Habermas's Sociological and Normative Theory of Law and Democracy: A Reply to Wirts, Flynn, and Zurn

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Habermas’ sociological theory of law and democracy: A reply to Wirts, Flynn and Zurn

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Abstract
In Between Facts and Norms (1996) Habermas presents the more straightforward normative discourse theory of law and democracy, in terms of contemporary legal orders, and then examines, in terms of social theory, whether the theory is plausible, given the complex nature of today’s conditions. The following article focuses in particular on Habermas’ social theory. It is critical of Habermas’ idea of ‘the lifeworld’ and discusses whether the circulation-of-power model might be mapped onto the system–lifeworld model.

Keywords
Democracy, Jürgen Habermas, law, lifeworld, social systems theory

I
The German title of the work translated as Between Facts and Norms is Faktizität und Geltung, or ‘Facticity and Validity’. This distinction organizes the book’s argument. First, on the ‘validity’ side, Habermas presents the normative ‘discourse theory of law and democracy’ proper, which he develops through a reconstructive account of modern legal orders’ ‘self-understanding’. Then, on the ‘facticity’ side, Habermas turns to social theory to determine whether his normative theory is plausible under present conditions of social complexity.

Most of the commentary on Habermas’ theory of law and democracy, particularly among legal theorists and philosophers of law, has focused on the more straightforwardly
normative theory. My book, however, is perhaps unusual in the attention it gives Habermas’ social theory. The first chapter sets out the key concepts and working ‘system–lifeworld’ theory of society that Habermas developed in his landmark Theory of Communicative Action (1981). My fourth chapter considers the extent to which Habermas’ Between Facts and Norms has corrected the deficiencies of that system–lifeworld model. Given the relative inattention the social-theoretical side of Habermas’ project has received, I was gratified that both Amelia Wirts and Jeff Flynn took interest in that part of my discussion.

Wirts accepts much of my criticism of Habermas’ account in Theory of Communicative Action but would retain, as I would not, the term ‘lifeworld’ in a revised theory. Flynn also accepts my argument that Theory of Communicative Action’s distinction between system and lifeworld is overdrawn. Flynn argues, however, that I overstate the discontinuity between Theory of Communicative Action and Between Facts and Norms and specifically that, contrary to my contention, the latter work does not offer, explicitly or implicitly, a revised conception of ‘system’.

I should be clear about how I understand Habermas’ system–lifeworld model, in both its original and its revised state, and why I think it needed and still needs to be thoroughly revised.

From at least 1973, when he published Legitimation Crisis, Habermas was interested in developing a theory that combined social systems theory (primarily Talcott Parsons, but also Niklas Luhmann) and approaches that proceed from the standpoint of acting subjects. The latter sort of approach, he said, presented societies as ‘life-worlds that are symbolically structured’. As Habermas put it in Legitimation Crisis: ‘Both paradigms, life-world and system are important. The problem is to demonstrate their interconnection.’

Eight years later, in his two-volume Theory of Communicative Action, he pursued this task systematically. Through an immanent critique of the work of Alfred Schütz, Habermas developed the idea of the lifeworld as the set of resources on which actors draw when they engage in specifically communicative action (a term of art for Habermas). Those resources, he maintained, lie along the dimensions of culture, society and personality. Habermas used this culture–society–personality schema to develop the idea of a society’s ‘symbolic’ (as opposed to material) reproduction and to organize his brilliant reformulation of Max Weber’s theory of occidental rationalization. From there, Habermas developed his notion of ‘the colonization [or colonialization] of the lifeworld’. By this term Habermas meant an increasingly one-sided rationalization, through which the functions of cultural reproduction, social integration and personality development had become impaired by the intrusion of economic and bureaucratic forms of rationality into life-spheres for which they were dysfunctional. Habermas’ objective was to reformulate critical social theory so as to capture Weber’s ambivalence about rationalization, accounting for its achievements but also for its unexhausted ‘rational potential’, diagnosing the partly dysfunctional and crisis-engendering path it had followed in complex modern societies.

