Thought,” *Political Theory* (Feb. 1988) pg. 32 [hereafter *Judgment*].

38 Arendt, *HC*, supra note 20, at 175.

39 *Id.*, at 176.

40 *Id.*, at 178.

41 *Id.*, at 181, 183.

42 See *Id.*, at 230-36.

43 *Id.*, at 198.

44 *Id.*, at 199.

Against this pre-political realm of presuppositions, however, the possibility of natality suggests that actors in the public space could challenge the structure of, or even the very presence of, the public space.⁴⁵ The structural paradox running through much of Arendt's work is that pre-political institutions that make politics and stability possible must be maintained, and yet must be constantly open to challenge and redirection by autonomous citizens. Arendt writes, "No civilization—the man-made artifact to house successive generations—would ever have been possible without a framework of stability, to provide the wherein for the flux of change."⁴⁶ As Arendt describes the paradox in *The Human Condition*:

"The frailty of human institutions and laws and, generally, of all matters pertaining to men's living together, arises from the human condition of natality and is quite independent of the frailty of human nature ... The limitations of the law are never entirely reliable safeguards against action from within the body politic, just as the boundaries of territory are never entirely reliable safeguards against action from without. The boundlessness of action is only the other side of its tremendous capacity for establishing relationships, that is, its specific productivity; this is why the old virtue of moderation, of keeping within bounds, is indeed one of the political virtues par excellence, just as the political temptation par excellence is indeed hubris (as the Greeks, fully experienced in the potentialities of action, knew so well) and not the will to power, as we are inclined to believe."⁴⁷

The paradox of Arendtian politics is that the boundlessness of action does not recognize limitation and yet civilization itself requires limitation of action and maintenance of stability. To negotiate this paradox, institutions must be created that institutionalize practices and establish rights or habits on which people can rely.⁴⁸ Some standards on the limits of political action, on the limits of autonomy, must be established. But to resolve the paradox by institutionalizing standards and practices as the basis of politics is to remove those institutions from the political realm—to make them into the pre-political givens of a society—and thus to deny the citizens their autonomy. To follow the opposite approach and embrace the boundlessness of action, however, disregards the necessity of certain basic limitations. To resolve the paradox in either direction, therefore, leads either to a tyranny of the present or an anarchy of the future.

45 Feminist critics of Arendt have argued that Arendt's positioning of the pre-political realm as prior to politics is tied to her privileging of *praxis* over *poesis* and thus the male public realm over the female private realm. While I agree that Arendt's schematic distinction between the public and the private realms in *The Human Condition* is susceptible to such a critique, I believe that Arendt's refusal to ever freeze the political and her embrace of a temporal politics of both limitation and autonomy disrupts any interpretations of her work that too heavily emphasize her schematic division of the world.

46 Hannah Arendt, "Civil Disobedience," in Hannah Arendt, *The Crises of the Republic* (1972) pg. 79 .

47 Arendt, *HC*, supra, note 20, at 191.

48 But Arendt's public space cannot simply be the formal legal guarantees of free speech and the right of assembly. Rather, it is the place of critical reflection, courage, responsibility, and the creation of new norms and orders. Lacking these substantive elements, Arendt's public space becomes "just an open space for advertising, mystification, and pornography—as is increasingly the case today." Castoriadis, supra note 35, at 113. For a fascinating conception of what public space requires (access to a symbolic universe), see Drucilla Cornell, *Transformations* (1993) pgs. 57-111.

One danger in the Arendtian conception of politics is that the paradox itself becomes abstracted into the non-negotiable and reified object of political debate. Arendt's unwillingness to give content to the paradox and to define which substantive institutions and standards should comprise the "normative presuppositions of the political" has disturbed some of her critics.⁴⁹ These critics argue that while Arendt sometimes speaks as if there is a substantive goal of politics, namely agon, there is a tendency in her work to reify politics and to argue that it is politics itself that must be preserved. It is true that Arendt's tendency to mystify politics treats politics as the answer instead of as the question. Democratic politics becomes, for Arendt, "a politics of self-limitation, where the urge to win, to impose one's will on the rest of the community is limited by a recognition of the contingent and relative nature of any claim to speak for the general interest or the community as a whole, including one's own claims."⁵⁰ Arendtian politics becomes, say her critics, a reified end in itself that ignores the substantive interests and concerns of the people.

It is true that Arendt does not attempt to resolve the paradox of autonomy and limitation by recourse to any substantive standards that would determine when limitation should give way to autonomy and vice versa. Arendt recognized the impossibility of definitively defining any normative or moral standards which would give substance to this paradox when she wrote that, "action can be judged only by the criterion of greatness, because it is in its nature to break through the commonly accepted and reach into the extraordinary, where whatever is true in common and everyday life no longer applies because everything that exists is unique and sui generis."⁵¹ But refusing to give moral content to the negotiation of the paradox need not be, as her critics suggest, unethical.

For Arendt, the refusal to determine substantive standards according to which one might resolve the paradox between autonomy and limitation may be an ethical attempt to preserve the political realm as the space of human freedom and natality. In Arendt's work, freedom and politics are inseparable. Freedom is not the liberal or stoic freedom from politics, but the freedom of "men to live together in a political organization."⁵² To have the freedom to act and to create a new world or self is, at the least, to have the freedom to risk the old one. Thus, while Arendt clearly recognized that 'greatness' was inadequate as a moral standard to evaluate action, as well as the necessity of having moral standards, she was unwilling to propose her own substantive moral standards as the pre-political foundation.⁵³

Those who fault Arendt for not specifying the normative presuppositions of politics may miss the democratic spirit in which Arendt's paradoxical presentation of politics is rooted. Politics seeks to erect boundaries that limit freedom in order of protecting a legal order; yet, in a democracy, there cannot be any extra-societal limits on the boundless capacity of action to be self-creating and thus simultaneously world-destroying. That is, in a democratic society, the only limits that can be relied on to restrain the boundlessness of

49 See Seyla Benhabib, *Situating the Self* (1992) pg. 103, and *Judgment*, supra note 37. Benhabib argues, through Habermas, that Arendt neglects the need for a moral foundation of judgment.

