
Between the Norm and the Exception

The Frankfurt School and the Rule of Law

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democracy is not the main bequest of the modern political tradition's universalistic features in Neumann's view, he underplays the potential (democratic) benefits of some deformed modes of state regulation. Either we preserve general law—or we get the horrors of Carl Schmitt and fascist legal decisionism. Yet precisely because existing modes of deformed law often have extremely ambivalent consequences for democratic politics, we need to take Neumann's worries seriously. Democracy is that political form based on the free and equal participation of all, where the views and interests of everyone must be considered equally in the formulation of policy, and which aspires to guarantee political autonomy for everyone. Some version of this basic idea, and not that of the generality of the legal norm per se, certainly has to be considered the main successor to universalistic natural law and the social contract tradition. Insofar as materialized law can be shown to pose problems for the democratic process—by creating unnecessary dependencies on state administrators, or by exacerbating inequalities rather than destroying them—democrats have a responsibility to strive to realize superior legal modes.

The modern rule of law was an anticipatory utopia from the very beginning. By demanding that rational law and not individuals rule, it pointed toward the possibility of replacing all forms of unjustifiable coercion with a system of norm-based rule that, due to its reasonableness and generality, would no longer be experienced as domination as such. The rule of law was to be anonymous and nonpersonal, not because the dynamics of an oppressive and distant state bureaucratic apparatus had become impermeable, but because political oppression had been eliminated from the universe. If democracy is to realize genuinely free and equal participation, it cannot tolerate inequalities that squelch the expression of some voices while privileging others. A reconstructed model of the rule of law will have to take this task more seriously than postwar welfare state law, with its oftentimes highly ambivalent substantialized legal modes, has. The central problem with capitalism is not (as Neumann emphasizes) that monopolies destroy the generality of the legal norm by forcing law to take an individual form, but that it contradicts the generality of the democratic process and, hence, the demand that all potential voices have an equal chance of being expressed and taken seriously in the process of policy formation. As long as capitalism—or

deformed legal standards that exacerbate capitalist injustices—continues to buttress inequalities and undermine the openness of the democratic process, it conflicts with the liberal tradition's most important gift to us, namely, the (incomplete) project of a democratic rule of law.

Like much else in *Behemoth*, Neumann's understanding of the relationship between capitalism and legal development was too mechanistic. Yet he was undoubtedly right in making it central to his attempt to defend the rule of law.

3 Neumann and the Frankfurt School: A Second Look

Were not Neumann's critics among The Institute for Social Research's inner circle right then? Are not his theoretical contributions, as Martin Jay has noted, expressive of "a more orthodox" Marxism than their own?⁵⁴ Some of my criticisms of *Behemoth* seem to support this reading.

But let us take a closer look at the theoretical alternative that Horkheimer and Pollock began to work out at about the same time as Neumann put the finishing touches on *Behemoth*. A central reason why Neumann is fixed on demonstrating the contradictory and economically unstable monopoly capitalist character of Nazi Germany is that he sees Horkheimer's and Pollock's alternative state-capitalist model not simply as intellectually misleading, but as a recipe for political paralysis. In his view, it irresponsibly exaggerates Nazi Germany's integrative capacities, wrongly suggests that state-managed capitalism could "become the millennium," and can only engender "utter hopelessness." It thereby points the way to the demise of a genuinely critical theory.⁵⁵

Despite my own reservations about central features of Neumann's theorizing during this period, it seems to me that there are good reasons for taking these criticisms seriously.

According to Horkheimer and Pollock, a series of novel shifts in contemporary capitalism proved that "the primacy of politics over economics, so much disputed under democracy, is clearly established" in a number of settings, among them fascist Germany (the main object of their analysis), as well as both the post-New Deal United States and the Soviet Union.⁵⁶ "[A]ll basic concepts and institutions of capitalism have changed their function; interference of the state with the structure

