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From Auschwitz to Jerusalem to Gaza: ethics for the want of law

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This essay emerges from a series of reflections on the presence of 'ethical' narratives and images of the Holocaust in debates and demonstrations around the recent conflict in Gaza. I argue that the lack of measure and violence of these narratives, which are now turned onto the descendants of the Holocaust, arise as a consequence of contemporary theories of the Holocaust that eschew the possibility of legal reflection, legal judgement and legal justice. I conclude with a discussion of Hannah Arendt's attempts to rethink law in the wake of the Holocaust, a law that does not exceed its limited, but clearly defined, area of competence.

Keywords: antisemitism; ethics; Holocaust; critical theory; Israel; Gaza; Arendt; Bauman; Lyotard

Ilana,

'People ask all the time what I learned in the camps. But the camps weren't therapy. What do you think these places were? Universities. We didn't go there to learn. One becomes very clear about these things'. The Reader¹

This article emerges from a series of reflections on the presence of certain narratives and images of the Holocaust in debates and demonstrations around the recent conflict in Gaza. In this article, I refer to those instances in which the Holocaust has been adopted as a tool with which to attack Israeli policies specifically as products of a 'Jewish' state. The particular trope focused on here is the increasingly popular, yet highly problematic and complex, discourse of the perceived connection between the Holocaust and the existence and present policies of the state of Israel. This trope is the idea that it is *because* Jews suffered so terribly under the Third Reich, that they 'should know better' and that, somehow, they have not 'learnt their lesson'. This notion is best encapsulated on a placard carried at a demonstration protesting Israel's 'Operation Cast Lead', stating 'How could you do this; you should know better'. In a similar vein, criticising Israeli policy/actions, Sara Roy asks, 'What did my family perish for in the ghettos and concentration camps [*sic*] of Poland?' and again 'Yet, they [Holocaust survivors] stood as a moral challenge among us and also as living embodiments of a history, way of life and culture that long predated the Holocaust and Zionism (and that Zionism has long denigrated)... I wonder what is truly left to take their place, to fill the moral void created by their absence?'.² It is this use, or abuse, of the Holocaust as an exercise, or, rather, as a test in morality that Jews have been marked as failing that forms the content of the following discussion.

My thesis is as follows. From the moment of the occurrence of the Holocaust, law has been unable (or unwilling) to integrate specifically *Jewish* dimensions of Nazi extermination policies within its terms of reference. It is as if the universalism inherent in the modern concepts of law (most notably, that of a formal, abstract equality) could not confront the particularism – or, rather, irreducibility (Yakira 2010, 32) – of a crime against specific people, in this instance,

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the Jews (Adorno and Horkheimer 1973, 173). This inability manifested itself almost immediately in the series of post-war trials, where specific charges confronting the victims of Nazi racial policy as events in their own right were absent; the charges presented remained connected with an overarching conspiracy to wage an aggressive war (Bloxham 2001; Marrus 1998). While the formal legal and political reasons for this absence have been addressed in some detail, this article is concerned with the jurisprudential difficulties of recognising, allocating and judging individual responsibility for a crime.

It is as if the trauma of the Holocaust has given rise to a trauma in law affecting its belief in its ability to reach an adequate judgement. This trauma arises from law's loss of confidence in its own basic premises and its own limited field of competence – which Arendt (1963, 253) defines as its ability 'to weigh the charges brought against the accused, to render judgment, and to mete out due punishment'. As a consequence of this trauma, law has left the judgement it has needed to make on the Holocaust to other domains, specifically to morals and ethics. Yet, as Nietzsche has illustrated through his conception of *ressentiment*, this recourse to morality is not without its dangers. Most notable among such dangers is morality's lack of measure, due to its failure to acknowledge its own inherent jurisprudence upon which its judgements are premised (Seymour 2007, 51ff).³

My argument, as laid out below, is that the insistence on the moral indictment of the Jews (as a people who should know better) is a direct consequence of the 'moralising' of the Holocaust in the face of the absence of law. Put differently, it is a result of the inversion of the Holocaust as a moral wrong against the Jews to that of a moral indictment of the Jews.

Hannah Arendt and the problem of eternal antisemitism

Writing in the 'Epilogue' to *Eichmann in Jerusalem*, Arendt draws a connection between theories of the Holocaust and the inability of law to meet the challenges they set. One such theory, and one such challenge, is the framing of the Holocaust through the notion of 'eternal antisemitism'; a concept of which Arendt was highly critical. 'Eternal antisemitism' points to the idea that the Holocaust be seen as but the latest episode of an eternal and unchanging hatred of Jews by non-Jews (Arendt 1973, 7–8). Her critique of eternal antisemitism and its relationship to law and legal judgement is threefold. First is the way in which eternal antisemitism *naturalises* antisemitism (presents antisemitism as a positivist concept through its presentation as natural (or brute) fact of life) (Seymour 2007, 13–33) and, as such, negates recognition of free will in general and legal and moral responsibility in particular. Secondly, eternal antisemitism masks the *singularity*, *uniqueness* and *novelty* of the crime itself – the extermination of an entire people. Thirdly, in failing to distinguish its singularity, it simultaneously overlooks important and significant developments within the Nazi era itself (Arendt 1963, 253ff).

