

Rawls in Germany

Jan-Werner Müller *All Souls College, Oxford, UK*



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ABSTRACT: This article analyses the reception of John Rawls's thought by Otfried Höffe, Jürgen Habermas and other political theorists on the German liberal left. It argues that, ironically, as Rawls's theory has become more historically self-conscious and sociologically oriented since *A Theory of Justice*, Habermas, while denying any fundamental difference between him and Rawls in this 'neo-Kantian family quarrel', has moved in the opposite direction. One might even say that there has been some mid-Atlantic convergence in political theory. Nevertheless, there remain peculiarities of German political thought, in particular its more sociological bent, a (positive or negative) fixation on the state, and the persistently felt need finally to reconcile a perceived conflict between liberalism and democracy.

KEY WORDS: *Habermas, Höffe, political liberalism, Rawls, social justice*

In this article I first outline three common assumptions – or perhaps clichés – about German political thought: its close association with sociology, its tendency to historicize philosophy, and its supposed fixation on the state.¹ I seek to test these assumptions against the case of the Rawls reception in Germany. To that end, I outline the belated reception of Rawls by Otfried Höffe, Jürgen Habermas and other political theorists on the liberal left. I argue that, ironically, as Rawls's theory has become more historically self-conscious and sociologically oriented, Habermas, while denying any fundamental difference between him and Rawls in this 'neo-Kantian family quarrel', has moved in the opposite direction. One might even say that there has been some mid-Atlantic convergence in political theory.

The Rawls reception shows, above all, that the German left has become reconciled to liberalism and the rule of law in particular. This liberal and legal turn seems to have been another chapter in Germany's much debated 'Westernization' – yet, arguably it has also meant the loss of peculiar traditions of social thought, which, in some way, actually presented a theoretical advantage over Anglo-American approaches.² In particular, the tendency to draw social and political

theory together and the attempt to do justice to the sheer complexity of modern societies is increasingly eclipsed by more analytical (and often sociologically and historically impoverished) approaches. On the other hand, just like elsewhere in the West, questions of social justice seem to have receded into the background, as issues of democracy, diversity and deliberation have gained more salience. There is now also an established field of ‘critiques of egalitarianism’ in the Federal Republic, some of which hark back to Robert Nozick’s *Anarchy, State and Utopia*. As has sometimes been remarked, the interesting question might be not so much how ‘Rawlsianized’ German liberalism has become, but why is there no libertarianism in Germany? For better or for worse, complementing liberal theories of justice with libertarianism seems to have been a further step towards ‘Westernization’.

German Political Thought: Concepts and Cliches

There are two common perceptions – or, perhaps, clichés – about German political thought, which I shall try to both confirm and subvert in this article. The first concerns the supposedly more sociological bent of German political theory. German theorists are always grappling to come to terms with social complexity (with Niklas Luhmann as the *maître penseur* in this regard), while also being preoccupied with questions of political stability and social integration. This, one might say, is both the virtue and the vice of German political theory. In the tradition of Max Weber, it makes theorizing more realistic, perhaps in certain ways even more politically responsible. From this sociological and realist perspective, the ethico-political tradition from Hobbes to Rawls can only ironically be termed ‘vetero-European’, as Luhmann has done.³ On the other hand, the premature introduction of social complexity and historical specificity often muddies the normative waters before any clear and analytically reflected moral intuitions can be discerned.

In the same vein, historicization is both the virtue and the vice of German political thought. It would seem that historicization has the advantage of making us aware that moral intuitions evolve over time – without thereby becoming necessarily relativized or losing their force – and that political thought necessarily is subject to cultural as well as logical constraints.⁴ Arguably, however, relentless historicization blunts the moral force of an argument – after all, it is arguments that convince us as moral agents, not genealogies.

Beyond historicization, there is of course also historicism, that is, broadly speaking, the idea that theory and history are somehow intimately connected. Habermas, for instance, despite his long theoretical journey from a Frankfurt School legacy of Hegelian Marxism in the 1950s and 1960s to neo-Kantianism in the 1990s, still clings to a notion of ‘reason in history’, or at least a relation between reason and history. This of course ties in with the old notion of critical theory that theory has to be related to some historical subject of emancipation,

even if it is clearly no longer the proletariat, and if the ‘master concept’ of labour has been displaced by communication.

Then there is the supposed fixation of German political thought on the state. What the prominent political scientist Wilhelm Hennis has called the *Problem der deutschen Staatsanschauung* (the problem of the German view of the state) has indeed posed a problem for much of post-war liberalism.⁵ The ideal of a powerful, rational state standing above society and remaining immune from the sectarian interests of groups in society constituted a benchmark not just for conservatives, but also for liberals. Since Hegel, in one way or another, the state–society distinction has been a kind of theoretical axis on which much German political thought has turned. If anything, the tragedy of German political thought appears to be that at least until the 1990s *étatistes* and *anti-étatistes* remained fixated upon each other, with anti-authoritarians advocating ‘direct action’ and statists eager to show the necessary and ultimate reality of a ‘strong state’. Both were being pulled by centrifugal anti-liberal forces. But even liberals seemed prone to the illusion that the rules were all that mattered – if only one designed the state and its procedures correctly, desired political outcomes would follow.

Arguably, the theorists most likely to transcend these fixations have actually been Habermas and Luhmann, despite all their differences. Making communication central to social and political theory and employing a sophisticated theory of functional differentiation as the main characteristic of modernity have been attempts to move away from notions of an all-powerful state standing above and directing society as a whole. However, the fact that both are social theorists, rather than political philosophers, is telling in this regard.⁶

Now, if these characteristics are broadly correct, then one might think that the auspices for an extensive engagement with Rawls in Germany would not have been too favourable. After all, Rawls offered a theory that was ahistorical, largely a-sociological and rather agnostic on the question of the state as such. Moreover, while Rawls drew heavily on economics and rational choice theory, such individualistic Anglo-American approaches were not likely to chime with leftist thinkers in Germany.

