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Foreword

Nancy Ehrenreich

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NANCY EHRENREICH*

Law professors have been drawing upon the work of philosopher Jürgen Habermas for years, finding countless applications of his discourse ethics theory to legal issues. But the publication of Habermas's formidable work on law and democracy, *Between Facts and Norms*,[1] provides an occasion for legal scholars to engage Habermas's ideas about law *per se*, and to assess his arguments about its role and function in democratic societies. This Symposium represents one set of such assessments. The product of a collaborative effort among legal scholars and other social theorists, it also constitutes an interdisciplinary conversation on Habermas's recent exploration of law and democracy.

That conversation actually began here in Denver well over a year ago, when the University of Denver College of Law selected *Between Facts and Norms* as the subject of our fifth annual legal theory symposium. The symposium is a small, workshop-like conference, designed to provide a forum for the examination of a particular problem or concept in legal theory that arises across various legal contexts. Interdisciplinary in its focus, the symposium is preceded by a year-long reading group in which law professors and interested scholars from other disciplines meet weekly to explore and discuss writings relevant to that year's topic. This year's reading group included individuals from the fields of philosophy, psychology, and political science, as well as law. The articles printed here reflect the rich and stimulating mix of ideas generated by those reading group sessions, as well as by the panel presentation in which the year-long symposium process culminated.[2]

Before introducing the Symposium papers, I would like to take a moment to thank three individuals who contributed immensely to the success of this enterprise. Interdisciplinary interactions are always fraught with challenge and promise, and this one was no exception. Three contributors to this volume, Mitchell Aboulafia, Myra Bookman,

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* Assoc. Prof. of Law, University of Denver College of Law. I would like to thank Mitchell Aboulafia, Myra Bookman, Catherine Kemp, and Charles Piot for their comments on an earlier draft of this *Foreword*. All errors are, of course, mine.

1. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1998).

2. This year, we deviated from our traditional format, taking advantage of the opportunity to hold the symposium in conjunction with the annual conference of the Society of Phenomenology and Existential Philosophy. Professor Habermas, who generously contributed a conference paper to the Symposium, was the keynote speaker at that conference, and three of our symposium contributors appeared on a panel following his remarks.

and Catherine Kemp, played a crucial role in our weekly reading group, contextualizing and translating Habermas's ideas for those of us law types who were unfamiliar with the larger body of his work. Their ability to discuss complex concepts in straightforward language, and their patience with the seemingly endless debates that often turned out to be more about terminology than substance, made the reading group an incredibly productive and stimulating undertaking for all concerned. Moreover, all three, and especially Catherine Kemp, provided helpful contacts and suggestions during the organizing of what turned out to be a very successful live panel on Habermas and law.

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The way that Habermas approaches the task he sets for himself in *Between Facts and Norms* is so ambitious and expansive—even the nooks and crannies in his argument are more like caves and canyons—that any attempt to summarize it seems doomed to failure.[3] Nevertheless, a brief overview can serve to set the stage for the pieces printed here. Hopefully, readers (and Habermas himself) will forgive the necessarily un-nuanced nature of any such effort.

The central project of *Between Facts and Norms* is huge and important: to articulate a theory of the legitimacy of the legal order in a complex society such as the United States or Germany. According to Habermas, the diversity of modern societies has destroyed the moral consensus that characterized an earlier era,[4] while the decline of religion has caused natural law to lose its moorings to divine authority. These developments, combined with the fact that individuals do not directly participate in or consent to the production of society's laws, create a problem of legal legitimacy. How can we justify the application of coercive force to citizens who might not agree with the reasons for its application and have not directly participated in the decision to apply it?

Habermas sees this problem as a conflict between "facticity" and "validity"—between, on the one hand, the existence of law as a social fact and, on the other hand, its legitimacy as the expression of a norm. The conflict could also be characterized as one between fidelity to law and justice[5]—or, if you will, between positivism and natural law. How can we reconcile the social reality of law as the product of power struggles acted out in concrete social institutions with law's claim to legiti-

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3. There have actually been many attempts to summarize *Between Facts and Norms*, though none as short as the one that follows here. The translator summarizes the argument in a lengthy, and very helpful, introduction to the book, and Habermas himself does the same (with some additions and clarifications) in a postscript at the end. His article in this Symposium is yet another—and still useful!—take on the argument.

4. Habermas seems to assume a premodern world characterized by uniformity and consensus—a world that, in fact, may never have existed.

