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‘EXPLODING THE LIMITS OF LAW: JUDGMENT AND FREEDOM IN ARENDT AND ADORNO¹

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Introduction

Long before she wrote *Eichmann in Jerusalem*, Arendt wrote that the Nazi crimes had ‘exploded the limits of law’ (Arendt and McCarthy 1992, p. 54), and she later developed her understanding of this problem into an attempt to think through, on the one hand, the apparent loss of individual moral freedom in totalitarianism, and on the other, the difficulty of establishing a community of judgment across a morally contrastive historical landscape. After examining the antinomies in her conclusions to *Eichmann I* I explore how these persist into the core of her later attempt to theorise individual freedom in historical context in a theory of judgment. These persistent tensions can be diagnosed as Kantian and surpassed through a comparative reading of Theodor Adorno’s thought. Adorno is rarely discussed either in legal theory³ or in relation to Arendt’s philosophy,⁴ yet I suggest he provides insights into the incomplete nature of Arendt’s critique of Kant, and suggests a more subtle, dialectical approach to the problem of freedom and judgment. Adorno refuses any one-sided answer, arguing that the problem of freedom must be seen in terms of the natural history of subjectivity, and is as much a problem of history and society as it is of the individual. In Adorno’s lights, judgment must confront the necessarily conflicted nature of moral categories in antagonistic ‘wrong life’, and becomes implicated in an effort to achieve a ‘spirit of solidarity’ with the potentially free but actually unfree subject of modernity. This pushes us beyond the dead ends of

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³ It is often assumed that Adorno had no interest in legal issues, yet he goes so far as to claim that ‘the theory of the criminal law provides us with something of a key to all serious thinking about freedom,’ (Adorno 2006a (HF), p. 197); notable exceptions include Bowring (2002), Norrie (2005) and Thornhill (2004).

⁴ Arendt and Adorno never wrote about each other, and only mention each other in letters, where there is great animosity from Arendt’s side, and indifference from Adorno’s. Among her speculative theories, Arendt suspects: that Adorno had tried to join the Nazi’s, based on a positive review he published in the early 1930’s of a set of songs, some of which had lyrics by a poet who was also a Fascist sympathiser; that he had been involved in a secret conspiracy to torment her mentor and former Nazi Party member, Martin Heidegger; and, what hurt Adorno most, Arendt publicly claimed that he had intentionally prevented his friend (and hers) Walter Benjamin from leaving Europe to California, leading to his suicide. There is little to support these speculations. The first fits with her general tendency to see communists as complicit with Fascism (cf. Benhabib 2003, p. 177-8), and the latter one relating to Benjamin was publicly rebutted by Frederick Pollock, (Adorno and Benjamin 1999, 02/08/1940; Cf. Arendt 1992, pp. 592-3, 628-9, 635-9, 644). One possible but strange explanation is suggested by Carol Brightman: ‘Arendt’s distaste for Marxist sociologist Theodor Adorno began in Frankfurt in the early 1930’s, when Adorno blocked her first husband Gunther Stern’s dissertation proposal,’ Arendt and McCarthy (1995, p. 206n).

idealism and has the potential to inform current debates in the philosophy of judgment and punishment.

The Problem of Judgment

Judgment in Eichmann in Jerusalem

Throughout her report of the Eichmann trial, Arendt repeats her view that, contrary to the claims of the prosecution and the assumptions of modern moral thinking, Eichmann was ‘not Iago and not Macbeth’ (Arendt 1964 (hereafter EJ), p. 287); Eichmann, along with those like him, was ‘neither perverted nor sadistic’, but rather ‘terribly and terrifyingly normal’ (EJ, p. 276). It was this ‘banality’⁵ that proved, ‘from the viewpoint of our legal institutions and of our moral standards of judgment,’ the most troubling thing of all about the Eichmann case (EJ, p. 276), since it suggested that in totalitarian systems, where the community undergoes a ‘loss of moral compass’ (Norrie 2008, p. 193), the individual like Eichmann ‘commits his crimes under *circumstances* that make it well-nigh *impossible for him to know or to feel that he is doing wrong*’ (EJ, p. 276). Yet this conflicts with the ‘assumption current in all modern legal systems that intent to do wrong is necessary for the commission of a crime’ (EJ, p. 277). The conditions of totalitarianism seem to undermine the moral freedom and thus the responsibility of the individual, throwing into question the basis on which legal judgment proceeds.

Following Alan Norrie’s insightful analysis (2008),⁶ I distinguish two sides of the problem arising from this ‘loss of moral compass’. The first side of the problem, on which Norrie focuses, is the *objective dimension*: the problem of how to make sense of *judgment across morally contrastive backgrounds*. In the Eichmann case, there appeared to be no shared normative framework within which both judge and judged could relate to one another. The normative community within which Eichmann committed his deeds was so radically at odds with the normative framework within which modern legal institutions try to judge him that there appears to be no relationship between the two. The emphasis here is on the need for a standpoint capable of constituting a shared normative space that had better not rely on the peculiarities of particular moral communities. But it is just this shared space which law seems unable to ground.

The other side of the problem is the *subjective dimension*, which arises from the way that totalitarianism forces us to doubt the law’s assumptions about a free and responsible ‘legal person’: under the ‘rule of Nobody, which is what bureaucracy truly is,’ (EJ, p. 289) the subject’s judgment seems to recede, making it possible for individuals to carry out ‘administrative massacres’ without being aware of the wrongful nature of their actions. This side emphasises the centrality of subjective experience of the moral

⁵ The subtitle of the book is ‘A Report on the Banality of Evil’, and apart from this Arendt uses the term only in the last sentence of the book. There is a vast literature on the empirical question of whether Arendt’s evaluation of Eichmann as banal was correct, much of which rejects her claim on the basis of new evidence and factual mistakes in her account (Cesarani, 2004; Wolin, 1999: 52-62). I leave this empirical question aside, assuming that whether or not Arendt’s assessment of Eichmann himself is accurate, the issues raised by her analysis are nevertheless real.

⁶ I largely follow Norrie’s analysis for the first section of this paper. He also situates the problems of judgment in *Eichmann* interestingly in the context of the philosophical tradition of German idealism in a way which elucidates these two dimensions.

qualities of actions, and suggests that the subject can be deprived of this experience by the power of totalitarian bureaucracy to ‘make functionaries and mere cogs in the administrative machinery out of men.’ (EJ, p. 289) Arendt characterises this phenomenon as one in which ‘everybody is swept away unthinkingly by what everybody else does and believes in,’ (Arendt 2003, p. 188) recalling Heidegger’s conception of alienation under the ‘real dictatorship of the ‘They’’, in which the individual’s independence is undermined by the anonymous coercion of the practices and institutions of social life (Heidegger 1962, p. 164).⁷ This thought seems to have broader implications for law, since it suggests that the idea of the free legal person may be seriously problematic, inviting us to see that the possibility of the individual knowing that he was doing wrong turns on the existence of an adequate normative background such that the freedom of the individual is paradoxically dependent on historical conditions. If subjective freedom is restricted by historical contexts, there seems to be a fundamental mismatch between the assumptions of legal judgment and the situation of the judged individual. Law then seems to fail to meet its own notion of justification. Now Arendt is ultimately unprepared to follow her arguments through to this implication. She refuses to question the presuppositions of the ‘administration of justice’ and remains resolutely in favour of an international penal code (EJ, p. 272).⁸ Arendt finds herself backed into a corner here, since she remains committed to judging Eichmann, and feels it would be a bare injustice to allow him to escape judgment, but this commitment seems to conflict with the rest of her arguments about totalitarianism. As Norrie rightly argues, Arendt’s conclusions are trapped in an antinomial impasse which permits no way of reconciling her conflicting intuitions (Norrie 2008, p. 208-9).

In the Epilogue, Arendt seems to relinquish the requirement for a mental element for criminal responsibility altogether, claiming that the court judged ‘solely on the basis of the monstrous deeds’ (EJ, p. 294), which means in fact that they abandoned, in the face of this ‘new criminal’, the entrenched legal presumption that an element of *mens rea* is required to establish criminal responsibility. Offering her own ‘alternative’ judgment, Arendt writes, ‘We are concerned here only with *what you did*, and not with the possible noncriminal nature of your inner life and of your motives[...].’ (EJ, p. 278). This judgment resorts to a purely ‘objective’ account of responsibility which takes into account only what was done, the *actus reus*, rescinding on the moral and legal requirement for a subjective element.⁹ Arendt relinquishes the law’s normative commitment to subjective freedom in order to accommodate judgment. The result, though, is a normatively anaemic mode of judgment which, remains deeply unsatisfactory.

⁷ Though unlike Arendt, Heidegger’s primary target here is language, and again unlike her, Heidegger sees this alienation as internal to the structure of sociality construed as an ahistorical *existentiale*.

⁸ Cf. Arendt’s discussion of Nuremberg and the ‘crime against humanity’ (EJ, pp. 256-7). Norrie puts it: ‘on the one side, Arendt displays a real support for an international penal justice system, while on the other, she pulls the rug from under it,’ (2008, p. 209).

