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FIFTH ANNUAL LEGAL THEORY SYMPOSIUM:

EXPLORING HABERMAS ON LAW AND DEMOCRACY

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FOREWORD

NANCY EHRENREICH*

Law professors have been drawing upon the work of philosopher Jürgen Habermas for years, finding countless applications of his discourse ethics theory to legal issues. But the publication of Habermas's formidable work on law and democracy, *Between Facts and Norms*,[1] provides an occasion for legal scholars to engage Habermas's ideas about law *per se*, and to assess his arguments about its role and function in democratic societies. This Symposium represents one set of such assessments. The product of a collaborative effort among legal scholars and other social theorists, it also constitutes an interdisciplinary conversation on Habermas's recent exploration of law and democracy.

That conversation actually began here in Denver well over a year ago, when the University of Denver College of Law selected *Between Facts and Norms* as the subject of our fifth annual legal theory symposium. The symposium is a small, workshop-like conference, designed to provide a forum for the examination of a particular problem or concept in legal theory that arises across various legal contexts. Interdisciplinary in its focus, the symposium is preceded by a year-long reading group in which law professors and interested scholars from other disciplines meet weekly to explore and discuss writings relevant to that year's topic. This year's reading group included individuals from the fields of philosophy, psychology, and political science, as well as law. The articles printed here reflect the rich and stimulating mix of ideas generated by those reading group sessions, as well as by the panel presentation in which the year-long symposium process culminated.[2]

Before introducing the Symposium papers, I would like to take a moment to thank three individuals who contributed immensely to the success of this enterprise. Interdisciplinary interactions are always fraught with challenge and promise, and this one was no exception. Three contributors to this volume, Mitchell Aboulafia, Myra Bookman,

* Assoc. Prof. of Law, University of Denver College of Law. I would like to thank Mitchell Aboulafia, Myra Bookman, Catherine Kemp, and Charles Piot for their comments on an earlier draft of this *Foreword*. All errors are, of course, mine.

1. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998).

2. This year, we deviated from our traditional format, taking advantage of the opportunity to hold the symposium in conjunction with the annual conference of the Society of Phenomenology and Existential Philosophy. Professor Habermas, who generously contributed a conference paper to the Symposium, was the keynote speaker at that conference, and three of our symposium contributors appeared on a panel following his remarks.

and Catherine Kemp, played a crucial role in our weekly reading group, contextualizing and translating Habermas's ideas for those of us law types who were unfamiliar with the larger body of his work. Their ability to discuss complex concepts in straightforward language, and their patience with the seemingly endless debates that often turned out to be more about terminology than substance, made the reading group an incredibly productive and stimulating undertaking for all concerned. Moreover, all three, and especially Catherine Kemp, provided helpful contacts and suggestions during the organizing of what turned out to be a very successful live panel on Habermas and law.

* * *

The way that Habermas approaches the task he sets for himself in *Between Facts and Norms* is so ambitious and expansive—even the nooks and crannies in his argument are more like caves and canyons—that any attempt to summarize it seems doomed to failure.[3] Nevertheless, a brief overview can serve to set the stage for the pieces printed here. Hopefully, readers (and Habermas himself) will forgive the necessarily un-nuanced nature of any such effort.

The central project of *Between Facts and Norms* is huge and important: to articulate a theory of the legitimacy of the legal order in a complex society such as the United States or Germany. According to Habermas, the diversity of modern societies has destroyed the moral consensus that characterized an earlier era,[4] while the decline of religion has caused natural law to lose its moorings to divine authority. These developments, combined with the fact that individuals do not directly participate in or consent to the production of society's laws, create a problem of legal legitimacy. How can we justify the application of coercive force to citizens who might not agree with the reasons for its application and have not directly participated in the decision to apply it?

Habermas sees this problem as a conflict between "facticity" and "validity"—between, on the one hand, the existence of law as a social fact and, on the other hand, its legitimacy as the expression of a norm. The conflict could also be characterized as one between fidelity to law and justice[5]—or, if you will, between positivism and natural law. How can we reconcile the social reality of law as the product of power struggles acted out in concrete social institutions with law's claim to legiti-

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3. There have actually been many attempts to summarize *Between Facts and Norms*, though none as short as the one that follows here. The translator summarizes the argument in a lengthy, and very helpful, introduction to the book, and Habermas himself does the same (with some additions and clarifications) in a postscript at the end. His article in this Symposium is yet another—and still useful!—take on the argument.

4. Habermas seems to assume a premodern world characterized by uniformity and consensus—a world that, in fact, may never have existed.

5. Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DENV. U. L. REV. 961, 963 (1999).

macy as the expression of pubic norms with which compliance can legitimately be demanded? Like many legal theorists who have tried to transcend the terms of the debate between classical legal theorists and legal realists, Habermas wants to salvage the moral neutrality of law without denying the moral pluralism of modern society. Seeking to construct a legal edifice whose legitimacy does not depend upon the substantive content of its rules, he proposes a not-unfamiliar solution: a "proceduralist" approach to law.

Between Facts and Norms reads like a highly sophisticated and ambitious version of process theory. Incorporating his earlier work on discourse ethics into this new meditation on law, Habermas ties the legitimacy of law to its production through a democratic process characterized by communicative action. "Just those [legal] action norms are valid," he writes, "to which all possibly affected persons could agree as participants in rational discourses."[6] This "discourse principle" is the central focus of his book.

Offering communicative action as a "postmetaphysical" definition of reason, Habermas's theory thus appears to present a means of rationally resolving disputes that does not fall prey to the universalizing formalism of classical theory. Resisting a naïve equation of democracy with the existence of formal institutional structures such as elected legislatures, it also promises a proceduralist approach that takes seriously the need to articulate a standard for defining the conditions necessary for meaningful democratic decision making. Law's role, says Habermas, is to translate democracy into government—to facilitate the formation of the views of the people and incorporate them into institutional legal structures, to serve as the mechanism by which popular will becomes positive law. The legal "norms" generated as he suggests will be legitimate precisely because they are the product of a genuinely democratic process in which each person has an equal opportunity to articulate his or her interests and views—a process that accords with the discourse principle.

In his Symposium conference paper,[7] Professor Habermas provides a helpful and informative summary of the material covered in his book. He cites six specific topics to which he believes the book contributes:

I. The form and function of modern law;

II. The relation between law and morality;

III. The relation between human rights and popular sovereignty;

IV. The epistemic function of democracy;

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6. HABERMAS, *supra* note 1, at 107.

7. Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. REV. 937 (1999).

V. The central role of public communication in mass-democracy;

VI. The debate about competing paradigms of law.[8]

Habermas begins his discussion by setting out his view of law as a medium of social integration, and argues that legitimacy is essential to that role. He turns next to "the relation between law and morality," arguing that the "legitimacy of law must not be assimilated to moral validity, nor should law be completely separated from morality."[10] Under the third topic he presents his "view [of] the democratic process from the standpoint of discourse theory."[11] The sorts of human rights that "empower citizens to exercise their political autonomy," he argues, are "what is necessary for the legal institutionalization of the democratic process of self-legislation."[12] Next, he briefly summarizes his rejection of a "mentalist conception of reason" in favor of a "pragmatist" approach that focuses on the conditions necessary for democratic deliberation.[13] In the succeeding part of the piece, he stresses the importance of the structural features of public, political communication to the successful creation of the deliberative democracy he seeks. Finally, in the last part of the paper, Habermas contrasts his "proceduralist paradigm" of law with two alternative views: the "liberal paradigm" and the "welfare-state paradigm."[14]

Habermas's summary of *Between Facts and Norms* is followed by Mitchell Aboulafia's article, *Law Professors Read Habermas*.[15] Consistent with his role as able (and essential) translator in the symposium reading group, Professor Aboulafia provides a lucid, extremely accessible overview of Habermas's proceduralist theory. Particularly useful is his exegesis on Habermas's ideas regarding the relationship among individual rights, law, and democracy. Aboulafia explains,

> For Habermas, rights are necessary for a discursively achieved political will-formation. The alternative would be to have the "will" of political actors shaped from above or by tradition. . . . Without rights protecting private "space," democracy would be unrealizable because citizens could not form themselves as autonomous agents; and without democracy law would not have the proper grounds for legitimacy; and without law that is legitimate, rights (public and private) would not be properly protected. And, of course, without public rights, discussion would not take place in a fashion that sustains democracy and legitimates the law.[16]

8. *Id.*
9. *Id.* at 937.
10. *Id.* at 938–39.
11. *Id.* at 939.
12. *Id.*
13. *Id.* at 940.
14. *Id.* at 942.
15. Mitchell Aboulafia, *Law Professors Read Habermas*, 76 DENV. U. L. REV. 943 (1999).
16. *Id.* at 948.

In passing, the piece also provides helpful clarification of the philosophical meaning of the terms "ethical life" and "morality"[17]—terms that initially befuddled law professors in the symposium reading group, who tended to equate both of them with "politics" as used in the Critical Legal Studies aphorism, "law is politics."

Habermas is not, of course, without his critics, and the remainder of our authors articulate a variety of points of disagreement, some more minor and others more major, with his approach. A useful exploration of the similarities and differences between Habermas and John Rawls is provided by David Rasmussen in *Accommodating Republicanism.*[18] Drawing on an earlier pair of articles by the two theorists, Rasmussen describes their exchange as a debate over whether it is possible to "realize justice as fairness while assuring impartiality in a process that is eminently democratic."[19] Both authors are trying to accommodate republicanism's critique of liberalism, he maintains, but they do so in different ways. Habermas indicts Rawls, Rasmussen explains, for falling prey to the liberal tendency to overemphasize private rights and underemphasize public decision making processes. Habermas sees public and private autonomy as co-original, as presupposing each other. Since "private right can only be derived from the process of public will-formation,"[20] private autonomy must be grounded in democratic processes. Rawls, in contrast, does not see private rights as democratically grounded, and thus, from Habermas's point of view, pays insufficient attention to "the procedure of democratic lawmaking."[21] Rasmussen turns briefly at the end of his piece to Rawls' critique of Habermas, which he summarizes thusly: "[I]f one asserts the co-originality thesis in the way that Habermas does, with its implicit assumption about the primacy of the political in the classical, as opposed to the modern sense, then one buys into a teleology which can only be justified through a comprehensive philosophical framework."[22] This criticism, Rasmussen contends, has not yet been replied to by Habermas.

Catherine Kemp, in her article, *Habermas Among the Americans: Some Reflections on the Common Law,*[23] criticizes *Between Facts and Norms* for being inattentive to differences between the German civil law system and the Anglo-American common law system. In a creative and thought-provoking argument, Kemp draws on Holmes' notion that judicial rulings emerge from experience in order to suggest that Habermas's treatment of customary law as part of the positive law provides an inadequate model for understanding common law systems. Following Frederic

17. *See id.* at 946.
18. David M. Rasmussen, *Accommodating Republicanism*, 76 DENV. U. L. REV. 955 (1999).
19. *Id.* at 956.
20. *Id.*
21. *Id.* at 957.
22. *Id.* at 960 (citation omitted).
23. Kemp, *supra* note 5, at 961.

Kellogg,[24] Kemp points out that, for Holmes, common law rules are not created out of whole cloth by judges but rather are derived through a process of "successive approximation" generated by the repeated experience of resolving particular types of disputes.[25] If this view is correct, she continues, then it might not be appropriate to equate common law rules with the legislatively enacted legal norms on which Habermas focuses. This part of our positive law, Kemp's argument suggests, may be less removed from, and more organically connected to, popular understandings than Habermas imagines North American legal enactments to be. A common law system like that in the United States may not suffer from the same tension between facticity and validity that, according to Habermas, characterizes modern law.

Psychologist Myra Bookman, in her piece, *Still Facing "The Dilemma of the Fact": Gilligan and Habermas (Re)Visited*,[27] likewise sees Habermas's theory as incomplete, but because of conceptual rather than cultural gaps. Drawing on the work of Carol Gilligan as interpreted "progressively" by Mary Joe Frug, Bookman makes a persuasive case for the argument that Habermas's legitimation theory "refuses to relinquish a model of psychological and social development that relies on autonomy, separation, and individuation as its ground note."[28] Habermas's focus on democracy, autonomy, and equality imports a particular substantive perspective into what he claims to be, in her words, a "postmetaphysical, strictly procedural, normatively empty position."[29] Rejecting the "vulgar Gilliganist" view that associates such a perspective with men and the alternative "ethic of care" perspective with women, Bookman maintains that Habermas's treatment is nevertheless incomplete as long as it fails to attend to the latter, alternative approach to morality. She does not, however, conclude from her finding of substance in Habermas's substanceless position, that his project of producing a neutral, non-normative definition of democracy is misguided. For her, the solution is to incorporate within Habermas's existing analysis a view of "a lifeworld fraught with attachment, vulnerability, and relational responsibility—a lifeworld beyond ego, separation, and blind fairness."[30] The "justice" and "care" perspectives, she argues, can "coexist in productive tension."[31]

In contrast to Bookman's pluralist solution to the substantivity she finds in *Between Facts and Norms*, the three remaining articles in our

24. *See* Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TULANE L. REV. 15 (1990).

25. Kemp, *supra* note 5, at 968–69.

26. "Myra Bookman, *Still Facing "The Dilemma of the Fact": Gilligan and Habermas (Re)Visited*, 76 DENV. U. L. REV. 977 (1999).

27. *Id.*

28. *Id.* at 978.

29. *Id.*

30. *Id.* at 979.

Symposium suggest at least the possibility that the substantive assumptions that implicitly ground Habermas's book might doom the entire undertaking. In *The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Enterprise*,[32] Brian Tamanaha shows that critiques of dense philosophical theorists like Habermas can be trenchant without being tortuous. Tamanaha begins this admirably readable piece by questioning the usefulness of jurisprudential theories that focus on trying to identify the source of law's legitimacy. Such inquiries, he argues, seem all too often to result not in legal critique (the law has failed to live up to applicable standards) but in legal apologetics (the standard of success is precisely what the law is already doing). This is especially true, he suggests, when the standard that is articulated is an idealized one that no system could ever fully meet. Moreover, Tamanaha argues, discourse theory is not a persuasive form of legitimation. In fact, in privileging discourse as the embodiment of democracy, Habermas has actually created an analysis that is biased in favor of those who are good at talking. Just like other formally neutral rules applied to social contexts characterized by inequality, Habermas's discourse principle will produce disparate results—favoring those with locutionary abilities over those without. The actual substantive results of legal rulings, Tamanaha suggests, may ultimately be more central to law's legitimacy than whether those results were reached in accordance with a discourse theory of law.

Like Tamanaha, Frank Michelman believes that Habermas's discourse principle is itself substantive, given that it is "concerned with and reflect[s] a particular way or form of life . . . that prefers honest reasoning with each other to force and manipulation."[33] In his evocative essay, *Morality, Identity and "Constitutional Patriotism,"* Michelman examines Habermas's offer of what Michelman calls a "*constitutional contractarian* model of political justification."[34] Habermas, like Rawls, believes that law gets its legitimacy from following certain fundamental constitutional principles upon which all can agree.[35] A necessary corollary of this constitutional contractarian justification is the notion of a shared attitude among the citizenry towards the constitution. Habermas calls this attitude "constitutional patriotism."

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31. Brian Tamanaha, *The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Enterprise*, 76 DENV. U. L. REV. 989 (1999).

32. Frank Michelman, *Morality, Identity, and "Constitutional Patriotism,"* 76 DENV. U. L. REV. 1009, 1027 (1999).

33. *Id.* at 1014 (emphasis in original).

34. Michelman quotes Rawls' formulation: "[O]ur exercise of political power is . . . justifiable . . . when it is in accordance with a constitution, the essentials of which all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." *Id.* (alteration in original) (quoting JOHN RAWLS, POLITICAL LIBERALISM 216 (1993)). As Michelman elaborates further, "Habermasians seek to establish the possibility and general characteristics (at least) of a political regime that is rationally acceptable—acceptable considering one's interests—to everyone who is (hypothetically) reasonable. They furthermore seek to do so without supposing any substantive-ethical commonality among the people concerned." *Id.* at 1019.

But the diversity of opinions about how to interpret a constitution, Michelman suggests, raises problems for the constitutional patriotism concept. So does the fact that any constitutional document that is phrased generally enough for all to accept will be so broad as to preclude meaningful conclusions about when and whether it is being violated.[36] The very difficulty that a constitutional contractarian justification purports to avert—that posed by the moral pluralism of modern society—thus merely reasserts itself at the level of constitutional interpretation. Using affirmative action as an example, Michelman shows how a constitutional principle such as "equality of concern and respect" can be interpreted to legitimate either a "color-blind" or an "anti-caste" approach to questions of race-conscious lawmaking.[37] (We do seem doomed to forever re-learn Holmes' admonition that abstract rules cannot decide concrete cases . . .) Thus, he argues, the substantive judgments that Habermas attempts to avoid resurface in his supposedly "removed, framing principles."[38]

Michelman attempts to salvage the constitutional patriotism concept, however, by invoking Habermas's argument that, despite the "linguistic turn" in recent social theory (the idea that language constructs reality), there are "universalist tendencies" in how people communicate with each other.[39] Habermas, explains Michelman, argues that two people will be motivated to try to understand each other only if they both assume there's a "point of convergence"—"a single object at hand, of which the parties are giving competing accounts."[40] This point, says Michelman, suggests that, for Habermas, citizens see their disagreement over issues like affirmative action *not* as a disagreement about the content of the relevant constitutional norms, but rather as a conflict over the nature of the *context* in which those norms are applied.[41] "[I]t must be," says Michelman, "the *idea of* the constitution that does the crucial work in a constitutional contractarian justification of politics, because there can be no settled agreement among a country's people on a description of

35. *See id.* at 1023.

36. *Id.*

37. *Id.* "There will have to be," Michelman concludes, "some way in which citizens perceive even their most intractable and divisive disagreements over the *application* of constitutional norms to be directed to something other than the *content* of the norms." *Id.* at 1025.

38. *See* Jürgen Habermas, *Hermeneutic and Analytic Philosophy: Two Complementary Versions of the Linguistic Turn?* (paper presented at the Annual Meeting of the Society for Phenomenology and Existential Philosophy, Denver, Colorado, 1999) (on file with the *Denver University Law Review*).

39. Michelman, *supra* note 33, at 1013.

40. This is how Michelman puts it:

> Given disagreements over applications of essential constitutional norms, citizens don't have to ascribe them to ambiguity or vagrancy of meaning in the norms themselves. We might rather ascribe their applicational disagreements to uncertainty or disagreement about exactly who we think we are and aim to be as politically constituted people, where we think we have come from and where we think we are headed.

Id. at 1025.

the actual thing in all its concrete specificity."[42] "Constitutional patriotism," Michelman concludes, must mean,

> the morally necessitated readiness of a country's people to accept disagreement over the *application* of core constitutional principles of respect for everyone as free and equal, without loss of confidence in the *univocal content* of the principles, because and as long as they can understand the disagreement as strictly tied to struggles over constitutional identity.[43]

But this readiness, Michelman argues, is necessarily empirical and contingent,[44] and therefore cannot be the basis of a universalist, proceduralist theory such as that presented in *Between Facts and Norms*.

Finally, the most far-reaching of the critiques presented in this Symposium is the piece by Rosemary Coombe with Jonathan Cohen, entitled, *The Law and Late Modern Culture: Reflections on* Between Facts and Norms *from the Perspective of Critical Cultural Legal Studies*.[45] An elegant variation on the familiar Critical Legal Studies argument deconstructing the public/private dichotomy, this article argues that Habermas's view of law as an autonomous intermediary between the lifeworld and the administrative apparatus of government ignores the fact that law shapes the political world he sees it as merely mediating. Law's role is as much about *constructing* disputes, the authors maintain, as *resolving* them.[46]

Coombe and Cohen also take Tamanaha's critique of the focus on discourse a step further, questioning not only the ability of all citizens to succeed at the communication Habermas describes, but also the exclusion from his analysis of a variety of other possible forms of political expression, such as popular music and religious oratory. Relying on the work of Iris Marion Young, Coombe and Cohen suggest that, by elevating a form of communication—"rational" argument—that is most valued by and engaged in by the dominant groups in society, Habermas reinforces the very power he sees as needing challenging.

In addition, the authors of this piece take Habermas to task for ignoring the corporate structuring of meaning-making activities in late-twentieth-century society, as well as the government's role in regulating those activities. Like law and lifeworld, politics and culture (including

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41. *Id.* at 1022.

42. *Id.* at 1026 (emphasis in original).

43. *Id.* at 1027–28.

44. Rosemary J. Coombe with Jonathan Cohen, *The Law and Late Modern Culture: Reflections on* Between Facts and Norms *from the Perspective of Critical Cultural Legal Studies*, 76 DENV. U. L. REV. 1029 (1999).

45. "Law is not simply an institutional forum or legitimating discourse to which social groups turn to have pre-existing differences recognized, but, more crucially, a central locus for the control and dissemination of those signifying forms with which identities and difference are made and remade." *Id.* at 1035.

the economic marketplace) are not mutually exclusive categories. Political views are significantly affected by corporate media; the media do not merely serve as a conduit for the political expressions of the citizenry, but rather help to set the terms of the discussion. And law, in regulating corporate media entities, reinforces and makes possible the effect that those entities have. Drawing on intellectual property concepts as an illustration, Coombe and Cohen show how legal rules protecting the productions of multimedia corporate conglomerates, under the legal fiction that they are protecting "authorship," actually reinforce those entities' deadening hegemony over the forms of production of mass culture. In so doing, law becomes implicated in the very process of political will formation from which it is supposed to derive its legitimacy.

From complementary commentary to corrosive critique, this set of papers provides an informative and thought-provoking perusal of *Between Facts and Norms.* It also memorializes a year of fruitful interdisciplinary exchange here at the University of Denver. Hopefully, it will inspire its readers to undertake similar cross-disciplinary inquiries in the future, as well as to engage Professor Habermas's important ideas about democracy and law.

BETWEEN FACTS AND NORMS: AN AUTHOR'S REFLECTIONS

JÜRGEN HABERMAS

What an author has actually said in and with a book, is up to interpretation. An intelligent reader will almost always know better than the author himself. The author only knows what he *intended* to say. With *Droit et Democratie* I think I have made specific contributions to six topics:

I. The form and function of modern law;

II. The relation between law and morality;

III. The relation between human rights and popular sovereignty;

IV. The epistemic function of democracy;

V. The central role of public communication in mass-democracy;

VI. The debate about competing paradigms of law.

I. THE FORM AND FUNCTION OF MODERN LAW

The first topic—form and function of modern law—issues from a sociological controversy about the function of modern law. The question is whether modern law is just a means for the exercise of administrative or political power or whether law still functions as a medium of social integration. In this regard I side with Emile Durkheim and Talcott Parson against Max Weber: Today legal norms are what is left from a crumbled cement of society; if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces. Law stands in as a substitute for the failures of other integrative mechanisms—markets and administrations, or values, norms, and face-to-face communications. This integrative capacity can be explained by the fact that legal norms are particularly functional in virtue of an interesting combination of formal properties: Modern law is cashed out in terms of subjective rights; it is enacted or positive as well as enforced or coercive law; and though modern law requires from its addressees nothing more than norm-conformative behavior, it must nevertheless meet the expectation of legitimacy so that it is at least open to the people to follow norms, if they like, out of respect for the law. It is easy to see why this legal form fits the requirements of modern societies:

> Modern law is supposed to grant an equal distribution of *subjective rights* for everybody. Such liberties function as a protective belt for each per-

son's pursuit of her own preferences and value-orientations and thereby fits the pattern of decentralized decision-making (which is in particular required for market-societies).

Modern law is *enacted* by a political legislator and confers with its form a binding authority to flexible programs and their implementation. It thus fits the particular mode of operation of the modern administrative state.

Modern law is *enforced* by the threat of state sanctions and grants, in the sense of an average compliance, the "legality" of behavior. It thus fits the situation of pluralist societies where legal norms are no longer embedded in an encompassing ethos shared by the population as a whole.

Modern law grants, however, stability of behavioral expectations only on the condition that people can accept enacted and enforceable norms at the same time as *legitimate* norms that *deserve* intersubjective recognition. Law thus fits to a posttraditional moral consciousness of citizens who are no longer disposed to follow commands, except for good reasons.

II. THE RELATION BETWEEN LAW AND MORALITY

The second topic—the relation between law and morality—issues from the controversy between legal positivism and natural rights theories about the question, how to explain the specific validity of law. Both positions face well-known and complementary difficulties. To put it in a nutshell: positivists, on one side, conceive legal norms as binding expressions of the superior will of political authorities. Like legal realists, who treat legal norms just as the result of policy-decisions, positivists cannot explain how legitimacy can spring from sheer legality. Both positivists and realists (including proponents of the CLS movement) refuse to recognize any claim to legitimacy stronger than the kind of legal validity that terminates in formally correct enactment and efficient enforcement. Proponents of natural right theories, on the other side, derive the legitimacy of positive law immediately from a higher moral law. Positive law here figures as the lowest level in a hierarchy of laws, the top of which is occupied by natural law, which is explained in metaphysical or religious terms. Even if we leave problems of foundationalism aside, such an assimilation of law to morality blurs important differences between the two. Whereas moral norms primarily tell us, what we *ought* to do and what we *owe* each other, modern law is in the first place designed for the distribution of individual *liberties*—for the determination of private spheres where everybody is free to do what one wants to do. Moral rights, on the other hand, are derivative from other people's *duties* towards us, whereas in law, rights are duties, since legal duties only result from mutual constraints of equally granted liberties.

The complementary weaknesses of both positions leads us to the conclusion that legitimacy of law must not be assimilated to moral validity, nor should law be completely separated from morality. Law is best understood as a functional *complement* of a weak posttraditional moral-

ity, which is, beyond institutionalization, only rooted in the conscience of the individual person. From an observer's point of view, modern law can therefore compensate for the uncertainties of moral conscience that usually works well only in the context of face-to-face contacts; where as coercive law has an impact far beyond that. At the same time, positive law does not lose all moral content, at least not as long as it meets the legitimacy requirement.

III. THE RELATION BETWEEN HUMAN RIGHTS AND POPULAR SOVEREIGNTY

The third topic—the relation between human rights and popular sovereignty—issues from a longstanding controversy about the source of legitimacy. Because of the positivity of law, we must distinguish here the role of *authors* who make (and adjudicate) law, from that of *addresses* who are subjects of established law. The autonomy of the person, which in the moral domain is all of one piece, so to speak, appears in the legal domain only in the dual form of private *and* public autonomy. These two elements—the liberties of the subject of private law and the political autonomy of citizens—must be mediated in such a way that the one form of autonomy is not impeded by the other one. This is to say that legal persons can be autonomous only insofar as they can understand themselves, in the exercise of their civic rights, as authors of just those norms, which they are supposed to obey as addressees. However, this intuition has never been quite convincingly explicated in Political Theory.

The republican tradition, which goes back to Aristotle and the political humanism of the Renaissance, has always given the public autonomy of citizens' priority over the prepolitical liberties of private persons. Liberalism, on the other hand, has always invoked the danger of tyrannical majorities and postulated the priority of the rule of law, as guaranteed by negative freedoms. Human rights were supposed to provide legitimate barriers that prevented the sovereign will of the people from encroaching on inviolable sphere of individual freedom. But both views are one-sided. The rule of law, expressed in the idea of human rights, must neither be merely imposed on the sovereign legislator as an external barrier, nor be instrumentalized as a functional requisite for the democratic process. In order to articulate this intuition properly, it helps to view the democratic process from the standpoint of discourse theory.

At this point I cannot summarize the complex arguments for the interdependence of both, human rights and popular sovereignty. Let me only make two remarks. The first suggestion is to conceive human rights as what is necessary for the legal institutionalization of the democratic process of self-legislation. That is, however, prima facie plausible only for those civil rights—the rights of communication and participation—that empower citizens to exercise their political autonomy. The suggestion is less plausible for the classical human rights that guarantee citizens' private autonomy. So it is further suggested to analyze the very grammar of the legal language which citizens must speak when they

of the legal language which citizens must speak when they wish to act *as* citizens. In other words, the legal code as such must be available as soon as we would wish to legally institutionalize a democratic process. We know from the analysis of the legal form, however, that we cannot establish any kind of legal order without creating placeholders for legal persons who are bearers of individual rights—whichever right these may be. But providing subjective rights means per se to provide a guarantee for private autonomy. This then is the core of the argument: Without basic rights that secure the private autonomy of citizens, there also would not be any medium for the legal institutionalization of the conditions under which these citizens could make use of their public autonomy. Thus private and public autonomy mutually presuppose each other in such a way that neither human rights nor popular sovereignty can claim primacy over its counterpart.

IV. THE EPISTEMIC FUNCTION OF DEMOCRACY

The fourth topic—the epistemic function of democracy - issues from the question why we may expect the legitimacy of law to emerge from the democratic process at all. The discourse-approach explains the legitimacy-generating force of the process with a democratic procedure that grounds a presumption of the rational acceptability of outcomes. Norms owe their legitimacy to a kind of recognition that is based on rationally motivated agreement. This assumption is stated in terms of the discourse principle: "Only those norms are valid to which all persons possibly affected could agree as participants in rational discourses." The contractarian tradition up to Rousseau and Kant has also referred to "reason" as a post-metaphysical base for legal and political orders. This mentalist conception of reason is now translated, however, in pragmatist terms and spelled out in terms of practices of reason-giving, i.e. as conditions for deliberation. Rational discourse is supposed to be public and inclusive, to grant equal communication rights for participants, to require sincerity and to diffuse any kind of force other than the forceless force of the better argument. This communicative structure is expected to create a deliberative space for the mobilization of the best available contributions for the most relevant topics.

"Deliberation" is broadly understood here and covers a wide range of reasons. Depending on empirical, technical, prudential, ethical, moral or legal reasons we distinguish different types of rational discourse and corresponding forms of communication. The rational acceptability of legal norms does not depend only, and not even primarily on moral considerations but on other kinds of reasoning as well, including processes of fair bargaining. Compromises form, after all, the core of politics. Anyway, this encompassing notion of 'deliberation' is to pave the way for a process-conception of legitimation. Legitimation depends on an appropriate legal institutionalization of those forms of rational discourse and fair bargaining that ground the presumption of the rational accept-

ability of outcomes. Deliberative politics is thus wedded to a complex notion of procedural legitimacy. There are three different kinds of procedures intertwined in the democratic process: first, the purely cognitive procedures of (various forms of) deliberation; secondly, decision procedures that link decisions to preceding deliberations (in normal cases the majority rule); finally, legal procedures which specify and regulate in a binding manner the material, social and temporal aspects of opinion- and will-formation processes.

V. THE CENTRAL ROLE OF PUBLIC COMMUNICATION IN MASS-DEMOCRACY

The fifth topic—the central role of public communication—is an obvious implication of the discourse-approach. From a normative point of view, structural features of political communication are more important than individual properties, such as the capacity for rational choice or good intentions or appropriate motivations. Public communication must be inclusive and selective at the same time; it must be channeled in such a way, that relevant topics come up, interesting contributions and reliable information come in, and good arguments or fair compromises decide on what comes out. This view is sufficiently abstract to bridge the gap between the normative idea of self-legislation and the stubborn facts of complex societies.

In virtue of the discourse-approach we can now disconnect the idea of popular sovereignty from its traditional bearer, "the people", which is a notion too concrete for present circumstances. On the normative level, another conception takes the place of the 'sovereignty of the people': the communicative freedom of citizens, which is supposed to issue in a public use of reason. Collective actors of civil society who are sufficiently sensitive and inclusive, can bother be instrumental for the perception problems of society-wide relevance, translate them into public issues and thus generate, through various networks, the "influence" of public opinions. Bust such "influence" is transformed into "power" only by an interaction of the informal and diffuse communications flows of the public sphere at large with formally organized opinion- and will-formation processes first embodied in the parliamentary and the judiciary complex. "Communicative power" is produced according to the democratic procedures of elected and deliberating bodies and the, in accordance with legislative programs and court decisions, transformed into the "administrative power" of the executive agencies, available for the purpose of implementation. This is, of course, only the normatively prescribed image from which the real circuit of power widely deviates. But it is an image that allows us at least to connect the normative self-understanding or constitutional democracy with its real practices.

VI. THE DEBATE ABOUT COMPETING PARADIGMS OF LAW

The last topic—the introduction of a new, proceduralist paradigm of law—issues from the hopeless competition between the two received

legal paradigms, the liberal and the welfare-state paradigm. The *liberal paradigm* counts on an economic society that is institutionalized through private law, above all through property rights and contractual freedom, and thus left to the spontaneous workings of the market. If, however, the legal capacity of private persons to own, acquire or sell property is supposed to guarantee social justice, then everybody must enjoy equal opportunities for making effective use of equally distributed legal powers. Since capitalist societies generally do not meet this requirement, proponents of the *welfare-state paradigm* argue for compensating growing inequalities in economic power, property, income and living conditions. Private law must be substantially specified and social rights must be reintroduced. On the other hand, unintended effects of welfare-paternalism indicate limitations of this alternative, too. It turns out that the traditional debate on deregulated markets versus state regulations is too narrowly focused on private autonomy, while the internal relation between *private and public* autonomy drops out of the picture. Between the two received paradigms, the only controversial issue is whether private autonomy is best guaranteed straightaway be negative freedoms, or whether the conditions for private autonomy must be secured through the provision of welfare entitlements.

One way out of this impasse is indicated by a third, a *proceduralist paradigm* that crystallizes neither around the private competitor on markets nor around the private client of welfare bureaucracies, but has its focus on the citizen who participates in political opinion- and will-formation. For private legal subjects cannot enjoy equal liberties if they themselves do not in advance exercise their civic autonomy in common in order to specify, which interests are at stake and which standards of evaluation are justified in the light of which cases should be treated alike and different cases differently. Citizens can only arrive at fair regulations for their private status if they make an appropriate use of their political rights in the public domain. They must be willing to participate in the struggle over the public relevance, the interpretation and evaluation of their own needs, before legislators and judges can even know what it in each case means to treat like cases alike. In highly differentiated societies with an intransparent diversity of interests, it is an epistemic requirement for the equal distribution of liberties for everybody that those citizens affected and concerned first get themselves the chance to push their cases in the public, and articulate as justify those aspects which are relevant for equal treatment in typical situations. Briefly, the private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy.

LAW PROFESSORS READ HABERMAS

MITCHELL ABOULAFIA*

In the summer and fall of 1998, in preparation for the Habermas Symposium which would lead to this edition of the *Denver University Law Review*, I had the good fortune to participate in a study group held on Habermas's recent work on the law[1] at the University of Denver College of Law. The group was interdisciplinary, made up of law professors of various stripes, philosophers, and social theorists. I was one of the philosophers. As is often the case with interdisciplinary groups, the rewards come at something of a price. The struggle to understand the language, interests, and concerns of those with different intellectual backgrounds and bents, was both exhilarating and frustrating. I am concerned with the latter reaction here, certainly experienced by everyone. The law professors having little familiarity with Habermas and his progenitors often found his work needlessly obtuse and riddled with unfamiliar intellectual byways. The theoreticians present found themselves taxed by having to explain and defend the importance of various ruminations that appear important only to distinction-obsessed philosophical types.

