In the years following the creation of the Third Reich in 1933, European thinkers in exile fiercely debated the extent of its uniqueness. Was Nazism a phenomenon rooted in particular German pathologies of the early twentieth century, or did it exemplify broader trends in European or even modern society, and could thus emerge again elsewhere? While historians such as Hans Kohn and novelists such as Thomas Mann believed that Germany had followed a “special path” that led it to Hitler (Kohn 1944; Mann 1947), political theorists and philosophers were much more inclined to identify Nazism as an extreme example of widespread patterns. In her Origins of Totalitarianism (Arendt 1951), for example, philosopher Hannah Arendt claimed that Nazi “totalitarianism” had emerged from European imperialism in Africa and Asia, a racist endeavor that included also Britain, France, and other democratic regimes, implying that a similar violent autocracy could emerge in these latter states. Similarly, the economist Friedrich Hayek’s Road to Serfdom (Hayek 1944) argued that Nazism was the product of the growth of state power and centralized economic planning, a process which he warned was unfolding also in the United States. The leading figures of the Frankfurt School, Theodor Adorno and Max Horkheimer, shared this outlook, locating Nazi brutality in the culture and psychology of Western culture. In their classic Dialectic of Enlightenment (Adorno and Horkheimer 2007) and other publications, they interpreted Nazism as the product of a profound impulse for domination and annihilation of “otherness,” which had been rife in Western cultures for centuries and which late capitalism had significantly boosted. This is why, despite their lasting interest in the Third Reich, their reflections on it remained submerged in writings on American and other cultures. For many of the émigré generation, the Nazis were of crucial importance because they revealed the persistent dangers lurking everywhere in the industrial world.

While scholars of the Frankfurt School have mostly focused on Adorno and Horkheimer, they were far from the only members of the Institute for Social Research to express their views on Nazism. Remembered less today, but well known at the time, the Institute also supported the works of legal scholars Otto Kirchheimer and Franz Neumann, whose celebrated essays and books in the 1930s and 1940s broke new ground in the Marxist study of Nazi law, politics, and economics. In fact, Neumann’s mammoth 1942 book, Behemoth: The Structure and Practice of National Socialism, was considered by many at the time to
be “unquestionably the best work on the subject” (Sweezy 1942, 281). On the strength of their reputations, Kirchheimer, Neumann, and other members of the school were hired by the Office of Strategic Services (OSS) to serve in its Research and Analysis Branch (Katz 1987; Laudani 2013). Yet, despite the considerable interest these works sparked upon their publication, after 1945 the Frankfurt School’s legal scholars never enjoyed the attention accorded to Arendt, Hayek, or Adorno and Horkheimer. Their works remained out of print and did not enter the canon of writing on Nazism. Over the past two decades, several political scientists have explored their works (Scheuerman 1994, 2008; Kelly 2003; Offe 2003). Still, their revival has been partial at best, and Kirchheimer and Neumann’s work remains familiar mostly to specialists of legal history.

Examining Kirchheimer and Neumann’s assessment of Nazism is more than a historical curiosity. Although at the time their focus on law, politics, and economics was less innovative than Adorno and Horkheimer’s insistence that psychology and culture lay at the core of modern human relations, their scholarship was part of an ambitious intellectual project that similarly sought to refigure Marxist theory in light of the realities of modern capitalism. Long before the Third Reich’s ascendance, the Frankfurt School’s legal scholars harbored concerns that capitalism not only fostered economic injustice but also chaos, violence, and irrationality. By studying Nazism, they sought to provide the intellectual tools to strengthen and stabilize modern society and overcome the vicious impulses that they feared could destroy it from within. To be sure, the tendency of readers to overlook their intellectual ambitions and novel arguments has not been accidental. Rich in technical legal jargon and filled with numerous empirical examples, their publications often obscured their theoretical insights. Moreover, the emergence of the Nazi genocide as the center of interest in Hitler’s Reich has rendered Kirchheimer and Neumann’s legal and economic analysis less appealing. Having published their works before the Holocaust’s full scope became known, and having never written about it systematically thereafter, their approach appeared woefully inadequate to those who sought to understand the depth of the Nazi regime’s horrifying dynamics. Despite these glaring shortcomings, their theories still merit attention. They offer some of the richest explorations of law, economics, and politics written in the Marxist tradition.

To illuminate the origins and evolution of Kirchheimer and Neumann’s theoretical contributions, this essay progresses in three steps. First, it explores the genesis of their thinking during the Weimar Republic (1919–1933), before Hitler’s rise to power. In particular, it focuses on the era’s intense debates over the relationship between socialism, law, and the state, and on the two thinkers’ innovative efforts to reconcile Socialism with liberal conceptions of law. The essay’s second section explains how Kirchheimer and Neumann’s ideological project reached its culmination in their assessments of the Third Reich. It highlights how they came to define Nazism as a regime of perpetual and deliberately fostered anarchy, an assault on the very concept of state, which could have occurred outside of Germany. Finally, the last part briefly discusses how their work, and Neumann’s in particular, conceived Nazi racism and anti-Semitism, and concludes with a few reflections on the limits and lacunae of their approach. Together, these sections chart the broad contours of the two thinkers’ intellectual project, its many penetrating insights as well as its significant weaknesses.

