

'Exploding the Limits of Law':

Freedom and Judgment in Arendt and Adorno

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In *Eichmann in Jerusalem*, Hannah Arendt struggled to think the possibility of judgment against the obvious problems encountered in attempts to offer legally valid and morally meaningful judgment of those who had committed crimes in morally bankrupt communities.¹ Long before, Arendt wrote that the Nazi crimes had 'exploded the limits of law,'² and she later developed her understanding of this problem into an attempt to think through, on the one hand, the apparent loss of individual moral freedom in totalitarianism, and on the other, the difficulty of establishing a community of judgment across a morally contrastive historical landscape. After examining the aporias in her conclusions to *Eichmann* and her later attempt to theorise individual autonomy in historical context in a theory of judgment, I contrast Arendt's approach to that of her contemporary, the critical theorist Theodor Adorno. Adorno is rarely discussed either in legal theory or in relation to Arendt's philosophy,³ yet I suggest he provides insights into the Kantian assumptions within which Arendt remains even while she struggles against Kant. In his negative dialectic view of freedom and judgment, he refuses any one-sided answer, arguing that the problem of freedom is as much a problem of history and society as it is of the individual. I suggest that his concept of solidarity shows how a dialectical conception of judgment might be retrieved immanently from Arendt's position.

I

The Problem of Judgment

Throughout *Eichmann in Jerusalem* Arendt repeats her view that, contrary to the claims of the prosecution and the assumptions of modern moral thinking, was 'not Iago and not Macbeth, and nothing could have been farther from his mind than to determine with Richard III to prove a villain.'⁴ Eichmann, like so many like him, was 'neither perverted nor sadistic', but rather 'terribly and terrifyingly normal,'⁵ and

it was this that lead Arendt to characterise his evil as 'banal'.⁶ It is this alleged 'normality' which, Arendt argues, is 'from the viewpoint of our legal institutions and of our moral standards of judgment,'⁷ the most troubling thing of all about the Eichmann case. It suggests that in totalitarian systems, where the community undergoes a 'loss of moral compass,'⁸ the individual like Eichmann 'commits his crimes under *circumstances* that make it well-nigh *impossible for him to know or to feel that he is doing wrong*.'⁹ Yet this conflicts with the 'assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime.'¹⁰ The conditions of totalitarianism seem to undermine the moral freedom and thus the responsibility of the individual, throwing into question the basis on which legal judgment proceeds.

Alan Norrie has suggested that the problem of judgment created by this 'loss of moral compass' can be considered from two sides, the 'subjective' dimension and the 'objective' dimension.¹¹ The subjective side refers to the way that totalitarianism forces us to question the legal assumptions about a free and responsible 'legal person': under the 'rule of Nobody, which is what bureaucracy truly is,'¹² the subject's judgment seems to recede, making it possible for individuals to carry out 'administrative massacres' without being aware of the wrongful nature of their actions. The idea here concerns the centrality of subjective experience of moral and immoral actions, and the possibility that the subject can in totalitarian circumstances be deprived of this experience. In 'Thinking and Moral Considerations' Arendt describes this phenomenon as the situation in which 'everybody is swept away unthinkingly by what everybody else does and believes in,'¹³ recalling Heidegger's conception of the alienation of the individual from herself in modern society, what he calls 'the real dictatorship of the "They,"'¹⁴ in which the freedom of the individual is undermined by the anonymous force of the practices, institutions and ideologies of social life. If this freedom is undermined in totalitarianism, this also seems to have broader implications for law, since it suggests that the idea of the legal person, free and responsible, may be a fundamentally misguided one. The implication of the subjective side of the problem suggests that the possibility of the individual knowing that he was doing wrong turns on the existence of a morally adequate normative

background, which means that the freedom of the individual is paradoxically dependent on certain historical conditions. Judgment can only make sense if the concepts with which we judge can hold in the case of the individual we judge, but if subjective freedom is restricted by historical contexts, the concepts of modern legality seem to be undermined.

From the objective side, the problem is how to make sense of judgment across morally contrastive backgrounds. In the Eichmann case, there appeared to be no shared normative framework within which both judge and judged could relate to one another. The normative community within which Eichmann committed his deeds was so radically at odds with the normative framework within which modern legal institutions try to judge him that there appears to be no relationship between the two through which such judgment could make sense. If judgment across contrastive normative backgrounds is to be possible, a normative standpoint which is able to embrace the different empirical perspectives would be necessary, which could make sense of a relationship between the judges and the judged that would not depend on particular empirical moral communities, and it is this which law seems unable to ground.

However, Arendt is not prepared to follow these arguments through to their implications. Despite questions raised over the reality of subjective freedom, she refuses to question the presuppositions of the 'administration of justice', insisting on the 'inadequacy of the *prevailing* legal system and of *current* juridical concepts to deal with the facts of administrative massacre organised by the state apparatus,'¹⁵ but suggesting that new legal categories could make judgment possible. In spite of the difficulties she describes, Arendt remains resolutely in favour of the emergence of an international penal code.¹⁶

In the Epilogue, Arendt claims that the court judged 'solely on the basis of the monstrous deeds,'¹⁷ which means in fact that they abandoned, in the face of this 'new criminal', the assumption that an element of *mens rea* is required to establish responsibility. Having insisted on both the dehumanising effects of totalitarian bureaucracy, and the need nevertheless to judge Eichmann, Arendt is forced to offer

her own 'alternative' judgment which departs radically from both the normative commitments of liberal legality and modern assumptions about moral responsibility:

There is an abyss between the actuality of what you did and the potentiality of what others might have done. We are concerned here only with *what you did*, and not with the possible noncriminal nature of your inner life and of your motives...¹⁸

This judgment resorts to a purely 'objective' account of judgment which takes into account only what was done, the *actus reus*, rescinding on the moral and legal requirement for a subjective element. From the objective side of the problem, her response is to posit that a community broader than any empirical one is involved: 'the point of [genocide] is that an altogether different order is broken and an altogether different community is violated.'¹⁹ This different community is that of humanity – 'the order of mankind' – and not of any particular positive legal or political community, and it is this that is supposed to ground the possibility of judging Eichmann across the radically contrastive moral landscape separating the Third Reich and post-war liberal legal institutions. Yet Arendt's claim is that Eichmann *violated* this order, and as such stepped outside of any possible objective community of judgment. Both the subjective dimension of freedom and the objective dimension of community recede, in order to sustain the possibility of judgment. The result, though, is a mode of judgment which abandons the elements crucial to legal judgment, and as such, is deeply unsatisfactory.

Yet in the 'Postscript', Arendt returns to these problems, offering a different account of the possibility of judgment which relies on a special capacity of judgment. In relation to the subjective element, seemingly contradicting her conclusions in the 'Epilogue', she claims that

What we have demanded in these trials, where the defendant 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.²⁰

What she is saying here is that although Eichmann didn't know the criminal nature of what he had done, nevertheless we have the right to expect of him that he had, since there exists a capacity to judge 'freely', which is independent of any particular

historical conditions and can be attributed to all individuals. What is striking is Arendt's equivocation, between the polarised, one-sided alternatives of the total abandonment of the subjective element (in the 'Epilogue'), and the presumption in the 'Postscript' of a metaphysical freedom, of just the sort she claimed did not exist in the 'Epilogue'. Her reticence to engage with the theoretical problem of freedom becomes apparent in her argument that whilst totalitarianism undermines subjective freedom, this cannot be true in a relevant sense since it conflicts with the categories of legal judgment:

we have become very much accustomed... to explaining away the responsibility of the doer for his deed in terms of this or that kind of determinism. Whether such seemingly deeper explanations are right or wrong is debatable. But what is not debatable is that no judicial procedure would be possible on the basis of them, and that the administration of justice, measured by such theories, is an... outmoded institution.²¹

This is problematic because it assumes that explanation and justification are equivalent, which assumes the falsity of compatibilist theories of freedom in advance.²² The claim that the 'administration of justice' would be 'outmoded' in light of the claims of 'explanatory theories' is a point apparently intended to act as a *reductio ad absurdum* of such explanatory claims, yet this simply seems to beg the question in favour of the modern legal notions of 'civilised jurisprudence' which her own insights about the difficulties of judgment cast into doubt. Thus, there is a tension in Arendt's response to the subjective side of problem of judgment. On the one hand, she feels that the institutions of totalitarianism undermined the legal assumptions about subjective freedom, yet she reels from the implications of this, which would be to undermine the foundational assumptions justifying modern law. Her response is to posit, *in spite* of the repressive context, that subjective freedom can nevertheless be asserted, even in oppressive political contexts, since there exists a capacity to *judge against the grain of historical context*. This idea asserts the reality of subjective freedom in spite of the various mechanisms which, on Arendt's own account, undermine that freedom.

This capacity of judgment is also invoked to establish an objective element of normative community, by explaining how the judges were able to judge across contrastive backgrounds. Faced with inadequate concepts and categories, the court, Arendt argues, '*judged freely*, as it were, and did not really lean on the standards and precedents with which they more or less convincingly sought to justify their decisions.'²³ The judgment of Eichmann, then, although couched in terms of the existing legal rules, in fact appealed to a normative standpoint 'beyond the limitation set upon them through positive, posited laws,'²⁴ in other words, a normative standpoint transcendent of the particular contexts in which individuals find themselves. Such a standpoint, like the subjective capacity, invokes a source of normativity beyond posited laws and empirical community. This normative space, which goes beyond particular communities, attempts to give a sense to the 'order of mankind,' yet it fails to resolve the tension between the need of a community of judgment and Arendt's contention that Eichmann had *stepped outside* of that community. On the one hand is the suggestion that the community that exists by virtue of the capacity to judge includes Eichmann because that capacity is attributable to all, yet on the other is the suggestion that, since Eichmann *failed* to judge, he stepped outside of that community.

