

Persistent Facts and Compelling Norms: Liberal Capitalism, Democratic Socialism, and the Law

David Abraham

No living social theorist has worked harder or produced more on behalf of progress(ive) universalism and grand theory than Jürgen Habermas.¹ Over the past 30 years, Habermas has sought to employ (and, in so doing, has enriched) a range of philosophies to advance the cause of human enlightenment and emancipation: Kantianism, the moral-developmental psychology of Kohlberg, the sociological Marxism of Offe and others of his own students, the philosophical pragmatism of Pearce, revived liberal Protestantism,² the linguistics of Searle and others, and, now, even American legal liberalism. All these and more have been among the approaches he has tried and continues to try. As one of the world's leading public intellectuals, he has done battle with those who reject the emancipatory quest: whether they be German historians and politicians rewriting the past in the name

Address correspondence to David Abraham, School of Law, University of Miami, P.O. Box 248087, Coral Gables, FL 33124-8087.

¹ The term "progressive universalism" begs some questions—but not all. Simply put, it is the aspiration to create sufficient social, political, and economic equality among a community of relatively similar citizens as to provide for a lessening of exploitation and alienation that would enable individual freedom and collective self-determination. Epistemologically, the lineage seeks universal communication by overcoming certain socially generated incompetencies and distortions; it runs from Descartes and Hume to Chomsky and Quine. Politically, it is the tradition of the Enlightenment, running from Kant and Diderot to Marx, Lincoln and DuBois, or, as some would have it, from Louis XIV to American slaveowners to Stalin (and maybe even Hitler). See, e.g., Rosenberg (1939) for the former view; Peukert (1989, 1992) for the latter.

The truth is that for all the quarrelsomeness over "progressive universalism" in the last decade or two (and its large-scale rejection by politically progressive academics in America during that same stretch), the best discussion of Enlightenment universalism, its promise and its dangers, was provided already by Habermas's Frankfurt school progenitors, Max Horkheimer and Theodor Adorno (1944).

² See this astute, albeit infrequent, take on Habermas proffered by Quentin Skinner (1982). Bronner (1993) provides one of the best of the many overviews of Habermas and critical theory.

of the nation and its elites³ or *soi-disant* postmodern radicals for whom particularity and irony are the only guarantors against oppressive rationalist homogenization and erasure.⁴

Nonetheless, as is clear from any perusal of social sciences, humanities, or even legal journals—including this one—many of the New Left scholars who came of age reading Habermas have contributed to the rejection/demolition of precisely that public-private distinction on which so much of the liberal order—the good and the bad alike—has rested.⁵ Habermas remains, for good reason, *the* liberal philosopher most admired by Old Left types seeking a vibrant and just civil society connected to a democratic state and *the* liberal philosopher most vexatious to “post-Left” types disillusioned with the fruits of Enlightenment rationality. Habermas’s quest to establish the conditions for reasoned universalist critical debate within the public sphere has been ridiculed by po-mo intellectuals, quite a few of whom made their debuts with *mea culpas* for their own erstwhile French Stalinism.

As we approach the end of the millennium we still ask ourselves: Is it possible to create conditions for effective participation in sovereign self-governing democratic communities? What role would law play in such an undertaking? Can differences of race, gender, and class (the new holy trinity) be *aufgehoben* to create the undistorted intersubjective communication underlying emancipation? Or does the value of “difference” lie precisely in its resistance to incorporation and effacement in some national-territorial public of abstractly equal citizens. Movement toward enlightened sameness has been the strategy of the last two generations of European social democrats. It has been the nightmare of conservatives since at least 1789, and, more recently, it has been the target of multiculturalism and postmodernism as well.

Conservatives have been buoyant of late because they believe that the ruin of the Soviet Union has buried the appeal of projects to transform societies beyond the market economy. In Germany, this new assertiveness has included an intellectual and institutional assault on Habermas, who, despite the fact that he was never a devotee of the German Democratic Republic, is rightly perceived as an opponent of the status quo and a progenitor of the now-defeated New Left (see on these matters Habermas 1991).

