Between Facts and Norms

Contributions to a Discourse Theory of Law and Democracy

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The concept of practical reason as a subjective capacity is of modern vintage. Converting the Aristotelian conceptual framework over to premises of the philosophy of the subject had the disadvantage of detaching practical reason from its anchors in cultural forms of life and sociopolitical orders. It had the advantage, though, of relating practical reason to the "private" happiness and "moral" autonomy of the individual. That is, practical reason was thenceforth related to the freedom of the human being as a private subject who could also assume the roles of member of civil society and citizen, both national and global. In the role of world citizen, the individual fuses with the human being in general, is an "I" both unique and universal. To this eighteenth-century conceptual repertoire the nineteenth century added the dimension of history. The individual subject is involved in its life history in a manner similar to the way that states, as subjects of international law, are caught up in the history of nations. G. W. F. Hegel expressed this point in his concept of objective spirit. Naturally, Hegel remained convinced, just like Aristotle, that society finds its unity in the political life and organization of the state. The practical philosophy of modernity continued to assume that individuals belong to a society like members to a collectivity or parts to a whole—even if the whole is only supposed to constitute itself through the connection of its parts.

However, modern societies have since become so complex that these two conceptual motifs—that of a society concentrated in the
state and that of a society made up of individuals—can no longer be applied unproblematically. This circumstance led Marxist social theory to forego a normative theory of the state. To be sure, traces of practical reason could still be discerned, as a philosophy of history, in the Marxist concept of a democratically self-governing society in which both the bureaucratic state and the capitalist economy were supposed to disappear. Systems theory erased even these last traces, renouncing any connection with the normative contents of practical reason. The state forms just one subsystem alongside other functionally specified social subsystems; these stand in system-environment relations with one another, similar to the relation between persons and their society. Starting from Thomas Hobbes’s naturalistic conception of the struggle for self-assertion among individuals, the rigorous elimination of practical reason has taken a path that leads to Niklas Luhmann’s autopoietic conception of self-referential systems. Neither attenuated empiricist approaches nor efforts at rehabilitation appear capable of restoring the explanatory power practical reason once possessed in the contexts of ethics and politics, modern natural law and moral theory, philosophy of history and social theory.

The philosophy of history can only glean from historical processes the reason it has already put into them with the help of teleological concepts. By the same token, norms for a reasonable conduct of life cannot be drawn from the natural constitution of the human species any more than they can from history. No less than philosophy of history, philosophical anthropology à la Max Scheler or Arnold Gehlen succumbs to the critique coming from the very sciences it ineffectually attempts to employ for philosophical ends—the two approaches display analogous weaknesses. Not much more convincing is the contextualist renunciation of all justification. Although this is an understandable response to the failures of the philosophy of history and philosophical anthropology, it never gets beyond the defiant appeal to the normative force of the factual. The development of constitutional democracy along the celebrated “North Atlantic” path has certainly provided us with results worth preserving, but once those who do not have the good fortune to be heirs of the Founding Fathers turn to their own traditions, they cannot find criteria and reasons that would allow them to distinguish what is worth preserving from what should be rejected.

The traces of modern natural-law normativism thus get lost in a trilemma: neither in the teleology of history nor in the constitution of the human species can we find the content of practical reason, once its philosophical foundation in the knowing subject has been shattered, nor can we justify such content simply on the basis of the fortuitous resources of successful histories and traditions. This explains the attractiveness of the only option that seems to remain open: the brash denial of reason altogether, whether in the dramatic form of a post-Nietzschean critique of reason or in the more sober variety of a systems functionalism that neutralizes anything that, from the participant perspective, appears obligatory or at all meaningful. Anyone in the human sciences not absolutely committed to a counterintuitive approach will find this solution rather unattractive as well. For this reason, I have taken a different approach with the theory of communicative action, replacing practical reason with a communicative one. This involves more than a change in terminology.

In the classical modern tradition of thought, the link between practical reason and social practice was too direct. This meant that the sphere of social practice was approached entirely from the angle of normative or—once filtered through a philosophy of history—cryptonormative issues. Just as practical reason was supposed to orient the individual’s action, so also natural law up to Hegel wanted to single out normatively the only reasonable social and political order. But a concept of reason transposed into the linguistic medium and unburdened of the exclusive relationship to moral issues plays a different role in theory construction: it can serve the descriptive purposes of a rational reconstruction of competences and structures of consciousness hitherto operative in history. The work of reconstruction can then link up with functional approaches and empirical explanations.

Communicative reason differs from practical reason first and foremost in that it is no longer ascribed to the individual actor or to a macrosubject at the level of the state or the whole of society. Rather, what makes communicative reason possible is the linguistic medium through which interactions are woven together and forms.
of life are structured. This rationality is inscribed in the linguistic telos of mutual understanding and forms an ensemble of conditions that both enable and limit. Whoever makes use of a natural language in order to come to an understanding with an addressee about something in the world is required to take a performative attitude and commit herself to certain presuppositions. In seeking to reach an understanding, natural-language users must assume, among other things, that the participants pursue their illocutionary goals without reservations, that they tie their agreement to the intersubjective recognition of criticizable validity claims, and that they are ready to take on the obligations resulting from consensus and relevant for further interaction. These aspects of validity that undergird speech are also imparted to the forms of life reproduced through communicative action. Communicative rationality is expressed in a decentered complex of pervasive, transcendentally enabling structural conditions, but it is not a subjective capacity that would tell actors what they ought to do.

Unlike the classical form of practical reason, communicative reason is not an immediate source of prescriptions. It has a normative content only insofar as the communicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations—for example, ascribe identical meanings to expressions, connect utterances with context-transcending validity claims, and assume that addressees are accountable, that is, autonomous and sincere with both themselves and others. Communicatively acting individuals are thus subject to the “must” of a weak transcendental necessity, but this does not mean they already encounter the prescriptive “must” of a rule of action—whether the latter “must” can be traced back deontologically to the normative validity of a moral law, axiologically to a constellation of preferred values, or empirically to the effectiveness of a technical rule. A set of unavoidable idealizations forms the counterfactual basis of an actual practice of reaching understanding, a practice that can critically turn against its own results and thus transcend itself. Thus the tension between idea and reality breaks into the very facticity of linguistically structured forms of life. Everyday communicative practice outtaxes itself with its idealizing presuppositions, but only in the light of this innerworldly transcendence can learning processes take place at all.

Communicative reason thus makes an orientation to validity claims possible, but it does not itself supply any substantive orientation for managing practical tasks—it is neither informative nor immediately practical. On the one hand, it stretches across the entire spectrum of validity claims: the claims to propositional truth, personal sincerity, and normative rightness; to this extent it reaches beyond the realm of moral-practical questions. On the other hand, it pertains only to insights—to criticizable utterances that are accessible in principle to argumentative clarification—and thus falls short of a practical reason aimed at motivation, at guiding the will. Normativity in the sense of the obligatory orientation of action does not coincide with communicative rationality. Normativity and communicative rationality intersect with one another where the justification of moral insights is concerned. Such insights are reached in a hypothetical attitude and carry only the weak force of rational motivation. In any case, they cannot themselves guarantee that insight will issue in motivated action.

One must keep these differences in view when I continue to use the concept of communicative reason in connection with a reconstructive social theory. In this new context, the received concept of practical reason also acquires a different, more or less heuristic status. It no longer provides a direct blueprint for a normative theory of law and morality. Rather, it offers a guide for reconstructing the network of discourses that, aimed at forming opinions and preparing decisions, provides the matrix from which democratic authority emerges. From this perspective, the forms of communication that confer legitimacy on political will-formation, legislation, and the administration of justice appear as part of a more encompassing process in which the lifeworlds of modern societies are rationalized under the pressure of systemic imperatives. At the same time, such a reconstruction would provide a critical standard, against which actual practices—the opaque and perplexing reality of the constitutional state—could be evaluated.

In spite of the distance from traditional concepts of practical reason, it is by no means trivial that a contemporary theory of law and democracy still seeks to link up with classical concept forma-
This theory starts with the socially integrating force of rationally motivating, hence noncoercive processes of reaching understanding. These provide a space for distance and recognized differences within a sustained commonality of convictions. Moral philosophers and philosophers of law adopt this perspective in the normative discourses they still carry on, indeed with greater vigor than ever before. Because they specialize in dealing with questions of normative validity in the performative attitude of participants, they usually remain inside the limited horizon of lifeworlds whose spell has been broken by the objectivating observations of social scientists for some time now. Normative theories are open to the suspicion that they take insufficient notice of the hard facts that have long contradicted the contractarian self-understanding of the modern constitutional state. From the objectivating viewpoint of the social sciences, a philosophical approach that still operates with the alternatives of factually stabilized versus rationally legitimated orders belongs to the transitional semantics of early modernity. Such terminology seemingly became obsolete once the transition from stratified to functionally differentiated societies was complete. Even when we adopt a theoretical approach that accords a central role to a communicative concept of "practical reason," we must, so it seems, single out a special and particularly demanding form of communication that covers only a small part of the broad spectrum of observable forms of communication: "using such narrow channels one can hardly succeed, in the new paradigm of reaching understanding, in once again filling out a sufficiently complex theory of society." 8

Tossed to and fro between facticity and validity, political theory and legal theory today are disintegrating into camps that hardly have anything more to say to one another. The tension between normative approaches, which are constantly in danger of losing contact with social reality, and objectivistic approaches, which screen out all normative aspects, can be taken as a caveat against fixating on one disciplinary point of view. Rather, one must remain open to different methodological standpoints (participant vs. observer), different theoretical objectives (interpretive explication and conceptual analysis vs. description and empirical explanation), the perspectives of different roles (judge, politician, legislator, client, and citizen), and different pragmatic attitudes of research (hermeneutical, critical, analytical, etc.). The following investigations stretch over this wide field.

