

## Complexity, Pluralism, and the Constitutional State: On Habermas's *Faktizität und Geltung*

James Bohman

Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt: Suhrkamp Verlag, 1992. Pp. 633. \$61.64 cloth; \$32.16 paper. ("FG")<sup>1</sup>

Jürgen Habermas has from the start had the goal of developing a normative democratic theory based on rational consensus. From *The Structural Transformation of the Public Sphere* (1989a; first published in 1961) to *The Theory of Communicative Action* (1984, 1987), Habermas has sought to elaborate the underpinnings for such a critical theory of democracy, one that is oriented to the participation of reasoning citizens. In many respects, Habermas's recent *Faktizität und Geltung*, while cast as a philosophy of law, bears the fruit of that labor by offering his long-awaited "radical" democratic theory. Habermas calls his theory of democracy "deliberative politics," clearly aligning himself with those contemporary political theorists who emphasize public deliberation and participation.<sup>2</sup> However, many faithful readers of Habermas may find his approach to legal and political legitimacy in *Faktizität und Geltung* somewhat surprising. Rather than defending participatory democracy directly, he instead embeds these radical democratic principles in a complex account of the political and legal institutions of constitutional democracies.

Address correspondence to James Bohman, Department of Philosophy, St. Louis University, St. Louis, MO 63103.

<sup>1</sup> The English translation is forthcoming: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg (Cambridge, MA: MIT Press). Page numbers in the text of this review essay refer to the fourth printing of the original German edition, which is denoted as FG. While I have consulted a draft of the English translation, the translations here are my own.

<sup>2</sup> See, e.g., Cohen 1989; Dryzek 1990; for the relation to representation, see Sunstein 1985; for a close study of deliberation in Congress, see Bessette 1994; for an account that draws on examples of town meetings and workplace democracy, see Mansbridge 1980. For an account of deliberative democracy in complex and pluralist societies, see Bohman (in press (a)).

The fall of bureaucratic socialist regimes in 1989 has been a sobering and disorienting experience for the European Left. In response to these events many on the Left adopted such terms as “civil society” and “constitutionalism” as essential components of a critical democratic theory, and in this book Habermas has thoroughly appropriated them. And yet, Habermas continues to defend the radical democratic egalitarianism which he sees as the core of what is still defensible in socialist ideals.<sup>3</sup> These ideals now need to be rethought, which Habermas does in two ways, one directly political and the other more theoretical. First, he has undertaken the positive task of constructing a political theory that emphasizes the institutional aspects of democracy, particularly the law. Just as his earlier work tried to find an alternative to both liberal capitalism and bureaucratic socialism, his current work attempts to revise radical democracy by locating its ideals within modern institutions rather than outside of and in opposition to them. Habermas also wants to revise radical democratic theories for sociological reasons. He has a deepening appreciation of the historical trends toward greater and “unavoidable” social complexity, which make the ideals of uncoerced agreement and undistorted communication more difficult to apply. Habermas’s current project is to recognize the “social facts of complexity” while not abandoning democratic ideals. He locates his social theory of law between the “facts” of social complexity and the ideal “norms” of democracy. His social theory thus tries to be realistic without being skeptical, normative in orientation while insisting on sociological descriptions that illuminate the real possibilities for democracy in current constitutional states.

As the title of the English translation *Between Facts and Norms* suggests, Habermas’s analysis identifies persistent tensions in democratic theory and practice and attempts to overcome them.<sup>4</sup> The law both embodies and resolves these tensions. According to Habermas, law is a powerful social force, capable of integrating the entire “societal community.” Law also has a special role within political institutions, insofar as it serves as the intermediary between citizens and the powerful institutions that implement decisions in a complex world. Thus, law is for Habermas “the medium for transforming communicative power into administrative power,” a means for making the public deliberation of citizens effective in solving societywide problems (*FG*, pp.

<sup>3</sup> For Habermas’s defense of socialism in light of its core radical democratic and egalitarian norms, see Habermas 1990. Here socialism has become identical with radical democracy.

<sup>4</sup> The fourth printing also has a very useful Postscript, in which Habermas himself summarizes the complex argument of the book. I have relied heavily on this account to pick out the most important arguments of this massive book of nearly 700 pages. Because of the abstract character of the original German title (which translates literally as “Facticity and Validity”), the English translation’s title has been altered to *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*.

108–11). Democracy requires that the equality and mutual recognition of face-to-face interactions be “transmitted” into interactions among “anonymous” strangers. Law is the only means by which this may take place, a fact proponents of radical democracy have too often ignored.

Another way to look at Habermas’s unification of the philosophy and sociology of law is to see it in the context of his theory of rationality. In volume 1 of *The Theory of Communicative Action* (1984), Habermas admits that his account of communicative rationality and its constructs such as the “ideal speech situation” cannot be applied directly to actual historical situations.<sup>5</sup> It is a theory based on idealizations which are presupposed in certain types of social actions and which regulate certain social practices. But in order to make the theory useful as a reconstruction of and guide to actual practices, it is necessary to put back in the complexities and contingencies left out of the theory. This must be done without sacrificing the normative insights of the original analyses. *Between Facts and Norms* represents Habermas’s own extended attempt to do just that, in which law mediates between normative demands of reason and the empirical facts of power and complexity.

In this essay, I want to show that Habermas employs two distinct theoretical strategies in *Between Facts and Norms*, each operating at a different level of analysis. At the normative level of political theory, Habermas generally attempts to overcome the opposition between facts and norms through synthesis: he is *both* a liberal and a radical democrat, both a Kantian and a Rousseauian. Indeed, one of the central arguments of the book is that public and private autonomy are “co-original,” or mutually interdependent. At the institutional level of political theory, by contrast, he employs a strategy of differentiation, or what Michael Walzer has called “the art of separation.” He finds a place for *both* the informal public sphere and formal administrative institutions; his model of the constitutional state thus has “two tracks” or levels. These two theoretical strategies together provide solutions to what Habermas calls the “internal” and the “external” tension between facts and norms, between the coercive and legitimate aspects of law and the communicative and systemic aspects of social integration.

Before turning to each of these methodological issues in Habermas’s democratic theory and the sociology of law, I first locate his recent turn in democratic and legal theory within the context of his previous treatments of these same themes, espe-

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<sup>5</sup> Habermas admits that a separate sort of analysis is needed to bring his theory closer to the “complexity of natural (social) situations without sacrificing all theoretical perspectives for the analysis of the coordination of interaction. This task consists in reversing step by step the strong idealizations by which the conception of communicative action has been built up.” See Habermas 1984:330.

cially the problems of rationality and democracy (sec. I). These earlier writings suggest a much stronger conception of democratic legitimacy and participation than Habermas currently defends. His recent retreat suggests that Habermas now considers the problems inherent in his previous views insoluble. I then examine Habermas's normative and institutional reconstruction of the constitutional state itself (secs. II & III). In the final section, I consider the two major weaknesses in Habermas's current democratic theory, one normative and the other sociological (secs. IV & V). First, his formulation of a "democratic principle" by which to judge the legitimacy of a law is too strong. For all his attempts to distance himself from some closely related versions of radical democracy, Habermas still holds too high a standard for democratic agreement: the agreement of all citizens rather than deliberative majorities. Second, I argue that his descriptive account of social complexity grants too much to systems theory; many of the "necessary" deviations from radical democratic norms are due to an uncritical acceptance of its theoretical presuppositions rather than to "unavoidable" social facts. Finally, in the conclusion, I show that my criticisms push Habermas's theory in a direction of radical democracy.

## I. Democracy in Habermas's Earlier Writings: Politics and Discursive Rationality

The central role that democracy plays in Habermas's critical social theory sharply distinguishes him from the previous generation of the Frankfurt School. As Martin Jay has shown, the Frankfurt School used the category of "totality" both descriptively and normatively: While its descriptive use primarily explains the high degree of integration of modern societies, its normative use demands that society ought to "express" human needs and powers.<sup>6</sup> Members of the Frankfurt School contrasted the "false totality" of contemporary society with the ideal of an "expressive totality." The clearest indication of Habermas's rejection of the explanatory holism of the Frankfurt School's first generation can be found in his consistent attempt to introduce the categories of meaning and agency back into critical social theory.<sup>7</sup> These were

<sup>6</sup> For a discussion of the category of totality as basic to Western European Marxism prior to Habermas, see Jay 1984. Charles Taylor (1975) shows the Romantic and Hegelian origins of the normative ideas of totality; "expressivism" is a reaction to the fragmentation, abstractness and atomism of liberal society. The first generation of the Frankfurt School falls within this Hegelian tradition.

<sup>7</sup> Habermas's methodological writings after the "positivism dispute" correct the micro-sociological deficits of Critical Theory, which focused on depth psychology and not social action. In *On the Logic of the Social Sciences* (1988), Habermas incorporates recent accounts of social action and interpretive social science into a two-level critical theory. See Habermas (1988) for his discussion of intentional and meaningful action, which was developed into a full, alternative account of rationality in Habermas 1984:ch. 1. The absence of these levels of reflection led first-generation Frankfurt School theorists into systematic

absent in the macro-sociological and depth-psychological approaches favored by descriptive theories of the “false totality” of contemporary society. Certainly, democracy has no point without these categories. Democracy also makes no sense apart from specific forms of interaction and association, from the public forum to various political institutions.