In thinking about how I might best make a contribution to the *Denver University Law Review*, I decided that drawing on the experience of this past summer might be of assistance to readers familiar with the law but not with Habermas's larger project. Therefore, I intend to pursue a path that became familiar to the study group; that is, I will engage in a reading of several pages of Habermas's text with commentary interspersed. The commentary will clarify the meaning of a particular passage in order to throw light on Habermas's larger project. I have chosen passages from the "Postscript" that Habermas wrote to *Between Facts and Norms* in 1994.[2] Of course, there are severe constraints on just how much of Habermas's position can be presented in a short piece, and some of the presentation may border on caricature, but what follows should be of some assistance to colleagues in law, and may help to make some of the other pieces in this symposium a bit more accessible. I begin with a

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1. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY at 448 (William Rehg trans., 1996).

2. *See id.* at 447.

quotation that serves as a good point of entry for Habermas's approach to the law:

> Modern law presents itself as Janus-faced to its addressees: it leaves it up to them which of two possible approaches they want to take to law. Either they can consider legal norms merely as commands, in the sense of factual constraints on their personal scope for action, and take a *strategic* approach to the calculable consequences of possible rule violations; or they can take a *performative* attitude in which they view norms as valid precepts and comply "out of respect for the law."[3]

One can obey the law because there are possible sanctions looming, or one can obey because there is a respect for the law; that is, the law is viewed as legitimate and worthy of compliance. Notice that Habermas uses the term "strategic" to describe the approach in which consequences are considered. Habermas's understanding of the law is incomprehensible without a basic distinction between what he calls communicative action and strategic action. Communicative action, the goal of which is mutual understanding, follows certain rules built into the pragmatics of communication. As Thomas McCarthy, the translator of Habermas's *Theory of Communicative Action*, notes:

> Habermas argues that our ability to communicate has a universal core—basic structures and fundamental rules that all subjects master in learning to speak a language . . . . [W]e are constantly making claims, even if usually only implicitly, concerning the validity of what we are saying, implying, or presupposing—claims, for instance, regarding the truth of what we say in relation to the objective world; or claims concerning the rightness, appropriateness, or legitimacy of our speech acts in relation to the shared values and norms of our social lifeworld; or claims to sincerity or authenticity in regard to the manifest expressions of our intentions and feelings.[4]

Interlocutors engage one another in a manner in which there are implicit or explicit claims made, and if the goal is mutual understanding, then we must presume that the parties are willing to give reasons for their claims. The parties must be willing to engage others in a manner in which non-coerced yes-no responses are possible; that is, I can agree or disagree with what you present, and you can do the same without threat of sanction. Of course, conversations with others do not always fit this ideal, but Habermas argues that this ideal of rational exchange is more basic than other modes of communication. When interlocutors act strategically—that is, when the goal is not understanding but is rather to manipulate others for gain or advantage—they utilize the rules of communicative action to distort the process and gain what they wish. Discourse

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3. *Id.* at 448.

4. Thomas McCarthy, *Introduction to* JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION at x (Thomas McCarthy trans., 1981).

directed at understanding is logically prior to language aimed at manipulation because it makes the latter possible. Linguistic interactions always move between the poles of the strategic and genuinely communicative, but the idealizing assumptions of communicative action make both poles possible. They are the transcendental or quasi-transcendental grounds of communication; that is, they are the conditions for the possibility of communication geared to understanding (and its distortion).

Now the modern world has seen an increase in the pervasiveness of strategic action. Why should this be? The story that Habermas tells has its roots in thinkers such as Marx, Weber, Durkheim, and members of the Frankfurt School. The modern world, to borrow from Weber, has been home to ever increasing degrees of goal-directed or purposive behavior as opposed to traditionalistic or value-oriented behavior. Expressed in the terms of the Frankfurt School, we live in a world of ever increasing instrumental reason or action. This is due to a number of historical factors, not least among them the prevalence of capitalism and modern bureaucracies. As transformations of the modern world have taken hold, traditional forms of societal organization have gone by the wayside; we can no longer depend on religion or more archaic traditions to organize our social lives. Actors are increasingly free from the constraints of all forms of traditionalism, at least in so far as their public actions are concerned. They behave as if they are singular, as opposed to collective or social, agents. We are faced, then, with a world that appears to confront us with fewer and fewer avenues for presuming that our public actions have any sanction beyond success. In this world, rules and norms seem open to constant revision depending on the strategic needs of actors, and we may wonder at what can possibly legitimate them. Habermas does not believe that strategic forms of action can ultimately be the grounds for legitimating rules and norms. In this he stands in a long line of political thinkers for whom there must be some genuinely rational ground that trumps power relations in providing legitimacy. As Plato knew, the Thrasymachi of the world—that is, those who believe that might makes right—must be proven wrong.

> What grounds the legitimacy of rules that can be changed at any time by the political lawgiver? This question becomes especially acute in pluralistic societies in which comprehensive worldviews and collectively binding ethics have disintegrated, societies in which the surviving posttraditional morality of conscience no longer supplies a substitute for the natural law that was once grounded in religion or metaphysics.[5]

This passage refers to the dilemma that modern pluralistic societies must face. Forms of social organization in which there is an integrated world-view that justifies the rules that people live under have gone by the wayside. In the modern world, there has been an increase in autonomy

5. HABERMAS, *supra* note 1, at 448.

and with it an order that places the burden of moral choices on the consciences of individual actors. The same actors who are confronted with an ever increasing array of choices, ones that can be negotiated in a strategic fashion, are also asked to become autonomous moral agents. These actors are often asked to view their moral dilemmas in increasingly Kantian terms; that is, they must act as autonomous rational agents in deciding what is just, and not simply follow tradition and convention. In terms of the above passage on the legitimacy of rules, Habermas has something of a conundrum to face: while he has argued that posttraditional morality is superior to conventional or traditional approaches—he follows the psychologist Lawrence Kohlberg's hierarchy of moral stages for the most part—postconventional morality does not appear to have the octane needed to "substitute for the natural law that was once grounded in religion or metaphysics."[6] Agents may have become more autonomous, but the grounds for their choices are increasingly less certain. They cannot depend on tradition. It is important to note here that Habermas is not suggesting that morality and law be conflated; in fact, it is quite the contrary. Habermas spends much of his book showing in just what ways they are different. He is asking how in a world of post-conventional morality are we to understand the source of legitimacy of modern law, since clearly the assumptions of a natural law grounded in a specific community no longer carries the proper weight.

It is worth noting at this juncture that Habermas makes an important distinction in this context. While Habermas modifies the traditional Kantian position regarding the isolation of the autonomous agent, he insists on the distinction between ethical life and morality. The former entails norms and standards that a specific community views as constitutive of the good life. For Habermas, ethical life must be distinguished from questions of morality and law (justice), which depend on proper procedure for their realization and not on substantive ethical forms of life. It is also worth noting that Habermas's position regarding the distinction between morality and ethical life is challenged by communitarians and various sorts of pragmatists who argue that one can not make the cut between them as Habermas does.

Modernity has changed the ground rules. If the modern state, its social organization, and the laws that help maintain the two are to be viewed as legitimate, then we must find mechanisms for legitimacy that do not simply appeal to tradition.

> The democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy. But what provides this procedure with its legitimating force? Discourse theory answers this question with a simple, and at first glance unlikely, answer: democratic procedure makes it possible for issues and contributions,

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6. *Id.*

> information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable.[7]

Democratic procedure will serve to legitimate the law, and will also secure what Habermas calls a "discursive will-formation." What does he mean by the latter phrase, a phrase that he links to reason? Perhaps the easiest route of entry here is to mention Rousseau. Rousseau, of course, spoke of the general will; that is, the (political) will that best expresses what is good for the people. According to Rousseau, while the general will is always correct, freedom is only possible in a society in which the people make laws that they can always change. No one has any natural authority over another for Rousseau. In this he was a conventionalist, but something of a peculiar one with strong commitment to a view of human nature that suggests ties to features of the tradition of natural law. In any case, the principle that the law is made by the people, and can be changed by them, has a certain appeal to Habermas, but the Rousseauian or republican form of this equation brings with it a grave danger, for Rousseau insists that the general will cannot be mistaken. How is it possible that the general will can never be wrong? In one line of interpretation it is because the general will is the servant (or manifestation) of reason itself. However, such a view of reason as incontrovertible is just what Habermas wishes to combat as he proceeds to develop and defend his own vision of the rational. How are we to understand Habermas's view of reason and its connection to what he calls discursive will-formation?

Kant developed the notion of autonomy found in Rousseau in the direction of the moral autonomous subject, who is both the giver and recipient of the moral law. Yet, the moral law is not one that can be broken. Like the general will, it must always be correct. Reason is the key to this law and to autonomy for Kant. In addressing Kant's moral theory above, I noted that Habermas agrees with much that Kant thought regarding moral life. He is, however, unsatisfied with the isolated agent as the arbiter of moral decisions. Kant's categorical imperative is not open to negotiation between interlocutors in that reason can show each individual the proper path. For Habermas, on the other hand, rationality is not to be construed as a possession of the monological subject; that is, the person who has a "dialogue" only with himself when trying to determine what is moral. Kant's moral subject is a singular agent, and interestingly enough, so is "the people" for Rousseau, for "the people" should act as a unitary subject. In some accounts of Marx, the proletariat is viewed as an updated version of "the people" whose common interests transform it into a unitary subject. Habermas will have none of this.

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7. *Id.*

For Habermas, reason is found in the discursive practices of political and social actors. And the political will of "the people" should be achieved through (rational) discourse; that is, political will-formation should have a discursive character. Reason is not the possession of the singular subject; it is a social phenomenon that can be located in our linguistic interactions. And it is found, for example, in proper legal procedure and not in substantive claims about values and ways to achieve the good life. Habermas's model presumes that reason shows itself in the processes involved in communicative action. Procedure, not substance, is the mantra here, because we can never be sure of the latter, and we know how often claims made about the nature of the good life have led to oppressive political and social organizations. The force of the better argument should prevail and can only do so if the interlocutors respect the rules for communicative action. In an analogous fashion, complex modern societies, tossed and turned by people with very different ideas about the good life, can only survive and flourish if procedures are in place that allow different voices to be heard with no particular voice silencing others. If certain rules of discourse are followed, conversation can be designated as rational. And societies are more rational when their political and legal systems bow to acknowledge these requirements, for example, by protecting the right to have one's voice heard. While Habermas is not a traditional liberal, he certainly would find some of Mill's conclusions in *On Liberty*[8] quite compelling.

In the quotation above on Discourse Theory, Habermas speaks of fallibilism.[9] The latter may be said to be part of a democratic temper; that is, in a democracy no one party may presume to have a corner on the truth in a way that dismisses the political observations or practices of others, although one could conceivably prohibit practices that prevent legitimating discourse. For Habermas, rights are necessary for a discursively achieved political will-formation. The alternative would be to have the "will" of political actors shaped from above or by tradition. For Habermas, rights, democracy, legitimacy, and discourse are intimately linked. We might express their connection in the following manner: Without rights protecting private "space," democracy would be unrealizable because citizens could not form themselves as autonomous agents; and without democracy, law would not have the proper grounds for legitimacy; and without law that is legitimate, rights (public and private) would not be properly protected. And, of course, without public rights, discussion would not take place in a fashion that sustains democracy and legitimates the law. In the modern world we should not allow justifications that are outside of the system, say God or natural rights, to pretend to legitimate the system. As one would expect, Habermas's argument involves an extended defense of the notion that in the modern world we

8. JOHN STUART MILL, ON LIBERTY (1859).

9. *See* HABERMAS, *supra* note 1, at 2; *see also* text accompanying note 7.

have come to expect that the law will be legitimate and that modern democratic political organization is what supplies this legitimacy.

> The argument developed in *Between Facts and Norms* essentially aims to demonstrate that there is a conceptual or internal relation, and not simply a historically contingent association, between the rule of law and democracy. . . . [T]he *democratic process* bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. This is because individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs. The proceduralist understanding of law thus privileges the communicative presuppositions and procedural conditions of democratic opinion- and will-formation as the sole source of legitimation.[10]

Without democracy it would not be possible to legitimate modern law. But it is modern law that acts as the guardian of rights that are required for the flourishing of communicative action and democracy.[11] Yet this is not the only role for law in modern society. Recall that one of Habermas's concerns is that modern society does not have available to it traditionalistic approaches to cementing the organization of society. While this is in fact a good thing—that is, in so far as modern society makes room for greater self-determination and self-actualization—there is still a question of what serves as the mortar of modern society. Habermas claims that in addition to the market place (or the money system) and the state (or administrative power), law helps to act as the mortar of the modern world.

> From the standpoint of *social theory*, law fulfills socially integrative functions; together with the constitutionally organized political system, law provides a safety net for failures to achieve social integration. It functions as a kind of "transmission belt" that picks up structures of mutual recognition that are familiar from face-to-face interactions and transmits these, in an abstract but binding form, to the anonymous, systemically mediated interactions among strangers. Solidarity—the third source of societal integration besides money and administrative power—arises from law only indirectly, of course: by stabilizing behavioral expectations, law simultaneously secures symmetrical relationships of reciprocal recognition between abstract bearers of individual rights.[12]

10. HABERMAS, *supra* note 1, at 449-50.

11. It should be noted that rights or proto-rights are grounded for Habermas in the conditions necessary for successful communicative action, and rights in turn come to act as legal safeguards for communicative action.

12. *Id.* at 448-49.

We cannot depend on face-to-face interactions in close knit communities to serve us in the same way that they may once have. We must find ways to deal with strangers in ways that parallel the manner in which we ought to treat others when there is ongoing personal contact. The law does this for us. In addition, given that strategic behavior is more pervasive in the modern world, we must find ways to navigate the ever-increasing number of interactions that we have of this sort. We need a world in which we can be released from always concerning ourselves with communicative action because there are so many circumstances in the modern world in which we cannot function in this manner. And here too the law comes to our aid, for it allows us to behave strategically and yet have our behaviors circumscribed in a manner that lends credence to the importance of the "idealizing" moment of communicative action. As the translator of *Between Facts and Norms*, Willliam Rehg, succinctly states:

> Modern law is meant to solve social coordination problems that arise . . . where, on the one hand, societal pluralization has fragmented shared identities and eroded the substantive lifeworld resources for consensus and, on the other, functional demands of material reproduction call for an increasing number of areas in which individuals are left free to pursue their own ends according to the dictates of purposive rationality. The solution is to confine the need for agreement to general norms that demarcate and regulate areas of free choice. Hence the dual character of law: on the one hand, legal rights and statutes must provide something like a stable social environment in which persons can form their own identities as members of different traditions and can strategically pursue their own interests as individuals; on the other hand, these laws must issue from a discursive process that makes them rationally acceptable for persons oriented toward reaching an understanding on the basis of validity claims.[13]

Communicative action can be thought of as transhistorical in the sense that the use of any human language entails certain pragmatic rules. But in the modern world there has developed a heightened awareness of the presuppositions of various types of discourses. We have learned to separate moral, legal, scientific, and aesthetic modes of discourse. We expect these domains to follow certain general discursive rules but also to differ in the sort of language games that each area involves. Post-enlightenment citizens have come to understand the advantages of keeping these spheres from encroaching on one another. They have also increasingly come to expect that certain practices and procedures inform the law and government. Legitimacy stems from these procedures and not from the assertions of those who claim, for instance, the divine right of kings. We have come to expect that those who are ruled have a voice in how they are ruled. But Habermas does not want this participation to

13. *Id.* at xix.

be understood in terms of republicanism and all the dangers that this sort of populism brings with it. No, there must be constitutional and legal safeguards, and these in turn will protect domains of privacy and personal development that nurture citizens capable of autonomous public activity.

> The internal relation between the rule of law and democracy can be explained at a conceptual level by the fact that the individual liberties of the subjects of private law and the public autonomy of enfranchised citizens make each other possible.[14]

> A constitution-making practice requires more than just a discourse principle[15] by which citizens can judge whether the law they enact is legitimate. Rather, the very forms of communication that are supposed to make it possible to form a rational political will through discourse need to be legally institutionalized themselves. In assuming a legal shape, the discourse principle is transformed into a principle of democracy. For this purpose, however, the legal code as such must be available, and establishing this code requires the creation of the status of possible legal persons, that is, of persons who belong to a voluntary association of bearers of actionable individual rights. Without this guarantee of private autonomy, something like positive law cannot exist at all. Consequently, without the classical rights of liberty that secure the private autonomy of legal persons, there is also no *medium* for legally institutionalizing those conditions under which citizens can first make use of their civic autonomy.[16]

Contra the extreme populist, there are human rights which are in fact presuppositions of democracy itself and cannot be "voted" away; and contra certain natural rights theorists, the source of these rights must be located in those practices that make communicative action possible. Another way of stating this is to say that we cannot be free and self-determining unless we can be rational, and that this rationality is located in practices of communication that allow for mutual understanding. Without communicative action directed at mutual understanding, we could not be active autonomous participants in a democracy. But communicative action requires a legal framework in order to flourish, a framework which provides space for individual autonomy to grow *and* one that helps to regulate our behaviors in an increasingly complex world.

> The positive law that we find in modernity as the outcome of a societal learning process has formal properties that recommend it as a suitable instrument for stabilizing behavioral expectations; there does not seem to be any functional equivalent for this in complex societies.

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14. *Id.* at 454.

15. In *Between Facts and Norms*, Habermas defines the discourse principle in the following fashion: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses." *Id.* at 107.

16. *Id.* at 454-55.

> Philosophy makes *unnecessary* work for itself when it seeks to demonstrate that it is not simply functionally recommended but also morally required that we organize our common life by means of positive law, and thus that we form legal communities. The philosopher should be satisfied with the insight that in complex societies, law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers.[17]

This is not to say that Habermas is unconcerned about morality. Much of his philosophical work has been directed at developing a theory of discourse ethics, which is actually a theory of morality. He warns us, however, that analysts of modern society should not confuse or conflate the activities of various domains, for example, ethical, legal, moral, scientific, and aesthetic. In practice, Habermas tells us that ethical life and considerations of morality do influence legislation and the law. But this does not argue for a conceptual confusion regarding these domains. Such a confusion is often revealed in the thinking of those who defend communitarian approaches to the law. From Habermas's vantage point, thinkers who view the law through the prism of the habitual and moral, as do communitarians, fail to do justice to the actual dynamics of modern law.

In this short piece, I have only sought to touch on some of the features of Habermas's approach to the law by drawing primarily on a few pages from the *Postscript* to *Between Facts and Norms*. Behind his extensive work on the law stands a social theory that incorporates ideas from numerous thinkers and traditions, for example, Weber, Marx, Durkhiem, Mead, Parsons, Dworkin, and members of the Frankfurt School.

A theoretical framework as vast as this one is bound to draw criticism. Some cannot accept his analysis of modernity, one in which the universalistic values of the Enlightenment hold sway. Some do not accept the manner in which he distinguishes law, morality, and habit. Some hold that his proceduralist approach to rights is simply too thin and that rights must be grounded in something more basic than communicative action.[18] Some believe that he cannot successfully combine his historicist sensibilities with those that can be earmarked transcendental. Some do not believe that strategic action can be separated from communicative action in the manner that Habermas proposes. Some think that his views cannot do justice to needs of ethnic minorities.[19] Some are unwilling to

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17. *Id.* at 460.

18. *See, e.g.*, Carol C. Gould, *Diversity and Democracy: Representing Differences*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 171-86 (Seyla Benhabib ed., 1996).

19. For a discussion of multiculturalism, *see* CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994) (containing five pieces on

accept his claim that post-conventional morality is superior to conventional morality, or that such a distinction exists at all. And there are no doubt other criticisms. Yet, at minimum, we can say that Habermas's approach has supplied the framework for many of the most important contemporary debates on law, morality, and the nature of society.[20]

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multiculturalism including: Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State* 107 (Shierry Weber Nicholsen trans., 1994)).

20. The literature on Habermas is enormous. A good place to start in English is *The Cambridge Companion to Habermas*. THE CAMBRIDGE COMPANION TO HABERMAS (Stephen White ed., 1995). In addition to the articles in the book, there is a bibliography of works by and on Habermas. *See id.* at 325.

ACCOMMODATING REPUBLICANISM

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Presently, there is a debate raging between deontological and teleological theories of justice. No doubt, both Jürgen Habermas and John Rawls would want to see themselves on the deontological side of the current debate. However, each accuses the other of a kind of latent Aristotelianism.[1] The source of that accusation is clearly to be found in both thinkers' attempts to accommodate the critique of liberalism by republicanism. In the following I want to turn to that portion of the 1995 debate between Rawls and Habermas[2] which focuses on the Ancients and the Moderns in order to clarify what is at stake in what I have called "accommodating republicanism." Then I want to pose the question of the relationship of deontological to teleological theories of justice to see what kind of response Habermas might make to Rawls's characterization of him as a "classical humanist" or what we have referred to as a latent Aristotelian. Finally, in a curious way, law is at the center of this issue whether one wants to see it in the form of Rawls's constitutionalism or Habermas's co-originality thesis. Does Rawls's constitutionalism provide an alternative to the co-originality thesis?

I. ANCIENTS VS. MODERNS

The battle between Rawls's interpretative constructivism and Habermas's argumentative constructivism comes to the fore over Benjamin Constant's idea that the liberties of the moderns and the liberties of the ancients should be nourished by the same root.[3] Habermas argues simply that private and public autonomy are co-original.[4] In his (Habermas's) view, Rawls finds himself defending the quintessentially liberal position of prejudicing the liberties of the moderns, private rights, over those of the ancients, political rights.[5] This is the heart of the debate. How

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1. The term Aristotelianism may be questionable. I presume that is what Habermas means when he associates Rawls with a classical theory that legitimates its theory of justice by assuming the actuality of just institutions as he does in chapter two of *Between Facts and Norms*. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 58 (William Rehg trans., 1996). Further, I assume that is what Rawls means when he associates Habermas with classical humanism, which he does at the end of the debate. *See infra* note 2.

2. The debate consists of an article written by Habermas, with a reply by Rawls. *See* Jürgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109 (1995); John Rawls, *Reply to Habermas*, 92 J. PHIL. 132 (1995).

3. *See* Rawls, *supra* note 2, at 156–57 & n.39.

4. *See* HABERMAS, *supra* note 1, at 104.

5. *See* Habermas, *supra* note 2, at 127.

does one retain the basic framework of liberalism while at the same time accommodating the republican critique? The republican critique says about liberalism the very thing that Habermas is here saying about Rawls: namely, that liberalism functions to justify private rights. But there is more at stake. The question is, how does one realize justice as fairness while assuring impartiality in a process that is eminently democratic? The notion of reciprocity derived from the procedure of argumentation provides the basis for Habermas's solution. At issue is the notion of intersubjectivity and with it the claim that, echoing Hegel's critique of Kant, Rawls adopts a position that is monological, a kind of liberal solipsism. Of course, the Habermasian thesis, anticipated from the beginning, is that justice as fairness can only be achieved through an adequate notion of reciprocity. In turn, in accord with Habermas's argument, an adequate notion of reciprocity can only be gained from the procedure of argumentation in which the actors in the political process mutually recognize the claims and counterclaims of one another. Here, we encounter the centrality of public will-formation, read democratic procedure, which can be reconstructed as a public and intersubjective process derived from the procedure of argumentation. The emerging thesis, which is a reconstruction of the intersubjective demands of discourse, postulates the assumption that private right can only be derived from the process of public will-formation. It follows from this that private and public autonomy are co-original. Or to put it another way, rights follow from the process of recognition. The consequence would be that rights are democratically grounded from the outset.

The point of all this is the claim that for Rawls rights are not democratically grounded. According to Habermas, this claim follows from the critique of the original position. The critique goes something like this: if Rawls had accepted Habermas's second critique, the epistemic association of the reasonable and the true with the consequence that consensus and validity would be linked from the outset, then he would not have to use the original position as a device of representation because he would have found that "the moral point of view is already implicit in the socio-ontological constitution of the public practice of argumentation."[6] Further, Rawls would not have had to make the second step in the theory, that is the step to overlapping consensus, because the public practice of argumentation requires the "complex relations of mutual recognition that participants in rational discourse 'must' accept (in the weak sense of transcendental necessity)."[7] In other words, if Rawls had built consensus into the first stage of the theory, rather than adding it on in the second stage, he would have escaped both the arbitrariness of the second stage as well as the implicit monological perspective of the first stage. Instead, given this speech-act view based on the nature of performatives from

6. *Id.*
7. *Id.*

which one derives a certain intersubjective necessity, intersubjectivity, with its notion of reciprocity, which guarantees impartiality, is written into the theory from the outset. In this sense, practical reason is actualized through mutual recognition. The result: "we could say that precisely those principles are valid which meet with uncoerced intersubjective recognition under conditions of rational discourse."[8] In other words, consensus need not be an afterthought.

From Habermas's point of view, Rawls's distinction between the private and the public, which underlies his distinction between the political and the comprehensive, is not only unnecessary but leads to undesired consequences particularly when one focuses on liberties and rights. Not only, in Habermas's view, does this contradict his (Habermas's) co-originality thesis, it also goes against the historical insight that the "boundary" defining the relative spheres is always shifting as defined by the basic shifts in political will-formation. In this view, Rawls would be better off if he would subsume this distinction under that of "legal regulation," which would in turn be determined by the democratic life of a political community. In other words, given such a scenario, legal regulation would determine the distinction between the public and private in a democratic way in the sense that those under the law would be its own authors. The reigning question would be: "Which rights must free and equal persons mutually accord one another if they wish to regulate their coexistence by the legitimate means of positive and coercive law?"[9] If one were to put the question that way it would follow that Rawls's characterization of a private domain which contains the realm of the comprehensive as distinguished from a public realm which characterizes the political would be less necessary than it would at first appear. Habermas then would shift Rawls's distinction between the private and the public, the comprehensive and the political, to the domain of the procedure of legal regulation which would accord the right to "*equal* subjective liberties" as well as the public autonomy of its citizens. In brief, legal procedure presupposes the subjective autonomy of its citizens, what Rawls would call the domain of private right. At the same time, legal procedure in a democratic society cannot be legitimate without the public exercise of democratic lawmaking. Private and public autonomy presuppose each other. Hence, one would infer from the argument that Rawls should have concentrated on the procedure of democratic lawmaking.[10]

Rawls denies Habermas's characterization. Here Rawls's more interpretative constructivism comes to the fore. Rawls contends that with careful attention to the design of a constitution in relationship to the process of

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8. *Id.*

9. *Id.* at 130.

10. Habermas believes: "Once the concept of law has been clarified in this way, it becomes clear that the normative substance of basic liberal rights is already contained in the indispensable medium for the legal institutionalization of the public use of reason of sovereign citizens." *Id.*

government, one can see that private autonomy is not pre-political.[11] The constitutional convention selects a constitution with its Bill of Rights which "restricts majority legislation in how it may burden such basic liberties as liberty of conscience and freedom of speech and thought."[12] To be sure then, rights "trump" popular sovereignty, but only as popular sovereignty is expressed in the legislature inasmuch as those very rights are derived from a democratic process. Hence, basic liberties are "incorporated into the constitution and protected as constitutional rights on the basis of citizens' deliberations and judgments over time."[13] In other words, and this is a distinctly American view, popular sovereignty is to be distinguished from "parliamentary supremacy." Following Locke's dualist idea of a constitutional democracy, a distinction is made between ordinary lawmaking by a legislature and the "people's constituent power to form, ratify, and amend a constitution."[14] As a consequence a distinction is made between "higher law of the people" and the "ordinary law of legislative bodies."[15] The example which illuminates Rawls' argument is a historical one. Following Bruce Ackerman,[16] Rawls cites the three significant innovations in American constitutional history, the founding of the Constitution 1787-91, Reconstruction, and the New Deal. Rawls observes that in these periods it was the electorate which "confirmed or motivated the constitutional changes that were proposed and finally accepted."[17]

Of course, Rawls's argument, derived from historical interpretation, and not purely from argumentation, relies on the development of the constitutional history of the United States. As such, Rawls argues this reference proves that justice as fairness is a political notion rather than a notion derived from natural law.[18] As a consequence, "the liberties of the moderns do not impose the prior restrictions on the people's constituent will."[19] But does it prove something beyond reference to the constitutional history of the United States? This is one way of asking the question. Another way might be to ask if the question of the co-relation of the liberty of the ancients and the liberty of the moderns, of private right and popular sovereignty, can be resolved independent of a constitutional history. In Rawls's view it could be that "Habermas may have no objection to justice as fairness but may reject the constitution to which he thinks it leads, and which I think may secure both the ancient and modern liberties."[20] Fair enough. Rawls is willing to concede that, "He and I are not, however, debating the

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11. *See* Rawls, *supra* note 2, at 155–56.
12. *Id.* at 157.
13. *Id.* at 157–58.
14. *Id.* at 158.
15. *Id.*
16. *Id.* at 158 (citing BRUCE ACKERMAN, WE THE PEOPLE, VOLUME I: FOUNDATIONS (1991)).
17. *Id.*
18. *See id.* at 159.
19. *Id.*
20. *Id.*

justice of the United States constitution as it is; but whether justice as fairness allows and is consistent with the popular sovereignty he cherishes."[21]

However, Rawls is sensitive to the interpretation, and thus the critique, that Habermas gives to liberalism. Hence, in support of his argument that individual rights are not pre-political, and to some extent in support of his own more interpretative view, he cites an argument which Habermas uses against Charles Larmore.[22] Larmore has argued that one right has to proceed and constrain democratic will-formation, "No one should be forcibly compelled to submit to norms whose validity cannot be made evident to reason."[23] Habermas interprets this to mean the establishment of a pre-political right against the state which is perceived under the category of violence. Against this view, Habermas presents a two-stage model which begins with the "horizontal sociation of citizens who recognizing *one another* as equals, mutually accord rights to one another. Only then does one advance to the constitutional taming of power presupposed with the medium of law."[24] Rawls would view his own construction in a similar way. Hence, he arrives at two conclusions. First, that Habermas's position is not that different from his own. Second, that Habermas misses on his interpretation of liberalism. At this point, Rawls has made no attempt to critique Habermas, but merely defends his position against the presumption of a liberal bias for private rights. But clearly he doubts that Habermas's construction as a theoretical construction, such as the co-originality thesis, will grant the proper exercise of law and justice.[25] Equally, he doubts the emphasis on the political in Habermas's emphasis on "the normative content of the *mode of exercising political autonomy*."[26] He speculates that the origin of that idea is found in classical humanism (he must mean Aristotle) where the greatest good is conceived of as participating in political life. This notion is really derived from a comprehensive doctrine, a notion of the good, which may be admirable and noble, but certainly not applicable, in Rawls's view, to everybody. I take him to mean here that not everybody is interested in the pursuit of the good, defined as politics or political action. Private interests and pursuits are legitimate as well. In any case, from the point of view of political liberalism, it would be inappropriate to assert

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21. *Id.*

22. Charles Larmore, however, generally shares the view of political liberalism with John Rawls.

23. HABERMAS, *supra* note 1, at 456 (quoting Charles Larmore, *Die Wurzeln Radikaler Demokratie* [The Roots of Democratic Reason], DEUTSCHE ZEITSCHRIFT FUR PHILOSOPHIE 41 (1993)).

24. HABERMAS, *supra* note 1, at 457.

25. Rawls is rather adamant on this point arguing that "for there is no human institution—political or social, judicial or ecclesiastical—that can guarantee that legitimate (or just) laws are always enacted and just rights always respected." Rawls, *supra* note 2, at 166. Further:

> No special doctrine of the co-originality and equal weight of the two forms of autonomy is needed to explain this fact. It is hard to believe that all major liberal and civic republican writers did not understand this. It bears on the age-old question of how best to unite power with law to achieve justice.

Id.

26. *Id.* at 169.

one comprehensive view over others. Hence, for Rawls, not everybody need pursue the good as in the politics of old.

II. THE TELEOLOGICAL QUESTION

Rawls has made a very interesting point to which, to my knowledge, Habermas has yet to reply. His critique can be formulated in the following way: if one asserts the co-originality thesis in the way that Habermas does, with its implicit assumption about the primacy of the political in the classical, as opposed to the modern sense, then one buys into a teleology which can only be justified through a comprehensive philosophical framework.[27] Of course, Rawls has not responded to Habermas's characterization of him as an Aristotelian in the second chapter of *Between Facts and Norms*.[28] However, it would be interesting to read Habermas's response to this very illuminating critique which suggests Habermas has gone too far in his attempt to accommodate the claims of republicanism. Equally, it would be interesting to know if Habermas believes that Rawls, by relying on American constitutionalism, avoids a similar dilemma—namely, the assertion of the teleological primacy of the public good on comprehensive grounds. Rawls claims to get by his interpretive constructivism what he contends Habermas does not get by his (Habermas's) argumentative constructivism.[29] As I understand it, Rawls claims to be able to assert a merely political and non-comprehensive notion of democratic procedure through his identification with the claims of a certain form of constitutional legal theory. Hence, Rawls could claim a more or less intersubjectivist identification with Habermas's co-originality thesis, but on grounds that require a relatively weak notion of reason. Although Habermas has spoken recently about the distinction between the reasonable and the true in Rawls,[30] to my knowledge he has not addressed the issue of Rawls's constitutionalism.

27. *See id.* (critiquing Habermas's view of the co-originality thesis).

28. *See* HABERMAS, *supra* note 1, at 56–66 (critiquing Rawls).

29. *See* Rawls, *supra* note 2, at 132.

30. *See* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 75–101 (1998).

HABERMAS AMONG THE AMERICANS: SOME REFLECTIONS ON THE COMMON LAW

CATHERINE KEMP*

In his *Translator's Introduction* to Jürgen Habermas's *Between Facts and Norms*,[1] William Rehg notes that one of the challenges facing the English translator is that the theory of law elaborated in this book "deals with two different legal orders,"[2] namely, "the American legal system, influenced as it is by the English common-law tradition" and in which "case law has always occupied a central position," and the German civil law.[3] Rehg goes on to say that it is important not to overemphasize these differences,[4] and certainly the fluidity with which the two orders serve the analysis of *Between Facts and Norms* bears witness to this view. In this essay, I suggest that Habermas's extension of his theory of law to the American system involves challenges not only to translation but also to a descriptive and philosophical account of American law. In particular, the status of customary law in Habermas's theory and its relation to adjudication as he characterizes it do not capture either the nature of the common law or, perhaps more importantly, its influence throughout the American system. This claim has implications for Habermas's description of the relations between adjudication and the American constitutional system and for his account of the nature of American constitutional law.

