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# HABERMAS'S DISCOURSE THEORY OF LAW AND THE RELATIONSHIP BETWEEN LAW AND RELIGION

MARK MODAK-TRURAN\*

## INTRODUCTION

The relationship between law and religion has become the subject of a sustained and robust debate.<sup>1</sup> However, unlike earlier theological attempts to ground law in religion or the Divine,<sup>2</sup> participants in the modern debate rarely, if ever, argue for a theological or religious legitimation of law. Either implicitly or explicitly, there appears to be a modern consensus among legal scholars and philosophers that the world has been disenchanting.<sup>3</sup> The world can no longer be viewed as an integrated, meaningful whole under a comprehensive religious or metaphysical worldview, and law can no longer be legitimized by its religious or metaphysical foundations.

Jürgen Habermas's discourse theory of law attempts to provide a justification for law that explicitly adopts the modern consensus that law must be legitimized independently of a religious or metaphysical

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<sup>1</sup> See, e.g., MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* (1997); JOHN RAWLS, *POLITICAL LIBERALISM* (paperback ed. 1996); FRANKLIN I. GAMWELL, *THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND DEMOCRATIC RESOLUTION* (1995); KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995); STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* (1993); HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* (1993); MICHAEL J. PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991); KENT GREENAWALT, *RELIGIOUS CONVICTIONS AND POLITICAL CHOICE* (1988); HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

<sup>2</sup> See, e.g., St. Thomas Aquinas, *Summa Theologica*, I-II, q. 91, a. 2-3, in *BASIC WRITINGS OF ST. THOMAS AQUINAS 749-52* (Anton C. Pegis ed., Random House 1945) (Aquinas argues that human law is not legitimate unless it meets the dictates of natural law which are "nothing else than the rational creature's participation of the eternal law [Divine Reason]."); SAMUEL PUFENDORF, *ON THE DUTY OF MAN AND CITIZEN* 37 (James Tully ed., Cambridge 1991) (Although he argues that the sociality required for a stable state is based in part on self-preservation, Pufendorf argues that "the ultimate sanction of duties towards other men comes from religion and fear of the Deity, so that a man would not even be sociable if he were not imbued with religion.").

<sup>3</sup> But cf. Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for The Worse?*, 41 *STAN. L. REV.* 871, 873 (1989) (Although addressing more directly the relationship between metaphysics and interpretivism, Moore claims that "metaphysics has been prematurely interred. The metaphysical debate over realism is both meaningful and relevant to practical concerns, in law as elsewhere.").

worldview.<sup>4</sup> Relying on Max Weber's social theory and sociology of law, Habermas claims that law requires a postmetaphysical justification because the increasing rationalization of Western culture has disenchanting the world. Society has become differentiated into many spheres of life (including economics, bureaucratic administration, law, and morality). These spheres are characterized by various types of objectified rationality that are oriented toward different values or goals and that require different bases of, or reasons for, legitimation. Once religious and metaphysical worldviews have been eliminated as a justification for law, law must be legitimated in a seemingly paradoxical manner: by its legality (i.e., by positive enactment according to certain formal procedures). Habermas concludes that "[t]he democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy," but he recognizes that this conclusion raises the question of "what provides this procedure with its legitimating force?"<sup>5</sup> Thus, Habermas acutely recognizes that this descriptive account of modern society and law raises the normative question: What is the source of legitimation for modern law?<sup>6</sup>

Despite his reliance on Weber's social theory, Habermas rejects Weber's positivistic theory of legitimation as circular and modifies Weber's theory of societal rationalization. Habermas proposes an alternative postmetaphysical or "posttraditional" explanation (critical social theory)<sup>7</sup> of legality as the basis for legitimizing law in a rationalized

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<sup>4</sup> In jurisprudence, legitimation or justification has to do with the question: What makes a law valid? Habermas claims that "[i]n the legal mode of validity, the facticity of the *enforcement* of law is intertwined with the legitimacy of a *genesis* of law that claims to be rational because it guarantees liberty." JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 28 (William Rehg trans., 1996) (1992) (emphasis in original). Although the following discussion will focus primarily on the normative aspect of rational legitimation, it assumes that legal validity involves both a factual identification of a rule as something enforced in a legal system and a rational normative justification or legitimation of that rule.

<sup>5</sup> *Id.* at 448.

<sup>6</sup> One commentator has remarked that "the theoretical work of Habermas can be understood as an attempt to grasp the moral nature of a law that has lost its traditional moral foundations in a religious world view or some other metaphysical order." Klaus Eder, *Critique of Habermas's Contribution to the Sociology of Law*, 22 *LAW & SOC'Y REV.* 931, 932 (1988). In *Between Facts and Norms*, Habermas highlights this tension between a descriptive account of law as a social fact (a mode of coercive social integration) and a normative account of law as justified by a claim of reason (an intersubjective agreement by all those affected). He attempts to develop this dual perspective to both "take the legal system seriously by internally reconstructing its normative content, and describe it externally as a component of social reality." HABERMAS, *supra* note 4, at 43.

<sup>7</sup> For a powerful argument that proposing a legal theory also involves proposing a social theory, see David E. Van Zandt, *The Relevance of Social Theory To Legal Theory*, 83 *Nw. U. L. REV.* 10 (1989). This article functions as an introduction to an entire symposium on "Law and Social Theory" which includes an article by Jürgen Habermas, (continued)

society. Like Weber, the legitimation or justification of law must come from the rationality within its own sphere because law cannot be reduced to politics or morality. Unlike Weber, law must be legitimated by the intersubjective agreement of all affected because the process of rationalization has also differentiated the objective, social (intersubjective), and subjective dimensions of the lifeworld. Habermas thus proposes a discourse theory of law to explain how rational intersubjective agreement can provide for a legitimation of law which is related to, but distinct from, politics and morality, but at the same time, avoid the circularity of Weber's explanation. As a result, the discourse theory of law attempts to bridge the gap between the descriptive account of law provided by the sociology of law (i.e., law as merely the command of the sovereign backed by threats or sanctions—observer perspective) with the normative account of law provided by the philosophy of justice (law as something rationally justified so that all citizens should find it acceptable—participant perspective).<sup>8</sup>

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*Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 Nw. U. L. REV. 38 (1989), reprinted in JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 195-215 (Christian Lenhardt & Sheirry Weber Nichol森 trans., 1990) [hereinafter *Habermas, Moral Consciousness*]. Note that for Habermas the concept of societal rationalization serves both as a general description of the character of modern societies but also as a standard by which modern societies can be critically evaluated (i.e., critical social theory). In this respect, Habermas states that “[t]he theory of communicative action is not a metatheory but the beginning of a social theory concerned to validate its own critical standards.” 1 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION xxxix (Thomas McCarthy trans., Beacon Press 1984) (1981) [hereinafter 1 *Habermas, Theory of Communicative Action*].