Habermas’s earliest work *The Structural Transformation of the Public Sphere* ([1961] 1989a) traced the emergence of new forms of public interaction from the intimate sphere of the family, to coffeehouses and salons, and finally to parliamentary debate.<sup>8</sup> The idea of an “expressive totality” does not capture the new norms that were emerging in this historical period. Habermas develops them as norms of publicity and discursive rationality that are applicable beyond the conditions of their historical emergence. Accompanying these cultural developments are social trends, mainly differentiation and pluralization, which are not pathological but instead positive features of complex, modern social life. They are not just empirical limits to democratic self-determination but even enable it in certain respects. Once a positive conception of complexity plays a role in political theory, it follows that modern society cannot be expressively unified and reintegrated even by the public sphere (without moral loss or political repression) because the public sphere is only one part of society. Habermas now considers the pluralism of forms of life and the differentiation of spheres of activity to be both desirable and unavoidable characteristics of modern society.

In *Legitimation Crisis* ([1973] 1975), Habermas challenges the political sociology of the Frankfurt School and gives a different account of the transition from liberal capitalism to its contemporary state interventionist form. In many respects, Habermas returns to the neo-Marxist view that the state cannot solve all the problems and contradictions of capitalist production. Indeed, even with state intervention this social form remains for Habermas “crisis ridden” at key points within its structure (see

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dead ends in social science and toward a critical theory based on “total reification” and a “totally administered society”; in their later writings, Adorno and Horkheimer used these as terms to describe current social reality, not just potential trends.

<sup>8</sup> Habermas 1989a, esp. part I. This work again employs the ideology critique of liberalism, comparing the norms that emerged in the public sphere of private individuals with their actual realization and development. While these norms remained unrealized, Habermas does speak of a “propitious moment” in early modernity in which a free and open public sphere of citizens existed in some form. Similarly, he sees the bourgeois family as creating the possibility of new forms of interaction and “audience-oriented subjectivity,” although in actuality it remained a “patriarchal” institution. The analysis in this work of the decline of the public sphere in the late 19th century is not so independent of the general theoretical orientation of the Frankfurt School after World War II. Habermas sees the public sphere as increasingly commodified, as it is transformed from a sphere of critical public discussion into a reified sphere of passive consumption of programmed cultural objects. Habermas had not yet incorporated a notion of social complexity into his account of the transformation of the public sphere, one that eventually replaces the one-sided idea of rationalization and decline.

Habermas 1975:parts 1 & 2). In particular, even if the burdens of the competitive market are shifted to the administrative apparatus of the state, economically generated conflicts and outcomes may exceed the state's problemsolving capacities for any number of reasons, including fiscal crises or lack of knowledge. In these cases, the social system as a whole can still suffer from a "rationality crisis." And even if these problems were effectively solved, the costs of such solutions, the distribution of benefits and burdens that results from them, and the use of explicitly political means to solve them all undermine the nature-like and impersonal character of market processes. Once outcomes are up to conscious choice and deliberation, they must meet the requirements of legitimacy; a "legitimation crisis" may occur either if solutions cannot be found or if available ones violate generalizable interests. Since administration cannot simply manufacture motives and reasons at will but is constrained by the existing pool of cultural reasons, the failure at these other levels may produce a "motivation crisis" among citizens as well. Motivation crises indicate the limits of the micro-management strategies that the earlier generation of the Frankfurt School assumed stretched into everyday life and psychic structure.

With these crisis tendencies, advanced capitalist societies are neither so integrated as the political sociology of the Frankfurt School made them out to be nor independent of ideological contestation and reason giving. Thus, there is a space for collective agency and the deliberation of citizens, if only in the public sphere and in social movements that contest the legitimacy of administrative decisions. Rather than being fully integrated with complementary micro- and macro-structures, advanced capitalist society is a complex and multileveled plurality of parts, each with different forms of integration. In those parts in which public interaction and institutions at least play a role in producing legitimacy, the political norms of democracy have not entirely lost their relevance. Economic growth often requires unemployment and environmental destruction; but policies that promote growth with these costs have produced new social movements and even new political parties.

With this rejection of explanatory and normative holism, Habermas takes over themes from the early neo-Marxist critique of liberal ideology. In *Legitimation Crisis* (1975), Habermas argued that the demands of advanced capitalism limit the scope and significance of democratic institutions and norms. Much like Horkheimer's (1974) argument that majority rule is a form of "subjectivism," Habermas saw the exclusive emphasis of current democratic practice on periodic elections and voting as an indication of its merely "formal" character.<sup>9</sup> To this reduced version

<sup>9</sup> For Horkheimer (1974:21), the reduction of democracy to majority rule shows the "illusory triumph of democratic progress that consumes the intellectual substance upon



of democracy, Habermas (1975:36) opposed “substantive” democracy, which emphasizes the “[g]enuine participation of citizens in . . . political will formation.” This stronger notion of a democratic will formed by citizens’ participation also requires more than a merely “formal” or self-interested notion of rationality, just as Horkheimer referred to some notion of “objective reason” to criticize majority rule. However, Habermas’s notion of rationality is not metaphysical but discursive and procedural; it is developed in terms of the procedural qualities of the communication necessary to make this public will formation “rational” and for it to issue in a genuine rather than merely “de facto” consensus.

Habermas’s defense of substantive democracy was still primarily epistemological at this stage, in that it demanded an expansion of Kantian practical reason; democracy was now founded on the intersubjective structure of communication exhibited in the special form of reflective and reciprocal communication he called “discourse.”<sup>10</sup> Democratic institutions are therefore discursive to the extent that free and equal citizens deliberate and make decisions in them, in such a way that all could agree to them without coercion or distorted beliefs. The core of democratic legitimacy is thus not some metaphysical foundation in “objective reason” but the creation of discursive conditions under which all can shape those decisions that affect them. The validity of a decision would be related to “rational consensus” to the extent that it passes a test of intersubjective universalization: A norm is justified only if all could agree to it under ideal conditions. In his moral and legal theory, Habermas (*FG*, p. 138) calls this test “the discourse principle.”

Such an agreement is primarily epistemological and not political. It provides criteria for testing the procedures and conditions for making a decision rather than for making specific institutional proposals. The main argument concerns refuting the value skeptic, such as Weber, who saw politics as the struggle between “gods and demons.” Because of the epistemological character of this view of rationality, Habermas has been suspicious of attempts to apply it or its counterfactual constructs such as the ideal speech situation *directly* to the structure of political institutions. His criticisms of Marx and Rousseau always had clear polit-

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which it has lived.” When reduced to majority rule (which is the mere quantitative aggregation of subjective preferences), democracy is so standardless that it easily dissolves into dictatorship when it fits subjective interests of the masses and blind functional forces. Habermas’s version of this argument in *Legitimation Crisis* (1975) is more dialectical and Weberian; he is arguing here that only a notion of practical reason richer than formal or instrumental reason can make sense of the cognitive character of democracy. He is opposing two “positivist” interpretations of law and democracy: mere decisionism and simple proceduralism.

<sup>10</sup> As Habermas (1975:102) puts it against Weber, a cognitivist ethics must show that “practical questions admit of truth.”

ical implications. As early as *Theory and Practice* ([1966] 1973), he distanced himself from Rousseau's claim that the general will can only be achieved in a direct republican form of democracy: By failing to see that the ideal agreement of the social contract specifies only a certain procedural and reflexive level of justification, Rousseau confused "the introduction of a new principle of legitimation with proposals for institutionalizing just rule."<sup>11</sup> Habermas has also argued from the start that democratic principles need not be applied everywhere in the same way, as defenders of participatory, "council democracy" might have it.<sup>12</sup> On this view, Marx, too, was Rousseauian enough to have succumbed to the illusions of direct democracy, putting forth democratic ideals and forms of organization whose scope is limited to face-to-face interaction.

Habermas found a modified version of the political skepticism of the Frankfurt School useful for dealing with this problem. The processes of social rationalization (such as the emergence of large bureaucracies, markets, and such other forms of social technology as the mass media) cannot be ignored in a critical theory of democracy. Previously, critical social theorists described these phenomena in terms of the Marxist category of reification, as turning human beings into objects of control and manipulation. These theorists' social ideals were expressivist: society ought to express true human needs and develop their capacities and powers. But for Habermas it is complexity, and not reification, that is the overwhelming social fact of modern society relevant to democratic theory. It is a fact that he believes neo-Rousseauian and neo-Marxist defenders of participatory democracy continue to ignore.<sup>13</sup> These facts do not have negative consequences only for democracy, as a richer description of social and cultural rationalization in modernity might show.

Habermas puts this point even more strongly in *Between Facts and Norms*. Democracy, he argues, cannot organize society as a whole "for the simple reason that democratic procedure must be

<sup>11</sup> Habermas, "Legitimation Problems of the Modern State," in Habermas 1979:186.

<sup>12</sup> See, e.g., Habermas's "Preface" to *Theory and Practice* (1973), entitled "Some Difficulties in the Attempt to Link Theory and Practice," esp. pp. 32–40.