of the old economic order has by its sheer totality and intensity 'turned quantity into quality' "57 and has thereby engendered a new form of capitalism in which control over the state apparatus becomes the real source of social power. Classical Marxism's insistence on the predominant role of the economic substructure as well as a corresponding theory of power highlighting the centrality of class-based antagonisms becomes anachronistic. Central planning replaces traditional market mechanisms; market-based prices are increasingly determined by state decrees; with the decline of private property as an independent source of social privilege, the profit motive declines as well, and a more amorphous drive for influence over the state bureaucratic apparatus replaces it. Given the state machinery's preeminent position, one's position in the social structure is now determined primarily by one's place in the "political set-up and only in a secondary way upon the extent of one's property".⁵⁸ Pollock repeatedly insists that the new order need not be threatened by all the more infamous types of economic crises plaguing traditional capitalist economies. Although acknowledging that the system's underlying social antagonisms might manifest themselves by means of irrationalities in the planning process, both Pollock and Horkheimer seem confident that this will probably not happen and that state capitalism can overcome all potential immanent threats to its basic workings. Pollock writes that in the case of Nazi Germany "I am unable to discover such inherent economic forces as would prevent the functioning of the new order. . . . Economic problems in the old sense no longer exist when the coordination of all economic activities is effected consciously instead of by 'natural laws' of the market."⁵⁹ Fascist state-directed capitalism is liberated from all the more worrisome economic consequences of the classical capitalist market economy and represents a "learning process," demonstrating to elite groups everywhere that capitalism can be successfully managed through extensive state intervention.

Horkheimer's more speculative essays from this period (1940-41) suggest the importance of these political-economic reflections for the subsequent history of Frankfurt-based critical theory. In the transitional "End of Reason" the institute's director offers an apocalyptic overview of the history of modern thought describing how reason "ultimately destroyed itself."⁶⁰ Horkheimer's new appreciation for the integrative ca-

pacities of state-directed capitalism is tied to a profoundly pessimistic cultural analysis in which fascism is seen as both the key experience of Western modernity and a logical consequence of deep trends in it. Capitalist society in its most developed statist (and authoritarian) form remains profoundly irrational, yet there are no significant social groups pointing to the possibility of its demise. As a result, the activity of critical theorists increasingly takes on hopeless, or at least melancholic, overtones. They are reduced to little more than chronicling the ongoing disintegration of "the fundamental concepts of civilization" without being able to point to any real alternative. Offering an even more dramatic critique of Western rationality, *Dialectic of Enlightenment* radicalizes the story of the "End of Reason" and, in the process, develops the philosophical fundamentals for Horkheimer's and Adorno's well-known postwar theory of "total integration" (or, in the elder Marcuse's rendition of it, "the one-dimensional society"), according to which all major institutions of the capitalist welfare state are overrun by an all-pervasive, irresistible logic of domination. At least implicitly, the experience of total fascist state-capitalist integration is given general significance: for postwar critical theory, the specter of fascist one-dimensionality continues to haunt liberal democracy. Critical theory increasingly exhausts itself in a backward-looking defense, as Horkheimer and Adorno revealingly describe it in their preface to *The Dialectic of Enlightenment*, of "the residues of freedom . . . even if these seem powerless in regard to the main course of history."⁶¹

In retrospect, Neumann's anxious warnings to his colleagues about the implications of the state-capitalist model take on a prophetic character. Inevitably, they suggest a set of speculative questions. Were other more satisfying analytical routes available to the first generation of critical theory? Might they have been intimated in some features of its work, which a "pearl diver" (Arendt) might fruitfully recover? Did critical theory have to culminate in the dreary and much criticized theory of total integration, or one-dimensionality?

From this perspective, Neumann's critique of the state-capitalist model takes on fresh significance. In part 2 of *Behemoth*, he offers a fiery response to his colleagues' views. He tells them that "the very term 'state capitalism' is a *contradictio in adiecto*."⁶² If the state is the de facto owner of the means of production (and this is what the state-capitalist model

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implies), it no longer makes any sense to call the system capitalist. Thoroughgoing state control of the economy on this scale is inconsistent with any defensible conception of capitalism's basic dynamics. More ambitiously, Neumann undertakes the tiresome chore of demonstrating that all the bureaucratic institutions important to Nazi economic coordination are, in reality, often dominated by a relatively conventional capitalist elite. The "primacy of politics" that Pollock and Horkheimer identify by pointing to the omnipresence of the state administrative apparatus remains more fiction than reality. Political groups do play a crucial role in the power structure but not to the exaggerated extent claimed by Pollock and Horkheimer. Most disturbingly, their basically unsubstantiated speculations about the integrated quality of German fascism reproduce the Nazis' own misleading propaganda about the system's stability and potential longevity. Not only is the chaotic behemoth not as perfectly integrated as they argue, but it is even more tension-ridden and potentially explosive than capitalist liberal democracy.

