

Equal consideration of all – an aporetic project?

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Abstract: The article considers the relationships among three arguments that purport to establish the intrinsically contradictory or paradoxical nature of the modern project aiming at the equal consideration of all. The claim that the inevitable historical insertion of universal-egalitarian norms leads to always particular and untransparent interpretations of grammatically universal norms may be combined with the claim that the logic of determination of political communities tends to generate exclusions. The combination of these two claims lends specific force to the third argument according to which equal consideration perpetually requires the non-egalitarian project of understanding (excluded) individuals on their own terms. Hence, taking off from a recent debate between Christoph Menke and Jürgen Habermas, I argue that the former is right to diagnose an aporetic self-reflection in egalitarian universalism, while agreeing with the latter about the indispensability of deliberative democratic frameworks for the defence of both egalitarian and non-egalitarian norms.

Key words: Theodor Adorno · deliberative democracy · Jacques Derrida · egalitarianism · equality · Jürgen Habermas · Christoph Menke · singularity · universalism

The current appeal of deliberative democracy may be explained by its perceived ability to address political and sociological issues confronting contemporary democratic societies and by its normative advance over older theories of liberal democracy. It promises to criticize a neo-liberal political and economic agenda while remaining realistic about the possibilities of democratization in highly complex societies. Deliberative democracy also seems to be able to solve the old problem of harmonizing popular sovereignty and liberal rights, as well as offering a conception of egalitarian universalism that is as inclusive as possible, that is, that embodies a high degree of toleration in the face of modern pluralisms, including those of value and those of interests. Lastly, it overcomes an older theory's emphasis on the mere aggregation of interests and preferences by focusing on pre-voting deliberation geared toward a consensus that may lay claim to being presumptively more just and rational: more just, because it does not conceive toleration so as to

permit (retrospectively established) majorities to blatantly disregard minorities, and more rational, in that subjective preferences are subject to discursive revision.¹

It can do all these things at once, it is claimed, by making legitimate decisions depend upon a process of public deliberation whose necessary procedural constraints (largely) include those subjective rights of equal autonomy that modern societies came to accept as a result of their growing pluralism and secularization (Habermas, 1996, ch. 3). This unity of liberalism and democracy, or of private and public autonomy, is also claimed to be a response to a 'post-metaphysical' situation in which fundamental values must be 'political, not metaphysical', that is, in which comprehensive views of the good life may not become the basis of legitimate conceptions of democratic equality. Thus, equal subjective rights enjoy a certain fundamental priority vis-à-vis other political and moral values insofar as they can be grounded on the basis of allegedly non-comprehensive, impartial (neutral) procedures that specify the moral point of view, such as the conception of an ideal discourse situation or an original position. While fundamental liberal rights are thus removed from criticism insofar as any such publicly asserted criticism and deliberation must already presuppose them, the further institutionalization, interpretation, application and enforcement of rights to equal consideration is subject to public deliberation. Such deliberation still prioritizes (moral) questions of justice (and thus of equality) over (ethical) questions of the good life and corresponding comprehensive doctrines in order to make rational consensus possible.

Despite the apparent appeal of deliberative democracy, its egalitarian universalism remains subject to critiques that, given that they proceed from the same normative and/or sociological background, it cannot afford to dismiss. Here, I will consider three arguments that, while friendly to egalitarian universalism, purport to show the intrinsically aporetic character of the equal consideration of all. The claim that the inevitable historical insertion of universal-egalitarian norms leads to always particular and untransparent interpretations of grammatically universal norms may be combined with the claim that the logic of determination of political communities tends to generate exclusions. As I will attempt to show, the combination of these two claims lends specific force to the third argument according to which equal consideration perpetually requires the non-egalitarian project of understanding individuals on their own terms. Hence, taking off from a recent debate between Christoph Menke and Jürgen Habermas, I argue that the former is right to diagnose an aporetic self-reflection in egalitarian universalism, while agreeing with the latter about the indispensability of deliberative democratic frameworks for the defence of both egalitarian and non-egalitarian norms. In order to make my case, I will seek to expand Menke's arguments by way of an immanent reading of Habermas' moral and political work, a reading that, I hope, is critical but generous.

Let me begin by summarizing, in the first section (I), the arguments Menke, on behalf of Adorno's 'non-identical' and Derrida's 'singularity', has presented against the egalitarian universalism of a Habermasian or Rawlsian kind. I will then show (II) how Habermas defends the normative ideal of deliberative democracy against aporetic conclusions, in order then to intervene more fully in the debate. I will argue first (in

section III) that the inevitable institutionalization of universal norms in particular historically grown institutions, which Habermas recognizes, creates tendencies toward exclusions from grammatically universal and inclusive norms. In a second step (IV), I will combine the argument from inevitable particularization with the hermeneutic argument about the influence of unreflected background in deliberation. In the following section (V), I will take up in greater detail a third argument that is to establish the aporetic self-reflection of egalitarian universalism: the claim that understanding individuals and describing equal persons reciprocally require, and yet limit and transcend, one another. I will confront this claim with the assumption that communicative, deliberative practices can accomplish both projects without contradiction, and argue, in the final section (VI), that especially in situations of exclusions, the relation between these two remains conflictual.

I

In the critique of egalitarianism in general and Rawls in particular, Menke's overall point is that the peculiarly self-reflective character of modern ethics takes two forms that are not simply to be opposed to one another, as is usually done, but stand in a 'negatively dialectical' (Adorno) or 'aporetic' (Derrida) relation of mutual presupposition and reciprocal limitation: the forms of justifying the overarching norm of equality and of criticizing it from the perspective of individuality. The idea of equal respect for, and consideration of, all persons, perpetually requires, but is also limited by, the attempt to do justice to singularity, that of 'beings' and that of situations. Modern egalitarianism is characterized by the double claim that, first, equality is fundamental in that it is not itself grounded in, and thus limited by, other norms, but rather grounds and conditions all others. And, secondly, equality enjoys priority over non-egalitarian norms of singularity, such as solidarity, loyalty, friendship, love, pity, compassion, care, and so forth. According to Menke, this double claim to a fundamental priority of equality in relation to other, non-egalitarian values is mistaken and potentially self-defeating (Menke, 2000: 6f.). The claim as to equality's foundational status cannot be established without an infinite regress or a vicious circle, as what is to be justified in its foundational status – the notion of equality – is usually already presupposed in the very concept of normative justification (Menke, 2000: 9, 36ff.).² Instead of this circular process, we should conceive equality's ground to lie in its relation to norms of singularity, whose very insufficiency calls forth equal treatment: 'The principle of equality is right because (and insofar as) it leads to the determination of modes of action or regulations, which are good in the sense of taking into account the complaints of individuals' (Menke, 2000: 37).³ This already indicates that equality is here to lose its priority over other norms: the claim as to its priority neglects that equality, understood as the equal consideration of all, must engage in the non-egalitarian project of seeking to understand others on their own terms in order to achieve its aim. The idea of equality must then remain exposed to those values of singularity that it nonetheless implies, and not only in the application, but already in the necessary but perpetual re-formulation of equal justice (Menke, 2000: 20ff.).⁴

