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Habermas

THE DISCOURSE ETHICS ALTERNATIVE TO *RUST v. SULLIVAN*

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I. INTRODUCTION

Legal theorists in the United States should pay more attention to Jürgen Habermas.[1] His theory of discourse ethics provides us with an enriched understanding of the term "normative validity." Discourse ethics "is concerned . . . with the grounding of normativity . . .; its central focus is the . . . specification of appropriate validation procedures."[2] Once participants in political discourse agree on validation procedures, they are then in a position to

1. Habermas's work on discourse ethics points the way towards a genuine participatory democracy. *See* DAVID M. RASMUSSEN, READING HABERMAS (1990); HABERMAS: CRITICAL DEBATES 1-11 (John B. Thompson & David Held eds., 1982); HABERMAS AND MODERNITY 1-8 (Richard J. Bernstein ed., 1985).

Habermas has integrated continental and Anglo-American philosophies to some extent, and he tries to answer the question: How is mutual understanding among human beings possible? For an anthology of excerpts taken from Habermas's writings, see JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER (Steven Seidman ed., 1989); *see also* JANE BRAATEN, HABERMAS'S CRITICAL THEORY OF SOCIETY (1991); THOMAS MCCARTHY, IDEALS AND ILLUSIONS: ON RECONSTRUCTION AND DECONSTRUCTION IN CONTEMPORARY CRITICAL THEORY (1991); STEVEN WHITE, THE RECENT WORK OF JÜRGEN HABERMAS (1988). Rasmussen's recent book contains biographical material about Habermas (including bibliographies of his work and secondary works about his writing). *See* RASMUSSEN, *supra*. If I were to label Habermas's political theory, I would call it "liberal communitarianism." *See* EZEKIEL J. EMANUEL, THE ENDS OF HUMAN LIFE 155-177 (1991) (description of liberal communitarianism).

2. SEYLA BENHABIB & FRED DALLMAYER, THE COMMUNICATIVE ETHICS CONTROVERSY 3 (1990).

achieve a fully rational consensus[3] about normatively right laws that are in everyone's best interests.[4]

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.[5]

Discourse ethics "must be a fully public communicative process unconstrained by political or economic force."[6] When the stringent conditions of discourse ethics are operative, participants in political debate achieve a universalistic[7] 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-

3. Habermas does not pit rational analysis and deeply felt emotions against each other. A fully rational consensus is one in which participants in debate reach political agreement after reflectively considering whether a proposed norm (procedural or substantive) is normatively right, instrumentally rational and psychologically acceptable. According to discourse ethics, agreements are based upon the best reasoned argument rather than upon the best deal a self-interested negotiator can make.

4. *See* Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning "Stage 6,"* 21 PHIL. F. 32, 46-51 (1989-90).

5. Jean Cohen, *Discourse Ethics and Civil Society*, 14 PHIL. & SOC. CRITICISM 315, 316 (1988).

6. *Id.*

7. Seyla Benhabib writes that "universalizability is defined as an intersubjective procedure of argumentation geared to attain communicative agreement." Seyla Benhabib, *In the Shadow of Aristotle and Hegel: Communicative Ethics and Current Controversies in Practical Philosophy*, 21 PHIL. F. 1, 6 (1989-90).

ulations that deny them information relevant to their well-being. Section II examines *Rust v. Sullivan*,[8] which upheld the validity of an agency rule that destroys the honest relationship between women and their health care providers.

Section III canvasses 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.[9] 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.

8. 111 S. Ct. 1759 (1991).

9. *Concededly, Habermas's work describing links between law and morality is somewhat* sketchy and needs to be developed more completely and more successfully. *See* JÜRGEN HABERMAS, *Law and Morality*, *in* 8 THE TANNER LECTURES ON HUMAN VALUES 219 (Sterling N. McMurrin ed. & Kenneth Baynes trans., 1988).

II. A CRITICAL EXAMINATION OF *Rust v. Sullivan*

A. *Overview of the So-Called Gag Rule Regulations*

Rust v. Sullivan[10] upheld the facial validity of regulations promulgated in 1988 by the Secretary of Health and Human Services (the "Secretary") pursuant to Title X of the Public Health Service Act.[11]

> Under the regulations, a physician discussing family planning matters with his patient is prohibited in virtually all instances from discussing abortion. For example, if a woman at a Title X clinic asks her physician for information about abortion, the physician, in most circumstances cannot tell the woman anything other than that the clinic does not believe in abortion [as a method of family planning] and therefore does not talk about it.[12]

Furthermore, "the physician is required to make referrals from a censored referral list."[13] Although women currently have a constitutionally recognized abortion option,[14] Title X physicians are required to withhold this information.

"Family planning," as used in the regulations, refers to 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."[15] The regulations "pose a choice to family planning clinics: Either take the federal funding and do not discuss abortion (as a method of family planning), or discuss abortion (as a method of family planning) but forfeit federal funding."[16] Although the relevant details of the regulations are reproduced in the appendix to this article, "[t]he bottom line is that a practitioner in a Title X-funded clinic is prevented from saying anything to a pregnant wo-

10. 111 S. Ct. at 1759. This article refers only to *Rust*; however, my commentary and the Court's holding and opinion apply as well to the companion case of New York v. Sullivan, 111 S. Ct. 1759 (1991).

