

# What's Left? Democratic Theory in *Between Facts and Norms* After Three Decades

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**Abstract:** This essay revisits my earlier 1999 critique (*Between Radicalism and Resignation: Democratic Theory in Habermas' 'Between Facts and Norms'*) of Habermas' most important contribution to political and legal theory. Some of my criticisms stemmed from a failure to address the book's complicated attempt to navigate between ‚facts‘ and ‚norms‘, and thus Habermas' vision of ‚rational reconstruction‘. Nonetheless, I argue that key elements of that original criticism not only remain pertinent, but that they can help us understand lacunae within Habermas' more recent contributions to a critical theory of politics. First, my worries about Habermas' apparent marginalization of systematic *Kapitalismuskritik* have been corroborated by his more recent writings. Second, there is no question that Habermas borrowed heavily from the democratic theory developed by Bernhard Peters, an important interlocutor for Habermas in the Frankfurt legal theory study group he coordinated during the late 1980s and early 1990s. Habermas' debts to Peters have continued to shape his thinking. While they have helped Habermas pursue some productive analytic paths, others, unfortunately, have consequently been neglected.

**Zusammenfassung:** Der Aufsatz greift meine frühere Kritik aus dem Jahr 1999 an Habermas' wichtigstem Beitrag zur politischen Theorie und Rechtstheorie auf (*Zwischen Radikalismus und Resignation: Demokratietheorie in Habermas' ‚Faktizität und Geltung‘*). Einige meiner Kritikpunkte an diesem Buch basierten auf einer unzureichenden Berücksichtigung von Habermas' Verständnis von ‚rationaler Rekonstruktion‘, also von seinem komplizierten Versuch, zwischen ‚Fakten‘ und ‚Normen‘ zu unterscheiden. Dennoch behaupte ich, dass Schlüsselemente dieser ursprünglichen Kritik nicht nur relevant bleiben, sondern dass sie uns auch helfen können, Lücken in Habermas' neueren Beiträgen zu einer Kritischen Theorie der Politik zu verstehen. Erstens wurde meine Sorge, dass es zu einer Marginalisierung der systematischen Kapitalismuskritik in Habermas' Arbeiten kommen könnte, durch seine neueren Schriften bestätigt. Zweitens steht außer Frage, dass Habermas sich stark an der Demokratietheorie Bernhard Peters orientierte, einem wichtigen Gesprächspartner für Habermas in der Frankfurter Rechtstheorie-Studiengruppe, die er in den späten 1980er und frühen 1990er Jahren koordinierte. Habermas' Anleihen bei Peters prägen sein Denken bis heute. Sie haben Habermas geholfen, einige produktive analytische Wege einzuschlagen, während andere dagegen leider systematisch vernachlässigt wurden.

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## 1. Introduction: Revisiting *Between Facts and Norms*

*Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996 [1992]) (*BFN*) remains not only one of Jürgen Habermas' most impressive works, but also the *Frankfurt School's* single greatest contribution to political and legal theory.<sup>1</sup> To be sure, first-generation *Frankfurt School* thinkers – most prominently, Franz L. Neumann and Otto Kirchheimer – had a great deal to say about law and democracy; more recent Frankfurt-oriented scholars have addressed these matters as well. Yet, *BFN's* creative discussion of the equal primordially of public and private autonomy, discourse-theoretical justification for rights and democracy, and many other innovative insights make it a landmark theoretical contribution. I cannot think of any related study that matches *BFN's* architectonic scope and raw intellectual ambition. Where else can we find such an impressive synthesis of European (though, admittedly, mostly German) with Anglophone (mostly US) legal philosophy, political theory, and the sociology of law? In a context where some Frankfurt critical theorists seem increasingly skeptical of pursuing a constructive assessment of basic rights, constitutionalism, and the rule of law, *BFN* remains not only an imposing but also timely work (see Scheuerman 2017).

I first encountered a draft of *BFN* while participating during 1990/1991, as a twenty five-year old PhD student, in a legal-theoretical research seminar Habermas conducted in Frankfurt. In some ways an accidental (and, obviously, extremely lucky) participant, for this unformed US-American graduate student the seminar presented an astonishing opportunity to gain exposure to Habermas and his Frankfurt students (including a number who are now renowned scholars), more mature scholars who were regular participants (e.g., Ingeborg Maus, Bernhard Peters), visitors from abroad (Ken Baynes, Jim Bohman), and famous occasional invitees (Gunther Teubner, Ulrich Preuss). I still have vivid memories of the photocopied draft of *BFN* and, even more vividly, my own intellectual struggle to make sense of what, given my limited formal training in legal theory, seemed like a mysterious code I desperately needed to crack. I also distinctly recall trying to situate *BFN* in relation to my PhD research on Neumann and Kirchheimer, thinkers who – to my great frustration at the time – barely appeared in the manuscript, despite some obvious thematic overlap.<sup>2</sup> I have never endorsed the overly simple assessment that *BFN* had embraced liberalism (alongside basic rights, constitutionalism, and the rule of law) at the cost of abandoning critical theory. After all, even as a young Marxist Habermas had taken such (supposedly) 'liberal' legal ideals seriously, as had Neumann and Kirchheimer before him. Nonetheless, I found myself struggling to answer a question that that

- 1 The essay was originally written for a (COVID-delayed) conference at the *Baldy Center for Law and Policy* at the University of Buffalo Law School in May 2023 dedicated to the thirtieth anniversary of the publication of Habermas' *Between Facts and Norms*. Special thanks to John Abromeit, Matt Dimick, and Paul Linden-Retek for the invitation, and to all the conference participants for a lively intellectual and political conversation. Special thanks also to Christian Joerges and Fabio Wolkenstein for important suggestions.
- 2 The dissertation morphed into Scheuerman (1994). More recently I discussed Habermas' relationship to Neumann in Scheuerman (2021).

has since preoccupied many left-leaning readers of *BFN*: how should we situate it in relation to the Frankfurt critical theory tradition? Despite my fascination with *BFN* and great admiration for Habermas, I left Germany unsure of how to answer that question.