The Early Rawls Reception in Germany: Back to Nature

In general, it seems fair to say that there has been a delayed and fragmented theoretical reception of Rawls in Germany. Rawlsian thought penetrated German political thought at a point when much of academic political theory was still characterized by a robust institutional liberalism. This kind of liberalism had been shaped by the imperative not to repeat the mistakes of Weimar, by anti-totalitarianism and by a sometimes rather restricted understanding of democracy. While thinkers such as Theodor Eschenburg, Karl Dietrich Bracher, Wilhelm Hennis and Ralf Dahrendorf – to name but a few – had done much to make the new field of political science a ‘science of democracy’, this kind of liberalism had

also increasingly come under threat from the mid-1960s onwards. On the one hand, theorists like Rüdiger Altmann charted a course that appeared to take political thought in a much more anti-pluralist, even authoritarian, direction. On the other, in the wake of 1968 neo-Marxism rapidly gained ground among students and faculty, while empirical and behaviourist work continued to dominate the field of political science as a whole.

Even at this point, however, German political philosophers did not announce the death of their discipline (nor did they ever become as much preoccupied with questions of language and logic as Anglo-American thinkers). In fact, from within the liberal and even left-liberal camp, voices were growing which demanded a more substantial 'rehabilitation of practical philosophy'.⁷ This rehabilitation was to reassert the role of liberal political thought in public life, and also solve what was increasingly perceived as an identity crisis for philosophy as a whole. De facto, however, rather than philosophy playing a larger role in society, it was simply philosophers who asserted their political opinions in parties and associations by virtue of their academic authority.⁸ Against the growing neo-Marxist influence, neo-conservatives such as Hermann Lübbe sought to defend a curiously illiberal liberalism that remained mired in the anti-totalitarian battles of the 1950s. Apart from that and some attempts at neo-Aristotelianism, 'practical philosophy' de facto confined itself to an investigation of its own history.

It was at this point that Rawlsian thought entered the picture, without, it seems fair to say, altering its basic contours very much. Most of the early Rawls reception revolved around very specific criticisms. Philosophers like Otfried Höffe and Wolfgang Kersting took Rawls to task for having claimed a Kantian lineage, when in fact Rawls's theory was at best the illegitimate offspring.⁹ However, as Thomas W. Pogge has pointed out, while it was correct to claim that Kant's legal philosophy was fundamentally different from *Theory*, the critics overlooked the fact that Rawls was, above all, referring back to Kant's *moral* – rather than *legal* – philosophy.¹⁰ Even then, there was legitimate disagreement about whether Rawls remained a good Kantian or not – yet these were largely questions of exegesis, rather than substantial theoretical conflicts.¹¹

More importantly, like in France and the US, parts of the post-'68 left did engage with liberalism, leading to a rapprochement with really existing liberal democracy. In the 1980s, parts of the left drew on Rawls's work on civil disobedience, when resistance to the deployment of nuclear missiles posed a major political-cum-theoretical challenge to the liberal conscience.¹² Paradoxically, resistance in the name of the normative principles underlying liberal democracy against the really existing forms of liberal democracy was a form of affirmation. Acts of civil disobedience and appeals to the sense of justice of the majority also committed the left to the recognition of the overall justice of the principles of the system as it stood.¹³ This helped pave the way for a collective 'liberal learning process', of which many '68ers remain proud.¹⁴

166 In 1987 Otfried Höffe, who had played a major role in introducing and engag-

ing with Rawls's thought in the late 1970s, offered what was probably the main theoretical response to *A Theory of Justice* before Habermas's extensive dialogue with Rawls in the 1990s.¹⁵ In *Political Justice*, Höffe advocated the need for a 'first' or fundamental political philosophy.¹⁶ According to Höffe, Rawls had in fact not provided such a philosophy, since he had not justified the 'perspective of justice' as such. Therefore he had also failed in his attack on utilitarianism, for which justice was, after all, merely derivative.

Moreover, according to Höffe, one also needed first to justify the existence of institutions – whether social or political – as such. Rawls simply assumed the need for a state and legitimate powers of coercion. Yet, modernity was above all characterized by the fact that rule and coercion were questioned in a way that ancient and medieval thinkers never had done. Thus, the state itself had to be legitimated before questions of a just distribution could be put on the agenda. If the state as such was unjust, principles of distributive justice to be realized by the state could not be redeemed. Finally, Höffe also sought a theory that would do justice to other 'characteristic modern orientations': 'freedom rather than happiness' and 'conflict rather than cooperation', when, for Rawls supposedly, there could be neither conflict nor cooperation in the original position – just a single consciousness. If Höffe, then, could make good on his claims, he thought he would accomplish nothing less than legitimating the 'constitutional history of modernity' itself.¹⁷

Höffe's theoretical strategy revolved around a two-way defence of political justice against legal positivism, which supposedly denied the relevance of justice to questions of law and state, on the one hand, and, on the other, against anarchism, which denied the need for coercion and the state altogether. Through extensive historical reconstructions, starting with no lesser lights than Plato and Aristotle, Höffe sought to show that a 'mediation' between these two positions was possible. For this purpose, he sought to differentiate between real 'legal amoralism' and the more subtle legal positivism of Kelsen and Hart, which, according to Höffe, in the form of 'collective security' did actually hide an idea of justice in the concept of law. On the other hand, drawing on the anthropology of Arnold Gehlen and rational choice theory, he sought to demolish the claims of anarchism that social life without institutions – whether social or political – was possible. Here Höffe simply subsumed discourse ethics under anarchism, thereby trying to deal a frontal blow to what was then still the dominant social philosophy of the German left.