For instance, the concept of a person that is required by the practice of equality must be continuously redefined on the basis of, and in relation to,

the self-understanding of individuals. Political, liberal neutrality may not mean mere abstraction and independence from individual (ethical) conceptions of selfhood and the good life. As can be seen from the history of determinations of persons as bearers of equal rights, these determinations always excluded some individuals, such as those without Christian faith, the economically underprivileged, women, non-European races, and so on. Apart from appealing to nakedly strategic interests, these exclusionary results can be explained in two ways, a 'hermeneutic' and a 'conceptual' one. The hermeneutic argument insists on what Gadamer, somewhat polemically, called 'prejudices' (Menke, 2000: 20). Such preconceptions derive from our inevitable and perpetual situatedness in history and influence the way we fill central notions such as those of the 'person' with content. Since we are today in a situation that is not different in principle from that of our prejudiced ancestors, we too must continuously seek to expose our prejudgments in the effort to revise and reformulate fundamental political categories (which are thus 'essentially contested concepts'). It is this exposure and working-through that cannot do without the attempt to understand individuals and newly emerging group identities on their own terms.

The exclusions may, however, also be understood less as a result of what Heidegger called the historicity of our understanding, and more as a result of a conceptual logic: since these political categories need to be determined, and determination requires the distinguishing reference to that which they are not, they must of necessity exclude. Equal consideration needs to delimit the world-views as well as the beings to be considered equal. For example, in Rawls' political liberalism, unreasonable comprehensive doctrines as well as people unable to cooperate over time are totally or partially excluded, as Menke reminds us (Menke, 2002: 900).⁵ While such exclusions are necessary, they may not be 'naturalized' (Mouffe, 2000: 49), or, as Menke charges political liberalism, 'ignored' (Menke, 2002: 905; see also Connolly, 1999: 10f., 62ff.). Hence, political liberalism must flag its contestability and 'practice an attitude, a virtue, which is not exhausted by the equal consideration of all' but rather 'limits and transcends' it from the perspective of the individual lives who suffer from exclusions (Menke, 2002: 903).

As a result of the inherently aporetic nature of equality, justice remains 'to come' in Derrida's sense of an open-ended historicity (Derrida, 1992; Fritsch, 2002). Political neutrality, as well as universality, as Menke and Laclau agree, remains an 'empty place' (Menke, 2002: 902; Laclau et al., 2000: 58) that equality must seek to fill, but is conceptually barred from ever, finally and exhaustively, reaching.

II

Let us now turn to Habermas' response to Menke.⁶ Habermas reads Menke's interrogation of equality as a 'postmodern' critique of reason in its attempt to identify a self-contradiction, a paradox, in the idea of equality and its relation to individuals. Habermas' defence of the nonaporetical (and hence, in Habermas' terms, rational) idea of impartial equality essentially revolves around three claims. First, he claims that no conceptual argument (on the basis of which Menke identified the necessity of exclusions in the determination of equality), but only empirical investigations, can explain historical exclusions, such as those

of women, non-property holders, blacks, indios, the disabled, and so on. Particularist usurpations of the universal display an 'incomplete differentiation between the right and the good' but do not prove the paradoxical, and hence in principle interminable, nature of the liberal-democratic project in general (Habermas, 2003: 376f.). Instead, this project may still be conceived as an ongoing, single historical 'learning process' that corrects such particularist readings over time. Secondly, Habermas reasserts the priority of equality, this time not in a normative but a functionalist manner, by arguing that the ideas of equality and of individual concern cannot have an equal status when it comes to the legal and the political sphere. An ethics of care, for instance, cannot be legally and politically institutionalized since morality and law serve different functions in highly complex modern societies.⁷ Contrary to morality, law has a disburdening function in regard to the motivational and cognitive demands on individuals who are free to choose their conception of the good life: to stabilize behavioural expectations and achieve social order, legally enforced demands must be reciprocal. In addition to this sociological point, Habermas argues that legal obligations remain restricted to the form of legal norms, according to which all institutionalizable expectations are reciprocal (Habermas, 2003: 373).

Thirdly, and most importantly, Habermas brings in a specifically deliberative understanding of democratic legitimacy to counter the charges on behalf of singular others. Given a legislative process in which private and public autonomy complement one another, Habermas argues, singular individuals have already had the chance to articulate their views in the deliberative process. Hence, laws that specify and apply constitutional guarantees of equal consideration do not confront them as alien impositions that inevitably do violence to their self-understanding and their ideas of the good life. Insofar as the standpoint of impartial equality, understood as an inclusive deliberative process, includes the voices of individuals, it cannot be opposed to the perspective of singular others. So Habermas agrees with Menke's insistence on the need to perpetually redefine central notions, such as that of the 'equal person', in light of the complaints of the excluded. However, Habermas argues that this perpetual redefinition is best accomplished in the egalitarian framework of a deliberative opinion formation. The discursively procedural and legally institutionalized scaffolding of this framework consists in norms of universal equality on which any claim to inclusion on the part of the excluded must always already draw.

