The View of Habermas from Below: Doubts about the Centrality of Law and the Legitimation Enterprise

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THE VIEW OF HABERMAS FROM BELOW: DOUBTS ABOUT THE CENTRALITY OF LAW AND THE LEGITIMATION ENTERPRISE

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Jürgen Habermas is the most influential living philosopher in the world today. The breadth of his learning, and the scope and erudition of his work, are unmatched. With the publication of *Between Facts and Norms*, Habermas has made his most systematic foray into the field of law. And the result is spectacular. Drawing up philosophy, legal theory, political theory, social theory, history, anthropology and sociology, he has attempted nothing less than a total reconstruction of the fields of legal and political theory, taking on all of their central dilemmas, and applying his discourse theory to resolve long-standing puzzles or impasses.

The already large and growing body of literature responding to this work has generally been supportive. Understandably, few critics have taken on this imposing book at its most grand level. Rather, most have supported Habermas’s overall project, limiting their criticisms to selected problems. In this modest commentary I will do the same, though the problems I address are, I believe, central to his exercise. The primary contribution I hope to make to the discussion will come from exploring a viewpoint that I have not yet seen raised—the view from below.

By “view from below,” I am referring to two distinct groups: the view of those who are not participants in legal theory discourse, lay people in particular; and the view of societies outside the West. As a Western law professor who has produced legal theory, I cannot claim any special privilege in relation to these views from below. However, I feel an affinity to them. I have lived and worked as a lawyer in a developing country for two years, and have studied and written on the subject, and while I am an avid consumer of philosophy, I am not formally trained in it. This background provides me with some insight into how these perspectives might approach Habermas’s work.

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I. TWO CENTRAL HABERMASIAN THESES

I will apply the view from below to test two theses central to Habermas's reconstruction. To my knowledge, neither of these theses has been challenged seriously in the responsive literature. I suspect this omission is because, among social theorists and legal philosophers, they are widely assumed to be correct. Habermas assumed them without offering virtually any supportive evidence. The first thesis is that law is central to the organization of complex societies; the second is that legitimation is essential to law. In Habermas's view, these two theses are intimately connected:

Today legal norms are what is left from a crumbled cement of society; if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces.

Modern law grants, however, stability of behavioral expectations only on the condition that people can accept enacted and enforceable norms at the same time as legitimate norms that deserve intersubjective recognition.

These two theses are of fundamental significance to Habermas. His entire argument is built upon their edifice. According to Habermas, the disenchantment of the lifeworld and the division of labor—the loss of faith in religion and the breakdown of shared values, customs and traditions—has dissolved the glue that previously kept society intact. Contrary to invisible hand or market theories, in his view, the instrumental rationality of a community of self-interested actors is not sufficiently self-organizing to hold society together. There is nothing to coordinate behavioral expectations between strangers. Moreover, the differentiation of modern society into increasingly autonomous subsystems (political, economic, family) increases the likelihood that we will lose the ability to exert control over the circumstances of our existence. As Habermas dramatically put it, "how can disenchanted, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions?"

Riding to the rescue, modern law, for Habermas, is the key lynchpin that mediates the relationship between system and lifeworld (to use his

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2. An extensive discussion by Habermas of these two theses, especially the first, can be found in his earlier book, Legitimation Crisis. JÜRGEN HABERMAS, LEGITIMATION CRISIS (Thomas McCarthy trans., 1975).


4. HABERMAS, supra note 1, at 26.
 terminology). "Modern law steps in to fill the functional gaps in social orders whose integrative capacities are overtaxed." Without the integrating function served by modern law, society would collapse, and/or there would be no effective form of communication between the life-world and system. However, the consequences of disenchantment also are visited upon law. Law too has been deprived of metaphysical and religious support, and, in modern, pluralistic societies which lack a shared morality or tradition, it cannot count on an underlying normative consensus. The efficacy of law, according to Habermas, is contingent upon the sense of the populace that law is legitimate, but under these circumstances it must find a new basis for legitimation.

Modern law can stabilize behavioral expectations in a complex society with structurally differentiated lifeworlds and functionally independent subsystems only if law, as regent for a "societal community" that has transformed itself into civil society, can maintain the inherited claim to solidarity in the abstract form of an acceptable claim to legitimacy.

Such an abstract claim to legitimacy is precisely what Habermas's discourse principle supplies. He states the principle as follows: "Only those [legal] norms are valid to which all persons possibly affected could agree as participants in rational discourses." Viewed in political terms, the discourse principle provides the internal relation between democracy and the rule of law. Laws generated by democratic means are consistent with the discourse principle; the addressees of laws are also their authors, which means we remain free even as we live under the rule of law. "The principle of democracy is what then confers legitimating force on the legislative process." At the posttraditional level of justification, as we would say today, the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion-and will-formation.

