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Gianfrancesco Zanetti
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Handbook of the History of the Philosophy of Law and Social Philosophy

Volume 3: From Ross to Dworkin and Beyond

Studies in the History of Law and Justice

Volume 24

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Gianfrancesco Zanetti • Mortimer Sellers •
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Editors

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Volume 3: From Ross to Dworkin and Beyond

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Preface

This *Handbook of the History of the Philosophy of Law* is the product of the global republic of letters and more specifically, the International Association for the Philosophy of Law and Social Philosophy. The Internationale Vereinigung fuer Rechts- und Sozialphilosophie (IVR) has promoted solidarity and the exchange of ideas among the world's philosophers since 1909. This Handbook reflects the efforts of philosophers in every school of legal and social thought and every corner of the world. More specifically, it reflects the leadership of Professor Gianfrancesco Zanetti and his colleagues at the University of Modena and Reggio Emilia: Professor Thomas Casadei and Professor Gianluigi Fioriglio, who both generously supported this project, and the rest of the Modena team—Michele Ferrazzano, John Patrick Leech (who helped to polish the English translation of some entries), Rosaria Pirosa, Serena Vantin, and Gianmaria Zamagni. Professor Zanetti is the Section Editor for Legal History in the *Encyclopedia of the Philosophy of Law and Social Philosophy*, published under the auspices of the IVR and the General Editorship of Professor Stephan Kirste and Professor Mortimer Sellers, the authors of this Introduction. The *Handbook of the History of the Philosophy of Law* arises from decades of shared effort that created the *Encyclopedia.*

The global nature of the cooperation that culminated in this *Handbook* and the *Encyclopedia* from which it derives took on a new meaning in the midst of the universal Covid pandemic through which we have suffered for more than 2 years and from which we have not yet fully emerged. The disease that threatened all humanity reminds us of the fundamental unity of human fate and human society that informs—or should inform—the law everywhere. The editors and contributors to this volume took great comfort and pleasure from the solidarity and common purpose of their fellow scholars in other nations, and the constant correspondence with distant and sequestered colleagues, united nonetheless in a common purpose of understanding law and society.

One happy benefit of the growth of computer technology has been the ability of those quarantined at home to reach across the world for knowledge and encouragement. This chance to be enlightened by the insights of others recalls the inspiring

epistolary exchanges of the eighteenth century that produced the great *Encyclopedie* of Denis Diderot. New and fortunate in this emergent era, we have also lectured and spoken directly with one another's students—and our own—from the safety of our libraries at home. This experience more than any other made clear the necessity that a *Handbook of the History of the Philosophy of Law* should accompany the *Encyclopedia.* We must know better the scholars who have gone before, including those of other nations, and different schools of thought or points of view. We, our colleagues, and our students are hungry for such knowledge. This *Handbook* will provide it.

No Handbook can be complete. There is a necessary and inescapable conflict between comprehensive coverage and convenience. Much was omitted from this collection that could have been included, including perhaps some subjects and scholars who ought to have been included, but were not. Here too the advance of technology provides some comfort. This *Handbook* appears in the bound paper volumes you now hold in your hand. These give it the presence and utility that justify its name. But there is also the vastly larger *Encyclopedia*, which exists in an ever-expanding, ever-corrected, ever-existent electronic form. Perhaps, this *Handbook* will turn you also to the broader project, to which you and scholars like you may yourselves contribute, by noticing its failures and omissions.

Above all, this *Handbook* is a tribute to the hard work and persistence of Professor Gianfrancesco Zanetti. As the *Encyclopedia* Section Editor for Legal History, he worked tirelessly for the broadest and most complete coverage. As primary editor of the *Handbook,* he brings it rigor and exactness. As a lifelong member and frequent participant in the scholarly projects of the IVR, he has contributed to the global sense of fellowship and good purpose that brings the consolations of philosophy to those who seek them everywhere. Legal and social philosophy study to understand and improve our relationships with other human beings. Nothing matters more to the value and felicity of our transient humanity.

Baltimore, MD, USA Mortimer Sellers
Salzburg, Austria Stephan Kirste

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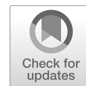

Marie-Andrée Ricard

Introduction

A German philosopher, social-theorist, musicologist, and literary critic, Adorno (1903–1969) is with Max Horkheimer and Herbert Marcuse one of the most prominent representatives of the first generation of the interdisciplinary and Marxist-oriented movement of thought called *Critical Theory*, named after a programmatic text of 1937 by Max Horkheimer titled "*Traditional and Critical Theory*," and less appropriately the "Frankfurt School," as it was based in Frankfurt in the *Institut für Sozialforschung*, an affiliate of Goethe University, directed after Horkheimer by Adorno from 1958 until his untimely death.

The only child of Oscar Wiesengrund, a prosperous Jewish wine merchant, and of Maria Calvelli-Adorno, a Catholic of Corsican descent who became a well-known singer before marriage and from whom Adorno later took his name, relegating Wiesengrund to the initial W., Adorno undertakes studies at the University of Frankfurt in the 1920s on philosophy, music, psychology, and sociology, then goes on to Vienna to further his study of musical composition with Alban Berg. Even though he continues to write many articles defending modern music and also to compose, he finally opts for philosophy.