Arendt argues that the normative context, within which the subject thinks, acts and judges is a radical constraint on his ability to do so freely. On the one hand, the bureaucratic rationalisation characteristic of totalitarian contexts has the power to "make functionaries and mere cogs in the administrative machinery out of men."²⁵ Historically changing contexts thus delimit the freedom of subjects who have no direct control over history. On the other hand, Arendt is resolutely committed to the actual possibility of the 'administration of justice,'²⁶ the responsibility, and thus the freedom of the subject to judge, regardless of the historical circumstances. It is the conflict between the problems of judgment and Arendt's commitment to legal judgment in spite of them that explains how 'on the one side, Arendt displays a real support for an international penal justice system, while on the other, she pulls the rug from under it.'²⁷

II

Judgment, Freedom and History

At the heart of the aporias in Arendt's account is a need to see subjectivity as historically contextualised, without relinquishing the subject's responsibility and the normative force of judgment. I suggest that this might be understood through a contrast with the approach of critical theory to the topic of history and freedom. Throughout Adorno's work, the idea that history undermines moral freedom plays a central role, captured in his aphorism from *Minima Moralia*: "there can be no good life within the bad one,"²⁸ highlighting the sense in which a corrupt historical context undermines the possibility of subjective moral freedom. Adorno's central idea here is that the internal contradictions and conflicts of modern society are such that moral categories no longer make any sense in it, and this, he suggests, might 'help to explain some of the antinomies and aporias we constantly encounter in discussions of Auschwitz.'²⁹ Against the background of 'overpowering structured institutions,' the notion of the 'formally free subjective agent' appears out of place.³⁰ Echoing Arendt, Adorno insists that 'wicked people... Iago, say, or Richard III... are no longer to be found,'³¹ but whereas Arendt sees the 'normality' of evil as a specific problem of totalitarianism, Adorno sees totalitarianism as simply the worst exaggeration of the antagonisms of modern societal rationalisation, such that the problems of judgment in *Eichmann* become *emblematic* of the problem of individual freedom in modernity. Adorno's strategy is to contend that it is the opposition of freedom and history that is itself suspicious. Where Arendt assumes that explanatory theories 'from the *Zeitgeist* down to the Oedipus complex' would 'explain and justify'³² individual crimes, Adorno thinks that this opposition of freedom and necessity needs rejecting. The assumption that explanations in terms of processes that are beyond the control of the individual would undermine freedom presupposes that freedom should be understood on the Kantian idea, which focuses on the individual as the sole locus of moral freedom and responsibility. The problem with this position is that it instates a conflict between individual and social as an essential one, the consequence of which is that freedom becomes an 'all-or-nothing' question, but for Adorno the question of freedom cannot receive a simple 'Yes or No' answer.

In Kant's idea of 'unsociable sociability' this conflict of individual and society appears as problematic,³³ but it is with Hegel that freedom becomes a specifically historical question, especially in his consideration of the conflict between morality with ethical life, and their alleged reconciliation in modernity.³⁴ Whilst Adorno rejects the idea that modernity has achieved this reconciliation,³⁵ he nevertheless insists that the question of freedom concerns the possibility of reconciling individual and society.³⁶ Adorno argues that it is illegitimate to assume that history and freedom are necessarily opposed; freedom is historically developing, and its relation to its history is problematic. While Arendt's response to the lack of subjective freedom in Eichmann is to try to posit it nevertheless, Adorno's is to point out that subjective freedom is itself dependent on history. Yet, like Arendt, Adorno also insists on the need for judgment, the impossibility of abandoning the ideas of individual freedom and responsibility entirely:

we necessarily apply yardsticks of good and evil to behaviour that... already belongs to a state of mankind in which, negatively, the entire sphere of morality has been abolished,³⁷

In an inversion of Hegel's vision of morality and ethical life reconciled in modernity,³⁸ Adorno sees modernity as a moment of history which has negatively *sunk below* both morality and ethical life, such that the categories of morality – which focus on the individual as the unit of moral freedom – make no sense. It is this contradiction in freedom that explains why it cannot receive a 'yes or no' answer, and suggests that we cannot understand either freedom of history as one-sidedly dominating the relationship. Freedom is a question of the individual's relation to society, and since that relation is historically developing, so must our notion of freedom. It is in this sense that freedom and responsibility must be seen as social problems as well as individual problems; instead of assuming that they are categories of the individual, we must understand them as 'categories of the social.'³⁹

Adorno's position shares some of the concerns of recent criminal law theory, which has begun to reject theories that 'locate culpability in the hearts and minds and capacities of individual defendants,'⁴⁰ emphasising instead that 'the very notion that

an individual exists at all depends upon a social world of relations'⁴¹ Reflecting the sentiments of critical theory, Nourse argues,

It is not enough, any longer, to imagine culpability either in the image of a lonely cunning self or a cruel deterministic world.⁴²

As I have described it, Arendt equivocates between these two images, remaining unsatisfied with both. In the rest of this essay, I discuss her attempt to reconcile this tension in a theory of judgment which sees 'the *relationship* between the individual and the community as a nexus within which responsibility and guilt are established.'⁴³ It is this tension between contextualising individual subjectivity, and holding to the possibility of judging nevertheless, that underlies Arendt's equivocations in *Eichmann*. Thinking past this dichotomy is also central to Adorno's concerns, but his critical approach may help to suggest where both Arendt's treatment and the current debates⁴⁴ need to be augmented even further against the grain of Enlightenment philosophical assumptions. It is in this direction that I perceive critical theory to hold suggestive insights for understanding the problems of legal judgment, both from the objective side of a normative community, and from the subjective side of freedom.

III

From Practical Reason to Judgment

In order to understand Arendt's theory of judgment, I begin by considering her criticisms of Kant's moral theory and the ways in which these lead her to attempt to think moral freedom within the limits of the historical, and to account for the possibility of both the subjective and objective dimensions of judgment, in terms of a single capacity to judge inspired by Kant's *Critique of Judgment*.

Arendt rejects Kant's theory of practical reason⁴⁵ because she understands it as a formal-rational model of moral autonomy which hypostasizes the subject from empirical context. *Arendt raises three objections to this model, that it is ahistorical, solipsistic, and heteronomous or unfree.* On the one hand, practical reason removes normative judgment from empirical historical contexts in which it must always in fact occur, which means that its claims are unanswerable to the unexpectedness of

history and the plurality of the human world. On the other, it frustrates human freedom, imposing 'external' truths on the autonomous judgments of men.

Whereas Kant's moral law speaks of man as an 'intelligible or cognitive being,' the *Critique of Judgment* 'speaks of men in the *plural*, as they really are and live in societies.'⁴⁶ Thus Arendt's first objection is that pure practical reason is unable to respect the historical context of evaluation, which is essentially characterised by human *plurality*. In the moral law's ahistorical, transcendental subject, moral evaluation is reduced to a solipsistic enterprise that is prior to experience, embodying the 'antipathy toward *plurality* that is typical of the tradition.'⁴⁷ In other words, practical reason is unacceptably individualistic in the face of the irreducible empirical difference in humanity. Moral understanding can not be made sense of from a solipsistic perspective, but instead requires an openness to the actual plurality of human perspectives.⁴⁸ To put the point differently, the intelligible subject of practical reason, constituted by the structure of rationality or the 'conception of lawfulness', strips away the actual differences between 'men in the plural', on the assumption that only the rational aspects of the subject are normatively relevant. In this sense, Arendt finds practical reason too autonomous from history to be of any meaning in real, plural, historical life. Thus on the one hand the move to judgment is motivated by the desire to situate normative judgment in real history, which requires that such judgment be rooted in the necessary plurality of the human world. This is the revelation of modernity, exemplified in the phenomenon of totalitarianism, which 'must be understood *without reference to conventional moral truths* because it shattered those truths.'⁴⁹

On the other hand, practical reason is inadequate because it assumes that a *fixed* rule can be relied on inform judgment which conflicts with the *natality* of human history – the 'freedom of a *relatively* absolute spontaneity' to create new beginnings.⁵⁰ The spontaneity of human action, its ability to be undetermined by anything previous, necessitates the autonomy to respond to the unexpected phenomena which history will throw up, and so normativity cannot come from outside, 'uttering commands'. In this sense practical reason is also, for Arendt, unacceptably closed. Moreover, practical reason represents a coercive imposition on the individual which

seems to come from outside. The form of law, which relies on the logical category of non-contradiction, is structurally connected with coercion, and as such, as conflicting with the autonomy of the subject.

