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Article (Accepted Version)

Finlayson, James Gordon (2016) Where the right gets in: on Rawls's criticism of Habermas's conception of legitimacy. *Kantian Review*, 21 (2). pp. 161-183. ISSN 1369-4154

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## Where the Right gets in:

### On Rawls's Criticism of Habermas's Conception of Legitimacy

Many commentators have failed to identify the important issues at the heart of the debate between Habermas and Rawls. This is partly because they give undue attention to differences between their respective devices of representation, the original position and principle (U), neither of which are germane to the actual dispute. The dispute is at bottom about how best to conceive of democratic legitimacy. Rawls indicates where the dividing issues lie when he objects that Habermas's account of democratic legitimacy is comprehensive and his is confined to the political. But his argument is vitiated by a threefold ambiguity in what he means by "comprehensive doctrine." Tidying up this ambiguity helps reveal that the dispute turns on the way in which morality relates to political legitimacy. Although Habermas calls his conception of legitimate law "morally freestanding", and as such distinguishes it from Kantian and Natural Law accounts of legitimacy, it is not as freestanding from morality as he likes to present it. Habermas's mature theory contains conflicting claims about relation between morality and democratic legitimacy. So there is at least one important sense in which Rawls's charge of comprehensiveness is made to stick against Habermas's conception of democratic legitimacy, and remains unanswered.

Keywords: Habermas, Rawls, Democratic Legitimacy, Comprehensive Doctrine, Morality.

1.1. In my estimation there has been a lot of unnecessary confusion about where the issues in the dispute between Rawls and Habermas lie.<sup>1</sup> That confusion extends both to the relevant secondary literature, and to the two protagonists themselves in their respective contributions to the debate.<sup>2</sup> A considerable part of the actual debate, and of its interpretation and analysis by commentators in the scholarly literature, was derailed by the assumption that the salient point of comparison between the respective political theories of Rawls and Habermas lies in their distinct ways of operationalizing 'the moral point of view,' or in their respective 'devices of representation,' namely the Original Position and Principle (U).<sup>3</sup> But that is not where the interesting points of the debate lie, and little is to be gained from taking these as the relevant points of contrast. The interesting points of dispute concern their respective accounts of the relation between morality and legitimacy, and arbitrating that dispute can throw light on what is still a very important question in political and legal theory.

That the existing literature has been preoccupied, to the neglect of other issues, with the comparison between the Original Position and Principle U is beyond question. This is probably because Habermas himself kicks off the debate by levying three criticisms at Rawls's idea of the Original Position. He claims

i. that the rational egoists in the original position are not able to stand in for, and model, the interests of 'autonomous citizens' and understand 'the meaning of the deontological principles they are seeking' (RPUR 28);

ii. that rights 'cannot be assimilated to primary goods without forfeiting their deontological meaning' hence the device of the original position does not represent an adequate procedure for the voice of principles of justice (RPUR 29);

iii. that Rawls smuggles in substantive considerations to the original position and does not develop it in a 'strictly procedural manner.' The theorist must already anticipate some of the information that is meant to flow in later steps 'of framing the constitution, of legislation, and applying the law' which defeats the point of the veil of ignorance (RPUR).<sup>4</sup>

1.2. Let me explain why these objections miss the point. To begin with the first two objections show that Habermas tends to construe the *Theory of Justice* as a general moral theory, vying with Kant's deontological ethics and utilitarianism as a general theory of right conduct. This, in fact, is how Lawrence Kohlberg reads *Theory* and Kohlberg's work on the psychology of moral development exerted a significant influence on Habermas as he was developing Discourse Ethics.<sup>5</sup> Habermas' talk here of 'deontological principles' and 'deontological meaning' indicates that he construes *Theory of Justice* as a general moral theory. And this supposition is confirmed by Habermas's presenting Rawls' device of choosing principles in the Original Position, behind a veil of ignorance, as a rival conception of the moral standpoint to discourse ethics. No doubt Rawls himself was partly responsible for Justice as Fairness's being so interpreted. In his earlier work he was keen to present his view as Kantian, implying that the Original Position is the operationalization of the moral point of view, rather like the Formula of the Universal Law, and that Justice as Fairness can be interpreted as a general theory of right conducted.<sup>6</sup> As

Rawls later admitted: 'In *Theory* a moral doctrine of justice general in scope is not distinguished from a strictly political conception of justice' (PL, xvii).<sup>7</sup>

Anyway, the later Rawls is keen to dispel the idea that he is advancing a 'moral doctrine of justice general in scope' and to reject the view that this is an appropriate task for *political* philosophy. The phrase 'moral doctrine of justice general in scope' is an almost perfect description of Habermas's Discourse Ethics, by contrast, which is a moral theory in the sense that it is a theory of right conduct that sets out to rationally reconstruct (and to justify) the moral standpoint, which he purports to capture by principle (U). Accordingly, in Habermas's work 'justice' is equivalent to moral rightness: it is the central normative concept of the discourse theory of morality and the central phenomenon to be studied.<sup>8</sup> Principle (U), the moral principle, has universal scope, and covers the whole range of interpersonal conflicts of action that can be appropriately regulated by appeal to valid moral norms. Unlike Rawls's two principles of justice (U) is not tailored only to questions concerning the basic structure of society.

1.3. Now, thinking of the Original Position and (U) as the central points of contrast of the Habermas-Rawls debate would make interpretative sense only if the debate was one between Rawls's *Theory of Justice* construed – in my view misconstrued – as a doctrine of justice general in scope, and Discourse Ethics understood – correctly – as a deontological moral theory. That, however, gets the whole context of the debate wrong, and so deflects attention from the real issues.

