Ascent to Freedom

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Chapter Eight

Jürgen Habermas

The welfare-state mass democracies on the Western model now face the end of a 200-year developmental process that began with the revolutionary birth of modern nation-states. We should recall this beginning if we want to understand why the welfare state has fallen on such hard times. The counterfactual content of the idea of republican autonomy, as it was developed by Rousseau and Kant, was able to triumph over its many detractors only by establishing its "headquarters" in societies constituted as nation-states. The phenomena of the territorial state, the nation, and a popular economy constituted within national borders formed a historical constellation in which the democratic process assumed a more or less convincing institutional form. And the idea that one part of a democratic society is capable of a reflexive intervention into society as a whole has, until now, been realized only in the context of nation-states. Today, developments summarized under the term "globalization" have put the entire constellation into question.

Jürgen Habermas

When we survey our lives and endeavours we soon observe that almost the whole of our actions and desires are bound up with the existence of other human beings. We see that our whole nature resembles that of the social animals…. The greater part of our knowledge and beliefs has been

communicated to us by other people through the medium of a language which others have created....

Only the individual can think, and thereby create new values for society – nay, even set up new moral standards to which the life of the community conforms. Without creative, independently thinking and judging personalities the upward development of society is unthinkable as the development of the individual personality without the nourishing soil of community.

Albert Einstein

8.1 Language and Values

Habermas' philosophy represents a general scientific and ethical awakening to the significance and implications of human language going on for the past century. Language provides both the possibility and the means of realization of human rational freedom and standards of self-reflection. Language presupposes our moral relationship with one another and makes possible communicative dialogue that can develop universal norms and mutual understanding between individuals and people and upon which one can build legitimate democracy. It points to democracy institutionalized on a planetary level transcending "the context of nation-states." It also contains the *telos* for a universal human community of mutual recognition and respect among all persons on Earth.

In his inaugural address, Habermas wrote:

It is no accident that the standards of self-reflection are exempted from the singular state of suspension in which those of all other cognitive processes require critical evaluation. They possess theoretical certainty. The human interest in autonomy and responsibility is not mere fancy, for it can be apprehended *a priori*. What raises us out of nature is the only thing whose nature we can know*: language*. Through its structure, autonomy and responsibility are posited for us. Our first sentence expresses unequivocally the intention of universal and unconstrained consensus. Taken together, autonomy and responsibility constitute the only Idea that we possess *a priori* in the sense of the philosophical

tradition…. In self-reflection knowledge for the sake of knowledge attains congruence with the interest in autonomy and responsibility. The emancipatory cognitive interest aims at the pursuit of reflection as such. (1971, p. 314)

A transformative self-awareness and process of self-transcendence of humanity is implicit within language from the beginning, an insight that Hegel had already asserted regarding the dynamics of human reason. Not only do autonomy and responsibility arise from the language but also the *telos* ("intention") toward unconstrained consensus, in other words, towards a universal human community. Our concern for knowledge is inseparably linked with our emancipatory interests in both autonomy and responsibility as well as universal community. Individual and community are linked from the beginning.

Many thinkers, we have seen, have correctly described the movement of Western thought as a movement away from traditional metaphysics toward a much greater sophistication about the grounding and limits of human knowledge derived from the success of the scientific method. The list includes not only great sociologists like August Compte and Max Weber but great philosophers such as Ludwig Wittgenstein, Martin Heidegger, and Jürgen Habermas. Careful reasoning and attention to the nature and limits of human knowledge are imperative for philosophy in our day. But there is no *a priori* reason why such careful reasoning should include a reductionist view of being human. Perhaps the opposite: for when the old metaphysical certainties die, we may be in a better position to encounter the awesome depths of existence.

Habermas expresses something of this insight when discussing the evolutionary progression of world-views from the "magical-animistic" to the "cosmologically or monotheistically conceived" views of the ancient and medieval worlds. With the advent of modern philosophy, however:

The highest principles lost their unquestionable character; religious faith and the theoretical attitude become reflective. The advance of the modern sciences and the development of moral-practical will formation were no longer prejudiced by an order that – although grounded – was posited absolutely. For the first time, the universalistic potential already contained in the rationalized world views could be set free. The unity of the world could no longer be secured objectively, through hypostizing

unifying principles (God, Being, or Nature); henceforth it could only be asserted reflectively, through the unity of reason (or through a rational organization of the world, the actualization of reason). The unity of theoretical and practical reason then became the key problem for modern world interpretations, which have lost their character *as* world views. (1979, p. 105)

With the development of free, self-reflective reasoning during the modern period, all the unquestioned assumptions or cultural metaphysical frameworks of former ages are now open for liberating examination in the light of building a unity through reason based on genuinely self-reflective and critically examined principles. However, Habermas does not mention here that the unity of the world (now in conjunction with the unity of reason) has now been demonstrated experimentally in twentieth-century physics. Universalistic potential was indeed set free during the Renaissance, but its epistemology was marred by the atomism, flawed notions of causality, and the materialism of Newtonian physics. It may be that Habermas' own thought remains weighed down by the fundamentally incorrect (reductionist) approach of philosophy under the spell of Newtonian physics.

Habermas himself has not fully appropriated the *unity in diversity* of the contemporary universe. He has rejected metaphysics in favor of a project that attempts to preserve "the unfinished project of modernity" through the articulation of the presuppositions of language and communicative rationality. He relies heavily on the empirical social sciences and philosophers of language to articulate a world grounded in modernistic empiricist assumptions that have since been challenged. Unlike reading Martin Heidegger, Emanuel Levinas, Paul Ricceur, or Ludwig Wittgenstein, Habermas' writings do not tend to illuminate the depths of existence or the truly transformative possibilities that have opened up for us under the new paradigm.

There is, therefore, a danger in the rejection of traditional metaphysics of which we need to be aware. For, as we said above, many of the ancient and medieval thinkers of the "age of metaphysics" were attempting to express the depths of the universe and our human connection with these depths. If they did not see clearly the limits of human knowledge and language concerning these things, this does not necessarily invalidate their insights or awareness of these depths. One may be directly aware of the depths of existence and still be unable to express non-metaphorically what

constitutes these depths. One may be aware of freedom and its concomitant sense of responsibility, and of the universal aspirations within us, without being able to explain the mystery of their emergence within human life.

Even the great advances by Habermas in understanding the communicative dimension that is presupposed in ordinary language are tarnished by his apparent lack of astonishment at the mysterious dimensions of the universe and our humanity that confront us at every turn. These limitations lessen the power of his ethical thought that apparently is not willing to draw on the background of depth that we are presupposing for the present inquiry. Nevertheless, Habermas makes a powerful case, demanding our attention, for the foundations of morality and law in the human communicative dimension.

He is correct when he argues that language at its heart is communicative, rather than instrumental or technical. And communicative language necessarily carries with it implicit claims to truth, truthfulness, normative rightness, and intelligibility (1998b, Ch. 1). He argues that when people enter into communicative discourse with one another, the presuppositions of the very possibility of this involve freedom to challenge any of these implicit or explicit claims made in statements by the other. Hence, the communicative situation itself (rational argumentation) involves several presuppositions for its very possibility: the equality of everyone participating in the discourse, the right of each to introduce any assertion, the freedom of each to express his attitudes, desires, etc., and freedom from internal or external coercion in the discussion (1991, pp 86-98).

The consequence is that, for Habermas, valid moral norms are not created "monologically," as Kant asserted, by one person rationally asking his or herself if the maxim of a proposed action can be universalized. Rather, valid norms are only arrived at publicly (intersubjectively) through a practical discourse. Therefore, Habermas concludes, "every valid norm has to fulfill the following condition…. *All* affected can accept the consequences and the side affects its *general* observance can be anticipated to have for the satisfaction of everyone's interests" (1991, p. 65).

