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CITIZENSHIP AND POLITICAL JUDGMENT: BETWEEN
DISCOURSE ETHICS AND *PHRONESIS*

ABSTRACT. Political judgment is notoriously hard to theorise, and in the recent debates surrounding Habermas's discourse ethics we encounter classic disagreements around the nature, operation and validity of such judgments. This paper evaluates Habermas's account of political judgment and explores the problems raised by his critics. It then focuses on the contentious role played by universals within his account. What emerges is a reformulated theory of judgment based on the thin universalism of fair deliberation, and a description of a sub-set of judgments, termed "democratic judgments", which are oriented to the preservation of democracy.

KEY WORDS: deliberation, democracy, discourse ethics, Habermas, justification, Kant, Neo-Aristotelianism, political judgment, reflective judgment, Wittgenstein

Integral to democracy is the requirement that citizens make political judgments. Whether in voting or being a member of a civic committee, such judgments involve the making up of one's mind about something political. Integral to liberalism is a conception of the political as pertaining to collectively binding decisions in the public realm. Such a view carefully distinguishes between matters public and private, between what is right and what is good, and between the political and the moral. Political judgment is thus most commonly seen as rational, and thus demonstrable to others, when normative concerns are screened out, as they are in rational choice approaches. Here, good judgments are seen to pertain to the best, or most effective, means towards pre-given, and pre-rational, ends.

Yet recent developments in critical social and political theory highlight the inherently political nature of our everyday interactions.¹ The current concern is to identify and analyse the complexities of power, and so to argue that the political should, more properly, range over all the sites in which it operates. Such an expansion of the concept of the political seriously problematises distinctions between the public and the private sphere,

¹ Elements of which include feminism: A Phillips, *Engendering Democracy* (Cambridge: Polity Press, 1991); multi-cultural accounts of citizenship: A. Gutmann, ed., *Multiculturalism* (Princeton, NJ: Princeton University Press, 1994); and radical democratic theory: A. Melucci, "Social Movements and the Democratization of Everyday Life", in J. Keane, ed., *Civil Society and the State* (London: Verso, 1988), 245–60, p. 258.



and between the political and the moral. It also raises significant difficulties for how we are to adjudicate between particular judgments in order to decide which is the best.

Political judgments, where they are seen as inescapably possessing some normative content, require different kinds of reasons for their justification and demonstration. In 1983, Ronald Beiner pointed out that the question of how to evaluate the normative element in political judgment had attracted surprisingly little attention in the literature.² It's not too difficult to see why. If political judgments are partly moral, then we confront the age-old problem of the status of such moral claims. As Toulmin asked, "What kinds of argument, of reasoning, is it proper for us to accept in support of moral decisions?"³ Only recently, with the neo-Aristotelianism recovery of *phronesis*, and Jürgen Habermas's articulation of discourse ethics, have we begun to properly address this question.

This paper explores the problems we encounter in theorising the broad range of judgments people make in their everyday lives which pertain to issues of power, and which are, thereby, taken to be political. In particular, it addresses the question of how such judgments can claim validity, or be demonstrated to others by giving reasons. To do so, it scrutinises the debate currently taking place around discourse ethics, showing how both Habermas and his critics draw insights from the realm of moral judgment in order to illuminate our understanding of the nature of political judgments and the status of the knowledge claims they embody. As we shall see, the problem of the validity of political judgment emerges, within current debates, as a dispute surrounding the role of universals in judgment. The paper therefore seeks to clarify the role played by universals in the Habermasian account, and thereby to formulate a theory of political judgment which retains the strengths of discourse ethics while also responding to the important advances offered by its critics.

As we shall see, the difficulty we face in following Habermas is that his account of how judgments aspire to normative validity takes us a long way from being able to understand how the everyday faculty of judgment actually works. By exploring this tension, the paper seeks to delineate a sub-set of political judgments, here termed "democratic judgments", which

² An overview of current theorising about judgment is presented in P. Steinberger, *The Concept of Political Judgment* (Chicago: University of Chicago Press, 1993). The topic is also receiving discussion in the area of political disagreement, for which see A. Gutmann, D. Thompson, *Democracy and Disagreement* (Cambridge, MA: Harvard University Press, 1996) and A. Mason, *Explaining Political Disagreement* (Cambridge: Cambridge University Press, 1993).

³ S. Toulmin, *An Examination of the Place of Reason in Ethics* (Cambridge: Cambridge University Press, 1970), 64.

are normatively defensible yet also attentive to the ways in which political judgments are actually made. Democratic judgments, it is argued, are characterised by a minimal, yet normative, concern to preserve the conditions of fair deliberation. One of the characteristics of democratic judgment is a healthy suspicion of the effects of power upon the future capacity to make good judgments.

THEORISING JUDGMENT

When we enquire into political judgment, we confront not only the theoretical problem of normative validity, but also the empirical question of how people actually make such judgments. Both these difficulties have received significant attention in recent debates surrounding whether or not judgments have a cognitive core. The phrase “cognitive core” refers to a kernel which is universally valid, and thus demonstrable to others, with the force of reason. In particular, this debate has been occasioned by Habermas’s articulation of a universalist discourse ethics, which attempts to state the grounds by which a judgment is rationally redeemable, allowing us to give reasons for distinguishing between certain kinds of moral/political position.

Seyla Benhabib administers the following test to uncover the cognitivists among us (or perhaps, within us). Is there a moral difference, she asks, between wanting to hurt children and wanting to eat ice cream?⁴ If there is, then what reasons can be given for supporting this distinction? If we see morality in relativistic terms, i.e. as a mere configuration of knowledge and power, then we preclude any appeal to a rational criterion of valid judgment.⁵ So, for example, to reject cognitivism outright, as do many postmodern theorists, is to accept, in regard to judgment, that ‘anything goes’. Though non-cognitivists might well disapprove of children suffering, they are unable (unwilling) to give *universal reasons* for their disapproval.

