THE DISCOURSE ETHICS ALTERNATIVE TO RUST v. SULLIVAN

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achieve a fully rational consensus about normatively right laws that are in everyone's best interests.\footnote{Habermas maintains that when the validity of a social norm or law has been questioned, social actors have three alternatives: they can switch to strategic action; they can break off all discussion and go their separate ways; or they can continue to interact practically by entering into a critical discussion (practical discourse) about the validity of the norm in question. A practical discourse aims at a rationally motivated consensus on norms. Discourse ethics articulates the criteria which guide practical discourses and serve as the standard for distinguishing between legitimate and illegitimate norms.}

Discourse ethics "must be a fully public communicative process unconstrained by political or economic force."\footnote{When the stringent conditions of discourse ethics are operative, participants in political debate achieve a universalistic perspective that takes every other person's interests equally into account. This attitude solidifies the social bonds linking all people trying to resolve their differences of opinion cooperatively. Controversies end on a satisfactory note when the best reasoned argument is admittedly convincing to everyone. This article compares discourse ethics with bureaucratic and judicial procedures. The focus is upon rules issued by federal administrative agencies.}

According to Habermasian discourse ethics, the moral burden of proof is on an agency proposing a gag rule that suppresses morally relevant information. Unfortunately, the Supreme Court places the moral burden of persuasion on pregnant women who challenge reg...
ulations that deny them information relevant to their well-being. Section II examines Rust v. Sullivan, which upheld the validity of an agency rule that destroys the honest relationship between women and their health care providers.

Section III canvases the inadequacies of contemporary legal theory. Because the theories advocated by most American jurists focus on judicial review, they suffer by comparison to Habermas's more comprehensive democratic theory. Section III also discusses why the paradigm of positivism is inferior to Habermas's discourse ethics. For the benefit of readers not already familiar with Habermas's work, Section IV clarifies his jargon, including such terms as "self-steering systems," the "lifeworld," and "ideal speech conditions."

Relying primarily on Habermas, the article explains why ordinary citizens need to resist the imperialistic subsystems that colonize society via the media of money and power. These subsystems include corporate hierarchies, governmental bodies, and the courts. Rust v. Sullivan is used to illustrate the extent of unchecked bureaucratic power.

Section V reveals that courts, by way of judicial review, are unable to reconstitute administrative law. Section VI proposes several alternatives to judicial review — alternatives that should strengthen participatory democracy in the United States.

Most of the American people believe that the agency's gag rule upheld in Rust violates the bond of trust between government and the women who ask their subsidized health care providers what their medically indicated choices are. Rust moves us away from the liberal ideals of an enlightened democracy that enable individuals to obtain advice that enables them to re-examine their beliefs and plans. In short, Rust violates the principles of discourse ethics, which provide a critical vantage point for condemning agency regulations that prevent the public discourse from being fair, honest, and genuinely open.

13. Id. at 1478.
accomplish indirectly what lawmakers are constitutionally forbidden to achieve directly. 97

Professor Sullivan argues that courts should at least require lawmakers to explain why conditions on government benefits that 'indirectly' burden preferred liberties should not be invalid. She identifies the harmful systemic effects of unconstitutional conditions (viz., the inappropriate allocation of relationships between the government and rightholders, the invidiously discriminatory effects on some rightholders, and the perpetuation of an already underprivileged caste). 98 She cogently points out the limitations of existing judicial methods that only ask whether the challenged condition is (1) penalizing or coercive, 100 (2) the result of governmental extortion, deceptions and manipulations, 101 or (3) a denial of basic rights. 102

The law's validity is suspect when courts uphold conditions that burden liberties simply because formally correct procedures were followed. 103 Nevertheless, Professor Sullivan's proposals for stricter scrutiny of conditions, which pressure indigents to surrender preferred rights, were ignored by a majority of the Justices in Rust v. Sullivan. 104 Thus, once again, a professor's legal theory has failed to influence the direction of law. Indeed, Professor Sullivan, who had helped write the brief filed by petitioners in Rust, did not even advocate her own theory.