The basic conceptual problem may look like the following. Despite its break with a Marxist view of the primacy of production, the state-capitalist thesis in fact reproduces some of the worst features of classical Marxism. Traditional Marxism saw the political sphere as being subordinated to the functional imperatives of the economic substructure; politics constitutes a mere superstructure dominated by the capitalist "base." Horkheimer and Pollock transform this constellation by making the state—which, in their analysis, seems to refer to little more than a central bureaucratic authority—its focal point, but the underlying functionalist logic characteristic of too much Marxist thinking about politics and law remains unquestioned in this model. It is now the state that, willy-nilly, dominates social and economic affairs, and it is now outfitted with all the social-structural omnipotence Marx tended to attribute to the capitalist substructure. Indeed, all of the model's most basic categories are concepts taken from Marxist political economy, which the authors just invert or turn upside down: the "plan" supposedly replaces the "market"; the "dictate" takes over the function of "prices"; the "profit motive" is jettisoned for a "power motive"; "buyers and sellers" are replaced by "commanders and commanded." Yet even more so than in the case of Marx, this leads not only to a one-sided empirical analysis of the sources of power and social privilege but to a truncated conception of politics:

politics here amounts to little but the (pretty much automatic) process by which the administrative apparatus assures that its basic imperatives have been satisfactorily fulfilled; all the facets of social existence potentially conflicting with this functionalist logic lack the conceptual autonomy appropriate to them here, just as an earlier economic Marxism denied any real conceptual independence to questions of culture, psychology, politics, or law. The political sphere—where competing social visions are fought over and contested and the very definition of functionalistic social mechanisms (and the possibilities for regulating or altering them) is a matter of dispute—is of little interest to Pollock and Horkheimer, given their underlying faith in the integrative capacities of the state bureaucratic "base." Nineteenth-century Marxism's original weaknesses are actually exacerbated because the social sphere constituting the base (the state) is additionally outfitted with all the positive properties that traditional socialist thought naively attributed to administrative planning and bureaucratic modes of organization. Very much in that tradition, Horkheimer and Pollock picture the planning process as having impressive capacities for overcoming all conceivable problems it might be forced to confront; there is probably even less reason here than in classical Marxism for developing any real appreciation for the significance and relatively autonomous dynamics of political culture, political institutions, or law. How else are we to explain why the authors group Franklin Roosevelt's United States, Hitler's Germany, and Stalin's Russia into one social type? This only makes sense if they assume that the obvious differences in political and legal institutions and culture separating these examples are, "if only in the last instance," irrelevant. Just as the "totally integrated society" allegedly has no real place for genuine political conflict or exchange, so, too, must a theory obsessed with encapsulating the experience of total integration obscure the meaning of these phenomena as well.

From this angle, Neumann's relationship to the Frankfurt school's inner circle begins to look more complex than is suggested by most of the secondary literature. Without doubt, his views are far too orthodox at times. Yet the eclectic character of much of Neumann's thinking—probably best demonstrated by his real appreciation for Max Weber and Enlightenment thinkers like Montesquieu, Locke, and Rousseau—nonetheless puts him in a far better position to grapple with political

and legal questions than his colleagues are. The German philosopher Axel Honneth may be going too far in seeing the makings of Habermas's theory of communicative action in Neumann's and Kirchheimer's work, but Honneth is certainly correct to suggest that we need to develop a renewed appreciation for both authors if we are to reach a more adequate understanding of the Frankfurt school's failings and missed chances.⁶³ Put somewhat more polemically: an acknowledgment of the crucial role played by the state bureaucracy in contemporary society does not a political theory make. However inadequately, all of those questions that Horkheimer, Pollock, and Adorno deem unimportant to social thought are precisely those taken on by Neumann and Kirchheimer.⁶⁴ Neumann was rightly unconvinced that even the Nazi German political and social system was totally integrated.⁶⁵ He rightly considered the attempt to put New Deal reforms in the same category as Nazi and Stalinist state interventionism as careless and misleading.⁶⁶ Although his interpretation of the demise of liberal democracy in Europe during the thirties parallels much of the Institute for Social Research inner circle's interpretation from the same period, he supplements it with a rich discussion of the political and historical idiosyncracies of Germany that anticipates much of the postwar debate about German exceptionalism, as well as a fascinating attempt to describe the problems posed by organized corporatist-style pluralist politics.⁶⁷ Horkheimer explicitly criticizes Neumann for emphasizing the relatively autonomous political dynamics of this development. In a letter to Neumann, he accuses him of underplaying "our [the inner circle's] conviction that fascism is the result of basic social trends" and not, as he thinks Neumann unduly exaggerates, a set of historically specific political failures that might have been avoided.⁶⁸ Yet the demise of classical competitive capitalism clearly did not necessitate an epoch of either fascist or postfascist total integration, and Neumann's richer understanding of the autonomous workings of politics and law placed him in a better position to understand why. Though Neumann might have assented to the inner circle's Hegelian-Marxist view that liberal democracy needs to be "superseded" (*aufgehoben*) by a future socialist alternative, he clearly had little patience with the political and legal vagaries of his colleagues' version of this idea. It is difficult to imagine Neumann, so intent on defending the rule of law and trying to show how it might be

preserved, arguing that "with the advent of justice" in socialism "law disappears,"⁶⁹ or believing even for a moment that council communism offered any real political option for modernity.

