

HABERMAS

## BOOK REVIEW

### LAW AS DISCOURSE: BRIDGING THE GAP BETWEEN DEMOCRACY AND RIGHTS

BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY. By Jürgen Habermas.<sup>1</sup> Cambridge: MIT Press. 1995 (trans. William Rehg).

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In complex pluralist and multicultural societies, successful social integration depends increasingly on law's predictability and on its justice. With the ever greater functional differentiation typical of contemporary societies, however, these two requirements seem more and more incompatible. On the one hand, law's predictability depends on the systematic reduction of complexity to stabilize expectations.<sup>3</sup> On the other hand, justice becomes more complex. Regulation through law becomes more encompassing, calling for more finely tuned calibrations between relevant equalities and inequalities. Legal norms also become more contested as normatively integrated, prevailing communal conceptions of religion, morals, and law give way to a disparate plurality of antagonistic visions.<sup>4</sup> Competition among conflicting visions of justice and conceptions of the good, moreover, sets up an antinomy between process and substance. Indeed, in the face of disagreement over substantive justice and the common good, process-oriented decisionmaking becomes eminently desirable. But as deeply rooted concerns over the "tyranny of the majority"<sup>5</sup> and the difficulties of achieving procedural justice independently of substantive justice evidence,<sup>6</sup> exclusively relying on process and procedure is unlikely to

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<sup>3</sup> See NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW 77-78 (Martin Albrow ed. & Elizabeth King & Martin Albrow trans., Routledge & Kegan Paul 1985) (1972); NIKLAS LUHMANN, ESSAYS ON SELF-REFERENCE 14-15, 232-33 (1990); Niklas Luhmann, *The Unity of the Legal System*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 12, 19-20, 27 (Gunther Teubner ed., 1988); see also Michel Rosenfeld, *Autopoiesis and Justice*, 13 CARDOZO L. REV. 1681, 1701-02 (1992) (arguing that the law legitimates and stabilizes people's expectations).

<sup>4</sup> See Rosenfeld, *supra* note 3, at 1682.

<sup>5</sup> See, e.g., THE FEDERALIST NO. 51 (James Madison).

<sup>6</sup> A prime example of these difficulties is the long and tortuous relationship between "procedural due process" and "substantive due process" in the context of the Due Process Clause of the

lead to justice or legitimacy. Hence, there is a need for substantive antimajoritarian rights that rest on contestable normative foundations and the apparently insoluble conflict between democracy and rights which is so familiar to American constitutionalists.<sup>7</sup>

There have been several creative attempts to deal with the antinomies between law's predictability and its justice and between democracy and rights.<sup>8</sup> But none of these attempts matches in either breadth of scope or ambition of the discourse theory of law that Jürgen Habermas develops in *Between Facts and Norms*. Habermas elaborates both a sociological theory of law and a philosophical theory of justice. These combine into a powerful framework in which to forge promising new paths toward the reconciliation of law and justice, and of rights and democracy. Habermas's book is a monumental achievement at once reminiscent, by virtue of its systematic and comprehensive nature, of Max Weber's sociology of law<sup>9</sup> and of Hegel's philosophy of law.<sup>10</sup> Moreover, through his reconstructive approach that places law at the center of a web that links morals, law, and politics, Habermas substantially perfects and completes the Kantian project undertaken by John Rawls in *A Theory of Justice*.<sup>11</sup>

*Between Facts and Norms* is a seminal work that provides a systematic account of major issues in contemporary jurisprudence, constitutional theory, political and social philosophy, and the theory of democracy. It is hardly surprising, therefore, that Habermas's book raises as many questions as it answers. The book will remain at the center of fruitful intellectual debate for the foreseeable future. It is, of course, beyond the scope of this Review to do justice to every facet of Habermas's contribution. This Review concentrates, therefore, on the broad outlines of Habermas's discourse theory of law and assesses it in terms of contemporary American debates in jurisprudence and constitutional theory.

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Fourteenth Amendment to the U.S. Constitution. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Lochner v. New York*, 198 U.S. 45, 53-54 (1905).

<sup>7</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

<sup>8</sup> The most notable contributions in the context of American constitutional theory include: 1 BRUCE ACKERMAN, *WE THE PEOPLE*, at 11-13 (1991); RONALD DWORKIN, *LAW'S EMPIRE* 370 n.11 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 84-86 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*]; JOHN HART ELY, *DEMOCRACY AND DISTRUST* 84 (1980); Frank I. Michelman, *The Supreme Court, 1985 Term - Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 15 (1986) [hereinafter Michelman, *Foreword*]; Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1493-94 (1988) [hereinafter Michelman, *Law's Republic*]. Among German contributions, Niklas Luhmann's theory of law as an autopoietic system should be singled out. See sources cited *supra* note 3.

<sup>9</sup> See MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Clause Wittich eds. & Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1956).

<sup>10</sup> See GEORG F. HEGEL, *PHILOSOPHY OF RIGHT* (T. M. Knox trans., 1967).

<sup>11</sup> JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

Part I of this Review places Habermas's discourse theory of law in the context of contemporary legal, moral, and political philosophy and discusses some of its salient features. Part II focuses on the proceduralist paradigm of law which Habermas extracts from his discourse theory and investigates how this paradigm is supposed to bridge the gap between democracy and rights. Part III takes a critical look at how discourse theory envisions the relationship between law, morals, and politics in the context of Habermas's proceduralist paradigm of law. Finally, Part IV assesses the role reserved for judicial review in a constitutional democracy under Habermas's proceduralist paradigm and contrasts Habermas's views with those of leading proponents in the American debate on constitutional adjudication.

#### I. THE DISCOURSE PRINCIPLE, CRITICAL THEORY, AND REFLECTIVE EQUILIBRIUM

With the breakdown of the inner bonds among religion, ethics,<sup>12</sup> and law characteristic of pluralist societies, it becomes difficult to understand what makes law legitimate. At the same time, precisely because no commonly shared religious or ethical norms can hold the pluralist polity together, law assumes the brunt of that task. Thus, law furnishes the normative framework that regulates interaction among citizens who relate to each other as strangers. In these circumstances, law is obeyed in part because of sanctions, but also because many citizens find it normatively justified (I, pp. 10, 50-51).<sup>13</sup> As Habermas notes, legal sanctions have, on the one hand, taken the place of religion and ethics when it comes to backing the law (I, pp. 33-38). On the other hand, sanctions alone cannot sustain a contemporary legal regime without widespread belief in the legitimacy of the law. The key inquiry, therefore, is to determine the source of legitimacy of both contemporary law and the legal sanctions on which it relies.

In line with a commitment to democracy, the most appealing answer to the last inquiry would be that the legitimacy of both law and sanctions derives from the fact that they are ultimately self-imposed. Empirical inquiry, however, does not clearly or consistently bear this out. On the other hand, reconstructive theory, proceeding with the aid

<sup>12</sup> Throughout this Review, for the sake of clarity, I adopt Habermas's definition of morality (*Moralität*) and ethics (*Sittlichkeit*), although these definitions, steeped in Kantian and Hegelian philosophy, run somewhat counter to the common understanding of these terms in English. For Habermas, "morality" encompasses universally applicable norms of justice and universally valid rights and duties that transcend all different conceptions of the good. "Ethics," on the other hand, refers to the mores, prudential maxims, and normative standards of a historically grounded community with its own conception of the good. See Thomas McCarthy, *Introduction* to JURGEN HABERMAS, *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION* at vii (Christian Lenhardt & Shierry W. Nicholsen trans., 1990) (1983).