A further elaboration of the basic thrust of this third response is the claim that the recognition of, say, cultural differences in the public sphere requires a deep-seated change of mentalities that cannot be enforced by law, but that can be indirectly promoted by it, precisely through the egalitarian constitutional and institutional protection of a public sphere in which communicative action, and hence mutual perspective-taking, flourishes. If we adopt a deliberative conception of impartial and equal consideration (as opposed to the aggregative conception of classical liberalism), the perspective of individuals as singular others cannot be opposed to it, as it (at least ideally) has already entered into it. Habermas writes:

He who takes into view only the semantic properties of a universal norm

and then claims that they cannot do justice to the particularity of a case and to the individual context of a life history, overlooks the pragmatic meaning of the 'universality' of democratically justified norms. These kinds of norms have been discovered and adopted after a deliberative and decision-making process which justifies the presumption of rational, and in this sense universal acceptability.... Like classical liberalism, postmodern liberalism shuts out, along with the legislative process, the democratic component from the guiding idea of equal freedom and neglects the dialectical relation between private and civic autonomy. (Habermas, 2003: 379)

Thus, by neglecting the deliberative input into the legislative process, Menke does not register that individuals participate in the construction of the impartial viewpoint that is to guarantee equal consideration. Its potentially asymmetrical and non-neutral consequences for individuals who affirm different visions of the good life are then not an indication of the aporetic character of civic equality in its relation to individuals, but an expression of the very principle of equality. Rather than locating contradictions within the norm of equality, which may lead to a 'disarming ontologization' of merely empirical contradictions between valid norms and social facts, we must affirm all the more the deliberative understanding of tolerant norms of equality in order to give marginalized individuals a voice and lift the cover that liberal equality continues to place over the blatant injustice of social inequality (Habermas, 2003: 380f.).

III

Let me now assess the debate I presented. I believe that Habermas' insistence on the voices individuals have within communicatively structured public spheres goes a long way towards answering the long-standing charge that liberalism is exclusive and intolerant of otherness in its consequences. However, the insistence on the democratic legislative process, cast in a non-aggregative, deliberative form, also opens up further potentials for exclusions and intolerance, even if we grant that democratic self-rule requires a prior commitment to equal respect for persons.⁸ I will discuss this potential now by extending some of Menke's arguments. In doing so, I will indirectly draw more explicitly on their roots in deconstructive ethics, Adornoian dialectics, and Heideggerian hermeneutics; the references will be indirect because Habermas' concessions to these traditions allow us to proceed from within his own work.

If deliberation is to safeguard a place for the perspective of individuals, the danger of selective interpretations of central categories (e.g. persons) does not only enter the discourses of application of basic (legal) norms, but also enter their prior formulation and adoption. As we saw, Menke explains the inevitability of particularist interpretations of grammatically universal categories by two logics: the hermeneutic necessity of prejudgments informed by our historical immersion in traditions, and the conceptual necessity of determining the content of categories by delimiting it from others. These two logics, however, are neither fleshed out nor combined by Menke, as is often, and with good justification, done in 'poststructuralist' political theory.

Habermas' third response to Menke – the one that insists on the

deliberative construction of universal concepts – is so powerful because it displaces the conceptual construction of ideas of equality and personhood from theory to practice, that is, from determinations in advance of challenges from individuals to a deliberative political setting in which such challenges are always already presumed. In the public sphere, abstract definitions and particularist challenges intermingle in the construction of neutrality and impartiality. However, in this practical political sphere, conceptual and social logics, as well as ‘moral’ discourses about justice and ‘ethical’ discourses aiming at collective and individual self-understanding, may also interpenetrate. At the same time, the sphere of democratic practice implies, according to Habermas’ own understanding, the inevitable institutionalization and, thus, particularization of universal norms of equality. In fact, this particularization occurs by way of the institutionalization of norms that has been rendered inevitable by modernity’s accelerating pluralization, societal complexification, and uprooting of traditions – the very processes whose implications for normative theory Habermas has perhaps analyzed better than any other, and which motivated the turn to a supposedly neutral egalitarian universalism in the first place. Hence, I will recommend a combination of Menke’s hermeneutic and conceptual arguments, focused on the public sphere between normative theory and political practice to which Habermas himself points us and thus read out of Habermas’ work itself. The combination of these arguments upholds the aporetic, open-ended status of egalitarian universalism while defending its distinctive promise of best incorporating norms of singularity.

Before turning to the hermeneutic argument and its interlocking with the requirement of conceptual determination, let us then expand the latter – the logic of determination and exclusion – from the sphere of logical concepts into the public sphere where deliberation is to safeguard a place for norms of singularity. According to Habermas’ *Between Facts and Norms*, universal norms of equality, such as the rational norms of deliberation that are to guarantee equal consideration of all, constitutively demand their translation into enforceable law (the very same point on which Habermas’ second response to Menke relied). In modern conditions that witness the absence of a binding world-view and an increasingly complex society in which instrumental reason is given some room to allocate resources more efficiently, social integration requires that enforceable law stabilizes behavioural expectations by providing individuals with self-interested motives to comply with moral demands. Hence, the discourse principle of norms, according to which only those norms are morally obligatory to which all affected could have assented in rational deliberation, must be supplemented by what Habermas calls the ‘legal form’ (*Rechtsform*) to yield a principle of democratic popular sovereignty (Habermas, 1996: 121). By way of this legal form, universal moral norms guaranteeing inclusive and equal access to popular sovereignty become institutionalized in an effective system of law.⁹ While universal moral norms of equality regulate interactions of communicatively competent subjects in general, legal norms affect only members of concrete societies. To be effective, such norms must become positive and factual, and that means, historically specific: they must name ‘specific rights’ that ‘stem from the decisions of a historical legislature’ and ‘demarcate the bounds of membership’ (Habermas, 1996: 124).

Such factual demarcation, however, can never be fully legitimated from the viewpoint of validity, that is, in moral discourse alone. Dismissing the 'fiction of the contractualist tradition' (Habermas, 1998: 116) as inattentive to the historicity of the human condition, Habermas writes: 'One cannot explain in purely normative terms how the universe of those who come together to regulate their common life by means of positive law should be composed' (Habermas, 1998: 115). Rather, this composition requires the contingency and historicity of political events, that is, the 'boundaries of a political community' are defined 'by historical chance and the actual course of events – normally, by the arbitrary outcomes of wars or civil wars' (Habermas, 1998: 116). The inevitable exclusion of non-members in the course of the factual positivization of universal norms constitutes a contingent violence that cannot be justified normatively. And further, the institutionalization of norms requires the creation of a constitutional state that monopolizes the use of violence to change, implement and enforce the law (Habermas, 1996: 132f.).¹⁰ As a result, universal norms of equality are dependent on their determination by way of a contingent history, a determinate community and a coercive state. Universal normativity remains locked in a state of tension with the facticity of histories and institutions of power that always threaten to eclipse it. The relation between universal and particular, between norm and fact, is one of conflictual dependence: a fragile alliance indeed (cf. Markell, 2000).

