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1998

Review essay of Jurgen Habermas's Between Facts and Norms

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Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg. Cambridge: MIT Press, 1996.

Jürgen Habermas's lifelong work has focused on the problem of curtailed communication. In the best tradition of critical theory, he has set out to explicate the conditions that would need to be met to assure that persons could come together freely to negotiate about and decide upon the conditions of their existence collectively. Ideally, only the weight of the better argument would rule the day. If such were the case, presumably the oppressive social structures of tradition, power, status, sexism, racism, political influence, etc. that distort free communication could be eliminated, thereby contributing to the emancipatory project of critical theory. But many are dissatisfied with Habermas's "linguistic turn," as Habermas's emphasis on the transcendental grounds of reason appears overly abstract and far removed from praxis or the promise of practical application. In the book under review, Habermas takes up a particularly troublesome practical domain for his theory: law.

Habermas argues that a "colonization of the lifeworld" occurs in modernity as impersonal media, money, and power infiltrate the lifeworld and distort the communicative practices of persons in their everyday face-to-face interactions. Functional integration, guided primarily by instrumental and technical rationality of the administrative realm, is a fundamental but problematic reality in modern societies as specialized structures arise to manage increasing societal complexity (i.e., via structural differentiation). In this way, Habermas's concern with the "pathologies of modernity" carries on the critical tradition of the substantive social inquiries initiated by Marx, Weber, and even Durkheim.

Up through his *Communicative Action* period, Habermas's view of the role of law was ambivalent at best. Habermas conceded that across Western society, common and civil law had functioned as tools of emancipation as the principle of democratic self-government arose to combat earlier autocratic and monarchical forms of government. But after this initial emancipatory thrust, whereby common law and civil democracy came together to ensure rights for all citizens, Habermas noted that law attains greater and greater prominence in modern society primarily out of the need to establish some objective way of adjudicating conflict between members of an increasingly disparate citizenry. Law in effect becomes a "micro-manager" of people's everyday lives, and this formalization or textualization of everyday life replaces the social solidarity of the lifeworld that formerly was forged tacitly through uncodified norms of communicative acts and reason.

Habermas was especially concerned with the social-welfare state, because here we witness the creation of new and greater pressures toward systems incursions into the lifeworld. For example, because a greater range of "rights" are identified (on the basis of race, gender, sexual orientation, age, disability, etc.), legal enforcement of these rights encroach further into the lifeworld, thereby individualizing legal claims. Additionally, social-welfare provisions are implemented and statutes are enforced bureaucratically through impersonal central organizations. Finally, social-welfare claims are settled under the auspices of civil law, with monetary compensation going to aggrieved parties (i.e., the consumerist re-definition of civil life). (These points are an adumbration of a lengthier discussion found in Mathieu Deflem, "Introduction: Law in Habermas's Theory of Communicative Action," *Philosophy and Social Criticism* 20 (1994), 1–20.)

In *Between Facts and Norms*, Habermas overcomes his earlier ambivalent view of law by describing it as a social institution that arises out of the common will of a people who, before establishing themselves as legal consociates, are already a communication community held together by a linguistic bond. The linguistic bond is forged through communicative actions wherein interactants take yes/no positions on a range of issues involving validity claims of normative rightness, subjective truthfulness, and objective (or propositional) truth. In other words, law is, at the systems or administrative level (through procedural deliberation and decisionmaking arrived at impartially), the instantiation of the primordial condition of lifeworld actors who come together freely to regulate the conditions of their common life via the negotiation and establishment of informal norms and values (i.e., culture) (pp. 304–308).

By assimilating law to his theory of communicative action in this way, Habermas is able also to show how law is both a "social fact" that draws upon the state's monopoly on power to compel citizens to align their conduct to the prescriptions of the law ("facticity"), and a self-referential system that, because of its "facticity" in the eyes of the citizenry, can evoke respect for the law beyond sheer compliance ("validity"). Habermas argues that guarantees of law, namely certainty and legitimacy, are simultaneously redeemed at the level of judicial decisionmaking, which at the systems level is analogous to the communicative rationality of "mere" citizens rationally setting standards for the conditions of their existence at the lifeworld level (pp. 197–203).

This move is controversial for a theorist coming out of the critical-theory tradition, because Habermas seems to embrace normative theories of democracy that suggest values, and hence laws, are created out of a consensus of citizens coming together to decide their fate collectively through representation. By contrast, critical theories of democracy hold that values are created primarily by elites who, wielding enormous social and political power through ideological hegemony, control the substance of public deliberation and, hence, are able to pass into legislation laws that reflect and defend their own interests at the expense of the relatively powerless masses (pp. 315–387).

Habermas attempts to walk a tightrope between these two extremes by creating a proceduralist theory of democracy that "invests the democratic process with normative connotations stronger than those found in the liberal model but weaker than those found in the republican

model" (p. 298). In other words, Habermas argues that the ultimate grounds of democracy must be founded not on the peculiar form that deliberations in the public sphere take, but on the unthematized institutionalization of procedures and conditions of communication that ultimately leads to thematized issues of democratic opinion- and will-formation.