Under the direction of the neo-Kantian Cornelius, Adorno obtains in 1924 his doctorate degree with a thesis on Husserl's phenomenology. In 1927, Cornelius refuses, however, his manuscript on the Freudian concept of the unconscious in the

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transcendental theory of knowledge, that is, that focussed on the conditions of possibility of knowledge. He will obtain his habilitation only at the beginning of the 1930s, on the basis of *Kierkegaard: Construction of the Aesthetic*. Although he turns to existentialism at this time, Adorno still pursues the project, started since his doctorate, of moving beyond what he will call idealism or epistemology, that is, the admission of a primacy of knowledge or of the constituent subject on the object, belief that he will later integrate into a logic of false identification and of domination. This critique will lead to a study on Husserl written in Oxford in 1934–1937, *Against Epistemology, A Metacritique*; to *Negative Dialectics*, where Adorno affirms at the same time a *reciprocal mediation* of the poles of subject and object and nevertheless *the difference of the object within this mediation*, and consequently, "The Object's Preponderance" (Adorno 1973, 183). In this way, he blocks any inclination toward elaborating any system, while bringing thought back to the necessity of experience and to the task of its interpretation.

Its multiple facets, the scope of the subjects it addresses as well as the anti-systematic impulses that follow from the desiderata of a genuine, i.e., open and corporeal-based experience of reality, give Adorno's writings a paratactical, fragmental, and aphoristic form, a content that resists summarization into a sole thesis and a radically critical impulse. Nevertheless, it is possible to assemble his key ideas around a few focal points.

The Actuality of Philosophy and the Period of Exile in the United States

Although he is not yet a member of the Institute for Social Research at this time, Adorno delivered there in 1933 his inaugural lecture entitled " *The Actuality of Philosophy.*" All the while opposing himself to Hegel's thesis pertaining that reality has an overall meaning and is identical to the concept, Adorno also rejects Heidegger's and Scheler's recourse to an immediate being. In his view, this phenomenological attempt lands either in the irrational or else in the ideological, that Adorno generally assimilates to the "false conscience," a conscience that has forgotten or abstracted its own activity and finds itself thus reified. Adorno's thesis is precisely that "the idea of science is research; that of philosophy is interpretation" (Adorno 2000, 31): "For the mind is indeed not capable of producing or grasping the totality of the real, but it may be possible to penetrate the detail, to explode in miniature the mass of merely existing reality" (Adorno 2000, 38).

Since Hitler comes to power at this very moment, Adorno finds himself barred from teaching and soon forced to exile. He rejoins Horkheimer and the Institute for Social Research, which moved to New York in 1934.

This period before and after the Second World War is very fertile for Adorno, although he never manages to adapt to the American way of life. He participates in two sociological studies in which the Institute is engaged.

The first is the Princeton University Radio Research Project, where Adorno detects already the tendency towards the "marketability of art" which he thematizes in the famous chapter in the *Dialectic of Enlightenment*, entitled "The Culture Industry."

The second is the Berkeley Opinion Study Group inquiry on anti-Semitic behaviors, for which Adorno publishes the results in 1950 in *The Authoritarian Personality*. This multidisciplinary research, both quantitative and qualitative, is more generally focused on prejudices that reveal a fascist or antidemocratic potential in individuals, an "authoritarian" disposition susceptible of radicalizing itself in hostile or destructive practices with regard to outgroups (minorities) when placed in contact with ideology. The study has for hypothesis "that the political, economic, and social convictions of an individual often form a broad and coherent pattern [. . .] and that this pattern is an expression for deep-lying trends in his personality" (Adorno et al. 1950, 1). As these prejudices cannot be explained entirely by sociopolitical, economical, or even rational causes, the authors considered crucial that, if one wishes to thwart them, then the accent should be placed foremost on the psychology of these individuals. Many of the ideas developed here will later be taken up in the "Elements of Anti-Semitism" in *The Dialectic of Enlightenment.*

Adorno publishes two decisive works as pertain to the development of his philosophical thought: *Minima Moralia, Reflexions from Damaged Life* in 1951 and, with Horkheimer in 1944, *The Dialectic of Enlightenment*. Starting from the presupposition that defines the *Aufklärung*, namely, that the progress of reason leads to emancipation from terror and superstition, this latter essays aims to comprehend the incomprehensible, that is, "why humanity instead of entering a truly human state, is sinking into a new kind of barbarism" (Adorno and Horkheimer 2002, XIV). The principal thesis of the book is that rationality has reversed into the myth of immanence – of existence as a blind and self-reproducing order – since it has misunderstood its own portion of alterity (its mimetic dimension, the ambiguous tendency of the living to make itself like the other) and its constitutive rapport to nature (as motor and substrate of thought and activity). This somber diagnostic draws on a reconstitution of the development of knowledge as a power which progressively substitutes itself to nature's blind one, by becoming the tool of an instrumental rationality, that is, that reduces all being to a fungible and calculable means to any given aim in the name of control and efficiency (in the first study, "The Concept of Enlightenment") and on a reconstitution of the advent of subjectivity as a fixed and closed ego, who represses his own impulsions and needs as heteronomous (in the excursus on Homer's Odyssey and on de Sade's Juliette).

The possibility of emancipation resides however in that the human being still has the capability to reflect itself and reverse its tendency for a "totalitarian" domination. Hope resides, in short, in "the remembrance of nature within the subject" (Adorno and Horkheimer 2002, 32). Adorno turns consequently towards the *non-identical*, a notion that can be approached theoretically as to what differs from the general concept or the always identical and therefore either escapes one's grasp or seems bare of meaning or value, i.e., blind spots and cast-off materials (Adorno 1987, §98), the "only" individual; and practically as to what raises fear and arouses defensive

reactions, in the first place nature in or outside us, the suffering and weakness of the living body, the expression of something that is aesthetically perceived. Advocating for the nonidentical and the negation of suffering, his thinking takes a materialistic turn.

The Return to Frankfurt and the Late Works

The two major publications from the 1960s converge into this motif of the materialistic turn concerning the subject.

