THE POSITIVE CRITERIA OF LEGAL NORMS:
LAW BETWEEN FACTS AND NORMS

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Abstract

With the publication of *Faktizitat und Geltung* Jurgen Habermas sought to extend his normative critical arguments to jurisprudence. In this work he argues that the law can mediate and coordinate valid social integration in complex modern societies because it is capable of receiving normative inputs from the public sphere, which are then translated into the administrative system. Throughout his extensive writings, Habermas has referred to a principle of the universalisation of the valid norm. Its role in pluralist societies is therefore not to offer a substantial value, but to guide in the character of a regulative idea. This idea would be impartial with respect to the plurality of conflicting goods in that society. This paper will argue that Habermas has not been able to maintain the impartiality or neutrality of the principles of discourse. That they are at each turn and in each operation involved in positive assumptions about goods. The norm, then, is situated and historical. Therefore, Habermas requires a revised account of the normative quality of both law, and the democratic forms of governance that sustain it. These are forwarded in terms both of a reconceived version of the democratic principle as a deliberative majority rather than a universal consensus. This, in turn, is based on a reconceptualisation of the public sphere from which norms arrive for the law to implement or reshape, away from its idealist version, to a situated and historical one in which the mediation of particular audiences is considered an element of rationality. Finally, the discourse of rights is considered, in order to assess both the context-dependence rather than context-transcendence of those norms. The difficulties encountered in the revision of normativity away from idealist conceptions of right is seen in a discussion involving recent criticisms demanding a more situated norm. It is concluded that that reconceptualisation cannot simply be implemented by jettisoning idealism at

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least as a regulative, and critical force, detecting the aporias of historical subjectivity.

THE NORMATIVE BASIS OF SOCIETY

Jurgen Habermas's social theory has consistently attempted to develop and defend a critical theory of normative society in which a credible form of universalism is reconciled with a genuine acceptance of pluralism.[1] This project has been conducted against a background of developments in philosophies of society and value which have discovered the irreducibility of the contextuality and contingency of knowledge and normativity. Similarly, whilst the rightness of norms can no longer be assessed against a conceptual universal, neither can it rely on a background of normative agreement, except, perhaps, on the most localised scale.

Habermas's conception of morality has been commented upon by numerous critics. Communitarians, for example, question the feasibility (and desirability) of the sharp distinction between the right and the good. They argue that the only defensible universal is a contextualist one arising from the well-being of a concrete identity, both individual and collective.[2] Feminists question the distinction's entrenchment of the public/private dichotomy on the basis of negative liberties.[3]

In response to communitarians, Habermas agrees that the right cannot be clarified without some reference to the good. Individual rights, for example, must relate to the broader social context of solidarity in which they are maintained, and which they in turn serve (the common good). However, Habermas insists that some distinction between the right and the good is required in a liberal society in which a diversity of conceptions of the good life is affirmed. A theory of public morality designed to address the legitimacy of the basic social norms that govern collective life should not rely upon a particular (and hence sectarian) conception of the good life.

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[1] For examples only of an extensive secondary literature see: David Rasmussen (ed), *Universalism v Communitarianism: Contemporary Debates in Ethics* (Cambridge, Mass., 1995); Shlomo Avinaeri and Avner de-Shalit (eds), *Communitarianism and Individualism* (Oxford, 1992).

[2] See eg, Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (New York, 1983); Alisdair MacIntyre, *After Virtue* (Notre Dame, 1981).

[3] See eg, Seyla Benhabib and Drucilla Cornell (eds), *Feminism as Critique: On the Politics of Gender* (Minneapolis, 1987); and Marie Fleming, *Emancipationa and Illusion: Rationality and Gender in Habermas's Theory of Modernity* (University Park, 1997).

Neither should it necessarily have something to say on every ethical issue concerning individual or communal life.

Habermas defends the distinction between the right and the good by distinguishing between the general structures of communicative action and the plurality of concrete lifestyles that are compatible with them. He also draws a distinction between discourses of application and discourses of justification. These discourses occur in inseparable entwinement in most if not all discourses on practical problems – that is, in situations in which numerous persons or groups with an interest in the outcome engage in thematising the issues, clarifying their approaches, and constructing a consensual outcome.

Communitarians typically wish to minimise or bridge the gap between descriptive and evaluative expressions, between the right and the good, or between the grounding of norms, and their application. In their view, a proceduralist account such as that developed by Habermas, which attempts to develop norms which are 'neutral' with respect to goods, values and contexts, cannot generate norms, institutions or rules. Whether conducted along the lines of a revitalisation of tradition or participatory political cultures, the aim is to affirm the context-specific qualities of validity and justice.

The Foundation of Norms

Habermas's overarching thesis is that it is possible to ground validity in a universalist but non-objectivist way by conceiving of truth and justice in procedural terms. This requires a rational consensus emerging from a free and open (that is, an ideal) discussion, among all those concerned with an issue or affected by a norm. Norms cannot be defended by reference to substantive values, but only by means of a properly conducted argument, and the validity of propositions and norms is fulfilled by the adherence to procedures rather than with reference to (unshared) content or (partial) particular perspectives.[4]

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[4] Two problems follow from this consensually grounded theory of truth. First, the assessment of the consensus itself must have reference to some external other than consensus. Second, it is not clear how consensus itself can be identified. Habermas responds in two, largely unsatisfactory, ways. The arguments involved are not of concern to this discussion; however they can be roughly stated. First, Habermas is forced to grant his theory the status of an exception. Second, he demonstrates in his engagement with his critics, that any attempt to deny the conditions of his theory of argumentation involves the denouncer in a 'performative contradiction'.

The consensually based grounding of validity is derived from a pragmatic analysis of the presuppositions of argumentation.[5] When we enter discourse, we must assume that the only legitimate criterion for agreement or disagreement is the cogency of the arguments adduced in support of the validity of the claim. Habermas argues that the discursive assessment of validity claims associated with statements and norms is only a special case of what takes place in ordinary communication. When speech acts are performed, three types of validity claim are implicitly raised. First, the concern for truth is raised in the presupposition of the propositional content of a speech act. Second, the illocutionary force grounds the presupposition of the validity of the social relation. Third, interlocutors generate and expect sincerity from each other. These claims may be accepted or rejected on the basis of reasons, or on the presupposition that reasons may be provided.

The values implied in speech acts, argues Habermas, are not the values of any historical community, but are drawn from the very idea of real-existing rational communicative forms of action. As a result, the good life is anticipated in every successful speech act.[6] Habermas gives an account of intersubjective relations "inscribed in the linguistic telos of reaching an understanding"[7] since mutual understanding is the basic type of social action[8]. Well-formed sentences presuppose the speaker's access to a priori linguistic elements which enable the speaker to reproduce the structures of speech in general, or the elements which all forms of social life presuppose.[9] The participants in the speech situation must take a performative attitude which involves a commitment to certain presuppositions. In particular, they must orient themselves to the presupposition that each and every dialogue raises claims to validity, which correspond fully to interpersonal obligations to offer grounds, disclose motives and exhibit norms in argument.[10] Validity is at the heart of reaching an understanding. When, through an assertion, a speaker raises a criticisable claim to the validity of the asserted sentence,

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[5] Jurgen Habermas, 'A Reply to My Critics' in J B Thompson and D Held (eds), *Habermas: Criticlal Debates* (London, 1982), 219; 'Counterquestions,' *Praxis International* 4, 1984, 229.

[6] Jurgen Habermas, *Knowledge and Human Interests*, trans J Shapiro (Boston, 1971), 54.

[7] Jurgen Habermas, *Theory and Practice* (London, 1974), 18.

[8] Jurgen Habermas, *Communication and the Evolution of Society* (London, 1979), 208-10, and 40-1.

[9] See J B Thompson, *Studies in the Theory of Ideology* (Cambridge, 1984), 263.

[10] Jurgen Habermas, 'What is Universal Pragmatics?' in *Communication and the Evolution of Society* , ibid., 64-8.

because no-one has direct access to uninterrupted conditions of validity, "'validity' must be understood epistemically as 'validity proven for us'."[11]

If the elements of speech act theory are part and parcel of everyday utterances, then illocutionary binding force can be "enlisted for the coordination of the actions plans of different actors."[12] For Habermas, what is true for language is true for society. The relationship between facticity and validity is stabilised because,

> with the concept of communicative action, which brings in mutual linguistic understanding as a mechanism of action coordination, the counterfactual suppositions of actors who orient their actions to validity claims also acquire immediate relevance for the construction and preservation of social order: for this order subsists through the recognition of normative validity claims."[13]

The means by which the relationship between facticity and validity is stabilised in complex society is the law. Under law, mutual understanding replaces authority. However, with the decay of formerly strong institutions which were guarantees of social integration, social dissension grows. In discourse theoretical terms: strategic and communicative action have become separated. Habermas believes that the "only way out of this predicament is for the actors themselves to reach an understanding about the normative regulation of strategic interactions."[14]

Where strategic action threatens to annihilate communicative action, Habermas has recourse to an original norm of interaction, the 'ideal speech situation', to which it would be unsustainably contradictory not to submit. This is because the ideal speech situation is pure intersubjectivity, a situation in which there are no barriers obstructing processes of communication. In that situation all participants have the same opportunity to: initiate and sustain discussion through question and answer; proffer interpretations and explanations so that preconceptions are laid open; express intentions and attitudes so that subjects remain transparent to themselves; order, prohibit, obey and refuse, thereby precluding the privileges that arise from one sided norms.[15]

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[11] Ibid, 64.

[12] Ibid.

[13] Ibid, 85.

[14] Ibid, 77.

[15] Thomas McCarthy, *The Critical Theory of Jurgen Habermas* (Cambridge, Mass., 1978), 308.

Habermas's methodology of advancing an evolutionary concept of society alongside a procedural concept of discourse enables him to separate social forms from essential social contents. This, in turn, is designed to preserve and reconcile pluralism (of content) and universalism (of form). Communitarian and other critics, of course, take exception to this distinction in the first instance. Most pointedly, they argue that this central presupposition simply negates the nature of morality itself, since the only substantial questions in ethics are those in which agents are confronted with choices between concretely distinct values, or those issues in which, conceptually, agents are asked to affirm or deny the available paradigms.[16]

For Habermas, the pragmatics and semantics of the good fall outside the range of the universalisable interests (the right) precisely because their separation has resulted from the rationalisation and increasing self-reflexivity of modern societies. Habermas's reasons for his sharp distinction is based on the fact, firstly, that identities are formed in particular collectives under historical circumstances. Therefore, when modern identities encounter each other and move beyond their range of operational felicity, they must find other bases for coordination, and other forms of accommodating their expectations. If one accepts that the rationally motivating force of the better argument contained in discourse ethics provides such a basis, reverting to older substantive values and forms will be impossible. This is because, being unable to convince others of the rational acceptability of the good or some part of it, the strength of one's conviction will be difficult to maintain (as a specifically moral force).

If Habermas is right in his social analysis, and sociological description of the irreducible plurality of modern complex societies, then it appears inconsistent to so completely exclude the values and goods contained therein from a central role in the achievement of rational consensus.[17] Rather than the absolute distinction between what is good for me and what is good for all, rational consensus must pursue both the moral and the ethical dimension of agreement.

