

Denver Law Review

Volume 76

Issue 4 *Fifth Annual Legal Theory Symposium -
Exploring Habermas on Law and Democracy*

Article 6

January 2021

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Recommended Citation

Mitchell Aboulafia, Law Professors Read Habermas, 76 Denv. U. L. Rev. 943 (1999).

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LAW PROFESSORS READ HABERMAS

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In the summer and fall of 1998, in preparation for the Habermas Symposium which would lead to this edition of the *Denver University Law Review*, I had the good fortune to participate in a study group held on Habermas's recent work on the law¹ at the University of Denver College of Law. The group was interdisciplinary, made up of law professors of various stripes, philosophers, and social theorists. I was one of the philosophers. As is often the case with interdisciplinary groups, the rewards come at something of a price. The struggle to understand the language, interests, and concerns of those with different intellectual backgrounds and bents, was both exhilarating and frustrating. I am concerned with the latter reaction here, certainly experienced by everyone. The law professors having little familiarity with Habermas and his progenitors often found his work needlessly obtuse and riddled with unfamiliar intellectual byways. The theoreticians present found themselves taxed by having to explain and defend the importance of various ruminations that appear important only to distinction-obsessed philosophical types.

In thinking about how I might best make a contribution to the *Denver University Law Review*, I decided that drawing on the experience of this past summer might be of assistance to readers familiar with the law but not with Habermas's larger project. Therefore, I intend to pursue a path that became familiar to the study group; that is, I will engage in a reading of several pages of Habermas's text with commentary interspersed. The commentary will clarify the meaning of a particular passage in order to throw light on Habermas's larger project. I have chosen passages from the "Postscript" that Habermas wrote to *Between Facts and Norms* in 1994.² Of course, there are severe constraints on just how much of Habermas's position can be presented in a short piece, and some of the presentation may border on caricature, but what follows should be of some assistance to colleagues in law, and may help to make some of the other pieces in this symposium a bit more accessible. I begin with a

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1. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* at 448 (William Rehg trans., 1996).

2. See *id.* at 447.

quotation that serves as a good point of entry for Habermas's approach to the law:

Modern law presents itself as Janus-faced to its addressees: it leaves it up to them which of two possible approaches they want to take to law. Either they can consider legal norms merely as commands, in the sense of factual constraints on their personal scope for action, and take a *strategic* approach to the calculable consequences of possible rule violations; or they can take a *performative* attitude in which they view norms as valid precepts and comply "out of respect for the law."³

One can obey the law because there are possible sanctions looming, or one can obey because there is a respect for the law; that is, the law is viewed as legitimate and worthy of compliance. Notice that Habermas uses the term "strategic" to describe the approach in which consequences are considered. Habermas's understanding of the law is incomprehensible without a basic distinction between what he calls communicative action and strategic action. Communicative action, the goal of which is mutual understanding, follows certain rules built into the pragmatics of communication. As Thomas McCarthy, the translator of Habermas's *Theory of Communicative Action*, notes:

Habermas argues that our ability to communicate has a universal core—basic structures and fundamental rules that all subjects master in learning to speak a language [W]e are constantly making claims, even if usually only implicitly, concerning the validity of what we are saying, implying, or presupposing—claims, for instance, regarding the truth of what we say in relation to the objective world; or claims concerning the rightness, appropriateness, or legitimacy of our speech acts in relation to the shared values and norms of our social lifeworld; or claims to sincerity or authenticity in regard to the manifest expressions of our intentions and feelings.⁴

Interlocutors engage one another in a manner in which there are implicit or explicit claims made, and if the goal is mutual understanding, then we must presume that the parties are willing to give reasons for their claims. The parties must be willing to engage others in a manner in which non-coerced yes-no responses are possible; that is, I can agree or disagree with what you present, and you can do the same without threat of sanction. Of course, conversations with others do not always fit this ideal, but Habermas argues that this ideal of rational exchange is more basic than other modes of communication. When interlocutors act strategically—that is, when the goal is not understanding but is rather to manipulate others for gain or advantage—they utilize the rules of communicative action to distort the process and gain what they wish. Discourse

3. *Id.* at 448.

4. Thomas McCarthy, *Introduction to JÜRGEN HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION* at x (Thomas McCarthy trans., 1981).

directed at understanding is logically prior to language aimed at manipulation because it makes the latter possible. Linguistic interactions always move between the poles of the strategic and genuinely communicative, but the idealizing assumptions of communicative action make both poles possible. They are the transcendental or quasi-transcendental grounds of communication; that is, they are the conditions for the possibility of communication geared to understanding (and its distortion).

