Judgment and Imagination in Habermas's Theory of Law

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Abstract: Recent debates in political theory display a renewed interest in the problem of judgment. This article critically examines the different senses of judgment that are at play in Jürgen Habermas's theory of law. The paper offers (a) a new critical reading of Habermas's account of the legitimacy of law, and (b) a revisionary interpretation of the reconstructive approach to political theory that underpins it. Both of these are instrumental to (c) an understanding of what is involved in judging the legitimacy of law that is richer than has been recognized thus far by both critics and defenders of Habermas.

1. Introduction

What is involved in judging the legitimacy of law? Much of the philosophical debate about legitimacy focuses on the content and justification of principles of legitimacy in light of which law (or political authority more broadly) ought to be considered legitimate or illegitimate. Judging is then taken to be a matter of applying those principles to a particular case. Yet with meta-theoretical debates as lively as ever in political theory, it is not surprising that political judgment, where theory and practice intersect, is re-emerging as a focus of sustained theoretical attention. Contemporary realists object that general principles cannot be treated as a given in politics and urge us to see political judgment as radically contestable and contextual (*e.g.*, Bourke and Geuss 2009; Philp 2010). Others, inspired by Kant's notion of reflective judgment or by Arendt's lectures on it, claim that judgment is a matter of attunement to the particularity of concrete situations, which provides a sense of context-transcending validity that does not derive from principles given in advance (Azmanova 2012; Ferrara 2008; Zerilli 2012). Rather than taking sides in this debate, in the present paper I call into question the idea that we face a stark choice between competing and mutually exclusive models or paradigms of judgment, by rethinking the role of judgment in the political theory of Jürgen Habermas. I aim to show that a richer understanding of judgment is at play in Habermas' work than either his defenders or his critics have recognized.

Habermas's political thought is often targeted by those who challenge the view of political judgment as the application of principles. As is well known, for Habermas the legitimacy of law derives from the discursively rational character of democratic legislative procedures that guarantee both popular sovereignty and basic rights. So, even though he takes a discursive turn with respect to the justification and implementation of this principle of democracy, at bottom it does indeed appear that, for him, judging the legitimacy of law would be a matter of applying a rationally justified principle. This strikes many critics as an overly abstract, idealized, or rationalistic view of judgment. For instance, one prominent critic, Linda Zerilli (to whom I'll respond below), castigates Habermas for "never consider[ing] the possibility that there could be a form of validity specific to democratic politics that would not be based on the application of rules to particulars" (Zerilli 2005, 164).

On closer examination, however, it appears that a different and more compelling notion of judgment is at play in the background in Habermas's theory of law, or so I will argue. As we shall see, judgment figures at two levels of analysis: in the content of the theory, but also in the particular form that Habermas gives it, namely that of a rational reconstruction of the self-understanding of modern law. The first part of the paper (sections 2 to 4) examines Habermas's explicit understanding of the legitimacy of law, and asks what would be involved, on this account, in judging legitimacy from a first-person perspective. We shall see that there is a crucial ambiguity in Habermas's construal of the participant perspective on law, which hides a gap between, on the one hand, what judgment involves from the first-person point of view of a subject confronted with the law, and, on the other, how the law, from its own, second-person standpoint, expects its subjects to judge.

The second part (sections 5 and 6) investigates the implications of this gap for Habermas's project of reconstructing the normative self-understanding of the law. I argue that the standard interpretation of his approach, according to which reconstruction is a matter of explicating the normativity implicit in practice, cannot coherently resolve this ambiguity. But I also provide an unconventional reading of the logic of the reconstructive approach to law, which can address the gap more productively. As the word suggests, reconstruction is both backward- and forward-looking: it draws on what it finds in practice, but takes this up in a creative and essentially contestable way. We'll see that this creative reflexivity of rational reconstruction relies on an imaginative judgment about how to conceive of the legal order on

the part of the theorist, who aims to elicit the same judgment from the reconstruction's audience. This reinterpretation trades the tension between actual and ideal participant perspectives postulated by the standard interpretation of Habermas's approach for a tension between the actual and the potential: actual subjects are invited to see themselves as the citizens that the law (as rationally reconstructed) takes them to be. This interpretation yields a nuanced understanding of judgment at the nexus of theory and practice, in which the application of principles and imaginative world-constitution figure as complementary aspects of judgment, rather than as alternative and mutually exclusive paradigms.

2. The participant perspective and the two faces of legal validity

To begin, we need a sense of the ambitions that inform Habermas's project. In *Between Facts and Norms*, Habermas aimed to show that we may retain the hope that the law in modern societies can fulfill the promise of being a means of democratic self-organization (Habermas 1996).[1] To do so, two deep-seated worries must be kept at bay. In a sense, the legal order is just one functional system among others (the economy, a bureaucratic state apparatus, civil society, etc.), but at the same time the law aspires to stand above the rest of society, to provide a sense of coherence without which the complex dynamics of society lack direction and control. So the first challenge is to show how it is possible for law to function as a means of "social integration" in modern societies, given the pressures that arise from increasing societal complexity (Habermas 1996, 26–27). The second challenge is to show how law, aside from being capable of organizing society, can also be rendered normatively legitimate, in the face of pluralism and the demise of metaphysical and traditional sources of authority.

Habermas's strategy for meeting these two challenges is to develop what he calls a "rational reconstruction" of the "self-understanding" of modern legal orders (Habermas 1996, 82). Toward the end of this paper we'll examine what this means. For now, three features are important. First, reconstruction aims to provide a critical perspective on the law, the normativity of which is immanent to legal practice, rather than deriving from outside it (as in a theory of natural law). Moreover, reconstruction aims to show that this normativity is in some sense already at work and efficacious in practice, and that it therefore cannot be ignored if we want to understand legal behavior sociologically (Habermas 1996, 287–288; cf. xl, 42-56, 66-81). Thus reconstruction should be understood in contrast to purely empirical approaches that abstract from the claim to normative validity, and from purely normative approaches that ignore the conditions in which a legal order functions and thereby miss what is distinctive about law: its institutional dimension gives it a kind of normativity that cannot be derived from morality (Habermas 1996, 56–66, chapter 3).

