
Civil Society and Political Theory

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operative here can thus be formulated as follows: The institutionalization of any norm that might cause irreparable damage to the integrity of the identities of individuals and groups who are willing to discuss and abide by the procedural principles of symmetric reciprocity is proscribed. This, of course, is another way of saying that discourses cannot legislate or judge forms of life. Yet something more is involved here. Since need-interpretations and identity concerns are brought into the discussion, the dialogue itself is guided by the principles of respect for the abstract and situated dimensions of personality, on the one hand, and for the minimum solidarity required for the maintenance of individual and group identity, on the other.

This concept of the good lays to rest the charge of empty formalism without thereby violating the deontological status of discourse ethics. Respect for the ability of each to formulate a coherent model of the good life and solidarity among those who have differing ways of life yet share a common lifeworld, or overlapping lifeworlds, and at least key aspects of a political collective identity do not unfairly favor any particular model of the good. Yet they are "*lebensweltliche*" relevant! Nor do they amount to a hidden, concrete concept of the good that undermines the deontological character of discourse ethics (Taylor's charge). The practice of discourse respects both individuation and intersubjectively shared ways of life. Each individual must be able to participate in the solidary process of dialogue that presupposes and potentially reaffirms solidarity since it involves considering the position of the other and openness to the other's identity needs. Indeed, the quality of a "*Zusammenleben*" ought to be measured both by the degree of solidarity and well-being it ensures and by how far the interests (identity requirements) of each individual are considered within the common interest.⁷⁴

This discussion of the structural aspects of the good internal to discourse ethics rests nonetheless on a differentiation between the right and the good, between the universal(izable) and the particular, between matters of justice and matters involving the self-realization of individuals, that is, their particular life histories, identity requirements, and forms of life. Individual need-interpretations can, of course, be brought into discourses so that we can discover which dimensions of these could become the content of a

generalizable norm. But after such a discourse, there remain dimensions of individual life histories, conceptions of the good, forms of life that cannot be generalized and hence remain particular. Even if we draw the boundary line between the right and the good after discourse, the latter by definition raise evaluative issues that escape the demanding logic of discourse, because they involve differences about which we cannot reach a consensus and that we cannot judge through a discourse. Those necessarily particular components of individual and group identity constitute the limit to the reach of discourse ethics. From what has been said above regarding the structures of mutual recognition within which individual and group identities are formed, it is clear that Habermas believes that the principles of justice must not violate—indeed, must protect—the intersubjectively shared form of life from which both solidarity and individual autonomy draw their resources. However, since the structural aspects of the good life are distinguishable from the concrete totalities of particular forms of life (and life histories), the question remains as to the relation between discourse ethics with its "structural conception of the good" and the particular identity needs, values, etc., of individuals or groups.

To the extent that such issues do not impinge upon matters of justice—that is, to the extent that they involve forms of conduct that we neither wish to see generalized beyond a specific context nor see as conflicting with any principle of justice, these fit the standard of "that which ought not to be violated" by or even subjected to claims of justice that are in principle irrelevant. What is involved here are standards of action, values, and components of the identities of individuals or groups that deserve (mutual) recognition as a domain of difference, of personal choice, distinct from the domain to which legal norms must apply. Legal recognition of such a domain that is beyond justice, as it were, could take the form of fundamental rights that secure the autonomy of individual judgment and the self-limitation of legal regulation. Discourse ethics is self-limiting precisely with respect to this domain; it "refers negatively to the damaged life instead of pointing affirmatively to the good life."⁷⁵

But it is clear that what appears to the individual or to a group as the constitutive components of one's form of life, of one's identity, can come into conflict with the demands of justice. In cases of

conflict between demands for self-realization and demands for justice, our immediate impulse is to say that those needs or components of identities that violate the principles of symmetric reciprocity and have become controversial must give way. There remains, however, the option of conscientious objection and civil disobedience when the conception of justice itself is under dispute.

Universality?

Although the requirements of reciprocal recognition can be traced back to the conditions of communicative action and identified as the common root of both justice and solidarity, these duties do not reach beyond the concrete world of a particular group—be it a family, a tribe, a city, or a state.⁷⁶ If we interpret discourse ethics as an ethic of citizenship, as a principle of democratic legitimacy and basic rights, how can we make universal claims for it? Don't ethics and citizenship vary with the particular form of the polity to which they relate? How can we arrive at that universal stance that alone would be able to ground not only tolerance but also solidarity with a plurality of group identities, without reverting to a Kantian formalism?⁷⁷ Habermas's answer is that discourses constitute more demanding forms of communication than everyday communicative practice. They are reflexive, governed by the principles of argumentative speech, and they reach beyond the particularity of a community's mores without thereby breaking the social bond. *The principle of solidarity loses its ethnocentric character when it becomes part of a universal theory of justice and is constructed in light of the idea of discursive will formation.* Arguments transcend particular lifeworlds. "Discourse generalizes, abstracts, stretches the presuppositions of context-bound communicative actions by expanding their range to include competent subjects beyond the provincial limits of their own particular form of life."⁷⁸ The limits of the lifeworld of a family, tribe, or state can be transcended in a context where discourses are institutionalized and the structural principle of the good is respected.⁷⁹ Moreover, moral argumentation can involve an invocation of principles that differ from the norms of a community, and the community must then respond with good and convincing arguments or else acquiesce to the compelling argument of the one

who thinks differently. Far from repressing particularity or "community," the universalizing thrust of discourse ethics, by virtue of its very abstractness, is the only basis on which to grant legitimacy to difference and to require solidarity with it. "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."⁸⁰

Habermas justifies this claim to universality in his analysis of the pragmatic presuppositions of communicative action that are formalized in discourse. In our opinion, however, this argument is not entirely satisfactory, because it implies an abstract and hence incomplete form of universalism. While it is quite probable that other cultures besides ours could make the transitions from normative to communicative action, and from the latter to discourse, it is also certain that such steps are impossible and irrelevant for many cultures, especially those that are not modern and not self-reflective. It would be preposterous for us to require that such a culture surrender its identity for ideals externally imposed on it. Respect for the collective identity of the other must obtain in these cases, perhaps in the form of toleration. But such respect cannot be equated with the solidarity one feels for those with whom one has at least some components of a collective identity or some principles in common.

Let us be clear here. There are two contexts in which solidarity becomes problematic: within plural civil societies and between different societies. The modern concept of solidarity that we have in mind does not require empathy or sameness with the other with whom we are solidary. The solidarity complementary to discourse ethics does, however, involve an ability to identify with the nonidentical. In other words, it involves the acceptance of the other as an other, as one who must be accorded the same chance to articulate identity needs and arguments as one would like oneself. Discursive situations within a single society, in which conflicts over norms are adjudicated, establish the possibility of such solidarity, because here one can put oneself in the place of the other, grasp what his or her needs and interests are, and discover, constitute, or reaffirm commonalities and a collective identity. Such processes should

enrich the self-understanding of all the actors involved. On the other side, solidarity makes discourse meaningful and reaffirms the logic of reciprocal recognition at its heart. In other words, we can have solidarity with others with whom we share a collective identity without sharing or even necessarily liking their personal needs and values (assuming that they are not incompatible with the preconditions of discursive conflict resolution or compromise). But we do have to accept these differences, to the extent that they are constituted in discourse as private.

