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**Diversity, Deliberation and Agonistic Politics:
An Arendtian Critique of Habermas' Discourse Theory**

by

ROSEMARY LYNNE NAGY, B.A.(Hons)

A Thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfillment of
the requirements for the degree of

Master of Arts

Department of Law

Carleton University
Ottawa, Ontario
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**Diversity, Deliberation and Agonistic Politics:
An Arendtian Critique of Habermas' Discourse Theory**

submitted by **Rosemary Lynne Nagy, B.A. Hons**
in partial fulfilment of the requirements for
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Abstract

Based on Hannah Arendt's theory of judgment and her conception of the "right to have rights," this thesis interrogates the self-understanding of Jürgen Habermas' discourse theory. The promise to generate fully inclusive, universalizable norms is compromised in discourse ethics by an emphasis on abstract justice, rationalistic argumentation and consensus. The transition from discourse ethics to deliberative democracy, which is effected by the injection of law, partially carries these exclusionary aspects through to the model of a "two-track" constitutional state and its system of rights. Habermas detracts from the full potential of rights as political tools of empowerment for diverse groups by ascribing an overly procedural role to rights. This thesis argues for a more agonistic conception of political action, judgment and rights in order to fulfill the promise of discourse theory to take diversity as the starting point of universalism.

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INTRODUCTION

We in late modernity have witnessed the shattering of traditional sources of moral authority as the result of increasingly divergent worldviews and demands for recognition of identity-based difference. The Enlightenment ideal of a universal, transcendental reason that once grounded moral authority has long since been discredited by feminist theory and a line of thinkers that can be traced from Nietzsche to the Frankfurt School and French postmodernists. Together, these critiques have proclaimed that the Enlightenment conception of instrumental rationality is founded upon or justifies relations of power which subjugate and negate the "other" in the name of a universal "Truth." The exclusion of women from the realm of rationality, and the brutal assimilation of colonial peoples into European culture are presented as two examples of the marginalization and homogenization that have operated under an Enlightenment rationality which prioritizes the public over private, reason over emotion, man over woman, and civilized over savage...while claiming to maintain a universalistic, impartial stance.

While the conception of instrumental rationality undergirding the Enlightenment project of universal truth clearly needs to be rejected, it does not follow that either the ideals of universalism, or rationality itself, need also be rejected. Against postmodernists and critical theorists like Adorno and Horkheimer, Jürgen Habermas has argued that rather than abandoning rationality altogether in a nihilistic will to power, or retreating into aesthetics as the sole realm of reason and truth, the Enlightenment is an "unfinished project." The ideal of universalism can be rehabilitated through a new form of rationality; one that is embedded in communicative interaction and focuses on just procedures, rather than transcendental

substantive “Truths.” Over the last three decades, Habermas has pursued a complex theoretical project whereby the universal authority of norms is derived from collective discourses of justification. This project is premised upon the discourse principle, which stipulates that only those norms which could meet with the agreement of all in a rational discourse may claim to be valid (Habermas, 1996: 107). Discursive validation starkly contrasts metaphysical claims to universality which impose themselves at the cost of assimilation and/or exclusion. Participants in discourse engage in a cooperative search for truth, advancing rational arguments until consensus about the disputed norm is reached via the “unforced force of the better argument.” Neither coercion nor strategic manipulation play a role in judgment formation. Participants maintain a performative attitude -- which dispenses with narrow self-interest in favour of a cooperative search for truth -- and they discern the better argument on the basis of the testable reasons offered. The free consent of all those affected holds the promise of a universalism that takes diversity as its starting point.

Discourse ethics is committed to the protection of difference within a procedure that guarantees universal impartiality because all those affected participate in the discourse. However, this self-understanding of discourse ethics needs to be questioned. Habermas is often subject to criticisms that discourse ethics compromises diversity by emphasizing commonality over difference and by suppressing forms of speech which are “non-rational” or hostile to consensus. These exclusionary aspects threaten the promise of discourse ethics because, in essence, the *full* participation of everyone affected is never realized. Habermas insists upon separating “moral” questions of justice from “ethical” understandings of the good life. The prioritization of morality over ethics causes an abstraction from the concrete

particularities -- the diverse backgrounds, experiences, cultural traditions and character traits -- that are the basis of plurality, or diversity. Further, it obscures the fact that all notions of justice rest on a particular understanding of the good life, thus risking the possibility that dominant conceptions of justice may pose as universal. Discourse ethics also privileges "rational" argumentation, which threatens to discredit those forms of speech that are "situated," such as gendered or cultural ways of speaking. Furthermore, Habermas' emphasis on consensus as the *telos* of discourse denies an agonistic reading of political action and risks suppressing statements which are provocative, or hostile to consensus.

The apparent promise of discourse ethics cannot be fulfilled until the weight of these criticisms is taken into account. Furthermore, the exclusionary aspects of discourse ethics carry implications for Habermas' model of deliberative democracy. Habermas retains the emphasis on consensus, indicating that majority rule is an interruption in the search for a single right answer, and thus denying the possibility of rational disagreement in a pluralistic society. He also continues to separate morality from ethics by insisting on separate discourses for strictly "moral" or "ethical" issues which are, in practice, indistinguishable. These two features render deliberative democracy less than fully responsive to the needs of diversity. Moreover, Habermas insufficiently addresses the political dimension of rights as tools of empowerment in diverse struggles for recognition.

The transition from discourse ethics to deliberative democracy is effected by the injection of law, which institutionalizes a system of rights. Rights primarily function as procedural guidelines that ensure the legitimacy of democratic decision-making: public opinion, or "communicative power" is channelled from the general populace to formal

parliamentary bodies via rights to public and private autonomy. Consequently, legitimate law is bound to the opinion- and will-formation of the people. However, Habermas' approach to rights emphasizes the procedural over the political. He locates the primary guarantee for rights in consensus, rather than in agonistic political action. This detracts from the unsettled nature of rights, which means they can be appropriated as discursive tools in different political struggles. Habermas neglects the "practice of rights," that is, the importance of agonistic rights claims, demands for new forms of rights and public action in the name of rights for those seeking acknowledgment of their specific needs and diverse identities.

In order to be fully responsive to diversity, discourse theory needs a conception of agonistic politics that is grounded in human plurality. This thesis argues that both discourse ethics and the model of deliberative democracy need to be reconceptualized from an Arendtian point of view. Arendt's theory of judgment, which is situated within a theory of action that is both agonistic and deliberative, redresses the exclusionary aspects of discourse ethics. Habermas frustrates the formation of sound judgment in discourse ethics by separating and prioritizing morality over ethics and by emphasizing consensus as the *telos* of rationalistic argumentation. In contrast, Arendt proposes that judgment involves a balance between the universal and the particular, where the emphasis is on the act of judging itself, rather than reaching consensus. Participants persuade, rather than argue against one another, and reach their decisions by thinking from the standpoint of everyone else with an enlarged mentality that extends beyond narrow self-interests. The ability to discern the better argument, it will be argued, requires reference to concrete particularities in an open and agonistic exchange of opinion.

To counter Habermas' problematic emphasis on rights as procedural structures in the democratic model, Arendt's notion of the "right to have rights" provides an understanding of rights as political, agonistic, and open to diversity. An Arendtian interpretation places the guarantee for rights in political action that both draws upon and strengthens diversity. Arendt grounds rights in human plurality, and contends that rights are an artifice that require agonistic political action to give them practical force. Following Arendt's "right to have rights," I argue that the agonistic or political dimension of rights needs to be reasserted within Habermas' democratic model.

I draw upon Arendt for several reasons. First of all, she provides an alternative interpretation of Kant, with whom Habermas is deeply, albeit critically, intertwined. Secondly, Habermas is already greatly indebted to Arendt's thought. He relies heavily upon her concept of communicative power in his model of deliberative democracy. Moreover, it was Arendt who first "rediscovered" the concept of public space, which Habermas later transformed into the notion of the public sphere (Benhabib, 1996: 199). Reconceptualizing discourse theory from an Arendtian perspective is fitting because "plurality" or "intersubjectivity" is the irrevocable foundation of human action for both Arendt and Habermas. However, I shall argue that Arendt's political theory more fully encompasses diversity. For Arendt, plurality¹ is the underlying condition of judgment and political action. She roots political action in the agonistic and deliberative exchange of opinion such that the distinct character of actors is revealed, and freedom is attained through participation in an

¹ "Plurality" is an Arendtian term, and I will usually use it when referring to her work or the context of her work. However, I intend plurality and diversity to be interchangeable synonyms.

open public realm. The greater the diversity in the public realm, the greater are the opportunities for speech, freedom-bearing action and expressions of distinction and difference. The agonistic element of political action encourages fluid, spontaneous and multiple forms of speech in a process of ongoing contestation.

An agonistic conception of political action, such as Arendt's, is integral to preserving and strengthening diversity. Whereas discourse theory aims towards consensus, in form of the "best argument," Arendt insists upon plurality, a constellation of multiple viewpoints that conflict and converge in an open-ended debate. As James Bohman writes:

Arendt explicitly rejects the demand that public reason produce a singular agreement or impartial consent in this sense. The assumption that there is such a unified standpoint is not pluralist enough: we cannot assume that there is *one* public standpoint in political life and not *many* different ones...Impartiality consists of the capacity to make judgments that reflect this multidimensionality, not to come to a single rational opinion, but to use a many-sided common sense [Kant's *sensus communis*]. Such a common sense will emerge only in the interaction among diverse citizens in the public sphere (1996: 62).

The emphasis on plurality carries through to Arendt's conception of the "right to have rights," which guarantees a place in the world "which makes opinions significant and actions effective" (Arendt, 1973: 293). Plurality, according to Arendt, is composed of equality and distinction (1958: 175). Without diverging opinions within a public sphere that is founded upon political equality and the "right to have rights," distinction is impossible. The multidimensionality that results from Arendt's radical pluralism is lost when agonistic politics are denied or downplayed. Consensus, as the overriding focus of deliberation, detracts from the diversity of opinions that exist in a pluralistic society. And a procedural reading of rights diminishes the political dimension of rights as tools in agonistic struggles for distinction and

equality.

If diversity is to truly be the starting point of universalism, discourse theory needs to incorporate an agonistic dimension in its understanding of political action, judgment and rights. This agonistic dimension, however, must remain connected to the communicative premises of discourse theory. The purpose of this thesis is to improve upon discourse theory, not to reject it. Arendt's political thought brings discourse theory closer to its self-understanding precisely because she recognizes the importance of both agonism *and* deliberation. Judgment is the result of an agonistic exchange of opinion, but this is also a process of public deliberation where participants persuade one another based on a community sense of rightness. Furthermore, the agonistic dimension of rights is always accompanied by a deliberative element. An agonistic interpretation understands rights as being fluid, or unsettled, and thus capable of being harnessed by different groups in their particular political struggles. However, these particular rights claims can only gain validity and common acceptance through public justification. Hence, rights also function as a language of justification which invokes the use of judgment in the public sphere. Public deliberation takes the particular needs and identities that underlie rights claim into account, and weighs them against the demands of impartiality and universal justice. Together, the themes of Arendtian judgment and the "right to have rights" join deliberation to agonistic political action, and therefore realize discourse theory's commitment to the needs of diversity.

Outline of Thesis

In chapters one and two I turn to Arendt's theory of judgment to analyze the

exclusionary aspects of discourse ethics. Participants in discourse are motivated toward consensus by the force of the better argument, which means that they must form judgments based on what they hear. Despite laying bare the procedural conditions necessary for the discursive validation of norms, Habermas neglects to explain how participants discern the better argument or what considerations are necessary for the formation of sound judgment. Whether we refer to the “force of the better argument” as a sociological claim or a procedural condition, there is a danger that the “better argument” may be unresponsive or hostile to diversity because it cannot ultimately refer to ethical particularities. The principle of universalization that governs discourse ethics stipulates that only those norms which can be justified on the basis of “moral” reasons, as opposed to “ethical” reasons, may claim normative validity (Habermas, 1990a: 104). In other words, the arguments forwarded in moral discourse must be universalizable, strictly expressing a general interest in the name of deontological justice. As a result, participants in discourse are asked to decontextualize the issue, that is, abstract from their ethical particularities in favour of that which is held in common. Furthermore, the emphasis on consensus and rational argumentation might discredit or suppress those claims which are disruptive, provocative or unconventional. This, combined with the abstraction from concrete particularities, could have the effect of privileging those forms of speech which are deemed rational by the dominant group.

I will argue that the moral principle of universalization in discourse ethics withholds certain considerations necessary to the formation of sound judgment. According to Arendt, political judgment is a faculty akin to the sense of taste and relies upon the use of aesthetic reason. She argues that the exercise of judgment combines the Kantian notion of enlarged

thought, which is concerned with the demands of universal justice, and the Greek concept of *phronēsis*, which entails notions of prudence or situated wisdom. As a result, participants must refer to concrete particularities because sound judgment is a matter of contextualizing the universal to fit the particular. Moreover, by situating judgment within a theory of action that contains both agonistic and deliberative politics, Arendt provides a corrective to the emphasis on rational argumentation and consensus in discourse theory. The exchange of opinion is a fluid, flexible process where there are no right answers and no limitations on the forms of speech. Without an overarching *telos* of consensus, speech in the public realm is conceived as an ongoing, permanent contestation between diverse groups who need not succumb to the “better argument” forwarded by the majority.

Chapter three looks at the transition to deliberative democracy, where the exclusionary aspects of discourse ethics carry through to Habermas’ system of rights. I reconstruct Habermas’ unique understanding of the relation between law and morality, his justification for the system of rights, and his analysis of the circulation of communicative power within the “two-track” constitutional state. Following Thomas McCarthy, I argue that deliberative democracy retains the prioritization of morality over ethics by insisting upon separate discourses. It also continues to emphasize rational consensus for the validity of legal norms. Habermas’ idea that truth resides in rational consensus leaves little room for irresolvable differences or permanent, yet peaceful disagreement. Habermas declines an understanding of majority rule as a break in ongoing contestation; rather, he sees it an interruption in the search for a single right answer.

In chapter four I argue that Habermas treats rights more as procedural rules that

structure the public sphere than as centers of political struggle themselves. He posits a set of rights that are grounded in autonomy, whose specific content is interpreted by citizens and guaranteed through consensus. Habermas detracts from the political process involved in the interpretation of rights by imposing an individualistic structure. While I do not want to argue for collective rights *per se*, I do submit the pre-determined schema of rights contains a theoretical shortcoming. It limits the scope for action and denies actors the possibility of deliberating whether collective rights may, in fact, be responsive to the needs of diversity in specific situations. Moreover, once rights have been concretized within specific polities, they function almost wholly as procedural structures in the public sphere. Habermas undervalues the notion of rights as tools of empowerment in political struggles (as opposed to creating a communicative space for everyday politics). This neglects that agonistic struggles in the name of rights both reinforce existing rights, generate new ones, and provide discursive and symbolic tools for minority groups.

Thus, I argue for an Arendtian interpretation of rights, relying upon Arendt's idea of the "right to have rights" which is grounded in human plurality. The "right to have rights" undergirds every legal community where there is a political commitment to freedom, speech and action. Struggles in the name of rights are the mark of an open political community that fosters fluid, spontaneous and diverse exchanges of opinion amongst equal citizens. Rights are an artifice which can only be sustained through political practice. Because rights find their impetus and guarantee in politics, the "right to have rights" both requires and reinforces plurality, which is the basic condition for genuine political action. Rights struggles that strengthen and acknowledge difference enhance the political commitment to the exchange of

diverse opinions and freedom-bearing action. By reasserting the political with Arendt's conception of the "right to have rights," deliberative democracy becomes more responsive to diversity. Finally, in the concluding chapter, I briefly discuss how the public justification of agonistic rights claims brings the themes of Arendtian judgment and the "right to have rights" together such that discourse theory's promise of attaining an inclusive universalism is fulfilled.

CHAPTER ONE: THE PROMISE OF DISCOURSE THEORY

In this chapter, I examine Habermas' program of discourse ethics and question the extent to which it realizes its own self-understanding. Discourse ethics promises to take diversity as the starting point of universalism by stipulating that the uncoerced consent of all those affected is required for the validity of norms. Habermas presents a theory of the "third way," which stands between metaphysical conjectures of a universal Truth and the postmodernist suspicion of all universalizing claims. By focusing on a procedure which emerges from an empirical analysis of basic cognitive structures, Habermas organizes a means of obtaining universal truth through reflexive and fallibilistic debate that results in consensus.¹

The promise of obtaining fully inclusive, universalizable norms, however, is jeopardized by certain exclusionary aspects of discourse ethics. Habermas' insistence upon distinguishing between strictly "moral" debate and ethically situated debate, that is, between discourses of justification and discourses of application, camouflages the ethical foundation that underlies reigning conceptions of justice. By abstracting from the situation at hand, Habermas privileges the viewpoint of the generalized other, to use Benhabib's term, over that of the concrete other. Subsequently, commonality is emphasized over difference, to the possible detriment of minority groups whose unique traditions and values may become abandoned or co-opted.

Discourse ethics also compromises the needs of diversity by privileging rational

¹Benhabib describes the "deep structures of cognition" as rooted in the "cognitive and interactive human competences which change and evolve as a result of internal learning processes" (1986: 265). Thus, Habermas' reconstructive theory is based on an empirical claim, as opposed to the transcendental groundings of metaphysical philosophies.

argumentation over more informal and particularistic forms of speech (i.e., speech rooted in a particular way of life, a cultural tradition, etc.) This threatens to marginalize those not as adept or familiar with the rationalistic style of speaking. An overwhelming pressure to attain consensus subtly influences participants to suppress statements which are provocative or inimical to consensus. It also reinforces the primacy of formal, rational and dispassionate speech. While consensus is a desirable outcome of discourse, it should not be the overriding goal within a mode of argumentation that privileges certain groups over others. To do so risks the possibility that minority groups will succumb to the force of the “better” argument for lack of alternatives; either because of the pressure to conform due to the emphasis on consensus or because they are unable to articulate their claims in form of a “rational” argument. I now turn to an explication of the basic premises underlying discourse ethics and then engage in a discussion of the exclusionary aspects that undermine the promise to take diversity as the starting point of universalism.

Universal Justice as Procedure

Once the Enlightenment conception of universality was exposed as false, the existence and grounding of universal truth and justice became both a theoretical problem and a practical problem. Fittingly, Habermas’s theory of communicative action bridges the gap between philosophy and the social sciences and thus offers a potential solution that is rooted both in the empirical world and in philosophy. Habermas analyzes the *deep structures* of cognition; that is, he makes explicit the moral intuition potentials that reside in us all to reconstruct a “universal moral point of view.” Unlike claims to universalism rooted in metaphysics,

Habermas's reconstructive theory understands the universal moral point of view as one that is continually evolving through historical processes and new stages of internal and societal learning (Benhabib, 1986: 264-5). The evolution up to this point is as follows. The modern condition of "disenchantment," as Weber termed it, is the result of historical processes that led to the rationalization of society. The rise of the capitalist welfare state, which contributed to the rationalization of the system, was in turn made possible by the "decentration of the worldview" and increased reflexivity in the lifeworld (Benhabib, 1986: 246). In a post-traditional age, value spheres such as religion, science and law have become differentiated. As a result of the reflexivity that characterizes the modern age, values are no longer taken for granted, but are continually questioned. The modern uncertainty about the "truth" of conventional values, coupled with the dominance of an impersonal self-steering bureaucratic system, has led to a loss of personal and social meaning.

Habermas strives to restore the personal and social meaning that has been lost because of the antinomies of Enlightenment values. He pinpoints the emergence of the decentered worldview as both the source of a loss of meaning and, paradoxically, the vehicle through which to determine post-traditional meaning. The rationalization of the lifeworld, or the questioning of metaphysical values, created a new form of rationality: one that is grounded in the communicative interaction of everyday life. The determination and validity of norms and values, which have lost their transcendental status, now lies in a cooperative search for truth whose outcome is intersubjective agreement. The determination of meaning, or in Habermas' language, the "reproduction of the lifeworld," occurs through everyday speech acts at the levels of personality, society and culture, such that identity formation, the

coordination of action and the reflexive legitimation of norms and values is determined through argumentation and intersubjective recognition (Benhabib, 1992: 104). Just as money and power steer the economy and bureaucracy, so communicative action steers lifeworld relations. Further, as the only viable source of norm validation in a post-traditional world, communicative action can neither be construed as willful nor decisionistic because it cannot be differentiated from the lifeworld. Communicative rationality is embedded in our *deep structures* of cognition. As Benhabib explains, “The lifeworld remains that background horizon of unthematized assumptions, implicit expectations, and individual know-how within which communicative action unfolds...the lifeworld is both constitutive of, and constituted by communicative action” (1986: 239).

Through a reconstruction of the deep structures of cognition, Habermas makes this background horizon explicit in his theory of discourse ethics. He relies upon moral psychology to demonstrate that communicative action is one of the “inescapable presuppositions” of human life. Anyone who refuses to engage in everyday communicative action “den[ies] that he moves in a shared sociocultural form of life, that he grew up in a web of communicative action, and that he reproduces his life in that web...In other words, he cannot extricate himself from the communicative practice of everyday life in which he is continually forced to take a position by responding yes or no” (1990a: 100). It is virtually impossible to remove oneself from the background horizon that constitutes communicative action because human life is intersubjective.

Habermas reformulates Kant’s categorical imperative based on the theory of communicative action. Unlike Kant’s ethics, the procedure for establishing the validity of

norms is neither monological nor is it one of non-contradiction. The validity of norms is established through an all-inclusive dialogue, rather than being imposed by a single observer or expert. Whereas the categorical imperative asks the single rational agent to negate those action norms which are not generalizable, discourse ethics insists upon the dialogical participation of all those affected: “the emphasis shifts from what each can will without contradiction to be a general law, to what all can will in agreement to be a universal norm” (Habermas, 1990a: 67). The categorical imperative is replaced by a procedure of moral argumentation whose principle stipulates:

(D) Only those norms may claim to be valid that could meet with the consent of all affected in their role as participants in practical discourse (Habermas, 1990a: 66).

The discourse principle (D) retains the essential features of Kant’s moral theory -- discourse ethics is deontological, formal, cognitivist and universal -- but reads an element of intersubjectivity into these features. As a deontological theory, discourse ethics is solely concerned with the justification, or rightness of action norms. The justification of action norms is governed by formal rules of argumentation which refer only to procedure and not to the substantive content of disputed norms. In practical discourses, the rules for argumentation are governed by the moral principle of universalization:

(U) *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation) (Habermas, 1990a: 65).²

² Habermas actually presents the principle of universalization (U) first, and once its transcendental-pragmatic status is justified, states that it is possible to then formulate the *principle of discourse ethics* (D) (1990a: 93). The distinction between the two principles is unclear and has been subject to much criticism. In particular, Benhabib argues that (U) adds a “consequentialist

Through rational argumentation, participants in discourse ascertain a universal interest which they “grasp *cognitively* from [their] perspective as participants” (Habermas, 1990a: 74). Because the universalizable claims have been grasped cognitively through argumentation, as opposed to being metaphysically deduced, their normative rightness can only “be regarded as a claim to validity that is analogous to a truth claim” (Habermas, 1990c: 197). In this way, the metaphysical absolutism of the Enlightenment notion of universal “Truth” is avoided. The rightness or validity of normative claims rests on the fact that they have been deemed universalizable according to the moral principle (U) in a process of open and inclusive discourse.

The formal proceduralism of discourse ethics imposes nothing on participants with respect to the substantive content of norms. It is only the procedure that insures normative claims are just: all those affected by the disputed norm must be allowed to participate free of coercion so that consensus (which is based on the universalizability of the norm) may be obtained. Furthermore, not even the procedure itself is imposed. Habermas argues that (U) reflects a moral intuition which is universally valid. He avoids charges of ethnocentrism or metaphysical justification by grounding discourse ethics in the “pragmatic presuppositions”

confusion” to the principle of discourse ethics because it has the effect of guaranteeing consensus (1992: 37). Habermas has since clarified the relation between the two principles, and has in fact reversed their order. He now terms (D) the *discourse principle* and it “is only intended to explain the point of view from which norms of action can be impartially justified” (Habermas, 1996: 108). The discourse principle simultaneously branches out into a moral principle (U), which functions as a rule of argumentation, and the democratic principle, which establishes a procedure of legitimate law-making (Habermas, 1996: 108-110). The *discourse principle* also differs slightly in wording from the original *principle of discourse ethics*: (D): “Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses” (Habermas, 1996: 107).

of argumentation, rather than in the alleged “fact of pure reason” to which Kant “evasively points” (Habermas, 1990c: 204).

