COMMENTARY: SOCIAL THEORY AND THE LAW: SYSTEMS THEORY, NORMATIVE JUSTIFICATION, AND POSTMODERNISM.

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Text

 [*398] Why should anyone interested in the law care about its potential or actual relationship to social theory? Or, put another way, for what should a legal theorist look to social theory? There are a variety of answers that place social theory in an external, supporting role: Social theory might, for example, provide useful accounts of social institutions such as business corporations and families, including how organizational constraints affect individual actions. Social theory might offer analyses of why certain social arrangements persist despite legislative and judicial efforts to change them, or of what range of differences inform legally similar social practices in different cultural contexts. Although such contributions might be useful, they suggest a sharp division of labor in which social theory speaks only externally to legal theory. Yet, just as law is a part of society, not something separate to be related to society,   [1] so legal theory is part of the same enterprise with social theory. Legal theorists must inevitably work with implicit accounts of what social life is like, of what the range of possibilities open for its change may be, of how individual action relates to social structure, and of what holds society together. So to be interested in social theory is only to be interested in making more explicit something which legal theorists have in fact been doing all along. And indeed, in earlier generations important social theorists often began their training as legal scholars.   [2]

There is, however, another equally important set of reasons why [*399] legal scholars might look to social theory. These reasons arise from within conventional notions of disciplinary and professional division of labor, for they involve questions that interest lawyers yet systematically are bracketed by conventional legal theory. These reasons also partially explain why the conventional notion of a sharp division of labor disturbs some scholars while

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[1] *See, e.g.,* Lyhmann, *Law as a Social System,* 83 NW. U.L. REV. 136 (1989).

[2] This was true most prominently of Max Weber and Karl Marx, but in later generations anthropologists Max Gluckman and Sally Falk Moore might also be cited. In studies of customary law, the division of labor between social and legal theory is especially unlikely to appear sharply. *See, e.g.,* M. GLUCKMAN, POLITICS, LAW AND RITUAL IN TRIBAL SOCIETY (1965), and THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA (1967); S. MOORE, LAW AS PROCESS (1978), and SOCIAL FACTS AND FABRICATIONS: "CUSTOMARY" LAW ON KILIMANJARO, 1880-1980 (1986).

it comforts others. I refer to two questions: (1) why is what lawyers, judges, and other legal actors do right or just?; and (2) why is it specifically theirs to do? Legal theory, of course, provides reasons for judicial decisions. But generally it does not address these reasons in terms of their ultimate justice or rightness, but in terms of their correctness internal to a system of law that is taken as given. Questions of ultimate justice are deferred to philosophy, especially ethics, and also to social theory, insofar as it is recognized that an individualistic ethics will prove inadequate. [3] Questions of why the law is at least to some extent an autonomous arena of social institutions and action point more directly to social theory. Both sorts of questions obviously bear on concern for the authority of law.

In this Commentary, I will focus primarily on the first of these two questions -- that of normative justification -- and will address legal autonomy only as it bears on the link between normative and empirical theory and the normative authority of law. This is in accord with the predominant foci of the papers in this Symposium. It also provides the occasion for thematizing the current debates over "modernism" and "postmodernism" which are central to sociocultural theory and at least one set of legal debates today. As Gunter Frankenberg comments:

It appears that, outside the citadel of law, an epochal intellectual-political battle has been raging between modernity and "postmodernity." The Zeitgeist, always eager for quick satisfaction, has already crowned the latter as victor. That may well have been rash. At this point the only thing that seems certain is that something is moving, although no one knows exactly what and in what direction. [4]

I will first comment briefly on why these concerns have come particularly to the fore at the present time. Then I will turn to the articles, which I have grouped into three categories (this serves my analysis more than the goal of dividing the bunch evenly); (1) Those articles (here only one -- Niklas Luhmann's) that propose purely explanatory, objective accounts **[*400]** of normative legal practice; [5] (2) those that pursue questions of ethical grounding for the law; [6] and (3) those that raise critically the question of whether there can be satisfactory normative grounding for the law (what might be called the postmodernist position -- also significant within critical legal studies -- but that is only somewhat indirectly represented by the articles papers in this Symposium). [7] The work of Jurgen Habermas is pivotal for this set of papers because his approach to simultaneously normative and empirical theory is taken by several papers as the main point of contrast to both functionalist explanation and postmodern anti-foundationalism. In each of these sections, I will limit myself primarily to considering the contributions these articles may make to our understanding of the claims to normative rightness of law. I shall neither take up the various other kinds of questions the articles raise nor try substantially to develop my own arguments. As my comments will be lengthy enough, and at least suggest several of my own views, I shall make no attempt at fashioning a fully developed statement of theoretical approach, though in passing I will suggest some of the advantages offered by

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[3] Social theory and ethics obviously are not the same discipline, and the extent of their relationship or overlap is subject to widely varying interpretation. Highly social accounts of ethics are pursued by ethicists (usually philosophers) working in little practical relationship with self-declared social theorists. I do not propose to offer an account of this problematic relationship, especially since I wish to claim that the division between empirical and normative theory that forms much of its basis is misconceived.

[4] Frankenberg, *Down By Law: Irony, Seriousness, and Reason,* 83 NW. U.L. REV. 371 (1989).

[5] *See* Luhmann, *supra* note 1, discussed *infra* in text accompanying notes 26-42.

[6] *See* Burns, *Rawls and the Principles of Welfare Law,* 83 NW. U.L. REV. 184 (1989), discussed *infra* in text accompanying notes 46-57; Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?* 83 NW. U.L. REV. 38 (1989), discussed *infra* in text accompanying notes 58-98; Solum, *Communicative Action and Freedom of Speech,* 83 NW. U.L. REV. 54 (1989), discussed *infra* in text accompanying notes 99-108; and Gunther, *The Idea of Impartiality and the Functional Determinacy of the Law,* 83 NW. U.L. REV. 151 (1989), discussed *infra* in text accompanying notes 109-31.

[7] *See* Balkin, *The Footnote,* 83 NW. U.L. REV. 275 (1989), discussed *infra* in text accompanying notes 132-48; Kaplan, *Unhappy Pierre: Foucault's Parricide and Human Responsibility,* 83 NW. U.L. REV. 321 (1989), discussed *infra* in text accompanying notes 149-63; Frankenberg, *supra* note 4, discussed *infra* in text accompanying notes 164-92.

theories taking seriously the social role of practices involving knowledge which is never made discursively explicit. [8]

I. LAW AND SOCIAL THEORY

The relationship between law and social theory is as old as the Enlightenment birth of modern social theory. Jurisprudence was an important source of early social theory and both law and social theory were influenced by the social contract theorists and by attempts like Montesquieu's to discover empirical bases for the fit of certain legal orders to specific patterns of social organization. In the twentieth century, however, law and social theory have become more separate enterprises. This is partly a product of growing academic specialization. Few social theorists now receive their training in law. Indeed, law is less often (especially outside of Germany) a general purpose course of study for scholars **[*401]** and elite administrators, as well as practicing lawyers. Social theory is not systematically introduced into either law curricula or pre-legal education. There is more to the separation of law and social theory than purely institutional factors, however. The central substantive issues are the relationship of normative to empirical, and critical to positive, theory and analysis.

Beginning in the mid-nineteenth century, social theorists increasingly claimed an empirical and positive scientific status for their work, which they counterposed to normative and critical theory. In the twentieth century, this tendency has been augmented by the attempt of many social scientists to pursue their studies either without serious reference to theory at all, or with a view of theory as merely an accumulation and organization of tested empirical propositions. As a result, while sociologists might do research on lawyers and court processes, they do not consider their work to be part of the same enterprise as that of lawyers; they regard their theories as scientific and empirical in a sense quite different from legal theories. At the same time, "mainstream" legal thinkers have come, less completely but still in large part, to think of sociological accounts of the law as external to the practice of law, and to think of social theory as partly a challenge to that practice. Such legal thinkers certainly recognize that the fit of legal system to social order is a problem for social theory, and that social research provides useful data for legal practitioners, by informing lawyers about the implications of judicial decisions. What legal theorists do not accept is the notion that social theory can in itself provide an account of what the law is and how it works. To accept such a claim, even in part, would be to jeopardize a centrally important belief about the law -- the belief that it is autonomous from politics and from social processes more generally.

The question of legal autonomy is most frequently raised with regard to politics, but also appears in law's relationship to economic factors. Defenders of a strong notion of autonomy must claim, for example, that the fact that legal services are bought and sold as commodities in a capitalist market place has little or no impact on the substance of litigation and adjudication. This is not just a matter of the inequality of resources that various classes of potential litigants have for the purchase of legal services -- the view of the problem implied in liberal solutions such as the provision of state-supported legal assistance. It goes even beyond the notion that what law is "made" is based solely on which litigation is profitable. Rather, it goes to the heart of legal autonomy because the internal practice of law is organized as a capitalist production process. [9] Thus, **[*402]** current trends, such as the

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[8] I will focus throughout on the social theory side of the relationship, assuming that legal theory is more familiar to readers of the *Northwestern University Law Review.* Since this Symposium has not focused on Critical Legal Studies, law and economics, or the work of Ronald Dworkin -- all of which are more familiar to most legal scholars -- I will not focus on their work in any detail either.

[9] I do not suggest by any of this that the organization of the provision of legal services in this way altogether refutes claims to legal rationality or denies other forms of interest operative for lawyers. This sort of organization is but one variable among several. Pierre Bourdieu has given this account:

The professionals create the need for their own services by redefining problems expressed in ordinary language as legal problems, translating them into the language of the law and proposing a prospective evaluation of the chances for success of different strategies. There is no doubt that they are guided in their work of constructing disputes by their financial interest, but they are also guided by their ethical or political inclinations, which form the basis of their social affinities with their clients.

consolidation of large law firms into increasingly oligopolistic providers of high-level corporate law, and at the other extreme, the proliferation of "mass-production" legal services for working and lower middle class clients, make law much more resemble other capitalist enterprises. Though it is asserted that the legal system is functionally oriented to its ultimate regulating norm, the provision of "justice," it is clear that this production process is at the very least highly biased. Just as many potentially useful goods are not produced because various human needs are not translated into market demand, so too, much law is either not made or not brought into fruition because of the absence of clients prepared to pay. That some elite law school graduates may choose to work for "below market" salaries in public service law practices only underlines the contrast to the bulk of legal practice.

Just as perceived threats to ideas of legal autonomy make "mainstream" legal thinkers suspicious, direct challenges to claimed autonomy have been central to legal movements that embrace social theory or social research in the cause of developing a critical stance towards received legal traditions. An important claim of these critics, who include the legal realists and the contemporary adherents of critical legal studies, has been that empirical accounts of the law can serve as the basis for criticism of its practices. While "mainstream" lawyers focused on the distinction between legislation and the application of laws, and emphasized the lawyer's role as fitting received law to new events, the social critics suggested that the legal profession's own account of its practices was fundamentally insufficient and should be complemented by social theory. Some argued that social theory was implicit in the law and that the issue was simply evaluating, modifying, or replacing social theory. Others suggested that legal practices, including judicial decisions, were better explained by extralegal analyses than by internal accounts of legislation and precedent. Theoretical bases for such explanation ranged from individualistic accounts of economic interests to class analyses and arguments about the systemic requirements of capitalism and the operational needs of businesses. Occassionally, the empirical accounts were held to have normative implications. [10]

The increasing concern of many social theorists to join normative **[*403]** and empirical theory has made them newly interested in legal studies. At the same time, a growing number of legal theorists have decided that normative argument requires social theoretical grounding, whether in the development of an alternative social theory [11] or in more limited ways, such as the development of a richer notion of interpretative community. [12] But not all social theorists find this renewed concern for joining empirical to normative theory appealing. Some social theorists (and many more social researchers) would still argue for the separation of normative and empirical argument. And others, often claiming the label "postmodernists," would reject as exercises in power and domination all normative enterprises, or at least all attempts to give them foundations in philosophy or social theory. Debate over legal autonomy is closely related to these concerns about the relationship of normative to empirical theory, though positions are partly cross-cutting.

II. THE CONFLICT WITHIN SOCIAL THEORY

In many recent polemics, the field of social theory has been reduced to a binary division between the heirs of Enlightenment universalism and rationalism, on the one hand, and so-called "postmodernists" on the other. Such a view is suggested, indeed, by the J. M. Balkin, [13] Klaus Gunther, [14] and Leonard Kaplan [15] articles in this

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Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field,* 38 HASTINGS L.J. 805, 834 (1987).

[10] See, for example, the recent work of William Landes and Richard Posner, AN ECONOMIC STRUCTURE OF TORT LAW (1987), as well as that of left-wing legal critics. Some of these more left-wing legal thinkers, indeed, use methodologies akin to those of the "orthodox" law and economics school, but to different ends. *See, e.g.,* Rose-Ackerman, *Progressive Law and Economics -- and the New Administrative Law,* 98 YALE L.J. 341 (1988).

[11] *See, e.g.,* R. UNGER, POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY (1987).

[12] R. DWORKIN, LAW'S EMPIRE (1986).

[13] Balkin, *supra* note 7.

Symposium, though none is extreme in this regard. This account reflects the extent to which the heterogeneous forces of postmodernism have seized the rhetorical initiative. Although all such simplifying schemes do some violence to the complexity of actual discourse, this scheme is flawed in three respects.

First, it is particularly ironic from the point of view of most postmodernists' declared intention to break with the traditional modernist intellectual approach of categorization and neat conceptual oppositions. As Frankenberg suggests, the postmodernists as polemicists have helped to produce "another ironic triumph for exactly the sort of dichotomous thought that the protagonists of the new reason set out to deconstruct." [16]

Second, there are questions to be raised with regard to the labeling of the opposition. It is quite unclear whether modernism/postmodernism grasps the most salient theoretical issues and puts them on a clear conceptual footing. There is the matter of the use of the vague prefix "post" which suggests an end, but not a future direction. There is ambiguity as to whether modernity is held to have ended, [17] or whether the **[*404]** opposition is not between historical eras but only between intellectual stances, with postmodern*ism* less a reflection of the social conditions of the age than a program independent from them. [18] The latter seemingly makes more sense, since it is quite unclear in what sense one may view the modern era to have ended, and on what date that end may be said to have occurred. [19] Some writers suggest that the threat of nuclear annihilation is decisive. Others point to an experience of fragmentation (though surely that is as old as modernity, *pace* Simmel). Still others emphasize a crisis or supplanting of subjectivity (though a turn of the century writer like Musil must then be seen as an anticipatory postmodernist). Of the French figures in the center of the postmodernist movement, Jean Baudrillard is perhaps most straightforward about declaring a transition in epochs. As he sees it, modernity was the era of classical capitalism in which the commodity form and productivism ruled; postmodernism is the era of simulation, where signification replaces reification, consumption rather than production dominates life, and seduction (e.g. through advertising) is substituted for material domination. [20] But though new information technologies and communications media are certainly striking in their social impact, I do not see any end to the driving "modern" tendencies of socioeconomic life -- the centralization of power and the increasing productivity of labor.

Third, and at least as important to the effort to achieve some clarity about the field of social theory, the simple binary opposition between modernist and postmodernist obscures the enormous differences separating positions within the so-called modernist camp. A wide range of political positions, from neoconservatives (in the sense of partisans of capitalism and nationalism, not the older anti-modernists), liberals, and Marxists all appear as prisoners of the old Enlightenment rationalist drive towards theoretical domination. No distinction is made between essentially functionalist theories which argue that social life is a self-regulating system working primarily by means of unintended adjustments, and those theories that stress the constitutive role of power in social life and

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[14] Gunther, *supra* note 6.

[15] Kaplan, *supra* note 7.

[16] Frankenberg, *supra* note 4, at 371-72.

[17] In different ways, both J-F. Lyotard and Jean Baudrillard have suggested this view. *See* J. BAUDRILLARD, THE MIRROR OF PRODUCTION (1975), OUBLIER FOUCAULT (1977), FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN (1981), and IN THE SHADOW OF TE SILENT MAJORITIES (1983); J-F. LYOTARD, THE POSTMODERN CONDITION (1984) (including especially *Answering the Question: What is Postmodernism?* (Appendix)).

[18] POSTMODERNISM AND POLITICS (J. Arac ed. 1986); and UNIVERSAL ABANDON? THE POLITICS OF POSTMODERNISM (A. Ross ed. 1988).

[19] Although, if postmodernism is simply a free-floating intellectual position, it loses the theoretical advantage of being able to ground itself historically. *See* Calhoun, "Culture, History and the Problem of Specificity in Social Theory," in POSTMODERNISM AND SOCIAL THEORY (S. Seidman and D. Wagner eds. forthcoming).

[20] *See* J. BAUDRILLARD, FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN (1981).

organization. Even the most acute observer in this Symposium, Frankenberg, tends towards this sort of conceptual collapsing, which **[*405]** somewhat obscures a central division in social theory. [21]

We would do better (though it is still a simplification) to see social theory as divided by at least two polemical and substantive divisions. The first division is longer standing and more influential in the overall field of social theory: between those who wish social theory to be critical and those who argue that it should simply be empirically explanatory. The most influential of the latter sort of theorists have been the functionalists. Among them Luhmann is the foremost contemporary exemplar. Many rational choice theorists and others take the same broad position of encouraging the explanation of what exists by some model of cause or function which relates the various manifestations of existing facts to each other. Critical theorists, by contrast, argue in some combination (1) that we must not limit ourselves to what exists, but address the underlying structure of possibilities which determines what can or cannot exist; (2) that we should combine normative and empirical moments into the same theories; and (3) that we need to subject our conceptual categories to a continual process of critical re-examination. This opposition, which Luhmann and Habermas personify, is central to divisions in most branches of academic social science, especially in the non-French speaking world. This opposition is partly cross-cut by the division between postmodernists and the rest of social theory, though the matter is obscured somewhat by the central position of Habermas.

Habermas appears as the main exponent of modernism in social theory, against which implicit or explicit postmodernist polemics are addressed. He accepts this challenge, indeed, insofar as he sees himself as a defender and extender of the Enlightenment project against forces of counter-Enlightenment. He is thus the social theorist most central in the field of contending forces that constitute contemporary social theory. [22] It should be recognized that, although the groundings for this vary and are unclear, many postmodernists subscribe to all or part of the program of a critical theory in opposition to Luhmannian functionalism. The only sense in which Luhmann might appear as a postmodernist [23] is that he fully removes human subjects from any place of centrality in his theory. This is very much in tune with the poststructuralist aspect of postmodernism: the acceptance of structuralist strictures against seeing **[*406]** the world as made by the actions of knowledgeable subjects (though without the structuralist belief that any attempt to engage in critique of philosophical categories must return one to a theory of the subject). Even Habermas is hostile to traditional subjectivism, pursuing instead a program of intersubjectivism and a more social conception of human capacities for thought and action. [24]

Closely related to these disputes are three basic sorts of answers to the question "what holds society together?" Is it sheer power, the functional interdependence of subunits and systemic self-regulation, or some level of mutual understanding and agreement? Obviously, the three answers can be combined in some proportion within a single theory, as Habermas in particular tries to do, but they also distinguish basic theoretical strategies. Strongly normative theories must place at least some stress on the possibility of creating social organization by shared participation in a process of design. If this is not considered plausible as history, it is at least available as the test of rational reconstruction -- that is, to what extent can we formulate what actually exists, for whatever reasons, as what we would have chosen had we acted rationally according to our best interests or intentions? By contrast,

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[21] *See* Frankenberg, *supra* note 7.