In *The Governance of the Rule of Law*, Neumann appreciatively describes Rousseau as an author who "stands at the frontier of bourgeois thought" and is still caught up in some of its key assumptions, while uneasily looking beyond them.⁷⁰ It seems to me that the same needs to be said about Neumann's relationship to classical Marxism—and, as far as developing a defensible theory of law and politics is concerned, certainly far more so than for most of his colleagues at the Institute for Social Research.

Beyond State Sovereignty

In 1940 Max Horkheimer seems to have asked his colleagues at the Institute for Social Research for feedback on an article on state capitalism that he was busily writing, and Otto Kirchheimer soon obliged him with a brief but arresting essay on what was soon to become Horkheimer's "The Authoritarian State." In subsequent years, Kirchheimer would raise a number of criticisms of the state-capitalism paradigm both in the *Zeitschrift für Sozialforschung* and in more traditional academic journals, but most of them did not extend much beyond Franz Neumann's core objection to the Horkheimer-Pollock line of argumentation: the state-capitalist model exaggerates the integrative capacities of new modes of political regulation emerging in capitalist countries as a consequence of the economic crisis of the thirties. Like Neumann, Kirchheimer acknowledges that the state bureaucracy now plays a central role in coordinating the capitalist economy, but he similarly refuses to concede that the Nazis had established a nightmarish, "perfectly administered" political and social order. Although the balance of power between organized private groups and political institutions "is definitely shifting in favor of government," as he notes in "Changes in the Structure of Political Compromise,"¹ and despite the fact that there are therefore legitimate reasons for labeling the evolving configuration of state-society relations "state capitalism,"² neither the Nazis nor the far more benevolent administrators of the democratic welfare state had eliminated capitalist-based social strife; that, at least, the Nazis would not succeed in exterminating. Characterized by a tendency to fuse private and public power,

the emerging order remains socially antagonistic. In Kirchheimer's view it is chiefly the new form taken by social conflict that is unprecedented. Struggles between massive interest blocs, merging private power and public organization in a fashion unfamiliar to competitive capitalism, replace the manifestly economy-centered class struggles of the early liberal past. In fascist Germany, quasi-public power groupings (monopolists, for example, whose privileged position is given government sanction) belong among the main social and political actors. Horkheimer and Pollock are right to focus on the active role of the state in monopoly capitalism but wrong to argue that the political superstructure takes on characteristics like those attributed by Marx to the capitalist economic base. The overall picture is more complicated. Although the social order remains capitalist, base and superstructure are welded together in a complex and at times bewildering manner.³

Kirchheimer's fascinating 1940 memo on Horkheimer's essay takes a pivotal step further in developing a critique of the Institute inner circle's state-capitalist paradigm.⁴ In demasking a series of hidden neo-Leninist presuppositions, Kirchheimer identifies a set of theoretical weaknesses distinct from, but as worrisome as, the hopelessness Neumann perceptively saw as following from the state-capitalist model.

In "The Authoritarian State," Horkheimer tries to argue not only that the state bureaucracy is contemporary capitalism's dominant institutional focus but that long-term bureaucratizing trends in capitalist development ultimately crippled oppositional social movements and precipitated fascism's rise to power. Despite its essayistic and even impressionistic form, the article powerfully describes the sources of the Left's alleged enslavement to "the spirit of administration." Horkheimer offers a disturbing chronicle of how independent and spontaneous anticapitalist movements, forced to adjust to the logic of an ever more bureaucratic and state-organized social universe, were eventually replaced by undemocratic unions and top-heavy bureaucratic parties with little capacity for mass mobilization. Just as state bureaucratic mechanisms supplanted classical capitalism's independent entrepreneur and its self-driven "natural" market mechanisms, so, too, was the working-class movement robbed of any real autonomy.