<sup>13</sup> For a similar view, see H.L.A. HART, *THE CONCEPT OF LAW* 197 (1961).

of counterfactuals,<sup>14</sup> could fill the gaps left open by empirical inquiry, and provide a coherent and systematic picture of a democratic society in which law and legal sanctions are truly self-imposed. To draw this picture, reconstructive theory, starting from existing intuitions, institutions, and practices, would have to supplement and organize them into a coherent whole with the help of counterfactual devices.<sup>15</sup>

The use of counterfactuals serves to demarcate a gap between the reconstructed picture and the prevailing practices. That gap, in turn, provides a space for either a critique or a vindication of the status quo. For example, the image of a pristine market economy with evenly matched competitors, perfect information, and no transaction costs is a counterfactual, which can either be used to critique existing markets as self-legitimizing mechanisms or to support such real-life markets because of their greater proximity to the relevant counterfactual than to any plausible alternative. Accordingly, reconstructive theory can either turn into critical theory or into a means to reach a "reflective equilibrium" that amounts to a considered and systematic vindication of the status quo.<sup>16</sup> As we shall see, moreover, Habermas's reconstructive theory of law alternates between a critical theory and a means to reach a reflective equilibrium, but its persuasive force stems mainly from its critical bite.<sup>17</sup>

Habermas's reconstructive theory of law begins with a search for counterfactual devices that permit one to depict the dictates of contemporary law as genuinely self-imposed. Furthermore, inasmuch as contemporary legal relationships are between persons who do not share a common conception of the good, acceptance of law as legitimately self-imposed depends on counterfactuals that are impartial between competing conceptions of the good. With this in mind, Habermas considers, then rejects as inadequate, social contract theory and Kantian morality as counterfactual constructs (Post., p. 4). Nonetheless, Habermas's discourse theory remains rooted in these two theo-

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<sup>14</sup> See R. S. Walters, *Contrary-to-Fact Conditional*, in THE ENCYCLOPEDIA OF PHILOSOPHY 212 (Paul Edwards et al. eds., 1967).

<sup>15</sup> Examples of such counterfactual constructs include Hobbes's and Rousseau's social contract, Kant's moral universe in which individuals relate to each other exclusively as ends in themselves rather than as means, and Rawls's hypothetical social contract concluded behind a veil of ignorance.

<sup>16</sup> This characterization of "reflective equilibrium" is not entirely consistent with Rawls's usage of the term. It is nevertheless consistent with the view, expressed by Habermas, among others, that Rawls's principles of justice, notwithstanding their universalist aspirations, are primarily geared to legitimate a kind of welfare liberalism prevalent in the United States during the 1960s (II, pp. 22-24). For a more extended and highly illuminating discussion of counterfactuals, critical theory and reflective equilibrium in the context of Habermas's work, see Michael K. Power, *Habermas and the Counterfactual Imagination*, 17 CARDOZO L. REV. (forthcoming Oct. 1995).

<sup>17</sup> See *infra* Part III, and especially p. 1183.

ries, incorporating and further developing their most attractive features, while restructuring or dropping their most objectionable ones.

Hobbesian theory relies upon the contractual device for the counterfactual.<sup>18</sup> At the root of Hobbesian contractarianism is the contract of association among all members of society. The conflicting wills of the individual members are harmonized through the common will that emerges in the joint contract. That common will transcends the individual wills but is voluntarily subscribed to by all of the members. Accordingly, the Hobbesian contract is not subservient to the will of any particular subset of social contractors.

Habermas objects, however, to Hobbesian contractarianism, because it depends on the morally arbitrary will of individual contractors (Post., pp. 3-4).<sup>19</sup> Kantian morality could counter this objection and overcome the problem of moral arbitrariness while maintaining that universally applicable moral norms are self-imposed. In Kantian morality, every autonomous individual freely assumes the duties flowing from universally encompassing categorical imperatives deduced from the premise that individuals should treat each other as ends in themselves.<sup>20</sup> The realm of universal rights and duties transcends all parochial conceptions of the good, thus yielding a counterfactual construct that incorporates universal morality, self-imposed normative duties, and impartiality toward competing conceptions of the good.

Notwithstanding Kant's success in filling the moral gap of Hobbesian contractarianism, Habermas refuses to settle on a Kantian construct for two principal reasons.<sup>21</sup> First, Kant's theory is predicated on a dichotomy that sunders the realm of morals, free will, and duty from that of inclinations, subjective interests, and socio-political institutions.<sup>22</sup> Second, Kant's approach is monological rather than inter-subjective, with each individual solipsistically deriving his or her moral duties on the basis of solitary reflection.<sup>23</sup> As a consequence of that schism, universal morality ~~that transcends~~ competing conceptions

<sup>18</sup> For an extended discussion of Hobbes' social contract theory, see Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 849, 852-54, 858-59, 864-85 (1985).

<sup>19</sup> The Hobbesian contract is shaped by the clash among the individual wills of social contractors who are motivated by contingent and egotistical desires untempered by any commonly rooted ethic. For a more extended discussion of this point, see Michel Rosenfeld, *Can Rights, Democracy and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas' Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. (forthcoming Oct. 1995).

<sup>20</sup> See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 53-54 (Robert P. Wolff ed. & Lewis W. Beck trans., 1969).

<sup>21</sup> For a succinct discussion of the main differences between Habermas's discourse ethics and Kant's moral theory, see JURGEN HABERMAS, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION*, *supra* note 12, at 195, 203-04.

<sup>22</sup> See *id.* at 203.

<sup>23</sup> See *id.*

of the good becomes impotent in dealing with the socio-political realm of legal relationships.

Rawls's hypothetical social contract, concluded behind a veil of ignorance, imports Kantian moralism into the contractarian tradition but is also ultimately found wanting by Habermas.<sup>24</sup> Although Rawls's social contractarian counterfactual seemingly relies on an inter-subjective process, it proves to be at bottom monological. The veil of ignorance, which supposedly sets aside arbitrary elements in the will of the contractors, in fact neutralizes differences among contractors so that each acting alone would opt for the same principles of justice. Moreover, by establishing equality among contractors at such a high level of abstraction, Rawls unwittingly privileges certain perspectives over others, thus failing to remain impartial among competing conceptions of the good.<sup>25</sup>

Habermas's discourse theory purports to overcome the shortcomings of Hobbesian, Kantian, and Rawlsian theory by providing a counterfactual construct that is both dialogic and consistent with the moral point of view. Habermas's counterfactual requires a move from contract to consensus, coupled with a process-based conception of argumentation that revolves around the key distinction between strategic action and communicative action.

Actors who come together with a view to finding ways to promote social cooperation usually undertake this endeavor from the standpoint of strategic action.<sup>26</sup> Guided by their own self-interest, such actors approach their interlocutors as potential instrumentalities in the pursuit of their own objectives. Moreover, in the context of inequalities in bargaining power, information, and rhetorical skills, contractual agreements between strategic actors would likely not be in the *equal* interest of all contractors or even in the interests of the group as a whole.

In communicative action, on the other hand, actors are oriented toward reaching a common understanding rather than achieving personal success.<sup>27</sup> The model for communicative action is that of an ide-

<sup>24</sup> See JURGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION*, *supra* note 12, at 43, 67.

<sup>25</sup> For an extended discussion of these shortcomings of Rawls's contractarianism, see MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 233-37 (1991).

<sup>26</sup> As Habermas states, in strategic action "the actors are interested solely in the *success*, i.e., the *consequences or outcomes*[,] of their actions, [and] they will try to reach their objectives by influencing their opponent's definition of the situation, and thus his decisions or motives, through external means by using weapons or goods, threats or enticements." JURGEN HABERMAS, *Moral Consciousness and Communicative Action*, in *MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION*, *supra* note 12, at 116, 133.

<sup>27</sup> For a comprehensive discussion of communicative action, see 1 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 273-337 (Thomas McCarthy trans., 1984) (1981) [hereinafter 1 HABERMAS] and 2 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION passim* (Thomas McCarthy trans., 1987) (1981) [hereinafter 2 HABERMAS].

alized community of scientists gathered together to ascertain the truth of a scientific hypothesis. In such a community, discussion would be circumscribed by a set of normative constraints, such as the need to afford each participant an equal opportunity to present arguments and the commitment to be persuaded only by the force of the argument that better comports with scientific norms of rationality. Similarly, in discussions concerning legal or moral norms, communicative action envisions a dialogue between actors who are oriented toward reaching an understanding concerning the *rightness* of the norms under consideration.<sup>28</sup> Here again, Habermas argues that the very agreement to engage in communicative action implies a voluntary submission to certain normative constraints embedded in the discursive practice itself.<sup>29</sup> Thus, given an equal opportunity to present arguments and a genuine commitment to being persuaded only by the force of the better argument in a rational discussion, actors engaged in communicative action would only accept as legitimate those action norms upon which all those possibly affected would agree *together* to embrace on the basis of good reasons (III, pp. 28, 34, 51).