<sup>13</sup> See Habermas's criticisms of Joshua Cohen's (1989) otherwise similar conception of "deliberative democracy." He distances himself from Cohen in the following way: "In contrast to Cohen, I would like to understand democratic procedure as the core of a separate constitutional political system and not as a model for *all* social institutions." *FG*, p. 369. Such a criticism is a self-criticism of Habermas's own view of "substantive democracy" in *Legitimation Crisis* as well. Nonetheless, Habermas insists that he is defending "radical democracy" throughout *FG*, as is especially evident in his discussion of Rousseau's popular sovereignty as a corrective to liberal conceptions of freedom (pp. 130 ff.). In *Civil Society and Political Theory*, Jean Cohen and Andrew Arato (1992) argue that the very conception of differentiation and complexity that Habermas has now adopted requires abandoning the "fundamentalist illusions" of radical democracy. I think Habermas is correct in not drawing such a strong conclusion, but he never clearly shows why this is the case and why he is still a radical democrat, for reasons that I will outline at the end of this essay. Put simply, his account of popular sovereignty is simply too weak.



embedded in contexts it cannot itself regulate" (*FG*, p. 370). These contexts are products of social complexity. According to Habermas, no normative conception of politics or law can be developed independently of a descriptively adequate model of the complexity of contemporary society, lest it fall prey to the impotent prescriptivism of the Kantian moral ought noted by Hegel and others (pp. 63 ff.).<sup>14</sup> Without this descriptive component, these norms become abstract and empty ideals rather than reconstructions of the rationality of actual practices. Moreover, directly applying such norms ignores further social facts, including the "systemic constraints" on the information and decision costs in the deliberative process; unavoidable asymmetries of competence, expertise, and the availability of information even in the public sphere; the limits of public attention; and other scarcities of deliberative resources (pp. 395–98).<sup>15</sup>

The main reason Habermas is not a Rousseauian is that complexity fundamentally changes the conditions for popular sovereignty, for the unified will of the people. There are two distinct forms of complexity that work to undermine sovereignty in this sense, one internal and the other external. The first has to do with the discursive complexity of political decisionmaking. Political deliberation cannot be reduced to moral discourse with its extremely demanding idealizations of the ultimate unanimity of all concerned. Rather, it concerns a whole network of overlapping and interconnected discourses about policies, goals, and norms. The second sort of complexity is even more deflationary for the sorts of utopian claims made by critical theorists. Given a certain degree of social differentiation and a plurality of cultural conceptions of the good, there are strong constraints on the scope of a principle of democracy and the effectiveness of delib-

<sup>14</sup> I am arguing that the Kantian side of Habermas's philosophical project, so prominent in his moral theory, is far in the background here. Indeed, Habermas considers Kant a liberal, who endorsed "the improbable idea that society as a whole can be governed as a free association of originally free and equal citizens" (p. 63). Rather than trying to figure out how to put this moral idea into practice, Habermas asks Hegel's institutional question: Where is the place for free agreement and deliberation among citizens in the complex society that has developed historically, with its large-scale institutions and massive accumulation of social power?

<sup>15</sup> In *FG* ch. 7 (pp. 395 ff.), Habermas adopts a "thought-experiment" proposed by Peters (1993:230 ff.). The thought experiment asks us to imagine a society that was entirely organized democratically; Peters calls it "pure communicative association," similar in many respects to Marx's image of the Paris Commune. He then introduces "facts" of scarcities, natural inequalities of ability, information and decision costs, and forms of complexity that all make "deviations" from the pure communicative model "unavoidable." But most of these deviations require further empirical assumptions, such as psychological assumptions about epistemic inequalities. Peters also assumes that the division of labor undermines the public sphere, rather than being a product of it; this is hardly true of most public enterprises, such as science. The target then turns out to be an easy one: the homogeneous "general will." Ignoring complexity is not the problem with these versions of radical democracy; rather it is hyperrationalism in politics and excessive political will. For these criticisms, see my review of Peters's book (Bohman 1995). For a somewhat different criticism of claims that participatory democracy is necessarily less adequate in situations of social complexity, see Dryzek 1990:ch. 3.

erative problemsolving. In particular, popular sovereignty loses its meaning as a radical norm. The "people" remains a fiction, since complex societies do not have a political center in the nation-state for collecting information or making decisions entirely by consensual means. Complex societies are "polycentric," and this fact changes the nature of democratic institutions and political participation.

Habermas's turn to a theory of communicative action was supposed to provide him with the means to answer Weberian value skepticism and to avoid its implications for the legitimacy of the modern state. Since Weberian skepticism presupposes that there is no alternative to instrumental reason, Habermas needed some other form of reason to describe cultural rationalization and learning in modernity. After rejecting his own attempt to formulate a theory of "cognitive interests," Habermas focused his theory of rationality on a Peircean consensus theory of truth for the sciences and a Kantian deontological ethics for the discursive justification of moral norms.<sup>16</sup> Initially, at least, it seemed to Habermas that the rationality of moral norms provided the key to a richer notion of "substantive" democracy that went beyond formal aggregation of self-interest. But this approach proved to be increasingly unfruitful for democratic theory, as Habermas explored the internal complexities of discursive rationality. In his most recent work, he has abandoned the strong analogies between the justification of moral norms and democratic decision-making so prominent in *Legitimation Crisis*. While exploring moral justification served the epistemological purpose of pointing the way beyond Weber, it proved a misleading and under-complex model for democratic deliberation. Besides leading to the subordination of law and politics to morality, the idealizations and abstractness of moral discourse set the standard of agreement too high for democratic theory.<sup>17</sup> This shift set the stage for Habermas's more modest approach, and his attempt to reintroduce complexity and contingency into his discourse theory as a way to establish a workable normative theory of democracy and law.

<sup>16</sup> Moral norms and cognitivist ethical theories are the focus of the discussion of the "logic of legitimation problems" in part III of *Legitimation Crisis* (1975). The focus shifts in *Between Facts and Norms*; Habermas now insists on a "precise and sharp distinction" between a discursive "principle of democracy" and a discursive "principle of morality" (*FG*, p. 141). See *FG* ch. 3 in particular for an extended discussion of this distinction, as well as Habermas's argument against "the subordination of law to morality."

<sup>17</sup> Habermas puts the point this way in the "Postscript" to the fourth printing: The practice of citizens giving themselves laws "requires more than a discourse principle by which citizens can judge whether the law they enact is legitimate" (p. 688); such a principle is, however, all that they need for moral justification.

## II. Democracy, Law and the Constitutional State

In the last section, I argued that Habermas has gradually moved away from the idea that he could infer necessary features of political institutions, such as their participatory character, directly from his moral theory or theory of rationality. He now sharply distinguishes morality from law and politics. Legal freedom is wider than what is morally acceptable or even permissible. Rather than being opposed to each other as conflicting values, law “complements” morality, particularly with regard to the problems of social coordination. The limited coordinating power of moral norms in face-to-face interaction cannot be transferred to the integrative functions of large-scale institutions, and this fact presents a limit on the participatory, democratic organization of complex societies.

In this section, I trace Habermas’s solution to this problem in *Faktizität und Geltung*. The nine chapters of the book divide into three basic sections. In the first two chapters, Habermas sets out the basic problem of combining moral and empirical factors in discussing the integrative power of democratic law. The middle four chapters present the main normative argument of the book and develop a “system of rights” for democratic constitutional states in complex societies. The last three chapters contain Habermas’s fullest account of democratic theory to date, one that he thinks both adequately combines sociological and normative perspectives and presents the main insight of the book: that democracies in complex societies must follow a “two-track model” of formal institutions rooted in an open and unrestricted public sphere. I begin my reconstruction of this complex argument with Habermas’s appropriation and criticism of the two sociologies of law closest to his dual empirical and normative perspective, those of Weber and Parsons.

After developing the philosophical tension between facts and norms in chapter 1, Habermas turns to the sociology of law in chapter 2 and argues that a similar tension is prominent in the theoretical orientation which begins with Weber and is refined further by Parsons and now by Habermas himself. Habermas identifies the main idea of this tradition as Weber’s idea of “legitimate orders” which produce social order by combining empirical with moral motives for compliance, and moral obligation with external coercion for behavioral expectations (pp. 99–101). Furthermore, Weber traced out the rationality gains of modern, positive law, especially its development of formal and procedural forms of justification and bureaucratic organizations for enforcement and enactment of decisions. The problem, as Habermas sees it, is not only that Weber’s inadequate notion of rationality remains paradoxical, since it cannot provide any justification for modern law; it is also that Weber tied law to the organization of

the bureaucratic domination of the modern state, rather than to its increasing democratic potential. Parsons's emphasis on value generalization and increasing inclusion of all persons in the category of citizenship goes some way toward correcting the deficit of Weber's functionalist version of modern social order (pp. 113–16). Although Parsons recognizes the integrative role of modern law, Habermas argues that in the end he, too, is guilty of functionally obscuring its distinctive normative features.

For all its weaknesses, Parsons's sociology of law provides a key descriptive term for Habermas's account of law as a medium for social integration. In complex and differentiated societies, the political subsystem, even if bureaucratically organized, cannot integrate all the many differentiated spheres.<sup>18</sup> According to Parsons, "the societal community" identifies a whole set of spheres of action that serve integrative functions, from rituals that produce solidarity to second-order institutions such as law and morality that regulate conflicts. For Habermas, it is law that is the central structure of the societal community, since law alone is able to transmit solidarity into increasingly abstract and institutionally mediated social relationships. It can do so not only due to its intermediary status but also because of its "self-referential" quality. As Habermas puts it: "Law is a legitimate order that has become reflexive with regard to the very process of institutionalization" (p. 109). It is with this reflexivity that democracy becomes possible, since law is a medium not only for making specific decisions but also for determining the character of regulating institutions themselves. The societal community out of which such institutions emerge, Habermas argues, now must be regarded as dispersed in civil society, along with the vast discursive network of the public sphere.