At the same time, Horkheimer suggests that bureaucratizing tendencies themselves undermine the ruling elite (whether capitalist or

"integral etatist" Soviet-type state socialist), whose privileges they had thus far buttressed. More and more the bureaucratization of the economy makes its management routine and simple. "Average technical skills" easily acquired by everyone, Horkheimer speculates, could soon undermine the last remaining rationale for political domination. With the possibility of a radical democratization of administrative tasks finally taking on real proportions, the vision of a planned socialist economy staffed by a legion of popular technician-workers leaves the sphere of bad utopianism and enters the realm of the politically feasible.⁵

Given the organized Left's subservience to bureaucratic ideology and practice, Horkheimer believes it is unlikely to pull this off. A paradoxical dialectic is at work: the bureaucratization (and routinization) of economic activities both prepares the preconditions for human liberation and denies social groups the capacity for achieving it. Bureaucratization should set us free, but instead it enslaves us. The general thrust of Horkheimer's analysis remains deeply pessimistic. If there is still a way beyond this paradox, he argues, it could only come from (unnamed) "isolated" (*vereinzelte*) individuals who have miraculously managed to escape the dark shadows of the spirit of administration. Only their unpolluted will for freedom, Horkheimer apocalyptically concludes, might still help free humanity from the repressive telos of bourgeois world history. But union bosses and staid social democratic apparatchiks surely cannot.⁶

From the perspective of postwar critical theory, "The Authoritarian State" is an eye-opener. Not only does it document Horkheimer's growing political pessimism and anticipate the postwar theory of the perfectly administered society, but it also points the way to the idiosyncratic brand of revolutionary politics most clearly represented in the history of the Frankfurt school by Herbert Marcuse's theory of one-dimensional society. It is hard to miss the similarities between Marcuse's picture of a one-dimensional world, capable of being challenged solely by the "great refusal" of isolated constituencies that for one reason or another are immune to its oppressive and all-encompassing logic, and Horkheimer's appeal to the isolated individual and what's left of a battered will for freedom, alone able to halt the regressive tide of bourgeois development.⁷ Horkheimer's essay suggests two conceivable political answers to the diagnosis of total integration, and the postwar theorizing of the first

generation of Frankfurt-based critical theory can be interpreted as the endeavour to develop one or the other of these options. Either, as in the case of Horkheimer or Adorno, the theory of total administration culminates in a melancholic and backward-looking attempt to save the final “residues of freedom” (as described in chapter 5, and as Neumann presciently warned his colleagues about), or, as with Marcuse, it generates a brand of fiery radicalism that can be satisfied with nothing less than overthrowing “the whole” (*das Ganze*) and ultimately incapable of finding any real redeeming qualities in any of the institutions of contemporary society or in any of its major players: Horkheimer’s own half-truths about the failings of the Second International resonate in Marcuse’s later (and hardly altogether unjustified) disgust with the conservative working-class hard hats who took such relish in pummeling longhaired peace activists during the late sixties. Most problematically, the idea of a totally integrated social order implies a neo-Leninist political project of educational dictatorship like that which can be detected even more clearly in Marcuse’s later writings than in Horkheimer’s “The Authoritarian State.” How else are we to break out of the suffocating one-dimensionality than by relying on isolated groups (college students? ghetto rebels?) supposedly free from its influence? If our universe is truly one-dimensional, is not some avant-garde of outsiders going to have to force the rest of us to be free? In a 1964 letter to Kirchheimer, Marcuse concedes that “as to your comments [about *One Dimensional Man*]: indeed, the political consequences would point to an *Erziehungsdiktatur* [educational dictatorship], although not really ‘*auf technokratischer Grundlage*’ [on a technocratic basis]. The point I wanted to make is that there is no such thing as pure (or almost pure) technological rationality—the latter is always also (and internally) political rationality. But then all the old arguments against an *Erziehungsdiktatur* since Plato are still valid. . . . Result: the pessimism expressed in the last pages.”⁸ Is there a more cogent summary of the political paradoxes of the theory of total integration? Either an educational dictatorship—or a paralyzing pessimism?

These are all familiar criticisms of Marcuse.⁹ Less appreciated is that there were alternative voices in the first generation of Frankfurt-based critical theorists who perceptively recognized some of these problems and tried, however incompletely, to sketch out another course.