Habermas's discourse principle requires the settlement of contested normative claims through communicative action and thus provides a procedural criterion of normative validity (Post., pp. 16-17). The discourse principle accordingly requires mutual recognition among all communicative actors, as well as consideration of all interests, as preconditions to the reaching of a consensus on action norms that are in the equal interests of all those affected. Consistent with this, the discourse principle does not predetermine which laws are valid but rather affords a counterfactual (idealized) means to test whether the laws would command the consensus of all those possibly affected.

Democratically enacted law is likely to be, at least in part, the product of strategically oriented debates and of the privileging of certain competing interests above others. Thus, Habermas's discourse principle is a promising vehicle for a critical reconstructive theory of the legitimacy of law. On the other hand, the discourse principle is also an apt instrument for the construction of a reflective equilibrium. This is the case if one can plausibly argue that, notwithstanding the actual contingencies surrounding the enactment of a particular law, such a law — if it has legitimacy — would have obtained the consensus of all those possibly affected had they jointly engaged in communicative action.

Habermas's discourse theory of law has roots in both the social contract and Kantian traditions. It is, in addition, a reconstructive theory, yielding a critical standard as well as the means to elaborate a

<sup>28</sup> See I HABERMAS, *supra* note 27, at 307.

<sup>29</sup> See JURGEN HABERMAS, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 12, at 43, 86-93.

"reflective equilibrium."<sup>30</sup> By relying on communicative rather than strategic action, Habermas's discourse principle overcomes the moral arbitrariness of Hobbesian contractarianism. Furthermore, as the discourse principle involves an inter-subjective process of deliberation culminating in a joint collective resolution, it overcomes the solipsism of both Kantian moral theory and Rawlsian hypothetical contractarianism.<sup>31</sup> Finally, Habermas's discourse principle does not privilege certain perspectives over others in the way that Rawls's hypothetical social contract does. Unlike Rawls's contractors who know virtually nothing about their differences, Habermas's communicative actors are fully aware of theirs. What is more, Habermas stipulates that communicative action requires a complete reversal of perspectives — that is, every claim must be considered from all the relevant perspectives involved prior to its resolution<sup>32</sup> — thus making room for empathy in the dialogical process designed to establish normative validity.

## II. DEMOCRACY, RIGHTS, AND THE PROCEDURALIST PARADIGM OF LAW

As filtered through the discourse principle, legitimate contemporary law must emerge for all free and equal legal actors as both self-imposed and binding.<sup>33</sup> This construct of legitimate law, however, contradicts accepted wisdom on the subject.<sup>34</sup> Even if all legal actors could influence democratic lawmaking, the resultant laws are unlikely to be in the equal interests of all those affected. In the absence of anti-majoritarian constraints, democratically enacted laws can be oppressive and their enforcement prone to perpetuate officially sanctioned violence against disfavored legislative minorities. To mitigate

<sup>30</sup> See the discussion of this term above, at note 16. For a more comprehensive discussion of the notion of "reflective equilibrium," see RAWLS, *supra* note 11, at 48-51.

<sup>31</sup> As Habermas states in the context of the validation of moral norms, from the standpoint of discourse ethics, "the categorical imperative needs to be reformulated as follows: 'Rather than ascribing as valid to all others any maxim that I can will to be a universal law, I must submit my maxim to all others for purposes of discursively testing its claim to universality. The emphasis shifts from what each can will without contradiction to be a general law, to what all can will in agreement to be a universal norm.'" Jürgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 12, at 67 (citation omitted).

<sup>32</sup> See McCarthy, *supra* note 12, at viii-ix ("Habermas's discourse model, by requiring that perspective-taking be general and reciprocal, builds the moment of empathy into the procedure of coming to a reasoned agreement: each must put him or herself in the place of everyone else in discussing whether a proposed norm is fair to all."). For a more extended discussion of the reversal of perspectives, see ROSENFELD, cited above in note 25, at 239-58, 262-73.

<sup>33</sup> Cf. David G. Carlson, *Liberal Philosophy's Troubled Relation to the Rule of Law*, 43 U. TORONTO L.J. 257, 284-88 (1993) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)) (describing Hegel's concept of self-legislation as the hallmark of autonomy).

<sup>34</sup> See ELY, *supra* note 8, at 152-70; Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 n.4, 740, 743 (1985).



these dangers, democratic law must be tempered by antimajoritarian rights, and hence engender the well-known tension between the majoritarian legislative will and anti-majoritarian constitutional rights.

Because Habermas's discourse principle trades in the realm of counterfactuals, that it does not comport with reality is not of itself a valid criticism. Nonetheless, one may still argue that counterfactuals predicated on the dichotomy between democracy and rights would better gauge the normative validity of contemporary law than would Habermas's discourse principle. Indeed, one could construct a coherent and systematic model of constitutional democracy driven by a clear division of labor between democracy and rights and use that model to critically appraise existing legal institutions.

Habermas's choice of counterfactual construct, however, is by no means arbitrary. The construct reflects changes in the perception of the relationship between law and social reality as reflected in different, successive paradigms of law. As conceived by Habermas, a paradigm of law constructs an image of contemporary society and explains how constitutional democracy and basic rights fit into that image (V, pp. 1-2). Furthermore, Habermas asserts that there are two competing paradigms which, to date, have most successfully represented the place and role of law in the modern world: the liberal-bourgeois paradigm and the social-welfare paradigm (V, p. 2). But Habermas claims that it is time for a new, proceduralist paradigm of law, which amply justifies the discourse principle as the counterfactual construct of choice.

Consistent with Habermas's approach, any theory of the validity of law in the modern world must incorporate certain normative and sociological features. First, all those who come within the sweep of modern law should recognize each other as free and equal persons endowed with inherent dignity (IX, pp. 37-38). Consistent with this, justice requires that legal equality — similar treatment of similar cases — should be reconciled with factual equality — consideration of only relevant identities and relevant differences in lawmaking (IX, pp. 38-44, 72).<sup>35</sup> In other words, in calling for a reconciliation between

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<sup>35</sup> To a significant extent, Habermas's requirement of a reconciliation of legal and factual equality seems to mirror the constitutional constraints imposed by the Due Process and the Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. Indeed, as interpreted by the Supreme Court, due process and equal protection mandate that similar cases be treated similarly, *see, e.g.,* *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (holding unconstitutional an ethnically discriminatory application of a generally phrased municipal ordinance), and that statutory classifications be based on identities and differences that bear at least a rational relationship to a legitimate state legislative objective, *see, e.g.,* *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-91 (1955) (holding that due process and equal protection are satisfied by showing a rational relationship between legislative means and ends).

legal and factual equality, Habermas stresses that all are equal under the law and that laws should treat all as equals.<sup>36</sup>

Second, Habermas conceives of law functionally, as filling gaps "in social orders whose integrative capacities are overtaxed" (II, p. 1). In our increasingly complex societies, the common cultural traditions, beliefs, practices, and normative assumptions, which emerge from what Habermas calls the "lifeworld" of a historically situated social group,<sup>37</sup> can no longer furnish comprehensive normative justification for all the different existing modes of social interaction. At the same time, such interactions are increasingly mediated through largely autonomous systems, like the market economy and the administrative bureaucracy of the state, which largely escape control by the social actors who depend on them. Thus, whereas the normatively rich lifeworld becomes ever more impotent, normatively poor and largely self-referential systems encroach upon greater expanses of social space. Under these circumstances, Habermas maintains that law is the only legitimate means for society-wide normative integration, a "hinge between system and lifeworld" (II, p. 19).