Here is a bare outline of Habermas's argument:

1. Society is in danger of falling apart owing to anomie;

5. Id. at 42.
6. See id. at 55-56.
7. See id. at 33-34.
8. Id. at 76.
9. Habermas, supra note 3, at 940 (emphasis added); see also HABERMAS, supra note 1, at 104 ("[T]he legitimacy of law ultimately depends on a communicative arrangement: as participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those possibly affected.").
10. This relationship is an intimate one. "Legal (political) rights are necessary for the proper constitution and exercise of the democratic process; while, at the same time, the democratic process is what legitimates law. Thus the relationship between legitimate law and the democratic principle is circular. They are 'co-originally constituted.'" HABERMAS, supra note 1, at 122.
11. Id. at 121.
12. Id. at 135.
2. Law must rescue society;
3. But law needs legitimation to be effective;
4. Discourse theory rescues law;
5. Society is saved.

Building upon discourse theory, Habermas goes on to reconcile or overcome some of the fundamental antinomies that perennially confound legal and political theory, including those between liberalism and republicanism (and, respectively, private autonomy and public autonomy), legal positivism and natural law, and facts and values.

It is beyond my capacity to meet these arguments, many of which I find thought provoking and compelling. My response will be limited to drawing upon the view from below to question whether in fact society is in danger of falling apart, whether law is what keeps it together, whether law must be seen as legitimate to be effective, and, if so, what generates this legitimacy and whether discourse theory is an effective form of legitimation.

II. THE INTEGRATION OF SOCIETY

Western social theorists, for the past couple of centuries, though extending earlier, have been obsessed with the question of what holds society together. This obsession is related undoubtedly to the dislocations caused by industrialization, population growth and movement (urbanization, trans-border), huge increases in the numbers of poor and their proximity to the wealthy, and the ever-present threat and reality of war. To theorists at the end of the nineteenth century, like Durkheim and Weber, there was a sense that something unique in the history of human-kind was occurring, an exhilarating yet frightening transition from the known to the unknown. The promise of modernity, at least in terms of generating new products and wealth, seemed limitless. The melding of people and machines in institutions was a wonder of organization and efficiency that generated pride in the human capacity. But the working and living conditions of the laborers were often abominable. And it was impossible to ignore the impending masses of poor.

Contributing to this sense of uncertainty was more than just a change in the material conditions of society. Traditional knowledge and beliefs were under increasing siege by science and the Enlightenment. The remorseless destruction of these beliefs beneath the critical scrutiny of reason is what led to the earlier mentioned disenchantment of the world. For an intellectual this meant liberation, up to a point. All moorings were being lost, with no replacements in sight. Science could provide knowledge but not purpose. Rationality supplied means but not ends. If neither God nor absolute morality required it, "Why be good?" It was a question they could not answer convincingly to themselves. Their fear was that the masses would be led to the same conclusion. When the elite act without concern
for the good, it is considered decadent by the intellectual, to be frowned upon (or celebrated), but not feared. In contrast, the prospect that the masses would act without concern for the good threatens the very destruction of society. After all, why do the poor put up with their perpetually abysmal and patently unjust condition when a better life, or at least more food and goods, is there within their reach to be seized?

Society, as social theorists knew or imagined it, seemed to be in imminent threat of breakdown. These threatening social circumstances, I am suggesting, explain why the first concern of social theorists has been the problem of social order, which has dominated sociology since its inception. When grappling with this problem, a favorite activity of social theorists has been to construct comparisons between primitive and modern society. Durkheim’s famous contrast between the “mechanical” solidarity of primitive societies and the “organic” solidarity of modern society epitomizes this approach.

His thesis was that primitive societies were held together by a shared mechanical, collective conscience. Modern societies, by contrast, are characterized by a division of labor, which results in a loss of shared values. The absence of the collective conscience of primitive societies is replaced in modern societies by the integrative ability of law. According to Durkheim, primitive law was retributive, while modern law is oriented toward restitution, effecting a shift away from coercion toward consensus. Thus he characterized modern law and modern society in a progressive way.

Law is an attractive candidate for solving the problem of social order. Its most visible task is the maintenance of order, including the preservation of property. To put the suspicion more bluntly, for one concerned not just about order but about one’s own privileged position in that order, social and legal theory nicely help legitimate Law (by characterizing it as important and good), and a good and important Law helps legitimate society. Durkheim’s portrayal of law in modern society is clearly favorable by contrast to his characterization of law in primitive society. Indeed, many social and legal theorists, including Habermas, characterize law’s role in modern society as rather heroic.

It would not be fair to saddle Habermas with the details of Durkheim’s contrast between primitive and modern societies. By his own account, however, Habermas does “side with Emile Durkheim” in his view of the central role that law plays in modern society. In the fundamental respects that matter here, their accounts are strongly parallel. The problem is that Durkheim was not concerned with accurately representing pre-modern societies. Rather, his intention was to understand modern

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societies. His contrast was a caricature that has since been sharply challenged by anthropologists and sociologists. Just as pre-modern societies were never as mechanical—unthinking extensions of the collective mind—as Durkheim portrayed, modern societies are not as pervaded by a loss of shared values as the term anomie suggests. Once this contrast is placed into doubt, it is not at all evident that there has been a need for a new mechanism to integrate complex societies—that society would have collapsed had law not been there to fill the gap.

