

# Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises of the State

John P. McCormick\*

## INTRODUCTION

The English-speaking intellectual world has eagerly awaited the translation of *Faktizität und Geltung*, Jürgen Habermas's magnum opus of legal and state theory, since its German publication in 1992.<sup>1</sup> Anticipation has run particularly high with respect to Habermas's attempts to (1) definitively mediate his influential system-lifeworld thesis of modernity through the institution of law;<sup>2</sup> (2) translate his social-philosophical theory of communicative ethics into the terms of political and legal theory;<sup>3</sup> and, perhaps most ambitiously, (3) overcome the opposition between purely empirical and strictly normative approaches to modern societies, particularly the treatment of law in such analyses.<sup>4</sup>

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\* Visiting Scholar, Center for European Studies, New York University, 1996-97; Assistant Professor of Political Science, University of New Hampshire. This Article originated in two sources: Richard Posner's and Stephen Holmes's winter 1993 seminar on Weber's sociology of law at the University of Chicago Law School and countless conversations and correspondence with Neil Brenner on Habermas's social and political theory. For helpful discussions, comments, and criticisms pertaining to this Article I thank the above, as well as the following: audiences at the Center for European Law and Politics, University of Bremen; the Departments of Law and Social/Political Science, European University Institute, Florence; the Government Department, Wesleyan University; the Department of Political Science, Western Michigan University; and a panel at the 1996 American Political Science Association annual meeting, San Francisco.

1. Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* [*Facticity and Validity: Contributions to a Discourse Theory of Law and Democracy*] (Frankfurt am Main: Suhrkamp, 1992). I cite the English edition, *Between Facts and Norms*, translated by William Rehg and published by MIT Press in 1996.

2. The system-lifeworld distinction was elaborated in Jürgen Habermas, *Theory of Communicative Action*, trans. Thomas McCarthy, 2 vols. (Boston: Beacon Press, 1984-87).

3. See Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholson (Cambridge: MIT Press, 1990) and *Justification and Application: Remarks on Discourse Ethics*, trans. Ciaran Cronin (Cambridge: MIT Press, 1993).

4. These themes have been explored in several Anglo-American reviews of the work: see David Dyzenhaus, "The Legitimacy of Legality," *University of Toronto Law Journal* 46 (1996);

I will argue here that in order fully to understand Habermas's theoretical efforts in *Between Facts and Norms* one must take into account the legal-sociological framework that he inherits from Max Weber.<sup>5</sup> This is by no means a purely intellectual or cultural inheritance, for Weber's sociology of law played a crucial role in the historical drama that was the collapse of Germany's first effort at liberal and social democracy: the Weimar Republic. It is the ghost of this failure that has haunted virtually all of Habermas's theoretical endeavors, no less *Between Facts and Norms*—perhaps even especially therein because of the centrality of law to its framework.

I claim that Habermas's textual and often subtextual desire to address those legal-theoretical problems that confronted Weber in a particular crisis of the state at the dawn of this century significantly undermines his attempt to address contemporary socio-political concerns. There exists a qualitatively different crisis of the state, and the role of law within it, at the twilight of the twentieth century than that in effect in Weber's time. The legal crisis with which Weber dealt was influenced in large part by the transition from a nineteenth-century noninterventionist-state model to a twentieth-century welfare-state one,<sup>6</sup> and the present predicament of law and the state is increasingly generated by transnational phenomena associated with growing interdependence of nation states.<sup>7</sup> Moreover, the intellectual categories on which Habermas relies in answering the deficiencies of Weber's earlier approach merge uniformly with Weber's own Kantian

Cass R. Sunstein, "Democracy Isn't What You Think," *New York Times Book Review*, 18 August 1996; Michel Rosenfeld, "Law as Discourse: Between Democracy and Rights," *Harvard Law Review* 108 (1995); James Bohman, "Complexity, Pluralism and the Constitutional State," *Law and Society Review* 28 (1994); David Rasmussen, "How is Valid Law Possible?" *Philosophy & Social Criticism* 20 (1994); Peter Dews, "Agreeing What's Right," *London Review of Books*, 13 May 1993; Stephen K. White, review of *Faktizität und Geltung*, by Jürgen Habermas, *Political Theory* 24 (1996); as well as William Rehg, introduction to *Between Facts and Norms*, by Jürgen Habermas (Cambridge: MIT Press, 1996). A symposium on the work, originally presented in 1992 at the Benjamin N. Cardozo School of Law, was recently published: "Habermas on Law and Democracy: Critical Exchanges," *Cardozo Law Review* 17 (1996).

5. For an alternative analysis of the manner in which Habermas grapples with Weberian categories in *Between Facts and Norms*, see Dyzenhaus, "The Legitimacy of Legality."

6. Two compelling accounts of the crisis of law in this transition within the German context are William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1994), and Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory and Practice of Weimar Constitutionalism* (Durham: Duke University Press, 1997).

7. On the present crisis of law with respect to the indeterminacy of national sovereignty, see E. Wyatt, "New Legal Order, or Old?" *European Legal Review* 7 (1982); Volkmar Gessner and Angelika Schade, "Conflicts of Culture in Cross-Border Legal Relations: the Conception of a Research Topic in the Sociology of Law," *Theory, Culture & Society* 7 (1990); Volkmar Gessner, "Global Approaches in the Sociology of Law: Problems and Challenges," *Journal of Law & Society* 22 (1995); Alec Stone, "What is a Supranational Constitution?: An Essay in International Relations Theory," *Review of Politics* 56 (1994); S. Howe, "Globalising the Law," *International Business Lawyer* (1995); and, especially, Neil MacCormick, "Beyond the Sovereign State," *Modern Law Review* 56 (1993).

philosophical perspective, thus completing the gradual shift from Hegel to Kant developed in Habermas's work over the last twenty years. This philosophical shift further impinges on Habermas's ability to account for historical change in his social theory of law—change that has arguably made Weber's paradigm of law and the state of decreased significance.

In coming years, legal philosophy and the sociology of law will be increasingly confronted with the empirical fact of diminishing state ability to address issues of bureaucratic accountability, economic regulation, and social justice under emerging conditions of what has been variously referred to as internationalization, regionalization, multilateralism, Post-Fordism, and, most fashionably, globalization.<sup>8</sup> Habermas, not only as an author who attempts to combine contemporary philosophical and sociological analyses, but also as an heir to a tradition—the so-called Frankfurt School of critical theory—that has always been sensitive to the possibility of democratic advancement within changing historical conditions, is the logical source of guidance in the formulation of categories to address this novel world-historical scenario. I demonstrate, however, that Habermas's fixation on the problematic that vexed German sociology of law and legal philosophy in the past—embodied in theoretical terms by Weber's sociology of law, and manifested in historical terms by the constitutional crisis of the Weimar Republic—leaves him somewhat ill-equipped to meet the challenges of a declining, rather than maturing, welfare state, challenges brought on by the increasingly transnational character of capital and finance, the growing interdependence of nation states, and the technologically accelerated interpenetration of cultures across the globe.

Ultimately the criteria that I will employ to measure the relative adequacy of Habermas's theoretical categories in this endeavor will not be arbitrarily imposed on Habermas—i.e., I do not intend to show that Habermas is in fact oblivious to empirical reality despite his claims to the contrary. Rather, my criticisms will be derived from Habermas's own theoretical goals and his definition of what has come to be called "critical theory," both as he has explained it in the past

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8. See Robert O. Keohane and Helen V. Miller, eds., *Internationalization and Domestic Politics* (Cambridge: Cambridge University Press, 1996); Mike Featherstone, ed., *Global Culture: Nationalism, Globalization and Modernity* (London: Sage Publications, 1990); John Gerard Ruggie, ed., *Multilateralism Matters: The Theory and Praxis of an Institutional Form* (New York: Columbia University Press, 1993); Ash Amin, ed., *Post-Fordism: A Reader* (Oxford: Blackwell, 1994); Suzanne Berger and Donald Dore, eds., *National Diversity and Global Capitalism* (Ithaca: Cornell University Press, 1996); and Roland Robertson, *Globalization: Social Theory and Global Culture* (London: Sage, 1992).

and as it is practiced in his discourse theory of constitutional democracy.<sup>9</sup>

### I. WEBER'S SOCIOLOGY OF LAW

The sociology of law elaborated in Weber's mammoth *Economy and Society*<sup>10</sup> in many ways sets the agenda for Habermas's legal philosophy.<sup>11</sup> I will focus herein upon two aspects of Weber's multifaceted analysis of law: (A) Weber's *analytical* approach as it unfolds in the work and (B) his *historical* approach as conveyed in particular parts of the "Sociology of Law" section itself.<sup>12</sup>

#### A. Analytical Approach

Weber's analytical account of the law seeks to explain how a sociological observer would deduce that modern law is correct or valid. He sets out two ways of so evaluating modern law within the analytical approach: (1) record relative compliance with the law empirically and factually,<sup>13</sup> and (2) analyze whether the law is semantically constructed in a formally rational and logical manner.<sup>14</sup> The obvious problem with (1) is that it is ultimately indifferent as to whether compliance with the law is secured through coercion or terror or as a result of a blind or unreflective subjective belief in the law by

9. This line of criticism has been followed rather successfully by Veit-Michael Bader, "Viel Geltung und immer weniger Faktizität: Zur Kritik an Jürgen Habermas' diskurstheoretischer Rechts- und Demokratietheorie," in Hans Ganßmann and S. Krüger, eds., *Produktion-und Klassentheorie: Festschrift für Sebastian Herkommer* (Hamburg: USA-Verlag, 1993); Neil Brenner, "The Limits of Civil Society in the Age of Global Capital: A Critique of Jürgen Habermas's Mature Social Theory," Master's Thesis, University of Chicago, 1993; and somewhat less successfully by Ota Weinberger, "Habermas on Democracy and Justice: Limits of a Sound Conception," *Ratio Juris* 7 (1994).

10. Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, 2 vols. (Berkeley: University of California Press, 1978).

11. This is explicit in Habermas's first full-scale foray into legal studies, "Law and Morality," in S.M. McMurrin, ed., vol. 8, *The Tanner Lectures on Human Values* (Salt Lake City: University of Utah Press, 1988), and is more implicit in *Between Facts and Norms*. Reliable discussions of Habermas's legal theory prior to the publication of the latter work would include Klaus Eder, "Critique of Habermas' Contribution to the Sociology of Law," *Law and Society Review* 22 (1988); Walter T. Murphy, "The Habermas Effect: Critical Theory and Academic Law," *Current Legal Problems* 42 (1989); Karlo Tuori, "Discourse Ethics and the Legitimacy of the Law," *Ratio Juris* 2 (1989); Wibren Van der Burg, "Jürgen Habermas on Law and Morality: Some Critical Comments," *Theory, Culture & Society* 7 (1990); William E. Scheuerman, "Neumann v. Habermas: The Frankfurt School and the Rule of Law," *Praxis International* 13 (1993); and Mathieu Deflem, "Law in Habermas' *Theory of Communicative Action*," *Philosophy & Social Criticism* 20 (1994).

12. Recent noteworthy treatments of Weber's sociology of law include Stephen M. Feldman, "An Interpretation of Max Weber's Theory of Law: Metaphysics, Economics, and the Iron Cage of Constitutional Law," *Law & Social Inquiry* 16 (1991); Harold J. Berman, "Some False Premises of Max Weber's Sociology of Law," *Washington University Law Quarterly* 65 (1987); and David Campbell, "Truth Claims and Value-Freedom in the Treatment of Legitimacy: The Case of Weber," *Journal of Law & Society* 13 (1986).

13. Weber, *Economy and Society*, 311.

14. *Ibid.*, 656-57.

the subjects to whom it is applied.<sup>15</sup> The problem with (2) is that there are innumerable statements that may be formulated in a sufficiently formal and logical manner, that conform with pre-established procedures, and that are applied consistently, whose particular normative status could be deemed questionable or even plainly immoral according to commonly-held ethical standards. To jump ahead historically, in little more than a decade after the appearance of Weber's volume some of the best legal minds of central Europe would set to work codifying in a discretely formal and eloquently logical manner some of the most abhorrent laws ever to exist in the history of Europe.<sup>16</sup>

### *B. Historical Approach*

In the section specifically titled "Economy and Law (The Sociology of Law),"<sup>17</sup> Weber undertakes a more historically specific analysis of modern law. After a discussion of what he calls the "Formal Law," a creation that reached its pinnacle under the conditions of nineteenth-century capitalism in Western Europe and North America, Weber describes the contemporary emergence of what he calls "deformalized law,"<sup>18</sup> or what is referred to elsewhere as "materialized law." The difference between the two types can be explained somewhat reductively in the following way: In the context of laissez-faire capitalism, where the state to some extent remains distinct from society, the law serves as the general and supposedly neutral rules to be abided by all the players within society; rules are set by a state that itself acts only as an umpire. This model presupposes a Continental version of the separation of powers, where the legislature takes precedence over the other two branches, delegating to them specific tasks and duties. It also presupposes a formula in which legal sentences are promulgated in conditional, "if x, then y," statements; that is, there is no state action without a specific condition or prior action, and hence a particular case, to trigger it. Such laws are addressed generally, directed to no particular social group. These

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15. Weber initially attempts to separate the coercive aspect of this definition from the freely believed-in aspect, only to collapse the two since he feels that all law is to some extent based upon force: "The distinction between an order derived from voluntary agreement and one which has been imposed is only relative." *Ibid.*, 37; cf. *ibid.*, 214.

16. See Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge: Harvard University Press, 1991); and Ralf von Dreier and Wolfgang Sellert, eds., *Recht und Justiz im "Dritten Reich"* (Frankfurt am Main: Suhrkamp, 1989); Bernd Rüthers, *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (Munich: Beck, 1988); as well as the classic, Ernst Fraenkel, *The Dual State: A Contribution to the Theory of Dictatorship*, trans. E.A. Shils (New York: Octagon Books, 1969).

17. Weber, *Economy and Society*, Vol. II, 641. [hereinafter "The Sociology of Law"].

18. Weber, *Economy and Society*, 880-89.

specifications work to keep the state from intruding arbitrarily into society. However, the obvious flaw of this model, based upon historical experience, is that this non- or qualified-interventionism allows quite a significant amount of social inequality to remain unaddressed by the state within society (e.g., wage-slavery, child labor, unlimited work hours, etc.).

Under conditions of increasing interventionism in the twentieth century, the state takes a more active role in both regulating the economy and addressing issues of social injustice. Lawmaking thus entails creation of the very rules by which the state itself plays. State action is no longer exclusively triggered by a particular case but, because of the broad goals that it is meant to achieve, continues in perpetuity. Legal sentences are no longer conditional statements but direct decrees without stopping points or specific actions within which to frame and contain them. The separation of powers is significantly undermined as the legislature grants the executive and judiciary wide discretion to carry out broad social goals. Law becomes, on the one hand, less general as it comes to be applied to specific groups (regulating corporations and protecting associations such as organized labor) and, on the other, less neutral as it is now enforced by one of the participants in the game: the state itself. Weber, despite his unambiguous advocacy of state welfare reform elsewhere, laments—perhaps because of his training as a lawyer<sup>19</sup>—this development as a crisis in accountability and determinacy for the law.<sup>20</sup>

### C. Reflections on Weber's Approaches to Law

If a person stepped back and examined these analyses from a distance he might notice that the categories that constitute the title and soul of Habermas's work, written some seventy-five years later, *Between Facts and Norms*, or more literally, *Facticity and Validity*, were already present in both of Weber's approaches. The analytical account's concern with actual compliance with the law parallels an empirically verifiable, *factual* approach to law; the formal account's concern with the logic and consistency of law-making and application

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19. See Anthony T. Kronman, *Jurists in Profile: Max Weber* (Stanford: Stanford University Press, 1983).