<sup>8</sup> This gap occurs not just because of the difference between descriptive (external) and normative (internal) perspectives on the question of legal validity but more importantly because Habermas maintains that all philosophical “attempts at discovering ultimate foundations,” either “ontological hopes for substantive theories of nature, history, society, and so forth” or “transcendental-philosophical hopes for an aprioristic reconstruction of the equipment of a nonempirical species subject, of consciousness in general . . . have broken down.” 1 *Habermas, Theory of Communicative Action*, *supra* note 7, at 2 (citation omitted). Rather, philosophy now focuses on “the formal conditions of rationality in knowing, in reaching understanding through language, and in acting . . . . The theory of argumentation thereby takes on special significance; to it falls the task of reconstructing the formal-pragmatic presuppositions and conditions of an explicitly rational behavior.” *Id.* (emphasis added). Consequently, understanding the substantive conditions of human existence (objective, social and subjective worlds) becomes an empirical task of inductively arriving at the best social theory for explaining the current conditions of modern society. Together, the “formal explication of the conditions of rationality and empirical analysis of the embodiment and historical development of rationality structures” will give us some insight into a new form of rationality which bases “the rationality of an expression on its being susceptible of criticism and grounding.” *Id.* at 2, 9. To understand law properly requires both a formal explication of the conditions of legal validity (philosophy of justice) and an understanding of how the substantive conditions of modern society affect the distinctive character of modern legal systems  
(continued)

Despite the many illuminating discussions of Habermas's discourse theory of law, the literature has been virtually silent regarding Habermas's claim that the legitimation of law must be postmetaphysical such that the law must be legitimized independently of a religious or metaphysical worldview.<sup>9</sup> By contrast, the following discussion attempts to summarize and critique Habermas's discourse theory of law and to put into question the modern consensus that law can be legitimized independently of a religious or metaphysical worldview. First, I will summarize Weber's theory about the rationalization of society and Habermas's modifications of this theory. Second, I will set forth Habermas's discourse theory of law and his critiques of other posttraditional theories of justification. Subsequently, I will critique Habermas's discourse theory of law and raise questions as to whether a posttraditional legitimation of law is possible.

### I. THE RATIONALIZATION OF SOCIETY

Habermas takes Weber's theory about the increasing rationalization of Western culture and law as a starting point for his analysis of the modern problem of legitimizing law.<sup>10</sup> Weber's theory of rationalization includes a very elaborate typology of the different ideal types of rationality (e.g., subjective, objective, objectified, conceptual, instrumental, substantive, and formal) that he finds in Western culture. For our purposes, it will serve to offer a general understanding of Weber's theory (and Habermas's modifications of it) and how it raises the question of the source of legitimation for modern law.

Weber argues that Western culture is characterized by a "specific and peculiar rationalism,"<sup>11</sup> which has resulted in the "disenchantment of the world."<sup>12</sup> Before disenchantment, religious and metaphysical worldviews gave comprehensive explanations of the whole of life; life was not yet differentiated into spheres. Science, the only form of objective knowledge, then showed that religious and metaphysical worldviews could not provide a "rational" explanation of the world. Science provided the

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(sociology of law). Thus, Habermas's philosophy of justice and sociology of law together form a critical legal theory that can be used as a standard to evaluate modern legal systems.

<sup>9</sup> See e.g., Symposium, *Habermas on Law and Democracy: Critical Exchanges*, 17 CARDOZO L. REV. 767-1684 (1996).

<sup>10</sup> Habermas's attempt to build on Weber's analysis of rationality and the rationalization of society in his social theory makes sense because Habermas asserts that social theory is a theory of social action (social integration through human action) and that human action is based on reason (in the broad sense that humans act with self-understanding or consciousness).

<sup>11</sup> MAX WEBER, *Author's Introduction to MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 26 (Talcott Parsons trans., 1958) (1920).

<sup>12</sup> MAX WEBER, FROM MAX WEBER 155 (H. H. Gerth and C. W. Mills eds., Oxford Univ. Press, Galaxy 1958) (1946) (internal quotation marks omitted).

only remaining "reasoned view of the world."<sup>13</sup> However, science also disclosed to us that the world process is a "meaningless infinity . . . on which *human beings* confer meaning and significance."<sup>14</sup>

[T]he fate of an epoch which has eaten of the tree of knowledge is that it must know that we cannot learn the *meaning* of the world from the results of its analysis, be it ever so perfect; it must rather be in a position to create this meaning itself.<sup>15</sup>

In other words, Weber claims that modern individuals are faced with the knowledge of an absolute division between objectively rational facts and subjectively rational values; all values are subjective and are only subjectively valid. Further, the different value-orientations (traditional, affectional, value-rational, and instrumental) are inevitably in conflict. Although objective scientific rationality can determine the "technically correct" means to a given end, it cannot determine the "correct" value-orientation. Value-orientations are based on an irrational, arbitrary, and criterionless choice. As a result, science can make objectively rational judgments for only a narrow range of technical problems where the end is precisely given and the only decision concerns choosing the most rational means. Most important social problems, however, involve choices between competing ends or values and between means which have undesired secondary consequences. These problems require subjectively rational choices concerning what ends to pursue and what means to employ, which are beyond objective scientific rationality. Thus, the most distinctive type of rationality defining Western culture, scientific (instrumental or means/end) rationality, cannot solve its most important problems.<sup>16</sup>

In addition, the "specific and peculiar rationalism of Western culture" has resulted in the differentiation of society into numerous spheres of life or objectified forms of rationality.<sup>17</sup> Objectified forms of rationality refer

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<sup>13</sup> *Id.* at 355.

<sup>14</sup> MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 81 (Edward A. Shils & Henry A. Finch eds. & trans., 1949) (emphasis in original).

<sup>15</sup> *Id.* at 57 (emphasis in original).

<sup>16</sup> For Habermas's and other Frankfurt School thinkers' critiques of instrumental reason, see *1 Habermas, Theory of Communicative Action, supra* note 7, at 366-99.