If, instead, we reach for a contextual account of moral validity, as do neo-Aristotelian theorists, we see the validity of a judgment in terms of its expression of, and appeal to, values which are embedded in particular cultures and practices.⁶ There is, therefore, such a thing as “good” judgment,

⁴ S. Benhabib, *Situating the Self* (Cambridge: Polity Press, 1992), 50.

⁵ J-F. Lyotard, J.-L. Thébaud, *Just Gaming* (Manchester: Manchester University Press, 1985), 25–6.

⁶ A. MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981); H. Gadamer, *Truth and Method* (New York: Seabury Press, 1975).

and not just anything goes. Yet such positions must overcome the modern 'fact of pluralism' if they are to identify a discrete context of meaning. And while being able to give contextual reasons for not hurting children, they must also live with the possibility that some particular culture might approve of such suffering. In such a context, there is, again, no possible appeal to any extra-contextual criterion which might correct, as it were, an aberrant conceptual scheme.⁷

Lastly, those theorists adhering to a universalist ethics, particularly in its modern communicative form, claim that both the relativist and contextualist positions are inadequate. Neither can provide the critical power required of a moral theory.⁸ A judgment is valid, they argue, when it makes successful appeal to an extra-contextual criterion of moral rightness, one that is applicable across conceptual schemes. Habermas, in particular, has provided a moral theory which delivers the critical power the first two positions seem to lack.

HABERMASIAN DIFFICULTIES WITH JUDGMENT

According to Habermas, communication works because there is an internal relation between meaning and validity.⁹ All communicatively competent subjects know how to give and receive meaning, and, therefore, how to understand validity. Similarly, Habermas has argued, when we debate the validity of a piece of communication, we know what *would be involved*, were the outcome of that debate to be valid.¹⁰ The outcome of an argument has validity, according to Habermas, when the procedure by which it was attained was deliberative, rational, fair and open to all concerned.¹¹

To engage in argumentation, to give and receive reasons for our judgments, presupposes an ideal of communication which is free from domination, one in which the force of the better argument is the only force. This extra-contextual ideal is "anticipated" whenever we discuss what we should do,¹² and it suggests that legitimacy involves a judgment regard-

⁷ M. Passerin d'Entrèves, "Aristotle or Burke? Some Comments on H. Shnaedelbach's 'What is Neo-Aristotelianism?'" , *Praxis International*, 1988, 7 3/4, 238–45.

⁸ J. Habermas, "Three Models of Democracy", *Constellations*, 1994, 1/1, 1–10, p. 4.

⁹ J. Habermas, "What is Universal Pragmatics?", in *Communication and the Evolution of Society* (Boston: Beacon Press, 1979), 1–69.

¹⁰ J. Habermas, *Moral Consciousness and Communicative Action* (Cambridge: Polity Press, 1992).

¹¹ *Ibid.*, 89.

¹² J. Habermas, *The Theory of Communicative Action*, Vol. 1 (Cambridge, MA: Beacon Press, 1984), 42.

ing the degree of transgression of the ideal, or of how closely an actual procedure approximates to that ideal.¹³

Such an account of legitimacy is not intended to counter the ‘anything goes’ of relativism with a universalist ‘only *this* thing goes’. It does not offer a substantive principle of justice.¹⁴ Rather, what Habermas is positing is a ‘thin’ universalism, a set of minimal procedural conditions which encapsulate the sense in which a political judgment is valid.¹⁵ In this way, communicative ethics addresses the question of the procedural grounds of legitimacy, and it does so in a profoundly democratic way. Democracy is here seen as morally superior to authoritarianism. And hurting children is wrong because it is not defensible in an open, fair and rational discourse.

The universalist nature of such an account, has, quite rightly, stimulated the suspicions of a number of commentators. It has been suggested, for example, that such a position might, as have other universalisms, be appealed to in order to justify what amounts to being a bully.¹⁶ Benhabib, in particular, shows how Habermas’s effort to preserve impartiality and universalisability in judgment effectively characterises the relation of self to other in such a way as to deny difference,¹⁷ and Wellmer suggests that, where judgment is seen to rely on universal criteria, it becomes a strangely rational, disinterested and abstract faculty.¹⁸ Importantly, Habermas’s theory, in stressing the role of extra-contextual criteria in judgment, seeks to separate ethical-existential questions regarding the good life from moral-practical ones regarding justice. Following Kant, he regards only the latter as rationally redeemable.¹⁹ This distinction has fuelled the charge that his position is *so* de-contextualised and formal that he is in danger of losing contact with the real world altogether.²⁰ Drawing arguments from

¹³ Habermas, *Moral Consciousness and Communicative Action*, op. cit., 92; J. Habermas, *Justification and Application* (Cambridge: Polity Press, 1993), 54–5; A. Ferrara, “A Critique of Habermas’ Diskursethik”, *Telos*, 1985, 64, 45–74, p. 63; J. Forester, “Introduction: The Applied Turn in Contemporary Critical Theory”, in J. Forester, ed., *Critical Theory and Public Life* (Cambridge, MA.: MIT Press, 1985), ix–xix.

¹⁴ Habermas, *Moral Consciousness and Communicative Action*, op. cit., 103.

¹⁵ *Ibid.*, 122.

¹⁶ F. Jameson, “Foreword” to J-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Minneapolis: University of Minnesota Press, 1984), x; but see Habermas, *Moral Consciousness and Communicative Action*, op. cit., 99.