11. *See* Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1508 (codified as amended at 42 U.S.C. § 300 a-b (1982)).

12. Planned Parenthood Fed'n of Am. v. Bowen, 680 F. Supp. 1465, 1477 (D. Colo. 1988), *aff'd sub nom.*, Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991).

13. *Id.* at 1476.

14. *See* Roe v. Wade, 410 U.S. 113 (1973).

15. 42 C.F.R. § 59.2 (1990).

16. *See* Carole I. Chervin, Note, *The Title X Family Planning Gag Rule; Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 402 (1989).

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 as invalid as 'direct' burdens on those same rights, such as the threat of criminal punishment.[98] 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).[99] 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 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 counseling. The Court, contrary to the principles of discourse ethics, imposed the administration's politically inspired vision of morality on women whose own judgmental capacity — concerning what reproductive choices are morally right — is deemed untrustworthy.

tive Rights in a Positive State, 132 U. PA. L. REV. 1293 (1984); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

97. Sullivan, *supra* note 92, at 1413.

98. *Id.* at 1419.

99. *Id.* at 1491.

100. *Id.* at 1428-56.

101. *Id.* at 1456-76.

102. *Id.* at 1476-89.

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 364-65 (1981).

104. 111 S. Ct. 1759 (1991).

C. *The Paradigms of Positivism and Communicative Action Compared*

1. Positivism and *Rust v. Sullivan*

The Justices in *Rust v. Sullivan* did not question the paradigm of legalistic positivism that restricts their world view. The positivists believe that factual statements can be ontologically separated from non-factual statements or generalizations.[105] Positivism is unduly influenced by science, and the validity of science is deemed independent of any moral principles. Indeed, things and events in the world are viewed by instrumentally rational scientists as potentially manipulable objects.

How does a positivist conceptualize law and the legal system?[106] For an old-fashioned arch-positivist, laws are the sovereign's commands issued by one or more habitually obeyed persons who do not render habitual obedience to anyone.[107] This Austinian definition is now discredited. Contemporary positivists now explain that general commands (e.g., legislation) become binding if, but only if, the community (including judges authorized to discern the law) accepts the commands as authoritative and recognizes them as valid merely because they have been duly enacted according to existing procedures and rules.[108]

Under a regime of positivism, judges should not evaluate laws according to universally valid norms of morality. Although the Secretary's gag rule can easily be validated in a regime of positivism, it is clearly incompatible with the principles of discourse ethics. Con-

105. 2 JEFFREY C. ALEXANDER, THEORETICAL LOGIC IN SOCIOLOGY. THE ANTINOMIES OF CLASSICAL THOUGHT: MARX AND DURKHEIM xviii (1982).

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 *philosophes*. The apparent scientific successes of the industrial revolution created the hope that scientific methods could be successfully employed in ethics, religion, politics, and law. 6 THE ENCYCLOPEDIA OF PHILOSOPHY 414 (1967).

107. JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 5 (2d ed. 1980).

108. *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17-46 (1967).

ince of experts in disciplines such as social theory, political philosophy, or ethics.[116] The former United States Solicitor General took a positivistic position when he insisted that law is "a rather technical subject, somewhat cut off from its ethical, philosophical, and other heady roots. . . ."[117]

For most positivists, there are no legal principles that transcend the legal system.[118] 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,"[119] but laws in force, according to positivism, depend on the decisions of persons authorized by power-conferring rules.[120] Moreover, "propositions that characterize conduct as right or wrong"[121] are not always relevant because positivists claim that "not all legal standards are grounded in morality."[122]

According to Habermas, "one cannot underestimate the extent to which the positivistic *temper* pervade[s] and dominate[s] intellectual and cultural life."[123] Positivism condones the bureaucratization of "most of the areas of everyday life."[124] Statists in power manage the political system's economic problems (scarcities, inequalities, insecurities, crises, etc.).[125] 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.[126]

Subsystems that are instrumental in steering society[127] become

116. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 357 (1980).

117. Fried, *supra* note 71, at 332-33.

118. RAZ, *supra* note 107, at 209 n.2.

119. *Id.* at 212.

120. 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.

121. EISENBERG, *supra* note 87, at 14.

122. *Id.* at 76.

123. HABERMAS AND MODERNITY, *supra* note 1, at 4-5.

124. HABERMAS, *supra* note 103, at 311 (quoting T. Luckerman, *Zwänge und Freiheiten im Wandel der Gesellschaftsstruktur*, 3 *Neve Anthropologie* 190 (H. 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 Held, *Crisis Tendencies, Legitimation and the State*, *in* HABERMAS: CRITICAL DEBATES 181 (John B. Thompson & David Held eds., 1982).

peculiarly indifferent to the individuals whom they affect. This dehumanizing process of legal regulation and bureaucratization[128] 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.[129] 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 by no means a painless process; its price is the destruction of traditional forms of life."[130] 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.[131]

Nevertheless, contemporary positivists condone the dominance of purposive or instrumental rationality,[132] which, according to Max Weber,[133] leads to "the creation of an 'iron cage' of bureaucratic rationality from which there is no escape."[134] 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.