Practical reason 'reasons' and tells me what to do and what not to do; it *lays down the law* and is identical with the will, and the will *utters commands*; it speaks in imperatives.⁵¹

The point here is that if judgments are governed by prior rules or 'imperatives', they cannot be truly free. This model of moral freedom seems to Arendt to exclude real autonomy; there is no freedom about how to choose, since the correct choice is legislated for in advance. This argumentative strand bears interesting parallels with Adorno's claim that practical reason cannot be pure, but always merges with instrumentality, and thus is bound up with dominating tendencies.⁵² Her intuition that truth is coercive suggests to Arendt the need of a non-cognitive or non-rational theory of normativity in judgment.⁵³

Arendt seems to rely on an implicit analogy between the moral law and positive law to suggest that the moral law presupposes a heteronomous source which is in principle separable from its authoritative normative force, portraying the relationship between the rational *form* of the moral law and its normative *content* as in principle distinct.⁵⁴ But to see the moral law as only contingently self-legislated is thoroughly confused, since it is the 'legislative authority of the [moral] law is a function of its justificatory force.'⁵⁵ Nevertheless, the basic force of her criticisms remains without this argument. The reduction of difference to what is identical between all subjects, their rational character, appears as a negation of plurality, at the same time as it appears as a coercion on the individual to conform with the universal form of law. Arendt rejects this because the Kantian approach cannot reconcile the need to ground moral freedom in historical context. Moral freedom seems abstracted from the realm of human affairs to such an extent that *from the perspective of that realm*, its determinations seem like an illegitimate imposition on the unexpectedness of history.

IV

The Perspectivalty of Judgment

The problem of judgment encountered in *Eichmann*, then, highlights the inadequacies of an ahistorical and abstract Kantian ground of moral freedom to inform judgment which is always situated in historically particular and original contexts, an inadequacy emphasised by Kant's equivocations over the clash of morality and politics.⁵⁶ On the one hand is the need to account for the moral freedom of the individual against history, on the other is the need to provide a normative community of judgment which transcends historical particularities and is capable of grounding *judgment across contrastive moral backgrounds* by establishing a normative community between judge and judged. In this context, Arendt's theory of judgment emerges from the struggle to reconcile normative universality with the particularity of plural history that gives this universality its meaning and worth.⁵⁷ Both aspects of judgment, Arendt thinks, can be accounted for by reference to one faculty whose essential characteristic is *publicity*.

Whereas practical reason remains isolated from history and the human world, judgment is necessarily situated in the world.⁵⁸

The crucial feature of judgment in Kant's *Critique of Judgment*,⁵⁹ from Arendt's point of view, is the shift toward intersubjectivity. Whereas practical reason exists for the abstracted subject, 'when one judges, one judges as a *member of a community*.'⁶⁰

Judgment

always reflects upon others and their taste, takes their *possible* judgments into account. This is necessary because I am human and cannot live outside the company of men. I judge as a member of *this community* and not as a member of a supersensible world...⁶¹

Thus, the Kantian theory of judgment seems a route to situating normative judgments, both of the moral subject and the legal judge, in its social historical context. Arendt sees here a way to avoid the abstraction and coercion of practical reason whilst maintaining the possibility of valid moral judgment, in the face of historical contingency, by anchoring judgment in the concept of community.

Given that Arendt refuses, as we have seen, to allow 'truth' to 'dictate' judgment – which 'must not be coerced... by 'truth', philosophical or scientific'⁶² – the question is how judgments can avoid the prejudices of a particular standpoint or context, and it is this that Kant's concept of *community sense* is supposed to achieve. Yet, for Kant, the 'enlarged thought' required by community sense involves

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.⁶³

Accordingly, the purpose of Kant's transcendental idea of community sense is to 'abstract' from the limitations of being empirically situated so as to arrive at a *universal* [*Allgemein*] standpoint, that is, to arrive at judgments which are universally valid for any judging person.⁶⁴ Arendt, however, inverts this idea, relying on the concept of enlarged mentality not to abstract from, but to situate judgment *in* empirical community, thereby constraining its validity to particular historical circumstances. This distinction underlies Arendt's claim that judgments have only *general* and never universal validity: 'its claims to validity can never extend further than the others in whose place the judging person has put himself.'⁶⁵ While Kant's version of enlarged mentality assumes that what is essential to judgment is not the empirical but the universal aspects of subjectivity that can be attributed to 'any man', Arendt emphasises the real difference in the empirical community within which any judgment takes place.

It is this shift that leads Beiner to question the sense of attempting to base a contextualist theory of judgment on Kant's model of enlarged mentality.⁶⁶ While Kant's theory in fact emphasises the transcendental *identity* of subjects, Arendt's theory of judgment emphasises their *plurality*, and the impossibility of rooting normativity in any notion which abstracts from history and empirical community.

Historically contextual judgment operates by means of imaginative 'visiting', whereby

in matters of opinion, but not of truth, our thinking is truly discursive, *running as it were, from place to place*, from one part of the world to the other through all kinds of

conflicting views, until it finally ascends from all these particulars to some impartial generality.⁶⁷

Such a process aims at ‘feeling and thinking simultaneously from a plurality of standpoints,’⁶⁸ and it is this ability to think from other’s standpoints that Eichmann lacked. The procedure of visiting ‘all kinds of conflicting views’ is supposed to avoid both the coercion of truth and the fiat of prejudice and thus achieve ‘impartiality’. Arendt’s assumption is that in human affairs truth recedes leaving a plurality of perspectives which together are constitutive of the community. It is impossible to escape one’s own perspective to an ‘Archimedean point,’ but through a process of imaginatively ‘visiting’ the plurality of other perspectives one can become aware of the perspectival quality of one’s own view; the realisation that there exists a plurality of different perspectives has the effect of undermining the certainty with which one may hold a position, since it highlights the contingent and perspectivally constrained nature of any view. Whilst I cannot avoid having a situated worldly perspective, I can take into account the diversity of perspectives, diffracting my own through the gradual encounters with the many other possible standpoints. In visiting the ‘possible rather than actual judgments of others’⁶⁹ one *imaginatively* represents the *actual perspectives* of others; where Kant’s transcendental method invokes ‘every conceivable standpoint,’ clearly detaching from empirical limitations, Arendt moves against this grain emphasising that the validity of judgment is tied to the ‘particular (empirical) conditions of the (actual) standpoints one has to go through (imaginatively) to arrive at one’s own standpoint.’⁷⁰ Rather than adopting the prejudices and views of others, I consider their perspectives as if I were there, ‘moving, as myself, ‘from standpoint to standpoint.’’⁷¹ Disch emphasises this aspect of judgment, describing it as the process of ‘telling oneself the story of a situation from the plurality of its constituent perspectives.’⁷²

Thus, Arendt’s theory holds that *the validity of judgments is a function of their perspectivality*, that is, of their relation to the empirically existing community and its plurality of different perspectives, rather than of any coercive cognitive universalist criteria. It is this fundamental perspectivality that links judgment’s autonomy with its historically situated character, and thus with plurality, and which links Arendt’s

theory of judgment to the real problems of legal judgment both in *Eichmann in Jerusalem* and in contemporary legal theory.

V

Judgment and Rationality

Arendt's theory of judgment, then, represents an attempt to theorise an autonomous faculty of the subject which is independent of historical determinations, but which avoids the coercive implications of the modern conception of reason. Yet, as Albrecht Wellmer has argued, this non-cognitive model makes Arendt's conception of intersubjectivity unintelligible since it offers 'no standards, and thus no grounds,' for the validity of moral judgments.⁷³ Arendt's position rests for its plausibility on an implicit analogy between aesthetic and moral judgments, which are all understood on her model as interpretive, rather than rational, claims. Rationality is excluded from judgments because of the perceived coercive function of universalistic reason, yet, as Peter Dews puts it,

It is the very *universality* of truth-claims which makes for their vulnerability: it is only because assertions make demands on the assent of others... that they are open to challenge.⁷⁴

The perspectival theory, then, provides no obvious grounds on which the validity of a judgment *could* be challenged. In this light it is the *absence* of a rational element that is coercive, since it leaves the limitation that other perspectives place on my judgments unexplained, potentially allowing arbitrary and illegitimate power and authority to influence judgment. The communicative rationality of judgment which, for Arendt, represents the coercion of instrumental reason, is, for Habermas⁷⁵ and Wellmer, necessary to ground the intelligibility of disagreement and the liberating effects of the plurality of perspectives.

In terms of the subjective side of the problem of legal judgment, the force of Wellmer's argument is that while Arendt's perspectival theory situates judgment in its empirical context in a way that a formal-rational conception of moral freedom cannot, in defining validity as a function of a judgment's empirical perspectivality, it leaves no clear ground for an autonomy *against the grain of a normative background*.

This makes the putative perspectival source of autonomy unintelligible, since if a judgment's validity is unconnected to its content, it seems that any judgment is equally 'valid', and thus it is unclear why the perspectives of others would lead me to question my own. Moreover, there are no grounds by which one might evaluate better or worse epistemic or moral standpoints within the community; each is given equal weight. Intersubjective judgment without a rational element merely inverts the Kantian picture, such that instead of being entirely independent of empirical community, the validity of moral judgment is *entirely constrained* by it, and does not include cognitive criteria. This is paradoxical given that Arendt's point in *Eichmann* is, as we saw, that the moral landscape had been turned upside down, such that it was 'well-nigh impossible for him to know or to feel that he was doing wrong.'⁷⁶ The irony, as Seyla Benhabib puts it, is that

the kinds of historical situations that led Arendt to her ruminations on thinking and moral considerations... are precisely instances when the intersubjectivity constitutive of the social world has been so dirempted and damaged that... the capacity to engage in enlarged thought disappears.⁷⁷

The perspectival theory provides no answers here, since 'as far as Eichmann could see, no one protested, no one refused to cooperate.'⁷⁸ A perspectival theory of judging seems to be paralysed in the face of the very problem it was supposed to resolve.