Discourse theory was hitherto tailored to individual will-formation and has proven itself in the areas of moral theory (in the narrow Kantian sense) and ethics (in the broader Aristotelian sense). However, from a functional point of view it can be shown why the posttraditional form of a principled morality depends on positive law as its complement. 9 From the very start, then, questions of legal theory explode the framework of a purely normative way of looking at things. The discourse theory of law and democracy must break away from the conventional paths of legal and political philosophy, even as it takes up their issues. In chapters 1 and 2, I pursue the dual goal of explaining how the theory of communicative action accords central importance to the category of law and why this theory in turn constitutes a suitable context for a discourse theory of law. Here my concern is to work out a reconstructive approach that encompasses two perspectives: the sociology of law and the philosophy of justice. In chapters 3 and 4, I reconstruct the normative content of the system of rights and of the idea of the rule of law from the perspective of discourse theory. In connection with questions raised by modern natural law, I attempt to show how the old promise of a self-organizing community of free and equal citizens can be reconceived under the conditions of complex societies. I shall then test and elaborate the discourse concept of law and democracy in the context of contemporary discussions. Chapter 5 treats in general fashion the problem of the rationality of adjudication, and chapter 6 deals with the problem of the legitimacy of the Supreme Court. Chapter 7 develops the model of deliberative politics by challenging theories of democracy that rely on an empiricist concept of power. In chapter 8, I investigate how the constitutional channeling of social and political power functions in complex societies. Finally, in connection with these insights gained from social theory, the discourse theory of law serves to introduce a proceduralist paradigm of law. As I show in the concluding chapter 9, this model can take us beyond the opposition between the social models that underlie the formalist and the welfarist concepts of law.
In legal theory, sociologists, lawyers, and philosophers disagree over the appropriate characterization of the relation between facticity and validity. Depending on the position one takes on this problematic relation, one accepts different premises and arrives at different theoretical strategies. For this reason, I want to begin by explaining the issue in social theory that grounds my interest in legal theory. The theory of communicative action already absorbs the tension between facticity and validity into its fundamental concepts. With this risky decision, it preserves the link with the classical conception of an internal connection, however mediated, between society and reason, and hence between the constraints and necessities under which the reproduction of social life is carried out, on the one hand, and the idea of a conscious conduct of life, on the other. Admittedly, with this comes the problem of having to explain how the reproduction of society can possibly proceed on such fragile ground as that of context-transcending validity claims. The medium of law, particularly in the modern form of positive (or enacted) law, offers itself as a candidate for explaining the issue in social theory that grounds my interest in classical concepts. For this reason, I want to begin by discussing the tension between facticity and validity, first developed in the Platonist tradition, changes with the linguistic turn, when language is conceived as a universal medium for embodying reason (section 1.1). The tension between facticity and validity, which then enters into the mode of action coordination itself, sets high demands on the maintenance of social orders. The lifeworld, naturally emergent institutions, and law must offset the instabilities of a mode of sociation that is effected through taking yes/no positions on criticizable validity claims (section 1.2). In modern economic societies, this general problem becomes especially acute where the strategic interactions cut loose from the bonds of traditional ethical life (Sittlichkeit) have to be normatively constrained. This explains, on the one hand, the structure and meaning of individual rights and, on the other hand, the idealist connotations of a legal community— as an association of free and equal citizens, this community determines for itself what rules should govern social interactions (section 1.3).

1.1 Meaning and Truth: On the Immanent Tension between Facticity and Validity

Recasting the basic concepts of "practical reason" in terms of a communicative rationality has the advantage of not cutting social theory off from the issues and answers developed in practical philosophy from Aristotle to Hegel. In fact, it is far from clear that the price we have to pay for the premises of postmetaphysical thinking must be an indifference to such questions, which in any case continue to be felt within the lifeworld. As long as theory does not itself block its access to the fund of everyday intuitions available to laypersons, methodological grounds are enough to prohibit it from ignoring the problems that objectively impose themselves on participants. To be sure, practical philosophy has taken its basic questions ("What ought I do?" or "What is good for us in the long run and on the whole?") from everyday life in an unmediated way, treating these questions without the objectivating filter of social science. The renunciation of the basic concept of practical reason signals a break with this naive normativism. But even the successor concept, that of communicative reason, still retains portions of the idealist heritage. In the context of an explanatory theory, these idealist elements are by no means an unmixed blessing. However far removed today's concept of reason is from its Platonic origins, and however much it may have been changed by paradigm shifts, it is still constituted by a reference, if not to ideal contents (let alone Ideas), then to idealizing, limit conceptions. No idealization remains satisfied with concepts that are merely mimetic adaptations to reality as given. When this operation with the concept of communicative reason is even ascribed to social reality itself—incorporated in it, as it were—the empiricist's suspicions against any kind of confounding of reason and reality perk up. In what sense could something like communicative reason be
Chapter 1

embodied in social facts? And what forces us to adopt such an assumption, which seems entirely counterintuitive? Although I do not want to recapitulate the basics of formal pragmatics, I must briefly recall how the relation between facticity and validity presents itself after the linguistic turn.

1.1.1

By the late nineteenth century, Immanuel Kant's metaphysical background assumptions about the abstract opposition between the noumenal and the phenomenal were no longer convincing. Still less plausible by then was Hegel's speculative account of the dialectical dynamics of essence and appearance. As a result, empiricist views gained the upper hand. These views gave priority to a psychological explanation of logical—or, more generally, conceptual—relations: internal relationships between symbols were assimilated to empirical relationships between mental episodes. This psychologism was countered with nearly equivalent, or at least similar, arguments by C. S. Peirce in America, Gottlob Frege and Edmund Husserl in Germany, and finally G. E. Moore and Bertrand Russell in England. They set the stage for philosophy in the twentieth century by apposing the attempt to make psychology into the foundational science for logic, mathematics, and grammar.

Frege summarizes the central objection in this thesis: "We are not owners of thoughts as we are owners of our representations." Mental representations (Vorstellungen) are, in each case, my representations or your representations; they must be ascribed to a representing—either perceiving or imagining—subject who can be identified in space and time. Thoughts, on the other hand, overstep the boundaries of an individual consciousness. Even if in each case they are apprehended by a variety of subjects in various places and at various times, in the strict sense thoughts remain the same thoughts in regard to their content.

The analysis of simple predicative sentences, moreover, shows that thoughts have a more complex structure than the objects of representational thinking. By means of names, designations, and deictic expressions, we refer to individual objects, whereas sentences in which such singular terms occupy the subject position usually express a proposition or report a state of affairs. If such a thought is true, then the sentence that expresses it reports a fact. The critique of the view that thinking is representational consciousness rests on these straightforward considerations. Objects alone are given in the mental representation; we apprehend states of affairs or facts in thoughts. With this critique, Frege takes the first step in the linguistic turn. From this point on, thoughts and facts can no longer be located immediately in the world of perceived or imagined objects; they are accessible only as linguistically "represented" (dargestellt), that is, as states of affairs expressed in sentences.

1.1.2

Thoughts are propositionally structured. One can get a clear sense of what this means by considering the grammatical form of simple assertoric sentences. I do not need to go into this here. The important point is that we can read the structure of thoughts from the structure of sentences; sentences are those elementary components of a grammatical language that can be true or false. Hence, if we want to explain the peculiar status that distinguishes thoughts from mental representations, we must turn to the medium of language. Both moments—that a thought overshoots the bounds of an individual consciousness and that its content is independent of an individual's stream of experience—can only be described in such a way that linguistic expressions have identical meanings for different users. At any rate, the members of a language community must proceed on the performative assumption that speakers and hearers can understand a grammatical expression in identical ways. They assume that like expressions keep the same meaning in the diverse situations and speech acts in which they are employed. Even at the level where meanings have their substrate in signs, the sign-type must be recognizable as the same sign in the variety of corresponding sign-events. The logical relationship between the general and the particular that philosophical idealism conceived as a relation of essence and appearance is reflected in this perceived relation of type and token. The same is true for the concept, or the
meaning of a term and its various expressions. What distinguishes
a symbolically expressed thought as something general, identical
with itself, and publicly accessible—as something transcending the
individual consciousness—from the always particular, episodic,
and only privately accessible, hence consciousness-immanent rep­
resentations is the ideal status of linguistic signs and grammatical
rules. These rules are what lend linguistic events—at the phonetic,
syntactic, and semantic levels—their determinate form, which is
constant and recognizable throughout all their variations.