Habermas invokes what he terms a “transcendental-pragmatic” justification for discourse ethics. He looks to the pragmatics of language, arguing that certain undeniable conditions are present when communicative action takes place. When actors maintain a performative attitude, when they engage in a cooperative search for truth that is solely motivated by the force of the better argument, they intuitively and unavoidably follow three sets of rules which may be summarized as follows: every competent subject is allowed to take part in discourse; everyone is allowed to question or introduce any assertion, as well as express all attitudes, desires and needs; and, “no speaker may be prevented, by internal or external coercion, from exercising his rights” as described above (Habermas, 1990a: 89). Cohen and Arato interpret these rules as principles of symmetry, reciprocity and reflexivity. Symmetry and reciprocity refer to the mutual recognition between autonomous and equal subjects which is necessary for the ideal role taking that occurs in discourse (to be discussed below). Reflexivity, as Cohen and Arato understand it, is that “participants must be capable of altering the level of discourse in order to be in a position to challenge traditional norms that may be tacitly presupposed” (1992: 348).

Together, these three principles constitute the “ideal speech situation.” Symmetry, reciprocity and reflexivity are not logically deduced principles; they are “implicitly adopted and intuitively known pragmatic presuppositions of a special type of speech,” i.e., practical discourse (Habermas, 1990a: 91). Herein lies the reconstructive element of Habermas’s thought -- the procedural principles for action oriented toward consensual understanding are

“always already” known in the deep structures of cognition and interaction. Habermas relies on Apel’s notion of a *performative contradiction* to show that the sceptic who *argues* against the principle of universalization tacitly recognizes the pragmatic presuppositions of argumentative speech from which (U) is derived (Habermas, 1990a: 82).

Of course, these intuitively known principles will be frustrated by strategic motivations and temporal-spatial limitations. Institutional measures, such as communication rights and rights to autonomy and equal moral respect, are required to approximate the conditions of the ideal speech situation. Once the ideal speech situation has been approximated, norms are universally validated through a process of intersubjective recognition and role-taking, wherein “*all* affected [are] to adopt the perspectives of *all others* in the balancing of interests” (Habermas, 1990a: 65). Habermas insists upon *actual* practical discourse, for this best prevents perspectival distortion of one’s own interests (Habermas, 1990a: 67). Participants engage in a reflexive process of questioning and arguing until they have “collectively become convinced of something” (Habermas, 1990a: 67). Speakers seek to “rationally motivate another by relying on the illocutionary binding/bonding effect of the offer contained in his speech act” (Habermas, 1990a: 58).³ The guarantee for this motivation is that the speaker will back up or redeem his/her claim by offering justifiable, testable reasons. Eventually the better argument prevails and consensus is obtained.

³ Participants in communicative action engage in illocutionary speech acts, which carry a force, such as informing or warning someone. Illocutionary speech acts are distinguished from locutionary acts, which convey meaning, and perlocutionary speech acts, which generate consequences (we do something by saying something, eg. surprise, mislead or convince) (Johnson, 1991: 187).

However, mere consensus is not sufficient to prove the validity of normative claims expressed in the ideal speech situation; we must also hold these normative claims to be worthy and right (Habermas, 1990a: 61; Cohen and Arato, 1992: 349). The moral principle of universalization (U) serves as a “bridging principle” in order to “establish a connection between the process of will formation and the criteria for judging the acceptability of a particular norm” (Cohen and Arato, 1992: 350). Only those claims which are universalizable, only those arguments that are justified with strictly normative, as opposed to evaluative, statements are valid. Habermas’ distinction between normative and evaluative statements corresponds with a separation of morality and ethics. Ethical or evaluative statements refer to the “ethnocentric” question of “who we are” whereas moral or normative statements answer the question of “how we want to live together and of how practical conflicts can be settled in the common interest of all” (Habermas, 1993: 24; see also Habermas, 1990c: 204). Thus, (U) invokes a careful distinction between collective choice or compromise, which are susceptible to the subtleties of domination and acquiescence, and consensus on “generalizable interests” which are held to be right and just by all.

The Exclusionary Aspects of Discourse Ethics

Discourse theory is infinitely valuable for a complex society that contains multiple and fractured identity groups. Procedural justice is rooted in the deep structures of cognition that stretch across race, gender and culture, and therefore overarches diverse value orientations, needs and identities. It promises a loose solidarity among diverse groups through mutual agreement upon universal norms. Ideally, these norms are not imposed by monological

observers or dominant groups, but are collectively determined in open and inclusive discourses where the universalizability of norms is guaranteed through rational argumentation, and not metaphysical reasoning that assimilates or marginalizes.

The procedure in discourse ethics, however, is not as inclusive as it purports to be. Habermas insists upon separating morality from ethics by prioritizing the right over the good. This has the effect of asking participants to detract from their concrete particularities in favour of that which is held in common. It also narrows the scope of reasons that can be given in argumentation to strictly normative, as opposed to evaluative claims. The emphasis on consensus within a mode of rationalistic argumentation promotes a form of politics where agonistic (contestatory or conflictual) and/or “non-rational” forms of speech (passionate, embodied, or informal speech) may be denied or discredited. I shall argue that these two aspects of discourse ethics direct the force of the “better argument” away from the needs of diversity.

The separation and prioritization of morality over ethics

Habermas has argued that the rationalization of the lifeworld has split the “unity of the practice of everyday communication” into two parts: norms and values. The transition to postconventional morality within society means that

moral questions, which can in principle be decided rationally in terms of criteria of *justice* or the universalizability of interests are now distinguished from *evaluative questions*, which fall into the general category of issues of the *good life* and are accessible to rational discussion only *within* the horizon of a concrete historical form of life or an individual life style (Habermas, 1990b: 177).

Issues of justice are severed from questions of the good life in order to reach mutual understanding about impartial, universalizable norms. Participants in discourse ethics are asked to abstract from the situation at hand in order to arrive at norms which go beyond their particular form of life. Habermas insists upon decontextualizing norms because interests and value orientations are becoming increasingly differentiated in society. As a result, “discourse generalizes, abstracts, and stretches the presuppositions of context-bound communicative actions...beyond the provincial limits of their own form of life” (Habermas, 1990c: 202).

This is made possible by the principle of universalization (U), which acts like a “knife that makes razor-sharp cuts between evaluative statements and strictly normative ones, between the good and the just” such that specifically cultural values cannot claim normative validity in a strict sense (Habermas, 1990a: 104). Practical discourse is solely concerned with those norms that “hold out the prospect of consensus,” that is, those that deal with questions of justice (Habermas, 1990a: 104). Evaluative statements, which are “inextricably bound with the totality of a particular form of life,” are left to the realm of aesthetic and therapeutic discourse; they do not belong in discourse ethics proper (Habermas, 1990a: 104-105). According to Habermas, the argumentation in moral discourse is confined to purely normative statements that can be judged universalizable.

This distinction between the good and the just has problematic effects. It exaggerates the extent to which concrete ethical life can be separated from abstract questions of justice. Controversial issues become thematized within discursive processes because their intersubjective validity is disrupted in the ethical lifeworld. Yet, Habermas expects participants in discursive processes to then abstract from the concrete situation which

originally caused its thematization. Participants are supposed to reach consensus on the basis of moral insight, which provides “demotivated answers to decontextualized questions” (1990a: 106). It is questionable whether this is possible or desirable. Habermas argues that the decontextualization in discourses of justification is offset by the use of hermeneutic prudence, which is a situated form of practical wisdom employed in separate discourses of application (1990c: 206). A principle of appropriateness is required in discourses of application, which refer to the concrete situation at hand because “moral rules do not contain their own rules of application” (Habermas, 1990b: 178-80). However, Habermas’ distinction between application and justification is overdrawn. Although separable in theory, we cannot as easily hold morality apart from ethics, or distinguish between abstract justification and practical application in real life situations.

Albrecht Wellmer argues that in morally complex situations where norms collide, “moral argument is concerned almost exclusively with the interpretation of the situations attendant upon actions and needs, as well as with the way that those who act or suffer the consequences see themselves” (1992: 197). Habermas should not relegate these types of considerations to (aesthetic and therapeutic) discourses of application because our evaluation of the situation at hand has an enormous bearing on our understanding of the disputed norm. Wellmer provides the following example:

Whether I judge the act of handing a fugitive over to the police to be non-generalizable or not depends entirely on whether I understand such a way of acting as an act of co-operation with legitimate state authority or as leaving a helpless and innocent victim of persecution in the lurch...But in a given situation, only one of these two interpretations can be correct. As soon as the question of a correct understanding of the situation is clarified, however, it

will as a rule be the case that the question of the generalizability of specific ways of acting is also resolved (1992: 202).

Moral discourse is not simply about the justification of norms -- the grounding of norms necessarily entails an application of the moral point of view, or reference to a context in order to determine the generalizability of a norm.

By bracketing evaluative statements out of moral argumentation, (U) provides a “barricade” for moral dogmatism and self-deception to hide behind (Wellmer, 1992: 204). The reason-giving in discourse ethics is contained to strictly normative statements, but this creates the possibility that the impartiality of norms may be compromised. Habermas’ distinction between justification and application, justice and the good life, moral insight and hermeneutic prudence is unsatisfactory because:

In practical discourses, a certain conception of justice is revealed to rest on a certain understanding of our needs, the cultural traditions which justify them, and the socialization patterns which shape them. If the subject matter of discourses is not artificially restricted, if the process of self-reflection reaches these presuppositions, then issues of justice and the good life flow into one another (Benhabib, 1986: 336).

The artificial restriction of arguments allowed in discourse threatens to perpetuate a hidden set of values that pose as universal. Dominant interpretations of the situation at hand will reign unquestioned, while alternative interpretations of the situation will be discounted as evaluative statements which do not survive the test of universalization. To avoid this possibility, all participants must refer to their evaluations of the concrete situation when advancing arguments about the disputed norm. As Wellmer states, “we only have to abandon the premise that moral *judgments* can only be grounded with recourse to norms in order to see that moral *arguments* do not have to be normative in character” (1992: 203). Evaluations

of the situation are an integral part of forming a judgment about the universalizability of norms. If these evaluations are not subject to the scrutiny of others -- if their articulation is cut out of moral discourse by (U) -- there is a danger that the dominant cultural tradition and understanding of needs will masquerade as universal because arguments for alternative conceptions of justice inevitably refer to the ethical background of the speaker.⁴

Conceptions of who we are, who we want to be and how we want to regulate our common life are deeply intertwined. Participants in moral discourse cannot avoid referring to their concrete particularities because evaluations of situations necessarily reflect their background and character. Limiting the reason-giving in moral discourse to purely normative statements not only neglects the importance of evaluating a situation for judging the universalizability of a norm, but it also ignores "our own affective and emotional constitution" (Benhabib, 1986: 333). By asking participants to detract from "who we are," Habermas

⁴Habermas has responded to Wellmer's criticism by arguing that "analytically, 'the right thing to do in the given circumstances' cannot be decided by a *single* act of justification" (1993: 36). Discourses of justification must remain separate from discourses of application because the validity, or justice of norms in general is different from the appropriateness of singular judgments in a given situation. The principle of universalization "must retain a rational, and thus operational, meaning for finite subjects who make judgments in particular contexts" (1993: 36). By abstracting from the situation, (U) relieves participants of the impossible task of taking into account every possible future context of disagreement. Rather, the applicability of the decontextualized norm in a particular situation is determined by a principle of appropriateness. Together, the principle of universalization and the principle of appropriateness "exhaust the idea of impartiality" (1993: 37). Moreover, the differentiation between justification and application preserves a "coherent normative order" when moral rules collide because the inapplicability of a norm does not destroy its validity (1993: 38). Habermas' defense, however, does not acknowledge the entanglement of justice and ethics. They may be analytically distinguishable, but are inseparable in practice (McCarthy, 1996: 1005; Benhabib, 1986: 336). By failing to make explicit the visions of the good life underlying conceptions of justice, Habermas risks producing norms that are premised upon unspoken, and unquestioned understandings of "who we are" -- a "we" that is, in fact, composed only of a dominant majority. I argue in the next chapter that Arendt provides a theory of judgment where ethical particularities are taken into account without jeopardizing the impartiality of decisions.

prioritizes the perspective of what Benhabib calls the “generalized other” for the moral point of view.

The generalized other “requires us to view each and every individual as a rational being entitled to the same rights and duties we would want to ascribe to ourselves” (Benhabib, 1986: 340). This perspective abstracts from the individuality and concrete identity of the other, and focuses on the moral dignity that constitutes our commonality. Moral feelings of respect, duty and worthiness result in a process of formal reciprocity. Formal reciprocity obscures the fact that identity does not simply refer to the potential for choice, but also to the “actuality of my choices” (Benhabib, 1992: 161). The formal justice perspective, argues Benhabib, needs to be complemented by a perspective of care. Following Gilligan’s critique of Kohlberg’s moral psychology, Benhabib argues that ideal role taking must accommodate the perspective of the “concrete other.”⁵ The concrete other views “each and every rational being as an individual with a concrete history, identity and affective-emotional constitution” (Benhabib, 1992: 158). The focus on human individuality is accompanied by feelings of friendship, love and care. Ideal role taking from the perspective of the concrete

⁵ Habermas relies upon Kohlberg for the transcendental-pragmatic justification of discourse ethics. Kohlberg divides moral development into six stages, the highest stage of moral orientation being the public discourse of rights and entitlements. Carol Gilligan has argued that the reason why women scored so much lower than men in Kohlberg’s test of moral maturity was that he prioritized a morality of rights over a morality of care. The morality of rights stresses liberal ideas of atomism, separation, and non-interference, whereas a morality of care signifies a sense of connection to others and a “striving to live in harmony with everyone else” (Gilligan, 1982: 132). These two moralities are complementary, and their integration results in full moral maturity (Gilligan, 1982: 165). Habermas’ appropriation of the generalized other threatens to suppress what Gilligan has called a “different voice” that articulates the moral point of view. It should be noted that Gilligan does not prescribe to a notion of essential femaleness with her concept of a different voice, nor does Benhabib (Benhabib, 1992: 191). Gender was not a methodological category guiding Gilligan’s early work and the morality of care can be primary in both men and women’s moral make-ups.

other is a process of complementary reciprocity whereby everyone's human dignity and individuality is confirmed, leading to a solidary community.

The precedence of generalized, formal justice within discourse ethics denies the possibility that justice may be achieved by enjoining a complementary relationship between diverse peoples. Rather than solely focusing on that which is held in common, discourse ethics should treat difference like a patch-work quilt that becomes the foundation of universal norms. This means that references to ethical particularities and evaluations of the concrete situation ought to be part of moral discourse. As we see in the next chapter, impartial judgment balances between the particular and the universal -- it does not simply disregard that which is different in favour of formal and decontextualized commonalities. Habermas' prioritization of the generalized other threatens the promise of discourse ethics by brushing aside the diverse claims of concrete others because they are not "strictly normative." However, as Wellmer points out, universalizable moral norms need not be grounded with strictly normative arguments.

Habermas criticizes the care perspective for relativizing the idea of justice and downgrading it to the status of a principle supplemented by the principle of benevolence (1989-90: 45). He argues that a contextualized perspective of care blurs the boundaries between questions of the good and the just, thereby depreciating the deontological status of discourse ethics. The complementary relation between justification and application addresses the misgivings of Benhabib and Gilligan because elements of care, concrete needs, and ethical values fall under the principle of appropriateness (Habermas, 1993: 154). However, I have already argued that the distinction between justification and application is overdrawn because

all conceptions of justice rest on a vision of the good life. Contextualizing justice does not “blur” the boundaries between the good and the just, but rather makes explicitly clear which ethical pre-understandings of the good underlie various conceptions of justice. Otherwise, there is a danger that the dominant conception of justice will contain the force of the “better argument” because its ethical underpinnings are taken for granted. Alternative conceptions of justice would be difficult to articulate without referring to the ethical background of speakers, and thus would not count under the moral principle of universalization. The appropriateness of a norm becomes moot if it is not truly universal.

Habermas also argues that discourses of justification include features of concrete life because solidarity is the reverse side of justice. Solidarity is a component of a universalistic morality that is grounded in the pragmatic presuppositions of communicative action (Habermas, 1989/90: 47). Both justice and solidarity have the same root: “the specific vulnerability of the human species, which individuates itself through sociation” (Habermas, 1990c: 200).

Justice concerns the equal freedoms of unique and self-determining individuals, while *solidarity* concerns the welfare of consociates who are intimately linked in an intersubjectively shared form of life -- and thus also to the maintenance of the integrity of this form of life itself. Moral norms cannot protect one without the other: they cannot protect the equal rights and freedoms of the individual without protecting the welfare of one’s fellow man and of the community to which the individuals belong (Habermas, 1989/90: 47).

With the idea of solidarity, discourse ethics refers only to the “structural aspects of the good,” as opposed to partial conceptions of the good life which contain substantive features (Habermas, 1989/90: 49). Habermas maintains that the abstract morality in discourse ethics

especially protects human vulnerability because it does not impose a particular form of the good life. Rather, it “refer[s] negatively to the damaged life” (Habermas, 1990c: 205).

According to Habermas, solidarity is prior to ideal role taking, as it is grounded in lifeworld relations of mutual dependency. This ignores the fact that processes of individuation and socialization differ between genders and across various ethnicities, cultures and classes. Solidarity does not exist in the lifeworld to the extent that Habermas claims it does. Certainly, solidarity exists within, and even across communities, but too often that which Habermas describes as “mutual dependencies” are actually relations of domination.⁶

I argue that solidarity should be understood as an aspect of the moral-transformative potential of discourse. We cannot count on it as a condition prior to discourse. Habermas is correct to state that all individuation occurs in an intersubjectively shared form of life, but this form of life is not inherently solidaristic; an intersubjectively shared form of life also contains relations of domination and oppression. Rather, solidarity is best understood as something that could be gained in the process of ideal role taking and the moment of

⁶ There is a body of feminist literature that expands upon this point. For example, Nancy Fraser argues that Habermas’ firm separation between system and lifeworld has the consequence of presenting the family as a “safe haven” and ignores the gendered subtext of lifeworld relations (1989: 118). Jessica Benjamin points out that the process of individuation is different for girls and boys: the self-identity of boys is reinforced in a culture of masculine values, whereas girls’ sense of identity is diminished (Benjamin quoted in Dean, 1995:217). Mutual recognition can slip into relationships of domination and submission that tend to align with gender roles (Benjamin, 1988:75). This occurs when boys discover they cannot grow to be like their mother, but can only possess her, and girls reenact “the vicarious pleasure of the self-sacrificing mother with whom she identifies” (Benjamin, 1988: 80). Individuation is also different across various cultures, races, class and ethnicities. For example, if a black girl sees herself according to racist stereotypes that pervade society, she recognizes herself as “undesirable, inadequate and inferior” (Ward quoted in Dean, 1995: 224). By interpreting these types of relations as solidarity, there is a great chance that the conceptions of justice that emerge from this “solidarity” will be skewed in favour of the dominant group.

collective insight and mutual understanding. Habermas' insistence upon actual participation allows a far more compelling argument that such a sense of solidarity is possible. Discourse between *actual* individuals implies that the perspectives of the generalized other and the concrete other are both present in the ideal role taking. Moreover, Habermas tells us that this process of ideal role taking *is situated* within a shared language: "We cannot attain an impartial standpoint by turning our back on the context of linguistically mediated interaction...but only by extending the individual participant perspective in a universal fashion" (Habermas, 1993: 49).

In Arendtian language, "extending the individual participant perspective in a universal fashion" is to think from the standpoint of everyone else with an "enlarged mentality." In the next chapter, I argue that we cannot think from the standpoint of others without first becoming aware of who they are. It is difficult to think from the standpoints of others without having knowledge of their life experiences, worldviews, characteristics and aspirations. By detracting from concrete particularities, by marginalizing difference in favour of commonalities, and by denying the articulation of evaluative statements about the situation, Habermas makes it difficult to extend various perspectives to everyone else. Without full access to the ethical background of fellow participants, there is a danger that their perspectives will be distorted through wrongful projection or ignorance. A trace of the concrete other is present in Habermas' insistence upon actual discourse within a shared, situated language. In order to fully actualize the perspective of the concrete other, Habermas must acknowledge that in practice, morality and ethics are inseparable. Concrete particularities, such as evaluative statements about the situation at hand, interpretations of

needs, and references to affective-emotional constitutions must be made explicit so as to facilitate thinking from the standpoint of everyone else. Consequently, judgments formed about the universalizability of a norm will be impartial, that is, unbiased toward any particular tradition, but also sensitive to and inclusive of the differences contained within the polity.

The emphasis on rational argumentation and consensus

Discourse ethics has often been criticized for privileging those forms of speech that fall under the rubric of “rational” argumentation. This tendency is exacerbated by the emphasis on consensus, whereby those forms of speech that are hostile or inimical to consensus are inhibited or suppressed. The artificial boundaries of discourse ethics discourages forms of communication such as storytelling, poetry, emotional outbursts and shouting protests. Yet, as Iris Marion Young points out, “claims about the rationality of speech can and often are used a means of asserting power...especially when there are cultural differences” (1993: 127). Rather than focusing solely on “rational” argumentation, discourse ethics must be expanded to include all types of communication that do not violate the principles of symmetry, reciprocity and reflexivity.⁷ Otherwise, it threatens to marginalize those not as adept at arguing in a rationalistic style which originated in institutions of scientific and parliamentary debate that have traditionally been white, male and upper class dominated (Young, 1996: 123). Further, the emphasis on consensus needs to be reduced in order to

⁷ Forms of speech that violate the principles of symmetry, reciprocity and reflexivity would include intimidation and racist or sexist speech specifically designed to detract from the value of the other's words.

allow for multiple forms of communication, including agonistic speech which is not conducive to consensus, and to permit the possibility of irresolvable differences.

In contrast to my position, Habermas maintains that rational argumentation is not tied to any particular worldview or tradition:

In all languages and in every language community, such concepts as truth, rationality, justification, and consensus, even if interpreted differently and applied according to different criteria, play the *same grammatical role* (1996: 311).

At any rate, he concludes, this is true in modern societies that have moved to a postconventional level of justification where members of a society take a reflexive attitude toward their respective cultural traditions (1996: 312). Habermas' defense that rational argumentation is rooted in the pragmatics of language does not meet its mark. For it is not the grammatical role of argument that I dispute, but the narrow scope that Habermas assigns to discourse in his specific formulation. Indeed, to conceive of rationality and justification as grammatically universal may be suitably abstract to incorporate the styles of expression as suggested by Young. However, Habermas constructs a common way of speaking under the conditions of the ideal speech situation that, in fact, reflects a particular tradition. To return to the issues in the previous section, by bracketing out the ethical backgrounds of participants, Habermas actually emphasizes a generalized, formal, and rationalistic style of argumentation (which corresponds to the perspective of the generalized other). In other words, he presumes that "when we eliminate the influence of economic and political power, people's ways of speaking and understanding will be the same; but this will be true only if we also eliminate their cultural differences and different social positions" (Young, 1996: 123). By assuming

that there is a common way of speaking, Habermas marginalizes difference because more “situated” forms of speech, i.e. gendered or ethnic styles of speaking, are downplayed or undermined.

Iris Marion Young argues that the emphasis on rational argumentation promotes those forms of speech which are formal and general, dispassionate and disembodied. These qualities of speech marginalize the underprivileged:

These norms of “articulateness”...are culturally specific, and in actual speaking situations in our society exhibiting such speaking styles is a sign of social privilege. Deliberation thus does not open itself equally to all ways of making claims and giving reasons. In formal situations of discussion and debate, such as classrooms, courtrooms, and city council chambers, many people feel they must apologize for their halting and circuitous speech...[The norms of dispassionate and disembodied speech] tend to falsely identify objectivity with calm and absence of emotional expression. Thus expressions of anger, hurt, and passionate concern discount the claims and reasons they accompany...The speech culture of women and racial minorities...tends to be more excited and embodied, more valuing the expression of emotion, the use of figurative language, modulation in tone of voice and wide gesture (Young, 1996: 124).