20. Franz Neumann's 1937 essay, "The Change in the Function of Law in Modern Society," in *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann & Otto Kirchheimer*, ed. William E. Scheuerman (Berkeley: University of California Press, 1996), is perhaps the definitive statement of this transformation of law. The most elaborate and articulate contemporary analysis of this problematic of "deformalized" welfare-state law—drawing explicitly from Neumann's account—is Scheuerman, *Between the Norm and the Exception*. For a specific consideration of the rule of law in the welfare state in the American context, see Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Cambridge: Harvard University Press, 1990).

parallels a conception of abstractly rational *validity*. Through the historical approach it may be observed that the nineteenth-century model held formal *validity* as a priority, while the twentieth-century welfare state model prioritizes *factual* enforcement and policy enactment. If this person were to step back even further, he might see that the analytical account is itself abstractly formal since Weber discusses modern law in a manner that is devoid of references to a specific historical time and space. On the other hand, the historical account is itself specifically directed to a concrete historical development actually experienced by the industrial societies of his day. The importance of the categories of facticity and validity that pervade Weber's account was not lost on his students in the years immediately following his death, and after the posthumous publication in 1920 of *Economy and Society*.

The significance of these respective categories and their relationship to each other reached a rather precarious point in the legal and political debates surrounding Germany's first attempt at democracy in the Weimar Republic, and arguably foreshadowed the Republic's eventual collapse and the subsequent triumph of National Socialism. In this sense, the analytical aspect of Weber's approach would be grafted onto the historical account in Weimar's crisis of law and the state, as juridical activists would seize upon the theoretical categories of the former to battle over the changing historical circumstances foreseen in the latter. As I will explain below, the efforts of Hans Kelsen can be understood as an attempt to maintain a formal conception of legal normativity that allows for the expansion of democracy under welfare state conditions while, on the other hand, the work of Carl Schmitt represents a jurisprudential attempt to coerce the conformity of society with supposedly irresistible factually-structural imperatives of concrete state intervention, a move that entails authoritarian consequences. The collapse of Weimar is often viewed as the victory of the latter hyperfactual over the former overly-normative position, a victory all too easily facilitated by the inherent weakness of the former and the ruthlessness of the latter, i.e., validity subdued by facticity.<sup>21</sup> It is this historical and personal memory of the failure of German democracy and the victory of the forces of reaction that has always motivated, and still now motivates, Habermas's endeavors—endeavors that have consistently sought to

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21. See David Dyzenhaus, *Truth's Revenge: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (New York: Clarendon Press, 1997).

solve theoretical dilemmas that have practical import in empirical reality.<sup>22</sup>

#### *D. Socio-Legal Categories and the Weimar Crisis of the State*

The ensuing crisis of the Weimar Republic can be read as a crisis of law during the transition to the welfare state, a crisis foreshadowed in Weber's work and, as we will see in greater detail below, one that continues to hover over Habermas's contemporary enterprise. The categories of facticity and validity stand out not only as unmediated theoretical opposites in Weber's theory, but as the intellectual standards to which his students strained as they struggled to discern the fate of the law—and concomitantly liberal and social democracy—in Weimar Germany.

While not officially a student of Weber, Austrian jurist Hans Kelsen shared with Weber a neo-Kantian methodology and epistemology.<sup>23</sup> The left-liberal democrat Kelsen practiced the abstract and general aspects of law described in Weber's sociology, aspects that focused primarily on the law's abstract validity.<sup>24</sup> He attempted to construct a formal notion of constitutional law that would allow those progressive social forces that were, for the first time, represented in Central European parliaments to promote an agenda, which would permit the welfare state to address effectively political and economic injustice.<sup>25</sup>

A jurist who was a student of Weber's, attending both famous "Vocation" lectures<sup>26</sup> as well as the "Parliament and Government in a Newly Ordered Germany" address,<sup>27</sup> was right-wing lawyer Carl

22. Witness, for instance, Habermas's intervention in the *Historikerstreit* over the place of the Holocaust in German history: Jürgen Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate*, trans. and ed. Shierry Weber Nicholsen (Cambridge: MIT Press, 1989). Habermas himself has intimated just how much the weight of Weimar legal theory bears down upon postwar German jurisprudence and social theory and, by extension, his own theoretical efforts. See Habermas, "Law and Morality," 233.

23. See Stanley L. Paulson, "The Neo-Kantian Dimension of Kelsen's Pure Theory of Law," *Oxford Journal of Legal Studies* 12 (1992) and Dhananjai Shivakumar, Note, "The Pure Theory of Law: Defending Kelsen on the Basis of Weberian Methodology," *Yale Law Journal* 105 (1996). On the theoretical content and historical context of neo-Kantianism in Central Europe during this period see Thomas Willey, *Back to Kant: The Revival of Kantianism in German Social and Historical Thought, 1860-1914* (Detroit: Wayne State University Press, 1978).

24. See Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beiträge zu einer Reinen Rechtslehre* (Tübingen: J.C.B. Mohr, 1920); *Der soziologische und der juristische Staatsbegriff: Kritische Untersuchung des Verhältnisses von Staat und Recht* (Aalen: Scientia, 1981); and *Introduction to the Problems of Legal Theory*, trans. Bonnie L. Paulson and Stanley L. Paulson (New York: Oxford University Press, 1992).

25. See Caldwell, *Popular Sovereignty*.

26. See Max Weber, "Science as a Vocation," and "Politics as a Vocation," in *From Max Weber: Essays in Sociology*, ed. H. H. Gerth and C. Wright Mills (New York: Oxford University Press, 1958).

27. Included in Weber, *Economy and Society*.

Schmitt.<sup>28</sup> Sniffing out the opportunity for state self-assertion in Weber's historically specific account of the supersession of formal rule of law by a deformalized welfare state law, Schmitt incessantly sought to hasten the demise of the formal rule.<sup>29</sup> His aspirations for an authoritarian interventionist state that would intercede in society—not to address socio-economic injustice but to further the aggrandizement of the state's power vis-à-vis liberal and leftist social forces—led him to support successive attempts at presidential coups by first Catholic, then Prussian aristocrats over and against the democratically elected parliament. In the wake of such arguably treasonous failures he endorsed a triumphant National Socialism in 1933.<sup>30</sup>

Georg Lukács, one of Weber's closest and perhaps most singularly brilliant students, chose not to privilege one theoretical pole of validity or facticity over the other. Instead, in an unfortunately understudied legal section of his *History and Class Consciousness* collection of 1923, Lukács calls for a Hegelian mediation and overcoming of such false—that is, independently empty and ineffectual—oppositions as Kelsenian abstract validity and Schmittian concrete factuality, categories he calls “antinomies of bourgeois thought.”<sup>31</sup> Lukács uses this phrase to demonstrate the link between the supposedly mutually indissoluble “ideal” versus “reality” poles of Kantian philosophy, and the methodology practiced by neo-Kantians such as Lukács's mentor, Weber. This methodology is perhaps best exemplified by Weber's sociological approach, which applies subjectively constructed “ideal types” to concrete empirical reality.<sup>32</sup> Lukács, for his part, attempted to ground these poles of validity and facticity in the respective abstract and concrete moments of both Marx's analysis of commodity form, exchange-value, and use-value, and the historical dynamics of capitalism. In joining the Communist party, he sought the practical overcoming of these oppositions and the

28. See Wolfgang Mommsen, *Max Weber and German Politics, 1890-1920*, trans. Michael S. Steinberg (Chicago: University of Chicago Press, 1984); and G. L. Ulmen, *Politische Mehrwert: eine Studie über Max Weber und Carl Schmitt* (Weinheim: VCH Acta Humaniora, 1991).

29. This is the sometimes stated goal of Carl Schmitt, *Die Hüter der Verfassung* (Tübingen: Mohr, 1931) and *Legalität und Legitimität* (Munich: Duncker & Humblot, 1932). On Schmitt's Weimar thought, see John P. McCormick, *Carl Schmitt's Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997).

30. On Schmitt's theoretical-political strategies, his constitutional debates with Kelsen, and his role in the collapse of the republic, see Scheuerman, *Between the Norm and the Exception*; Caldwell, *Popular Sovereignty*; Dyzenhaus, *Truth's Revenge*; and Stanley L. Paulson, “The Reich President and Weimar Constitutional Politics: Aspects of the Schmitt-Kelsen Dispute on the ‘Guardian of the Constitution,’” (paper presented at the American Political Science Association Annual Meeting, Chicago, 31 August-3 September 1995).

31. Georg Lukács, *History and Class Consciousness*, trans. Rodney Livingstone (Cambridge: MIT Press, 1988), 95-98, 256-71.

32. See Max Weber, *The Methodology of the Social Sciences*, trans. and ed. Edward A. Shils and Henry A. Finch (New York: Free Press, 1949).

socio-economic reality with which they corresponded, first in the present moment of revolution and eventually in apologies for Lenin and Stalin.<sup>33</sup>

Despite the particularly misguided activity that resulted from Lukács's attempted transcendence of Weber's neo-Kantian categories, the spirit of this Hegelian-Marxist theoretical-practical project was passed down to his progeny in the so-called Frankfurt School of Critical Social Theory. It is to this legacy that Jürgen Habermas is today the preeminent heir.<sup>34</sup> And so we should not be surprised to find in the title of Habermas's recent major theoretical effort, *Between Facts and Norms*, categories familiar from Weber's "Sociology of Law." Habermas's almost equally mammoth tome purports to mediate the opposition between that empirical facticity [*Faktizität*] and abstract validity [*Geltung*] expressed in its title, and he therein discusses contemporary expressions of each. Yet behind the norm-dismissing, factually-fixated systems theory of Niklas Luhmann,<sup>35</sup> a theory frequently criticized in the work, looms the specter of Schmitt; behind what Habermas identifies as the empirically blind normativity of John Rawls<sup>36</sup> stands Kelsen. According to Habermas, the former's "sociological theories of law" convey a "false realism that underestimates the empirical impact of the normative presuppositions of existing legal practice,"<sup>37</sup> while the latter's "philosophical theories of justice" are problematically formulated "in vacuo" socially—that is, to a great extent oblivious to social reality and the politically marginalizing effects of purely abstract categories.<sup>38</sup> Whether Habermas successfully mediates these poles within a contemporary crisis of the state, or does so only in an unwittingly anachronistic manner within the earlier Weberian and Weimar contexts of crisis, will be a crucial question to the following discussion.

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33. On Lukács's relationship to and critique of Weber in this regard, as well as the contrast between Lukács's and Schmitt's approaches to their mutual mentor, see John P. McCormick, "Transcending Weber's Categories of Modernity?: The Early Lukács and Schmitt on the Rationalization Thesis," in *New German Critique* (forthcoming 1997).

34. On this intellectual tradition, see Martin Jay, *Marxism and Totality: The Adventures of a Concept from Lukács to Habermas* (Berkeley: University of California Press, 1984). On Habermas's relationship to the neo-Marxism of the Frankfurt School, its major figures, such as Theodore W. Adorno, and the general intellectual context of the Federal Republic of Germany, see Romand Coles, "Identity and Difference in the Ethical Positions of Adorno and Habermas"; Nancy S. Love, "What's Left of Marx?"; and Max Pensky, "Universalism and the Situated Critic," in the "Heritage and Context" section of Stephen K. White, ed., *The Cambridge Companion to Habermas* (Cambridge: Cambridge University Press, 1995).

35. See Niklas Luhmann, *Legitimation durch Verfahren* (Darmstadt: Luchterhand, 1969) and *A Sociological Theory of Law*, trans. Elizabeth King and Martin Albrow (Boston: Routledge & Kegan Paul, 1985).

36. See John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University Press, 1971) and *Political Liberalism* (New York: Columbia University Press, 1993).

37. Habermas, *Between Facts and Norms*, xl.

38. *Ibid.*, 57.

## II. HABERMAS'S SOCIAL PHILOSOPHY OF LAW

Habermas can be understood to propose a solution to Weber's analytical problematic if one reinterprets in terms of law his system-lifeworld distinction,<sup>39</sup> a distinction originally formulated in his two-volume social-theoretical epic, *Theory of Communicative Action*.<sup>40</sup>

### A. Language, Law, and Lifeworld versus System

Habermas's theory of modernity, as set forth in *Theory of Communicative Action*, provides the basis for his efforts in *Between Facts and Norms* to fill the normative deficit left by Weber's analytical approach to law, wherein even laws imposed by force or irrationally observed could be deemed valid, and hence potentially legitimate. The attempt of *Between Facts and Norms* to inject a normative dimension into Weberian legal sociology allows Habermas to reconfigure the classical model of state and society presupposed by traditional social theory. Habermas detaches the economy from the society component of the nineteenth-century binary state/society model and attaches it to the state, thereby forming what he calls the system, i.e., that part of modernity concerned with the material reproduction and administrative regulation of society, a body that functions primarily through the language of strategic rationality. What remains of the nineteenth-century model is society, reconstructed in Habermas's thesis as the lifeworld, i.e., that part of modernity comprising the family, free associations, religion, etc., which symbolically reproduce culture through communicative rationality characterized by an implicit desire to reach understanding in virtually every utterance of communication. Not just undifferentiated

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39. *Ibid.*, 169ff., 295-302, 319-21.

