

Unjust Legality

A CRITIQUE OF
HABERMAS'S PHILOSOPHY
OF LAW

James L. Marsh

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Philosophy of Law

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To William Kunstler and Ramsey Clark,
whose lives as lawyers manifest and exemplify
the just practice of law
in an unjust society

Preface

In a book such as this, it is important to lay out the context, historical and personal, in which and from which I am writing. As the reader will discover, I am very profoundly positively influenced by Habermas. In fact, Habermas, along with others such as Ricoeur, Marx, Hegel, Kierkegaard, and Lonergan, is one of the major influences on my thought. But, as the reader will also discover, I am also profoundly critical of Habermas, and the reasons for that, insofar as they refer to my previous personal development, need to be articulated.

But, first, a few words are in order about Habermas in his historical and social context. Today, at the beginning of the twenty-first century, Habermas is undoubtedly one of the world's top four or five philosophers and social theorists. His thought has caught on increasingly in the United States, so much so that any major graduate program that claims to be serious about contemporary continental philosophy and social theory has to have at least one critical theorist on its faculty. That was not true twenty years ago. Such a state of affairs owes much not only to Habermas but also to the success of his students and disciples, such as Thomas McCarthy, in spreading the word.

With these gains, however, has also come cost, mostly the taming of critical theory so that it conforms to the limits of academic, liberal discourse in the West. It has become apparent to many of us involved as active participants in critical theory that Habermas is no longer interested, if he ever was, in undertaking a radical critique leading to a transformation of late capitalist society. Rather, at best he is concerned with beating back the effects of illegitimate intrusion of market and administrative power on the life-world, effects that he calls "colonization." But capitalism kept within its own proper economic sphere is apparently unproblematic,

nonexploitative, the best we can do. Critical theory in his hands and those of most of his U.S. disciples has become a progressive form of liberal theory, able and willing to dialogue with, and learn from, the likes of Dworkin and Rawls but no longer interested in "that wild man" Marx or even an earlier, much more radical critical theorist such as Marcuse.¹

I find all of this unfortunate and reprehensible, not only because I think the project of radical social critique and transformation is necessary, desirable, and feasible but also because Habermas's own theory has radical implications from which he backs off. Simply put, the theory of communicative action in *Between Facts and Norms*, developed into a theory of democratic law, implies radical democracy—full economic, social, and political democracy. Showing this is one of the main aims of this book. By contrast, late, welfare-state capitalism, to which Habermas remains committed, is an inadequate, contradictory, halfway measure. A great deal of the interest and story of *Between Facts and Norms* is Habermas's heroic effort to square that circle, law rooted in democracy and capitalism. It is my contention that he does not and cannot succeed.

The liberal, pro-capitalist stance has been manifested *in actu* by Habermas in his support of the Gulf War and the war in Yugoslavia, both unjustified, unjust, imperial interventions. While his support for the Gulf War seemed somewhat restrained, apologetic, and cautious, his support for the Yugoslavian intervention was aggressive, enthusiastic, and even contemptuous of dissenters. Habermas, in the latter part of his life, seems to have become, or at least to approach having become, an enthusiastic apologist for late state capitalism in all its viciousness at home and abroad. And he has adopted these stances on foreign policy in spite of his very conscientious liberal stances on political debates within Germany, such as discussion of the Holocaust. But it is increasingly evident that such liberalism, for all its genuine moral-political substance, is insufficient.²

These stances are inconsistent with, and fly in the face of, Habermas's best insights—for example, into the necessity for unfettered communication in the public sphere freed of the influence of money and power and the necessity for legislative, administrative, and judicial spheres to be similarly free of such unjust intrusion. These insights rest on, and flow from, many others, such as the theory of communicative action, his account of historical materialism, his theory of modernity and defense of a legitimate form of modernist reason against postmodern critique, his account of the life-world-system distinction, his theory of morality, and his account of the system of rights. Above all, he has brought a methodological consciousness to critical theory which we dare not reject.