What is interesting about Arendt's critique of eternal antisemitism (and its consequences for law and judgement) is the way in which more recent thinking about the Holocaust from within the tradition of critical theory reproduces the lines of thought of eternal antisemitism. They regard the Holocaust as the latest stage in modernity, thereby not only dissolving the specificity of the Holocaust but also naturalising it and reducing personal responsibility. Modern critical theoretical accounts differ, however, in that whereas Arendt insists upon rethinking law in the wake of the Holocaust, contemporary thought refuses any such attempt. It is through this legal vacuum that a morality, presented as autonomous from and 'uncontaminated' by the mundane affairs of the world, establishes itself.

In order to relay this point more forcefully, I concentrate first on two thinkers who are excellent examples of such thought: Zygmunt Bauman and Jean-Francois Lyotard. For, both of these

thinkers, understanding the Holocaust turns on this distinction between the implication of law and the innocence of morals. I end this article with a critique of their thought, which draws on the work of Hannah Arendt (notably her comments in *Eichmann in Jerusalem* noted above).

Zygmunt Bauman: morality as law's Other

As is now well known, Bauman explains the Holocaust through recourse to the overarching concept of *modernity*. Here, modernity points to the idea of the dream of a perfectly ordered society in which not only was there a place for everything and everything a place, but also that anything that was a threat to such order (in this instance, 'the Jews', or rather, the concept of 'the Jews') was to be 'weeded' out and 'excluded' (Bauman 1989, 91–2). This obsession with order and ordering, carried out by an alliance of knowledge (natural science) and power (the state) and imposed onto the social world by the bureaucracy, acted as a means to counter the threat of disorder in a world in which the formal equality expressed through law and legal rights failed to adequately distinguish between 'categories' of citizens. This project reached its fullest potential with Nazism and was put into practice through the operation of a modern bureaucracy guided by nothing more than the 'normal' tenets of Weberian legal-rationality (1989, 104–6).

The resonance with Arendt's account of eternal antisemitism and the problem it poses for the limits of law can be identified quite clearly. Bauman dissolves the specificity of the Holocaust within the overarching concept of 'modernity'. Modern exterminatory antisemitism becomes a *natural* aspect (or, at least, potential) within modernity, merely awaiting the right moment to appear (1989, 83ff). It is the product of no-one, but is the product of modernity itself. Rather, it is *modernity* that is to be placed in the dock. The difficulty is of course that it is precisely this concept of modernity that law not only cannot try, but also should not try, according to the limits of its own procedure and dignity.

The problem we note in Bauman's writings is furthermore reinforced by the central role Bauman allocates to the bureaucracy, which further evaporates *personal* responsibility (Bauman 1989, 98ff). As numerous small decisions are taken by a numerous number of bureaucrats, none, taken individually, appears responsible for the end result: mass extermination. Additionally, there is the denial of *moral* responsibility, which arises from Bauman's argument that legal-rationality – obeying superiors, ensuring that the ends are reached by the most efficient means, etc. – act a 'moral sleeping pill'. By this, Bauman means that it counters or neutralises a social or ontological moral imperative not to harm another (quoted in Fine 2001, 109).

It is at this point in his thinking that he makes the shift from (the irrelevance of) *legal* modes of judgement to that of *ethics* or *morality*. Bauman's recourse to morals is intimately connected to his account of the Holocaust. As I have just noted, morality is the one element that should be able to escape modernity's legal-rationality and thus be untainted by modernity. Bauman thus draws upon morality (or ethics) as a mode of 'being-together' that he opposes to legal-rationality and sees as appropriate to a post-Holocaust (postmodern) world (1989, 208ff).

Bauman's recourse to a Levinasian ethics to fill the lacuna of law and legal judgement is of immediate import. Central to Levinas' conception of ethics is its *non-relationality*. Ethical obligation is said to arise *immediately* at the mere sight of 'face of the Other' (Douzinas, Warrington, and McVeigh 1991). What is more, this ethical obligation that arises at this moment is *absolute* – it is both non-negotiable and non-rescindable. The difficulty here is, as Gillian Rose observed, that while ethics may present itself as the Other of Law, it refuses to recognise itself as a *law* of the Other (Rose 1993). By this, I mean that, whereas law recognises the violence and coercion inherent within it, such acknowledgement is lacking in ethics. The upshot of this is that ethics

contains no check to measure or limit its (equally unrecognised) faculty of judgement. Just as ethics' demand is considered absolute, so too is its breach and its judgement.

