

Natural law and critical theory: Bringing rights back in

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Robert Fine

University of Warwick, UK

Abstract

This paper re-assesses the significance of the idea of ‘right’ in the tradition of critical theory. Focusing on the work of Hannah Arendt and Theodor Adorno, especially their confrontation with totalitarianism, it addresses their conceptualization of rights, their engagement with the philosophies of right created by Kant and Hegel, and the ambivalent place of Marx in their thinking about rights. My argument is that critical theory turned to natural rights in response to the perceived difficulties positive sociology had in confronting the barbarities of fascism and Stalinism. Critical theory steered a path between philosophies of right that acknowledged the idea of right within an unacceptably naturalistic frame of reference, and a sociological consciousness that denatured the idea of right at the cost of its devaluation. Arendt and Adorno both confronted the contradictions of an age in which the rights of the individual were elevated as a supreme value while individuality was subjected to the forces of technological and economic determination. Both understood the barbarism of their times in terms of the disintegration of mediations between freedom and determination. Both recognized the gulf that separates the concept of rights from the material interests, inequalities and prejudices concealed behind them. And both drew on the critical substance of natural right theory to distinguish between the critique of rights, which has as its end their *reevaluation*, and the trashing of rights, which serves to reinforce their *devaluation*. I argue that there is much to be gained, in terms of our understanding both of rights and of critique, from critical theory’s engagement with the natural law tradition.

Keywords

Arendt, Adorno, critical theory, Hegel, human rights, Kant, Marx, natural law, natural right

Natural law and the critique of sociology

It is not news to say that the tradition of natural law thinking, which long formed the basis of European political and legal thought, is deeply suspect from a sociological point of view. The idea of a higher law – ordained by nature, elevated above human agency,

Corresponding author:

Robert Fine, Department of Sociology, University of Warwick, Coventry CV4 7AL, UK.

Email: Robert.Fine@warwick.ac.uk

determining right and wrong everywhere and always, independent of all historical and social conditions – is not immediately attractive to a sociological consciousness that emphasizes the historicity of moral norms, the plurality of co-existing cultures, the relativity of ethical values and the human origins of all law. It is perhaps one of the core epistemic and normative convictions of sociology that we have overcome the metaphysical presuppositions of the natural law tradition, wiped this particular slate clean and started afresh on a more worldly basis.

If this is the prevailing self-conception of our discipline, it has not gone unchallenged. It has been argued that the very attributes which led sociology to repudiate natural law also impede it from facing up to the social problems of the modern world. We might think, for example, of the critiques of sociology implicit or explicit in Karl Löwith's *Meaning in History*, Leo Strauss's *Natural Right and History* and Eric Voegelin's *The New Science of Politics*, all written in the aftermath of the Holocaust and under the shadow of totalitarianism (see Chernilo, 2013). From their point of view, it appeared that sociology's emphasis on the historicity, transitoriness and relativity of all values threatens to devalue values and equalize the most criminal of principles with the most elevated – principles that justify mass murder with principles that defend human life. The conviction that all laws are positive laws and that natural law was an illusion that has now been dispelled seemed to remove all limits on what human beings can posit. As a result everything becomes possible. If there is indeed something about sociology that situates social life outside the sphere of substantive ethical consideration, the allure of natural law is that it provides a standard against which to compare and evaluate different moral and legal systems. Natural law raises the thought that the human condition itself, the condition of living with others, may contain moral imperatives that in certain circumstances can be neutralized or suppressed by surrounding social forces. As Zygmunt Bauman reminds us, on occasion society can act as a morality-silencing rather than morality-generating force and sociology can reduce moral behaviour to little more than 'social conformity and obedience to the norms observed by the majority' (1991: 174–175).

The iterative engagement with natural law that we find among critical theorists derives, in part, from what they perceive as the uncritical, conformist character of positivistic, value-free sociology. This may be exemplified by the critique of positivist sociology found in the work of Hannah Arendt and Theodor Adorno.¹ Arendt maintained that the positivistic language prevalent within the social sciences tends to normalize rather than challenge the emergence of the 'mass man' who hides behind conformity to the collective (see Baehr, 2010). She argued in particular that the social scientific ethos of objectivity and detachment impedes sociology's ability to confront the totalitarian phenomena of the modern age:

To describe the concentration camps *sine ira et studio* is not to be 'objective', but to condone them; and such condoning cannot be changed by condemnation which the author may feel duty bound to add but which remains unrelated to the description itself. When I used the image of hell, I did not mean this allegorically but literally. ... In this sense I think that a description of the camps as Hell on earth is more 'objective', that is, more adequate to their essence, than statements of a purely sociological or psychological nature.

(Arendt, 1994: 404)

For Arendt, the sociological stress on general characteristics shared by members of a social category and determining their lives is too close for comfort to the categorical thinking of totalitarians who imagine an ideal world in which individuals who belong to the wrong category are removed – not because of what they have done but because of the category they belong to. Against the grain of categorical thinking within the social sciences, Arendt wrote of the ability of some human beings to tell 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’ (1977b: 295). Referring to German resisters against Nazism, she commented that ‘[t]he few who were still able to tell right from wrong went really only by their own judgments ... there were no rules to be abided by ... they had to decide each instance as it arose, because no rules existed for the unprecedented’ (1977b: 295). Arendt referred to reflective judgment as a ‘mysterious’ human faculty – mysterious because it appears as a permanent possibility for human beings. Even under conditions of terror, she wrote, ‘most people will comply but *some people will not*’ (1977b: 233, emphasis in original). A case in point Arendt mentioned was a German Sergeant Anton Schmidt, who helped Jewish partisans during the Holocaust by supplying them *gratis* with forged papers and military trucks.

