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Hugh Baxter. *Habermas: The Discourse Theory of Law and Democracy.* Stanford: Stanford Law Books, 2011. 352 pp. $60.00 (cloth), ISBN 978-0-8047-6912-9.

Reviewed by Steven Klein (University of Chicago)
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Communication Breakdown: Critiquing Habermas's Discourse Theory of Law

Hugh Baxter's book provides an accessible introduction to German philosopher Jürgen Habermas's contributions to legal philosophy and the sociology of law. By giving as much weight to the empirical and sociological side of Habermas's thought as to the normative side, Baxter also succeeds in providing a welcome addition to the critical literature in general. Baxter focuses on what he takes to be the most original aspect of Habermas's project: namely, Habermas's attempt to integrate normative philosophy and social theory so as to produce an account of liberal democracy that shows how its ideals can be realized in complex modern societies. This project, already latent in Habermas's first book, *The Structural Transformation of the Public Sphere* (1962), came to fruition in his *Between Facts and Norms: Towards a Discourse Theory of Law and Democracy* (1992). In between, Habermas wrote his definitive contribution to social theory, *The Theory of Communicative Action* (1981), where he introduced his sociological distinction between the system and the lifeworld, the object of much of Baxter's critical attention. Baxter rightly calls attention to the deficiencies of Habermas's "two-level theory of society," especially Habermas's persistent difficulty explaining how the two domains relate to each other. However, as I argue below, Baxter's own suggestion that Habermas incorporate more of system theorist Niklas Luhmann's "autopoetic" theory of law would blunt the critical thrust of Habermas's approach to the sociology of law.

Baxter begins by outlining the social theory Habermas develops in *The Theory of Communicative Action*. Drawing on Talcott Parsons's systems theory and hermeneutic sociology, Habermas there introduces the concepts of "system" and "lifeworld." Put briefly, "system" refers to domains of social action where individuals successfully coordinate their behavior without reference to values or use of persuasive arguments, i.e., the economy and the state administration. "Lifeworld" is the domain of social action coordinated by the taken-for-granted cultural values of a society, for instance, the family and most everyday interactions. One of Habermas's central claims is that Western modernity can be understood as a "decoupling" of systems and lifeworld. The economic and administrative systems become increasingly able to pursue autonomous, self-generating goals, independent of either cultural values or democratic control. Without such controls, the system of the economy and the state bureaucracy risk "colonizing" the lifeworld, disrupting patterns of everyday cultural interaction by imposing systemic forms of rationality.

Baxter repeatedly criticizes Habermas for being unable to explain how those two domains interact with each other after they are decoupled. In the first place, Baxter argues that Habermas presents a hyperbolic account of the distinction. Habermas at times veers toward saying that systems function without any norms at all. For instance, it is far from obvious that bureaucracies operate entirely through the "steering medium" (to use Habermas's phrase) of power, or the issuing and obeying of commands. Rather, they inevitably draw on cultural values and rational debate in defining and pursuing goals, albeit perhaps to a much lesser extent than the activities Habermas includes in the lifeworld. As a result of this stylization, Baxter argues, it is unclear how system and lifeworld relate to each other in modern societies. Habermas wants to argue that systems need to be "anchored" in the lifeworld if they are to function, but his theoretical commitments make it hard to see how such anchoring can occur. In the end, Baxter argues, Habermas reverts to a functionalist social theory, one where the lifeworld is reduced to ensuring mass loyalty and social stability, that betrays his original theoretical and political intentions.

Baxter then moves on to the theory of law and democracy Habermas develops in *Between Facts and Norms*, beginning with Habermas's reconstruction of the norma-

tive principles of modern law and then examining his theory of legal adjudication. With regard to the normative dimensions of modern law, Habermas attempts to integrate the liberal tradition's focus on private liberty with the republican tradition's emphasis on popular sovereignty. He argues that private liberty and public autonomy mutually presuppose each other and therefore must be co-equal in modern constitutional orders. However, Baxter argues that this integration only works because of the level of abstraction at which Habermas argues. In concrete constitutional states, it certainly seems like liberty-preserving constraints trump the autonomy of lawmaking. Turning to Habermas's theory of adjudication, Baxter faults Habermas for failing to incorporate common law into his more continental theory of adjudication. Furthermore, he argues that Habermas's approach rests on a distinction between discourses of justification and discourses of application that is problematic and vague in practice.