This essay has two objectives. First, in the essay itself I want to raise some questions about the fit between Habermas's theory of law and the American system. These questions are intended to suggest lines of inquiry merely and are perforce preliminary. I begin in Part I with an extended review of Habermas's theory of adjudication, and then turn in Part II to a summary of the place he assigns to custom and to customary law. In Part III, I elicit a picture of the common law to illustrate the hy-

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1. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996).

2. *Id.* at xxxiv.

3. *Id.*

4. Rehg notes that since its enactment, the German Civil Code—German private law—has taken into itself the interpretations and adaptations of it made by the judiciary. *Id*; *see also* RUDOLPH B. SCHLESINGER ET AL., COMPARATIVE LAW 592 (6th ed. 1998).

pothesis that although the notion of "a system of customary law"[5] is not appropriate, there is a deeply held and pervasive residue of common law culture in American law—something I will call the 'custom of custom' in adjudication, enactment, and interpretation. Finally, in Part IV, I consider a few implications this attention to the culture of the common law may have for the theory of law presented in *Between Facts and Norms*.

Second, I hope that this discussion will provide American legal scholars with a foothold in their assimilation of the analysis in *Between Facts and Norms* to American jurisprudential debates. This second objective, the work of which lies beyond the present discussion, has its inspiration in my own sense that, absent a compelling picture of the influence of the common law, American jurisprudence misses its familiarly contested territory. Contemporary as well as historical debates about legal truth, certainty, legitimacy, indeterminacy, justice, justification, adjudication, interpretation, federalism, and the relation of law to politics, economic theory, history, et cetera all revolve around issues of adjudication and of decisional law as (analytically) distinct from and related to legislative enactment. Without an integration of the influence of the common law and the "legal theory" Habermas offers us,[6] American jurisprudential concerns, even those that do not make their concern with the common law explicit (and except for a handful of constitutional and political questions),[7] generally lack an entrance point to Habermas's claims about American law.

I. HERCULES' RETROFIT: ADJUDICATION IN THE DISCOURSE THEORY OF LAW

At the beginning of chapter five, Habermas points out that a discourse theory of law must "first of all" prove itself at the level of the legal system "in the narrow sense."[8] Thus considered, the legal system is law insofar as it is engaged in the production and reproduction of law.[9] To account for law in this sense, which always entails grappling with a particular legal order, is the task of "legal theory."[10] Although not exclusively devoted to adjudication, legal theory concerns itself primarily with

5. A.W.B. Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND LEGAL HISTORY 371 (1987).

6. *See* HABERMAS, *supra* note 1, at 196.

7. *See, e.g.*, *id.* at 267 (presenting questions raised by Frank Michelman and John Ely in Habermas's discussion of the role of the United States Supreme Court).

8. *Id.* at 196.

9. This includes all interactions that are not only oriented to law, but are also geared to produce new law and reproduce law as law. To institutionalize the legal system in this sense requires the self application of law in the form of secondary rules that constitute and confer the official powers to make, apply, and implement law. *See id.* at 195. Habermas distinguishes this from the legal system in the broad sense, which "includes all social communications that refer to law." *Id.*

10. *Id.* at 196.

what judges do.[11] At this level, the most important aspect of modern law, namely, the tension between "facticity" and "validity,"[12] appears for legal theory as the problem of the rationality of adjudication.[13] This problem is best understood as that of reconciling legal certainty, or fidelity to existing law, with justice, the legitimacy of the application of law in a particular case.[14]

Habermas notes that of all the efforts to reconcile these demands, Ronald Dworkin's theory of the "rational reconstruction of the law of the land" is the most promising.[15] In his own work Dworkin assigns this task to an ideal judge he names Hercules, who is not limited in either time or capacity.[16] Hercules' job is to reread—as both activist and preservationist—the "institutional history"[17] of his society in light of the principles (of political morality) it contains in order to render the uniquely right decision in a particular case.[18] For Habermas, the figure of Hercules cutting a lonely path[19] through the thickets of American law[20] serves as the launch pad for his retrofit of the ideal judge "as a member of the interpretation community of legal experts,"[21] whose role in adjudication is to instantiate communicatively achieved acceptance of validity claims.[22]

What does this mean? In the rather tortuous synthesis of section 5.3, Habermas preserves two elements of Dworkin's theory: (1) the notion of

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11. *See id.* at 197. Habermas's rationale for this claim resides in the premise that "all legal communications refer to actionable claims" so that "court decisions provide the perspective from which the legal system is analyzed." *Id.* at 196–97.

12. The eponymous "facts" and "norms." Modern society, as Habermas sees it, suffers from a splitting apart of traditional law and conventional morality. In pre-modern society, according to this view, law, morality, and ethical life enjoyed a unified foundation in the authority of the Church. With the increasing secularization and pluralization of society in the modern era, these authorities lost their "sacred foundation." Modern law is institutionalized ("facticity") and morality is merely a form of cultural knowledge, so that the "validity" of law is problematic. Habermas characterizes this as a tension immanent to law between facts and norms. *See id.* at 106–07. Habermas associates pre-modern law with natural law theory. *See id.* at 199. For an American reflection on this attribution of this tension to law, see Frederic Kellogg, *Review Essay*, 81 NEWSL. OF THE SOC'Y FOR THE ADVANCEMENT OF AM. PHIL., Oct. 1998, at 14–17.

13. *See* HABERMAS, *supra* note 1, at 197.

14. *See id.* Habermas also characterizes the tension to be reconciled as one between "consistent decisionmaking" and "rational acceptability" and also as between the "certainty" and the "rightness" of law. *Id.* at 198–99.

15. *Id.* at 197. Along with Dworkin's theory, Habermas considers "legal hermeneutics", legal realism, and legal positivism. *Id.* at 197–203.

16. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105 (1977).

17. *Id.* at 120.

18. *See id.* at 116.

19. On the suggestion of Professor Michelman, Habermas locates the limitations of Dworkin's theory in the monologic character of Hercules' efforts. *See* HABERMAS, *supra* note 1, at 224.

20. *Cf.* William H. Rehg, *Translator's Introduction* to HABERMAS, *supra* note 1, at xxxiv (noting Karl Llewellyn's notion of the "bramble bush").

21. HABERMAS, *supra* note 1, at 224.

22. *See id.* at 226. For a detailed account of communicative action, see Mitchell Aboulafia, *Law Professors Read Habermas*, 76 DENV. U. L. REV. 943, 944–45 (1999).

institutional history (as "unproblematic background assumptions")[23] and (2) the personal role of the judge.[24] First, institutional history brings with it both the body of decisional and enacted law in relation to which the judge's decision must be consistent[25] and the democratically-justified norms embedded therein.[26] Second, Habermas's judge is not unlimited in time or capacity like Hercules, but he brings with him a theory of argumentation which takes the place of Hercules' virtuosity.[27] This theory of argumentation is the product of the democratically-justified procedural regulation of the judge.[28] These rules of procedure, according to Habermas, "institutionally carve out an internal space for the free exchange of arguments."[29] The judge, presented with this exchange, adopts an ideal role as an interlocutor in an uncoerced, truth-seeking discussion. This position, as Habermas understands it, entails taking the perspectives of every person involved in and affected by the decision so that the decision is the outcome of an ideal conversation among communicatively ideal participants.[30] The judge's decision is an impartial application of norms to the case at hand.[31] For these reasons,[32] the decision is as far as possible the right one, thereby answering the demand of "validity" in our

23. HABERMAS, *supra* note 1, at 227.

24. "[E]ach participant in a trial, whatever her motives, contributes to a discourse that *from the judge's perspective* facilitates the search for an impartial judgment. This latter perspective alone, however, is constitutive for grounding the decision." *Id.* at 231.

25. *See id.* at 198.

26. "[A] discourse theory [starts] with the assumption that moral reasons enter into law via the democratic procedure of legislation." *Id.* at 204.

27. *See id.* at 225.

28. *See id.* at 234.

29. *Id.* at 235. Note that by "internal" here, Habermas means internal to the judge. The parties are advancing adversarially-positioned arguments and generally behaving very strategically, but for the judge these appear as a free and uncoerced airing of (almost) all the arguments important to the decision of the case. *See id.* at 230–31. As an example of such procedural regulation, Habermas cites the German Code of Civil Procedure. *See id.* at 236–37.

30. This is very difficult to put simply. Here is the passage: "[W]hether norms and values could find the rationally motivated assent of all those affected can be judged only from the intersubjectively enlarged perspective of the first-person plural. This perspective integrates the perspectives of each participant's worldview and self-understanding in a manner that is neither coercive nor distorting." *Id.* at 228. Further, "interpretations of the individual case, which are formed in light of a coherent system of norms, depend on the communicative form of a discourse [which] allows the perspectives of . . . uninvolved members of the community (*represented by an impartial judge*) to be transformed into one another." *Id.* at 229 (emphasis added). The picture here (roughly) is of adversarial, strategic parties flushing out a set of arguments on the matter in question before a judge who, in virtue of his professional obligation, hears and thinks about these arguments as if he were the entire affected community—shorn of coercion and distortion—seeking the right outcome of the case. Because he is taking this position, the decision he renders has the highest chance of being the most right.

31. *See id.* at 234.

32. Clearly, much remains implicit in this summary. A much less abbreviated although very accessible summary of the theory of communicative action and its application to law can be had in Richard A. Lynch, *Distinguishing Between Legal and Moral Norms*, 41 PHIL. TODAY 67 (1997). For my purposes here the centrality and the nature of the role of the judge are most important.

tension.[33] Finally, because this free exchange of arguments takes place against the "unproblematic" background of institutional history, its outcome via the judge's decision preserves as far as possible consistent decision-making—law's "facticity."[34]

II. FACTICITY: HABERMAS ON CUSTOM AND CUSTOMARY LAW

Habermas defines law as "modern enacted law."[35] His characterization of law's "facticity"[36] suggests not only that decisional law is a kind of enactment,[37] but also that any residuum of a customary tradition in institutional history has itself this status.[38] Unlike modern enacted law, however, mere customs or conventions have "the organic facticity of inherited forms of life."[39] This facticity has a kind of "de facto validity," which consists in the fact that a rule or norm is actually acted on and is likely to be accepted by the people to whom it is addressed.[40] This de facto legitimacy is independent of a *belief* on the part of the addressees that a rule or norm is legitimate; the degree to which a particular requirement lacks belief in its legitimacy affects the extent to which it is reinforced by "other factors" such as "intimidation, the force of circumstances, custom, and sheer habit."[41] As we saw in Part I, Habermas's legal theory understands law as the source of the rational acceptability which is the modern form of this legitimacy.[42] In the transition from premodern to modern society, "positive law separated from the customs and habits that were devalued to mere conventions."[43] This, as I pointed out at the end of Part I, leaves the institutional history as unproblematic background—facticity—for adjudication:[44]

> An existing law is the product of an opaque web of past decisions by the legislature and the judiciary, and it can include traditions of customary law as well. This institutional history of law forms the

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33. *See* HABERMAS, *supra* note 1, at 227.

34. "[W]e bring argumentation to a de facto conclusion only when the reasons [offered in the exchange] solidify against the horizon of unproblematic background assumptions into such a coherent whole that an uncoerced agreement on the acceptability of the disputed validity claim emerges." *Id.* at 227.

35. *Id.* at 79.

36. "[T]he facticity of making and enforcing law." *Id.* at 447; *see also* Rehg, *supra* note 20, at xii (discussing the "factual generation, administration, and enforcement" of law). Facticity is what is given, that which can be taken as a fact or collection of things factual. Note that facts here are not legal facts, distinct from law: under this more general notion of facticity, law in its various aspects is itself a fact.

37. A claim common law theorists dispute. *See* SIMPSON, *supra* note 5, at 366–70.

38. *See, e.g.*, HABERMAS, *supra* note 1, at 198.

39. *Id.* at 20, 30.

40. *See id.* at 29. Another type of de facto validity attaches to enacted law in virtue of its being backed by threat of sanctions. For Habermas, the facticity of law under this construction is "artificially produced," by contrast with the "organic" character of custom. *Id.* at 30.

41. *Id.*

42. *See supra* notes 29–31 and accompanying text.

43. HABERMAS, *supra* note 1, at 106.

44. *See supra* note 32 and accompanying text.

> background of every present-day practice of decision-making. The positivity of law also reflects the contingencies of this original context of emergence.[45]

As facticity, that is, as that in relation to which the communicative activity of adjudication must try to make itself consistent, this background of institutional history is not 'in play' in adjudication. Past decisions are just that, past decisions, yielding—alongside legislation—truths which require the fidelity of subsequent decisions made by judges. For Habermas, to the extent that institutional history may owe some of its content to "traditions of customary law," it is nevertheless not itself customary in nature. Further, because it serves as the background—unquestioned, unproblematic, out-of-play—for the discourse of adjudication, it departs even from Dworkin's notion of the "gravitational" pull of precedent.[46]

Finally, it is reasonable to infer that Habermas's judge renders decisions that will be logged into the institutional history as that in relation to which subsequent decisions must be consistent. His decision, its context, and the procedural requirements which shape these are not driven by custom and are not themselves customary. As instances of decisional law, they are products of an alternative type of enactment, and take their place beside legislation in the facticity of law.

III. THE 'CUSTOM OF CUSTOM': A HYPOTHESIS ABOUT THE COMMON LAW CULTURE OF AMERICAN LAW

By way of contrast with Habermas's view of the place of customary and common law as "facticity," in this section I want to be old-fashioned for a moment, and draw a likely conclusion from a typical style of argument. Anglo-American legal theory has in many of its manifestations claimed pride of place for adjudication and then gone on to ground statements about the nature of law on accounts of the nature of adjudication. For this part of the essay, I claim not pride of place but certainly tremendous importance for adjudication. Then I elicit a picture of adjudication in the American system which suggests that judges decide cases in a customarily-delimited and custom-based context, a picture of adjudication which departs substantially from Habermas's. Finally I consider the thesis that the character of common law adjudication as it appears in this picture pervades and distinguishes American constitutional law as well.

A. *Adjudication and the Common Law in the American System*

In response to Realist, formalist, positivist, and natural law accounts of adjudication and of the common law, various legal theorists of different periods have held out for an account of the common law as a kind of

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45. HABERMAS, *supra* note 1, at 198.

46. *See* DWORKIN, *supra* note 16, at 115.

(perhaps highly systematized) customary law.[47] This would, it seems, have a corollary in the claim that adjudication in jurisdictions heavily influenced and pervaded by a common law culture owes its peculiar nature at least in part to the demands of rendering decisions in ways consonant with that culture;[48] that is, common law adjudication is significantly—if residually—a customary and a custom-based activity. As I noted above in Rehg's remarks about the challenges of translation,[49] American law is heavily influenced and pervaded by the common law. This means that the work of courts is essential and that the culture of adjudication affects nearly every aspect of law,[50] which is to say that American law in all its aspects places significant reliance on customary and/or custom-based forms and practices. For my purposes here, the relevant aspects of customary law are its simultaneously stable and provisional or tentative character—common law rules can be 'in play' long after they are settled—and the fact that there is implied in practices or customs a kind of "emergent consensus"[51] about a particular kind of controversy.

The peculiar character of the common law has been described by many in the history of legal theory, from Blackstone[52] to Holmes.[53] Most focus on the nature of case law, the doctrine of *stare decisis*, and the role of the judge. Others focus on the customary (as distinct from the enacted) aspect of the common law, which in a nutshell runs something like this: law is "a system of customary law"[54] consisting of two parts: first, a collection of practices "regularly observed" by a group for a long period of time where this history of regular observance is regarded by the group as the reason the practice is proper.[55] These practices are the "customs" of customary law. Second, alongside these practices there exist "complex theoretical notions which both serve to explain and [to] justify the past practice" and to guide future conduct.[56] The common law is not (contra Legal Formalism) reducible to these propositions,[57] rather, law as a sys-

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47. *See, e.g.*, Simpson, *supra* note 5, at 373–76. *See generally* HENRY M. HART & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (1994) (analyzing the common law and the role of adjudication).

48. *See* SCHLESINGER, *supra* note 4, at 644–47 (reviewing the differences between common law and civil law jurisdictions and their corollaries in differences in adjudication).

49. *See also id.*

50. *See* HABERMAS, *supra* note 1, at 196 (establishing the rationale for his focus on adjudication by stating that "all legal communications refer to actionable claims"). *See generally* HART & SACKS, *supra* note 47 (arguing for centrality of adjudication and the mutual dependence of statutory and decisional law).

51. Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15, 29 (1990).

52. *See generally* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND (1765).

53. *See, e.g.*, Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1 (1870).

54. *See* Simpson, *supra* note 5, at 375.

55. *Id.* at 374.

56. *Id.* at 376.

57. *See id.*

tem of customary law "consists of a body of practices observed and ideas received."[58] In this picture, what is customary about the common law is the reliance for "time whereof the memory of man runneth not to the contrary"[59] on particular means of resolving disputes or ordering situations and on certain statements of these means as rationales for this reliance.

As Hart and Sacks point out in *The Legal Process*,[60] a simple equation of the common law with custom does not take sufficient account of its operation as an independent force in the law[61] and, in particular, is not suited to a rapidly changing legal system.[62] Hart and Sacks see custom as one dynamic among several at play in the American legal system.[63] It is nonetheless a vital and contemporary feature of American law—how, then, does it work?[64]

In a recent treatment of the relevance of American Pragmatism to the contemporary debates over legal indeterminacy, Frederic Kellogg elicits a picture of Oliver Wendell Holmes's theory of law which does justice to the variety and rate of growth in American law.[65] Two features of Holmes's legal theory concern us here: his notion of "successive approximation"[66] and the element of consensus he assigns to rules which emerge in the common law.[67] "Successive approximation" is the process by which the packages[68] of problems, responses, patterns, standards, principles, values, and choices come to be reflected in the body of cases from which rules emerge and then are "sifted" until a general rule 'takes shape.'[69] Referring to Holmes's own account, Kellogg considers the example of new rules in tort for traffic cases:

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58. *Id.*

59. *Id.* at 375 (quoting Blackstone) (citations omitted).

60. HART & SACKS, *supra* note 47, at 435.

61. *Id.* at 427.

62. *Id.* at 429.

63. *See, e.g., id.* at 435 (presenting an account of adjudication when custom is unhelpful).

64. *Id.*

65. *See* Kellogg, *supra* note 51, at 28. Kellogg says that "Legal indeterminacy might be viewed as the residue from, or, more accurately, the impression we get from . . . the judiciary's periodically concentrated experience with the tentativeness inherent in the enterprise of social ordering." *Id.* He suggests that for Holmes legal indeterminacy is "episodic" and has its origin not in some aspect of the law, as H.L.A. Hart and the Legal Realists would have it, but rather in the patterns and standards of conduct which emerge in experience and are then taken up into law.

66. *Id.* at 24–25 (arguing that Holmes borrows this notion either directly or indirectly from Charles Sanders Peirce).

67. *See id.* at 29.

68. Ethical principles and values, as well as choices involving policy, are not introduced into rules through the medium of law. Rather they are implicated both in the development of standards of conduct, which are in turn reflected in the decisions of cases in a given area of liability, and in the development of the consensus from which the rule eventually emerges. *See id.* at 32.

69. *See id.* at 24–25.

> The common law begins, just like scientific inquiry, with an external problem—say, the invention of the wheel leads to the invention of the carriage and thence, to the emergence of traffic, traffic accidents, and the problem of resolving claims of people injured in traffic accidents. Traffic cases, although long familiar and settled by rules, were once original matters and initially resulted in little more than a bunch of decisions, tentatively offered as a set of hypotheses as to how like situations should be resolved.[70]

According to Holmes, this bunch of cases yields a general rule only very slowly:

> It is only after a series of determinations on the same subject-matter, that it becomes necessary to "reconcile the cases," as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape.[71]

The rule which emerges is not enacted by the judiciary, it is instead a reflection of "developments external to law" of patterns and standards of conduct evolving through "repeated experience with particular disputes."[72]

Once settled, rules can come into conflict. For Holmes, rules which conflict define "poles" between which there is a clear distinction so that as subsequent cases "cluster" around the poles and begin to approach each other, the distinction becomes less clear:

> [T]he determinations are made one way or the other *on a very slight preponderance of feeling rather than articulate reason*; and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little further to the one side or to the other. . . . [I]t is better to have a line drawn somewhere in the penumbra between darkness and light, than to remain in uncertainty.[73]

Controversies arise in life outside the law, around which patterns and later standards of conduct emerge. When these situations with all of their aspects end up in court, adjudication is that process via which a kind of provisional or emergent, if ultimately inveterate, consensus of practice or

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70. *Id.*

71. Kellogg, *supra* note 51, at 25 (quoting Holmes).

72. *Id.* at 27–28. (explaining that "[o]nly after becoming implicated in standards established through practical experience, reflected in (and to some extent affected by) multiple fact-based judicial determinations, are rules abstracted from experience by judges"); *see also* Simpson, *supra* note 5, at 367–68 (stating that "[t]he notion that the common law consists of rules which are the product of a series of acts of legislation . . . by judges . . . cannot be made to work . . . because common law rules enjoy whatever status they possess *not because of the circumstances of their origin, but because of their continued reception. [Judges'] actions create precedents, but creating a precedent is not the same thing as laying down the law.*" (emphasis added)).

73. Kellogg, *supra* note 51, at 28 (quoting Holmes).

custom emerges. These practices in turn influence the shape and course of adjudication and of its subsequent results, still with the same tentative and yet stable character. Taken together these aspects give us Holmes's model of the common law:

> Law is given content (1) by *the character of urgent controversies* that require resolution, and find their way into the courts; (2) by the tendency of *repetition* to engender both accepted practices and standards of conduct; and (3) by *emergent consensus*, not dominated by any single judge, or even judges as a class, but including juries and many actors outside the legal process who are engaged in the activities which generate both patterns of conduct and controversy: farmers, drivers, ship captains, bailors and bailees, landowners and tenants.[74]

In this picture, law's pedigree in the operation of custom and of custom-based forms does more than *appear* in the institutional history as a "contingenc[y] of the original context of emergence,"[75] as Habermas would have it. These customs and customary forms have the kind of force Habermas accords to the "de facto legitimacy" of convention and intimidation, not simply as contents of the 'unproblematic background' for adjudication.[76] The common law and its residual presence in American law permits and sustains forms and practices which have neither the character of "mutual recognition" nor the legitimacy of democratically-derived norms, which for Habermas are the matter applied in adjudication.[77] Law is perhaps a kind of "transmission belt,"[78] but of conventions attended merely by "de facto legitimacy" rather than democratic norms. American law is in this sense "pre-modern" under Habermas's description: the separation of positive law and custom or convention Habermas attributes to modern law[79] does not characterize the American system.

B. *Constitutional Law in a Common Law Context*

It is a commonplace of American constitutional law scholarship that the U.S. Constitution can be understood as a 'superstatute' and, on the other side, that it is nothing of the sort. Construed as a statute, the Constitution fits neatly under the umbrella of 'enacted law.' Certainly the Constitution is a kind of enactment, in some sense; just as certainly this characterization does not capture its peculiarity of its life and importance in the American system.

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74. *Id.* at 29 (emphasis added); *see also* Simpson, *supra* note 5, at 374–75 (discussing the effect of the repetition).

75. HABERMAS, *supra* note 1, at 198.

76. *See id.* at 29; *see also supra* notes 39–40 and accompanying text.

77. *See* HABERMAS, *supra* note 1, at 235.

78. *Id.* at 76; *see also id.* at 448 (stating that "[Law] functions as a kind of 'transmission belt' that picks up structures of mutual recognition that are familiar from face-to-face interactions and transmits these, in abstract but binding form, to the anonymous, systematically mediated interaction among strangers").

79. *See id.* at 106.

In *Constitutional Fate*,[80] Philip Bobbitt elaborates a theory of the Constitution which suggests that the legitimacy of certain conventional types of arguments is antecedent to, rather than founded upon, a theory of the Constitution.[81] Bobbitt claims that constitutional law is the relation of these conventional forms of arguments.[82] He ties the identity of the American people to the particular set of conventional forms which make up legitimate constitutional argument: "[the conventions] could be different, but . . . then we would be different."[83] How have these conventions emerged as essential aspects of our constitutional system? In what sense, if any, are they still conventional? That is, why should we suppose that American constitutional law is still affected and pervaded by these conventions?

Bobbitt's answer is that the initial forms of constitutional argument have their origin in decisions made by the Framers, decisions which in effect made the state a subject matter for the common law.[84] Previously, in the English system, the common law was addressed to relations among private persons (torts, property) and between private persons and the state (common law crimes). The state was the source, not a subject, of the common law. In framing the Constitution the drafters reversed this relationship: the people became the source of the law, and the state became part of the subject matter. This entailed applying common law forms—types of argument and certain processes—against the state. These common law forms—conventions—are the source of the forms of constitutional argument.[85]

The emergence and falling away of legitimate forms of argument are, in Bobbitt's picture, contingent, that is, they depend upon the type and urgency of problems which arise and upon a series of choices we make in addressing them.[86] Their origin is partly customary or conventional,

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80. PHILIP BOBBITT, CONSTITUTIONAL FATE (1982).

81. *See id.* at 5. Bobbitt describes six argument-forms: historical, textual, doctrinal, structural, prudential, and ethical. *See id.* at 247. He also accounts for two "functions": cueing and expressing. *Id.* at 248. Both argument forms and functions are what Bobbitt calls conventions. *See id.* at 6.

82. *See id.* at 245. Note that Bobbitt does not reduce constitutional law to the conventions of judges, because the conventions emerge from a participatory process. Bobbitt states:

> Legal truths do exist within a convention. But the conventions themselves are only possible because of the relationship between the constitutional object—the document, its history, the decisions construing it—and the larger culture with whom the various constitutional functions serve to assure a fluid, two-way effect on the on-going process of constitutional meaning. We have, therefore, a participatory Constitution.

Id. at 234–35.

83. *Id.* at 6.

84. Telephone interview with Phillip Bobbitt, author, CONSTITUTIONAL FATE (Mar. 30, 1999).

85. *See id.*

86. *See* BOBBITT, *supra* note 80, at 238 (quoting John Wheeler and discussing the following example: in a game of twenty questions, the assembled answerers decide not to pick a certain word for a questioner sent out of the room, but rather to answer each of his questions in a way which suggests an answer consistent with all previous answers, all the while narrowing the field of possibilities each by his or her own choice even though that choice is not for a definite word selection but rather of a particular direction in a particular instance).

lying as it does in the forms of the common law, and their new life as forms of constitutional argument is also, according to Bobbitt, entirely conventional.[87] Constitutional adjudication transpires in a context of a "competition of arguments,"[88] but unlike Habermas's "free exchange" of arguments,[89] this competition is constrained by conventional limits on the set of legitimate arguments, something which would take constitutional adjudication in Bobbitt's account out from under at least the ideal form of Habermas's notion of adjudication.[90] Finally, the six forms of argument taken together can come into conflict in a particular case, and do not by themselves guarantee particular outcomes.[91] In Bobbitt's theory of the Constitution, legitimate forms of argument do not yield single right answers.[92] However, they are thereby no less legitimate.[93]

According to Bobbitt, "the very functioning of the argumentative modes works to insure that there is consensus among those persons operating within the conventions."[94] Central both to Holmes's and to Bobbitt's theory of adjudication is the notion of consensus embedded in custom or convention. This supposition is vitally and persistently controversial in American jurisprudence. Objections range themselves under two general heads, on the one hand arguing that this consensus is fictional and that law is a cover for social dissensus[95] or, on the other, granting that it exists and arguing that it relies on a kind of uncritical complacency by a mystified and distracted populace.[96] Critics see ideological maneuvering in the place of this 'emergent consensus'; defenders defend the consensus as an aspect of the 'rule of law.'[97]

In this very controversy, however, we can see the importance of the residue of common law culture, what I will call here the 'custom of custom,' in the American constitutional system and in American adjudica-

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87. *See id.* at 8.

88. *Id.* at 233.

89. HABERMAS, *supra* note 1, at 235.

90. *See id.* at 30. So that, for example, it is a matter of convention in Bobbitt's account that arguments based on religion or kinship are not legitimate. *See* BOBBITT, *supra* note 80, at 6. For Habermas, the irrelevance of these kinds of arguments is instead a matter of the separation of positive law from life-world forms in the modern world. *See* HABERMAS, *supra* note 1, at 106.

91. *See supra* notes 8–34 and accompanying text. Habermas's judge, Hercules, J. after the retro-fit with a theory of legal argumentation, would push beyond the limits of the available conventional forms (which show up merely as contents of the facticity of the relevant institutional history) to a communicatively-achieved decision about the rights of the parties. Bobbitt's judge relies on a specialized form of conscience to resolve incommensurable conclusions from the particular argument-forms. *See generally* PHILLIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991).

92. *See* BOBBITT, *supra* note 91.

93. On the distinction between legitimacy and justification, see *id.*

94. *Id.* at 245.

95. *Cf.* David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 578 (1984).

96. *See id.* at 589–91.

97. For a recent treatment of these controversies, see DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997).

tion in general. Even if one disputes a claim to an actual moral or political consensus behind conventional or customary forms, one may nevertheless grant that in the American system there exists some kind of consensus—however undesirable—in the very functioning of such conventions or customs. Or, if one disputes even this claim to a de facto or weak consensus in constitutional and common law forms, one *must* concede that the object of one's critique is the resistance that these forms and practices have to social movements or to social criticism.[98] In both of these objections as well as in the counterarguments advanced by those who defend the notion of consensus, the residual culture of customary and common law forms and processes is essential. This residue has a status in American law today that the requirement of a wax seal for important documents possessed in the time long after the widespread illiteracy contemporaneous with the Norman conquest—the basis of the requirement of the seals—had disappeared.[99] Common law forms and the elaboration through custom they carry with them are *themselves* now customary in American law: judges resort to and refine them and innovate on their terms, legislative and other enactments are invariably subject to interpretation and elaboration on these terms, and they shape and influence the drafting of enacted law. Even on a critical reading of theories of American adjudication and constitutional law, the 'custom of custom'—the customary residue of conventional forms—is an element which must be taken into account in any theoretical treatment of American law.

IV. IMPLICATIONS OF THE CULTURE OF CUSTOM FOR A DISCOURSE THEORY OF LAW

Construed as it is in *Between Facts and Norms* as a modern legal system, American law in Habermas's picture does not appear with this, its most important and enduring aspect, namely, the residue of the culture of the common law or as I have called it here, the 'custom of custom'. The central problem of modern legal theory for Habermas, viz. the tension between facticity and validity, appears only upon the separation between positive law and life-world forms that arrives with modernity.[100] This separation is not realized in the American legal system. The culture of the common law that pervades and supports so much of the adjudication, enactment, and application of American law renders the attribution of such a separation premature. On this argument, the theory of law presented in *Between Facts and Norms* confronts several difficulties in its application to the American system, which I will only enumerate here.

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98. *See id.* at 2.

99. Albert Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 40 (1996) (quoting Blackstone: "which custom continued when learning had made its way among them through the reason for doing it had ceased").

100. *See* HABERMAS, *supra* note 1, at 106.

First, as we can see in a comparison of Habermas's view of what judges do with the picture of the American judge drawn in Part III, adjudication in American law, shot through as it is with customary forms and processes, is something altogether unlike the communicatively committed justice of *Between Facts and Norms*. Second, the results of the efforts of Habermas's judge have a status as outcomes which is very different from that of the products of the American judge: decisions in American courts contribute to the elaboration and interpretation-accretion of statutes and lines of case law in the incremental, circumstantial, and open-ended way suggested by Holmes' story of the emergence of rules.[101] New decisions take on the dual status of settled and tentative possessed by the earlier decisions which shaped the subsequent outcomes in turn. The decisions of Habermas's judge, on the other hand, join the body of enacted and vestigially traditional "web" of institutional history in relation to which, as facticity, subsequent decisions must be consistent.[102] His decision in a particular case becomes part of the inert content of that institutional history, inert, that is, in the sense that as an elaboration of existing law it is finished, complete, so it can serve to inform—but not in any organic or uncontemplated fashion to shape—the deliberative processes of subsequent judges communicatively constrained.

Third, this construction of existing law as "facticity" in relation to which the "validity" of law is in tension and to both of which adjudication is a reconciliation leaves the dynamic, as well as the emergent, variety in existing law out of the picture altogether. The "web" is "opaque,"[103] that is, although the peculiarity of the origin of a particular part of the institutional history may be apparent in that history, it is not permitted in its peculiarity to affect judicial outcomes differently than other types of institutional history. For Habermas's judge, facticity is a homogeneous constraint, without variety or even "gravitational force"[104] in its effect on outcomes. Further, casting all of existing law as facticity and setting it in tension in modern legal systems with "validity" or legitimacy is to overlook—quite rightly, given Habermas's picture of the emergence of the modern from the pre-modern world—the legitimacy of, for example, common law forms and processes, that is, of customary law. Nevertheless, it is arguable that the legitimacy of the results of adjudication in the American system is neither a modern "validity" nor a reconciliation-based communicative legitimacy but rather the de facto legitimacy Habermas assigns to traditional customary or otherwise circumstantial law.

Fourth, the location of the legitimacy of judicial outcomes in the American system with the 'custom of custom' as I have suggested here

101. *See supra* notes 47–79 and accompanying text.

102. *See supra* notes 8–34 and accompanying text.

103. HABERMAS, *supra* note 1, at 198.

104. DWORKIN, *supra* note 16, at 115.

poses problems for the relationship Habermas would draw between democracy and the rule of law. In particular, the role of the U.S. Constitution in the application of this part of the theory to American law is rendered problematic by the alternate view, suggested in Part III.B, that the Constitution itself is steeped in and relies substantially on common law forms and processes. Further complication is introduced by the permeation of legislative processes by vestigial common law form. To the extent that such a system cannot be said to be rational, American constitutional law falls outside the view of this relationship.[105] That is, it is unlikely that we would say of the American constitutional system "that there is a conceptual or internal relation, and not simply a historically contingent association, between the rule of law and democracy."[106] Philip Bobbitt's view of the very nature of the Constitution and of constitutional law suggests—at least in the first instance—quite the opposite.[107]

Finally, a review of contemporary American jurisprudential debates cannot be complete, or on target, without some sense of the stakes involved in the (celebrated or reviled) tenacity with which the 'custom of custom' or the residual culture of common law forms and processes pervade and sustain American law in all its parts and aspects. On this point, as with the four which precede it, I would emphasize the following distinction for American readers of Professor Habermas's legal theory: if *Between Facts and Norms* is intended as regards American law as a descriptive account, it does well to note the role of common law culture in the law itself, and of controversies attendant upon it in American legal scholarship. If, on the other hand, the theory is prescriptive or hortatory in its aim, I would suggest that it needs to be refocused for the American context to take account of this most important aspect.

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105. Because judicial decision making is bound to law and legal statutes, the rationality of adjudication depends on the legitimacy of existing law. This legitimacy hinges in turn on the rationality of a legislative process that, under the conditions of the constitutional separation of powers, is not at the disposal of agencies responsible for the administration of justice.

HABERMAS, *supra* note 1, at 238.

106. *Id.* at 449.

107. *See supra* Part III.B.