Young also argues that discourse ethics privileges speech that is assertive and confrontational because the “force of the better argument” enforces competition.

Here, I depart from Young for two reasons. First, she finds discourse ethics more confrontational than I do and secondly, she judges agonistic speech to be a threat, particularly to women and cultural minorities. In contrast, I maintain that discourse ethics is characterized by a consensual politics that promotes rationalistic styles of speaking within an overarching *telos* of reaching common agreement. The problem is not, as Young suggests, simply that discourse ethics is combative and confrontational and therefore marginalizes women and cultural minorities. Rather, it is because the competition in discourse ethics is *channelled*

toward consensus, within a paradigm of rational argumentation, that groups such as women and cultural minorities are marginalized. This exerts a pressure against expressions of difference which are detrimental to reaching agreement and/or depart from the dominant form of argument.

Agonistic or confrontational speech only threatens diversity when it is circumscribed by an exclusive form of argumentation that aims toward consensus. If the emphasis on consensus is loosened, which Arendt's theory of judgment and action allows us to do, agonistic speech then promotes and celebrates diversity. As I argue below and in the following chapter, to conceive of public deliberation as an agonistic exchange of opinion is to allow multiple forms of expression to compete and converge in a public realm whose *raison d'être* is political performance, the act of judging itself, and the expression of distinction -- rather than reaching consensus through the force of the better argument.

Young is correct to say that the competitive aspect of discourse ethics supports a male, western style of speaking. But she pays little attention to the way that this competition is shaped by an overarching *telos* of consensus that reinforces this privileged model of argumentation. Although in places Habermas does speak of discourse ethics in terms of a competition, it is a *cooperative* (i.e. consensual) competition, where participants engage in a mutual search for truth. The competition is not oriented toward influencing or manipulating others, but toward rationally motivating others to agree to the better argument. As Habermas states, it is a "competition with arguments in order to convince one another, that is, in *order to reach consensus*. This dialectical role structure makes forms of disputation available for

a comparative [cooperative] search for truth" (1990b: 160; emphasis added).⁸ The emphasis on reaching consensus places a pressure upon participants to minimize dissension or expressions of difference.

There is an element of normalization within discourse ethics that moves participants towards consensus. An analogous example is the social and psychological pressure exerted upon dissenting jurors in hung trials (Gould, 1996: 174). Moreover, this normalizing force is exerted in the direction of the rationalistic model of argumentation. The prioritization of rational argumentation as a common way of speaking fails to interrogate whether minority groups have succumbed to the pressures of assimilation or normalization. The inhibition of situated, or informal types of speech obscures whether or not assimilation into mainstream culture has occurred. In other words, we cannot tell whether marginalized groups such as women and cultural minorities have been forced into the rationalistic style of argument for lack of alternatives or whether it is a freely chosen way of speaking. The danger is that those expressions of difference which depart from the rationalistic paradigm are likely to be discredited because they inhibit consensus and supposedly have no rational basis. As Villa argues, the criterion of consensus "leaves unexamined the self-surveillance of the civically virtuous citizen (who has internalized the hegemonic conception of the public good) or the

⁸Young (1996: 122; fn. 8) cites the same passage to demonstrate the confrontational and combative aspects of discourse ethics that privilege male forms of speaking. She does not sufficiently note the connection between this form of competition and the search for consensus. I wish to bring out this aspect of discourse ethics to argue that Young is correct insofar as the competitive elements are marginalizing, but only because they are contained within a rationalistic style of argumentation that is attuned to consensus.

communicatively rational agent (who has internalized the hegemonic conception of what constitutes 'the better argument')" (1992: 715).

What is needed, I suggest, is an open and agonistic exchange of opinion that is neither circumscribed by a particular paradigm of argumentation nor overwhelmingly concerned with reaching consensus. Conceptualizing discourse in this way achieves two things. First, the inclusion of all non-violent forms of communication lifts the inhibition against culturally diverse forms of speaking and arguing. Communication acts such as storytelling, physical gestures, emotional outbursts, metaphor, and rhetoric are interspersed with traditional legal or parliamentary argumentation. The voices of minority groups are not marginalized because no form of communication is privileged over another. Secondly, by relaxing the emphasis on consensus, there is more room for expressions of difference, and hence for inclusiveness within deliberation. Once we understand discourse as an Arendtian exchange of *opinion*, rather than the search for the better argument, the agonism in discourse no longer threatens diversity. Rather, the agonistic exchange of opinion provides an open forum for all groups to voice their dissent and fight for the common acceptance of their beliefs, while at the same time having enough respect for others' cultural values to admit the possibility of permanent disagreement. Although the quest for consensus is not abandoned, it is no longer the primary driving force behind public deliberation. Instead, discourse is opened up to a multiplicity of voices that articulate diverse opinions which compete and coalesce with one another.

There are several objections that could be made to this argument. First of all, one might argue that discourse ethics is a fallible process where decisions can be reopened and rechallenged (see Markell, 1997). The revisibility of consensus insures that no group is

excluded, at least for long. Furthermore, it could be argued that under the idealizing presuppositions of the ideal speech situation, minorities are always free to voice their dissent. However, as the diversity of value orientations in a society grows, morally justified norms must move to higher and higher levels of abstraction to consensually resolve issues (Habermas, 1990c: 205). The greater the decontextualization, the greater the possibility that the needs and identities of cultural minorities will become marginalized in the discursive process. As the ability to refer to concrete particularities diminishes with higher levels of abstraction, the rationalistic argumentation that corresponds to the perspective of the generalized other overwhelms all other forms of reason giving. Groups such as women and cultural minorities thus may be forced to speak in a discursive language with which they are unfamiliar or uncomfortable, or else remain silent. In either case, there is a danger that they will succumb to the "better argument" for lack of alternatives -- irresolvable differences are not a welcome option in discourse ethics.⁹

⁹ In chapter three I more fully discuss the idea of permanent disagreement in terms of Habermas' description of majority-rule decisions as the interruption in the search for a single right answer (see McCarthy, 1996). I will argue that the fallibilism of discourse does not refer to the fact that norms are open to rechallenge, but to the fact that the single right answer has not yet been found. While consensus is certainly desirable, it should not be placed as the overriding goal within discourse. According to an Arendtian theory of judgment, the focus of discourse should be judgment and political speech themselves. The possibility of permanent disagreement does not necessarily lead to decisionism, but rather to compromise formation or majority rule under mutually agreed upon procedures. While Habermas allows that many political issues will involve strategic negotiation, he stipulates that ethical-political disputes about who we are, what constitutes the common good and fundamental values cannot be settled in this way. McCarthy argues that irresolvable, yet reasonable disagreements which are settled by majority rule requires a "reworking" of Habermas' understanding of majority rule: members may rationally accept outcomes with which they substantively agree, but then the notion of rational acceptance "does not here have the *cognitive* sense of succumbing to the force of the better argument" (1996: 1123). This interpretation loosens the notion of consensus. Rather than viewing majority rule as the interruption in the search for a single right answer, consensus now revolves around "abid[ing] by the rules they accept as fair even when things do not go their way" (McCarthy, 1996: 1123).

A second objection against including forms of speech that lie outside rational argumentation comes from Seyla Benhabib. She maintains that it is implausible to institutionalize the informal aspects of everyday communication because “to attain legitimacy, democratic institutions require the articulation of bases of their actions and policies in discursive language that appeals to commonly shared and accepted public reasons” (1996b: 83). The rule of law requires a discursive language because the ideal of impartiality “should govern not only our *deliberations* in public but also the *articulation* of reasons” (Benhabib, 1996b: 83). Benhabib criticizes Young’s attempt to introduce more situated, partial and affective communication alongside rational argumentation because it causes arbitrariness and capriciousness. Specifically, Benhabib argues that non-discursive language such as rhetoric, greeting¹⁰, and story-telling moves people to act without having reasons for their action. As a result, the impartiality of decision-making in the public sphere is jeopardized. Furthermore, these informal forms of speech should not be a part of formal decision-making because they are present in processes of opinion formation in the public sphere, which is an “anonymous, plural, and multiple medium of communication and deliberation” (Benhabib, 1996b: 84).

Benhabib’s criticisms of Young’s proposal runs counter to practical examples and theoretical arguments that support the inclusion of ethically situated speech in moral

¹⁰Young defines greeting as “the forms of speech that often lubricate ongoing discussion with mild forms of flattery, stroking of egos, and deference” (1996: 129). She argues that greeting is a necessary preliminary for the establishment of trust and respect. This also includes non-linguistic gestures such as “smiles, handshakes, hugs, the giving and taking of food and drink” (1996: 129). Benhabib maintains that these sorts of communication induce arbitrariness because “who can tell how far the power of a greeting can reach” (1996b: 83).

discourse.¹¹ The ideal of impartiality is not endangered with the introduction of situated, affective forms of speech that fall outside the rationalistic paradigm of argumentation. Arendt provides a theory of judgment where deliberation and decision-making results from the agonistic exchange of opinion in a pluralistic public sphere. Arendt speaks of opinion rather than argumentation in order to avoid what she sees as the tyranny of rationalistic claims to truth. Deliberation as the exchange of opinion refuses the notion that a single right answer lies in the better rational argument. It encourages multiple forms of communication, including situated speech that refers to the concrete particularities of participants. This does not, however, violate the ideal of impartiality in decision-making. Arendt roots judgment in the *sensus communis*, a term she appropriates from Kant which means common or community sense. As we see in chapter two, the *sensus communis* provides the criteria for judgment; participants in deliberation take into account the standpoints of others and their judgments accord with the community sense of rightness. Arendt shows that we need not abstract from our concrete particularities and engage in purely “rational” argumentation in order to remain impartial. Impartiality lies in the “disinterested” balance between the universal and the

¹¹For example, the procedural rights granted to Native peoples during the MacKenzie Valley Pipeline Inquiry demonstrates how “situated,” informal forms of speech can be accommodated within formal decision-making processes in a manner that strengthens democratic legitimacy (see Swan, 1996: 23-25). The Inquiry examined the environmental and social effects of installing a natural-gas pipeline in the North, a project which would have tremendous impact upon the local Natives. The public hearings were formulated so that they were not simply a formal opportunity for participation but a means of “articulating claims in such a way as to legitimate both local knowledge of the situation and ethical claims about the specific effects of risks on community identities” (Swan, 1996: 24). Thus, in addition to formal hearings with lawyers and witnesses, informal hearings involving oral presentations in the Natives’ own languages were given equal weight in Justice Berger’s considerations. In effect, the inclusion of informal hearings in the decision-making process was grounded in a recognition of the Native way of life, that is, a community with a different language and oral tradition, a different history and relationship to the land, and a different set of values from the white majority.

particular that is characteristic of sound judgment. Arendt's conception of deliberation avoids the rationalistic and marginalizing aspects of discourse ethics, while mitigating charges of relativism by rooting the validity of decisions in the community sense of rightness.

Judgment and the "Force of the Better Argument"

In the next chapter I approach the exclusionary aspects of discourse ethics from Arendt's theory of judgment and political action. Habermas maintains that participants in discourse ethics will be motivated toward consensus solely by the unforced force of the better argument. Yet, he never clarifies how participants discern the better argument or what considerations are necessary to the formation of sound judgment. It is my contention that the exclusionary aspects of discourse ethics warp or corrupt sound judgment. The separation and prioritization of morality over ethics denies that judgment involves contextualizing the universal to fit the particular. The emphasis on consensus within the paradigm of rational argumentation undermines an open and pluralistic exchange of opinion. Contention between conflicting opinions, rather than "rational" argumentation, is the mark of an inclusive deliberation where judgment is formed by opening our minds to the standpoints of others through imagination and what Arendt calls enlarged thought. The exclusionary aspects of discourse ethics compromise diversity by discrediting or marginalizing evaluative statements, references to concrete particularity and those forms of communication that fall outside of the rationalistic paradigm of argumentation and/or are inimical to consensus. This erodes the very foundation of the public sphere, which is plurality. It also denies actors full access to the standpoints of others when forming judgments.

Habermas argues that the “rationally motivating force of insights” achieved in discourses of justification only becomes effective when moral judgment is supplemented by “the additional competence of *hermeneutic prudence*, or in Kantian terminology, *reflective judgment*” in discourses of application (1990b: 180; emphasis added). In contrast, Arendt argues that almost all political judgment is reflective, meaning that the universal must be found for a pre-given particular. This is opposed to determinant judgment, where the particular is subsumed under a pre-given universal. The politics of recognition demands the acknowledgment of concrete particularities that have been marginalized or ignored by norms which have posed as universal. Increasingly, the challenge in modern, complex societies is to have universalizable norms which fully include women, cultural minorities and ethnic groups. Discourse theory promises to take diversity as the starting point of universalism. It will not, however, fulfill this promise until it recognizes that the search for universals involves reflective judgment. Discourse must therefore include diverse forms of communication, evaluations and references to concrete particularities, and the possibility of irresolvable differences.

CHAPTER TWO: ARENDT'S THEORY OF JUDGMENT

The purpose of this chapter is to show how Hannah Arendt's theory of judgment provides an alternative to Habermas; one that addresses issues of diversity more fully than discourse ethics. Arendt's theory of judgment provides a response to the criticisms of discourse ethics advanced in the previous chapter. From an Arendtian perspective, I argue that sound judgment is the result of an agonistic and deliberative exchange of opinion where a balance between the particular and the universal is achieved. This understanding of judgment provides the conditions for a reformulation of Habermas' version of procedural justice whereby 1) the entanglement of morality and ethics is acknowledged and evaluative statements that refer to the ethical background of participants are permitted in moral discourse; and 2) multiple and diverse forms of communication are encouraged while the emphasis on consensus is lessened.

Participants determine the "better argument" by engaging in what Arendt calls representative or enlarged thought, which means thinking from the standpoint of everyone else. Arendt derives this concept from Kant's *Critique of Judgment* because, she argues, Kant's work on aesthetic reason contains his "unwritten" political philosophy. She criticizes Kant's official political writings because the questions underlying his moral philosophy -- "What can I know? What ought I to do? What may I hope?" -- nowhere refer to humans as political beings nor to action or plurality (Arendt, 1982: 19). The denigration which Kant accords human action in his moral philosophy differs radically from Arendt's theory of

action.¹ For Arendt, freedom is inherent in action, and action in a pluralistic public sphere is the basis of politics. This enables her to claim that Kant's theory of aesthetic judgment is inherently political because it requires a public realm, which presupposes plurality and forms the arena for political action (Arendt, 1968b: 221).

Kant places judgment within two categories. Determinant judgment subsumes the particular under a pre-given universal, whereas reflective judgment finds the universal for the pre-given particular. He posits that all moral judgment is determinant, and limits reflective judgment to objects of beauty in the aesthetic realm. Arendt sees this as an erroneous limitation. Aesthetic judgment, by virtue of being an intersubjective procedure for gaining agreement, is a political faculty capable of telling not only "beautiful from ugly," but also "right from wrong" (Arendt, 1978: 193). Although political judgment is akin to the sense of taste, telling right from wrong is neither an arbitrary subjective process nor is it the result of sheer assertion. This is because Arendt confers a deliberative element to judgment, which is linked to the community sense of rightness (*sensus communis*), or in Habermas' terminology, intersubjective validity. The deliberation in Arendt's theory of judgment, however, is more contextualized and agonistic than it is in Habermas' discourse theory. Arendt situates judgment within an agonistic conception of politics and combines Kantian enlarged thought

¹ In contrast to Arendt, Kant sullies the relation between action and freedom. Benhabib explains how Kant gets "mired in the problem of his two world metaphysics," which is incapable of distinguishing between morally good actions and morally right ones because he relies upon the epistemologically inadequate language of natural events to describe human action (1992: 131). This creates a quandary wherein the morally good becomes impure as soon as it is embodied in action. Yet, writes Benhabib "to embody the good will in action is the only mark of freedom and moral dignity. Thus we seem to be free only when we act, yet become unfree as soon as we act" (1992: 132).

with the Greek idea of *phronesis*, or prudence. Consequently, judgment involves considerations that are more inclusive of diversity than discourse ethics allows. Arendt's theory of judgment calls for multiple and diverse forms of communication within discourse and greater reference to concrete particularities. It also calls for a movement away from a consensus theory of truth which overpowers the multidimensionality of the public sphere in a push for the best argument.

Judgment, I argue below, is a matter of contextualizing the universal to fit the particular. When participants engage in representative thought, judgments result from contention, persuasion, exchanges of opinion, and the "wooing" of everyone else's consent (Arendt, 1968b: 222). This is a process that accommodates and encourages diversity because sound judgment requires reference to concrete particularities, whereas Habermas' "force of the better argument" refers to that which is generalizable at the expense of differences. Furthermore, the exchange of opinion is a flexible process where there are no right answers, no limitations on the forms of speech and the unique identities of actors are revealed through their speech and judgments. In the following, I shall endeavour to show that Arendtian judgment formation is impaired in discourse ethics because Habermas separates and prioritizes morality over ethics, and emphasizes consensus while privileging rationalistic argumentation. I argue that we can use Arendt's theory of judgment to redress these flaws while maintaining the deliberative foundation to politics, thus bringing discourse theory closer to its promise.

Judgment as a Balance between the Universal and the Particular

Earlier, I stated that the politics of recognition demands the acknowledgment of concrete particularities which have been previously marginalized or ignored by norms that have posed as universal. In a post-traditional society, discourse ethics provides a set of procedural rules which guide the search for universalizable norms that promise to fully include groups such as women, cultural minorities and ethnic groups. By its very definition, reflective judgment is present throughout moral discourse because the search for universalizable norms in the age of identity politics is directed by pre-given particulars. Furthermore, as I have argued above, Habermas' distinction between justification and application, moral insight and reflective judgment, is exaggerated. The grounding of norms necessarily entails an evaluation of the situation at hand, or in other words, an application of the moral point of view. Arendt's theory supports this argument -- judgment involves contextualizing the universal to fit the particular, or obtaining a balance between the particular and the universal. Arendtian judgment reconciles the demands of universalism with demands for the acknowledgment of specificity. This is accomplished by combining the enlarged thought and *sensus communis* that are present in reflective judgment with the Greek notion of *phronēsis*. For the remainder of this section, I discuss Arendt's theory of judgment and how it differs from and improves upon Habermas' representation of the generalized other.

Hannah Arendt died before completing the final volume of *Life of the Mind*, which was to have fully examined the faculty of judgment. A schema of what we can only assume to be her theory of judgment is scattered throughout various writings, and culminates in her *Lectures in Kant's Political Philosophy* (delivered in 1970) where she argues that political

judgment is based on the use of aesthetic reason. I contend that Arendt's connection between aesthetic reason and the judgment of political questions provides a better explanation of consensus formation than Habermas' "force of the better argument," which assumes that controversial issues can be settled by the "rational" giving of reasons. By failing to explicitly examine how individuals form judgments, Habermas risks presenting the superiority of the better argument as self-evident. On the other hand, Arendt recognizes that initial reactions to arguments or situations are purely subjective. Discriminations between right and wrong are akin to the sense of taste. Unlike seeing, hearing and touching, the sense of taste "give[s] inner sensations that are entirely private and incommunicable... [and] the it-pleases-it-displeases-me is immediate and overwhelming" (Arendt, 1982: 64). An enlarged mentality, or representative thinking, is needed to move from gut reactions to a state of impartiality. This is a process that Habermas overlooks because he assumes that participants are immediately capable of maintaining a performative attitude and engaging in communicative, as opposed to strategic action.

Arendt asks why is judgment based on a private sense despite the fact that "when it comes to matters of taste we are so little able to communicate that we cannot even dispute about them?" (Arendt, 1982: 65).² The answer lies in the use of imagination, which "transforms an object into something I do not have to be directly confronted with" (Arendt, 1982: 64). Imagination represents the overwhelming sensations associated with the immediate and places them at a proper distance which allows for disinterested impartiality:

² To elaborate upon this point, Arendt claims that "No argument can persuade me to like oysters if I do not like them. In other words, the disturbing thing about matters of taste is that they are not communicable" (1982: 66).

One then speaks of judgment and no longer of taste because, though it still affects one like a matter of taste, one now has, by means of representation, established the proper distance, the remoteness or uninvolvedness or disinterestedness, that is requisite for approbation and disapprobation, for evaluating something at its proper worth. By removing the object, one has established the conditions for impartiality (Arendt, 1982: 67).

Thus, political judgments about questions of right and wrong “transcend the expression of simple preference, while falling short of the a priori and certain validity demanded by Kantian [practical] reason” (Benhabib, 1996a: 189).

Once the conditions of impartiality have been established the operation of reflection i.e., the actual activity of judging, can begin. Judgment is no longer rooted in purely subjective reactions; through representation, “the nonsubjective element in the nonobjective senses is intersubjectivity” (Arendt, 1982: 67). The standards for judgment are rooted in the *sensus communis*, which is like a sixth sense that coordinates the other five by guaranteeing that the object I sensually experience is also experienced by others. Humans cannot live outside the company of each other and thus rely on their common sense to orient them toward the common world and the opinions of others (Arendt, 1982: 67). Sound judgments are those which are communicable and in accord with the community sense of rightness. Reflective judgment relies on an enlarged mentality that “takes all others and their feelings into account...when one judges, one judges as a member of a community” (Arendt, 1982: 72).

Judgment means neither emotionally assuming the standpoint of others, nor is it simply an empirical process of forming an aggregated majority:

Political thought is representative. I form an opinion by considering a given issue from different viewpoints, by making present to my mind the standpoints of those who are absent; that is, I represent them. This process of representation does not blindly adopt the actual views of those who stand

somewhere else, and hence look upon the world from a different perspective; this is a question neither of empathy, as though I tried to be or to feel like somebody else, nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not. The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusions, my opinion. (1968a: 241).

This process of reaching judgment may appear to be monological, rooted in the perspective of the observer, or in Arendt's language, the spectator. For example, Beiner divides Arendt's Kantian theory of judgment into an early stage, which relates to the *vita activa* and a later stage, which relates to the *vita contemplativa*.

The more she reflected on the faculty of judgment, the more inclined she was to regard it as the prerogative of the solitary (though public-spirited) contemplator as opposed to the actor (whose activity is necessarily nonsolitary). One acts with others; one judges by oneself (even though one does so by making present in one's imagination those who are absent). In judging, as understood by Arendt, one weighs the *possible* judgments of an imagined Other, not the actual judgments of real interlocutors (1982: 92).

Indeed, Arendt does refer to section 40 of the *Critique of Judgment*, where Kant says that we ought to compare our judgments "with the possible rather than the actual judgments of others" (1982: 71). Further, she argues that only spectators are capable of impartial judgment, particularly when judging historical events: "The advantage of the spectator is that he sees the play as a whole, while each of the actors knows only his part, or...only the part of the whole that concerns him. The actor is partial by definition" (1982: 68). This seems to directly counter Habermas's stipulation that all affected actors are to be potentially involved as participants in *actual* discourse.

In my interpretation, however, Arendt's distinction between actor and spectator can in fact be understood as complementing the demands of the ideal speech situation. Judgment is not monological in the sense that Beiner portrays it. Certainly, judgments "are determined by a certain subjectivity, by the simple fact that each person occupies a place of his own from which he looks upon and judges the world" but "it also derives from the fact that the world itself is an objective datum, something common to all its inhabitants" (Arendt, 1968b: 222). Although each individual reaches his or her decision through interior thought processes, these decisions are the result of a public dialogue: common deliberation, the exchange of opinions, and thinking (sometimes aloud) from the standpoint of everyone else. It is not that only the spectator is capable of judgment. *Rather, every actor involved in discourse must assume the perspective of the spectator.* This is only possible through representation and enlarged thought. Representation frees the actor from prejudiced subjective reactions and establishes an impartial disinterestedness, i.e., gut feelings about the issue at hand are displaced, and the issue becomes a spectacle to be observed with disinterest and intersubjectively judged. Once prepared to examine the issue impartially, the spectator never acts alone, but always forms judgments with the use of enlarged thought and criteria based on the *sensus communis*.³ The theory of judgment from the perspective of the spectator (*vita contemplativa*) is not intended

³ "The public realm is constituted by the critics and the spectators, not by the actors or the makers. And this critic and spectator sits in every actor and fabricator; without this critical, judging faculty the doer or maker would be so isolated from the spectator that he would not even be perceived... Spectators exist only in the plural. The spectator is not involved in the act, but he is always involved with fellow spectators. He does not share...the faculty of novelty with the actor; the faculty they have in common is the faculty of judgment" (Arendt, 1982: 63).

to exclude the actor, but to address the concerns of the actor (*vita activa*) in a more detached and impartial way (d'Entrèves, 1994: 132).