5. Catherine Kemp, *Habermas Among the Americans: Some Reflections on the Common Law*, 76 DENV. U. L. REV. 961, 963 (1999).

macy as the expression of pubic norms with which compliance can legitimately be demanded? Like many legal theorists who have tried to transcend the terms of the debate between classical legal theorists and legal realists, Habermas wants to salvage the moral neutrality of law without denying the moral pluralism of modern society. Seeking to construct a legal edifice whose legitimacy does not depend upon the substantive content of its rules, he proposes a not-unfamiliar solution: a "proceduralist" approach to law.

Between Facts and Norms reads like a highly sophisticated and ambitious version of process theory. Incorporating his earlier work on discourse ethics into this new meditation on law, Habermas ties the legitimacy of law to its production through a democratic process characterized by communicative action. "Just those [legal] action norms are valid," he writes, "to which all possibly affected persons could agree as participants in rational discourses."[6] This "discourse principle" is the central focus of his book.

Offering communicative action as a "postmetaphysical" definition of reason, Habermas's theory thus appears to present a means of rationally resolving disputes that does not fall prey to the universalizing formalism of classical theory. Resisting a naïve equation of democracy with the existence of formal institutional structures such as elected legislatures, it also promises a proceduralist approach that takes seriously the need to articulate a standard for defining the conditions necessary for meaningful democratic decision making. Law's role, says Habermas, is to translate democracy into government—to facilitate the formation of the views of the people and incorporate them into institutional legal structures, to serve as the mechanism by which popular will becomes positive law. The legal "norms" generated as he suggests will be legitimate precisely because they are the product of a genuinely democratic process in which each person has an equal opportunity to articulate his or her interests and views—a process that accords with the discourse principle.

In his Symposium conference paper,[7] Professor Habermas provides a helpful and informative summary of the material covered in his book. He cites six specific topics to which he believes the book contributes:

I. The form and function of modern law;

II. The relation between law and morality;

III. The relation between human rights and popular sovereignty;

IV. The epistemic function of democracy;

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6. HABERMAS, *supra* note 1, at 107.

7. Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. REV. 937 (1999).

V. The central role of public communication in mass-democracy;

VI. The debate about competing paradigms of law.[8]

Habermas begins his discussion by setting out his view of law as a medium of social integration, and argues that legitimacy is essential to that role. He turns next to "the relation between law and morality," arguing that the "legitimacy of law must not be assimilated to moral validity, nor should law be completely separated from morality."[10] Under the third topic he presents his "view [of] the democratic process from the standpoint of discourse theory."[11] The sorts of human rights that "empower citizens to exercise their political autonomy," he argues, are "what is necessary for the legal institutionalization of the democratic process of self-legislation."[12] Next, he briefly summarizes his rejection of a "mentalist conception of reason" in favor of a "pragmatist" approach that focuses on the conditions necessary for democratic deliberation.[13] In the succeeding part of the piece, he stresses the importance of the structural features of public, political communication to the successful creation of the deliberative democracy he seeks. Finally, in the last part of the paper, Habermas contrasts his "proceduralist paradigm" of law with two alternative views: the "liberal paradigm" and the "welfare-state paradigm."[14]

Habermas's summary of *Between Facts and Norms* is followed by Mitchell Aboulafia's article, *Law Professors Read Habermas*.[15] Consistent with his role as able (and essential) translator in the symposium reading group, Professor Aboulafia provides a lucid, extremely accessible overview of Habermas's proceduralist theory. Particularly useful is his exegesis on Habermas's ideas regarding the relationship among individual rights, law, and democracy. Aboulafia explains,

> For Habermas, rights are necessary for a discursively achieved political will-formation. The alternative would be to have the "will" of political actors shaped from above or by tradition. . . . Without rights protecting private "space," democracy would be unrealizable because citizens could not form themselves as autonomous agents; and without democracy law would not have the proper grounds for legitimacy; and without law that is legitimate, rights (public and private) would not be properly protected. And, of course, without public rights, discussion would not take place in a fashion that sustains democracy and legitimates the law.[16]

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8. *Id.*
9. *Id.* at 937.
10. *Id.* at 938–39.
11. *Id.* at 939.
12. *Id.*
13. *Id.* at 940.
14. *Id.* at 942.
15. Mitchell Aboulafia, *Law Professors Read Habermas*, 76 DENV. U. L. REV. 943 (1999).
16. *Id.* at 948.

In passing, the piece also provides helpful clarification of the philosophical meaning of the terms "ethical life" and "morality"[17]—terms that initially befuddled law professors in the symposium reading group, who tended to equate both of them with "politics" as used in the Critical Legal Studies aphorism, "law is politics."