STILL FACING "THE DILEMMA OF THE FACT": GILLIGAN AND HABERMAS (RE)VISITED

MYRA BOOKMAN*

> [T]he "dilemma of the fact": that in the experience of life choices, no single perspective could adequately encompass the problem . . . has been consistently mistaken . . . for a retreat from the adolescent cognitive apogee—in this case from the principled morality of Kohlberg's highest stages.[1]

Facts trouble. They persistently and stubbornly trouble attempts to universalize higher order thinking, to justify moral norms, and to defend formal legal equality. Habermas in *Between Facts and Norms*[2] shoots at the trouble, but like his predecessors he doesn't quite mitigate it. The same recalcitrant "lifeworld" or sociological facts that plague Habermas also continually trouble the universalizing claims of Freud, Piaget, and Kohlberg, a few of Habermas's theoretical fathers. And like them, Habermas refuses to relinquish a model of psychological and social development that relies on autonomy, separation, and individuation as its ground note. Reliance on such models for the legitimation of law translates into a façade of legal neutrality that is "functionally biased" and fails to address the dilemma of the "facts" that arise out of difference.[3] Incorporation of Carol Gilligan's[4] work enriches the substantive base of Habermas's legitimation enterprise without forfeiting its theoretical elegance, essential logic, or structural integrity.

Gilligan's reformulation of moral development theory and the rhetoric of rights provides a correction toward a critique and reinterpretation of dominant legal doctrine without losing validity claims or reverting to a crude contextual relativism. Mary Joe Frug suggests a "progressive reading" of Gilligan's research not for the purpose of privileging women's approach to life or the law or to compare legal treatment of

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1. Carol Gilligan & John Michael Murphy, *Development from Adolescence to Adulthood: The Philosopher and the Dilemma of the Fact*, *in* INTELLECTUAL DEVELOPMENT BEYOND CHILDHOOD 85, 96 (Deanna Kuhn ed., 1979).

2. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

3. *See* Mary Joe Frug, *Progressive Feminist Legal Scholarship: Can We Claim "A Different Voice"?*, 15 HARV. WOMEN'S L.J. 37, 37–38 (1992), *reprinted in* POSTMODERN LEGAL FEMINISM 30, 30 (1992).

4. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

men and women through case reviews.[5] Rather it is to show how "life-world" or experiential differences, in this case gender-linked, can provide clues to the invisible undergirdings of the dominant interpretations of the law and offer keys to critique and change. Just as Gilligan's work underwrites a transformation in philosophical moral theory and psychological development theory, it can also serve legal theory. By tracing a developmental path through women's criteria for moral justifications, she introduces a previously unnoticed line of moral development, the now well known "care voice."[6] The findings reveal that Kohlberg's stages[7]—derived from an all-male sample—tell only a partial story. Heretofore unrepresented experiences are shown by Gilligan's work to be "facts" or *content* that cognitive reflection abstracts into a set of previously untheorized principles, that is, new *forms*.[8] New subjects, new "facts," new interpretations expose the hidden uniformity of assumptions behind moral, legal, and developmental "universals." Space opens for recognizing that different figurative content spawns different formal structures. The "postconventional" thinking that Gilligan proposes is just such a form. It is contextual, yet neither relative, unreflective, nor devoid of consistent justificatory claims. It arises out of a lifeworld fraught with attachment, vulnerability, and relational responsibility—a lifeworld beyond ego, separation, and blind fairness.

My purposes in writing this essay are pedagogical and rhetorical as well as experimental. I attempt to inform and convince, but I also sketch the outline of new connections. As a cognitive-developmental psychologist cum social theorist, I first demonstrate, in section one, how Habermas links morality and law through a theoretical reliance on "developmental logic" specified by Piaget, and then elaborated by Kohlberg. In section two, I show how this theoretical ancestry inadvertently supports Freudian notions of the originary self-serving id. Such implicit support invisibly scaffolds existing normative hierarchies and legitimates Habermas's "normative substantive values"—democracy, autonomy, equality—despite his claims to a postmetaphysical, strictly procedural, normatively empty position.[9] Finally, in section three, I suggest that Gil-

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5. *See* Frug, *supra* note 3, at 52–53.

6. GILLIGAN, *supra* note 4, at 62–63.

7. *See* STEPHEN K. WHITE, THE RECENT WORK OF JÜRGEN HABERMAS: REASON, JUSTICE AND MODERNITY 66–68 (1988) (summarizing Kohlberg's stages and their relationship to Habermas's work).

8. My analysis of Gilligan's theory is based on Jean Piaget's extensive admonitions regarding the correlation between particular *content* and the nature of its resulting *form*. *See* JEAN PIAGET, STRUCTURALISM 136–37 (Chaninah Maschler ed. & trans., 1970). The false dichotomy, *form* vs. *substance/content*, classically privileges *form* as an abstract procedural ideal emptied of *substance*, which refers to particular empirical events. "[L]iberal law presently draws predominantly from the form side of the form/substance dichotomy." Note, *The Myth of Context in Politics and Law*, 110 HARV. L. REV. 1292, 1301 (1997).

9. *See* Mathieu Deflem, *Introduction* to *Habermas's Theory of Communicative Action*, *in* HABERMAS, MODERNITY AND LAW 1, 9 (Mathieu Deflem ed., 1996).

ligan's reformulations are consistent with the developmental logic with which Habermas has impressive affinities. But her findings broaden the substantive foundations on which his work rests. Specifically, I argue that *impartiality*, *reciprocity*, and *solidarity* are justifiable, but particular, outcomes of particular "social facts." *Different* social facts can result in *different*, but equally justifiable, "postconventional" norms. Concluding remarks weave the discussion back into the law and show that principles of "care" neither replace those of "justice," nor are subsumed under them. Rather they coexist in productive tension.[10]

I. MORALITY AND LAW—THE "POSTCONVENTIONAL"

Habermas draws heavily on Kohlberg's "postconventional" morality, which in turn depends on Piaget's "decentered" subject whose maturity is measured by her ability to apply formal logic to moral problems and whose thinking is not polluted by particulars of local conventional life.[11] According to Habermas, an analogous evolutionary process describes a "rationalization of the lifeworld" that is necessary for valid law "through a separation of law and morality, and of public and private law, . . . a separation achieved at the post-conventional level of social evolution."[12] A strictly procedural discourse based on formal pragmatic rules of language ensures that such separations are sustained through abstract conditions of universalism. But despite his claims of a "strictly procedural" approach, substantive values steeped in assumptions of functional equality and autonomy lurk. Habermas seems to counterpoise his profound apprehensions about parochial blindness with a blind faith in a rational autonomous subject. But this hypothetical mature subject whose sensitivity to particulars should be trumped by justice and fairness doesn't match the developmental "facts," whether that subject is a man or a woman. In other words, the traditional formal separation between an ethics of practical life and a higher more abstract morality (where the latter subsumes the former) continues to trouble attempts to translate justification into application.

Both Piaget and Kohlberg reconsider this problem in their later work when empirical evidence continually reveals the reentry of "reality," "commitment," and "responsibility" in late adolescents and young adults who had previously achieved the "postconventional" stage. The standing framework requires this to appear as a regression to conventional morality.[13] Kohlberg addresses the problem with a scoring revision that increases the formal requirements of the highest stages. Gilligan departs in another direction—a direction that may align better with Piaget who supports the correlativity of form and content and the limitations of

10. *See* Axel Honneth, *The Other of Justice: Habermas and the Ethical Challenge of Postmodernism*, *in* THE CAMBRIDGE COMPANION TO HABERMAS 289, 319 (Stephen K. White ed. 1995).

11. *See* HABERMAS, *supra* note 2, at 71.

12. Deflem, *supra* note 9, at 6–7.

13. *See* Gilligan & Murphy, *supra* note 1, at 90.

formalization. He writes, "[T]here *is* no 'form as such' or 'content as such,' that each element—from sensory-motor acts through operations to theories—is always simultaneously form to the content it subsumes and content for some higher form."[14] Gilligan demonstrates the key role of *particular* social experiences in the process of moral development and how those experiences of subjectivity constitute *content*. This diverse content gives birth to diverse but not infinite structural *forms*. Pluralistic "lifeworlds" in the late-twentieth-century world demand a theory open to diverse experience, yet one that remains loyal to a "developmental logic" that holds validity claims.

Frug threads this back to the law when she suggests that when interpreted "progressively," Gilligan provides a "strategy of difference" to circumvent legal moves that in the guise of formal equality are detrimental to subordinated groups.[15] By "progressively," she seems to indicate the importance of the above understanding—that this is not about affectivity vs. reason, or contextualism vs. absolutism, or the quotidian vs. the higher-order, but about how abstract justifications applied to concrete circumstances harbor within them hidden substance and are not formally pure. The next section explores the substantive beliefs that support the so-called normatively empty forms that Habermas assumes in his communicative ethics. Legal rhetoric of justice and rights, like its handmaidens and interpreters—philosophy, psychology, and social theory—presupposes the same substantive beliefs.

II. NORMATIVE HIERARCHIES AND PSYCHOLOGICAL THEORY

Kohlberg formalizes "postconventional" justice by explicitly drawing on Kant, Piaget, Mead, and Rawls. He points to a "moral point of view" that involves "impartiality" and "reversibility"[16] as necessary aspects of "cognitivism, universalism, and formalism."[17] Habermas, when proposing communicative ethics as an ameliorative for some of Kohlberg's theoretical problems, suggests that "strategic action" and "normatively regulated action" constitute the two directions of cognitive restructuring.[18] They operate on an egocentric "preconventional morality" on the path toward "conventional morality" until the individual "decenters" and differentiates "between lifeworld and world" to emerge as postconventionally moral.[19] In this section, I want to submit a sketch that sets the scene for my contentions in section III, where I (1) expose "imparti-

14. PIAGET, *supra* note 8, at 35.

15. Frug, *supra* note 3, at 49.

16. Lawrence Kohlberg, *Justice As Reversibility*, *in* 1 ESSAYS ON MORAL DEVELOPMENT 190 (1981).

17. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 116–68 (Christian Lenhardt & Shierry Weber Nicholson trans., 1996). Here Habermas argues for subsuming Gilligan's "care ethic" under criteria for "justice." *See id.* at 176–81.

18. *Id.* at 141–56.

19. *Id.* at 138–41.

ality" and "reversibility" (moral reciprocity) as *one* important outcome of cognitive operations but not *the* necessary outcome, and (2) outline how "strategic action" and "normatively regulated action" can be substantively different for differently socially situated subjects and therefore can provide different *contents* upon which cognition operates to result in new *forms*.

I shudder to "psychologize" to an audience of philosophers, social theorists, and legal scholars. But in order to ground my comments, I must. Consider it an excursus. Piaget explicitly relies (and therefore Kohlberg and Habermas implicitly rely) on traditional Freudian notions of originary egoism, tempered by encounters with reality and cultural norms, culminating in separation and detachment as developmental goals. This defines a trajectory that translates into "reciprocity"[20] or "solidarity"[21] as moral ideals—a stance that "always refers back to the self."[22] Gilligan presupposes a different originary scene. In an alternative construction she draws upon John Bowlby's twist on psychoanalytic theory.[23] Bowlby places attachment at the center of psychological growth and castigates the trend toward valorization of separation, detachment, and disengagement, which he viewed as fraught with pathogenic potential. Gilligan extends this danger to civilization itself.

Contemporary empirical evidence corroborates infantile response to connection and relationship.[24] Traditional psychological theories neglect this dimension of human psychology and concentrate instead on the egoistic dimension where perceptions of inequality and oppression subsume the human psyche. These perceptions, an important aspect of human psychology, force attention towards ideals of reciprocal rights and equal respect. They reflect a need for "justice" criteria. But a "care perspective" responds to an equally primordial, albeit neglected, human vulnerability—"problems of detachment or abandonment [that] hold up an ideal of attention and response to need."[25] *Both dimensions are equally affective and potentially subject to cognitive reconstruction toward "de-*

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20. *Id.* at 122.

21. Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning "Stage 6,"* 21 PHIL. F. 47 (1989–90).

22. Carol Gilligan, *Remapping the Moral Domain: New Images of Self in Relationship*, *in* MAPPING THE MORAL DOMAIN: A CONTRIBUTION OF WOMEN'S THINKING TO PSYCHOLOGICAL THEORY AND EDUCATION 3, 6 (Carol Gilligan et al. eds., 1988).

23. *See id.* at 10; *see also* JOHN BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT (1969); JOHN BOWLBY, ATTACHMENT AND LOSS: SEPARATION, ANXIETY AND ANGER (1973).

24. *See* LYN MIKEL BROWN & CAROL GILLIGAN, MEETING AT THE CROSSROADS 5 (1992); DANIEL N. STERN, THE INTERPERSONAL WORLD OF THE INFANT: A VIEW FROM PSYCHOANALYSIS AND DEVELOPMENTAL PSYCHOLOGY 203–26 (1985) (hypothesizing and describing four infant "senses of self"); Lynne Murray & Colwyn Trevarthen, *Emotional Regulation of Interactions Between Two-Month-Olds and Their Mothers*, *in* SOCIAL PERCEPTION IN INFANTS 177, 180 (Tiffany M. Field & Nathan A. Fox eds., 1985) (discussing how young infants imprint to particular caregivers).

25. Carol Gilligan & Jane Attanucci, *Two Moral Orientations: Gender Differences and Similarities*, 34 MERRILL-PALMER Q. 223, 225 (1988).

centered" ends. Both aspects are present in young children and are not sex-linked. They often become gender-associated through gender soaked cultural expectations and conventional norms. Societal structures sanction many boys to bury attachment and express individuation, while a preponderance of girls internalize mechanisms aimed at preventing the loss of attachment.[26] This is not a theory about innate differences, nor is it one that valorizes emotion over reason, particulars over absolutes, or women over men. Frug's admonitions about the dangers of a "crude Gilliganism" applied to the law are germane here. She warns that "vulgarization of Gilligan's book has been a catastrophe for feminists. Ripped from the context . . . [it] los[es] its edge as a disruption of previous research methods or a *challenge to existing normative hierarchies.*"[27]

Mainstream psychology normalizes existing hierarchies. Therefore when "the dilemma of the fact" appears—when particularism and benevolence appear to override absolute fairness—it is read as a "regression" rather than as a sophisticated moral form underwritten by the universal injunction "to do the least harm." Gilligan's research, coupled with her theoretical assumptions that designate attachments as originary moments along with egoism, allow her to reject the interpretation of this apparent dilemma as a regression. Instead it becomes an adult equilibration of the prior adolescent "egocentric belief in the omniscient capacity of formal logic" and represents a "postconventional morality of care."[28] A fresh framework rescues the "fact" from "dilemma" and elevates it to a positive outcome—a moral stage that transcends both the impediments of conventional ethical life *and* the empty formalisms of abstract reason and replaces both with an awareness of need and avoidance of detachment. Yet, in agreement with philosophers such as Levinas and Derrida with whose work Gilligan appears not to have familiarity, she places equality and justice on an equal plane with an ethic of care.[29] Each moral justification responds to pivotal, but different, notes of human psychology—separation and attachment. The transcendental subject of pure reason, mythologized at least since Kant, vanishes once tradition suspends disbelief that *both self and attachment* form an originary affect on which cognition operates but does not vanquish.

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26. *See* NANCY CHODOROW, FEMINISM AND PSYCHOANALYTIC THEORY 108–10 (1989).

27. Mary Joe Frug, *Sexual Equality and Sexual Difference in American Law*, 26 NEW ENG. L. REV. 665, 673 n.26 (1992) (emphasis added).

28. Gilligan & Murphy, *supra* note 1, at 86.

29. *See* Gilligan & Attanucci, *supra* note 25, at 224–25; *see also* Honneth, *supra* note 10, at 319 (commenting on the inadequacy of modern law to deal with the question of "care"). Honneth also presents a discussion of the problems with Habermas's attempt to mediate between the two moral principles with discourse ethics. For Honneth, as with Gilligan, "care" is a necessary counterpoint to justice.

III. IMPARTIALITY, RECIPROCITY, SOLIDARITY AS OUTCOMES OF SPECIFIC FACTS AND NORMS

The singular ego that encounters the other as "object" or *alter ego* levels all others to ancillary variations of himself. Habermas's moral alternative to justice, "solidarity," rests on this foundation. For Habermas, "the perspective complementing that of equal treatment of individuals is not benevolence but solidarity. . . . [E]ach person must take responsibility for the other because as consociates all must have an interest in the integrity of their shared life context in the same way."[30] The other is an *object* of "reciprocity"—concern for others is given equally to all. There is no privileging or asymmetry. We take the role of the other to ensure our shared communal life. The other is the object of "reversibility"—the *sine qua non* of the orthodox Piagetian stance combining autonomy and formal logic.[31] Piaget links moral reciprocity to the development of formal logical structures—transformations applied to propositions—in this case, reversibility. "[T]he logical act consists essentially of *operating*, hence of acting on things and toward people."[32]

Habermas, like Piaget and Kohlberg, has been roundly criticized for emptying people of content and for relegating substance to mere affectivity and particularism. But these theorists have not emptied their subjects. Instead they fill them with substance that commentators from Karl Marx, Hannah Arendt, and Carol Gilligan to contemporary political and legal theorists describe in various ways.[33] Until recently, this was a substance so elusive as to be nearly invisible, so rooted is it in our intellectual tradition. Habermas, Piaget, and Kohlberg all assume a psychology and developmental trajectory that is rife with substantive content—content that limits their observation, interpretation, and prediction of lifeworld facts and social norms. An originary narcissistic ego is tacitly construed, one that is non-social and non-rational. Fears of inequality and oppression eventually drive rationality and socially directed thinking. Hence, "impartiality, reciprocity, solidarity"—engagement with a generalized other to ensure individual fairness coupled with survival of a shared community—emerge as valued, anything but neutral, outcomes of this imagined journey of the lone ego. Our constitutional scheme as well as liberalism in general presupposes the same self that these outcomes

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30. Habermas, *supra* note 21, at 47.

31. *See* PIAGET, *supra* note 8, at 136–37.

32. JEAN PIAGET, SIX PSYCHOLOGICAL STUDIES 121 (David Elkind ed. & Anita Tenzer trans., 1967).

33. *See* Seyla Banhabib, *The Debate over Women and Moral Theory Revisited*, *in* FEMINISTS READ HABERMAS: GENDERING THE SUBJECT OF DISCOURSE 181, 182–93 (Johanna Meehan ed., 1995) (exploring the implications of Gilligan's research for universalist moral philosophy) [hereinafter FEMINISTS READ HABERMAS]; Jodi Dean, *Discourses in Different Voices*, *in* FEMINISTS READ HABERMAS, *supra*, at 205, 220–25 (introducing the notion of an "orientation toward connection," to fill out Habermas's account of moral development).

assume—a view of self that limits both questions and answers about democracy, constitutionalism, and judicial review.[34]

Lev Vygotsky, early-twentieth-century Russian psychologist, provides me with a transition to write about a different, equally cognitive but less rationalistic and detached, outcome through his recognition of Piaget's shortcomings. Vygotsky proves to be a good stand-in interpreter for me because his work never involved gender differences. Nevertheless he saw the limiting metaphysics in which Piaget, like Freud, was mired, and presented an alternative to which Gilligan's much later work can be related. Vygotsky places the social at the center of development, the originary moment. Whereas Piaget's child overcomes egocentrism with social language and pure thought, Vygotsky's child is *first* connected and social. Knowing at all levels is born of interaction, activity, sociality—the "interpsychological." The bifurcated world of inner-outer is anathema to him. Piaget, Vygotsky tells us, gives the narcissistic ego an independent metaphysical beginning, which forces him to represent realistic thinking as "completely severed from the real needs, interests, and wishes of the organism, that is, as *pure thought*."[35]

Habermas, too, avoids severing inner from outer world and mitigates the problem of "pure thought" by keeping the lifeworld in play—both individual and societal. He holds that paths toward legitimate norms, whether in moral development, social evolution or law, consist of continual cognitive reconstructions of the experienced world. For Habermas, as with Vygotsky, language serves as the lynchpin of this process. But for all these similarities, Vygotsky's initial condition of all transformations, "social speech," takes the more Piagetian form of inner egocentric thinking for Habermas. The social aspect maps on later, in Habermas's view, and culminates in the honing of language and the pragmatics of discourse as the medium of understanding and universalizing in the "postconventional" moment. However, two contrasting types of actions, "strategic action" and "normatively regulated action" precede the postconventional maturity that secures universal legitimate norms for Habermas. These motivations or "actions" enter at the crossroads where the child's egoistic development meets "conventional" morality. Self-interest drives behavior and conventional norms constrain it until an individual (or a culture) "thematizes" the latter to set it off from the lifeworld. To achieve such a "decentered understanding" requires that

> a hypothetical attitude is introduced. Before the reflective gaze . . . the social world dissolves into so many conventions in need of justification. The empirical store of traditional norms is split into

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34. *Cf.* Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1690–94 (1997).

35. Lev Vygotsky, *The Problem of Speech and Thinking in Piaget's Theory*, *in* 1 COLLECTED WORKS OF L.S. VYGOTSKY 53, 77 (Robert W. Rieber & Aaron S. Carton eds., 1987).

> social facts and norms. The latter have lost their backing in the certainties of the lifeworld and must now be justified in the light of principles. Thus the *orientation to principles of justice* and ultimately to the *procedure of norm-justifying discourse* is the . . . inevitable moralization of a social world become problematic. Such are the ideas of justice that, at the postconventional stage, take the place of conformity to roles and norms.[36]

But "social facts and norms" constitute differently for different groups and therefore provide different motivations for strategic action. In addition, different conventional expectations offer a different focus for the "reflective gaze" and "norm-justifying discourse." Gilligan's inclusion of girls and women in moral justification studies, which had previously only included boys and men, provides a potent example of such differences. Her empirical findings, commensurate with the theory of originary attachment, suggest that girls often strategically avoid detachment since the social injunctions to separate are not as operative as they are with boys. This form of "strategic action" works in conjunction with conventional norms of self-sacrificial "female goodness" until conflicts about equality and fairness emerge and force cognitive reconstructions of moral dilemmas and justifications. Notions of impartiality enter and demand the subject's recognition of herself as a subject. She understands the logical grounds for the conflict—principles of fairness to self against those of unconditional maintenance of relationship[37]—and struggles with the resulting tension. In a move toward what Gilligan names "postconventional care," this social actor refuses to relinquish the moral injunction to stay attached. She rejects a detached application of reversibility operations to others but instead justifies her acts based on an awareness of need, her own, that of the other, and of non-violence to the relationship. Autonomy, symmetry, ability to take the role of the other, or "what the other means to me" do not drive this morality.[38] Yet it responds to issues of fairness. "Do the least harm to self and others," expresses the universal norm-justifying validity claim of this discourse. Different lifeworld *contents* produce different postconventional *forms*. "Principles of care" should be added to complement "principles of justice" in the Habermas passage above, but should never be subsumed under them. Postconventional "care" is cognitive, principled, and the result of a "reflective gaze."

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36. HABERMAS, *supra* note 17, at 165.

37. *See* BROWN & GILLIGAN, *supra* note 24, at 177–81 (providing descriptions of either-or framing of "selfish or selfless, self or relationship" as a constructive tension toward potential resolution of conventional norms that dictate such dichotomies).

38. It should be made clear that this is not a response based on *empathy*, being able to exchange oneself for the other or "walking in the others' shoes." Rather it is a genuine disinterested *response and responsibility* to another simply rooted in need. *See id.* at 38 (describing this distinction as one rarely made in the psychological literature).

IV. CONCLUDING REMARKS

Tradition relegates empirical differences or "facts" that are anomalous within the prevailing theory to mere particularism or relativism, regression or immaturity, or affectivity. That is, to *content*—as opposed to *universal form or reason*. This tradition impedes theories of legal and political legitimacy as it has moral philosophy for centuries. The importation of Carol Gilligan's findings and interpretations into Habermas's project palliates the serious consequences of this "'rationalist' bias," which "abstract[s] away from the embedded, contingent, and finite aspects of human beings" . . . [and] neglect[s] . . . the contingent beginnings of moral personality."[39] Yet, the inclusion of Gilligan's view does not destroy the cognitivism that Habermas requires for legitimacy based on Piaget's "developmental logic" driven by the "reflective gaze." In this essay, I show how the experiences of differently situated subjects provide "facts" or figurative *content* on which Piagetian reflexive abstraction operates to create *forms* that correlate to that content. "At each level, formalization of a given content is limited by the nature of this content;"[40] "form and content are correlatives, not absolutes."[41] Gilligan describes two dimensions of early relationship, perceptions of autonomy/inequality *and* of attachment, each of which constitutes originary content. Depending on individual situatedness and cultural factors, social norms selectively highlight and transform each dimension into differentiated objects of the "reflective gaze." When the first dimension—autonomy, inequality, detachment—is foregrounded, "principles of justice" instantiated through "impartiality" and offset by "reciprocity and solidarity" represent logical formal outcomes. But when attachment is theoretically recognized as equally foundational content, and is then cognitively transformed, "principles of care" logically emerge as another consequent set of formal justifications that define mature moral development. Both outcomes are cognitive, result from operations on originary affect *and* on conventional norms, and require equal "decentration" from the moral injunctions of a parochial lifeworld.

Critiques of formal equality models and of the liberal self as legitimate frameworks for law abound, especially from feminist legal scholars. Yet "limited cross-fertilization" has occurred between these critics and constitutional theory and studies of legal legitimacy.[42] Tracy Higgins unpacks the debate between democracy and feminism by suggesting that "liberalism's emphasis on individualization may constitute a normative claim about the value of individuation rather than a descriptive claim

39. Seyla Benhabib, *In the Shadow of Aristotle and Hegel: Communicative Ethics and Current Controversies in Practical Philosophy*, 21 THE PHILOSOPHICAL FORUM 1, 21 (1989–1990).

40. PIAGET, *supra* note 8, at 35–36.

41. *Id.* at 28.

42. Higgins, *supra* note 34, at 1660.

about the self."[43] Moreover, she adds that critiques of liberalism simply present an alternative normative claim bolstered by complementary descriptive claims of the self, which should inform an analysis of alternative structures to assess legal policy. The interpretation of Gilligan's work presented here provides both theoretical and empirical support toward such an analysis without reducing alternatives to crude contextualism or false oppositions that frame affect against thought.

Gilligan's logic like that of Piaget and Kohlberg retains validity claims by assuming that cognitive reflection yields moral competence through increased decentration from conventional norms and unexamined emotivism. While the "postconventional morality" she describes refuses detachment from the relational "facts" of everyday life, it requires justificatory claims. In a lifeworld where attachment figures as centrally as individualism, developmental reflection operates on that attachment and transforms it into a "postconventional" morality in which human connection plays as a counterpoint to the individual. The theory reworks assumptions about originary egoism, proposes different frameworks for problem solving, and new possibilities for competence criteria. Alternative standards resist both disengagement and total submission of self while upholding responsibility for the suppressed or vulnerable other. A morality of "care" neither replaces a morality of "justice," nor is subsumed under it. They coexist as "bifocalities"[44]—living in a productive tension.[45] Gilligan's theory provides normative claims to complement those of classical liberalism and simultaneously assists Habermas's rescue mission—saving lifeworld "facts" from obliteration by transcendental moral norms without sacrificing reliable justification. It expands the departure point for Habermas's journey toward "postmetaphysical thinking."

43. *Id.* at 1692.

44. *See* Gilligan & Attanucci, *supra* note 25.

45. *See* Honneth, *supra* note 10, at 316.

THE VIEW OF HABERMAS FROM BELOW: DOUBTS ABOUT THE CENTRALITY OF LAW AND THE LEGITIMATION ENTERPRISE

BRIAN Z. TAMANAHA*

Jürgen Habermas is the most influential living philosopher in the world today. The breadth of his learning, and the scope and erudition of his work, are unmatched. With the publication of *Between Facts and Norms*,[1] Habermas has made his most systematic foray into the field of law. And the result is spectacular. Drawing up philosophy, legal theory, political theory, social theory, history, anthropology and sociology, he has attempted nothing less than a total reconstruction of the fields of legal and political theory, taking on all of their central dilemmas, and applying his discourse theory to resolve long-standing puzzles or impasses.

The already large and growing body of literature responding to this work has generally been supportive. Understandably, few critics have taken on this imposing book at its most grand level. Rather, most have supported Habermas's overall project, limiting their criticisms to selected problems. In this modest commentary I will do the same, though the problems I address are, I believe, central to his exercise. The primary contribution I hope to make to the discussion will come from exploring a viewpoint that I have not yet seen raised—the view from below.

By "view from below," I am referring to two distinct groups: the view of those who are not participants in legal theory discourse, lay people in particular; and the view of societies outside the West. As a Western law professor who has produced legal theory, I cannot claim any special privilege in relation to these views from below. However, I feel an affinity to them. I have lived and worked as a lawyer in a developing country for two years, and have studied and written on the subject, and while I am an avid consumer of philosophy, I am not formally trained in it. This background provides me with some insight into how these perspectives might approach Habermas's work.

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* Professor, St. John's University School of Law. I would like to thank Elizabeth van Schilfgaarde and Peter van Schilfgaarde for their critical comments on earlier drafts of this article. I would also like to thank Professor Habermas for his graceful response to the presentation upon which this article is based.

1. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS, CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

I. TWO CENTRAL HABERMASIAN THESES

I will apply the view from below to test two theses central to Habermas's reconstruction. To my knowledge, neither of these theses has been challenged seriously in the responsive literature. I suspect this omission is because, among social theorists and legal philosophers, they are widely assumed to be correct. Habermas assumed them without offering virtually any supportive evidence.[2] The first thesis is that *law is central to the organization of complex societies*; the second is that *legitimation is essential to law*. In Habermas's view, these two theses are intimately connected:

> Today legal norms are what is left from a crumbled cement of society; if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces.
>
> . . . .
>
> Modern law grants, however, stability of behavioral expectations only on the condition that people can accept enacted and enforceable norms at the same time as *legitimate* norms that *deserve* intersubjective recognition.[3]

These two theses are of fundamental significance to Habermas. His entire argument is built upon their edifice. According to Habermas, the disenchantment of the lifeworld and the division of labor—the loss of faith in religion and the breakdown of shared values, customs and traditions—has dissolved the glue that previously kept society intact. Contrary to invisible hand or market theories, in his view, the instrumental rationality of a community of self-interested actors is not sufficiently self-organizing to hold society together. There is nothing to coordinate behavioral expectations between strangers. Moreover, the differentiation of modern society into increasingly autonomous subsystems (political, economic, family) increases the likelihood that we will lose the ability to exert control over the circumstances of our existence. As Habermas dramatically put it, "how can disenchanted, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?"[4]

Riding to the rescue, modern law, for Habermas, is the key lynchpin that mediates the relationship between system and lifeworld (to use his

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2. An extensive discussion by Habermas of these two theses, especially the first, can be found in his earlier book, *Legitimation Crisis*. JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., 1975).

3. Jürgen Habermas, Between Facts and Norms, *An Author's Reflections*, 76 DENV. U. L. REV. 937, 937–38 (1999).

4. HABERMAS, *supra* note 1, at 26.

terminology). "Modern law steps in to fill the functional gaps in social orders whose integrative capacities are overtaxed."[5] Without the integrating function served by modern law, society would collapse, and/or there would be no effective form of communication between the life-world and system.[6] However, the consequences of disenchantment also are visited upon law. Law too has been deprived of metaphysical and religious support, and, in modern, pluralistic societies which lack a shared morality or tradition, it cannot count on an underlying normative consensus.[7] The efficacy of law, according to Habermas, is contingent upon the sense of the populace that law is legitimate, but under these circumstances it must find a new basis for legitimation.

> [M]odern law can stabilize behavioral expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as regent for a "societal community" that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of an acceptable claim to legitimacy.[8]

Such an abstract claim to legitimacy is precisely what Habermas's discourse principle supplies. He states the principle as follows: "Only those [legal] norms are valid to which *all persons possibly affected* could agree as participants in rational discourses."[9] Viewed in political terms, the discourse principle provides the internal relation between democracy and the rule of law.[10] Laws generated by democratic means are consistent with the discourse principle; the addressees of laws are also their authors, which means we remain free even as we live under the rule of law. "The principle of democracy is what then confers legitimating force on the legislative process."[11] "At the posttraditional level of justification, as we would say today, the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion- and will-formation."[12]

Here is a bare outline of Habermas's argument:

1. Society is in danger of falling apart owing to anomie;

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5. *Id.* at 42.
6. *See id.* at 55–56.
7. *See id.* at 33–34.
8. *Id.* at 76.
9. Habermas, *supra* note 3, at 940 (emphasis added); *see also* HABERMAS, *supra* note 1, at 104 ("[T]he 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.").
10. This relationship is an intimate one. "Legal (political) rights are necessary for the proper constitution and exercise of the democratic process; while, at the same time, the democratic process is what legitimates law. Thus the relationship between legitimate law and the democratic principle is circular. They are '*co-originally* constituted.'" HABERMAS, *supra* note 1, at 122.
11. *Id.* at 121.
12. *Id.* at 135.

2. Law must rescue society;
3. But law needs legitimation to be effective;
4. Discourse theory rescues law;
5. Society is saved.

Building upon discourse theory, Habermas goes on to reconcile or overcome some of the fundamental antinomies that perennially confound legal and political theory, including those between liberalism and republicanism (and, respectively, private autonomy and public autonomy), legal positivism and natural law, and facts and values.

It is beyond my capacity to meet these arguments, many of which I find thought provoking and compelling. My response will be limited to drawing upon the view from below to question whether in fact society is in danger of falling apart, whether law is what keeps it together, whether law must be seen as legitimate to be effective, and, if so, what generates this legitimacy and whether discourse theory is an effective form of legitimation.

II. THE INTEGRATION OF SOCIETY

Western social theorists, for the past couple of centuries, though extending earlier, have been obsessed with the question of what holds society together. This obsession is related undoubtedly to the dislocations caused by industrialization, population growth and movement (urbanization, trans-border), huge increases in the numbers of poor and their proximity to the wealthy, and the ever-present threat and reality of war. To theorists at the end of the nineteenth century, like Durkheim and Weber, there was a sense that something unique in the history of humankind was occurring, an exhilarating yet frightening transition from the known to the unknown. The promise of modernity, at least in terms of generating new products and wealth, seemed limitless. The melding of people and machines in institutions was a wonder of organization and efficiency that generated pride in the human capacity. But the working and living conditions of the laborers were often abominable. And it was impossible to ignore the impending masses of poor.

Contributing to this sense of uncertainty was more than just a change in the material conditions of society. Traditional knowledge and beliefs were under increasing siege by science and the Enlightenment. The remorseless destruction of these beliefs beneath the critical scrutiny of reason is what led to the earlier mentioned disenchantment of the world. For an intellectual this meant liberation, up to a point. All moorings were being lost, with no replacements in sight. Science could provide knowledge but not purpose. Rationality supplied means but not ends. If neither God nor absolute morality required it, "Why be good?" It was a question they could not answer convincingly to themselves. Their fear was that the masses would be led to the same conclusion. When the elite act without concern

for the good, it is considered decadent by the intellectual, to be frowned upon (or celebrated), but not feared. In contrast, the prospect that the masses would act without concern for the good threatens the very destruction of society. After all, why do the poor put up with their perpetually abysmal and patently unjust condition when a better life, or at least more food and goods, is there within their reach to be seized?