Situating himself squarely in the tradition of Anglo-American social contract theory, he eventually arrived at his own 'thought experiment' to lay the foundations of a proper theory of justice. In this he remained closer to Hobbes than to Rawls (or Locke), assuming a state of nature that was broadly modelled on the Hobbesian conception of all as potential victims and perpetrators. At the same time, Höffe sought to broaden this conception by not making survival everyone's overwhelming desire. Instead, he allowed for a variety of motivations, all of which,

however, would lead the parties to have an interest in the prevention of violent death. Ultimately, however, Höffe constructed two overriding transcendental interests in integrity of life and limb, as well as free speech. These would prove indispensable for enabling a 'practical subject' in the first place. In that sense, he also sought a 'liberalization' of Hobbes.¹⁸

In this situation, Höffe claimed, a mutual renunciation of complete freedom for the sake of a 'fully impartial and fully equal limitation of freedom' was the only prudent choice.¹⁹ Such a 'negative exchange' constituted the core of justice, since it resulted in a 'distributive advantage' for all parties concerned. Höffe argued that:

. . . what is of primary relevance to political legitimation is *commutative* and not *distributive* justice, and within commutative justice the *negative exchange* of goods or services. The negative exchange can be viewed as cooperation, but must be distinguished as *negative cooperation* as against the *positive cooperation* in the production of goods and provision of services.²⁰

In a first step, the primary state of nature was exchanged for a secondary state of nature, in which individuals had undertaken the mutual renunciation of freedom. This secondary state, however, was likely to be unstable due to free-riding and endless conflicts about the interpretation of the actual freedoms established. The 'negative' foundation of justice then led on to the establishment of institutions which were to secure the 'negative exchange' and the basic liberties and human rights agreed upon. 'Natural justice' was first transformed into social and finally into institutionalized or political justice, which meant justice backed by state-administered 'non-coercive coercion' to which all parties had consented.²¹

Ultimately, then, justice was measured through an impartial judgement of the advantages accruing to every party from a particular institutional settlement. At the same time, the fact that the state was only founded in a second step to secure justice also meant that its *legitimation* through the 'negative exchange' and distributive advantage was at the same time its *limitation*. If the state failed in securing 'distributive advantage', it would lose its legitimacy. Thus, despite sharing a pessimistic anthropology with Hobbes (and Gehlen), Höffe did not end up having constructed (or rather, reconstructed) the monster of the Leviathan.

Höffe retained a state–society distinction largely lost in Rawls's theory, but at the price of offering what amounted mainly to a theory of legitimation of coercion – as opposed to justice as such. Due to his primary concern with *Herrschaft* (a term Höffe's English translator wisely chose not to translate), questions of distribution, and even questions of democracy, largely dropped out of the picture, as did explorations of the actual workings of law and the state in modern societies. In a sense, he simply decided to sidestep the question of distribution, instead taking impartiality as the mark of justice and making it fundamental to a consensus on a procedure to arrive at a legitimation of coercion. Yet, the real work in the theory was performed by the quasi-Hobbesian anthropological assumptions and the rational choices that followed from them.

potential' in the state of nature. Höffe's only answer could be that they had to be treated on the basis of 'solidarity', as opposed to justice.²² Due to the entirely rational foundation of justice, there remained no space for anything like a 'reflective equilibrium' taking account of already existing moral intuitions. Not by chance, perhaps, Höffe was to give one of his subsequent books the telling title *Morality as the Price of Modernity*.²³

In a sense, Höffe succeeded in providing a 'first' or 'fundamental' political philosophy – using no more than three basic concepts to construct his theory. There was no need for space ships, islands, auctions or veils of ignorance or any other fantastic models and metaphors.²⁴ Yet, due to this sparseness, as critics such as Jürgen Habermas pointed out, Höffe's approach risked appearing *unterkomplex* (insufficiently complex).²⁵ Not surprisingly, perhaps, Habermas took Höffe to task for his overly individualistic approach, for his neglect of questions of democracy and for the 'abstract opposition of natural law and the historical process' – issues around which the later Rawls–Habermas exchange were also to revolve.²⁶ Habermas charged that Höffe neglected the fact that individuals were already socialized through and through and therefore equipped with certain moral intuitions and expectations. In the same vein, Höffe was supposed to have left out the potential for legitimation and political integration through political participation and self-legislation in particular. For Höffe, it seemed, democracy was merely derivative.

More importantly, perhaps, Habermas followed Luhmann in rejecting a theory that still assumed the state to be central in directing society and 'social consciousness'.²⁷ In that sense, one might say that Habermas singled out for criticism the Rawlsian elements of Höffe's approach – abstract individualism and rational choice – as well as the supposed German legacy of a focus on the state and *Herrschaft*. Needless to say, discourse ethics was supposed to have overcome both of these deficits, while at the same time remaining closer to the reality of legal systems in advanced industrial and welfare states.²⁸

Rawls and Habermas I: A Neo-Kantian Family Quarrel?

One of the paradoxes of the German Rawls reception is that, while German theorists by and large remained wary of communitarianism, Rawls's thought was often debated after a detour via communitarianism. While communitarianism as such found few takers in the Federal Republic, a quasi-communitarian critique of Rawls played a large role in the response to *A Theory of Justice*.²⁹ This critique essentially updated the old Hegelian critique of Kant. Rawls was charged with abstract, 'empty normativism' or the so-called 'impotence of the Ought'.³⁰ It was also deemed, in Habermasian parlance, insufficiently complex. Consequently, many theorists argued that one had to fuse Rawlsian insights with more sociological approaches. Partly, this was due to the German preoccupation with questions of social integration and cohesion. The secular liberal state, or so an axiom

of post-war thought went, cannot guarantee its own preconditions, whether they be social, cultural or economic.³¹ Thus from the beginning there was a general concern with civic motivations and political stability that was much stronger than in Britain or the United States.