**Capitalism and Law in the Weimar Republic**

The roots of Kirchheimer and Neumann’s ideas are found long before the Nazis’ rise to power, in the intellectual debates surrounding the German Left and its political predicament after World War I. On the one hand, the revolution that ended Germany’s war in
1918 and led to the creation of the Weimar Republic marked a historic Socialist triumph. The Socialist party, long the outcast of German politics, was catapulted to power, which allowed it to expand substantially workers’ rights and welfare around the country. On the other hand, the republic brought with it bitter disappointments. Unable to achieve a parliamentary majority, and facing violent uprisings from reactionaries on the right and communists on the left, the Socialists were forced to compromise with middle-class and nationalist movements, allowing many of the old elites—especially in the military and judiciary—to retain their privileged positions. Moreover, the Socialists refrained from implementing their key agenda, the nationalization of major industries. In the eyes of many, nothing symbolized Socialism’s achievements and failures better than the Weimar Constitution, named after the town in which it was ratified in 1919. While it enshrined countless Socialist demands, from a minimum wage to broad-based health care, as basic legal rights, the constitution also upheld the supremacy of anti-Socialist principles, most importantly the sanctity of private property.

Over the following years, the legitimacy of the fragile compromise embodied in the Weimar Constitution stood at the center of vibrant intellectual debates. Most of Germany’s leading political and legal scholars, who largely shared an anti-Socialist bent, heaped scorn on the constitution and sought to expose the dangers that its social legislation allegedly posed to the nation. Of these many attacks, two were particularly important for the evolution of Kirchheimer and Neumann’s thought. The first line of critique, which drew heavily upon the work of the liberal sociologist Max Weber, regarded Socialism as an alarming threat to the rule of law, defined as a regime in which state power was limited by predictable, egalitarian, and universal laws. According to Weber and his followers, who considered the rule of law to be modernity’s greatest achievement, the rise of modern law was profoundly tied to the emergence of capitalism. It was the proponents of free enterprise, who required the predictability and stability for their commerce, contracts, and investments, who pressured states to embrace the rule of law (Weber 1978a: 311–640). For this reason, Weber and other liberal scholars feared that Socialism’s hostility to private property and free competition endangered the pillars of legal rationality and predictability. By making the state an arbiter of economic struggles, and enshrining the working class’ demands as constitutional rights, the constitution’s social clauses threatened the law’s abstract universality. Weber went so far as to warn that such methods could resurrect feudalism’s irrational structures, in which different laws applied to certain individuals or groups. In this dark world, modern “formal” law would mutate into a “deformalized” system (Weber 1978b: 641–901).

The second, and even more damming, intellectual assault on Weimar’s socio-legal structure was led by the nationalist and authoritarian jurist Carl Schmitt. According to Schmitt’s pessimistic ontology, modern politics was the stuff of inevitable and violent conflict between groups. The state’s duty was to prepare for such struggles by moderating domestic tensions and achieving “homogeneity,” a notion that for Schmitt referred to ethnic and national unity. In Schmitt’s universe, the state’s laws and institutions were not meant to curtail the power of rulers or to force them into negotiations with others. Rather, their sole legitimate function was to provide leaders with the means to suppress internal friction, to strengthen the national collective, and to establish a strong “total state” (Schmitt 1931, 1996a). Not surprisingly, Schmitt and his students viewed the social rights enshrined in the Weimar constitution as the epitome of the Republic’s disastrous erosion of unity and a reflection of liberal democracy’s weaknesses. The product of tedious compromises, these laws empowered workers and more generally transformed the state into a battleground between sectarian interests. Even worse, Schmitt decried what he saw as the Socialists’ obsession with “material” and economic matters, which distracted their followers from the “spiritual” and transcendent
values that the nation embodied. Socialist laws, he scoffed, were dismembering the state and posed one of the greatest threats to Germany’s homogeneity (Schmitt 1996b).

The work of Kirchheimer and Neumann emerged from an effort to craft a Socialist response to these two dominant theories. Their early publications in the late 1920s and early 1930s positioned them as young stars in the vibrant school of Socialist legal theory, which was led by University of Frankfurt professor Hugo Sinzheimer and University of Berlin jurist Hermann Heller. Thinkers of the Socialist school agreed with Weber that the rule of law was a noble accomplishment; constraining the state through predictable and rational rules was a cornerstone of any decent society. However, they disagreed with Weber in their understanding of history’s development. While the rule of law had perhaps emerged under the influence of free markets, as time passed capitalism had begun to turn against it. Unprecedented wealth and power were concentrated in the hands of a few corporations, which threatened to undermine the rule of law’s original quest for broad equality. Sinzheimer, Heller, and their students therefore argued that the state must embark on a mission to temper the liberal focus on universal and abstract legal equality by complementing it with economic and social parity. The state had to issue a wave of progressive legislation and court rulings that would mitigate capitalism’s deleterious impact by expanding welfare, reinforcing workers’ rights, and guaranteeing a more equal distribution of wealth (and, by extension, political power). The Weimar Constitution, in this view, was only the first step in a worthy effort to forge a new legal and political order. It was the first attempt to achieve what Heller famously called the “social rule of law” (Heller 1930).