Society, as social theorists knew or imagined it, seemed to be in imminent threat of breakdown. These threatening social circumstances, I am suggesting, explain why the first concern of social theorists has been the problem of social order, which has dominated sociology since its inception. When grappling with this problem, a favorite activity of social theorists has been to construct comparisons between primitive and modern society. Durkheim's famous contrast between the "mechanical" solidarity of primitive societies and the "organic" solidarity of modern society epitomizes this approach.[13] His thesis was that primitive societies were held together by a shared mechanical, collective conscience. Modern societies, by contrast, are characterized by a division of labor, which results in a loss of shared values. The absence of the collective conscience of primitive societies is replaced in modern societies by the integrative ability of law. According to Durkheim, primitive law was retributive, while modern law is oriented toward restitution, effecting a shift away from coercion toward consensus. Thus he characterized modern law and modern society in a progressive way.

Law is an attractive candidate for solving the problem of social order. Its most visible task is the maintenance of order, including the preservation of property. To put the suspicion more bluntly, for one concerned not just about order but about one's own privileged position in that order, social and legal theory nicely help legitimate Law (by characterizing it as important and good), and a good and important Law helps legitimate society. Durkheim's portrayal of law in modern society is clearly favorable by contrast to his characterization of law in primitive society. Indeed, many social and legal theorists, including Habermas, characterize law's role in modern society as rather heroic.

It would not be fair to saddle Habermas with the details of Durkheim's contrast between primitive and modern societies. By his own account, however, Habermas does "side with Emile Durkheim" in his view of the central role that law plays in modern society.[14] In the fundamental respects that matter here, their accounts are strongly parallel. The problem is that Durkheim was not concerned with accurately representing pre-modern societies. Rather, his intention was to understand modern

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13. *See* EMILE DURKHEIM, SELECTED WRITINGS 123–44 (Anthony Giddens ed. & trans., 1972).

14. Habermas, *supra* note 3, at 937. In *Legitimation Crisis*, Habermas discusses the contrast between primitive and modern societies in a manner strongly reminiscent of Durkheim. *See* HABERMAS, *supra* note 2, at 1–31.

societies. His contrast was a caricature that has since been sharply challenged by anthropologists and sociologists.[15] Just as pre-modern societies were never as mechanical—unthinking extensions of the collective mind—as Durkheim portrayed,[16] modern societies are not as pervaded by a loss of shared values as the term anomie suggests. Once this contrast is placed into doubt, it is not at all evident that there has been a need for a new mechanism to integrate complex societies—that society would have collapsed had law not been there to fill the gap.

The foregoing summary characterization of the circumstances and motivations surrounding the obsession of social theorists with the problem of social order, and their reasons for identifying law as the solution, is admittedly superficial and cynical. And I offer no evidence to support it. My purpose in suggesting it is to prompt us to create some distance from the assumption that law is essential to the integration of modern society, and to question it. For too long it has passed as an accepted truth, when in fact it is grounded in speculation which originated under the pressures of specific historical circumstances and concerns.

Beyond the general suspicions raised above, there are several concrete reasons to demand that the thesis identify some form of empirical support, granting that it is one of those speculations about the nature of society which cannot be tested through experiment. The first reason is that, despite the fact that the project of modernity has accelerated in the century since Durkheim first wrote, it is not easy to identify societies which have collapsed for lack of law to serve as an integrative mechanism. Various societies have suffered breakdown—especially economic and political in origin—to be sure, but none that can be easily attributed directly to the loss of values and the failure of law to subsequently fill in the vacuum. Keep in mind, furthermore, that many of the societies that have undergone vast changes from the impact of modernity have not had strong legal traditions, especially those outside the West. Modernity and its consequences have virtually swept the globe, leaving severe dislocations in its wake. Given the weakness of law in many locales,[17] if the thesis that law serves the essential role of integrating society in the modern era is correct, surely we would have seen a number of clear examples of societal breakdown.

One possible answer to this line of reasoning is that societal breakdown is a gradual process—the loss of values occurs slowly—and law

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15. *See, e.g.*, Gerald Turkel, *Testing Durkheim: Some Theoretical Considerations*, 13 L. & SOC'Y REV. 721, 724–27 (1978).

16. Malinowski's *Crime and Custom in Savage Society* helped dispel the notion of mechanistic adherence to customs and culture. *See* BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 63–64 (Littlefield, Adams & Co. 1959) (1926).

17. For a case study of the impact of transplanted Western law on a non-Western society, see BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW (1993).

happens to fill the breach with just enough strength to keep society integrated and functioning. The functional needs of society, in other words, insure that law—as a subsystem that contributes to the survival of the whole—will develop in the precise proportion necessary to prevent a society from collapsing. But that answer smacks of Panglossian functionalist rationalization formulated in a manner that is impervious to refutation, a type of reasoning which has long been in disfavor precisely because it cannot be disproven (and thus does not qualify as a scientific or empirical proposition).[18]

A second compelling reason to challenge the Durkheim/Habermas thesis is that it appears to reverse the actual order of dependency as between law and society. Habermas asserts that "if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces."[19] However, it is far more plausible to assert that law cannot be strong if the society in which it exists is not *already* functioning well in terms of social cohesion. It is not that society depends upon law to keep it from crumbling, but rather that law would be weak or crumble if society was in a state of near collapse. A loss of values sufficiently severe to threaten the disintegration of society would begin a downward spiral that would sweep law in its wake. Society may be ordered without law (though not without rules), but law cannot exist without an already organized society.

An obvious retort to my argument is to ask, if not law, then what are the essential sources of social order? To that inquiry, after an initial admission of uncertainty, I have a three-part response. First, as indicated above, I reject the very contrast between primitive and modern society. Focusing on this framework has taken us down the wrong track. Habermas is wedded to a nineteenth-century antinomy, which was of dubious validity at its inception and is hardly relevant today.

Second, I would say that just about *everything* that doesn't break society apart contributes to social order: intersubjectivity, shared language, values, customs, conventions, beliefs, practices, habits of action, role orientations, organized complexes of action (institutional arrangements), associations, explicit coordination, shared knowledge, self-interested action, survival instinct, altruism, the market, the reinforcing effects of the successful conduct of affairs, spontaneous social organization, and more, including all those traits selected by evolution which have helped the human species thrive as social animals (as sociobiologists insist), and, yes, also law. All of these influences likely exist to varying degrees in all societies (pre-modern and modern). But in no single society, pre-modern, modern,

18. *See* CARL HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION, AND OTHER ESSAYS IN THE PHILOSOPHY OF SCIENCE 319–20 (1965) (pressing this critique of functional analysis).

19. Habermas, *supra* note 3, at 937.

or in-between, can it be said that law is *the* integrating mechanism.[20] The lesson found in many developing countries, which are "complex" and "modern" by any usage of the term,[21] is that law often plays a marginal role in the integration of society.[22]

Third, I would suggest that the question is ill posed. Given the prevalence of social order, instead of asking what are the essential sources of social order, perhaps the more appropriate questions should be, Why and under what circumstances do societies break down? The focus would then shift to actual situations of societal breakdown, away from imagined explanations of the sources of order based upon fictional contrasts to a time before memory, back to concrete investigations of the various reasons contributing to breakdown in specific historical situations. Following such investigations, I doubt that the failure of law as an integrating mechanism to fill in for a value deficit would be identified as a leading cause.

Thus far, arguing on a general level, I have expressed skepticism about the assumption that modern society has suffered a significant value breakdown that distinguishes it in any fundamental way from premodern society, and the assumption that law is the glue which holds modern society together, by questioning both aspects of this assumption. I have suggested that there may be elitist reasons why these assumptions have held sway unchallenged for so long among social theorists. The view of law from the bottom—from the poor in Western societies and the general populace in non-Western societies—has seldom consisted of grateful relief that law is there to hold society together, staving off chaos and disorder. Contract and property laws are not significant factors in the coordination of their daily existence because they have scant property and enter into few contracts. The apparatus of the criminal law system is either nowhere to be seen when they need it, or an unwelcome and oppressive intrusion in their lives. Too often, from these perspectives, law has been viewed as unresponsive, unavailable, alien, impenetrable, and as something to be feared or avoided. The disparity between this view of law and the heroic view of law as essential to the survival of society bears explanation. It is not enough to assert that the law they are exposed to is deficient, a dirty shadow of what law should be. If society has not collapsed and the law still works, it passes the test set up by social theorists for a law that is effectively serving its function of maintaining order in society.

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20. For a general argument in support of this assertion, see Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 OXFORD J. LEGAL STUD. 501, 515 (1995).

21. Indeed, I would suggest that these societies are far more "complex" than Western societies, because they consist of extraordinary mixtures of transplanted and indigenous, modern and premodern.

22. *See* TAMANAHA, *supra* note 17, at 177–79.

Rather than further press these points about the negative views of law from below, which are well known, I will instead conclude this section by arguing that the most dominant experience of law from below is that it is *irrelevant*. Habermas's thesis is that, in modern society, the primary function law performs is to stabilize behavioral expectations. This task places law at the very heart of social action. To achieve this task, law must inform actions both at a conscious and subconscious level (where most behavioral expectations are lodged). In interpretive theory generally,[23] it is ordinarily asserted that behavioral expectations are coordinated through shared social typifications, which are assumed and operate beneath our awareness unless brought to the surface through explicit thematization, or by the disruption or disappointment of an expectation.

Whichever way it is understood, the view that law helps stabilize behavioral expectations assumes that law has an extraordinary degree of influence on our daily actions. One of the lessons of the legal realists and of legal sociologists, however, is that often the general public is ignorant of—or doesn't pay attention to—vast portions of the law.[24] People have knowledge about law only if they have a specific reason to know, usually that knowledge is limited to the purpose at hand, and often that knowledge is obtained only after what's done is done. With regard to most action, people are not informed at all of the law that might be relevant, and often they hold erroneous assumptions about what the law requires. As Eugen Ehrlich demonstrated, people seldom think about the law in the course of their everyday actions.[25] When law is consciously contemplated, it is often thought of in terms of a transaction cost, as a consideration when calculating the costs and benefits of the action. The most effective (in terms of patterns of conforming behavior) laws are those which happen to coincide with what people do anyway, out of custom or normative conviction. However, in such cases, properly speaking, it is not the positive law that stabilizes behavioral expectations but the shared underlying customs and convictions. Given the literature which has raised doubts about the extensiveness of the knowledge about law of ordinary citizens,[26] and doubts about the degree to which people order their activities based upon the dictates of legal norms,[27] the notion that law stabilizes behavioral expectations in modern society is highly questionable.

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23. *See* ALFRED SCHUTZ, COLLECTED PAPERS I: THE PROBLEM OF SOCIAL REALITY (Maurice Natanson ed., 1962). An extensive discussion of interpretive theory can be found in TAMANAHA, *supra* note 17, at 79–101.

24. *See* BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 91–152 (1997).

25. EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 486–506 (Walter Moll trans., 1936).

26. *See generally* ADAM PODGORECKI ET AL., KNOWLEDGE AND OPINION ABOUT LAW (C.M. Campbell et al. eds., 1973) (discussing and providing support for the premise that the public is not as familiar with the local law as was once presumed).

27. *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (discussing how people routinely settle disputes without looking to the law).

III. THE NATURE AND SOURCES OF LEGITIMATION IN LAW

The suspicions expressed in the preceding section gain momentum when we shift to an examination of the discussion of legitimation of law. I will explore three related points: (1) concern about legitimation as an exercise; (2) whether discourse theory is a persuasive form of legitimation; and (3) whether law must be considered legitimate to be effective, and, if so, whether legitimation follows from philosophical explorations. All of these points, again, will be examined with the view from below in mind.

A. *The Dangers of the Legitimation Enterprise*

A review of the histories of legal and social theory shows that they are replete with discussions of the legitimacy of law.[28] More to the point, the literature is filled with attempts to portray law *as legitimate*. This is what I call the legitimation enterprise, an effort that has to an extraordinary degree occupied the attention of legal and social theorists. Many such theorists, including Habermas, would protest indignantly and justifiably that their objective in setting up standards against which to test the legitimacy of law is to provide for a *critique* of law, to improve the law by demonstrating its *illegitimacy*, not to rationalize the law. The problem is that it has seldom worked out that way in practice. Natural law theory has perhaps had the most critical edge of any form of legitimation inquiry, because it conditioned the validity of positive law on its conformity to a higher standard. Frequently what has occurred, however, have been pious assertions of the fidelity of positive law to natural law, and thus natural law has been called upon to bolster the legitimacy of law.[29] Legitimation is a two-sided enterprise: it can serve as a critique, or it can rationalize the status quo. More often than not throughout history, for whatever reason, the critical potential of the legitimation enterprise has been sublimated and enlisted to serve as an apologist for the existing system of law.

Suspicion of the legitimation enterprise should be heightened when, as is the case with Habermas, an *idealized* standard is applied to test the legitimacy of law. Recall that the test for the legitimacy of law is the discourse principle: "Only those norms are valid to which *all persons possibly affected* could agree as participants in rational discourses."[30] This standard is idealized in the sense that it is impossible to achieve.

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28. *See* Brian Z. Tamanaha, A General Jurisprudence of Law and Society (manuscript in progress, on file with the author).

29. Blackstone, for example, employed his theory of natural law as "the chief tool of rationalization" in support of the existing English legal system. DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 50 (1941). Roscoe Pound has pointed out that, despite its critical import, natural law principles and natural rights have all too often merely been derived from, and used to justify, the existing social order. *See* 1 ROSCOE POUND, JURISPRUDENCE 488 (1959).

30. Habermas, *supra* note 3, at 940 (emphasis added).

Habermas does not intend nor expect to hold all legal norms to this standard. Rather, it operates as a kind of regulative ideal, something to aspire toward, which has value even if we are always doomed to fall short. But idealized standards are especially susceptible to the rationalizing tendency of legitimation. The following concerns regarding idealized standards will be taken up on turn: the *immunity* effect, *forgetfulness*, and *slippage*.

Once an idealized standard that cannot be met is set out, it is easy to have it both ways. The standard is *immune* to the complaint that it is unrealistic, because it was not intended to be achieved in reality—Habermas labels his discourse principle "counterfactual" to emphasize this fact.[31] Yet at the same time, as long as it stands, its authority is drawn upon continuously as a standard in relation to which judgments are made about reality. That is a luxurious position to occupy. Habermas further dances on two sides of the line by insisting that his "counterfactual" discourse principle is in fact "empirical," because the idealizations that underlie the discourse principle are presupposed in all actual communicative processes.[32] Thus Habermas will, on the one hand, deflect the critique that his idealization is too unrealistic with the assertion that it is meant to be counterfactual anyway, and, on the other hand, refute the charge of unreality with the claim that it is in fact empirical.[33] His straddle is successful only because it shifts what is being referred to as unrealistic. Regardless of whether the norms of rational speech are always presupposed in acts of communication (and thus in a sense are empirical) as Habermas insists,[34] the point is that it is unrealistic to suggest that the legitimacy of legal norms be measured by a standard which requires that they be assented to by all persons affected, because that will seldom if ever happen.[35] Habermas repeatedly dismisses other theories as insufficiently empirical. His theory is subject to the same complaint. At some point an idealization is so idealized that it is irrelevant beyond the general benefits gained by the imagining of Utopian scenarios. Calling it counterfactual does not save it from having to answer to this charge.

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31. JÜRGEN HABERMAS, POSTMETAPHYSICAL THINKING: PHILOSOPHICAL ESSAYS 47 (William Mark Hohengarten trans., 1992).

32. As Habermas puts it: "These and similar idealizing yet unavoidable presuppositions for actual communicative practices possess a normative content that carries the tension between the intelligible and the empirical into the sphere of appearances itself. Counterfactual presuppositions become social facts." *Id.* at 47.

33. This was Habermas's oral response at the panel discussion following my criticism of his argument.

34. I am, for the sake of this argument, assuming Habermas is correct about the inevitable posing of the presuppositions, though I believe there are substantial reasons to doubt this claim. It seems that a more pragmatic theory of discourse—simply based upon the accumulated effects of successes and failures of communication—can be constructed that would contest the assertion that these presuppositions underlie all communication.

35. If Habermas insists that this counterfactual discourse principle is empirical, he would seem to also necessarily insist that law is therefore legitimate, a dangerous assumption to make. *See* David Dyzenhaus, *The Legitimacy of Legality*, 46 U. TORONTO L.J. 129, 175 (1996).

Forgetfulness occurs when conclusions are drawn about the legitimacy of real practices based upon application of the idealized standard. What makes the discourse principle powerful—what allows it to escape so many other problems that plague political and legal theory—is *precisely that it is conditioned upon unanimous agreement in a rational discourse* of those affected. Anything short of that is not close. It throws us back into the thick morass of dilemmas that the discourse principle allowed us to escape only because it was grounded in universal agreement. *Forgetfulness* arises when theorists assert that a given law-generating practice that approximates the discourse principle is, therefore, legitimate. This is an unwarranted conclusion; one which cannot be grounded in the discourse principle itself, because the demands of the principle have not in fact been met. The discourse principle does not contain within it the ability to provide guidance on how much approximation is enough to qualify as legitimate. To the contrary, nothing short of total success in achieving the required universality would seem to be enough. When perfection is the standard, and perfection is required because only that will do, as is the case with the discourse principle,[36] anything less than perfection is failure.

To the extent that no real situation can ever meet the discourse principle, it is not clear that is can ever be usefully applied as a concrete standard with which to test real situations. In this respect there is a strong similarity between the discourse principle and the idealized modeling conducted in law and economics. Economic modeling is often so simplified that no conclusions can be drawn about the real world based upon the model. As real conditions are added, the model becomes unworkable owing to complexity and/or the conclusions change. The value of these models is thus limited to helping us think about the situation, though the temptation to draw real life conclusions based upon the model has often proven too difficult to resist. The same is true of the discourse principle.

Slippage occurs when theorists adjust the idealization to make it more realistic, or achievable. The fact that an idealized standard cannot be met, combined with the consequent limitations in its actual application, leads inevitably to frustration. One obvious solution is to make the standard less demanding. Sympathetic theorists have manifested this impulse when urging that the unanimity requirement be dropped in favor

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36. Robert Alexy explains why anything short of actual unanimity is in fact failure:

> It is easy to see that any tension between basic rights and democracy must vanish immediately once one presupposes the perfect realization of this principle of democracy. By "perfect realization" I mean a political state of affairs in which only such laws are enacted as have *actually* met with the agreement of all legal consociates in a discursive process of law-making. The identity of addressee and author of the law so often mentioned by Habermas would be fully realized in this model. As the agreement of all legal consociates (to which in this ideal model each legal norm can be retraced) is a discursively purified and therefore a rational act of self-government, no norm can violate a basic right.

Robert Alexy, *Basic Rights and Democracy in Jürgen Habermas's Procedural Paradigm of the Law*, 7 RATIO JURIS 227, 232 (1994).

of plain old majority assent. James Bohman, for example, argued that "Unanimity is too strong a criterion and should be replaced by a weaker standard of agreement: that all citizens have the opportunity to participate in the decisionmaking process in such a way as to have the reasonable expectation that they may affect its outcome."[37] Another tempting form of slippage is in the suggestion, which assuredly will be made (if it hasn't already), that the standard should not require universal acceptance but only a fictional "acceptability."

Never mind that these more modest demands are far from the original discourse principle; and never mind that theorists wish to continue to draw upon the prestige of the discourse principle even when applying such lower standards. The most telling implication of steps to lessen the standard is that as a result the idealization begins to sound a lot like Western liberal democracies. That is the first—I dare say inevitable—move toward using the discourse principle (in watered down form) to rationalize and legitimate our existing practices. *Our practice thereby becomes the ideal.* That, as I warned earlier, is the perennial danger of engaging in the legitimation enterprise. Despite Habermas's impeccable critical pedigree, it is difficult to read his argument without sliding to the conclusion that our systems of liberal democracies and the rule of law, despite their flaws, for the most part are deserving of a substantial claim to legitimacy.

Not only does this make us self-satisfied about our own situation; the greater problem is that it imposes on the rest of the world our own (liberal democratic) practice, but now in the guise of a *universalistic* ideal. There are strong echoes of this kind of philosophical imperialism throughout the history of Western relations with the non-Western world. Although Habermas may insist that the discourse principle is flexible enough to allow for different instantiations in non-Western societies, he cannot argue that it is neutral and completely open to all non-Western forms of the generation of norms. It does, at a minimum, require a form of strong democracy.

B. *Whether the Discourse Principle Is a Persuasive Form of Legitimation*

The discourse principle is procedural in nature. With the modern loss of beliefs in absolute values, and the moral and ethical pluralism of modern society, it seems impossible to come up with substantive standards of rightness with which to test the legitimacy of legal norms. In lieu of this, the discourse principle suggests that when the proper decision-making procedures are followed—through uncoerced discourse open equally to

37. James Bohman, *Complexity, Pluralism, and the Constitutional State: On Habermas's Faktizitat und Geltung*, 28 L. & SOC'Y REV. 897, 921 (1994); *see also* William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jürgen Habermas*, 17 CARDOZO L. REV. 1147, 1156 (1996) (arguing that the unanimity standard is too high).

all persons affected, with full knowledge and an attitude oriented toward understanding, terminating only upon achievement of unanimous agreement—the outcome will be right, entitled to a claim of legitimacy. Through this reasoning, legality consistent with the discourse principle is itself legitimate, and its products morally worthy. In United State's legal theory, Habermas's proceduralist approach is reminiscent of Lon Fuller's argument that the procedures of the rule of law have an affinity with good, in the sense that they are unlikely to produce evil outcomes.[38] Thus the morality of law inheres in its procedures.

Philosophers with far more ability and knowledge than I can no doubt mount a more sophisticated response, but I cannot shake the sense that there is no logical way to move from a procedure to a morally correct outcome. The barrier between procedure and substance (the content produced by that procedure) seems impassable. A morally worthy procedure does not, by virtue of that fact, entail any guarantee of doing the right thing (to put it in more common vernacular), though I would readily agree that following a morally worthy procedure is a better way of making a decision than not. Another obvious objection to this procedural legitimation of law, which I have already mentioned but will not elaborate in detail, is the abject inability of the production and application of law to ever meet the conditions of the discourse principle. Constraints of time and resources, and the reality that agreement will seldom be universal, cannot be overcome.

The response I will develop based upon the view from below is different. In Habermas's scheme, the view from below is essential because the efficacy of the law is contingent upon the support of the populace, and any form of legitimation must appeal to "a posttraditional moral consciousness of citizens who are no longer disposed to follow commands, except for good reasons."[39] Habermas thus identifies the view from below, not the view of theorists, as the one that ultimately matters. The pertinent question, then, is whether the populace will agree with Habermas that legal norms are worthy of being followed solely because they are produced consistent with the discourse principle, whether they will count this as a "good reason."

The legitimacy of the procedure by which the decision is produced is certainly not irrelevant. But the normal reaction to whether a legal norm or action is right is still based upon whether one agrees or disagrees with the outcome. Consistent with Habermas's universal assent ideal, of course, everyone does agree with the outcome. However, this merely serves as a reminder that we cannot slip from the ideal to the real to legitimate any particular manifestation of law because law will seldom if ever meet this condition. There will almost always be people who believe a given outcome

38. *See* LON L. FULLER, THE MORALITY OF LAW (1964).

39. Habermas, *supra* note 3, at 938.

to be wrong, and they will not be persuaded otherwise by the fact that good procedures were followed. The fact that people who are on the losing side of majority-rule decisions may nevertheless abide by the decisions does not mean that they like the decisions, or think those decisions are correct, simply by virtue of the fact that they were made democratically.

There are deeper problems with the discourse procedure in relation to the view from below. Foremost, it carries the odor of self-privileging: the skill which philosophers and lawyers singularly excel at is discourse. Talk is our trade. Even under the conditions of the idealized setting, many people will be silenced through the weight of plain inability. The old gap between formal and substantive equality is thus reconstituted within the discourse principle. It is impossible to tweak the conditions of formal discourse equality into substantive discourse equality because there is no way to alter the unequal distribution of discursive talent.

There is another respect in which the discourse principle is self-privileging, a respect which shades into the kind of paternalistic determining of life's choices that Habermas raised as an objection against social welfare systems. Habermas declares that the proceduralist paradigm "has its focus on the citizen who participates in political opinion- and will-formation."[40] He continues:

> Citizens can only arrive at fair regulations for their private status if they make an appropriate use of their political rights in the public domain. They must be willing to participate in the struggle over the public relevance, the interpretation and evaluation of their own needs, before legislators and judges can even know what it in each case means to treat like cases alike.[41]

These demands on the citizens are fundamental to Habermas's reconciliation of private and public autonomy, and thus form a key component of his argument.

The view from below: "Give me a break! I have better things to do with my time." If the discourse principle requires that every private citizen become the ideal citizen of the republic, it asks too much, and forces a burdensome obligation upon the ordinary citizen, whose vision of worthy or desirable pursuits often extends in other directions. Political philosophers may be inclined to value this kind of participation (though many write about it more so than actually engage in it), but imposing it upon others can be oppressive.

Yet another response from below would be to point out the alienating, excluding effect of, and the irony of, a theory which makes an extensive case for open and accessible discourse, but is presented in a form and manner that is comprehensible only to the initiated. There are sig-

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40. *Id.* at 942.
41. *Id.*

nificant discourse barriers inhibiting general access to discourse theory. Although Habermas may respond that he and others can convey more simplified versions of this theory in the realm of public discourse, this raises further concerns. As pointed out earlier, the danger of watered down versions is that they are altered in the course of the translation in a manner that ends up bearing little resemblance to the carefully constructed original. The final message would likely end up being: discourse theory (or a famous philosopher) tells us that democracy is good.

C. *Whether Law Must Be Considered Legitimate to Be Effective, and, If So, What Is the Most Likely Source of Such Legitimation.*

Theorists are wont to declare that there is a "legitimation crisis" of some kind, which must be solved if chaos or collapse is to be avoided, whereupon they present their solution.[42] Against this tendency I will raise two questions: Is legitimacy really so important to the functioning of modern law?; and, to the extent that it is, What are the effective sources of legitimacy? Although I had always assumed that legitimacy is indeed essential to the functioning of a legal system, my experience as a lawyer in Micronesia has shaken its hold.[43] Law in Micronesia, from the legal code to the staff who implemented it, was transplanted virtually wholesale from the United States. From the standpoint of the general public, the law was an alien presence with which they felt no sense of identification. It is not obvious that they saw it as legitimate at all, and, to the extent that they did, this legitimacy was based on little more than its naked prestige as state law. Nevertheless, although the law had a limited reach and a marginal influence in the maintenance of social order, it was effective in the tasks it undertook.

Although it would be inappropriate to extrapolate from this situation to law in the West, keep in mind that the situation of transplanted law is a common one around the world. Moreover, it suggests at least that it is not an absolute condition that the law be seen as legitimate to be effective. Many theorists, including Habermas, reason that if there were no legitimation-based support, the legal system would be required to exert a continuous and unsustainable application of force. The colonial experience—wherein effective legal systems were set up supported only by small staffs of armed support—would seem to belie this common view.

There is an intermediate position between legitimacy and the constant application of coercion. That is, coexistence based upon accommodations on both sides. The law limits its reach, avoiding interventions that will generate great resistance and often withdrawing when such resistance arises, for the remainder the populace more or less abides by the

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42. Habermas presented an early work, *Legitimation Crisis*, in precisely this vein. *See* HABERMAS, *supra* note 2. He has been repeating this theme ever since.

43. *See* TAMANAHA, *supra* note 17.

dictates of the law. Inertia and the high threshold necessary to effect change are majors factor in suppressing resistance that might otherwise result from a lack of legitimation. In other words, a law not seen as legitimate will not need to exert coercion on a constant basis. The threat of coercion often will be enough to suppress resistance until sufficient support is marshaled by the rebellious to have a reasonable prospect of prevailing in a contest with the law.

There is no point in further speculation along these lines. My intent is not to assert conclusively that law can survive without legitimation, but rather to encourage the reexamination of this assumption. There are enough functioning legal systems around the world today that are viewed with suspicion by the populace to suggest, perhaps, that legitimation is not as essential as Habermas and others assume.

The second question relates to the sources of legitimacy. Recall that, here, we are concerned specifically about legitimacy from the standpoint of the populace, because that is what Habermas believes to be necessary. I take it as self-evident that a minuscule proportion of the populace would ever read or be directly exposed to Habermas's work. This lack of access, and perhaps even lack of interest, suggests that if legitimation is important, theorists are searching for it and producing it in the wrong places. Discourse theory might still be effectual in so far as it influences intellectuals and thereafter trickles down to affect ideas circulating in the general public discourse. This kind of influence, however, is attenuated at best, and, as I suggested earlier, the risk of distortion in the filtering process is great.

Ideas about the legitimacy of law do circulate in society. In the United States, our dual liberal and republican inheritances influence these ideas. While the conflicts between these two streams of thought trouble theorists, people seem capable of holding to both views, shifting from one to the other without concern for inconsistencies and without suffering cognitive breakdown or a loss of faith. These ideas are a part of our tradition, passed on to each generation in various ways. Ideas about the legitimacy (or illegitimacy) of law also circulate in the public cultural sphere, fed by the reporting on sensational cases, and by popular novels, movies, and television shows about law. They derive from what is taught in school, from slogans about democracy and the rule of law at an early age to more serious scholarly examinations later on. They derive from actual exposure to legal proceedings, to concrete experiences with lawmaking or the court system. They derive from a sense of the fairness of procedures and a sense of fairness about the outcomes of the legal apparatus (to the extent that these are observed). Finally, these ideas of legitimacy derive from our experience of whether the law serves our interests and needs when called upon—on our common experience of whether *the law works* reasonably well to satisfy the demands placed upon it by those who resort to it. If it is correct that these are the primary

sources of views of the legitimacy (or illegitimacy) of law among the populace, the most direct route would be to make sure that legal procedures have the appearance of fairness, that their results generally accord with people's sense of what is right, and that the law more or less serves their needs.

I would not suggest that discourse theory is irrelevant to this process, by any means. But it does put into better perspective the likely marginal impact of discourse theory on the fact of legitimation. This is an important consideration because Habermas has pinned the relevance of discourse theory, in part, on the service it can provide to legitimate law in the modern era.

IV. WHAT ABOUT THE COMMON LAW?

To end this commentary I will offer a few brief remarks about a major aspect of law that Habermas fails to mention in his otherwise exhaustive coverage of the core issues in legal theory, a rather gaping omission from the standpoint of an Anglo-American lawyer: What about the common law?[44]

The common law poses a serious legitimation problem for legal theorists. Precisely how unelected judges obtain the authority to formulate law has never been clear. When the subject arose in early theoretical writings, the common law was portrayed as legitimate in so far as it merely embodied the customs of the people, a dubious claim from the outset. Consistency with custom allowed the common law to aver a kind of consent, since custom was thought to epitomize long-standing consent through ongoing and widespread conformity of action. Later, in theoretical writings, the grounds proffered for the legitimacy of the common law shifted from custom to consistency with natural law precepts; and still later, it shifted to consistency with reason.[45] All the while, there also have been claims that the judges were not actually creating law—they were merely discovering the law that was already there.

Reading this history, it is difficult to avoid the conclusion that theorists were scrambling for whatever arguably respectable basis might exist to support the common law. As custom, then natural law, lost their ability to serve as props, only reason was left to uphold the validity of the common law. The Realist critique essentially eliminated any final illusions about the common law, leaving it to drift without a clear source of legitimation. Dworkin's views of the integrity of the law, successively authored and worked pure by generations of Herculean judges, is the

44. For an excellent exploration and critique of Habermas's theory from the standpoint of the common law, see Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DENV. U. L. REV. 961 (1999).

45. *See* PETER STEIN, LEGAL EVOLUTION, THE STORY OF AN IDEA 69 (1980); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591, 604 (1911).

most recent candidate for a replacement, but it is implausible on its merits, and when seen in the context of this history it must be viewed with skepticism.

Habermas makes, at best, a weak effort to legitimate the common law. Perhaps, as a native of a civil law country, he did not feel the need to legitimate the common law, or perhaps he himself could not understand how the common law could be seen as legitimate. If the discourse principle were applied to the common law, it would fail miserably.

My points are twofold. First, to the extent that the common law is adjudged substantially inadequate by comparison to the civil law (or to legislatively generated law) when tested by the discourse principle, we should take note. After all, despite legislative inroads, much of our basic contract, property, and tort law are still grounded in the common law. Second, contrary to the import of the first point, it is not clear whether we should care. After all, the common law has thrived for centuries without ever having clear grounds of legitimation. Being told that it once again falls short seems entirely beside the point. That must say something about the legitimation enterprise.

V. CONCLUSION

In conclusion, I would like to state my specific underlying concern with discourse theory, and explain the skeptical tone of this article. I have no concerns about Professor Habermas. His humanitarianism is unquestioned, and his critical credentials are beyond reproach. In his writings as well as in person, he is respectful and open-minded, and indeed to a remarkable degree he appears to live by the demands of the discourse principle.

However, he cannot control the ways in which his work is used. I fear Habermas's theory will make it more difficult to raise what is always an essential question: "Is the law good or right?" Discourse theory is "meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy."[46] Accordingly, the initial answer to the question of whether the law is good or right would be: "Of course it is right, we generated the norm in a manner closely adhering to the dictates of discourse theory."

The troubling aspect of this response is that it does not answer the question on it merits. Rather, it deflects the question by pointing out how the law at issue was created. To get to the merits of the question, the inquisitor must first demonstrate that the process of generating the norm fell substantially short of what the discourse principle requires. No doubt there also will be a dispute about whether the extent to which it fell short was enough to dispel the presumption of legitimacy. Remember that dis-

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46. HABERMAS, *supra* note 1, at 127.

course theory itself requires perfection and thus provides no guidance on how much approximation is enough. This dispute will take the inquiry even further away from the question at hand, resulting in a potentially lengthy delay, and going down a path that may have no resolution.

Only after going through this process can you even begin to examine the question of whether the law is good or right. Discourse theory thus creates a barrier that protects law from facing this crucial question. Law needs no such protection. It is powerful enough to protect is own integrity without the cover provided by discourse theory. Law at base entails the application (and threat) of coercion. For this reason alone, it must always be directly subject to the question of whether it is good or right.

MORALITY, IDENTITY AND "CONSTITUTIONAL PATRIOTISM"

FRANK I. MICHELMAN*

I. CLAIMS

Among the aims that Habermasian political philosophy shares with other, contemporary, liberal-minded political philosophy is the justification of politics. More specifically, the aim is the justification of democracy, which is, after all, a kind of political rule.

