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The Discourse Ethics Alternative to *Rust v. Sullivan*

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THE DISCOURSE ETHICS ALTERNATIVE TO *RUST v. SULLIVAN*

Gary Charles Leedes*

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I. INTRODUCTION

Legal theorists in the United States should pay more attention to Jürgen Habermas.¹ His theory of discourse ethics provides us with an enriched understanding of the term "normative validity." Discourse ethics "is concerned . . . with the grounding of normativity . . . ; its central focus is the . . . specification of appropriate validation procedures."² Once participants in political discourse agree on validation procedures, they are then in a position to

1. Habermas's work on discourse ethics points the way towards a genuine participatory democracy. See DAVID M. RASMUSSEN, *READING HABERMAS* (1990); *HABERMAS: CRITICAL DEBATES 1-11* (John B. Thompson & David Held eds., 1982); *HABERMAS AND MODERNITY 1-8* (Richard J. Bernstein ed., 1985).

Habermas has integrated continental and Anglo-American philosophies to some extent, and he tries to answer the question: How is mutual understanding among human beings possible? For an anthology of excerpts taken from Habermas's writings, see JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER (Steven Seidman ed., 1989); see also JANE BRAATEN, *HABERMAS'S CRITICAL THEORY OF SOCIETY* (1991); THOMAS MCCARTHY, *IDEALS AND ILLUSIONS: ON RECONSTRUCTION AND DECONSTRUCTION IN CONTEMPORARY CRITICAL THEORY* (1991); STEVEN WHITE, *THE RECENT WORK OF JÜRGEN HABERMAS* (1988). Rasmussen's recent book contains biographical material about Habermas (including bibliographies of his work and secondary works about his writing). See RASMUSSEN, *supra*. If I were to label Habermas's political theory, I would call it "liberal communitarianism." See EZEKIEL J. EMANUEL, *THE ENDS OF HUMAN LIFE* 155-177 (1991) (description of liberal communitarianism).

2. SEYLA BENHABIB & FRED DALLMAYER, *THE COMMUNICATIVE ETHICS CONTROVERSY* 3 (1990).

achieve a fully rational consensus³ about normatively right laws that are in everyone's best interests.⁴

Habermas maintains that when the validity of a social norm or law has been questioned,

social actors have three alternatives: they can switch to strategic action; they can break off all discussion and go their separate ways; or they can continue to interact practically by entering into a critical discussion (practical discourse) about the validity of the norm in question. A practical discourse aims at a rationally motivated consensus on norms. Discourse ethics articulates the criteria which guide practical discourses and serve as the standard for distinguishing between legitimate and illegitimate norms.⁵

Discourse ethics "must be a fully public communicative process unconstrained by political or economic force."⁶ When the stringent conditions of discourse ethics are operative, participants in political debate achieve a universalistic⁷ perspective that takes every other person's interests equally into account. This attitude solidifies the social bonds linking all people trying to resolve their differences of opinion cooperatively. Controversies end on a satisfactory note when the best reasoned argument is admittedly convincing to everyone. This article compares discourse ethics with bureaucratic and judicial procedures. The focus is upon rules issued by federal administrative agencies.

According to Habermasian discourse ethics, the moral burden of proof is on an agency proposing a gag rule that suppresses morally relevant information. Unfortunately, the Supreme Court places the moral burden of persuasion on pregnant women who challenge reg-

3. Habermas does not pit rational analysis and deeply felt emotions against each other. A fully rational consensus is one in which participants in debate reach political agreement after reflectively considering whether a proposed norm (procedural or substantive) is normatively right, instrumentally rational and psychologically acceptable. According to discourse ethics, agreements are based upon the best reasoned argument rather than upon the best deal a self-interested negotiator can make.

4. See Jürgen Habermas, *Justice and Solidarity: On the Discussion Concerning "Stage 6,"* 21 PHIL. F. 32, 46-51 (1989-90).

5. Jean Cohen, *Discourse Ethics and Civil Society*, 14 PHIL. & Soc. CRITICISM 315, 316 (1988).

6. *Id.*

7. Seyla Benhabib writes that "universalizability is defined as an intersubjective procedure of argumentation geared to attain communicative agreement." Seyla Benhabib, *In the Shadow of Aristotle and Hegel: Communicative Ethics and Current Controversies in Practical Philosophy*, 21 PHIL. F. 1, 6 (1989-90).

ulations that deny them information relevant to their well-being. Section II examines *Rust v. Sullivan*,⁸ which upheld the validity of an agency rule that destroys the honest relationship between women and their health care providers.

Section III canvasses the inadequacies of contemporary legal theory. Because the theories advocated by most American jurists focus on judicial review, they suffer by comparison to Habermas's more comprehensive democratic theory.⁹ Section III also discusses why the paradigm of positivism is inferior to Habermas's discourse ethics. For the benefit of readers not already familiar with Habermas's work, Section IV clarifies his jargon, including such terms as "self-steering systems," the "lifeworld," and "ideal speech conditions."

Relying primarily on Habermas, the article explains why ordinary citizens need to resist the imperialistic subsystems that colonize society via the media of money and power. These subsystems include corporate hierarchies, governmental bodies, and the courts. *Rust v. Sullivan* is used to illustrate the extent of unchecked bureaucratic power.

Section V reveals that courts, by way of judicial review, are unable to reconstitute administrative law. Section VI proposes several alternatives to judicial review — alternatives that should strengthen participatory democracy in the United States.

Most of the American people believe that the agency's gag rule upheld in *Rust* violates the bond of trust between government and the women who ask their subsidized health care providers what their medically indicated choices are. *Rust* moves us away from the liberal ideals of an enlightened democracy that enable individuals to obtain advice that enables them to re-examine their beliefs and plans. In short *Rust* violates the principles of discourse ethics, which provide a critical vantage point for condemning agency regulations that prevent the public discourse from being fair, honest, and genuinely open.

8. 111 S. Ct. 1759 (1991).

9. Concededly, Habermas's work describing links between law and morality is somewhat sketchy and needs to be developed more completely and more successfully. See JÜRGEN HABERMAS, *Law and Morality*, in 8 THE TANNER LECTURES ON HUMAN VALUES 219 (Sterling N. McMurrin ed. & Kenneth Baynes trans., 1988).

II. A CRITICAL EXAMINATION OF *Rust v. Sullivan*

A. Overview of the So-Called Gag Rule Regulations

*Rust v. Sullivan*¹⁰ upheld the facial validity of regulations promulgated in 1988 by the Secretary of Health and Human Services (the "Secretary") pursuant to Title X of the Public Health Service Act.¹¹

Under the regulations, a physician discussing family planning matters with his patient is prohibited in virtually all instances from discussing abortion. For example, if a woman at a Title X clinic asks her physician for information about abortion, the physician, in most circumstances cannot tell the woman anything other than that the clinic does not believe in abortion [as a method of family planning] and therefore does not talk about it.¹²

Furthermore, "the physician is required to make referrals from a censored referral list."¹³ Although women currently have a constitutionally recognized abortion option,¹⁴ Title X physicians are required to withhold this information.

"Family planning," as used in the regulations, refers to the "process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved."¹⁵ The regulations "pose a choice to family planning clinics: Either take the federal funding and do not discuss abortion (as a method of family planning), or discuss abortion (as a method of family planning) but forfeit federal funding."¹⁶ Although the relevant details of the regulations are reproduced in the appendix to this article, "[t]he bottom line is that a practitioner in a Title X-funded clinic is prevented from saying anything to a pregnant wo-

10. 111 S. Ct. at 1759. This article refers only to *Rust*; however, my commentary and the Court's holding and opinion apply as well to the companion case of *New York v. Sullivan*, 111 S. Ct. 1759 (1991).

11. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1508 (codified as amended at 42 U.S.C. § 300 a-b (1982)).

12. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1477 (D. Colo. 1988), *aff'd sub nom.*, *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991).

13. *Id.* at 1476.

14. See *Roe v. Wade*, 410 U.S. 113 (1973).

15. 42 C.F.R. § 59.2 (1990).

16. See Carole I. Chervin, Note, *The Title X Family Planning Gag Rule; Can the Government Buy Up Constitutional Rights?*, 41 STAN. L. REV. 401, 402 (1989).

man about abortion, even if she asks."¹⁷ Moreover, to reduce the incidence of abortion¹⁸ as a method of family planning, the regulations among other things prohibit referrals, lobbying, and advocacy of any activities that promote abortion.¹⁹

The Secretary's regulations were challenged as ultra vires²⁰ and as incompatible with the First and Fifth Amendments of the Constitution.²¹ Both the First and the Tenth Circuits invalidated the challenged regulations, primarily on constitutional grounds.²² The Second Circuit upheld the regulations.²³ In *Rust*, the Supreme Court affirmed the judgment of the Second Circuit.²⁴

The Court was unconvinced that constitutional rights of federally funded grantees were violated even though the regulations mandated medical deceit and required physicians to betray their patients. The Court skillfully distinguished between conditions imposed on subsidy recipients and conditions placed on programs and held that the challenged regulations applied to programs.²⁵ Moreover, the Court viewed the federal subsidy as a "carrot" rather than a "stick," even though many pregnant women are duped by the funded grantees who grab the carrots.

B. A Closer Look at the Content and Context of the Regulations

1. Historical Background of Title X Regulations

Title X, entitled "Family Planning Services and Population Research Act of 1970,"²⁶ provides federal funding for a broad range of

17. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1474 (D. Colo. 1988), *aff'd sub nom.*, *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991).

18. *See* 42 C.F.R. § 59.2 (1990).

19. *See Rust v. Sullivan*, 111 S. Ct. 1759, 1765 (1991).

20. *Id.* at 1766. *Rust* presented the threshold question of whether Congress authorized the Secretary to deny funds to family planning entities that failed to comply with the new 1988 restrictions. If the Court had held that the Secretary's interference with communicative activity was unauthorized, then the Court's resolution of the First and Fifth Amendment issues would not have been necessary.

21. *Id.* at 1766.

22. *See Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492 (10th Cir. 1990); *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53 (1st Cir. 1990)(en banc), *vacated sub. nom. Massachusetts v. Sullivan*, 111 S. Ct. 2252 (1991).

23. *See New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *aff'd sub nom.*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

24. *Rust*, 111 S. Ct. at 1764.

25. *Id.* at 1774-75.

26. Pub. L. No. 91-572, 84 Stat. 1504 (1970) (codified as amended at 42 U.S.C. §§ 300-

voluntary family planning methods.²⁷ The Secretary is authorized to make grants²⁸ to nonprofit entities who establish and operate family planning projects. Title X also authorizes the Secretary to issue regulations to make family planning methods more readily available to persons desiring such information.²⁹

In fiscal year 1988, Title X "provided \$142.5 million for family planning services and related activities."³⁰ The majority of Title X grantees are public health clinics.³¹ "Title X projects serve an estimated 14.5 million women. About a third of those who receive services are adolescents and approximately ninety percent of the women served had incomes [substantially] below . . . the poverty line."³² As of 1989, the money appropriated under Title X provided services for 4.3 million people. The *targeted* population for Title X includes "5 million adolescents between the ages of 15 and 19, and 9.5 million adult women between the ages of 20 and 44."³³ Many of the women requesting services suspect that they are pregnant, and "are indeed found to be pregnant."³⁴

Although the Secretary has the power to promulgate rules,³⁵ Title X includes the following restriction on the Secretary's regulatory power:

Sec. 1008. None of the funds appropriated under this subchapter

300a-6 (1988)).

27. The preamble to the Act states that it was enacted "[t]o promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government, and for other purposes." *Id.* The declaration of congressional purposes states that the purpose of the Act is "(1) to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services; . . . [and] . . . (5) to develop and make readily available information (including educational materials) on family planning and population growth to all persons desiring such information." *Id.*

28. Title X of the Public Health Service Act authorizes federal grants to public, and nonprofit private entities. 42 U.S.C. § 300 (1988).

29. See Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 1005, 84 Stat. 1504, 1507 (codified as amended at 42 U.S.C. § 300a-3 (1988)).

30. Note, *supra* note 7, at 408.

31. *Id.* (quoting *Massachusetts v. Secretary of Health and Human Servs.*, 899 F.2d 53, 55 (1st Cir. 1990)(en banc), *vacated sub. nom.*, *Massachusetts v. Sullivan*, 111 S. Ct. 2252 (1991)).

32. *Id.* at 56 (citing 131 CONG. REC. S16,860 (daily ed. Dec. 4, 1985)).

33. *New York v. Sullivan*, 889 F.2d 401, 415 n.1 (2d. Cir. 1989), *aff'd sub nom.*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (Cardamone, J., concurring).

34. *Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1492, 1499 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991).

35. 42 U.S.C. § 300a-4(a) (1988).

shall be used in programs where abortion is a method of family planning.³⁶

The Secretary's original interpretation of section 1008 *permitted* recipients of Title X funds "to provide neutral information to women regarding abortion in a counseling context, as long as the activity 'did not have the immediate effect of promoting abortion or . . . the principal purpose or effect . . . of promoting abortion'"³⁷ In 1978, the regulations clearly provided that "'the provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered to be proscribed by § 1008.'"³⁸

By 1981, Program Guidelines issued by the Department of Health and Human Services specifically *required* nondirective counseling for pregnant women.³⁹ The regulations promulgated by the Secretary in 1986 "prohibited grant recipients from performing abortions but did not purport to censor or mandate any kind of speech."⁴⁰ In sum, the Secretary's interpretations prior to 1988 permitted nondirective options counseling so long as grantees did not actively encourage or promote abortion as a method of family planning.

2. The New Regulations

On September 1, 1987, the Secretary, under a directive from President Reagan, proposed new regulations setting forth more specific standards for compliance with section 1008.⁴¹ The new regulations distinguish between Title X programs and non-funded programs.⁴² For example, under the new regulations an organization may no longer receive Title X funds to operate an abortion

36. Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, § 1008, 84 Stat. 1504, 1508 (1970) (codified as amended at 42 U.S.C. § 300a-6 (1988)).

37. *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1470 (D. Colo. 1988), *aff'd sub nom. Planned Parenthood Fed'n of Am. v. Sullivan*, 913 F.2d 1490 (10th Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991) (quoting 53 Fed. Reg. 2923 (1988)).