This point was also explicitly made by Habermas in his engagement with Rawls.³² He saw Rawls's return to 17th-century social contract theory as 'unmediated' and as 'lacking metacritical references to the change in perspective brought about by political economy and social theory'.³³ In other words, this return had taken place in a historical and sociological vacuum, as if 'one could ignore the disenchantment of law in social science'.³⁴

Nevertheless, as much as Habermas's critique retains particularly German concerns, the real overall story appears to be what one might call a 'move in opposite directions'. Whereas Habermas has become even more Kantian, Rawls has become more Hegelian – to put it crudely.³⁵ In that sense, there has been a rapprochement from both sides. Rawls has moved from a perspective *sub specie aeternitatis* to a preoccupation with pluralism and stability, which includes, one might say, the historicization (and relativization) of his own theory. Habermas, on the other hand, has moved from, broadly speaking, a heritage of Hegelian Marxism, including what was then a very strong dose of anti-capitalism, via Luhmann's systems theory and an engagement with Anglo-American legal and political thinkers such as Rawls and Dworkin, to, in the end, a strongly neo-Kantian position. This latest position is refracted through German social theory, but also rather 'realist' sociological work on administrative and legal decision-making. Thus we have clear evidence of what one might call a transatlantic theory trade: Rawls of course initially imported Kantianism into American liberal thought, and Habermas in turn imported Rawls and Dworkin – although these were of course not his first American imports, nor was he the first to import them.³⁶

Perhaps not surprisingly, Habermas has always maintained that he shares the goals of the Rawlsian project and agrees with its conclusions. Therefore any disagreements are said to be really more like 'family quarrels', with criticisms remaining 'immanent' and 'constructive'.³⁷ This self-assessment, it seems to me, is largely correct (but it is worth bearing in mind that family quarrels can be particularly fierce). After all, both theorists are concerned with questions of how to find procedures which will guarantee some kind of impartiality, whether it is the veil of ignorance or discourse ethics, and which will model Kantian moral autonomy.³⁸ Both are aiming at an 'autonomous theory' of justice that is genuinely 'post-metaphysical' in Habermas's case and 'non-metaphysical' for Rawls – although the respective 'strategies of avoidance' of metaphysics are rather different.³⁹ Both are fundamentally committed to a principle of public justification through shared public reason.⁴⁰

Both also – and this might be less obvious – have in their own different ways tried to make a strong claim about *immanence* for their theories – they have

attempted to link their theories with societies as they already are, so to speak. Of course, Rawls has argued that political liberalism is immanent in modern western societies, whereas Habermas has maintained that discourse ethics can be reconstructed from the communicative rationality inherent in our use of language – with the theory culminating in the idea that ‘only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse’.⁴¹ However – and this is a crucial difference – there is of course no veil of ignorance for Habermas: the ideal speech situation is real in the sense that it does not screen out people’s real social circumstances, only the wrong motivations, so to speak. The original position, in contrast, is essentially a non-discursive device of representation. Moreover, while Habermas’s theory is not about finding the right conceptions of the good, it also does involve more than distributive justice – it can be extended to debating the normative validity of all kinds of rules of action.

Habermas, then, is both more and less ambitious than Rawls.⁴² The discourse principle is more ambitious in the sense that it does not confine itself to deciding the basic structure of society. But it is less ambitious in the sense that, in a post-metaphysical age, it does not prescribe any moral conclusions, but simply sets up the ‘moral point of view’. Based on these very differences, Habermas has criticized in Rawls that the American’s procedure remains ‘monological’ – in theory, the moral philosopher, as an ‘expert on justice’, can work out a theory of justice all by himself (or herself). Like Höffe, then, Rawls is supposedly still mired in ideas about an ‘impartial spectator’, rather than taking on board the intersubjective turn of discourse ethics, which moves philosophy, including political philosophy, away from the ‘philosophy of (a single) consciousness’. Habermas, after all, claims that

. . . it is not enough for each individual to reflect on whether he can assent to a norm . . . what is needed is a ‘real’ process of argumentation in which the individuals concerned cooperate. Only an intersubjective process of reaching understanding . . . can give the participants the knowledge that they have collectively become convinced of something.⁴³

Rawls and Habermas II: A Competition in Modesty?

Despite the dispute then ‘being all in the family’, Habermas has made a number of rather substantial criticisms of Rawls, and the Rawls of *Political Liberalism* in particular, and not surprisingly, they all culminate in a much stronger demand for deliberative democracy. First, Habermas has claimed that the original position is still too much modelled as a situation of self-interested rational choice. It remains, in short, too close to Hobbes for liberal comfort, and too far removed from proper Kantian ethics. At the deepest level, it is perhaps fair to say, there is a difference between a social contract model appealing to self-interest and even fear (‘What if I am one of the worst-off?’) – as opposed to an approach ultimately informed by solidarity (as opposed to ‘mere’ fairness) and the empathy of putting oneself in other people’s shoes.⁴⁴

Second – and connected to this rational choice orientation – is the reproach that Rawls can think of normative issues only in terms of goods and interests – but such an approach, Habermas argues, properly belongs to an Aristotelian or utilitarian framework, not a Kantian–liberal one. Rights and liberties are not like goods to be distributed, things of which one can have more or less, but should be the outcome of the mutual recognition of free and equal citizens.⁴⁵

Third, Habermas argues that Rawls is both insufficiently proceduralist and insufficiently intersubjective. In Habermas's view, Rawls first subtracts information from the original position to model impartiality, only then gradually to add specific information again. Such a procedure means that the theorist, rather than the actual participants in a democratic process, ends up selecting information – in particular, the theorist has to bring in by the backdoor, so to speak, normative and substantial attributes through the conception of the moral person. In short, despite the supposed elements of choice for different parties in the original position, the theory has de facto already decided everything. Real people in a real democracy – rather than as ciphers behind the veil of ignorance – would be faced with a ready-made constitution, instead of deliberating on it.