<sup>17</sup> Weber's use of the term objective rationality is ambiguous. It can be interpreted as meaning both objectively correct action and as supra-individual or institutionalized rationality. Thus, I have used the term "objectified" to denote "objectivity" in the institutionalized sense. In addition, please note that Habermas refers to Weber's "spheres of life" both as spheres, *id.* at 243-71, and as "cultural subsystems," *id.* at 72. I will use the term spheres to promote continuity with the discussion of Weber.

to the institutionalized forms of rationality which become embodied in the social order and confront individuals as something external. Some common examples of this are the objectified rationality of industrial capitalism, formalistic law, and bureaucratic administration. In *The Protestant Ethic and the Spirit of Capitalism*, Weber comments:

There is, for example, rationalization of mystical contemplation, that is of an attitude which, viewed from other departments of life, is specifically irrational, just as much as there are rationalizations of economic life, of technique, of scientific research, of military training, of law and administration. Furthermore, each one of these fields may be rationalized in terms of very different ultimate values and ends, and what is rational from one point of view may well be irrational from another. Hence rationalizations of the most varied character have existed in various departments of life and in all areas of culture. To characterize their differences . . . it is necessary to know what departments are rationalized, and in what direction.<sup>18</sup>

Moreover, this passage emphasizes both the variety of differentiated fields (i.e., "spheres of life") resulting from the rationalization of society and the multiplicity of historical processes of rationalization (both internal and external to the spheres) which are proceeding at different rates and are furthering different ends and values.

Weber also describes the effect of the rationalization of Western culture on the bases of legitimation within these differentiated "spheres of life" such as law. He recognizes four basic types of legitimation: 1) traditional; 2) affectual (emotional) faith; 3) value-rational (including ethical); and 4) legal (positive enactment).<sup>19</sup> Rationalization, however, has minimized the first three types. "Today," he claims, "the most common form of legitimacy is the belief in legality, the compliance with enactments which are *formally* correct and which have been made in the accustomed manner."<sup>20</sup> In other words, legality is that which is produced from following the recognized procedures constituting positive enactment; no substantive criteria of justice must be met. Legality, in this sense, constitutes legitimacy because either: "(a) it derives from a voluntary agreement of the interested parties; [or] (b) it is imposed by an authority

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<sup>18</sup> WEBER, *supra* note 11, at 26.

<sup>19</sup> See 1 MAX WEBER, *ECONOMY AND SOCIETY* 36 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans. 1978).

<sup>20</sup> *Id.* at 37 (emphasis in original).

which is held to be legitimate and therefore meets with compliance."<sup>21</sup> The distinction between legitimacy by voluntary agreement and by the imposition of authority is relative. For example, in majoritarian democracies, the majority often imposes its agreement on the dissenting minority.<sup>22</sup> In addition, legality—whether democratically determined or not—can be reduced to compliance with the procedures believed to be legitimate in the existing regime.<sup>23</sup> Thus, in a rationalized society, many spheres of life—economic, bureaucratic, and legal—will be legitimized by legality because the other bases of legitimation whether value-rational (moral, religious, metaphysical), traditional, or emotional have been substantially diminished by the rationalization of society.

Habermas agrees with much of Weber's analysis of the rationalization of Western society.<sup>24</sup> He agrees that the world has been disenchanting by religious and metaphysical worldviews and that law, like other spheres, has been differentiated and requires its own rational justification or legitimation. However, Habermas further proposes the following:

the hypothesis that the socially integrative and expressive functions that were at first fulfilled by ritual practice pass over to communicative action; the authority of the holy is gradually replaced by the authority of an achieved consensus. This means a freeing of communicative action from sacrally protected normative contexts. The disenchantment and disempowering of the domain of the sacred takes place by way of a linguistification of the ritually secured, basic normative agreement; going along with this is a release of the rationality potential in communicative action. The aura of rapture and terror that emanates from the sacred, the *spellbinding* power of the holy, is sublimated into the *binding/bonding* force of criticizable validity claims and at the same time turned into an everyday occurrence.<sup>25</sup>

In addition, Habermas adds the concept of lifeworld which signals "*the decentration of an egocentric understanding of the world.*"<sup>26</sup>

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<sup>21</sup> *Id.* at 36.

<sup>22</sup> *See id.* at 37.

<sup>23</sup> *See* Jürgen Habermas, *Law and Morality*, in 8 THE TANNER LECTURES ON HUMAN VALUES 219 (Sterling M. McMurrin ed. & Kenneth Baynes trans., 1988).

<sup>24</sup> *See, e.g.,* 1 Habermas, *Theory of Communicative Action*, *supra* note 7, at 143-271.

<sup>25</sup> 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 77 (Thomas McCarthy trans., 1987) (emphasis in original).

<sup>26</sup> 1 Habermas, *Theory of Communicative Action*, *supra* note 7, at 69 (emphasis in original).



Habermas claims that in communicative action, "the members of a communication community demarcate the one objective world and their intersubjectively shared social world from the subjective worlds of individuals and (other) collectives."<sup>27</sup> Thus, both the spheres or cultural subsystems and the lifeworld are rationalized in modern life.

Habermas also rejects Weber's claims that instrumental (means/ends) rationality is the only "objective" rationality and that value-rationality is irrational. To the contrary, Habermas argues that morality can be rationally grounded,<sup>28</sup> and that all "practical questions can be judged impartially and decided rationally."<sup>29</sup> This is one of Habermas's biggest disagreements with Weber. He claims that

Weber goes too far when he infers from the loss of the substantial unity of reason a polytheism of gods and demons [*Glaubensmächte*] struggling with one another, with their irreconcilability rooted in a pluralism of incompatible validity claims. The unity of rationality in the multiplicity of value spheres rationalized according to their inner logics is secured precisely at the formal level of the argumentative redemption of validity claims. Validity claims differ from empirical claims through the presupposition that they can be made good by means of arguments. And arguments or reasons have at least this in common, that they, and only they, can develop the force of rational motivation under the communicative conditions of a cooperative testing of hypothetical validity claims. Of course, the differentiated validity claims—to propositional truth, normative rightness, sincerity and authenticity, as well as the claim to well-formedness or intelligibility related to symbolic construction in accordance with rules—call not merely for reasoning in general, but for reasons in a form of argumentation typical of each.<sup>30</sup>

In other words, the societal process of rationalization has differentiated different spheres which function according to different validity claims, but it has not resulted in an "iron cage" or a reification of subsystems. We can still validate claims within these separate spheres and the values to which these spheres are directed (i.e., no loss of meaning). Communicative action coordinates action through a process of reaching

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27 *Id.* at 70.

28 *See, e.g., Habermas, Moral Consciousness, supra* note 7, at 43-115.