Third, and crucially for present purposes, rational reconstruction gives center stage to the *participant perspective* on the law. Only if we take the standpoint of participants into account can we grasp the two faces of legal validity that form the core of the law's self-understanding. If participants in legal practice are to comply with the law and to apply and enforce it, and thus distinguish what counts as law and as lawful from what does not, they need to recognize legal demands as binding. According to Habermas this binding character has two distinct senses. On the one hand, in order to be considered valid, a legal norm must actually be implemented by institutions such as courts and enforcement agencies, and regularly complied with by subjects (Habermas 1996, 198). He calls this "de facto validity" (Habermas 1996, 29–30). A law that the authorities fail to uphold loses its validity as a legal

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[1] Specter (2010) argues persuasively that *Between Facts and Norms* does not represent a turn toward law in Habermas's career, but that his work from the beginning shows a conviction that social progress and emancipation can only be realized through rule of law, not in spite of it.

norm—it becomes a dead letter. In a different sense, taking a law to be binding involves taking it to be obligatory or worthy of respect.[2] A law that is upheld by the authorities but cannot rationally be agreed to by its subjects fails to live up to its claim, as law, to *deserve* compliance, and thereby fails to be a valid legal norm in a normative sense—this is the law's "normative validity" or "legitimacy." Thus the law "presents itself as Janus-faced to its addressees": subjects can choose whether to comply with the law out of self-interest or from a sense of obligation (Habermas 1996, 448; 30-32).[3] So the two prongs of legal validity each respond to one of two possible modes of self-understanding for subjects who are confronted with the law (Habermas 1996, 30–32).

It is tempting to read this two-pronged account as mapping directly onto the typology of forms of social interaction that Habermas proposed in his theory of communicative action. The basic distinction there is between the *strategic* and *communicative* orientations that social agents can take toward one another in a context of action (Habermas 1984, 286–295). In pursuing certain goals through social interaction, agents can adopt a stance oriented merely to their personal success, *i.e.,* the satisfaction of their perceived interests, irrespective of whether and how these mesh with the goals of others. For such an agent, other agents appear either as means or as obstacles, which must be taken into account instrumentally if those goals are to be achieved. By contrast, an agent who adopts a "communicative" stance in pursuing certain goals also exhibits an "orientation toward mutual understanding" with those others. This essentially involves allowing room for others to challenge one's intended course of action, as well as a willingness to engage in an exchange of reasons when they do. This attitude manifests an openness that could in principle lead to revision of intended goals as well as chosen means. Thus others appear not merely as means or obstacles to the realization of goals, but as interlocutors who can call one's goals into question. To put this point in negative terms, communicative agents shun forms of influence on others that operate behind their backs.[4] Communicative action typically takes place against the background of a shared understanding with other subjects of what ought to be done, and, when confronted with disagreement, attempts to resolve it by disputing validity claims.

If we map the two faces of legal validity onto this typology of social interaction, we get the schema presented in Figure 1. Strategically oriented agents encounter the law as an object to be reckoned with and comply with it due to its threat of sanctions (de facto validity). In contrast, communicative agents can see legal norms as the expression of a mutual understanding with others. They adopt a "performative" attitude toward the law, viewing it as an expression of their communicatively rational collective will, and therefore as legitimate (as normatively valid).

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[2] One might suggest that there is a meaningful distinction between obligation and worthiness of respect , but Habermas seems to use them interchangeably.

[3] Of course, Habermas isn't the first to draw this kind of distinction of between two stances on the part of participants toward the law; he draws on Kant's theory of law (Kant 2009), but a similar distinction can be found in H.L.A. Hart (see Shapiro 2006). As we'll see, however, Habermas construes these stances in a distinctive way.

[4] I am indebted on this point to Patchen Markell, who elucidates and qualifies the much-debated role of consensus in communicative action, arguing that "to be 'oriented toward agreement,' an actor need not have agreement as the *goal* of his or her action or speech, nor must the action or speech be likely to *produce* agreement. An 'orientation toward agreement' simply means a foreswearing of the mechanisms of coercion and influence—a foreswearing of perlocution—in the pursuit of one's goals and a corresponding commitment to provide reasons for one's claims if they are challenged." (Markell 1997, 390)