50 Alan Keenan, "Arendtian Themes in the Work of Ernesto Laclau," paper on file with author.

51 Arendt, *Human Condition*, supra note 20, at 205.

52 Arendt, *Freedom*, supra note 36, at 146.

53 See Arendt's discussion of Jefferson's and Paine's conclusion that it was "vanity and presumption [to govern] beyond the grave" in Hannah Arendt, *On Revolution* (1963) pg. 233.

action are self-imposed limits, which are often no limits at all. That is why Arendt rightly saw that in a democracy hubris and moderation are respectively the most subversive and most virtuous of political temptations. Hubris is what destroys democratic politics because it extends the truth of democratic autonomy to unsustainable limits. As Cornelius Castoriadis argues:

”Hubris does not simply presuppose freedom, it presupposes the absence of fixed norms, the essential vagueness of the ultimate bearings of our actions. ... Transgressing the law is not hubris, it is a definite and limited misdemeanor. Hubris exists where self-limitation is the only ‘norm,’ where ‘limits’ are transgressed which were nowhere defined.”⁵⁴

If the unlimited autonomy of hubris elevates Man to God, moderation, on the other hand, is the virtue of democratic politics because it recognizes that autonomy can only be preserved if it is limited. Democracy is the regime of self-limitation; once formed, the first goal of democracies is to bring about the institutionalization of self-restraint.

According to Arendt, the key to the attempt to institutionalize self-restraint and to limit the boundlessness of action is the “power of stabilization inherent in the faculty of making promises. ...”⁵⁵ Promises are actions by which a collectivity or a nation seeks to control the incalculability of the future and thus to preserve the institutional reality of the present for an unspecified time into the future. Promising is rooted in natality. It is the most creative of actions, by which citizens themselves bring into being new institutions, new realities, new futures, and new men.⁵⁶ Promising is also the faculty of control and limitation without which, “we would be doomed to swing forever in the ever-recurring cycle of becoming, ...”⁵⁷ Promising presents both the brilliance of autonomy and the security of limits. Thus, instead of resolving the paradox of politics, Arendt suggests that promising, as the “very distinction which marks off human from animal life,”⁵⁸ enables the affirmation of the paradox as central to the human condition.

The distinctively modern attempt to raise the faculty of promising to an institutional level and to apply it to the political problem of natality and limitation is the written constitution. The constitution, as the “fundamental Charter embodying the norms of norms and defining particularly stringent provisions for its revision,”⁵⁹ promises to provide both a fundamental ground for the creation of political institutions and an effective guarantee that those institutions will not be transgressed.⁶⁰ In other words, the constitution is said to solve both the problem of autonomy and that of limitation. Constitutions solve the problem of autonomy by transferring certain norms and standards from the political to the pre-political realm. They solve the problem of limitation by confining formerly political disputes into legal questions. In the next section, I argue that

54 Castoriadis, *supra* note 35, at 115.

55 Arendt, *HC*, *supra* note 20, at 243.

56 *Id.*, at 247. See also *On Revolution*, *supra* note 53, at 175: “There is an element of the world-building capacity of man in the human faculty of making and keeping promises.”

57 Arendt, *HC*, *supra* note 20, at 246.

58 *Id.* 245.

59 Castoriadis, *supra* note 35, at 115.

60 *Id.*

the political paradox of autonomy and limitation is, in constitutional regimes, transformed into the judicial paradox of legislating and following.

IV. Constitutionalism and Judging

Constitutions, Arendt argues, generate new worlds⁶¹ and are the most politically relevant examples of natality. But the problem of the constitution as the source of pre-political norms, as Arendt rightly points out, is that any constitution must itself be unconstitutional. Arendt argues: “The great problem in politics, which I compare to the problem of squaring the circle in geometry [is]: How to find a form of government which puts the law above man.”⁶² She adds, “those who get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they have set out to achieve.”⁶³

The greatest achievement of the American revolution,⁶⁴ Arendt writes, and the reason that the American revolution succeeded where all others were to fail, was the elevation of the constitution from a worldly and political document, to a divine law. The success of the American revolution, Arendt argues, “was decided the very moment when the Constitution began to be ‘worshipped,’ even though it had hardly begun to operate.”⁶⁵ The American Constitution is the foundation of the republic because it combines the mythology of religious divinity, the idea of permanence, and the possibility of change in one document. The Supreme Court, like the Roman Senate to which she analogizes it, continually connects the republic to its origins; it is tied to the originary act of the foundation of the republic and that symbolic limitation provides the Court with its Authority. “[F]oundation, augmentation, and conservation are intimately interrelated, [and that] might well have been the most important single notion which the men of the Revolution adopted. ...”⁶⁶ By incorporating a “pre-rational”⁶⁷ and divine element of a preserved symbolic originary into the constitutional republic, the Founding Fathers, created the constitution as an “absolute authority,” one which inspired a “blind and indiscriminating” obedience.⁶⁸ Once the Constitution, the founding act of the republic, ceased to be considered a political act among others and instead became viewed as the ‘beginning itself’ and as the foundational norm of the republic, the squaring of the circle was accomplished.⁶⁹

The transformation of the constitution from a political act of foundation into a pre-political object of worship is both the beginning and the end of political action. Constitutions, themselves creations, create obligations to abide by the law. It is precisely because of the success of the American constitution in establishing itself as the foundation of a stable legal structure, Arendt argues, “that the revolutionary spirit in America began

61 See Robert Cover, “Nomos and Narrative,” 97 *Harvard Law Review* 4 (1983).

62 Arendt, *On Revolution*, supra note 53, at 183-4 (Quoting Rousseau).

63 *Id.*, 183-4.