³ As in the *Historikerstreit* of the mid-1980s (the intellectuals’ Bitburg), some aspects of which are summarized in Habermas 1989:209–67.

⁴ As evident in his consistent rejection of French postmodernism, with or without its perverse Heideggerian spin. See especially Habermas’s lectures in *Philosophical Discourse of Modernity: Twelve Lectures* (1987).

⁵ See, e.g., the recent volume edited by Craig Calhoun (1992), especially Fraser (1992); see also Friendly (1983) (issue on public/private distinction and its collapse), and earlier discussions in *Law & Society Review*: Eder 1988, Tushnet 1988, and Teubner 1983 (and the literature cited in them).

Postmoderns, following a line of analysis laid out in Max Weber's analysis of the *Machtstaat/Wohlfahrtsstaat* (power state/welfare state, coercion/legitimation), see in that power constellation pretty much what my colleague Jonathan Simon (1994) reports from Foucault-land in his contribution here.⁶ The emancipation of individuals and creation of competent communities of self-determining citizens guided, independent of class and status but in a sociologically tenable way, by democratic justification, may remain a wish to be realized—but maybe not.

For Habermas that wish remains. As he has put it, “the liberal interpretation is not wrong. It just does not see the beam in its own eye” (Habermas 1991:31). Liberal capitalism does not understand the need for its own transcendence. And well it might not: Capitalism has through recent events in Europe and elsewhere again demonstrated its staying power while liberal democracy has again proven its allure. Such “facts” can only be ignored at one's peril, and in his new book, *Between Facts and Norms*, Habermas struggles mightily to come to grips with the *persistent* while remaining committed to the *compelling*.

* * *

In this struggle between the persistent and the compelling, law now appears to be the method and means of mediation. This is, as James Bohman (1994) amply demonstrates in his learned and sensitive review essay, a *retreat*. In the interwar and postwar phases of German socialist legal theory, after the defeat of the direct democracy councils movement, law became a mechanism for advancing the interests of the working classes (and their allies) against capitalism by means of a juridification (*Verrechtlichung*) of class struggle. Law could be made both to recognize the existence of hostile classes in society and to tilt in favor of those classes representing a majority within the democratic polity. The goal was (and remains) to transform the sphere of *civil* society as the *political* sphere had been transformed by liberal democracy, from a sphere of *subjects* to one of *citizens*. According to the *Verrechtlichung* strategy, unless the elites preferred civil war or fascism—which, in fact, they did in Germany in 1932, and have on occasion elsewhere since—democracy and law would regulate and undermine capitalism in favor of the people.⁷

⁶ The best discussion of *Staatsräson* and *Wohlfahrtsstaat* in English is Wolin 1989: 151–79. See Simon 1994.

⁷ Perhaps the best known of these interwar and postwar legal theorists were Franz Neumann, Otto Kirchheimer, Hugo Sinzheimer, Ernst Fraenkel, Hans Kelsen and Otto Kahn-Freund. There is a distinct paucity of literature in English on this topic. On the origins and logic of this undertaking, particularly its “economic democracy” aspect, see my own account (Abraham 1985:7–21) and Esping-Andersen (1985).

On the legal thought behind the left social-democratic project, see Luthardt (1986), Klingeman & Luthardt (1993), Perels (1984), Kirchheimer & Neumann (1987), Blau (1980); Kahn-Freund (1981). For the specific case of the German social democrats and postwar *Verrechtlichung*, see Voigt (1980); Bock (1988).

When, in the late 1960s and early 1970s, the juridified system of capitalist democracy, as developed in the corporatistic Keynesian welfare state, appeared to be in a deep crisis, indeed insoluble contradiction, Habermas sided with efforts to transcend complex capitalism. That is the clear message of *Legitimation Crisis*, published in 1973 in an atmosphere shaped by West Germany's militant New Left. At the time, it seemed clear to many that, however "complex" advanced capitalism, its crises—economic, political, cultural, motivational, etc.—could only be unstably fudged, not overcome. The goal-du-jour was full, real democracy, not effective pluralism.