In *Negative Dialectics*, subjectivity's self-reflection leads to validating the non-identical as the need or the pulsion that motivates the thought of suppressing the reality that weighs down on it and gives it at the same time its objectivity. This primarily somatic need to abolish suffering transforms itself respectively into the imperative and into desire, at the heart of the Adornian "after Auschwitz" reformulation of morality and metaphysics. On the one hand, morality must henceforth be reconstituted on this imperative that is addressed to humanity: "to arrange their thoughts and actions so that Auschwitz will not repeat itself, so that nothing similar will happen. [. . .] Dealing discursively with it would be an outrage, for the new imperative gives us a bodily sensation of the moral addendum – bodily, because it is now the practical abhorrence of the unbearable physical agony to which individuals are exposed even with individuality about to vanish as a form of mental reflection" (Adorno 1973, 365). On the other hand and in the same vein, metaphysics is reborn on contact with the despairing experience of the self as cadaver. It leads to a meditation on the intrinsically human desire, i.e., founded on a mimetic solidarity with the living, of immortality. This motif, which concludes *Negative Dialectics* and opposes Adorno to Heidegger's solemnization of death (cf. also *The Jargon of Authenticity*, 1964), merges with the impulsion that penetrates the art of saving the nonidentical in an appearance, which is in the end perhaps only an appearance.

This is treated in *Aesthetic Theory*, Adorno's second major work, published posthumously in 1970. The feat which radically modern art must realize, that is, of turning itself against its appearance of being the thing itself, is to realize again this salvage. For this to be, art must become autonomous, nonapparent, almost a simple commercial commodity. Baudelaire is already an exemplary case: "The new is akin to death" (Adorno 1997, 21).

Adorno's engagement with respect to education converges also in this emancipatory motif. He returns to Germany in 1949, a year before the Institute, at the express request of authorities in Frankfurt, in order to occupy a position in the Department of Philosophy at the University. He also gets actively involved in the ongoing revision of the education program, which he conceives as well in an "after Auschwitz" perspective, as an education opposed to the hardening of individuals and to the iciness that allowed genocide to be, as indicated by the title of his most famous essay on the subject, " *Education after Auschwitz*" (1966).

The Question of Justice

Adorno did not develop a philosophy of law to speak of and only rarely engaged on questions of jurisprudence, as in " *Sexual Taboos and Law Today*" (Adorno 1998, 79 sq.), seemingly contenting himself with denouncing injustice, in particular that of positive law for which "the formal principle of equivalence becomes the norm" (Adorno 1973, 309). Notwithstanding the negativity of his position with regard to law, his advocacy for the fundamental right of those who suffer to express themselves, for the nonidentical and more concretely, the unique and incomparable entity that is each individual, is part and parcel of a conception of justice that permeates all of his writings. Drawn from a Marxian critique of the commodity fetishism and from the Lukácsian diagnostic of the universalization of the value of exchange in our societies that are increasingly bureaucratized, this conception of justice has for cornerstone the notion of exchange. According to *The Dialectic of Enlightenment*, this notion is rooted in the mythical law of equivalence between "guilt and atonement, happiness and misfortune" (Adorno and Horkheimer 2002, 12) and finds itself materialized in multiple activities aimed at escaping from that blind fatality, but ends up reproducing it, through sacrificial rituals, replacing the victim by the criminal, barter, work and the gift of hospitality, among others.

In *Negative Dialectics*, Adorno connects more explicitly barter to identity, stressing therefore its ambiguity: "if mankind is to get rid of the coercion to which the form of identification really subjects it, it must attain identity with its concept all the same. The barter principle, the reduction of human labor to the abstract universal concept of average working hours, is fundamentally akin to the principle of identification. Barter is the social model of the principle [...] The spread of the principle imposes on the whole world to become identical, to become total" (Adorno 1973, 146). Accordingly, a just and unconstrained exchange would be one that is not governed by the abstract and potentially deceptive equality of equivalence, but by an equity wherein "each receives his own." In terms of knowledge, this would imply that the subject "makes up for " (Adorno 1973, 145) the "false copy" (Adorno 1973, 170) that he projects onto nature or objects, and that he gives them *more* than what he receives from them, however without sacrificing himself, proportionally to the surplus that they possess relative to the general concept, on the one hand, and to their reified facticity, on the other. In terms of social interactions, finally, this would mean that each tries to promote the others' ends. In addition to the determination that a human being is its own end, according to a famous variation of the Kantian categorical imperative, Adorno takes up the Kantian rule of law that "everyone's freedom need be curtailed only insofar as it impairs soemone (sic) else's" (Adorno 1973, 283). In this way, a just society would ultimately correspond to a reconciled, a happy society.

The Good Life and the Advocacy for the Nonidentical

As for *Critical Theory* in general, Adornos aim lays in the emancipation from domination and in the intellectual contribution to the transformation of our society. Thus, at the very beginning of his major theoretical work, *Negative Dialectics*, Adorno says, contrary to Marx's final *Thesis on Feuerbach*, that philosophy as an interpretation of the world is still on the agenda, given the failure of the transformation of reality and the regression into blind violence of soviet praxis and western activism. "The whole is the false": this polemical thesis of *Minima Moralia* §29 means that, albeit entirely and rationally administered, our post-capitalist society is on the whole a self-destructive organization that atomizes individuals, forcing them to strategies of self-preservation, hence repressing human needs – i.e., the material and corporeal ones in the first place, as we have seen – instead of satisfying them, as promised. Adorno's thought is therefore seminal in that it is located in the perspective of the good life and in that it confronts us with the crucial and still living question of whether and how one can lead a good life in a "bad life." In short, Adorno answers this problem by way of an imminent critique and an autocritique. He believes that the exposure of the inner contradictions of one's own life and those of the society as such may allow the good to still shine through, provided that the exposure permits the expression of suffering and its awareness. As we cannot know exactly what the good is, Adorno invokes it as an identity of ideas and phenomena, of subject and object, that he sometimes calls utopia, reconciliation, or best, "communication of what was distinguished" (Adorno 2000, 140).