Conception of law

legal validity

| de facto implementation |

| legitimacy through democratic procedures |

sanctions

calculated compliance

obligations

respect

| strategic |

| communicative |

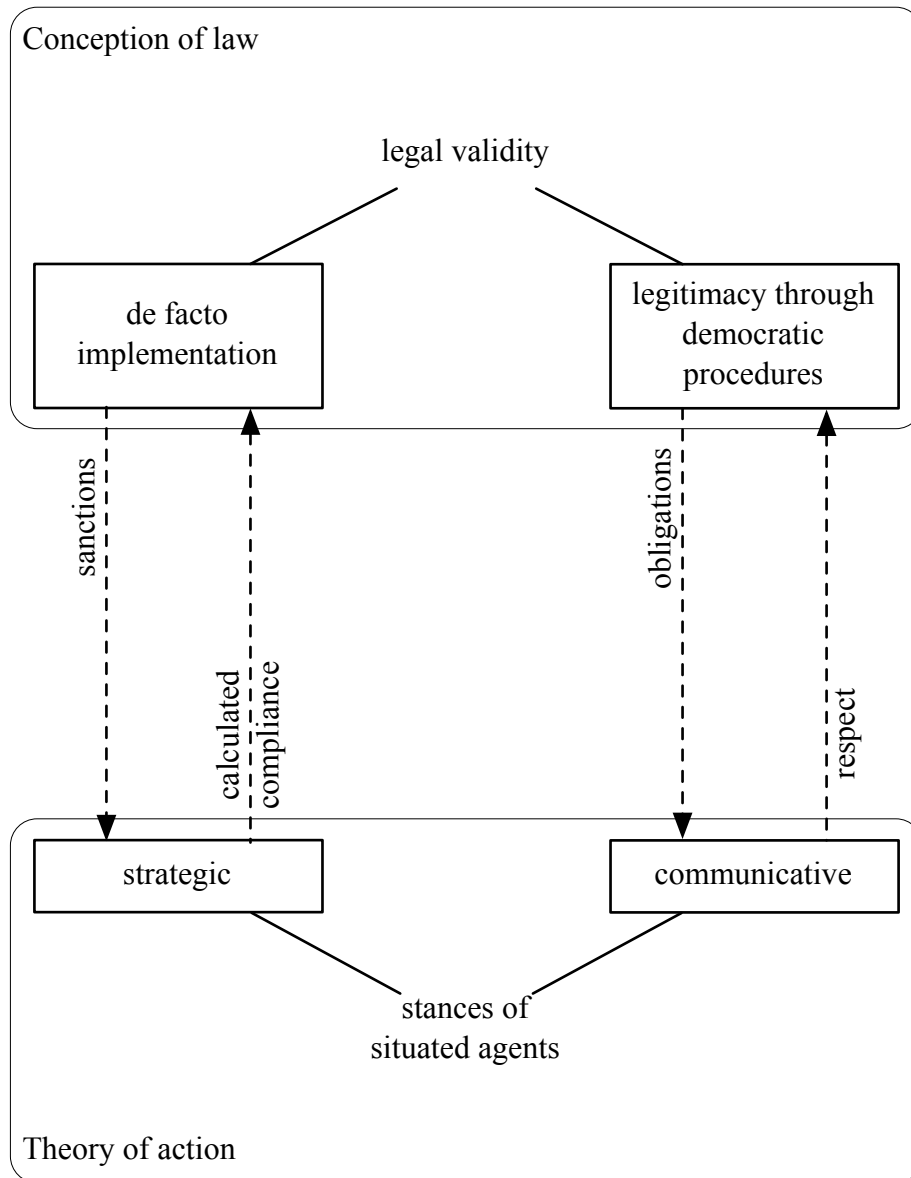stances of
situated agents

Theory of action

Figure 1: The law's two faces and agents' practical stances

If we accept neat alignment of legal validity and action theory, we can see why for Habermas grasping the law's legitimacy is essential for an adequate understanding of the law even from a sociological perspective. Legal norms must have an effect on the behavior of subjects in order for the law to be factually efficacious. This effect is due not only to the changes to the equations in utility calculations that stem from sanctions, but also to the imposition of rationally acceptable obligations.

3. *Whose* participant perspective?

However, this picture of the relation between Habermas's conception of law and his theory of action calls for qualification. The two dimensions of legal validity do not latch onto the two types of action-orientation on the part of social agents without remainder. It is important not to conflate the two different distinctions at play here, *i.e.*, that between the different attitudes toward the law to which the two dimensions of legal validity appeal for motivational efficacy,

labeled "objectivating" (or "strategic"; a desire to avoid sanctions) and "performative" (or "communicative"; a sense of obligation), and the action-theoretic distinction between different orientations that agents can adopt toward others in social interactions (labeled "strategic" and "communicative").

In Habermas's construal of the participant perspective on the law, these distinctions tend to be fused together: to adopt a performative attitude toward the law *is* to be motivated by respect for the law, which *is* to be oriented toward rational mutual understanding with other citizens. For instance, he writes:

> Depending on the chosen perspective, the legal norm presents a different kind of situational element: for the person acting strategically, it lies at the level of social facts that externally restrict her range of options; for the person acting communicatively, it lies at the level of obligatory expectations that, she assumes, the legal community has rationally agreed on. (Habermas 1996, 31)

Here the equivocation between the two distinctions (legal validity vs. action theory) is clear: a communicative agent assumes the discursive rationality of legal norms. But is there something inherent in a communicative orientation toward others that necessarily involves such an assumption, when one is confronted with the law? I do not believe so.[5] It would be more precise to say that the legal order *expects* communicative agents to assume so—it *claims* legitimacy, but whether that legitimacy is *recognized* is another matter.[6] (On the other, "*de facto*" side of legal validity, we find a similar ambiguity when Habermas appears to conflate the implementation and enforcement of the law with the "factual compliance" that this is meant to help generate (*e.g.*, Habermas 1996, 29–30); but this is not so important for present purposes.) Indeed, elsewhere Habermas makes this more explicit. For instance, a moment later, he says of private rights:

> As elements of a legal order that is legitimate as a whole, they appear at the same time with a normative validity claim that expects a rationally motivated recognition. As such, they at least *invite* the addressees to follow them from the nonenforceable motive of duty. This invitation means that the legal order must always make it *possible* to obey its rules out of respect for the law. (Habermas 1996, 31, emphasis in original)

The legitimacy of the law here appears as a claim or an invitation and as such, one presumes, might be refused.

What this equivocation between action theory and legal validity obscures is that, for either stance toward the law (strategic or performative), certain conditions must be met if the law is indeed to be considered valid in the relevant sense and to motivate compliance. For the strategically oriented agent, enforcement must be perceived as likely and severe enough for the law to be seen as a force to be reckoned with. Similarly the communicatively inclined agent must indeed endorse the law as worthy of respect. Yet Habermas tends to write as if the law's motivational efficacy flows effortlessly from its validity: "Thus the actor, taking in each case a different point of view, *will* ascribe to a legally valid regulation either the status

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[5] It is clear, also for Habermas, that the legitimacy of the law is a live question: "Often enough, law provides illegitimate power with the mere semblance of legitimacy. At first glance, one cannot tell whether legal regulations deserve the assent of associated citizens or whether they result from administrative self-programming and structural social power in such a way that they independently generate the necessary mass loyalty." (Habermas 1996, 40)

[6] Here is another point where the ambiguity comes up: "The less a legal order *is legitimate, or is at least considered such*, the more other factors [...] must step in to reinforce it." (Habermas 1996, 30, emphasis added)

of a fact with predicable consequences or the deontological binding character of a normative expectation" (Habermas 1996, 31 emphasis added). There seems to be no conceptual room for a precarious moment of judgment in which a communicative agent might refuse to recognize the law's claim. Put differently, the ambiguous alignment of action theory and legal validity leaves no possibility for disagreement among communicative agents about the grounds of legitimacy.

To resolve this ambiguity, we need to distinguish more carefully than Habermas does between two different ways of construing the participant perspective on the law. The stances that subjects can take toward the law can be seen from two different points of view: (a) the first-person perspective of an actual subject confronted by the law (participants-*qua*-subjects); and (b) the second-person perspective of the law, as it presents itself to such a subject (participants-*qua*-addressees):

(a) On the one hand, there is the law as it appears phenomenologically from the perspective of an actual subject confronted with it. From his or her perspective, the law appears as an object of evaluation, as something that seeks to regulate behavior by both asking for and demanding compliance, claiming legitimacy while threatening coercion. When subjects wonder whether to comply with the law, they can respond in one of two ways (according to Habermas's action theory): by strategically calculating the expected consequences of compliance and non-compliance, or by normatively evaluating its claim to legitimacy.

(b) On the other hand, the possible stances that participants can take toward the law can be construed from the viewpoint of the legal order as it presents itself and addresses its subjects (according to Habermas's theory of law). From the law's reconstructed point of view, citizens appear as addressees of legal norms who can be motivated to comply in two different ways, by virtue of discursive justifications and sanctions. On this construal of the participant perspective, participants-*qua*-addressees have a choice between two stances, as we've seen: they can relate to the law "strategically" or "performatively", *i.e.*, comply out of self-interested calculation or respect.