Habermas and the left were not then primarily concerned with pluralism: "a plethora of at best loosely connected and fragmented discourses in which many groups of individuals arrive at partial insights into issues through discussion" (Bohman, p. 918). Rather, the demand of the hour was to lift or remove the social and communication distortions generated by the various social inequalities that the Keynesian welfare state had, in its mediation of capitalism and democracy, rationalized but not eliminated. As "complex" as society might be, "discursive agreement" was seen as possible only once material conditions were rectified to the degree that "communicative competence" was broadly available and undistorted. Society, in other words, could be transformed to produce competent and engaged citizens who would speak fairly and truthfully with each other about themselves and the commonweal. Democracy and justice were both desirable and possible.

* * *

Now, "democratic process" and political responsibility through law—democracy and a rights-generating rule of law—have replaced any conception of general will or (to be less portentous) popular sovereignty moving toward a communicative ideal. As Bohman indicates (pp. 919–21 & n.31), Habermas has now substituted for active popular sovereignty a somewhat republican vision of consensus-producing public reason. Habermas has also apparently surrendered part of himself to the persistent. As Bohman argues, Habermas now accepts more of the American legal proceduralism he had rejected in *Legitimation Crisis* while being less committed to the "substantive democracy" he championed two decades ago. "Civil society" and "constitutionalism"—foci brought back to western Europe from antistate

Much more has been written on the *decomposition* of the system that ultimately connected capitalist democracy and the Keynesian welfare state (which was only partly what the interwar radicals had in mind). For the area of labor law and labor relations, where this tradition was arguably the most successful, see Abraham (1988:1277–90, 1339). The three essential discussions of the logic and predicaments of welfarist capitalist democracy as it did ultimately emerge and function are Przeworski (1985:7–46, 133–222), Offe (1984:35–64, 119–29, 179–206), and Cohen & Rogers (1983:47–87). O'Connor (1973) offered a more specifically American variant.

struggles in the East—are the watchwords of the day while “socialism” leads the new *bien pensants* to cringe.⁸ Public opinion and formal decisionmaking are more separate than before.

Whatever the reason, be it the capture of public-opinion molding by money, media, and messiahs in the West or the corruption of popular sovereignty in the formerly socialist East, Habermas has now expanded the role of law, of legal liberalism, and of structured processes of compromise in tempering popular control and managing social complexity. Law embodies, but it can also resolve, some of the tensions between facts and norms, between the empirical reality of capitalism and the normative demands of reason for democracy. In a peculiar way, in the political sphere Habermas now chooses a generous *Rechtstaatlichkeit*, one committed to publicity and equality, over participatory democracy.⁹ In contrast, the question of *access* and its social determination, once so central to democratic socialism, seems to have receded somewhat in favor of a “neo-proceduralist” paradigm of law¹⁰ that leaves social welfare issues behind. In turn, if capitalism is treated as natural or inevitable, then democratic proceduralism is left with an immense burden to carry.

What emerges is law-bound policy formation (*Willensbildung* or “will formation”) undertaken by institutional actors who, in Bohman’s (p. 925) words, “are only ‘influenced’ by the public or ‘open to’ reasons it puts forward” in its “opinion formation” (*Meinungsbildung*) capacity. Public opinion may steer or “countersteer,” but it does not form the basis of rule: Popular sovereignty, let alone radical democracy, is in fact difficult to find here. Without it—as the fate of the previous social-democratic model of corporatist, juridified decisionmaking dissected in *Legitimation Crisis* showed—bureaucratic and market considerations, singly or together, will drain the energy and legitimacy from

⁸ For a good example of left antistatism, see Cohen & Arato 1992. Amy Bartholomew 1993 sounds a proper cautionary note.

⁹ One way that Habermas states his current position is this: “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*” (Habermas 1992:141; Bohman 1994:922; emphasis added). Bohman (p. 922) counters with a position that stresses access: “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. Bohman, p. 925, later adds a third requirement: “the public deliberation of the majority [is] the source of sovereign power.”