The foregoing summary characterization of the circumstances and motivations surrounding the obsession of social theorists with the problem of social order, and their reasons for identifying law as the solution, is admittedly superficial and cynical. And I offer no evidence to support it. My purpose in suggesting it is to prompt us to create some distance from the assumption that law is essential to the integration of modern society, and to question it. For too long it has passed as an accepted truth, when in fact it is grounded in speculation which originated under the pressures of specific historical circumstances and concerns.

Beyond the general suspicions raised above, there are several concrete reasons to demand that the thesis identify some form of empirical support, granting that it is one of those speculations about the nature of society which cannot be tested through experiment. The first reason is that, despite the fact that the project of modernity has accelerated in the century since Durkheim first wrote, it is not easy to identify societies which have collapsed for lack of law to serve as an integrative mechanism. Various societies have suffered breakdown—especially economic and political in origin—to be sure, but none that can be easily attributed directly to the loss of values and the failure of law to subsequently fill in the vacuum. Keep in mind, furthermore, that many of the societies that have undergone vast changes from the impact of modernity have not had strong legal traditions, especially those outside the West. Modernity and its consequences have virtually swept the globe, leaving severe dislocations in its wake. Given the weakness of law in many locales, if the thesis that law serves the essential role of integrating society in the modern era is correct, surely we would have seen a number of clear examples of societal breakdown.

One possible answer to this line of reasoning is that societal breakdown is a gradual process—the loss of values occurs slowly—and law

17. For a case study of the impact of transplanted Western law on a non-Western society, see BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW (1993).
happens to fill the breach with just enough strength to keep society integrated and functioning. The functional needs of society, in other words, insure that law—as a subsystem that contributes to the survival of the whole—will develop in the precise proportion necessary to prevent a society from collapsing. But that answer smacks of Panglossian functionalist rationalization formulated in a manner that is impervious to refutation, a type of reasoning which has long been in disfavor precisely because it cannot be disproven (and thus does not qualify as a scientific or empirical proposition).  

A second compelling reason to challenge the Durkheim/Habermas thesis is that it appears to reverse the actual order of dependency as between law and society. Habermas asserts that “if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that otherwise would fall into pieces.” However, it is far more plausible to assert that law cannot be strong if the society in which it exists is not already functioning well in terms of social cohesion. It is not that society depends upon law to keep it from crumbling, but rather that law would be weak or crumble if society was in a state of near collapse. A loss of values sufficiently severe to threaten the disintegration of society would begin a downward spiral that would sweep law in its wake. Society may be ordered without law (though not without rules), but law cannot exist without an already organized society.

An obvious retort to my argument is to ask, if not law, then what are the essential sources of social order? To that inquiry, after an initial admission of uncertainty, I have a three-part response. First, as indicated above, I reject the very contrast between primitive and modern society. Focusing on this framework has taken us down the wrong track. Habermas is wedded to a nineteenth-century antinomy, which was of dubious validity at its inception and is hardly relevant today.

Second, I would say that just about everything that doesn’t break society apart contributes to social order: intersubjectivity, shared language, values, customs, conventions, beliefs, practices, habits of action, role orientations, organized complexes of action (institutional arrangements), associations, explicit coordination, shared knowledge, self-interested action, survival instinct, altruism, the market, the reinforcing effects of the successful conduct of affairs, spontaneous social organization, and more, including all those traits selected by evolution which have helped the human species thrive as social animals (as sociobiologists insist), and, yes, also law. All of these influences likely exist to varying degrees in all societies (pre-modern and modern). But in no single society, pre-modern, modern,

19. Habermas, supra note 3, at 937.
or in-between, can it be said that law is the integrating mechanism. The lesson found in many developing countries, which are "complex" and "modern" by any usage of the term, is that law often plays a marginal role in the integration of society.

Third, I would suggest that the question is ill posed. Given the prevalence of social order, instead of asking what are the essential sources of social order, perhaps the more appropriate questions should be, Why and under what circumstances do societies break down? The focus would then shift to actual situations of societal breakdown, away from imagined explanations of the sources of order based upon fictional contrasts to a time before memory, back to concrete investigations of the various reasons contributing to breakdown in specific historical situations. Following such investigations, I doubt that the failure of law as an integrating mechanism to fill in for a value deficit would be identified as a leading cause.

Thus far, arguing on a general level, I have expressed skepticism about the assumption that modern society has suffered a significant value breakdown that distinguishes it in any fundamental way from pre-modern society, and the assumption that law is the glue which holds modern society together, by questioning both aspects of this assumption. I have suggested that there may be elitist reasons why these assumptions have held sway unchallenged for so long among social theorists. The view of law from the bottom—from the poor in Western societies and the general populace in non-Western societies—has seldom consisted of grateful relief that law is there to hold society together, staving off chaos and disorder. Contract and property laws are not significant factors in the coordination of their daily existence because they have scant property and enter into few contracts. The apparatus of the criminal law system is either nowhere to be seen when they need it, or an unwelcome and oppressive intrusion in their lives. Too often, from these perspectives, law has been viewed as unresponsive, unavailable, alien, impenetrable, and as something to be feared or avoided. The disparity between this view of law and the heroic view of law as essential to the survival of society bears explanation. It is not enough to assert that the law they are exposed to is deficient, a dirty shadow of what law should be. If society has not collapsed and the law still works, it passes the test set up by social theorists for a law that is effectively serving its function of maintaining order in society.