4. Judging the legitimacy of law

We are now in a position to address the question of what is involved in judging the legitimacy of law, keeping in mind the distinction just drawn between two ways of construing the participant perspective (from a first- or second-person standpoint). In both cases we can ask: "Suppose the legitimacy of laws or of the legal order is called into question. What would be involved in judging and disputing this claim to legitimacy?"[7]

Seen from the law's reconstructed second-person standpoint, it is quite clear what is involved, but in order to explain this we must look more closely at Habermas's understanding of legitimacy and of normative validity in general (though we need not look in detail at the content of Habermas's account of legitimacy, which has been much discussed[8]). According to the theory of communicative action, to put forward a validity claim is to presume it to be

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[7] The legitimacy of specific norms and of the order as such are different questions, but Habermas's account is meant to address both: "The reconstructive analysis undertaken from the participant's perspective [...] aims at the normative self-understanding of the legal system, that is, at those ideas and values by which one can explain the claim to legitimacy or the ideal validity of a legal order (or of individual norms)" (Habermas 1996, 69; cf. 30).

[8] *E.g.*, Baynes (1995); Baxter (2011); McCarthy (1996); Rehg and Bohman (1996); Rummens (2006)

capable of achieving recognition among all rational participants if such an argumentative process were to take place under ideal conditions (Habermas 1996, 12–21; Habermas 1984, 305–319). In actual practice, a claim to validity comes with a presumption of justifiability—a presumption that is in principle always open to challenge. Habermas's "discourse principle" applies this idea to norms of action. It states: "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses" (Habermas 1996, 107). For legal norms this rational process takes the form of institutionalized procedures that are associated with enforcement agencies (in contrast to other types of norm, *e.g.*, moral ones). The normative validity of this process is represented by the "democratic principle", which Habermas sees as a further specification of the discourse principle: "only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation that in turn has been legally constituted" (Habermas 1996, 110). This principle gives expression to the performative attitude toward the law of citizens (*i.e.*, participants-qua-addressees): "[The democratic principle] explains the performative meaning of the practice of self-determination on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily." (Habermas 1996, 110) Legitimacy claims with respect to the law should thus be understood, implicitly or explicitly, with reference to this principle.[9] Or as Habermas states in a more recent paper: "Thanks to the intuitive knowledge of what it means to frame a constitution, any citizen can put herself at any time in the shoes of a framer and check whether, and to what extent, the established practices and regulations of democratic deliberation and decision-making meet at present the required conditions for legitimacy-conferring procedures" (Habermas 2003, 193).

From the law's second-person standpoint, then, judging legitimacy is a matter of applying the democratic principle, of trying to determine whether actual legislative procedures resemble rational discourse closely enough (where what counts as enough is open to dispute). According to the rationally reconstructed self-understanding of the law, this is what subjects do when they judge the legitimacy of the law (both particular statutes, and the legal order as a whole). Insofar as they judge differently, they do not count as taking a performative attitude toward the law. So from this point of view, what participants do when they judge the legitimacy of the law fits quite well with the model of judgment as the application of rules to particulars, which many critics find problematic. This is not to deny that applying the democratic principle will be a complicated task.[10] It is a very abstract principle, and actually applying it would require bringing in the complex account of the co-originality of public and private autonomy and the system of basic rights that it implies, according to Habermas. But as an approximation, the idea of judgment as the application of rules or principles fits well enough.

The story becomes more complicated when we consider, as Habermas neglects to do, the first-person perspective of actual subjects who are confronted by the law and for whom its legitimacy is in question.[11] It is by no means clear that judgment, for such a subject, can be

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[9] Habermas stresses that legitimacy is not a moral category. Due to the specific characteristics of the legal form, law has a *sui generis* kind of normativity that complements morality (Habermas 1996, 105–106, 156).

[10] Indeed, to capture the complexities of norm-application in the context of discourse ethics, as well as when he speaks about judicial adjudication, Habermas distinguishes between "discourses of justification" and "discourses of application" (Habermas 1996, 217–218; Habermas 1994, 35–39, 128–130). Arguably such discourses cannot be so neatly separated when it comes to the legitimacy of the legal order.

[11] Habermas does briefly discuss civil disobedience as a justified means of opposing legislation deemed to be illegitimate, though always against the background of acceptance of the legal order as a whole (Habermas 1996, 383–384; cf. Habermas 1985). White and Farr's reading of civil disobedience in Habermas highlights the aesthetic and expressive aspects of such "no-saying" (White and Farr 2012), which fits well with the interpretation of reconstruction developed below.

construed simply as a matter of applying the democratic principle. Someone who wonders whether the law truly deserves the legitimacy it claims might take a communicative stance toward others. But taking the democratic principle as the appropriate normative reference of legitimacy claims presupposes much more than what is involved in a communicative stance as such. For one thing, it presupposes that they already see themselves as citizens of a constitutional state, rather than merely being treated as such by a coercive state apparatus—a form of identification that seems far from straightforward if "[t]he 'self' of the self-organizing legal community disappears in the subjectless forms of communication that regulate the flow of discursive opinion- and will-formation" (Habermas 1996, 301). Habermas is clear about this: as we've just seen, the democratic principle expresses the meaning of a practice according to those who already see themselves as members of a legal community. But the legitimacy of that practice is what is at stake here. And there is nothing about the idea of a communicative stance toward others as such, in a situation in which the legitimacy of a legal order is (for whatever reason) called into question, that makes it necessary for subjects to self-identify as citizens.

Even if we set this concern aside and consider a (first-person) subject who already sees herself as a citizen, as the legal order (in second-person mode) expects of her, it seems that Habermas's account of the performative meaning of legal-political practice is highly specific and contestable. In disputing legitimacy, communicative agents could adduce all sorts of grounds for respect for the law besides or instead of its discursive rationality (for example, its ability to provide order and stability).[12] A communicative orientation toward others about legitimacy does not proceed from a consensus on a principle of legitimacy, or presuppose that this will be reached; all it requires is that subjects in their relation to concrete others are willing to provide reasons when challenged, while refraining from illicit (non-communicative) influence in convincing those others.

Many critics have argued, in different ways, that Habermas's account of legitimacy in terms of the democratic principle requires a supplement of one form or another. On my reading, the gap between what judgment involves from the first-person standpoint of actual subjects and what it involves from the second-person standpoint of the law explains why this should be so. Even subjects who are oriented toward mutual understanding in Habermas's sense cannot judge whether the law is legitimate simply by reference to the democratic principle; to see themselves as citizens they need something that identifies a constitutional project as theirs—perhaps (as various commentators have proposed) the narration of a foundational event, affective attachment to a constitution, a moral background consensus, or a transcendental justification.[13] The crucial implication for our purposes is that a different sense of judgment than that involved in the application of a given principle must be at play here. But this remains implicit and even hidden, and is certainly not attended to, in Habermas's account of legal validity. In that sense there is certainly something to say for the objection that Habermas has an overly rationalistic or idealized conception of judgment. But then again, that is not to say that a richer understanding of judgment isn't at work in his theory. To see in what sense it may be at work, we'll need to take a closer look at what Habermas is doing in reconstructing the law's self-understanding.