Already this argument from institutionalization implies the inevitability of what we might term external exclusions from the reach of universal norms, exclusions which affect democratic states in the form of immigration and refugees. However, Habermas' reference to deliberation also results in at least strong tendencies toward internal exclusion which affect most visibly, but not exclusively, the formerly excluded who have attained formally full membership in democratic states (from slaves and the economically underprivileged to women and immigrants). If Menke's logic of determination affecting universal norms must be extended, with Habermas, to the political-institutional level, the extension may be expected to have consequences for the political deliberation that is to best permit the practical intermeshing of norms of equality and of singularity. For deliberation brings in the question of political affect, and political institutions the issue of motivation for compliance and participation. Charles Taylor noted that the democratic deliberation Habermas sees as most well designed to successfully incorporate individual self-definitions also demands some form of cohesion and shared identity on the basis of which a common will can be based (Taylor, 1998: 142ff.). In order to coalesce into a sovereign entity capable of making collectively binding decisions, deliberation requires mutual trust, understanding, a common language, and shared affective identifications. Even if we do not, from the beginning, identify the unity offering identification with a supposedly pre-political, ethnic, or national identity – an identity Habermas admits was necessary in the past to consolidate incipient liberal-democratic states, but is no longer (Habermas, 1998: 117) – strong exclusionary tendencies result from the conceptual requirement to determine such an identity.

This insight is not lost on Habermas, who always recognized the need for affective identifications with norms for the purposes of motivation

and democratic practice. While his strategy of 'constitutional patriotism' continues to hold out the promise of directly reattaching such affects to universal norms themselves, a close reading of his use of the concept and his interventions in specific political matters uncovers that such identification is always mediated by the institutions that we have seen as necessary to particularize universal norms (Markell, 2000). What Patchen Markell terms the 'factual particularization' of universal norms (Markell, 2000: 48), then, takes place both on the institutional and the affective levels: universal-egalitarian norms confront, and even co-constitute and interpellate (in the Althusserian sense), individuals as the rights and laws of a specific, bounded community with its own contingent history. It comes as no surprise, then, that the deliberation informed by constitutional patriotism is attached to the shared identifications with particular institutions. And it is again this inevitable mediation of the universal by the particular embodying it that creates tendencies toward exclusion, which in turn require the open-ended confrontation of universal norms of equality with norms of singularity.¹¹

IV

Let us now turn to Menke's second, 'hermeneutic' argument in his critique of Rawls' and Habermas' egalitarian universalism. This argument will move us from the historicity of institutions, whose particularity is indispensable for effective universal norms, including the historicity of affective identifications, to the historicity of deliberative discourses. While the argument about the uncircumventable institutionalization of universal norms already highlighted the ineluctability of a particular, contingent history of violence, the argument about the role of affect in deliberative settings presents us with an opportunity to recognize the workings of the historicity of hermeneutic prejudgments. For the common identity both partially established by, and needed for, the project of universalization through particular institutions is also one of a more or less common framework of interpretation inherited from historical traditions in which we find ourselves 'thrown' (as Heidegger's felicitous phrase has it). The becoming determinate and particular of universal norms that exist only through such becoming also introduces into deliberation along the lines of rational discourse a non-chosen frame of reference in which discussion takes place, a frame we can partly thematize but never (on rational grounds) affirm or dismiss in toto. If you will allow me this extension of a well-known Wittgensteinian metaphor: while the ('transcendentalpragmatic') norms of discourse provide the river banks between which the stream of discussion takes place, the shifting horizon is never entirely visible for those travelling on the water.¹²

According to Habermas, deliberative discourses are not only always embedded in particular contexts with their customs and traditions, but need to be so in order to draw on taken-for-granted background agreements for the purpose of establishing consensus. This embeddedness in cultural and historical contexts implies that unreflected – and, as Habermas says, in toto unthematizable (Habermas, 1987: 124ff., 131ff.) – background convictions thwart efforts at a fully transparent, fully post-traditional consensus, as they render some claims immune to discursive examination. If we take seriously Habermas' concessions in

this regard, his dialogical theory of justification, which underwrites the moral deliberation he turns against 'postmodern liberalism', is not a criterial, but a non-foundationalist, contextualist theory (despite the fact that Habermas usually reserves the latter term for his 'relativist' opponents). Justifying a belief or a norm to others – including normatively substantial conceptions of personhood, of equality, freedom, and so on

– means the bringing about of rationally motivated agreement. But such a rational agreement must rely upon prior agreements that are not rationally motivated, but taken for granted in the present context. The taken-for-granted beliefs function as regress-stoppers in a chain of justification without themselves being foundations in the sense of, for example, intuitively self-evident principles. In another context, these background beliefs may be thematized, criticized, and defended, but this new context will itself rest upon antecedent agreements. Hence, a final agreement that rests entirely upon rational, well-justified beliefs is impossible to achieve (Heath, 2001: 205): there will always be what Habermas calls 'this remainder of facticity' (Habermas, 1996: 226) regarding our immersion in the historical life-world.

The effect such facticity of embeddedness has on political equality and the concept of the person to which it applies, especially if its definition and application are made dependent on deliberation, is noted by Habermas himself in the exchange with Menke – without, for all that, conceding the intrinsic, rather than merely empirical, problems that go along with it:

The selective interpretations of norms – which are, according to their grammatical form, universal propositions, but which are, on the semantic level, by no means immune to particularist interpretations of the fundamental concepts employed therein, such as 'person' or 'human being' – demand an empirical explanation. This explanation, however, must extend to the semantics of the world view background [des weltanschaulichen Hintergrundes], which prejudices the interpretation of norms of equality in favour of dominant ideas of value [herrschender Wertvorstellungen]. (Habermas, 2003: 377)

According to the empirical reading that Habermas employs here, the possibility of unexamined prejudgments rendering such interpretations particular is always given. While we must make every effort to examine the prejudices informing our understanding of persons, we can never rule out that we have failed. The procedural constraints of deliberation imply universal and context-transcending validity-claims which are, of course, always fallible. Their principled fallibility, however, does not, on this reading, imply that 'selective', particularist interpretations of grammatically universal norms are conceptually necessary.