The increasing complexity and differentiation of society, however, exacerbates problems for democratic governance in ways unanticipated by Parsons, while at the same time opening up new possibilities for private and public autonomy. Under these conditions of social complexity and with the plurality of cultures and subcultures, many domains of action are "unleashed" from the control of conventional moral norms and "strong" institutions, such as religion, which formerly fused together factual and normative aspects of social integration in an unquestioned moral consensus about authority (pp. 45–46). Political and legal institutions are now necessary to overcome the deficits in social integration that are empirical facts of modern societies: they compensate for "the cognitive indeterminacy, motivational insecurity, and the limited coordinating power of

<sup>18</sup> "Parsons uses the term 'societal community' to designate the central sphere from which each differentiated social system is supposed to develop" (p. 109). Habermas is referring here to Parsons 1971. In Habermas's view, Parsons overlooked the special, self-referential status of law in all institutionalization in modern societies.

moral norms and informal norms of action in general” (p. 397). This need for institutional mediation means that political life will not consist merely of “free association” based on communication, and that even the “sovereign will of the people” is no longer able to effectively control or constitute the whole of society. Communication by itself cannot perform this integrative role without institutional mediation. For democratic theory, it follows that whatever is left of ideals of participation and self-determination will have to be worked out within the context of liberal constitutionalism and its institutions, which in turn is based on “a system of basic human rights” (pp. 154–65).

If law is to perform this integrative function, then political decisionmaking and institutions must be oriented to the making of laws; politics is “jurisgenerative,” as Frank Michelman puts it (1988; see also Sunstein 1988). Political deliberation deals with issues that are so complex that it typically must employ all three aspects of practical reason (p. 667). Politics is “pragmatic” to the extent that it deals with achieving practical ends, “moral” insofar as it is concerned with achieving the fair resolution of interpersonal conflicts, and “ethical” when it is concerned with the interpretation of cultural values and identities.<sup>19</sup> Consider how the recent health-care debate has been conducted in all these dimensions in ways that are difficult to separate: Questions of fairness, efficiency, and cultural values are all relevant. Moreover, the debate mixes together argumentation, compromise, and bargaining as well. Political deliberation, therefore, does not take place within a specialized form of discourse, with its own logical structure and orientation to a single aspect of validity such as truth or justice. Deliberative politics for Habermas is instead a complex “discursive network” that includes argumentation of various sorts, bargaining and compromise, and, above all, unrestricted communication and the free expression of opinions by all citizens in the informal public sphere. How the inevitable conflicts between differing claims, discourses, and values are to be sorted out is itself a matter for public deliberation.

Nonetheless, Habermas spends the middle chapters of the book defending a notion of “legal validity,” which at least guides this complex process and can be used to assess its outcomes. By this concept, Habermas does not mean mere “legality” in the Weberian sense of rules enacted according to formally correct procedures. He discusses the validity of law, or its criticizable claim to be legitimate, at various levels. All validity claims are “Janus faced.” On the one hand, they have a “moment of unconditionality,” in that speakers assume that the validity of their utter-

<sup>19</sup> For a clear discussion of what Habermas means by the various “uses” of practical reason, see Habermas 1993b:1–18. This set of distinctions, which may be jarring for the English-language reader, is presupposed in the discussions throughout Habermas 1993a, esp. ch. 3.

ances transcends the particular context in which they are made. On the other hand, only the local, binding act of acceptance by real social actors enables a validity claim to coordinate actions in everyday practice (p. 37). That law has this particular duality has been recognized by philosophers from Kant onward. Law is, on the one hand, a social fact as a particular set of rules backed by coercive power; on the other hand, it cannot achieve even average compliance based on mere coercion and threat of punishment, but must be recognized as legitimate. This duality is the “internal” tension between facticity and validity in law. Habermas puts his version of this irresolvable tension this way: “In the legal mode of validity, the facticity of the state’s enforcement of the law is intertwined with the justificatory force of a law-making process that claims to be rational to the extent that it guarantees freedom” (p. 46).

Legal validity brings together the two sides of the “internal tension” of facts and norms in proper relationship. As a social *fact*, a law is coercively enforced, but in such a way as to increase the freedom of each citizen. This side even frees citizens to act strategically within these constraints of mutually recognized liberties. But as a *lawmaking process* organized democratically, the conditions and procedures on which it is based lend it the supposition of rational legitimacy—that it is worthy of being obeyed by all, even by those worst off. Both these sides of the law are reflected in the system of rights Habermas proposes as the basis for constitutional democracy, including basic liberties, legal protections, and rights of equal participation. This dual characterization of valid laws as publicly made and coercively enforced is behind much of Habermas’s treatment of particular issues. In chapter 5, for example, Habermas argues that jurisprudence needs to be guided by the cognitive presupposition of a single right answer, even in “hard cases.”<sup>20</sup> This is demanded by both the functional requirement of “legal certainty” and the discursive process of lawmaking.

Habermas insists that democracy and the rule of law are “internally related.” This relationship determines his solutions to certain persistent dilemmas of democratic practice, such as conflicts between freedom and equality. One such synthetic claim is Habermas’s central normative argument that private and public autonomy mutually imply each other; or, as he puts it, they are “equiprimordial” (p. 162). In this way, Habermas hopes to avoid

<sup>20</sup> It is odd that Habermas spends so much time in his chapter on jurisprudence (ch. 5) discussing these problems in terms of adjudication rather than legislation. The main issue here for Habermas is the cognitive constraints on the reasoning of judges rather than those of citizens and legislators. This focus has to do with the way Habermas develops his own positions by criticizing Ronald Dworkin’s more hermeneutic one, but it results in a misleading picture of the full range of problems of publicity that underlie his account of the rationality of law and politics. One reason is his proceduralism, which requires strong institutional conditions to assure the rationality of deliberation.



the exclusively *moral* interpretation of human rights typical of liberal and natural law theory, as well as the *ethical* (or value-oriented) interpretation of republicans and communitarians which reduces rights to the values of a particular community. But how can both extremes be avoided? Habermas gives an intersubjective interpretation of rights by again appealing to the mediating role of law and legal order. Even at the conceptual level, he argues, rights make no sense either as the properties of atomistic persons or as the shared values of communities but only as “elements of a legal order” based on mutual recognition and self-legislation (pp. 117–18). Rights emerge as conditions under which it is possible for citizens to collaborate in making positive law as free and equal citizens: “‘subjective’ rights emerge equiprimordially with ‘‘objective’ law” (p. 117). Basic rights do not exist independently of this collaborative process of regulating the common life of citizens through law, and these laws that regulate matters of common concern will not be legitimate unless citizens grant to each other equal rights and liberties. Habermas “derives” a whole system of rights from the discursive character of lawmaking, and these include negative liberties, rights of membership, and legal rights of due process, all of which guarantee private autonomy. The final category concerns rights of participation as a guarantee of public autonomy, to be supplemented by social welfare rights if circumstances of social inequalities make impossible the equally effective exercise of political rights by all citizens.

This analysis of rights as conditions of legitimate lawmaking gives Habermas his final step in putting back the contingencies and complexities left out by the idealizations of his theory of rationality. In its current form, the theory presents a general “principle of discourse” (or D), by which any norm can be evaluated. According to D, “only those norms are valid which all those affected could agree to as participants in a rational discourse” (p. 138). Habermas then derives his system of rights from this principle, coupled with the idea that the regulation of common life will take “the form of law” (p. 154). With this system of rights in place, Habermas thinks he can specify a distinct principle of democracy with which to judge the legitimacy of law. But as a principle of legitimacy, the “principle of democracy” requires two distinct features of the lawmaking process: (1) that laws meet with the agreement of all citizens and (2) that the process of making laws is discursive, or structured according to the conditions of mutual recognition typical of communicative interaction. These conditions assure that law “preserves its connection with the socially integrative force of communicative action” (p. 111). The final result of intertwining the ideal principle of discursive justification with the medium of law as creating conditions of common life is the following principle: “Only those laws may claim legitimacy that meet with the agreement of all citizens in a discursive

law-making process that is itself legally constituted" (p. 141). It is important to note that the agreement of *all* citizens, or the requirement of unanimity, does not distinguish the discourse principle from the principle of democratic legitimacy. This requirement, and the impartiality it demands, is precisely what characterizes lawmaking as a discursive process.

### III. Complexity and Democracy: The Two-Track Model of the Constitutional State

There is one further tension between facts and norms for Habermas to solve: the problem of complexity. Even this modified principle of democracy seems oriented to face-to-face interaction rather than to large-scale institutions and societies. This is the problem of *external* tensions between facts and norms. Once again, there are two opposing positions that turn out to be two sides of the same dilemma: on the one hand, Habermas considers purely normative positions, such as Rawls's theory of justice, to be "sociologically naive"; on the other hand, purely descriptive sociology, such as Luhmann's systems theory, collapses into "legal positivism." Most versions of deliberative democracy are ensnared on the first horn of the dilemma. They develop ideal theories of democratic justification that specify necessary conditions and procedures for decisionmaking processes in all institutions.

In contrast to this approach, Habermas thinks that a normative and sociological theory of democracy has to be developed at the same time (p. 410). Habermas here applies his method of "rational reconstruction," which attempts to combine normative and empirical analyses of social practices. In this case, Habermas sees the development of law as representing a "social learning process" in the direction of the increasing autonomy and complexity of law in modernity. At the same time that this development occurs at the institutional level, the actor's moral cognition also undergoes a learning process toward more universal and reflexive norms, preparing the way for democratic forms of justification based on the agreement of free and equal citizens. By employing the method of rational reconstruction, Habermas hopes to give a less instrumental account of what Weber called rationalization, while connecting the emergence of social complexity with new cultural institutions. Such a reconstruction is multi-dimensional and does not rely on the dubious empirical assumption that public discourse can take on all the roles of social coordination and reproduction. Indeed, unavoidable social complexity, Habermas asserts, makes it necessary to apply the conditions of discourse and standards of democratic legitimacy "in a differentiated way" (p. 384).