1.1.3

The ideal character inherent in the generality of concepts and
thoughts is interwoven with an idealization of a wholly different
sort. Every complete thought has a specific propositional content
that can be expressed by an assertoric sentence. But beyond the
propositional content, every thought calls for a further determina­
tion: it demands an answer to whether it is true or false. Thinking
and speaking subjects can take a position on each thought with a
“yes” or a “no”; hence, the mere having of a thought is comple­
mented by an act of judgment. Only the affirmed thought or the
true sentence expresses a fact. The affirmation of a thought or the
assertoric sense of a statement brings into play a further moment
of ideality, one connected with the validity of the judgment or
sentence.

The semantic critique of representational thinking holds that the
sentence “This ball is red” does not express a particular represen­
tation of a thing, that is, a red ball. Rather, it is the linguistic
representation of the fact that the ball is red. This means that a
speaker who utters ‘p’ in an assertoric mode does not refer with her
affirmation to the existence of an object but rather to the corre­
sponding state of affairs. As soon as one expands ‘p’ into the
sentence “There is at least one object that is a ball, of which it is true
that it is red,” one sees that the truth of ‘p’ and the being-the-case
of a corresponding state of affairs or circumstance must not be
understood by analogy to a thing’s existence. Veridical being or
being-the-case must not be confused with the existence of an
object. Otherwise one is misled, along with Frege, Husserl, and
later even Popper, to a Platonic conception of meaning, according
to which thoughts, propositions, or states of affairs enjoy an ideal
being-in-themselves. These authors considered it necessary to
supplement the two-world architectonic of the philosophy of con­
sciousness with a “third world” of timeless, ideal beings. This sphere
of ideal objects is set off against reality or the objective world of
objects and events we can perceive or manipulate, on the one hand,
and against the mind or subjective world of inner episodes to which
each individual has a privileged access, on the other.

This three-world doctrine of meaning-Platonism is, however, no
less metaphysical than the two-world doctrine of subjective ideal­
ism. It remains a mystery how the three worlds can enter into
contact with one another: “Even the timeless . . . must somehow be
implicated with the temporal,” Frege conceded. Once meanings
and thoughts have been hypostatized into ideally existing objects,
the relations among the worlds pose stubborn questions. It is hard
to explain how sentence meanings and thoughts reflect events in
the world and how they enter persons’ minds. Formal semantics has
slaved away in vain on these questions for decades.

1.1.4

The stable propositional structure of thoughts stands out from the
stream of experiences in virtue of an ideal status that furnishes
concepts and judgments with general, intersubjectively recogniz­
able and hence identical contents. This ideality intrinsically refers
to the idea of truth. But grammatical invariance alone, that is, the
linguistic rule structures that account for the ideal generality of
concepts and thoughts, cannot explain the idealization connected
with the unconditional meaning of truth claims. And because formal
semantics, in line with Frege, operates only with a concept of
language that relegates all aspects of language use to empirical
analysis, this approach cannot explain the meaning of truth within
the horizon of linguistic communication. Formal semantics recurs
instead to the ontological relationship between language and
world, sentence and fact, or thought and intellect (as the subjective
capacity to apprehend and judge thoughts). C. S. Peirce, on the
other hand, took the logical next step in the linguistic turn by
applying formal analysis to the use of language.
As Wilhelm von Humboldt viewed conversation, so Peirce considered communication, and the interpretation of signs in general, as the heart of linguistic achievements. Using the practice of reaching understanding as his model, he can explain not only the ideal moment of concept formation, which establishes generality, but also the idealizing moment of forming true judgments, which triumph over time. In place of the dyadic concept of a linguistically represented world, Peirce installs a triadic concept: the linguistic representation of something for a possible interpreter. The world as the sum total of possible facts is constituted only for an interpretation community whose members engage, before the background of an intersubjectively shared lifeworld, in processes of reaching understanding with one another about things in the world. “Real” is what can be represented in true statements, whereas “true” can be explained in turn by reference to the claim one person raises before others by asserting a proposition. With the assertoric sense of her statement, a speaker raises a criticizable claim to the validity of an intersubjectively shared lifeworld, in processes of reaching understanding as his model, he can explain not only the ideal moment of concept formation, which establishes generality, but also the idealizing moment of forming true judgments, which triumph over time. In place of the dyadic concept of a linguistically represented world, Peirce installs a triadic concept: the linguistic representation of something for a possible interpreter. The world as the sum total of possible facts is constituted only for an interpretation community whose members engage, before the background of an intersubjectively shared lifeworld, in processes of reaching understanding with one another about things in the world. “Real” is what can be represented in true statements, whereas “true” can be explained in turn by reference to the claim one person raises before others by asserting a proposition. With the assertoric sense of her statement, a speaker raises a criticizable claim to the validity of the asserted proposition, and because no one has direct access to uninterpreted conditions of validity, “validity” (Gültigkeit) must be understood in epistemic terms as “validity (Geltung) proven for us.” A justified truth claim should allow its proponent to defend it with reasons against the objections of possible opponents; in the end she should be able to gain the rationally motivated agreement of the interpretation community as a whole.

Here the reference to some particular interpretation community settled in its own particular form of life does not suffice, however. Even if we cannot break out of the sphere of language and argumentation, even if we must understand reality as what we can represent in true statements, we must not forget that the relation to reality contains a reference to something independent of us and thus, in this sense, transcendent. Each truth claim, speakers and hearers transcend the provincial standards of a particular collectivity, of a particular process of communication localized here and now. Thus Peirce, drawing on the counterfactual concept of the “final opinion,” a consensus reached under ideal conditions, constructs something like a transcendence from within: “The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of me and you. Thus, the very origin of the conception of reality shows that this conception essentially involves the notion of a community, without definite limits, and capable of a definite increase of knowledge.” Peirce explains truth as ideal assertability, that is, as the vindication of a criticizable validity claim under the communication conditions of an audience of competent interpreters that extends ideally across social space and historical time.

1.1.5

With this pragmatic explanation of the idea of truth, we touch on a relation of facticity and validity that is constitutive of the very practice of reaching understanding and is hence relevant for social reality as well. This social reality, which includes Peirce’s “community of investigators,” is more complex than the aspects of nature objectified in instrumental action or scientific research. With the ideal character of general concepts, we face the problem of explaining, in terms of the rule structure of language, how meanings remain identical in the diversity of various linguistic realizations. The idealization built into truth claims confronts us with the more ambitious task of explaining, in terms of the pragmatic conditions of argumentation, how the validity claims raised hic et nunc and aimed at intersubjective recognition or acceptance can, at the same time, overshoot local standards for taking yes/no positions, that is, standards that have become established in each particular community of interpreters. Only this transcendent moment of unconditionality distinguishes the argumentative practices of justification from other practices that are regulated merely by social convention. For Peirce, the reference to an unlimited communication community serves to replace the eternal moment (or the supratemporal character) of unconditionality with the idea of an open but ultimately cumulative process of interpretation that transcends the boundaries of social space and historical time from within, from the perspective of a finite existence situated in the world. On Peirce’s view, it is within time that the learning processes of the unlimited communication community build the bridges that span all local and temporal distances; it is within the world that such learning realizes the conditions that must be presupposed as
sufficiently satisfied for the unconditionality of context-transcending validity claims. Here a certain degree of satisfaction counts as “sufficient” when it qualifies our current practice of argumentation as an exemplary local embodiment of the (unavoidably assumed) universal discourse of an unbounded community of interpretation. With this projection, the tension between facticity and validity moves into the presuppositions of communication. Even if these presuppositions have an ideal content that can be only approximately satisfied, all participants must de facto accept them whenever they assert or deny the truth of a statement in any way and want to enter into argumentation aimed at justifying this validity claim.

Peirce, who is primarily interested in the semiotic transformation of epistemology and the philosophy of science, develops the above model with the argumentative practice of a republic of letters in view. What applies to processes of reaching understanding within the community of investigators, however, holds mutatis mutandis for everyday communication as well. That is, speech-act theory demonstrates the presence of entirely similar structures and presuppositions in everyday communicative practice. Here, too, participants, in claiming validity for their utterances, strive to reach an understanding with one another about something in the world. Of course, unlike argumentation-guided research processes, the everyday use of language does not turn exclusively or even primarily on its representational (or fact-stating) functions; here all the functions of language and language-world relations come into play, so that the spectrum of validity claims takes in more than truth claims. In addition, these validity claims, which also include claims to subjective sincerity and normative rightness, are initially raised in a naive manner, thus intention recta, even if they implicitly depend on the possibility of discursive vindication.