After studying with both Sinzheimer and Heller, Neumann emerged as one of the most important thinkers to articulate this Socialist response to liberal legal theory. According to his 1931 “On the Preconditions and the Legal Concept of an Economic Constitution” (Neumann 1987a), for example, Weber and his followers may have been right to claim that capitalism helped foster the notion of equality under the law. They had, however, failed to recognize capitalism’s dark transformation in the twentieth century, which turned it into a threat to this legal order. When liberal thinkers first crafted their theories of the rule of law, they did so envisioning a world of small and equal competitors, in which the free market could offer a genuine opportunity for social mobility. The twentieth century, however, had witnessed the rise of massive industrial monopolies and mammoth cartels, which had in practice neutralized the market’s assumed capacity to spread prosperity. Impoverished workers could never hope to climb the economic ladder, while CEOs devoted most of their energy to suppressing any move toward wealth redistribution. In fact, monopolies frequently threatened to erode the very meaning of abstract and universal law. If, for example, a single corporation dominated the electricity market, all laws in this sphere were shaped with this particular organization in mind, and thus became the “deformalized” law that Weber so feared.

Neumann therefore claimed that in the modern era, it was Socialism that had emerged as the guardian of the rule of law so valued by Weber. If the concept of legal equality was to remain true to its original spirit, it must be complemented by a wide-scale redistribution of wealth. In several essays, Neumann translated these abstract claims into concrete institutional suggestions. Alongside the rights already guaranteed by the Weimar Constitution, such as the right to unionize, Neumann proposed further democratization of the workplace, the introduction of workers’ representation on all public planning bodies, and the establishment of special labor courts (Neumann 1928, 1929, 1931). To be sure, Neumann never made clear whether such welfare programs were to become a permanent fixture or merely constituted a transitional step on the path toward the total abolition of private property, as Marxist orthodoxy demanded. Similar to others in Socialist legal circles, Neumann remained ambiguous on this point, and his writings contain conflicting statements on the matter.
Frankfurt School & Assessment of Nazism

Frankfurt School and theories of the state. To be sure, their Marxist commitment to the working class often stood in some tension with Schmitt's authoritarian critique of the Weimar Republic. Indeed, despite some scholars' claims that the Frankfurt School was heavily influenced by Schmitt and his terminology (Kennedy 1987), most historians agree that their work reflects a fundamentally different intellectual commitment to a pluralist and democratic, albeit a fiercely anti-capitalist, politics (Söllner 1986; Schale 2011; Olson 2016). This was true especially of Kirchheimer, who began his career as Schmitt's student and admirer (Kirchheimer 1969a), but who by the early 1930s had turned against his mentor. In several essays, Kirchheimer rejected Schmitt's claim that only “homogenous” groups could form functioning states. The modern world, he argued, was comprised of heterogeneous societies containing multiple communities, which states had to recognize and accept. More critically, states had the reasonability to promote social equality—as Socialists had always demanded—and to defend individual liberty and legal rights. As Kirchheimer put it, “the democratic socialist position… [is to] bring about [economic] 'equality of opportunity' while preserving the rights of citizenship” (Kirchheimer 1996b: 80). Ideologies that discarded the individual in favor of the collective, such as Communism and Fascism (which Schmitt admired), were thus illegitimate and dangerous. Democracy alone could peacefully expand social justice and enhance social cohesion without politically subjugating its citizens. Of course, as a Marxist, Kirchheimer insisted that the redistribution of wealth should be democracy's most urgent priority and conceded that Socialist laws would occasionally infringe on some individuals' property rights. But democracy was in the final analysis admirable because it was “the only political system that provides an institutional guarantee that even the most decisive transitions of power need not threaten the continuity of the legal order” (Kirchheimer 1996b: 82).

Even more solidly pluralist was Neumann, who passionately rejected Schmitt's claim that economic and social compromise necessarily curtailed the state's ability to rule. Cooperation between social and economic groups was not only legitimate but was, in fact, an integral part of the state's responsibilities to its subjects. In his short book Union Autonomy and the Constitution, Neumann maintained that the social rights established by the Weimar Constitution did not presage political disintegration, as Schmitt had warned (Neumann 1932). Rather, they were integral to the state's responsibility to furnish its citizens with economic and social independence. As he put it, “the economic constitution is the system of norms which orders state and social intervention into economic freedom, which is solely an enhanced legal freedom” (Neumann 1987a: 57). Importantly, as political scientist William Scheuerman shows, Neumann never believed that all social tensions should be resolved by the state (Scheuerman 1994: 53). In his vision, unions and other social groups had to engage in independent activity and struggles, and to utilize state institutions only occasionally, lest their autonomy be compromised. In Neumann's democratic and socialist order, the state was to provide citizens with the economic conditions for independence. In fact, the Weimar Constitution showed that even capitalist societies could legislate progressive laws, which, in turn, could open the door to future Socialist gains without state supervision (Neumann 1987b).