Theodor Adorno argued in a similar vein when he maintained that positivist sociology merely ‘holds a Medusa-like mirror to a society ... organized according to abstract classificatory categories’ and ‘hypostatizes the state of affairs which their research methods both describe and embody’ (Adorno et al., 1976: 244). Adorno’s concern was that the transfer of the natural scientific model of investigation to the study of society reflects a society in which human beings are in reality reduced to ‘the condition of objects’ and the condition of objects is turned into a ‘second nature’. As he put it, ‘the unfreedom of the methods’ bears witness to ‘the unfreedom that prevails in reality’ (Adorno et al., 1976: 243). Adorno acknowledged that there is a sense in which freedom is a ‘historical category’. He commented on the limited scope of freedom possible when, for instance, the Spartacus uprising or Babeuf’s conspiracy took place. However, he argued that an emphasis on historicity alone misses ‘the permanent component’ of freedom that binds freedom to the individual prior to any social determination and prevails throughout all the changes freedom undergoes (Adorno, 2006: 181). For Adorno, the concrete possibilities of freedom can be found at every moment of history whenever individuals genuinely assert themselves. He called resistance to oppressive power ‘the true primal phenomenon of moral behaviour’ and argued it can arise wherever ‘the element of impulse joins forces with the element of consciousness to bring about a spontaneous act’ (Adorno, 2006: 240). In *Problems of Moral Philosophy* he writes of the ever-present possibility that ‘things may be so intolerable that you feel compelled to make the attempt to change them’ (Adorno, 2001: 8). Adorno’s equivalent to Sergeant Schmidt was a German judge involved in the July 20th conspiracy, Fabian von Schlabrendorff, who ‘just couldn’t put up with things the way they were any longer’ and ‘followed the idea that anything would be better than for things to go on as they were’ (Adorno, 2006: 240).

Arendt wrote of the *mysterious* faculty of reflective judgment, Adorno of the *primal* phenomenon of moral behaviour. Both entertained the possibility that the moral ability to tell right from wrong may have pre-societal sources and may arise simply out of what

it is to be a human being confronted by the suffering of other human beings. For both Arendt and Adorno, a positivist sociology that equates moral behaviour with conformity to socially accepted norms can never get to grips with this human capacity. The intuition behind this sensibility is that when sociology loses sight of natural law, it loses its own critical capacity.

Arendt and Adorno: Natural right and the critique of totalitarianism

Both Arendt and Adorno were tempted on occasion to downplay the legal, institutional theory of Kant's *Metaphysics of Justice* and look instead to Kant's *Critique of Judgment* to uncover that pre-societal moral sense that has more to do with the human condition of being with others than with any particular social circumstances we are thrown into. However, moral sense can be a fickle beast driven by all manner of contingencies. As Kant noted, its weakness lies in its lack of proportion: '... a suffering child fills our heart with sadness, but we greet the news of a terrible battle with indifference' (Boltanski, 1999: 12). In the face of such difficulties, Arendt and Adorno found themselves compelled to reconsider their conception of law and to re-connect with Kant's critique of judgment with his philosophy of right.

In *Origins of Totalitarianism*, Arendt emphasized the *stabilizing* effects of law in public affairs but had less to say on the generative effects of rights to inspire action. Indeed, she maintained in one passage that lawfulness sets limits to human action but cannot inspire them; it tells us, she argued, what we should not do but not what we should do (Arendt, 1973: 467). This restrictive view of law captures its negative aspects but neglects what might be more significant for understanding why some people simply will not comply with power: the generative capacity of rights to inspire action even in the absence of any positive legal framework. In her *Lectures on Kant's Political Philosophy*, written some two decades after *Origins*, Arendt remedied this restrictive view of law. Here she observed that Kant's critique of judgment should not be divorced from his constitutional deliberations about 'a united mankind, living in eternal peace' (Arendt, 1989: 74). She maintained that the idea of an original compact based on inalienable human rights was one that can and should 'inspir[e] our actions', and that human beings 'can be called civilized or humane to the extent that this idea becomes the principle not only of their judgments but of their actions' (Arendt, 1989: 74–75). Here Arendt tied judgment firmly to the generative aspect of rights:

One judges always as a member of a community, guided by one's community sense, one's *sensus communis*. But in the last analysis one is a member of a world community by the sheer fact of being human; this is one's 'cosmopolitan existence'. When one judges and when one acts in political matters, one is supposed to take one's bearings from the idea, not the actuality, of being a world citizen.

(1989: 75–76)

We are anchored in the circumstances in which we live. It takes *imagination* to invoke rights in the absence of positive laws and *courage* to act on rights in the absence of

protective authority, but the capacity of reflective judgment of which Arendt speaks, or of moral behaviour of which Adorno speaks, is intimately tied to the idea of human rights that shapes our cosmopolitan existence. If we separate them too radically, who knows what wrongdoing the moral point of view may justify or what overbearing institutional framework the idea of right may justify. Judgment and the idea of right need one another. There is, therefore, every reason to read Kant's *Metaphysics of Justice* and his *Critique of Judgment* together as a unity.