The fact that this expanded spectrum of validity is situated in the lifeworld makes it necessary to generalize Peirce’s concept of the unlimited communication community beyond the cooperative search for truth on the part of scientific investigators. The tension between facticity and validity that Peirce uncovered in the inescapable (nicht-hintergehbaren) presuppositions of research practices can be pursued even beyond the communicative presuppositions of various types of argumentation, into the pragmatic presupposi-

1.2 Transcendence from Within: Managing the Risk of Dissension through Lifeworld Backgrounds

Regardless of what position we take on the details of this controversial conception, which requires further clarification, we can say this much: in explicating the meaning of linguistic expressions and the validity of statements, we touch on idealizations that are connected with the medium of language. Specifically, the ideal character of conceptual and semantic generality is accessible to a semantic analysis of language, whereas the idealization connected with validity claims is accessible to a pragmatic analysis of the use of language oriented to reaching understanding. These idealizations inhabiting language itself acquire, in addition, an action-theoretic meaning if the illocutionary binding forces of speech acts are enlisted for the coordination of the action plans of different actors. With the concept of communicative action, which brings in mutual understanding as a mechanism of action coordination, the counterfactual presuppositions of actors who orient their action to validity claims also acquire immediate relevance for the construction and preservation of social orders; for these orders exist through the recognition of normative validity claims. This means that the tension between facticity and validity built into language and its use turns up again in the dynamics of the integration of communicatively socialized individuals. What is more, this tension must be worked off by the participants’ own efforts. In the social integration achieved through enacted law, this tension is, as we shall see, stabilized in a special way.

1.2.1

Every social interaction that comes about without the exercise of manifest violence can be understood as a solution to the problem of how the action plans of several actors can be coordinated with each other in such a way that one party’s actions “link up” with those of others. An ongoing connection of this sort reduces the possibili-
ties of clashes among the doubly contingent decisions of participants to the point where intentions and actions can form more or less conflict-free networks, thus allowing behavior patterns and social order in general to emerge. As long as language is used only as a medium for transmitting information, action coordination proceeds through the mutual influence that actors exert on each other in a purposive-rational manner. On the other hand, as soon as the illocutionary forces of speech acts take on an action-coordinating role, language itself supplies the primary source of social integration. Only in this case should one speak of “communicative action.” In such action, actors in the roles of speaker and hearer attempt to negotiate interpretations of the situation at hand and to harmonize their respective plans with one another through the unrestrained pursuit of illocutionary goals. Naturally, the binding energies of language can be mobilized to coordinate action plans only if the participants suspend the objectivating attitude of an observer, along with the immediate orientation to personal success, in favor of the performative attitude of a speaker who wants to reach an understanding with a second person about something in the world. Under this condition, speech-act offers can achieve an action-coordinating effect because obligations relevant to further interaction result from the addressee’s affirmative response to a serious offer.

Communicative action, then, depends on the use of language oriented to mutual understanding. This use of language functions in such a way that the participants either agree on the validity claimed for their speech acts or identify points of disagreement, which they jointly take into consideration in the course of further interaction. Every speech act involves the raising of criticizable validity claims aimed at intersubjective recognition. A speech-act offer has a coordinating effect because the speaker, by raising a validity claim, concomitantly takes on a sufficiently credible guarantee to vindicate the claim with the right kind of reasons, should this be necessary. However, with such unconditional validity claims, which point beyond all provincial standards that are locally accepted and established, the ideal tension that Peirce analyzed in the validity of true scientific statements enters into the facticity of the lifeworld. The idea of the redeemability of criticizable validity claims requires idealizations that, as adopted by the communicating actors themselves, are thereby brought down from transcendental heaven to the earth of the lifeworld. The theory of communicative action detranscendentalizes the noumenal realm only to have the idealizing force of context-transcending anticipations settle in the unavoidable pragmatic presuppositions of speech acts, and hence in the heart of ordinary, everyday communicative practice. Even the most fleeting speech-act offers, the most conventional yes/no responses, rely on potential reasons. Any speech act, therewith, refers to the ideality expanded audience of the unlimited interpretation community that would have to be convinced for the speech act to be justified and, hence, rationally acceptable.

1.2.2

We have distinguished the ideal character of conceptual/semantic generality from that of validity. These aspects can be clarified by examining, on the one hand, the rule structure of language in general and, on the other, the presuppositions of the use of language oriented to mutual understanding. Both levels of idealization are built into linguistic communication itself and, via communicative action, have a hand in constituting the social reality of networks of interactions spreading out radially through space and time. The ideal character of semantic generality shapes communicative action inasmuch as the participants could not even intend to reach an understanding with one another about something in the world if they did not presuppose, on the basis of a common (or translatable) language, that they conferred identical meanings on the expressions they employed. Only if this condition is satisfied can misunderstandings prove to be such. The presupposition that linguistic expressions are used with identical meanings can often turn out to be false from an observer’s perspective, and perhaps this is always the case under the ethnomethodologist’s microscope. But even as counterfactual, this presupposition remains necessary for every communicative use of language.

Any sociology aware that the route to its object domain lies through the hermeneutic understanding of meaning (Sinnverstehen) must reckon with this tension between facticity and validity. This
As an empirical science, because it can ascribe to the communicatively acting subjects themselves the normal capabilities for managing those disturbances in communication that arise from mere misunderstandings. In a rather harmless way, misunderstandings evoke idealizations that were necessarily assumed. Something similar holds for a further, communicatively unavoidable—and again, idealizing—presupposition. Namely, the interacting participants must consider themselves mutually accountable, hence they must presuppose that they can orient their action according to validity claims. As soon as this expectation of rationality turns out to be false, the participants—just like the sociological observer in the role of virtual participant—drop their performative attitude in favor of an objectivating one.

A different kind of problem results, however, from the demanding counterfactual presuppositions of communicative action that are supposed to secure an unconditional character for validity claims. This second level of idealization, that is, determines the constitution of social reality in such a way that every communicatively achieved agreement—which makes possible the coordination of actions, the complex buildup of interactions, and the weaving together of action sequences—takes as its yardstick the intersubjective recognition of criticizable validity claims. In virtue of such communicative agreements, the taking of yes/no positions plays a key role in the functioning of everyday language games. These acts of position taking charge the social facts they create with an ideal tension, because they respond to validity claims whose justification must presuppose the agreement of an ideally expanded audience. The validity (Gültigkeit) claimed for statements and norms (as well as for first-person reports of experience) conceptually transcends space and time, whereas the actual claim is, in each case, raised here and now, in a specific context in which its acceptance or rejection has immediate consequences. The validity we claim for our utterances and for practices of justification differs from the social validity or acceptance (soziale Geltung) of actually established standards and expectations whose stability is based merely on settled custom or the threat of sanctions. The ideal moment of unconditionality is deeply ingrained in factual pro-

cesses of communication, because validity claims are Janus-faced: as claims, they overshoot every context; at the same time, they must be both raised and accepted here and now if they are to support an agreement effective for coordination—for this there is no "null context." The universalistic meaning of the claimed validity exceeds all contexts, but only the local, binding act of acceptance enables validity claims to bear the burden of social integration for a context-bound everyday practice.

An interpretive sociology that realizes that this second, more radical tension between facticity and validity inhabits its object domain must revise its conventional, more or less empiricist self-understanding and conceive of itself as a social science that proceeds in a reconstructive manner. One needs a reconstructive approach to explain how social integration in general can take shape under the conditions of such an unstable situation, which operates with permanently endangered counterfactual presuppositions.