[22] For more on this way of describing the academic field by identifying the relations of force and tension within it, see P. BOURDIEU, HOMO ACADEMICUS (1984). Concerning law specifically, Bourdieu has written that we need to study the social basis of legal autonomy and practice: "The historical conditions that emerge from struggles within the political field, the field of power -- which must exist for an autonomous social (i.e. a legal) universe to emerge and, through the logic of its own specific functioning, to produce and reproduce a juridical corpus relatively independent of exterior constraint." Bourdieu, *supra* note 9, at 815.

[23] This is Frankenberg's somewhat surprising labeling of Luhmann, though Frankenberg notes that Luhmann's theory offers no further insight on the question of modernity vs. postmodernity. *See* Frankenberg, *supra* note 4, at 380.

[24] This is one of his significant departures from traditional Kantianism. His Article in this Symposium otherwise moves him as firmly into the Kantian camp as any of his writings. *See* Habermas, *supra* note 6.

functionalist theories tend to assert a sharp division between normative and empirical accounts. Yet, the implicit focus on the presumed successful functioning of actually existing social life deprives functional theories of any purchase on critical judgment and biases them towards support for the status quo. Power theories range from those, like Marx', that consider power as central to history but as removable or reducible in the future, to those that consider power relations the basic stuff of social solidarity, and, as in Foucault's theory, even of knowledge. [25]

Similarly, there are three basic positions on the relationship of social theory to the issue of normative rightness of the law. First, like Luhmann, one might pursue the normative qualities of law as essential features of a self-regulating system, the internal functioning and external relations of which may be approached objectively. To this end we may study norms and normativity, but theory can offer no prescription or even contribution to debate over their rightness, though it may prove helpful insofar as it informs us about the nature of that debate. Second, **[*407]** one might try to pursue a grounding of the normative content and operations of the law in the tradition of classical moral philosophy and jurisprudence. Here John Rawls, Ronald Dworkin, and Habermas are key contemporary exemplars. This is the core "modernist" tradition. It is the mainstream of the philosophy of law, just as the objectivist position is the mainstream of social theory in social science disciplines. To these two mainstreams, we might oppose the new wave of postmodernist arguments. These question the possibility of grounding normative positions on a secure and stable foundation, and celebrate a certain historical insecurity and, especially, various sorts of cultural difference. Although they deny the possibility of secure foundations for moral claims, the postmodernists generally do not subscribe to an objectivist position which weakens the normative significance of their approach. Let us look now at the contributions made by the papers in this symposium to understanding these three lines of work.

III. PURELY EXPLANATORY ACCOUNTS OF NORMATIVE ARGUMENTS IN THE LAW: LUHMANN'S SYSTEMS THEORY

Luhmann is the only contributor to this Symposium who tries to develop a basically empirical theory of law, without manifest normative aims. His approach, however, is in many ways typical of twentieth century social theory, particularly in sociology and other social sciences insofar as they pursue an agenda of "scientific" empirical research (for example, in the parts of political science influenced by the "behavioral revolution," but not so much in the subfield called political theory, where normative theory predominates over empirical theory). Moreover, although this line of theory maintains an empirical rather than normative orientation, its developers do not believe that this means it is devoid of implications for action. These implications are more apt to receive attention under the rubric of "policy analysis" or "policy science," in a manner similar to contemporary economics, rather than as part of a directly normative argument. [26]

Luhmann's article develops clearly and tersely a statement of his basic views on the sociology of law, slightly revising his earlier more voluminous statements by drawing on some recent developments in systems theory. [27] In general, Luhmann seeks to develop sociology as a branch of the general theory of autopoietic (self-moving and self-regulating) systems. This approach grows out of cybernetics and both biological and sociological functionalism. Luhmann does not regard as damaging, arguments that suggest that the central place of interpretation and

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[25] Another difference between theories stressing power is whether power is conceived of essentially in interpersonal, transitive terms, as in power over the will or action of another, or by contrast is seen as a basic structuring principle shaping everyone's life in a society. Michel Foucault, notably, has stressed the latter. By power he means basic forces that are productive of social life in various forms, not simply relations of force among the members of a society. *See* M. FOUCAULT, DISCIPLINE AND PUNISH (1977), POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 (1977) [hereinafter POWER/KNOWLEDGE], and 1 THE HISTORY OF SEXUALITY (1978).

[26] *See, e.g.,* D. MACRAE, THE SOCIAL FUNCTION OF SOCIAL SCIENCE (1976), and POLICY INDICATORS: LINKS BETWEEN SOCIAL SCIENCE AND PUBLIC DEBATE (1985).

[27] Luhmann's main work on law is A SOCIOLOGICAL THEORY OF LAW (1985). The main general statement of his theory available in English is THE DIFFERENTIATION OF SOCIETY (1982). Luhmann's SOZIALE SYSTEME (Frankfurt, 1984) is thus far untranslated.

communication **[*408]** of meaning in human life sets social systems apart from those of the natural world. [28] He does admit that so far an adequate place has not been created within the theory of autopoietic systems for "systems that conduct their operations with the aid of the medium of meaning." [29] This does not mean, however, that the appropriateness of the theory of autopoietic systems should be questioned: "The challenge is rather to construct a general theory of autopoietic systems that can be related to a variety of bases in reality and can register and deal with experiences deriving from such diverse domains as life, consciousness, and social communication." [30] The approach to consciousness and communication in such a theory is not to treat both as constitutive of social life -- that is, as fundamental to making social order possible -- but rather to approach them as attributes of systems, one specific case for explanation. [31]

Luhmann does not directly offer the lawyer any help in accounting for the normative rightness of the law, though his paper does address three related issues. First, his functionalist account of the relations between law and other systems does imply a defense of the standard conception of legal autonomy as guaranteeing the (at least partial) freedom of legal practice from domination by economic, political, or other interests. This is part of what is meant by stressing the internally recursive nature of legal practice. [32] More precisely, the legal system observes and monitors itself in accord with an internal code of division into the legal and nonlegal, the just and the unjust. An attempt is made to provide consistency with previous processing within the system. As in any other rational system, however, (and I think we can imagine that Luhmann is thinking of Kurt Godel's proof of the insufficiency of the arithmetic postulates [33]), the workings of law must produce paradoxes or tautologies. The system works to minimize these, thus maximizing its apparent rationality for practitioners. To the extent that practitioners even recognize these functional adjustments, they are apt to see them as required by the nature of things, rather than to recognize them as results of the artificial **[*409]** creation of the legal code. In other words, justice and injustice are not given by nature; there is no fixed ideal referent for satisfactorily deciding between them in all cases.

The sociologist describes the processes of argumentation through which the legal system deals with both these internal difficulties and the "inputs" of the rest of social life, "not as a search for convincing rational grounds but as a way of mastering contingency and as a condensation of the systemic context." [34] In doing so, the sociological description necessarily departs from the ordinary self-understanding of members of the legal system, but "in contrast to the aims of a critique of ideology, no unmasking or enlightening effect is intended here." [35] Rather,

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[28] *See, e.g.,* A. GIDDENS, NEW RULES OF SOCIOLOGICAL METHOD: A POSITIVE CRITIQUE OF INTERPRETIVE SOCIOLOGIES (1976), and THE CONSTITUTION OF SOCIETY (1984) (summarizing efforts to overcome the opposition between "action-oriented" and structural, more deterministic, social theories).

[29] *See* Luhmann, *supra* note 5, at 137.

[30] *Id.*

[31] For a discussion of this point see Gunther, *supra* note 6, at 153-54.

[32] Bourdieu has rather sharply criticized Luhmann's claim:

"Systems theory" posits that "legal structures" are "self-referential." This proposition confuses the symbolic structure, the law properly so called, with the social system which produces it. To the extent that it presents under a new name the old formalist theory of the juridical system transforming itself according to its own laws, systems theory provides an ideal framework for the formal and abstract representation of the juridical system. However, although a symbolic order of norms and doctrines contains objective possibilities of development, indeed directions for change, it does not contain within itself the principles of its own dynamic.

Bourdieu, *supra* note 9, at 816.

[33] *See* E. NAGEL & J. NEWMAN, GODEL'S PROOF (1958).

[34] Luhmann, *supra* note 5, at 144-45.

[35] *Id.* at 145.

Luhmann intends only to point to the processes of concurrent self-observation and self-description, which allow a recursive system to maintain itself. The implication is that sociology can grasp what lawyers are really doing when they think they are engaging in normative argument. What they are doing is simply maintaining the legal system by the means of an apparent normative argument. [36] Moreover, though the rest of the social system appears to demand justice from the law, the system's real requirements are a series of outputs which maintain overall functional equilibrium. While Luhmann can address the level of meaning as a medium of legal operations, he cannot address it in terms that make sense of, or even derive from, participants' self-understandings. His sociology of law must, as a result, maintain an essentially external relationship to law.

Second, Luhmann conceptualizes the question of illegitimate impingement of politics or economics on the law only as "corruption." [37] This view, however, inadequately accounts for the biases introduced into law by the overall structure of social interests. Luhmann's focus is on whether the law will raise or lower the "threshold of discouragement" -- that is, whether people will have confidence in the law. This is necessary for the law to perform its functional role. But built into this apparently objective explanatory approach is a bias towards the status quo. [38] The very conception of law as an autopoietic system highlights the extent to which law maintains its own and the larger social system's equilibria. It also implies that change is an evolutionary property of systems rather than the result of intentional human action. In this sense, Luhmann challenges the division of labor between law and normative discourse and **[*410]** sociology versus empirical explanation only by making the former essentially impotent and reducing it to an epiphenomenon of systemic adjustment.

Third, Luhmann offers one example of the kind of insight that can be derived from his sort of analysis of autopoietic systems, regardless of whether one chooses to accept this as a sufficient, rather than merely a one-sided and partial, approach to social theory. In interactions between elastic and rigid systems, he points out, the elastic systems will adapt to the rigid ones. Law may be more or less elastic. To the extent it is elastic, law will have to adapt to rigid environmental systems such as large organizations. [39] Moreover, "[o]nly as a self-referential closed system can the legal system develop 'responsiveness' to social interests." [40] In other words, if the legal system becomes radically open and undifferentiated from the rest of society, then the legal system is in no position to respond to anything concrete, or to raise and address questions of justification, normative or otherwise.

Luhmann's account, thus, may offer some insight into certain social conditions necessary for the existence of law. Overall, however, anyone starting with a desire for a theory that can contribute to the task either of grounding the law's claims to normative rightness or critiquing such claims, will find Luhmann's theory wanting. It treats the law entirely as system, with no place for the activity of individuals except as vehicles of that system. It can approach values and evaluative discourse only as objects to be explained. As Luhmann says, "for the normal jurist, the idea that even good, pertinent arguments lead only to the confirmation of argumentation itself -- to the strengthening of its redundancy -- must still be completely unacceptable." [41] Here we can, indeed, compare Luhmann to the postmodernists insofar as both declare legal systems to be merely positive. Of course, where a theorist like

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[36] The distinction is essentially one between manifest and latent functions. *See, e.g.,* R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 73-138 (1968).

[37] Luhamnn, *supra* note 5, at 142.

[38] *See also* Frankenberg, *supra* note 4. Frankenberg points to Luhmann's "'secret theory' of judicial procedure, which entangles the participants in a ritual and treats their disappointments in a quasi-therapeutic manner, in order to absorb possible outbreaks of protest." *Id.* at 381. Also note his wicked but apt description of Luhmann's theory as a theory "as postmodern as the neutron bomb, which eliminates the subject, while leaving everything else as it was." *Id.*

[39] Luhmann, *supra* note 5, at 144.

[40] *Id.* at 149.

[41] *Id.*

Foucault would stress that legal operations are exercises of structuring power, for Luhmann they are aspects of the overall recursive self-regulation of society and its normless evolution. [42]

IV. PURSUING NORMATIVE GROUNDING FOR THE LAW

The two most important theorists engaged in trying to develop a theory of social life with sufficient normative purchase to provide grounding for the law are Habermas and Rawls. [43] Rawls' theory is a **[*411]** more traditional normative theory in the sense that it does not attempt to incorporate any significant influences from explanatory social theory or the social sciences. Habermas, by contrast, breaks with a lengthy tradition in trying to reunify normative and empirical theory.

There is a certain irony in the comparison of Rawls and Habermas. The former has moved recently from his celebrated neo-Kantian position to an increasingly Hegelian conception of political philosophy. [44] Habermas, meanwhile, has moved from Hegelian-Marxist early work to an increasing embrace of Kant. The two still share a great deal, notably their reliance on forms of procedural justification -- Rawls' original situation and reflective equilibrium, and Habermas' communicative action and ideal speech situation. Because Rawls' work is represented only indirectly (and somewhat negatively) by one article in this Symposium, [45] and is in any case more familiar to readers of law reviews, I will focus more on Habermas here. But first, Robert Burns on Rawls.

A. Burns on Rawlsian Justice and Income Policy

Rawls' theory is not in a strong sense a social theory. That is, although the morality it proposes is a social one, its method of development remains highly abstracted from concrete description or explanation of historically existing social arrangements. In fact, in certain senses it is not even abstracted from social arrangements as such, but rather from characteristics of individuals that hold implications for patterns of aggregation. It proceeds much more abstractly, and though it focuses on social arrangements, its approach is individualistic. [46] One of the virtues of **[*412]** Burns' Article, in fact, is that it shows how the sociological concretization of the theory can both inform us as to its implications and, in certain senses, test it. It can be a test, as Burns shows, because Rawls is concerned that

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[42] *See* DISCIPLINE AND PUNISH, *supra* note 25. In this way, Luhmann's argument about mere positivity derives more from his general scientism (quite an old tradition in the West) than from anything more generally shared among "postmodernists."

[43] See *infra* notes 58, 61, 62, 68, 70, 161, for references to Habermas. Rawls' main theoretical statement is A THEORY OF JUSTICE (1971). So far, Dworkin has focused mainly on how normative argument and interpretation might work, not on developing a positive normative theory. His work has also had less of substance to say about social life in general, at least than that of Habermas, though its approach to the law offers very favorable openings to social theory. For example, in LAW'S EMPIRE, *supra* note 12, Dworkin develops an account of legal practice as a constant but progressive construction of interpretations. These interpretations are developed within communities whose members require constructed narratives to make sense of their everyday practices, particularly when faced with disagreements about them. *Id.* at 45-86. Dworkin's account of what it means to be an interpretative community is extremely thin, in sociological terms, but development of a richer sociological understanding could be taken as an internal improvement of the theory. For more of Dworkin's work, see TAKING RIGHTS SERIOUSLY (1978), and A MATTER OF PRINCIPLE (1985).

[44] *See* Burns, *supra* note 6, at 272.

[45] *Id.*

[46] One of the results of this approach is a treatment of social systems in social contract terms which both imply a high level of priority to the individuals comprising them, and a high level of conscious "agreement" through which "men agree to share one another's fate." *Id.* at 204 (quoting J. RAWLS, A THEORY OF JUSTICE 102 (1971)). Rawls presumes that there is a "we" who decide social issues, and that in principle can speak with a high degree of unanimity. Moreover, his account makes completely unproblematic the question of who constitute the members of "a society." But, in fact, this has been recurrently problematic throughout history. Recently sociologists have begun much more clearly to recognize the problems reifying the abstraction society with its implied clear boundaries and functional unity entails. *See, e.g.,* 1 M. MANN, THE SOURCES OF SOCIAL POWER (1986).

his theory should not be solely prescriptive, but also explanatory of the actual moral judgments people make and the justifications they offer. Much of Burns' paper is given over to an analytic summary of Rawls' theory. I shall not reprise this.

Burn's paper sets up income policy as a test case for Rawls' theory. It is an apt test that Burns introduces very adequately and at some length. Burns' conclusion is that Rawls fails "to create and justify a single situated normative theory to resolve concrete distributional issues." [47] Burns suggests that his critique based on "immanent reflection" seems almost exactly parallel to that brought from an external vantage point by Unger. [48] It is indeed damaging to the notion that Rawls' theory of justice provides concrete, specific, and conclusive indications about the selection of specific policies. It strikes rather less at the general conceptual strategy.

Two kinds of arguments are central for Burns, though he has raised many individual issues. These two arguments are linked in his specific case analysis of income policy. The first is essentially an abstract theoretical complaint about the absoluteness of lexical priority -- Rawls' extremely demanding principle that the requirements of lexically earlier principles, such as provision of opportunity, be fully met before lexically inferior principles, such as reduction of difference, begin to operate. Burns finds this position relatively unsupported in Rawls' work. It is postulated but not fully argued. Beyond this, Burns shows that this position causes some problematic policy implications. Among them is that if provision of maximum income transfers has some level of negative effects on the motivational or other psychological (or sociological) strengths of the least advantaged, the absolute lexical priority of the opportunity principle would require the legislator to reduce transfer payments in order to encourage labor force participation. [49] Even small negative effects on mobility rates to higher positions would have to be ended, on a strict application of Rawls' theory, before a level of transfer payments could be justified. This is a problem partly because it evidences only a very distant, abstract, and inadequate approach to the matter of human needs on Rawls' part. Because Rawls has no strong argument about needs, he can make mobility rates absolutely prior to any general characteristic of standard of living of a population.

This is where Burns' second argument kicks in. Essentially an empirical argument, its importance to Burns' account suggests the value of integrating empirical and normative theory. The empirical claim is that **[*413]** poor people's lives require, or at least are characterized by, a strong ethic of equality, mutuality, and sharing. If anyone acquires some money, this ethic requires that it be shared with so many others that it is hard for the money to start any individual upward mobility. According to Burns, because there are not enough funds available to raise the social position of the entire network, Rawls' theory must urge us to avoid income transfers and encourage labor force participation regardless of the resulting group standard of living, because it is the only way to encourage individual upward mobility. But, paradoxically and disastrously for Rawls' theory, "[s]ince it is impossible to lift the entire network out of poverty, mobility for all members is effectively foreclosed." [50]

This argument is based on a specific anthropological study. [51] We might quibble with two features of Burns' use of this work. First, he consistently treats it as describing a general characteristic of poverty, rather than a specific empirical study of one group. While it is possible that a similar pattern is present among all poor groups, this fact has not been demonstrated. Moreover, the extent of such an ethic of sharing and equality almost certainly varies dramatically among different poor populations, particularly among different ethnic groups. As a result, it is a mistake to treat the issue as one of "psychological effects" of income transfers and not to introduce culture as a mediating category. This makes the problem more complex, however, because it means that any theory developed to address the problem Burns shows would have to substantially incorporate a recognition of the cultural difference

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[47] Burns, *supra* note 6, at 265.

[48] *Id.* at 274.

[49] *Id.* at 247-48.

[50] *Id.* at 235.