Rationality, and its capacity to generate universally valid norms, is understood as a result of human interaction, of communication, rather than a capacity of individuals considered in isolation prior to their integration into communities. Hence, what we have described as the specifically human

capacities that we find in ourselves in contradistinction to our merely personal desires, needs, and inclinations are products of the human community. This is true of every aspect of our "individuation":

> Individuation, as part of life history, is an outcome of socialization. For the organism to become, with birth, a person in the full sense of this term, an act of social individuation is required, that is, integration in the *public* context of interaction of an intersubjectively shared lifeworld. It is not until the moment the symbiosis with the mother is resolved that the child enters into a world of persons who can *approach* it and talk to it. As a member of the species, as a specimen of a community of procreation, the genetically individuated child *in utero* is by no means a fully fledged person "from the very beginning." It takes entrance into the public sphere of a linguistic community for a natural creature to develop into both an individual and a person endowed with reason. (2003, pp. 34-35)

In *The Future of Human Nature,* quoted here, Habermas is considering issues such genetic engineering of fetuses in relation to issues of human rights, dignity, and autonomy. As such, the book is particularly valuable for examining the relation between our socially developed human capacity for communication and questions of inviolability or dignity, how these belong to all of us, and how they might belong in some ways to fetuses, young children, the retarded, or the insane. Throughout, he appeals to Kant in ways that resonate with our account of moral development given above:

> In its detranscendentalized version, Kant's "free will" no longer descends from the sky as a property of intelligible beings. Autonomy, rather, is a precarious achievement of finite beings who may attain something like "strength," if at all, only if they are mindful of their physical vulnerability and social dependence. If this is the "purpose" of morality, it also explains its "limits." It is the universe of possible interpersonal relations and interactions that is in need as well as capable of moral regulation. Only within this network of legitimately regulated relations of mutual recognition can human beings develop and – together with their physical integrity – maintain a personal identity. (2003, p. 34)

Despite the fact that rational freedom is "a precarious achievement of finite beings," and despite the fact that our freedom arises only through social interaction with others, our freedom is "not at our disposal." It is something that transcends the individuality of each of us and gives us the dignity attendant on being moral beings who formulate moral and legal principles through mutual interaction. "We experience our own freedom with reference to something which, by its very nature, is not at our disposal. The person, irrespective of her finiteness, knows herself to be the irreducible origin of her own actions and aspirations" (ibid. p. 58).

Our "subjective nature we experience as being something we cannot dispose over" (p. 53), in spite of the fact that it is a result of socialization, results in an inviolable dignity for the individual that must respect the aspirations and life-projects of persons because they are persons. In the development of law these two poles are balanced: the participatory development of democratic laws that require certain kinds of behavior from individuals and respect for the inviolable freedom of individual life projects.

> This is accounted for by a concept of morality where individuation and generalization interpenetrate. The authority of the first person, as expressed in specific experiences, authentic aspirations, and the initiative for responsible actions, that is, all in all, in the authorship for one's own life conduct, must not be violated even by the self-legislation of the moral community. Morality will ensure the freedom of the individual to lead his own life only if the application of generalized norms does not unreasonably lace in the scope for choosing and developing one's life-project. In the very universality of valid norms, a nonassimilative, noncoercive intersubjective communality gets expressed in view of the whole range of a reasonable variety of interests and interpretive perspectives, neither leveling out nor suppressing nor marginalizing nor excluding the voices of the others – the strangers, the dissidents, and the powerless. (Ibid. pp. 56-57)

Not only must the strangers, dissidents, and powerless be included in the communally generated norms or laws, there are compelling moral reasons to include the infirm, insane, or prelinguistic. Habermas speaks of "an ethics of the species" deriving from the anthropological universality of communicative competence but applying to those whom we identify as members of the species but who do not share this competence. This conception appears broader than that of having a potential for becoming

communicatively competent. For those with brain damage or hopeless insanity might not share this potential in any meaningful way. Nevertheless, our ethical and legal principles must be generated with respect to the species and not solely toward those who share communicative competence.

> On the other hand, the legal distinction established between the human dignity of the person, which is unconditionally valid, and the protection of the life of the embryo, which may on principle be weighted against other rights, by no means opens the way to a hopeless controversy over conflicting ethical goals. In evaluating prepersonal human life we are not dealing, as I have shown in section III, with a "good" among other goods. How we deal with human life before birth (or with human beings after death) touches on our self-understanding as members of the species. And this self-understanding as members of the species is closely interwoven with our self-understanding as moral persons. Our conceptions of – and attitude toward – prepersonal human life embed the rational morality of subjects of human rights in the stabilizing context of an ethics of the species. This context must endure if morality itself is not to start slipping. (Ibid. pp. 66-67)

"An ethics of the species" means that an ethical context surrounding human subjectivity and autonomy must be developed that protects those at the fringes of communicative competence. Our moral and legal principles begin with an internal quality (the subjectivity of free, autonomous individuals) that is not open to the objectivating attitude of the positivist. In this respect, Lon L. Fuller is right on the mark to identify the "internal morality of law" (1969) and insist that law cannot be understood, as a mere factual matter, apart from this dimension.

Habermas is correct in combating those philosophical perspectives that see human beings as having all the properties of being human from the moment of conception. To these conceptions he opposes the fact that we are, both as individuals and in our species-being, a product of the linguistic human community. Self and other arise together in mutual interdependence and equality. Nevertheless, this development of our personhood in tandem with that of others requires the interaction of society with the genetic endowment of each bodily individual. And the qualities developed in each of us are uniquely individual, our "inviolable" subjectivity that makes each of us capable of a variety of life-projects.

Human rationality itself is inseparable from these social aspects of ourselves and from the community in the sense of the social environment embraced by language. Presuppositions are embodied in the very possibility of communication that guide and limit the development of normative principles through communicative interaction. Our individual dignity and inviolability, therefore, are necessarily connected with the community that makes these possible and that develops our rational, free subjectivity. Community is necessary and hence extremely important, but the ethical autonomy that it develops in me is of equal importance.

If this development in us requires an "ethics of the species" and results in the obligation of socially constructed norms and laws to respect that free individuality in all persons, then there is no compelling reason why this moral capacity that I find in myself cannot *itself* be the source of valid norms. Indeed, for Habermas it already is in the sense that the unique dignity of each person must be recognized. If I have unique dignity, then I can demand respect from others for my rights as a person and I recognize that I must also logically respect their rights. We saw Leonard Nelson develop this idea above. I do not have to appeal to my communicative competence. I may be mute, I may be unwilling in this situation to communicate. Nevertheless, I have rights to be treated as a person and am obligated to respect the rights of others in all situations.

The starting point for recognizing my human dignity is more correctly described as we have described it in Chapter Seven above, even if it is true that the community has made possible my development as a free, moral subjectivity, as well as my development as an individual. There may be many gradations in communicative competence, and one can ask the question at what point children reach a level of communicative competence that allows us to include them into the set of those with an inviolable moral subjectivity worthy of respect by all others. For this respect is precisely what Habermas claims. In *Justification and Application*, he writes:

> Respect for a person *as* a person admits of no gradations; we respect a person as such not on account of some outstanding characteristic or other. We respect a person as such on account of his capacity to act autonomously, that is, to orient his actions to normative validity claims; we respect him solely on account of the accomplishment or quality that makes him a person. One cannot possess this constitutive capacity to a

greater or lesser degree; it is definitive of what it means to be a person as such. (1994a, p. 45)

Habermas returns again and again in his writings to the formulations of Kant. And with good reason, for Kant, as we saw in Chapters Two and Six, put his finger on many fundamental features of morality and law. These do not need to be linked to Kant's particular metaphysics of an intelligible world inaccessible to our reason or senses. But the very fact that I can identify within myself a capacity for rationally free decisions for which I am responsible gives rise to the "categorical imperative" of moral duty with all its implications. Habermas expresses his understanding of Kant as follows:

Moral convictions and norms are, as I said, situated in forms of life which are reproduced through members' communicative actions. Since individuation is achieved through the socializing mechanism of thick linguistic communication, the integrity of individuals is particularly dependent on the respect underlying their dealings with one another. This, in any case, is how we may understand the first two phrasings Kant gives of the moral principle. The "formula of ends" of the categorical imperative expresses the claim that every person is to be regarded "always at the same time as an end in himself" and "never" to be treated "simply as a means"….The "self" of this end in itself we are obliged to respect in the other person is primarily expressed in the authorship of a life guided by his own aspirations. Everybody interprets the world from his point of view, acts according to his own motives, is the source of authentic aspirations….

Kant's "formula of ends" already provides the bridge to the "formula of laws." The idea that a valid norm must be of a kind that can be generally accepted is suggested by the remarkable provision enjoining us to respect "humanity" in every single person by treating her as an end in itself: "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end." The concept of humanity obliges us to take up the "we" perspective from which we perceive one another as members of an *inclusive* community no person is excluded from.