¹⁰ One typical formulation of this democratic social access right was offered by C. B. Macpherson (1978:201): “[T]he problem of liberal democratic theory is no longer a problem of putting limits on the property right, but of supplementing the individual right to exclude others by the individual right not to be excluded by others. . . . The right not to be excluded by others may . . . be stated as the individual right to equal access to the means of labor and/or the means of life.” Equal access? Whether in regard to property or the processes of participatory democracy, competence and access are key. Law in its liberal, essentially “negative rights” versions, has a great deal of trouble moving from equal opportunity to equal access.

Cf. Bohman (1994:n.33) where he suggests that Habermas has, in fact, actually *replaced* a social welfare paradigm of law with a proceduralist one.

otherwise progressive and just social and political arrangements (see Offe 1984; Walzer 1988; Pateman 1988).

I am not entirely certain that Bohman is right in concluding (n.33) that Habermas has actually *replaced* a social welfare paradigm of law with a proceduralist one. But he is arguably right that the universalist radical democratic project, of which Habermas remains an exemplar, has turned “more liberal than ever before” (p. 926). Perhaps we will never get over our embarrassment at the failures and deconstruction of state socialism. As Americans deeply aware of what excessive derogation of both democracy and the state and excessive (and often thoughtless) exaltation of civil society can produce, we should avoid facile reliance on “the public sphere,” which already a half-century ago was in deep crisis (see Dewey 1927; Fraser 1992).

Finally, democracy is more than the state, or a state with progressive social policies. But democracy *needs* the state as well as the public sphere of civil society—something Habermas remembers despite the evident impact on his thought of lifeworld “new social movements” and their antistatism. More to fear today than statism—or even liberal proceduralism—is the retrenchment of compelling democratic norms in the face of a capitalist inequality that, whether more or less complex, is persistent in its injustice. And that’s a fact.

References

- Abraham, David (1985) “Labor’s Way: On the Successes and Limits of Socialist Politics in Interwar and Post-World War II Germany,” 28 *International Labor & Working Class History* 1.
- (1988) “Individual Autonomy and Collective Empowerment in Labor Law,” 63 *New York Univ. Law Rev.* 1268.
- Bartholomew, Amy (1993) “Democratic Citizenship, Social Rights and the ‘Reflexive Continuation’ of the Welfare State,” 42 *Studies in Political Economy* 141.
- Blau, Joachim (1980) *Sozialdemokratische Staatslehre in der Weimarer Republik: Hermann Heller, Ernst Fraenkel, und Otto Kirchheimer*. Marburg: Verlag Arbeiterbewegung & Gesellschaftswissenschaft.
- Bock, Michael (1988) *Recht ohne Mass: Die Bedeutung der Verrechtlichung für Person und Gemeinschaft*. Berlin: D. Reimer.
- Bohman, James (1994) “Complexity, Pluralism and the Constitutional State: On Habermas’s *Faktizität und Geltung*,” 28 *Law & Society Rev.* 897.
- Bronner, Stephen Eric (1993) *Of Critical Theory and Its Theorists*. Cambridge, MA: Basil Blackwell.
- Calhoun, Craig, ed. (1992) *Habermas and the Public Sphere*. Cambridge, MA: MIT Press.
- Cohen, Jean, & Andrew Arato (1992) *Civil Society and Political Theory*. Cambridge, MA: MIT Press.
- Cohen, Joshua, & Joel Rogers (1983) *On Democracy: Toward a Transformation of American Society*. New York: Penguin Books.
- Dewey, John (1927) *The Public and Its Problems*. Denver: A. Swallow.
- Eder, Klaus (1988) “Critique of Habermas’s Contribution to the Sociology of Law,” 22 *Law & Society Rev.* 931.