64 Arendt, *On Revolution*, supra note 53, at 239.

65 *Id.*, at 198-99.

66 *Id.*, at 200-202. pg. 201.

67 *Id.*, at 192.

68 *Id.*, at 198.

69 *Id.*, at 204.

to wither away, and it was the Constitution itself, this greatest achievement of the American people, which eventually cheated them of their proudest possession.”⁷⁰ In other words, Arendt suggests that the worship of the constitution leads to the permanent foreclosure of politics and, consequently, an unacceptable limitation on human autonomy.⁷¹ Arendt warns:

”[Jefferson’s] occasional, and sometimes violent, antagonism against the Constitution and particularly against those who ‘look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched’, was motivated by a feeling of outrage about the injustice that only his generation should have it in their power ‘to begin the world over again’; for him, as for Paine, it was plain ‘vanity and presumption [to govern] beyond the grave’; it was, moreover, the ‘most ridiculous and insolent of all tyrannies.’ ... The danger and the advantage inherent in all bodies politic that rely on contracts and treaties is that ... [t]he moment promises lose their character as isolated islands of certainty in an ocean of uncertainty, that is, when this faculty is misused to cover the whole ground of the future and to map out a path secured in all directions, they lose their binding power and the whole enterprise becomes self-defeating.”⁷²

A constitution, as Arendt would continually point out with respect to ancient Athens, is a polis, a people and a collectivity which the people themselves create—not from a nullity—but in the continual acts of creation and re-creation which defines for her the height of human happiness. Constitution-making, therefore, is for Arendt something that can never end; it represents what may be called her utopian vision of permanent politics.⁷³

⁷⁰ *Id.*, at 239.

⁷¹ This is, of course, precisely the argument of many liberal theorists in favor of constitutional government. For example, Bruce Ackerman argues that the meaning of constitutional government is that there are certain foundational issues, such as free speech, equal protection, etc. which are too contentious to be openly debated in the public sphere. Ackerman, “Why Dialogue?,” 86 *J. of Philosophy* 16-17 (Jan. 1989) (cited in Benhabib, *Situating the Self*, supra note 49, at 96-97). Seyla Benhabib makes a similar argument but argues that free speech, as the most important norm, should be the only one off limits of debate, a contradiction which she is comfortable with as the substantive normative standard for politics. See Benhabib, *Situating the Self*, supra note 49, at 99. Arendt too believed that substantive limits on autonomy were necessary. [See her letter to Karl Jaspers complaining that during the McCarthy trials: “the judiciary branch ... has ceased to function and ... everything hinges now on the opinion of the people.. ... The republic, which should define the framework and the limits of democracy, is being dissolved from within by democracy.” (Arendt to Jaspers, December 21, 1953, In *Correspondence: Hannah Arendt, Karl Jaspers*, (1993) pg. 235).] The difference between Arendt and the liberals is not that one thinks substantive limits on autonomy are necessary and the other does not, but that while Benhabib believes it ethically necessary to name the limit, Arendt argues that naming the limit is precisely what is unethical.

⁷² Arendt, *HC*, supra note 20, at 233, 244, (my italics).

⁷³ Arendt expresses what may be her utopian vision of permanent politics in describing a letter Jefferson wrote to John Adams. “And Jefferson’s true notion of happiness comes out very clearly. ... when he lets himself go in a mood of playful and sovereign irony and concludes one of his letters to Adams as follows: ‘May we meet there again, in Congress, with our ancient Colleagues, and receive with them the seal of approbation ‘Well done, good and faithful servants.’ Here, behind the irony, we have the candid admission that life in Congress, the joys of discourse, of legislation, of transacting business, of persuading and being persuaded, were to Jefferson no less conclusively a foretaste of an eternal bliss to come than the delight of contemplation had been for medieval piety.” *Id.*, pg 131 (citing Jefferson’s letter to Adams of 11 April 1823).

For those whose job it is to interpret the constitution, the political paradox of autonomy and limitation is recast as the judicial paradox of legislating and following. If, in judging, the Arendtian paradox is to be affirmed, the judge can neither disregard the law and decide according to his will, nor can he simply mechanically apply the law even when, like the ante-bellum judges, he is firmly convinced that the law is morally wrong. The best that a judge can offer is, for Arendt, summed up in Justice Marshall's now famous phrase, "we must never forget that it is a constitution we are expounding."⁷⁴ When Arendt describes the Supreme Court as a constitutional convention in continuous session, she invokes the hope of constitutional government. The hope is to not resolve the paradox either on the side of legislating anew which would destroy legal society or on the side of blind fidelity—even if possible. The essence of being a judge is thinking and judging, which requires a judge to work through and within the Arendtian paradox, without ever hoping to resolve it. The hope of the judge, therefore, is both constantly to re-constitute the world in which she lives, while still preserving the constitution of that world.