Habermas is correct to link the linguistic capacities of the human community closely with the relation implied by the two formulations of Kant's categorical imperative that he cites in this quotation. My relation to

the other person is a function of the fact that we are members of the "inclusive" human community defined, in a fundamental way, by the fact that we are linguistic beings for whom all languages are translatable into one another and in which all languages share the same presuppositions that make communication possible.

This important analysis of language has also helped illuminate the meaning and significance of *community* for human life. As we have seen, a person is guaranteed an inviolable respect due to his or her ability to participate in communicative discourse, which, he argues, is the only source of valid norms. In terms of this source of our dignity (through our ability to communicate with one another in a discussion of possibly valid norms), we recognize that the moral (communicative) community is of extraordinary importance. In *The Future of Human Nature*, Habermas writes:

> An entirely different viewpoint emerges if we conceive of rights held by individual subjects as the mirror image of an objective legal order which obliges state authorities to observe their duties to protect weaker or helpless parts of society. This applies to the cases of protecting the life of the unborn, who are unable to protect their individual rights by themselves. This shift in perspective brings to the foreground objective principles that are embodied in the legal order as a whole. Objective right realizes and interprets the basic idea of the mutual recognition of free and equal persons who voluntarily associate with one another in order to legitimately regulate their common life through the means of positive law.
>
> From the point of view of the constitution of a political community, the vertical relations between citizens and the state are no longer privileged over the horizontal network of relations that citizens maintain with one another. (2003, pp. 76-77)

The human community in the sense of "the network of relations that citizens maintain with one another" is created through communicative language in which free and equal participants in dialogue recognize "the humanity" dwelling in each other. Democracy fosters precisely this sort of community as opposed to communities built around traditional religious or metaphysical beliefs. Habermas often terms the value-orientations of the latter "the ethical." The ethical involves cultural or personal goals built around a nexus of factors that project one's life-project or a community's historical project into a future toward the realization of culturally conditioned goals.

Habermas distinguishes this from the universal "morality" implicit in communicative language: the ethical in this sense is something that cannot be universalized but is unique to individuals and cultures (1998c, pp. 95-99).

But there is another kind of community that has developed in the world, especially since the eighteenth century: that is community based on mutual respect and protected by government institutions that treat everyone as equal before the law, everyone as having inalienable rights, and everyone as potential participants in the practical dialogue concerning what laws to make for society as a whole. This is the community at the heart of authentic democracy. Implicit in the idea of each person being capable of entering into dialogue with others concerning the creation of valid moral norms is the idea of a community of mutual respect and recognition. Habermas writes:

> A universalistic understanding of law and morality rests on the assumption that there is no definite obstacle to egalitarian interpersonal relations. Of course, our societies are marked by manifest as well as structural violence. They are impregnated by the micropower of silent repression disfigured by despotic suppression, deprivation of political rights, social disempowerment, and economic exploitation. However, we could not be scandalized by this if we did not know that these shameful conditions might *also* be *different*. The conviction that all actors, as persons, obtain the same normative status and are held to deal with one another in mutual and symmetrical recognition rests on the assumption that there is, in principle, a reversibility to interpersonal relationships. No dependence on another person must be irreversible. (2003, p. 63)

"The moral foundations of the constitutional state," for Habermas, involve creation of the moral norms of equality, freedom, and inviolability of citizens. In pluralistic societies where there is a multiplicity of ideas of the good, the place of the state is not to impose ideas of the good ("ethical" projects in their non-moral sense) on citizens but to create institutions through which citizens can participate in the creation of the law and in which citizens are free to pursue their own life projects to the same degree as everyone else.

> Cultural forms of life are bound up with systems of interpretations that explain the position of humanity in the universe and provide the "thick"

anthropological context in which the prevailing moral code is embedded. In pluralistic societies, these metaphysical or religious interpretations of the self and the world are, for good reasons, subordinated to the moral foundations of the constitutional state, which is neutral with respect to competing worldviews and commented to their peaceful coexistence. Under the condition of postmetaphysical thought, the ethical self-understanding of the species, which is inscribed in specific traditions and forms of life, no longer provides the arguments for overruling the claims of a morality presumed to be universally accepted. But this "priority of the just over the good" must not blind us to the fact that the abstract morality of reason proper to subjects of human rights is itself sustained by a prior *ethical self-understanding of the species*, which is shared by all *moral persons*. (Ibid. p. 40)

Habermas brings in a new and wider concept of the "ethical" here to help us understand the "moral foundations of the constitutional state." The dignity and inviolability of persons is initially limited to those persons who have the capacity to enter with others into communicative relations that presuppose equality, freedom, non-coercion, etc. However, the state guarantees inalienable human rights to all not only because its legitimacy requires that it provide a neutral forum for citizens to participate in the formation of the law to which they will be subject, but because all who are governed by its laws are human beings.

"Human rights," therefore, embraces a larger category than the class of people able to enter into communicative speech. These rights normally include infants, young children, the feeble elderly, and the insane. This is where Habermas' larger category of the "prior ethical self-understanding of the species" becomes applicable. We extrapolate, he argues, from the equality and respect of the communicative situation to the whole of the species, including in our respect for the dead (2003, pp. 39-40).

This idea of universal rights that a species ethics can generate, based on our "anthropological universality," shows that the notion of community need not be limited to the historical development of a particular ethnic, religious, or cultural tradition. Implicit in Habermas' notion of a species ethics and corresponding conception of law is the possibility of a *universal* human community, no longer based on particularistic characteristics like traditional communities. The universal community derives from the ability

of human beings, whatever languages they may speak, to adopt the performative attitude of persons intending to truly communicate with one another.

Our intersubjective attitude in communication enhances the solidaristic awareness of *community*: "the mutual recognition of free and equal persons." The potential for such a community has been with us since the "Axis Period" of human history but only with modern self-aware critical thought has it become a project that can be competed for all humanity (ibid. pp. 37-44).

Our human rights, including the right to a governmental and legal framework that makes this communication possible and meaningful, derive from this ability. In Habermas' philosophy we are not caught between an autonomous individuality that exists independently of society and the conformist or coercive demands of the environing community. Our individuality is formed in and through social interaction, that is, through the human interactive community within which we mature.

But this particular community is merely a unique expression of the *universal human linguistic community* through which we can recognize the dignity and inviolability of every human being. We saw above that Leonard Nelson also distinguishes the state as "a fortuitous product of nature" from the ideal of the state as a community devoted to justice and freedom, which cannot be limited to some mere territorially defined portion of humanity. Our rights as individual human beings (the humanity dwelling within each person) inevitably derive from this species community (the humanity dwelling on planet Earth). In Habermas' philosophy, this *unity in diversity* becomes one basis for a global community of democratic world law.

8.2 Explanations versus Emergent Evolutionary Abilities

Habermas has uncovered presuppositions at the heart of human language that should revolutionize our self-understanding as human beings and that contribute immensely to the philosophy of law. He sees our "inviolable dignity" as human beings as directly related to our ability to enter into communicative interaction with other persons. In doing this, he has established a *norm inherent in our human situation and independent of a possible consensus reached in communicative discourse with others.*

Habermas asserts that "respect for a person *as* a person admits of no gradations; we respect a person as such not on account of some outstanding characteristic or other. We respect a person as such on account of his capacity to act autonomously, that is, to orient his actions to normative validity claims" (1994a, p. 45). As we will see further below, he equates this respect without gradations that is owed to persons to Kant's categorical imperative that states that every person has inviolable dignity as an end in himself or herself.

It is important to emphasize that while Habermas has significantly illuminated our human situation, we should not conclude that this *explains* anything. As with my capacity to act autonomously, my ability to communicate in language is an emergent ability that can develop both in individuals and in the species. We can understand the technical structure of languages in terms of phonemes, syntax, and grammar. We can even show how language must have developed in history, but we still have not *explained* the emergence of language.

If there are specific capacities that are emerging in human beings through evolutionary and historical processes, then tracing their factual development explains nothing. The emergent capacities themselves remain awe-inspiring and full of potential for further development in ways that we may not be able to imagine. And in understanding the communicative core of language we have not "explained" human dignity but only described something of its phenomenal and conceptual environment.

