Review Essay: Comment

Between Power and Knowledge: Habermas, Foucault, and the Future of Legal Studies

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The forthcoming publication in English of *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* by Jürgen Habermas comes at a time when the nature and role of legal studies in the United States is being problematized. In both law schools and in the broader scientific and humanistic discussion of law (the totality of which, for the sake of brevity, I call legal studies), the consensus of more than a generation is breaking down, and a broad debate over what counts as interesting problems, adequate research, and useful results is emerging. This timing is central because Habermas has been a key figure in an important debate about the nature and prospects of social knowledge; a debate which has everything to do with the debate about the future of legal studies.

As my colleague Ken Casebeer (1994) notes, Habermas's work has been largely ignored in legal studies (a surprising fact given his general renown as one of the leading philosophers of his generation). *Between Facts and Norms*, a book specifically about legal theory, is likely to change that. But if the substance of this latest book is the occasion for Habermas's introduction into legal studies, it is his writings on social theory and epistemology that may be of the most relevance to the emerging debate over the future of our discipline. Of particular importance, in this regard, is Habermas's dialogue with the work of the late Michel Foucault.[1] Fortuitously, MIT Press, which is publishing *Between Facts and Norms*, has just recently published *Critique and Power: Recast-*

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[1] Foucault's untimely death in 1983 cut off what would surely have become a significant engagement between the two great thinkers. It has continued through Habermas's engagement with Foucault's published work and through a growing secondary literature.

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ing the Foucault/Habermas Debate, a new volume edited by Michael Kelly which reprints some of the most significant elements of this dialogue and related commentaries (Kelly 1994a).

In what follows I want to explore the implications of the Habermas/Foucault debate for the future of legal studies. Habermas's epistemological assumptions are likely to be highly attractive to those who feel most uncomfortable with the very existence of fundamental debate about the prospects and purposes of legal studies and who would like to return to the perceived benefits of the increasingly unstable modernist settlement.[2] For those who find the breaking up of settled positions stimulating, Foucault's epistemological posture may be the more appropriate one for legal studies at this juncture. While I place myself solidly in the latter camp, I want to suggest here that taking this debate seriously may be more productive for both sides than simply adopting a giant of European critical theory as a banner or mascot.

Habermas

James Bohman's (1994) description of the development of Habermas's social theory (while not uncritical) helps make clear why Habermas and his project have already been so attractive to U.S. scholars in fields like epistemology, political theory, and social theory; and why his approach is likely to be welcomed by many in law. Habermas has been the strongest contemporary defender of the Enlightenment faith in Reason. Against those who would catalogue the atrocities produced by Reason and its technological spin-offs, Habermas has sought to define a form of communicative reason (the kind that makes it possible for people to understand one another's speech acts) distinguishable from its more destructive cousin instrumental reason (the kind that makes electric razors and freeway off-ramps work) (Habermas 1984, 1987). Habermas's theory of "discourse ethics" builds on this theory of communicative reason to suggest that only practices that permit truly undistorted and uncoerced communication are capable of generating legitimate controls over conduct. Although *Between Facts and Norms* concedes that social complexity may require that large segments of social life be governed more instrumentally, Habermas still believes in the priority

[2] I use the term "settlement" as roughly analogous to, but more tentative than, "paradigm" (Kuhn 1962). Kuhn was describing natural sciences which seem to experience episodic periods where a successful model of research practice and theorizing wipes the field of opponents, a condition that Kuhn calls "normal science." It remains quite unclear whether social sciences, including legal studies, are even capable of normal science. At any rate, I do not mean to imply that what I call the modernist settlement (described below) was ever as totalizing or stable as paradigms that have been described in the natural sciences.

of communicative reason and looks to law as the crucial field for enforcing this priority.