Arendt was rightly sceptical of the unworldliness of 'Kantian' idealists who spoke of global government and human rights without confronting the barbarism around them. She saw herself, however, as a better reader of Kant than the 'Kantian' idealists. She looked back to Kant because he was *not* in her view one of those heady idealists for whom all talk of human rights and world government serves merely as means of evading reality. I would suggest that echoes of Kant's natural philosophy of right can be heard throughout her texts. We hear them, for example, in the cosmopolitan vision Arendt put forward early in *Origins of Totalitarianism*:

Anti-Semitism ... imperialism ... totalitarianism ... have demonstrated that human dignity needs a new guarantee which can be found only in a new political principle, a new law on earth, whose validity this time must comprehend the whole of humanity while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities.

(1973: ix)

We hear these echoes of Kant in the principle on which Arendt based her anti-totalitarian politics, that 'the right to have rights, or the rights of every individual to belong to humanity, should be guaranteed by humanity itself' (1973: 298). They infused her project of reconstructing the 'juridical person in man' after its destruction under totalitarian domination and of overcoming the corruption of the language of rights totalitarianism left in its wake. In the spirit of Kant's formal conception of rights, Arendt rejected as 'barbaric' the notion that 'what is right' is simply what is good or useful for the whole, whether the whole is the German people, the world proletariat or even 'mankind itself' (1973: 299). She recognized the obsolescence of the notion that 'rights spring immediately from the "nature" of man' and defined the modern condition as one in which the idea of humanity must assume the role formerly ascribed to the idea of nature (1973: 298). She argued that totalitarianism made it evident, if it was not so before, that the political props that once supported the rights of man could be cut away. Arendt's acknowledgement that organized attempts to eradicate the concept of the human being might have succeeded in the past and could still succeed in the future might appear to contrast with Kant's belief that 'perpetual peace is guaranteed by no less an authority than the great artist *Nature* herself' (1991: 108, emphasis in original), but the difference is not as great as it seems at first sight. After all, Kant acknowledged that 'the education Nature offers us is harsh and stern' to the point of 'nearly destroying the whole human race' (2009: 233).

Let us now turn to Adorno. He strongly criticized Kant's natural law theory for imposing fixed standards of legality on subjects irrespective of their will or welfare and for neglecting class inequalities contained within an apparently egalitarian legal framework. The limitation Adorno saw in Kant's natural law philosophy was that the institutional

nexus of rights Kant purported to deduce from the postulates of practical reason was too compromised by its own false promises and dialectical inversions to provide any way forward for critical theory or emancipatory politics. However, Adorno also insisted that Kant's idea of right should not be treated as merely false, as it was by 'those who adopted the fascist practice of making ... men's membership or non-membership in a designated race ... the criteria of who was to be killed' (Adorno, 1973: 236). Adorno acknowledged the abstract character of equal right but reaffirmed the efficacy of rights in countering the fetishized forms of capitalist society: '... despite and because of its abstractness, there survives ... something of substance: the egalitarian idea' (1973: 236). In the face of fascism, Adorno explored a variety of alternatives to the existing system of rights but rejected them almost as soon as they were advanced. We may look to overcoming the modern system of right as a whole in the name of a higher justice; we may entertain the notion that human freedom is no longer attached to juridical notions of 'right'; we may argue that the idea of the formally free, rights-bearing individual is an anachronism going back to the 'high period' of bourgeois society; we may face up to the negativity of the system of right from the 'standpoint of redemption' in the hope that this standpoint might delineate the 'mirror-image of its opposite'. For Adorno, however, these essentially utopian projects would be marked by the same distortions they sought to overcome (2006: 207; see Jarvis, 1998: 169). As Adorno put it in *Minima Moralia*:

[It] presupposes a standpoint removed ... from the scope of existence, whereas we well know that any possible knowledge must not only be first wrested from what is, if it shall hold good, but is also marked for this very reason by the same distortion and indigence which it seeks to escape.

(1996: 247)

In the face of this impasse, Adorno returned to Kant's natural law philosophy, since it at least offered 'recognition of the bourgeois equality of all subjects' and in this respect contrasted with 'the allegedly *a priori* differences that are supposed to exist between people according to fascist principles' (2006: 252–253).

Both Arendt and Adorno endeavoured to overcome the contempt and hatred for rights prevalent in the era of totalitarianism. They recognized that their origins lay in the gulf between the *abstract idea* of rights and the *concrete existence* of concealed material interests, political violence and ethnic prejudices. However, each was profoundly critical of ways of thinking that gave sustenance to such contempt and hatred for rights.