Now the modern world has seen an increase in the pervasiveness of strategic action. Why should this be? The story that Habermas tells has its roots in thinkers such as Marx, Weber, Durkheim, and members of the Frankfurt School. The modern world, to borrow from Weber, has been home to ever increasing degrees of goal-directed or purposive behavior as opposed to traditionalistic or value-oriented behavior. Expressed in the terms of the Frankfurt School, we live in a world of ever increasing instrumental reason or action. This is due to a number of historical factors, not least among them the prevalence of capitalism and modern bureaucracies. As transformations of the modern world have taken hold, traditional forms of societal organization have gone by the wayside; we can no longer depend on religion or more archaic traditions to organize our social lives. Actors are increasingly free from the constraints of all forms of traditionalism, at least in so far as their public actions are concerned. They behave as if they are singular, as opposed to collective or social, agents. We are faced, then, with a world that appears to confront us with fewer and fewer avenues for presuming that our public actions have any sanction beyond success. In this world, rules and norms seem open to constant revision depending on the strategic needs of actors, and we may wonder at what can possibly legitimate them. Habermas does not believe that strategic forms of action can ultimately be the grounds for legitimating rules and norms. In this he stands in a long line of political thinkers for whom there must be some genuinely rational ground that trumps power relations in providing legitimacy. As Plato knew, the Thrasymachi of the world—that is, those who believe that might makes right—must be proven wrong.

What grounds the legitimacy of rules that can be changed at any time by the political lawgiver? This question becomes especially acute in pluralistic societies in which comprehensive worldviews and collectively binding ethics have disintegrated, societies in which the surviving posttraditional morality of conscience no longer supplies a substitute for the natural law that was once grounded in religion or metaphysics.⁵

This passage refers to the dilemma that modern pluralistic societies must face. Forms of social organization in which there is an integrated world-view that justifies the rules that people live under have gone by the wayside. In the modern world, there has been an increase in autonomy

5. HABERMAS, *supra* note 1, at 448.

and with it an order that places the burden of moral choices on the consciences of individual actors. The same actors who are confronted with an ever increasing array of choices, ones that can be negotiated in a strategic fashion, are also asked to become autonomous moral agents. These actors are often asked to view their moral dilemmas in increasingly Kantian terms; that is, they must act as autonomous rational agents in deciding what is just, and not simply follow tradition and convention. In terms of the above passage on the legitimacy of rules, Habermas has something of a conundrum to face: while he has argued that posttraditional morality is superior to conventional or traditional approaches—he follows the psychologist Lawrence Kohlberg's hierarchy of moral stages for the most part—postconventional morality does not appear to have the octane needed to “substitute for the natural law that was once grounded in religion or metaphysics.”⁶ Agents may have become more autonomous, but the grounds for their choices are increasingly less certain. They cannot depend on tradition. It is important to note here that Habermas is not suggesting that morality and law be conflated; in fact, it is quite the contrary. Habermas spends much of his book showing in just what ways they are different. He is asking how in a world of post-conventional morality are we to understand the source of legitimacy of modern law, since clearly the assumptions of a natural law grounded in a specific community no longer carries the proper weight.

It is worth noting at this juncture that Habermas makes an important distinction in this context. While Habermas modifies the traditional Kantian position regarding the isolation of the autonomous agent, he insists on the distinction between ethical life and morality. The former entails norms and standards that a specific community views as constitutive of the good life. For Habermas, ethical life must be distinguished from questions of morality and law (justice), which depend on proper procedure for their realization and not on substantive ethical forms of life. It is also worth noting that Habermas's position regarding the distinction between morality and ethical life is challenged by communitarians and various sorts of pragmatists who argue that one can not make the cut between them as Habermas does.

Modernity has changed the ground rules. If the modern state, its social organization, and the laws that help maintain the two are to be viewed as legitimate, then we must find mechanisms for legitimacy that do not simply appeal to tradition.