128. HABERMAS, *supra* note 103, at 307-09.

129. For a discussion and definition of "lifeworld," see *infra* notes 151-159 and accompanying text.

130. HABERMAS, *supra* note 103, at 321.

131. *Id.*

132. HABERMAS AND MODERNITY, *supra* note 1, at 5. When individuals think instrumentally and do not think normatively or empathetically, they become incapable of "offering critical perspectives on social development." DOUGLAS KELLNER, CRITICAL THEORY, MARXISM AND MODERNITY 96 (1989).

133. In his examination of the aggressively opportunistic spirit of capitalism, Weber noted how the combination of increasingly complex social subsystems and the need for instrumental rationality accelerated the growth of public and private bureaucracies. *See, e.g.*, MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM I(e) (Talcott Parsons trans., 1958).

134. HABERMAS AND MODERNITY *supra* note 1, at 5.

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[135] 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."[136]

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."[137] 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 contending 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.

135. "[P]urposive-rational action . . . refers to actions or systems of action in which elements of rational decision and instrumentally efficient implementation of technical knowledge predominate." McCarthy, *supra* note 74, at 29.

136. Raymond Geuss, The Idea of a Critical Theory: Habermas and the Frankfurt School 60 (1981).

137. *Waldheim Won't Seek Re-election*, Richmond Times-Dispatch, June 22, 1991, at A-4, col. 6.

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.[138] 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.[139] This Leviathan is often the source of personal problems and rarely helps people solve "problems of mutual understanding."[140]

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 implementing 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 unintelligible. The United States, like other nations, has been unable to control abuses of power by agencies.

Habermas's " 'classic' texts in social theory"[141] describe how the steering systems that colonize the lifeworld disable society from "exercis[ing] an influence over itself by the neutral means of politi-

138. Geuss, *supra* note 136, at 61.

139. Jürgen Habermas, The Philosophical Discourse of Modernity 361 (Fredrick Lawrence trans., 1987).

140. *See id.* at 363.

141. Fred R. Dallmayr, Critical Encounters: Between Philosophy and Politics 73 (1987).

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 unless there are compelling countervailing reasons requiring centralized control.

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 interests 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 in 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.[288]

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 atheoretical 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.[290]

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."[291] 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 Court's opinion, which is insensitive to the interests of women. The opinion is devoid of moral reasoning and therefore lacks the "legitimating force [that results] from an alliance between law and morality."[292] Under progressive standards of democracy, the regulations upheld in *Rust* were inadequately "exposed to discursive testing" for validity.[293] Discursive testing asks the question, "Is the [regulation] fair to others as well as myself, when I take into account everyone's

289. Dana Priest, Competitiveness Council Suspected of Unduly Influencing Regulators, Wash. Post, Nov. 18, 1991, at A19, col. 1.

290. Allan C. Hutchinson, *Mice Under a Chair: Democracy, Courts, and the Administrative State*, 40 U. Toronto L.J. 374, 378 (1990).

291. Benjamin R. Barber, Strong Democracy & Participatory Politics for a New Age 238-39 (1984).

292. Jürgen Habermas, *Law and Morality in* 8 The Tanner Lectures on Human Values 217, 219 (S. McMurrin ed. & K. Baynes trans. 1988).

293. *Id.* at 227.

basic interests (generally described) and give them equal weight with my own?"[294] 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."[295] *Rust v. Sullivan* is a shameful case ruling because it uncritically endorses undemocratic rulemaking procedures that resulted in regulations abridging freedom of speech.[296]

APPENDIX A

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

§ 59.2 [Amended]

. . . .

"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. . . . Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the

294. Lawrence Kohlberg et al., *The Return of Stage 6: Its Principle and Moral Point of View*, *in* THE MORAL DOMAIN 151, 167 (Thomas E. Wren ed., 1990) (quoting Paul W. Taylor, *On Taking the Moral Point of View*, *in* 3 MIDWEST STUDIES IN PHILOSOPHIES 35, 51 (Peter A. French, et. al., 1978)).

295. *See* ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, STEVEN M. TIPTON, THE GOOD SOCIETY 291 (1991) (discussing Habermas's works).

296. On November 19, 1991, the House of Representatives unsuccessfully attempted to override President Bush's veto of a bill that would have nullified the gag rule upheld by the Supreme Court. Many members of Congress explained that the gag rule does not violate freedom of speech. Rust v. Sullivan was cited numerous times by politicians using the Court's imprimatur for partisan purposes. Unfortunately, the Court's reasoning in *Rust* has allowed the President to override the will of Congress. Unlike the Court, the majority of American people realize that the gag rule violates the First Amendment, but the system once again has failed to function properly and the poorest people continue to be poorly served.

incidence of abortion. . . .

"Title X" means Title X of the Act, 42 U.S.C. 300, *et seq.*

"Title X program" and *"Title X project"* are used interchangeably and mean the identified program which is approved by the Secretary for support under . . . the Act. . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

§ 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 § 59.8 and § 59.10 of these regulations