At this point, there appears to be little difference between the detached impartiality of participants engaging in enlarged or representative thought, and the ideal role taking of Habermas' generalized other. Although both theories involve a distancing or abstraction from the situation at hand, the Arendtian participant is attached to the context and concrete particularities by virtue of Arendt's understanding of human action. First, Arendt combines enlarged thought with the Greek concept of *phronēsis*, thus indicating an attention to the particularities of the situation. Second, Arendt situates judgment within a theory of action where the "who," or distinct characteristics, of actors is revealed. The dual perspective of actor and spectator can be aligned with the complementary perspectives of the concrete other and the generalized other. Actors reveal their unique characteristics, or "whoness," to others and use situational wisdom (*phronēsis*) to analyze the concrete situation. Spectators engage in representative thought, distancing themselves from the situation, and judging it with impartiality. Both perspectives must be present in judgment formation. In order to think impartially from the standpoints of others, we must first become aware of who they are. An awareness of the distinct characteristics of fellow participants prevents unsound judgments about norms that are exclusive, marginalizing or unresponsive to the needs of diversity. I will now expand upon these two features of Arendtian judgment in order to demonstrate that sound judgment takes both the universal and the particular into account.

There is an Aristotelian strain in Arendt's thought, which Dana Villa has termed an "aestheticization of action" that stems from the inherent value Aristotle attributes to

deliberative speech (Villa, 1996: 99). Arendt appeals to the aesthetic first of all by locating judgment within the realm of taste, and secondly by emphasizing the performative aspects of action and speech (Villa, 1996: 32). Following Aristotle's distinction between *praxis* and *poiēsis*, or acting and making, Arendt understands genuine political action as speech which is conducted for its own sake. In contrast, speech which exists as a means to an end (*technē*) is "mere talk" that erodes the political; that is, it denies the ability to "act together" (Arendt, 1958: 180; 200). Aristotle depicts the *phronimos*, or the man of practical wisdom, as engaging in deliberation as a form of political action. Deliberation, whose primary intellectual virtue is practical wisdom (*phronēsis*), has no end other than itself: "To deliberate well, as the man of practical wisdom does, is to *do* well" (Villa, 1996: 33).

Like Aristotle, Arendt brings out the performative aspects of speech and deliberation by arguing that "no other human performance requires speech to the same extent as action...If nothing more were at stake here than to use action as a means to an end, it is obvious that the same end could be much more easily attained in mute violence" (1958: 179). Political speech has no purpose other than the joy of acting in sheer human togetherness, such that plurality, which is the "basic condition of action and speech" is strengthened and celebrated (1958: 175). If we were to say that there is an end to political speech and public deliberation, it could only be judgment itself. However, even judgment contains a performative aspect because it involves the use of practical wisdom, which is grounded in action or performance. The capacity to judge rests on a "specifically political ability in exactly the sense denoted by Kant, namely, the ability to see things not only from one's own point of view but in the

perspective of all those who happen to be present...The Greeks called this ability *phronēsis*, or insight..." (Arendt, 1968b: 221).

The connection between Kantian judgment and *phronēsis* underscores Arendt's commitment to *praxis*, or politics as speech and action. Further, it indicates that judgment involves a sensitivity toward concrete situations. The term *phronēsis* connotes ideas of prudence, practical or situational wisdom and judgment. It is "the competence to choose between conceptual schemes which embed incompatible or differently ranked values in situations where no a priori standard can be invoked" (Ferrara, 1987-88: 251). Without a priori standards, *phronēsis* is bound to context and particularities.⁴ Conversely, enlarged thought requires transcending context in order to attain impartial universality. In a seeming contradiction, Arendt combines the two in her theory of judgment, and this, I argue, indicates that judgment involves a quest for a balance between the particular and the universal.

The tension between the Kantian and Aristotelian strains of Arendt's thought are more apparent than real. Enlarged thought and *phronēsis* do not conflict so much as complement one another. Both are components of reflective judgment, because they are concerned with finding universals for pre-given particulars. Moreover, both are rooted in the *sensus communis* and rely upon speech and deliberation. Arendt's use of the term *phronēsis* differs somewhat from Aristotle's because she links it to aesthetic reason, or taste.

⁴ To expand, judgment as *phronēsis* contains a performative element because it is bound to action by virtue of its connection to context and particularities. Enlarged thought is much more contemplative than *phronēsis* because it calls for a mental exercise whereby participants distance themselves from the situation under discussion and examine it with impartial disinterest. In contrast, because the exercise of *phronēsis* is immersed in the moment, participants actively analyze and choose between the particularities of the situation.

Aristotelian *phronēsis* is the privilege of a wise and judicious few whereas Arendt's use of the term is more democratic because it is a capacity that belongs to everyone.⁵ By constructing an affinity between *phronēsis* and taste, Arendt connects practical wisdom to the opinions of others; validity rests upon agreement with a community of differently situated subjects (d'Entrèves, 1994: 123). Consequently, as a "specifically political ability" that presupposes the condition of human plurality, *phronēsis* is joined to the *sensus communis*. The *sensus communis* acts as a sixth sense to coordinate private sensations into a common world shared by others. It guarantees that the "subjectivity of the it-seems-to me is remedied by the fact that the same object also appears to others" (Arendt, 1978: 50).⁶ In other words, it guides the process of thinking from the standpoint of everyone else -- a process which requires distancing from immediate, partial reactions but nevertheless remains bound to context and relies upon situational wisdom.

In order to think from the standpoint of others, we must first understand who they are. Arendt's theory contains a further performative aspect in that the "who" of actors is revealed in the course of genuine political action. Judgment is inherently linked to this performative

⁵Judgment belongs to everyone because "if...the ability to tell right from wrong has anything to do with the ability to think, then we must be able to 'demand' it from every sane person, no matter how erudite or ignorant, intelligent or stupid..." (Arendt, 1978:13).

⁶ For Arendt, appearances constitute reality. She argues that Being and Appearing coincide, and those who claim that the surface is superficial are wrong: "Since we live in an appearing world, is it not much more plausible that the relevant and meaningful in this world of ours should be located precisely in the surface?" (1978: 27). All living beings in this world makes an appearance "like actors on a stage set for them" that presupposes spectators (1978: 21). Political action and judgment are especially linked to the common world of appearances -- the *sensus communis* secures agreement about perceptions, so that the object I see also appears to others. Beiner notes: "for Arendt, politics is a matter of judging appearances, not purposes. It is for this reason that she can assimilate political judgment to aesthetic judgment...she had already assumed an affinity between politics and aesthetics for both concern the world of appearances" (1982: 141).

element of action and speech, because all three occur within the common world of appearances that contains a “web of human relationships” (Arendt, 1958: 183). Together, action and speech retain an “agent-revealing capacity,” whereby the “who” of a person is disclosed through the words and deeds they offer within the public realm (1958: 178-182). Arendt refers to the “who” in two different ways, but each revolves around attaining distinction. First, there is the idea of being as you *wish* to appear, of presenting oneself to others in a fashion that requires self-awareness (Arendt 1978: 37). Second, Arendt speaks of the “who” in terms of a narrative that can only be pieced together by the spectator or historian: “it is more than likely that the “who,” which appears so clearly and unmistakably to others, remains hidden from the person himself” (Arendt, 1958: 179). I will refer to the first type of distinction as the “self-aware who” and the second, as the “*daimonistic* who.”⁷

That actors are both aware and unaware of their unique characteristics is not as paradoxical as it may seem. I argue that they are not only compatible, but that they must both be present in the ideal role taking that discourse ethics requires in order to be responsive to diversity. I suggest that the self-aware “who” ought to be present in discourse ethics in terms of the participants’ particular identities, concrete needs, concerns and evaluations of the situation at hand. The *daimonistic* “who,” on the other hand, is contained within the moral-transformative potential of discourse. Together, participants in discourse come to an agreement as a result of persuasion and contentious exchanges of opinion that generate

⁷ I refer to the second type of revelation as the *daimonistic* “who” because Arendt states that the “who” which appears so clearly to others yet remains hidden from the actor is “like the *daimon* in Greek religion which accompanies each man throughout his life, always looking over his shoulder from behind and thus visible only to those he encounters” (1958: 179-80).

reflexive scrutiny of one's own, and others' positions. In other words, participants do not know how they will judge until they hear and think from the standpoint of everyone else. The openness and reflexivity demanded by discourse ethics necessarily entails an element of mystery with respect to the changes in people's self-understandings and attitudes toward one another and with respect to the substantive outcome of moral discourse.

The revelation of the *daimonistic* "who" that is contained in the moral-transformative potential is dependent upon a process of ideal role taking whereby the self-aware "who" is disclosed to others. Benhabib argues that enlarged thought enjoins a process of symmetrical reciprocity which involves "making present to oneself what the perspectives of others involved are or could be, and whether I could 'woo their consent' in acting the way I do" (1996: 190). Out of moral respect, we consider the standpoint of each person involved, and this requires being able to reverse positions with them. In Arendt's words, this is "thinking from the standpoint of somebody else" (1964: 49). In order to think from the standpoints of others, we must first become aware of who they are:

Neither the concreteness nor the otherness of the "concrete other" can be known in the absence of the voice of the other. The viewpoint of the concrete other emerges *only as a result of self-definition*. It is the other who makes us aware of both her concreteness and her otherness. Without engagement, confrontation, dialogue and even a "struggle for recognition" in the Hegelian sense, we tend to constitute otherness of the other by projection and fantasy or ignore it in indifference (Benhabib, 1992: 168; emphasis added).

Participants present themselves as they *wish* to appear to others in ideal role taking. Their sincerity or truthfulness is only apparent to others; here again the *daimonistic* "who" is revealed to spectators. Persuasion, exchanges of opinion and representative thinking result in reflexive moral transformations and judgments that are rooted in the *sensus communis*.

In contrast, Habermas suppresses both elements of the “who” by privileging the perspective of the generalized other and disallowing evaluative claims about the concrete situation. By emphasizing that which is held in common, he denies participants a full understanding of the particularistic standpoints of others, and therefore denies the conditions necessary for sound judgment. Arendt shows that there are two components to judgment -- *phronēsis* and enlarged thought -- while Habermas blocks out one half by demanding an abstraction from context. Rather than balancing the demands of universalism with the particularistic concerns of diversity, rather than acknowledging the dual actor/spectator perspective that is used in judgment, Habermas separates and prioritizes impartial “moral” claims over situated “ethical” ones. However, discourse ethics must recognize the morality and ethics cannot be separated in practice -- the moral principle of universalization falsely assumes this. I argue that we make our decisions based on who we are, our diverse ethical backgrounds and our experiences, *as well as* opening our minds to the standpoints of others and judging with impartial disinterest. We change who we are through exposure to others, which encourages and enables reflexivity. This is the importance of intersubjectivity, or the *sensus communis*. This is the “moral-transformative potential” of discourse ethics.

Habermas acknowledges that everyone is situated within an ethical framework, but then asks participants to abstract from who they are in order to attain impartiality. Arendt’s theory of judgment, however, demonstrates that impartiality can be attained without denying reference to concrete particularities. To reiterate the argument from chapter one, moral norms do not have to be grounded with strictly normative arguments. As Wellmer points out, evaluations about the particularities of the disputed situation are an integral part of judging

the universalizability of norms (1992: 203). The moral principle of universalization prevents these evaluations from being articulated or else discredits them. As a result, judgment is impeded because participants do not have full access to the standpoints of others for enlarged thought. Nor can they exercise *phronēsis* because Habermas demands an abstraction from the context. Hence, there is a danger that the dominant culture's vision of justice and the good life will masquerade as universal because alternative conceptions of justice would be discounted for referring to the ethical background of the speaker.

Arendt provides an understanding of judgment such that it is a balance between the particular and the universal, or a contextualization of the universal in order to fit the particular. I maintain that we can use her theory to retain the deliberative foundation of discourse ethics, while at the same time making it more responsive to the needs of diversity. Arendtian judgment involves impartial disinterest as well as situational prudence, thus reinforcing my claim that Habermas' distinction between justification and application, or moral insight and hermeneutic prudence is exaggerated. The dual actor/spectator perspective complements Benhabib's argument that the perspectives of both the concrete other and the generalized other ought to be present in discourse. Arendt's theory of judgment provides the conditions for the reformulation of discourse ethics that moves it toward its self-understanding. Her theory grants a more contextualized notion of justice that is fully inclusive of diverse needs and concrete particularities without violating the demands of impartial universalizability.

Excursus: Arendt and the "Rise of the Social"

One possible contention against my thesis is that Arendt's theory of judgment cannot provide the conditions for a more contextualized conception of justice because she strictly separates the political from the social. Arendt laments the "rise of the social" in modern society because it destroys the distinction between the public and private such that "distinction and difference have become private matters of the individual" (1958: 41). She argues that the public realm, which is the arena for speech and political action, has been conquered by mass society's concern for the "public organization of the life process itself" (1958: 46). Arendt strictly separates the realm of necessity from the realm of freedom and action. The undeniable demands of necessity make it a coercive force; any attempt to meet needs through politics "inevitably produces terror; because while politics can 'transcend' nature, it cannot overcome it" (Villa, 1996: 30).⁸ What sort of justice does Arendt envision when she condemns the impoverished and downtrodden for their indignation and their attempts to redress social injustice through politics? As Hanna Pitkin so poignantly asks, if all that stems from the realm of necessity is excluded from politics, "what is it that they talk about together, in that endless palaver in the *agora*?" (1981: 336).

⁸ Arendt points to Robespierre's reign of terror as a prime example of what occurs when one attempts to redress social issues through politics: "It was under the rule of this necessity that the multitude rushed to the assistance of the French Revolution, inspired it, drove it onward, and eventually sent it to its doom, for this was the multitude of the poor. When they appeared on the scene of politics, necessity appeared with them, and the result was that the power of the old regime became impotent and that the new republic was born stillborn: freedom had to be surrendered to necessity, to the urgency of the life process itself...It was necessity, the urgent needs to the people, that unleashed the terror and sent the Revolution to its doom" (1965: 54-55).

This criticism can be resolved by conceptualizing Arendt's line between the political and the social as a *motivational* distinction. It is not that Arendt is oblivious or indifferent to poverty and social injustice. Rather, she demands that politics be motivated by the exigencies of freedom, not necessity itself. She criticizes the French Revolution for succumbing to compassion and the demands of necessity. Originally a fight for liberation from tyranny and oppression, the French Revolution later transformed into a rebellion against exploitation and poverty. Compassion compelled Robespierre to recognize that despite overthrowing the monarchy, the many remained "loaded down by their misery" and had to be liberated once more (Arendt, 1965: 69). The French attempt to transcend necessity, however, unavoidably resulted in terror because we can never escape the demands of necessity. According to Arendt, poverty is a natural phenomenon, the result of scarcity rather than politics, violence and violation (1965: 57). In contrast, Arendt commends the American commitment to freedom that inspired their Revolution. By focusing on freedom rather than necessity, the Americans established lasting institutions that foster a plurality of opinions which is far superior to the tyrannical "Une" of *le peuple*, Rousseau's general will.

Despite the conservatism of Arendt's claim that scarcity is an existential condition, there is still room for an interpretation of her theory that allows for recourse against misery, poverty and other forms of social injustice. Although she approves of the American Revolution, Arendt also expresses dismay at the American indifference to the miseries and injustice of slavery.⁹ However, she approaches this unjust social condition from the angle

⁹ She writes: "If it were not for the presence of Negro slavery on the American scene, one would be tempted to explain this striking [lack of compassion] exclusively by American prosperity, by Jefferson's "loving equality," or by the fact that America was indeed, in William Penn's words, "a

of freedom and action. Arendt opposes slavery on the basis of its incompatibility with freedom, rather than out of compassion because “the institution of slavery carries an obscurity even blacker than the obscurity of poverty” (1965: 66). She points to John Adams’ “conviction that darkness rather than want is the curse of poverty,” that the impoverished remain hidden in total obscurity even in the public realm (1965: 63).¹⁰ Robbed of the opportunity to distinguish themselves and gain freedom through political action, the impoverished and miserable remain subject to the absolute dictates of their bodies in a dehumanizing state of existence (Arendt, 1965: 54). Thus, insofar as social conditions threaten or undermine freedom, they are actionable in the public realm.

Social issues, or concrete needs, belong in public discourse so long as the motivation for their discussion stems from the desire to expand the realm of political freedom and action. As Pitkin explains, Arendt seeks to guard public sphere against a particular attitude:

Perhaps a “laborer” is to be identified not by his manner of producing nor by his poverty but by his “process”-oriented outlook; perhaps he is “driven by necessity” not objectively, but because he *regards* himself as driven, incapable of action...And the poor themselves became politically active not when most driven by objective necessity, but precisely when they came to see their suffering as actionable, as the bounds of necessity receded (1981: 342).

good poor Man’s country.” As it is, we are tempted to ask ourselves if the goodness of the poor white man’s country did not depend to a considerable degree upon black labor and black misery...” (1965: 65).

¹⁰ Adams writes, “The poor man’s conscience is clear: yet he is ashamed...He feels himself out of the sight of others, groping in the dark. Mankind takes no notice of him. He rambles and wanders unheeded. In the midst of a crowd, at church, in the market...he is in as much obscurity as he would be in a garret or a cellar. He is not disapproved, censured or reproached: *he is only not seen*...To be wholly overlooked and to know it, are intolerable” (in Arendt, 1965: 63-64).

Demands for social justice which are motivated by want itself denigrate genuine political action by imposing instrumental action in the public realm. Instrumental action carries a coercive force and undermines or destroys exchanges of opinion, persuasion, deliberation and judgment. Therefore, when social conditions are transformed into political issues, the fight for needs and interests should be articulated in terms of principles of justice, freedom and the strengthening of plurality in the public realm through broader inclusion (Pitkin, 1981: 346; Benhabib, 1996a: 145). Demands for social justice which strengthen a pluralistic public realm and genuine political action belong within Arendt's understanding of politics, and accordingly, we can interpret her theory of judgment as providing the conditions for a contextualized notion of justice.

Judgment, "Rational" Argumentation and Consensus

Arendt situates judgment within an agonistic conception of action that allows for multiple and diverse forms of communication, while lessening the emphasis on consensus found in discourse ethics. I have criticized Habermas for privileging rationalistic argumentation that is oriented toward consensus because this risks excluding or marginalizing those groups such as women, cultural and ethnic minorities who are not as adept or familiar with a formal, disembodied and dispassionate style of speaking. Furthermore, the overriding focus on consensus may influence participants to suppress claims which are provocative, confrontational or hostile to consensus. To fully include women and diverse ethnic and cultural minorities, the rational argumentation in discourse ethics must be broadened to include multiple forms of communication, including storytelling, emotional outbursts and

provocative demonstrations. Further, a more agonistic conception of political action is needed to accommodate diversity because it encourages expressions of difference and permits the possibility of irreconcilable differences. It is not that consensus is undesirable, but an overriding pressure that makes consensus the *telos* of discourse may subtly influence judgments about the universalizability of a norm. Following Arendt, I argue that judgment is the result of a deliberative *and* agonistic exchange of opinion. So long as diverse forms of communication are present, the agonistic element of discourse insures that all perspectives are voiced, challenged, reflexively examined and defended. Whether consensus is obtained is secondary to the debate itself.

Despite the heavy influence of (male) Greek thought on her writings, we need not interpret Arendt as privileging rationalistic speech. Her correlation between politics and aesthetics, judgment and taste lies in the fact that for Arendt, appearances constitute reality. Consequently, she distinguishes between truth and opinion, argumentation and persuasion. Politics is founded upon opinion, whereas truth carries a coercive force. Arendt writes that “every claim in the sphere of human affairs to an absolute truth, whose validity needs no support from the side of opinion, strikes at the very roots of all politics and all governments” (1968a: 233). Thus, Thomas Jefferson’s proclamation that “*We hold* these truths to be self-evident” actually concedes that the equality of men is not self-evident or beyond dispute -- rather, it “stands in need of agreement and consent...equality, if it is to be politically relevant, is a matter of opinion, and not the ‘truth’” (Arendt, 1968a: 246).

Arendt and Habermas both reject metaphysical claims to Truth that are asserted monologically. Although they share the notion of intersubjective validity or common

agreement as the alternative to metaphysics, discourse theory is less inclusive because of its rationalistic and consensual traits. Habermas stipulates that the validity of universalizable norms lies in rational consensus which is motivated by the force of the “better argument.” This implies that there is a single argument whose superiority will be compellingly self-evident -- at least for those who conform to the rationalistic style of argumentation. In contrast, Arendt writes that “validity depends upon free agreement and consent; they are arrived at by discursive, representative thinking; and they are communicated by means of persuasion and dissuasion” (1968a: 247).

Persuasion and dissuasion imply “wooing” agreement, whereas argumentation contains a non-violent form of coercion through truth. In politics,

it is not knowledge or truth which is at stake, but rather judgment and decision, the judicious exchange of opinion about the sphere of public life and the common world, and the decision of what manner of action is to be taken in it, as well as to how it is to look henceforth, what kind of things are to appear in it (Arendt, 1968b: 223).

The political world, or *polis*, appears as a common realm that is artificially created and maintained through laws, institutions and conventions, etc. Accordingly, it is contention between convincing opinions, rather than the force of the truth in the single “best” argument, that shapes political judgments. The significance of this distinction is that persuasion and convincing enable a plurality of opinions, and a multiplicity of voices and intersecting judgments to exist in the public sphere. Rational argumentation as Habermas depicts it, in contrast, moves actors toward a unified, potentially homogenizing judgment.

The difference between the exchange of opinion and rationalistic argumentation suggests that different forms of communication could fit within Arendt’s understanding of

deliberation. Arendt's approving citation of Socrates' efforts to teach by example supports this interpretation.¹¹ Further evidence that Arendt falls outside the rationalistic paradigm of argumentation can be found in Habermas and Wellmer's criticisms of her distinction between opinion and truth. I partially defend her distinction because it leaves discourse open to multiple and diverse forms of communication. At the same time, I accept that judgment cannot be so far removed from rational argumentation that the exchange of opinion degenerates into mere assertion. Below, I argue that Wellmer has succeeded in recasting Arendtian judgment so that it is more strongly linked to argumentation without being insensitive to the needs of diversity.

Both Habermas and Wellmer have criticized Arendt for presenting judgment as an autonomous faculty that is severed from the rational arguments of others. Habermas argues that Arendt's distinction between truth and opinion "sees a yawning abyss between knowledge and opinion that cannot be closed by arguments" (1990d: 186). By assimilating political judgment to aesthetic taste, Arendt makes it difficult for us to differentiate between good and bad judgment, since aesthetic judgments are only open to contention, not argument (Wellmer, 1996: 38). This leads to what Wellmer has called a "mythology of judgment" where "the faculty of judgment now begins to emerge as the somewhat mysterious faculty to

¹¹ Arendt writes: "this teaching by example is, indeed, the only form of 'persuasion' that philosophical truth is capable of without perversion or distortion; by the same token, philosophical truth can become 'practical' and inspire action without violating the rules of the political realm only when it manages to become manifest in the guise of an example. This is the only chance for an ethical principle to be verified as well as validated" (1968a: 247-8). Teaching by example is unlike the forceful articulation of a rational argument. It is a somewhat passive form of persuasion, relying upon observers to gather the lesson for themselves, rather than driving it home as an argument. Moreover, it does not fall within the model of disembodied, formal speech that Habermas privileges.

hit upon the truth when there is no context of possible arguments by which truth claims could be redeemed” (1996: 38). In Habermas’ words, Arendt places more trust in “the capacity of the subject to be able to speak and to make and keep promises” than in her own concept of communicative practice (1990d: 186).