How exactly a judge might negotiate the paradox of judging, Arendt never fully elaborates; however, in the epilogue of *Eichmann in Jerusalem*, she publicly announces a hypothetical judgment, which she imagines should have been the decision issued by the court. In the final section, I read Arendt's judgment of Eichmann as a guide to how 'we,' as judges with the responsibility to speak the truth of the Constitution even as we deny the certainty of that truth, should negotiate the paradox of judgment. The judge, Arendt argues, must act—at least in certain situations—to re-authorize the existing framework of legal limitations.

V. Judging Eichmann

Near the end of *Eichmann in Jerusalem*, Arendt quotes from the District Court of Jerusalem's opinion in which it found Adolf Eichmann guilty of crimes against the Jewish people:

"Expressing [Eichmann's] activities in terms of section 23 of our Criminal Code Ordinance, we should say that they were mainly those of a person soliciting by giving counsel or advice to others and of one who enabled or aided others in [the criminal] act.' But 'in such an enormous and complicated crime as the one we are now considering, wherein many people participated, on various levels and in various modes of activity—the planners, the organizers, and those executing the deeds, according to their various ranks—there is not much point in using the ordinary concepts of counseling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals was close to or remote from the actual killer of the victim means nothing, as far as the measure of his responsibility is concerned. On the

⁷⁴ *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). Arendt quotes a version of this issued by Woodrow Wilson: "[T]he Supreme Court is indeed, in Woodrow Wilson's phrase, 'a kind of Constitutional Assembly in continuous session'." Arendt, *On Revolution*, supra note 53, at 200.

contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands.”⁷⁵

For Arendt, the Court’s insight was its recognition that Eichmann’s guilt was not of the usual form, and that his guilt did not conform to the ‘ordinary concepts’ of criminal culpability. While, the usual construction of legal responsibility requires both a guilty act and a guilty mind, it was conceivable, the court admitted, that Eichmann had neither. Eichmann was definitively guilty neither of physically murdering anyone, nor of having the desire to murder anyone. Eichmann was held responsible precisely for his compliance with the law, his lack of resistance to laws he should have known were evil, and his “participation, on various levels and in various modes of activity,” which made it easier for those charged with running the camps, operating the ‘showers,’ and pulling the triggers to commit the atrocity of the holocaust. While Eichmann, himself, may have been responsible for neither the acts themselves nor for conceiving the acts, he was, as Arendt puts it, a “willing instrument in the organization of mass murder,” and thus, at some level, responsible for the consequences of his actions.⁷⁶

The issue of responsibility looms large in the Eichmann trial and in the Court’s opinion. Eichmann claimed that he could not be held personally responsible for crimes committed by a mass of people. He claimed that he was merely a cog in a machine, and that his role in carrying out the Final Solution was an historical accident, that almost any other German could have (and would have, given the opportunity) taken his place if he had refused. Eichmann claimed, in essence, that when all are guilty, none is responsible.

To hold Eichmann responsible for his role in the Final Solution, as the Israeli Court did, required that they judge Eichmann responsible. But responsibility, as it is understood in the West and in Western legal systems, has its genesis in conscience;⁷⁷ that is, in modern Western societies, people are usually considered guilty and responsible for their crimes only when they committed the crime with a guilty mind—i.e. with the requisite *mens rea*—which is understood to be an intent to do an act which is against the law by a person who also can be held responsible for the crime.⁷⁸ The law, therefore, usually assumes the voice of conscience—one’s duty to obey the law—which acts to limit the self-interested desires and inclinations of individuals. In Nazi Germany, however, conscientious obedience to the law ceased to be restraint on evil: evil “lost the quality of temptation. Many Germans and many Nazis ... must have been tempted not to murder, not to rob, not to let their neighbors go off to doom ... and not to become accomplices in all these crimes by benefiting from them. But, God knows, they had learned how to resist temptation.”⁷⁹ The difficulty Eichmann presented the court was that under traditions of positivist law, he had

⁷⁵ Arendt, Eichmann, supra note 16, at 247 (first italics added).

⁷⁶ Id., at 278.

⁷⁷ Arendt, HC, supra note 20, at 245.

⁷⁸ See Sanford Kadish, “Mens Rea—The Mental State Accompanying The Forbidden Acts,” in Criminal Law and its Process (1962) ed. by Paulsen and Kadish, pgs. 229-270. Every crime has a specific level of *mens rea* which a person must be found to have before he can be convicted. In certain circumstances, such as insanity or duress, persons who committed a crime which they intended to commit, may not be considered responsible—and thus would not be considered guilty—if they are not found to have the sufficient level of guilt.

⁷⁹ Eichmann, supra note 16, at 150, 105.

acted according to his conscientious duty to obey the law, and he had acted without a guilty intent. Technically, he was not responsible for his crimes.⁸⁰

Arendt's image of Eichmann as a law abiding citizen is crucial to understanding Arendt's epilogue, where she criticizes the Israeli Court's decision and suggests her own alternative. The irony of the Court's decision is contained in its statement that, "the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands." The Israeli judges, Arendt reminds us, play a role in the social organization of violence. Judges differ from poets and critics because their interpretations, even the weak or bad ones, are carried out "in a field of pain and death."⁸¹ For judges rhetorically to ground their sentence of Eichmann on 53 sections of precedent is, as Arendt implies, to tell Eichmann that he is guilty and sentenced to die because he broke the law—a conclusion that turns on nothing other than the right of the victor to try the loser in the victor's courts.