Habermas's conception of the relationship between system and lifeworld and of the role of law in that relationship is a complex and evolving one.<sup>38</sup> The key task for the sociologist is to identify what holds together a social universe defined by a seemingly unbridgeable gap between a lifeworld that no longer provides the normative glue necessary for society-wide solidarity, and largely independent systems like the economy, which operate behind the backs of the relevant social actors and which often seem completely impervious to external normative regulation. In working through this problem, Habermas rejects radical solutions that entail eliminating or greatly downplaying one of the two poles of the divide between system and lifeworld. Specifically, Habermas rejects Luhmann's autopoietic systems approach, which regards law, economics, politics, and morals as differentiated, self-enclosed, and self-referential sub-systems that operate independently of each other in an increasingly fragmented and compartmentalized world.<sup>39</sup> On the other hand, Habermas also rejects the notion that in the modern state, the economy or the state's bureaucracy could

<sup>36</sup> Cf. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 8, at 227 (distinguishing between equal treatment — to each the same thing — and treating persons as equals — as possessors of the same inherent worth and dignity).

<sup>37</sup> In the broadest terms, for Habermas the "lifeworld" of a given society at a given time in history is the sum of commonly shared assumptions, beliefs, customs, and practices so deeply embedded that they remain unquestioned. The lifeworld thus provides a massive background consensus against which normative questions arise (I, p. 28). For a thorough discussion of Habermas's conception of the lifeworld, see 2 HABERMAS, *supra* note 27, at 119-52.

<sup>38</sup> See Thomas McCarthy, *Legitimacy and Diversity: Dialectical Reflections on Analytical Distinctions*, 17 CARDOZO L. REV. (forthcoming Oct. 1995).

<sup>39</sup> For works presenting a more extended discussion of Luhmann's views, see sources cited above in note 3.

ultimately be co-opted to conform with some preordained set of externally generated commands. Habermas rejects both the idea that the economy and other systems make external normative concerns superfluous and the idea that modern societies could successfully institute anything resembling a fully planned economy.

Assuming that systems, like the economy, require law to function and that the normative gap left by the lifeworld can be filled through communicative action, Habermas charts a middle course, using law as the bridge between system and lifeworld. From the standpoint of a system such as the economy, law is indispensable not as an external constraint, but as a structural *sine qua non* of the system. Thus, without property, contract, or criminal laws penalizing interference with property and contract rights, there could be no large-scale functioning market economy. The law of supply and demand and the process of monetization may be the motors of the economic marketplace, but without law such an economy could not become socially institutionalized. Looking at the whole, however, law can simultaneously function as a structural pillar of, and as an external constraint on, a market economy. This latter function, moreover, is carried out not by interfering with the systemic functioning of economic markets, but by narrowing or broadening the domain of application left open to market forces.<sup>40</sup> Whereas Habermas does not indicate how far law may impinge on the domain of market transactions without trampling on the economic system itself, he assumes that at least at the edges, there is room for external normative constraints on systemic economic activity.

From the vantage point of the lifeworld, on the other hand, the failure of intra-communal ethical norms to extend to the extra-communal dealings among strangers calls for alternative sources of normative validation. Accordingly, Habermas proposes that legal norms deserving of society-wide approval supplement parochially rooted ethical norms to legitimate inter-subjective dealings among strangers. In other words, strangers, who do not share the deep bonds of common ethical roots, can still legitimately interact through the more extensive, though admittedly more superficial, links forged by consensually validated law (Post., pp. 2-3).

Consistent with the preceding observations, the appeal of a particular paradigm of law in Habermas's theory depends on its ability to reconcile legal and factual equality while bridging the gap that splits system and lifeworld in a way that secures and constrains systems and that concurrently supplements the output of the lifeworld. With this in

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<sup>40</sup> For example, a minimum wage law can be construed as imposing an external constraint on the market for labor and narrowing the range of freedom of contract with respect to that market. Although a minimum wage law may alter or distort market outcomes, labor contracts above the minimum wage would still be governed by systemic market dynamics conditioned on the economic laws of supply and demand.

mind, let us now briefly turn to the three paradigms of law discussed by Habermas.

The liberal-bourgeois paradigm promotes a formal conception of law and reduces justice to the equal distribution of rights. The paradigm's failure to deal with factual equality, however, does not mean that it is inadequate. Actually, the liberal-bourgeois paradigm may command genuine support so long as one believes that a free market economy necessarily produces (through "invisible hand" mechanisms) an adequate measure of factual equality. The liberal-bourgeois paradigm, moreover, draws a sharp line between the private realm of the bourgeois and the public realm of the citizen to which corresponds a fairly clear divide between the realm of rights and that of democratic participation. Furthermore, consistent with the liberal bourgeois paradigm, the activities of *homo economicus* are so sharply set apart from other inter-subjective endeavors that system and lifeworld can be sufficiently separated to obviate the need to bridge the gap between them.

Notwithstanding the economy of means achieved by the liberal-bourgeois paradigm through a clear splitting of rights from democracy and of system from lifeworld, Habermas finds that paradigm wanting. First, he points out that the formal law of property and contract prevalent during the nineteenth century has given way to more goal-driven alternatives (IX, pp. 22-24),<sup>41</sup> and second, by rejecting the "invisible hand" assumption, he finds that the bourgeois-liberal paradigm is ill-equipped to promote factual equality (IX, pp. 42-44).

The social-welfare paradigm, on the other hand, is geared to achieving factual equality and to levelling disproportionate inequalities in material conditions. But it must rely on the administrative state's massive and pervasive bureaucracy. In the administrative state, formal law is replaced by goal-oriented bureaucratic policies and regulations, and justice is reduced to distributive justice (IX, pp. 42-43). As Habermas sees it, however, the cost of factual equality under the social-welfare paradigm is too high, as material well-being can only be obtained by being reduced to becoming a "client[ ]" of the welfare state (IX, p. 24). Individuals thus exchange much of their autonomy and dignity for basic welfare entitlements. Basic decisions are left in the hands of experts, and increasing inequalities in the possession and use of information split the polity into ruling elites and administered masses (IX, pp. 24-27, 32-37, 39-43).

In contrast to the liberal-bourgeois paradigm it replaces, the social-welfare paradigm does not carve out any clear boundaries between the private and public realms, system and lifeworld, or rights and democracy. Moreover, in his search for an alternative paradigm, Habermas

<sup>41</sup> Compare in this connection the Anglo-American scholarship concerning the "death of contract." See, e.g., PATRICK S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 716-26 (1979); GRANT GILMORE, *THE DEATH OF CONTRACT* 87-103 (1974).

does not seek to return to the formalism or sharp dichotomies of the liberal-bourgeois paradigm. Actually, Habermas accepts the inevitability of the administrative state with its bureaucracy, large corporate organizations, and dominant mass media. What his alternative paradigm aims to accomplish is to explore how to restore personal autonomy and dignity without abandoning the quest for factual equality under the material conditions characteristic of the modern welfare state.

Habermas's proposed alternative, the proceduralist paradigm of law animated by the discourse principle, is, above all, elegantly simple. Starting from a picture of equal "consociates" under law as autonomous and as reciprocally recognizant of each other's dignity, Habermas postulates that these consociates would have to regard as legitimate any laws of which they were both the authors and the addressees (I, p. 50). In other words, if a law can be reconstructed through the discourse principle counterfactual as being genuinely self-imposed pursuant to a consensus among all those who come under its sweep, then any rational actor must acknowledge its normative validity. Consistent with this, Habermas's proceduralist paradigm does not predetermine the content of any legitimate law but merely lays down the procedural requirement that laws satisfy the discourse principle to establish their normative validity.

With the idea of legal consociates as both authors and addressees of valid law firmly in mind, the relationships between democracy and rights on the one hand, and law, system, and lifeworld on the other, neatly fall in place. Indeed, from this vantage point, rights and democracy become *internally* linked as the two fundamental pillars on which the entire enterprise rests (Post., p. 10). Without discursively redeemed rights, communicative actors could not sustain the level of reciprocal recognition that must go hand in hand with genuinely reached dialogical consensus. Yet, without popular democracy, not only would the basis for consensus be undermined, but mutual recognition would be curtailed, as not everyone's goals and aspirations could figure in the making of law and public policy.