Problems of Social Interaction

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[16] See eg, MacIntyre, above n 2.

[17] William Rehg, *Insight and Solidarity: The Discourse Ethics of Jurgen Habermas* (Berkeley, 1997), 97.

When it comes to social interaction - the problem law is specifically designed to address - the requirements of discourse ethics shape the solution *ab initio*:

> If we want to decide the normative questions having to do with the elements of living together, not by the direct or masked resort to force, by pressure, influence or by the power of the stronger interest, but rather by a non-violent conviction based on a rationally motivated agreement, then we have to concentrate on the circle of questions accessible to an impartial evaluation. We should not expect a generally binding answer if we ask, what is good for me or good for us or good for her; for that we must rather ask, what is equally good for all. This 'moral point of view' projects a sharp but narrow circle of light which throws into relief, against the mass of all evaluative questions, those action conflicts that can be resolved in relation to a universalisable interest: the question of justice.[18]

Moral norms, therefore, are related to social order, and are the means for adjudicating conflict among competing interests.[19] The analysis of adjudication or the institutions of adjudication formally so designated, or otherwise recognised, would distinguish modes of normative cooperation accessible to rational consent from those dependent on oppression.

However, the adjudication of competing interests does not depend on a sharp distinction between particular values and consensual morality. Discourse does not impose restriction on individuals bringing their particular self-understandings to discussions. In fact, Habermas insists on this point: "If the actors do not bring with them, and into their discourse, their individual life-histories, their identities, their needs and wants, their traditions, memberships and so forth, practical discourse would at once be robbed of all content."[20] Logically, an individual could not know if a good was equally acceptable to all unless they had some conception of the other's sense of values, which could only have come from an engagement with them.

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[18] Ibid.

[19] Ibid.

[20] Jurgen Habermas, 'A Reply to My Critics' in J B Thompson and J Held (eds), above n 5, 219, 255.

Habermas thus now engages with the possibility of a new-found role for the conceptions of the good life in the modern polity.[21] Conflicts must be settled on the basis of moral considerations if they are to be settled across a range of conceptions of the good that cannot, in principle, be hierarchised. If the existence of the group depends on the cooperation of others, or on their not being interfered with by others, conditions of moral adjudication will have to be satisfied. However, that resolution will only be possible to the extent that the group's ethos will allow them to harmonise their conception of the good with the moral rules of cooperation. If regulation resulted in some unavoidable detriment to interests, participants would have to enter joint assessments of those detriments and interests.

SOCIAL INTEGRATION AND VALID LAW

For Weber, the secularisation and rationalisation processes of modernity deprived law of a foundation in sacred authority.[22] Instead of a substantive ethos extensive through social roles and authorities, he claimed that the law embodied a value-free formal rationality which was general, abstract and well defined, and calculable.[23] Weber places emphasis on overt behaviours rather than on the values actually espoused by social agents. For Habermas, however, whilst the "metasocial guarantees of the legal order" were effectively undermined by the rationalisation process, secularisation did not, he claims, "vaporise … the non-instrumentalisable quality of the law's claim to legitimacy."[24] Modern law cannot be exhaustively described by formal rationality.[25] What remains to be reconstructed counterfactually, are the

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[21] Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, 1996), 200-01.

[22] Even before *Between Facts and Norms*, Habermas begins his discussion of social modernity with Weber's theory of universal rationalisation in which the rationalisatsion of law played a prominent part. See, *Theory of Communicative Action*, Vol. I (Cambirdge, 1995), 173-242.

[23] Ibid, 260.

[24] See David Rasmussen, 'How is Valild Law Possible? A Review of *Faktizitat und Geltung* by Jurgen Habermas,' *Philosophy and Social Criticism*, Vol 20 no 4, 1994, 21-44.

[25] Indeed, Weber's description is ideological in that he ignores or underestimates the significance of two prominent currents in the modernisation of law. Firstly he underestimates the role played by the materialisation of law (Habermas,.above n 21, 332), since, from the perspective of formal rationality it is particular, concrete and uncalculable. Secondly, his theory of law's formalisation does not allow for recent developments that proceduralise law: see Gunther Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Gunther Teubner (ed), *Juridicifation of Social Spheres* (Berlin, 1987). Proceduralism dissolves formal rationality by replacing judicial imposition with informal bargaining procedures and hearings which accommodate compromise formations, destroying calculability. These forces are aberrant and deficient from Weber's perspective only because he develops a concept of law that is as value free as his theory of the scientific

communicative forms of rationality and legitimacy the law can claim (as opposed to any strategic rationality it has acquired historically).[26] For Weber the socially integrative force was political domination. However, Habermas brings together Parson's concept of the 'juridification of political power' and Durkheim's concept of the 'evolution of societal community' to explain the integrative force as the replacement of political domination with democratic will-formation.[27] This explains how the rationality of modern law can be upheld while the legal control of social life increases, and how spreading juridification can be controlled by those subject to it:

> [M]odern law can stabilise behaviour expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as a regent for 'societal community' that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of a believable claim to legitimacy.[28]

Habermas's is a law legitimated under the conditions of deliberative democracy. The participant citizens are consociates of a form of life embedded in structures of communicative action, which are linguistically mediated forms of interaction based on the ability of the hearer and speaker to accept and reject the validity claims raised in reciprocally related speech acts. For Habermas, law represents a form of necessary coercion that can be discursively, or normativley, redeemed.

For Habermas, then, law is legitimate because it is the most abstract medium through which consociates can regulate one another's communicative freedom. Law occupies a relation between facticity and normativity analogous to communicative reason. Law brings "the language of lifeworld communications in a form in which these messages can be absorbed by the specific codes of self-steering systems in action – and vice

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institutions. Habermas, on the other hand, insists that Weber's analysis shows that law cannot be theorised as value-free since it is permeated by moral viewpoints, and the amorality of law assumes a moral viewpoint. As the law is socially embedded, it cannot be disengaged from the normative viewpoint which allows its critique. Habermas therefore reverses Weber's form of inquiry: rather than asking how legitimacy can result from legality, he inquires after the legitimacy of legality.

[26] Habermas, above n 22, 11.

[27] See Emile Durkheim, *The Division of Labour in Society* (New York, 1933).

[28] Rasmussen, above n 24, 28.

versa."[29] Indeed, the function of law is to compensate for the motivational weakness of practical reason alone in a form of mutual completion. The mechanism for forcing those involved to accept the procedural rules is reason – or, more specifically, a discursive ethics based on the idealistic reconstruction of the rationality inherent in the intersubjective engagement itself. For Weber, in the absence of other forms of social integration, law in modern society performs the sociological role of legitimation through domination. However, a central part of legitimacy – convincing others of the legitimacy of legal decisions – cannot be based on power. The coercive power of law is a necessary fact of modern democracies that rests in the validity of democratic institutions, and the freedoms exercised through practices of participation, contestation, deliberation and legislation. These civic practices precede the law but can only be exercised through the medium of the law. Inverting Weber, Habermas explains this to be the "paradoxical emergence of legitimacy from legality."[30]

ANALYSING MODERNITY: LAW BETWEEN SYSTEM AND LIFEWORLD

For Habermas, modern complex societies must be conceived in terms of the relatively independent domains of the 'lifeworld' and the 'system'. The distinction is introduced in response to Habermas's disappointment with the Frankfurt School's analysis of modern societies in terms of 'totality.'[31] The category of totality failed to analyse the emerging norm of discursive rationality which arose in the specific historical conditions of modernity, but was applicable beyond the conditions of its emergence. Totality was replaced with the category of 'complexity' which did not assume a totally integrated version of advanced capitalist society, but discovered one open to ideological contestation and reason giving. Democratic practices were embedded in contexts which they, in and of themselves, could not regulate.[32] Therefore, a normative conception of politics was only available from within a sociological description of complexity.

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[29] Rasmussen, above n 24, 28.

[30] Ibid, 130-1.

[31] Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-50* (London, 1973), 113-42.

[32] Habermas, above n 21, 370.

Habermas developed a methodology with a double perspective to differentiate spheres of social reproduction (symbolic and material), which in turn designate functions of societal integration (social and systemic), embedded in different contexts of action (communicative and strategic). The lifeworld is what participants in communicative action presuppose as their shared background.[33] It contributes to the maintenance of individual and social identity by organising action around shared values by means of mutual criticism, or collective agreement on what is communicated. The system, on the other hand, is that aggregate of social subsystems whose functions are internally mediated and externally coordinated by the steering mechanisms of power and money. It integrates diverse activities in accordance with adaptive goals of economic and political survival by regulating the unintended consequences of strategic action through market and administrative mechanisms that constrain voluntary decisions.[34]

Therefore, for Habermas, democratic theory must avoid the extremes of the purely normative and purely functionalist accounts of complex societies. The consequences of this would be, in the first place, to develop ideal theories of democratic deliberation, specifying conditions for justification and procedures for decision making purged of the reality of institutional constraint. Normative theories lack a "sociological translation".[35] Systems theories, on the other hand, provide an understanding of the mechanism by which complex societies are organised. However, systems theories replace all normative categories with functionalist ones.[36] To achieve the aim of giving institutional arrangements legitimacy, Habermas must combine an account of social complexity with normative principles.

Habermas, does however agree with Luhmann's functionalist accounts of law to the extent that law must have functional characteristics related to the maintenance of the social environment.[37] As part of the social system based on money and power, law is a medium for the reproduction of the modern state and economy. However, the functional analysis of law's role in the bureaucratic control of state and private organisations, and the reproduction of the legal system as such, must be combined with a reconstruction of the rationality structures guaranteeing its legitimacy. Law and the legal system,

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[33] Thompson and Held (eds), above n 5, 268.
[34] David Ingram, *Habermas and the Dialectic of Reason* (New Haven, 1987), 115.
[35] Habermas, above n 21, 388.
[36] Ibid, 369.
[37] Ibid, 303.

as the 'regent for societal community,' functions as the interface between the system and the lifeworld.[38]

Habermas develops his bi-level analysis of social integration from Parsons conception of society as consisting of a cultural sphere of action on one side, and a functional system comprising personality and social systems on the other.[39] Ideal values logically interrelate the two spheres. However, conflict and inconsistency resulted in pattern stabilisation through repression, which could be reconciled with personality on the basis of Freud's theory of internalisation,[40] the relegation of dysfunctional ideas to the spheres of personality or culture, or their ideological repression.[41] Unlike Parsons, however, Habermas's concept relates the spheres through channels of mutually conditioning communication. Both lifeworld and systems have claims over each other. Where Parson's was a theory of social integration as conflict control, Habermas's can be used to describe social change.

Habermas's "two-track model"[42] of democracy accounts for the normative assessment and guidance of the law (rule of law). In complex democracies, representative institutions exist alongside and contend with a vibrant and free public sphere and civil society of associations, social movements and citizens initiatives. Law can act as the interface between system and lifeworld by virtue of its bi-functionality. Habermas's first account of the law under the paradigm of communicative action described it in terms, firstly as a medium[43] in that it normatively orders the social world, and in the second place, it is an institution[44] and a medium of distribution for money and power. Being both, it can provide the mechanisms of money and power with a normative context. Critics, however, argued that this paradigm neglected the possibility of law itself being restructured by systems. However, he now maintains that law can be encroached by systems imperatives (political and economic) transforming its normative bases in intersubjective reason, and guiding it in terms of efficiency.[45] At the same

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[38] Jurgen Habermas *Theory of Communicative Action*, Vol. II: 524, 534; For Habermas, law presupposes the lifeworld in order to function, but restricts its regulative function to systems – it does not 'colonise the lifeworld' (TCA II: 489 n).