Jean-Francois Lyotard: the ethical imperative and the Holocaust

If we turn now to Jean-Francois Lyotard's account of the Holocaust, many of the themes present in Bauman's thought appear in greater relief. Correspondingly, his thought exhibits a closer connection to the substance of Arendt's critique of eternal antisemitism and of its renunciation of law and legal judgement (Lyotard 1990, 1993a, 1993b, 1993c, 1993d).

While for Bauman, the turn to ethics was as a *counter* to modernity's complicity in the extermination project, for Lyotard, the relationship between ethics and the Holocaust is intimately connected. Lyotard presents 'the Jews' as the personification or embodiment of an ethical imperative that remains unacknowledged – and will remain unacknowledged – within the discourses and practices of law.

Lyotard hereby radicalises Bauman's belief that law cannot recognise the Holocaust since it takes place 'behind the back' of law and its emphasis on formal, abstract equality. Lyotard radicalises Bauman's insight by locating it in the more distant and seemingly unconnected realm of 'Europe's unconscious'. While law cannot address the event of the Holocaust directly, the Holocaust's location in European unconsciousness means that it is nonetheless registered in the consciousness of law *indirectly* and inherently as an *unspecified trauma*. The trauma of the Holocaust is that it occurs at the level of the unconscious; the impact of this can be 'felt' but not articulated at the conscious level of law. While Lyotard recognises the antecedents and consequences of this trauma in the *history* of antisemitism, he nonetheless remains unaware of its impact within the 'post-Holocaust' world. That is to say, he remains unaware of the impact of the ethicalisation on contemporary political and legal conflicts, of which Jews *as Jews* are a part.

Instead, antisemitism is explained by Lyotard as a series of attempts by 'Europe' or 'Western' civilization to cancel once and for all an irredeemable ethical imperative. The meaning of this ethical imperative is captured by Lyotard through the notion of 'heteronomy', which refers to the owing of an ontological debt to an Other, for being given the (moral) Law; a moral law that precedes the conscious constituting of 'a people' and whose obligations remain in excess of such a constitution. In this account, the Holocaust is merely regarded as the latest (if not the last) attempt of this series of attempts to cancel the ethical imperative. Seen in this light, the trajectory of 'European' or 'Western' history is read as a series of attempts at 'emancipation'. That is, it is regarded as a series of efforts to free itself of this ethical obligation, as well as any memory of such this ethical obligation – including the content of the Law itself. Lyotard explains this trajectory of attempted emancipation as follows:

The Christian Churches had introduced the motif of fraternity. The French Revolution extended it, by turning it on its head. We are brothers, not as sons of God, but as free and equal citizens. It is not an Other who gives the law. It is our civil community that does, that obliges, prohibits, permits. That is called emancipation of the Other and autonomy. Our law opens citizenship to every individual, conditional on respect for republican virtues. (Lyotard 1993d, 161–2)

At the level of discursive practices, these attempts at emancipation from heteronomy appear successful. However, they have in fact blotted any memory only at the discursive level. In the unconscious, there is still the presence of the debt, and the corresponding sense of obligation continues unabated. While blocked from consciousness through the belief in a seemingly gained 'autonomy', the existence of this memory can still be felt, but not recognised or acknowledged.

One might wonder what this has to do with the Jews, and the argument presented in this article. Why should Europe's sense of unease in not overcoming, or emancipating itself from

the obligation of the ethical imperative, cause it to come into conflict with the Jews, and account for what Lyotard sees as the Western ubiquity of antisemitism? The answers to these questions emerge from Lyotard's depiction of the Jews as the very embodiment or personification of the ethical and the ethical imperative itself.

Lyotard argues that this personification of the Jews as the ethical arises as a consequence of the Jews' constitution as a people. Lyotard places special emphasis on the Jews' founding prohibition to represent the figure of God. He insists that the Jews are prohibited from representing 'the Other' as they were given the Law by Him that constituted them as a people. Because of this, the sense of heteronomy, of the ethical imperative, remains within the Jews' unconscious and lingers as a trace that is beyond consciousness. 'Europeans', on the other hand, are free of this prohibition on representation. They can believe that it is possible to overcome or cancel this ethical imperative through naming their originator (be it as Christ for Christianity, or Man for the Enlightenment and the Revolutions made in its name). For Jews, no such palliative is available.

