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REFLECTING ON HANNAH ARENDT AND *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL*

Abstract

In this essay, we offer a modern legal reading of Hannah Arendt's classic book, *Eichmann in Jerusalem*. First we provide a brief account of how Arendt came to write *Eichmann in Jerusalem* and explain her central arguments and observations. We then consider the contemporary relevance of Arendt's work to us as legal academics engaged with a variety of problems arising from our times. We consider Arendt's writing of *Eichmann in Jerusalem* as a study in intellectual courage and academic integrity, as an important example of accessible political theory, as challenging the academic to engage in participatory action, and as informing our thinking about judgement when we engage in criminal law reform. Finally, we consider the role of Arendt's moral judgement for those within government today and how it defends and informs judgement of the modern bureaucrat at a time of heightened government secrecy.

I Introduction

On 11 April 1961 the Israeli Government put the Nazi war criminal Adolf Eichmann on trial in Jerusalem. The trial was established by the Israeli prosecution as not only a trial of Eichmann, but also a bearing witness to the Holocaust itself. The prosecution called over 100 witnesses to testify, many of whom were survivors of Nazi concentration camps. For 14 weeks the trial made international headlines. One of the trial's most famous observers was the political theorist Hannah Arendt.[1] Arendt reported her observations in *The New Yorker*. These essays were then collated and published in her 1963 book *Eichmann in Jerusalem: A Report on the Banality of Evil*.[2]

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1 While Arendt is sometimes described as a philosopher she explicitly rejected this title. See Hannah Arendt, *Hannah Arendt: The Last Interview: And Other Conversations* (Melville House, 2013) 1.

2 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics, first published 1963, 2006) ('*Eichmann in Jerusalem*').

At the time of their publication, Arendt's reports and characterisation of Eichmann's crimes and the nature of Eichmann's criminality shocked, outraged and hurt many within the public, the Jewish community, the academic community and even her close circle of friends.[3] Few exercised the same rational, rigorous and objective judgement that Arendt had brought to the trial of Eichmann. In 2012, the release of a new film about her reports, Margarethe von Trotte's *Hannah Arendt*, stirred again these emotive responses.

What attracts people to Arendt's *Eichmann in Jerusalem*? Some may read it to understand how the horror of the Final Solution could have ever occurred, while many read it to take lessons for humanity and society, and also themselves, in avoiding evil. We read the text, scouring it for signs or themes that can be absorbed for the benefit of our societies today. The main insight traditionally drawn from the work is Arendt's profound and counterintuitive argument that evil can be banal and that Eichmann was merely a bureaucrat doing his work in an efficient, unquestioning manner.[4] However, while one lesson from the text concerns the potential even-handedness, the dullness and the bureaucratisation of evil, there are other poignant lessons embedded in Arendt's work.

In this essay, we write as a small community of legal scholars, from different areas of law, who wish to offer a modern legal reading of *Eichmann in Jerusalem*.[5] First we provide a brief account of how Arendt came to write *Eichmann in Jerusalem* and explain her central arguments and observations. This essay does not seek to answer the most common questions that have engaged critics of Arendt and *Eichmann in Jerusalem*: questions about whether Arendt's historical portrayal of the Holocaust and the role of the Jewish councils in the Final Solution was accurate or whether Eichmann was, in fact, banally or radically evil. The answers to these questions are, no doubt, important and deserving of inquiry. Here, rather, we consider the contemporary relevance of Arendt's work to us as legal academics engaged with a variety of problems arising from our times. We consider Arendt's writing of *Eichmann in Jerusalem* as a study in intellectual courage and academic integrity (at a time when this appears to be waning), as an important example of accessible political theory (when theory has become convoluted and inward-looking), as a challenge to the

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3 For an introduction to the controversy over *Eichmann in Jerusalem*, see Roger Berkowitz, *Misreading 'Eichmann in Jerusalem'* (7 July 2013) New York Times, <http://opinionator.blogs.nytimes.com/2013/07/07/misreading-hannah-arendts-eichmann-in-jerusalem/> and Adam Kirsch and Rivka Galchen, *Fifty Years Later, Why Does 'Eichmann in Jerusalem' Remain Contentious?* (28 November 2013) New York Times <http://www.nytimes.com/2013/12/01/books/review/fifty-years-later-why-does-eichmann-in-jerusalem-remain-contentious.html?pagewanted=all&_r=0>.

4 Bernard J Bergen, *The Banality of Evil: Hannah Arendt and 'The Final Solution'* (Rowman & Littlefield Publishers, 1998).

5 See also Marco Goldoni and Christopher McCorkindale, *Hannah Arendt and the Law* (Hart Publishing, 2013). This volume represents the first dedicated and coherent treatment of the many engagements that Arendt makes with the law. See also Marie Luise Knott's recent encounter with the Eichmann trial, *Unlearning with Hannah Arendt* (Other Press, 2014).

academic to engage in participatory action (rather than write for ourselves and our small research community) and as informing our thinking about judgement when we engage in criminal law reform. We consider the role of Arendt's moral judgement for those within government today and how it may defend and inform judgement of the modern bureaucrat at a time of heightened government secrecy.

II Introducing *The Banality of Evil*

The Eichmann trial marked a major shift in Arendt's thinking and provided her with a fresh and original theory of evil. When she wrote *The Origins of Totalitarianism* in 1951,[6] Arendt used the phrase 'radical evil' to describe Nazi extermination camps (or 'death factories' as she called them).[7] Arendt argued that '[s]uch an invention could have come only from an intention to do evil.'[8] The concept of 'radical evil' was derived from Immanuel Kant (whose work Arendt claimed to have first read at age 12). For Kant, the noun 'evil' does sometimes require the adjective 'radical'. Radical evil is a type of evil that is rooted in an evil motivation or an intention to do evil.[9] Kant held that radical evil is a rare and quite distinct evil that results from ignorance or incompetence.[10]

Having missed the Nuremburg trials,[11] the Eichmann trial was Arendt's first opportunity to see and listen to a Nazi official in the flesh. In response she provided an interesting and yet contestable description of Eichmann.[12] Arendt was immediately struck by how normal Eichmann appeared: he was 'not even sinister.'[13] She described him as a superficial conformist, with no sense of personal responsibility. Arendt reported that Eichmann had nothing but banal motives.[14] He wanted to move up in the Nazi bureaucracy, to be an accepted and integral part of that group and prove himself to be the perfect civil servant by obeying every order and carrying out his role in the deportation and then extermination of the Jewish people with maximum efficiency. These, Arendt argued, were not radically evil motives connected to a lust for power, revenge, hatred of the Jewish people, or anything of that nature.[15]

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6 Hannah Arendt, *The Origins of Totalitarianism* (first published 1951, Harcourt, 1973).