VI

Natural History and Subjective Freedom

This paradoxical position is, I suggest, due to the conflict between Arendt's critique of rationality and her commitment to the Kantian assumption that the conflict between freedom and history is a necessary and ahistorical one:

Finally we shall be left with the only alternative there is in these matters – we can either say with Hegel [that the ultimate judgment is success], or we can maintain with Kant the *autonomy of the minds of men and their possible independence of things as they are or as they have come into being*.⁷⁹

Given these alternatives, she sides with Kant and assumes that freedom is to be accounted for by some autonomous faculty, which is outside of historical

development. Thus, Arendt's version of human history has liberated itself from natural history and become nature's master,⁸⁰ and as such is not susceptible to explanation,⁸¹ whilst the 'mind' is construed as autonomous from the coercion of truth, and thus even from the processes of social history, 'of things as they are or as they have come to be'. Her conception of reason and judgment are thus completely *independent of natural history*, and thus essentially unchanging: 'Heraclitus', asserts Arendt, 'spoke truly, in words still unburdened by terminology: 'the mind is separate from all things.'"⁸² Arendt fails to appreciate that the Kantian assumption that freedom must be independent of history relies for its plausibility on the distinction between reason [*Vernunft*], which is the realm of freedom, and nature, which is the realm of necessity. Arendt rejects this second distinction which is central to the concept of practical reason, but nevertheless accepts the suppositions of the classical distinction between causal explanation [*Naturwissenschaften*], whose faculty is 'understanding' [*Verstand*], and meaningful interpretation [*Geisteswissenschaften*], whose category is reason and domain is 'human affairs'.⁸³

Her reliance on these Kantian distinctions *conflates truth with certainty*, and partly explains the inability of her theory to adequately understand the role of rationality in free moral judgment. As Habermas argues,

An antiquated concept of theoretical knowledge that is based on ultimate insights and certainties keeps Arendt from comprehending the process of reaching agreement about practical questions as rational discourse.⁸⁴

This conception is unfounded; there is a clear distinction between claims to truth and claims to certainty, especially in scientific practice, where it is a condition of the intelligibility of attempts to reject a truth-claim, by experimental activity and rational argument, that a claim to truth is self-consciously fallibilist. It is this positivistic error, which flows partly from her Kantian assumptions about reason and nature, that leads Arendt to equate all rational claims with the coercive character of reason.

With its unsupported positivist distinction between reason and cause, the inadequacy of this hermeneutic view of history⁸⁵ is already apparent in *Origins of Totalitarianism*,⁸⁶ where Arendt invokes the concept of 'crystallization' to distance herself from 'explanatory theories', favouring an 'interpretation' of the 'amalgam of

fragments that are only contingently related⁸⁷ which 'come together' to form the phenomenon of totalitarianism. Yet 'crystallization' actually captures the difficulty of understanding causation in human affairs, because it is, of course, *a causal process that appears to be undetermined* because of the complexity and openness of the mechanisms involved.⁸⁸ Arendt's own analyses suggest the untenability of the explanation/interpretation distinction, yet she holds firm to it and the positivist conception of knowledge it entails.

For Adorno this choice between freedom and necessity is a false one. Whereas Arendt attempts to establish the fact of autonomy against a history which conflicts with it, Adorno argues that the problem of subjective freedom is itself a historical one, so that

The question of freedom does not call for a simple Yes or No, but a theory which rises above society as well as above the individuals existing in it.⁸⁹

Like Arendt, he recognises the internal antagonism between freedom and coercion in Kant's moral philosophy, yet for him the breakdown in the concept of subjective freedom shows that freedom cannot be thought of ahistorically. The problem of freedom itself,

is a product of history in the sense that the categories of freedom and unfreedom are themselves the products of history; and in the sense that the entire sphere of morality only came into being historically together with the human subject.⁹⁰

Thus, to assume particular historical conflicts are metaphysical is an illegitimate abstraction from historical context. The conflict between individual freedom and historical context has itself come about historically, and should not be assumed to have a metaphysical reality beyond particular circumstances. Rather, subjective freedom must be seen as interdependent with the structure of social life, and this is historically changing. Adorno's materialism here is influenced by Marx's view of *history as natural history*, but it is not an arbitrary metaphysical materialism;⁹¹ it is a position which, Adorno claims, is licensed by the immanent contradictions in the idealist position,⁹² which necessitate an account of the understanding of freedom in its relation to historical context. The relevance of Adorno's philosophy to Arendt's theory of judgment is twofold: firstly, it helps explain how Arendt's theory of

judgment fails to resolve the aporia in the conclusions to *Eichmann in Jerusalem*; secondly, it provides an alternative way of thinking about the free subject which rejects the distinction between subjective freedom and objective history, giving a picture of subjective freedom which is both natural and rational, both possible and suppressed, and moreover, one which I think is immanent in Arendt's own aporetic position.

Crucial to Adorno's position is his argument that the idealist distinction between 'freedom' and 'necessity' is internally incoherent because freedom and necessity overlap with each other in the actual experience of freedom. Kant's concept of freedom opposes itself to the necessity of nature, yet real freedom would be impossible *without* a natural element, since reason on its own operates according to the 'legality of the pure form of thought.'⁹³ In *Negative Dialectics*, he argues,

due to its rationality, the will becomes irrational... Freedom is sabotaged: its Kantian carrier, reason, coincides with pure law. Freedom would need what Kant calls heteronomous.⁹⁴

The argument here is that Kant's reduction of freedom, to action determined by the lawfulness of reason,⁹⁵ becomes *incoherent* because without a natural 'heteronomous' element it would not be able to account for the motivational element in action, and so would 'retranslate spontaneity into contemplation.'⁹⁶ What would be required for this spontaneity is precisely the natural element which Kant sees as belonging to the realm of necessity and thus unfreedom. This is what Adorno calls the 'addendum in which consciousness externalises itself',⁹⁷ the aspect of natural embodied impulse from which reason cannot coherently be abstracted. It is only with this 'impulsiveness that freedom extends into the realm of experience,'⁹⁸ but because this impulse is represents an element of natural necessity, Kant's 'idea of freedom turns into a paradox: it comes to be incorporated in the causality of the phenomenal world.'⁹⁹ Adorno rejects the distinction between reason and nature that underlies the Kantian hypostasization of freedom from history, arguing that the immanent collapse of the distinction between freedom and necessity licenses a view of freedom as embedded in natural history. To see freedom as a capacity of the mind severed from historical change is to assume that reason is separate from natural history. The

first philosopher to appreciate the historical nature of reason was Hegel,¹⁰⁰ but Adorno sees history as natural in way Hegel did not, arguing that reason and sociality must be understood as an outgrowth of nature.

Yet, Adorno's dialectical analysis of the concept of freedom reveals an element of truth in its falsity, since internal contradiction between freedom and necessity correctly maps the antagonistic experience of freedom in modernity, the subjective experience of being *both actually unfree but potentially free*. The subject must then be thought of as always potentially free, yet always also historically constrained by the very same aspects of historical development that have led to the possibility of freedom, and it is this entanglement of the conditions of freedom and of unfreedom that makes freedom a dialectical phenomenon. The problem of freedom is a definite one for 'men as products of history,'¹⁰¹ which is why it is a mistake to treat it as an ahistorical problem. If this argument is right, then Arendt's attempt to assert freedom in abstraction from history, as an autonomous faculty, assumes what it tries to prove, that subjective freedom is a given in spite of the limitations imposed on it by the very social conditions which also make it possible. Taking for granted that the 'administration of justice' in legal judgment is possible, Arendt commits one-sidedly to the liberal idea of freedom even though her analyses in Eichmann demonstrate the inadequacies of legal thinking about the subject's relation to history. Arendt's critique of Kant is inconsistent and incomplete; although recognising the collapse of the Kantian distinction between freedom and necessity, Arendt fails to recognise that this undermines the distinction between reason and nature, and thus the idea that freedom is independent of history. In asserting that individuals are free to judge against the grain of history, she rather arbitrarily rejects the implication of her analyses of both the dehumanising effects of totalitarianism and the coercive functioning of reason, which is that the individual's freedom could depend on objective historical conditions.

This assertion, that freedom actually exists in 'a political system in which freedom is completely suppressed,'¹⁰² runs the risk of pressing the concept of freedom 'into the actual service of repression.'¹⁰³ This is the broader dangerous aspect of

Arendt's approach; she is eager to ignore the sociality of freedom on the argument that,

Under conditions of terror, most people will comply but *some people will not*, just as the lesson of the countries to which the final solution was proposed is that "it could happen" in most places but *it did not happen everywhere*.¹⁰⁴

This argument again invokes confused positivist understanding of causal relationships as necessary connections. What these few exceptions show is not that freedom actually existed, but that it always *remained a possibility*. But 'posited positively, as given or as unavoidable amidst given things, freedom turns directly into unfreedom,¹⁰⁵ both in moral philosophy, and in the discourses of criminal law 'where matters become critical, where it 'hurts.'¹⁰⁶ In light of Adorno's analysis, Arendt seems to align herself with 'the idealistic, Kantian thinkers, who insist on the freedom of man... [and] who infer from this the *unconditional responsibility* of individual human subjects,¹⁰⁷ where the concept of freedom blurs with the demand of 'voluntarily accepting a compulsion that human beings cannot escape anyway.'¹⁰⁸

The antagonistic nature of the concept of freedom reveals the real interdependence of individual and social, such that it makes more sense to see freedom as a category of society than to emphasise the independence of the individual. At the same time though, freedom cannot simply be rejected on historical grounds either, since to assume the negation of freedom would still be to accept the terms of the idealist choice between freedom and history. On the contrary, whilst freedom cannot be assumed, 'we can only speak meaningfully of freedom because there are *concrete possibilities* of freedom, because freedom can be achieved in reality.'¹⁰⁹ The point here is that it is the very processes that give rise to the possibility of freedom also frustrate its realisation, and these processes are social and historical, such that freedom is itself socially and relationally structured.