20. For a general argument in support of this assertion, see Brian Z. Tamanaha, An Analytical Map of Social Scientific Approaches to the Concept of Law, 15 OXFORD J. LEGAL STUD. 501, 515 (1995).

21. Indeed, I would suggest that these societies are far more "complex" than Western societies, because they consist of extraordinary mixtures of transplanted and indigenous, modern and pre-modern.

22. See TAMANAHA, supra note 17, at 177–79.
Rather than further press these points about the negative views of law from below, which are well known, I will instead conclude this section by arguing that the most dominant experience of law from below is that it is irrelevant. Habermas's thesis is that, in modern society, the primary function law performs is to stabilize behavioral expectations. This task places law at the very heart of social action. To achieve this task, law must inform actions both at a conscious and subconscious level (where most behavioral expectations are lodged). In interpretive theory generally, it is ordinarily asserted that behavioral expectations are coordinated through shared social typifications, which are assumed and operate beneath our awareness unless brought to the surface through explicit thematization, or by the disruption or disappointment of an expectation.

Whichever way it is understood, the view that law helps stabilize behavioral expectations assumes that law has an extraordinary degree of influence on our daily actions. One of the lessons of the legal realists and of legal sociologists, however, is that often the general public is ignorant of—or doesn't pay attention to—vast portions of the law. People have knowledge about law only if they have a specific reason to know, usually that knowledge is limited to the purpose at hand, and often that knowledge is obtained only after what's done is done. With regard to most action, people are not informed at all of the law that might be relevant, and often they hold erroneous assumptions about what the law requires. As Eugen Ehrlich demonstrated, people seldom think about the law in the course of their everyday actions. When law is consciously contemplated, it is often thought of in terms of a transaction cost, as a consideration when calculating the costs and benefits of the action. The most effective (in terms of patterns of conforming behavior) laws are those which happen to coincide with what people do anyway, out of custom or normative conviction. However, in such cases, properly speaking, it is not the positive law that stabilizes behavioral expectations but the shared underlying customs and convictions. Given the literature which has raised doubts about the extensiveness of the knowledge about law of ordinary citizens, and doubts about the degree to which people order their activities based upon the dictates of legal norms, the notion that law stabilizes behavioral expectations in modern society is highly questionable.

26. See generally ADAM PODGORECKI ET AL., KNOWLEDGE AND OPINION ABOUT LAW (C.M. Campbell et al. eds., 1973) (discussing and providing support for the premise that the public is not as familiar with the local law as was once presumed).
III. THE NATURE AND SOURCES OF LEGITIMATION IN LAW

The suspicions expressed in the preceding section gain momentum when we shift to an examination of the discussion of legitimation of law. I will explore three related points: (1) concern about legitimation as an exercise; (2) whether discourse theory is a persuasive form of legitimation; and (3) whether law must be considered legitimate to be effective, and, if so, whether legitimation follows from philosophical explorations. All of these points, again, will be examined with the view from below in mind.

A. The Dangers of the Legitimation Enterprise

A review of the histories of legal and social theory shows that they are replete with discussions of the legitimacy of law. More to the point, the literature is filled with attempts to portray law as legitimate. This is what I call the legitimation enterprise, an effort that has to an extraordinary degree occupied the attention of legal and social theorists. Many such theorists, including Habermas, would protest indignantly and justifiably that their objective in setting up standards against which to test the legitimacy of law is to provide for a critique of law, to improve the law by demonstrating its illegitimacy, not to rationalize the law. The problem is that it has seldom worked out that way in practice. Natural law theory has perhaps had the most critical edge of any form of legitimation inquiry, because it conditioned the validity of positive law on its conformity to a higher standard. Frequently what has occurred, however, have been pious assertions of the fidelity of positive law to natural law, and thus natural law has been called upon to bolster the legitimacy of law.

Legitimation is a two-sided enterprise: it can serve as a critique, or it can rationalize the status quo. More often than not throughout history, for whatever reason, the critical potential of the legitimation enterprise has been sublimated and enlisted to serve as an apologist for the existing system of law.

Suspicion of the legitimation enterprise should be heightened when, as is the case with Habermas, an idealized standard is applied to test the legitimacy of law. Recall that the test for the legitimacy of law is the discourse principle: "Only those norms are valid to which all persons possibly affected could agree as participants in rational discourses." This standard is idealized in the sense that it is impossible to achieve.

28. See Brian Z. Tamanaha, A General Jurisprudence of Law and Society (manuscript in progress, on file with the author).

29. Blackstone, for example, employed his theory of natural law as "the chief tool of rationalization" in support of the existing English legal system. Daniel J. Boorstin, The Mysterious Science of the Law 50 (1941). Roscoe Pound has pointed out that, despite its critical import, natural law principles and natural rights have all too often merely been derived from, and used to justify, the existing social order. See 1 Roscoe Pound, Jurisprudence 488 (1959).