Conclusion: Reception

The reception of Adorno's thinking encountered numerous critiques at first, even from the second generation of *Critical Theory* (Jürgen Habermas; Axel Honneth).

He was generally criticized for his pessimism, negativity, and lack of a positive criteria for emancipation. Adorno obtains today a more favorable reception.

The *Posthumous Writings*, which include his lectures in 18 volumes, his unpublished conferences and additions to the 20 tomes of the *Gesammelte Schriften*, assist in making his thinking more comprehensible.

On another note, the recent publication of a 1967 conference, " *Aspects of Contemporary Right-Wing Radicalismus,*" is surprising by its actuality.

Finally, the primacy given to the body and the sympathy with respect to the concomitant vulnerability finds notably an echo in feminist and environmentalist thinking, animal rights studies, and even in the ethics of *care*.

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Arendt, Hannah

Hanna Lukkari and Martina Reuter

Introduction

Hannah Arendt (Germany 1906 – United States 1975) is one of the most important political thinkers of the twentieth century and is mostly known for her writings on political action, evil, and totalitarianism. She studied philosophy in Marburg and Heidelberg, Germany, with such renowned German philosophers as Martin Heidegger and Karl Jaspers (Young-Bruehl 1982, 44, 48). Arendt's political awakening took place when the Nazis ascended to power in Germany, and she joined the resistance movement. In 1937, she fled the Nazi regime first to France and then to the United States, where she lived the rest of her life and produced the majority of her intellectual work (Arendt 2000, 6–7; Young-Bruehl 1982, 92, 113).

Arendt never systematically developed a theory of law. However, nearly all her works deal with some aspect of law, and in recent years scholars across academic disciplines have brought to light the insights and importance of Arendt's legal thought (for instance Goldoni and McCorkindale 2012; Volk 2015). Arendt lived through the Second World War and saw how traditional, political, and legal concepts became unable to respond to the horrific events. She was concerned to find novel

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ways of orienting ourselves politically and legally in a post-totalitarian world. This entry introduces key aspects of Arendt's jurisprudential thinking through three themes that all shed light on the boundaries of law: law and politics, the problem of human rights, and law and evil, exemplified by the trial of Adolf Eichmann.

Law and Politics: Arendt's Constitutionalism

Arendt traces to ancient Greece the roots of the conception of law as a stabilizing and polity-constitutive force. In her reading, for the Greeks, law, *nomos*, was the ground of the political life in the *polis* that had to be erected before politics could take place (Arendt 2005, 182–183). Laws are artifacts comparable to houses, public squares, and books. They form the stable, nonpolitical foundations of the public space in which political action and freedom may continuously appear, and demarcate this space from what lies outside it, the private sphere and other polities. In *The Human Condition* (1958), Arendt distinguishes lawmaking from politics and emphasizes that for the Greeks, "the lawmaker was like the builder of the city wall, someone who had to do and finish his work before political activity could begin" (Arendt 1998, 194).

However, Arendt does not simply claim that law is prior to politics and establishes its condition of possibility (see Barbour 2012). She is also inspired by the Roman notion of law, *lex*, which, she explains, came about through the explicitly political act of peace treaties, the binding of new contracts between different, formerly hostile peoples (Arendt 2005, 179). The notion of law as a durable tie and relation between people emerging from mutual contract fascinates Arendt, for in her understanding, political action of a plurality of people forms "an in-between," and binds them into acting in concert, and the task of law as a contract is to maintain this bind across time (Arendt 1998, 243–245).

According to Arendt, the roots of legitimate political power lie in "[t]he mutual contract by which people bind themselves together in order to form a community," and such a contract "is based on reciprocity and presupposes equality; its actual content is promise, and its result is indeed a 'society' or "cosociation" in the old Roman sense of *societas*, which means alliance" (Arendt 1990, 170). She is particularly interested in the American constitution, which she sees as a historical – and thus factual as opposed to fictional – example of John Locke's horizontal social contract. Locke criticized Thomas Hobbes' vertical social contract, which transfers all powers to the sovereign, and according to Arendt, the American constitution follows Locke as it "limits the power of each individual but leaves intact the power of society" (Arendt 1972, 86).

For Arendt, the American Revolution exemplifies political freedom in its act of founding a new polity. It shows how a polity can emerge out of political freedom to begin something new and be made a durable entity through "promises, covenants, and mutual pledges" (Arendt 1990, 181). In her famous argument, the French Revolution turned out to be a pale shadow of the American one and succumbed to

terror. This was ultimately because the French were attached to the idea of the sovereign, to the idea of the One People that overrode the plurality of individuals and opinions the expression and appearance of which are, for Arendt, the quintessence of politics and political freedom and "precisely the quality that makes men human" (Canovan 1992, 27).

Societas is, as we can see from its aspect of alliance, ultimately reliant on the obligation to keep promises. Arendt emphasizes the importance of the human capacity to make and keep promises in several of her writings: promises are the foundation for continuity and the only possibility humans have – often to a very limited degree – to determine the future (Arendt 1972, 92–93; *1998*, 244–254). As a basis for the continuity of *societas*, promises serve the same purpose as laws, but on a more fundamental level. Arendt emphasizes that *societas* is prior to government: it is an alliance between individuals "who contract for their government after they have mutually bound themselves" (Arendt 1972, 86). *Societas* is not only prior to, but also to a certain extent independent of government. Like Locke, Arendt holds that *societas* can remain intact, and thus ground the possibility of resistance and/or a new contract, when a government dissolves or degenerates into tyranny (Arendt 1972, 87; Locke 1967, 429).