Not surprisingly, back home in the USA I began drafting a paper on the published version of *BFN*. With the benefit of hindsight, I now see that the resulting essay's occasionally polemical tone embodied some of my frustrations with Habermas' neglect of Neumann and Kirchheimer, but also, more significantly, his ambivalent relationship to the sort of radical social critique with which Frankfurt critical theory had long been identified. The finished version of the paper made a number of critical claims about *BFN*, but two of them stand out (see Scheuerman 1999). First, I worried about what had happened to the imposing legacy of Frankfurt *Kapitalismuskritik*. Although *BFN* expressed concerns about capitalist-based social inequality and underscored the socially and economically egalitarian presuppositions of a thriving democracy, its comments on this crucial matter seemed surprisingly unsystematic. Second, democratic theory in *BFN* oscillated uneasily between, on the one hand, a 'radical' (basically socialist) model, in which deliberative publics exercise what Habermas called 'communicative power' to oversee 'administrative power', and, on the other hand, a decidedly more defensive 'realistic' (nonsocialist) version in which deliberative publics, under most circumstances, are sidelined. Directly inspired by the writings of Bernhard Peters, this second *two-track* model suggested that only during moments of crisis might deliberative civil society gain the requisite traction and meaningfully impact political decision making and 'administrative power', which Habermas had sharply juxtaposed to its 'communicative' cousin. On this more defensive strand, political decisions are generally made by a political 'system' that remains, to an unsettling degree, impermeable to free-wheeling deliberative civil society.

I shared the paper with Habermas, who pointedly responded that I had failed to understand *BFN*'s method: in particular, my (admittedly) stylized contrast between a radical and more realistic or resigned democratic theory failed to capture the complex way the book navigated between facticity and validity, or facts and norms. Because of this mistake, he bluntly claimed, the contrast between the two views of democracy "took place in your head, not in the book". As a result, I had unfairly reduced his argument – and complicated view of how facts and norms were unavoidably imbricated – to the level of a "sociological legal theory à la Neumann".<sup>3</sup>

It now seems to me that some of my criticisms did stem from a failure to address Habermas' method of 'rational reconstruction', a feature of *BFN* I had neglected. Nonetheless, in what follows, and at the obvious risk of intellectual obtuseness, I suggest that *some* key elements of my original criticism not only remain pertinent, but that they can help us understand lacunae within Habermas' more recent contributions to political theory. First, my worries about Habermas' apparent marginalization of systematic *Kapitalismuskritik*, I fear, have been corroborated by his recent writings, despite his criticisms of neoliberalism and interest in its deplorable impact on democratic politics. Second, there

3 Private correspondence to author, October 5, 1996 (translated by the author).

is no question that *BFN* borrowed heavily from the democratic theory developed by Bernhard Peters, an important interlocutor for Habermas in the Frankfurt study group. Since the publication of *BFN* Habermas' debts to Peters have continued to shape his thinking. They and other core elements of *BFN*'s democratic theory constitute the analytic backdrop to Habermas' recent writings, including his latest *New Structural Transformation of the Public Sphere and Deliberative Politics* (2022a).<sup>4</sup> Unfortunately, we can trace some of this otherwise insightful work's limitations to *BFN*.

## 2. *Kapitalismuskritik* since *Between Facts and Norms*

*BFN* boldly claimed that only in a social order that successfully “transcended class barriers and thrown off thousands of years of social stratification” could we achieve a thriving deliberative civil society and, potentially, a flourishing system of political democracy (Habermas 1996: 308). Even more fundamentally, the volume's overall argument targeted capitalist-based pathologies and their threats to democracy and the rule of law; it built on Habermas' socio-theoretical *magnum opus*, *The Theory of Communicative Action* (1984–86), which had analyzed the pathological “systemic” consequences of capitalism and bureaucratization on the “lifeworld”. Yet, as I argued in my original critique, many of Habermas' comments about material inequalities were made without clear reference to either a broader social theory of capitalism or systematic political economy. My worry was not, *pace* Simone Chambers, that *BFN* lacked a proper *normative theory of social justice*. Rather, missing was sufficient recourse to critical social theory and political economy, neither of which in my view can be neglected because Habermas, as Chambers (2017) has quite accurately noted, believes that philosophers have no privileged access to the results of practical reason or discourse. Even so, I thought – and still think – it fair game to expect a deeper theoretical grounding for – and engagement with – critical views of capitalism, at least from a thinker who has always claimed to be working in the shadows of Theodor Adorno and other members of the early *Frankfurt School*.

My sense when first encountering *BFN* was that something of the ubiquitous post-1989 market euphoria, not surprisingly, had given the work a different complexion than some of Habermas' previous writings.<sup>5</sup> To be sure, Habermas has long been a *social democrat* critical of capitalism while skeptical of standard leftist proposals to replace it *in toto* (e.g., with a planned economy, or economic democracy). Yet *BFN* nonetheless seemed to give his brand of social democracy a surprisingly cautious and sometimes defensive texture.

Since *BFN*'s appearance, however, Habermas has frequently written powerfully about the many threats posed by contemporary capitalism: *Kapitalismuskritik* has been pivotal

4 All translations from this text by the author.

5 Compare with, for example, his quite radical, left-socialist analysis of “revolutionizing late-capitalist societies” (Habermas 1970), based on a lecture given at a 1968 conference in Korcula organized by the Yugoslav Marxist *Praxis* group.

to his writings on the mass media and, most recently, digitalized social media; postnational politics, in general, and technocratic tendencies in the EU, in particular; neoliberalism and its direct threats to democracy; and, within recent years, the rise of authoritarian populism. As with many others on the democratic left, the twenty-first century's myriad crises – most importantly, the 2008 global economic meltdown – seem to have reignited longstanding skepticism about “markets” and given some of Habermas' writings about contemporary social and economic affairs a more pointed and less defensive tone. This should not surprise us: Habermas has always been a deeply political thinker. Like the rest of us he is both shaped by shifting political currents and intervenes in response to them in ways that unavoidably reproduce elements of the shifting political landscape.