To move beyond Habermas, as I and others are trying to do, we must

be sure that we have measured up to and absorbed his positive achievements and insights. And yet, after doing that, or trying to do that, and because we have done that, we regret to say that Habermas's theory falls painfully short of what it could be and should be. Instead of championing a radical, transformative social theory that takes on late capitalism in all of its pomps, Habermas has capitulated to it and even become, at times at least, its apologist.

In my own efforts to develop such a transformative, genuinely radical theory, I find myself moving toward a new critical theory, based upon Habermas but going beyond him.³ Such a new critical theory has several aspects: a much fuller, more positive appropriation of Marx, earlier critical theory, and sources of Western Marxism such as Bloch, Gramsci, and Benjamin; exploration of the cognitive, existential intersubjective human subject including but going beyond Habermas's linguistic subject; a linking of a formal moral with a material ethic of content; a linking of right with good, duty with happiness, deontology with teleology; a critique of capitalism not only as colonizing but also as exploitative in its own inner workings, marginalizing, tyrannizing, and dominating, interpreting racism, sexism, and heterosexism as distinct from, but related to, classism; and a critique of capitalism as imperialistic, extending beyond the borders of the North into the South, into the Third World.

Let us focus a bit on two of these aspects, the link between formal and material morality and the link between right and good, duty and happiness, deontology and teleology. Both of these are comprised in my three-level social ethic, developed in *Critique, Action, and Liberation*, of right, morality, and justice. The level of right calls on me to obey the exigencies of communicative action as spelled out in a principle of universality, U, which leads to and grounds the basic principle of discourse ethics, D. The principle of universality states that any legitimate norm requires that all concerned can accept the consequences and side effects its universal acceptance can be anticipated to have for the satisfaction of everyone's interests (and that these are preferable to any other alternative). D states that only those norms can claim to be valid that meet (or could meet) with the approval of all concerned in their capacity as participants in a rational discourse. U and D cannot be denied without self-contradiction or arbitrariness. If, for example, I try to deny U, that it should meet with universal acceptance on the basis of the better argument, I implicitly contradict the content of what I affirm explicitly. If the claim is not rational, then what is arbitrarily asserted can be rationally questioned or denied.

The level of right, however, proves to be insufficient, for the issue arises concerning the requisite material and social conditions such that people

can participate equally and freely in communicatively active, moral, political discourse. Equal opportunity to participate that is more than merely formal and verbal demands approximately equal material and social conditions, such as wealth, income, education, housing, food, and medical care. Accordingly, the principle of generic consistency, or PGC, is affirmed: act in accordance with the generic rights of others as well as yourself. Negatively, this principle implies that I ought to refrain from coercing or harming recipients of my actions. Positively, the PGC implies that I ought to assist others to have freedom and well-being whenever they cannot otherwise have them and I can help them at no great risk or cost to myself. Accordingly, if I see a person drowning in a lake as I am walking by and I am a good swimmer, I have an obligation to save that person.

On the level of morality, moreover, the PGC implies freedom as self-development, or FSD. Because freedom and well-being are both dispositional and occurrent, habitual and present in individual actions, any choice must imply the willing of the basic conditions and dispositions that are necessary for the essential unfolding and realization of the project of being a self. Self-development is the freedom to develop myself through my actions. It is a process of realizing my projects through activity in the course of which I develop my character and other capacities. I develop myself when I engage in political activity over a period of time, or learn to be a pianist, or go to graduate school in philosophy.

Because, however, freedom in the full sense is positive and not merely negative, because it implies the capacity to realize one's choices, and because control by one group over the enabling conditions of self-development implies a domination incompatible with freedom, self-development implies equal positive freedom. Such a freedom implies and includes the right of each individual to the enabling conditions, material and social, without which individual purposes cannot be realized. Among the material conditions are means of subsistence, labor, and leisure activity. Among the social conditions are cooperative forms of social interaction; reciprocal recognition of each one's free agency; and access to training, education, and other social institutions.