38. *Id.* at 1470 (quoting Letter from Office of General Counsel, Health, Education, and Welfare, to Elsie Sullivan, Assistant for Information and Education, Office for Family Planning (Apr. 1, 1978)); *see also Massachusetts v. Sullivan*, 899 F.2d 53, 62 (1st Cir. 1990), *vacated*, 111 S. Ct. 2252 (1991).

39. *Massachusetts v. Sullivan*, 899 F.2d at 62.

40. *Rust v. Sullivan*, 111 S. Ct. 1759, 1787-8 (1991) (Stevens, J., dissenting) (citing 42 C.F.R. §§ 59.1-59.13 (1986)).

41. *See* 52 Fed. Reg. 33,210-15 (1987).

42. 53 Fed. Reg. 2922-46 (1988).

clinic in physical structures funded by the federal government.⁴³

The new regulations also provide that a "project"⁴⁴ may not receive federal funds unless it is in compliance with the following rules dealing with abortion as a method of family planning:

(1) *Title X Projects may not provide options counselling or referrals.*⁴⁵

Courts have held that the prohibitions of referrals and counselling are not inconsistent with the intent of Congress.⁴⁶

(2) *A pregnant client must be furnished with a list of health care providers who "promote the welfare of [the] mother and [the] unborn child." The list is incomplete because it is censored. Until the pregnant woman keeps an appointment with one of these governmentally approved health care providers, she must be furnished with prenatal care information necessary to protect the health of the unborn child.*⁴⁷

This ban opens the door for federal budget-cutters who formulate policies of "cost-containment the sleazy way, by forcing doctors to mislead their federally insured patients about the . . . availability of treatments the government prefers not to fund."⁴⁸

(3) *Client referrals may not be used "as an indirect means of encouraging or promoting abortion as a method of family planning."*⁴⁹ Accordingly, *Title X projects may not provide lists of "health care providers whose principal business is the provision of abortions."*⁵⁰ More specifically, *Title X projects may not steer*

43. See *Rust*, 111 S. Ct. at 1766. The Secretary's position, until the new regulations were promulgated, was that so long as federal funds were kept separate, physical separation of the abortion program from the Title X program was unnecessary. *Massachusetts v. Bowen*, 679 F. Supp. 137, 143 n.2 (D. Mass. 1988), *aff'd sub nom.*, *Massachusetts v. Sullivan*, 899 F.2d 53 (1st Cir. 1990), *vacated sub nom.*, *Sullivan v. Massachusetts*, 111 S. Ct. 2252 (1991) (citing Memorandum from Joel M. Mangel, Office of General Counsel, Health, Education, and Welfare, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971)).

44. "Title X program" and "Title X project" are used interchangeably in the amended regulations to "mean the identified program which is approved by the Secretary for support under . . . the Act . . ." 42 C.F.R. § 59.2 (1988).

45. 42 C.F.R. § 59.8(a)(1).

46. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1769 (1991); *Massachusetts v. Sullivan*, 899 F.2d 53, 61 (1st Cir. 1990).

47. 42 C.F.R. § 59.8(a)(2).

48. M. Gregg Bloche, *Mandating Medical Deceit*, WASH. POST, July 9, 1991, at A19.

49. 42 C.F.R. § 59.8(a)(3).

50. *Id.*

*clients to providers who offer abortion as a method of family planning.*⁵¹

This content-based regulation, which sharply deviates from the Secretary's more tolerant 1980 Program Guidelines,⁵² interferes with communicative interaction between patients and their physicians.

(4) *Projects providing clients with information concerning contraceptive information may not "include counseling with respect to . . . abortion as a method of family planning."*⁵³

This content-based regulation insensitively divides many physician-patient relationships into pre-conception and post-conception segments.

(5) *Title X projects may not use federal funds to engage in the following forbidden activities:*

a. *Lobbying for legislation increasing the availability of abortion planning;*

b. *Providing speakers who promote the use of abortion as a family planning method;*

c. *"Paying dues to any group that, as a significant part of its activities, advocates abortion as a method of family planning;"*

d. *Using legal action to make abortion more readily available;*

e. *Developing or disseminating any information which advocates abortion; for example, grantees may not give patients "brochures advertising an abortion clinic."*⁵⁴

Although a Title X "recipient remains free to use private, non-Title X funds to finance abortion-related activities,"⁵⁵ the Secretary's speech-restrictive regulations impinge on First Amendment freedoms.

(6) *A project may not use Title X funds unless it is physically*

51. *Id.*

52. U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES (1981).

53. 42 C.F.R. § 59.8(a)(4).

54. 42 C.F.R. § 59.109(a), (b).

55. *Rust v. Sullivan*, 111 S. Ct. 1759, 1775 n.5 (1991). Apparently, matching funds provided by state and local governments may not be used for the activities prohibited by the regulation.

and financially separated from facilities⁵⁶ where prohibited activities occur.⁵⁷

The requisite extent of this separation is determined on a case-by-case basis.⁵⁸

The United States Court of Appeals for the Tenth Circuit held that the requirement of physical separation runs contrary to Congress's emphasis on coordinated and integrated health care services.⁵⁹ The Court of Appeals for the First Circuit also criticized the financial and *physical* separation requirement⁶⁰ because it unreasonably restricts a grantee's ability to provide private abortion counseling.⁶¹ The Supreme Court, however, accepted the Secretary's explanation that the facility-separation requirements are necessary to assure that Title X grantees "avoid creating the appearance that the government is supporting abortion-related activities."⁶² The Court also held "that the program integrity requirements are . . . not inconsistent with Congressional intent."⁶³

In summary, the Secretary's interpretations of Title X initially permitted and later *required* grant recipients to provide some information about abortions.⁶⁴ Indeed, if a woman desiring an abortion requested a referral (in 1981), then grant recipients were *required* to help her find physicians who performed abortions in non-funded agencies.⁶⁵ As late as 1986, the regulations contained

56. Facilities include treatment, consultation, examination, and waiting rooms.

57. *Id.*

58. 42 C.F.R. § 59.9.

59. See Planned Parenthood Fed'n of Am. v. Sullivan, 913 F.2d 1492, 1498 (10th Cir. 1990).

60. Programs that receive partial Title X funding are required under the regulations to restructure their facilities so that federally funded activities are "physically and financially separate" from any prohibited activities. 42 C.F.R. § 59.9.

61. Massachusetts v. Sullivan, 899 F.2d 53, 74 (1st. Cir. 1990).

62. Rust v. Sullivan, 111 S. Ct. 1759, 1769 (1991).

63. *Id.* at 1770.

64. New York v. Sullivan, 889 F.2d 401, 405 (2d Cir. 1989). A memorandum from the General Counsel for the Department of Health, Education, and Welfare advised the Secretary in 1978 that "provision of information concerning abortion services [and] mere referral of an individual to another provider of services for an abortion . . . are not considered to be proscribed by § 1008." *Id.* (quoting memorandum from Joel M. Mangel, Office of General Counsel, Health, Education, and Welfare, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971)). The memorandum suggested that "[i]f the immediate effect of the activity is essentially neutral as in the case of mere referral or collection of statistical data, then the activity does not fall afoul of § 1008." *Id.* However, non-neutral activities such as encouraging or otherwise assisting a woman in obtaining an abortion would clearly violate § 1008. *Id.*

65. See *id.* (citing U.S. DEP'T OF HEALTH, EDUC. & WELFARE, Program Incentives for Pro-

no restrictions censoring or mandating speech.⁶⁶

An entirely new approach was embodied in the 1988 regulations. The 1988 regulations fall into three categories; (i) counseling and referrals (ii) lobbying and advocacy, and (iii) physical and financial separation of Title X programs and abortion programs. As to the first category, if a pregnant woman asks about abortion providers, then the federally funded project counselor *may not* "encourag[e] or promot[e] abortion as a method of family planning."⁶⁷ The 1988 regulations in the second category prohibit the exercise of First Amendment rights by grantees who desire to influence government officials. Concerning the third category, the high cost of complying with the physical separation requirement eliminates many two-track family counseling programs. In short, the 1988 regulations curtail, censor, and mandate speech in accordance with the federal government's anti-abortion policy.

III. THE LIMITATIONS OF LEGAL THEORY

A. *The Impotence of Legal Scholarship*

People need law to liberate them from overt and hidden forms of tyranny. There is also a related need for persons to become aware of their options and best interests by engaging in ongoing, uncoerced, non-manipulative communicative action with government officials. Habermas's discourse ethics protects everyone from unconstitutional conditions abridging speech more so than the following approaches to law.

1. The Critical Legal Studies Movement

In 1975, a disturbing critique of the antinomies⁶⁸ and aporias of classical liberalism's presuppositions inspired a movement.⁶⁹ Thus

ject Grants for Family Planning Services (Jan. 1976); U.S. DEP'T OF HEALTH & HUMAN SERVS., PROGRAM GUIDELINES FOR PROJECT GRANTS FOR FAMILY PLANNING SERVICES § 8.6 (1981)).

66. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1788 (Stevens, J., dissenting) (citing 42 C.F.R. §§ 59.1-.13 (1986)).

67. 42 C.F.R. § 59.8(a)(3).

68. According to Roberto Unger, adjudication based on classical liberal thought requires judgments of instrumental rationality; and yet, according to liberal thought, adjudication is inconsistent with instrumental rationality. See ROBERTO M. UNGER, *KNOWLEDGE & POLITICS* 138 (1975).

69. For a description of the critical legal studies movement, see MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987).

far, the critical legal studies movement has not produced a consensus-building model useful for rationally transforming the structure of law.⁷⁰ By discrediting law as a rational enterprise, critical scholars undercut their own credibility when they rely on reasoning to argue for legal reforms.

Mainstream lawyers and judges believe that the critical legal scholars and their predecessors, the legal realists, are wrong in thinking that rules are necessarily arbitrary and that legal doctrines are a sham.⁷¹ Destabilizing critical legal theory is generally regarded as dogmatic and radical by mainstream moderates. Moreover, critical legal theory is antithetical to democratic discourse ethics because most critical scholars insist that they know which principles of justice are best for society.

2. The Law and Economics Approach

Some academically influential scholars have integrated economic principles with theories of adjudication. *Laissez-faire*-minded economists believe that market forces should constrain lawmakers even though legal regulation, according to centrist and left-wing economists, is often necessary to prevent socially undesirable free-market outcomes.⁷² Professor, now Judge, Richard A. Posner⁷³ has shown how we may explain much of the common law through the use of economic principles. Judges are in a position to adopt objective criteria (e.g., Pareto or Kaldor-Hicks efficiency tests) when choosing among proposed case rulings. Nevertheless, in cases re-

70. Objectives as vague as Roberto Unger's vision of a world "free from deprivation and drudgery" do not help decide concrete cases. See Roberto M. Unger, *The Critical Studies Movement*, 96 HARV. L. REV. 561, 651 (1983). Unger himself wrote that a "newly established theory throws a strong light on the connection among the principles that govern the several branches of knowledge But the emerging system of thought no sooner becomes a dominant one than it begins to fall into pieces that can no longer be put back together." UNGER, *supra* note 68, at 1.

71. See Charles Fried, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 331, 333 (1988).

72. For example, legal regulation can be used to prevent grossly unequal distributions of wealth and income.

73. Judge Posner concedes that expertise in economics does not frequently help judges agree on a method of interpreting certain texts such as judicial opinions, statutes, and constitutions. See Richard Posner, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 326, 329 (1988). For Judge Posner's works on law and economics, see *ECONOMIC ANALYSIS OF LAW* (1986) and *THE ECONOMICS OF JUSTICE* (1981). Posner recognizes that the subject of economics is markets rather than the legal system, and that it is a mistake to think that criteria useful to economists are often useful in cases involving fundamental or unenumerated constitutional rights. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 362 (1990).

quiring an interpretation of the Constitution the notion that utility or efficiency is a desirable consideration is but one preference among many competing standards of adjudication. Therefore, in cases presenting questions of constitutional law, the objectivity claim of law and economics theorists in the "Chicago school" is misleading.

In the nineteenth century, Max Weber criticized the type of pragmatic thinking that is celebrated by the Chicago school.⁷⁴ Weber believed that a one dimensional conception of instrumental rationality inadequately measures the moral costs of pursuing greater wealth. Similarly, law-related economic theory is not adequately sensitive to humanistic considerations of decency, fairness, and kindness. Unlike Jürgen Habermas, many jurists who believe that wealth maximization is the law's objective doubt the existence and relevance of identifiable, testable and falsifiable *moral* norms.

3. Process-Oriented Theory

John Hart Ely's process-oriented theory reinforces liberal democracy; its proposals protect politically weak groups who do not have adequate opportunities to influence lawmakers.⁷⁵ Unfortunately, however, the type of judicial review deemed adequate by Ely is incapable of invalidating morally unjustifiable laws. Ely's theory of judicial review is not supplemented by a critical theory with power to overcome many hidden forms of domination latent in majoritarian rule.

The process-oriented theory of communicative action conceived by Jürgen Habermas is deeper, broader and more emancipatory than Ely's theory of democracy. Habermas's theory appeals to a concept of reciprocal respect that motivates citizens not to treat their political opponents as mere objects of their will. For Habermas, the unreflective will of the majority is not an adequate test of a law's validity.

Habermas's vision of a rational democratic society is a "commu-

74. Weber ambivalently described social pathologies associated with the complex of tendencies related to scientific and technical progress and its extension to areas of society subject to the criteria of instrumentally rational decisions. Weber regarded the modern development of economic activity, law, and the expanding bureaucracy as a "shell of bondage." THOMAS McCARTHY, *THE CRITICAL THEORY OF JURGEN HABERMAS* 8-19 (1978).

75. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Ely stresses the importance of those participational rights that justified several landmark Warren Court decisions.

nication community of . . . participants in a practical discourse [who] test the validity claims of norms and, to the extent that they accept them with reasons, arrive at the conviction that in the given circumstances the proposed norms are 'right.'"⁷⁶ Valid norms are morally binding because they are the products of a genuine consensus. Like Ely, Habermas's consensus-based theory provides a process-based justification for validity claims about proposed laws. Unlike Ely, however, Habermas's theories of adjudication combine legal reasoning and moral reasoning.