Despite his frequently forceful critical remarks, I nonetheless doubt that they successfully supersede the critical concerns I raised about the limited contours of *Kapitalismuskritik* in *BFN*. To see why, we hardly need to engage in tortured exegetical calisthenics. We simply can turn to a telling 2009 interview on the global financial crisis, where Habermas bluntly states that “[s]ince 1989–90, it has become impossible to break out of the universe of capitalism; the only option is to civilize and tame the capitalist dynamics from within” (Habermas 2009: 187). He adds:

“[t]his was why, in 1973, I wrote on legitimation problems ‘in’ capitalism. These problems have forced themselves onto the agenda once again, with greater or lesser urgency depending on the national context. A symptom of this is the demands for caps on managers' salaries and the abolition of golden parachutes, that is, of the outrageous compensation payments and bonuses”.

The statement raises many questions about the status of “capitalism” in Habermas' long and complicated theoretical trajectory; I will say a bit more about these matters in just a moment.<sup>6</sup> For our immediate purposes, the statement usefully encapsulates core traits of his most recent remarks on matters of political economy.

Most importantly, Habermas seems to view capitalism as an enormously productive economic system that we cannot realistically hope to escape or transcend, though it still requires far-reaching reform (that is, taming or “civilizing”) “from within”, by political – and, more specifically – democratic means. Yet he does not apparently think it presently useful to direct, in a more unabashedly socialist vein, analytic or political energy to possible radical or antisystemic reforms that might allow us to escape from the “universe of capitalism”. Instead, he regularly argues that capitalism's potential threats to democracy have to be checked or balanced, as they apparently were with some real measure of success during the heydays of the postwar welfare state, by regulatory and interventionist means. Contemporary democracy's failure to do so, in part because of accelerated globalization processes, has created a dangerous imbalance between democracy and capitalism that presently threatens the former. Even more specifically, we need a decisive break with neoliberal policies that fetishize privatization and unregulated markets. In this vein, Habermas' many writings on postnational politics have focused on the necessity of

6 See also Scheuerman (2013).

achieving a novel, updated version of postwar regulated capitalism – e.g., new *European* social and redistributive measures – if democratic politics is to flourish.

Despite its constructive and forward-looking contours, it is hard to miss this position's occasionally nostalgic notes. As Habermas (2018a: 881, *Italics in the original*) has commented in a more recent interview:

“It is only since the Second World War that attempts to tame capitalism through the welfare state have prevailed...at least in a rather small region of the world. These in retrospect somewhat gilded ages...have nevertheless shown that the balanced implementation of *both* elements, the rule of law and democracy can achieve – namely, the political *exploitation* of a highly productive economic system to implement the normative content of constitutional democracies. In *Between Facts and Norms* I tried to reconstruct this content...In the light of this reconstruction one can discern all the more clearly the erosion of democracy that has been progressing ever further since politics, in the politically promoted process of economic globalization, more or less abdicated before the systemic pressure of deregulated markets.”

During the postwar ‘golden age’, it seems, democratic and rule of law-based states in western Europe and elsewhere did a reasonably decent job guaranteeing their requisite social presuppositions. That historical moment, Habermas suggests, is crucial if we are to understand many features of *BFN*. The key political problem at present is policymakers’ abdication in response to changing economic imperatives: they have abandoned the quest to achieve a similarly effective “exploitation” of the “highly productive economic system” of capitalism under twenty-first century conditions. On the one hand, the “capitalist dynamics of that highly productive economic society whose mobilizing power is celebrated by Marx and Engels in the *Communist Manifesto* must [...] find a counteracting complement in the cultural dynamics of civil society”. On the other hand, only a reasonably thriving civil society and effective democratic state are likely to pursue the necessary reforms. Otherwise, capitalism “will break the overstrained bond of civic solidarity” and undermine democracy and the rule of law (Habermas 2018b: 130 f., *Italics in the original*).

In this account, the relationship between capitalism and democracy takes the form of an uneasy, constantly imperiled balancing act. As 1989 and the collapse of state socialism should apparently have taught us, we must not try to ‘step beyond’ capitalism, in part because modern societies require complex markets, and in part simply because its impressive productivity generates the sort of wealth that generous social welfare states require. At the same time, successful regulatory and welfare-state measures presuppose a reasonably flourishing democracy and thriving civil society, both of which are nonetheless constantly threatened by capitalism and today are under attack in far-reaching ways.

There is much to be said in defense of this view. Yet, I remain irritated by its tendency to foreclose vital conversations, in a world plagued by shocking material inequality and terrible poverty, about possible political-economic alternatives. At any rate, it constitutes a striking downsizing of more traditional leftist critiques of capitalism, including early critical theory’s more categorical hostility to capitalism. Despite the reference to Marx and Engels, there is nothing specifically Marxist about this standpoint: parallel assessments

of the nexus between democracy and capitalism are easily found among many left-liberal scholars. The prominent US political scientist Robert Dahl, for example, analogously depicted the nexus between democracy and market capitalism as akin to “two persons bound in a tempestuous marriage that is riven by conflict and yet endures” (Dahl 2020: 166). Rather than debate the pros and cons of Habermas’ social democratic versus more radical left-socialist views of capitalism, in what follows I simply point to some resulting analytic lacunae. To do so, I conclude this section with some remarks about Habermas’ illuminating recent exchange with the left-wing sociologist Wolfgang Streeck.