In the specific terms of Habermas' thought, even though I may realize that my dignity and my sense of the inviolability of other persons is a function of the communicative core of language, this does not mean that I cannot appeal to my dignity, so to speak, in silence. I can appeal to the "humanity dwelling within me" as a ground for inviolable dignity without necessarily having to appeal to the theory of communicative competence. People everywhere have, of course, done just this, and correctly so. For our human dignity can be directly connected with the fact that we are rational, free moral beings as Kant insisted. My rational freedom, and my unique individuality, may indeed be only activated through communicative uses of language, as Habermas claims. Nevertheless, my pre-theoretical intuition remains that I am uniquely valuable simply as a person.

There is no need to draw upon some transcendental property inserted by God at the time of conception as medieval metaphysics often claimed. I may independently recognize within myself aspects of absolute value that transcend my individuality and link me with every member of the human community. Karl Marx's idea of our "species-being" had already done this, as well as the formulations of many other thinkers. Habermas' notion of communicative competence does not provide any greater explanatory ground for accounting for the mystery of human freedom and responsibility than does our appeal above to the pre-theoretical fact of this freedom that emerges within every normal self.

Habermas claims that "in its detranscendentalized version, Kant's 'free will' no longer descends from the sky as a property of intelligible beings." We may freely affirm that our genetic predisposition for language, elucidated by Noam Chomsky (1988) and others, is activated by the social context of a human community within which we grow to maturity. But this fact no more *explains* subjectivity, freedom, individuation, and moral responsibility than does Kant's idea of a "noumenal self" breaking into the phenomenal realm in the form of rational freedom.

The problem lies in the explanations and interpretations of rational freedom that never seem quite to be able to account for our pre-theoretical sense of absolute dignity and inviolability. Why should communicative competence make us *absolutely* inviolable? Why should it be thought to bind us into a human community that expresses a species dignity so profound as to respect "the humanity dwelling within each person" as Habermas puts it, following Kant? Kant takes this "absolute" quality of moral obligation as an indicator that morality links us with God (1965b, pp. 637-644). At least this transcendental solution can make some sense of the quality of absoluteness. Habermas says that "respect for a person *as* a person admits of no gradations." Is it possible to derive something like absolute inviolability from communicative competence?

If we persist in the attempt at explanation of these emergent human capacities that claims for the explanation more than it can deliver, it may be that we will miss the depth, the awe and mystery, of our human situation. Explanations explain one set of phenomena in terms of something else. But perhaps these emergent, cutting-edge human abilities cannot be so easily translated into something else without *reducing them* to this something else. This is not to say that the marvelous accomplishments of Habermas'

philosophy of language should be minimized. It is to say that his theoretical account of language cannot, without qualification, give us the inviolable dignity he claims for it, and that it puts us in danger of missing the depths of existence.

One reason for acting morally and communicatively that Habermas has given is that not doing so results in what he has called "a performative contradiction." If I argue, for example, that there are no valid moral principles, I must use communicative language to do so, which presupposes the very moral principles that my arguments deny. If I use language to manipulate someone or cheat someone, the very moral presuppositions of language that allow me to deceive this person are contradicted by my actions (1991, pp. 129-130).

But a performative contradiction is not equivalent to infinite dignity and inviolability. The mutual respect required for communicative dialogue to take place cannot without qualification be elevated to inviolability. The assumption that human rights have been "explained" here is not correct. If we are talking in philosophy of law about human dignity, human rights, or human equality, we will find that these "inalienable" aspects of our existence can be understood as deeply related to the depths and mystery of human life, in the emergent capacities that we have for love, compassion, justice, mutual respect, and nonviolence, and not only to the methodological premises of intersubjective dialogue.

We should be very clear about this. Habermas is not mistaken that the presuppositions of communicative action necessarily include recognition of persons as persons and hence point to their inviolable dignity. "The humanity dwelling within us" is indeed expressed in the presuppositions of our language and in many other dimensions of human life. Habermas has made a monumental discovery in revealing this fact. What appears missing in Habermas' work is the awe and wonder at these emergent capacities of our humanity that cannot be reduced to any naturalistic or quasi-factual explanatory framework. Language, like rational freedom, *embodies and reveals* our inviolability, it does not explain it.

This point may be generalized to modern philosophy and intellectual life in general. The modern world has been obsessed with explanation. And explanations have hitherto been largely reductionist, making it appear as if our sense of the depth and mystery of existence only exists because things

have not yet been *explained*. As Edmund Husserl understood, the fact that everything is a target of explanations from multiple points of view can lead to a corrosive skepticism and relativism. Every aspect of our humanity is subjected to sociological explanations, historical explanations, genealogical explanations, cultural explanations, anthropological explanations, biological explanations, chemical explanations, and linguistic explanations.

Explanations normally translate one set of phenomena into another, supposedly "explaining" the first. For example, Friedrich Nietzsche in the *Genealogy of Morals* argues that the Christian values of humility, kindness, love, gentleness, and compassion are explained in terms of a "slave revolt in morals" in which weak and impotent people, out of resentment for the strong, life-affirming people, inverted healthy morality and affirmed their own sickness and weakness as "good," while negating the affirmations of the strong as "evil." Jeremy Bentham and John Stuart Mill explain all human values, even altruism, in terms of the pursuit of pleasure and avoidance of pain. Karl Marx at times appears to explain all law as a manifestation of class ideology.

"Explained" very often means "explained away." According to Nietzsche, Christian morality is not the noble natural law "written," in the words of St. Paul, "on the human heart." Altruistic self-sacrifice for others is not the highest expression of noble morality, for Bentham and Mill, but simply the fact that pleasure is derived from holding these ideals. Law is not potentially the great political and social liberator of humanity, for Marx, but often appears as *nothing but* the expression of class exploitation and domination. Our obsession with explanations obscures from us the wonder and astonishment with which we should be living our lives. In this spirit we have seen Wittgenstein exclaim "Why don't we just leave explaining alone?" (1969, sec. 615). "Man has to awaken to wonder," he says, "science is a way of sending him to sleep again" (1980, p. 5). This is not *necessarily* the case for science, as we have seen in Chapters Two and Three. But science often makes it *appear* as if everything were capable of being "explained."

I believe something like this mistake has led Habermas to underestimate the power of the understanding of language and its implications for democracy that he has uncovered. His philosophy is merely an evolutionary one, predicated on "performative contradictions," not a revolutionary one predicated on absolute moral obligations deriving from

our *rational freedom oriented toward wholeness*. We saw these absolute moral obligations underlined by Kant, Marx, Gewirth, and Nelson. Democracy is an emergent, transforming, revolutionary force in human history. Its full potential can break into history with tremendous rapidity and transform our planetary nightmare of horrific suffering and death into a practical utopia of peace, freedom, justice, and prosperity. This book attempts to point out the immense potential of the democratic ideal as yet unrealized in human history. Law is a primary vehicle of this ideal.

The consequence of the transformed paradigm in twentieth-century sciences has led to a new concept of explanation that may avoid the negative consequences of the reductionist concept. In commenting on the implications of the new paradigm, Errol E. Harris writes that "explanatory procedures cannot be simply reductionist – that is, they must not seek to explain the whole in terms of the parts in their separation, but, while distinguishing the specific differences in their minutest detail, will seek the explanation of the parts, and their behavior, in the structure of the whole" (2000, p. 97). Such a transformed orientation toward explanation may mitigate the reductionist tendency in many explanatory accounts. But it remains impossible to substitute an explanatory account for existential astonishment. The world we encounter "is new each day," as Japanese Zen Master Dōgen exclaims. Or as French philosopher Gabriel Marcel puts the matter: "Existence is inseparable from a certain astonishment….metaphysical astonishment" (1971, p. 337).

Nevertheless, if our thesis is correct that we live in an emergent universe in which new capacities are emerging out of the process that are not entirely reducible to earlier states of affairs, it is possible that certain features of our humanity cannot be "explained," even within holistic terms. We find within ourselves many possibilities and many capacities. Some of these (like the sex drive) appear to be very ancient instinctual urges.