In the same vein Habermas claims that Rawls has actually conceded too much to the value of social stability – and muddied the moral waters by blurring the distinction between philosophical acceptability and de facto political acceptance. Unlike Richard Rorty, however, Habermas does not claim that Rawls has become a full 'contextualist' – only that he has very unfortunately weakened his own theory by giving up too much normativity for the sake of presumed political stability.⁴⁶ Rawls has ended up with a weak version of tolerance, rather than a shared public morality. Instead, Habermas argues, there should be an open-ended discourse, which does not start off by excluding information and the pluralism of values among the participants – in short, the concept of public reason should be made to do more work. And the assumptions to be made at the outset should be even more modest than they already are – in that sense, Habermas and Rawls have been competing to expunge 'metaphysics' and other substantial assumptions from their theories.⁴⁷

Above all, however, Habermas claims that there is not enough democracy in Rawls – liberal rights and liberties always come first. And they are always already decided by the theory, whereas democracy then merely serves their protection. According to Habermas's 'Kantian republicanism', the rule of law and democracy are 'co-original' – in other words, they presuppose each other.⁴⁸ Genuinely deliberative democracy is as important as the *Rechtsstaat*, the rule of law. This combination, so Habermas claims, is not only normatively desirable, but conceptually necessary. Otherwise, he argues, the legally constituted person, that is, the citizen, is cut in half – one might have private rights protected by a paternalist state, but they cannot be secured until there is also participation by the citizens in determining these rights. In short, Habermas argues that the public autonomy of citizens who create their own laws through deliberation and rational will forma-

tion is 'co-original' with the private autonomy of the subjects bound by these laws. Or, to put it differently, the addressees of the law also have to be its authors – the recognition of private dignity and public participation cannot be disentangled. *Bourgeois* and *citoyen* have to be thought together. This means nothing less than that the often remarked-upon tension between liberalism and democracy has been dissolved.

Why is this particularly significant? To some extent, Habermas here responds to a peculiar German predicament.⁴⁹ In Germany, the constitutional state and the rule of law preceded democracy – but also proved unsuccessful in the face of Nazism. Many thinkers in the German tradition have conceptually dissociated liberalism and democracy, both on the left and the right, from Carl Schmitt to the student radicals of the 1960s.⁵⁰ Since this is of course originally a Marxist dissociation, one might say that Habermas's theory would indicate a sort of final reconciliation between the left and liberalism.

Habermas's thoughts on law have been put to somewhat similar uses in Britain and North America. There political thinkers have charged that the political liberalism of Rawls and Dworkin increasingly retreats from democracy, and that the implicit model on which this kind of liberalism is based turns out to be a Supreme Court decreeing liberal morality. For them, Habermas becomes a democratic *deus ex Germania* whose work mainly serves as a reminder that liberalism desperately needs democracy and deliberation. Liberalism accordingly needs to run democratic risks, even the risks of instability that are supposedly associated with a pluralism of sometimes not fully liberal political forces. Liberals should let themselves fall into the abyss of democracy, as one of Habermas's interpreters in Canada has described it – even though of course Habermas would say that stability is ultimately only guaranteed by democracy.⁵¹ Nevertheless, for defenders of radical democracy, neither Dworkin's Supreme Court nor Habermas's seminar room is the appropriate mode (or metaphor) for democratic struggle.

Goodbye to All That?

So goodbye to radical democracy, the 'legitimation crises of capitalism' and all that? Not quite. Habermas has sometimes been called a 'German John Dewey' – but he is still not a liberal in a conventional Anglo-Saxon mould. Authentic politics is never merely about the clash of private interests. In the latest writings, an enormous burden is put on legitimate law to hold society together and transmit the public will and solidarity from the life-world to the system. Legality is imagined as transmitting the structures of mutual recognition familiar from interactions between persons both accountable and vulnerable to the level of abstract relationships between citizens. Only law can generate solidarity between strangers.

Reason and morality, rather than being directly present as in a more com-

munitarian republicanism, retreat into procedures, whose outcome can at least be presumed to be reasonable. Deliberative democracy allows the claims of the life-world to be channelled into the political and administrative systems via law. Habermas has finally arrived at an idea of legitimate government in highly complex societies, namely a government that is open to discursive will-formation in the public sphere via the means of law.⁵² Or, as Habermas puts it, the connection should be one of 'higher-level intersubjectivity of communication processes that unfold in the institutionalized deliberations in parliamentary bodies, on the one hand, and in the informal networks of the public sphere, on the other'.⁵³ Habermas might not be fixated on the state, as clichés about German political thought would have it – but he puts enormous faith in legitimate public law as a means of social integration and transmitting civic solidarity.

Politics, one might say then, retains a transformative, almost redemptive quality and remains aimed at the establishment of a true general interest through consensus. Ralf Dahrendorf once observed that two souls seemed to be struggling in Habermas's breast – a liberal Kantian one and a Rousseauian radical democratic one, which believes in popular sovereignty and the resolution of differences in discourse.⁵⁴ In that sense, Habermas has also not betrayed any ideals, as some of his Marxist critics have claimed: he was always interested first and foremost in democracy, not distribution. His defence of equality was about ensuring the preconditions of rational political debate – not social equality as such.

So where does this leave the Rawls–Habermas dialogue and German political thought? In one sense, the 'critique' in critical theory has been scaled down massively, and theorists like Rawls and Dworkin have indirectly helped this process along – perhaps inadvertently. Yet, Habermas maintains that his theory is related to a real emancipatory potential in society. He still argues that 'a sceptical evaluation of current world conditions is the background for my reflections. That is why my way can be distinguished from purely normative conceptions such as John Rawls's theory of justice, as admirable as it is in itself'.⁵⁵

Above all, there has been what one might call a liberalization and legalization of the left. In Habermas's case in particular, the 'linguistic turn' has been followed by 'legalistic' and 'liberal' turns. The focus is now firmly on the legal parameters of autonomous and peaceful coexistence, rather than on the economic terms of citizenship – certainly a deradicalization or even resignation in the eyes of the more radical exponents of critical theory.⁵⁶ Ironically, this kind of critical theory might now also be less ambitious than Rawls himself who still believes in some form of 'property-owning democracy' which goes much further than welfare state capitalism.⁵⁷ Habermas, on the other hand, has explicitly had 'to let go of interpretations that have become dear to us, including the idea that radical democracy is a form of self-administering socialism', since 'only a democracy that is understood in terms of communications theory is feasible under the conditions of complex societies'.⁵⁸

Habermas's critique of Rawls and Anglo-American liberalism as insufficiently democratic. Already, there are sophisticated efforts to mediate between Rawls and Habermas and, in the best case, construct a political theory which leaves behind the deficiencies of both.⁵⁹

Finally, there is now also an established anti-Rawlsian and broadly anti-egalitarian literature, which responds largely to the perceived crisis of the *Sozialstaat*.⁶⁰ Much of that literature criticizes egalitarianism not necessarily for its principles, but for its practical failures (although some critics also now ascribe 'totalitarian implications' to it). The 'egalitarian paradigm' is supposed to be replaced by a new 'political solidarity' – all of which sounds suspiciously like a theoretical legitimation for a German 'Third Way'.