29 HABERMAS, *supra* note 4, at 109.

30 *1 Habermas, Theory of Communicative Action, supra* note 7, at 249.

understanding and agreement among social actors. Coordinated action is not forced from the outside (a constriction on individual freedom) nor is it merely a *de facto* accord (strategic agreement to achieve individual successes). Rather, communicative action ensures the full release of human potential and maximizes individual freedom. Thus, the rationalization of Western society, when properly understood, will lead to the emancipation, rather than enslavement, of individuals as the rationalization of society increases, and intersubjective rationality and communicative action will provide a rational grounding for law, morality, and politics.<sup>31</sup>

Finally, Habermas also disagrees with Weber's claim that law and morality are completely separate. As will be shown below, law and morality complement one another. Although law cannot be reduced to a deficient morality, it requires the impartial moral point of view as part of the self-regulating procedure that checks its own rationality.<sup>32</sup> Consequently, "[w]ith the positivity of law the problem of justification did not disappear, it only shifted to the narrower basis of a post-traditional, secular ethic, decoupled from metaphysical and religious worldviews."<sup>33</sup>

## II. LEGALITY AS LEGITIMATION

Although Habermas adopts much of Weber's theory of the rationalization of society, his discourse theory of law attempts to provide a substantially different and arguably non-circular interpretation of the paradoxical emergence of legitimacy from legality. Legality must provide the legitimation for modern law because the rationalization of society has eliminated religious and metaphysical justifications and has differentiated law from other spheres of life such as morality and politics. Consequently, law cannot be reduced to morality (like some natural law theories) or political power (like Critical Legal Studies), but the legitimation of law is not completely independent of politics and morality which complement law. According to Habermas, however, no one has thus far been able to provide an adequate posttraditional legitimation of modern law. In order to specify the relationship between law, politics, and morality in Habermas's discourse theory of law, the following will briefly consider these alleged failures at posttraditional justification and compare them with Habermas's discourse theory of law.

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31 See HABERMAS, *supra* note 4, at 98.

32 See Habermas, *supra* note 23, at 274.

33 *Id.* at 268.

### A. *Posttraditional Theories of Legitimation*

Habermas's discussion of posttraditional justifications of law starts with Weber. Weber proposes a positivistic theory of law<sup>34</sup> and claims that law can be legitimated by its legality. Legality, as discussed above, merely means that a formal process of positively enacting law (via certain procedures that are *believed* to be legitimate in the existing regime) was followed. No substantive criteria of justice must be met. Further, law cannot draw any legitimizing force from morality or from comprehensive religious or metaphysical worldviews.<sup>35</sup> The rationalization of society and law has eliminated these traditional or value-rational bases of legitimation. Law possesses its own independent rationality; it is reducible to neither morality nor political power. "[L]aw is precisely what the political legislator—whether democratic or not—enacts as law in accordance with a legally institutionalized procedure."<sup>36</sup> Thus, Weber detaches law from moral-practical rationality and reduces law to that which was positively enacted according to the accepted procedures.<sup>37</sup>

Similarly, other legal positivists agree with Weber that law is legitimated independently of morality and political power. These theorists have proposed similar formal or procedural definitions of what constitutes a valid law. For example, Hart claims that law is established by a rule of recognition. A rule of recognition is a rule that specifies "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule [of law] of the group to be supported by the social pressure it exerts" (e.g., a written constitution or enactment by the legislature), but it does not necessarily incorporate substantive moral principles.<sup>38</sup> Additionally, Austin claims that law is a command of the sovereign which is backed by threats.<sup>39</sup> For both Hart and Austin, the validity of a law does not depend on its moral value; validity comes from

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<sup>34</sup> In the legal context, positivism usually means that law is not legitimated by morality (rational normative justification) but is legitimated by following the established formal procedures for enacting a law (facticity). In other words, legitimacy = facticity = validity.

<sup>35</sup> Habermas, *supra* note 23, at 219; 1 Habermas, *Theory of Communicative Action*, *supra* note 7, at 259.

<sup>36</sup> Habermas, *supra* note 23, at 219.

<sup>37</sup> 1 Habermas, *Theory of Communicative Action*, *supra* note 7, at 262.

<sup>38</sup> H.L.A. HART, *THE CONCEPT OF LAW* 92, 199 (2d ed. 1989). Note that in the new appendix to *THE CONCEPT OF LAW*, Hart claims that his "account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in [his] general account of law." *Id.* at 240 (emphasis in original). Consequently, Habermas may disagree with Hart's description of the law (i.e., his sociology of law), but Hart does not claim to be providing a normative account of what legitimizes the law.

<sup>39</sup> *Id.* at 6 n.1 (quoting John Austin, *The Province of Jurisprudence Determined*, Lecture I, 13 (1954 ed.)); cf. Habermas, *supra* note 23, at 263.

the observance of proper procedures by competent law makers. Thus, law is a social fact.

Surprisingly, the separation of law and morality is also adopted by some modern natural law thinkers like John Finnis.<sup>40</sup> As a natural lawyer, Finnis proposes a list of human goods that are necessary for human flourishing. To avoid the *is/ought* problem, however, he claims that his list of human goods are pre-moral and that they do not entail a naturalistic criterion of validity. Consequently, Finnis rejects the classic natural law position that "unjust laws are necessarily non-laws,"<sup>41</sup> and his formal "natural law" method of legitimizing law is in effect indistinguishable from the procedural legitimation proposed by legal positivists.<sup>42</sup> Thus, among these theorists (Weber, Hart, Austin, and Finnis), there appears to be a broad consensus that law is merely a matter of positive enactment that does not have an internal relationship to morality (substantive moral principles).

Despite his reliance on Weber, Habermas rejects positivistic theories of law. For example, Habermas finds Weber's theory of legality as legitimacy circular. According to Habermas:

[i]t remains unclear how the belief in legality is supposed to summon up the force of legitimation if legality means

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<sup>40</sup> His basis for rejecting this position is his acceptance of the argument that naturalism (deriving ethical norms from facts) entails an illegitimate derivation of "ought" from "is." John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS* 134, 135 (1992). See also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 34 (1980) [hereinafter *Finnis, Natural Law*].

<sup>41</sup> Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in *NATURAL LAW THEORY: CONTEMPORARY ESSAYS*, *supra* note 40, at 106. Aquinas argues that "[l]aws framed by man are either just or unjust. If they be just, they have the power of binding in conscience from the eternal law whence they are derived . . ." Aquinas, *supra* note 2, at I-II, q. 96, a. 4, 794. Aquinas also cites Augustine for the proposition that "a law that is not just, seems to be no law at all." *Id.* at I-II, q. 96, a. 4, 795 (citation omitted).