1.2.3

The first step in reconstructing the conditions of social integration leads to the concept of the lifeworld. The starting point is the problem of how social order is supposed to emerge from processes of consensus formation that are threatened by an explosive tension between facticity and validity. The double contingency that every interaction must absorb assumes an especially precarious form in the case of communicative action, namely, the ever-present risk of disagreement built into the mechanism of reaching understanding, where the costs of dissension are quite high from the viewpoint of action coordination. Normally, only a few options are available: carrying out straightforward "repair work"; putting aside the controversial claims, with the result that the ground of shared assumptions shrinks; moving into costly discourses of uncertain outcome and open to unsettling questions; breaking off communication and withdrawing; and, finally, shifting over to strategic action. To be sure, the rational motivation based on each person's ability to say no has the advantage of stabilizing behavioral expectations noncoercively. But the risks of dissension, which are continually
fueled by disappointing experiences and surprising contingencies, are high. If communicative action were not embedded in lifeworld contexts that provide the backing of a massive background consensus, such risks would make the use of language oriented to mutual understanding an unlikely route to social integration. From the very start, communicative acts are located within the horizon of shared, unproblematic beliefs; at the same time, they are nourished by these resources of the always already familiar. The constant upset of disappointment and contradiction, contingency and critique in everyday life crashes against a sprawling, deeply set, and unshakable rock of background assumptions, loyalties, and skills. We do not need to go into the formal-pragmatic analysis of the lifeworld here, nor into the place that communicative action occupies in a broader theoretical architectonic (i.e., between rational discourse and lifeworld). The lifeworld forms both the horizon for speech situations and the source of interpretations while it in turn reproduces itself only through ongoing communicative actions. \({}^{14}\) In the present context, what interests me about background knowledge is its peculiar pre-predicative and precategorial character, which already drew Husserl’s attention in his investigations of this “forgotten” foundation of meaning inhabiting everyday practice and experience.\(^{14}\)

As we engage in communicative action, the lifeworld embraces us as an unmediated certainty, out of whose immediate proximity we live and speak. This all-penetrating, yet latent and unnoticed presence of the background of communicative action can be described as a more intense yet deficient form of knowledge and ability. To begin with, we make use of this knowledge involuntarily, without reflectively knowing that we possess it at all. What enables background knowledge to acquire absolute certainty in this way, and even augments its epistemic quality from a subjective standpoint, is precisely the property that robs it of a constitutive feature of knowledge: we make use of such knowledge without the awareness that it could be false. Insofar as all knowledge is fallible and is known to be such, background knowledge does not represent knowledge at all, in a strict sense. As background knowledge, it lacks the possibility of being challenged, that is, of being raised to the level of criticizable validity claims. One can do this only by converting it from a resource into a topic of discussion, at which point—just when it is thematized—it no longer functions as a lifeworld background but rather disintegrates in its background modality. Background knowledge cannot be falsified as such; no sooner has it been thematized, and thereby cast into the whirlpool of possible questions, than it decomposes. What lends it its peculiar stability and first immunizes it against the pressure of contingency—generating experiences is its unique leveling out of the tension between facticity and validity: the counterfactual moment of idealization, which always overshoots the given and first makes a disappointing confrontation with reality possible, is extinguished in the dimension of validity itself. At the same time, the validity dimension, from which implicit knowledge acquires the intuitive force of conviction, remains intact as such.

1.2.4

A similar fusion of facticity and validity that likewise stabilizes behavioral expectations appears in an entirely different form at the level of knowledge that has already passed through communicative action and is thus thematically available, namely, in those archaic institutions that present themselves with an apparently unassailable claim to authority. In societies based on kinship, institutions protected by taboos form a site where cognitive and normative expectations merge and harden into an unbroken complex of convictions linked with motives and value orientations. The authority of powerful institutions encounters actors within their social lifeworld. In putting things in such terms, we no longer describe the lifeworld as background knowledge from the formal-pragmatic perspective of a participant, but rather objectify it from the perspective of a sociological observer. The lifeworld, of which institutions form a part, comes into view as a complex of interpenetrating cultural traditions, social orders, and personal identities.

Arnold Gehlen’s anthropology of institutions directs our attention to the phenomenon of an original, auratically transfigured normative consensus that can be analytically distinguished from lifeworld certainties. This consensus refers especially to behavioral expectations that are culturally transmitted and rehearsed as ex-
licit knowledge, their deep institutional anchoring notwithstanding. In the interplay of mythical narratives and ritual practices one can show why this knowledge can be thematized only with reservations. Ceremonially fixed patterns of communication restrict challenges to the authoritative validity of the syndrome of intermeshing descriptive, evaluative, and expressive contents. This crystallized complex of beliefs reveals a kind of validity, one equipped with the force of factual reality. In this case, the fusion of facticity and validity occurs not in the mode of the always already familiar, not in terms of basic certainties that, so to speak, stand behind us, but rather in the mode of an authority that imperiously confronts us and arouses ambivalent feelings. Emile Durkheim worked out the ambivalence of this mode of validity with respect to the status of sacred objects, which instill onlookers with mixed feelings of terror and enthusiasm and simultaneously trigger in them both reverence and trembling. This symbiosis of conflicting affects is still accessible to us today in the aesthetic experience; it is tamed and rendered repeatable in the surrealistically triggered shock that such authors as Georges Bataille and Michel Leiris have not only produced in their own literary works but described as well.

In the simultaneously frightening and attractive fascinosum of such authoritarian institutions, it is striking that two moments we now consider incompatible are fused together. The threat of an avenging power and the force of bonding convictions not only coexist, they spring from the same mythic source. The social sanctions imposed by human beings are secondary: they punish violations of an antecedent, intrinsically compelling and at the same time bonding authority. Social sanctions borrow their deontological meaning, so to speak, from this authority. Evidently, the social integration of collectivities could originally be secured through communicative action only when the concomitant risk of dissension could be brought under control within the validity dimension itself. Even today, our deeply rooted reactions to violations of incest or similar taboos recall the fact that the stability of behavioral expectations at the core of kinship societies had to be secured through beliefs that possess a spellbinding authority that is at once bonding and frightening. Moreover, this stability had to be achieved below that threshold at which the coercive force of sanctions irreversibly splits off from the forceless force of plausible reasons.

Above that threshold, validity retains the force of the factual. This is true whether such validity takes the form of lifeworld certainties that remain in the background of explicit communication or whether it appears in the form of communicatively available value orientations that are nevertheless subject to the rigid communication patterns of a bewitching authority and withdrawn from challenge.

1.2.5

Only with the third step in this reconstruction do we arrive at the category of law. The embeddedness of communicative action in lifeworld contexts and the regulation of behavior through strong archaic institutions explain how social integration in small and relatively undifferentiated groups is at all possible on the improbable basis of processes of reaching understanding. Naturally, in the course of social evolution the risk of dissension increases with the scope for taking yes/no positions on criticizable validity claims. The more societal complexity increases and originally ethnocentric perspectives widen, the more there develops a pluralization of forms of life accompanied by an individualization of life histories, while the zones of overlapping lifeworlds and shared background assumptions shrink. In proportion to their disenchantment, sacralized belief complexes fall apart, under differentiated validity aspects, into the more or less freely thematizable contents of a tradition set communicatively allow. Above all, however, processes of social differentiation necessitate a multiplication and variation of functionally specified tasks, social roles, and interest positions. On the one hand, this allows communicative action to escape its narrowly circumscribed institutional boundaries for a wider range of opportunities. On the other hand, in a growing number of spheres social differentiation not only unshackles but requires the self-interested pursuit of one’s own success.

This brief outline should suffice to indicate the problem that emerges in modern societies: how the validity and acceptance of a social order can be stabilized once communicative actions become autonomous and clearly begin to differ, in the view of the actors themselves, from strategic interactions. Naturally, self-interested action has always been fused with, or limited by, a normative order.
In societies organized around a state, legal norms are already superimposed on a mature normative infrastructure. In these traditional societies, however, even the law still feeds on the self-authorizing force of the religiously sublimated sacred realm. For example, the notion of a higher law familiar in the medieval tradition of law was still rooted in the sacred fusion of facticity and validity. According to this idea, the law made by the ruler remained subordinate to the Christian natural law administered by the Church.

In what follows, I start from the modern situation of a predominantly secular society in which normative orders must be maintained without metasocial guarantees. Even lifeworld certainties, which in any case are pluralized and ever more differentiated, do not provide sufficient compensation for this deficit. As a result, the burden of social integration shifts more and more onto the communicative achievements of actors for whom validity and facticity—that is, the binding force of rationally motivated beliefs and the imposed force of external sanctions—have parted company as incompatible. This is true, at least, outside the areas of habitualized actions and customary practices. If, as I assume along with Parsons and Durkheim, complexes of interaction cannot be stabilized simply on the basis of the reciprocal influence that success-oriented actors exert on one another, then in the final analysis society must be integrated through communicative action.

Such a situation intensifies the problem: how can disenchanted, internally differentiated and pluralized lifeworlds be socially integrated if, at the same time, the risk of dissension is growing, particularly in the spheres of communicative action that have been cut loose from the ties of sacred authorities and released from the bonds of archaic institutions? According to this scenario, the increasing need for integration must hopelessly outtax the integrating capacity of communicative action, especially if the functionally necessary spheres of strategic interaction are growing, as is the case in modern economic societies. In the case of conflict, persons engaged in communicative action face the alternatives of either breaking off communication or shifting to strategic action—of either postponing or carrying out the unresolved conflict. One way out of this predicament, now, is for the actors themselves to come to some understanding about the normative regulation of strategic interaction. The paradoxical nature of such regulation is revealed in light of the premise that facticity and validity have split apart, for the acting subjects themselves, into two mutually exclusive dimensions. For self-interested actors, all situational features are transformed into facts they evaluate in the light of their own preferences, whereas actors oriented toward reaching understanding rely on a jointly negotiated understanding of the situation and interpret the relevant facts in the light of intersubjectively recognized validity claims. However, if the orientations to personal success and to reaching understanding exhaust the alternatives for acting subjects, then norms suitable as socially integrating constraints on strategic interactions must meet two contradictory conditions that, from the viewpoint of the actors, cannot be simultaneously satisfied. On the one hand, such rules must present de facto restrictions that alter the relevant information in such a way that the strategic actor feels compelled to adapt her behavior in the objectively desired manner. On the other hand, they must at the same time develop a socially integrating force by imposing obligations on the addressees—which, according to my theory, is possible only on the basis of intersubjectively recognized normative validity claims.