Unlike other founding narratives, the purpose of the Jews' 'Book' is hence not to *represent* the Other, but, rather, to serve as a constant reminder that they have, in Lyotard's phrase, 'forgotten the forgotten', that they have forgotten that which cannot be recalled by consciousness. For Lyotard, it is this constant reminder of the forgotten debt to the Other that constitutes the Jews as the embodiment and personification of 'the ethical' *per se*.

Through this ethical reading of the Jews, Lyotard presents antisemitism as the dark underside of emancipation. With each attempt at emancipation, understood as the overcoming of ethics, the Jews stand as a constant reminder of the failure and impossibility of such an aim. Read in this way, antisemitism is nothing other than the *ressentiment* brought about by the 'bad conscience' of 'Europe' in the face of this silent 'reminding' brought about by the presence of the Jews.

However, while Lyotard offers a connection between emancipation and antisemitism, the two phenomena appear within two distinct realms: the realm of conscious discursive practices and the realm of the unconscious. It is this distinction that not only explains Lyotard's depiction of the Holocaust as an 'event' that 'exceeds' politics but also accounts for its raw ferocity and lack of restraint:

The solution was to be final; the final answer to the 'Jewish' question. It was necessary to carry it right up to its conclusion, to terminate the interminable. And, thus, to terminate the term itself. It had to be the perfect crime, one would plead not guilty, certain for lack of proofs. This is a 'politics' of absolute forgetting, forgotten. Absurd, since its very desperation distinguishes it as extra-political. Obviously, a politics of extermination exceeds politics. It is not negotiated on a scene. The obstinacy to exterminate to the very end, because it cannot be understood politically, already indicates that we are dealing with something else, *with the Other*. (Lyotard 1990, 25)

At this point in the discussion, the correspondence between Lyotard's thesis and eternal antisemitism as critiqued by Arendt comes into relief. Arendt's critique of eternal antisemitism entailed the naturalisation of hostility to Jews, the corresponding disavowal of personal agency and responsibility (political, social and legal), the inability to recognise the unprecedentedness and internal trajectory of the mass extermination of millions of individuals.

However, before entering into more detail on this, one particular issue remains to be addressed. This issue turns on the question of legal judgement in the sense of asking *what* is to be judged or 'what' is to be placed on trial? For Bauman, it is 'modernity' and for Lyotard it is *emancipation* that is forced into the dock.

The problem is, however, that it is precisely the institution and practice of law that are denied jurisprudential competence. This denial is twofold. First, since antisemitism, in general, and the Holocaust, in particular, are located in the realm of the unconscious, it remains as much beyond the law as it remains beyond politics. It remains in 'excess', and so beyond the reach of law.

In Lyotard's parlance, the Holocaust becomes law's *differend*.⁴ Secondly, by implicating law as the means of (modern) emancipation, law becomes one of the very means through which the ethical is blocked and denied. It is therefore indirectly responsible for the *ressentiment* that mounts and ignites in the realm of the unconscious. What follows from this is that for law to even begin to hear a 'case' relating to the Holocaust, it would have to open itself to the unconscious (including its own unconscious). At this point, it could not be foresworn what it would find there. But, for Lyotard, what would be found would be the Jews or 'the ethical', the debt to the Other, the folly of autonomy and the acceptance of heteronomy.

What Lyotard overlooks, however, is the coercion and violence (potential and real) that is inherent within the ethical, but which, at the same time, cannot be acknowledged or recognised. This equivocation at the core of Lyotard's conception of the ethical appears in greater relief in his discussion of antisemitism and the Holocaust: here one finds within 'Europe's' unconscious, not only the absolute of the ethical, but also the absoluteness of a violence that blindly and frenziedly seeks to extinguish not only that irredeemable debt, but also those who act as a constant reminder to the impossibility of ever cancelling that debt. In place of an acceptance of the debt to an Other – of the ethical – one only finds a refusal. The difficulty is that by presenting ethics as the Other of Law, Lyotard, like Bauman, fails to recognise the law of the Other. In other words, by removing all consciousness, all agency and the discursive practice of law from his account of antisemitism and the Holocaust, Lyotard has overlooked that the ethical sphere is *not* devoid of judgement. It is, in fact, a judgement that can only be described as absolutist and without measure. It is a judgement that is akin to a blind fury that, knowing no limits, knows only 'obstinacy' and 'desperation' and now includes within its repressed memories, genocide and death camps. My argument hence is that it is the removal of law and legalism from judgements relating to the Holocaust (in the name of an ontological ethics) that goes part way in explaining contemporary abuses of the Holocaust and its inversion into a standard against which to measure the acts of contemporary Jewry and the Jewish state.