Habermas is not, of course, without his critics, and the remainder of our authors articulate a variety of points of disagreement, some more minor and others more major, with his approach. A useful exploration of the similarities and differences between Habermas and John Rawls is provided by David Rasmussen in *Accommodating Republicanism*.[18] Drawing on an earlier pair of articles by the two theorists, Rasmussen describes their exchange as a debate over whether it is possible to "realize justice as fairness while assuring impartiality in a process that is eminently democratic."[19] Both authors are trying to accommodate republicanism's critique of liberalism, he maintains, but they do so in different ways. Habermas indicts Rawls, Rasmussen explains, for falling prey to the liberal tendency to overemphasize private rights and underemphasize public decision making processes. Habermas sees public and private autonomy as co-original, as presupposing each other. Since "private right can only be derived from the process of public will-formation,"[20] private autonomy must be grounded in democratic processes. Rawls, in contrast, does not see private rights as democratically grounded, and thus, from Habermas's point of view, pays insufficient attention to "the procedure of democratic lawmaking."[21] Rasmussen turns briefly at the end of his piece to Rawls' critique of Habermas, which he summarizes thusly: "[I]f one asserts the co-originality thesis in the way that Habermas does, with its implicit assumption about the primacy of the political in the classical, as opposed to the modern sense, then one buys into a teleology which can only be justified through a comprehensive philosophical framework."[22] This criticism, Rasmussen contends, has not yet been replied to by Habermas.

Catherine Kemp, in her article, *Habermas Among the Americans: Some Reflections on the Common Law*,[23] criticizes *Between Facts and Norms* for being inattentive to differences between the German civil law system and the Anglo-American common law system. In a creative and thought-provoking argument, Kemp draws on Holmes' notion that judicial rulings emerge from experience in order to suggest that Habermas's treatment of customary law as part of the positive law provides an inadequate model for understanding common law systems. Following Frederic

17. *See id.* at 946.
18. David M. Rasmussen, *Accommodating Republicanism*, 76 DENV. U. L. REV. 955 (1999).
19. *Id.* at 956.
20. *Id.*
21. *Id.* at 957.
22. *Id.* at 960 (citation omitted).
23. Kemp, *supra* note 5, at 961.

Kellogg,[24] Kemp points out that, for Holmes, common law rules are not created out of whole cloth by judges but rather are derived through a process of "successive approximation" generated by the repeated experience of resolving particular types of disputes.[25] If this view is correct, she continues, then it might not be appropriate to equate common law rules with the legislatively enacted legal norms on which Habermas focuses. This part of our positive law, Kemp's argument suggests, may be less removed from, and more organically connected to, popular understandings than Habermas imagines North American legal enactments to be. A common law system like that in the United States may not suffer from the same tension between facticity and validity that, according to Habermas, characterizes modern law.

Psychologist Myra Bookman, in her piece, *Still Facing "The Dilemma of the Fact": Gilligan and Habermas (Re)Visited*,[27] likewise sees Habermas's theory as incomplete, but because of conceptual rather than cultural gaps. Drawing on the work of Carol Gilligan as interpreted "progressively" by Mary Joe Frug, Bookman makes a persuasive case for the argument that Habermas's legitimation theory "refuses to relinquish a model of psychological and social development that relies on autonomy, separation, and individuation as its ground note."[28] Habermas's focus on democracy, autonomy, and equality imports a particular substantive perspective into what he claims to be, in her words, a "postmetaphysical, strictly procedural, normatively empty position."[29] Rejecting the "vulgar Gilliganist" view that associates such a perspective with men and the alternative "ethic of care" perspective with women, Bookman maintains that Habermas's treatment is nevertheless incomplete as long as it fails to attend to the latter, alternative approach to morality. She does not, however, conclude from her finding of substance in Habermas's substanceless position, that his project of producing a neutral, non-normative definition of democracy is misguided. For her, the solution is to incorporate within Habermas's existing analysis a view of "a lifeworld fraught with attachment, vulnerability, and relational responsibility—a lifeworld beyond ego, separation, and blind fairness."[30] The "justice" and "care" perspectives, she argues, can "coexist in productive tension."[31]

In contrast to Bookman's pluralist solution to the substantivity she finds in *Between Facts and Norms*, the three remaining articles in our

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24. *See* Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TULANE L. REV. 15 (1990).

25. Kemp, *supra* note 5, at 968–69.

26. "Myra Bookman, *Still Facing "The Dilemma of the Fact": Gilligan and Habermas (Re)Visited*, 76 DENV. U. L. REV. 977 (1999).