<sup>42</sup> Finnis argues that practical reasonableness is one of the basic, pre-moral goods that is self-evident (i.e., morally legitimated, formal, rational requirements). He further maintains that there are ten requirements of practical reasonableness which "express the 'natural law method' of working out the (moral) 'natural law' from the first (pre-moral) 'principles of natural law'." Finnis, *NATURAL LAW THEORY*, *supra* note 40, at 103. However, although Finnis argues that practical reasonableness is "the essential moral aspiration of lawgiving" ("a necessary, albeit weak, connection of law with morality"), Finnis does not claim that it is a requirement of legal validity. See MacCormick, *supra* note 41, at 118, 120. He only asserts that breaking the "norms of sound reasoning" undermines the "justification" for a decision (i.e., "bad law really is law" but "from the moral point of view bad laws are only weakly obligatory"). *Id.* at 121, 108, 110. Even a legal decision violating the "norms of sound reasoning," however, still constitutes a valid or legitimate legal decision if the proper legal procedures were followed (i.e., practical reasonableness is only a moral aspiration rather than a legitimacy requirement). Thus, the requirements of practical reasonableness do not appear to have any practical results which would distinguish Finnis's natural law theory from legal positivism.

only conformity with an actually existing legal order, and if this order, as arbitrarily enacted law, is not in turn open to practical-moral justification. The belief in legality can produce legitimacy only if we already presuppose the legitimacy of the legal order that lays down what is legal.<sup>43</sup>

In other words, a belief that certain procedures will produce valid laws does not make it so; the belief in legality does not per se legitimize.<sup>44</sup> Those procedures must themselves be legitimized. Likewise, Habermas would reject the other positivistic theories discussed above because they define legality merely in terms of a set of existing formal procedures without legitimizing those procedures.

A second group of posttraditional theories of law rejects the possibility of a procedurally or substantively rational justification of law and reduces law to politics. In general, these theories argue that neither legality nor morality can provide a rational legitimation for law. Rather, law cannot be rationally legitimated; it is an assertion of political power. For example, the Critical Legal Studies Movement rejects the claims that law and morality can be based on an apolitical method or procedure of justification and that the legal system can be objectively defended as embodying an intelligible moral order.<sup>45</sup> The legal order is merely the outcome of power struggles or practical compromises. Thus, they advocate "the purely instrumental use of legal practice and legal doctrine to advance leftist aims."<sup>46</sup> Similarly, feminist legal theorists usually claim that the dominant moral and legal doctrines reflect a male bias.<sup>47</sup> In both cases, legality is not an independent form of legitimation but an assertion

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<sup>43</sup> I Habermas, *Theory of Communicative Action*, *supra* note 7, at 265; see also JURGEN HABERMAS, *LEGITIMATION CRISIS* 97-99 (Thomas McCarthy trans., Beacon Press 1975) (1973) [hereinafter *Habermas, Legitimation Crisis*].

<sup>44</sup> See Habermas, *Legitimation Crisis*, *supra* note 43, at 97-99; See also HABERMAS, *supra* note 4, at 202.

<sup>45</sup> See, e.g., Roberto M. Unger, *The Critical Studies Movement*, 96 HARV. L. REV. 563 (1983) (The social and historical analyses of Marx and Weber have been particularly influential on many critical legal theorists.). For a good introduction to Critical Legal Studies, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

<sup>46</sup> Unger, *supra* note 45, at 567.

<sup>47</sup> For an excellent introduction to feminist jurisprudence, see Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988), reprinted in *FEMINIST JURISPRUDENCE* 493 (Patricia Smith ed., 1993). West discusses a different "separation thesis" which claims that human beings are essentially separate (typical of masculine or modern jurisprudence), rather than essentially connected (typical of feminist jurisprudence), to other human beings and not that law and morality are separate. See *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Rosanne Kennedy eds., 1991).

of political power.<sup>48</sup> As a result, law cannot be legitimized by its legality (or moral validity); law merely can be explained as the institutionalized biases of the empowered group (esp. wealthy, white males).

To the contrary, Habermas rejects any attempt to reduce law to politics. He claims that the very nature of political power would be undermined; political power could no longer function as legal authority. "As soon as legitimation is presented as the exclusive achievement of politics, we have to abandon *our* concepts of law and politics."<sup>49</sup> For Habermas, the rationalization of society has eliminated religious and metaphysical worldviews as bases of legitimation, but rather than reducing law and morality to politics, it has simultaneously led to the differentiation of the spheres of law, morality, and politics. However, contrary to Weber, the Critical Legal Studies Movement, and some Feminists, he claims that politics is a matter of practical reason in the modified classic sense that we can come to a rational intersubjective agreement about the norms required for establishing a just society (i.e., communicative reason replaces practical reason).<sup>50</sup> All "practical questions can be judged impartially and decided rationally,"<sup>51</sup> including law, morality, and politics. Further, "[w]ithout the backing of religious or metaphysical worldviews that are immune to criticism, practical orientations, in the final analysis, can be gained only from rational discourse, that is, from the reflexive forms of communicative action itself."<sup>52</sup> In the communicative action of democratic law formation, politics is part of law in the sense that the ethical-political reasons influence the rational agreement constituting its

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<sup>48</sup> In this context, political refers to the modern notion that politics is a matter of promoting your self, or group, interest. You are presumed to know your interest, and politics is merely a means of attaining your goal (i.e. instrumental rationality (means/ends)). By contrast, politics in the classic sense is about determining and fostering the common good (the good life).

<sup>49</sup> Habermas, *supra* note 23, at 267 (emphasis in original).

<sup>50</sup> Habermas recently has characterized one of the aspects of the theory of communicative action as a "[r]ecasting [of] the basic concepts of 'practical reason' in terms of a 'communicative rationality.'" HABERMAS, *supra* note 4, at 9. He claims that the classical understanding of practical reason is based on a "philosophical foundation in the knowing [individual] subject" (subject/object model of consciousness), involves only normative validity claims (rightness), and has a moral telos (a subjective capacity to tell actors what they ought to do). *Id.* at 3, 4. By contrast, communicative reason is based on a decentration of the subject into objective, subjective, and social worlds. This means that reasoning is a communal rather than an individual process. In addition, every speech act in communicative action involves three distinct validity claims which correspond to the three world-relations: a truth claim (objective world of states of affairs), a rightness claim (social world of normatively regulate interpersonal relations), and a truthfulness or sincerity claim (subjective world of individual experiences). *See id.* at 3-5. Finally, the moral telos of practical reason which aims at immediate prescriptions is replaced by a linguistic telos which aims at mutual understanding and consensus. *See id.* at 4.

<sup>51</sup> *Id.* at 109.

<sup>52</sup> *Id.* at 98.

formulation. However, moral and pragmatic reasons also influence that agreement.<sup>53</sup> As a result, law cannot be reduced to politics,<sup>54</sup> and the validity of law cannot be derived from its positivity or from politics.