All this was a monumental accomplishment on Habermas’ part. Nonetheless, in my book I am highly critical of Habermas’ idea of ‘the lifeworld’. Although Habermas developed that idea by analysing specifically communicative action, the three dimensions of resources he identifies (culture, society and personality) would seem to support
and inform any form of action, including strategic interaction (the type Habermas distinguishes from communicative action). Yet Habermas came to use the term ‘lifeworld’ not to designate the background that all action presupposes but instead particular social spheres – those that are communicatively structured and informally organized. His plan of understanding the interconnection between two theoretical paradigms – action-theoretical and system-theoretical – became a division of social turf between ‘the lifeworld’ and the economic and administrative systems. These two systems, Habermas maintained, had in the course of societal rationalization become ‘uncoupled’ from the lifeworld and differentiated out through the ‘steering media’ of money and power. In the most extreme version of this position, Habermas described the economic and administrative systems as ‘norm-free structures’.² Toward the end of Theory of Communicative Action, Habermas presented a model of the ‘interchange’ between system and lifeworld. This model, drawing from the work of Talcott Parsons, was systems-theoretical, not neutral between the two ‘paradigms’ of system and lifeworld. Within this model ‘the lifeworld’ became a partial system of society, engaged in input–output, money- and power-mediated interchange with the economic and administrative systems.

I argued in my book, and Wirts and Flynn here agree, that Habermas’ distinction between ‘norm-free’ system and normatively rich lifeworld was overdrawn.³ Other passages of Theory of Communication unrelated to Habermas’ ‘uncoupling’ thesis present a more measured view, and, as Flynn notes, Habermas acknowledged his hyperbole in replying to the first round of commentary on Theory of Communicative Action.

But once one abandons the descriptively and analytically inaccurate polar conception of system and lifeworld, I argued in my book, one also can abandon the idea that the term ‘lifeworld’ names some particular social sphere that is in interchange with economic and administrative systems. From an action-theoretical perspective, markets and bureaucracies, and not just families or neighborhood groups or the like, are ‘lifeworlds’: one can analyse how social action there draws upon the resources of culture, society and personality. Further, Habermas’ idea that spheres supposedly free from the ‘steering media’ of money and power somehow are in money- and power-mediated input–output interchange with the economic and administrative systems really makes little sense.

Wirts argues that the idea of ‘the lifeworld’ is necessary for two reasons. First, she says, it is necessary for democratic politics because systems cannot be self-legitimizing. The lifeworld, she claims, ‘is the source of democratically valid norms’.

The insight that systems cannot be self-legitimizing is extraordinarily important. It is basic, for example, to Hart’s idea of ‘the rule of recognition’ at the foundation of legal systems. More interesting still for present purposes, it is a basic idea of Niklas Luhmann’s theory of autopoietic systems. Luhmann sees paradox at the foundation of all systems, in that the basic criteria for validity cannot be judged valid (or invalid) within the system. Luhmann discusses various strategies for ‘paradox management’: ‘unfolding’, ‘externalization’ and ‘invisibilization’ are terms he uses regularly.⁴ With respect to law, briefly, the strategy for paradox management Luhmann discusses most deeply is the constitution. A constitution (as with Hart’s rule of recognition) establishes the conditions for a system’s valid law, but in that function it cannot be said to be either legally valid or legally invalid. Instead, the constitution is grounded externally, in politics – the extraordinary politics of a founding. And in turn, the constitution provides a solution to
the legitimation problem of politics, which Luhmann identifies as the paradox of sovereignty: ‘the binding of necessarily unbound authority’. As Luhmann puts it, ‘the constitution provides political solutions for the problem of the self-reference of the legal system and legal solutions for the problem of the self-reference of the political system’. My point here is not to press hard for Luhmann or for Hart, but only to suggest that even social systems theory and standard Anglo-American philosophy of law have illuminating ideas about self-legitimation problems, without recourse to the idea of or the term ‘lifeworld’.

Wirts’ second and related argument is for why the idea of the lifeworld focuses on Habermas’ idea of ‘problematization’. This idea comes from *Between Facts and Norms*’ discussion of how the ‘communicative power’ generated from citizens’ discussion first in civil-social organizations, and then in the informal public sphere at the periphery of the political system, can influence legislation in the central ‘parliamentary complex’ or law application in the courts. While this flow is the ‘official’ or ‘constitutional’ circulation of power, in practice operations of the political system’s core – its ‘institutional complex’ – proceed according to routines or settled patterns and thus exercise administrative power disconnected from citizens’ power. With what Habermas calls ‘problematization’, the official flow of power is able to reassert itself. Habermas is thinking here of social movements that originate in civil society, and sometimes only after a long period of public-opinion formation, capture official attention. When this happens, ‘the attention span of the citizenry lengthens’, and the ‘pressure of public opinion’ reasserts the constitutional flow of communicative power.