However, as we saw, Habermas himself claims that our communicative efforts to reach understanding are always informed by life-world backgrounds which can never be exhaustively examined, but which are needed to secure rational agreement in deliberation. If we combine this hermeneutic insight with the need to determine persons and to delimit legal communities, then we are located somewhere between 'empirical possibility' and 'conceptual necessity': on the terrain of undecidability. A dialogically achieved consensus on norms of equality and notions of

personhood will always be secured by antecedent agreements on 'the semantics of the world view background' – a semantics that provides a horizon against which our claims and aspirations gain intelligibility in the first place.¹³ These taken-for-granted beliefs are unreflected but necessary for consensus and group-building – in the past, we can think of the widely shared assumption that atheists are unfit to stand by mutually agreed normative obligations, thereby uniting the warring Christian factions; that women and non-European peoples are unable to reach the rationality required for democratic participation, thus uniting white males, and so on. Surely, we can thematize and criticize these past particularisms from the vantage of a historically later standpoint, and give an empirical account of how they emerged, but we cannot achieve universals, understood as dialogically justified norms of equality, without any such uniting backgrounds. As a result of this 'contextualism', an entirely transparent universal consensus, in which the universality of norms is brought to reflective awareness, is unattainable.

So Habermas is right to claim for moral discourses that we cannot be sure future interpretations of 'person' will be exclusionary, but this does not yet mean that all exclusions are merely empirical: as we saw, in the public sphere of legally bounded communities, exclusions follow an inescapable logic of determination that particularizes grammatically universal norms in specific institutions and histories. These in turn develop strong tendencies toward exclusion, and render decisions as to the non-exclusionary status cognitively undecidable. Not only can exclusions never be ruled out with certainty, but they are even very likely, and require us to take non-empirical reasons for their occurrence into account. Whether we wish to call this result 'paradoxical' (or 'postmodern' or 'reason-critical') may be beside the point (and betray a perhaps outdated inclination to divide up the world into moderns and postmoderns, what Foucault famously called 'Enlightenment blackmail').

That exclusionary injustice often depends on collective frames of interpretation which render the moral status of current norms and associated concepts of personhood cognitively undecidable indicates, however, that resistance to injustice not so much follows from an ideal toward which we are progressively marching, but rather proceeds according to the logic of determinate negation: in the past, the unequal treatment of women, homosexuals, and others, relied on the inequality that is justified when it comes to small children or to cases of severe mental handicaps. Collective learning processes, as Albrecht Wellmer has argued on the basis of similar considerations, consist not so much in the application of an ideal state to current practices of exclusion, but in the gradual recognition that such justification does not really hold for women, homosexuals, and others. The notion of progress toward an ideal which Habermas defends in his first response to Menke, then, fails to consider that the ideal might be unanticipatable or unthinkable. Progress, in Wellmer's words, might rather consist in the 'elimination of nonsense', not in the 'completion of sense' (Wellmer, 1986: 124, 127).¹⁴

V

So far we have considered two of the three arguments that seek to establish

the inherently aporetic nature of egalitarian universalism: the hermeneutic argument from historicity and the logic of determination. Let me now turn to the third argument, to wit, the claim that equal consideration internally requires a different project, one centered on understanding others from their own point of view without merely seeking to abstract from differences. As indicated, Menke believes that the latter project, while indispensable to equal treatment, both re-grounds and exceeds the egalitarian framework:

According to its own sense, an interminable, always to be enacted re-examination of the existing practices of equality already belongs to the egalitarian reflection. . . . As we have seen, however, we can enact this examination only if we, at the same time, repeat the formation process of our respective 'abstract' concept of persons. For this reason, we are inexorably involved in a different project in the revision of our practice of equality: in the understanding of individuals in their concreteness and difference. . . . But the understanding of individuals is not enacted from the normative perspective of equality. (Menke, 2000: 22f.)

What I now wish to indicate is, first, that the tension between a universal-egalitarian and a particularist approach to others in their very difference does not disappear once both are, with Habermas, transferred to a discursive, deliberative framework. Second, I wish to argue in the next and last section that it is the combination of the first two arguments, which we saw leading to exclusions, that provide the third argument with additional, perhaps its most salient, significance. To approach the first of these two argumentative sketches, let us look a bit more closely at Menke's redescription of the egalitarian project.

Menke conceives of the egalitarian reflection, as we have seen, as requiring both the description of 'persons' who are to be treated as equal, and the understanding of individuals in their own terms. Apart from the difference in content between these two practices, the crucial divergence consists in the perspective from which they are undertaken: while conceiving persons occurs from the perspective of all, understanding individuals and their plans of life proceeds from their own perspective. The former describes individuals in view of more abstract determinations they are presumed to share with all, while the latter suspends abstraction in the effort to enter their own hermeneutic self-relation, including the weight they attach to different elements of their lives. In short, 'a person is determined from the perspective of his or her equality with all others, whereas an individual is determined from his or her own perspective upon him- or herself' (Menke, 2000: 26).

Reasons for needing both perspectives reveal the interdependence of norms of equality and of singularity: the insufficiency of each taken by itself releases a call for its transcendence toward the other. Equality demands the determination of equal persons, which in turn must be able to absorb the shifting self-descriptions of individuals. The equally significant demand to do justice to individuals, however, must realize the ultimate arbitrariness of singling out some (e.g. co-nationals) at the expense of others, and thus calls for universally equal treatment (Menke, 2000: 83; cf. Derrida, 1990: 949; Derrida, 1999b: 33).¹⁵ In this sense, the two projects – doing justice to individuals and to all equals – depend on, and yet interrupt and limit, one another. This is why, for conceptual

reasons, the egalitarian project of morality and law cannot be referred to a utopian horizon or a regulative idea without addressing the necessity of interrupting the progress toward the ideal (Menke, 2000: 85; cf. Derrida, 1990: 965ff.; Bennington, 2000: 192f.).¹⁶