7 Ibid 14.

8 Ibid.

9 Immanuel Kant, *Religion Within the Limits of Reason Alone* (Theodore M Greene and Hoyt H Hudson trans, Harper and Row, 1960) [trans of: *Die Religion innerhalb der Grenzen der bloßen Vernunft* (first published 1793)] 32.

10 Ibid.

11 Ann Tusa and John Tusa, *The Nuremberg Trial* (Skyhorse Publishing, 2010).

12 More recent biographical information casts a somewhat different light on Eichmann's agency and motivations. See eg Hans Safrian, *Eichmann's Men* (Cambridge University Press, 2009).

13 Lotte Kohler (ed), *Within Four Walls: The Correspondence Between Hannah Arendt and Heinrich Blucher, 1936–1968* (Harcourt, 2000) 359.

14 Arendt, above n 2, 15–16.

15 Richard J Bernstein, *Hannah Arendt and the Jewish Question* (MIT Press, 1996) 137.

Arendt had begun to formulate her alternative explanation of evil in the ten-year period between the publication of *The Origins of Totalitarianism* and the Eichmann trial. Central to her thinking was the notion of 'thoughtlessness', a term she described in her 1958 book *The Human Condition* as 'the heedless recklessness or hopeless confusion or complacent repetition of "truths", which have become trivial and empty.'[16] Arendt suspected that this phenomenon was widespread and even called it *the* 'outstanding characteristic of our time.'[17]

There in Jerusalem, right before her eyes, was the living incarnation of a thoughtless person. In describing Eichmann as 'thoughtless' Arendt did not mean that he was careless or stupid.[18] Rather, Arendt believed that Eichmann lacked common sense and an ability to exercise thoughtful judgement.[19] Eichmann could recite the complex details of his work and even correctly recite Kant's categorical imperative to the three presiding German-speaking Israeli judges (a point that we take up again in the next section).[20] But Eichmann could neither ask himself nor think through the question that Arendt considered most essential to morality: 'Could I live with myself if I did this deed?'[21]

Following her report on the Eichmann trial, Arendt stopped using the phrase 'radical evil'.[22] She did not deny that human beings could act from base motives and she used terms such as 'calculated wickedness' to describe immoral or heinous actions.[23] However, as she explained in a letter to the philosopher and historian Gershom Scholem:

> It is indeed my opinion that evil is never 'radical', that it is only extreme, and that it possesses neither depth nor any demonic dimension. It can overgrow

16 Hannah Arendt, *The Human Condition* (first published 1958, University of Chicago Press, 1998) 5.

17 Ibid.

18 Dana Villa, *Politics*, *Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton University Press, 1999) 40.

19 See Judith Butler, 'Hannah Arendt's challenge to Adolf Eichmann', *The Guardian* (online), 29 August 2011 <http://www.theguardian.com/commentisfree/2011/aug/29/hannah-arendt-adolf-eichmann-banality-of-evil>.

20 Arendt, above n 2, 135. Kant's categorical imperative stipulates: 'Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.' See Immanuel Kant, *Grounding for the Metaphysics of Morals* (James Wesley Ellington trans, Hackett Publishing Co, 1993) [trans of: *Grundlegung zur Metaphysik der* Sitten (first published 1785)] 14–15, 30.

21 Elisabeth Young-Bruehl, *Why Arendt Matters* (Yale University Press, 2009) 3. See further Hannah Arendt and Mary McCarthy, *Between Friends: The Correspondence of Hannah Arendt and Mary McCarthy 1949–1975* (Harcourt, 1995) 19, 22.

22 Seyla Benhabib, 'Arendt's Eichmann in Jerusalem' in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press, 2000) 74.

23 Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (Yale University Press, 2nd ed, 2004) 369.

> and lay waste the entire world precisely because it spreads like a fungus on the surface. It is 'thought defying,' as I said because thought tries to reach some depth, to go to the roots, and the moment it concerns itself with evil, it is frustrated because there is nothing. That is its 'banality.' Only the good has depth and can be radical.[24]

For Arendt, this insight represented a '*cura posterior*'[25]— a cure for her previous thinking on the nature of evil evident in her work on totalitarianism. It marked an important turning point in her own personal history and intellectual development. And yet, as we note above, her report caused many to label her a Nazi apologist and a traitor to the Jewish people. While most scholars concede that there are passages in her report that were insensitive, poorly expressed and lacked historical nuance,[26] Arendt never once suggested that Eichmann was innocent — she supported the death sentence handed down by the Israeli Supreme Court (although not the Court's reasoning).[27] Arendt wanted people to pay attention to Eichmann's story, and so she told his story in enormous detail so that her readers could understand how ordinary people could commit great acts of evil.[28]

In her report, Arendt sought to identify the 'moment' or period of time when Eichmann chose to abandon his capacity for thinking and go along with the orders of his superiors. According to Arendt, this occurred during a four-week period beginning on 31 July 1941 after Eichmann was officially informed that the Final Solution of the Jewish question had become official Nazi policy. During those four

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24 Ibid. In her subsequent writing Arendt provided only further illustrations of the banality of evil rather than a thorough going argument that evil is never radical.

25 Ibid 328. Two years after her report was published, and with controversy still brewing, Arendt wrote in a letter to her friend Mary McCarthy: 'You are the only reader to understand that I wrote the book in a curious euphoria. And that ever since I did it I feel — after twenty years — light-hearted about the whole matter': Arendt and McCarthy, above n 21, 168. See also Susan Neiman, 'Theodicy in Jerusalem' in Steven E Aschheim (ed), *Hannah Arendt in Jerusalem* (University of California Press, 2001) 65.

26 See eg Young-Bruehl, above n 23, 339–347. While Arendt had produced a considerable volume of historical material during the writing of her three volume *Origins of Totalitarianism* she also drew heavily from Raul Hilberg's *The Destruction of the European Jews* (Holmes & Meier, 1985). It is noteworthy that Hilberg was himself very disappointed with Arendt's use of his research. See Raul Hilberg, *The Politics of Memory: The Journey of a Holocaust Historian* (Ivan R Dee, 2002) 148–149:

> 'In constructing the linkage [between the two books] ... historians have failed to observe two significant differences between us ... she did not recognise the magnitude of what this man had done with a small staff, overseeing and manipulating Jewish councils in various parts of Europe ... the second divergence between her conceptions and mine concerned the role of the Jewish leaders in what she plainly labelled the destruction of her own people'

27 Villa, above n 18, 40.

28 Jochen von Lang (ed), *Eichmann Interrogated: Transcripts from the Archives of the Israeli Police* (Vintage Books, 1984). This text contains extracts from Eichmann's 275-hour pre-trial interrogation.

weeks, Eichmann had several opportunities to observe firsthand the grisly preliminary killing operations in Poland. Eichmann testified that he was repelled by these operations but after a short time he assumed his responsibilities for transporting Jews to those same death camps.[29] Arendt remarks:

> It is of great political interest to know how long it takes an average person to overcome his innate repugnance toward crime, and what exactly happens to him once he has reached that point … Yes, he had a conscience, and his conscience functioned in the expected way for about four weeks, whereupon it began to function the other way around.[30]

For Arendt, the controversy that her book generated was a vivid illustration of the thoughtlessness that she observed in Eichmann. People stopped thinking, took on received ideas about her work and acted on them without critical reflection.[31] In other words, there was a thoughtless controversy over a description of a mass-murdering bureaucrat as a thoughtless man. What better way to illustrate the key point of her report?