Much attention, especially among political theorists and philosophers, has rightly been paid to Habermas’ critique of Streeck’s anti-cosmopolitan and arguably nationalistic political preferences. Let me say right off that I share the critical assessment of those who interpret Streeck as “clinging to national borders as a last line of defense” against capitalist destabilization; his nostalgia for the nation-state has generated some troublesome, empirically unfounded claims about immigration and other matters (Roos 2019: 282). Yet the two thinkers’ disagreements about contemporary capitalism remain illuminating. Habermas correctly observes that both he and Streeck reject orthodox Marxist economic theory (e.g., ideas about the tendency of the rate of profit to fall) (see Habermas 2015: 92; also, Shoikhetbroad 2020). Yet he faults Streeck for succumbing to a view of crisis tendencies as having an “air of inevitability” and thus political defeatism. Streeck, he claims, underestimates the political possibilities for reform offered by “the *actually existing* democratic complex [...] the established institutions, rules and practices embedded in political cultures”, which still apparently offer a launching pad for effectively resisting neoliberalism (Habermas 2015: 92, *Italics in the original*). Habermas’ profound worries about neoliberalism notwithstanding, he thinks that existing democratic states, in Europe and perhaps elsewhere, might still effectively cooperate in far-reaching ways to tame and civilize capitalism. Things, it turns out, are perhaps not so bad for democracy and the rule of law as some of his comments elsewhere might lead us to think. The immediate problem remains the *political system*’s failure to push back against neoliberalism in order to reform capitalism from ‘from within’. To do so effectively, an overdue postnational recalibration of social policy making with economic globalization must transpire.

Crucially, for Habermas *neoliberalism* here and frequently elsewhere refers chiefly to *policies* (e.g., tax policies that allow for managers to earn exorbitant salaries) that, given the right conditions and sufficient political will, democratic governments might successfully reject. In contrast, for Streeck it represents much more, i.e., a decisive make-over of a constantly evolving social order that has undergone a series of *developmental stages*, each of which has been immanently generated by a series of internal contradictions and resulting crises. With direct recourse to 1970s Frankfurt theories of capitalist crisis (including Habermas’ *Legitimation Crisis* (1973)), Streeck (2014: xiv) sees recent capitalist crises as the result of “an evolutionary and also dialectical process”, a “long developmental sequence”, in which different attempts to stabilize democratic capitalism in the postwar era each generated its own internal tensions and resulting, inevitably tension-laden, attempts to resolve them.

Habermas (2015: 92) is right that he and Streeck both view “historical conditions and contingent constellations of power yield” as essential to understanding contemporary capitalism. However, in recent political writings Habermas might be read as positing that a misbegotten neoliberal ideology ‘infected’ intellectuals and then policymakers, who, beginning with Thatcher and Reagan, worked in unison to create a series of perfectly avoidable policy shifts. He comes close to endorsing what commentators have described as an “idealist take” on neoliberalism that tends to highlight the influence of intellectuals on policymakers (Cahill/Konings 2017: 9). In contrast, from Streeck’s – and, yes, more conventionally leftist – positions, that view risks downplaying how internal tensions within the postwar capitalist political economy *invited*, though perhaps did not *necessitate*, a series of neoliberal transformations that have dramatically reshaped many features of social existence. Its key driving force has not perhaps been intellectuals or even policy makers, but privileged bourgeois *social classes* that rebelled against the postwar welfare state and regulatory regime and ignited far-reaching political and economic shifts. For Habermas, neoliberalism is primarily a political mistake, whereas for Streeck (2014: xiv) it has political contours yet nonetheless grew immanently and perhaps organically out of the crises of postwar democratic capitalism, in which “[o]stensible solutions never took more than a decade to become problems”. As such, any attempt to transcend neoliberalism entails much more than properly enlightened political actors shedding it; more fundamental institutional and ‘structural’ mechanisms are likely to impede policymakers from doing so in the first place. Streeck’s so-called defeatism reflects his multi-layered, arguably richer grasp of contemporary capitalism and its unfolding historical dynamics.

Habermas’ faith in the possibility of effective political countermeasures may have some deeper analytic roots. In his insightful critical remarks on 1970s Frankfurt crisis theories, Streeck (*ibid*: 14 f.) points out that a younger Habermas and others (e.g., Claus Offe) located the “capitalist line of fracture” no longer in the

“economy but...polity and society: located in the field of democracy rather than the economy...of social integration rather than system integration. Rather than the production of surplus value –its ‘contradictions,’ it was thought, had become controllable –the problem was the legitimacy of capitalism as a social system; not whether capital converted into the economy, would be able to keep society supplied, but whether what it was supply would be enough to make its recipients continue playing the game. Thus, for the crisis theories...the impending crisis of capitalism was not of *production* but of *legitimation*.”

In Streeck’s critique, this approach necessarily failed to anticipate the massive backlash by substantial elements of the capitalist classes against the postwar welfare state, a backlash that generated a series of systemic neoliberal makeovers. Why this oversight? According to Streeck (*ibid*: 18), “[t]he problem of the Frankfurt crisis theories...was that they did not think capital capable of any strategic purpose, because they treated it as an apparatus rather than an agency, as means of production rather than a class”. In Habermas’ recent writings on Europe, Streeck (2017: 247) points out, there is a parallel

tendency to neglect “the nature of the economic interests and conflicts underlying the contemporary politics of Europe and European integration”.

Habermas, with some undeniable justification, accuses Streeck of succumbing to a nostalgic attempt to retrieve the postwar European *nationally based* welfare state. Yet this criticism occludes Habermas’ *own* nostalgia for the postwar welfare state, even as he has of course sought a *postnational* reconstruction of its more-or-less (apparently) erstwhile effective balancing of capitalism with democracy. That nostalgia rests uneasily with his *own* decidedly more critical assessment of the postwar welfare state, as found in a range of studies extending from *Structural Transformation of the Public Sphere* (1989) to *Theory of Communicative Action* (1984–86). Moreover, Habermas risks succumbing to a political voluntarism that probably stems from his view of neoliberalism as a reversible policy mistake; thus, his endless exhortations to his social democratic political allies to ‘see the light’ and advance a more aggressively social democratic and identifiably postnational political agenda.<sup>7</sup> Unfortunately, those exhortations downplay the many structural impediments – and resulting political disincentives – to doing so. The analytic roots of this strand in Habermas’ thinking are manifold, but one of them may in fact be his longstanding view – predating *BFN* and found even within the more identifiably neo-Marxist *Legitimation Crisis* – that the fields of democracy and, more generally, politics, are ultimately most important for understanding capitalism’s contemporary crisis tendencies than the terrain of political economy or class conflict.