Societas does not survive totalitarianism, though, and its destruction forms an important aspect of Arendt's analysis of how totalitarianism destroys politics. True alliances do, according to Arendt, require plurality, and as she argues in *The Origins of Totalitarianism* (1951), it is significant for the particular kind of terror exercised by totalitarian regimes that they destroy the public space – be it the free press or the freedom of associations – that makes the emergence of plurality possible (Arendt 1976, 465–466).

In her essay "Civil Disobedience" (1972), inspired by ongoing protests against the US involvement in the Vietnam War, Arendt discusses the conditions under which it is justified to break the law. She emphasizes that it is essential to distinguish consent to *societas* from consent to individual laws and specific policies: there are situations where *societas* may justify breaking the law. Arendt considers civil disobedience to be an American phenomenon, closely tied to the American legal system and its distinctions between the constitution, federal law, and state laws (Arendt 1972, 83). She criticizes the idea that representative democracy in itself creates an obligation to obey the law by giving people the right to vote. The idea is particularly flawed when representative government is in crisis, as Arendt claims it was in the USA in the early 1970s (Arendt 1972, 89). She holds that the only way to revitalize the foundation for consent to law is to revitalize institutions of actual participation, such as voluntary associations (Arendt 1972, 94–96).

Arendt reworks the Republican constitutional tradition in thinking that the authority of the Republic and its law lies in the beginning, in the Founders' act of foundation and constitution-making, and that this "beginning" cannot simply be something in the past. Rather, the Constitution must be "augmented" by new acts in the present that express its prevailing authority by renewing it. Civil disobedience ought to be added as a fundamental right to the American Constitution, Arendt argues, because the voicing of one's opposition to a particular law is a way of both

participating in the political debate concerning the form that laws as the "worldly artifice" ought to take and showing one's respect for the Republic as a whole. In that sense, civil disobedience is part of the "caring for a world that can survive us and remain a place fit to live in for those who come after us" (Arendt 1993, 95). This political care for the world is the only possibility that we have in our time to preserve its authority and stability.

The Problem of Human Rights

The Nazi regime stripped Arendt of her German nationality. She lived in exile as a stateless person for years, until she finally received new citizenship in the USA (Young-Bruehl 1982, 113). Arendt thus personally experienced what it is to live as a refugee outside the legally protected membership in a political community. In *The Origins of Totalitarianism*, Arendt presents her influential analysis of the structural "decline" that European states underwent after the First World War; a decline ultimately intertwined with what she calls the "end of the Rights of Man" (Arendt 1976, 267–302). Arendt identifies two aspects that were particularly striking in this decline: the creation of new national minorities as an effect of the Versailles Peace Treaties, such as Germans in Poland or Macedonians in Albania, and the phenomenon of mass refugee movements. The appearance of these two groups, minorities and refugees, and the state response to their appearance, constituted, for Arendt, an unprecedented legal-political situation in Europe. The plight of refugees and minorities differed from the "usual" sufferings of the unemployed or those whose civil rights had been violated, as they rather had no rights recognized by the state at all: they were rightless (Arendt 1976, 269). The displacement of the minorities and refugees "forced people to live outside the scope of all tangible law" (Arendt 1976, 293). Regardless of the recognition of minority rights as an element of the Versailles Treaties, both groups had lost the protective bond of *equal* citizenship in a nation state.

The refugee was also an anomaly in the eyes of international refugee law of the time that only knew religiously motivated persecution and political dissidence as grounds for recognizing someone as a refugee. The new refugees were, however, persecuted because of their ethnic identity, not because of their political actions. The unprecedentedness of their condition in the history of forced migration consisted of the fact that the refugees could not find a new home anywhere else, thus being forced outside the legal world completely. In Arendt's analysis, the plight of interwar refugees was an unprecedented situation of displacement: they were, Arendt writes, "depriv[ed] of a place in the human world which makes opinions significant and actions effective" (Arendt 1976, 296).

According to Arendt, such loss of one's own place left individuals in an exceptional position of "abstract nakedness of being human and nothing but human" (Arendt 1976, 297). Suddenly there were millions of people that European states did not recognize as their full-fledged members. States only protected the rights of

those they selected for protection, not the human being as such. Arendt analyzes how old European democracies became incapable of reconnecting themselves to their own constitutional principle of legal equality at the moment when they faced people whose presence challenged the nationalist principle "one nation, one state." Arendt's analysis is a poignant description of state action that responds to the unwanted presence of people by, first, depriving them of equal legal statuses or refusing to recognize that they have any, and then resorting to "legally emancipated" means of police violence, or in the best of cases to humanitarian aid, to deal with the stubborn presence of these people (Arendt 1976, 287).

The "kill[ing of] the juridical person in man" (Arendt 1976, 447) was one of those elements that, according to Arendt, in time crystallized into the totalitarian regime. Arendt observed that concentration camps were not prisons, but rather spaces of legal exception. Their inmates were precisely "merely human" and "absolutely innocent": they could not be considered criminals, guilty or not guilty of illegal actions (Arendt 1976, 447–448). Arendt observed that to be made "merely human" is a horrific form of deindividualization and dehumanization, and stripping individuals of their meaningful place in a political-legal community opens the door to the possibility of their physical destruction. The blind spot of the Enlightenment idea of inalienable natural rights was that rights in actual reality are forms of recognition and inclusion of the individual into legal, political, and social institutions. "Inalienable" human rights turned out to mean nothing the moment people lost their membership in established legal-political institutions, national or international. Arendt's radicality vis-à-vis the Western jurisprudential tradition rests on her claim that becoming recognized as a juridical person is a condition for any meaningful notion of human rights. The citizen grounds a recognizably human life, rather than the other way around (Balibar 2007, 732).