40. On the relationship of *Theory of Communicative Action* and *Between Facts and Norms*, see Kenneth Baynes, "Democracy and the Rechtsstaat: Habermas' *Faktizität und Geltung*," in White, ed., *The Cambridge Companion to Habermas*; Dews, "Agreeing What's Right"; and Deflem, "Law in Habermas' *Theory of Communicative Action*." The ensuing discussion in this section is a necessarily brief, but hopefully not excessively crude, summary of the combined arguments of the two works, as well as those of two important works—*Moral Consciousness and Communicative Action* and *Justification and Application*—written by Habermas in the years between the publication of *Theory of Communicative Action* and *Between Facts and Norms*. For excellent discussions of Habermas's communicative ethics, see the essays by Stephen K. White, Georgia Warnke, J. Donald Moon, Mark Warren, and Simone Chambers in White, ed., *The Cambridge Companion to Habermas*; David Ingram, "The Limits and Possibilities of Communicative Ethics for Democratic Theory," *Political Theory* 21 (1993); *The Communicative Ethics Controversy*, ed. Seyla Benhabib and Fred Dallmayr (Cambridge: MIT Press, 1990); James Bohman, "Communication, Ideology and Democratic Theory," *American Political Science Review* 84 (1990); Jean Cohen, "Discourse Ethics and Civil Society," *Philosophy & Social Criticism* 14 (1988); Seyla Benhabib, "The Utopian Dimension in Communitarian Ethics," *New German Critique* 85 (1985); and Agnes Heller, "The Discourse Ethics of Habermas: Critique and Appraisal," *Thesis Eleven: Rethinking Social and Political Theory* 10-11 (1984-85).

sociological entities in this theory, the lifeworld and its heterogeneous character are emphasized through an elaboration of the communicative activity that constitutes it; that is, through the institutions of civil society, public spheres, and weak and strong publics. These informal institutions are the loci that generate what he terms communicative power.<sup>41</sup> The lifeworld is economically dependent on the system to produce the material requisites of life, and politically dependent on it to enforce the communicatively-derived decisions made through civil society, public spheres, and discursive publics. However the lifeworld is potentially threatened by the social inequalities generated by the economy and the potentially arbitrary administrative activities performed by the bureaucratic state apparatus, pathologies of modern life identified by Habermas as the “colonization of the lifeworld.”<sup>42</sup>

In *Between Facts and Norms*, Habermas characterizes law as the mediator between the lifeworld and the system, the “transformer” that converts the communicative language of the lifeworld into the strategic language of the administrative state and the economy.<sup>43</sup> He purports to overcome the Weberian dilemma of formal procedures of lawmaking and factual instances of compliance that have no inherent normative content by re-thinking will-formation in terms of his discourse theory of society. In so doing, Habermas claims to evade the problems of both liberal and republican models: The former engender a legitimation deficit in the conception of pre-formed and somewhat rigidly understood interests that either prevail, fail, or are compromised in the law-making process, thereby necessarily creating political losers; the latter constrain the possibilities of democracy by placing limits on what is open for discussion in their particular deliberative political models, for instance the topic of the status of the

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41. Habermas, *Between Facts and Norms*, 151-57.

42. On the advantages and limits of the system-lifeworld distinction, see the friendly but serious remarks of the following: Fred R. Dallmayr, “Habermas and Rationality,” *Political Theory* 16 (1988); Axel Honneth, *The Critique of Power: Reflective Stages in a Critical Social Theory* (Cambridge: MIT Press, 1991); and Nancy Fraser, “What’s Critical about Critical Theory?: The Case of Habermas and Gender,” in *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Minneapolis: University of Minnesota Press, 1989). For a Habermasian interpretation of civil society, see Jean Cohen and Andrew Arato, *Civil Society and Political Theory* (Cambridge: MIT Press, 1992). Habermas’s own conception of the public sphere was set forth in his first book, the 1962 work *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge: MIT Press, 1989). For recent reevaluations of this thesis, see the essays collected in the volume, *Habermas and the Public Sphere: An Inquiry Into a Category of Bourgeois Society*, ed. Craig Calhoun (Cambridge: MIT Press, 1992), especially the contribution by Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” in which is formulated the distinction between “weak” and “strong” publics that Habermas appropriates, and partially subverts, in *Between Facts and Norms*.

43. Habermas, *Between Facts and Norms*, 56, 169.

republican polity itself.<sup>44</sup> Habermas outflanks both models by seeking to gain the assent of all communicative actors affected by a particular law or policy. Habermas thereby conceptualizes law in a way that renders its functioning both normatively rich and substantively rational. He avoids the coercive shadow of a law enforced upon those who have not consented to it by guaranteeing that the collective and potentially unanimous will of a populace (or a particular part thereof) affected by a law is reflected in the making and enforcement of that law, through his establishment of a communicative process free of coercion and capable of facilitating the transformation of interests and positions. By building into the process of law-making institutional opportunities for understanding, and therefore for the emergence of the best justifications for policy decisions and by fostering non-exclusively strategic bargains, Habermas ensures that law will not be accepted by its authors/subjects as mere convention.<sup>45</sup>

In the next section I discuss just how Habermas understands law simultaneously to protect the lifeworld from the pathological excesses of the economically/bureaucratically functioning system and, conversely, to insure that the latter performs only as the rational instrument of the former. Moreover Habermas undertakes this task without lapsing into either holistic and thereby potentially authoritarian notions of a quasi-homogenous democratic people, or excessively formalistic accounts of those relationships of legal actors and subjects that result in weak and vulnerable models of constitutional democracy. First, to conclude this section, I offer a brief clarification and defense of Habermas's discourse theory of law.

In assessing the merits of *Between Facts and Norms*, many critics appear to misapprehend the linguistic underpinnings of discourse theory when they suggest that Habermas arbitrarily insists on potentially unanimous consensus building in law and constitution making. One articulate, though herein misguided, commentator states that, "the insistence on rational argumentation seems to be dictated more by the preferences of the discourse theorists than by any presupposed rules of language."<sup>46</sup> This common type of objection ignores Habermas's central arguments concerning the mutual understanding necessarily taken for granted in every act of speech. Even the most hostile or aggressive verbal directive assumes certain abilities of reception on the part of the addressee. When confronted

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44. On the liberal versus republican debate in constitutional law, see Cass R. Sunstein, "Preferences and Politics," *Philosophy & Public Affairs* 20 (1991); and Sunstein, "Beyond the Republican Revival," *Yale Law Journal* 97 (1988).

45. Habermas, *Between Facts and Norms*, 180.

46. James Herget, *Contemporary German Legal Philosophy* (Philadelphia: University of Pennsylvania Press, 1996), 55.

with such assumptions the aggressive addressor can either rationally accept the egalitarian notions presupposed in his speech act or concede that he is committing an irrational act, in which case he removes himself from the realm of rationally productive discourse. This invites a moment of challenge to authority. The historical examples of oppression to which critics often gesture as proof of the inefficacy of emancipatory discourse are rife with precisely the kinds of restrictions on free speech that Habermas suggests are performative self-negations on the part of those who wield power. Indeed, the example from Plato's *Republic* of Thrasymachus and the blush that Socrates induces in him reveals that power, no matter how cynically asserted, must be communicatively legitimated with those over whom it is exercised. This can, but need not necessarily, initiate a cycle of less legally restricted communication, which leads to further progressive political practice, which itself leads to more substantive forms of communication, and so on. In this historical possibility lies the source of discourse theory's subversive and emancipatory potential.

The "playing games" hypothetical to which critics often resort, an example that purportedly exposes the trivially tautological character of discourse theory, is also easily addressed. The point is not, as many suggest, that advocating discourse theory in law and politics is equivalent to "telling someone that if he or she wants to play tennis, the rules of tennis must be followed,"<sup>47</sup> but rather that if two or more persons want to play tennis *correctly* and *fairly*, certain strictures apply. To play without a net is, according to communicatively established convention, *not* to play tennis properly. Moreover, to play with the hand of one of the participants tied behind his back is to play inequitably. Most importantly, according to Habermas, the rules of law and politics *are* (factually) and *should be* (normatively) open-ended and subject to the constant and perpetual discussion, evaluation, and transformation of the rules of social life. This can never be done unilaterally or "monologically," in the style of Rawls's original position, for that would entail, ultimately without consultation with socially or historically real others, arbitrary decisionism. As with laws, however, the making and enforcement of political rules necessarily involves the input of all those affected by a particular policy decision. The off-hand dismissal of the jurisprudential usefulness of discourse theory by many critics is justified only if the question of legitimacy is to be banished from questions of the law.

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47. *Ibid.*, 59.

*B. Between Formalist and Vitalist Notions of Constitutional Democracy*

To establish more firmly accountability within his discourse theory of legality, Habermas reconstructs the mutual relationship of facticity and validity,<sup>48</sup> which had traditionally been treated as separate and even competing entities in the self-understanding of German legal sociology and philosophy. While the Weimar ghost of Schmitt is treated in a mostly subtextual manner in the work, Habermas directly addresses Schmitt's Weimar interlocutor, Kelsen. It is, after all, the latter's legal positivism, a version of progressive legal theory inherited from the context of Weimar, that sought to render state activity accountable to popular sovereignty through procedural means.<sup>49</sup> Habermas finds the Kelsenian tradition of procedural jurisprudence overly susceptible to "realist" dismissal by present-day hyper-empirical interpreters such as Luhmann, who may share none of Schmitt's political predilections, but whose skepticism regarding normativity may corrode, in an equally devastating manner, the substantive efficacy of communicative power's expression in procedural legality.

Weber's sociology of law, with its thin notion of legal validity, left unresolved the riddle of whether mere legality could entail legitimacy.<sup>50</sup> Whether the simple fact of the law—its recognition or its formal validity—was sufficient to render it substantively rational or legitimate is central to Habermas's analysis. Whereas Schmitt cynically answered the riddle in the negative in *Legality and Legitimacy*,<sup>51</sup> and Luhmann, on the basis of sociological assumptions similar to those held by Weber and Schmitt, answered it with a weak affirmative in *Legitimation Through Procedures*,<sup>52</sup> Kelsen's constitutional theory is the most elaborate effort to solve definitively this dilemma in favor of formal proceduralism. Habermas had subtitled his earlier treatment of legal theory explicitly in terms of this riddle, "How Is Legitimacy Possible on the Basis of Legality?" in "Law and Morality"<sup>53</sup>—but it

48. Habermas, *Between Facts and Norms*, 416.

49. In a compelling interpretation, Dhananjai Shivakumar emphasizes Kelsen's affinities with Weber's neo-Kantianism over his more generally-discussed relationship to Kantianism writ large in an effort to preserve the viability of Kelsen's jurisprudential methodology. See Shivakumar, "The Pure Theory of Law." As I will discuss below, Habermas attempts to address the deficiencies of both Weberian and Kelsenian methodologies, though himself employing something of a neo-Kantian approach.

50. See Johannes Winckelmann, *Legitimität und Legalität im Max Webers Her-schaftssoziologie* (Tübingen: J.C.B. Mohr [Paul Siebeck], 1952).

51. Schmitt, *Legalität und Legitimität*.

52. Luhmann, *Legitimation durch Verfahren*. On Luhmann and Schmitt, see Cohen and Arato, *Civil Society and Political Theory*, 323-25.

53. Habermas, "Law and Morality."

is in *Between Facts and Norms* that he fully engages Kelsen's theory.<sup>54</sup>

Accepting Weber's diagnosis of modernity, which posits the destruction of the legitimating force of natural law by the polytheism of a pluralizing enlightenment,<sup>55</sup> and also acknowledging that the overtly formalist solutions of the early modern period do not hold sufficient legitimating potential on either normative or empirical grounds,<sup>56</sup> Habermas lays out two alternative versions of modern validity, both previously analyzed by Weber: the factually based, empirically ascertained notion that registers average compliance with the law, and the normatively inclined notion of subjective recognition of the law's legitimacy.<sup>57</sup> As noted, both are fundamentally unstable conceptions; in the former, the subjective aspect of the participant's attitude toward the law is rendered unimportant in comparison to her possibly coerced factual compliance with it, while in the latter this subjective disposition is rendered inaccessible to social-scientific observation and hence potentially indeterminate. In the first, the subject is conceived of as a strategic actor for whom the law is merely a fact that structures behavior. In the second, the subject "believes in" the law with no assuredly rational account as to why, or whether, she will continue to do so and with no observable or necessary link with the structure of the law itself.<sup>58</sup> Thus, in Habermas's estimation, neither instrumentalism nor conventionalism are sufficiently substantive orientations toward the law to ameliorate the risk of coercion and promote the primacy of communicative over administrative power.<sup>59</sup>

Kelsen's legal positivism remains a sophisticated attempt to combine these two notions of validity by transposing the requisite but inaccessible normativity of the subjective participant into the procedures of the law itself, thus cushioning the potential coerciveness of the law's positive facticity in state enforcement. However, Habermas perceptively illustrates how the attempt to embed normativity within institutional procedures of lawmaking that forsake the connection with subjective personalities defers *too much* to factual necessity. For Kelsen, the positive quality of a law itself renders that

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54. For a more general overview of legal positivism, see the classics H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Oxford University Press, 1983); Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); and Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986). See also more recent considerations by Anthony J. Sebok, "Misunderstanding Positivism," *Michigan Law Review* 93 (1995) and Michael Stokes, "Formalism, Realism and the Concept of Law," *Law and Philosophy* 13 (1994).

55. Habermas, *Between Facts and Norms*, 145.

56. *Ibid.*, 146.

57. *Ibid.*, 54.

58. *Ibid.*, 31.

59. *Ibid.*, 33.

law legitimate; the fact that it was made through a set of procedures that can ultimately be traced back through other pre-arranged procedures to a previously established popular sanction renders it correct. Hence, for Habermas, Kelsen's famous "ought" in his "normativist" scheme of jurisprudence is ultimately "empirical" and not "deontological" because it is constituted by state sanction and divorced from continuous interaction with subjectively normative imperatives. In Kelsen's elaborate architectonic construction of multiple, hierarchically arranged levels of norms, the persons who initially author these norms are eclipsed soon after the act of authorship.<sup>60</sup> Kelsen thus encourages those approaches to law that devote attention only to the already established formal procedures that themselves quickly expose the law's lack of normative resonance: "Once the moral and natural person has been uncoupled from the legal system, there is nothing to stop jurisprudence from conceiving rights along purely functional lines. This doctrine of rights hands on the baton to a systems theory that rids itself by methodological fiat of all normative considerations."<sup>61</sup>

Drawing upon the arguments he had expounded as early as 1963 in his classic essay "Dogmatism, Reason, Decision,"<sup>62</sup> Habermas unmasks the actual fluidity between one-sided approaches that emphasize either facticity or validity by demonstrating how a Kelsenian normativity is ultimately reliant upon a decisionist moment, a moment reminiscent of the Schmittian theory of "decisionism" against which it is opposed in its own self-understanding.<sup>63</sup> The tracing of the legality of all statutes to a basic will at the constitution's founding that serves as the "ground-norm" from which all others derive ultimately amounts to a might-makes-right proposition and leaves administrative directives beyond the reach of communicative regulation. Normativism hence "exhausts itself in the legalism of a political domination construed in positivist terms."<sup>64</sup> The democratic potential of this sovereign will is thus rendered static and normatively unaccountable; according to Habermas, in a theory like Kelsen's:

[T]he source from whence positive law may derive its legitimacy is not successfully explained. To be sure, the source of all

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60. *Ibid.*, 86.

61. *Ibid.*, 87. For different assessments of Kelsen, see Joseph Raz, "The Purity of the Pure Theory," in *Essays on Kelsen*, ed. Richard Tur and William Twining (Oxford: Clarendon Press, 1986); Stanley L. Paulson, "Kelsen's Legal Theory: The Final Round," *Oxford Journal of Legal Studies* 12 (1992); and Peter C. Caldwell, "Legal Positivism and Weimar Democracy," *American Journal of Jurisprudence* 39 (1995).

62. "Dogmatism, Reason and Decision: On Theory and Practice in Our Scientific Society," in *Jürgen Habermas on Society and Politics*, ed. Steven Seideman (Boston: Beacon Press, 1989).