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[12] Kevin Olson makes this point (2003, 286–287).
[13] See Apel (2002); Cronin (2006); Honig (2007, 12); Ferrara (2001, 787); Markell (2000, 51); Näsström (2007); Rummens (2006).

5. The standard interpretation: reconstruction as explication of implicit normativity

I have argued up to this point that Habermas's construal of the participant perspective on the law tends to equivocate between the perspective of actual subjects confronted by the law and that of the law's addressees as seen from its reconstructed point of view, and that making explicit the difference between these perspectives reveals that judging the legitimacy of the law cannot merely be a matter of applying the democratic principle. Even though Habermas does not explicitly address this in the content of his theory of law, we can see a more complex conception of judgment at play in the form he gives the theory, namely that of a rational reconstruction of the law's self-understanding. (Habermas refers apparently interchangeably to the self-understanding of "modern law", "constitutional democracy", the "constitutional state", the "legal community", the "legal system", and "modern legal orders" (Habermas 1996, 41, 462, 288, 41, 156, 69, 82). Let us assume that "self-understanding of the law" will do as well.)

Unfortunately Habermas is not very clear in *Between Facts and Norms* about the meaning and status of the reconstructive approach in relation to law, other than saying that it is supposed to transcend the limitations of purely empirical and purely normative approaches by identifying normativity at work in practice. The most straightforward interpretation is to see it as an application of the methodology for the humanities and social sciences that he elsewhere articulates and calls rational reconstruction.[14] This methodology attempts to understand human practices from within, as it were, by articulating the meaning of a practice from the standpoint of its participants. Typically it does so by making explicit the intuitive knowledge, the implicit know-how, and the necessary presuppositions that structure their performances. This structure of the practice can then provide critical standards for qualifying performances as appropriate or inappropriate. For example, Habermas's formal pragmatics of language claims to make explicit the implicit structure inherent in our everyday language use; the discourse principle simply states formally and explicitly what one commits oneself to in claiming validity for a norm. Similarly, in his theory of law, we can see Habermas's reconstructive approach as explicating a kind of normativity that is already implicit and at work to some degree in practice, rather than postulating a normative theory prior to politics.[15] "The reconstructive analysis undertaken from the participant's perspective of the judge or client, legislator or citizen, aims at the normative self-understanding of the legal system, that is, at those ideas and values by which one can explain the claim to legitimacy or the ideal validity of a legal order (or of individual norms)" (Habermas 1996, 69). Thus it "identif[ies] particles and fragments of an 'existing reason' already incorporated in political practices, however distorted these may be" (Habermas 1996, 287).

It seems, then, that the central aim of rational reconstruction is to explicate the normativity found to be inherent in practice. Judging that practice would then be a matter of measuring actual practice according to the normative standards found to be imperfectly realized in it— and indeed we saw in the preceding section that this is true of participants-*qua*-addressees. But we also saw that this notion of judgment is too narrow to account for the judging of actual subjects confronted by the law. How might this understanding of reconstruction address this gap? It seems that the only available (but still problematic) move would be to

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[14] On the method of rational reconstruction, see for instance Habermas (1990); Habermas (1998a); Pedersen (2008); McCarthy (1978, 276–279); Yates (2011). (For discussions of reconstruction as it pertains to law, see the next note.)

[15] For discussions of reconstruction pertaining specifically to law, see Olson (2003); Peters (1994); Pedersen (2009); Gaus (2013); Patberg (2014). Pedersen and Gaus focus particularly on the sociological ambitions of Habermas's reconstructive approach; as such, the interpretation of rational reconstruction developed below can plausibly be seen as complementary to their analyses.

equate the participant perspective as seen from the law's reconstructed standpoint with the point of view that actual subjects *ought* to take—the perspective adopted by their better, more rational selves.

This might be done in two ways. The first would be to claim that subjects are committed to forming their judgments through the application of the democratic principle because doing so is part of the proper meaning of the practice at stake. The idea would be that subjects who question the legitimacy of the law in terms other than by reference to the democratic principle misunderstand what they are doing. But this move clearly begs the question. If the democratic principle expresses the performative meaning of constitutional-democratic practice, then applying it in judging the law already presupposes the legitimacy of that practice. The second way to explain how the standpoint of participants-*qua*-addressees might reflect how actual subjects ought to judge, would be to appeal to a more fundamental form of practice, such as communication or morality, to which subjects are in any case already committed. In this case, subjects who judge without referring to the law's discursively rational character fail to see the full implications of their own deeper commitments. Indeed, as we've seen, the democratic principle also purports to be a specification of the discourse principle (in addition to expressing the meaning of constitutional-democratic practice). This move, however, raises two problems in relation to Habermas's theoretical ambitions, as explained above (section 2). First, Habermas explicitly denies that legitimacy derives from morality. And he would need a substantial argument to explain why social agents are committed to recognizing the legal order as legitimate simply by virtue of engaging in communication, which he seems unwilling to provide.[16] Second, were he to take up this challenge, the link between the law's legitimacy and its motivational efficacy would become much more precarious. For the law's normative validity to be motivationally efficacious as a source of social integration, it would have to latch on to the actual perspectives of participants, as we find them, not their better selves. Put differently, motivational efficacy seems to flow from the law's being *taken* to be legitimate; it's actually *being* legitimate, in discourse-theoretical terms, is another matter.

In sum, the reconstructive approach to law, when interpreted according to the standard reading, namely as the articulation of the normative standards that are implicit in practice, becomes problematic once we make explicit the ambiguity in Habermas's construal of the participant perspective. The failure of that interpretation to bridge the gap between the perspectives of participants-*qua*-subjects and participants-*qua*-addressees seems to confirm the suspicion that the reconstruction "proceeds chiefly from a theorist's projection of a participant's point of view" (Olson 2003, 288). In other words, it becomes difficult to see in what sense Habermas's theory is a *re*construction of the *self*-understanding of constitutional-democratic practice, as opposed to one version of what that practice ought to be like, according to one of its subjects. Now we may be tempted to conclude that there is a fundamental incoherence within the project of reconstructing the self-understanding of the law, and that Habermas can maintain the appearance of integrating his normative and empirical aspirations only through an ambiguous construal of the participant perspective. But that would be too hasty.