The judges' insistence that Eichmann's responsibility inhered in his intention to break the law represents an absolute blindness to the very danger that Eichmann embodies. It represents, Arendt suggests, a resistance to thinking, a self-certain and banal thoughtlessness which Arendt argues should be understood as a resistance to the perspective of the other. This resistance to thinking is precisely what Arendt condemns in Eichmann:

"The longer one listened to [Eichmann], 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. No communication was possible with him, not because he lied but because he was surrounded by the most reliable of all safeguards against the words and the presence of others, and hence against reality as such."⁸²

That most reliable of safeguards is none other than the certainty of one's own convictions and identity. Eichmann's thoughtlessness is revealed to Arendt in his self-certainty. Even during his trial, Eichmann maintained that he had acted according to his conscientious duty as a law-abiding citizen. It is for this reason that Arendt cannot sanction the Israeli judge's attempt to kill Eichmann with no other justification than that the law of the victor authorizes it. The Court's blindness to Eichmann's reality—the reality of his certainty of moral conviction as having acted according to his duty to obey the law—is the flip side of its unshakable faith in its own reality—the reality of the judges' own certainty of their moral obligation to judge Eichmann according to Israeli law.

Like the ante-bellum judges, and chillingly like Eichmann as well, the Israeli judges judged Eichmann as different, evil, and thus guilty without engaging in the process of thinking which would have explored the parallels between the judges' self-certainty of their right to judge Eichmann with his similarly legally inspired certainty of his dutiful obligation to follow the Fuhrer's law. Unwilling to question its own self-certainty and thus

80 A mistake of law (claiming that one did an act but did not know it was against the law) is no defense in criminal law. Yet one cannot be prosecuted for committing a wrong, even an intended wrong, if the wrong is not illegal.

81 Cover, "Violence and the Word," supra note 9, at 1609.

82 Hannah Arendt, *The Life of the Mind*, (1978) pg. 49.

claiming to act with the clean hands of moral authority, the Israeli Court, Arendt argues, 'buried' its insights concerning the unprecedented nature of Eichmann's guilt "under a flood of precedents— ... to which the first fifty-three sections of the judgment correspond—many of which sounded, at least to the layman's ear, like elaborate sophisms."⁸³ The Court, Arendt argues, refused to recognize explicitly the true nature of Eichmann's crime, which was thoughtlessly to give his support to a legal regime of organized genocide.

In her introduction to *The Life of the Mind*, Arendt writes that Eichmann's thoughtlessness was the original impulse for her consideration of the question of thought as an activity with the potential to prevent evil. Arendt asks: "Could the activity of thinking as such, the habit of examining whatever happens to come to pass or to attract attention, regardless of results and specific content, could this activity be among the conditions that make men abstain from evil-doing or even actually 'condition' them against it?"⁸⁴ Thinking, for Arendt, is both the activity of critically examining oneself and—and this is included in the former—doing so by imagining oneself through the eyes of others.⁸⁵

While Arendt praises the honesty of parts of the Israeli Court's decision recognizing the novelty of Eichmann's crime, she criticizes the Court for its inability to breakdown the symbolic barrier between the judges and Eichmann. Instead of admitting Eichmann's normalcy, his everyday thoughtlessness, the Court sought to portray Eichmann as a criminal, an other. In contrast to the judges' certitude of their right to judge Eichmann, Arendt through the example of the first 56 pages of her book, makes a courageous effort to understand Eichmann as human and to comprehend how, as human, the rest of us are prone to the same thoughtlessness as was he. What Arendt denied herself is the unquestioned reliance on the safeguard of faith that her own reality is different from and better than Eichmann's; it is such a risk of the self,⁸⁶ an attempt to communicate even when communication seems almost impossible, that Arendt suggests is necessary if justice is to avoid falling into the trap of thoughtlessness.

It is not that Arendt came to respect Eichmann; she most certainly did not. But that she made an effort to understand him and thus to respect him is central to understanding Arendt's attempt to negotiate the paradox of autonomy and limitation in her judgment. Respect, Arendt argues, is the corollary of love in the domain of public affairs and respect, "because it concerns only the person, is quite sufficient to prompt forgiving of what a person did, for the sake of the person."⁸⁷ Forgiveness is predicated on respect because it is the person who is forgiven and not the act. Thus forgiveness, as Arendt argues, is the polar opposite of vengeance. Whereas vengeance re-acts against an original trespass in a spiraling cycle of wrong, forgiveness "is the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it ..."⁸⁸

⁸³ *Id.*, at 263.

⁸⁴ *Life of the Mind*, 5.

⁸⁵ For an example of the difficulty of imagining oneself through the eyes of the other and in doing so of putting the very identity of one's self at risk, see Drucilla Cornell's essay "Diastrotologies," in Cornell, *Transformations*, supra note 48, at 45-56, 170-94.

⁸⁶ For an explanation of what I mean by 'risk of the self,' see my article, "Risk of the self: Drucilla Cornell's Transformative Philosophy," 9 *Berkeley Women's Law Journal*, 175 (1994).

⁸⁷ Arendt, HC, supra note 20, at 243.

⁸⁸ *Id.* at 241.

Forgiveness, as an act of judgment, is an autonomous act that frees both parties from the cycle of vengeance not by erasing the evil of the act, but by coming to respect the actor. Here it is instructive to observe, however sketchily, the similarities between Arendt's unsuccessful attempt to come to respect and therefore to forgive Eichmann, and Hegel's account of the dialectic of the conscientious transgressor and judging consciousness in the *Phenomenology of Spirit*. Eichmann, in Arendt's retelling of Hegel's story, plays the role of the moral actor who acts according to his conscience, his conviction as to his duty. This is why Eichmann's self-image as a conscientious and law-abiding citizen is central to Arendt's text. Like Hegel's moral actor, Eichmann recognized that, "the essence of the action, duty, consists in conscience's conviction about it."⁸⁹ That is, in the realm of morality, the highest truth, the claim to universality, is essentially the moral actor's conviction that he acts according to his duty. Whatever positive content is adopted as the universal duty and thus as the essence of moral obligation cannot be refuted by another consciousness claiming that another content ought to have been placed there instead.