All this is an important and attractive part of Habermas’ theory of democracy. It supplies what was missing in the interchange model of *Theory of Communicative Action*: an account of how genuine democracy is possible and how it might operate under realistic conditions of complexity and pressure for decision. I do not think, however, that it requires invocation of a ‘lifeworld’. Habermas’ account of civil society and the political public sphere is theoretically far richer, more precise and more generative of institutional and empirical analysis than the sentimentalized covering notion of the lifeworld – that living creator of mechanical systems that turn back ungratefully to dominate their parent.

II

Toward the end of my chapter 4, I spent what might have seemed an unusual amount of space trying to determine whether the circulation-of-power model in *Between Facts and Norms* could be mapped onto the older system–lifeworld interchange model. My point was to show how Habermas’ analysis of democracy and its relation to legitimate law had far outgrown the system–lifeworld model. Whereas *Theory of Communicative Action*’s interchange model referred to the ‘administrative system’, *Between Facts and Norms*’ circulation-of-power model targets the relation between civil society, public sphere and the ‘political system’. Flynn is correct that Habermas also still refers to ‘the administrative system’ and to ‘the administration’. But in addition to the administration proper – an executive branch – Habermas identifies in the political system’s institutional ‘core’ both parliamentary bodies, connected to competitive political parties and productive of ‘democratic opinion- and will-formation’, and also the judicial system. The core of the
political system, then, involves the very sort of communicative and deliberative discourse from which the idea of the power-steered administrative system abstracted. In light of this newer model, Habermas’ invocations of the old system–lifeworld model have almost a ritualistic quality. They now carry essentially no real analytical weight.

What, then, does ‘system’ mean in Habermas’ conception of the ‘political system’? That was the question that interested me, not merely the question whether the old idea of system could be forced into the new circulation-of-power model. Habermas must be aware that he now is using the term ‘system’, in the expression ‘political system’, in a sense different from Theory of Communicative Action’s Parsons-inspired idea of media-steered functional subsystems. In some passages of Between Facts and Norms, Habermas invokes the newer ideas of systems theory that Niklas Luhmann adopted in 1984, three years after Theory of Communicative Action’s publication. His brief mentions of Luhmann’s theory of autopoietic or self-referential systems point in two directions. In some places, Habermas suggests that the legal and political systems have distinct system ‘codes’ – binary distinctions, like legal–illegal, or command–obedience, that organize the system’s communication and mark it out from its environment.8 In such passages, he offhandedly states that the political system is autopoietic,9 and that is a conception of ‘system’ fundamentally different from the older, Parsons-inspired, input–output conception of systems and their ‘steering media’. But elsewhere in Between Facts and Norms, Habermas continues his (not well-informed, in my opinion) polemics against the idea of autopoietic systems and seems to adhere – as Flynn notes – to his earlier conception of systems.10

Can the ‘administrative system’ be an island of a Parsons-style system in the sea of a differently organized political system? Not if we are genuinely committed to the idea of Parsons-style systems, with their input–output, media-steered relations to environments. In suggesting that I conflate ‘two very different problems’, Flynn suggests that law is the key here: that it works as a ‘transformer’ or translator between the ‘ordinary language’ communication of the lifeworld and the specialized, medium-organized communication of the economic and administrative systems. Habermas of course does use this ‘transformer’ metaphor – along with, by the way, the inconsistent and enigmatic metaphor of law as ‘hinge’ between system and lifeworld.11 But in my view, this metaphor raises unanswered questions. Flynn points to Habermas’ idea that modern law operates by providing the option of obedience motivated by normative conviction, on one hand, and obedience motivated by the prospect of rewards or sanctions, on the other. One difficulty is that this conception of law seems to equate legal rules with what Hart called primary rules – duty-imposing rules that require persons to ‘do or abstain from certain actions’ – and not also secondary or power-conferring rules, such as rules that establish rules for contract- or corporation-formation, or for marriage or bequest of property.12 Further, this image of law as transformer or translator does not address the very real difficulties law faces in addressing different social contexts with their different procedures and distinct criteria of validity and value. Law struggles, for example, when it tries to incorporate scientific evidence to illuminate legal issues in court proceedings, or when it brings evidence of mental illness to bear on the question of criminal guilt or innocence. Much can be said here about how law does better or worse with these tasks. But Habermas’ original conception of systems and their distinct steering media that engage in input and output helps us not at all.
My own view, set out in a preliminary way at the end of my chapter 4, is that selective appropriation of Luhmann’s theory of self-referential but ‘structurally coupled’ systems is far more promising. In any event, I think Habermas has not yet presented a coherent conception of ‘system’. Even if, with Flynn, we want for some reason to retain the old idea of Parsonsian media-steered systems for the ‘administrative system’ as part of the political system’s institutional core, we still need a theory of what ‘system’ means for the more encompassing context of the ‘political system’ in Habermas’ new model. And then Habermas would have to explain how the word ‘system’ could have such different meanings within the same theory. I think it would be better simply to cast off the old Parsonsian ideas rather than struggle to reconcile them with the much more supple new model.