In the eyes of Arendt, Edmund Burke personified a national outlook according to which the rights of man and citizen appeared as a mere abstraction compared with the 'entailed inheritance' of rights that spring from within the nation. Arendt acknowledged that this Burkeian conception of rights was realistic in the sense that it acted as a mirror to a world increasingly organized according to national categories. The growth of ethnic nationalism both in imperialist countries in Western Europe and in post-imperial countries in Eastern Europe underwrote the persuasiveness of this methodologically nationalist worldview. The rights of man and citizen had indeed been subsumed to an emphatically national view of the nation-state. However, Arendt found no hidden profundity in Burke's

preference for the 'Rights of an Englishman' over the inalienable rights of man. On the contrary, she discerned a 'curious touch of race feeling' in Burke's conception of rights as 'an outgrowth of a unique national substance which was not valid beyond its own people and the boundaries of its own territory', and in his corresponding inclination to leave 'conquered peoples to their own devices as far as culture, religion and law were concerned' (Arendt, 1973: 130). Arendt contrasted Burke's belief in the superiority of the 'rights of Englishmen' unfavourably with the 'practical attempts' of the European Enlightenment to 'include all the peoples of the earth in their conception of humanity' (1973: 176). In Arendt's words, Burke's disdain for the natural law conception of universal rights belonging to humanity as such functioned to strengthen 'the new imperialist consciousness of a fundamental, and not just a temporary, superiority ... of the "higher" over the "lower" breeds' (1973: 130–131). We might note in passing that the view advanced by Giorgio Agamben that Arendt's own approach to rights was 'Burkeian' in character is mistaken in that it appropriates Arendt's name for precisely the national outlook she sought to resist (Agamben, 1998: 127).

For Adorno, a key representative figure of this national outlook was Hegel, or rather the older Hegel of the *Philosophy of Right*. Adorno read this text, as the young Marx did before him, as a normative prescription for the supremacy of the nation state over the rights of the individual. According to Adorno, Hegel treated the state as if it were some kind of earthly deity and invariably stood for the state ('the universal') against the individual ('the particular'). Given this reading, it is unsurprising that Adorno judged Hegel's *Philosophy of Right* reactionary in comparison with Kant's cosmopolitan republicanism. As he saw it, it leaves us with a world of chained and defeated figures walking through social life as in a prison-yard (see Adorno, 1973: 300–360). Just as Arendt acknowledged a certain realism in Burke's subjection of human rights to the prerogatives of the nation, so too Adorno acknowledged the realism of Hegel's 'dialectical' inversion of freedom into its opposite. As he saw it, the regression of natural law from a philosophy of right to a philosophy of the state was a mirror of the regression of capitalist society, which was increasingly prone to elevate the state into an object of worship and degrade the individual into its mere executor (Adorno, 1973: 329). Against what he read as Hegel's disdain for rights, Adorno cautiously declared that 'part of the social force of liberation may have temporarily withdrawn to the individual sphere' (1996: 17). Adorno, in my judgment, misconstrued the meaning and purpose of Hegel's *Philosophy of Right*, but the role of Hegel for Adorno was analogous to the role of Burke for Arendt: each served as a negative reference point for the consequences that derive from a merely negative rejection of natural right philosophy (see Fine, 2001: 5–23).

Kant's *Metaphysics of Justice*: Natural right and the critique of the European state system

When Kant declared in his *Metaphysics of Justice* that the 'student of natural right' has to supply the 'immutable principles on which all positive legislation must rest' (1991: 132), he placed his jurisprudence firmly within the tradition of natural law. His distinctive

contribution was to modernize and formalize natural law. He argued that the ‘immutable principles’ on which positive law must be based cannot be what the law happens to say in any particular place or time for they might merely offer an endorsement of the status quo. Kant argued that they must be drawn from the realm of rational laws, defined as those to which ‘an obligation can be recognized *a priori* by reason without external legislation’ (1965: 26), and on this basis he prepared the way for a critique of right that recognized the difference between the idea of right on the one hand and both existing positive laws and subjective feelings and opinions on the other.

Kant’s contribution to the philosophy of right was to delineate and formalize the relational character, systemic organization and developmental capabilities of rights. His argument may be summarized thus. First, rights are not natural attributes of individuals but the expression of definite relations between individuals: ‘... the sum of those conditions within which the will of one person can be reconciled with the will of another in accordance with a universal law of freedom’ (Kant, 1965: Intro § B). Individuals do not have rights in the same way they have legs and arms; they have rights only in relation to others. Second, the forms and shapes of right constitute a system and all the elements of this system – private and public law in the national field, international and cosmopolitan law in the international field – have to be in place if freedom is to be realized. Every sphere of right must have its due in the system of right as a whole. Third, the system of rights is not a closed, static system but one that is radically incomplete, open-ended, capable of generating new forms and indeterminate in its outcomes. As Kant put it in the Appendix from *The Critique of Pure Reason*:

... no one can or ought to decide what the highest degree may be at which mankind may have to stop progressing, and hence how wide a gap may still of necessity remain between the idea and its execution. For this will depend on freedom, which can transcend any limit we care to impose.

(1999: 191)

As Hegel was later to comment, whatever were his faults, Kant had ‘some inkling of the nature of spirit ... to assume a higher shape than that in which its being originally consisted’ (1991: § 343R).

The methodological approach Kant adopted in his *Metaphysics of Justice* was self-consciously ‘scientific’ in the sense that it begins with the simplest and most abstract forms of right and then moves on to the more complex and concrete. The forms of private and public law with which the text commences were already prefigured in the most advanced republican states of Kant’s own time. Kant argued that private law, deduced from the idea of free will, must hold that every human being is a possessor of rights; possession of rights entails ownership of some property (beginning with one’s own bodily capacity for labour); and no human being can be the property of another. Public law, deduced from the ‘Idea of the state as it ought to be’, must support a representative legislature to establish universal norms; an executive to subsume particular cases under these universal norms; a judiciary to determine what is right in cases of conflict; and the constitutional separation of powers to keep these spheres of activity distinct (Kant, 1965: § 45).