Perhaps most surprisingly, however, Rawls's ideas have by now also left an imprint on German political culture at large – or at least public political argument, as opposed to what Rawls might call the German 'background culture'. In debates about distributive justice, the idea of a veil of ignorance has played a not insignificant role. Rawls was recently cited in a landmark decision of the German Constitutional Court on redistribution between federal states within Germany (even if the citation only served to point out that legislators could actually never be behind a veil of ignorance). Proponents of a reform of the pension system have also put forward the device of the veil of ignorance to achieve intergenerational justice.⁶¹ Most remarkable, however, have been the rather strategic uses of Rawls by politicians across the political spectrum. For instance, the leader of the by now largely libertarian Free Democratic Party has invoked the veil of ignorance to promote globalization on the grounds that it promotes equality of opportunity.⁶²

Finally, debates about multiculturalism and religious toleration remain very much informed by Rawls's views on liberal neutrality.⁶³ The current state minister for culture (who happens to be a political philosopher) has explicitly endorsed a Rawlsian conception of tolerance and justice, and has named Rawls as one of his main influences – alongside Plato and Kant.⁶⁴ In his attempts to outline a new approach to toleration, he has presented a model heavily informed by Rawlsian notions of state neutrality.⁶⁵ If nothing else, Rawls has very much contributed to the actual 'rehabilitation of practical philosophy' in political argument – perhaps more than any German theorist ever did.

Nevertheless, while German political thought is now almost indistinguishable in its analytical style and ambitions, there remains the question what – if anything – should be mourned in terms of a loss of German philosophical peculiarities. Among the concepts and clichés mentioned at the outset, it seems that the 'fixation on the state' has weakened most. If anything, one might discern a pattern of falling from one extreme into the other. German theorists have taken ideas about the *Depotenzierung*, or loss of power, of the state further than anybody else, contrary to much evidence that there might be a change in specific functions of the state, rather than its complete transformation.⁶⁶ In this regard, Höffe's conflict theory actually provides a salutary reminder.

In the same vein, it appears that historicism has – for the moment – run its course, while ‘historical reconstructions’ in political theory have also lost their appeal. Very tentatively, I would suggest that the attempt at coming to terms with social complexity which Habermas and Luhmann undertook – as metaphysical, overwrought, obscure or simply just incomprehensible as it might have been at times – might not find any successors, if German political thought becomes dedicated to the refinement or exegesis of Rawlsian or Habermasian political theory. And perhaps that would be a real loss. The mid-Atlantic republic of liberalism might now stretch from San Francisco to Berlin – but as its internal diversity diminishes, so would its strength.

Appendix: A Brief Chronology of the Reception of John Rawls in Germany

- 1975: John Rawls, *Eine Theorie der Gerechtigkeit*. Frankfurt/Main: Suhrkamp.
- 1977: Otfried Höffe (ed.) *Über John Rawls' Theorie der Gerechtigkeit*. Frankfurt/Main: Suhrkamp.
- 1987: Otfried Höffe, *Political Justice: Foundations for a Critical Philosophy of Law and the State*. Cambridge: Polity Press, 1995.
- 1992: Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr. William Rehg. Cambridge, MA: MIT Press, 1998.
- 1992: John Rawls, *Die Idee des politischen Liberalismus: Aufsätze 1978–1989*, Wilfried Hinsch (ed.). Frankfurt/Main: Suhrkamp.
- 1995: Jürgen Habermas, ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism’, *Journal of Philosophy* 92: 109–31.
- 1998: John Rawls, *Politischer Liberalismus*. Frankfurt/Main: Suhrkamp.

Notes

Thanks for incisive comments to G.A. Cohen, Cécile Laborde, Thomas W. Pogge and Chris Thornhill. No doubt the article still offends all of them.

1. I take the topic to be Rawls and political thought in Germany, rather than Rawls and German political thinkers – i.e. I assume that the editor is applying *ius soli* and not *ius sanguinis* in reception history. If the latter were the case, major attention would of course have to be paid to Thomas W. Pogge.
2. Anselm Döring-Manteuffel (1999) *Wie westlich sind die Deutschen? Amerikanisierung und Westernisierung im 20. Jahrhundert*. Göttingen: Vandenhoeck und Ruprecht.
3. Luhmann quoted in Danilo Zolo (1992) *Democracy and Complexity: A Realist Approach*, tr. David McKie, p. 29. Cambridge: Polity.
4. For arguments along these lines, see also Charles Larmore (1996) *The Morals of Modernity*. Cambridge: Cambridge UP; and Michael Freedon (1996) *Ideologies and Political Theory: A Conceptual Approach*. Oxford: Oxford UP.
5. Wilhelm Hennis (1959) ‘Zum Problem der deutschen Staatsanschauung’, *Vierteljahrshefte für Zeitgeschichte* 7: 1–23.
6. Of course, Luhmann’s realism has come at the price of disabling political philosophy altogether. See for instance Niklas Luhmann (1988) *Paradigm Lost: Die ethische Reflexion*