Freedom conceived as reason stripped of the natural impulse would be coercive, both as an element of necessity, and as a suppression of natural difference, but this antinomy contains an element of truth which points beyond the opposition of freedom and necessity, and it is this which grounds the 'concrete possibility' of freedom. Central to Adorno's account of individual freedom is the idea of the

natural bodily impulse, without which reason and spontaneity would lack the motivational element and be inconceivable. Freedom, contrary to both Kant's and Arendt's account, is not based on a faculty of mind abstracted from natural historical change, since 'reason has become what it is only because it has separated itself from the addendum, from the element of impulse that is characteristic of will,'¹¹⁰ which suggests both that the will suppresses impulse, and at the same time implies it. Freedom involves the 'somatic' embodied impulse, an element that according to Kant and Arendt, would be the opposite of freedom: natural determination.

Freedom is thus *possible* because of the concrete emergence in history of reflective reason, which nevertheless frustrates freedom so long as it remains detached from its natural embodiment. Yet Adorno is able to reject the coercive aspect of reason whilst also insisting that this abstract universal moment in reason also contains a progressive, utopian element: 'the egalitarian ideal'.¹¹¹ Adorno suggests that without the element of rational reflection, the natural element of will would be undetermined¹¹² could revert to 'direct, naked force.'¹¹³ The universalistic aspect of reason is thus both repressive in that it suppresses difference, and progressive, in that it points beyond its own limitations to 'the idea of a *solidarity* transcending the divergent individual interests'¹¹⁴ of humanity, that could carry forward the element of universality, without the element of suppression, and it is in this sense that 'truth beyond coercive identity would not be its absolute other, but would always pass through that coercive identity and be mediated by it.'¹¹⁵

According to this thought, individual freedom would involve both the elements of reason and nature, coming together:

Both the elements that are needed if freedom is to make its appearance, reason and impulse, are mutually dependent. Thus practice needs both theoretical consciousness at its most advanced, and it needs the corporeal element, the very thing that cannot be fully identified with reason.¹¹⁶

I suggest that such an account of freedom grounded in natural impulse together with reason has the potential to give us a way of thinking freedom as a real possibility even against the grain of history, without hypostasising it from that history: 'freedom is something which has not yet come into being,'¹¹⁷ in the sense that social life in

modernity frustrates the possibility of free subjectivity, and yet 'despite all that, there is a genuine possibility of freedom, even in a totality steeped in guilt.'¹¹⁸ The crucial contrast with Arendt's position here, is that while she insists that freedom, in the capacity to judge, must be asserted as actually real, Adorno insists it is not necessary to claim that freedom is actual in order to maintain that it is *a real potential*. This possibility of freedom precludes attempts at 'evading a confrontation... with everything that Auschwitz represents,'¹¹⁹ but it also precludes Arendt's dangerous response of asserting freedom, in spite of unfreedom, on the basis of a mysterious faculty of judgment. Although it is possible, it is extremely difficult to exercise freedom within a repressive historical context, and it is this that makes legal judgment, which presumes this individual freedom, so problematic. The more repressive the context, the more problematic this judgment will be, which explains the special difficulties in the Eichmann case. This is the ambiguity in modern freedom which Adorno tries to capture in claiming that 'in a very real sense, we are simultaneously free and unfree.'¹²⁰ The fundamental insight here, which problematises legal judgment in a way that gives full force to the implications of Arendt's analyses of totalitarianism, is that individual freedom is bound up with the socio-historic context of the individual; it is this paradox, that freedom is something real, but something which is itself dependent of the social, dependent on history, that explains the tensions in the problem of legal judgment, and thus explains Adorno's insistence that the question of freedom cannot receive a 'Yes' or 'No' answer.

Although failing to give us any easy answers, Adorno does help to understand the subjective side of the problem of judgment in Eichmann, and furthermore, draws out the implications for thinking about modern legal judgment outside of totalitarianism more explicitly than Arendt's account. The conflict between Arendt's commitment to a Kantian distinction between freedom and nature, coupled with the rejection of truth as coercive, gives rise to the aporia in Arendt's position. In confining freedom to a realm in opposition to and autonomous of natural history, in the faculty of judging, she takes for granted the Enlightenment conception of subjectivity on which 'civilised jurisprudence's'¹²¹ notion of culpability rests, adopting a one-sided view of the individual's relation to society and implicitly

refusing to carry through the insights of her understanding of totalitarianism's dehumanising effects. Yet in rejecting rationality in moral matters, she leaves no conceivable ground of this freedom, since it cannot depend either on reason or on nature. The ground of the individual's ability to judge remains mysterious.

Adorno's account suggests the ground of judgment against the grain of history would be the naturalistic version of freedom, which highlights the irrepressible need for *both* a natural element and a rational element in freedom. Since he argues that this natural impulse can only be given a moral character when it is refracted through the utopian egalitarian element in reason, Adorno resists any one-sided account of what freedom would involve. Furthermore, because Adorno insists on the necessity of a rational element of reflection to make this natural impulse critical and free, his position would be less vulnerable to Benhabib's charge of 'quasi-intuitionism' than Arendt's.¹²² Morally free judgment would depend not on the perspectives of others – which in a corrupt community might provide no guidance – but on the 'flesh and blood' reaction to human suffering which is irreducible to reasoning or to any particular perspective, captured in von Schlabrendorff's sentiment that 'I just couldn't put up with things the way they were any longer.'¹²³ Adorno refers to this as a 'solidarity with suffering', and it is this naturally grounded response which provides a means of thinking individual freedom against the grain of historical context in a way that Arendt's perspectival theory of judgment fails to do.

This act of resistance, the fact that things may be so intolerable that you feel compelled to make the attempt to change them... is the precise point at which the irrational aspect of moral action is to be sought.¹²⁴

This moment of solidarity provides an account of how freedom is possible *without* asserting its actuality.

VII

Solidarity, Reason and Objective Community

From the objective side of the problem of judgment, Arendt's perspectival theory of judgment, in the absence of a rational element, threatens to undermine the possibility of valid judgments across morally contrastive empirical communities, that

is, to provide a normative standpoint that can embrace contrastive normative standpoints without ignoring the situatedness of judgment. A culturally relativist position would be ironic given that Arendt's aim was to ground just this sort of evaluative judgment across communities.¹²⁵ In *Eichmann in Jerusalem* the objective side of the problem was that the empirical community was itself corrupt, such that no common normative ground existed between Eichmann and his liberal judges. In restricting normative judgment to the general validity that holds only for the perspectives one has imaginatively visited, Arendt's intuition that truth is coercive unpicks the normative stitching of intersubjectivity.

As we have seen, Arendt's rejection of truth has in common with Habermas and Adorno a suspicion of the reductive instrumentality of cognition, which is the real significance of her emphasis on the liberating effect of plural perspectival thinking is. This model of autonomy is motivated by her rejection of the subjectivist preoccupations of modernity,¹²⁶ whereby 'the principle of [rationally structured] subjectivity emerges as the only origin of normativity.'¹²⁷ Her mistake, however, is to be led by her positivistic commitments to *equate all truth with coercion*, rather than to see the *ambiguous* relationship between truth, rationality and normativity. In this respect, her position bears unfavourable resemblance to the paradoxical rejection of 'truth' characteristic of the Nietzschean perspectivism of some post-structuralist philosophers, for whom

the universality implicit in the concept of truth appears as a threat. Since no conception of truth could ever justify the universal validity which it claims, such a claim can only mask a desire for power, the wish to unify coercively a multiplicity of standpoints.¹²⁸

Arendt's rejection of rationality as a coercive suppression of difference is not entirely misplaced: it is *one-sided*. The crucial strength of Adorno's negative dialectic approach, here, is that he is able to reject the coercion and suppression of rationality without sacrificing rationality altogether in the way that Arendt's 'mysterious' faculty of perspectival judgment does.

In *Dialectic of Enlightenment* Adorno argues that reason is entangled with the self-preservative need to reduce difference to that which is identical with itself.¹²⁹ Yet,

as we have seen, in contrast with Arendt's argument, Adorno insists on the need for an element of reason; practical reason's 'absolute split between freedom and chance is as arbitrary as the absolute split between freedom and rationality,'¹³⁰ since both rationality and nature ('chance') are necessary for freedom to be conceivable. He is able to reconcile these intuitions by seeing reason as historically constituted and structured in a way that Arendt does not. Wellmer's implicit equation of Arendt's and Adorno's position is thus too quick;¹³¹ reason is not to be seen as reducible to domination, since this would leave no room for the sort of critical rationality upon which such a thesis would inevitably rely. Adorno's argument is, rather, that reason is *entangled* with its natural instrumentality so that it is not possible to clearly separate reason's progressive and oppressive aspects. This conception is able to criticise reason whilst doing justice to the progressive element in Kant's rational 'formalism', which Adorno vigorously defends:

It stipulates the universal legal norm, and thus, despite and because of its abstractness, there survives in it something of substance: the egalitarian idea. The German critics who found Kantian formalism too rationalistic have shown their bloody colours in the fascist practice of making blind phenomena the criteria of who was to be killed.¹³²

This passage illustrates Adorno's emphasis on the dialectical unity of the progressive and regressive elements in the idealist concept of freedom, since it is both 'despite and because of' the formalism of reason that it contains a progressive aspect; the internal antagonism in the concept of reason both acts as a critique of its repressive aspect, and is disclosive of its utopian egalitarian element which reaches beyond it.