The issue of solidarity between collectivities that do not share a common political identity is more complex. The easiest case concerns interactions between two societies that are rooted in different cultural traditions but have both institutionalized discourses and the principles of democratic legitimacy and basic rights. We have already seen that solidarity reinforces the collective political identity of members of a modern civil society, integrating those who differ from each other yet share in the political culture of the society at large. This kind of collective identity is capable of asserting a *we* while fostering solidarity among the many group identities that compose a modern civil society. It is this version of a modern collective identity and a modern form of social solidarity that can be expanded in a universal direction to include solidarity with those who are not members of the same civil society but who are members of other civil societies. For cultures that have not institutionalized discourse or rights, we must still show respect if not solidarity.

There are, however, two points at which the universal implications of discourse ethics apply to *all* cultures. First, when the demands for democratic participation and basic rights are raised within a given culture, we cannot avoid solidarity with those who articulate them. The minimum meaning of human rights is that those who claim them have them against any state. Such rights can be secured only within the context of citizenship in a particular polity. But their referent (universal human rights) points beyond any given polity. Second, to the extent that various cultures meet one another in peace and potential war (and today hardly any cultures are excluded from such a possibility), discourse ethics implies that the principles of rational dialogue among equals

represent the only normatively acceptable form of conflict resolution. This version of universalism is, moreover, the only basis on which solidarity with those who are truly different is conceivable, since it opens the possibility of arriving at common norms or principles and mutual recognition.

The Habermasian idea that those who act communicatively can, in principle, raise themselves to the level of discourse does not have to imply a universal yardstick that lets us judge (and even less, interfere with) forms of life radically different from our own. But it does give us a way to address the two cases in which radically different cultures meet. The existence of different forms of life within modern civil societies allows us to think that internalizing such a relationship of mutual recognition and respect for individuality and difference is not in principle impossible. This would entail neither the bad faith of pretending to place all forms of life on an equal footing with our own (relativism) nor an abstract universalist stance that is incapable of according each particularity its own dignity.

The universal referent, in the last instance of discourses in the above sense, is, of course, the "ideal speech community." The identity to which this refers is our identity as human beings; the formal concept of the good it implies is solidarity with all humanity capable of speech.⁸¹ This is a regulative, practical ideal in the domain of a political ethic. Discourse ethics thus preserves the eighteenth-century insight that justice without solidarity is untenable. Indeed, this is the principle behind the idea of human rights. Yet it presupposes difference, not sameness, within the general and basically empty rubric of humanity. Thus, when interpreted in terms of the concepts of collective identity and solidarity, the structural understanding of the good can indeed operate as the other side of the theory of justice: "Without unrestricted individual freedom to take a position on normative validity claims, the agreement that is actually reached could not be truly universal; but without the empathy of each person in the situation for everyone else, which is derived from solidarity, no resolution capable of consensus could be found."⁸²

Identities arrived at (or reaffirmed) in a discursive process of self-constitution involving a postconventional testing of candidates for

political norms leave room for transcultural solidarities that have universal implications in a deeper sense than any supposed universal interest. In order to feel solidarity with the other, we must have potential access to a nonviolent form of conflict resolution when we encounter one another. A *we* constituted in part through discourse has ready access to the only possible medium for such conflict resolution: cross-culturally relevant communication. To possess the capacity for solidarity at all, we must have access to a cultural tradition; but to be able to feel solidarity with an other (with whom we have little in common), we must be able to criticize our own political tradition. The two steps taken together imply the possibility of a broadening of collective identities in a universal direction without breaking substantive links to a plurality of different traditions and, hence, identities.

This does not amount to a synthesis of Kant and Aristotle, for the restrictions with respect to value judgment about the worthiness of individual and group identities still hold. Discourse ethics does not force us to judge past ways of life that have never developed discursive forms of grounding norms. But it does imply that, in the case of contact between pluralities (nationally or internationally), the only acceptable form of conflict resolution is discourse. Let us repeat: *Instead of supplying a substantive standard of the good with which to judge particular ways of life, the structural concept of the good proscribes norms that might cause damage to the integrity of individual and group identities.* Components of identities that either resist processes of discursive conflict resolution, in the case of contested societal norms, or violate the metanorms of discourse ethics (those based on forms of domination, exclusion, inequality, etc.) would have to either yield to a political ethic that provides for moral autonomy and solidarity with difference.

Motivation

The previous point raises the problem of motivation. As stated earlier, deontological procedural judgments seem to offer demotivated answers to decontextualized questions. Indeed, the metanorms of discourse apply only to the dialogue situation itself and can neither motivate participation nor provide criteria for

applying results. Nor does the principle of solidarity that is the flip side of discourse ethics provide a ready answer to this problem. It has its limits precisely at the point at which one is unwilling to engage in discursive communicative processes that involve altering one's perspective and possibly even aspects of one's way of life. Why should anyone participate in discourse?

There are all sorts of pragmatic or strategic reasons for participating in dialogue. One might, for example, come to the conclusion that peaceful, dialogic forms of conflict resolution are better than the use of force and violence, given the existing constellations of interests and balance of power. But there would be nothing intrinsic to the dialogue itself that would automatically yield obligation. Indeed, dialogue is not equivalent to discourse.

Habermas's answer to the problem of motivation that faces all deontological moral theories is twofold. First, he insists that the presuppositions of discourse are really a reflective form of communicative action, and thus the reciprocities undergirding the mutual recognition of competent subjects are already built into action oriented toward reaching an understanding, the action in which argumentation is rooted. In reply to the stance of the radical skeptic who refuses to argue, thereby rejecting the moral point of view, Habermas thus insists that one cannot drop out of the communicative practice of everyday life. Since the presuppositions of communicative interaction are at least partly identical with the presuppositions of argumentation as such, the option of opting out is really no option at all.

In reaching an understanding about something in the world, subjects engaged in communicative action orient themselves to validity claims, including . . . normative validity claims. This is why there is no form of sociocultural life that is not at least implicitly geared to maintaining communicative action by means of argument, be the actual form of argumentation ever so rudimentary and the institutionalization of discursive consensus building ever so inchoate.⁸⁵

Second, Habermas acknowledges the fact that practical discourse does disengage problematic actions and norms from the substantive ethics of their lived contexts, subjecting them to hypothetical reasoning. He grants that unless discourse ethics is

undergirded by the thrust of motives and by socially accepted institutions, the moral insights it offers will be ineffective in practice. Discourse cannot by itself ensure that the conditions necessary for the actual participation of all concerned are met. Discourse ethics is dependent upon a form of life that "meets it halfway."