At a time of "culture wars" in American academic life, when the epistemological right is held by analytic moral philosophers and rational choice theorists and the left by feminists and postmodernists (like Foucault), Habermas occupies a strategic position.[3] Over the past decade and a half he has pursued a significant engagement from the left with the philosophy of language, ethics, psychology, and rational choice theory. At the same time Habermas has been perhaps the leading critic of postmodernist theory, which he has attacked for abandoning a commitment both to reason and to social reform (Habermas 1989; Fraser 1985). From this perspective Habermas appears as a progressive intellectual who shares the conservative response to those who seem to be "trashing" the West's intellectual inheritance, its belief in "truth" and in the possibility of rigorous justification for social action.

Habermas is also an attractive figure in more directly political terms. As my colleague David Abraham points out in his comment, Habermas is the leading figure on the German political scene advocating American versions of civil rights and civil liberties.[4] That is an enormous relief to many who feel that, epistemology aside, they would rather not see the Germans throwing reason and bureaucratic legal norms out the window once again. Just as many once thought that belief in God (whatever its validity) was necessary to keep the social order intact, some now see belief in reason and in liberal legalism as a necessary bulwark against future atrocities. Even if one is willing to test the capacity of ethics to operate without visible guarantees of reason and law, it is unlikely that many would choose the Germans to be the first experimental subjects.

Habermas has also played a significant role in mediating that other great paranoid complex of American intellectuals in the post–World War II era. He is, after all, the leading living version of the Frankfurt School line of critical theorists whose works provided the main link to a humanist side of Marxism at the height of Cold War anticommunism in the United States and of Stalinism in the Soviet Union. In more recent times, Habermas has managed to sustain a public commitment to social justice and radical transformation of the social order while striving mightily to articulate a broad common front with liberals in an era of conservative national politics exemplified by Reagan, Thatcher, and Kohl.

[3] I use "postmodernist" to describe Foucault and other thinkers for convenience' sake because Habermas (1989) has used that term in describing them. In fact, Foucault rejected that appellation (Foucault in Kelly 1994a:124).

[4] A version often far more progressive than is commonly accepted here.

Habermas's effort to describe a theory of discourse rationality which would provide foundations for both social policy choices and norm evaluation brings these virtues together. By linking the most respected area of contemporary philosophical research—language—with the key aspirations of European democratic traditions, Habermas has managed to span the leading cultural gaps that threaten the position of Western intellectuals at the end of the 20th century. This is all the more powerful since language is just the place where (in different ways) postmodernist discourses demonstrate the intractability of power and of desire.

Foucault

Summarizing Foucault in a piece this short is likely to be equally impossible and unhelpful.[5] That part of his work best known in the United States consists of brilliant and highly contentious revisionist histories of the development of modern practices involving the insane (1965), the criminal (1977), and the sexual deviate (1978). As a philosopher, Foucault may be best known for his use of the concept of power to describe modern society. In contrast to the long-running assumption that truth and power are adversarial, Foucault has argued that the two are always deeply intertwined. While Foucault's usage of power is actually quite subtle and complex (Honneth 1991; Winter 1994), many read him as an unrelenting critic of all reforms who views power as inevitable and intractable.

Unlike Habermas, Foucault never tried to assemble a comprehensive system that addressed both a theory of society and one of knowledge. That did not stop him, however, from making sweeping and often highly pejorative statements about the structure of both political and intellectual authority in modern society. The combination of these statements and Foucault's avant-garde image have helped turn him into a symbol of postmodern barbarism. I have heard colleagues who have never read a word of Foucault bitterly denounce his noxious influence on the lives, language, and research projects of their students and (usually younger) colleagues.[6] Habermas, in contrast, comes off as a veritable Heidi's grandfather providing comfort and security during these dark times of skepticism. For others, of course, Foucault has boldly created spaces for new ethical and political projects, while Habermas seems a virtual coupon-clipping pensioner in the long twilight of Western civilization. These too brief descriptions, perhaps even caricatures, will, I hope, suggest why the

[5] The best single secondary source on Foucault remains Dreyfus & Rabinow 1983. For an informative analysis of Foucault's work as it pertains to law see Hunt 1992.

[6] Ironically, Foucault's political life bears some important resemblances to Habermas's. Both have been ardent supporters of civil liberties and protections for ethnic minorities in their respective countries (Gandal 1986; Miller 1993).