People wake up each day to find in place effectively compulsory regulations of social life, "laws" with which the publicly supported authorities in the land predictably will demand their compliance. None of these people, as individuals, chose these laws for themselves. In a democratic country, the laws normally will have been decided by voting procedures in which majorities rule over dissenters. These might be simple or "super" or compound majorities. They might be majorities of the citizens, or of some class or classes of them, or of some class or classes of their representatives and officials. Whatever may be the precise history of how a democratic country's laws came to be what they are, it will not be that they were effectively made that way by the actions of any single one, much less every single one, of the individuals who are called upon to abide by them.[1]

From one standpoint, the question of political justification is that of how and on what conditions it might be possible that individual members of a modern society, each one sensitive to both political equality and political differences, could all come willingly to comply with various laws that none chose, and many would not have chosen, for themselves. From another standpoint, the question is how it possibly can be right for members of society at large to mobilize force (or the threat of it) as a way to bring a population of presumptively free and equal individuals into average compliance with laws that none of them individually chose and many do not now approve. The challenge is to supply a moral warrant for the application of collective force in support of laws produced by non-consensual means, against individual members of a population of presumptively free and equal persons. For countries under democratic rule, this means, as John Rawls has expressed it, to explain how "citizens [may] by their vote properly exercise their coercive political power over

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1. *See* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 14–16, 31–33 (1999).

one another"—to explain how your or my exercises of our shares of political power may be rendered "justifiable to others as free and equal."[2]

In Part III, I show how the idea of the constitution plays a pivotal and indispensable part in contemporary, liberal-minded political justification. I do mean the idea of the constitution as opposed to the thing itself. It must be the idea that is doing the work, I shall maintain, because there can be no settled agreement among a modern country's people on a description of the actual thing in all its concrete specificity. In support of this claim, I call upon the recent political philosophy of Jürgen Habermas. In his essay, *Struggles for Recognition in the Democratic Constitutional State*, Habermas shows the dependency of political justification on something he calls "constitutional patriotism."[3] I do not find that he means by that expression either a devotion to any specific choice of constitutional content—for example, choice of a strictly "formal" as opposed to a "material" or "compensatory" norm of equality (or vice-versa)—or a devotion to any country in view of that country's specific constitutional choices.

Neither, however, can Habermas be speaking only of people's attachment to some purely abstract, ideal notion of a constitution. To be sure, constitutional patriotism does, for Habermas, have its aspect of transcendental insight, of recognition of what a constitution unconditionally and counterfactually has to be in order to fulfill its pivotal role in the moral justification of legal force. But what Habermas further shows is that political justification depends, as well, on a population's conscious sharing of sentiments of attachment to a concrete *community* (although not, I shall insist, to any concrete *constitution*). Habermasian constitutional patriotism, in fact, is a confection of counterfactual constitutional idea and empirical communitarian sentiment. It consists in a conscious sharing of sentiments of attachment to the community, inspired by the community's perceived attachment to the counterfactual idea. Habermasian constitutional patriots feel devotion to their country just because they perceive their country's concrete ethical character to be such as to make possible the credible pursuit in practice of a certain regulative political idea. I pick a small fight with Habermas by putting the matter exactly in terms of the community's concrete ethical character. Yet I do believe he will agree that there is, in this instance, no prying apart *die morale* from *das ethische*, no real-life disentangling of the call of unconditional rightness from the call of integrity or self-consistency, of loyalty to the best one can make of one's own and one's community's life history and self-understanding.

2. JOHN RAWLS, POLITICAL LIBERALISM 217 (1993).

3. Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, *in* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY 225–26, 203–36 (Ciarin Cronin & Pablo DeGrieff, eds., Ciarin Cronin, trans., 1998) [hereinafter HABERMAS, THE INCLUSION OF THE OTHER].

II. CULTURES AND THE MAKING OF THE WORLD

A. *The Linguistic Turn*

Thus had I imagined the claims I would offer as a panelist, on the occasion, as I supposed it would be, of delivery by Habermas of a paper on legal theory, only to discover that what we would in fact be hearing from Habermas on that occasion was his paper, *Hermeneutic and Analytic Philosophy: Two Complementary Versions of the Linguistic Turn*.[4] Bracing as that paper is, legal theory is not its concern. Yet it does shed a helpful light on what Habermas does with the notion of constitutional patriotism.

The *Complementary Versions* paper is concerned with the philosophical aftermath of an early-nineteenth-century "linguistic turn" in metaphysics and epistemology, which Habermas traces to works of Wilhelm von Humboldt. As Habermas sees matters, the linguistic turn has required all of social theory ever since to cope with the idea that language "constitutes the world." According to this world-constructing view of language, its "lexicon and syntax"

> shape the totality of concepts and ways of apprehension by which first a conceptual space is articulated for everything the members of the community may come upon in the world. . . . [E]ach language articulates a certain "view" of the world as a whole. Thus the formula of language being the "formative organ of thought" may be understood in the transcendental sense of spontaneous world-constitution. Through this linguistic pre-understanding of the world, a language simultaneously structures the form of life of the community. . . . Language is no longer primarily seen as a [transparent medium for] representing objects or facts, but as the medium for shaping a people's spirit.[5]

Thus language, by preordaining the grid of conceptual possibilities on which facts can be spread, is said to assume a priority over the representation of the world, whether by oneself to oneself or by oneself to others; just as it is said to take priority over intention by limiting what it is possible to think or say regarding the categories—objectives, purposes, motives, values, sensations, sentiments, beliefs, likes, dislikes, hopes, and fears—by which one represents to oneself and to others the state of one's own mind.

At no point does Habermas offer denial of this "transcendental" position of language, meaning its decisive, irresistible, and limiting control over the construction of all possible objects and categories of experience and observation. But he does have a problem with it. Every natural

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4. Jürgen Habermas, *Hermeneutic and Analytic Philosophy: Two Complementary Versions of the Linguistic Turn* (paper presented at the Annual Meeting of the Society for Phenomenology and Existential Philosophy, Denver, Colorado 1999) (on file with the *Denver University Law Review*).

5. *Id.*

language is both a historically contingent matter and an indissolubly social one. If a people's language decisively shapes and limits both the "spirit" of that people and the ways in which it is possible for that people to perceive and to judge, then there are in the history of the world, and on our planet today, an indefinite but certainly plural number of mutually non-translatable, indissolubly collective spirits and ways of seeing and judging, a plurality of "semantically closed universes" from which any possible escape could only—since no one has conscious experience at all outside of language and society—be tantamount to immediate entry into another, comparably limiting "world view."

The linguistic turn thus calls into question the notions of moral experience and moral obligation, as Habermas and many others would understand those terms. It does so by seeming to preclude the possibility of there being any trans-culturally or even trans-ethically accessible concepts, any concepts that remain the same, invariant, in the eyes of beholders from different "comprehensive views," as John Rawls might call them, of the world and of the good. Any such preclusion must, it seems, extend to motivational sorts of concepts, such as values, reasons, maxims, norms, and obligations. But if a value, reason, maxim, norm, or obligation cannot retain its identity under regard by persons speaking different languages, how can it be one that is unconditionally binding on every individual human agent, just as human? If the answer is that it cannot, then an apparent result of the linguistic turn has been to preclude there being anything to which Habermas would concede the title of a moral value, reason, maxim, norm, or obligation.

B. *The Retrieval of "Universalistic Tendencies": The Moral Experience Localized*

Or so it might seem. In fact, Habermas believes that the possibility of the universal and unconditional bindingness of the class of maxims and reasons for action we call moral can be salvaged from the linguistic turn. He aims to retrieve "universalistic tendencies" from the linguistic turn as rendered by Humboldt, and his *Complementary Versions* paper is in considerable part the story of a salvage operation in which his own philosophy has played a major part, although he gives others a generous share of the credit.

Those universalist tendencies, Habermas explains in his *Complementary Versions* paper, lie in the "communicative" function that Humboldt was the first to attribute to language, along with its informative and expressive functions. They lie in the perception that when parties to a disagreement or misunderstanding enter into verbal exchange about it, both parties—as Habermas puts the matter—"must, from their own point of view, share the assumption of a point of convergence."[6] That is, nei-

6. *Id.*

ther can make sense of what they are doing together, absent a working assumption in the mind of each of there being a single object at hand, of which the parties are giving competing accounts. That alone can explain the parties' expenditures of effort to "learn to understand" each other's reports (descriptions, analyses, assessments) of the object.

Thus does Habermas recover from the seeming devastation of the linguistic turn the possibility of the experience of objectivity, and thus of moral reasons and moral experience. But the recovery, as we now go on to notice, is not a completely clean one.

Habermas finds in Humboldt the idea that a conviction of the standpoint-independent, identical reality of objects under discussion—a reality that it's worth getting truly to know—is what keeps disagreeing observers committed to the work of coming to understand one another. But notice a circularity of motivation here. The parties' sense of there being some single object they are all perceiving, the truth about which they are trying to resolve, is supposed to support their loyalty to their shared or public enterprise of dialogue. But then what would have instilled in them this sense of objectivity? We could say that the experience of the dialogic engagement itself creates it. But then we would have to ask what in the first place could have drawn the parties into the engagement, or made the engagement seem possible to them. What possibly, except an antecedently existing expectation, among the parties to the conversation, of a pressure felt by each to strive for a successful result? But then what in their world and in their lives could prompt and sustain such an expectation? Only, it would seem (if we accept the linguistic turn), a *language*. Anticipating an argument of Habermas to be reviewed in Part IV(B), it would be a language in which the categories exist for recognition of the freedom and equality of persons and of resulting reciprocal obligations of persons to treat each other as such.

Must *every* human language necessarily be like that? If so—if there are categories that a human language necessarily must have—what is really left of the linguistic turn? But if not, then what Habermas has done is something rather beyond a simple retrieval from the linguistic turn of the possibility of moral experience and moral obligation. What he has done is to show how human beings can, and some of us do, maintain in our lives the category of the unconditionally obligatory (the moral), even as we, accepting the linguistic turn, know that moral reasons and experience are reasons and experience into which we must always enter not in entire forgetfulness but trailing clouds of consciousness from our particular linguistic home.[7] In other words, what Habermas has done (at least it seems so to me) is to make clear how there can be a wholly valid

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7. Wordsworthians may see in what I just wrote an implicit equation of language with God, but isn't that, after all, one way of describing the linguistic turn? In the beginning was . . . .

experience of the unconditionally obligatory *that is not necessarily accessible from within every human form of life.*

That observation will figure in my analysis of "constitutional patriotism" in Part V(B) of this essay. Before we can come to that, however, we must pause for a closer look at some problems and solutions in liberal-minded political justification.

III. CONSTITUTIONAL CONTRACTARIANISM: THREE KEY COMPONENTS

Recall the aim of a liberal-minded justification of democratic politics: in Rawls's words, to explain how "citizens [may] by their vote properly exercise their coercive political power over one another"—to explain how your or my exercises of political power may be rendered "justifiable to others as free and equal."[8]

Currently on offer from Habermas, Rawls, and others is what we may call a *constitutional contractarian* model of political justification.[9] The Rawlsian version is probably most familiar:

> [O]ur exercise of political power is . . . justifiable . . . when it is in accordance with a constitution, the essentials of which all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational.[10]

This text helps us distinguish a chain of three key components in constitutional contractarian justification, as follows:

First key component: ***rational universalism*** *("all citizens [as rational] may be expected to endorse").* Constitutional contractarianism begins with a proposition of very roughly the following form (specific versions differing among philosophers): Exercises of coercive political power can be justified, on the condition that every individual affected has reason to accept them in the light of his or her interests. In the philosophy of Habermas, the more specific version of the rational-universalist standard of justification takes on a decidedly intersubjecivist inflection. It is that everyone, each judging from his or her own standpoint and with due regard for his or her own interests, should be able to see how everyone else, each judging similarly, could find prevailing reason to accept the political act or arrangement in question. "A law," proposes Habermas, "is valid in the moral sense when it could be accepted by everybody from the perspective of each individual."[11]

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8. RAWLS, *supra* note 2, at 217.

9. I should report that I feel a strong tug of attachment to the constitutional contractarian model, although my aim in this essay is to cause it trouble.

10. RAWLS, *supra* note 2, at 217.

11. Jürgen Habermas, *A Genealogical Analysis of the Cognitive Content of Morality*, *in* HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 31 [hereinafter Habermas, *Cognitive Content of Morality*]; *See also* Jürgen Habermas, *"Reasonable" Versus "True," or the Morality of*

At the core of the rational-universalist type of justificational standard for political coercion that both Rawls and Habermas have in mind, what we find is a demand for consonance between potentially coercive political acts and the reasons of *each* (not "all," in some collectivized sense of "all") of countless persons among whom rational conflicts of interests abound. It is this uncompromisingly individualistic sensibility—this apparent taking to extremes of insistence on the severalty and singularity of persons or their interests or their worths, this refusal in the last analysis to let "the good of society" decide—that leads me to label "liberal-minded" the constitutional contractarian family as a whole.

*Second key component: **constitutional essentialism** ("in accordance with a constitution, the essentials of which all . . . may be expected to endorse").* Now, no one seriously suggests application of such a universalistic standard of justification (consonance with the reasons of everyone) to each and every political act taken one by one, each and every discrete lawmaking event or other exercise of political power in a country. In the modern free countries marked by what Rawls calls a reasonable pluralism of comprehensive views and ideas of the good and, correspondingly, by true conflicts among the politically relevant projects and interests of sundry persons,[12] it would be an obviously hopeless undertaking to apply such a standard to each and every discrete political act issuing from a country's established lawmaking system.

Inevitably, what we find is that the rational-universalist standard of political justification really is not meant for application on an act-by-act or law-by-law basis. It is rather meant for application to *the system of lawmaking*—that is, to *constitutional* laws, the special set of basic laws, including bills of rights, that fundamentally shape, organize, limit, and direct the country's lawmaking operations. As a normative doctrine, constitutional contractarianism thus pivots crucially on the idea of the constitution. It absolutely depends on the idea that your acceptance as right—as fair, as worthy of your respect—of a lawmaking *system* (or constitution) commits you to acceptance of the daily run of lawmaking events that issue from the system.[13] That, after all, is the point of Rawls's claim that exercises of political coercion are justifiable insofar as they accord "with *a constitution*, the essentials of which all citizens may be expected to endorse."[14]

Worldviews, *in* HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 89–90 [hereinafter Habermas, *"Reasonable" Versus "True"*].

12. *See* RAWLS, *supra* note 2, at 36–37.

13. To be clear, the idea is that your acceptance of the system means that your finding particular laws unjust gives you no ground for resort to illegal force, not that it gives you no ground for denunciation, bounded civil disobedience, or bounded conscientious refusal. *See* JOHN RAWLS, A THEORY OF JUSTICE 363–91 (1971).

14. RAWLS, *supra* note 2, at 217 (emphasis added).

But why does Rawls say "the essentials of which?" The deep and interesting answer lies in a perceived need for objective certainty in the application of basic systemic legal norms ("constitutional law") to specific controversies—a need apparently entailed in the pivotal role we've just now assigned to constitutions in contractarian justificatory argument.[15]

Suppose there is firmly established in a certain country's political and legal practice a publicly recognized set of basic laws, called "the Constitution," that are seen to shape, organize, limit, and direct the country's lawmaking operations. Everyone agrees that this Constitution consists of twenty-six clauses, *A-Z*, the wording of which is canonical and undisputed. But everyone also honestly believes that is impossible to say with confidence, of many enacted laws, whether they do or do not truly comply with clauses *T-Z*, because those clauses just don't have objectively certain applications, one way or the other, to the kinds of laws that are being enacted. (For example, clause *T* provides that everyone must be guaranteed a "minimally decent standard of living" and the Parliament has just replaced welfare with workfare, reduced the minimum wage by half, lifted rent control, and budgeted an annual sum of three billion crowns for housing allowances and job training.) Those clauses, then, cannot be regarded as a part of the *essential* constitution, the constitution that is supposed to be playing the pivotal role assigned to constitutions in contractarian political justification.

The general idea is that I can freely accept the daily run of coercive acts from a constituted political regime, including those I judge to be pernicious or unjust, because and only because (i) I regard this regime *qua* regime as consonant with the rational interests of everyone including me and (ii) I see the government and my fellow citizens abiding by this regime. Such a conjunction of perceptions may be possible for me, but only if at all times I can see confidently that (ii) is really satisfied. And I can't if clause *T* is part of the regime in question. So even if *T* is a part of the *documentary* "Constitution," it cannot be deemed a part of the *essential* constitution, the constitution that does the pivotal work that constitutions have to do in contractarian justification.

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15. There is also a shallow answer, which is that any practically serviceable "constitution," in the sense of a law that prevails over other laws and is not itself alterable except by following its own (perhaps quite onerous) provisions for constitutional amendment, inevitably contains a certain amount of arbitrary and even irrational matter that could not possibly be said to respond to reasons attributable to everyone. It seems plain that the presence of some such matter in a given constitution need not disqualify that constitution from playing its pivotal role in contractarian justification. For example, the U.S. Constitution unalterably guarantees equal representation in the Senate to every state regardless of population. *See* U.S. CONST. art. V. The idea is that a constitution may play the pivotal role in contractarian justification as long as all of its "essential" parts can be seen to satisfy rational universalism.

The sum of it is that constitutional contractarianism is a ticklish business indeed. It requires the existence in a country—the being-in-force there—of an essential constitution that satisfies two potentially contradictory demands. First, the essential constitution has to include every systemic norm or guarantee that would be required in order for it to give everyone reason for willing compliance with laws enacted under the regime it constitutes. But, second, the essential constitution cannot include any systemic norm or guarantee that, singly or in combination with others, lacks the trait of more-or-less objectively certain application to more-or-less all of the specific cases arguably falling under them.

*Third key component: **moral responsivism** ("in the light of principles and ideals acceptable to them as reasonable").* Why and how can sensible people allow themselves even to hope that there is any way at all to satisfy both demands at once? It seems to me that all practitioners of constitutional contractarian justification, Habermas included, pin our hopes on a certain kind of favorable motivational attribution to persons in general. Rawls imports as much by his stipulation that political acts are justified when fairly found to accord with constitutional essentials reflecting principles that should be rationally acceptable to every "reasonable" person.

If I am right, a full, rough statement of the constitutional contractarian model of political justification would go something like this:

> Specific exercises of coercive political power are justified when [CONSTITUTIONAL ESSENTIALISM] they are validated by a set of constitutional essentials [RATIONAL UNIVERSALISM] that everyone can see that everyone affected has reason to accept in the light of his or her interests, [MORAL RESPONSIVISM] considering himself or herself to be one among a company of presumptively free and equal co-inhabitants, all of whom are under moral motivational pressure to find agreement on fair terms of cooperation within their necessarily shared social space.

By calling the attributed pressure a "moral" one, I mean it is conceived as lacking any ulterior instrumental content, as being purely a motivation to find and abide by fair or universally acceptable terms of social cooperation just for the sake of the respect that one thereby pays to oneself and others as free and equal. I am hazarding the view that every contemporary philosopher who posits the possibility of the universal rational acceptability of a political constitution does so on the stipulation of the experience by all concerned of the moral motivation to find a fair agreement.[16] This may be a highly controversial suggestion. Habermasians

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16. I am not saying that every contemporary philosophical defense of democratic-liberal constitutionalism does in fact base itself on a showing of the possibility of universal acceptability. I am only making a claim regarding those that do, a class in which I include the defenses recently advanced by Rawls and Habermas. I am currently uncertain about whether to extend the claim to defenses advanced by advocates of "ethical" or "perfectionist" (as opposed to "political") liberalism,

may feel prompted to resist by the worry that it makes justification depend on an empirical contingency—the contingency, that is, of the persons concerned really having a specific motivation that no person, just as a person, need have. That particular worry would be needless, however, and explaining why will help set the stage for succeeding discussion of a rather different sort of Habermasian worry.

IV. HABERMAS AND MORAL MOTIVATION

A. *Hypothetical "Acceptability"*

Making justification depend on everyone in fact being moved by desires to find a fair agreement (or perhaps by second-order desires to be the kind of person who is thus moved) would apparently violate the unconditionality that Habermas appropriately requires of a justification of politics. What, after all, is the point of justification? It is to establish the possibility of a just political regime, and of everyone's moral warrant for joining in the collective maintenance of the threat of force and punishment to secure compliance with the positive law of a political regime. The nub of such a warrant must consist in reasons that everyone as free and equal—everyone as capable like anyone else of arriving at his or her own conception of the good—may be considered to have for accepting the regime. So these have to be reasons that we can say apply to everyone regardless of particulars of situation, identity, and ethical view. (Their nature seemingly must be that of what we call moral reasons.[17]) That doesn't rule desires as such out of consideration, because desires surely can give people perfectly good reasons for action. Ruled out, however, are all desires except for those (if there are any) that we can say every person as free and equal must have. And maybe it doesn't seem that anything like a desire to find and live by fair terms of social cooperation, or a desire to have such a desire, would be one that we can say every person as free and equal must have.[18]

Rather, it seems that in some countries at some times desires of that sort might be common among the people, whereas in other countries or at other times they would not be. In a Habermasian view (which is in this respect a Kantian view), a set of constitutional essentials that is just and morally supportable in a country where such desires prevail cannot be unjust and morally insupportable in a county where they do not. The question of justice cannot depend in that way on what desires a country's people do and do not contingently happen to have.

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such as Ronald Dworkin, *Foundations of Liberal Equality*, *in* THE TANNER LECTURES ON HUMAN VALUES at xi (1990), and JOSEPH RAZ, THE MORALITY OF FREEDOM (1986).

17. *See, e.g.*, Habermas, *Cognitive Content of Morality*, *supra* note 11, at 21–22, 27–28, 32; Habermas, *"Reasonable" Versus "True," supra* note 11, at 86–87.

18. *See* Habermas, *Cognitive Content of Morality*, *supra* note 11, at 15.

What have we found out? That Habermasians cannot be constitutional contractarians, if or insofar as constitutional contractarianism makes justice, or the possibility of justice, depend in that way on the prevalence of "moral responsivism," or anything like it, among a country's people. However, it doesn't, not at all. The constitutional contractarian proposition is that a set of constitutional essentials is morally justified, and so is your or my complicity in the imposition of it and its legislative issue on the recalcitrant, so long as the set would be acceptable in all reason to everyone who is *imagined as* a morally responsive person, meaning (to repeat it) one who understands himself or herself to be one among a company of presumptively free and equal co-inhabitants, all of whom are under moral motivational pressure to find agreement on fair terms of social cooperation.

The point is, the contractarian test of justification is one of *hypothetical* not *actual* acceptance of the constitutional essentials in question. It is, as Habermas would have it, a test of "acceptability."[19] Contractarian justification, therefore, does not depend on whether moral responsiveness is in fact true of everyone or, for that matter, of anyone. (There don't have to *be* any morally responsive people as long as some of the rest of us can understand them well enough to judge whether or not a given set of constitutional essentials would be acceptable to all of them if there were any.)

B. *A Short Genealogy of Political Morals*

As constitutional contractarians, Habermasians seek to establish the possibility and general characteristics (at least) of a political regime that is rationally acceptable—acceptable considering one's interests—to everyone who is (hypothetically) reasonable. They furthermore seek to do so without supposing any substantive-ethical commonality among the people concerned. Can they succeed?

Consider the following genealogical exposition, as one might call it, of the moral necessity of democratic constitutionalism. The exposition starts with an empirical proposition about general human needs and desires, but one that no one is expected to question.[20] The founding proposition is that, in modern, plural societies, there is no alternative to the ruin of everyone's life by social conflict and disorder but resort to the always potentially coercive medium of positive, institutionally enacted law. Thomas Hobbes, we suppose, has explained convincingly and for-

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19. *See id.* at 95–96. Habermas maintains that only the actual conduct of properly structured, democratic debate can provide an adequate basis for belief that the arrangements in question do satisfy a test of (hypothetical) universal acceptability, but that is another matter. *See id.*; *see also* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 296, 448 (William Rehg, trans., 1996) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS].

20. The scenario, writes Habermas, is "an ideal-typical development that could have taken place under real conditions." Habermas, *"Reasonable" Versus "True"*, *supra* note 11, at 39.

evermore why, in posttraditional societies, everyone has reason to support *some* practice of positive legal ordering. Equally inescapable, however, is the certainty in such societies of profound, intractable disagreement over what the positive laws should be made to provide in substance and over what should be the institutional arrangements for deciding from time to time what the laws shall provide. From which it follows, Habermasians say, that the concerned persons have somehow to *work out together* their disagreements over these matters of basic positive legal content and basic arrangements and procedures for further positive lawmaking.

Before going on to why they say that, and what they are driving at when they do, it is well to notice how we have already established a nice little beachhead in the campaign to justify a democratic constitution, regarded as a particular set of arrangements for the production of positive law, without the slightest hint of reliance on anyone's actually being moved by any special substantive-ethical interests, motivations, or outlooks (such as "moral responsiveness" might easily be considered to be). Habermasians say that no such reliance is needed, either, to finish up the campaign. Logic, of a sort, is all that will be needed.

The logic runs as follows. As itself a positive law prescribing the society's set of arrangements for the production of (other) positive laws, the constitution sits in a delicate position. Inevitably, many of its provisions are themselves objects of reasonable disagreement, and yet these provisions must at any given moment be fixed, decided, because in them lies the institutional program for debating and deciding disputed specifications or proposed modifications of any and all positive legal prescriptions, including constitutional provisions themselves. How, then, can contested constitutional provisions be justified? What can possibly provide a standard of rightness for the institutional program for deciding all other politically decidable matters? Nothing other, Habermasians say, than norms already implicit in a certain "point of view," the one that "members of posttraditional societies . . . intuitively adopt when they find they must appeal to reasons" to justify something.[21] As Habermas has recently summarized these norms, they are:

> (i) that nobody who could make a relevant contribution [to the discussion] may be excluded; (ii) that all participants are granted an equal opportunity to make contributions; (iii) that the participants must mean what they say; and (iv) that communication must be freed from external and internal coercion so that the "yes" or "no" stances that

21. *See* Habermas, *Cognitive Content of Morality*, *supra* note 11, at 7; Ciaran Cronin & Pablo DeGreiff, *Editors' Introduction* to HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at vii–ix.

> participants adopt on criticizable validity claims are motivated solely by the rational force of the better reasons.[22]

Habermas makes a strong case. There being in posttraditional societies no normative authority "higher" than "the good will and insight" of those who must abide by basic terms of social cooperation, it may well be said that the standard for deciding such terms and judging them, *as propositions of moral obligation*, "must be derived exclusively from the situation in which the participants seek to *convince* one another" regarding them.[23]

But why must we judge these terms of cooperation as matters of *moral* obligation? Why not as matters of *legal* obligation, which is how we usually judge the validity of laws? When a warrant is demanded for a law, a legal warrant is usually what we feel we are expected to produce. But consider where we find this legal warrant. We find it, ultimately, in the concrete constitution in force. (In the United States, for example, one shows that the law was enacted by constitutional majorities in both houses of Congress and signed by the President, that it deals with a subject-matter assigned by the Constitution to the national government, that it is not a bill of attainder and does not abridge the freedom of speech, etc.) But the aim of the justification of politics is to provide a warrant for complicity in coercive support of *the constitution itself*, and *that* warrant cannot be a legal one. It can only be a moral warrant, and the Habermasian argument is that nothing can provide the constitution with such a warrant except its conformity, in both a substantive and a procedural sense—with regard, that is, both to its prescriptive programmatic content and the processes by which it came to have that content—to certain practical principles implicit in a certain "point of view." Namely, the *moral* point of view, the "the point of view that members of posttraditional societies intuitively adopt" when they run into a need to convince one another about some question of the rightness, goodness, or fitness of something, because they see that the resolution of that something will have to bind all of them and *they can't help regarding one another as free and equal.* (As the linguistic turn would have it, their language won't let them.)

In other words, when Habermasians say that the justification of a package of constitutional essentials is and can only be that it "*could* meet with the acceptance of all those concerned in their capacity as participants in a practical discourse,"[24] or that it *could* "win the agreement of all concerned, on the condition that they jointly examine in a practical discourse" whether the package "is in the equal interest of all,"[25] they are incorporating into that conditional "could" a hypothetical supposition of

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22. Habermas, *Cognitive Content of Morality*, *supra* note 11, at 127.
23. *Id.* at 24.
24. *Id.* at 34 (emphasis added).
25. *Id.* at 36.

moral responsiveness, or reasonableness, on the parts of "all concerned." Their specific claim on behalf of democracy is that a constitutional practice cannot conceivably meet the standard of universal rational acceptability to the reasonable unless it makes its own content always open to revision by processes meeting the same standard—unless it subjects all further determinations of constitutional content to a certain, normative conception of political democracy drawn from the ideal of a practical discourse.[26]

You can now check through the whole argument, and you will see that the abstract Habermasian moral justification of democratic constitutionalism has reached its completion without any empirical attribution to anyone of moral responsiveness or any kind of motivational disposition.

V. TOWARDS CONSTITUTIONAL PATRIOTISM

A. *The Threat from Interpretation*

Consider, now, that "constitutional patriotism" surely seems to name some sort of motivational disposition. It names, I believe, a disposition of attachment to one's country, specifically in view of a certain spirit sustained by the country's people and their leaders in debating and deciding disagreements of essential constitutional import.

What can such an empirical notion be doing in Habermasian constitutional theory? The answer, I believe, lies in Habermas's sensitivity to a claim I promised earlier to redeem: that it must be the *idea of* the constitution that does the crucial work in a constitutional contractarian justification of politics, because there can be no settled agreement among a country's people on a description of the actual thing in all its concrete specificity.

A country's disagreements of essential constitutional import can never be restricted to disagreements about the wording of canonical constitutional provisions, the constitution's "clauses." There will also, inevitably, be disagreements about how the clauses are to be applied to specific cases and disputes. Consider American constitutional experience. Again and again we have found that our constitution's canonical provisions for constitutional essentials cannot be applied decisively to

26. In Habermas's text, the first of the quoted formulas in this paragraph is preceded by the following:

> . . . [Kant] tacitly assumes that in making moral judgments each individual can project himself sufficiently into the situation of everyone else *through his own imagination*. But when the participants can no longer rely on a transcendental preunderstanding grounded in more or less homogeneous conditions of life and interests, the moral point of view can only be realized under conditions of communication that ensure that *everyone* tests the acceptability of a norm, implemented in a general practice, also from the perspective of his own understanding of himself and of the world. In this way, the categorical imperative receives a discourse-theoretical interpretation . . . .

Id. at 33–34.

real, live social controversies without undergoing momentous interpretations that will themselves inevitably be open to reasonable disagreement. Think about substantive due process. Think about free exercise of religion. And think about equal protection: a principle of equal governmental concern and respect for every individual is doubtless an American constitutional essential. Few will question that such a principle is canonically ensconced, and rightly so, in the American Constitution. Disagreement nevertheless breaks out over whether, in the United States today, that principle prohibits, permits, or requires race-conscious government action in any circumstances. Someone, let's say a majority of a doubtless divided Supreme Court, is going to have to decide the question, and to decide it over persisting, heartfelt—and who is to say not reasonable?—disagreement.[27]

Remember, now, how it is that constitutional essentialism becomes a key component in contractarian political justification. Realizing the futility of a rational-universalist standard applied on an act-by-act or law-by-law basis, we hope instead that such a standard might be satisfiable if applied only to a set of relatively removed, framing principles and ideals for a lawmaking system. But now the difficulty, obnoxiously, seems to reappear at the point where the relatively abstract framing principles have to be applied to decide the legal validity of major, morally freighted policy choices. (Let it be clearly understood that, throughout this discussion, my assumption is that the disagreements are over how to answer the proper normative question; namely, under which of the competing interpretations will the set of constitutional essentials in question be one that could meet with the acceptance of all concerned in a practical discourse.) To state the problem another way: It is not clear how we can say that a constitutional norm such as "equality of concern and respect" remains invariant—remains one and the same norm—under reasonably contesting major interpretations of it ("color-blindness" versus "anti-caste"). And that threatens disaster to the proposed constitutional contractarian justification of politics. For, obviously, the justification cannot succeed if it turns out that the constitutional "principles and ideals" to which everyone, as reasonable, hypothetically agrees are just forms of words papering over unresolved and deeply divisive political-moral disagreements among the reasonable.

B. *Constitutional Patriotism to the Rescue*

The point is one that Habermas has grasped and confronted. And his way of perceiving and dealing with it, I now want to suggest, directly echoes the explanation we earlier found in his "retrieval" of the possibil-

27. The point here is not simply that the requisite interpretative act will often be reasonably contestable as conducted under any given method for constitutional interpretation. It is also that among the country's people there are ongoing, reasonable disagreements about exactly what method of constitutional interpretation is to be employed.

ity of moral experience from the linguistic turn, of how there can be a wholly valid experience of the unconditionally obligatory that is not necessarily accessible from within every human form of life.

Habermas, as I understand him, argues that citizens, moved by unshakeable recognition of each others' claims to consideration as free and equal, may attribute overriding importance to upholding the idea of existent agreement on a single set of principles for their country's essential constitution, and their sense of the urgency of affirming agreement *on the principles* can keep citizens committed to the idea that their disagreements *over the applications* does not—cannot be allowed to—impeach the invariance of the principles themselves. Major, disputed applications of constitutional principles, Habermas avers, "cannot be ethically neutral." Nevertheless, he insists, "the debates are always about the best interpretation of the same constitutional rights and principles."[28]

They *have* to be conceived thus, Habermas appears to argue, because only on this perception of the persisting "sameness" of the constitutional essentials—their invariance under contesting major interpretations—can the constitutional essentials play their pivotal role in constitutional contractarian political justification. From that standpoint, a debate or disagreement over the interpretation of constitutional essentials is a special kind of normative debate or disagreement, in which something special is at stake, namely, the possibility of a form of political association that is *just* in the sense of rationally and reasonably acceptable to all. The parties to such debates accordingly have, whether they know it or not, a special reason for understanding the debates in a particular way.

From the standpoint of justification, there are always two alternative ways to describe debates over constitutional interpretation involving constitutional essentials. We can see them as debates over the meanings or applications of a set canonical items, already securely certified as acceptable to everyone as reasonable, come what may in disputes over how to apply them. Or we can see them as debates over *which* of the contesting meanings or applications *will render* these items acceptable to everyone as reasonable. An obvious problem with the first view is its puzzling implication that a nominal constitutional essential's rational acceptability to the reasonable can somehow be independent of what that nominal essential is going to turn out in practice to mean when push comes to shove. And yet it is *only* by adopting the first view that anyone could purport to judge that any given political regime is justified, without having to wait forever to see how every one of a never-ending succession of interpretive disputes is going to be resolved by the supreme court or other powers that be.[29] It thus appears that the possibility of constitutional

28. HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 225.

29. *See* Frank I. Michelman, *Always Under Law?*, 12 CONST. COMMENTARY 227, 235–38 (1995).

contractarian justification depends on citizens being able credibly to see debates over constitutional interpretation according to the first view, the one that allows a constitutional-essential item to be judged rationally acceptable to the reasonable before anyone knows how that item is going to be construed and applied in hard, morally disputable cases.