There has to be a modicum of congruence between morality and the practices of socialization and education. The latter must promote the requisite internalization of superego control and the abstractness of ego identities. In addition, there must be a modicum of fit between morality and sociopolitical institutions.⁸⁴

In other words, what Rawls calls the "circumstances of justice" have to obtain for discourse ethics to be complemented by the appropriate motivational complex. For Habermas, this means that what is required is at least the beginnings of the institutionalization of discourses, the articulation of the principle of basic rights, the requisite socialization processes such that dispositions and abilities necessary for taking part in moral argumentation can be learned, and material living conditions that are not so desperately impoverished and degrading as to render universalistic moral strictures irrelevant. It is Habermas's view that in modern civil societies the principles of basic rights and public discourses have been, albeit selectively and haltingly, institutionalized in the public spaces of civil and political society. This means that discursive testing of normative validity already is part of our intuitions about the legitimacy of institutions. Thus, the subjection of controversial norms to discourse can be understood on the model of Rawls's "reflective equilibrium," as a reconstruction of everyday intuitions underlying the impartial judgment of social and political institutions in modern civil societies.

But even if participation in discourses concerning norms implicitly commits the participant to the metanorms of symmetric reciprocity, it remains possible to maintain an overall strategic relationship to one's participation in specific discourses. Yet participation can have socializing effects on its own, and the relevant principles are such that we all can come to embrace them. It is in such a process that discursive conflict resolution could itself acquire normative power. While *phronesis* (good judgment) is neces-

sary for the application of the principles of discourse ethics, the normative learning that is necessary to resolve the motivational problem from the input side is in principle possible in societies with modernizing lifeworlds, since such societies provide at least for the possibility of internalizing a few highly abstract and universal principles that follow from practical argumentation. In discussing the postconventional level of moral consciousness necessary for discourse ethics, Habermas insists that the gap between moral insights and culturally habituated empirical motives needs to be compensated for

by a system of internal behavior controls that is triggered by principled moral judgments (convictions that form the basis for motivations). This system must function autonomously. It must be independent of the external pressure of an existing recognized legitimate order, no matter how small that pressure may be. These conditions are satisfied only by the complete internalization of a few highly abstract and universal principles that, as discourse ethics shows, follow logically from the procedure of norm justification.⁸⁵

Beyond this, no deontological theory can or should say more. The question of the generation of empirical motives for participation in discursive conflict resolution then belongs to the domains of social theory or social psychology.

An Institutional Deficit?

Discourse ethics does not prescribe a particular form of life. A great variety of forms may be compatible with it, yet no modern form of life (including the one that made it historically possible) can escape its critical potential. The concept of "life form" includes the cultural, institutional, and socialization patterns of a society. Such a broad concept could easily lead to misjudgments about the implications of discourse ethics. It is thus worth noting that the critique can be restricted to specific social spheres without leading to an evaluation of whole social formations or civilizations. Interpreting discourse ethics as a theory of justice could, nevertheless, imply that, without determining entire forms of life, the conception leads to a specific model of *political* practice.⁸⁶ It is indeed difficult to conceive of democratic legitimacy without democratic

institutions. Nevertheless, we insist that no single model of democratic institutions follows from discourse ethics. Moreover, none should be derived from it, if democratic theory is to avoid an authoritarian turn vis-à-vis existing (even if deficient) patterns of democracy. Nevertheless, we shall argue in this section and the next that (1) discourse ethics does have a link to an institutional level of analysis, and (2) the principles of democratic legitimacy and basic rights that it grounds imply an open-ended plurality of democracies and hence projects of democratization that presuppose both modern civil societies and a critical relation to them.

The cornerstone of our argument is the distinction between principles of legitimation, on the one hand, and the institutionalization (or organization) of domination (or rule) on the other.⁸⁷ Habermas uses this distinction to show the shortcomings of both realistic and normative theories of democracy. From Weber to Schumpeter and beyond, "realist" theories of "elite democracy" identify as democratic a procedure (of elite competition) that has at best a minimal connection to democratic norms. It is not based on presuppositions of arriving at a free agreement or public discursive will formation or on an orientation to general interests. The problem of legitimation is either reduced to the empirical question of acceptance of the rules of such procedures or disregarded altogether. Conversely, the theorists of direct democracy, from Rousseau to Arendt, derive a set of idealized practices from a genuine democratic principle of legitimacy. Yet their arguments place in doubt the very possibility of genuine democracy.

The strict separation of legitimacy and the institutionalization of rule points beyond both of these alternatives. Nevertheless, it is easy to suppose from Habermas's own train of thought that he is merely combining the two types of theory, deriving his stress on democratic legitimacy from the normativists and his acceptance of empirical procedures of organization from the realists. He rightly abandons Arendt's illusions concerning the desirability and possibility of the absence of rule in democratic public life.⁸⁸ Yet, at the same time, he seems to leave behind a somewhat Weberian impression that democratic organization is merely one form of domination among others.

The apparent concessions to the realistic theory are due to a combination of agnosticism vis-à-vis democratic utopias and pessi-

mism vis-à-vis the current stage of parliamentary democracy. We would like to develop our own conception in relation to these two postures. Habermas defines democracy as all political orders that satisfy a procedural type of legitimacy, in the sense of the procedures validated by discourse ethics: "Democracies are distinguished from other systems of domination by a rational principle of legitimation."⁸⁹ There are, in principle, many forms of organization that can qualify under this definition. We are told that a choice among them "depends on concrete social and political conditions, on scopes of disposition, on information." However, democracy on the organizational level should be understood in terms of democratization, defined in terms of a "self-controlled learning process" that is capable of allowing and even generating institutional change.⁹⁰

Habermas claims that, in the modern procedural type of democratic legitimacy first worked out by Rousseau, the formal conditions of possible consensus formation, rather than ultimate grounds, obtain legitimating force. This means that the level of justification itself has become reflexive. Accordingly, any given consensus, including the one on organizational structures for arriving at a consensus, is, in principle, open to learning and revision, guided by the criteria articulated by discourse ethics and presupposed by it as the constitutive conditions of discourse. Democratization understood as a self-controlled learning process means precisely this.

We have no quarrel with this train of thought, as far as it goes. We, too, think of democratic legitimacy as prior to the inevitably plural forms of democratic organization. We, too, see democratization as an open-ended process. But we believe that, while rightly denying that any particular form of organization (e.g., council democracy) can be derived from the principle of democratic legitimacy, Habermas has omitted to give the minimum conditions necessary for organizing democratic institutions. The statement about historical preconditions in this context says much too little. Beyond this, Habermas can only reiterate that "It is a question of finding arrangements which could ground the presumption that the basic institutions of the society and the basic political decisions could meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will formation."⁹¹

Characteristically, this statement draws us back from the question of institutions. Habermas is here describing, in the sense of dis-

course ethics, the procedures that can provide legitimating grounds for accepting any arrangement as democratic. We should notice, however, that the restatement of discourse ethics is itself affected by avoiding the institutional issue. There is a noticeable shift in the passage from *actual* to *virtual* discourse. A "presumption" that certain institutions and decisions "would" generate "consent" if those involved "could participate" requires either interpreting mental states, in the sense of Weber's concept of *verstehen*, or the social-scientific analysis of constellations of interests, in the sense of the Marxist tradition. Neither approach is consistent with the deeper thrust of discourse ethics that implies that the formation of identity and the analysis of interests depend on public communication and dialogue. Thus, democratic legitimacy requires at the minimum establishing actual processes of discourse on the level of organization. Without this minimum, the illusion could arise that we can speak about democratic legitimacy without insisting on the presence of institutions having some internal relationship (even if not that of a simple derivation of one from the other) to the procedures of discursive validation and justification. While the requirements of valid discourse are not generally or fully satisfied by actual, empirical, institutionalized discourse, there is nevertheless an intrinsic connection between the counterfactual norms and actual processes of discourse. We have argued that discourse is always actual discourse, and the norms of discourse are available only to participants in empirical, institutionalized discourse.