[51] C. STACK, ALL OUR KIN (1974).

among groups of people affected. This would more fully make such a theory a social theory, and a much more satisfactory one. But it would pose serious problems for typical strategies of normative theory that are essentially individualistic not only in values but also in the assumption that variable attributes of individuals, such as income or wealth, can represent relevant differentiations. Taking culture seriously would at least require a theory to moderate its universalism as well as its individualism and to recognize certain qualitative variations in the human condition. How to reconcile this with the more universalistic values of legal theory is a problem hardly addressed in the literature. [52]

Second, we need to ask why "it is impossible to lift the entire network out of poverty"? Burns assumes that insufficient funds are available to do this. As a matter of practical politics, I think that this is true. But I have two concerns about the way he approaches this issue. He first assumes that radical restructuring of social arrangements is not possible -- our discussion may only be of moderate, not radical or revolutionary reforms. This seems an unnecessary foreclosing of the horizons, **[*414]** especially for a theory of social justice. I am not persuaded, for example, that America lacks the funds to lift the entire underclass out of poverty. I am convinced that we lack the will, partly because the only way to accomplish this goal would be through a basic, and more or less socialist, restructuring of our class and economic system. [53]

Beyond this, or perhaps before it, is the question of just what group is being addressed. It may be impossible to lift all the poor -- for example, the underclass described by William Julius Wilson [54] -- out of poverty at a stroke by income transfers without radically disrupting the U.S. economy. But it does not follow that every specific local network is in a similar position. The underlying theoretical issue is the assumption that mobility is an individual matter, that it cannot be accomplished by groups. But in fact it has been accomplished by some groups, even though the prevailing social and cultural system is against it. Ethics of sharing and mutual responsibility (perhaps without the same egalitarianism) have contributed to the collective upward mobility of certain Asian-American populations in the United States. The same ethic of sharing assumed here to be problematic for African-Americans has been, at certain points in their history, a vital basis for collective upward mobility of some groups. [55] In other words, we need to address the local community or network, as well as the class; and we need to consider whether we might not think of mobility less exclusively in individual terms.

Burns makes a good point when he argues (admitting that Rawls might not accept this conclusion) that "in some circumstances the attempt to make persons from all sectors of society who are similarly endowed and motivated equally able to attain the very highest positions in society might result in the less advantaged being unable to attain a whole range of desirable intermediate positions." [56] There are a variety of empirical approaches to social mobility, and presumably some attention to what sociologists call net mobility rates would make sense.

Near the end of his Article, Burns suggests that conservatives may object that Rawls places too great a burden on strictly moral concepts and arguments, while radicals will argue that he grossly underestimates the distance between the requirements of his principles and "our" considered judgments -- namely, the patterns of normative judgments that are intertwined with, indeed are inseparable from, our institutions:

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[52] As Frankenberg comments, "equality without respect for a person's standing and needs is prone to be unjust -- and will be considered political in the end." Frankenberg, *supra* note 4.

[53] Rawls excuses himself from dealing with such radical transformations by a combination of avoiding concrete historical reality and of assuming that only those policies will be devised that can be kept in line with a Pareto-efficient market economy. This is a sort of "realism" which translates -- much more than Rawls would probably like -- into support for the existing socioeconomic system.

[54] W. WILSON, THE TRULY DISADVANTAGED (1978).

[55] *See, e.g.,* N. PAINTER, EXODUSTERS: BLACK MIGRATION TO KANSAS AFTER RECONSTRUCTION (1976).

[56] Burns, *supra* note 6, at 250-51.

Here the argument will be that a theory may serve normatively -- as a vehicle **[*415]** for change -- only if it includes something like a theory of "false consciousness" in Marxist philosophy or an account of the obsolescence of dominant social "conceptions" in Dewey's social philosophy and, as in varying ways in both of the latter, a theory of contemporary social and economic realities in order to discern "what is practically necessary and at the same time objectively possible." [57]

The phrase at the end of this passage is quoted from one of Habermas' relatively early essays. It expresses a goal that continues to inform Habermas' thought, and in general Burns has met the desiderata of this passage considerably more than Rawls. But, as my discussion will suggest, as Habermas becomes more Kantian, his ethical theory becomes more detached from the practical tasks of social theory and presents a theory of normative ideals without an adequate account of how we might move towards them.

B. Habermas' Discourse Ethics

Habermas has engaged in extensive debates with Luhmann, debates which have had a substantial impact on Habermas' theory, though they seem to have affected Luhmann much less. [58] In particular, Habermas has tried to address what he sees as the necessary relevance of theories like Luhmann's to certain dimensions of social life, such as markets, while not conceding that it is an adequate account of social life in general. To this end, Habermas has introduced a distinction between "system" and "lifeworld." The contrast is at one level between the phenomena to which functionalist theories like Luhmann's and Talcott Parsons' are well suited, and those to which more phenomenological accounts are oriented. At the same time, however, Habermas might also be read to suggest that the contrast is not simply between spheres of life, but between approaches to understanding. The latter reading has significant advantages because it does not imply the severing of life and social relationships into those which are, for example, economic versus familial, or the making of other false (or at least idealizing) conceptual distinctions. The contrast, then, is between two ways of looking at a social world that is always the result of constructive human action. Our experience in modern society leads to divergent ways of trying to understand the social world, and to an experiential and intellectual split between lifeworld and system world (or such common sense analogs as "the people" and "the system," "everyday life" and "the big picture"). These splits can be analyzed as deriving from the contrast between directly interpersonal social relationships and the indirect relationships that are formed when social action affects others only through the mediation of complex organizations, impersonal markets, or communications technology. Indirect relationships **[*416]** permit a societal scale unimaginable on the basis of direct relationships, and simultaneously encourage objectification and reification of their origin in human action. [59]

Habermas' distinction echoes older ones like that between *gemeinschaft* (traditional community) and *gesellschaft* (society or association). [60] He places this sort of opposition on a new foundation, however, by suggesting a further split within the realm of rational action into "action oriented to reaching understanding and action oriented to success." [61] It is on this basis that he attempts to rescue the Enlightenment project of rationalization as progress from the Weberian iron cage of domination through rational, bureaucratic, systemic means. The complaint of excessive formalization or "juridification" of legal systems echoes this point, revealing a proliferation of rules

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[57] *Id.* at 273 (quoting J. HABERMAS, THEORY AND PRACTICE 44, (1973)).

[58] J. HABERMAS & N. LUHMANN, THEORIE DER GESSELLSCHAFT ODER SOZIALTECHNOLOGIE: WAS LEISTET DIE SYSTEMFORSCHUNG? (Frankfurt, 1971).

[59] *See* Calhoun, *Populist Politics, Communications Media, and Large Scale Social Integration,* 6 SOC. THEORY 219-41 (1988), and *The Infrastructure of Modernity,* in SOCIAL CHANGE AND MODERNIZATION (N. Smelser & H. Haferkamp eds. 1989).

[60] Habermas correctly sees the relationship of these as coexistence in shifting proportionate importance to overall societal integration, not as a simple supplanting of the former by the latter.

[61] 1 J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY 341 (1985) [hereinafter COMMUNICATIVE ACTION].

deriving from instrumental activity, and attempts to coordinate action externally, rather than the pursuit of mutual understanding.

Habermas opposes the system world to a lifeworld in which people's primary orientation is towards mutuality with each other and in which communication is full, free, and undistorted. It is not the lifeworld in general which he wishes to defend, but an idealized, purified form of communicative action aimed at interpersonal understanding. He conceptualizes this through the notion of an idealized speech situation, that universalizes certain validity claims (to comprehensibility, truth, appropriateness, and sincerity) which are always implicit in speech. All real historical societies fall short of this ideal, but they may be compared to it and evaluated in terms of an evolutionary scale of undistorted communication. [62] Thus something closer to the ideal emerges from the lifeworld through a process of rationalization: "Correspondingly, a lifeworld can be regarded as rationalized to the extent that it permits interactions that are not guided by normatively *ascribed* agreement but -- directly or indirectly -- by communicatively *achieved* understanding." [63] In this way, Habermas tries to processualize Kantian universalistic morality.

A key challenge for Habermas' critical theory is to find a way to maintain the momentum of communicative rationality in the face of systemic, instrumental rationality, on the one hand, and recidivistic calls to **[*417]** return to a premodern form of community and traditional authority, on the other. But Habermas runs into four difficulties.

First, he tends to appropriate systems-theory and sociological functionalism rather too completely for the sake of the critical edge of his theory and its relevance to action. [64] Though indebted to the Marxist tradition, he virtually abandons analysis of class and other fundamental social divisions. Power relations play little constitutive role in his conceptualization of society. Moreover, he does not make collective action involving conflict a significant part of his account of social change.

Second, the Enlightenment rationalism underlying Habermas' project leads him to reject too completely the importance of tradition to intellectual life in general, and traditional communities as bases for progressive popular action. [65] His accounts of human action and reason are always abstracted from cultural or social particularities. It is sociologically and hermeneutically necessary to give greater weight to the unchosen foundations for action if we are to envision either a stable society or a deeply motivated radical challenge to established patterns and tendencies. [66] If any form of lifeworld activity is defensible in the face of system world challenges, it must depend on strong social commitments, not simply contingent individual choices, however rational.

Third, Habermas' notion of pure communicative action, idealized in his account of the rationalized lifeworld, derives from institutional arenas that are hardly realms of perfect communication and freedom, including for example family

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[62] J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979).

[63] 1 COMMUNICATIVE ACTION, *supra* note 61, at 340. See also pages 243-71 discussing rationalization of the law.

[64] McCarthy, *Complexity and Democracy, or The Seducements of Systems Theory,* 35 NEW GERMAN CRITIQUE 27-54. Similarly, as Benhabib has noted, *see* S. BENHABIB, CRITIQUE, NORM AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY (1986), Habermas' general Enlightenment universalism leads him to deny that difference as such -- for example on gender lines -- could be a positive social or intellectual value. *See also* I. Young, *Impartiality and Civic Virtue,* in FEMINISM AS CRITIQUE: ESSAYS ON THE POLITICS OF GENDER IN LATE-CAPITALISM SOCIETIES (S. Benhabib & D. Cornell eds. 1987) [hereinafter FEMINISM AS CRITIQUE]; Frankenberg, *supra* note 4.

[65] Thus, Habermas worked rather more vigilantly to maintain the distinction of his theory from Gadamer's in their debates, than he did in relation to his exchanges with Luhmann. *See* Habermas, *A Review of Gadamer's Truth and Method,* in COMMUNICATION AND THE EVOLUTION OF SOCIETY, *supra* note 62, at 356-61.

[66] Calhoun, *The Radicalism of Tradition: Community Strength or Venerable Disguise and Borrowed Language,* 88 AM. J. SOC. 886-914 (1983).

relations that have generally been patriarchal. [67] It does make sense for Habermas' to distinguish between action oriented to understanding and action oriented to success. Seriously problematic, however, is the idea that the lifeworld and system world can be concretized as spheres of life (for example, family and community versus bureaucracies and markets). Two forms of understanding may be involved: one more concrete and phenomenological, the other more abstract. But neither form constitutes a realm free of power relations. And power relations, **[*418]** however personal and direct, involve an instrumental or success orientation.

Fourth, Habermas' account of system world and lifeworld lacks an adequate social structural foundation. [68] Not only does it not provide for an analysis of class conflict and power relations, but it also takes changing orientations to action as both the primary causes and the primary results of the large scale social changes of modernity. Little independent role is ascribed to demography, to patterns in networks of concrete relationships, or to capitalism's relentless expansion. Rather than regard changes in orientation to social action as primary, I would argue that these are dialectically related to such social structural factors as the transformation in scale of social organization. Material changes in the scale and form of social relationships partly necessitate adopting instrumental or systemic orientations to action.

Rather than focus on material factors or kinds of social relationships as such, Habermas begins with a qualitative distinction in forms of rational action: instrumental (oriented to success in relation to objectified goals) and communicative (oriented to reflective understanding and the constitution of social relations). [69] In his view, both of these develop naturally in the course of human history. They come into conflict when they give rise to competing forms, systemic and social (lifeworld) of societal integration. The latter is integrated through communicative action in which people seek mutual understanding. The former is integrated through the feedback mechanisms of "de-linguistified steering media," without any actors necessarily understanding the whole system, or without such understanding playing a central role.

Money is the paradigmatic example of the de-linguistified steering media to which Habermas (following Parsons) refers. But a wide range of statistical indicators, for example of productivity and public opinion also share many relevant features. These media allow social systems to be "steered" as though they were independent of human action. Through systems theory they may be similarly understood. Indeed, the real complexity of very large scale social processes may dictate that they can be grasped better in cybernetic and other relatively abstract academic terms, rather than in terms of the ordinary discourse of the lifeworld. Accordingly, Habermas uses systems theory in his analysis of system integration **[*419]** even while he attacks the reifying (and anti-democratic) tendencies of systems theory. [70] It is unclear whether or how he maintains the ability to show in his theory that such large scale indirect phenomena remain nonetheless human social activity and relationships.

Habermas almost loses the "unmasking" moment of a putatively critical theory and almost accepts the reifications of cybernetic theory -- which actual social arrangements make convenient and predispose us to use -- for us to accept as fully satisfactory accounts of the system world. It seems to me preferable to argue that very large scale social organization based on indirect relationships is difficult to understand without recourse to the kind of understanding

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[67] Fraser, *What's Critical about Critical Theory? The Case of Habermas and Gender,* 35 NEW GERMAN CRITIQUE 97-132 (1985).

[68] Curiously, there was more attention to social structure in Habermas' early work on the public sphere, STRUKTURWANDEL DER OFFENTLICHKEIT (1962) (English translation forthcoming as THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE) [hereinafter STRUCTURAL TRANSFORMATION].

[69] There is also an intermediate form of strategic social action -- for example, seeking to redefine the situation relevant to any communicative discourse -- that is hard to treat as entirely collapsible into the binary scheme. See, for example, T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS (1978), which, though slightly dated, remains the best secondary source in English on Habermas' theory. *See also* S. WHITE, THE RECENT WORK OF JURGEN HABERMAS: REASON, JUSTICE, AND MODERNITY (1988).

[70] *See* 2 COMMUNICATIVE ACTION, *supra* note 61.

Habermas describes as typical of the system world. This is a way of looking at social action well suited to large scale phenomena, but nonetheless it is an intellectual choice. In other words, when relationships are directly interpersonal we will recognize the extent to which they are human social creations. But when relationships are highly indirect, mediated by technology and complex organizations, we are likely to need to approach their operation through aggregate statistics and cybernetic conceptions. These will tend to make it look as though the large scale systems were somehow autonomously functioning entities rather than creations of human social action.

We see this each time economists talk about the economy as though it were a natural system to be predicted and understood in the same manner as the weather (and indeed, economists are increasingly called upon to play a role similar to that of weather forecasters on the evening news). It is almost impossible to see the manifold ways in which human actions create large scale markets, for example, and certainly to understand complex economic processes on the basis simply of aggregation upward from those specific relationships of buying, selling, making, and using. A categorical break is intellectually necessary in order to look at these relationships holistically, on a collective level of analysis. This break is not a break in reality, however, but in our approach to understanding reality. A critical theorist continually needs to remind herself that reality is provisional; it must be unmasked recurrently to reveal the actual human activity creating the larger system. "System world" ought to be seen, then, less a sphere of life than as a mode of understanding, one which is particularly relevant to certain spheres of activity.

The lifeworld, for Habermas, suggests both the model for communicative action and its primary locus. Although Habermas' reasoning derives particularly from examples like the family, the lifeworld does not consist solely of what he has elsewhere called the "intimate sphere." [71] On the contrary, it includes also the public sphere, the realm in which actors not closely related, and perhaps distinguished by sharp differences **[*420]** of social status, might enter into discourse capable of shaping each other's (and hence the public's) opinion. In his earlier work, Habermas located this public sphere as a historical category of bourgeois liberal society, and analyzed its transformation and the degeneration that accompanied its reorganization on the basis of mass media. This view brought him perilously close to "mass society" critiques of twentieth century modernity, and to their implied pessimism about the future of enlightenment and democracy. Habermas began to recast his theory, replacing the historical grounding of the earlier work with an appeal to transhistorical, essential characteristics of human speech, particularly discourse or argumentation. These included, centrally, the validity claims to sincerity, truthfulness, and rightness or appropriateness, which Habermas believes are intrinsic to all communicative interactions. [72]

To make a long story short, Habermas' early work was more Hegelian and Marxian in tracing the various ways in which the reality of bourgeois society undermined the ideals of its conception of itself -- that is, as governed by the free choices and interactions of more or less equal individuals, a view which could be maintained only by keeping a strong belief in the irrelevance of economic differences for public life. The earlier work thus suggested ways in which the broadening of the public sphere to include members from the very widely split, even opposed, classes of mature capitalist society, could only result in the debasement of that public sphere, so long as participation was premised on acceptance of a notion of formal equality. The only way for such an inclusive public to live up to the ideals of the public sphere would be for the structure of civil society to be transformed. In his later work, Habermas ceases to address this issue of societal transformation. He accepts that some sort of split between system and lifeworld is necessary, neglects class (and other sorts of social-cultural differences), and pursues instead a notion of evolution based on increasing rationality and capacity for social coordination through communication action. The later theory makes him much more of a Kantian, which helps to explain the Article in this Symposium. His Article is

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[71] STRUCTURAL TRANSFORMATION, *supra* note 68, at 30-31, 151-59.

[72] Following Austinian speech act theory, Habermas makes a distinction between illocutionary speech acts aimed at accomplishing understanding, and perlocutionary ones that attempt to achieve effects in other ways. See 1 COMMUNICATIVE ACTION, *supra* note 61, at 277-95, and discussion in Solum, *supra* note 6.

distinctive because Habermas seems to declare himself a Kantian, at least of sorts, whereas he has previously resisted that label. [73]

Habermas' Article basically represents a consideration of and reply to the charge that his discourse ethics is vulnerable to the same critique **[*421]** that Hegel made of Kant's moral philosophy. Hegel's four key charges were: (1) excessive formalism; (2) abstract universalism; (3) impotence of the mere ought; and (4) the terrorism of pure conviction. In answering them, Habermas also implicitly addresses some of the charges that have recently been leveled against his theoretical strategy from the postmodernist camp.

Briefly, Habermas' answer to the charge of formalism is that discourse ethics replaces the Kantian categorical imperative by a procedure of moral argumentation. He does not move very far from Kant. He offers two postulates. The first, "[o]nly those norms may claim to be valid that could meet with the consent of all concerned, in their role as participants in a practical discourse," implies the standard of fully aware and rational participants, at least as a regulative ideal. [74] The second, "[f]or a norm to be valid, the consequences and side-effects its general observance has for the satisfaction of each's particular interests must be freely accepted by all," is a scaled down version of the categorical imperative itself, recast slightly in the social contract direction. [75]

Hegel's charges of abstract universalism and the impotence of the mere ought trouble Habermas more. Habermas definitely wants to claim universalism for his theory, arguing that its moral principle is valid across historical and cultural contexts. And he accepts the label of "cognitivist ethics," asserting that "normative rightness must be regarded as a claim to validity which is analogous to a truth claim." [76] He defines universalism into the very idea of morality: "[t]he viewpoint from which moral questions can be judged impartially is called the 'moral point of view'" (specifically likening this to Rawls' original position and Mead's ideal role taking). [77] For Habermas, practical discourse produces this moral point of view, and it has the advantage over most previous Kantian moral theories because it makes this a social, intersubjective process, not a matter of isolated individuals engaged in private reflection. This would seem, however, to somewhat conflate two issues. The first issue is intersubjectivity, the argument that being a human individual is a fundamentally social phenomenon, that consciousness is not best understood as "interior" to singular subjects but as developing out of their relations. The second issue is "publicness," the manner by which such individuals carry on discourse that pertains to matters of their mutual concern, recognizing each other as equally entitled to be parties to such discourse. Habermas' conception of the public already presumes individuals. More importantly, a variety of intersubjective cognitive processes necessarily exist that are hardly public, though they are certainly **[*422]** shared and social. To suggest that all aspects of intersubjectivity can be made public, even as an ideal, is to deny that there is any significant, necessarily prerational, presuppositional dimension to human life -- whether the unconscious, emotions, the socially produced but partially embodied "habitus" in which (Bourdieu suggests) our actions are situated, or the "prejudices" (in Gadamer's sense) on which we build our more reasoned judgments. [78] This raises the more general concern that Habermas' ethical theory is built on an unrealistic notion of human social existence.