So the question becomes: How can intelligent citizens possibly decide to approve, as rationally acceptable to the reasonable, an essential constitutional item *the content of which at the business end they do not yet fully know*?

The only possible answer to the question put in that form is that they cannot. The fate of constitutional contractarian justification must hang on a different possibility. There will have to be some way in which citizens can perceive even their most intractable and divisive disagreements over the *application* of constitutional norms to be directed to something other than the *content* of the norms. But what else, then, might the applicational disagreements be about? What is there besides a norm's content that can decide or help decide the norm's application? An apparent answer is: The context of application.

Now, one dimension of the context of application of an essential constitutional norm is what some have called a country's "constitutional identity."[30] Given disagreements over applications of essential constitutional norms, citizens don't have to ascribe them to ambiguity or vagrancy of meaning in the norms themselves. We might rather ascribe our applicational disagreements to uncertainty or disagreement about exactly who we think we are and aim to be as a politically constituted people, where we think we have come from and where we think we are headed. In a Habermasian view, it is indeed easier to see how citizens might differ over such "ethical" matters than how they could differ over the core demands on constitutional practice exerted by the moral ideal of respect for everyone as free and equal—an ideal, if Habermas is right, that is transcendentally immanent in the practice of constitutional argument itself. Those invariant core demands, then, always figure as a "fixed point of reference for [a] constitutional patriotism that situates the system of rights within the historical context of a legal community."

Thus, for example, in the United States today constitutional law strongly protects freedom to utter racist hate speech[31] while in Canada it does not.[32] In a Habermasian view, the difference is not evidence that different basic principles of freedom and equality prevail in the two

30. For identitarian views of constitutional interpretation (as we may call them), see Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519, 1519–36 (1997); George P. Fletcher, *Constitutional Identity*, 14 CARDOZO L. REV. 737, 737–46 (1993); ROBERT POST, CONSTITUTIONAL DOMAINS (1997) (discussed in Frank I. Michelman, *Must Constitutional Democracy Be "Responsive"?*, 107 ETHICS 706, 706–23 (1997)).

31. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

32. *See, e.g.*, R. v. Keegstra, [1990] 3 S.C.R. 697.

countries, but rather that the two countries have somewhat differing constitutional identities.[33]

We are close, now, to the core of "constitutional patriotism." "Constitutional patriotism," it appears, is the morally necessitated readiness of a country's people to accept disagreement over the *application* of core constitutional principles of respect for everyone as free and equal, without loss of confidence in the *univocal content* of the principles, because and as long as they can understand the disagreement as strictly tied to struggles over constitutional identity. And what explains *that* readiness, when and where it is found? The answer to that must be that conditions then and there warrant a level of confidence that the struggle *over* corporate identity occurs *within* a corporate identity that is already incompletely, but to a sufficient degree, known and fixed. The answer is, in other words, a cultural contingency—the cultural contingency, when and where it exists, that the corporate identity in question, however contested it may be in other respects, is already perceived by all concerned to fall within the class of *morally conscientious* (hence democratic-proceduralist) constitutional identities. Listen to Habermas:

> [I]n complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedure for the legitimate enactment of laws and the legitimate exercise of power. Citizens who are politically integrated in this way share the rationally based conviction that unrestrained freedom of communication in the political public sphere, a democratic process for settling conflicts, and the constitutional channeling of power together provide a basis for checking illegitimate power and ensuring that administrative power is used in the equal interest of all. The universalism of legal principles manifests itself in a procedural

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33. Several passages in the main judgment in the leading Canadian case suggest that such was view of the Chief Justice of Canada:

> The question that concerns us in this appeal is not, of course, what the law is or should be in the United States. * * * Though I . . . by no means reject the whole of the First Amendment doctrine, in a number of respects I am . . . dubious as to the applicability of this doctrine in the context of a challenge to hate propaganda legislation [in Canada]. * * * [A]pplying the Charter to the legislation challenged in this appeal reveals important differences between Canadian and American constitutional perspectives. . . . [I]n my view . . . the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression. * * * Section 27 states that: "27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."
>
> This Court has where possible taken account of s. 27 and its recognition that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced. . . . I am of the belief that s. 27 and the commitment to a multicultural vision of our nation bear notice in emphasizing the acute importance of the objective of eradicating hate propaganda from society. . . .

Id. at 740–41, 743–44, 757 (Dickson, C.J.).

> consensus, which must be embedded through a kind of constitutional patriotism in the context of a historically specific political culture.[34]

There, in that text, there is no ambiguity about what is and is not empirical and contingent. Political integration, a sharing of rationally based conviction, historically specific political culture: all these expressions refer to something that can only be empirical and contingent, namely, an intersubjective cognitive convergence experienced by the people of a particular country.

Habermas says it is not a "substantive" convergence on "values" but a convergence only on procedure. Of course, discussion cannot end there. We shall need to consider what these provisos mean, and how they matter. Habermasian procedure, it appears, is very much a matter of what we sometimes call substance. For example, Habermas observes, I believe correctly, that "human rights" are a part of what it takes to "satisfy the requirement that a civic practice of the public use of communicative freedom be legally institutionalized."[35] As for that discourse ideal that is "implicit in the point of view" of morally responsive citizens who accept the obligation to convince one another of the acceptability of the regime to all concerned—is not that ideal a value?[36] How about a "form of social integration" consisting in "an abstract, legally mediated solidarity between strangers?"[37] Not a value? And are these not *ethical* values, at that, concerned with and reflecting a particular way or form of life? A way of life, I mean, that prefers honest reasoning with each other to force and manipulation—or one that features a language (as I put it earlier) in which the categories exist for recognition of the freedom and equality of persons and of resulting reciprocal obligations of persons to treat each other such.

I am not sure what is left, at this point, of the distinction between substance and procedure. What does seem clear is that the fact of the convergence of a country's people upon the discourse ideal—procedural

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34. HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 225–26.

35. *Compare* Jürgen Habermas, *On the Internal Relation Between the Rule of Law and Democracy, in* HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 259–61 *with* Michelman, *supra* note 1, at 16–18, 33–34.

36. Habermas differentiates "values" from "norms" along four dimensions. First, norms obligate, whereas values attract; the fulfillment of a norm consists in its non-violation, whereas the fulfillment of a value consists in the successful pursuit of it by purposive action. Second, that which is proposed as a norm either obligates (is valid as a norm) or it does not (is not valid as a norm), whereas values fix relations or orderings of preference among various, perhaps alternative or competing, states or outcomes. Third, norms are unconditionally binding on everyone, whereas values are relative to culture and belief. Fourth, norms within a system of norms cannot point in conflicting directions, whereas values can be competitive. *See* Jürgen Habermas, *Reconciliation Through the Public Use of Reason, in* HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 55. It is not clear to me that, by those criteria, the interpersonal-relational ideal implicit in the point of view of whoever sets out to convince another is unambiguously a norm and not a value.

37. Jürgen Habermas, *Does Europe Need a Constitution? Response to Dieter Grimm, in* HABERMAS, THE INCLUSION OF THE OTHER, *supra* note 3, at 159.

and abstract as that ideal may be—is an empirical, contingent matter. That point holds regardless of Habermas's persuasive suggestion that the appearance of such a convergence among the people of a country need not precede the establishment in that country of democratic-discursive institutions, but rather can be expected to arise from those institutions.[38] "The ethical-political self-understanding of citizens in a democratic community," he writes, "must not be taken as a historical-cultural a priori that makes democratic will-formation possible." Such a national self-understanding is rather to be understood as "the fluid content of a circulatory process that is generated through the legal institutionalization of citizens' communication."[39] It is—the point seems to be—within the power of the inhabitants of a country to create the convergence, "given" their "political will" to do it.[40] That "given" seems to me to name an empirical contingency, and I do not see what is not ethical about it.

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38. *See id.* at 159–60.
39. *Id.* at 161.
40. *Id.*

THE LAW AND LATE MODERN CULTURE: REFLECTIONS ON *BETWEEN FACTS AND NORMS* FROM THE PERSPECTIVE OF CRITICAL CULTURAL LEGAL STUDIES

ROSEMARY J. COOMBE* WITH JONATHAN COHEN**

It would be impossible to do justice to as large and as ambitious a work as *Between Facts and Norms*[1]—nevertheless the entirety of Professor Habermas's theoretical edifice—in the space available here. Our interlocution in this symposium will address some of the central themes in Habermas's work from a particular corner of the legal academy—one that has not, as yet, been fully engaged in the rich dialogue that Habermas's work (and Habermas himself) invites. Others have suggested that Habermas overstates the pervasive and integrative nature of law.[2] Given the positivist[3] and formalist[4] conceptualization of law that dominates his work, this objection is well-founded. However, the insights, research and investigations of the Legal Realists, legal historians, legal sociologists, and legal anthropologists (whose collective enterprise we will deem a critical cultural studies of law)[5] suggest another alternative. This scholar-

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1. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996).

2. *See* Brian Z. Tamanaha, *The View of Habermas From Below: Doubts About the Centrality of Law and the Legitimation Enterprise*, 76 DENV. U. L. REV. 989 (1999).

3. Arthur Jacobson describes Habermas's position as one of "[t]he most rigorous positivism" because, like other positivist forms of static jurisprudence, the source of law is an authoritative procedure and law is whatever those who get hold of the procedure mark as law using the procedure. *See* Arthur J. Jacobson, *Law and Order*, *in* HABERMAS ON LAW AND DEMOCRACY: CRITICAL EXCHANGES 190, 191–92 (Michel Rosenfeld & Andrew Arato eds., 1998). His model is "rigorous" it would seem, because it "gives control of the procedure to a political sphere" outside of and differentiated from the legal system. *Id.* at 192. Mark Modak-Truran, however, believes that Habermas goes beyond positivism by asking what provides the procedure by which "law is legitimated by its legality or by positive enactment according to certain formal procedures," with their legitimating force? The answer is "the procedure of coming to a rational intersubjective agreement." Mark Modak-Truran, *Habermas's Discourse Theory of Law and the Relationship Between Law and Religion*, 26 CAP. U. L. REV. 461, 475 (1997). To the extent that law is still limited to its positive enactment, however, the position is still a positivist one.

4. As Jacques Lenoble puts it, "If the Habermasian model makes up for a lot of inadequacies of the Luhmannian functionalist model, it fails to move beyond formalism and remains bound to the classical idealization of human reason." Jacques Lenoble, *Law and Undecidability: Toward a New Vision of the Proceduralization of Law*, *in* HABERMAS ON LAW AND DEMOCRACY, *supra* note 3, at 40.

5. Rosemary Coombe has explored the premises and parameters of this area of sociolegal research in a recent book and in two recent articles. *See* ROSEMARY J. COOMBE, THE CULTURAL

ship indicates that law plays a more powerful role in shaping those activities we consider "political" than Habermas himself acknowledges and explores the historically contingent and contested location of the law/politics distinction he seems to take for granted. From the perspective of a critical cultural studies of law, law appears to be simultaneously more pervasive but far less integrative than *Between Facts and Norms* would have us believe.

The critical cultural study of law complicates the systems/lifeworld distinction upon which Habermas's conception of law—if not his entire theoretical edifice—rests and does so by challenging some of the central categorical distinctions of the liberal legalism that Habermas takes for granted. We will develop each of the following points in turn. First, the law may shape and provide the very substance of lifeworlds as well as the symbolic resources with which aspirations for social transformations are articulated and specific cultural meanings are, through practices of adjudication, routinely legitimated and given the force of law. Thus, even for heuristic purposes, the interaction between law and culture cannot be adequately understood in terms of a relationship between an independent system and meaningful lifeworld as discrete spaces. Second, the law creates and upholds the very public/private distinction Habermas assumes and provides forums in which social struggles over such characterizations are enacted. Rather than separating itself from the market, the law creates markets by recognizing "private" properties; it also constrains the development of democratic cultures of deliberation by excusing holders of private properties from public accountability for the political effects of their exercise of ownership. Third, a far wider range of expressive activities would appear to have "political" consequence than the narrow range of communications characterized by rational argumentation. In contexts of social pluralism, confining political speech this narrowly may reinforce systemic forms of exclusion. Fourth, capitalist mass communications systems provide not only the means, but the media for many kinds of expressive persuasion which call the social into account by calling it into question and which might therefore be considered political. Mass media provides many of the cultural forms with which communities, identities, and social aspirations are articulated in contemporary democratic societies: a theory that insists upon maintaining strict divisions between politics and the lifeworld and isolating both from market forces and commodity relations cannot acknowledge let alone accommodate these expressive practices. Finally, intellectual property laws will be drawn upon by way of example. Such laws serve to commodify mass

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LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (1998) [hereinafter COOMBE, THE CULTURAL LIFE]; Rosemary J. Coombe, *Contingent Articulations: A Critical Cultural Studies of Law*, *in* LAW IN THE DOMAINS OF CULTURE 21 (Austin Sarat & Thomas R. Kearns eds., 1998) [hereinafter Coombe, *Contingent Articulations*]; Rosemary J. Coombe, *Critical Cultural Legal Studies*, 10 YALE J.L. & HUMAN. 463 (1998).

media circulated forms as private properties, protect corporate investment in such texts, control their reproduction and circulation, and prohibit subaltern practices of media appropriation that would speak alternative truths to dominant powers. In conclusion, we will suggest that given the inherent instability of the social and its inability to fully grasp itself as a positivity, as well as the indeterminacy of language, a radical democracy cannot predefine a realm of properly political activity, but must be vigilant in providing protection to emerging forms of human expression whose political characteristics cannot immediately be comprehended.

These arguments pose serious social challenges to Habermas's characterization of law as the autonomous intermediary that neutrally transmits lifeworld energies into political expressions that speak local truths to central administrative powers. A critical cultural legal studies reveals that the law is fully imbricated in shaping lifeworld activities, bestowing proprietary powers, creating markets, establishing forms of cultural authority, constraining speech, and policing the public/private distinction that protects corporate authors from social accountability. The very marrow of contemporary political practice may be found in expressive activities that call the social into question and into account by confronting it with the contingency of its current boundaries. In worlds as textually mediated as those of late modern capitalist democracies, forms of political persuasion that call the social into question are likely to take a variety of expressive forms—including humor, parody, satire, and emotional narratives. Rather than predefining a range of activities as political—and limiting the space of the political to rational argumentation—a truly dialogic democratic politics must consider those practices that address, comment upon, and transform the meaning of dominant cultural texts. Any understanding of the political that cannot encompass such practices—and address the role of law in shaping, regulating, and constraining them—can provide only an impoverished vision of dialogic democracy and the role of law in facilitating it.

I. OF LEGAL SYSTEMS AND CULTURAL LIFEWORLDS

There is little to warrant the construction of an ideal bridge to join two autonomous realms designated as "law" and "culture." Such a construction serves only to reinforce the exhausted metaphysics of modernity which enabled their conceptual emergence as discrete and naturalized domains of social life. As Coombe (and others) have argued elsewhere, the tidy distinction between law as an autonomous system and culture as a symbolic lifeworld emerges out of a colonial framework and is itself the residual artifact of regimes of colonial governance.[6] Putting that historical argument to one side, however, an understanding of how the two terms—law and culture—have been reconfigured across discipli-

6. *See* Coombe, *Contingent Articulations*, *supra* note 5, at 21.

nary lines does serve to reveal the fundamental lineaments of critical cultural legal studies.

Over the last two decades, law and society scholars have turned away from positivist, formalist (doctrinalist or structuralist), instrumentalist, and institutionally centered accounts of law to explore law as a more diffuse and pervasive force shaping social consciousness and behavior. An enormous body of literature draws upon historical records, sociological inquiry, and ethnographic research to question law's "relative autonomy."[7] Concerns with law's legitimating function increasingly focus on law's cultural role in constituting the social realities we recognize. Such constitutive theories recognize law's productive capacities by shifting attention to the workings of law in ever more improbable settings.[8] Focusing less exclusively upon formal institutions, law and society scholarship has begun to look more closely at law in everyday life,[9] in quotidian practices of struggle, and in forms of social perception.[10]

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7. Most scholars of law and society write against law as a body of self-sufficient doctrine, or law as an autonomous set of institutions and also reject the abstractions of structuralist analysis of law or liberal legal discourse, even when such practices are allegedly critical, as they are in critical legal studies and critical race theory. *See generally* PAUL F. CAMPOS ET AL., AGAINST THE LAW (1996); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END (1995); CHARLES SAMPFORD, THE DISORDER OF LAW: A CRITIQUE OF LEGAL THEORY (1989); PIERRE SCHLAG, THE ENCHANTMENT OF REASON (1998); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). These might be seen as propensities to write "against law" in the sense that these scholars are writing against the law's dominant self-representations.

8. *See* Frank Munger, *Sociology of Law for a Postliberal Society*, 27 LOY. L.A. L. REV. 89 (1993); *see also* ALAN HUNT, EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW (1993); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION (1995); Sue Lees, *Lawyers' Work As Constitutive of Gender Relations, in* LAWYERS IN A POSTMODERN WORLD: TRANSLATION AND TRANSGRESSION 124 (Maureen Cain & Christine B. Harrington eds., 1994); Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997). For a brief, introductory discussion of the constitutive perspective, see Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide. Forms of Legal Scholarship and Everyday Life, in* LAW IN EVERYDAY LIFE 21 (Austin Sarat & Thomas R. Kearns eds., 1993).

9. *See* Sarat & Kearns, *supra* note 8; *see also* Craig A. McEwen et al., *Lawyers, Mediation, and the Management of Divorce Practice*, 28 L. & SOC'Y REV. 149 (1994).

10. *See generally* PATRICK EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE at xi (1998); SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS (1990); AUSTIN SARAT & WILLIAM L. F. FELSTINER, DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS (1995); THE RHETORIC OF LAW (Austin Sarat & Thomas R. Kearns eds., 1994); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 NEW. ENG. L. REV. 731, 731(1992); Sally E. Merry, *Resistance and the Cultural Power of Law*, 29 LAW & SOC'Y REV. 11 (1994); Michael Musheno, *Legal Consciousness on the Margins of Society: Struggles Against Stigmatization in the AIDS Crisis*, 2 IDENTITIES 101 (1995); Austin Sarat, *The Law Is All Over: Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 343 (1990); Austin Sarat & L.F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office*, 98 YALE L. J. 1663, 1665 (1989).

Through historical, ethnographic and sociological inquiries, this scholarship shows that legal discourse provides significant resources for practices in which dominant social meanings are constructed and contested, and that the legal system provides institutional venues for struggles to establish, legitimate, and challenge authoritative meanings. In short, the adoption of legal strategies may give meanings the force of material enforcement. The revitalization of legal anthropology has enhanced our theoretical understandings of power and resistance.[11] Critical cultural studies of law recognize that law provides resources for rhetorical persuasion as well as regulation, possibility as well as prohibition, subversion as well as sanction. From this vantage, "law becomes a form of social mediation, a locus of social contest and construction."[12]

If law fuels hegemonic processes, it also assists counterhegemonic struggles. When law shapes the realities we recognize, it is not surprising that its spaces should be seized by those who would have other versions of social relations ratified and other cultural meanings mandated. Culturally, law is explored as discourse, process, and practice—engaged in forms of both domination and resistance.[13] Locally interpreted, law provides means and forums for legitimating and contesting dominant meanings and the social hierarchies they support.[14] Legal regimes shape the social meanings assumed by signifying properties in public spheres. Such meanings are socially produced in fields characterized by inequalities of discursive and material resources, symbolic capital, and access to channels of communication. The law creates spaces in which hegemonic struggles are enacted as well as providing signs and symbols whose connotations are always ever at risk. Legal strategies and legal institutions may lend authority to certain interpretations while denying status to others.

If understandings of law have become more cultural in this corner of the legal academy, traditional understandings of cultural lifeworlds have been transformed by developments in anthropology and cultural studies. Anthropologists have acknowledged the Orientalizing tendencies of studying culture as discrete formations—shifting focus to the study of power and meaning in everyday life. Culture has been largely reconceptualized as involving activities of expressive struggle rather than singular symbolic contexts, socially located in conflictual signifying practices

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11. *See generally* John L. Comaroff, *Foreword* to CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994) (attempting to "demonstrate that new scholarship in legal history and the anthropology of law contributes to theoretical understanding of power, hegemony, and resistance").

12. Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 L. & SOC'Y REV. 1243, 1246 (1994).

13. *See* Susan F. Hirsch & Mindie Lazarus-Black, *Introduction* to CONTESTED STATES: LAW, HEGEMONY & RESISTANCE 1–2 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

14. For an extended discussion see Rosemary J. Coombe, *Contesting the Self Negotiating Subjectivities in Nineteenth-Century Ontario Defamation Trials*, 11 STUD. IN L. POL. & SOC'Y 3 (1991).

rather than integrated worlds of meaning. Culture is now recognized as both the medium and the consequence of social differences, inequalities, dominations, and exploitations—the form of their inscription and the means of their imbrication.[15] In short, an entrenched skepticism towards both law and culture as reified fields of social life—nevertheless closed systems of rationality or protected social worlds of harmonious meaning—is the intellectual hallmark of contemporary legal anthropology, and the related fields of sociolegal studies and critical legal theory.

A critical cultural legal studies explores the dynamic nature of *juridiculture* (to coin a word) as it unfolds in political processes. Habermas himself has long been concerned with the tendency of systems to "colonize" lifeworlds.[16] However, the increasing evidence that lifeworlds shape systems suggests a more dialectical relationship.[17] Culture—the meaningful forms and practices of lifeworld activity—is shaped by law, but it would be a grave misrepresentation to see this as a one way imposition. The relationship between forms of legal power, the resistance this power paradoxically both engenders and endangers, shaping and inviting—but never determining—lifeworld practices which may in turn transform law and the rights it recognizes—is both dialectic and diacritical.

Attention to the cultural dimensions of law's power suggests that law cannot operate autonomously as a hinge that protects lifeworlds from the incursions of the market and the state and neutrally transmits lifeworld "signals" to administrative powers. Although Habermas seems to believe that the lifeworld is a nonlegal form of social and behavioral regulation that provides the cultural matrix within which identities and communities are formed, it becomes clear, even in his own account, that the law's intervention in the political system affects the "signals" it mediates, such that "far from being neutral, the law is embedded in the lifeworld."[18]

A critical cultural legal studies rejects any vision of a social world in which differences exist before the law and law is merely called upon to resolve and lend authority to social claims generated elsewhere. Instead,

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15. As Thomas McCarthy notes, Habermas's model can accommodate conflicts of interest but is less hospitable to conflicts of value, ways of life, or worldviews. *See* Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, *in* HABERMAS ON LAW AND DEMOCRACY, *supra* note 3, at 115. Disagreement continues to be marginalized even as notions of social diversity, multiculturalism, and transnationalism are incorporated into the model. *See id.*

16. Jacques Lenoble notes that Habermas recognizes that the West has entered into a historically new phase of the extension of the role of law such that juridification no longer protects lifeworlds from system intrusions but his "proceduralization" of law "does not give us a procedural way to call into question the inherent organizational structures of the state, or the specifically legal mechanisms for controlling . . . the market and the administrative apparatus." Lenoble, *supra* note 4, at 63. Hence, he characterizes Habermas as resigned to continuing colonizations. *See id.*

17. For a recent survey discussion and a set of ethnographic studies developing the proposition, see THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL (Lisa Lowe & David Lloyd eds., 1997).

18. Dick Howard, *Law and Political Culture*, 17 CARDOZO L. REV. 1391, 1428 (1996).

it explores the role of law and legal discourse in those signifying practices in which politically salient social distinctions and social differences are constructed and contested—temporarily establishing and legitimating social orders of differentiation while simultaneously providing resources with which these orders may potentially be disrupted. A critical cultural legal studies attends to the ways in which law provides the discursive vehicles that give legitimacy to socially salient distinctions, adjudicating their meanings, and shaping the very practices through which such meanings are disrupted. Law is not simply an institutional forum or legitimating discourse to which social groups turn to have pre-existing differences recognized, but, more crucially, a central locus for the control and dissemination of those signifying forms with which identities and difference are made and remade. The signifying forms around which political action mobilizes and with which social rearticulations are accomplished, may be attractive and compelling precisely because of (the qualities of) the powers legally bestowed upon them.

II. PUBLIC SPHERES AND PRIVATE PROPERTIES

If a critical cultural legal studies suggests that it is untenable to consider lifeworlds that exist before the law and illustrate, instead, that law is a constitutive force in lifeworld activity, they also join the tradition of Critical Legal Studies and Legal Realists in denying that public spheres are socially distinguishable from private interests except to the extent that the law legitimates and enforces such distinctions. A critical cultural studies of law sees such distinctions not as established prior to political activity but instead as providing sites for and stakes of political contestation.

In his early work, Habermas used the distinction between public and private to define the boundaries of political deliberation, and was properly criticized for so doing. Such a narrowing of the public sphere could not serve democratic interests if it implied that "private interests" and "private issues" would be considered inappropriate topics for public discourse. The appropriate boundaries of the public sphere must be part of any process of public negotiation, because such boundaries are never naturally given but historically constructed and "are frequently deployed to delegitimate some interests, views, and topics and to valorize others."[19] Boundaries exist only in contingent compromises that must be open to the challenges of those who seek "to convince others that so-called private matters are subjects of common concern."[20] This, at least, is a criticism of his model that Habermas has accepted[21] and largely taken into account in *Between Facts and Norms*.

19. Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, *in* THE PHANTOM PUBLIC SPHERE 1, 22 (Bruce Robbins ed., 1993).

20. *Id.* at 20.

21. *See* HABERMAS, *supra* note 1, at 306, 309, 314.

Two senses of the term "private" tend to disenfranchise subordinate(d) groups—that which pertains to intimate, domestic, or sexual life (which are especially likely to affect women and sexual minorities) and that which pertains to the prerogatives of private property in a market economy. By deeming such matters private, we make them off-limits to public contestation and debate.[22] Habermas's reformulated discourse theory of democracy in *Between Facts and Norms* addresses the former issue by accepting that topics cannot be ruled "out of order" by virtue of some preordained status as "private issues." Respecting the "privacy" of market allocations, however, seems to pose no particular concerns for him, primarily because of his insistence that civil society (the social space for political debate in public spheres) is distinct from the market and the administrative state.[23]

In his early work, Habermas asserted that under the altered conditions of the late twentieth century, the bourgeois model of the public sphere was no longer viable. Many legal theorists concerned with democracy and dialogue in contemporary capitalist conditions have also questioned the applicability of eighteenth-century models to late twentieth-century communications conditions. They, too, doubt the propriety of continuing to assume the communicative conditions of the bourgeois public sphere, but unlike Habermas, who appears determined to maintain its cartography, these scholars see its constitutive categories of differentiation as increasingly archaic:

> [S]peech v. action, print v. broadcast, political v. nonpolitical. Symbolic expression in its many forms . . . blurs the speech/action cleavage; new forms of technology . . . confuse courts in applying the print/broadcast distinction; arguments over what is and is not political speech have no resolution . . . .[24]

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22. *See* George Yudice, *Civil Society, Consumption, and Governmentality in an Age of Global Restructuring: An Introduction*, 14 SOC. TEXT. 1, 22 (1995).

23. *See* HABERMAS, *supra* note 1, at 299. In this view, each sphere—the public sphere, the economic sphere, and the sphere of public administration—rather neatly has its own mechanism of social integration. Just as administrative power is the coordinating force in public administration (a rather tautological proposition), money is the coordinating motor of the economic system (a reductionist position which discounts the various social conventions and cultural belief systems which enable markets to function), and language is the medium that integrates the public spheres that comprise civil society. Although Habermas would seem to acknowledge that ordinary language communications can be distorted, he provides no mechanisms for avoiding this danger. In none of these spheres are possibilities for aggregations of wealth or concentrations of power adequately attended to.

24. Robert Trager, *Entangled Values: The First Amendment in the 1990s*, 45 J. COMM. 163, 169 (1995). Garnham makes a significant point about the shortcomings of the liberal model in contemporary conditions:

> While the rights of free expression inherent in democratic theory have been continually stressed, what has been lost is any sense of the reciprocal duties inherent in a communicative space that is physically shared . . . , the social obligations that participation in the public sphere involves . . . , duties to listen to others . . . , to alternative versions of events . . . , to take responsibility for the effects of actions that may result from that debate . . . .

Some critics of liberal legalism (from which Habermas has not fully divorced himself) complain that it continues to take communication by print as its model and aspiration. A relation between an individual intentional author and a rationally deliberating reader serves as the paradigm for the production and reception of communicative forms. Others, like legal philosopher Owen Fiss see the central rhetorical figure to be the individual "street corner speaker" who requires protection against state censorship—an increasingly anachronistic (although not wholly irrelevant) configuration in contemporary conditions.[25] In either case, justifications for constitutional rights of freedom of speech or expression cling tenaciously to Enlightenment concepts and bourgeois ideals despite fundamental transformations in the nature of contemporary communications. As Fiss asserted over a decade ago, the American constitutional tradition of freedom of expression is unable to effectively grasp the salient characteristics or challenges of capitalist mass-communications systems.[26]

In an era in which media conglomerates dominate communications, threats to the autonomy of speech and to public debate are just as likely—if not more likely—to be posed by so-called private actors than by the state. In the United States, for example, freedom of speech doctrine routinely confronts conflicts between economic and political liberties framed as competing rights.[27] Rights to political speech are often posed against rights to enjoy the prerogatives of private property (and in many jurisdictions both rights are constitutionally protected for corporations as well as persons pursuant to the fiction of the corporation as a

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> A crucial effect of mediated communication in a context of mediated social relations is to divorce discourse from action and thus favour irresponsible communication.

Nicholas Garnham, *The Mass Media, Cultural Identity, and the Public Sphere in the Modern World*, 5 PUB. CULTURE 251, 261 (1993).

25. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408 (1986) [hereinafter Fiss, *Free Speech*]; *see also* Owen Fiss, *In Search of a New Paradigm*, 104 YALE L. J. 1613, 1613–14 (1995). For an extensive discussion of the ways in which freedom of expression jurisprudence ignores fundamental facets of communication in late-twentieth-century contexts and dominant principles of protection are at odds with the realities of a mass-mediated "amusement-centered culture," see RONALD K. L. COLLINS & DAVID M. SKOVER, THE DEATH OF DISCOURSE (1996).

26. *See* Fiss, *Free Speech*, *supra* note 25, at 1414–15.

27. Habermas does not address the numerous critiques leveled against "rights-discourse" and the defenses this critique has provoked. Lenoble correctly points to "the fundamental instability of all adjudication between competing rights. An individual right can only be established in relation to the rights of others, and therefore remains tied to the undecidability that permeates all communicative action." Lenoble, *supra* note 4, at 71. Similarly, McCarthy reminds us that

> the system of basic rights does not exist in a state of transcendental purity, but only in the interpretations of it embodied in actually existing democratic constitutional traditions. . . . [T]hese interpretations are multiple, various, and context-dependent. . . . [T]here is significant basis for reasonable disagreement. . . .[N]ot only the correct interpretation but also the proper balancing of different components of existing systems of rights will be subject to reasonable dispute.

McCarthy, *supra* note 15, at 132.

legal individual). As Fiss and others recognize, the property owner's "No Trespassing" sign generally prevails.[28]

Mass media, electronic telecommunications, instantaneous communications, and the corporate restructuring and commodification of urban space have made street corners and their speakers invisible, inaudible, and obsolete as forums and agents of political dialogue. More of the texts we encounter in everyday life are the products of corporate marketing departments than the creations of individual authors, and images beamed at us via fiber optic cables are more ubiquitous than rhetorical oratory mediated through human vocal chords. It is doubtful that protecting an individual's autonomy to speak will guarantee rich public debate when the forums for speaking and the circuits of communication are privately owned, and when those who control them have an inordinate capacity to influence the terms of debate.[29] In conditions of scarcity of access, the protection of a certain agent's autonomy to speak may well impoverish public debate to the extent that opportunities for effective communication are limited. Communications markets may ensure only that the views of those who are economically powerful will be heard in public debates.[30]

Critics of liberal free speech doctrine find that it is built upon untenable distinctions between private property and public speech in an era when so many forms of public speech require the use of private properties. Most contemporary constitutional theorists now appear to agree that some form of regulation of mass media is necessary to achieve democratic political goals,[31] given that mass communications controlled by

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28. *See* Fiss, *Free Speech*, *supra* note 25, at 1407. For a discussion of free speech under the First Amendment, its history, and various interpretations, see PAUL CHEVIGNY, MORE SPEECH: DIALOGUE RIGHTS AND MODERN LIBERTY 123–48 (1988); DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME: A CRITIQUE OF THE CONSERVATIVE SUPREME COURT 39–82 (1993); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992); J.M. Balkin, *Some Realism About Pluralism. Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375; Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993); Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture. Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258 (1992); Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988); Allan C. Hutchinson, *Talking the Good Life. From Free Speech to Democratic Dialogue*, 1 YALE J.L. & LIB. 17 (1989); Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993); Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689 (1994); Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993).

29. *Cf.* Fiss, *Free Speech*, *supra* note 25, at 1410–11; Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786 (1987), *reprinted in* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996).

30. *See* Fiss, *Free Speech*, *supra* note 25, at 1413.

31. *Cf.*, *e.g.*, THE BILL OF RIGHTS IN THE MODERN STATE (Geoffrey R. Stone et al. eds., 1992). For an overview of recent scholarship, see Trager, *supra* note 24.

private actors and governed by market forces simply do not permit the diversity of perspectives necessary for the flourishing of dialogic democracy. State regulation of speech is thus supported as necessary to promote free speech. Free speech for those with access to media may limit the speech of those who lack such access. Access to media must be expanded if we are to secure conditions for effective communication to promote recognition of diverse interests in the political process and this may well involve regulation of the exercise of private property—limits to the rights of shopping mall owners to control access to their properties, and regulations limiting campaign expenditures, for the most oft-cited examples.[32] By excluding realms of private law and market forces from the space he regards as political, the model of democracy Habermas provides would keep existing allocations of communicative power intact while entrenching corporate dominance over realms of public communication.

Some critical legal scholars go further still, suggesting not only that a proactive state needs to intervene in private property relations to engender public debate, but that we need to denaturalize the modern public/private distinction that would frame the issue in such terms. According to Allan Hutchinson, for instance, liberal commitments to such dichotomies preclude the resolution of such dilemmas[33] or the realization of a truly democratic polity,[34] such that the modern public/private distinction is politically untenable even as a description:[35]

> As sovereign, the government is as responsible for its active decisions not to intervene and regulate as it is for its decisions to act affirmatively.... The protection of private property and the enforcement of private contracts by the government attests to the strong and necessary presence of government in private transactions.... Property and contract are creatures of the state and support for these allocative regimes is neither more or less politically neutral or activist than opposition to them. The question is not whether government should intervene, but when and how ....[36]

In contemporary American and Canadian jurisprudence, for example, when public speech interests come up against private property interests, the latter almost invariably triumph, ensuring that "the law insulates vast sectors of the social hierarchy from official scrutiny and public accountability."[37] Those who hold private property are not required to con-

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32. *See* Fiss, *Free Speech*, *supra* note 25, at 1417–18; *see also* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 11–13 (1998) (discussing the threats to the public sphere posed by concentration of economic power in the context of campaign expenditures).