[39] Ingram, above n 34, 142.

[40] Habermas, above n 38, 310-11, 314-18; Talcott Parsons, *The Structure of Social Action* (New York, 1937), 93-101.

[41] Talcott Parsons, *Toward a General Theory of Action* (Cambridge, Mass, 1953), 173-78.

[42] Habermas, above n 21, 306.

[43] Habermas, above n 38, 536.

[44] Ibid.

[45] Habermas, above n 21, 135-6.

time, it could still be legitimated by moral-practical discourses in its reliance on procedural democracy which operates in legislation, jurisprudence and administration.[46]

The categories of system and lifeworld, then, are methodological tools suggesting that actions be view from two perspectives: the perspective of the social agent who participates in communicative networks (the public sphere), and the perspective of the observer who views social behaviour in terms of unintended consequences.[47] These perspectives are overlapping functions, since systems are never completely uncoupled from normative contexts, and because democratic legitimacy requires such system steering mechanisms as power and money to be anchored in law before they can function.[48] This results in the mutual conditioning of system and lifeworld.[49] For Habermas, ideological illusions can only be analysed when existing forms of social integration are understood as compromises between lifeworld and system.

Habermas conceives of law as a mechanism for social integration, as Parsons did. Parsons' model, however, made no distinction between the contribution of each subsystem. For Habermas there is a fundamental difference between the sites of integration. Law remains related to the normative perspective that is only available from the lifeworld[50] – in other words, that it requires moral justification, especially when legal norms are affected by political and economic values and imperatives. There are, therefore, three mechanisms guiding changes in the legal form: economic and political imperatives, so-called technocratic imperatives resulting from the 'colonisation' of law by systems, and responses to the moral claims of the lifeworld. Recently, Habermas has paid closer attention and accorded greater significance to the levels at which law operates, attending to the significance of the constitution and the judiciary. He argues that the law's legitimacy is ultimately a product of legislation, but that the judiciary ensures that this process obeys the conditions of judicial will-formation.[51]

Thus, Habermas's theory argues for a relative autonomy of law. Understandably, developing his theory in the context of European welfarist

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[46] Ibid, 109.
[47] **See Ingram, above n 34, 120.**
[48] Habermas, above n 38, 273, 275-6.
[49] Ibid, 275-6.
[50] Habermas, above n 21, 70-8.
[51] Ibid, 292-348.

states, Habermas accords a more interventionist role to the state[52] than would a non-European. The government secures basic liberties and rights, and curtails capitalist encroachment on the lifeworld by supporting demands for equality and participation.[53] The normative claims of the lifeworld, then, are reflected in the norms guiding substantive law aimed at securing the viable coexistence of plural lifeworlds. Systems imperatives influence legal norms in terms of formal justifications, rather than specific *topoi*. Legal matters may arise anywhere, but the systems interest is in how they are dealt with, and how they are dealt with could transform the terms of justification demanded by the system.

THE JUDGE AND REASON

Before seeing how these consideration can be used to assess, more or less successfully, an actual historical situation, it is necessary to consider Habermas's application discourse on the relation of justice to rationality. Habermas comments on the normative influxes filtered through law to determine or control systemic functions. He does not however provides a detailed discussion of how law will handle normative inputs and channel them through to the system. For Habermas, the legitimacy of the legal norm is determined from the counterfactual reconstruction of the legislative process.

However, judicial application of a legal norm to a particular case involves more than a counterfactual reconstruction. It also requires judicial adaptation of the legal norm to the to the facts and circumstances of the actual case. For a judicial decision to be legitimate it must both contribute to legal stability and be right.[54] The judge faces the problem of how the application of a contingently emergent law can be carried with internal consistency, and grounded in an externally rational way so as to guarantee simultaneously the certainty of law and its rightness.[55] Habermas analyses Legal Hermeneutics, Legal Realism and Legal Positivism and finds them lacking,[56] since they fail to make the appropriate distinction between facticity and validity.

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[52] Habermas, above n 38, 267-72, 347-63
[53] See eg. Suzanne D Berger (ed), *Organising Interests in Western Europe* (Cambridge, 1981)
[54] Habermas, above n 21, 199-201.
[55] Ibid, 200.
[56] Ibid, 33.

For Habermas, ideological illusions can be diagnosed only when existing forms of social integration are understood as compromises between lifeworld and system.[57] Functionalist theories reduce social integration to adaptation and interpret cultural ideals as mechanisms for steering behaviour. Such ideals can be functionally legitimated but not ideologically compromised by the system, and so cannot serve as standards for criticising the injustice of adaptive hierarchies of power and wealth.[58] Legal realism shows an awareness of the contingencies of any particular ethics in a pluralistic society. Therefore it focuses on external factors such as the judge's politics, psychology and ideology to account for judicial decisions. However, in the process it wipes out the structural difference between law and politics and hence cannot explain how law stabilises expectations.[59] Legal positivism accounts for law's role in stabilising expectations by considering it impermeable to extra-legal principles, thus unduly sacrificing its rightness to its certainty.

Hermeneutic theories which reduce social integration to a consensus are incapable of grasping how the ideal of freedom and equality underwriting civil and democratic rights are vitiated by the constraints of political and economic domination that lie "hidden in the process of communicative action."[60] Legal hermeneutics admits the embeddedness of interpretation. It argues that standards for interpretation are relative because they are only referable to the pre-understanding of the judge and citizen. In turn this pre-understanding is shaped by the ethical complex of tradition. An essentially contextualist position it, because of its location in tradition, cannot reach beyond the available interpretations of tradition for standards of judgment. Habermas comments that the principle of adjudication can only be legitimated from "the effective history of those forms of law and life in which judges continually find themselves"[61]– thus it implements an already shared ethos.

However, there are numerous problems with this model. Firstly, context-dependent positions are bound by traditions which may be oppressive – and so should be regarded suspiciously.[62] Secondly, in a pluralist society defined by competing conceptions of the good the hermeneutic model is flawed in

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[57] Ibid.
[58] Habermas, above n 38, 276-7.
[59] Habermas, above n 21, 204-5.
[60] Habermas, above n 38, 276-9.
[61] Ibid.
[62] Ibid.

choosing to promote or advance one form of life over another. Therefore, Habermas concludes, overcoming context-dependent positions requires forms of idealisation which separate facticity from validity.

Dworkin's legal philosophy is appealing to Habermas in both its deontological character and its appeal to history. Contrasted with legal hermeneutics this approach is not associated with the 'pre-understanding of normative transmissions.' Rather it represents the 'critical appropriation of the institutional history of law' (critical reasoning). This takes legal philosophy beyond context-dependent, historical references by incorporating a moment of idealisation, applying appropriate deontological principles. For Habermas, Dworkin's critical hermeneutics contributes two principles. In the first place, it states that legal decisions may have a reference to a certain moral content (normative inputs). In the second place it includes a moral content that goes beyond a particular historical context – thus vying for unanimity and universality. Dworkin's appeal to deontological principle gets beyond the assumption that law is a closed rule system.

Habermas interprets principle as "higher-level justification of norm applications"[63] The application of a deontological principle distinguishes Dworkin from hermeneutics:

> Since these principles cannot be drawn like historically proven *topoi* from an ethical community's complex of received traditions, as legal hermeneutics assumes, the practice of interpretation requires a point of reference that takes one beyond settled legal traditions.[64]

Critical hermeneutics is said to appeal to a certain form of ahistoricality which in turn will lead to the separation of the context dependent historical evidence from theory. However, as we have established in terms of a provisional critical theory emerging from the particulars of practical reason in the public sphere, something more is required for the convergence of principle and practice.[65]

Dworkin explains it by postulating a legal theory that rationally reconstructs and articulates valid law at a given time.[66] Dworkin says: "Constructive interpretation is a matter of imposing purpose on an object or practice in

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[63]Habermas, above n 21, 342..

[64] Ibid, 343.

[65] See, Ingram, above n 34, 172-88.

[66] Habermas, above n 21, 34, 31.

order to make of it the best possible example of the form or genre to which it is taken to belong."[67] Habermas interprets this to mean that Dworkin is advancing a legally grounded bridge between reason and history: "With the help of such a procedure of constructive interpretation each judge should be able to reach an ideally valid decision by supporting his justification on a theory, thereby compensating for the supposed indeterminacy of law."[68] So, Dworkin's judge (Hercules) is able to appeal to the 'best theory possible' and conduct 'rational reconstruction'. By upholding the classical principle of integrity, Hercules is able to sustain the interpretation of the law on the basis of ideals derived from the political community:

> The judge's obligation to decide the individual case in the light of a theory justifying valid law as a whole on the basis of principles reflects a prior obligation of citizens, attested by the act of founding the constitution, to maintain the integrity of their life in common by following principles of justice and respecting each other as members of an association of free and equal persons.[69]

The judge is another citizen in this respect. But Habermas contends that Dworkin's judge/citizen is unable to carry the program out because the integrity of the judge is not enough. One would have to liberate Hercules from the "loneliness of a monologically conducted theory construction" and redeem the deontological promise of adjudication dialogically. So, Habermas brings his theory and critique of subjectivity to bear on the point. Dworkin has acknowledged that integrity is grounded in equal right. Should the equal right to subjective liberties be anchored in the ideal personality of a judge who distinguishes himself by his virtue and his privileged access to truth? It would be better, argues Habermas, to ground the ideal demands of legal theory (and citizenly practical reason) in another ideal: the ideal "of an open society of interpreters of the constitution."[70] Interpretation would then refer beyond the immediacy of the judgment of an individual to the intersubjectivity of a community of interpreters conceived along the lines of a discourse theory of law.

The argument draws on the establishment of the co-originality of public and private autonomy to link subjective liberties with the common good. Individual judgment is therefore critiqued in the name of the community of

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[67] Ibid, 222.
[68] Ibid, 333.
[69] Ibid, 354.
[70] Habermas, above n 22, 267

interpreters. The subject must be given a role without sacrificing the account of public rationality. Habermas furnishes a principle of dialogue among civic-minded individuals who do not share the same conception of the good.

THE HISTORICAL CASE

Deflem's historical analysis of the institutional, social, cultural and political changes in abortion law in America considers the political and cultural extra-legal conditions under which these decisions were reached.[71] The two most notable cases in this debate were *Roe v Wade* (1973)[72], and *Planned Parenthood v Casey* (1992)[73] In *Roe* the United States Supreme Court based its decision on a woman's privacy right. The right to privacy is not explicit in the US Constitution, but the Court concluded that

> however based … whether it is to be found in the Fourteenth Amendment's concept of personal liberty, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of the right to the people, it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[74]

The court also ruled that this privacy right is not absolute and that it should be measured in relation to the state's interest to protect potential life. The decision was highly controversial and led to legislative changes in all American states. In effect *Roe* curbed the legislative powers of the US States by not allowing them to pass legislation that proscribed abortion. Casey *represents the most restrictive abortion ruling to date. Whilst not overruling Roe, it discarded Roe's trimester framework.* The State's interest can now be set by a determination of fetal viability no longer bound to a definite period in pregnancy.