Every content, because it is determinate, stands on the same level as any other, even if it does seem to be characterized by the elimination in it of elements of particularity. It might seem, then, that action for the general good is to be preferred to action for the good of the individual; but this universal duty is simply what already exists as absolute substance, as law and right, and is valid on its own account independently of the individual's knowledge and conviction, not to mention his own immediate interest. It is, therefore, precisely against the form of that duty that morality in general is directed.⁹⁰

But if Eichmann's dutiful adherence to the law is a moral action, that does not mean his actions can escape judgment. "Just as every action is capable of being looked at from the point of view of conformity to duty, so too can it be considered from the point of view of the particularity [of the doer] ..." ⁹¹ As particular, the moral actor's claim to duty, a claim to universality, is subject to judgment as having fallen away from the objective universality of pure duty. For the consciousness that judges, there is no action in which it could not oppose to the universal aspect of the action, the personal aspect of the individuality," and condemn the particularity of the action.⁹² But as Hegel argues, this judging consciousness that condemns the conscientious actor is itself base and hypocritical because it refuses to acknowledge that its own judgment--which it attempts to pass off as dutiful and correct--is itself just another manner of being wicked.

It is the moral actor and not the judging consciousness that recognizes the similarity in these opposing positions and, as did Eichmann, who saw his trial as an opportunity to make "peace with his former enemies."⁹³ Eichmann admitted all he had done, but claimed the mantle of truth: "One of the few gifts fate bestowed upon me is a capacity for truth insofar as it depends on myself."⁹⁴ Such a claim, Arendt cautioned, must be taken seriously, but only to show how Eichmann's self-certainty, his unyielding belief in the veritude of his conscience, makes him appear the clown. Even as a clown, Eichmann--like

⁸⁹ Hegel, *Phenomenology of Spirit*, trans. by A.V. Miller, at 388.

⁹⁰ *Id.* 392.

⁹¹ *Id.* 404.

⁹² *Id.*

⁹³ Eichmann, *supra* note 20 at 53.

⁹⁴ *Id.* at 54.

Hegel's moral actor--recognizes the similarity those who judge him and, perceiving this identity and giving utterance to it, he [the moral actor] confesses this to the other, and equally expects that the other, having in fact put himself on the same level, will also respond in words in which he will give utterance to this identity with him, and expects that this mutual recognition will now exist in fact. ... But the confession of the one who is wicked, 'I am so', is not followed by a reciprocal similar confession.⁹⁵

The moral actor, like Eichmann, expects his confession of the non-universality of his conscientious action to be met with a similar confession, a reciprocal acknowledgment of the evil and self-certainty of his judges; instead, the moral actor meets with the 'hard heart' of judging consciousness which "rejects any continuity with the other" and repulses and expels that other as evil in contrast to the serene beauty of the judging consciousness. The Israeli judges, like Hegelian 'beautiful souls,' retreat into their comfortable hierarchies (comfortable because they are hierarchical) that enable them to judge Eichmann precisely for what Eichmann admits to doing which is participating in the holocaust.

If the Israeli judges never consider the possibility of respecting Eichmann, Arendt does make that attempt. She has to because, like Hegel, she understands that punishment is in fact a form of forgiveness. The breaking of the hard heart, the safe cocoon of self-certainty erected by the judging consciousness, requires that judge as well as judged recognize that each acts on the conviction of conscience. While one more truthfully represents the spirit of the community, both, in the eyes of the other, are wrong. Punishment, unlike revenge, does not seek to erase the act, but to right the wrong. The wrongdoer, the transgressor, must be shown his transgression from the law and reintegrated into the law. This is the source of both Hegel's line that the law is only actualized in punishment, as well as Arendt's argument that it is impossible "to punish what has turned out to be unforgivable."⁹⁶ Punishment, unlike vengeance, requires forgiveness and forgiveness, which is oriented to the actor rather than the act, requires respect. The respect, as Arendt emphasizes in her unbelieving repetition that Eichmann acted according to his conviction as to his legal duty, is thought, in Hegel's analysis, to arise from the requirement of conscientious action. If someone is a conscientious objector, or breaks the law in the name of conscience, we are comfortable condemning the act, but usually continue to respect the actor's commitment to duty. The wounds of spirit, Hegel assures us, heal, and leave no scars behind. Forgiveness, Arendt adds, is the radical and autonomous newness that, out of respect for the person's conscientiousness, enables the reintegration of the individual into the community.

It must be observed that Arendt's ultimate decision to hang Eichmann is not presented as punishment. It is, as Arendt argues, vengeance for an unforgivable harm. Radical evils are just those acts that can be neither punished or forgiven; the individual drops out and, despite his conscientious convictions, is judged unforgivable. All that can be done in the face of such radical evil, Arendt suggests, is to "repeat with Jesus: 'It were better for him that a millstone were hanged about his neck, and he cast into the sea.'"⁹⁷

⁹⁵ Hegel, at 405.

⁹⁶ Arendt, HC, supra note 20, at 241.

⁹⁷ Id. at 241.