The idea of institutionalizing discourse is hardly absent from Habermas's overall conception, and it is useful to examine the place of modern formal democracy in this context. The institutionalization of discourse refers to the existence of a "generalized and obligatory expectation that under definite conditions, a discourse can be carried out."⁹² Actual historical examples of social embodiments of discursive norms are understood to be variable, contingent, and precarious.⁹³ Habermas includes three such examples: the beginning of philosophy in Athens, the rise of early modern experimental science, and the creation of a political public sphere in the Enlightenment and the revolutions of the seventeenth and eighteenth centuries.⁹⁴ Here we are interested only in the meaning and fate of the last example.

According to Habermas, "bourgeois" democracy claimed to link "all politically consequential processes of decision to legally guaranteed discursive will formation of the citizen public."⁹⁵ This claim indicates that the idea of a valid consensus penetrates the structure of rule itself in "the form of democratization."⁹⁶ Thus, at least for the moment of genesis of modern parliamentary democracy, Habermas recognizes the internal link between legitimation and rule that we have postulated. But he has also argued that, in the course of development, legitimation and rule became uncoupled. The claims of bourgeois democracy have remained (or become) a fiction (however effective for legitimation, in Weber's sense). Consequently, a deep split has developed between those who are increasingly cynical about the substance of democratic claims and normative theorists of democracy.⁹⁷ Habermas has always been critical not only of "elitism" and "realism" but also of their two antagonists: Marxist critiques of formal democracy, and normative theories of democracy. He rejects the council model as an alternative to representative democracy because it is based on a category mistake. It is worth noting, however, that, as organizational mechanisms, he by no means considers the devices of either form of democracy incompatible with the discursive model. Formal mechanisms, such as majority rule, protection of minorities, or parliamentary immunity, are potentially important political devices delimiting yet preserving discursive procedures in the face of material and temporal scarcities and a multitude of interests and identities.⁹⁸ On the other hand, direct democratic forms have a potential for increasing the participatory features of representative democracy; they need not imply a serious restriction of complexity.⁹⁹ Nevertheless, with the development of modernity, each of these models of democracy, representative and direct, enters into crisis. The extension of direct democracy runs into the "structural violence" built into those institutions that seem to exclude the introduction of genuine forms of participation. But if one may proceed to a full participatory model only discursively, the latter runs into the intractable problem of finding the means for first establishing discourse where it is excluded or deformed.

Habermas's position remains somewhat ambiguous with respect to formal, representative democracy. On the one hand (from his

early work to the present), he has presented the history of this model as a process of decline variously conceived. On the other hand, he is uncomfortable with a mere replay of the neo-Kantian dichotomy between *Sollen* (legitimacy) and *Sein* (institutions) on the level of democratic theory. He warns that a necessarily counterfactual ethical theory should not imply "radically ignoring . . . the *already operative* ideas of justice, the orientations of *already present* social movements, the *existing* forms of freedom."¹⁰⁰ While the target of this remark is the interpretation of the political implications of discourse ethics in terms of revolutionary rupture, the exact referents for the terms *justice* and *freedom* are hard to locate. It is also difficult to specify precisely how already existing social movements fit into this class of terms. Justice and freedom seem to refer to the institutions of democratic politics and to established rights. But even the latest version of Habermas's theory puts into doubt the possibility that the increase in freedom and justice in these contexts can be a matter of further institutionalization. Here Habermas depicts the great historical stages of state formation leading to the development of the modern democratic welfare state as epochs of juridification.¹⁰¹ Of these, the nineteenth-century *Rechtsstaat* and its younger contemporary, the democratic constitutional state, are initially presented as guaranteeing freedoms (or rights) in the face of the modern state, while their common successor, the twentieth-century democratic welfare state, is presented as ambiguous from the point of view of freedom, because its "very means of guaranteeing freedom . . . endangers the freedom of the beneficiaries."¹⁰² Habermas has in mind the negative features of the welfare state that involve surveillance, control, and the bureaucratization of everyday life. From this point of view, however, the nineteenth-century democratic constitutional state becomes ambiguous as well. While Habermas insists that the principles of participatory rights remain (unlike the very principles of the welfare state) "unambiguously freedom-guaranteeing," the organization (institutionalization) of these rights is seen as already bureaucratic. Thus, "the possibility of spontaneous opinion formation and discursive will formation" are considerably restricted "through segmentation of the voter's role, through competition of leadership elites, through vertical opinion formation in bureau-

cratically encrusted party apparatuses, through autonomized parliamentary bodies, through powerful communication networks, and the like."¹⁰³

To proceed from the side of contemporary political institutions to locate the necessary minimum for democratic legitimacy thus seems quixotic. Rather than appearing as instances of actual discourses, these institutions seem to reduce the principles of democratic legitimacy to their counterfactual status. The standards of discourse ethics seem to lift the democratic veil off the political practices of mass democracies, rather than finding institutional supports in them.

It might be objected that the civil and political rights established outside the state sphere do represent institutionalizations of freedom and justice. Indeed, if one proceeds from the standpoint of civil society rather than that of the political system, a way beyond the antinomy of normative development and institutional decline opens up.¹⁰⁴ More specifically, the conception of rights could lead to a theory of civil society as the minimum framework for institutionalizing discourse ethics.

We claimed earlier that both the principle of democratic legitimacy and the principle of rights can be justified by discourse ethics. In the first place, it should be clear that public, democratic discourse has a role to play in generating and maintaining rights. We have already shown that, as a principle of democratic legitimacy, discourse ethics implies that the generation of law and power must be referred back to the democratic participation of all concerned in order to be considered legitimate. In the case of basic rights, to the extent that they are to be institutionalized, our thesis is that they require enactment through discursive processes as well as opportunities for participation in public discourses. The discursive process is, in other words, duplicated on the level of the constitutional origin of rights and on the level of the renewed argumentation and participation necessary for their sustenance. We shall argue that this second dimension depends on the chances to assemble, associate, and articulate positions publicly on the terrain of civil society.

At issue is the relationship between asserting rights and legalizing rights. While rights in the modern sense presuppose the positivization of law, they cannot be reduced to positive law. The rights

that we have can become effective and stable only when embodied in constitutions and legal codes. But such rights are necessarily paradoxical: Formally they represent a voluntary self-limitation of state power that could be annulled by a legislative act (in England, for example, 51 percent of parliament could abolish any right). But rights do not simply emerge, nor are they sustained or expanded as mere acts of positive legislation. What the state could take back on the legal-constitutional level, it ought not take back from a normative point of view, and it cannot take back if certain social-historical conditions are fulfilled.