¹⁷ S. Benhabib, *Situating the Self*, op. cit., 158–9.

¹⁸ A. Wellmer, *The Persistence of Modernity: Aesthetics, Ethics and Postmodernism* (Cambridge: Polity Press, 1991), 196.

¹⁹ Habermas, *Moral Consciousness and Communicative Action*, op. cit. 104, 108.

²⁰ C. Taylor, “The Motivation Behind a Procedural Ethics”, in R. Beiner and W.J. Booth, eds, *Kant & Political Philosophy: The Contemporary Legacy* (New Haven: Yale University Press, 1993), 337–59, p. 342; Wellmer, *The Persistence of Modernity*, op. cit., 155.

Hegel's critique of Kant, Habermas's critics point out that he is unable to show us how the ideal actually functions in specific situations to produce valid moral judgments.²¹

Habermas has sought to address these objections with some care.²² In particular, he has distinguished between the justification and the application of a norm, referred to by Wellmer as the "differentiation thesis",²³ thereby admitting a great deal more situational knowledge in the making of a valid judgment.²⁴ He has also agreed that a valid judgment is always fallible, and so can only ever be provisional.²⁵ And he has shown that his counterfactual ideal might be interpreted differently in different cultures, or, to use Taylor's phrase, that the ideal is "ethically patterned".²⁶

These moves are intended to compensate for the level of abstraction of his normative theory, and its resulting inattention to actual cultures and situations. Yet Habermas does not lose sight of his insight that political judgment is somehow informed by a universal procedural ideal of impartiality and rationality. Even when he adjusts his position, as he does with his distinction between the justification and the application of a norm, he is careful to preserve the cognitivist core of the latter activity.²⁷ If we have, in even a small way, been uncovered as a cognitivist by Benhabib's test, then Habermas is right to insist on the appeal to an extra-contextual criterion, for only this can deliver the required critical power over abhorrent practices which might gain empirical consensus. Cognitivism insists that there are reasons for our moral and political judgments. And, as Haber-

²¹ G.W.F. Hegel, *Philosophy of Right* (Oxford: Oxford University Press, 1967), 75–104; G.W.F. Hegel, *The Phenomenology of Spirit* (Oxford: Oxford University Press, 1977), 252–61; S. Benhabib, *Critique, Norm, and Utopia* (New York: Columbia University Press, 1986), 70–84.

²² Habermas, *Moral Consciousness and Communicative Action*, op. cit., 195–215.

²³ Wellmer, *The Persistence of Modernity*, op. cit., 206.

²⁴ Habermas, *Moral Consciousness and Communicative Action* op. cit., 104, 179, 206; Habermas, *Justification and Application* op. cit., 13, 36; K. Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law* (Albany: State University of New York Press, 1993), 229–46.

²⁵ Habermas, *Justification and Application*, op. cit., 39; D. Ingram. "The Limits and Possibilities of Communicative Ethics for Democratic Theory", *Political Theory*, 1993, 21/2, 294–321.

²⁶ Habermas, *Moral Consciousness and Communicative Action*, op. cit., 86; Habermas, *Justification and Application*, op. cit., 39; J. Habermas, "Struggles for Recognition in Constitutional States", *European Journal of Philosophy*, 1993, 1/2, 128–55, pp. 139, 144.

²⁷ Habermas, *Moral Consciousness and Communicative Action*, op. cit., 181–2, 206–7; Habermas, *Justification and Application*, op. cit., 10, 14, 17; Günther, *The Sense of Appropriateness*, op. cit., 11.

mas so cogently shows in his argument from performative contradiction,²⁸ political judgment *must* be rationally redeemable, for, when challenged, we defend our judgments with reasons.

THE ROLE OF UNIVERSALS IN JUDGMENT

According to Habermas's cognitivist account, citizens make political judgments via a process of deliberation and argumentation. The validity of a judgment turns, not on its content, but on how closely the procedure by which that judgment was attained approximates to the ideal of fair communication. In making a political judgment, then, a citizen would seem to engage in an act of *approximation*, one in which actual instances of argumentation are compared to an ideal, and so evaluated and weighted. Good judgments, it follows, are those attained under maximally fair deliberative procedures.

Actual political judgments, of course, take place under significant pressures. We cannot always, or even ever, have complete fairness of procedure. The constraints exerted by the real world always demand some transgression of the ideal in order that our decisions be effective. If we have to make a quick judgment, for example, we must trade off some of our fairness in order to procure the necessary streamlining of our procedure. Political judgments, where they concern the evaluation of such trade-offs, are in fact comparative, for they involve selecting between various possible alternatives.²⁹ Should we do X or Y? Is one procedure better or worse than its suggested alternative? Where we conceive of the legitimacy of a collective judgment in terms of approximation, or as an asymptotic approach to a universal ideal, judgment appears as an ability to quantify and compare the preponderance of the ideal in particular instances of communication.

Such an account of judgment suggests the faculty has two important characteristics. First, to use Kant's terminology, it is determinant.³⁰ For Kant, all moral judgment was determinant, for it involved the application of a pre-given universal, in his case the categorical imperative, to a real situation. The act of judgment therefore entailed a subsumption of the particular under the universal. In Habermas's theory, the pre-given universal under which the particular is subsumed is, instead, the ideal of domination-free communication. But the ensuing account of judgment remains determinant in its structure.

²⁸ Habermas, *Moral Consciousness and Communicative Action*, op. cit.

²⁹ R. Beiner, *Political Judgment* (London: Methuen, 1983), 37; Habermas, *Justification and Application*, op. cit., 63.

³⁰ I. Kant, *Critique of Judgment* (Oxford: Clarendon Press, 1952), Section IV.