Professor Sullivan's failure to persuade the Court is unfortunate. As stated earlier, Rust upholds regulations which induce citizens to forego the exercise of cherished First Amendment rights, namely freedom of conscience, freedom of speech, freedom of association and freedom to obtain medically relevant information and counsel.

97. Sullivan, supra note 95, at 1413.
98. Id. at 1419.
99. Id. at 1491.
100. Id. at 1426-28.
101. Id. at 1436-38.
102. Id. at 1478-89.
103. By contrast, Habermas observes that legal norms that are not morally justified cannot be sufficiently legitimized through a positivistic reference to procedures. See 2 Jürgen Habermas, THE THEORY OF COMMUNICATIVE ACTION: THE CRITIQUE OF FUNCTIONALIST REASON 344-65 (1983).
106. Positivism is a term first used by Henri comte de Saint-Simon, to refer to the scientific method and its extension to philosophy. It refers to a major philosophical movement which became dominant in Western thought during the last half of the 19th century. It draws support from the works of Francis Bacon, English empiricists and other Enlightenment philosophers. The apparent scientific successes of the industrial revolution created the hope that scientific methods could be successfully employed in ethics, religion, politics, and law. See 2 THE ENCYCLOPEDIA OF PHILOSOPHY 414 (1967).
ince of experts in disciplines such as social theory, political philosophy, or ethics. The former United States Solicitor General took a positivist position when he insisted that law is "a rather technical subject, somewhat cut off from its ethical, philosophical, and other heady roots..."

For most positivists, there are no legal principles that transcend the legal system. The positivists' uncritical conception of a legal system reinforces the power of economic and bureaucratic subsystems to abridge freedoms that advance everyone's best interests.

"A legal system can be conceived of as a system of reasons for actions," but laws in force, according to positivism, depend on the decisions of persons authorized by power-conferring rules. Moreover, "propositions that characterize conduct as right or wrong" are not always relevant because positivists claim that "not all legal standards are grounded in morality."

According to Habermas, "one cannot underestimate the extent to which the positivistic temper pervades..." and dominate[s] intellectual and cultural life. Positivism condones the bureaucratisation of "most of the areas of everyday life." Statists in power manage the political system's economic problems (scarcities, inequalities, insecurities, crises, etc.). Owing to the complexities of social management, success-oriented subsystems (economic and administrative) encroach on the ability of ordinary people to reach consensus-based agreements about the content of law.

Subsystems that are instrumental in steering society become peculiarly indifferent to the individuals whom they affect. This dehumanizing process of legal regulation and bureaucratization has produced a colossal economic-political-legal Leviathan. Increasingly, individuals are dominated by agencies claiming expertise in areas of life, such as reproductive autonomy, family relationships, physical and mental health, and other areas previously left to the lifeworld. In sum, many private consensual arrangements have been replaced by a system of social control that paradoxically is often uncontrollable.

"Viewed historically, the monetarization and bureaucratization of labor power [replacing feudalism and primitive capitalism] is no means a painless process; its price is the destruction of traditional forms of life." The price currently exacted seems excessively high since the bureaucracies (commercial, financial and political-legal-administrative) are not effectively attaining their strategic goals (e.g., utilizing the most economically productive method of distributing scarce resources) and are not adapting well to changing conditions.

Nevertheless, contemporary positivists condone the dominance of purposive or instrumental rationality, which, according to Max Weber, leads to "the creation of an 'iron cage' of bureaucratic rationality from which there is no escape." Worse yet, the systematized social environment, where there is inadequate space for consensual agreements, inhibits normatively right and emotionally satisfying kinds of social coordination. These distortions call into question the positivist's model, which condones institutionalized dehumanization.