The democratic procedure for the production of law evidently forms the only postmetaphysical source of legitimacy. But what provides this procedure with its legitimating force? Discourse theory answers this question with a simple, and at first glance unlikely, answer: democratic procedure makes it possible for issues and contributions,

6. *Id.*

information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable.⁷

Democratic procedure will serve to legitimate the law, and will also secure what Habermas calls a "discursive will-formation." What does he mean by the latter phrase, a phrase that he links to reason? Perhaps the easiest route of entry here is to mention Rousseau. Rousseau, of course, spoke of the general will; that is, the (political) will that best expresses what is good for the people. According to Rousseau, while the general will is always correct, freedom is only possible in a society in which the people make laws that they can always change. No one has any natural authority over another for Rousseau. In this he was a conventionalist, but something of a peculiar one with strong commitment to a view of human nature that suggests ties to features of the tradition of natural law. In any case, the principle that the law is made by the people, and can be changed by them, has a certain appeal to Habermas, but the Rousseauian or republican form of this equation brings with it a grave danger, for Rousseau insists that the general will cannot be mistaken. How is it possible that the general will can never be wrong? In one line of interpretation it is because the general will is the servant (or manifestation) of reason itself. However, such a view of reason as incontrovertible is just what Habermas wishes to combat as he proceeds to develop and defend his own vision of the rational. How are we to understand Habermas's view of reason and its connection to what he calls discursive will-formation?

Kant developed the notion of autonomy found in Rousseau in the direction of the moral autonomous subject, who is both the giver and recipient of the moral law. Yet, the moral law is not one that can be broken. Like the general will, it must always be correct. Reason is the key to this law and to autonomy for Kant. In addressing Kant's moral theory above, I noted that Habermas agrees with much that Kant thought regarding moral life. He is, however, unsatisfied with the isolated agent as the arbiter of moral decisions. Kant's categorical imperative is not open to negotiation between interlocutors in that reason can show each individual the proper path. For Habermas, on the other hand, rationality is not to be construed as a possession of the monological subject; that is, the person who has a "dialogue" only with himself when trying to determine what is moral. Kant's moral subject is a singular agent, and interestingly enough, so is "the people" for Rousseau, for "the people" should act as a unitary subject. In some accounts of Marx, the proletariat is viewed as an updated version of "the people" whose common interests transform it into a unitary subject. Habermas will have none of this.

7. *Id.*

For Habermas, reason is found in the discursive practices of political and social actors. And the political will of "the people" should be achieved through (rational) discourse; that is, political will-formation should have a discursive character. Reason is not the possession of the singular subject; it is a social phenomenon that can be located in our linguistic interactions. And it is found, for example, in proper legal procedure and not in substantive claims about values and ways to achieve the good life. Habermas's model presumes that reason shows itself in the processes involved in communicative action. Procedure, not substance, is the mantra here, because we can never be sure of the latter, and we know how often claims made about the nature of the good life have led to oppressive political and social organizations. The force of the better argument should prevail and can only do so if the interlocutors respect the rules for communicative action. In an analogous fashion, complex modern societies, tossed and turned by people with very different ideas about the good life, can only survive and flourish if procedures are in place that allow different voices to be heard with no particular voice silencing others. If certain rules of discourse are followed, conversation can be designated as rational. And societies are more rational when their political and legal systems bow to acknowledge these requirements, for example, by protecting the right to have one's voice heard. While Habermas is not a traditional liberal, he certainly would find some of Mill's conclusions in *On Liberty*⁸ quite compelling.

In the quotation above on Discourse Theory, Habermas speaks of fallibilism.⁹ The latter may be said to be part of a democratic temper; that is, in a democracy no one party may presume to have a corner on the truth in a way that dismisses the political observations or practices of others, although one could conceivably prohibit practices that prevent legitimating discourse. For Habermas, rights are necessary for a discursively achieved political will-formation. The alternative would be to have the "will" of political actors shaped from above or by tradition. For Habermas, rights, democracy, legitimacy, and discourse are intimately linked. We might express their connection in the following manner: Without rights protecting private "space," democracy would be unrealizable because citizens could not form themselves as autonomous agents; and without democracy, law would not have the proper grounds for legitimacy; and without law that is legitimate, rights (public and private) would not be properly protected. And, of course, without public rights, discussion would not take place in a fashion that sustains democracy and legitimates the law. In the modern world we should not allow justifications that are outside of the system, say God or natural rights, to pretend to legitimate the system. As one would expect, Habermas's argument involves an extended defense of the notion that in the modern world we

8. JOHN STUART MILL, *ON LIBERTY* (1859).

9. See HABERMAS, *supra* note 1, at 2; see also text accompanying note 7.

have come to expect that the law will be legitimate and that modern democratic political organization is what supplies this legitimacy.