Even before the creation of the Third Reich, then, the Frankfurt School's legal scholars began crafting innovative legal and political theories of law, politics, and economics. At the same time that Horkheimer, Adorno, Erich Fromm, and others initiated their groundbreaking fusing of Marxist social science with cultural critique and psychoanalysis, Kirchheimer and Neumann rethought Socialism's relationship to the rule of law and theories of the state. To be sure, their Marxist commitment to the working class often stood in some tension with...
their project of universal liberation under the abstract and rational rule of law. Their early writings often privileged workers as the agents of progress and occasionally conflated them with all of humanity, assuming that the empowerment of one class would seamlessly benefit all. Moreover, Kirchheimer and Neumann never fully explained how to resolve potential conflicts between individual and collective rights. If capitalism was so clearly the source of modern ills, curtailing it was a more urgent task than sketching the precise contours of a future Socialist order. Whatever its limitations, in years to come, this intellectual project of adapting Marxist thought would provide the basis for their assessments of Nazism. It would guide Kirchheimer and Neumann’s terminologies, penetrating insights, and glaring shortcomings.

Capitalism and Law in the Third Reich

The Nazi takeover of Germany in 1933 sent shockwaves through the Left’s intellectual world. That the Great Depression had led not to a Socialist revolution, but to a brutal and fervently anti-Marxist regime, threw many Marxist assumptions about capitalism’s inevitable demise into question. Of course, those who steadfastly adhered to the crude Marxist formula by which the economic “base” always shapes the political “superstructure” could simply dismiss Hitler as the puppet of large corporations. As Bulgarian Communist Georgi Dimitrov famously proclaimed in 1935, Nazism was “the open terrorist dictatorship of the most reactionary, most chauvinistic and most imperialist elements of finance capital” (Dimitrov 1935). Yet for more critical thinkers, understanding Nazism became the source of sustained intellectual efforts. From Paris to New York to Mexico City, Marxist intellectuals sought to explain the causes and consequences of Nazism’s triumph. Kirchheimer and Neumann, who fled Germany and in 1937 joined the Institute for Social Research in New York City, were among the leading figures in this scholarly campaign. Alongside numerous essays in the Institute’s journal Zeitschrift für Sozialforschung and its successor Studies in Philosophy and Social Science, Kirchheimer published a book on Nazi criminal law, Punishment and Social Structure (Kirchheimer 1939a), while Neumann produced Behemoth, a lengthy study of Nazi legal, political, and economic policy. In line with their previous interests, both authors continued to observe the Nazis through the prisms of law and economics, rarely deploying the cultural, psychological, or sexual explanations becoming popular among their Institute colleagues. Still, by the mid-1940s, these works had broken new ground and joined the vanguard of left-leaning writing on the Third Reich.

Unlike in Weimar, the most immediate interlocutors of the Frankfurt School’s legal scholars were not liberals and nationalists like Weber and Schmitt, but other Marxists, specifically the Institute’s associate director, Friedrich Pollock. In several essays, Pollock claimed that Nazism represented a new stage in capitalism’s evolution that produced a system he termed “state capitalism.” In this incipient era, governments around the world had abandoned the free market in favor of price and wage regulation and had assumed control over consumption and production. To Pollock’s mind, this shift, in which Germany was only the vanguard, was epochal because it rendered economic subjugation secondary to political control. Investors and employers now no longer ruled the masses through employment and consumption, but had been pushed aside by politicians. “[T]he profit motive,” Pollock asserted, had not disappeared, but had been “superseded by the power motive” (Pollock 1941a: 207). In this bleak assessment, which was shared by many others in the Institute (Gangl 2016), capitalism had emerged from the Depression more powerful and stable than ever. The antagonism it inevitably generated between classes, which Marxists believed would lead to its collapse, was largely muted by increased spending on military expansion and government-run employment. Nazism, then, was a “new order,” which was likely to survive
for the foreseeable future (Pollock 1941b). In the words of Horkheimer, who agreed with Pollock, state capitalism provided “a new breathing space for domination” (Jay 1973: 155).

While Kirchheimer and Neumann shared Pollock's conviction that capitalism was crucial to understanding the Third Reich, they believed that he fundamentally misunderstood the new regime. Drawing on their earlier writings, they claimed that Nazism embodied not the replacement of economics by politics, but rather an extreme legal chaos that capitalism was threatening to inflict on the world. According to one of Kirchheimer's earliest essays in the Institute's Zeitschrift, the Nazis had indeed gained unprecedented power over the heads of large corporations. Hitler and his clique were too powerful to be toppled or managed by industry mogul Fritz Thyssen or metal tycoon Gustav Krupp. It was nevertheless crucial that the regime allowed such corporations to maintain their independence and ownership of their property. “The concentration of economic power which characterizes the social and political development of the Nazi regime,” Kirchheimer wrote, “crystallizes in the tendency toward preserving the institution of private property both in industrial and agricultural production, while abolishing the correlative to private property, the freedom of contract. In the contract's place the administrative sanction now has become the alter ego of property itself” (Kirchheimer 1969b: 108). Neumann was even blunter in his rejection of Pollock's theory, claiming that “the very term 'state capitalism' is contradiction in adjecto [a contradiction in terms].” Quoting Socialist theoretician and former finance minister Rudolf Hilferding, he continued, “[o]nce the state has become the sole owner of the means of production, it makes it impossible for a capitalist economy to function, it destroys the mechanism which keeps the very processes of economic circulation in active existence” (Neumann 1942: 183).