⁹ In this sentence I deploy the terminology of ‘subjective’ and ‘objective’ in a strictly different sense from the way in which that distinction is used throughout the rest of this article. Here it evokes simply the legal distinction between an assessment based purely on the ‘objective’ state of affairs – what the defendant actually did – and an assessment which takes into account the ‘subjective’ situation – what the defendant’s state of mind was at the time. This should not be confused with the sense in which I use the subjective/objective distinction in the rest of the discussion.

Now in the ‘Postscript’ Arendt offers a starkly opposite response, abandoning her own insights about the actual absence of subjective freedom and invoking a special capacity of *judgment*. The Eichmann trial, she says, demanded

that human beings be *capable of telling right from wrong* even when all they have to guide them is their own *judgment*, which, moreover, happens to be completely at odds with what they must regard as the unanimous opinion of all those around them. (EJ, p. 295, emphasis added)

What she is saying here is that although Eichmann did not know the criminal nature of what he had done, nevertheless we have the right to *expect* of him that he did, since there exists a capacity to judge ‘freely’, which is independent of any particular historical conditions and can be attributed to all individuals.¹⁰ Her reticence to engage with the theoretical problem of freedom¹¹ becomes apparent in her argument that whilst totalitarianism undermines subjective freedom, such deterministic theories cannot be relevant since

what is not debatable is that no judicial procedure would be possible on the basis of them, and that the administration of justice, measured by such theories, is an... outmoded institution. (EJ, p. 290)

The claim that the ‘administration of justice’ would be ‘outmoded’ in light of the claims of ‘explanatory theories’ is a point apparently intended to function as a *reductio ad absurdum* of such explanatory claims, yet this simply seems to beg the question in favour of the notions of ‘civilised jurisprudence’ which her own insights about the difficulties of judgment cast into doubt (EJ, pp. 290, 296).

What is striking here is Arendt’s equivocation between the polarised alternatives of the abandonment of the subjective element, relinquishing the normative commitments of law, in the ‘Epilogue’, and the contrary presumption of a unconditional freedom, relinquishing her insights about totalitarianism’s repressive functions, in the ‘Postscript’. Most conspicuous by its absence in her discussion is any thought that the answer might lie somewhere between these two equally unappealing and one-sided alternatives, and it is this binary approach to the question of freedom which underpins Arendt’s antinomical position. She identifies the institutional pressures undermining subjective freedom, yet she reels from the implications of this. Her response is to posit, *in spite* of the totalitarian context, that subjective freedom can nevertheless be asserted, even in oppressive political contexts, since there exists a capacity to *judge against the grain of historical context*.

This capacity of judgment is also invoked to establish an objective element of normative community, by explaining how the judges in the Eichmann case were able to judge across a contrastive background. In Eichmann’s crimes ‘an altogether different order is broken and an altogether different community is violated,’ and it is this ‘*order of mankind*’, presupposed in judgment, which is supposed to provide a source of normativity beyond any particular positive legal or political communities, thereby

¹⁰ It is important to note the ambiguous relation between *judging* and *thinking* in Arendt’s thought. She sometimes suggests that judging relies on thinking, but more often leans toward seeing judging, as associated with action and so natality and freedom, as independent and *sui generis*. She talks of both thinking and judging in *Eichmann*, though it is judging that emerges as the crucial category. I touch on these issues later in the paper.

¹¹ Arendt does show a critical understanding of this issue elsewhere, arguing the problem of freedom has been inappropriately transposed from the political to the individual realm (Arendt 1978c, p. 145), but this is not enough to spirit away the problems posed by the *Eichmann* case, and posed by a host of moral issues more generally.

grounding the possibility of judging Eichmann across the treacherous moral landscape separating the Third Reich and post-war liberal legal institutions (EJ, p. 272). Yet this fails to resolve the tension between the need of a community of judgment and Arendt's contention that Eichmann and his political community had violated and so *stepped outside* of that community. On the one hand is the suggestion that the community that exists by virtue of the capacity to judge includes Eichmann because that capacity is attributable to all, yet on the other is the suggestion that, since Eichmann and all of those like him *failed* to judge, they had stepped outside of that community, placing them seemingly beyond the pale of judgment after all. Under the pressure of the binary formulations in which Arendt couches the problem, Arendt remains caught between the historical insights about totalitarianism and the need to maintain both subjective freedom and objective community on pain of failing to make sense of the responsibility, and thus adequately ground the judgment of the most troubling criminals with which international law can be faced.

Judgment, Freedom and History

At the heart of the tensions in *Eichmann in Jerusalem*, then, is a need to see subjectivity as historically contextualised, without relinquishing the subject's freedom and responsibility and the normative force of judgment. Throughout Adorno's work, the idea that a corrupt historical context can undermine subjective moral freedom plays a central role, captured in his well-known dictum '[w]rong life cannot be lived rightly.' (Adorno 1974, p. 39)¹² The gist here is that the internal contradictions and conflicts of modern society are such that moral categories no longer make any sense in it, and this, he suggests, might 'help to explain some of the antinomies and aporias we constantly encounter in discussions of Auschwitz.' (Adorno 2006a, hereafter HF, p. 207) Against the background of 'overpowering structured institutions,' the idealist assumption of the 'formally free subjective agent' is falsified in practice (HF, p. 204). Echoing Arendt, Adorno insists that 'wicked people... Iago, say, or Richard III... are no longer to be found,' (HF, p. 206) but whereas Arendt sees the banality of evil as a specific problem of totalitarianism, Adorno sees totalitarianism as simply the worst exaggeration of the antagonisms of modern society, such that the problems of judgment in totalitarianism become emblematic of the problem of individual freedom in modernity. This is why he deems Arendt's formula ought to be inverted: attention to modern life reveals not that evil is banal (it is horrific), but that banality is evil because it does or can lead to horrors (cf. Adorno 2000).

Where Arendt assumes that historical explanations would justify immoral actions (EJ, p. 297), Adorno's strategy is to contend that it is the opposition of freedom and history that is itself suspicious and needs rejecting. The problem with this opposition is that it instates a conflict between individual and social as an essential one, the consequence of which is that freedom becomes an 'all-or-nothing' question, but for Adorno the question of freedom cannot receive a simple 'Yes or No' answer.¹³ Yet, with

¹² As Freyenhagen points out, Adorno intentionally plays on the ambiguous double meanings in German which elide between good/right/true and bad/wrong/false (Cf. Freyenhagen 2008, p. 101).

¹³ In Kant's idea of 'unsociable sociability' this conflict of individual and society already appears as problematic, Kant (2006a, 8:20-8:22). Although Adorno focuses on freedom, the doctrine of the postulates

Arendt, Adorno also insists on the need for judgment, the impossibility of abandoning the ideas of individual freedom and responsibility entirely: ‘we *necessarily* apply yardsticks of good and evil to behaviour that... already belongs to a state of mankind in which, negatively, the entire sphere of morality has been abolished.’ (HF, p. 207) In an inversion of Hegel’s vision of morality and ethical life reconciled in modernity (Hegel 1942), Adorno thinks the ethical life of modernity is distorted and living morally is thereby prevented, and sees Hegel’s assertion of reconciliation as a instance of the violence of a falsely imposed identity which acts to obscure and perpetuate a bad reality (HF p. 42).¹⁴ It is this contradiction between the subjective freedom of morality and the corrupt ethical life of modernity from which those moral concepts arise that explains why freedom cannot receive a ‘yes or no’ answer, and which suggests that we cannot understand either freedom or history as the essential or foundational term. Freedom is a question of the individual’s historically changing relation to society. It is in this sense that freedom and responsibility must be seen as social problems as well as individual problems (cf. Dews 2008, Ch. 6).¹⁵

Adorno’s position shares some of the concerns of recent criminal law theory, which has begun to reject the temptation to ‘locate culpability in the hearts and minds and capacities of individual defendants,’ emphasising instead that ‘the very notion that an individual exists at all depends upon a social world of relations.’ (Nourse 2003, pp. 386, 387) Reflecting the sentiments of critical theory, Nourse argues: ‘It is not enough, any longer, to imagine culpability either in the image of a lonely cunning self or a cruel deterministic world.’ (2003, p. 388) As I have described it, Arendt equivocates between these two images, remaining unsatisfied with both, but finding no route beyond them. In what follows I discuss her attempt to reconcile this tension in a theory of judgment which sees ‘the *relationship* between the individual and the community as a nexus within which responsibility and guilt are established.’ (Norrie 2005c, p. 106) I then develop Adorno’s dialectical approach to these dichotomies¹⁶ to illustrate how both the Arendtian position

of practical reason itself gives expression to the tension – irresolvable within an idealist framework – between individual and history.

¹⁴ The thought is that modernity provides an inadequate ethical context to ground its moral categories. In the Hegelian story it is the Roman and Greek worlds respectively that provide historical examples of one-sided achievements of those spheres, but Adorno thinks that ethical life is absent or distorted in modernity and moral categories are left free-floating without any contextual anchorage. In some sense, then, modernity is worse than these one-sided examples, not least because they made no claim to reconciliation in the way that idealism does of modernity (cf. HF pp. 90-98, and *passim*).