According to the above analysis, the type of norms required would have to bring about willingness to comply simultaneously by means of de facto constraint and legitimate validity. Norms of this kind would have to appear with an authority that once again equips validity with the force of the factual, only this time under the condition of the polarization already existing between action oriented to success and that oriented to reaching understanding, which is to say, under the condition of a perceived incompatibility of facticity and validity. As we have already assumed, the metasocial guarantees of the sacred have broken down, and these guarantees are what made the ambivalent bonding force of archaic institutions possible, thereby allowing an amalgam of validity and facticity in the validity dimension itself. The solution to this puzzle is found in the system of rights that lends to individual liberties the coercive force of law. We can then also see, from a historical perspective, that the core of modern law consists of private rights that mark out the legitimate scope of individual liberties and are thus tailored to the strategic pursuit of private interests.
1.3 Dimensions of Legal Validity

Since Hobbes, the prototype for law in general has been the norms of bourgeois private law, which is based on the freedom to enter into contracts and to own property. Even Kant begins his Rechtslehre (Elements of Justice) by discussing natural, “subjective” rights that authorize each person to use coercion against violations of his or her legally protected liberties. The transition from natural to positive law transforms these authorizations to use coercion—which may no longer be directly enforced by individual persons after the state has monopolized all the means of legitimate coercion—into authorizations to take legal action. At the same time, private rights are supplemented by structurally homologous rights that protect the individual against the state itself, that is, protect private persons from unlawful infringements of the administration on their life, liberty, and property. It is Kant’s concept of legality that most interests me here. Taking his start from individual rights, Kant uses this concept to explain the complex mode of validity connected with law in general. In the dimension of legal validity (Rechtsgegeltung), facticity and validity are once again intertwined, but this time the two moments are not fused together—as they are in lifeworld certainties or in the overpowering authority of archaic institutions withdrawn from any discussion—in an indissoluble amalgam. In the legal mode of validity, the facticity of the enforcement of law is intertwined with the legitimacy of a genesis of law that claims to be rational because it guarantees liberty. The tension between these two distinct moments of facticity and validity is thus intensified and behaviorally operationalized.

1.3.1

For Kant, the facticity-validity relationship within the dimension of legal validity appears as the internal connection that law establishes between coercion and freedom. Law is connected from the start with the authorization to coerce; this coercion is justified, however, only for “the prevention of a hindrance to freedom,” hence only for the purposes of countering encroachments on the freedom of each. The validity claim of law is expressed in this internal “conjunctive of the universal reciprocal coercion with the freedom of everyone.” Legal rules posit conditions of coercion, conditions “under which the will [Wille] of one person can be unified with the will of another in accordance with a universal law of freedom.” On the one hand, legal behavior can be enforced as “the mere conformity . . . of an action with the law,” this means it must be open to subjects to comply with the law for reasons other than moral ones. The “conditions of coercion” need only be perceived by the addressers as the occasion for norm-conformative behavior; as one can see on analytic grounds alone, acting from duty, that is, morally motivated obedience to the law, cannot be brought about by coercion. On the other hand, however, “unifying” the free choice (Wille) of each with that of all others, that is, social integration, is possible only on the basis of normatively valid rules that would deserve their addressees’ uncoerced, which is to say rationally motivated, recognition from the moral point of view—in accordance with a universal law of freedom.” Although legal claims are coupled with authorized coercion, they must always be such that subjects can comply on account of their normative validity as well, hence out of “respect for the law.” Kant’s concept of legality dissolves the paradox of rules of action that, without regard for their moral worthiness, only require a behavior that objectively corresponds to the norm: legal norms are at the same time but in different respects enforceable laws based on coercion and laws of freedom.

The dual character of legal validity, which we have first of all clarified in terms of Kant’s legal theory, can also be elucidated from the perspective of action theory. The two components of legal validity, coercion and freedom, leave the choice of action orientation up to the addressees. For an empirical approach, the validity of positive laws is in the first instance characterized tautologically, in that the law is considered to be whatever acquires the force of law on the basis of legally valid procedures and retains its legal force for the time being, despite the legally available possibilities of repeal. But one can adequately explain the meaning of such legal validity only by referring simultaneously to both aspects—to de facto validity or acceptance, on the one hand, and to legitimacy or rational acceptability, on the other. The de facto validity of legal
norms is determined by the degree to which such norms are acted on or implemented, and thus by the extent to which one can actually expect the addressees to accept them. In contrast to convention and custom, enacted law does not rely on the organic facticity of inherited forms of life, but on the artificially produced facticity found in the threat of sanctions that are legally defined and can be imposed through court action. On the other hand, the legitimacy of statutes is measured against the discursive redeemability of their normative validity claim—in the final analysis, according to whether they have come about through a rational legislative process, or at least could have been justified from pragmatic, ethical, and moral points of view. The legitimacy of a statute is independent of its de facto implementation. At the same time, however, de facto validity or factual compliance varies with the addressees’ belief in legitimacy, and this belief is in turn based on the supposition that the norm could be justified. The less a legal order is legitimate, or is at least considered such, the more other factors, such as intimidation, the force of circumstances, custom, and sheer habit, must step in to reinforce it.

Generally, the legal system as a whole has a higher measure of legitimacy than individual legal norms. Ralf Dahrendorf includes the following among the necessary conditions for the validity of a legal system:

First, [the legal system] must by and large be socially effective and, second, by and large ethically justified. The legal validity of individual norms [requires] that these are enacted in accordance with a constitution satisfying the above-mentioned criteria. In addition, norms must individually display, first, a minimum of social effectiveness or the prospects for such and, second, a minimum of ethical justification or the potential for such.

The double reference of legal validity to de facto validity as measured by average acceptance, on the one hand, and to the legitimacy of the claim to normative recognition, on the other, leaves addressees with the choice of taking either an objectivating or a performative attitude toward the same legal norm. For a rationally choosing actor who expects norms to be enforced, the legal precept forms a de facto barrier, with calculable consequences in the case of a violation. On the other hand, for an actor who wants to reach an understanding with others about the jointly observed conditions for each’s successful actions, the norm’s claim to validity, along with the possibility of critically reexamining this claim, binds the actor’s “free will” (Wollen). Keeping these alternatives open does not imply a fusion of the moments that continue to be incompatible from the actor’s point of view. Depending on the chosen perspective, the legal norm presents a different kind of situational element: for the person acting strategically, it lies at the level of social facts that externally restrict her range of options; for the person acting communicatively, it lies at the level of obligatory expectations that, she assumes, the legal community has rationally agreed on. Thus the actor, taking in each case a different point of view, will ascribe to a legally valid regulation either the status of a fact with predictable consequences or the deontological binding character of a normative expectation. The legal validity of a norm—and this is its point—means, now, that two things are guaranteed at the same time: both the legality of behavior, in the sense of an average norm compliance that, if necessary, is enforced by sanctions; and the legitimacy of the rule itself, which always makes it possible to follow the norm out of respect for the law.

We can see this dual perspective on law—legal norms as both enforceable laws and laws of freedom—by looking at private rights. Inasmuch as these norms leave open the motives for rule-conforming behavior, we might say they “tolerate” an actor’s strategic attitude toward the individual norm. As elements of a legal order that is legitimate as a whole, they appear at the same time with a normative validity claim that expects a rationally motivated recognition. As such, they at least invite the addressees to follow them from the nonenforceable motive of duty. This invitation means that the legal order must always make it possible to obey its rules out of respect for the law. This analysis of the mode of validity connected with coercible law thus has implications for lawmakers: positive law, too, must be legitimate.