- der *Moral*. Stuttgart: Enke. As a grand summary: Niklas Luhmann (2000) *Die Politik der Gesellschaft*. Frankfurt/Main: Suhrkamp. This contains a few snide remarks about Habermas, as far as ethics is concerned.
7. Manfred Riedel (ed.) (1972/74) *Rehabilitierung der praktischen Philosophie*, 2 vols. Freiburg: Rombach.
 8. See also Martina Plümacher (1996). *Philosophie nach 1945 in der Bundesrepublik Deutschland*, pp. 240–9. Reinbek: Rowohlt.
 9. Otfried Höffe (1984) 'Is Rawls' Theory of Justice Really Kantian?', *Ratio* 26: 103–24.
 10. Thomas W. Pogge (1984) *John Rawls*, pp. 189–98. Munich: C. H. Beck.
 11. Others engaged in exegesis and the kind of comparative studies of 'Rawls and . . .', which have turned into a minor global cottage industry. Apart from that, there was a large industry of importing American discussions to Germany, including the liberalism–communitarianism debate. Predictably enough, German theorists were wary of communitarianism, but by engaging with communitarianism, they also became more familiar with the communitarians' main target. See for instance Axel Honneth (ed.) (1993) *Kommunitarismus: Eine Debatte über die moralischen Grundlagen moderner Gesellschaften*. Frankfurt/Main: Campus. Micha Brumlik and Hauke Brunkhorst (eds) (1993) *Gemeinschaft und Gerechtigkeit*. Frankfurt/Main: Fischer.
 12. Habermas drew extensively on Rawls in 'Ziviler Ungehorsam – Testfall für den demokratischen Rechtsstaat', in (1985) *Die neue Unübersichtlichkeit*, pp. 79–99. Frankfurt/Main: Suhrkamp. See also Ulrich K. Preuss (1984) *Politische Verantwortung und Bürgerloyalität: Von den Grenzen der Verfassung und des Gehorsams in der Demokratie*. Frankfurt/Main: S. Fischer. Is it an accident that Germany's foremost left-liberal intellectual had to resort to an American theory to construct an argument for civil disobedience in Germany as part of a 'democratic normalization'?
 13. Left-wing political theorists still see Rawls mainly as a defender of protest movements and as a theorist of the democratic deficits of really existing liberal democracies. See for instance Peter Niesen (2001) 'Die Ideale des Protests: Der große Denker der Demokratietheorie und Verteidiger des zivilen Ungehorsams: John Rawls begeht seinen 80. Geburtstag', *Frankfurter Rundschau* (21 February).
 14. Ulrich K. Preuss (2001) 'Geschichte auf krummen Wegen', *Süddeutsche Zeitung* (3 March).
 15. See for instance Otfried Höffe (ed.) (1977) *Über John Rawls' Theorie der Gerechtigkeit*. Frankfurt/Main: Suhrkamp. John Rawls (ed.) (1977) *Gerechtigkeit als Fairness*, and with an essay by Otfried Höffe, tr. Joachim Schulte. Freiburg: Alber.
 16. Otfried Höffe (1995) *Political Justice: Foundations for a Critical Philosophy of Law and the State*. Cambridge: Polity Press. For a succinct summary, see Otfried Höffe (1991) *Gerechtigkeit als Tausch? Zum politischen Projekt der Moderne*. Baden-Baden: Nomos.
 17. Höffe (n. 16), p. 259.
 18. *Ibid.*, p. 253.
 19. *Ibid.*, p. 257.
 20. *Ibid.*, p. 250.
 21. *Ibid.*, p. 247.
 22. Julian Nida-Rümelin (1997) 'Gerechtigkeit bei John Rawls und Otfried Höffe: Ein Vergleich', in Wolfgang Kersting (ed.) *Gerechtigkeit als Tausch? Auseinandersetzungen mit der politischen Philosophie Otfried Höffes*, pp. 306–20; here p. 310. Frankfurt/Main: Suhrkamp, 1997.
 23. Otfried Höffe (1993) *Moral als Preis der Moderne: Ein Versuch über Wissenschaft, Technik und Umwelt*. Frankfurt/Main: Suhrkamp.
 24. Wolfgang Kersting, 'Herrschaftslegitimation, politische Gerechtigkeit und