¹⁵ On the one hand the predominance in history of the universal (social.historical totality) over the individual subjects, which confronts the subject as the domination of fate over freedom (the ‘spell’), reveals a truth-moment in Hegel’s story: ‘the supremacy of the universal[...] is the way the world is’ (HF p. 43). Hegel’s mistake is to ontologise this state of affairs as if it was necessary and just. On the other hand, the insight that freedom is a ‘category of the social’ is itself critical insofar as this oughtn’t be the case, and doesn’t justify itself. To pretend that the universal (totality) has not come to dominate the particular (individuals) would be to posit a false reconciliation where none existed, but to assert the universality of the domination of universal over particular would no less cooperate with that domination (cf. HF p. 93).

¹⁶ Nourse indicates the need to judge the individual’s relations with others but does not get beyond thinking in terms of individuals and their immediate relations to other individuals and to the state, which is where Adorno’s focus on the historical dimension takes the inquiry further. Later in this paper the dimension of nature becomes central to this approach. Other recent ‘relationality’ scholarship which has emphasised the need to see subjectivity as contextualised in community includes Kutz (2000, Ch. 1-2), and Norrie (2000, Ch. 9).

and the contemporary debates need to be augmented even further against the grain of Enlightenment philosophical assumptions. In this direction critical theory suggests a more constructive way of viewing the problem of individual freedom, and moreover suggests a way of answering the objective need for normatively grounded community.

Arendt's Theory of Judgment

Judging and Morality

Arendt invokes *judging* in *Eichmann* to account for both Eichmann's own failures and to guide our judgment of him. Now my emphasis on *judging* here may seem counter-intuitive since Arendt typically equates *thinking* rather than judging with moral reflection *per se*, so this issue requires some clarification.¹⁷ 'Thinking results in conscience as its by-product' (Arendt 2003, p. 189),¹⁸ whereas judging, by contrast, is taken up as the *political* faculty, which interprets the meaning of things (Arendt 1994; 1978c). The activity of thinking is set methodologically at odds with judging, since in thinking it is better to be in harmony with yourself and disharmony with everyone else, while judging concerns, as we shall see, the sharing of a world (Arendt 1978c, p. 221). Crucially though, judging also plays a role in normatively guiding practice because it is the faculty that mediates between contemplative reflection and action (Hutchings 1996, p. 90). Political action requires normative grounds without which freedom would degenerate into fiat, so it is thrown back to judgment to ground its legitimacy, and this already demonstrates the moral role judging plays (Hutchings 1996, pp. 93,99).¹⁹ But more importantly, Arendt also looks to 'judgment as the faculty of *telling right from wrong*' even when there are no guidelines to go by (Benhabib 2003, p. 174), as I have argued she did in *Eichmann*.²⁰ What's more, thinking is itself seriously problematic as a ground of normativity, since it relies on pre-reflective normative commitments, a problem that was not lost on Arendt.²¹

These ambiguities are, on the one hand, symptomatic of the deep Kantian tension between the normativity of action and that of reflection that Arendt incorporates into her theory (cf. Bernstein 1986; Beiner 1982), but they make more sense when one considers the idiosyncrasy of her distinction between morality and politics. She generally thinks of

¹⁷ Thinking is identified with morality in *The Life of the Mind*, and in places elsewhere. I am indebted to an anonymous reviewer for pointing out the need for clarification here.

¹⁸ Thinking is an imaginary dialogical relationship with oneself, which involves stepping back so that moral conclusions may be reached on the Socratic principle that each wants to be in harmony with himself. (Arendt 2003, 1978a)

¹⁹ The political category of action is expounded in Arendt's *The Human Condition* (1974).

²⁰ Arendt continues to equivocate between thinking and judging, sometimes intimating that thinking is more basic and that judging is merely a 'by-product of the liberating effect of thinking' (Arendt 2003, p. 189), but as I suggest, ultimately she sees judging with its emphasis on plurality and natality, as the ability which most clearly grounds moral reflection in the broad sense.

²¹ Who would want to live with a murderer? As Mary McCarthy put it, 'the modern person I posit would say to Socrates, with a shrug, 'Why not? What's wrong with a murderer? And Socrates would be back where he started' (Arendt and McCarthy 1995, p. 22). The problem is you already need an evaluative attitude to murdering before the thinking model will help, so it does no normative work. Without an already-existing ethical context from which to draw one's evaluative stances, there is no way for thinking to prefer one thing or another, except fiat.

morality in formalistic terms – as laws, rules, customs and mores (Arendt 1994, p. 321; Arendt 2003, p. 176) – which partly obscures the intimacy that links political and moral reflection in its broader sense (‘telling right from wrong’). For her, politics is the realm of free action, yet ultimately this cannot be unbridled or unconstrained by normative considerations of the broader moral sort. This is why political action relies on judging for normative validity, as Hutchings argues, and why judging cannot be tied to formalistic rules.²² The point here, to which I return later, is that *judging* much more than *thinking* becomes crucial for normatively guiding practice²³ when moral problems become as entangled with political ones as (according to Adorno) they are in modernity.

Now in developing judging as a moral capacity Arendt rejects Kant’s moral philosophy, and draws on his idea of aesthetic taste for moral purposes instead. It is worth considering her reasons for this move, since they shed light on the distinct character of her conception of moral judging as an imaginarily public practice. Arendt’s critique operates from two directions.²⁴ The first line of criticism is that practical reason hypostasizes normative judgments from their contexts, distancing them from the *plurality* of the human world. While Kant’s moral philosophy speaks of man as an ‘intelligible or cognitive being,’ the *Critique of Judgment* ‘speaks of men in the *plural*, as they really are and live in societies.’ (LKPP, p. 13) So Arendt’s objection is that practical reason fails to recognise the importance of context for evaluation, since for practical reason there is no need to appeal to the authority or sanction of a community. Since the moral law operates *ahistorically* for a transcendental subject, moral evaluation in Kant also takes on a *solipsistic* dynamics that exemplifies the ‘antipathy toward *plurality* that is typical of the tradition.’ (Disch 1994, p. 146) Arendt’s point is that the complexity of moral phenomena cannot be made sense of from a solipsistic perspective, but require instead an openness to human plurality (Beiner 2001, p. 95). In other words, the intelligible subject of practical reason is an abstraction that strips away some of the most morally central features of subjectivity – difference, uniqueness, and relationship to a community and its history – on the assumption that only the rational aspects of the subject are normatively relevant. The move to judgment is partially motivated, then, by the desire to situate normative judgment in real, plural history, and this motivation is at least partly down to a deep dissatisfaction with the sterile rationalistic conception of subjectivity.

Secondly, practical reason is inadequate to judge the unprecedented crimes of Fascism, which ‘must be understood without reference to conventional moral truths because it shattered those truths.’ (Disch 1994, p. 144) In assuming that an abstract rule can be relied on to inform judgment practical reason conflicts with the ‘natality’ of human history – the ‘freedom of a relatively absolute spontaneity’ to create new beginnings (Arendt 1978b, p. 110). The criticism, then, is that fixed and ahistorical rules and laws actually undermine the spontaneity of human action. Normativity should, for Arendt, be internal to the particularity of the individual subject. Because the moral law comes from a reductively abstracted model of the subject, it represents a *coercive*

²² Because this would undermine the freedom or natality proper to action.

²³ It is perhaps a problematic topology of practice that obscures this, for example in *The Human Condition*, where Arendt separates political action from various other types of activity, which get cut off in the categories of labour and work (Arendt 1974, *passim*).

²⁴ For a defence of Kant cf. Allison (1990; 1996). For some criticisms sympathetic to Arendt’s sentiments cf. Beck (1960).

imposition on the individual which seems to come from an alien source. Coercion is in other words internal to the form of the moral law, which relies on the abstract logical category of non-contradiction:

Practical reason ‘reasons’ and tells me what to do and what not to do; it *lays down the law* and is identical with the will, and the will *utters commands*; it speaks in imperatives. (LKPP, p. 15)

This model of moral freedom seems to Arendt to exclude real autonomy; there is no freedom about how to choose, since the correct choice is legislated for in advance by formal ‘imperatives’, an intuition that runs parallel with Adorno’s claims that practical reason cannot be pure, but always merges with instrumentality, and thus ‘turns directly into unfreedom’ (ND p. 232; cf. Horkheimer and Adorno 2002).