63. Habermas, *Between Facts and Norms*, 38.

64. *Ibid.*, 89.

legitimacy lies in the democratic lawmaking process, and this in turn calls on the principle of popular sovereignty. But the legal positivism, or *Gesetzespositivismus*, propounded in the Weimar period by professors of public law does not introduce this principle in such a way that the intrinsic moral content of the classical liberties . . . is preserved. In one way or another, the intersubjective meaning of legally defined liberties is overlooked . . . .<sup>65</sup>

Kelsen's type of legal formalism is not interactively dynamic in that it does not insure that the imperatives of administrative power remain accountable to the democratic will. Once this will is all but metaphysically constituted in a founding act, or less dramatically in a parliamentary election, it has insufficient means continually to influence systemic forces. Through his discourse theory, however, Habermas purports to infuse Kelsen's merely formal characteristics of the law with a normative substance that ensures its legitimacy: "The law receives its full normative sense neither through its legal *form* per se [e.g., Kelsenian positivism], nor through an a priori moral *content* [e.g., natural law or Rawlsian liberalism], but through a *procedure* of lawmaking that begets legitimacy."<sup>66</sup> To be more specific, if at every level of opinion- and will-formation, and law- and policy-making, there obtain the structures that facilitate those full communicative interactions that lead to general assent, then the formality of legality can be rendered substantively legitimate:

If discourses . . . are the site where a rational will can take shape, then the legitimacy of law ultimately depends on a communicative arrangement: As participants in rational discourses, consociates under law must be able to examine whether a contested norm meets with, or could meet with, the agreement of all those affected.<sup>67</sup>

In contrast to both Kelsen *and* Schmitt, who presuppose a static will at the original moment of a constitution's founding,<sup>68</sup> Habermas theorizes a process of will-formation—a "concept of the political" that is alternative to both the liberal and authoritarian ones<sup>69</sup>—that is open to constant change but that remains stable in its adherence to the procedures themselves: "The preferences entering into the political process are viewed not as something merely given but as

65. *Ibid.*, 89.

66. *Ibid.*, 135.

67. *Ibid.*, 103-04.

68. *Ibid.*, 202.

69. *Ibid.*, 150-51. See Ulrich K. Preuß, "Communicative Power and the Concept of Law," *Cardozo Law Review* 17 (1996).

inputs that, open to the exchange of arguments, can be discursively changed.”<sup>70</sup> The universality of “general assent” or “reasonable consensus” engendered by such proceedings insures legitimacy that may be defined in terms of lifeworld control of the system.<sup>71</sup> According to Habermas, a discourse theory of popular sovereignty poses no danger to liberty because it necessitates the assent of all affected and is characterized by a requirement of deference to more rational arguments in general discussion, including those regarding the very definition of rights previously conceived of as pre-political and potentially untouchable.<sup>72</sup>

Moreover, for Habermas, subsequent liberal attempts to shore up the deficiencies of the normative framework perform scarcely better in addressing the Weberian normative void preserved by Kelsen. Rawls, for instance, ignores the factual side altogether, thus providing a reverse image of Kelsen who, for his part, pays too much attention to legal form and not enough to its potentially normative content.<sup>73</sup> However, Habermas’s desire to build legitimacy into the legal order entails abandonment neither of Rawlsian ethical-political normativity nor of Kelsenian formal-legal normativity. In fact, the latter still holds a particular attraction for Habermas. Because of the Kantian inclinations of the work, which will be discussed below, Habermas deems “economical and elegant” certain characteristics of the liberal statute-positivism tradition, of which Kelsen is the greatest representative, and he remarks that they “still have a certain suggestive power even today.”<sup>74</sup> He is herein referring specifically to the fact that statutes are parliamentarily produced and general in character, as well as subsumptive in form; that is, these statutes presuppose the hierarchy of the constitution over the legislature and the latter over the executive.<sup>75</sup>

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70. Habermas, *Between Facts and Norms*, 162-68, 181.

71. *Ibid.*, 147, 155. Habermas’s emphasis on the potential for unanimous agreement in societal and parliamentary will- and opinion-formation has already sparked vigorous commentary. In addition to Herget, *Contemporary German Legal Philosophy*, see William Rehg and James Bohman, “Discourse and Democracy: The Formal and Informal Bases of Legitimacy in Habermas’s *Faktizität und Geltung*,” *Journal of Political Philosophy* 4 (1996); William E. Scheuerman, “Between Radicalism and Resignation: Democratic Theory in Habermas’s *Between Facts and Norms*,” (paper presented at the American Political Science Association Annual Meeting, San Francisco, 29 August-1 September 1996); Baynes, “Democracy and the Rechtsstaat,” and Simone Chambers, “Discourse and Democratic Practices,” in White, ed., *The Cambridge Companion to Habermas*; Charles Larmore, “The Foundations of Modern Democracy: Reflections on Jürgen Habermas,” *European Journal of Philosophy* 3 (1994); Bernhard Peters, “On Reconstructive Legal and Political Theory,” *Philosophy & Social Criticism* 20 (1994); and Robert Alexy, “Basic Rights and Democracy in Habermas’ Procedural Paradigm of the Law,” *Ratio Juris* 7 (1994).

72. Habermas, *Between Facts and Norms*, 89.

73. *Ibid.*, 60-61.

74. *Ibid.*, 190.

75. *Ibid.*, 191.

Having elaborated his reconstruction of the Kelsenian theory of formal law, essentially a substantive theory of legal procedure, and having pointed out the relationship of Kelsen's theory of popular sovereignty with those more authoritarian ones against which it is opposed in its self-understanding, Habermas is careful to distance his own conception of popular sovereignty from Rousseauian *cum* Schmittian interpretations, in which the political will of an empirically and physically existing collective group or community is prioritized over formal legal and constitutional matters.<sup>76</sup> In fact, Habermas appears to be so deeply concerned by the implications of this concretist notion of democracy that it often clouds his thinking in other areas.

For instance, the shadow of Schmitt prevents Habermas from seriously considering the creative and productive use of the executive branch exhibited in the separation of powers and checks and balances in various constitutional contexts; e.g., that the executive might hold some leverage over the other branches through agenda-setting or popular appeals not necessarily plebiscitary in character. On the contrary, Habermas asserts rather curtly that such functions "are excluded" from his theory and raises in retort the ominous specter of *Führerdemokratie*:

Anyone who would want to replace a constitutional court by appointing the head of the executive branch as the 'Guardian of the Constitution'—as Carl Schmitt wanted to do in his day with the German president—thwarts the meaning of the separation of powers in the constitutional state into its very opposite.<sup>77</sup>

Despite his somewhat extreme stance in this particular instance, Habermas is correct to criticize constitutional theorists like Bruce Ackerman, and to a lesser extent Frank Michelman and Werner Becker, for unwittingly reviving quasi-Schmittian notions of democracy. Habermas expresses grave reservations regarding Ackerman's "vitalist" constitutional approach, which he associates with the Schmittian notion of *Ausnahmezustand* or the "exception";<sup>78</sup> he softens this charge somewhat in reference to Michelman,<sup>79</sup> as well as to Becker, in whose empiricist (that is, overly "*faktische*") account of democracy Habermas finds shades of decisionism.<sup>80</sup> In fact, at times it seems as though Habermas's own discourse-theoretic *Rechtsstaat*, in its adamant insistence on multivocal (in contradis-

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76. *Ibid.*, 102-03.

77. *Ibid.*, 241-42.

78. *Ibid.*, 277-78.

79. *Ibid.*, 279.

80. *Ibid.*, 295.

tion to monolithic) expressions of popular will, is expressly formulated in opposition to a Schmittian notion of democracy.<sup>81</sup>

Thus Habermas can be understood to have solved the dilemma left by Weber's analytical approach to law. The normative vacuum found in Weber's account is filled by Habermas's discourse theory of law, which postulates that law can be formulated in such a way as to garner the assent of all those to whom it applies. This rules out the potential coercion entailed in arbitrary enforcement of the law over particular subjects and the potential irrationality of a formalist conception that allows for any outcome to be deemed valid provided it has complied with established procedure. Because the procedures themselves, as conceived by Habermas, are infused with the possibility of coercion-free communication and are amenable to change on the bases of such communication, the formalism of the law is neither empty nor irrational. Moreover, because the will to which law-making and -enforcement are accountable is not theorized as a singular homogenous will, as conceived by competing Schmittian and Kelsenian constitutional notions, but is instead understood as anonymous and manifold, Habermas avoids the irrational excesses of nationalist or homogeneity-enforcing expressions of democracy.<sup>82</sup>

Below I criticize Habermas's privileging of a transhistorical, Kantian approach to law over Hegel's historically specific one. However, here Habermas's flight from Hegel serves him well in at least one regard: He refrains from elaborating the particular qualities of the institutions that constitute the law-making transition from lifeworld to law itself, or of those institutions by which law fastens the interests of the lifeworld to the system. While many will consider this omission a flaw,<sup>83</sup> Habermas is consistent in leaving the determination of these institutions to the decisions of his deliberating democratic publics and not to the ruminations of German philosophers.<sup>84</sup>

81. Ibid., 136, 563, n.75. This is not, however, the occasion to discuss the complicated and controversial issue of Habermas's intellectual relationship with Schmitt. On this issue, see Ellen Kennedy, "Carl Schmitt and the Frankfurt School," *Telos: A Quarterly Journal of Critical Thought* 71 (1987), and the accompanying responses by Martin Jay, "Reconciling the Irreconcilable? Rejoinder to Kennedy"; Ulrich K. Preuß, "The Critique of German Liberalism: Reply to Kennedy"; and Alfons Söllner, "Beyond Carl Schmitt: Political Theory in the Frankfurt School" (ibid.). See also Cohen and Arato, *Civil Society and Political Theory*, 201-54.

82. For further accounts of a discourse theory of law, see Dyzenhaus, "The Legitimacy of Legality"; Rosenfeld, "Law as Discourse"; Baynes, "Democracy and the Rechtsstaat"; and David Sciulli, *Theory of Social Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge: Cambridge University Press, 1992).

83. See Chambers, "Discourse and Democratic Practices."

84. This includes even considerations as cogent and rigorous as those found in G.W.F. Hegel, *Elements of the Philosophy of Right*, ed. Allen Wood (Cambridge: Cambridge University Press, 1991). See Drucilla Cornell, Michel Rosenfeld, and David G. Carlson, eds., *Hegel and Legal Theory* (New York: Routledge, 1991).

The project is not without problems, however. Habermas sacrifices a degree of contemporary relevance by seeking to solve the normative deficit of Weber's sociology of law through his own discourse theory of law, supplanting Weber's simple state/society model with his own more differentiated system/lifeworld one. While Habermas is able to assume a normative potential in the civil societies, public spheres, and discursive publics of the lifeworld by transferring into the system the potentially coercive instrumental rationality of the market and coupling it with the strategic rationality of the state, he still explicitly assumes a nation-state configuration within which this rearrangement takes place.<sup>85</sup> Indeed, while this would be a perfectly acceptable approach to the aporia of Weberian legal theory within Weber's own context of an emerging and soon hegemonic welfare state, its adequacy is questionable for an empirical reality where threats to the communicative rationality of the lifeworld are posed by economic imperatives whose sources lie increasingly beyond the purview of a particular state apparatus acting in accord with the will collected from a particular lifeworld.<sup>86</sup> In other words, whereas the coercion generated by either social, state, or economic forces might have been tamed by Habermas's model of law in a scenario where the state had the capacity to act as the agent of the lifeworld and was instructed to enforce policies by the latter through the institution of law, in a situation where such state capacities are diminished by economic globalization, state decentralization, and nation-state interdependence, there are risks of pathological attacks on the lifeworld that increasingly lie beyond the control of the state.<sup>87</sup>

To be more specific, should a particular multinational corporation decide to withdraw from a particular nation, the state may have little leverage to keep that company within its borders and hence little power to address the economic hardship to be suffered by its

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85. This and other ramifications of Habermas's isomorphic and state-centric understanding of the relationship of the economy and the state within the system-lifeworld model are elaborated in Brenner, "The Limits of Civil Society."

86. Here I bracket the serious objections raised by critics of Habermas's underestimation of the extensive coercion that pervades the lifeworld itself and indeed the kind of normative rationality that obtains in the system. See Fraser, "What's Critical about Critical Theory?"

87. On the importance of these kinds of considerations for democratic theory, see Brenner, "The Limits of Civil Society"; John Dunn, "Political Science, Political Theory and Policy-Making in an Interdependent World," *Government and Opposition* 28 (1993); David Held and Anthony McGrew, "Globalization and the Liberal Democratic State," *Government and Opposition* 28 (1993); John Dunn, ed., *Contemporary Crisis of the Nation State?* (Oxford: Blackwell, 1995); and David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995). John Rawls, the foremost Anglo-American legal-political democratic theorist, has only recently begun to consider the ramifications of international relations for his theory of justice. See John Rawls, "The Law of Peoples," in *On Human Rights: The Oxford Amnesty Lectures*, ed. Stephen Shute and Susan Hurley (New York: Basic Books, 1993).

lifeworld. The ensuing unemployment to be experienced in this lifeworld will have a direct effect on the communicative capabilities of the discursive publics that are supposed to participate vigorously in the law- and policy-making process that directs the operations of the state and economy.<sup>88</sup> Or, as is more likely the case in these days of corporate-conciliatory state policy,<sup>89</sup> should a state negotiate a settlement with a transnational corporation by which the company remains within the state's territory at the cost of the state's tax revenue vis-à-vis the corporation, the state compromises its ability to redistribute wealth within society. Since state welfare policy is one of the chief means by which the lifeworld uses legal direction of the system to regulate social inequality within its domain, its subversion engenders the same cycle of denatured and deformed communicative possibilities and participation as the previous example.<sup>90</sup> Therefore, Habermas's reconstruction of the normative status of law left vacant by Weber's sociology to some extent undermines its contemporary efficacy by relying on a rearrangement of Weber's state-society model within a system-lifeworld one without questioning the nation-state parameters of both models. This is a theme I will take up below in considerations of Habermas's attempt to solidify his legal theory by addressing judicial adjudication (C) and his attempt to solve what I have identified above as the historical dilemma of law in the transition to the twentieth-century welfare state, a dilemma left unresolved in Weber's sociology of law (D).

### *C. Excursus: Interactive Adjudication*

There is already considerable precedent in classical liberal literature, and certainly in Habermas's earlier works, regarding the appropriate methods by which to build into the societal and parliamentary processes of will-formation and lawmaking the kind of communicative structures Habermas advocates.<sup>91</sup> But in offering a comprehensive account of how modern law facilitates the potential for democratic communicative power to keep in check the threats posed

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88. See Charles Tilly, "Globalization Threatens Labor's Rights," working paper 182, New School for Social Research/Center for Studies of Social Change, New York, 1994.

89. See Paul Pierson, "The New Politics of the Welfare State," *World Politics* 48 (1996).

90. In a recent essay, Habermas concedes the existence of this kind of problem and proposes as a solution the elevation of his discourse theory of constitutional democracy to supra-national levels such as those of the European Union (hereinafter EU). See Jürgen Habermas, "The European Nation State—its Achievements and its Limits: On the Past and Future of Sovereignty and Citizenship," *Europäische Zeitschrift für Recht, Philosophie und Informatik* 2 (1995). I address the adequacy of this solution below.