4. Rights-Oriented Jurisprudence

Rights-oriented theories of social justice integrate law with morality. Most fundamental substantive rights are based upon open-ended moral concepts (e.g., dignity, autonomy, and equality). These abstract concepts need to be converted into concrete "wheat and chaff" segments. But who makes the hard decisions? Rights-oriented theorists empower judges to provide the best interpretation of indeterminate rights. Unwilling to accept this responsibility, the Rehnquist Court in *Rust* empowers agencies to impose unconstitutional conditions. Unlike Habermas, the rights-oriented legal theorists do not rely primarily upon participatory dialogues leading to a rationally-motivated consensus.

5. Communitarianism

Some political theorists are trying to inspire an interest in communitarian principles and aspirations.⁷⁷ Communitarians cogently describe the disadvantages of a fragmented, pluralistic society. They have revived civic republicanism and civic virtue,⁷⁸ and they condemn classical liberalism's fixation on the egocentric individual. Communitarians reject political neutrality and believe that the law

76. JURGEN HABERMAS, *LEGITIMATION CRISIS* 105 (Thomas McCarthy trans., 1976).

77. See MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). But see NANCY L. ROSENBLUM, *ANOTHER LIBERALISM* 152-163 (1987).

78. See, e.g., Frank I. Michelman, *The Supreme Court, 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). Communitarianism tends to suffocate individuality and spontaneous self-expression. Communitarians have the "idea that we are not in any meaningful sense . . . unconnected individuals, but are interdependent and inevitably connected to one another, . . . and that even our personal identity and meaning depend on our connections as members of a community." Gary Peller, *The Classical Theory of Law*, 73 CORNELL L. REV. 300, 304 (1988). Communitarians insist that the good is prior to the right in the political realm. Justice is therefore subordinated to the community's conception of the good life. CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 123 (1987).

should embody and foster some particular conception of the common good. But one community's ethos is politically incorrect in another community. Moreover, in the United States, most of us have allegiances to, and shifting involvements with, many communities.

Communitarianism is perhaps appropriate for small, homogenous, and stable communities, but mandatory social solidarity is unrealistic in large pluralistic nations where many groups do not share the same core beliefs, values, and social and moral perspective. Unfortunately, legal theorists advocating all-consuming communitarianism have failed to devise methods to prevent the rise of irrational nationalism, exclusionary ethnocentrism and arrogant ideological parochialism.

6. The Law and Literature Movement

The once fashionable law and literature movement is an exciting but unpredictable *ideologiekritik*.⁷⁹ By analyzing novels and the great classics of literature, a story of law untold in the official reports of cases can be reconstructed. Indeed, discerning authors of immortalized literary works help lawyers (whose vision is narrowed by the case method) see the full dimensions of injustices not rectified by the legal system. The connection between law and rhetoric is another reason for a law and literature synthesis, but "[e]ven the meaning and significance of rhetoric seems to involve a rhetorical dispute."⁸⁰ Although literary critics explain why the distinction between justice and injustice is often a matter of ideology and interpretation, literary hermeneutics generates new controversies about the art of interpretation. Some writers believe that most words mean whatever they want them to mean. Unfortunately, many of these influential writers privilege ideological purity over enlightened liberal values.⁸¹

79. Deconstruction, for example, is a view about language and texts that creates the prospect of endless indeterminacy. Deconstruction, needless to say, has had no impact on the law although its critique of logocentrism is provocative; the problem is that deconstructionists do not fully explain what they mean by logocentrism because that would be too logocentric. For a clear description of what deconstructionists probably mean by logocentrism, see J. CLAUDE EVANS, *STRATEGIES OF DECONSTRUCTION* 146-55 (1991).

80. Brook Thomas, *Reflections on the Law and Literature Revival*, 17 *CRITICAL INQUIRY* 510, 523 (1991).

81. See JACQUES DERRIDA, *OF SPIRIT: HEIDEGGER AND THE QUESTION* 34 (Geoffrey Bennington & Rachael Bowlby trans., 1989). Another movement, feminist juris prudence, is not discussed in this article. It is a fragmented movement that has much to offer, but thus far, the law has been unreceptive to its more radical tenets which are incompatible with liberalism.

7. Do Theories Have Consequences?

None of the aforementioned theories have transformed the nature of the judicial process or the practice of law. Some critics of the theory-building project claim that no theory, however brilliant, comprehensive, and profound, can change the practices of lawyers and judges.⁸² Stanley Fish contends that we ought to abandon the hope that theory has practical consequences.⁸³ He contends:

- (1) that in whatever form it appears the argument for theory fails,
- (2) that theory is not and could not be used to . . . generate and/or guide practice,
- (3) that when theory is in fact "used" it is . . . in order "retrospectively" to justify a decision reached on other grounds,
- (4) that theory is essentially a rhetorical and political phenomenon whose effects are purely contingent, and
- (5) that these truths are the occasion neither of cynicism nor of despair.⁸⁴

If Fish simply means that theory remains ineffectual until it is put into practice, his claim is sound, but sterile. If he means that no "cutting edge" theory has made any difference in the way people behave (after it becomes known and approved by enough people to change their world view), his claim is absurd. The theories of Martin Luther, Thomas Hobbes, Adam Smith, John Locke, and Jeremy Bentham, among others, disprove that assertion. When judges are convinced that one of several competing theories of adjudication is the best theory, their adoption of the "best" theory can transform the Constitution. Although, socially-accepted theories usually become indistinguishable from practices,⁸⁵ few, if any, theories of justice during the last 150 years have injected any beneficial code of normative rightness or fraternity⁸⁶ into the law. To

82. See, e.g., MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

83. STANLEY FISH, *DOING WHAT COMES NATURALLY* 372-98 (1989).

84. *Id.* at 380.

85. Law is somewhat less conceptualistic than it was 100 years ago, thanks to the theories of William James and C.S. Pierce adopted by, among others, Justice Oliver Wendell Holmes, Jr. and other legal realists. The legal realists who exposed the flaws in formal legal reasoning did not transform the nature of the judicial process.

86. Ronald Dworkin claims that law is "a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction." RONALD DWORKIN,

the contrary, judges continue to resolve disputes in accordance with the predictable and stabilizing "process of reasoning that is replicable by lawyers."⁸⁷

Concededly, there have been piecemeal legal reforms inspired by specialized theories that respond to the apparent incoherence of the case law.⁸⁸ These narrowly drawn mini-theories explain how and why various lines of cases need to be realigned, but they do not prophetically usher in new paradigms that could radically change the methods of the legal profession. To achieve radical change, a theorist must convince a critical mass of the legal profession, as well as the general public, to abandon their faulty premises, constellations of belief, and methods.⁸⁹

Despite the efforts of American legal theorists, we still have a negative Constitution; one that does not recognize fundamental rights such as housing, education, clothing, medicine, food, and welfare checks. Increased sexual freedom is found in the penumbras of rights of privacy, but this development is attributable more to the counter-culture lionized during the 1960's than to the monologic theories of John Rawls.⁹⁰ In short, judges remain unmoved by supra disciplinary scholarly theories explaining why courts should act as imaginative novelists or "independent architects"⁹¹ who should creatively enlarge the dimensions of social justice. Habermas's ideas empower the people to emancipate *themselves* from outmoded ideologies, and his theory of discourse ethics provides the means for their enlightened emancipation.

LAW'S EMPIRE 413 (1986).

87. MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 11 (1988). The legal profession expects judges to use a method of legal reasoning that lawyers should be able to replicate; otherwise attorneys "could not give reliable legal advice in planning and dispute-settlement." *Id.* It follows that many proposed moral norms are considered destabilizing, potentially dysfunctional and therefore legally irrelevant.

88. For example, § 90 of the *RESTATEMENT (FIRST) OF CONTRACTS* was a product of the efforts of Samuel Williston and Lon Fuller. See EISENBERG, *supra* note 87, at 78.

89. Bruce Ackerman explains how the New Deal justices appointed by Franklin D. Roosevelt radically reconstructed the Founder's conceptions of liberty. This led to the legitimization of a powerful regulatory and welfare dispensing state. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40-49, 103-108, 118-29 (1991).

90. I refer of course to John Rawls' theory of justice. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

91. DWORKIN, *supra* note 86, at 410.

B. *A Half-Hearted Doctrine of Unconstitutional Conditions*

The doctrine of unconstitutional conditions, strictly applied, never permits the government to grant a benefit on the condition that the beneficiary surrender a constitutional right.⁹² This unpredictable line of cases has many ragged edges. Although the Supreme Court has frequently held that unconstitutional conditions attached to the benefits provided by law are valid,⁹³ the Court, in many cases, has struck down the condition in question.⁹⁴ Of the unconstitutional conditions doctrine Richard Epstein writes: "It roams about constitutional law like Banquo's ghost, invoked in some cases, but not in others."⁹⁵ Kathleen Sullivan, like Epstein, criticizes courts⁹⁶ that fail to invalidate laws and regulations that

92. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

93. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Secretary of Transportation was authorized to withhold a portion of the allocated state highway construction funds if states did not enact laws forbidding the purchase of alcoholic beverages to persons under age twenty-one. This condition was upheld even though its relevance to the purposes of the expenditure was questionable.

In *Harris v. McRae*, 448 U.S. 297 (1980), and in *Maher v. Roe*, 432 U.S. 464 (1972), the Court upheld a subsidy for the medical expenses of childbirth, but not abortion, despite the claim that the selective subsidy interfered with the fundamental right of reproductive autonomy. The Court has also upheld conditions to tax benefits, which require non-profit organizations to spin off their lobbying activities to separate affiliates. *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983).

In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court upheld a condition that required recipients of federal contract grants to set aside a percentage of those grants for designated minority subcontractors. In *Oklahoma v. Civil Serv. Comm'n*, 330 U.S. 127 (1947), the Court upheld the applicable statute that conditioned continued employment in state agencies on the prohibition of participation in political campaigns.

94. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (government may not condition public broadcasting subsidy on abstinence from editorializing); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirement penalized residents of state seeking welfare benefits); *Sherbert v. Verner*, 374 U.S. 398 (1963) (state cannot deny claimant unemployment compensation benefit because she chose not to work on Saturday due to her religious precepts); *Speiser v. Randall*, 357 U.S. 513 (1958) (veterans' property tax exemption conditioned on fulfillment of loyalty oath requirements was deemed a penalty); *United States v. Butler*, 297 U.S. 1 (1936) (subsidy to farmers conditioned on reduction of crop production deemed coercion by economic pressure); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) (state's attempt to attach condition to the privilege of using highways deemed coercive).

95. Richard Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 10-11 (1988).

96. Sullivan, *supra* note 92, at 1415. In its most absolutist form, the doctrine of unconstitutional conditions "holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions, that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights." Epstein, *supra* note 95, at 6-7; see Robert L. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); see also Seth F. Kreimer, *Allocational Sanctions: The Problem of Nega-*

accomplish indirectly what lawmakers are constitutionally forbidden to achieve directly.⁹⁷

Professor Sullivan argues that courts should at least require lawmakers to explain *why* conditions on government benefits that 'indirectly' burden preferred liberties should not be as invalid as 'direct' burdens on those same rights, such as the threat of criminal punishment.⁹⁸ She identifies the harmful systemic effects of unconstitutional conditions (*viz.*, the inappropriate allocation of relationships between the government and rightholders, the invidiously discriminatory effects on some rightholders, and the perpetuation of an already underprivileged caste).⁹⁹ She cogently points out the limitations of existing judicial methods that only ask whether the challenged condition is (1) penalizing or coercive,¹⁰⁰ (2) the result of governmental extortion, deceptions and manipulations,¹⁰¹ or (3) a denial of basic rights.¹⁰²

The law's validity is suspect when courts uphold conditions that burden liberties simply because formally correct procedures were followed.¹⁰³ Nevertheless, Professor Sullivan's proposals for stricter scrutiny of conditions, which pressure indigents to surrender preferred rights, were ignored by a majority of the Justices in *Rust v. Sullivan*.¹⁰⁴ Thus, once again, a professor's legal theory has failed to influence the direction of law. Indeed, Professor Sullivan, who helped write the brief filed by petitioners in *Rust*, did not even advocate her own theory.

Professor Sullivan's failure to persuade the Court is unfortunate. As stated earlier, *Rust* upholds regulations which induce citizens to forego the exercise of cherished First Amendment rights, namely freedom of conscience, freedom of speech, freedom of association and freedom to obtain medically relevant information and counsel-

tive Rights in a Positive State, 132 U. PA. L. REV. 1293 (1984); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

97. Sullivan, *supra* note 92, at 1413.

98. *Id.* at 1419.

99. *Id.* at 1491.

100. *Id.* at 1428-56.

101. *Id.* at 1456-76.

102. *Id.* at 1476-89.

103. By contrast, Habermas observes that legal norms that are not morally justified cannot be sufficiently legitimized through a positivistic reference to procedures. See 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: THE CRITIQUE OF FUNCTIONALIST REASON* 364-65 (1981).

104. 111 S. Ct. 1759 (1991).

ing. The Court, contrary to the principles of discourse ethics, imposed the administration's politically inspired vision of morality on women whose own judgmental capacity — concerning what reproductive choices are morally right — is deemed untrustworthy.

C. *The Paradigms of Positivism and Communicative Action Compared*

1. Positivism and *Rust v. Sullivan*

The Justices in *Rust v. Sullivan* did not question the paradigm of legalistic positivism that restricts their world view. The positivists believe that factual statements can be ontologically separated from non-factual statements or generalizations.¹⁰⁵ Positivism is unduly influenced by science, and the validity of science is deemed independent of any moral principles. Indeed, things and events in the world are viewed by instrumentally rational scientists as potentially manipulable objects.

How does a positivist conceptualize law and the legal system?¹⁰⁶ For an old-fashioned arch-positivist, laws are the sovereign's commands issued by one or more habitually obeyed persons who do not render habitual obedience to anyone.¹⁰⁷ This Austinian definition is now discredited. Contemporary positivists now explain that general commands (e.g., legislation) become binding if, but only if, the community (including judges authorized to discern the law) accepts the commands as authoritative and recognizes them as valid merely because they have been duly enacted according to existing procedures and rules.¹⁰⁸

Under a regime of positivism, judges should not evaluate laws according to universally valid norms of morality. Although the Secretary's gag rule can easily be validated in a regime of positivism, it is clearly incompatible with the principles of discourse ethics. Con-

105. 2 JEFFREY C. ALEXANDER, *THEORETICAL LOGIC IN SOCIOLOGY. THE ANTI-NOMIES OF CLASSICAL THOUGHT: MARX AND DURKHEIM* xviii (1982).