27. *Id.*

28. *Id.* at 978.

29. *Id.*

30. *Id.* at 979.

Symposium suggest at least the possibility that the substantive assumptions that implicitly ground Habermas's book might doom the entire undertaking. In *The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Enterprise*,[32] Brian Tamanaha shows that critiques of dense philosophical theorists like Habermas can be trenchant without being tortuous. Tamanaha begins this admirably readable piece by questioning the usefulness of jurisprudential theories that focus on trying to identify the source of law's legitimacy. Such inquiries, he argues, seem all too often to result not in legal critique (the law has failed to live up to applicable standards) but in legal apologetics (the standard of success is precisely what the law is already doing). This is especially true, he suggests, when the standard that is articulated is an idealized one that no system could ever fully meet. Moreover, Tamanaha argues, discourse theory is not a persuasive form of legitimation. In fact, in privileging discourse as the embodiment of democracy, Habermas has actually created an analysis that is biased in favor of those who are good at talking. Just like other formally neutral rules applied to social contexts characterized by inequality, Habermas's discourse principle will produce disparate results—favoring those with locutionary abilities over those without. The actual substantive results of legal rulings, Tamanaha suggests, may ultimately be more central to law's legitimacy than whether those results were reached in accordance with a discourse theory of law.

Like Tamanaha, Frank Michelman believes that Habermas's discourse principle is itself substantive, given that it is "concerned with and reflect[s] a particular way or form of life . . . that prefers honest reasoning with each other to force and manipulation."[33] In his evocative essay, *Morality, Identity and "Constitutional Patriotism,"* Michelman examines Habermas's offer of what Michelman calls a "*constitutional contractarian* model of political justification."[34] Habermas, like Rawls, believes that law gets its legitimacy from following certain fundamental constitutional principles upon which all can agree.[35] A necessary corollary of this constitutional contractarian justification is the notion of a shared attitude among the citizenry towards the constitution. Habermas calls this attitude "constitutional patriotism."

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31. Brian Tamanaha, *The View of Habermas from Below: Doubts About the Centrality of Law and the Legitimation Enterprise*, 76 DENV. U. L. REV. 989 (1999).

32. Frank Michelman, *Morality, Identity, and "Constitutional Patriotism,"* 76 DENV. U. L. REV. 1009, 1027 (1999).

33. *Id.* at 1014 (emphasis in original).

34. Michelman quotes Rawls' formulation: "[O]ur exercise of political power is . . . justifiable . . . when it is in accordance with a constitution, the essentials of which all citizens may be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." *Id.* (alteration in original) (quoting JOHN RAWLS, POLITICAL LIBERALISM 216 (1993)). As Michelman elaborates further, "Habermasians seek to establish the possibility and general characteristics (at least) of a political regime that is rationally acceptable—acceptable considering one's interests—to everyone who is (hypothetically) reasonable. They furthermore seek to do so without supposing any substantive-ethical commonality among the people concerned." *Id.* at 1019.

But the diversity of opinions about how to interpret a constitution, Michelman suggests, raises problems for the constitutional patriotism concept. So does the fact that any constitutional document that is phrased generally enough for all to accept will be so broad as to preclude meaningful conclusions about when and whether it is being violated.[36] The very difficulty that a constitutional contractarian justification purports to avert—that posed by the moral pluralism of modern society—thus merely reasserts itself at the level of constitutional interpretation. Using affirmative action as an example, Michelman shows how a constitutional principle such as "equality of concern and respect" can be interpreted to legitimate either a "color-blind" or an "anti-caste" approach to questions of race-conscious lawmaking.[37] (We do seem doomed to forever re-learn Holmes' admonition that abstract rules cannot decide concrete cases . . .) Thus, he argues, the substantive judgments that Habermas attempts to avoid resurface in his supposedly "removed, framing principles."[38]

Michelman attempts to salvage the constitutional patriotism concept, however, by invoking Habermas's argument that, despite the "linguistic turn" in recent social theory (the idea that language constructs reality), there are "universalist tendencies" in how people communicate with each other.[39] Habermas, explains Michelman, argues that two people will be motivated to try to understand each other only if they both assume there's a "point of convergence"—"a single object at hand, of which the parties are giving competing accounts."[40] This point, says Michelman, suggests that, for Habermas, citizens see their disagreement over issues like affirmative action *not* as a disagreement about the content of the relevant constitutional norms, but rather as a conflict over the nature of the *context* in which those norms are applied.[41] "[I]t must be," says Michelman, "the *idea of* the constitution that does the crucial work in a constitutional contractarian justification of politics, because there can be no settled agreement among a country's people on a description of

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35. *See id.* at 1023.