91. See Bernard Manin, "On Legitimacy and Political Deliberation," *Political Theory* 15 (1987); John Dryzek, *Discursive Democracy: Politics, Policy and Political Science* (Cambridge: Cambridge University Press, 1990); and David Miller, "Deliberative Democracy and Social Choice," *Political Studies* 40 (1992).

by systemic power in the state and the economy at every institutional level,<sup>92</sup> Habermas is compelled also to give an account of how communicative procedures can be built into the post-parliamentary—and traditionally only quasi-democratically legitimate—judicial branch of government. Specifically, he addresses the question of how law is to be interpreted “with both internal consistency and rational external justification so as to guarantee simultaneously the *certainty of law* and its *rightness*.”<sup>93</sup> Habermas carefully considers three post-natural law alternatives (hermeneutics, realism, positivism), as well as the sophisticated proposals of Ronald Dworkin and Klaus Günther, before setting forth his own approach.<sup>94</sup>

Therefore, before addressing in section (D) how Habermas answers the historical quandary left by Weber’s sociology of law, in this section, I discuss Habermas’s theory of jurisprudential interpretive theory and practice, also resolved unsatisfactorily by Weber. In a famous passage from “The Sociology of Law,” Weber compares conceptions of the judge as on the one hand a vending machine into whose head the appropriate statutes and case materials are poured and from whose mouth pops forth the eternally correct decision, and on the other an unbounded creator of law who negotiates the fundamentally unbridgeable gap between rule and case with his or her own ultimately arbitrary decision.<sup>95</sup> These two paradigms confront each other as judge-as-automaton versus judge-as-lawgiver.<sup>96</sup> In *Economy and Society* and elsewhere, Weber is ambivalent as to which model obtains more closely in reality. Habermas seeks to move beyond these alternatives and their contemporary expressions in his own confrontation with the question of judicial adjudication.

According to Habermas, the alternative of legal hermeneutics is too democratically compromised as a result of its dependence on received judicial tradition, however loosely conceived, for it to serve as a viable interpretive model for the law. Habermas is nevertheless careful to acknowledge its sophistication in approaching the complex relationship between a rule and its application: The context or situation of application is to some extent defined by being brought into proximity

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92. On the important differences between the pre-parliamentary and parliamentary modes of communication in Habermas’s “two-track” approach, see Baynes, “Democracy and the Rechtsstaat,” 216.

93. Habermas, *Between Facts and Norms*, 199.

94. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); *A Matter of Principle* (Cambridge: Harvard University Press, 1985); and *Law’s Empire* (Cambridge: Belknap Press of Harvard University Press, 1986); as well as Klaus Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law* (Albany: State University of New York Press, 1993).

95. Weber, *Economy and Society*, 979, 756; cf. 656, 811, 895, 1395.

96. *Ibid.*, 758, 894; see also 979, 1395.

with a law, while the law is only made concrete in its application to a specific case.<sup>97</sup>

In much the same way that he theoretically undresses poststructuralism elsewhere, Habermas reveals legal realism's inability to justify its own normative goals once it has exposed as ideology the normative claims of the judicial system as ideology in its reduction of law to politics and its emphasis on the naked value preferences of judges.<sup>98</sup> Legal positivism, according to Habermas, is closed to both social context and vested interest, rendering it unresponsive to the needs of substantive democracy. Moreover, Habermas reiterates his distrust of the decisionism latent within the positivist theory of adjudication: Given the strict formalism of positivism, when the rule is unclear because of the inevitable indeterminacy of language, the judge is given unnecessarily wide discretion.<sup>99</sup>

Habermas finds much more of value for linking a theory of legal coherency with legal legitimacy in the philosophy of Dworkin. Dworkin's distinction of principles and rules bypasses both positivist and anti-positivist responses to the apparent indeterminacy of the law: only the conflict of either/or rules makes for decisionistic resolution. Principles, on the other hand, do not have this zero-sum quality.<sup>100</sup> Habermas is inclined to accept Dworkin's call for a work-in-progress approach to legal principles wherein coherency follows from—rather than is presupposed by—the principles themselves (as in the consequently, and justifiably, more often criticized Rawlsian approach). For Dworkin, according to Habermas, “the task does not consist in the philosophical construction of a well-ordered society whose basic institutions would embody principles of justice [but rather] in the *discovery* of valid principles and policies in the light of which a given, *concrete* legal order can be justified in its essential elements such that all the individual decisions fit into it as parts of a coherent whole.”<sup>101</sup>

Habermas also finds in Dworkin the grounds to refute the radical critique of legal theory launched by the Critical Legal Studies (CLS) movement—the contemporary manifestation of the legal realist assault on formal law that also happens, wittingly or unwittingly, to reproduce some of the arguments used by the radical right in its Weimar assault on liberal law.<sup>102</sup> CLS claims that the everyday workings of judges

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97. Habermas, *Between Facts and Norms*, 244.

98. *Ibid.*

99. *Ibid.*, 200.

100. *Ibid.*, 208-09.

101. *Ibid.*, 212.

102. On this comparison, see Scheuerman, *Between the Norm and the Exception*. On CLS in general, see Roberto M. Unger, *Law in Modern Society* (New York: Free Press, 1976); Mark

reflect their own interests, attitudes, and biases that the judges then “rationalize” with principles and policies which hide the “objective indeterminacy of the law.”<sup>103</sup> Habermas claims that this supposed “internal indeterminacy” does not result from the structure of the law but rather from judges’ failure to put forth the best arguments in particular cases. Moreover, the institutional history to which judges are obliged to resort often resists rational reconstruction in adjudication.<sup>104</sup>

Thus, with the aid of Dworkin, and Günther as well, Habermas undermines the once reactionary, now supposedly progressive, strategy of reducing all cases to “exceptions” and utilizing the ensuing exposé of the indeterminacy of the liberal rule of law as the point of departure for a wholesale overhaul of it. According to Habermas, CLS claims that there is no coherency to liberal-democratic law, hence no justice. Habermas, Dworkin, and Günther argue that CLS confuses rules with principles; the former collide in irreconcilable ways but, unlike the latter, do not constitute the workings of justice as such. All principles are necessarily indeterminate because they do not apply themselves. They must be examined to see if another principle better conforms to a particular case.<sup>105</sup> In application, all suitable normative reasons must be collected and then the situation itself interpreted:

If the “collision” between norms being weighed in the interpretive process led one to infer a “contradiction” within the system of norms itself, then one would be confusing the norm’s “validity,” which it enjoys in general insofar as it is justified, with its “appropriateness” for application in particular cases. If instead one explains the indeterminacy of valid norms in terms of argumentation theory, then a contest of norms competing as *prima facie* candidates for application in a given case makes good methodological sense.<sup>106</sup>

Habermas suggests that those fixated on indeterminacy themselves expect a predetermined outcome in the judicial process that falsely begs the result they already desire: the “trashing” of the legal system. Drawing upon the work of Lon Fuller, Habermas sets out the appropriate expectations of the legal system: “not certainty of outcome but a discursive clarification of the pertinent facts and legal questions.

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Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987); Alan Hunt and Peter Fitzpatrick, *Critical Legal Studies* (Oxford: Blackwell, 1987); and Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton: Princeton University Press, 1990).

103. Habermas, *Between Facts and Norms*, 214.

104. *Ibid.*

105. *Ibid.*, 216-17.

106. *Ibid.*, 218.

Thus affected parties can be confident that in procedures issuing in judicial decisions only relevant reasons will be decisive, and not arbitrary ones."<sup>107</sup>

But in section III of chapter V, Habermas parts company with both Dworkin and Günther. By placing far too much emphasis on the individual judge—likening her to “Hercules”—Dworkin is too “monologic” for Habermas. And Günther, by making too strong a distinction between rules and principles as well as justification and application, endangers the very legal determinacy he seeks to uphold, because for Habermas the way in which something is rationally justified cannot be wholly divorced from the manner in which (and means with which) it is applied. As a solution to these deficiencies, Habermas introduces his “dialogic approach” to adjudication, an approach that takes into account multiple perspectives in the process:

Whether norms and values could find the rationally motivated assent of all those affected can be judged only from the inter-subjectively enlarged perspective of the first person plural. This perspective integrates the perspectives of each participant’s worldview and self-understanding in a manner that is neither coercive nor distorting. The practice of argumentation recommends itself for such a universalized ideal role taking practiced in common. As the reflective form of communicative action, argumentation distinguishes itself socio-ontologically, one might say, by a complete reversibility of participant perspectives that *unleashes* the higher-level intersubjectivity of the deliberating collective. In this way Hegel’s concrete universal is sublimated into a communicative structure purified of all substantial elements.<sup>108</sup>

There is much more that could be said here with respect to the substantive qualities of Habermas’s own legal hermeneutics.<sup>109</sup> However, I would like to raise questions about the way in which Habermas decontextualizes legal theory in *Between Facts and Norms*, the ramifications of which again threaten the contemporary pertinence of his theses. While Habermas has never engaged in the crude reduction of ideas to some socio-economic or materialist base, from his very first work, *The Structural Transformation of the Public*

107. Ibid. at 220. For recent reinterpretations of the way out of certain dead ends of legal positivism without resort to the left-nihilism of CLS via the work of Fuller, see Dyzenhaus, “Legitimacy of Legality” and Sciulli, *Theory of Social Constitutionalism*. See also Stanley L. Paulson, “Lon L. Fuller, Gustav Radbruch and the ‘Positivist’ Theses,” *Law and Philosophy* 13 (1994).

108. Habermas, *Between Facts and Norms*, 228.

109. See Stephen M. Feldman, “The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas and Civic Republicanism,” *Georgetown Law Journal* 81 (1993).

*Sphere*, he demonstrated a sophisticated understanding of the way that theoretical positions, philosophical ideas, and cultural understandings interacted with particular socio-historical moments. For instance, when discussing the status of the “bourgeois public sphere,” he made it clear that although that sphere was located within the complex of nineteenth-century, liberal, laissez-faire capitalist societies, it could not be reduced to the mere ideological expression of them.<sup>110</sup>

In *Between Facts and Norms*, however, Habermas seems to have ceased to inquire about the socio-historical status of theoretical utterances and has instead come to take them almost exclusively at intellectual face value—that is, purely at the level of theory. Throughout the work, particularly when treating competing interpretive strategies of jurisprudence, the question for Habermas is almost exclusively one of principles and how they are interpreted and not one of the moment that informs and to some extent motivates a particular emergence of principles.<sup>111</sup> As I will elaborate further in section (E), just as Habermas does not sufficiently contextualize within a transformation of state and society in the early twentieth century the neo-Kantian categories of Weber’s sociology of law (facticity and validity) and the ensuing Weimar jurisprudential debates over these positions, he does not locate the contemporary legal-theoretical controversies of constitutional adjudication addressed above in their own changing historical context. In other words, many of the legal-theoretical positions analyzed by Habermas and explicated above might have been more comprehensively treated had they been examined on socio-historical grounds along with ratio-normative ones. Habermas fails to entertain the issue of whether the competition between the reformed formalism of Dworkin, Raz, and Rawls, and the chauvinistic anti-formalism of CLS are themselves characteristic of a crisis of the state in the post-Fordist Western European and North American countries,<sup>112</sup> just as such a competition was indicative earlier this century of crisis and change in legal debates in Germany and elsewhere. It is remarkable that the “indeterminacy” thesis, one of the subtexts of Weimar debates during the transition to the welfare state, should again emerge with such vitality in a post-1970s transition away from this model. These arguments about the purported prevalence of legal indeterminacy remained largely the possession of neo-conservatives and were not taken

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110. Habermas, *Structural Transformation*, 160, 257.

111. See Habermas, *Between Facts and Norms*, 252.

112. See Bob Jessop, “Towards a Schumpeterian Workfare State? Preliminary Remarks on Post-Fordist Political Economy,” *Studies in Political Economy* 40 (1993); and Gosta Esping-Andersen, ed., *Welfare States in Transition: National Adaptations in Global Economies* (London: Sage Publications, 1996).

completely seriously during the period of welfare state stability in the decades immediately following World War II.<sup>113</sup> If these are plausible considerations, then some questions ought to be posed and addressed:

- Are CLS and its post-structuralist fellow travelers perhaps the ideological opposite of a neo-formalism of Rawls, Dworkin, and Raz, the latter seeking to grant the state a leeway in intervention that it is increasingly incapable of achieving under present constraints?
- Is the former an attempt to spur the materialization of welfare state law in the name of a purportedly progressive normative agenda that it has itself helped to undermine through its “trashing” of formal law and the generalizable rationality that accompanies it?
- Is there significance to the fact that the arguments employed by legal realism during the “progressive era” to justify quite plausible state intervention in the name of social justice are today replicated by CLS in the name of goals so clearly uninstitutionalizable that CLS actually provides the “farce” to follow on the heels of realism’s “tragedy,” in the social-philosophical sense?
- Just as substantivist/anti-formalist strategies at moments of social transformation (like those of CLS) may reflect a Nietzschean bravado with respect to the possibility of expressing an existential will over a decaying structure formerly considered immutable,<sup>114</sup> might not Kantian formalism as practiced by Rawls, Dworkin, and Raz serve as socio-psychological retreat at such moments of qualitative change?
- Do formal categories offer a refuge from a concrete world perceived as ever more “complex” and indecipherable according to familiar theoretical equipment, just as “indeterminacy” reflects a certain theoretical exhilaration-belying-despair over such a scenario?<sup>115</sup>

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113. The champion of this position was, of course, Friedrich A. Hayek. See Friedrich A. Hayek, *Law, Liberty, and Legislation: A New Statement of the Liberal Principles of Justice and Political Economy*, 3 vols. (Chicago: University of Chicago Press, 1976).

114. See Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing Too* (New York: Oxford University Press, 1994).

115. Fortunately there is some dialogue between the Kantian formalist and Nietzschean anti-formalist approaches to law—both of which assume social complexity as a “fact”—as reflected by the debate between Charles Larmore and Drucilla Cornell. See Drucilla Cornell, “Time, Deconstruction and the Challenge to Legal Positivism: The Call for Judicial Responsibility,” *Yale Journal of Law and the Humanities* 2 (1990), and Larmore’s response, Charles Larmore, “Law, Morality, and Autopoiesis in Niklas Luhmann,” *Cardozo Law Review* 13 (1992).