But also, it is partly as a result of this ethicalisation of the Holocaust that the argument 'The Jews should know better' arises. Let me explain this again using the example of Lyotard. Lyotard implies that the Holocaust is not only the latest episode in the occidental 'history' of antisemitism, but also the final one. Yet, as I have noted elsewhere (Seymour 2007, 72), Lyotard transfers the figure of the Jews as the personification of the ethical onto that of the 'event' of the Holocaust, or, rather, onto the 'sign' of 'Auschwitz'.⁵ It is now no longer 'the Jews' but 'Auschwitz' that for Lyotard becomes the *differend* in the post-Holocaust world. Just like the Jews before it, 'Auschwitz' now becomes the embodiment of the ethical that not only continues to exist in the unconscious, but also continues to be forgotten or disavowed by consciousness. It is now 'Auschwitz' that takes the place of the Jews as the unidentifiable thorn in 'the West's' flesh. 'Europe' appears 'indebted' to Auschwitz. This debt can never be repaid, and its presence is a reminder of our limits of emancipation (and this includes not just 'Auschwitz' but also the Jews as those for whom 'Auschwitz' was brought into being), which will be met with an unconscious frustration. The potential remains that, once again, 'Europe' will vent that frustration on the personification of its failure. And so, it is my contention that this *ressentiment* against the *ethical* reading of the Holocaust that partly accounts for the idea that it is the Jews who have betrayed the ethical imperative (and, by implication, their own ontological essence) that the Holocaust is said to carry within its 'sign'.

Hannah Arendt: the praxis of law and limiting the space of the ethical

If Bauman's and Lyotard's thinking on antisemitism and the Holocaust makes the possibility of legal judgement impossible and if they remain blind to the implicit but unacknowledged

judgements and violence of 'the Ethical', Hannah Arendt's reflections offer an alternative to both the renunciation of law and the implied innocence of ethics, which is positioned as the Other of Law. However, Arendt's thinking on these issues is not without its own equivocations. These difficulties run through the chain of her argument in seeking the means and end of legal judgement for the crimes carried out by and in the name of Nazism.

These equivocations within her thinking appear immediately in the manner in which she frames the question of a legal response to the Holocaust. On the one hand, Arendt is at pains to emphasise the *unprecedented* nature of the extermination. On the other hand, she seeks recourse to what can be identified as legal orthodoxy; that an individual can, and must, be held legally responsible for their own individual acts. The difficulty for Arendt, therefore, is how to find a mode of legal judgement that remains faithful to that unprecedentedness,⁶ but which, at the same time, can aspire to a legal comportment of justice. This initial difficulty appears in her recognition of Nazism as an entirely novel political configuration, one that she conceptualises as *totalitarianism*. For Arendt, totalitarianism negates the political liberalism from which it emerged (Arendt 1973, 21–74). Yet, at the same time, it is precisely the liberal notions of law to which Arendt ultimately has recourse in judging the crimes of that novel system. The following discussion will bring into relief this initial contradiction as it runs through the chain of her argument in seeking the means and end of legal judgement for the crimes carried out by and in the name of Nazism. In so doing, attention will be paid to those parts of her argument that connect most closely with Bauman's loss of subjectivity and Lyotard's question of ethics.

At the core of her definition of totalitarianism are two interrelated concepts: *ideology* and *terror* (Arendt 1973, 593–617). 'Ideology' points to what she terms a belief in suprahuman laws of nature and/or laws of history. 'Terror' is the means through which these 'laws' are applied in the human world. Despite the reference here to the concepts of 'law', it is important to note that her definition of its meaning and place within totalitarianism is distinct from that within liberalism. For Arendt, totalitarian law and its components of ideology and terror mark the demise of subjectivity upon which liberal legal responsibility is premised.

This demise of subjectivity appears in the distinction Arendt makes between the totalitarian notion of laws of nature and the tradition of natural law. Natural law demands the mediation of human agency through the faculty of reason, whereas totalitarian laws of nature reduce that agent to nothing more than a vehicle of its own categories, or as Arendt phrases it, to a 'walking embodiment of the law'. Understood in this light, totalitarian law and its consequent eschewing of human reflection and positivist expression mean that the mediating gaps between deed, law and judgement are collapsed. This means that subjectivity becomes irrelevant. As such, the role of human institutions is reduced to nothing other than the executors – or, executioners – of its eternal will. It is in this context that the human reflection that mediates traditional natural law and its judgements is substituted by *terror*:

Terror executes the judgements, and before its court, all concerned are subjectively innocent; the murdered because they did nothing against the system and the murderers because they do not really murder, but execute a death sentence pronounced by a suprahuman tribunal. The rulers themselves do not claim to be just or wise; they do not 'apply' laws, but execute a movement in accordance with its inherent law. Terror is lawfulness, of law as the law of movement of some suprahuman force, Nature or History. (Arendt 1973, 465)

For Arendt, the 'objectivity' inherent within these suprahuman laws of nature not only marks who shall die, but also who shall be executioners (Arendt 1973, 468). In this apparently objective situation, in which all live in fear, but in which fear is no guide to survival, no one is safe. It is quite possible – indeed, necessary – for the constant movement brought about by the law of nature and the terror of its application that the executioner of today can invert easily into the victim of tomorrow (Arendt 1973, 468).