It is against this background that Arendt argues for the existence of "the right to have rights," the right to "belong to some kind of organized community" (Arendt 1976, 296). What she calls for in response to the horrors of the twentieth century is not unfettered universalism of a single global political community without borders (Arendt 1976, 302), but rather a novel understanding of the political-legal community that preserves both the humanity of the individual human being and the plurality of their communities.

An important part of recent scholarship on Arendt has focused on interpreting the meaning of the enigmatic notion of "the right to have rights." Scholarly understandings and uses of this notion can roughly be divided into three groups. The first group of scholars reads this notion against the background of Arendt's oeuvre as a whole and articulates it as a novel, moral or ethical foundation of human rights (Birmingham 2006; Michelman 1996). The second group takes from Arendt's analysis heuristic tools with which to analyze contemporary refugee and human rights law as well as the continuing plight of refugees and the persisting "rightlessness in an age of rights," as one commentator puts it (Gündoğdu 2015). The third group understands "the right to have rights" politically, as pointing to political struggles of the excluded for inclusion and recognition of their juridical personality (Barbour 2012; Beltrán 2009). The "right" to rights is about politically claiming or taking one's

rights in a situation where one has been found by the state authorities as entitled to none (see Rancière 2004). Whichever approach to Arendt's fascinating but enigmatic idea we choose, however, "the right to have rights" clearly is a notion that highlights the crucial importance of independent judgment and critique of the extant limits of positive legal rights and the framework of recognizing humanity and membership they provide.

Law and Evil: Adolf Eichmann on Trial

In *The Human Condition*, Arendt connects the faculty to make and keep promises, discussed above, with the faculty of forgiving: these are the two faculties by which humans can come to terms with the unpredictability and irreversibility inherent to action (Arendt 1998, 237). She emphasizes that forgiving is "the exact opposite of vengeance," which is a mere "re-acting against an original trespassing" (Arendt 1998, 240). Forgiving is "the only reaction which does not merely re-act but acts anew and unexpectedly, unconditioned by the act which provoked it" (Arendt 1998, 241). Arendt distinguishes forgiving from punishment as well, but here we are not speaking about opposites. Forgiving and punishment are both attempts to "put an end to something that without interference could go on endlessly." They are intimately interconnected because humans are, according to Arendt, "unable to forgive what they cannot punish and [. . .] unable to punish what has turned out to be unforgivable" (Arendt 1998, 241).

In *The Origins of Totalitarianism* and *The Human Condition*, Arendt connects the unforgivable and unpunishable with Immanuel Kant's concept of radical evil (Arendt 1976, 459; Arendt 1998, 241). Later, in *Eichmann in Jerusalem* (1963), these remarks on evil are developed into her controversial claim that Adolf Eichmann's deeds exemplify "the fearsome, word-and-thought-defying *banality of evil*" (Arendt 1994, 252; also Birmingham 2003; Rae 2019). Arendt argues that evil deeds do not require evil motives: except for looking out for his own advantage, Eichmann "had no motives at all" (Arendt 1994, 287). In her interpretation, the trial against Eichmann came to question the juridical assumption that the seriousness of a crime depends on the subjective factor of intent (Arendt 1994, 277). Eichmann may have lacked evil intentions, but this was certainly not an extenuating circumstance. Arendt argues that he was just as responsible for his deeds regardless of whether they were motivated by evil intentions or not.

Arendt's analysis of Eichmann's trial is above all a fierce criticism of what she calls "the cog theory," according to which the Nazi perpetrators, including Eichmann, were mere cogs in a machinery. Arendt does not deny that "the essence of totalitarian government [. . .] is to make functionaries and mere cogs [. . .] out of men, and thus dehumanize them," quite the contrary, but she emphasizes that the "cog theory is legally pointless" (Arendt 1994, 289). The trials against the Nazi perpetrators were of crucial importance exactly because "all the cogs in the

machinery, no matter how insignificant, are in court forthwith transformed back into perpetrators, that is to say, into human beings" (Arendt 1994, 289).

Arendt develops her discussion of the de- and rehumanizing of the Nazi perpetrators in her posthumously published lectures on moral philosophy from the mid-1960s. Here she points out that when perpetrators on trial claimed that they had not acted on their own initiative, they "renounced voluntarily all personal qualities, as if nobody were left to be either punished or forgiven" (Arendt 2003, 111). This voluntary dehumanization is, according to Arendt, what makes limitless evil possible. She continues: "the greatest evil perpetrated is the evil committed by nobodies, that is, by human beings who refuse to be persons" (Arendt 2003, 111). In these lectures, Arendt concretizes the banality of evil by describing it as rootless evil. A person is someone who is rooted in the world by using her capacities of thinking and remembering (Arendt 2003, 100). Arendt emphasizes that though a person may be vicious as well as stupid, thinking and remembering will impose some "limits to what he can permit himself to do [. . .] limitless, extreme evil is possible only where these self-grown roots [. . .] are entirely absent" (Arendt 2003, 101).

Arendt discusses the crucial importance of memory and remembering throughout her writings (also Herzog 2002; McMullin 2011). In *The Origins of Totalitarianism*, she compares memory and law: "the boundaries of positive law are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world" (Arendt 1976, 465). Nobody can be forced to think and remember, but a court in its judgment declares even those renouncing the common world as well as their personhood responsible for their deeds. This is why the trials against the Nazis included an important aspect of repersonalization, not just of the victims, but also of the perpetrators.