There are messy issues of social theory at stake here; I cannot revisit them sufficiently. Habermas, obviously is a hugely complicated thinker; for his part, Streeck draws on a rich variety of intellectual figures (e.g., Karl Marx, Karl Polanyi, and Max Weber) to construct a multifaceted theory of contemporary capitalism.<sup>8</sup> I simply worry that Habermas’ tendency to neglect such a similarly rich account of political economy and instead defend some sort of inescapable ‘capitalism’ gets in the way of addressing the tough questions. Streeck (2017: 248) reiterates longstanding worries, even among those sympathetic to his project, about Habermas’ “system-theoretically neutered” ideas of capitalism and democracy.<sup>9</sup> The Brazilian scholar Alessandro Pinzani (2022: 67) may be going a bit too far when he accuses Habermas of “objectifying” capitalism and treating it as little more than a “natural catastrophe” whose negative consequences require a response. Yet Pinzani is right that even Habermas’ critical recent remarks about capitalism too often raise more questions than they successfully answer.

Let me be clear: I am not suggesting that recent Frankfurt-oriented critical theory would have been better off if Habermas had instead devoted more of his imposing

7 As Streeck (2017: 248) has noted, for Habermas the main problem in Europe appears to be “cognitive and moral deficits on the part of both governments and the governed, while the only solution are stronger ‘pro-European’ leaders”.

8 On competing – and by no means always consistent – strands within Streeck’s thinking see Joerges (2022).

9 Recall also Thomas McCarthy’s (1991) now classic critique of Habermas’ use of systems theory. My own view is that Habermas’ system-theoretical interpretation of capitalism has allowed him to circumvent difficult questions about political economy; among his philosophically-oriented disciples, it has invited a tendency to view such issues as intellectually passe and/or irrelevant to the central tasks of critical theory.

intellectual energies to political economy or bashing capitalism. Yet I do worry that the way in which such matters have been sidelined by Habermas and so many influenced by him has generated a striking theoretical and diagnostic-political lacuna. And the resulting gap, I fear, has too often been filled by orthodox, unreconstructed versions of leftist political economy that suffer from some very real faults of their own.

### 3. *Between Facts and Norms*: Frankfurt Democratic Realism?

I still think that my original anxieties about Habermas' extensive debts to his Frankfurt legal theory group interlocutor, the late Bernhard Peters, remain legitimate. Interestingly, in Habermas' otherwise very critical letter responding to a draft of my essay, he conceded that he had in fact learned a great deal from Peters, "which should hardly come as a wonder in light of five years of close work together".<sup>10</sup> My impression when first reading *BFN* was that Habermas had gone too far to accommodate Peters, a brilliant scholar whose intellectual temper was deeply at odds with those who have advocated ambitious, oftentimes radical ideas of popular sovereignty and self-government. Though no political conservative in the mode of Joseph Schumpeter, in some major (and still, unfortunately, mostly untranslated) publications, Peters fought hard to integrate what we might accurately describe as core realist intuitions into deliberative democratic theory.<sup>11</sup> Notwithstanding this programmatic agenda's potential merits, it paved the way for *BFN*'s unduly modest *two-track model* of deliberative democratic politics.

Those debts are most striking in chapters seven and eight of *BFN*, where Habermas (1996: 356) relies extensively on Peters to proffer a "sociological reconstruction of discourse theory", or what he has more recently dubbed "a sociological analysis of what is realistic in the concept of *deliberative politics*" (Habermas 2015: 47). This sociological reconstruction, Habermas (1996: 287) argued there, seeks to transcend the commonplace but unproductive divide between empirical and normative political theories, in part by rebuilding democratic theory's "basic concepts in such a way that it can identify particles and fragments of an 'existing reason' already incorporated in political practices, however distorted these may be". As I interpret Habermas' use of Peters, his colleague's relatively hard-headed views about democracy provide a fruitful starting point for capturing how *existing* democracy already includes 'particles' of reason that remain insufficiently

<sup>10</sup> Private correspondence to author, October 5, 1996 (and translated by the author).

<sup>11</sup> See, in particular, Peters (1993). Peters, who went on to become a professor of political theory at the University of Bremen, passed away tragically from cancer in 2005. Despite our intellectual disagreements, I admired Peters enormously and remain grateful for his decency and kind words to me as a young graduate student – and then, in 1997, as an Assistant Professor visiting Frankfurt – for his warmth and hospitality. Like many of the most perceptive critics of radical politics, he had once been immersed in it; unlike many others who have undergone a similar transformation, even when rejecting political and theoretical positions he had once embraced he remained respectful of – and, in my case, unnecessarily indulgent towards – those who continued to try to hold onto some version of them. I happily directed a dissertation that made constructive use of Peters' writings; that dissertation was the basis for Kersey (2016).

developed or tapped. Deliberative democracy, in other words, is not a mere 'ought' or purely normative. Simultaneously, it can provide normative and political guidance for those seeking democratic reform. Peters' views, despite their empirical and purportedly realistic contours, are – according to Habermas (1996: 356 f.) – in some ways demanding and thus do transcend the status quo. As Habermas (*ibid*: 354) concludes, he thus can make constructive “use of Peters's model to give a more precise form to, and seek a tentative answer to, the question of whether and how a constitutionally regulated circulation of power might be established”.