Discursively redeemed law under the proceduralist paradigm also emerges as the hinge that both legitimates and holds together system and lifeworld (II, p. 19). To the extent that systems, such as the economy and the administrative bureaucracy, depend on law to function, discursive validation of such law casts these systems as if they were ultimately self-imposed, infusing them with a significant measure of legitimacy. Moreover, the process of legitimation is obviously reinforced through the constraints on systems imposed by discursively redeemed law. Discursively redeemed law, on the other hand, serves as a normative supplement to the lifeworld, and because of its consensual nature, is not prone to being inconsistent with the ethical norms em-

bedded in the lifeworld. Finally, by encompassing both system and lifeworld, discursively redeemed law provides a normative layer upon which all interactions among strangers can be grounded. And thus law furnishes points of connection between system and lifeworld.

The proceduralist paradigm of law also simply and elegantly reconciles legal and factual equality. That similar cases should be treated similarly follows from dialogical consensus on what reciprocal recognition requires. Furthermore, discovering the relevant identities and differences necessary to conform law to factual equality should simply be left to the joint deliberations of communicative actors. In other words, the only identities and differences that ought to count are those which all communicatively engaged legal actors could agree upon.

The preceding account indicates how Habermas's proceduralist paradigm of law would assume the role of a counterfactual with critical bite. It does not reveal, however, the potential of that paradigm to construct a reflective equilibrium, or whether that paradigm provides a particularly useful and convincing tool for assessing contemporary legal relationships. To better assess these issues, it is necessary to cast a critical look at how Habermas envisions the relationship among law (particularly the proceduralist paradigm of law), morals, and politics.

### III. THE PROCEDURALIST PARADIGM AND THE RELATIONSHIP AMONG LAW, MORALS, AND POLITICS

The value of a particular counterfactual construct in relation to critical theory or achieving reflective equilibrium depends on at least two important factors: its ability to establish a sufficient but not excessive contrast with prevailing circumstances; and its potential for suggesting genuine and useful ways of resolving existing conflicts and inconsistencies. Habermas's discourse theory, based on the distinction between communicative and strategic action, provides a singularly valuable counterfactual by underscoring the demarcation between the collective *generation* of impartial inter-subjective action norms and their *use* to every actor's best advantage. Indeed, this demarcation contrasts with prevailing practice, while tracking an ideal that would furnish a logical solution to the principal conflicts and inconsistencies rooted in that practice. Furthermore, discourse theory is richly suggestive in postulating an inter-subjective deliberative model for settling normative questions, in contrast to the isolation of monological determinations and to the dogmatism of unitary collective solutions.

Habermas's discourse theory, however, looms as a much less successful counterfactual when it comes to the relation among law, morals, and politics. In general terms, discourse theory approaches legal, moral, and political conflicts in the same way — providing an impartial discursive procedure, which, if followed by communicatively engaged actors, will yield legitimate solutions acceptable to all affected.

Accordingly, the differences among law, morals, and politics boil down to differences concerning their relevant domains, and concerning the kinds of arguments that are appropriate in relation to each of these domains. Thus, for example, Habermas asserts that the proper moral domain spans all social space and historical time, whereas law's domain is that of a particular society living in a circumscribed historical time frame. Similarly, discursive moral arguments must be universal in scope, whereas discursive legal arguments can also include ethical arguments tied to conceptions of the good that are only prevalent in the relevant society, as well as pragmatic arguments. Also, whereas moral arguments can only be settled by consensus, legal arguments can also be resolved through compromise and bargaining, and political arguments through majority rule. Yet for all these differences, Habermas claims that in the context of discourse theory, morals, ethics, law, and politics are mutually consistent, and that law and morals actually complement each other (Post., pp. 15-19). Upon close examination, however, these claims are not necessarily borne out.

Following the Kantian tradition, Habermas regards morals as the domain of universal justice, establishing correlative rights and duties transcending all particular conceptions of the good. Accordingly, as applied to the realm of morals, discourse theory must be impartial as among different conceptions of the good. On the other hand, even in a pluralist multicultural society, only a fraction of the various conceptions of the good formulated throughout history would be represented. Discursive validation of law in such a society would therefore not require impartiality as among all conceptions of the good but only as among those conceptions actually represented. Thus, for example, moral norms must be impartial as among all religions, but legal norms need only be impartial as among those religions with adherents within the relevant society. There might conceivably be a continuum between the absolute impartiality of morals and the relative impartiality of law. But, as explained below,<sup>42</sup> it seems just as plausible that the relative impartiality of law would clash with the absolute impartiality of morals.

Even if one does not concede the latter possibility, there is another, potentially more vexing, problem. Certain issues, such as abortion, raise serious moral and legal questions, but cannot be approached from any perspective indifferent to competing conceptions of the good. In Western societies, for example, abortion is viewed as anything from murder to a fundamental right inextricably linked to a woman's autonomy, privacy, and equality. Consequently, to determine whether abortion is morally or legally unjust requires reference to contestable

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<sup>42</sup> See *infra* pp. 1180-81.

conceptions of the good<sup>43</sup> and to the value preferences that they engender.<sup>44</sup>

Whereas moral consensus on the abortion issue seems impossible in contemporary societies, a discursive legal resolution of the issue might still seem plausible to the extent that, in the context of law, the discourse principle finds room for compromises and fair bargains. Compromises, consistent with the discourse principle, are legitimate, provided they are acceptable in principle to all communicative actors (III, p. 36). But unlike discursive consensuses, discursive compromises may be acceptable to different actors on the basis of different reasons (III, p. 36; IV, p. 45). Furthermore, Habermas asserts that in the context of law, the discourse principle extends to ethical and pragmatic questions (Post., pp. 7-8). Ethical questions ask who we are and what our goals are, or, in other words, raise concerns relating to the authenticity and the collective self-realization of a particular ethical community. Pragmatic questions, on the other hand, aim at reaching an equilibrium between competing value preferences and competing interests (III, pp. 35-36).<sup>45</sup>

Even with the greater flexibility surrounding the operation of discourse theory in the realm of law, it is most unlikely that the proceduralist paradigm of law would yield any satisfactory legal resolution of the abortion issue. Lurking beneath the abortion controversy, there is such a sharp clash in value preferences and interests that no dialogical compromise or balancing seems plausible. Indeed, subjecting all existing perspectives on abortion to the reversal of perspectives process may result in better mutual understanding and empathy, but would not afford any persuasive rationale for either pro- or anti-abortion advocates to change their position.

The abortion issue would not be resolved any more easily as a political matter under Habermas's discourse theory of political democracy. Assuming that there is an internal relation between popular sovereignty and fundamental rights, discourse theory projects a picture of democracy as a lawmaking process in the hands of communicative actors dialogically engaged in the task of joint rational opinion- and will-formation (III, pp. 38-40, 53-58). Consistent with Habermas's approach, the dialogical process must establish the fundamental rights that make popular sovereignty possible among communicative actors

<sup>43</sup> Strictly speaking, if morals are conceived as not encompassing questions relating to the good, abortion would not be susceptible to any moral judgment.

<sup>44</sup> According to Habermas, value preferences are inter-subjective and they derive from the ethical norms associated with a particular conception of the good (VI, pp. 24-25).

<sup>45</sup> Whereas different value preferences derive from different ethical norms, there are likely to be different interests even in the context of shared value preferences and ethical norms. Thus, for example, even if management and labor share an equally strong commitment to the value preferences associated with a market as opposed to a command economy, at times the interests of labor may be at odds with those of management.



and the political objectives that may legitimately shape laws acceptable under the proceduralist paradigm of law. Fundamental rights under this conception would seem, moreover, to come within the ambit of constitutional norms, whereas discursively validated political objectives would result in legitimate legal norms.

In view of existing divisions on the abortion issue, there seems to be no principled basis for dialogical agreement on the status of abortion either at the level of fundamental rights or at that of majoritarian lawmaking. Indeed, for someone who is sincerely persuaded that the right to abortion is central to a woman's autonomy, privacy, and equality, the absence of a constitutional right to abortion would vitiate the very possibility of Habermasian deliberative democracy, because women could not be genuinely counted as equal participants in the relevant discursive process. Conversely, for someone who sincerely maintains that abortion is murder, the absence of a constitutional ban on abortion would negate the possibility of the kind of mutual recognition and respect that Habermas invokes in connection with his dialogical approach to democracy. Finally, leaving the abortion issue to the will of the majority would also be unsatisfactory, because it seems highly unlikely that rational discourse among communicative actors would change the minds of those who sincerely believe that abortion should be dealt with at the constitutional level.