A legal order must not only guarantee that the rights of each person are in fact recognized by all other persons; the reciprocal recognition of the rights of each by all must in addition be based on laws that are legitimate insofar as they grant equal liberties to each.
so that each's freedom of choice can coexist with the freedom of all. Moral laws fulfill these conditions per se, but for legal statutes, they must be satisfied by the political legislator. The process of legislation thus represents the place in the legal system where social integration first occurs. For this reason, it must be reasonable to expect those who participate in the legislative process, whether directly or indirectly, to drop the role of private subject and assume, along with their role of citizen, the perspective of members of a freely associated legal community, in which an agreement on the normative principles for regulating social life either has already been secured through tradition or can be brought about deliberatively in accordance with normatively recognized procedures. We have already clarified the unique combination of facticity and legitimacy in individual rights that equip legal persons with enforceable entitlements to pursue their own interests strategically. This combination requires a process of lawmaking in which the participating citizens are not allowed to take part simply in the role of actors oriented to success. To the extent that rights of political participation and rights of communication are constitutive for the production of legitimate statutes, they must not be exercised by persons who act merely as private subjects of civil law. Rather, these rights must be exercised in the attitude of communicatively engaged citizens. Hence, the concept of modern law, which both intensifies and behaviorally operationalizes the tension between facticity and validity, already harbors the democratic idea developed by Rousseau and Kant: the claim to legitimacy on the part of a legal order built on rights can be redeemed only through the socially integrative force of the "concurring and united will of all" free and equal citizens.

We will deal with the idea of civic autonomy in detail later. For the moment, note simply that it recalls the fact that coercible laws must prove their legitimacy as laws of freedom in the process—and by the kind of process—of lawmaking. Moreover, in this process of enacting law, the tension between facticity and validity is reproduced yet again, though it takes a different form than it does in established law. To be sure, legal behavior can be described as compliance with norms that have been backed with the threat of sanction and have acquired the force of law through the decisions of a political legislature. But the facticity of lawmaking differs from that of the enforcement of law insofar as the permission for legal coercion must be traced back to the expectation of legitimacy connected with the decisions of the legislature, which are both contingent and revisable. The positivity of law is bound up with the promise that democratic processes of lawmaking justify the presumption that enacted norms are rationally acceptable. Rather than displaying the facticity of an arbitrary, absolutely contingent choice, the positivity of law expresses the legitimate will that stems from a presumptively rational self-legislation of politically autonomous citizens. In Kant, too, the democratic principle has to fill a gap in a system of legally regulated egoism that cannot reproduce itself on its own but must rely on a background consensus of citizens. However, this gap in solidarity, which opens up insofar as legal subjects exclusively pursue their own private interests, cannot be closed again by rights tailor for this kind of success-oriented action, or at least not by such rights alone. Enacted law cannot secure the bases of its legitimacy simply through legality, which leaves attitudes and motives up to the addressees.

Either the legal order remains embedded in an encompassing social ethos and subordinate to the authority of a suprapositive or sacred law (as in the stratified societies and absolute states of early modernity), or else individual liberties are supplemented by rights of a different type, rights of citizenship that are geared no longer to rational choice but to autonomy in the Kantian sense. For without religious or metaphysical support, the coercive law tailored for the self-interested use of individual rights can preserve its socially integrating force only insofar as the addressees of legal norms may at the same time understand themselves, taken as a whole, as the rational authors of those norms. To this extent, modern law lives off a solidarity concentrated in the value orientations of citizens and ultimately issuing from communicative action and deliberation. As we shall see, the jointly exercised communicative freedom of citizens can assume a form that is mediated in a variety of ways by legal institutions and procedures, but it cannot be completely replaced by coercive law. This internal connection between the facticity of law enforcement and the legitimacy of the lawmaking process imposes a heavy burden on legal systems, which are sup-
posed to lighten the tasks of social integration for actors whose capacities for reaching understanding are overtaxed. For nothing appears less probable to the enlightened sociologist than the claim that the integrative achievements of modern law are nourished solely, or even in the first instance, by a normative consensus, whether already existing or achieved, and hence by the communicative sources of solidarity.

With the functional imperatives of highly complex societies, another kind of facticity comes into play. Unlike the facticity of law enforcement, this social facticity is no longer internally related to the legitimacy claimed for the legal order. The normative self-understanding of law can be negated by social facts that intervene in the legal system from without. Here facticity and validity are externally related, for both moments—the normative presuppositions of established legal practices, on the one hand, and the social constraints that actually govern legal decisions, on the other—can be described independently of one another. Before taking up this theme in the next chapter, I will recapitulate the internal relations between facticity and validity that constitute the infrastructure of law in modern societies.

1.3.2

Following the linguistic turn taken by Frege and Peirce, the opposition between idea and perceptible reality was overcome. As it came down from the Platonist tradition, this opposition was initially construed in ontological terms; later it was cast in terms of the philosophy of consciousness. Ideas are then considered to be directly embodied in language, so that the facticity of linguistic signs and expressions as events in the world is internally linked with the ideal moments of meaning and validity. The generality of meanings gains its ideal status only in the medium of signs and expressions that stand out, according to grammatical rules, from the stream of sign-tokens and speech events (or written materials) as recognizable types. Furthermore, the difference between the truth of a proposition and its being taken to be true is accounted for by explicating truth as rational assertability under ideal conditions, and hence only in reference to the discursive redemption of validity claims. If “true” or “valid” is understood as a triadic predicate, the unconditionality of truth is expressed only in the idealizing presuppositions of our argumentative practice of justification, and hence at the level of language use. This shows the internal relation between the validity of a proposition and the proof of its validity for an ideally expanded audience. What is valid must be able to prove its worth against any future objections that might actually be raised. As was the case with the ideal character of general concepts and meanings, so is the validity dimension of language constituted by a tension between facticity and validity: truth and the discursive conditions for the rational acceptability of truth claims are mutually explanatory.

With the use of language to coordinate action on the basis of mutual understanding, and thus at the level of communicative action, this tension enters the world of social facts. In contrast to the facticity of sign-tokens and speech events, which we could understand as necessary for the embodiment of meanings, the intransitive linguistic tension between facticity and validity that enters communicative action along with validity claims must be conceived as a moment of social facticity, that is, as a moment of that everyday communicative practice through which forms of life reproduce themselves. To the extent that action coordination, and with it the formation of networks of interaction, takes place through processes of reaching understanding, intersubjectively shared convictions form the medium of social integration. Actors are convinced of what they understand and consider valid. This is why beliefs that have become problematic can be supported or revised only through reasons. Reasons, however, are not adequately described as dispositions to have opinions; rather, they are the currency used in a discursive exchange that redeems criticizable validity claims. Reasons owe their rationally motivating force to an internal relationship between the meaning and the validity of linguistic utterances. This makes them double-edged from the word go, because they can both reinforce and upset beliefs. With reasons, the facticity-validity tension inhabiting language and its use penetrates society. Insofar as it is supported by shared beliefs, the integration of a society is susceptible to the destabilizing effect of invalidating reasons (and is all the more susceptible to the invalidation of an entire category.
of reasons). The ideal tension breaking into social reality stems from the fact that the acceptance of validity claims, which generates and perpetuates social facts, rests on the context-dependent acceptability of reasons that are constantly exposed to the risk of being invalidated by better reasons and context-altering learning processes.

These properties of communicative action explain why the symbolically structured lifeworld, mediated by interpretations and beliefs, is shot through with fallible suppositions of validity. They help us see why behavioral expectations that depend on such fallible suppositions acquire at best a precarious kind of stability. This stability depends on achievements of social integration that ward off the ever-present danger of destabilization resulting from rationally motivated dissent. To be sure, reasons count only against the background of context-dependent standards of rationality, but reasons that express the results of context-altering learning processes can also undermine established standards of rationality.

We have dealt with two strategies that counter the risk of dissension and therewith the risk of instability built into the communicative mode of social reproduction in general: on the one hand, circumscribing the communicative mechanism and, on the other, giving this mechanism unhindered play. The risk built into communicative action is circumscribed by those intuitive background certainties that are accepted without question because they are uncoupled from any communicatively accessible reasons that one could deliberately mobilize. Entrained below the threshold of possible thematization, these behavior-stabilizing certainties that make up the lifeworld background are cut off from that dimension—opened up only in communicative action—in which we can distinguish between the justified acceptability and the mere acceptance of beliefs and reasons. We have observed a similar fusion of facticity and validity in those value orientations that were bound to sacred worldviews and to the spellbinding authority of strong institutions. This archaic form of authority was not based on the fact that normative beliefs remained in the background, that they could not be thematized and connected with reasons; it was based rather on a prescriptive choice of themes and the rigid patterning of reasons. By putting a hold on the communicative flux of reasons, and thereby stopping criticism, authoritative norms and values provided a framework for communicative actions that remained withdrawn from the vortex of problematization. The social integration accomplished through values, norms, and mutual understanding comes to depend entirely on actors' own communicative achievements only where norms and values are set communicatively allow and, with a view to the categorial difference between acceptability and mere acceptance, are exposed to the interplay of free-floating reasons.

Under the modern conditions of complex societies, which require self-interested and hence normatively neutralized action in broad spheres, the paradoxical situation arises in which unfiltered communicative action can neither unload nor seriously bear the burden of social integration falling to it. Using its own resources, it can control the risk of dissension built into it only by increasing the risk, that is, by making rational discourse permanent. What kind of mechanism might allow an unfiltered communication to unburden itself of socially integrative achievements without compromising itself? One plausible solution to the puzzle would be to "positivize" the law hitherto based in the sacred and interwoven with conventional forms of ethical life (Sittlichkeit), that is, completely transform it into enacted law. In other words, a system of rules could be invented that both binds together and assigns different tasks to the two strategies for dealing with the risk of dissension found in communicative action, that is, the strategies of circumscribing communication and giving it unhindered play.

