Otto Kirchheimer (1905–1965) and Franz L. Neumann (1900–1954), the early Frankfurt School’s resident legal and political thinkers, can be credited with bringing the imposing legacy of Weimar jurisprudence and state theory into a productive conversation with first-generation Frankfurt School Marxism. Between 1936 and 1942, a crucial conjuncture during which Max Horkheimer, the Institute for Social Research’s Director, encouraged interdisciplinary social inquiry, Kirchheimer and Neumann were able to contribute creatively to the Institute’s intellectual profile. Although they never garnered the attention bestowed on their Frankfurt colleagues (e.g., Adorno, Marcuse, and Horkheimer), renewed interest in their writings played a key role in the revitalization of critical legal scholarship in Germany and elsewhere in the late 1960s and early 1970s. Without a proper grasp of their legacy, it is difficult to make sense of the ambitious contributions to legal sociology and jurisprudence by the Frankfurt School’s pivotal second-generation thinker, Jürgen Habermas (1929–). Their oftentimes prescient insights still provide a fruitful starting point for analyzing contemporary legal developments. Not surprisingly perhaps, we can find echoes of their ideas among Frankfurt critical theorists who are grappling with challenges posed by globalization to the rule of law and constitutionalism.

Neumann and Kirchheimer: Adieu to General Law and the Modern State

Born in Kattowitz (formerly East Prussia), Neumann pursued legal studies at Breslau, Leipzig, Rostock, and ultimately Frankfurt, where his most important mentor was Hugo Sinzheimer, a prominent left-wing labor and criminal lawyer, one architect of the ill-fated Weimar Constitution, and author of some of its socialist features (e.g., Article 165, which called on labor and capital jointly to manage the economy). During the Weimar Republic’s final years, Neumann—like Sinzheimer, a lawyer and Social Democratic Party (SPD) activist—wrote widely for political, legal, and especially labor law journals, with his efforts generally focused on defending labor rights and a distinctly reform-socialist interpretation of the Weimar system as situated “between capitalism and socialism.” Even Neumann’s specialized writings on Weimar labor law always evinced familiarity with the ideas of Karl Marx, Max Weber, and leading contemporary political and legal thinkers (e.g., Hermann Heller, Hans Kelsen, Karl Renner, and Carl Schmitt). Working alongside another young socialist lawyer, Ernst Fraenkel (with whom he shared a legal practice in Berlin during Weimar’s final years), Neumann began laying the groundwork for his most important theoretical claim when subsequently based at the Institute for Social Research: contemporary monopoly capitalism...
undermines the generality of the legal norm and thereby the fundamentals of any normatively defensible conception of the Rechtsstaat or “rule of law” (Neumann 1957, 1978). According to this view, a resolute defense of the rule of law was both a political necessity and an essential component of a sound critical theory.

Born in Heilbronn (and tragically orphaned at a young age), Kirchheimer began his intellectual career as a fierce left-socialist critic of Weimar and the mainstream SPD. Always drawn to a politically diverse range of outspoken teachers (including the socialist Heller, but also right-wingers like Schmitt and Rudolf Smend), he acquired a broad legal and jurisprudential training, before ultimately moderating his enmity to Weimar and making a name for himself as an up-and-coming socialist jurist. His publications on a host of timely legal and political issues appeared in prominent journals like Die Gesellschaft. By the early 1930s, Kirchheimer, like Neumann, could look forward to a promising career as an outspoken left-wing lawyer and intellectual with links to the SPD (Kirchheimer 1972, 1976).

Hitler’s seizure of power in 1933 abruptly forced both men—Jews as well as socialists—to flee Germany and recalibrate their intellectual profiles in accordance with the inhospitable dictates of forced exile. More fortunate than many others, they escaped Nazism and eventually found their way to Horkheimer’s Institute for Social Research, now located in New York’s Morningside Heights. Deeply political creatures, Neumann and Kirchheimer, not surprisingly, immediately focused their efforts on critically analyzing the evolving Nazi political and legal order, which they both viewed as a cataclysmic culmination of basic structural tendencies operative in modern society. Like other first-generation Frankfurt School theorists who interpreted fascism as rooted in underlying societal pathologies, they emphasized the epochal implications of the transformation of classical or competitive capitalism, “based on the assumption of a large number of entrepreneurs of about equal strength, freely competing with each other on the basis of freedom of contract and freedom of trade, with the entrepreneur investing his capital and his labor for the purpose of his economic ends, and bearing the risks involved” (Neumann 1944: 258), into contemporary “monopoly” capitalism. In the latter, mammoth corporations possess structural advantages vis-à-vis small- and medium-sized firms, cartels and other anticompetitive institutions become commonplace, and the “self-regulating” market declines, as state intervention proves ubiquitous and economic risks are eliminated for the largest economic units.