It follows from the preceding observations that, at least with respect to certain issues, moral norms that are impartial as among all conceptions of the good seem impossible; that moral norms appear more likely to be in conflict with ethical norms than in harmony with them;<sup>46</sup> and that value preferences within the polity may be so polarized as to preclude uncoerced political compromise or balancing of interests. Hence, Habermas's counterfactual rests on a conception of the relation among morals, ethics, law, and politics that leads to an impasse on certain important and bitterly divisive issues within contemporary pluralist and multicultural societies. Moreover, to the extent that it leads to such an impasse, Habermas's counterfactual fails to engender constructive criticism of existing institutional arrangements or to suggest creative solutions to divisive social conflicts.

Notwithstanding these problems, Habermas's discursive counterfactual can still be defended as a powerful and useful theoretical tool. For one thing, many important issues, unlike abortion, arise against a background of unified or largely compatible value prefer-

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<sup>46</sup> It is conceivable, for example, that the value preferences of one community would legitimate protecting abortion rights while those of another would, on the contrary, legitimate a complete ban on abortion. Accordingly, whatever may emerge as a discursively valid norm regarding abortion could not, obviously, be neutral as between the conflicting conceptions of the good underlying, respectively, the pro- and anti-abortion ethic.

ences.<sup>47</sup> More significantly, Habermas's counterfactual may be altogether prevented from leading to impasses if his conclusions concerning the relation among morals, ethics, law, and politics are somewhat modified, and if the role of impartiality in the context of discourse theory is redefined.

Habermas's discursive proceduralism — of which his proceduralist paradigm of law is an integral part — is the product of a pluralist vision bent on fairly and equally including and accommodating persons and groups who disagree on substantive issues. While it operates in different space/time frameworks ranging from the most universal to the here-and-now of concrete social groups, Habermas's proceduralism invariably replicates throughout its field of application the same model predicated on impartiality as between different substantive positions within the relevant framework. This model is deficient, however, inasmuch as proceduralism ultimately depends upon a compatibility with an underlying consensus on relevant substantive values.<sup>48</sup> Consistent with this, pluralism should be regarded as emerging from a substantive perspective grounded in its own conception of the good, rather than as a mere methodological by-product of proceduralism.<sup>49</sup> Indeed, although pluralism may appear neutral as between diverse value preferences, it embodies an ethic of inclusiveness toward diversity, which paradoxically requires exclusion or transformation of certain value preferences.<sup>50</sup> Ideally, pluralism would generate complete diversity and encompass all value preferences. Because that is impossible, however, pluralism must inevitably choose among value preferences, eliminating some, and displacing or transforming others. Thus, pluralism inevitably privileges certain value preferences over others, in the pursuit of its own overriding value preference — establishing the greatest possible diversity consistent with maintaining room for co-existence

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<sup>47</sup> For example, in the United States, there now seems to be a wide-ranging consensus that constitutional equality requires, at the highest level of abstraction, upholding the equal worth, dignity, and respect of every individual, regardless of race or ethnic origin. See Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 588 (1991). This harmony is in sharp contrast, however, with the contentiousness that constitutional equality has produced at lower levels of abstraction, as evinced by the Supreme Court's closely divided affirmative action jurisprudence. See generally ROSENFELD, *supra* note 25, at 163-215 (analyzing the progression from racial segregation to affirmative action in Supreme Court jurisprudence and the principal affirmative action cases decided before 1990).

<sup>48</sup> See Rosenfeld, *supra* note 19, at 5-16, 34-39, 50-51.

<sup>49</sup> See Rosenfeld, *supra* note 3, at 1694-95; Rosenfeld, *supra* note 19, at 51-56.

<sup>50</sup> See Rosenfeld, *supra* note 3, at 1710 (arguing that pluralism is incompatible with value preferences of crusading religions while compatible with other religions' value preferences, provided the latter are relegated to the private sphere).

and political cohesion and with treating included value preferences as fairly and equally as possible.<sup>51</sup>

Viewing pluralism's own overriding value preference as a second-order value preference and the value preferences that vie for inclusion as first-order value preferences, it seems clear that the latter are unlikely to be included *on their own terms*. Accordingly, as properly grounded in an ethic of pluralism driven by its second-order value preference, Habermas's discourse theory emerges as an apt procedural vehicle for suggesting useful and imaginative ways of accommodating as *many* first-order preferences as *much* as possible within a cohesive and historically determinate political society. Within this scheme, moreover, the ethic of pluralism may be viewed as taking the place of morals — though it would fail the Kantian and Habermasian test for morals because it encompasses a definite conception of the good. As a substantive moral norm driven by its second-order value preference, pluralism would be neutral towards all first-order value preferences *ex ante*,<sup>52</sup> but would inform and delimit the discursive procedure designed to select first-order value preferences for inclusion, thus subsuming that procedure under its own conception of the good.

Although not stemming from an utterly impartial perspective, the discursive procedure under pluralism would not only have a legitimating function, but also a determinate role in establishing the configuration of encompassed first-order value preferences for a given society at a given time. Specifically, the discursive procedure would test the authenticity of asserted first-order value preferences; explore whether different value preferences share some common ground or whether they overlap,<sup>53</sup> and suggest compromises pursuant to a balance of interests according to their relative weight in relation to the respective value preferences to which they are linked.<sup>54</sup>

To the extent that pluralism cannot ultimately place all first-order value preferences on an equal footing, the proceduralist paradigm of law cannot fully reconcile legal and factual equality. Also, the direction such an attempted discursive reconciliation might take, and the

<sup>51</sup> In his recent work, Rawls acknowledges that political liberalism, or pluralism, cannot foster strict neutrality. See JOHN RAWLS, *POLITICAL LIBERALISM* 137–38 (1993).

<sup>52</sup> Another way of conceiving of the work of pluralism revolves around the difference between two logically distinct moments. In the first moment, pluralism performs the *negative* task of equally, and hence impartially, dislodging all first-order value preferences vying for predominance. After wiping the slate clean, pluralism must proceed to the non-neutral *affirmative* task of readmitting some, though not all, first-order value preferences to the extent that they are susceptible to remaining subordinate to pluralism's second-order value preference. See Rosenfeld, *supra* note 3, at 1711.

<sup>53</sup> For Habermas, needs, preferences, and interests are not static, but susceptible to dialogic transformation. See JÜRGEN HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 90 (Thomas McCarthy trans., 1979).

<sup>54</sup> For a detailed discussion on how discourse theory might accomplish these tasks, see ROSENFELD, cited above in note 25, at 254–82.

scope of its success, depend in significant part on historically contingent factors, such as the nature, number, and predominance of prevalent first-order value preferences within a given society at a given time. For example, in a religiously heterogeneous society with several different, comparably large, religious groups, discursive pluralism might justify a strict separation of church and state. By contrast, in a religiously homogeneous society with a sprinkling of religious minorities, discursive pluralism might well be satisfied with much greater links between church and state, provided religious freedom and freedom of conscience are effectively protected. More generally, given the impossibility of fully reconciling legal and factual equality, and given the historical contingency concerning first-order value preferences, discursive proceduralism can only aim at suggesting the best possible solution under current limitations. Furthermore, under these circumstances, discursive proceduralism can only be understood as impartial in the sense of consistently placing the second-order value preference of pluralism above the first-order value preferences which it encounters on its path.

Discursive proceduralism, viewed as the means to discover the best possible solution under limiting circumstances, has the advantage of restoring the balance between the two profiles of Habermas's counterfactual construct. From the standpoint of pluralism's need for integration, discursive proceduralism provides the means to construct a reflective equilibrium. From the standpoint of the first-order value preferences left out, displaced, or diminished through transformation, on the other hand, discursive proceduralism affords a critical vantage point from which to demand inclusion or more favorable terms of inclusion.