Rational reconstruction supplies just what these normative theories lack: a “sociological translation” (p. 388). Systems theory and other forms of legal positivism simply attempt to replace normative descriptions with functionalist ones. While the functionalism of most macrosociological theories may be rejected, such theories do nonetheless provide insights into the mechanisms by which complex societies are reproduced and organized. Because of this aspect of social integration, a translation of normative theory into cultural practices alone, such as Rawls’s “overlapping consensus,” is not enough; Theories of law and democracy need “the harder material of action systems and social institutions” (p. 369). Sociologies of law have met this challenge in the past by incorporating both a descriptive and a normative dimension, as is true of Weber and Parsons. But, for all his agreement at the methodological level, Habermas thinks that both Weber and Parsons slipped into forms of functionalism that ultimately failed to fully account for the normative dimension of law and, hence, for its integrative power in complex society.

The single greatest difficulty here is to do what Weber and Parsons failed to do: Habermas must provide a sociological translation that both grasps the high degree of social complexity of modern society and leaves room for the normative principles that provide the basis for political legitimation. Habermas makes this task harder by accepting to a large degree Luhmann’s description of contemporary societies as “polycentric,” that is, so highly complex and differentiated that there can be no single center or apex of power and control, not even the political system or any part of it. If this is the case, how can it be that agents control the conditions of their own common lives? Such popular sovereignty remains central to democratic legitimacy for Habermas and is his last link to the radical democratic tradition.

Once again, law provides the key component for the two-sided—normative and systemic—sociological translation. It is the only medium that can fulfill the demands for societywide integration and at the same time remain rooted in communicative interaction. Here Habermas bases his argument on the law’s connection to ordinary language as the basis for communication between supposedly independent subsystems. Autopoietic theories of law, as developed by Niklas Luhmann and Gunther Teubner, deny any larger integration between subsystems, claiming instead that there is a multiplicity of “codes” or languages specific to each subsystem (e.g., money in economics, contracts in law, or votes in politics). Habermas uses this ordinary language component of law to challenge the assumption that these codes are closed to public input. But ordinary language as a societywide means of communication does not yet provide the sociological translation of democratic ideals Habermas seeks. Is ordinary language a strong enough thread both to hold together the diverse

subsystems and to produce the political consensus required by his notion of popular sovereignty? Habermas's concept of "subjectless" communication, along with his "two-track" model of democratic decisionmaking, is meant to accomplish just this seemingly impossible task.

According to the two-track model, laws and political decisions in complex and pluralistic societies can be rational and hence legitimate in a deliberative democratic sense—that is, rationally authored by the citizens to whom they are addressed—if institutionalized decisionmaking procedures follow two tracks. They must be both (1) open to inputs from an informal, vibrant public sphere and (2) appropriately structured to support the rationality of the relevant types of discourse and to ensure effective implementation. That is, political decisionmaking in institutions must be open to an unrestricted public sphere and yet structured in such a way as to be timely and effective (as well as coherent).

Habermas grants that political problems and forms of deliberation are internally complex. But he must also meet the demands of *social* complexity if the idealized account is to be serviceable for real processes of deliberation and decisionmaking. The discussion that follows bears primarily on deliberations that issue in *legislative decisionmaking*, for this is where the claims of deliberative democracy must primarily prove themselves. If the laws that regulate the judiciary and administration do not issue from the deliberation of citizens, then it is difficult to see how one can even begin to speak of a deliberative democracy. Yet decisions about laws, whether made by a legislature or through a broader referendum, almost never enjoy the sort of unanimous agreement or participatory conditions projected by Habermas's ideals.

Here the problem of participation in complex societies is the more basic one. In modern societies, citizens cannot literally come together to deliberate as a whole in any forum or particular body (p. 210). The process of discourse itself is inevitably dispersed across a variety of forums: these include face-to-face interactions at home and work; larger meetings in the various informal voluntary associations and different levels of organization throughout civil society (clubs, professional associations, unions, issue-centered movements, and the like); the dissemination of information and arguments through the public media; and the complex network of government institutions, agencies, and decisionmaking bodies (pp. 435 ff.). Even before the problem of dissent is dealt with, a plausible concept of rational deliberation must somehow do justice to the complex and dispersed reality of actual public discourse under contemporary social conditions.

In dealing with such complexity, a deliberative democratic theory must hold three terms together in a certain tension: it must link deliberation and decisionmaking with the citizenry.

The sheer size and complexity of society could tempt one to relegate deliberation so much to representatives that it would be difficult to call the account “democratic.” An opposite error would be to underestimate complexity and locate deliberation primarily in the public sphere. Here one does not take sufficient account of the institutional requirements for such deliberation to issue effective decisions. At the same time, popular sovereignty and the public control of decisions can also be lost.<sup>21</sup> The facts of complexity seem to present deliberative democracy with a Weberian dilemma: *either* decisionmaking institutions gain effectiveness at the cost of democratic deliberation *or* they retain democracy at the cost of effective decisionmaking. In either case, citizenship, deliberation, and decisionmaking fail to be linked, so that the public sphere becomes powerless and the power of political institutions derives from some source other than the agreement of citizens.

Habermas solves this three-variable problem with a two-track model, according to which Parliament, or Congress, provides an institutional focus for a broader, decentered “subjectless” communication dispersed across the public sphere and involving all citizens. On this view, institutional decisionmaking depends on a deliberation that is restricted neither to the better informed representatives nor to citizens who merely delegate power of will to representatives as their agents (pp. 210–29, esp. p. 224).<sup>22</sup> The public communication necessary for deliberation under these conditions is “subjectless” or, as Habermas sometimes puts it, “anonymous.” Here is a model of modern politics that is at once democratic, deliberative, and effective.

Such a model of politics depends crucially on the rule of law, interpreted democratically. The people do not govern them-

<sup>21</sup> Habermas sees a tendency toward this error in Hannah Arendt’s republicanism; *FG*, pp. 182–87; also his “Hannah Arendt: On the Concept of Power,” in Habermas 1985:173–89. For an account of the tension between deliberation and democracy in the U.S. Constitution, as well as between popular and institutional power, see Besette 1994:chs. 1–2.

<sup>22</sup> For a two-track interpretation of the U.S. system, see Ackerman (1988:153–93; see also Ackerman 1991, esp. pp. 6–33). While all two-track models reject “monist” interpretation of popular sovereignty, Ackerman’s “dualist democracy” is not exactly parallel to Habermas’s model. Ackerman’s “two tracks” are the rare and special periods of decisionmaking directly by the People (“higher lawmaking”) and the normal politics of daily government decision (“normal lawmaking”). For the use of the principal-agent distinction from contract law as a way of understanding representation as a form of delegation, see Peters (1993:284 ff.). The two-track model provides the basis for criticizing both direct democracy and theories of civil society or associationalist theorists. Habermas would argue that Joshua Cohen and Joel Rogers’s recent work (e.g., Cohen & Rogers 1992), goes too far in this direction as a way for democratic renewal. A vibrant associative life is a necessary condition of a strong public sphere but certainly not a sufficient condition for democracy. It does not by itself assure that citizens will be able to engage in the sort of deliberation that is necessary for the larger, civic public sphere of pluralist societies. Habermas also specifies how representative bodies can still meet the condition of “equal participation” of all citizens contained in his principle of democracy: “they must be receptive to the informal public sphere” and have election procedures that permit “the broadest possible spectrum of interpretive perspectives” (p. 224).

selves except through laws, nor can they organize themselves as a body of citizens with rights apart from the institutional procedures embodied in the lawmaking process. Most important, the rule of law also describes a process for the way that power operates and circulates in a society. "Communicative power" is generated in the process of public discourse by which citizens come to agree with one another; this same process also shapes and steers the exercise of power in administrative institutions, since their power can only be exercised legitimately within the limits set forth by law. The system of rights that is the basis of the rule of law assures that the conditions of public and private autonomy enter into the formation and use of power throughout society. Without the law as medium and institution, communicative interaction is simply too weak an integrative force not to be overwhelmed by other more efficacious sources of social power. But when communicative power is connected to the capacities for bureaucratic organization, such sources of power can be brought under public control.

This connection between legitimate power and the rule of law has brought Habermas to reject the political pessimism that characterized some of his political essays from the late 1980s, and perhaps also his characterization of the law as one mechanism by which bureaucracies colonize the lifeworld.<sup>23</sup> Habermas now thinks that law permits the administrative system to amplify communicative power and make it an effective integrative force. Habermas no longer thinks that such communicative power is necessarily transformed into a nonpublic and systemic power above a certain threshold of complexity, nor that the public of citizens can only defensively "lay siege" to more powerful social systems. Habermas now gives law the heavy task of preserving social complexity; the system of rights limits the effects of complexity through guarantees of private and public autonomy and anchors the law in the structures of communicative interaction.