Discourse ethics points to the conditions of possibility of this *cannot* on the sociological side and to the ground of this *ought* on the philosophical side. First, the survival and expansion of basic rights depend very much on vital political cultures that allow for and even promote the mobilization of concerned constituencies on behalf of rights. The claims of individuals to protections by basic rights would be hollow if they could not be backed up by public discussion, assembly, and, in many cases, social movements practicing civil disobedience. The principle of rights thus requires the possibility of participation in societal public spaces. Discourse ethics has obvious relevance here, for it implies an institutionalization of discourses in civil society that is crucial for positing and defending rights.

Second, discourse ethics not only points to the sociological process of creating and expanding rights but also provides part of the basis for a theory of rights. It gives us arguments for having fundamental rights, and it helps us isolate the central clusters of rights among them. Indeed, the core of the very meaning of basic rights entails the "right" to assert rights on the part of the citizenry. This "right" is, of course, neither a particular positive right nor a negative liberty, but rather a *political* principle involving a new and active relation on the part of citizens to a public sphere that is itself located within civil society.¹⁰⁵ We believe that the metanorms of discourse ethics can justify the principle of the right to assert rights, and hence the idea of rights itself.

This claim rests on a crucial set of distinctions that we can only summarize here. What relationship, if any, exists between the metaprinciples of discourse ethics and fundamental rights? There

are three possible ways of conceptualizing such a relationship: (a) fundamental universal rights could be presupposed by discourse ethics, but the metanorms of rational discourse would not be able on their own to supply the "ground" or principle for such rights; (b) fundamental rights could enter in as the content of a possible rational consensus; or (c) fundamental rights could be implied by the metaprinciples of discourse ethics. We shall argue that all three ways of relating discourse ethics and basic rights obtain, depending on which classes of rights one is considering. We shall take up each position in turn.

(a) Let us assume that the principles of constitutionalism include the idea that during the course of writing and amending constitutions, we arrive at (constitutional) rights by coming to agreement. Nevertheless the idea of rights in the strong sense cannot be reduced to constitutional legal positivity.¹⁰⁶ They are in a crucial sense always antecedent to positive law, even to positive higher law (constitutions). Yet we need not fall back into natural rights dogma to account for the antecedent character of rights. Instead, we can link the idea of rights to the metaconditions of discourse: Without individuals whose autonomy is guaranteed by rights, the demanding preconditions of rational discourse (against which any empirical agreement can be measured) cannot in principle be met. Accordingly, rights can be interpreted as normative requirements for participation in practical discourses about society.¹⁰⁷ If our individual and collective autonomy were not secured by rights, our participation in discourses could not be protected from constraints whose absence can never be taken for granted by the individual, even if these constraints are arrived at democratically. Civil and political rights constitute the preconditions for an institutionalized discourse claiming to be democratic. In other words, both rights and democratic discussion presuppose autonomous individuals able to assert moral norms or values as possible candidates for a rational consensus. In this sense, the metaprinciples of rational discourse "demand" the principle of basic rights.

This argument needs to be unpacked, however. We are assuming that behind the idea of basic rights is a "substantive moral principle," the principle of autonomy.¹⁰⁸ On the one side, there is a conception of autonomy that flows directly from discourse ethics

(grounded in the theory of universal pragmatics). In this context, autonomy means the ability to take on dialogue roles, to engage reciprocally in ideal role taking, to achieve reflexivity vis-à-vis these roles, and to articulate one's own needs, interests, and values in order to determine their universalizability and arrive at a common agreement on general norms.¹⁰⁹ But this conception of autonomy is not enough to encompass what comes to mind when one speaks of the antecedent character of basic rights or the autonomous individual as the subject of basic rights. The communications-theoretic conception of autonomy establishes a link between the metaprinciples of discourse (symmetric reciprocity) and a conception of the individual who is to participate in such a discourse. But this conception is nonetheless parasitic on a more complex principle of autonomy that is not derivable from the metaprinciples of rational discourse. The concept of autonomy we have in mind here has two components that attach to the abstract and situated dimensions of personality, respectively. The first can be construed as the principle of self-determination and individual choice along Kantian lines that is presupposed by the abstract and general conception of the rights-bearing person. The second refers to the ability to construct, revise, and pursue one's own life plan (Mill, Rawls); this component attaches to the idea of unique personality and to the dynamics of individual identity formation. One or the other aspect of this dualistic conception of autonomy has always been invoked as the core principle of liberty or inviolate personality underlying the liberal idea of basic individual rights. It constitutes a moral principle irreducible to the metanorms of rational discourse that underlie the idea of democratic legitimacy, although, as indicated above, discourse ethics always has a role to play in the process of asserting rights. In our view, the dualistic conception of autonomy comprises the "truth content" of liberal arguments for fundamental rights based on a conception of freedom as negative liberty or the free self-development of unique, inviolate personalities.

It is not necessary, however, to saddle the ideas of negative liberty and inviolate personality with atomistic, asocial conceptions of the individual or to establish the paradigm of property rights as the conceptual heart of the rights that protect individual autonomy. We have already noted the fragility of individual identity due to the fact that individuation occurs in complex, intersubjective, commu-

nicative processes of interaction. Individual identities are vulnerable because they are never set once and for all. One develops one's identity throughout one's life, and it is dependent on the dynamics of mutual recognition for its stability and self-esteem. Thus, the set of rights that articulate respect for the dignity, uniqueness, and inviolability of socialized individuals (liberty, personality, and privacy rights) are indispensable guarantees of autonomy in both of the above senses. While we may need some form of property rights (to our homes, personal possessions, etc.) in order to be able to concretize our negative liberty and to express our personality, it is only on the untenable assumption of possessive individualism that negative liberty, inviolate personality, and property in the economic sense become equated. In short, property rights, suitably reduced, may be one among many sets of rights we may need, but they are not the conceptual core of the idea of autonomy.

Thus, the principles of symmetric reciprocity comprise the metanorms of practical dialogue, while core aspects of the principle of autonomy constitute the metanorm underlying the conception of the individual who is to participate in such a dialogue. Accordingly, there is a sense in which an important dimension of rights involves negative liberties and personality rights that do not flow directly from discourse ethics.

(b) As Albrecht Wellmer has noted, the dimension of negative liberty that is bound up with determinations of the type and structure of property rights, and with market relations, can be linked to discourse ethics on the second model mentioned above, that is, on the level of content. In other words, "the delegation of steering functions to the market—as a sphere of negative freedom—can be seen as at least potentially resulting from—and being limited by—a democratic process of decision making. This kind of legitimation of a sphere of "strategic" economic action is the one which is built into Habermas's theory of communicative action."¹¹⁰ The same holds true for what have come to be called "social rights" or matters of redistributive justice. Here, too, the precise range and variety of social rights we want to accord one another would have to enter into a discourse on the level of content, although we could of course agree to construe these as basic liberties. As such, property rights and social rights can be the content of a democratic discussion. They do not stand as external limits to it.

(c) There is a third class of rights that mediates between autonomy and democratic legitimacy: the rights of communication (speech, assembly, association, expression, and all citizenship rights). It is our contention that this class of rights is implied by discourse ethics; that is, they have the structure of basic rights (they can be conceived of as antecedent to and inviolable by any democratic consensus), but insofar as they are the conditions of possibility of any consensus claiming to be legitimate, they can be read off directly from the principles of symmetric reciprocity underlying the idea of discourse ethics itself. This class of rights is constitutive of discourse. These rights enter in neither as possible contents of a discussion (they could not be rejected without violating the procedural principles of discourse) nor as limits to the reach of a possible discussion, but rather as the constitutive principles of discussion itself. Needless to say, we argue that these rights institutionalize the public spaces within civil society in which democratic legitimacy is generated.