The forms of international and cosmopolitan law to which the text then moves required a still more radical programme of legal innovation. Kant maintained that the development of an international law worthy of its name, and then the development of a framework of cosmopolitan laws enacting rights of hospitality for individuals deprived of national protections, necessitated not only major changes at the national level but also the establishment of an international authority designed to legislate, adjudicate and enforce laws at the international level (1991: 105–114). Kant deployed the idea of right to attack the ‘depravity’ of the existing European state system. He argued that there was no effective legality in the sphere of international relations, and that traditional natural lawyers merely painted a legal gloss on an ‘order’ in which rulers went to war as they pleased, used any means of warfare necessary, exploited newly acquired colonies as if they were ‘lands without people’, and stripped foreigners landing on their shores of all rights (1991: 103–105). Kant described the leading figures of *ius gentium* – Grotius, Pufendorf, Vattel et al. – as ‘sorry comforters’ whose justifications of state sovereignty were incapable of providing for a lawful or peaceful community of nations. He maintained it was necessary to challenge the claims to absolute sovereignty made by modern European states and inherited from the pre-revolutionary age by creating a Federation of Nations based on mutual co-operation and voluntary consent. This was an argument not for state sovereignty to be wholly superseded, but for claims to absolute state sovereignty to be relativized (Brown, 2005). As Kant observed, the claim to absolute state sovereignty in Western Europe was accompanied by the absence of all sovereignty in non-European lands colonized by European powers (Fine, 2011). According to the universal laws of nature, Kant insisted, all people, and not only European peoples, have the right to develop their own institutions of political freedom. Thus Kant attacked the ‘Jesuitism’ of those who treated non-European societies as *res nullius*, belonging to no one and therefore fair game for all, and of those who justified the subjugation of non-European peoples on the grounds that they violated the right to hospitality of European travellers – ‘travellers’ who were in fact armed invaders (1991: 106). So too Kant exposed the blatant contradictions present in legitimations of European colonialism that held that it both brought culture to uncivilized peoples and purged the home country of depraved characters (1991: 173). Finally, he poured scorn on the claims of European societies to be privileged upholders of civilization whilst in fact they were themselves ‘civilized only in respect of outward courtesies and proprieties’ (1991: 49).

For Kant, the idea of natural right was a vehicle for his critique of the European state system. To be sure, the *Metaphysics of Justice* had conservative as well as critical aspects. For example, in the sphere of domestic law the juridical categories Kant deduced from the postulates of practical reason were arguably based on long-established categories of Roman law. One of the limitations of this approach had to do with its inability to distinguish between civil society and the state: that is, to understand civil society in its modern form as a de-traditionalized society separated from the state on one side and the family on the other. Kant still tended to follow the classical formula of traditional natural law, which used the terms ‘civil society’ and the ‘state’ interchangeably (Riedel, 1984). It is difficult to avoid the conclusion that he rationalized legal relations of bourgeois society as if they were *a priori* conditions of all social organization (Rose, 1981). This was most evident in the *étatist* injunctions he put forward that it is the duty of the citizen to ‘endure even the most intolerable abuse of supreme authority’, that the ‘well-being of the state’

must not be confused with ‘the welfare or happiness of the citizens’, and that the state legislature can do ‘absolutely no injustice to anyone’ (1965: 86). The limitations of Kant’s natural philosophy of right are manifest and manifold, but they should not be allowed to nullify the fundamental role it played in the formation of critical theory.

Hegel: Natural right and the critique of absolutism

We saw above that, according to Adorno, Hegel’s *Philosophy of Right* introduced a note of realism in relation to Kant’s normative philosophy of right but also a note of regression from Kant’s cosmopolitanism to state absolutism. Arendt’s critique of Hegel’s *Philosophy of Right* followed parallel lines. She acknowledged that Hegel’s contribution lay in his attempt to break from the framework of natural law and think ‘without the guidance of any authority whatsoever’. According to Arendt, Hegel understood that the modern world was invaded by new problems with which the natural law tradition was unable to cope and that it was necessary to relocate philosophy in this world: that is to say, to reconnect philosophy with the social and political life of human beings. However, the flaw she discerned in Hegelian philosophy was to reduce ‘the most divergent values, contradictory thoughts and conflicting authorities ... into a unilinear and dialectically consistent thread of historical continuity’ and to hypostasize the Idea of Freedom as advancing over the heads of human beings. She argued that Hegel could only escape the traditional framework of natural law by replacing it with the idea of a single, continuous, unilinear and progressive world history – a totalizing story of humankind endowed with its own march, rhythms, *telos* and laws (Arendt, 1977a: 28). The cost of Hegel’s realism was the inversion of freedom into necessity.