The pair’s most important contribution to Frankfurt School theory was to trace what Neumann called the “change in the function of law in modern society” to capitalism’s shifting contours (Scheuerman 1996). Cautiously hopeful that monopoly capitalism might prove at least temporarily consonant with some version of welfare state democracy, for both thinkers the trauma of Weimar encouraged them to view it as inimical even to bare rudiments of a decent political and legal order. Its Marxist preoccupation with shifts in material production notwithstanding, their account broke decisively with leftist orthodoxy by highlighting modern law’s indispensable protective functions. In Neumann’s formulation, the rule of law, and particularly its conceptual centerpiece, the classical demand for relatively clear, prospective, and general legal norms, represented modern rational natural law’s most important legacy: “The principles which are still valid, although not solely derived from Natural Law” are the generality of law and closely related idea of an independent judiciary (Neumann 1957 [1940]: 90). On this account, general law possessed a historically transcendent “ethical function”:

The generality of laws and the independence of the judge guarantee a minimum of personal and political liberty. The general law establishes personal equality, and it forms the basis of all interferences with liberty and property. Therefore the character of law which alone permits such interference is of fundamental significance.

(Neumann 1957 [1937]: 42)
The fundamental dilemma at hand was that the rule of law’s social and economic presuppositions vanished with the transition from competitive to monopoly capitalism. Although legal reality in competitive capitalism had never seamlessly meshed with strict models of the rule of law, monopoly capitalism demanded, in both qualitatively and quantitatively unprecedented ways, discretionary and increasingly specialized legal interventions or “individual measures,” inconsonant with conventional ideas of general or formal law. While “competitive society requires general laws as the highest form of purposive rationality, for such a society is composed of entrepreneurs of about equal value,” contemporary society generated individualized and oftentimes discretionary legal regulation (Neumann 1957 [1953]: 168). “If the state is confronted only by a monopoly, it is pointless to regulate this monopoly by a general law” (Neumann 1957 [1937]: 52).

Core economic realities, in conjunction with corresponding political-institutional shifts, meant that the basically admirable modern aspiration for the “rule of law” was now under direct attack. Monopoly capitalism generated an ominous deformalization of law destructive of a host of auxiliary legal institutions (e.g., an independent judiciary). Substantial empirical evidence suggested that deformalization directly served privileged economic actors because they typically were best placed to exploit law’s vague and open-ended contours. The road not just to authoritarianism but totalitarianism was paved because the rule of law necessarily constituted the indispensable basis for a bare modicum of liberty. Finally, totalitarianism entailed unmediated domination not simply by powerful political players but also—and perhaps more significantly—by big economic interests.

During the 1930s and early 1940s, Neumann and Kirchheimer undertook systematic research on National Socialism—in their account, a “totalitarian monopoly capitalist” system exhibiting contemporary capitalism’s deepest pathologies—in order to corroborate this general diagnosis. Kirchheimer contributed chiefly by publishing detailed individual studies on various aspects of Nazi law (Burin and Schell 1969; Kirchheimer 1976), while Neumann employed such specialized inquiries as the basis for his Behemoth: The Structure and Practice of National Socialism (1944), a mammoth study devoted to demonstrating that Nazism’s horrors stemmed directly from the structural transformations of bourgeois society, and especially general law’s incongruence with contemporary capitalism. Because of its underlying economic sources, deformalization represented a universal trend. The Nazi case, however, suggested that it was likely to prove particularly perilous when monopoly capitalism lacked minimal liberal and democratic checks on it.

National Socialism also provided evidence for the destatization or disintegration of state sovereignty, a second developmental tendency Neumann and Kirchheimer viewed as operative in modern bourgeois society. In Behemoth’s final pages, Neumann left his readers with the surprising conclusion that the conventional notion of modern states “conceived as rationally operating machineries disposing of the monopoly of coercive power” no longer was useful for describing Nazism, a system in which privileged ruling blocs (the party, upper civil service, army, and monopoly capital) controlled “the rest of the population directly, without the mediation of that rational though coercive apparatus hitherto known as a state” (Neumann 1944: 467, 470). Neumann believed that he had empirically demonstrated that Nazism’s ruling interests, “each operating under the leadership principle, each with a legislative, administrative, and judicial power of its own,” had effectively dispensed with general law and a “rationally operating bureaucracy” standing above them and, when necessary, resolving conflicts in a binding manner (Neumann 1944: 468). A measure of social cohesion was guaranteed not by a state apparatus acting via general law but instead primarily by imperialist plunder, with its benefits accruing disproportionately to privileged political and social groupings. As Kirchheimer noted in “Changes in the Structure of Political Compromise,” the Nazi leadership—and especially Hitler—could occasionally arbitrate between
and among the regime’s competing power groupings only “because the unfolding program of [military] expansion has given the various groups the possibility...of satisfying their desires without too much need of getting in each other’s way” (1969 [1941]: 158).