Habermas/Foucault debate is so important (both intellectually and symbolically) to disciplines, including legal studies, where the modernist settlement is being destabilized and challenged.

Law, Modernism, and the Discursive Turn

The "discursive turn" is a term used to describe the trend in the humanities and the social sciences toward prioritizing the context of meanings around which human actors communicate and behave.[7] Western philosophy has always paid a lot of attention to language as a medium through which representations passed between subjects and objects. What seems different now is that the medium has increasingly come into the foreground blurring the lines between subjects and objects altogether. In fact, this trend is not all that new; it was heralded by Nietzsche in the 19th century and by American pragmatists like Dewey at the start of the 20th century (Rorty 1991:3). But for much of the mid-20th century, the trend was contained by what I call here the modernist settlement, a formation encompassing both the quantification of knowledge about subjects and objects and reform-oriented normative objectives. We tend to think of this formation as most embodied in Progressive era intellectuals (among whom we could include Dewey himself; see Westbrook 1991), but it remained a dominant posture revitalized by the public culture of the Cold War and the Great Society until the 1970s at least.[8]

Law, always having been about language and about nasty ethical problems, should have been among the most vulnerable discourses to the "discursive turn." This did not happen because the formidable institutional structure of the American law school succeeded remarkably well until recently in assuring something close to academic autarchy. Traditional academic writing on law largely ignored the status of law as ideology, language, text, and narrative; and those dissident strains that failed to expunge themselves, like some of the Realists, were squeezed out during the 1950s (Horwitz 1992).

For some time now scholarship has been highlighting specifically these aspects, but at the cost of breaching the barriers that once kept law relatively autonomous from theoretical ferment in other fields. Focused analyses of specific policy or doctrinal problems in the service of legislative or judicial reform remains a prominent part of legal writing, but it now competes for journal space with scholarship that is theoretically reflexive and inter-

[7] Some of the works most influential in spreading the discursive turn in the United States include Geertz (1973), Thompson (1964), and Berger & Luckmann (1966). Influential as well were translations of Foucault, Jacques Lacan, Jacques Derrida, Antonio Gramsci, and other European theorists that began to enter American academic life in the 1970s.

[8] In Simon 1993, I try to make this case for a narrow slice of this formation concerned with penology.

ested in making issues of law and policy more rather than less problematic (Alfieri 1991; Coombe 1989, 1991; Cornell 1991; Edwards 1992; Peller 1985; Schlag 1991; Winter 1991).

It might be possible to write off the new theoretical reflexivity in law schools as an unintended consequence of lucrative law school salaries and stagnation in the job market for literary critics, political theorists, and philosophers if it were not that a similar shakedown is going on in law and society. The founding of the Law and Society Association some 30 years ago reflected the prestige of the positivistic social sciences and the promise of scientifically guided institutional reform. Statistical analysis of standardized data was never the sole methodology of law and society scholars (e.g., Selznick 1969; Skolnick 1966), but it claimed a dominant position in defining the credibility of policy-relevant legal studies research. As any recent conference program for the Law and Society Association demonstrates, this is no longer the case. There are a variety of developing research programs in the Association today that do not employ standardized observation methodologies or policy-oriented problem definition (e.g., Constable 1994; Harrington & Merry 1988; Sarat & Kearns 1993; Scheppele 1988) but that claim an empirical orientation toward legal discourses, practices, and institutions. While many do not welcome these developments, few can pretend that what we study and how we study it is not more up for grabs than it has been for a long time.

Transformations in both the doctrinal and empirical wings of legal studies are linked to a third problem—the relationship between scholarship and social reform (Handler 1992). The success of both law and society research and reformist doctrinal scholarship from the 1920s through the 1960s was premised on a set of assumptions about the role of knowledge in achieving social transformation. Those assumptions have been eroded from both the intellectual and the political side. Many of those developing new research strategies have also been skeptical of the traditional models of the relationship between research and policy established in both doctrinal law review articles and empirical books and articles (Sarat & Silbey 1988).