III

One line of Chris Zurn’s criticism targets my attack on Habermas’ ‘universal assent’ requirement – his idea that what it means for a norm to be valid is that it would be capable of receiving universal assent in an unconstrained discourse among all those affected. Focusing not on moral norms but on legal norms, I argue against this universal assent criterion, even as a regulative ideal.

Zurn is right that a principle is not disqualified as a regulative ideal just because it cannot be realized. He is right also that in work of the early and mid-1980s that I do not much discuss, Habermas made arguments for his interpretation of the discourse principle as truly fundamental, not just as a practice followed by us moderns. While I do discuss the typology of argumentation that Habermas developed during that period – a typology he calls up for use in Between Facts and Norms – I agree with Zurn that I should have given more attention to Habermas’ arguments for the universal assent criterion.

But the problem is not just that universal assent to legal norms is not practically realizable. The more fundamental difficulty is that any attempt to justify through discourse a basic standard of discursive validity is going to wind up in paradox. As I suggested earlier, Niklas Luhmann’s work on self-referential or autopoietic theory is particularly good in analysing this problem, but so too is H. L. A. Hart’s discussion of the rule of recognition. As a legal system’s ultimate standard for legal validity, the rule of recognition cannot itself be considered either legally valid or legally invalid. Instead, it simply must be accepted as the fundamental presupposition of the group’s practice. Habermas needs to take the paradox of self-legitimation as seriously as he takes the idea of performative self-contradictions.

But apart from that, I think there are other reasons, built into the structure of the legal and political discourses we actually have, why universal assent cannot be considered a regulative ideal in contemporary constitutional democracies. Zurn has some sympathy for this argument when it comes to adjudicative procedures. As he notes, the parties to adjudication proceed strategically, not purely communicatively. That is their expected role, and so the standard for successful discourse in their case is not necessarily rationally motivated consensus. In adjudication, only the judge, a non-participant in an important sense, is motivated in an appropriately Habermasian way. Further, well over 90 per cent of litigated cases settle, in bargaining that reflects in part the financial and time and reputational resources of the litigants, not just the convincing force of their arguments. These
are, to use Zurn’s helpful term, differences of kind and not just differences of degree when compared with Habermas’ model of discourse. Extra-discursive considerations are thus built into the workings of the adjudicative system in ways that truly matter to the participants.

I see similar differences of kind in legislative politics. First, distributional issues are a staple of legislative politics, and as Habermas notes, they require compromise and bargaining. With respect to legislative discourse, Habermas speaks of the validity-claim to ‘legitimacy’, not (as with morality) to ‘rightness’. What he means by ‘legitimacy’ is ‘a reasonable consensus’ in light of not just moral concerns but also collective goals, ‘problems of value’ and ‘the balancing of interests’. Habermas identifies symmetry conditions of power and influence that must be satisfied for a compromise or bargain to be presumptively fair. That, he says, is a parallel to the symmetry requirements of discourse. But there are, I note in my book, important differences between the model of discourse and the model of bargaining. Most important, bargainers and compromisers proceed primarily strategically, not purely communicatively. This difference is not just a matter of contingent circumstances; it is a fundamental part of the meaning of the practice. And thus the ideal of universal assent is in my judgment not a regulative ideal of distributional politics – not if, with Habermas, we mean assent from shared belief in the same normative reasons.

More generally, party systems centrally organize legislative politics in modern constitutional democracies, and parties operate strategically more than ‘communicatively’ in Habermas’ sense. The logic of a party system is the logic of government and opposition, not that of disinterested discourse seeking common convictions. That is not to say that party-organized politics in legislatures does not require and feature the exchange of ideas and arguments. But in my judgment, participants in legislative politics cannot be said to accept the discourse principle, with its requirement of universal assent, as a regulative ideal.