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[73] Actually, it seems to me that Habermas is (like Kant) in many ways a Rousseauian, though he hardly ever cites Rousseau, and is usually hostile when he does do so. Through Kant, however, he draws a highly rationalized version of Rousseau. And one way of interpreting the entire course of his work is as a search for a rationally defensible procedural foundation for claims about "general will." *See especially* STRUCTURAL TRANSFORMATION, *supra* note 68, at ch. 3.

[74] Habermas, *supra* note 6, at 40.

[75] *Id.*

[76] *Id.* Habermas suggests that we must not require too strong a justification of any norm of action. But he does not really specify what less demanding sort of justification is acceptable.

[77] *Id.* at 41.

[78] P. BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977), and LE SENS PRATIQUE (1980); G. GADAMER, TRUTH AND METHOD (1982), and PHILOSOPHICAL HERMENEUTICS (1976).

Though Habermas does not take this up in terms of law, we can think about it as at least somewhat analogous to the contrast of common law to statute law. Habermas is proposing an ethical theory that is like a radical attempt to substitute legislation for common law. Legislation is to be the product of the fullest and freest possible rational discourse among parties affected. But the principle of formulating universalistic and abstract laws applied to later action is followed. By contrast, arguments for the common law involve, among other things, the assertion that such legislation must be basically, and possibly radically, inadequate. It will always be necessary for some legal development to be case-based -- that is, founded on the recognition of the particularities of each case. If not done in the common law (where it may be explicitly substantive) this will appear as an issue in the application of legislation to cases. It will thus require notions of judicial discretion or some other confrontation with the distance between the abstractly universal and the concretely particular. [79] The common law includes an explicit recognition of this necessary incompleteness of any process of rational prior legislation. It also relies on an incremental developmental process that includes both learning and noncumulative change as pushed by the cases which are brought to court (in this it has much in common with all hermeneutic traditions). The common law (in the somewhat idealized sense to which I refer here, distinct from its own history of formalism) embodies the claim that much of our practical reason will necessarily be "contentful," not abstract, and will embody only a limited approximation to universalism. The common law is hardly a call for extreme relativism, and I see no reason why greater contentfulness and reliance on something like a case-based notion of development and change should be taken to pose the threat of radical relativism to social or ethical theorists. The common law is still a discursive arena in which problems may be settled (and, **[*423]** coincidentally, law developed) through a public process. But it is embedded in history and concrete social practices, not abstracted from them.

Similarly, for Habermas, morality is conceived of primarily as a safety device, not a force for positive improvement in life:

"Moral intuitions" are intuitions that instruct us on how best to behave in situations where it is in our power to counteract the extreme vulnerability of others by being thoughtful and considerate. In anthropological terms, morality is a safety device compensating for a vulnerability which is built into the socio-cultural form of life. [80]

One senses a view of the good as limited evil. Habermas suggests that this orientation of morality to human fragility gives morality two tasks: to serve justice through equal respect for everyone, and to serve solidarity, by maintaining the intersubjective relations of mutual recognition within a community. [81] Somewhat surprisingly, liberty does not appear alongside justice, and the possibility of essential tension between either of these and solidarity is not really developed. Yet if this tension is essential, it suggests some limits to the (ultimately liberal) regulative ideal with which Habermas works, and some need for a greater positive recognition of particularity and interpersonal (and cross-cultural) difference.

Habermas is not unaware of the issue of difference:

There is only one reason why discourse ethics, which presumes to derive the substance of a universalistic morality from the general presuppositions of argumentation, is a promising strategy. And this is that discourse or argumentation is a more exacting type of communication, going beyond any particular form of life. Discourse

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[79] This issue is discussed more substantially, though not altogether clearly, in Gunther's Article in this Symposium. Gunther, *supra* note 6. Habermas raises the issue fairly directly in his Article, though without reference to law. He asks "whether practical reason may be forced to abdicate in favor of a faculty of judgment when it comes to applying justified norms to specific cases." Habermas, *supra* note 6, at 52.

[80] Habermas, *supra* note 6, at 42.

[81] Habermas' concept of solidarity "refers to the well-being of associated members of a community who intersubjectively share the same lifeworld," *id.* at 43, unlike the more standard sociological usage that would place the stress directly on the fact of association, making the question of well-being a separate one. In fact, a page later, Habermas explicitly treats solidarity and the common good as distinct moral categories (along with respect). *Id.* at 44.

generalizes, abstracts, and stretches the presuppositions of context-bound communicative actions by extending their range to include competent subjects beyond the provincial limits of their own particular form of life. [82]

But Habermas' approach to this issue is ultimately one of liberal tolerance for difference, and a program for overcoming it, not recognition of it as necessary, or still less a positive good.

Habermas' difficulties with difference are linked to the sheer cognitivism of his approach. This is especially true of his later work, specifically on discourse ethics. In his earlier work on the public sphere, his conceptual framework was much more open to the introduction of difference and of concrete historical social structures as central issues for the theory. The idea of public, for example, did not (and does not) suggest any progressive eradication of differences as part of a movement towards consensus. On the contrary, it suggested the need that certain societies have **[*424]** (and which we might elevate to a regulative ideal) to produce a discourse across lines of important social differences in order to pursue limited consensus -- or at least mutual respect and understanding. Similarly, Habermas (in the present Article) faults Michael Sandel's critique of Rawls for introducing community as a basic presupposition of social life, something good in itself. [83] Without going into Sandelhs argument in any detail, we should note the extent to which this forces Habermas back into a sort of individualism -- albeit one in which individuals are understood intersubjectively. Community, in Sandel's sense, must appear as a particular good, on the lines of Aristotelian virtues, and thus must be opposed by a cognitivist, deontological ethics. But this fails to consider the possibility that community should appear in an ethical theory not simply as a good in itself but as a crucial condition of a wide variety of goods, and perhaps of any alternative to the simple opposition of state and individualistically conceived civil society. [84]

Habermas does admit that Hegel's charge of formalism rings true in one sense:

deontological abstraction segregates from among the mass of practical issues in general precisely those which lend themselves to rational debate. . . . [T]his procedure differentiates normative statements about the hypothetical "justice" of actions and of norms from evaluative statements about subjective preferences that we articulate to what our notions of the good life happens to be, which in turn is a function of our cultural heritage. Hegel believed that it was this tendency to abstract from the good life that made it possible for morality to claim jurisdiction over the substantive problems of daily life. He has a point, but his criticism overshoots its aim. . . .

In the back of Hegel's mind was a theoretical question which is rather more difficult to answer: Can one formulate concepts like universal justice, normative rightness, the moral point of view, etc., independently of any vision of the good life, i.e. independently of an intuitive project of some privileged but concrete form of life. Noncontextual definitions of a moral principle, I admit, have not been satisfactory up to now. Negative versions of the moral principle seem to be a step in the right direction. They heed the prohibition of graven images, refrain from positive depiction and, as in the case of discourse ethics, refer engatively to the damaged life instead of pointing affirmatively to the good life. [85]

This passage is the heart of Habermas' Article and points to the most significant challenges his project faces in contemporary social theoretical debate. We must first ask whether this negative vision of ethics is adequate **[*425]** for real living? Can a concrete practical discourse be imagined that is entirely negative without presuming

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[82] *Id.* at 44.

[83] *Id.* at 44, n. 16.

[84] For all his emphasis on the state as source of unity in opposition to the fragmentation and division of civil society, Hegel is distinct from Hobbes. Where Hobbes' theory linked individuals directly to the state, Hegel's introduces widely varying and ramifying patterns of social relationships and group identities. These certainly did not play the role for him that "intermediate associations" played for Tocqueville, but in each case, the importance of community is suggested not as a particular good but -- like individuality or the state -- as conditions of other goods.

[85] *Id.* at 47.

some positive understanding of the good life? Habermas leaves the question unresolved. Moreover, his passage leaves open the question of how to give sufficient significance to cultural particularity as a positive good rather than mere impediment to universality. Habermas appears to equate abstraction with achieving generality, but the latter does not seem to follow from the former. [86] In any case, Habermas is willing, as a Kantian, to offer a moral theory that addresses only justification, leaving questions of application unanswered. [87] He regards this as a decisive advantage over neo-Aristotelian theories. But must we equate all projects of contextualization and concretization with neo-Aristotelian assertions of a collection of particular moral goods or virtues? Are there not other paths to follow once we recognize that judgment always moves within the ambit of a more or less accepted way of life?

Could we not, for example, follow Charles Taylor's notion of substituting the pursuit of "epistemic gain" for strong claims to certain truths? [88] On this analogy, we would see confrontations among holders of strongly differing ethical views -- for example, members of different cultures -- as occasions for mutual learning. Any form of cross-cultural understanding must involve genuine change in both parties, not simply the translation of the views of one into a form transparent to the other. Such practical changes, rather than retrospective or prospective abstract justifications, seem central to mediation between divergent ethical perspectives. But they are always in some part particular. While participants may attempt to step outside of pure egocentrism (a process recognized in most cultures) they cannot step outside of their culture. They move to the process of mutual understanding along specific paths that present issues to them in certain ways, and so forth.

Habermas touches upon these issues when he says that "any universalistic morality is dependent upon a form of life that *meets it halfway*. . . . Morality thrives only in an environment in which postconventional ideas about law and morality have already been institutionalized to a certain extent." [89] But this throws an enormous weight **[*426]** upon Habermas' notion of social evolution, and particularly on the analogy between social evolution and Kohlberg's developmental notion of justice. [90] The evolutionary aspect of Habermas' theory is one of its weakest and least attractive features. This is particularly so since his theory is based on little empirical attention to non-Western societies. Habermas is unfortunately prone to a kind of binary thinking in which any theory (or historical change) can be categorized either as a modern contribution to the progress of enlightenment or as a carry-over or resuscitation of premodern darkness and backwardness. Here Habermas appears rather explicitly and concretely as a supporter of the Enlightenment as a Western historical process: "The last two or three centuries have witnessed the emergence, after a long seesawing struggle, of a directed trend toward the realization of basic rights." [91] This is true in many ways, such as in the proliferation of liberal democratic rights vis-a-vis the state. But we must immediately remind ourselves, as Habermas does not, that the same centuries have seen at least as much of a "directed trend" toward genocide and terrorism. Habermas is too willing to dismiss these from his account of modernity, relegating them misleadingly to the category of carry-overs of the premodern, rather than

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[86] For example, "as interests and value orientations become more differentiated in modern societies, the morally justified norms that control the individual's scope of action in the interest of the whole become ever more general and abstract." *Id.* The abstraction is much more evident than the generality. In what sense is it true that the interests governing relations among people of different occupations or classes in modern societies are more general than those pertaining to members of different families in kin-based societies? In the sense of Durkheim's argument that differentiation necessarily leads to a stronger solidarity? *See* E. DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (1985). Is there any evidence that this was an empirically sound assertion?

[87] Habermas, *supra* note 6.

[88] *See* 1 C. TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS (1985).

[89] Habermas, *supra* note 6, at 50.

[90] L. KOHLBERG, ESSAYS ON MORAL DEVELOPMENT VOL. 1: THE PHILOSOPHY OF MORAL DEVELOPMENT (1981) ESSAYS ON MORAL DEVELOPMENT VOL. 2: THE PSYCHOLOGY OF MORAL DEVELOPMENT (1984).

[91] Habermas, *supra* note 6, at 30.

recognizing that the same modernity produced Hitler and Albert Schweitzer, and that if there was something modern to Gandhi, there was also to Pol Pot.

Habermas follows Hegel in sharply distinguishing action under moral laws from political practice that aims to promote the institutional prerequisites for such moral laws -- in his case for general participation in posttraditional moral reasoning. "Wherever existing conditions make a mockery of the demands of universalist morality, moral issues turn into issues of political ethics." [92] In a sense, Habermas here accepts a basic tenet of the postmodernist position, except that he sees the problematic ubiquity of politics not as an essential characteristic of human life but as historically specific to certain social situations. But this raises serious problems. Habermas has put forward a highly idealized moral theory, only to withdraw it as the basis for most political action since the conditions do not obtain in contemporary society for the full development of the kind of public discourse Habermas' theory requires. "How can political action be morally justified, when the social conditions in which practical discourses can be carried on and moral insight can be generated and transformed do not exist but have to be created?" [93] This is a fundamental problem for Habermas' attempt to derive morality and practical reason **[*427]** from idealization of validity claims *implicit,* but not necessarily predominant, in all discourse. Is he offering a moral scheme for a future society, or a guide on how to move towards a better society? If the former, is that future society possible? [94]

Faced with this problem, Habermas suggests that we are asking too much from moral theory. All that it can do

and should be trusted to do is clarify the universal core of our moral intuitions, thereby refuting value skepticism. What it cannot do is make any kind of substantive contribution. By singling out a procedure of decision-making, it seeks to make room for those involved, who must then, under their own steam, find answers to the moral-practical issues that come at them, or are imposed upon them, with objective historical force. [95]

Again we see an apparent binary choice: We must either accept a "universal core" of moral intuitions, or be value skeptics. And we see the result of Habermas' refusal to involve moral philosophy in any particular vision of the good life, or even in the process of bringing such visions into relationship with each other. The result is a sharp limitation on the usefulness of moral theory. As Habermas guesses, it comes as a disappointment that his elaborate attempt to develop a social-theoretical approach to moral philosophy can have little directly to say about what he suggests are the four big moral-political liabilities of our time: (1) Third World hunger and poverty; (2) torture and other violations of human dignity by autocratic regimes; (3) inequality and unemployment within Western nations; and (4) the nuclear arms race. [96]

Habermas seems to share the general idea that moral philosophy which generates idealistic accounts of human relations requires the complement of a social theory about how we are to move towards the ideal state. Oddly, though, he seems to suggest that such a social theory will be deterministic and evolutionary. For example, he closes with a quotation from Max Horkheimer (a leading figure of earlier, more Marxist, critical theory). Horkheimer calls for a materialist theory of society -- a surprising call for Habermas to echo, given his own minimal attention to material factors. Part of the problem may lie in Habermas' attempt to ground his theory in the universal potential immanent in speech acts, rather than in actual historical development or categories. This sets Habermas on a

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[92] *Id.* at 51.

[93] *Id.* at 52.

[94] In passing, I would suggest that discourse ethics *is* adaptable to the task of guiding gradual development of counter-hegemonic movements in Gramsci's sense. That is, the conditions for local discourse of a highly justifiable and democratic nature may be created even when such conditions are very distant for the public as a whole. Kant clearly saw public discourse as both a norm and a means for producing enlightenment. *See* I. KANT, THE CONFLICT OF THE FACULTIES (1979); *see also* STRUCTURAL TRANSFORMATION, *supra* note 68, at 109-17.

[95] Habermas, *supra* note 6, at 52-53.

[96] *Id.* at 53.

program that increasingly takes him back onto the traditional turf of idealistic moral philosophy, and turns him away from incorporating attention to social organization and historical change **[*428]** directly into his theory. Perhaps most decisively, it diverts his attention from the possibility that one might develop a theory that addressed basic normative problems historically and with cultural specificity, without giving way to extreme relativism. Such a theory would have to involve some notion of a learning process inherent in the pursuit of communicative understanding across lines of cultural (or other) difference. It would have to rest content with a notion of multiple and partial truths, and indeed celebrate differences as the condition for the process of learning. But it would not need to suggest that such historical grounding and affirmation of the positive side of difference entail denial of the standpoint of normative theory.

Such a theory might incorporate a great deal of Habermas' discourse ethics and his social theory more generally, but it would have to temper its universalism. It is Habermas' demand for moral certainty that leaves him open, however slightly, to the Hegelian critique of "the terrorism of pure conviction," as it is reformulated by the current postmodernists. [97] Of course he is not a Leninist substitutionist, and the notion that ends can justify means is indeed quite foreign to discourse ethics. Indeed, one might take Habermas' theory of communicative action to suggest that the internal practices of any movement, and the process by which it aims at a more democratic future, need themselves to be evaluated by the standards of communicatively achieved understanding. Moreover, Habermas' theory would certainly militate against taking society (or class) to be a super-subject with unitary interests in historical change. But the search for a single universalist truth in matters of ethics, the sharp split of justification from application, the attempt to transcend rather than theorize the historical and cultural specificity of one's knowledge, perspective, and understanding, and the willingness to abstract from human particularity to some notion of human essence, all contribute to a theoretical result that encourages a focus on the ultimate ideal rather than on the immediate directions of movement. And while this may pose no serious threat of totalitarianism, it does represent truth as something which must triumph over falsehood, rather than as the gradual but never complete improvement in understanding which follows from epistemic gain in discourse and lived experience. In this, Habermas' theoretical orientation, as well as his monological style of writing, are in slight tension with his focus on discourse. The tension between orientation and discourse has increased as he has attempted to find transhistorical, transcultural categories to ground the notion of discourse **[*429]** ethics, rather than continuing his earlier emphasis on the public sphere, and tempering his cognitivism with a theory of practice.

Habermas does not address law much in his Symposium Article, which suggests that he views law as basically similar to morality except that "the target group of a law -- those who are expected to comply with a legal norm -- are relieved of the burdens of justifying, applying, and implementing it. These chores are left to public bodies." [98]

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[97] These are the "neoconservatives" to whom Habermas refers. *Id.* at 50. It is common in the English-language intellectual world for those influenced by French postmodernism to take the stance of political radicals, feminists, advocates of those oppressed by prevailing normalizations of power and cultural categorizations. Whether such postures translate into any significant action is one question; more theoretically important is the point that they lack real grounding in the theory or approach generally labeled postmodernism.

[98] *Id.* at 51, n.3. Elsewhere, Habermas has addressed more substantially the place of the 'public sphere' in understandings of the relationship between law and morality. *See* STRUCTURAL TRANSFORMATION, *supra* note 68, at ch. 4. Kant suggested a fundamental distinction between law and morality, that treated the former as involving compliance which might be based on external (natural or political) necessity, while the latter was a product of free will. The public sphere played a central role because it offered the arena in which rational-critical debate might promote movement beyond forced compliance towards a transcendence of law in morality (that is, an achievement of Rousseau's general will by highly rationalized means, rather than intuition, mysticism, or authority). Hegel and Marx, by contrast, challenged the liberal conception of society on which Kant's theory rested, particularly the notion of society as an aggregation of independent, more or less equal, individuals. For Hegel, civil society was characterized by the basic disunity which arose from the necessary existence of functionally differentiated social subgroups. Only the state could achieve unity. Publicity was the state's means of educating citizens in the ways of social solidarity, but publicity was not a vehicle of enlightenment. For Marx, of course, the whole project of achieving social unity was chimerical as long as society remained divided by capitalism into classes. The public sphere could be approached for various instrumental ends but was a sphere of false consciousness or distorted understanding rather than enlightenment. In his earlier work Habermas' focus is equally on the value of the Kantian (and more generally liberal) category of public sphere. Habermas

But one can readily imagine applications of the theory of communicative action to law that suggest some tensions between the overall theory and this notion of division of labor. If, for example, an overall goal were to increase the degree by which communicative action among all those affected coordinated social affairs, we could evaluate the extent to which the law served or impeded the attainment of this goal. This has obvious bearing on the issue of autonomy of law.