36. *Id.*

37. *Id.* "There will have to be," Michelman concludes, "some way in which citizens perceive even their most intractable and divisive disagreements over the *application* of constitutional norms to be directed to something other than the *content* of the norms." *Id.* at 1025.

38. *See* Jürgen Habermas, *Hermeneutic and Analytic Philosophy: Two Complementary Versions of the Linguistic Turn?* (paper presented at the Annual Meeting of the Society for Phenomenology and Existential Philosophy, Denver, Colorado, 1999) (on file with the *Denver University Law Review*).

39. Michelman, *supra* note 33, at 1013.

40. This is how Michelman puts it:

> Given disagreements over applications of essential constitutional norms, citizens don't have to ascribe them to ambiguity or vagrancy of meaning in the norms themselves. We might rather ascribe their applicational disagreements to uncertainty or disagreement about exactly who we think we are and aim to be as politically constituted people, where we think we have come from and where we think we are headed.

Id. at 1025.

the actual thing in all its concrete specificity."[42] "Constitutional patriotism," Michelman concludes, must mean,

> the morally necessitated readiness of a country's people to accept disagreement over the *application* of core constitutional principles of respect for everyone as free and equal, without loss of confidence in the *univocal content* of the principles, because and as long as they can understand the disagreement as strictly tied to struggles over constitutional identity.[43]

But this readiness, Michelman argues, is necessarily empirical and contingent,[44] and therefore cannot be the basis of a universalist, proceduralist theory such as that presented in *Between Facts and Norms*.

Finally, the most far-reaching of the critiques presented in this Symposium is the piece by Rosemary Coombe with Jonathan Cohen, entitled, *The Law and Late Modern Culture: Reflections on* Between Facts and Norms *from the Perspective of Critical Cultural Legal Studies*.[45] An elegant variation on the familiar Critical Legal Studies argument deconstructing the public/private dichotomy, this article argues that Habermas's view of law as an autonomous intermediary between the lifeworld and the administrative apparatus of government ignores the fact that law shapes the political world he sees it as merely mediating. Law's role is as much about *constructing* disputes, the authors maintain, as *resolving* them.[46]

Coombe and Cohen also take Tamanaha's critique of the focus on discourse a step further, questioning not only the ability of all citizens to succeed at the communication Habermas describes, but also the exclusion from his analysis of a variety of other possible forms of political expression, such as popular music and religious oratory. Relying on the work of Iris Marion Young, Coombe and Cohen suggest that, by elevating a form of communication—"rational" argument—that is most valued by and engaged in by the dominant groups in society, Habermas reinforces the very power he sees as needing challenging.

In addition, the authors of this piece take Habermas to task for ignoring the corporate structuring of meaning-making activities in late-twentieth-century society, as well as the government's role in regulating those activities. Like law and lifeworld, politics and culture (including

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41. *Id.* at 1022.

42. *Id.* at 1026 (emphasis in original).

43. *Id.* at 1027–28.

44. Rosemary J. Coombe with Jonathan Cohen, *The Law and Late Modern Culture: Reflections on* Between Facts and Norms *from the Perspective of Critical Cultural Legal Studies*, 76 DENV. U. L. REV. 1029 (1999).

45. "Law is not simply an institutional forum or legitimating discourse to which social groups turn to have pre-existing differences recognized, but, more crucially, a central locus for the control and dissemination of those signifying forms with which identities and difference are made and remade." *Id.* at 1035.

the economic marketplace) are not mutually exclusive categories. Political views are significantly affected by corporate media; the media do not merely serve as a conduit for the political expressions of the citizenry, but rather help to set the terms of the discussion. And law, in regulating corporate media entities, reinforces and makes possible the effect that those entities have. Drawing on intellectual property concepts as an illustration, Coombe and Cohen show how legal rules protecting the productions of multimedia corporate conglomerates, under the legal fiction that they are protecting "authorship," actually reinforce those entities' deadening hegemony over the forms of production of mass culture. In so doing, law becomes implicated in the very process of political will formation from which it is supposed to derive its legitimacy.

From complementary commentary to corrosive critique, this set of papers provides an informative and thought-provoking perusal of *Between Facts and Norms*. It also memorializes a year of fruitful interdisciplinary exchange here at the University of Denver. Hopefully, it will inspire its readers to undertake similar cross-disciplinary inquiries in the future, as well as to engage Professor Habermas's important ideas about democracy and law.