Political responses to both cases assumed unprecedented proportion. This was characterised by an explosion of abortion related legislative initiatives after 1973, and an increased litigation over their constitutionality. The evolution of abortion law since *Roe* reflects the struggle between state and

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[71] Mathieu Deflem, 'The Boundaries of Abortion Law: Systems Theory From Parsons to Luhmann and Habermas,' *Social Forces* 76(3), 775.
[72] Ibid, 784.
[73] Ibid.
[74] *Roe* at 728, in Ibid.

federal bodies of government. A number of controversial proposals were raised at state level. In 1976 the *Hyde Proposal* was put forward by Senator Henry J. Hyde to introduce an amendment to a federal health bill that stipulated that except where the mother's life was threatened, abortions could not be funded through Medicaid under Title XIX of the *Social Security Act* which provides federal funds to the states for medical care.[75] Senator Orrin Hatch proposed a constitutional amendment (the only one ever to reach the Senate floor) that abortion was not a right guaranteed under the Constitution and that the more restrictive law should govern in the case of federal and state law conflicting. Bitter controversies in Congress surrounded both amendments.

The political importance of the abortion issue was also evident in the consecutive presidential campaigns of Presidents Reagan, Bush and Clinton. Abortion was a key issue in the Reagan presidential campaign, whose administration advanced pro-life proposals. George Bush ran on a pro-life platform and continued the anti-abortion policies of the previous administration. Clinton, on the other hand, declared his more liberal position during his campaign, and pursued a number of them, if not legislatively, then through his appointment of key justices and Attorneys-General.[76]

The cultural influence on the abortion cases is empirically difficult if not impossible to measure. They can be described, but not quantified. Furthermore, there are difficulties in accounting for the variables that constitute culture. Abortion is discussed in the light of multiple claims over the meaning of abortion from ethnic minorities, religious groups, women's rights movements, and the counter-reactions they invoke. Then, within any one of these groups analysis confronts the difficulty of attempting to relate the connection between the legality of abortion, the sentiments attached to its morality, to the political orientation, religious convictions, age, race, gender, and regional affiliations of individuals and collectives.

More broadly, analysis can point to the struggle between the American religious inheritance and the culture of individual rights – "a constant factor"[77] in all considerations of social life. Deflem argues that the Supreme Court expressed a reluctance to consider particularistic rights for women in favour of the application of universal principles, and that this confirms

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[75] Ibid, 785.
[76] Ibid, 786-87.
[77] Ibid, 788.

Parson's contention that the universals have a conflictual relation between the plurality of values and the integrative aspirations of legal norms in the abortion case. Habermas argues that lifeworld claims are reflected in normative demands that have to be mobilised by social movements actively oriented towards legal and political reform[78] – so it better accounts for the cultural-religious controversy between different, pro-life and pro-choice pressure groups that seek to promote their interests in the debate.

Habermas argues that the role of the Constitutional Court is to preserve the very system of rights that preserves an internal link between the public and private autonomy of citizens.[79] He therefore provides a systematic theory of democracy that brings the legitimate parameters of constitutional review into focus. For Habermas, constitutional adjudication must be susceptible to deontological justification to the community of communicatively engaged actors. Legitimate constitutional adjudication is not a matter of "[w]hat is best for us at a given point" but "what is equally good for us all."[80] However, at the same time, constitutional norms cannot simplistically preside over all conceptions of the good.

Habermas limits legitimate constitutional adjudication to the application of constitutional norms that a judge must presuppose to be valid.[81] However, this is too narrow a formulation when considering the counterfactual nature of deliberative democracies. In an ideal democracy, surely constitutional norms would be established by a discursively oriented legislative procedure, and judges would merely apply those norms to individual cases. However, the greater the deviation between actual democracy and its counterfactual counterpart, the more room there is for judicial elaboration and application of constitutional norms. As long as the work of the judge can be justified in terms of Habermas's understanding of constitutional adjudication, there is a sufficiently strong theoretical foundation for the distinction between the judiciary and the legislature.

Habermas identifies technocratic pressures determined by medical technology on the Supreme Court's decisions. *Roe* acknowledged the normativity of the medical profession's position.[82] The abandoning of the trimester framework was dependent largely on medical expertise: the state's

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[78] Habermas, above n 38, 391-96.
[79] Habermas, above n 21, 272.
[80] Ibid, 270.
[81] Ibid, 269-70.
[82] Deflem, above n 71, 790.

compelling interests were judged not to apply until the end of the first trimester of pregnancy, while, "up to that point, the abortion decision in all aspects is inherently, and primarily, a medical decision …[and] must be left to the medical judgment of the pregnant woman's attending physician."[83] As Habermas has argued in relation to the technocratic redefinition of European welfare laws,[84] the court resolved the normative dilemma ("the vigorous opposing views") on the basis of technological reasoning.

This applies formally only to the justifications that set limits to the constitutional right to abortion. The technocratic reframing of abortion law has given rise to numerous criticisms. It has been suggested that the Supreme Court's abortion rulings are constitutionally vague because the Court failed to clearly define the boundaries of the trimester framework and the point in pregnancy.[85] Some commentators therefore propose alternative standards based on fetal development.[86] Others questions the reliance on medical technology altogether in constitutionally determining the boundaries of legal abortions. Because technocratically transformed abortion law subordinates abortion as a right (defended or denied) to the technical abilities of medical experts and reaffirms the role of women in terms of their reproductive abilities, it is argued to abandon technocratic standards in favour of constitutional principles or a recognition of specifically feminite qualities.[87] The conversion of symbolic into technocratic reasoning has been applied in constitutional abortion rulings that have been reached since *Roe*.[88]

The theories applied are not strong in determining the weights of the interests influencing abortion laws. However, the bi-level model is more successful in accounting for the range and types of influence. The law is not closed to these influences, as Luhmann would have it, nor is it simply

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[83] *Casey* at 733, in ibid.

[84] Habermas, above n 38, 361-73.

[85] Carole Clark, 'Perspectives of Viability,' *Arizona State Law Journal* 9 1980, 128, 129-37.

[86] Ronald Dworkin, 'Unencumbered Rights: Whether and How *Roe* Should be Overruled,' *University of Chicago Law Review* 59, 1992, 381, 381-42; Kelly Henry, '*Planned Parenthood of Southeastern Pennsylvania v Casey*: The Reaffirmation of *Roe* of the Beginning of the End?' *Journal of Family Law* 32, 1994, 93, 113; John E Kennedy & Michael Nicolazzo, 'Abortion: Toward a Standard Based upon Medical Signs of Life and Death,' *Journal of Family Law* 23, 1985, 545-63.

[87] Susan Behuniak-Long, '*Roe v Wade*: the Impact of an Outdated Decision on Reproductive Technologies,' *Policy Studies Review* 8, 1989,368-79; R H Blank, 'Judicial Decision Making and Biological Fact: *Roe v Wade* and the Unresolved Question of Fetal Viability,' *Western Political Quarterly* 37, 1984, 584-602..

[88] *Casey* (1992) at 710-11, and *Webster* (1989) at 3054-58 cited Deflem, above, n 71, 790.

translating these inputs into its own hermetically sealed and specialised code for the purpose of its own maintenance. For Deflem, Parsons can assist in accounting for changes in society and in relations between the state and society. Parsons' theory is able to describe changes in social agent's beliefs and values. However, he maintains that law mediates by curing society of dissent through the procedural negotiation between different values.[89] When law does not function, orders will disintegrate. This denies that law can heighten social disintegration. This, he concludes from his historical analysis, was indeed the case with abortion law. Rather than provide cohesion, it has contributed to conflicts over the morality of abortion, both between the culture and the state, between state and federal levels of government, and within the pluralistic culture.

Habermas's relation of the law to the lifeworld, on the other hand, allows for a more sophisticated analysis of a complex social process. Divergent lifeworld claims confront the legal system, and vice versa. The legal situation is characterised less by integration than by enduring conflicts and tensions. In a pluralistic society harbouring multiple and divergent values, normative integration is becoming more difficult to achieve. As Habermas says, "the sphere of questions than can be answered rationally from the moral point of view shrinks in the course of development towards mutliculturalism."[90] Deflem concludes that the legal system still serves integrative functions, and can still solve problems even in the most intractable situations (unwanted children, illegal abortions). He refers to the fact that the qualified legalisation of abortion has found general support. However, he also concedes that public opinion on abortion has become more polarised, so that a normative conflict reigns. Ultimately, the legal determination of abortion is a determinate outcome rather than one reflecting a normative consensus.

LEGAL SOLUTION

Despite the shrinking domain of normatively relevant questions, discourse theory does aim to relate law, politics and morality by providing an impartial procedure of adjudication. The strong claim it makes is that, if these procedures are followed by actors they will yield legitimate solutions for all effected. Despite the difference between the universal moral domain, and

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[89] Deflem, above n 71, 803.

[90] Jurgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (Cambridge, Mass., 1991), 91.

the local and particular domain of values, Habermas claims that ethics, morals and values can be brought into a complimentary relationship. Discursive validation of the law requires impartiality with respect to conceptions of the good actually represented in an historical society. Law is, in this respect, at best relatively impartial. Morality, on the other hand, would have to be impartial with respect to all conceptions of the good – including those not represented – and thus absolutely impartial.

However, there are issues, such as abortion, that cannot be approached independently of some conception of the good. Alisdair MacIntyre refers to abortion as a paradigmatic case of essentially contested and incommensurable moral disagreement in contemporary life.[91] The issue, as extracted from the historical cases, policy initiatives and legislation, can be variously characterised as one of wilful murder (pro-life), or women's rights to autonomy, privacy and equality (freedom of choice). If the value of discourse is in its ability to assess the injustice of an action or course of action, it must do so by referring squarely to these different conceptions of the good, and the value preferences they enshrine. If moral consensus, as defined by Habermas, is impossible, legal consensus on the basis of adjusted preferences, compromise and bargaining may be available.

Compromises, suggests Habermas, are legitimate as long as they are acceptable to all communicative actors.[92] Unlike discursive consensus, discursive compromise may be acceptable to different actors on the basis of different reasons.[93] Even if it is permissible in legal discourse to introduce pragmatic concerns, identity issues, and aspirations which aim at reaching an equilibrium between competing value preferences and interests,[94] it is unlikely that even the flexibility of discourse in legal reasoning would resolve the issue of abortion. This is quite clearly because the issue is structured by a sharp class of value preferences for which no dialogical compromise or balance seems possible. It is difficult to see how an even perfect reversal in subject positions could produce the gain in understanding required to produce persuasion for the purpose of transformation.

POLITICAL SOLUTION

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[91] Thomas Farrell, *Norms of Rhetorical Culture* (New Haven, 1993), 234.
[92] Habermas, above n 21, 118.
[93] Ibid, and 177.
[94] Ibid., 118.