C. Solum's Communicative Action Approach to the First Amendment

Solum's Article in this Symposium offers a more concrete substantive use of Habermas' theory. Solum finds that a theory based on communicative action provides both the best justification for the first amendment and the best fit with existing case law. The first amendment, according to Solum, protects only communicative action. Attempts to **[*430]** make it protect all "speech" as somehow distinct from "practice" are misguided, both because that distinction is impossible and because merely instrumental speech should not be protected. [99]

But, can it really be that the first amendment only protects speech that is oriented to achieving understanding, and not that which focuses more instrumentally on achieving success? First, an obvious question exists whether the distinction between illocutionary and perlocutionary acts, or between communicative and instrumental action, allows for any precise analysis of empirical, contextual speech. Solum recognizes this concern and suggests that most speech is at least preponderantly one or the other. [100] Moreover, he argues that the ability to make this distinction is general: "Competent communicators do have the ability to distinguish communicative action from strategic action despite the mixed nature objection." [101] Here Solum appears to introduce what we might call a "reasonable communicator" criterion, by analogy to the notion of judgment by the standard of what a reasonable man might have known, thought, or done -- in other words, a reference to some sort of "normal practice" to guide what otherwise would appear to be a muddling through. Solum suggests that we see the theory of communicative action as rational reconstruction of current legal practice: "Judges simply draw upon the knowledge of the ideal speech situation which is available to all competent speakers because it is built into the structure of communication." [102]

But would an ordinary reasonable communicator or a judge necessarily arrive at Solum's solution to his major case of labor picketing? Solum argues that "the distinction between communicative action and strategic behavior grounds the construction of two categories of labor picketing -- informational picketing protected by the first amendment and unprotected signal picketing." [103] But it is dubious to distinguish between labor picketing as an

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also focused on the impossibility of sustaining the notion of the public sphere (and the enlightenment project) on liberal grounds that mystified the basically inegalitarian nature of social life. Rather than seeking a historically concrete basis for transformative politics in the spirit of the earlier work, however, Habermas has turned increasingly to transhistorical, even transcendental categories such as the notion of a perfect speech situation, the possibility of which is implied by all communicative action. This formulation suggests a sympathy with the Kantian notion of the separation of law and morality, a treatment of law as a realm of strategic action which may be judged not directly by moral criteria but by how much it contributes to the project of furthering the evolution of communicative action (and hence of morality). *See also* 1 Theory of Communicative Action at 243-71.

[99] Solum, *supra* note 6, at 91. Solum examines attempts to understand first amendment protection through metaphors like the "marketplace of ideas" and idealizations of local, "town meeting," democracy. *Id.* at 72-73. In fact, there are historical connections between metaphor and the examples of early public life. The metaphor is intimately related to the origins of the modern public sphere both in the literary world made possible by early print capitalism, and in the more general liberal understanding of the market as a sphere of freedom to be protected from state encroachment. On print capitalism, see STRUCTURAL TRANSFORMATION, *supra* note 68; B. ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983); and E. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE (1980).

[100] Solum, *supra* note 6, at 107.

[101] *Id.* at 114.

[102] *Id.* at 133.

[103] *Id.* at 125.

attempt to bring pressure on an employer and as an attempt to engage in discourse on the rightness of current social arrangements. Labor pickets are very seldom simply the latter. Surely the distinction must involve whether the economic pressure is produced by **[*431]** means of changing understanding or by non-communicative manipulative effect. Even so, a "signal picket" may aim at consensus among one set of actors.

For another demonstration that competent speakers have the ability to distinguish strategic from communicative action, Solum argues that "in the case of the 'actual malice' test the distinction is explicitly and formally incorporated into the law."   [104] We might ask whether the actual malice test actually involves this precise distinction or a somewhat different one. Surely not all strategic or instrumental action is malicious? But even if we take this as the relevant distinction, is its recognition conclusive evidence that the ability to make the distinction inheres in *speech* as such, rather than in some conventional pattern of conceptual distinction? The claim would be much more convincing if it were shown that across many lines of cultural difference speakers were always able to make such a distinction.

Habermas himself recognized, at least implicitly, some difficulty with this binary scheme when he introduced the intermediate type of "strategic social action" -- action that is oriented to success but works through communicative relations with other people. In any case, Solum seems to want to place the emphasis too strongly on the characteristics of speech acts and not enough on their orientation to different sorts of social relationship. For Habermas, a central point of the distinction of communicative from instrumental action is to open up analysis of the severing of system from lifeworld and the challenges this poses for the overall goal of democratic and ethical social life:

Thus there is a competition *not between the types of action* oriented to understanding and success [which Habermas sees as complementary], *but between principles of societal integration* -- between the mechanism of linguistic communication that is oriented to validity claims -- a mechanism that emerges in increasing purity from the rationalization of the lifeworld -- and those de-linguistified steering media through which systems of success-oriented action are differentiated out. [105]

It would seem that a central issue should be the relationship of any particular speech act to the principles of societal integration. Therefore, the success-orientation of an action, as such, should not be that which denies it first amendment protection, but rather the primary location of the act within systems of success-oriented action. The key is differentiating the two forms of integration, not simply conceptually distinguishing between the two speech acts.

Solum's move away from the first amendment and into consideration of contract (or more generally reaching agreement) is somewhat more convincing. It makes sense to suggest, as Solum does, that an agreement is irrational if it can be shown that the agreement was reached **[*432]** *because* some condition of the ideal speech situation was not met.   [106] In this sense, indeed, his use of a full, free, and undistorted standard of communication as a regulative ideal by which to judge actual agreements seems to capture much of what we mean by justification. Contrary to Kant, we need not suppress individual interests to achieve consensus, universalizability or generality, but rather these interests may be expressed and shaped through nondistorted communication.   [107] And the ideal speech act may be more preferable for posing a regulative ideal than Rawls' original position, since the latter imagines a mythical history while the former anticipates a better (if infinitely receding) future.

But the notion that instrumentally intended speech is not protected seems problematic. While established doctrine certainly denies first amendment protection to some perlocutionary ends such as shouting "fire" in a crowded

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[104] *Id.* at 134.

[105] *See* 1 COMMUNICATIVE ACTION, *supra* note 61, at 342.

[106] Solum, *supra* note 6.

[107] *Id.* at 103.

theater, it would seem difficult to argue, for example, that speech in the pursuit of political office -- instrumental, but still truthful and sincere -- is not protected. The political candidate touting his program may be neither insincere nor deceived, yet he surely engages in an instrumental or strategic form of action. We might try to distinguish those candidates who approached electioneering primarily as a forum for public expression and education from those who focused more narrowly and manipulatively on getting elected. Yet, we would raise as many problems as we solved because, idealistic democratic theory notwithstanding, the public itself engages in politics not just for education (though that may be an attractive by-product) but in order to make decisions. More generally, we would miss the point that the relationship of the candidate's action to the political process, not its evaluation in isolation, is the decisive issue. That is, does the candidate's political action, of which speech is a part, serve or subvert the possibility of the public's making an informed decision of the practical matters before it? The same would be even more true of a salesman. We might gain a better understanding of his case by focusing on its place in relation to capitalism and its nonlinguistic steering media, such as money. But what about speech acts in aesthetic contexts, such as speech intended to produce emotional responses when uttered from the stage or movie screen? Should these be denied protection because their purpose is not rational understanding as such?

Despite these quibbles, Solum generally makes a persuasive case for the utility of Habermas' theory in trying to produce a better grounding for first amendment doctrine and caselaw. His point that the theory makes sense of the difficulty of hard cases, particularly those involving trade-offs between equality and freedom or fullness of communication is well taken in this regard. [108] In developing this line of reasoning, it might **[*433]** be worthwhile to expand its grounding both within and beyond Habermas' work, to include not only speech act theory but more general social theory that says something more about the nature, types, and significances of contexts of speech and the broader courses of action of which they are a part. We might then see protection of free speech and communicative action less in terms of single speeches understood monologically in terms of the speaker. We might approach it in terms of the social conditions for dialogicality, for discourse in which various speakers are able to address the validity claims implicit in each other's utterances.

D. Gunther's Applied Impartiality

Klaus Gunther's Article takes up a basic issue in the development of a legal theory out of Habermas' discourse ethics and social theory. Specifically, he defends cognitivist ethics by developing a better account of the relationship of justification to application, one which would not leave open the possibility that the accomplishments of the former would be undone by the contingency and arbitrariness of the latter. In fact, he wants to accomplish even more with his account of application. He wants to counter the assertion that "[p]roponents of cognitive ethics who connect the validity of a norm to the universality of its foundation . . . neglect or even destroy the diversity of separate situations and the many images of the persons and the life-forms involved for the sake of abstract impartiality." [109] Gunther argues that universalistic substantiation (justification) still allows for attention to differences in concrete situations of application. Obviously, this is directly analogous to the notion that laws may be abstract but their judicial application takes account of the particularities of cases. Just as the legal notion places an uncomfortable burden on the "discretion" of judges, Gunther's idea likewise raises major concerns about how the ethical theory is to account for application.

The threat is substantial. Kantian theories, such as Habermas', approach ethical problems on the basis of abstract rational reasoning, attempting to guarantee universality by dealing only with necessary categories of human existence or of moral reason. But an alternative view suggests that universality of this sort is too strong a requirement, particularly in the area of application rather than justification. Application must be more contentful. It must begin, as Wellmer has argued from a point of view otherwise very close to Habermas', with descriptions of

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[108] *See id.* at 76-79.

[109] Gunther, *supra* note 6, at 155-56.

concrete situations.   110 It is the appropriateness and relative completeness **[*434]** of such descriptions that ground our ability to make generalizations.   But for Gunther, such attempts "hold a special difficulty.   They assimilate the principle of impartiality into the capacity for forming a judgment and consequently reduce questions of substantiation to questions of discovery and application."   111 Any such empirical dimension will necessarily threaten the complete impartiality central to the Kantian or Habermasian ethical projects:

If it were true that the idea of impartiality must be supplemented on the level of application in situations by means of a "sense of appropriateness" -- which is not rationally reconstructable and which can only be explained by means of reference to a contingent capacity and the special equipment of human nature -- then not only is the moral-philosophical undertaking of discourse ethics superfluous, but the socio-theoretical relevance of moral principles becomes questionable.   112

Gunther's view seems to be that ethical principles are radically undermined if they cannot apply absolutely. Once again, I would argue that what is needed is a theory of knowledge (and hence also of ethics) in less absolute terms -- for example, Taylor's view of epistemic gain.   113 Here the premise is simple, and quite relevant to law. We are virtually never in the position of choosing, Taylor suggests, a scientific theory, a legal principle, or an ethics simply in the abstract, based on whether it meets formal standards of universal truth or applicability.   At most, such standards inform our retrospective rationalizations of choices, and some of the terms in which we think them through and then defend them.   But the actual choices are always made among alternatives.   It requires the availability of the Copernican view of the universe for people to abandon the Ptolomaic cosmology. Judges facing cases (especially, perhaps, hard cases) do not simply find the truth, they choose between available views, each of which perhaps grasps the truth only partially.   114 And in theory **[*435]** itself, we choose between available theories on the basis of greatest epistemic gain (or on less rational criteria); we do not simply discover theories to be true or false.

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110 A. WELLMER, ETHIK UND DIALOG (Frankfurt, 1986). More broadly, this argument may be seen as deriving from Carol Gilligan's critique of Kohlberg's male centered, universalistic theory of the development of moral reasoning. *See* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan argued that Kohlberg's hierarchy of stages of moral development, defined in terms of increasing universalism and leading to the pinnacle of "post-conventional" judgment, neglected the more contextual but equally valid reasoning characteristic of (but not limited to) women. Some thinkers have extended this to develop an ethics of caring rather than solely one of impartiality. See the discussion in Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory,* in FEMINISM AS CRITIQUE, *supra* note 64, at 77-95.

111 Gunther, *supra* note 6, at 160.

112 *Id.* at 161.

113 1 C. TAYLOR, *supra* note 88. The point is to grant the necessary level of particularity and contextual sensitivity without suggesting a relativism so extreme as to make decisions arbitrary or beyond justification across lines of significant cultural or personal difference.

114 The necessity of such choices is part of what is behind Dworkin's argument against the claim of "no right answer" in hard cases. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Such a claim is simply the inverse of the pursuit of a universalistically right answer, as relativism is often the result of a disappointed search for certainty. The challenge is to develop a way of thinking that recognizes imperfect answers as the best available and in that sense right. Similarly, we might follow Calabresi who has suggested that the formulation of judicial decisions as absolutely right may both misrepresent a court's knowledge and, paradoxically, undermine public faith in the judicial process. *See* G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 91-114 (1985). His case in point is *Roe v. Wade,* in which the decision as written, he contends, denied all validity to the views of those opposing abortion, and so made them seek extra-judicial ways of pursuing their agenda because it appeared that the views of those opposing abortion were denied any standing at law. A better decision might have reached the same conclusion but represented it (more dialogically, perhaps) as a hard choice between competing valid claims. Such a decision, Calabresi suggests, might have led to a more moderate, less polarized debate on the issue.

Similarly, as I hinted above, the cognitivist ethical project suffers for lack of a developed theory of practice. This would include an account of tacit knowledge (Polanyi) but would not be limited to it. Following Bourdieu, it would recognize the extent to which social and cultural patterns become a part of ourselves, are even physically embodied, are constitutive of us, and are in important senses necessarily and unavoidably prior to processes of conscious ratiocination. [115] Gunther works with a binary opposition between that which is rule governed and rationally reconstructable, and that which is simply arbitrary:

[E]verything depends on whether it is possible, beyond the unavoidable prerequisite of natural abilities, to reconstruct the "sense of appropriateness," at least partially, as a rational capacity that results from rules and thus whose practice can be criticized. Only then could the drama be taken out of contextual and functionalistic positions [*i.e.,* challenges like those of the postmodernists and hermeneuticists on the one hand, and Luhmann on the other]. [116]

But it is not clear that rationality should be equated with following rules. This tends towards an extremely mechanistic view of cognition or reason. It also places the essential ethical action within individuals, making of ethics precisely the sort of intrapersonal reflection that intersubjectivity was developed partly to avoid. But perhaps we should move further away from this individualistic notion to see crucial dimensions of morality as inhering in what Bourdieu has called the "habitus," the socially produced and maintained patterns of characteristic action within which individuals live and which form the usually unconscious bases of their more explicit decisionmaking. [117] The rule-following notion of rationality **[*436]** abstracts from this social process and locates decision entirely within the individual. Typical of a discourse based theory, it also embodies the disparagement of that which is not discursive. And Gunther's comment suggests that there is, again, simply a binary choice between a highly formal rationalism and extreme relativism, that any contextual sensitivity would be a step onto the slippery slope of relativism.

Gunther attempts to combine the "internal" perspective of Habermas with the "external" perspective of Luhmann. The first addresses the law's relationship to ultimate normative justification, while the second explains the functional aspects of law. [118] Law is, in this view, "a system of discourses on application in which functional requirements are taken into consideration." [119] These functional requirements are the main concrete factors that Gunther seems to

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[115] *See* OUTLINE OF A THEORY OF PRACTICE, *supra* note 78, and LE SENS PRATIQUE, *supra* note 78.

[116] Gunther, *supra* note 6, at 161.

[117] The "habitus" is a concept which has caused a good deal of confusion, yet it is extremely useful in developing a theory of social practice -- indeed, one which is "intersubjective," in Habermas' term: The habitus, the durably installed generative principle of regulated improvisations, produces practices

which tend to reproduce the regularities immanent in the objective conditions of the production of their generative principle, while adjusting to the demands inscribed as objective potentialities in the situation, as defined by the cognitive and motivating structures making up the habitus. . . . Each agent, wittingly or unwittingly, willy nilly, is a producer and reproducer of objective meaning. Because his actions and works are the product of a modus operandi of which he is not the producer and has no conscious mastery, they contain an "objective intention," as the Scholastics put it, which always outruns his conscious intentions. . . . The habitus is the universalizing mediation which causes an individual agent's practices, without either explicit reason or signifying intent, to be none the less "sensible" and "reasonable."

OUTLINE OF A THEORY OF PRACTICE, *supra* note 78, at 78-79. In this sense, trying to understand legal or moral practice primarily as the following of rules will always miss a substantial part of the activity in which people actually engage, by which their behavior is adjusted objective conditions and social constraints or demands. In social life, we are all like jazz musicians long accustomed to collective improvisation; we know the range of possible next steps without ever thinking them explicitly; this knowledge is in a sense embodied in us physically, but not as an enduring substance but as history turned into nature, a capacity for getting into the flow of the moment.

[118] Habermas had paved the way for this approach in his account of the bifurcation of system and lifeworld. *See* 2 COMMUNICATIVE ACTION, *supra* note 61.

[119] Gunther, *supra* note 6, at 170.

think the law should take into account when it links normative justification to specific problems. In this way, rather than positing "large" individual rights (as in the natural law tradition), various highly specific rights are recognized. These "small" rights address the relationship of individuals to specific areas of functioning, and through functional integration allow the jurist to pursue a rationally reconstructable approach to the issue of appropriateness. Far from practical "sense," it becomes rationalizable through the sociology of functional integration of social systems:

Corresponding to this [the value judgments of a legal community found in the form of law] is both a general appropriateness, which refers to the interest of the community in definiteness and legal security, and a concrete appropriateness, which is directed at the individual concerned. [120]

Thus contracts, for example, cease to be interpreted exclusively on the basis of a putative agreement among people with autonomous wills. Instead they are judged increasingly in terms of how they meet the "needs" or "interests" of their parties (or of society at large). This is a rational reconstruction of the contract in terms of people's places in highly differentiated social systems. Gunther tries to avoid treating individual claims as matters of power, rather than as a more rationalizable, general factor. "Need" thus becomes a standard beyond private autonomous power, a standard treated in a more general way because it can be addressed in **[*437]** functional terms. [121] This is the meaning of the reconceptualization of contract law on the basis of a putative "rational choice" of individuals -- for example, in the car dealer example discussed in the last pages of his Article -- which in fact reflects ascribed, but impartially considered, interests or needs. [122]

I found Gunther's article confusing, especially the intended demonstration of his approach in the second half. The upshot seems to be that "the structural indefiniteness of situations" -- the uncertainty in applying universal norms in concrete cases -- is remedied by the use of systems theories to produce a functional definiteness in discourses on application. Without developing this much, I have suggested that this seems to neglect the possibility of a more satisfactory account of "appropriateness" of applications from the point of view of a theory of practice. Such an account would have to be contentful; it would always be caught up in particular cultural and social contexts to some extent, but it would allow for a progress of continual readjustment and for maximal inclusion of continuing ethical "learning" into legal discourse. By contrast, turning to systems theory seems to buy definiteness in application at the cost of losing -- or at least taking basic significance away from -- the constant play of interpretative discourse within the community (*pace* Dworkin).