This is the proper context. The Habermas-Rawls debate took place in 1995, three years after the publication of *Faktizität und Geltung* and two years after the publication of *Political Liberalism*.<sup>9</sup> The former is a theory of democratic legitimacy and the rule of law, and the latter is a defence of justice as a political conception.<sup>10</sup> (The full title of Habermas's book in English is *Between Facts and Norms: Contributions to a Theory of Law and Democracy*). The focus of the 1995 exchange is evident from the titles of their respective contributions: Habermas's 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*' and Rawls's 'Political Liberalism: Reply to Habermas.' Rawls emphasizes that the theory of Political Liberalism, which the debate was about, falls entirely in the domain of the political (RH 47). Habermas, though he has a different conception of the political to Rawls,

accepts these terms. All of which is not a knock down argument against those interpreters who construe the dispute as one between two moral theories or 'two procedures of moral thinking,' but it does constitute significant evidence against it.

1.4. The second thing to note about Habermas's opening objections is that by straightway contrasting the Original Position with Principle (U), he appears to imply that these contrasting ideas lie at the heart of the dispute.<sup>11</sup> But it should strike one as quite puzzling why Habermas would initiate a discussion of Rawls' *Political Liberalism* with criticisms aimed at the Original Position, which is not a central component of that theory. I think he does this, because, at the time of writing – as he later makes clear – he did not fully appreciate the differences between *Political Liberalism* and *Theory of Justice*. (Habermas (2011), 284.)<sup>12</sup>

1.5. Interestingly Rawls, in his Reply to Habermas, describes the difference between their respective 'devices of representation' by implication as the second and least fundamental difference between them. The first, more fundamental difference, he claims – which 'frames the second,' – is that Habermas's theory 'is comprehensive while mine is an account of the political and is limited to that' (RH 47). Rawls is right not to see the difference between Original Position and principle (U) as fundamental. As we have seen, Habermas's principle (U) is the central principle of Discourse Ethics. It is not the centrepiece of Habermas's political theory. That honour goes to what he calls the Principle of Democracy, which states:

Only those statutes may claim legitimacy [*legitime Geltung*] that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted.<sup>13</sup>

Furthermore, it is fundamental to the design of Habermas's political and legal theory that the 'principle of democracy' does not depend on, or derive from, the moral principle (U), nor indeed from any moral principle, moral theory, or any actually existing morality.

The central argument of *Between Facts and Norms* is that the principle of democracy 'derives from the interpenetration of principle (D) and the legal form.'<sup>14</sup> Principle (D) states that 'only those norms are valid that could meet with the assent of all those potentially affected, insofar as they participate in

rational discourse.<sup>15</sup> (D) is held to be a rule of practical argumentation in general, i.e. one that applies to all types of practical discourse.<sup>16</sup> It is supposedly anchored below the threshold of morality (and politics), in the deep structure of social action, and as such expresses a necessary condition of the validity of action-norms in general – political, legal and moral norms.<sup>17</sup> It is, Habermas claims, 'neutral' or 'initially indifferent vis à vis morality and law'.<sup>18</sup> This is what Habermas means when he later claims –with a nod towards Rawls's Political Liberalism – that the principle of democracy is 'morally freestanding'.<sup>19</sup>

The legal form, for its part, is a matter of institutional and empirical fact. So the structure of Habermas's theory, the relation between the three principles, reflects Habermas's view that in modern societies political legitimacy does not derive from moral norms. The principle of democracy is supposed to rationally reconstruct 'the democratic procedure for the production of law' which is the *sole* source of legitimacy in modern Western societies.<sup>20</sup> In other words, according to Habermas, the normative force (and authority) of law is *sui generis*; it is not borrowed from the normative force and authority of morality. That, he argues, is the mistake that thinkers such as Kant, Natural Law theorists, and K-O Apel make.<sup>21</sup> Rather the normative force of law is borrowed from 'the validity basis of action oriented to reaching understanding'.<sup>22</sup> This is not just an abstract theoretical point, namely a feature of Habermas's *reconstruction* of democratically legitimate law. It is also equally a feature of the actual systems of legitimate law that his theory reconstructs.

1.6. Rawls's central idea in *Political Liberalism* is to formulate and to present a political conception of justice, where what makes the conception *political* is that it is freestanding from any comprehensive moral or philosophical doctrine.<sup>23</sup> Thus, in *Political Liberalism* Rawls presents and re-constructs Justice as Fairness as a 'module, an essential constituent part that fits into and can be supported by various reasonable comprehensive doctrines' but that, importantly, is not dependent on any single comprehensive doctrine or any particular combination thereof (PL 12). A political conception also has to meet two further criteria: scope specificity – it only addresses issues of justice that apply to the basic structure; and publicity – it should also derive its content from the fundamental ideas contained in the public political culture (PL 11, 450-52). The latter condition is not fully met by the conception's being part of an

'overlapping consensus' of reasonable comprehensive doctrines, not if the overlapping consensus is thought of as a serendipitous overlap, say, like the intersection area of a Venn diagram. That may contain coincidentally shared preferences, or values whose universality arises, say, from hard wired aspects of human nature. (It might not be permissible for a liberal state to legislate on the basis of such preferences or values, merely because they are shared by all citizens. For example, it might lead to overly invasive and needlessly prescriptive laws.) Which is only to say that not everything in the overlapping consensus so conceived will be a political value; although no value that is not part of the overlapping consensus can count as a political value. Rather the values that are political, and meet the publicity condition, will be those values that form part of the overlapping consensus of reasonable doctrines, that are 'realized in and characterize political institutions', and which 'others, as free and equal citizens, might also be reasonably expected reasonably to endorse.' (PL 453 & 450)

The salient differences from *Theory* stem from the fact that the focus in the later work is not on justice *per se*, but on justice as a *political conception*, which meets the conditions stated above, and is thus apt to play a role in the determination of political legitimacy for a democratic constitutional liberal state. This is because the chief aim of the later work is to make a case for constitutional liberal democracy, i.e. for a régime in which the legitimacy of laws and policies flow from its having a liberal constitution and a democratic form of government, rather than for liberalism or democracy as such.<sup>24</sup> Crucially, both the theory provided by Rawls and the particular form of government it sets out to explain and defend have to operate, and to be made acceptable, under conditions of reasonable pluralism, which means that they can be welcomed as reasonable by free and equal citizens, whatever their comprehensive doctrine.