This is an extremely abstract and complex argument that appears indefensible on the surface, and there is simply not enough space here to justify or clarify fully Habermas's position. In effect, Habermas wants to analyze the implementation of democratic procedures in modern societies without lapsing into the reifying tendencies of earlier theories that tend to view the creation and implementation of such procedures as emanating from above rather than through the concerted activities of real, flesh-and-blood human beings. As Bobbio states, "As soon as we conceive intentional social relations as communicatively mediated in the sense proposed, we are no longer dealing with disembodied, omniscient beings who exist beyond the empirical realm and are capable of context-free action, so to speak" (p. 324).

Actors are socialized into concrete forms of life, but they are not totally at the mercy of their lifeworld. Habermas's proceduralist view of democracy is derived from a discourse theory whose guiding principle states that "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourse" (p. 107). Within the contexts of their everyday lifeworld, actors take yes/no positions on various claims pertaining to propositional truth, normative rightness, and subjective truthfulness. The ability to say no in any of these instances marks the freedom that comes through persuasion rather than coercion. Although no complex society could ever fully implement this model of purely communicative social relations, Habermas argues that there is an underside to the realities of inequality and differential power that, although hidden from the participants themselves, nevertheless contains the presuppositions of communicative action and the tacit injunction of the discourse principle. Viewed in this light, "law as such already incorporates those features from which the model of 'pure' sociation abstracts" (p. 326).

By insisting ultimately on the ontological priority of the discourse principle, Habermas attempts to shatter once and for all the philosophy of consciousness program. The philosophy of consciousness, Habermas asserts, leads one either "to ascribe the citizens' practice of self-deter-

mination to a macrosocial subject or to refer the anonymous rule of law to competing individual subjects" (p. 29). Discourse theory instead "reckons with the *higher-level intersubjectivity* of processes of reaching understanding that take place through democratic procedures or in the communicative network of public spheres"(ibid.).

Habermas envisions relatively subjectless communications that form arenas at both lifeworld and system levels in which rational opinion- and will-formation can take place. This idea owes much to Parsons's conceptualization of the generalized media of interchange – such as money and power – that circulate throughout complex societies. Contra Foucault, Mills, and other critical theorists, Habermas does not view social life as a zero-sum game, but rather as a tableau of inflationary and deflationary trends that range from oppressive totalitarianism at one extreme to relatively free and open civil democracy at the other. Habermas's entire argument is summed up in the following passage: "Once one gives up the philosophy of the subject, one needs neither to concentrate sovereignty concretely in the people nor to banish it in anonymous constitutional structures and powers. The 'self' of the self-organizing legal community disappears in the subjectless forms of communication that regulate the flow of discursive opinion- and will-formation in such a way that their fallible results enjoy the presumption of being reasonable" (p. 301).

The most important thing to note about Habermas's program is that his reliance (some would say over-reliance) on the force of rationality as realized through talk, and as institutionalized in societal and political communities, is constituted as Habermas's own self-conscious attempt to capture the essence of such procedures and practices in his own theory. In effect, Habermas is attempting to thematize much about law and democracy that heretofore has gone unthematized. The important role of rationality and the discourse principle in Habermas's theory could be construed as evidence that such procedures and practices are indeed operating in the "real" world. At least this is Habermas's hope.

One problem, however, with Habermas's new sympathetic reading of welfare-state law is that he appears to discard his earlier emphasis on the importance of maintaining distinctions among various forms of rationality. These distinctions are, as we have seen, the unique forms of rationality paralleling the validity claims associated with issues of aesthetics (subjective truthfulness), moral-practical concerns (normative rightness), and technical-instrumental actions (propositional truth). Haber-

mas seems to sidestep the fact that the basis of law as a design of human action is overwhelmingly grounded in the idea of instrumental or technical reason, insofar as law is narrowly circumscribed by evidentiary procedure and is limited to adjudicating conflict on a case-by-case basis. Case law sets up precedents for the basic conception that any legal norm can be created or changed by a procedurally correct enactment. This is certainly true, as Habermas appropriates this directly from Weber's idea of the rational-legal domination by law in modern society.

But law is not a theory of society, and does not pretend to contain indicators or dimensions of knowledge or practice that are isomorphic with the empirical social world. There are huge gaps in law's understanding of the ontology of social action and social life. For example, the limited rationality of law (instrumental rationality) means that the "reasonable person" standard is seriously limited because it is assimilated to technical or instrumental rationality, as is the "reasonable woman" standard that has recently become prominent in sexual harassment litigation and law.

If Habermas's reading of law is correct, and if the discourse principle represents a sound basis for understanding the processes of law and democratic opinion- and will-formation, then the ongoing textualization of social life may be viewed unproblematically and simply as a logical derivative of the internal assumptions of democracy itself. If indeed all law abiding citizens are equal under the law, and if indeed all citizens should be able to participate broadly in society vis-à-vis the rights that inhere to all as ratified members of the constitutional state, then law should specify clearly and concretely the possible dimensions across which citizens' rights can be assured. This leads to an inexorable process within modern welfare states whereby persons' status sets – the sum total of positions we hold in society – are formally connected to the protections of the substantive law appropriate to that particular institutional sphere (family, economy, religion, polity, education).