The destatization thesis was intended, at least in part, as a rejoinder to Friedrich Pollock and other Institute colleagues (including Horkheimer) who had begun sketching out an alternative account of Nazism as a totalitarian variant of “state capitalism.” According to Pollock’s competing diagnosis, traditional market capitalism was being supplanted not by monopoly capitalism, but instead by a novel state-centered capitalism in which the state apparatus assumed decisive economic functions (Pollock 1982 [1941]). Neither Neumann nor Kirchheimer believed that Pollock’s thesis could withstand rigorous conceptual or empirical scrutiny, in part because it badly overstated the contemporary state’s autonomy, administrative coherence, and rationality. Pollock’s “state,” when carefully examined, in fact consisted of unwieldy conglomerations of fused public and private power interests.

Notwithstanding their critique, Pollock’s view soon became dominant within the Institute. Nonetheless, Neumann and Kirchheimer’s alternative position later garnered attention from many scholars—most famously perhaps, Hannah Arendt—struggling to make sense of the apparent “shapelessness” of the National Socialist power apparatus (Iakovu 2009). It also at least briefly influenced US wartime policy: from 1942 until 1945, Neumann and Kirchheimer became key figures in the Office of Strategic Services, tasked with planning for postwar central Europe, with Neumann’s Behemoth briefly taking on a programmatic role (Laudani 2013).

Monopoly capitalism not only undermined formal or clear general law but also its key institutional presupposition, the modern state “disposing of a monopoly of coercive power.” The disintegration of modern stateness or sovereignty, as evinced so clearly by Nazi Germany, illuminated another general trend: state institutions increasingly were parceled out to deeply antagonistic social (and political) interests, with the state no longer possessing a sufficient minimum of institutional coherence. In contemporary society, domination was to an ever greater degree being exercised absent not only modern law but also basic attributes of modern stateness. Rather than the statist “Leviathan” theorized by Thomas Hobbes, political institutions in Germany and elsewhere tended to approximate what the seventeenth-century philosopher had described as an ominous and disorderly “Behemoth.”

As Kirchheimer observed in the aptly entitled “In Quest of Sovereignty,” this general trend posed the question “as to whether the term 'state' may still be considered an appropriate starting point for an inquiry into the power relationships of social forces in present-day society” (1969 [1944]: 161). Contemporary political life was lacking in a realistic “hope of finding a permanent subject of sovereignty that would be intent on, and capable of, balancing the interests and volitions of different groups and factions” (1969 [1944]: 191). Carl Schmitt’s reactionary decisionist model of sovereignty, Kirchheimer speculated, simply reproduced a worrisome historical conjuncture in which “emergency in permanence becomes the genuine symbol of the very absence of that system of coordination to which history traditionally affixes the attribute of sovereignty” (1969 [1941]: 191).

As Marxists, Neumann and Kirchheimer occasionally hinted at the possibility of transcending or at least transforming modern state power in a postcapitalist society. In the context of a class-divided or socially antagonistic society, however, the modern state continued, on their view, to serve basic protective functions. The premature realization of “statelessness” in contemporary capitalism was likely to generate, as Nazism demonstrated, unmediated control by those possessing de facto power. Only the modern state could effectively rein in privileged power blocs: its dismantlement under present-day conditions portended not utopia but instead dystopia.
Influenced by Hermann Heller, Neumann defined the state as a “sociologically sovereign institution” or “the totality of men [sic] who exercise the highest legal power, and the totality of men to whom such legal power is delegated” (Neumann 1986 [1936]: 23). The state exercised power by means of both general law (and the rule of law) and, when necessary, individual commands or decisions. On this view, the modern state faced the task of squaring the circle of general law with sovereignty, or “highest right” with “highest might,” a task rendered effectively impossible by the socially antagonistic contours of modern bourgeois society. In an innovative reinterpretation of modern political and legal theory, Neumann tried to show that the tradition’s great canonical figures from Hobbes and Locke to Hegel could be plausibly interpreted as struggling to explain how sovereignty and the rule of law might be successfully synthesized. On his reading, they were doomed to fail; even liberals like Locke, otherwise hostile to the state, ultimately justified far-reaching emergency or executive prerogative. The only thinker who pointed to the possibility of successfully resolving the contradiction turned out to be Rousseau, whom Neumann—revealingly—tentatively interpreted as a proto-socialist, or at least: a theorist who pointed in the direction of Neumann’s own desire for an egalitarian and socially homogeneous replacement for capitalism (Neumann 1986 [1936]: 136–137, Scheuerman 1994: 109–112).

Despite the tensions between sovereignty and law, the relationship remained partly symbiotic; law may require state coercion. The decay of general law, not surprisingly, transpired in conjunction with state sovereignty’s disintegration. Both processes, because intimately linked to basic trends in the structure of material production, necessarily predated National Socialism. Legal de-fomalization not only plagued the Weimar Republic but there as well:

[...]the sovereignty of the state was no longer to be exercised by an independent bureaucracy, by the police and the army, but was supposed to rest in the hands of the entire populace which, for this purpose, would organize itself in voluntary associations.

(Neumann 1957 [1937]: 49)

Given Weimar’s deep political and social divides, however, this experiment failed. Without the mediating force of the modern “rational” state, outfitted with coercive mechanisms in principle capable of restraining powerful interests, domination merely took more direct forms.