These criticisms raise several points that I wish to address. First of all, it would be a mistake to think that Arendt did not provide any grounding at all for opinion and contention. Opinion is not whimsical, or fanciful: “facts inform opinions, and opinions, inspired by different passions and interests, can differ widely and still be legitimate as long as they respect factual truth...In other words, factual truth informs political thought just as rational truth informs philosophical speculation” (Arendt, 1968a: 238). Secondly, Arendt distinguishes between truth and opinion so as to avoid the tyranny associated with claims of absolute truth. Truth has a coercive force, whereas opinion, or intersubjective agreement, is the foundation of all legitimate government and politics. For Arendt, the importance of insisting on opinion over truth in politics is that opinion relies upon plurality and intersubjectivity, as opposed to the monological nature of philosophical speculation. Like Habermas, Arendt stresses intersubjective validity, but she differs on how to obtain common agreement. The rational argumentation in discourse ethics carries a force which may be coercive, because as I have argued above, the privileging of rational forms of speech may exclude or marginalize women and cultural minorities. Discourse ethics’ privileging of rational speech, plus the prioritization of normative arguments over evaluative ones, may lead to the creation of norms that are unresponsive to diversity, or worse, which falsely pose as universal.

Wellmer would argue that my defense of Arendt is inadequate precisely because her distinction between truth and opinion traps her within the narrow tradition of empiricist-rational epistemology. Despite her attempt to transcend Kant's limitations, Arendt accepts his formalistic notion of rationality and his underlying premise that cognition exists in the singular.¹² Thus, when she assimilates political judgment to aesthetic judgment, she leaves intact Kant's distinction between thinking and cognition, judgment and rational compulsion:

Arendt remains entrapped within an epistemological framework from the perspective of which physical science must appear as the paradigm of knowledge, physical facts as the paradigm of factuality, and logical demonstration as the paradigm of rational argument; correlatively, the activities of thinking and judging must appear as lying outside the sphere of cognition, truth, and rational argument proper" (Wellmer, 1996: 43).

Arendt places the common world, the human world created by speech and politics, the world of thinking and judging "*beyond or above* the sphere of cognition" (Wellmer, 1996: 42). As a result, judgment is severed from rational argumentation. There is no way to distinguish between good and bad judgment and consequently no link to intersubjective validity.

To some extent, Wellmer is correct that judgment becomes a myth, a mysterious and ungrounded faculty of hit-and-miss. However, he has also exaggerated the weaknesses of Arendt's theory. Wellmer argues that had Arendt launched into a "recovery of an Aristotelian conception of *phronēsis*," she might have sustained a connection between judgment, action and argumentation (1996: 36). This statement clearly indicates an interpretive difference

¹² Wellmer argues that Arendt accepts "the model of a singular cognitive subject (or organism) confronting an external world that leaves its imprint on the internal representations of this subject, the corresponding primacy of cognition over language, and the ideal of rational compulsion or logical proof" (1996: 41). Thus, aesthetic judgment that is rooted in the *sensus communis* is not based upon logical proofs or rational compulsion, but thinking, deliberation, and contention amongst "a plurality of sensuous and worldly beings" (Wellmer, 1996: 38).

between Wellmer's understanding of Arendtian judgment and mine. While Arendt does not mention *phronēsis* in the *Lectures on Kant's Political Philosophy*, we cannot abstract these notes, which are an *incomplete* basis for her intended volume on judgment, from the greater body of her published work. Arendt links judgment to *phronēsis* in earlier work (1968b; see also d'Entrèves, 1994; Villa, 1996). Moreover, she never abandoned her commitment to politics as *praxis*; thus why would she move away from including *phronēsis* -- which is rooted in action and contains a performative element -- as a component of judgment?

Interpretive differences about *phronēsis* aside, I am willing to concede that Arendt's theory could benefit from a stronger connection between judgment and intersubjective validity, especially because of the manner in which Wellmer recasts Arendtian judgment. Wellmer's strategy explicitly stands against Habermas' notion of linking validity to judgment through consensus which is motivated by the force of the better argument. A consensus theory of truth, argues Wellmer, "ultimately requires the reintroduction of an autonomous faculty of judgment to become intelligible" (1996: 46). Without the presupposition that all participants are capable of judgment, consensus as a criterion of truth is nonsensical. To presuppose a competence to judge, however, would render judgment an autonomous faculty -- the very problem which crops up in Arendt's theory -- because it cannot be captured under the formal characteristics of the ideal speech situation.¹³

¹³ For a more expanded discussion, see Wellmer, 1992: 160-168. There, he argues that the rationality of consensus cannot be characterized in formal terms. i.e., as components of the ideal speech situation. This is because the capacity for judgment, which is needed to "deduce the truth of consensus from their rationality," cannot be formalized (162). If Habermas moves away from the notion of consensus as a criterion of truth, and locates truth in a relationship between validity and a commonality within the medium of language, discourse theory becomes relativistic. Habermas is caught in a trap: a *finite* consensus relies upon the competence to judge, which then means that the

Instead, Wellmer argues that the faculty of judgment should be understood “as a placeholder for a conception of *rationality* and *intersubjective validity* respectively, for which no overall formal criterion and no overall formal explanation can be given” (1996: 46). Judgment loses its mysterious and autonomous character because Wellmer abandons the formal and monological characteristics of Kantian epistemology. More importantly, he broadens discursive rationality beyond Habermas’ narrow conception of what constitutes argument. Judgment is no longer an addition to, but an expression of the “faculty” of discursive rationality, which is “situated” within the context of the moral dilemma (Wellmer, 1996: 51; 47). Thus, Arendtian judgment is connected to argumentation in a manner that is both sensitive to the needs of contextualization and reduces Habermas’ prioritization of “rational” speech. Judgment now becomes:

a faculty to hit upon the truth in situations where it is not easy to do so, or where -- depending on the situation -- experience, character, imagination, or courage is required. The *goodness* of judgment, however, could only prove itself by a judgment’s being confirmed through either experience, or arguments, or -- connected with these two -- the independent judgment of others (Wellmer, 1996: 47).

The emphasis on “rational” speech is reduced because judgment is recast to be an expression of a broadened rationality that includes concrete particularities rooted in *praxis* (experience, character, courage) and enlarged thought (imagination, the judgment of others). Argumentation is no longer confined to a discussion of decontextualized issues in a

ideal speech situation can no longer be described in purely formal terms: on the other hand, an *infinite* consensus itself becomes a condition for truth because it assumes that no new arguments will arise. This means that it is “strictly speaking no longer possible to speak of a *redemption* of validity claims” unless we return to the formal characteristics of the speech situation, which was the original target of Wellmer’s objections to the consensus theory of truth (166).

dispassionate, formal and rationalistic manner. Wellmer's reinterpretation of discursive rationality permits internal relationships between different types of validity claims and their corresponding arguments, as well as a connection between different spheres of validity (1996: 44). Thus, different sorts of claims, be they aesthetic-expressive, scientific, moral or evaluative, and their corresponding arguments are included within moral discourse. I argue that by extension, these claims may be communicated in any form desired, because the nature of a claim often dictates the style of argument. The exchange of opinion, which might now be termed *discursive* argumentation rather than rational argumentation, includes storytelling, tears of rage, provocative demonstrations and so on.

Just as the emphasis on "rational" argumentation threatens to compromise diversity, so does the emphasis on reaching consensus. Both serve to inhibit forms of speech that may be confrontational, provocative, or hostile to agreement. Habermas' reliance upon a consensus theory of truth has the effect of eliminating "what Arendt calls the 'incessant discourse' born of plurality" (Villa, 1996: 71). A consensus theory of truth imposes hegemonic paradigms of argumentative speech, and instrumentalizes action and "emasculates" plurality (Villa, 1996: 70). When consensus is the overriding goal of discourse, speech and action lose their performative aspect, becoming "mere talk" as a means to an end. Expressions of difference may be cast aside -- either ignored by the majority, or stifled by minority participants themselves -- in favour of those that move toward consensus. When this happens, plurality in the public sphere is undermined. Of course, this is a worst case scenario. Ideally, consensus is achieved after full, unconstrained and diverse discussion has taken place and all are equally satisfied with the solution to a common problem. The emphasis on

consensus threatens this possibility because it elicits an overwhelming pressure to conform. On the other hand, while Arendt understands that “coming to agreement” is a fundamental aspect of judgment, she is more interested in political action itself than reaching a rational consensus. Reaching consensus is secondary to ensuring that plurality thrives in open-ended deliberation.

Thus, Arendt’s theory calls for a public sphere whose *telos* is judgment and action, not coming to agreement. Villa argues that it is precisely Arendt’s separation of reason and judgment that allows her to preserve “the political dimensions of performance *and* persuasion, deliberation *and* initiation, agonism *and* agreement” (1996: 71). However, if we understand discursive rationality in Wellmer’s terms, that is, composed of concrete particularities and enlarged thought, we can maintain the agonistic elements of discourse without separating judgment from reason. Certainly, the performative dimension of politics that Villa stresses is crucial to individual feelings of empowerment and participation. Agonistic, contestatory speech preserves and fosters diversity whereas speech aimed toward consensus emphasizes commonality over difference. However, I caution against overstating the agonistic at the expense of intersubjective validity. It is not enough to say, as Villa does, that Arendt considered “unimpaired intersubjectivity” and enlarged thought to be preconditions for genuine action (1996: 70). Judgment must retain its ties to the *sensus communis*, the web of human relations and the common world if it is to be valid. This is not a precondition for action; linking one’s judgment to others’ *is* political action.

The difficulty lies in maintaining a balance where the requirement that judgment be linked to intersubjective validity does not impose an overbearing *telos* of consensus.¹⁴ Wellmer's broadened notion of discursive rationality does just this. It links judgment to intersubjective validity, while at the same time it brings out the agonistic dimensions of discourse by expanding the types of communication and speech claims allowed. As Wellmer has argued, consensus cannot be a criterion of valid judgment.¹⁵ Rather, the process itself -- the deliberation, the agonistic exchange of opinions, relating lived experiences, expressing identities and needs, evaluating the situation and thinking from the standpoints of others -- is the hallmark of good judgment. Consensus is no longer the *telos* of discourse, nor is it an indicator of sound judgment. Rather, it is the by-product of open, pluralistic debate where participants persuade and scrutinize one another, reflexively self-examine, exercise enlarged thought as well as situational wisdom, and form judgments that are in agreement with everyone else. In this way, diverse expressions and claims are voiced, and the impartial judgments that are reached are fully inclusive.

¹⁴ One possible alternative lies in Patchen Markell's interpretation of the fallibilism of validity as contestatory, agonistic element in Habermas' discourse theory (1997:392). He argues that consensus functions more to restrict coercive, rather than contestatory forms of speech. This reading of consensus will be discussed more fully, and refuted, in chapter three.

¹⁵ See my previous discussion on Wellmer, 1992: 160-168.

Judgment and Deliberative Democracy

Arendt's theory of judgment provides the conditions for a more contextualized notion of justice that both retains the deliberative foundations of discourse ethics, and introduces a more agonistic, or performative notion of political action. Judgment is formed through the dual perspective of the actor, who relates to concrete others by articulating and *representing* particular needs, and the spectator, who evaluates with impartial disinterestedness the claims of generalized others. The parallel between the concrete other and the generalized other, the actor and the spectator, is not a set of rigid distinctions. The various perspectives used in judgment flow together within one mind, yet achieving a balance between these perspectives is only possible through communication and thinking from the standpoint of everyone else. Participants discern the better argument through the use of enlarged thought and *phronēsis* within an open-ended debate where coming to agreement is the ancillary result of a process committed to deliberation and genuine political action.

So far, I have discussed judgment with respect to discourse ethics. In chapter three, I turn to Habermas' model of deliberative democracy, which expands discourse theory beyond the realm of moral argumentation to include ethical and pragmatic issues. In the model of democracy, Habermas introduces law as a medium which transforms communicative power (a term explicitly borrowed from Arendt) into state, or administrative power. Communicative power refers to the vast array of opinions that circulate throughout the public sphere. State authority retains its legitimacy so long as it accords with the communicative power that is generated in greater society. Judgment in the model of democracy roughly splits into two

domains: the informal processes of opinion- and will- formation in the wider public sphere and the formal decision-making procedures of the parliamentary and judicial bodies.

In many ways, the model of democracy fulfills the demands of sound judgment that I have articulated in this chapter. The informal processes of opinion formation are more anarchic and agonistic than discourse ethics. Consensus does not play a role in the generation of communicative power. Rather, topically specified opinions are “bundled” together in an anonymous network of public communication (Habermas, 1996: 360). Furthermore, there are no limitations on the forms of argument permitted in the public sphere (except for violence or terrorism). Nevertheless, deliberative democracy does retain some of the exclusionary aspects of discourse ethics that infringe upon judgment formation. This includes a stipulation that consensus be obtained for legal norms and a continued separation between ethics and morality within formal discourses. These limitations will be the focus of the next chapter, but I also want to point ahead to chapter four, where I criticize Habermas’ system of rights from the perspective of Arendt’s idea of the “right to have rights.” I argue that Habermas neglects the agonistic dimension of rights, thus detracting from their full potential as tools of empowerment in the politics of recognition.

I leave the issue of judgment largely aside until the concluding chapter, but note here that the formal and informal domains of judgment in the model of democracy join together with an Arendtian interpretation of rights. Although rights are legal norms, subject to formal institutionalization, they also contain the seeds of informal political action by providing a discursive language for agonistic claims and struggles. The agonism that underlies political action in the form of rights claims and demands for new rights cannot be separated from the

deliberative element of politics. Agonistic rights claims must be publicly justified in order to gain legitimacy, whether at the formal or informal level. Integral to the conception of political action is linking one's judgment to others: fitting our perceptions, understandings and decisions into the *sensus communis* through the public exchange of opinions and representative thinking. The agonistic dimension of rights is accompanied by Arendt's theory of judgment, when the legitimacy of rights claims is determined in common. This occurs in an inclusive process where diverse groups persuade each other to think from different standpoints and to agree that the universalizing demands of impartial justice can afford to integrate their particularistic rights claims into the body politic.

CHAPTER THREE: FROM DISCOURSE ETHICS TO DELIBERATIVE DEMOCRACY

In his recent book, *Between Facts and Norms*, Habermas presents a model of deliberative democracy that rests upon the same communicative premises as discourse ethics. The transition from discourse ethics to the model of deliberative democracy is effected by the injection of law, which acts as a coordinating mechanism within society. The discourse principle is extended to formulate a principle of democracy and the system of rights to which Habermas alludes in discourse ethics is more fully developed. However, the model of democracy extends beyond a mere institutionalization of discourse ethics. In contrast to the moral norms produced in discourse ethics, legal norms refer to a broader context of human interaction. Although both legal and moral norms serve to regulate interpersonal conflicts and protect the autonomy of all affected, the legal autonomy of citizens differs from the autonomy of the moral agent. Citizen autonomy splits into public and private aspects which are "*equiprimordial*" -- citizens are both the authors and the addressees of legitimate law. Thus, the legal autonomy of citizens includes "the free choice of rationally deciding actors as well as the existential choice of ethically deciding persons" because legal norms regulate interactions within a specific polity (Habermas, 1996: 451).¹ In contrast, the moral autonomy of participants in discourse ethics only reflects the "free choice of rationally deciding actors" who relate to one another at the level of decontextualized justice; their ethical background is bracketed out of discourse.

¹ All citations in chapter three refer to *Between Facts and Norms* (Habermas: 1996) unless otherwise indicated.

Habermas links law, morality and politics to one another in a complex relationship. Neither law nor morality may be subsumed under the other; they are joined in a complementary relationship. Habermas mediates between legal realists and natural law theorists, arguing that law derives its legitimating force both from the legal form, which carries a coercive force, and from its function as a resource of justice (145). The connection between law and justice is twofold. First, the two-track constitutional state embodies principles of procedural justice, similar to the “moral point of view” as formulated in discourse ethics. Habermas depicts a discourse-theoretic system of rights which structures political action or the pursuit of legislation along procedural guidelines that are deemed to be just by all. Secondly, morality and justice enter law by way of the political process of legislation. Debates about moral issues (as well as ethical-political and pragmatic debates) are made possible by the system of rights which enables citizens to actualize their private and public autonomy.

Due to the novelty of Habermas' approach to law, rights and deliberative democracy, I shall reconstruct his model in some detail. While much within the model of deliberative democracy addresses the criticisms I have levied against discourse ethics, Habermas retains certain elements that make his model less than fully responsive to diversity. As in discourse ethics, Habermas fails to acknowledge that moral issues are intertwined with ethical considerations. He divides the justification of legal norms into separate discourses, either moral, ethical-political or pragmatic, rather than allowing for a multifaceted debate that enjoins all types of reason-giving. I also argue that consensus as a regulative ideal assumes there is a single right answer for every controversial issue, and does not admit to the

possibility of what Thomas McCarthy describes as rational disagreement in a pluralistic society. McCarthy wants to locate the validity of legal norms in the agreement upon constitutional rules that regulate conflict rather than in consensus on the substantive content itself. Habermas has already converged with this suggestion in the recent essay, “Struggles for Recognition in the Democratic Constitutional State,” where he argues that the system of rights supplies an overarching legal order that regulates conflicts between diverse groups (1994). However, this solution ascribes an overly proceduralist reading to rights (despite the accuracy of McCarthy’s diagnosis).

A proceduralist interpretation of rights, I argue in chapter four, undermines the promise of discourse theory to be fully responsive to diversity. Habermas primarily depicts rights as an overarching structure that is grounded in consensus and governs the pursuit of everyday politics in the public sphere. This neglects the importance of the political dimension of rights, where diverse groups make claims in the name of rights, struggle for the maintenance of existing rights and for the creation of new rights. I contend that a more political and agonistic conception of rights arising from Arendt’s notion of the “right to have rights” is needed within discourse theory. An Arendtian interpretation of rights locates political action *within* rights. That is, rights do not merely function as procedural rules that regulate our living together, but are themselves subject to political contestation and find their reinforcement in action and speech, which are the basic conditions underlying human plurality. Habermas does not fully capture the openness of rights to diversity because he underplays the idea of rights as the articulation of political claims. In chapter four I analyze the limitations

of the discourse-theoretic system of rights with respect to an Arendtian reading and elaborate upon the “right to have rights.”

Law, Morality and the Discourse-Theoretic System of Rights

I start the reconstruction of Habermas’ democratic model with an explanation of the complementary relation between law and morality because it underpins the novelty of his democratic theory. Standing between legal realists and natural law theorists, Habermas reconciles the traditional tension between popular sovereignty and human rights with a concept of autonomy that serves as the basis for his system of rights. According to Habermas, legal and moral rules “are *simultaneously* differentiated from traditional ethical life and appear *side by side* as two different but mutually complementary kinds of action norms” in our post-traditional age (105). Hence, in discourse theory the moral principle (U) and the democratic principle are derived from the same source. The discourse principle (D) assumes a central role in *Between Facts and Norms*, in contrast to earlier work where it was accorded a secondary role behind the moral principle of universalization (Habermas, 1990a). The discourse principle broadly expresses the postmetaphysical requirements for the impartial justification of action norms in general. For the justification of moral norms, the discourse principle takes form in the principle of universalization, which functions as a rule of argumentation (109). For the justification of legal norms, the discourse principle translates into the democratic principle, which establishes a procedure for legitimate law-making: “only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted” (110). At the heart of the

democratic principle lies a system of rights which serves to legally constitute the discursive processes of opinion- and will-formation.

The democratic principle lies at a different level than the moral principle. We might say that the democratic principle presupposes or incorporates moral argumentation as governed by (U). Moral norms always demand the universal assent of all affected, whereas legal norms minimally require the assent of all members of the legal community. The moral principle operates “at the level at which a specific form of argumentation is *internally* constituted” whereas the democratic principle refers to “the level at which the interpenetrating forms of argumentation are *externally* institutionalized” (110). Depending on the nature of the issue at hand, legal norms can be justified by referring to pragmatic, ethical-political or moral reasons. Thus, valid legal norms “harmonize” with moral principles of universal justice but also with “the ethical principles of a consciously ‘projected’ life conduct for which the subjects themselves, at both the individual and collective levels, take responsibility” (99). Accordingly, legitimate law can neither be grounded in pre-given moral facts that merely need to be promulgated by law, nor in the legal form itself, whereby a self-legislating ethical community enacts its political will.

The private autonomy of the self-determining moral agent stands in tension with the public autonomy of a collective entity. This has traditionally appeared as a conflict between morally grounded human rights and the principle of popular sovereignty, or as Habermas describes it, between Kantian liberalism and Rousseau’s civic republicanism. Habermas resolves this tension between moral self-determination and ethical self-realization by positing an *internal* connection between human rights and popular sovereignty. Unlike Kant, who

subordinates law to morality with his understanding of autonomy, or Rousseau, who emphasizes the ethical aspects of self-legislation with his conception of the general will.

Habermas argues that private and public autonomy are "co-original":

The normative intuitions we associate with human rights and popular sovereignty achieve their *full* effect in the system of rights only if we assume that the universal right to equal liberties may neither be imposed as a moral right that merely sets an external constraint on the sovereign legislator, nor be instrumentalized as a functional prerequisite for the legislator's aims. The co-originality of private and public autonomy first reveals itself when we decipher, in discourse-theoretic terms, the motif of self-legislation according to which the addressees of law are simultaneously the authors of their rights (104).

As a result of this internal connection, neither popular sovereignty nor human rights may claim priority over the other. Morality cannot be conceived as a pre-given limitation on legislators' political will formation. On the other hand, law cannot be promulgated for just any reason: law must be accepted as a source of justice in order to be valid. Legitimate law must be grounded both in positive legal form and in morality.

Law and morality are joined in a complementary relationship whereby law supplements morality. It carries a coercive force which relieves the moral agent of various burdens that arise from a principled morality. However, even in its coercive mode, law must not destroy the rational motives for obeying legal norms that are based on moral insight (121). Law can only integrate society and stabilize behavioural expectations "if it preserves an internal connection with the socially integrating force of communicative action" (84).²

² Law guarantees social integration through the moral regulation of conflicts and the ethical safeguarding of identities and forms of life. Law also performs functional coordination, which is needed to maintain systems and realize goals, and is evaluated in terms of economic and technical rationality. This type of coordination is neutral with respect to the differences between

In other words, the coercive force of the legal form must be linked to justice. The gap between the facticity of positive law and its rational validity is bridged by rooting legitimate law in discursive processes where the addressees of law are simultaneously its authors. This is only possible within a system of rights that equally recognizes and nourishes private and public autonomy.

The democratic principle, derived from the interpenetration of the discourse principle and the legal form, constitutes a "logical genesis of rights" (121). The genesis of rights is a circular process, where abstractly posited private liberties retroactively assume legal form, once the conditions for the discursive exercise of political autonomy have been institutionalized. Habermas first establishes, from the perspective of political theory, which rights citizens should confer upon one another "if they want to legitimately regulate their interactions and life contexts by means of positive law" (122). Law secures "symmetrical relationships of reciprocal recognition between abstract bearers of individual rights" by stabilizing behavioural expectations and integrating society (449). However, these relationships of reciprocal recognition cannot be imposed by the philosophical observer -- to do so would fail to leave the monological realm of justification. Therefore, Habermas also articulates a set of public autonomy rights which makes it possible for citizens to confer private liberties upon each other by means of discursively achieved agreement.

Habermas outlines three categories of basic private rights which define the status of the abstract legal person:

system and social integration (319).

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*;
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law; and
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual legal protection (122).

This set of rights is not yet to be understood as rights against the state, but as a guarantee of the mutual recognition consociates confer upon one another as addressees of laws (123). The private autonomy of citizens and their membership status is protected. Moreover, citizens who feel their rights have been infringed upon have access to legal recourse by filing suits. Such recourse demands a right to equal protection under the law, equal application of the law, equal legal protection and equal claim to a legal hearing -- in other words, free access to impartial courts of law (125). Private rights also include the right to withdraw from communicative action: "the legal subject does not have to give others an account or give publicly acceptable reasons for her action plans" (120). Citizens need not engage in communicative action, but may form their action plans on the basis of utility calculations compelled by recognition of others' rights and the coercive nature of law. In addition to being able to drop out of communicative action, citizens are also able to renounce their membership status by emigrating. Membership status, however, can never be taken away unilaterally (124).