Again, the exploration of such intentionally provocative and potentially loaded questions is not to encourage the reduction of ideas to, for instance, socio-economic forces. It is, however, to suggest that their relationship is still worthy of exploration, at least according to Habermas's own methodological-political aims as first expressed in *The Structural Transformation of the Public Sphere*.<sup>116</sup>

To sum up this section on the intricacies of Habermas's critique of contemporary legal interpretation, which includes his critique of legal hermeneutics, legal realism, and legal positivism, his critical appropriation of Dworkin and Günther, and his rather devastating assault on CLS,<sup>117</sup> I say this: Rather than inquire into the socio-political context of the legal theories in question, Habermas tends to take them at intellectual face value, i.e., exclusively at the level of their logical principles and normative justifications. One of the implications of the arguments developed above, however, is that an adequate engagement of contemporary legal theories necessarily entails examination not only of their ratio-normative defensibility but also of their relation to contemporary societal dynamics such as the status of the state, as well as statutory and constitutional law, under conditions of a declining postwar welfare state and emerging scenarios of economic globalization and international multilateralism.

The fact that the "indeterminacy of law" emerges as a theme of legal debate during both the Weimar Republic and the present socio-historical juncture raises the question of whether there are any structural similarities between these respective contexts. Such similarities may indeed be found in dramatic, if qualitatively different, crises of the state. The questions posed above are the kinds of questions that a critical theory of law would at least have to consider, if not necessarily greet with an "amen." Had Habermas positioned himself vis-à-vis his interlocutors in such a manner—certainly without ignoring the normative-rational weight of their positions—he would perhaps have thought about the relationship between validity and facticity, determinacy and indeterminacy in different, more historically sensitive, ways. This problem of failing to historicize normative prescriptions adequately is central in the next section as I examine

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116. Brenner, "Limits of Civil Society" and Scheuerman, "Between Radicalism and Resignation" both hold Habermas to the political-methodological standards of this work, while Nancy Fraser and Margaret Somers evaluate the progressive potential of the book's content today. See Fraser, "Rethinking the Public Sphere," and Margaret R. Somers, "What's Political or Cultural about Political Culture and the Public Sphere? Toward an Historical Sociology of Concept Formation," *Sociological Theory* 13 (1995) and "Narrating and Naturalizing Anglo-American Citizenship Theory: The Place of Political Culture and the Public Sphere," *Sociological Theory* 13 (1995).

117. Habermas, *Between Facts and Norms*, 194-204.

Habermas's attempt to merge the respective advantages of the nineteenth- and twentieth-century "paradigms" of law as a response to the historical dilemma handed down to him by Weber. He undertakes this task without ever seriously pausing to consider whether we are in the midst of a new, *twenty-first-century* paradigm generated by very real structural transformations, and not a paradigm that could be created by the—however sophisticated—theoretical efforts of his work or his response to previous moments of social change.

#### *D. Selecting Nineteenth- or Twentieth-Century Paradigms of Law*

One of the most remarkable aspects of *Between Facts and Norms* is the way in which Habermas is able to synthesize the social scientific and jurisprudential accounts of the transition of law from the relatively laissez-faire conditions of the nineteenth century to the state-interventionist scenario of the twentieth—a transition already presciently perceived by Weber in what I identified above as the "historical" aspect of his sociology of law. Habermas draws upon classic accounts of the pathologies of welfare state law (e.g., Talcott Parsons and Michel Foucault),<sup>118</sup> as well as the best of the German sociology and philosophy of law from the last twenty years (e.g., Dieter Grimm, Ernst-Wolfgang Böckenförde, Erhard Denninger, Ulrich K. Preuß, and Ingeborg Maus),<sup>119</sup> to elaborate on the ramifications of the "deformalization" or "materialization" of law that ensues under welfare-state conditions.

Appropriating these authors, Habermas argues that the complicated issue of the welfare state's deformalization or materialization of law can be boiled down to a crisis of the separation of powers and of the determinacy of legislative statutes. As the state intervenes in the market for purposes of regulation and redistribution, "the classical scheme for separating branches of government becomes less tenable the more laws lose the form of conditional programs and assume instead the shape of substantive goal-oriented programs."<sup>120</sup> Consequently, the judicial and executive branches exercise considerable discretion in the interpretation and application of laws that are no longer formally specific.<sup>121</sup> This trend eventually generates the crisis of what is now called the "indeterminacy of law": "As a rule these 'materialized' laws . . . are formulated without proper nouns and directed to an indeterminate number of addressees . . ."<sup>122</sup> The

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118. *Ibid.*, 78-79.

119. *Ibid.*, 244-48.

120. *Ibid.*, 190.

121. *Ibid.*

122. *Ibid.*

normative intent of broad policies is lost in the vagaries of application, or, conversely, policies with dubious normative content are enforced arbitrarily by democratically unaccountable, bureaucratic, or judicial officials.<sup>123</sup>

But it is Habermas's understanding of the *cause* of the shift from formal to materialized law, as much as his understanding of its *effects*, that to some extent determines the success of his endeavor to transcend both kinds of law. He develops a method that allows for selection of either type of law depending upon the discursively derived choice of the collectivity affected by the proposed policy. Habermas refers to laissez-faire-conducive formal law and welfare state deformed law as "the two most successful paradigms . . . which are still competing today," but does not clarify whether this competition is played out on ideological or sociological terrain, or indeed some synthesis of the two.<sup>124</sup> Both laissez-faire and welfare state law are embedded within specific socio-economic complexes, yet Habermas makes no explicit attempt to ground his "higher third"—a "reflexive" strategy of opting for one or the other—in the possibilities afforded by present socio-economic conditions. It could be suggested that Habermas's definitions of bourgeois rule of law and welfare-state law are potentially voluntaristic, emphasizing the idealistic characteristics of previous epochs in a way that obfuscates their socio-structural characteristics, as well as those of the present crisis of the state. For instance, Habermas attributes the motor of each respective model to "claims of rights by market participants" on the one hand, and "claims of entitlements by welfare clients" on the other.<sup>125</sup> In short, these epochs were generated to a large extent by the *demands* of social agents.

Habermas claims that "the social-welfare model emerged from the reformist critique of bourgeois formal law,"<sup>126</sup> thus underemphasizing the structural conditions that facilitated, if not forged, such a model—conditions that were in fact the central subject of Habermas's *Structural Transformation of the Public Sphere*. The constraints on communicative action delineated in that book are given little attention in *Between Facts and Norms* and seem to indicate that Habermas already presupposes the substantive participatory state of affairs that he encourages with his discourse theory of democracy.

123. On the issue of the indeterminacy of law, see the literature on CLS at note 99; on this theme understood more generally in contemporary theory, see Benjamin Gregg, "Possibility of Social Critique in an Indeterminate World," *Theory & Society* 23 (1994); and James Bohman, *New Philosophy of Social Science: Problems of Indeterminacy* (Oxford: Polity, 1991).

124. Habermas, *Between Facts and Norms*, 117.

125. *Ibid.*, 221, translation amended.

126. *Ibid.*, 401.

Such constraints are absent from Habermas's explanation of how many of the so-called deficits of the welfare-state model turn out to be largely matters of perspective on the parts of the particular subjects:

It is only a particular paradigmatic understanding of law in general that causes the objective legal content apparently *to drop out* of some basic rights [in the welfare-state scenario]. This understanding stems in turn from how a particular historical situation was perceived through the lens of social theory, that is, a situation in which the liberal middle class had to grasp, on the basis of its interest position, how the principles of the constitutional state could be realized.<sup>127</sup>

The potentially voluntarist assumptions of Habermas's account are perhaps best reflected by the very notion of "paradigm shifts" referred to in the passage above, made famous by Thomas Kuhn.<sup>128</sup> Habermas repeatedly refers to the transition from liberal- to welfare-state law in terms of such "paradigm shifts."<sup>129</sup> The Kuhnian concept, however, suggests that the way in which objective conditions are perceived by a particular community of observers is almost exclusively determinate of its reality. It is this subjectivist understanding of legal history that affords Habermas the opportunity—through the prospective choices of deliberating subjects within multifarious public spheres—selectively to preserve and reject particular elements from previous "paradigms" as ingredients of new ones at any moment of law- or policy-making. Again, Habermas argues that paradigm shifts are to be explained in terms of the *perception* that a particular paradigm has become "dysfunctional." He promotes his "reflexive strategy," a strategy that moves from one paradigm or the other depending on the particular needs of deliberative law-making publics: "Today the political legislator must choose from among formal, material and procedural law according to the matter that requires regulation."<sup>130</sup>

As a result of this approach, Habermas does not reflect upon the status of his model in relation to the historical moment in which it occurs; this context may not be amenable to either formal or materialized strategies of law (or some combination thereof), but rather may entail wholly new options for wholly new circumstances. In this respect it could be said that Habermas's reflexive strategy amounts to

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127. *Ibid.*, 251.

128. See Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

129. See Habermas, *Between Facts and Norms* 252, 397.

130. *Ibid.*, 438.

a social-democratic philosophy of will, a philosophy that wavers between the ideal constructions of the theorist and the demands, perceptions, and expressions of particular social groups. As mentioned above, Habermas has simultaneously sought to distance his theories from potentially authoritarian notions of popular sovereignty as well as seeking to avoid a construction that places philosopher/sociologist as lawgiver. Through this paradigm-dependent analysis, Habermas, on the one hand, leaves the discussion and decision over the mode of law appropriate to a specific situation to the practices of the community directly affected by it. On the other hand, on the basis of the socio-historical presuppositions he has set out in advance, the options are confined to one of either two, or if somehow combined, three such possibilities. Yet because the relationship between the discursive publics and the observations of the theorist on one side and sociological reality on the other are not joined in a more explicit manner, both remain potentially ideological.

For Habermas, because the conditions that obtained under the two respective previous “paradigms” came to be seen as dysfunctional, this fact—as much or more than the empirical reality of the actual dysfunctionality—becomes sufficient grounds for an ideally-created supercession thereof. Habermas insists that “a social theory claiming to be ‘critical’ cannot confine itself to describing the relationship of norm and reality solely from the perspective of an observer.”<sup>131</sup> However, he seems to move to the opposite extreme in a different section of *Between Facts and Norms* and therein appears to privilege *participants’* perspectives or consciousness: “The tacit assumption that these two paradigms exhausted the alternatives was questioned only after the dysfunctional side effects of the successfully implemented welfare state became pressing political issues.”<sup>132</sup> It is therefore the ensuing politicization that directly results in “the search for a new paradigm beyond the familiar alternatives.”<sup>133</sup>

Habermas claims that the newly theorized reflexive paradigm must preserve the liberty-upholding and solidarity-instilling aspirations of the two previous ones—the respective *Rechts-* and *Sozialstaat* paradigms—without, like them, undermining the possibility of their historical realization through the emergence of the pathologies associated with them—socio-economic injustice and state paternalism, respectively. He also insists that given present societal realities, his new discourse-theoretic paradigm must not be anachronistic in what

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131. Ibid., 109.

132. Ibid., 390.

133. Ibid., 390.

it hopes to preserve from the previous paradigms.<sup>134</sup> On this basis, in a telling passage he criticizes Ernst-Wolfgang Böckenförde's nostalgia for certain irretrievable aspects of the nineteenth-century formal rule of law:

The liberal paradigm of law is certainly not a simplifying *description* of a historical starting point that we could take at face value. It tells us, rather, how the principles of the constitutional state could be realized under the hypothetically *assumed* conditions of a liberal economic society. This model stands and falls with the social-theoretic assumptions of classical political economy, which were already shaken by Marx's critique and no longer hold for developed postindustrial societies in the West. In other words the principles of the democratic constitutional state must not be confused with *one* of its context-bound historical modes of interpretation.<sup>135</sup>

However, Habermas's supposed overcoming of the two paradigms of law also "stands or falls" on "context-bound" assumptions about social complexity in the welfare state that may "no longer hold for developed postindustrial societies."

Habermas succinctly describes his strategy as follows:

The desired paradigm should satisfy *the best description of complex societies*; it should illuminate once again the original idea of the self-constitution of a community of free and equal legal citizens [bourgeois rule of law]; and it should overcome the rampant particularism of a legal order that, having lost its center in adapting to the *uncomprehended* complexity of the social environment, is unraveling bit by bit [welfare state materialized law].<sup>136</sup>

Habermas seeks to infuse the new paradigm with a normativity that has been drained from social-scientific accounts by a "a functionalistically prejudiced understanding of law fixated on government action" that "conflates legitimacy and efficiency."<sup>137</sup> But his failure to give an account of the socio-structural bases of the new paradigm, except through repeated references to systemic "complexity," undermines its potential efficacy. It thus would seem that Habermas's "third way" in democratic constitutional theory is grounded upon a systems-theoretic empirical reality upon which is superimposed a philosophically idealistic "paradigm shift." That would render Habermas's conception of

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134. *Ibid.*, 249.

135. *Ibid.*, 250.

136. *Ibid.*, 393, first emphasis added.

137. *Ibid.*, 434, 444, translation amended.

present socioeconomic reality merely a further differentiating welfare-state paradigm that already obtains in essence.

To this charge Habermas explicitly pleads guilty: "The social-welfare project must neither be simply continued along the same lines nor be broken off, but must be pursued at a higher level of reflection."<sup>138</sup> This presupposes a socioeconomic structure already in place and does not entertain the notion of its fundamental change. In *The Structural Transformation of the Public Sphere* Habermas had criticized the tendency to "derive the essence" of capitalism *per se* from the "unique historical constellation" of laissez-faire capitalism in Great Britain at the transition from the eighteenth to the nineteenth century.<sup>139</sup> However, Habermas's own tendency to derive the essence of contemporary state-economy-society relations from the equally historically unique model of the post-World War II welfare state seriously hampers his attempt to ground sociologically his contemporary normative project.<sup>140</sup>

The key issue here is therefore not whether Habermas's goal of combining the strengths of the *Rechts-* and *Sozialstaat* paradigms is normatively desirable, but whether in the attempt to preserve the progressive qualities of each he has also absorbed the aporias of Weberian or Luhmannian philosophies of history and epistemology that were tied to these past contexts. Such philosophies would now prevent the realization of his project at a present, potentially post-Fordist or post-welfare-state, socio-political conjuncture. Habermas correctly asserts that normative content has dropped out of systems-differentiation theories of democracy. However, it is not clear whether in the insufficient interrogation of the factual assertions of systems theory that unfortunately accompanies his criticisms of its normative shortcomings Habermas's effort is an attempt simply to stick such normative content back in. It is further unclear whether this alone is an adequate strategy for a contemporary sociology/philosophy of law.

Again, the conceptual components that constitute Habermas's title, "facticity" and "validity," reflect two intellectual poles of the contemporary social-theoretic world: one an exclusively empirical orientation—represented for Habermas by Luhmann—that completely dismisses normative concerns from the purview of social research; the other a political-philosophical theorization of justice—represented by Rawls—that is inadequately attuned to the specificities of social

138. *Ibid.*, 410.

139. Habermas, *Structural Transformation of the Public Sphere*, 78-79.

140. Other efforts that more specifically historically contextualize Habermas's project in terms of political economy are David Held, "Crisis Tendencies, Legitimation and the State," in *Habermas: Critical Debates*, ed. John Thompson and David Held (Cambridge: MIT Press, 1982), 193-94; and Brenner, "Limits of Civil Society."

reality. However, Habermas does not bring together the two types of analyses; that is, he seldom if ever questions whether the substance of what emerges in the general analysis is in some way related to the historical context that he describes in the sociological analysis.