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115. See John Finnis, *Natural Law and Natural Rights* 357 (1980).
117. Id. supra note 107, at 200 n.2.
118. Id. at 212.
119. Power-conferring rules designate lawmakers to change the legal norms in force and effect when they are pleased to do so. See id. at 228.
120. Enters, supra note 87, at 14.
121. Id. at 78.
122. HABERMAS, supra note 1, at 4-5.
123. HABERMAS AND MODERNITY, supra note 1, at 4-5.
124. HABERMAS, supra note 103, at 311 (quoting T. Luckeman, Zugeh and Freiheiten im Wandel der Gesellschaftsstruktur, 3 Neue Anthropologie 191-94 (Gadamer & P. Vogler eds., 1972)).
125. See id. at 343-48.
126. Id. at 326.
127. The subsystems that steer the socio-cultural subsystem include the political-administrative and the economic bureaucracies of (1) oligopolistic enterprises that are relatively free of the market restraints of small entrepreneurs and (2) industries such as armaments which are oriented largely towards production for and consumption by the state. See David
IV. REALIGNING THE BOUNDARIES OF POWER

A. Unemancipated Public Opinion

As we approach the twenty-first century, inhumane laws are tolerated by members of the public who are not always fully aware of their own best interests. Members of the public cannot free themselves from coercive purposive-rational social institutions "as long as they retain the ideological world-picture [of positivism] which legitimizes them, nor can they [emancipate themselves from] their ideological world-picture [of positivism] as long as their basic coercive social institutions render [their worldview] immune to free discussion and criticism."

Supreme Court opinions like Rust facilitate the state's massive penetration into private spheres of freedom. Unfortunately, a Supreme Court opinion upholding an immoral law (or agency rule) creates the false belief that immoral laws are legitimate, even when they obliterate the reasonable expectations of individuals and groups.

Vaclav Havel was surely right when he said, "there is no full freedom where full truth is not given free passage." Full truth will never be given free passage so long as the federal courts rubberstamp agency rules that condition benefits on the recipients' willingness to withhold medical information needed by women. When the government exacts silence or censored speech as the quid pro quo for a benefit or subsidy, human beings are manipulated as objects of government policy. Even if the government's ends are justifiable, certainly its manipulative use of hush money is not. The persons most severely affected by the benefit-dispensing gag rule upheld in Rust are the clients of the grantees, who are often young, poor, pregnant women urgently needing trustworthy advice.

Unfortunately, the media's coverage of the gag rule issue emphasizes the strategic-reasoning of the rhetoricians hired by the conservative attack-dog political pressure groups. This kind of reporting impoverishes public discourse, and does not generate a fully rational consensus concerning the validity of agency rules that are insensitive to the oppression of women. When public opinion is not sufficiently critical, informed, organized, persuasive, and heard, the President, Congress and the administrative agencies do not heed the public interest.

B. Towards a More Informed, Effective Public Opinion

Many individuals are victimized by their own self-imposed passivity. This passivity results in members of the public becoming unreflective spectators watching inside-the-beltway power struggles. Habermas's critical theory challenges the public to alter the existing boundaries of power. More specifically, individuals must realize that their inability to discern their own best interests is partially the result of their own readiness to accept, without adequate cross-examination and protest, "an increasingly dense network of legal norms" implemented by bureaucracies.

Excessive power is entrusted to administrative agencies that are neither politically accountable nor adequately responsive to the public. As a result, the least powerful and least affluent segments of the population are deceived and exploited by rules implemented by dysfunctional social welfare programs.

In the United States, the federal courts have done virtually nothing to diminish the power of bureaucracies. Agency rules and orders are presumed valid, even when the statutory source of the agency's practically unfettered discretion is unclear, if not illegitimate. The United States, like other nations, has been unable to control abuses of power by agencies.

Habermas's "classic texts in social theory" describe how the steering systems that colonize the lifeworld disable society from "exercising an influence over itself by the neutral means of polit-
8. In addition to environmental impact statements and other impact statements required by law, there should be a normative rightness statement justifying any proposed or final rule on grounds of morality and social justice. All such statements should indicate how the rules are responsive to human needs and aspirations.

9. Procedures for decentralizing controversial decisionmaking concerning family life and family planning (by delegating power to state and local governments, as well as to other relevant private organizations) should be institutionalized and local in the sense of being responsive to local concerns. This institutionalization need not be institutionalized at every level, but must be responsive to local concerns.

10. Eligibility conditions for grants must never burden fundamental rights directly or indirectly unless the agency's well-documented, reasoned explanation identifies how and why particularized compelling reasons are advanced by the most narrowly tailored, least burdensome, least discriminatory eligibility requirements.