One consequence of his making the theory of Political Liberalism itself (not just the political régime it is a theory of) responsive to the fact of reasonable pluralism, is that Rawls has to allow that Justice as Fairness is only one among several possible political conceptions of justice (PL 450).

1.7. All this dislodges the Original Position from the central place it occupied in *Theory*.<sup>25</sup> In *Political Liberalism* it is merely one device (among others) for showing that the Principles of Justice may be endorsed by free and equal citizens in the light of principles and ideals acceptable to their common human

reason, and thus that Justice as Fairness is a political conception.<sup>26</sup> To sum up, just as principle (U) is not a central organizing idea of *Between Facts and Norms*, so the Original Position is not a central organizing idea of *Political Liberalism*, and consequently discussions of the Habermas-Rawls debate which take this as the salient contrast are not engaging the real issues. In spite of what many commentators have assumed, the heart of the dispute lies elsewhere.<sup>27</sup>

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2.1. I maintain that the Habermas-Rawls debate is in essence a dispute about the nature of legitimacy and the production of legitimate law in liberal constitutional democracies.<sup>28</sup> The central question they both raise is how a democratic liberal state can produce legitimate laws and policies, which, to put it in Habermas's terms can elicit enough quasi-voluntary compliance to law to maintain social integration, or, to put it in Rawls's terms, can evince 'stability for the right reasons' (PL xlii). But to identify the issues that divide them we need to examine the different answers they respectively give to this question, paying particular attention to areas where one theorist denies something significant that the other affirms. Doing so will allow us to zero in on two important and related sets of issues that divide them.

The first and I believe most significant is, to put it briefly and much too crudely, the question of how the moral stands to the political. In other words, what role does morality (suitably specified) play in the determination of legitimate law and policy in a liberal constitutional democracy? The second set of issues concerns how the arguments of political philosophy stand in respect to the arguments by the representative of the state, or by citizens, for a liberal constitutional democratic régime. In other words how do the reasons adduced by the political theorist in support of her theory stand with respect to the reasons offered by the state to its citizens, and by citizens to one another, in support of its power to coerce them, and of other related matters such as the extent of its reach, the appropriateness of its objects, and the nature of its implementation.



2.2. These two sets of issues are broached in the second group of criticisms that Habermas makes in RPUR, and they gradually come into focus in Rawls's response to them in RH and in Habermas's subsequent reflection on that response in RTMW. In section 2 of RPUR Habermas makes the following three criticisms: that Rawls collapses the distinction between justified acceptability and actual acceptance; that he thereby fails to do justice to the 'epistemic meaning' of his own theory; and that he reduces practical reason to instrumental reason by subordinating the political conception to the aim of securing stability (RPUR 36-7). Some of these objections are clearly based on misunderstandings.<sup>29</sup> Be that as it may, it is these objections that prompt Rawls's remark that the chief difference between his approach and Habermas's is that 'his is comprehensive, while mine is an account of the political and is limited that' (PL 47).

What exactly Rawls means by this remark is hard to discern, because he uses the concept of 'comprehensive doctrine' in at least three different senses, to mean: a) world views, religious and secular; b) actually existing moralities, or conceptions of the good; c) philosophical theories of one kind or another, including moral theories such as utilitarianism or Kantianism. Further, all of these three types of comprehensive doctrine have one feature in common, which is that they are all subject to reasonable doubt, because there are several alternatives that reasonable people might endorse. Consequently, Rawls's counterargument can be developed in at least three different ways. The way Rawls actually goes on to develop it in RH shows that the objection to Habermas he has in mind is that Discourse Theory takes too many theoretical hostages to fortune – i.e. it is 'comprehensive in sense c) – whilst Rawls's theory 'leaves philosophy as it is' (RH 49-51 & 48).

2.3. Rather than deny the accusation that his theory is 'comprehensive', Habermas defends himself by arguing that political theories have to take a stand on some philosophical questions, which, while beyond the domain of the political, nevertheless are not 'metaphysical' in any objectionable sense.<sup>30</sup> Habermas considers his own Discourse Theory to be 'post-metaphysical' in the sense that it has been purged of extravagant ontological assumptions, that it consists in defeasible hypotheses, that it begins from empirical assumptions and relates to empirical inquiry through the reconstructive method.<sup>31</sup> He takes this

tack presumably because he is cognizant of the fact that his democratic and legal theory in BFN does indeed presuppose the truth of Discourse Ethics, and some related aspects of the *Theory of Communicative Action*.

There is another reason too. Habermas believes it better to be upfront with his philosophical commitments, because he does not think that the philosopher has to respond to the fact of reasonable pluralism, that is, to the fact that his theory is open to reasonable doubt, in the same way as the legislator and the citizen do. In the political domain reasonable pluralism is a fact, and the default assumption is that it will always be so. Hence, for strategic reasons, legislators and citizens had better not saddle their political justifications of a coercible law or policy with controversial assumptions. But the same does not hold for the political philosopher. In the realm of political theory, Habermas assumes, the unforced force of the better argument will eventually prevail, and consequently his theory will either prove itself or be overturned.<sup>32</sup> In which case, Habermas thinks, there is no reason to claim, as Rawls does, that the 'citizens, not the philosophers, are to have the final word' on the truth or correctness of a political theory (RTMW 108). That would only be a relevant consideration if the task of political theorist was to draw up a blueprint of the good society in the manner of Fichte or Fourier. But by Habermas's lights political philosophy has long since given up the illusion that its task is to work out matters of substance like that. So it is not a worry for a 'post-metaphysical' theory that confines itself to the task of 'clarifying the implications of the legal institutionalization of procedures of democratic legislation' (RTMW 108). The work of the political philosopher in the theoretical domain, the work of explication, clarification and rational reconstruction, is distinct from the democratic deliberation of citizens in the political domain, or as Habermas puts it, in the formal public sphere, and it matters not, if the theorist makes use of ideas that are not political values and ideas in Rawls' narrow sense set out in 1.6 above.