Law, Norms, and Power

The theory of law Habermas offers in *Between Facts and Norms* (as summarized by Bohman 1994) seeks to defend the now classic modernist vision of law as achieving social integration, channeling political participation, and subordinating power to democratic purposes. In contrast to recent critiques of rights theory from the left, Habermas affirms:

> [T]he system of rights that is the basis of the rule of law assures that the conditions of public and private autonomy enter into the formation and use of power throughout society. Without the law as medium and institution, communicative interaction is simply too weak an integrative force not to be overwhelmed by other more efficacious sources of social power. But when communicative power is connected to the capacities for bureaucratic organization, such sources of power can be brought under public control. (Bohman, p. 916)

In these terms it is easy to see why Habermas's intervention may be most welcome by legal scholars who feel that epistemological attacks on the tradition of modern legal theory risk undermining both political reform and the authority to isolate and criticize moments of extralegal coercion and domination. Habermas offers a theory of law that affirms its unique status as a system of authority and invites the possibility of reform.

Foucault, in contrast, by focusing on power leaves the role of law in considerable uncertainty. Habermas has criticized Foucault's "theory of power" as "utterly unsociological" (Habermas 1994a:57). Habermas grants that Foucault's historical analyses of the asylum, the prison, etc., succeed brilliantly at highlighting disturbing features, but he argues that they fail at the task of providing a coherent and plausible account of social order. Habermas accuses Foucault of leveling the role of culture and politics to the immediate application of violence, and social life to a series of occasions for power to be exercised over bodies (Habermas 1994b:101).

If this is right, Foucault's use of power as a critical tool is a failure and a costly one. The role of "values, norms, and processes of mutual understanding" in "stabilizing domains of action" (ibid.) is ignored. This leaves Foucault unable to provide an adequate account of how the totality of struggles and confrontations creates a network of power, let alone creating a social order that could be called just and defended as such (see also Hunt 1992). In contrast, what Habermas calls *communicative action* "with its interlacing of the performative attitudes of speakers and hearers" (Habermas 1994b:99) focuses heavily on values, norms, and the experience of mutual understanding.

According to Habermas, Foucault's privative view of power also makes it difficult to conceive of the relationship between the individual and the social order. Foucault's analysis of law ignores the internal development of the constitutional order and the gains in liberty and security that have been attained in the 19th and 20th centuries (Habermas 1994b:102).[9]

[9] Habermas explicitly relies on Axel Honneth's (1991) critique of Foucault's theory of power. A similar critique has also been raised, somewhat more sympathetically to Foucault, by Alan Hunt (1992).

> The increasingly individualizing formative processes that penetrate ever broader social strata in societies with traditions that have become reflective and with action norms that are highly abstract, have to be artificially reinterpreted to make up for the categorical poverty of the empowerment model. (Ibid., p. 99)

On this account, it is easy to see why legal scholars of various sorts would put some distance between their work and Foucault's. The latter seems to dismiss law, norms, and ethical principles as instruments of social order and emphasize only the chain of molecular coercions to provide stability. The most relevant defense of Foucault here[10] is to challenge the view that his work is a theory of power at all rather than a strategy for critical historical research. There are places where Foucault seems very much to want to offer a theory of power through his substantive studies. "It is better to advance step by step, examining different fields one at a time, in order to see how a theory of power might be elaborated" (Foucault 1991:150).[11] There are other places (indeed in the same interview) where he indicates a much more limited horizon of interest: "I am led to raise the question of power by grasping it where it is exercised and manifested, without trying to find fundamental or general formulations" (ibid., p. 164). As I have argue elsewhere (Simon 1992), reconstructing what he actually might have believed about this may be a pointless and futile process; we can learn more by observing his research practice.