30. Habermas, supra note 3, at 940 (emphasis added).
Habermas does not intend nor expect to hold all legal norms to this standard. Rather, it operates as a kind of regulative ideal, something to aspire toward, which has value even if we are always doomed to fall short. But idealized standards are especially susceptible to the rationalizing tendency of legitimation. The following concerns regarding idealized standards will be taken up on turn: the immunity effect, forgetfulness, and slippage.

Once an idealized standard that cannot be met is set out, it is easy to have it both ways. The standard is immune to the complaint that it is unrealistic, because it was not intended to be achieved in reality—Habermas labels his discourse principle "counterfactual" to emphasize this fact. Yet at the same time, as long as it stands, its authority is drawn upon continuously as a standard in relation to which judgments are made about reality. That is a luxurious position to occupy. Habermas further dances on two sides of the line by insisting that his "counterfactual" discourse principle is in fact "empirical," because the idealizations that underlie the discourse principle are presupposed in all actual communicative processes. Thus Habermas will, on the one hand, deflect the critique that his idealization is too unrealistic with the assertion that it is meant to be counterfactual anyway, and, on the other hand, refute the charge of unreality with the claim that it is in fact empirical. His straddle is successful only because it shifts what is being referred to as unrealistic. Regardless of whether the norms of rational speech are always presupposed in acts of communication (and thus in a sense are empirical) as Habermas insists, the point is that it is unrealistic to suggest that the legitimacy of legal norms be measured by a standard which requires that they be assented to by all persons affected, because that will seldom if ever happen. Habermas repeatedly dismisses other theories as insufficiently empirical. His theory is subject to the same complaint. At some point an idealization is so idealized that it is irrelevant beyond the general benefits gained by the imagining of Utopian scenarios. Calling it counterfactual does not save it from having to answer to this charge.


32. As Habermas puts it: "These and similar idealizing yet unavoidable presuppositions for actual communicative practices possess a normative content that carries the tension between the intelligible and the empirical into the sphere of appearances itself. Counterfactual presuppositions become social facts." Id. at 47.

33. This was Habermas's oral response at the panel discussion following my criticism of his argument.

34. I am, for the sake of this argument, assuming Habermas is correct about the inevitable posing of the presuppositions, though I believe there are substantial reasons to doubt this claim. It seems that a more pragmatic theory of discourse—simply based upon the accumulated effects of successes and failures of communication—can be constructed that would contest the assertion that these presuppositions underlie all communication.

35. If Habermas insists that this counterfactual discourse principle is empirical, he would seem to also necessarily insist that law is therefore legitimate, a dangerous assumption to make. See David Dyzenhaus, The Legitimacy of Legality, 46 U. TORONTO L.J. 129, 175 (1996).
Forgetfulness occurs when conclusions are drawn about the legitimacy of real practices based upon application of the idealized standard. What makes the discourse principle powerful—what allows it to escape so many other problems that plague political and legal theory—is precisely that it is conditioned upon unanimous agreement in a rational discourse of those affected. Anything short of that is not close. It throws us back into the thick morass of dilemmas that the discourse principle allowed us to escape only because it was grounded in universal agreement. Forgetfulness arises when theorists assert that a given law-generating practice that approximates the discourse principle is, therefore, legitimate. This is an unwarranted conclusion; one which cannot be grounded in the discourse principle itself, because the demands of the principle have not in fact been met. The discourse principle does not contain within it the ability to provide guidance on how much approximation is enough to qualify as legitimate. To the contrary, nothing short of total success in achieving the required universality would seem to be enough. When perfection is the standard, and perfection is required because only that will do, as is the case with the discourse principle, anything less than perfection is failure.

To the extent that no real situation can ever meet the discourse principle, it is not clear that it can ever be usefully applied as a concrete standard with which to test real situations. In this respect there is a strong similarity between the discourse principle and the idealized modeling conducted in law and economics. Economic modeling is often so simplified that no conclusions can be drawn about the real world based upon the model. As real conditions are added, the model becomes unworkable owing to complexity and/or the conclusions change. The value of these models is thus limited to helping us think about the situation, though the temptation to draw real life conclusions based upon the model has often proven too difficult to resist. The same is true of the discourse principle.

Slippage occurs when theorists adjust the idealization to make it more realistic, or achievable. The fact that an idealized standard cannot be met, combined with the consequent limitations in its actual application, leads inevitably to frustration. One obvious solution is to make the standard less demanding. Sympathetic theorists have manifested this impulse when urging that the unanimity requirement be dropped in favor

36. Robert Alexy explains why anything short of actual unanimity is in fact failure:
It is easy to see that any tension between basic rights and democracy must vanish immedi-
ately once one presupposes the perfect realization of this principle of democracy. By
“perfect realization” I mean a political state of affairs in which only such laws are en-
acted as have actually met with the agreement of all legal consociates in a discursive pro-
cess of law-making. The identity of addressee and author of the law so often mentioned
by Habermas would be fully realized in this model. As the agreement of all legal conso-
ciates (to which in this ideal model each legal norm can be retraced) is a discursively pu-
rified and therefore a rational act of self-government, no norm can violate a basic right.