There are also problems with Gunther's reliance on the principle of impartiality itself. Iris Young has argued that the attempt to ground ethics in a standpoint of impartiality has led Western thinkers to denigrate concrete social relations, desire, and affectivity. [123] The ideal of impartiality expresses what Adorno called a logic of identity, a conceptualization of reason based on a tendency to totalize both the object(s) of thought and the thinker. [124] The concrete diversity of sensuous objects in the world and sensual perceptions of them, and the manifest diversity of human beings, are negated in a notion of their equivalent standing before the court of consciousness. Similarly, the Cartesian ego suggests the extreme of totalizing the subject of consciousness as the reflective self-presence of consciousness to itself. This view of the subject is both dangerously anti-social and based on an opposition of reason to desire and affectivity (especially insofar as both of these involve concrete objects). The opposition of reason to desire and affectivity is closely linked to the idealization of impartiality. Impartiality is understood precisely

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[120] *Id.* at 178-79.

[121] *Id.*

[122] *Id.* at 182-83.

[123] Young, *Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory,* in FEMINISM AS CRITIQUE, *supra* note 64, at 57-76.

[124] Derrida's notion of logocentrism is somewhat similar to Adorno's "logic of identity." Each suggests a criticism of claims to discover authenticity or pure truth in original speech or images of thoughts thinking themselves (or consciousness thinking itself) in a realm of pure rationality. J. DERRIDA, OF GRAMMATOLOGY (1976); T. ADORNO, NEGATIVE DIALECTICS (1973).

as offered by reason alone. Thus, impartiality is grounds for expelling **[*438]** desire and affectivity from the forums of rational deliberation (like the courts). Conceived in opposition to desire and affectivity, however, reason (and morality based exclusively on it) loses the ability to distinguish good from bad desires, healthy from unhealthy emotions. Impartial reason gains its lofty position by forfeiting its connection to vast and central parts of lived experience.

An ideal of impartiality promotes an attitude of tolerance towards human differences, but not any encouragement of differences. Claiming a strong ideal of impartiality can be a device for avoiding the complex discussions in which manifold voices express competing understandings. Like God, "the impartial subject need acknowledge no other subjects whose perspective should be taken into account and with whom discussion might occur. Thus, the claim to be impartial often results in authoritarianism." [125] Legal procedures thus have been distinct from democratic processes partly because they are meant to embody an impartial voice of the singular law, rather than the manifold voices of the citizenry. It is in this sense that the ideal of impartiality has an important role to play as part of the liberal defense of minority rights against majorities.

The issue, however, is whether conceiving of the law exclusively in terms of the ideal of impartiality and the requirement of functional adequacy (as Gunther does) gives a sufficient basis for legal practice in a democracy. Such a view both omits and distorts. What impartiality leaves out is any positive encouragement of diversity. The distortion comes with the imposition of divisions between reason and affect, public and private, tolerating and tolerated. Approaching legal and political thought only by viewing human beings as formally equivalent citizens recognizes the commonality they share in relationship to the state or the natural law. But it is no coincidence that such views have historically focused on *men* and excluded women, because they have abstracted citizenship from the realm of concrete and particular social relationships. Such social relationships have been characterized by affectual bonds, and have been defined as the sphere of women. Women appear as the private supports of public men. They care for their particular desires and feelings and thus allow them to appear in illusory fashion as independent rational actors in the public realm. The inclusion of all citizens -- men, in **[*439]** the first instance -- is accomplished by the exclusion of this private realm. It remains topically excluded in large part even when its paradigmatic representatives -- women -- are allowed to vote and otherwise participate in the affairs of citizenship. Similarly, and more notably, this liberal conception of public equivalence is based on a suppression of attention to the "private" -- namely, economic -- inequalities among people. The most universalistic declarations of the rights of man were made in 18th Century societies which endorsed property qualifications for voting and other restrictive devices to exclude many men from the putatively universal category of *man* as citizen.

Public affairs are too often understood to be those affairs which affect everyone equally in their roles as citizens (that is, abstracted from their concrete, particular identities and attachments), and which accordingly demand to be addressed impartially. As a result, the conditions that define a person as a proper participant in public life include denial of particularity, or more idealistically, a transcendence of the sentiments, embodied orientations and desires, and personal attachments which make us who we are as human beings. [126] As Young suggests, this produces a tendency to exclude some categories of people from the public sphere: "An emancipatory conception of public life

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[125] Young, *supra* note 123, at 62. Consider also Bourdieu (in a passage with more than a hint of Foucault):

It makes sense that, in a complex society, the universalization effect is one of the mechanisms, and no doubt one of the most powerful, producing symbolic domination (or, if one prefers to call it that, the imposition of legitimacy in a social order). When the legal norm makes the practical principles of the symbolically dominant style of living official, in a formally coherent set of official and (by definition) social rules, it tends authentically to *inform* the behavior of all social actors, beyond any differences in status and lifestyle. The universalization effect, which one could also term the *normalization effect,* functions to heighten the effect of social authority already exercised by the legitimate culture and those who control it.

Bourdieu, *supra* note 9, at 241.

[126] This is directly analogous to Marx' contrast between the abstract labor value through which commodities became significant for capitalism -- a quintessentially "impartial" system -- and the concrete use value which gave them meaning to the human beings who used them (and for that matter the concrete labor process through which they were produced).

can best ensure the inclusion of all persons and groups not by claiming a unified universality, but by explicitly promoting heterogeneity in public. [127] Gunther attempts to think about the specificities of identities only in terms of a systems-theoretical account of functional differentiation leading to various partial systems each creating categories of legal subjects -- incumbents of various sorts of roles. [128] But attending simply to universalistic procedures of justification and functionally differentiated procedures of application is hardly sufficient. This is not simply a matter of excluding some people from public life, an error which could in principle be corrected without overturning the whole system. Rather, it is a matter of the impossibility of adequately conceptualizing either public life or justice in terms independent of human differences and the particularities of people's situations. In Gunther's view:

The post-conventional level of moral argumentation devalues these topics of the sphere of life in their claims to validity and, under the proviso that it is possible to make generalizations, puts them beyond the horizon of the one particular lifestyle. This devaluation does not imply the destruction of lifestyles but only the obligation of being able to show, in certain concrete cases, that normative relevancies are justifiable from a standpoint of impartiality. . . . For the justification of these norms, however, all those features **[*440]** constitutive for validity that are displayed by a certain self-image and a certain lifestyle must be replaced by ones that could apply to virtually all self-images and lifestyles. In this way a standpoint is reached that may attempt to assess norms in the light of all those interests concerned, independent of individual situations. [129]

A great deal turns on whether one considers this a desirable or even an imaginable project. Can there be a legislative or judicial standpoint from which it is possible to assess impartially *all* interests, self-images, and lifestyles? Or should it be that, in politics and law alike, we aim not for such perfection but for a continuous series of sound choices in the context of the practical alternatives presented? In other words, is it not possible that relatively deep understandings of the particularities of certain cases and situations allows for a discourse that can achieve a decision respectful of all positions, even though that decision does not follow from any necessarily universal precept?

Making too much of the distinction of justification from abstraction suggests the possibility of pure knowledge or pure moral insight untainted by the particularities of cases. But as Marx said in his theses on Feuerbach, all knowledge is "this-sided," embedded in history and contexts of practical action. As one regulative ideal among several, impartiality certainly has an important place. Indeed, it may be necessary. But it is not a sufficient basis for addressing issues of justice. [130] Impartiality needs to be reconceptualized (or replaced by some other concept)

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[127] Young, *supra* note 123, at 59.

[128] Gunther, *supra* note 6, at 172.

[129] *Id.* at 163-64.

[130] An oblique insight into this may be gained by considering the transformations in trial by jury over the last several hundred years. The practice began with the notion that jurors would be people in similar social situations to the defendant (his peers -- particularly, initially, for peers of the realm). These were frequently, if not indeed generally, people who knew the defendant and knew much of the necessary background information to the case. They were particularly enabled by this similarity of social position and access to relevant knowledge to render decisions about what a "reasonable man" would have done under the circumstances of the case. Jurors were instructed, in deliberating on the case, to rise above personal enmities or affections and to decide in an impartial way. This impartial way, however, was to be found in part through their reflection on the practical knowledge available to them. Over time, the notion of impartial juries changed. Increasingly, the notion of being in the same social situation lost its importance as liberal ideology proclaimed that there were no significant differences of rank or station dividing the citizenry. Impartiality was defined by ignorance of the case, rather than being simply a charge to the honorable men and women of the jury. This implies, strangely enough, a practical assumption that knowledge indeed results in bias -- at least unless it is closely controlled by the procedures of the courtroom. The results can sometimes be paradoxical, as in the case of Oliver North which impaneled its jury while I was writing this Commentary. The jury was chosen from among the very small proportion of the population of Washington, D.C. which indicated having seen neither the Senate hearings nor TV news coverage of Col. North's involvement in the Iran-Contra arms sale scandals. Putative impartiality, thus was achieved only by limiting jury participation to a radically atypical and specifically ignorant segment of the population.

that allows us to recognize not only the equal dignity of all others but the validity and significance of their particular identities and attachments. [131] This **[*441]** reconceptualization is particularly important for the Habermasian project (in which Gunther shares) because his theory places so much weight on the ideals of universality and impartiality. Yet I find the significance of these ideals contingent, not essential. Discourse ethics could complement the ideal of impartiality with, for example, one of solidarity or caring, understood concretely. I cannot develop a proper argument for this here. The issue simply is whether openness to the concrete and particular in social life may not be crucial and addressable within the terms of discourse ethics, or at least in a complementary fashion. Left entirely to the realm of application distinction from justification, such concrete factors must always be devalued, no matter how important they are to human beings individually and to the species.

Like Habermas, Gunther seems surprisingly willing to accept systems theory. Yet they both are surprisingly unwilling to find a theoretical place for concrete identities and particular attachments. I think the reason for this is largely because neither Gunther nor Habermas can envision a way to construct such a theory place that does not provide openings for arbitrariness and weaken the theory's ability to provide for decisions which can in principal be accepted quite generally. Gunther is certainly right to fear that the role of the legal and the normative will be reduced to a matter of mere power. But perhaps his fear is too great, not because the result would not be pernicious but because there are a variety of more moderate positions that also oppose it. He sees the reduction to mere power suggested both in the rigorist's posing of the opposites of duty versus affection and law versus obedience, which makes rational morality and law into purely instrumental vehicles over and against the field of actual life; and also in the relativist's placing of moral duty on the same level as repression. At least outside Germany, there are relatively few rigorists left, but relativists are proliferating. In order, then, that we may assess the potential danger, it is appropriate to turn to those articles that either represent, or address directly, the charge that law is not and cannot be an exercise in the impartial application of universal morality, but rather, must always be an exercise of power.

[V](#). POSTMODERNISM: QUESTIONING THE POSSIBILITY OF NORMATIVE GROUNDING

There is an enormous amount to be said about postmodernism, and there are many differences among its various self-declared and alleged protagonists. I cannot go into all of this here, so I will confine myself to comments on the specific issues raised by the Articles in this Symposium, and whether projects like Habermas' are fatally undermined by the postmodernist challenge to the old foundationalist pursuit of certain grounding for knowledge and, more generally, to theoretical claims to normative authority.

[*442] A. Balkin's Reading of Legal Writing

Balkin's Article is not in a strong sense postmodernist, but it does take up aspects of that movement's core themes, particularly through the influence of Derrida. Central among these is a focus on textuality, a willingness to read a wide variety of "texts" through methods of "literary" analysis -- that is, for example, by paying attention to style and mode of expression as well as to manifest locutionary content. [132] Derrida, in particular, is the leading exponent of "deconstruction," the reading of a text to uncover and recover meaning from its inconsistencies, contradictions,

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[131] *See, e.g.,* Benhabib, *supra* note 110, at 92.

[132] In much recent American cultural analysis, it has been suggested that "textuality" is either directly or metaphorically a feature of all sorts of social exchanges and cultural products, not only of written documents. For example, Michael Perry quite recently has presented this view: "By 'text' I mean simply 'object of interpretation'." Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa),* 6 CONST. COMMENTARY (forthcoming 1989). Perhaps the most famous exponent of this extension of the textual metaphor is Clifford Geertz in THE INTERPRETATION OF CULTURES (1973) and LOCAL KNOWLEDGE (1983). What Derrida has had to say about textuality is more specific, however. In his view, philosophy has been shaped since Plato by a basic understanding of truth as inhering primarily in self-identical acts of speech, which are only poorly and ultimately unauthentically recorded by writing. In challenging this "logocentric" view, Derrida means both specifically and literally to defend the claims of writing as a primary form of knowledge, and to suggest that some of the "defects" (or virtues) of written texts occur more broadly, and are essential rather than accidental features of thought. These latter include the existence of internal tensions, aporias, and hence the possibility (or even necessity) of deconstruction.

anomalies, and other ways in which its writing conveys more information than it declares manifestly. [133] Balkin undertakes a deconstruction of the **[*443]** *Carolene Products* case, partly for its own interest in the history of constitutional doctrine, and partly to exemplify the applicability of "literary" method to law and to undermine the stereotypical legal faith in the ideal of pure locution or precise and definite textual meaning.

At one broad level, Balkin succeeds cleverly in showing the "condensation of features" [134] in his text:

In tracing the metaphors of purity and impurity, exclusion and inclusion, we have noted an uncanny self-reference between what *Carolene Products* is about (introduction of adulterated milk into state borders) and what *Carolene Products* is *about* (judicial perfection of the democratic process through the protection of minority rights). [135]

The democratic process is described, for example, as impure because of the "adulteration of the means of political deliberation . . . or by the exclusion of discrete and insular minorities from full political participation." [136] Substantively, Balkin contends that this "purificationist" approach results in the court's struggle to find the "nice version," the rational reconstruction, of the legislative process behind whatever law it is presented with. "The Court adopts the stance of the infatuated lover in the first stages of a crush, who substitutes an ideal picture of the beloved for a less flattering reality." [137] This is a twist on Habermas' ideal speech situation as introduced into the legal context by Solum. Here ideal discourse appears not as a critical norm by which to assess legal rationality, but as an imputation of the Court onto the legislature: "The Court replaces one conception of the judicial role -- the inquiry into the actual deliberative process in democratic institutions -- with another: the creation of excuses for pluralist hardball." [138] At the same time, *Carolene Products* is one of the cases marking a transition away from the explicit exercise of judicial discretion by directly applying value-oriented tests to laws, and towards a strong assertion that legislatures work with values that courts merely apply (in other words towards the problematic sharp division between justification -- or value choice -- and application [139]). The ultimate attempt to achieve "purity" in the judicial opinion is the attempt to compartmentalize and separate from the rest of the opinion those areas where

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[133] Christopher Norris has recently done an excellent job of showing the extent to which the wildly proliferating schools of American deconstructionists and "postmodernists" have drawn distorted lessons from Derrida's own texts. *See* C. NORRIS, DERRIDA (1987). In particular, he argues, they have drawn the conclusion that deconstruction is simply a license for an infinitude of interpretive readings of any text, minimally if at all disciplined by the manifest contents of or intentions behind the texts. Those who have recognized the extent to which such a practice is at odds with Derrida's own work have tended to suggest, like Richard Rorty in THE CONSEQUENCES OF PRAGMATISM (1982), that Derrida is simply unfortunately over-influenced by his extensive involvement with Kant, Husserl, and other major figures of the Western philosophical tradition. Norris's attempt to describe "Derrida's most frequent deconstructive moves" may be helpful in relation to Balkin's paper:

What these consist in, very briefly, is the dismantling of conceptual oppositions, the taking apart of hierarchical systems of thought which can then be *reinscribed* within a different order of textual signification. Or again: deconstruction is the vigilant seeking-out of those "aporias," blindspots or moments of self-contradiction where a text involuntarily betrays the tension between rhetoric and logic, between what it manifestly *means to say* and what it is nonetheless *constrained to mean.* To "deconstruct" a piece of writing is therefore to operate a kind of strategic reversal, seizing on precisely those unregarded details (casual metaphors, footnotes, incidental turns of argument) which are always, and necessarily, passed over by interpreters of a more orthodox persuasion.

C. NORRIS, *supra,* at 19; *see also id.* at 162-63. In Derrida's view it is crucial that interpretation is not arbitrary, but disciplined by detailed and laborious engagement with the texts under discussion. It should be noted that Derrida distinguishes himself (along the lines Norris suggests) not only from most "American deconstructionists" but also from hermeneutic notions that the indefiniteness of textual interpretations stem from the distance between writer and reader. For present purposes, the most important of Derrida's works are OF GRAMMATOLOGY, *supra* note 124, WRITING AND DIFFERENCE (1978), and DISSEMINATION (1981). The volume of interviews, POSITIONS (1981), and collection of essays, MARGINS OF PHILOSOPHY (1982), both are helpful in placing Derrida politically and in relation to the field of self-proclaimed deconstructionists and postmodernists.

[134] Balkin, *supra* note 7, at 314.

judicial review would be necessary -- hence the famous footnote on minority political rights. [140] And of course minorities themselves are often thought of in the same metaphorical terms.

The *Carolene Products* analysis links up with a number of other **[*444]** themes I have already touched on. For example, it shows the Court acting in terms of classical liberal ideology when it attempts to perpetuate the myth that the political process may be impure when non-economic rights are at stake, but is pure when economic rights are concerned. [141] In other words, legislation directly affecting civil liberties is to be treated as a matter of force in the political process, and hence of questionable legitimacy. Yet the role of political power in maintaining economic inequality is not similarly questioned. Balkin also notes, I think quite rightly, the necessity of substantive vision to determine whether the democratic process has in fact misfired; attention to procedure, however much informed by idealist theory, is not enough. [142] We also see something typical of liberalism when

during the 1960s and 1970s the Court clearly sensed the powerlessness of the poor, but was unable or unwilling fully to accept the claim that the democratic process treated lower income classes unfairly *in general.* Instead, the Court picked out fundamental rights whose abridgment affected the poor in significant respects, or else relied upon suspect classes that were, in some contexts, proxies for poverty. . . . The Court was willing to remedy the ineffectiveness of the political process to aid the poor in every way except directly. And in so doing, the Court created rationales for heightened judicial scrutiny that were so awkwardly constructed, so piecemeal, that they created sympathy for Powell's skeptical conclusion in *Rodriguez* that it was time to stop picking out fundamental rights and suspect classes at random, that it was time to bar the door. [143]

This reveals two general weaknesses in liberal rights theory. The first stems from the attempt to place liberalism on a transhistorical basis and results in the need to defend rights as essential or fundamental. The second is the tendency to proliferate specific rights instead of confronting the need for more basic social change.