Despite essential differences, Arendt's understanding of totalitarianism coalesces with those of Bauman and Lyotard on the question of subjectivity, or, rather, the loss of subjectivity. Whereas for Bauman and Lyotard, such a loss leads them to disavow law and turn to 'the ethical', Arendt grapples with an alternative response. The question for Arendt, therefore, is precisely the question of the possibility of legal judgement.

The specific task for Arendt, therefore, is how to judge a specific individual for specific acts when that individual is caught within a framework that appears to eradicate and erase all notions of subjectivity; that is, the very conditions for the holding of legal responsibility. It is this question that Arendt grapples with in her reflections on the Nazi functionary Adolf Eichmann, his trial in Jerusalem and the nature of the judgement reached.

Discussing what she sees as the conundrum of the person Eichmann (the gap between his 'normality' and the enormity of his crimes), Arendt expresses disappointment that in attempting to paint him as a 'brutal' or 'sadistic killer', the Court failed to recognise what she sees as the 'greatest moral and even legal challenge of the whole case' (Arendt 1963, 26). Instead, when he expressed his views that he "'personally" never had anything whatever against Jews' and that he was free of an 'insane hatred of Jews or indoctrination of any kind. . .nobody believed him':

The prosecutor did not believe him, because that was not his job. Counsel for the defence paid no attention because he, unlike Eichmann, was, to all appearances, not interested in questions of conscience. And the judges did not believe him, because they were too good, and perhaps also too conscious of the foundations of their profession, to admit that an average, 'normal' person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong. They preferred to conclude from occasional lies that he was a liar – and missed the greatest moral and even legal challenge of the whole case. Their case rested on the assumption that the defendant, like all 'normal persons' must have been aware of the criminal nature of his acts, and Eichmann was indeed normal insofar as he was 'no exception within the Nazi regime'. However, under the conditions of the Third Reich, only 'exceptions' could be expected to react 'normally'. This simple truth of the matter created a dilemma for the judges which they could neither resolve nor escape. (Arendt 1963, 26–7)

For Arendt, therefore, neither modernity (Bauman) nor emancipation (Lyotard), any more than 'eternal antisemitism', is to be held legally accountable *at the expense* of individuals and their acts. However, it is at this point in her argument that her attempt to take seriously the novel without fully discarding the old reveals an equivocation at the heart of her depiction of totalitarianism and the question of judgement. It is at least some degree questionable whether Arendt herself 'escaped from' or 'resolved' the dilemma that had confronted the trial judges in Jerusalem.

Eschewing the idea of putting totalitarianism in the dock, Arendt insists on so placing the individual Eichmann. In so doing, she attempts to find the means by which to judge him within the law and for law to 'weigh the charges brought against the accused, to render [legal] judgement, and to mete out due punishment'. As she recognises, this attempt is made in the face of the absence of law's traditional demand for 'moral and legal responsibility' (Arendt 1963). Despite the potential shortcomings of her position, her inability to fully resolve the equivocations of law's engagement with Nazism, in formulating a legal response, she restores to Eichmann his dignity as a human being, even if that dignity is itself undermined by his own 'banality'.

In articulating her argument, Arendt confronts directly the idea present in Bauman's account of the Holocaust's bureaucratic nature inherent within which is the bureaucrat's defence of being but a 'small cog in a giant wheel'; an argument whose essence is to deny individual responsibility. From the point of view of law, Arendt notes that:

[T]he whole cog theory is legally pointless and, therefore, it does not matter at all what order of magnitude is assigned to the 'cog' named Eichmann. In its judgement the court naturally conceded that

such a crime can be committed only by a giant bureaucracy using its resources of government. But, insofar as it remains a crime – and that, of course, is the premise for a trial – all the cogs in the machinery, no matter how insignificant, are in court transformed back into perpetrators, that is to say, human beings. If the defendant excuses himself on the ground that he acted not as a man but as a mere functionary whose functions could just as easily be carried out by anyone else, it is as if a criminal pointed to the statistics of crime – which set forth that so-and-so many crimes per day are committed in such-and-such-a place – and declared that he not only did what was statistically expected, that it was mere accident that he did it and not somebody else, since, after all, somebody had to do it. (Arendt 1963, 298)

Having made the argument for *legal* responsibility, Arendt moves on to address the question of the bureaucratic ‘desk murderer’s’ *moral* responsibility. As Fine notes, and in keeping with her argument as a whole, Arendt’s response to this question is ‘not without its own ambiguities’ (Fine 2001, 111). Reminiscent of Bauman’s argument, Arendt speaks of the ‘collapse of all existing standards of morality’ and, through reviewing Eichmann’s own biography, asks, ‘how long does it take an average person to overcome his innate repugnance toward crime, and what exactly happens to him once he has reached this point?’ (Arendt 1963, 93).