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[16] The most Habermas provides in response to the question of why the law should exist in the first place is an instrumental consideration: "The positive law that we find in modernity as the outcome of a societal learning process has formal properties that recommend it as a suitable instrument for stabilizing behavioral expectations; there does not seem to be any functional equivalent for this in complex societies. Philosophy makes *unnecessary* work for itself when it seeks to demonstrate that it is not simply functionally recommended but also morally required that we organize our common life by means of positive law, and thus that we form legal communities. The philosopher should be satisfied with the insight that in complex societies, law is the only medium in which it is possible reliably to establish morally obligated relationships of mutual respect even among strangers." (Habermas 1996, 460; cf. Apel 2002)

6. The creative reflexivity of rational reconstruction

I submit that a different and more constructive interpretation of rational reconstruction is possible, which casts this tension in a different light by revealing a richer notion of judgment that is at play in the background in Habermas's theory of law. As far as the law is concerned, the standard interpretation of rational reconstruction as the explication of normativity implicit in practice is only partially correct. It is right in the sense that reconstruction does not appeal to an external source of normativity, but conceives it as immanent to practice. But it is insufficient insofar as it is taken to mean that this normativity is simply *found* by the theorist, already present in practice, if inchoately. This interpretation misses what we might call the *creative reflexivity* of reconstruction. Reconstruction has both backward- and forward-looking moments: as the word suggests, it draws on what it finds while taking this up in a novel way. The emphasis on this creative reflexivity—not just on *re*construction but on re*construction*—is what sets my reading apart from the standard interpretation of the reconstructive approach to law.

Where exactly can we see this creativity at work? As I'll explain below, it appears most fundamentally in the constitution of the "self" of the legal order. The project of reconstructing the self-understanding of the law presupposes an imaginative judgment about how to conceive of the legal order (namely as an ongoing, shared, deliberative enterprise) on the part of the theorist, and attempts to elicit a similar judgment on the part of its audience. The reconstructing theorist has an active role to play in conceiving of the law in a particular way and in inviting others to share that conception. Such imaginative judgment is what breathes life into the "self" of the legal order.

What sense can we make, on this interpretation, of the gap between the first and second-personal understandings of the participant perspective (participants-*qua*-subjects vs. participants-*qua*-addressees) distinguished above? The participant perspective on the law, as seen from the law's reconstructed standpoint, is not the perspective that we (*qua* subjects) actually have. Neither is it a perspective that we rationally ought to take, compelled by the nature of our practices. Rather, it is a perspective we are invited, even urged, but certainly not forced, to adopt.[17] This is not to say that that invitation can be declined lightly, for doing so would mean giving up on the promise of the law to be a means by which society organizes itself democratically. Yet insofar as we do take up the invitation, and adopt a participant perspective in line with the law's self-image, the law will indeed appear as offering the choice between obeying either out of obligation or out of strategic calculation. Our perspective *qua* subjects confronted with the law will coincide with the viewpoint the law expects us to take. The immediate connection between legitimacy and motivational efficacy that Habermas sometimes postulates (as we saw in section 3) must then be loosened a bit, for it depends on the success of the reconstructive project in eliciting or reinforcing the imaginative judgment through which citizens see themselves as engaged in a practice of collective self-organization through law. In other words, this reinterpretation trades the tension between actual and ideal participant perspectives postulated by the standard interpretation of reconstruction for a tension between the actual and the potential: the actual (first-person) subject could (and is encouraged to) see herself as the citizen that the law (in second-personal mode) expects her to be.

This reinterpretation of the participant perspective is a theoretical improvement over the standard reading, which fails to coherently bridge this gap. Still, there remains something

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[17] This holds in particular for the performative rather than the strategic stance, of course.

peculiar about reconstruction on this interpretation, in the sense that in order to count as successful, reconstruction depends on its audience to take it up. In doing so, that audience helps to constitute the practice that the reconstruction purports to find already in place. That is, reconstruction explicates a constitutional project to which the audience finds itself already committed, but only on condition that the audience takes up the invitation, seeing itself as engaged in this project all along. In other words, there is a tension between the creativity of reconstruction—its constituting the legal-political world anew—and its reflexivity: its continuing an ongoing activity. This tension reflects the fact that reconstruction is not a disengaged enterprise, but a political activity. The paradoxical structure of political speech that aims at bringing forth the conditions for its own success has drawn much attention in recent years from agonistic theorists.[18] If they are right that this is a condition of politics, then it should not surprise us that Habermas is implicitly committed to it. But my claim is stronger: the best way to understand his theory of law is to see it as acknowledging and relying on, rather than denying, this paradoxical structure.

To bolster this claim, I will, in what follows, (a) explore the fact that the object of reconstruction is the *self*-understanding of the law; (b) point to the imaginative moment at the heart of the constitution of this "self"; and (c) address the objection that this interpretation neglects the claim to rationality of rational reconstruction.

a. The self of a legal order

It must be admitted that the imaginative moment in the reconstructive approach to law is not very explicit in Habermas's work. He sometimes writes as if the unfinished and ongoing project of constitutional democracy were already present, to be found and explicated, rather than called into being, by reconstruction.[19] Still, I do think that there are important moments in his texts that point in the latter direction, and that focusing on these will give us a more consistent and compelling reading of his theory of law. The most important consideration here is the fact, which has received surprisingly little attention, that the intended object of Habermas's reconstruction is the *self*-understanding of the law. This is crucial because it implies that reconstruction has a different, more reflexive relation to its object when it is concerned with law than with communication or most of our other social practices. The reconstruction of communication that yields Habermas's theory of formal pragmatics does not purport to explicate the self-understanding of communication, but the implicit knowledge and presuppositions of the participants engaged in it. Practices of argumentation do not have a self-understanding in the way in which a legal community does (on Habermas's account), with its own second-personal standpoint, distinct from the first- and second-person perspectives of subjects among themselves. Interpreters of Habermas's approach to law have failed to notice this dis-analogy between the application of reconstruction to law and its application to communication.[20]

Of course, the law's self-understanding can live only through its participants, by being conceived and enacted by them in their common practices (Habermas rejects the idea of a collective "macro-subject" [*e.g.*, Habermas 1996, 505]). The self of the legal order is possible

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[18] See Frank (2010); Honig (2009); Norval (2007) and several of the essays in Schaap (2009).

[19] "[T]he constitutional state does not represent a finished structure but a delicate and sensitive—above all fallible and revisable—enterprise, whose purpose is to realize the system of rights anew in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically." (Habermas 1996, 384) There is a danger here of falling captive to a picture of the constitutional state not only as an ongoing project, but as *essentially* an ongoing project, against which Bert van den Brink and David Owen appropriately caution (van den Brink 2012; Owen 2003).