III The Responses and the Contemporary Relevance of *Eichmann in Jerusalem*

The phrase 'the banality of evil' is interesting and challenging. If evil is accepted as banal,[32] its destruction requires vigilance and judgement by every member of society, lest we be pulled into thoughtlessness. Arendt herself provides a model for a life lived with integrity, critical reflection and moral judgement. As teachers, it is also our responsibility to develop the critical thinking and capacity for judgement of future generations. It is for these reasons that Arendt matters to us, as thinking and acting people, now.[33] In the remainder of this article, we explore five ways in which Arendt's life and ideas in *Eichmann in Jerusalem* remain of contemporary relevance to academics, theorists, lawyers, public servants and governments.

A *The First Response: Intellectual Courage and Academic Integrity*

In producing her report on the Eichmann trial, Arendt demonstrated an intellectual courage that ought to inspire contemporary academics. The presentation of her report reflects an *idea* of the intellectual whose station it is to raise difficult questions publically, to confront orthodoxy and dogma and who, in the words of Edward Said, should be prepared to be 'embarrassing, contrary, even unpleasant.'[34]

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29 Arendt, above n 2, 92.

30 Ibid 93, 95.

31 Young-Bruehl, above n 23, 328–340.

32 Books such as Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (Picador, 2006) specifically challenge this thesis.

33 Young-Bruehl, above n 21, 5.

34 Ibid 12.

Arendt's moral courage is to be found in her portrayal of Eichmann as banal; her remarks on the European Jewish councils and their role in the Final Solution;[35] and her discussion of Israel's conduct of the trial, the legal questions raised by it and the political ends to which she believed it was directed.[36]

Arendt also understood that moral principles need to transcend abstract philosophical discussion and be realised in practice if they are to have any meaning.[37] In holding this position, Arendt was deeply inspired by many friends who modelled moral courage.[38] Arendt captures several of these figures in her 1968 book, *Men In Dark Times.* She introduced the text by noting:

> Even in the darkest times we have the right to expect some illumination. [This] may well come less from theories and concepts than from the uncertain, flickering, and often weak light that some men and women, in their lives and their works, will kindle under almost all circumstances and shed over the time span that was given them on earth.[39]

A particular source of light for Arendt was her friend and teacher, the philosopher Karl Jaspers.[40] Jaspers had stood firm and stated clearly his opposition to Nazi policy at a time of great persecution.[41] He continued to criticise publically the Nazi regime while teaching in Heidelberg and was only rescued in the last days of the war as he and his Jewish wife were scheduled for deportation to a concentration camp.[42] After the war, Jaspers held a special place in Arendt's small circle of friends. She described him as an intellectual who 'never despised the world, never retreated

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35 For a particularly blistering account of Arendt's handling of the role of Jewish councils in the final solution see Deborah E Lipstadt, *The Eichmann Trial* (Schocken, 2011) 212–216.

36 Young-Bruehl, above n 23, 337.

37 Chief amongst Arendt's influences was Immanuel Kant (see discussion above). However, see also Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (Hans Jonas and David Herr trans, University of Chicago Press, 1985) [trans of: *Das Prinzip Verantwortung*, (first published 1979)]; Reinhold Nieburh, *Moral Man and Immoral Society: A Study in Ethics and Politics* (first published 1932, Westminster John Knox Press, 2013) and Karl Jaspers, *The Question of German Guilt* (Fordham University Press, 2001).

38 Arendt's humanism and the relationship between her ethics and friendship are deeply fascinating. Arendt quotes Cicero in saying: 'I prefer before heaven to go astray with Plato rather than to hold true views with his opponents': *Between Past and Future* (Penguin Classics, 2006) 221. See also Danielle Celermajer, 'The Ethics of Friendship' in Andrew Schaap, Danielle Celermajer and Vrasidas Karalis (eds), *Power, Judgement and Political Evil: In Conversation with Hannah Arendt* (Ashgate, 2010) 55.

39 Hannah Arendt, *Men in Dark Times* (Mariner Books, 1968) ix.

40 See Hannah Arendt and Karl Jaspers, *Correspondence 1926–1969* (Mariner Books, 1993).

41 Young-Bruehl, above n 21, 7.

42 Ibid.

into himself' but with a 'sovereign naturalness' and a certain 'cheerful recklessness' exposed himself to 'the currents of public life, speaking out with consistent reasonableness on public issues.'[43]

A point of contrast from Jaspers was Arendt's first important teacher, Martin Heidegger.[44] As a young woman, Arendt watched her 'once life-transforming professor'[45] join the Nazi party and position himself as the 'philosopher king' of the Third Reich.[46] Later in life, Arendt re-established contact with Heidegger and watched him retreat further from the public sphere and 'pour scorn' on the idea that human beings are by nature political animals. To Arendt, Heidegger's 'sarcastic, perverse-sounding statement: The light of the public obscures everything'[47] represented the embodiment of irresponsibility toward the public sphere — a space that, she argued, was the only place where truth could emerge.[48]

That Arendt chose to focus her final (and uncompleted) book on her friends reveals something of the urgent philosophical claim that she introduced in *Eichmann in Jerusalem*: that the most powerful way to combat evil is through the practice of politics. People should gather together and collectively build a form of life in which the worth of each is made essential. Political action, according to Arendt, is the only way that truth could emerge[49] and her intellectual courage should be a source of inspiration for academics today, if we are to avoid the spectre of totalitarianism in our own time.

B *The Second Response: Arendt and Participatory Action Research*

Arendt dedicated an entire part of *Eichmann in Jerusalem* to the deportation of the Jewish people and the responses of the neighbouring European countries to the revelation of Germany's crimes.[50] She included descriptions of these events in Denmark and Italy. The actions taken within these countries embody moments of human fearlessness and bravery. As we look for lessons about actions and attitudes to avoid, here we read about what made some societies and the people within them maintain their humanity.