As indicated, it is plausible that the open and inclusive forms of communication Habermas advocates can absorb both the description of persons and the understanding of individuals. Especially the communicative processes in what Habermas describes as an 'anarchic' public sphere of free-floating opinion-formation without pressure to come to a binding agreement, can, and indeed must, accomplish both. This does not yet imply, however, that the two processes do not remain distinct: communication is such a wide term that it may be able to accommodate the understanding of individuals on their own terms and the formulation of equal persons as well as the justification of norms which apply to them equally. In the deliberation which Habermas recommends, all affected are to have equal chances of initiating discourses, setting the agenda, voicing concerns, and all such voices are to count equally. In addition, the cognitive demand for good reasons forces merely self-involved or self-interested participants to seek reasons which could convince all, thereby demanding that they take the perspective of all involved (cf. Benhabib, 1996: 71f.). Habermas rightly insists further that, against his understanding of Rawls' political liberalism, such perspective-taking requires that actual processes of communication be carried out (Habermas, 1990: 66f.; Habermas, 1998: 49ff.).¹⁷ Hence, communicative practices in civil society should, ideally, be able to justify norms of equality and determine personhood by taking into account individual self-descriptions, as communicated by those individuals themselves. In this sense, Habermas writes: 'The impartiality of judgment is expressed in a principle that constrains all affected to adopt the perspectives of all others in the balancing of interests' (Habermas, 1990: 65; original emphases).

The phrase, however, is ambiguous in our context: I may take the perspective of all others in the distributive sense of the perspective of each individual or the collective sense of the perspective of the common good. In the latter case, I take the perspective of the other only so as to determine what interests he or she shares with me; it would thus correspond to Habermas' insistence that norms be justified on the basis of universalizable interests.¹⁸ Alternatively, the discourse principle of justification constrains all participants to take the perspective of each and every person concerned from her or his own, singular point of view, in order to assess whether they could agree to proposed norms. That the latter is, for Habermas, an indispensable aspect of universalization is clear from another formulation of the universalization principle:

(U) A norm is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of each individual could be jointly accepted by all concerned without coercion. (Habermas, 1998: 42; original emphases)

The principle thus requires that all affected apprehend an institutionalized or widely followed norm's 'consequences and side effects' for all singular others and their value-orientations and interests. This suggests that all concerned adopt the perspective of each individual from his or her own point of view, in order to see what consequences a norm,

and its understanding of personhood, has for a person's way of life and self-understanding – the same line of reasoning that led Habermas to call for ideal role-taking in the ambiguous passage cited above. Thus, the universalization principle governing the democratic discourses that are to include the voices of individuals wavers between what Seyla Benhabib called the generalized and the concrete other (Benhabib, 1986), and corresponds to Menke's account of the perspective of all and the perspective of the singular other.

This brief consideration of Habermas' principle governing the equal consideration of all, then, not only shows that deliberative and democratic discussion, being such an inclusive term, may include both the description of persons and the understanding of individuals. Rather, the very formulation of the universalization principle suggests the necessity of at least including within equal treatment norms of singularity, if not, more aporetically, transcending the former practice toward the latter. Hence, Habermas' reference to deliberation in the debate with Menke not so much resolves the 'paradox' of equality but rather confirms it: according to its very sense, equal treatment demands that the perspective of singular others be assumed from their own points of view. One might here claim on behalf of Habermas that the ambiguity does not yet show a paradoxical duality at the heart of equality, for deliberative communication could once more accomplish both types of perspective-taking without intrinsic conflict. However, the very fact that Habermas seeks to cast both perspectives into different types of hierarchically related discourses appears to indicate his recognition that the inclusion of the singularizing perspective in universally equal treatment renders it aporetically self-reflected or 'mirrored' in Menke's sense. It is in his response to Benhabib and others that Habermas sought to resolve the ambiguity or duality of the universalization principle by distinguishing between discourses of justification focused on understanding all equally from the viewpoint of what is equally good for all, and subordinate (nachgeordnete) discourses of application, in which the viewpoint of the singular other must be taken (Habermas, 2005: 317ff.). I have argued elsewhere that this strategy of re-compartmentalization fails due to the kind of reasons Menke mentions as well as the more general problems affecting the distinction between justification and application.¹⁹ This strategy, then, fails largely because avoiding conflict between the universalist and the singularizing approaches also avoids their interdependence, and therewith the possibility of individual self-understandings making their way into justified norms and challenging dominant concepts of personhood.

VI

Thus, we have to adopt the perspective of others not only from the viewpoint of all, but from the viewpoint of each individual. As indicated, it is especially significant to adopt the perspective of those who have been excluded in the past. This brings me to my last point: since the becoming-enforceable of egalitarian norms requires their supplementation by a particularity that brings with it strong tendencies toward exclusion, Menke's insistence on egalitarian universalism's need for a different, singular project of understanding individuals becomes all the more plausible, even urgent. If we take into account the inevitable institutionalization of abstract procedures of moral deliberation, the resulting

external exclusions of non-members and strong tendencies toward internal exclusion add a number of complications to the insistence on communicative conflict resolution.

To begin with external exclusions, we saw that Habermas not only sees them as facts of empirical history, but finds it difficult to envision their absence, given the need for political determination and the well-rehearsed arguments against a world state. Thus, the moral requirement of involving all affected by norms and their consequences conflicts with the legal-political requirement of restricting deliberation to members of bounded democratic communities. As has been observed frequently, this conflict calls for resolution in the context of globalization processes in which many western democracies, including the European Union, restrict access to markets and to citizenship for political and economic refugees and would-be immigrants, while at the same time liberalizing financial markets and capital flows to increase the number of those affected by the neo-liberal economic policies of those same countries. Witness also the increasing interest of an emerging global civil society in, especially, US elections, due to the clearly perceived stake non-US citizens have in the outcome. Here, we would need from Habermas clarification of the relation between moral and legal-political fora, as well as models of global democracy that extend the reach of deliberative inclusiveness. Habermas is on the right track when he claims that the globalization of democracy has to catch up with economic globalization once we no longer have markets within nation-states, but nation-states in a global market (Habermas, 1999). It is clear, however, that a conflict will remain between the moral demand to include all those affected, and the political requirement to distinguish between members and non-members, a distinction, we saw, that is required for the enforceability of egalitarian-universal norms.