2.4. Is this a good response? Yes and No. Habermas is right to claim that controversial theoretical commitments do not present the same kind of problem to the philosopher as the religious or otherwise doctrinaire commitments of a reasonable citizen of liberal constitutional democratic state engaging in political justification in the context of reasonable pluralism. And the onus here is surely on Rawls to show

that political theories must answer to the same constraints as first order political discourses of justification. That said, theoretical hostages to fortune are both philosophically and practically unwelcome, since they tend to deflect attention from the main issue. And Habermas has some very hefty ones, for example his pragmatic theory of meaning and truth, not to mention his theory of social evolution.<sup>33</sup>

2.5. So far the dispute has broached only what look like meta-theoretical questions, questions of how political philosophy is best done. Actually the term 'meta-theoretical' does not properly capture what is at issue, because one of Rawls's controversial views is that the justification of political theory is itself a practical political matter: i.e. it is the work of citizens in providing the reasons they owe to one another, and of the state in providing the reasons it owes to its citizens, in order to justify the laws and policies with which it demands compliance. But this practice, Rawls claims, the aim of which is to determine the legitimacy of a political system (and its basic structure), and to evince stability for the right reasons, is impeded when political philosophy reaches for materials beyond the domain of political values (in the sense defined in 1.6 above) and makes use of controversial, non-political ideas. So on this view, which Habermas denies, meta-theoretical controversies are also practical political ones.

That said, there is further dimension to Rawls's objection to the comprehensiveness of Habermas's theory, which touches upon an even more fundamental issue dividing them, namely the relation of morality to legitimate law, and the question of the moral content and status of legitimate law. In this case what is at issue is the extent to which, and the way in which, political legitimacy can be 'freestanding' from morality. This is a significant area of dispute. However, the point at issue is hard to pin down because the relation between morality and law in Habermas's theory is complex and somewhat diffuse.

2.6. Habermas's main argument in *Between Facts and Norms* is that principle (D) assumes 'the shape of a principle of democracy only by way of legal institutionalization' which is to say, the principle of democracy, Habermas claims, 'derives from the interpenetration of principle (D) and the legal form.'<sup>34</sup> As

we saw above, the principle of democracy is supposed to rationally reconstruct 'the democratic procedure for the production of law' which in turn is the sole source of legitimacy.<sup>35</sup> (Recall Habermas rejects the Kantian and the Natural Law view according to which the laws borrow their legitimacy from the authority of morality.<sup>36</sup>)

To understand Habermas's theory here we need to know more about what he means by the legal form.<sup>37</sup> Legitimate laws are:

- a. properly enacted according to a legally constituted process;
- b. coercible by force that is itself legitimate. (These features of the form of law give citizens two different but conjoined reasons for complying with the law: namely that it is indeed the law, and that violation of the law lead to sanctions of some kind. Habermas thinks of these as the positivity of law.) But there is more to law than that. Legitimate laws have in addition
- c. an extra-legal rationale.

This rationale consists in the various reasons and kinds of reasons — moral, ethical and pragmatic — why the law was made, and remains on the statutes. This rationale is essential to the law's legitimacy. It is because the decisions of the political system (parliaments or assemblies) are sensitive to the input of moral, ethical and pragmatic reasons that flow into the democratic-decision making body from 'civil society' – Habermas's term for the informal public sphere in which discourse flows freely, and in which citizens form their political opinions and will – that their outputs (laws and policies) in turn have a rationale that resonates with the background beliefs of the citizens and elicits widespread quasi-voluntary compliance.<sup>38</sup> It is this feature of law that attunes it to the private autonomy of citizens, by allowing them to act lawfully out of insight into its rationale, rather than out of sheer obedience to the fact that it is the law, or out of fear of sanctions they will meet if they break the law.

2.6 The point I want to focus on is that this rationale of legitimate law is made up in part by reasons of morality.<sup>39</sup> Although he allows that ethical reasons – reasons that have to do with conceptions of the good life and associated values – and pragmatic reasons play a role in politics, he is clear that moral reasons have priority.<sup>40</sup> Ethical reasons only have validity (and thus can play a role in the determination of the

legitimacy of law) within the bounds of moral permissibility. In this sense there is, what he calls, an 'absolute priority of the right over the good' and note that by 'the right' here, he means moral rightness.<sup>41</sup> Note also that this priority does not just hold in the political domain. The priority of the right (of valid moral norms) is not something that only applies to laws which people may be forced to comply with. It is not a constraint that operates just within the political domain by dint of the fact that reasonable citizens are profoundly divided by their religious, ethical and metaphysical world views, and yet must all abide by the same laws. Rather it applies outwith the political domain of legitimate law, in its recesses, in civil society at large, and in the moral realm more broadly. In other words the public reasons that are channelled from civil society into the law making procedure come already stamped with the priority of moral rightness, and the resulting laws bear the hallmarks of this input (alongside whatever features they get from the form of law itself) as features of their legitimacy.

2.7. All this leads Habermas to endorse a thesis, the full significance of which, I believe, has yet to be appreciated. I shall call it: the moral permissibility constraint or MPC for short. Habermas often observes that legitimate laws must 'harmonize with the universal principles of justice and solidarity'.<sup>42</sup> He also says that 'a legal order can be legitimate only if it does not contradict basic moral principles'.<sup>43</sup>

Actually, there appear to be two claims here, a requirement of coherence, and a prohibition on inconsistency. The former is stronger than the latter, and sits well with Habermas's functional account whereby public reasons from arenas of discourse in civil society are let in to the political system by various sluices and channels, which suggests that the claim is about the moral content of law. (The stronger claim is also implied by Habermas's criticism that Rawls's idea of a political conception lacks 'deontological meaning', insofar as it is based only on a serendipitous overlapping consensus, for that criticism suggests that by contrast Habermas's conception of legitimacy better captures the 'deontological meaning' of legitimate law.) However, understood as a coherence requirement MPC would seem to be much too strong, because there are too many legitimate laws – for example those governing which side of the road citizens should drive on – which are morally speaking neither here nor there. In such cases, unlike say laws prohibiting murder or theft, coherence with morality is not in question. Hence we should

interpret MPC negatively as being about mere consistency of law with morality: MPC impugns the legitimacy of any law that violates a valid moral norm. Recall that on Habermas's view legitimate laws elicit quasi-voluntary compliance, and enable the exercise of autonomy, but once set against morality laws cannot do either of these things. Laws that are not consistent with the demands of morality give rise to 'cognitive dissonance' and practical dilemmas (BFN 99, 350).