Others (like rational freedom) may well be capacities that have emerged out of a more primitive substratum that are not reducible to that substratum. I suggest that rational freedom is indeed such an emergent capacity, as is the moral dimension of human life and its institutionalization in the form of planetary democracy. This may be true of all the rare and seemly exalted qualities of our lives that appear within us mixed with a plethora of other drives, impulses, and inclinations: the capacity for genuine compassion with others, the capacity for mystical awakening to the

unsayable oneness of the cosmos, our capacity for communion with beauty, our ideals of truth and justice and freedom.

If there is cogency in these suggestions, then we can begin to approach the philosophy of law from an entirely different angle. We do not need to look for the "essence" of all law, for example, law as a mirror of God's natural law, or law as the commands of a sovereign, or law as a body of primary and secondary rules. These designations can be helpful for the understanding but they should not be confused with explanations. The meaning and function of law can be understood as emerging out of the processes of history and human evolution. What Plato thought with respect to law can be illuminating, but must be understood as part of *an evolutionary and emergent process that has changed the meaning of law* through the centuries. Our investigation reveals overlapping similarities and differences with Plato's conception, but all of these arising, nevertheless, from our universal human qualities that emerged during Plato's era.

Today law is fundamentally connected with the formal moral principles derivable directly from our human capacity for rational freedom, and, we will see, with the formal requirements for democracy that also derive from our rational freedom and moral principles. Democracy also has been evolving out of the processes of history so that democracy today has a somewhat different meaning than it did for enlightenment thinkers and its early revolutionaries. As the capacity for democracy grows in us as human beings, the meaning of democracy becomes transformed from the level of the Greek *polis* to the modern nation-state to the level of democratic world law. We do not need to look to the "intent" of the founding fathers but rather to the duty and the ideal and the transformative power of democracy that have been growing clearer since that time.

In today's philosophy of law, one of the criteria for legitimate law is sometimes identified as its "pedigree" (e.g. Hart, 1994, pp. 262-268). The laws can be traced back to a founding body or document and beyond that to another, etc. However, if the meaning of law as it emerges from our growth in autonomy and capability for democratic participatory decision-making is growing with us, then the "pedigree" of law becomes less significant than its *telos*. Similarly, if the legitimacy of government and law is connected to the extent to which these fulfill the moral demands at the heart of democratic theory (e.g. for equality, freedom, justice, and peace) then these moral demands will be seen to justify democratic world government and

delegitimize so-called democracy as it is found in capitalist societies and militarized sovereign nation-states.

The moral demands for a decent world order are emerging out of the process of human growth toward *planetary maturity*. There is much that we can do to activate and enhance that growth, as we will see, but it is important at this point to understand the principle itself. Human beings are growing as a species just as we are growing as individual persons. There is no simple criterion through which we can distinguish what is higher within us from what is lower and more primitive. Our freedom extends this far: that we are free to choose the lower and more barbaric sides of our selves. Pico della Mirandola pointed this out in his 1486 *Oration on the Dignity of Man.*

Nevertheless, these ideas of emergent evolution and genuine growth toward an ever-fuller humanity can help us make sense of much that appears not to make sense in history and philosophy. We will see that democratic world law constitutes a fulfillment of the tradition of democratic lawmaking as well as a duty implicit within our rational freedom. With this, we can better understand Habermas' discussion of our "fragile" inner autonomy that can grow within us. This autonomy is connected with the linguistic community which is its source and context. But the reason why this autonomy was not significantly discussed two thousand years ago is not because the ancients were deluded or ignorant but because the capacity for autonomy has been growing within us for twenty centuries. Today we are capable of discerning its *telos*, its direction toward ever-fuller democratic participation and community.

Language developed as an integral component of human evolution on Earth. Its immense power to give us the communicative framework of our social and ethical existence is inseparable from all aspects of our humanity that have emerged out of 4.6 billion years of evolution on this planet. As Habermas asserts, it is a manifestation of the communal nature of human existence and at the same time individuates us and makes possible ethical autonomy. But language does not supersede or exhaustively define our humanity. Our humanity is rooted in the mysterious depths of the universe, perhaps forever beyond the reach of language and knowledge.

8.3 Morality Beyond Discourse Ethics

It appears initially as if Habermas believes that moral principles require communicative discourse for their formulation and validation. If this were so, it would leave human beings in a strange situation. For where do our daily pre-theoretical intuitions of right and wrong come from? Even people who have developed beyond the conventional level of deriving moral principles uncritically from their environing community appear capable of action on the basis of universal moral principles that have not received universal consensus from all those affected. Yet Habermas claims that "every valid norm has to fulfill the following condition…. *All* affected can accept the consequences and the side affects its *general* observance can be anticipated to have for the satisfaction of everyone's interests."

Yet there are other elements in Habermas' philosophy, we have seen, that do not appear to meet, or need, this requirement. There is the *equality* of participants in communicative dialogue. This equality is the basis for the normative form taken by communicative dialogue which can be understood as the basic norm of democracy (equality of political participation). Secondly, we have seen Habermas generate a conception of "an ethics of the species," deriving from the anthropological universality of communicative competence but applying to those whom we identify as members of the species but who do not share this competence. Clearly, if there are to be universal ethical norms applicable to humanity, these must apply toward infants, young children, and senile persons as well. Hence, there must be valid norms that are decided upon through communicative discourse only potentially (as implicit in language), not actually.

In an essay directed against philosophical skepticism, Habermas writes: "[That] we, as socialized individuals, always already find ourselves within the linguistically disclosed horizon of our lifeworld implies an unquestioned closed background of intersubjectively shared convictions, proven true in practice, which makes nonsense of total doubt as to the accessibility of the world" (1998, p. 358). My suggestion is that our pre-theoretical sense of right and wrong is as much a part of this lifeworld of intersubjectively shared convictions as the fact that these are my two hands. This does not mean that we should not consciously ask ourselves if we can universalize the proposed maxims of our actions. It does mean that our socialization through the linguistic medium has led us to internalize the norms of reciprocity, mutual caring, and recognition of persons as persons.

Finally, we have seen that Habermas recognizes the "inviolability" of persons. He asserts that "respect for a person *as* a person admits of no gradations; we respect a person as such not on account of some outstanding characteristic or other. We respect a person as such on account of his capacity to act autonomously, that is, to orient his actions to normative validity claims; we respect him solely on account of the accomplishment or quality that makes him a person." Surely, our first response should be to wonder why our capacity to act autonomously should be constricted within our ability or orient our actions to normative validity claims. This appears to be a serious diminishment of the Kantian idea of autonomy.

Nevertheless, we must also ask where this respect that admits of no gradations comes from. Apparently it is presupposed in language in the sense that the other as person and as equal is presupposed in language. But why does it admit of no gradations? Habermas apparently has in mind a capacity that is available to every normal adult. But what of children? Do prelinguistic children demand a respect that admits of no gradations? Or might we perform infanticide since they have not yet reached the level that demands we respect them as persons? Habermas apparently derives his "ethics of the species" to extend the protection of human rights to such cases. But then the ethics of the species is not arrived at through communicative dialogue but apparently is an extrapolation from the pre-theoretical intuitions that are themselves connected with the "mutual recognition" that linguistic creatures intuitively have for one another.

We have seen Habermas praise Kant's formulation of "the humanity dwelling within a person" as an important insight. I submit that we are now not far from Alan Gewirth's articulation of the idea of natural rights as the presuppositions of human rational action and his idea of a universal community of rights derivative from this. Nor are we far from Kant's or Leonard Nelson's idea that there are goals inherent in our human situation that are at the same time duties. If language presupposes equality and a respect that admits of no gradations, and if language allows us to derive an ethics of the species from the communicative foundations of our lifeworld, then we already have moral principles confronting us prior to our entry into normative discourse.

If natural rights are the presuppositions of human rational action, we still need a way of extending this concept to non-rational infants, senile

persons, etc. There is no significant reason why our communicative capacities should take precedence over the traditional concept of our rational capacities. We have seen that these rational capacities for abstract thought, universalization, and the ability to distinguish the objective from the merely subjective have emerged as fundamental human capacities since the Axis Period 2500 years ago. These capacities, inherent in every normal human being (inherent as unrealized or former capacities in children and senile persons as well), are the foundation of our rational personhood, that is, about capacity for free, moral action, which in turn is the foundation of morality and human rights. The capacity for communicative discourse is integral to this to be sure.