This is not, of course, to say that Habermas's conception of judgment is determinant in the full sense in which Kant understood that term. Unlike Kant, Habermas does not adhere to a universal principle entirely independent of any interpretation and derived solely from some invariant structure of subjectivity. Nor is the relation between the universal principle and the norm to be tested one of strict deduction. Yet nevertheless, as Ferrara points out,

one essential feature of the model of determinant judgment which [Habermas] retain[s] is the conceptual distinction between . . . general principles of justice and what is just on a concrete occasion Furthermore, both the adequacy of the principle and the inclusion of some intended line of conduct within the scope of the principle are assumed to be possible objects of *demonstration* – where by “demonstration” I mean an argument which, if valid, would thereby make it *unreasonable* for anyone to reject its conclusions.³¹

For Habermas, the determinant character of judgment is preserved, even though justification is to be distinguished from application, by the impartial and rational quality of discourses of application.

Second, such a determinant subsumption here proceeds as a *quantification* of the ideal in the particular. This suggests that Habermasian citizens make judgments almost as acts of algorithmic calculation. Good judgment here takes the form of a heightened *rational* ability impartially to apply the ideal, and to assess, in a hypothetical and disinterested way, the degree to which a particular procedure approximates to the ideal.³²

It is no wonder, then, that Habermas is so attracted to Kohlberg's work on moral judgment, for within it he finds empirical confirmation that moral maturity is a disinterested and abstracting faculty. Such an account imagines the *other* in the moral encounter in generalised and universal-

³¹ A. Ferrara, “Authenticity and the Project of Modernity”, *European Journal of Philosophy*, 1994, 2/3, 241–73, p. 255.

³² While Habermas explicitly denies that his account of expert judgment is one of moral rigourism, he is in fact addressing criticisms that he has paid insufficient attention to the role of emotional dispositions in applicatory judgment: see Habermas, *Moral Consciousness and Communicative Action*, op. cit., 182 and Günther, *The Sense of Appropriateness*, op. cit., 161–5. But the problem with Habermas's account of mature judgment is not that it *completely* ignores emotions, relationships and ethical questions. Though, within his scheme, these aspects enter as conditions and components of solidarity (J. Habermas, “Justice and Solidarity: On the Discussion Concerning ‘Stage 6’”, in M. Kelly, ed., *Hermeneutics and Critical Theory in Ethics and Politics* (Cambridge, MA: MIT Press, 1990), 32–52, p. 47), they still appear as secondary to the intellectual aspects, owing mostly to the strongly normative orientation of his position. The charge here is not so much moral rigourism, but more a kind of cerebralism; for on his account, all human capacities, emotional and intellectual, are seen to be oriented, in the act of judgment, to *assessing the quantity* of the ideal contained in each particular.

ised terms, carefully denuded of individual and concrete characteristics.³³ Moral relationships are here conceived *intellectually* rather than emotionally. And it's no wonder, also, that Kohlberg's work was subjected to so devastating an attack by Gilligan for its gender bias, for its blindness to the concrete other and therefore also to an ethics of care.³⁴

For the mature Habermasian citizen is really something quite extraordinary. *He* (and following Gilligan's critique, we can use the masculine here) is able to judge the fairness of an actual procedure according to abstract and universal principles. He is able to calculate, in a real example, the preponderance of the ideal, to take into account all points of view, and to apply the ideal with impartiality and a seemingly infinite calculative capacity. Wellmer, and others, have drawn attention to the resulting "cognitive overload" which threatens when we attempt to cash in Habermas's account of validity for a description of how judgment actually works.³⁵

So, while Habermas may be able to state the sense in which a judgment is valid, his account offers us little understanding of how the everyday activity of judging ever takes place at all. We should, perhaps, not be surprised that a de-contextualised ethics generates such problems. For though it is precisely the de-contextualisation of the ideal that allows for the validity of judgments, so the possibility of critical judgments of existing practices requires the re-contextualisation of that ideal. The solution to the question of a judgment's validity seems to move us away from an adequate phenomenology of how contextual judgment actually works.

In the face of these criticisms, Habermas's commentators, most notably Benhabib, McCarthy and Ferrara,³⁶ have sought to make adjustments to the normative theory, thus giving still greater attention to the actual contexts in which the ideal is ethically patterned. Their work amounts to an attempt to retain the cognitivism of Habermas's position, yet to move away from a determinant account of judgment and towards a more reflective one.

³³ Benhabib, *Situating the Self*, op. cit., 148–77.

³⁴ C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982).

³⁵ Wellmer, *The Persistence of Modernity*, op. cit., 155.

³⁶ Benhabib, *Situating the Self*, op. cit.; T. McCarthy, "Practical Discourse: On the Relation of Morality to Politics", in *Ideals and Illusions* (Cambridge: Polity Press, 1991), 181–99; A. Ferrara, "Postmodern Eudaimonia", *Praxis International*, 1992, 11/4, 387–411; A. Ferrara, *Justice and Judgement* (London: Sage, 1999).

THE REFLECTIVE TURN

Once again, the notion of reflective judgment comes from Kant.³⁷ Judgments pertaining to aesthetic questions were, for him, of a different nature from moral ones. In assessing, say, the beauty of a work of art, the subject first responds to the particular, and only then searches for the appropriate universal. Reasons can then be given for predicating the word “beautiful”, say, to a work of art, here by virtue of that work embodying, or being an example of, the universal concept of beauty. Aesthetic phenomena are, according to Kant, not judged determinately, as are moral phenomena, but reflectively. Unlike determinant judgment, which subsumes the particular under a pre-given universal, reflective judgment proceeds from the particular to the universal.³⁸ Such judgments are rationally demonstrable to others by virtue of the fact that they show how the particular embodies, or is an example of, the universal.