33. *See* Hutchinson, *supra* note 28, at 20.

34. *See id.* at 19–20.

35. *See id.* at 21.

36. *Id.*

37. *Id.* at 22.

sider public interests in expression when exercising their property rights. Once we acknowledge the state's role in creating and enforcing property rights, however, "the question of whose entitlements are to be protected from whose interference becomes a contested matter of political choice rather than the correct application of abstract principle."[38]

William Forbath, in a recent critique of Habermas's assumptions about economic life, makes a similar point.[39] Forbath suggests that Habermas's view of the economy as a self-regulating system ignores the insights of Legal Realists and their Critical Legal Studies heirs, who have repeatedly shown that markets, rather than being self-regulating are in fact "political artifacts, based on and constituted by highly plastic cultural norms and legal rules."[40] Rather than being uncontested, institutional arrangements, market presuppositions about property rules, ownership entitlements and bargaining norms are far from uncontroversial. Radical reorganizations of property relations are possible and compatible with both human autonomy and economic efficiency:

> The Neo-Realists . . . have shown in painstaking detail that far from being reasonably self-defining, the legal concepts of property and contract leave open a great variety of possible sets of rights and ground rules, each with distinctive distributive consequences. One may believe that markets, as decentralized arenas of exchange and coordination, are indispensable to freedom and efficiency, and still one must choose among an indefinitely wide range of alternative sets of rules and rights, and of alternative arrangements for decentralized production and exchange. Which of them are most autonomy enhancing, or most conducive to democracy, or most likely to promote economic growth? . . . [I]nsulating the economic order from democratic decision making means excluding a world of political choices from the very processes that Habermas insists should govern such choices.[41]

This poses serious social problems for a theory that bases democratic legitimacy in ideal discursive conditions. We would echo Lenoble when he suggests that

> the mere reinforcement of argumentative procedures at the center of civil society seems to me impotent to counter the effects of the relations of force that structure the socioeconomic field. It is doubtful that the mere virtues of argumentation in the midst of public space can counterbalance the perverse effects of the colonization of the life-

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38. *Id.*

39. *See* William E. Forbath, *Short-Circuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life*, *in* HABERMAS ON LAW, *supra* note 3, at 272.

40. *Id.* at 280 (citing the work of Albert Hirschman, Geoffrey Hodgson, Amitai Etzioni, Fred Block, Charles Sabel, Roberto Unger, Duncan Kennedy, and Karl Klare).

41. *Id.* at 281.

world, such as the commercialization of culture and the bureaucratization of important aspects of private life.[42]

III. OF RATIONALITY AND POLITICAL COMMUNICATIONS

Just as preconceptions about "private" interests shape those activities we deem to take place in "public" spheres and thereby limit arenas of potential political dialogue, determining which expressive activities are "political" is necessarily a process of social exclusion. The distinction between political and nonpolitical speech becomes more difficult to defend in situations characterized by growing social inequalities, multiculturalism, transnationalism, and increased sensitivity to sexual and racial axes of discrimination. Most liberal legal commentators favor the protection of speech that "is both intended and received as a contribution to public deliberation about some issue."[43] Although those who favor speech rights as necessary incidents to the self-expression of sovereign individuals feel that protection of merely political speech is too restrictive a field of protection, more consequentialist approaches limit protection to speech that contributes to public deliberation of political issues. All of these positions (including Habermas's own) presuppose that the political can be defined prior to socially signifying activities and as a category for evaluating them. This predilection, we suggest, may be traced historically to European understandings of civil society and the public sphere—both concepts that have been revitalized in contemporary critical debates about their continued relevance.

Critics of the bourgeois public sphere idealized in Habermas's early work suggested that the so-called universal categories of this space of ideal communication—public and private, speech and property, political and nonpolitical—were both exclusionary and elitist. To the extent that a realm designated political is delineated in advance of social activities of articulation, such parameters will inevitably be perceived from partial perspectives, privilege particular interests, entrench identities, and limit identifications. Of particular concern to critical legal scholars is the restriction of political discourse to issues involving the common good, the foundational distinction between public and private[44] and the privileging of rationalist forms of communication.[45] Other legal scholars have ad-

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42. Lenoble, *supra* note 4, at 76.

43. THE BILL OF RIGHTS IN THE MODERN STATE, *supra* note 31, at 304.

44. See generally Howard, *supra* note 18, for a discussion of the foundational distinction between public and private, and Forbath, *supra* note 39, for a more critical analysis of the distinction.

45. For explorations of the forms of rationality presupposed, see Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory?*, *in* HABERMAS ON LAW, *supra* note 3, at 82; Lenoble, *supra* note 4; Modak-Truran, *supra* note 3; McCarthy, *supra* note 18; William Rehg, *Against Subordination*, *in* HABERMAS ON LAW, *supra* note 3, at 257; Ulrich K. Preuss, *Communicative Power and the Concept of Law*, *in* HABERMAS ON LAW, *supra* note 3, at 323.

dressed the first of these restrictions,[46] and we have already considered the second. The third restriction will be our concern here.

Habermas's concept of rational discourse draws on Kant's idealized conception of reason as well as Hannah Arendt's work on political judgment and communicative power. In its most abstracted form, it consists of "an idealized linguistic exchange [between a speaker and a hearer] in which [the] hearer [makes] a yes or no response to a validity claim [embodied] in a speech act . . . uttered by [the] speaker."[47] Can such a simple exchange provide an adequate building-block for democracy in political communities characterized by the coexistence of multiple and ever-emergent forms of social difference, or does it reflect a form of cultural bias?

Feminist scholar Iris Marian Young suggests that to restrict the political to deliberation about the common good will have discriminatory effects whenever existing distributions of symbolic or material goods are unequal; appeals to a "common good" are likely to perpetuate and reproduce existing privileges to the extent that "particular" experiences and interests are defined as such from the vantage point of the powerful.[48] Political communication, however, necessarily involves encounters with differences which cannot be "transcended" by appealing to a common language (which will inevitably be that of the dominant class to the extent that local vernaculars will be deemed idiosyncratic). As political theorist Nancy Fraser points out, even the process of discursive interaction in formally inclusive arenas puts some people at a disadvantage; those in subordinate social groups tend to employ styles and idioms of expression denigrated and marginalized by the mainstream.[49] For Fraser, this implies the need for a number of distinct public spheres (which Habermas appears now to agree with) in which deliberations take place in the context of local lifeworlds. For Young, however, the political itself must be expanded to encompass more than mere argument. To speak "across differences of culture, social position, and need"[50] requires respect for embodied and particular expressive practices such as greeting, gesture, humor, wordplay, images, figures of speech, seduction, and narrative. In short, Young argues that models of deliberative democracy ignore or trivialize those very forms of communication through which differences are expressed.

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46. For critical discussions of the concept of the common good in *Between Facts and Norms*, see Jacobson, *supra* note 3; McCarthy, *supra* note 15; Rosenfeld, *supra* note 45.

47. Lenoble, *supra* note 4, at 47.

48. *See* Iris Marian Young, *Communication and the Other: Beyond Deliberative Democracy*, *in* DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 120 (Seyla Benhabib ed., 1996).

49. *See* Fraser, *supra* note 19.

50. Young, *supra* note 48, at 127.

By restricting his "concept of democratic discussion narrowly to critical argument" Habermas "assume[s] a culturally biased conception of discussion that tends to silence or devalue some people or groups."[51] Young proposes that a truly "communicative democracy" would respect other forms of meaning-making activity than those of rational argument, because the latter contain cultural biases which devalue forms of understanding and expression characteristic of those who are socially marginalized. They may also facilitate gender bias to the extent that women's use of language may be more "tentative, exploratory, or conciliatory."[52] The speaking styles and rhetorical forms characteristic of sub-cultural vernaculars may put their expressions of social concern beyond the pale of what is properly considered political in deliberative democracies. Rap music and forms of black religious oratory, for example, often (but not always) convey highly political messages through culturally specific forms of persuasion, but are unlikely to be acknowledged as political expression due to their form, regardless of their effects.

Habermas's rationalism cannot encompass the range of expressive activity that has political meaning and consequence. There is no doubt that in *Between Facts and Norms*, Habermas has greatly expanded the scope of communications that might be considered politically relevant by multiplying the number of operative public spheres in which opinions, interests, wills, and identities are forged. Such publics are privileged precisely because of their intimate relations with meaningful experiences in the contexts of contingent lifeworlds. Nonetheless, his work still seems to assume that lifeworld contexts exist in a pristine integrity from market forces and that "ordinary language" is the authentic vehicle of their maintenance and reproduction.[53]

Public spheres are dominated by the mass media as channels for communication, community-formation and exerting influence—as Habermas himself acknowledges. Such media, however, are seen merely as conduits for communications that are imagined to be autonomous from market forces.[54] Habermas does finally acknowledge the literature on the culture industries that delineates the political economy of media ownership, program structuring, and financing. Moreover, he gives long overdue acknowledgment to reception theories and cultural studies that emphasize the interpretive work that consumers do as audiences in actively refashioning the media texts they receive. Ultimately, however, this literature is only deployed to nuance Habermas's theory, rather than serving to subvert or transform it. These interpretive strategies are viewed as the activity of rational agents whose agencies are in no way influenced by the texts they consume and whose lifeworlds remain

51. *Id.* at 120.
52. *Id.* at 123.
53. *Cf.* HABERMAS, *supra* note 1, at 352–64.
54. *Cf. id.* at 376–79.

autonomous from the cultural forms the media affords them. The possibility that market driven means, meanings, texts, and forms of communication may actively shape lifeworld contexts and that media texts might themselves become part of "ordinary language" is never envisioned. Nor is the constitutive role of law in these processes alluded to.

IV. OF CULTURAL LIFEWORLDS AND MARKET FORCES

If the protection of public speech can no longer be guaranteed in contemporary conditions of late capitalist democracies to the extent that we insist on isolating it from considerations of private property, it has also become more and more incredible to believe that politics is a sphere we can isolate from consumer capitalism. One does not need to embrace a postmodernist philosophy to agree that "the modernist separation of social spheres, in particular the separation of culture on the one hand from politics and economics on the other" begs the question of how people endow their lives with the meaning that motivates and legitimates social action.[55]

In *Between Facts and Norms*, Habermas assumes a less hostile attitude towards mass media than he did in earlier work, but his ambivalence towards mass mediated cultural forms is still clearly manifest.[56] Primarily this ambivalence appears to stem from Habermas's conviction that the conveyance of information to reach understanding is the privileged, if not exclusive form of political communication. Whether what is communicated is needs, interests, or issues, and whether wills or opinions are formed, he assumes that rational communications will fully accomplish this. The political economy of mass media interests Habermas only to the extent that it may influence the flow of information between the public spheres and the political system. To the extent that modern political spheres are defined by rational debate, "information provision is stressed

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55. *See* Garnham, *supra* note 24, at 253.

56. As Peter Dews puts it:

> He does not conceal the mass of evidence suggesting the extent to which the manipulated, media-saturated public sphere destroys the potential for an effective democratic opinion to form . . . . One could also argue that Habermas's enthusiasm for the "post-Marxist" category of "civil society," already tarnished by the latest developments in Eastern Europe, seriously underplays the continuing role of social class as a factor in determining access to channels of political influence. In *Faktizitat and Geltung* he is obliged to appeal, rather weakly, to the "normative self-understanding of the mass media," as informing and facilitating public discussion, in order to convince his readers that issues of sufficient common concern will eventually obtain a hearing. Even then, however, he stresses that only crises are capable of mobilizing people successfully. Can such sporadic movements really be said to constitute "communicative practices of self-determination?"

PETER DEWS, THE LIMITS OF DISENCHANTMENT: ESSAYS ON CONTEMPORARY EUROPEAN PHILOSOPHY 199 (1995). For an informative discussion of how we might rethink class relations in conditions characterized by concentrations of media power and monopolies over information, see John Carlos Rowe, *The Writing Class*, *in* POLITICS, THEORY, AND CONTEMPORARY CULTURE 41 (Mark Poster ed. 1993).

and entertainment is negatively evaluated."[57] Contemporary variants of critical social theory, however, insist that contemporary identity politics and new social movements are forged within "the institutions of mass-cultural dissemination [which] are seen as providing and structuring the cultural field on which these fragmented and diverse identities are formed and reformed":[58]

> [A]n ever-larger proportion of the cultural goods and services consumed by the world's population are being conceived, produced, and distributed by . . . multinational corporations—not to speak of the consumer goods and their associated advertising that now play such an important role in the creation and maintenance of cultural identities.[59]

We will not be the first to suggest that the sophistication of current understandings of textuality has not sufficiently informed contemporary theories of politics. The conceptual repertoire of such theories seems remarkably isolated from theoretical insights into the nature of culture and communication. The transparency of language as a public medium through which facts and values are communicated is presupposed within theories of political communication whether these are centered upon paradigms of individual face-to-face communication or of autonomous and intentional authors addressing independent reflexive readers.

Critical cultural studies (including anthropology, communications, sociolinguistics and their legal variants) have shown that human beings always speak with and within historically specific modes of representation. The lifeworld resources available for communicative activity shape our ways of knowing even as we use them to express identity and aspiration. We create social realities discursively and through systems of signification we transform in the process. Discursive social interactions and the opportunities for imaginative meaning making they yield are paramount to human life and crucial to historical change. In too much of contemporary political theory, however, highly mediated symbolic forms are treated as the unproblematic expressions of singular authors and as unmeditated reflections of external realities that pre-exist (and are uninfluenced by) their circulation.[60] Processes of information production, distribution, and consumption, however, play an ever greater role in contemporary social and cultural theories; mass media is recognized as central, not only in terms of the forms and channels of communication, but also in terms of providing the media we communicate *with*. Is it sensible to continue to maintain a Romantic opposition between culture as an

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57. Garnham, *supra* note 24, at 253.
58. *Id.*
59. *Id.* at 256.
60. *Id.* at 261.

authentic lifeworld and capitalist market relations as rational systems which alienate us from human meanings?

Habermas, like many contemporary constitutional theorists, clearly recognizes the dangers of corporate control and concentration of ownership, and the effects of free market principles in limiting the cultural resources, information, and modes of argumentation available to us in a consumer society. Contemporary social theory, however, suggests that mass mediation is far more extensive as a force shaping communications. As Nicholas Garnham puts it, what political theory still fails to grasp is "that what has also come to be mediated is the content of communication"[61] itself.

> Our everyday social relations, our social identities are constructed in complex processes . . . of [media] mediations. We see ourselves . . . in terms of ways of seeing those identities constructed in and through mediated communications...and we often express [these] using objects of consumption provided and in large part determined by the system of economic production and exchange.[62]

This is not, however, simply to equate media with culture. Such an equation reifies and freezes culture and elides the very social practices through which meanings are generated and transformed.[63] Lifeworlds are produced through the construction and contestation of meaning. The reactivation of media-activated textuality is central to cultural reproduction and to social transformation. The political work that such practices of interpreting commodified textuality achieve cannot be reduced to information transfer in the service of rational discourse. Use of media to make meaning is often a constitutive and transformative activity, not merely a referential or descriptive one.

Individual identities and cultural communities are dialectically created and related through signifying activities that must deploy socially available vehicles of significance. Increasingly, the most widely accessible cultural forms are those conveyed by and appropriated from mass media channels of communications. Indeed, access to media signifiers might well be deemed a prerequisite to the proliferation of alternative understandings in the public sphere. Law, however, intervenes powerfully to prevent such possibilities.

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61. *Id.* at 260.

62. *Id.* at 260–61.

63. *See* Dana Polan, *The Public's Fear: or, Media As Monster in Habermas, Negt, and Kluge*, *in* THE PHANTOM PUBLIC SPHERE 33, 35 (Bruce Robbins ed., 1993).

V. OF INTELLECTUAL PROPERTIES: PRIVATE PROPERTIES AND PUBLIC SPEECH

The imagery of commerce and the commodification of imagery provides a rich semiotic source for expressive activity in contemporary public spheres. In consumer cultures, however, most pictures, texts, motifs, labels, logos, trade names, designs, tunes, and even some colors and scents are governed, if not controlled, by regimes of intellectual property. As Coombe has explored in great detail elsewhere, intellectual property laws (copyright, trademark, publicity rights, design patents, merchandising rights and some consumer protection laws) create private property rights in cultural forms or lifeworld resources and thereby insinuate commodity relations into most forms of lifeworld communications.[64]

Film theorist Miriam Hansen suggests that contemporary public spheres cannot be legitimated by appeal to the liberal-bourgeois model, because they can "no longer pretend to a separate sphere above the marketplace."[65] Corporate public relations have an increasing presence and influence in public domains and spaces of leisure, entertainment, and consumption are colonized by "the privately owned media of the consciousness industry."[66] Nonetheless, as Coombe has argued, by virtue of the legal bestowal of intellectual property rights, corporate producers of those cultural forms gain all of the powers and privileges of bourgeois authors with none of the social responsibilities and public accountability historically invested in that political figure.[67]

In the modern public sphere, an "unrestricted rational discussion of public matters that is open and accessible to all in the service of producing consensus about the common good"[68] was both anticipated and encouraged. The proliferation and increased circulation of print media facilitated the creation of a critical "public." The modern figure of the author emerges concomitantly with this print-mediated public; the very act of publishing implies an appeal to reason, that is, to the reflexive capacities of a readership engaged in relationship to a print-based public sphere. This unitary author who speaks with a single voice and possesses a singular self embodied in unique textual expressions deemed to be his "works," and thus his property,[69] is the conceptual foundation of copy-

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64. *See* COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 5.

65. Miriam Hansen, *Unstable Mixtures Dilated Spheres: Negt and Kluge's* The Public Sphere and Experience, *Twenty Years Later*, 5 PUBLIC CULTURE 200 (1993).

66. *Id.*

67. *See* COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES, *supra* note 5.

68. *Id.*

69. *See* Rosemary J. Coombe, *Contesting Paternity: Histories of Copyright*, 6 YALE J.L. & HUMAN. 397, 398–99 (1994) (exploring the historical emergence and consolidation of these ideas in England and Germany in a review of historical literature on copyright).

right, later extended by implication to trademarks, design patents and rights of publicity.[70]

As modes of technology for the transmission of cultural products have proliferated, the author-function has been stretched to accommodate them. Rather than outline a history, an example will suffice. The originating role in cultural reproduction has increasingly become centralized in corporate entities due to the complexities of the divisions of labor and the scale of capital involved in creating new media works for new technologies of dissemination.[71] Legally, however, the bourgeois author-function maintains its hegemony. Drawing upon Edelman's pioneering work, sociologist Celia Lury points to the relocation of authorship with respect to cinematographic works. A film is clearly the product of highly differentiated labor and of a multiplicity of creative processes not easily accommodated by the legal fictions of individuated creation, singular personality and juridical subjecthood that copyright law crystallizes in the figure of the author as first owner of copyright. By vesting legal rights of authorship "in the collective subject constituted by the representatives of the capital used to produce the film,"[72] the attributes of the creative author are extended to capital itself; "the 'original' moment here is thus that of investment. By contrast, the 'creative' labour of others involved in the process of film production is proletarianised in order to deprive them of such a right."[73]

Romantic ideologies of authorship justify both copyright protections and the commodification of publicly circulating cultural texts as the 'private' properties of corporate individuals. Modernity's legitimating rhetoric—historically based upon democratic dialogical ideals—now serves to protect corporate hegemony over increasingly monologic domains of mass culture.[74] Fictions of creativity, personality, and originality are preserved to legitimate the rights of investors to control the commerce in and circulation of corporately-produced textuality, and to police its reworkings by others.

Today's spaces of civil society, public spheres, and emergent counterpublics are fundamentally different from those of the bourgeois public

70. For an overview of some of the developing literature on the history of literary property in the eighteenth century, see *id.* and the sources cited therein. For an excellent collection of essays on historical and contemporary dimensions of authorship and copyright, see THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994).

71. *Cf.* CELIA LURY, CULTURAL RIGHTS: TECHNOLOGY, LEGALITY AND PERSONALITY 34–35 (1993).

72. *Id.* at 35.

73. *Id.*

74. *See generally* THOMAS STREETER, SELLING THE AIR (1996) (showing how the author-function was continually extended to maintain the fiction of individual authors and readers in relations of direct contractual exchange in the development of television broadcasting in the United States).

sphere whose demise Habermas has famously lamented. Nonetheless, intellectual property laws still privilege the figure of the author, using conceptual premises that presuppose the continuance of eighteenth-century European conditions. Today's authors—corporate holders of intellectual property rights in the promotional texts proffered by mass media—have all of the exclusive rights and privileges of the bourgeois author and none of his traditional responsibilities or forms of accountability. Corporate authors cannot be held accountable in any direct way for the advertising messages they convey in unidirectional forms of illocutionary address because they so seldom assume the form of rational argumentation and provide no space for response. They are, however, responded to in lifeworld activities of appropriation, but these are always at risk of being censored as forms of intellectual property infringement. Public dialogue about the greater good—once encouraged by the activities of publicly responsible authors—is no longer even considered a goal that might be accomplished through the legal recognition of authorship via intellectual property laws. Instead, the law increasingly serves to ensure that returns on capital investment in forms of commercial speech are secured, but at the price of creating monologic lifeworld conditions through unidirectional forms of illocutionary address. New communications technologies pose new opportunities for more democratic forms of dialogue, but even these discursive spaces (like the Internet) have become warzones between those who would seek to use intellectual property rights to censor expressive speech which "speaks back" to corporate power and those who attempt to use this space to subject mass media cultural texts to social circulation, shared deliberation, lifeworld commentary, critique, satire, and parody. Alternative public spheres are vulnerable to the very legal power that should, on Habermas's account, transmit their expressions to the core of administrative powers. Understanding how the law at once constitutes and threatens alternative public spheres undermines any simple sense of bifunctional duality.

Legal frameworks enable the reproduction and repetition of cultural forms as ever the same marks of authorial proprietorship, while paradoxically prohibiting and inviting their interpretive appropriation in the service of other interests and alternative agendas. Such legal regimes are constitutive in shaping commercial and popular culture, both in terms of the cultural power that the law affords holders of copyright, trademark, and publicity rights, but also by creating the incentives for the mass dissemination of symbolic forms which ensures their ubiquity in daily life. Scholars in literary theory, communications, film studies, and political theory point to the social importance of media-circulated cultural forms and their political significance in contemporary consumer societies. These signifying vehicles assume local meanings in the lifeworlds of those who incorporate them into quotidian practices, emergent identities, and nascent communities. They may also provide rhetorical means with

which to articulate appeals for political recognition, corporate accountability, and social transformation.[75]

We might point to one central paradox of postmodernity: just as all forms of cultural difference are appropriated by corporate interests in the authorship of new commodity forms that circulate publicly through mass-media communications, the proliferation of publicly-disseminated commodity signs simultaneously enriches the realm of cultural resources with which counterpublics may be forged.[76] Such alternative public spheres, however, remain vulnerable to the legal power that authorship confers upon commercial-industrial forces of publicity. Corporate cultural power is maintained and insulated from public scrutiny by legal liberalism's distinctions between public and private, property and speech, fact and fiction, and commercial and noncommercial forms of expression. The deployment of such distinctions in intellectual property regimes serves to privilege the appropriations, decontextualizations and commodification of lifeworlds by capitalist interests as acts of authorship, while it simultaneously delegitimates those creative reappropriations around which counterpublics form as acts of illicit piracy. Although corporate appropriation of cultural forms and the appropriation of mass media texts in the lifeworld activities of others can never be fully contained, the dialectical relationship between legally created forms of power and legally investigated forms of resistance clearly alerts us to the difficulty, if not the futility of sustaining any vision of pristine lifeworlds isolated from market systems or of law as a neutral mediating force between them. Today's spaces of civil society, public spheres and counterpublics are fundamentally different from those of the bourgeois public sphere that Habermas holds in such high regard.

Postliberal and postliterary public formations thus pose different questions for democracy and demand different political responses. The modern ideal of intentional authors appealing to the rational deliberation of readers, or the idealized linguistic exchange in which a hearer arrives at a yes or no response to a validity-claim in a speech act that has been uttered by a speaker,[77] are inadequate formulations for communication in a promotional culture[78]—such as our image and logo-saturated world—where corporately-authored messages, flashing images and rapid soundbites are dominant signifying modes. Messages conveyed by quickly circulating evanescent signifiers on a multitude of shifting surfaces can-

75. For longer discussions and numerous examples, see Rosemary J. Coombe, *Sports Trademarks and Somatic Politics*, *in* SPORTCULT 262 (T. Miller & R. Martin eds., 1999).

76. *See* Hansen, *supra* note 65.

77. *See* Lenoble, *supra* note 4, at 47.

78. *See generally* ANDREW WERNICK, PROMOTIONAL CULTURE: ADVERTISING, IDEOLOGY, AND SYMBOLIC EXPRESSION (1991); Andrew Wernick, *Promotional Culture*, 15 CAN. J. POL. & SOC. THEORY 260 (1991). Wernick says that North American culture has come to present itself at every level as an endless series of promotional messages; advertising, besides having become a most powerful institution in its own right, has been effectively universalized as a signifying mode.

not be effectively countered with oral arguments or written treatises. Indeed, it may be impossible even to say "no" in any fashion that is persuasive or audible when responding to commercial culture that does not deploy mass media forms and tactics and use the private properties of others to refuse their connotations.

In short, the commodification of cultural forms creates new relations of power in contemporary cultural politics—arenas for connotative struggle.[79] If we recognize cultural signifiers as multivocal sites of conflict bearing the traces of social struggles and historically inscribed differences, then laws which govern the circulation of these forms—controlling their ironic reproductions and parodic recodings—necessarily intervene in processes of defining the social and its parameters by enabling and legitimating practices of cultural authority that attempt to contain the expression of difference in the public sphere.

In *The Cultural Life of Intellectual Properties*, Coombe shows that intellectual property law does not function simply in a rule-like fashion, nor is it adequately portrayed as a regime of rights and obligations.[80] Although it is constructed through a rhetoric of private property rights and public benefits, it is necessary to go beyond its self-representation to show how it is also simultaneously a generative condition and a prohibitive boundary for practices of political expression, public sphere formation, and counterpublic articulations of political aspiration. This is not immediately apparent, however, if one limits one's scholarly gaze to constitutions and statutes, human rights covenants and reported cases. From the perspective of a critical cultural legal studies, the (social) life of the law cannot be explored simply in terms of its *logos*, positivities, or presences. It must be seen, as well, in terms of "counterfactuals,"[81] the missing, the hidden, the repressed, the silenced, the misrecognized, and the traces of practices and persons underrepresented or unacknowledged in its legitimations. The law's impact may be felt where it is least evident and where those affected may have few resources to recognize or pursue their rights in institutional forums. The law is at work shaping social worlds of meaning—not only when it is institutionally encountered, but when it is consciously and unconsciously apprehended. Its power is at work when threats of legal action are made as well as when they are actually acted upon. People's imagination of what "the law says" shapes lifeworld evaluations and value commitments as well as the expressive forms chosen to assert claims for collective recognition. People's anticipations of law (however reasonable, ill-informed, mythical, or even paranoid) may actually shape law and the property rights it protects. The

79. *Cf.* JANE M. GAINES, CONTESTED CULTURE: THE IMAGE, THE VOICE AND THE LAW 204 (1991).

80. COOMBE, THE CULTURAL LIFE, *supra* note 5.

81. PATRICK BRANTLINGER, CRUSOE'S FOOTPRINTS: CULTURAL STUDIES IN BRITAIN AND AMERICA 64 (1990).

law is a palpable presence when people create their own alternative standards and sanctions governing the use of corporate properties in the moral economies that emerge in law's shadows.

VI. CONCLUSION

"We surely must address the legitimacy of the law in relation to the rights of democratic participation that underpin the 'ethics of communication' in political and legal fields."[82] We cannot do so, however, if we begin from a position that cordons off laws governing private property, communications markets, and commercial speech from critical scrutiny and democratic accountability. We cannot expect the law to protect "fundamental individual rights" as conditions of the participatory structure of public communication if we fail to recognize the political implications of the fact that law, by protecting the interests of corporations as individual rights holders in the public sphere, also guarantees forms of corporate communicative hegemony.

Theorists of dialogue and democracy in contemporary conditions must address the role of the market in shaping means and forms of communications in civil society. George Yudice and Bruce Robbins argue that the concept of civil society will only continue to have critical purchase if it is capable of engaging the "global conjunctures of culture and capitalism" as well as the practices through which publics and counterpublics "maintain significant and even adversarial autonomy within, and even perhaps, by means of the market."[83] They plead for recognition of a more "creative politics of citizenship"[84] and a greater creativity in conceiving the political such that it can at least potentially encompass a greater range of "social sites of production and reproduction" that will include spheres of commerce and consumption.[85] In a world where the media through which views are disseminated are centralized, corporately owned, and operated for profit, subaltern social groups are both culturally disenfranchised and materially deprived of means to public participation. As media theorist Miriam Hansen suggests, "the media of industrial-commercial publicity is an inescapable horizon, and the most advanced site of struggle over the organization of everyday experience."[86]

Democratic dialogue will require more than equal access to the forums and channels of communication—the material conditions for conversation. It will require consideration of appropriate access to the symbolic means of communication—the cultural conditions for conversation. If the most powerful signifiers and those most widely disseminated are the private properties of an elite—if their meanings are controlled and

82. Lenoble, *supra* note 4, at 61.

83. THE PHANTOM PUBLIC SPHERE, *supra* note 19, at 112.

84. *Id.*

85. *Id.* at 113.

86. Hansen, *supra* note 65, at 211.

their polysemy exclusively possessed—then it becomes impossible to engage in dialogic interaction with and within the historical lifeworld in which we are situated. The social systems of signification through which a dialogic democracy constitutes itself must be available, not merely to convey information—an unduly reductivist understanding of human communication—but to express identity, community, and social aspiration in the service of imagining and constructing alternative social universes. Regardless of those who assert them, such dialogic practices may be of larger social benefit, for they provide conversational means for new allegiances and affiliations—the basis for recognizing the other in one's self and one's identification with others. Dialogic practices must be public and widely visible to serve these purposes; this is only possible when they can be mass-disseminated. In a market economy, this will necessarily involve mass reproduction and distribution processes linked to the commerce that increasingly constitutes relations of communication. No pristine space of noncommercial dialogic exchange need be insisted upon, nor is it appropriate to privilege particular discursive sites, cultural mediums, or signifying vehicles as defining the limits of the properly political.

It may well be imperative, then, *not* to isolate a sphere of political activity when assessing the effects and affect of expressive activity. In David Carroll's terms, "the so-called postindustrial, postmodern, hyperreal age of information in which we supposedly live"[87] demands the articulation of a critical sense of the political formulated without Enlightenment certainties about the boundaries of public and private, culture and politics, commerce and art.[88] What makes a contemporary political community common cannot assume the form of an identity or image of collectivity but must remain indeterminate.[89] An undetermined notion of community is necessary to animate a postmodern public and to enable the full range of activities we might recognize as political:

> The critical demand we make of the political should also challenge what is accepted or acceptable as "practical politics" by constantly making possible other forms of political practice than those practised as politics.[90]

Conditions of postmodernity have opened up new possibilities for political activity that were foreclosed by modernity's metanarratives and their pretences to universality. Challenges to the boundaries of the public sphere from those formerly excluded from making public claims, for example, creates a potentially far greater realm of and for political activity.

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87. David Carroll, *Community After Devastation: Culture, Politics and the "Public Space," in* POLITICS, THEORY, AND CONTEMPORARY CULTURE 159 (Mark Poster ed., 1993).

88. *See id.* at 164.

89. *See id.* at 166.

90. *Id.* at 172.

As Lenoble puts it, "liberal legal formalism, no less than the instrumentalization of law that accompanies the welfare state, remains bound to the metaphysical assumption that a society is able to grasp itself."[91] If we recognize, instead, that the social world must be represented, performatively expressed, and institutionally inscribed, we are compelled to abandon a metaphysics of political presence that presupposes a realm of self-evidently "political" practices. This is not to suggest that society is meaningless, but that its meaning is never fully transparent to us. Habermas cannot grasp the communicative nature of the pluralism that distinguishes contemporary democracies to the extent that his formal understanding of language and his conception of speech acts is still grounded in "a classical model of a unique validity and of the objective world as a stable system."[92] Today, democratic pluralism is, as Lenoble notes, predicated upon an unstable constellation of incommensurable systems of meaning, given the very "pragmatic undecidability of all linguistic communication."[93] The declining faith in objectivism and positivism enables us to acknowledge the contingent character of those articulations which gave full meaning to Enlightenment concepts and to the categories of modern politics.[94] The parameters of the public sphere as a space of deliberation and recognition are only ever contingently forged. Moreover, they are continuously challenged by the expressive activities of others who may be deigned without standing in political arenas, making appeals with respect to issues first understood to be the private concerns of those who occupy particularistic spaces. Contemporary public spheres must continually incorporate new social developments that press political boundaries. These include both the contestations of those whose specificities had previously excluded them from the bourgeois public sphere (those whose particular needs were rendered private issues) *as well as* the transformation of relations of representation and reception in a world of globalized media communications.[95] The result of such an engagement is a more inclusive understanding of the political that extends beyond the influence of state policy to potentially include all sites of cultural production and reproduction in which relations of social difference, entitlement, recognition, and redistribution are established and contested in conditions involving publicity.

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91. Lenoble, *supra* note 4, at 75.

92. *Id.* at 59.

93. *Id.* at 61.

94. *See* THE MAKING OF POLITICAL IDENTITIES 1–8 (Ernesto Laclau ed., 1994). For similar arguments, see ARYEH BOTWINICK, POSTMODERNISM AND DEMOCRATIC Theory (1993), and CLAUDE LEFORT, DEMOCRATIC AND POLITICAL THEORY 17–19 (David Macy trans., 1988), arguing that:

> Democracy is instituted and sustained by the dissolution of the markers of certainty. It inaugurates a history in which people experience a fundamental indeterminacy as to the basis of power, law and knowledge, and as to the basis of relations between self and other, at every level of social life.

LEFORT, *supra*, at 19.

95. *See* Hansen, *supra* note 65.

For a critical cultural studies of law, this recognition entails attention to the structural limits or institutional obstacles to the meaning-making capacities of ever-emergent others. Rather than insisting on a pristine space of noncommercial dialogic exchange, or predefining the political according to particular modes of discourse, legal scholars ought to monitor the way in which market agents—and, no less, legal regimes—effect partial fixations of social meanings and contain the articulatory agencies of others. Otherwise, law may well silence those groups who most need its assistance in speaking difference to power.