Foucault did not leave a methodology,[12] if that means a precise set of techniques. He did, however, leave a substantial body of statements about how to study the same kinds of social practices that legal studies scholars are almost invariably interested in. The most famous of these is his call for examining the "positivity" of power, its productivity in social life, rather than associating power exclusively with repressive functions (Foucault 1978:9). Few now would disagree with Foucault's argument that the "repressive hypothesis" (ibid., p. 10) that power is primarily negative and deductive has blinded us to the role of power in enabling ways of life. Equally well absorbed by the larger intellectual culture is his call to recognize resistance and power as entailing each other (Foucault 1983:221). Power, from this perspective, is not something possessed or held in reserve, it is always in circulation creating the possibilities of resistance that further in-

[10] See Kelly 1994b for a sustained defense of Foucault against Habermas's general critique.

[11] Honneth (1991:200) suggests, correctly in my view, that Foucault's most general statements about power, if seen as serious elements of a social theory of power, point to a systems theory of power in which the system of one epoch is succeeded in the next by a more complex and efficient system.

[12] "I don't construct a general method of definitive value for myself or for others. What I write does not prescribe anything, neither to myself nor to others. At most, its character is instrumental and visionary or dream-like" (Foucault 1991:29).

voke it (see Winter 1994). A third call was to study power at its points of application rather than at its central places of legitimation (Foucault 1980:96). Few in the law and society movement, at least, would disagree with his invitation to examine the "capillary" actions of governments and other strategic formations (ibid.).

Less well observed are the limits implied by the scope of Foucault's projects. The prevailing pressure is to read Foucault back into the production of social theory. Whatever Foucault's ambitions in this regard, his discussion of power may be most useful as a strategy for conducting a kind of postmodern version of "middle range" research (Simon 1992).[13] His studies pick out specific technologies of power that operate in particular social practices with the aim of analyzing their genealogical development from earlier strategies and struggles. His most insightful discussions are almost always in describing some cluster of practices. Take him away from the specific contexts he is studying in order to generate evaluative principles and you will end up with provocative but often silly things to say.

In brief, Habermas may be precisely right when he says that Foucault's use of the concept *power* is "utterly unsociological" if sociology codifies for Habermas a commitment to providing a comprehensive account of social ordering. Others have made similar points. Alan Hunt (1992:12) argues that Foucault's account needs a concept like "hegemony," while Axel Honneth (1991) views Foucault as irrationally rejecting any role for intersubjectivity in social integration. Habermas, in contrast, has long placed intersubjectivity at the center of his account of the social order (although *Between Norms and Facts* may be a retreat on that line (Bohman 1994)).[14]

If Foucault's analysis of power is more useful as a methodology for legal studies than as a theory of power to be contrasted with a theory of law, it might be productive to see it as a supplement to rather than as an alternative for Habermas's normative social theory. Habermas's own "reconstructive" approach, as outlined by Bohman (1994:899), involves isolating "idealizations" of

[13] Middle range in the sense that such work is not deductively related to a theory of the social order or a phenomenology of individual or group consciousness. The term was used most influentially by Robert Merton (1968).

[14] The closest Foucault comes to thematizing this problem is in his oft-cited formulation that "power relations are both intentional and nonsubjective" (Foucault 1978: 94–95). Hunt (1992:13) argues the Foucault wrongly conflates the aggregation of tactics with strategy. As a result, in Hunt's view (p. 14), Foucault either sneaks a strategic agent back in through an underthematized view of the ruling class or is left with a standard social science finding about unintended consequences. Hunt would be right if Foucault is to be read as constructing a comprehensive theory of the social order. Genealogy as a middle-range practice points in a different direction, however. From that perspective the analysis of strategies does not preclude a history of strategists but privileges the history of the technologies of power that such strategists deploy. In other words, only if Foucault's results are stretched to account for the overall social order do they produce the obviously unsatisfactory claims that Hunt derives from them.

the norms that govern social action systems, which are then philosophically explored, leading to a reconstructive analysis of actual social practices. It's interesting in this regard that in Bohman's account Habermas has eschewed discussion of empirical research on law and society in favor of philosophical exercises in modeling in his theory of law.[15]

The Role of Critical Theory

Habermas seems to be able to offer legal scholars a strategy for playing a limited but unambiguously positive role in democratizing modern society. While language is just what makes law in the work of postmodern theorists look dangerous and weird, Habermas offers it as the reason why law is such a privileged site for reforming society.[16] One of Habermas's most sustained criticisms of Foucault has been precisely about the relationship between his critical analysis of social institutions and the process of social transformation. His critique raises two distinct points of interest for legal studies.

