Review Essay: Comment

Paris Is Closer than Frankfurt: The *n*th American Exceptionalism

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James Bohman's review (1994) contributes to an important goal for the American legal academy: bringing to us the recent focus on the role of law in society of Jürgen Habermas and, by extension, contemporary Frankfurt School social theory. These comments[1] attempt to locate Habermas broadly in three discursive contexts. My purpose will be to suggestively examine whether and how the American legal reception of Habermasian ideas has been limited—the implicit rationale being that the reception is overdue. With almost all discussion of Habermas and law taking place in Europe, it seems we must ask, Why is there no [German] social theory in America, or at least in American law? After all, the United States became the home in exile for the Frankfurt survivors, and Habermas has been writing influentially in philosophy and political theory for more than 30 years. Yet, for reasons not altogether different from the revision and partial rejection of the other American exceptionalisms (socialism, labor politics, class formations, etc.), perhaps the question in fact should be more about the particularity of American treatment of the role of

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[1] The English translation (Habermas, in press) of Habermas's legal theory, *Faktizität und Geltung* (1992), should be the subject of close consideration by American legal academics. In some ways, the role of law in Habermas's system provides a test toward realizing this politics in social life. In conversations with Editor Frank Munger, we suggested for readers less familiar with Habermas that it would be helpful to locate the new work in current literatures cross-cutting work in law: e.g., explaining the lack of use of Habermas among progressive American legal writers; comparing Habermas to perhaps his foremost European theoretic opponent—Michel Foucault; and locating Habermas within his own German social theory contemporary debate. Proving suggestions are dangerous, Munger agreed. In these short, intentionally suggestive comments, we assume that the general debates in each area are sufficiently known so that citations are few and meant usually to be examples.

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law in the reproduction of society than about Habermas and his ideas.

I would locate the reasons for the alleged lack of attention, first, in the institutionalization of Critical Legal Studies—at least within the intellectual majority of CLS; second, in the theory partnership between American legal realism and epistemic, and therefore normative, contextualism; and, third, in certain difficulties within Habermas's theory itself which emerge strongly in his treatment of law. While somewhat independent, the three forces clearly interact in complicated cross-currents.

It would not have been illogical to guess that the Conference on Critical Legal Studies offered both a focused group debating Habermasian ideas within the American legal community and a conduit for progressive ideas about law back to Frankfurt. The term "Critical" is assumedly taken from Frankfort "Critical Theory." Early Critical Legal literature heavily relies on Frankfurt School mainstays Georg Lukacs, Herbert Marcuse, and Theodore Adorno for a critique of culture, including law, as reified social relations within a totalizing social ideology. CLS took to deconstruction of all ideological assumptions driving legal discourse. In contrast, Habermas seemingly aligns with American liberals advocating a procedural form of dialogic rationality and civic republicanism. In my view, in both instances more progressive alliances were available.

Habermas and CLS met and disagreed (Joerges & Trubek 1989).[2] The main currents of CLS, claiming the mantle of legal realism, found a direct relationship between realist institutional skepticism, together with its attack on judicial formalism, and the discursive priority and deconstruction of French postmodernism (Kelman 1987). Thus far, Habermas and CLS could share an ideology critique of rigid, formal apologies (particularly for the Americans in judicial opinions) reinforcing status quo hierarchies of power. But CLS took the linguistic turn for a number of reasons. First, its founding members were largely from the '60s New Left and prone to distrust substitution of one ideology of power for another. This was compounded by a substantial cross-membership with the old law and society movement, which had come to doubt its export of First World legal institutions to Third World countries (Schlegel 1984). The result was the belief that politics should be first centered in one's own academic house and that, correspondingly, universal claims at least risked inappropriate attempts to speak for the masses (Boyle 1985:685). Second, attempting universal political strategies, as Habermas did, depended on a subjectively acting individual agent projecting a strategic program in an ideology competition. This smacked too much of the social contract, dependency on the strict private-

[2] I agree with Habermas; see Casebeer 1983:379–92.