Discursive proceduralism in general, and the discourse theory of law subsumed under it, acknowledges the pluralist nature of modern complex societies, and attempts to provide a means for including perspectives which disagree on substantive issues. However, proceduralism ultimately depends on the compatibility with an underlying consensus on relevant substantive values. Discourse theory is adaptable to testing the limits of pluralism. On the one hand, Habermas insists that differences must be settled within the discursive process. So, feminists who reject standards of justice reflected in pro-life abortion rulings, for instance, must either agree to discursive proceduralism or renounce pluralism.[95] Habermas is amenable to a theoretical underpinning of the analyses of abortion cases in a liberal bourgeois democracy whose aim is to produce the greatest possible diversity compatible with the harmonious coexistence and cooperation, and with treating others with respect, fairly and equally, because discourse theory is grounded in pluralism's second-order value preferences. It is therefore appropriate for suggesting ways of accommodating as many first order value preferences as possible and to the greatest extent possible that is consistent with a cohesive and determinate political society. In fact, this ethic of pluralism takes the place of morality – although it would, as a definite conception of the good, fail the test of universalism.

Driven by its second order norm, pluralism is neutral to all first order values. It informs and limits the discursive procedure designed to select first order values for inclusion, subsuming that procedure under its own conception of the good. The pluralist perspective and the procedure it establishes are not entirely impartial. Rather, its role is to: test the authenticity of first order preferences; explore whether value preferences have commonalities or overlap; 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.[96] Law cannot reconcile legal and factual equality for the same reason pluralism cannot place all first order preferences on an equal footing. Therefore, discursive proceduralism can only suggest the best possible solution under current limitations.

Discursive proceduralism, therefore, restores the balance between the two profiles of Habermas's counterfactual constructs. First, it provides the means for constructing reflective equilibrium – the balance of first and second order preferences which orders them according to the situation and the concerns of morality. Second, it affords a critical vantage point from

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[95] Ibid, 182.
[96] Ibid, 181.

which to demand inclusion or more favourable terms of inclusion. As the abortion case severely demonstrates through its deep value chasm, the morality of pluralism, and the legitimacy described by discursive legalism restricts the range of instances where legal consociates in a form of life can be genuinely considered both the authors and addressees of their own laws. Given that one's first order preference (pro-life/pro-choice) has been set aside or greatly restricted by a pluralist proceduralism, one cannot consider oneself an author of coercive laws to which one is subjected. The tension is acknowledge by Habermas as the tension between facts and norms which can never be ultimately resolved

The divisions of the abortion issue militate against the possibility of a dialogical agreement at the level of fundamental rights. Ethical and culturally specific interpretations (and conflicting self-understandings) enter the process which do not admit of a convergence towards consensus. Value conflicts cannot be impartially resolved – especially so if what is at stake is the concept of ethical interpretation itself. The task is made more difficult by Habermas's insistence that citizens agree "for the same reasons"[97] when deliberating, rather than agreeing for different reasons as in bargaining and compromise. The only solution may be a loosening of the requirements of the discourse principle that: "Only those laws may claim legitimacy that meet with the agreement of all citizens in a discursive law-making process that is itself legally constituted."[98] Lowering the requirement of unanimity without surrendering the norm of popular sovereignty requires the introduction of a participatory component into the formulation of any principle. Thus, a law may be legitimate if it is agreed to in a participatory process that is fair, and open to all citizens.

Citizens who participate may still cooperate in processes the outcome of which does not accord with their values directly. Cooperation is defined as continued participation in the ongoing public discourse, despite disagreement with any particular decision. Furthermore, a law is thereby legitimate if it agreed to by all citizens in a fair and open participatory process in which they continue to cooperate freely. Habermas's principle of publicity prescribes cooperation among numerous collectives and counter public spheres. Once unanimity is abandoned, it is possible to incorporate the principle of majority rule into the two-track theory of democracy. Majority rule is acceptable as a basis for cooperation as long as minorities have reasonable expectations of being able to effect and revise political

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[97] Ibid, 411.
[98] Ibid, 141.

decisions, including decisions about the conditions of participation. If all decisions are open to revision it is possible to compel the majority to take the minority into account, as long as all citizens are potentially capable of occupying the position of the minority. This condition is available from Habermas's discursive rules, but the outcome of unanimity is not unavoidable. Thus, the rule of the majority is what institutionalised popular sovereignty means – its weaknesses corrected by rational counter-majoritarian institutions such as judicial review.

RIGHTS

The ideal speech situation provides Habermas with the basis of the definitional interdependence of autonomy and solidarity. Habermas postulates that in any setting involving communicative action, the individual arguers or advocates are self-promoting, but are bound by good faith to recognise their mutual embeddedness in a community of discourse. This bond of belonging requires of interlocutors both the right to assert or deny, and the overcoming of egocentrism and resistance to self-criticism.[99] The same communicative setting requires equal rights of individuals within argumentation, and equal respect for the dignity of each participant in the process.[100] In other words, Habermas is raising, through the networks of communication, the prospect of identifying private and public persons engaging in practical historical questions.

What the ideal speech situation proposes, then, is nothing less than that democracy and the rule of law are mutually related. This synthetic claim is central to a system of rights in which public autonomy and private autonomy are mutually implied, or "equiprimordial."[101] Subjective liberties must be derived from democratic legislative procedures which confront its participants with the normative expectations of the orientation to the common good.[102] Habermas wishes to avoid the liberal-republican dichotomy in the interpretation of rights. That is, the representation of

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[99] Jurgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, Mass., 1990), 195-217.

[100] Ibid., 202-3.

[101] Habermas, above n 21, 162.

[102] See Claus Offe, 'Binding, Shackles Brakes: On Self-Limitation Strategies,' in Axel Honneth et al (eds), *Cultural-Political Interventions in the Unfinished Project of Modernity* (Cambridge, Mass., 1992), 63.

rights as on the one hand the exclusively moral, universal property of atomistic individuals, and on the other hand the shared values of a particular community.

Law, in a manner analogous to communicative reason, mediates the dichotomy. As elements of a legal order, rights make sense by means of the mutual reinforcement of mutual recognition and self-legislation. It is the dual characterisation of rights which make them the means for citizens to collaborate in making positive law as free and equal citizens. Rights are collaborative in that they do not exist independently of the process of regulating the common life of citizens through the law. Laws, too, are legitimated when citizens grant each other equal rights and liberties. Habermas's theory of rights is based on his principle of discourse, derived from his postulates of communicative reason and states that "only those norms are valid which all those affected could agree to as participants in a rational discourse"[103] Thus, the regulation of common life will take the form of law when this principle is upheld, since the unanimity of citizens in its internal connection with the principle of legitimacy, preserves its "connection with the socially integrative force of communicative action."[104]

The system of rights which Habermas derives from his formal postulates of successful communication supports a substantive democracy which emphasises the '[g]enuine participation of citizens in … political will formation."[105] Thus a strong notion of democratic will formation emerges which requires more than either formal or self-interested rationality. Habermas thereby rejects Weber's contention that legitimacy is a function of instrumental rationality. Rather, communicative rationality based on speech act theory founds modern law. Law expects its consociates to have a capacity for purposive-rational decision making. Habermas explains that the connection between public rights and subjective liberties,

> lies in the normative content of a mode of exercising political autonomy, a mode that is not secured simply through the form of general laws but only through the communicative form of discursive processes of opinion and will formation.[106]

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[103] Habermas, above n 21, 411.
[104] Ibid, 111.
[105] See *Legitimation Crisis* (London, 1974), 36; and Habermas, above n 38, 8.
[106] Habermas, above n 21, 419.

Habermas's concept of the constitutional state in which rights are institutionalised is aligned to the model of the *Rechtstaat*.[107] The *Rechtstaat* institutionalises impartial procedures of decision making, and guarantees impartiality by procedural forms determining the rationality of law and the areas of life regulated by it. However, Habermas has characterised complex democracies as consisting of mixed modes of pragmatic, ethical and moral discourse, producing compromise and bargaining procedures.

This, however, would involve democracy in perlocutionary acts as well as illocutionary ones. Perlocutionary acts are strategic, symbolic and non-propositional, whereas illocutionary acts are communicative and propostional. Perlocutionary acts are also parasitic on illocutionary acts in that comprehensibility is the condition of all communicative action. In the course of Habermas's theorising of the speech act types which constitute a communicative practice, he comes to identify validity with some and not others, producing a hierarchy of types with rational and ethical significance.[108] In this case, the perlocutionary are not rational. Moreover, neither are they any longer two ways of examining the same phenomenon as they were in the speech act theory from which they were derived.[109] Habermas, in revising speech act theory for his own ends, denies the co-existence of perlocutionary and illocutionary perceptions or performances of utterances, morality or rationality, and replaces that symbiosis with a dichotomy.

A perfectly perlocutionary act in Habermas's complex democracy, and strategies of modern law, is bargaining.[110] Bargaining is perlocutionary because an incompleteness of initial intent – which violates rules of discourse – is built into the procedure. The attitude involved in the dialogue requires an acceptance of ambiguity and a withholding of consent. Furthermore, it is only by these means that bargaining proceeds so that it is redeemed by reciprocal strategies.[111] If comprehensibility, as Habermas claims, is the condition of all communication, then there are never prior conditions to understanding. Comprehension occurs in the pure mode of rational reconstruction. However, if we return to speech act theory's forgotten claim that all utterances have locutionary, illocutionary and

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[107] Jurgen Habermas, *The Philosophical Discourse of Modernity* (Cambridge, 1987), 8.
[108] Farrell, above n 91, 192-3..
[109] Allen Wood, 'Habermas's Defence of Rationalism,' *New German Critique* 35 (1985), 158, 158-9.

[110] Habermas, above n 21, 207.
[111] Farrell, above n 91, 196.

perlocutionary elements, then it is possible for perlocution to precede illocution. Some communicative acts may therefore be based on substantive values rather than ideal presuppositions. In those cases, understanding and proof may not be advanced by validity claims grounded in grammatical structures, but by feelings that arise in historical cultures under specific conditions. In law, concern for justice may motivate understanding and proof.[112]

Democratic pluralism therefore requires a revised discourse ethics constructed within the framework of Habermas's statement that "the substance of human rights … resides in the formal conditions for the legal institutionalisation of those discursive processes of opinion- and will-formation in which the sovereignty of a people assumes a practical shape."[113] Here, Habermas connects concrete and specific rights with their formal conditions of formation, as well as discursive processes and their social form. The defence of substantive democracy requires an expansion of Kantian practical reason towards a conceptualisation of practical reason in historical contexts. For democratic institutions to be rational and discursive in Habermas's sense (under illocutionary comprehensibility conditions alone) is too stringent. Free and equal citizens may deliberate and make decisions in ways other than those revealed by pure conditions of intersubjectivity.

Democratic legitimacy does not rely on metaphysical foundations, but centres on the creation of discursive conditions under which all can shape the decisions affecting them, not intersubjective universalisation. Indeed, Habermas encounters this set of conditions in his discussion of communicative power – the illocutionary acts that issue from the norm-defining public sphere. Significantly, he draws on Arendt's distinction between power (*Macht*) and violence (*Gewalt*) in his search for a basis of legitimacy.[114] Power, says Arendt, emanates "from the ability not just to act but to act in concert."[115] For Habermas, law is the medium through which communicative power is transformed into administrative power, thus establishing "a balance of forces between three forces of social integration:

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[112] Ibid, 197.