Kirchheimer’s “Memo on State Capitalism” shows that, alongside Neumann, he has to be counted as one such dissident voice. Kirchheimer raises two central criticisms of Horkheimer’s argument. First, he concedes that mass-based political parties have proven ineffective in undertaking the much-needed revolutionary transformation to democratic socialism. With fascism well on its way to becoming Europe’s dominant political force, Kirchheimer, like Horkheimer (and Walter Benjamin as well, to whom Horkheimer dedicates his essay), has few qualms about laying a great deal of the blame for this catastrophe on the failures of mass-based left-wing organizations.¹⁰ Yet Kirchheimer is somewhat skeptical of Horkheimer’s vague reference to a “will to freedom.” Given that Horkheimer’s appeal to the isolated lacks any more definite political contours (who is meant here? under what conditions will this “will to freedom” be exercised?) does it not probably rely on some further assumption—in Kirchheimer’s view, a faith in human nature? Considering Horkheimer’s own gloomy portrayal of contemporary social and political trends and his suspicions about conventional mass-based politics, what else but such an assumption would allow him to preserve even the most minimal hope in a will to freedom? In response, Kirchheimer worries that if contemporary history suggests anything, it is that human nature has become deeply depraved. For that matter, it is not clear that Horkheimer’s optimism about human nature can perform the function expected of it. If we are to make absolutely sure that the transition to democratic socialism does not take on terroristic features, more than the will to freedom of the lonely and unintegrated is called for. In order for revolutionary change to take a genuinely democratic form, Kirchheimer insists, it most certainly will have to rely on mass-based bureaucratic organizations. The real lesson of the Left’s collapse in the face of fascism is not that a revolutionary project of social transformation can do without mass-based democratic parties, but that the Left will have to figure out how to keep such parties from succumbing to paralyzing bureaucratizing tendencies, which Kirchheimer sees Horkheimer as describing more or less accurately.

Secondly, Horkheimer’s crucial “argument, that the victorious revolution can transform economic-political problems into purely technical ones,” was advanced in a similar form by Lenin, in *State and Revolution*, and Horkheimer’s analysis risks committing errors similar to those that

made Lenin's original views so problematic.¹¹ Like Lenin, Horkheimer fails to acknowledge adequately that even a planned socialist economy cannot eliminate all questions of "value." Economic priorities will have to be set, some regions and industries developed instead of others, and such questions remain (pace Lenin and Horkheimer) intensely political. Lenin's obsession in *State and Revolution* with the example of a state-run postal service obscures this. In the post office, clear goals can be presupposed and the question of "which path is right and which path is wrong" in their pursuit often "is a technical problem."¹² But the same cannot be said for the economy as a whole. Again, like Lenin's own simplistic vision of a primitive democracy managed by technician-workers, Kirchheimer seems to suggest, Horkheimer's claim here does not give us enough reason for believing that his postcapitalist utopia could avoid the dangers of administrative dictatorship. In the earlier, closely related "Marxism, Dictatorship, and the Organization of the Proletariat" (1933), Kirchheimer had written that "the primitivity of Lenin's image of democracy, all too restricted as it was by the ideas of the Paris Commune, hardly takes into account the technical complexity of the governmental apparatus of the twentieth century," and he clearly has this criticism in mind when discussing Horkheimer's own failure to acknowledge the necessity of both complex forms of bureaucratic decision making and distinct (superordinate) democratic political institutions.¹³ Conceivably, a model along the lines suggested by Horkheimer gives us reason for believing that economic power in socialism would no longer need to be buttressed by control over the state apparatus. Hypothetically, democratic socialism makes possible peaceful political transitions to an extent that capitalist liberal democracies often fail to achieve. In Kirchheimer's view, socialism means, in part, that key economic decision makers (in a planning agency, for example) could simply be "outvoted" and replaced without their economic status being threatened—in contrast to the situation in capitalism, where economic actors defeated in the competitive struggle or challenged by new subordinate social groups sometimes opt to disrupt the peaceful course of democratic politics rather than surrender their hegemonic power position.¹⁴ Nonetheless, if the crudity of Lenin's ideas helped generate an authoritarian "oligarchical bureaucracy," by failing to recognize the unavailability of complex bureaucratic institutions and the virtues of genuinely

democratic representative institutions, as Kirchheimer had noted in his earlier criticism of Leninism, Horkheimer's view risks making the same mistake.

Here, as at many junctures, Kirchheimer—like Neumann—points to the outlines of a theoretical and practical "third way," beyond both Horkheimer's and Adorno's apocalyptic defeatism and Marcuse's odd brand of elitist revolutionary politics. Alongside Neumann, it is Kirchheimer who represents a real alternative to the mainstream of early critical theory, and it may be their legacy, not that of their better-known colleagues, that constitutes a starting point for a rejuvenated critical theory of politics.