The argument developed in *Between Facts and Norms* essentially aims to demonstrate that there is a conceptual or internal relation, and not simply a historically contingent association, between the rule of law and democracy. . . . [T]he *democratic process* bears the entire burden of legitimation. It must simultaneously secure the private and public autonomy of legal subjects. This is because individual private rights cannot even be adequately formulated, let alone politically implemented, if those affected have not first engaged in public discussions to clarify which features are relevant in treating typical cases as alike or different, and then mobilized communicative power for the consideration of their newly interpreted needs. The proceduralist understanding of law thus privileges the communicative presuppositions and procedural conditions of democratic opinion- and will-formation as the sole source of legitimation.¹⁰

Without democracy it would not be possible to legitimate modern law. But it is modern law that acts as the guardian of rights that are required for the flourishing of communicative action and democracy.¹¹ Yet this is not the only role for law in modern society. Recall that one of Habermas's concerns is that modern society does not have available to it traditionalistic approaches to cementing the organization of society. While this is in fact a good thing—that is, in so far as modern society makes room for greater self-determination and self-actualization—there is still a question of what serves as the mortar of modern society. Habermas claims that in addition to the market place (or the money system) and the state (or administrative power), law helps to act as the mortar of the modern world.

From the standpoint of *social theory*, law fulfills socially integrative functions; together with the constitutionally organized political system, law provides a safety net for failures to achieve social integration. It functions as a kind of “transmission belt” that picks up structures of mutual recognition that are familiar from face-to-face interactions and transmits these, in an abstract but binding form, to the anonymous, systemically mediated interactions among strangers. Solidarity—the third source of societal integration besides money and administrative power—arises from law only indirectly, of course: by stabilizing behavioral expectations, law simultaneously secures symmetrical relationships of reciprocal recognition between abstract bearers of individual rights.¹²

10. HABERMAS, *supra* note 1, at 449-50.

11. It should be noted that rights or proto-rights are grounded for Habermas in the conditions necessary for successful communicative action, and rights in turn come to act as legal safeguards for communicative action.

12. *Id.* at 448-49.

We cannot depend on face-to-face interactions in close knit communities to serve us in the same way that they may once have. We must find ways to deal with strangers in ways that parallel the manner in which we ought to treat others when there is ongoing personal contact. The law does this for us. In addition, given that strategic behavior is more pervasive in the modern world, we must find ways to navigate the ever-increasing number of interactions that we have of this sort. We need a world in which we can be released from always concerning ourselves with communicative action because there are so many circumstances in the modern world in which we cannot function in this manner. And here too the law comes to our aid, for it allows us to behave strategically and yet have our behaviors circumscribed in a manner that lends credence to the importance of the "idealizing" moment of communicative action. As the translator of *Between Facts and Norms*, William Rehg, succinctly states:

Modern law is meant to solve social coordination problems that arise . . . where, on the one hand, societal pluralization has fragmented shared identities and eroded the substantive lifeworld resources for consensus and, on the other, functional demands of material reproduction call for an increasing number of areas in which individuals are left free to pursue their own ends according to the dictates of purposive rationality. The solution is to confine the need for agreement to general norms that demarcate and regulate areas of free choice. Hence the dual character of law: on the one hand, legal rights and statutes must provide something like a stable social environment in which persons can form their own identities as members of different traditions and can strategically pursue their own interests as individuals; on the other hand, these laws must issue from a discursive process that makes them rationally acceptable for persons oriented toward reaching an understanding on the basis of validity claims.¹³

Communicative action can be thought of as transhistorical in the sense that the use of any human language entails certain pragmatic rules. But in the modern world there has developed a heightened awareness of the presuppositions of various types of discourses. We have learned to separate moral, legal, scientific, and aesthetic modes of discourse. We expect these domains to follow certain general discursive rules but also to differ in the sort of language games that each area involves. Post-enlightenment citizens have come to understand the advantages of keeping these spheres from encroaching on one another. They have also increasingly come to expect that certain practices and procedures inform the law and government. Legitimacy stems from these procedures and not from the assertions of those who claim, for instance, the divine right of kings. We have come to expect that those who are ruled have a voice in how they are ruled. But Habermas does not want this participation to

13. *Id.* at xix.

be understood in terms of republicanism and all the dangers that this sort of populism brings with it. No, there must be constitutional and legal safeguards, and these in turn will protect domains of privacy and personal development that nurture citizens capable of autonomous public activity.