To be clear, MPC is not a just a theoretical requirement, and certainly not a requirement that moral philosophy's demands be satisfied by law. Rather it is a multi-dimensional requirement of consistency that has to be met within the entire system of legislation, adjudication and administration. This is because modern societies are complex and functionally differentiated entities in which the political system is 'just one action system among others' which has to be able 'to communicate through the medium of law with all the other legitimately ordered spheres of action' (BFN 302).<sup>44</sup>

2.8. Now, in addition to the direct constraint of moral permissibility, that no legitimate law may violate any valid moral norm, Habermas states that legitimate law 'must also harmonize with...ethical principles.' This is actually quite an eye-popping claim for him to make. Habermas is a pluralist about conceptions of the good. Obviously this ethical harmonization requirement cannot imply that if someone's – or some group's – ethical self-understanding conflicts with any law, then that law is not legitimate. That would make legitimacy a very scarce resource, almost impossible to achieve.

Moreover, Habermas explicitly equates conceptions of the good with religious and metaphysical world views, so such a move would be incompatible with his methodological presupposition that his theory conforms to the precepts of post-metaphysical thinking. So Habermas would be more or less contradicting himself if he held democratic legitimacy to be dependent on any particular ethical conception or values. In this case, I believe that what Habermas must mean, and what we should take him to be saying, is just that legitimate laws should aspire to garner as much support from ethical values as possible. True, this raises tricky question about whose ethics the legislators should reach out to, and whose not, and raises worries about the tyranny of the majority culture. In BFN Habermas does not go into much detail about the role of ethical reasons in the determination of legitimate law. However some of

the more obvious worries are allayed by the fact that he subscribes to the priority of the right, which in his view implies that all ethical conceptions and all ethical reasons are already operative within the bounds of moral permissibility.<sup>45</sup> Clearly then, whatever role they play in the determination of legitimate law, ethical reasons are subject to the absolute priority of morality. Recall that Habermas is not a pluralist about morality: he is an unabashed universalist: there is no scope restriction on the moral principle (or on the moral norms it validates), and the fact of pluralism (reasonable or not) in his view does not apply to morality. Even so, he holds that Discourse Ethics, along with its central principle (U), meets all the criteria for a post-metaphysical theory, which means that MPC is still in tune with his methodological self-understanding.

2.9. With MPC Habermas claims it is a necessary condition of any legitimate law that it not violate any valid moral norm. Habermas does not claim that moral permissibility is sufficient for legitimacy, in fact he denies this.<sup>46</sup> He sums up his position – presumably referring to the priority of moral rightness, and the MPC: 'law owes its legitimacy in essence to its moral contents'.<sup>47</sup>

Now one advantage of building this feature into his procedural account of democratic legitimacy, is that it explains not only why citizens are guaranteed to be treated as free and equal by law, but also why they are (and should be) protected from certain kinds of moral harm or injury.<sup>48</sup> But at the same time it raises some very tricky questions for Habermas's overall theory.

First, how does it square with Habermas's insistence that the political stands free from the moral? Habermas appears to think that such a question does not arise because (D) 'remains neutral with respect to morality and law' and because the principle of democracy is supposed to be derived from (D), together with the form of law. (This is the basis of his critique of Karl-Otto Apel, Kant and Natural Law.<sup>49</sup>) However, if it is a requirement (whether social, functional, theoretical, or all three) that legitimate law not violate any valid moral norm, then democratic legitimacy is subordinate to morality, in the sense that moral requirements set a parameter of the production of legitimate law. This holds regardless of how things stand with theoretical (reconstructive) relations between (D), the form of law, the principle of Democracy, and what Habermas calls the 'logical genesis of rights.'

It seems to me that MPC and the priority of moral rightness, as Habermas understands them, smudges the sharp line that Habermas wishes to draw between the domain of legitimate law (and the supposedly *sui generis* sources of its authority) and the normativity of morality. In short, if Habermas is serious about the MPC, and the priority of the right, as he understands these, then he must accept that the political system in its production of legitimate law does not stand free from morality. Rather, regardless of the relation that is supposed to hold between the principle of democracy, and principle (D), the moral principle (U) - that is, moral discourse and its outputs - namely all valid moral norms - constrain democratic legitimacy from within and without. To my mind this is the most important respect in which Habermas's theory is, in the final analysis, just as Rawls claims it to be, comprehensive. Yet this was not the way in Rawls understood and developed his objection in the debate with Habermas, focused as he was, largely on meta-theoretical and methodological differences. So this very significant issue was not addressed.

2.10. Habermas's only recourse here would be to argue that the Discourse Theory of Law and the conception of democratic legitimacy he puts forward in BFN is freestanding in the sense that it is not dependent on any *comprehensive* moral doctrine or *comprehensive* morality, even if, as he admits, 'law owes its legitimacy in essence to its moral contents'. Many of Habermas's defenders seem to think that such an argument can be made. I envisage three possible lines of defence.

a) The first is the one we have already discussed, namely the contention that in Discourse Ethics not a comprehensive moral doctrine because it is a post-metaphysical theory. But as we saw in 2.3 above, that means only that Habermas's theory abstains from making certain kinds of metaphysical and ontological claims, that his theory is defeasible, and proceeds from empirically assumptions by way of the reconstructive method. None of that shows that it is not a 'comprehensive moral doctrine' in any of the relevant senses, namely a), b) and c) above. On the contrary it is a controversial theory that is open to reasonable doubt by reasonable people. That theory, as we have seen Larmore charge, presupposes the truth of a secular world view, by advancing a general theory about the obsolescence of religious and



metaphysical narratives. Moreover, it is not scope restricted: it is a universal theory that applies across all domains. It does make use of ideas and theories that lie beyond the domain of political values as Rawls sees it, and hence fails to meet the publicity condition.