I will come to Arendt's actual judgment in which she hangs a millstone from Eichmann's neck shortly, but it is first necessary to understand how Arendt justifies her ability to sit in judgment of Eichmann. Arendt's attempt to understand Eichmann as worthy of respect, threatens to eliminate the space, the spectatorial distance as well as the temporal reflection which makes judging possible. Judging requires standards and criteria that are applied to another; but when that other is understood, and understood as reciprocal actors to those who judge, judging that other becomes in a sense judging oneself. How is it that Arendt's injunction to think so as to hear the words of the other does not lead to situation in which judging is impossible?

I think Arendt tried to answer this question in her epilogue. "We must stress," Arendt writes, "the judges' firm belief that they had no right to become legislators, that they had to conduct their business within the limits of" the law.⁹⁸ Like the ante-bellum judges who upheld the constitutionality of the Fugitive Slave Act, the Israeli judges appealed to their judicial function as legal technicians whose job was merely to apply the law. At one point, Arendt suggests that the Court could not but approach its task of judging Eichmann except as constrained by the law. She writes: "The Court, moreover, could not overstep these limits without ending 'in complete failure.' ... [I]t speaks with an authority whose very weight depends upon its limitation."⁹⁹ Arendt, here, affirms the judges' own conclusion that the authority of law depends, in large measure, on the treatment of judging as technical application.

Yet in her judgment, the one she suggests that the court should have adopted, Arendt appears to reject precisely the limited attitude towards judging to which the Israeli court appealed. Arendt appeals not to her role as an official judge bonded to the law, but to her role as an autonomous judge with the capacity and the authority to make decisions based on her judgment. To understand why Arendt departs from what she elsewhere calls the "nature of the law"¹⁰⁰ to remain faithful to the law itself, one must take Arendt at her word when she declares Eichmann's crimes and guilt to be unprecedented. For Arendt, Eichmann presented the court with a new and qualitatively different situation, one which could not disingenuously be brought within past legal precedent, and which therefore called for an autonomous act of judging—of creation of a new realm of law.

Does this mean therefore that Arendt, forced to decide between autonomy and limitation, resolves the paradox of judging firmly on the side of autonomy? And if she does, how is her autonomous judgment to be justified except as the prerogative of the victor? Let me state unequivocally that I think there is a difference—one more meaningful than the fact that Arendt and the Israeli judges represent the victors and Eichmann the losers—between the judgments made by Eichmann and the one made by his judges. That difference, however, is hidden within the legalistic justifications of the Israeli court's opinion and only made explicit by Arendt's claim for the intersubjectivity of her judgment.

⁹⁸ Arendt, *Eichmann*, supra note 16, at 274.

⁹⁹ *Id.*, at 253-54. Arendt makes similar arguments in her essay "Civil Disobedience," in which she argues that the authority of judges is dependent upon the consent of the people, a consent which is contingent on the judges' commitment to operate within a defined and limited legal sphere. See Arendt, "Civil Disobedience," supra note 46, at 99-102.

¹⁰⁰ Arendt, "Civil Disobedience," supra note 46, at 99.

Arendt announces what she says is the sentence the court should have read, but dared not. Against Eichmann's protests that he "had never been a Jew-hater," and that he was a 'victim' being forced to 'suffer for the acts of others,' Arendt imagines the court responding:

"[P]olitics is not like the nursery; in politics obedience and support are the same. And just as you supported and carried out a policy of not wanting to share the earth with the Jewish people and the people of a number of other nations—as though you and your superiors had any right to determine who should and who should not inhabit this world—we find that no one, that is, no member of the human race, can be expected to want to share it with you. This is the reason, and the only reason, you must hang."¹⁰¹

What is necessary in a bureaucratic and violent world such as ours, Arendt suggests, is the maturity to take responsibility for objective consequences of one's actions, regardless of one's subjective intent. Importantly, her speech is an argument; it does not seek authority in the laws, but primarily serves to justify her judgment that Eichmann must be held responsible for crimes he committed, even though he lacked, in legal terms, the requisite *mens rea* or responsibility. The difference between Arendt's judgment and the decision read by the Israeli Court centers around Arendt's decision to employ forcefully the rhetorical device of the first person plural: 'We.' It is her use of "we," and thus her attempt to speak to and for an imagined world community, a community that she transforms even as she attempts to speak for it, that, I argue, is the key to Arendt's attempt to negotiate the paradox of autonomy and limitation.

"We find," says Arendt. First, therefore, Arendt seeks to assume collective responsibility for the decision to hang Eichmann. She proclaims her decision as an at least partially autonomous—as opposed to a fully limited—judgment. Second, by using the collective 'we,' Arendt presumes to speak for the relevant community. "We," she argues, find that "no member of the human race" should have to share the Earth with Eichmann. Arendt turns the trial of Eichmann into a collective accusation rather than an attempt to prove specific guilty acts or a guilty mind. She thus professes a faith that the human community will agree with her assertion. By invoking the collective 'we,' Arendt asks those for whom she speaks to accept her characterization of themselves, to accept and take responsibility for their collective action, and thus in doing so, to re-constitute ourselves as individuals.

In writing 'we find,' Arendt imaginatively traverses what I have argued is the central paradox of her political and philosophical thinking, the paradox between political autonomy and political limitation. In sentencing Eichmann based on a subjective determination—the 'we find'—Arendt acknowledges that she, and through her the human race, is the source of the norms upon which collective judgment is founded. In terms of Arendt's own vocabulary, speaking the sentence becomes a political action through which she injects her own self—and with her the human race—into the public sphere of narrative self-creation. Who Hannah Arendt is and, more importantly, who the world is cannot but change as the public begins the never-ending process of interpreting and re-interpreting

¹⁰¹ Arendt, *Eichmann*, *supra* note 16, at 279. (emphasis my own).

the implications of their collective statement. Arendt's speech is, in essence, a claim about collective identity; as a thoughtful claim, it is one that does not reassert a pre-existing and unchanging identity. As a claim, however, it is one that she, nor nobody else can control. By saying 'we' instead of saying 'I', Arendt transforms a legal sentence of positive assertion, 'Based on the law and the precedent I find ...' into a political appeal to a collective identity which can either be accepted or rejected.