In a fascinating discussion, Baxter next evaluates the mature social theory of *Between Facts and Norms*. Habermas now gives much more weight to civil society, the public sphere, and, of course, law than he did in his earlier account. Law, he argues, can function as a hinge between system and lifeworld, as legal norms leave it up to the addressee whether he or she will follow them for strategic or normative reasons. This all goes some way toward addressing Baxter's objections to the initial formulation of the system/lifeworld distinction. To the system/lifeworld distinction, Habermas adds the idea of a circulation of power that divides the political system into center, semi-periphery, and periphery. He thus emphasizes the anonymous flow of arguments that move from the anarchic public sphere up into legislative institutions. In contrast to his earlier pessimistic account of system colonization, Habermas is here much more optimistic about the potential to democratically steer the economy and the state administration. This new framework, Baxter argues, leads Habermas to quietly revise the concepts of "system" and "lifeworld" to the point that the old framework is effectively abandoned. While Baxter welcomes this, he worries that Habermas is now unable to specify the boundaries of the legal system. In his attempt to develop a complex theory that mediates between law and politics, Habermas risks reducing law to politics. As a result, Baxter implies, Habermas could fail to appreciate what is distinctive about law in modern societies.

In response to this problem, Baxter argues that Habermas should selectively incorporate more of Niklas Luhmann's autopoetic theory of law. Luhmann has been a frequent foil for Habermas. Unlike Habermas, Luhmann wants to develop a comprehensive social theory using only systems theory. Instead of Habermas's steering mediums, he uses the idea of a "code" to distinguish various systems. For example, the legal system includes any statement whose force comes from the "coded" distinction between legal and illegal. For Luhmann, all of modern society can be divided into distinct, self-regulating systems whose operations can be understood through an analysis of their codes. Habermas objects to Luhmann's theory because it presents systems, and especially the legal system, as each communicating in completely distinct languages, so it is unclear how they can talk to each other at all. While Baxter is not a fan of Luhmann's idea of codes, he thinks that Luhmann's theory can be refurbished by focusing on what Baxter calls communicative themes. Thus, the legal system would consist of all communications "oriented toward the theme of legal validity (or invalidity)" (pp. 181-182). He thinks this reformulation, combined with more emphasis on how systems are cognitively open to disruptions from their surrounding environments, can overcome Habermas's objections.

However, Baxter's argument only works if one takes Habermas's polemics as merely targeting the explanatory power of Luhmann's theory. Rather, Habermas thinks that Luhmann's difficulty explaining intersystemic communication is symptomatic of a more fundamental normative-methodological flaw: Luhmann is a positivist in a way Habermas is not. Luhmann hopes to develop a social theory that appreciates human communication but is purged of all normative premises. As a result, Luhmann's theory leaves no room for the ordinary language communication that is at the basis of Habermas's entire approach. Unlike systemic communication, engaging in ordinary language communication commits the speaker to certain normative principles of rational argument that Habermas reconstructs with his discourse theory of morality. Discourse ethics in turn forms the basis of his reconstruction of the normative principles of liberal democracies.

Baxter neglects this part of Habermas's objections to Luhmann. Luhmann's approach reduces law to just one system among many. Yet as Habermas repeatedly argues, law is unique in that it is a system whose norms can be considered valid in two senses. From a systems theoretical perspective, legal norms are valid insofar as they have the positive sanction of state power. Equally important, however, is the fact that legal norms are valid in a *normative* sense. In modern democratic societies, citizens presume that legal norms can be argumentatively redeemed

in ordinary language, and that if they cannot be, that they are open to challenge and change. The implication of all this is that communication oriented toward legal validity can only be considered part of a system if it only considers a law's positive validity. As soon as it takes on a normative character, it cannot be considered part of a system in Luhmann's sense, yet the speech is still oriented toward legal validity. Thus, it is unclear how Baxter can use his criterion of communication oriented toward legal validity to demarcate the legal system, unless he wants to jettison the normative dimension of Habermas's project.

One of Habermas's great achievements is to show that these two legal perspectives–positive and normative validity–are equally important. The sometimes-ambiguous nature of Habermas's sociological categories reflects his attempt to understand the complex mediation between these two dimensions of law in modern Western societies. Moving Habermas closer to Luhmann dilutes the moral force of Habermas's argument. It makes the interaction of law with other parts of society a matter of empirical interest but normative indifference. Habermas usually argues at a staggeringly high level of abstraction, so the sort of careful explication Baxter provides often reveals little-noted problems. However, Baxter's objections fail to add up to a compelling alternative perspective and risk obscuring what is truly innovative in Habermas's project. Despite his appreciation of liberalism, Habermas's political instincts lean more toward radical democratic and socialist conceptions of an egalitarian self-governing society. Critics of these political traditions have argued that they not only fail to recognize the value of the rule of law but also actively undermine it, subordinating the law to unpredictable majorities and arbitrary socioeconomic demands. Habermas turns the table, showing that even the most minimal accounts of legal validity point toward an expansive democratic project, and that it is the supposedly realistic conservative skeptics who undermine the rule of law by insulating law from democracy. None of this is to say that Habermas's theory, especially his distinction between system and lifeworld, is flawless, and Baxter's book valuably and carefully lays out many of those flaws.

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