106. Positivism is a term first used by Henri, comte de Saint-Simon, to refer to the scientific method and its extension to philosophy. It refers to a major philosophical movement which became dominant in Western thought during the last half of the 19th century. It draws support from the works of Francis Bacon, English empiricists and other Enlightenment *philosophes*. The apparent scientific successes of the industrial revolution created the hope that scientific methods could be successfully employed in ethics, religion, politics, and law. 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 414 (1967).

107. JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 5 (2d ed. 1980).

108. See Ronald Dworkin, *The Model of Rules*, 35 *U. CHI. L. REV.* 14, 17-46 (1967).

trary to positivism, Jürgen Habermas's theory stipulates the conditions for reaching agreements about verifiable universally valid moral principles. Habermas's theory undermines the validity of any law that is not generated by procedures likely to produce a reflective and fully rational moral consensus.

2. Discourse Ethics

Discourse ethics rejects the reductive paradigm of instrumentally rational positivism. It is the antithesis of a rational choice model in which an orientation of self-interest takes precedence over social norms advancing the common good. The concept of discourse ethics is expansive enough to include moral reasoning.

When a norm is valid, according to Habermas, it is because there is a consensus that the norm can be justified and derived from a universally valid moral principle, *U*, "which . . . is implied by the presuppositions of argumentation in general."¹⁰⁹ More specifically, to guarantee a genuinely unforced agreement about a law's normative rightness, Habermas writes,

every [agreed upon] valid norm has to fulfill the following condition: *U*. All affected can [sincerely] accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities).¹¹⁰

Habermas argues that mutual understanding and a rational consensus can be achieved through *U*. With the epistemological ground provided by *U*, a principle of discourse ethics, *D*, can be formulated to test whether a contested norm is truly valid. *D* demands that "[o]nly those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as *participants in practical discourse*."¹¹¹

If a contested norm meets or could meet the demands of discourse ethics, which require an uncoerced, genuine, and fully rational moral consensus, then the norm is valid. Obviously, the Secretary's gag rule cannot survive the demands of discourse ethics

109. JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 86 (Christian Lenhardt & Shierry W. Nicholsen trans., 1990).

110. *Id.* at 65.

111. *Id.* at 66.

because indigent women may not participate in practical discourse affecting them.

3. Positivism and Communicative Action

Since time and space constraints¹¹² prevent lawmakers from adhering exactly to Habermas's model, institutionalized conditions should be established by the legal system in order to approximate¹¹³ an ideal speech situation. To achieve an ideal speech situation, three rules must be followed:

(1) *The rule of participation*, stipulating that each affected person capable of debating the precise issue raised by a validity claim under discussion may speak;

(2) *The rule of equal participation*, stipulating that any participating person may question any assertion, introduce his or her own assertion into the discourse, and express his or her own relevant opinions, wishes, needs, attitudes, and sincerely held beliefs; and

(3) *The rule of protecting discourses from constraints*, stipulating that no speaker may be prevented by constraints — whether arising within or outside the discourse — from making use of the rights established in rules (1) and (2).¹¹⁴

Obviously, the Secretary's gag rule regulations denying uninformed women useful medical advice and information violate all of the foregoing ethical rules of discourse. Title X grantees may *not* discuss the abortion issue with their patients, they may *not* communicate their sincerely held beliefs. More specifically, the Secretary's unconstitutional conditions deny grantees and women the right to communicate honestly with each other.

The three rules of discourse ethics, which test validity claims for normative rightness, are irrelevant to positivists¹¹⁵ who assert that the morality of law is a subject that should be the exclusive prov-

112. "Discourses take place in particular social contexts and are subject to the limitations of time and space." *Id.* at 92.

113. HABERMAS, *supra* note 109, at 92.

114. Although the three conditions are rarely observed in practice, they can be used to evaluate actual discourses. See Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 Nw. U. L. REV. 54, 96-99 (1989).

115. The several streams of thought that can be categorized as positivism have left a "legacy of convictions and attitudes, problems and techniques, concepts and theories [that] pervade contemporary thought." See McCARTHY, *supra* note 74, at 137-38.

ince of experts in disciplines such as social theory, political philosophy, or ethics.¹¹⁶ The former United States Solicitor General took a positivistic position when he insisted that law is "a rather technical subject, somewhat cut off from its ethical, philosophical, and other heady roots. . . ."¹¹⁷

For most positivists, there are no legal principles that transcend the legal system.¹¹⁸ The positivists' uncritical conception of a legal system reinforces the power of economic and bureaucratic subsystems to abridge freedoms that advance everyone's best interests.

"A legal system can be conceived of as a system of reasons for actions,"¹¹⁹ but laws in force, according to positivism, depend on the decisions of persons authorized by power-conferring rules.¹²⁰ Moreover, "propositions that characterize conduct as right or wrong"¹²¹ are not always relevant because positivists claim that "not all legal standards are grounded in morality."¹²²

According to Habermas, "one cannot underestimate the extent to which the positivistic *temper* pervade[s] and dominate[s] intellectual and cultural life."¹²³ Positivism condones the bureaucratization of "most of the areas of everyday life."¹²⁴ Statists in power manage the political system's economic problems (scarcities, inequalities, insecurities, crises, etc.).¹²⁵ Owing to the complexities of social management, success-oriented subsystems (economic and administrative) encroach on the ability of ordinary people to reach consensus-based agreements about the content of law.¹²⁶

Subsystems that are instrumental in steering society¹²⁷ become

116. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 357 (1980).

117. Fried, *supra* note 71, at 332-33.

118. RAZ, *supra* note 107, at 209 n.2.

119. *Id.* at 212.

120. Power-conferring rules designate lawmakers to change the legal norms in force and effect when they are pleased to do so. See *id.* at 228.

121. EISENBERG, *supra* note 87, at 14.

122. *Id.* at 76.

123. HABERMAS AND MODERNITY, *supra* note 1, at 4-5.

124. HABERMAS, *supra* note 103, at 311 (quoting T. Luckerman, *Zwänge und Freiheiten im Wandel der Gesellschaftsstruktur*, 3 *Neue Anthropologie* 190 (H. Gadamer & P. Vogler eds., 1972)).

125. See *id.* at 343-48.

126. *Id.* at 326.

127. The subsystems that steer the socio-cultural subsystem include the political-administrative and the economic bureaucracies of (1) oligopolistic enterprises that are relatively free of the market restraints of small entrepreneurs and (2) industries such as armaments which are oriented largely towards production for and consumption by the state. See David

peculiarly indifferent to the individuals whom they affect. This dehumanizing process of legal regulation and bureaucratization¹²⁸ has produced a colossal economic-political-legal Leviathan. Increasingly, individuals are dominated by agencies claiming expertise in areas of life, such as reproductive autonomy, family relationships, physical and mental health, and other areas previously left to the lifeworld.¹²⁹ In sum, many private consensual arrangements have been replaced by a system of social control that paradoxically is often uncontrollable.

“Viewed historically, the monetarization and bureaucratization of labor power [replacing feudalism and primitive capitalism] is by no means a painless process; its price is the destruction of traditional forms of life.”¹³⁰ The price currently exacted seems excessively high since the bureaucracies (commercial, financial and political-legal-administrative) are not effectively attaining their strategic goals (e.g., utilizing the most economically productive method of distributing scarce resources) and are not adapting well to changing conditions.¹³¹

Nevertheless, contemporary positivists condone the dominance of purposive or instrumental rationality,¹³² which, according to Max Weber,¹³³ leads to “the creation of an ‘iron cage’ of bureaucratic rationality from which there is no escape.”¹³⁴ Worse yet, the systematized social environment, where there is inadequate space for consensual agreements, inhibits normatively right and emotionally satisfying kinds of social coordination. These distortions call into question the positivist’s model, which condones institutionalized dehumanization.

Held, *Crisis Tendencies, Legitimation and the State*, in HABERMAS: CRITICAL DEBATES 181 (John B. Thompson & David Held eds., 1982).

128. HABERMAS, *supra* note 103, at 307-09.

129. For a discussion and definition of “lifeworld,” see *infra* notes 151-159 and accompanying text.

130. HABERMAS, *supra* note 103, at 321.

131. *Id.*

132. HABERMAS AND MODERNITY, *supra* note 1, at 5. When individuals think instrumentally and do not think normatively or empathetically, they become incapable of “offering critical perspectives on social development.” DOUGLAS KELLNER, CRITICAL THEORY, MARXISM AND MODERNITY 96 (1989).

133. In his examination of the aggressively opportunistic spirit of capitalism, Weber noted how the combination of increasingly complex social subsystems and the need for instrumental rationality accelerated the growth of public and private bureaucracies. See, e.g., MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM I(e) (Talcott Parsons trans., 1958).

134. HABERMAS AND MODERNITY *supra* note 1, at 5.

IV. REALIGNING THE BOUNDARIES OF POWER

A. *Unemancipated Public Opinion*

As we approach the twenty-first century, inhumane laws are tolerated by members of the public who are not always fully aware of their own best interests. Members of the public cannot free themselves from coercive purposive-rational¹³⁵ social institutions "as long as they retain the ideological world-picture [of positivism] which legitimizes them, nor can they [emancipate themselves from] their ideological world-picture [of positivism] as long as their basic coercive social institutions render [their worldview] immune to free discussion and criticism."¹³⁶

Supreme Court opinions like *Rust* facilitate the state's massive penetration into private spheres of freedom. Unfortunately, a Supreme Court opinion upholding an immoral law (or agency rule) creates the false belief that immoral laws are legitimate, even when they obliterate the reasonable expectations of individuals and groups.

Vaclav Havel was surely right when he said, "there is no full freedom where full truth is not given free passage."¹³⁷ Full truth will never be given free passage so long as the federal courts rubberstamp agency rules that condition benefits on the recipients' willingness to withhold medical information needed by women. When the government exacts silence or censored speech as the quid pro quo for a benefit or subsidy, human beings are manipulated as objects of government policy. Even if the government's ends are justifiable, certainly its manipulative use of hush money is not. The persons most severely affected by the benefit-dispensing gag rule upheld in *Rust* are the clients of the grantees, who are often young, poor, pregnant women urgently needing trustworthy advice.

Unfortunately, the media's coverage of the gag rule issue emphasizes the strategic-reasoning of the rhetoricians hired by the contending pressure groups. This kind of reporting impoverishes pub-

135. "[P]urposive-rational action . . . refers to actions or systems of action in which elements of rational decision and instrumentally efficient implementation of technical knowledge predominate." McCARTHY, *supra* note 74, at 29.

136. RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 60 (1981).

137. *Waldheim Won't Seek Re-election*, RICHMOND TIMES-DISPATCH, June 22, 1991, at A-4, col. 6.

lic discourse, and does not generate a fully rational consensus concerning the validity of agency rules that are insensitive to the oppression of women. When public opinion is not sufficiently critical, informed, organized, persuasive, and heard, the President, Congress and the administrative agencies do not heed the public interest.

B. *Towards a More Informed, Effective Public Opinion*

Many individuals are victimized by their own self-imposed passivity. This passivity results in members of the public becoming unreflective spectators watching inside-the-beltway power struggles. Habermas's critical theory challenges the public to alter the existing boundaries of power.¹³⁸ More specifically, individuals must realize that their inability to discern their own best interests is partially the result of their own readiness to accept, without adequate cross-examination and protest, "an increasingly dense network of legal norms" implemented by bureaucracies.¹³⁹ This Leviathan is often the source of personal problems and rarely helps people solve "problems of mutual understanding."¹⁴⁰

Excessive power is entrusted to administrative agencies that are neither politically accountable nor adequately responsive to the public. As a result, the least powerful and least affluent segments of the population are deceived and exploited by rules implementing dysfunctional social welfare programs.

In the United States, the federal courts have done virtually nothing to diminish the power of bureaucracies. Agency rules and orders are presumed valid, even when the statutory source of the agency's practically unfettered discretion is unclear, if not unintelligible. The United States, like other nations, has been unable to control abuses of power by agencies.

Habermas's "'classic' texts in social theory"¹⁴¹ describe how the steering systems that colonize the lifeworld disable society from "exercis[ing] an influence over itself by the neutral means of politi-

138. GEUSS, *supra* note 136, at 61.

139. JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY* 361 (Fredrick Lawrence trans., 1987).

140. *See id.* at 363.

141. FRED R. DALLMAYR, *CRITICAL ENCOUNTERS: BETWEEN PHILOSOPHY AND POLITICS* 73 (1987).

cal-administrative power."¹⁴² Society can regain more control over itself in the United States only if the people can renew, enliven, and enrich public debates through discourse ethics.

Towards this end, Habermas identifies the conditions for a "communicatively achieved consensus"¹⁴³ capable of recognizing when validity claims have universally binding force. A speaker's validity claim is warranted if it is supported by convincing grounds concerning (a) "existing states of affairs," (b) the rightness of the claim given the applicable normative context of "legitimately regulated interpersonal relationships," and (c) the speaker's own subjective world to which the speaker has privileged access.¹⁴⁴ The term "universally binding force" in this context refers to the disposition of speaking and acting subjects to act on the basis of a consensus produced by cogent arguments and shared learning.¹⁴⁵

Agency officials and members of the public need to reach mutually satisfactory understandings,¹⁴⁶ uncontaminated by agencies that manipulate anomic public opinion.¹⁴⁷ Agency rulemaking procedures must be reconstituted in ways allowing "impulses from the lifeworld . . . to enter into the self-steering of functional systems."¹⁴⁸ If rulemaking procedures permit more public participation, then informed members of the public can "develop the prudent combination of power and intelligent self-restraint that is needed to sensitize the self-steering mechanisms of the state and the economy to the goal-oriented outcomes of radical democratic will formation."¹⁴⁹

C. *The Latent Power of the Lifeworld*

Habermas abandons the dichotomy between the individual (*qua* Cartesian self-referential, power-seeking subject) and society (*qua* identity-obliterating, organic collective). It is replaced with a model of ongoing communicative action that is "carried or sup-

142. HABERMAS, *supra* note 139, at 361.

143. JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 13 (1984).

144. HABERMAS, *supra* note 109, at 58.

145. MICHAEL PUSEY, JÜRGEN HABERMAS 80, 83, 120 (1987).

146. HABERMAS, *supra* note 139, at 296.

147. HABERMAS, *supra* note 76, at 3 (society becomes anomic when the consensual foundations of traditional normative structures are severely impaired).