- Esping-Andersen, Gøsta (1985) *Politics against Markets: The Social Democratic Road to Power*. Princeton, NJ: Princeton Univ. Press.
- Fraser, Nancy (1992) "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in Calhoun 1992:109–42.
- Friendly, Henry J. (1982) "The Public-Private Penumbra—Fourteen Years Later," 130 *Univ. of Pennsylvania Law Rev.* 1289.
- Gutmann, Amy, ed. (1988) *Democracy and the Welfare State*. Princeton, NJ: Princeton Univ. Press.
- Habermas, Jürgen (1987) *Philosophical Discourse of Modernity: Twelve Lectures*, trans. F. Lawrence. Cambridge, MA: MIT Press.
- (1989) *The New Conservatism*, ed. & trans. S. W. Nichol森. Cambridge, MA: MIT Press.
- (1991) "What Does Socialism Mean Today? The Revolution of Recuperation and the Need for New Thinking," in R. Blackburn, *After the Fall: The Failure of Communism and the Future of Socialism*, pp. 25–46. New York: Verso.
- (1992) *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*. Frankfurt: Suhrkamp Verlag.
- (forthcoming) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans W. Rehg. Cambridge, MA: MIT Press.
- Horkheimer, Max, & Theodor W. Adorno (1944) *The Dialectic of Enlightenment*, trans. J. Cumming. New York: Herder & Herder.
- Kahn-Freund, Otto (1981) *Labour Law and Politics in the Weimar Republic*, ed. R. Lewis & J. Clark, trans. J. Clark. Oxford: Basil Blackwell.
- Kirchheimer, Otto, & Franz Neumann (1987) *Social Democracy and the Rule of Law*, ed. K. Tribe. Boston: Allen & Unwin.
- Klingeman, Hans-Dieter, & Wolfgang Luthardt, eds. (1993) *Wohlfahrtsstaat, Sozialstruktur und Verfassungsanalyse: Jürgen Fijalkowski zum 60 Geburtstag*. Opladen: Westdeutscher Verlag.
- Luthardt, Wolfgang (1986) *Sozialdemokratische Verfassungstheorie in der Weimarer Republik*. Opladen: Westdeutscher Verlag.
- Macpherson, C. B. (1978) *Property: Mainstream and Critical Positions*. Toronto: University of Toronto Press.
- O'Connor, James (1973) *The Fiscal Crisis of the State*. New York: St. Martin's Press.
- Offe, Claus (1984) *Contradictions of the Welfare State*, ed. J. Keane. Cambridge, MA: MIT Press.
- Pateman, Carole (1988) "The Patriarchal Welfare State," in Gutmann 1988: 231–60.
- Perels, Joachim, ed. (1984) *Recht, Demokratie und Kapitalismus: Aktualität und Probleme der Theorie Franz L. Neumanns*. Baden-Baden: Nomos Verlagsgesellschaft.
- Peukert, Detlev J. K. (1989) *Max Webers Diagnose der Moderne*. Göttingen: Vandenhoeck & Ruprecht.
- (1992) *The Weimar Republic: The Crisis of Classical Modernity*, trans. R. Deveson. New York: Hill & Wang.
- Przeworski, Adam (1985) *Capitalism and Social Democracy*. New York: Cambridge Univ. Press.
- Rosenberg, Arthur (1939) *Democracy and Socialism*, trans. George Rosen. New York: A. A. Knopf.
- Simon, Jonathan (1994) "Between Power and Knowledge: Legal Studies and Social Theory at the Crossroads," 28 *Law & Society Rev.* 947.
- Skinner, Quentin (1982) "Habermas's Reformation," *New York Rev. of Books*, 7 Oct., p. 35.
- Teubner, Gunther (1983) "Substantive and Reflexive Elements in Modern Law," 17 *Law & Society Rev.* 239.
- Tushnet, Mark V. (1988) "Comment on Eder," 22 *Law & Society Rev.* 945.

- University of Pennsylvania Law Review (1982) Special Issue [on public/private distinction and its collapse], 130 *U. of Pennsylvania Law Rev.* 1289.
- Voigt, Rudiger, ed. (1980) *Verrechtlichung: Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung, und Justizialisierung sozialier, politischer und ökonomischer Prozesse*. Königstein/Ts: Athenaum Verlag.
- Walzer, Michael (1988) "Socializing the Welfare State," in Gutmann 1988: 13–26.
- Wolin, Sheldon S. (1989) "Democracy and the Welfare State: The Political and Theoretical Connections between *Staatsräson* and *Wohlfahrtstaaträson*," in Wolin, *The Presence of the Past: Essays on the State and the Constitution* 151–79. Baltimore: Johns Hopkins University Press.