The chapter on the deportation of Jews from Western Europe considers the action of the Danes and Italians and the courage of their action.[51] The Danish stories of bravery are about the dock workers who went on strike, refusing to repair German

43 Arendt, above n 39, 77.

44 Hannah Arendt and Martin Heidegger, *Letters: 1925–1975* (Harcourt, 2003).

45 Young-Bruehl, above n 21, 7.

46 Ibid.

47 Arendt, above n 39, ix.

48 Young-Bruehl, above n 21, 7. Arendt's most detailed elaboration on the public sphere can be read in above n 16.

49 Young-Bruehl, above n 21, 7.

50 Arendt, above n 2, 172–180.

51 Ibid.

ships;[52] the Danish police, who were willing to obstruct the Germans;[53] and the King, 'who stood ready to receive'[54] the Jewish population. Evil may indeed be banal, but, in contrast, Arendt described Denmark's reaction to the protection of its Jewish population as '*truly amazing*'.[55] The stories about the Italians described a different strategy and a different bravery: 'The Italians never offer public opposition to Nazi plans. They humor the Nazis, saying they will do it tomorrow. But they do not comply'.[56] As Arendt noted, the 'Italian humanity, moreover, withstood the test of the terror that descended upon the people during the last year and a half of the war'.[57] What lessons can be drawn from Arendt's reporting of these humane actions, and how can these lessons be translated into a legal academic's life?

Denmark and Italy can be read as embodying two contrasting examples: a public and private response to evil, respectively. This division has been central in subsequent analysis by political philosophers, such as Iris Marion Young, in order to assess and compare the relative merits of the political responses to evil. According to Young, 'To be political, action must be *public*, and aimed at the possibility or goal of collective action *to respond to and intervene in historic events.*'[58] For Young it was only the Danish that succeeded, politically, in their response to evil as their government and society publicly rejected the deportation.

The insistence on a public response to evil may well be an accurate recommendation for a political ideal. However, it is also possible to read the Danish and Italian response as examples of a more personal and less idealised lesson. It is clear that the Danish and Italian experiences as recounted by Arendt reveal a *common* personal response to evil. Individuals within both societies personally acted against and withstood the Nazi action in relation to deportations. In relation to both countries, Arendt describes neither the country nor their citizens as merely following orders. If we are reading Arendt for *individual personal instruction*, one lesson could be 'to take action',[59] purposeful free human action. The importance of a personal lesson stands, regardless of one's 'good luck' in being born in an ideal public and politically responsible Denmark or 'bad luck'[60] in being born in Italy. Regardless of

52 Ibid 172.

53 Ibid 173.

54 Ibid 174.

55 Ibid 172 (emphasis added).

56 Ibid 176–180; Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) 89.

57 Arendt, above n 2, 179.

58 Young, above n 56, 89.

59 On the reading of the centrality of action to Arendt's work see Jan Klabbers, 'Possible Islands of Predictability: The Legal Thought of Hannah Arendt' (2007) 20(1) *Leiden Journal of International Law* 1, 6: 'the political world revolves around a concept of action'.

60 The importance of taking your circumstances as you find them, and acting within them, is highlighted by Arendt's recounting of Eichmann's extraordinary defence as to his actions — a defence based in part on luck. Arendt, above, n 2, 175.

your political circumstances, the personal response should be to act in whatever way you can.

How does one translate this concept of 'personal action' into an academic legal context?[61] One way is through participatory-action research ('PAR'), which has an accepted place in the social sciences but less so in law.[62] The basis of PAR is engagement. PAR has a rich history and embodies a range of complex and sometimes divergent approaches.[63] The approach centres on action by the researcher, gaining knowledge through different methods by encouraging movement beyond traditional ideas of knowing and reducing the gap 'between those who have social power over the process of knowledge generation and those who have not'.[64] PAR is a process of 'liberation'[65]— not in the sense of revealing a 'truth' that would risk replicating social forms of knowing, but through the individual researcher acting within the world.

The most egalitarian expression of the idea of acting in the world is that '[l]eaving one's office and venturing into the field transforms one's core assumptions regarding one's subject of study':[66] not forever, but for a while. This can be illustrated by reflecting on Arendt's work itself.[67] Had Arendt not travelled, seen, observed, there is a real question as to whether she could have evoked the central thesis of her work: the *banality* of evil. In her office, evil may well have remained powerful and ever present. She took action; Arendt was within the world observing it. PAR can translate to whatever area of study an academic may be undertaking.

The concept of reading Arendt for signs of PAR is not original and has been explored, for example, by Bridget Somekh: 'Arendt's insight of plurality ... provides us with our most reliable organizing principle, as well as her understanding that it is *through our actions that we make meanings rather than through words*.'[68]

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61 Bridget Somekh, *Action Research: A Methodology for Change and Development* (McGraw-Hill Education, 2005) 26.

62 However there are elements of participatory approaches in the movement to new legal realism. See Victoria Nourse, and Gregory Shaffer, 'Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?' (2009) 95 *Cornell Law Review* 61.

63 See the overview of approaches in Peter Reason and Hilary Bradbury, *Handbook of Action Research* (Sage Publications, 2006).

64 Norma R A Romm, *New Racism: Revisiting Researcher Accountabilities* (Springer, 2010) 317–318 citing M A Rahman, 'The Theoretical Standpoint of PAR' in O Fals-Borda and M A Rahman (eds), *Action and Knowledge: Breaking the Monopoly with Participatory Action Research* (Apex Press, 1991) 13, 14.

65 Ibid.

66 Nourse and Shaffer, above n 62, 85 quoting Gregory Shaffer, 'A Call for a New Legal Realism in International Law: The Need for Method' (Legal Studies Research Paper Series, Research Paper No 09-02, University of California, Irvine School of Law, 6 January 2009) 8, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323912>.

67 Somekh, above n 61.

68 Ibid 26 (emphasis added).

Reading Arendt provides us with a powerful example of how PAR can be achieved in academic life. *Eichmann in Jerusalem* is primarily itself brave humane action involving witnessing and travelling by Arendt, and we simply gain access to this great *action* through words.

C *The Third Response: Eichmann in Jerusalem as Theory*

For a book that launched a 'civil war' among intellectuals, that bitterly divided its readers and led to a kind of excommunication of Arendt,[69] *Eichmann in Jerusalem* is, in some respects, a benign text. The book is not, and does not purport to be, a detailed and fully developed work of legal, political or moral theory. For Arendt, the book is first and foremost a trial report, and draws from, as its main source, the trial transcript.[70] However, *Eichmann in Jerusalem* is not *only* a trial report; if it were it is inconceivable that it would have led to such significant and sustained controversy. Rather, the genius of the work is in the way it uses the form and style of the report to demand of the reader an engagement with deep and confronting issues of theory.

That a piece largely written as a series of essays in *The New Yorker* should be capable of creating such significant cultural waves challenges us to think not only about the public role of legal and political theory, but the way in which the *form* of the presentation of theory affects the performance of that role.