b) The second possible defence of Habermas is that Discourse Ethics not a comprehensive moral doctrine because is procedural and not substantive. Against this, it can be and has been argued – to my mind, convincingly – that Habermas smuggles a lot of moral substance into the procedures he reconstructs, both in principle (D) and in the pragmatic presuppositions of argumentation. However, since this line of argument has been well developed by others, I shall not pursue it here.<sup>50</sup> A more direct response is to say that, whether or not Discourse Ethics is procedural (in Habermas's sense) is beside the point. Habermas contends that no legitimate law may contradict 'moral principles' and the plural indicates that he is referring to valid moral norms, rather than principle (U). It is true that Habermas's theory prescind (allegedly) from stating what valid moral norms there are. The discourse theory of morality is procedural, Habermas claims, in that it leaves the determination of moral norms to participants themselves in actual discourses. It is not substantive in the sense that it does not offer a repertoire of norms and values. That said, Habermas does think that there are some valid moral norms.<sup>51</sup> He is not an error theorist; he is a success theorist: he holds that some candidate moral norms successfully pass the test of universalization contained in principle (U). Habermas's position is that whatever moral principles there are, and there are some, no legitimate law may contradict them.

What needs to be shown, if this line of defence is to be successful, is that by virtue of being procedural (in Habermas's sense) the discourse theory of morality is therefore not a 'comprehensive moral doctrine' in Rawls's sense. Rawls, as we have seen, uses the term 'comprehensive doctrine' in contrast to political conception. Political conceptions are scope restricted and open to justification by public reason alone. Discourse Ethics, though, is not scope restricted. Principle (U) and the norms that it validates are universal and apply to actions in all domains. So Discourse Ethics is a comprehensive moral doctrine in the sense that it is not tailored only or primarily to the basic structure.

Political conceptions, according to Rawls, have also to meet the publicity condition. Now on Habermas's account it looks like valid moral norms will meet the publicity condition. That follows already from their being universally valid. (Note that Rawls abstains on this point, because he, unlike Habermas, allows that reasonable people may disagree about morality and moral theory, and about which moral norms are universally valid.) What counts for Rawls is that a moral norm should also be a political value, i.e. it should form part of an overlapping consensus of reasonable doctrines, and in addition, it should be the case that all free and equal citizens can be reasonably expected to endorse it as a political value. The difference here is small, but important. For Habermas the acceptability (and acceptance/acceptedness) of valid moral norms is carried over intact from the moral domain into the political and legal sphere, and holds both within and without. So insofar as moral norms – on Habermas's account of morality – meet the publicity condition, they do so in the wrong way, so far as Rawls is concerned – they meet it qua universally valid moral norms – and in that sense Discourse Ethics is a comprehensive moral doctrine in sense b) above. For Rawls, by contrast, in the political domain all bets are off: all political values, whether moral or not, have to win their reasonable acceptance anew, as political values, in the political sphere from free and equal citizens.

c) Finally, it might be argued that in the process of its *Verschrankung* (interpenetration) with the form of law, somehow the comprehensive elements of morality are screened out, so that one is left with only something like what Lon Fuller called the 'inner morality of law'.<sup>52</sup> The objection rests entirely on the aptness of Fuller's phrase (the 'inner morality of law') to capture the normative feature of that Habermas is after with MPC. However, Fuller's idea is quite different. For one thing, what Habermas understands by 'moral principles' and 'valid moral norms,' and thus by the MPC, is something very different to what Fuller means by the 'inner morality of law.' What Fuller has in mind is that laws take the form of rules, that these are clear and coherent, that they are promulgated, that they are not made retrospectively etc.<sup>53</sup> Most of what Fuller calls 'the inner morality of law' is in fact captured in Habermas by what he calls 'the form of law' and by the requirement of the principle of democracy that laws be properly enacted according to a legally recognized process. It is certainly not the case, on the account Habermas's gives in

BFN, that in the process of the *Verschränkung* of principle (D) with the legal form, the universal scope of moral norms, is screened out along with the controversial and thus dubitable features of his moral theory. So the appeal to Fuller's theory is not appropriate and cannot be used to save Habermas from the objection.

2.11. It turns out, then, that Habermas theory is indeed a 'comprehensive moral and philosophical doctrine' in at least senses b) and c), a doctrine of the kind that Rawls believed political theory was to avoid. In the end, if Habermas is serious about endorsing MPC and the priority of the right (as he construes it, namely as the priority of the moral over the ethical) then he ends up endorsing a position very close to the one that he attributes to Apel, Kant, and Natural Law theorists, and which he rejects on the grounds that they make the legitimacy of the law depend on the authority of the moral.

This does not in itself resolve the debate between Habermas and Rawls in the latter's favour, although it does uncover a deep problem in Habermas's theory. If Habermas was to prevail, without radically altering his own theories, he would need to convince Rawls that Discourse Ethics (or something similar) is true, that there are some universally valid moral norms, and that such norms as there are, by that fact alone, count as political values. I doubt that Rawls would be minded to concede these points. Still, rather than insisting that his own theory is 'morally freestanding' and that the source of legitimacy is not borrowed from the moral, Habermas would have been better off pursuing a different line of argument, and merely countering that Rawls conceives the boundaries of the political too narrowly and too impermeably. Against the charge that his theory was comprehensive in sense c), Habermas, as we saw, replied that Rawls has weightier philosophical commitments than he is prepared to admit: 'Political theory' as Habermas puts it 'cannot move entirely in the domain of the political and steer clear of ... philosophical controversies.' (MW 93) Habermas could make, and in my view probably should have made, a similar argument against the charge that Discourse Theory is comprehensive in sense b): namely that the domain of the political and of democratically legitimate law is inevitably entangled in morality, understood as the actually existing moral practice that Discourse Ethics claims to reconstruct, and hence cannot be freestanding from every 'comprehensive moral doctrine' a Rawls claims.<sup>54</sup>

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<sup>1</sup> The exchange of views took place in *Journal of Philosophy*, 1995. Habermas's reply to Rawls' 'Reply' appeared in *The Inclusion of the Other: Studies in Political Theory* (Cambridge: Polity, 2005 [1999]), 75-104; and was also republished in Finlayson and Freyenhagen eds. (2010), 92-117. See note 4 below.