<sup>23</sup> Habermas's pessimism emerges in political essays such as "The New Obscurity" (1989c:64–69), where he speaks of the "weak" integrative force of communicative action and the autonomous public sphere. On the metaphor of the public besieging, but never taking over for, the integrative effects of social systems, see Habermas (1989b:31; reprinted as an appendix to *FG*). The metaphor of a defensive siege also plays a prominent role in Habermas's (1990) essay on radical ideals and the fall of socialist regimes. All these rather pessimistic political essays stem from the same period between *The Theory of Communicative Action* (1984, 1987), especially vol. 2, and *Between Facts and Norms*, roughly between 1981 and 1992. This pessimism includes law as a social medium, which Habermas presents as part of the problem rather than the solution to social complexity and the colonization of the lifeworld. In *Theory of Communicative Action*, vol. 2 (1987), Habermas goes so far as to say that law is inadequate to deal with conflicts in domains of social life that are communicatively structured, such as the family or the education system. He argues that such domains must be defended "from becoming converted over, through the steering medium of the law, to a principle of sociation that is, for them, dysfunctional" (p. 373). Habermas no longer sees "juridification" as having this inevitable consequence, if the conditions of private and public autonomy can be legally protected and embodied in institutional procedures.



#### IV. Three Problems for Democratic Institutions: The Challenge of Social Complexity

To see how (and if) Habermas's model solves this problem while meeting the challenge of social complexity, we must distinguish three institutional problems that Habermas has to solve: the problem of keeping the political division of labor consistent with democracy, the problem of the plurality of publics and their perspectives, and the problem of keeping formal institutions open to differing substantive opinions and arguments on complex issues. At least in some measure, Habermas's model explicitly recognizes each of these three forms of complexity and is formulated to provide a solution to the institutional dilemmas of each type, which threaten either the publicity of democratic procedures or the sovereignty of the citizenry. I here elaborate how Habermas's two-track model offers solutions to each of these problems, before turning to the weaknesses of these solutions in the next section.

The problem of the political division of labor represents a direct challenge to citizen participation in decisionmaking in complex societies. Political deliberation in complex societies involves something like a *division of labor* across levels of deliberation and decision. "All members must be able to take part in discourse, even if not necessarily in the same way" (p. 224). Exactly how one spells out the various roles in a given deliberative process will depend not only on the issue of how a particular political system is structured but also on citizens' perspectives. Probably the most obvious and important differentiation is that between "weak" and "strong publics" (to use Nancy Fraser's (1992) terminology). This lines up with the two main components of Habermas's model, the informal public sphere and formal decisionmaking bodies. That is, a weak public is one whose "deliberative practice consists exclusively in opinion formation and does not also encompass decisionmaking," whereas strong publics, such as parliaments, can reach binding decisions and are institutionally organized to do so (p. 373) (see Fraser 1992:134). This distinction is not hard and fast inasmuch as citizens also occasionally decide matters through referenda; in addition, the general election of officials is a kind of decisionmaking, and it is often related to deliberation about issues.<sup>24</sup>

Drawing on the recent work of Bernhard Peters (1993: 327–52), Habermas introduces a more fine-grained analysis of this relation between publics with a distinction between "center" and "periphery." He distinguishes institutional roles according to how close an actor or institution is to the "center" of the political

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<sup>24</sup> Popkin (1991) provides a detailed account of the "low-information" rationality characterizing voters' reasoning in presidential elections.

apparatus (pp. 429 ff.) and hence to the apex of decisionmaking power accumulated in the institution. At the center are those agencies with executive power, along with the other branches of government; at the periphery lie opinion-forming public spheres containing a wide variety of nongovernmental organizations and groups. In a similar framework one might further distinguish positions according to their *power to decide* and their *influence on deliberation* (pp. 439–40).<sup>25</sup> Whereas political power, the ability to make binding decisions and execute government action, is found chiefly at the center, influence extends throughout society. Critics and social movements struggle to gain such influence and, in so doing, focus public attention on particular problems and issues.

Given that the periphery of such a political system will be inhabited by a diverse set of public actors, the problem of pluralism enters into the informal public sphere. This sort of *plurality of public spheres and roles* suggests an intriguing interpretation of subjectless communication in informal public spheres. The public distribution of information and perspectives could be viewed as harboring a kind of communicative (or discursive) rationality, but not in a sense that would require full insight on the part of each citizen. The complexity of public spheres means that there will be a plethora of at best loosely connected and fragmented discourses in which many groups of individuals arrive at partial insights into issues through discussion. The idea of such subjectless communication suggests that a kind of public use of reason emerges from this diffuse network of discourses. If one assumes that for any given problem or issue, there are a number of considerations (corresponding to the different validity spheres, as well as to different interest positions, values, etc.), then there “exists” a public “potential of reasons” that individuals draw on in different ways and to differing degrees, some stressing efficiency considerations, others moral ones, and so on. One might then think of an informed “public opinion” as a kind of aggregation of reasons that develops as people gradually become aware of an issue.<sup>26</sup> For this reason, Habermas calls such public opinion “anonymous,” since it is not located in any individual or groups of individuals. It is “decentered” into the network of communication itself, suggesting a different and weaker conception of publicity than the highly idealized one of discursive agreement.

The potential for conflict suggested by perspectival pluralism leads to the third institutional problem Habermas's model must

<sup>25</sup> Habermas suggests this distinction here but does not employ it systematically in his discussion of “weak” and “strong” publics that is part of his two-track model of the constitutional state. This is because Habermas realizes that influence alone would indeed undermine the ideal of popular sovereignty.

<sup>26</sup> Note that aggregative mechanisms, such as voting, need not be antithetical to deliberation on the common interest (see Estlund 1990); this is also one of the main points of Johnson and Knight's (1994) argument.

face. Political life under the conditions of social and cultural pluralism may normally not be so cooperative as the above image of information pooling suggests. On the contrary, one more often associates different social positions with a further political problem of pluralism: the *plurality of conflicting opinions and arguments*. Precisely this “fact of pluralism” is what makes majority rule necessary to conclude real deliberation. As I shall show, this raises more problems than Habermas seems to realize. But, by itself, it need not undermine Habermas’s strongly consensual account of discourse. Majoritarian decisionmaking is compatible with ideal consensus if the better arguments—the arguments that *would* eventually lead to full consensus under ideal conditions—are more likely to be those that sway the majority. But this means that it is *deliberative majorities* who should rule, and it is here that Habermas’s solution is the weakest in relation to these institutional problems of pluralism. Furthermore, even such a deliberative majority will not be a probable indicator of rational consensus if the conditions of undistorted discourse are seriously violated. The pluralism of competing arguments, values, and interests is actually an important safeguard, then, for it makes it less likely that a majority will reflect a false consensus. To the extent that there are competing counter-publics, or “subaltern counter-publics,” to use Fraser’s (1992) term, it is less likely that false arguments and attempts to exclude some groups will go unchallenged. Aside from this critical function, multiple publics have an important role even in egalitarian and multicultural societies, in that they help citizens form their own identities and find proper expression for their needs (*ibid.*, pp. 122–28).<sup>27</sup>

As can be seen in each case, Habermas’s solutions to these three institutional problems rely heavily on the informal public sphere and its “network” of public discourses. This turn to discursive structures makes it possible for Habermas to state more precisely how the ideals of deliberation can be realized even in complex societies. To start with a broad characterization, it is precisely the presence of “discursive structures” that gives the rather chaotic mix of roles, positions, and arguments an epistemic character, so that one can be justified in supposing that the resulting political decisions are reasonable. This “structuralist approach,” as Habermas calls it, locates public reason not in a general will—which would have to be indicated by empirical majorities or discerned by representative bodies—but in the *discursive structures* that link the public with the legislature (p. 228).<sup>28</sup> This

<sup>27</sup> Here, too, “counter-publics” are not sufficient for democracy for the same reason that civil society is insufficient; the plurality of publics is democratic only if these publics are within an open civic public sphere. Not only can “strong” publics be distinguished from “weak” publics but also specialized publics can be distinguished from the larger “civic” public sphere. Deliberative democracy depends on the existence of a larger, unifying civic public of all citizens.

<sup>28</sup> In *FG*, p. 228, Habermas writes:

has somewhat different implications for the two main components in Habermas's model, the informal public sphere and formal decisionmaking. In both cases, however, the basic idea is to foster processes of communication and to design institutional procedures that at least make it more likely that political decisions will be based on reasons that would correspond to those emerging from a discourse under ideal conditions (pp. 209–10).<sup>29</sup> Above all, by being open to deliberative inputs from the public sphere, the process of lawmaking retains the connection to communicative association necessary for democratic legitimacy. But these “structuralist” solutions raise as many problems as they solve, especially since they remain in tension with the very ideals of popular sovereignty and the democratic participation of all citizens which Habermas still espouses. I now turn to this tension and offer a solution to the problems of complexity and pluralism that is more consistent with the ideal of popular sovereignty.

## V. Unanimity, Complexity, and Majority Rule: Some Problems with Habermas's Version of Deliberative Democracy

As indicated by these general solutions to various problems of complexity and size, Habermas does provide a plausible sociological translation of his democratic ideals for a complex society. But it does not seem obvious that it is the only one possible, or even the best with respect to preserving the ideals of radical democracy. Although I am sympathetic with his account of the two-track nature of the constitutional state, it seems to me to go too

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This model takes a *structuralist approach* to the manner in which institutionalized opinion- and will-formation is linked with informal opinion-building in culturally mobilized public spheres. This linkage is made possible neither by the homogeneity of the people and the identity of the popular will, nor by the identity of a reason that is supposedly able simply to *discover* an underlying homogeneous general interest. . . . If the communicatively fluid sovereignty of citizens instantiates itself in the power of public discourses that spring from autonomous public spheres but take shape in the decisions of *democratically proceeding* and *politically responsible* legislative bodies, then the pluralism of beliefs and interests is not suppressed but unleashed and recognized in revisable majority decisions as well as in compromises. For then the unity of a completely proceduralized reason retreats into the discursive structure of public communication.