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public distinction dressed in welfare state clothes, and on the submersion of minority cultures under majoritarian oppression (Heller 1984). On the other hand, the French proclaimed the death of the subjective individual. The decentered subject, constructed within the historically given web of multiple linguistic meanings, cohabitated with an individual person. The individual, left alone with an apparent choice, could only resist those meanings presupposed by any particular point of constructed time and place. Opening a public space for free play seems the opposite from rationally reconstructing democratic consensus (Hutchinson & Monahan 1984). So the two parted.

To CLS, Habermas just didn't get it that regardless of procedural niceties, the only thing that discursive actors had to throw at each other were purely rhetorical replications, which were borrowed from something required by the language already. Talk is just talk, without agency within it. But Habermas, being committed to the systemic reproduction of the conditions of society and the accompanying ideological representations of its production as economics and politics, also needed a device to boost agency out of the trap created by a pure reductionist notion of language (Bohman 1994:906). Contrary to the French, the Habermasian individual could at once be socially dependent on the purely social reproductions of conditions and an appropriately functional division of labor, and be, as well, potentially independent if a condition of transcendent rationality could be achieved. Dialogue cognitively true to the presumption of undistorted exchange arguably could provide a place to stand. What is gained by taking such a position is the possibility of doing more than resist oppressive power. However, to maintain Habermas's position, it must be epistemically possible to sustain his claim for agency, a claim that requires functional differentiation between personal (lifeworld) and technical (conditions) understanding. American critics could accept neither the requirement of transcendent rationality nor the requirement of differentiated agency; the first because of pragmatic distrust of any procedural neutrality and the second because of an unwillingness to reimagine any emancipatory outcome involving a bifurcation of public or social action into democratic discourse and strategic technocracy (Fischl 1992). The state is seemingly always the tool of factional oppression.[3]

Habermas contributes to the tension in two primary ways. First, his critique seems to depend on a correspondence theory of truth, that is, a claim that it is in principle possible to know the relation between representations and an underlying reality.[4] This is necessary in order to know that the conditions of rational dia-

[3] By "state" here, I mean the broad concept of state—i.e., something more inclusive than government in regard to socially organized power.

[4] Casebeer (1989a) elaborates this criticism of Habermas.

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logue have been achieved in contradistinction to instrumental manipulation of language, invoked to meet system imperatives or personal power. It is what provides the individual agent facing inevitable actual interdependence with a critical purchase on events. On the one hand, this prevents a collapse to pure contractarian liberalism and, on the other, it provides a way to proceed programmatically toward a democracy recognizing such interdependence. If the scheme works, it supplies political hope not apparently available to the decentered subject who can but desultorily resist and who, lacking a basis for solidarity, can almost always be crushed or safely ignored. However, it is difficult to see other than on the basis of pure assumption why this correspondence theory should hold. How can it be proven? At the least, contextual theories of truth are widely held. Further, even privileging dialogue need not be inconsistent with the lanugage used or speakers pragmatically taking strategic positions against each other. Though he seems to need a correspondence theory, Habermas claims he needs only a consensus theory of truth to assure undistorted communication. In fact, it is difficult to see why the lifeworld might not be completely colonized and such consensus illusory. Also, the separation of dialogue and construction forces law into an implausible ambiguity, aspiring to neutrality of dialogue about specific interests in conflict and, at the same time, constructing instrumental legitimation of existing functions and power. As Bohman (1994:917, 924) demonstrates, Habermas's acknowledgment that undistorted communication is impossible as a fact of historical social complexity leaves consensus a vague ideal especially as a regulatory stance. It, however, also explains Habermas's reliance on the work of liberal law professors Cass Sunstein (1985) and Bruce Ackerman (1980), whose commitment to consensus dialogue is not rooted in sociological understanding of contextual distortions caused by instrumental and institutional power, and on the more progressive attempt to appropriate civic republicanism by Frank Michelman (1988:1502).