These problems are more concretely exemplified in Habermas's discussion of the feminist critique of formal and welfare state law.<sup>141</sup> Habermas draws upon literature that demonstrates the various ways in which women were marginalized and exploited under a formal law paradigm blinded to women's needs by andro-centric notions of neutrality, a paradigm that tacitly condoned the abuse of women in the name of state non-intervention. He also acknowledges the feminist indictment of the welfare-state legal paradigm that manipulated and enforced female dependency through the promulgation of policies over which women had little control. Habermas suggests that a new legal paradigm might emerge from feminist "demands" for alternative types of legal practice; that is, legislation and policies could be crafted that draw upon the former traditions that prevent both state intrusion and clientization of welfare recipients yet continue to provide the substantive service and support of welfare-state policies. However, once again his focus on the "demands" of the legal subjects in question entails a neglect of the socio-structural context within which these persons are situated. In this case Habermas's discussion of feminist legal theory fails to consider the ways in which the increasing number of women in the work force over the last twenty-five years may have contributed to the changing political and legal agendas of feminists, and occludes the necessity of taking into account present possibilities and constraints.<sup>142</sup>

Thus, despite Habermas's references in the last chapter of *Between Facts and Norms* to "historically situating" his project,<sup>143</sup> to a "structural transformation of society,"<sup>144</sup> to the "qualitative transformation of state tasks,"<sup>145</sup> and to "the *unavoidable* results of struc-

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141. Habermas, *Between Facts and Norms*, 409-27. See Deborah L. Rhode, *Justice and Gender* (Cambridge: Harvard University Press, 1989); Catherine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Iris M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); and Martha Minow, *Making all the Difference* (Ithaca: Cornell University Press, 1990). See also Patricia Smith, ed., *Feminist Jurisprudence* (New York: Oxford University Press, 1993).

142. For attempts to confront the transformation of the welfare state and the role of women within it under globalization, see Anna Yeatman, "Women's Citizenship Claims, Labour Market Policy and Globalization," *Australian Journal of Political Science* 27 (1991); and L. McDowell, "Life Without Father and Ford: The New Gender Order of Post-Fordism," *Transactions of the Institute of British Geographers* 16 (1992).

143. Habermas, *Between Facts and Norms*, 395.

144. *Ibid.*, 516.

145. *Ibid.*, 427.

tural changes in state and society,"<sup>146</sup> his conception of historical change is ultimately grounded upon a notion of an "*outmoded paradigmatic understanding*."<sup>147</sup> His attempt to transcend both bourgeois formal law and welfare-state law models, as originally set forth by Weber as a historical dilemma, amounts to an abstract negation of each option against the other, an attempt to overcome two historical pasts that is nevertheless itself theoretically blind to the historical present.<sup>148</sup> In his treatment of paradigm shifts, although he eventually grapples with feminist literature on welfare state law, Habermas reveals himself to be actually addressing those controversies between left-liberals and neo-conservatives over welfare state policy that were prefigured in Weber's writings, because the status of the welfare state itself is taken for granted in such debates. While he may concede that welfare-state reality is growing ever more complex, he does not entertain the notion that it is changing qualitatively. This sets up the paradox that on the one hand an extant scenario can be reformed, but on the other its growing complexity suggests a situation moving beyond the grasp of conscious choice and control. Lukács perceived this same tension in Weber and offered a vision of how to seize what was to him the immediately apparent dynamic of dramatic change to promote progress: a notion of history that was precisely under the control of those human actors who needed to be made aware of it, instead of a notion that portrayed these actors as beguiled into passivity and resignation by linear and deterministic notions of ever increasing societal rationalization. These are themes whose ramifications for law and socioeconomic change will be addressed in the next section.

*E. A Socio-Legal Methodology Beyond Weber:  
Kant's Rechtslehre or Hegel's Rechtsphilosophie?*

Habermas begins the foreword of *Between Facts and Norms* with the curious statement that he will privilege Kant's philosophy of law over Hegel's (whose name he shall "scarcely mention") so as to "avoid a model that sets unattainable standards."<sup>149</sup> And indeed in the very first chapter of the work he accords Kant's *Rechtslehre* preeminence as the source of mediation of facticity and validity.<sup>150</sup> Section 3 of chapter 1 suggests that Kant's concept of legality

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146. *Ibid.*, 430.

147. *Ibid.*, 423.

148. *Ibid.*, 445.

149. *Ibid.*, xxxviii.

150. See Immanuel Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, trans. John Ladd (Indianapolis: Bobbs-Merrill, 1965).

embodies a notion of law wherein the concrete *facticity* of law enforcement presupposes the formal *validity* of a lawmaking process into which, according to certain procedural requirements, normative claims may be injected.<sup>151</sup> It is not the content of this particular account of the categories of facticity and validity that raises questions regarding Habermas's theoretical-practical effort in general, but rather his characterization of it as an exclusively *Kantian* problematic—a characterization intrinsically tied to Habermas's jettisoning of Hegel at the very outset of the book. I would argue that it is the unqualified elevation of Kant and rather rude ejection of Hegel that facilitates Habermas's failure to recognize the historical deficiencies of his own efforts as described in the sections above—most importantly, the fact that he is theorizing in a moment of crisis for the state.<sup>152</sup>

In fact, as Habermas proceeds to elaborate on the supposedly Kantian quality of the categories of facticity and validity, it is actually Weber's account of legality from *Economy and Society* that Habermas paraphrases.<sup>153</sup> Had Habermas acknowledged Weber's historical *context* at this juncture and had he not abandoned his own sensitivity to the realities of historical change as derived from Hegel, he would have been compelled to acknowledge further that the categories of facticity and validity only became recognized *as such* in the midst of the first crisis of German state and society in this century.

Instead, when Habermas explicitly turns to Weber's sociology of law in *Between Facts and Norms* he presents Weber as merely part of the neo-Kantian tradition (which includes Durkheim and Parsons) that grappled with the quasi-perennial Kantian problem of facticity and validity in general, not with the social demands of a particular historical configuration.<sup>154</sup> Weber's own neo-Kantian legal sociology, however, was in large degree addressed to the particular crisis men-

151. Habermas, *Between Facts and Norms*, 28. Rasmussen, "How is Valid Law Possible?" 22-23 and Kenneth Baynes, "Democracy and the Rechtsstaat," 204-05, carefully explicate the manner in which Habermas theorizes the tension between facticity and validity within the very structure of language itself.

152. Rosenfeld and Alexy are particularly good at highlighting the Kantian aspects of the work, e.g., the use of "counter-factual" analysis, "reflective equilibrium," and "idealization." Rosenfeld, "Law as Discourse," 1169, 1171, 1176, 1179; Alexy, "Basic Rights and Democracy," 227, 232, 237. Based on this and my discussion below it is difficult to concur with David Rasmussen's interpretation that Habermas signals a quasi-Hegelian strategy in *Between Facts and Norms*, or with his suggestion that Habermas has actually "triumphed over" both Hegel and Weber in his philosophy/sociology of law. Rasmussen, "How is Valid Law Possible?" 21. On the contrary, Habermas has abandoned the former in a manner that figuratively enslaves him to the latter. For engaging alternative readings of the role of Kant in the work, see Kenneth Baynes, "Democracy and the Rechtsstaat," 207-09, and Ingeborg Maus, "Liberties and Popular Sovereignty: On Jürgen Habermas' Reconstruction of the System of Rights," *Cardozo Law Review* 17 (1996).

153. Habermas, *Between Facts and Norms*, 30-31.

154. *Ibid.*, 66 ff.

tioned above—a fact that Habermas oddly admits only in the very last chapter of the book when he remarks that Weber had “bemoaned” the transition from the formal rule of law to welfare-state deformed law. This is, in fact, the same point in *Between Facts and Norms* at which Habermas finally raises the issues of “transformation” and “crisis”: “This *social transformation of law* was initially thought of as a process in which a new instrumental understanding of law, one related to social-welfare conceptions of justice, was superimposed on the liberal model of law. German jurisprudence has perceived this long-standing process. . . as a ‘*crisis of law*.’”<sup>155</sup> Given his intellectual pedigree, Habermas might have raised these concerns from the outset and made them central to his project. The relative facticity or validity of law, therefore, simply did not become a critical issue for legal theory in the late eighteenth-century context of Kant’s writings. It only became important under conditions of structural transformation from laissez-faire to welfare-state capitalism—again, a central subject of Habermas’s *Structural Transformation of the Public Sphere*.

Habermas sidesteps the issue that “facticity and validity” emerged as a problematic in a specific historical crisis of the state, thereby blinding himself to the fact that he is taking up a similar problematic in the midst of a contemporary crisis. Instead of treating facticity and validity as Hegelian “moments” that change their orientation at specific instances of historical change, Habermas treats them as persistent and consistent themes of Kantian legal theory. Thus the Kantianism of Habermas’s approach in *Between Facts and Norms* is still occupied with the quasi-Weberian attempt to make the nineteenth-century character of Kant’s philosophy conform with the realities of welfare state conditions—but only on a theoretical level and not in any significant way moving beyond Weber’s particular historical moment: “In connection with questions raised by modern natural law, I attempt to show how the *old* promise of a self-organizing community of free and equal citizens can be reconceived under the conditions of *complex societies*.”<sup>156</sup> For “old,” read “classical enlightenment,” and for “complex societies,” read “welfare state.” These are reifications that Habermas perpetuates throughout the work, rarely pausing to consider whether the ever-increasing differentiation characteristic of the expansion of the latter complexity is instead a wholly new socioeconomic-political configuration.

It is fair to say, then, that Habermas presents the categories of facticity and validity under the rubric of “perennial problems in

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155. *Ibid.*, 389, second emphasis added.

156. *Ibid.*, 7, emphases added.

Kantian legal-political theory.” In this way, Habermas virtually ensures that the ghosts of Weimar Germany will not be fully exorcised from his theoretical endeavor, nor from the landscape of contemporary law, politics, and society.<sup>157</sup> Those theorists and that crisis discussed above emerged in the midst of a radical transformation of state, society, and economy from nineteenth- to twentieth-century conditions. Rather than warding off the crisis that led to the triumph of reaction and the unprecedented proliferation of social destruction in the wake of Weimar’s collapse, by occluding the specificities of the new transformation Habermas may in fact unintentionally make possible the emergence of modes of domination different in kind than those that appeared in the 1930s (because they are generated by different conditions) but nevertheless potentially similar in extremity and intensity.

Habermas’s theoretical project in *Between Facts and Norms* can be understood ostensibly as an attempt to overcome—in the Hegelian sense of an *Aufhebung*—the antinomy between the purely functional, sociological focus on the facticity of state action and the purely normative focus on the validity claims of political or legal philosophy. And in response to the Weberian “historical” dilemma, Habermas undertakes a Hegelian synthesis in his attempt to merge the framework of nineteenth-century formal rule of law with that of the twentieth-century “deformalized” or “materialized” law that emerges with the welfare state, while simultaneously purging each “paradigm” of its regressive characteristics. I have demonstrated, however, that Habermas’s success in carrying out an ostensibly Hegelian strategy while relying extensively on a Kantian orientation is severely limited.

Throughout his recent work, including *Between Facts and Norms*, Habermas distances his own theory from the holistic and deterministic assumptions of what he labels “philosophies of history.” In an explicit reaction against the neo-Hegelianism of his formative work and to some extent the tradition in which he developed, Habermas declares explicitly in *Between Facts and Norms* that his approach “does not need a philosophy of history to support it.”<sup>158</sup> Unfortunately, however, Habermas now interprets Hegelian methodology almost exclusively in terms of the kind of crude totalism mentioned above—that is, on the basis of its supposed inability to appreciate the diversity within (and complexity of) modern societies.<sup>159</sup> Habermas’s extensive

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157. On the relationship between the presence of these ghosts and Habermas’s insufficiently reconstructed appropriation of Kant, see Tracy B. Strong and Francis A. Sposito, “Habermas’ Significant Other,” in White, ed., *The Cambridge Companion to Habermas*.

158. Habermas, *Between Facts and Norms*, 287.

159. See Jürgen Habermas, “Further Reflections on the Public Sphere,” in Calhoun, ed., *Habermas and the Public Sphere*, 430, 435-36, 442-45.

reliance on the sociological assumptions of Luhmann's theory, in which Luhmann tries to suffuse normativity, results in a negative image of "totality" with apparent presuppositions about systems differentiation that assume its supposedly indefinite continuation into the future. In this way, Habermas renders inaccessible the aspect of his earlier Hegelian-Marxian methodology that is ultimately indispensable for his emancipatory goals: sensitivity to historical specificity and qualitative social transformation.<sup>160</sup> By avoiding the excesses in which Hegelian philosophies of history have indulged in the past, Habermas seems to have banished from his thought the possibility of real, qualitative historical change, the locus where theoretical false oppositions like facticity and validity can be grounded and understood in practical reality.<sup>161</sup>

It is precisely qualitative historical transformation that can either provide the possibility for emancipatory social progress or else lead toward reactionary social regression. But Habermas's theoretical sensitivity to qualitative historical change is significantly blunted by his extensive use of categories such as "rationalization" à la Weber or "differentiation" à la Luhmann—categories that themselves presuppose a philosophy of history in their linear postulation of a future constituted ultimately by *more* of the present. The average response of any variety of Kantianisms to crisis or radical change has been to assert the validity of transcendental spacio-temporal categories upon a reality that increasingly resists such impositions. Just as "pluralism"—the "fact" of a heterogeneity of incommensurable perspectives within social life that may be contained by a formal arrangement of procedures, legal or otherwise—was the socio-political solution to "rationalization" in Weber's context, "complexity" is the complement to notions of "differentiation" in our own. The controversy over the relationship between Weber's neo-Kantian methodology and the existentialist leanings of some of his political orientations toward the end of his life raises the question of the adequacy of such approaches for moments of crisis and change.<sup>162</sup>

The political existentialist, whether starting, as did Weber, from a neo-Kantian standpoint or from a self-understood opposition to it,

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160. Two analyses that steadfastly hold Habermas to the Hegelian-Marxian standards that he explicitly sets for himself and for critical theory in general, especially at the conclusion of Thomas McCarthy, trans., *Theory of Communicative Action*, 2 vols. (Boston: Beacon Press, 1984); Brenner, "The Limits of Civil Society"; and Love, "What is Left of Marx?"

161. For this kind of critique of Habermas's earlier works, *Theory of Communicative Action* and *Structural Transformation of the Public Sphere*, respectively, see Moishe Postone, "History and Critical Social Theory," *Contemporary Sociology* 19 (1990), and Moishe Postone, "History and Political Theory" in Calhoun, ed., *Habermas and the Public Sphere*.