148. HABERMAS, *supra* note 139, at 364.

149. *Id.* at 365.

ported from behind, as it were, by a lifeworld that not only forms the *context* for the process of reaching understanding but also furnishes *resources* for it."¹⁵⁰

The lifeworld is a warehouse of unquestioned cultural givens.¹⁵¹ This warehouse of presuppositions comes to the foreground when members of society "construct, negotiate, and reconstruct the social meanings of their world."¹⁵² As Habermas writes: "[i]nsofar as speakers and hearers straightforwardly achieve a mutual understanding about something in the world, they move within the horizon of their common lifeworld;¹⁵³ this remains in the background of the participants — as an intuitively known, unproblematic, and unanalyzable, holistic background."¹⁵⁴

After an item in the lifeworld's store of knowledge becomes relevant to a situation or discussion, it can become knowledge in a strict epistemological sense.¹⁵⁵ When a discussion reaches the stage of decisionmaking, any taken-for-granted background knowledge can be tested by discourse ethics, which is a mode of discourse quite different from unreflective everyday conversation.

Although culturally ingrained "always-in-the-background" assumptions resist thematization,¹⁵⁶ the three "universal *structures*"¹⁵⁷ that transcend the everyday conversation of participants interacting in the lifeworld¹⁵⁸ are culture, society, and personality.¹⁵⁹

Culture denotes that reservoir of knowledge "from which those engaged in communicative action draw [their viewpoints] susceptible of consensus as they come to an understanding about something in the world."¹⁶⁰ This pre-given, pre-reflective, pre-theoretical context can be brought to the foreground and expressed in

150. HABERMAS, *supra* note 109, at 135.

151. *Id.*

152. HABERMAS AND MODERNITY, *supra* note 1, at 22.

153. "The lifeworld forms a horizon and at the same time offers a store of things taken for granted in the given culture from which communicative participants draw consensual interpretive patterns in their efforts [to reach understandings]." HABERMAS, *supra* note 139, at 298.

154. HABERMAS, *supra* note 139, at 298.

155. HABERMAS, *supra* note 103, at 124.

156. Background assumptions are not identifiable until a situation brings to mind a relevant and problematic segment of the lifeworld. See HABERMAS, *supra* note 139, at 299.

157. *Id.* at 343.

158. *Id.* at 299.

159. *Id.*

160. *Id.* at 343.

statements asserting validity claims. The validity claims can be exposed to the rigorous tests of discourse ethics. The person to whom a validity claim is addressed can respond either by saying "yes" or "no" based on reasons. Any new consensual agreement adds to the culture's stock of knowledge.¹⁶¹

Society, in the narrower sense of the word, as it is used by Habermas, describes the traditional normative order. Because conceptions of morality are always embedded in the customs of a time and place in history, or in what Hegel called *Sittlichkeit*, discourse ethics enables the participants to expand their intellectual horizons, escape from traditional shibboleths, and advance everyone's best interests.

Personality, the third lifeworld structure, refers to "acquired competences that render a subject capable of speech and argumentation and hence able to participate in processes of mutual understanding in a given context and to maintain his own identity in the shifting contexts of interaction."¹⁶²

The latent content of the three component structures (culture, society, and personality) corresponds to each individual's differentiated objective, social, and subjective worlds. The same three lifeworld structures can be described functionally and diachronically as processes of cultural reproduction, social integration and socialization. Habermas writes:

Cultural reproduction ensures that (in the semantic dimension) newly arising situations can be connected up with existing conditions in the world; it secures the continuity of tradition and a coherency of knowledge sufficient for the consensus needs for everyday practice. *Social integration* ensures that the newly arising situations (in [norm regulated] social space) can be connected up with existing conditions in the world; it takes care of the coordination of action by means of legitimately regulated interpersonal relationships and lends constancy to the identity of groups. Finally, the *socialization* of members ensures that newly arising situations (in the dimension of historical time) can be connected up with existing world conditions; it secures the acquisition of generalized capacities for action for future generations and takes care of harmonizing individual life histories and collective life forms.¹⁶³

161. HABERMAS, *supra* note 103, at 132-33.

162. HABERMAS, *supra* note 139, at 343.

163. *Id.* at 343-44.

Habermas's insights direct attention to the evolution of society which, through discourse ethics, can lead to beneficial changes if society can withstand the imperialism of economic and bureaucratic steering agencies. The Secretary's gag rule interferes with cultural reproduction; it also impedes social integration and socialization because it does not allow Title X grantees and their clients to participate in the process of mutual understanding.

D. *The Uncoupling of Steering System and Lifeworld*

In Habermas's analysis, the uncoupling of system and lifeworld occurs when the resources of the lifeworld are colonized, exploited, taken, and taxed by the self-steering subsystems in society. Habermas writes, "In modern societies, economic and bureaucratic spheres emerge in which social relations are regulated only via money and power."¹⁶⁴

Instrumentally rational subsystems "penetrate [into] the core domains of cultural reproduction, social integration and socialization."¹⁶⁵ Habermas questions "whether under these changed premises it still makes any sense to speak of 'a society exercising influence upon itself.'"¹⁶⁶

What can be done? Habermas develops his theory of discourse ethics in order to secure the conditions for freedom, enlarged lifeworld space, and greater equality of opportunity:

The point is to protect areas of life that are functionally dependent on social integration through values, norms, and consensus formation, to preserve them from falling prey to the systemic imperatives of economic and administrative subsystems growing with dynamics of their own, and to defend them from becoming converted over, through the steering medium of the law, to a principle of sociation that is, for them, dysfunctional.¹⁶⁷

The problems of resisting the expanding quasi-autonomous eco-

164. HABERMAS, *supra* note 103, at 154.

165. HABERMAS, *supra* note 139, at 355.

166. HABERMAS, *supra* note 139. Then Professor, now Justice, Scalia wrote, "There is abroad in our land the feeling that we no longer control our government, but it controls us, through thousands of law-making functionaries in every field of life who are effectively beyond popular control." Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 REG. 19, 26 (1979).

167. HABERMAS, *supra* note 103, at 372-73.

conomic and administrative subsystems are formidable, perhaps insurmountable. Apathetic citizens are numerous and adequately informed voters are few. Single issue pressure groups negotiate instrumentally rational compromises with *this* committee of Congress or *that* executive agency. Logrolling and pork-barrel politics are not sufficiently criticized because of the widespread indifference on the part of the public. As David Riesman wrote:

[These "new indifferents" are not] devoid of political opinions. . . . But . . . the . . . indifferents do not believe that, by virtue of anything they do, know, or believe, they can buy a political package that will substantially improve their lives. And so, subject to occasional manipulations, they tend to view politics in most of its large-scale forms as if they were spectators.¹⁶⁸

Habermas observes, "[I]n the manipulated public sphere an acclamation-prone mood comes to predominate, an opinion climate instead of public opinion."¹⁶⁹

To make matters worse, the powers of administrative agencies "are expanded in such a way that their activity can no longer be considered a mere execution of the law."¹⁷⁰ Bureaucrats are given virtually free rein because statutes contain no intelligible direction concerning most of the specific issues to be resolved by agencies.

As the system of "bureaucratic disempowering"¹⁷¹ expands, the desire to rein in the bureaucracy becomes the dire need to avoid the danger of creeping totalitarianism. The federal courts, however, even with the power of judicial review over agency action, cannot adequately reduce abuses of discretion by administrative agencies.

A theory of discourse ethics under these circumstances calls to mind the claim that theories have no consequences in the real world.¹⁷² But such a claim makes us less conscious of the critical need to transform the theory of discourse ethics into institutionalized practices that ameliorate the dehumanizing effects produced by corporate hierarchies and the administrative state.

168. JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 217 (Thomas Burger & Frederick Lawrence trans., 1989) (quoting DAVID RIESMAN, *THE LONELY CROWD* 189-90 (1950)).

169. *Id.*

170. HABERMAS, *supra* note 168, at 179.

171. HABERMAS, *supra* note 103, at 325.

172. *See supra* text accompanying notes 79-85.

E. *Emancipatory Discourse Ethics as a Potential Alternative to System Dominance*

Habermas argues that the law's validity depends on reflective discursive testing rather than "mere de facto acceptance . . . of habitual practices."¹⁷³ Indeed, because of the general and unavoidable presuppositions of achieving [intersubjective] understanding in language,¹⁷⁴ participants in discourse ethics can "bring about a [consensus] that terminates in the intersubjective mutuality of reciprocal understanding, shared knowledge, mutual trust, and accord with one another."¹⁷⁵ Since "[v]alidity claims are *internally* connected with reasons and grounds,"¹⁷⁶ valid law depends on the use of reason¹⁷⁷ to achieve an acceptable and supportable agreement.¹⁷⁸

According to Habermas, there are "three different aspects of validity."¹⁷⁹ More specifically, a citizen can challenge and contest the validity claim of a lawmaker in part or *in toto* by either disputing the *truth* of the validity claim, the *rightness* of a proposed law, or the *truthfulness* of the intention expressed by the lawmaker.¹⁸⁰ If there is a consensus about (1) truthfulness of lawmakers, (2) the instrumental rationality of a proposed law, and (3) its normative rightness, then the proposed law, if enacted, is valid.

The validity thesis of discourse ethics emphasizes legitimacy and consensus not power. Even positivists agree that social stability is secured best by a widely shared sense that the law should be voluntarily obeyed. The social system, however, needs a normative anchor.¹⁸¹ If enough reflective citizens engage in discourse ethics and decide that an immoral law or agency rule does not deserve their voluntary obedience, then the system will sense the pressure

173. HABERMAS, *supra* note 109, at 19.

174. See Jürgen Habermas, *What is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 1 (Thomas McCarthy trans., 1979).

175. *Id.* at 3.

176. *Id.* at 313.

177. HABERMAS, *supra* note 143, at x, (Editor's introduction).

178. *Id.*

179. HABERMAS, *supra* note 139, at 313.

180. *Id.*

181. Habermas's work on systems theory and theories of socialization and communication help us better understand "how to conceive of society as at once socially and systemically integrated." Thomas McCarthy, *Ideals and Illusions: On Reconstruction and Deconstruction*, in CONTEMPORARY CRITICAL THEORY 156 (1991).

from its hostile environment and officials will be more likely to respond to consensus-based criticism.

F. *The Supreme Court's Statism*

Agencies have a duty to support their rules with a reasoned explanation.¹⁸² A fully reasoned explanation would demonstrate whether or not an agency rule is normatively unconscionable. *Rust*,¹⁸³ however, demands far less of administrative agencies. Recall that many low-income women depend on Title X projects.¹⁸⁴ Nevertheless, Title X health care providers may not disclose what they know about a pregnant woman's options.

Contrary to Habermas's model of unforced agreements, Title X providers do not fully disclose: (a) their knowledge of existing medically appropriate alternatives; (b) their intentions to deceive; and, (c) their own views concerning what is morally right. Although the instrumentally rational Title X regulations might reduce the incidence of abortion, they mislead the gullible, unwary, and unsophisticated women who have been lured into the program.¹⁸⁵ In this way, the federal government is regulating access to reliable medical advice, a scarce economic resource.¹⁸⁶ Not everyone can buy the information needed to make a knowledgeable decision about their future.

After observing how government largess is an increasing necessity,¹⁸⁷ Charles Reich wrote:

One of the most important developments in the United States [since 1950] has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses. Government has always had this function.

182. See *Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

183. 111 S. Ct. 1759 (1991).

184. Other women who would have sought advice elsewhere but for the convenience of the Title X project discover, after paying the fee, that they have purchased misleading information. See *Massachusetts v. Sullivan*, 899 F.2d 53, 70 (1st Cir. 1990).

185. The regulations are crafted in a fashion which "constitutes a trap for the mostly unsophisticated and unwary patients" at a Title X clinic. *New York v. Sullivan*, 889 F.2d 401, 415 (2d Cir. 1989) (Cardamone, J., concurring).

186. "The greatest force of a modern government lies in its power to regulate access to scarce resources." Kreimer, *supra* note 96, at 1296.

187. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

But while in early times it was minor, today's distribution of largess is on a vast, imperial scale.¹⁸⁸

Paraphrasing Reich, dependent welfare recipients become trapped in an underclass more horrific than feudalistic serfdom.¹⁸⁹

According to the Court, these individuals have no one to blame but themselves, since the surrender of precious rights in return for a federal grant is a "voluntary" exchange.¹⁹⁰ Even though the regulations do not meet a poor woman's *need* for advice, Rehnquist's opinion echoes an economist's disdain for the word "needs." Many economists explain:

Most of us are in the habit of thinking of . . . needs. Some needs are even claimed to be "vital", "urgent", "crying," . . . or "critical." Yet, as ringing as these words can be, they have no basis in fact. . . .

. . . Everyone, no matter how poor, will give up *some* of one good if offered *enough* of other goods.¹⁹¹

According to economists preoccupied with supply and demand curves, the word "needs" is substituted incorrectly for the word preference. Nevertheless, the opposite is true; economists conflate needs and preferences incorrectly since human beings choose their preferences, whereas human needs (e.g., sense of personal identity, sleep, water) exist regardless of their choice.¹⁹²

Rust supports the suggestion that the subject of administrative law is "an oxymoron."¹⁹³ "[P]articularly appalling to constitutional scholars,"¹⁹⁴ whether or not they support *Roe v. Wade*,¹⁹⁵ is the Court's assault on the First Amendment¹⁹⁶ and the doctrine of un-constitutional conditions.

188. *Id.*

189. Reich referred to the new feudalism, a metaphor that updated Weber's "iron cage." *Id.* at 768-71.

190. *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

191. ARMEN ALCHIAN & WILLIAM R. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION & CONTROL* 20 (1983).

192. CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 139 (1987).

193. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2072 (1990).

194. Ronald Dworkin, *The Reagan Revolution and The Supreme Court*, 38 N.Y. REV. OF BOOKS 23 (1991) (book review).

195. 410 U.S. 113 (1973).