Have these reasons for doubting Habermas's general theory impeded reception of his legal ideas in the United States? His influence has shaped legal analysis of legitimation, and Habermas embraces compatible parallels to other methods opposed to the limits of deconstruction. First, the framework of communicative or dialogic rationality has been widely influential in feminist critical theory of law (Cornell 1991) and to a lesser extent in neo-Hegelian analysis of law (Cardozo Law Review 1989). Second, Habermas is not alone in focusing on the ambiguous status of law. The dialectic contestation of legal ideology has been influential through the work of historians such as E. P. Thompson, and the lifeworld-like analysis of social and labor historians. In fact, an alternative to deconstruction is prominently situated within

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CLS itself in the work of labor law academics who continue to focus on alternative democratic strategies in the workplace (Klare 1988; Hyde 1993).

Finally, in addition to method, there is the background problem of the state. In some ways, the American fear of the instrumental use of the public-private distinction leads us to think of the opposition of state and civil society as if they were exact parallels. But a curious twist occurs. Public action should be freed from subordination to dominant private interests. Thus, while the public needs to be reclaimed, the current state, infected as it is by existing hierarchies of private power and state beneficiaries, is always the enemy. All good or emancipatory developments are found in reformed civil society. An important alternative seems to be missing in this debate. Beginning with a more European notion of state as the constellation of power that prevails in any moment of civil society or, at least, the inevitable interpenetration of state and civil society would break the parallel. By beginning precisely in this manner, Habermas (1987) generates the epistemic experience of the lifeworld, and this contributes to a further curiosity. For the American postmoderns, the individualistic character of agency reemerges in the escape from the state, to make the best of a bad situation within local communities. Suppose, instead, one begins with the state as those systems of power which prevail, a definition much broader than government. State could not be escaped so easily. A social agency of any kind would then have to epistemically take account of the interdependency of subjectivity by democratizing social ordering, in order to avoid the collapse of civil society into state or, at least, state domination. I believe Habermas has something like this in mind in asserting that the formation of the socially constructed lifeworld need not be completely colonized. In this case, American sociolegal theorists ignore his work at our peril.

However, Habermas's legal solution to the duality of law as enforcer of status quo norms and justifier of claims to freedom does not follow from law as a typifier of this complexity in reproducing society. Bohman claims for Habermas that "jurisprudence needs to be guided by the cognitive presupposition of a single right answer, even in hard cases."[5] It would seem more consistent with the recognition that with complexity comes insoluble distortions of communication to rather reenvision legal meaning as continuously contested. Legal events like legislation or adjudication would be seen as an embedded struggle, whose past relevance to current mediation would depend on the continuity of the past struggle to the present struggle. Belief in a single right answer, even bracketed in terms of the function of legal media-

[5] Bohman, p. 910. This aligns him (despite his protest) directly with Dworkin's *Law's Empire* (1986).

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tion, both assumes adjudication to be between individual independent agents and is undemocratic in its exclusion of relative power as it is and was factually contested in the interdependent social constitution of lived lives. While law in an alternative understanding would be explicitly indeterminate, something that CLS already believes, it would also focus more on power as it exists and is deployed in communities (Casebeer 1994a, 1994b). It would make the democratic strategy the overcoming of injustice rather than the search for a rationalized justice (Casebeer 1989b). Yet, bringing struggle inside law as a way of bowing to the seamlessness of history and its complexity, as Habermas also realizes, makes living within the state, as broadly conceived, necessary, at least as one of our addresses. This would put Habermas at odds with the growing attempts to circumvent the state entirely by reorganizing the public as civil society (Cohen & Arrato 1992).

Habermas's legal theories have had some impact on American legal studies. To the extent his system has not been adopted, blinders here about the nature of the "state" have contributed. At the same time, parts of his philosophy crucial to the enunciation of his legal ideas are treated as more problematic here and may deserve contest, particularly given American emphasis on adjudication. Finally, the ambiguity of his more concrete characterizations of law will need further elaboration by any user and in the end may represent an insoluble riddle. These latter issues are important for progressives who will need to answer two questions. First, are law and legal practices the situs of conflict in the construction of society? And second, can or should law be the focus or the periphery of strategic practice? Both CLS and Habermas remain unsure—but unwilling to be out of touch with embedded power structures of present institutional practices. At this point of retreat from a more fully participatory meaning as well as more democratic practices of law, social theory on law from neither side of the ocean should be considered an exceptionalism.

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