[113] Habermas, above n 21, 291.

[114] See Dana Villa, *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton, 1999), 128-54.

[115] Ibid, 16-17.

money, administrative power and solidarity."[116] Habermas then explains how discursively achieved collective clarification (comprehension) is connected to opinion- and will-formation and communicative power: in the setting of a legal community, political opinion- and will-formation include pragmatic, ethical-political, moral and bargaining question-procedures which then pass into legal discourse.[117]

They are, then, theoretically internally connected from the start. Indeed, because the legal form occurs at the same time as the collapse of traditional ethical life, the validity of legal norms derives from both law's being enforceable, and its appeal to the assent of the governed. Discursive law making and communicative power are linked by the fact that reasons in communicative actions produce no motives, and law makes up the positive deficit. The connection is effective because concrete communities arrange their common lives using common legal norms and do not "separate questions of regulation of behaviour by law from questions of collective goals."[118] Habermas appears forced to presuppose, not ideal discursive conditions, but a legal community. This is so despite the fact that communicative power was meant to explain the conditions "bringing into being new institutions and laws."[119] That is, through the intersubjective recognition of validity claims raised in speech-acts reinforcing a belief held in common which is held by a speaker and hearer involving tacit acceptance of obligations relevant for action.

Thus the endorsement of values mediates a consensus on norms. Solidarity must include references to both individual welfare and the common good. The two moments of the discourse principle – that each can convince others of the acceptability of norms, and that one can be convinced by all – represents the extent to which solidarity brings to light the "hidden link between justice and the common good."[120] Described in pragmatic terms as an agreement on the common good, consensus does not necessarily prescribe goods for all participants. Solidarity indeed describes for

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[116] Habermas, above n 21, 187.

[117] Ibid, 207.
[118] Ibid, 188.

[119] Ibid, 187.
[120] Habermas, above n 99, 202.

Habermas the notion of concern for others on the part of those who are not concretely pursuing the same goods.

This absence of commonality in the uncontextualised justice of right needs completion in something beyond the ideal speech situation. Habermas has referred to the centrality of the ego's concern for the other:[121]

> The agreement made possible by discourse depends on two things: the individual's inalienable right to say yes or no and his overcoming of his egocentric viewpoint. Without the individual's uninfringeable right to respond 'yes' or 'no' to criticisable validity claims, consent is merely factual rather than truly universal. Conversely, without the empathetic sensitivity by each person to everyone else, no solution deserving universal consent will result from the deliberation. These two aspects – the autonomy of the inalienable individual's and their embeddedness in an intersubjectively shared web of relations – are internally connected, and it is this link that the procedure of discursive decision making takes into account.[122]

Empathy is essential to rationality, at least for the time needed to allow insight into the rationality of the other's consent. The connection between empathy and justice is substantial, for empathetically sensitive arguments are designed to solicit rationally motivated consent. Rights claims, therefore, are only possible to the extent that private autonomy is based on mutual prior recognition. These relations of "mutual recognition"[123] involve a co-original concern for the welfare of others, and for the unlocalisable bonds of social solidarity.

The anthropological nexus between solidarity and presuppositions of communicative reason "is rooted in the realisation that each person must take responsibility for the other because as consociates all must have an interest in the integrity of their shared life context in the same way."[124] This,

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[121] See Steven Hendley, *From Communicative Action to the Face of the Other: Levinas and Habermas on Language, Obligation and Community* (Lanham, 2000).

[122] Habermas, above n 99, 202.
[123] Ibid, 200.
[124] William Rehg, *Insight and Solidarity: The Discourse Ethics of Jurgen Habermas* (Berkeley, 1997), 110.

however, does not explain how the common good shines through the conditions of rational agreement. It may be argued that the common good is the norm itself, and that the common good is teleologically embedded in dialogue.[125] The norm is, in this sense, self-preservative, and preserves those other values necessarily founded upon and negotiated through it.

The intersubjectivity of discourse locates the site of the negotiation of solidarity and legitimacy in a public place. Indeed, the reversibility of the insights necessary to the structuring of solidarity relies on their being perfectly shared, which is inconceivable if a priori subjectivity were being used as the basis of rights claim in the liberal manner. However, as long as the cognition attributed to agents is theirs first, and then linked with other's convictions for the purposes of universal rational assent, obstacles impede the realisation of consensus. The complexity of modern society itself, as Luhmann maintains, renders this face-to-face conception of social integration both factually and theoretically naïve.[126] However, Habermas proposes no expedient mechanism for overcoming this extension of self-related insights.

Social integration cannot be produced outside conditions of legitimation, and legitimation is the direct result of citizens producing discourses in communicative engagements. The conditions of successful communication – individual and collective – and therefore genuine praxis – for Habermas is directly dependent on comprehension. It is a stringent requirement because it is geared to universalisable interests achieved communicatively under the conditions of discourse. Comprehension is that form of consensual understanding[127] which represents for Habermas an attempt to overcome the distortions of opinion formation under conditions of limited information, ideological forms of address, and restricted opportunities for testing and stabilising insights into the constitution of understanding. The self-reflective science that Habermas promotes connects the meaning of propositions to their causal structures.[128] In this way interpretation is linked to explanation.[129] Emancipation then occurs through self-reflection – and repeats the solipsistic gesture.

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[125] Ibid.

[126] See Thomas McCarthy, *Ideals and Illusions: On Reconstruction and Deconstruction in Contemporary Critical Theory* (Cambridge, Mass., 1991) on the 'naïve' attitude Luhmann is attempting to overcome with Systems Theory: 154-6.

[127] Habermas, above n 38, 276-9.

[128] J M Bernstein, *Recovering Ethical Life: Jurgen Habermas and the Future of Critical Theory* (New York 1995), 59-60.

[129] Ibid, 60.

Habermas has never altered his position on the need for complete participation in discursive opinion- and will-formation. Rational accountability is absolute. His historical study of the public sphere envisaged a society in which subjective participation was an empirical norm as well as a moral one. More recently he has confronted the problem of complexity as a limit to solidaristic participation. In the process "subjectless forms of communication"[130] have replaced the collective subject of the historical public sphere. However, in stating that "an intersubjectively dispersed, anonymous popular sovereignty withdraws into democratic procedures and the demanding communicative presuppositions of their implementation" Habermas returns to the universal pragmatic structures of communicative reason, with their insight-dependent subjectivities. At the same time, he advances an image of decentred processes which fail to coordinate all members of the social sphere. These two competing tendencies of the continuing presence of the subject, and the escalating distance over which the communicative process is forced to expand creates a legitimation gap.

Rehg suggests that no amount of rational reconstruction can unite this archipelago of discourse.[131] As a fact of advanced modernity, if rationality is to be secured, an ontological element must supplement the presuppositions of discourse. He suggests that "trust must inhabit the heart of rational conviction."[132] Experts must be consulted, and the formation of a rational opinion on behalf of each subject fast-tracked through the assessment of these condensations of discourse. Of course, this trust is not to amount to blind faith or naïve acceptance, but to be cognitively acceptable on some basis that is not itself, of course, rationalistic. He sees the development of regimes of trust as possible on the basis of the cooperative nature of will-formation itself. If will-formation requires trust, the presuppositions of discourse do not fully thematise rational consensus, and therefore compromise the strength of normativity.

Intelligibility and Comprehension

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[130] For criticism of Habermas's equivocal historicism see Craig Calhoun (ed), *Habermas and The Public Sphere* (Cambridge, Mass., 1993), especially sec. II: 181-358.
[131] Rehg, above n 124, 236; see also Kenneth Baynes, *The Normative Grounds of Social Criticism: Kant, Rawls, Habermas* (Albany, 1992), 172-81, on the multiple spheres of the public.
[132] Rehg, above n 124, 237-8.

Moral autonomy involves a complex set of competencies. The principle competence for moral autonomy, according to Habermas, is communicative. The autonomous person has acquired a decentred understanding of the world, is able to differentiate between the natural, social and subjective, and raise the three types of validity claims in relation to them.[133] The morally autonomous person is also able to abstract contested norms from their embeddedness in social life and adopt a reflective attitude towards them.[134] If the norm is contested a reflective person can enter debate, or practical discourse to determine its validity. These competences constitute normative cognitive behaviour, and are criteria for rational social interaction.

However, once it is accepted that trust is not incompatible with rationality, and is a component of (historical) rationality itself, then the shift entailed from Habermas's position may require extending communicative competences under conditions of decentredness. According to Rehg, with the addition of trust, rationality remains concordant with its origins in discourse. However, recently critics have suggested that Habermas must modify the requirements of discourse to accommodate these untranscendable characteristics. Anderson is critical of Habermas's attempts to avoid facing the tension between the real and the ideal by ignoring the subjective requirements of his dialogic interlocutors. In particular Anderson identifies "need-interpretive competence" as "an *essential* aspect of discourse".[135] This competence, or set of competences, is central to pragmatic discourse, demanded by participants of each other, and pressures Habermas to revise discourse ethics.[136] The revision is structural, since it addresses the substance of the presuppositions of the discourse to which Habermas' entrusts consensus formation for the purpose of social integration. Facticity is not simply in tension with normativity as a conflictual counterpart, rather the tension describes the unity of social complexity.

In other words, on Anderson's account, Habermas is in danger of unjustifiably relieveing his justificatory discourse of a responsibility of

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[133] Ibid, 237; on trust and ontological uncertainty in modernity see also Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge, 1991), 38-42.
[134] Habermas, above n 99, 138. See also Baynes, above n 131, 144.
[135] Habermas, ibid, 125.
[136] Ibid, 1.

understanding normativity "all the way down."[137] Habermas characterises 'interests' and 'needs' as instantiations of the "partiality that determines our subjective attitudes in relation to the external world."[138] As Habermas notes, need interpretation cannot be abstracted from the interpretive subject, for whose competence there is "no functional equivalent."[139] Habermas also maintains that needs are inaccessible even to the participants who process them outside a form of life in which they are attributed value, position and priority by means of intersubjective engagement.[140] Dialogue about those needs and the contexts in which they have arisen decontextualises them, and recontextualises them as discursively understood. However, it is the second phase of this familiar Habermasian move that is difficult to conceptualise. Recontextualisation requires motivation, which is inconceivable outside a lifeworld of shared values. Without this, needs interpretations resemble arguments in which speech acts supply reasons for other speech acts, and constatives, representatives and regulatives offer grounds, disclose motives and exhibit norms.[141] However, the only motive allowed in such justificatory discourses is the willingness "to arrive at an understanding"[142] and this does not suffice for action.

Anderson argues that needs-interpretive competence is an unavoidable presupposition of practical discourse. Habermas, he argues, conceives of it as a "lifestyle choice" that "remains contingent on a prior *telos* of a consciously pursued way of life".[143] For Anderson, this merely restates the tension of the real and ideal as one between anticipation and the currency and poignancy of the 'here and now': the "anticipation built into the claims

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[137] Joel Anderson, 'Competent Need Interpretation and Discourse Ethics' in James Bohman and William Rehg (eds), *Pluralsim and the Pragmatic Turn: the Transformation of Critical Theory, essays in Honour of Thomas McCarthy* (Cambridge, Mass., 2001) .