I must admit, however, that if we reject universal assent as a regulative ideal, then we need to identify some other critical standard that will identify excessive partisanship or strategic behavior in the political process. This task is difficult. I have had to confront this problem in work I have been doing about gerrymandering in the drawing of electoral districts. In this country, at least, the task is given over to partisan political actors. Short of taking the redistricting task out of their hands, is there a way to identify when politics has become too much politics? The federal courts have found this so far to be, for them, an impossible task. In distancing itself from these controversies, the Supreme Court has suggested that determination of when hard-edged partisanship becomes an unfair denial of equality should be a task for political philosophy. Yet so far political philosophy has not had much more success with the issue than has the Supreme Court.

Zurn also raises a criticism of the way I interpret the 1995 Habermas–Rawls debate. Zurn thinks I overemphasize the two thinkers’ similarities. One point Zurn focuses on is the balance between the liberties of the ancients and the liberties of the moderns – between private and political rights. Habermas argues that they are co-original – that they mutually imply one another, and that neither category is prior to or more fundamental than the other. Zurn points out that Rawls, in contrast, treats political rights as justified instrumentally, by their capacity to secure other basic liberty rights – ‘private’ rights.
That is of course correct. Yet Rawls also lists the political liberties as among the basic liberties, and in fact he requires that political rights, and those only, be given their "fair value."19 Political rights, that is, require the regulation of private rights – extensive regulation and redistribution to ensure more or less equal access to political opportunities.20 Rawls is quite clear, also, that strong limits on the use of money in electoral politics are required.21 So even in Rawls, each kind of right both conditions and helps secure the other. I think Habermas overemphasizes the differences between his position and that of Rawls.

Zurn has persuaded me of one crucial difference that deserved greater emphasis than I gave it. Habermas’ theory of law is fundamentally democratic in a way that Rawls’ theory of democracy is not. The very meaning of legitimate law, for Habermas, is that it is generated through radically participatory democracy. We see here a much stronger emphasis on democracy than one finds in Rawls.

But that leaves for Habermas a difficult problem – the problem that, in common-law countries, judges make law without the kind of democratic warrant Habermas requires. Zurn is generous in identifying and praising the details of the argument I make. He wonders what ultimately I make of common-law (and non-constitutional) adjudication – is it legitimate? I am inclined to say ‘yes and no’. Yes, it is legitimate law in the American system, given the practices that are taken as basic and fundamental. But no, it is not legitimate in an ideal sense, and the various excuses for it that often are given – that the legislature can prospectively override courts’ decisions, or that an informed public might one day develop to criticize common-law judicial decisions after the fact – seem to me just makeweight.

I want to thank Chris Zurn for his kind words about my discussion of how Habermas’ work might speak to American constitutional practice and theory.

**IV**

My critics here train their attention on my book’s first four chapters, but I would like to mention briefly the discussion in my fifth and final chapter. There I examine the way Habermas has extended his analysis since *Between Facts and Norms*. With respect to Habermas’ social-theoretical model, I discuss an important 2009 article in which Habermas presented a revised and expanded account of the relation between public sphere and political system. Particularly interesting is his consideration of the role of the mass media, positive and negative, in the public sphere. Less successful, but still a beginning, is Habermas’ discussion whether internet communication could break the restrictive power that large media corporations have had on political discussion.22

I examine also in chapter 5 Habermas’ consideration of democracy beyond the nation-state, primarily in the European Union. There Habermas argues convincingly that European democracy presupposes a Europe-wide public sphere that still is lacking. He has interesting suggestions about the relation between national and transnational public spheres in his attempt to formulate what he calls a ‘politically constituted world society without a world government’.

Finally, I consider Habermas’ new attention to religion as a political force. I discuss critically his participation in the Rawls-inspired debate over the place of religious
reasons in the public sphere. In addition, I examine critically Habermas’ related treatment of multiculturalism.

Each of these new developments in Habermas’ work reflects a thinker who, now at 84 years old, still grows and reinvents himself. That is perhaps the most amazing and admirable aspect of this remarkable man.

Notes

I would like first to express my gratitude to Kevin Gray for organizing this critical exchange and the editors of Philosophy & Social Criticism for publishing it. It is truly an honor for me. I would also like to thank my critics – Chris Zurn, Jeff Flynn and Amelia Wirts – for offering me such productive and insightful suggestions. Working with their criticisms has been extraordinarily helpful to me, and a pleasure.

5. ibid.: 408–9.
7. ibid.: 357.
8. ibid.: 144, 482.
9. ibid.: 333, 354.
10. ibid.: 55, 333, 335, 346, 352.
11. ibid.: 55, 56, 81, 354.
15. ibid.: 151–5.