We might want to reinterpret Kant's categorical imperative in a manner something like: "Always act only on that maxim that you can imagine as achieving universal consent in an unconstrained discourse." Nevertheless, a theory of morality that requires potential universal consensus to generate norms is worse than useless (as well as counter-intuitive) *if we must wait upon the actual discourse* before we can know the difference between right and wrong. Philosopher William Gass imagines a case where I invite a stranger to help me perform an experiment. I then knock the stranger out and proceed to bake him in my oven while I play cards, thereby ruining the experiment by overbaking the stranger. Gass writes "any ethic that does not roundly condemn my action is vicious" (in Murphy and Coleman, 1990, p. 97). An actual discourse confirmation of these immediate moral intuitions is not necessary for either knowledge or action.

As we have seen, there are often hints in Habermas' work of this autonomous capacity of persons who have internalized the presuppositions of ethical discourse to act on moral precepts they have universalized according to a Kantian categorical imperative. As normal adults who have internalized language, we are often perfectly capable of universalizing to our selves the conclusions of an imagined communicative dialogue over a proposed norm. In moral discourse, Habermas says, we adopt "the comprehensive perspective of an unlimited communication community…and together practice an ideal role taking (as understood by G. H. Mead)" (1998, p. 162).

Here the practical idealization takes two forms (1) we can adopt the perspectives of others through Mead's ideal role taking and act with reasonable moral certainty on the conclusions without having to wait until an

actual conversation occurs, and (2) since the moral universality embodied in communicative discourse implies the "unlimited communication community" of humanity (a normative discourse impossible to actualize), we can again use our ethical imagination of such a discourse to formulate universal moral imperatives without having to enter into an actual discourse.

With regard to the respect of persons that admits of no gradation, we might also wonder whether a good will is necessary to have such respect, or whether respect for persons is obvious even to persons of bad will. If a good will is necessary, how is this to be generated except through reason's reverence for the moral law as such, as Kant suggests? Habermas wants to overcome Kant's distinction between the duties of the good will and the inclinations that must be distinguished from these duties. This is a legitimate endeavor in one sense, but in another sense it appears to miss the deeper intent of Kant's distinction: to underline the capacity we have to do what our rational will tells us is right regardless of whether this requires sacrifice of happiness, pleasure, anger, hate, or other impulsions to immoral action found within all of us.

In a description of the highest stage of ethical development (stage seven discourse ethics), Habermas writes:

> The meaning of the transition from a formalistic ethics of duty to a universal ethics of speech – can be found in the fact that need interpretations are no longer assumed as given, but are drawn into the discursive formation of will. Internal nature is thereby moved into a utopian perspective; that is, at this stage internal nature may no longer be merely examined within an interpretive framework fixed by the cultural tradition in a nature like way, tested in the light of a monologically applied principle of generalization, and then split up into legitimate and illegitimate components, duties, and inclinations…. Naturally this flow of communication requires sensitivity, breaking down barriers, dependency – in short a cognitive style marked as field dependent….Autonomy that robs the ego of a communicative access to its own inner nature also signals unfreedom. Ego identity means a freedom that limits itself in the intention of reconciling – if not of identifying – worthiness with happiness. (1979, pp. 93-94)

A critical social theory and liberation ethics would indeed want to reconcile worthiness with happiness and to bring need-interpretations into discursive

will formation such that they no long remain cultural artifacts that cannot be touched by reflective examination.

Nevertheless, Habermas believes that bringing internal nature into a communicative discussion, so that need interpretations are no longer assumed as given, points forward to a utopian perspective: an integrated human being not bifurcated between needs and duties but living both a morally fulfilled existence in relation to the human community and a happy life in which needs are not in conflict with duties. There is nothing that prohibits this in the Kantian perspective so long as the insight remains (suppressed here by Habermas) that the capacity to do what is right because it is right is precisely where human dignity and autonomy lie, regardless of whether it is necessary to sacrifice happiness or inclinations under certain circumstances. If the presuppositions of language cannot bring out this insight, then we must look elsewhere for the grounding of morality.

Habermas occasionally asserts the sense of absolute obligation that attends on Kant's distinction between duty and inclinations. For example, he writes that "Moral precepts have the semantic form of categorical or unconditional imperatives. The imperative sense of these precepts can be understood as an "ought" that depends neither on subjective ends and preferences nor on the (for us) absolute goal of a good, or not misspent, way of life" (1998, pp. 191-162). However, as we have seen, it is not clear how he can justify any such ought, such as respect for human dignity, as truly *unconditional*. Without any appeal, as Kant has, to God or to some depth dimension beyond sociological or philosophical comprehension, it is difficult to see why there should be unconditional values that I would be willing to suffer or die for. My rational freedom generates a demand for this respect, but my rational freedom arises from the depths.

In Chapter Three we saw political philosopher Hannah Arendt speak of "miracles" with respect to the process of actualization of our emergent evolutionary potential. But exactly the same point can apply to the creations of human social and political life. Let us reflect on her words within this larger context:

> Every act, seen from the perspective not of the agent but of the process in whose framework it occurs and whose automatism it interrupts, is a "miracle"—that is, something which could not be expected. If it is true that action and beginning are essentially the same, it follows that a

capacity for performing miracles must likewise be within the range of human faculties. This sounds stranger than it actually is. It is in the very nature of every new beginning that it breaks into the world as an "infinite improbability," and yet it is precisely this infinite improbability which actually constitutes the very texture of everything we call real.…

Hence, it is not in the least superstitious, it is even a counsel of realism, to look for the unforeseeable and unpredictable, to be prepared for and to expect "miracles" in the political realm. And the more heavily the scales are weighted in favor of disaster, the more miraculous will the deed done in freedom appear; for it is disaster, not salvation, which always happens automatically and therefore must appear to be irresistible.

The decisive difference between the "infinite improbabilities" on which the reality of our earthly life rests and the miraculous character in those events which establish historical reality is that, in the realm of human affairs, we know the author of the "miracles." It is men who perform them – men who because they have received the twofold gift of freedom and action can establish a reality of their own. (1968, pp. 169-171)

We are creatures of language, no doubt, but our emergent human capacities are not exhausted by language. Every free human action, every establishment of something new in history, every step toward institutionalizing the absolute commands of morality in the form of authentic democracy, is a miracle against all odds. The emergent evolutionary potential of human beings reflects the miraculous quality of the universe itself and points to human beings as the creative vanguard of a truly transformed world in which global democracy has institutionalized and protected the inherent dignity of every human being. Those who extrapolate pessimistic conclusions from a bleak past record are missing something fundamental about our human situation and its extraordinary possibilities.

The deep mystery of human subjectivity, so well understood by Søren Kierkegaard, for example, remains an emergent capacity, like so much else about us, that defies reduction to language or any other phenomena. Gabriel Marcel speaks of philosophizing about our human situation as requiring a perpetual "metaphysical astonishment" (1971, p. 337). Ludwig Wittgenstein attempts to express the sense of the *unconditional imperative* of the moral ought by asserting that "Ethics, if it

is anything, is supernatural and our words will only express facts; as a teacup will only hold a teacup full of water even if I were to pour a gallon over it" (1965, p. 7). Habermas appears to miss the depths of existence that confront us on every side.

One of the great contributions of Habermas is the notion, implicit in all his work, of the possibility of a human community of mutual recognition and respect, precisely because we are all linguistic beings who are bound together, from the moment of our first sentence, into "the intention of universal and unconstrained consensus." This aspect of his work is extremely important and needs to be carried forward to a reformulation of the theoretical foundations of democracy. We carry within us the potential for actualization of a universal human community under universal democratic laws. As the following chapters will show, any universal human community must necessarily also be a community under democratic world law.