The first key lesson Habermas draws from Peters is that any reading of deliberative politics as modeled directly on some utopian vision of “purely communicative social relations” is untenable. Idealized views of a fully and immediately communicative polity and society fail to acknowledge the “unequal distribution of attention, competences, and knowledge within a public” (Habermas 1996: 325). They also downplay elements of “egocentrism, weakness of will, irrationality, and self-deception on the part of participants,” as well as the apparently “unavoidable division of labor in the production and diffusion of knowledge” and resulting “unequal distribution of information and expertise” (*ibid*: 325). So Habermas (*ibid*: 304 ff.) initially taps Peters to push back against those (e.g., Joshua Cohen) who have endorsed deliberative conceptions of legitimacy as a way of achieving a radical democratization of political and social life, including the economy. Such thinkers obscure irrepressible impediments to deliberation as an ideal procedure that can be directly “‘mirrored’ in social institutions as much as possible” (*ibid*: 305).

Although I failed to point this out in my original criticism, even here one might cautiously resist Peters' (and Habermas') strong claims about 'unavoidable' checks on a more 'purely' deliberative social order. The impediments described seem, for the most part, subject to huge variations, depending on a variety of social and historical factors: for example, unequal attention spans, though undeniably a major challenge to radical visions of egalitarian popular rule, vary as an empirical matter even within and among existing liberal democracies. Given such variations, it is hardly self-evident that radical attempts to establish deliberative democracy more directly within a variety of social spheres should *a priori* be excluded from consideration. Cohen and others who have given deliberative democracy a more radical (and identifiably socialist) spin could surely acknowledge the soundness of Habermas' (and Peters') underlying worries (about our limited attention spans, limited time for discussion, and so on). However, since such impediments to a more thoroughgoing rendition of deliberative democracy remain, in principle, socially malleable, their existence hardly constitutes a knock-down argument, for example, against a more immediately and directly deliberative-democratic economic order. Whether or not such models are 'realistic' is perhaps better left to democratic and, yes, institutional experimentation.<sup>12</sup>

12 As grasped, for example, by John Dewey, who had far more to say than Habermas about the possibility of reconstructing economic life in a more democratic fashion. For a discussion see Westbrook (1993: 429–463).

Peters' second main take-away for Habermas is that we need to envision democratic politics as operating on two tracks. On this view, deliberative publics and civil society *typically* remain distant from actual political decision making, which Habermas (following Peters) locates in a political-institutional 'center' consisting primarily of government, parliament, the administration, and judiciary. Located instead at the political system's 'periphery', deliberative civil society during 'normally' operating politics more-or-less inevitably plays second fiddle when it comes to shaping policymaking. Even within the political system's center, that institution most closely linked to deliberative publics, the legislature, is often marginalized: "the initiative and power to put problems on the agenda and bring them to a decision lies more with the government leaders and administration than with the parliamentary complex" (ibid: 380). Only during "exceptional" moments of crisis and heightened political conflict, and thus in periods of crisis, should we expect not only effective political mobilization within a broadly deliberative civil society, but also an elected legislature that can "*actually determine* the direction" of the political machinery (ibid: 357).<sup>13</sup>

I will not bore readers by repeating my previous criticisms of this model, which I still consider unsatisfyingly cautious and limited, and not simply considering Habermas' *Frankfurt School* credentials. In the final analysis, his 'sociological reconstruction' of discourse theory leaves us with a basic model of democracy, though open to some modifications, that appears to justify leaving many significant day-to-day decisions within the upper branches of a political machinery that, from a more robustly radical democratic perspective, would be inappropriately independent of popular deliberation and political mobilization. Habermas' model surely succeeds in linking his otherwise abstract theory to "real" features of existing democracy. However, it does so at the cost of unnecessarily sacrificing democratic and institutional imagination. To be sure, Habermas (ibid: 358) worries about the "illegitimate independence of social and administrative power vis-à-vis democratically generated communicative power" in existing liberal states. Accordingly, he notes "a growing need for integration that renders crises permanent, stimulates the public sphere, and makes accelerated learning processes necessary" (ibid). Nonetheless, his appropriation of Peters' realist-inspired two-track model places excessive – and arguably unnecessary – limitations on meaningful and by no means unduly utopian prospects for more far-reaching democratic reform. Habermas is surely right, for example, that inequalities in knowledge and expertise pose profound challenges to more radical renditions of deliberative democracy. Yet that fact hardly necessitates a political order in which democratic citizens and deliberative publics are for the most part relegated to the sidelines of everyday or normal democratic politics. Even if we accept some of Habermas' criticisms of an idealized, utopian, purely deliberative social order, there is still significant space for more ambitious ideals of political and social democracy than his two-track model abides.

13 Walter Lippmann (2009: 56, 96), in his *Ur-realist* classic *The Phantom Public* introduced the idea that only during "crises" is "public opinion" aroused; otherwise it typically remains "at best, a reserve force that may be mobilized" by political elites.

Unfortunately, I find no real evidence in Habermas' more recent political writings that he has distanced himself from that model. On the contrary, in a 2006 lecture dedicated to Peters, he referenced it again and appeared to endorse its main features (see Habermas 2009: 158–167). As he has noted as recently as 2022, “we must learn to read the ‘organizational’ part of the constitution like a flowchart,” or what he previously described in *BFN* as a two-track deliberative democracy operating via a series of “sluices” (*Schleusen*). By doing so we can apparently “see how the process of democratic public opinion- and will-formation often only makes a *limited contribution* toward legitimate exercises of political rule” (Habermas 2022b: xv-xvi). What I would like to do in the final section of this essay is to suggest how fidelity to the two-track model, along with the lack of institutional imagination that it invites, implicitly circumscribes the contours of Habermas' recent reflections of what he describes as a ‘new’ structural transformation of the public sphere, as generated by digitalization and the ascent of social media.