First, Foucault's historical studies document the role the normalizing discourse of "scientific" experts on human life plays in constructing some of the most undemocratic aspects of modern society, but he is unable to provide an account of how critical social theory (including his own work) escapes from the interlocking of knowledge and power he describes (Habermas 1994a:55). In contrast, Habermas wants to take a redemptive and reconstructive approach to the tradition of rational inquiry into human affairs that has produced the modern social sciences.

Second, Foucault is unable to provide justificatory or normative evaluation. His empirical studies of power practices may offer useful tools for those engaged in conflict, but they provide no answers to how such conflicts should be resolved.

> If it is just a matter of mobilizing counter-power, of strategic battles and wily confrontations, why should we muster any resistance at all against this all pervasive power circulating in the bloodstream of the body of modern society, instead of just adapting to it? Then the genealogy of knowledge as a weapon would be superfluous as well. It makes sense that a value-free analysis of the strength and weakness of the opponent is of use to one who wants to take up the fight—but why fight at all? (Habermas 1994b:96)

In contrast, Habermas subordinates empirical investigation to the philosophical construction of procedural tests that can be

[15] Given the current prestige of rational choice theory, this will hardly be counted against it among political scientists and sociologists.

[16] Habermas (1994b:84) cites Foucault's inability to provide an account of the liberating potential in legal rights as an example of how sterile his critiques of power really are in helping to formulate goals for social transformation.

used to determine whether particular institutional orders are legitimate.

Habermas's critique of Foucault is likely to be highly attractive to those who feel the greatest loss in the clouding of the relationship between science and political reform. Indeed, the intellectual who produces middle-range studies of how power is exercised in particular domains and through a highly specific context of social action, is not in a position to offer critical social theory in the sense of a theory that explains *why* certain practices or even whole social orders must be changed. You can say things like "down with disciplinary society," but they sound silly.[17]

But this is fatal in this regard only if one believes that what philosophers or other intellectuals can hope to do is produce tests which people can apply to determine the acceptability of various social arrangements. The plausibility of developing such tests that produce more than purely tautological truths should be highly questionable at this point to legal scholars (Gaskins 1993). In the end, however, refutation of this position may be less important than showing that it does not fit our own traditions of practice and that attractive alternatives remain for scholarship even if that of guaranteeing the validity of social struggles is out.

Knowledge and Human Interests

Foucault believed that his work could help people actually engaged in resistance to power by illuminating the relationship between their problems and the way power is exercised within the specific domains they inhabit. "What do the mentally ill say? What is life like in a psychiatric hospital? What is the job of nurse? How do the sick react?" (Foucault 1991:151). A colleague who represents mental patients and worries precisely about how to engage them in dialogue about their real interests and needs noted that the problems that patients raised often reflected their own sense of how much of their universe they saw as changeable (see Gaventa 1980 for an account of this process among Appalachian coal miners). They complain about caps on the number of cigarettes they could have in a day, rather than about why they were in confinement. Such issues are bound to disappoint the lawyer or legal scholar who cares about freedom and justice.

But rather than leaping from cigarettes to talking about the legitimacy of confinement, one might follow the patients' complaints in the direction of an analysis of how power is exercised. What kind of power is it that must control how much a person

[17] Foucault walked away from the concept (although typically by denying he ever held it) of a disciplinary society, telling journalist Duccio Trombadori in 1978: "I have never held that a mechanism of power is sufficient to characterize a society" (Foucault 1991:170).

smokes for their own good.[18] What relationship do such rules have to the staff's more general domination of the patients? What is the nature of a daily regimen in which smoking would loom as such a central measure of autonomy and self-interest for the patients? These questions may not yield definitive judgments about the legitimacy of particular institutions, but they may drive deep and wide cracks in the solidity of their authority claims—cracks in which alternative arrangements may become far more plausible.