Even in his writings from the early 1950s, Neumann—now a somewhat chastened Marxist, ensconced as Professor of Political Science at Columbia University—continued to underscore sovereignty’s protective functions. Although “fashionable to defame the concept of sovereignty,” he noted in a 1953 essay, amid conditions of inequality it performed useful protective functions. In international law, for example, the idea of state sovereignty attributed formal equality to all states “and a rational principle is thus introduced into an anarchic system. As a polemical notion, state sovereignty in international politics rejects the sovereign claims of races and classes over citizens of other states.” Consequently, Neumann concluded, the “notion of state sovereignty is thus basically anti-imperialist” (Neumann 1957 [1953]: 181–182).

Habermas: Rethinking the Rule of Law, Democracy, and the Social Welfare State

Throughout his long and distinguished career, and thus decades prior to the publication of Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996 [1992]), Jürgen Habermas (1929–) has regularly directed his daunting intellectual acumen
to questions of legal theory and legal sociology (Specter 2010). Habermas systematically engaged legal matters while working on his Habilitation (or second dissertation), The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society [1989 [1962]], under the guidance of the project's advisor, the Marxist political scientist Wolfgang Abendroth.

In 1950s West Germany, Abendroth represented a direct link not only to an indigenous Marxism Nazism had virtually extinguished but also to the vibrant universe of left-wing Weimar jurisprudence. A student of Sinzheimer and Heller, Abendroth's main accomplishment in Adenauer's Germany was to update the original socialist idea of a “social Rechtsstaat,” a concept Heller (and, though sometimes forgotten, also the young Neumann) had formulated in Weimar's waning days, and which subsequently garnered codification in Article 20 of the Federal Republic's Basic Law (1949). Against right-wing disciples of Carl Schmitt who read the Basic Law's endorsement of a “social Rechtsstaat” as nothing more than a call for modest state intervention in a sound bourgeois social order, Abendroth insisted that it not only left open the possibility of democratic socialism but immediately demanded extensive egalitarian reforms and the creation of an expansive democratized social welfare state. With the emergence of massive concentrations of economic power threatening “formal” democracy, in conjunction with the collapse of the classical liberal state/society divide, Abendroth believed only a far-reaching democratization of both state and economy could fulfill the Basic Law's demand for Germany to become a full-fledged “social rule of law.”

The concluding programmatic sections of Habermas' Structural Transformation directly mirrored Abendroth's agenda. There Habermas offered a radical gloss on the idea of a social Rechtsstaat, following Abendroth's call for systematic democratization of the messy institutional configuration that had emerged in the context of organized capitalism and the collapse of the classical liberal separation of state and society. Habermas' claim that new forms of participatory critical publicity had to be realized in emerging “neo-feudal” institutional settings represented a creative application of Abendroth's original agenda (Habermas 1989 [1962]: 222–235).

It was partly under Abendroth's aegis that Habermas became so intimately acquainted with left-wing currents in interwar German law and legal thought, including some crucial contributions from Neumann and Kirchheimer. Like Neumann and Kirchheimer, Abendroth was not only a politically engaged leftist intellectual with a legal background, but one socialized in a context where socialist jurists like Renner and Sinzheimer, along with figures like Kelsen, Heller, and Schmitt, constituted major figures and (sometimes) interlocutors. Not surprisingly perhaps, well into the 1970s Habermas' legal reflections constituted an implicit and sometimes explicit dialogue with older traditions of left-wing German legal thought and Staatsrecht [public law]. To be sure, the young Habermas' writings always evinced more appreciation than either the Staatsrechtler or his Frankfurt Marxist predecessors for normative and philosophical questions and especially democracy's normative foundations. Yet the diagnostic parallels to Neumann and Kirchheimer remain striking. In a lengthy introductory chapter to Students and Politics [Student und Politik] (1961), Habermas appropriated Neumann and Kirchheimer's core intuition from the 1930s: with the transition from competitive to monopoly or organized capitalism, the liberal rule of law—and especially the generality of legal statutes—disintegrates. There and then also in Structural Transformation [ST] Habermas argued that contemporary capitalism generates unchecked administrative and judicial discretion and increasingly authoritarian political and legal oversight. Even if fascism had been militarily defeated, authoritarianism still haunted not just the fledgling German Federal Republic but also other advanced capitalist societies. Directly echoing Neumann, he interpreted the idea of the generality of law as the very linchpin of the rule of law, a concept whose normative potential he emphatically underscored in
opposition to orthodox Marxist accounts, and which he envisioned as building on normatively praiseworthy elements of modern natural law (Habermas 1989 [1962]: 177–179; 284n88). As Habermas noted with evident frustration in a 1963 essay, Marx “went beyond Hegel to discredit so enduringly for Marxism both the idea of legality itself and the intention of Natural Law as such that even since the link between Natural Law and revolution has been dissolved” (Habermas: 1974 [1963]: 113). Accordingly, the young Habermas tried to correct for this analytic rupture within Marxism by highlighting the rule of law’s implicit normative and political potential. By showing how it could be reconceived as a politically progressive social rule of law, Habermas hoped to overcome the unfortunate delineation of legality (and its origins in modern natural law) from radical politics. An updated version of the rule of law, in short, was indispensable to radical reform (Habermas 1974 [1963]: 116–118).