Now at times Arendt seems to rely on a latent analogy between the moral law and positive law to suggest that the moral law springs from a heteronomous source (reason) which is in principle separable from its normative force.²⁵ It is clear that to paint the moral law as only contingently self-legislated is thoroughly confused, since, as Henry Allison puts it, the ‘legislative authority of the [moral] law is a function of its justificatory force.’ (Allison, 1996: 117)²⁶ The main point of the argument though is the way in which a rationalistic construction of subjectivity both ignores plurality and acts as a coercive imposition on the subject’s freedom. This is best read in phenomenological terms, and the thrust of it is that moral freedom seems abstracted from the realm of human affairs to such an extent that *from the perspective of the moral subject*, its determinations are encountered as an illegitimate imposition on the spontaneity of the individual from an alien source.²⁷ Such a position seems unable to reconcile moral freedom with its moorings in historical context, and suggests to Arendt the need of a non-cognitive or non-rational theory of normativity in judgment.²⁸

Publicity, Community and Perspectivity

The problem of judgment in *Eichmann* highlights the difficulty with moral judging already manifest in Kant’s equivocations over the clash of morality and politics (LKPP, pp. 47-54).²⁹ In this context, Arendt’s theory of judgment emerges from the struggle to reconcile normative universality with the particularity of plural history that gives this

²⁵ Another way of putting this is that Arendt portrays the relationship between the rational *form* of the moral law and its normative *content* as in principle distinct. For example, in the claim that Eichmann followed the command to ‘identify his own will with the principle behind the law – the source from which the law sprang. In Kant’s philosophy, that source was practical reason; in Eichmann’s household use of him, it was the will of the Fuhrer.’ (EJ: 137)

²⁶ Rather than the other way round as Arendt seems to suggest. To drive this point home, it makes no sense to attribute any normative force to the law except insofar as it is self-legislated. This is the oddness in Eichmann claiming to be following Kant in making the *positive* law his moral imperative. Indeed Arendt’s charge of formalism applies more to her own theory of moral conscience than to Kant’s.

²⁷ This phenomenological strategy is also evident in some of Adorno’s arguments, but given Arendt’s philosophical background it is especially unsurprising to find her deploying similar lines of thought. Since Kant’s position relies partially on phenomenological claims, for example in the ‘*experimenta crucis*’, this seems a wholly legitimate strategy.

²⁸ Since in the *Critique of Judgment*, ‘the word truth does not occur.’ (LKPP: 13)

²⁹ Kant’s conflicted sentiments toward the French Revolution – he both supported it as a spectator, and condemned those who took part from the moral point of view – might be understood as exemplifying the distance, and thus impotence, of his conception of moral subjectivity *vis a vis* the plural world of real history (Kant 2006b, ss. 6:321-6:323).

universality its meaning and worth but that practical reason suppresses (Benhabib 2003, p. 185). Both aspects of judgment, Arendt thinks, can be accounted for by reference to one faculty whose essential characteristic is *publicity*. The crucial feature of judgment in *Critique of Judgment* (Kant 1951), on Arendt's reading, is the shift toward intersubjectivity or community, asserting the need for a richer and less solipsistic understanding of moral subjectivity. Whereas practical reason exists for the abstracted subject, 'when one judges, one judges as a *member of a community*.' (LKPP, p. 72)

Judgment

always reflects upon others and their taste, takes their *possible* judgments into account. This is necessary because I am human and cannot live outside the company of men. I judge as a member of *this community* and *not* as a member of a supersensible world... (LKPP, p. 67)

Thus, the Kantian theory of judgment seems a route to situating normative judgments, both of the moral-political subject and the legal judge,³⁰ in its social historical context. Arendt sees here a way to avoid the abstraction and coercion of practical reason whilst maintaining the possibility of valid moral judgment, in the face of historical contingency, by anchoring judgment in the concept of *community*. Given that, for Arendt, judgments 'must not be coerced... by 'truth', philosophical or scientific' (Young-Bruehl 1982, p. 292), the question is how judgments can avoid the prejudices of a particular standpoint or context, and it is this that Kant's concept of *sensus communis* is supposed to achieve. Yet, for Kant, the 'enlarged thought' required by community sense involves

comparing our judgment with the *possible* rather than the *actual* judgments of others, and by putting ourselves in the place of any other man, by abstracting from the limitations which contingently attach to our own judgment. (Kant 1951; cf. LKPP, pp. 43, 71)

Accordingly, the purpose of Kant's transcendental idea of community sense is to 'abstract' from the limitations of being empirically situated so as to arrive at a *universal* [*Allgemein*] standpoint, that is, to arrive at judgments which are universally valid for any judging person.³¹ Arendt, however, diverges from this idea: whereas practical reason remains isolated from history and the human world, judgment is necessarily situated *in* the world.³² Relying on the concept of enlarged mentality not to abstract from, but to situate judgment *in* empirical community, Arendt restricts its validity to particular historical circumstances. This distinction underlies Arendt's claim that judgments have only *general* and never universal validity: 'its claims to validity can never extend further than the others in whose place the judging person has put himself.' (Arendt 1978c, p. 221) While Kant's version of enlarged mentality assumes that what is essential to judgment is not the empirical but the universal aspects of subjectivity that can be attributed to 'any man', Arendt emphasises the real difference in the empirical community within which any judgment takes place.

³⁰ Arendt's talks of the historical and philosophical judge as the contemplative judge of things; the position of the legal judge, which is my concern here, occupies a space in part analogous to them.

³¹ See Beiner's note at p. 163 on the issue of translation here: he points out that *Allgemein* is typically translated as 'universal', whereas Arendt specifically renders it as 'general'. Insofar as this is an interpretation of Kant, and she does intimate that it should be so understood, then it seems wrong. Yet, and this goes for the whole of my discussion of her theory of judgment, the accuracy of her interpretation of Kant is of less consequence than the power of her own theoretical approach, which is my focus here. (cf. Disch, 1994: 151-2)

³² To place normativity in the context of 'men in the plural, as they really are and live in societies,' (LKPP, p. 13)

Kant's theory in fact emphasises the transcendental *identity* of subjects, yet Arendt's theory of judgment emphasises their *plurality*, and it is this shift that leads Beiner to question the sense of attempting to base a contextualist theory of judgment on Kant's model of enlarged mentality (Beiner 2001, p. 97). Historically contextual judgment operates by means of imaginative 'visiting', whereby

in matters of opinion, but not of truth, our thinking is truly discursive, *running as it were, from place to place*, from one part of the world to the other through all kinds of conflicting views, until it finally ascends from all these particulars to some impartial generality. (Arendt 1967, p. 115)

Such a process aims at 'feeling and thinking simultaneously from a plurality of standpoints,' and it is this ability to think from other's standpoints that Eichmann lacked (Disch 1994, p. 153). The procedure of visiting 'all kinds of conflicting views' is supposed to avoid both the coercion of truth and the fiat of prejudice and thus achieve 'impartiality'. Arendt's assumption is that in human affairs truth recedes leaving a plurality of perspectives which together are constitutive of the community. It is impossible to escape one's own perspective to an 'Archimedean point,' but through a process of imaginatively 'visiting' the plurality of other perspectives one can become aware of the perspectival quality of one's own view; the realisation that there exists a plurality of different perspectives has the effect of undermining the certainty with which one may hold a position, since it highlights the contingent and perspectively constrained nature of any view. Whilst I cannot avoid having a situated worldly perspective, I can take into account the diversity of perspectives, diffracting my own through the gradual encounters with the many other possible standpoints.

In visiting the 'possible rather than actual judgments of others' (Kant 1951; cf. LKPP, p. 43) one *imaginatively* represents the *actual perspectives* of others; where Kant's transcendental method invokes 'every conceivable standpoint,' clearly detaching from empirical limitations, Arendt moves against this grain emphasising that the validity of judgment is tied to the 'particular (empirical) conditions of the [actual] standpoints one has to go through [imaginatively] to arrive at one's own standpoint.' (LKPP, p. 44) Rather than adopting the prejudices and views of others, I consider their perspectives as if I were there, 'moving, as myself, 'from standpoint to standpoint,' (Disch 1994, p. 162) and the point of this process is that I can diffract my own views through the community sense, reigning in not only my prejudices but my rationalistic calculations³³ through the process of 'telling oneself the story of a situation from the plurality of its constituent perspectives.' (Disch 1994, p. 163) Accordingly, Arendt's theory holds that *the validity of judgments is a function of their perspectivality*, that is, of the degree of their relation to the empirically existing community and its plurality of different perspectives, avoiding the coercive implications of universalist criteria and the modern conception of reason. It is this fundamental perspectivality that links judgment's autonomy with its historically situated character, and thus with plurality, and which links Arendt's theory of judgment

³³ There is hardly space to discuss this point fully; what I have in mind here though is the thought, expressed in quarters as diverse as those of Emmanuel Levinas (1969) and Raimond Gaita, (2004, Ch. 15-17) that theoretical knowledge cannot be expected to trump moral or ethical understanding. This view does not entail that moral considerations have nothing to do with rational deliberation (although perhaps more so in the case of Levinas than of Gaita), but rather invites us to consider the complexities and reciprocities of that relationship. This is, I believe, part of the difficulty that Adorno is engaging with.