On the one hand, the state's guarantee to enforce the law offers a functional equivalent for the stabilization of behavioral expectations by spellbinding authority. Whereas archaic institutions supported by worldviews fix value orientations through rigid communication patterns, modern law allows convictions to be replaced by sanctions in that it leaves the motives for rule compliance open while enforcing observance. In both cases, destabilization resulting from disagreement is avoided in virtue of the fact that the addressees cannot call into question the validity of the norms they are supposed to follow. In the case of modern law, this "cannot" admittedly acquires a different, namely purposive-rational, sense, because the mode of validity itself is changed. Whereas
Chapter I

If facticity and validity fuse together in the kind of validity that characterizes authority-bound convictions, the two moments split apart in the validity of law: the enforced acceptance of the legal order is distinguished from the acceptability of the reasons supporting its claim to legitimacy. This binary coding refers, on the other hand, to the fact that the combination of positivity and legitimacy takes into account the unleashing of communication, that removal of restrictions that in principle exposes all norms and values to critical testing. Members of a legal community must be able to assume that in a free process of political opinion- and will-formation they themselves would also authorize the rules to which they are subject as addressers. To be sure, this process of legitimation must be included in the legal system. In view of the contingencies of formless, free-floating everyday communication, it is itself in need of legal institutionalization. Aside from this restriction, however, the permanent risk of contradiction is maintained in ongoing discourses and transformed into the productive force of a presumptively rational political opinion- and will-formation.

1.3.3

If one thus views modern law as a mechanism that, without revoking the principle of unhindered communication, removes tasks of social integration from actors who are already overburdened in their efforts at reaching understanding, then the two sides of law become comprehensible: its positivity and its claim to rational acceptability. Clearly, the positivity of law means that a consciously enacted framework of norms gives rise to an artificial layer of social reality that exists only so long as it is not repealed, since each of its individual components can be changed or rendered null and void. In light of this aspect of changeability, the validity of positive law appears as the sheer expression of a will that, in the face of the ever-present possibility of repeal, grants specific norms continuance until further notice. As we shall see, this voluntarism of pure enactment stirs the imagination of legal positivism. On the other hand, the positivity of law cannot be grounded solely on the contingency of arbitrary decisions without forfeiting its capacity for social integration. Law borrows its binding force, rather, from the alliance that the facticity of law forms with the claim to legitimacy. This connection reflects an interpenetration of fact-grounding acceptance with the claimed acceptability of validity claims—an interpenetration that, as a tension between facticity and validity, had already entered into communicative action and into the more or less naturally emergent social orders. This ideal tension reappears in the law. Specifically, it appears in the relation between the coercive force of law, which secures average rule acceptance, and the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable.

This tension within the validity dimension of law also makes it necessary to organize political power, which is called on to enforce (and authoritatively apply) the law, into forms of legitimate law. This desideratum of transforming the power presupposed by law itself is met by the idea of the rule of law (or constitutional state, Rechtsstaat). Within the framework of the constitutional state, the civic practice of self-legislation assumes an institutionally differentiated form. The idea of the rule of law sets in motion a spiraling self-application of law which is supposed to bring the internally unavoidable supposition of political autonomy to bear against the facticity of legally uncontrolled social power that penetrates law from the outside. The development of the constitutional state can be understood as an open sequence of experience-guided precautionary measures against the overpowering of the legal system by illegitimate power relations that contradict its normative self-understanding. From inside the legal system, this appears as an external relation between facticity and validity, the familiar tension between norm and reality that again and again provokes a normative response.

Modern societies are integrated not only socially through values, norms, and mutual understanding, but also systemically through markets and the administrative use of power. Money and administrative power are systemic mechanisms of societal integration that do not necessarily coordinate actions via the intentions of participants, but objectively, "behind the backs" of participants. Since Adam Smith, the classic example for this type of regulation is the
market's "invisible hand." Both media of systemic integration, money and power, are anchored via legal institutionalization in orders of the lifeworld, which is in turn socially integrated through communicative action. In this way, modern law is linked with all three resources of integration. Through a practice of self-determination that requires citizens to make public use of their communicative freedoms, the law draws its socially integrating force from the sources of social solidarity. On the other hand, institutions of private and public law make possible the establishment of markets and governmental bodies, because the economic and the administrative system, which have separated from the lifeworld, operate inside the forms of law.

Because law is just as intermeshed with money and administrative power as it is with solidarity, its own integrating achievements assimilate imperatives of diverse origin. This does not mean that legal norms come with labels telling us how these imperatives are to be balanced. In the different subject areas of law, we can certainly see that the needs for regulation, to which politics and lawmaking respond, have different sources. But in the functional imperatives of the state apparatus, the economic system, and other social subsystems, normatively unfiltered interest positions often carry the day only because they are stronger and use the legitimating force of legal forms to cloak their merely factual strength. Therefore, as a means for organizing state activities related to the functional imperatives of a differentiated economic society, modern law remains a profoundly ambiguous medium of societal integration. Often enough, law provides illegitimate power with the mere semblance of legitimacy. At first glance, one cannot tell whether legal regulations deserve the assent of associated citizens or whether they result from administrative self-programming and structural social power in such a way that they independently generate the necessary mass loyalty.

The less the legal system as a whole can rely on metasocial guarantees and immunize itself against criticism, the less scope there is for this type of self-legitimation of law. Indeed, a law responsible for the brunt of social integration in modern societies comes under the secular pressure of the functional imperatives of social reproduction; however, it is simultaneously subject to what we might call the idealistic pressure to legitimate any regulations. Even the systemic integration achieved through money and power ought, in accordance with the constitutional self-understanding of the legal community, to remain dependent on the socially integrating process of civic self-determination. The tension between the idealism of constitutional law and the materialism of a legal order, especially a commercial law that reflects only the unequal distribution of social power, finds its echo in the drifting apart of philosophical and empirical approaches to law. Before I come back to the facticity-validity tension internal to law, I would like to go into the external relation between social facticity and the normative self-understanding of modern law. Specifically, I will treat this relation as it is reflected in the sociological discourses on law and the philosophical discourses on justice.
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36. "Objective law is the rule to which the individual must make his conduct conform; subjective right is the power of the individual that is derived from the norm." Merryman, Civil Law Tradition, p. 70, quoting from an unidentified civil law textbook.


Preface


5. Rudiger Bubner continues to raise the "blindness" objection; most recently, see his Das sprachliche Medium der Politik, in Bubner, Anutsche Themen und ihre moderne Verwandlung (Ethics) (Frankfurt am Main, 1992), pp. 188–202, here pp. 196ff. For the anarchism charge, see O. Höffle, Politische Gerechtigkeit (Frankfurt am Main, 1987), pp. 19ff.


7. These lectures on "Natural Law and Revolution" were held in October 1962; the English translation appears in J. Habermas, Theory and Practice, trans. J. Viertel (Boston, 1973), pp. 82–120, here p. 113 [trans. altered. Trans.].

8. K. Günther, The Sense of Appropriateness, trans. J. Farrell (Albany, 1993); B. Peters, Rationalität, Recht und Gesellschaft (Frankfurt am Main, 1991); I. Maus, Aufklärung der Demokratieidee (Frankfurt am Main, 1992); B. Peters, Die Integra-

Notes to pages 5–22

Chapter 1


5. See chap. 3, sect. 2, in this volume.

6. In a similar fashion, Edmund Husserl took into account the fundamental role of validity claims in the constitution of the lifeworld; see J. Habermas, "Vorlesungen zu einer sprachtheoretischen Grundlegung der Soziologie," in Habermas, Vorlesungen und Überlegungen zur Theorie des kommunikativen Handelns (Frankfurt am Main, 1984), esp. pp. 35ff. (English translation forthcoming, Cambridge, Mass.).


Chapter 2


12. N. Luhmann, “Juristische Argumentation,” ms. 1991, p. 1. The answer that Luhmann offers is not very convincing. It goes something like this: If “information” renders the unknown known and if “redundancies” repeat what is already known, then communication can be generally understood as the routine conversion of information into redundancies. Argumentation achieves the same thing at a reflexive level. It uses reasons to secure a sufficient measure of redundancy with the help of available redundancies and thus counteracts the pressure of variation from incoming information. Correspondingly, legal argumentation deals with the need for justification arising from the pressure of variation created by new cases; in this it aims to secure the consistency of decisions over time. It thus erects a doctrinal (dogmatisches) barrier against the cognitive adaptability of an adjudication that weighs interests in light of anticipated consequences. This proposal is implausible, however, because a doctrinal conservation of existing...