Robert Alexy, Basic Rights and Democracy in Jurgen Habermas's Procedural Paradigm of the
of plain old majority assent. James Bohman, for example, argued that "Unanimity is too strong a criterion and should be replaced by a weaker standard of agreement: that all citizens have the opportunity to participate in the decisionmaking process in such a way as to have the reasonable expectation that they may affect its outcome." Another tempting form of slippage is in the suggestion, which assuredly will be made (if it hasn’t already), that the standard should not require universal acceptance but only a fictional "acceptability."

Never mind that these more modest demands are far from the original discourse principle; and never mind that theorists wish to continue to draw upon the prestige of the discourse principle even when applying such lower standards. The most telling implication of steps to lessen the standard is that as a result the idealization begins to sound a lot like Western liberal democracies. That is the first—I dare say inevitable—move toward using the discourse principle (in watered down form) to rationalize and legitimate our existing practices. Our practice thereby becomes the ideal. That, as I warned earlier, is the perennial danger of engaging in the legitimation enterprise. Despite Habermas’s impeccable critical pedigree, it is difficult to read his argument without sliding to the conclusion that our systems of liberal democracies and the rule of law, despite their flaws, for the most part are deserving of a substantial claim to legitimacy.

Not only does this make us self-satisfied about our own situation; the greater problem is that it imposes on the rest of the world our own (liberal democratic) practice, but now in the guise of a universalistic ideal. There are strong echoes of this kind of philosophical imperialism throughout the history of Western relations with the non-Western world. Although Habermas may insist that the discourse principle is flexible enough to allow for different instantiations in non-Western societies, he cannot argue that it is neutral and completely open to all non-Western forms of the generation of norms. It does, at a minimum, require a form of strong democracy.

B. Whether the Discourse Principle Is a Persuasive Form of Legitimation

The discourse principle is procedural in nature. With the modern loss of beliefs in absolute values, and the moral and ethical pluralism of modern society, it seems impossible to come up with substantive standards of rightness with which to test the legitimacy of legal norms. In lieu of this, the discourse principle suggests that when the proper decision-making procedures are followed—through uncoerced discourse open equally to

all persons affected, with full knowledge and an attitude oriented toward understanding, terminating only upon achievement of unanimous agreement—the outcome will be right, entitled to a claim of legitimacy. Through this reasoning, legality consistent with the discourse principle is itself legitimate, and its products morally worthy. In United States’s legal theory, Habermas’s proceduralist approach is reminiscent of Lon Fuller’s argument that the procedures of the rule of law have an affinity with good, in the sense that they are unlikely to produce evil outcomes. Thus the morality of law inheres in its procedures.

Philosophers with far more ability and knowledge than I can no doubt mount a more sophisticated response, but I cannot shake the sense that there is no logical way to move from a procedure to a morally correct outcome. The barrier between procedure and substance (the content produced by that procedure) seems impassable. A morally worthy procedure does not, by virtue of that fact, entail any guarantee of doing the right thing (to put it in more common vernacular), though I would readily agree that following a morally worthy procedure is a better way of making a decision than not. Another obvious objection to this procedural legitimation of law, which I have already mentioned but will not elaborate in detail, is the abject inability of the production and application of law to ever meet the conditions of the discourse principle. Constraints of time and resources, and the reality that agreement will seldom be universal, cannot be overcome.

The response I will develop based upon the view from below is different. In Habermas’s scheme, the view from below is essential because the efficacy of the law is contingent upon the support of the populace, and any form of legitimation must appeal to “a posttraditional moral consciousness of citizens who are no longer disposed to follow commands, except for good reasons.” Habermas thus identifies the view from below, not the view of theorists, as the one that ultimately matters. The pertinent question, then, is whether the populace will agree with Habermas that legal norms are worthy of being followed solely because they are produced consistent with the discourse principle, whether they will count this as a “good reason.”

The legitimacy of the procedure by which the decision is produced is certainly not irrelevant. But the normal reaction to whether a legal norm or action is right is still based upon whether one agrees or disagrees with the outcome. Consistent with Habermas’s universal assent ideal, of course, everyone does agree with the outcome. However, this merely serves as a reminder that we cannot slip from the ideal to the real to legitimate any particular manifestation of law because law will seldom if ever meet this condition. There will almost always be people who believe a given outcome

39. Habermas, supra note 3, at 938.
to be wrong, and they will not be persuaded otherwise by the fact that good procedures were followed. The fact that people who are on the losing side of majority-rule decisions may nevertheless abide by the decisions does not mean that they like the decisions, or think those decisions are correct, simply by virtue of the fact that they were made democratically.

There are deeper problems with the discourse procedure in relation to the view from below. Foremost, it carries the odor of self-privileging: the skill which philosophers and lawyers singularly excel at is discourse. Talk is our trade. Even under the conditions of the idealized setting, many people will be silenced through the weight of plain inability. The old gap between formal and substantive equality is thus reconstituted within the discourse principle. It is impossible to tweak the conditions of formal discourse equality into substantive discourse equality because there is no way to alter the unequal distribution of discursive talent.