1 *The Form and Style of Theory*

To the modern reader of *Eichmann in Jerusalem*, the accessible, journalistic style is captivating and readable; the work is perfectly capable of being digested in a couple of sessions. Arendt's mixture of 'social analysis, journalism, philosophical reflections, psychology, literary allusion and anecdote' constitutes a disregard for conventional scholarship and academic norms.[71] Such a style is beguiling and is particularly foreign when contrasted with the staid and structured conventions of academic writing, especially the writings of legal philosophy.

Modern 'legal philosophy'[72] has become increasingly unreadable, an 'impenetrable thicket'[73] accessible only to 'a shrinking audience within the academy'.[74] It is

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69 Elon, 'Introduction', in Arendt, above n 2, i.

70 Arendt, above n 2, 280.

71 Ibid xi.

72 For a discussion of the significance of this difference of nomenclature between 'jurisprudence' and 'legal philosophy' see Roger Cotterrell, 'Why Jurisprudence Is Not Legal Philosophy' (Legal Studies Research Paper No 169/2014, Queen Mary University of London, 24 January 2014) available at <http://ssrn.com/abstract=2384615>.

73 Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd ed, Oxford University Press, 2012) xvii.

74 Richard Cosgrove, *Scholars of the Law: English Jurisprudence From Blackstone to Hart* (New York University Press, 1996) 10, quoted in Neil Duxbury, 'The Narrowing of English Jurisprudence' (1997) 95 *Michigan Law Review* 1990, 1996.

largely a discipline that operates in a 'small, hermetic — and rather incestuous — universe',[75] a discipline that fails 'to communicate its ideas to those outside its own caste'.[76] The enterprise of jurisprudence has been transmuted into 'a confined arena of debate, policed not by criteria of social or legal significance but by canons of technical sophistication in argument.'[77] Such an approach to theory excludes all but the most dedicated disciple.

In stark contrast, Arendt invites the reader in, creating a narrative that is engaging and accessible. Of course, part of the style and tone is attributable to the origin of the book as reports for *The New Yorker* and the broad readership that would be its audience there.

However, it is a mistake to think that its style can simply be reduced to this issue of audience. Rather, the work is a powerful example of the use of narrative to challenge the reader; it is more a parable than a simple report. *Eichmann in Jerusalem* is properly a work of theory, if entirely atypical in its form. In developing a conception of 'thoughtless' evil, in exploring the role of the criminal trial (as opposed to the show trial),[78] issues of intent in criminal law,[79] the role of international tribunals[80] and the significance of the original kidnapping of Eichmann,[81] Arendt offers profound insights into issues of legal, political and moral theory. Much of this theory is not explicitly addressed except in the Prologue and Postscript of the text. However, it is a mistake to think that this is an afterthought or that it can be excised from the previous discussion. Rather, it is the unavoidability of the moral concerns, the difficulties posed by Eichmann's banality and the terrifying nature of his crimes that give intensity to the concerns of legal and moral theory. The narrative style makes the portrayal of Eichmann fascinating, challenging and difficult to dismiss. This in turn poses a most uncomfortable challenge for the reader, who is forced to engage, actively and personally, in the theoretical issues. The conclusions Arendt reaches are compelling because they are revealed as such a natural part of the narrative. They are confronting for the same reason.

If *Eichmann in Jerusalem* had been put forward as a traditional work of legal or moral theory, there is little doubt that the piece would not have created a fraction of the controversy. The narrative style demands an engagement from the reader that is rarely present in the rarefied and parochial discourses of academic philosophy. Modern jurisprudence and philosophy more generally tend to exclude argumentative

75 Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) 2.

76 Cosgrove, above n 74.

77 Cotterrell, above n 72, 7.

78 Arendt, above n 2, 8, 298.

79 Ibid 277.

80 Ibid 261.

81 Ibid 263–4.

engagement, rather than 'encouraging the challenge of different perspectives.'[82] The stylistic norms and protocols of such theory 'divide, limit and insulate it from an outward-looking curiosity',[83] collapsing into a 'sharpshooter'[84] approach to analysis that focuses on abstract technical problems. Legal philosophy, in particular, has become focused not on 'juristic experience in all its practical complexity, ethical ambiguity and contextual specificity'[85] but upon abstract problems defined by philosophical interest.

Arendt's work is a direct challenge to such a parochial and isolationist approach.[86] It revels in the important moral and political dilemmas that surround the *practice* and *experience* of theory. Moreover, the narrative style presents those dilemmas in a manner that invites a response from the reader without restricting such engagement to an elite core of theorists. It is this very democratisation of theory that allowed the work to have the impact that it did. Had Arendt utilised a more traditional academic form, her conclusions may have been intellectually controversial, but they would not have been captivating in the same way. Her style is beguiling precisely because of its contrast with academic protocols: it is arguable that it is *because* of its form, rather than despite it, that the work succeeds in being a significant work of public theory.

2 *The Purpose of Theory and the Narrative Form*

Eichmann in Jerusalem challenges the thoughtful theorist to consider what it is that makes a successful work of theory; indeed, what is the role and purpose of legal and moral theory? Without getting into a detailed examination of the role of jurisprudence,[87] at least one role of theory is to provide practical guidance for conduct

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82 Cotterrell, above n 72, 9.

83 Ibid 13.

84 Ibid 9–10; As Sean Coyle notes, legal philosophers 'have extracted innumerable technical satisfactions from their exploration of the weaknesses of each other's positions': Sean Coyle, 'Legality and the Liberal Order' (2013) 76 *Modern Law Review* 401, 404.

85 Cotterrell, above n 72, 13–14

86 Many theorists are increasingly aware of these critiques, even as they struggle to break free from the conventions. Jeremy Waldron, for example, notes that many of the debates in modern jurisprudence tend 'to be flat and repetitive … revolving in smaller and smaller circles among a diminishing band of acolytes. Worse still, they are in danger of becoming uninterestingly parochial from a philosophical point of view, as we distance ourselves from the intellectual resources that would enable us to grasp conceptions of law and controversies about the law other than our own conceptions and our own controversies, and law itself as something with a history that transcends our particular problems and anxieties': Jeremy Waldron, 'Legal and Political Philosophy' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002).