We can now make sense of the possible opposition between rights and democracy that haunts liberal and democratic political theory. Even if rights are required for the very conception of democratic discourse, it is nonetheless possible for there to be conflict between democratic decisions and rights of communication and between democracy and rights of autonomy. Are these conflicts on the level of principle, or are they conflicts between the ways two different but interdependent principles are institutionalized? We believe that the latter, not the former, is the case. This claim is based on our attempt to reinterpret the core idea of basic rights in terms of the idea of autonomy and the democratic principle of the "right to have rights." This reinterpretation involves the following steps. First, we sever the idea of autonomy from the unnecessary baggage of anthropological assumptions of atomistic, asocial individuals. Second, we free it from the ideology of possessive individualism in which property appears as the paradigm of all rights and of negative liberty itself. Certainly the "communitarian" insight that individuation occurs through socialization and participation in the culture, traditions, and institutions of society and that individual and collective identities emerge together through complex processes of communicative interaction does nothing to diminish the claims of individual autonomy, the principle of negative liberty, or the

idea of fundamental rights. Third, we explain a key complex of rights in terms of the metanorms of discourse ethics itself, namely the rights to communication that are the *sine qua non* for the principle of democratic legitimacy to find an institutional locus. Fourth, we argue that civil and political society are constituted by these basic sets of rights and provide for their institutionalization. Finally, we argue that the idea of the right to have rights is a democratic political principle involving the active participation of individuals in the institutionalized public spheres of civil and political society and also in noninstitutionalized public spheres that emerge in the milieu of social movements. The assertion of rights is thus seen as a political act, even if its thrust is, in part, to establish a terrain of individual autonomy with respect to which democratic decision making must be self-limiting. These steps greatly diminish the distance between rights-oriented liberal theories and participatory democratic theories.

Empirical discourse can violate both the communicative preconditions of discourse and its preconditions on the level of autonomy. From the point of view of the claims of autonomous individuals, every discourse is only empirical and always stands to be corrected. This is the most obvious case and easiest to handle theoretically. But even from the point of view of an ideal rational communication, conflict between democracy and autonomy is conceivable. We are not trying to deny this. Indeed, we began this discussion by restricting the object domain of discourse ethics to legal norms and to the legal system as a whole, insisting that a realm of autonomous judgment for the individual beyond the purview of law must be respected. Obviously an individual's judgment can come into conflict with a given political norm even when it is democratically arrived at. As Wellmer has pointed out, the demands of communicative rationality in any specific historical context will have some kind of public definition in terms of institutions, moral beliefs, public opinion, or societal norms, and these must be open to critique and revision and must leave room for dissent.¹¹¹ However, it is a mistake to construe this as an opposition between the principles of rights *tout court* and democracy.

Certain rights institutionalize the positions of moral conscience and individual judgment as a legitimate, principled standpoint from which one can challenge any empirical norm. The right to

dissent, the right to be different, the right to act on one's judgment, and privacy rights protect negative liberty and inviolate personality. Yet what is involved here is not, as Wellmer believes, a right to be irrational, but rather a right, metapolitically grounded, to be autonomous and different. Freedom of conscience and the right to particularity follow from this, but these are still rational rights. Moral conscience can then exercise these rights according to its own standards, rational or irrational. Individual autonomy would be lost in fact if we insisted on a specific way of exercising freedom of conscience or of pursuing one's particular conception of the good. But it would also be lost if in our own sphere we violated the autonomy of others.

The principles of rights and democracy, each in its own way, define the limiting conditions of what the legitimate content of an empirical consensus might be. Each provides for dissent, the first by delimiting the reach of such a consensus (to which those involved must nonetheless agree), the second by delimiting the procedural principles through which a valid consensus can be reached. Both, in other words, provide a principled reference point from which one can challenge the legitimacy of an empirical agreement.

It should be clear from what we have said so far that only some rights involve negative liberty and that the principle of rights itself is a profoundly political one. Nonetheless, there is a boundary question about the limits to the reach of democratic decision making. The specific content of rights, the norms agreed upon within a dialogue, and the ways in which one acts out one's negative liberty and identity goals within generally agreed-upon constraints, all impinge on this boundary question. The concepts of negative liberty, inviolate personality, and privacy set limits to the reach of democratic decision making in the name of particularity and individual autonomy and draw upon a foundation independent from that of consensus itself. While the boundary line between basic autonomy rights and democratic decision making cannot be drawn in advance of a discussion of content, it nevertheless has to be drawn in principle. There is no way in advance of a practical discourse to settle controversies over what constitutes issues of the good life and what belongs to the domain of generalizable "inter-

ests."¹¹² But we insist that once such a boundary line is drawn, those matters that are particular (my determination of and pursuit of my life plan, my identity) are then off limits to democratic decision making yet retain a moral worth—they cannot be reduced to error, egoism, interest compromise, or matters of taste—for what is at stake is the individual's identity, moral autonomy, or way of life (as a member of a particular group within a larger social whole or simply as an individual with a unique identity). Controversial identity needs can be brought into a general discussion when they impinge upon general norms of action. The first set of rights protects this domain. One can gain a certain reflexivity regarding one's projects, but it would be too much to demand that, for the sake of justice, one give up one's identity, for that would surely not be just. In other words, here the standard of "the least disruptive impact" on identity needs discussed in the previous section with respect to collective identity enters in with respect to individual identity—and provides a limit to the democratic determination of what is just—with one proviso: Those dimensions of particularity that violate either the autonomy of others or the metanorms of discourse (symmetric reciprocity) have no claim to legitimacy. In this sense, the right and the good, autonomy rights and democratic legitimacy, must be *mutually* self-limiting.

Accordingly, the two sets of rights most fundamental to the institutional existence of a fully developed civil society are those that secure the integrity, autonomy, and personality of the person and those having to do with free communication. However, all rights, including those securing moral autonomy, require discursive validation. From this point of view, it might appear that the rights of communication are the most fundamental, since they are constitutive of discourse itself and hence of the key institution of modern civil society: the public sphere. This appearance is due in part to the sociological primacy of the rights of communication.

In fact, discourse ethics logically presupposes both classes of rights. By basing rights not on an individualist ontology, as classical liberals have done, but on the theory of communicative interaction, we have strong reason to emphasize the cluster of rights of communication. It would certainly be possible to argue that other clusters of rights, such as those of privacy and suffrage, are required

to maintain this key complex. The rights to privacy and autonomy would be affirmed because of the need to produce the autonomous person without whom rational discourse would be impossible. Such would be the result of a purely Habermasian deduction of rights from discourse ethics understood as the sum total of practical philosophy.¹¹³ In our argument, however, the two sets of rights represent two pillars of ethical life that are irreducible to each other. From one we can reason to the principle of unconstrained communicative interaction; from the other, to the principle of the autonomous and unique person. Both are preconditions of actual discourse that seeks to be rational. Thus, both are required as preconditions of democratic legitimacy, even if not in the same way. From this point of view, the rights of communication point us to the legitimate domain of formulating and defending rights. The rights of personality identify the subjects who have the right to have rights.