However, in answering this question, Arendt diverges from Bauman’s conclusions that this ‘innate repugnance’, which elsewhere she calls ‘conscience’ or ‘morality’, was simply held in suspension, and, therefore, remained uncontaminated by the world of which it is a part. Rather, like all aspects of life under totalitarianism, morality was absorbed within totalitarianism. Fine summarises Arendt’s argument on this point succinctly when he argues that the overcoming of the repugnance of crime, ‘was also due to the skilful use of moral imperatives to overcome the natural resistance of “ordinary men” of slaughtering entirely innocent human beings’ (Fine 2001, 111).

Although Eichmann’s involvement with the extermination was less direct than the killing squads operating in Eastern Europe, a similar ‘use of moral imperatives’ is nonetheless operative. Again noting the ‘cog-like’ fashion of Eichmann’s self-presentation, Fine draws attention to substance of Arendt’s critique of this point:

It is that Eichmann did not so much abandon the Kantian moral principle when he acted in line with the Leader principle, as adapt it to an absolute morality which declares that duty is duty, law is law, and Jews must perish – with no exceptions, not even for his own friends. (Fine 2001, 112)

The final paragraphs of *Eichmann in Jerusalem* contain Arendt’s formulation of a legal judgement on Eichmann. In that judgement, Arendt takes seriously what she had previously argued the court did not; that is, Eichmann’s claim that he held no personal animosity against Jews, that he never acted from ‘base motives’, that he could not have acted differently and that he did not feel guilty. She takes equally seriously that his ‘role in the Final Solution was an accident’ and that it could well have been, and probably would have been, occupied by someone else. In taking Eichmann’s claims at face-value, Arendt confronts directly the equivocal question of the mass nature of totalitarianism and the place and status of the individual within it. However, it is an equivocality that, as with her argument overall, appears likewise in her judgement on that question.

In presenting this judgement, Arendt summarises Eichmann’s defence, a ‘defence’ that is implicit in both Bauman’s and Lyotard’s accounts of the Holocaust; ‘What [Eichmann] meant to say was that when all, or almost all, are guilty, nobody is’ (Arendt 1963, 278). While she noted the common currency of such a defence, it is precisely this conclusion that she rejects *in toto*.

Arguing to the contrary, Arendt inverts the proposition: if all are guilty, then all are to be judged. They are to be judged, not out of any notion of ‘collective guilt’ (or of its resemblance to the collectivist concepts of ‘modernity’ or ‘emancipation’), but because:

[G]uilt and innocence before the law are of an objective nature; and even if eight million Germans had done what you did, this would not be an excuse for you. (Arendt 1963, 278)

Continuing in this vein of objectivity, Arendt rejects Eichmann's related mitigation that he found himself in his position by accident. It is rejected on the grounds that while for others the actions for which Eichmann is guilty remained nothing more than a *potentiality* as compared to the *actuality* of the 'man in the glass booth'. It is with this *actuality* that law is concerned and the *actual acts* committed. Law, Arendt continues, is not concerned with his inner life, with his motives or the criminal potentialities of those with whom he worked. The baseline for Arendt is that, regardless of the fact that he many never have committed a crime of any magnitude in his life, nonetheless, the fact remains that he did commit those acts of which he was charged when placed in the situation in which he found himself. He committed crimes, in other words, for which he was personally and subjectively responsible,

Let us assume for the sake of argument, that it was nothing more than misfortune that made you the willing instrument in the organisation of mass murder; there still remains the fact that you have carried out, and, therefore, actively supported, a policy of mass murder. (Arendt 1963, 279)

Despite the strength of her argument, it is apparent that her turn to objectivity, or, what in the common law world would be termed 'strict liability', does not resolve the difficulties that are present within her task. Paradoxically, her dependence on the absence of subjectivity⁷ (of the irrelevance of 'inner life') as a means of allocating personal responsibility articulates precisely the equivocations inherent in the attempt to judge the unprecedentedness of totalitarianism by reference to the precedent of prior liberal law and liberal legality; of grounding legal responsibility in those situations in which any distinction between subjectivity and the environment appears to have vanished.

However, for all its shortcomings, what is clear is that Arendt *refuses* that the *praxis* of liberal law be abandoned even in the face of the totally unprecedented. By arguing that law refuses to countenance the idea of a jurisprudential or jurisdictional 'gap', Arendt limits the possibility that at least as regards the Holocaust, a space is created for reference to ethics or 'the ethical'; an ethics that is all the more precarious for perceiving itself as the Other of Law without recognising within itself its own Law of the Other.