ST devoted significant energy to showing how the rule of law and the crucial idea of legal generality not only contributed to the calculability and security of competitive capitalism but also constituted part and parcel the bourgeois public sphere, a notion its author stubbornly refused to view as an altogether obsolescent leftover from liberalism. The liberal rule of law had proved critical to the bourgeois public sphere’s implicit emancipatory potential:

> The bourgeois idea of a law based state, namely, the binding of all state activity to a system of norms legitimated by public opinion (a system that had no gaps, if possible), already aimed at abolishing the state as an instrument of domination altogether.

(Habermas 1989 [1962]: 82)

As Neumann had previously suggested, one might begin to conceive of the possibility, given certain social conditions, of overcoming the perennial contradiction between state sovereignty and law, or voluntas and ratio, and perhaps therefore a complete and more perfect rule of law “in which domination itself was dissolved; veritas non auctoritas facit legem” (1989 [1962]: 82).

Of course, this emancipatory agenda—for Habermas, as for his Frankfurt predecessors—remained unfulfilled in capitalism. The bourgeois public sphere’s idealized social and economic presuppositions were never met even during the golden age of competitive capitalism, which rested on social exploitation and political exclusion. Bourgeois society’s implicit utopia necessarily proved false. However, if “the objectively possible minimizing of bureaucratic decisions and a relativizing of structural conflicts” could be achieved in a postbourgeois context, Habermas speculated, the modern state might someday undergo the requisite transformation (Habermas 1989 [1962]: 235).

Notwithstanding his criticisms of the bourgeois public sphere, Habermas clearly admired classical liberalism’s aspiration for a “dissolution of domination into that easygoing constraint that prevails[s] on no other ground than the compelling insight of a [deliberatively grounded] public opinion” (1989 [1962]: 88). The simple idea that domination might be “dissolved” by means of free-wheeling rational discourse arguably inspired much of his subsequent work in an astonishing range of fields over the course of many decades. At times even more emphatically than either Neumann or Kirchheimer, as part of this story Habermas underscored not just general law’s “ethical” (and basically protective and defensive) functions, but also its key role as modern law’s normative cornerstone: law’s generality gave more-or-less direct expression to identifiably universalistic modes of moral-practical rationality on which its potential legitimacy rested. As late as 1976, he described law’s generality, defined as the quest for semantically general norms (and prohibition of individual measures), as indispensable to the quest to view modern law as potentially expressing “universalizable interests”
(Habermas 1976: 265). As Habermas there immediately conceded, Marxist critics had powerfully deconstructed the illusions of bourgeois formal or general law. Yet their critique, he added, itself presupposed modern law’s implicit normative claim to offer a “rational basis” for state and society, a normative claim—he noted—that had been interrogated by a rich tradition of rational natural law extending from Hobbes to Hegel (Habermas 1976: 265).

Congruent with this emphasis on law’s general semantic structure, the young Habermas sometimes endorsed Neumann and Kirchheimer’s view that the deformalization and closely related “materialization” of modern law provided direct evidence for capitalist-based legal decay (Habermas 1989 [1962]: 177–179). The transition from competitive to contemporary capitalism, in short, produced a potentially disastrous legal decline, as classical general law was supplanted by discretionary, vague, and sometimes oddly moralistic (“unconscionable,” “in good faith”) legal directives. Such trends, as Neumann and Kirchheimer had previously argued, not only undermined basic legal protections but also provided a thin veneer for unmediated domination by privileged social interests. To be sure, Neumann and Kirchheimer always acknowledged the necessity of nonclassical law in the democratic welfare state: if a democratically elected parliament were to regulate individual monopolies, for example, it was not only silly but reactionary to deny it the authority to do so. Nonetheless, their failure to develop a sufficiently nuanced account of the nexus between democracy and the rule of law, in conjunction with vestigial elements of Marxist functionalism, probably prevented them from fully theorizing the issues at hand. In the final analysis, their diagnosis inferred a dramatic and somewhat one-sided Marxist Verfallsgeschichte [narrative of decay] rather than a more ambivalent and multipronged social process (Scheuerman 1994).

In striking contrast, even in Habermas’ earliest writings, a competing and arguably more satisfactory interpretation of recent legal trends could be discerned. The democratization of new modes of political decision-making, even when unavoidably resting on non-general legal bases, could in principle compensate for perils resulting from the deterioration of law’s semantic attributes. Even if legal regulation no longer took a clear, prospective, and general form, new participatory mechanisms might still secure greater democratic legitimacy. Citing Abendroth, Habermas noted that participatory innovations might in fact generate legal “predictability...not in every particular, to be sure, but certainly along general lines,” as new “regularized procedures” emerged (Abendroth cited in Habermas 1989 [1962]: 230; also, Habermas 1961). Open-ended “materialized” law perhaps posed no necessary danger to either autonomy or legal security as long as the liberal rule of law was reconfigured as a social Rechtsstaat. Civil and political rights could be supplemented by social rights guaranteeing a share in social benefits and equal participatory rights in a decision-making context where state and society fused.