196. The First Amendment was one of Justice O'Connor's primary concerns. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1788 (1991) (O'Connor, J., dissenting).

The statism of the Court disappoints progressive thinkers like Kathleen Sullivan who helped write the brief for the losing petitioners in *Rust*.¹⁹⁷ The Court's statism is no less disappointing to libertarians who believe unborn children should be protected by the government. No tolerant compassionate democrat can be pleased by regulations that "prescribe what [ideas] shall be orthodox"¹⁹⁸ when women ask physicians about their health-related options.

Rust encourages the subsystems of the administrative state to impinge intrusively upon lifeworld processes of identity-formation,¹⁹⁹ sociation, and social integration. The Secretary's regulations deny to many women a right to discuss which reproductive choices are normatively right without being manipulated, deceived, or coerced.²⁰⁰ As Habermas wrote, there is a need to protect functions of human life that are largely dependent on consensus formation "from . . . systemic imperatives of economic and administrative subsystems growing with dynamics of their own."²⁰¹ The Rehnquist Court, however, seems eager to accommodate the subsystems.

Although *Rust* still recognizes the university as a "traditional sphere of free expression,"²⁰² the Court's contrived dichotomy between "traditional spheres of free expression" and spheres of government-controlled speech shrinks the "marketplace of ideas." As a result, there is a significant *inequality* of opportunity in the nation's system of free expression. Not everyone can afford a university and not everyone who visits a Title X project can afford private health care. Given the government's power to dominate the marketplace of ideas by creating restricted-speech zones, the Court provides less than adequate conditions for truth-seeking. Of course, the best reason for protecting the marketplace of ideas is not the proven ability of the market to provide truth, but the fre-

197. See Brief for Petitioner, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (No. 89-1391).

198. See *Texas v. Johnson*, 491 U.S. 397, 415 (1989).

199. "Government indoctrination on the morality of abortion [obviously] hinders a woman's ability to choose for herself how to order the most intimate aspects of her own life." Janet Benshoof, Comment, *The Chastity Act: Government Manipulation of Abortion Information and the First Amendment*, 101 HARV. L. REV. 1916, 1936 (1988).

200. See *supra* text accompanying notes 42-59.

201. HABERMAS, *supra* note 103, at 373.

202. 111 S. Ct. at 1776.

quently evidenced desire of the government to conceal information.²⁰³

In *Rust*, the Court chose to endorse regulations that are one-sided. For example, doctors are now required to advise patients: "Let's see now, Ms. Smith, you have the option of bearing children or the option of . . . uh, bearing children."

The Secretary justifies his gag rule as an efficient means of preventing a slide into "moral relativism."²⁰⁴ Yet he also relies on an alleged shift in the public's attitude concerning the "elimination of unborn children by abortion."²⁰⁵ This is curious reasoning. If the Secretary opposes moral relativism, then his policies should not change in accordance with transitory and unreflective attitudinal shifts. It follows from *Rust*, however, that when the President's policy changes, an agency may suddenly change its interpretations of statutes.

The Court and the Secretary agree that "[t]he Department's responsibility . . . is to implement the choice that Congress made in enacting section 1008."²⁰⁶ The catch-22 created by *Rust* is this: although required to implement Congress' choices, the Secretary actually decides what policy is mandated by Congress, and the Court asks virtually no questions so long as the Secretary's choice is not inconsistent with Congress' clear intent with respect to the precise issue in question.²⁰⁷ Because of the discretion given to rulemaking agencies by *Rust*, government subsidies may now be used as leverage to reduce the number of health providers who are free to tell women that abortion is one of their legal options.

Agencies obviously may not directly abridge First Amendment rights. However what agencies may not do directly, they *may* do by withholding allocated funds as a sanction. Regulators get away with this strategy, since the Court asserts that any applicant for Title X funds "retains the choice of complying or not."²⁰⁸ As for the women who suffer, they are victimized by the Court's weakened doctrine of unconstitutional conditions.

Rust is unprecedented; indeed "[t]he right of the doctor to ad-

203. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 34 (1982).

204. 53 Fed. Reg. 2922 (1988)(to be codified at 42 C.F.R. § 59).

205. 111 S. Ct. at 1769.

206. 53 Fed. Reg. 2922 (1988) (to be codified at 42 C.F.R. § 59).

207. See *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43, *reh'g denied*, 468 U.S. 1227 (1984).

208. Kreimer, *supra* note 96, at 1304.

wise his patients according to his best lights seems so obviously within [the] First Amendment . . . as to need no extended discussion."²⁰⁹ In the past, the Court rejected government efforts "to wedge [its] . . . message discouraging abortion into the privacy of the informed-consent dialogue . . ."²¹⁰ The suppression of ideas is absolutely proscribed by the First Amendment,²¹¹ or so it seemed until *Rust* upheld the power of the executive branch to censor the speech of doctors who accept Title X funds.

The *Rust* majority claims that the government's conditions only indirectly²¹² affect the speech of those who apply for federal grants and only collaterally affect the needs of women. The majority's opinion unrealistically maintains that the disqualified grantees (and their patients) are no worse off than they were before the regulations were issued.²¹³

How far does this fallacious logic of the Court extend? Does it follow that the Secretary could make grant applicants renounce their memberships in pro-choice organizations? Certainly, that cannot be the law. And yet, according to *Rust*, choosing speech-restrictive conditions is entirely up to the rulemaking agency. This unabashed statism is hardly designed to protect the best interests of impecunious pregnant women who are treated ignominiously as if they are not morally responsible enough to be fully informed.

The pregnant women deprived of medical advice are medically and financially worse off after they enter the Title X project than they were before they visited the clinic. Nevertheless, the Court insists that "[t]here is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."²¹⁴ Therefore, the Court did not require the Secretary to shoulder the burden of persuasion demonstrating the absence of less onerous alter-

209. *Poe v. Ullman*, 367 U.S. 497, 513 (1961) (Douglas, J., dissenting from majority's ruling on standing).

210. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986); see also *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 443-44 (1983).

211. See *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965).

212. Labelling an effect "indirect" is often misleading rhetoric. The underlying thought is merely that "the law is not indifferent to considerations of degree." *Carter v. Carter Coal Co.*, 298 U.S. 238, 327 (1936) (quoting *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 554 (1935)) (Cardozo, J., concurring).

213. *Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

214. *Id.* at 1772 (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977)).

natives,²¹⁵ even though many women are harmed and exploited by the Secretary's regulations.

For more than a decade, there was reason to believe that the unconstitutional conditions doctrine had more bite, but the Warren Court's question begging focus on overbreadth²¹⁶ did not deal substantively with the "greater and lesser" doctrine.²¹⁷ This doctrine is the nemesis of a normative theory of unconstitutional conditions which would require judges to evaluate the externalities of bargains negotiated between the government and its grantees.

Justice Holmes, the quintessential pragmatist, was unable "to understand how a condition can be unconstitutional when attached to a matter over which a State has absolute arbitrary power."²¹⁸ Holmes's befuddlement notwithstanding, the doctrine of the greater and the lesser obviously is inapplicable in some cases; for example, the State does not have the lesser power to punish females simply because it has the greater power to punish both males and females.

Many landmark judicial opinions more sensitively protect First Amendment rights. For example, *Keyishian v. Board of Regents*²¹⁹ forbids states to precondition employment "upon the surrender of constitutional rights which could not be abridged by direct government action."²²⁰ *Perry v. Sindermann*²²¹ makes it clear that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests -- especially, his interest in freedom of speech."²²²

In *Rutan v. Republican Party*,²²³ the Court reiterated the maxim: "What the First Amendment precludes the government from commanding directly, it also precludes the government from

215. The Court simply asserted that the government may favor childbirth over abortion, but this does not necessarily mean that the government interest outweighs the competing First Amendment values at stake. *Id.* at 1774-75.

216. The overbreadth technique decides speech problems evasively and "often more sketchily" than an "open confrontation." See GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1188 (10th ed. 1980).

217. See Kreimer, *supra* note 96, at 1308.

218. *Western Union Tel. Co. v. Kansas*, 216 U.S. 1, 53 (1910) (Holmes, J., dissenting).

219. 385 U.S. 589 (1967).

220. *Id.* at 605.

221. 408 U.S. 593 (1972).

222. *Id.* at 597 (dictum).

223. 110 S. Ct. 2729 (1990).

accomplishing indirectly."²²⁴ *Rust* adopts a different approach supposedly because the government is not denying a benefit or a privilege to anyone; it "is instead simply insisting that public funds be spent for the purposes for which they were authorized."²²⁵

Rust is at odds with analogous tax exemption cases.²²⁶ In *FCC v. League of Women Voters*,²²⁷ for example, the Court stated that in cases involving the spending power, "[a] regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'"²²⁸ The *Rust* majority contracted the scope of *League of Women Voters* and relied on dicta in *Regan v. Taxation with Representation of Washington*.²²⁹

In *Regan*, the appellee, Taxation with Representation, ("TWR") was not entitled to a tax exemption under section 501(c)(3) of the Internal Revenue Code ("Code") if it engaged in lobbying.²³⁰ Although the Court held that section 501(c)(3) did not violate the First Amendment rights of TWR, *Regan* is arguably distinguishable from *Rust* because TWR remains eligible for a tax exemption under Code section 501(c)(4).²³¹ Moreover, the Code is not aimed at suppressing TWR's ideas.²³² In short, TWR's First Amendment rights are not substantially burdened because it has an adequate opportunity to obtain a tax exemption. In *Rust*, however, there are no other federal subsidies available for grantees who provide non-directive options counseling. Of course, grantees are not precluded from counseling women about options if they do so in a different forum, physically separated from a Title X facility.²³³ This alternative does not help the women who are misled by the

224. *Id.* at 2738-39.

225. 111 S. Ct. at 1774.

226. See e.g., *Speiser v. Randall*, 357 U.S. 513 (1958). In *Speiser*, the Court wrote, "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. . . . The denial is 'frankly aimed at the suppression of dangerous ideas.'" *Id.* at 518-19 (quoting *American Communications Ass'n. v. Douds*, 339 U.S. 382, 402 (1950)).

227. 468 U.S. 364 (1984).

228. *Id.* at 383-84 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring)).

229. 461 U.S. 540 (1983).

230. *Id.* at 542.

231. *Id.* at 551.

232. *Id.* at 548.

233. 111 S. Ct. at 1774-75.

advice obtained in a Title X facility.²³⁴

As interpreted by the *Rust* majority, *Regan*, without any qualifications or reservations, supports the proposition that a “‘legislature’s decision not to subsidize the exercise of a [First Amendment] right does not infringe the right.’”²³⁵ In other words, the Court’s strict compelling interest test does not apply even if a conditioned government subsidy discriminates on the basis of speech content.²³⁶

In *Rust*, petitioners relied upon *Arkansas Writers Project, Inc. v. Ragland*, but Chief Justice Rehnquist found this reliance misplaced.²³⁷

That case involved a state sales tax which discriminated between magazines on the basis of their content. Relying on this fact, and on the fact that the tax “targets a small group within the press,” contrary to our decision in *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 . . . (1983), the Court held the tax invalid. But we have here not the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from scope of the project funded.²³⁸

The so-called “small group” of magazines targeted in *Arkansas Writers Project* included all the general interest magazines that were taxed, as compared with the religious, professional, trade and sports journals that remained tax exempt. If general interest magazines are a small targeted group, then so are impecunious pregnant women.

234. The rights of female patients were asserted by the plaintiff grantees. *Id.* at 1766.

235. *Id.* at 1772 (quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549 (1983)).

236. See *Regan*, 461 U.S. at 549; *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting). In *Rust*, the Court did not concede that the Secretary’s regulations discriminated on the basis of viewpoint, but they did. A regulation is viewpoint neutral when it “‘does not favor either side of a political controversy,’” *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quoting *Consolidated Edison Co. v. Public Serv. Comm’n*, 447 U.S. 530, 537 (1980)), and does not “regulate speech in ways that favor some viewpoints or ideas at the expense of others.” *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

237. 481 U.S. 221 (1987).

238. 111 S. Ct. at 1773.

G. *Paying Lip Service to Prudential Canons of Judicial Restraint*

In *Rust*, the Court applied the formula of statutory interpretation embodied in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²³⁹ *Chevron* and its progeny hold that where a court's statutory interpretation fails to reveal a congressional purpose contrary to the challenged agency action, the court should accept a reasonable agency construction.²⁴⁰ Since agencies are in the best position to understand the implications of their enabling act,²⁴¹ *Chevron's* defenders claim that, "[b]ecause of their superior accountability, expertise, and ability to coordinate complex enact-

239. 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984). *Chevron* upheld an Environmental Protection Agency (EPA) rule under the Clean Air Act § 172(b)(6), 42 U.S.C. § 7502(b)(6)(1977), allowing states to treat all pollution emitting sources within the same industrial group as though they were just one source. Before the 1980's, any pollution emitting device within a plant was viewed as a separate source. In 1981, the EPA began focusing on the emissions emitted from the entire plant, and thereafter plants were permitted to modify existing sources of pollution so long as the modification did not produce an additional net increase in pollution. EPA's policy change (the so-called bubble concept) gave "company management greater control over specific decisions affecting air quality as long as the total impact of a plant on air quality [was] not affected negatively by those decisions." RICHARD J. PIERCE, SIDNEY A. SHAPIRO & PAUL R. VERKUIL, *ADMINISTRATIVE LAW AND PROCESS* 406 (1985). "The question for decision in *Chevron* was whether the plantwide definition of 'source' violated the Clean Air Act." Sunstein, *supra* note 193, at 2083. The Supreme Court upheld EPA's new interpretation because Congress never addressed the specific issue of whether a "source" (the statutory term in question) referred to an entire plant or only part of a plant.

240. Even in pure questions of statutory interpretation that do not depend on the specific facts of the rulemaking record, the Court will accept the agency's construction of the statute, if it is reasonable, unless Congress has directly spoken to the precise question at issue in the case at bar. *Chevron*, 467 U.S. at 842-45. Before *Chevron*, courts showed a much more pronounced tendency to interpret statutes "independently when pure questions or major questions were involved and primary interpretive authority had not been delegated [clearly] to the agencies." Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts*, 7 *YALE J. ON REG. L.* 19 (1990).