The three categories of basic private rights may take different forms according to their interpretation by a community of legal consociates. Habermas speaks of "saturating" the schema of rights, or infusing the general principle of civil liberties with concrete content in

a manner that suits the specific political situation (125). It is not possible to “saturate” the above categories of private rights until they are complemented with basic rights to public autonomy. Private rights regulate the interaction between the addressees, or subjects of law, but only on the understanding that they are also the authors of these laws. Habermas calls for:

4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law (123).

Political participation rights ground the ability to simultaneously develop public and private autonomy, for they allow citizens to elaborate upon the abstract categories of rights listed in (1) through (4). Habermas argues that these four sets of rights, which are “absolutely justified,” imply

the following “relatively justified” rights (123):

5. Basic rights to provision of living conditions that are socially, technologically and ecologically safeguarded, insofar as the current circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).

Without these five sets of rights, there is no legitimate law. The tension between facticity and validity, or, between the positivity of law and its rational legitimacy is “operationalized” by the mutual presupposition and co-emergence of rights to private and public autonomy. The relation between private and public autonomy is circular, where the legal code (private rights which regulate the interaction of legal subjects) and the mechanism for producing legitimate law (civic autonomy) are simultaneously constituted (122).

Communicative Power and the Two-Track Constitutional State

Much of *Between Facts and Norms* is a philosophical and legal theoretical account of the normative foundations of law, which, as described above, reside in an internal relation between human rights and popular sovereignty such that private and public autonomy are given equal weight in the system of rights. This system of rights is situated within a democratic constitutional state that includes both formal and informal processes of democratic opinion- and will-formation. The tension between facticity and validity (coercive positive form and moral justification) in the normative foundations of law is reproduced in the second part of the book in terms of a sociological analysis. This time, the tension emerges as one between the fact of law-making and the expectation that the validity of law emerges from legitimate democratic procedures. I turn now to the sociological analysis of law, which explains the relation between rights, state and society in a democracy.

The system of rights implicitly supposes a state apparatus and a notion of government by law. Moreover, it secures the conditions necessary for the existence of a public sphere. The exercise of participation rights is institutionalized within formal structures such as parliamentary bodies and general elections and within informal processes of opinion formation in political parties, social movements, and so on. Popular sovereignty, which is interlaced with individual liberties and again with governmental power, manifests itself in law (135). Governmental power is bound to the collective will; all legitimate government authority rests upon the assent and opinion of the people. Accordingly, “the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion- and will-formation” (135). Whereas law once found its legitimation in sacred law

or metaphysical reason, it now gains its validity from discursive processes where citizens exercise their civic autonomy and together constitute the legal order under which they live.

Law presupposes politics; without processes of discursive opinion- and will-formation to ground it, state authority is untethered, autonomous and open to abuse. Habermas argues that legitimate law rests upon the generation of what Hannah Arendt terms communicative power. Communicative power radically differs from understandings forwarded by Weber and social contract theorists, who view power as the assertion of one's interests. Power, according to Arendt, is the opposite of violence. It is not the assertion of one's will over the conduct of others, but the potential that "springs up between men when they act together and vanishes the moment they disappear" (Arendt, 1958: 200). Communicative power is an inherent capacity found in all speech and action that occurs in the common world of appearances. When people act in concert, when communication is undistorted by strategic and instrumental interests, communicative power arises as public opinion or common will. In one of his few eloquent passages, Habermas describes communicative power as an "authorizing force expressed in jurisgenesis:"

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 institutions and laws "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 close kinship of communicative action with the production of legitimate law* that Arendt tracks down in different historic events...(148).

Power and law are not antagonistic opposites: they are *internally* connected. Constitutionally organized political power, which includes the use of the administrative apparatus, is backed by sanctions and threats of force. This force, however, is authorized by legitimate law that rests upon the communicative power generated in discursive processes of opinion- and will-formation. Law is the medium “through which communicative power is translated into administrative power...administrative power should not reproduce itself on its own terms but should only be permitted to regenerate from the conversion of communicative power” (150).

To counter the possibility that law could be instrumentalized by illicit powers, Habermas outlines a *principle of popular sovereignty* for the organization of the constitutional state.³ The principle of popular sovereignty forms the “hinge between the system of rights and the construction of a constitutional democracy” (169). It stipulates that all legitimate law must rest upon the communicative power of the citizenry. The use of parliamentary bodies circumvents the logistics of mass participation. However, the discourse principle demands that there be political pluralism both inside and outside of representative bodies. “Parliamentary opinion- and will-formation must remain anchored in the informal

³ Habermas also outlines three other principles to protect law from illicit powers. These are: the *principle of guaranteeing comprehensive legal protection for each individual*, which ensures that the judiciary is bound to existing laws, separated from the legislature and unable to program itself; the *principle of the legality of the administration*, which forbids the administration from extending its power outside democratically enacted law when it enforces and implements law; and, the *principle of the separation of state and society*, which puts forward a notion of civil society as an origin of communicative power. The principle of the separation of state and society also stipulates democratic accountability in terms of political offices and responsibility of the incumbent Administration for its decisions and subordinate officials (172-175).

streams of communication emerging from public spheres that are open to all political parties, associations, and citizens" (171). While informal streams of communication do not have decision-making power, they prepare and influence the parliamentary body with the advantage of not having institutional pressures to reach an outcome. The generation of communicative power in informal communication processes necessitates the guaranteed autonomy of public spheres and open competition between political parties.

Habermas focuses on civil society as the main forum where informal opinions generate communicative power. Civil society stands between the general public sphere, where the illegitimate exercise of social power may arise, and the state. Social power, which measures the ability to assert one's preferences over others, restricts civic autonomy when it asserts a privileged influence on the administration or directly manipulates the public opinion on which legitimate law rests.⁴ However, it can be absorbed and neutralized in civil society. As "a network of voluntary associations and a political culture that are sufficiently detached from class structures," civil society functions as a source of communicatively generated public opinion that is undistorted by social power (175). Thus, there is a flow of communicative power between civil society and parliamentary bodies that serves to legitimate law, and to circumscribe social and administrative power.

⁴ Note, however, that social power can also facilitate civic autonomy, for example, in discursive processes of bargaining by allowing participants to back up their threats and promises. The discourse principle comes to bear indirectly on bargaining processes by regulating them from the standpoint of fairness. Where consensus rests on the same reasons for all, bargains rests upon different reasons for different parties. Bargaining is for situations where social power cannot be neutralized in the way that rational discourse requires. Non-neutralizable social power is at least equally distributed among the parties by procedures that ensure that everyone has an equal opportunity to influence and pressure others (166).

Deliberative democracy rests upon the interplay between informal processes of opinion-formation in civil society and institutionalized, or formal processes of will-formation. Communicative power flows along a core-periphery axis in the public sphere. Following Bernard Peters' model, Habermas explains that the core refers to those democratically institutionalized processes of opinion- and will-formation: the administrative complex, the judiciary, parliamentary bodies, political elections and party competition (355). The core, distinguished from the periphery by its formal decision-making powers, contains a system of "sluices through which the many processes in the sphere of the political-legal system must pass" (Peters in Habermas, 1996: 356). Communicative power, or informal public opinion, circulates from periphery to core in a process where issues are perceived and thematized within the wider public sphere, and brought to bear upon parliamentary legislation, judicial decisions and administrative implementation. "This is the only way to exclude the possibility that the power of the administrative complex, on the one side, or the social power of the intermediate structures affecting the core area, on the other side, become independent vis-à-vis a communicative power that develops in the parliamentary complex" (356).

The periphery is divided into inner and outer sectors. The inner periphery refers to "various institutions equipped with rights of self-governance or with other kinds of oversight and lawmaking functions delegated by the state (universities, public insurance systems, professional agencies and associations, charitable organizations, foundations, etc.)" (355). The outer periphery is loosely divided into "customers" and "suppliers," that is, between those who implement already adopted policy and those who seek to influence the formation of policy. The outer periphery ranges from labour unions, business associations, public agencies

and interest groups, which operate from a particular standpoint, to public interest groups, cultural associations, churches and charitable organizations, which seek to influence policy from a more normative standpoint than any particular interests (355).

Habermas focuses primarily on those opinion-forming associations which “belong to the civil-social infrastructure of a public sphere dominated by the mass media” and seek to influence public policy (355). As peripheral, the non-governmental associations, movements and organizations that “spontaneously” emerge in civil society are more closely attuned to the societal problems of the lifeworld than the core institutions of the public sphere (366). As Habermas explains, they function as a warning system with “sensors” that are sensitive throughout society:

From the perspective of democratic theory, the public sphere must, in addition, amplify the pressure of problems, that is , not only detect and identify problems but also convincingly and *influentially* thematize them, furnish them with possible solutions, and dramatize them in such a way that they are taken up and dealt with by parliamentary complexes” (359).

It is precisely because of civil society’s unspecialized language that it can perceive and solve macro-social problems, even at the levels of private or intimate life, and transmit its messages via law to the economy and administration. The political influence generated in civil society can, just like social power, only be transformed into political power through institutionalized procedures. Public opinion, or the political influence generated in civil society, circulates toward the core institutions and passes through their sluices to emerge as law.

The formation of public opinion, and its circulation along the core-periphery axis, comprises the exercise of popular sovereignty. As discussed earlier, popular sovereignty in discourse-theoretic terms is interpreted intersubjectively; it neither resides in a homogenous

“general will” nor in constitutional powers and structures. Rather, popular sovereignty is embodied in “subjectless forms of communication that regulate the flow of discursive opinion- and will-formation” (301). The spontaneous and exhaustive discussion of issues, controversies, proposals and reasons in the public sphere creates “communicative social spaces” where participants take a performative stance and seek to rationally resolve societal problems. However, there is no order to the creation of communicative social spaces -- they arise in church congresses, rock concerts, café discussions, party assemblies, writers’ collectives, feminist groups and the mass media (374).

Together, these overlapping communicative social spaces provide a “network for communicating information and points of view...[where] the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified *public opinions*” (360). Public opinion should not be confused with survey results, for “it is not representative in the statistical sense;” rather, what “makes these bundled opinions into *public opinion* is both the controversial way it comes about and the amount of approval that ‘carries’ it” (362). Once the communicative space expands beyond simple interactions, Habermas envisions a differentiation among speakers and hearers. He talks of a lay public, using the metaphor of a gallery to the speakers’ arena. The political influence that actors gain in the arena ultimately rests upon the lay public, who “must be *convinced*” through comprehensible reasons, rather than bought out or coerced (364). Any “manufactured” public opinion loses its influence and credibility as soon as its sources of social power (either money or organizational power) are revealed. Genuine public opinions,

ones that are convincing on their own merit, circulate toward the parliamentary complex, generating the communicative power which forms the basis for all legitimate law.

Both the strength and the weakness of the public sphere is its anarchic structure. The more dense the organizational complexity of a political body, the less sensitive it is to lifeworld issues. For example, although the administration has the greatest “capacity to act” with respect to social problems, it is the least attuned to the very miseries it creates through surveillance and supervision. In contrast, the spontaneously formed civil society is the most perceptive to these types of problems. Together, the various publics that develop informally inside associations “form a ‘wild’ complex that resists organization as a whole” (307). This makes them more vulnerable to effects of social power, structural violence and systematically distorted communication, but at the same time they have the advantage of being a “medium of unrestricted communication” that can express concerns with fewer compulsions than in the formal public sphere (308).

The emergence of associations, movements and forums that coalesce around certain issues, such as global poverty, women’s rights, or environmental issues is only possible in a society that protects and constitutes the public sphere through basic rights. Plurality is safeguarded by freedoms of speech, association and assembly. Freedom of the press protects the communication infrastructure and “preserve[s] an openness for competing opinions and a representative diversity of voices” (368). The rights to participation in elections and political parties maintain the link between the parliamentary complex and the communicative power generated in the public sphere. Finally, the autonomy and spontaneity of the civil society is preserved insofar as there is an “untouchable zone of personal integrity and

independent judgment” (368). Privacy rights, including personality rights, freedom of belief and conscience, freedom of movement, and the inviolability of one’s residence, supports a “mature pluralism in forms of life, subcultures, and worldviews” (368).⁵ These private and public rights intermesh to foster popular sovereignty in civil society and the public sphere while at the same time protecting a pluralistic realm of individual freedom.

However, the system of rights alone is not sufficient to protect civil society and the public sphere from distortion. The discursive formation of public opinion is dependent upon a liberal political culture which is committed to the principles of democracy and civil liberties, and an energetic civil society which pursues both *offensive* and *defensive* goals. Habermas differentiates between actors who merely use existing forums and those “who know they are involved in the *common* enterprise of reconstituting and maintaining structures of the public sphere as they contest opinions and strive for influence” (369). Communication in civil society has a self-reflexive character. Actors not only pursue issue-oriented goals, but also seek to expand and “revitalize” civil society by creating new subcultures, reforming institutions, reinterpreting and expanding norms and rights, and patterning new identities. In other words, defensive action in civil society focuses on the procedural aspects and institutional structures necessary for the generation of public opinion. Offensive action thematizes and makes public those issues that are perceived in the society component of the lifeworld in order to influence the core institutions of the public sphere.

⁵ Habermas points to Cohen and Arato (1992) for this list of rights (derived from Hegel’s *Philosophy of Right*) which preserve the vital characteristics of civil society: plurality, publicity, privacy and legality (Habermas, 1996: 368).

The potential for action in civil society is, however, limited. Following Cohen and Arato, Habermas argues that actors in civil society can only acquire influence, not political power. He writes, “public influence is transformed into communicative power only after it passes through the filters of the institutionalized procedures of democratic opinion- and will-formation and enters through parliamentary debates into legitimate law-making” (371). Furthermore, even if public opinion passes through the sluices of the parliamentary complex, the reach of law itself is circumscribed. Although law is the only medium capable of social integration, at times it must take an indirect approach and “leave intact the modes of operation internal to functional systems and other highly organized spheres of action” (372). Aspirations to a self-organizing society must be abandoned, for civil society is not capable of controlling and acting for the rest of system.

Although the scope of action for civil society is limited, it is not incapacitated. Civil society influences actors in the formal political process, thematizes societal problems of which institutional structures are generally unaware, and mobilizes communicative action in the public sphere. Civil society is most effective at times when its actions invoke a “crisis consciousness” throughout the public sphere. When civil society thematizes issues dramatically and effectively enough, it forces the political process to follow the official circulation of power. Habermas relies heavily upon the existence of a liberal political culture, arguing that *only* in liberal public spheres are social movements capable of redirecting the circulation of power along constitutional lines:

Under the conditions of a *liberal* public sphere, informal public communication accomplishes two things in cases in which mobilization depends on crisis. On the one hand, it prevents the accumulation of

indoctrinated masses that are seduced by populist leaders. On the other hand, it pulls together the scattered critical potentials of a public that was only abstractly held together through the public media, and it helps this public have a political influence on institutionalized opinion- and will-formation...By contrast, an authoritarian, distorted public sphere that is brought into alignment merely provides a forum for plebiscitary legitimation (382).

If efforts to gain influence do not succeed, as a last resort protest movements may engage in acts of civil disobedience. When the crisis consciousness in the periphery reaches a level of overwhelming magnitude, when the demand for legitimation becomes increasingly crucial, actors engage in acts of “nonviolent, symbolic rule violation”(382). Civil disobedience protests binding decisions that need to be re-evaluated in light of constitutional principles. The constitution is an unfinished product, and civil society plays an important role in reinterpreting and redefining constitutional norms to fit lifeworld needs and identities. “Civil disobedience thereby refers to its own origins in a civil society that in crisis situations actualizes the normative contents of a constitutional democracy in the medium of public opinion and summons it against the systemic inertia of institutional politics” (383). Civil disobedience, as an act of last resort, appeals to the community’s sense of justice, thereby reasserting the link between the legal form and intersubjective validity. The tension between facticity and validity is reconciled by communicatively generated power.

Exclusionary Aspects of Deliberative Democracy

In many ways, Habermas’ account of deliberative democracy can be read as a response to the criticisms levied against discourse ethics in chapter one. Unlike discourse ethics, the democratic process is open to political-ethical *and* moral discourses. The

justification for legal norms varies with the nature of the issue at hand. Whether the law concerns questions of the good life or justice determines the types of reasons to be given in argumentation. Political opinion- and will-formation answers both the ethical-political question of who we want to be, and the moral-practical question of how we ought to act in accordance with principles of justice (180). Thus, the perspective of the concrete other is present in hermeneutical discourses of self-understanding where an “authentic will” arises from shared values within the polity (180). This can be juxtaposed against the “autonomous will” that arises from the shared insights of generalized others in moral discourses of justification.⁶

Moreover, Habermas’ conception of the public sphere contains a distinctly Arendtian flavour. The public sphere is a “wild” and “anarchic” complex, where spontaneously formed associations engage in multiple forms of communication, interpreting concrete needs and thematizing controversial issues. The opinions formed in the public sphere generate the flow of communicative power, a concept that Habermas explicitly borrows from Arendt. Communicative power, which forms the basis of all legitimate law, flows from anonymous networks of identity groups, associations and coalitions that are rooted or linked to the ethical lifeworld. The informal nature of the public sphere permits diverse forms of communication and an exchange of opinion, in the Arendtian sense, rather than purely rationalistic argumentation. This fluid and informal interaction between concrete actors is regulated only by the system of public and private rights.

⁶ Pragmatic discourses, where preferences are reconciled and coordinated, are also a part of deliberative democracy. Rather than producing legal norms through consensus, however, negotiations involving a balance of interests give rise to an “aggregated will” (180).

The spontaneity and fluidity of opinion-formation in the public sphere differs significantly from discourse ethics' emphasis on abstract justice, moral reason-giving and rational argumentation, which as I have argued, is exclusionary and threatens diversity. However, in the democratic model, Habermas continues to separate and prioritize the right over the good and place an emphasis on consensus. These features are not as threatening as they are in discourse ethics, but they nevertheless detract from the full potential of deliberative democracy to respond to diversity.

Although Habermas expands the discourse in his model of democracy to include moral, ethical-political and pragmatic reason-giving, he divides these into separate discourses rather than envisioning them as components of a multifaceted discussion. He argues that the nature of the controversy -- either how we ought to regulate living together according to the principle of justice, who we are and want to be, or how to reconcile competing differences -- determines which "respectively different kinds of arguments count" (180). This erroneously assumes that morality and ethics are separable. Thomas McCarthy correctly points out that ethics and morality may be *analytically* distinguishable, but "*in practice* political deliberation is not so much an interweaving of separate discourses as a multifaceted communication process that allows for fluid transitions among questions and arguments of different sorts" (1996: 1005). Most "moral" issues are shot through with ethical considerations. For example, capital punishment raises the questions of whether retribution is just and also whether our understanding of the value of life rests in the denial or advocacy of capital punishment.

The entwinement of morality and ethics in political deliberation means that laws about moral justice need not conform to what is "equally good for all," but rather to what is "equally good for all of us" (McCarthy, 1996: 1096).⁷ This argument does not advocate a communitarian position, but points out that legal norms that regulate how we live together according to principles of justice need not be strictly universalizable in the way that moral norms are in discourse ethics. McCarthy does not propose a unifying conception of the good that underpins the legal order. Rather, he argues that legal norms are specific to a given polity, and therefore just decisions need only be "equally good for all of us affected" by the legal norm (1996: 1097). This formulation enables the existence of diverse self-understandings within the overarching "us," while at the same time requiring a critical distance from one's cultural tradition in the search for a just legal norm -- "just" meaning that the legal norm is equally good for everyone in the political union.

⁷ Habermas cautions against an ethical interpretation of deliberative politics (such that laws need only be "equally good for all *of us*"). He argues that the generation of law "involve[s] more than just the hermeneutical explication of shared value orientations. *By their very structure*, laws are defined by the question of which norms citizens want to adopt for regulating their common life. To be sure, discourses aimed at achieving self-understanding are *also* an important component of politics...But as we have seen, these questions are subordinate to moral questions and connected with pragmatic questions. The question that has *priority* in legislative politics is how a matter can be regulated in the equal interest of all. The *making of norms is primarily a justice issue*, subject to principles that state what is equally good for all" (282; emphasis added). As a result, argues McCarthy, Habermas erringly conflates legal norms with moral norms by demanding strict universalizability for laws that regulate common life (1996: 1104). This stipulation exhorts a transcendence of concrete particularities within the polity, a decontextualization that threatens to overlook the specific needs of culturally diverse groups. The inseparability of morality and ethics, or the concrete and particularistic foundation of generalizable norms must be taken into account by making the validity of legal norms dependent upon what is "equally good for all of us." This is more than a "hermeneutical explication of shared value orientations." Rather, it is an acknowledgment of the "interdependent aspects of the same problem," namely that those "*norms [which] citizens want to adopt to regulate *their life together**" combine both the "justice issue" and questions of who we are and what kind of society we wish to live in (McCarthy, 1996: 1105).

Even though the degree of rational acceptability has been lessened by granting that citizen consent to norms can be based on reasons that are “equally good for all of us,” a further caution against this form of agreement is needed. The emphasis on consensus implies that there is a “single right answer” to political issues, and leaves little room for the acceptability of irresolvable differences (McCarthy, 1996: 1092; 1107). Habermas calls the move to majority rule an “interim result of a discursive opinion-forming process,” thus idealizing consensus as the most desirable outcome of discourse (1996: 179). By demanding that everyone agree on the substantive content of the legal norm, Habermas indicates his disapproval of the fact that some issues may be perpetually disputed in pluralistic societies. However, in order to make discourse theory more responsive to the needs of diversity, Habermas ought to consider the possibility of rational disagreement to be as acceptable as consensus. As McCarthy argues, reasonable people will agree to disagree, and abide by the rules so long as the substantive outcomes follow legitimate procedures. This understanding of majority rule is far more accommodating of diverse forms of life:

They [the minority] have not simply succumbed to the force of the better argument; nor need they anticipate that what they consider to be the better argument will some day convince all. As reflexive participants, they know that even ideally rational discourse may not lead to substantive consensus concerning what is in the best interest of all of “us,” if the “we” is as socially, culturally, and psychologically diverse as it is (McCarthy, 1996: 1097).

Open disagreement that is based upon fair procedures allows for diverse forms of life to coexist peacefully, rather than pushing them toward a single right answer on any given issue.

In contrast, Patchen Markell defends Habermas’ emphasis on consensus against criticisms such as McCarthy’s. Markell argues that the emphasis on consensus fully

accommodates disagreements that stem from diversity because of the “fallibilistic nature of validity and the reflexivity of discourse” (1997: 391). Indeed, Habermas refers to majority rule as the “rationally motivated but fallible results of institutional pressures for a decision” (179). This implies that there is always room for permanent disagreement. However, I suggest that fallibilism refers more to the point that the majority decision has not yet found the single right answer to the issue at hand. The revisability of a majority decision rests on the fact that the minority agrees to the majority decision based on the proviso that “they retain the opportunity in the future of winning over the majority with better arguments” (179). The regulative ideal, however, is to move toward a consensus based on the force of the better argument, rather than a notion of permanent yet ever-changing constellations of rational disagreement. This is because the democratic principle moves law toward a single right answer whereby “only those statutes may claim legitimacy that can meet with the assent of *all citizens* in a discursive process of legislation that in turn has been legally constituted”(110; emphasis added). Hence, the fallibilism of majority decisions is due to their inability to sustain rational acceptability through consensus.

This is not to say that once consensus is achieved the norm is no longer open to question. Reflexivity is integral to the learning process of modern societies, and “nothing is immune to contestation in the public sphere,” including the procedures by which we regulate discourse (Markell, 1997: 392). However, I argue that this contestation still aims toward substantive consensus, that is, a single right answer. In contrast to my position, Markell does not interpret the emphasis on consensus as substantive, but rather as an emphasis on “the means that each sort of actor intends to use to accomplish the desired outcomes” (1997: 390).