Overall, I think Balkin succeeds in his contention that much (though I would stress hardly all) of the "inclusion and exclusion, this partiality, is a characteristic feature of law conceived of as *writing,* as the creation of a series of texts through the reading and rereading of previous authoritative materials." [144] His deconstructive reading does indeed show that

The history of *Carolene Products* is the history of our discovery of its partiality, of its intellectual marginalizations. For history deconstructs -- revealing that the dominant conceptions we use to understand the world at a particular point in time are increasingly inappropriate for solving the **[*445]** problems of later years. [145]

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[135] *Id.* at 285.

[136] *Id.* at 283.

[137] *Id.* at 292.

[138] *Id.* at 292-93.

[139] *See supra* text and accompanying notes.

[140] Balkin, *supra* note 7, at 297-98.

[141] *Id.* at 299.

[142] *Id.* at 303.

[143] *Id.* at 308-09.

[144] *Id.* at 304.

[145] *Id.* at 305. The hermeneutic tradition has at least as much to say about this as *reading,* but the deconstruction of the writing is still apt. See, in particular, H-G. GADAMER, *supra* note 78.

Balkin produces an admirable indictment of the institutional myth that the liberal Roosevelt majority introduced in apparent optimism about the future of democracy: "an ideal legislature that has never sat, moved by artificial purposes that were never expressed, in the service of an artificial public good that has never existed." [146]

Yet, there is also something obscured by all this talk of writing (and reading): the sense that *Carolene Products,* like other legal cases, emerged from a process of struggle involving contending forces inside as well as outside the law. If "history deconstructs," then history is only a name given to courses of action too complex to describe in terms of concrete individuals. This not just a matter of the specific struggles which brought the case to court, or of the broader social context which had changed the terms of debate by the time the appellate case was decided. It is also a matter essential to the workings of the law:

The practical content of the law which emerges in the judgment is the product of a symbolic struggle between professionals possessing unequal technical skills and social influence. They thus have unequal ability to marshall the available juridical resources through the exploration and exploitation of "possible rules," and to use them effectively, as symbolic weapons, to win their case. The juridical effect of the rule -- its real meaning -- can be discovered in the specific power relation between professionals. [147]

Focusing on the law as a literary text should not blind us to the fact that it is not simply (monologically) written. Courts have their own internal contentions, of course, and contending lawyers appear before them. And in the background, contention also continues among the writers of law review articles, the givers of speeches, classroom professors, and judges -- not least of all in the footnotes to their opinions.

Balkin's deconstructive method is limited to the discovery of certain meanings. In and of itself, it cannot evaluate them. Uncovering metaphors for example, shows the "literary" at work in law, but does not give any alternative view of law's rightness (or of how to decide any specific case). For example, when Balkin points to the textual usage of "purity" as a description of both milk and political processes, our agreement with that comparison in itself suggests no conclusion. Balkin of necessity imports a number of evaluative criteria on an ad hoc basis. I share many of these, but would suggest that we need to see deconstruction rather more explicitly as only a critical moment in theoretical work. By itself, deconstruction may (as Habermas fears) put us on the slippery slope towards an extreme relativism, since there is no internal source (or justificatory procedure) for norms or values. For some deconstructionists, this may **[*446]** suggest an infinite interpretability of texts, Derrida notwithstanding (and it should be said, it is only some of the time that Derrida's extraordinarily, intentionally, difficult work clearly suggests his disagreement with such a view). Even though he resists this view, Derrida cannot offer anything other than his *readings* themselves as evidence for his arguments. There is no appeal either to an interpretative community or to some regulative ideal. [148] This is a general danger with the "postmodern" theories, so it is an issue to be kept in mind as social and legal theorists import bits of this currently fashionable line of thought.

B. Kaplan's Individual Responsibility

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[146] Balkin, *supra* note 7, at 313.

[147] *See* Bourdieu, *supra* note 9, at 223.

[148] Some other "postmodernists," notably Lyotard in THE POSTMODERN CONDITION, *supra* note 17, and Baudrillard in OUBLIER FOUCAULT, *supra* note 17, and FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN, *supra* note 17, have explicitly challenged the "grand metanarratives" which underly most claims to interpretative or moral authority. They suggest that the nature of the postmodern situation reveals that there is no such standard available because of factors such as the velocity of information flows and the heterogeneity of social life. In a different way, Foucault sought to show how appeals (especially foundationalist theoretical appeals) to such standards have always themselves formed part of the discourse and effective workings of disciplinary power. Of course, even granting this claim (without making the complementary one that they have also been a part of the resistance to such power) does not amount to giving reasons for why we should dismiss or attack such appeals or theories.

The bulk of Kaplan's Article consists of reproducing the story of Pierre Riviere and Foucault's commentary on it. Its argument is relatively straightforward and contains few surprises:

It is the thesis of this essay that, in fact, the apparent opposition between legal and psychiatric discourses masks a fundamental identity on the question of legal disposition of the criminally dangerous. Further it is the thesis here that the identity is constituted by the same social concern -- the coding of tolerable behavior for the protection of the social order. [149]

There is a more basic aim, however, which I think Kaplan does not reach, though his approach is typical of the so-called postmodernist, and especially Foucauldian, critique of modern thought. His aim is to "get at the question of individual responsibility." [150] In particular, he thinks that law and psychiatry are unable to adequately address the individual, especially in terms of responsibility, because the central concern of both is with social control. The treatment of individuals only derives from that concern with social control.

Kaplan notes the competing extreme readings of individuality in the Western tradition: that the progress of Western civilization can be measured in the growth of individuality (implicitly, I might add, as both liberty or autonomy and capacity), and that the individual is an artifact of society. He describes each of these accounts as involving a "similar displacement of social resources onto individual disposition," the first by **[*447]** making responsibility into an entirely individual matter, and the second by treating social context as determinant of the individual. [151] He implicitly charges that human personhood is poorly grasped by either inflated individualism or the denial of reality to individuality. As a result, legislators, judges, law professors, and other actors in the legal system often attribute responsibility with an inadequate foundation. Consequently such practitioners are often unsure of themselves. The key symptom is our simultaneous belief in the social causation of individual pathology and in the debility of the individual. We are aware that we are acting in a certain bad faith when we legally attribute responsibility to individuals, but we suppress the bad faith, although "it is increasingly the case that we are aware that those we judge have been shaped by circumstances that destroyed them and which we have ignored." [152] The big questions, ultimately left unanswered by Kaplan, are what we are supposed to do once we recognize the force of circumstances beyond individual control; does social culpability really reduce individual culpability? Or, if the Foucauldian standpoint is to be made normative, once we know that the positing of the individual is part of the play of disciplining social power, what do we do about that?

The Riviere case figures in Kaplan's Article as one of the first "diminished responsibility" cases, as well as a striking confessional narrative. [153] Kaplan's implication (and to some extent Foucault's, although there was more historical specificity to Foucault's analysis) is that the extreme case of Pierre Riviere holds something of a dramatic mirror to us all. Perhaps so, but let me use this assertion to raise a basic question about the Foucauldian (and to some extent generally postmodern) premise of the ubiquity of power. Bluntly, within Foucault's theory and Kaplan's account there is no provision for ways of noting differences in extent of power; likewise there is no way of approaching the crucial normative questions of relative good or evil. The critical moment of this tradition points to crucial dimensions of the creation of modern individuality, including the production of knowledge as power. But this is expressed in absolute terms. This prevents any move towards a positive theory, rather than a critique, and sets up the performative contradiction of putting forward normative views that apparently challenge as knowledge

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[149] Kaplan, *supra* note 7, at 322.

[150] *Id.* at 321.

[151] *Id.* at 322.

[152] *Id.* at 350.

[153] Confessional narratives have been one of the central vehicles promoting the modern Western understanding of individuality. They show the very deep historical roots of individuality in the Christian tradition (Christian specifically, and not Judeo-Christian, because although there are Jewish roots to individualism as well, the confessional is not one of them).

existing arrangements of power. It does so within a theory which asserts that all such views and challenges are equally part of the play of power.

 [*448] There is much to be learned from Foucault. [154] It is less clear what Kaplan adds. This is partly because he makes it difficult for us to understand some of his phrases (perhaps under the influence of the general pretentious and self-indulgent flow of jargon characteristic of much French post-structuralism). What are we to make of this: "Foucault's parricide, Pierre, has significance for us at least as a marker, and as an exemplar of a dialectic of the post structural in the face of the denial of the possibility of the transcendence associated with dialectics."? [155] I assume there is social change through contradiction but that we cannot be confident that we are moving forward. Then there is the question of relativism. Kaplan points to Riviere as saying something about us all, but it is not entirely clear what: "Kristeva, following the psychoanalytic, and Lacan particularly, posits anguish in the heart of the self of us all." [156] O.K., but however fragile the self in general is understood to be, this leaves open the question of how to address differences among selves. [157]

A few other minor points puzzled me. Kaplan brings Freud into his discussion, but he does not consider the difference between parricide as a general notion and more specific areas such as matricide, patricide, and fratricide. [158] He alludes to discussions of the psychological effects of capitalism, "ironically[] the kind of characters that we are developing, like Riviere, have great difficulty in even achieving an Oedipal configuration." [159] Not only does this discussion lack developed analysis, [160] but it also seems to be in an unexplored tension with Kaplan's general Foucauldian stance. It is hard to imagine Foucault would accept, as Kaplan seems to do, the general applicability of Freudian developmental theory **[*449]** and then use it as a standard by which to develop a normative critique of modern society.

Most disappointing, Kaplan never returns to the general issue of attribution of responsibility, individual or otherwise, which is truly fascinating and important for contemporary legal, social and ethical theory. For a long time we have taken as given notions of individuals as responsible actors because they were so central to modern Western culture. We have addressed various exceptions, from developmental immaturity to insanity, but only recently has our intuitive faith -- at least that of many theorists -- started to waver. Challenges also come from other directions. For example, they come from trying to figure out the relationship between ideas of individual and corporate

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[154] Beyond the general theme of the mutual implication of power and knowledge as a common phenomenon in the modern world, I will mention one other Foucauldian theme which has direct relevance for the law. That is his contention that the very *individuality* which we moderns take as universal and natural, or at least characteristic of us, is the product of disciplinary power as it replaced external coercion with various normative (normalizing) understandings that motivated and disciplined people from within. Foucault, already more accessible as a writer than Derrida (or Baudrillard, Kristeva, and others), is rendered even more readily accessible to English-language readers by the availability of a well-chosen and well-introduced anthology: P. RABINOW, THE FOUCAULT READER (1985); *see also* note 17.

[155] Kaplan, *supra* note 7, at 353.

[156] *Id.* at 354.

[157] Kristeva is a psychoanalytically oriented literary critic and an important figure in the group of intellectuals originally involved with the journal *Tel Quel?*. These intellectuals are noted for the ambiguity or volatility of their political positions, most of which are loosely characterizable as post-Marxist and frequently conservative. Derrida has maintained an active involvement with this group. Lacan was a controversial French psychoanalyst expelled from Freudian analytic organizations and noted for his linguistic analysis of the unconscious and mental life generally. For a superb reading of the relationship between Derrida, Lacan, and the project of critical theory, see P. DEWS, LOGICS OF DISINTEGRATION (1988).

[158] *See, e.g.,* Kaplan, *supra* note 4, at 333-38.

[159] *Id.* at 350.

[160] Kaplan does quote Hans Loewald, *see id.* at 350, but Loewald's analysis does not turn on capitalism as a social formation.

responsibility, and the attribution of responsibility in tort law for "insidious injuries" that defendants produced unawares, partly rooted in a trend towards a new strict liability.

One might try to address the question of why this is happening in Foucauldian terms, although I would not advocate making this the exclusive frame of reference. Thus, one might argue that we are witnessing a basic crisis of structuring power. Much of what has been described as a crisis of legitimation is really a crisis of power. [161] The contrast of legitimacy and illegitimacy has been one of the central ideas informing modern discussions of power. Following Foucault, we could see this very approach as one that suits power. In Foucault's view, all ways of knowing are exercises of power, but in varying proportion any text may reveal or disguise power's workings. Although it is hard to ground such a task within his theory, the tone and thrust of Foucault's work seems to be largely towards precisely such a revelation of the hidden workings of power. Thus Foucault exposes the rise of individualism as a restructuring of power away from external, punitive force towards new forms of normalization in carceral control and especially in disciplines (including those of the body itself) which remake people as individuals taking responsibility for themselves. It is crucial to such a view that power is not reducible to interpersonal domination, but is constitutive of social life and culture generally:

If power were never anything but repressive, if it never did anything but to say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us as a force that says no, but that it traverses and produces things, it induces pleasure, forms knowledge, produces discourse. [162]

Power is, in this sense, "decentered," not the property of any subject. It is practiced routinely by people upon themselves insofar as they reenact the premises of their culture. This seems to grasp an important dimension of the modern experience of power and also seems to offer possibilities **[*450]** for analyzing contemporary uncertainties and cultural upheavals. On the other hand, this approach obscures the specifically modern increase in occasions and resources for people to distinguish between what power is and ought to be. [163] If we give up the problem of legitimate versus illegitimate power, normative theory -- and for that matter, legal theory in particular -- stands in real jeopardy. A fundamental challenge for social theory today is to figure out how to incorporate insights from "postmodernism" while maintaining bases for making critical, normative judgments.

C. Frankenberg Between Reason and Relativism

Of all the articles in the Symposium, Frankenberg's seemed to grapple most interestingly with the general range of contemporary challenges in relating social theory to law. I am also sympathetic to his contention that we are not forced necessarily to make an exclusive choice between modernist seriousness about and ambitions for the law, on the one hand, and postmodernist ironism, cynicism, and denial of normativity on the other.

The title of Frankenberg's opening section is a play on a Derridean play on a title of Kant's -- another affirmation that there is a polyphonic intellectual discourse, not simply a two-way argument. Frankenberg's structure that opposes Solomon and Brecht's Azdak is also salutary, removing "modernist" seriousness to a premodern symbolic locus and postmodernist irony to a quintessential internal critic of modernity. We are indirectly reminded that the debate did not begin with Habermas and Derrida.

Frankenberg begins his analysis by recognizing basic problems that have informed this commentary: The challenge of overcoming legal indeterminacy by applying abstract rules to concrete life situations without impairing their internal rationality, and the demonstration of the external rationality of legal norms, despite the challenge to legal

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[161] *See* J. HABERMAS, LEGITIMATION CRISIS (1975).

[162] *See* M. FOUCAULT, POWER/KNOWLEDGE, *supra* note 25, at 61.

[163] This proposition seems a clearer vindication of Habermas' claim that enlightenment has made some progress, than is his attempt to actually weigh achievements in respect for human dignity or rights. *See* Habermas, *supra* note 6, at 30, discussed *supra* in text accompanying note 91.

autonomy posed by law's obvious dependence on political processes. [164] He identifies two basic (and by now familiar) strategies for confronting these challenges. The first is acceptance of the legal project of modernity, "a daunting task: guaranteeing the rationality of statutory law and its application," [165] an acceptance which tends to produce an attitude of affirmative, theoretical-dogmatic seriousness. The second strategy is to join in the postmodern critique of law, which raises "the spectre of legal nihilism" [166] but offers the possibility of ironic distancing and playfulness. On **[*451]** the way to developing his own argument for a third path, Frankenberg contributes to this symposium the best representation of the varieties of postmodernist or ironic approaches to law -- even though he is not altogether an internal commentator.

Ironic distancing has its own constructive, more serious mode, Frankenberg points out, with Marx as an example. But the irony particular to the recent discourse is that which Foucault suggested when he spoke of an "emancipatory laughter" directed against the order of things. There is a seriousness hidden even in this. It is emancipatory not in the sense of offering a transcendent resolution to the range of concrete social problems, but in the sense of freeing us from doctrinal compulsions, the determination to divide the world into angels and demons, and the assumption that one must be a partisan of either darkness or light.

Frankenberg rightly points out that the "failure of reason" has been noted both by figures like Habermas who would rescue the Enlightenment project and by postmodernists who would reject it. The difference lies in the determination of the former to offer a reconstruction of rationalization. While both sides reject the isolated subject typical of older modernist visions, the neomodernist wants to retain a kind of subjectivity: "The theory of communicative action 'intersubjectivizes' the subject-centered reason in the bath of communicative rationality, replacing the paradigm of knowledge of objects beyond the subject with the paradigm of understanding among subjects capable of speaking and acting." [167] A linguistic critique of the subject as creator of meaning is shared by both camps, but the postmodernists radicalize this linguistic turn, rejecting both subjectivity and the classical subject. At the same time, postmodernism appears to revolt against institutionalized modernity. [168]

Frankenberg casts his definitional net very widely when deciding what to take into his conception of postmodernism. He includes, misleadingly I think, nearly all critics of the institutionalized views of modernity as progress. The postmodern, thus, may have begun in architecture.

Ultimately, following literary criticism and art, sociology was also "infected" by the critique of canonized modes of thinking, seeing, and creating. This shows up most clearly in debates about modernization, particularly in the critique of a paradigm of social progress measured solely along a developmental path derived from Western industrial societies and a spatio-temporally neutralized pattern of progress. [169]

But not all criticisms of canonical views are postmodernist. The critics of modernization theory were predominantly Marxists or close fellow travelers. They stressed not the supercession of modernity but its misconception by those who saw things only from a First World point of **[*452]** view, who neglected the embeddedness of particular states and economies within a larger world system, and who addressed the transformations of capitalism and state formation as though they were primarily matters of cultural psychology. Many of these critics followed theoretical

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[164] Frankenberg, *supra* note 4, at 362.

[165] *Id.* at 361.

[166] *Id.* at 364.

[167] *Id.* at 368 (footnote omitted).

[168] *Id.* at 372.

[169] *Id.*

strategies that we must consider modernist, at least within the framework of a forced binary choice with postmodernism. [170]

In the same sense, we can simultaneously see the insight in, but need to question, Frankenberg's assertion that "the counter-cultural tendencies and revolts of the sixties and seventies can be interpreted as the social substrata of these deconstructive movements . . . [t]hey displayed recognizably postmodern features." [171] The movements in question were heterogeneous in this regard, combining again some rather modernist Marxism with some postmodernist cultural play.

Abandoning the fora and transgressing the limits of rational debate and opposition, they offered (occasionally neo-Romantic) counter-cultural models and radically questioned the rationality claims of European social culture -- of course, not infrequently carried along by a theory which itself bore Eurocentric hegemonial pretensions. The caricature of a unified modern culture is confronted with a pluralism of life worlds, the social-theoretical construct of a single huge society is confronted with a "patchwork of minorities." [172]

While from the lifeworld point of view there might seem to be this patchwork of minorities, from the system point of view there is increasing centralization and concentration of power. That the two views can coexist, each accurately grasping a dimension of contemporary life, is testimony both to the power of Habermas' analytic distinction and the complexity of contemporary life. [173] Thus, the fact that "unity of discourse is probably lost," [174] or that totalizing discourse is radically under attack, does not mean that the totalizing tendencies of capitalism or the power of the state are on the retreat.

Frankenberg follows the postmodernists too fully in assuming that discourse is an adequate object of attention for social theory. He quotes Huyssen in noting that "[i]t looks as though the poststructuralists, while demystifying petrified rationalisms, get caught up in a 'quasi-metaphysical theory of textuality'." [175] The postmodernists offer little real evidence **[*453]** or argument, however, for dismissing material factors in their social analyses. They favor a culture constructed conceptually with no strong connection to the material or the social. Frankenberg tries to weigh the merits of the discourses as such, without directly trying to assess the adequacy of that discourse to any objects in the world.