It was Hannah Arendt who first suggested that Kant’s work on reflective judgement might fruitfully be applied to political questions.³⁹ Seeking to build on Aristotle’s account of judgment as *phronesis*, or the general competence to discern the universal in the particular, Arendt intended to show that a judgment could claim an exemplary validity;⁴⁰ and she cites, with approval, Kant’s observation that “examples are the go-cart of judgments”.⁴¹ Achilles, therefore, could be described as brave, and reasons could be given for the validity of this description, because his actions were examples of the universal, “bravery”. Here, though, Arendt’s understanding of the “universal” to be found in the particular was contextual. Particular cultures and contexts of meaning offer immanent concepts, and it is by virtue of such concepts that members of those cultures can demonstrate the validity of their judgments to other members.

Though she never wrote her theory of judgment, her ideas have since been expanded upon. Neo-Aristotelians, as well as commentators on Habermas, have reached for a reflective account of moral and political judgment, and sought to stress the importance of the contexts of meaning in which judgments take place, and by virtue of which they can be

³⁷ Kant, *Critique of Judgment*, op. cit., 141.

³⁸ R. Makkreel, “Kant and the Interpretation of Nature and History”, in M. Kelly, ed., *Hermeneutics and Critical Theory in Ethics and Politics*, op. cit., 169–81.

³⁹ H. Arendt, *Between Past and Future* (London: Penguin, 1961), 219; H. Arendt, *Lectures on Kant’s Political Philosophy* (R. Beiner, ed.) (Brighton: Harvester Press, 1982), 7–78.

⁴⁰ M. Passerin d’Entrèves, *The Political Philosophy of Hannah Arendt* (London: Routledge, 1994), 114.

⁴¹ Arendt, *Lectures on Kant’s Political Philosophy*, op. cit., 76.

given rational demonstration. For Habermasians, such developments signal a growing concern to articulate what might be called a context-sensitive universalism, for they attempt to bring together the ‘thin’ procedural universalism with a more adequate empirical account of how the everyday faculty of judgment actually works.

Yet once again, though the reflective turn in communicative ethics gives a better account of the validity of a judgment – by which I mean one that is more context-sensitive and less determinant – it nevertheless helps us very little when it comes to the question of how judgments actually proceed. For we remain stuck within a model which sees judgment as an assessment of the degree to which a particular approximates to an ideal.⁴² Judgment, here, still takes the form of an evaluation of the preponderance of an ideal in particular instances of communication. It still sees particulars as instantiating the ideal “in analogy to geometric idealisations”,⁴³ and judgments about those particulars as acts of impartial quantification.

I want to suggest that the phenomenology of judgment does *not*, empirically, proceed via an assessment of approximation. When citizens make judgments, which they do every day, they certainly aspire to validity. And validity might indeed be reflective, rather than determinant, in its nature. But this is not how the practical faculty of judgment actually works. We do not distinguish between alternative procedures by comparing the preponderance of the ideal in each. Similarly, expertise in political judgment is not an algorithmic capacity for accurate calculation.

HOW JUDGMENT ACTUALLY WORKS

The universalist solution to the problem of validity, when conceived reflectively, clarifies the role of the universal in the normative question of justification. But it encourages us to conflate the normative question of validity with the empirical question of how judgment actually operates. It invites us to imagine that our everyday attempts to make valid judgments follow the same method as our theorising about the validity of judgment. This conflation is part of a general confusion in communicative ethics regarding the role of the procedural ideal in the actual process of evaluative judgment. Certainly, *reflective* cognitivism shows the sense in

⁴² Habermas, *Justification and Application*, op. cit., 54–5; the logical structure of an invalid “approximation assumption” is fully examined in A. Margalit, “Ideals and Second Bests”, in S. Fox, ed., *Philosophy for Education* (Jerusalem: Van Leer Foundation, 1983), 77–90.

⁴³ A. Wellmer, “Reason, Utopia, and the Dialectic of Enlightenment”, in R. J. Bernstein, ed., *Habermas and Modernity* (Cambridge, Polity Press, 1985), 35–66, p. 61.

which a judgment is valid to be a function of its exemplification of an ideal. When we theorise about judgment, we can show that the sense in which a judgment is normatively valid derives from its exemplification of the ideal. But this does not necessarily mean that the process by which we actually make judgments proceeds via an asymptotic appraisal of the quantity of universal contained in the particular.

What is precisely so fascinating about judgment is that it appears to be a strangely bifurcated process. For while it somehow relies upon an ideal for its normative validity, it seems, in practice, to leap beyond rule governed measurement, to proceed, not by grasping a universal, but through an understanding of lots and lots of actual cases.⁴⁴ Somehow, the everyday activity of judgment resembles, not a search for the universal in the particular, but a kind of “spontaneous coping” with a complex array of particulars.⁴⁵ If this is so, then the empirical question of how we evaluate an instance of communication in practice must not, methodologically, be conflated with the abstract question of normative validity. It is this conflation which, preserving as it does the approximation assumption, continues to constrain reflective accounts of judgment. To imagine that the practice of judgment proceeds in the same way as assessment of its validity betrays a profound “intellectualist prejudice”,⁴⁶ and derives, according to Wellmer, from a “covert scientific residue” at the heart of Habermas’s project.⁴⁷

We must, therefore, more adequately distinguish between the methodologies we use to understand the normative validity of judgments and the empirical ways in which it proceeds in practice. Yet, if not by a process of approximation to an ideal, how are we to understand the latter? Just as the problems in Habermas’s position are prefigured in Hegel’s critique of Kant, so their solution is provided by another important philosophical episode, Wittgenstein’s critique of universals in judgment.⁴⁸ In *The Blue and Brown Books*, Wittgenstein refers to what he sees as “our craving for generality”.⁴⁹ Here, he highlights our tendency to subsume, under a common name, all those properties which are shared by a group of practices. The general concept thereby comes to be seen as a common property, appearing

⁴⁴ A. MacIntyre, “Does Applied Ethics Rest on a Mistake?”, *The Monist*, 1984, 67, 498–513.