#### 4. Habermas and the ‘New’ Structural Transformation of the Public Sphere

Habermas, as we would expect, has many insightful things to say about digitalization and its role in the ongoing authoritarian revival. However, *New Structural Transformation of the Public and Deliberative Politics* (2022a) suffers from lacunae arguably related to *BFN*'s democratic-theoretical limitations.<sup>14</sup>

Habermas' latest volume describes three interrelated trends as essential for understanding the emergence of authoritarian populism. First, in good social democratic fashion, he again observes that the postwar compromise between democracy and capitalism has been badly shaken by neoliberalism and the economic globalization. The result is that governments often fail to respond effectively to the preferences and interests of many voters, a growing number of whom experience social exclusion. “Left behind” or “hung out to dry” (*abgehängt*), if only because of a failure to adapt to accelerated technological and social transformation, they provide an opening for authoritarian populists bent on attacking “the system” as such (Habermas 2022a: 34).

Second, recent failures to ‘tame’ and ‘civilize’ capitalism generate not just social inequality but also political alienation. Habermas reiterates his longstanding skepticism about standard attempts to delineate ‘ideal’ (or normative) from ‘empirical’ (or realistic) democratic theories. Normativity is always constitutive of ‘real-life’ democratic institutions and practices. Modern democracy presupposes normative idealizations without which political life might simply dry up, e.g., many of us would simply not bother to participate in the first place. Some implicit recognition of the “normative core” (*normativer Kern*) of the democratic constitutional state as resting on free and equal citizens, for example, probably provides us a motivation to act, despite empirical realities that too

14 Some of the paragraphs that follow have appeared, in slightly altered form, in my contribution to a *Constellations* symposium on Habermas' *New Structural Transformation of the Public Sphere* (see Scheuerman 2023).

often conflict with demanding normative ideal of equal liberty under the law (Habermas 2022a: 16, 71). Absent *some* implicit sense of the intuition that *each of us* is a free and equal citizen deserving of respect, why bother turning up at the polls? Even if democratic politics typically fails to live up to its own inherent normativity, political stability – and by this Habermas seems to mean: the willingness of enough of us to participate constructively in the political process – demands that empirical conditions have *some* relationship to democratic ideals. Citizens should be able to identify, however imperfectly, with the political ‘game’ and its resulting policies.

On this view, authoritarian populism’s appeal derives partly from contemporary democracy’s failure to provide a minimal real-life corroboration for its normative bases. Because policy and the political process too often seem disconnected from its implicit idealizations, voters have become disaffected; many have stopped voting altogether. Real life politics appears to shake (*erschüttern*) and even deny (*dementieren*) the democratic state’s normative essentials (see Habermas 2022a: 17, 27, 93). This lacuna then invites authoritarian challenges such as the January 6, 2021 Trump-inspired extremist right-wing attack on the US Capitol. Why? Those who lose faith in democracy become easy targets for right-wing populists who exploit their frustrations and the resulting antidemocratic potential (see Habermas 2022a: 33 f., 71 f.).

Third, Habermas – like many other political observers – worries that new information technologies and social media are playing into the hands of populists who effectively peddle misinformation and far-out conspiracy theories. As he notes, mainstream media are increasingly forced by market pressures to imitate social media’s at first glance inclusive and nonhierarchical but – at second glance – fundamentally profit and corporate-driven contours. This tendency seems to undermine public receptiveness towards serious political news and discussion (see Habermas 2022a: 51). The new technologies, he notes (following the insightful work of Shoshana Zuboff), have been hijacked by large quasi-monopolistic firms that design and manage them chiefly to collect data about users as a basis for new forms of capitalist accumulation (see Habermas 2022a: 54; Zuboff 2019). Though Habermas does not categorically deny the new technologies’ deliberative potential, he worries that they at present too often fragment and dissolve public spheres: digital platforms function as “echo chambers” for like-minded “followers”, who cordon themselves off from those with dissonant opinions. Contemporary corporate-based social media invite the proliferation of sharply competing, sometimes antagonistic online “communities” that depend on contradictory and probably incongruent epistemic standards (Habermas 2022a: 53).

For Habermas, social media have increasingly become vehicles for oddly “half-public” (*halb-öffentlich*) consumption and self-presentation. News and political discussion blend with entertainment, hucksterism, and narcissistic self-presentation. Public and private are fused such that the idea of an inclusive public sphere, open to a diversity of opinions and interests and characterized by serious deliberative exchange, gets lost (Habermas 2022a: 59 ff.). The problem is not “fake news” per se, but instead that too many of us can no longer even delineate it from reliable journalism. The very possibility of

perceiving a properly *political* public as such (*als solcher*), in which matters of public interest are more-or-less rigorously interrogated, is imperiled (Habermas 2022a: 12).

Let me just underscore that I find all three lines of inquiry insightful. Nonetheless, they evince some oversights related to *BFN*'s earlier limitations.

Habermas' first, basically social-democratic explanation for authoritarian populism only takes as so far. Let me just mention one reason: many who flocked to Trump and others like him elsewhere belong to relatively privileged social groups that, if anything, have been *overrepresented* in decision making and policy, e.g., rural white voters in the US, who enjoy systemic advantages via the US Senate and other anachronistic political institutions. Pollsters have pierced the myth that Trump drew his support mostly from the white working class.<sup>15</sup> Similarly, Brazil's Jair Bolsonaro relied on the backing of disproportionately middle and upper-class voters in his country's richest, most developed areas.<sup>16</sup> These are not, in fact, voters it necessarily makes sense to describe as "left behind" or "hung out to dry" (*abgehängt*) (Habermas 2022a: 34). On the contrary, many – and, in some national settings, perhaps *most* – of them are beneficiaries of rapid-fire social and economic shifts. Despite their hostility to some elements of neoliberalism (e.g., free trade and open borders), they often want an even more dramatic rollback of core elements of the modern regulatory and welfare states (e.g., environmental regulations, redistributive policies favoring the poor). A more nuanced political-economic analysis might allow us to get a better handle on the sources of this radicalization among such decidedly bourgeois strata, along with their enthusiasm for authoritarian strongmen such as Bolsonaro and Trump. I am not convinced that Habermas' social and economic diagnosis, along with the rather limited view on neoliberalism on which it rests, does the job.