[138] Habermas, above n 22, 92.

[139] Habermas, above n 38, 96. See also, Seyla Benhabib, 'The Generalised and the Concrete Other: the Kohlberg-Gilligan Controversy and Feminist Theory" *Praxis International* 5 (1986), 402-24; Nancy Fraser, 'Towards a Discourse Theory of Solidarity,' ibid, 425-9, and Thomas McCarthy, 'Practical Discourse: On the Relation of Morality to Politics,' in McCarthy, above n 126, 181-99.

[140] See McCarthy, ibid; see Ingram, above n 34, 141-42: on needs as choices requiring interpretive contributions.

[141] Jurgen Habermas, 'What is Universal Pragmatics?' in *Communication and the Evolution of Society* (London, 1978), 1, 64-8.

[142] Jurgen Habermas, *Theory and Practice* (London, 1974), 18.

[143] Jurgen Habermas, *Justification and Application* (Cambridge, Mass., 1995), 12. See also, Anderson, above n 136, 2.

of rightness"[144] appears to eliminate the distinction between ideal values and empirical functions by treating discourse as a special action sphere in its own right. The realisation of rightness appears in discourse as a goal value controlling its functions, when discourse was ostensibly established as a formalist procedure without ethical pre-commitment. Habermas cannot claim, for instance, as Parsons did, that the power of cultural values devolves on them by virtue of their relationship to the telic system.[144] Rather, an awareness seems to emerge that the 'here and now' is simply overridden (not logically compelled) by the context-transcending requirements of discourse.

This is not strictly accurate. Habermas identifies both validity claims and conditions of intelligibility, but identifies rationally motivated binding force with the acknowledgment of the validity claim alone.[145] So, the only attitude to the world that speakers can adopt is with relation to the validity claims themselves. More forceful is Thomas McCarthy's argument which notes that needs, desires, feelings and concerns are interpreted "in the light of cultural values."[146] That is to say, needs are not available to abstraction because they embody values. In complex, pluralist societies, having lost its basis in the unassailable authority of tradition, no value-preference associated with a need could be prioritised over others to constitute a universal. Similarly, pluralism ensures that values will clash or even conflict. Because needs require interpretation through 'thickly' evaluative languages, neither can agreement be expected about the ways in which norms are to be assessed through them, given that establishing the validity of the norm will effect different needs in different ways.

Intelligibility might prove an adequate substitute for agreement, if understanding the other's meaning could be achieved without sharing their language or conceptual schemas. Anderson regards it as unintelligible to assert the possibility of 'making sense' of a perspective one does not share. Thomas McCarthy equally forcefully states that reaching agreement about moral norms requires some, and perhaps comprehensive, agreement about substantive ethical values.[147] Methodologically, this is the pole *in extremis* to Habermas's consensual understanding. However, for subjects to expect only

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[144] Jurgen Habermas, 'Reply to Symposium Participants, Benjamin N Cardozo School of Law' in M Rosenfeld and A Arato (eds) *Habermas on Law and Democracy: Critical Exchanges* (Berkeley, 1998), 452.

[145] Habermas, above n 38, 372-3.

[146] Habermas, above n 22, 307; see also Baynes, *The Normative Grounds of Social Criticism*, 105.

[147] Robert Brandon, *Making it Explicit: Reasoning, Representing, and Discursive Commitment* (Cambridge, Mass., 1994), 230-1.

intelligibility from each other is not to avoid raising validity claims, or giving reasons of the type Habermas requires. Scanlon, for example, in his assessment of contractual negotiations, suggests that interpersonal comparisons involve an assessment of preferences, reasons, and any potential reasons a person might give.[148] From reasons alone, he argues, can a range of variation from normality emerge. This is necessary, because needs rarely appear in isolation or perfectly specified, but come in bundles to be assessed for their urgency. Because preferences vary between cultures and individuals, the notion of responding to a need involves a standard of justification[149] which McCarthy's reference to thick evaluations does not in itself embrace.

Anderson argues in broad terms that moral consensus is either unachievable in a pluralistic society with a diverse representation of values, or will be achieved on the basis of some modification of the overly stringent universalistic requirements proposed by Habermas. Anderson therefore confronts Habermas with three related choices: either

> (a) loosen the requirements of agreement and mutual intelligibility, particularly of having to agree for the same reasons, or (b) lower the expectations of need interpretive competence as a presupposition of discourse, or (c) accept that agreement on norms will only be attainable if we limit the scope to those who share our evaluative language.[150]

McCarthy is certainly right to point out that Habermas is committed to basing moral discourses on ethical ones. However, despite the comprehensive discussion of needs, the conditions of intelligibility producing Anderson's 'trilemma' is in need of further clarification.

Neither Anderson nor McCarthy considers the need to undertake a critical examination of intelligibility. It is presented without a sense of its own historical constructedness. They proceed as if the subject's access to and disclosure of their needs were given, and that the different domains of intelligibility ("space of values") existed unproblematically in a broader social context. This space includes distortions of communicative relations in the form of ideological dominance and material inequalities, for example, which reconstructions of the ideal presuppositions of discourse address in

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[148] See Anderson, above n 136, 5.
[149] Baynes, above n 145, 148.
[150] Ibid.

order to distinguish consensus from conformity. It is therefore necessary to consider needs in the light of a prior, or at least concurrent, critical discourse which sensitises and informs subjects about the non-neutrality of value difference – reconstructive science which makes visible distortive, quasi-causal mechanisms, or a power-sensitive hermeneutics which arms subjects with a degree of self-understanding premised on simultaneous self-distancing and self-disclosure.[151]

Anderson and McCarthy require Habermas to weaken the notion of ideal standards of practical discourse. However, to accept something 'less' may be to accept something other. To accept the inarticulate may be to accept the distorted, although this is not to equate articulation with ideologically-free or pure transparency. However, to use compromise as a starting point, not for practical but for structural reasons may immunise the participant against critical self-relation.[152] Does less than full comprehension, for example, include tolerance for the incomprehensible?

McCarthy identifies the basic requirement of discourse as being no more than the mutual attribution of need-interpretive competence as an ongoing achievement of engaged participants for all practical purposes.[153] Anderson believes that participants could 'scale back' their expectations of consensus or agreement in response to the context:

> If we know, for example, that our interlocutors are ethically opposed to viewing sexuality in the language of 'basic needs', we have grounds to view their relative silence regarding the impact of a norm on their potential for sexual satisfaction as something other than a repressed relation to self.[154]

The observer function takes over and assesses the 'appropriateness' of considering the other competent, rather than assuming the existence of an objective basis for assessment. Implicit in this suggestion is the criticism that Habermas shares with some of the theorists he criticises (in particular, Luhmann) a tendency to reduce the moral judgment to a determinant

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[151] Anderson, above n 136, 5.

[152] Hans Herbert Kogler, *Critical Hermeneutics after Gadamer and Foucault* (Cambridge, Mass., 1996), 199-250.

[153] Ibid.

[154] See Thomas McCarthy, 'On the Pragmatics of Communicative Reason' in David Cozens Hoy, *Critical Theory* (Cambridge, Mass., 1994).

judgment, and consider reflective judgment irrelevant or, at best, a psychological component of cognition.

This lack of context sensitivity is the basis on which McCarthy urges a reconceptualisation of moral autonomy and solidarity. Using the intelligibility criterion, McCarthy implicitly advances Rawls over Habermas[155] – reflective equilibrium over rational consensus. In addressing the first branch of the trilemma with respect to agreement, McCarthy has argued against the necessity of participants in a practical discourse agreeing for the same reasons, and for "rationally motivated agreement" that may involve conciliation, compromise and accommodation.[156] McCarthy argues that participants in discourse are "reflective participants". Given the presupposed *telos* of universal pragmatics which involves reaching an understanding, participants must base their engagement in discourse on the potential they see in possible agreement. However, they can, at the same time, access an observer perspective from which can be noted facts such as the cultural prevalence of reasonable pluralism "and anticipate that of the reasons acceptable to us will be unacceptable to others."[157]

Weakening ideal conditions is problematic because the function of such idealisations is the counterfactual influence it has in transforming and improving actual discourse. The solution is to alter the criteria for recognising the participant as a deserving discourse partner – but, this not need involve the attribution of full competence. Indeed, it would weaken the transformative power of counterfactual discourse if it did not offer groups identities on a basis of something other than complete competence, or the full articulation of its needs.

Context sensitivity, then, is the new norm. This new normative function is expressed in perlocutionary speech acts, which withhold aims and intentions, and await revelation. To accept 'silence' may be a way of opening the interlocutor up to 'another language'. This process may trigger processes of reconstruction, learning and reflexive social knowledge by challenging the speaker to clarify and extend arguments and insights. On the other hand others may wish to define themselves to interlocutors only provisionally, for reasons that range from the political to the moral.

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[155] Anderson, above n 136, 14.
[156] Thomas McCarthy, 'Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue,' *Ethics* 105 (1994), 58.
[157] See Anderson, above n 136, 8.

Appropriateness also raises the need for the interlocutor to exercise a prudential capacity, which is essentially judicial. Needs now call forth a requirement to apportion meaningful properties to real persons. In other words, needs competence is not just any competence: it is a competence that goes to identity, and is a guide to practical engagement. It is also a form of justification because, as Perelman says, "the manner in which he judges permits the judges to be judged."[158]

If appropriateness is the norm, does it limit intelligibility, allowing for ambiguity? If intelligibility accepts ambiguity, it presumably also accepts interpretation. Interpretation may simply not be context sensitive. Firstly, ambiguity is itself measured relative to a baseline and is inseparable from a form of prior interpretation. Anderson and McCarthy may allow for this in simply identifying such prior conditions with an ethos. Intelligibility might then be identifiable with a substantive value which motivates the subject's willingness to remain appropriately open to the unknown other. On the other hand, intelligibility might motivate the desire to assign a role, or determine an outcome.

Neither Anderson nor McCarthy consider whether some other quality, or higher (Habermasian) standard (say impartiality) might make ambiguity tolerable when the initial encounter is not the final one. However, here we strike the bargaining position, where intelligibility appears as truly parasitic on the illocutionary. The less demanding the criteria – the evidence required to consider another participant in discourse competent – the greater the number of competent participants. The emphasis on context sensitivity ("appropriateness") and the negotiation of expectations recall Lyotard's *Differend*.[159]   What emerges, then, is something closer to Lyotard's 'solidarity without criteria', than Habermas's normative consensus. For Lyotard, justice consists in recognising and respecting the heterogeneity of genres and phrase regimes and resisting any temptation to adopt genres (discourses) which 'cover over the abyss' of heterogeneity.[160]

However, recognising the Lyotardian connection reintroduces a problem seemingly rejected along with other Habermasian criteria. Namely, given the respect for something approaching radical difference in the McCarthy-Anderson proposals, what will authorise the respect shown to

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[158] McCarthy, above n 155, 58.
[159] Farrell, above n 91, 206.
[160] Jean-Francois Lyotard, *The Differend: Phases in Dispute* (Minneapolis, 1988), 130.

heterogeneous regimes?[161] Will it be the observer perspective, grounded in empirical reality, tolerant of reasonable plurality? Or will the wheel turn full circle to construct a discourse which bridges genres without disguising their difference? Perhaps at this point the long sought-for form of rationality able to mediate between forms of rationality, and discourses, is required.[162]

The second problem is related to the first. Given that the observer participant is willing and able to tolerate silence, what kind of intelligibility will this silence have? Will it be distinguishable from inarticulateness? From obstinance? Again, the wheel recircles towards an escalating demand for intelligibility, and the higher the degree of tolerance (given the lack of criteria for discourse), the greater the demand on intelligibility. The "relative silence"[163] of participants is surely no bar to their complete silence and, on discursive criteria, their exclusion from democratic and juridical processes. If intelligibility is not required for an ethics of this nature to be advanced, it must be explained. Pluralistic tolerance assumes facts rather than reveals relations.