Finally, Habermas's discursive proceduralism has an important further counterfactual function, in that it seems readily adaptable to test the very limits of pluralism. This becomes apparent upon consideration of a possible feminist critique of Habermas's discourse theory and its stress on justice, rights, and equality.<sup>55</sup> In essence, this feminist critique asserts that by favoring justice and rights over care, concern, and responsibility, Habermas's discourse theory is biased against feminist value preferences.<sup>56</sup> Habermas, in turn, rejects this critique, declaring that feminists must settle their differences *within* the discursive process (IX, p. 52). In terms of pluralism and the two orders of value preferences, Habermas's reply implies that feminists must either agree to discursive proceduralism or renounce pluralism. To prove him wrong, feminists would have to indicate how reliance on care,

<sup>55</sup> Habermas takes on this feminist challenge in chapter IX. For a critique of Habermas's treatment of this feminist critique, see Rosenfeld, cited above in note 19, at 39-50.

<sup>56</sup> This particular feminist critique is based on acceptance of Carol Gilligan's theories. See CAROL GILLIGAN, *IN A DIFFERENT VOICE* 12, 73-74, 132 (1982).

concern, and responsibility might yield a credible alternative means of integrating various first-order value preferences.

Subsuming Habermas's discourse theory under the morals of pluralism does not destroy the internal link between democracy and rights, but it does appear to restrict significantly the range of instances where legal consociates might be genuinely considered as being both the authors and addressees of law. Indeed, to the extent that one's first-order value preferences have been completely set aside or greatly restricted by pluralist proceduralism, one could not reasonably be expected to consider oneself as an author of coercive laws to which one is subjected. This, however, need not dilute the force of the discursive counterfactual, and it may actually enhance its critical power. By sharpening the focus on those who are marginalized or excluded, discourse theory can both stress the limits of pluralism and confront it with the need to become more inclusive. In sum, as recast through an explicit pluralist framework, Habermas's discourse theory and his proceduralist paradigm of law emerge as powerful and richly suggestive conceptual tools in the quest to evaluate contemporary legal relationships.

#### IV. DISCURSIVE DEMOCRACY AND JUDICIAL REVIEW OF CONSTITUTIONAL NORMS

The combined insights of Habermas's discourse theory of democracy and of his proceduralist paradigm of law yield new and provocative ways of dealing with judicial review and with the antimajoritarian problem in constitutional adjudication. Habermas himself, based on his assessment of the decisions of the German Constitutional Court and of certain leading American theories of constitutional interpretation, advocates a rather limited legitimate role for judicial review of constitutional norms (VI, pp. 13-15, 22-23). Nevertheless, as we shall see, from Habermas's own premises and from the counterfactual nature of his discourse theory of democracy, it is possible to sketch a much broader justification for judicial activism in constitutional adjudication.

Under the proceduralist paradigm of law, as already mentioned, the legitimacy of a legal norm is determined in terms of a counterfactual reconstruction of the legislative process. Judicial application of a legal norm to a particular case, however, involves more, according to Habermas, than such a counterfactual reconstruction (V, pp. 6-13, 32). It also requires some further judicial adaptation of the legal norm in question to the facts and circumstances of the actual case under consideration, and that, in Habermas's view, is not a mechanical or automatic process (V, pp. 6-13, 32). Instead, from the perspective of the judge, application of a legal norm demands further elaboration to promote both legal predictability and justice. In other words, according

to Habermas, for a judicial decision to be legitimate it must both contribute to stabilizing expectations and be right (V, pp. 5-7).

Achieving these two objectives seems an increasingly elusive task for a pluralist society. Noting that natural law is not a viable option for a society with competing gods and demons (V, pp. 8-9), Habermas also finds legal hermeneutics, legal realism, and legal positivism inadequate (V, pp. 8-13). Legal hermeneutics is objectionable because it deals with the problem of indeterminacy through reliance for meaning on the ethos of the judge, which in a pluralistic society is but one ethos among many. In other words, hermeneutics holds that the meaning of a text can only be cogently grasped if that text is placed in its proper historical, cultural, and normative context. In a society such as ours, marked by a clash among various competing sets of value preferences, a judge must necessarily draw upon her own value preferences, to the exclusion of others, in rendering her opinion. Accordingly, hermeneutical judicial interpretation cannot lead to society-wide acceptance or consensus. Legal realism, on the other hand, is fully aware of the contingency of any particular ethos in a pluralistic society, and accordingly focuses on external factors, such as a judge's politics, psychology, or ideology to account for judicial decisions. For Habermas, however, the realist thesis is unacceptable because it wipes out the structural difference between law and politics, and hence cannot explain how law stabilizes expectations (V, pp. 10-11). Legal positivism, for its part, tries to account for law's role in stabilizing expectations, but does so by considering it as impermeable to extra-legal principles. In so doing, legal positivism unduly sacrifices law's rightness to its certainty (V, pp. 11-12).

These problems are compounded in constitutional adjudication, consistent with Habermas's observation that the role of the constitution and of judicial review of constitutional norms has significantly changed with the succession of prevailing legal paradigms (VI, p. 3). In the liberal-bourgeois paradigm, the constitution is confined to providing a framework for the separation of powers and to guaranteeing citizens' rights against state interference with the workings of a well-delimited private sphere (VI, pp. 10-11). With the advent of the social-welfare paradigm, however, the largely formal and clearly circumscribed role of the liberal-bourgeois constitutional judge gives way to a much more context-sensitive approach, designed finely to calibrate each application of a constitutional norm to the unique circumstances of each case. As Habermas sees it, therefore, in the social-welfare paradigm, constitutional adjudication depends on a degree of contextualization which may call for drawing upon the constitution as a whole, greatly increasing the power of the judge to the point of blurring the boundary between legislative and judicial power (VI, pp. 12-13).

Based on his critical assessment of the German Constitutional Court's value-based jurisprudence, Habermas draws a sharp distinction between deontological and teleological approaches to constitutional adjudication (VI, pp. 22-24). These approaches are both represented in American constitutional theory. Habermas mentions Dworkin as a proponent of the deontological approach, and Michael Perry as an exponent of the teleological approach (VI, pp. 26-29). Moreover, these two approaches differ in the following essential respect: under the deontological approach, constitutional adjudication must establish what is right; under the teleological approach, on the other hand, constitutional adjudication is shaped by desirable objectives based on value preferences parasitic on conceptions of the good. Habermas rejects the teleological approach, which he regards as transforming the judge into yet another lawmaker (VI, p. 28), and embraces the deontological approach as the only legitimate one for a pluralistic society (VI, pp. 29-31).

As a consequence of opting for a deontological approach, which relies on a clear divide between the right and the good, Habermas must confront serious obstacles. Indeed, as he acknowledges, one cannot simply do away with the teleological excesses of social-welfare constitutional adjudication by returning to the relatively simple deontological formalism of liberal-bourgeois constitutionalism (VI, pp. 34-35). Instead, the complexities reflected in the social-welfare paradigm and its emphasis on the greater interpenetration among the state, the economy, and the social and administrative spheres, deserve to be taken into full account. The challenge, therefore, is to reinvigorate the normative legitimacy of constitutional adjudication without undermining its suitability in a complex and evolving society, with multiple interlocking centers of power bearing on the daily existence of the average citizen.

Constitutional adjudication under Habermas's proceduralist paradigm need not differ in result from its social-welfare counterpart, but it must be susceptible to deontological justification to the relevant community of communicatively engaged actors. In Habermas's own words, legitimate constitutional adjudication is not a matter of "[w]hat is the best for us at a given point," but rather of "what is equally good for all" (VI, p. 32). Moreover, in view of Habermas's discourse theory of democracy and his proceduralist paradigm of law, it is not surprising that he advocates a process-oriented approach to constitutional adjudication.

Notwithstanding his commitment to proceduralism, Habermas rejects the process-based approaches of Ely<sup>57</sup> and Michelman<sup>58</sup> in favor

<sup>57</sup> See ELY, *supra* note 8, at 73-104.