I also find Habermas' claims about digitalization and social media insightful yet similarly limited. His discussion of this supposedly 'new' structural transformation of the public sphere, in fact, echoes the bleak but still illuminating assessment of contemporary society he sketched in the closing sections of *Structural Transformation of the Public Sphere* (1989). There as well, he diagnosed an ambivalent blurring of public and private, and the emergence of a messy overlap between state and society that denied sufficient possibilities for a properly critical public sphere or, for that matter: the prospects of *citizenship* committed to the public good. Other key parallels between Habermas' new book and its predecessor spring to mind: in 1962, Habermas similarly expressed skepticism about then relatively 'new' media technologies (e.g., television); he argued that broader social trends, augmented by troublesome tendencies in the mass media, opened the door to a personalized plebiscitarianism having authoritarian contours. In his latest book, Habermas (2022a: 58) alludes to – but does not explore – the peculiar marriage of plebiscitarianism, right-wing populism, and social media, a key theme that has been

15 See, for example Silver (2016).

16 To be sure, Bolsonaro, like Trump, gained support from those of modest economic means with conservative religious views (e.g., pentecostals and evangelicals); like Trump as well, he had a strong base of support among police and military personnel. For a discussion see Nobre (2022).

discussed astutely by other critical-minded scholars and requires more careful attention.<sup>17</sup> The original *Structural Transformation* also concluded with calls to update the social welfare state's constitutional framework so as to help guarantee the preconditions of wide-ranging, critical public exchange (see Habermas 1989: 222–235; 2022a: 66 f.). Massive recent changes to the media system (and its technological presuppositions) notwithstanding, I wonder whether the changes at hand represent as novel a 'structural' transformation as Habermas implies.

My sense is that Habermas is probably forced to overstate the novelty of such trends for an analytic reason we can trace to *BFN*. While sketching his two-track model, he conceded that its success depended on the satisfactory fulfillment of "normative expectations connected with deliberative politics on the peripheral networks of opinion-formation" (Habermas 1996: 358). Stated crudely: for the two-track model to work, far-reaching deliberation and communicative 'networks' based in civil society were imperative. Civil society would need to possess the capacity to perceive, interpret, and present society-wide problems in a way that is both attention-catching and innovative. The periphery can satisfy these strong expectations only insofar as the networks of noninstitutionalized public communication make possible more or less *spontaneous* processes of opinion-formation (see Habermas 1996: 358).

Not surprisingly, some of Habermas' major political writings since *BFN* have focused on the problems of *political communication in media society*, the title of an important 2006 lecture and subsequent publication (Habermas 2009: 138–183). In the same spirit, *New Structural Transformation* zooms in on pathological tendencies in the mass media and present-day deliberative 'infrastructure' on which his model of democracy relies. Such trends not only constitute an (allegedly) novel structural transformation of the public sphere but also invite authoritarianism.

Obviously, this is a potentially fruitful line of inquiry. Yet I fear that it leaves us with a somewhat circumscribed view both of populism and the daunting political challenges at hand. In his original 1962 masterpiece, Habermas analyzed not only shifts in journalism and the mass media, but also closely related – and equally significant – transformations of key political and legal institutions (e.g., the demotion of parliament, decline of legality, rise of an authoritarian administrative state, etc.). In his updated version of the argument, in contrast, such matters seem rather peripheral, in part perhaps because of the author's fidelity to a two-track-model of democracy: that model too narrowly delineates the range of permissible democratic and institutional reforms and, more generally, circumscribes the democratic and institutional imagination. This strand in his thinking perhaps also leads him to overstate the role of shifts within the news and mass media; at any rate, authoritarian populism's other constitutive elements and causal driving forces do not make much, if any, of an appearance. The whiff of institutional complacency that plagued his original two-track model arguably resurfaces in the limitations of his contemporary political diagnosis.

17 See also Gerbaudo (2019); Nobre (2022: 51–80, 137–145).

Just to be clear: I am not faulting Habermas for failing to perform an intellectual magician's act, i.e., provide a complete theory of contemporary authoritarian populism. But I am struck by the extent to which *New Structural Transformation* neglects major shifts in political and legal institutions and political parties, and the role such shifts have undoubtedly played in the recent authoritarian resurgence. If I am not mistaken, this neglect stems in part from a two-track model that was always insufficiently vexed by both the centralization of political decision making and mass political disinterest during 'normal' political times. Of course, Habermas has never been a complacent defender of the political or social status quo. Yet in his quest to tap Peters' realist-inspired theory in order to identify 'particles of reason' within existing democratic practice, Habermas may have marginalized some tough questions about 'real-existing' liberal democracy and its many troublesome developmental trends; e.g., the seemingly universal ascent of executive plebiscitarianism, a dumbing down of citizens and popular discourse that predates the rise of social media and information technologies, the personalization of key political institutions. Because those trends represent a crucial source for the present-day authoritarian revival, their neglect means that his discussion of populism is similarly one-sided.

## 5. Concluding Reflections

Given my general sympathy for many features of Habermas' political and legal theory, some of my comments will likely strike some readers as sectarian and even perhaps tendentious. Yet, precisely because *BFN* remains a major theoretical contribution from which we can learn so much, it is vital that we identify possible weaknesses. If I am right to suggest that such weaknesses illuminate problems within Habermas' otherwise quite admirable more recent political and theoretical interventions, they deserve our careful attention. As he (2018a: 873) has nicely put it in a recent interview, "[t]o argue is to contradict", and to argue with – and contradict, when appropriate – a thinker from whom we can learn so much remains very much worthy of our energy and time.

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