8.4 Law and Democracy

For Habermas, there is no rigid break between morality and law. Formal procedures (such as the equality of participants, the right to speak freely, etc.) can be derived from the communicative presuppositions of language that structure communicative discourse. These formal procedures may result in genuine communicative discourse that points forward toward the unconstrained consensus that constitutes valid moral norms. Similarly, democracy involves in large measure the institutionalization of formal procedures of discourse that allow the development of a political will formation that is the source of valid and legitimate positive laws. Habermas writes:

> Positive law and postconventional morality complement each other and together overlay traditional ethical life. From a normative point of view, it is easy to see that universalistically grounded moral norms are in need of supplementation….Kant already justified the transition from morality to state-sanctioned law in this way. But Kant also recognized the problem generated by the recourse to the medium of state power. Political power is not a neutral medium; its use and organization must themselves be subjected to moral constraints. The idea of a state

governed by the rule of law is the response to this demand. (2001, p. 155)

Universalistically grounded moral norms are in need of supplementation through enforceable laws in part because of the "vulnerability" of individuals in an uncertain world (ibid. p. 109). The democratic state legislates universal laws on the basis of moral, pragmatic, and ethical forms of reasoning (1998, p. 192). Yet the state itself is also subject to moral restraints. These restraints bear not only on the legitimacy of the state itself but the rational assertability of its laws (ibid. p. 121). The problem of institutionalization in the form of state power is the problem of how "the unity of practical reason can be realized in an unequivocal manner only within a network of public forms of communication and practices in which the conditions of rational collective will formation have taken on concrete institutional form" (2001, p. 17).

The organization of complex societies requires democratically legislated laws:

The political legislature decides which norms count as law, and the courts settle contexts of interpretation over the application of valid but interpretable norms in a manner at once judicious and definitive for all sides. The legal system deprives legal persons in their role of addressees of the power to define the criteria for judging between lawful and unlawful. Parliamentary legislative procedures, judicial decision making, and the doctrinal jurisprudence that precisely defines rules and systematizes decisions represent different ways that law complements morality by relieving the individual of the cognitive burdens of forming her own moral judgments. (1998, p. 115)

Valid norms legislated by a parliamentary body using proper procedures are those that deserve rationally motivated agreement and are, therefore, legitimately enforced against deviant behavior (ibid, p. 116). The coordination of society (on a morally legitimate basis) frees up citizens in dozens of ways to live their own lives by relieving them of the burden of having to make moral judgments on every aspect of the vast complexity of life. Society is coordinated through systematized decision-making and universal public laws in such a way that citizens can have guarantees of equal treatment, security, regularity of contractual outcomes, and behavioral expectations from others.

Any society calling itself a "democracy" must be morally legitimated. Its institutionalization of enforceable rules with regularized incentives as well as penalties for disobedience can be understood, not as restricting liberty in order to derive benefits of security and impartiality as Locke surmised, but as enlarging the moral autonomy of persons to a political autonomy within a "*system* of rights."

> Legitimate law is compatible only with a mode of legal coercion that does not destroy the rational motives for obeying the law: it must remain possible for everyone to obey legal norms on the basis of insight....
> The principle of democracy is what then confers legitimating force on the legislative process. The key idea is that the principle of democracy derives from the interpenetration of the discourse principle and the legal form. I understand this interpenetration as a *logical genesis of rights,* which one can reconstruct in a stepwise fashion. One begins by applying the discourse principle to the general right to liberties – a right constitutive for the legal form as such – and ends by legally institutionalizing the conditions for a discursive exercise of political autonomy. By means of this political autonomy, the private autonomy that was at first abstractly posited can retroactively assume an elaborated legal shape. Hence the principle of democracy can only appear as the heart of a *system* of rights. (1998, p. 121)

Rights are not *a priori* principles given by God that demand protection in a political social contract. Habermas is much closer to Kant's conception that the only *a priori* absolute right is freedom and all specific political rights are derivative from this within a Republican form of government. For Habermas, our moral autonomy as human beings capable of engaging in communicative dialogue (which is the basis of the unqualified respect due to each person) rationally dictates that society institutionalize this general right to liberties into a system of rights that constructs politically autonomous persons who can participate in the making and administering of the laws that govern their relationships. Personal moral autonomy has now taken "an elaborated legal shape" as political autonomy.

Just as Kant saw the social contract as an absolute moral obligation, with Republican government that institutionalized the normative force of universal law as a tremendous positive accomplishment, so Habermas sees

enforceable democratic law as citizen agreement to "legitimately regulate their common life through the means of positive law." Since the state derives from these moral foundations, it is "no longer privileged over the horizontal network of relations that citizens maintain with one another" (2003, pp. 76-77). With this understanding, we are approaching the end of the mythology of the nation-state as a demi-god within human affairs whose autonomous ravaging of the world must be unquestioningly accepted by cowed citizens who worship it as the embodiment of their national spirit.

Democracy is not understood as a product of a social contract (which is at best a useful heuristic device for reflecting on issues of government and law) but as the institutionalization of procedures of normative decision-making that constitute the legitimate basis for positive law with its systems of incentives and coercions. Among these institutionalizations must be the *creation and maintenance of a public sphere* within which large numbers of citizens can process information, debate issues, and engage in political will formation that is then authentically transmitted to lawmakers for translation into laws and policies. This sphere must be "violence-free" in Hannah Arendt's sense," Habermas says, so that it may "unleash the generative force of communicative freedom" (1998, p. 151).

In this way the input of information, debate, and deliberation reaches the level of political will formation that "enjoys a presumption of rational acceptability; democratic procedure should ground the legitimacy of law" (ibid., p. 151). Philosophers of former ages pointed to the contradictions between the unjust uses of state power and lawmaking power and the moral basis of legitimate law through the device of a "natural law" transcending human affairs that showed positive law as interest-based, violence-based, and unjust. With the advent of the modern age in which all spheres of human existence are now subject to rational examination and critical debate, the metaphysical conceptions of natural law have lost their acceptability as rational explanations of the human situation.

The rationalization of human life and society beginning with the Renaissance does not terminate, as Max Weber thought, in a loss of freedom within the "iron cage" of capitalism and state domination of individual life. Weber ignored the communicative core of rationality in favor of instrumental rationality. Legitimate power can no longer be equated with political domination (1976, pp. 180-181). Mass loyalty to the state managed though forms of manipulation of the public mind is not the source of

legitimation, which can only be secured through citizen participation in the making of laws in which they recognize their own authorship. Only the "generative force of communicative freedom" can legitimize state power and enforceable law.

> The *democratic process* bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. This is because the individual private rights cannot be adequately formulated, let alone politically implemented, if those affected have not first engaged discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for consideration of their newly interpreted needs. The procedural understanding of law thus privileges the communicative presuppositions and procedural conditions of democratic opinion- and will formation as the sole source of legitimation. The proceduralist view is just as incompatible with the Platonic idea that positive law can draw its legitimacy from a higher law as it is with the empiricist denial of any legitimacy beyond the contingency of legislative decisions. (1998, p. 450)

Metaphysical forms of the legitimacy of state power and law (traditional natural law theories) are no longer rationally compelling, and the positivist and empiricist abdication of any moral justification for the power of the state and law entirely misses the rationally justifiable, normative foundations of both state and law. Procedures become extremely important because they institutionalize the equal right to participation that is presupposed by communicative dialogue and hence prove essential in the process of democratic political will formation. Democracy must protect the private autonomy of citizens since this is the heart of their human dignity deserving of unqualified respect and also the ultimate source of its legitimate authority. It must also protect their public autonomy (their legal rights to participate as citizens in the making and administration of laws), since their legal personhood constitutes the process by which universal moral norms are translated into legitimate, legally binding laws.

H. L. A. Hart's idea that many laws are technical or administrative in nature (e.g., should be speed limit be 25 or 30 mph in town?) does not obviate the moral basis that is at the heart of the normative legitimacy of the power of law and the procedures for making law. We are much closer to natural law theory than to the positivist denial of the moral basis of law.