87 For a useful discussion of the various roles of jurisprudence, see William Twining, 'Some Jobs for Jurisprudence' (1974) 1 *British Journal of Law & Society* 149; William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 557, 575.

and to inform concrete decisions. Jurisprudence thus becomes an 'exploratory enterprise' serving to support an ongoing, ever-changing juristic practice,[88] and to make sense of experience.[89] If this role is accepted, then the accessibility of a theory becomes intertwined with its usefulness and its ultimate merit. There is a normative imperative for good theory to be clear and accessible. If at least part of the purpose of legal theory is to inform and engage broadly, then accessible and engaging work is not only stylistically but functionally preferable to logically precise yet impenetrable work. Seen in this way, works of theory that may be disparaged as works of academic legal philosophy may be the most successful and enlightening jurisprudentially. The work of jurists such as Lon Fuller and Karl Llewellyn would fall into this category.[90] Fuller's famous tale of King Rex[91] is not simply a way of alerting us to a range of settled understandings, but a *story* with a narrative logic of its own.[92] That narrative form, approachable and clear, contributes greatly to the success of Fuller's point. Similarly, Ronald Dworkin's image of Judge Hercules and the 'chain novel' concept of integrity,[93] capture the mind of the reader in a way in which more abstract theorists such as Joseph Raz, Matthew Kramer or HLA Hart may fail to do.

Arendt took this approach a step further, not merely using an image or parable as part of a theory, but expanding that narrative to subsume the entire work. In doing so, Arendt used this narrative form to draw the reader inevitably to confront conclusions they would otherwise be reluctant to contemplate. Arendt has not set forth a fully developed legal or moral theory in *Eichmann in Jerusalem*, and in that respect it may be described as not a book *of* legal theory. However, it is very much a book *for* theory. Through the narrative form, Arendt forces the reader to confront unavoidable problems of moral, legal and political theory.[94] She invites, and indeed demands, the reader to contemplate and reflect upon basic moral matters. She succeeds in presenting her conclusions precisely because she does not hide behind a façade of academic protocols. Her readers are obliged to engage in theory irrespective of whether or not they are steeped in learning of the leading theorists. Her conclusions are compelling because they are broadly accessible.

The lessons of *Eichmann in Jerusalem* extend beyond its substantive conclusions, to force us to consider the role of style and form in academic writing, most particularly in works of theory. The success, in terms of impact, controversy and longevity

88 Cotterrell, above n 72, 2.

89 Ibid 14.

90 Ibid 15.

91 See Lon Fuller, *The Morality of Law* (2nd ed, Yale University Press, 1964) 33–41.

92 Nigel Simmonds, *Central Issues in Jurisprudence* (4th ed, Sweet & Maxwell, 2013) 247.

93 Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998) 239–54.

94 Many of the legal issues involved in the Eichmann trial were examined a few years prior to that trial with respect to the Nuremberg trials in the celebrated Hart/Fuller debate: See HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard Law Review* 593; Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1957) 71 *Harvard Law Review* 630.

of Arendt's work asks us to re-examine our existing conventions in a way that few other works do.

D *The Fourth Response: Reading Arendt as a Criminal Lawyer*

By declaring Eichmann to be ordinary, banal and uninteresting, Arendt could be said to have exercised moral courage as a public intellectual. We all found her impressive in this manner. Again and again we were reminded of the civil function of the academic as contrarian.

Arendt's finding of banality is broadcast from the outset as it is built into the title of her book, making it memorable and polemical. Eichmann, she claimed, was not intrinsically or 'radically' evil, a moral monster utterly set apart from other people. In court she found him 'superficial', 'thoughtless',[95] self-justifying and unable to appreciate the moral gravity of his conduct and so she refused to condemn and denounce him in the usual manner. She failed to express out-and-out abhorrence and repugnance for the man himself, whom she found instead to be a bland and colourless rule-follower.[96]

Implicitly, her message was that ordinary people who attend almost exclusively to the formal rules of their society, at the expense of their moral content, might do as he did and remain ordinary.[97] Arendt's interpretation of Eichmann meant that she herself could be found wanting in judgement: insufficiently damning of him and too critical of those of us who could be like him, if we held too closely to the formal obligations created by legal rules and reflected too little on their moral meaning.[98] Thus she swept her reader into the zone of responsibility and blurred the distinction between Eichmann and those who were judging him.

Arendt was expected to express disgust for Eichmann and to describe him as radically evil. Further, Eichmann himself was meant to express disgust for himself and his actions and be riven by remorse. Criminal law looks for this in its subjects and will give it formal expression in reduced sentences.[99] But, as Arendt explained, Eichmann was too insubstantial a person to respond in this manner. He could not understand, properly condemn or appropriately regret his own actions, and his lawyer implicitly failed to tutor him sufficiently in the expression of the right emotional responses. Emotional elements were thus apparently missing from the judgements made by both Arendt and Eichmann.

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95 Arendt, above n 2, 15–16.

96 For a broad discussion of these points see also Raimond Gaita, *Breach of Trust: Truth, Morality and Politics* (Black Inc, 2004) 43–48.

97 There is possibly a message here for us all in the modern university.

98 The conformist and the ritualistic rule follower have been well described by American sociologist Robert K Merton in *Social Theory and Social Structure* (Free Press, 1968).

99 See Steven Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Ashgate Publishing, 2010).

The expectation and desire for an expression of deep disgust from both the author and her subject is understandable: her of him; him of himself. But on the grounds of intellectual honesty, as the careful and analytical observer she strove to be, Arendt persisted with her candid account of this man in court. As such, it is more measured and complex than simply a reaction of raw disgust in the face of radical evil. What she documented instead was a man who engages in bureaucracy when he should be seeing, feeling and understanding his grand-scale participation in the exercise of human cruelty and murder.

Arendt's perverse refusal to condemn Eichmann in the expected manner (with a sustained display of heartfelt disgust) poses interesting questions for the criminal lawyer, especially about the role of emotion. Is right-feeling, right-emotion, a required part of legal judgement, or, in this case, our judgement of both Arendt, as commentator, and Eichmann, as criminal? If so, as lawyers should we conclude that Arendt failed in this respect?[100] More pointedly, as legal scholars, do we have an authoritative role to play in evaluating such emotions and their regulation in saying that some emotions should be legally endorsed and others denounced? If we say that the right emotion is wanting in Arendt, are we succumbing to popular sentiment, which seems to demand hatred of the evil-doer? Should criminal law be guiding the community towards more civil responses or giving expression to community outrage? Arendt seems to counsel against the expression of rage, ultimately finding it of little value.

In the past decade, the emotion of disgust, especially when linked with anger and hatred, has come under scrutiny for its role and significance in criminal law; this new legal interest may have a direct bearing on our reading of Arendt. While disgust was once treated as a raw and reliable emotion, a useful indicator of the intolerable nature of a person or their actions, which could be legitimately recognised and employed by law,[101] it is now treated with greater circumspection. More particularly, in relation to the partial defence to murder of provocation, disgust has come under the legal spotlight and is being subjected to evaluation and indeed re-evaluation.[102]

Raw and extreme disgust, that which could provoke fatal violence and so attract a provocation defence, is now being critically examined for its social content and meaning.[103] Disgust for a homosexual who offers a sexual advance, thus apparently provoking a lethal response, has been fully condemned. It no longer supports even

100 On the relationship between emotion, reason and moral judgement see the extensive writings of Martha Nussbaum. For example, *Political Emotions: Why Love Matters for Justice* (Belknap Press, 2013).