An application: Sexual harassment

Consider the example of sexual harassment, or hate speech law. Today across business, government, and education, the assumption is made that because of the "alarming" rate of incidents of harassment – usually verbal – formal guidelines must be enacted to control or sanction those actions or utterances found to be offensive, inappropriate, derogatory,

inflammatory, or otherwise damaging. What should be realized, however, is that codifying rules of behavior presupposes that the heretofore tacit, unarticulated rules of conduct have somehow fallen into disrepair, and are no longer efficient mechanisms of social control.

Here, there is an explicit move away from the Enlightenment ethos that posits a dualism of mind and body. It is plain that those attempting to codify guidelines meant to control certain so-called offensive utterances must also attempt to sell the notion that words can indeed hurt as much as sticks and stones. Such a rhetorical ploy – in this case, the attempt to equate mental with physical harm – is essential for the livelihood and continuing legitimacy of any text. The pressures toward the continuing textualization of life – such as codifying guidelines, procedural norms, or truths regarding offensive talk – is symptomatic of broader processes of institutionalization, an area Habermas seems less interested in, but that nevertheless has an impact on his theory of democracy.

In reality, much of social life involves the battle over knowledge claims (as played out through the implicit validity claims underlying all speech, as Habermas rightly points out). Although we all share to some degree a common culture, we see great differentiation at the level of individual personality. This gives us the flavor of multiple meaning, and social life can thereby be seen as a plurality of actors negotiating the conditions of their existence.

Institutions, on the other hand, are quasi-symbolic forms of understanding that, even in the face of multiple meaning and polysymbolic interpretation, survive by ordering taken-for-granted knowledge of the essential segments of human activity. Institutions legitimate and reaffirm their existence by producing official texts; these texts provide a monologic interpretation of a particular area of social life.

Unfortunately, the attempt to sanction through texts the institutional position as *the* singular objective truth goes beyond merely providing for a symbolic understanding of that area of social life. Texts work to "freeze" the world of everyday activity into an official, sanctioned version of reality that is nothing more than a "textualization" of that reality. This closes off further understanding of that reality to members of the societal community.

In summary, institutional pressures drive the legitimation of knowledge claims. These knowledge claims must come in the form of "texts"

that, as tracts of monologic discourse, serve to anchor its officially sanctioned version of reality in a secure, rational world of social facts. With this in mind, how did the texts containing recent legal decisions pertaining to sexual harassment, and especially the "reasonable woman" standard, come about, and is this explanation consistent with Habermas's new sympathetic reading of welfare-state law?

Very briefly, in a landmark 1991 case, the 9th U.S. Circuit Court in California ruled that sexual harassment law covers any remark or behavior that a "reasonable woman" would find to be a problem. The court also acknowledged that a woman's perception might differ from a man's (see Deborah L. Siegel, *Sexual Harassment: Research and Resources*, New York: National Council for Research on Women, 1992). Judge Robert Beezer noted that "conduct that many men consider unobjectionable may offend women," and that because women are more likely to be the victims of a sexual assault, they have "a stronger incentive to be concerned with sexual behavior." This ruling assumes, however, that there is a continuum that runs from the innocent gesture to the brutish assault, all of which can be covered under the rubric of sexual harassment law, be it of the *quid pro quo* or "hostile environment" form. From some social-science perspectives, and especially from the perspective of Habermas's system/lifeworld distinction and the refinement of forms of rationality and validity claims operating in various social spheres, this is patently ridiculous. The attempt to capture this particular slice of social reality through formalization reflects not only law's tendency toward arbitrariness, but also the huge holes that exist in law's ability to make sense of the world, guided as it is by narrow understandings of the world as manifested in its employment of technical or instrumental rationality. In this sense, law may be understood as a system imperative intruding upon lifeworld activity, and the ongoing textualization of social life indeed may be considered an element in the colonization of the lifeworld.

A leading pathology of modernity, then, is the gradual infiltration of law into ever greater expanses of lifeworld activity. As informal understandings of life give way to formal rules codified in law, the lifeworld becomes increasingly impoverished. As I see it, Habermas went too far in attempting to show that, no matter how bad things seem to be getting, citizens living in post-conventional societies (i.e., in constitutional democracies) still have the power to create conditions for their existence that all could agree upon form a valid and just form of life (as per the discourse principle). But Habermas need not point to law as

functioning only in a positive or beneficial direction. The great promise of Habermas's theory of communicative action is, and has been, to identify the structures and processes operating within democratic societies that might pose a threat to the democratic principles of justice and fairness for all.

Even with what I perceive as his misplaced and over-vigorous defense of welfare-state law, Habermas's linguistic account of solidarity, namely the bonds that hold members of a democratically self-regulated life-world together through a rationally motivated agreement to reach understanding, is still the best resource for understanding both the blessings and ills of modernity.

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