It is, thus, Adorno's understanding of the *ambiguity* of modern reason, often overlooked by his critics,¹³³ his awareness of the internal connectedness of dominating and liberating tendencies in modernity, that allows him to reconcile the insights of Arendt's position with the criticisms of Habermas and Wellmer. With Arendt, he argues that freedom and normativity cannot be grounded in rationality alone, since normative reason is *entwined* with a coercive logic of 'identity', which negates real difference. For Wellmer and Habermas, cognition in its moral forms is mediated by subjectivising and instrumentalising pressures which do not show that

rationality is normatively *sterile*, but rather that it is *fragile*, and requires political nurturing through public institutions which create a space for communicative rationality to flourish against the pressures of instrumental rationality. Crucially, the force of Adorno's argument here is that it is a mistake to think that the instrumental and normative aspects of rationality can be strictly differentiated.¹³⁴ If this is right, then the model of communicative rationality replicates the transcendental subject as a ground of normativity, by hypostasising the quasi-transcendental structure of intersubjectivity from its natural history. Accordingly, unlike Arendt, Adorno is able to criticise the attempt to root normativity *solely* in ahistorically valid structures of rationality whilst at the same time acknowledging the necessary role rationality must play in critical judgment, because of his emphasis in the entwinement of rationality with its natural history.

If this is right, Arendt's model of perspectival judgment is incapable of providing the universalistic normative resources to judge across morally contrastive backgrounds, because it makes validity a function of empirical perspectivalty. In the final pages of the *Lectures on Kant*, however, she suggests that the ultimate empirical community extends to the whole of mankind, since

in the last analysis, one is a member of a world community by the sheer fact of being human... When one judges.. one is supposed to take one's bearings from the idea, not the actuality, of being a world citizen.¹³⁵

The final stage of community reverts from an empirical to a transcendental strategy, founded on 'the necessary condition for the greatest possible enlargement of the enlarged mentality... 'An original compact, dictated by mankind itself.'¹³⁶ In order to extend perspectivalty beyond its relativistic limitations Arendt is forced to invoke the classical contractarian idea of an 'original compact', and it is difficult not to read this as a revocation of the central commitments of her theory to empirical difference and plurality. As Habermas puts it,

Arendt finally puts more trust in the venerable figure of the contract than in her own concept of praxis... She retreats instead to the contract theory of natural law.¹³⁷

This move exemplifies Adorno's insistence that to try to think in universal ahistorical terms from a conflict-ridden totality will necessarily lead to conceptual antagonism.

Yet, in her notion of a community established by the 'sheer fact of being human' I suggest that Arendt betrays the immanent tension between the relativising impact of an empirical community-based perspectivalty and the universal aspirations of her commitment to autonomous judgment, revealing a pull away from the hermeneutic conception of community and toward a materialist and naturalistic commonality that could transcend the limitations both of coercive rationality and of the contingent normative landscapes which constrain individual moral freedom. In Adorno's thought there is a gesture toward a normative community beyond the 'conflict-ridden totality' which attempts to derive an analogue to the 'world community' that would not have to fall back to the quasi-transcendental formalism of a 'rationality of practical judgment' under-labouring Habermas' criticism. The dialectic of repressive and liberatory aspects in the concept of freedom, Adorno argues, discloses a utopian impulse to go beyond the antagonism of individual and community, for 'the so-called moral categories of the individual are more than strictly individual.'¹³⁸ It is here that Adorno develops the objective dimension of his 'idea of a *human solidarity* that transcends all individual interests,'¹³⁹ giving it his own naturalistic content whilst arguing that the concept itself can be arrived at by working immanently from idealism's own internal antagonisms, since 'the spirit of solidarity is only able to develop on the back of the spirit of repression, which that of solidarity then annuls.'¹⁴⁰

What Adorno captures is the ambiguity in the 'concept of mankind', which on the one hand 'contains the idea of reason as a universally valid notion,' but through this universality 'points to the plurality of subjects,'¹⁴¹ and thus to a really existing naturalistic community which transcends particular empirical backgrounds. However, 'the power of solidarity can grow only by working its way through its own repressive nature.'¹⁴² The basic force of this elliptical claim is that, for Adorno, the dialectical tension between the repressive and utopian aspects of rational universality expresses a historical conflict; whilst they do not necessarily imply each other, they have historically come to be entangled. The challenge for universal solidarity to work through its own repressive nature is the indication that, since freedom is something

made possible and at the same time held back by modernity, the experience of this human solidarity requires a massive effort.

It is this *solidarity* with the free individual ‘ensnared by the false totality’¹⁴³ which I suggest emerges from my discussion as something to retrieve from Arendt’s reflections on judgment. Such a solidarity in judgment between judge and judged, both of whom lie in each individual, would be alive to the contradictions and coercion of judgment in a world in which, ‘in the midst of unfreedom, human beings practise the gestures of freedom.’¹⁴⁴ These contradictions require a form of judgment which can do justice to the dignity of the always *potentially* free individual, whilst recognising the tragic status of that subject enveloped in a historical legacy they do not choose or make. But in order to articulate this conception of judging solidarity we need to go beyond the Kantian assumptions that characterise Arendt’s thinking.

Conclusions

Whilst Adorno provides a way to think past the ahistorical concept of freedom, his response is not without difficulties. It deliberately gives no guarantee of freedom, and no exhaustive criteria for the justification of moral claims. This flows from his view that, given the conflicted nature of freedom and its relation to modern society, ‘a substantial, indubitable certainty with regard to moral behaviour does not exist... there is *no such thing as moral certainty*.’¹⁴⁵ The irrationality that arises when moral categories are applied consistently, means that no fixed rules or categories will do. This implies that moral and legal judgment, though urgent, will remain deeply problematic.

The ‘spirit of solidarity’ in Adorno’s thought seems to me to indicate how judgment might be thought of given its deeply problematic character. It is an idea which tries to think past the simple dichotomy of freedom and history, which Arendt accepts in spite of herself. It attempts to embrace the inherently antagonistic nature of judgment in an antagonistic world, which calls for a dialectical form of judgment that

brings the executioners into the diagnosis of entanglement and guilt, and even conceives of them as victims and not *just* as murderers, which is what they *also* are.¹⁴⁶

This passage is crucial for understanding the implications of Adorno's view for the problem of legal judgment, since it grasps the necessarily conflicted nature of judgment in historical conditions which conflict with the realisation of freedom. That individuals can be *both murderers and victims simultaneously* because they are both potentially free and actually unfree, is at the heart of the problem of judgment, and its implications are that the problem cannot receive a one-sided answer. The nature of the potentially free but actually unfree subject means that the objective community does exist – we are all included in the tragic status of individuals who cannot transcend the historical limitations on their freedom. It is this realisation that might ground a kind of solidarity with mankind, in light of which Arendt's mistake may be to see Eichmann as outside of the community of mankind, putting him beyond the reach of any possible community. I began by arguing that Arendt begs the question in favour of the possibility of valid judgment in *Eichmann*, and one of the strengths of Adorno's position is that he is able to provide a more robust *defence* of judgment, since he argues that to accept either the image of the 'cunning self' or of the 'cruel, deterministic world' would be equally one-sided and incoherent. Individual judgment can be neither entirely rational nor totally perspectival; subjective freedom must be thought of as involving both rational and natural elements, since these two aspects are inseparably bound up in a common natural history. A materialist and naturalistic view of judgmental community provides a way to think this unity, since if the structure and process of social life are not excluded from normative judgment, they become vital tools to inform and guide reflection, explaining how some perspectives are more or less epistemically privileged or corrupted by sedimentations of power and social conflict.

In broader terms, in rejecting the distinctions between reason and nature, freedom and history, normative and instrumental rationality, Adorno suggests a way of more rigorously thinking the free subject in historical context since he sees freedom as a category of the social whole, a category of history itself, as well as a category of the individuals existing within history. Such an approach, I suggest, offers support for forms of judgment which go beyond the one-sided thinking of 'formal' legality, towards ideas of relational and collective responsibility emergent in

recent scholarship,¹⁴⁷ but also to other, non-traditional and creative ways of thinking about judgment.¹⁴⁸

Notes

¹ See L. Douglas, *The Memory of Judgment*, New Haven, 2001, Ch. 2;

² *Hannah Arendt – Karl Jaspers Correspondence 1926-69* (New York: Harcourt Brace, 1992), p. 54

³ It is often assumed that Adorno had no interest in legal issues, yet he goes so far as to claim that ‘the theory of the criminal law provides us with something of a key to all serious thinking about freedom,’ *History and Freedom*, p. 197; notable exceptions to this rule are A. Norrie, ‘How Does Freedom Lie?’, in *Law and the Beautiful Soul* (London: Glasshouse, 2005), and C. Thornhill, ‘Critical Theory and Legal Theory’, *King’s College Law Journal*, (2004). Arendt and Adorno never wrote about each other, and only mention each other in letters, where there is great animosity from Arendt’s side, and indifference from Adorno’s. Among her speculative theories, Arendt hypothesises: that Adorno had tried to join the Nazi’s, based on a positive review he published in the early 1930’s of a set of songs, some of which had lyrics by a poet known to be a Fascist sympathiser; that he had been involved in a secret conspiracy to torment her mentor and former Nazi Party member, Martin Heidegger; and, what hurt Adorno most, Arendt publicly claimed that he had intentionally prevented his friend (and hers) Walter Benjamin from leaving Europe to California, leading to his suicide. There is scant ground to believe these claims, and the latter one relating to Benjamin was publicly rebutted by Frederick Pollock, *Adorno – Benjamin Correspondence 1928-40*, (Cambridge: Polity, 1999), 02/08/1940. See *Hannah Arendt – Karl Jaspers Correspondence*, pp. 592-3; p. 628-9; p. 635-9; p. 644. One possible but strange explanation is suggested by Carol Brightman: ‘Arendt’s distaste for Marxist sociologist Theodor Adorno began in Frankfurt in the early 1930’s, when Adorno blocked her first husband Gunther Stern’s dissertation proposal.’ *Between Friends: The Correspondence of Hannah Arendt and Mary McCarthy*, p. 206n

⁴ H. Arendt, *Eichmann in Jerusalem* (London: Penguin, 1994), (hereafter, *EJ*), p. 287

⁵ *Ibid.*, p. 276

⁶ The subtitle of the book is ‘A Report on the Banality of Evil’, and apart from this Arendt uses the term only in the last sentence of the book. There is a vast literature on the empirical question of whether Arendt’s evaluation of Eichmann as banal was correct, much of which rejects her claim on the basis of new evidence and factual mistakes in her account, the most notable recent example of which is David Cesarani’s biography *Eichmann: His Life and Crimes* (London, 2004). I leave this empirical question aside, assuming that whether or not the assessment of Eichmann is accurate, the issues raised by the case are nevertheless real.