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

Judgment, Rationality and Normativity

Now this idea has been influential on contemporary political and ethical thought, but has also been criticised for its relativising bent. As Albrecht Wellmer has argued, this non-cognitive model makes Arendt's conception of intersubjectivity unintelligible since it offers 'no standards, and thus no grounds,' for the validity of moral judgments (Wellmer 2001, p. 169). Arendt's position rests for its plausibility on an implicit analogy between aesthetic and moral judgments, which are all understood on her model as interpretive, rather than rationally justifiable claims. Rationality is excluded from judgment because of the perceived coercive functions of reason, yet, as Peter Dewes puts it,

It is the very *universality* of truth-claims which makes for their vulnerability: it is only because assertions make demands on the assent of others[...] that they are open to challenge. (Dewes 1987, p. 271)

Perspectivity doesn't connect moral judgment to the possibility of moral discourse (Wellmer 1991, p. 206), providing no obvious grounds on which the validity of a judgment *could* be challenged. In this light it is the *absence* of a rational element that is coercive, since it leaves the limitation that other perspectives place on my judgments unexplained, opening the door to arbitrary power and authority. The communicative rationality of judgment which for Arendt remains undistinguished from the coercion of instrumental reason is, for Habermas and Wellmer, necessary to ground the intelligibility of disagreement and the liberating effects of the plurality of perspectives (Habermas 1977; Wellmer 2001).

In terms of the subjective side of the problem of legal judgment, the force of Wellmer's argument is that while Arendt's perspectivity situates judgment in its empirical context in a way that a formal-rational conception of moral freedom cannot, in defining validity as a function of a judgment's empirical perspectivity, it leaves no clear ground for an autonomy *against the grain of a normative context*. This makes the putative perspectival source of autonomy unintelligible, since if a judgment's validity is unconnected to its content, it seems that any judgment is equally 'valid', and thus it is unclear why the perspectives of others would lead me to question my own. This merely inverts the Kantian picture, such that instead of being entirely independent of empirical community, the validity of moral judgment is *entirely constrained* by it, paradoxically so given that Arendt's point in *Eichmann* was that the moral landscape had been turned upside down, so that it was 'well-nigh impossible for him to know or to feel that he was doing wrong.' (EJ, p. 276) The irony in Arendt's reflections on moral judging is, as Benhabib puts it, that

The moral attitude of enlarged thought seems to be missing when we most need it, that is, in those situations of moral and political upheaval when the fabric of moral interactions that constitute everyday life are so destroyed that the obligation to think of the other as one whose perspective I must weigh equally alongside my own disappears[...] (Benhabib 2003, p. 193)

The public nature of moral reflection seems necessary and yet impotent, since 'as far as Eichmann could see, no one protested, no one refused to cooperate.' (EJ, p. 115) A perspectival theory of judging seems to be paralysed in the face of the very problem it was supposed to resolve.

This tension, however, was not lost on Arendt. She tries to avert it by marrying the universal perspective with empirical community in the activity of judging, but she can do this only by fudging together empirical and transcendental ideas within her notion of *sensus communis* itself (Hutchings 1996, p. 95).³⁴ At the end of the *Lectures on Kant*, she suggests that the ultimate empirical community extends to the whole of mankind, since

in the last analysis, one is a member of a world community by the sheer fact of being human[...] When one judges[...] one is supposed to take one's bearings from the idea, not the actuality, of being a world citizen. (LKPP, pp. 75-6)

In the last instance, then, Arendt seems to collapse the empirical and transcendental communities together into one founded on 'the necessary condition for the greatest possible enlargement of the enlarged mentality[...] "An original compact, dictated by mankind itself."' (LKPP, p. 74) In order to extend perspectivalty beyond its relativistic horizon Arendt is forced to invoke the classical contractarian notion of an 'original compact'. One is left to wonder how this 'idea of mankind' in any way squares with her relentless emphasis on empirical community; whilst judgment is supposedly historically located, at the same time 'it is deshistoricised as an eternally indeterminate condition' (Hutchings 1996, p. 96). As Habermas observes, it is difficult not to read this move as a revocation of Arendt's most cherished commitments to particularity and plurality (Habermas 1977, p. 24). Moreover, the transcendental source of authority invoked seems to replicate the coercive aspect of practical reason she roundly rejected. All of this betrays the immanent tension between the relativising impact of Arendt's perspectival theory and the universalist aspirations of her commitment to autonomous judgment.³⁵ As Hutchings suggests, rather than solving the dilemma, Arendt's theory just seems to replicate the Kantian tensions between moral and political attitudes within the activity of judging itself (Hutchings 1996, p. 99), rendering Arendt's distinction between universality and generality spurious.

Natural History and Subjective Freedom

Arendt's Latent Kantianism

This paradoxical position is, I suggest, due to the conflict between Arendt's rejection of practical reason and her latent commitment to the idealist assumption that the conflict between freedom and history is a necessary and ahistorical one. Her critique works at one level, but fails to penetrate deeply enough into the Kantian philosophical architecture. She assumes that *the choice in the philosophy of history is a binary one*, between a Hegelian privileging of history over freedom, or a Kantian privileging of the 'autonomy of the minds of men and their possible independence of things as they are or as they have come into being.' (Arendt 1978a, p. 216) Siding with Kant, she sees freedom as grounded in an autonomous faculty insulated from historical process and separated off from nature.³⁶ Autonomous from the coercion of truth and historical change, 'the mind is separate from all things'. (Arendt 1978a, p. 71) Arendt fails to appreciate that the Kantian

³⁴ Thanks to an anonymous reviewer for pushing me to explore these issues in detail.

³⁵ Compare Ferrara (2008) for an alternative account of the *sensus communis* that attempts to rescue it from the twin troubles of relativism and abstraction.

³⁶ 'By producing one species with the faculty [of reason], nature has produced its own master.' (LKPP, p. 59)

assumption that freedom must be independent of history is parasitic, for its plausibility, upon the distinction between reason [*Vernunft*], which is the realm of freedom, and nature, which is the realm of necessity. Although she is alive to the problems of reducing freedom to reason, Arendt nevertheless accepts the suppositions of hermeneutics' distinction between causal explanation [*Erklären*], and meaningful interpretation [*Geisteswissenschaften*], whose category is *Verstehen* and domain is 'human affairs'.³⁷

The problems of this hermeneutic view of history³⁸ is already apparent in *Origins of Totalitarianism*. Arendt invokes the concept of 'crystallization' (Arendt 1979 p. xiv), to distance herself from 'explanatory theories' and privilege 'interpretation' (Disch 1994, pp. 123, 149). Yet 'crystallization' actually captures the complexity of human affairs against Arendt's position, since it is a causal process that *appears* to be undetermined at first sight because of its complexity and openness.³⁹ Arendt's own analyses suggest the difficulty of the explanation/interpretation distinction, yet she holds firm to it. The net result is a view of freedom as existing autonomously from history and nature, inspired by the assumption that the choice is between freedom or history.

Adorno's Immanent Critique of Idealism

For Adorno this binary opposition between freedom and history is a false one. Whereas Arendt attempts to establish the fact of autonomy against a history which conflicts with it, Adorno argues that the problem of subjective freedom 'is a product of history in the sense that the categories of freedom and unfreedom are themselves the products of history' (HF, p. 207). Like Arendt, he recognises the internal antagonism between freedom and coercion in Kant's moral philosophy, yet for him the breakdown in the concept of freedom shows that the conflict of freedom with history cannot be thought of ahistorically. This conflict has itself come about historically, and should not be *assumed* to have a metaphysical reality. Rather, subjective freedom must be seen as interdependent with the historically transient structure of social life. Like Arendt, Adorno thinks that a will determined by the 'legality of the pure form of thought' conflicts with the idea of spontaneity (Adorno 1973, hereafter ND, p. 233). But his argument is that the idealist distinction between 'freedom' and 'necessity' is internally incoherent because freedom and necessity overlap with each other in the actual experience of freedom. Kant's concept of freedom opposes itself to the necessity of nature (Kant 1929, B472-B479), yet real freedom would be impossible *without* a natural element:

³⁷ For the classical statement of the distinction cf. Dilthey (1894). History thus appears as a merely *interpretive* idea of 'progress without end[...] without which the mere story of history would not make sense.' (LKPP, p. 59)

³⁸ For a notable alternative to both positivist and hermeneutic standpoints, which shares some common ground with Adorno's position, cf. Bhaskar (cf., Bhaskar 1998, ch. 2, 3; 1987, ch. 2, 3).

³⁹ Disch also notes that Paul Guyer acknowledges that 'Kant uses crystallization to argue that the 'mechanical processes of nature' are sufficient to account for the existence of natural forms', reinforcing my point that Arendt's assumption that the concept distances her from causal explanation is misplaced (Disch 1994, p. 148n). Disch remains herself as confused as Arendt, however, when she suggests that 'crystallisation' and 'amalgamation' occupy a place of ambiguity between 'contingency and causality'. This is both because 'crystallisation' and 'amalgamation' are both unequivocally no-strings-attached causal notions, and because 'contingency' and 'causality' do not conceptually oppose each other whatsoever: causal processes are natural necessities, but these are contingent rather than logical necessities. These necessities do not link events but underlie and explain processes, and so should be understood tendentially (cf. Bhaskar 1978).

due to its rationality, the will becomes irrational[...] Freedom is sabotaged: its Kantian carrier, reason, coincides with pure law. Freedom would need what Kant calls 'heteronomous'. (ND, p. 237)

The argument here is that Kant's reduction of freedom to action determined by the lawfulness of reason (cf. Kant 1956, p. 98) becomes incoherent because without a natural 'heteronomous' element it would not be able to account for the motivational element in action, and so would 'retranslate spontaneity into contemplation' (ND, p. 236). What would be required for this spontaneity is precisely the bodily impulse which Kant sees as belonging to the realm of necessity and thus unfreedom. It is only with this 'impulsiveness that freedom extends into the realm of experience' (HF, p. 237), but because this impulse represents an element of natural necessity, Kant's 'idea of freedom turns into a paradox: it comes to be incorporated in the causality of the phenomenal world.' (ND, p. 231)⁴⁰ The relevance of Adorno's philosophy to Arendt's theory of judgment is twofold: firstly, it helps explain how Arendt's theory of judgment fails to resolve the aporia in the conclusions to *Eichmann*; secondly, it provides an alternative way of thinking about the free subject which rejects the distinction between subjective freedom and objective history, giving a picture of subjective freedom which embraces both the split between the natural and the rational, and the need for their reconciliation, which is at the same time both possible and suppressed.