It seems to me that both Arendt and Adorno struggled to comprehend the link Hegel’s *Philosophy of Right* provided between Kant’s *Metaphysics of Justice* and their own critical theorizing. It was a question not just of historicizing and ironing out the creases of natural law, but of reconfiguring the idea of right as a social form of modern subjectivity. Hegel saw in Kant’s work a philosophical expression of the highest spirit of his times, in which absence of reverence for the existing order was complemented by the conviction that right is ‘the soul which holds everything together’ (Hegel, 1991: § 32). One of the strengths Hegel found in Kant’s *Metaphysics of Justice* was that it ‘does not stop at what is *given*, whether the latter is supported by the external positive authority of the state or of mutual agreement among human beings, or by the authority of inner feeling and the heart ... it does not adhere with trusting conviction to the publicly recognized truth’ (1991: 11, emphasis in original). It was not content merely to describe outward appearances but found in the idea of right the ‘inner pulse’ that beats within ‘the wealth of appearances’ that constitute the system of right as a whole (Hegel, 1991: 21).

However, Hegel also pushed against the limits of Kant’s understanding of right and its tendencies toward rationalism, subjectivism, moralism and absolutism. Hegel sought to denature the idea of right: to treat it as a social form of the modern age, and not a rational deduction from the postulates of practical reason. As Hegel observed in his essay on *Natural Law*, we can no longer regard the system of right as ‘absolute and eternal’; we have to see it for what it is, as ‘wholly finite’ (1999:102). He also sought to objectify the idea of right: to acknowledge that it is no longer a ‘mere concept’ in the

heads of philosophers but an element of 'objective spirit' whose existence is external to our consciousness. Hegel sought to put the philosophy of right on a scientific rather than normative footing: its priority, he argued, is not to prescribe what the system of right ought to be but to understand what it is and how it works. Finally, Hegel emphasized the inseparability of the modern principle of universality from the particular rights and wellbeing of individuals. The spirit of modernity, as he put it, is that the right of subjective freedom must enter into every sphere of life: '... love, the romantic, the eternal salvation of the individual ... morality and conscience. ... the principle of civil society ... the political constitution... history at large' (Hegel, 1991: § 124R). Hegel sought to counter the tendency he found in natural law to idealize one sphere of right as absolute – be it private property, civil society, the state or even cosmopolitanism – and to relegate other spheres of right to a subordinate status. He wished to demonstrate that the various forms and shapes of right that emerge in modern society gain their significance only in relation to 'all the other determinations, which constitute the character of a nation and age' (Hegel, 1991: § 3R), and that it is the 'error of abstract thought', to which Kant was not immune, to consider one particular determination of right in isolation from the rest, as if the idea of right were embodied in this determination alone (see Fine and Vazquez, 2006).

Hegel was critical of the Hobbesian tendency to elevate the modern state to supreme status over the rights of individuals. He observed that '[t]he principle of modern states has enormous strength and depth' precisely because 'it allows the principle of subjectivity to attain fulfilment in the self-sufficient extreme of personal particularity' (Hegel, 1991: § 260). He was equally critical of the tendency to give private property primacy of place. He argued that rights of property necessarily grow into higher forms of right, and that once morality, family, civil society, the state and world society are brought into the picture, restrictions are necessarily imposed on property rights (Hegel, 1991: § 46R). He commented that if property rights come into conflict with personal survival, they should be subsumed to 'rights of necessity'; when the alternative is a 'finite injury' to property or 'an infinite injury' to existence, the latter must prevail (Hegel, 1991: § 127). Hegel saw it as the sign of 'uncultured' personality to insist on rights under all possible circumstances. The determination of right should be understood as an expression of social relations, but it is only one aspect and merely formal compared with the relationship as a whole. There is more to human relationships than rights alone. If I relate to others and they to me *exclusively* in terms of rights, then everything that depends on particularity becomes a matter of indifference (Hegel, 1991: § 37A).

Hegel was also critical of the tendency toward merely negative definitions of right. Kant defined right as the '*limitation* of my freedom or *arbitrary will* in such a way that it may coexist with the arbitrary will of everyone else in accordance with a universal law' (Hegel, 1991: § 29, emphasis in original). While this formulation catches something of the relational quality of right, it offers no affirmative content. Right appears merely as a restriction on my freedom necessitated by the demands of living with others. If rights are understood in this way as a limitation on my will, it is but a short step to demand that this limitation be erased, abolished, in the name of my freedom. A negative definition of rights can thus be mobilized to encourage an antagonism to rights that Kant would indeed have refused. For Hegel this was exemplified on the conservative side by the historical

jurisprudence of von Haller that could rationalize any crime, even slavery, in terms of its original rationale; it was exemplified on the radical side by the bottom-up populism of Jacob Fries that subsumed rights to feeling, opinion and conviction (Hegel, 1991: 19). As Hegel put it, the problem with ‘the power of judgement which determines *solely* from within itself what is good in relation to a given content’ is that ‘it evaporates into itself all *determinate* aspects of right’ (Hegel, 1991: § 138, emphasis in original). This sense of ‘self-certainty’ was felt most acutely when people developed a sense of their own freedom by destroying all laws and institutions external to themselves. In political life it was played out in the ‘terror of natural right’ (Edelstein, 2010) on the basis of which those designated *hostis generis humani* could and did lose their heads. Hegel’s critique of Kant’s natural law theory was designed not to replace the philosophy of right with a philosophy of the state, but to denature the idea of right and explore its developmental contradictions.