This catalogue of rights constitutive of the public and intimate spheres of civil society is crucial for any version of rational communication, in the sense of discourse ethics. Political and socioeconomic rights are also important, if less directly so. Some version of these represents the precondition for stabilizing the public and private spheres and hence for institutionalized discourse by “mediating” between them and modern states and economies.

Habermas has recently argued that fundamental rights are realizations of the universal content of norms that are not only legitimate, in the sense of discourse ethics, but also central to the moral substance (*Sittlichkeit*) of our legal system.¹¹⁴ In the West, there has in fact been a decreasingly selective realization of the norms of such an ethics precisely to the extent that here has been an expansion of rights.¹¹⁵ Nevertheless, selectivity and one-sidedness have been the rule in exercising and interpreting rights in the modern capitalist economy and the modern state. Dividing rights somewhat roughly into liberties (*Freiheitsrechte*) and membership rights (*Teilhabe-rechte*), Habermas suggests that the latter are organized today in such a way that bureaucracies restrict actual participation and spontaneous public will formation.¹¹⁶ The former are construed, in capitalist societies, on the basis of individualistic premises. Foreshortened in these two ways, rights appear as the

prerogative of the private individual, severed from the principles of solidarity and citizenship that, on the basis of communicative interpretation, they should ideally entail. Thus, once again on the level of norms and principles, we can speak of the expansion of “justice” and “freedom,” but the institutional embodiment is presented as either primarily negative or highly selective.¹¹⁷

There is a crucial difference between these two options. Indeed, Habermas has actually taken an important step away from a thesis of institutional decline and toward a thesis of selective institutionalization. His stress on legal institutions (counterposed to legal media that have steering functions and can be disconnected from the normative substance of everyday interaction) and on selective institutionalization of the emancipatory potentials of modernity points beyond the antinomy of normative development and institutional decline. Accordingly, we argue that, even if rights and liberties are institutionalized selectively in contemporary capitalist mass democracies (i.e., if they are limited to individualistically conceived rights), they are nonetheless institutionalized. Moreover, the right to have rights has come to be recognized as a core component of democratic political culture. As Claude Lefort has shown, the symbolic significance of rights is the open possibility of fighting for the fuller realization, expansion, reinterpretation, and creation of new rights.¹¹⁸ Even if the normative development that represents the positive side of modernity is only selectively established in stable institutions, such partial achievements create the space for social movements to renew and reestablish the relevant principles in less selective ways.

Habermas has argued that social movements are the dynamic factor behind the expansion of rights. The practice of movements can culminate in the alteration “of interpretations given to publicly recognized needs or wants” and the thematization of the normative contents of everyday life institutions, making them “accessible to communication.” As far as the present is concerned, though, Habermas maintains that “the concept of ‘democratization’ is not adequate to what is at issue here, because, except in some cases, the initiatives and movements . . . are not likely to enlarge the scope for effective participation in political decisions.”¹¹⁹ It is fair to say that Habermas’s stress remains on the contribution of social move-

ments to a new political culture or new cultural hegemony, which is only connected indirectly, in the long run, and in an indeterminate fashion to democratic institutions.¹²⁰ The reason for this foreshortened assessment of the effects of social movements is that Habermas does not connect the principle of democratic legitimacy (as he does the concept of basic rights) to institutions that actually express democratic processes. Thus, he has to limit the consequences of movements to the transformation of political culture—a process that could affect the viability of rights but not lead to their expansion. The paradox of this position is that the nonselective institutionalization of basic rights required by discourse ethics is inconceivable without the generation of new democratic institutions, and this requires the contribution of social movements. The transition from a purely individualistic to a communicatively organized structure of rights is impossible on the basis of a democratized political culture alone. A new definition of rights needs new types of legislative activity. But the exclusionary mechanisms and selectivity of contemporary representative systems set key limits to the requisite broadening of basic rights. Quasi-legislation through courts can supply some of the missing elements for the democratization of rights, but, without a democratized political system, such activism has serious limits. Habermas's attachment to the thesis of the decline of mass democracy, however, opens up very little perspective for the institutionalization of democratic legitimacy. Thus, the relationship of discourse ethics to institutional analysis remains deeply antinomic in his work.

It would be unfair not to stress those dimensions of his social theory that, in some respects, point beyond the antinomy. Habermas's recent discussions of system and lifeworld point in a direction that views institutions as dualistic.¹²¹ Instead of locating normative development exclusively on the levels of personality and culture, while construing social institutions to be one-dimensional, the recent theoretical construction recognizes the dualistic features of a variety of institutions ranging from law, mass communications, and the family to the political structures of compromise. This approach makes the rigid juxtaposition of democratic legitimacy and pseudo-democratic forms of domination untenable. Rather, on this model, it becomes clear that contemporary democratic institutional forms are two-sided, that they *internalize* the

antinomy as a set of dual possibilities of development, a conclusion that in any case follows from the idea of democratic legitimacy itself. We have already argued as much in the case of basic rights. What remains at issue is how, on the level of a theory of democratic legitimacy, discourse ethics can throw light on the dual possibilities of existing democratic institutions, instead of emphasizing only their distance from the normative claims of this form of legitimacy. Our reformulation of democratic legitimacy severs discourse ethics from a form of life and even from a specific set of political institutions supposedly derivable from it. It thus breaks with any utopia of a fully transparent discourse as a form of life as well as with the corresponding disregard of all dimensions of human existence that give it its index of particularity.¹²² But we have not yet moved beyond a conception that focuses on the counterfactual character of this principle. The most paradoxical conclusion of this analysis would be to deny any possibility of deriving institutional consequences from the principle of democratic legitimacy while diagnosing existing societies as entirely undemocratic. Such a conception would amount to a discourse-theoretic reformulation of the *dialectic of enlightenment*. Our point is not that Habermas's social theory is nothing more than such a reformulation; this was true (partially) only for *Strukturwandel der Öffentlichkeit*. Rather, we are proposing that discourse ethics needs to be refined further if it is to be related adequately to the dualistic social theory emerging from *The Theory of Communicative Action*.