Only in this way can the political order remain faithful today, under the conditions of a public sphere that itself has been structurally transformed, to that idea of a public sphere as an element in the political realm once invested [but no longer necessarily so] in the institutions of the bourgeois constitutional state.

(Habermas 1989 [1962]: 226)

To the extent that the postwar welfare state had already tentatively moved in this direction, one could start to counter overly pessimistic views of recent legal trends. And to the degree that it might prospectively do so far more ambitiously, such anxieties might be put to rest altogether.

This (initially latent) analytic and diagnostic challenge to previous Frankfurt School legal scholarship became more pronounced during the 1980s. On my reading of Habermas’ complex trajectory, a subtle yet crucial shift in emphasis can be discerned.
First, in his socio-theoretical magnum opus, The Theory of Communicative Action (1984 [1981], 1989 [1987]), Habermas turned to a substantial literature in legal sociology to posit that general or abstract legal regulation sometimes counterproductively served as a conduit by means of which the “media-controlled subsystems of the economy and the state interven[ed] with monetary and bureaucratic means” in ways that undermined rather than buttressed autonomy (Habermas 1989 [1985]: 356). Inappropriate modes of general law contributed to a deleterious “colonization” of the lifeworld in social spheres—his examples included the family and schools—where they improperly undermined existing communicative structures: pathological “juridification” (Verrechtlichung) resulted. Law’s semantic generality no longer appeared, as it had for him in the 1960s and 1970s, as a normatively admirable though practically ambivalent feature of modernity’s moral-practical universalism, but instead as an attack on its most admirable features.

Second, in his Tanner Lectures, devoted to legal theory and delivered at Harvard during 1986–1987, Habermas broke even more cleanly with views of legality that emphasized its semantic generality and tied it “too concretely…to specific semantic features” (Habermas 1988: 242). A proper understanding of law’s universalistic (or general) normative energies, he argued, would do well to focus on general or universal processes of moral-practical rationality operative in processes of adjudication and especially democratic legislation. A normatively coherent notion of the rule of law, he concluded, would have to show how “legal procedures institutionalized for legislation and for the administration of justice guarantee impartial judgment and provide the channels through which practical reason gains entrance into law and politics” (Habermas 1988: 279). Such a view, in any event, could no longer rely on overly concretistic ideas of the rule of law that reduced its moral-practical universalism to law’s semantic generality.

The Tanner Lectures conveniently neglected to mention that Habermas had probably defended just such a position as late as 1976, and that his earlier writings, following Neumann and Kirchheimer, also emphasized the importance of law’s semantic virtues. By 1992, with the appearance of Between Facts and Norms (1996 [1992]) [BFN], he was ready to come clean. Though his great magnum opus in political and legal theory was perhaps indirectly inspired by Neumann and Kirchheimer—like Habermas, and unlike many others in the Frankfurt tradition, thinkers who stubbornly demanded that critical theory take modern law seriously—they only made a fleeting appearance in BFN. In a revealing but easily missed endnote, Habermas distanced himself from Neumann’s tendency to highlight law’s semantic generality, polemically grouping Neumann’s views alongside those of the infamous Carl Schmitt: “In Germany the discussion over the generality of legal statutes is still colored by the rather extreme views” of Schmitt, who unduly influenced postwar leftist German legal theory via Neumann: “I did not escape this influence myself” (Habermas 1996 [1992]: 564–565n75).

Whatever the merits of Habermas’ somewhat polemical exegetical claim about the Schmitt-Neumann nexus, there is no question that BFN successfully transcended not only Habermas’ previous legal theorizing but also that of Neumann and Kirchheimer. Given the work’s immense complexity, my discussion here remains unavoidably circumscribed.

An imposing contribution to contemporary political and legal scholarship, BFN relies on a broadly Neo-Kantian reworking of contract theory, and a proceduralist theory of (deliberative) democracy resting on it, to offer a rich account of the mutually dependent nexus between modern democracy and the rule of law. Synthesizing socio-theoretical and sociological legal theories with normative political and legal philosophy, Habermas’ volume weighs in not only on the most fundamental questions of political and legal philosophy, but also on a host of specific jurisprudential matters. Habermas there offers a creative account of what he calls the equiprimordiality of public and private autonomy to demonstrate how human rights and popular sovereignty need to be seen as mutually constitutive. Detailed discussions
of the adjudicative process, and competing views of legal interpretation, are systematically analyzed, as are the modern constitutional state's basic organizational principles (e.g., the separation of powers). Since legality's legitimacy rests ultimately on its deliberative democratic moorings, much of the volume is necessarily devoted to formulating both a normatively demanding and realistic democratic theory. In contrast to earlier writings, the author's original Hegelian-Marxism fades into the background, as does the tradition of Weimar Staatsrecht to which the young Habermas, like Neumann and Kirchheimer before him, tried to wed it. Not only Neumann and Kirchheimer's specific understanding of the rule of law, but also their Marxist critique of capitalism, tends to get pushed to the sidelines. Habermas' interlocutors in BFN prove suitably diverse, but the most striking shift perhaps is the author's dramatically heightened interest in Anglophone (and especially US) political and legal theory.