There is another respect in which the discourse principle is self-privileging, a respect which shades into the kind of paternalistic determining of life's choices that Habermas raised as an objection against social welfare systems. Habermas declares that the proceduralist paradigm "has its focus on the citizen who participates in political opinion-and will-formation." He continues:

Citizens can only arrive at fair regulations for their private status if they make an appropriate use of their political rights in the public domain. They must be willing to participate in the struggle over the public relevance, the interpretation and evaluation of their own needs, before legislators and judges can even know what it in each case means to treat like cases alike.  

These demands on the citizens are fundamental to Habermas's reconciliation of private and public autonomy, and thus form a key component of his argument.

The view from below: "Give me a break! I have better things to do with my time." If the discourse principle requires that every private citizen become the ideal citizen of the republic, it asks too much, and forces a burdensome obligation upon the ordinary citizen, whose vision of worthy or desirable pursuits often extends in other directions. Political philosophers may be inclined to value this kind of participation (though many write about it more so than actually engage in it), but imposing it upon others can be oppressive.

Yet another response from below would be to point out the alienating, excluding effect of, and the irony of, a theory which makes an extensive case for open and accessible discourse, but is presented in a form and manner that is comprehensible only to the initiated. There are sig-

40. Id. at 942.
41. Id.
significant discourse barriers inhibiting general access to discourse theory. Although Habermas may respond that he and others can convey more simplified versions of this theory in the realm of public discourse, this raises further concerns. As pointed out earlier, the danger of watered down versions is that they are altered in the course of the translation in a manner that ends up bearing little resemblance to the carefully constructed original. The final message would likely end up being: discourse theory (or a famous philosopher) tells us that democracy is good.

C. Whether Law Must Be Considered Legitimate to Be Effective, and, If So, What Is the Most Likely Source of Such Legitimation.

Theorists are wont to declare that there is a "legitimation crisis" of some kind, which must be solved if chaos or collapse is to be avoided, whereupon they present their solution. Against this tendency I will raise two questions: Is legitimacy really so important to the functioning of modern law? and, to the extent that it is, What are the effective sources of legitimacy? Although I had always assumed that legitimacy is indeed essential to the functioning of a legal system, my experience as a lawyer in Micronesia has shaken its hold. Law in Micronesia, from the legal code to the staff who implemented it, was transplanted virtually wholesale from the United States. From the standpoint of the general public, the law was an alien presence with which they felt no sense of identification. It is not obvious that they saw it as legitimate at all, and, to the extent that they did, this legitimacy was based on little more than its naked prestige as state law. Nevertheless, although the law had a limited reach and a marginal influence in the maintenance of social order, it was effective in the tasks it undertook.

Although it would be inappropriate to extrapolate from this situation to law in the West, keep in mind that the situation of transplanted law is a common one around the world. Moreover, it suggests at least that it is not an absolute condition that the law be seen as legitimate to be effective. Many theorists, including Habermas, reason that if there were no legitimation-based support, the legal system would be required to exert a continuous and unsustainable application of force. The colonial experience—wherein effective legal systems were set up supported only by small staffs of armed support—would seem to belie this common view.

There is an intermediate position between legitimacy and the constant application of coercion. That is, coexistence based upon accommodations on both sides. The law limits its reach, avoiding interventions that will generate great resistance and often withdrawing when such resistance arises, for the remainder the populace more or less abides by the

42. Habermas presented an early work, *Legitimation Crisis*, in precisely this vein. See HABERMAS, supra note 2. He has been repeating this theme ever since.

43. See TAMANAH, supra note 17.
dictates of the law. Inertia and the high threshold necessary to effect change are major factors in suppressing resistance that might otherwise result from a lack of legitimation. In other words, a law not seen as legitimate will not need to exert coercion on a constant basis. The threat of coercion often will be enough to suppress resistance until sufficient support is marshaled by the rebellious to have a reasonable prospect of prevailing in a contest with the law.

There is no point in further speculation along these lines. My intent is not to assert conclusively that law can survive without legitimation, but rather to encourage the reexamination of this assumption. There are enough functioning legal systems around the world today that are viewed with suspicion by the populace to suggest, perhaps, that legitimation is not as essential as Habermas and others assume.

The second question relates to the sources of legitimacy. Recall that, here, we are concerned specifically about legitimacy from the standpoint of the populace, because that is what Habermas believes to be necessary. I take it as self-evident that a minuscule proportion of the populace would ever read or be directly exposed to Habermas's work. This lack of access, and perhaps even lack of interest, suggests that if legitimation is important, theorists are searching for it and producing it in the wrong places. Discourse theory might still be effectual in so far as it influences intellectuals and thereafter trickles down to affect ideas circulating in the general public discourse. This kind of influence, however, is attenuated at best, and, as I suggested earlier, the risk of distortion in the filtering process is great.