At issue is the notion of rational consensus. We maintain that it is the extreme formulation of this notion that leads either to an untenable utopia based on the ideal speech situation or to a restatement of the neo-Kantian dualism of *Sein* and *Sollen* in terms of ethics and institutions. We do not, however, propose to replace rational consensus with the liberal democratic notion of empirical or factual consensus. The objection that such a replacement would be impotent in the face of manipulated or enforced consensus is well taken. Nevertheless, we believe, with Wellmer, that all consensus is empirical. The parameters of discourse ethics can exist only in empirical contexts. Rationality in such contexts can be only a matter of degree. Furthermore, it is always a matter of a *process* of rationalization, in the sense of the development of the potentiality for the communicative coordination of action. Accordingly, any

doubt as to the rationality of a consensus must be regarded as a hypothesis that can be sustained only by carrying out another discourse, culminating in a "more rational" consensus, in the sense that participants recognize their previous unreason.¹²³

With this reformulation, do we commit ourselves to an overly minimalist interpretation of discourse ethics? We would, if we were to assert with Wellmer that no evaluation of the legitimacy of concrete institutions can be derived from the principle of discourse because "it can never be derived from principles what is possible in concrete historical situations."¹²⁴ This statement brings the reformulated version of the notion of consensus back into the antinomic straightjacket we have already analyzed. But Wellmer also tells us that (1) a negative procedure for criticizing existing institutions can be based on Merleau-Ponty's principle that "we cannot intend the realization of sense, only the elimination of nonsense,"¹²⁵ and (2) "the principle of discourse can give us a *direction* . . . that demands the expansion of the realm of discursive rationality till that limit which we . . . can find only in historical practice."¹²⁶ Thus, we might say in the spirit of this conception that a more minimal statement of discourse ethics actually opens up the field for its institutional implications: We can criticize existing institutions and plan new ones if we take into account both what the principle requires and what is possible in concrete historical situations. Not only the development of moral consciousness and ego identity but "the history of institutions and revolutions" belongs to the history of the unfolding of universal principles.¹²⁷

But how is concrete history to be taken into account? The Western Marxist tradition from Lukács to Adorno tended to postulate a rupture with history, implicitly assuming that emancipation has no historical basis. Yet Habermas and Wellmer have explicitly repostulated historical *continuity* without using the orthodox Marxist productivist basis to which their theoretical forebears objected.¹²⁸ In the new argument, emancipation has normative preconditions that, according to Wellmer and Habermas, exist in formally democratic societies in the form of the principles of democratic legitimacy and basic rights, which have been established since the seventeenth or eighteenth centuries. But the implications of this position in relation to inherited institutions remain unclear. Indeed, Wellmer finds two strands in Habermas's work that do not

coexist very well—one stressing continuity, the other discontinuity; one linked to a revised Hegelian tradition, the other to a politically interpreted Marxian tradition.¹²⁹

The Hegelian tradition implies the theory of civil society. To adhere to it critically means to accept neither Hegel's vision of the modern state nor an unchanging view of the capitalist economic system. Nonetheless, it does mean that differentiation of a sphere of negative freedoms along with the steering mechanism of the market cannot be overcome without the massive regression of totalitarianism. The same is true for the related issue of legal universalism and formalism: In the Hegelian model, this cannot be overcome in the form of an allegedly higher, substantive form of social freedom. Preserving the autonomy of law is not possible without culturally differentiating the sphere of legality from morality, art, and science and distinguishing all of these from everyday life practice. Even a rationally organized society in such a revised Hegelian model would involve contingency, particularity, and hence the continued existence of conflict-filled social relations. Finally, emancipation would have the meaning of realizing the full potential of already institutionalized structures of universal law and morality.

But Wellmer insists that another Marxist utopia is also present in Habermas's work, involving a communication-theoretic translation of the project of a direct democratic republic of councils: "A society free of domination would be one in which collective processes of will formation have taken on the form of discursively achieved associations, without compulsion."¹³⁰ We have already accepted Wellmer's criticism of the use of the theory of communication as the constitutive framework for an anticipated utopia of this sort, and Habermas himself had abandoned such a conception by the mid-1970s. Indeed, the model cannot possibly withstand Hegel's critique of a rationalist-enlightenment concept of freedom. Yet Wellmer is equally uncomfortable with the model of civil society derived from Hegel,¹³¹ because it no longer seems to allow a clear, sharp conceptualization of the idea of a rational society and therefore of emancipation. We want to contest this last idea.

Wellmer notes the internal relationship between discourse ethics and the concept of civil society and, even more important, the link between civil society and the institutionalization of discourses in

political public spheres and parliaments. He speaks of democratic legitimacy as itself institutionalized; capitalist private property now appears as *its* limitation rather than as the fetter of the forces of production. However, the formulation of this point is somewhat ambiguous: Capitalist relations of production “block the real institutional carrying out of this organizational principle of democratic legitimacy.”¹³² In the context of this metaphor, the Marxian and Hegelian alternatives appear as restatements of the old “revolution or reform” option, and Wellmer, after all our experience with these processes, can work up little enthusiasm for either. No wonder that the Habermasian antinomy of democratic legitimacy (whose unfolding is assigned to the development of new identities and political culture) and pseudo-democratic institutions periodically returns in his work.¹³³

Our own conception of civil society, in the tradition of Tocqueville, Gramsci, Parsons, and (as we shall show) the new dualistic social theory of Habermas himself, has a chance of linking up with discourse ethics in a way that avoids an ultimately negative outcome involving the trilemma of reform, revolution, or resignation. By using a three-part model of economy, civil society, and state, we remove the almost definitional connection (in Hegel, and even more in Marx) between capitalist economy and modern civil society. By focusing on the antinomies of the institutions and the contradictory institutional development of civil society, we avoid the model of decline derived from the older Frankfurt school, the womb metaphor of Marx, and also all pluralist apologies for existing societies. By linking the notions of differentiation and democracy, we derive a model of the plurality of democracies that restores the utopian thinking that Wellmer feared lost with the Hegelian model without buying into fundamentalisms that imply either dedifferentiation or the total replacement of steering mechanisms by the communicative coordination of action.

Discourse Ethics and Civil Society

The concept of civil society we defend differs from Hegel's model in three essential respects. First, it presupposes a more differentiated social structure. Taking our cue from Gramsci and Parsons, we

postulate the differentiation of civil society not only from the state but also from the economy.¹³⁴ Our concept is neither state-centered, as was Hegel's, however ambiguously, nor economy-centered, as was Marx's. Ours is a society-centered model.¹³⁵ Second, following Tocqueville and the early Habermas, we make the public spheres of societal communication and voluntary association the central institutions of civil society. Of course, the *private*, understood as the domain of autonomous individual judgment, is also crucial to a modern civil society. Third, we conceive the institutionalization of civil society as a process that always (as in Hegel) involves a stabilization of societal institutions on the basis of rights (“abstract right”), but also one that has the immanent possibility of becoming more democratic and whose norms call for democratization.

Civil society in the historical sense is the ground of possibility of all modern political ethics, from secular natural law to discourse ethics. The latter in particular (whose forerunners reach back to the nineteenth century) would not have been possible without the institutionalization of discourse in the modern liberal public sphere. However, discourse ethics differs from all other modern political ethics (natural rights, utilitarianism, Kantian political philosophy, and even the recent neocontractarianism and neo-Aristotelianism) in that its political implications center on the normative necessity and empirical possibility of democratization in civil society. Thus, it is the only ethics that reconciles the claims of classical liberalism with radical democracy.

We accept the argument that different models of democratic organization are compatible with the discourse-ethical principle of democratic legitimacy. This compatibility need not be viewed only in terms of an opposition between direct and representative democracy. The requirements of the principle of democratic legitimacy may be fulfilled, in principle at least, by a direct democracy of councils pyramidally organized, as well as by a representative type of democracy whose delegated authorities are controlled by viable public spheres with general access and real power. But, on another axis, the principle is compatible with a federalist polity as well as one organized on centralist lines. Finally, it may even be compatible with spheres of life that are not discursively or democratically