Marx: Natural right and the critique of bourgeois society

Let me turn briefly to Marx, since his name is most associated with the devaluation of rights in critical theory. It is true that civil and political rights have been widely denigrated within the Marxist tradition as a form of bourgeois egoism, an instrument of class power or a means of atomizing collective struggles. The idea of right appears within Marxism as an ideology of power or at best as a normative concept without empirical purchase. Although the Marxist tradition is not to be blamed for negating the naturalness of natural right, it should be challenged for diminishing the idea of right itself as a mere semblance of freedom and equality. In other words, Marxism is to be faulted not for seeking to denature natural right, but for throwing out the baby with the bathwater and devaluing the idea of right itself.

Marx is usually treated, by critics and advocates alike, as the authoritative source for this negative attitude, but we find in his critique of bourgeois society another thread that is more deeply rooted in the philosophy of right of Kant and Hegel. This may be indicated in the support Marx gave to rights movements of his day: those for free speech against censorship, Jewish emancipation against the ‘Christian state’, forest rights for the rural poor against landowner prerogatives, worker rights to a limited working day, the people’s rights to universal suffrage (see Fine, 2002; Thompson, 1978). To be sure, equivocations abound in Marx’s texts, but the idea of ‘right’ as the soul that animates struggles for human freedom in the modern world is never far from the surface. Certainly, Marx found no profundity in those who dismissed rights as a mere abstraction.

Consider, for example, Marx’s early essays on the ‘Jewish question’ (Marx, 1992) and his co-authored monograph on *The Holy Family* (Marx and Engels, 1980), where he defended equal rights for Jews against opponents of Jewish emancipation, such as the young Hegelian Bruno Bauer. Bauer maintained that Jews should not be granted equal rights unless and until they surrendered their Judaism, and he came out with a litany of anti-Jewish stereotypes to support his opposition to Jewish rights: Jews are an a-historic people lacking the capacity to evolve; Jews are indifferent to the happiness of other peoples; Jews claim discrimination at the hands of European society but control its destiny through financial power; Jews call for their own emancipation but never the

emancipation of others; Jews are hated in the Christian world but provoke this treatment through their own indifference to the progress of humanity at large; Jews complain about their suffering but are unable to derive universal moral principles from it; and so on. Bauer concluded that the civil equality of Jews could only be implemented when 'Jewry no longer exists'.

Marx and Engels would have none of this: 'We do not tell the Jews that they cannot be emancipated politically without radically emancipating themselves from Judaism, which is what Bauer tells them' (Marx, 1992: 226). For Marx, the 'Jewish question' was in reality a non-Jewish question – the question of the distorted lens through which non-Jews looked at Jews. No one had the right to demand of Jews the abolition of Judaism as the condition of political emancipation. Jews did not have to prove their worth. The grammar of Marx's argument was that since none of the 'rights of man' go beyond egoistic man, it makes no sense to exclude Jews on the grounds of their alleged egoism, and since money has become a world power, it makes no sense to exclude Jews as 'moneymen'. The real question for Marx was whether backward states like Germany, which did not recognize the legal and political equality of Jews, could catch up with those states like France and America in which Jews were already politically emancipated. Marx turned Bauer on his head: instead of subordinating rights to the Jewish question, he dissolved the so-called 'Jewish question' into support for the universal rights of man and citizen.

It may be argued that Marx's defence of rights was merely provisional and that he envisaged that the system of rights would be transcended. While he described the 1789 declaration as a great step forward that marked the difference between 'the modern representative state and the old state of privileges' (Marx and Engels, 1980: 143), it might appear that this step forward was to be jettisoned with the movement from political to human emancipation. Marx acknowledged the limits of political emancipation: '... the fact that you can be politically emancipated without ... renouncing Judaism shows that *political emancipation* by itself is not *human* emancipation' (1992: 226, emphasis in original). As we now know, legal recognition of Jews by no means only paved the way for their social recognition; on the contrary, it also paved the way for an intellectual and popular *ressentiment* directed against the equal treatment of those designated as unequal. However, it was Bauer's argument, not Marx's, that that the social was everything and the legal nothing. Marx defined human emancipation in terms of overcoming the dominance of abstractions over our lives; in this case it signified overcoming the abstraction of 'the Jews'. I would suggest that the 'real humanism' Marx reached out for was one in which the right of *all* human beings to have rights, exemplified in this instance in the right of Jews to have civil and political rights or in another in the right of workers to own their labour-power, is realized as the *beginning* of a long and arduous journey to human self-emancipation.

For the mature Marx, I would suggest that his critique of rights was a critique of the forces that undermine the realization of rights in capitalist society. In Marx's later writings there are passages where he speaks of rights as 'mere semblance' (Marx, 1976: 729), but the abuse of the language of rights by capitalists who were in fact intent on treating workers as mere means of production should not be confused with the nature of rights as such (Fine, 2002: 95–121). The more substantial hypothesis in Marx's *Capital* is that the same social relations that transform the products of human labour into

quantities of exchange value also transform the producers into bearers of rights. Value and right are two sides of the same coin. Together they mark the division in bourgeois society between the ideal and the material, the political and the economic, free will and determination. Neither is 'mere semblance'. We might add that Marx's attitude to Hegel's *Philosophy of Right* was not simply one of putting the dialectic back on its feet, as if any talk of rights represented a hopeless idealism, but rather one of understanding that the 'ideal' forms of right are as constitutive of capitalist social relations as are the 'material' forms of value (Fine, 2001: 61ff.). If law is everywhere imbricated in capitalist relations of production, as E.P. Thompson (1977: 258ff.; 1978: 354ff.) once demonstrated, it is not mere semblance.