241. How should a court decide, under the *Chevron* approach, whether Congress in 1970 delegated to the Secretary power in 1988 to deny federal funds to grantees who wish to counsel persons concerning abortion? Several factors should be taken into account by courts when Congress' intent to delegate is not clear. The following is a partial list:

1. Is the agency competent enough to be entrusted with the virtually unreviewable responsibility to interpret the statute in accordance with its preferred policy choices?
2. Has the agency earned a reputation for fairness, reliability, and a capability to resist undue political pressures?
3. Is the agency empowered to make legislative rules that have the same force and effect as statutes or is it merely given power to clarify, by interpretive rules, pre-existing statutory norms? If the agency is not given the power to make legislative rules, then judicial review should not be extremely deferential on pure questions of statutory construction.

ments, agencies should be given the benefit of every doubt."²⁴² The Court has emphasized that "[w]hen an agency is charged with administering a statute part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities."²⁴³ Nevertheless, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court [should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."²⁴⁴ There is obviously tension between *Chevron* and prudential doctrines admonishing judges to construe statutes narrowly whenever agency action presents "a significant risk" of unconstitutionality.²⁴⁵

Invocation of *Chevron* was a surprise to astute commentators who had incorrectly assumed that "[w]hen constitutionally based norms conflict with an agency's interpretation [of a statute], it is highly probable that the agency's view will not prevail."²⁴⁶ Indeed, before *Rust*, it seemed "implausible" to assert that "agency interpretations of ambiguous statutes [would] prevail even if the consequence of those interpretations was to produce invalidity or to raise serious constitutional doubts."²⁴⁷ In *NLRB v. Catholic Bishop of Chicago*,²⁴⁸ for example, the Court went so far as to "severely strain[] the statutory text in order to avoid a constitutional question."²⁴⁹ The Court did not defer to the NLRB's interpretation of the governing statute since "[t]he values enshrined in the First Amendment plainly rank high 'in the scale of our national values' [and] [i]n keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its

242. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 444 (1989). Sunstein himself is far less supportive of *Chevron*. See *id.*

243. *Department of the Treasury v. FLRA*, 110 S. Ct. 1623, 1629 (1990) (citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984)).

244. Brief for Petitioners, at 37, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (No. 89-1391) (quoting *Edward DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

245. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). In *Webster v. Reproductive Health Services*, Justice O'Connor referred to the "venerable principle" of avoiding constitutional questions. 109 S. Ct. 3040, 3060 (1989) (O'Connor, J., concurring).

246. Sunstein, *supra* note 193, at 2112.

247. *Id.* at 2113, quoted in *Rust v. Sullivan*, 111 S. Ct. 1759, 1780 (1991) (Blackmun, J., dissenting).

248. 440 U.S. 490 (1979).

249. William N. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1022 (1989).

jurisdiction here would give rise to serious constitutional questions."²⁵⁰

The *Catholic Bishop* rule²⁵¹ has been applied in many cases. In *Edward J. Debartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*,²⁵² the Court described its policy of judicial restraint as follows:

[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle . . . is beyond debate . . . "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach . . . recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.²⁵³

Chief Justice Rehnquist, in *Rust*,²⁵⁴ conceded that:

The principle . . . is a categorical one: "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act." This principle is based at least in part on the fact that a decision to declare an act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform."²⁵⁵

250. *Catholic Bishop*, 440 U.S. at 501.

251. In the 1980's, the Court refused to interpret statutes expansively whenever a narrowed construction would avoid an interpretation of the Constitution. See, e.g., *Regan v. Wald*, 468 U.S. 222, 240-43 (1984) (laws banning travel to Cuba narrowly construed to avoid potential conflict with due process clause); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 n.24 (1983) (Court abstained from addressing equal protection clause issues by narrowly interpreting the Internal Revenue Code); *United States v. Security Indus. Bank*, 459 U.S. 70, 82 (1982) (absent clear statement of congressional intent, Bankruptcy Act was construed narrowly to avoid deciding "difficult and sensitive questions" of constitutional law); *Industrial Union Dep't v. American Petroleum Inst.* 448 U.S. 607, 645-46 (1980) (construing Occupational Safety and Health Act narrowly to avoid resolving issue of unconstitutional delegation). Many other citations appear in Eskridge, *supra* note 249, at 1022.

252. 485 U.S. 568 (1988).

253. *Id.* at 575 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1985)).

254. In *Chapman v. United States*, 111 S. Ct. 1919, 1927 (1991), decided seven days after *Rust*, Chief Justice Rehnquist wrote, "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

255. *Rust v. Sullivan*, 111 S. Ct. 1759, 1771 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

The Chief Justice, by some sleight of logic, concluded that the Secretary's regulations did not raise the sort of "grave and doubtful constitutional questions that would lead us to assume Congress did not intend to authorize their issuance."²⁵⁶

Having chosen to hold that the Secretary's regulations were authorized by Title X, the Court considered several grave and doubtful First Amendment questions. For example, may an agency censor the speech of health care providers? Since the health care providers in *Rust* were employed in a federally funded project, the Court explained that "the employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority."²⁵⁷ *Rust* therefore endorses the "dangerous proposition" that "the First Amendment . . . tolerate[s] any governmental restriction upon an employee's speech so long as that restriction is limited to the funded workplace."²⁵⁸

The Court's unnecessary and unwise deference to the Secretary dramatically demonstrates the "large-scale shift in the allocation of authority within American institutions."²⁵⁹ As a result, the people's right to participate in democratic decisionmaking is subordinated to the autocratic use of bureaucratic power.

V. PAINFUL LESSONS LEARNED FROM *Rust*

The Secretary's regulations stigmatize poor pregnant women as inferior human beings who cannot be trusted as responsible moral agents if they are fully informed by their health care providers. The bargain between the government and Title X grantees presumably is, so far as the contracting parties are concerned, mutually beneficial. The agency, however, did not adequately consider the interests of low income women whose needs and aspirations

256. *Id.* at 1771 (quoting *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Rehnquist did not think that *Rust* was a close case, and he stated, "There is no question but that the statutory prohibition contained in § 1008 is constitutional." *Id.* at 1772.

257. *Id.* at 1775.

258. *Id.* at 1783 (Blackmun, J., dissenting).

259. Sunstein, *supra* note 193, at 2077. The Court in *NLRB v. United Food & Commercial Workers Union* held that judicial deference is required even when the issue resolved by the agency involves a pure question of statutory construction, since an agency must be accorded "deference . . . as long as its interpretation is rational and consistent with the statute." 484 U.S. 112, 123 (1987).

were deliberately neglected in order to achieve political objectives that were not related to health. Other foreboding messages sent by *Rust v. Sullivan* include:

1. Women suffer the social costs (i.e., the externalities²⁶⁰) of many agency rules and they cannot count on courts to nullify morally abhorrent agency rules. The Rehnquist Court marginalizes, if not ignores, the reasonable expectations of low-income, pregnant women.

2. The least powerful segments in our society are usually the hardest hit when agencies use financial disincentives.

3. Conditional grant programs exploit the dependency of organizations and entities in order to make them supporters of federal policy. In effect, the recipients of government funds are deputized as agents, if not puppets, of the federal government.

4. The Department of Health and Human Services, notwithstanding its more than 123,000 employees,²⁶¹ has become too remote from the everyday lives of the ordinary people they serve and govern.²⁶²

5. The enormous amount of money that Congress appropriates each year attracts self-interested groups who lobby for morally insensitive agency rules that are valuable to them.²⁶³ The Courts decline to interfere, even when the loser in the lobbying contest is freedom of speech.

6. Contributions of money by Political Action Committees ("PAC") enable interest groups to exert powerful influences on the single issue that they care about, thereby diminishing and diluting the influence of the general public during the rulemaking process. PAC money frequently undermines representative government.²⁶⁴

260. "Costs borne by others are called *externalities*. The failure to impose all the components of cost on the decision maker often produces consequences deemed distressing and objectionable — such as 'excessive' pollution and 'shortsighted' . . . laws." ALCHAIN & MILLER, *supra* note 191, at 5 (emphasis in original).

261. Gerald E. Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 574 n.54 (1990).

262. Bureaucracies "unprecedented in size and power [are] regulating previously autonomous private interests, as well as dispensing benefits and subsidies to groups that formerly had been assisted, if at all, by local government and private charities." ROBERT RABIN, *PERSPECTIVES ON THE ADMINISTRATIVE PROCESS* 1 (1979).

263. Judge Posner, in his description of the interest group theory of legislation "asserts that legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare. . . ." Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

264. HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* 263 (1988) (quoting a former secretary of the Department of Health, Education, and Welfare, and the president of Common Cause).

7. There is evidence that “[p]ublic expenditures are made for the primary benefit of the middle classes, and financed with taxes which are borne in considerable part by the poor and rich.”²⁶⁵ “The constituencies that were supposed to have benefited from new bureaucratic and regulating programs — the poor and disadvantaged, environmentalists, consumers, and workers’ organizations — have found the benefits delivered to be far below those promised.”²⁶⁶

8. In Habermas’s terminology, the lifeworld diminished by bureaucratic encroachments provides disempowered citizens with little personal control over their lives. The Supreme Court, unfortunately, does not deplore bureaucratic techniques of domination²⁶⁷ by “[s]pecialists without spirit, sensualists without heart.”²⁶⁸

9. The lingering ideology of positivism condones repressive and exploitative administrative subsystems that are unresponsive to the needs of the truly disadvantaged.²⁶⁹ These administrative subsystems often interfere with a person’s identity formation and a discrete and insular group’s social integration.²⁷⁰

10. A multitude of agencies responsive to special interests and unresponsive to the truly disadvantaged are largely uncontrollable by society. “The legal commands adopted by . . . agencies are necessarily crude, and dysfunctional in many applications. . . .”²⁷¹

11. When instrumentally rational agency officials do not engage in reflective communicative action with their critics and clientele, the very idea of the common good is emptied of real meaning.

VI. ALTERNATIVES TO JUDICIAL REVIEW

Courts are no longer providing meaningful judicial review when agency rules are challenged as arbitrary and capricious.²⁷² Judges no longer presume that they have superior competence to interpret

265. GEORGE JOSEPH STIGLER, *Director’s Law of Public Income Distribution*, in CHICAGO STUDIES IN POLITICAL ECONOMY 106 (George Joseph Stigler ed., 1988).

266. Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342 (1990).

267. For an influential analysis of the tactics and techniques of pervasive power, see MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (1980).

268. WEBER, *supra* note 133, at 182.

269. See PHILIPPE NONET & PHILIP SELZNIC, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978).

270. See HABERMAS, *supra* note 139, at 362.

271. Stewart, *supra* note 266, at 343.

272. Under the Administrative Procedure Act, courts may hold unlawful and set aside agency actions, findings, and conclusions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (1988).

statutes limiting the power of agencies. According to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁷³ which was followed in *Rust*, it is not the province and duty of courts to "say what [administrative] law is."²⁷⁴

In pre-*Chevron* days, a court reviewing agency action exercised independent judgment to determine whether an agency is staying within the boundaries of the field marked out by Congress. To a large extent, post-*Chevron* cases allow agencies to lay down their own boundary markers whenever the agency's enabling act is ambiguous with respect to the precise issue of statutory authority. Not only does the Court allow the fox to guard the henhouse, it also does not allow lower court judges to order the agency to adhere to democratic procedures that will make administrative law more responsive to persons adversely affected by proposed agency rules.²⁷⁵

To make administrative law more democratic, an "interest" representation model of administrative law has been proposed²⁷⁶ in order to provide everyone with a better opportunity to participate in agency rulemaking proceedings.²⁷⁷ The Supreme Court, however, has rejected the model. The Court has also rejected the concept of the legislative veto, which enabled Congress to supervise agencies that run amuck.²⁷⁸ Administrative law is not sufficiently democratic, and rulemaking procedures do not allow the public to have enough input. Moreover, the courts are not well-equipped to reconstitute administrative law on their own for many reasons, including the following:

- (1) The adversarial process encourages a zero sum game and litigation forensics are inconsistent with discourse ethics. Indeed, the format of adjudication denies many interested persons access to courts.

273. 467 U.S. 837 (1984), *reh'g denied*, 468 U.S. 1227 (1984).

274. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

275. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978).

276. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1760-90 (1975).

277. This "democratic process ideal promotes the direct participation of the public through such efforts as expanded right of involvement in agency and judicial review proceedings." Thomas A. Sargentich, *The Future of Administrative Law*, 104 HARV. L. REV. 769, 774 (1991) (book review); see *Vermont Yankee*, 435 U.S. at 519, (disapproval of judge-made improvements of agency procedures).

278. *INS v. Chadha*, 462 U.S. 919 (1983) (invalidation of legislative veto).

(2) Courts cannot adapt flexibly to rapidly changing social conditions. Moreover, courts are backward looking rather than forward looking; judges usually cannot make corrective changes once a final judgment is entered.

(3) Courts, like agencies, are instrumentally rational subsystems often steering society away from a consensus-based agreement concerning normative *rightness*. In other words, courts prefer efficiency²⁷⁹ and legalistic discourse rather than moral discourse.²⁸⁰ Under the paradigm of positivism, normative *rightness* is deemed beyond the parameters of the court's province and duty to review agency rules.

(4) Scholarly checklists of interpretive "canons" (enabling courts to construe regulatory statutes) are inadequate.²⁸¹

(5) The informed public's confidence in the ability of jurists, judges, and "lawyers on their own to put right the major problems in the legal system has collapsed."²⁸² Federal judges with life tenure are increasingly divorced from the lifeworld.

Because of the inability of the courts to reconstitute administrative law, the public has no choice but to turn to Congress.

Many concerned academic commentators believe the situation is too urgent to delay radical reformation of the administrative process.²⁸³ For example, Paul Brest writes, "we must design and carry out programs of genuine participatory . . . spheres of human activity. Toward this end . . . we must abandon our obsession with courts. . . ."²⁸⁴ Brest concedes that "[p]articipatory democracy has had few modern successes and many failures. But, if only because the alternative is so bleak, there is every reason . . . to work to realize a genuinely participative deliberative democracy."²⁸⁵

279. Richard Posner, *A Theory of Primitive Society, With Special Reference to Law*, in CHICAGO STUDIES IN POLITICAL ECONOMY 149, 205 (George Joseph Stigler ed., 1988).