Moreover, law cannot be reduced to morality. Habermas argues that the reduction of law to morality results "not only from certain premises rooted in the philosophy of consciousness but also from a metaphysical legacy inherited from natural law, namely, the subordination of positive law to natural or moral law."<sup>55</sup> Law as subordinate to morality is a pre-modern idea of law that eliminates the instrumental aspects of law (ethical-political and pragmatic) and undermines the complementary relationship between law and morality (see below). Despite this complementary relationship, law is a separate sphere which is evident from the different functions that law and morality play in society. In this respect, Habermas claims that "morality and law differ *prima facie* inasmuch as posttraditional morality represents only a form of cultural *knowledge*, whereas law has, in addition to this, a binding character at the institutional level. Law is not only a symbolic system but an action system as well."<sup>56</sup> Furthermore, law is related to, but distinct from, politics and morality, and thus it requires a different basis of, or reasons for, legitimation.

### B. *The Discourse Theory of Law*

Once the religious and metaphysical worldviews have been eliminated, "the legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected."<sup>57</sup> Here we see that the consensus formerly based on tradition and settled ethical conventions is being replaced by rational intersubjective consensus. This signals a rationalization of the modern lifeworld into the subjective, objective, and intersubjective (neglected by Weber) in addition to a rationalization and differentiation of the spheres of life.<sup>58</sup> "From the vantage point of the theory of communicative action, we can say that the

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<sup>53</sup> For Habermas's distinction between ethical-political, moral, and pragmatic reasons and their role in democratic law formation, see *infra* text accompanying notes 67-73.

<sup>54</sup> Note, however, that Habermas's argument is pragmatic rather than foundational. He claims that his social theory better explains *our* use of the terms law and politics rather than giving a foundational justification of his definition of politics as rational.

<sup>55</sup> HABERMAS, *supra* note 4, at 84.

<sup>56</sup> *Id.* at 107 (emphasis in original); cf Habermas, *supra* note 23, at 220.

<sup>57</sup> HABERMAS, *supra* note 4, at 104; see also 1 Habermas, *Theory of Communicative Action*, *supra* note 7, at 261.

<sup>58</sup> See 1 Habermas, *Theory of Communicative Action*, *supra* note 7, at 340.

subsystem 'law,' as a legitimate order that has become reflexive, belongs to the societal component of the lifeworld."<sup>59</sup> Under these conditions, the real basis of legitimation, rational agreement becomes evident and heightens the "need for legitimating enacted law—a law that rests on the changeable decisions of a political legislator."<sup>60</sup> In other words, the disenchantment of the world eliminated the possibility of an "objective" legitimation of law. Assuming rationality still has some non-subjective meaning, intersubjective agreement must then become the arbiter of legitimation. Legitimation thus occurs from the procedure of coming to a rational intersubjective agreement. The substance of legitimate law is not known ahead of time. The important issue for legitimation becomes the rationality of the procedures required to produce a rational intersubjective agreement. Consequently, an answer to the question of what makes a law valid depends on a procedural, intersubjective process of validation that is internal to law.

Habermas has proposed the discourse principle as such a procedure. He has recently pointed out that in his prior writing on discourse ethics, he failed to distinguish sufficiently the moral principle from the discourse principle.<sup>61</sup> The discourse principle is the more general principle and "is only intended to explain the point of view from which norms of action can be *impartially justified*."<sup>62</sup> It specifies the conditions under which rational agreement must occur to produce legitimate (intersubjectively rational or impartial) action norms (the practical norms of law, morality, and politics).<sup>63</sup> Habermas summarizes this new procedural criterion of

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59 HABERMAS, *supra* note 4, at 80.

60 *Id.* at 95.

61 *Id.* at 108.

62 *Id.* at 108-09 (emphasis in original).

63 Habermas recognizes that the discourse principle "presupposes that practical questions can be judged impartially and decided rationally." *Id.* at 109. But he claims to redeem this claim pragmatically by showing that "[w]henver we want to convince one another of something, we always already intuitively rely on a practice in which we presume that we sufficiently approximate the ideal conditions of a speech situation specially immunized against repression and inequality." *Id.* at 228. Thus, an attempt to deny the general pragmatic presuppositions of the ideal speech condition results in a performative contradiction because one accepts its presuppositions in one's attempt to deny them. See also Habermas, *Moral Consciousness*, *supra* note 7, at 197-98. Habermas states:

Briefly, the thesis that discourse ethics puts forth on this subject [the universal validity of moral norms] is that anyone who seriously undertakes to participate in argumentation implicitly accepts by that very undertaking general pragmatic presuppositions that have a normative content. The moral principle can then be derived from the content of these presuppositions of argumentation if one knows at least what it means to justify a norm of action.



validity: "Just those action norms are valid to which all those possibly affected persons could agree as participants in rational discourses."<sup>64</sup> He defines "action norms" "as temporally, socially, and substantively generalized behavior expectations."<sup>65</sup> "Affected" persons include those whose interests could be foreseeably touched by the consequences of the action norm.<sup>66</sup> Finally, he defines "rational discourse" as any attempt at understanding occurring under conditions of communication providing for free processing of information and reasons.<sup>67</sup> Alternatively, Habermas talks about a norm lying "equally in the interest of everyone." That norm would be rationally acceptable to all because "all those possibly affected should be able to accept the norm on the basis of good reasons. But this can become clear only under the *pragmatic* conditions of rational discourses in which the only thing that counts is the compelling force of the better argument based on the relevant information."<sup>68</sup>

In the case of morality and law, each of these spheres separately utilizes the discourse principle as a procedure for validating moral (via moral principle) and legal (via principle of democracy) claims. Both the moral principle and the principle of democracy are specifications of the discourse principle. The moral principle justifies moral norms by the universalization principle which gives equal consideration to everyone's interest.<sup>69</sup> Humanity or "a presupposed republic of world citizens" is the frame of reference for grounding norms, and the decisive reasons for those norms must be persuasive to everyone.<sup>70</sup> Although the discourse theory of law is modeled after discourse ethics, "the heuristic priority of moral-practical discourses, and even the requirement that legal rules may not contradict moral norms, does not immediately imply that legal discourses should be conceived as a subset of moral argumentation."<sup>71</sup> Rather, the principle of democracy justifies legal norms on the basis of pragmatic, ethical-political, and moral reasons but not on the basis of moral reasons

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<sup>64</sup> HABERMAS, *supra* note 4, at 107; *cf.* Habermas, *Moral Consciousness, supra* note 7, at 66 (summarizing the discourse principle in discourse ethics: "Only those norms can claim to be valid that meet [or could meet] with the approval of all affected in their capacity as participants in a practical discourse.") (emphasis in original).

<sup>65</sup> HABERMAS, *supra* note 4, at 107.

<sup>66</sup> *See id.*

<sup>67</sup> *See id.* at 107-08.

<sup>68</sup> *Id.* at 103 (emphasis in original); *cf.* Habermas, *Moral Consciousness, supra* note 7, at 43-115.