<sup>2</sup> An anonymous referee for this journal has claimed that one should not assume that two such important thinkers failed to understand one another. But that is the consensus view in the literature. It is most trenchantly expressed by Christopher McMahon, (2002). It was the near unanimous view of a panel of Cambridge political philosophers including Onora O'Neill and Andrew Kuper. Skinner et. al. (2002). Joseph Heath in a recent article remarks on the 'relatively low level of philosophical engagement between the two thinkers' and A. S. Laden has claimed that Rawls and Habermas 'end up talking past one another'. Heath (2011), 117 and Laden (2011), 135. Jonathan Wolf (2008) described the debate as 'an exchange that other readers have felt to be a somewhat embarrassing failure of two of the greatest contemporary minds to meet.' Habermas has also been frank enough to acknowledge that he did not initially grasp the 'true significance' of Political Liberalism. Habermas, (2011) 284.

<sup>3</sup> Rawls claims that there are two main differences between him and Habermas. The first is the role of their respective 'devices of representation.' The second and 'more fundamental difference' is that Habermas's position is comprehensive and his is not. PL, 132.

<sup>4</sup> In this paper I use the following abbreviations. Habermas: RPUR - 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's *Political Liberalism*'; RTMW - "'Reasonable" versus "True". Or the Morality of Worldviews'; BFN - *Between Facts and Norms*; TIO - *The Inclusion of the Other*; JA - *Justification and Application*. Rawls: TJ - *Theory of Justice*; PL - *Political Liberalism*; RH - 'Reply to Habermas.'

<sup>5</sup> See for example MCCA, 122. Kohlberg (1981), 197. Kohlberg was not alone in interpreting Rawls's Justice as Fairness as general theory of right conduct. Michael Sandel also did. See Sandel (1982), 1-15, 54, 64, 175-83.

<sup>6</sup> Take for example the following passage: 'The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative.' TJ 256.

<sup>7</sup> Habermas not only construes *Theory* as a doctrine of justice general in scope, he takes 'justice' to be equivalent with moral rightness. (See Finlayson and Freyehagen eds. (2011), 4.) This shows that he, like Kohlberg, takes *Theory* to contain a general moral theory.

<sup>8</sup> See for example MCCA, 180: 'This moral point of view comes about when the social world is moralized from the hypothetical attitude of a participant in argumentation... This deontological abstraction separates out issues of justice from issues of the good life.' See also MCCA, xii, 200; TIO 28f; and especially, Habermas (1989-90: 32-52). In *Justification and Application*, where Habermas introduces the distinction between morality and ethics, he notes that Discourse Ethics would be more properly called the discourse theory of morality. JA, 2.

<sup>9</sup> Habermas 1995b and Rawls 1995. Reprinted in Finlayson and Freyenhagen eds. (2011), 25-45 & 46-91.

<sup>10</sup> Habermas, (1992) and (1996).

<sup>11</sup> This may explain why so much of the literature focused on the contrast between the original position and principle (U). A representative sample of the literature that endorses the interpretation I reject, includes McCarthy (1994); J Donald Moon (1995); McMahon, (2002); Skinner et. al. (2002); and Nussbaum, (2003), Bankovsky (2012).

<sup>12</sup> It also might be that Habermas's focus is at this point still on the general issue of the normative grounds of Rawls' theory, how it justifies its content.

<sup>13</sup> BFN, 110/FG, 141. 'The principle of democracy is what then confers legitimating force on the legislative process.' BFN, 121.

<sup>14</sup> BFN, 122-123. The nature of the alleged 'interpenetration [Verschränkung]' and consequent 'derivation' is unclear to me. It is not a logical derivation but what Habermas calls a 'reconstruction' of a '*logical genesis of rights*'.

<sup>15</sup> BFN, 107, 127, 458/FG, 138, 161. Note that (D) says that amenability to consensus in (an ideally prosecuted) discourse is a necessary but not a sufficient condition of the validity of any norm. Both (D) and the principle of democracy differ from the moral principle (U) which has the logical form of a bi-conditional and gives the necessary and sufficient conditions of the validity of moral norms. See Konrad Ott (1996), and especially Lumer (1997).

<sup>16</sup> MCCA 66.

<sup>17</sup> Habermas writes, 'I understand 'action norms' as temporally, socially and substantively generalized behavioural expectations.' BFN, 107.

<sup>18</sup> BFN, 107, 121.

<sup>19</sup> BNR, 80.

<sup>20</sup> Habermas, BFN, 448. 'Legitimacy' for Habermas is a technical term applying to the social acceptability of law and policy, and the grounds of that social acceptability.

<sup>21</sup> Habermas, BFN, 103-105 & 104-5; BNR, 78.

<sup>22</sup> BFN 297.

<sup>23</sup> See, for example, PL, xx-ii, xxixf, xliiif, xlvif, 10-5, 154-8.

<sup>24</sup> See Dreben (2003); Talisse (2001); Laden (2011); Langvatn (2013).

<sup>25</sup> In TJ, depending on how it was interpreted, it formed a premise of the argument for Justice as Fairness, or it was a heuristic device used to highlight the kinds of reasons supporting Rawls's two Principles of Justice.

<sup>26</sup> On this see Scanlon (2003).

<sup>27</sup> Refer to note 9 above for a sample of literature by commentators hold the position I am arguing against.

<sup>28</sup> Fabian Freyenhagen and I have argued for this in Finlayson and Freyenhagen (eds.) (2011).

<sup>29</sup> For example Habermas assumes that Rawls is indifferent to the truth of Political Liberalism, and is advancing a non-cognitivist theory that does not aspire to truth, whereas Rawls is rather making his theory prescind from taking a stance on such sideways-on questions. Habermas also mistakenly thinks that the justification of the political conception being offered in PL is the merely instrumental one that it is the best means of securing stability (RPUR 36).

<sup>30</sup> Rawls's original article on which chapter 1 of *Political Liberalism* was based was called 'Political, not Metaphysical.' Rawls (1985).