162. The classic examination of this question remains Mommsen, *Max Weber and German Politics*. See also McCormick, "Transcending Weber's Categories."

whether left- or right-leaning, senses the obsolescence of abstract categories, encourages their evaporation, and promotes the new, concretely grounded reality from which society can be restructured: Witness today the “will to power” tendencies for which the feminism of a MacKinnon or the legal philosophy of an Unger have been criticized.<sup>163</sup> The critical theorist, in contrast, seeks new categories without regressively choosing between the concrete or abstract antinomies offered by the moment; these new categories reflect a privileging of neither subject nor object but an understanding of them in the moment and character of change. Whether or not Habermas’s location of “overcoming” such oppositions in the practice of communication is the ill-chosen misrecognition of history that replays Lukács’s fateful privileging of labor is a question that cannot be definitively answered here and now.<sup>164</sup> In a more mundane vein, however, the nation-state level at which Habermas pitches his discourse theory in *Between Facts and Norms*, or his elevation of this explicitly nation-state-bound socio-legal theory to a supra-national level, betrays a diminished sensitivity to the relationship of ideas and reality, what he himself had earlier identified as theory and practice.<sup>165</sup>

Though it would surely be shortsighted to dismiss out of hand Habermas’s appropriation of Kantian-liberal institutional and constitutional theory as a resource for his self-understood “socialist” project,<sup>166</sup> it is necessary to question the liberal social-theoretic philosophy of history that pervades *Between Facts and Norms* as manifested in Habermas’s understanding of modernity as driven by processes of sub-system differentiation and societal rationalization.<sup>167</sup>

163. On the dangerous inadequacy of conventional understandings of pluralism in Weber’s context and our own, see David Dyzenhaus, “Liberalism After the Fall: Schmitt, Rawls and the Problem of Justification,” *Philosophy and Social Criticism* 22 (1996).

164. On the potential losses and gains of Habermas’s recentering of critical theory in communication rather than labor, see Love, “What’s Left of Marx?”; Postone, “History and Critical Social Theory”; and Giddens, “Reason Without Revolution?” *Praxis International* 2 (1982).

165. See Jürgen Habermas, *Theory and Practice*, trans. John Viertel (Boston: Beacon Press, 1973). On the necessity of mediating social scientific theory and practice and Habermas’s previous successes and failures in doing so, see John Dryzek, “Critical Theory as a Research Program,” in White, ed., *The Cambridge Companion to Habermas*.

166. Habermas, *Between Facts and Norms*, xli. Immanuel Wallerstein approximates something close to a leftist dismissal of liberalism’s relevance for a social reality characterized by globalization in his *After Liberalism* (New York: New Press, 1996).

167. The oft-ignored relationship between social-philosophical systems theory and political-philosophical liberal theory is reflected in Stephen Holmes, “Differenzierung und Arbeitsteilung im Denken des Liberalismus,” in *Soziale Differenzierung: Zur Geschichte einer Idee*, ed. Niklas Luhmann (Opladen: Westdeutscher, 1985), and Charles Latmore, *Patterns of Moral Complexity* (New York: Cambridge University Press, 1987). James Bohman sardonically takes note of Habermas’s “new found liberal modesty,” and in the same tenor calls *Between Facts and Norms* “a surprisingly liberal work.” Bohman, “Complexity, Pluralism and the Constitutional State,” 926, 928. What is problematically “liberal” about *Between Facts and Norms* is not, as many critics have already suggested, Habermas’s endorsement and adoption of liberal constitutional

“Complexity” may be understood as the refuge in which Kantian rationality hides, or against which it rebels, when faced with the incommensurability of “ideal” categories and the “real world.” Habermas uses complexity within *Between Facts and Norms*, as do commentators on the work, to invoke sociological reality when it in fact functions as the de facto avoidance thereof.<sup>168</sup> Habermas absorbs much of Luhmann’s systems theory in his attempt both to buttress it normatively and to address a Weberian scenario no longer of first-order concern for a contemporary sociology of law. A reliance on Luhmann and complexity in the present and a fixation on Weber and rationalization in the past render the promise of Habermas’s project potentially stillborn. In this sense he is only slightly more successful than Weber, whose analysis of the historical transformation of law at the beginning of this century offered no solution to the situation. And while Habermas has recently attempted to confront the challenges posed to constitutional democracy by globalization, his solutions are not fully considered.

Habermas presently advocates the fostering of a transnational European civil society through the proliferation of communicative technologies within Europe. Such communicative action will create an increasingly more powerful European Parliament that can be made responsive to citizens of *Europe*.<sup>169</sup> Besides making premature institutional presumptions with respect to the development of the European Parliament, however, Habermas is insufficiently attentive to the literature on telecommunications in Europe, a literature which does not necessarily support his expectations about a communicatively

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and institutional theory, but rather his seeming acceptance of liberal sociological and epistemological presuppositions. One may not want to argue with the imperfect successes of liberal principles and practices at fostering the kind of “autonomy” that leftists and liberals both desire; certainly, Habermas’s and his students’ healthy borrowings from these lessons have proved valuable and will continue to do so. However, to accept wholesale the liberal account of modernity (in either its optimistic Whiggish or pessimistic Weberian versions), the individualist epistemology of subjectivity and the positivistic objective analysis of society will do more to occlude the opportunity for realizing autonomy in contemporary contexts than facilitate its attainment. On Habermas’s position between liberalism and Marxism, see Mark Warren, “Liberal Constitutionalism as Ideology: Marx and Habermas,” *Political Theory* 17 (1989).

168. Two sophisticated versions of a “complexity” approach to democracy are Bernhard Peters, *Die Integration moderner Gesellschaften* (Frankfurt am Main: Suhrkamp, 1993) and Danilo Zolo, *Democracy and Complexity* (Cambridge: Polity, 1992). Any account of “complexity” or “differentiation” must contend with Niklas Luhmann, *Political Theory in the Welfare State* (New York: W. de Gruyter, 1990). On the problems with Habermas’s dependence on systems theory and its notion of complexity, see Thomas McCarthy, “Complexity and Democracy: or the Seductions of Systems Theory” and Hans Joas, “The Unhappy Marriage of Hermeneutics and Functionalism” in *Communicative Action*, ed. Axel Honneth and Hans Joas (Cambridge: Polity, 1991).

169. See Habermas, “The European Nation State,” as well as Habermas, “Comments On Dieter Grimm’s ‘Does Europe Need a Constitution?’,” *European Law Journal* 1 (1995).

democratic European civil society.<sup>170</sup> It is also simply uncertain whether a new “European” civil society or public sphere will function with respect to European institutions in the manner that organizations of national citizens did with respect to the nation state over the last two centuries.<sup>171</sup> The status of social democracy in the European Union at this moment is at best unclear and at worst precarious.<sup>172</sup> Habermas’s model explicitly requires a robust quality of social welfare to sustain the kind of coercion-free and vigorously discursive lifeworld institutions that characterize its proper functioning. For these reasons, Habermas’s recent suggestion that his discourse theory of law and democracy be transposed to the level of the European Union to better address changing historical circumstances is inadequate at this point in time.

Habermas declares that the facticity/validity dichotomy cannot be mediated at the level of theory alone, i.e., at the level of validity. Yet this is what he does in operating with unreflected assumptions about factual reality. He builds the potential for an unavoidable anachronism into his project. Focusing on formalist versus substantive strategies, or the proper way of overcoming these, obfuscates equally important debates in the study of law, the state, and the international arena. Habermas is, however, correct in his identification of both private and constitutional law as the sites at which to perceive and address concrete problems facing postindustrial democracies.

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170. See Steven D. Krasner, “Global Communications and National Power: Life on the Pareto Frontier,” *World Politics* 43 (1990-91); Hamid Mowlana, *Global Communication in Transition: The End of Diversity?* (Thousand Oaks: Sage Publications, 1992); and Wayne Sandholtz, “Institutional and Collective Action: The New Telecommunications in Western Europe,” *World Politics* 45 (1993). The literature that Habermas cites in *Between Facts and Norms* on the subject of the media is generally more nationally focused and potentially less appropriate to discussions about a *European* public sphere. See Habermas, *Between Facts and Norms*, 444-45, 454-58. Moreover his expressed desire to avoid treating this subject with the kind of pessimism that characterized his early work and the late writings of his mentor, Theodor W. Adorno, is not an appropriate social scientific orientation; “optimism” and “pessimism” are not social-theoretical categories. See also Jürgen Habermas, “Further Reflections on the Public Sphere,” in Calhoun, ed., *Habermas and the Public Sphere*.

171. See Yasemin N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago, 1994).

172. See Giandomenico Majone, “The European Community Between Social Policy and Social Regulation,” *Journal of Common Market Studies* 31 (1993); Stephan Leibfried and Paul Pierson, “Europe’s Semi-Sovereign Welfare States: Social Policy in an Emerging Multi-Tiered System,” in *European Social Policy: Between Fragmentation and Integration*, ed. Stephan Leibfried and Paul Pierson (Washington, D.C.: Brookings Institute, 1993); Wolfgang Streeck, “European Social Policy after Maastricht: The ‘Social Dialogue’ and ‘Subsidiarity,’” *Economic and Industrial Democracy* 15 (1994); Stephan Leibfried, “The Social Dimension of the European Union: En Route to Positively Joint Sovereignty?,” *Journal of European Social Policy* 4 (1994). To this end, Seyla Benhabib’s observation that Habermas’s contemporary formulation of critical theory runs the risk of forsaking the “transfigurative” potential of the project in the name of the “joyless reformism” of welfare state democratic theory is especially incisive if the sociological conditions for the latter have substantially evaporated. Seyla Benhabib, “The Utopian Dimension in Communicative Ethics,” *New German Critique* 85 (1985).

Fortunately, there are scholars who are grappling with those concrete legal changes in a more perspicacious manner, and who may therefore be better situated to make pronouncements on the future of democracy in a transnational context.<sup>173</sup> While Habermas presumes territorially bound statutory and constitutional parameters for his theory, contemporary legal sociology—especially that which makes the European Union its focus—is debating the *level* as much as the *kind* of law that can both preserve democratic traditions and forge new ones.<sup>174</sup>

Discerning, for instance, whether European Union law is more like national statutes or international treaties is a more currently relevant question than whether formal or deformalized law is best suited to a national welfare state. Certainly the issue of formalist versus deformalized modes of law will obtain at the European Union level, but such debates can not simply be hoisted up to that tier without incorporating into socio-legal considerations the potential qualitative change in the categories that thereby results.<sup>175</sup> The welfare state is indeed in trouble, but its crisis will not be addressed in a decision whether nineteenth- or twentieth-century strategies (or a combination thereof) are appropriate to ensure vigorous discursive democracy within the lifeworlds of particular nation states. Since the genesis of the present crisis of the welfare state and hence of social democracy itself is to a large degree transnational in cause, solutions must be sought in strategies beyond the state and not transposed mechanically from the state to the transnational level.

Habermas's reconfiguration of Weber's state-society model into his own system-lifeworld model allows him to formulate a theory wherein

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173. On the study of law in Habermas's chosen site of application, Europe, see Christian Joerges, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration," *European Law Journal* 2 (1996); Anne-Marie Slaughter Burley, "New Directions in Legal Research on the European Community," *Journal of Common Market Studies* 31 (1993); and Joseph H.H. Weiler, "The Transformation of Europe," *Yale Law Journal* 100 (1991).

174. Wayne Sandholtz, "Membership Matters: Limits of the Functional Approach to European Integration," *Journal of Common Market Studies* 34 (1996); Francis Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques," *Modern Law Review* 56 (1993); MacCormick, "Beyond the Sovereign State"; and Nicolas Green, *The Legal Foundations of the Single European Market* (New York: Oxford University Press, 1992).

175. This critique applies to Bill Scheuerman's provocative endorsement of a revival of the formal rule of law to address the crisis of welfare state law. See Scheuerman, *Between the Norm and the Exception*. What is needed is not a return to the exact analysis and prescriptions of Neumann's "The Change in the Function of Law in Modern Society," but a new analysis that embeds the status of law within developments related to transnational phenomena and not exclusively those of an emerging welfare state. The *level* at which such an analysis is pitched and the *quality* of its substance needs reevaluation. For a more elaborate critique along these lines, see John P. McCormick, review of *Between the Norm and the Exception*, by William E. Scheuerman, *History of Political Thought* (forthcoming 1997).

law serves as the key that unlocks Weber's normatively vapid and coercive "iron-cage." However, since Habermas's superior account of the welfare states that were emerging in Weber's time may no longer rely upon the assumption that such states are relatively self-sufficient politically, economically, and socially, the sociology and philosophy of law needs to be further reconstructed to address the "alloy sieve" that contemporary states seem to be becoming in the modern international arena.

Toward the end of *Between Facts and Norms*, Habermas insists explicitly on the historical focus of his enterprise:

Because [democratic-constitutional] rights must be interpreted in various ways under changing social circumstances, the light they throw on this context is refracted into a spectrum of changing legal paradigms. Historical constitutions can be seen as so many ways of construing one and the *same* practice—the practice of self-determination on the part of free and equal legal subjects; but like every practice this too is situated in history. Those involved must start with their own current practice if they want to achieve clarity about what such a practice means *in general*.<sup>176</sup>

This is an explicit injunction to contextualize one's own moment and one's proposed activity within it as a basic step in the process of democratic practice. However, Habermas's own mode of analysis, an analysis that has abandoned Hegel in favor of Kant, ultimately forecloses the very emancipatory possibility that it aspires to open. The dilemma of historicizing emancipatory practice necessarily evokes the figure of Lukács who, though ultimately succumbing to his own "philosophy of history," helped lay the social-theoretical foundations for the project of critical theory in which Habermas is engaged. Habermas had intended that his Kantian turn in the years leading up to the publication of *Theory of Communicative Action* would serve as the second, more efficacious, appropriation of Weber in the tradition of critical theory. In the present context, however, one of the most enduringly relevant aspects of Lukács's *first* appropriation of Weber in *History and Class Consciousness* is his indictment of neo-Kantian, Weberian methodologies for their inability to grasp qualitative historical transfigurations.<sup>177</sup> In *Between Facts and Norms*, Habermas demonstrates that it is rather his own "critical theory" that has been appropriated by Weberian methodology and not vice-versa, for his

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176. Habermas, *Between Facts and Norms*, 386-87.

177. Lukács, *History and Class Consciousness*, 144-45.

theoretical project succumbs to that socio-historical myopia still characteristic of similar theoretical frameworks.

#### CONCLUSION

In *Between Facts and Norms*, Habermas impressively resolves the dilemmas, both normative and historical, bequeathed to him by Weber's *Sociology of Law*. The discourse theory of law effectively replenishes the void left in Weber's analytical approach and straightforwardly addresses the dilemma left by his historical approach. But because this resolution is carried out with the assumption of a historical, sociological, economic, and political reality having grown merely more "complex" since Weber's day, Habermas's legal solution is lacking in contemporary efficacy. His own mechanical attempt to update his theory in application, with only minor adjustment, to a supranational level of the European Union has thus far lacked the historical sensibility of the author of *The Structural Transformation of the Public Sphere* and the heir, however critical, of the author of *History and Class Consciousness*. These works delineated the relationship between the changing intellectual currents and transforming socioeconomic conditions at two different points in the emergence of industrial welfare states in the Northern Hemisphere. Habermas's present project requires just such a radical interrogation of the welfare state, a state undergoing changes brought on by transnational developments, a state in which he must situate, and thus necessarily recenter, his discourse theory of law.