The Third Reich, in this view, did not seek to forge a stable economic and political synergy, as Pollock believed. Instead, it had established an odd and hybrid system, which Neumann called a “monopolistic totalitarian economy.” According to Neumann, Germany contained two parallel economic structures. One was controlled by the capitalist corporations that had dominated the economy since the early twentieth century, while the other was operated by the Nazi party itself. In Neumann's telling, the Nazis recognized that the growing dominance of large corporations increasingly destabilized the economy and exposed the masses to cyclical depressions. But instead of restricting the free market, the Nazis had undergirded it with their own large-scale industries, such as the munitions factories run by Hitler's second in command, Hermann Goering. The result was a country in which free enterprise had neither disappeared nor declined. If anything, German capitalism was now able to operate with greater brutality against workers and consumers, who were no longer protected by the rule of law. Thus, even the Nazis' bold forays into the economy did not spell the end of capitalism. “On the contrary, it appears as an affirmation of the living force of capitalist society. For it proves that even in a one-party state, which boasts the supremacy of politics over economics, political power without economic power, without a solid place in industrial production, is precarious” (Neumann 1942: 249–250).

If the Third Reich's “new order” had turned out to be not particularly new in the economic sphere, Kirchheimer and Neumann believed that it signaled an alarming development, of which they had warned before 1933: the replacement of rational and universal law with the conditions of intentional and perpetual legal anarchy. Neumann underscored this claim by titling his book Behemoth, a reference to Thomas Hobbes's work of the same name, in which the renowned political theorist studied the chaos brought on by the English civil war of the seventeenth century. According to Kirchheimer and Neumann, Germany was ruled by four autonomous power blocs: the Nazi party, the senior civil service, the army, and monopoly capital. These groups were locked in competition over wealth and power, each developing its own chains of command and internal ruling mechanisms. Yet in line with capitalism's indifference to rational legality, Germany had now abandoned earlier efforts to govern such
different groups under one set of universal and applicable laws. Each bloc followed the path blazed by large corporations by developing its own legislative rules, courts, and judicial processes, which often contradicted those developed by the others. Kirchheimer, who was especially interested in criminal law, highlighted how lawyers and judges increasingly tended to ignore existing legal codes and resorted to using vague and unpredictable concepts such as “the feelings of the people” when crafting their verdicts. The legal establishment had become the servant of the most powerful rulers (Kirchheimer 1939b). Germany, in short, was witnessing the rise of Weber’s nightmarish “deformalized” and unpredictable order. As Neumann bluntly put it in his 1936 *The Rule of Law*, “the law does not exist in Germany” (Neumann 1986: 298).

What made this constellation so harrowing compared to earlier capitalist regimes was the nakedly opportunistic and sectarian impulses that it helped unleash. For, contrary to Schmitt’s claims that weaker legalism would enhance national cohesion and “homogeneity,” German elites displayed zero commitment to the general population and remained intent on furthering their own selfish interests. “Devoid of any common loyalty, and concerned solely with the preservation of their interests,” Neumann wrote, for the ruling groups “nothing remains but profit, power, prestige, and above all, fear” (Neumann 1942: 384). Both authors agreed that, for all its proclamations of “national revival,” the Nazi regime had done little to improve the lives of most citizens. It “provided no support for the independent middle classes in their struggle for survival, but, instead, actually hastened their final decline more than any other single factor in modern German history” (Kirchheimer 1969c: 155). If this loose ruling coalition of oppressive forces did not explode into an all-out civil war, this was mainly because of Hitler’s promise of imperialist conquest and sharing of future spoils. “It is this interdependence between the unquestionable authority of the ruling group and the program of expansion,” Kirchheimer determined, “which offers the characteristic phenomenon of the compromise structure of the fascist order” (Kirchheimer 1969c: 158–159).

Despite its pervasive gloom, this description of the Third Reich also contained a strong dose of optimism. For both Kirchheimer and Neumann assumed that the regime was not as popular as it claimed to be and, in fact, relied upon a growing antagonism between the German elites and the people they ruled. Abandoned due to their leaders’ competition over power and wealth, the masses were bound to see through the regime’s empty promises of prosperity and were likely unmoved by Hitler’s overall ideological message of racial purity and salvation. As Neumann put it,

> The promises given by the regime to the masses are certainly sweet, but many of them have been broken... This antagonism must be felt by the masses, which are not simply babes in the woods but have a long tradition behind them, a tradition that imbued them with a critical spirit and made them aware that the primary fact of modern civilization is this very antagonism between an economy that can produce in abundance for welfare but that does so only for destruction. (Neumann 1942: 378)

Falling back on traditional Marxist views, both Kirchheimer and Neumann remained convinced that most people recognized and were naturally enraged by their “true” position in capitalist society. As long as capitalism continued to exist, it would foster the resentment that could bring about its undoing. If the regime was violent and oppressive, this was at least in part because it recognized its own fragility. No amount of uplifting rhetoric or coercive violence could change this fundamental and potentially destabilizing tension.

In fact, much of the Frankfurt School’s legal scholars’ work was motivated by their desire not merely to understand Nazism, but to expose its weaknesses. Neumann was quite candid
when he explained his rejection of Pollock’s theory of state capitalism. “If we accept the assumptions of the state capitalistic theory,” he wrote,

   the choice is determined solely by political expediency. The rulers are completely free to determine the character of their rule: their system of mass domination is so flexible that it seems potentially invulnerable from within. The present writer does not accept this profoundly pessimistic view. He believes that the antagonisms of capitalism are operating in Germany on a higher and, therefore, a more dangerous level, even if these antagonisms are covered up by a bureaucratic apparatus and by the ideology of the people’s community.