The internal relation between the rule of law and democracy can be explained at a conceptual level by the fact that the individual liberties of the subjects of private law and the public autonomy of enfranchised citizens make each other possible.¹⁴

A constitution-making practice requires more than just a discourse principle¹⁵ by which citizens can judge whether the law they enact is legitimate. Rather, the very forms of communication that are supposed to make it possible to form a rational political will through discourse need to be legally institutionalized themselves. In assuming a legal shape, the discourse principle is transformed into a principle of democracy: For this purpose, however, the legal code as such must be available, and establishing this code requires the creation of the status of possible legal persons, that is, of persons who belong to a voluntary association of bearers of actionable individual rights. Without this guarantee of private autonomy, something like positive law cannot exist at all. Consequently, without the classical rights of liberty that secure the private autonomy of legal persons, there is also no *medium* for legally institutionalizing those conditions under which citizens can first make use of their civic autonomy.¹⁶

Contra the extreme populist, there are human rights which are in fact presuppositions of democracy itself and cannot be "voted" away; and contra certain natural rights theorists, the source of these rights must be located in those practices that make communicative action possible. Another way of stating this is to say that we cannot be free and self-determining unless we can be rational, and that this rationality is located in practices of communication that allow for mutual understanding. Without communicative action directed at mutual understanding, we could not be active autonomous participants in a democracy. But communicative action requires a legal framework in order to flourish, a framework which provides space for individual autonomy to grow *and* one that helps to regulate our behaviors in an increasingly complex world.

The positive law that we find in modernity as the outcome of a societal learning process has formal properties that recommend it as a suitable instrument for stabilizing behavioral expectations; there does not seem to be any functional equivalent for this in complex societies.

14. *Id.* at 454.

15. In *Between Facts and Norms*, Habermas defines the discourse principle in the following fashion: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses." *Id.* at 107.

16. *Id.* at 454-55.

Philosophy makes *unnecessary* work for itself when it seeks to demonstrate that it is not simply functionally recommended but also morally required that we organize our common life by means of positive law, and thus that we form legal communities. The philosopher should be satisfied with the insight that in complex societies, law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers.¹⁷

This is not to say that Habermas is unconcerned about morality. Much of his philosophical work has been directed at developing a theory of discourse ethics, which is actually a theory of morality. He warns us, however, that analysts of modern society should not confuse or conflate the activities of various domains, for example, ethical, legal, moral, scientific, and aesthetic. In practice, Habermas tells us that ethical life and considerations of morality do influence legislation and the law. But this does not argue for a conceptual confusion regarding these domains. Such a confusion is often revealed in the thinking of those who defend communitarian approaches to the law. From Habermas's vantage point, thinkers who view the law through the prism of the habitual and moral, as do communitarians, fail to do justice to the actual dynamics of modern law.

In this short piece, I have only sought to touch on some of the features of Habermas's approach to the law by drawing primarily on a few pages from the *Postscript to Between Facts and Norms*. Behind his extensive work on the law stands a social theory that incorporates ideas from numerous thinkers and traditions, for example, Weber, Marx, Durkheim, Mead, Parsons, Dworkin, and members of the Frankfurt School.

A theoretical framework as vast as this one is bound to draw criticism. Some cannot accept his analysis of modernity, one in which the universalistic values of the Enlightenment hold sway. Some do not accept the manner in which he distinguishes law, morality, and habit. Some hold that his proceduralist approach to rights is simply too thin and that rights must be grounded in something more basic than communicative action.¹⁸ Some believe that he cannot successfully combine his historicist sensibilities with those that can be earmarked transcendental. Some do not believe that strategic action can be separated from communicative action in the manner that Habermas proposes. Some think that his views cannot do justice to needs of ethnic minorities.¹⁹ Some are unwilling to

17. *Id.* at 460.

18. See, e.g., Carol C. Gould, *Diversity and Democracy: Representing Differences*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 171-86 (Seyla Benhabib ed., 1996).

19. For a discussion of multiculturalism, see CHARLES TAYLOR, *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* (Amy Gutmann ed., 1994) (containing five pieces on

accept his claim that post-conventional morality is superior to conventional morality, or that such a distinction exists at all. And there are no doubt other criticisms. Yet, at minimum, we can say that Habermas's approach has supplied the framework for many of the most important contemporary debates on law, morality, and the nature of society.²⁰

multiculturalism including: Jürgen Habermas, *Struggles for Recognition in the Democratic Constitutional State* 107 (Shierry Weber NicholSEN trans., 1994)).

20. The literature on Habermas is enormous. A good place to start in English is *The Cambridge Companion to Habermas*. THE CAMBRIDGE COMPANION TO HABERMAS (Stephen White ed., 1995). In addition to the articles in the book, there is a bibliography of works by and on Habermas. See *id.* at 325.