⁷ *EJ*, p. 276

⁸ A. Norrie, ‘Justice on the Slaughter-bench: The Problem of War Guilt in Arendt and Jaspers’, *New Criminal Law Review*, 1998 (forthcoming), p. 5

⁹ *EJ*, p. 276

¹⁰ *Ibid.*, p. 277

¹¹ A. Norrie, ‘Justice on the Slaughter-Bench’. Norrie also situates the problems of judgment in Eichmann interestingly in the context of the philosophical tradition of German idealism in a way which elucidates these two dimensions.

¹² *EJ*, p. 289

¹³ H. Arendt, ‘Thinking and Moral Considerations’, in *Responsibility and Judgment* (New York: Schocken, 2003), p. 188

¹⁴ M. Heidegger, *Being and Time*, Oxford: Blackwell, 1962, p. 164

¹⁵ *EJ*, p. 294, emphasis added

¹⁶ *Ibid.*, p. 272; see her discussion of Nuremburg and the ‘crime against humanity’ at p. 256-7.

¹⁷ *Ibid.*, p. 294

¹⁸ Ibid., p. 278

¹⁹ Ibid., p. 272

²⁰ Ibid., p. 295

²¹ Ibid., p. 290

²² Compatibilism holds that a meaningful sense of freedom is compatible with a deterministic world. Some compatibilists argue that freedom would be unintelligible without a deterministic world. The terms of the debate here are important to my argument later that it is Arendt's assumption that freedom and history are ahistorically opposed that undermines her attempt to think through the problems of judgment. Furthermore, it is unclear that a commitment to responsibility is coherent without a supporting commitment to freedom; for example, Strawson suggests that we can be committed to the former without relying on the latter, that we are "non-rationally" committed to certain attitudes and practices which presuppose freedom, without needing "an external 'rational' justification" for those underlying beliefs. See P. Strawson, 'Freedom and Resentment', in Fischer and Ravizza, eds., *Perspectives on Moral Responsibility* (London: Cornell, 1993), pp. 45-66, esp. p. 64; cf. G. Strawson, 'On 'Freedom and Resentment'', in Fischer and Ravizza, pp. 67-100.

²³ *EJ*, p. 294, emphasis added.

²⁴ Ibid., p. 274

²⁵ Ibid., p. 289

²⁶ Arendt appeals unquestioningly to this notion explicitly in at least two places, *ibid.*, p. 290, p. 296

²⁷ A. Norrie, 'Justice on the Slaughter-Bench', p. 14

²⁸ T. Adorno, *Minima Moralia*, p. 39, where Jephcott's more familiar translation reads "Wrong life cannot be lived rightly." I think the above translation which is from Rodney Livingstone's translation of *History and Freedom* captures the sentiment more naturally; see p. 263

²⁹ T. W. Adorno, *History and Freedom: Lectures 1964-1965*, (Cambridge: Polity, 2006), (hereafter *HF*), p. 207

³⁰ Ibid., p. 204

³¹ Ibid., p. 206

³² *EJ*, p. 297

³³ I. Kant, *Idea for a Universal History from a Cosmopolitan Perspective*, AK 820-1, in P. Kleingeld (ed.), *Toward Perpetual Peace and Other Writings*, (London: Yale University Press, 2006), pp. 3-16; Although Adorno focuses on freedom, the doctrine of the postulates of practical reason itself gives expression to the irresolvable tension between individual and history.

³⁴ G. W. F. Hegel, *The Philosophy of Right* (Oxford: Clarendon Press, 1942)

³⁵ See the argument in M. Horkheimer and T. Adorno, *Dialectic of Enlightenment* (Stanford: Stanford University Press, 2002), trans., E. Jephcott, pp.1-35

³⁶ Adorno retains a problematic optimism, ultimately never giving up the hope that reconciliation is still possible, for example see *HF*, p. 258-266

³⁷ Ibid., p. 207

³⁸ Hegel, *The Philosophy of Right*, *passim*

³⁹ See P. Dews, *The Idea of Evil* (Oxford: Blackwell, 2008), Ch. 6, for more on this idea in specific relation to good and evil.

⁴⁰ V. F. Nourse, 'Hearts and Minds: Understanding the New Culpability', *Buffalo Criminal Law Review*, pp. 360-388, p. 386

⁴¹ Ibid., p. 387

⁴² Ibid., p. 388

⁴³ A. Norrie, 'Albert Speer, Guilt and the 'Space Between'', in *Law and the Beautiful Soul* (London: Glasshouse, 2005), p. 106

⁴⁴ Nourse indicates the need to judge the individual's relations with others but does not get beyond thinking in terms of individuals and their immediate relations to other individuals and to the state, which is where Adorno's focus on the historical dimension takes the inquiry further. Later in this paper the dimension of nature becomes central to this approach. Other recent 'relationality' scholarship which has emphasised the need to see subjectivity as contextualised in community includes C. Kutz, *Complicity: Ethics and Law for a Collective Age* (Cambridge: CUP, 2000), and A. Norrie, *Punishment, Responsibility and Justice*

⁴⁵ See I. Kant, *Critique of Practical Reason* (New Jersey: Macmillan, 1993), trans. L. W. Beck; and *Groundwork of the Metaphysic of Morals* (London: Harper and Row, 1956), trans. H. J. Patton

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- ⁴⁶ H. Arendt, *Lectures on Kant's Political Philosophy* (Brighton: Harvester Press, 1982), (hereafter *LK*), p. 13
- ⁴⁷ Disch, p. 146
- ⁴⁸ Beiner makes this point in 'Rereading Arendt's Kant Lectures', in R. Beiner and J. Nedelsky (eds.), *Judgment, Imagination and Politics: Themes from Kant and Arendt* (Lanham, Md.: Rowan and Littlefields, 2001) p. 95
- ⁴⁹ Disch, p. 144
- ⁵⁰ H. Arendt, *The Life of the Mind: Willing* (London: Harcourt Brace, 1978) p. 110
- ⁵¹ *LK*, p. 15
- ⁵² I examine this in detail later in the paper.
- ⁵³ Since in the *Critique of Judgment*, 'the word truth does not occur.' *LK*, p. 13
- ⁵⁴ For example, in the claim that Eichmann followed the command to 'identify his own will with the principle behind the law – the source from which the law sprang. In Kant's philosophy, that source was practical reason; in Eichmann's household use of him, it was the will of the Fuhrer.' *EJ*, p. 137
- ⁵⁵ H. Allison, *Idealism and Freedom: Essays on Kant's theoretical and Practical Philosophy* (Cambridge: CUP, 1996), p. 117; see also H. Allison, *Kant's Theory of Freedom* (Cambridge: CUP, 1990)
- ⁵⁶ *LK*, p. 48
- ⁵⁷ See S. Benhabib, *The Reluctant Modernism of Hannah Arendt* (Oxford: Rowan and Littlefield, 2003), p. 185
- ⁵⁸ To place normativity in the context of 'men in the plural, as they really are and live in societies,' *LK*, p. 13
- ⁵⁹ As Beiner notes, Arendt relies on I. Kant, *Critique of Judgment* (New York: St Martins Press, 1963), trans. N. Kemp Smith
- ⁶⁰ *LK*, p. 72
- ⁶¹ *LK*, p. 67, emphasis added.
- ⁶² E. Young-Bruehl, 'Reflections on Hannah Arendt's *The Life of the Mind*', *Political Theory*, Vol. 10 No. 2, 1982 pp. 277-305, p. 292
- ⁶³ I. Kant, *Critique of Judgment*, quoted in *LK*, p. 43 and again at p. 71
- ⁶⁴ See Beiner's note at p. 163 on the issue of translation here: he points out that *Allgemein* is typically translated as universal, whereas Arendt specifically renders it as general. Insofar as this is an interpretation of Kant, and she does intimate that it should be so understood, then it is clearly wrong, as I argue. Yet, the accuracy of her interpretation of Kant is of less consequence than the power of her own theoretical approach, which is my focus here. Cf. L. Disch, p. 151-2
- ⁶⁵ H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 1978), p. 221
- ⁶⁶ Beiner, 'Rereading Arendt's Kant lectures', p. 97
- ⁶⁷ Arendt, 'Truth and Politics' in Laslett and Runciman, eds., *Philosophy, Politics and Society*, (Oxford: Blackwell, 1967), p. 115
- ⁶⁸ Disch, p. 153
- ⁶⁹ I. Kant, *Critique of Judgment*, quoted in *LK*, p. 43
- ⁷⁰ *LK*, p. 44; parentheses added.
- ⁷¹ Disch, p. 162
- ⁷² Disch, p. 163
- ⁷³ A. Wellmer, 'Hannah Arendt on Judgment', in *Judgment, Imagination and Politics*, p. 169
- ⁷⁴ P. Dews, *Logics of Disintegration: Post-structuralist Thought and the Claims of Critical Theory* (London: Verso, 1987), p. 271
- ⁷⁵ J. Habermas, 'Hannah Arendt's Communications Concept of Power', *Social Research*, 44:1 (1977: Spring), pp. 3-24
- ⁷⁶ *EJ*, p. 276
- ⁷⁷ S. Benhabib, 'Judgment and the Moral Foundations of Politics in Arendt's Thought', *Political Theory*, Vol. 16 No. 1, 1988 pp. 29-51, p. 45
- ⁷⁸ *EJ*, p. 115
- ⁷⁹ *The Life of the Mind: Thinking*, p. 216, emphasis added.
- ⁸⁰ "By producing one species with the faculty [of reason], nature has produced its own master." *LK*, p. 59
- ⁸¹ *Ibid.*, p. 54