   (Neumann 1942: 186)

There was more than a little willful self-deception in this sanguine observation. While the Third Reich was certainly violent and oppressive, Neumann ignored its remarkable ability to coopt many of its skeptical opponents, including workers, a feature which contemporary observers and historians alike have often noted was crucial to its success (Baranowski 2004). For Kirchheimer and Neumann, analyzing Nazism was meant at least in part to identify its weaknesses and craft an alternative to it. As Neumann commented in the conclusion to Behemoth, his study was meant in part to provide a blueprint for the regime that would replace Nazism with a Socialist and stable democracy (Neumann 1942: 388).

   Yet for all their high hopes, the two thinkers’ assessment contained a much darker and less traditionally Marxist element. Neumann in particular believed that Germany’s descent into chaos revealed the Nazi regime’s bizarre and truly unprecedented assault on the concept of the state itself. The Reich was neither the “total state” that Schmitt desired nor the “state capitalism” that Pollock described; rather, it was a non-state, a chaos, a rule of lawlessness and anarchy” (Neumann 1942: 5). According to Neumann, modern states were “conceived as rationally operating machineries disposing of the monopoly of coercive power. A state is ideologically characterized by the unity of the political power that it wields.” But in Germany, there was no individual or institution that functioned as a unifying and final authority. Far from being a supreme leader, Hitler was, in fact, a figurehead whose orders merely reflected decisions made by others. Thus, while the country’s four ruling groups informally negotiated among themselves, they never bothered to codify their agreements in binding and universally applicable terms. “There is no need for a state standing above all groups; the state may even be a hindrance to compromise and to domination over the ruled classes” (Neumann 1942: 468–469). Taking a historical view, Neumann further claimed that “National Socialism has revived the methods current in the fourteenth century… It has returned to the early period of state absolutism where theory was mere arcanum dominationis [secret of domination], a technique outside of right and wrong, a sum of devices for maintaining power” (Neumann 1942: 380). The Nazis, according to Neumann, had rolled back the modern project of separating authority from specific individuals. Like gangsters, Germany’s rulers viewed power and legitimacy as identical; there was nothing above or beyond raw domination.

   For Neumann, nothing reflected the Nazis’ ingrained and systematic hostility to the state more than their unprecedented competition with state bureaucracy. Ever since the eighteenth century, scholars such as Weber had considered efficient and impartial bureaucrats—police officers, state lawyers, or economic planners—to be the cornerstones of modern governance. Despite the deep-seated hostility between Socialists and the largely conservative bureaucrats during the Weimar period, Neumann shared this conviction and asserted that a robust bureaucracy would be necessary to build a healthy and just Socialist state (Scheuerman 1994: 145–149). The Nazis, however, had deliberately undermined state institutions by developing their own vast bureaucratic apparatus. Party treasurers engaged in economic planning,
Hitler Youth officials helped craft educational policies, and party engineers designed public projects, intentionally competing with state functionaries and limiting their influence (Neumann 1942: 71–72). But these Nazis activists did not operate according to clear and fixed guidelines. They obeyed only the charismatic authority of their leaders and encouraged other citizens, including non-party members, to disregard formal laws that contradicted Hitler's dictates. Similar to a cancerous tumor, the party machine had grown to such an extent that it now rendered state bureaucracy meaningless. The parallel existence of these structures was “a constitutional situation which is self-contradictory” (Neumann 1942: 72), and which intentionally fostered ambiguity and disorder.

According to Neumann, this anti-statist zeal laid bare Nazism's disturbing rejection of rationalism itself. In many ways, this was its most destructive and confusing characteristic. Neumann maintained that unlike any other modern political ideology, Nazism did not seek to tame violence or direct it toward the betterment of society. Instead, Hitler and his followers viewed the perpetual brutality of all against all as the natural state of human affairs. To be sure, rational planning still existed in spheres that required it, such as economic planning. And the regime very rationally crafted its propaganda and employed political terror against its opponents. Yet these were means to achieve goals that were essentially irrational. The Nazis' Darwinist ethos rendered the attempt to legitimize power superfluous because it tautologically assumed that those who held power were by definition superior to those over whom they ruled. In Neumann's eyes, this fetish for violence, and not merely material considerations, was the key to understanding the Third Reich's voracious appetite for expansion. “National Socialism,” he wrote, was incompatible with any rational political philosophy, that is, with any doctrine that derives political power from the will or the needs of man... [This explains the] fundamental antagonism between the productivity of German industry, its capacity for promoting the welfare of the people and its actual achievements.

Thus a “huge industrial machinery in continuous expansion,” Neumann darkly concluded, “has been set to work exclusively for destruction” (Neumann 1942: 378).