<sup>69</sup> *See also* Habermas, *Moral Consciousness, supra* note 7, at 65 (summarizing the principle of universalization with respect to his discourse ethics: "All affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation).") (emphasis in original).

<sup>70</sup> HABERMAS, *supra* note 4, at 108.

<sup>71</sup> *Id.* at 230.

alone.<sup>72</sup> Thus, the discourse must also take into account ethical-political reasons which provide the form of life of "our" political community for grounding norms. Legal norms express an authentic collective self-understanding and must be acceptable in principle to all sharing "our" traditions and strong evaluations. In addition, pragmatic reasons are those attempting to achieve "a rational balancing of competing value orientations and interest positions."<sup>73</sup> The frame of reference here strives to take into account the "totality of social or subcultural groups that are directly involved" for negotiating compromises.<sup>74</sup> Moreover, while moral reasons provide the impartial point of view in legal decision making, ethical-political reasons make those reasons relevant to the historical situation, and pragmatic reasons help facilitate a compromise between competing positions. Thus, law has both non-instrumental (moral) aspects and instrumental (ethical-political and pragmatic) aspects that inform the creation of its regulations. In sum, "Max Weber was right: only regard for the intrinsic rationality of law can guarantee the independence of the legal system. But since law is internally related to politics, on the one side, and to morality, on the other, the rationality of law is not only a matter of law."<sup>75</sup>

### III. CRITICAL COMMENTS

The complexity and sheer volume of Habermas's work makes one question whether one understands his project even after substantial effort. Nevertheless, his theory of communicative action and discourse theory of law leave many unanswered questions and invite many critical responses. In this light, I wish to make four critical comments about Habermas's discourse theory of law.

First, I feel compelled to ask whether Habermas's claim that legality can legitimize law is not circular like Weber's. Weber tried to define law merely by its positivity—by the fact that it was enacted by existing procedures believed to be legitimate. Weber also denied that morality or politics provide any input into the law-making process. However, Habermas does two things that Weber failed to do. Habermas provides arguments both: 1) to support his procedural definition of legality (a pragmatic argument for the formal ideal speech conditions required for intersubjective agreement); and 2) to identify the sources of the substantive reasons (moral, ethical-political, and pragmatic) that legitimize law. Despite these claims, Habermas fails to explain to us how

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<sup>72</sup> "Specifically, the democratic principle states that only those statutes may claim legitimacy that can meet with the assent [*Zustimmung*] of all citizens in a discursive process of legislation that in turn has been legally constituted." *Id.* at 110.

<sup>73</sup> *Id.* at 108.

<sup>74</sup> *Id.* at 108.

<sup>75</sup> Habermas, *supra* note 23, at 259.

we can know that all the procedural requirements (the counterfactual ideal speech conditions) are met in an actual communicative agreement so that it is legitimate. It seems that the fact of a communicative agreement must certify both that the ideal speech conditions were met and that the law in question is legitimate. No independent evaluation of these issues is possible. Thus, there is no way to know independently of an actual intersubjective agreement resulting from actual discourse whether laws are legitimate and whether the ideal speech conditions have been met.

However, the communicative agreement may have resulted because some parties were not fully informed about the factual circumstances or the implications of the proposed legal norm. Subsequent events and investigations may reveal certain things to us, but we do not know precisely what difference this information would have made short of a new communicative agreement that will also have some other unknown and possibly new deficiencies (i.e., this process will continue *ad infinitum*). In addition, Habermas argues that laws are legitimate when assented to by all citizens in a legitimated, discursive process of legislation. Does this mean that children need to participate in the legislative process to ensure that their interests are given equal consideration? If so, do children really have the rational capacity to know their interests and to present arguments to support their positions. If not, how can we be sure that their interests will be given equal consideration? For example, the amount and apportionment of school funding may be an example where the lack of participation by children in the legislative process leads to an inequitable resolution of school funding issues. Furthermore, even though legal rules may not violate moral norms, how do we know that the pragmatic reasons requiring "a rational balancing of competing value orientations and interest positions,"<sup>76</sup> and the ethical-political reasons taking into account "our" traditions did not override the moral reasons requiring equal consideration of everyone's interest in the process of coming to the intersubjective agreement?

These questions seem to suggest a dilemma for Habermas. Either one can legitimize a law independent of an actual intersubjective agreement (know that the ideal speech conditions were met and that the law in question is legitimate) or one must merely *believe* that the discourse procedural requirements will provide a rational basis for legitimation without knowing this to be the case. In the first case, intersubjective agreement becomes unnecessary, and in the second, Habermas's discourse theory of law becomes circular like Weber's.

Second, assume that no intersubjective agreement results from the actual discourse. How do we decide whether the law at issue is legitimate? Habermas claims that if the procedural requirements of the

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HABERMAS, *supra* note 4, at 108.

discourse principle are met, agreement will occur. To the contrary, it is hard to point to a particular situation where a unanimous and voluntary intersubjective agreement actually occurs and, if so, on a regular basis. Consequently, either the procedural requirements of the discourse theory of law are not often met or they cannot be met (e.g., legislators choose or must choose a course of action based on subjective preferences or interests (pragmatic reasons) or subjective notions of the good life (ethical-political reasons)). In either case, the discourse fails to produce a unanimous and voluntary intersubjective agreement. Although the ideal speech conditions are a counterfactual regulative idea, what consensus is sufficient to legitimize a law? A graphic example of substantial and widespread disagreement is the issue of abortion.<sup>77</sup> The two poles of disagreement are anchored on the one side by those who claim that the right to have an abortion establishes a woman's autonomy and equality, and on the other side by those who claim that all abortions are murder. De facto, the intersubjectively rational agreement is the will of the stronger party or parties. In a democracy, the will of the majority rules. Thus, in practice, Habermas's theory seems similar to the theories of the critical legal studies and feminist jurisprudence, which reduce law to politics.

Third, Habermas maintains that "the universalization principle acts like a knife that makes razor-sharp cuts between evaluative statements and strictly normative ones, between the good and the just."<sup>78</sup> In order for a law to be impartial (i.e., not violate moral norms), Habermas's postmetaphysical, rational justification of law appears to depend upon the possibility of these razor-sharp cuts. Otherwise, the ethical-political and pragmatic reasons would result in a consensus based on strategic or prudential rationality like Hobbes. In that case, the consensus signals not a notion of intersubjective rational validity but a confluence of subjective interests. However, it is unclear how Habermas can justify his distinction between ethical-political and pragmatic reasons and moral reasons because this is itself a claim about the good. "To assert that all good human purposes are in all respects historically specific is itself a universal evaluation of human purposes . . . in other words, the assertion is self-refuting."<sup>79</sup> As a result, Habermas's discourse theory of law fails to provide an impartial or rational justification for law.