⁴⁵ H.L. Dreyfus and S.E. Dreyfus, “What is Morality? A Phenomenological Account of the Development of Ethical Expertise”, in D. Rasmussen, ed., *Universalism vs. Communitarianism* (Cambridge: Polity Press, 1990), 237–64, p. 239.

⁴⁶ *Ibid.*, 238.

⁴⁷ Wellmer, *The Persistence of Modernity*, op. cit., 227.

⁴⁸ R. Bambrough, “Universals and Family Resemblances”, *Proceedings of the Aristotelian Society*, 1961, 61, 207–22, p. 207.

⁴⁹ L. Wittgenstein, *The Blue and Brown Books* (Oxford: Basil Blackwell, 1958), 17–18.

in each practice as a kind of ingredient. In addition, he suggests, we often imagine that to understand a common term, such as “leaf”, indicates that we possess a “kind of general picture of a leaf as opposed to pictures of particular leaves”.⁵⁰ Such a general image, wrung from the inspection of many particular leaves, then appears to constitute a ‘thing’ which somehow contains all the common properties whereby particular leaves are leaves.

In the *Philosophical Investigations*, Wittgenstein develops this discussion by asking what various kinds of game have in common.⁵¹ “If you look at them,” he suggests, “you will not see something that is common to all, but . . . a network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail. I can think of no better expression to characterise these similarities,” he concludes, than “family resemblances And I shall say: ‘games’ form a family.” Seeking to redress what he calls our “contemptuous attitude towards the particular case”, Wittgenstein shows us that it is not by virtue of some common ingredient that a game is a game, but rather that it is one by virtue of its membership of a family.⁵²

What then, do citizens do when they make political judgments? If we accept Wittgenstein’s account, judgment does not proceed via an inspection of the particular in order to find the universal. Rather, a judgment by citizens that a discourse was fair, or was as fair as it could be under the circumstances, entails their perception of family resemblances between a great array of instances of discourses which were, in different ways, distorted by power. As Wittgenstein says, “Don’t think, but look!”⁵³ In effect, we are here counselled to immerse ourselves in a particular labyrinth of words and signs, where rules of language usage and matted threads of family resemblances make up a way of life. Wittgenstein’s solution to the problem of universals allows us to separate, methodologically, the sense in which a judgment is valid from the way in which participants in a discourse actually make judgments regarding comparative validity.

Judgments, therefore, are cognitive because they exemplify an ideal, and, following Habermas, the ideal can be reconstructed from the internal relation between meaning and validity. There is such a thing as fairness, there is such a thing as legitimacy and the ideal which allows for the demonstration of validity to others is ethically patterned in different ways

⁵⁰ Ibid., 18.

⁵¹ L. Wittgenstein, *Philosophical Investigations* (New York: Macmillan, 1969), paras. 66, 67.

⁵² Bambrough, “Universals and Family Resemblances”, op. cit., 211.

⁵³ Wittgenstein, *Philosophical Investigations*, op. cit., para. 66.

in different cultures. Yet, at the same time, this does not translate directly into an understanding of how we make evaluative judgments. Such judgments, rather than assessing the preponderance of an ideal in particulars, in fact involve the perception of family resemblances between them. To recognise the family resemblance between 'good' judgments requires practice. It requires that one learn how to *see*. In such a learning process, it may well be that Habermas's ideal can 'help train our eyes', but it can never be a substitute for direct experience, for making mistakes, for seeing others do it well. For this reason, neo-Aristotelian accounts of judgment in terms of *phronesis* more accurately address the empirical question of how judgment operates than do Kohlberg's and Habermas's developmental stages.

BETWEEN DISCOURSE ETHICS AND *PHRONESIS*

Citizens perceive family resemblances between fair and unfair procedures, between differing trade-offs of fairness for effectiveness. The way in which these resemblances appear to participants can be quite different in different ethical contexts. Yet in all contexts where reasons are adduced for judgments, a valid political judgment involves the inspection of procedures for their relative fairness. Procedures are to be as fair as we can make them, given the pressures of our situation. Procedures should, therefore, be as fair as we are, here and now, able to see.

Of course, for Wittgenstein, the rejection of generality went hand in hand with a non-cognitive, or at least a culturally situated, account of validity. Family resemblances are part of the structure of a particular language game, and for this reason judgments can never climb out, as it were, to declare a practice in another language game to be valid or invalid. As such, his position is normatively akin to that of the neo-Aristotelians.⁵⁴ What we are pursuing here, however, is an account of the empirical phenomenology of judgment which nevertheless admits some degree of universal validity. Judgments, even though they proceed via the recognition of family resemblances, can be normatively valid by virtue of the fact that a particular instance of communication somehow, and in some ethically patterned way, exemplifies an extra-contextual ideal of communication which is free from domination.