[20] See the references in note 15.

only through the collective identification of subjects. And such identification draws on the imagination, as Habermas recognizes (although this isn't always clear in *Between Facts and Norms*).[21] As he mentions in an interview, for instance, the description of any identity involves an "image that we present to ourselves and to others, and according to which we want to be judged, respected, and accepted by others" (Habermas and Ferry 1996, 4).[22] Therefore, if we take seriously the fact that the object of reconstruction is the *self-understanding* of the law, we should see the reconstructing theorist as offering precisely such an image of the legal order on its behalf—an image according to which it wants to be judged, respected, and accepted by its subjects. Yet doing so is not a matter of holding a mirror up to it in its presence; rather the theorist necessarily represents and frames the picture in a particular way. This creative reflexivity of reconstruction implies that reconstruction cannot be a matter of merely making explicit what is already found to be present: the reconstructive approach to law is involved in reconstituting what it reconstructs.[23]

b. Fictional moments

The imaginative aspects of the constitution of the self of a legal order become particularly visible in the fictional aspects of crucial points in Habermas's theory of law.[24] Recall that, while introducing the principle of democracy, Habermas says that it "explains the performative meaning of the practice of self-determination on the part of legal consociates who recognize one another as free and equal members of an association they have joined voluntarily" (Habermas 1996, 110). Taken literally as an explication of the practice of law, the reference to voluntarily joining the association seems gratuitous at best. Virtually none of those who find themselves subject to law have had a genuine choice in the matter (and many of those who would join voluntarily if they could are denied that opportunity[25]). Instead, we are invited here to imagine the legal order *as if* it were the product of a voluntary association.

This point is particularly clear in a more recent, famous essay by Habermas about the "co-originality" of democracy and the rule of law, where he argues that popular sovereignty and basic rights do not stand in a paradoxical relation to one another but presuppose each other. To see why basic rights are inherently bound up with democratic self-legislation, Habermas proposes a thought experiment that "simulates an original condition: an arbitrary number of persons freely enter a constitution-making process" (Habermas 2001, 776). The details are not important for our purposes. The argument aims to show that in order to engage in this endeavor at all, participants must institute various categories of basic right: "[basic rights] express this practice [of democratic self-legislation] itself and are not constraints to which the practice would be subjected." (Habermas 2001, 778)

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[21] The *locus classicus* of this idea is Anderson (2006). See also Habermas (1998b, 131–132). Ciaran Cronin's interpretation of Habermas similarly emphasizes that "the *demos* as the putative 'subject' of democratic political self-constitution is always also a *retrospective* construct, an indispensable, though imaginary, projection" (Cronin 2006, 366).

[22] This is pointed out by Patchen Markell, who argues that while Habermas, in *Between Facts and Norms*, overlooks the mechanisms through which the law produces shared identifications, he does attend to those mechanisms in other writings (Markell 2000, 49–50). Markell does not mention, however, that reconstruction itself is also implicated in such mechanisms.

[23] In a more recent essay, Habermas states that the practice of constitution making involves "reflecting on and conceptually explicating the specific meaning of the intended enterprise," where the intended enterprise is collective self-organization through law (Habermas 2001, 776). Reflecting and explicating the meaning of an enterprise are, of course, aspects of the reconstructive approach itself; and so it seems clear that reconstruction is part of the activity that it reconstructs.

[24] Patberg's recent interpretation is one of the few to highlight these fictional moments (2014, 510–511).

[25] This raises a further question, which cannot be addressed here: how will the invitation extended in reconstructing the law be regarded from the perspective of someone who does *not* already count as a member?

The histories of actual constitutional democracies obviously do not meet the standards posited in this fictional genesis. So how is it possible at all to see existing legal orders as a product of democratic self-legislation? How could such a process even get started, if self-legislation requires basic rights that must themselves be instituted in a democratically legitimate way? Rather than demanding a beginning that meets the standards of democratic legitimacy, Habermas proposes to see constitutional democracy as an unfinished, ongoing, and open-ended project: it is not the purity of the origin of a constitution, but the future-directed promise of "actualizing [its] still-untapped normative substance" that makes it possible to see it as legitimate (Habermas 2001, 774).[26] Habermas's central claim is that the "allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives of the constitution as a project that makes a founding act into an ongoing process of constitution-making that continues across generations" (Habermas 2001, 768).

I do not want to rehearse the debate about this proposal here.[27] Let me simply highlight the way in which Habermas quite self-consciously appeals to the imagination, not just in proposing a thought experiment, but, more importantly, in inviting us to see the law in a particular light. In my view, the proviso (in the sentence just quoted) that one *conceives* of constitutional democracy *as* an unfinished project is crucial. It acknowledges that we are offered an image that is framed in some way. The proviso makes clear that Habermas's account of the co-originality of democracy and the rule of law makes sense only against the background of a shared understanding of constitutional practice as an ongoing project; the "nontrivial assumption" that "we are 'in the same boat'" with the founders (Habermas 2001, 775).

That there is an imaginative aspect to this proposed shared understanding also comes out in Habermas's appeal to historical events. When he refers to the constitutional assemblies of Philadelphia and Paris as a moment of founding—"a great, dual historical event we can now see in retrospect as an entirely new beginning" (Habermas 2001, 768)—he also says explicitly that this event can be *seen as* a beginning *in retrospect*. To put it more strongly: the event counts as the beginning of our ongoing practice only to the extent that we treat it as such. The "project" of the constitution (that is to say, our carrying on with it, as participants) "*makes* the founding act into an ongoing process" (Habermas 2001, 768, emphasis added). Insofar as carrying on with the project is precisely what Habermas's reconstruction invites us to do, his appeal to this event is "making a past into a history" (Brandom 2002, 14).

So Habermas's claim, as I understand it, is that the possibility of seeing democracy and the rule of law as co-original depends on treating the constitution as our ongoing, historically situated practice; and part of what is involved in seeing and treating this ongoing project as *ours* is to treat the founding as a beginning, where its performative meaning is identifiable for the first time. In that sense, Habermas invites us to treat the founders as "figures of rightness before they can be figures of history" (in the words of Frank Michelman, quoted by Habermas [2001, 775]): they started a project that we can take up as our own, thereby "tapping" into what we take to be the same normative core.

It is quite obvious, I think—also to Habermas—that taking such a view of these historical conventions involves a stretch of the imagination (as is already signaled by his use of the singular "event", referring to both at once). As Bonnie Honig emphasizes, treating

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[26] It would be fair to point out that this tapping metaphor invites us to see the normative content of the constitutional project as contained in a reservoir already present from the start (as would fit with the standard interpretation). Still, as we shall see, this is mitigated by the fact that the metaphor occurs in the context of proposing that we see the constitution in a particular light, namely *as* an ongoing project, rather than that we simply happen upon it as such.