Despite major theoretical and programmatic shifts, one core element of Habermas' thinking in BFN remains both directly congruent with his earlier reflections and pertinent to our discussion here. In BFN's final chapter, Habermas revisits the question of how a reformulated conception of the rule law might contribute to political and social reform. As in his earliest writings, legal and social reform are tied at the hip, with a reconstructed model of legal regulation—here described as "proceduralist" law—serving as a core component of his (updated) version of radical reformism.

Unless subject to far-reaching reform, BFN argues, the capitalist welfare state produces apathetic and sometimes passive clients but not autonomous democratic citizens. Much of the blame is placed at the doorsteps of the two dominant approaches to legal regulation, i.e., classical (liberal) formal law and conventional (materialized) welfare state law. Even if classical liberals are still wrong to overstate the differences between social rights, on the one side, and civil and political rights, on the other side, the welfare state's shared normative ground with traditional liberal law comes at a high cost. Like its classical liberal predecessor, social welfare state-type legal institutions rest latently on a troublesome economistic and productivistic image of society: both legal paradigms privilege private over public autonomy. Stated in the simplest terms, just as classical liberalism favored the bourgeois, the modern welfare state too often sanctions passivity and civic privatism.

Habermas' alternative proceduralist model instead aspires to "secure the citizens' private and public autonomy unio actu: Each legal act should at the same time be understood as a contribution to the politically autonomous elaboration of basic rights" (Habermas 1996 [1992]: 410). In this model, specific addressees of legal regulation should conduct "public discourses in which they articulate the [relevant legal] standards and justify the relevant aspects" of possible state regulation to a greater degree than is presently achieved (Habermas 1996 [1992]: 425). The lawmaker would select from competing forms of legal regulation (potentially including formal and materialized law) "according to the matter that requires regulation...Choosing among alternative legal forms reflexively does not permit one to privilege just one of these forms" (Habermas 1996 [1992]: 425). In short,

Dealing with the law reflexively requires that parliamentary legislators first make meta-level decisions; whether they should decide at all; who should decide in the first place; and assuming they want to decide, what the consequences will be for the further legitimate processing of their broad legal programs.

(Habermas 1996 [1992]: 439)

Here citizens and ultimately lawmakers would deliberate about the specific regulatory tasks at hand and make meta-decisions about the best way to tackle them. In doing so, Habermas comments, they might still opt to employ familiar (i.e., formal and materialized) legal means. Yet they might also experiment with novel types of legal and administrative oversight.
Habermas sees proceduralist law as potentially playing a vital political role. If properly institutionalized, it might allow the welfare state to refurbish its democratic credentials and also successfully “tame the capitalist economic system” (Habermas 1996 [1992]: 410). In contrast to neoliberals who want to “break it off,” and also against those on the traditional left who see its expansion along overly statist lines, Habermas advocates for a more “reflexive” welfare state, in which the administrative apparatus employs “mild means of indirect steering” so as to restructure the economy in socially and ecologically sensitive ways (Habermas 1996 [1992]: 410).

As in his ST, and with at least some faint echoes of Abendroth’s unabashedly leftist “social Rechtsstaat,” the fate of the welfare state is again directly welded to the prospect of reformed legal regulation. Notwithstanding major changes in his thinking since the early 1960s, Habermas continues to view a proper understanding of law, in general, and social welfare state legal regulation, in particular, as essential to viable left-wing politics.

The Frankfurt Legacy and Recent Critical Theory:
Law Beyond the State?

The writings of the first-generation Frankfurt legal scholars Neumann and Kirchheimer have had a significant resonance over the course of many decades. Many historians and political scientists—including one of Neumann’s Columbia University advisees, Raul Hilberg (2003)—immediately began employing his surprising thesis concerning National Socialism’s statelessness and “polycratic” power structure. Though the general revival of interest in the 1960s and 1970s in the early Frankfurt School sometimes neglected their place in the Institute’s history,1 radical German legal and political scholars (e.g., Ingeborg Maus, Ulrich Preuss, and Jürgen Seifert), including many affiliated with the new journal Kritische Justiz, creatively built on Neumann and Kirchheimer to formulate trenchant criticisms of the jurisprudence of the German constitutional court, energetically reapplying the critique of legal deformalization to contemporary trends. Others (most prominently, Claus Offe) hoping to revitalize an identifiably Marxist theory of the state also referenced Kirchheimer and Neumann. Radical criminologists (e.g., the Italian Dario Melossi) during the same period found inspiration in Kirchheimer’s Frankfurt School-era writings on criminal law.