<sup>31</sup> See Habermas PT. See also Yates (2011). Habermas's term 'post-metaphysical' is, as Lorenz B. Puntel has argued, used not with the implication that his theory eschews 'everything that has been called metaphysics' but that it avoids the mistakes of what Habermas calls 'metaphysics'. These include the priority of the one over the many; first philosophy; foundationalist epistemology. But the most important implication of this methodological self-understanding for Habermas's political theory is that, as Charles Larmore nicely put it: 'The normative foundations of the modern liberal-democratic state must consist in procedural principles of justice that do not presuppose the validity of controversial ideas of the good life.' Larmore (1995) 59.

<sup>32</sup> Note that this is the major point of disagreement between Habermas and Larmore. The salient feature of our experience as moderns, Larmore argues, 'does not lie in the demise of metaphysical and religious worldviews' but in our acknowledgement 'that reasonable disagreement about the nature of the good life and even about the philosophical foundations of morality is not a passing phenomenon, but rather is the situation we should expect.' Larmore (1995) 63.

<sup>33</sup> Joseph Heath argues that Habermas might more profitably have pursued a different line of defence: namely that, as ‘weakly transcendental,’ Discourse Theory also counts as ‘political’ in Rawls’s sense c). Heath argues thus because he, along with Rainer Forst, thinks (D) to be platitudinous, in that it claims little more than that norms must be justifiable. (Heath, 2011; Forst, 1999.) That is indeed a possible line of defence, but I think Habermas was wise not to take it. Not because of his wider views about the relation of political theory to politics proper, but because one of the hallmarks of a ‘comprehensive doctrine’ as Rawls understands it is that a reasonable person can doubt it. And a reasonable person might doubt, for example, that (D) is a platitude, especially given its putative role as a premise of the derivation of the much more weighty moral principle (U). They might suspect, as Charles Larmore and Seyla Benhabib do, that (D) itself either is a moral principle, or rests on antecedent moral principles. (See Larmore, 1995, 66-7, and Benhabib, 1990, 345.) Or they might doubt that it is a correct reconstruction of what it means to justify a norm. Or they might doubt that the democratic principle follows from the interpenetration of (D) and the form of law. All this is eminently dubitable even by reasonable people. But if so, this would render Habermas’s theory a moral or philosophical doctrine ‘comprehensive’ in senses b) and or c).

<sup>34</sup> BFN, 122-123.

<sup>35</sup> BFN, 448.

<sup>36</sup> BFN, 65, 84, 87, 98 448-49.

<sup>37</sup> Finlayson and Freyenhagen offer a more detailed analysis of what Habermas means by ‘the legal form’ in Finlayson and Freyenhagen (eds.) (2011), 10.

<sup>38</sup> BFN, 108ff. A little further on Habermas claims that the Democratic Principle presupposes the possibility of ‘all the various kinds of justification operative in discourses (and procedurally regulated transactions) to which laws owe their legitimacy’. BFN, 110 translation amended/FG, 142.

<sup>39</sup> Habermas argues that 'matters in need of legal regulation certainly do not raise moral questions only, but also involve empirical, pragmatic and ethical aspects as well as issues concerned with the fair balancing of interests open to compromise... Unlike the clearly focused normative validity claim of moral commands, the legitimacy claim of legal norms, like the legislative practice of justification itself, is supported by different types of reasons.' BFN, 99-109, 452; TIO, 257.

<sup>40</sup> Habermas, BFN, 103, 108 & 113; FG, 64-66; 1993: 13; TIO, 42-3.

<sup>41</sup> Indeed when Habermas insists on the priority of the right over the good in his work up to and including *Between Facts and Norms* he means the priority of questions of justice (which, you will recall, he takes to be equivalent with moral rightness) over questions of the good life, the priority of moral norms over ethical values. See, for example, TIO 27-8. Habermas talks of the 'conceptual priority of the right over the good.' BNR 286. And he makes claims like the following: 'The perspective of justice and that of evaluating one's own life are not equally valid in the sense that the morally required priority of impartiality can be levelled out and reversed in favour of the ethical priority of one's particular goals in life.' BNR 287

<sup>42</sup> Habermas, BFN 99, 155.

<sup>43</sup> I take it that by 'moral principles [moralischen Grundsätzen]' Habermas means in the first instance valid moral norms. FG 137/BFN106. Later on, he makes an equivalent claim i.e., that 'legal norms... claim to be in accord with moral norms [Moralnormen], that is, not to violate them.' FG 193/BFN 155.

<sup>44</sup> One anonymous reviewer for this journal suggested that this answers my objection since it shows that the work of ensuring consistency with morality is not that of citizens or philosophers. But that was not the worry. The worry was that MPC brings Habermas's position much closer to the 'morality first' accounts of democratic legitimacy which he rejects, and of which he claims Discourse Theory is not one. And that worry holds whether or not MPC is a functional requirement of the political and legal system as a whole.

<sup>45</sup> Habermas goes on to address some of the less obvious worries in his later work on the role of religious reasons. Discussion of such questions would take us too far afield. Some of the most important work is contained in Calhoun, Mendieta and Van Antwerpen (eds.) (2013).

<sup>46</sup> Habermas, BFN 111, 452, 453, & 457.

<sup>47</sup> Habermas, BNR 279.

<sup>48</sup> I take it that MPC answers the Dworkinian objection to Habermas's theory levelled by John Mahoney (2001).

<sup>49</sup> BFN 80, 89.

<sup>50</sup> McCarthy (1993); Larmore (1995) and more recently Gledhill (2011).

<sup>51</sup> JA 90-92.

<sup>52</sup> Fuller (1969) 42.

<sup>53</sup> Fuller, (1969) 39.

<sup>54</sup> Thanks to Sorin Baiasu, Fabian Freyenhagen Lorna Finlayson, James Gledhill, Bob Talisse, John Weymark, Huw Reeves, Andrew Chitty, Michael Morris and Sarah Sawyer for helpful discussions or comments on earlier versions of this paper, and for critical comments from the anonymous reviewers for this journal.