11. If congressional intent is arguably unclear, the agency should send its proposed rule and its proposed statutory construction to appropriate committees in Congress whose members shall be invited to comment on the rulemaking record.

12. If a rule is issued and upheld in court, whenever practicable, a citizen's petition for redress of grievances should be considered in congressional subcommittee hearings.

13. All proposals for greater public participation in rulemaking should be docketed in a record open for public inspection. Whenever possible, a brief reasoned statement explaining why any such proposal was rejected should also be docketed.

14. Town meetings should be held, where appropriate, to discuss proposals for reconstituting administrative law.

15. In order to generate greater public awareness and a more informed public debate, legal scholars ought to make a greater effort to educate the public about the need to curb agency power. Habermas's theory of discourse ethics should be pertinent to this scholarly effort.

16. Agencies should be required to publish in the Federal Register a list of any rules that are being reviewed by the White House or the Office of Management and Budget (OMB). Moreover, each federal agency should be required to explain how any review by the White House or OMB has affected their decision to draft a rule in a certain way. Finally, the White House and OMB should be required to disclose to the media all documents pertaining to its review of an agency rule, as so long as privileged confidential information is not disclosed.

VII. Conclusion

Section I of this article examined an agency gag rule that is incompatible with the conditions necessary for discourse ethics. Although Section II observed that legal theory rarely radically transforms the law's institutionalized practices, there is no aetheoretical way to engage in the study of administrative law. Most lawyers' allegiances to particular theories of the state are unconscious, and therefore all the more potent in operation. By functioning at the level of self-evident truths or tacit presupposition, theory is placed beyond critical awareness and scrutiny.

A theory like Habermas's discourse ethics must be translated into public law through "moral leadership," which promotes social cohesion and community and celebrates the freedom and individual dignity on which democracy depends. Absent effective political leadership which increases public participation in agency rulemaking, the system's colonization of the lifeworld will continue unabated. This is the unwelcome signal sent by Rust v. Sullivan.

Supporters of democratic government who find Habermas's model of democracy superior to positivism are disheartened by Rust. They deplore the Secretary's instrumentally rational regulations, which require health care providers to surrender their First Amendment freedoms. They rightfully condemn the regulations upheld in Rust were inadequately "exposed to discursive testing" for validity. Discursive testing asks the question, "Is the [regulation] fair to others as well as myself, when I take into account everyone's rights?

295. Id. at 227.
basic interests (generally described) and give them equal weight with my own.\textsuperscript{26}\textsuperscript{26} In short, discourse ethics condemns the procedures leading to the Secretary's gag rule; it also condemns the substance of the Secretary's viewpoint selective rule and it exposes the shallowness of the Supreme Court's commitment to freedom of speech when the bureaucracy uses government funds to suppress a point of view.

Discourse ethics is a morally superior alternative to the administrative and judicial procedures culminating in Rust v. Sullivan. Indeed, Rust moves us away from "the institutional humanization of the economy and the administrative state." Rust v. Sullivan is a shameful case ruling because it uncritically endorses undemocratic rulemaking procedures that resulted in regulations abridging freedom of speech.\textsuperscript{26}\textsuperscript{26}

APPENDIX A

The relevant provisions of the regulations upheld in Rust provide as follows:

\textsection 59.2 [Amended]

\text"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. \textldots \textldots \text"Family planning" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. \textldots 

\textsection 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and \textsection 59.8 and \textsection 59.10 of these regulations.

\textsuperscript{26}\textsuperscript{26} Lawrence Kohlberg et al., The Return of Stage 6: Its Principle and Moral Point of View, in The Moral Domain 151, 157 (Thomas R. Wren ed., 1980) (quoting Paul W. Taylor, On Taking the Moral Point of View, in 3 MINDWORT STUDIES IN PHILOSOPHY 55, 51 (Peter A. French, et. al., 1978)).

\textsuperscript{26}\textsuperscript{26} See ROBERT N. BELLAM, RICHARD MAZARR, WILLIAM M. SULLIVAN, ANN SWIDLER, SUE W. TAYLOR, The Good Society 293 (1990) (discussing Habermas's work).