<sup>58</sup> See Michelman, *Foreword*, *supra* note 8, at 73-77; Michelman, *Law's Republic*, *supra* note 8, at 1524-26.

of a theory closer to Dworkin's deontological reconstructive theory (VI, pp. 1, 29).<sup>59</sup> Habermas is attracted to Ely's thesis that judicial review of constitutional norms should reinforce rather than contravene the processes of democratic will-formation. Habermas is also sympathetic to Ely's insistence that judicial intervention should be largely confined to rectifying injustices owing to the malfunctioning or abuse of democratic processes. Habermas, however, ultimately rejects Ely's views as lacking foundation in any systematic theory of democracy (VI, pp. 39-40).<sup>60</sup>

Michelman's process-oriented republicanism, with its emphasis on deliberative politics among civically engaged citizens, seems to have much in common with Habermas's views.<sup>61</sup> In particular, Michelman's reliance on a deliberative process of self-realization to justify broad-based judicial intervention to invalidate legislative norms contrary to the republican ethos (VI, pp. 40-41) comports with Habermas's discourse theory of democracy. But although Habermas sees much merit in Michelman's republican views, he ultimately rejects them inasmuch as he believes that they reduce politics to ethics (VI, p. 57). In Habermas's assessment, the republican project is predicated on the flawed assumption that at the root of deliberative self-realization, there is a common core of fundamental values issuing from the ethical order framed by a single conception of the good (VI, pp. 57-58). On the basis of that assumption, deliberative politics illuminates, clarifies, consciously embraces, and collectively implements an already commonly shared ethical vision. Consistent with this, moreover, extensive judicial intervention seems fully warranted as long as it contributes to the deliberative actualization of the commonly shared ethical life. For Habermas, however, the flawed republican assumption is fatal, as a plurality of competing conceptions of the good defines the very essence of contemporary societies (VI, p. 57; V, p. 9).

What makes Dworkin's reconstructive theory of judicial interpretation appealing to Habermas are its deontological character and its acknowledgement of the importance of history. According to Dworkin's theory, judges can reach the right result, even in hard cases, provided

<sup>59</sup> See DWORKIN, *LAW'S EMPIRE*, *supra* note 8, at 410-13; DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 8, at 279-90.

<sup>60</sup> According to Ely's theory, judicial intervention is warranted, where as a result of a "we-they" perspective, legislative majorities have enacted laws designed to disadvantage "discrete" and "insular" minorities. See ELY, *supra* note 8, at 152-70. Since it is of the essence of democratic lawmaking that legislative majorities will promote laws likely to disadvantage legislative minorities, a theory of democracy, which Ely does not provide, is needed to allow for a cogent and systematic determination of the circumstances under which imposition of the legislative will of a majority properly calls for judicial intervention. See Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1740-41 (1989).

<sup>61</sup> In fact, Michelman has acknowledged the influence of Habermas on his works. See Frank I. Michelman, *Family Quarrel*, 17 CARDOZO L. REV. (forthcoming October 1995).



they apply appropriate deontological principles — such as the right of each person to equal respect and dignity — with integrity (that is, in the best possible manner consistent with relevant past judicial interpretations).<sup>52</sup> Dworkin's theory speaks to Habermas's concern that judges promote both justice and coherence, but it remains unacceptable for Habermas in one essential respect. As Habermas notes, Dworkin's theory, symbolized by the superhuman judge, Hercules, remains predominantly monological rather than dialogical (V, pp. 39-40).

For Habermas, the proper role for a constitutional court is to supervise the requisite implementation of the very system of rights that preserves an internal link between the private and public autonomy of citizens (VI, p. 35). Accordingly, like Ely, Habermas regards constitutional adjudication as a necessary adjunct to the democratic law-making process. Unlike Ely, however, Habermas has a systematic theory of democracy that brings into focus the legitimate parameters of constitutional review. Discourse theory, moreover, furnishes Habermas's conception of constitutional review with its strong deontological component. Embedded in the very process of communicative action is a commitment to mutual respect reminiscent of Dworkin's equal respect principle. But in contrast to Dworkin, discourse theory redeems its deontological principles dialogically. Finally, Habermas's conception of constitutional review is dialogical like Michelman's, but, unlike Michelman, Habermas envisions a dialogue among civic-minded citizens who do not share the same conception of the good.

In short, Habermas's conception of constitutional review seeks to provide a legally grounded bridge between reason and history. On the one hand, based on the assumption that communicative actors draw upon reason to reach agreement, constitutional review should promote those rights which would secure both private and public autonomy in a pluralistic society. On the other hand, constitutional review should seek to establish a coherent set of constitutional rights adapted to the particular historical legacy of the polity.

In terms of its particulars, Habermas has a rather restrictive view of the proper scope of constitutional adjudication. Concerned with maintaining a clear divide between the legislative and judicial functions, Habermas limits legitimate constitutional adjudication to the application of constitutional norms that the judge must presuppose to be valid (VI, pp. 32-33). This view, however, is much too narrow when considering Habermas's insistence on the counterfactual nature of his deliberative democracy. It is true that in an ideal deliberative democracy, constitutional norms would be established by a discursively oriented legislative process, and judges would merely apply those norms

<sup>52</sup> Dworkin has analogized the interpretative task of the judge to that of an author of a chain novel who must build the best possible narrative consistent with the past contributions of his or her predecessors. See DWORKIN, *LAW'S EMPIRE*, *supra* note 8, at 228-32.

to individual cases. But the greater the deviation between an *actual* democracy and its Habermasian counterfactual counterpart, the more room there would seem to be for legitimate judicial elaboration as well as application of constitutional norms. Indeed, so long as the actual work of the constitutional judge can be justified in terms of Habermas's counterfactual vision of constitutional adjudication, there remains a sufficient theoretical foundation for the distinction between judge and legislator.

Placed in its broader counterfactual context, a Habermasian theory of constitutional democracy and adjudication may contribute rich and novel insights to constitutional jurisprudence. Thus, for example, Habermas's theoretical approach may be elaborated to provide a more systematic theoretical foundation to the distinction between constitutional politics and ordinary politics drawn by Bruce Ackerman.<sup>63</sup> Moreover, a Habermasian theory of constitutional adjudication need not be undermined by a rejection of Habermas's embrace of a Kantian conception of morals. Indeed, within a pluralist framework, while constitutional norms could not preside above all conceptions of the good, they could inhabit the space of second-order value preferences and mediate among the plurality of ethical visions underlying first-order value preferences. Drawing upon the relevant historical tradition, discursively redeemed constitutional norms could accordingly hold a pluralist society together, provided they fostered a fair balance between the unifying thrust of second-order value preferences and the room for diversity demanded by the multiplicity of competing first-order value preferences.

## V. CONCLUSION

*Between Facts and Norms* is a seminal book that challenges us to rethink our most commonly held beliefs about law, justice, and democracy. Habermas's book is most remarkable in that it both brings the procedural approach to justice, stretching back to Hobbes, to its logical culmination and presents a sociology of law and democracy that calls for a reexamination of the legal and political underpinnings of the modern constitutional state. Through his counterfactual reconstructive discourse theory, Habermas sets up a privileged vantage point from which one may launch a coherent and penetrating critique of existing institutions or discover their best and most comprehensive justifications. Moreover, Habermas's account and assessment of contemporary pluralist societies is largely on target, as is his conclusion that neither the liberal nor the republican or communitarian position can do such societies justice. Indeed, the liberal approach is wanting inasmuch as it downplays inter-subjective dealings and the need for

<sup>63</sup> See ACKERMAN, *supra* note 8, at 194-95, 266-69.

collective solidarity in favor of a vision that concentrates on the clash between the individual and society. The republican or communitarian approach, on the other hand, stresses the importance of a common ethos and accounts for inter-subjective dealings through dialogical exchange, but underplays the existence of a plurality of competing value preferences and thus fails to address the need to mediate between conflicting conceptions of the good. Finally, Habermas also forcefully captures the complexities that surround the relationship among law, morals, and politics, and convincingly demonstrates that law is neither impermeable nor reducible to morals or politics. The two strongest criticisms against Habermas's theory in *Between Facts and Norms* concern Habermas's embrace of the Kantian notion that morals can be impartial as between competing conceptions of the good, and his tendency to tilt more than seems warranted toward reflective equilibrium rather than toward critical theory. These criticisms, however, hardly detract from the success or the powerful impact of Habermas's approach to law, particularly since Habermas himself has provided us with the requisite tools to deal successfully with these criticisms.