Habermas does not address here the question of the origins of state power under a constitution. The heuristic device of imagining a social contract will not serve unless this procedure can be transmuted into a discourse perspective. Democratic forms of legitimation require institutionalized democratic procedures. Prior to this institutionalization there is no democracy and hence no procedural processes of political will formation. Habermas points out the difficulty here in the following:

> A constitution-making practice requires more than just a discourse principle by which citizens can judge whether the law they enact is legitimate. Rather, the very forms of communication that are supposed to make it possible to form a rational political will through discourse need to be legally institutionalized themselves. In assuming a legal shape, the discourse principle is transformed into a principle of democracy. For this purpose, however, the legal code as such must be available, and establishing this code requires the creation of the status of possible legal persons, that is, of persons who belong to a voluntary association of bearers of actionable individual rights. Without this guarantee of private autonomy, something like positive law cannot exist at all. Consequently, without the classical rights of liberty that secure the private autonomy of legal persons, there is also no *medium* for legally institutionalizing those conditions under which citizens can first make use of their civic autonomy. (1998, pp. 454-455)

The communicative potential, inherent in language, that binds all human beings together in a universal moral community, requires translation into democracy as the institutionalization of persons as legal persons who can participate in generating the system of enforceable laws they will be required to obey. In the absence of institutionalized forms of legal autonomy, persons have no *"medium"* for the creation of democratic institutions. *We confront here the problem of origins.*

Social contract theories had attempted to deal with this problem through the device of imagining an original contract. Positivist theories had simply traced state power constellations back to an original seizing of power. How can we theoretically comprehend the origins of legitimate democracy? This issue takes on a seriousness much greater than the term "theoretical" would imply. For we live in a world of horrific suffering and horrific violation of the respect and freedoms due to all persons. Moreover

we live in a world in which even states claiming to be democracies do not fulfill the communicative conditions of legitimacy.

No present-day state apparatus entirely fulfills the moral basis for its own legitimation for two broad reasons. The first is that bourgeois pseudo-democracies (my term) provide little public space for the generation of democratic will formation. They still make laws on behalf of special interests (e.g., wealthy individuals and corporations), and, instead, manage consent of the governed through strategic, rather than communicative, means (1998, p. 480). The second is that the global economic system, and its protection under current imperially dominated global economic institutions, inhibits our ability to respond adequately to the universal moral community on this planet.

> The unmistakable duty to preserve even anonymous neighbors from starvation conspicuously contrasts with the fact that millions of inhabitants of the First World allow hundreds of thousands in poverty-stricken areas of the Third World to perish. Even charitable aid can be transmitted only along organized paths; the convoluted route taken by food, medicine, clothing, and infrastructures far exceeds the initiative and range of individual action. As many studies have shown, a structural improvement would require no less than a new economic world order. (1998, p. 116)

We touch here on the need, running quietly through the background of Habermas' work, for a world order transformed on the basis of the moral universality of the human community and the equal respect this requires for every human being. Just as Habermas reconstructs many thinkers from Marx to Weber to Kant in the service of comprehending the development of communicative rationality during the modern period, so the promising insights in Habermas' own theory must be developed to bring out the full import of his work. The full import of this work points to a democratic earth federation that includes "a new economic world order."

Habermas writes, now and then, of the difficult problem of "jurisgenesis" in which the communicative moral freedom of people results in the origin of democratic institutions. Here he connects his own thought with that of Hanna Arendt:

Arendt conceives political power neither as a potential for asserting one's own interests or for realizing collective goals, nor as the administrative power to implement collectively binding decisions, but rather as an *authorizing* force expressed in "jurisgenesis" – the creation of legitimate law – and in the founding of institutions. It manifests itself in orders that protect political liberty; in resistance against the forms of repression that threaten political liberty internally or externally; and above all in the freedom-founding acts that bring new laws and institutions "into existence." It emerges in its purest form in those moments when revolutionaries seize the power scattered through the streets; when a population committed to passive resistance opposes foreign tanks with their bare hands; when convinced minorities dispute the legitimacy of existing laws and engage in civil disobedience; when the sheer "joy of action" breaks through in protest movements. Again and again, it is the same phenomenon, *the close kinship of communicative action with the production of legitimate law*, that Arendt tracks down in different historic events and whose exemplar she found in the constitution-making force of the American Revolution. (1998, p. 148)

However we conceive of the origins of legitimate democratic state power in the world, it must be grounded in communicative action that "manifests itself in orders that protect political liberty; in resistance against the forms of repression that threaten political liberty internally or externally." The struggle for freedom and democracy arises from the relations of mutual recognition that are at the heart of communicative language.

The power of governmental law and its legitimation in the will of the people forged through communicative consensus-making have become one. The right of government to legislate and command is now inextricably tied to the people's communicative action. Rousseau's "general will" is forged in the communicative, political will formation undertaken by the people. Political and moral obligation become ever-more closely identified and these are now tied inextricably to humanity as a whole.

Attempts at solutions to our global problems that do not create the institutional framework for global political will formation are doomed to failure. The development of what has come to be known as "global civil society" (Falk 1992) is a good thing but entirely inadequate to realize substantive democracy in human affairs. Movements like "Citizens for

Global Solutions," like many other global organizations, have abandoned their world federalist vision and sacrificed addressing the roots of our problems for the illusion of progress on specific issues.

The development of a movement for global citizens voting simultaneously in their respective countries on global issues in ways that transcend national party politics is a positive development (Bunzl 2001). However, like most of the other world citizen movements, this accepts the current political structures of the world (nation-states) and attempts to build global solutions within the fragmented framework of a past that structurally inhibits global solutions. *Global political will formation requires world democratic political structures to make it possible.* Legitimate global political will formation also requires the governmental authority to implement the will of the citizens of Earth.

There is one and only one document and movement that fulfills both the requirement that the universality of the communicative basis of morality be institutionalized on this planet and that the genesis of this be grounded in communicative action. That is the *Constitution for the Federation of Earth*. Many constitutions for the Earth have been written, but only this one has been formulated through a thirty-three year period (1958-1991) of dialogue and debate among thousands of world citizens concerned to establish freedom on the Earth for the first time in history. It has been preliminarily ratified in four Constituent Assemblies of the world citizens during their thirty-three year dialogue in Interlaken, Switzerland and Wolfach, Germany (1968), Insbruck, Austria (1977), Colombo, Sri Lanka (1979), and Troia, Portugal (1991).

It provides both the framework for global political will formation and the governmental authority to democratically implement the general will of the people of Earth. Democracy can mean nothing less. Democracy on the local level in communities world-wide cannot generate a legitimate political will for the whole of humanity. Only democratic world law can do so. Without institutionalized mechanisms for the creation and execution of political will formation with regard to all global issues that transcend national boundaries, the human project is doomed to failure.

This *Constitution* provides for its own democratic ratification by the peoples of Earth. It provides a detailed definition of legal persons adequate to empower the citizens of Earth to begin the process of political will

formation that will determine their collective destiny. It provides the public space for the people of Earth to begin formulating legitimate democratic laws for themselves. It legally abolishes all tyrannous political institutions and lays the foundations for a new world economic order predicated on prosperity for all rather than the exploitation of the many by the few. Finally, it provides for its own development and amendment so that the people of Earth may further legitimize even the document serving as a foundation for their planetary liberation.

And, for many, the precedent and model of this process is precisely the process by which the U.S. Constitution was formulated and ratified through what Habermas terms "the constitution-making force of the American Revolution." Errol E. Harris agrees that the process by which the thirteen post-revolutionary colonies forged themselves into a federation under a democratic constitution serves as "the precedent" for the process by which the *Constitution for the Federation of Earth* was created and can be ratified to form a democratic world federation (2005, Ch. 7). He quotes from former U.S. Vice-President Al Gore's book *Earth in the Balance*:

> The world as a whole has now arrived at a watershed comparable in some ways to the challenge that confronted the founders two hundred years ago. Just as the thirteen colonies faced the task of defining a framework to unite their common interests and identity, the people of all nations have begun to feel that they are part of a truly global civilization, united by common interests and concerns – among the most important of which is the rescue of our environment. (Ibid. p. 99)

In the face of the apparent "infinite improbabilities" of uniting the planet under a "constitution-making force" that can save us from the impending disasters that have now entered the awareness of nearly every human being, we need to remind ourselves of the "depth dimension" and "miraculous" qualities of everything that has appeared in the world to date. "Hence, it is not in the least superstitious," writes Hannah Arendt, "it is even a counsel of realism, to look for the unforeseeable and unpredictable, to be prepared for and to expect "miracles" in the political realm."

In the following chapter we will attempt to formulate a set of basic principles by which authentic democracy can be judged and by which present day state-systems can be evaluated. By these simple, rationally grounded criteria, we will see, nation-states today are becoming ever-more

illegitimate as they attempt to hang onto an historically outdated sovereignty inadequate to realize the minimal requirements of democracy anywhere on Earth. The "modern world system" is structured so as to prevent a just world order, and the moral foundations of our collective human life on this planet demand "jurisgenesis," the founding of a new system of democratic world law that allows our human communicative potential to emerge and that institutionalizes equal respect for the humanity of each person living on the Earth.