For the whole argument, see pp. 226–28.

<sup>29</sup> In *FC*, pp. 209–10, Habermas writes:

The exercise of political rule is oriented to and legitimated by the laws citizens give themselves in a discursively structured opinion- and will-formation. . . . The rational acceptability of outcomes reached in conformity with [democratic] procedure follows from the institutionalization of interlinked forms of communication that . . . ensure that all relevant questions, topics, and contributions are brought up and processed in discourses and negotiations on the basis of the best available information and arguments.

far in the direction of undermining rather than reinterpreting the main idea of radical democracy: popular sovereignty.

My criticisms of Habermas's two-track model focus on two main difficulties. First, I argue that the root of the problem lies in Habermas's formulation of the principle of democratic legitimacy. While emphasizing participation in public discourse, this principle retains the strong criterion of unanimity or the agreement of *all* citizens as the goal of democratic practice. Unanimity is too strong a criterion and should be replaced by a weaker standard of agreement: that all citizens have the opportunity to participate in the decisionmaking process in such a way as to have the reasonable expectation that they may affect its outcome. This criterion is sufficient to motivate continued cooperation in the democratic process. Second, Habermas tends to view majority rule as a mere expedient, a necessary device in lieu of the impracticability of better mechanisms for producing agreement. I argue that majority rule need not be seen as a necessary evil but as a normative ideal if it is interpreted so as to produce *deliberative majorities*. Such a notion of majority rule retains the normative core of radical democracy, without the strong separation of public opinion and formal decisionmaking that characterizes Habermas's current view. Finally, I also show that Habermas grants too much weight to the argument that social complexity limits democratic and popular control on decisionmaking and its execution. These problems are particularly apparent in chapters 7 and 8 of the book, where Habermas turns to democratic theory proper, particularly to the problem of linking "empirical" sociological analyses of democratic institutions to his normative solutions.<sup>30</sup>

That Habermas retains the ideal of unanimous agreement in democracy seems paradoxical and runs counter to the general orientation of the book to locate politics between facts and norms. Throughout his discussion of democratic legitimacy, Habermas is now careful to distinguish the demands of politics from those of morality. However modest it seems in relation to the stronger justifications needed for morality, Habermas's principle of democracy still sets the standard of agreement too high: that standard is unanimity, since *all* citizens must agree. Given the potential conflicts indicated by the first form of discursive complexity, it is hard to see why such procedures would necessarily lead to the agreement of *all* citizens in culturally pluralistic societies, if by such agreement is meant unanimity for every par-

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<sup>30</sup> For a clear statement of the sort of problems of functional differentiation and complexity pose for democratic theory, see Zolo (1992), esp. ch. 3. For a criticism of the claim that complexity is an inherent limit on democracy, see Bohman (in press (a):ch. 4). There are also serious methodological problems with the sorts of explanations that support these antidemocratic claims, including the oft-repeated conclusion that "the autonomous individual is obsolete in complex societies." For a discussion of these issues, see Bohman 1991:ch. 4.

particular law. Certainly, “ethical” and hence culturally specific elements of interpretation will enter into such processes; they do not admit of convergence toward consensus, especially as diverse and potentially conflicting cultural self-understandings enter into the debate on particular issues. Such value conflicts cannot always be ignored or impartially resolved, especially if the conflict of ethical interpretations itself is at stake. Moreover, he makes the task all the more difficult by insisting that citizens in democracies agree for “the *same* reasons” when they deliberate, rather than agreeing for different reasons as in bargaining and compromises (p. 411).<sup>31</sup> Simply introducing compromise as an alternative democratic outcome, as Habermas does, is not enough to solve the problem of having an appropriate standard of legitimacy. While few fair compromises meet with the agreement of all citizens, many permit continued cooperation, despite conflicts, in the absence of any stronger consensus.

The problem can be solved only by modifying Habermas’s original principle of democracy. As cited above, it states: “Only those laws may claim legitimacy that meet with the agreement of all citizens in a discursive law-making process that is itself legally constituted” (p. 141). In order to lower the requirement of unanimity without surrendering the norm of popular sovereignty, a participatory component needs to be introduced into the final clause of the principle. With this in mind, we can restate the principle as follows: A law is legitimate if it is agreed to in a participatory process that is fair and open to all citizens. The difference here is that citizens may not all agree, but all will continue to cooperate in such a process so long as they can see that it is fair and open to revision. It is thus not necessary for everyone to agree with every particular law, goal, or decision. Cooperation is defined as continued participation in ongoing public discourse, despite disagreement with any particular decision reached by discursive means. In my reformulation, the principle of democracy should read as follows: A law is legitimate only if it is agreed to by all citizens in a fair and open participatory process in which they may continue to cooperate freely.

Under this interpretation, the point of the democratic principle is to specify *how* citizens exercise their political autonomy together in deliberation. It is exercised in the cooperative use of practical reason among citizens within a common public sphere. However institutionalized, some common public sphere is neces-

<sup>31</sup> The point of the passage in *FG I* I cite here is to distinguish impartial public reason from mere compromise. “Whereas parties can agree to a negotiated compromise for different reasons, the consensus brought about through argument must rest on identical reasons that are able to convince the parties in the same way” (p. 411). This emphasis on the sameness of reasons is due to the fact, Habermas goes on to say, that impartiality “lends a reason its consensus producing force.” For criticisms of Habermas’s (and Rawls’s) model of public reason for its failure to deal with problems of cultural pluralism, see Bohman in press (b); see also Bohman in press (a):ch. 2.



sary if citizens are to be equal participants in a democracy. The principle of publicity prescribes a form of cooperation that applies even if there are numerous counter- or subpublic spheres. Under internal conditions of discursive complexity discussed above, the democratic principle is a regulative ideal of common citizenship in the political public sphere, not of the legitimacy of law. It is an ideal that also guides the institutionalization of discourses in institutions such as law, with their often indirect ways of distributing discursive roles and decisionmaking powers according to public, constitutional principles.

Once the requirement of unanimity is abandoned, it is possible to incorporate the historically common practice of majority rule into Habermas's two-track theory. Majority rule provides a perfectly acceptable basis for such cooperation so long as minorities have the reasonable expectation of being able to affect and to revise political decisions, including decisions about the character and conditions of political participation. Deliberative majority rule also helps democracies deal with contingent demographic facts that may undermine cooperation. If such facts make minorities permanent, democratic institutions will not be "well-ordered" in Rawls's sense; they will undermine the political equality necessary for mutual cooperation in the long run. If all decisions are open to future revision, it is possible to create various arrangements which, as Bernard Manin (1987:360) puts it, "compel the majority to take the minority into account, at least to a certain extent." Citizens will then be more likely to overcome their myopia and ethnocentrism and to think of their democratic practices in an inclusive and future-oriented way, knowing that their decisions may have to be revised to maintain publicity and equality. They will also regard themselves as potentially occupying the minority position; even if they are in the majority for now, this alone does not lend their arguments epistemic force as necessarily the better ones. Majority rule can then be interpreted deliberatively.

For all Habermas's insistence on institutional mediation, he nonetheless attempts to preserve the radical democratic critique of current liberal practice and a weakened version of reification, now confined to political institutions. The independent power of actors within political institutions and the control of the mass media can reduce the possibilities of effective deliberation and public control. To retain these criticisms, Habermas must hold on to some stronger notion of popular sovereignty than liberalism alone provides, despite all his criticisms of unmediated versions of the unified will of the people in civic republicanism and in socialism. Law and politics, he agrees, must "ultimately" be under the control of the people themselves (p. 606). Without this notion of popular sovereignty and an active public, political will, democracy loses its point.

Why does Habermas transfer the popular will into “anonymous networks of communication”? It is clear that he thinks that this is the only appropriate form of popular sovereignty for complex societies. Given his criticism of undercomplex and “direct” models of communicative association, Habermas interprets the “ultimate” role of popular sovereignty quite minimally: Political and legal procedures in institutions must remain at least open and accessible to the opinions of the general public sphere and to self-organized actors in civil society such as social movements. Whereas the informal spheres of opinion formation remain directly subject to the norms of communicative association, the formal institutions in which decisions are made are not. Social complexity thus requires a strong distinction between what Habermas calls “opinion” and “will formation.” But if formal institutions are themselves democratic, such a distinction does not stand up to much scrutiny. The same processes that go on in the public sphere at large take place in these institutions to the extent that they may still be considered democratic. It is misleading to place much weight on this distinction since, in Habermas’s own terms, they are *procedurally* identical. This is a distinction without a difference.

Since at least a minimal popular sovereignty now resides in the complex network of communication in the public sphere, it is still possible for Habermas to speak of continuing the radical democratic project of further democratizing the existing political system. In the final analysis, it may be that this sovereignty is too minimal and too indirect to preserve the radical contents of democracy. Kant thought that the will of the people could be expressed in the public sphere and then only indirectly affect independently and monarchically preserved political power. Hegel also preserves complexity by sacrificing democracy: sovereignty for Hegel is monarchical and not popular. Marx’s criticism of the democratic deficits of Hegel’s *Rechtsstaat* applies to Habermas’s minimalist interpretation of the political content of popular sovereignty: “In a democracy the constitution, the law, the state, insofar as it is a political constitution, is itself only a self-determination of the people and a determinate content of the people” (Marx 1975:31).<sup>32</sup>

Habermas’s version of complexity is open to the same nominalist suspicion about agency that Marx raises against Hegel’s highly complex and mediated constitutional state. With or without complexity, too strong a distinction between will-forming and opinion-forming institutions undermines any actual democratic

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<sup>32</sup> The problem Marx is raising here is Hegel’s tendency to think of agents as mere placeholders within an independent complex system of interdependent roles and functions; Hegel makes the converse of the liberal mistake of detaching rational action from the whole and makes the constitutional system itself solve problems of sovereignty and the irrationality of public opinion.

sovereignty; will formation is entirely given over to institutional actors who are only “influenced” by the public or “open to” reasons it puts forward. It also makes it difficult to see why Habermas continues to call his democratic theory “deliberative,” since the public is given only opinion-forming capacity.