Regarding the often less perceptible exclusions internal to democratic states, we should begin by noting that taking the perspective of others, especially in the distributive sense, is not merely 'mutual', as Habermas routinely and without further ado has it, when communication and understanding are envisioned as taking place between unequal partners, and against a frame of reference that shores up a dominant identity. The frame in question typically includes a habitual, 'normalized' conceptualization of, first, the notion of personhood that underwrites institutionalized practices of equality; second, the agents expected to take part in public deliberation; and, third, the mode of communicative engagements in the public sphere. For example, western democracies still expect 'person' to refer primarily to heterosexual individuals, often heterosexual (and married) men; the public deliberator is usually expected to be reasoned, calm, dispassionate, and articulate; and deliberation is to be competitive but orderly, logical, and non-rhetorical (cf. Young, 1996; Young, 2000: 36f.). In addition, the frame often makes 'ideological' assumptions that, while potentially exclusionary or harmful to certain groups, are difficult to thematize because of their deep sedimentation in traditions and world-views (such as the assumption that work is good in itself, that productivity growth is an unquestionable good, and that women are more emotional than men). To absorb the project of understanding individuals, we must avoid conceptions of deliberation that deny the influence of frames of reference and emphasize the role that norms of singularity play in it.

And further, the dual accomplishment of communicative action – conceiving and justifying universal-egalitarian norms while doing justice to individuals and their self-descriptions – requires that the model of deliberation be aware of tendencies to exclusion that inhabit communication itself and that mutual perspective-taking between equals not be taken for granted. In situations of exclusions, the dominance of a certain identity and its frame of interpretation often goes unnoticed by the members of that community, though not by the excluded. The latter have often less trouble in taking the perspective of the dominant identity, so that equality in the process of exchanging perspectives should be a normative goal, but may not be assumed and encounters practical obstacles. Hence, it requires an extra effort on the part of members of privileged groups to do justice to individuals and their differences. The moral call to understand individuals on their own terms must be addressed to them above all. At the same time, and this time looked at from the perspective of marginalized voices, these voices might have to resort to practices that appear non-deliberative or merely disruptive to the center in order to call attention to the exclusionary processes. For instance, art and social activism, expressed in noisy and angry protests, may play important roles here (Young, 2001). This is so especially if, as is the case in deliberative publics that depend on privately owned media outlets, some dominant perspectives are supported by non-communicative interests and systemic, functional imperatives which routinely exclude undesirable perspectives (see Herman and Chomsky, 2002). Activist and artistic challenges to dominant frames may then not be dismissed easily, as is routinely the case in corporate media, as unreasonable, undeliberative, and particularistic.

This need for a different form of engagement not subsumable under rational discussion becomes of particular importance in relations of often unacknowledged differential status with regard to culture, class, power, and gender. In order to encourage the assumption of excluded or marginalized points of view – that is, the understanding of excluded individuals as opposed to the construction of generalizable norms and concepts of person – communication must first loosen affective identifications with particular institutions that mediate universal norms. Only then can communication seek to encourage the understanding of individuals. This might require less rationalistic, more affective modes of engagement, such as narratives. Here, it is important to emphasize less the justificatory, rational processes of public deliberation, and more the often unilateral, asymmetric adoption of perspectives that is irreducible to the process of coming to an agreement. In addition, in situations of exclusion in particular, understanding others is often more important than, and a prior requirement of, justifying norms and concepts of personhood acceptable to all.

Thus, the key concepts of equality and personhood must remain essentially contested and open-ended. Due to its 'internal heterogeneity', the logic of equality requires its constant interrogation from the perspective of singular individuals. Obviously, such a perspective has to prevent nihilistic conclusions: a 'disarming ontologization' (Habermas, 2003: 381) of particularist readings of universal categories may not undermine efforts to redefine it. But unless we wish to resuscitate the doctrine of

politically necessary illusions, we have to face up to a democracy as well as a justice that remain to come.

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Notes

1

Josh Cohen would add that deliberative democracy, precisely by including such intersubjective revision, also allows for more individual autonomy. See Cohen (1988); Weinstock (2001).

2

Menke does not elaborate on this point. However, for a similar argument, see Geuss (1999).

3

All translations from Menke as well as from Habermas (2003) are my own.

4

As becomes apparent here, in order to allow what I am calling a norm of singularity (doing justice to individuals on their own terms) to play this indispensable role in egalitarian universalism, Menke severs the norm from the motivational and affective ties that are usually associated with relations such as care, love, and friendship (Menke, 2000: 43f.). In addition, he does not agree with Levinas and Derrida that doing justice to individuals requires the complete absorption in their perspective, so as to speak their language; rather, understanding individuals, he claims, is sufficient (Menke, 2000: 84ff.). This perspective is consistent with Iris Marion Young's insistence on the dangers of mutual perspective-taking as opposed to merely seeking to understand others (Young, 1997). I will not go into this discussion here.

5

Following Menke and Habermas, I leave aside for the moment the issue of excluding clearly illiberal, anti-egalitarian conceptions of the good life.

6

Habermas responds mostly to Menke's critique of Rawls (Menke, 2002), with only sporadic references to Menke's book-length treatment of egalitarian universalism (Menke, 2000; see also the revised version: Menke, 2004). Taking the latter term to cover both his own theory and also Rawls', Habermas defends Rawls, but from the viewpoint of his own theory of deliberative democracy. This strategy might seem surprising, given that, as we will see, Habermas largely criticizes what he calls 'postmodern liberalism' for its neglect of the internal relation between democracy and liberalism, more or less the same charge he levelled at Rawls (Habermas, 1998: 50f., 67ff.). We can only speculate whether this strategy implies a reconsideration of the critique of Rawls, or a joining of forces in the face of a perceived common foe.

7

Primary defenders of the ethics of care agree that it must be restricted to

the private realm: Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Virginia Held, *Feminist Morality* (Chicago, IL: University of Chicago Press, 1993); Marilyn Friedman, *What are Friends For?* (Ithaca, NY: Cornell University Press, 1993), pp. 87–8; Nel Noddings, *Caring, a Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984). See, however, Michael Slote, 'Justice and Caring', *Social Philosophy and Policy* 15 (1998): 171–95. See also his *Morals From Motives* (Oxford: Oxford University Press, 2001), 92–113, and Scott D. Gelfand, 'The Ethics of Care and (Capital?) Punishment', *Law and Philosophy* 23(6) (November 2004): 593–614.