Conclusion

In her legal thought, Arendt tries to bring together two ideas (see also Honig 1991; Lukkari 2020). First, the idea of law as a precondition and guarantee of the durability of a space within which political action may appear, and all members are recognized as equals; and second, the idea of politics, the acting together of a plurality of individuals, as the ultimate source of law. Laws guarantee equality, but a legitimate legal order also requires concerted political action between equals in order to arise. Equality, thus, is both inside and outside the law, its product and precondition.

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Cardozo, Benjamin

Laura Miraut Martín

Introduction

Benjamin Nathan Cardozo (1870–1938) is, together with Oliver Wendell Holmes (whom he succeeded as Associate Justice of the United States Supreme Court) and Roscoe Pound, one of the maximum representatives of the anti-formalist school of thought described as "sociological jurisprudence" which was highly influential in North America in the early decades of the twentieth century. Cardozo's protagonism in the juridical culture of his time is twofold: as a judge and as a legal theorist. The two are, in any event, facets that are intertwined. On the one hand, his rulings (recognized for being thoroughly adapted to the new needs of a society in a continual process of transformation) represent a genuine expression of his theoretical thinking. On the other hand, his extrajudicial writings were mediatized by the final aim of providing the reader with an analysis of the correct legal decision. Cardozo already advances the nucleus of his ideas in *The Nature of the Judicial Process* (1921), where he expresses his intention of revealing the methods that a judge follows in preparing his rulings, proposing a definite criterion for determining their content. He looks more deeply, however, into some of those questions in *The Growth of the Law* (1924) and in *The Paradoxes of Legal Science* (1928), offering precise and articulated replies to problems that remained unanswered in that initial expression of his conception.

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Legal Wisdom

Cardozo believes that legal decisions are conditioned by law and the interpretation that scientific doctrine makes of it. The theory of legislation and the science of law represent in this respect ancillary legal wisdom that places the judge in the best position to give his ruling: the former permits laws to be well formulated, adapting them to the objectives that the legal system pursues; the latter transmits the necessary information about current legal provisions, reformulating in some cases their significance. But when it comes down to it, in resolving the conflict elucidated in each specific case, the judge has to reach for legal philosophy, unless the matters dealt with are so simple as to permit the automatic application of the law or of legal precedent. Legal philosophy thus emerges as the fundamental legal wisdom, i.e., the legal wisdom that determines in each case the ultimate meaning of the judge's ruling.

For the rest, legal judgments operate on the basis of facts. This makes it necessary for the judge to have sufficient knowledge to evaluate their presence and meaning, which is ever more difficult in a world that is changing at a dizzying speed. He proposes in this regard the model of a generalist judge who has the maximum level of knowledge of the realities of life that have to be taken into consideration when giving each ruling. The concept of continuity of knowledge that Cardozo (1939, 232) takes from Lawrence Lowell would refer to the importance that he himself attributes to the conjunction of legal knowledge and extralegal knowledge in the judicial process.

The fundamental role that Cardozo attributes to legal philosophy contrasts with the absence of even the most superficial treatment of its subject areas, considering it unnecessary for his purpose of defining the correct judgment. He limits himself in this to declaring that the genesis, growth, and ends of law are the subjects in legal philosophy that claim his attention and for an overall consideration of the subject matter of legal philosophy referring to the analyses presented by Roscoe Pound (1922).

The Concept of Law and the Value of Legal Certainty

Cardozo recognizes the existence of a body of law prior to the judicial ruling and in this matter is critical of the extremist positions of the legal realism that were beginning to form in America. In the idea of prediction, he detects the key to determining the very existence of the law: only those elements that permit us to predict the sense of the future action of the courts will constitute law. Those elements that in *The Growth of the Law* had not been defined sufficiently (on incorporating therein, superimposed, the contradictory ideas that only the principles of order are law and law is both these and the rules that reflect them provided they pass the test of predictability) would then be clarified in his Address in 1932 to the New York State Bar Association as encompassing therein "a vast conglomeration of principles and

rules and customs and usages and moralities" (Cardozo 1932, 18). In this he definitively embraces as law those principles that inspire the traditional legal sources but also directly the latter. The only requirement for giving legal character to both is that both the principles and the rules of official law fulfil the demands imposed by the principle of predictability.

Furthermore, Cardozo identifies in the adapting of the legal ruling to the legal objective the element that in the final reckoning determines its correct sense. He incorporates in this point legal safety or certainty that permits individuals to know in advance the consequences to them of acting against the law as part of the wider objective that he recognizes as social interests in *The Growth of the Law*. But legal certainty is not an absolute value but one which in certain cases may yield before the realization of other legal values with greater specific weight.

Cardozo is very graphic in indicating the difficulties involved in the task of detecting in legal precedents the principle that has to guide at all times the determination of the content of the legal ruling. Applying legal precedents mechanically in a society which is constantly changing where the situations presented for the decision of the judge bear little relation to those that were presented in the past will in the end convert legal precedents in centers of infection that, as such, may finally affect the whole of society, perverting conclusively the sense of the very function of law. In these cases, the most we can achieve with legal precedent is a false sense of security whose appearance limits us in our efforts to reach true legal certainty. In this respect in *The Growth of the Law*, the distinction between what is the sound certainty and the sham certainty, between gold and tinsel, is emphasized (Cardozo 1924, 16–17). Cardozo assumes here a surprising material or finalistic conception of legal certainty bringing into it the idea of movement, i.e., of adaptation to social change. He would later (Cardozo 1932) take up once more the formal traditional conception of legal certainty, stressing in this sense that legal certainty as the governing aim of the content of the legal ruling can be defeated when it is in conflict with another higher aim.