Likewise, we should ask of Habermas's theory of law what it would contribute to such strategic problems of lawyers and legal studies. It is troublesome, in this regard, that Habermas's theory of law in *Between Facts and Norms* is set at such an abstract level. On Bohman's account it is a treatment of law as a broad and universal practice, not grounded to the analysis of any specific institutions or examined in the light of any particular historical struggles.

An example of the kind of possibilities and limits of social reform based on middle-range genealogical work is provided by the career of legendary community organizer Saul Alinsky (see generally Horwitt 1989). Alinksy was trained in the sociology department of the University of Chicago whose founders, men like Robert Park and Ernest Burgess, were intent (and largely successful) on turning out progressive experts anxious to help produce official knowledge for reform. Alinsky broke away from the Chicago path, however, and began to work directly with community groups. His projects were subversive but recognizable mutations of Park's and Burgess's sociology. He deployed the same techniques to produce counter-flows of knowledge that established more efficient ways of exercising power from below.

Originally he had been assigned by Park's and Burgess's student Clifford Shaw to organize neighborhood councils to combat juvenile delinquency in Chicago's slum neighborhoods. The Shaw strategy was itself quite radical in the light of the prevailing views of delinquency in the 1930s. Shaw viewed delinquency as an outgrowth of disempowered communities that could not effectively generate social control over their young, but his aspirations remained in line with the classical normalizing goals of official criminology. Shaw's strategy involved building a base of social science knowledge about a community in order to identify the critical elements of community power that could be realigned in support of antidelinquency efforts. After building a number of such neighborhood coalitions for Shaw, Alinsky used the same techniques to build a community organization in the notorious Back-of-the-Yards neighborhood in Chicago (Horwitt 1989:56–76). But rather than following Shaw's strategy of bind-

[18] Of course, we are increasingly seeing issues like smoking and drinking become matters of first priority for all kinds of institutions.

ing such organizations to normalization goals and civic elites, Alinksy created a community organization with broad goals of resistance to exploitive employers and banks and with ties to radical union leaders. His strategies managed, at their best, to enact a direct seizure of social science power/knowledge for subaltern classes he identified with.

It is important, of course, to recognize that not having a social theory has its costs. One is that anyone doing local work of this kind needs to worry about who is deploying the technologies of power and for what ends; the genealogy of power itself will tell them little about that. Another is that genealogy may lead one to ignore the way in which people become attached to their own subordination. If Alinsky can be pointed to as an exemplar of how creating alternative knowledge/power flows may support viable social movements, his experience also reveals the pratfalls of not having a larger counterhegemonic strategy. Some of his most successful community organizations, like the Back-of-the-Yards Neighborhood Council, utilized the mechanisms he helped innovate to pursue agendas, like racial segregation, that he never supported (ibid., p. 367).

Part of what Habermas objects to about Foucault's genealogy is that it cannot provide a guarantee of its own freedom from dangerous uses. This is accurate, but its bite depends on how much you believe that anything interesting and useful could provide such a guarantee.

Conclusion

Legal studies scholars are engaged in a (frustrating to some) growing debate about how to study legal practices and what the aims of a critical study of law might be. Habermas's engagement with the work of Michel Foucault is particularly relevant to legal studies at this crossroads. If nothing else, it will deepen a debate that needs to be deepened before a useful resolution will be achieved. More ambitiously, it might be hoped that an emergent expansion of empirical work influenced by Foucault's research strategies will find itself called by Habermas to a necessary ethical reflection; while those who mourn the passing of the modernist settlement on political and ethical grounds will find in Foucault's genealogies of modern power/knowledge formations new purchase on the significance and future possibilities of the reform tradition.

Likewise, we need not assume that the normative implications of these two great thinkers run in opposite directions. We might find, for example, that an administrative regime constituted along the lines of Habermas's discourse ethics would create precisely the counterflows of knowledge that a Foucault (or an Alinsky) would use to empower traditionally subordinated

groups; or that the fruits of political struggles enriched by genealogical research include the creation of those spaces of uncoerced and unmanaged public discourse that Habermas strives so rightly to create and preserve.

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