Freedom in Natural History

Adorno argues that this immanent collapse of the distinction between freedom and necessity licenses a rejection of the distinction between reason and nature. Freedom must be understood in the context of *natural history*. In the 'Idea of Natural History' he argues that nature and history as antithetical concepts become entangled in one another, such that 'second is, in truth, first nature' (Adorno 2006b, p. 268). By this he means that the construction of history as the realm of reason that has liberated itself from the natural realm of necessity become complicit to the extent that what is presented as history is really a mystified version of nature. Adorno insists that this opposition can be overcome, opening up 'consciousness to the inroads of nonconsciousness' (Dallmayr 1981, p. 212). Adorno approves of Marx's recognition that 'the objectivity of historical life is that of natural history' (ND p. 354). Historical life 'does *appear* as an objective context arising by natural growth,' (ND p. 355, emphasis added) but this is a mere appearance which in fact mystifies the dialectic entwinement of nature and history and perpetuates the unconscious prevalence of historical forces as if they were natural ones.⁴¹ 'History, the explication of something it is supposed to have always been, acquires the quality of the unhistoric' (ND pp. 356-7); the dichotomy of nature and history, in privileging the historical, paradoxically represents itself as a natural separation rather than a historical one, a 'transmutation of metaphysics into history' (ND p. 360). On the contrary,

⁴⁰ Here Adorno is referring to the 'intelligible character' and the problem that in order to enable the will to impact on action, Kant is forced to attribute causal power to the intelligible character which is supposed to be noumenal.

⁴¹ Adorno quotes Marx: 'I comprehend the development of society's economic formation as a process of natural history.' But there is a tension here too, since the quote continues by raising the very problem at stake in this paper, the place of individual responsibility given that history is a process of natural history: 'less than any other does my standpoint permit *holding the individual responsible* for conditions whose social creature he remains[...]' (Marx 1954, p. 7n; cf. ND, p. 354, emphasis added).

The traditional antithesis of nature and history is both true and false – true insofar as it expresses what happened to the natural element; false insofar as, by means of a conceptual reconstruction, it apologetically repeats the concealment of history's natural growth by history itself. (ND p. 358)

Reason (and history) have historically become differentiated from nature, but it is only because of this experience that the distinction can be drawn. The critical reconstruction of natural history is, then, a cipher for the internal collapse of the Enlightenment distinction of reason from nature, and a rejection of both sides of this distinction: freedom liberated from necessity/chance, and nature purged of meaning.⁴² Adorno thinks that the problem of freedom can only be properly understood in the context of a historical naturalism that has been mediated through reflection on natural history and thus licensed by its immanent contradictions. Contrary to Arendt's assumption that 'the mind' is autonomous from 'all things', the thrust of Adorno's position is, as Dallmayr quite rightly emphasises, a rejection of 'the separation between human intentionality and future-oriented action on the one hand, and natural determination on the other.' (Dallmayr 1981, p. 212)⁴³ In this light, Arendt's inability to deal coherently with the enveloping of freedom in history is revealed to be parasitic on her latent idealist commitments, which Adorno's reconstruction of natural history call into question.

This explains why freedom conceived as reason as against natural impulse is coercive – because it ends up unconsciously incorporating the ossified idea of nature it opposes – but this antinomy points beyond itself to a reconciliation of reason and nature which grounds the 'concrete possibility' of freedom. Individual freedom would need what idealism rejects as a merely 'natural' bodily impulse, the 'addendum in which consciousness externalises itself' (ND, p. 227), without which reason and spontaneity would lack the motivational element and be inconceivable. Freedom cannot be based on a faculty of mind abstracted from natural-historical change, since 'reason has become what it is *only because it has separated itself* from the addendum, from the element of impulse that is characteristic of will,' (ND, p. 256) which suggests both that the doctrine of the will *explicitly* suppresses the 'somatic', embodied impulse, and at the same time *implicitly* contains and requires it. In the same way that Hegel's idea of Spirit negates itself by suppressing its dependence on nature (ND p. 356), the Kantian idea of freedom is blind to its own dependence on what it denigrates as mere nature.

This antagonism in the concept of freedom reveals the interdependence of individual and natural-historical, such that it makes more sense to see freedom as a category of society (as a natural-historical process) than to emphasise the independence of the individual. At the same time though, freedom cannot simply be rejected on historical grounds either, since to assume the negation of freedom would still be to turn

⁴² Adorno's position here has parallels with the rejection of 'disenchanted nature' as recently proposed in the naturalism of John McDowell (1996), although any quick assimilation of the two should be avoided (cf. Bernstein, 2002).

⁴³ Adorno deploys his reconstruction of natural history in a number of contexts: as a critique of Hegel's concept of Spirit; a critique of 'dialectical materialist' perversions of Marx; against Heidegger's notion of historicity. It is also pertinent to note that the underlying theme makes sense as both a reading of Marx's critique of capitalism (Buck-Morss 1978, p. 62) and of Freud's theory of the unconscious, to both of which Adorno makes explicit references in this connexion.

historical development into metaphysical necessity (cf. ND pp.355-6).⁴⁴ On the contrary, whilst freedom cannot be assumed, ‘we can only speak meaningfully of freedom because there are *concrete possibilities* of freedom, because freedom can be achieved in reality.’ (HF, p. 180) The point here is that *the very processes that give rise to the possibility of freedom also frustrate its realisation*, and these processes are social and nature-historical, such that freedom is itself socially, historically and relationally structured.

It is in this sense that Adorno’s analysis reveals a ‘truth-moment’ in idealism, since the internal contradiction between freedom and necessity truthfully maps the antagonistic reality of freedom in modernity, the subjective experience of being *both actually unfree but potentially free*. The subject must then be thought of as always potentially free, yet always also historically constrained by the very same aspects of historical development that have led to the possibility of freedom – the differentiation of reason from nature – and it is this entanglement of the conditions of freedom and of unfreedom that makes freedom a dialectical phenomenon. Moreover, the modern experience of unfreedom is itself only possible because of the potential for freedom arising with the emergence of reflective subjectivity. In other words, it is only because of the always present potential for freedom that real unfreedom is experienced as an absence.⁴⁵

Freedom is thus *possible* because of the concrete emergence in history of reflective reason, which nevertheless frustrates freedom so long as it remains detached from a reflexive awareness of its natural particularity. Unlike Arendt, Adorno rejects the coercive features of reason whilst *also* insisting that this abstract universal moment in reason also contains a progressive, utopian element: ‘the egalitarian ideal’.⁴⁶ Adorno suggests that without the element of rational reflection, the impulse would be undetermined and would revert to ‘direct, naked force.’ (HF, pp. 260-261) Neither reason nor nature taken abstractly can constitute freedom because taken out of their context in one another they are both coercive; reason, having become differentiated, must in turn remember its natural-historical character. ‘[T]ruth beyond coercive identity would not be its absolute other, but would always pass through that coercive identity and be mediated by it,’ (HF, p. 266) which is to say that the universalistic aspect of reason is both coercive in that it suppresses difference, and progressive, in that it points beyond its own limitations to ‘the idea of a *solidarity* transcending the divergent individual interests’ of humanity, that could carry forward the element of universality without the element of repression (ND, p. 282). Freedom is made possible by reason’s differentiation, but it can only be consolidated if reason gives up its claim to independent autonomy. Accordingly,

Both the elements that are needed if freedom is to make its appearance, reason and impulse, are mutually dependent. Thus practice needs both theoretical consciousness at

⁴⁴ It is in this sense that Adorno’s response to the dilemma of compatibilism and incompatibilism is to reject the choice as a false one. Incompatibilism happens to be true, but that is because we have historically made it so. The modern world is incompatible with our freedom; the opposition is historical not natural.