Conclusion

The argument of this article is that despite the differences in emphasis, Bauman's and Lyotard's ontology detaches ethics from the realm of this-worldly events and modes of judgement, including law. Unable or unwilling to recognise its own place in the world and its own inherent, but unacknowledged, jurisprudence, ethics produces judgements that are both unreflective and absolute. By presenting both the Jews and their extermination solely in terms of the ethical, ethics runs the risk of producing judgements concerning events of *both* the past *and* the present that, in eschewing the application of even the possibility of legal judgement, bring with them their own unacknowledged and unrestrained violence. It is a violence that, like the harm with which it is confronted, is in excess of the measure and dignity of law and finds expression in the presentation of the Holocaust as a lesson taught to, but not learnt by, Jews.

Notes

1. *The Reader* (screenplay David Hare, Director Stephen Daldry), 2008.
2. *How can children of the Holocaust do such things?* A Jewish Plea; Sara Roy, *Counterpunch*, 7 April 2007. <http://www.counterpunch.org/roy04072007.html>.
3. When speaking of morality here, it is not a specific account of moral philosophy that is offered here. Rather morality is used in similar veins as it has been employed by Zygmunt Bauman and Jean Francois Lyotard, who understand morality as that which is not contaminated by modernity's procedural and instrumental rationality.

4. In general terms, the *differend* is that which escapes discursive representation through the impossibility of it being 'phrased' in the appropriate language (Lyotard 1988).
5. Lyotard's use of the term 'sign' points again to the referent's – 'Auschwitz' – unrepresentability and unintelligibility (i.e. its location in the 'unconscious').
6. This unprecedentedness, as will be discussed later, includes questioning accepted notions of personal responsibility.
7. The notion of the absence of subjected that informs Arendt's reflections is questioned by Fine. He argues that the space for subjectivity even in the most extreme circumstances can never be fully erased:

People choose to *defer* to authority. To be sure, their choices are never completely free; they are made within the limits of what is possible and what alternatives are available; yet rarely are those constraints so rigid that there is no choice and rarely is the structure so dominating as to remove all moral agency (Fine 2001, 111).

Unfortunately, the importance of this reference to the presence of subjective choice identified by Fine appears to be absent in Arendt's 'legal judgement'.

References

- Adorno, T.W., and M. Horkheimer. 1973. *Dialectic of enlightenment*. Trans. John Cumming. London: Verso.
- Arendt, H. 1963. *Eichmann in Jerusalem: A report on the banality of evil*. New York: Viking Press.
- Arendt, H. 1973. *Origins of totalitarianism*. London: Harcourt, Brace and Co.
- Bauman, Z. 1989. *Modernity and the Holocaust*. Oxford: Polity Press.
- Bloxham, D. 2001. *Genocide on trial*. Oxford: Oxford University Press.
- Douzinas, C., R. Warrington, and S. McVeigh. 1991. *Postmodern jurisprudence: The law of text in the texts of law*. London: Routledge.
- Fine, R. 2001. *Political investigations: Hegel, Marx, Arendt*. London: Routledge.
- Lyotard, J.-F. 1988. *The differend: Phrases in dispute*. Minneapolis, MN: University of Minnesota Press.
- Lyotard, J.-F. 1990. *Heidegger and 'the Jews'*. Trans. Andreas Michel and Mark Roberts. Minneapolis, MN: University of Minnesota Press.
- Lyotard, J.-F. 1993a. *'The grip (Mainmise)' in political writings*. Trans. Bill Readings and Kevin Paul Geiman. London: UCL Press.
- Lyotard, J.-F. 1993b. *'German guilt' in political writings*. Trans. Bill Readings and Kevin Paul Geiman. London: UCL Press.
- Lyotard, J.-F. 1993c. *'Heidegger and "the Jews": A conference in Vienna and Freiburg' in political writings*. Trans. Bill Readings and Kevin Paul Geiman. London: UCL Press.
- Lyotard, J.-F. 1993d. *'Europe, the Jews, and the book' in political writings*, Trans. Bill Readings and Kevin Paul Geiman. London: UCL Press.
- Marrus, M. 1998. The Holocaust at Nuremberg. *Yad Vashem Studies* 26: 5–41.
- Rose, G. 1993. *Judaism and modernity*. Oxford: Blackwell.
- Seymour, D.M. 2007. *Law, antisemitism and the Holocaust*. London: Glasshouse-Routledge.
- Yakira, E. 2010. *Post-Zionism, post Holocaust: Three essays on denial, forgetting and the delegitimation of Israel*. Cambridge: Cambridge University Press.