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<sup>77</sup> See Michel Rosenfeld, *Law as Discourse: Bridging the Gap Between Democracy and Rights*, 108 HARV. L. REV. 1163, 1179-80 (1995) (reviewing HABERMAS, *supra* note 4), reprinted in HABERMAS, *MODERNITY AND LAW* (Mathieu Deflem ed., 1996) (Rosenfeld identifies abortion as an example of an issue which would lead to an impasse under Habermas's counterfactual assumptions about discourse.).

<sup>78</sup> Habermas, *Moral Consciousness*, *supra* note 7, at 104.

<sup>79</sup> Franklin I. Gamwell, "Metaphysics and the Rationalization of Society," 23 PROCESS STUD. 219, 230 (1994).

Finally, one wonders whether Habermas's purely procedural definition of legality as legitimation is enough. In *Critical Theory and Philosophy*, David Ingram raises this same question with respect to Habermas's theory of communicative action:

Habermas is concerned that a purely emancipated society may not be fully rational, after all. Paradoxically stated, if rationality boils down to acting in accordance with rules of free and fair speech, then with the destruction and or withering away of tradition, there would be no values and meanings worth talking about! Therefore, rationality *must* imply more than emancipated communication. It must imply a global vision of health that is intimately linked to the specific prescriptive contents of tradition. In other words, if reason is conceived *purely formally*, in terms of *specific* types of argumentation, which are restricted to thematizing just *one* type of validity claim—truth, moral rightness, aesthetic correctness (or expressive sincerity)—how do we rationally determine what conduces to global happiness?<sup>80</sup>

Although this quote refers to the moral principle, it focuses many of my questions with respect to the principle of democracy. Despite Habermas's claims to the contrary, can comprehensive notions of the good life or global happiness be discussed and agreed upon in legal discourses? If they can, the bases of legal legitimation could also be the subject of discourse. On this point, Habermas notes that “[t]he democratic principle must specify, in accordance with the discourse principle, the conditions to be satisfied by individual rights in general, that is, by any rights suitable for the constitution of a legal community and capable of providing the medium for this community's self-organization.”<sup>81</sup> Lawmakers could thus agree that Habermas was wrong about the disenchantment of society and that “the conditions to be satisfied by individual rights in general . . . for

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<sup>80</sup> DAVID INGRAM, *CRITICAL THEORY AND PHILOSOPHY* 184 (1990) (emphasis original). See also Richard J. Bernstein, *The Retrieval of the Democratic Ethos*, 17 *CARDOZO L. REV.* 1127, 1129 (1996) (arguing that Habermas “has elaborated a discourse theory that relies on, and presupposes, substantial-ethical considerations” rather than one which is procedural or formal and “free from any taint or contamination by substantial-ethical commitments”); Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 *CARDOZO L. REV.* 791, 793 (1996) (contending that “even Habermas’s more nuanced and versatile proceduralism ultimately confronts the need to embrace contestable substantive normative assumptions in order to contribute to the resolution of conflicts that divide the members of the polity”).

<sup>81</sup> HABERMAS, *supra* note 4, at 111.

the constitution of a legal community" include an implicit or explicit reliance on comprehensive religious or metaphysical worldviews. Hence, on his own terms, Habermas may be shown to have lead us down the wrong path. Our intersubjective conclusion may be that the pre-modern religious or metaphysical unity of law, morality, and politics is required to legitimize law after all.

### CONCLUSION

Habermas's discourse theory of law poignantly sets forth the modern legitimation crisis of law. He argues that the rationalization of society has eliminated religious and metaphysical justifications for law and has differentiated law from politics and morality. Law must now be legitimated based on its legality. The legal positivists (including Weber, Hart, Austin) and Finnis attempt to define legality merely in terms of procedural requirements. Habermas, however, demonstrates the circularity of this definition of legality. Legal positivists fail to legitimize the procedural requirements that are claimed to validate law; they merely rely on a subjective belief (rationality) in the legitimacy of the existing legal procedures. By contrast, Habermas claims that legality can legitimize law based on the discourse principle. The discourse principle claims that voluntary, intersubjective agreement by all those affected by a legal norm provides a basis for legitimation. To the contrary, the criticisms discussed above suggest that the discourse theory of law is also circular and fails to explain adequately how intersubjective agreement can legitimate law. As a result, law as legality cannot have subjective or intersubjective rational grounds for legitimation.

Consequently, three options appear to remain. First, with critical legal studies and some feminist jurisprudence, one could argue that law does not have a rational justification or legitimation but is merely an exercise of political power. Second, legality could legitimate law based on an objective rationality which is not grounded in a religious or metaphysical worldview. However, although I am not able to defend my position here, there are strong arguments to support the claim that an objectively rational legitimation of law would entail a grounding of legality in a religious or metaphysical worldview.<sup>82</sup> In that case, this approach would be the same

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<sup>82</sup> For example, although proposing a postmetaphysical or noncomprehensive theory of legitimation ("political or metaphysical"), John Rawls attempts to provide an "objectively rational" justification or legitimation for law in contrast to those postmetaphysical theories giving up on the possibility of rational justification for law (e.g., Critical Legal Studies). Rawls argues for an objective justification of law based on a substantive political conception of justice which "hopes to articulate a public basis of justification for the basic structure of a constitutional regime working from fundamental intuitive ideas implicit in the public political culture and abstracting from comprehensive religious, philosophical, and moral doctrines." RAWLS, *supra* note 1, at 192. "[A] political  
(continued)

as the final option which is a "traditional" theory of legitimation based on a religious or metaphysical worldview. This approach would reject Weber's and Habermas's claims that the world has been disenchanted and that the law must be legitimated independently of religious or metaphysical worldviews. In other words, it would maintain that legality as a basis of legitimation is mistaken, and thus, it would put into question the modern consensus that law can be legitimized independently of a religious or metaphysical worldview.

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conviction is objective" if "there are reasons, specified by a reasonable and mutually recognizable political conception (satisfying those essentials), sufficient to convince all reasonable persons that it is reasonable." *Id.* at 119. Rawls, however, fails to justify adequately an objective legitimation of law (political not metaphysical) which is isolated from comprehensive convictions (religious or metaphysical worldviews) because he finally bases this isolation on a comprehensive conviction. He claims that an objective legitimation of law must be independent of comprehensive convictions because comprehensive convictions are private and not public (i.e., not rational). However, this claim entails a comprehensive evaluation of all comprehensive convictions which, according to Rawls, is not possible. *See* GAMWELL, *supra* note 1, at 72-73. As a result, his "objective" legitimation of law is incoherent and indicates that an "objectively rational" legitimation of law based on a "political not metaphysical" conception of justice cannot be consistently maintained.