Ideas about the legitimacy of law do circulate in society. In the United States, our dual liberal and republican inheritances influence these ideas. While the conflicts between these two streams of thought trouble theorists, people seem capable of holding to both views, shifting from one to the other without concern for inconsistencies and without suffering cognitive breakdown or a loss of faith. These ideas are a part of our tradition, passed on to each generation in various ways. Ideas about the legitimacy (or illegitimacy) of law also circulate in the public cultural sphere, fed by the reporting on sensational cases, and by popular novels, movies, and television shows about law. They derive from what is taught in school, from slogans about democracy and the rule of law at an early age to more serious scholarly examinations later on. They derive from actual exposure to legal proceedings, to concrete experiences with lawmaking or the court system. They derive from a sense of the fairness of procedures and a sense of fairness about the outcomes of the legal apparatus (to the extent that these are observed). Finally, these ideas of legitimacy derive from our experience of whether the law serves our interests and needs when called upon—on our common experience of whether the law works reasonably well to satisfy the demands placed upon it by those who resort to it. If it is correct that these are the primary
sources of views of the legitimacy (or illegitimacy) of law among the populace, the most direct route would be to make sure that legal procedures have the appearance of fairness, that their results generally accord with people's sense of what is right, and that the law more or less serves their needs.

I would not suggest that discourse theory is irrelevant to this process, by any means. But it does put into better perspective the likely marginal impact of discourse theory on the fact of legitimation. This is an important consideration because Habermas has pinned the relevance of discourse theory, in part, on the service it can provide to legitimate law in the modern era.

IV. WHAT ABOUT THE COMMON LAW?

To end this commentary I will offer a few brief remarks about a major aspect of law that Habermas fails to mention in his otherwise exhaustive coverage of the core issues in legal theory, a rather gaping omission from the standpoint of an Anglo-American lawyer: What about the common law? 44

The common law poses a serious legitimation problem for legal theorists. Precisely how unelected judges obtain the authority to formulate law has never been clear. When the subject arose in early theoretical writings, the common law was portrayed as legitimate in so far as it merely embodied the customs of the people, a dubious claim from the outset. Consistency with custom allowed the common law to aver a kind of consent, since custom was thought to epitomize long-standing consent through ongoing and widespread conformity of action. Later, in theoretical writings, the grounds proffered for the legitimacy of the common law shifted from custom to consistency with natural law precepts; and still later, it shifted to consistency with reason. 45 All the while, there also have been claims that the judges were not actually creating law—they were merely discovering the law that was already there.

Reading this history, it is difficult to avoid the conclusion that theorists were scrambling for whatever arguably respectable basis might exist to support the common law. As custom, then natural law, lost their ability to serve as props, only reason was left to uphold the validity of the common law. The Realist critique essentially eliminated any final illusions about the common law, leaving it to drift without a clear source of legitimation. Dworkin's views of the integrity of the law, successively authored and worked pure by generations of Herculean judges, is the

44. For an excellent exploration and critique of Habermas's theory from the standpoint of the common law, see Catherine Kemp, Habermas Among the Americans: Some Reflections on the Common Law, 76 DENVER U. L. REV. 961 (1999).

most recent candidate for a replacement, but it is implausible on its merits, and when seen in the context of this history it must be viewed with skepticism.

Habermas makes, at best, a weak effort to legitimate the common law. Perhaps, as a native of a civil law country, he did not feel the need to legitimate the common law, or perhaps he himself could not understand how the common law could be seen as legitimate. If the discourse principle were applied to the common law, it would fail miserably.

My points are twofold. First, to the extent that the common law is adjudged substantially inadequate by comparison to the civil law (or to legislatively generated law) when tested by the discourse principle, we should take note. After all, despite legislative inroads, much of our basic contract, property, and tort law are still grounded in the common law. Second, contrary to the import of the first point, it is not clear whether we should care. After all, the common law has thrived for centuries without ever having clear grounds of legitimation. Being told that it once again falls short seems entirely beside the point. That must say something about the legitimation enterprise.

V. CONCLUSION

In conclusion, I would like to state my specific underlying concern with discourse theory, and explain the skeptical tone of this article. I have no concerns about Professor Habermas. His humanitarianism is unquestioned, and his critical credentials are beyond reproach. In his writings as well as in person, he is respectful and open-minded, and indeed to a remarkable degree he appears to live by the demands of the discourse principle.

However, he cannot control the ways in which his work is used. I fear Habermas’s theory will make it more difficult to raise what is always an essential question: “Is the law good or right?” Discourse theory is “meant to guarantee that all formally and procedurally correct outcomes enjoy a presumption of legitimacy.” Accordingly, the initial answer to the question of whether the law is good or right would be: “Of course it is right, we generated the norm in a manner closely adhering to the dictates of discourse theory.”

The troubling aspect of this response is that it does not answer the question on it merits. Rather, it deflects the question by pointing out how the law at issue was created. To get to the merits of the question, the inquisitor must first demonstrate that the process of generating the norm fell substantially short of what the discourse principle requires. No doubt there also will be a dispute about whether the extent to which it fell short was enough to dispel the presumption of legitimacy. Remember that dis-

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46. HABERMAS, supra note 1, at 127.
course theory itself requires perfection and thus provides no guidance on how much approximation is enough. This dispute will take the inquiry even further away from the question at hand, resulting in a potentially lengthy delay, and going down a path that may have no resolution.

Only after going through this process can you even begin to examine the question of whether the law is good or right. Discourse theory thus creates a barrier that protects law from facing this crucial question. Law needs no such protection. It is powerful enough to protect its own integrity without the cover provided by discourse theory. Law at base entails the application (and threat) of coercion. For this reason alone, it must always be directly subject to the question of whether it is good or right.