There is an anti-democratic danger in the reading I am attributing to Arendt. The use of the first person personal pronoun 'we,' as Herbert Spiegelman has argued, is an aggressive address.¹⁰² Simply saying 'we' does not make one the spokesperson for a group of people; nevertheless, in certain circumstances, saying 'we' serves not as an assertion, but as an appeal to others. These others, Spiegelman calls the speaker's we-partners, and when they are addressed in an appeal, saying 'we' urges them to listen to, focus on, and join with the speaker's statement. When the speaker's "we-partners" are not present, saying 'we' requires the arrogance to presume the authority to speak for others, many of whom one does not, and will not ever know.¹⁰³ The right to say 'we,' Spiegelman argues, "presupposes some prior authorization or subsequent ratification. ... Without it, all we-talk in the absence of the we-partners is clearly false pretense."¹⁰⁴ Yet even when prior authorization is not present, Spiegelman recognizes that the use of 'we' is often necessary; there can be times, he argues, when 'we' serves not as an arrogant assertion of an unknown groups' beliefs, but rather as an invitation, an appeal, to that group to agree or disagree with the speaker.¹⁰⁵

When Arendt says "We find," I believe that she employs the first person plural 'we' as an appeal to the human community; she addresses that community and appeals to it to accept and understand her judgment; in doing so, she provides an example of one way to negotiate the political paradox of autonomy and limitation and the judicial paradox of legislating and following. Negotiation of the paradox requires the confidence to judge and to speak for others, but also the humility to present oneself as a conduit for the voice of a larger group. Further, to negotiate the paradox one must show the courage to announce her decision as an appeal for support rather than as a conclusion of law.

Judges must recognize that their authority does come from their limited role as interpreters; without this, stability is destined to remain an illusive goal. Yet Arendt's judgment in the epilogue demonstrates that there are times, certain occasions, when judging should cease to be a routine of deference and technique, and instead must rise to the level of autonomy and natality. Judges, as political actors, have a responsibility to make claims on the identity of the polity they are authorized to speak for. That identity, Arendt argues, is never given as unalterable; instead, it must be sought and attained

¹⁰² Herbert Spiegelberg, "On the Right to Say 'We': A linguistic and Phenomenological Analysis," in George Psathas, ed., *Phenomenological Sociology* (1973) 129, 133.

¹⁰³ *Id.*, at 130.

¹⁰⁴ *Id.*, 136-7.

¹⁰⁵ *Id.* The right to say "we" assumes an "arrogance of power" behind the patronizing usurpation of the right to speak for the 'free' people of the world, when they have never been asked, or the arrogant claim to speak for the 'old' or the 'new' generation ..." *Id.*, at 130. In defending a limited right to say "we," Psathas argues that the frequent misuse of "we" as a persuasive device designed to silence others who may have disagreed, must be replaced by an invitation to disagree and catch the speaker in a lie. Though we will continue to employ the third person plural and presume to speak for absent others, we also invite critics to show up our arrogance.

through action. Judges, as actors who in their arguments, indictments, and sentences speak for the community in the first person plural 'we,' have the responsibility to reveal our world as it is. It is for us who are not (officially) judges, therefore, to respond.

VI. Conclusion

The ante-bellum judges who upheld the Fugitive Slave Act, consciously or not, refused to confront the dilemma revealed by the absence of ultimate judicial standards and avoided the responsibility to judge that the freedom of interpretation demands. As a consequence, they had little difficulty determining a stable space from which to judge the constitutionality of slavery and of the Act. They refused to risk their stable conception of themselves as neutral legal minds; instead they presented themselves as tragic heroes. In the higher interest of their legal roles and the interests of society, they were willing, even eager, to sacrifice concerns of justice to what they thought were the requirements of the law. They appealed to a vision of themselves as bonded to the law, a vision that made their own job easier and also resonated with the popular image of judges as those who apply rather than make the laws.

It is the spectatorial distance which is necessary in order to judge another and yet doubly denied in the Eichmann trial. First, because Eichmann acted conscientiously and according to his duty, the attempt to push him away as different, as evil, as Other failed. Second, because Eichmann's crimes were so extraordinary, the effort to bring their judgment under the rubric of legal positivism approximated legal sophistry. Arendt does not reject the ideals of that vision of judging appealed to by the ante-bellum and Israeli judges. On the contrary, she recognizes that a significant part of being a judge is to understand oneself as limited and as stable. Yet, Arendt, like Cover, insists that following rules does not exhaust the activity of judging.

She appeals to the judge as someone who must have the security of identity to risk that identity; especially when confronted with situations which reveal the hidden assumptions of that identity, a judge must be willing to understand those whom she judges as well as herself. But a judge must not only seek to understand; the judge must also accept her position as an autonomous actress who has the freedom and responsibility to speak for the community in a way that both affirms and changes what the community is and what it will become. Judges rhetorically represent and speak for polities; Arendt and Cover insist that when they do, they take care to neither treat the identity of the polity as certain and unchanging, nor to ignore the fact that their authority to speak for the community derives from the consent of the community. In short, judges can neither be wholly autonomous nor absolutely limited. Rather, they must be both; they must also be neither.

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