In this chapter, I will try to buttress this thesis by focusing on the critique and deconstruction of Carl Schmitt's theory developed by Kirchheimer. Although Kirchheimer's writings here range over a tremendous variety of themes (from criminal law to fascism to the question of decree powers and sovereignty), he is intent on doing battle with Carl Schmitt's decisionism by means of a "critical political sociology of the exception," which, as I will show, suggests an interpretation of twentieth-century legal development similar to that which I have tried to defend in previous chapters: we can no longer demand (with early modern political theory) that law always take a (semantically) general form, yet we need to confront the possibility of deformed law's leaving us with a frightening system of decisionist law like that advocated by Carl Schmitt. While recognizing the necessity of forms of legal regulation unforeseen by classical authors, we need to insist that any contemporary legal alternative integrate all the merits of cogent formal law. In Hegelian terms, we cannot merely negate traditional modes of parliamentary general law but have to preserve its core aspiration (section 1).

In preceding chapters, we broached the difficult theoretical question of state sovereignty. Kirchheimer's considerations on this theme can help us tackle some of the enigmas that are still unsolved. I described Neumann's critique of Schmitt's decisionist view of sovereignty (in terms of "he who decides on the exception") as well as his attempted resolution of the riddle of state sovereignty and law (and *voluntas* and *ratio*, or state power and right) by means of a neo-Marxist reworking of Weber's conception of legal rationalization. These two tasks turned out to be closely interrelated for Neumann. Insofar as situation-specific

materialized law, like that enthusiastically endorsed by Schmitt, potentially fails to bind or regulate state agencies effectively, the corrosion of modern formal law was seen as generating a renaissance of poorly regulated modes of state action akin to those traditionally associated with unharnessed sovereignty or even "reason of state." Formal law had long been a crucial instrument for taming the state's monopoly on violence and making it normatively legitimate. Neumann shows that its apparent disintegration poses real problems for those intent on defending the constitutionalist agenda. Like Neumann, Kirchheimer now intends to take on Schmitt's fascistic conception of sovereignty by defending a democratic alternative to it. By closely examining Kirchheimer's views, we can better see the limits of both his and Neumann's own conceptualization of sovereignty. Despite the undeniable superiority of their views in relation to Schmitt's, Kirchheimer and Neumann still end up trying to restore a vision of state sovereignty poorly adapted to modern democratic politics. Nonetheless, ongoing attempts to develop a defensible modern reconceptualization of democratic political legitimacy can still learn a great deal from the early Frankfurt school's analysis of sovereignty (section 2).

1 A Critical Political Sociology of the Exception

Franz Neumann long tried to show that the contemporary legal order had taken on features disturbingly reminiscent of Schmittian decisionism and that Schmitt's theory and political program could be debunked by proving that its central features matched worrisome developmental trends in the capitalist political economy. One of Kirchheimer's main achievements during the thirties and early forties was to buttress Neumann's insistence on the links between bourgeois society, Carl Schmitt, and decisionist ideology and law. Like Neumann, Kirchheimer thinks the history of the capitalist political economy and decisionist modes of law are interconnected, and his writings can be interpreted as identifying and describing three distinct stages in the relationship between the two. An impressive set of studies on the history of criminal law describes a system of dual justice in which modern forms of formal law exist side by side with discretionary legal gaps primarily employed against the socially underprivileged (subsection A). This

dualism characterizes bourgeois law until anticapitalist antisystemic movements appear on the historical scene in the early twentieth century, helping to radicalize its decisionist elements and giving the state of emergency a place in the everyday workings of the liberal legal order unlike anything desired by classical liberal constitutionalism. The flourishing of temporary emergency governments in European parliamentary politics during the twenties and thirties offers the clearest manifestation of this trend (subsection B). Finally, fascist regimes toss aside the final remnants of the emancipatory potentialities of political liberalism in order to rescue a particularly exploitive brand of capitalism: the exception becomes the norm, and the state of emergency becomes normalcy. Bourgeois society surrenders its most important legal achievements and regresses to the *raison d'état* ideologies and practices that accompanied its ascent. The Janus-faced modern state, in which one face speaks the language of reason and law and the other that of unrestrained sovereignty and force, becomes a violent beast (subsection C).