- transzendentaler Tasuch: Eine kritische Einführung in das politische Denken Otfried Höffes', in Kersting (n. 22), pp. 11–60; here p. 19.
25. Jürgen Habermas (1990) 'Grenzen des vernunftrechtlichen Normativismus', in *Die nachholende Revolution*, pp. 71–81; here p. 71. Frankfurt/Main: Suhrkamp.
 26. *Ibid.*, p. 76.
 27. *Ibid.*, pp. 80–1.
 28. *Ibid.*, p. 80.
 29. See for instance Rainer Forst (1994) *Kontexte der Gerechtigkeit: Politische Philosophie jenseits von Liberalismus und Kommunitarismus*. Frankfurt/Main: Suhrkamp.
 30. Jürgen Habermas (1998) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, tr. William Rehg, p. 56. Cambridge, MA: MIT Press.
 31. This is the famous formulation of constitutional lawyer Ernst-Wolfgang Böckenförde, which seems to have been accepted across the political spectrum. See Böckenförde (1991) 'Die Entstehung des Staates als Vorgang der Säkularisation', in *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, pp. 92–114; here p. 112. Frankfurt/Main: Suhrkamp.
 32. On the Rawls–Habermas debate generally, see Thomas McCarthy (1994) 'Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue', *Ethics* 105: 44–63, and Rainer Forst (1999) 'Die Rechtfertigung der Gerechtigkeit: Rawls' Politischer Liberalismus und Habermas' Diskurstheorie in der Diskussion', in Hauke Brunkhorst and Peter Niesen (eds) *Das Recht der Republik*, pp. 105–68. Frankfurt/Main: Suhrkamp. I do not seek to do justice to the subtleties of the debate here, but merely to outline the main points of Habermas's critique and its meaning in the German context.
 33. Habermas (n. 30), p. 57.
 34. *Ibid.*
 35. Rawls himself has maintained that even *A Theory of Justice* starts with the basic Hegelian insight that people are first and foremost rooted in society – I disagree with this reading, but cannot engage with it here. See John Rawls (2000) *Lectures on the History of Moral Philosophy*, Barbara Herman (ed.), p. 366. Cambridge, MA: Harvard UP. There can be no doubt, however, that *Political Liberalism* pushes this insight further than *Theory*.
 36. For another engagement with the Rawls of *Political Liberalism*, see Wilfried Hinsch (ed.) (1997) *Zur Idee des politischen Liberalismus: John Rawls in der Diskussion*. Frankfurt/Main: Suhrkamp.
 37. Jürgen Habermas (1998) 'Reconciliation through the Public Use of Reason', in *The Inclusion of the Other: Studies in Political Theory*, Ciaran Cronin and Pablo De Greiff (eds.), pp. 49–73; here p. 50. Cambridge: Polity.
 38. Other German theorists in the Kantian tradition take their Kantian starting point elsewhere. Höffe, as already seen, begins with the conflict-prone nature of human beings, while Ingeborg Maus takes self-legislation to be fundamental for political theory. See Ingeborg Maus (1992) *Zur Aufklärung der Demokratietheorie: Rechts- und demokratietheoretische Überlegungen im Anschluss an Kant*. Frankfurt/Main: Suhrkamp. See also Forst (n. 32), p. 110.
 39. Forst (n. 32), p. 106. Habermas's claims of 'post-metaphysics' might well be seen as a comprehensive or at least overly controversial doctrine in itself.
 40. *Ibid.*, 109.
 41. Jürgen Habermas (1990) *Moral Consciousness and Communicative Action*, tr. Christian Lenhardt and Shierry Weber Nicholsen, p. 66. Cambridge: Polity.
 42. Habermas (n. 37), p. 72.
 43. Habermas (n. 41), p. 67.
 44. See also William Rehg (1994) *Insight and Solidarity: A Study in the Discourse Ethics of*

Jürgen Habermas. Berkeley: University of California Press.

45. Habermas (n. 37), pp. 54–6.
46. Habermas (n. 30), p. 60.
47. Forst (n. 32), p. 120.
48. Habermas (n. 37), p. 126.
49. A fact that American observers frequently use to dismiss Habermas altogether. See for instance Richard A. Posner (1999) *The Problematics of Moral and Legal Theory*. Cambridge, MA: Harvard UP. This makes much of the peculiar German context.
50. Carl Schmitt (1985) *The Crisis of Parliamentary Democracy*, tr. Ellen Kennedy. Cambridge, MA: MIT Press. Johannes Agnoli and Peter Brückner (1968) *Die Transformation der Demokratie*. Frankfurt/Main: Europäische Verlagsanstalt. See also Jan-Werner Müller (2002) '1968 as Event, Milieu and Ideology', *Journal of Political Ideologies* 7: 15–37.
51. David Dyzenhaus (1997) *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, p. 257. Oxford: Clarendon Press.
52. See also Chris Thornhill (2000) *Political Theory in Modern Germany: An Introduction*, pp. 169–73. Cambridge: Polity.
53. Habermas (n. 48), p. 248.
54. Ralf Dahrendorf (1989) 'Zeitgenosse Habermas: Jürgen Habermas zum sechzigsten Geburtstag', *Merkur* 43: 478–87.
55. Jürgen Habermas (1997) *A Berlin Republic: Writings on Germany*, tr. Steven Rendall, p. 132. Lincoln, NE: University of Nebraska Press.
56. William E. Scheuerman (1999) 'Between Radicalism and Resignation: Democratic Theory in Habermas's *Between Facts and Norms*', in Peter Dews (ed.) *Habermas: A Critical Reader*, pp. 153–77. Oxford: Blackwell.
57. See John Rawls (2001) *Justice as Fairness: A Restatement*, pp. 135–40. Cambridge, MA: Harvard UP.
58. Habermas (n. 55), p. 133.
59. See for instance the attempt in Forst (n. 32).
60. See Wolfgang Kersting (ed.) (2000) *Politische Philosophie des Sozialstaats*. Weilerwist: Velbrück Wissenschaft. Wolfgang Kersting (2000) *Theorien der sozialen Gerechtigkeit*. Stuttgart: J. B. Metzler. Wolfgang Kersting (2000) *Politik und Recht: Abhandlungen zur politischen Philosophie der Gegenwart und zur neuzeitlichen Rechtsphilosophie*. Weilerwist: Velbrück Wissenschaft. See also Detlef Horster (2001) 'Gerechtigkeit ist ein Anderes', *Süddeutsche Zeitung* (24 Feb.).
61. Stefan Voigt and Gert Wagner (2000) 'Ein weiser Rat zur Rentenreform: Der Bundestag sollte die Entscheidung an ein unabhängiges Gremium delegieren', *Frankfurter Allgemeine Zeitung* (1 July).
62. Guido Westerwelle (2001) 'Keine Zwänge, sondern globale Chancen', *Frankfurter Allgemeine Zeitung* (23 June).
63. Christian Geyer (2000) 'Spiel nicht mit der Leitkultur: Was die politische Philosophie in der Debatte um Einwanderung und Integration zu sagen hat', *Frankfurter Allgemeine Zeitung* (1 Nov.).
64. 'Philosophische Argumente in der kulturpolitischen Praxis: Ein Gespräch mit Julian Nida-Rümelin, dem neuen Staatsminister für Kultur', *Neue Zürcher Zeitung* (8 Jan. 2001). See also Julian Nida-Rümelin (1999) *Demokratie als Kooperation*. Frankfurt/Main: Suhrkamp.
65. Julian Nida-Rümelin (2001) 'Die offene Gesellschaft und ihre Feinde', *Frankfurter Allgemeine Zeitung* (9 Nov.).
66. See for instance Helmut Willke (1992) *Ironie des Staates: Grundlinien einer Staatstheorie polyzentrischer Gesellschaft*. Frankfurt/Main: Suhrkamp.