The levels of both right and morality, form and content, lead into and imply four principles of justice, unity of form and content, in the light of which we can evaluate social institutions:

1. Everyone's security and subsistence rights are to be respected.
2. There is to be a maximum system of equal basic liberties, including freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person along with the right to hold prop-

erty, and freedom from arbitrary arrest and seizure as defined by the rule of law.

3. There is to be (a) a right to equal opportunity to attain social position and offices and (b) an equal right to participate in all social decision-making processes within institutions of which one is a part, as well as (c) an equal opportunity for meaningful work.
4. Social and political inequalities are justified if and only if they benefit the least advantaged and are consistent with just savings but are not to exceed levels that will seriously undermine equal worth of liberty or the good of self-respect.

One implication of my principles of right, morality, and justice is the injustice of both capitalism and state socialism. Both violate the orientation to full communication present in U and D. State socialism openly represses any kind of dissent, and late capitalism covertly represses it through such mechanisms as campaign financing, largely supplied by the rich and corporations; media subservient to capitalism; and different kinds of selection mechanisms operative in government, such as limiting the range of options considered and forming committees largely sympathetic to the corporations they are overseeing.

Both state socialism and capitalism are also incompatible with equal positive freedom on the moral level. If such freedom is to be realized, it requires access to means of self-development as they are present in political power, production, and culture. Because they allow some to own, control, and derive the primary benefit from the means of production, power, and culture, both capitalism and state socialism essentially violate the imperative of equal positive freedom.

Both state socialism and capitalism violate all or most of the principles of justice. Both systems violate the principle of equal opportunity to make decisions in the economic arena, and both violate the fourth principle because the levels of income and wealth exceed the limits of equal worth of freedom and self-respect. Democratic socialism, however, involving ownership of firms by workers; full economic, political, and social democracy; a minimal welfare state; a market forbidding exchanges between capital and labor; and local, regional, and national planning associations to coordinate and plan investments, disperse funds to needy, deserving firms and individuals, and monitor abuses, does satisfy the principles of right, morality, and justice.⁴

Another consequence of my principles of right, morality, and justice is solidarity with the poor and oppressed. For insofar as people are exploited, dominated, and marginalized by an unjust racist, sexist, heterosexist,

classist capitalism, then I have to hear and respond to their cry and side with them against the oppressor. There is a preferential option for the poor, marginalized, and oppressed that can be argued for philosophically.⁵

Such is the context of my own personal development, out of which I write this book on Habermas's philosophy of law. The reader can easily see that there are many agreements and many disagreements with Habermas. For the most part, however, these will be in the background of my argument with and against his position in this book. When I have recourse to my own arguments and claims, they will be used to complement and strengthen the main argument of this book, which is one of *immanent critique*: using Habermas's own theory, values, and principles, do his arguments, conclusions, and implications of his arguments measure up in a fully consistent and comprehensive way with his own best, true insights, or do they fall drastically short ethically, legally, and socially-theoretically?

I argue that they fall drastically short. The system of rights, democracy informed by law, and the ideal of communicative action cannot be realized fully, adequately, and consistently in late capitalist society. At their best, Habermas's arguments point beyond themselves toward a qualitatively more just, fully democratic, socialist society. At their worst, they lead to uncritical, dogmatic capitulation to an intrinsically unjust society that should be ruthlessly criticized, resisted, and transformed. Capitalism in its essential functioning is flatly contradictory to the rule of law, full democracy, and the full flowering of communicative action in the public sphere and the formal political sphere of the state.⁶

In order to critique Habermas's position adequately, I have found it necessary to lay out his argument in detail as it unfolds chapter by chapter in *Between Facts and Norms*. Whatever the reader thinks of my critique, which I hope she will find stimulating and challenging, I hope that she will find my interpretation of Habermas's thought to be fair, clear, and comprehensive.

Finally, I wish to thank my assistant, Ryan Gable, for an excellent job of word processing this manuscript, and my department and university for a full year off in order to write it.

NOTES

1. See James L. Marsh, "What's Critical about Critical Theory?" in *Perspectives on Habermas*, ed. Lewis Edwin Hahn (Chicago: Open Court Press, 2000), 555–65.