We might describe this account of judgment as a discursive *phronesis* with a cognitivist core. It entails *phronesis*, here conceived as a general

⁵⁴ R. Beiner, "Do We Need a Philosophical Ethics? Theory, Prudence, and the Primacy of Ethos", *The Philosophical Forum*, 1989, 20/3, 230–43.

competence to see family resemblances and differences, and to make good decisions between alternatives. It entails a discursive search for a collective *phronesis*, and it sees the validity of judgment in terms of a reflective relation between the universal and the particular. Such an account of judgment breaks with Habermas's and Kohlberg's characterisation of mature judgment as a rational and detached activity based on universalist principles. Instead, expertise in practical judgment appears to be directly related to intuition, where intuition is an ability, born of experience, to perceive family resemblances. As Dreyfus and Dreyfus point out: "[I]t seems that beginners make judgments using strict rules and features, but that with talent and a great deal of involved experience, the beginner develops into an expert who sees intuitively what to do without applying rules . . ."⁵⁵ Learning to make judgments, therefore, at some point breaks away from a search for guiding principles, and becomes a matter of 'seeing', of 'being struck by', ways forward.

Such a conception of expertise in judging has a number of advantages. First, it moves us closer to understanding the everyday ability to judge which seemed so hard to reach when we approached it from Habermas's more overtly normative standpoint. Second, while retaining critical power, it incorporates the advances offered by Gilligan and other theorists who articulate an ethics of care, privileging involvement rather than detachment, and paying greater attention to ethical concerns and the individuality of the concrete other. Third, it at last breaks free from the approximation assumption which operates behind so much of the contemporary discussion of judgment, thus avoiding the tendency to view the faculty in terms of impartial quantification and rational calculation. Finally, with judgments now appearing as acts of understanding, as intuitive grasping, we are better placed to see their role in the construction of narratives of identity.

Emotion and intuition, as thinkers like Taylor and Vetlesen have so cogently shown, are not to be seen as merely sources of irrational confusion which threaten the calculability of moral questions.⁵⁶ Rather, they are the very preconditions of judgment.⁵⁷ Without them, moral import does not come to our attention at all. Intuition and emotion, then, when schooled by experience, are the ways in which we perceive relative fairness. When we argue about judgments, we reason not about our intellectual grasp

⁵⁵ Dreyfus and Dreyfus, "What is Morality?", op. cit., 243.

⁵⁶ A.J. Vetlesen, *Perception, Empathy, and Judgment: An Inquiry into the Preconditions of Moral Performance* (Pennsylvania: Pennsylvania State University Press, 1994); C. Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989).

⁵⁷ Habermas, *Moral Consciousness and Communicative Action*, op. cit., 182.

of the universal, but about our intuitive grasp of the particular. And yet, once again, to characterise judgment in terms of the perception of family resemblances rather than as impartial quantification, though better able to address the intuitive and emotional components of the faculty, does not signal a degeneration into ethical relativism. Against the Dreyfus's, Beiner and even Gilligan, such an account of judgment remains capable of cognitive redemption.⁵⁸

In making political judgments, then, citizens deliberate, perceive family resemblances between instances of communication and make intuitive judgments regarding their relative fairness for which valid reasons can be given. In this way, citizens judge whether a procedure, and thus the outcome it generates, is legitimate.

It should, of course, be noted that where the perception and interpretation of Habermas's universal ideal might differ between cultures and individuals, we raise again the problem of whether citizens can make valid judgments about the actions of others. If, following Benhabib's example, a practice like hurting children were to receive consensual agreement within a particular culture, then it could be claimed that it was capable of rational redemption because, within that culture, the ideal of deliberative fairness just happened to be interpreted and perceived in *that* way. In reaching for a more adequate empirical account of judgment, then, we are again tempted to wander away from the strong cognitivism of Habermas's position, and to be threatened with the inability to rise above particular cultures in such a way as to enable valid (yet restrained) cross-cultural judgments. It is precisely this threat that occupies Benhabib's attentions, for while she applauds the many differences in interpretation of the ideal to which other cultures might adhere, her cognitivism prompts her to retain some minimal capacity to criticise practices in other cultures which seem 'obviously' cruel and indefensible. This, of course, was the whole point of her cognitivist test with which we began. This concern has led her to suggest that the ideal might operate not so much as the grounds of legitimacy, but as a kind of "negative limitation on our intuitions".⁵⁹ Thus, while variable perceptions and interpretations of the ideal might be defensible, certain practices are still ruled out. For no matter how the ideal is perceived and ethically patterned, practices which undermine the *very possibility* of a

⁵⁸ See Habermas's charge that Hubert Dreyfus is "undermining Western Society" with his account of judgment, and the latter's gleeful acceptance of the charge, in B. Flyvbjerg, "Sustaining Non-Rationalized Practices: Body-Mind, Power and situational Ethics. An Interview with Hubert and Stuart Dreyfus", *Praxis International*, 1991, 1/11, 93-113, p. 93.

⁵⁹ Benhabib, *Situating the Self*, op. cit., 36; A. Heller, "The Discourse Ethics of Habermas: Critique and Appraisal", *Thesis Eleven*, 1984, 10/11, 5-17, p. 7.

moral dialogue always violate the ideal.⁶⁰ In this way, Benhabib moves towards a position which we might characterise as “relativism with a caveat”, for while *almost* anything goes, some things do not. Those that do not are those practices which serve to deny the necessary conditions of a deliberative politics.

Intriguingly, just such a caveat is currently being explored in American jurisprudence and constitutional law by writers such as Sunstein and Michelman.⁶¹ Here, questions surrounding the freedom of speech are being inspected for their effects on the very possibility of open deliberation. We also encounter this notion of “relativism with a caveat” when we consider the problem of making judgments about the legitimacy of trade-offs between procedural fairness and effectiveness. Deliberation, we noted, takes place under significant pressures. For this reason, trade-offs for effectiveness are inevitable, and deliberation is seldom, if ever, completely fair. As citizens assess such trade-offs, they confront the possibility that they might trade off too much: that their procedures, when adjusted to deliver greater effectiveness, might actually become illegitimate. As liberal democracy illustrates only too well, some trade-offs between participation and effectiveness becomes so entrenched as to not only render political decisions illegitimate, but also irreversible. One important way in which such trade-offs become irreversible is when they irrevocably damage the discursive capacities of citizens themselves. Such capacities, being a necessary condition of a deliberative politics, themselves require preservation.