101 See Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1959). Devlin viewed disgust for the homosexual in this way.

102 The landmark article by Dan Kahan and Martha Nussbaum on law and the emotions interestingly prefigured these changes. See Dan Kahan and Martha Nussbaum 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 331.

103 See Thomas Crofts and Arlie Loughnan 'The Good, The Bad and the Ugly' (2011) 37 *Criminal Law Journal* 23.

a partial excuse for killing, as it has in the past.[104] So too has disgust and violent rage directed at the adulterous wife been rendered illegitimate by criminal law. The complete abolition of this defence in Victoria was an explicit response to these new legal evaluations of the role of disgust.[105] The objects of disgust were re-evaluated and the disgust itself was also deemed an unacceptable legal emotion, certainly from the point of view of the law of homicide. Other Australian jurisdictions are amending the defence in response to similar concerns. These can be regarded as civilising moves.

Disgust is a powerful emotion, one that is tempting to exploit by governments that seek to appear decisive and full of moral resolve. There is nothing like having someone to hate.[106] Criminal lawyers are increasingly concerned about the manner in which governments manipulate and engineer disgust and fear within the community to gain support for unprincipled criminal lawmaking directed against certain, broadly defined classes of person, as a way of garnering popularity with the electorate. The loosely labelled 'paedophile' is an easy target; community hatred is easily engineered and traditional legal rights thus suspended.[107] So too with 'bikies'[108] and street 'hoons' — fear and hatred are easily mobilised.[109] Criminal legal scholars have been highly critical of the legal uses of disgust and have called for more measured and responsible lawmaking that does not rely on an appeal to raw and often uninformed emotion.[110]

Beyond the discipline of law, there is a fascinating literature, highly compatible with these new legal concerns about disgust. From neuroscience, psychology and also

104 See especially the High Court decision of *Green v The Queen* (1997) 191 CLR 334 and then the more recent judicial objections to *Green v The Queen (*2010) 207 A Crim R 148 in *The Queen v Hajistassi* (2010) 107 SASR 67.

105 See Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004). The recent NSW Select Committee Report on the partial defence of provocation similarly condemns these violent responses: see Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (2013) xii.

106 To James Fitzjames Stephen, 'hatred' for the criminal was the right and proper response of the community and for criminal law: *Liberty, Equality and Fraternity* (Liberty Fund, 1874) 22. For Patrick Devlin, the proper emotion was 'disgust': above n 101, 18.

107 For example South Australia Police recently published on its website the pictures, names and addresses of wanted child sex offenders who have failed their reporting duties. See *Wanted Child Sex Offenders* (28 August 2014) South Australia Police <https://www.police.sa.gov.au/your-safety/crime-prevention-and-security/wanted-child-sex-offenders>.

108 See *Serious and Organised Crime (Control) Act 2008* (SA).

109 See the early work of Stanley Cohen. See especially Stanley Cohen, *Folk Devils and Moral Panics* (MacGibbon and Kee, 1972).

110 The most influential modern legal critic of overcriminalisation is Douglas Husak. See especially Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).

from Western Buddhism there is a growing scholarship on the potentially destructive and also misleading nature of such negative emotions.[111] Disgust and anger are certainly indicators of a subject's evaluation of a person or action. They supply important information about the moral assessment of the object. But proper moral judgement, it is said by scholars from a variety of disciplines, entails an assessment of the reasons for disgust and when those reasons are examined, disgust may appear unhelpful and may indeed dissipate.

Arendt herself seems to undergo the sort of moral and intellectual journey urged by these students of the emotions. She expects to, and is expected to, face and find 'radical evil' and to meet it with disgust. Her proper moral response thus will be to cast Eichmann outside the realm of the knowable. She finds instead a tedious bureaucrat wanting in basic human feeling, but he is not entirely beyond comprehension. She develops a measured and thoughtful response which goes beyond the visceral. Over the course of the trial, she implicitly evaluates her own disgust, finds it uninformative as a generalised response and so begins to make sense of something more ordinary and pedestrian. This more detached and analytical approach she knows will prove far less palatable.

The legal defence of provocation once acknowledged deep disgust and gave it a moral and legal role to play in homicide law. With this defence, the objects of disgust have been re-evaluated — not so with Eichmann. But the emotion itself has also been subject to evaluation and found unhelpful as a way of both moderating responsibility and exercising moral and legal judgement. Arendt too comes to find it unhelpful and then no doubt braces herself for her critics.

E *The Fifth Response: Evaluating Leaking as Modern Judgement*

Whistleblowers, leakers and hackers — famous modern incarnations include Aaron Swartz, Edward Snowden and Chelsea (Bradley) Manning — engage in civil disobedience, breaking governmental strictures of secrecy, because they have *judged* the morality of the government's system and found it lacking. As such, modern conversations on Arendt's call to 'judgement' return to their position time and time again.[112] But how can one judge their actions? Modern leakers are both lionised and

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111 Antonio Damasio, *The Feeling of What Happens: Body and Emotion in the Mapping of Consciousness* (Mariner Books, 2000); Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (Back Bay Books, 2007); Iain McGilchrist, *The Master and His Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2012); Daniel Goleman, *Destructive Emotions: A Scientific Dialogue with the Dalai Lama* (Bantam, 2004).

112 See, eg, Peter Ludlow, 'The Banality of Systemic Evil', *The New York Times* (online), 15 September 2013 <http://opinionator.blogs.nytimes.com/2013/09/15/the-banality-of-systemic-evil/?_php=true&_type=blogs&_r=0l>; Roger Berkowitz, *The Banality of Systems and the Justice of Resistance*, (20 September 2013) Hannah Arendt Center <http://www.hannaharendtcenter.org/?p=11692>; Roger Berkowitz, *The Conscience of Edward Snowden* (21 June 2014) *Hannah Arendt Center* <http://www.hannaharendtcenter.org/?p=13420>.

condemned and offered little protection by the legal system. Often, academic and public judgement rests on subjective responses to the content of the revelations, whether the individual *agrees* with the surveillance of government or the war in Iraq. Arendt's strong judgement of Eichmann, her criticism not of the 'radical evil' that drove his actions, but his complacency within the bureaucracy about its actions and motives, provides us with an important moral framework with which to judge and defend the actions of modern leakers.