True, we might complement Marx's critique of the fetishism of the commodity with our own critique of the fetishism of the bourgeois subject: that is, the atomized subject divorced from the world, a zero point of free will whose social dependence on others is erased. However, our critique of the fetishism of the bourgeois subject should not be confused with rejection of the rights that make it possible for human beings to resist subordination to the imperatives of capital accumulation.

Conclusion: Natural law and the critique of right

Let us return in conclusion to the idea of natural law. Throughout its long and diverse history two premises have remained essential to the natural law tradition: first, that natural law is a universal law that must be given definite positive form; second, that positive laws are invalid if they do not accord with the laws of nature (Gierke, 2001). The natural law credo is that natural law is empty and incomplete if it is not given positive form and that positive law is unjust and despotic if it contravenes natural law. It is this classic formula of natural law that was drawn by Jacques Derrida from Pascal's *Pensées*: 'Justice without force is impotent; force without justice is tyrannical' (Derrida, 1990: 937). The unity of natural and positive law does not mean that natural law is 'universal' and must be enforced against all 'particulars', nor does it mean that positive laws are 'particular' and therefore have no universal validity. It means rather that the universal and the particular, what is true and valid in itself and what is historical and transitory, are in some significant sense indivisible. The insight of natural law philosophy is ranged against all manner of doctrinal philosophies which posit the transcendence of natural law over positive law, and against all manner of positive philosophies which can see no further than already codified legality.

My argument is that this double-take, so characteristic of natural law theory, has served critical theory well. The unity of the universal and the particular, which was the rational kernel of the natural law tradition, is precisely what gives to critical theory its critical edge. It provides critical theory with the resources it needs to confront conservative doctrines that convert natural law into an endorsement of the status quo: for example, those that treat our own age as the actualization of the cosmopolitan ideal Kant once imagined and subsume critical thought to fixed principles. It also provides critical theory with the resources to confront totalitarian doctrines that subsume legal rights to so-called 'laws of nature' and 'history'. The account of totalitarianism we find in critical theory emphasizes its defiance of positive laws, even those it has itself

established, in the name of a 'higher form of legitimacy'. What we find in totalitarian movements is an attack on positive law and on the sources of authority from which positive laws receive their legitimation, and an appeal in its place to a non-legal end: 'the rule of justice on earth'. The only 'laws' totalitarianism recognizes in its attempt to establish a reign of justice on earth are supra-human laws of History or Nature before which the rights and self-interest of every individual must be sacrificed (Arendt, 1973: 462–464).

In both cases, conservative and totalitarian, the unity of natural and positive law, the kernel of the natural law tradition, is severed either by subsuming natural right to positive law or vice versa. Against this diremption, critical theory may be understood as the endeavour to hold the pieces together.

Critical theory may also be viewed as an attempt to find a space between natural law and sociology: to denature right but also to revalue it. The critique of rights is not the same as the trashing of rights – they should rather be seen as opposites. Trashing has as its end the *devaluation* of the value of rights. It does so by demonstrating the chasm between the idea of universal human rights and the actuality of concealed material interests, social inequalities and cultural prejudices. By contrast, the *critique* of rights has as its end the *revaluation* of the idea of right. When it explores the conditions of its downfall, its interest lies in the reconstruction of rights and its criticism is targeted at those forms of 'spiritless radicalism' (a phrase drawn from the work of Arendt) that know only how to substitute trashing for critique. We can seek to understand the dismay and disgust people feel over the gulf between the rights bourgeois society espouses and the violence that lurks beneath its surface; but critical theory teaches us not to let dismay and disgust, however justified, morph into hostility to the idea of rights itself.

Critical theory weaves between natural law and sociology and declines to accept an unbridgeable chasm between them. In its confrontation with the horrors of the twentieth century, critical theory turns to sociology to denature natural law but also to natural law to de-positivize sociology. The suspicion that informs this paper, that there is a link between the difficulties we face in confronting the evils of the modern age and our self-alienation from the natural law tradition, may be summed up in a statement of Alexis de Tocqueville that Arendt quotes in *Between Past and Future*: 'Since the past has ceased to throw its light upon the future, the mind of man wanders in obscurity' (Arendt, 1977a: 7).

Notes

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1. For the purposes of this essay I am treating Hannah Arendt as a critical theorist whose parallels with Adorno and roots in the tradition of critical theory are far more significant than her differences (see Rensmann and Gandesha, 2012; Fine, 2012).

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Author biography

Robert Fine is Emeritus Professor of Sociology at the University of Warwick. He is author of a study of Marx's relation to the enlightenment (*Democracy and the Rule of Law: Marx's Critique of the Legal Form*, Pluto 1984 and Blackburn 2002); a study of relations between labour and nationalist movements in South Africa (*Beyond Apartheid*, Pluto, 1990); a study of common critical threads running through Hegel, Marx and Arendt (*Political Investigations*, Routledge, 2001); and a study of the strengths and weaknesses of cosmopolitan ideas in social theory (*Cosmopolitanism*, Routledge 2007). He has more recently been working on social theories of rights and on contemporary debates around antisemitism, and has co-edited a special issue of *European Societies* (2012) on 'Racism and Antisemitism'.