

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

William E. Scheuerman *

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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.

* William E. Scheuerman, Indiana University (USA)
📧 0000-0001-8054-6481, Kontakt: wscheuer@iu.edu

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.¹ 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.² 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).