For Arendt, Eichmann's 'thoughtlessness' was not that he was an unthinking bureaucrat, a clerk, blindly following orders. Rather, it was that he failed to think about the larger framework in which those orders had been given. He took great pride in his ability to go above and beyond in achieving the orders that were given. He did, in her words 'his best to make the Final Solution final'.[113] Eichmann wanted, above all things, to belong to a movement and follow, with his entire being, the ideals of that movement. He was able to suppress his own judgements about the evils being perpetrated toward the Jewish people and his own repulsion at the reality of the Final Solution, because obedience was demanded by the ideal to which he had pledged himself. He was 'sacrificing an easy morality for a higher good.'[114] This led Eichmann to claim during his trial that his superiors abused his qualities: 'the subject of a good government is lucky, the subject of a bad government is unlucky. I had no luck.'[115]

For Arendt, however, the subject has agency and must judge the government's actions. The judgement is not of others, but of oneself. Arendt thus provides us with an important, individualised conception of judgement that provides the source for our judgement of the actions of modern leakers.

Rahul Sagar postulates that individuals *more likely* to leak are the so-called 'moral crusaders', ideologues convinced of their own righteousness.[116] According to public choice theorist James Buchanan, the most dangerous individuals are the zealots who believe they act in the public interest, as they impose their will under the pretext of helping others.[117] Individuals act in their self-interest and it is only their exposure to the pressures of other self-interested persons that allows equilibrium to be achieved between these interests.

Arendt recognises the necessity of strength of individual conviction, the strength of character that allows an individual to judge. She embraces and does not condemn the

113 Arendt, above n 1, 146.

114 Berkowitz, above n 3.

115 Arendt above n 2, 175.

116 Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press 2013) 150–1.

117 See interview with James Buchanan in 'F**k You Buddy', *The Trap*, Episode 1, 11 March 2008. See also James M Buchanan, 'Politics Without Romance: A Sketch of Positive Public Choice Theory and its Normative Implications' in James M Buchanan and Robert D Tollison (eds), *The Theory of Public Choice II* (University of Michigan Press, 1984) (first published *IHS-Journal* 1979) 11.

judge. She wrote in her notes: 'For conscience to work, either very strong religious belief — extremely rare. Or pride, even arrogance. If you say to yourself in such matters, who am I to judge? You are already lost.'[118]

Edward Snowden's own explanation of his actions in leaking the details of government surveillance programs, predominantly those conducted by the United States National Security Agency, reflects Arendt's call for thought and judgement. He describes his attempts to talk to people within the organisation about his concerns of abuse of power. He found that 'people tend[ed] not to take them very seriously and move on from them'.[119] But Snowden could not walk away: 'The more you're told it's not a problem until eventually you realize that these things need to be determined by the public and not be somebody who was simply hired by the government.'[120]

Snowden's judgement was that the public ought to be told the truth of the extent and nature of that program to allow the people to exercise judgement as part of their rights within a democratic system. The potential difficulty, however, is that by making these systems public, their utility may be undermined. Critics argue that Snowden betrayed the system and by doing so undermined its ongoing operation and ability to protect the public.[121]

There is undeniably a democratic 'good' in starting public discussion of government action; decisions can be made about whether the people think what is being undertaken in their name is appropriate. As David Williams wrote:

> The ultimate danger of executive secrecy in a much-governed country is that it denies the knowledge essential for an informed public opinion and that it inhibits effective scrutiny and criticism of the government and the administration.[122]

But it is never this simple. What if the people *want* the surveillance and the heightened security it may provide? Snowden's actions may have actively undermined the government's ability to restart the program; sometimes security demands secrecy.

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118 Young-Bruehl, above n 21, 339.

119 Glenn Greenwald, Interview with Edward Snowden (Hong Kong, video interview for *The Guardian*, 6 June 2013). Video available at: <http://www.theguardian.com/world/video/2013/jun/09/nsa-whistleblower-edward-snowden-interview-video>.

120 Ibid. See also Gabriel Rodriguez, *Edward Snowden Interview Transcript FULL TEXT: Read the Guardian's Entire Interview With the Man Who Leaked PRISM* (9 June 2013) Policy Mic <http://www.policymic.com/articles/47355/edward-snowden-interview-transcript-full-text-read-the-guardian-s-entire-interview-with-the-man-who-leaked-prism>.

121 See, eg, reported remarks of former US Ambassador John Bolten in John Dempsey, 'Bolton, NSA Leaker Edward Snowden is Guilty of Treason' *89 WLS* (10 June 2013) <http://www.wlsam.com/common/page.php?pt=Bolton%3A+NSA+leaker+Edward+Snowden+is+guilty+of+treason&id=45663&is_corp=0>.

122 David Williams, *Not in the Public Interest: The Problem of Security in Democracy* (Hutchinson, 1965) 9.

Should Snowden's judgement on the immorality of the system also have been a judgement that others (the public) would also make that same judgement if they were given the opportunity to do so? Must the leaker in a democratic system exercise not only their own judgement, but predict the exercise of the judgement of others? Here is the dilemma for the leaker. These judgements often require the balancing of incomparable goods. They are made in the context of power and politics. The embrace of Snowden as a whistleblowing hero of democracy was not universal. By many, including the United States government, he was judged as a traitor. He now lives in exile, with a warrant issued for his arrest on charges of espionage, theft and conversion of government property. He is taking ultimate public responsibility for his actions, for his judgement.

Arendt's judgement provides us with a more satisfactory way of assessing the actions of the leaker that does not depend on views about the actions involved. Arendt's call for judgement is that of the individual. She does not shy from a situation where individuals make their *own* moral decisions as to whether they will comply with state regulation, exercising their *own* judgement on the overall direction of the state's trajectory. The individual who fails to do so may receive the blessing of a particular legal regime, but the individual has fallen victim to the temptingly safe banality of evil.

IV Concluding Thoughts

In *Eichmann in Jerusalem*, Arendt poses a fundamental challenge to us as academics and intellectuals. Arendt invites us to be contrarian, to question social norms and assumptions, to confront taboo. Arendt's actions and words urge us, by example, to use our position as academics to engage with the world and be unafraid to judge what we observe. However, not all criticism or questioning is brave. Arendt was unusually fearless in that she knew full well that she risked alienation from within her own community. This is an important test for the academic; if critique is only a means of enhancing professional reputation or cementing relationships within one's discipline, then (while it may be valuable) it is not akin to the bravery of Arendt. Academic courage entails a willingness to take those risks that expose the academic to personal detriment, be it harsh criticism, social censure, ridicule or indeed hostility. It is a rare virtue.

Arendt prompts us to examine our own scholarly lives, to reflect and consider whether our work lives up to our personal moral determinations. Beyond ourselves, she offers us a way to judge the actions of others placed in morally difficult circumstances, especially those who feel that they can no longer comply with existing law. In *Eichmann in Jerusalem*, Arendt challenged existing academic conventions on both form and substance, and so expanded the very possibilities of strong dialogue, dispute and even disobedience to law.