(A) Coauthored with the legal sociologist George Rusche, *Punishment and Social Structure* (as well as a number of related articles in French and American journals) advances two main theses.¹⁵ First, and probably most convincingly, Kirchheimer and Rusche deflate the widespread view that the severity of punishment influences the crime rate. No empirical evidence adequately shows that harsh punishment deters crime.¹⁶ The crime rate is conditioned most fundamentally by the structure of capitalist-based inequality: the poor and desperate are driven to commit crimes even when threatened by highly repressive modes of punishment. Furthermore, as long as liberal reformers continue to presuppose that subordinate social constituencies making up the great bulk of criminals should "fear a further decline in their mode of existence" if they break the law, criminal law reform is likely to remain extremely modest.¹⁷ If punishment has to be more unattractive than the social and economic conditions of the least well off members of society, even a reformed system of punishment will remain highly unpleasant given capitalist-based inequalities. Second, the evolution of criminal law's disciplinary instruments can be explained by recourse to a history of the capitalist labor market. The cyclical "laws of motion" of the capitalist economy are recapitulated in a series of parallel cycles, identified by the authors, in

Punishment
+ Social
Structure

the history of punishment. Where labor shortages exist, for example, the harshness of punishment tends to be somewhat reduced because of the advantages (from the standpoint of the propertied) of avoiding a needless waste of labor power. Conversely, punishment tends to be brutal under market conditions unfavorable to the working classes. Contra liberal common sense, the history of criminal punishment is hardly characterized by linear progress. Like the booms and busts of the capitalist economy, it continually succumbs to terrifying relapses.

From our perspective, the study is significant for a number of reasons. The authors share Neumann's esteem for the classical liberal vision of a closed system of neatly formulated and fixed legal rules, and they similarly refuse to see early demands for rationalizing law and legal procedure purely as a consequence of the functional requirements of capitalism. Unlike Neumann, Kirchheimer and Rusche focus on the problem of criminal law—in which cogent formal law is even more important than those areas of the law Neumann was most concerned with: in criminal law, the state confronts society's most unpopular constituencies, and one minimal test of the rule of law's claim to equal protection before the law certainly is the extent to which the structure of legal regulation helps preserve basic protections for the political community's most disliked elements. For many classical liberals, as for Kirchheimer and Rusche, formal law always had an important role to play in maintaining the rights of the accused. In a key chapter focusing on the Enlightenment and its contributions to criminal law, Kirchheimer and Rusche argue not only that the emergence of modern rational law was ultimately "to benefit all classes alike" but that pre-Enlightenment absolutist forms of law were more appropriate to the exigencies of a complete "capitalist rationalization of criminal law."¹⁸ Arbitrary and irregular discretionary law, not the relatively radical views of criminal law developed by writers like Beccaria, better suits bourgeois society's interest in disciplining subordinate social groups according to the imperatives of the capitalist labor market. Simultaneously, the authors acknowledge the incomplete character of the Enlightenment and, like Neumann, see its limitations as stemming from unwarranted concessions to capitalism. In particular "the formal and rational system [of law] . . . had little to do with the actual administration of criminal justice" either in legal practice during or after the Enlightenment or in the

minds of all Enlightenment authors, and substantial loopholes and harsh punishment outlived the reform period. In spite of Enlightenment-era reforms, "death or transportation was the rule for most offenses."¹⁹ Even during the golden age of revolutionary liberalism, the tendency to abandon formal law in favor of protecting a socially unjust mode of property against vagrants, petty thieves, and other mostly small-time criminals remained all too evident, and criminals continued to suffer unnecessarily, due to political liberalism's unfortunate alliance with capitalist private property. The tragic implications of this alliance became even more apparent in the nineteenth century, as increasingly powerful and conservative bourgeois strata lost faith in so-called bourgeois formal law precisely because of its potential advantages to "all classes alike." The immediate aftermath of the Paris Commune, when bourgeois groups in France showed few reservations about establishing a repressive system of special courts and martial law, already anticipated the middle classes' impending betrayal of rational law.

Walter Benjamin, who was likely working on his "Theses on the Philosophy of History" at about the same time Kirchheimer and Rusche's study appeared in the United States, was not altogether off the mark when claiming that "the tradition of the oppressed teaches us that the 'state of emergency,' " like that which had by then become "normal" in fascist-dominated Europe, "is the rule."²⁰ Benjamin's theoretical intentions were certainly more ambitious than Kirchheimer's and Rusche's, but the former's sensitivity to how a crude political faith in progress could help prepare the way for political cataclysms is hardly alien to Kirchheimer and Rusche. This is made most clear in the final pages of *Punishment and Social Structure*, where they warn us about reformist proposals in modern criminal law that fail to acknowledge the necessity of far-reaching social and economic change: "The crime rate can really be influenced only if society is in a position to offer its members a certain measure of security and to guarantee a reasonable standard of living."²¹ Unless linked to a broader agenda for radical social change, reform projects can only experience short-lived and probably limited successes. The disappointment likely to follow from their failure, as the authors think the advent of fascist criminal law suggests, inevitably prepares the way for a resurgence of brutal authoritarian views about criminal punishment. In fascism, "fixed criminal law" is abandoned, in part because

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