Habermas has also impacted a broad range of scholars working on legal questions. Recent theorists of constitutionalism (e.g., Andrew Arato, Günter Frankenberg, Chris Zurn) have relied productively on key elements of his agenda, while yet others have done so in order to develop sophisticated theories of legal and juridical interpretation (i.e., Klaus Günther). Axel Honneth, Habermas’ successor at Frankfurt, tries to resuscitate Habermas’ critique of juridification in his Freedom’s Right: The Social Foundations of Democratic Life (2014), while Hauke Brunkhorst reformulates Habermas’ contributions to a theory of social evolution (during the 1970s) as part of his own monumental “critical theory of legal revolutions” (Brunkhorst 2014). As part of their efforts to make sense of human rights and constitutionalization “beyond the nation state,” some third-generation Frankfurt critical theorists (e.g., Seyla Benhabib, Jean L. Cohen) have reworked important elements of Habermas’ legal thinking as well.

Such recent critical theory-inspired legal-theoretical work on globalization, interestingly, provides distant yet recognizable echoes of early Frankfurt theory’s anxieties about destatization and the decline of state sovereignty. As discussed above, though drawn to the Marxist view that socialism might fundamentally transform the modern state and state sovereignty, Neumann and Kirchheimer ultimately worried that the “rational” state’s premature demise in contemporary capitalism posed major threats. Neumann, in particular, staked out a rather defensive posture vis-à-vis traditional ideas of state sovereignty.
Habermas’ oeuvre perhaps suffers from a similar analytic tension. ST tentatively suggested that radical social reform might fundamentally overhaul modern state sovereignty, as political domination per se “dissolved.” However, his subsequent embrace of a reworked version of Niklas Luhmann’s systems theory, with one clear implication being that some facets of the modern state (i.e., the administrative apparatus) could not realistically be rendered directly subject to radical democracy, pointed in a more cautious direction. By accepting some elements of systems theory, Habermas has tried to distance himself from holistic social theories that misleadingly inferred that social integration can be achieved via a central political agency (the state). Yet that analytic move simultaneously implies that the state administration is partly impervious to the “communicative power” motoring democracy and essential to its legitimacy.

Most recently, in his writings on globalization and the European Union (EU), Habermas follows Brunkhorst in sharply delineating modern stateness from the prospect of (democratic) constitutionalization:

>A “state” is a complex of hierarchically organized capacities available for the exercise of political power or the implementation of political programs; a “constitution,” by contrast, defines a horizontal association of citizens by laying down the fundamental rights that free and equal founders mutually grant each other. (Habermas 2006: 131)

Analytically, one consequence of this divide is the reemergence within Habermas’ thinking of what we might loosely describe as an anti-statist strand, albeit one lacking its original Marxist moorings. The key programmatic result, in any event, is the provocative thesis that it is both realistic and normatively desirable to pursue far-reaching democratization and constitutionalization “beyond the nation-state” absent corresponding forms of postnational stateness. In his political writings, Habermas thus praises the EU for having undertaken a historically significant legal and institutional innovation: the European legal order successfully “binds the member states… even though it does not dispose over their sanctioning powers” (Habermas 2012: 25).

Habermas’ interpretation has ignited some controversy. Given our analysis here, some reasons for possible concern can be quickly identified. Following Neumann, one might wonder whether the (alleged) dissolution of state sovereignty in the context of extreme inequality represents a step forward, or instead simply portends the decay of (state-based) protective devices useful to the politically and socially vulnerable. Within the EU’s (allegedly) non-statist political and legal order, in fact, there is massive evidence not just of growing popular dissatisfaction, but also that the system is rigged in favor of big financial interests and the most powerful member-states. The present situation, in which controversial austerity programs are being promulgated via emergency (and legally dubious) top-down mechanisms, might be more plausibly viewed as corroborating Kirchheimer’s unsettling prediction that sovereignty’s premature dissolution means “emergency in permanence... because society has reached a stage where the equilibrium of group forces is utterly unstable” (Kirchheimer 1969 [1944]: 191).

Not surprisingly perhaps, other theorists working within the Frankfurt critical tradition have expressed qualms about condoning and even celebrating state sovereignty’s decay. Ingeborg Maus, a political theorist inspired by Neumann, preserves some elements of the traditional discourse of state sovereignty, in part because she continues to see an integral link between democratic politics and the notion that in international affairs states should
be treated as legally equal and independent entities (Maus 2015). Popular sovereignty may require, as Rainer Schmalz-Bruns has suggested in a powerful critical response to Habermas, familiar elements of stateness: state-like organizations undergrid self-government. Democratic equality and liberty are best guaranteed by fair and reasonable procedures which can realistically be expected to have a determinative influence or impact on action. Influence of this type can perhaps only be achieved by forms of institutionalization with which we rightly associate familiar elements of stateness (Schmalz-Bruns 2007; also, Scheuerman 2009).

Note

1 For an important exception, see Söllner (1978) and, more recently, Stirk (2000).

References

CRITICAL THEORY AND THE LAW


Further Reading