No matter how minimal, how reticent, how undisclosed, the relation between the observer and silence is still one premised on action-guiding principles, if only potentially. How will these principles be articulated? What will the observer do in the face of silence? Classically, the problem of the subject-object relation returns. A descriptive discourse which accompanies every act of observation will be relied upon to furnish prescriptive norms for guidance without participation.[164] The silent other cannot simply retreat from the action context. They will inevitably be involved. The context for pure strategic rationality appears to have been prepared by a failure to acknowledge that the transformative quality of idealised discourse is pertinent not only to the silent participant, but to the observer, since transformation is a mutual process, but mimetic reconciliation is asymmetrical.

From the fact of silence and reasonable pluralism it does not follow that every language game or discourse is equally worthy. Habermas was right to

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[161] Dwight Furrow, *Against Theory: Continental and Analytical Challenges in Moral Philosophy* (New York, 1995), 175.

[162] See Jean-Francois Lyotard, *Just Gaming* (Minneapolis, 1985).

[163] See Ingram, above n 34, 172-88; for a review see Jane Braaten, 'The Succession of Theories and the Recession of Practice' *Social Theory and Practice*, Vol 18, no 1, Spring (1982), 81.

[164] Anderson, above n 136, 10.

refer to McCarthy's argument for tolerance and self-restraint in the face even of "comprehensive doctrines"[165] as 'Schmittian' in its implications.[166] Some account of the kinds of discourses that should be fostered or constrained is required. Ethics will require forms of collective action.[167] The proposal of modified and reduced demand may threaten the demand for justice itself. Whilst it is clearly not intended to accept radical atomism, there is nothing theoretically predisposed against it in either Anderson's or McCarthy's tolerance for 'reasonable difference'. Indeed, reasonable here only refers to existing social data. This data has apparently not been subjected to counterfactual demands. But collective action will have to subject empirical reality to just that, because collectivities are not necessarily pre-given, nor the form of collective action predetermined. In that case, what is to be the source of the prescription? Here, we cannot do without the authorisations of deliberative democracy.

The final question to be put to the proposed revisions of Habermas's presuppositions of comprehensive reason giving is, what is to prevent the silent participant from having competencies attributed to them, in precise disregard of Anderson's edict that this was not to be done? It is psychologically reductive to introduce a sense of the paranoic encounter with uneventful otherness in the scenario presented. Conversely, how can we be obligated by something that cannot be adequately expressed? Lyotard suggests that genres can be preserved and traversed by analogically borrowing rules and strategies from each other.[168] In other words, the communicative solution once again addresses the problem of conflict and pattern stability, and will not allow the participants to remain in a context of difference amounting to discourse about silence on one side, and silence on the other.

THE HISTORICAL PUBLIC SPHERE

Habermas has admitted that his concept of communicative rationality is dogged by shadow of a "transcendental illusion."[169] It does not address the issue traced out previously, of the existence of unstable conditionals between ideal presuppositions and the presupposed discourses of which they are a function. As such it has a more likely role as a revisable and

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[165] See Furrow, above n 160, 175-6.
[166] McCarthy, above n 155.
[167] Habermas, above n 143, 395.
[168] Furrow, above n 160, 176.
[169] Ibid.

fallibilistic regulative ideal than a detached a priori ground of validation. Reintroducing volatility, controversy, partisan and strategic participation and provisional judgment would link reason to the norm-forming public sphere in its historical specificity. This historical recontextualisation would revise the theoretical position wherein validity conditions were presupposed by communicative utterances, so that validity conditions and communicative utterances converged through the encounter with an interlocutor or audience.[170]

The link between autonomy and solidarity evinces a desire in the theorist to do more than elaborate the conditions of legitimacy through discourse. Communicative practices must be motivational in order to be legitimated: "Unless discourse ethics is undergirded by a thrust of motives and by socially accepted institutions, the moral insights it offers remains ineffective in practice."[171] If it is the case that morality thrives only where certain moral intuitions have already taken hold and been institutionalised, it is simply not the case that his theory is without partiality. Western culture itself is presupposed, along with westernised forums, and capitalist economic societies through which law was formalised. That is to say, a predisposition to a developmental-evolutionary explanation of societal culture is part of the substance.

In the *Structural Transformation of the Public Sphere* Habermas overcomes the distinction between action (referring to everyday contexts of social interaction) and discourse (which is abstracted from them)[172] by showing how a society with a history of class relations and partisan interests raised and sustained a generalised 'humanity' which transcended social distinctions and asymmetries. Thus, norms of critique arose from specific conditions. Moreover, the public sphere is sustained not by the reconstruction of a universal viewpoint on idealist premises, but a provisional critical theory embodied in institutional practices. Given Habermas's pessimism regarding the possibility of reclaiming a public space for effective, general norm formation,[173] what will be able to act as the condition of possibility for the validity claims raised in public and on which institutional practices such as law and government depend? Institutional embodiment and specification is

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[170] Jurgen Habermas, 'The Unity of Reason in the Diversity of Its Voices,' in *Postmetaphysical Thinking* (Cambridge, 1995), 144.
[171] See Farrell, above n 91, 225.
[172] Habermas, above n 99, 207.
[173] Jurgen Habermas, 'A Postscript to Knowledge and the Human Interests' in *Philosophy and the Social Sciences* 3 (1973), 157-89.

possible: legal reasoning is established, parliamentary rules of order and modes of inquiry exist. But these are ultimately, says Habermas, public concerns. Indeed, the duality of institution-public only begs the question of their origins.

Habermas addresses this issue in his system of rights wherein the constitutional state enforces the law to increase the freedom of each citizen. However, even that relation is subtended by an immediate abstraction without any intervening form between discursive conditions and lifeworld practices secured by law: "In the legal mode of validity, the facticity of the state's enforcement of the law is intertwined with the justificatory force of a law-making process that claims to be rational to the extent that it guarantees freedom."[174] However, the speech acts accompanying rights and their practice are not as invariant as propositions, but are embedded in complex situations, appear in ambiguous episodes and are otherwise marked by contingency. As Habermas himself maintains, rights have no existence outside their practice: they are not property, but performed validity claims. They are therefore redeemed in contexts involving conduct and choice, character and decision. However, as stated, Habermas does not confront the emergence of rights in an ethos but postulates them through foundational discourses of communicative power.

Perelman positions himself midway between Habermas, for whom rationality depends on a non-delusional lifeworld, and Luhmann, who emphasises the illusion of moral reasoning, since it never escapes the context of power and money which it serves to reproduce. Perelman structures his discussions of practical reason around the paradoxical (or doubly contingent) construction of justice.[175] Firstly, he claims that when universal conceptions of justice are raised they can only be seen after first obscuring the disagreements the claim engenders. Secondly, in defining concrete justice its advocates are obliged to package it in essentialist notions of universal justice. These are not, as they are for Habermas, deformations to be redeemed by practical reason in abstraction. Rather, Perelman's solution is to locate the determinant of the normative content of justice in audiences involved in the process of justification. For Perelman, justice is a product of practical reasoning. And the rule he formulates as a principle of justice (consisting of the obligation to treat in a certain way all persons who

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[174] See Jurgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge, Mass., 1973) chapter IV.
[175] Habermas, above n 21, 46.

belong to that category[176]) is an attempt to apportion "comparatively meaningful properties to real persons in existing settings" because and so that "those who reason through problems of justice also help to enact the virtue."[177]

For Perelman, the audience's involvement allows the act of judgment to be cultivated. Judgment is a cultural modality rather than an ahistorical universal. Habermas, it could be said, posits historical creations inferred directly from the partial normative contents of real commitments in existing communication practices. In the *Theory of Communicative Action* Habermas considers the limits to money and power as steering mechanisms of the sociopolitical system.[178] He argues, in this context, that money and power are insufficiently grounded and therefore unreliable constructs. Lacking grounds in language, or discourse, money requires a level of constraint to be found in law. Power also requires a further level of reflective constraint because of the structural asymmetries between those obey and those who command. This constraint is the communicative norm of legitimation. Both are therefore oriented to mutual understanding, yet both are traditional, value laden and social. The level of reflective constraint applied to both suggest that ideality may emerge from practice, as well as being imposed on it.

Thus, contrary to his demands in discourse ethics for universal consensus without recourse to deductive or intuitive certainty, Habermas admits that additional mediations are necessary. Indeed he notes that the cogency of moral argumentation rests on the fact that an inference is possible, and thus requires only a "sufficient motivation for considering [a norm] plausible."[179] As we have seen, essentially contested concepts such as abortion underlie intractable political, legal and ethical disputes. Moral concepts frequently turn on such concepts and so are, precisely as moral concepts, open to reasonable disagreement. The fact of pluralism, as Habermas accepts, precludes deductivist conclusions such as there being 'one right answer'. The deductivist approach appeals to an ideal 'universal audience'[180] of rational beings able to assent to relevant conclusions. Habermas, too,

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[176] Chaim Perelman,*The Idea of Justice and the Problem of Argument* (London, 1963), 6.
[177] Ibid, 40.
[178] Farrell, above n 91, 206.
[179] Habermas, above n 38, 260-96.
[180] Rehg, above n 124, 239.

appeals implicitly to such an audience: the language of 'convincing' indicates this.[181]

However, Perelman's concept of audience is mediated by acts of 'persuasion'[182] and this form of practical reason only claims validity for a particular audience. Given the decentered subjectivity to which Habermas's principle of universalisation refers, under conditions of complexity, universality may be the result of a series of ongoing discourses before a series of particular audiences. A norm could therefore be successfully argued before particular audiences enjoying the rebuttable presumption of validity or rightness. Universal agreement is enjoyed by dispersement. Not every particular audience need assent to the discourse, but the achievable consensus is binding on all. The result, then, as we have seen, is majoritarianism securing cooperation, with the inbuilt principle of participation, and the ongoing process of revision (the persistence of universalisation). Indeed, precisely because the subject no longer occupies a privileged position dissent can be grounds for non-compliance. However, a particular audience will have a privileged position with respect to the discourse at the time of address.[183] In this way, value orientations that would otherwise be purged from the concerns of discourse would be incorporated. However, the ultimate aim is to bring all audiences into a stable cooperation.

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[181] Chaim Perelman and Olbrechts-Trycta, *New Rhetoric* (Notre Dame, 1982), 19.
[182] Ibid, 26-31.
[183] Ibid. 39.