⁴⁵ ‘Philosophy, which once seemed obsolete, lives on because the moment to realise it was missed.’ (ND, p. 3)

⁴⁶ This egalitarian idea is the ‘utopian’ aspect of the concept of freedom. As Gillian Rose explains, ‘utopia is another way of naming the thesis that non-dialectical thought is closed thought, because it implies that the object is already captured [by the concept]. To see that the object is not captured is to see utopia.’ (Rose 1978, p. 48)

its most advanced, and it needs the corporeal element, the very thing that cannot be fully identified with reason. (ND, p. 238)

As such, the reconciliation of the dirempt fragments of nature and reason would not resemble either, but would contain the memory of fragmentation overcome. I suggest that such an account of freedom grounded in the diffraction of impulse through reflection has the potential to give us a way of thinking freedom as a real possibility even against the grain of history, without hypostasising it from that history: ‘freedom is something which has not yet come into being,’ in the sense that social life in modernity frustrates the possibility of free subjectivity, and yet ‘despite all that, there is a genuine possibility of freedom, even in a totality steeped in guilt.’ (HF, pp. 202, 265)

Freedom and Legal Judgment

It should now be clear how, for Adorno, the problem of freedom is a definite one for ‘men as products of history’ (ND, p. 396), which is why it is a mistake to treat it as a metaphysical problem.⁴⁷ If this argument is right, then Arendt’s attempt to assert freedom in abstraction from history, as an autonomous faculty, assumes what it tries to prove, that subjective freedom is a given in spite of the limitations imposed on it by the very social conditions which also make it possible. While Arendt insists that freedom, in the capacity to judge, must be asserted as actually real, Adorno insists it is not necessary to claim that freedom is actual in order to maintain that it is a real ‘potential that would rid men of coercion.’ (ND, p. 275) Arendt’s turn to judging as a moral faculty shows her awareness of the political nature of moral judgment, but she remains stuck to an ahistorical notion of individual judging nevertheless.⁴⁸ Adorno’s insistence that ‘wrong life cannot be lived rightly’ highlights the problem, since the entwinement of moral and political problems in an over-integrated society where the totality dominates makes abstract individual moral reflection and practice inherently problematic.⁴⁹ Arendt invokes judging in *Eichmann* because in totalitarianism individual (isolated) moral practice is undermined, such that ‘thinking’ alone doesn’t help. The trouble is that these problems are not specific to totalitarianism – they really belong to the modern world more generally, as Adorno

⁴⁷ An anonymous reader has questioned how Adorno can side-step this issue. His argument is that nature is not in conflict with freedom, although second nature – the structure of the modern social world, is. The Kantian assumption that nature blocks freedom is the result of a misattribution of social oppression to natural laws. All of this rests on the false assumption that the nature-reason separation is itself natural rather than historical. For a detailed discussion see Freyenhagen (2003, Ch. 2); I explore the issue in my article ‘Causality and Critical Theory’ (forthcoming).

⁴⁸ Given these considerations, it seems to me that precisely the same problem occurs in thinking as in judging, that of a lack of just the sort of liberating normative standpoint that might allow one to combat the coercive pressures of oppressive social contexts and normative backgrounds. On this, I am in agreement with Benhabib (2003, p. 193-4).

⁴⁹ Whether Adorno thinks that moral reflection, or just practically acting on that reflection, is blocked in modernity, is questionable. It seems to me though that since he sees theoretical reflection as a kind of practice, he would be unlikely to rest on this distinction comfortably. In brief, I read Adorno to be claiming that, although it has been philosophically misconstrued to concern ahistorical features of an abstracted subject by the idealist tradition, the question of moral freedom is in fact one about the structure of the social totality.

insists, which is why morality becomes central for political judgment, as political considerations become central for understanding individual moral judgment.⁵⁰

Now the possibility of freedom precludes attempts at ‘evading a confrontation[...] with everything that Auschwitz represents,’⁵¹ but it also precludes Arendt’s dangerous response of asserting freedom, in spite of unfreedom, on the basis of a ‘mysterious’ faculty of judgment. Although it is possible, it is extremely difficult to exercise freedom within a repressive historical context, and it is this that makes legal judgment, which presumes this individual freedom, so problematic. The more repressive the context, the more problematic this judgment will be, which explains the special difficulties in the *Eichmann* case. This is the ambiguity in modern freedom which Adorno tries to capture in claiming that ‘in a very real sense, we are simultaneously free and unfree.’ (HF, p. 218) The fundamental insight here, which problematises legal judgment in a way that gives full force to the implications of Arendt’s analyses of totalitarianism, is that individual freedom is bound up with the socio-historic context of the individual; it is this paradox, that freedom is something real, but something which is itself dependent on the social, both made possible and yet held back or suppressed in history, that explains the tensions in the problem of legal judgment. While refusing to give us any easy answers, Adorno does help us understand the subjective side of the problem of judgment in *Eichmann*. Arendt’s myopic commitment to the liberal assumptions of ‘civilised jurisprudence’ turns out to depend on her latent Kantianism. Contrasted with Adorno’s account, Arendt’s critique of Kant is revealed to be inconsistent and incomplete. Although recognising the failure of the Kantian distinction between freedom and necessity, Arendt fails to recognise that this undermines the distinction between reason and nature. Yet in rejecting rationality in moral matters, she ends up leaving no conceivable ground of freedom, since it cannot depend either on reason or on nature. The ground of the individual’s ability to judge remains ‘mysterious’.

Moreover, Arendt’s assertion that freedom actually exists in ‘a political system in which freedom is completely suppressed,’ runs the risk of pressing the concept of freedom ‘into the actual service of repression.’ (HF, p. 198) This is the broader danger of Arendt’s approach; she is eager to ignore the historicity of freedom on the argument that, ‘under conditions of terror, most people will comply but *some people will not.*’ (EJ, p. 233) This argument invokes a confused positivist understanding of causal relationships as necessary connections;⁵² what such exceptions show is not that freedom actually existed, but that it always *remained a possibility*, albeit one which required great effort to actualise. But, as Adorno warns, ‘posited positively, as given or as unavoidable amidst given things, freedom turns directly into unfreedom’ both in moral philosophy, and in the

⁵⁰ Arendt fails to penetrate this issue, and her attempt to import Socratic moral reflection into the modern context is a testimony to this, while her ongoing equivocations are equally a testimony to her awareness of the problems.

⁵¹ In the way that Eichmann’s ‘cog in the machine’ defence attempted to do (HF, p. 203).

⁵² There is no room to develop this point, but what I have in mind is the positivist orthodoxy, bequeathed by Hume, that causal processes are reducible to constant conjunctions of perceived events, excluding the ‘constitutive’ element from the discussion; cf. Psillos (2002, pp. 19-136); Buchdahl (1988). Against this view, I am pursuing a line of thought from realist philosophy, that causal laws describe processes which are usually active in open and complex systems, and so rarely produce empirical constant conjunctions. This is not a very strange idea; no-one thinks that the occasional chain-smoking centenarian casts any doubt on the carcinogenic effects of tobacco; cf. Bhaskar (1978, pp. 63-142).

discursive practices of law (ND, p. 232; HF, p. 200). Arendt, then, risks aligning herself with ‘the idealistic, Kantian thinkers, who insist on the freedom of man... [and] who infer from this the *unconditional responsibility* of individual human subjects.’ (HF, p. 197)

Adorno seems to suggest the ground of the possibility of judgment against the grain of history would be this reconstructed naturalistic version of freedom, which highlights the irrepressible need for *both* a natural element and a rational element – both on their own coercive and opposed – coming together. These are two sides which have been falsely separated and can only make sense together. Since he argues that the natural impulse can only be given a moral character when it is diffracted through the utopian egalitarian element in reason, Adorno resists the arbitrary oppositions of the idealist picture. Furthermore, Adorno’s position is less vulnerable to Benhabib’s charge of ‘quasi-intuitionism’ than Arendt’s (Benhabib 1988, p. 45), since it insists on the need for the rational moment in moral freedom. Morally free judgment would depend not on the perspectives of others – which in a corrupt community might provide no guidance – but on a reconciled reflective reaction to human suffering which is irreducible to reasoning or to simple impulse but involves both transformed, captured in von Schlabrendorff’s sentiment that ‘I just couldn’t put up with things the way they were any longer.’ (HF, p. 240)⁵³ This sentiment gestures toward the possibility ‘that things may be so intolerable that you feel compelled to make the attempt to change them’ (Adorno 2000, p. 8), invoking what Adorno calls ‘solidarity with tormentable bodies,’ (ND, p. 286) a phenomenon which may also help to resolve the problem of community.

Solidarity, Judgment and Community

The Ambiguity of Reason

From the objective side of the problem of judgment, Arendt’s perspectival theory, in the absence of a rational element, threatens to undermine any normative standpoint capable of grounding valid judgments across morally contrastive empirical communities. A culturally relativist position would be ironic given that Arendt’s aim was to ground just that sort of judgment, but in restricting normative judgment to the general validity that holds only for the perspectives one has imaginatively visited, Arendt’s intuition that truth is coercive threatens to unpick the normative stitching of intersubjectivity. As we have seen, Arendt’s rejection of truth has in common with Adorno a suspicion of the reductive instrumentality of cognition, which is what inspires her emphasis on perspectivality. This model of autonomy is motivated by her rejection of the subjectivist preoccupations of modernity (cf. d’Entreves 1994), whereby ‘the principle of [rationally structured] subjectivity emerges as the only origin of normativity.’ (Habermas 1987, p. 41) Her mistake, however, is to equate *all* truth with coercion, rather than to see the *ambiguous*

⁵³ Fabian von Schlabrendorff was a judge involved in the July 20th Conspiracy. Adorno refers to him on a number of occasions to express the ‘irrational’ element in moral experience that cannot be reduced to law. ‘Irrational’ is in scare quotes here to underscore the point that we are trapped in the very distinction which Adorno says is unsustainable – between the rational and natural aspects of subjectivity – by the terminology bequeathed by the tradition. Since without this irrational element, the rational aspect would itself become irrational, the distinction really makes no sense except in the transitional tone that I employ it here. (cf. HF, p. 326n)

relationship between truth, rationality and normativity. Arendt's rejection of rationality as a coercive suppression of difference is not entirely misplaced: it is one-sided.