[27] *E.g.*, Cronin (2006); Ferrara (2001); Honig (2001); Meckstroth (2009); Olson (2007)

Philadelphia and Paris as an entirely new beginning that harbors the promise of democracy papers over continuities with the past, injustices committed in the founding, and alternative possibilities that have not been pursued (Honig 2007, 10–13). For Honig, there lies the problem: "When Habermas's tappers choose 'Philadelphia' as the beginning of their tradition-building enterprise, the costs of alternatives foregone and still sidelined daily are not viewed" (Honig 2007, 13). If, as I am claiming, Habermas's imaginative appeal to history is not merely a motivational supplement to his rationalist account of legitimacy,[28] but is rather constitutive of it, doesn't that provide Honig's objection with all the more force? Not really. Habermas also stresses that we should treat the texts and decisions of the founders "*in a critical fashion*" (Habermas 2001, 775, emphasis in original). He urges us to appropriate the ongoing project of constitutional democracy, while also maintaining a critical stance toward it; to make it our own, and to make the most of it. That is not to deny that actual constitutional history still has its lost treasures to be found and dark sides to be exposed, and doing so may cast our understanding of current practice in a new light and lead us to revise it. But unless one draws the more radical conclusion (as Honig does not) that in view of the tainted past, Habermas has deeply misunderstood the nature of this supposedly collective enterprise and that his proposed picture of constitutional democracy is a chimera, the possibility of such a critical history carries little force against his invitation to take up this shared, unfinished, and ongoing project.[29]

In short, Habermas's imaginative appeal to the founding as new beginning and to the founders as authoritative figures should not be read as a return to a purified origin, but as an expression of a moment of imaginative identification that is involved in sharing a practice. Thus, the activity of rationally reconstructing the law's self-understanding draws on the imagination in a stronger sense than do the "counterfactual idealizations" that are involved in any social practice, such as the context-transcending element of validity claims; it does not simply overshoot the boundaries of a particular context of action, but shapes our view of this context in a particular way.

c. The rationality of reconstruction

The sense of imaginative judgment at play in the background of Habermas's theory of law is akin to what Linda Zerilli, building on the work of Hannah Arendt, has recently called "judging as a world-building practice" (Zerilli 2012). In judging politically, she says, we do not apply rules to a particular case but "alter our sense of what is common or shared: we alter the world, the space in which things become public" (Zerilli 2005, 183). Yet while she sees quite clearly the world-building capacity of imaginative judgment in the work of Arendt, she finds no trace of it in Habermas. Still, it is no accident that she does not, for, as I have noted,

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[28] In Honig's reading, Habermas invokes the founding in order to generate affective attachment to a constitutional project that already counts as legitimate, thanks to the reconciliation of democracy and the rule of law achieved on a theoretical level.

[29] Honig states: "No criteria decide which event is a sign and which is its (un)reasonable trace: We do, and the worth of our judgment depends on its implications: what politics and public goods are generated thereby?" (Honig 2007, 13) She is right about this, but wrong to think that it distinguishes her from Habermas. Honig seems to regard Habermas's statement that Philadelphia and Paris count only retrospectively as a beginning as a slip of the tongue: "Habermas even seems to concede the point when he says: 'we can now see in retrospect' that Philadelphia and Paris marked 'an entirely new beginning.' If our apprehension of Philadelphia and Paris as new beginnings is, as Habermas says, retrospective, then that means we are making the judgment from inside the frame we are supposed to be judging——and that means we are not out of but rather firmly in the paradox of politics." (Honig 2007, 13) But this discovery comes as a surprise, and counts as an objection, only if we assume that our judgment was supposed to come from the outside in the first place.

the traces do not abound. And after all, Habermas does call his approach *rational*, not imaginative, reconstruction. Does my interpretation, then, not underplay this claim to rationality, and aestheticize his approach instead?

I do not think that the imaginative aspect of the reconstructive approach contradicts its claim to rationality. This objection seems powerful if, with Zerilli, one reads Habermas as setting the "intersubjective recognition of criticizable validity claims" "fully at odds" with "the poetic, rhetorical, and world-creating capacity of language" (Zerilli 2005, 166).[30] But this opposition is too stark. Nothing in communicative action, as far as I can see, prevents the validity-claiming and world-constituting aspects of language use from working in tandem—perhaps even as complementary aspects of the same speech act. What Habermas objects to in his criticism of Derrida, to which Zerilli refers on this score, is treating the poetic use of language as an exhaustive model of language use as such (Habermas 1998c).[31] For Habermas, the claim to validity is a crucially important aspect of communicative speech acts. And while he clearly conceives of normative validity in terms of rational acceptability, claiming validity is not, *pace* Zerilli, the same thing as purporting to have an unassailable chain of arguments or a deductive proof from indubitable or shared premises.[32] Rather, the "orientation toward mutual understanding" to which one commits oneself in making a validity claim involves a willingness to provide and respond to reasons. I think reconstruction's claim to rationality signals precisely this discursive openness, not a moment of closure. So in contrast to Zerilli's criticism, what Hannah Arendt says about Kant's notion of reflective judgment holds equally for Habermas's understanding of judgment: "[O]ne can never compel anyone to agree with one's judgments—'This is beautiful' or 'This is wrong' […]; one can only 'woo' or 'court' the agreement of everyone else." (Arendt 1989, 72)

7. Conclusion

As we have seen, there is an important but limited role in Habermas's theory of legitimacy for the application of principles to particulars. But judging the legitimacy of law cannot merely be a matter of applying the democratic principle. As Habermas's reconstructive approach to law displays, in a way that remains too implicit but is nonetheless identifiable, political judgment can indeed alter our sense of the space in which objects of judgment appear in a particular way—subjects as citizens, and laws and constitutions as the expression of their will—while at the same time appealing to criteria in terms of which one might evaluate those objects. If we do take up his invitation to apply the democratic principle when we judge the law's legitimacy, we are at the same time imagining ourselves and our political world in a way that breathes life into the "self" of our legal order, thereby keeping alive the promise of the law as a means for the democratic self-organization of society.

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[30] Zerilli's reading of Habermas seems to be common; at least Leslie Thiele, in his critical response to Zerilli (Thiele 2005), finds her reading of Habermas to be fair.

[31] He claims that Derrida obscures the distinctiveness of different uses of language, *e.g.*, for problem-solving or literary purposes, "as though language in general were determined by the poetic use of language specialized in world-disclosure" (Habermas 1998c, 393).

[32] According to Zerilli, a politics based on communicative action amounts to "the exchange of proofs" (Zerilli 2005, 181).

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