In recent decades, many scholars have resurrected this line of thought and have portrayed Nazism as a radical departure from modern impersonal regimes toward the primitive worship of a “charismatic” leader. For some, this feature distinguished it as a unique case among all other modern regimes (Kershaw 1993). But for Kirchheimer and Neumann, Nazism was so important because it exposed how potentially destructive capitalism could be everywhere, not only in Germany's idiosyncratic case. Both authors never believed that the Nazis were simply the servants of capital. The large industries appeared in their works as only one of four key power blocs and usually as secondary in power to the Nazi party. Moreover, Kirchheimer and Neumann were well aware that the Nazi party itself was not motivated primarily by material economic considerations, despite the pervasive corruption that plagued the regime. Economic spoils were necessary to preserve its ruling coalition, but the party also took its racial ideology very seriously, as evident in its obsession with eugenics and its brutal crusade against Jews, Roma, and other “undesirables.” Yet Germany's case was so alarming because it revealed the consequences of capitalism's growing hostility toward legal rationality. The Nazis showed what kind of bedfellows monopoly capitalism could bring together if left unchecked. Capitalism was far more dangerous than Socialists had previously recognized. Its triumph spelled not only economic exploitation but also potentially the collapse of modern civilization.

As was the case during the Weimar period, these theories of capitalism, law, and politics were not without tensions and omissions. Neither Kirchheimer nor Neumann fully
explained how monopoly capitalism facilitated legal and political anarchy by its very nature, nor did they elucidate how capitalism could do so outside Germany. After all, the United States at the time certainly operated in an advanced capitalist mode, but did not appear to be tilting toward such chaos. If there was “no specific German trait responsible for aggression,” and Nazi brutality was “inherent in the structure of... monopolist economy,” as Neumann claimed (Neumann 1942: 388), why did this same legal nightmare not afflict other capitalist countries, as his analysis suggested it would? Indeed, both Kirchheimer and Neumann joined the American intelligence establishment without hesitation in 1942, drafting plans for the future U.S. occupation of their former homeland, and remained appreciative of the United States long after the war was over, with Kirchheimer continuing to work for the State Department (Katz 1987; Kettler 2007). Their actions indicate that both believed there were regimes in which capitalism, for all its inequalities and injustices, operated quite well alongside state institutions. Nevertheless, their analysis was crucial in highlighting capitalism’s disturbing ability to survive under an irrational and chaotic legal regime. Not only did the free market bring about social and economic exploitation; much worse, it could bring about the denigration of rationality and any hope for peaceful politics.

Beyond Law and Economics: Racism and Anti-Semitism

For all their insights, Kirchheimer and Neumann’s analysis displays its most serious shortcoming in its treatment of Nazi racism and anti-Semitism. Specifically, their tendency to view the Nazis’ vitriolic and intense hatred of “undesirable” minorities, and especially Jews, as ultimately secondary to the regime’s economic and legal character is the point at which their Marxist perspective exemplified its clearest limits. Of course, this perspective was far from unique during the war and the early postwar era. As historians have often noted, in the immediate aftermath of World War II, thinkers, politicians, and jurists almost universally observed the Third Reich’s toxic anti-Semitism and Nazi genocide as but one—and definitely not the foremost—example of the regime’s transgressions (Bloxham 2001). It was not until the 1960s that scholars began to critically examine anti-Semitism’s fundamental role in Nazi ideology and to conclude that the Holocaust was the towering evil of the twentieth century. Nevertheless, several thinkers, such as Arendt and Adorno, had previously gone to great effort to understand the predatory nature of Nazi violence, viewing Auschwitz as the essence of Nazi politics. In comparison, Kirchheimer and Neumann’s assessment of Nazi racial policies seems like a crucial lacuna, which invites critical engagement.

To be sure, the Frankfurt School legal scholars never ignored Nazi racism and were deeply disturbed by the violence it unleashed. In early 1942, before news of the scope of Nazi atrocities began to reach the West, Neumann described Nazi racism as the regime’s most awful component. “The National Socialist population policy,” he wrote, “is, perhaps, the most revolting of National Socialist policies. It is so completely devoid of Christian charity, so little defensible by reason, so fully opposed to pity and compassion, that it appears as a practice of men utterly pagan.” Neumann decried the Nazi reduction of humans to nothing more than dispensable cells within the complete organism of society. Hitler’s orders revolved around two principles: for women, “[p]roduce as many children as possible so that the earth can be ruled by the master race”; for men, “kill the unhealthy so that the masters need not be burdened by the care of the weak.” Neumann recognized that the obsessive Nazi biologism rendered the Third Reich fundamentally different from other brutal regimes such as the Soviet Union (to which most commentators compared it at the time). “National Socialism and bolshevism are utterly divergent,” he wrote. “Not the persecution of political opponents—which is practiced in both countries [Germany and the Soviet Union]—but the extermination of helpless individuals is the prerogative of National Socialism” (Neumann 1942: 96).
Occasionally, Neumann portrayed Nazi anti-Semitism as a unique ideological force that could not be understood as a cover for other objectives. Devoid of any logic, like “magic,” it was part of the Nazis’ overall rejection of rationality (Neumann 1942: 85).