DEMOCRATIC JUDGMENT

In making judgments regarding trade-offs for effectiveness, then, the account of judgment we have been pursuing here would suggest that there is a cut-off point for legitimacy, a point beyond which trade-offs for effectiveness can no longer, cognitively and rationally, be defended as normatively valid. While citizens might make any trade-off they wish, they cannot, if they want to be democratic, trade off their capacity to deliberate freely. By characterising political judgment as “discursive *phronesis* with a cognitivist core”, we indicate that citizens must, in their judgments, preserve those capacities and institutional practices upon which turns the very

⁶⁰ Benhabib, *Situating the Self*, op. cit., 38.

⁶¹ C.R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993); F.I. Michelman, “Can Constitutional Democrats be Legal Positivists?”, *Constellations*, 1996, 2/3, 293–308.

possibility of fair deliberation. Democracy means something, not just anything. It is normatively superior to authoritarianism. Political judgments, where they aspire to democracy, can, therefore, claim legitimacy by virtue of their cognitivist core. Such judgments, which we shall here term “democratic” judgments, form a sub-set of political judgments generally and are those oriented to the preservation of democracy itself.⁶² If, therefore, in attempting to adjudicate between political judgments, it can be shown that one has a deleterious effect upon the future capacity of citizens to engage in open discussion, then that judgment has been shown to be normatively inferior to one which has no such effect. Democratic judgments, as the ancient Athenians understood, are normatively superior to non-democratic judgments because they preserve the capacities and conditions required to make democratic judgments in the future.⁶³

We are here exploring the possibility that while most political judgments quite properly express a diversity of cultural values, good reasons can be given for some judgments to be ruled invalid. The question then becomes one of how we ascertain which judgments are damaging to the democratic process, and which are not. Vetlesen has suggested that the empathic emotional/intuitive response is the precondition of all moral judgment, for it is through this response that one gains access to the object as one of moral import. Thus, Eichmann did not, he suggests (contra Arendt) merely exhibit an inability to think. He also evinced an inability to *feel*, the result of which was moral uninterest, or blindness.⁶⁴ One of the implications of our investigation is that the corresponding emotional/intuitive precondition for democratic judgments would seem to be that of mistrust or suspicion. In making democratic judgments, it is this response that enables us to ‘smell a rat’, that alerts us to unfairness, to exclusionary practices and to excessive trade-offs for effectiveness. Suspicion, then, is the emotional/intuitive precondition for democratic judgment; it is the perceptual tool by which we gain access to the object of political import; it is the way in which we stand guard over our liberty.

Democratic legitimacy is not, after all, something static. It is not something that, once attained, can be left to run itself. No matter how settled a constitution, no matter how deep a democratic tradition, as a procedure for the making of political decisions democracy requires the ongoing participation of the populace if it is to maintain its legitimacy. Citizens are,

⁶² R. Blaug, *Democracy, Real and Ideal: Discourse Ethics and Radical Politics* (Albany: State University of New York Press, 1999), 125–6.

⁶³ J. Ober, *Mass and Elite in Democratic Athens* (Princeton: Princeton University Press, 1989), 161.

⁶⁴ Vetlesen, *Perception, Empathy, and Judgment*, op. cit., 106.

therefore, continually required to make political judgments. Yet, wherever reasons are adduced for judgments, as they often are in modernity, we stumble upon the problem of their normative validity. Now, as we try to theorise about judgment, and to demonstrate the validity of our judgments to others, we find we have invented something of stunning complexity. For once we begin to struggle with the problem of normative grounding, we find it very hard to stop. Our efforts to address this question tempt us to subsume the empirical characteristics of everyday judgment into our philosophical and intellectual discourse; they involve us in attempts to see how we can have critical power over the judgments of others, and at the same time, they threaten an excessive critical power which, as has so often been the case with universalism, is open to serious abuse.

CONCLUSION

Only when we understand the validity of a judgment reflectively, yet where the everyday faculty is seen in terms of learned perceptions and intuitions, do we retain the critical gains of a 'thin' universalism, and the explanatory advantages of contextualism and relativism. Habermas, or at least his most cogent commentators, can deliver the first: an understanding of the role of critical reflection in the legitimation of judgment. Yet we have seen the drawbacks of over-extending such insights. Wittgenstein delivers the second: for he understood how judgments are actually made. Yet having drained all critical reflection from the bath, he finds that the baby too has disappeared. To be fair, Habermas has never sought directly to provide a phenomenology of judgment, and Wittgenstein felt able to dispense with the problem of justification.⁶⁵ But perhaps we are being too kind, for the citizens of a democracy cannot afford such luxuries.

What, then, is political judgment? It is an act of evaluation and assessment about questions of power which admits of exemplary validity. Citizens make judgments by recognising family resemblances among particular instances of communication. There are good reasons to be democratic, and good reasons, also, to make judgments which preserve the conditions and capacities necessary for democracy. Citizens in a democracy should be mistrustful, even fearful, of power, for it is this emotional response which alerts them to its effects upon themselves, and upon those who, though different from themselves, might nevertheless be subject to

⁶⁵ J. Tully, "Wittgenstein and Political Philosophy: Understanding Practices of Critical Reflection", *Political Theory*, 1989, 17/2, 172–204.

their judgment. When it comes to political judgments, anything goes; but best are those which help us make democratic judgments.

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