At the same time, there is the matter of tension between the content and the performance of postmodernism. Postmodernists reject the forced conceptual imprisonment of sharp categorical divisions -- then rhetorically produce a binary opposition between themselves and putative modernists. At least some postmodernists speak of Mikhail Bakhtin and dialogical or polyphonic discourse, and then write in dogmatically monological and assertive tones.

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[170]   *E.g.,* I. WALLERSTEIN, THE MODERN WORLD SYSTEM (Vol. 1, 1974; Vol. 2, 1980; Vol. 3, 1988); A. FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1969), and DEPENDENT ACCUMULATION AND UNDERDEVELOPMENT (1978). For this discourse, capitalism and socialism still form more central categories than do modernism and postmodernism. It is also the case, in the United States at least, that sociology has been remarkably resistant to the postmodernist infection. It is surprisingly secure not only in modernism but in scientism, and has not even recognized the drift away of much theoretical initiative.

[171]   Frankenberg, *supra* note 4, at 372-73.

[172]   *Id.* at 373 (quoting J. F. LYOTARD, DAS PATCHWORK DER MINDERHEITEN (1977)).

[173]   *See* Calhoun, *The Infrastructure of Modernity, supra* note 59.

[174]   Frankenberg, *supra* note 4, at 374.

[175]   *Id.* at 374 (quoting Huyssen, *Postmoderne -- eine amerikanische Internationale?,* in POSTMODERN -- ZEICHEN EINES KULTURELLEN WANDELS 38 (A. Huyssen & K. Scherpe eds. 1986)).

[176] Declaring modernity at an end, they revel in one of its most characteristic stylistic modes, the infatuated pursuit of the new. They declare, as Frankenberg observes,

[t]he cancellation of all significance and the renunciation of all theories striving to identify and explain phenomena[, which] sounds like the surrender of the modern project. But must this really be taken so seriously? Even postmodern thinkers seek -- at least -- a public and its understanding and agreement. [177]

To the extent that postmodernist writers try to offer support for that label in purported trends in the social world, new information technologies and communications media figure centrally. I believe Frankenberg follows Baudrillard, and to a lesser extent Lyotard, in asserting this:

Hypermodern information technologies, new media, progressive computerization, and high-tech communication are now pressing language into their services with instrumental rationality, driving man out of his final refuge outside the *forum internum* of conscience. This slow expropriation of the speaking subject goes hand in hand with the conversion of language into a commodity which can be consumed at will. The consequences are palpable, and subject to culture-critical attack, as the deprivileging of both the spoken and the printed word and the dequalification of reading and writing in "perfect capitalism." [178]

Frankenberg suggests that information technologies are tearing apart the chain of signifiers and undermining the idea of language as the unity and **[*454]** locus where meaning is being created. But is this technological determinism warranted? First off, are we talking of the technologies or of their use by human subjects? Are computer languages really operative in consciousness in the same way as natural languages, so that we can treat one as in any serious sense supplanting or challenging the other -- or even as being the same sort of phenomenon? Even if we grant the premise, which I find debatable, what precisely is its significance? Are we to take it to mean a complete severing of value from use value, or merely further distancing and mystification?

Likewise, he suggests the fundamentally damaging paradox of a modernist rationality focused on justice but abdicating before the task of controlling the destructive insanity of nuclear, genetic, and other technologies. [179] The implication is that a modernist vision, such as Rawls', might suggest that we could achieve a completely just world, while still living under the impending doom of such destructive technologies. There is something startling in this notion, which points to the limits of justice as a basic political or ethical vision. But is the threat of apocalypse (any more than the hope for revolution) a warrant for avoiding the issues of justice and reform in contemporary life? Is the irony of observing minor quarrels going on alongside threatened annihilation sufficient reason to give up the project of normative justice or justification?

In this context, Frankenberg points out that the kinship between the French postmodernists and the American Critical Legal Studies movement is only partial. Roberto Unger, for example, sets himself a largely constructive program, trying to develop a theory that will open the struggle over law to controversy concerning the proper structure of society and the desirable relations of human beings with one another. [180] Stylistic features, such as

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[176] The Russian literary critic Mikhail Bakhtin developed the notion of "polyphonic discourse" to describe the multiple voices speaking in certain novels -- paradigmatically Doestoevsky's -- and adapted the idea of dialectic into a notion of "dialogicality," or the essentially interpenetrating dimensions of understanding. *See* M. BAKHTIN, THE DIALOGIC IMAGINATION (1981). Derrida, it should be said, has gone out of his way (and forced readers out of theirs) by constructing texts of multiple and interpenetrating voices and significances. He has, for example, aligned texts of Plato's and Mallarme's in parallel columns on a page, challenging the reader to make sense of them simultaneously and in relation to his -- Derrida's -- own implicit voice as organizer of deconstruction. *See* Derrida, *The Double Session,* in DISSEMINATION, *supra* note 133.

[177] Frankenberg, *supra* note 4, at 374.

[178] *Id.* at 377.

[179] *Id.* at 377-78.

[180] *Id.* at 388.

the unwillingness to coalesce into a unified school, are a more postmodernist feature of the Crits. This refusal is both an affirmation of the importance of maintaining a discourse with many divergent voices, and also, as Frankenberg suggests, a "[t]heoretical eclecticism, which appears to be postmodern per se -- comparable to the play with citations and fragments of postmodern architecture -- [and] provides for a new unclarity in the critique of law." [181] Frankenberg puzzles over the fact that their deconstruction of each attempt to construct a defense of rational law gets them, the American Crits, labeled "out-of-control leftist radicals," rather than "'neoconservatives,' the label applied in Germany to the neo-French theorists for their alleged acquiescence in the political status quo." [182] But there are somewhat mundane explanations for this. For instance, the "neoconservative" label had already been claimed by a rather different group in the United States. Also, many of the Crits take **[*455]** genuinely left-wing political and social positions. In fact, it is a general characteristic of the American postmodernists, including those directly influenced by significantly right-wing Europeans, that they see themselves as largely part of the left, and as critics of the existing regime of power. The extent to which this is mere stylistic posturing or real substantive politics varies. The extent to which postmodernism appears as at least culturally radical and progressive in the United States is, however, striking. It is so striking partly because this political stance is virtually impossible to ground logically in the postmodernist theories espoused. In fact, the postmodernists have difficulty grounding many of their normative stances, which must be taken as given rather than as theorized. Why, for example, should there be discursive freedom? Habermas can explain his position in favor of this. Many postmodernists accuse him of false consciousness on this point, alleging that his kind of theorization is necessarily monological and repressive. But despite the vigor of the postmodernist defense of discursive freedom, postmodern theory offers no reasons for its value. It cannot do so when it declares all traditions of discourse to be incommensurable and all specific discourses to be plays of power.

In this connection, Frankenberg draws attention to the remarkably "liberal" response of various Crits to a virulent attack on the Critical Studies Movement from the dean of Duke University Law School. Inconsistent with their theory, the Crits reacted as outraged defenders of academic freedom, "all served up with the old liberal pathos of enlightenment, and without a trace of irony!" [183] As Frankenberg asks quite rightly:

Are rational legal principles and liberal thought perhaps more deeply rooted in us (and the law of the land) than the pre-Carrington critical rhetoric would have led one to suspect? Should law, whose seriousness is directed towards a just social order, be taken seriously after all as possessing an intrinsic value? Or did the need to defend critical insights merely compel an instrumental, strategic use of constitutionally guaranteed freedoms? [184]

Underlying the story, I think, is a general misrecognition by postmodernists about their own discourse. Although they reject all fixed structures of knowledge, and write texts denying any privileged point of view, they typically write in authorial voices which implicitly assert a relatively strong and authoritative knowledge. [185] This authorial voice and the very pragmatic mode of writing claim not only the truthfulness of what is written but the authenticity of the author. Indeed, it may be **[*456]** ultimately this presentation of authenticity that is the central persuasive claim of much of the more serious postmodernist writing. [186] Despite their professed interest in polyphonic discourse, most

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[181] *Id.* at 384.

[182] *Id.* at 386.

[183] *Id.* at 387.

[184] *Id.* at 388.

[185] Indeed, if this claim to strong knowledge were absent, the postmodernist could not present his argument as critique. To show arbitrariness does not necessarily reveal fault. An implied knowledge of a better order informs postmodernist criticism of present conditions. Only exceptionally (as in the case of Unger) is this made explicit.

[186] *See* T. ADORNO, THE JARGON OF AUTHENTICITY (1973); R. SENNETT, THE FALL OF PUBLIC MAN (1976) (including especially the discussion of Zola's *J'accuse*). This "jargon of authenticity" is practiced in some circles by placing the author surprisingly in the center of texts that do not seem to be about the author, as in much of the "new ethnography" in anthropology.

postmodernists speak monologically, as though their own statements were self-sufficient. But the meaning and significance of their work derives largely from its presence in a field of discourse. This fact is true of, and often denied by, modernists, but it is even more the case for postmodernists. The postmodernists fail to recognize the necessity of other discourses -- notably those labeled modernist -- as interlocutors. If modernists did not exist, the postmodernists would have to invent them. In other words, the value of postmodernist critiques is premised upon the dominant acceptance of modernism. Postmodernists add a dimension to modernist discourse but do not, at least so far, offer an alternative. [187] This also helps explain the otherwise puzzling CLS penchant for attacking liberals rather than genuine conservatives (as Frankenberg suggests a European critical legal scholar would expect them to do [188]). After it gave up the Marxist part of its original roots, CLS began to espouse a radical indeterminacy of the law that was only an intelligible position in relation to the hegemonic position of liberalism, which claimed to embody universal reason and common sense, despite its privileging of possessive individualism. The principle that no reforms, defined as no better liberal legal tradition or constructive efforts, will be adequate to challenge mainstream legal discourse is only part of the explanation. The reason is precisely that CLS would be uninterpretable without that mainstream discourse as a foil.

This would also seem to be a reason for another apparent paradox in the practice of at least some Crits. Their deconstructive method operates by examining the law against the standards of certainty about rightness and autonomy developed by mainstream lawyers, and finding the law wanting. [189] But why should the Crits accept those standards? Why not start from the premise that law is only somewhat autonomous and make more room for a social account of the reasons law is continually needed and used; thus the Crits could recognize that rightness is always partial **[*457]** and introduce something like an epistemic gain theory? The stance of the Crits, and of many other postmodernists, is somewhat like that of stereotypical ex-Catholics -- as rigidly antagonistic to the Church as they accuse the Church of being dogmatic. [190] Ultimately, many Crits and especially many other sorts of postmodernists are not engaged in solving material problems about class society, or practical problems of social justice. Rather they are engaged in trying to produce a space for alternative identities. Like many of the "new social movements" that have flowered with the declining hegemony of labor and social democracy, the postmodernists are held together not by a positive vision of the future so much as a resistance to normalizing power that implies a conformist identity. And this normalizing power is not wielded exclusively, or even predominantly by conservatives. Indeed, in Foucault's sense it is not wielded at all but built into many of the very presuppositions of liberal discourse -- notably the reliance on some notion of universally equivalent individuals. Gender and other biases are built into this very deep level, a bias not simply against women but against difference.

Yet the postmodernist position is radically undermined by its refusal to enter into the world of practical, material problems. What of value can postmodernism say about hunger in Africa or unemployment in America's inner cities? Virtually nothing. The postmodernist affirmation of the positive value of difference might, as a stimulus to change in other theories, ultimately make for better theoretical understandings to inform such practical dealings, but it cannot produce such understandings itself. Moreover, as suggested above, the critical dimension of

See, e.g., G. MARCUS & M. FISCHER, ANTHROPOLOGY AS CULTURAL CRITIQUE (1986), and WRITING CULTURE: THE POETICS AND THE POLITICS OF ETHNOGRAPHY (J. clifford & G. Marcus eds. 1986). But this is also true, though less obviously and more remarkably, in texts which seem to efface the author. Foucault is hardly an "official" presence in his texts, yet his tone implies a strong claim to authenticity and his persona is a crucial interpretative datum for most postmodernist readers.

[187] Calhoun "Culture, History and the Problem of Specificity in Social Theory," *supra* note 19.

[188] Frankenberg, *supra* note 4, at 385-86.

[189] Frankenberg aptly calls Crits "methodists of contradiction." *Id.* at 390. We could extend the label to the American deconstructionists, despite Derrida's own repudiation of the charge.

[190] In another context, Bourdieu refers to those who refuse to accept patterns of historical conditioning and partial arbitrariness in the construction of a scientific field as condemning "themselves either to self-founding strategies or to nihilist challenges to science inspired by a persistent, distinctly metaphysical nostalgia for a 'foundation,' which is the nondeconstructed principle of so-called 'deconstruction'." Bourdieu, *supra* note 9, at 215.

postmodernism is challenged by its inability to ground normative positions, an inability that is elevated into an affirmative refusal by some postmodernists. We could get over the compulsion to find and press on the fallible character of every legal argument, Frankenberg suggests,

if only the self-imposed renunciation of even the weakest, but nevertheless criticizable, normative hypotheses did not create a power vacuum that opens the gates to any and every doctrinal construction. When all normative perspectives are equally valid, no single perspective possesses any validity. . . . Radical norm skepticism, one might fear, blinds us to any verifiable difference between right and wrong. Who has an interest in that? It would seem only those who, if necessary, could probably succeed in realizing their interests even without the law. This in turn cannot be acceptable to the Crits, whose critique of legal education and of practical work in legal clinics and elsewhere are all intended to help dismantle hierarchical structures and ideological worldviews, and establish counterhegemonial power bases and **[*458]** democratic communities. [191]

Frankenberg notes that ultimately readers and critics must come to postmodernist texts with communicative needs. Where absolute relativity is asserted, but the author fails to apply such a point of view to himself, we should challenge the implication of authorial authenticity. [192] Habermas' arguments about the validity claims of speech suggest a needed interrogation of the postmodernists. Such an interrogation cannot relieve Habermas, I think, of the need to address more positively the central postmodernist point about the importance of difference and the normalizing tendencies of Habermas' own, and many other theories, especially liberal ones.

VI. CONCLUSION

At several points in these comments I have made explicit some of my own ideas about how social theory might fruitfully be related to law. In particular, I have argued against both Luhmann and the postmodernists that social theory can and should be involved in normative discourse. Luhmann follows much of mainstream social science in espousing an essentially "value-free" view of social theory. He suggests it is a neutral tool for understanding the workings of law. Its perspective is external. It can explain, but not directly inform, legal reasoning and discourse. This should not be mistaken for modesty on the part of the social scientist. The implicit contention is that legal practitioners misunderstand their own behavior, neglecting the extent to which it is simply the conditioned self-production of law as functionally dictated by systemic considerations (rather than chosen in some more creative or at least voluntary way). Under this view, legal self-understanding is clouded by the uncritical acceptance of the everyday official categorizations of lawyers' and jurists' work. Even social scientists who reject Luhmann's specific cybernetic theory, share many features of his perspective. They too would argue that social theory should understand law from an external vantage point, in causal or functional terms. Such a view, however, obscures the extent to which evaluation is anyway an essential part of their (or Luhmann's) theories -- usually an affirmation of the status quo as at least functionally satisfactory if not explicitly desirable. Further, this approach neglects the possibility of maintaining normative and empirical theory as part of the same enterprise.

External accounts of the law are particularly helpful at charting the relationships within the legal field and establishing the nature and extent of legal autonomy. If, as Bourdieu suggests, "the practical meaning of the law is really only determined in the confrontation between different bodies (judges, lawyers, solicitors, etc.) moved by divergent specific interests," [193] **[*459]** then there is a good deal of room for empirical accounts and theories of these confrontations and of the constitution of the various contending parties. Similarly, with an external approach, we can examine the extent to which the law is relatively autonomous from various sorts of extra-institutional influence or causation -- political manipulation, bribery, sheer force. Further, we may theoretically understand law's relative autonomy in terms of both the functional performance of the law and the ideological productions -- like the notion of legal impartiality -- which sustain it.

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[191] Frankenberg, *supra* note 4, at 394-95 (footnote omitted).

[192] *Id.* at 397.

[193] Bourdieu, *supra* note 9, at 217.

External accounts of the law are also quite limited. While they can inform lawyers strategically about the field of their operations, they cannot inform the law substantively. This is the province of normative theory. Yet, there are good arguments as to why normative theory needs also to include substantial input from empirical social theory. Among them is the advantage of having a contentful rather than purely abstract theory in order to avoid a too sharp demarcation between justification and application.

Burns' Article on Rawls uses empirical social research and theory to develop some central parts of its critique -- a critique intended to have normative consequences. Habermas has explicitly set out to develop a simultaneously normative and empirical theory. He proposes an account of the modern condition in terms of the split between system and lifeworld, together with the distortions of the rationalization process produced by that split. And he proposes discourse ethics as both a regulative ideal to hold up to the world and as a guide (at least in some limited ways) to practical action intending to change the world. Unlike Rawls' theory, Habermas' theory is a critical theory (1) because it identifies objective conditions of possibility for social life (for example, the validity claims implicit in all discursive speech) rather than simply aggregating existing factual descriptions of social life or disregarding empirical conditions altogether; (2) because it subjects its categories -- inherited and constructed -- to continuous critical reevaluation (at its best, developing them out of historical analysis, though in the later theory they tend more often to be transcendental); and (3) because it engages contemporary social institutions and arrangements, pointing out faults, failings and possible improvements. Critical theories thus constitute the main efforts to combine normative and empirical theory, a task otherwise only weakly pursued in academic social science.

The project of a normative theory of law, in short, requires a social theory as part of its grounding. The social theory needs to contribute the specific substance of legal theory and to the "objective possibility" of its proposals. Where proponents of purely explanatory theory see this contribution as undesirable because it would position theory on more than **[*460]** narrowly empirical grounds, or worse, taint science with values, "postmodernists" and fellow travelers regard it as undesirable because it is potentially authoritarian, and perhaps impossible anyway. The danger of authoritarianism is felt because of the tendency of theories to claim sufficiently strong "rightness" to justify their position, and more moderately, simply because the acts of theoretical conceptualization and categorization may do violence to the complexity and variety of life. Impossibility is argued on the grounds that no theory can justify itself except in terms of its own "native" tradition -- and hence not to those who disagree with it in fundamental ways. [194] There are no absolute, non-perspectival foundations for knowledge, and hence no knowledge adequate to ground a moral theory. To the extent this attack holds, I have suggested, it is only by hoisting universalists on the petard of their own tendency to claim extreme universalism as a necessary feature of moral and legal theory.

My own argument here turns on two interrelated notions. We need to find a new path in arguments, between demanding notions of moral universalism and extreme relativism, between ideals of pure truth and the abandonment of all discourse about truth. Further, we need to complement a theoretical discussion of ideas and discourse (well represented here) and of material social organization (only tangentially represented here) with attention to social practice which is at once ideal and material, active and structured, dependent on actors' understandings and embodied in ways impossible to make explicit. I hope I have said enough to make these clear as projects, though they are hardly theoretically developed in this Commentary.

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[194]   *See, e.g.,* J-F. Lyotard, *supra* note 17; Nicholson, *On the Postmodern Barricades,* in SOCIAL THEORY AND POSTMODERNISM (S. Seidman & D. Wagner eds. forthcoming).