Such assertions, however, remained marginal to the legal scholars’ overall body of work. Far more frequently, they described Nazi racism and anti-Semitism as part of the regime’s cynical arsenal of distraction, a conscious lie designed to divert attention from its alliance with capitalism. “[T]he so-called non-rational concepts,” namely ethnic unity and racial enemies, Neumann wrote, “are devices for hiding the real constellation of power and for manipulating the masses.” Like the regime’s claim to lead “the struggle of a proletarian race against plutocracies,” racist ideas were “consciously applied stratagems,” carefully designed to mask the fact that wealth and power continued to flow upward from the masses to a small elite. Ultimately, alongside the inherent irrationality of anti-Semitism, there was a far more rational strand to the Nazis’ anti-Semitic ideology. And this rationality was above all else economic, a well-crafted plan to displace the aggressive “anti-capitalist longing of the German people” against invented enemies (Neumann 1942: 379). In light of his optimistic belief in the masses’ critical capacity to see through the regime’s rhetoric, Neumann could not admit anti-Semitism a spontaneously and widely held credence. “[P]aradoxical as it may seem,” he confidently asserted, “the German people are the least anti-Semitic of all” (Neumann 1942: 96), an opinion which was at the time widely shared by other members of the Institute (Jay 1980: 140).

Even in the less economic-centered parts of their analysis, such as Neumann’s discussion of the Nazis’ campaign against the state, anti-Semitism appeared as a tool for the achievement of other goals. As he put it in a secret 1943 report to his OSS superiors, and then a year later in Behemoth’s second edition, “anti-Semitic ideology and practice of the extermination of the Jews is only the means to the attainment of the ultimate objective, namely, the destruction of free institutions, beliefs, and groups” (Neumann 1944: 551; Laudani 2013: 28). It furthermore served to implicate countless Germans, especially from the military and the civil service, in the regime’s crimes and thus made it “impossible for them to leave the Nazi boat” (Laudani 2013: 30). Kirchheimer, too, viewed Nazi extermination as an expression of its despise for legal checks on power. In a 1945 memorandum on criminal responsibility (which he drafted in preparation for his participation in the Nuremberg trial), he addressed extermination as one of the many side effects of legal chaos, rather than a special category that demanded separate reflection (Laudani 2013: 464–474). From the perspective of twenty first century readers, it is remarkable how, despite possessing full knowledge of the Nazi genocide, both legal scholars remained committed to what Neumann called the “spearhead theory of anti-Semitism,” in which the Jews served as “guinea pigs in testing a method of repression.” Unable to differentiate between political persecution and full-scale genocide, Neumann speculated that what had been perpetrated against the Jews would soon befall “pacifists, conservatives, Socialists, Catholics, Protestants, Free thinkers and members of occupied peoples” (Laudani 2013: 28–29).

Recognizing how the effort to universalize Nazism’s lessons led to overlooking the uniquely predatory nature of its racism is important for understanding not only Kirchheimer and Neumann but also more recent assessments of Nazism. For a long period of time, historians such as Jürgen Kocka and Saul Friedländer gained much attention by portraying Nazi racism and the Holocaust as unparalleled phenomena, rooted in Germany’s unique history (Kocka 1993, Friedländer 1997). Over the last decade, however, scholars have begun to revive the postwar works of Arendt, Hayek, and Adorno and Horkheimer to claim that Nazism was ultimately an extreme version of broader historical trends in the industrialized world. While countries such as Britain and the United States may have fought Nazism to the death, these scholars argue, perhaps they were not as different as they imagined themselves.
to be. Wolfgang Schivelbusch, for example, has maintained that the Third Reich is best understood as one version of the modern welfare state, which also evolved in United States in the 1930s (Schivelbusch 2006). Historians Mark Mazower and Eric Weitz have suggested that Nazism was but one manifestation of Western imperialism’s obsession with ethnic cleansing, which also guided British, French, Dutch, and Belgian empire building (Weitz 2003; Mazower 2008). Most provocatively, political theorists Giorgio Agamben lambasted the United States and its “war on terror” as resurrecting the Nazis’ legal anarchy. By making the “state of emergency” a permanent condition and detaining prisoners in Guantanamo Bay indefinitely, he claimed, Americans were no different from the Nazis who established concentration camps (Agamben 2005). These critical works have done much to expand contemporary interpretations of Nazism. They invested much energy in an effort to uncover troubling legacies that still influence Western politics. But like Kirchheimer and Neumann, they all downplay predatory anti-Semitism and the Holocaust as fundamental issues that distinguish Nazism from other regimes.

Alongside their many penetrating insights, then, Kirchheimer and Neumann’s theories provide an important opportunity to reflect on the limits and problems inherent in any effort to draw broad lessons from Nazism, whether on capitalism or other social, economic, and political systems. The legal scholars’ inability to grasp the centrality of racism and anti-Semitism in the Third Reich, or the scope of their toxic consequences, demonstrates how much one has to downplay and overlook in order to explain Nazism’s relevance to contemporary politics. It was only by marginalizing anti-Semitism that Kirchheimer and Neumann believed they could expose Nazism’s significance for modern economics and law. This is not to say that such a task is futile or meaningless. As long as the Nazi era continues to spark intense emotion as one of modernity’s darkest hours, understanding its roots and pointing to its hidden legacies will remain a powerful tool in identifying current evils. But it is only by recognizing the profound limitations of such efforts that one can draw on the Nazis to better understand today’s world.

References


**Further Reading**


Kettler, D. (2001), *Domestic Regimes, the Rule of Law, and Democratic Social Change*, Cambridge: Galda & Wilch. (A study of German Social Democratic thought, which includes both Neumann and Kirchheimer, and its relevance to social thought and law today.)