That oscillation between contradictory conceptions of legal certainty is explicable if we examine the specific characteristics that define the style used by Cardozo in his arguments. The assumption of the finalistic conception makes sense in the quest to discredit the function of legal precedent as the foundation of the ruling: in saying that precedent gives false legal certainty, he saves himself the work of convincing his audience of the limited weight of legal certainty as the governing aim of a ruling. The rehabilitation of the formal conception of legal certainty shown in his mature writings illustrates his assumption of the idea that the best that can be done so that law can be perceived as it really is is to show the opposition that presents itself in a legal ruling between differing values without searching for a formula that artificially encompasses all of them.

The Workings of the Legal Process

In *The Nature of the Judicial Process*, Cardozo identifies four methods that the judge employs in the discharge of his duties: the rule of analogy or the method of philosophy, the method of evolution, the method of tradition, and the method of sociology (Cardozo 1921, 30).

The logical method represents the first tool for the work of the judge. As a method it is relevant, but not necessarily decisive because the ruling ought in any case to be adjusted to the social ends of law. The defense of the historical method, or the method of evolution, does not necessarily shackle a legal institution to the form that it had in the past. On the contrary, Cardozo considers it an invigorating and dynamizing function, one that enables the evolutive sense of law to be captured in relation to the different institutions. Cardozo admits the subordinate role of custom in respect of law, but that does not prevent him from appreciating the force that it can acquire in the absence of an applicable juridical regulation and, indeed, as a criterion operating on the very regulation that the existing legal norms establish, and he distinguishes two different scenarios: the reform of legal regulation through custom and the integration of the undefined legal concepts that may crop up in the existing legal norms.

The method of sociology acquires sovereign significance over the rest in the view of Cardozo; it is the arbiter between all the other methods, the method that tells us in what proportion each of the others have to be taken into account in the various instances. At this point Cardozo turns to the concept of the social welfare underscoring with this the conventionalist sense of law, because the legal principle that determines the meaning of the ruling is given by consideration of the consequences that the application of one rule or another would bring about in each case. The social welfare is a hypothetical situation in which the consequences deriving from the legal ruling are appropriate more or less directly to the individuals and, by extension, to the whole of society. In this sense he proposes the substitution of the traditional structural analyses of law by other functional analyses that permit an evaluation of the adaptation of law to the ends which are intended.

The problem is to determine which are the particular guidelines that the judge has to follow in order to carry out the aims of the law. Cardozo excludes the possibility of issuing correct legal responses on the basis of mere subjective sentiment or personal intuition. However, in *The Nature of the Judicial Process*, he gives no general rule for solving the problem of the content of the principle that has to guide the sense of the ruling. What prevails, he says, is the need to resort to reasons of a superior nature that have to be sought in life itself, but which have at the same time to connect with the demands imposed by moral considerations.

Cardozo offers a much more elaborate analysis of the object of law in *The Paradoxes of Legal Science*. There, he expressly recognizes liberty as the underlying principle of his political philosophy, as a genuine element directing the sense of law and the legal ruling itself. But the principle of liberty is not a static and frozen concept. If the judge wishes to attend to the achievement of liberty, he will also have

to provide the corresponding satisfaction to the personal circumstances of the individual whose exercise of liberty he is endeavoring to guarantee. The principle of liberty is thus endorsed in the formula of free development of personality which implies recognition of the right of each individual to form his own opinion furnishing him with knowledge of the opinions of others and permitting him to participate actively in public discussion. The free development of the personality evidently ought not to constitute a privilege of any individual or social class but should be open to all, guaranteeing equality of opportunity to every individual. The right to knowledge that is a result of the exercise of the liberty to participate effectively in social debate and the equality of opportunities are, therefore, the basic pillars on which his view of the free development of personality can rest.

The application of these elements will not be automatic, however, as demands of time and place need to be met. Their application must in this regard be contextualized. The demands implied in the free development of personality cannot be of an absolute nature because frequently the claims of one individual to guarantee his liberty clash with those that another invokes to guarantee his own liberty. Hence the solution to be adopted by the judge when faced by a conflict of interests has necessarily to be adapted to the circumstances of the social group and the time and place in which he has to make his ruling. The ruling does not lose its moral nature with this. But it is not the morality of the judge himself that the ruling should reflect but the morality of the social group. That apparent relativism of the legal ruling is, nevertheless, nuanced when he states that the moral model that should be enshrined in the ruling is not that which the general membership of the group share, but that of those men and women of that same social group whose mentality may be considered as "intelligent and virtuous" (Cardozo 1928, 37). The law does not have as its aim the achieving of a society of virtuous people, but that of an ordered social life in accordance with criteria often imposed by convenience and prudence. In this point the social circumstances and peculiarities of the group it is intended to regulate and its environment have to be taken into account when solving social conflicts. But in trying to strike a balance between the various elements to be given value in the ruling, the judge will have to keep in mind the model of moral behavior that corresponds to intelligent and virtuous men. The legal ruling acquires in this sense a dimension that is unequivocally perfectionist. That remission to the perfectionist moral model of the social group does to some extent permit a solution to the problem that Cardozo had marked out in *The Nature of the Judicial Process* with remission to the idea of the superior principles that would have to guide in any case the sense of the legal ruling.

The Theory of Legal Decision-Making as Legal Philosophy

Cardozo never intended to produce a complete, articulated philosophy of law. This already provoked in his own time some discussion about whether or not Cardozo could be considered a true legal philosopher. His view is explicit in this regard. Each