⁸² *The Life of the Mind: Thinking*, p. 71

⁸³ History thus appears as a merely *interpretive* idea of ‘progress without end... without which the mere story of history would not make sense.’ *LK*, p. 59

⁸⁴ J. Habermas, ‘Hannah Arendt’s Communications Concept of Power’, p. 22

⁸⁵ It is a telling irony that opponents often disagree because of a shared mistake; the hermeneutic attitude vigorously opposes the positivist one precisely because it accepts the positivist’s incorrect view of the distinction between reason and cause, and its equally incorrect conflation of causal relations and necessary connections, both of which belie positivism’s flat, atomistic ontology which lies at the root of its epistemic conundrums (e.g., Hume’s ‘problem of induction’.) For a notable alternative to both positivist and hermeneutic standpoints, which shares some common ground with Adorno’s position, see R. Bhaskar, *The Possibility of Naturalism* (London: Routledge, 1998)

⁸⁶ See ‘Preface’, *The Origins of Totalitarianism* (New York: Harcourt Brace Jovanovich, 1979)

⁸⁷ Disch, p. 149

⁸⁸ Disch also notes that Paul Guyer acknowledges that “Kant uses crystallization to argue that the ‘mechanical processes of nature’ are sufficient to account for the existence of natural forms”, reinforcing my point that Arendt’s assumption that the concept distances her from causal explanation is misplaced. *Ibid.*, p. 148n.

⁸⁹ *HF*, p. 264, emphasis added.

⁹⁰ *Ibid.*, p. 207

⁹¹ “I comprehend the development of society’s economic formation as a process of natural history.” K. Marx, *Capital I*, p. 7n, quoted at ND 354. I am not claiming that Marx’s view of history *is* a metaphysical materialism, but Adorno’s position is clearly self-consciously ‘immanent’ in idealism in a way that is not so clear in Marx.

⁹² See Simon Jarvis’ interpretation of this issue in S. Jarvis, *Adorno: A Critical Introduction* (London: Polity, 1998), Ch. 8

⁹³ T. W. Adorno, *Negative Dialectics* (London: Routledge, 1973), (hereafter *ND*), p. 233

⁹⁴ *Ibid.*, p. 237

⁹⁵ I. Kant, *Groundwork of the Metaphysics of Morals*, p. 98

⁹⁶ *ND*, p. 236

⁹⁷ *Ibid.*, p. 227

⁹⁸ *HF*, p. 237

⁹⁹ *ND*, p. 231

¹⁰⁰ In *The Phenomenology of Spirit* (Oxford: OUP, 1977), Cf. T. Pinkard, *Hegel’s Phenomenology: The Sociality of Reason* (Cambridge: CUP, 1994)

¹⁰¹ *ND*, p. 396

¹⁰² *HF*, p. 198

¹⁰³ *Ibid.*

¹⁰⁴ *EJ*, p. 233

¹⁰⁵ *ND*, p. 232

¹⁰⁶ *HF*, p. 200

¹⁰⁷ *Ibid.*, p. 197

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, p. 180

¹¹⁰ *Ibid.*, p. 256

¹¹¹ This egalitarian idea is the ‘utopian’ aspect of the concept of freedom. As Gillian Rose explains, “Utopia is another way of naming the thesis that non-dialectical thought is closed thought, because it implies that the object is already captured [by the concept]. To see that the object is not captured is to see utopia.” G. Rose, *The Melancholy Science: An Introduction to the Thought of Theodor W. Adorno* (London: Macmillan, 1978), p. 48

¹¹² *HF*, p. 260

¹¹³ *Ibid.*, p. 261

¹¹⁴ *ND*, p. 282

¹¹⁵ *HF*, p. 266

¹¹⁶ *Ibid.*, p. 238

¹¹⁷ *Ibid.*, p. 202

¹¹⁸ Ibid., p. 265

¹¹⁹ In the way that Eichmann's 'cog in the machine' defence attempted to do; *HF*, p. 203

¹²⁰ Ibid., p. 218

¹²¹ *EJ*, p. 277

¹²² Matt Grist has recently argued that Adorno's naturalistic conception of moral agency is vulnerable on this count, possibly overlooking the importance of the universalistic element of solidarity to Adorno's account, although Grist's argument is addressed primarily to Bernstein's version of Adorno as a moral realist. See M. Grist, XXX in Heidegger and Adorno, cf. J. Bernstein, *Adorno: Disenchantment and Ethics* (Cambridge: CUP, 2001)

¹²³ *HF*, p. 240; Fabian von Schlabrendorff was a judge involved in the July 20th Conspiracy. Adorno refers to him often to express the 'irrational' element in moral experience that cannot be reduced to law. Cf. *HF*, p. 326f.

¹²⁴ T. W. Adorno, *Problems of Moral Philosophy* (Cambridge: Polity, 2001), p. 8

¹²⁵ It is this tension that Benhabib refers to as the 'problem of the mediation of moral principle and moral culture,' S. Benhabib, 'Judgment and the Moral Foundations of Politics in Arendt's Thought', p. 45; see also *The Reluctant Modernism of Hannah Arendt*, pp. 173-215

¹²⁶ M. P. d'Entreves, 'Arendt's Conception of Modernity' in *The Political Philosophy of Hannah Arendt* (London: Routledge, 1994)

¹²⁷ J. Habermas, *The Philosophical Discourse of Modernity* (1986), p. 41

¹²⁸ P. Dews, *Logics of Disintegration*, p. 271

¹²⁹ M Horkheimer and T. Adorno, *Dialectic of Enlightenment* (Stanford: Stanford University Press, 2002), p. 3

¹³⁰ ND 237

¹³¹ A. Wellmer, 'Hannah Arendt on Judgment', p. 170

¹³² ND 236

¹³³ The recent debates in Adorno scholarship have generally pitted Adorno against the institutional differentiation theory of Habermas on the one hand, and the Nietzschean post-structuralist rejection of reason and truth on the other. Fredric Jameson, for example, argues Adorno provides a Marxism for post-modernity, underemphasizing Adorno's awareness of the progressive aspects of modernity, whilst Robert Pippin has argued that Adorno's naturalistic dimension suggests a reversion for a pre-modern "re-enchantment project that is hopeless," recalling the "teleological, scholastic view of nature," which seems to completely ignore Adorno's emphasis on the progressive aspects of modernity. See F. Jameson, *Late Marxism* (London: Verso, 1990), and R. Pippin, 'Adorno's Negativistic Ethics' in *The Persistence of Subjectivity* (Cambridge: CUP, 2005), p. 119; for a discussion of the literature see P. Hohendahl, *Prismatic Thought: Theodor W. Adorno*, (London: University of Nebraska, 1995), Ch. 1.

¹³⁴ The Adornian rejoinder to the forceful criticisms of Habermas, Honneth and Wellmer might be along the lines that the entanglement of normative and instrumental rationality means that the project of institutional differentiation which the second generation critical theorists propose would only be possible on the assumption of their goal: a state of reconciliation. Only in a social world where reason was not antagonistic with itself could one begin to differentiate normative and purposive rationality.

¹³⁵ *LK*, p. 75-6

¹³⁶ Ibid., p. 74

¹³⁷ J. Habermas, 'Hannah Arendt's Communications Concept of Power', p. 24

¹³⁸ *HF*, p. 263

¹³⁹ Ibid., p. 264

¹⁴⁰ Ibid.

¹⁴¹ Ibid., p. 263

¹⁴² Ibid., p. 264

¹⁴³ Ibid., p. 262

¹⁴⁴ Ibid., p. 265

¹⁴⁵ *HF* 262

¹⁴⁶ *HF* 203

¹⁴⁷ For example the relational theories, mentioned earlier, of Norrie, *Punishment, Law and Ideology*, and Kutz, *Complicity*.

¹⁴⁸ I have in mind recent restorative and ‘therapeutic’ approaches to judgment and punishment, as well as ‘informal’ or popular models, on which see A. Norrie, ‘From Law to Popular Justice: Beyond Antinomianism’, in *Law and the Beautiful Soul*, pp. 33-49