In other words, the emphasis on consensus is only used to guarantee that actors maintain a performative attitude, i.e., that actors engage in a cooperative search for truth and do not resort to perlocutionary speech acts which are coercive. This interpretation is problematic, however, for it is not consensus that guarantees a performative attitude, but the “implicitly adopted and intuitively known pragmatic presuppositions” of discourse, which are the principles of symmetry, reciprocity and reflexivity (Habermas, 1990a: 91). The emphasis on consensus is irrelevant to maintaining a performative attitude within discourse; it is quite possible to abide by the principles of symmetry, reciprocity and reflexivity without ever reaching consensus, or even more significantly, while agreeing to disagree. Consensus does not refer to means, but to the outcome of discourse. Otherwise, Markell’s interpretation makes consensus extraneous to discourse theory.

McCarthy argues that consensus in discourse theory ought to revolve primarily around the procedures that regulate substantive conflicts. Rather than placing the validity of legal norms wholly in their substantive rational acceptability (consensus around the actual issue), the validity of legal norms ought to be derived from the legitimacy of the decision-making process. So long as participants consent to the rules and principles which structure opinion- and will-formation, they will accept the substantive outcome as a rational disagreement. This is a more agonistic conception of decision-making that allows for expressions of difference, even irresolvable differences. Citizens try to understand one another and persuade one another toward their point of view, but this “need not lead to a consensual weighing of competing orders of reasons” (McCarthy, 1996: 1110). Majority rule decisions are not an

interruption in the search for the single right answer, but are an interruption in political contestation which is organized by agreed-upon constitutional principles.

Furthermore, the arguments presented in discussion, which may or may not motivate consensus, need only refer to that which is “equally good for all of us” because ethics and morality are seamlessly connected in politics. To return to Arendt’s theory, judgment is a matter of thinking from the ethical standpoints of others and submitting these standpoints to generalizable criteria within the *sensus communis*. These two aspects of judgment should not be divided into separate discourses, but are present within a process of multifaceted deliberation. Moreover, by making judgment itself the endpoint of discourse, Arendt brings diversity to the forefront of political action. Rather than emphasizing substantive consensus for the validity of norms, a more agonistic understanding of justification permits expressions of difference which need not succumb to the force of the better argument.

In McCarthy’s agonistic understanding of justification, permanent disagreements gain their validity from the legitimacy of the decision-making procedure itself. In contrast to general legal norms, McCarthy maintains that those rules and procedures regulating everyday discourse must achieve substantive consensus based on that which is “equally good for all” (McCarthy, 1996: 1094). I suspect that Habermas would not disagree with this. In a recent essay on struggles for recognition, he speaks of an overarching political order -- which is embodied in the system of rights -- that is neutral with respect to sub-cultures that are organized around different conceptions of the good (1994:133-4). An abstract integration around the common political culture permits the peaceful co-existence of different forms of life. Habermas argues that the system of rights, whose universalizable structure he separates

into five categories, are ethically permeated with respect to their specific content and actualization. He speaks of a "common horizon of interpretation" arising from a shared conception of the polity and an overarching constitutional patriotism that give shape to the system of rights (1994: 134).

Although the system of universalizable rights may be ethically permeated by an overarching political culture, it maintains strict ethical neutrality with respect to competing forms of life at the subcultural level. Hence, rights function as moral rules, "modeled after obligatory norms of action," and as universally binding "trumps" against evaluative (or ethical) policy (256: 259). Although rights symbolically express the identity and form of life of the community, "anyone wanting to equate the constitution with a concrete order of values mistakes its specific legal character" (256). Rights form a coherent system of rules: when rights collide, their resolution is a question of appropriateness, not a competition between differently ranked values.⁸

Habermas provides a mechanism to monitor the peaceful co-existence of different forms of life by treating the system of rights as an overarching source of abstract integration. While this does not alter the regulative ideal of finding a single right answer for every political issue, it nonetheless acknowledges the reality that most decisions will be by majority rule. Thus, Habermas has partially responded to McCarthy by saying that disagreements, or the "coexistence of different forms of life," are made possible through agreement upon the rules and procedures that regulate conflict. Were Habermas to drop

⁸ In adjudication "one must establish a plausible connection between the pertinent norm and the norms that -- without diminishment in their general validity -- do not prevail, so that the coherence of the rule system as a whole remains unaffected. The pertinent norm and those that give way do not relate to each other like competing values, which, as optimizing prescriptions, are 'fulfilled' to different degrees depending on the case. Rather, the relation is that between 'appropriate' and 'inappropriate' norms" (Habermas, 1996: 260).

consensus as the overriding regulative ideal, and admit that legal norms need only coincide with that which is “equally good for all of us.” discourse theory would respond to diversity as fully as McCarthy envisions it should.

However, I argue that this would still be inadequate. McCarthy’s insistence upon reducing consensus as the regulative ideal within multifaceted discourses aligns with the demands of Arendtian judgment, and discourse theory ought to incorporate this. But the second half of McCarthy’s solution, which Habermas has followed, departs from an Arendtian understanding of politics. By focusing on rights as procedural rules that legitimate permanent disagreements, both McCarthy and Habermas give rights an overly proceduralist, as opposed to political, reading. McCarthy’s agonistic model of justification for everyday legal norms needs to be accompanied by a more agonistic conception of rights.

Both McCarthy and Habermas give an overly proceduralist reading because they refer to rights primarily as constitutional rules that regulate political conflict, rather than as sites of political conflict themselves. In this interpretation, rights have a consensual and static character because they overarch everyday politics as agreed-upon procedural structures that regulate conflict at the sub-cultural level. This contrasts the fluidity and agonism of Arendt’s notion of the “right to have rights,” which is grounded in human plurality. An Arendtian reading of rights, I will argue in the next chapter, is more responsive to diversity than a proceduralist interpretation of rights. Arendtian rights are guaranteed through agonistic political action -- not consensus. Genuine political action, according to Arendt, is only possible in a pluralistic public sphere. But pluralism, which has the “twofold character of equality and distinction,” is safeguarded by the “right to have rights” which argues for incontrovertible citizenship in a political community (Arendt, 1958: 175). In other words, plurality and political action reinforce rights which reinforce plurality and political action.

This contrasts Habermas' static conception of rights where the structure is predetermined by the five discourse-theoretic categories and the specific content of these rights ("saturation") is achieved through consensus. While interpretive battles over rights do occur within Habermas' model of democracy, the "equal rights to coexistence" are mainly accepted as components of the overarching legal order that regulate the interaction between sub-cultural groups. I turn to this issue in the final chapter and argue that discourse theory needs a more agonistic reading of rights based on Arendt's notion of the "right to have rights."

CHAPTER FOUR: AGONISTIC RIGHTS AND HUMAN PLURALITY

Discourse theory must embrace a more agonistic conception of rights in order to fully respond to expanding needs and identities within pluralistic modern societies. Relying upon Arendt's notion of the "right to have rights," I argue that Habermas insufficiently brings out the political in his system of rights. I want to articulate a conceptual distinction between rights as political and rights as legal, a distinction between a struggles in the name of and for rights, and rights as a structural element of the public sphere. Rights as *praxis* lie within the realm of opinion-formation, or Arendtian politics, whereas rights as procedural structures are grounded at the level of will-formation, or Habermasian consensus. While these two aspects of rights are conceptually discrete, in reality they are inseparable: "no institution, including the state can guarantee either the public space or rights themselves. Rights are gained and secured only in their practice" (Swan, 1990: 223). The "practice of rights" entails political rights claims, public action in the name of rights and demands for new forms of rights. Habermas detracts from these political aspects of rights by placing more importance upon them as procedural rules than as sites of political struggle among diverse groups. In other words, he emphasizes the *legal* over the *political* in his system of rights. By doing so, Habermas reduces the openness of rights to the needs of diversity, both in terms of his theoretical basis for rights and its sociological implications.

Arendt provides a theoretical grounding for rights -- human plurality -- that allows for an interpretation of rights as political, fluid, agonistic and responsive to diversity. While intersubjectivity lies at the heart of Habermas' democratic theory, I submit that the discourse-theoretic system of rights is more procedural, static, consensual and therefore less open to

diversity than an Arendtian reading of rights. Habermas grounds the universalizable structure of rights in autonomy and their specific concretization in consensus. Although Habermas' understanding of autonomy does recognize human plurality such that "persons, and legal person as well, become individualized only through a process of socialization," he does not adequately bring out the element of political action that undergirds rights (1994: 113). For Habermas, rights comprise an overarching procedural structure that regulates the interaction between citizens. As an overarching set of rules that abstractly integrates society, rights find their main guarantee in consensus rather than agonistic political action. This emphasis on consensus, however, detracts from the "unsettled characteristics" of rights in their political dimension (Bartholomew and Hunt, 1990: 550).

Bartholomew and Hunt capture the agonistic nature of rights in the following:

[rights are] the crystallization of past struggles and the resulting balances of forces of power. They are thereby legitimated and play a role in constituting the terrain for subsequent social action and interaction. Rights thus typically constitute arenas of struggle or contestation (1990: 551).

While Bartholomew and Hunt propose a Gramscian conception of rights as counter-hegemonic struggle, the above formulation converges with an Arendtian reading of rights because political action lies at the heart of both accounts. Their interpretation brings out the importance of rights as political tools for the powerless and rights as a political language in "discursive struggles" for social justice. The "unsettled" nature of rights enables diverse groups to grasp and seize the language of rights, to adapt and employ rights in their political battles and to express their needs and identities. The fluidity of agonistic rights differs from the static nature of discourse-theoretic rights, which function less as political tools than as

guidelines for public interaction that are held immovable by consensus.¹ Consequently, discourse theory neglects the full potential of rights, particularly for marginalized or disadvantaged peoples. When rights are treated primarily as procedural rules that stand above or outside of conflict, their value as instruments of empowerment *within* conflicts is undermined.

Claude Lefort also stresses the importance of rights as political contestation. Appropriating Arendt's terminology, he argues that the "right to have rights" enables an understanding of democracy as founded upon "*the legitimacy of a debate as to what is legitimate and what is illegitimate* -- a debate which is necessarily without any guarantor and without any end" (1988: 39). Rights cannot be treated simply as procedural conditions which structure this debate. They are a part of the debate itself. Changing political circumstances, particularly in an era of diverse struggles for recognition, give rise to demands for new rights -- what Bartholomew and Hunt refer to as the move from rights claims, to legal or constitutional rights (1990: 507). Judgments about the legitimacy of a regime rest in "the conformity between the new right and the spirit of the old rights" (Lefort, 1988: 40). In other words, the "right to have rights" generates defenses for existing rights and demands for new ones. Above all, rights are constitutive of public debate and politics (Lefort, 1986: 243).

Arendt's notion of the "right to have rights" provides a theoretical basis for the above arguments that rights are politically empowering tools for diverse groups. What exactly does Arendt mean when she talks about the "right to have rights?" It seems to be a slippery and

¹Procedural guidelines in the form of rights are not literally immovable, since consensus is revisable. However, the difficulty of attaining consensus makes changes in the system of rights unlikely.

tautological term. However, it is only circular, I believe, insofar as the more diversity in a society is strengthened, the more the “right to have rights” is strengthened. Anytime humans gather together and form a political community at least two things are required. First is plurality, since by definition a community is composed of more than one person. Second is a fundamental right to guaranteed inclusion in the community. This is the “right to have rights,” which has been described as a right to the “satisfaction of a certain precondition of the having of empirical rights. This precondition is membership in the society of a law-dispensing state” (Michelman, 1996: 202). Political inclusion is a fundamental right for Arendt, and from it flows the possibility of acquiring further rights, including traditional civil liberties or the so-called “Rights of Man.”

Arendt does not ground the “right to have rights” in some abstract notion of human nature akin to the “Rights of Man.” As we see later in this chapter, she grounds her conception of rights in the fact of human plurality. The “right to have rights” calls for incontrovertible citizenship in a political community whose integrity is safeguarded by political action that expands and reinforces the “right to have rights.” This is because equality and citizenship are artifices, maintained only through political action -- something in Arendt's account that is impossible without community. Therefore, the “right to have rights” both requires and reinforces plurality in a community. Accordingly, Arendtian rights respond to the needs of diversity by gaining their practical force and theoretical grounding from diversity, or human plurality.

Thus far, I have attempted to point to some advantages of an agonistic reading of rights in an era of diversity politics. Rights as political gain their practical force through

contestation between different groups who struggle in the name of existing rights and demand the generation of new rights. Rights do more than provide the conditions for the articulation of political claims; they are the driving force behind claims that question the legitimacy or fairness of a democratic order. However, the agonistic dimension of rights is tempered by the requirements of sound political judgment. Rights claims must always be publicly justified; otherwise agonistic political action degenerates into a strategic power game with no connection to the deliberative foundations of democracy. The validity of rights claims is judged in common, in a deliberative process where citizens balance the particularities of claims against the demands of universality.

Together, Arendtian judgment and Arendtian rights move discourse theory closer to its own self-understanding. This is accomplished through a conception of action that emphasizes agonistic praxis and human distinction in a pluralistic public sphere. In what follows, I elaborate upon some of the problematic aspects of Habermas' system of rights that prevent him from fully capturing the agonistic dimension of rights. I expand upon Arendt's idea of the "right to have rights" and argue that she provides grounds for an interpretation of rights that is more responsive to diversity. In the concluding chapter, I further examine how the connection between Arendtian judgment and the justification of agonistic rights positively impacts upon diversity in an era of identity politics.

Rights as Procedure

Up to this point, I have somewhat exaggerated the extent to which Habermas portrays rights as procedural conditions. Certainly it would be unfair to totally characterize discourse-theoretic rights in this manner. Habermas is undoubtedly concerned with revitalizing civil society as a public space for political action. This is especially apparent in his reliance upon Cohen and Arato's description of "dual politics" in civil society. Social movements in civil society pursue both offensive and defensive goals. Defensive political action seeks to "maintain existing structures of association and public influence, to generate subcultural counterpublics and counterinstitutions, to consolidate new collective identities, and to win new terrain in the form of expanded rights and reformed institutions" (Habermas, 1996: 370). Defensive political action -- which actualizes, extends and radicalizes existing rights -- supports Habermas' understanding of the constitution as an "unfinished" or "living project" (1996: 384; 129). Interpretations of the founding constitutional principles develop and change as society shifts and evolves. Rights are employed as political tools in attempts to defend the communicative infrastructure of the public sphere against encroachments from the economic and administrative subsystems.

Habermas also refers to feminist arguments that rights are features of relationships, more about "doing" than "having."² The realization of basic rights to private autonomy occurs only through the actualization of political autonomy, that is, public conversation that contests the interpretation of individual liberties. This avoids both the paternalism of the

²Habermas is referring to Iris Marion Young's (1990) critique of the distributive paradigm of justice (Habermas, 1996: 419).

welfare state and the gender-blindness of liberalism by allowing citizens (women) themselves to determine and publicly justify their needs in a manner that “simultaneously strengthens the position of women in the political public sphere and thereby augments participation in forms of political communication that provide the sole arenas in which citizens can clarify the relevant aspects that define equal status” (1996: 426).

The contestatory nature of the interpretation of private rights is, however, diminished by the overall procedural role that these rights play in deliberative democracy. Habermas cautions against reducing law to politics, arguing that law -- in the form of rights -- imposes structural constraints on political action such that

the *sheer quantity* of politics ends up overburdening the legal medium only if the political process violates the procedural conditions of legitimate lawmaking that are spelled out by constitutional principles; ultimately, this is to violate the democratic procedure for a politically autonomous elaboration of the system of rights. Policies that are adopted in a manner that does not conform to the conditions for the democratic genesis of law are merely cloaked in juridical form (1996: 428-9).

The constestatory aspect of rights primarily exists to enable what I suspect to be the true business of politics in Habermas' account: the “sheer quantity” of policy-making and the pursuit of everyday legislation. The political element of rights is far outweighed by references to rights as the structural framework of the public sphere. Because Habermas conceives of rights as an overarching political order that is ethically neutral with respect to competing sub-cultural groups, this implies that rights themselves are not questioned. Rather, rights structure the public space and ensure equal access to it for the pursuit of everyday

politics.³ Rights are “enabling conditions” which “ground the supposition that the processes of making and applying law lead to rational outcomes” (Habermas, 1996: 128; 414). The circulation of communicative power, which serves as the foundation of legitimate law, originates in the public sphere that is constituted and guaranteed by the system of rights (Habermas, 1996: 368). So long as communicative power remains untainted and flows through the “sluices” along the core-periphery axis, laws are rational and tied to public opinion. Thus, “there is no legitimate law without rights” (Habermas, 1996: 125).

The sociological shortcomings of Habermas’ model, where rights are accorded an overly procedural role in deliberative democracy, are accompanied by theoretical limitations that also restrict an agonistic reading of rights. Habermas derives the universalizable structure of rights from the co-originality of private and public autonomy and the specific concretization of rights is grounded in consensus. This is problematic for two reasons. First of all, Habermas posits a pre-determined schema of rights whose basic structure, I argue, fails to depart from traditional liberal notions of private autonomy. Secondly, the emphasis on consensual interpretation leads to a circular grounding of rights, one that neglects the importance of agonistic political action for the guarantee of rights. In contrast, Arendt provides a theoretical grounding that neither circumscribes the structure of rights nor detracts from the agonistic nature of the interpretation and guarantee of rights.

³By everyday politics, I refer essentially to the pursuit of strategic interests and what Habermas has described as the “offensive” goals of new social movements, which are: “[the] attempt to bring up issues relevant to the entire society, to define ways of approaching these problems, to propose possible solutions, to supply new information, to interpret values differently, to mobilize good reasons and criticize bad ones. Such initiatives are intended to produce a broad shift in public opinion, to alter the parameters of organized political will-formation, and to exert pressure on parliaments, courts, and administrations in favor of specific policies” (Habermas, 1996: 370).

Habermas claims that “nothing is given prior to the citizen’s practice of self-determination other than the discourse principle” (1996: 128). In fact, however, he posits a universalizable structure for private rights that is quite individualistic. He eschews the idea that private autonomy may be realized through collective rights, dismissing it as both unnecessary and undesirable (Habermas, 1994: 129).⁴ It is not that I want to argue for collective rights *per se*. Nor am I certain that Arendt would approve of them either, since collective rights may detract from the notion of distinction that she so cherishes (that is, if we interpret distinction as an individual phenomenon, rather than as sub-cultural groups distinguishing themselves against one another within society). Rather, my point is that Habermas’ *political* arguments against collective rights (with respect to issues in Quebec and Germany) have filtered into his supposedly impartial *theoretical* structure.

Habermas does little more than assert that traditional civil liberties, which were once grounded in natural law or social contract theory, are now to become part of discourse theory. At times, he even fails to move beyond social contract language, particularly where he writes that “the right to emigrate implies that membership must rest on an (at least tacit) act of agreement on the member’s part” (1996: 125). I suggest that Habermas in fact relies upon “two hundred years of European constitutional law” to outline the schema of private autonomy rights; as he admits, “even our theoretical introduction to civil rights in abstracto is exposed ex post facto as an artifice. No one can credit herself [or himself!] with access to

⁴He argues that the protection of the individual presupposes the protection of the intersubjectively shared life contexts in which individuation occurs. Not only are individual rights adequate for the protection of diverse subcultures, he argues, but group rights designed to guarantee the survival of that group take away members’ ability to be internally reflexive (1994: 129-130).

a system of rights in the singular, independent of the interpretations she already has historically available" (1996: 129). If the discourse-theoretic schema of private rights does rest upon two hundred years of liberalism, I am not as certain as Habermas that this radically differs from the pre-given natural law that Kant "*put ahead* of political will-formation" as the content of rights (Habermas, 1996: 101). Habermas circumscribes the political will-formation used in the interpretation of the content of rights by predetermining their structure -- the political autonomy of citizens is undermined because their authorship is limited to individualistic rights.

In contrast, nothing is "given prior" in an Arendtian conception of rights except for the "right to have rights." While the "right to have rights" might be just as much a moral claim as Habermas' conception of private autonomy, it does not impose a particular form upon the content of rights.⁵ This permits free-flowing political contestation and the ability to articulate and demand *any* set of rights, including collective rights which "power an acknowledgement of specificity" in an age of identity politics (Taylor, 1994: 39). Not only does the "right to have rights" widen the scope for agonistic political action by refraining from imposing a structure, but it also explicitly situates the content of rights, and their guarantee, in agonistic political action as opposed to consensus. This makes an Arendtian reading of rights far more responsive to diversity because as Carol Gould argues, consensual procedure is a weak basis for rights, particularly rights of difference. Even if Habermas were to accept

⁵See Michelman, 1996 for a discussion on the extent to which the "right to have rights" is a moral claim. Interestingly, Michelman draws an analogy between the "right to have rights", which calls for inclusion in the political community, and Kant's moral law of universal freedom, which places everyone under the obligation of reason to accept some form of civil government (1996: 204).

that private autonomy could be realized in form of collective rights, this would not sufficiently redress the exclusionary aspects of deliberative democracy because the exercise of public autonomy centers around consensus.

Gould contends that Habermas presupposes the freedom and equality of participants in the very notion of consensus and as a result, “rights are seen as no more than conditions for participation in this procedure” (Gould, 1996: 175). To clarify her argument, I note that freedom and equality *as rights* are not identical with the pragmatic presuppositions of discourse.⁶ According to Habermas, conventions like rights that “help to actualize the ideal content of the presuppositions of argumentation under empirical conditions” must be “carefully differentiate[d]” from the rules of discourse (Habermas, 1990a: 92). While equality and freedom are presupposed by the procedural rules leading to consensus, as rights they manifest only as institutional attempts that are “subject in turn to normative conceptions and their goal, which spring *spontaneously* from our intuitive grasp of what argumentation is” (Habermas, 1990a: 92). Rights emerge as a substantive feature of discursive institutions, subject to justification, but nonetheless necessitated and presupposed by the demands of consensual procedure itself. This has problematic implications for a theory that is committed to protecting diversity because:

the very freedom and equality of the participants cannot themselves be grounded in any consensual norm. If they were, this would entail an infinite

⁶ Rights and the rules of discourse cannot be construed as identical because: “It is by no means self-evident that rules that are unavoidable *within* discourses can also claim to be valid for regulating action *outside* of discourses. Even if participants in an argumentation are forced to make substantive normative presuppositions (e.g., to respect one another as competent subjects, to treat one another as equal partners...) they can still shake off this transcendental-pragmatic compulsion when they leave the field of argumentation” (Habermas, 1990a: 86).

regress (of procedures that ground rights that ground procedures that ground rights *ad infinitum*); or else a circle, in which the rights grounded by norms are themselves presupposed in the procedure of grounding these norms (Gould, 1996: 175).

Consequently, rights have no status exterior to the consent gained in a democratic body. This is especially dangerous for rights of difference, which “stand apart from what is in the generalizable interest” and therefore “cannot be grounded in the requirements of coming to agreement” (Gould, 1996: 175).

Gould proposes that rights be grounded in “the character of human action itself,” that is, in the freedom-bearing capacity for self development (Gould, 1996: 175; see Gould, 1988). The idea that all humans are capable of self-transformation is not a transcendental or essentialist claim that would be more limiting than Habermas' position, but an empirical condition of human existence. There is no inherent pattern of self-development in human nature, nor is it inevitable. Rather, there is a “tendency” toward self-development in that “people normally tend to act in the pursuit of their goals and to some degree toward the achievement of long-range plans” (Gould, 1988: 55-56). Individuals are situated within social relations which both constrain and enable their capacity for self-development. Subsequently, negative rights provide freedom from constraint and positive rights strengthen the conditions that enable the capacity for differentiated self-development. Through this conception of positive freedom, “justice requires not the *same* conditions for each one but rather *equivalent* conditions determined by differentiated needs” (Gould, 1996: 180).

I see two problems with Gould's proposal. First of all, while she is correct to argue that rights ought not be grounded solely in a circular procedure, she disconnects the

justification of rights from intersubjective processes of discursive validation far too severely. Gould charges Habermas with moral relativism by saying “it remains unclear why the judgments arrived at in this way [i.e., consensual procedure] should be regarded as morally right rather than merely accepted” (1988: 127). However, it is not necessary to leave the discursive paradigm altogether in order to provide a basis for rights that extends beyond consensus. That which is morally right is not “merely accepted,” but accepted according to stipulations that entail mutual recognition, reflexivity, symmetry and moral reciprocity. Nor is it desirable to sever rights from the discursive paradigm; to do so would be a regression into the philosophy of consciousness, a departure from the postmetaphysical realm of justification characteristic of late modernity. Secondly, grounding rights in self-development detracts from the agonistic potential of rights. Gould maintains that it is impossible for rights to be both inviolate and contestable (1996: 178). This claim, however, mistakenly assumes that rights are inviolable and conflates the essential condition of having rights with the contestable articulation of specific rights.