2. On Habermas's support of the Gulf War, see Jürgen Habermas, *The Past as Future*, trans. Max Pensky (Lincoln: University of Nebraska Press), 5–31. On his

support of the war in Yugoslavia, see his "Bestialität und Humanität: Ein Kriegand der Grenze zwischen Recht und Moral," in *Die Zeit*, April 29, 1999, 1, 6–7. Ulrich Rippert, "How Habermas Defends the Balkan War," World Socialist Web Site, www.wsws.org, June 5, 1999, 1–6.

3. Marsh, "What's Critical about Critical Theory?" 555–65.

4. See James L. Marsh, *Process, Praxis, and Transcendence* (Albany: State University of New York Press, 1998), 211–13; and James L. Marsh, *Critique, Action, and Liberation* (Albany: State University of New York Press, 1995), 113–76.

5. Marsh, *Critique, Action, and Liberation*, 174–75.

6. There have been several books published after the appearance of *Between Facts and Norms* that deal with, or draw on, it in different ways. None of these includes the detailed, analytic interpretation and critique in this book. Such books include James Bohman, *Public Deliberation* (Cambridge: MIT Press, 1996); David Ingram, *Reason, History, and Politics* (Albany: State University of New York Press, 1995); Michael Rosenfeld and Andrew Arato, eds., *Habermas on Law and Democracy: Critical Exchanges* (Berkeley and Los Angeles: University of California Press, 1998); William Rehg, *Insight and Solidarity: A Study of the Discourses on Ethics of Jürgen Habermas* (Berkeley and Los Angeles: University of California Press, 1994); Lewis Edwin Hahn, ed., *Perspectives on Habermas* (Chicago: Open Court Press, 2000); and Peter Dews, ed., *Habermas: A Critical Reader* (Oxford: Basil Blackwell, 1999).

For the most part, these books, while insightful and helpful in many respects, adhere to Habermas's reformist, pro-capitalist stance on democracy and law and his support of capitalism. The exceptions are Ingram, who argues for workplace democracy and offers a critique of capitalism as unjust in principle; William E. Scheurman, "Between Radicalism and Resignation: Democratic Theory in Habermas's *Between Facts and Norms*," in *Habermas: A Critical Reader*, ed. Dews, 253–77; William Forbath, "Short-Circuit: A Critique of Habermas's Understanding of Law, Politics, and Economic Life," in *Habermas on Law and Democracy: Critical Exchanges*, ed. Rosenfeld and Arato, 272–86; and many authors in Hahn, *Perspectives on Habermas*, critical of Habermas's reformist, pro-capitalist stance. Interestingly enough, Habermas in his reply in *Habermas on Law and Democracy*, 381–452, chose not to respond to Forbath's critique and did not choose to reply to any of the contributors to *Perspectives on Habermas* after initially agreeing to do so. Whatever the motives for these refusals, they constitute an interesting limit so far on responding to those who question his reformist framework.

Many of the other efforts are useful and illuminating, but to the extent that they share the reformist framework of the master, they are limited. James Bohman, for example, in *Public Deliberation* has plausible proposals for shifting to a dialogical model of democracy over against Habermas's discourse model and for the notion of "capacities" as useful in describing the abilities that citizens need to participate effectively as equals in public dialogue. But in saying that radical democracy "no longer means the total transformation of society; rather it means a piecemeal project of reforms that builds upon the constitutional achievements of the past" (20), he gives in to the worst mistakes and limitations of Habermas himself. My questions to Bohman are, why does he call his proposal "radical democracy" at all?

(Habermas makes a similar mistake), and are not Bohman's democratic dialogue and capacities as effectively short-circuited and blocked by capitalism as other forms of democracy? There is more to capitalist injustice than colonization and an inadequate welfare provision that can in principle be reformistically handled. Like Habermas, therefore, Bohman understates empirically the depth and variety of capitalist injustice and thus ends up in an implausible, harmonizing unity between capitalism and democracy.