Habermas admits that communicative power formed in the public sphere must continue to be sovereign, however mediated and constrained. Given the inchoate state of most citizens’ opinions, it is true that a public will can take shape only in deliberative institutions of some sort. Even such a “public opinion,” however, does not “by itself rule, but rather points administrative power in specific directions”; or as he sometimes puts it, it does not “steer” but “countersteers” institutional complexity (p. 398). Countersteering is once again too minimal for democracy: citizens rule in a democracy to the extent that it is the majority, and not administrators acting as proxies for institutions or “subsystems,” who ultimately make decisions and have power. The rule of the majority is what institutionalized popular sovereignty means, and its weaknesses need to be corrected by rational countermajoritarian institutions (such as judicial review), not by social complexity and the differentiation of administrative subsystems for decisionmaking. Moreover, the majority must be a deliberative, informed, and rational one, in that its decisions are the outcome of fair and open public deliberation.

Without popular sovereignty in some form or another, granting too much to social complexity and its forms of power simply threatens to eliminate any vestige of radical democracy and the very meaning of democratization itself. If, as Habermas admits, democratic political power “ultimately” has to depend on the will of the people, then sovereignty cannot simply be dissolved into “anonymous” communicative networks or dispersed in civil society. It must be a political will not only with an indirect influence on institutions but also with real decisionmaking powers; an anonymous public cannot replace the role of the deliberative majority, even if it is rather punctual and episodic in its decisionmaking powers. The attempt to avoid the excesses of past versions of radical democracy and majoritarian rule should not lead to the abandonment of the deliberating public itself, nor to the rejection of the democratic constitution of power by citizens.

Once again, we need to add to Habermas’s principle of democracy. Popular sovereignty, too, must be added as the third part of the discursive principle of democracy itself: “Laws are legitimate if (1) they are agreed to in a fair and open participatory process, (2) citizens agree to each law in the sense of continued cooperation, and (3) this process makes the public deliberation of the majority the source of sovereign power.” Only in this way can decisionmaking still be rooted in public participation. Only then do occasions for public input provide opportunities to resist

the bureaucratic tendencies of taking more and more issues out of the public sphere and making them matters for administrative or economic efficiency rather than practical reason. Public input makes a difference only if such institutions are themselves democratic and deliberative. Only if the procedures of the constitutional state pervade even administrative systems will popular sovereignty be based on more than the "anonymous" public and its "subjectless" communication. Habermas's metaphors are very misleading for any reconstruction of radical democratic theory.

## Conclusion

The two main criticisms developed in the last two sections are meant to push Habermas's institutional framework in the direction of radical democracy. Despite his new-found liberal modesty, Habermas sees himself as developing the long tradition of radical democracy in modernity.<sup>33</sup> This tradition has provided a real alternative to liberalism and civic republicanism, all the while incorporating the best features of both. Radical democracy needs to be more liberal than ever before, now that its own excesses became so clear in the spectacle of the rapid disintegration of state socialism. Radical democracy no longer means the total transformation of society, but is rather a piecemeal project of reform that builds on the constitutional and institutional achievements of the past. In this reformist democracy, the role of critical theory is to show the potentials and limits of the public and autonomous employment of practical reason. According to the radical democratic view, public reason is not exercised in the state but in the public sphere of free and equal citizens. In the American civil rights movement, for example, citizens collectively changed the legal interpretation of political equality and its enforcement. To the extent that critical theory is defined by its link

<sup>33</sup> See Habermas 1989b:33 ff.; a translation of this essay ("Popular Sovereignty as Procedure") will appear in an appendix to the English translation of *FG*. There are differences between the view expressed here and Habermas's current one. In this essay, Habermas argued that social movements from civil society have to "lay siege" to the inevitably systemic and undemocratic administrative system; now Habermas thinks that the problem is to make such institutions "porous" to the public sphere. While this current view seems more plausible, Habermas does not really suggest any mechanisms that would affect actual administrative decisions. This is no oversight, because Habermas defends the need for administrative institutions precisely on the grounds of their efficiency. It must also be said that Habermas departs from liberalism in significant respects: he does not defend anything like a standard view of neutrality, nor does he advocate anything like the method of avoidance of political conflict. But he has accepted standard rights to privacy and negative liberties and the need for the separation of the state and civil society. The latter includes the market, which is necessary to unburden administration from the demands of social complexity. This does not mean, however, that it should not be regulated. Habermas also advocates social welfare rights in circumstances of social inequality but sees a danger of paternalism; it is this problem that has led to the new "proceduralist paradigm of law" replacing the social welfare paradigm. Paternalism takes the form of normalization of the needs of citizens, who are subject to the hidden assumptions of supposedly formal legal categories. For these arguments, see *FG*, ch. 9.

to radical democracy, it searches for the potential for greater democracy, that is, for increased scope for public deliberation and popular sovereignty. It should not confine its search to institutional procedures, as Habermas's emphasis on law in his two-track model might suggest.

The example of the civil rights movement reveals another feature of Habermas's theory of law and democracy. In his model, actors emerging in the public sphere are the source of innovation and change. Habermas has long emphasized that social movements emerge in the public sphere and change institutions, particularly those "new" social movements that call into question the very nature of "normal" politics itself. But the civil rights movement also shows the ambiguities of the public sphere as it is now constituted. The constitutional state and its institutions are not as open or "porous" as the two-track model seems to suggest, and it required a great deal of collective organization for the civil rights movement to gain public attention and influence the public agenda of formal institutions. Further, the process of inclusion and reform has been much more difficult than mere legislative success, since both citizens and the state have used many avenues to resist enforcing civil rights legislation. Nonetheless, Habermas's methodological mixture of descriptive and normative perspectives provides a unique access to these very historical ambiguities of movements for democratic change. As descriptive and normative, Habermas's theory permits a better understanding of how publics are organized in institutions; it also helps us understand how institutions, to the extent that they are democratic, can be reorganized by these same publics. As neither normal social science nor a recipe for political action, Habermas's theoretical approach can identify potentials and barriers to citizens who seek to expand their opportunities for effective public deliberation.

At the same time, my theoretical criticisms also suggest that the democratic ideals of Habermas's theory need to be rethought in order to be more useful for politics and law. In *Between Facts and Norms*, Habermas compensates for the practical deficits of the idealizations of his previous theory by going in the direction of a "realistic" theory of social institutions, one which makes democracy fit the conditions of social complexity. But this presupposes that the ideals themselves could not be revised to make them more practical. Between ideal consensus and coercive law, there is room for a deliberative form of majority rule that does not sacrifice rational integrity, particularly one that stresses ongoing revision and deliberation. This might partly explain why citizens more readily accept unfavorable institutional

outcomes when these have been preceded by discourse or opportunities to voice their disagreements.<sup>34</sup>

With the revisions that I have proposed, Habermas's ideal of deliberative democracy helps us to understand why majority rule must always be linked with free and open public spheres in which we can continue to cooperate even when we do not agree with one another. Only if he revises his principle of democracy itself and removes its strong condition of unanimity can Habermas solve the problems of complexity he sets for himself. And only then do the resources of public communication, particularly in the form of well-motivated dissent, provide a basis for radical democracy in complex and pluralistic societies. The weaker versions of these ideals are thus not only more defensible and consistent. They also better fulfill Habermas's own goals of reversing the idealizations of his theory, reconstructing the potential for rationality built into current democratic institutions, and defending the heritage of radical democracy under contemporary conditions. They will also help to make more plausible how constitutional democracy actually institutionalizes deliberative ideals.

For those who have looked to Habermas to be the clearest proponent of radical democracy, *Between Facts and Norms* will seem a surprisingly liberal work. At times his reconstruction of the constitutional state may even seem uncritical of its current form. His previous critical analyses of the "colonization of the lifeworld" by markets and state bureaucracy are generally absent. Nor is it clear what crisis tendencies, if any, are now operative that might pose problems for the democratic character of large-scale, nation-state institutions. Habermas does not fully indicate whether his new embrace of liberal norms and the fact of "unavoidable social complexity" vitiates these previous critical perspectives. This seems unlikely, given that Habermas sometimes still describes such institutions as "overcomplex," especially when they are not open to inputs from the public sphere. The category of overcomplexity remains undeveloped here, as does a clear account of the potential losses and dangers inherent in any institutional translation of the broad network of public communication. *Between Facts and Norms* remains, however, a sophisticated critical theory of law and democracy, concerned with the gap between professed ideals and actual social reality. Habermas wants to show us how a stronger form of democracy is still a genuine and achievable goal, even in complex and pluralist societies.

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<sup>34</sup> For a survey of empirical research on this topic, see Lind & Tyler 1988. Another area of empirical research that supports this view is the phenomenon of "cheap talk," in which pre-play communication among strategic actors increases the likelihood of mutually beneficial outcomes; even without effective sanctions, it helps coordinate expectations among the players. See Johnson 1993.



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