8

See Charles Larmore's critique of Habermas (Larmore, 1999). Menke makes the more general point that, not only can equal respect not be derived from a conception of autonomy, as Habermas' discourse rule (D) implies, but equality cannot ground itself without presupposing itself (Menke, 2000: 8f.).

9

In his treatment of the relation between law and justice, Derrida simply assumes, with Pascal, the necessity of translating justice into enforceable law, without giving the functional justification Habermas provides (Derrida, 1990: 937).

10

Both the founding of such a state and its monopoly cannot be fully justified, as Derrida and Benjamin have argued (Derrida, 1992; Benjamin, 1979; see also Fritsch, 2005: 107ff.). From the insight into the factual particularization of universal norms and the resulting status between facts and norms, Habermas comes close to drawing the same conclusion as did Derrida: the justification of exclusionary boundaries and the monopolization of violence remain deferred to a non-present future that involves us in a forever incomplete project of universalization: 'Every earthly monopoly on violence, even that of a world government, has finite dimensions, which remain provincial in comparison with the future and the universe' (Habermas, 1996: 124).

11

I leave the question open whether the logic of conceptual determination on which Menke draws may be extended to a social ontology that takes the (cultural, and at times, as in the case of Laclau and Mouffe, socioeconomic) struggle for recognition to include a logic of identity and difference. According to this logic of inclusion and exclusion, an identity can establish itself only in relation to others (*omnis determinatio est negatio*, as Hegel had Spinoza say), with the result that every identity is both internally differentiated and requires an other whose exclusion it must perpetuate and re-negotiate (see Connolly, 1991: 64ff.; Mouffe, 2000). If the conceptual logic of inclusion and exclusion could be transferred to social and political ontology, what Charles Taylor has diagnosed as (strong but mere) tendencies toward exclusions that precisely stem from the deliberative requirement of cohesion and knowing and trusting one another (Taylor, 1998), may be seen as conceptually inevitable. The argument would be that a collectivity inherently requires, especially for the sake of democratic struggles and their motivation, the existence of some other in contrast to which it can define itself. While Mouffe makes this claim on the basis of Carl Schmitt and Derrida's logic of the 'constitutive outside', Derrida

himself rejects the Schmittian logic of 'us' and 'them' as being too sure as to who the 'enemy' and who the 'friend' is (Derrida, 1999a: 114ff.). Derrida appears to favour a non-antagonistic reading of the logic of identity and difference that does not yet commit us to an adversarial understanding of the relation between the 'us' and the 'them' – it could be some combination of admiration, friendship, competition, resentment, hostility, etc. The Derridian argument also does not yet dispute the possibility of universally human solidarity, as the other may be internal to the human, or non-human. See Abizadeh (2005).

12

Such an inherited frame of reference, while necessary in general to motivate action and agreement, may nonetheless be 'oppressive' (arguably, a Puritan-derived work ethic would be a case in point). See Iris Marion Young's concern about the ways in which an ideological frame of reference structures deliberation and precipitates agreement even against the (strategic and moral) interest of the oppressed. Young's claim that, in conditions of unequal power relations, such frames are best disrupted not by deliberation itself but by political activism, deserves to be taken seriously (Young, 2001). Political activism would here serve a role that art played for most members of the earlier generation of the Frankfurt School, Adorno in particular: that of disrupting well-oiled frames of reference that serve the powers that be.

13

For Heidegger and Gadamer, of course, the very unreflectedness of the background is a necessary condition for the possibility of what is thematized coming to light: disclosure requires withdrawal in the same sense in which a foreground cannot be thought without a background. With primary reference to Gadamer, see Odenstedt (2003).

14

As I have argued elsewhere, that Habermas tends to neglect his own concession to the phenomenological account of the life-world and the hermeneutic conception of historicity may be explained by the fact that his transcendental inquiry into the enabling conditions of communicative action in general and argumentative discourse in particular – conditions which would have to include the life-world background as well as, perhaps more controversially, embodiment in a sense to be specified – relies on the logic of performative contradictions to identify such conditions (Fritsch, 'Practical Reason Reconstructed and Deconstructed. A Reading of Habermas', MS; see also Connolly, 1999: 10, 38, 41). As a result, conditions that, already at a conceptual level, lie in conflict with one another, such as those of rational decidability and historicity, are screened out from the beginning.

15

Largely for this reason, Adorno, Levinas and Menke claim, the ethical impulse to solidarity with the unique other is, in fact, the origin of the moral law of equality (cf. Menke, 2000: 84).

16

This is why Habermas is wrong to attribute to Derrida an 'undefined messianic hope' that could be described in positive terms, for example, as the 'outstanding, expanded, and domination-free understanding of liberal

equality' (Habermas, 2003: 371). This attribution misses the difference between what Derrida calls 'messianism' (which projects such outstanding horizons of expectation) and 'messianicity' (which names the contradictory status of such horizons). See Derrida (1994: 167ff.). Thus, Habermas misreads Derrida when he claims that Menke's (and Laclau's) 'anti-utopian' (Habermas') conclusion is not shared by Derrida. Elsewhere, I have argued that it is better to speak of messianicity as 'post-utopian' (Fritsch, 2005: 96ff.).

17

In their debate, Rawls in essence responds by claiming that such actual processes of communication, while not situated at the level of the original position, are nonetheless demanded at the prior level of reflective equilibrium, which first agrees on the procedure of the original position (Rawls, 1996: 382ff.).

18

Even this understanding is ambiguous: an interest may be collectively or distributively universal, in the sense that it either indicates that parties hold a single interest in common (e.g. the avoidance of global environmental catastrophe), or that each party has its own interest (e.g. in avoiding pain), which happen to overlap. See Finlayson (2000).

19

See 'Equality and Singularity in Justification and Application Discourses', MS. There, I argue that Habermas' strategy of confining the perspective-taking of each singular individual (gen. obj. and gen. subj.) to application discourses, while restricting to justification discourses the perspective of what is equally good for all, fails to consider that the former is already needed at the level of justification. For the more general problems affecting the justification-application distinction, see Wellmer (1986) and also Arash Abizadeh, 'Pragmatic, not Metaethical: a Critique of the Habermas/Günther "Justification vs. Application" Distinction', paper presented at the 12th Critical Theory Roundtable, Montréal, October 2004.

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