This is because while arguing that reason is entangled with the self-preservative intolerance of alterity (cf. Horkheimer and Adorno 2002), Adorno also insists on the centrality of reason for morality. He is able to reconcile these intuitions by seeing reason as historically constituted and structured in a way that Arendt does not so Wellmer's implicit equation of Arendt's and Adorno's positions is too quick (Wellmer 2001, p. 170); Adorno sees domination as a function of reason's *historical differentiation* from nature (rather than an essential aspect of a dehistoricised reason). Reason comes to be *entangled* with natural instrumentality from its inception, so that it is not possible to clearly separate reason's progressive and oppressive aspects given the current forms of its expression, but this doesn't make reason abstractly reducible to domination.⁵⁴ This view enables Adorno to do justice to the progressive element in Kant's formalism: 'despite and because of its abstractness, there survives in it something of substance: the egalitarian idea.' (ND, p. 236)⁵⁵ Adorno accordingly emphasises the dialectical unity of the progressive and regressive elements in the idealist concept of freedom – that it is regressive just in virtue of its progressive aspects – showing how the internal antagonism in modern reason contains a utopian moment that reaches beyond it.

It is thus Adorno's often overlooked⁵⁶ understanding of the *ambiguity* of modern reason, his awareness of the internal connectedness of dominating and liberating tendencies in modernity, that allows him to reconcile the insights of Arendt's position with the criticisms of Habermas and Wellmer. With Arendt, he argues that freedom and normativity cannot be grounded in rationality alone, since critical reason is entwined with a coercive logic of 'identity', which negates real difference and undermines its own relationship with freedom. But he is clear that arbitrary substantive criteria in the absence of the formalism and coercion of reason would be just as coercive and violent (ND p. 236). Reason cannot be thought of as coercive in essence; rather it is reason's historical detachment from a reflective awareness of its particularity (nature) that leads it to brutality. Unlike Arendt, Adorno is able to criticise the attempt to root normativity *solely* in ahistorical rational forms whilst at the same time acknowledging the necessary role rationality must play in critical judgment.⁵⁷

⁵⁴ Particularly its mediation through social institutions and practices organised around the exchange principle.

⁵⁵ Adorno continues with a passionate tone, 'the German critics who found Kantian formalism too rationalistic have shown their bloody colours in the fascist practice of making blind phenomena the criteria of who was to be killed.' Such passages should be borne in mind by those who see Adorno, and they are many, as a one-sidedly pessimistic or irrationalist enemy of modernity.

⁵⁶ Fredric Jameson, for example, argues Adorno's is a 'postmodern Marxism', underemphasizing Adorno's awareness of the progressive aspects of modernity, whilst Robert Pippin has suggested that Adorno's naturalism demands a reversion to a pre-modern 're-enchantment project that is hopeless,' recalling the 'teleological, scholastic view of nature,' which seems to completely ignore Adorno's appreciation of the progressive aspects of modernity. Cf. Jameson (1990); Pippin, (2005, p. 119); also cf. Hohendahl (1995, Ch. 1).

⁵⁷ For Wellmer and Habermas, cognition in its moral forms is mediated by subjectivising and instrumentalising pressures which do not show that rationality is normatively *sterile*, but rather that it is *fragile*, and requires political nurturing through public institutions. Adorno's concerns seem to persist though, since it is unclear how the process of institutional differentiation could ever get off the ground without having *already* achieved its aim of reconciliation.

Solidarity and the Community of Mankind

Now in Adorno's 'idea of a *human solidarity* that transcends all individual interests,' (HF, p. 264) there lies a path toward cashing out Arendt's derailed idea of an objective 'world community', that would not depend on relativistic perspectivism, nor on formalistic or quasi-transcendental foundations, but would push toward a *reflective naturalistic* commonality beyond the limitations of particular communities, linked to the reaction to suffering. What Adorno captures is the ambiguity in the 'concept of mankind', which on the one hand 'contains the idea of reason as a universally valid notion,' but through this universality 'points to the plurality of subjects,' (HF, p. 263) and thus to a really existing natural-historical community which transcends particular empirical backgrounds.⁵⁸ Such solidarity is grounded by the basic natural-historic commonality which unites all as subjects who experience their freedom as a suppressed potential: the universal element is, paradoxically, the *absence* of freedom, and this is a specific sort of 'torment' whose possibility, as well as possible overcoming, are embedded in the natural history of subjectivity. However, 'the power of solidarity can grow only by working its way through its own repressive nature.' (HF, p. 264) For Adorno, the dialectical tension between the repressive and utopian aspects of rational universality expresses a historical conflict; they have historically come to be entangled in the damaged social fabric of modernity (ND, p. 264). The challenge for universal solidarity to work through its own repressive nature is the indication that, since freedom is something made possible and at the same time held back by modernity, the achievement of this solidarity requires a great effort – it must 'develop on the back of the spirit of repression, which that of solidarity then annuls.' (HF, p. 263)

It is this *solidarity* with the free individual 'ensnared by the false totality' (HF, p. 262) which I suggest emerges from my discussion as something to take forward from the dialogue between Arendt and Adorno. Such a solidarity in judgment between judge and judged, both of whom lie in each individual, would be alive to the contradictions and coercion of judgment in a world in which, 'in the midst of unfreedom, human beings practise the gestures of freedom.' (HF, p. 265) These contradictions require a form of judgment which can do justice to the dignity of the always *potentially* free individual, whilst avoiding the temptation to turn freedom into a justification for oppression. But in order to articulate this conception of judging solidarity we need to go beyond the Kantian assumptions that characterise Arendt's thinking.

Whilst Adorno provides a way to think past the ahistorical concept of freedom, his response is not without difficulties. He deliberately gives no guarantee of freedom, for the reason that, given the conflicted nature of freedom and its relation to modern society, 'there is *no such thing as moral certainty*.' (HF, p. 262) The irrationality that arises when moral categories are applied consistently to a contradictory reality means that no fixed rules or categories will do. The 'spirit of solidarity' in Adorno's thought seems to me to indicate how judgment might be thought of given its deeply problematic character. It attempts to embrace the inherently antagonistic nature of judgment in an antagonistic world, which calls for a dialectical form of judgment that 'brings the executioners into the diagnosis of entanglement and guilt, and even conceives of them as victims and not

⁵⁸ Here I am invoking not a simple idea of natural commonality, but Adorno's critical reconstruction of natural-historical community which recognises the inseparability of history and nature.

just as murderers, which is what they also are.' (HF, p. 203) That individuals can be *both murderers and victims simultaneously* because they are *both potentially free and actually unfree*, is at the heart of the necessarily conflicted nature of judgment under conditions which block the freedom of individuals.

An objective community does exist: none of us can elude the tragic status of individuals trapped in historical conditions that suppress their freedom. In this light, Arendt's mistake may be to see Eichmann as *outside* of the community of mankind, putting him beyond the reach of that community. One of the strengths of Adorno's position is that it is able to provide a more robust *defence* of judgment beyond the images of the 'cunning self' and the 'deterministic world'. Subjective freedom must involve both rational and natural elements, and a materialist and naturalistic view of judgmental community provides a way to think this unity, since if the structure and process of social life are not excluded from normative judgment, they become vital tools to inform and guide reflection. In broader terms, in rejecting the distinctions between reason and nature, freedom and history, Adorno suggests a way of more rigorously thinking the free subject in historical context since he sees freedom as a category of the social whole, a category of history itself, as well as a potential for the individual within history. Such an approach, I suggest, offers support for forms of judgment which go beyond the one-sided thinking of 'formal' legality, towards ideas of relational and collective responsibility emergent in recent scholarship,⁵⁹ but also to other, non-traditional and creative ways of thinking about judgment, not in abstraction, but as part of broader reflections on the nature of us potentially free individuals engulfed in a history we only unconsciously make.⁶⁰

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⁵⁹ For example, the contemporary relational theories of Norrie (2000); Kutz (2000).

⁶⁰ I have in mind restorative, therapeutic and 'informal' or 'popular' approaches to judgment and punishment, along the sort of lines proposed by Norrie (2005b). I am grateful for Susan Marks for pointing out the potentially 'de-politicising' connotations of such 'creative' forms of judgment. Yet the idea of judging solidarity I have developed is what Adorno might call a 'utopian' concept, which acts both as a criticism of the present state of things, and a suggestion for change. The conditions of the possibility of realising, in practice, such judging solidarity would presumably be fairly thoroughgoing transformations of the totality of 'wrong life', its structures, practices and institutions, but this is something for future exploration.

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