280. "Substantive administrative law issues tend to take a form such as "'Does the statute allow an agency to do X?' rather than, 'Is X a good or bad idea?'" Sargentich, *supra* note 277, at 769.

281. See Richard B. Stewart, *Regulatory Jurisprudence: Canons Redux?*, 79 CAL. L. REV. 807 (1991) (book review).

282. See Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769 (1987).

283. Frug, *supra* note 261, at 559 (1990); see also Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 505 n.393 (1987); Stewart, *supra* note 266, at 335 (1990); Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1986).

284. Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988).

285. *Id.* at 1631 (footnotes omitted).

A dialogue approximating discourse ethics would help people to influence the subsystems that penetrate their lives and relationships. Concededly, the conditions of discourse ethics are rarely in place in the real world. Habermas's theory is adaptable, however, and practicable procedures approximating the ideal can be devised to realize more of the benefits of a participatory deliberative democracy.

Consider, for example, the model conceived by Charles E. Larmore, who discerns in the liberal conception of political neutrality a universal norm of rational dialogue. He writes:

When two people disagree about some specific point, but wish to continue talking about the more general problem they wish to solve, each should prescind from the beliefs that the other rejects, (1) in order to construct an argument on the basis of his other beliefs that will convince the other of the truth of the disputed belief, or (2) in order to shift to another aspect of the problem, where the possibilities of agreement seem greater. In the face of disagreement, those who wish to continue the conversation should retreat to *neutral ground*, with the hope either of resolving the dispute or of bypassing it. Thus abstracting from a controversial belief does not imply that one believes it any less, that one has had reason to become skeptical toward it. One can remain as convinced of its truth as before, but for the purposes of the conversation one sets it aside.²⁸⁶

According to Larmore's model, the government's "decisions cannot be justified by an appeal to the intrinsic superiority of any . . . view that remains disputed."²⁸⁷

Compared to the models described by Habermas and Larmore, the administrative process culminating in the Secretary's gag rule falls far below acceptable levels of democratic discourse. Unfortunately, agency rulemaking procedures rarely provide the kind of "participation in the public sphere [that] . . . creates the foundation for a genuine community."²⁸⁸ Rulemaking in a participatory

286. CHARLES E. LARMORE, *PATTERNS OF MORAL COMPLEXITY* 53 (1987).

287. *Id.* at 54. Larmore's model, like Habermas's, is politically and morally neutral with regard to controversial conceptions of the common good and the good life. Their models do not eliminate irresolvable moral conflicts, but they guarantee an adequate discussion of the morality of proposed rules.

288. Brest, *supra* note 284, at 1623. The cement of any community or society is composed of varying amounts of altruism, envy, social norms, and self-interest. JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 287 (1989). The rules of the Secretary are

democracy should, at a basic minimum, include realistic, workable procedures that increase the influence of citizens affected by agency rules. More controversial proposed procedures to reconstitute administrative process include the following:

1. The composition of high-level administrative agency boards should include, in addition to the executive branch's appointees, lay persons who are elected or chosen by lot. The addition of ordinary citizens to the composition of an agency is likely to expose several agency board members to fresh ideas during their deliberations.

2. Government employees at all levels of bureaucracy should participate meaningfully (orally, if practicable) in the debates, deliberations, and final decisionmaking process of agencies. Obviously, not all employees of large agencies can participate personally, but employees at all levels should have representatives who engage in discourse ethics with the officials having final rulemaking authority.

3. Before any rule becomes final, the rulemakers should appear at a public hearing for questioning by affected members of the public. Public support or opposition of rules should be determined by impartial pollsters whose data should be well publicized and made part of the rulemaking record.

4. Rulemakers should be required to summarize their rules in televised appearances on a (C-Span-type) telephone call-in program.

5. All agency deliberations should be transcribed and videotaped. The videotapes and transcripts should be preserved and mailed to interested persons who request them, upon payment of a fee covering reasonable costs. For persons below certain income levels, fees should be waived.

6. Procedures should be devised to inform members of the public fully and frequently about the content of all written comments received by the rulemaking agency, including any proposed amendments. No empirical data or scientific studies should be withheld from the public for more than 5 days during the rulemaking proceeding. Computer software programs can be designed to improve communications between agencies and the public.

7. An office of ombudsman should be created with power to subpoena and publish documents that are not promptly disclosed by the agency. Ombudsmen should have power to investigate the public's complaints about agency action and inaction.

hardly altruistic in design for they are based on the self-interested political agenda of the Reagan and Bush administrations.

8. In addition to environmental impact statements and other impact statements required by law, there should be a normative rightness statement justifying any proposed or final rule on grounds of morality and social justice. All such statements should indicate how the rules are responsive to human needs and aspirations.

9. Procedures for decentralizing controversial decisionmaking concerning family life and family planning (by delegating power to state and local governments, as well as to other relevant private organizations) should be institutionalized unless there are compelling countervailing reasons requiring centralized control.

10. Eligibility conditions for grants must never burden fundamental rights directly or indirectly unless the agency's well-documented, reasoned explanation identifies how and why particularized compelling interests are advanced by the most narrowly tailored, least burdensome, least discriminatory eligibility requirements.

11. If congressional intent is arguably unclear, the agency should send its proposed rule and its proposed statutory construction to appropriate committees in Congress whose members shall be invited to comment on the rulemaking record.

12. If a rule is issued and upheld in court, whenever practicable, a citizen's petition for redress of grievances should be considered in congressional subcommittee hearings.

13. All proposals for greater public participation in rulemaking should be docketed in a record open for public inspection. Whenever possible, a brief reasoned statement explaining why any such proposal was rejected should also be docketed.

14. Town meetings should be held, where appropriate, to discuss proposals for reconstituting administrative law.

15. In order to generate greater public awareness and a more informed public debate, legal scholars ought to make a greater effort to educate the public about the need to curb agency power. Habermas's theory of discourse ethics should be pertinent in this scholarly effort.

16. Agencies should be required to publish in the Federal Register a list of any rules that are being reviewed by the White House or the Office of Management and Budget (OMB). Moreover, each federal agency should be required to explain how any review by the White House or OMB has affected their decision to draft a rule in a certain way. Finally, the White House and OMB should be required to disclose to the media all documents pertaining to its review of an

agency rule, as so long as privileged confidential information is not disclosed.²⁸⁹

VII. CONCLUSION

Section I of this article examined an agency gag rule that is incompatible with the conditions necessary for discourse ethics. Although Section II observed that legal theory rarely radically transforms the law's institutionalized practices,

there is no atheoretical way to engage in the study of administrative law. Most lawyers' allegiances to particular theories of the state are unconscious, and therefore all the more potent in operation. By functioning at the level of self-evident truths or tacit presupposition, theory is placed beyond critical awareness and scrutiny.²⁹⁰

A theory like Habermas's discourse ethics must be translated into public law through "*moral leadership*, which promotes social cohesion and community and celebrates the freedom and individual dignity on which democracy depends."²⁹¹ Absent effective political leadership which increases public participation in agency rulemaking, the system's colonization of the lifeworld will continue unabated. This is the unwelcome signal sent by *Rust v. Sullivan*.

Supporters of democratic government who find Habermas's model of democracy superior to positivism are disheartened by *Rust*. They deplore the Secretary's instrumentally rational regulations, which require health care providers to surrender their First Amendment freedoms. They rightfully condemn the Court's opinion, which is insensitive to the interests of women. The opinion is devoid of moral reasoning and therefore lacks the "legitimizing force [that results] from an alliance between law and morality."²⁹² Under progressive standards of democracy, the regulations upheld in *Rust* were inadequately "exposed to discursive testing" for validity.²⁹³ Discursive testing asks the question, "Is the [regulation] fair to others as well as myself, when I take into account everyone's

289. Dana Priest, *Competitiveness Council Suspected of Unduly Influencing Regulators*, WASH. POST, Nov. 18, 1991, at A19, col. 1.

290. Allan C. Hutchinson, *Mice Under a Chair: Democracy, Courts, and the Administrative State*, 40 U. TORONTO L.J. 374, 378 (1990).

291. BENJAMIN R. BARBER, *STRONG DEMOCRACY & PARTICIPATORY POLITICS FOR A NEW AGE* 238-39 (1984).

292. JURGEN HABERMAS, *Law and Morality in 8 THE TANNER LECTURES ON HUMAN VALUES* 217, 219 (S. McMurrin ed. & K. Baynes trans. 1988).

293. *Id.* at 227.

basic interests (generally described) and give them equal weight with my own?"²⁹⁴ In short, discourse ethics condemns the procedures leading to the Secretary's gag rule; it also condemns the substance of the Secretary's viewpoint selective rule and it exposes the shallowness of the Supreme Court's commitment to freedom of speech when the bureaucracy uses government funds to suppress a point of view.

Discourse ethics is a morally superior alternative to the administrative and judicial procedures culminating in *Rust v. Sullivan*. Indeed, *Rust* moves us away from "the institutional humanization of the economy and the administrative state."²⁹⁵ *Rust v. Sullivan* is a shameful case ruling because it uncritically endorses undemocratic rulemaking procedures that resulted in regulations abridging freedom of speech.²⁹⁶

APPENDIX A

The relevant provisions of the regulations upheld in *Rust* provide as follows:

§ 59.2 [Amended]

. . . .

"*Family planning*" means the process of establishing objectives for the number and spacing of one's children and selecting the means by which those objectives may be achieved. . . . Family planning does not include pregnancy care (including obstetric or prenatal care). As required by section 1008 of the Act, abortion may not be included as a method of family planning in the Title X project. Family planning, as supported under this subpart, should reduce the

294. Lawrence Kohlberg et al., *The Return of Stage 6: Its Principle and Moral Point of View*, in *THE MORAL DOMAIN* 151, 167 (Thomas E. Wren ed., 1990) (quoting Paul W. Taylor, *On Taking the Moral Point of View*, in 3 *MIDWEST STUDIES IN PHILOSOPHY* 35, 51 (Peter A. French, et. al., 1978)).

295. See ROBERT N. BELLAH, RICHARD MADSEN, WILLIAM M. SULLIVAN, ANN SWIDLER, STEVEN M. TIPTON, *THE GOOD SOCIETY* 291 (1991) (discussing Habermas's works).

296. On November 19, 1991, the House of Representatives unsuccessfully attempted to override President Bush's veto of a bill that would have nullified the gag rule upheld by the Supreme Court. Many members of Congress explained that the gag rule does not violate freedom of speech. *Rust v. Sullivan* was cited numerous times by politicians using the Court's imprimatur for partisan purposes. Unfortunately, the Court's reasoning in *Rust* has allowed the President to override the will of Congress. Unlike the Court, the majority of American people realize that the gag rule violates the First Amendment, but the system once again has failed to function properly and the poorest people continue to be poorly served.

incidence of abortion. . . .

“Title X” means Title X of the Act, 42 U.S.C. 300, *et seq.*

“Title X program” and “Title X project” are used interchangeably and mean the identified program which is approved by the Secretary for support under . . . the Act. . . . Title X project funds include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds.

§59.8 Prohibition on counseling and referral for abortion services; limitation of program services to family planning.

(a)(1) a Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principal business is the provision of abortions, by excluding available providers who do not provide abortions, or by “steering” clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

§ 59.9 Maintenance of program integrity.

A Title X project must be organized so that it is physically and financially separate, as determined in accordance with the review established in this section, from activities which are prohibited under section 1008 of the Act and § 59.8 and § 59.10 of these regulations

from inclusion in the Title X program. In order to be physically and financially separate, a Title X project must have an objective integrity and independence from prohibited activities. Mere bookkeeping separation of Title X funds from other monies is not sufficient. The Secretary will determine whether such objective integrity and independence exist based on a review of facts and circumstances. Factors relevant to this determination shall include (but are not limited to):

- (a) The existence of separate accounting records;
- (b) The degree of separation from facilities (e.g., treatment, consultation, examination, and waiting rooms) in which prohibited activities occur and the extent of such prohibited activities;
- (c) The existence of separate personnel;
- (d) The extent to which signs and other forms of identification of the Title X project are present and signs and material promoting abortion are absent.

§ 59.10 Prohibition on activities that encourage, promote or advocate abortion.

(a) A Title X project may not encourage, promote or advocate abortion as a method of family planning. This requirement prohibits actions to assist women to obtain abortions or increase the availability or accessibility of abortion for family planning purposes. Prohibited actions include the use of Title X project funds for the following:

- (1) Lobbying for the passage of legislation to increase in any way the availability of abortion as a method of family planning.
- (2) Providing speakers to promote the use of abortion as a method of family planning.
- (3) Paying dues to any group that as a significant part of its activities advocates abortion as a method of family planning; (4) Using legal action to make abortion available in any way as a method of family planning; and
- (5) Developing or disseminating materials (including printed matter and audiovisual materials) advocating abortion as a method of family planning.

Section 59.10(b) provides, in relevant part:

59.10 Prohibition on activities that encourage, promote or advocate abortion.

. . . .

(b) *Examples.* (1) Clients at a Title X project are given brochures advertising an abortion clinic. Provision of the brochure violates subparagraph (a) of this section.

(2) A Title X project makes an appointment for a pregnant client with an abortion clinic. The Title X project has violated paragraph (a) of this section.

(3) A Title X project pays dues to a state association which, among other activities, lobbies at state and local levels for the passage of legislation to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on such activity. Payment of dues to the association violates paragraph (a)(3) of this section.

(4) An organization conducts a number of activities, including operating a Title X project. The organization uses non-project funds to pay dues to an association which, among other activities, engages in lobbying to protect and expand the legal availability of abortion as a method of family planning. The association spends a significant amount of its annual budget on each activity. Payment of dues to the association by the organization does not violate paragraph (a)(3) of this section.

(5) An organization that operates a Title X project engages in lobbying to increase the legal availability of abortion as a method of family planning. The project itself engages in no such activities and the facilities and funds of the project are kept separate from prohibited activities. The project is not in violation of paragraph (a)(1) of this section.

(6) Employees of a Title X project write their legislative representatives in support of legislation seeking to expand the legal availability of abortion, using no project funds to do so. The Title X project has not violated paragraph (a)(1) of this section.

(7) On her own time and at her own expense, a Title X project employee speaks before a legislative body in support of abortion as a method of family planning. The Title X project has not violated paragraph (a) of this section.