What is needed is a conception of rights whose grounding extends beyond consensual procedure without abandoning the theory of communicative action. Further, such a conception of rights must retain an agonistic element which allows for political struggles that defend existing rights and generate demands for new ones. Hannah Arendt’s “right to have rights” presents an understanding of rights that are grounded in human plurality, which according to Arendt, is the basic condition of speech and action. Human plurality provides a grounding for rights that is inherently open to diversity. Further, it intimately links rights to the discursive paradigm because the “right to have rights” guarantees the conditions for

speech. While the basic "right to have rights" undergirds any political community, the articulation of specific rights is an open process of contestation and political struggle. Arendt locates rights in a notion of political praxis that is possible only in a pluralistic society where speech and politics are one and the same.

Plurality, Politics and the "Right to Have Rights"

Arendt never outlined a comprehensive theory of rights, but she was profoundly concerned with the failure of the "Rights of Man" to protect people from being displaced and then persecuted under Nazi totalitarianism. Denationalization was a "powerful weapon of totalitarian politics," for once minorities such as Jews and gypsies were deprived of their citizenship those "inalienable" rights that are grounded in the abstract notion of humanity became meaningless (Arendt, 1973: 269). Without a state to enforce these supposedly inviolable rights, "the world found nothing sacred in the abstract nakedness of being human" (Arendt, 1973: 299).

Arendt pinpoints the ineffectualness of the Rights of Man in the historical conflation of the individual "Man" with the People, or nation-state. The paradoxical notion that rights originated from "an abstract human being who seemed to exist nowhere" had to be reconciled with the fact that "even savages lived in some kind of social order" (Arendt, 1973: 291). If these "savages" or "backwards communities" did not enjoy human rights, it was only because their progress toward this level of civilization had been impeded by despotic leaders:

The whole question of human rights, therefore, was quickly and inextricably blended with the question of national emancipation; only the emancipated sovereignty of the people, of one's own people, seemed to be able to insure

them. As mankind, since the French Revolution, was conceived in the image of a family of nations, it gradually become self-evident that the people, and not the individual was the image of man (Arendt, 1973: 291).

The French granted rights such that “by virtue of being born” everyone was the owner of certain rights (Arendt, 1965: 147). In contrast, the Americans proclaimed that all people should live under a constitutional government and extended the “rights of Englishmen,” to borrow Burke’s phrase, to all members of the democratic polity regardless of nationality.⁷

Arendt explains the difference between the two constitutions:

The American version actually proclaims no more than the necessity of civilized government for all mankind; the French version, however, proclaims the existence of rights independent of and outside the body politic, and then goes on to equate these so-called rights, namely the rights of man *qua* man, with the rights of citizens (Arendt, 1965: 147).

By equating the rights of man *qua* man with the rights of citizenship, they “could not but be less than the rights of nationals” (Arendt, 1965: 147). Rights granted “by virtue of being born” soon became rights “by virtue of being born French.” The so-called “inalienable” human rights contained no guarantee outside of their promulgation within a nation-state.

Similarly, German nationalism became so bound up with the state and law that Hitler was able to claim that “right is what is good for the German people.” Subsequently, when the Jews were deprived of their German citizenship status, human rights were incapable of protecting them against the loss of their homes, and then against the denial of asylum in any other country. Expulsion and the shuffling of Jews from border to border were just the first

⁷Of course, the rights of Englishmen were really only extended to whites of non-British and immigrant stock (Germans, Swedes, Irish, etc).

steps toward the final solution, which was implemented once the Jews were denied legal protection by a nation-state.

The “calamity” of the rightless, wrote Arendt, was not that they were deprived of life, liberty and the pursuit of happiness, for these were formulas “designed to solve problems *within* given communities” (1973: 295). Rather, the problem is that the rightless were deprived of status in a community: “Their plight is not that they are not equal before the law, but that no law exists for them; not that they are oppressed but that nobody wants even to oppress them. Only in the last stage of a rather lengthy process is their right to live threatened; only if they remain perfectly ‘superfluous,’ if nobody can be found to ‘claim’ them, may their lives be in danger” (Arendt, 1973: 296). The condition of rightlessness necessarily preceded the violation of the right to live.

Arendt’s understanding of the loss of rights through statelessness is entirely consistent with her theory of action. Action secures a place in the world, creates a space of appearances where the “who” of the actor is disclosed, and is the source of the communicative power which binds humans together in non-violent relations. The deprivation of rights is not so much a deprivation of freedom as the loss of a place in the world where opinions and action are significant and effective. Civil liberties are a “fool’s freedom” if there is no place in the world -- no nation-state or legal community -- in which to meaningfully exercise the rights to opinion and speech. The inalienability of rights cannot rest in an abstract notion of Man’s inherent dignity, but must be bound to incontrovertible membership in an organized community. The massive displacement of persons between the two wars clearly demonstrated that “Man, it turns out, can lose all so-called Rights of Man without losing his essential quality

as man, his human dignity. Only the loss of a polity itself expels him from humanity” (1973: 297). This is why displaced persons insisted so strongly upon their ethnic nationality, which contained the last vestiges of citizenship, the last traces of a connection to a common world and humanity (Arendt, 1973: 300).

Arendt calls for the “right to have rights,” which means “to live in a framework where one is judged by one’s actions and opinions” (1973: 296). Rights both provide for and find their guarantee in a public realm where speech and political action are synonymous with one another. Public action only becomes meaningful within a political community that is undergirded by the “right to have rights.” The “inalienable” Rights of Man necessarily proceed from the “right to have rights,” because freedom of thought, speech and action can only find their guarantee through membership in a political community. The consistency of Arendt’s theory of action and her analysis of rightlessness clearly indicates that the “right to have rights” is grounded in the fact of human plurality. Plurality gives rise to the common space of appearances that exists when humans act together. When the significance and effectiveness of speech and action are denied, when actors are no longer part of a common realm but are isolated and ostracized, so too are plurality and human distinction denied. Hitler was able to claim that “right is what is good for the German people” because the state had become the instrument of a nation that was homogeneous, monolithic and allowed no exchange of opinion. It is precisely because the Rights of Man “are independent of human plurality” and “remain valid even if a human being is expelled from the human community” that they were so ineffectual for the plight of stateless persons. Traditional human rights must

be grounded in plurality in order to be effective; that is, they must be linked to the guarantee of a common public space where action and speech count. Only then is freedom within reach.

Arendt's understanding of freedom forms the bridge between human plurality and the "right to have rights." According to Arendt, freedom is inherent in action: "for to *be* free and to act are one and the same" (Arendt, 1968c: 153). In contrast to the liberal idea that freedom consists in freedom *from* politics, freedom is only possible *through* politics (Arendt, 1968c: 149). By extension, rights do not merely protect individuals from an intrusive state so they can freely pursue the good life in private. Rather, rights are integral to freedom because they are the basis of political action. Freedom-bearing political action, however, is only possible in a society that respects the "right to have rights." Without irrevocable citizenship that provides the basic condition for speech and action, i.e. plurality, freedom would be unattainable.

It could be argued that Arendt's "right to have rights" barely differs from Habermas' system of rights because both aim to secure public spaces for the exchange of speech. However, a claim of this sort ignores the inherently political foundation that Arendt ascribes to rights, a foundation that is lacking in Habermas' schema. While the "right to have rights" certainly provides the conditions for political action, rights are much more than a mere procedural framework. The political dimension of discourse-theoretic rights is understated because their guarantee lies in consensus, whereas an Arendtian reading of rights emphasizes that agonistic political action in the name of, and for rights, is integral to their safeguarding.

As Jeffrey Isaac explains, Arendtian rights are "mute and invisible, unless spoken for, unless made actionable" (1996: 67). In the Habermasian scheme, rights function more as

silent legal structures which “guide” the formation of legitimate law and direct the flow of communicative power through the proper sluices. While Habermasian citizens do engage in defensive political action to protect and expand rights, the *telos* of this action is maintaining the public sphere for the pursuit of everyday politics. In contrast, an Arendtian interpretation of rights views political action that protects and expands rights as an end in itself. This is because freedom is inherent in action, and rights are both the foundation and the content of political action. This view is made possible by the fact that Arendt grounds rights directly in plurality, which is prerequisite for political action. Plurality, politics and rights are bound together, such that the more pluralistic or diverse a society, the greater the capacity for speech and freedom-bearing action, *and* the greater the reinforcement of the “right to have rights” which secures that same plurality.

Although Habermas’ grounding of rights in the co-originality of private and public autonomy recognizes plurality as a facet of human existence, he does not anchor rights strongly enough to plurality, and subsequently, the political dimension of rights and their responsiveness to diversity is diminished. First of all, Habermas’ emphasis on consensus and individualistic rights deadens the potential for agonistic political action. He circumscribes the realm of political action by permitting individual rights only, thus denying the possibility of a struggle for collective rights which respond directly to minority groups. By treating rights as an overarching political order whose content is determined through consensus, Habermas detracts from the contested and unsettled nature of rights whose best guarantee lies in political action. Secondly, autonomy as the basis of rights does not reinforce plurality in the manner of Arendtian rights, because Habermas treats plurality, or intersubjectivity, as an

ontological precondition for the co-originality of private and public autonomy.⁸ In contrast, Arendt focuses on political plurality as an artificial condition which can only be maintained through political action. The connection between rights, plurality, freedom and action is as follows.

We can trace Arendt's conception of freedom back to the Greek form of government called *isonomy*, or "no rule," where freedom manifests within the common space of appearances where one's actions are witnessed, judged and remembered (Arendt, 1965: 24). As the space for freedom through action, the isonomic political realm was made possible through the institution of the "equality of those who form a body of peers" (Arendt, 1965: 23).⁹ The artificialness of the Greek sense of equality has had a tremendous influence on Arendt's claim that the "right to have rights" is intimately bound with irrevocable membership in a political community:

The difference between this ancient concept of equality and our notion that men are born or created equal and become unequal by virtue of social and

⁸I am here thinking of the transcendental-pragmatic justification for the discourse principle, which refers to communicative action as a basic feature of human life that cannot be denied without committing a performative contradiction. The interpenetration of the discourse principle and the legal form, which constitutes a "logical genesis of rights," secures the *equiprimordiality* of private and public autonomy. I do not contest this understanding. Rather, I want to point out the difference in focuses between Arendt and Habermas. Arendt brings out the political nature of rights by emphasizing their artificial character, whereas Habermas is concerned with making intersubjectivity the basis for autonomy, and the system of rights.

⁹Arendt criticizes the French identification of freedom with sovereignty, which arguably manifests in the conflation of human rights and the nation-state, for the following reasons. The equation of freedom with sovereignty "leads either to a denial of human freedom -- namely if it is realized that whatever men may be, they are never sovereign -- or to the insight that the freedom of one man, or a group, or a body politic can be purchased only at the price of the freedom, i.e. the sovereignty, of all others...If men wish to be free, it is precisely sovereignty they must renounce" (Arendt, 1968c: 164-5). The renunciation of sovereignty leads back to *isonomy*, or no-rule, where freedom and plurality presuppose one another.

political, that is man-made institutions, can hardly be over-emphasized. The equality of the Greek polis, its isonomy, was an attribute of the polis and not of men, *who received their equality by virtue of citizenship, not by virtue of birth*. Neither equality nor freedom was understood as a quality inherent in human nature...they were...conventional and artificial, the products of human effort and qualities of the man-made world (Arendt, 1965: 23; emphasis added).

Human rights are neither inalienable nor do they reside in the abstract dignity of human nature. Rights are an artifice, particularly because their enforceability derives from the commitment to political community, which is also artificially maintained through laws and institutions. Equal citizenship, or the “right to have rights,” is grounded in the idea of human plurality. To deny the “right to have rights,” which can and has happened, is first of all to deny the basic condition of speech and action. Subsequently, equality and distinction, which constitute the twofold character of plurality, are also denied (Arendt, 1958: 175). Freedom, as Arendt understands it, finds its expression in acts of distinction that are safeguarded by equality.

No system of rights is inviolable, but Arendt provides a conceptual tool that makes rights more secure. The “right to have rights” undergirds any organized political community. Without full, incontrovertible citizenship, plurality, action, freedom and speech are denied. We see how freedom requires the presence of others in a political space in the following passage: “by assuming the rule over others, he [the despot] had deprived himself of those peers in whose company he could have been free. In other words, he had destroyed the political space itself, with the result that there was no freedom extant any longer, either for himself or for those over whom he ruled” (Arendt, 1965: 24). In essence, there is no political community without the “right to have rights.”

Above I criticized Carol Gould for conflating the essential condition of having rights with the contestable articulation of specific rights. In a sense, Gould is correct to say that rights cannot be both inviolate and contestable because rights *are* violable. But she seems to suggest that rights will not be abrogated if they are closed to contestation. In fact, *the only safeguard against the violation of rights is their contestability*. To reiterate, rights are only gained and secured in their practice.

According to Arendt, the “right to have rights,” or “the right of every individual to belong to humanity” should be guaranteed by humanity itself (1973: 298). In other words, rights find their guarantee in plurality, action and speech -- that is, in politics. Rights cannot exist without politics to back them up since they rest upon artifice in form of a political commitment to equal citizenship (Isaac, 1996: 67). Agonistic rights claims and public action in the name of rights are the mark of an open political community that fosters fluid and diverse exchanges of opinion among equal citizens. Of course, the fragility of open political communities makes this safeguarding of rights somewhat precarious. However, it is less precarious than a passive understanding of rights as natural. Arendt emphasizes the freedom-bearing activity of humans, “who can only achieve their dignity by doing something about it” (Isaac, 1996: 65).

The “right to have rights” invokes equal, incontrovertible citizenship that provides the grounds for freedom-bearing action and speech in a pluralistic political sphere, which again reinforces the right to have rights as the undergirding factor in pluralistic polities. Without an underlying conception of the “right to have rights,” the organized community is something other than open, pluralistic and freedom-bearing. Claude Lefort, who appropriates

Arendt's terminology in his comprehensive analysis of rights, also maintains that rights "are bound up with a general conception of society"(1986: 241). For Lefort, rights are constitutive of a politics that seeks to open up public spaces that form the basis of democratic legitimacy:

it is only by recognizing in the institution of human rights signs of the emergence of a new type of legitimacy and of a public space, only by recognizing that individuals are both the products and instigators of that space, and only by recognizing that it cannot be swallowed up by the state without a violent mutation giving birth to a new form of society, that we can possibly hope to evaluate the development of democracy and the likely fate of freedom (1988: 30).

In Arendtian terms, humans are products of the public space because distinction and freedom through participation must occur in the common space of appearances. Humans instigate this public space through the pluralistic exchange of opinion and the agonistic safeguarding of rights. The constitution of public spaces is undergirded by the "rights to have rights," that is, by a conception of a pluralistic society where equality and the possibility of freedom are artificially secured through full and undeniable citizenship.

To bring out the contestable nature of rights, rights as the products of agonistic action in a political community, is to open rights up to the needs of diversity. Despite acknowledging the necessity of defensive political action to safeguard rights, Habermas fails to fully develop an agonistic conception of rights. In contrast to the static nature of the discourse-theoretic schema, where rights function as an overarching political structure whose main guarantee lies in consensus, an Arendtian interpretation stresses the fluidity and multi-dimensionality of rights. We must emphasize rights as the centre of political struggles, subject to varying interpretations and contestations, rather than as procedural frameworks that

structure the public space for the pursuit of everyday politics. Otherwise, rights become stale and inert, incapable of providing sustenance to political struggles that, in an Arendtian scheme, would reinforce and guarantee those very rights.

Rights find their impetus and guarantee in participatory politics. The safeguarding and expansion of rights through political action also strengthens plurality in the political community. Contestation requires multiple viewpoints, differences of opinion and diversity in the public sphere. Without these things, rights carry little practical force and the political community ceases to exist in any meaningful way. The realm for genuine political action is corrupted when plurality in the public sphere is compromised or damaged. Plurality and the “right to have rights” presuppose one another, and both find their guarantee in agonistic political action that is premised upon incontrovertible citizenship and political equality. The “right to have rights” is bound to a notion of praxis in a pluralistic society such that diversity, as the theoretical grounding of Arendtian rights, is integral to the political contestation that safeguards, expands and instigates rights.

An agonistic interpretation of rights provides a empowering tool to diverse groups seeking political recognition, whereas Habermas neglects the contestatory and unsettled nature of rights. When rights contestation is joined with the demands of sound political judgment, as I discuss in the concluding chapter, discourse theory is moved even closer toward its promise. The public justification of rights claims is determined in common through a process of public deliberation that is responsive to both the needs of diversity and the requirement of impartiality. Together, the “right to have rights” and Arendtian judgment

accommodate diverse peoples and their political claims without disturbing the discursive and universalizing features of discourse theory.

CONCLUSION:

JUDGMENT AND THE PUBLIC JUSTIFICATION OF AGONISTIC RIGHTS

Hannah Arendt is one of the truly unique thinkers of our time. Her work does not fall into a single category, as it touches upon classical, modernist, and postmodernist themes, at times calling for a renewal of democracy, and at other times seemingly elitist. Above all, however, we can characterize Arendt as a philosopher who was profoundly concerned with the loss of public participation, civic virtue and excellence that was precipitated by the rise of mass democracy. She laments the inability of modern citizens to think and judge for themselves in a world beset with genocide, totalitarianism, mass consumerism and rapid technological change. Nostalgia strongly flavours her work; a yearning and admiration for the Greek *polis* and Socratic valor fill her account of the need for public deliberation. It is the need for public deliberation -- speaking, thinking and judging -- intersected with Arendt's conception of agonistic political action that strives for equality and distinction that have been key to this thesis. I have, however, attempted to leave behind Arendt's nostalgia and elitism, appropriating those elements of her work that speak to the imperfections of discourse theory.

My juxtaposition of Arendt's thought against that of Jürgen Habermas seeks to strengthen discourse theory by making it even more accommodating to diversity. Habermas strives to recover the Enlightenment project of attaining universalizable norms while avoiding the ethno- and phallocentrism of transcendental logic. Discourse ethics and the model of deliberative democracy are presented as part of a theory of "the third way," one which stands between the fallacies of metaphysical thought and the alleged fatalism of postmodernists. It is a brilliant project that responds to the crises of modernity which, in many ways, resemble

what Arendt articulated years prior: a loss of meaning in a post-metaphysical world and an abdication of public autonomy in a depersonalized, bureaucratic system of government. Habermas seeks to restore meaning through public communication processes whose theoretical justification is rooted in universal linguistic patterns and deep cognition structures. He also seeks to locate democratic legitimacy in what Arendt calls communicative power, which is generated by the general population within civil society and the wider public sphere. In essence, Habermas offers us a theory that promises to generate universalizable norms which are wholly inclusive.

However, as I have argued throughout this thesis, there are shortcomings in discourse theory with respect to the needs of diversity in an era of identity politics. Its promise is threatened by an emphasis on consensual procedures, abstract justice and rational argumentation. While Arendt does not explicitly offer us a theory of the “third way,” she does provide the conceptual tools that move discourse theory toward a universalism that truly takes diversity as its starting point. She treats the same basic themes of intersubjectivity and discourse (or in her words, plurality and speech) such that the exclusionary aspects of discourse theory are averted. Both Arendt and Habermas stress the importance of deliberation and communicative power in the public sphere. But Habermas emphasizes the procedural and consensual aspects, whereas Arendt brings out the agonistic dimension of deliberation and political action. Thus, for Arendt, it is not consensus that is the goal of public discourse, but the act of judging itself. And it is not that rights simply regulate the process of reaching consensus, but that rights themselves are at the center of agonistic exchanges of opinion in the public sphere. An Arendtian interpretation of rights, and how

participants discern the better argument provides for a reassertion of agonistic politics in discourse theory. A reassertion of the political, in turn, brings discourse theory closer to fulfilling its promise.

This thesis is premised on the understanding that there is a connection between agonistic politics and responsiveness to diversity. This connection becomes particularly apparent through Arendt's conception of plurality. Arendt insists upon radical pluralism -- a multidimensionality of voices in the public sphere that strive for distinction under the artifice of political equality. Without distinction and equality there is no political community, and therefore no realm for speech and action. Agonism, as Arendt understands it, is "the passionate drive to show one's self in measuring up against others," in other words, it is a quest for distinction (1958: 194). The quest for distinction is fundamental, both as a condition and as a form of political action. Diversity, or distinction amongst equals, is not only a precondition, but also a consequence of agonistic political action. Moreover, much of this agonistic political action stems from the "right to have rights," which strengthens and maintains plurality in the public sphere.

I have argued that discourse theory ought to incorporate Arendt's conception of the "right to have rights" in order to bring out the agonistic dimension of rights. This calls for an understanding of rights as *praxis*, such that rights gain their meaning and effect through political action. The practice of rights -- the articulation of rights claims in political struggles for social justice, public action in the name of rights and the discursive demand for new forms of rights -- both secures and invigorates a public space for the exchange of opinion and gives rise to a symbolic awareness of rights (see Lefort, 1986: 260). An awareness of rights, in

turn, reinforces the vitality of the public sphere and generates a demand for new rights that must be publicly justified. The agonism that lies at the heart of the practice of rights is not to be confused with action that Habermas refers to as strategic, i.e., self-interested claims that invoke and manipulate the language of rights in a battle where “might makes right.” As Hanna Pitkin has argued, we may be drawn into the public sphere by need, fear or ambition, but once there “we are forced to find or create a common language of purposes and aspirations, not merely to clothe our private outlook in public disguise, but to become aware ourselves of its public meaning...to transform ‘I want’ into ‘I am entitled to,’ a claim that becomes negotiable by public standards” (1981: 347). Rights claims, political action in the name of rights and demands for new rights must all be publicly justified. How to do this in fair, inclusive and open manner reconnects us to the issues of judgment and public deliberation.

Rights as *praxis* remain tied to the deliberative foundations of discourse theory. The agonism that is central to the practice of rights is linked to Arendtian judgment because all rights claims must be publicly justified. Agonistic rights claims and demands can only become legitimate and gain acceptance through public deliberation: thinking from the standpoint of everyone else and forming judgments based on the *sensus communis*. Rights provide a common language for public deliberation and a common basis for understanding the political claims of others. Yet, at the same time, their fluidity and unsettled nature makes rights appropriate tools for various and diverging sorts of politics. The agonistic dimension of rights is complemented by the demands of Arendtian judgment in a way that opens up discourse theory to diverse peoples and their competing political claims without jeopardizing the

discursive validity of legal norms. When rights claims transform into legal or constitutional rights, they have attained discursive validity through a process of public justification that renews and strengthens discourse theory's commitment to diversity. When deliberating over the rights claims of others, participants in a public dialogue think representatively. They take into consideration the concrete particularities and ethical concerns of their fellow citizens but balance this with an impartial stance that considers the justice of their claims.

An Arendtian critique of Habermas' discourse theory brings out an element of agonistic political action without disrupting its communicative foundations. To reassert the political in discourse theory is to understand public deliberation as a contentious exchange of opinions -- often revolving around rights -- between diverse, distinct, and ethically situated peoples. Thus, it acknowledges the agonistic dimension of rights as valuable tools in different struggles for recognition but anchors rights contestation to public deliberation and political judgment. This makes Habermas' work more open to difference because agonistic political action both strengthens and feeds off diversity. When (and if) universalizable norms are generated in discourse, they are the result of persuasion and contestation between diverse people who "woo" the consent of one another and form judgments based on the plurality of opinions they encounter -- not on the force of rationalistic arguments that aim toward consensus. Accordingly, the multidimensionality of the public sphere is reflected in these norms, which at the same time gain validity from their universalizability, which is rooted in the *sensus communis*. The multidimensionality of the public sphere, which stems from agonistic differences of opinion, is balanced against the universalizability of norms, which is judged in common with an enlarged mentality. This fulfills the promise to place diversity at

the foundation of universal norms in a society that equally cherishes difference and commonality.

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