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Toward a Critique of Habermas's Philosophy of Law

In *Between Facts and Norms* Habermas has shown, in a way that he has not done since *Legitimation Crisis*, the concrete, social, political, and legal implications of his theory of communicative action. As we know from *The Theory of Communicative Action*, Habermas is committed to democracy. What he has done in *Between Facts and Norms* is to show that such democracy is possible and actual in modern democratic states.

I am not sure that I would agree with the assessment of a well-known critical theorist that *Between Facts and Norms* is Habermas's greatest work.¹ That honor belongs to *The Theory of Communicative Action*, I think, and it would be as much of a mistake to accord *Between Facts and Norms* that honor as it would be to thus rank Hegel's *Philosophy of Right* over against his *Phenomenology of Spirit*. Nonetheless, like *Philosophy of Right*, *Between Facts and Norms* is a great, marvelously synthetic, original, path-breaking book that erects the philosophy of law on a new, much more sophisticated and comprehensive foundation.

To say that *Between Facts and Norms* is an achievement, however, is not to deny that it is, as Marx has shown *The Philosophy of Right* to be, a flawed achievement. When I first read *Between Facts and Norms*, it seemed to me to be very insightful, yet more and more I have the sense that Habermas and I do not live in the same social world. That impression, of course, does not necessarily speak against Habermas. This chapter will attempt to articulate the basis for this ambivalent reaction and to defend my radical interpretation of the social world as more adequate than Habermas's reformist version. I will first reflect on some of the general contours of my argument with and against Habermas and then move into my argument with *Between Facts and Norms*. This chapter outlines in

a provisional way the argument of this whole book.

On the one hand, *Between Facts and Norms* is correct in discussing the many-leveled tension between facticity and validity; the co-originality of private and public autonomy; the overcoming and sublating of liberal and republican accounts of law into a procedural paradigm of law; the correlation between different aspects of the constitutional state and forms of rationality (for example, the legislature with justification, the judiciary with application, and the administrative with pragmatic, strategic forms of rationality); and finally the claim that law is a medium whereby communicative power is translated into administrative power. On the other hand, we live in a racist, sexist, heterosexist capitalist society that is at odds structurally not only with democracy but also with justice and with human well-being. In New York City, where I live, one can see the victims of capital—the poor, the unemployed, and the homeless—grow daily more numerous; the division in income between rich and poor is worse than in Guatemala. I live in a country in which democracy is for sale. Western capitalist democracies are, or seem to be, more and more democracies for the few, for those who can afford them, leaving the vast majorities both underrepresented politically and underprivileged economically. Such a state of affairs seems to be in flat contradiction with the proclaimed universality of Habermas's proceduralist paradigm of law, which posits that everyone should have an equal right to participate, make her interests known, and share power.²

An initial reaction to *Between Facts and Norms*, therefore, is to say that Habermas seems to be insufficiently bothered about this state of affairs and that he should be. He seems not to share, for example, the kind of prophetic outrage that Jacques Derrida expresses in *Specters of Marx* about the New World Order. This initial impression, however, is somewhat unfair, as *Between Facts and Norms* struggles with this sensed incompatibility. Like Fukuyama and apologists for the capitalist order, Habermas is haunted by the specter of Marx. Maybe, finally, Marx is right about the fundamental irrationality and injustice of capitalist democracies, early or late.³

The tensions and contradictions of *Between Facts and Norms* are on at least two levels, normative and hermeneutical. On a normative, moral level, Habermas's vision is contradicted by the reality of late capitalist society. On a hermeneutical level, Habermas is inaccurate insofar as he continually underestimates, understates, and ignores the deep pathology and irrationality of capitalist democracy.

My basic claim is that *Between Facts and Norms* is fundamentally, internally contradictory. Its moral and political reach exceeds its grasp insofar

as that vision cannot be realized or even approximated in a society that is as fundamentally unjust, unequal, dominating, and exploitative as ours is. The clearest indication of that contradiction is Habermas's statement (407–8) that both the liberal paradigm of law, developed to defend the rights of the individual before the state, and the welfare paradigm, which grants welfare entitlements to secure such negative liberties, are rooted in a productivist image of capitalist society that legitimates the pursuit of private interests by autonomous individuals. Both views lose sight of the link between private and public autonomy and of the democratic meaning of a community self-organization; the proceduralist paradigm, in contrast, does see such connections and is thus preferable. It is nonreified as opposed to reified, communal as opposed to individualistic, democratic and communal as opposed to instrumental and strategic. Yet how is such a paradigm to thrive and be realized in a capitalist society that is as virulently productive as it ever was, as committed as ever to turning human beings into means for the sake of profit? The material underpinnings—racist, sexist, heterosexist, classist—of capitalist society seem to be at odds with the proceduralist paradigm. Habermas's procedural model hovers uneasily, like a Kantian postulate, above a capitalist society that is incompatible with it.⁴

Such a contradiction expresses itself in other contradictions in this and previous works of Habermas. One, equally universal and fundamental, is the contradiction between capitalism and democracy. Democracy as a free and equal community of human beings relating to each other mutually is in tension with a socioeconomic system that not only is undemocratic, unfree, and unequal in its own internal workings but also tends to expand outward, to the extent that it is a mature capitalism, and subjects everything to its sway. Thus the culture and the state tend more and more to be "capitalized," to serve the ends of capital, of which the dominant one is the extraction of profit.

By *capitalism* in this book, I understand a socioeconomic system in which one class owns, controls, and derives the primary economic benefit from the means of production, and another class, separated from the means of production and possessing only or mostly its own labor power to sell, can work only on capital's terms. Profit or surplus value, the amount of average, socially necessary time for which labor is not paid and which goes to the capitalist, is the overriding goal of such a society and tends to impose itself on all domains of society, economic, social, and political. Such surplus value represents the part of the working day that goes to capital and is over and above necessary labor time, which goes to the worker to reproduce the value of his own labor power. *Capital* refers,

first, to the class of persons owning and controlling the means of production; second, to the process of investment, production, exchange, and consumption running through capitalist society (self-expanding value); and, finally, to the social relationship between capital and labor. Most of the time in this book, “capital” will have the first sense, the class of those who own and control the means of production.

The result of such subordination is a structurally based legitimation crisis, taking the form in the modern state of a tension between accumulation and legitimation. The state has contradictory goals: to secure capitalist accumulation in a way that more or less frustrates the economic and political aspirations of noncapitalists such as labor, women, blacks, and Hispanics; and to legitimate its decisions in ways that respect the demand of democratic participation, in which all interests and persons in principle have an equal voice, no question is in principle excluded, and a legitimate formation of general interests emerges. To the extent that full, free democratic discussion occurs, the prerogatives of capital are undermined. To the extent that capital prevails, false, manipulative consensus is substituted for true consensus in a way that violates democratic procedure, and a pseudocompromise between legitimate general interests representing the will of all and particular interests is substituted for a legitimate compromise between merely particular interests that cannot be generalized. A nation’s legitimate interest in a reduction in military spending after 1989 (a “peace dividend”) and an increase in spending for the poor, education, the inner city, and the environment gives way to capital’s need to keep military spending as high as possible for the sake of profit and the necessity of keeping the Third World in thrall by maintaining a strong military enforcer of last resort.⁵

As the foregoing indicates, there is a sense in which one can show how on Habermas’s own terms capitalism is unjust and systemically irrational and contradictory. At the same time, he understates both the injustice and the irrationality. As I have shown elsewhere, in addition to colonization of the life-world by system, which Habermas articulates, there is exploitation of labor, women, and racial minorities within the workplace by capital; tyranny (in Walzer’s sense), in which one life-worldly sphere imposes itself on others (science and technology, for example, imposing themselves on spheres subject to moral, communicative action); marginalization and nonrecognition of the disenfranchised such as the poor, the unemployed, women, blacks, and Hispanics; and domination in many different spheres by capital over labor, black over white, men over women. Consequently we have five forms of injustice and irrationality rather than just one, and the capitalist firm is not innocent if all it does is